

## **AUCTION RATE SECURITIES - MASSACHUSETTS**

### **Tutor Perini Corporation v. Banc of America Securities LLC**

**United States Court of Appeals, First Circuit - November 21, 2016 - 842 F.3d 71**

Investor in student loan auction rate securities sued broker-dealer and its parent company, asserting securities fraud claims under federal and state law, by alleged misrepresentations and omissions regarding auction rate securities market that eventually collapsed, and asserting various state law claims.

The United States District Court for the District of Massachusetts granted defendants summary judgment. Investor appealed.

The Court of Appeals held that:

- Parent company was not liable for securities fraud as control person;
- Summary judgment was precluded on state securities fraud claim;
- Summary judgment was precluded on federal securities fraud claim;
- Investor waived any objection to summary judgment on federal securities fraud claim based on unsuitability;
- Summary judgment was precluded on state negligent misrepresentation claim;
- Investor waived any argument regarding state intentional misrepresentation claim; and
- Summary judgment was precluded on state unfair business practices claim.

Parent of subsidiary broker-dealer, that allegedly engaged in securities fraud in violation of federal and state securities laws in connection with sales of student loan auction rate securities to investor, was not liable as control person, due to actions of two employees of parent and two dual employees of parent and subsidiary who analyzed maximum rate waivers and liquidity risks for deciding which auctions to fail, since investor never in four years of litigation ever alleged any facts indicating that parent actually exercised control over subsidiary.

Investor waived argument that parent of subsidiary broker-dealer, that allegedly engaged in securities fraud in violation of federal and state securities laws in connection with sales of student loan auction rate securities to investor, was liable as control person due to broker-dealer needing parent's approval to expand its inventory of auction rate securities, since investor failed to bring that argument to district judge's attention, and made no argument that any exception to raise-or-waive rule applied.

Investor waived arguments concerning many instances of allegedly material misstatements by broker-dealer that sold student loan auction rate securities to investor, in violation of Massachusetts securities fraud law, since investor had not raised arguments before district court.

Investor waived argument that municipal securities rulemaking board issued rule creating independent disclosure duty for broker-dealers, where investor failed to raise argument in district

court.

Genuine issues of material fact remained as to whether broker-dealer made material omissions regarding nonviability of auction rate securities market during time that broker-dealer was specifically recommending and selling student loan auction rate securities to investor while market teetered on brink of collapse, thus precluding summary judgment on investor's securities fraud claim against broker-dealer under Massachusetts law.

Genuine issues of material fact remained as to whether broker-dealer made material omissions regarding nonviability of auction rate securities market during time that broker-dealer was specifically recommending and selling student loan auction rate securities to investor while market teetered on brink of collapse and whether investor reasonably relied on outdated information that broker-dealer disclosed regarding state of auction rate securities market, thus precluding summary judgment on investor's securities fraud claim against broker-dealer.

Investor waived any objection to district court's ruling that investor's suitability claim, under § 10(b), against broker-dealer that sold student loan auction rate securities to investor was barred due to investor holding non-discretionary brokerage account in which investor directed all investments made, since investor cited no authority to support its view that nondiscretionary account holders could bring unsuitability claims and investor's appellate pleadings failed to offer any convincing explanation of what law should be, assuming investor found no on-point authority.

Genuine issues of material fact remained as to whether broker-dealer made material omissions regarding nonviability of auction rate securities market during time that broker-dealer was specifically recommending and selling student loan auction rate securities to investor while market teetered on brink of collapse, thus precluding summary judgment on investor's claim against broker-dealer for negligent misrepresentation under Massachusetts law.

Investor waived any arguments regarding dismissal of intentional misrepresentation claim against broker-dealer, under Massachusetts law, in connection with auction rate securities market during time that broker-dealer was specifically recommending and selling student loan auction rate securities to investor while market teetered on brink of collapse, where investor's opening appellate brief suggested district judge erred in dismissing claim, but investor's appellate papers never explained how that was so.

Genuine issues of material fact remained as to whether broker-dealer acted unfairly or deceptively by making material omissions regarding nonviability of auction rate securities market during time that broker-dealer was specifically recommending and selling student loan auction rate securities to investor while market teetered on brink of collapse, thus precluding summary judgment on investor's claim against broker-dealer for unfair business practices in violation of Massachusetts law.

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## **LIABILITY - NEW YORK**

### **[Torres v. Faxton St. Lukes Healthcare](#)**

**United States District Court, N.D. New York - January 3, 2017 - F.Supp.3d - 2017 WL 24774**

Administrators of estates of family who were killed by a family member with mental illness brought separate actions in state court against city, city police department, responding officers, hospital, hospital staff, provider of security services to hospital and security guard, after police officers

responded to a violent incident involving family member, transported family member to local hospital for mental health evaluation, and when family member was released several hours later, family member returned home and killed his sister, uncle, and aunt.

On removal to federal district court and following consolidation of the cases, defendants moved to dismiss for failure to state a claim and failure to join an indispensable party.

The District Court held that:

- Police did not have a special relationship with family members;
- Administrators stated § 1983 state-created dangers claims against police department and police officers;
- Administrators sufficiently alleged that police officers' conduct was objectively unreasonable, as would preclude qualified immunity;
- Administrators sufficiently stated § 1983 claims against city under Monell;
- Administrators sufficiently stated negligence claims against police officers;
- Administrators sufficiently alleged that emergency room physician had a duty to control family member to protect third-party family;
- Administrators sufficiently alleged that hospital and staff exercised authority and control over family member; and
- Administrators sufficiently alleged that hospital security guard exercised authority and control over family member.

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## **EMIENT DOMAIN - TEXAS**

### **[Denbury Green Pipeline-Texas, LLC v. Texas Rice Land Partners, Ltd.](#)**

**Supreme Court of Texas - January 6, 2017 - S.W.3d - 2017 WL 65470**

Pipeline company petitioned for a temporary restraining order and temporary and permanent injunction to prevent property owner and its tenant from interfering with company's alleged right to enter the property as a common carrier for construction of carbon dioxide (CO2) pipeline.

After granting the request for a temporary injunction, the District Court entered summary judgment permanently restraining owner and tenant from interfering with company's survey rights. Owner and tenant appealed.

The Court of Appeals affirmed. Petition for review by owner and tenant was granted. The Supreme Court reversed and remanded. On remand, the District Court granted summary judgment to company. Owner appealed. The Court of Appeals reversed and remanded. Company's petition for review was granted.

The Supreme Court of Texas held that:

- Court of Appeals improperly focused on company's intent at the time of its plan to construct the pipeline;
- Company's post-construction contracts for transporting other company's CO2 were relevant;
- Company was "common carrier" with right to eminent domain; and
- Reasonably probable future use of pipeline did not need to serve a substantial public interest.

Prefatory phrase "for a person intending to build" demonstrated who had to prove common carrier status in test stating requirements for a person intending to build carbon dioxide (CO2) pipeline to

qualify as a common carrier with power of eminent domain, and the phrase thus did not make central inquiry company's intent at the time of its plan to construct the pipeline.

Pipeline company's post-construction contracts for transporting other company's carbon dioxide (CO2) were relevant to analysis of whether company was common carrier with right to eminent domain and were properly considered by trial court granting summary judgment in favor of company.

Reasonable probability existed that, at some point after construction of pipeline for carbon dioxide (CO2), it would serve the public by transporting CO2 for one or more customers who would either retain ownership of their gas or sell it to parties other than the carrier, and, thus, company was "common carrier" with right to eminent domain. Company built pipeline along Gulf Coast in close proximity to potential customers and entered post-construction contract to transport CO2 for another company.

Reasonably probable future use of carbon dioxide (CO2) pipeline did not need to serve a substantial public interest in order for pipeline company to qualify as common carrier with right of eminent domain.

Establishing a reasonable probability that the pipeline will, at some point after construction, serve even one customer unaffiliated with the pipeline owner is substantial enough to satisfy public use necessary to qualify owner as common carrier with right to eminent domain.

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## **PENSIONS - CALIFORNIA**

### **[San Joaquin County Correctional Officers Association v. County of San Joaquin](#)**

**Court of Appeal, Third District, California - December 20, 2016 - Cal.Rptr.3d - 2016 WL 7373836**

Correctional officers' union brought action against county to challenge reductions in county's retirement contributions.

The Superior Court entered judgment for county. Union appealed.

The Court of Appeal held that Public Employees' Pension Reform Act (PEPRA) did not shield officers' compensation package from a reduction authorized by County Employees Retirement Law (CERL).

Public Employees' Pension Reform Act (PEPRA) did not bar a county from reducing its share of retirement contributions for correctional officers to 50 percent under the County Employees Retirement Law (CERL) provision stating that a resolution authorizing retirement contributions exceeding 50 percent may be amended or repealed "at any time," where the memorandum of understanding (MOU) requiring the county to make retirement contributions exceeding 50 percent had expired, and bargaining had reached an impasse.

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## **IMMUNITY - LOUISIANA**

### **[Greene v. Succession of Alvarado](#)**

**Court of Appeal of Louisiana, First Circuit - December 27, 2016 - So.3d - 2016 WL 7443262**

**- 2015-1960 (La.App. 1 Cir. 12/27/16)**

Motorist brought action against trailing motorist's succession and Department of Transportation and Development (DOTD) arising out of collision on icy bridge which killed trailing motorist and severely injured motorist.

After bench trial, the 32nd Judicial District Court entered judgment in favor of motorist. DOTD appealed.

The Court of Appeal held that:

- Decisions and actions undertaken by DOTD as to maintenance of bridge in a reasonably safe condition, in hours preceding accident, were operational in nature, not policy-making or discretionary, and therefore governmental immunity did not apply to such decisions and actions;
- Evidence was sufficient to support finding that DOTD had constructive knowledge or notice of ice on bridge; and
- Evidence was sufficient to support finding that DOTD failed to take reasonable corrective measures.

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**UTILITY DISTRICTS - NORTH CAROLINA**

**[City of Asheville v. State](#)**

**Supreme Court of North Carolina - December 21, 2016 - S.E.2d - 2016 WL 7422422**

City brought action against State and sewerage district, seeking injunctive relief and declaration that statute requiring city to transfer public water system to newly created sewerage district was unconstitutional.

The Superior Court granted summary judgment to city. State appealed. The Court of Appeals reversed in part. City filed notice of appeal and petitioned for discretionary review, which was allowed.

The Supreme Court of North Carolina held that:

- Statute was a local law, and
- Statute was related to health, sanitation, and abatement of nuisances, rendering it unconstitutional.

The purpose of the state constitution's prohibition on the enactment of any local, private, or special act or resolution concerning 14 prohibited subjects is to free the General Assembly from the enormous amount of petty detail which had been occupying its attention, to enable it to devote more time and attention to general legislation of statewide interest and concern, to strengthen local self-government by providing for the delegation of local matters by general laws to local authorities, and to require uniform and coordinated action under general laws on matters related to the welfare of the whole state.

Statute requiring one city to involuntarily transfer public water system to metropolitan sewerage district was local law, as required for statute to be unconstitutional local law. Even though legislation appeared to create class of municipalities to which involuntary transfer provisions applied, city was only municipality that would have ever been subject to transfer provisions, and legislation did not explain why every other municipality had right to decide whether to transfer

water system or why expected benefits from transfer should not have been made available to other municipal water system customers.

Local statute requiring one city to involuntarily transfer public water system to metropolitan sewerage district had material connection to issues involving health, sanitation, and abatement of nuisances, and thus was unconstitutional local law. Stated purpose of legislation was to provide reliable, cost-effective, high-quality water and sewer services to affected customers, and city was required to comply with Drinking Water Act, located in public health chapter of statutes, and other health statutes regarding water quality.

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## **IMMUNITY - OHIO**

### **[Bibler v. Stevenson](#)**

**Supreme Court of Ohio - December 29, 2016 - N.E.3d - 2016 WL 7645348 - 2016 -Ohio-8449**

Driver with right-of-way filed negligence suit against city and driver who failed to stop at stop sign that was obscured by foliage.

The Court of Common Pleas granted summary judgment in favor of city. Plaintiff appealed. The Court of Appeals affirmed. Plaintiff's discretionary appeal was accepted.

The Supreme Court of Ohio held that city was not immune from liability since stop sign was required.

Stop sign at intersection with through highway was "public road" within meaning of statute making political subdivisions liable for failure to keep public roads in repair, and, thus, city was not immune from liability for intersection collision caused by driver who failed to stop at sign obscured by foliage, even though statutory definition of "public roads" excluded traffic control devices unless mandated by Ohio manual of uniform traffic control devices and manual mistakenly, inadvertently, or intentionally did not precisely align with statute requiring stop signs at intersections with through highways. Manual could not override clear statutory mandate, but necessarily incorporated it.

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## **PORT AUTHORITY FINANCING - OREGON**

### **[International Longshore and Warehouse Union v. Port of Portland](#)**

**United States Court of Appeals, Ninth Circuit - December 27, 2016 - F.3d - 2016 WL 7438634**

Labor union representing longshore workers filed suit against municipal port and port officials, alleging that programs adopted by the port to mitigate its financial losses, which involved incentive payments to private entities who did business with the port and were funded out of port bank account that contained tax and non-tax revenue violated the Oregon Constitutional prohibition against a public entity raising money for, or lending credit to, any private entity.

The United States District Court granted summary judgment in favor of defendants on certain claims, and subsequently granted summary judgment in favor of defendants on the remaining claims. Union appealed.

The Court of Appeals held that the Court of Appeals would certify question to the Oregon Supreme Court as to whether municipal port's incentive programs violated Oregon Constitutional prohibition against public entity raising money for, or lending credit to, private entities.

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## **ARBITRATION - PUERTO RICO**

### **[UBS Financial Services Inc. v. Asociación de Empleados del Estado Libre Asociado de Puerto Rico](#)**

**United States District Court, D. Puerto Rico - December 22, 2016 - F.Supp.3d - 2016 WL 7408828**

Investment consulting and brokerage service providers filed petition to confirm arbitration award issued against client, denying client's claims that service providers violated Securities Exchange Act and Puerto Rico Uniform Securities Act by alleged misrepresentations regarding investments in Puerto Rico municipal bonds.

Client moved to dismiss for lack of subject-matter jurisdiction, or alternatively, for a stay. Service providers removed to federal court.

The District Court held that substance of arbitral claims arose under federal law, and thus federal question jurisdiction existed.

Substance of client's arbitral claims against investment consulting and brokerage service providers, alleging misrepresentation by service providers, arose under federal law, and thus federal question jurisdiction existed for court to hear service providers' petition to confirm arbitration award under Federal Arbitration Act (FAA). Client's statement of claim alleged "violation of the federal securities laws."

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## **OPEN MEETINGS - WYOMING**

### **[Cheyenne Newspapers, Inc. v. City of Cheyenne](#)**

**Supreme Court of Wyoming - December 23, 2016 - P.3d - 2016 WL 7423093 - 2016 WY 125**

Newspaper brought action against city, seeking declaration that team created by city to considering staffing and compensation study was subject to Wyoming Public Meetings Act.

City moved for summary judgment. The District Court granted the motion. Newspaper appealed.

The Supreme Court of Wyoming held that:

- Team created by city to consider staffing and compensation study was a "committee" for purposes of Wyoming Public Meetings Act, but
- Team was not created by or pursuant to constitutional, statute, or ordinance, and therefore, did not qualify as an "agency" subject to open meeting requirements.

Team created by city to consider staffing and compensation study was a "committee" for purposes of Wyoming Public Meetings Act, rather than an impermanent, advisory group. Resolution that created team called it a "committee," and city counsel referred business for consideration to the team.



Team created by city to consider staffing and compensation study was not created by or pursuant to constitutional, statute, or ordinance, and therefore, did not qualify as an “agency” subject to open meeting requirements of Wyoming Public Meetings Act. Team was charged to deal with matters of temporary and special nature and appropriately created by resolution, and team was not formed pursuant to statute granting city authority to set and pay employee salaries.

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## **PUBLIC CORPORATIONS - ALABAMA**

### **[Water Works Board of City of Arab v. City of Arab](#)**

**Supreme Court of Alabama - December 23, 2016 - So.3d - 2016 WL 7428391**

City brought action against city water board, seeking declaration that board was bound by resolutions adopted by city directing board to fluoridate city’s water supply and requesting a preliminary injunction enjoining the board from halting fluoridation.

The Circuit Court denied the board’s motion to dismiss and entered the preliminary injunction requested by city. Board appealed.

The Supreme Court of Alabama held that:

- Board was an independent public corporation, not a mere agency of city, and
- Doctrine of waiver or of laches did not require board’s continued compliance with city’s resolutions.

City water board was an independent public corporation tasked with operating city’s waterworks system, not a mere agency of city, and thus board was not required to comply with city resolutions directing board to fluoridate city’s water supply. Because municipal resolutions had to be read in pari materia with other state laws, the legislature, by statutorily establishing the board as an independent public utility corporation and vesting it with all authority over the waterworks system, limited city’s authority to pass resolutions regarding the waterworks system, and allowing city to control board’s operational decisions by adopting resolutions would mean that the board would not be truly separate and independent, contrary to the legislature’s intent.

Fact that city water board began to fluoridate city’s water supply after city adopted resolution directing board to do so did not mean, pursuant to the doctrine of waiver or of laches, that board was required to continue to fluoridate the water supply. Even if board took into consideration the resolution in deciding to fluoridate the water supply, that did not change fact that the Board alone, as an independent public corporation separate from the city, had the authority, as derived from the legislature, to make all operational decisions concerning the waterworks system.

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## **EASEMENTS - INDIANA**

### **[Duke Energy of Indiana, LLC v. City of Franklin](#)**

**Court of Appeals of Indiana - December 16, 2016 - N.E.3d - 2016 WL 7333575**

Holder of utility easement in land underneath proposed intersection expansion project brought action against city, alleging that the city lacked sufficient property rights to complete the project and that the project would impermissibly interfere with the holder’s easement rights.



The Superior Court denied the holder's request for a preliminary injunction, and it appealed.

The Court of Appeals held that:

- Holder lacked standing to challenge city's property interests, and
- Holder failed to demonstrate reasonable likelihood of success at trial.

Holder of utility easement in land underneath proposed intersection expansion project lacked standing to challenge project based on city's purportedly insufficient property rights in the land. Holder was essentially pursuing an ejectment action against the city based on alleged trespass, and holder did not have a possessory interest in the land that would it to maintain such an action.

Holder of utility easement in land underneath proposed intersection expansion project failed to demonstrate a reasonable likelihood of success at trial with respect to its claim that project would permissibly interfere with its easement rights, as required to support holder's request for preliminary injunction preventing city from completing the project. City demonstrated that project was part of effort to beautify corridor, enhance motorist safety, and spur commercial and business growth, and holder failed to show that its ability to repair and maintain its transmission lines would be affected apart from having to employ some additional traffic control measures.

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## **LAND USE & ZONING - IOWA**

### **[Residential and Agricultural Advisory Committee, LLC v. Dyersville City Council](#)**

**Supreme Court of Iowa - December 9, 2016 - N.W.2d - 2016 WL 7175256**

Community members filed petition for writ of certiorari challenging city council's decision that rezoned agricultural land to commercial land in order to facilitate the development of baseball and softball complex.

The District Court denied the petition and denied members' motion to modify the order. Members appealed, which was transferred. The Court of Appeals reversed and remanded. Members filed second writ of certiorari in response to city council's vote approving ordinance correcting description of rezoned land. Members' motion to consolidate the two writs was granted. Following trial, the District Court annulled the writs. Members filed appeal, which was retained.

The Supreme Court of Iowa held that:

- City council's rezoning decision was not arbitrary, capricious, or unreasonable;
- City council's rezoning decision was made in accordance with city's comprehensive plan;
- City council's rezoning decision did not constitute illegal spot zoning;
- City council proceedings concerning ordinance, which sought to correct legal description contained in rezoning ordinance, substantially complied with statutory zoning requirements, and thus, ordinance was valid;
- City council's rezoning decision met rational basis test, and thus did not violate equal protection; and
- Community members were afforded procedural due process.

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## **PUBLIC EMPLOYMENT & BENEFITS - MASSACHUSETTS**

## **Retirement Bd. of Stoneham v. Contributory Retirement Appeal Bd.**

**Supreme Judicial Court of Massachusetts, Middlesex - December 22, 2016 - N.E.3d - 2016 WL 7390971**

Municipal retirement board sought review of decision by Contributory Retirement Appeal Board that municipal board could not unilaterally terminate membership of part-time school department employee on ground that scheduled working hours dropped below 30.

The Superior Court Department reversed Appeal Board's decision. Employee appealed, and case was transferred from the Appeals Court.

The Supreme Judicial Court held that:

- Municipal board lacked absolute discretion to terminate membership when employee's second job ended, and
- Separation from service did not occur when second job ceased and employee continued working in first job for several more years.

Municipal retirement board's "full jurisdiction" to determine eligibility referred only to its authority to set initial eligibility criteria and did not give absolute discretion to terminate part-time municipal employee's membership when her second job with school department ended and she ceased to satisfy eligibility requirement of at least 30 hours of scheduled work per week. Statutorily enumerated events supporting termination of member's status did not include subsequent failure to satisfy eligibility criteria that led to that member's admission, and member's status as member in service continued even if member ceased to satisfy criteria that initially qualified member for admission into the retirement system.

Separation from service terminating membership in municipal retirement system did not occur when part-time municipal employee's second job with school department ceased and she continued working in first job for several more years, and, thus, she remained in service in non-full-time capacity and was eligible for retroactive membership.

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## **ZONING & LAND USE - NORTH DAKOTA**

### **Western Petroleum, LLC v. Williams County Board of Commissioners**

**Supreme Court of North Dakota - December 20, 2016 - N.W.2d - 2016 WL 7368813 - 2016 ND 249**

Company appealed decision by county board of commissioners assessing a \$29,635,000 penalty against company for violating temporary housing regulations.

The District Court affirmed the penalty. Company appealed.

The Supreme Court of North Dakota held that company was subject to \$1,000 penalty per day for violating temporary housing regulations, rather than \$1,000 penalty on a per housing unit, per day basis. Plain language of the regulations stated it is unlawful to violate any of its provisions, and the penalty for violating the provisions was \$1,000 per violation.

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## **PUBLIC RECORDS - OHIO**

### **[State ex rel. Caster v. Columbus](#)**

**Supreme Court of Ohio - December 28, 2016 - N.E.3d - 2016 WL 7448756 - 2016 -Ohio- 8394**

Attorney who was involved in innocence project petitioned for writ of mandamus to compel city to comply with public records request for law enforcement records concerning convicted defendant whose direct appeals ended more than four years earlier.

The Supreme Court of Ohio held that:

- Specific investigatory work-product exception to disclosure does not extend beyond completion of trial for which the information was gathered, overruling *State ex rel. Steckman v. Jackson*, 70 Ohio St.3d 420, 639 N.E.2d 83, and *State ex rel. WLWT-TV5 v. Leis*, 77 Ohio St.3d 357, 673 N.E.2d 1365;
- City and police chief should have produced records; and
- Attorney was entitled to attorney fees.

Specific investigatory work-product exception to disclosure under Public Records Act (PRA) does not extend beyond completion of trial for which the information was gathered; overruling *State ex rel. Steckman v. Jackson*, 70 Ohio St.3d 420, 639 N.E.2d 83, and *State ex rel. WLWT-TV5 v. Leis*, 77 Ohio St.3d 357, 673 N.E.2d 1365.

City and police chief should have produced to attorney, who was involved in innocence project, all records that were withheld based on claim that the records constituted specific investigatory work product, where criminal defendant's original trial had long been completed.

Attorney's public records request was sufficiently different from prior requests denied by police chief to constitute new request, and, thus, award of attorney fees was mandatory for failure of chief to respond to request for records concerning criminal defendant under consideration for innocence project. Attorney's letter was responsive to chief's earlier refusals, pointed out deficiencies in the prior responses, and added information that criminal case was complete, direct appeal process had concluded, and there were no pending collateral attacks.

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## **CONTRACTS - OHIO**

### **[Colaianne Constr., Inc. v. Indian Creek Local School Dist.](#)**

**Court of Appeals of Ohio, Seventh District, Jefferson County - December 12, 2016 - N.E.3d - 2016 WL 7291139 - 2016 -Ohio- 8156**

Contractor on school construction project sought arbitration of contract dispute with school district.

The Court of Common Pleas granted contractor's motion to compel arbitration. District appealed.

The Court of Appeals held that state, rather than district, was public owner of project, and thus

contractor's remedy was to file action in court of claims.

State, rather than school district, was public owner of district's project to construct new school facility, even though contractual promise to establish and maintain escrow account was made by school district, and thus contractor's means to seek release of retainage from escrow was to file action in court of claims rather than to file for arbitration. All actions taken by district under contract, including entry into escrow agreement and controlling of escrow account, were actions made in district's agency function, and contract explicitly named court of claims as exclusive jurisdiction for action or proceeding by contractor.

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## **BONDS - OKLAHOMA**

### **[Matter of Application of The Oklahoma Turnpike Authority](#)**

**Supreme Court of Oklahoma - December 13, 2016 - P.3d - 2016 WL 7212488 - 2016 OK 124**

Oklahoma Turnpike Authority applied to the Supreme Court for approval of an issuance of bonds for four turnpike construction projects. Protestant filed objection to the application.

The Supreme Court of Oklahoma held that statute providing funding for four projects under one bond issue did not violate single subject rule.

Bonds requested by Oklahoma Turnpike Authority to finance four turnpike construction projects all related to the construction and/or improvement of turnpikes, and therefore, statute providing funding for the four projects under one bond issue did not violate single subject rule contained in the state constitution. Authority had the express legislative authority to issue bonds for turnpike projects and to combine multiple projects for purposing of issuing bonds.

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## **IMMUNITY - TEXAS**

### **[Byrdson Services, LLC v. South East Texas Regional Planning Commission](#)**

**Supreme Court of Texas - December 23, 2016 - S.W.3d - 2016 WL 7421392**

Contractor brought action against Regional Planning Commission to recover payments allegedly due on contracts funded by Commission, for repairs to homes that were damaged in hurricane.

The 60th District Court denied Commission's plea to jurisdiction. Commission appealed. The Beaumont Court of Appeals reversed. Contractor appealed.

The Supreme Court of Texas held that suit fell within statutory governmental immunity waiver contained in Local Government Code.

Contractor's suit against Regional Planning Commission to recover payments allegedly due on contracts funded by Commission for repairs to homes damaged by hurricane fell within provision of Local Government Code that waived governmental immunity if the contract, among other things, provided goods or services to the local governmental entity. Texas homeowners were primary beneficiaries under contract, but they were not the only beneficiaries, as contract also benefitted the local governmental entity, directly so, providing rebuilding work the entity was obligated to provide itself.

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## UNIONS - CALIFORNIA

### **City of Palo Alto v. Public Employment Relations Board**

**Court of Appeal, Sixth District, California. November 23, 2016 - Cal.Rptr.3d - 5 Cal.App.5th 1271 - 2016 WL 6902091 - 2016 L.R.R.M. (BNA) 392, 764**

City petitioned for a writ of extraordinary relief annulling Public Employment Relations Board's (PERB) decision ordering city to rescind its resolution referring a measure to the voters. The Court of Appeal granted a writ of review.

The Court of Appeal held that:

- City failed to consult in good faith with firefighters' union over city's vote to repeal city charter provision requiring binding interest arbitration upon impasses in wage negotiations;
- Requirement to consult in good faith with firefighters' union did not violate the charter city home rule provisions of the California Constitution;
- Evidence supported finding that city council was notified of union's desire to negotiate;
- Separation of powers doctrine barred PERB from ordering city to rescind resolution that violated Myers-Milias-Brown Act (MMBA);
- PERB was authorized to grant relief by declaring that city council's resolution was void; and
- Initiative's passage in election did not render the unfair practice charge moot.

City failed to meet its obligation under the Meyers-Milias Brown Act (MMBA) to consult in good faith with firefighters' union over city's vote to place on the ballot for the upcoming election a measure that repealed a city charter provision requiring binding interest arbitration upon impasses in negotiations regarding wages, hours, and other terms and conditions of employment for the city's firefighters, where the city did not meet and discuss the issues.

The Meyers-Milias Brown Act (MMBA) did not violate the charter city home rule provisions of the California Constitution and the constitutional authority of the city council to propose charter amendments, in requiring a charter city to consult in good faith with firefighters' union over city's vote to place on the ballot for the upcoming election a measure that repealed a city charter provision requiring binding interest arbitration upon impasses in negotiations regarding wages, hours, and other terms and conditions of employment for the city's firefighters, since the MMBA consultation requirement did not make the amendment process significantly less expedient.

Public Employment Relations Board's (PERB) decision did not represent such a sea change in California law as to preclude retroactive application of its decision that the Meyers-Milias Brown Act (MMBA) did not violate the charter city home rule provisions of the California Constitution and the constitutional authority of the city council to propose charter amendments, in requiring a charter city to consult in good faith with firefighters' union over city's vote to place on the ballot for the upcoming election a measure that repealed a city charter provision requiring binding interest arbitration upon impasses in negotiations regarding wages, hours, and other terms and conditions of employment for the city's firefighters, since there was no previously settled rule that binding arbitration was not a mandatory subject of consultation.

Public Employment Relations Board (PERB) did not improperly deprive city of due process and fairness, in considering and rejecting several possible defenses that the city had not argued before sustaining firefighters' union's unfair practice charge against the city for failing to consult in good faith with union under the Meyers-Milias Brown Act (MMBA), since the issue of whether any valid defense existed for the city's acts was encompassed within the broader issue of whether the city

violated the MMBA.

Public Employment Relations Board's (PERB) conclusion that firefighters' union gave city council adequate notice to preserve its right to negotiate over city's plan to place on the ballot a measure that would repeal a city charter provision requiring binding interest arbitration upon impasses in negotiations regarding the conditions of employment for the city's firefighters, in ordering city to rescind its resolution referring the measure to the voters, was supported by substantial evidence, including evidence that the union specifically stated in writing that it wished to consult with the city about proposed changes to the provision and asked the city to comply with the Meyers-Milias Brown Act (MMBA), and evidence that city continued to consider the possible changes until it placed the measure on the ballot one year later.

The separation of powers doctrine barred Public Employment Relations Board (PERB) from ordering city to rescind its resolution placing on the ballot a measure that would repeal a city charter provision requiring binding interest arbitration upon impasses in negotiations regarding the conditions of employment for the city's firefighters, as a remedy for the city's violation of the Myers-Milias-Brown Act (MMBA), since PERB's order would compel a legislative act.

A declaration by Public Employment Relations Board (PERB) that city council's resolution was void would be proper relief, on union's Myers-Milias-Brown Act (MMBA) unfair practice charge for city council's failure to negotiate with firefighters' union before placing on the ballot a measure that would repeal a city charter provision requiring binding interest arbitration upon impasses in negotiations regarding the firefighters' conditions of employment, since such relief would effectively return the parties to the status quo ante, and would have the affirmative effect of "undoing" the invalid act without impermissibly infringing on legislative powers.

Union's Myers-Milias-Brown Act (MMBA) unfair practice charge, for city council's failure to negotiate with firefighters' union before placing on the ballot a measure that would repeal a city charter provision requiring binding interest arbitration upon impasses in negotiations regarding the firefighters' conditions of employment, was not rendered moot or merely advisory by the passage of the measure in the election, since Public Employment Relations Board (PERB) was able to determine that the city engaged in an unfair practice, and PERB was able to order the city to cease and desist from refusing to meet with the union's members prior to adopting ballot measures to establish or modify rules or regulations for the administration of employer-employee relations.

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## **ZONING & LAND USE - CALIFORNIA**

### **[Orange Citizens for Parks and Recreation v. Superior Court](#)**

**Supreme Court of California, California - December 15, 2016 - P.3d - 2016 WL 7241419**

City filed petition for writ of mandate and complaint for injunctive and declaratory relief, seeking to stop a ballot referendum that sought to nullify a general plan amendment providing that golf course property was designated low density residential.

Citizens filed cross-petition for writ of mandate and cross-complaint for declaratory relief, seeking to set aside zoning change and development agreement as inconsistent with city's general plan. City filed another petition for writ of mandate and cross-complaint for declaratory relief, specific performance, and injunctive relief, seeking to establish that project was consistent with general plan even without general plan amendment.



After bifurcation, the Superior Court entered judgment in favor of city, and citizens filed a petition for writ relief. The Court of Appeal affirmed in part, reversed in part, and remanded. The Supreme Court granted petition for review, superseding the opinion of the Court of Appeal.

The Supreme Court of California held that:

- City council resolutions not adequately reflected in planning documents did not validly zone the property for residential development, and
- Residential development was inconsistent with the property's zoning for open space.

City abused its discretion in interpreting its general plan to include a city council resolution that upheld a planning commission recommendation to designate a subdivision for low density residential development in the land use element of the general plan, or a later resolution that purportedly amended the general plan's land use element to permit low density residential development in the subdivision, where the city never updated the land use policy maps of the general or specific plans to include the low density designation, any members of the public who requested a copy of the specific plan would have received a copy of the earlier resolution but not the underlying planning commission recommendation, the city later adopted a general plan amendment stating that a residential construction project in the subdivision was consistent with the general plan, opponents of the construction successfully conducted a referendum campaign against the amendment, and there was no evidence that city officials intentionally flouted the city council's directive to update the plan documents and map.

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## **IMMUNITY - NEW YORK**

### **[Trimble v. City of Albany](#)**

**Supreme Court, Appellate Division, Third Department, New York - November 23, 2016 - N.Y.S.3d - 144 A.D.3d 1484 - 2016 WL 6883669 - 2016 N.Y. Slip Op. 07912**

Property owners whose home was destroyed, when fire re-ignited from undiscovered embers located in vicinity of window well after municipal fire department employee represented that it had been fully extinguished, brought negligence action against municipality.

The Supreme Court, Albany County, granted defendants' motion for summary judgment, and property owners appealed.

The Supreme Court, Appellate Division, held that:

- Property owners sufficiently raised genuine issue of material fact, of kind sufficient to preclude entry of summary judgment for municipality in negligence action, as to whether lead investigator's representations were sufficient to give rise to special relationship between municipality and property owners, and
- Municipal firefighters' alleged failure to remove stack of firewood and the remains of lawn furniture from area of window well in violation of department protocol, following their containment and purported extinguishment of fire when it first broke out at property owners' home, did not involve the exercise of reasoned judgment.

Property owners whose home was destroyed, when fire that was represented to be fully extinguished by municipal fire department's lead investigator re-ignited from embers that remained undiscovered near window well, sufficiently raised genuine issue of material fact, of kind sufficient to preclude entry of summary judgment for municipality in negligence action, as to whether lead investigator's



representations were sufficient to give rise to special relationship between municipality and property owners to protect property owners from dangers posed by risk that fire might re-ignite, on which property owners relied to their detriment in leaving home unattended for the night and foregoing other available avenues of protection.

Municipal firefighters' alleged failure to remove stack of firewood and the remains of lawn furniture from area of window well in violation of department protocol, following their containment and purported extinguishment of fire when it first broke out at property owners' home, did not involve the exercise of reasoned judgment of kind typically producing different acceptable results, as required for municipality, if such a violation of department protocol were established, to successfully assert governmental immunity defense to liability for firefighters' negligence in representing that fire had been fully extinguished and in allowing fire to re-ignite and destroy home from smoldering embers located underneath this stack of firewood.

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## **SECURITIES FRAUD - PUERTO RICO**

### **Fernandez v. UBS AG**

**United States District Court, S.D. New York - December 7, 2016 - F.Supp.3d - 2016 WL 7163823**

Investors in Puerto Rico tax-free closed-end mutual funds brought putative class action against broker-dealers, investment advisors, administrator of funds, and officers of one of the broker-dealers, alleging breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and breach of contract.

Defendants filed motions to dismiss for lack of subject matter jurisdiction and failure to state a claim.

The District Court held that:

- Investors had Article III standing to assert claims on behalf of putative class;
- Securities Litigation Uniform Standards Act (SLUSA) did not preclude any of investors' claims;
- Publication of reports of lawsuits and administrative proceedings against broker-dealer triggered limitations period for breach of fiduciary duty claim against same broker-dealer;
- Publication of reports of lawsuits and administrative proceedings against broker-dealer triggered limitations period for breach of fiduciary duty claim against different broker-dealer;
- Puerto Rico Uniform Securities Act's (PRUSA) two-year statute of repose applied to claims alleging breach of fiduciary duty and breach of implied covenant of good faith and fair dealing;
- PRUSA's two-year statute of repose did not apply to claims alleging breach of an express contractual provision imposing an obligation to conduct a suitability analysis;
- Claims alleging breach of implied covenant of good faith and fair dealing, and breach of fiduciary duty, failed to plead fraud with sufficient particularity; and
- Only those investors whose contracts contained a provision obligating defendants to perform a suitability analysis sufficiently stated a claim for breach of contract.

Investors in Puerto Rico tax-free closed-end mutual funds had Article III standing to assert breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and breach of contract claims against broker-dealers, investment advisors, and fund administrator, on behalf of putative class of investors in Puerto Rico tax-free closed-end mutual funds administered by same party. While not all investors had invested in same funds, the underlying allegations regarding defendants' misconduct applied to

all of the funds, and the funds were all alleged to be structured the same way and to hold the same types of assets by the same defendants.

Securities Litigation Uniform Standards Act (SLUSA) did not preclude any of investors' claims, in putative class action alleging breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and breach of contract claims, regardless of whether the claims sounded in fraud, because no misrepresentations were alleged to have been made in connection with the purchase or sale of covered securities.

Investors discovered or reasonably should have discovered broker-dealers' alleged breach of their fiduciary duty, triggering Puerto Rico's one-year limitations period for tort claims, when reports of lawsuits and administrative proceedings against broker-dealer, which were probative of alleged breach of fiduciary duty, were publicized.

Publicized reports of lawsuits and administrative proceedings against broker-dealer, and accompanying media coverage, did not put investors on notice of their breach of fiduciary duty claims against a second broker-dealer, as would trigger Puerto Rico's one-year limitations period for tort claims, where second broker-dealer was not explicitly named in reports or media coverage.

Investors' claims against broker-dealer, alleging breach of fiduciary duty and breach of implied covenant of good faith and fair dealing, sounded in fraud, rather than mere negligence, and thus Puerto Rico Uniform Securities Act's (PRUSA) two-year statute of repose applied, where the main thrust of the claims was that broker-dealer misrepresented the risks involved in investing in Puerto Rico tax-free closed-end mutual funds and pushed investor to invest in the funds in order "to line their own pockets," without disclosing all of their conflicts of interest and without assessing the suitability of the investments for their clients, when broker-dealer knew or should have known how risky the funds were because it helped underwrite the bonds that comprised the bulk of the funds.

Investors' breach of contract claims against broker-dealers, which were premised on an alleged breach of an express provision imposing an obligation to conduct a suitability analysis, were not subject to Puerto Rico Uniform Securities Act's (PRUSA) two-year statute of repose, as such breach of contract claims did not rely on allegations of fraudulent conduct.

General allegations that broker-dealer pushed investors to invest in Puerto Rico tax-free closed-end mutual funds, by representing that they were safe when they were actually risky, did not plead fraud with sufficient particularity, as required to state claims of breach of fiduciary duty and breach of implied covenant of good faith; allegations did not include the required who/what/where/why/when of the alleged misrepresentations or omissions.

Blanket allegations that broker-dealer and fund manager breached implied covenant of good faith and fair dealing, based on misrepresentations and omissions, did not satisfy rule requiring fraud be pled with particularity; investors failed to attribute the purported misrepresentations and omissions to any particular defendant, and it was unclear as to when, where, or by whom the alleged misrepresentations or omissions were purportedly made.

Under Puerto Rico law, investor whose contract did not contain a provision obligating broker-dealer to perform a suitability analysis failed to state a claim for breach of contract based on broker-dealer's failure to conduct such analysis.

## **Portsmouth Water and Fire District v. Rhode Island Public Utilities Commission**

**Supreme Court of Rhode Island - December 6, 2016 - A.3d - 2016 WL 7105876**

Water district petitioned for writ of certiorari, challenging order of Public Utilities Commission finding that net-cost savings realized by city water utility were available to city water utility to reduce its payables to city, and further recognizing that savings city water utility realized through specific types of efficiencies were a means for city water district to commence required repayment of debt city water utility owed to city.

The Supreme Court of Rhode Island vacated the Commission's order and remanded for more specific findings of fact. On remand, the Commission entered an order identifying, inter alia, specific areas of savings and reductions in reference to efficiencies and certain excess revenues city water utility could use to repay debt to city. Water district petitioned for writ of certiorari, challenging Commission's remand order.

The Supreme Court of Rhode Island held that:

- Commission complied with Supreme Court's remand order directing Commission to make more specific findings of fact; and
- Commission lawfully and reasonably defined "efficiencies"; but
- Commission's order on remand ruling that city water utility could use certain excess revenues to repay certain debts owed to city exceeded scope of remand order.

Public Utilities Commission complied with Supreme Court's remand order directing Commission to make more specific findings of fact to support Commission's conclusion that city water utility complied with Commission's initial order permitting water utility to use savings realized from efficiencies to pay down accounts payable balance water utility owed to city, since, in order on remand, Commission clearly identified 12 areas in which water utility realized savings through efficiencies and quantified total amount saved, and even though Commission did not provide detailed itemization of savings that water utility achieved or create line item that corresponded to each efficiency identified, Court did not require such degree of specificity.

Public Utilities Commission lawfully and reasonably defined, identified, and quantified "efficiencies," following Supreme Court's remand order directing Commission to make more specific findings of fact to support Commission's conclusion that city water utility complied with Commission's initial order permitting water utility to use savings realized from efficiencies to pay down accounts payable balance water utility owed to city. In making definition, Commission gave examples of what it deemed to be efficiencies, and instead of looking only at specific items that created savings, Commission considered totality of water utility's operations.

Public Utilities Commission's order on remand ruling that city water utility could use certain excess revenues to repay certain debts owed to city exceeded scope of Supreme Court's remand order, since remand order limited Commission to making more specific findings of fact to support its conclusion that water utility complied with Commission's initial order permitting water utility to use savings realized from efficiencies to pay down accounts payable, and initial order was silent on whether excess revenues could be used to reduce the debts water utility owed to city.

