

**[J-46-2019]**  
**IN THE SUPREME COURT OF PENNSYLVANIA**  
**EASTERN DISTRICT**

**SAYLOR, C.J., BAER, TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, JJ.**

CITY OF PHILADELPHIA,	:	No. 36 EAP 2018
	:	
Appellant	:	Appeal from the Order of
	:	Commonwealth Court entered on
v.	:	03/28/2018 at No. 1953 CD 2016,
	:	vacating and remanding the Judgment
	:	entered on 05/27/2016 in the Court of
FRANCIS GALDO,	:	Common Pleas, Philadelphia County,
	:	Civil Division at No. 2885 April Term
	:	2014.
Appellee	:	
	:	ARGUED: May 15, 2019

**OPINION**

**JUSTICE BAER**

**DECIDED: September 26, 2019**

This appeal involves an ejectment action commenced by the City of Philadelphia (“City”) against Francis Galdo and a counterclaim to quiet title filed by Galdo, claiming ownership of the property at issue by adverse possession. The trial court ruled in favor of the City, holding that it was immune from suit because a claim of adverse possession cannot lie against a municipality. The Commonwealth Court vacated the trial court’s order and remanded for trial on the adverse possession claim. The court held that the adverse possession claim could proceed against the City because the property was not devoted to a public use during the twenty-one-year prescriptive period, as required for immunity to apply. For the reasons set forth herein, we agree that the City is not immune from a claim of adverse possession under the facts presented and affirm the order of the Commonwealth Court.

### *I. Background*

The record establishes that the property at issue in this appeal is a rectangular lot of undeveloped land located at 1101-1119 N. Front Street in Philadelphia (hereinafter, “the Parcel”). To understand the origin of the City’s ownership of the Parcel, we begin by observing that on May 31, 1956, the City passed an ordinance granting consent to the Department of Highways of the Commonwealth of Pennsylvania to establish and occupy rights of way and certain traffic interchanges for the construction of the Delaware Expressway between the Walt Whitman Bridge and Poquessing Creek in Philadelphia. The City entered into an agreement with the Commonwealth on July 30, 1962, to assist in the construction of the various state highways. The agreement stated, *inter alia*, that the City would cooperate with the Commonwealth by: securing the City Planning Commission’s approval of the final approved construction plans; contributing to the construction costs of the Delaware Expressway and its appurtenances; and providing the detour of traffic necessitated within the City before and during the construction period. The agreement did not require the City to condemn property, but provided, instead, that “[c]ondemnation shall be effected by the Commonwealth.” Agreement between City of Philadelphia and Commonwealth of Pennsylvania, 7/30/1962, at ¶ 8.

Nevertheless, in 1974, City Council passed an ordinance authorizing the Commissioner of Public Property to execute a Declaration of Taking of several properties, including the Parcel. On November 13, 1974, the City obtained fee simple title to the Parcel by condemnation, with the notice of condemnation stating that the Parcel had been condemned for transit purposes. At a public hearing regarding the condemnation held before the City Council Committee on Public Property and Public Works, testimony was presented establishing that the purpose of condemning the Parcel and other properties in the immediate area was to divert temporarily the Frankford Elevated train line so that

the Commonwealth could construct Legislative Route 1000 (“I-95”). Notes of Testimony (“N.T.”), Philadelphia City Council Meeting, 9/10/1974, at 2. Notably, it was further established at the hearing that, upon completion of new I-95, the City intended that the temporary structure constructed to facilitate that highway project would be demolished and that the land condemned would be available for disposition by the City. *Id.* at 3, 4, and 13.

On January 19, 1976, the Commonwealth filed a notice of condemnation against several of the City’s lots, indicating that the Commonwealth would permanently retain the land in the I-95 right-of-way, and that the Commonwealth would have a temporary easement on other condemned properties, including the Parcel condemned by the City, during the period that the Elevated Frankford train line was rerouted to allow for construction of I-95. Germane to this appeal, the parties agree that the City has not physically occupied the Parcel since completion of the work connected to the rerouting of the Elevated Frankford train line in the 1970s.<sup>1</sup> Parties’ Stipulated Facts, 3/22/2016, at ¶ 16. Further, it is undisputed that the City has not performed any maintenance, grass-cutting, grading, or landscaping on the Parcel. *Id.* at ¶ 17. Instead, after the highway construction was completed, the City viewed the Parcel as “surplus property” that was not actively being used. N.T. (Deposition of Ilene Burak), 10/26/2015, at 10.

