
IMMUNITY - NEW HAMPSHIRE

Maryea v. Velardi

Supreme Court of New Hampshire - March 8, 2016 - A.3d - 2016 WL 873811

County house of corrections inmate filed suit against county for injuries she sustained when van that she was riding in while being transported to courthouse collided with another vehicle. The Superior Court granted county's motion for summary judgment on grounds of immunity, and inmate appealed.

The Supreme Court of New Hampshire held that:

- Statutory exception to immunity for actions to recover for bodily injury, personal injury, or property damage arising out of ownership, occupation, maintenance or operation of motor vehicle did not abrogate common law "discretionary function" immunity, and
- County was entitled to "discretionary function" immunity from liability for inmate's injuries.

Statute providing that governmental unit may be liable in action to recover for bodily injury, personal injury, or property damage arising out of ownership, occupation, maintenance or operation of motor vehicle did not abrogate county's common law "discretionary function" immunity from liability for injuries sustained by county house of corrections inmate when van she was riding in while being transported to courthouse collided with another vehicle, which claim arose out of county sheriff's decision not to install seat belts in portion of van designated for inmates.

County sheriff's decision not to install seat belts in portion of transport van designated for inmates was discretionary, not ministerial function, and thus, county was entitled to "discretionary function" immunity from liability for injuries sustained by House of Corrections inmate when van she was riding in while being transported to courthouse collided with another vehicle. Sheriff considered installing seatbelts, but decided that danger to officers and public outweighed increased safety that the seatbelts would provide for inmates, in that installation of seatbelts would require corrections officers to enter van with inmates in order to strap them in, which would make it easier for inmates to overwhelm officers, access their firearms, and escape.

IMMUNITY - NORTH DAKOTA

Woody v. Pembina County Annual Fair Exhibition Ass'n

Supreme Court of North Dakota - March 15, 2016 - N.W.2d - 2016 WL 1031797 - 2016 ND 56

Spectator brought action against county fair association alleging negligence after she fell through a board in the grandstand while watching a fireworks display. The District Court granted summary judgment in favor of association. Spectator appealed.

The Supreme Court of North Dakota held that:

- Association was entitled to recreational use immunity, and
- Statute imposing supervision requirement did not impose duty on association to ensure premises were safe.

County fair association was engaged in recreational, rather than commercial, purposes in staging fireworks display, and therefore was entitled to recreational use immunity in negligence action brought by spectator who fell through grandstand while watching fireworks, where association did not charge any fee for entry to fairgrounds, to the grandstand area, or to observe the fireworks display.

Statute that imposed supervision requirement on county fair associations that granted applications for carnivals did not impose duty to ensure the premises were safe from all conditions, and therefore statute did not apply in negligence action brought by spectator who fell through grandstand while watching fireworks display at county fairgrounds.

MUNICIPAL ORDINANCE - NORTH DAKOTA

State v. Putney

Supreme Court of North Dakota - March 15, 2016 - N.W.2d - 2016 WL 1030024 - 2016 ND 59

Defendant was convicted in the District Court of aggravated assault. Defendant appealed.

The Supreme Court of North Dakota held that:

- Evidence supported finding that defendant acted knowingly;
- Evidence supported finding that shooting victim suffered a permanent impairment of a bodily function; and
- Courts are free to judicially notice municipal ordinances, abrogating *Keyes v. Amundson*, 391 N.W.2d 602, and *State v. Stensaker*, 2007 ND 6, 725 N.W.2d 883.

MUNICIPAL ORDINANCE - OHIO

Springfield v. State

Court of Appeals of Ohio, Second District, Clark County - February 26, 2016 - N.E.3d - 2016 WL 768655 - 2016 -Ohio- 725

City filed complaint against state, alleging that proposed legislation that served to amend and enact several statutory provisions governing traffic law photo-monitoring devices violated Home Rule Amendment to state constitution. The Court of Common Pleas denied city summary judgment and granted state summary judgment. City appealed.

The Court of Appeals held that:

- City lacked standing to challenge legislation regarding provision implementing use of speed cameras and mobile photo-monitoring devices;
- City's traffic camera ordinance was an exercise of police power subject to invalidation; and
- Proposed legislation was a general law.

ZONING - RHODE ISLAND

Tarbox v. Zoning Bd. of Review of Town of Jamestown

Supreme Court of Rhode Island - March 15, 2016 - A.3d - 2016 WL 984044

Homeowners appealed town zoning board of review's denial of their application for a dimensional variance. After the Superior CourT reversed, the Superior Court denied homeowners' motion for an award of reasonable litigation expenses under the Equal Access to Justice for Small Businesses and Individuals Act. Homeowners appealed.

The Supreme Court of Rhode Island held that:

- As a matter of first impression, litigant seeking review of ruling on litigation expenses under the Act in case on appeal from decision of zoning board must petition for writ of certiorari;
- Zoning board is an "agency" under the Act; and
- Homeowners' hearing was an "adjudicatory proceeding" under the Act.

IMMUNITY - WISCONSIN

Estate of Collis ex rel. Collis v. Hazel Green Rescue Squad, Inc.

Court of Appeals of Wisconsin - March 3, 2016 - Slip Copy - 2016 WL 820825

Following ambulance accident, decedent's estate brought a wrongful death action against the Hazel Green Rescue Squad, Inc.

Hazel Green moved for summary judgment. It argued that the Estate failed to provide the Hazel Green Rescue Squad with a notice of claim as required under WIS. STAT. § 893.80(1d) (2013–14). Hazel Green argued that the Hazel Green Rescue Squad is a political corporation or governmental subdivision of the municipalities that it is organized and funded to serve, that its ambulance is a municipal vehicle, and that driver was its volunteer at the time of the accident, triggering the notice of claim statute. Hazel Green provided supporting affidavits averring that the Hazel Green Rescue Squad is a nonprofit organization that provides ambulance services for a group of neighboring municipalities; that all of its drivers are volunteers; that each participating municipality pays for a portion of the organization's equipment and operating costs; that the ambulance involved in this case is owned by the Hazel Green Rescue Squad; and that the Estate did not provide a timely notice of claim.

The Estate opposed summary judgment, arguing that the Hazel Green Rescue Squad is not a political corporation or governmental subdivision.

The Court of Appeals held that the Hazel Green Rescue Squad is a nonprofit corporation organized and maintained by neighboring municipalities to provide authorized ambulance services. The Hazel Green Rescue Squad is therefore a "municipality" for purposes of negligence actions arising from operation of a motor vehicle owned by a municipality.

PUBLIC UTILITIES - CALIFORNIA

Rosen v. Uber Technologies, Inc.

United States District Court, N.D. California - February 23, 2016 - F.Supp.3d - 2016 WL

704078

Taxicab driver brought putative class action against mobile-based transportation network company, which allowed passengers to request paid transportation from third-party transportation providers on their smartphones, alleging failure to comply with applicable California Public Utilities Commission regulations for taxi and other transportation companies, and misrepresentations in regards to company's "safe rides fee." Company moved to dismiss.

The District Court held that:

- Action interfered with Commission's regulatory authority, and thus Commission had sole jurisdiction over claims;
- Driver did not allege his actual reliance on alleged misrepresentations made by company, and thus failed to state claim for misrepresentation against company under Unfair Competition Law;
- Driver did not allege any vested interest in profits of network transportation company, and thus failed to state claim for restitution under False Advertising Law; and
- Driver failed to allege any interference with existing economic relationship by company, precluding claim for intentional interference with prospective economic advantage.

District court action on taxicab driver's claims against mobile-based transportation network company, which allowed passengers to request paid transportation from third-party transportation providers on their smartphones, alleging failure to comply with applicable Public Utilities Commission regulations for taxi and other transportation companies, would hinder or interfere with the exercise of regulatory authority by the California Public Utilities Commission, and thus Commission had sole jurisdiction over the claims. Commission had commenced rulemaking procedures in order determine how to supervise companies that offered new ways of arranging transportation of passengers over public highways for compensation through smartphone applications.

PROPERTY - GEORGIA

Atlanta Development Authority v. Clark Atlanta University, Inc.

Supreme Court of Georgia - March 7, 2016 - S.E.2d - 2016 WL 860297

University filed complaint against city development authority for declaratory judgment, seeking declaration and judgment that university had a valid automatic reversionary interest in college's property that was triggered when college sold property to authority. The Superior Court denied authority's motion to dismiss complaint. Interlocutory appeal was granted.