## **In re Black Hills Power, Inc.**

**Supreme Court of South Dakota - December 14, 2016 - N.W.2d - 2016 WL 7245331 - 2016 S.D. 92**

Intervenors appealed Public Utility Commission's approval of amended stipulation for rate increase for electricity provider.

The Circuit Court affirmed. Intervenor appealed.

The Supreme Court of South Dakota held that:

- Provider was entitled to file adjustments to its cost analysis after its initial application;
- Commission did not act arbitrarily or capriciously in considering five-year period of pension normalization without considering sixth year; and
- Evidence supported Commission's decision to consider provider's incentive-compensation plan.

Under rule requiring analysis of system costs for test year prior to approval of rate increase, electricity provider was entitled to file adjustments to its cost analysis after its initial application for rate increase.

In considering electricity provider's application for rate increase, Public Utility Commission did not act arbitrarily or capriciously in considering five-year period of pension normalization without considering sixth year. There was no indication that Commission's acceptance of five-year normalization was in any way based on personal, selfish, or fraudulent motives or that information was in any way false.

Evidence supported decision of Public Utility Commission to consider electricity provider's incentive-compensation plan in cost analysis when considering application for rate increase. Significant amount of plan concerned employee safety and other nonfinancial goals, such as retaining key employees.

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## **SPECIAL ASSESSMENT LIEN - VIRGINIA**

### **Cygnus Newport-Phase 1B, LLC v. City of Portsmouth**

**Supreme Court of Virginia - September 22, 2016 - 292 Va. 573 - 790 S.E.2d 623**

Property owner brought action against city and community development authority, alleging that a special assessment lien, recorded after a deed of trust, was extinguished by the foreclosure sale and that the special assessments were void.

The Circuit Court granted the pleas in bar and dismissed the complaint. Owner appealed.

The Supreme Court of Virginia held that:

- Special assessment liens have priority over previously recorded deeds of trust;
- Special assessment lien was enforceable against property owner; and
- Owner's belated challenge to special assessments was foreclosed.

Special assessment lien was enforceable against property owner after foreclosure sale on deed of trust, even though deed of trust was recorded before lien, where city filed in deed book of circuit court clerk's office an abstract of ordinance authorizing improvements, which made lien enforceable

against any person deemed to have had notice of assessment, and owner had notice of assessment and lien when it acquired deed of trust and property at foreclosure.

State constitution and code foreclosed property owner's belated challenge to special assessments on property that owner acquired following foreclosure sale on deed of trust. Owner acquired its interest long after assessment agreement with former owner had been finalized and recorded, assessments approved and recorded, and bonds issued, owner filed suit approximately nine years after special assessments were imposed and bonds issued, and state constitution and code did not contemplate endless challenges from subsequent purchasers who bought property with notice of existence of assessment, notice of agreement with former owner, and notice of what infrastructure had been constructed.

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## **EMINENT DOMAIN - WEST VIRGINIA**

### **[Mountain Valley Pipeline, LLC v. McCurdy](#)**

**Supreme Court of Appeals of West Virginia - November 15, 2016 - S.E.2d - 2016 WL 6833119**

Landowners brought action against private pipeline company, seeking declaratory judgment that company could not enter their property to survey the area as potential location for natural gas pipeline that company planned to construct.

The Supreme Court of Appeals held that company's proposed natural gas pipeline was not being constructed for "public use," and thus, statute governing entry on lands by incorporated companies did not allow company to enter landowners' property to survey the area as potential location for the pipeline.

Private company's proposed natural gas pipeline was not being constructed for "public use," and thus, statute governing entry on lands by incorporated companies did not allow company to enter landowners' property to survey the area as potential location for the pipeline, where owners of natural gas were affiliates of the company, company could not identify single West Virginia consumer or natural gas provider who was not affiliated with the company who would derive benefit from the pipeline, and company had no firm agreement to ship natural gas through the pipeline for anyone other than affiliated companies.

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## **ARBITRATION - CALIFORNIA**

### **[Move, Inc. v. Citigroup Global Markets, Inc.](#)**

**United States Court of Appeals, Ninth Circuit - November 4, 2016 - 840 F.3d 1152 - 2016 Daily Journal D.A.R. 11, 106**

Investor filed complaint seeking to vacate arbitration award based on misrepresentations made by arbitrator affiliated with non-governmental organization that regulated member brokerage firms and exchange markets. Brokerage firm moved to dismiss.

The United States District Court for the Central District of California denied investor's motion to vacate and granted firm's motion to dismiss. Investor appealed.

The Court of Appeals held that:

- As an issue of first impression, Federal Arbitration Act (FAA) is subject to doctrine of equitable tolling;
- Investor was entitled to equitable tolling of three month limitations period under FAA; and
- As an issue of first impression, investor's rights were prejudiced as result of deceit by arbitrator, warranting vacatur.

Federal Arbitration Act (FAA) is subject to doctrine of equitable tolling. Text of statute does not preclude equitable tolling, FAA's structure is not incompatible with equitable tolling, and equitable tolling would not undermine the basic purpose of the FAA, which was enacted to make valid and enforceable written provisions or agreements for arbitration of disputes.

Investor was entitled to equitable tolling of three month limitations period under Federal Arbitration Act (FAA) in challenge to arbitration award based on misrepresentations made by arbitrator affiliated with non-governmental organization that regulated member brokerage firms and exchange markets. Investor acted with due diligence in pursuing its claim, as it justifiably relied on information provided by non-governmental organization regarding arbitrator, and tolling would not prejudice brokerage firm.

Investor's rights were prejudiced as result of deceit by arbitrator affiliated with non-governmental organization that regulated member brokerage firms and exchange markets, as required to vacate arbitration award under Federal Arbitration Act (FAA). Upon submitting claim against brokerage firm to arbitration, investor made clear throughout panel selection process that it was critical for attorney to chair proceedings, investor believed that arbitration of complex securities claim required a chairperson with requisite experience to understand and interpret sophisticated legal concepts, and as a result, investor struck candidates from proposed roster who were not experienced attorneys and ranked arbitrator first on its chairperson list, relying on arbitrator disclosure report in which arbitrator falsified credentials to state that he was attorney when he was not.

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## **REFERENDA - CALIFORNIA**

### **[Eblovi v. Blair](#)**

**Court of Appeal, First District, Division 3, California - December 1, 2016 - Cal.Rptr.3d - 2016 WL 7011551**

Proponent of a citizen-sponsored city initiative filed a petition for writ of mandate seeking an order directing city's interim clerk to strike ballot arguments submitted by other electors.

The Superior Court denied petition. Proponent appealed.

The Court of Appeal held that city initiative ballot argument statute is permissive and thus does not restrict participation by unnamed people or entities.

The statute providing that persons filing a city initiative petition "may file a written argument in favor of the ordinance" and "the legislative body may submit an argument against the ordinance" is permissive and thus does not restrict participation by other unnamed people or entities.

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## **MUNICIPAL GOVERNANCE - MISSISSIPPI**

## **McAdams v. Perkins**

**Supreme Court of Mississippi - December 8, 2016 - So.3d - 2016 WL 7180151**

Unsuccessful candidate in city's mayoral election filed bill of exceptions challenging city council's resolution to employ counsel, which was the same law firm employed by the city's mayor, to represent the city's interest in upholding the validity of the election.

The Circuit Court reversed, finding that the resolution was beyond council's scope or power and in violation of the Mississippi Constitution. Mayor appealed.

The Supreme Court of Mississippi held that:

- Mayor was not estopped from raising issues on appeal by virtue of her certification of bill of exceptions;
- Resolution was permitted under statute allowing municipalities to employ legal counsel for defense of "any claim, demand, or action";
- Resolution was permitted under "home rule" statute;
- Resolution did not authorize an unconstitutional donation of public funds to a private individual; and
- Mayor had authority to pursue appeal without specific authorization from council.

On appeal of trial court's decision determining that city council was not permitted to pass resolution employing counsel to defend city's interest in mayoral election contest, city's mayor was not estopped from raising issues by virtue of her certification of bill of exceptions, which was filed by her election opponent and challenged the resolution. Although the bill of exceptions reflected the actions taken and the decision made, the mayor's signature did not constitute an agreement with opponent that the resolution was prohibited by law or otherwise improper.

Statute allowing municipalities to employ legal counsel for the defense of "any claim, demand, or action" permitted city council to employ counsel to defend city's interest in mayoral election contest, even though the contest was an action between private litigants and no claims were asserted against city's mayor in her official capacity; city was permitted to employ legal representation to defend all "claims" challenging official actions of municipal officers, to require that formal litigation be filed against the city before the council may retain legal representation would place a significant limitation on the council's authority, and if legislature had intended such a limitation, it would have limited the statute's language to "demand or action brought."

City council's resolution to employ counsel to represent city's interest in mayoral election contest did not authorize a donation of public funds to a private individual in violation of the Mississippi Constitution, even though city's mayor employed the same counsel to represent her personally. Resolution did not authorize payment of mayor's personal attorney's fees, and fact that counsel's services could provide "overlapping support" to both mayor and council and result in decreased attorney's costs to the mayor did not transform the resolution into an unlawful donation.

City's mayor had authority to pursue appeal on behalf of city without specific authorization from city council. statute governing mayoral powers provided that mayor had superintending control of all the officers and affairs of the municipality, and there was no evidence that the council voted to prohibit the appeal or objected to it.



## **MacMann v. Matthes**

**United States Court of Appeals, Eighth Circuit - December 9, 2016 - F.3d - 2016 WL 7174117**

City residents brought state court action alleging that city violated their rights under city charter, Missouri Constitution, and First and Fourteenth Amendments by interfering with their participation in a municipal referendum process to appeal two ordinances passed by city council in connection with a student-housing development project.

City removed action to federal court. The United States District Court for the Western District of Missouri entered summary judgment in city's favor. Residents appealed.

The Court of Appeal held that:

- Under Missouri law, rights of city residents to challenge ordinances were governed by city charter rather than by provision of Missouri Constitution conferring on Missouri citizens right to challenge by referendum laws enacted by state legislature;
- Under Missouri law, city did not violate city residents' rights established under charter by enacting second ordinance after referendum process had been initiated in response to city's first ordinance;
- Under Missouri law, city did not violate city residents' rights established under city charter by issuing construction-related permits;
- City did not violate city residents' First Amendment rights by introducing second ordinance;
- City residents did not have protected property interest in participation in referendum process; and
- Provision of second ordinance conditioning repeal of first ordinance on residents' abstention from referendum process did not violate First Amendment.

Under Missouri law, city residents' right to challenge two ordinances passed by city council in connection with a student-housing development project were governed by city charter rather than by provision of Missouri Constitution conferring on Missouri citizens the right to challenge by referendum laws enacted by the state legislature.

Under Missouri law, city did not violate city residents' rights, established under city charter, to approve or reject at the polls any ordinance passed by the city council by enacting second ordinance in connection with a student-housing development project after municipal referendum process had been initiated in response to city's first, materially identical ordinance in connection with the project. Charter required suspension of further action under an ordinance subject to a referendum petition only after the referendum petition had been certified by city clerk, city council adopted second ordinance before referendum on it had been certified, and once referenda on ordinances were certified, city council reconsidered and repealed the ordinances.

Under Missouri law, city did not interfere with city residents' referendum rights, established by city charter, by issuing construction-related permits for student-housing development projects while municipal referendum process challenging ordinances passed by city council in connection with the projects was ongoing. Although city charter granted residents power to approve or reject by referendum any ordinance passed by the council, city charter did not grant residents any right to challenge the issuance of permits by city administrative departments, and city issued permits as part of its ministerial duties once valid permit applications were submitted.

City did not violate city residents' First Amendment right to free speech or to petition the government when, after referendum process was initiated, in accordance with city charter, regarding city ordinance in connection with a student-housing development project, city council introduced a second ordinance that was materially identical to first ordinance. Neither the

referendum process itself nor the city's conduct in responding to the referendum process interfered in any way with the message the residents sought to communicate, restricted their ability to circulate either referendum petition, regulated the content of their speech, or infringed on their ability to communicate with other voters or the manner by which they could so communicate.

City residents did not have protected property interest in participation in referendum process for challenging city ordinances, and thus city did not violate residents' Due Process rights when, after municipal referendum process was initiated, in accordance with city charter, regarding city ordinance in connection with a student-housing development project, city council introduced a second ordinance that was materially identical to the first ordinance and authorized permits for the project. Under Missouri law, any opportunity to participate in the municipal referendum process was subject to the procedures set forth in the city charter.

Provision of second ordinance passed by city council in connection with a student-housing development project, conditioning repeal of city's first, identical ordinance, on city residents' abstention from referendum process under city charter, did not violate First Amendment. There was no constitutional right at stake in the referendum process.

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## **PRESCRIPTIVE EASEMENTS - NEW HAMPSHIRE**

### **[Jesurum v. WBTSCC Limited Partnership](#)**

**Supreme Court of New Hampshire - December 9, 2016 - A.3d - 2016 WL 7177669**

Town resident brought action against landowners seeking declaratory judgment that both the resident and the public had right to prescriptive easement over portion of landowners' property, which was connected to beach by walking path, for parking and access to the beach.

The Superior Court determined that members of the public had acquired prescriptive easement and awarded attorney's fees to resident. Landowners appealed.

The Supreme Court of New Hampshire held that:

- Public's use of portion of landowners' property, which was connected to beach by walking path, for parking and access to the beach was adverse, as required to support resident's claim for prescriptive easement;
- Scope of public's prescriptive easement over portion of landowners' property was not limited to digging for worms and searching for shellfish;
- Landowners did not interrupt the public's ability to park on portion of their property by conducting three construction projects in the area over the course of nearly a decade, and thus, public's use of the property was continuous, as required for the public to attain prescriptive easement over the property; and
- Award of attorney's fees against landowners, as private litigants, under the public benefit theory was unwarranted.

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## **MUNICIPAL ORDINANCE - NEW YORK**

### **[People v. Hoyt](#)**

**Criminal Court, City of New York, New York County - November 29, 2016 - N.Y.S.3d - 2016 WL 6989398 - 2016 N.Y. Slip Op. 26391**

A defendant charged with serial acts of public lewdness moved to dismiss the count.

The Criminal Court of the City of New York held that local law prohibiting serial acts of public lewdness was not preempted by state law.

New York State Legislature's enactment of public lewdness statute and public lewdness in the first degree statute did not intend to occupy the entire field of offenses involving public lewdness, and therefore city's enactment of local law prohibiting serial acts of public lewdness was not preempted by state law and complied with constitutional home rule provision conferring broad police power upon local government relating to the welfare of its citizens; neither state statute conflicted with local law and state's public lewdness in the first degree statute was enacted after the local law and was silent on preemption.

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## **SECURITIES FRAUD - OHIO**

### **[United States Securities and Exchange Commission v. Crowe](#)**

**United States District Court, S.D. Ohio, Eastern Division - October 20, 2016 - F.Supp.3d - 2016 WL 6125401 - Fed. Sec. L. Rep. P 99, 438**

The Securities and Exchange Commission (SEC) brought action against lobbyist, alleging violations of Section 10(b) of the Securities Exchange Act of 1934, Rule 10b-5 thereunder, and Section 17(a) of the Securities Act of 1933. Lobbyist moved to dismiss for failure to state a claim.

The District Court held that:

- SEC was entitled to bring action in federal court against lobbyist, even though its complaint referred to violation of state campaign finance laws;
- SEC sufficiently alleged misrepresentations and omissions made by lobbyist's client and its principal occurred "in connection with" securities sale, as required to state a claim for aiding and abetting securities fraud;
- SEC sufficiently alleged that lobbyist caused concealed campaign contributions to be made, which coincided with a securities transaction, as required to state a claim for securities fraud; and
- SEC sufficiently alleged that lobbyist had a general awareness that his role was part of an overall activity that was improper, as required to state a claim for aiding and abetting securities violations.

Securities and Exchange Commission (SEC) action against lobbyist, alleging he engaged in a "pay to play" scheme that resulted in securities fraud was not precluded, even though Adviser's Act rule governing "pay to play" practices by investment advisers did not apply to conduct by lobbyist. The SEC did not bring action against lobbyist under the Adviser's Act rule, which was not the exclusive vehicle by which the SEC could bring enforcement actions based on "pay to play" allegations.

Securities and Exchange Commission (SEC) was entitled to bring action in federal court against lobbyist, alleging violations of Section 10(b) of the Securities Exchange Act of 1934, Rule 10b-5 thereunder, and Section 17(a) of the Securities Act of 1933, even though its complaint also alleged that lobbyist knowingly violated state campaign finance laws. The SEC did not bring its case under federal or state campaign finance laws, so the question for the District Court on lobbyist's motion to dismiss for failure to state a claim was whether the SEC stated a claim that lobbyist violated federal securities laws, as alleged in the complaint, given that lobbyist did not argue that Ohio's campaign finance statute limiting contributions preempted federal securities laws.

The Securities and Exchange Commission (SEC) sufficiently alleged that misrepresentations and

omissions made by lobbyist's client and its principal occurred in connection with an offer, sale, or purchase of securities, as required to state a claim for aiding and abetting securities fraud against lobbyist. While lobbyist argued that the omissions and misrepresentations were made to facilitate his client's receipt of contracts to be a subcustodian of state employees' pension funds, the subcustodian services were inextricably intertwined and integral to facilitating and effecting transactions in securities on behalf of the pension funds in the subcustodian's care, and because of the fraud alleged in the SEC's complaint, state pension funds were told that lobbyist's client would be the most favorable custodian and executer of their securities transactions which was material to the decision to buy and sell through lobbyist's client.

The Securities and Exchange Commission (SEC) sufficiently alleged that lobbyist repeatedly caused concealed campaign contributions to be made on behalf of his client, which coincided with a securities transaction, as required to state a claim for securities fraud. The alleged fraud "coincided" with the purchase or sale of securities because the fraud involved influencing the state Treasurer's choice of lobbyist's client to serve as subcustodian of state pension funds, which bore an adequate connection to the purchase or sale of securities, given that the services of a subcustodian were inextricably intertwined with transactions in securities on behalf of the pension funds.

The Securities and Exchange Commission (SEC) sufficiently alleged that lobbyist had a general awareness that his role was part of an overall activity that was improper, as required to state a claim for aiding and abetting securities violations by lobbyist's client and its principal. Though lobbyist was not alleged to have seen the false "no improper influence" certifications signed by his client through its principal, given lobbyist's fundraising experience, alleged filtering of illegal payments to state Treasurer's campaign through his own bank account, and alleged reimbursement of campaign donations, if true, constituted extraordinary conduct requiring less evidence of his complicity, and lobbyist allegedly took pains to cover his tracks.

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## **EMINENT DOMAIN - SOUTH DAKOTA**

### **[State ex rel. Dept. of Transp. v. JB Enterprises, Inc.](#)**

**Supreme Court of South Dakota - December 7, 2016 - N.W.2d - 2016 WL 7157632 - 2016 S.D. 89**

State instituted quick-take condemnation action.

The Circuit Court granted summary judgment to State. Owner appealed.

The Supreme Court of South Dakota held that:

- Owner did not agree to elimination of taking;
- State was not entitled to eliminate taking; and
- Owner was entitled to compensation for loss of its right to access highway.

Property owner did not agree to elimination of taking that was part of highway reconstruction project. Owner acknowledged change in scope of public improvement but never wavered from its position that State's public improvement caused compensable loss to property.

Under statute prohibiting abandonment of condemnation proceedings, State was not entitled to eliminate any actual taking by amending its petition to include revised plans for highway reconstruction.

Once title vests in the State following a declaration of taking, it is not permitted to reduce or abandon the interest acquired. It is merely permitted to minimize damage to the landowner's remaining property that results from being severed from the property actually taken.

In condemnation action, even if property owner still had ability to access highway from its property, it was entitled to compensation for loss of its right to do so as a result of State's taking.

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## **EMINENT DOMAIN - SOUTH DAKOTA**

### **[State ex rel. Dep. of Transp. v. Miller](#)**

**Supreme Court of South Dakota - December 7, 2016 - N.W.2d - 2016 WL 7157636 - 2016 S.D. 88**

State instituted quick-take condemnation action.

The Circuit Court entered judgment on jury verdict awarding owners \$551,125. State appealed.

The Supreme Court of South Dakota held that:

- Whether separate lot was to be considered as contiguous with owners' other lots was question for jury;
- Relevant values of property were values before and after taking; and
- Court's determination that a change in access amounts to a substantial impairment of access is a prerequisite to obtaining compensation for the change in access, overruling *Schuler v. Board of Supervisors of Lincoln Township*, 12 S.D. 460, 81 N.W. 890.

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## **IMMUNITY - CALIFORNIA**

### **[McNair v. City and County of San Francisco](#)**

**Court of Appeal, First District, Division 4, California - November 22, 2016 - Cal.Rptr.3d - 2016 WL 6879277**

Patient brought action against city and physician employed by the city's department of public health for breach of contract and violation of the California Confidentiality of Medical Information Act (CMIA).

The Superior Court granted summary adjudication on patient's intentional tort cause of action and nonsuit on his breach of contract claim. Patient appealed.

The Court of Appeal held that:

- Litigation privilege barred patient's CMIA cause of action based on physician's disclosure of patient's cognitive deficits to the Department of Motor Vehicles (DMV);
- Catchall provision of the CMIA authorized physician's disclosure of patient's cognitive deficits to the DMV; and
- Litigation privilege barred patient's breach of contract cause of action based on physician's disclosure of patient's cognitive deficits to the DMV.

The litigation privilege barred patient's cause of action under the California Confidentiality of Medical Information Act (CMIA) arising from physician's report to the Department of Motor Vehicles

(DMV) that patient suffered from cognitive deficits calling into question whether it was appropriate for him to have a commercial driver's license, even assuming that the physician's report did not comply with the statute providing that a physician may report a patient's condition to a local health officer upon a good faith belief that the report will serve the public interest, since the letter to the DMV was a communication "authorized by law."

A voluntary disclosure of confidential medical information falls within the reach of the catchall provision of the California Confidentiality of Medical Information Act (CMIA) if a public policy exists encouraging such disclosure, the disclosure involves issues of public safety, and it is a communication which would otherwise be immunized by the litigation privilege.

The litigation privilege barred patient's breach of contract cause of action against city and a city-employed physician arising from physician's report to the Department of Motor Vehicles (DMV) that patient suffered from cognitive deficits calling into question whether it was appropriate for him to have a commercial driver's license, where the contract did not clearly prohibit the physician's conduct.

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## **JUDGMENTS - CALIFORNIA**

### **[Sutter Health v. Eden Township Healthcare District](#)**

**Court of Appeal, First District, Division 1, California - November 29, 2016 - Cal.Rptr.3d - 2016 WL 6958654**

Nonprofit health system brought action against township healthcare district for specific performance of a written agreement to convey real property and for damages. District cross-complained for declaratory and injunctive relief.

The Superior Court granted summary judgment for health system on cross-complaint and denied district's motion for summary adjudication. District appealed. The Court of Appeal affirmed. The Superior Court denied health system's motion for attorney fees. Health system appealed, and the Court of Appeal reversed and remanded. District filed a motion to pay a judgment in up to 10 annual installments on the basis that prompt payment would impose an "unreasonable hardship." The Superior Court granted the motion, and effectively amended the judgment nunc pro tunc to decrease the postjudgment interest rate retroactively from the date the judgment was entered. Judgment creditor appealed.

The Court of Appeal held that:

- District's financial straits supported a finding of "unreasonable hardship," but
- Interest accrued prior to the trial court's grant of relief could not be reduced retroactively.

Trial court's finding that prompt payment of a \$19.5 million judgment would impose an "unreasonable hardship" on township healthcare district, in authorizing payment in up to 10 annual installments, was supported by substantial evidence, including testimony of an accountant that a 10-year installment plan was necessary to avoid significantly impacting district's "ability to continue to service its residents," evidence that district was unable to borrow the funds necessary to pay the judgment in a lump sum, and evidence that a sale of assets to finance payment of the judgment would threaten bankruptcy by depriving the district of the funds required for it to operate.

Under the statutes providing that a local agency may pay a judgment in up to 10 annual installments upon a showing that prompt payment would impose an "unreasonable hardship" and that the



interest rate for such judgments is the one-year United States Treasury bill rate, interest accrued prior to the trial court's grant of relief could not be reduced retroactively to the Treasury bill rate.

Township healthcare district's failure to challenge the constitutional default seven percent rate of postjudgment interest, either at the time a judgment was entered against the district or on appeal, waived any argument that the seven percent rate was not the correct rate for the trial court to impose upon the Court of Appeal's reversal of the trial court's order imposing the one-year United States Treasury bill rate retroactively under the statute authorizing a local agency to pay a judgment in up to 10 annual installments where prompt payment would impose an "unreasonable hardship."

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## **ZONING & LAND USE - MAINE**

### **[Fryeburg Trust v. Town of Fryeburg](#)**

**Supreme Judicial Court of Maine - December 1, 2016 - A.3d - 2016 WL 7010513 - 2016 ME 174**

Adjacent landowner sought review of local board of appeals decision upholding local planning board's approval of neighboring private secondary school's application to use an agricultural land parcel for primarily outdoor teaching purposes and use a residential land parcel for administrative offices.

The Superior Court affirmed in part and vacated in part. All parties appealed.

The Supreme Judicial Court of Maine held that:

- Proposal to use agricultural lot as an outdoor classroom constituted using the lot as a place where courses of study that fit state education requirements were taught, and
- Proposal to use residential lot for school administrative offices concerned a task that was so integral to the functioning of the school that it was indistinguishable from the school.

Private secondary school's proposal to change use of agricultural lot and use it as an outdoor classroom instead constituted using the lot as a place where courses of study that fit state education requirements were taught, as required by local land use ordinance, despite argument that no complete courses would be taught on the lot, much less all mandated courses. School's planned courses for the lot included those in the state-required subjects of physical education and science, and nothing within the text of the ordinance required that all of the courses required by the state or the entirety of those courses be taught on each piece of property or in each building where a secondary school operated.

Private secondary school's proposal to change use of residential lot to use it for school administrative offices instead concerned a task that was so integral to the functioning of the school that it was indistinguishable from the school and, therefore, permissible under local land use ordinance governing uses by secondary schools, despite ordinance's definition of a secondary school as a "place where courses of study are taught"; administrative offices were integral to the functioning of a school.

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## **EMINENT DOMAIN - NEBRASKA**



## **Strode v. City of Ashland**

**Supreme Court of Nebraska - October 28, 2016 - 295 Neb. 44 - 886 N.W.2d 293**

Husband and wife landowners brought action against city and county, alleging zoning regulation inverse condemnation and alleging that bridge load limit constituted a taking.

The District Court dismissed husband's inverse condemnation claims as time barred, and granted summary judgment for city and county. Landowners appealed.

The Supreme Court of Nebraska held that:

- As a matter of first impression, cause of action for inverse condemnation based on a regulatory taking begins to accrue when the injured party has the right to institute and maintain a lawsuit due to a city's infringement, or an attempt at infringement, of a landowner's legal rights in the property;
- City's letter to landowners providing notice of nonconforming use and the city's intention to institute legal action began running of 10-year statute of limitations on husband landowner's cause of action for inverse condemnation;
- Statute of limitations on wife landowner's separate claim for inverse condemnation began to run on date husband received letter from city; and
- Load limit on bridge to property did not constitute a "regulatory taking."

In the context of a regulatory taking, a cause of action for inverse condemnation begins to accrue when the injured party has the right to institute and maintain a lawsuit due to a city's infringement, or an attempt at infringement, of a landowner's legal rights in the property.

At the latest, city's letter to landowners providing notice of nonconforming use and the city's intention to institute legal action if landowners did not conform their use began running of 10-year statute of limitations on cause of action for inverse condemnation, as city's actions had an adverse economic impact on the landowners' right to use the property in the commercial manner that they wished.

Statute of limitations on wife landowner's separate claim for inverse condemnation began to run on date husband received letter from city providing notice of nonconforming use and the city's intention to institute legal action if landowners did not conform their use, rather than any date on which wife received actual notice of land use ordinance affecting the property, as letter constituted an infringement or attempted infringement on wife's right to use the property as she wished and gave rise to her right to institute and maintain a lawsuit.

Load limit on bridge to property did not constitute a "regulatory taking"; while load limit restricted landowner to using either semitrailer trucks that weighed less for access across the bridge or trucks of a limited height for access through railroad underpass, restriction was not an injury different in kind than injury to the general public, bridge limit did not decrease the economic value of the property, and bridge limit, which was posted prior to landowners' purchase of the property, did not interfere with any reasonable investment-backed expectations.

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## **COLLECTIVE BARGAINING - PENNSYLVANIA**

### **Americans for Fair Treatment, Inc. v. Philadelphia Federation of Teachers**

**Commonwealth Court of Pennsylvania - November 21, 2016 - A.3d - 2016 WL 6833073**

Nonprofit organization brought action against school district and teachers' union, seeking declaration that provision of collective bargaining agreement providing for union leaves of absence was unlawful.

School district and union moved to dismiss, for lack of standing. The Court of Common Pleas granted the motion. Organization appealed.

The Commonwealth Court held that:

- Allegations by organization were insufficient to establish associational standing, and
- Organization could not establish taxpayer standing.

Allegations by nonprofit organization were insufficient to establish associational standing to maintain an action against school district and teachers' union to challenge a provision in collective bargaining agreement providing for union leaves of absence. Organization alleged that many of its members were teachers with lower seniority than teachers who were on leave, but complaint lacked any factual allegation sufficient to show that this lower seniority had any direct and non-speculative, immediate effect on the organization's members.

Nonprofit organization could not establish taxpayer standing to challenge lawfulness of union leaves of absence under collective bargaining agreement. School district was better situated to assert claim that union leaves were unlawful, any teachers who were affected by the leave policy could challenge it, and organization did not allege any adverse effect on taxpayers as a whole.

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## **ZONING & LAND USE - PENNSYLVANIA**

### **[Lower Mount Bethel Township v. Gacki](#)**

**Commonwealth Court of Pennsylvania - November 30, 2016 - A.3d - 2016 WL 6993996**

Township filed zoning enforcement action against landowners. The magisterial district judge entered judgment against landowners, and landowners appealed.

The Court of Common Pleas entered judgment in favor of township and awarded attorney fees. Landowners appealed.

The Commonwealth Court held that:

- Township had geographic jurisdiction over retaining wall and backfill which landowners alleged were located in the Delaware River;
- Landowners' failure to appeal zoning violation notice to zoning hearing board resulted in a conclusive determination that their retaining wall and backfill violated floodplain ordinance; Award of over \$20,000 in attorney fees to municipality was reasonable;
- Permanent injunction directing landowners to remove the retaining wall and backfill was warranted; and
- Imposition of \$1,200 fine was warranted.

Township had geographic jurisdiction over retaining wall and backfill which landowners alleged were located in the Delaware River, in township's zoning enforcement action. Federal law granted Commonwealth authority over the portion of the river bed that was within the Commonwealth's boundaries, boundary of township and Commonwealth was the middle of the Delaware River, and interstate compact with New Jersey extended boundary line of township to river's New Jersey shore.

If a landowner does not appeal a zoning violation notice to the zoning hearing board, the failure to appeal renders the violation notice unassailable; therefore, in the event a landowner does not appeal to the zoning hearing board and the municipality files an enforcement action with a district justice, neither the district justice nor a common pleas court may conduct a de novo review of the question of whether the landowner violated the zoning ordinance, and the only question before the district justice and the Common Pleas Court is whether the penalty imposed for the violation was proper.

Award of over \$20,000 in attorney fees to municipality was reasonable in zoning enforcement action. Landowners' failure to appeal violation notice resulted in conclusive determination of their violation of ordinance, and landowners' counsel stipulated that amount of attorney fees was reasonable.

Permanent injunction directing landowners to remove the retaining wall and backfill that violated township's zoning ordinance was warranted; landowners constructed the retaining wall and backfilled the property without applying for a permit, and failed to appeal violation notice.

Imposition of \$1,200 fine was warranted for landowners' violation of township zoning ordinances; landowners remained in violation of magisterial district judge's judgment that their retaining wall and backfill violated the ordinance for 687 day

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## **BANKRUPTCY - PENNSYLVANIA**

### **[Becker v. Bank of New York Mellon Trust Company, N.A.](#)**

**United States District Court, E.D. Pennsylvania - October 5, 2016 - Slip Copy - 2016 WL 5816075**

Plaintiff Leonard Becker moved to certify a class comprising holders of revenue bonds ("Bondholders") who were entitled to a distribution under the Plan for reorganization of the bond debtor, Lower Bucks Hospital ("LBH"), which Plan was confirmed under Chapter 11 of the Bankruptcy Code.

The Bondholders were awarded \$8,150,000 by the Bankruptcy Court in the reorganization. That amount was distributed to The Bank of New York Mellon Trust Company ("BNYM") as the successor Indenture Trustee. None of those funds were disbursed to the ninety-five Bondholders.

BNYM opposed certification. Its primary argument was that a finding of predominance was precluded because the proximate cause of the bondholders' alleged losses could not be proved with evidence that was common to all class members.

Plaintiff had previously sued BNYM under the multi-party agreements that created the bond financing transaction. The Complaints alleged that BNYM was negligent and breached its fiduciary and contractual duties to the Bondholders by failing to maintain perfected security interests in the property securing the bonds. Plaintiff alleged that the Bondholders were allowed less in LBH's bankruptcy than they would have been allowed if the security interests had been perfected.

Plaintiff had also sued for a declaratory judgment that the Bondholders were entitled to prompt disbursement of the funds allowed for them under the Plan, and that BNYM was not entitled to deduct from those funds any amounts that it incurred asserting its personal interests in the bankruptcy proceedings or in this litigation. Plaintiff also sued for equitable remedies — an injunction compelling BNYM to distribute the Bondholders' funds, an accounting of those funds, and damages for conversion and for money had and received.

Relevant to this litigation was the fact that the proposed pre-confirmation Plan included a stipulated third-party release of potential claims by the Bondholders against BNYM based on its alleged failure to maintain perfected security interests and liens against the property securing the bonds. Upon being made aware of the proposed release, the Bondholders objected. The Bankruptcy Court denied confirmation of the third-party release and struck it from the Plan because the release was inadequately disclosed before the Bondholders voted to accept the proposed plan.

The District Court took up the motion to certify the purported class of Bondholders.

The Court began its analysis by reviewing the facts of this case against Rule 23(a). The Court concluded that the proposed class met the requirements of numerosity, commonality, typicality and adequacy.

The Court then turned to Rule 23(b), finding that common questions predominated over any questions affecting only individual class members, as required under Rule 23(b)(3).

The Court concluded by certifying the class, certifying Plaintiff Becker as the class representative, and appointing class counsel.

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## **IMMUNITY - GEORGIA**

### **Mayor v. Harris**

**Court of Appeals of Georgia - November 15, 2016 - S.E.2d - 2016 WL 6747806**

Parents, individually and on behalf of their minor daughter, brought action against city, alleging premises liability, negligence, and negligence per se.

City moved for summary judgment. The trial court denied the motion, but certified its order for immediate review.

The Court of Appeals held that:

- Nominal admission fee charged by city for entrance into stadium was a “charge” within the meaning of the Recreational Property Act (RPA), and
- Fact that city exempted very young children, including child injured by falling through bleachers, from admission fees did not mean that stadium was open to the public without charge, as would qualify the city for immunity under the RPA.

Nominal admission fee charged by city for entrance into stadium hosting youth football game was a “charge” within the meaning of the Recreational Property Act (RPA), as could exempt city from protections of act in action brought by parents of child who fell through the bleachers and was injured. Payment of the fee was a requirement for entry onto the facility where the injury occurred, and it was immaterial that city argued that the fees it collected were used to defray the maintenance cost of the facility.

Fact that city exempted very young children, including child injured by falling through bleachers, from admission fees did not mean that stadium hosting youth football game was open to the public without charge, as would qualify the city for immunity under the Recreational Property Act (RPA). RPA was only applicable where property did not charge a admission fee, and city charged admission fees for child’s parents and other adults and students.

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## **INTERAGENCY AGREEMENTS - LOUISIANA**

### **[Tatney v. City of Deridder](#)**

**Court of Appeal of Louisiana, Third Circuit - November 16, 2016 - So.3d - 2016 WL 6777557 - 2016-395 (La.App. 3 Cir. 11/16/16)**

Passenger of vehicle, which was owned by city and operated by state employee pursuant to interagency agreement between city and state for use of inmate labor, brought personal injury action against city, sheriff of parish correctional facility, employee, and state following traffic accident.

The 13th Judicial District Court granted city's motion for summary judgment. State appealed.

The Court of Appeal held that:

- State did not acquiesce to trial court's judgment;
- City was not liable for allegedly negligent conduct of state employee; and
- City was entitled to attorney fees for state's frivolous appeal.

In personal injury action arising from traffic accident involving vehicle used to transport inmate labor pursuant to interagency agreement between city and state, state did not acquiesce to trial court's judgment such that it abandoned its right to appeal trial court's grant of city's motion for summary judgment. Although state did not file an opposition to the motion and waived its right to appear, it did not clearly and unconditionally demonstrate that it acquiesced to the judgment.

City was not liable for personal injuries sustained by inmate as a result of traffic accident allegedly caused by negligent conduct of state employee who was transporting inmate using van owned by city. Under plain terms of interagency agreement between city and state for the use of inmate labor, the state, not the city, was responsible for state employees' alleged acts of negligence.

City was entitled to \$3,500 in attorney fees for state's frivolous appeal of trial court's grant of summary judgment in favor of city in personal injury action arising from traffic accident involving vehicle used to transport inmate labor pursuant to interagency agreement city and state. State failed to provide any countervailing evidence or argument to rebut affidavit indicating that vehicle's driver was not a city employee at the time of the accident, state did not articulate any argument at trial level, and state's arguments on appeal were intellectually tenuous, as evidenced by its reference to post-hearing evidence and proceedings that had no place in an appellate court.

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## **REFERENDA - MINNESOTA**

### **[Vasseur v. City of Minneapolis](#)**

**Supreme Court of Minnesota - November 23, 2016 - N.W.2d - 2016 WL 6901660**

Interest group filed petition seeking to order city council to place charter amendment on general election ballot to establish local minimum-wage standard.

The District Court granted petition. City filed petition for accelerated review.

The Supreme Court of Minnesota held that proposed amendment was an exercise of general legislative authority that was not a proper subject for voter initiative under city charter.

Proposed city charter amendment that would establish a local minimum-wage standard constituted an exercise of general legislative authority, and thus was not a proper subject for voter initiative under plain language of city charter, which placed the responsibility for the general welfare of city residents in the city council. Amendment was expressly sought to “protect the welfare of city residents,” and nothing in city charter authorized an exercise of legislative action through a citizen petition that circumvented city council’s authority for legislation and policymaking.

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## **MUNICIPAL ORDINANCE - MISSOURI**

### **[City of Cape Girardeau v. Kuntze](#)**

**Missouri Court of Appeals, Eastern District, Southern Division - November 8, 2016 - S.W.3d - 2016 WL 6601433**

Defendant was found by the Circuit Court guilty of the offense of creating public nuisance in violation of city ordinance. Defendant appealed.

The Court of Appeals held that:

- Word “registered” in city ordinance, which defined the term inoperable vehicle as used in ordinance declaring any inoperable vehicle located on city property to be a public nuisance, referred to proper registration of vehicle within the state, and
- Ordinance, which declared any inoperable vehicle located on city property to be a public nuisance, did not violate equal protection.

Word “registered” in city ordinance, which defined the term inoperable vehicle as used in ordinance declaring any inoperable vehicle located on city property to be a public nuisance, referred to proper registration of vehicle within the state. The word “registered” could not mean having titled a vehicle, since under state statutes vehicle could not be registered until owner applied for title and titling of the vehicle was not the same as annual registration.

City ordinance, which declared any inoperable vehicle located on city property to be a public nuisance, did not violate equal protection. City had legitimate interest in keeping properties free from inoperable vehicles due to their impact on property values and beautification of the city, and applying ordinance to unregistered vehicle, which was illegal to operate, was rationally related to city’s interest.

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## **PUBLIC CONTRACTS - NEW YORK**

### **[Acme Bus Corp. v. Orange County](#)**

**Court of Appeals of New York - November 22, 2016 - N.E.3d - 2016 WL 6837923 - 2016 N.Y. Slip Op. 07835**

Bus company petitioned for article 78 review of a county’s determination to accept proposals from two of company’s competitors to provide school bus transportation services for special needs students and to award contracts to competitors.

The Supreme Court, Orange County, denied petition and dismissed proceeding. Company appealed. The Supreme Court, Appellate Division, affirmed. Company appealed.

The Court of Appeals of New York held that county acted arbitrarily by accepting proposals for school bus transportation services based on a method of evaluation that was inconsistent with the standard set out in the request for proposals.

County acted arbitrarily as a matter of law by evaluating proposals for school bus transportation services for special needs students using a method that was inconsistent with the standard set out in county's request for proposals (RFP). While the RFP explained that if difference between the lowest offeror and the next lowest offeror was 10%, then the next lowest offeror would have two points deducted from the maximum cost score of 20, the county used a two-point deduction in scoring proposals for every 4% difference in price.

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## **ZONING & PLANNING - PENNSYLVANIA**

### **[EDF Renewable Energy v. Foster Township Zoning Hearing Board](#)**

**Commonwealth Court of Pennsylvania - November 22, 2016 - A.3d - 2016 WL 6873015**

Renewable energy company sought review of decision by township zoning hearing board to deny company's application for special exception to construct three wind farms in three different zoning districts in township.

The Court of Common Pleas affirmed. Company appealed and board cross-appealed.

The Commonwealth Court held that company failed to satisfy objective requirements of special exception in ordinance.

Renewable energy company, which applied for special exception to construct three wind farms in three different zoning districts in township, failed to satisfy objective requirements of special exception in ordinance. Company failed to submit site plan as required by ordinance, and evidence offered at zoning board hearing did not provide all of information required by ordinance, as company's regional development manager testified that number of wind turbines and precise location of turbines and other details could not be determined until soil was tested.

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## **PENSIONS & BENEFITS - PENNSYLVANIA**

### **[Zampogna v. Law Enforcement Health Benefits, Inc.](#)**

**Supreme Court of Pennsylvania - November 22, 2016 - A.3d - 2016 WL 6873038**

Candidate for union president brought against administrator of union's health and welfare benefit plan for declaratory judgment barring administrator from expending its funds to engage in partisan activities and endorse incumbent president.