At least a decade after construction of I-95 had been completed, in September of 1989, Galdo purchased a two-story dwelling on 1115 N. Lee Street, Philadelphia, which is located directly across the street from the Parcel. At that time, the Parcel was not being maintained and was purportedly home to “prostitutes” and “derelicts”. N.T. (Deposition

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<sup>1</sup> Other than a general reference to the 1970s, the record is unclear as to precisely when construction of I-95 was completed or when occupation of the Parcel ceased. This lack of specificity does not affect our resolution of this appeal as Galdo claims that his period of prescriptive possession did not begin until 1989.

of Nancy Klenk), 10/26/2015, at 17. In early 1990, Galdo cleared the Parcel of weeds and trash, poured a concrete slab, and parked his vehicles there. He also used the Parcel to discard debris from the remodeling of his home. By 1992, Galdo poured another concrete slab on the Parcel for storing materials and enclosed that area with a fence. In 1994, he installed on the Parcel a fire pit and a picnic table affixed to the ground.

In 1997, a nearby factory burned down and Galdo created a driveway on the Parcel with materials collected from the remains of the factory. He also planted two maple trees and built a carport with metal poles, which was later replaced with a wooden pavilion. Additionally in 1997, Galdo converted the fire pit on the Parcel into a brick barbeque, installed two oversized trailers to store gardening tools and the like, and installed a sand volleyball court and horseshoe pit. Between 1998 and 2001, Galdo planted grass seed on a portion of the Parcel, and he planted a willow tree in 2010. From 2010 through 2014, he built a tree-house deck on the Parcel. Although Galdo regularly obtained permits to work on properties that he owns in connection with his business, he has never obtained any permits to make improvements to the Parcel, did not pay property taxes for the Parcel, and did not provide evidence that he insured the Parcel. Further, it is undisputed that the City never gave Galdo permission to possess the land at issue.

In the meantime, in 2008, the City entered into an agreement to sell the Parcel to Tower Properties, but that sale was never finalized. On or about February 4, 2013, the City posted a public notice on the Parcel, directing all individuals to remove personal property from the site within thirty days of the notice. Galdo refused to comply. On April 24, 2014, the City filed an ejectment action against Galdo. Galdo responded by filing a counterclaim to quiet title, claiming ownership of the property by adverse possession.<sup>2</sup> In

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<sup>2</sup> As explained *infra*, adverse possession is a legal doctrine that permits one to achieve ownership of another's property by operation of law. One who claims title by adverse

his counterclaim, Galdo contended that he had been in continuous and exclusive possession of the Parcel without the City's consent or authorization since September of 1989. He further asserted that the Parcel had not constituted a public use since 1976. The parties filed preliminary objections, which the trial court overruled.

The parties subsequently filed cross-motions for summary judgment. In its motion for summary judgment, the City argued, *inter alia*, that it was immune from Galdo's claim of adverse possession under two alternate theories: (1) it was protected by the Commonwealth's immunity because it obtained title to the property as an agent of the Commonwealth for the purpose of facilitating the construction of I-95; and (2) it was immune because it held the Parcel for a public use as it was acquired through eminent domain and was held for resale purposes.<sup>3</sup> Galdo asserted in his summary judgment motion that he had established title to the Parcel by adverse possession, and the City could not prevail on its ejectment action as a matter of law. He further maintained that the City waived the immunity defense by not pleading it as new matter. The trial court denied the cross-motions for summary judgment on February 24, 2016.

Following a bench trial on March 24, 2016, the trial court returned a verdict in favor of the City. Galdo subsequently filed post-trial motions, contending, *inter alia*, that the City was not protected by the Commonwealth's immunity under an agency theory; the City did not have immunity pursuant to a theory of public use; the City waived any

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possession must prove actual, continuous, exclusive, visible, notorious, distinct, and hostile possession of the land for a period of at least twenty-one years. *Baylor v. Soska*, 658 A.2d 743, 744 (Pa. 1995).

<sup>3</sup> As discussed *infra*, it is well-established in this Commonwealth that one cannot assert a claim of adverse possession against the Commonwealth. *Evans v. Erie County*, 66 Pa. 222 (1870). Moreover, claims of title by adverse possession cannot be made against any entity, including local governments, where the land in question is devoted to public use. *Bruker v. Burgess & Town Council of Carlisle*, 102 A.2d 418, 422 (Pa. 1954).

immunity defense by failing to raise the defense in new matter; and the coordinate jurisdiction rule was violated when the trial court ultimately ruled in favor of the City after having denied the City's motion for summary judgment based on the same evidence.<sup>4</sup> The trial court denied Galdo's post-trial motions on April 29, 2016. Judgment was subsequently entered on May 27, 2016.