The Supreme Court of Georgia held that:

- Restriction and reverter provisions of deed were valid, and
- College's sale of property was not a permitted "use" under provisions.

Easement in gross in favor of named individual with respect to one parcel conveyed in deed, which contained a restriction and reverter provision that all three parcels conveyed would revert to grantor university if grantee college ceased to use the property for specified educational purposes, did not insulate that parcel from restriction and reverter provision applicable to all parcels that were conveyed. Easement allowed university employee to use property that he occupied at time of conveyance, which was consistent with expressed intent that property be used for educational purposes.

College's sale of property to city development authority did not qualify as college's "use" of property as contemplated in restriction and reverter provisions of deed, under which property would revert to grantor if grantee college ceased to use the property for specified educational purposes.

FINRA ARBITRATION - IDAHO

AXA Advisors, LLC v. Lee

United States District Court, D. Idaho - January 27, 2016 - Slip Copy - 2016 WL 335852

The Lee family lost over a million dollars in investments they made through Douglas Roberts, who was a representative for AXA at the time. The Lees filed an arbitration claim with the Financial Industry Regulatory Authority (FINRA) against plaintiff AXA Advisors, a broker-dealer and member of FINRA. In their arbitration claim, the Lees claim that AXA failed to properly supervise Roberts.

AXA brought this lawsuit seeking to enjoin the arbitration on the ground that the Lees were never customers of AXA and hence could not compel arbitration under FINRA Rule 12200. Both sides agree – for the purposes of these cross motions only – that (1) AXA is a FINRA member governed by FINRA Rules, (2) Roberts was an "associated person" with AXA at all times relevant here for purposes of FINRA Rule 12200; (3) the Lees dealt exclusively with Roberts and never opened an account with AXA or purchased any services from AXA; and (4) the Lees were customers of Roberts.

The parties diverge, however, in the meaning they attach to these undisputed facts. AXA argues that because the Lees dealt exclusively with Roberts, the Lees were never customers of AXA and hence cannot compel arbitration under Rule 12200. The Lees argue that because they were customers of Roberts who was an associated person with AXA, they are entitled to compel arbitration under Rule 12200.

"The issue boils down to whether it is enough for the Lees to be customers of Roberts, an associated person of AXA, or whether the Lees must be direct customers of AXA."

The court denied AXA's motion, holding that the Lees have the right to seek arbitration against AXA under FINRA Rule 12200.

EASEMENTS - IDAHO

Morgan v. New Sweden Irr. Dist.

Supreme Court of Idaho., Boise, December 2015 Term - March 4, 2016 - P.3d - 2016 WL 852737

Property owner brought negligence action against irrigation district, and district counterclaimed for declaratory judgment as to its easement's existence and scope. Following remand from the Supreme Court the District Court entered declaratory judgment determining where to measure 16-foot width of easement held district that bordered irrigation canal that ran the length of property owner's property. Property owner appealed.

The Supreme Court of Idaho held that:

- Property owner was not entitled to jury trial on declaratory judgment claim;
- Admission of new evidence was not warranted following remand;

- Trial court was not required to incorporate original judgment into judgment entered following remand; and
- District was entitled to award of appellate attorney's fees.

Claim concerned only issues of equity, and therefore property owner did not have right to a jury trial under state constitution on irrigation district's request for declaratory judgment concerning terms of easement.

Admission of new evidence was not warranted on remand to trial court in property owner's negligence action on narrow issue of determining where on the servient estate the width of a 16-foot easement held by irrigation district was to be measured. Additional evidence property owner sought to have admitted on remand was not probative on limited issue.

Judgment entered after remand was not required to describe every aspect of easement, and therefore trial court was not required to incorporate original judgment into its judgment following remand from the Supreme Court in negligence and declaratory judgment dispute between property owner and irrigation district that held easement, where Supreme Court remanded for consideration of limited issue of where on the servient estate the width of a 16-foot easement held by irrigation district was to be measured.

Irrigation district was entitled to award of appellate attorney's fees pursuant to statute that permitted municipal entities to recover fees when nonprevailing party acted without reasonable basis in fact or law in property owner's appeal following entry of declaratory judgment after remand regarding terms of district's easement, where remand was limited to narrow issue of where on property width of easement was to be determined, and property owner attempted to argue numerous issues outside scope of remand.

BOND INSURANCE - LOUISIANA

New Orleans City v. Ambac Assur. Corp.

United States Court of Appeals, Fifth Circuit - March 2, 2016 - F.3d - 2016 WL 825388

To help fund a pension plan for firefighters, the City of New Orleans decided to issue municipal bonds in December 2000. City officials enlisted the help of an accounting firm, three law firms, and a financial advisory firm to consult in the bond issuance. At the time, the City's credit rating was just above "junk" status. The City contracted with Ambac Assurance Corporation to provide municipal bond insurance. The City paid Ambac a nonrefundable, up-front premium of $6,388,658.80 for the Municipal Bond Insurance Policy. Under the Policy, Ambac guaranteed payment of principal and interest to the bondholders in the event of non-payment by the City. When the Policy was issued, Ambac enjoyed a Aaa credit rating from Moody's.

Starting in late 2007, securities analysts and market commentators began to question the exposure of bond insurers to sub-prime residential mortgage backed securities and similar consumer finance asset-backed securities. As a result, Ambac's credit rating began to fall. As Ambac's credit rating fell, so too did the rating of the City's bonds, despite not missing a payment to the bondholders. The bonds became costlier for the City to service, and Paine Webber eventually stopped remarketing them. Consequently, the City has paid tens of millions of dollars in additional debt service and refinancing costs.

The City brought action against Ambac alleging breach of agreement to provide credit enhancement,

bad faith, and misrepresentations as to value of insurer's credit enhancement product. The United States District Court granted insurer's motion to dismiss. City appealed.

The Court of Appeals held that:

- No larger credit enhancement agreement bound insurer under policy;
- Any error by city as to what it was purchasing was unilateral error that did not vitiate city's consent; and
- City did not sufficiently allege detrimental reliance cause of action.

Under municipal bond insurance policy, pursuant to which insurer guaranteed payment to bondholders of principal and interest if city failed to make such payment, no larger credit enhancement agreement bound insurer, precluding city's Louisiana-law breach of contract claim. Policy made no mention of such agreement, no written statement recognizing existence of such agreement was attached to policy, insurer was only party to policy and surety bonds, rendering other alleged agreements mentioning such agreement irrelevant in this analysis, city's use of term "credit enhancement device" to describe policy did not create any obligation for insurer, and city failed to provide sufficient factual allegations to support existence of oral agreements with insurer.

Any error about what city was purchasing when it paid insurer more than six million dollars for municipal bond insurance policy was unilateral error by city, and such error was neither reasonable nor excusable, and thus error did not vitiate city's consent, precluding its claim for damages under Louisiana contract law. Policy's clear language promised municipal bond insurance, not credit enhancement, and insurer's marketing of policy as form of credit enhancement and its assistance in drafting city's resolutions did nothing to support belief that city was purchasing larger agreement for credit enhancement.

City did not allege sufficient facts that insurer represented that it would maintain its credit and underwriting standards for term of municipal bonds, precluding its Louisiana-law detrimental reliance claim against insurer, as related to municipal bond insurance policy, where city's resolutions showed only that city purchased policy from highly-rated insurer, which, at time of issuance, lessened perceived credit risk of city's bonds, and any alleged representation by insurer to provide larger credit enhancement was foreclosed by clear policy language.

Even if city sufficiently pled that insurer represented that it would maintain its credit and underwriting standards for term of municipal bonds, city was not reasonable in relying on such representations, precluding its Louisiana-law detrimental reliance claim against insurer, as related to municipal bond insurance policy, where insurer made only general statements in its annual reports and references to term credit enhancement in city's resolutions, and city and insurer were sophisticated parties that engaged in arm's-length negotiations with respect to bond offering.

LAW ENFORCEMENT - MASSACHUSETTS

Frawley v. Police Com'r of Cambridge

Supreme Judicial Court of Massachusetts, Middlesex - March 4, 2016 - N.E.3d - 2015 WL 10401419

Retired police officer brought action against police commissioner for declaratory and injunctive relief, seeking declaration that commissioner breached his duty by refusing to issue officer replacement retired officer identification card, which allows the retired officer to carry a concealed

firearm across state lines. The Superior Court Department granted summary judgment to officer. Commissioner appealed, and the case was transferred to the Supreme Judicial Court.