Following a bench trial, the Court of Common Pleas dismissed candidate's action, and he appealed. The Commonwealth Court vacated and remanded. Administrator's petition for allowance of appeal was granted.

The Supreme Court of Pennsylvania held that:

- Administrator's act of endorsing incumbent was sufficiently related to administering benefits to union members and, therefore, was sufficiently related to corporate purpose, and



- City's payments to administrator lost public character and were no longer public funds.

Health and welfare plan administrator's act of endorsing police union's incumbent president in election was sufficiently related to administering benefits to union members and, therefore, was sufficiently related to corporate purpose set forth in articles of incorporation and was authorized under Nonprofit Corporation Law (NCL). Because president had direct impact on administrator's ability to function effectively due to president's effect on city funding source, endorsing candidate that administrator believed would better serve its members was not unrelated to corporate purpose.

City's payments to administrator of police union's health and welfare benefit plan lost public character and were no longer public funds, but were in sole control of administrator that spent money to endorse incumbent for union president. City agreed to pay a specific amount of money per police officer to joint trust, not only to pay for the ultimate healthcare benefit that each police officer received, but also to pay for administration of those benefits.

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## **IMMUNITY - TENNESSEE**

### **[Moore v. City of Clarksville](#)**

**Court of Appeals of Tennessee, at Nashville - October 31, 2016 - Slip Copy - 2016 WL 6462193**

Homeowners brought action against city alleging breach of implied contract after suffering damages from a sewage backup.

City moved for summary judgment. The Chancery Court granted the motion. Homeowners appealed.

The Court of Appeals held that:

- Gravamen of homeowners' action sounded in tort and was thus subject to Tennessee Governmental Tort Liability Act's one-year statute of limitations, and
- Homeowners' service of complaint on city administrative assistance was ineffective and did not toll the statute of limitations.

Gravamen of homeowners' action against city for breach of implied contract sounded in tort and was thus subject to Tennessee Governmental Tort Liability Act's one-year statute of limitations.

Homeowners alleged that they were intended beneficiaries to implied-in-fact contract demonstrated by sewer service access to the house, yet their complaint had, as a factual basis, raw sewage backing up into the house, and they sought compensatory damages.

Homeowners' service of tort complaint on city administrative assistance was ineffective and did not toll the one-year statute of limitations under the Tennessee Governmental Tort Liability Act. Homeowners were required to serve major or city attorney.

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## **EMPLOYMENT - WYOMING**

### **[Vance v. City of Laramie](#)**

**Supreme Court of Wyoming - November 7, 2016 - 382 P.3d - 1104 - 41 IER Cases 1367 - 2016 WY 106**

City petitioned for judicial review of decision of the Civil Service Commission, which reduced discipline of employee, a firefighter, from discharge to a suspension after random breath test machine tests, performed while employee was on duty, detected alcohol in his system.

The District Court reversed and remanded. On remand, the Commission refused to consent to a discharge. City petitioned for judicial review. The District Court reversed and remanded, and on remand, the Commission found that employee was properly discharged. Employee sought judicial review. The District Court affirmed. Employee appealed.

The Supreme Court of Wyoming held that city was not permitted to seek judicial review of Commission decision refusing to consent to employee's discharge.

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## **ANNEXATION - GEORGIA**

### **[City of Atlanta v. Atlanta Independent School System](#)**

**Supreme Court of Georgia. November 21, 2016--- S.E.2d ----2016 WL 6833419**

City brought action seeking declaratory judgment that state house bill did not properly continue local constitutional amendment setting forth effects on territory of school systems and ownership of school property emanating from city's annexation of parts of county.

The Superior Court entered judgment declaring that local constitutional amendment was properly continued by the house bill. City appealed.

The Supreme Court of Georgia held that city's action did not present justiciable controversy.

City's action for declaratory judgment, seeking to confirm that state house bill did not properly continue local constitutional amendment setting forth effects on territory of school systems and ownership of school property emanating from city's annexation of parts of county, raised no justiciable controversy. Although three communities in county had submitted annexation petitions to become part of the city, no actual annexation of any of the properties was in question in the action, controversy was founded upon city's proposed annexation, and city simply wanted to know whether it was still subject to local constitutional amendment before it annexed county property.

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## **AUCTION RATE SECURITIES - MASSACHUSETTS**

### **[Tutor Perini Corporation v. Banc of America Securities LLC](#)**

**United States Court of Appeals, First Circuit - November 21, 2016 - F.3d - 2016 WL 6835375**

Investor in student loan auction rate securities (ARS) sued broker-dealer and its parent company, asserting securities fraud claims under federal and state law, by alleged misrepresentations and omissions regarding ARS market that eventually collapsed, and asserting various state law claims.

The United States District Court for the District of Massachusetts granted defendants summary judgment. Investor appealed.

The Court of Appeals held that:

- Parent company was not liable for securities fraud as control person;
- Summary judgment was precluded on state securities fraud claim;
- Summary judgment was precluded on federal securities fraud claim;
- Investor waived any objection to summary judgment on federal securities fraud claim based on unsuitability;
- Summary judgment was precluded on state negligent misrepresentation claim;
- Investor waived any argument regarding state intentional misrepresentation claim; and
- Summary judgment was precluded on state unfair business practices claim.

Parent of subsidiary broker-dealer, that allegedly engaged in securities fraud in violation of federal and state securities laws in connection with sales of student loan auction rate securities (ARS) to investor, was not liable as control person, due to actions of two employees of parent and two dual employees of parent and subsidiary who analyzed maximum rate waivers and liquidity risks for deciding which auctions to fail, since investor never in four years of litigation ever alleged any facts indicating that parent actually exercised control over subsidiary.

Genuine issues of material fact remained as to whether broker-dealer made material omissions regarding nonviability of auction rate securities (ARS) market during time that broker-dealer was specifically recommending and selling student loan auction rate securities (ARS) to investor while market teetered on brink of collapse, thus precluding summary judgment on investor's securities fraud claim against broker-dealer under Massachusetts law.

Genuine issues of material fact remained as to whether broker-dealer made material omissions regarding nonviability of auction rate securities (ARS) market during time that broker-dealer was specifically recommending and selling student loan auction rate securities (ARS) to investor while market teetered on brink of collapse and whether investor reasonably relied on outdated information that broker-dealer disclosed regarding state of ARS market, thus precluding summary judgment on investor's § 10(b) and Rule 10b-5 securities fraud claim against broker-dealer.

Investor waived any objection to district court's ruling that investor's suitability claim, under § 10(b), against broker-dealer that sold student loan auction rate securities (ARS) to investor was barred due to investor holding non-discretionary brokerage account in which investor directed all investments made, since investor cited no authority to support its view that nondiscretionary account holders could bring unsuitability claims and investor's appellate pleadings failed to offer any convincing explanation of what law should be, assuming investor found no on-point authority.

Genuine issues of material fact remained as to whether broker-dealer made material omissions regarding nonviability of auction rate securities (ARS) market during time that broker-dealer was specifically recommending and selling student loan auction rate securities (ARS) to investor while market teetered on brink of collapse, thus precluding summary judgment on investor's claim against broker-dealer for negligent misrepresentation under Massachusetts law.

Investor waived any arguments regarding dismissal of intentional misrepresentation claim against broker-dealer, under Massachusetts law, in connection with auction rate securities (ARS) market during time that broker-dealer was specifically recommending and selling student loan auction rate securities (ARS) to investor while market teetered on brink of collapse, where investor's opening appellate brief suggested district judge erred in dismissing claim, but investor's appellate papers never explained how that was so.

Genuine issues of material fact remained as to whether broker-dealer acted unfairly or deceptively by making material omissions regarding nonviability of auction rate securities (ARS) market during time that broker-dealer was specifically recommending and selling student loan auction rate

securities (ARS) to investor while market teetered on brink of collapse, thus precluding summary judgment on investor's claim against broker-dealer for unfair business practices in violation of Massachusetts law.

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## **BONDS - NEW JERSEY**

### **[New Jersey Alliance for Fiscal Integrity, LLC v. New Jersey Sports and Exposition Authority](#)**

**Superior Court of New Jersey, Appellate Division - October 3, 2016 - Not Reported in A.3d - 2016 WL 5759377**

The New Jersey Alliance for Fiscal Integrity LLC, (NJAFI) appealed from four Resolutions issued by the New Jersey Sports and Exposition Authority (NJSEA) approving issuance of bonds to provide a portion of the financing for the American Dream development in the Meadowlands to be built by intervenor Ameream LLC.

In summary, the NJSEA plans to issue two types of limited obligation bonds, which will be backed exclusively by two revenue sources: redevelopment area bonds (RAB bonds), backed by payments in lieu of taxes (PILOTs) which Ameream will begin paying once it completes the project; and Economic Redevelopment Grant revenue bonds (ERG bonds), backed by an Economic Redevelopment Grant which the Economic Development Authority (EDA) has awarded to Ameream and the proceeds of which Ameream will in turn sell to the NJSEA. Once the RAB and ERG bonds are sold, the PILOTs and ERG grant money, respectively, will provide the sole source of funding to pay the bondholders a return on their investment

The NJSEA will sell both the RAB bonds and the ERG bonds to one buyer—the Wisconsin Public Finance Authority (PFA or Wisconsin PFA) — in a negotiated sale. The financing documents anticipate that the PFA will pay the NJSEA approximately \$300 million for the ERG bonds and \$800 million for the RAB bonds. The PFA will obtain the purchase money by issuing and selling its own bonds (PFA bonds) to the public, in Wisconsin. The PFA intends to use the revenue it earns from the RAB and ERG bonds to pay the debt service on the PFA bonds. However, each State's agency is issuing its own bonds. Nothing in the NJSEA bond documents obligates the NJSEA to guarantee or pay the PFA's debt service on the PFA's bonds.

NJAFI raised a series of arguments challenging the issuance of both bonds. It contends that the NJSEA's actions are ultra vires, violate "legislative policies," and are arbitrary; the RAB bond resolutions unlawfully pledge the PILOTs as "collateral for another state's debt issue"; the NJSEA cannot issue the ERG bonds because it cannot issue the RAB bonds; the Stimulus Act does not permit the securitization of ERG grant payments; issuance of the ERG bonds violates the Debt Limitation Clause unless approved by the voters; the NJSEA lacks statutory authority to issue the ERG bonds; the NJSEA Resolutions violate Executive Order 26 because they contemplate a private sale of the bonds to one buyer; and the RAB bond resolutions differ materially from the financial transaction approved by the Local Finance Board (LFB).

The Appeals Court affirmed, holding that:

- NJAFI's argument that - because the Wisconsin PFA will use the proceeds from the New Jersey bonds to pay the Wisconsin PFA bondholders a return on their investment - this means that the NJSEA is "in effect" pledging the PILOTs as collateral for the Wisconsin PFA bonds mischaracterizes the financing;

- The fact that a purchaser of NJSEA bonds intends to use those bonds as collateral for some economic project of its own does not transform the NJSEA into the issuer or guarantor of the bond purchaser's financial project;
- Because the ERG bonds are secured solely by the ERG grant revenue and the bondholders have no recourse against the State, the bonds are not "contract bonds" and their issuance would not violate the Debt Limitation Clause; and
- The ERG bonds will be issued pursuant to the NJSEA Law, N.J.S.A. 5:10-10, which authorizes the NJSEA to issue bonds or notes for any of its corporate purposes, including the redevelopment project to be financed here.

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## **MUNICIPAL GOVERNANCE - NEW MEXICO**

### **[Felix v. City of Bloomfield](#)**

**United States Court of Appeals, Tenth Circuit - November 9, 2016 - F.3d - 2016 WL 6634870**

City residents brought action against city, alleging that it violated First Amendment by allowing placement of Ten Commandments monument on lawn in front of municipal building complex.

The United States District Court for the District of New Mexico entered judgment in favor of residents. City appealed.

The Court of Appeals held that:

- Residents had Article III standing;
- Monument was government speech regulated by Establishment Clause; and
- City's conduct in authorizing continued display of Ten Commandments monument endorsed religion, in violation of the Establishment Clause.

City residents' unwelcome encounters with Ten Commandments monument satisfied injury-in-fact requirement for Article III standing to bring Establishment Clause challenge to placement of that monument on lawn in front of municipal building complex. Residents had direct contact with the monument, as it sat outside main entrance of building, which included department where residents paid utilities bills, and monument was visible from major roadway, residents were polytheistic Wiccans who testified that they were offended and felt excluded by the Ten Commandments, and residents testified that they avoided the building, but still saw it from the roadway several times per week.

Display of granite Ten Commandments monument on front lawn of municipal building complex was government speech regulated by Establishment Clause, not private speech. Even though monument was funded by private donations, monument was permanent object located on government property, as it was 3400 pounds, with a foundation of steel, concrete, and wood embedded 14 inches in the ground.

City's conduct in authorizing continued display of Ten Commandments monument on lawn in front of municipal building complex had primary or principal effect of endorsing religion, and thus, violated Establishment Clause. Text of Ten Commandments was unmistakably religious, the monument was located directly in front of principal municipal building, and was clearly visible to onlookers or persons driving by on roadway, funding for monument was initially sought exclusively through local churches, dedication of monument began with invocation by deacon of local church, other parts of dedication contained religious references, city residents brought action challenging monument only

seven months after it was erected, and city's curative efforts, such as including disclaimer on monument and later adding secular items to the display, were insufficient to negate city's religious endorsement.

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## **MUNICIPAL ORDINANCE - NEW YORK**

### **[People v. Stephens](#)**

**Court of Appeals of New York - November 21, 2016 - N.E.3d - 2016 WL 6825633 - 2016 N.Y. Slip Op. 07819**

Defendant was convicted, after a bench trial of third-degree criminal possession of a controlled substance, fifth-degree criminal possession of a controlled substance, and sound reproduction in violation of city's noise control ordinance. Defendant appealed.

The Supreme Court, Appellate Division, affirmed. Leave to appeal was granted.

The Court of Appeals held that city's noise control ordinance, prohibiting the creation of "unnecessary noise," was not unconstitutionally vague under due process principles, as applied to defendant.

City's noise control ordinance, prohibiting the creation of "unnecessary noise," was not unconstitutionally vague under due process principles, as applied to defendant. Ordinance defined "unnecessary noise" based on an objective standard involving a reasonable person of normal sensibilities, ordinance was tailored to specific context of creating unnecessary noise by playing a car radio or similar device that could be heard at least 50 feet away when being operated in a motor vehicle on a public highway, and it had become common knowledge what was usual noise in operating a car radio or other sound production device.

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## **DEEDS - NORTH CAROLINA**

### **[Town of Belhaven, NC v. Pantego Creek, LLC](#)**

**Court of Appeals of North Carolina - November 15, 2016 - S.E.2d - 2016 WL 6694585**

Town, civil rights organization, and others brought action against operators of closed hospital for breach of contract, declaratory judgment, fraud, unfair and deceptive trade practices, breach of fiduciary duty, and civil rights violations.

After case was designated as exceptional, operators filed motion to dismiss for failure to state a claim. The Superior Court granted the motion, and town and others appealed.

The Court of Appeals held that:

- Land which town had deeded for construction and operation of hospital did not revert to town after hospital was closed
- Under mediation agreement, operator had right to close hospital if, by certain date, community board had not legally assumed responsibility for hospital's operation;
- Plaintiffs were not parties to or third-party beneficiaries of agreements and deeds among hospital operators;
- Plaintiffs lacked standing to bring unfair and deceptive trade practices claims;

- Civil rights organization lacked standing to bring claim for violations of civil rights statutes; and
- Court lacked jurisdiction consider whether plaintiffs were denied right to a fair and impartial hearing through designation of case as an exceptional case.

Under deed, land which town had deeded to grantee to construct and operate a hospital did not revert to town after hospital was closed, even if town had a public purpose in mind at the time it conveyed the property, where deed provided that grantee was to have and hold the property “in fee simple,” and deed did not contain any express reversionary interest.

Town, as grantor of hospital land, could not maintain breach of contract and declaratory judgment claims against grantee and its successors based on alleged breach of deed’s hospital use restrictions, where deed conveyed title in fee simple, and grantee held property for well over 30 years.

Under mediation agreement with town and civil rights organizations, hospital operator had right to close hospital if, by certain date, community board had not legally assumed responsibility for hospital’s operation, and thus operator’s act in closing hospital on that date after board failed to assume control did not constitute fraud, despite claim that operator had secret plans to close and demolish hospital and build new clinics nearby.

Town and civil rights organizations were not parties to or third-party beneficiaries of agreements and deeds among hospital operator and successors, and thus did not suffer any damages from those agreements as required to have standing to maintain fraud claim against operator and successors following closure of hospital; agreements expressly provided that they were not intended to be third-party beneficiary agreements.

Hospital operators did not commit any fraud or deception, as required for town and others to maintain claim for unfair or deceptive trade practices, when they closed hospital pursuant to mediation agreement with town which called for closure of hospital if community board failed to take over operation of hospital by certain date.

Town and civil rights organizations which had entered into mediation agreement with hospital operator which allowed closure of hospital if community board did not assume operation of hospital by certain date lacked standing to bring unfair and deceptive trade practices claim against operator, where there was no business relationship between plaintiffs and operator, plaintiffs were not customers of operator, and plaintiffs did not plead any injury in fact beyond the mere abstract allegation that “Plaintiffs suffered actual injury as a result” of operator’s conduct.

Civil rights group lacked standing to bring action against operator of closed hospital for violations of civil rights statutes, as statutes only granted individually aggrieved persons or the North Carolina Human Relations Commission standing to bring an action.

Court of Appeals lacked jurisdiction consider whether plaintiffs were denied right to a fair and impartial hearing when the Chief Justice of the Supreme Court designated case as an exceptional case, as Superior Court had no jurisdiction to overrule a command of the Supreme Court and jurisdiction of the Court of Appeals was derivative of the Superior Court’s jurisdiction.

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## **LIABILITY - NORTH DAKOTA**

### **[Frith v. Park Dist. of City of Fargo](#)**

**Supreme Court of North Dakota - November 16, 2016 - N.W.2d - 2016 WL 6778246 - 2016 ND 213**



In-line skater brought action against city's park district and Insurance Reserve Fund, seeking monetary damages for injuries she allegedly sustained while in-line skating on park pathway.

The District Court dismissed complaint, and skater appealed.

The Supreme Court of North Dakota held that:

- Three-year statute of limitations applied to skater's tort claims against district;
- Date when skater tripped on soft patching material used to fill a crack in the park pathway was when skater became aware of her injuries so as to trigger running of three-year statute of limitations; and
- District court did not have authority under civil procedure rule, governing extensions of time, to extend three-year statute of limitations.

Three-year statute of limitations applied to in-line skater's tort claims against city park district, alleging that she was injured when she tripped on soft patching material used to fill a crack in the park pathway. Although skater contended that six-year personal injury statute of limitations applied because a private contractor applied the patching material that was responsible for skater's injuries, skater sued the park district, which was political subdivision, and not the contractor.

Pursuant to discovery rule, date when in-line skater tripped on soft patching material used to fill a crack in the park pathway was when skater became aware of her injuries, so as to trigger running of three-year statute of limitations on skater's tort claims against city park district.

District court did not have authority under civil procedure rule, governing extensions of time, to extend three-year statute of limitations on in-line skater's tort claims against city park district; civil procedure rule did not apply to periods of time which were definitely fixed by statute.

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## **ZONING - PENNSYLVANIA**

### **[River's Edge Funeral Chapel and Crematory, Inc. v. Zoning Hearing Board of Tullytown Borough](#)**

**Commonwealth Court of Pennsylvania - November 16, 2016 - A.3d - 2016 WL 6777976**

Proposed operator of funeral home and crematory filed appeal from borough's zoning hearing board's order affirming a zoning officer's decision to deny its application for a use and occupancy certificate to operate a funeral home.

The Court of Common Pleas reversed the board's order. Borough appealed.

The Commonwealth Court held that:

- Proposed development would constitute a "funeral home" under zoning ordinance permitting such development, and
- Principal use of property under development would be a funeral home, which was permitted under zoning ordinance, rather than a crematory, which was permitted as an accessory use but not as a principal use.

Proposed development on property would constitute a "funeral home" under zoning ordinance permitting such development. Development would provide services a funeral home offers, including a service, a viewing, and transportation of the body, and would employ individual required to offer

licensed funeral services to the public.

Principal use of property under development would be a funeral home, which was permitted under zoning ordinance, rather than a crematory, which was permitted as an accessory use but not as a principal use. Crematory would only constitute 12% of total building area, large portion of building was dedicated to funeral home related services, property met requirements to be a licensed funeral home, and fact that earlier applicant with related ownership had sought to operate only crematory on site did not establish that current application was a pretext.

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## **IMMUNITY - PENNSYLVANIA**

### **[Brewington v. City of Philadelphia](#)**

**Commonwealth Court of Pennsylvania - November 14, 2016 - A.3d - 2016 WL 6677925**

Parent, as guardian for her son, brought action against school district alleging negligence arising out of injuries to son when he hit his head on a concrete wall during a relay race in gym class.

The Court of Common Pleas granted school district's motion for summary judgment. Parent appealed.

The Commonwealth Court held that:

- Genuine issue of material fact existed as to whether school gymnasium was unsafe for its intended and regular use, and
- Parent's claims alleged an injury caused by school district's negligence in its care, custody, and control of real property, overruling *Rieger v. Altoona Area School District*, 768 A.2d 912.

Genuine issue of material fact existed as to whether school gymnasium, which had a concrete floor and concrete walls but no safety mats on walls, was unsafe for its intended and regular use, as required by the statutory real property exception to local government tort immunity, thus precluding summary judgment in negligence action arising from student tripping during a relay race in gym class and hitting his head on the wall.

Student's claims of a "defective and dangerous condition of the premises" and school district's failure "to conform to" its "own specifications and standards as to the design" of the school gymnasium, which had a concrete floor and concrete walls but no safety mats on walls, were claims alleging injury caused by school district's negligence in its care, custody, and control of real property, as required by the statutory exception to local government tort immunity in action arising from student tripping during a relay race in gym class and hitting his head on the wall; overruling *Rieger v. Altoona Area School District*, 768 A.2d 912.

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## **REDEVELOPMENT AGENCIES - CALIFORNIA**

### **[Covarrubias v. Cohen](#)**

**Court of Appeal, Third District, California - October 7, 2016 - 3 Cal.App.5th 1229 - 208 Cal.Rptr.3d 226 - 2016 Daily Journal D.A.R. 10, 119**

City residents petitioned for writ of mandate to compel Director of the Department of Finance, the state Controller, city, and county auditor-controller to continue payments of set-asides from "tax

increment” to city’s subsidized housing fund.

The Superior Court denied petition. Residents appealed.

The Court of Appeal held that:

- City’s set-asides for future affordable housing payments were not “deferred” payments that remained enforceable after the dissolution of the redevelopment agency, and
- City’s set-asides for future affordable housing payments were not “obligations imposed by state law” that remained enforceable after the dissolution of the redevelopment agency.

City’s scheduled future payments to the low and moderate income housing fund of city’s redevelopment agency were not “deferred” payments and thus were not within the definition of an “enforceable obligation” after the dissolution of the redevelopment agency, even though the Legislature authorized redevelopment agencies to plan for the surcharged set-asides as well as the underlying obligations.

Under the statute providing that “all provisions of the Community Redevelopment Law that depend on the allocation of tax increment to redevelopment agencies” are inoperative, city’s set-asides for scheduled future payments to the low and moderate income housing fund of city’s redevelopment agency were inoperative, and thus they were not “obligations imposed by state law” under the statute providing that such obligations remained enforceable after the dissolution of the redevelopment agency.

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## **EMINENT DOMAIN - CALIFORNIA**

### **[People ex rel. Department of Transportation v. Presidio Performing Arts Foundation](#)**

**Court of Appeal, First District, Division 5, California - November 3, 2016 - Cal.Rptr.3d - 2016 WL 6554353**

Department of Transportation (Caltrans) filed a lawsuit against performing arts foundation for declaratory relief regarding the value of its eminent domain claim. Foundation cross-complained for money due and owing.

The Superior Court entered judgment for Caltrans after bench trial. Foundation appealed.

The Court of Appeal held that:

- Foundation suffered a loss of “goodwill” from the taking of its lease, and
- Assuming foundation was required to quantify its loss of goodwill, it adequately did so.

Under the eminent domain business goodwill compensation statute, compensation for the loss of goodwill involves a two-step process: first, the court determines entitlement: that is, whether the party seeking compensation has presented sufficient evidence of causation, unavailability, and no double recovery; and if the party meets this burden, the matter proceeds to a second step, in which a jury, unless waived, determines the amount of the loss.

Since the conditions set forth in the eminent domain business goodwill compensation statute all pertain to the “loss” of “goodwill,” the initial obligation to establish entitlement to compensation requires a showing, as a threshold matter, that the business had goodwill to lose.

Nonprofit performing arts foundation suffered a loss of “goodwill” from the taking of its lease under the eminent domain business goodwill compensation statute, even though the foundation was not making a profit even before the taking, where the foundation’s annual operating loss increased, the foundation was displaced to a new building with fewer structural advantages and less favorable lease terms, the taking imposed frequent and significant disruptions to the foundation’s operations, which led to a loss of students, employees, donors, and awards, and the shortfall in expected cash flow after the taking could not be attributed to tangible assets or any factor other than a decline in goodwill.

Even assuming that a nonprofit performing arts foundation was required to quantify its loss of goodwill from the taking of its lease in the bench trial phase of the inquiry under the eminent domain business goodwill compensation statute, the foundation adequately did so in showing how much the foundation’s annual operating loss increased, and showing that the shortfall in expected cash flow after the taking could not be attributed to tangible assets or any factor other than a decline in goodwill.

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## **LIABILITY - LOUISIANA**

### **[Barnett v. City of Baton Rouge](#)**

**Court of Appeal of Louisiana, First Circuit - October 31, 2016 - So.3d - 2016 WL 6426460 - 2016-0222 (La.App. 1 Cir. 10/31/16)**

Motorist filed an action for personal injuries against city and parish, through the Department of Public Works, after overhead school zone traffic control signal crashed on the front of motorist’s vehicle and into his windshield.

The District Court granted the Department of Public Works summary judgment. Motorist appealed.

The Court of Appeal held that a genuine issue of material fact existed as to whether the Department of Public Works created the defective condition that caused school zone traffic control signal to fall onto motorist’s vehicle.

A genuine issue of material fact existed as to whether the Department of Public Works created the defective condition that caused school zone traffic control signal to fall onto motorist’s vehicle and into his windshield by its own substandard conduct in selecting and installing a potentially deficient sign, precluding summary judgment in motorist’s personal injury action against city and parish, through the Department of Public Works.

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## **LIABILITY - NEW HAMPSHIRE**

### **[Weaver v. Stewart](#)**

**Supreme Court of New Hampshire - October 27, 2016 - A.3d - 2016 WL 6276083**

Motorcyclist brought negligence action against town, police officer, and towing company arising out of automobile accident in which motorcyclist was injured and his wife died, after being struck by intoxicated motorist who drove his vehicle into oncoming traffic and who had retrieved his vehicle from the towing company on the morning of the accident.

The Superior Court granted summary judgment for town and officer and the Superior Court granted

summary judgment for company. Motorcyclist appealed.

The Supreme Court of New Hampshire held that:

- Motorcyclist could not recover on negligent entrustment claim against town and officer;
- Towing company did not need to obtain authorization from police or court before releasing vehicle to motorist; and
- Motorcyclist could not recover on negligent entrustment claim against towing company.

There was no evidence that police officer knew or should have known that, at time motorist arrived at towing company to pick up his vehicle the morning after his arrest for driving under the influence (DUI), he was impaired and unfit to drive, and thus motorcyclist could not recover on his claim of negligent entrustment against town and officer arising out of accident in which motorcyclist was injured and his wife died after being struck by motorist's vehicle. Motorist only speculated that it would have been obvious that he exhibited signs of impairment when he was at towing company, officer was not at towing company when motorist picked up his vehicle, and while motorist left voicemail message for officer from which officer allegedly was in position to know of motorist's intoxication, motorist had retrieved his car well before he left message.

Motorist's vehicle was towed pursuant to statute authorizing police officers to remove vehicle after owner was arrested if vehicle was menace to traffic, as opposed to statute authorizing officers to remove and impound vehicle because it might have been evidence of crime, and, thus, towing company did not need to obtain authorization from police department or court before releasing vehicle to motorist who had been arrested the previous night for driving under the influence (DUI). No officer ordered removal and impoundment of vehicle, vehicle was not placed in custody of law enforcement official or court and was not retained for any evidentiary purpose, and officer caused removal and storage of vehicle because he had reasonable grounds to believe that motorist was under arrest or otherwise incapacitated and vehicle would have been menace to traffic if permitted to remain in roadway.

There was no evidence that owner of towing company knew that motorist was unfit to operate his vehicle due to intoxication when motorist retrieved it from company on the morning after his arrest for driving under the influence (DUI), and thus motorcyclist could not recover on his negligent entrustment claim against company arising out of automobile accident in which motorcyclist was injured and his wife died after being struck by motorist's vehicle. Motorist merely speculated that it would have been obvious that he exhibited signs of impairment when he was at company, there was no indication in toxicology report as to whether motorist was impaired at time he picked up vehicle from company, and owner stated that motorist did not appear to be impaired when he picked up his vehicle, as he was not falling down, did not smell of alcohol, and did not have glassy eyes, slurred speech, or seem unsteady on his feet.

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## **PUBLIC UTILITIES - NEW JERSEY**

### **[Matter of Petition of South Jersey Gas Company](#)**

**Superior Court of New Jersey, Appellate Division - November 7, 2016 - A.3d - 2016 WL 6575214**

Environmental organizations appealed from decision of executive director of Pinelands Commission finding that proposed natural gas pipeline was consistent with minimum standards for land use under Pinelands Comprehensive Management Plan (CMP) and decision of Board of Public Utilities

granting public utility's petition seeking order declaring that Municipal Land Use Law (MLUL) and local government MLUL regulations did not apply to proposed pipeline project.

The Superior Court, Appellate Division, held that:

- Commission retained final decision-making authority as to whether public utility's proposed natural gas pipeline was consistent with the minimum standards for land use under CMP, and thus, matter would be remanded to allow Commission to review determination by its executive director, and
- Sufficient evidence supported Board's determination that public utility's proposed natural gas pipeline was reasonably necessary for service, convenience, or welfare of the public, as required to support Board's waiver of MLUL and local government MLUL regulations for pipeline project.

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## **EMINENT DOMAIN - OHIO**

### **[State ex rel. Dynamic Industries, Inc. v. Cincinnati](#)**

**Supreme Court of Ohio - November 10, 2016 - N.E.3d - 2016 WL 6646213 - 2016 -Ohio- 7663**

Property owner filed petition for writ of mandamus seeking to compel city, manager of city's department of planning and buildings, and head of department's historic conservation office to issue demolition permit.

The Court of Appeals dismissed petition. Property owner appealed.

The Supreme Court of Ohio held that:

- Court of Appeals lacked jurisdiction over claims for injunctive, declaratory, and monetary relief, and
- Property owner failed to exhaust administrative remedies.

Court of Appeals lacked jurisdiction over property owner's claims for injunctive, declaratory, and monetary relief stemming from city and city employees preventing property owner from demolishing building on owner's property.

Property owner failed to exhaust administrative remedies, and therefore constitutional takings claim against city and city employees stemming from city and employees preventing owner from demolishing building on owner's property was precluded, where property owner had not applied for a certificate of appropriateness.

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## **EMINENT DOMAIN - OHIO**

### **[State ex rel. Cuyahoga Lakefront, L.L.C. v. Cleveland](#)**

**Supreme Court of Ohio - November 8, 2016 - N.E.3d - 2016 WL 6646121 - 2016 -Ohio- 7640**

After temporary street closure blocked access to one of parking lot's two entrances, owner of the parking lot brought action seeking writ of mandamus compelling city to commence appropriation proceedings.

The Court of Appeals issued writ of mandamus. City appealed.

The Supreme Court held that temporary loss of owner's access to street for 16-day period so that permit-holder could film scenes for movie did not substantially, materially, or unreasonably interfere with owner's easement to the street, and thus did not create compensable taking of owner's property under Ohio Constitution.

Temporary loss of parking lot owner's access to city street for 16-day period so that permit-holder could film scenes for movie did not substantially, materially, or unreasonably interfere with owner's easement to the street, and thus did not create compensable taking of owner's property under Ohio Constitution, where street closure blocked access to one of parking lot's two entrances, and parking lot was still accessible to public but customers had to take different route to access the lot.

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## **EMINENT DOMAIN - OHIO**

### **[Sunoco Pipeline L.P. v. Teter](#)**

**Court of Appeals of Ohio, Seventh District, Harrison County - September 29, 2016 - N.E.3d - 2016 WL 5719301 - 2016 -Ohio- 7073**

Pipeline company filed petition for appropriation and complaint for condemnation of land for the purposes of running pipeline that would transport pure propane and butane.

The Court of Common Pleas granted petition and complaint. Landowner appealed.

The Court of Appeals held that:

- Pure propane and pure butane are "petroleum," for purposes of statute governing appropriation of land;
- Evidence supported finding of public use;
- Landowner failed to overcome presumption of necessity; and
- Landowner waived constitutional challenges that were not raised in the trial court.

Pure propane and pure butane are "petroleum," for purposes of statute governing appropriation of land by common carriers, when they are derived from splitting raw material or wet gas into its component parts.

Evidence supported finding of public use supporting common carrier pipeline company's exercise of its statutory authority to appropriate land for the purpose of running pipeline to transport pure propane and butane; production would be stifled without pipeline infrastructure, transportation of propane and butane provided economic benefit to Ohio and some of the necessities of life, pipeline took Ohio product to market, and pipeline was open for public use.

Presumption of necessity for common carrier pipeline company's appropriation of land for the purpose of running pipeline to transport pure propane and butane was not overcome by landowner's assertions that trucks or railroad could be used to transport product, that a cracker plant could be built next to fractionation plants, or that pipeline could be reconfigured to bypass landowner's land; testimony indicated the pipeline was the most efficient option to move the propane and butane.

Landowner waived constitutional vagueness challenge to authorizing statute in proceedings on pipeline company's petition to appropriate land for the purposes of running pipeline that would transport pure propane and butane; arguments presented to the trial court concerned the definition of the word "petroleum" and whether it included pure propane and pure butane, and landowner never argued to the trial court that company's interpretation would render the statute



unconstitutionally void for vagueness, though such argument was apparent and could have been asserted.

Landowner challenging pipeline company's petition to appropriate land for the purposes of running pipeline that would transport pure propane and butane waived argument that statute creating a rebuttable presumption of necessity was unconstitutional, where landowner failed to raise the claim in the trial court.

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## **UTILITIES - OKLAHOMA**

### **[Mustang Run Wind Project, LLC v. Osage County Board of Adjustment](#)**

**Supreme Court of Oklahoma - November 1, 2016 - P.3d - 2016 WL 6462378 - 2016 OK 113**

Applicant appealed decision of the county board of adjustment denying application for conditional use permit to operate energy facility using wind turbines.

The District Court ordered the board to issue the permit. Board appealed, and the appeal was retained.

The Supreme Court of Oklahoma held that:

- County board of adjustment possessed the authority under the City-County Planning and Zoning Act to grant conditional use permits to owners of real property located in the county;
- District Court considered board's general welfare objections to approval of conditional use permit application, even though the court did not expressly cite to county zoning ordinance allowing board to consider general welfare in deciding permit applications, and thus, court's failure to cite to ordinance did not render its order invalid;
- County zoning ordinance, which allowed county board of adjustment to deny conditional use permit applications, did not grant the board the discretion to deny conditional use permit application on the basis that operation of wind turbines was not beneficial to the community; and
- District Court's findings, that application for conditional use permit satisfied county zoning ordinances and that board's objections to approval of application were not based upon credible evidence, were not against the clear weight of the evidence.

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## **PUBLIC RECORDS - PENNSYLVANIA**

### **[Commonwealth v. Walsh/Granite JV](#)**

**Commonwealth Court of Pennsylvania - October 31, 2016 - A.3d - 2016 WL 6407282**

State Department of Transportation petitioned for review of determination of Office of Open Records (OOR) granting in part and denying in part records request under the Right-to-Know Law (RTKL).

The Commonwealth Court held that unsuccessful bid proposals to state Department of Transportation for repair or maintenance of structurally-deficient bridges were exempt from disclosure under provision of Public-Private Transportation Partnership Law (P3 Law) exempting certain proprietary information following selection of a development entity to be a party to a public-private transportation partnership agreement, and therefore such proposals were not public records subject to disclosure under the Right-to-Know-Law (RTKL). P3 Law was a standalone law that was enacted after RTKL and was more specific.

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## MUNICIPAL FINANCE - CALIFORNIA

### City of Bakersfield v. West Park Home Owners Association and Friends

**Court of Appeal, Fifth District, California - October 31, 2016 - Cal.Rptr.3d - 2016 WL 6408001**

The City of Bakersfield proposed to finance road improvement projects through a public benefit corporation (Corporation) and pay the debt from revenues held in special funds. The City filed an action seeking validation of this finance plan. West Park Home Owners Association and Friends (West Park) opposed the finance plan.

The Superior Court entered judgment for City. West Park appealed.

The Court of Appeal held that:

- Funding sources for road improvement projects – the gas tax revenues fund, the transportation impact fees fund, and the restricted utility franchise and surcharge fees fund – qualified as “special funds” under state constitution’s debt limitation provision;
- A provision of city’s contract purporting to make City’s payment obligation “absolute and unconditional” did not require payment from sources other than special funds;
- the three sources of revenue pledged by the City to make the installment payments satisfied the nexus requirement under the special fund exception;
- City did not violate the state constitution’s limitation on the permissible uses of gas tax revenues;
- The term “bonds” as used in article XIX, section 6 and Streets and Highways Code section 2107.4 includes installment payments under an installment sale agreement;
- The City’ use of gas tax revenues violated article XIX, section 6 and Streets and Highways Code section 2107.4 in that the City intended to use gas tax revenues on non-voter approved financing; and
- The Corporation had a separate existence from the City.

City’s gas tax revenues fund, which contained all amounts received by the city related to the purchase of motor vehicle fuels, qualified as a “special fund,” as required for obligations payable from the fund not to violate the state constitution’s debt limitation provision.

City’s transportation impact fees fund, which contained fees paid to the city by developers to mitigate the regional traffic impacts of development projects, qualified as a “special fund,” as required for obligations payable from the fund not to violate the state constitution’s debt limitation provision.

City’s “restricted utility franchise and surcharge fees” fund, which contained proceeds of a surcharge on the franchise fees imposed on utility companies related to their use of city streets for transmitting and distributing electricity and gas, qualified as a “special fund,” as required for obligations payable from the fund not to violate the state constitution’s debt limitation provision, where the city adopted an ordinance providing that the fund was to be segregated from all other revenues and general funds and not maintained from the general funds.

Under a contract providing that city’s obligation to pay for construction services was “absolute and unconditional,” but that “notwithstanding” that provision the city’s obligation to pay for the services was limited to three special funds, the city had no obligation to pay for the services if the special funds were insufficient, and thus the contract did not violate the state constitution’s debt limitation provision.

City's gas tax revenues fund, which contained all amounts received by the city related to the purchase of motor vehicle fuels, had an adequate nexus to city's road improvement finance plan to fall within the special fund exception from the state constitution's debt limitation provision, since the gas tax revenues were generated by the public's use of the streets and highways.

City's transportation impact fees fund, which contained fees paid to the city by developers to mitigate the regional traffic impacts of development projects, had an adequate nexus to city's road improvement finance plan to fall within the special fund exception from the state constitution's debt limitation provision, since the fees were imposed so as to assure that new development bore a proportionate share of the cost of capital expenditures necessary to provide a regional transportation system.

City's "restricted utility franchise and surcharge fees" fund, which contained proceeds of a surcharge on the franchise fees imposed on utility companies related to their use of the city streets for transmitting and distributing electricity and gas, had an adequate nexus to city's road improvement finance plan to fall within the special fund exception from the state constitution's debt limitation provision, since the fees were imposed to compensate the city for the use of its streets to transmit and distribute electricity and gas.

City did not violate the state constitution's limitation on the uses of gas tax revenues, in making payments to a nonprofit corporation that was obligated to "cause the design, acquisition and construction" of the street improvements for, and sell those improvements to, the city, since the gas tax revenues were being used to pay for street improvements as required by the state constitution.

City's use of gas tax revenues to make payments to a nonprofit corporation that was obligated to "cause the design, acquisition and construction" of the street improvements violated the state constitution's prohibition against non-voter approved financing, since the payments were to be made under a certificate purchase agreement that amounted to "bonds," where the certificates included a maturity date, principal amount, interest rate, price, and yield.

State constitutional provision requiring two-thirds vote of qualified electors before city incurs indebtedness in excess of annual income and revenue did not apply to nonprofit corporation formed by city to implement a road improvement finance plan, since the corporation had a genuine separate existence from the city, where the corporation signed an agreement with the city to "cause the design, acquisition and construction" of the projects, and the corporation's bond purchase agreement did not make the city responsible for the corporation's debt.

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## **SPECIAL DISTRICTS - COLORADO**

### **[Bill Barrett Corporation v. Sand Hills Metropolitan District](#)**

**Colorado Court of Appeals, Div. VI - October 6, 2016 - P.3d - 2016 WL 6087897 - 2016 COA 144**

Taxpayers, along with an involuntarily plaintiff, brought action under Special District Act challenging the taxing authority of a special district that originally had geographic boundaries located entirely within town and a local focus on providing necessities for construction of a residential and commercial development but then shifted its boundaries to encompass land in both

in town and county and then land only in county, and also shifted its focus to regional water infrastructure.

The District Court granted in part taxpayers' motion for summary judgment and granted in part special district's motion for summary judgment. Special district appealed and taxpayers cross-appealed.

The Court of Appeals held that:

- Special district's shift in purpose from local to regional was a material modification of its original service plan;
- Special district's shift of boundaries to eliminate all land in town was a material modification of service plan;
- Special district did not provide adequate notice under Act of material modifications of service plan;
- Special district's shift in boundaries to include land in county in addition to land in town was a material modification of service plan; and
- Involuntary plaintiff was entitled to relief that was similar to what taxpayers received.

Special district's shift in purpose, from a local focus on providing necessities for construction of a residential and commercial development in town to a focus on regional water infrastructure upon its change in geographic boundaries to encompass land only in county, was a material modification of its original service plan requiring approval of county board of commissioners under Special District Act.