In its opinion dated June 27, 2016, the trial court explained that it was unnecessary to examine the elements of adverse possession because one "cannot adversely possess a property owned by the City of Philadelphia." Trial Court Opinion, 6/27/2016, at 3. Citing the Commonwealth Court's decision in *Lysicki v. Montour School District*, 701 A.2d 630, 631-32 (Pa. Cmwlth. 1997), the trial court reasoned that adverse possession could never be established against the Commonwealth or its agents; thus, the City was immune as a Commonwealth agent because it condemned the Parcel "at the behest of the Commonwealth to facilitate the Commonwealth's construction of a highway." Trial Court Opinion at 4. Notably, in addition to finding immunity based on an agency theory, the trial court further held that the City was immune because the Parcel was devoted to a public use, as the City obtained the Parcel through its eminent domain power. *Id.*

The trial court also rejected Galdo's claim that the City waived its immunity defense by not including it in new matter pursuant to Rule 1030(a) of the Pennsylvania Rules of Civil Procedure (setting forth the general rule that all affirmative defenses, including immunity from suit, "shall be pleaded in a responsive pleading under the heading 'New Matter'"). The trial court emphasized that because Galdo's adverse possession claim was filed as a counterclaim in his answer to the City's complaint in ejectment, the City did

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<sup>4</sup> The coordinate jurisdiction rule provides that "judges of equal jurisdiction sitting in the same case should not overrule each other's decisions." *Ario v. Reliance Ins. Co.*, 980 A.2d 588, 597 (Pa. 2009).

not waive its immunity defense by proffering it in its preliminary objections filed in response to Galdo's counterclaim. Trial Court Opinion at 4 (citing Pa.R.C.P. 1032(a), entitled "Waiver of Defenses. Exceptions. Suggestion of Lack of Subject Matter Jurisdiction or Failure to Join Indispensable Party," which provides, in relevant part, that "[a] party waives all defenses and objections which are not presented either by preliminary objection, answer or reply . . ."). Finally, the trial court held that the coordinate jurisdiction rule did not apply to this case because the standards applicable to the resolution of a summary judgment motion differ from those applicable to a determination of whether the City was immune from Galdo's adverse possession claim. Trial Court Opinion at 5.

The Commonwealth Court vacated the trial court's order denying Galdo's post-trial motions, and remanded the matter for trial on Galdo's adverse possession claim. *City of Philadelphia v. Galdo*, 181 A.3d 1289 (Pa. Cmwlth. 2018) ("*Galdo*"). The intermediate appellate court viewed the primary issue as "whether a claim of adverse possession can lie against the City, a municipality, when the City's only use of the [Parcel] during the statutory period was to hold the [Parcel] for possible future sale." *Id.* at 1292. The court began its analysis by acknowledging the well-established proposition that "political subdivisions, such as counties, townships, municipalities, and boroughs, are not immune from claims of adverse possession, although the Commonwealth is." *Id.* at 1293 (citing *Evans v. Erie County*, 66 Pa. 222, 228 (Pa. 1870)). It explained, however, that claims alleging title by adverse possession cannot be made against any entity, including a municipality, where the property at issue is devoted to a public use. *Galdo*, at 1293.

Rejecting the trial court's conclusion that the City enjoyed the Commonwealth's immunity pursuant to an agency theory, the Commonwealth Court clarified that its prior decision in *Lysicki* "did not provide political subdivisions with total immunity from claims of adverse possession." *Id.* at 1294. Rather, the court explained, *Lysicki* held that

property owners adjacent to school district property could not maintain a claim of adverse possession against the school district because school districts are “agents of the Commonwealth to which the legislature has delegated authority in order to fulfill the state’s responsibility to provide public education.” *Id.* at 1293 (citing *Lysicki*, 701 A.2d at 632 (internal citations and emphasis omitted)). The Commonwealth Court emphasized that the school district in *Lysicki* was immune from the adverse possession claim only because it held the school district property pursuant to a legal responsibility, bestowed upon it by the Commonwealth, to provide public education. *Galdo*, at 1295. The court found that, here, the City had no legal obligation to hold the Parcel as an agent of the Commonwealth during the prescriptive period, *i.e.*, from 1989 through 2014, before Galdo filed his claim for title by adverse possession. It reasoned that, even assuming that the City condemned the property at the Commonwealth’s behest, any agency relationship ceased in the late 1970s, when the construction project was completed. *Id.* at 1294 n.4.

Significantly, the Commonwealth Court further discounted the trial court’s alternative holding that the City was immune from Galdo’s claim of adverse possession because it held the Parcel for a public use. The court agreed that immunity arises when the property in question is devoted to a public use, but concluded there was no public use here. In reaching this conclusion, the Commonwealth Court examined *Torch v. Constantino*, 323 A.2d 278 (Pa. Super. 1974), which held that the twenty-one-year prescriptive period for adverse possession tolled during the years that the county held the property for tax sale for the nonpayment of taxes. The intermediate appellate court reasoned that, in *Torch*, it was the legislative mandate, requiring counties to act as trustee and hold property for tax sale for the nonpayment of taxes, which served as the basis for finding that the property was devoted to a public use. *Galdo*, at 1294.