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

- There is no private cause of action to compel a commissioner to issue a replacement card;
- Appropriate avenue to challenge decision to deny application for card was in nature of certiorari;
- A reviewing court will examine whether commissioner's decision was an abuse of discretion;
- Commissioner could reopen officer's case; and
- Commissioner abused his discretion in denying officer's application.

Appropriate avenue of relief for retired police officer's challenge to police commissioner's decision to deny officer's application for replacement retired officer identification card was in nature of certiorari, rather than declaratory judgment action. Commissioner's legal obligation under regulations was not in dispute, proceeding after officer completed application included professional standards review, which was quasi judicial, officer did not have private cause of action, and denial of card rendered officer ineligible to exercise federal right to carry concealed firearm across state lines.

Supreme Judicial Court would decide retired police officer's challenge to police commissioner's decision to deny officer's application for replacement retired officer identification card that allowed retired officers to carry concealed firearms across state lines, which was in nature of action for certiorari and which was improperly brought to trial court as action for declaratory relief. Even though officer's challenge would have been untimely if brought as certiorari action, judicial review of commissioner's decision proceeded under same standard whether conducted by Supreme Judicial Court or on remand, review under certiorari action was limited, and no appellate court had previously decided whether aggrieved party could challenge denial of identification card.

Police commissioner abused his discretion in deciding that retired police officer had not met standard set by police department for retiring in good standing, as required to obtain replacement retired officer identification card that allowed officer to carry concealed firearm across state lines. Department had cleared officer of any wrongdoing with respect to citizen complaint at time of retirement, charges that officer failed to tell truth during investigation were effectively closed, and officer's prior suspension for insubordination and misconduct were not pending at time of retirement.

AUCTION RATE SECURITIES - MICHIGAN

William Beaumont Hospital v. Morgan Stanley & Co., L.L.C.

United States District Court, E.D. Michigan, Southern Division - January 19, 2016 - Slip Copy - 2016 WL 213028

Hospital brought standard-issue Auction Rate Securities claim against Morgan Stanley. Morgan Stanley moved to dismiss the action as time-barred and for failure to state a claim.

Morgan Stanley argued that the fraud and misrepresentation claims accrued when Hospital executed the contract that it alleges it was fraudulently induced to sign. Because these agreements were executed in March 2006, it is asserted that the limitations period expired in March 2012, and thus Plaintiff is time-barred from bringing this complaint.

Hospital argued that the harm it suffered as a result of the underwriters' fraud occurred when the

ARS market collapsed in February 2008, meaning that their claims would have been timely, as filed on January 28, 2014.

The District Court held that Michigan case law supports the view that a fraud or misrepresentation claim alleging fraudulent inducement to enter into a contract accrues when the plaintiff enters into the contract, because the harm is suffered when the contract is signed. Consequently, the Hospital's claim was time-barred.

The Court also noted that, even if the claims were not time barred, the Court would still be required to dismiss Hospital's fraud and misrepresentation claim for failure to state a claim.

EMINENT DOMAIN - NEW YORK

Village of Haverstraw v. Ray River Co., Inc.

Supreme Court, Appellate Division, Second Department, New York - March 2, 2016 - N.Y.S.3d - 2016 WL 802700 - 2016 N.Y. Slip Op. 01500

Village commenced condemnation proceeding, and the Supreme Court, Rockland County, granted that branch of landowners' motion which was, in effect, to extend their time to file notice of appearance. Village appealed.

The Supreme Court, Appellate Division, held that landowners established good cause for extension of time to file notice of appearance.

Landowners established good cause for extension of time to file notice of appearance in village's condemnation proceeding, even though landowners' counsel failed to properly file notice of appearance with clerk of court, where village was nevertheless served with notice of appearance that alerted it to landowners' claims, landowners repeatedly demanded "advance payment" for taking, requested that their expert appraisers be given access to subject property in order to assess its value, and sought to exchange "written appraisal reports," judicial viewing of property took place after village acquired property, and landowners demonstrated potential merit of their claim with expert evidence demonstrating that property was worth significantly more than amount tendered by village as advance payment.

REFERENDA - OREGON

Kendoll v. Rosenblum

Supreme Court of Oregon, En Banc - March 3, 2016 - P.3d - 2016 WL 852731

Petitioner sought review of certified ballot title for initiative petition that, if enacted, would require as matter of state law, that employers use a federal website to verify authenticity of documents establishing that new employee was not an unauthorized alien.

The Supreme Court of Oregon held that:

- Caption did not reasonably identify subject matter of the measure;
- "yes" and "no" result statements were inadequate; and
- Summary inaccurately implied that existing state law required employers to confirm new employee's employment authorization.

Caption for ballot initiative, "Imputes employment license to employers; conditions license on using specified federal program for employment authorization", did not reasonably identify subject matter of certified ballot title. Caption did not highlight effect of initiative, which if enacted, would require, as matter of state law, that employers use a federal website to verify authenticity of documents establishing that new employee was not an unauthorized alien, when federal law required only review of documents.

Result statement in certified ballot title, that a "yes" vote would impute employment license to employers, and conditioning license on verifying new employee's employment authorization using federal program, did not identify a significant and immediate effect of the measure, which was to require employers to use a federal website to verify that new employees were authorized to work in the United States.

Result statement in certified ballot title, that a "no" vote would maintain current law requiring employer to confirm employee's employment authorization, implied inaccurately that the "current law" found its source in state rather than federal law.

Summary for certified ballot title relating to employment authorization, stating in part that existing law required employers to confirm employee's employment authorization, inaccurately implied that existing state law required the authorization, when federal law was the source of that requirement.

IMMUNITY - OREGON

Johnson v. Gibson

Supreme Court of Oregon - March 3, 2016 - P.3d - 2016 WL 852868

Jogger who was injured after falling while jogging in municipal park brought action in diversity against park employees, alleging negligence. Parties consented to final disposition by magistrate judge. The District Court granted summary judgment for defendants. Jogger appealed. The Court of Appeals certified questions.

The Supreme Court of Oregon held that city employees responsible for maintaining improvements on city-owned recreational land were not entitled to city's tort immunity under Public Use of Lands Act.

Individual employees responsible for repairing, maintaining, and operating improvements on city-owned recreational land made available to the public for recreational purposes are not "owners" of the land, as that term is defined in the Oregon Public Use of Lands Act and, therefore, they are not immune from liability for their negligence.

PUBLIC UTILITIES - CALIFORNIA

Seacrist v. Southern California Edison Company

Court of Appeal, Fourth District, Division 2, California - January 27, 2016 - 244 Cal.App.4th 308 - 197 Cal.Rptr.3d 834 - 16 Cal. Daily Op. Serv. 1100 - 2016 Daily Journal D.A.R. 948

Homeowners sued electric company for negligence, nuisance, trespass, strict products liability, breach implied warranty of fitness, strict liability based on ultra hazardous activity, and intentional infliction of emotional distress, alleging that stray electrical currents from company's substation

were causing homeowners to suffer various medical issues. The Superior Court sustained company's demurrer without leave to amend. Homeowners appealed.

The Court of Appeal held that:

- Homeowners were not bound by theory that trial court's jurisdiction was based upon company's violation of rule prohibiting utilities from using ground or earth as a normal neutral to return electricity along the circuit;
- Trial court had authority to decide whether electric company was negligent;
- Trial court had authority to determine nuisance, trespass, and intentional infliction of emotional distress claims; and
- Trial court had authority to determine products liability, breach of implied warranty of fitness, and ultra hazardous activity claims.

Homeowners were not bound by theory that trial court's jurisdiction was based on violation of rule prohibiting utilities from using the ground or earth as a normal neutral to return electricity along the circuit on appeal from trial court's decision sustaining electric company's demurrer in homeowners' action stemming from allegation that stray electric currents were causing homeowners to suffer medical issues. Homeowners' comments about violations of rule were not made in format that would cause them to be judicial admissions, and facts and legal theories upon which homeowners asserted on appeal were found in homeowners' complaint.

Trial court had authority to decide whether electric company was negligent in its operation of substation in homeowners' action against company, alleging that stray electrical currents from substation were causing homeowners to suffer various medical issues. Negligence claims would not have hindered or interfered with Public Utility Commission (PUC) policy, as element of test used to determine whether claim fell within PUC's exclusive jurisdiction.