Special district's shift in its geographic boundaries, to eliminate all land in town and include only land in county, was a material modification of its original service plan requiring approval of county board of commissioners under Special District Act.

Special district did not provide adequate notice under Special District Act of material modifications of its original service plan consisting of shift in focus from local development services to regional water infrastructure and a shift in its geographic boundaries from land in town, to land in town and county, and then to land only in county, where district's published notice was in a newspaper in another county, that publication did not advise that a material departure from service plan was proposed or that the operative objection timeline would begin to run, and district did not provide county board of commissioners with notices of departures from service plan.

Special district's shift in geographic boundaries, to include land in county in addition to land in town, was a material modification of its original service plan requiring approval of county board of commissioners under Special District Act, where 13,000 acres of land in county was proposed for district services.

Trial court did not abuse its discretion in ordering a stay of judgment pending appeal that required special district to preserve funds collected from taxpayers who were challenging the taxing authority of district, which shifted its geographic boundaries from land in town to land only in county; order was not manifestly arbitrary, unreasonable, unfair, or contrary to law.

Involuntary plaintiff was entitled to relief that was similar to what plaintiff taxpayers received in litigation challenging the taxing authority of special district that shifted its geographic boundaries from land in town to land only in county, even though the trial court's judgment only mentioned taxpayers and not involuntary plaintiff, where involuntary plaintiff held itself out as being similarly situated to taxpayers from the beginning of litigation and paid taxes on land at issue in the case.

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## **TORT CLAIMS - IDAHO**

### **[CNW, LLC v. New Sweden Irrigation District](#)**

**Supreme Court of Idaho, Idaho Falls, September 2016 Term - November 3, 2016 - P.3d - 2016 WL 6520152**

After a sinkhole developed on landowner's property, landowner brought action against irrigation district and city, alleging that their actions relating to a canal caused the sinkhole.

Irrigation district moved for summary judgment, arguing that landowner failed to comply with notice requirements of Idaho Tort Claims Act (ITCA).

The District Court granted the motion. Landowner appealed.

The Supreme Court of Idaho held that landowner satisfied presentment requirement of ITCA by delivering notice of its tort claim to district's attorney.

Section of Idaho Tort Claims Act (ITCA) requires presentment of claims to the secretary of a political subdivision but does not require formal service.

Presentment requirement of Idaho Tort Claims Act (ITCA) is satisfied when the notice of tort claim is delivered to an employee or agent of the governmental entity who then delivers the notice to the clerk or secretary.

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## **IMMUNITY - ILLINOIS**

### **[Salvi v. Village of Lake Zurich](#)**

**Appellate Court of Illinois, Second District - October 31, 2016 - N.E.3d - 2016 IL App (2d) 150249 - 2016 WL 6461540**

Owner of property that was contiguous to lot containing pond filed suit against village and others, arising out of damages from flooding of owner's building.

After claims against other parties were dismissed under settlement agreement, the Circuit Court dismissed claims as barred under Tort Immunity Act, and property owner appealed.

The Appellate Court held that:

- Tort Immunity Act was not defense to property owner's claim for breach of easement agreement and mandamus relief;
- Village owed common law duty of care to property owner with respect to development and maintenance of pond in manner designed to prevent increase in natural flow of surface water onto owner's property;
- Watershed ordinance disclaiming liability for liability resulting from certified community's reliance on ordinance did not immunize village from liability for alleged noncompliance with ordinance; Immunity granted to governmental entity under Tort Immunity Act for failure to enforce any law did not apply;
- Immunity granted to governing entities and their employees under Tort Immunity Act for injuries caused by issuance of permits for improvements to property did not apply;
- Immunity granted to government entities and their employees for injury caused by effect of

- weather on use of public places did not apply;
  - Owner was not third-party beneficiary of easement agreement between village and owners of other lots adjoining pond; and
  - Mandamus would not issue to compel village's compliance with agreement.
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## **LIABILITY - ILLINOIS**

### **Mulvey v. Carl Sandburg High School**

**Appellate Court of Illinois, First District, Sixth Division - October 28, 2016 - N.E.3d - 2016 IL App (1st) 151615 - 2016 WL 6461677**

Parents of minor high school student brought action, on behalf of themselves and student, against high school, school district, and district officials and coaches, for injuries student allegedly sustained as result of school bullying, asserting claims for breach of contract and willful and wanton conduct. Student's older sister, a former student, brought similar claims.

The Circuit Court dismissed all claims. Plaintiffs appealed.

The Appellate Court held that:

- Bullying prevention provisions in student and athletic handbooks were not legal offers sufficient to support valid contract between plaintiffs and defendants;
- Neither students' attendance at school, nor parents' payment of property taxes, created sufficient consideration needed to establish contract with school; and
- Individual defendants were entitled to discretionary immunity under Local Governmental and Governmental Employees Tort Immunity Act.

Bullying prevention provisions in student and athletic handbooks, providing that public school district's progressive discipline policy was consistently and fairly applied and that superintendent or designee would develop and maintain an anti-bullying program, were not legal offers sufficient to support a valid contract between students and school, needed to support breach of contract action premised on students' alleged bullying. State law required creation, implementation, and enforcement of policy prohibiting bullying, and provisions did not include any specific promise to prevent or eliminate bullying, with handbooks instead indicating that preventing students from engaging in disruptive behaviors was an important district goal.

Neither students' attendance at public high school, nor parents' payment of property taxes, created sufficient consideration needed to establish contract with school which would support breach of contract action premised on students' bullying, in alleged violation of student and athletic handbooks. School attendance could not be considered a legal detriment or disadvantage to students, in that students were required to attend school until age 17 unless already graduated, and students' attendance did not benefit school, in that public school was required to provide free education to any students living within district.

High school administrators, coaches, and guidance counselors were performing discretionary, rather than ministerial, acts in responding to student's allegations of bullying and, thus, such defendants were entitled to discretionary immunity under Local Governmental and Governmental Employees Tort Immunity Act in action by parents, individually and on behalf of student, for willful and wanton conduct premised on bullying in alleged violation of student and athletic handbooks. Anti-bullying policy adopted by the district did not mandate a particular response to certain situations, but instead allowed school district personnel to determine whether bullying had occurred and what remedial

action was appropriate.

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## **EMINENT DOMAIN - MINNESOTA**

### **[Yarmon v. Minnesota Dept. of Transp.](#)**

**Court of Appeals of Minnesota - October 17, 2016 - Not Reported in N.W.2d - 2016 WL 6077143**

Property owners brought inverse-condemnation action after road construction increased travel time to their business from highway.

The District Court granted summary judgment to State. Owners appealed.

The Court of Appeals held that:

- Owners did not have right to direct and immediate access to highway, and
- No taking of property occurred.

Owners of property abutting right-of-way to highway did not have right to direct and immediate access to highway following road construction, where owners had never enjoyed direct and immediate access to highway.

Evidence supported finding that access to property abutting right-of-way to highway was still reasonably convenient and suitable after road construction, and thus no unconstitutional taking occurred, even though travel distance from highway to business had increased by 2,600 feet and 3,600 feet and grade elevation may have obstructed visibility of business from highway. Increased distances did not render access unreasonable, and no land was taken.

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## **PUBLIC FINANCE - MISSOURI**

### **[Regional Convention and Sports Complex Authority v. City of St. Louis](#)**

**Missouri Court of Appeals, Eastern District, Division One - September 27, 2016 - S.W.3d - 2016 WL 5377882**

The Regional Convention and Sports Complex Authority (“the RSA”) brought suit against the City of St. Louis (“the City”) seeking a declaration that Ordinance 66509 was unconstitutional and void. The Ordinance was enacted in 2002 via initiative petition and was designed to bar the City from providing financial assistance to the development of a professional sports facility without first: (1) preparing a fiscal note and making it available to the public for at least twenty days prior to action; (2) holding a public hearing allowing opportunity for proponents and opponents to be heard; and (3) obtaining voter approval for financial assistance by a majority vote of City of St Louis voters.

Appellants – residents, registered voters, and taxpayers in the City of St. Louis – filed a Motion for Leave to Intervene in the case as defendants, seeking a public hearing and public vote on whether financial assistance would be provided for the construction of a new professional sports facility pursuant to their rights as set forth in the Ordinance.

The trial court held that Appellants did not meet the burden to intervene of right, nor did they meet the requirements for permissive intervention, and therefore denied Appellants’ Motion to Intervene.



The Court also entered a judgment in favor of the RSA invalidating the ordinance.

“The trial court found that status as a registered voter and signatory to a referendum petition is not an interest of adequate directness or immediacy as required to intervene as a matter of right. We agree.”

“The record clearly demonstrates that Appellants failed to show an adequate interest in the subject matter and failed to show that their ability to protect that interest would be impeded absent intervention.”

The Court declined to rule on the merits of the trial court’s decision on the validity of the ordinance, as Appellants had been denied intervention.

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## **ANNEXATION - MISSOURI**

### **[Village of Agency v. City of St. Joseph](#)**

**Missouri Court of Appeals, Western District - October 25, 2016 - S.W.3d - 2016 WL 6208433**

Village petitioned for a declaratory judgment authorizing its involuntary annexation of 347 acres of unincorporated land, 238 acres of which were owned by city that operated landfill near the annexed territory.

The Circuit Court denied petition. Village appealed.

Holdings: The Court of Appeals, Cynthia L. Martin, J., held that:

- The circuit court imposed on village the proper burden of proceeding with the evidence, as opposed to a burden of persuasion, and
- Village’s proposed involuntary annexation to prevent expansion of city’s landfill was not reasonable and necessary.

The standard of review applicable to a municipality’s decision to involuntarily annex adjacent unincorporated land is whether there is substantial evidence showing that the reasonableness and necessity of the annexation is at least fairly debatable.

The extent of the court’s inquiry as to whether the reasonableness and necessity of a municipality’s involuntary annexation of adjacent unincorporated land is at least fairly debatable is whether substantial evidence has been presented by municipality to support the determination of its governing body such that reasonable men could differ as to the necessity of the extension.

Factors for determining whether an involuntary annexation is reasonable include need for residential or industrial sites; city’s inability to meet its needs without expansion; consideration only of needs which are reasonably foreseeable; past growth relied on to show future necessity; extent to which past growth has caused city to spill into proposed area; beneficial effect of uniform application and enforcement of zoning ordinances; need for or beneficial effect of uniform application and enforcement of municipal building codes; need for or beneficial effect of extending police protection area; need for or beneficial effect of uniform application and enforcement of health ordinances or regulations; need for and ability of city to extend essential municipal services into area; enhancement in value by reason of adaptability of land for prospective city uses; and regularity of boundaries.

Circuit court imposed the proper burden of proceeding with the evidence, as opposed to a burden of persuasion, on village seeking a declaratory judgment approving an involuntary annexation of adjacent unincorporated land, despite the court's finding that village failed to produce substantial evidence that the reasonableness and necessity of the proposed annexation was fairly debatable; that finding only reflected the court's determination that village failed to sustain its burden to proceed with the evidence.

The "burden of proof" applicable in an involuntary annexation proceeding by a municipality is a burden of proceeding with the evidence and not a burden of persuasion by the preponderance of the evidence.

Village's proposed involuntary annexation of adjacent unincorporated land was not reasonable and necessary, where village based its annexation decision exclusively on concerns about, and a desire to prevent, city's efforts to expand a nearby landfill.

When the sole evidence justifying a proposed involuntary annexation of adjacent unincorporated land is the municipal annexing authority's defensive desire to prevent uses on annexed land, no benefit to the annexed land is demonstrated, negating any ability to find the annexation reasonable and necessary to both the annexing authority and the annexed area.

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## **ZONING - NORTH DAKOTA**

### **[Dakota Outdoor Advertising, LLC v. City of Bismarck](#)**

**Supreme Court of North Dakota - November 9, 2016 - N.W.2d - 2016 WL 6611238 - 2016 ND 210**

Applicant for special use permit to erect a digital billboard appealed decision of city's board of commissioners that affirmed decision of city's planning and zoning commission denying the permit.

The District Court affirmed. Applicant appealed.

The Supreme Court of North Dakota held that:

- Applicant's appeal from district court order was not moot; and
- Decision of city's board of commissioners to deny application for special use permit to erect digital billboard less than 300 feet from a residential area was not arbitrary, capricious, or unreasonable.

Applicant's appeal from district court order affirming decision of city's board of commissioners that denied special use permit to erect digital billboard less than 300 feet from a residential property was not moot, though applicable city ordinance was changed shortly after district court's decision so as not to allow for special use permits for digital billboards less than 300 feet from residential properties, where new ordinance was not expressly written to be applied retroactively.

Decision of city's board of commissioners to deny application for special use permit to erect digital billboard less than 300 feet from a residential area was not arbitrary, capricious, or unreasonable. Board had authority to grant special use permit if proposed use would not adversely affect health and safety of public and workers and residents in the area, and board found a high incidence of accidents on street running next to proposed site, found that the North Dakota Department of Transportation Urban High Crash Locations report showed the subject intersection was the seventh most dangerous in the state and the second most dangerous in city, and found that applicant's evidence was inconclusive as to whether digital billboards increased driver distraction.

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## **MUNICIPAL ORDINANCE - TEXAS**

### **[Ex Parte Sedigas](#)**

**Court of Appeals of Texas, Waco - October 12, 2016 - Not Reported in S.W.3d - 2016 WL 5944788**

Defendants who were charged with misdemeanor violation of city's "no touch" ordinance for sexually-oriented businesses filed pretrial applications for writ of habeas corpus, challenging ordinance's constitutionality.

The County Court at Law denied applications and certified defendants' right of appeal. Defendants appealed.

The Court of Appeals held that:

- Ordinance was not facially overbroad; and
- Possible punishment of one year in prison and a \$4,000 fine was not grossly disproportionate to the offense so as to violate Eighth Amendment.

City ordinance was not facially overbroad in violation of First Amendment's protection of free expression in prohibiting any employee who appeared nude or semi-nude in a sexually oriented business from knowingly or intentionally touching a customer or the clothing of a customer on the premises of a sexually oriented business. Ordinance only applied at the time that the employee was nude or semi-nude on the premises of a sexually-oriented business and touched a customer.

Possible punishment of one year in prison and a \$4,000 fine was not grossly disproportionate, so as to violate Eighth Amendment prohibition against cruel and unusual punishment, to city ordinance making it a class A misdemeanor offense for any employee who appeared nude or semi-nude in a sexually oriented business to knowingly or intentionally touch a customer or the clothing of a customer on the premises of a sexually oriented business.

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## **SPECIAL ASSESSMENT LIENS - VIRGINIA**

### **[Cygnus Newport-Phase 1B, LLC v. City of Portsmouth](#)**

**Supreme Court of Virginia - September 22, 2016 - 790 S.E.2d 623**

Property owner brought action against city and community development authority, alleging that a special assessment lien, recorded after a deed of trust, was extinguished by the foreclosure sale and that the special assessments were void.

The Circuit Court granted the pleas in bar and dismissed the complaint. Owner appealed.

The Supreme Court of Virginia held that:

- Special assessment liens have priority over previously recorded deeds of trust;
- Special assessment lien was enforceable against property owner; and
- Owner's belated challenge to special assessments was foreclosed.

Special assessment lien was enforceable against property owner after foreclosure sale on deed of trust, even though deed of trust was recorded before lien, where city filed in deed book of circuit

court clerk's office an abstract of ordinance authorizing improvements, which made lien enforceable against any person deemed to have had notice of assessment, and owner had notice of assessment and lien when it acquired deed of trust and property at foreclosure.

State constitution and code foreclosed property owner's belated challenge to special assessments on property that owner acquired following foreclosure sale on deed of trust. Owner acquired its interest long after assessment agreement with former owner had been finalized and recorded, assessments approved and recorded, and bonds issued, owner filed suit approximately nine years after special assessments were imposed and bonds issued, and state constitution and code did not contemplate endless challenges from subsequent purchasers who bought property with notice of existence of assessment, notice of agreement with former owner, and notice of what infrastructure had been constructed.

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## **EMINENT DOMAIN - WASHINGTON**

### **[Tapio Investment Company I v. State by and through the Department of Transportation](#)**

**Court of Appeals of Washington, Division 3 - October 27, 2016 - P.3d - 2016 WL 6301605**

Property owner brought inverse condemnation action against Department of Transportation alleged taking of office park during construction of a freeway project.

The Superior Court granted Department's motion for judgment as a matter of law, and property owner appealed.

The Court of Appeals held that:

- Court would not undertake an independent analysis of state constitution's taking provision;
- Order entitled "Final Limited Access Order" was not an administrative regulation warranting a regulatory takings analysis;
- Construction in the neighborhood of owner's property was not a taking; and
- Property owner could not establish that property manager had sufficient personal knowledge of e-mails to establish exhibit's relevance.

"Action" undertaken by Department of Transportation in which Department began freeway construction in the neighborhood of owner's office park, did not constitute a taking. Businesses in the vicinity of freeway project did not suffer a harm that was compensable in an inverse condemnation proceeding, and just because a portion of owner's property was expected to be taken in the future did not make it different from its neighbors in that respect.

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## **EMINENT DOMAIN - ALASKA**

### **[State v. Alaska Laser Wash, Inc.](#)**

**Supreme Court of Alaska - October 21, 2016 - P.3d - 2016 WL 6134788**

Owner of car wash brought inverse condemnation action against the State, claiming business damages resulting from State's acquisition of car wash site as part of highway improvement project.

Following jury trial, the Superior Court denied State's motion for directed verdict, entered jury

verdict in favor of owner, and awarded attorney's fees and costs to owner. State appealed.

As matters of first impression, the Supreme Court of Alaska held that:

- Business owner may recover business damages when the State condemns the business only if it is not feasible for the business owner to relocate, and
- Relocation of car wash was "feasible," and thus, owner could not recover business damages, which owner claimed resulted from State's acquisition of the car wash.

A business owner may recover business damages when the State condemns the business only if it is not feasible for the business owner to relocate; if it is not feasible for a business owner to relocate, the State's taking is reasonably certain to have directly damaged the value of the business, requiring compensation.

Relocation of car wash that was taken by State as part of highway improvement project was "feasible," and thus, owner of car wash could not recover business damages, which owner claimed resulted from State's acquisition of the car wash, in inverse condemnation action against State, where owner had the ability to obtain financing to build another car wash, other available sites existed upon which to relocate the car wash, and new owners of owner's car wash business successfully built additional locations on the sites that owner considered for relocation.

In determining whether a business owner whose property was taken by the State may recover business damages since it was not feasible for the owner to relocate the business, "feasible" means capable of being accomplished or brought about and possible. Feasibility is a lower threshold than reasonableness.

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## **JOINT POWERS AGREEMENT - IDAHO**

### **[City of Sandpoint v. Independent Highway District](#)**

**Supreme Court of Idaho, Boise, June 2016 Term - November 1, 2016 - P.3d - 2016 WL 6462148**

City brought action against highway district for breach of contract and sought both a declaratory ruling that a Joint Powers Agreement (JPA) was valid, and an order enjoining highway district from interfering with city's control of streets within city limits.

The District Court granted city's motion for summary judgment, and highway district appealed.

The Supreme Court of Idaho held that Joint Powers Agreement (JPA) between city and highway district, in which city assumed control of all streets in the city and highway district agreed to pay over to the city all highway ad valorem taxes collected on property in the city limits, was void and unenforceable. JPA sought to divest highway district of its statutory responsibility to maintain and improve the streets of city.

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## **PENSIONS - ILLINOIS**

### **[Underwood v. City of Chicago](#)**

**Appellate Court of Illinois, First District, First Division - September 21, 2016 - N.E.3d - 2016 IL App (1st) 153613 - 2016 WL 5239868**

City retirees filed state court action alleging that reduction in their health care benefits violated state constitution and Contracts Clause.

After removal, the United States District Court dismissed complaint, and retirees appealed. The United States Court of Appeals vacated and remanded. On remand, the Circuit Court denied retirees' motion for a preliminary injunction, and granted city's motion to dismiss with regard to retirees' contract and estoppel counts. Retirees appealed.

The Appellate Court held that:

- City retirees had no ascertainable claims to lifetime health care benefits under time-limited Pension Code amendments;
- Evidence was sufficient to support finding that retirees could not demonstrate a likelihood of success on the merits of their claim that the city's plan was a diminishment of anything they were entitled to, as required for the issuance of a preliminary injunction against city;
- City annuitant's handbook did not create a right to lifetime medical benefits for city retirees; and
- Retirees failed to demonstrate that they could overcome the statute of frauds, or any express act by the city or any of its authorized representatives to bind city to a commitment to provide retirees with lifetime medical benefits, as required to allow for the extraordinary relief of enjoining the city from phasing out plan on retirees' health care coverage.

Pension Code amendments that provided only time-limited health care benefits to city retirees did not create or give retirees rights beyond what the legislature afforded, and thus, city retirees had no ascertainable claims to lifetime health care benefits.

Evidence was sufficient to support trial court's finding that because city's most current pension plan did not diminish or impair the benefits set forth in non time limited amendments to the Pension Code, retirees could not demonstrate a likelihood of success on the merits of their claim that the city's plan was a diminishment of anything they were entitled to, as required for the issuance of a preliminary injunction against city. Retirees received greater health care subsidies under the city's plan than they received under the Pension Code amendments, which did not provide for any increase in monthly subsidies or for fixed premiums.

City's annuitant's handbook did not create a right to lifetime medical benefits for city retirees; the book referred several times to the ideal that the city's plan to provide medical benefits to retirees would at some time terminate.

City retirees failed to demonstrate that they could overcome the statute of frauds, or any express act by the city or any of its authorized representatives to bind city to a commitment to provide retirees with lifetime medical benefits, as required to allow for the extraordinary relief of enjoining the city from phasing out plan on retirees' health care coverage.

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## **ZONING & PLANNING - MARYLAND**

### **[Viles v. Board of Municipal and Zoning Appeals](#)**

**Court of Special Appeals of Maryland - October 27, 2016 - A.3d - 2016 WL 6276908**

Objectors sought review of decision of the Board of Municipal and Zoning Appeals of Baltimore City, concluding that it was without authority to review decision of the Baltimore Planning Commission that modified terms of planned unit development (PUD) established by the Baltimore City Council.

The Circuit Court for Baltimore City affirmed. Objectors appealed.

The Court of Special Appeals held that Board had authority to review decision of Baltimore Planning Commission to modify PUD, as Planning Commission was acting in an administrative capacity when it approved the design modifications to the PUD.

Baltimore Planning Commission's decision to approve modifications to planned unit development (PUD) was an administrative one within meaning of constitutional provision governing the review authority of the Board of Municipal and Zoning Appeals of Baltimore City, because the decision of the Planning Commission clearly was limited to design changes within the PUD property.

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## **EMINENT DOMAIN - MISSISSIPPI**

### **[State v. Murphy](#)**

**Supreme Court of Mississippi - October 27, 2016 - So.3d - 2016 WL 6427112**

Property owners brought inverse condemnation action against State and city, after city constructed municipal harbor on disputed property.

After a jury trial, the Circuit Court found State liable. State appealed.

The Supreme Court of Mississippi held that:

- Issue of whether State owned disputed property was for jury;
- Cause of action accrued when property was actually taken;
- Owners' expert did not include noncompensable littoral rights in his calculation of damages;
- Weight of the evidence supported jury's finding that property owners owned disputed property;
- State was not prejudiced by the decision to admit city's deemed admissions;
- Jury's verdict did not exhibit impermissible prejudice or bias against State; and
- State was not entitled remittitur.

Issue of whether State owned all property east of seawall was for jury in property owners' inverse condemnation action, arising out of State's lease of property to city for building municipal harbor.

Property owners' cause of action for inverse condemnation accrued when property was actually taken by State and city to construct municipal harbor, despite contention that three-year, "catch-all" statute of limitations was triggered when final map of public trust submerged land was published pursuant to Tidelands Act. Final map did not establish that property in question was public trust tidelands, and owners had no cause of action against State when map was published, because they still owned property in dispute after map was published.

Property owners' expert on real estate appraisal in inverse condemnation action did not include noncompensable littoral rights in his calculation of damages, and therefore expert's testimony was admissible. Even though expert said phrase "riparian and littoral rights" on cross-examination, expert did not mention littoral or riparian rights during his direct examination, and expert simply explained characteristics of property that he considered in calculating fair market value before and after taking, including fact that property no longer had access to or view of ocean after taking.

Weight of evidence supported jury's finding that property owners owned disputed property east of seawall in their inverse condemnation action against State and city. Even though evidence was conflicting, deeds referenced mean high water tide or water's edge of bay as eastern boundary of



property, oldest deed was executed 12 years before seawall was completed, and no deed in chain of title made reference to seawall.

State was not prejudiced by trial court's decision to admit city's deemed admissions in property owners' inverse condemnation action against city and State, and therefore court did not abuse its discretion. State did not object to admissibility of city's deemed admissions, but only to format in which they were admitted, owners amended city's deemed admissions so that they clearly stated they did not apply to State, and jury was instructed that admissions did not apply to State.

Jury's verdict finding State, but not city, liable to property owners in inverse condemnation action, after city constructed municipal harbor on property, did not exhibit impermissible prejudice or bias against State. State claimed true ownership of property, State was listed as lessor of property to city, and city could not have constructed harbor without State first exercising claim of ownership over property.

State was not entitled remittitur in property owners' inverse condemnation action regarding municipal harbor constructed on land east of old seawall, despite contention that owners considered construction of new seawall by Army Corps of Engineers as cause of approximately 90% of owners' damages. Owners considered new seawall and harbor to be part of one project, new seawall did not completely block owners' access to or view of beach, whereas construction of harbor did, and jury's award was lower than owners' calculation of compensatory damages.

Award of attorneys' fees to property owners in inverse condemnation action against State was authorized by statute, even though State merely leased property to city for construction of municipal harbor, where State claimed and asserted control over property owned by owners, and State stated in its discovery responses that, upon information and belief, federal funds were used in construction of harbor.

The statute authorizing the trial court to award reasonable expenses, including attorneys' fees, in specific inverse condemnation proceedings does not limit the source of recovery to the party who actually used the property or received federal funds, but broadly orders the trial court to award reasonable expenses in any case in which private property is being used in any program or project in which federal or federal-aid funds are used.

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## **EMINENT DOMAIN - NEBRASKA**

### **[Strode v. City of Ashland](#)**

**Supreme Court of Nebraska - October 28, 2016 - N.W.2d - 295 Neb. 44 - 2016 WL 6395384**

Husband and wife landowners brought action against city and county, alleging zoning regulation inverse condemnation and alleging that bridge load limit constituted a taking.

The District Court dismissed husband's inverse condemnation claims as time barred, and granted summary judgment for city and county. Landowners appealed.

The Supreme Court of Nebraska held that:

- As a matter of first impression, cause of action for inverse condemnation based on a regulatory taking begins to accrue when the injured party has the right to institute and maintain a lawsuit due to a city's infringement, or an attempt at infringement, of a landowner's legal rights in the property;

- City's letter to landowners providing notice of nonconforming use and the city's intention to institute legal action began running of 10-year statute of limitations on husband landowner's cause of action for inverse condemnation;
- Statute of limitations on wife landowner's separate claim for inverse condemnation began to run on date husband received letter from city; and
- Load limit on bridge to property did not constitute a "regulatory taking."

In the context of a regulatory taking, a cause of action for inverse condemnation begins to accrue when the injured party has the right to institute and maintain a lawsuit due to a city's infringement, or an attempt at infringement, of a landowner's legal rights in the property.

At the latest, city's letter to landowners providing notice of nonconforming use and the city's intention to institute legal action if landowners did not conform their use began running of 10-year statute of limitations on cause of action for inverse condemnation, as city's actions had an adverse economic impact on the landowners' right to use the property in the commercial manner that they wished.

Statute of limitations on wife landowner's separate claim for inverse condemnation began to run on date husband received letter from city providing notice of nonconforming use and the city's intention to institute legal action if landowners did not conform their use, rather than any date on which wife received actual notice of land use ordinance affecting the property, as letter constituted an infringement or attempted infringement on wife's right to use the property as she wished and gave rise to her right to institute and maintain a lawsuit.

Load limit on bridge to property did not constitute a "regulatory taking"; while load limit restricted landowner to using either semitrailer trucks that weighed less for access across the bridge or trucks of a limited height for access through railroad underpass, restriction was not an injury different in kind than injury to the general public, bridge limit did not decrease the economic value of the property, and bridge limit, which was posted prior to landowners' purchase of the property, did not interfere with any reasonable investment-backed expectations.

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## **BONDS - NEBRASKA**

### **[GE Funding Capital Market Services, Inc. v. Nebraska Investment Finance Authority](#)**

**United States District Court, S.D. New York - September 14, 2016 - Slip Copy - 2016 WL 4784002**

Nebraska Investment Finance Authority ("NIFA") is an independent, quasi-governmental body established under the Nebraska Investment Finance Authority Act. Between 1994 and 2000, NIFA issued a series of revenue bonds to finance its acquisition of mortgage loans or mortgage-backed securities, which were generated in connection with purchases of homes by eligible Nebraska residents.

For each bond series, NIFA and the Trustee entered into an Investment Agreement GE Funding Capital Market Services, Inc. ("GE"). The Investment Agreements provided that GE would pay a fixed rate of return to NIFA on amounts deposited in the Accounts created in connection with each series of bonds. The Investment Agreements further provided that NIFA could make withdrawals from the Accounts for "Permitted Withdrawal Purposes" and that GE would remit to NIFA on the "Termination Date" the outstanding principal balance and all unpaid interest thereon. This

arrangement was designed to provide NIFA with an income stream so that NIFA could make debt service payments on, and ultimately redeem, each series of bonds.

NIFA redeemed the bonds on a rolling basis between 2005 and 2010. Although the Investment Agreements required the Trustee to give GE notice if and when each bond series was redeemed, GE was not aware that any of the bond series had been redeemed until late 2014. NIFA continued to invest funds and accept interest payments under the Investment Agreements.

In September 2014, GE requested an explanation why the Investment Agreements had remained funded following the redemption of the bonds. On February 13, 2015, after GE and NIFA failed to reach agreement as to the status of the Investment Agreements following redemption, GE filed this action. GE sought a declaratory judgment that NIFA had no right to further interest payments under the relevant Investment Agreement following redemption of each series of bonds and that NIFA's conduct in that regard constituted ultra vires activity. GE also brought claims for unjust enrichment, constructive trust, breach of contract and breach of the duty of good faith and fair dealing.

NIFA and GE proffered competing interpretations of the Investment Agreements as they pertain to when interest payments to NIFA cease. NIFA argued that it is entitled to interest payments until the relevant Investment Agreement terminates, either on the Termination Date or "earlier ... in accordance with its terms." Because neither the Termination Date nor any of the events expressly defined as triggering termination have come to pass for any of the Investment Agreements, NIFA contended that it should continue to receive interest payments. GE argued that the determinative issue was not whether the Investment Agreements have terminated but whether there was still a qualifying Investment. Because the Investments are defined in terms of series-specific Accounts, GE posited that redemption of each bond series extinguished the associated Accounts and, with them, the qualifying Investment.

The District Court found that both interpretations of the Investment Agreements are reasonable and cannot be reconciled with one another. Section 2.2 of the Investment Agreements provides that interest payments shall be made on the "Investment" and until the "Termination Date." "Each party begins its interpretation with one of those key terms, and by following the plain language of the Investment Agreements the parties come to opposite conclusions as to whether NIFA is entitled to interest payments following bond redemption."

"Since the Investment Agreements are ambiguous regarding NIFA's entitlement to interest payments following redemption of the bonds, NIFA's motion for judgment on the pleadings is denied with respect to GE's claims for declaratory judgment on that issue." The court also denied NIFA's motion for judgment on the pleadings with respect to the ultra vires and breach of contract claims.

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## **BANKRUPTCY - PUERTO RICO**

### **[Assured Guaranty Corp. v. Garcia-Padilla](#)**

**United States District Court, D. Puerto Rico - October 4, 2016 - F.Supp.3d - 2016 WL 5794715**

Insurance companies brought actions against Puerto Rico officials seeking declaratory order that executive orders by Puerto Rico's governor that resulted in default on bonds they insured violated their rights under Takings, Due Process, and Contracts Clauses, and seeking injunction barring officials from enforcing those orders. Officials moved to dismiss.

The District Court held that:

- Eleventh Amendment did not bar actions;
- Puerto Rico's payment priority scheme and executive orders deferring payment on bonds were not barred by Bankruptcy Code provision forbidding involuntary compositions; and
- Companies stated plausible claims against president of Government Development Bank of Puerto Rico (GDB).

Eleventh Amendment did not bar insurance companies' actions against Puerto Rico officials seeking declaratory order that executive orders by Puerto Rico's governor that resulted in default on bonds they insured violated their rights under Takings, Due Process, and Contracts Clauses, and injunction barring officials from enforcing those orders.

Payment priority scheme established in Puerto Rico's Management and Budget Office Organic (OMB) Act and Puerto Rico governor's executive orders deferring payment on bonds did not prescribe method of composition, and thus were not barred by Bankruptcy Code provision forbidding involuntary compositions by municipalities, where scheme and orders did not relieve or reduce Puerto Rico's obligation to pay debt owed on bonds in full.

Insurance companies stated plausible claims against president of Government Development Bank of Puerto Rico (GDB) in her official capacity for violating their rights under Takings, Due Process, and Contracts Clauses as result of Puerto Rico's deferment of payment on bonds that companies had insured, in light of companies' allegations that GDB had prominent and extensive role in Commonwealth fiscal activities, that GDB was addressed or participated in documents regarding Puerto Rico's payment priority scheme and "clawing back" of funds, and that president was likely involved in those actions.

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## **PENSIONS - TENNESSEE**

### **[Frazier v. City of Chattanooga, Tennessee](#)**

**United States Court of Appeals, Sixth Circuit - November 3, 2016 - F.3d - 2016 WL 6520066**

Retired city employees brought action for declaratory and injunctive relief when city amended its ordinance to reduce cost-of-living-adjustment (COLA) that retirees had previously received in their pension benefits, as allegedly protected by the Contract Clause.

The United States District Court granted city's motion for summary judgment, and retirees appealed.

The Court of Appeals held that ordinance previously adopted by city, providing that retirees would be entitled to annual three-percent cost-of-living-adjustment (COLA) in their pension benefits, did not unmistakably manifest intent by legislature to forego from exercising its sovereign power to reduce extent of COLA increases in future.

Ordinance previously adopted by city, providing that retirees would be entitled to annual three-percent cost-of-living-adjustment (COLA) in their pension benefits, did not unmistakably manifest intent by legislature to forego from exercising its sovereign power to reduce extent of COLA increases in future, where City Code provided that city could freely amend pension plan subject only to condition that vested financial benefits accrued by any plan participant "shall not in any way decrease," and where this COLA adjustment was not included in pension plan's vesting provision. Use of the mandatory word "shall" manifested intent only to prevent any decrease in vested and

accrued benefits, and retirees' interest in 3% COLA adjustment, as interest that was neither vested nor accrued, was not protected by the Contract Clause.

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## **REFERENDA - UTAH**

### **[Anderson v. City](#)**

**Supreme Court of Utah - October 27, 2016 - P.3d - 2016 WL 6311287 - 2016 UT 50**

Residents filed petition for extraordinary relief after local clerks refused to accept and file referendum petitions.

The Supreme Court of Utah held that residents were required to file their petition for relief with district court.

Residents challenging refusal of local clerks to accept and file referendum petitions were required to file petitions for relief in district court rather than Supreme Court. Residents did not demonstrate that it would be impractical or inappropriate for them to file petitions in district court.

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## **MUNICIPAL GOVERNANCE - CALIFORNIA**

### **[San Diegans for Open Government v. City of Oceanside](#)**

**Court of Appeal, Fourth District, Division 1, California - October 25, 2016 - Cal.Rptr.3d - 2016 WL 6236428**

Objector brought action against city for declaratory, injunctive, and writ relief challenging the adequacy of city council's public notice that it was considering granting a subsidy to a developer.

The Superior Court entered judgment for city. Objector appealed.

The Court of Appeal held that:

- City council agenda adequately informed the public that the city was considering a subsidy to a developer, and
- Subsidy report considered by city council was adequate.

City council agenda adequately notified the public that the city was considering an agreement under which a developer would be paid a subsidy in the form of remission of \$11 million for transient occupancy tax, and thus the notice to the public in the agenda satisfied the Brown Act's requirement of "a brief general description of each item of business to be transacted or discussed," where the agenda expressly gave the public notice that it would be considering a fairly substantial development of publicly owned property as a luxury hotel, and the agenda made express reference to a subsidy report.

City council substantially complied with the statutory requirements for a subsidy report, for its remission to a hotel developer of \$11 million for transient occupancy tax, even though the report itself did not make it entirely clear that each annual estimated subsidy was discounted to present value and that the present value of the total subsidy was the sum of each discounted annual subsidy, since the report gave the public a good faith and reasonable estimate of the present value of the subsidy.

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## **PLANNING & DEVELOPMENT - FLORIDA**

### **Herbits v. City of Miami**

**District Court of Appeal of Florida, Third District - October 26, 2016 - So.3d - 2016 WL 6249116**

Residents brought action against city and property developer seeking declaratory and injunctive relief regarding developer's plans to lease and develop public land for use as a mega-yacht marina, hotels, and retail and commercial space.

The Circuit Court dismissed action. Residents appealed.

The District Court of Appeal held that:

- Residents lacked standing to pursue claim alleging that city violated city charter by failing to lease property to developer with a return to the city of fair market value;
- Residents lacked standing to pursue claim alleging that city violated city charter by deviating from property development request that it advertised in its request for proposal (RFP) and approved in a referendum;
- Residents insufficiently alleged claims for violations of city citizens' bill of rights; and
- Residents were not permitted to bring claim alleging that agreement between city and property developer to enter into a ground lease should be terminated.

Residents did not and would not suffer any special injury in connection with their claim alleging that city violated city charter by failing to lease property to a developer with a return to the city of fair market value, and thus residents lacked standing to pursue claim, even though residents might have been in closer proximity to the alleged adverse traffic conditions caused by the completed project. Injuries alleged by residents were in substance zoning, land use, and permitting objections to project, and city's alleged failure to obtain a fair market rental for property would not have affected residents in a manner different in kind, not merely greater in degree, than it affected other residents throughout city.

Residents did not and would not suffer any special injury in connection with their claim that city violated city charter by deviating from property development request that it advertised in its request for proposal (RFP) and approved in a referendum, and thus residents lacked standing to pursue claim. Injuries alleged by residents were in substance zoning, land use, and permitting objections to project, and injuries residents would have suffered were injuries as a result of the development itself, not as a result of fact that city allowed or may have allowed developer to develop a project materially different from project specified in RFP.

Residents insufficiently alleged claims against city and property developer for violations of city citizens' bill of rights for concealing appraisal information from the public regarding true rental value of project, concealing differences between project as described in city's request for proposal (RFP) and referendum and project as it was later renegotiated, and concealing fact that changes in project required an updated notice and RFP solicitation process, absent any allegation that any final and legally binding lease terms for project site were in place, or that original RFP process was subverted or corrupted.

Residents were not permitted to bring claim alleging that agreements between city and property developer to enter into a ground lease should be terminated as a result of the failure to begin construction by a certain date, where residents were neither parties to agreements nor third party



beneficiaries to agreements.

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## **EMINENT DOMAIN - GEORGIA**

### **[Stroud v. Hall County](#)**

**Court of Appeals of Georgia - October 20, 2016 - S.E.2d - 2016 WL 6134088**

Landowners brought action against county, asserting claims of trespass, nuisance, and inverse condemnation. County moved for summary judgment.

The trial court granted the motion. Landowners appealed.

The Court of Appeals held that:

- Landowner's testimony in affidavit that county's maintenance of abutting road caused his property to flood was sufficient to create genuine issue of material fact;
- Genuine issues of material fact existed as to damages suffered by landowners;
- Landowners' claim of a continuing nuisance was not barred by statute of limitations; and
- Landowner's testimony in affidavit that county's maintenance activities destroyed his vegetation multiple times was sufficient to create genuine issue of material fact.

Testimony by landowner in affidavit that the elevation of an abutting road was increased by county's maintenance and that, consequently, flooding of his property had increased, was sufficient to create genuine issue of material fact as to causation in landowners' nuisance and trespass action against county, precluding summary judgment.

Genuine issues of material fact existed as to damages suffered by landowners allegedly as a result of county's maintenance of abutting road causing flooding on landowner's property, precluding summary judgment in landowners' nuisance and trespass action against county.

To the extent that landowners' nuisance claim against county was based on flooding caused by county's maintenance of abutting road, it was a claim of a continuing nuisance that was not barred by the statute of limitations, but to the extent that landowners alleged that the existence of the road itself was responsible for the flooding on the property, their claims were of a permanent nuisance and, as the road existed for much longer than four years, were barred by the statute of limitations.

Landowner's testimony in affidavit that county's maintenance activities on abutting road destroyed his vegetation multiple times was sufficient to create genuine issue of material fact as to landowners' trespass claim against county, precluding summary judgment.

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## **MUNICIPAL ORDINANCE - KENTUCKY**

### **[Kentucky Restaurant Association; v. Louisville/Jefferson County Metro Government](#)**

**Supreme Court of Kentucky - October 20, 2016 - S.W.3d - 2016 WL 6125883**

Plaintiff organizations and company brought against consolidated city-county government, alleging that government did not have authority to enact a minimum wage ordinance and seeking an injunction barring the enforcement of the ordinance.



The Circuit Court granted judgment on the pleadings in favor of government. The Court of Appeals denied plaintiffs' request for emergency relief, and the Supreme Court accepted transfer of the case.

The Supreme Court of Kentucky held that:

- Ordinance impermissibly conflicted with state minimum wage statute;
- State had enacted a comprehensive statutory scheme on the issue of wages; and
- Federal minimum wage law had no effect on ordinance's validity.

Minimum wage ordinance enacted by consolidated city-county government conflicted with the state minimum wage statute, and was thus invalid. Ordinance required businesses to pay workers a higher wage than the statutory minimum, and "saving provision" in the minimum wage statute merely protected certain state laws that pre-dated statutory laws on the same subject and did not apply to the ordinance.