The Commonwealth Court held that in the instant case, the “City does not provide any analogous obligation imposed by law or evidence of any public use of the [Parcel] to justify holding and neglecting it for decades.” *Id.* at 1295. The court further posited that “were we to determine that a municipality that condemns and holds previously private property for possible future sale did so for a public use, we would essentially hold that municipalities could institute a taking of private property for a land bank, keeping the property until the market provides a considerable profit upon its sale.” *Id.* Finding such holding to be detrimental to private property rights, the Commonwealth Court held that the City was not immune from Galdo’s adverse possession claim because it did not hold the Parcel pursuant to a legal obligation, or for public use. *Id.* Because the trial court based its ruling on the City’s immunity and not on a consideration of the elements necessary to establish title by adverse possession, the Commonwealth Court remanded the matter to the trial court for consideration of Galdo’s adverse possession claim. *Id.* at 1296.

Senior Judge Dan Pellegrini dissented, opining that the City was immune from Galdo’s claim of adverse possession because the retention of condemned property for eventual disposition constitutes a public use. *Id.* at 1297. He relied on the fact that the City condemned the Parcel at the behest of the Commonwealth for an indisputable public purpose (*i.e.*, construction of a highway) and retained the Parcel to resell it to offset governmental expenses and restore the real estate to the City’s tax assessment list. *Id.* at 1296. In the dissent’s view, condemned property that is taken with the intent to resell is akin to the tax-sale property in *Torch*, and is immune so long as it is retained for eventual disposition. *Id.*

This Court subsequently granted the City’s petition for allowance of appeal to address whether the Parcel was devoted to a public use where the property was acquired

by condemnation to assist the Commonwealth with the construction of I-95 and was held by the City for subsequent resale. *City of Philadelphia v. Galdo*, 194 A.3d 1043 (Pa. 2018). The determination of whether the Parcel was devoted to a public use is a question of law over which our standard of review is *de novo* and our scope of review is plenary. *Scungio Borst & Assocs. v. 410 Shurs Lane Developers, LLC*, 146 A.3d 232, 238 (Pa. 2016).

## *II. The Parties' Arguments*

The City, as appellant, contends that it is immune from Galdo's adverse possession claim because the Parcel was devoted to a public use.<sup>5</sup> Echoing Judge Pellegrini's dissent, the City contends that a public use was established because the Parcel was condemned by the City to assist the Commonwealth with the construction of I-95, and the City had always planned to resell the property after the construction was completed to return the property to taxable status. The City relies upon the Superior Court's decision in *Torch*, which it interprets as holding that a municipality's acquisition of property at a tax sale, followed by the municipality's subsequent holding of the property for future resale, constitutes a public use, even if the future resale does not occur for decades and the land lies fallow in the interim. The City posits that there are sound reasons for this holding, including eliminating impediments placed on tax titles that drive purchasers away from tax sales, affording municipalities the opportunity to sell the property at a time when they would receive a considerable profit, and restoring properties to tax assessment lists.

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<sup>5</sup> The City expressly abandons the argument presented below that it is immune because it acted as an agent of the Commonwealth in condemning the Parcel. Brief for Appellant at 6.

The City maintains that there is no reason to distinguish the public use in *Torch* (obtaining ownership of an individual's property in consideration for delinquent taxes and thereafter holding the property for future resale) from the public purpose here (acquiring the Parcel by condemnation to assist the Commonwealth with construction of I-95 and thereafter holding it for future resale). In both cases, it contends, the government initially acquired the properties with the intent of ultimately reselling it for the public purpose of offsetting government expenses with economic efficiency.

The City submits that the Commonwealth Court erred in distinguishing *Torch* on the grounds that a municipality's acquisition of property at a tax sale is protected because it is required by legislative fiat, while the City's retention of property acquired through condemnation, as in this case, is not protected from adverse possession because it is voluntary. In the City's view, a legislative mandate is not a prerequisite to finding a public use, as the Superior Court in *Torch* cited no statutory provision requiring the municipality to acquire, hold, or sell tax-delinquent property. Regardless of whether a municipality's public use acquisition and subsequent holding of the property occurs by mandate or voluntarily, it argues, the municipality is in the same position of holding the property for eventual resale. Hence, the City concludes, Judge Pellegrini's dissent was correct in observing that there is "no reason why condemned property, when taken with the intent to resell, should be treated any differently than tax-sale property." *Galdo*, 181 A.3d at 1297.