Trial court had authority to determine homeowners' claims against electric company for nuisance, trespass, and intentional infliction of emotional distress, alleging that stray electrical currents from company's substation near homeowners' property were entering their property, causing homeowners to suffer health issues and distress, discomfort, anxiety, fear, and anguish. Stray voltage litigation would not have hindered or interfered with Public Utility Commission (PUC) policy, as element of test used to determine whether claim fell within PUC's exclusive jurisdiction.

Trial court had authority to determine homeowners' claims against electric company for strict products liability, breach of implied warranty of fitness, and strict liability based on ultra hazardous activity, stemming from allegation that stray voltage from company's substation caused homeowners to suffer health issues, since stray voltage litigation would not have hindered or interfered with Public Utility Commission (PUC) policy, as element of test used to determine whether claim fell within PUC's exclusive jurisdiction.

EMINENT DOMAIN - CONNECTICUT

Barton v. City of Norwalk

Appellate Court of Connecticut - February 23, 2016 - A.3d - 163 Conn.App. 190 - 2016 WL 597384

Property owner brought action against city, alleging that city inversely condemned his building when it took the building's parking lot by eminent domain. The Superior Court entered judgment in

favor of property owner. City appealed.

The Appellate Court held that:

- Property owner was not judicially estopped from asserting his position regarding valuation of property at issue;
- City's taking of parking lot resulted in the substantial destruction of owner's ability to use and enjoy the neighboring building, supporting claim of inverse condemnation, but
- Offer of compromise statute did not apply to authorize award of interest to owner.

Property owner who previously asserted in eminent domain proceedings that condemned parking lot should be valued according to its "highest and best use" as a mixed use development, and who had received just compensation for it on that basis, was not judicially estopped in subsequent inverse condemnation action involving a neighboring property from assuming that it was still a parking lot when he asserted the neighboring property's value prior to the taking. The positions were not clearly inconsistent or contradictory in the context of the two actions, and owner derived no unfair advantage.

City's taking of property owner's parking lot by eminent domain resulted in the substantial destruction of owner's ability to use and enjoy the neighboring building, thus supporting determination that city inversely condemned owner's building. 90 percent of owner's building was effectively unleasable due to lack of parking, and building's value dropped from $1.1 million to $200,520, which expert testified could be lower than the value of the land if vacant and available for development.

Offer of compromise statute did not apply to authorize award of interest to property owner in his action against city, alleging that city inversely condemned his building when it took the building's parking lot by eminent domain, even though, after offering to settle claims in exchange for $500,000 with interest, plus up to $20,000, plus all necessary permits to use the property for its intended use as a mixed use retail/office building, owner actually recovered $899,480 with interest and no permits. Even if owner could properly include nonmonetary demands in his offer of compromise, owner's recovery was different from, not equal to or greater than, his demand.

INVERSE CONDEMNATION - CONNECTICUT

Buck v. Town of Berlin

Appellate Court of Connecticut - February 23, 2016 - A.3d - 163 Conn.App. 282 - 2016 WL 597944

Property owners brought inverse condemnation claim against town. The Superior Court denied town's motion for summary judgment, and town appealed.

The Appellate Court held that:

- Property owners' current claims against town for inverse condemnation were based on the same underlying transaction as their prior claims against town for purposes of claim preclusion, and
- Property owners had an adequate opportunity to litigate their present claim in a prior action, and therefore, the present claim was barred by res judicata.

Property owners' current claims against town for inverse condemnation were based on the same underlying transaction as their prior claims against town for purposes of claim preclusion,

regardless of whether they differed in the legal theories espoused and the relief sought. Property owners' claim that town's interference with their properties in the form of a locked gate and large concrete blocks that prevented property owners from accessing their property by means of the only point of access was virtually the same in both actions.

Property owners had an adequate opportunity to litigate their present inverse condemnation claim against town in a prior action, and therefore, their present claim was barred by res judicata. Property owners' did not allege in the first action that road to their properties had been abandoned or formally discontinued, but rather that town had wrongfully blocked road and prevented property owners from using their easement to access their properties, which was the same claim brought in the current action.

ANNEXATION - GEORGIA

City of Lovejoy v. Clayton County

Court of Appeals of Georgia - March 1, 2016 - S.E.2d - 2016 WL 785688

County filed action seeking declaration that city's annexation of property was void for multiple reasons. The trial court granted county's motion for summary judgment, declaring ordinance of annexation invalid. City appealed.

The Court of Appeals held that city's failure to publish a notice of public hearing that accurately described the property to be annexed, as required by annexation statute, so that owners of certain properties had notice that their land was being considered for annexation, rendered annexation null and void.

REFERENDA - MARYLAND

Fraternal Order of Police v. Montgomery County

Court of Appeals of Maryland - February 23, 2016 - A.3d - 2016 WL 699459

Fraternal order of police officers, individually and as class of officers below rank of lieutenant, brought declaratory judgment action against county and individual county employees, alleging that county improperly used county funds to campaign for passage of ballot question concerning mandatory collective bargaining in county referendum.

The Circuit Court entered judgment declaring that county had no authority to use funds to campaign but dismissed counts seeking monetary relief against county employees on basis of qualified immunity. County and employees appealed and order cross-appealed. The Court of Special Appeals reversed. Order filed petition for certiorari and county and employees filed cross-petition, which were both granted.

The Court of Appeals held that:

- Order had standing to bring action;
- Doctrine of laches did not bar order's action;
- Use of county funds to campaign was appropriate use of government speech;
- County executive and director of county's office of public information were not political committee; and

- Use of other county employees by executive and director was appropriate county function.

Fraternal order of police officers, individually and as class of officers below rank of lieutenant, had standing to bring declaratory judgment action against county and individual county employees, alleging that county improperly used county funds to campaign for passage of ballot question in county referendum. Although all citizens living in county had general interest in assuring that county government did not exceed its legitimate authority and did not expend funds or labor of its employees for unlawful purposes, order had more specialized interest in sustaining effect bargaining and assuring that county did not use unlawful means to repeal provision of county code providing for collective bargaining.

Doctrine of laches did not bar declaratory judgment action by fraternal order of police officers, individually and as class of officers below rank of lieutenant, against county and individual county employees, alleging that county improperly used county funds to campaign for passage of ballot question in county referendum. Order's action was solely to seek monetary redress for what it regarded as unlawful activity by county and employees that was prejudicial to it and to preclude county and employees from engaging in that conduct in future, there was no prejudice to county and employees from order's waiting until eve of election on question to file suit, delay was not inordinate, and order's claims could be adjudicated as easily after election as they could have been before.

Use of county funds to campaign for passage of ballot question in county referendum for modifying requirement of collective bargaining with fraternal order of police officers was appropriate use of government speech. Proposed law was intended to correct what county council found to be behavior by fraternal order of police officers and its members that was disruptive to running of police department and was not conducive to public safety, order succeeded in petitioning law to referendum and was mounting substantial political campaign to persuade voters to nullify it, and county executive, in aid of preserving law and countering order's effort, directed expenditure of county funds to inform voters of impact of nullifying law and, for welfare of county, advocate for its confirmation.

County executive and director of county's office of public information were not political committee, and, thus, they were not required to comply with campaign finance provisions of election law. Since provisions did not apply to county, they could not apply to authorized county officials when acting solely in their official capacity, for it was only through those officials that county could exercise its powers.

Use of other county employees by county executive and director of county's office of public information to further county's advocacy efforts for passage of ballot question in county referendum for modifying requirement of collective bargaining with fraternal order of police officers was appropriate county function. Since activities by executive and director, on behalf of county, were authorized and appropriate manifestation of legitimate government speech, any assistance in those activities by subordinate county employees at direction of executive and director was also appropriate county function and fell within scope of their official duties.

PENSIONS - MARYLAND

Employees' Retirement System of Baltimore County v. Bradford

Court of Special Appeals of Maryland - February 24, 2016 - A.3d - 2016 WL 743687

County police officer sought to change his retirement benefit option after he retired for second time subsequent to rehire and additional period of employment with police department. County employees' retirement system determined that officer could not select retirement option upon second retirement that did not exist at time of first retirement. Officer appealed. County board of appeals reversed. Retirement system appealed.

The Court of Special Appeals held that:

- Decision of "agency" being reviewed was that of board of appeals, rather than that of retirement system, and
- Officer was not prevented, upon his second retirement, from changing his retirement benefit option to one that did not exist at time of first retirement, despite county code provision indicating that members who had elected an optional benefit could not change such an election after the first payment of the member's allowance became normally due.