State statutes governing wages and hours provided a comprehensive statutory scheme on the issue of wages, and thus minimum wage ordinance enacted by consolidated city-county government was invalid. Scope and number of statutory provisions demonstrated that the statutes were intended to be a detailed and through regulation of wages, minimum wage statute itself provided no room for local legislation, and express preemption of local legislation was not required where the legislature had enacted a comprehensive statutory scheme.

Fair Labor Standards Act (FLSA) section, which provided that nothing in the FLSA shall preclude noncompliance with any federal or state law or municipal ordinance establishing a minimum wage than the minimum wage established under the FLSA, only precluded federal preemption of local laws establishing a higher minimum wage, not state preemption of those laws, and thus had no effect on the validity of minimum wage ordinance that had been enacted by consolidated city-county government and conflicted with Kentucky's minimum wage statute.

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## **WORKERS' COMP - LOUISIANA**

### **[Borja v. FARA](#)**

**Supreme Court of Louisiana - October 19, 2016 - So.3d - 2016 WL 6123579 - 2016-0055 (La. 10/19/16)**

Parish firefighter filed disputed claim for workers' compensation compensation for knee, heart, and lung injuries.

The Office of Workers' Compensation granted employer's exceptions of res judicata and prescription. Claimant appealed. The Court of Appeal affirmed. Claimant's application for writ of certiorari was granted.

The Supreme Court of Louisiana held that:

- Res judicata did not bar claim for permanent disability benefits;
- Employer's payment of maximum disability payments interrupted prescription under heart and lung statute; and
- Three-year prescriptive period applicable to medical benefits claim under heart and lung statute did not commence.

Workers' compensation claimant's claim for permanent disability benefits, whether result of his knee

injury or his heart and lung condition, was not barred by res judicata, based on prior voluntary dismissal of disputed claim for benefits, where voluntary dismissal was not final judgment denying benefits, and there was no settlement of all issues, much less lump sum settlement approved by workers' compensation judge.

Employer's payment of maximum disability payments following workers' compensation claimant's prior disputed claim, which included claim for indemnity benefits for both knee injury and heart and lung issues, interrupted prescription under Firemen's Heart and Lung Statute with respect to claimant's subsequent disputed claim for permanent disability for same injuries filed within one year of termination of indemnity benefits, and therefore claims for benefits under Statute were not barred by prescription. Even though claimant did not assert in prior form that he was totally and permanently disabled, he did state that his injuries included occupational disease and his right knee, and employer paid maximum benefits allowed at time without sunset or end date.

Employer had not made payment of medical benefits for workers' compensation claimant's alleged heart and lung condition, such that three-year prescriptive period applicable to claim under Firemen's Heart and Lung Statute would have commenced to run. Employer's payment of medical expenses was for claimant's knee injury, rather than his heart and lung condition, and there had not yet been determination by workers' compensation judge that claimant was entitled to benefits under Statute.

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## **PROPERTY - MASSACHUSETTS**

### **[Brown v. Kalicki](#)**

**Appeals Court of Massachusetts, Suffolk - October 20, 2016 - N.E.3d - 2016 WL 6105684**

Three parcel owners filed petitions seeking to amend their certificates of title to include portions of formerly submerged land on shoreline.

Intervenors sought to intervene and claimed they had acquired prescriptive rights over the accreted land.

The Land Court Department granted parcel owners summary judgment.

The Appeals Court held that as a matter of first impression, accretions to parcel owners registered beachfront littoral land automatically acquired registered status at the time of their creation, and thus did not require amendments to owners' certificates of title to include previously submerged land. If accreted land was not deemed registered upon its creation, owners of littoral property would need to amend their certificates of title on a regular basis to prevent any loss in their property rights due to adverse use by another, which would be inconsistent with the principle purpose of the registration system, which was to make titles certain and indefeasible.

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## **ZONING & PLANNING - MONTANA**

### **[Citizens for a Better Flathead v. Board of County Commissioners of Flathead County](#)**

**Supreme Court of Montana - October 11, 2016 - P.3d - 2016 WL 5900204 - 2016 MT 256**

Citizens group brought action against county and county planning board, alleging that the adoption

of a revised growth policy violated state statutes, the state constitution, and the county's own procedures.

The District Court granted county and board's motion to strike group's expert report and county's motion for summary judgment. Group appealed.

The Supreme Court of Montana held that:

- Expert report impermissibly offered legal conclusions;
- Revisions to growth policy complied with procedural requirements
- Board's actions could not be invalidated for alleged violations of open meetings laws;
- County did not violate open meeting laws;
- Group was not deprived of meaningful participation guaranteed by state constitution;
- County and board adequately considered and incorporated public comments; and
- Policy could not trump citizens' constitutional rights.

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## **ZONING - NEW YORK**

### **[Citrin v. Board of Zoning and Appeals of Town of North Hempstead](#)**

**Supreme Court, Appellate Division, Second Department, New York - October 19, 2016 - N.Y.S.3d - 2016 WL 6089178 - 2016 N.Y. Slip Op. 06827**

Owners of split-zone lot brought article 78 proceeding to review determination of town zoning board which imposed a five-year durational limit on special permit granted to them.

The Supreme Court, Nassau County, denied the petition, and owners appealed.

The Supreme Court, Appellate Division, held that zoning board did not have authority to impose durational limit on a special use permit.

It was improper for zoning board to impose five-year durational limit on special use permit granted to owners of property on a split-zone lot to continue to use parking lot in residence district, where zoning ordinance did not explicitly provide the Board with authority to impose durational limits on special use permits.

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## **IMMUNITY - OHIO**

### **[Cochran v. Presbyterian Church of Bloomingdale](#)**

**Court of Appeals of Ohio, Seventh District, Jefferson County - September 23, 2016 - N.E.3d - 2016 WL 5415975 - 2016 -Ohio- 7020**

Motorcyclist and his wife, who were riding their motorcycle when it began to rain and they parked at cemetery, brought negligent maintenance claim against township and board of trustees, which owned cemetery, alleging that motorcyclist leaned on a headstone while changing clothes, causing it to fall onto and injure his wife.

The Court of Common Pleas entered summary judgment for township, and motorcyclist and his wife appealed.

The Court of Appeals held that physical defect exception to governmental immunity did not apply.

Injury had to be caused by a political-subdivision employee's negligence in order for the exception to apply, and no township employee was ever identified by name.

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## **EMINENT DOMAIN - VERMONT**

### **[Regan v. Spector](#)**

**Supreme Court of Vermont - October 21, 2016 - A.3d - 2016 WL 6157443 - 2016 VT 116**

Property owners brought action alleging trespass and nuisance against neighbors, and inverse condemnation against town, after their property was damaged by flood.

The Superior Court entered judgment in favor of neighbors and town, and property owners appealed.

The Supreme Court of Vermont held that:

- Trial court properly focused on the nature and character of the invasion of property in inverse condemnation action, and
- Evidence could not support property owners' trespass and nuisance claims against neighbor.

Trial court property focused on the nature and character of the invasion of property in property owners' inverse condemnation action against town after property owners' land was damaged by flooding. The trial court noted that it did not need to consider in depth the property owners' claim because the property owners had failed to prove a substantial injury potentially warranting equitable relief, and to the extent that the court did consider the claim, it concluded that there was no permanent physical occupation or temporary incursions by the town amounting to an easement on property owners' land.

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## **BANKRUPTCY - CALIFORNIA**

### **[Deocampo v. Potts](#)**

**United States Court of Appeals, Ninth Circuit - September 8, 2016 - F.3d - 2016 WL 4698299 - 63 Bankr.Ct.Dec. 22 - 2016 Daily Journal D.A.R. 9390**

Following city's Chapter 9 municipal bankruptcy, judgment was entered in favor of arrestee and against individual city police officers in a § 1983 excessive force claim, and the United States District Court awarded \$314,497.73 in attorney fees in favor of arrestee.

Subsequently, the District Court denied officers' motion for relief from the judgment. Officers appealed.

The Court of Appeals held that neither judgment against officers nor subsequent award of attorney fees was discharged by the city's Chapter 9 bankruptcy.

Although city was generally obligated, under California law, to indemnify its employees for claims against them arising from their employment, only the city, not the individual officers, filed for bankruptcy and adjusted its debts, the judgment and award of fees were entered against officers solely in their personal capacities, and city's bankruptcy plan did not reference or propose to discharge claims against indemnifiable city employees.

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## **EMPLOYMENT - MASSACHUSETTS**

### **Thompson v. Civil Service Com'n**

**Appeals Court of Massachusetts, Suffolk - October 7, 2016 - 59 N.E.3d 1185**

Police department and four terminated officers sought judicial review of decision of the Civil Service Commission upholding termination of employment of four officers, but reinstating six officers, after 10 officers submitted hair samples that tested positive for cocaine.

The Superior Court affirmed. Four officers appealed and department cross-appealed.

The Appeals Court held that:

- Positive drug tests alone were insufficient to support termination of employment of police officers;
- Civil service law applied over conflicting provision of collective bargaining agreement;
- Evidence was sufficient to support termination of four officers based on positive drug tests; and
- Awards of back pay to reinstated officers were mandatory.

Hair test positive for cocaine was not, by itself, sufficient to support termination of employment of city police officers, where positive test was not conclusive on question of voluntary ingestion, as positive test may have also represented sample contamination by environmental exposure.

Provision of civil service law governing termination of public employees for misconduct conflicted with termination provision of collective bargaining agreement, and therefore law applied over agreement in proceeding concerning termination of police officers following positive drug tests, where agreement permitted termination of employment based solely on positive drug test, even in absence of actual misconduct, whereas law permitted termination only for just cause.

Evidence was sufficient to support termination of employment of four city police officers based on positive cocaine tests. Officers each had positive hair test, as to all four officers, each of their initial tests and each of their safety net retests were positive at levels well above the cutoff level, two of four officers had no independent hair testing following initial positive test, while third prevaricated in testimony on issue, finally admitting that his independent hair test was positive, and Civil Service Commission found testimony in support of denials of all four officers to lack credibility.

Awards of back pay to city police officers who were terminated following positive hair tests for cocaine was statutorily mandated after Civil Service Commission reversed terminations, where applicable statute used mandatory language and provided for no exceptions.

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## **MECHANIC'S LIEN - MISSOURI**

### **Brentwood Glass Company, Inc. v. Pal's Glass Service, Inc.**

**Supreme Court of Missouri, en banc - August 23, 2016 - S.W.3d - 2016 WL 4444039**

Sub-subcontractor brought mechanic's lien claim against county, county's agent for construction of property development project, general contractor, and subcontractor.

The Circuit Court granted summary judgment to defendants. Sub-subcontractor appealed.

The Supreme Court of Missouri held that:

- Public policy did not prohibit sub-subcontractor from perfecting lien against leasehold interest in property held by agent;
- Genuine issue of material fact as to last date that sub-subcontractor worked on project, as would determine whether sub-subcontractor's mechanic's lien was filed within six months of such date, as required by statute, precluded summary judgment in favor of agent;
- Genuine issue of material fact regarding whether sub-subcontractor's mechanic's lien statement contained a just and true account of demand due, despite statement's alleged inclusion of nonlienable items, precluded summary judgment in favor of agent; and
- Agent was not a "contractor" of whom a bond would be statutorily required to be furnished to county.

Sub-subcontractor could not perfect mechanic's lien against county, after sub-subcontractor allegedly failed to receive payment for glass and glazing work done on county's property development project, where county owned property at time sub-subcontractor began working on building, and contract between county and county's agent for construction of project provided that any improvements installed in building immediately became property of county.

Public policy did not prohibit sub-subcontractor from perfecting its mechanic's lien against leasehold interest in property held by county's agent for construction of development project regarding property. County's contract with agent authorized, under certain circumstances, agent to assign its leasehold interest without county's prior written consent, and thus county anticipated circumstances that would end its control over the leasehold.

Sovereign immunity doctrine barred sub-subcontractor's action against county alleging county failed to require purported contractor to furnish a bond for property development project, where sub-subcontractor sued only the county and not any individual public official.

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## **ANNEXATION - MONTANA**

### **[Schweitzer v. City of Whitefish](#)**

**Supreme Court of Montana - October 11, 2016 - P.3d - 2016 WL 5900212 - 2016 MT 254**

Property owners brought declaratory action challenging the denial of their second petition for de-annexation of their property.

The District Court granted city's summary judgment motion, and property owners appealed.

The Supreme Court of Montana held that:

- Dismissal of property owners' first declaratory action, in which they challenged city's denial of their first petition for de-annexation of their property, constituted a final judgment for purposes of claim preclusion;
- Both of property owners' declaratory actions involved the same subject matter for purposes of claim preclusion;
- Both of property owners' declaratory actions involved the same issue and subject matter for purposes of claim preclusion; and
- Termination of an interlocal agreement between city and county did not constitute a material fact for purposes of claim preclusion or summary judgment.

Dismissal of property owners' first declaratory action, in which they challenged city's denial of their first petition for de-annexation of their property, constituted a final judgment for purposes of claim

preclusion. The trial court dismissed the action with prejudice on the basis of the running of the statute of limitations.

Two declaratory actions brought by property owners against city, in which they challenged city's denial of their petitions for de-annexation of their property, involved the same subject matter for purposes of claim preclusion. The complaints arose from the city's denial of property owners' petitions for exclusion, and both of the declaratory complaints had the same basic factual underpinnings, property owners' voluntary petition for annexation, city's annexation, property owners' decision not to pay for extension of services to their property, their petition for exclusion, and the denial of the petition.

Two declaratory actions brought by property owners against city, in which they challenged city's denial of their petitions for de-annexation of their property, involved the same issue and subject matter for purposes of claim preclusion. The gravamen of both complaints was that the city failed to follow the requirements of statute that governed the process of excluding land from a municipality, and any additional claims in each of the two declaratory complaints were directly premised on that initial claim.

Termination of an interlocal agreement between city and county, which property owners alleged caused their property to become "an island" of city property surrounded by land under county jurisdiction, did not constitute a material fact for purposes of either claim preclusion's issue similarity requirement or summary judgment, as applied to property owners' second declaratory action challenging city's denial of a petition for de-annexation of their property. Since the time property owners' property was annexed, the jurisdiction of the city over the property has not changed, and on each occasion when property owners sought de-annexation, city expressed its continuing objective to annex the area in which the property was located.

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## **MUNICIPAL ORDINANCE - NEW MEXICO**

### **[State v. Goodman](#)**

**Court of Appeals of New Mexico - October 6, 2016 - P.3d - 2016 WL 5864596**

Following a guilty plea after denial of motion to suppress, defendant was convicted in the Metropolitan Court of obstructing traffic. Defendant appealed.

The District Court affirmed. Defendant appealed.

The Court of Appeals held that defendant's 5- to 15-second delay in proceeding from a red light did not constitute obstructing traffic in violation of city ordinance prohibiting obstructing traffic.

Motorist's 5- to 15-second delay in proceeding forward from intersection when traffic signal turned from red to green did not constitute "obstructing traffic," under city ordinance prohibiting obstructing traffic. Delay, without any indication as to why it occurred, was no threat to public safety or free use of city's roads, and there was no indication that following motorist was inconvenienced or was forced to wait through another full light cycle at intersection.

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## **CHARTER SCHOOL FUNDING - NEW YORK**



## **Brown ex rel. Stevens v. State**

**Supreme Court, Appellate Division, Fourth Department, New York - October 7, 2016 - N.Y.S.3d - 2016 WL 5857364 - 2016 N.Y. Slip Op. 06566**

Students and advocacy group commenced action against State of New York, challenging validity of charter school funding scheme under New York State Constitution.

The Supreme Court, Erie County, denied State's motion to dismiss in part. State appealed.

The Supreme Court, Appellate Division, held that:

- Advocacy group for charter schools had capacity to sue;
- Member charter schools did not have standing to sue to challenge constitutionality of charter school funding legislation;
- State of New York did not challenge standing of infant students;
- Students had standing;
- Education Article could not serve as basis for challenging constitutionality of facilities funding to charter schools;
- Students were not denied equal protection by difference in facilities funding between traditional public schools and charter schools; and
- Failure to plead discriminatory intent was fatal to disparate impact equal protection cause of action.

Advocacy group for charter schools had capacity to sue to challenge constitutionality of charter school funding legislation on behalf of its member charter schools if its member charter schools had such capacity. Although charter schools were political subdivisions of state, charter schools benefited from broad exemption.

Member charter schools did not have standing to sue to challenge constitutionality of charter school funding legislation, since Education Article did not protect schools; it protected students' constitutional right to sound basic education.

State of New York did not challenge standing of infant students under Education Article to sue to challenge constitutionality of charter school funding legislation on claim that students' allegations were vague, conclusory, and failed to establish injury in fact. Those allegations challenged merits of case, not standing.

Infant students had standing under Education Article to assert cause of action against State of New York to challenge constitutionality of charter school funding legislation.

Education Article could not serve as basis for challenging constitutionality of facilities funding to charter schools, since there was no meaningful way to apply requirements for claim under Article in context of charter school funding challenge.

Infant students were not denied equal protection by difference in facilities funding between traditional public schools and charter schools, since traditional public and charter schools were not similarly situated, and any disparity in school funding scheme was supported by rational basis.

Failure to plead discriminatory intent was fatal to disparate impact equal protection cause of action alleging that failure of State of New York to provide charter schools with facilities funding impacted racial and ethnic minorities more severely.

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## **PENSIONS - OKLAHOMA**

### **[Stevens v. Fox](#)**

**Supreme Court of Oklahoma - October 11, 2016 - P.3d - 2016 WL 5920748 - 2016 OK 106**

Participants in Oklahoma Public Employees Retirement System (OPERS) brought action against the Executive Director of OPERS and its Board of Trustees, challenging the validity of law that created a new defined contribution system within OPERS.

The District Court granted defendants' motion for summary judgment, and participants appealed.

The Supreme Court of Oklahoma held that as a matter of first impression, Legislature's alleged violation of Oklahoma Pension Legislation Actuarial Analysis Act (OPLAAA) was non-justiciable.

Even if Legislature violated Oklahoma Pension Legislation Actuarial Analysis Act (OPLAAA) by passing law creating new defined contribution system within Oklahoma Public Employees Retirement System (OPERS) as a non-fiscal retirement bill, any such violation was non-justiciable and could not be the basis for finding an illegal expenditure of public funds. Relevant provisions of OPLAAA were part of a codified set of legislative procedures that amounted to self-imposed limitations, fact that OPLAAA required an actuarial certification as to whether a proposed retirement bill was fiscal or non-fiscal be attached to the bill through the legislative process did not change OPLAAA's procedural nature, and the accuracy or sufficiency of that certification was a purely legislative concern.

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## **ZONING & PLANNING - SOUTH DAKOTA**

### **[Hyde v. Sully County Bd. of Adjustment](#)**

**Supreme Court of South Dakota - September 28, 2016 - N.W.2d - 2016 WL 5637003 - 2016 S.D. 65**

Petitioners sought writ of certiorari, challenging decision of county board of adjustment granting a conditional use permit (CUP) for an ethanol plant.

The Circuit Court dismissed petition as untimely. Petitioners appealed.

The Supreme Court of South Dakota held that 30-day period for filing petition for writ of certiorari challenging board's decision to issue CUP began to run when board's decision was filed in county planning and zoning office, not on later date when board approved the minutes from its previous meeting and, in doing so, approved additional language to be added to the conditions of the CUP. Petitioners did not contend that by adding language in the minutes, the board had failed to regularly pursue its authority.

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## **PENSIONS - TEXAS**

### **[City of Houston v. Houston Firefighters' Relief and Retirement Fund](#)**

**Court of Appeals of Texas, Houston (14th Dist.) - September 8, 2016 - S.W.3d - 2016 WL 4705928**

City brought action against city firefighters' pension fund, seeking declaration that the statute

establishing the fund was unconstitutional.

The 190th District Court granted fund's motion for summary judgment. City appealed.

The Court of Appeals held that:

- Fund's board of trustees was a public entity;
- Statute was not an unconstitutional delegation of legislative duties;
- Statute was not an unconstitutional local or special law;
- Statute did not violate constitutional provision directing legislature to provide for creation of local retirement systems; and
- Statute did not violate constitutional requirement that pension benefits be reasonably related to a participant's contributions.

Board of trustees of pension fund for city's firefighters was a "public entity," and thus statute establishing the fund was not subject to eight-factor test used to analyze constitutionality of legislative delegations to private entities. State constitution expressly authorized legislature to create pension systems for public employees with administration by a board of trustees, the active or retired firefighters who served on board did so solely to administer benefits to public employees, a fundamentally public concern, even if they had a private interest in the matters they were administering, and board was treated as a governmental body in that it enjoyed governmental immunity, its decisions could be appealed to district courts, and it was required to comply with open meeting laws.

Statute establishing pension fund for city's firefighters was not an unconstitutional delegation of legislative duties to the fund. Statute provided reasonable standards for calculating city's contributions to fund, even though actuarial valuations used to calculate those contributions were performed by actuary chosen by fund's board of trustees and there was no review of the actuary's conclusions, statute conditioned any increase in benefits over those otherwise set by statute on approval by actuary, majority of fund members, and State Pension Review Board, and while statute permitted board to adopt rules, policies, and procedures consistent with the statute, it did not grant the board rogue authority to act in an arbitrary manner.

Statute establishing pension fund for city firefighters was not an unconstitutional local or special law, even if legislature, by limiting statute to a certain minimum population bracket, ensured that the statute only applied to city of Houston. Legislature could have reasonably determined that treating Houston differently than other major cities was warranted because certain factors, such as its large size and heavy industry, translated into more service calls for firefighters and greater risk of injury or death.

Statute establishing pension fund for city's firefighters did not violate state constitutional provision directing legislature to provide for creation of local retirement systems by cities and counties. Nothing in the provision stated that city-created systems were the exclusive ones permitted for a city or that legislature was prohibited from creating other systems for a city, legislature had broad powers under constitution to create pension systems for public employees, and provision was merely intended to consolidate existing constitutional provisions regarding pension systems into one provision, not to make locally-created systems exclusive for cities and counties and invalidate legislature-imposed systems.

Statute establishing pension fund for city's firefighters did not violate state constitutional requirement that pension benefits be reasonably related to a participant's contributions. Requirement only applied to pension systems created by a city or county or a statewide system in

which a city or county may choose to participate, while statute was enacted pursuant to separate constitutional provision granting the legislature power to enact general laws establishing systems for retirement benefits for public.

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## **ZONING & PLANNING - WASHINGTON**

### **[Whatcom County v. Hirst](#)**

**Supreme Court of Washington, En Banc - October 6, 2016 - P.3d - 2016 WL 5853289**

County sought review of Growth Management Hearings Board's final decision and order determining that rural element of county's comprehensive plan and zoning code failed to comply with Growth Management Act (GMA).

Objectors sought review of Board's final decision and order, arguing that Board erred by declining to declare ordinance invalid.

Following transfer of objectors' appeal, the Superior Court consolidated appeals. Board certified consolidated appeals for direct review by the Court of Appeals. The Court of Appeals affirmed in part, reversed in part, and remanded. County sought review.

After granting review, the Supreme Court of Washington held that:

- GMA requires counties to consider and address water resource issues in land use planning;
  - County's comprehensive plan was insufficient to comply with county's duty under GMA to protect groundwater resources when issuing building permits;
  - GMA's listing of enhancement of water quality as a goal of the Act does not require a county's comprehensive plan to include provisions that enhance water quality; and
  - Board has discretion to decide whether or not to declare a comprehensive plan invalid, after finding noncompliance with GMA.
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## **PENSIONS - ALABAMA**

### **[Southern States Police Benevolent Association, Inc. v. Bentley](#)**

**Supreme Court of Alabama - September 23, 2016 - So.3d - 2016 WL 5338749**

Police officers and police union brought action against governor and members of the Board of Control of the Employees' Retirement System of Alabama (ERS), the chief executive officer and secretary-treasurer of the Retirement Systems of Alabama (RSA) and the ERS, and the State comptroller, seeking injunctive relief and a judgment declaring that participants in ERS pension plan could make retirement contributions, and therefore receive increased retirement benefits, based upon their "earnable compensation," to include payments received for overtime worked.

The Circuit Court entered summary judgment for defendants. Plaintiffs appealed.

The Supreme Court of Alabama held that:

- "earnable compensation" refers to the full rate of compensation that would be payable to an employee if he or she worked the full normal work-time, and does not include overtime pay;
- State's changing its interpretation of "earnable compensation" did not unconstitutionally infringe on contractual rights of vested members in the ERS plan; and

- Amended statute did not make mandatory overtime part of a member's annual base compensation.

State's changing its interpretation of "earnable compensation," for purposes of determining allowed retirement contributions to Employees' Retirement System (ERS) pension plan, following issuance of attorney general's opinion concluding that "earnable compensation" did not include overtime pay, did not unconstitutionally infringe on contractual rights of police officers who were vested members in the ERS plan at the time of the policy change. Legislature did not clearly intend to contractually bind itself to any definition of "earnable compensation" that would include overtime payments, no statute was amended to officers' detriment, and a longtime erroneous interpretation of governing statute failed to bind the State in any respect.

Amended statute including overtime payments within the meaning of earnable compensation for purposes of determining allowed retirement contributions to Employees' Retirement System (ERS) pension plan, and explicitly providing that earnable compensation could not exceed 120 percent of annual base compensation, did not make mandatory overtime part of a member's annual base compensation. Had the legislature intended to create some distinction between mandatory overtime and voluntary overtime it could have done so.

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## **MUNICIPAL ORDINANCE - ALABAMA**

### **[Breland v. City of Fairhope](#)**

**Supreme Court of Alabama - September 30, 2016 - So.3d - 2016 WL 5582405**

Property owner brought action against city, seeking a declaration that property owner was entitled to fill the property without further approval from city, and asserting a claim for money damages based on alleged negligence of city.

The Circuit Court entered summary judgment in favor of city, and property owner appealed.

The Supreme Court of Alabama held that:

- No statute of limitations applied to bar property owner's requests for prospective relief as expressed in his declaratory-judgment claims challenging the validity of city's permitting ordinances;
- Two-year statute of limitations for negligence claims applied to property owner's backward-looking claim for money damages against city based on city's purported negligence in refusing to issue land fill permits; and
- Property owner's negligence claims accrued each time city enforced its ordinances to stop property owner from filling activity on his property, for purposes of triggering the applicable two-year statute of limitations.

No statute of limitations applied to bar property owner's requests for prospective relief as expressed in his declaratory-judgment claims challenging the validity of city's permitting ordinances, when the ordinances presented a current and ongoing infringement of his property rights.

Two-year statute of limitations for negligence claims applied to property owner's backward-looking claim for money damages against city based on city's purported negligence in refusing to issue land fill permits.

Property owner's claims for money damages against city, based on city's purported negligence in refusing to issue land fill permits, accrued each time city enforced its ordinances to stop property

owner from filling activity on his property, for purposes of triggering the applicable two-year statute of limitations for negligence claims.

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## **BONDS - DELAWARE**

### **[Nichols v. City of Rehoboth Beach](#)**

**United States Court of Appeals, Third Circuit - September 7, 2016 - F.3d - 2016 WL 4651383**

City called a special election to vote on the issuance of up to \$52.5 million in general obligation bonds to finance an ocean outfall project. At the special election, city accepted only voters who were either property owners or who had been residents for a minimum of six months. Corporations and other artificial entities that owned property in the city were also permitted to vote.

Taxpayer alleged that persons who owned several parcels of property in the city through the ownership of artificial entities were granted one vote for each parcel owned. Taxpayer further alleged that those who qualified as residents and who owned property were granted two votes.

Taxpayer brought action against city challenging the special election on the grounds that the city violated the Fourteenth Amendment by a) requiring voters to live in, or hold property in, the city for six months before being entitled to vote as residents, and b) allowing property owners to vote more than once.

The United States District Court for the District of Delaware dismissed action. Taxpayer appealed.

The Court of Appeals held that:

- Debt incurred from bond issue was insufficient basis for municipal taxpayer standing;
- City's expenditure of municipal funds to hold a special election for approval of bond issue was insufficient basis for municipal taxpayer standing; and
- City's purchase of advertisement in local newspaper to inform voters of special election was insufficient basis for municipal taxpayer standing.

Debt incurred by city from \$52.5 million bond issue approved by special election was insufficient basis for taxpayer to have municipal taxpayer standing in her action against city alleging that election violated the Fourteenth Amendment with regard to requirements to vote in election, where city did not expend funds from bond on the allegedly illegal elements of the special election.

City's expenditure of municipal funds to hold a special election for approval of bond issue was not sufficient basis for taxpayer to have municipal taxpayer standing in her action challenging certain voting procedures used in special election under Fourteenth Amendment in her action against city, where taxpayer did not assert that city expended funds on the allegedly unconstitutional aspects of the special election, special election itself would have been held regardless of procedures city employed in holding election, causing city to expend the funds regardless of voting requirements used, and funds expended on special election were de minimis.

City's purchase of advertisement in local newspaper to inform voters of special election for approval of bond issue was not sufficient basis for taxpayer to have municipal taxpayer standing in her action challenging certain voting procedures use in special election under Fourteenth Amendment in her action against city, where purported illegality of election procedures had nothing to do with expenditure of funds for advertisement, and cost of advertisement was de minimis.

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## **ANNEXATION - GEORGIA**

### **[Fulton County v. City of Atlanta](#)**

**Supreme Court of Georgia - October 3, 2016 - S.E.2d - 2016 WL 5758991**

City filed petition seeking declaratory judgment that its annexation of unincorporated county property would be lawful.

The Superior Court entered declaratory judgment for the city. County appealed.

The Supreme Court of Georgia held that city's action amounted to a request for an improper advisory opinion in absence of any municipal legislation to annex the property.

City's action for declaratory judgment, seeking to confirm its right to annex property in unincorporated county into its municipal boundaries, notwithstanding a putative prohibition against annexation or incorporation of such property in a local constitutional amendment, amounted to a request for an improper advisory opinion and raised no justiciable controversy in the absence of any municipal legislation to annex the property, where controversy between the city and county was founded upon proposed legislation and had no immediate legal consequences.

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## **IMMUNITY - MASSACHUSETTS**

### **[Brown v. Office of Com'r of Probation](#)**

**Supreme Judicial Court of Massachusetts, Suffolk - October 11, 2016 - N.E.3d - 2016 WL 5888408**

Suit was brought against Commonwealth under anti-discrimination statute. The Superior Court Department, Suffolk County, Paul E. Troy, J., entered judgment for Commonwealth employee, and awarded compensatory and punitive damages, attorney fees, and costs, but denied employee's subsequent motion for postjudgment interest on award of punitive damages, attorney fees, and costs.

Appeal was taken. The Appeals Court affirmed the denial of postjudgment interest. The Supreme Judicial Court allowed further appellate review.

The Supreme Judicial Court of Massachusetts held that as a matter of first impression, section of antidiscrimination statute providing for award of punitive damages and reasonable attorney's fees and costs does not expressly or by necessary implication waive sovereign immunity from liability for postjudgment interest on such awards.

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## **IMMUNITY - ILLINOIS**

### **[Foust v. Forest Preserve Dist. of Cook County](#)**

**Appellate Court of Illinois, First District, Fifth Division - September 30, 2016 - N.E.3d - 2016 IL App (1st) 160873 - 2016 WL 5706935**

Administrator of deceased bicyclist's estate brought survival and wrongful death action against county forest preserve district alleging negligence and willful and wanton conduct.



The Circuit Court dismissed counts based on negligence and certified questions. Both parties filed petitions for leave to appeal questions, which were allowed and consolidated.

The Appellate Court held that:

- Forest preserve grove was intended to be used for recreational purposes, but
- Tree with limb that broke off and fell onto bicyclist was not condition of trail.

Forest preserve grove, including tree located seven feet from edge of bicycle path, which had limb overhanging approximate width of path that broke off and fell onto bicyclist on path, was intended to be used for recreational purposes, and, thus, county forest preserve district was immune from liability for negligence under provision of Tort Immunity Act setting forth immunity for property used for recreational purposes in survival and wrongful death action brought by administrator of deceased bicyclist's estate. According to brochure, grove was suitable for picnicking, hiking, cycling, in-line staking, cross-country skiing, and fishing, which were quintessentially recreational activities.

Tree located seven feet from edge of bicycle path, which had limb overhanging approximate width of path that broke off and fell onto bicyclist on path, was not condition of trail under provision of Tort Immunity Act setting forth immunity for access roads and trails and, thus, county forest preserve district was not immune from liability in survival and wrongful death action brought by administrator of deceased bicyclist's estate. While path was trail, as it ran through forest preserve grove, and there were trees, shrubs, and other vegetation in close proximity to edges of path, plain language of provision required that injury be caused by condition of trail and only reasonable interpretation of language was that for there to be immunity, there had to be something on trail itself that caused injury, and, thus, tree from which limb broke off and fell onto bicyclist was not condition of trail.

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## **BANKRUPTCY - MICHIGAN**

### **[In re City of Detroit, Michigan](#)**

**United States Court of Appeals, Sixth Circuit - October 3, 2016 - F.3d - 2016 WL 5682704 - 63 Bankr.Ct.Dec. 45**

Hearing was held on city's proposed Chapter 9 plan. The United States Bankruptcy Court for the Eastern District of Michigan entered order confirming proposed plan, and pensioners filed separate appeals, which were all dismissed as equitably moot in separate orders entered by the District Court. Pensioners Appealed.

Consolidating appeals, the Court of Appeals held that:

- Pensioners' appeals from Chapter 9 plan confirmation order were equitably moot, and
- Equitable mootness was viable doctrine that applied in Chapter 9 cases just as it applies in cases under Chapter 11.

Pensioners' appeals from bankruptcy court order confirming the Chapter 9 plan of large city, which had effect of reducing pension benefits accorded to city employees and retirees, were equitably moot, where pensioners had failed to obtain stay pending appeal, where plan had been substantially consummated inasmuch as numerous significant, even colossal, actions had been undertaken or completed, many irreversible, in reliance on plan, and where the relief that pensioners requested on appeal would necessarily rescind bargain that was at heart of city's negotiated plan and adversely affect countless third parties, including the entire city population.

Equitable mootness is viable doctrine that determines whether it is prudential to allow bankruptcy appeal, and that applies in Chapter 9 cases just as it applies in cases under Chapter 11.

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## **LIABILITY - NEW YORK**

### **Cockburn v. Town of Mina, N.Y.**

**Supreme Court, Chautauqua County, New York - September 19, 2016 - N.Y.S.3d - 2016 WL 5106530 - 2016 N.Y. Slip Op. 26294**

Passenger in three-wheeled motorcycle applied for leave to file a late notice of claim against a New York township, relating to motorcycle leaving the road and crashing while traveling on road straddling border between New York and Pennsylvania, and alleging a road defect from loose gravel on New York side of border.

The Supreme Court, Chautauqua County, held that leave to file late notice of claim would be granted.

Passenger in three-wheeled motorcycle would be granted leave to file late notice of claim against New York township, relating to motorcycle leaving road and crashing while traveling on road straddling border between New York and Pennsylvania, and alleging a road defect from loose gravel on New York side of border. Passenger's Pennsylvania attorneys, having filed timely notice under Pennsylvania law, promptly asked Pennsylvania State Police (PSP) to provide complete police report once attorneys were informed by Pennsylvania township's insurer that accident might have started in New York, PSP denied the request, complete report was not produced until PSP was compelled to produce it in lawsuit brought by motorcyclist's estate, and complete PSP report was based upon thoroughly documented and photographed investigation performed contemporaneous to accident.

It would be an improvident exercise of discretion for the court to deny a late notice of claim against a municipality when the claimant demonstrates: (1) she promptly commenced the proceeding after verifying the wrong entity had been served previously, and (2) the accident scene was contemporaneously memorialized by photographs of the alleged road defect and a thorough police investigation was performed.

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## **SEWER EASEMENTS - PENNSYLVANIA**

### **Berwick Township v. O'Brien**

**Commonwealth Court of Pennsylvania - October 12, 2016 - A.3d - 2016 WL 5936587**

Township filed suit against landowners for declaratory judgment and injunctive relief relating to its rights under sewer-line easement agreement. Township moved for summary judgment.

The Court of Common Pleas granted the motion in part. Landowners appealed to the Superior Court, which transferred the appeal to the Commonwealth Court.

The Commonwealth Court held that:

- Declaration that sewer-line easement and right-of-way permitted township to remove brush and overgrowth was not an overly broad grant of declaratory relief;
- Removal of brush and overgrowth, including trees, in order to allow township access to its sewer

lines for purposes of inspection and maintenance was reasonable and necessary to purpose of the easement grant;

- Permanent injunction prohibiting landowners from interfering with the township's rights under easement agreement and restraining landowners from taking any actions that prohibited township from accessing easement in order to inspect and maintain its sewer lines was warranted; and
- Trial court did not reform easement agreement by clarifying that the area within the sewer-line easement could be clear cut to the extent necessary consistent with customary industry practices.

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## **EMINENT DOMAIN - PENNSYLVANIA**

### **[Robinson Township v. Commonwealth](#)**

**Supreme Court of Pennsylvania - September 28, 2016 - A.3d - 2016 WL 5597310**

Municipalities and individuals brought petition for review challenging constitutionality of legislative act that set out statutory framework for regulation of oil and gas fracking operations, preempted local regulation of such operations, and gave power of eminent domain to natural gas corporations.

The Commonwealth Court found that the act was unconstitutional in part and enjoined application of certain provisions. On cross-appeals, the Supreme Court affirmed in part, reversed in part, and remanded. On remand, the Commonwealth Court ruled that certain sections of act were not severable and upheld constitutionality of other sections. Public Utilities Corporation (PUC) appealed and municipalities and individuals cross-appealed.

The Supreme Court of Pennsylvania held that:

- Sections of legislative act which created a mechanism for Public Utility Commission (PUC) to determine whether a local ordinance violated the Municipalities Planning Code (MPC) or chapters of legislative act at issue, were not severable from unconstitutional provisions of act which had preempted certain regulations of fracking by local municipalities;
- Statutes restricting health care professionals' access to information regarding chemicals used in fracking process were an unconstitutional special law;
- Provision requiring Department of Environmental Protection, in event of chemical spill associated with fracking, to notify only public, not private, drinking water facilities that could be affected was unconstitutional special law; and
- Provision which authorized the taking of real property for the storage of natural or manufactured gas, violated public use requirement and thus was an unconstitutional taking.

Sections of legislative act which created, as part of Oil and Gas Act, a mechanism for Public Utility Commission (PUC) to determine whether a local ordinance violated the Municipalities Planning Code (MPC) or chapters of legislative act at issue, were not severable from unconstitutional provisions of act which had preempted local municipalities from enacting or enforcing environmental legislation, mandated that certain drilling activities attendant to production of natural gas be allowed in every zoning district, and established mandatory setback waivers. Legislative history made clear that legislature's overarching objective was to have act provide a singular statewide zoning and permitting process for all oil and gas wells, and sections for which severability was at issue furthered the legislative goal of maintaining this statewide regulatory uniformity.

Sections of legislative act, restricting health professionals' access to information regarding the chemicals used in fracking process, were germane to act's overall purpose of regulating the oil and gas industry, and therefore act did not violate constitution's single subject requirement. Primary purpose of sections at issue was not the regulation of health care but rather the maintenance of

trade secret protections for chemicals used in fracking process.

Provision of legislative act regarding the fracking process, requiring Department of Environmental Protection (DEP), in event of chemical spill associated with fracking, to notify only public, not private, drinking water facilities that could be affected was an unconstitutional special law. It was not clear how exclusion of notice to the over three million Commonwealth residents who received their drinking water from wells bore any fair and substantial relationship to legislative act's objective of securing health, safety, and property rights for all Commonwealth residents during oil and gas extraction process, and there was no other mandate for DEP to provide notice to private well owners following a spill.

Provision of legislative act regarding the fracking process, which authorized the taking of real property for the storage of natural or manufactured gas, did not satisfy public use requirement and thus was an unconstitutional taking under state and federal constitutions, where statute did not restrict its application to only corporations that met conditions for classification as public utilities, and any projected benefit to public from purportedly advancing development of Commonwealth infrastructure was speculative and incidental.

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## **DEVELOPMENT FEES - CALIFORNIA**

### **[616 Croft Ave., LLC v. City of West Hollywood](#)**

**Court of Appeal, Second District, Division 1, California - September 23, 2016 - Cal.Rptr.3d - 2016 WL 5335511**

Developers petitioned for writ of administrative mandate to compel city to return fees the city collected when developer applied for building permits.

The Superior Court denied petition. Developers appealed.

The Court of Appeal held that:

- Developer could not challenge fee ordinance's facial constitutionality more than 90 days after establishment of fee schedule;
- In-lieu housing fees were not an "exaction" under the Mitigation Fee Act;
- In-lieu housing fees were not governed by the Right to Vote on Taxes Act;
- Developer could not argue an "absence of a reasonable relationship" between the development project and the demand for affordable housing more than 90 days after establishment of the fee schedule.

Under the statute providing that an action to "attack, review, set aside, void, or annul the decision of a legislative body to adopt or amend a zoning ordinance" must be brought within 90 days of the legislative body's decision, a developer was barred from arguing in an administrative mandamus action that the ordinance authorizing in-lieu housing fees the city collected from the developer violated Fifth Amendment takings principles on its face, where the developer filed its protest letter challenging the ordinance more than 90 days after the city council resolution establishing the schedule of in-lieu housing fees, and the developer paid the in-lieu fee voluntarily as an alternative to setting aside affordable housing units.

In-lieu housing fees paid by developer voluntarily as an alternative to setting aside affordable housing units under city ordinance were not an "exaction" under the Mitigation Fee Act, and thus were not governed by the provision of the Act authorizing parties to protest the imposition of

exactions, even if the city would have had a “right of first refusal” to buy any set-aside units.

In-lieu housing fees paid by developer voluntarily as an alternative to setting aside affordable housing units under city ordinance were not governed by the Right to Vote on Taxes Act, and thus the city did not have the burden to prove the reasonableness of the fees to establish the fees were not “special taxes” under the Act.

Under city ordinance providing that any person subject to an in-lieu housing fee may apply to the city council for an adjustment, reduction, postponement, or waiver of that fee “based upon the absence of a reasonable relationship between the impact of that person’s commercial or residential development project on the demand for affordable housing,” the reasonableness inquiry relates to the creation of the city council resolution establishing the schedule of in-lieu housing fees, and does not relate to the reasonableness of the individual calculation of fees related to a development’s impact on affordable housing, and thus a challenge under the “reasonable relationship” standard is barred by the Mitigation Fee Act if it is brought more than 90 days after the creation of the fee schedule.