The City further argues that neither the length of time a property is left idle nor the municipality's lack of vigilance in reselling the property should negate its immunity. This is so, it asserts, because the government does not have the same incentives as private property owners to monitor its properties and because effective monitoring is burdensome, considering there are tens of thousands of vacant properties spread across

Philadelphia. According to the City, it makes no sense to lose municipal land due to oversight, indifference, or mistake of government employees.<sup>6</sup>

Finally, the City deems unfounded the Commonwealth Court's concern that a ruling in its favor would render every municipal acquisition of private property by condemnation a public use. Notably, it concedes that a municipality's acquisition of private property would not be protected by immunity where it continues to hold the property long after the stated public use has lapsed or has been abandoned or where the City acquires property in its proprietary capacity by contract. Here, the City contends, it did not abandon the public use because the record demonstrates that it had intended at the time of condemnation to sell the Parcel after the construction of I-95 had been completed. The City maintains that it should be afforded the opportunity to sell the property when the market best supports its disposition. It clarifies that it is not suggesting that a municipality's taking of property for resale, in and of itself, devotes the property to a public use. Rather, the essence of the City's contention is that when a municipality acquires property for a public use with the intent to resell it after that use is completed, the public use continues into perpetuity until the property is sold.

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<sup>6</sup> The City observes that some states apply similar public policy rationales to grant absolute immunity to municipalities from claims of adverse possession, regardless of whether the property was acquired and maintained as a public use. Brief for Appellant at 25-26 (collecting cases). Significantly, however, the City does not advocate that we adopt such an approach and, instead, recognizes that in Pennsylvania "municipalities have partial immunity from adverse possession - - where the property is devoted to public use." *Id.* at 7 (emphasis omitted). Moreover, the City acknowledges expressly that it never argued below that municipalities are always immune from claims alleging title by adverse possession. *Id.* at 8 n.2. Accordingly, we need not reexamine the well-established case law, set forth *infra*, permitting claims of title by adverse possession to proceed against municipal property, unless the property is devoted to a public use.

Galdo responds that the Commonwealth Court was correct in holding that the City does not have immunity from his claim of adverse possession under the facts presented. He asserts that the parties agree that the Commonwealth is immune from all claims of adverse possession, and that political subdivisions are generally not immune unless the property at issue is devoted to a public use. Brief for Appellee at 25 (citing *Evans*, 66 Pa. at 228; and *Torch*, 323 A.2d at 279). Galdo maintains that a public use is established where there is actual occupation of the property to benefit the public, such as a public park, or where there is a legal obligation requiring the municipality to hold the property for a public use. He contends that neither occurred here because the City never physically occupied the Parcel during the twenty-one-year prescriptive period, and the City's holding of the Parcel for decades after the initial public use had lapsed was voluntary and not legislatively required. Accordingly, Galdo concludes that his claim for adverse possession should proceed against the City.

Galdo further contends that the City and the dissent below erroneously equate tax delinquent property held for resale for the nonpayment of taxes, as occurred in *Torch*, with condemned property held for resale in the instant case after the public use of the Parcel had expired. This view is mistaken, he argues, because *Torch* is distinguishable, both factually and legally. Galdo submits that the concern in *Torch* was that property acquired and held by local government pursuant to the legislative purpose of collecting taxes could potentially be exposed to adverse possession without payment of any consideration or taxes. Galdo concludes that where a municipality is legislatively required to hold a particular property to sell it to recoup unpaid taxes, it logically follows that the municipality should not be subject to adverse possession claims during the time it is attempting to recoup taxes due.

Galdo argues that *Torch* did not declare that a political subdivision's voluntary holding of property for eventual resale constitutes a public use. Rather, he submits, *Torch* stands for the proposition that absent a political subdivision's physical occupation of the property for a public use, a public use may still exist if the political subdivision is holding the property pursuant to a legal obligation imposed by the legislature as herein described. Unlike in *Torch*, Galdo maintains, there was no legal obligation in the instant case requiring the City to hold the Parcel from the late 1970s, after the public use had lapsed because the construction of I-95 was completed, until 2014, when Galdo asserted title by adverse possession. He finds no precedent supporting the City's position that once property is condemned for a public use, the political subdivision is forever immune from adverse possession claims, regardless of whether the public use continues.

Moreover, Galdo contends, if this Court were to adopt the City's position, political subdivisions would be immunized from all adverse possession claims by simply contending in each case that it intended to sell the condemned property at a later time. In this regard, he submits, the Commonwealth Court correctly observed that municipalities could institute a taking of private property for a land bank, keeping the property indefinitely until the market provides for a formidable profit upon its resale. Galdo asserts that any suggestion of public use simply because a municipality acquires title by condemnation is not the law of Pennsylvania.