AUCTION RATE SECURITIES - NEVADA

Goldman, Sachs & Co. v. City of Reno

United States District Court, D. Nevada - January 25, 2016 - Slip Copy - 2016 WL 320120

On February 10, 2012, the City of Reno filed a complaint against Goldman Sachs ("GS") with the Financial Industry Regulatory Authority ("FINRA"), alleging wrongdoing with respect to $200 million of Auction Rate Securities ("ARS"). GS sued the City in this Court, asking the Court to declare that FINRA was an inappropriate forum in light of the forum selection clauses in the Broker-Dealer Agreements and the lack of any arbitration clauses in either the Broker-Dealer Agreements or the Underwriter Agreements.

The City subsequently consented to a permanent injunction against the arbitration. The Court then ordered the City to answer and file any counterclaims. The City answered and filed counterclaims for breach of fiduciary duty, fraud, and negligent misrepresentation. GS moved to dismiss the counterclaims as time-barred and for failure to state a claim.

GS argued that a three-year statute of limitations barred all of the counterclaims. If New York law applied to the counterclaims, a six-year limitations period applied. A three-year limitations period applied to all of the counterclaims if Nevada law applied.

The Court found that Nevada's choice of law rules govern the tort claims in this case despite the contractual choice-of-law clause. None of the counterclaims are contractual claims. The City's tort claims are therefore governed by Nevada law, including Nevada's choice of law rules.

Nevada courts apply the Restatement (Second) of Conflict of Laws to tort claims. In this case, all the counterclaims sound in fraud and thus Section 148 of the Restatement (Second) applies.

Following an analysis of Section 148, the Court held that because the fraudulent statements themselves were made from New York, that state's law should control. "The Restatement (Second) makes clear that the place where the fraudulent representations are made is more important (and is as important as the place of the tortious activity in a personal injury case) than the place of reliance and loss, which is difficult to determine conceptually in contractual cases such as this one." Therefore, New York's six year limitation period applied.

EMINENT DOMAIN - NEW YORK

In re Village of Port Chester

Supreme Court, Appellate Division, Second Department, New York - March 2, 2016 - N.Y.S.3d - 2016 WL 802693 - 2016 N.Y. Slip Op. 01501

In condemnation proceeding, after principal sum of $3,062,000 awarded to claimants after nonjury trial as just compensation for taking of real property was upheld on appeal, claimants moved for additional allowance of $832,244.59. The Supreme Court, Westchester County, granted motion only to the extent of awarding the sum of $406,827.44. Claimants appealed.

The Supreme Court, Appellate Division, held that the Supreme Court properly determined that an additional allowance in an amount less than what claimants requested was necessary for them to receive just and adequate compensation.

Additional allowance in an amount less than what condemnees requested was necessary for them to receive just and adequate compensation, given that portion of condemnees' efforts and costs were used to develop and present valuation theories to support a claim for compensation substantially in excess of the condemnation award, and so Supreme Court providently exercised its discretion in granting condemnees' motion for additional allowance only to the extent of awarding them $406,827.44, despite their request for $832,244.59.

HIGHWAYS - WASHINGTON

Washington State Dept. of Transp. v. City of Seattle

Court of Appeals of Washington, Division 1 - February 29, 2016 - P.3d - 2016 WL 783919

After city required grading permits for construction on temporary easements of work bridges for highway floating bridge project, Washington State Department of Transportation filed a land use petition seeking to invalidate the permits. The Superior Court granted petition and invalidated permits. City appealed.

The Court of Appeals held that:

- Exception to mootness doctrine was met, and
- City's interpretation of grading code exemption was an erroneous interpretation of the law.

Because an authoritative determination would provide future guidance, and interpretation of municipal grading code exemption for Washington State Department of Transportation (WSDOT) development in state highway right-of-way presented an issue of continuing and substantial public interest that was likely to recur, exception to mootness doctrine was met in Department's land use petition seeking to invalidate grading permits.

City's interpretation of municipal grading code exemption, requiring Washington State Department of Transportation to obtain grading permits for construction on temporary easements of work bridges necessary to access and construct portion of state highway floating bridge project, was not entitled to deference, for purposes of reviewing decision under Land Use Petition Act (LUPA), as it was an erroneous interpretation of the law. City's interpretation gave no meaning to language that exempted development undertaken by the Department in state highway right-of-way, ignored state law, and the exclusive authority of the Department to construct and acquire property for the

construction of state highway right-of-way.

EMINENT DOMAIN - COLORADO

Town of Silverthorne v. Lutz

Colorado Court of Appeals, Div. VI - February 11, 2016 - P.3d - 2016 WL 611657 - 2016 COA 17

Town filed a petition in condemnation to acquire easement rights over strip of land to construct trial for nonmotorized transportation. After jury trial, the District Court awarded compensation. Landowners appealed.

Holdings: The Court of Appeals held that:

- Landowners did not waive any challenge to town's condemnation proceeding by failing to timely file an answer, but
- Existence of constitutional amendment forbidding a recipient of funds from the Great Outdoors Colorado Program (GOCO) from using its funds to acquire property by condemnation did not allow landowners to present evidence of source of funding for town's trail project.

Landowners did not waive any challenge to town's condemnation proceeding by failing to timely file an answer. Town did not explain how the relatively short delay caused it any prejudice, and landowners' jury demand, filed within the twenty-one day period for an answer, as well as the parties' long history of conflict concerning land that was subject of condemnation, placed town on notice that landowners intended to contest condemnation.

Existence of constitutional amendment forbidding a recipient of funds from the Great Outdoors Colorado Program (GOCO) from using its funds to acquire property by condemnation did not allow landowners to present evidence of source of funding for town's trail project, in a condemnation proceeding for construction of nonmotorized transportation trail by town which received funds under GOCO. Such collateral matters could not be heard in a condemnation proceeding.

Town's offer of $400,000 to landowners in pre-condemnation negotiations did not demonstrate bad faith on part of town in such negotiations, despite argument that offer was less than the $500,000 that town had received from Great Outdoors Colorado Program (GOCO) for trail project for which easement condemnation was sought, where offer exceeded actual value of easement rights as determined at trial.

NUISANCE - CONNECTICUT

Perry v. Town of Putnam

Appellate Court of Connecticut - February 2, 2016 - A.3d - 162 Conn.App. 760 - 2016 WL 307112

Municipality filed motion to strike homeowner's amended complaint alleging nuisance. The Superior Court granted motion. Homeowner appealed.

The Appellate Court held that:

- Parking lot did not have a natural tendency to create danger and inflict injury on person or property;
- Use of public land as a parking lot was not unreasonable or unlawful; and
- Decision to locate, construct, and encourage parking in a parking lot located immediately adjacent to homeowner's property did not constitute the type of affirmative act necessary for actionable nuisance.

Municipal parking lot located immediately adjacent to homeowner's property did not have a natural tendency to create danger and inflict injury on person or property, thus precluding action for nuisance against municipality. The disruptive activity and sounds in the parking lot simply did not imbue the parking lot with a natural tendency to create danger and to inflict injury.

Municipality's use of public land as a parking lot was not unreasonable or unlawful, thus precluding homeowner's action for nuisance based on municipality's construction of parking lot located immediately adjacent to homeowner's property. Building a public parking lot on town land in the vicinity of athletic facilities simply was not an unreasonable use of the land, nor was it unlawful.

Construction of parking lot located immediately adjacent to homeowner's property did not constitute the type of affirmative act necessary for actionable nuisance claim against a municipality. The acts giving rise to the annoyances of which homeowner's complained were those of third parties, and such unpleasant and disruptive behavior by third parties was the proper bailiwick of police regulation and control, not of the law of nuisance.

IMMUNITY - KENTUCKY

Taylor v. Maxson

Court of Appeals of Kentucky - February 19, 2016 - S.W.3d - 2016 WL 675429

Petitioner who had filed records request under Open Records Act with Education and Workforce Development Cabinet filed suit against Cabinet's policy advisor, seeking tort damages for emotional distress and other claims. The Franklin Circuit Court dismissed claims on basis of governmental and qualified official immunity. Petitioner appealed.

Commonwealth of Kentucky Court of Appeals held that:

- Limited waiver of governmental immunity for willful violation of Open Records Act did not extend to claim against policy advisor for tort damages for emotional distress;
- Suit for violation of Open Records Act could only be brought against Cabinet, and not against Cabinet policy advisor in his individual capacity;
- Policy advisor was entitled to qualified official immunity from liability for statements made to Attorney General related to petitioner's records appeal; and
- Statements made by policy advisor to Attorney General were cloaked with absolute judicial immunity.