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## **LIABILITY - CALIFORNIA**

### **[Esparza v. Kaweah Delta District Hospital](#)**

**Court of Appeal, Fifth District, California - September 21, 2016 - Cal.Rptr.3d - 2016 WL 5121829**

Patient brought action against health care district’s hospital for medical malpractice.

The Superior Court sustained demurrer without leave to amend. Patient appealed.

The Court of Appeal held that:

- Patient’s general allegation was sufficient to plead compliance with the claims presentation requirement of Government Claims Act, and
- Patient’s allegation that she served a claim on health care district’s hospital under the Act “on or at” a particular date was not so ambiguous as to be inconsistent.

Patient’s general allegation, on a Judicial Council form, that had she complied with applicable claims statutes was sufficient to plead compliance with the claims presentation requirement of the Government Claims Act, for patient’s medical malpractice claim against a health care district’s hospital, even though patient’s allegation did not include the word “timely.”

Patient’s allegation that she served a claim on health care district’s hospital under the Government Claims Act “on or at” a particular date was not so ambiguous as to be inconsistent with patient’s general allegation of compliance with the claims presentation requirements of the Act, since patient’s general allegation of compliance could be true even if she served a claim “on or at” the date she alleged.

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## **EMINENT DOMAIN - COLORADO**

### **[Department of Transportation v. Amerco Real Estate Company](#)**

**Supreme Court of Colorado - September 26, 2016 - P.3d - 2016 WL 5375508 - 2016 CO 62**

State department of transportation brought petition in condemnation in connection with highway expansion project.

The District Court denied motion by owner and occupant of subject property to dismiss petition and granted department's motion for immediate possession of property. Owner and occupant petitioned for relief. The Supreme Court issued rule to show cause.

The Supreme Court of Colorado held that general authorization by transportation commission, to the extent it purported to delegate to transportation department the choice of particular properties to be taken for a project to alter a state highway and the manner of their taking, constituted an unlawful delegation of the commission's statutorily imposed obligation.

Commission's enabling legislation contemplated that it alone must decide whether the public interest or convenience would be served by a proposed alteration of a state highway, and that decision must be made in consideration of, among other things, the portions of land of each landowner to be taken for that purpose and an estimate of the damages and benefits accruing to each landowner whose land may be affected thereby.

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## **MUNICIPAL ORDINANCE - FLORIDA**

### **[Classy Cycles, Inc. v. Bay County](#)**

**District Court of Appeal of Florida, First District - September 28, 2016 - So.3d - 2016 WL 5404205**

Operator of motor vehicle rental businesses brought action against county and city, seeking declaratory judgment that county and city ordinances relating to rental of certain motor vehicles exceeded the scope of authority of local governments and damages for lost revenue because businesses could not fully operate due to inability to obtain required insurance.

The Circuit Court granted summary judgment in favor of county and city. Operator appealed.

The District Court of Appeal held that:

- Ordinances requiring safety vest while operating rental motor scooter were expressly preempted;
- Ordinances requiring insurance for businesses renting motor scooters were expressly preempted;
- Ordinances requiring insurance were an attempt to regulate in an area well-covered by existing statutes and, thus, were impliedly preempted; and
- Ordinances did not constitute "temporary or experimental regulations" to address "special conditions," and thus did not fall within statutory exception to preemption.

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## **IMMUNITY - ILLINOIS**

### **[Corbett v. County of Lake](#)**

**Appellate Court of Illinois, Second District - September 23, 2016 - N.E.3d - 2016 IL App (2d) 160035 - 2016 WL 5358017**

Bicyclist injured while riding bicycle on bike path brought action against county and city, alleging that they were liable for defects in bike path.

The Circuit Court granted summary judgment in favor of defendants on grounds of immunity under

Local Governmental and Governmental Employees Tort Immunity Act. Bicyclist appealed.

The Appellate Court held that paved bicycle path in developed city park was not a riding “trail” within meaning of Act.

Paved bicycle path in developed city park was not located within a forest or mountainous region, and thus was not a riding “trail” within meaning of statute providing local governments immunity in connection with injuries caused by the condition of such trails. Bike path was bordered merely by narrow bands of greenway containing shrubs and a few trees, and was surrounded by industrial development, residential neighborhoods, parking lots, railroad tracks, and major vehicular thoroughfares.

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## **PENSIONS - ILLINOIS**

### **[Underwood v. City of Chicago](#)**

**Appellate Court of Illinois, First District, First Division - September 21, 2016 - N.E.3d - 2016 IL App (1st) 153613 - 2016 WL 5239868**

City retirees filed state court action alleging that reduction in their health care benefits violated state constitution and Contracts Clause.

After removal, the United States District Court dismissed complaint, and retirees appealed. The United States Court of Appeals vacated and remanded. On remand, the Circuit Court denied retirees’ motion for a preliminary injunction, and granted city’s motion to dismiss with regard to retirees’ contract and estoppel counts. Retirees appealed.

The Appellate Court held that:

- City retirees had no ascertainable claims to lifetime health care benefits under time-limited Pension Code amendments;
- Evidence was sufficient to support finding that retirees could not demonstrate a likelihood of success on the merits of their claim that the city’s plan was a diminishment of anything they were entitled to, as required for the issuance of a preliminary injunction against city;
- City annuitant’s handbook did not create a right to lifetime medical benefits for city retirees; and
- Retirees failed to demonstrate that they could overcome the statute of frauds, or any express act by the city or any of its authorized representatives to bind city to a commitment to provide retirees with lifetime medical benefits, as required to allow for the extraordinary relief of enjoining the city from phasing out plan on retirees’ health care coverage.

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## **LIABILITY - ILLINOIS**

### **[Perez v. Chicago Park Dist.](#)**

**Appellate Court of Illinois, First District, Second Division - September 13, 2016 - N.E.3d - 2016 IL App (1st) 153101 - 2016 WL 4772481**

Park visitor, who was injured by fireworks illegally set off by other visitors, brought action against city park district.

The Circuit Court granted park district’s motion to dismiss, and visitor appealed.



The Appellate Court held that:

- Fireworks were an activity on the property, not a condition;
- Park district had no duty to supervise park visitors who set off fireworks;
- Fireworks were not “conducted” by park district; and
- Park visitor forfeited her right to have review denial of motion to file a fourth amended complaint.

Fireworks set off illegally by people in park were an activity on the property, not a condition of the property, in determining whether city park district was liable for injuries sustained by park visitor injured by the fireworks under statute allowing an individual to bring action against public entities for willful and wanton conduct that creates a condition that causes an injury on property used for recreational purposes.

Fireworks that were illegally set off by park visitors and that injured park guest were not “conducted” by city park district, precluding liability of park district under the statute making a public entity liable for wanton and willful conduct in conducting a hazardous recreational activity on public property.

Park visitor, who was injured by fireworks set off illegally in park, forfeited her right to have Appellate Court review denial of her motion to file fourth amended complaint in her action against city park district. Visitor failed to include the amended complaint in the record on appeal, and the record contained no transcript of the proceedings on park visitor’s oral motion to amend.

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## **EMPLOYMENT - NEW YORK**

### **Pilla v. Karnsomtob**

**Supreme Court, Appellate Division, Second Department, New York - September 26, 2016 - N.Y.S.3d - 2016 WL 5348237 - 2016 N.Y. Slip Op. 06142**

Village board of trustees sought judgment declaring that its determination regarding elimination of firefighter positions was not subject to a permissive referendum, or, in the alternative, sought to invalidate referendum petitions.

The Supreme Court, Westchester County, declared that board’s determination was subject to permissive referendum and invalidated referendum petitions. Board appealed and respondents cross-appealed.

The Supreme Court, Appellate Division, held that:

- Board’s decision to eliminate firefighter positions was subject to permissive referendum, and
- Respondents’ failure to include each signer’s election district in referendum petitions rendered petitions invalid.

Village board of trustee’s decision to eliminate all eight paid firefighter positions in village fire department was subject to permissive referendum, pursuant to Village Law regarding abolition of fire departments, despite reference in Village Law to such “voluntary fire department,” and despite fact that board eliminated only paid firefighter positions. First sentence of relevant Village Law indicated that legislature contemplated that village fire departments could consist of both volunteer and paid firefighters.

Respondents’ failure to include in referendum petitions, which sought to challenge village board of

trustee's decision to eliminate all paid firefighter positions, each signer's election district, rendered referendum petitions invalid under Village Law regarding referendum petitions. Although legislature had evidenced an intent to remove technicalities that deprived citizens of ballot access by removing election district requirement from Election Law, legislature did not make similar change to Village Law regarding referendum petitions.

Respondents' failure to include in referendum petitions, which sought to challenge village board of trustee's decision to eliminate all paid firefighter positions, each signer's election district, rendered petitions invalid under Village Law regarding referendum petitions, which permitted substantial rather than strict compliance with details of form but required strict compliance with matters of prescribed content of petitions. Failure to include signer's election districts was a defect in the prescribed content of the petitions, not in the form of the petitions.

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## **EMINENT DOMAIN - NEW YORK**

### **[730 Equity Corp. v. New York State Urban Development Corp.](#)**

**Supreme Court, Appellate Division, Second Department, New York - September 21, 2016 - N.Y.S.3d - 2016 WL 5107963 - 2016 N.Y. Slip Op. 06086**

Condemnee brought action against condemnor seeking compensation arising from the taking of condemnee's real property.

Following bench trial, the Supreme Court, Kings County, awarded just compensation. Condemnor appealed.

The Supreme Court, Appellate Division, held that:

- Reasonable probability existed that condemnee's real property, which was located in manufacturing district, would have been rezoned to permit commercial uses along with residential and community facility uses, and
- Highest and best use of condemnee's real property following rezoning was 12-story budget hotel.

Reasonable probability existed that condemnee's real property, which was located in manufacturing district, would have been rezoned to permit commercial uses along with residential and community facility uses, and thus, potential uses of the property were not limited to uses permitted by zoning regulations at the time of the taking when determining just compensation award to condemnee. Although rezoning immediate area would result in certain nonconforming uses, the property and its surrounding blocks comprised section of outdated manufacturing zoning with large area of residential and commercial rezonings, and city policy was to rezone underutilized industrial sites to allow for commercial or residential development.

Highest and best use of condemnee's real property following rezoning to permit commercial, residential, and community facility uses was 12-story budget hotel, as used to determine just compensation award to condemnee. Lease on the property did not prohibit finding different highest and best use than contemplated in the lease, and condemnee's expert provided alternate designs for hotel that would meet zoning requirements and evidence of increased demand for and development of hotels in the area around vesting date.

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## **UTILITIES - SOUTH DAKOTA**

### **[Brant Lake Sanitary Dist. v. Thornberry](#)**

**Supreme Court of South Dakota - September 28, 2016 - N.W.2d - 2016 WL 5637019**

Sanitary district brought action against landowners seeking to enjoin them from using their property until they connected their dwelling to a sewer line.

The Circuit Court entered summary judgment in favor of landowners. Sanitary district appealed.

The Supreme Court of South Dakota held that ordinance requiring connection to a sewer line did not apply to landowners, who were subject to "grandfather" clause providing that ordinance did not apply to existing houses "not currently required" to be connected.

Language "not currently required" referred to the time at which the ordinance was enacted, rather than to those property owners who had not yet received notice to connect to sewer line.

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## **SPECIAL ASSESSMENT LIENS - VIRGINIA**

### **[Cygnus Newport-Phase 1B, LLC v. City of Portsmouth](#)**

**Supreme Court of Virginia - September 22, 2016 - S.E.2d - 2016 WL 5239588**

Property owner brought action against city and community development authority, alleging that a special assessment lien, recorded after a deed of trust, was extinguished by the foreclosure sale and that the special assessments were void.

The Circuit Court granted the pleas in bar and dismissed the complaint. Owner appealed.

The Supreme Court of Virginia held that:

- Special assessment liens have priority over previously recorded deeds of trust;
- Special assessment lien was enforceable against property owner; and
- Owner's belated challenge to special assessments was foreclosed.

Special assessment lien was enforceable against property owner after foreclosure sale on deed of trust, even though deed of trust was recorded before lien, where city filed in deed book of circuit court clerk's office an abstract of ordinance authorizing improvements, which made lien enforceable against any person deemed to have had notice of assessment, and owner had notice of assessment and lien when it acquired deed of trust and property at foreclosure.

State constitution and code foreclosed property owner's belated challenge to special assessments on property that owner acquired following foreclosure sale on deed of trust. Owner acquired its interest long after assessment agreement with former owner had been finalized and recorded, assessments approved and recorded, and bonds issued, owner filed suit approximately nine years after special assessments were imposed and bonds issued, and state constitution and code did not contemplate endless challenges from subsequent purchasers who bought property with notice of existence of assessment, notice of agreement with former owner, and notice of what infrastructure had been constructed.

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## EMERGENCY MANAGERS - MICHIGAN

### [\*\*Phillips v. Snyder\*\*](#)

**United States Court of Appeals, Sixth Circuit - September 12, 2016 - F.3d - 2016 WL 4728026**

Voters and local elected officials from areas with emergency managers brought action challenging the constitutionality of Michigan's Local Financial Stability and Choice Act, a statute allowing for the temporary appointment of an emergency manager for a municipality or public school system facing financial crisis.

The United States District Court granted defendants' motion to dismiss, and plaintiffs appealed.

The Court of Appeals held that:

- Plaintiffs had standing to bring action;
- Voters do not have a substantive due process right to vote for the individuals exercising legislative power at the local level;
- Claims brought under the Guarantee Clause are nonjusticiable political questions;
- The Act did not violate the Equal Protection Clause;
- Section 2 of the Voting Rights Act (VRA) did not provide plaintiffs an avenue for recovery;
- The enactment of the Act was not an instance of viewpoint discrimination; and
- The Act did not violate the Thirteenth Amendment.

Voters and local elected officials from areas with emergency managers had standing to challenge constitutionality of Michigan's Local Financial Stability and Choice Act, a statute allowing for temporary appointment of emergency managers for municipalities or public school systems facing financial crisis. Cities and school districts in which plaintiffs lived were under emergency managers when complaint was filed, such that they allegedly suffered constitutional deprivations that residents elsewhere did not suffer, that is, "concrete and particularized" injuries that affected them in personal and individualized ways, injury was ongoing and thus actual and imminent as opposed to conjectural or hypothetical, alleged deprivations would be redressed by decision favorable to plaintiffs, and though cities were no longer governed by emergency managers, they were now governed by receivership transition advisory boards (TABs) provided for by Act, which limited powers of local elected officials.

Voters do not have a substantive due process right to vote for the individuals exercising legislative power at the local level; rather, states have "absolute discretion" in allocating powers to their political subdivisions and therefore to the officers running those subdivisions, and so may allocate the powers of subsidiary bodies among elected and non-elected leaders and policymakers.

Claims brought under the Guarantee Clause are nonjusticiable political questions; it is up to the political branches of the federal government to determine whether a state has met its federal constitutional obligation to maintain a republican form of government.

Michigan's Local Financial Stability and Choice Act, a statute allowing for the temporary appointment of an emergency manager for a municipality or public school system facing financial crisis, did not violate the Equal Protection Clause. The Act, which gave vast powers to emergency managers to deal with the problems of financially distressed localities, was rationally related to the legitimate legislative purpose of improving the financial situation of a distressed locality.

Michigan's Local Financial Stability and Choice Act, allowing for temporary appointment of

emergency managers for municipalities or public school systems facing financial crisis, did not violate the Equal Protection Clause by discriminating against entities already having “emergency financial managers” (EFM) from prior statute. Although, under the Act, EFM appointed under prior statute who was still serving when Act took effect was deemed to be emergency manager under the Act, was subject to Act’s 18-month provision, and would effectively remain in place longer than emergency manager who was appointed for first time under new law, this different treatment was justified, as 18-month limitation on removal was rational because managers in place before Act took effect had much less power, giving them time to adjust to new, broad powers was legitimate interest, and giving them same 18 months as other emergency managers to work with those powers was rationally related to that interest.

In assessing equal protection challenge to Michigan’s Local Financial Stability and Choice Act, which allowed for temporary appointment of emergency managers for municipalities or public school systems facing financial crisis, there was no basis for applying stricter scrutiny than rational basis review. Although plaintiffs challenging Act argued that statute violated the Equal Protection Clause by denying their right to vote and by conditioning their vote on wealth, Act did not in fact impair their right to vote, as it did not remove local elected officials but simply vested the powers of the local government in an emergency manager, plaintiffs did not show that they had been denied the right to vote on equal footing within their respective jurisdictions, and Act’s alleged wealth discrimination, without the involvement of some other fundamental right or suspect category, did not require scrutiny any closer than rational basis scrutiny.

Section 2 of the Voting Rights Act (VRA) does not cover appointive systems and, thus, did not provide an avenue for recovery for plaintiffs challenging Michigan’s Local Financial Stability and Choice Act, a statute allowing for temporary appointment of emergency managers for municipalities or public school systems facing financial crisis. Case was not one involving a voting qualification or prerequisite to voting or standard, practice, or procedure resulting in the denial of a right to vote.

Michigan’s Local Financial Stability and Choice Act, a statute allowing for temporary appointment of emergency managers for municipalities or public school systems facing financial crisis, did not violate the Thirteenth Amendment. Plaintiffs did not challenge the label of “financial emergency” attached to their localities, and there was no sufficiently direct connection to race in the Act that could amount to something comparable to the odious practice the Thirteenth Amendment was designed to eradicate, but, instead, the state’s remedy for financially endangered communities, which was passed by state-elected bodies for which African-Americans had a constitutionally protected equal right to vote, and was facially entirely neutral with respect to race, was far removed from being a “badge” of the extraordinary evil of slavery.

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## **MUNICIPAL ORDINANCE - NEW YORK**

### **[Panattieri v. City of New York](#)**

**Supreme Court, New York County, New York - August 30, 2016 - N.Y.S.3d - 2016 WL 4691555 - 2016 N.Y. Slip Op. 26283**

Dog owners, whose pet dog was seized after killing a dog and injuring its owner, brought article 78 proceeding challenging seizure, alleging that city code governing dangerous animals was pre-empted by state law, and seeking declaration that determination of city department of health and mental hygiene (DOHMH) to execute their dog was unconstitutional.

The Supreme Court, New York County, held that city code governing dangerous animals was not

preempted by state statute governing dangerous dogs.

City code governing dangerous animals was not preempted by state statute governing dangerous dogs, since statute governing licensing, identification, and control of dogs expressly allowed municipalities to enact their own rules governing dangerous dogs provided their program was not less stringent than state program, and city's code incorporated standards that were as or more protective of public health and safety as those set forth in statute.

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## **ANNEXATION - NORTH DAKOTA**

### **[New Public School Dist. No. 8 v. State Bd. of Public School Educ.](#)**

**Supreme Court of North Dakota - August 17, 2016 - 883 N.W.2d 460 - 2016 ND 163**

School district appealed State Board of Public School Education's decision approving annexation of certain real properties to another school district.

The Northwest Judicial District Court affirmed the Board's decision, and school district appealed.

The Supreme Court of North Carolina held that eligibility requirements for annexation by a school district were met when the annexations became effective, even though the real properties to be annexed were not contiguous with the school district at the time the annexation petition was heard.

Statutory eligibility requirements for annexation by a school district were met when the annexations became effective, even though the real properties to be annexed were not contiguous with the school district at the time the annexation petition was heard. The properties to be annexed were contiguous to other property which was contiguous to the school district, to which annexation had previously been approved, and annexation of all of the properties became effective on the same date.

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## **EMINENT DOMAIN - OHIO**

### **[Gordon Cox, et al., Plaintiffs v. State of Ohio, et al., Defendants](#)**

**United States District Court, N.D. Ohio, Western Division - August 29, 2016 - Slip Copy - 2016 WL 4507779**

In 2012, Ohio exempted specified pipeline companies from regulatory scrutiny by the Ohio Power Siting Board. As a result, a company like the defendant, Kinder Morgan Utopia LLC, that intends to build such a pipeline may select the pipeline's route and initiate eminent-domain proceedings to acquire the necessary easements and rights-of-way - all without oversight from any Ohio governmental or regulatory body.

Three property owners in Wood County, Ohio - received notices from Kinder Morgan that the company intends to acquire, whether by voluntary agreement or a state-court appropriation action, easements across their properties. The landowners, who have refused to grant the easements voluntarily, argue that the delegation of eminent-domain power to Kinder Morgan is an impermissible delegation of legislative authority and, as such, violates the Due Process Clause of the Fourteenth Amendment.

Landowners moved for a preliminary injunction.

The District Court denied the motion, finding that landowners were unlikely to prevail on the merits and had not established an irreparable injury.

"I conclude that plaintiffs are unlikely to prevail on their impermissible-delegation claim. This is because the courts of Ohio will undertake judicial review of Kinder Morgan's exercise of its eminent-domain powers. That means that the company cannot take property over an objection without obtaining judicial approval of the appropriation."

"Because Ohio law does not delegate that kind of "final" legislative power to Kinder Morgan, plaintiffs are unlikely to prevail on their nondelegation claim."

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## **ELECTIONS - OHIO**

### **[State ex rel. Ganoom v. Franklin Cty. Bd. of Elections](#)**

**Supreme Court of Ohio - September 16, 2016 - N.E.3d - 2016 WL 5221159 - 2016 -Ohio-5864**

Candidate filed petition for writ of mandamus to compel city to conduct election to fill seat on city council.

The Supreme Court of Ohio held that:

- Personal knowledge affidavit was adequate;
- Delay in filing personal knowledge affidavit did not prejudice city; and
- City charter required vacant city council seat to be filled through election, rather than appointment.

Personal knowledge affidavit included with petition for writ of mandamus seeking to compel election for vacant city council seat was not deficient due to failure to include specifics of claim in affidavit, where there were no additional details for candidate to submit by way of affidavit, rather, case presented single, discrete question of law of whether city charter required an election.

Candidate's one-day delay in filing affidavit of personal knowledge along with petition for writ of mandamus seeking to compel election for vacant city council seat did not prejudice city, where parties understood and briefed the single legal issue and the affidavit provided no additional legal or factual information.

City charter required an election for vacated city council seat, rather than permitting city council to appoint replacement for remainder of term. Charter tied the duration of the appointment to the next general election, suggesting that the intent was to fill the seat at that next election, and permitting city council to fill vacant seat by appointment multiple times would have lead to an absurd result.

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## **REFERENDUM - OHIO**

### **[State ex rel. Jacquemin v. Union Cty. Bd. of Elections](#)**

**Supreme Court of Ohio - September 19, 2016 - N.E.3d - 2016 WL 522401 - 2016 -Ohio-5880**

Objectors filed petition for writ of mandamus seeking to prevent referendum regarding zoning



amendment from appearing on ballot.

The Supreme Court of Ohio held that summary contained in referendum petition was misleading, and therefore petition was invalid.

Summary of resolution's contents contained in referendum petition regarding proposed zoning amendment was misleading, and therefore petition was invalid, where summary stated incorrect intersection when listing nearest intersection to property at issue.

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## **EMINENT DOMAIN - SOUTH CAROLINA**

### **[Dominion Carolina Gas Transmission, LLC v. Acres](#)**

**United States District Court, D. South Carolina, Columbia Division - August 24, 2016 - Slip Copy - 2016 WL 4475032**

Dominion Carolina Gas Transmission, LLC (DCGT) was granted certain eminent domain powers pursuant to the Natural Gas Act ("NGA") and the applicable Federal Energy Regulatory Commission (FERC) Certificate order in connection with its pipeline project.

DCGT moved for partial summary judgment as to its right to condemn certain easements after negotiations with the applicable landowners failed.

The District Court granted the motion, holding that:

- DCGT's unsuccessful two-year effort to obtain the easements satisfied the FERC negotiation requirement; and
- Any contention by landowners that DCGT was not in compliance with the FERC Certificate order is not properly raised as a defense in this action but rather must be made to the FERC.

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## **DEVELOPMENT - CALIFORNIA**

### **[Citizens for Ceres v. City of Ceres](#)**

**Court of Appeal, Fifth District, California - September 12, 2016 - Cal.Rptr.3d - 2016 WL 4733253**

Objector petitioned for writ of mandate challenging city's approval of shopping center construction project under California Environmental Quality Act (CEQA).

The Superior Court denied the petition but denied the shopping center developer's request for an award against the objector of the cost of reimbursing the city for the city's outside counsel's preparation of the administrative record. Objector and developer appealed.

The Court of Appeal held that developer was eligible to recover the cost of reimbursing the city for preparation of the administrative record.

A shopping center developer that reimbursed a city for the city's outside counsel's preparation of the administrative record for objector's unsuccessful California Environmental Quality Act (CEQA) challenge to the city's approval of the development was eligible to recover the cost of reimbursing the city from the objector, subject to the trial court's power to reduce unreasonable costs, since the developer was a prevailing party under CEQA.

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## **PRIVATE ACTIVITY BONDS - FLORIDA**

### **Indian River County v. Rogoff**

**United States District Court, District of Columbia - August 16, 2016 - F.Supp.3d - 2016 WL 4385776**

Two counties brought action against the Department of Transportation (DOT) and DOT officials, alleging that DOT's authorization of tax-exempt private activity bonds (PAB) supporting construction and operation of railway violated various federal statutes.

After owner and operator of railway project intervened as defendant, defendants moved to dismiss for lack of subject matter jurisdiction and for failure to state claim.

The District Court held that:

- Counties suffered redressable injury;
- Counties adequately alleged the existence of major federal action; and
- County was not within zone of interests protected or regulated by section of Internal Revenue Code dealing with tax-exempt bonds.

There was substantial likelihood that operator of railway construction project would not proceed with project if Department of Transportation (DOT) did not support project with tax-exempt private activity bonds (PAB), and thus counties, through which portion of railway would run, suffered redressable injury, as required for them to have Article III standing in their action challenging DOT's decision under various federal statutes including NEPA. Operator did not have alternative financing plan in place beyond PAB-financing, operator had only invested about 13% of total estimated capital cost of second phase of project that would run through counties, and project was likely not financially viable through conventional taxable debt financing.

Counties, which challenged authorization of tax-exempt private bonds (PAB) by Department of Transportation in support of construction project of railway that would travel through counties, adequately alleged the existence of major federal action, as required to state claim that DOT failed to conduct environmental review of project as required under NEPA. PAB-financing would enable operator of project to finance about 50% of overall estimated cost of project, DOT required operator to undertake mitigation measures as condition of PAB-financing, and DOT's authorization of PAB-financing was not conceptually distinct from an agency providing a loan to a project, which had been determined to amount to major federal action, especially given that federal government chose to forgo large amounts of tax revenue by authorizing PAB-financing, likely resulting in ultimately greater cost to taxpayers than in the loan context.

County, through which railway was planned to be constructed, was not within zone of interests protected or regulated by section of Internal Revenue Code that allowed for tax-exempt bonds to be issued when their proceeds are used to fund certain types of projects, and thus county could not bring Administrative Procedure Act (APA) challenge alleging that decision of Department of Transportation (DOT) to authorize tax-exempt private activity bonds (PAB) to finance railway construction project violated Internal Revenue Code section. Section was created to create tax benefit to support certain construction projects, and had nothing to do with county's asserted environmental and public safety interests.

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## **ANNEXATION - KENTUCKY**

### **[City of Mayfield v. Kennemore](#)**

**Court of Appeals of Kentucky - August 5, 2016 - Not Reported in S.W.3d - 2016 WL 4256898**

In late 2015, the city of Mayfield passed two ordinances allowing it to annex properties owned by the Graves County Board of Education. In a letter sent to the Mayor of Mayfield on January 5, 2016, an attorney representing the Board objected to the annexation. The Board considered the letter to be its notice to the City that it was petitioning for a referendum on the annexation, to be certified by the Graves County Clerk and brought for a vote in the November general election. In response, the City filed a declaratory judgment action against the Clerk and sought an injunction to prevent the Clerk from certifying the petition. The Board, to protect its interests, filed a motion to intervene.

The Circuit Court entered an order granting intervention, denying injunctive relief, and declaring that the petition had been properly submitted. It ordered the Clerk to certify the petition and place the question of annexation on the ballot in the general election. The Circuit Court reasoned that the Board could not meet the requirements of KRS 65.012 since it has no date of birth, no address, and is not a registered voter in the area to be annexed. However, it did find that the Board properly filed a petition under KRS 81A.420, which allows property owners, as well as residents of the affected area, to petition for a referendum. Acknowledging the conflict between the statutes regarding the requirements for a valid petition, the court found KRS 81A.420 more specifically addressed a petition for a referendum on an annexation. The City appealed.

The Court of Appeals held that:

- The Board's motion to intervene was rightly granted, but;
- Reversed the Circuit Court's order denying the City's request to prohibit the Graves County Clerk from certifying the petition for a referendum.

The Court found that KRS 65.012 controlled, not KRS 81A.420. Because the Board could not follow the requirements of KRS 65.012 (i.e. date of birth, address, registered voter in the area to be annexed), the petition was void and the clerk could not certify it for placement on the November ballot.

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## **BONDS - NEW YORK**

### **[FMS Bonds, Inc. v. Bank of New York Mellon](#)**

**United States District Court, S.D. New York - July 28, 2016 - Slip Copy - 2016 WL 4059155**

Around 1994, the former General Motors Corporation ("GM") sought to build a sewage disposal facility in Warren, Ohio, and negotiated with the County of Trumbull, Ohio (the "Issuer") regarding the issuance of a series of industrial revenue bonds (the "Bonds") in order to finance the project.

On July 1, 1994, the Issuer and GM entered into a written agreement pursuant to which the Issuer would loan GM proceeds to fund the construction project (the "Loan Agreement"). The proceeds loaned under the Loan Agreement were generated by the offering and sale of the Bonds in the aggregate principal amount of \$2.75 million. The Bonds were issued pursuant to a written Indenture of Trust (the "Indenture"), as executed between the Issuer and an Indenture Trustee (the "Trustee"), Dai-ichi Kango Trust Company of New York ("DKT"). In 1999, DKT was succeeded as Trustee by

JPMorgan Chase Bank (“JPMC”). Seven years later, on October 1, 2006, the predecessor to Defendant BNY Mellon would succeed JPMC as Trustee.

Plaintiffs are bondholders owning 92.73% of the Bonds issued, which they acquired in October 2009. They allege that the Loan Agreement and the Indenture “contain frequent reference to the other and were intended to be read together,” and that, together, those two agreements “required GM to repay with periodic interest the \$2,750,000 aggregate amount of the Bonds to the Trustee” on behalf of the Issuer and, ultimately, the bondholders.

On January 1, 1999, GM and Delphi Automotive Systems LLC (“Delphi”) entered into a written agreement (the “1999 Agreement”) under which Delphi assumed GM’s obligations to make payments under the Bonds to the Trustee. The 1999 Agreement purported to assign the Loan Agreement in full to Delphi, but the Trustee was not a party to the 1999 Agreement, and Plaintiffs allege that the Trustee never consented to such an assignment, and that neither GM nor Delphi sought to comply with the provision of the Loan Agreement requiring the Trustee to consent to any assignment. Nevertheless, Plaintiffs allege that, upon learning of the 1999 Agreement, the Trustee should have known that it was an “intended third-party beneficiary” of the 1999 Agreement. Critically, upon execution of the 1999 Agreement, Delphi honored its payment obligations to the Trustee for at least the next ten years.

Delphi filed a petition for relief under Chapter 11 of the Bankruptcy Code in 2005. The bar date for creditors to file a proof of claim in the Delphi Bankruptcy was July 31, 2006 (the “Delphi Bar Date”). The Delphi Bankruptcy concluded in August 2009. The Trustee did not file a proof of claim in the bankruptcy case, timely or otherwise. In August 2008, Delphi entered into a Master Restructuring Agreement with GM (the “Delphi-GM MRA”), pursuant to which Delphi “agreed to perform certain of its existing contractual obligations to GM, including paying GM’s obligations to the Trustee in respect of the Bonds.” The Delphi-GM MRA contained an express “no third-party beneficiary” provision, however, and in any event, Delphi and GM entered into a subsequent agreement pursuant to which Delphi’s obligations to GM were resolved and extinguished.

GM filed a petition for relief under Chapter 11 of the Bankruptcy Code in June 2009 (the “GM Bankruptcy”). The bar date for creditors to file a proof of claim in the GM Bankruptcy was November 30, 2009 (the “GM Bar Date”). The Trustee did not file a proof of claim with respect to the Bonds, and GM’s obligations to the Trustee under the Bonds were not scheduled as GM obligations in GM’s bankruptcy filings.

But the Trustee contended that the Bonds were not listed because, by that point, they were a direct obligation of Delphi’s—indeed, as the Trustee notes, Delphi made an interest payment to the Trustee on July 1, 2009, a payment that, had GM attempted to make it, would have been precluded by the automatic stay then in place due to the GM Bankruptcy.

On July 8, 2009, the Bankruptcy Court approved an Asset Sale Plan (the “New GM Plan”). Neither the New GM Plan nor any other order from the Bankruptcy Court required the new GM to assume any obligation as to the Trustee in respect of the Bonds. At the closing of the GM bankruptcy case, GM’s obligations in respect of the Bonds were discharged and the Bonds thereby rendered worthless.

On January 2, 2010, Delphi failed to make an interest payment due on the Bonds and informed the Trustee that Delphi would not make any further the interest payment because Delphi was obligated “only to the extent that General Motors Corporation is obligated to make such payments,” and since the GM Bankruptcy discharged all obligations GM owed to the Trustee, Delphi no longer had to pay on an underlying GM obligation that no longer existed.

Pursuant to section 8.4 of the Indenture, Plaintiffs executed a Direction & Indemnity Agreement (the "D&I Agreement") on November 17, 2011. The D&I Agreement instructed the Trustee to seek an order from the Delphi Bankruptcy Court authorizing the Trustee to commence an action against Delphi seeking the outstanding principal and interest due under the Bonds, or in the alternative, if such relief was denied, to file late proofs of claim in the Delphi Bankruptcy (the "Instruction"). Further, pursuant to sections 9.1(l) and (o) of the Indenture, Plaintiffs agreed to indemnify the Trustee "on demand" for any losses, liabilities, costs, and expenses related to the Trustee's compliance with the Instruction. The indemnity provision specifically covered breaches of fiduciary duty "as a result of relying upon and complying with the Instruction," but did not cover losses resulting from the Trustee's "gross negligence or willful misconduct."

On November 15, 2010, Delphi moved the Bankruptcy Court that adjudicated the Delphi Bankruptcy to enjoin the Trustee from taking any action against Delphi regarding payment on the Bonds. On December 10, 2010, the Bankruptcy Court ruled in Delphi's favor and enjoined the Trustee from seeking payment from Delphi without prior authorization of the Bankruptcy Court.

Plaintiffs filed this suit against the Trustee on November 30, 2015, ultimately alleging three causes of action: (1) breach of contract (the Indenture) for failure to file a timely proof of claim in the GM Bankruptcy, (2) breach of contract (the Indenture) for failure to file a timely proof of claim in the Delphi Bankruptcy, and (3) breach of fiduciary duty for seeking further indemnification in order to rectify the Trustee's own mistakes and negligence. Trustee moved to dismiss.

The District Court held that:

- General issues of material fact existed as to whether the Trustee acted prudently in failing to file a timely proof of claim in the GM Bankruptcy, precluding summary judgment;
- Plaintiffs' breach of contract cause of action for failure to file a timely proof of claim in the Delphi Bankruptcy was time-barred, as the cause of action accrued on the Delphi Bar Date, more than six years prior to this action;
- General issues of material fact existed as to whether the Trustee breached its fiduciary duty by seeking further indemnification in order to rectify the Trustee's own mistakes and negligence (notwithstanding the the indemnification provision of the D&I Agreement), precluding summary judgment; and
- Plaintiffs could pursue punitive damages, but only as to the breach of fiduciary duty for seeking further indemnification in order to rectify the Trustee's own mistakes and negligence claim.

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## **IMMUNITY - OHIO**

### **Milbert v. Wells Twp. Haunted House, Inc.**

**Court of Appeals of Ohio, Seventh District, Jefferson County - September 2, 2016 - Slip Copy - 2016 WL 4594241 - 2016 -Ohio- 5643**

Plaintiff Elizabeth Milford filed a premises liability suit against Wells Township Haunted House, Inc. and Wells Township Board of Trustees after she was injured on a haunted house ride.

The township claimed political subdivision immunity. Specifically, the township asserted there was no evidence its employees were negligent in performing the proprietary function of operating a haunted house.

The Common Pleas Court denied the Township's motion for summary judgment and Township appealed.

The Court of Appeals affirmed, noting that, in addition to operating the haunted house, the township designed and constructed a swinging coffin ride which ejected the plaintiff after the coffin lid opened prematurely. The township admitted this failure was due to a bolt which became loose.

The plaintiff submitted an affidavit wherein a safety consultant opined the lid opening was foreseeable due to the use of an ungraded eye bolt and the design by which the release mechanism traveled across the eye bolt securing the lid.

The Court held that reasonable minds could differ on the question of whether a township employee negligently designed and constructed the ride which resulted in a hazardous condition. Therefore, the trial court's denial of the township's request for summary judgment was upheld.

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## **PUBLIC UTILITIES - OHIO**

### **[In re Application of Buckeye Wind, L.L.C.](#)**

**Supreme Court of Ohio - September 7, 2016 - N.E.3d - 2016 WL 4699153 - 2016 -Ohio-5664**

After obtaining certificate for construction of wind farm, developer filed application to amend certificate. Following hearing on two of proposed changes, the Power Siting Board approved application to amend certificate and then denied request by county and townships for rehearing. County and townships appealed.

The Supreme Court of Ohio held that county and townships forfeited appellate review of claim that hearing was warranted on all proposed changes.

Application for rehearing was not appropriate remedy for county to assert, for first time, challenge to Power Siting Board's decision to limit scope of hearing on developer's application to amend certificate for construction of wind farm to two of six proposed changes, and thus, county and townships forfeited appellate review of claim that hearing was warranted on all proposed changes, where ALJ had ruled prior to hearing that three of six proposed changes did not require hearing, county and townships did not object to ALJ's ruling regarding scope of hearing, request reconsideration, or seek interlocutory review, and when neighbors' requested at hearing that hearing include proposed change to bury all electrical lines, ALJ asked county and townships if they had any comment on neighbors' objection, to which they replied "no."

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## **ANNEXATION - SOUTH CAROLINA**

### **[Vicary v. Town of Awendaw](#)**

**Court of Appeals of South Carolina - August 3, 2016 - S.E.2d - 2016 WL 4123978**

The Circuit Court held that the Town of Awendaw's purported annexation of a ten-foot strip of United States Forest Service property was *ultra vires* of the Town's authority, and thus the the Town's subsequent annexations of two tracts failed because those tracts lacked contiguity with the Town.

The Town appealed, arguing that the Court erred in finding that: (1) the South Carolina Coastal Conservation League had standing; (2) the Town never received a proper petition requesting the 2004 annexation; (3) the Town falsely claimed it had a proper petition to annex the United States

Forest Service property; (4) the Town was estopped from asserting a statute of limitations defense; and (5) the statutory time period for challenging the 2004 annexation was tolled.

The Court of Appeals held that the South Carolina Coastal Conservation League lacked standing, either under the public importance exception or as taxpayers challenging government action under the South Carolina Uniform Declaratory Judgment Act.

“We agree with the Town that Respondents lacked standing. Our case law provides that ‘to challenge a 100% annexation, the challenger must assert an infringement of its own proprietary interests or statutory rights,’ and the State of South Carolina is the only non-statutory party which may challenge a municipal annexation. ”

In light of the disposition of the case, the Court deemed it unnecessary to address the Town’s remaining issues.

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## **PENSIONS - ALABAMA**

### **[Boman v. City of Gadsden](#)**

**Supreme Court of Alabama - September 2, 2016 - So.3d - 2016 WL 4585731**

Retired city police officer brought action against city, State Employees’ Insurance Board, and local-government health-insurance plan, seeking in part an injunction requiring city to provide continuing medical care and a judgment for unpaid medical bills due and owing.

The Circuit Court entered injunction and dismissed claims against Board and plan. City appealed. The Supreme Court reversed and remanded with directions. On remand, the Circuit Court issued two orders granting injunctive relief to retired officer. City and members of Board appealed. The Supreme Court reversed and remanded. On remand, the Circuit Court entered summary judgment in favor of city, and retired police officer appealed.

The Supreme Court of Alabama held that:

- Employee handbooks distributed by city to its police officers did not create a contract under which city was obligated to provide retired police officer with lifetime health benefits;
- Doctrine of promissory estoppel did not operate to require city to provide retired police officer with lifetime health benefits; and
- No evidence existed of outrageous conduct on city’s part in refusing to provide retired police officer with lifetime health benefits, as required to support his tort-of-outrage claim.

Employee handbooks distributed by city to its police officers did not create a contract under which city was obligated to provide retired police officer with lifetime health benefits. While some versions of the handbook summarized health benefits provided by city, they applied to active uniformed employees of the city, not retirees, and retirement benefits mentioned in the handbooks regarded pension benefits, and not health-care benefits.

Doctrine of promissory estoppel did not operate to require city to provide retired police officer with lifetime health benefits, when city did not promise to provide him with such benefits.

No evidence existed of outrageous conduct on city’s part in refusing to provide retired police officer with lifetime health benefits, as required to support his tort-of-outrage claim.



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## **ELECTION LAW - ARIZONA**

### **Public Integrity Alliance, Inc. v. City of Tucson**

**United States Court of Appeals, Ninth Circuit - September 2, 2016 - F.3d - 2016 WL 4578366**

Voters and advocacy organization brought action challenging the constitutionality of city's hybrid system for electing members of its city council through staggered ward-level primary elections and at-large general elections.

The United States District Court entered judgment in city's favor, and plaintiffs appealed. The Court of Appeals reversed, and rehearing en banc was granted.

The Court of Appeals, en banc, held that:

- Balancing and means-end fit analysis, rather than traditional rational basis review, was the appropriate standard of review, overruling *Libertarian Party of Washington v. Munro*, 31 F.3d 759, and
- City's hybrid election system did not violate the Equal Protection Clause.

The balancing and means-end fit analysis set forth by *Burdick v. Takushi*, 112 S.Ct. 2059, rather than traditional rational basis review, was the appropriate standard for reviewing whether city's hybrid system for electing its city council members violated the Equal Protection Clause; overruling *Libertarian Party of Washington v. Munro*, 31 F.3d 759.