Finally, in the event the Court agrees with the City that it is immune from Galdo's claim of adverse possession, Galdo requests that this Court affirm the Commonwealth Court's order on the following two alternative grounds: (1) that the City waived its immunity

defense by failing to plead it in new matter; and (2) that the coordinate jurisdiction rule bars the City's defense of immunity.<sup>7</sup>

### *III. Analysis*

Adverse possession is an extraordinary doctrine that permits one to achieve ownership of another's real property by operation of law. *Weible v. Wells*, 156 A.3d 1220, 1224 (Pa. Super. 2017). The doctrine is dependent upon an individual's possession of another's property for an enumerated period of time authorized by statute. *Id.*; see also 68 P.S. §§ 81-88 (governing claims by adverse possession); and 42 Pa.C.S. § 5530 (setting forth twenty-one year limitations period in actions for the possession of real property).<sup>8</sup> The rationale behind adverse possession lies in the "sound public policy to encourage those who diligently develop and improve the land as against those who are content to hold the bare legal title inactively for many years." Carl C. Risch, COMMENT: *Encouraging the Responsible Use of Land By Municipalities: The Erosion of Nullum Tempus Occurrit Regi and the Use of Adverse Possession Against Municipal Land Owners*, 99 DICK. L. REV. 197 (1994) (citing George A. Pindar, *American Real Estate Law* 480 (The Harrison Company 1976)). An individual who claims title by adverse possession in Pennsylvania must prove actual, continuous, exclusive, visible, notorious,

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<sup>7</sup> In its reply brief, the City reiterates its position that it need not demonstrate that it held the Parcel pursuant to a legislative mandate to prove that the property is devoted to a public use. Interpreting *Torch* as not involving any legislative mandate to acquire tax-delinquent property, the City finds *Torch* indistinguishable and dispositive here affording it immunity against Galdo's claim of adverse possession. Additionally, the City counters Galdo's suggested alternative grounds in support of affirming the Commonwealth Court's order. Reply Brief for Appellant at 10-15.

<sup>8</sup> Upon expiration of the twenty-one-year statute of limitations governing actions for the possession of real property, the property owner's right to bring an ejectment action against the adverse possessor is precluded.

distinct, and hostile possession of the land for a period of twenty-one years. *Baylor v. Soska*, 658 A.2d 743, 744 (Pa. 1995).

As alluded to *supra*, it is well-established that a claim of title by adverse possession does not lie against Commonwealth property. *Commonwealth v. J.W. Bishop & Co.*, 439 A.2d 101, 103 (Pa. 1981); see also 68 P.S. § 88 (entitled “Act not to apply to claims adverse to the Commonwealth”).<sup>9</sup> The basis for this rule of immunity emanates from the doctrine *nullum tempus occurrit regi*, meaning “[t]ime does not run against the king,” which has its roots in the prerogative of the Crown. *J.W. Bishop & Co.*, 439 A.2d at 103 (citing 1 Blackstone, Commentaries at 247-4872 P.S. § 5860.101).<sup>10</sup> Underlying the doctrine of *nullum tempus* is the vindication of public rights and the protection of public policy. *J.W. Bishop & Co.*, 439 A.2d at 105.

For well over a century, it has been the law of Pennsylvania that the doctrine of *nullum tempus* is reserved exclusively for the Commonwealth. *Evans v. Erie County*, 66 Pa. at 228. In *Evans*, this Court held that a claim for title by adverse possession could proceed against Erie County as it was not protected by the doctrine of *nullum tempus*. *Id.* This Court explained that the running of the statute of limitations “against a county or other municipal corporation . . . cannot be doubted,” as the “prerogative is that of the sovereign alone.” *Id.* at 228. We held that grantees of the sovereign, “though artificial bodies created by her, are in the same category as natural persons.” *Id.* (citation omitted).

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<sup>9</sup> Section 88 provides that “[n]othing contained in this act shall be construed to give any title to any lands by a claim of title adverse to that of the Commonwealth of Pennsylvania, and no claim of title adverse to the Commonwealth of Pennsylvania shall be made or recorded under the provisions of this act.” 68 P.S. § 88.

<sup>10</sup> This maxim is sometimes expressed as *nullum tempus occurrit republicae* (“time does not run against the state”). *J.W. Bishop & Co.*, 439 A.2d at 102 n.2.