ZONING - NORTH CAROLINA

Cherry v. Wiesner

Court of Appeals of North Carolina - February 16, 2016 - S.E.2d - 2016 WL 611074

Owners of lot in designated historic district appealed city Board of Adjustment ruling which rejected modernist design for home, which had been approved by city Historic Development Commission. The Superior Court reversed the Board's decision, and neighbor appealed.

The Court of Appeals held that:

- Neighbor failed to allege special damages and thus was not an "aggrieved party" with standing to challenge the decision;
- Neighbor had numerous opportunities to allege standing before Board of Adjustment; and
- Neighbor was not entitled to supplement the record before the trial court to include two affidavits addressing the issue of standing.

ANNEXATION - NORTH DAKOTA

In re Lewis & Clark Public School Dist. #161 of Ward

Supreme Court of North Dakota - February 18, 2016 - N.W.2d - 2016 WL 682970 - 2016 ND 41

Landowners sought judicial review of decision of Board of Public School Education denying petition to annex land from one school district to another. The District Court affirmed. Landowners appealed.

The Supreme Court of North Dakota held that:

- School district had standing to object to petition;
- Closed telephone proceeding between Board and its attorney following public hearing did not result in denial of fair hearing;
- Board properly considered amount of land to be annexed; and
- Catch-all provision of statute governing annexation of property from school district was not unconstitutionally vague.

School district had standing to object to landowners' petition for annexation of land from one school district to another. District, superintendent, and board members were members of public entitled to participate in annexation hearings to protect district's interests.

Telephone proceeding between Board of Public School Education and its attorney, during which Board and attorney discussed Board's decision regarding landowners' petition for annexation of land from one school district to another, and alleged failure to provide landowners with notice, did not result in denial of fair hearing. Board adopted prepared findings, conclusions, and order at a public hearing, and landowners cited no authority requiring that Board give parties notice or opportunity to comment on proposed orders after decision was made or before order was issued.

Board of Public School Education, in denying landowners' petition for annexation of land from one school district to another properly considered amount of land involved. Catch-all provision of statute governing annexation of property, which permitted consideration of "all other relevant factors," was sufficiently broad to encompass amount of land.

Catch-all provision of statute governing annexation of property permitting consideration of "all other relevant factors" was not unconstitutionally vague and did not amount to unconstitutional delegation of legislative authority to Board of Public School Education. Legislature's ability to retract delegation of authority provided adequate safeguard to deter arbitrary decision-making by the Board.

BONDS - OREGON

Yes On 24-367 Committee v. Deaton

Court of Appeals of Oregon - February 3, 2016 - P.3d - 2016 WL 430878

Political committee organized to support a local ballot measure that would have authorized a fire protection district to issue general obligation bonds to pay for capital projects brought action against distributors of a pamphlet opposing the measure for publication of false statement of material fact relating to candidate or measure. The Circuit Court struck the complaint pursuant to the anti-Strategic Lawsuits Against Public Participation (SLAPP) statute. Committee appealed.

The Court of Appeals reversed, holding that:

- Statement in pamphlet that tax assessments would double was a factual assertion, rather than opinion;
- Committee made a prima facie showing that distributors made a false statement of material fact; and
- Failure by committee to submit direct evidence of mental state of distributors was not fatal to its claim.

Statement in pamphlet opposing local ballot measure, which would have authorized a fire protection district to issue general obligation bonds to pay for capital projects, that proposed bond levy would have doubled the fire district tax assessment for the next 20 years was a factual assertion, rather than an opinion that would be protected by anti-Strategic Lawsuits Against Public Participation (SLAPP) statute from action for publication of false statement of material fact relating to candidate or measure. Statement expressed an assertion of objective, mathematical fact.

Political committee organized to support a local ballot measure that would have authorized a fire protection district to issue bonds to pay for capital projects made a prima facie showing in action by committee against distributors of a pamphlet opposing the measure for publication of false statement of material fact relating to candidate or measure that distributors made a false statement of material fact that proposed bond levy would have doubled the fire district tax assessment, where the bonds would have resulted in a property tax assessment of $0.49 per $1,000 in assessed value, the existing assessments were for $0.8443 and $0.49 per $1,000, and, thus, the assessments would have increased 37%, rather than doubled, and statement expressly referred to assessments in the plural.

Failure by political committee organized to support a local ballot measure that would have authorized a fire protection district to issue bonds to pay for capital projects to submit direct evidence of mental state of distributors of pamphlet opposing the measure was not fatal to committee's action against distributors for publication of false statement of material fact relating to candidate or measure at stage of proceedings at which distributors moved under anti-Strategic Lawsuits Against Public Participation (SLAPP) statute to strike committee's complaint. Direct proof of a defendant's subjective state of mind was typically hard to come by, and intent, knowledge, and recklessness were often inferred from surrounding circumstances.

EMINENT DOMAIN - TEXAS

Lenox Barbeque and Catering, Inc. v. Metropolitan Transit Authority of Harris

County

Court of Appeals of Texas, Houston (14th Dist.) - February 23, 2016 - S.W.3d - 2016 WL 720805

Landowner brought inverse condemnation claim against transit authority. The County Civil Court at Law granted summary judgment for transit authority. Landowner appealed.

The Court of Appeals held that landowner's settlement of transit authority's condemnation petition released any inverse condemnation claim for lost profits.

Landowner's conveyance of part of a tract of land used for a restaurant to transit authority, pursuant to a settlement of the authority's condemnation petition, operated as a release of any claim under the state constitution for lost profits based on the loss of the parcel taken by the transit authority, even though there was no express release, since the settlement agreement included an award of just compensation to the landowner for the taking, the alleged lost profits were damages that reasonably could have been foreseen and determined at the time of the settlement agreement, and neither the settlement agreement nor the warranty deed contained a reservation of a right to sue for lost profits.

ZONING - VERMONT

Brisson Stone LLC v. Town of Monkton

Supreme Court of Vermont - February 12, 2016 - A.3d - 2016 WL 555809 - 2016 VT 15

Commercial gravel extraction permit applicants filed for declaratory judgment claiming protracted review process caused their application to be deemed approved. In a separate appeal, applicants sought review of the development review board's denial of the application. In the second proceeding, adjoining landowner was granted intervenor status, and she moved for summary judgment arguing zoning regulation did not authorize crushing quarried ledge rock to create gravel. The Superior Court, Environmental Division, held that application could not be deemed approved, and subsequently granted summary judgment to intervenor. Applicants appealed and the appeals were combined.

The Supreme Court of Vermont held that:

- Environmental court's decision to deny the application was not clearly erroneous, arbitrary, or capricious, and
- Deemed-approval remedy does not foreclose an interested party's timely appeal on merits of the application.

Environmental court reasonably based its holding on plain language of zoning regulation, finding that the regulation permitted extraction of naturally occurring gravel, but not applicants' proposed method of blasting, drilling, and crushing ledge rock to produce gravel, and thus its decision to deny the application for a commercial gravel extraction permit was not clearly erroneous, arbitrary, or capricious.

Deemed-approval remedy, pursuant to statute providing that failure of a municipal panel to approve or disapprove requested development review application within 45 days after date of final public hearing shall be deemed approval, does not foreclose an interested party's timely appeal on the merits of the application.

COMMERCE CLAUSE - VIRGINIA

Colon Health Centers of America, LLC v. Hazel

United States Court of Appeals, Fourth Circuit - January 21, 2016 - F.3d - 2016 WL 241392

Out-of-state medical providers brought action against Virginia government officials, claiming that the requirement to obtain a certificate of need (CON) to establish or expand medical facilities and services violated the dormant aspect of the Commerce Clause. The United States District Court granted defendants' motion to dismiss for failure to state a claim. Providers appealed. The Court of Appeals reversed and remanded. On remand, the District Court granted summary judgment to defendants. Providers appealed.

The Court of Appeals held that:

- The CON requirement did not discriminate against out-of-state medical providers in its purpose;
- The CON requirement did not have a discriminatory effect on out-of state medical providers; and
- The burden of the CON requirement on interstate commerce was not clearly excessive to the putative local benefits.

The burden on interstate commerce of Virginia's statutory requirement for medical providers obtain a certificate of need (CON) to establish or expand medical facilities and services was not clearly excessive in relation to its putative local benefits, and thus the CON requirement did not violate the dormant Commerce Clause on Pike balancing, despite contention that the requirement reduced competition which allowed entrenched incumbents to exert market power and charge inefficiently high prices, where the State claimed that the CON requirement boosted healthcare quality, ensured underserved and indigent populations had access to medical care, and maintained a geographic distribution of health care facilities.