City's hybrid system for electing its city council members, whereby candidates were nominated in staggered partisan primaries held in each of city's six wards but all residents voted in general election for one council member from each ward that held primary during same election cycle, did not violate Equal Protection Clause. Burden on voters was minimal, as every voter had the equal right to vote in both the primary and general elections, even if every voter could not vote in a primary in every election year, and there was no unequal weighting of votes, discrimination, or impediment to voting, and any such burden was justified by city's interest in ensuring local representation by and geographic diversity among its elected officials.

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## **PUBLIC UTILITIES - CALIFORNIA**

### **California Public Utilities Commission v. Superior Court**

**Court of Appeal, First District, Division 2, California - August 31, 2016 - Cal.Rptr.3d - 2016 WL 4540053**

Requestor filed petition for writ of mandamus and complaint for injunctive and declaratory relief against California Public Utilities Commission (CPUC) for failing to produce documents under Public Records Act (PRA) related to CPUC's investigation of nuclear plant shutdown and subsequent settlement and meeting relating to costs and losses due to shutdown.

CPUC demurred on grounds that the Superior Court lacked subject matter jurisdiction and that requestor had failed to exhaust his administrative remedies.

Following hearing, the Superior Court overruled demurrer. CPUC filed petition for extraordinary writ directing the Superior Court to vacate its order and sustain demurrer.

The Court of Appeal held that as a matter of apparent first impression, trial court had no jurisdiction over requestor's petition, other than to sustain CPUC's demurrer.

Trial court had no jurisdiction over requestor's petition for writ of mandamus seeking to compel California Public Utilities Commission (CPUC) to produce documents under Public Records Act (PRA), other than to sustain CPUC's demurrer without leave to amend on ground that court lacked subject matter jurisdiction over matter. Duty to comply with PRA was an official duty of CPUC within meaning of statute providing that no court, except Supreme Court and Court of Appeal, had jurisdiction to interfere with CPUC in the performance of its official duties, fact that provision of PRA referred to proceedings in trial court did not enlarge jurisdiction of trial court when case was against CPUC, and statute providing for original appellate jurisdiction over applicable claims against CPUC did not limit any right of access, and thus statute was not subject to narrow construction.

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## **BOND ELECTIONS - DELAWARE**

### **[Nichols v. City of Rehoboth Beach](#)**

**United States Court of Appeals, Third Circuit - September 7, 2016 - F.3d - 2016 WL 4651383**

Taxpayer brought action against city challenging special election for approval of bond issue and the resultant issuance of bonds.

The United States District Court for the District of Delaware dismissed. Taxpayer appealed.

The Court of Appeals held that:

- Taxpayer's challenge to bond was insufficient to confer municipal taxpayer standing on her;
- City's expenditure of municipal funds to hold a special election for approval of bond issue was not sufficient to establish municipal taxpayer standing on taxpayer; and
- City's purchase of advertisement in local newspaper to inform voters of special election was not sufficient to establish municipal taxpayer standing on taxpayer.

Municipal taxpayer's challenge to debt incurred by city from \$52.5 million bond issue approved by special election that allegedly violated the Fourteenth Amendment with regard to requirements to vote in election was insufficient to confer municipal taxpayer standing on taxpayer in her action against city, where city did not expend funds from bond on the allegedly illegal elements of the special election.

City's expenditure of municipal funds to hold a special election for approval of bond issue was not sufficient to establish municipal taxpayer standing on taxpayer who sought to challenge certain voting procedures used in special election under Fourteenth Amendment in her action against city, where taxpayer did not assert that city expended funds on the allegedly unconstitutional aspects of the special election, special election itself would have been held regardless of procedures city employed in holding election, causing city to expend the funds regardless of voting requirements used, and funds expended on special election were de minimis.

City's purchase of advertisement in local newspaper to inform voters of special election for approval of bond issue was not sufficient to establish municipal taxpayer standing on taxpayer who sought to challenge certain voting procedures use in special election under Fourteenth Amendment in her action against city, where purported illegality of election procedures had nothing to do with expenditure of funds for advertisement, and cost of advertisement was de minimis.

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## **PUBLIC RECORDS - MARYLAND**

### **[Action Committee for Transit, Inc. v. Town of Chevy Chase](#)**

**Court of Special Appeals of Maryland - September 1, 2016 - A.3d - 2016 WL 4570428**

Public transportation advocacy organization and activist affiliated with organization brought action against town, alleging that the town violated the Maryland Public Information Act (MPIA) when it denied their requests for waivers of fees proposed by town for responding to information requests.

The Circuit Court granted summary judgment in favor of town. Plaintiffs appealed.

The Court of Special Appeals held that:

- Arbitrary and capricious standard of review applied to fee waiver decisions under MPIA;
- Town's decision to deny organization's fee waiver request was arbitrary and capricious; and
- Town's decision to deny activist's fee waiver request was arbitrary and capricious.

The arbitrary and capricious, rather than de novo, standard of review applied to judicial review of town's decision to deny requests for fee waivers made in connection with requests for information under the Maryland Public Information Act (MPIA). De novo review standard for fee waiver disputes under the federal Freedom of Information Act (FOIA) was statutory, and applying the federal statute's prescription that "the court's review of the matter shall be limited to the record before the agency" would burden government units with the obligation of generating a record against the possibility that a dispute will end up in court.

Town's decision to deny fee waiver request made by public transportation advocacy organization in connection with its request for information under the Maryland Public Information Act (MPIA) was arbitrary and capricious. In its response to organization, town failed to explain the reasons for its decision to deny the waiver request, but it was clear that a significant factor, if not the primary factor, in the town's decision was the fact that the organization had previously criticized town officials for their opposition to light rail project, and town was not permitted to base its fee waiver decision on considerations that violated the organization's free speech rights.

Town's decision to deny fee waiver request made by activist, who was associated with public transportation advocacy organization, in connection with his request for information under the Maryland Public Information Act (MPIA) was arbitrary and capricious. Although town, which did not identify any reason for denying activist's request other than his affiliation with the organization, may have reasonably believed that activist, who submitted and withdrew an MPIA request on behalf of organization within hours of submitting his own request, was acting as a proxy for the organization, the town's denial of the organization's fee waiver request was not based on legitimate concerns.

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## **EMIENENT DOMAIN - MINNESOTA**

### **[American Family Insurance v. City of Minneapolis](#)**

**United States Court of Appeals, Eighth Circuit - September 6, 2016 - F.3d - 2016 WL 4608142**

Property insurers for condominium association and basement unit owners brought state-court subrogation action against city to recover for violation of Equal Protection Clause and unlawful takings arising out of water-main break.

Case was removed. The United States District Court for the District of Minnesota entered summary judgment in favor of city. Insurers appealed.

The Court of Appeals held that:

- City's payments to uninsured owners, but not insurers, did not violate Equal Protection Clause, and
- Insurers were required to bring inverse condemnation claim through mandamus action in Minnesota state court before pursuing federal takings claim.

City's decision to pay claims of uninsured property owners flooded by water main break, but not property insurers as subrogees, was rationally related to legitimate government interests in protecting welfare of citizens by minimizing time they were without housing and suffering uncompensated damages and in minimizing city's own costs and litigation risks from sympathetic jurors and, therefore, did not violate Equal Protection Clause.

Property insurers that had paid claims for damage from city water main break were required to bring their inverse condemnation claim through mandamus action in Minnesota state court before pursuing federal takings claim, and, thus, it was not ripe for review by federal court. State court hearing had ability not only to determine whether a taking occurred under the state constitution, but also to determine the monetary value of harm, and that remedy would not be futile.

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## **PUBLIC CONTRACTS - NEW YORK**

### **[Michael R. Gianatasio, PE, P.C. v. City of New York](#)**

**Supreme Court, New York County, New York - August 26, 2016 - N.Y.S.3d - 2016 WL 4522061 - 2016 N.Y. Slip Op. 26270**

Construction company brought action against city, city administration for children's services (ACS), and service provider, asserting claims for breach of contract, quantum meruit, unjust enrichment, and fraudulent inducement, based on allegations that city and ACS failed to pay company full amount owed under two construction contracts.

The Supreme Court, Westchester County, granted city and ACS's motion to change venue to New York County. City, ACS, and provider moved to dismiss, and provider separately moved for sanctions against company.

The Supreme Court, New York County, held that:

- City was not estopped from challenging validity of contracts;
- City could not ratify contracts;
- City and ACS did not fraudulently induce company to enter into contracts;
- Service provider could not be held liable for city's and ACS's breach of contracts;
- Construction company could not maintain unjust enrichment claim against provider; and
- Sanctions against company were not warranted.

City's unlawful failure to abide by requirements of competitive bidding statute and procurement regulations in awarding contracts to construction company, and city's failure to pay company for work done and money outlaid, did not estop city from challenging validity of contracts as illegal; company assumed risk when it entered into contracts with city.

An illegal contract cannot be ratified by a municipality, even if the municipality already made partial

payment and accepted some of the contract's benefits.

City and city administration for children's services (ACS) did not fraudulently induce construction company to enter into contracts that were illegal in that they were awarded in violation of the competitive bidding statute and procurement regulations; at time contracts were executed, ACS intended to pay company, company was paid much of the money due under the contracts, the non-payment arose from subsequent discovery of the contracts' illegality, and company could have, and should have been aware of law requiring contracts to be bit-out and it could thus not justifiably rely on ACS's invitation to work on no-bid contracts.

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## FIRST AMENDMENT RETALIATION - PENNSYLVANIA

### [Feibush v. Johnson](#)

**United States District Court, E.D. Pennsylvania - August 25, 2016 - F.Supp.3d - 2016 WL 4478775**

Real estate developer brought action against city councilman, alleging First Amendment retaliation based on councilman's efforts to stop sale of two city lots to developer in retaliation for developer's criticisms of councilman and challenge of councilman for office.

After jury returned verdict in favor of developer, councilman moved for judgment as a matter of law.

The District Court held that:

- Evidence demonstrated that councilman's actions were sufficient to deter a person of ordinary fitness from exercising his First Amendment rights, as required for retaliation claim;
- Evidence demonstrated that municipal custom or policy was moving force behind developer's injuries, as required for *Monell* claim; and
- Developer was not required to present evidence of city's deliberate indifference in making his *Monell* claim.

Given the evidence at trial, it was reasonable for jury to conclude that real estate developer's potential financial loss, allegedly caused by city councilman's refusal to introduce resolution into city council approving sale of two city-owned lots to developer, was sufficient to deter a person of ordinary firmness from exercising his First Amendment rights, as required for retaliation claim by developer, who alleged that councilman's conduct was in response to developer's challenge for councilman's position in city council and general criticism of councilman. Real estate developer allegedly lost out on \$260,000 profit he would have realized had he been able to buy the lots and develop them as he had planned.

Given the evidence presented at trial, it was reasonable for jury to conclude that real estate developer's First Amendment rights were violated and that a municipal custom or policy was the moving force behind his injuries, as required for *Monell* claim based on city councilman's block of sale of two city lots to developer, following developer's political challenge and criticism of councilman, which caused developer to sustain financial loss. Councilman would not have been able to block the sale of two city lots to developer absent city's custom of councilmanic prerogative, confident that he would not be subverted by his city council colleagues because custom required deference by them to his decision not to introduce resolution approving the sale.

Real estate developer's *Monell* claim, based on city councilman's prevention of sale of two city lots to developer by refusing to introduce resolution approving the sale, was premised on custom of city

council which gave council members power to stop any land use requiring legislative approval, rather than conduct of city employees and city's deliberate indifference thereto, and thus developer was not required to present evidence regarding deliberate indifference.

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#### **EMINENT DOMAIN - SOUTH CAROLINA**

##### **[Carolina Convenience Stores, Inc. v. City of Spartanburg](#)**

**Supreme Court of South Carolina - August 31, 2016 - S.E.2d - 2016 WL 4537656**

Convenience store owner brought inverse condemnation and negligence against city following city police department's bulldozing of a section of the store to gain access to a suspect who had fled into the store and taken an employee hostage.

The Circuit Court granted summary judgment in favor of city on inverse condemnation claim and entered judgment on jury verdict in favor of city on negligence claim. Store owner appealed. The Court of Appeals affirmed. Store owner petitioned for writ of certiorari, which was granted.

On an issue of apparent first impression, the Supreme Court of South Carolina held that city's actions in bulldozing section of convenience store to gain access to suspect who had fled into store and taken employee hostage was not compensable taking.

City's actions in bulldozing section of convenience store to gain access to suspect who had fled into store and taken an employee hostage did not constitute a compensable taking through inverse condemnation pursuant to the state constitution. Framers of the state constitution did not intend that law enforcement operate under the fear that their actions could lead to takings-based liability.

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#### **EMINENT DOMAIN - TEXAS**

##### **[State v. YS & LS & LS Partnership, Ltd.](#)**

**Court of Appeals of Texas, Corpus Christi-Edinburg - July 28, 2016 - Not Reported in S.W.3d - 2016 WL 4040320**

In October 2013, the State filed a petition for condemnation seeking to condemn a strip of land consisting of 0.034 of an acre fronting a state highway.

Landowner counterclaimed for inverse condemnation, alleging that the State noticed its intent to take the property in November 2007, requiring Landowner to disclose the impending condemnation to prospective tenants and therefore preventing Landowner from leasing the property. Landowner alleged that the State's acts constituted a taking of its property.

The State filed a plea to the jurisdiction in which it argued that it was entitled to sovereign immunity because Landowner had not alleged a valid inverse condemnation claim. The trial court denied the State's plea to the jurisdiction. The State appealed.

The Court of Appeals reversed, holding that "publicly targeting a property for condemnation, resulting in economic damage to the owner, generally does not give rise to an inverse condemnation cause of action unless there is some direct restriction on use of the property."

The court found that, in order to allege a valid inverse condemnation claim, there must be a



“current, direct restriction” on the use of the land, referring to a physical act or legal restriction on the property’s use, “such as a blocking of access or denial of a permit for development.” Here, Landowner alleged that the State’s announcement of its intent to take the property prevented Landowner from leasing the property to prospective tenants, thereby causing it damages. Landowner had not alleged a “current direct restriction” on the use of its land such as an “actual physical or legal restriction on the property’s use, such as a blocking of access or denial of a permit for development.” Accordingly, Landowner had failed to state a valid inverse condemnation claim, and the State’s sovereign immunity was not waived.

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## **MUNICIPAL ORDINANCE - VERMONT**

### **[In re LaBerge NOV](#)**

**Supreme Court of Vermont - September 2, 2016 - A.3d - 2016 WL 4582182 - 2016 VT 99**

Neighbor sought review of decision by Development Review Board that overturned notice of violation issued by town zoning administrator.

The Superior Court, Environmental Division, concluded that landowners violated town noise ordinance. Landowners appealed.

The Supreme Court of Vermont held that:

- Noise ordinance was not unconstitutionally vague on its face;
- Noise ordinance was not unconstitutionally vague as applied;
- Admission of standards on noise levels was warranted; and
- Decibel measurements taken by sound expert were admissible.

Town ordinance prohibiting unreasonable noises was not, on its face, unconstitutionally vague under due process clause. In addition to incorporating an objective “reasonableness” standard, ordinance identified key factors in assessing reasonableness: intensity, duration, and frequency—guidance that further focused the reasonableness inquiry, guarded against arbitrary enforcement, and puts individuals on notice of the law’s requirements.

Town ordinance prohibiting unreasonable noises gave landowners fair notice that noise levels produced from motocross racing on their property were proscribed, and therefore, as applied to landowners, ordinance was not unconstitutionally vague under the due process clause. Noise level at property line, 80 decibels, was very high, and neighbor testified that noise was extremely loud, irritating, assaultive, and disruptive.

Admission of world health organization standards on noise levels, used by neighbor’s expert in forming opinion relating to noise levels produced on landowners’ motocross track, was warranted in proceedings to determine if landowners violated town noise ordinance. Expert’s testimony was based in part on the standards, and expert testified that the standards were typically used as a reference level.

Decibel measurements taken by sound expert were admissible to show level of noise on date of alleged ordinance violation by landowner through operation of motocross track, despite fact that measurements were not taken on the date at issue; neighbor had taken own measurements on date at issue, accompanied expert during his measurements, and testified that the sound level was identical to the level on the date at issue.



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## **PUBLIC CONTRACTS - CALIFORNIA**

### **[California-American Water Company v. Marina Coast Water District](#)**

**Court of Appeal, First District, Division 1, California - August 18, 2016 - Cal.Rptr.3d - 2016 WL 4400452 - 16 Cal. Daily Op. Serv. 9086**

Water utility brought action against water district and county water resources agency for declaratory judgment that five contracts related to desalination project were void because a board member of the county water resources agency was financially interested in the contract.

Water district cross-complained for a declaration barring any challenge to the contracts, and county water resources agency cross-complained for a declaration the contracts were void. The Superior Court declared four of the contracts void after bench trial. Water district appealed.

The Court of Appeal held that:

- A public agency is not bound by the 60-day limitation period that governs validation actions when it seeks a judicial determination of the validity of a contract under the statute forbidding public officers from being financially interested in any contract made by them in their official capacity;
- Water resources agency's cross-complaint was not barred by statute of limitations; and
- Board member had sufficient financial interest to invalidate contracts.

In water utility's action against water district and county water resources agency for declaratory judgment that contracts were void under the statute forbidding public officers from being financially interested in any contract made by them in their official capacity, water resources agency's cross-complaint against the water district for declaratory judgment that the contracts were void related back to the water district's cross-complaint against the water resources agency that the contracts were valid, and thus the four-year limitation period for water resources agency's cross-complaint stopped running upon the water district's cross-complaint.

Member of county water resources agency's board of directors had a sufficient financial interest in four contracts related to desalination project for his participation in the agency's negotiation of the agreements to support invalidation of the contracts under the statute forbidding public officers from being financially interested in any contract made by them in their official capacity, where the board member was a paid consultant for the project manager, the project manager increased board member's compensation from \$25,000 to \$160,000 while three of the contracts were being negotiated, and board member reasonably could have expected to receive more work based on the execution of a fourth contract that was negotiated after manager stopped working as a consultant.

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## **PENSIONS - CALIFORNIA**

### **[Marin Association of Public Employees v. Marin County Employees' Retirement Association](#)**

**Court of Appeal, First District, Division 2, California - August 17, 2016 - Cal.Rptr.3d - 2016 WL 4379316 - 16 Cal. Daily Op. Serv. 9044**

County employees and their unions brought action against county employees' retirement association for declaratory, injunctive, and writ relief to halt implementation of revised retirement income formula. State intervened to defend constitutionality of Pension Reform Act.

The Superior Court sustained demurrer without leave to amend. Employees and unions appealed.

The Court of Appeal held that:

- Statutory hearing procedure did not apply to retirement board's determination that all members were barred from including in-kind benefits converted to cash in pension calculation because they had "been paid to enhance a member's retirement benefit";
- Retirement association's revision of members' retirement income formula was not an unconstitutional impairment of contracts; and
- Retirement association had no authority to establish equitable estoppel requiring items to be included in calculation of "compensation earnable."

Trial court's order sustaining county employees' retirement association's demurrer to county employees' and unions' estoppel and constitutional contract clause challenges to the revision of their retirement income formula under Pension Reform Act satisfied the statute requiring a statement of the specific grounds for the trial court's decision, and thus the judgment was not subject to reversal based on the brevity of the trial court's statement of grounds, where the order stated that a "statute, once duly enacted, is presumed to be constitutional."

The statute providing that a county employees' retirement board "shall establish a procedure for assessing and determining whether an element of compensation was paid to enhance a member's retirement benefit," and thus whether the element of compensation was subject to exclusion from the retirement association member's "compensation earnable" in calculating the member's pension, did not require a county retirement board to follow such a procedure in determining that in-kind benefits converted to cash were categorically "paid to enhance a member's retirement benefit" as applied to every member of the retirement association, and thus that in the future the payments would be excluded from every member's pension calculation.

County employees' retirement association's revision of retirement income formula under the Pension Reform Act for members who had not yet retired, in excluding payments for services rendered outside of normal working hours and for in-kind benefits converted to cash, was not an unconstitutional impairment of contracts under federal and state constitutions, since the revision was not an "unreasonable" change or a "substantial" impairment of the contracts, even though the revision resulted in a net decrease in the pension benefit, where the revision caused the county to stop making paycheck deductions for the items that were excluded from the pension calculation, and the revision excluded the items from the pension calculation only prospectively for future pay periods.

Short of actual abolition, a radical reduction of benefits, or a fiscally unjustifiable increase in employee contributions, the governing body may make reasonable modifications and changes to public employees' pension before the pension becomes payable, and until that time the employee does not have a right under the contract clause of the constitution to any fixed or definite benefits but only to a substantial or reasonable pension.

A public pension system is subject to the implied qualification that the governing body may make reasonable modification and changes before the pension becomes payable and that until that time the employee does not have a right to any fixed or definite benefits, which can mean that any one or more of the various benefits may be wholly eliminated prior to the time they become payable, so long as the employee retains the right to a substantial pension.

Any representations or promises made by county employees' retirement association to county employees regarding calculation of their pensions could not, under doctrine of equitable estoppel,

prevent the association from implementing and enforcing new definition of “compensation earnable” set out in Pension Reform Act, and require the association to instead calculate “compensation earnable” to include in-kind benefits converted to cash or payments for additional services rendered outside of normal working hours. Association’s representations or promises could not displace clear statutory language or delay its implementation.

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## **PENSIONS - KENTUCKY**

### **[Puckett v. Lexington-Fayette Urban County Government](#)**

**United States Court of Appeals, Sixth Circuit - August 15, 2016 - F.3d - 2016 WL 4269802**

Retired county employees brought action against county, Commonwealth of Kentucky, and others, alleging that statutory amendment reducing cost of living adjustments (COLA) to their service retirement annuities violated Contract Clause, Due Process Clause, and Takings Clause of state and federal constitutions.

The United States District Court granted defendants’ motions to dismiss and subsequently denied plaintiffs’ motions to alter or amend judgment and for leave to amend complaint. Plaintiffs appealed.

The Court of Appeals held that:

- The court was without jurisdiction to consider the claims against the Commonwealth based on Eleventh Amendment sovereign immunity principles;
- The Ex parte Young doctrine was applicable to permit suit against individual state officers for the alleged violations of plaintiffs’ federal constitutional rights;
- Addressing questions of first impression in the circuit, the legislature’s statutory scheme for reducing the extent of future COLA increases to retired county workers did not constitute an unconstitutional impairment of contracts;
- Assuming arguendo that plaintiffs had a protected property interest, plaintiffs did not state a plausible procedural due process claim;
- Assuming arguendo that plaintiffs had a protected property interest, plaintiffs did not state a plausible substantive due process claim;
- Plaintiffs did not state a plausible Takings Clause claim; and
- Plaintiffs waived their argument that the district court erred when it denied their motion for leave to amend their complaint.

Based on Eleventh Amendment sovereign immunity principles, the Court of Appeals was without jurisdiction to consider claims brought by retired county employees against Commonwealth of Kentucky concerning reduced cost of living adjustments (COLA) to their service retirement annuities. Kentucky, which did not file an answer to employees’ complaint, did not waive its immunity defense by raising that defense in its motion to dismiss, there was no question that Congress had not abrogated Kentucky’s immunity for present purposes, and none of the exceptions to the doctrine of sovereign immunity applied.

In action brought by retired county employees against Commonwealth of Kentucky and various state officials concerning reduced cost of living adjustments (COLA) to employees’ service retirement annuities, the doctrine set forth in Ex parte Young was applicable to permit suit against individual state officers pursuant to § 1983 for the alleged constitutional violations where the complaint alleged an ongoing violation of federal law and sought prospective relief.

Kentucky legislature's statutory scheme for reducing the extent of future cost of living adjustment (COLA) increases to retired county employees' service retirement annuities did not constitute an unconstitutional impairment of contracts. Even assuming that the Police and Firefighters' Retirement and Benefit Fund Act created some contractual obligations, employees did not plead facts showing a clear intent on the part of the legislature to create contractual rights against the modification of a specific COLA formula, as employees pointed to no language within the Act, such as a provision giving them immutable lifetime entitlement to COLA increases, and nothing in the Act's legislative history, such as evidence that COLA formula was part of bargained-for exchange, indicating any expression of intent by the legislature to create a contractual right to the specific COLA formula in effect at the time they retired.

Assuming *arguendo* that retired county employees had a protected property interest in the specific cost of living adjustment (COLA) formula for their service retirement annuities that was in effect at the time they retired, employees did not state a plausible procedural due process claim in connection with Kentucky legislature's amendment of statute to reduce future COLAs. Although amendments to state's Police and Firefighters' Retirement and Benefit Fund Act were designated as emergency legislation, employees failed to allege any reason why the legislature's emergency designation was improper, or how that designation denied them any sort of "process" they were due.

Assuming *arguendo* that retired county employees had a protected property interest in the specific cost of living adjustment (COLA) formula for their service retirement annuities that was in effect at the time they retired, employees did not state a plausible substantive due process claim in connection with Kentucky legislature's amendment of statute to reduce future COLAs. When it amended the Act, the Kentucky General Assembly explained that its basis for doing so was to keep the Policemen's and Firefighters' Retirement Fund financially sound and resolve its financial difficulties, and employees' conclusory allegation, that there was "no rational connection between the amendments to the Act and any legitimate government interest," was nothing more than recitation of essential element of claim, insufficient to withstand motion to dismiss.

Where retired employees of Kentucky county had no protected property interest in the specific cost of living adjustment (COLA) formula for their service retirement annuities that was in effect at the time they retired, their claim under the Takings Clause necessarily also failed.

Plaintiffs waived their amendment claim on appeal where, although they requested reversal of the district court's denial of their motion to amend the complaint, they developed no argument in their brief.

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## **ZONING - MASSACHUSETTS**

### **[311 West Broadway LLC v. Zoning Bd. of Appeal of Boston](#)**

**Appeals Court of Massachusetts, Suffolk - August 23, 2016 - N.E.3d - 90 Mass.App.Ct. 68 - 2016 WL 4431561**

Neighbor appealed from decision by city zoning board of appeal granting landowner approval to change occupancy of its property.

After the case was remanded by the Superior Court and proceedings were stayed, the board issued another decision in landowner's favor. After more than 20 days, landowner moved to dismiss the Superior Court action for neighbor's failure to appeal second decision. The Superior Court Department granted the motion. Neighbor appealed.

The Appeals Court held that neighbor was not required to appeal second decision to invoke Superior Court's subject matter jurisdiction.

Neighbor challenging zoning appeal board's approval of landowner's change of occupancy, who had already appealed an earlier decision of board in litigation that remained pending, was not required to appeal board's decision after superior court remand or to amend its complaint within 20 days, in order to invoke subject matter jurisdiction of superior court, despite ordinance stating that appeal must be filed within 20 days. Neighbor had been diligent in efforts to assert rights, landowner could not claim surprise and was not prejudiced by any delay, and decision after remand did not concern an entirely different or new project.

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## **PUBLIC LANDS - MASSACHUSETTS**

### **[Smith v. City of Westfield](#)**

**Appeals Court of Massachusetts - August 25, 2016 - N.E.3d - 2016 WL 4467901**

After a preliminary injunction had been granted that prevented school construction project at city playground, the Superior Court vacated injunction. Residents appealed.

The Appeals Court held that:

- City did not specifically designate playground for public use, and thus constitutional protections were not triggered;
- Statewide comprehensive outdoor recreation plan (SCORP) was inconsistent with statutory and judicial interpretation of applicable constitutional provision; and
- Prior public use doctrine did not apply to preclude city from permitting construction of school building on property.

City did not specifically designate, in a manner sufficient to invoke constitutional protections, by deed or other recorded restriction on the land, a playground for public purposes and land was not taken for those purposes, and therefore city was not required to obtain two-thirds vote of the General Court before permitting construction of school building on land. art. 97 of the Amendments to the Massachusetts Constitution.

Statewide comprehensive outdoor recreation plan (SCORP) that considered land rehabilitated with Federal Land and Water Conservation Fund (LWCF) as being public lands protected under state constitution did not render playground rehabilitated with LWCF grant public lands subject to constitutional protections. SCORP contradicted statutory and judicial interpretation of applicable constitutional provision. art. 97 of the Amendments to the Massachusetts Constitution.

Prior public use doctrine did not preclude city from permitting construction of school building on land that had previously been used as playground, where land had been conveyed to city with no limitation on its use, and there was neither a taking nor a prior public or private grant restricting the use of the land.

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## **ENVIRONMENTAL - MISSOURI**

### **[City of Harrisonville v. McCall Service Stations](#)**

**Supreme Court of Missouri, en banc - August 23, 2016 - S.W.3d - 2016 WL 4443950**

City filed suit against owner and prior owner of gas station for negligence and trespass arising out of soil contamination caused by leak from underground petroleum storage tanks, which was discovered during city's project to upgrade sewer system. City also brought claims for compensatory and punitive damages against Missouri Petroleum Storage Tank Insurance Fund for negligent and fraudulent misrepresentation, after Fund refused to pay costs incurred by city to hire contractor qualified to perform that portion of contract affected by contamination.

The Circuit Court entered judgment on jury's verdict for city on all claims, and then entered remittitur on punitive damages award against Fund. Fund, owner, and prior owner appealed, and city cross-appealed remittitur of punitive damages award.

The Supreme Court of Missouri held that:

- Jury instructions referencing "consequential" damages did not give jury impermissible "roving commission";
- Whether city incurred additional costs that exceeded \$72,009.89 in completing portion of sewer system upgrade affected by soil contamination, for purposes of calculating compensatory damages, was question for jury;
- Whether city relied to its detriment on misrepresentation by Fund's third-party administrator that Fund would pay costs incurred by city to hire contractor, recommended by administrator, to perform portion of city's sewer system upgrade affected by soil contamination, less amount that city would have paid if it had not hired contractor, was question for jury;
- Statute authorizing Fund to provide coverage for claims involving property damage or bodily injury caused by leaking petroleum storage tanks did not authorize award of compensatory and punitive damages; Fund's board of trustees, and not Fund itself, was party subject to liability for fraudulent and negligent misrepresentation; and
- Interests of justice warranted remand following reversal of punitive damages award against Fund, in order to permit city to amend complaint to substitute/add board trustees and its members as defendants.

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## **ANNEXATION - NEBRASKA**

### **[City of Springfield v. City of Papillion](#)**

**Supreme Court of Nebraska - August 26, 2016 - N.W.2d - 294 Neb. 604 - 2016 WL 4491757**

City filed suit, claiming that another city and county illegally annexed land that it had mapped for future growth and development.

The District Court dismissed the case for lack of standing. City appealed.

The Supreme Court of Nebraska held, as a matter of first impression, that County Industrial Sewer Construction Act granted city standing to challenge allegedly illegal annexation.

County Industrial Sewer Construction Act granted city standing to challenge other city's and county's annexation of land that infringed on the city's powers over areas mapped for future growth and development. City's right to exercise powers under the Act, associated with a municipality's area of future growth and development, was a personal, legal interest of the city's, regardless of whether it was actively exercising those rights at time the other city annexed the disputed territory.

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## **FAIR HOUSING ACT - NEW JERSEY**

### **In re Declaratory Judgment Actions Filed by Various Municipalities, County of Ocean**

**Superior Court of New Jersey, Appellate Division- July 11, 2016 - 446 N.J.Super. 259 - 141 A.3d 359**

Several municipalities brought declaratory judgment actions seeking determination of their fair share of affordable housing obligation under Fair Housing Act (FHA).

Actions were consolidated. The Superior Court, Law Division, Ocean County entered order directing Special Regional Master to include as part of fair share calculation a separate component for municipalities' fair share obligation during gap period for which Council on Affordable Housing (COAH) had failed to adopt rules governing determination of housing obligation. Municipalities sought interlocutory review.

The Superior Court, Appellate Division, held that:

- Separate component was improper, and
- Doctrine of judicial estoppel did not preclude such holding.

Separate, retroactive obligation for municipalities' fair share of affordable housing during gap period for which Council on Affordable Housing (COAH) had failed to adopt rules governing determination of housing obligation was not an appropriate component of municipalities' housing obligation for third-round cycle under Fair Housing Act (FHA). Text of FHA demonstrated legislature's concern with present and prospective fair share housing, low and moderate income households formed during gap period needing affordable housing could be captured in calculation of municipalities' fair share without resort to retroactive obligation component, and imposition of new obligation was best left to executive and legislative branches.

Doctrine of judicial estoppel did not preclude Appellate Division's holding that separate, retroactive obligation for municipalities' fair share of affordable housing during gap period for which Council on Affordable Housing (COAH) had failed to adopt rules governing determination of housing obligation was not an appropriate component of housing obligation for third-round cycle under Fair Housing Act (FHA). Appellate Division had not previously been asked to address, and had not sanctioned, a gap-period affordable housing obligation in prior action, and none of the parties in instant action participated in prior action.

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## **UTILITY IMPACT FEES - NORTH CAROLINA**

### **Quality Built Homes Incorporated v. Town of Carthage**

**Supreme Court of North Carolina - August 19, 2016 - S.E.2d - 2016 WL 4410716**

Developers brought action seeking declaration that water and sewer impact fee ordinances adopted by city exceeded city's municipal authority under Public Enterprise Statutes.

The Superior Court granted summary judgment in favor of city. Developers appealed. The Court of Appeals affirmed. Developers sought discretionary review, which was granted.

The Supreme Court of North Carolina held that water and sewer impact fee ordinances exceeded



city's authority under Public Enterprise Statutes.

Water and sewer impact fee ordinances that triggered immediate charges for future and sewer water expansion, regardless of whether the property owner ever connects to the system or whether city ever expanded the system, was not collection of monies for operation, maintenance, and expansion of water and sewer systems permitted by Public Enterprise Statutes. While Statutes allowed city to charge for the contemporaneous use of its water and sewer systems, the plain language of the Public Enterprise Statutes clearly failed to empower city to impose impact fees for future services.

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## **MUNICIPAL UTILITIES - NORTH CAROLINA**

### **[Acts Retirement-Life Communities, Inc. v. Town of Columbus](#)**

**Court of Appeals of North Carolina - August 2, 2016 - S.E.2d - 2016 WL 4087669**

Owner of retirement facility brought action against town, seeking a declaration that town's decision to charge retirement facility the commercial rate for some water and sewer services but the residential rate for others violated town's charter and state constitution, alleging claim for relief based on unjust enrichment, and requesting permanent injunction requiring town to reclassify meters as commercial.

After bench trial, the Superior Court ruled that reclassification was arbitrary, capricious, and unreasonable, awarded owner compensatory damages, and denied request for injunctive relief. Town appealed, and owner cross-appealed.

The Court of Appeals held that:

- Owner's cause of action accrued, and three-year statute of limitations began to run, when reclassification took effect, and
- Continuing wrong doctrine did not apply.

Owner of retirement facility's cause of action against town challenging town's reclassification of water meters from commercial to residential, seeking declaratory and injunctive relief as well as damages for unjust enrichment, accrued, and three-year statute of limitations began to run, when reclassification took effect.

Each water bill issued by town to owner of retirement facility, after reclassifying some of retirement facility's water meters from commercial to residential, did not constitute a separate wrong that triggered its own limitations period, and thus continuing wrong doctrine did not apply to the three-year statute of limitations applicable to owner's action against town seeking declaratory and injunctive relief as well as damages for unjust enrichment resulting from alleged overcharges. Overcharges were the continual ill effects of the allegedly unlawful reclassification, which triggered the statute of limitations, and town did not reclassify the water meters each month.

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## **IMMUNITY - NORTH DAKOTA**

### **[Tangedal v. Mertens](#)**

**Supreme Court of North Dakota - August 25, 2016 - N.W.2d - 2016 WL 4485811 - 2016 ND 170**

Property owners brought negligence action against governmental entity responsible for septic system inspections.

The District Court granted summary judgment in favor of entity and denied property owners' motion to amend their complaint to add entity employee as a defendant. Property owners appealed.

The Supreme Court of North Dakota held that public duty immunity precluded property owners' negligence claim against governmental entity responsible for septic system inspections and its employee.

There was no special relationship between property owners and governmental entity responsible for septic system inspections and its employee, and therefore public duty immunity precluded property owners' negligence claims against entity and employee stemming from inspection, where invoice for septic inspection identified property owners' real estate agent as the customer, and property owners proffered no evidence to establish the existence of a special relationship.

A political subdivision and an employee may not be held jointly liable for a claim for an injury caused by the performance or nonperformance of a public duty unless a special relationship is established. When the existence of a special relationship is established, the political subdivision may be liable if the employee's actions are within the scope of employment and the employee may be personally liable if the employee's conduct within the scope of employment constitutes reckless or grossly negligent conduct, or willful or wanton misconduct.

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## **IMMUNITY - UTAH**

### **[Craig v. Provo City](#)**

**Supreme Court of Utah - August 26, 2016 - P.3d - 2016 WL 4506309 - 2016 UT 40**

Plaintiffs brought timely tort action against city pursuant to the Governmental Immunity Act, which was dismissed without prejudice after the limitations period had lapsed for plaintiffs' failure to submit statutorily-required bond.

Plaintiffs filed second action with the appropriate bond under statute allowing parties to commence a second action within one year of dismissal of original action for reasons other than on the merits.

The Fourth District Court held statute allowing parties to commence a second action did not apply to claims against governmental entities, and dismissed the second action. Plaintiffs appealed. The Court of Appeals reversed. City filed petition for certiorari, which was granted.

The Supreme Court of Utah held that claim filed outside time limits of Act is time-barred and cannot be resurrected by terms of Savings Statute.

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## **PENSIONS - WASHINGTON**

### **[Lenander v. Washington State Department of Retirement Systems](#)**

**Supreme Court of Washington, En Banc - August 18, 2016 - P.3d - 2016 WL 4401213**

Retired state trooper brought declaratory judgment action against Department of Retirement Systems (DRS), asserting statutory and constitutional challenges to newly adopted actuarial factors

by which DRS reduced trooper's monthly pension benefits based on his opting for a pension that would allow surviving spouse to receive monthly pension benefits at the same amount after his death. Trooper also appealed from administrative proceeding in which DRS held the actuarial reduction was properly calculated.

The Superior Court denied trooper's claims for relief. Trooper appealed. The Supreme Court granted direct review.

The Supreme Court of Washington held that:

- DRS had statutory authority to amend its regulations to ensure that benefits paid to Washington State Patrol Retirement System (WSPRS) retirees who opted for a pension that would allow a surviving spouse to continue to receive monthly pension benefits at the same amount after the retiree's death remained actuarially equivalent in value to the pension benefit previously available;
- DRS has broad authority to adopt such actuarial factors as it deems necessary for the purpose of calculating a WSPRS survivor benefit of "equal value" to the only previously available benefit, but, at a minimum, the DRS must consider and adopt a mortality rate and interest rate it deems appropriate; and
- Amendment by DRS of regulations containing actuarial factors for calculating survivor benefit for retired Washington State Patrol employees did not substantially impair the pension contract rights of retired state trooper, for purposes of analysis under State Constitution's Contract Clause.

Department of Retirement Systems (DRS) had statutory authority to amend its regulations to ensure that benefits paid to Washington State Patrol Retirement System retirees who opted for a pension that would allow a surviving spouse to continue to receive monthly pension benefits at the same amount after the retiree's death remained actuarially equivalent in value to the only pension benefit previously available, i.e., a survivor benefit for a spouse who outlived the retiree that was usually equal to 50 percent of the retiree's monthly benefit. Such authority existed without express statutory language reserving authority to DRS to make future amendments to actuarial factors.

Department of Retirement Systems (DRS) has broad authority, under statute requiring it to collect and keep in convenient form such data as shall be necessary for an actuarial valuation of the assets and liabilities of the state retirement systems, to adopt such actuarial factors as it deems necessary for the purpose of calculating a Washington State Patrol Retirement System survivor benefit of "equal value" to the only previously available benefit, i.e., 50 percent of retiree's monthly benefit, but, at a minimum, the DRS must consider and adopt a mortality rate and interest rate it deems appropriate.

Retired state trooper had contractually protected right under Washington State Patrol Retirement System and Department of Retirement Systems (DRS) statutes to a retirement allowance for life, computed based on years of public service and final average salary, as well as the right to select a survivor benefit that was of equal value, subject to DRS's authority to update the actuarial factors involved in that calculation of equivalency, but retired trooper did not have a vested contract right to the three percent actuarial reduction first used by DRS in calculating survivor benefit.

Amendment by Department of Retirement Systems (DRS) of regulations containing actuarial factors for calculating survivor benefit for retired Washington State Patrol employees did not substantially impair the pension contract rights of state trooper, for purposes of analysis under State Constitution's Contract Clause. Trooper was still entitled to receive a retirement benefit based on same calculation of average final salary and years of service.

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## **PUBLIC UTILITIES - CALIFORNIA**

### **Desoto Cab Company, Inc. v. Picker**

**United States District Court, N.D. California - July 20, 2016 - F.Supp.3d - 2016 WL 3913643**

Owner and operator of taxicab company filed § 1983 equal protection claim against California Public Utilities Commission, seeking declaratory and injunctive relief, and alleging that operators of companies that provided prearranged transportation services through online-enabled applications were de facto taxicab companies and therefore should be subject to the same rules and regulations as traditional taxicab companies. The Commission moved to dismiss.

The District Court held that:

- Suit was not barred by the Johnson Act;
- Action was ripe for adjudication; and
- Non-parties were not necessary and required to be joined in action.

Equal protection claim asserted under § 1983 by owner of taxicab company against California Public Utilities Commission, seeking declaratory and injunctive relief, and alleging that companies that provided prearranged transportation services through online-enabled applications were de facto taxicab companies and therefore should be subject to the same rules and regulations as traditional taxicab companies, was not barred by Johnson Act, which precluded federal court jurisdiction over certain state utility rate cases. Although taxicab company owner effectively conceded that companies providing prearranged transportation services were public utilities, and rules and regulations imposed by Commission did not necessarily interfere with interstate commerce, the claim did not challenge order affecting rates charged by a utility, but rather challenged the larger act of the Commission's regulation of companies providing prearranged transportation services, but not taxicab companies.