Accordingly, as a general rule, political subdivisions in this Commonwealth may be subject to claims of adverse possession.<sup>11</sup>

An exception to this general rule exposing political subdivisions to claims of adverse possession exists where the property owned by the political subdivision is devoted to a public use.<sup>12</sup> *J.W. Bishop & Co.*, 439 A.2d at 103. A determination of whether property is devoted to a public use is dependent upon the individualized facts of each case. See *Reading Area Water Authority v. Schuylkill River Greenway Ass'n*, 100 A.3d 572, 580 (Pa. 2014) (holding that for purposes of eminent domain, “[t]he question of what constitutes a public use is highly fact-dependent”); see also *Dornan v. Philadelphia Housing Authority*, 200 A. 834, 840 (Pa. 1938) (opining that “judicial interpretation of ‘public use’ has not been circumscribed in our State by mere legalistic formulas or philological standards . . . ,” but “has been left, as indeed it must be, to the varying circumstances and situations which arise, with special reference to the social and economic background of the period in which the particular problem presents itself for consideration”).

Here, it is undisputed that the City condemned the Parcel in 1974 for transit purposes to assist in the construction of I-95. Thus, we conclude, without hesitation, that the Parcel was acquired for the public use of the construction of a state highway. It is also undisputed that the transit purposes underlying the condemnation lapsed in the late

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<sup>11</sup> This rule is not unanimous throughout the country. We reiterate, however, that in this case, the City does not contend that the Commonwealth’s immunity from adverse possession claims should be extended to political subdivisions. See *supra* at 11-12 n.6.

<sup>12</sup> Another exception to the general rule arises where the political subdivision is acting as an agent of the Commonwealth. See *Lysicki*, 701 A.2d at 632 (holding that because school districts are agents of the Commonwealth, they are protected by the Commonwealth’s immunity from claims of adverse possession). As noted *supra*, the City has abandoned its agency argument in this appeal.

1970s when the work relating to the rerouting of the Elevated Frankford line was completed to assist in the construction of I-95. The parties agree that the City has not physically occupied the Parcel for a public use during the nearly forty-year period since that time. Parties' Stipulated Facts, 3/22/2016, at ¶¶ 16. Indeed, the City viewed the Parcel as "surplus property" that was not actively being used. N.T. (Deposition of Ilene Burak), 10/26/2015, at 10.

Further, the City concedes as a matter of law that a public use can lapse or be abandoned. Brief for Appellant at 35. The Eminent Domain Code supports this view as it contemplates the abandonment of the purpose for which property has been condemned. See 26 Pa.C.S. § 310(a) (setting forth the means of disposition of condemned property where the condemnor abandons the purpose for which the property has been condemned). The crux of the City's argument in this appeal is its narrow assertion that there was no abandonment of the public use under the facts presented because the ultimate disposition of condemned property through its sale constitutes an extension of the original public use that supported the condemnation. Thus, the City's defense of immunity against Galdo's claim of adverse possession relies exclusively on its declaration in 1974 that it intended to dispose of the Parcel after the highway construction concluded. On a more global scale, it is the City's view that once it acquires property for a public use, it can retain that property in perpetuity without being subject to adverse possession claims so long as it does so for the putative purpose of resale, without any obligation to maintain such property and regardless of whether the land continues to function in its dedicated capacity.

We find the City's position to be unsupported by legal precedent and antithetical to the policies underlying the doctrine of adverse possession, particularly the promotion of the active and efficient use of land. The City cites no authority, and we have found

none, to support the proposition that holding condemned property formerly devoted to a public use for resale constitutes a public use. The reason necessitating the sale of the property is because the public use no longer exists. Absent the public use, a municipality's holding of abandoned property, here for decades, offers no benefit to the public. Under such circumstances, the public is not occupying the property in any way, no tax dollars are being received from the property, and the neighborhoods in which the dormant properties are located risk the threat of becoming blighted. This scenario constitutes the opposite of devoting property to a public use as the indefinite holding of abandoned municipal property is detrimental to those tax payers who own property nearby and to the community at large.

While we acknowledge the vast number of condemned properties that the City oversees, we emphasize the high burden that adverse possessors must satisfy to obtain title under the doctrine and observe that the City need only intervene to prevent adverse possessors on each municipal property at some point prior to the end of the twenty-first year after the purpose of the condemnation has lapsed. Encumbering municipalities with the limited responsibility to monitor their properties at some point during the twenty-one-year prescriptive period or face claims of adverse possession will promote the goals of municipal efficiency and the active and efficient use of the land by motivating municipalities to either use the retained property for the public benefit or sell it to private individuals so that it may be taxed for the municipality's and the public's financial benefit.