SCHOOL FUNDING - ALASKA

State v. Ketchikan Gateway Borough

Supreme Court of Alaska - January 8, 2016 - P.3d - 2016 WL 106156

After making its contribution to fund local school district, borough brought suit against state asking the superior court to declare the required local contribution unconstitutional, to enjoin the state from requiring the borough to comply with the statute, and, to direct the state to refund its protested $4.2 million payment. Both parties moved for summary judgment. The Superior Court partially granted borough's motion. State appealed and borough cross-appealed.

The Supreme Court of Alaska held that:

- As a matter of first impression, local school funding formula was not a state tax or license within meaning of state constitutional prohibition against dedicated taxes, and
- Required local contribution did not violate the appropriations clause or the governor's veto clause of the Alaska Constitution.

SCHOOL FUNDING - KANSAS

Gannon v. State

Supreme Court of Kansas - February 11, 2016 - P.3d - 2016 WL 540725

School districts that lost funding due to reductions in base state aid per pupil (BSAPP) filed suit against state, challenging constitutionality of school funding under state constitution's education article on both adequacy and equity grounds.

Following trial, the District Court ruled that state violated education article by failing to provide suitable funding for education and that state created unconstitutional, wealth-based disparities among districts. State appealed. The Supreme Court affirmed in part, reversed in part, and remanded. On remand, a three-judge panel of the District Court determined THAT state failed to meet equity and adequacy requirements of education article, issued remedial orders to enforce holdings, and directed districts to join state officials. State appealed as a matter of right and equity and adequacy portions of appeal were bifurcated.

The Supreme Court of Kansas held that:

- Panel unnecessarily joined state officials in their official and personal capacities;
- Panel did not exceed scope of Court's mandate by reviewing Classroom Learning Assuring Student Success Act's (CLASS) capital outlay and supplemental general state aid provisions;
- Panel applied proper equity test;
- State failed to carry its burden to show that it had cured capital outlay's unconstitutional inequities; and
- State failed to carry its burden to show that it had cured supplemental general state aid's unconstitutional inequities.

District court panel unnecessarily joined certain state officials in their official and personal capacities under compulsory joinder statute to provide for enforcement of any order that might ensue on remand from Supreme Court's determination that state failed to meet adequacy and equity requirements of state constitution's education article in school district's action against state challenging constitutionality of school funding. It was possible for complete relief to be accorded among existing parties in officials' absence.

On remand from Supreme Court's decision that state failed to meet its duty to provide equity in public education under state constitution's education article, district court panel did not exceed scope of Supreme Court's mandate by reviewing capital outlay and supplemental general state aid provisions under Classroom Learning Assuring Student Success Act (CLASS), which was new funding system enacted in response to Court's decision, for compliance with education article's equity requirement. Supreme Court specifically instructed panel to review any legislative action taken in response to Court's decision for constitutional compliance, and panel needed to review CLASS to comply with Court's directive that panel ensure school funding inequities were cured.

On remand from Supreme Court's decision that state failed to meet its duty to provide equity in public education under state constitution's education article, district court panel applied proper equity test adopted by Court on prior appeal, instructing panel to evaluate any legislative response to Court's decision by considering whether response sufficiently reduced unreasonable wealth-based disparity among districts so disparity then became constitutionally acceptable, not whether cure necessarily restored funding to prior levels. Panel determined that legislature had not fully funded capital outlay and the supplemental general state aid provisions, but had otherwise attempted to cure inequities, and panel quoted language of equity test several times in determining that state failed to meet equity requirements.

State failed to carry its burden to show that it had cured unconstitutional capital outlay inequities for fiscal year 2015 on remand from Supreme Court's determination that state created unconstitutional, wealth-based disparities among school districts under state constitution's education article in districts' action against state, challenging constitutionality of school funding. Although state demonstrated that more money was provided than before, state failed to show that increase provided students in districts entitled to capital outlay state aid with reasonably equal access to substantially similar educational opportunity through similar tax effort.

State failed to carry its burden to show that it had cured unconstitutional supplemental general state aid inequities for fiscal year 2015 on remand from Supreme Court's determination that state created unconstitutional, wealth-based disparities among school districts under state constitution's education article in districts' action against state, challenging constitutionality of school funding. Although state showed that amount of supplemental general state aid was greater than previous years' funding, state still made it more difficult for aid-receiving districts to provide substantially similar educational opportunities through tax efforts similar to their wealthier counterparts.

State failed to carry its burden to show that it had cured unconstitutional capital outlay inequities through Classroom Learning Assuring Student Success Act (CLASS) on remand from Supreme Court's determination that state created unconstitutional, wealth-based disparities among school districts under state constitution's education article in districts' action against state, challenging constitutionality of school funding. Despite contention that any reduction in aid was relatively minimal and did not impact educational opportunity, losses only affected districts with lower property wealth entitled to aid, and aid-qualifying districts would have not received any additional aid even if districts increased their tax burden or if districts' property values increased, since CLASS froze funds at prior year's amount, which did not comply with Court's equity order.

State failed to carry its burden to show that it had cured unconstitutional supplemental general state aid inequities through Classroom Learning Assuring Student Success Act (CLASS) on remand from Supreme Court's determination that state created unconstitutional, wealth-based disparities among school districts in districts' action against state, challenging constitutionality of school funding under state constitution's education article. Despite contention that any change in supplemental general state aid was relatively minimal and that there was no evidence showing any aid reductions would have impacted districts' access to substantially similar educational opportunities, CLASS's failure to provide additional supplemental general state aid even to those districts that chose to obtain more funds through their own efforts exacerbated wealth-based disparities between districts and did not comply with Court's equity order.

School districts were not entitled to attorney fees during remedial phase of districts' action against state, challenging constitutionality of school funding, following remand from Supreme Court's decision that state failed to meet its duty to provide equity in public education under state constitution's education article. Districts failed to raise claim in district court on remand, districts' request for fees was not so narrowly drawn as to warrant interpretation as a request for only appellate attorney fees, and even if request could be interpreted in such a light, districts failed to file motion for attorney fees and supporting affidavit required under rule authorizing appellate attorney fees.

LIABILITY - LOUISIANA

Miller v. Thibeaux

Court of Appeal of Louisiana, Third Circuit - January 27, 2016 - So.3d - 2016 WL 385304 -

2013-541 (La.App. 3 Cir. 1/27/16)

Putative father brought wrongful death and survival action against parish school board, its insurer, bus driver, and his insurer, after driver closed bus doors on child's arm and drove away, dragging child. The District Court denied defendants' exception of no right of action, granted putative father's motion for judgment of paternity, awarded damages to putative father. Defendants appealed. The Court of Appeal reversed and rendered. Father sought review. The Supreme Court reversed and remanded.

On remand, the Court of Appeal held that:

- Putative father adequately established paternity;
- Bus driver was not covered under school board's automobile insurance policy for damages in excess of cap set forth in Louisiana Governmental Claims Act (LGCA), and thus statute allowing direct claim to be brought against school employee when there was insurance coverage for such negligence did not apply;
- Evidence supported trial court's finding that child had been conscious for only up to four seconds between time he became trapped in school bus door and when he was run over by bus; and
- Damages award of $250,000 on wrongful-death claim was not abusively low.

PUBLIC UTILITIES - MARYLAND

Maryland Office of People's Counsel v. Maryland Public Service Com'n

Court of Special Appeals of Maryland - January 28, 2016 - A.3d - 2016 WL 360891

Office of People's Counsel (OPC) petitioned for judicial review of Public Service Commission's approval of gas company's imposition of customer surcharge during implementation of plan to replace outdated gas distribution infrastructure.

The Court of Special Appeals held that:

- Deference was warranted to Commission's interpretation of law to allow imposition of surcharges before completion of each project;
- Strategic Infrastructure Development and Enhancement (STRIDE) law allowed implementation of such surcharges; and
- Commission acted within its discretion by approving broader program conditioned on subsequent annual review of specific projects.

Deference was warranted to Public Service Commission's interpretation of Strategic Infrastructure Development and Enhancement (STRIDE) law to allow Commission to authorize gas company to recover estimated project costs from customers for infrastructure improvements after initial implementation of projects and before completion of each project. Commission focused its attention on statutory provision in question, thoroughly addressed relevant issues, and reached its interpretation through a sound reasoning process.