Equal protection claim asserted under § 1983 by owner of taxicab company against California Public Utilities Commission, seeking declaratory and injunctive relief, and alleging that companies that provided prearranged transportation services through online-enabled applications were de facto taxicab companies and therefore should be subject to the same rules and regulations as traditional taxicab companies, was ripe for adjudication. Even if all of the rules and regulations applicable to the companies providing prearranged transportation services had not been finalized, taxicab company owner challenged the overall regulatory scheme that differentiated between regulations governing the two types of transportation providers.

Companies that provided prearranged transportation services, other traditional taxicab companies, and municipalities that regulated traditional taxicab companies were not necessary parties required to be joined in equal protection action asserted under § 1983 by owner of taxicab company against California Public Utilities Commission, seeking declaratory and injunctive relief, and alleging that companies that provided prearranged transportation services through online-enabled applications were de facto taxicab companies and therefore should be subject to the same rules and regulations as traditional taxicab companies. Disposing of action in absence of traditional taxicab companies, providers of prearranged transportation services, and municipalities would not impede or impair their ability to protect their interests, as the positions of those entities were represented by the parties to the action.

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## **PARKING FEES - ILLINOIS**

### **[Franklin v. Parking Revenue Recovery Services, Inc.](#)**

**United States Court of Appeals, Seventh Circuit - August 10, 2016 - F.3d - 2016 WL 4248035**

Plaintiffs brought putative class action against debt collector, alleging violations of Fair Debt Collection Practices Act (FDCPA) in relation to collection of public parking fees and nonpayment penalties.

The United States District Court granted debt collector's summary judgment motion. Plaintiffs appealed.

The Court of Appeals held that plaintiffs' obligations arose from contract law, and thus were debts covered by FDCPA.

Plaintiffs' obligations for public parking fees and nonpayment penalties arose out of contract law, and thus those obligations constituted debts covered by Fair Debt Collection Practices Act (FDCPA), even though parking lot was owned by municipal agency, and even though contract between agency and contractor that operated lot sometimes referred to nonpayment penalty as "fine," where no municipal ordinance or regulation imposed nonpayment penalty, agency's contract with contractor stated that disputes with parking patrons would be handled as matter of contract law, and, by parking in lot, plaintiffs accepted contractor's offer to park at stated cost, which formed contract obligating them to pay stated price or pay higher price if they left lot without paying.

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## **IMMUNITY - INDIANA**

### **[Birge v. Town of Linden](#)**

**Court of Appeals of Indiana July 25, 2016 - N.E.3d - 2016 WL 3976353**

Property owners brought action against town after modifications to a farm drainage system caused flooding on their property, asserting claims for nuisance, civil conspiracy, and inverse condemnation.

The Circuit Court granted town's motion to dismiss, and property owners appealed.

The Court of Appeals held that:

- Town failed to demonstrate that it was entitled to discretionary function immunity under the Tort Claims Act, and
- Property owners' allegations were sufficient to state a claim for civil conspiracy.

Town failed to demonstrate in motion to dismiss property owners' claims for nuisance and inverse condemnation that it was entitled to discretionary function immunity under the Tort Claims Act. Accepting as true the allegations in property owners' complaint as to whether town's actions constituted a nuisance, the question of immunity required additional factual development with regard to whether or not town consciously weighed competing interests in reaching its decision to modify farm drainage system, and the immunity provisions of the Act did not apply to claims for inverse condemnation.

Property owners' allegations that town conspired with drainage board to improperly utilize existing right-of-way and construct new components for municipal storm drainage system, which caused water to accumulate on property owners' farmland was sufficient to state a claim for civil conspiracy, even if property owners did not allege town acted unlawfully or to accomplish an unlawful purpose. The allegation of civil conspiracy was just another way of asserting a concerted action in the commission of a tort causing damages to the property owners.

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## **HIGHWAYS - MINNESOTA**

### **[J & W Asphalt, Inc. v. Belle Plaine Tp.](#)**

**Court of Appeals of Minnesota - August 1, 2016 - N.W.2d - 2016 WL 4069244**

Landowner brought action against township, seeking declaratory and injunctive relief, arguing that township was responsible for maintaining road used to access property.

Parties filed cross-motions for summary judgment. Landowner's motion was granted in part, and the trial court ordered the Department of Transportation be joined as a party. The Department moved to dismiss. The District Court granted the motion, concluding that township, not Department, was responsible for road's maintenance. Township appealed.

The Court of Appeals held that:

- Statute allowing Department to convey to a political subdivision road that was a necessary part of an upgrade to a trunk highway system does not require that the subdivision's acceptance for the conveyance to be effective;
- Road was a public road rather than a cartway; and
- Township was responsible for maintaining road.

Land for road was acquired through condemnation and road was constructed as part of trunk highway upgrade, and therefore, road was a "public road" rather than a "cartway"; there was no petition for establishment of cartway, nor was there a dedication of land to public use.

Township was responsible for maintaining road conveyed to it by Department of Transportation, despite fact that township did not open the road and had not authorized expenditure of funds for its maintenance; road was a necessary part of an upgrade to a trunk highway system and conveyed to township after its creation.

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## **MUNICIPAL ASSESSMENTS - MINNESOTA**

### **[First Baptist Church of St. Paul v. City of St. Paul](#)**

**Supreme Court of Minnesota - August 24, 2016 - N.W.2d - 2016 WL 4446310**

Churches brought action challenging city's right-of-way (ROW) assessment.

The District Court entered summary judgment in city's favor, and churches appealed. The Court of Appeals remanded. On remand, the District Court entered summary judgment in city's favor, and churches appealed. The Court of Appeals affirmed, and churches appealed.

The Supreme Court of Minnesota held that:

- City's ROW assessment was "tax," rather than fee for services, and
- Fact issues remained as to extent of special benefits to churches' properties attributable to right-of-way services.

City's right-of-way (ROW) assessment was "tax," rather than fee for services, even though many services provided addressed conditions that, if left unabated, would have become nuisances, and funds collected through ROW assessment were kept in segregated accounts used only to pay for right-of-way maintenance services, where city charter provided assessments were for "the cost of improvements as are of a local character," that "in no case shall the amounts assessed exceed the benefits to the property," and that one basis to appeal ROW assessment was that it "is in an amount in excess of the actual benefits to the property," city code provisions implementing ROW assessment system made repeated reference to property "benefited," city's policy resolution governing ROW assessments recited that "[t]he law requires that the properties assessed must receive a special benefit from the assessment," ROW assessment functioned as revenue measure, benefiting public in general, and each property owner paid annual assessment without regard to whether owner had violated any ordinance or undertaken any activity requiring regulation.

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## **EMINENT DOMAIN - MISSISSIPPI**

### **[City of Jackson v. Jordan](#)**

**Supreme Court of Mississippi - August 18, 2016 - So.3d - 2016 WL 4398971**

Condemnee brought action against condemner, alleging that condemner violated his constitutional rights by depriving him of his property without due process of law.

Following a bench trial, the Circuit Court entered judgment in favor of condemnee and denied condemner's motion for reconsideration. Condemner appealed.

The Supreme Court of Mississippi held that:

- Condemnee had standing to file claim, even though condemnee acquired property from minor-grantor;
- Ten-day statutory limit in which to appeal decision rendered by municipal authorities was inapplicable to condemnee, and thus, condemnee's failure to timely appeal decision did not deprive Circuit Court of jurisdiction;
- Condemner's immunity from tort claims based on administrative action or inaction of a legislative or judicial nature did not protect it from condemnee's claim; and
- Condemner waived issue of proper method of determining damages by failing to preserve the issue at trial and on appeal.

Condemnee had standing to file claim against condemner alleging that he was deprived of his property without due process of law, even though condemnee acquired property from minor-grantor, where grantor did not seek to avoid deed, but ratified the deed by affidavit upon reaching the age of majority.

Ten-day statutory limit in which to appeal decision rendered by municipal authorities was inapplicable to condemnee who filed action against city-condemner after it ordered his house demolished as menace to public health, and thus, condemnee's failure to timely appeal decision did not deprive Circuit Court of jurisdiction, where condemner's notice of condemnation hearing did not



provide the statutorily required two-weeks notice, and condemnee did not become aware of the condemnation until after time to appeal condemner's decision had expired.

City-condemner's immunity from tort claims based on administrative action or inaction of a legislative or judicial nature did not protect city from condemnee's claim, alleging that city failed to give him notice of condemnation as required by statute in violation of his due process rights. City's immunity against tort claims did not encompass claims of constitutional violations.

Condemner waived issue of proper method of determining damages in action brought by condemnee, alleging that condemner deprived him of his property without due process of law, by failing to preserve the issue at trial and on appeal, where condemner failed to object that condemnee's receipts for home repairs were improper method for calculating damages, and did not make argument on appeal with citations to relevant legal authority.

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## **PUBLIC CONTRACTS - MISSOURI**

### **[Brentwood Glass Company, Inc. v. Pal's Glass Service, Inc.](#)**

**Supreme Court of Missouri, en banc - August 23, 2016 - S.W.3d - 2016 WL 4444039**

Sub-subcontractor brought mechanic's lien claim against county, county's agent for construction of property development project, general contractor, and subcontractor.

The Circuit Court granted summary judgment to defendants. Sub-subcontractor appealed.

The Supreme Court of Missouri held that:

- Public policy did not prohibit sub-subcontractor from perfecting lien against leasehold interest in property held by agent;
- Genuine issue of material fact as to last date that sub-subcontractor worked on project, as would determine whether sub-subcontractor's mechanic's lien was filed within six months of such date, as required by statute, precluded summary judgment in favor of agent;
- Genuine issue of material fact regarding whether sub-subcontractor's mechanic's lien statement contained a just and true account of demand due, despite statement's alleged inclusion of nonlienable items, precluded summary judgment in favor of agent; and
- Agent was not a "contractor" of whom a bond would be statutorily required to be furnished to county.

Sub-subcontractor could not perfect mechanic's lien against county, after sub-subcontractor allegedly failed to receive payment for glass and glazing work done on county's property development project, where county owned property at time sub-subcontractor began working on building, and contract between county and county's agent for construction of project provided that any improvements installed in building immediately became property of county.

Public policy did not prohibit sub-subcontractor from perfecting its mechanic's lien against leasehold interest in property held by county's agent for construction of development project regarding property. County's contract with agent authorized, under certain circumstances, agent to assign its leasehold interest without county's prior written consent, and thus county anticipated circumstances that would end its control over the leasehold.

Genuine issue of material fact as to last date that sub-subcontractor worked on property development project, as would determine whether sub-subcontractor's mechanic's lien was filed

within six months of such date, as required by statute, precluded summary judgment in favor of holder of leasehold interest in property, in sub-subcontractor's action to enforce lien.

Genuine issue of material fact regarding whether sub-subcontractor's mechanic's lien statement contained a just and true account of demand due, despite statement's alleged inclusion of nonlienable items, precluded summary judgment in favor of holder of leasehold interest in property, in sub-subcontractor's action to enforce lien.

Entity with which county contracted regarding property development project was not a "contractor" of whom a bond would be statutorily required, where entity did not provide construction services under its contract with county but rather merely contracted to be county's agent and arranged for construction services to be provided by others.

Sovereign immunity doctrine barred sub-subcontractor's action against county alleging county failed to require purported contractor to furnish a bond for property development project, where sub-subcontractor sued only the county and not any individual public official.

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## **MUNICIPAL ORDINANCE - NEBRASKA**

### **[Malone v. City of Omaha](#)**

**Supreme Court of Nebraska - August 19, 2016 - N.W.2d - 294 Neb. 516 - 2016 WL 4411311**

Resident brought action against city challenging an ordinance requiring the licensure of contractors.

After summary judgment was granted to city on all but one claim, the District Court conducted a bench trial and found for city. Resident appealed.

The Supreme Court of Nebraska held that:

- City was not required to recommence notice process after city amended ordinance's title;
- Legislature authorized city to pass ordinance;
- Ordinance was not invalid for monopolistic tendencies;
- Ordinance was not preempted by state laws; and
- Ordinance did not violate resident's constitutional right to conduct lawful business or his right to privacy and property.

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## **EMINENT DOMAIN - NORTH DAKOTA**

### **[In re 2015 Application for Permit to Enter Land for Surveys and Examination](#)**

**Supreme Court of North Dakota - August 18, 2016 - N.W.2d - 2016 WL 4395434 - 2016 ND 165**

County water resource district filed applications for permission to enter landowners' properties to conduct surveys, mapping, and examinations in connection with a proposed flood control project.

The District Court granted applications. Landowners appealed, and the appeals were consolidated.

The Supreme Court of North Dakota held that:

- Trial court had subject matter jurisdiction over district's applications, and

- Statute allowing district to “enter upon the land and make examinations, surveys, and maps thereof” entitled district to perform soil borings.

Trial court had subject matter jurisdiction over county water resource district’s applications for permission to enter landowners’ properties to conduct surveys, mapping, and examinations required for evaluating and designing a proposed flood control project, even though district did not serve eminent domain summonses and complaints on landowners. Proceedings on district’s applications were special statutory proceedings exempt from the rules of civil procedure, and such proceedings were preliminary to condemnation proceedings, rather than being condemnation proceedings requiring eminent domain summonses and complaints.

Eminent domain statute authorizing a preliminary proceeding in which the condemning authority may “enter upon the land and make examinations, surveys, and maps thereof” entitled county water resource district to perform soil borings on land in connection with a proposed flood control project, and thus such soil borings did not themselves constitute a compensable taking. Proposed soil borings constituted “examinations” under the statute and were minimally invasive, as district was forbidden to enter or damage buildings or cut trees without the landowners’ permission, and was required to restore the affected property to its original condition as nearly as practicable.

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## **MUNICIPAL GOVERNANCE - OHIO**

### **[State ex rel. Bates v. Smith](#)**

**Supreme Court of Ohio - August 23, 2016 - N.E.3d - 2016 WL 4486241 - 2016 -Ohio- 5449**

Prosecuting attorney sought peremptory writ of quo warranto to prohibit two township trustees from removing third trustee from office and appointing another trustee.

The Supreme Court of Ohio held that:

- Office of township trustee held by trustee on active military duty was not vacant, and
- Meeting at which trustees removed other trustee from office and appointed trustee violated Open Meetings Act.

Office of township trustee held by trustee who was on active military service was not vacant, and therefore other trustees were not statutorily authorized to remove trustee from office and appoint another trustee. Although applicable statute provided that, when a township officer was absent for more than 90 days, the office was deemed vacant, statute expressly excepted active military service from that provision.

Meeting during which two township trustees removed third trustee from office and appointed another trustee did not qualify as an emergency meeting, and therefore failure to give sufficient notice of meeting violated Open Meetings Act, where trustees had held another meeting less than 24 hours before meeting at issue, with no suggestion of any emergency, let alone one that would have compelled another meeting in less than 24 hours.

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## **PUBLIC RECORDS - PENNSYLVANIA**

### **[Clearfield County v. Bigler Boyz Enviro, Inc.](#)**

**Commonwealth Court of Pennsylvania - July 28, 2016 - A.3d - 2016 WL 4063054**

County brought action challenging Office of Open Records' (OOR) determination that handwritten notes made by county commissioner concerning two unsolicited telephone calls she received from private individuals were "records" under Right-to-Know Law (RTKL).

The Court of Common Pleas reversed, and requestor appealed.

The Commonwealth Court held that notes were not "records" subject to disclosure pursuant to RTKL.

Handwritten notes made by county commissioner concerning two unsolicited telephone calls she received from private individuals were not produced with county's authority and were not ratified, adopted, or confirmed by county, and thus were not "records" subject to disclosure pursuant to Right-to-Know Law (RTKL), where commissioner did not rely on information to make decision, did not discuss or otherwise share information contained in her notes with other commissioners, and was not authorized to speak for or bind county regarding matter at issue.

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## **IMMUNITY - ALABAMA**

### **[Ex parte Harris](#)**

**Supreme Court of Alabama - July 29, 2016 - So.3d - 2016 WL 4204837**

Community entertainment center owner brought action against town and town's police chief, in his individual capacity, asserting claims of malicious prosecution, false arrest, false imprisonment, harassment, intentional infliction of emotional distress, libel, and slander, after owner was arrested for allegedly selling alcohol without license.

The Circuit Court denied defendants' motion for summary judgment. Defendants separately petitioned for writ of mandamus directing trial court to enter summary judgment in their favor on basis of immunity. Petitions were consolidated.

The Supreme Court of Alabama held that:

- Chief carried burden, in seeking state-agent immunity, of showing that he was engaged in discretionary function for which such immunity would be available;
- Chief had at least arguable probable cause to arrest owner and, thus, exception to state-agent immunity applicable to willful, malicious, fraudulent, or bad faith actions did not apply;
- Chief was immune from malicious prosecution claim under doctrine of state-agent immunity; and
- Town was statutorily immune from suit as to all claims.

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## **LIENS - CALIFORNIA**

### **[Mechammil v. City of San Jacinto](#)**

**United States Court of Appeals, Ninth Circuit - June 30, 2016 - Fed.Appx. - 2016 WL 3619398**

San Jacinto Municipal Code § 1.28.110(C) allows the city to "place a lien on property that is the subject of a citation if the citation has been issued to the current property owner of record." "[T]he amount of the proposed lien may be collected as a special assessment at the same time and in the same manner as property taxes are collected." SJMC § 1.28.110(C)(3).

Property owner argued that these city ordinances are inconsistent with California state law.

The Court of Appeal agreed, holding that cities in California cannot attach liens or impose special assessments to collect outstanding nuisance fines or penalties.

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## **EMINENT DOMAIN - CALIFORNIA**

### **[City of Perris v. Stamper](#)**

**Supreme Court of California - August 15, 2016 - P.3d - 2016 WL 4268627**

City filed eminent domain action to acquire land for truck route through light industrial land, and appraised the take as undevelopable agricultural land on theory that it would not approve any development unless landowners gave or dedicated truck route land to the city.

After bifurcation and court trial on legal issues, the Superior Court entered judgment for city regarding dedication issue. Following stipulated judgment as to appraisal, landowners appealed. The Court of Appeal reversed and remanded. City petitioned for review. The Supreme Court granted review, superseding the opinion of the Court of Appeal.

The Supreme Court of California held that:

- Requirements of “essential nexus” and “rough proportionality” were questions for the court, not a jury, disapproving *City of Hollister v. McCullough*, 26 Cal.App.4th 289, 31 Cal.Rptr.2d 415, and
- Project effect rule generally applies when it is probable at the time a dedication requirement is put in place that the property subject to the dedication will be included in the project for which condemnation is sought.

The questions of “essential nexus” to a valid public purpose and “rough proportionality” to the impact of the proposed development, for a dedication requirement alleged to reduce the fair market value of condemned property to satisfy the Fifth Amendment, were questions for the court rather than a jury, since they were mixed questions of law and fact in which the legal issues predominated, and they were analytically prior to any factual dispute as to whether the condemner would actually have reduced the value of the property by requiring the dedication as a condition for development; disapproving *City of Hollister v. McCullough*, 26 Cal.App.4th 289, 31 Cal.Rptr.2d 415.

The project effect rule generally applies to an agency’s expectation for property to be dedicated as a condition of development of adjacent properties, and thus the dedication requirement is not considered in valuing the property in an eminent domain proceeding, when it is probable at the time a dedication requirement is put in place that the property subject to the dedication will be included in the project for which the condemnation is sought.

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## **MUNICIPAL ORDINANCE - CALIFORNIA**

### **[Weiss v. City of Los Angeles](#)**

**Court of Appeal, Second District, Division 4, California - August 8, 2016 - Cal.Rptr.3d - 2016 WL 4183951**

Motorist filed petition seeking a writ of mandate directing city and its processing agency to provide a legally sufficient initial review of parking violation.

The Superior Court issued the writ and awarded attorney's fees, and city and processing agency appealed.

The Court of Appeal held that:

- Motorist lacked any beneficial interest in outcome of mandamus proceeding, as motorist had paid fine;
- Motorist had standing under the "public interest" exception to pursue mandamus relief;
- City was required by statute to conduct initial review of tickets and could not delegate that duty to processing agency;
- Home rule doctrine did not apply to allow charter city to override statute and allow processing agency to review citations;
- Action resulted in the enforcement of an important right affecting the public interest as required for award of private attorney general fees; and
- Writ relief conferred a significant benefit on a large class of persons as required for award of fees under the private attorney general statute.

Motorist lacked any beneficial interest in outcome of mandamus proceeding seeking writ directing city and its processing agency to provide a legally sufficient initial review of parking violations, and thus lacked general standing to pursue the writ, where motorist unsuccessfully challenged his own parking citation at the initial review, then elected to pay the fine rather than pursue further appeal.

Motorist had standing under the "public interest" exception to pursue mandamus relief seeking writ directing city and its processing agency to provide a legally sufficient initial review of parking violations. Ensuring that city followed the proper procedure for processing and collecting parking tickets was a matter of public right, and given the burden of mounting a challenge to the initial review procedure and the typically minimum fine, it was unlikely an individual motorist would do so.

City, as agency issuing parking tickets, was required by statute to conduct initial review of tickets and could not delegate that duty to processing agency, notwithstanding statutory provision stating that an issuing agency may elect to contract with a private vendor for the processing of notices of parking violations prior to filing with the court.

Home rule doctrine did not apply to allow charter city to override statute and allow processing agency to review municipal parking citations, rather than city as required by statute. While administration of parking citations was a core municipal function for purposes of the home rule doctrine, city outsourced its duty to perform initial review of parking citations by way of a contract, not pursuant to a municipal ordinance, regulation or provision of the city charter.

Motorist's action for writ of mandate directing city and its processing agency to provide a legally sufficient initial review of parking violation resulted in the enforcement of an important right affecting the public interest warranting award of private attorney general fees. Motorist was successful in obtaining injunctive and declaratory relief ending processing agency's unlawful but longstanding practice of conducting initial reviews and compelling the city to comply with its statutory duty to perform that task, and public had fundamental right to review by a tribunal properly convened under the law and authorized by law to conduct the review.

Grant of writ relief requiring city, rather than its processing agency, to provide initial review of parking violations conferred a significant benefit on a large class of persons as required for award of fees under the private attorney general statute. Motorists who parked their cars in the city and received a parking ticket would have the initial review of their parking tickets performed by the city as the issuing agency, rather than the private processing agency, and benefit was significant, as it

increased city's accountability and accessibility and city and processing agency had argued that writ would necessitate a "complete changeover."

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## **LIABILITY - CONNECTICUT**

### **[Giannoni v. Commissioner of Transp.](#)**

**Supreme Court of Connecticut - August 9, 2016 - A.3d - 322 Conn. 344 - 2016 WL 4124295**

Parents brought highway defect action on behalf of their child, who was injured when he fell into a stream culvert while riding his bicycle on the sidewalk along a state highway, which ended at a private driveway and lawn shortly before the culvert.

The Superior Court denied Commissioner of Transportation's motion to dismiss, and Commissioner appealed.

The Supreme Court of Connecticut held that parents demonstrated that child was a traveler and that culvert was highway defect, as was required to state highway defect claim.

Parents of child, who was injured when he fell into a stream culvert while riding his bicycle on the sidewalk along a state highway, which ended at a private driveway and lawn shortly before the culvert, demonstrated that child was a traveler and that culvert was highway defect, as was required to state highway defect claim. Child retained his status as a traveler on the highway when he moved from the shoulder of the road to the sidewalk along highway because his travel over the sidewalk was incidental to and for a purpose connected with his travel over highway, state reasonably should have expected the public to traverse the culvert area, which would render the culvert a highway defect actionable under statute, sidewalk led directly to the culvert, the sidewalk was an area intended for public travel, and bicyclists were invited and reasonably expected to utilize the sidewalk, when necessary, in connection with their travel over highway.

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## **IMMUNITY - MAINE**

### **[Day's Auto Body, Inc. v. Town of Medway](#)**

**Supreme Judicial Court of Maine - August 2, 2016 - A.3d - 2016 WL 4088076 - 2016 ME 121**

Auto body business brought negligence action against town and contractor that assisted town fire department in responding to fire at business location.

The Superior Court granted summary judgment in favor of defendants, and business appealed.

The Supreme Judicial Court held that:

- Town's actions in responding to fire did not fall within the Tort Claims Act's immunity exception for negligent acts or omissions in its ownership, maintenance, or use of vehicles, machinery, and equipment;
- Contractor was a government employee for purposes of the Tort Claims Act;
- Contractor was absolutely immune from personal civil liability for any intentional act or omission within the course and scope of its employment; and
- Tort Claims Act provision that governed the defense and indemnification of government employees by their employers in certain suits arising out of the use of motor vehicles did not apply to hold



contractor liable for damages to business to the extent of any private liability insurance contractor held.

Town's actions in responding to fire did not fall within the Tort Claims Act's immunity exception for negligent acts or omissions in its ownership, maintenance, or use of vehicles, machinery, and equipment, regardless of the fact that vehicles or equipment were involved in the conduct that allegedly caused harm, because the gravamen of business's claim was that the town made imprudent tactical decisions in the course of fighting fire at business location.

Contractor that assisted town fire department in responding to fire at business location was a government employee for purposes of the Tort Claims Act. On the day of the fire, town's fire department summoned one of contractor's employees to assist at fire scene with an excavator, employee acted only at the direction of the town, no contract existed for performance of the work performed at a fixed price, and the type of work, fire suppression, was the regular business of the town.

Contractor, that under the Tort Claims Act, was an employee of town when, at the direction of town, it responded to a business fire and used its excavator in an attempt to minimize fire damage, was absolutely immune from personal civil liability for any intentional act or omission within the course and scope of its employment. Contractor's actions were intentional, they were within the scope of its employment, and there was no allegation that they were taken in bad faith.

Tort Claims Act provision that governed the defense and indemnification of government employees by their employers in certain suits arising out of the use of motor vehicles did not apply to hold contractor that assisted town in responding to business fire liable for damages to business to the extent of any private liability insurance contractor held, when contractor, as a government employee, was otherwise immune from suit pursuant to the Act.

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## **IMMUNITY - NEW JERSEY**

### **[Parsons v. Mullica Tp. Bd. of Educ.](#)**

**Supreme Court of New Jersey - August 17, 2016 - A.3d - 2016 WL 4370011**

Student, by her parents, brought negligence action against township board of education and nurse who conducted a visual acuity test on student, arising out of delay in reporting results of test to student's parents.

Board and nurse moved for summary judgment. The Superior Court denied motion. Board and nurse appealed, and the Superior Court, Appellate Division, reversed and remanded. Student sought leave to appeal, which was granted.

The Supreme Court of New Jersey held that:

- Visual acuity test of student was a "physical examination" within scope of provision of Tort Claims Act providing immunity to public entities for failing to conduct an adequate physical examination, and
- An "adequate physical examination" includes reporting the results of the examination.

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## **ANNEXATION - NORTH DAKOTA**

## **New Public School Dist. No. 8 v. State Bd. of Public School Educ.**

**Supreme Court of North Dakota - August 17, 2016 - N.W.2d - 2016 WL 4379223 - 2016 ND 163**

School district appealed State Board of Public School Education's decision approving annexation of certain real properties to another school district.

The Northwest Judicial District Court affirmed the Board's decision, and school district appealed.

The Supreme Court of North Dakota held that eligibility requirements for annexation by a school district were met when the annexations became effective, even though the real properties to be annexed were not contiguous with the school district at the time the annexation petition was heard.

Statutory eligibility requirements for annexation by a school district were met when the annexations became effective, even though the real properties to be annexed were not contiguous with the school district at the time the annexation petition was heard. The properties to be annexed were contiguous to other property which was contiguous to the school district, to which annexation had previously been approved, and annexation of all of the properties became effective on the same date.

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## **REFERENDA - OKLAHOMA**

### **Save the Illinois River, Inc. v. State ex. rel. Oklahoma State Election Board**

**Supreme Court of Oklahoma - August 8, 2016 - P.3d - 2016 WL 4189500 - 2016 OK 86**

Concerned citizen group filed petition urging that a legislatively proposed constitutional amendment was facially unconstitutional.

Defendants filed a motion to dismiss, submitting that the challenge was untimely. The District Court granted the motion finding the challenge was untimely and was not facially unconstitutional. Citizen group appealed.

The Supreme Court of Oklahoma held that district court properly dismissed citizen group's petition but should have done so on basis that it should abstain from addressing a legislative referendum before voted on by the people.

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## **EMINENT DOMAIN - PENNSYLVANIA**

### **In re Sunoco Pipeline, L.P.**

**Commonwealth Court of Pennsylvania - July 14, 2016 - A.3d - 2016 WL 3755774**

Pipeline service operator sought to condemn property, and condemnees filed objections.

The Court of Common Pleas overruled the objections. Condemnees appealed.

The Commonwealth Court held that:

- Collateral estoppel did not bar action;
- Operator was public utility corporation empowered to exercise eminent domain;
- Operator had power to condemn property for construction of pipeline; and

- There was no basis for the Court of Common Pleas to review the Public Utility Commission's (PUC) determination of public need.

Issue decided in previous case regarding pipeline service operator's plans to construct interstate natural gas pipeline was not same issue raised in operator's petition to condemn property after pipeline was repurposed to be interstate and intrastate pipeline, and therefore collateral estoppel did not bar action. Prior case addressed only whether operator was public utility corporation because it was subject to regulation as public utility by Federal Energy Regulatory Commission (FERC), and did not decide whether operator was public utility corporation because it was subject to regulation as public utility by Public Utility Commission (PUC).

Service to be provided by natural gas pipeline involved both interstate service, subject to Federal Energy Regulatory Commission (FERC) regulation, and intrastate service, subject to Public Utility Commission (PUC) regulation, and therefore pipeline service operator was public utility corporation empowered to exercise eminent domain, despite contention that pipeline was solely in interstate commerce. Pipeline was to consist of physical structure with access points in Ohio, West Virginia, and Pennsylvania, product was to be placed into pipeline and removed at multiple points within Pennsylvania, and pipeline operator had filed, and received PUC approval, of multiple tariffs applicable to operator's provision of intrastate service.

Public Utility Commission (PUC) regulated intrastate shipments of natural gas liquids, including service provided by pipeline that was authorized expansion of existing service, and therefore pipeline service operator had power of eminent domain to condemn property for construction of pipeline. Operator's certificates of public convenience applied to both existing service and to planned expansion, and operator's approved tariffs proposed to add new origin point for west-to-east intrastate movements of propane, based on the certificates issued.

There was no basis for court of common pleas to review Public Utility Commission's (PUC) determination that public need was demonstrated by pipeline service operator in application to condemn property to construct natural gas pipeline. PUC followed its statutory mandate and evaluated issues within its purview, and allowing such review would have permitted collateral attacks on PUC decisions and would have been contrary to statute that placed review within authority of Commonwealth Court.

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## **PUBLIC UTILITIES - TENNESSEE**

### **[Tennessee v. Federal Communications Commission](#)**

**United States Court of Appeals, Sixth Circuit - August 10, 2016 - F.3d - 2016 WL 4205905**

States of Tennessee and North Carolina petitioned for review of an order of the Federal Communications Commission (FCC) which purported to preempt state statutory provisions that either forbade or put onerous restrictions on expansion of broadband service networks by municipal telecommunications providers.

The Court of Appeals held that:

- Clear statement rule applied in determining whether state statutes that either forbid or restricted expansion of broadband service networks by municipal telecommunications providers were preempted by Telecommunications Act, and
- Telecommunications Act provision relating to promotion of competition in broadband marketplace

did not preempt state statute regulating expansion of municipal broadband service networks.

Clear statement rule applied in determining whether state statutes that either forbid or restricted expansion of broadband service networks by municipal telecommunications providers were preempted by Telecommunications Act provision relating to promotion of competition in broadband marketplace, as federal preemption of state law threatened to trench on the states' arrangements for conducting their own governments.

Telecommunications Act provision relating to promotion of competition in broadband marketplace did not contain a clear statement authorizing preemption of Tennessee and North Carolina statutes that either forbid or put onerous restrictions on expansion of broadband service networks by municipal telecommunications providers, and, thus provision did not authorize such preemption. Telecommunications Act provision's directive to remove barriers and promote competition could not be read to limit a state's ability to trump a municipality's exercise of discretion otherwise permitted by Federal Communications Commission (FCC) regulations.

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## **IMMUNITY - CALIFORNIA**

### **[Findleton v. Coyote Valley Band of Pomo Indians](#)**

**Court of Appeal, First District, Division 2, California - July 29, 2016 - Cal.Rptr.3d - 2016 WL 4120780 - 16 Cal. Daily Op. Serv. 8123**

Contractor filed petition to compel mediation and arbitration against Indian tribe, seeking to enforce the mediation and arbitration clauses in agreements pertaining to project to construct new gaming facility on tribe's reservation, stemming from tribe's failure to pay contractor for work completed on project.

The Superior Court granted tribe's motion to quash service of summons and to dismiss for lack of subject matter jurisdiction on grounds that tribe had not waived its sovereign immunity. Contractor appealed.

The Court of Appeal held that:

- Evidence was sufficient to establish that general council resolution delegating authority to waive sovereign immunity to tribal council was authentic and adopted;
- Tribe's constitution allowed general council to delegate authority to tribal council to waive immunity by adopting resolution; and
- Tribal council waived tribe's sovereign immunity by enacting resolution that included limited waiver of immunity.

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## **WATER LAW - CALIFORNIA**

### **[Santa Clarita Organization for Planning and the Environment v. Castaic Lake Water Agency](#)**

**Court of Appeal, Second District, Division 2, California - July 28, 2016 - Cal.Rptr.3d - 2016 WL 4045243 - 16 Cal. Daily Op. Serv. 8150**

Objector brought action against water agency, water purveyor, their boards of directors, the company that sold the purveyor to the water agency, and an affiliate of that company for inverse

validation, writ of mandate, violations of the California Environmental Quality Act (CEQA), illegal expenditure of taxpayer funds, and conflict of interest.

The Superior Court sustained demurrer with leave to amend on objector's CEQA claim, denied objector's claims for invalidation and for a writ of mandate, and rejected objector's claim based on the improper use of taxpayer funds. Objector appealed.

The Court of Appeal held that:

- Objector's pleading of validation statutes did not judicially estop objector from arguing that the validation statutes' shorter deadline to file a notice of appeal did not apply;
- Purveyor did not become agency's alter ego such that the agency was improperly engaged in the retail sale of water; and
- Agency's acquisition of purveyor's stock did not violate the constitutional provision limiting agency ownership of company stock.

Water agency's acquisition of water purveyor, through a settlement agreement in the agency's eminent domain action against the purveyor's owner, was not subject to validation proceedings under the uncoded provision of the water agency's enabling act authorizing validation proceedings for "any bonds, warrants, promissory notes, contracts, or other evidences of indebtedness" of the kinds authorized by provisions dealing with issuing bonds and borrowing money.

Water agency's acquisition of water purveyor, through a settlement agreement in the agency's eminent domain action against the purveyor's owner, was not subject to validation proceedings under the uncoded provision of the water agency's enabling act providing that retail sale of water within an area that had been serviced by another water district until the agency absorbed that district was governed by the Water Code provision making validation proceedings applicable "to determine the validity of an assessment, or of warrants, contracts, obligations, or evidence of indebtedness," since the purveyor operated outside the boundaries of the district that had been absorbed.

Water agency's acquisition of water purveyor, through a settlement agreement in the agency's eminent domain action against the purveyor's owner, was not subject to validation proceedings under the statute making validation proceedings available to determine the validity of a local agency's "bonds, warrants, contracts, obligations or evidences of indebtedness," where the agency purchased purveyor's stock using cash on hand, and the agency's settlement contract to acquire purveyor's stock did not deal with bonds, warrants, or other evidence of indebtedness, and was not inextricably bound up with other contracts that did.

Objector's invocation of the validation statutes by pleading them in its inverse validation complaint challenging water agency's acquisition of water purveyor, seeking the trial court's permission to publish the requisite constructive notice required by the validation statutes, and by informing the court that it gave that notice, did not judicially estop objector from arguing on appeal that the validation statutes' shorter deadline to file a notice of appeal did not apply, since objector's contest to the applicability of the validation statutes amounted to a dispute over the court's subject matter jurisdiction.

Trial court's finding that water agency's acquisition of retail water purveyor did not cause the purveyor to become agency's alter ego, in concluding that the purveyor's retail sales of water did not violate a provision of the water agency's enabling act requiring it to sell water at wholesale only, was supported by substantial evidence, including evidence that only three of the purveyor's five directors were agency employees, and that the acquisition agreement addressed a merger between

the agency and the purveyor as at most a possible contingency.

Water agency's acquisition of all of retail water purveyor's stock did not violate the constitutional provision limiting agency ownership of company stock, where the purveyor was a corporation, and the water agency held purveyor's stock for the purpose of furnishing a supply of water for public purposes.

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## **IMMUNITY - FLORIDA**

### **Bair v. City of Clearwater**

**District Court of Appeal of Florida, Second District - August 5, 2016 - So.3d - 2016 WL 4150220**

Homeowners brought action against city asserting claims of equitable estoppel and relief pursuant to the Bert Harris Act after city issued stop-work order relating to work being done on their home.

The Circuit Court dismissed estoppel claim and granted summary judgment for city on Bert Harris Act claim, and homeowners appealed.

The District Court of Appeal held that:

- Bert Harris Act's waiver of sovereign immunity did not apply to city's issuance of stop-work order;
- Bert Harris Act's waiver of sovereign immunity did not apply to city's reliance on Federal Emergency Management Agency (FEMA) guidelines;
- Even if city had applied regulations from FEMA, homeowners had no cause of action under Bert Harris act;
- Homeowners did not have a cause of action under Bert Harris Act based on city's reliance on flood insurance maps and studies;
- Legislature intended Bert Harris Act to bar claims based on the application of grandfathered legislation; and
- Homeowners' equitable estoppel claim was waived on appeal.

Bert Harris Act's waiver of sovereign immunity did not apply to city's issuance of stop-work order against homeowner's demolition and reconstruction of home, where city did not apply a law, rule, regulation, or ordinance, but merely requested additional information regarding the project, and requested revisions to plans.

Bert Harris Act's waiver of sovereign immunity did not apply to city's alleged reliance on Federal Emergency Management Agency (FEMA) guidelines in issuing stop-work order for work being done on homeowners' property, where city never argued it had the authority to administer or apply FEMA regulations.

Even if city had been delegated authority by Federal Emergency Management Agency (FEMA) to administer and apply FEMA regulations when it issued stop-work order against homeowners, such application did not give rise to cause of action under Bert Harris Act. Actions that inordinately burden real property under the Act did not include a municipality that independently exercised governmental authority when exercising the powers of the United States or any of its agencies.

Homeowners did not have a cause of action under Bert Harris Act based on city's use of flood insurance maps and studies from after Act's enactment in determining that homeowner's property was in a flood zone, and requiring improvements to meet city's flood resistance standards; any

reliance on post-enactment portions of the flood standards did not inordinately burden homeowners' property.

Bert Harris Act was not only intended to bar claims of application of an ordinance that occurred prior to Act's enactment date, but was intended to bar claims based on the application of grandfathered legislation after its effective date, and to only allow claims based on newly imposed requirements that were the result of an amendment after Act's enactment date and that inordinately burdened real property.

Whether homeowners were bound by their stipulation that they were asserting a stand-alone equitable estoppel claim against city was waived on appeal, where homeowners failed to argue at trial or in a motion for rehearing that the trial court was precluded from considering stipulation and brought the issue up for the first time on appeal.

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## **MUNICIPAL ORDINANCE - GEORGIA**

### **[Flanigan's Enterprises, Inc. of Georgia v. City of Sandy Springs, Georgia](#)**

**United States Court of Appeals, Eleventh Circuit - August 2, 2016 - F.3d - 2016 WL 4088731**

Adult bookstore brought action against city, asserting Fourteenth Amendment Due Process Clause challenge to city's municipal ordinance that prohibited the sale, rental, or lease of obscene material, including "[a]ny device designed or marketed as useful primarily for the stimulation of human genital organs."

Individuals who sought to purchase sexual devices for their private sexual activity and for use in artwork intervened.

The United States District Court granted city's motion for judgment on pleadings. Plaintiffs appealed.

The Court of Appeals held that consenting adults had no fundamental right to engage in private sexual intimacy, including by the use of sexual devices in the privacy of the home.

Consenting adults had no fundamental right to engage in private sexual intimacy, such as the use of sexual devices in the privacy of the home, and thus a city municipal ordinance did not violate the Due Process clause by prohibiting the sale, rental, or lease of obscene material, including "[a]ny device designed or marketed as useful primarily for the stimulation of human genital organs."

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## **EMINENT DOMAIN - ILLINOIS**

### **[Illinois State Toll Highway Authority v. South Barrington Office Center](#)**

**Appellate Court of Illinois, First District, Sixth Division - June 30, 2016 - N.E.3d - 2016 IL App (1st) 150960 - 2016 WL 3569556**

State Toll Highway Authority brought condemnation action against property owner and other entities with interests in the property.

The Circuit Court, entered order finding that Authority was authorized to condemn owner's property



and awarding preliminary compensation. Owner filed interlocutory appeal.

The Appellate Court held that resolution authorizing condemnation contained sufficiently reasonable description of property to permit Authority to proceed with condemnation.

Resolution authorizing State Toll Highway Authority to condemn property in connection with highway construction project contained reasonable description of parcels, as required for Authority to proceed with condemnation of the property. Resolution specifically identified property index numbers (PIN) in which parcels were contained, specifically provided for acquisition of the types of property interests sought by Authority, including fee title, permanent easement, and access control, and specifically authorized condemnation proceeding when no agreement could be made with respect to all or part of each parcel identified.

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## **SPECIAL ASSESSMENTS - MINNESOTA**

### **[McCullough and Sons, Inc. v. City of Vadnais Heights](#)**

**Supreme Court of Minnesota - August 10, 2016 - N.W.2d - 2016 WL 4211972**

Landowner appealed city's imposition of a special assessment on its real property.

The District Court denied city's motion for summary judgment. City appealed. The Court of Appeals reversed. Landowner's petition for review was granted.

The Supreme Court of Minnesota held that:

- District court's order, which denied city's summary judgment motion seeking dismissal based on landowner's failure to file written objections to proposed assessment, was not final, appealable judgment;
- District court's order was reviewable on appeal from final judgment, and thus was not immediately appealable under the collateral-order doctrine;
- Written-objection requirement set forth in special assessment procedure statute was claim-processing rule, rather than jurisdictional requirement, that did not give rise to city's right to immediately appeal order; and
- Written-objection requirement set forth in special assessment procedure statute was not analogous to claim of immunity, and thus, did not give rise to city's right to immediately appeal order.