Our holding herein is not inconsistent with the Superior Court's determination in *Torch*.<sup>13</sup> In *Torch*, Jack and Genevieve Constantino commenced an ejectment action against Joseph and Rosella Torch, asserting title by adverse possession of .65 acres of

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<sup>13</sup> While the Superior Court's decision in *Torch* is not binding on this Court, we decline to reexamine the holding of that case as the parties do not herein challenge it.

land in Lackawanna County. The Torchs claimed title to the land by virtue of a tax deed they received from Lackawanna County after a treasurer's tax sale. The issue on appeal was "whether land held for tax sale after return for nonpayment of taxes tolls the prescription period." *Torch*, 323 A.2d at 279. To resolve this issue, the court looked to "whether the duty of collection of taxes placed by legislative mandate on local governments, imposing as it does a trusteeship for all tax bodies involved, is not in fact a governmental function." *Id.* at 280. Recognizing that views regarding what constitutes a public use may vary with changing notions of the scope and functions of government, the court reasoned that there was a clear legislative intent to "make tax sales and tax titles more attractive to prospective purchasers so that land owned by local government by virtue of nonpayment of taxes can be more promptly sold and the land restored to the assessment lists." *Id.*

The *Torch* court found that the legislature has attempted to remove tax title impediments that hinder tax sales, and that one such impediment would be permitting claims of adverse possession against county property held for nonpayment of taxes. *Id.* The Superior Court in *Torch* expressed concern over allowing a potential "smart manipulator" to claim title to county land by adverse possession without consideration and without the payment of taxes. *Id.* at 281. Citing the Real Estate Tax Sale Law, 72 P.S. § 5860.101 *et seq.*, the court found that the legislature demonstrated an intent "to impose on counties a governmental function of collecting delinquent taxes as a trustee for the taxing districts so that real estate does not lie fallow and that tax titles are so improved as to attract buyers and restore real estate to the tax lists." *Torch*, at 281. Thus,

the court concluded, adverse possession does not run against political subdivisions holding tax-delinquent land for tax sale as such function is a governmental one.<sup>14</sup> *Id.*

We agree with Galdo that *Torch* does not stand for the broad proposition that a political subdivision's holding of municipal property for eventual resale constitutes a public use. Critically, as the Commonwealth Court cogently observed below, the finding of a public use in *Torch* was based upon Erie County's legal obligation to acquire and hold tax delinquent property for tax sale purposes pursuant to the Real Estate Tax Sale Law, 72 P.S. § 5860.101 *et seq.* The decision in no way suggested that a municipality who acquired property by other means, such as condemnation, could hold that property indefinitely after the public purpose for the condemnation had lapsed, without being subject to claims of adverse possession. Rather, the county's method of acquisition of the property to carry out its legal obligation of tax collection, coupled with the subsequent holding of the property for that same purpose, created the public use. While the *Torch* decision cited goals of removing impediments to the sale of county property and returning those properties to the tax assessment lists, which come into play in the instant case, the finding of a public use was based on the county's legal obligation to recoup unpaid taxes.

Unlike the instant case, the public use in *Torch* was never extinguished or abandoned because the public use derived from the legal obligation to hold the property. The same cannot be said for the condemned property at issue here. As established at length *supra*, the public purpose for condemnation of the Parcel lapsed in the late 1970s, approximately ten years before the alleged period of adverse possession began in 1989. After the construction of I-95 ceased, the City retained the Parcel and left it idle for nearly

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<sup>14</sup> The Superior Court reiterated this holding in *Fred E. Young, Inc. v. Brush Mt. Sportsmen's Ass'n.*, 697 A.2d 984, 992 (Pa. Super. 1997) (providing that "[a]dverse possession does not lie against land held by the county in connection with a tax sale").

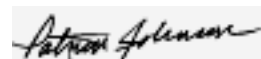
forty years, during which it had no legal obligation to hold the property and failed to otherwise occupy the property for a public use.

In summary, we hold that, generally, political subdivisions in this Commonwealth may be subject to claims of adverse possession. An exception to this general rule is where the property is devoted to a public use. A public use may lapse or be abandoned. Here, the public use of the Parcel to assist in the construction of a state highway lapsed in the late 1970s and the only purported public use proffered by the City thereafter was the holding of the Parcel for resale. For the reasons set forth *supra*, we hold that condemned property that is held for eventual resale by a political subdivision after the original public purpose for the condemnation has lapsed does not constitute a public use of the property that affords a municipality immunity from adverse possession claims.

Because the trial court deemed the City immune from adverse possession, there has been no factual determination of whether Galdo has satisfied the requisites thereof. Accordingly, we affirm the order of the Commonwealth Court, which vacated the trial court's order finding immunity, and remanded to the trial court for further proceedings on Galdo's adverse possession claim.

Chief Justice Saylor and Justices Todd, Donohue, Dougherty, Wecht and Mundy join the opinion.

Judgment Entered 09/26/2019

  
Patricia A. Johnson  
Chief Clerk  
Supreme Court of Pennsylvania