The Strategic Infrastructure Development and Enhancement (STRIDE) law allows the Public Service Commission to authorize a gas company to recover estimated project costs from customers for infrastructure improvements after initial implementation of projects and before the completion of each project.

Public Service Commission acted within its discretion under Strategic Infrastructure Development

and Enhancement (STRIDE) law by approving broader program authorizing gas company to recover estimated project costs from customers for infrastructure improvements conditioned on subsequent annual reviews of the specific projects within the broader program, rather than reviewing each project prior to approving a new plan.

PUBLIC UTILITIES - MISSISSIPPI

City of Tchula v. Mississippi Public Service Com'n

Supreme Court of Mississippi - February 4, 2016 - So.3d - 2016 WL 453451

Private gas company, that operated gas-distribution systems for two cities as a public utility, sought rate increase for customers beyond one mile of city limits in each gas system it operated. The Public Service Commission granted the rate increase request, and the two cities appealed.

The Supreme Court of Mississippi held that the Commission lacked statutory rate-setting jurisdiction over municipally owned, but not operated, public utility gas distribution systems.

State Public Service Commission lacked statutory rate-setting jurisdiction over municipally owned, but not operated, public utility gas distribution systems; even though cities continued to supply gas outside one mile of their city limits after passage of the Public Utilities Act, they did not add to or enlarge their distribution or transmission systems beyond those that were in service prior to that date, and thus, remained exempt from Commission regulation.

EMINENT DOMAIN - MISSISSIPPI

Mississippi Transp. Com'n v. United Assets, LLC

Supreme Court of Mississippi - February 11, 2016 - So.3d - 2016 WL 541067

Mississippi Transportation Commission (MTC) filed complaint to condemn property. After a jury trial, the Special Court of Eminent Domain awarded more than $1.6 million as just compensation for the taking. MTC appealed.

The Supreme Court of Mississippi held that:

- MTC waived argument that appraiser's testimony was improper, and
- Jury's award was supported by substantial evidence.

Mississippi Transportation Commission (MTC) did not object to appraiser's testimony regarding after-taking value of remaining land in eminent domain case as soon as it reasonably appeared evidence was objectionable, and therefore MTC waived error for appeal, despite contention that MTC failed to object when appraiser opined that land had no commercial value and properly objected when appraiser later testified land had no value for any purpose. Appraiser's initial testimony about remainder was not limited to highest and best use, appraiser discussed both commercial and residential use, appraiser stated during voir dire that remainder was essentially worthless, and MTC did not object until after appraiser had testified several times that remainder had no value.

Jury's eminent domain award of more than $1.6 million was supported by substantial evidence, and therefore any error in admission of appraiser's testimony regarding after-taking value of remaining

land was harmless. Jury viewed property, all witnesses agreed that highest and best use of property before taking was for commercial development, testimony established that remainder would have no access for several years, and award was between values provided by appraisers.

SEWER DISTRICT - MISSOURI

U.S. v. Geranis

United States Court of Appeals, Eighth Circuit - December 15, 2015 - 808 F.3d 723

United States filed lawsuit on behalf of United States Department of Agriculture (USDA), seeking to enjoin dissolution of county sewer district. Group of voters, customers, ratepayers, and property owners moved to intervene. The District Court denied motion, and group appealed. While appeal was pending, parties sought court approval for asset purchase agreement to sell district's assets to private entity and finally dissolve district, and group renewed its motion to intervene. The District Court denied motion, and group appealed.

The Court of Appeals held that alleged violation of group's interest in upholding vote to dissolve county sewer district did not establish standing to intervene.

Alleged violation of interest of group of voters, customers, ratepayers, and property owners in upholding vote to dissolve county sewer district and immediately dissolving district did not state specific individualized injury necessary to establish standing in federal court to intervene in United States government's action seeking to enjoin dissolution of county sewer district, since interests were shared by all voters who voted to dissolve district, and existing parties had not ignored or attempted to undermine vote in support of dissolution, and sought to effectuate district's dissolution in accordance with Missouri law, which required "no district shall be dissolved until all of its outstanding indebtedness has been paid."

Group of voters, customers, ratepayers, and property owners failed to show that any injury to interest in opposing repayment of revenue bond county sewer district issued to United States Department of Agriculture (USDA) was actual or imminent, and thus group did not state specific individualized injury necessary to establish standing in federal court to intervene in United States government's action seeking to enjoin dissolution of county sewer district. Through lawsuit, parties arranged a solution for repaying USDA that would lower rates, and group's alleged injury would arise only if sale of district's sewer system failed to close, USDA continued to demand payment on revenue bond, and district raised rates to pay the bond obligation.

Group of voters, customers, ratepayers, and property owners failed to establish that enforcement of Missouri environmental and administrative regulations amounted to a "personal and individual" injury necessary to establish standing in federal court to intervene in United States government's action seeking to enjoin dissolution of county sewer district, where group asserted only a generalized grievance, which was available to all members of sewer district.

Alleged violation of interest of group of voters, customers, ratepayers, and property owners in proposing on-site sewage treatment alternatives did not state specific individualized injury necessary to establish standing in federal court to intervene in United States government's action seeking to enjoin dissolution of county sewer district, since any injury group could suffer with regard to ability to construct on-site systems was not "personal and individual" to group, and it was not caused by dissolution of district.

PENSIONS - NEW YORK

Regan v. Dinapoli

Supreme Court, Appellate Division, Third Department, New York - January 21, 2016 - 135 A.D.3d 1225 - 23 N.Y.S.3d 688 - 2016 N.Y. Slip Op. 00415

Petitioner, a teacher who later served as elected town supervisor, brought Article 78 proceeding seeking to review determination of State Comptroller denying petitioner retirement benefits credit for certain years of service. The Supreme Court, Albany County, dismissed petition. Petitioner appealed.

The Supreme Court, Appellate Division, held that:

- Petitioner was not permitted to receive teacher pension benefits and salary as elected official while also accruing service credits towards local retirement system (LRS) pension, and
- Comptroller was not equitably estopped from denying petitioner benefits.

Civil Service Law provision, which prohibited receipt of both a public pension and salary as public official or employee, except for public pensioners who became elected officials, did not permit petitioner to receive both his state teachers' retirement system (TRS) pension benefits and his salary as elected official while simultaneously accruing service credit toward a state and local retirement system (LRS) pension. While provision made no express mention of service credit and instead referred only to benefits already awarded or allotted, it made no reference to accrual of any additional credit for new or greater benefits, and Retirement and Social Security Law provision, which considered petitioner an active member of TRS only if he suspended benefits during his time as elected village justice, meant that, as he did not suspend his TRS benefits while a justice, he was not an active member of LRS and, accordingly, did not accrue additional LRS service credit.

State Comptroller was not equitably estopped from denying petitioner, a teacher who later served as elected town supervisor and village justice, retirement benefits credit for certain years of service. No mistakes made regarding information provided to petitioner rose above level of erroneous advice given by government employee.

DEVELOPMENT - PENNSYLVANIA

Honey Brook Estates, LLC v. Board of Sup'rs of Honey Brook Tp.

Commonwealth Court of Pennsylvania - January 13, 2016 - A.3d - 2016 WL 147150

Developer sought review of decision of township board of supervisors, which disapproved developer's preliminary plan for a townhouse development. The Court of Common Pleas affirmed. Developer appealed.

The Commonwealth Court held that:

- Township acted in bad faith in its processing of developer's preliminary plan, and
- Fact that developer's property was not entirely within township's sewer district and thus could not be served by public sewer did not render developer's preliminary plan incapable of correction, and thus remand to township board of supervisors for review of plan was not futile.

EMINENT DOMAIN - TEXAS

City of Friendswood v. Horn

Court of Appeals of Texas, Houston (1st Dist.) - February 11, 2016 - S.W.3d - 2016 WL 638471

Owners of four lots within subdivision that had suffered severe damage in tropical storm filed suit against city and mayor, asserting claims for declaratory relief, breach of contract, inverse condemnation, and nuisance, arising out of city's purchase, with federal assistance, of 38 of 42 lots, for purposes of development of property for public park and amendments to subdivision's original deed restrictions on use of property for residential purposes only to conform to federal laws governing use of such property. The District Court denied city's and mayor's plea to jurisdiction on grounds of immunity, and they appealed.

The Court of Appeals held that:

- City was engaged in governmental function, to which governmental immunity applied, when it purchased lots that had been severely damaged in tropical storm and amended subdivision's deed restrictions in order to comport with its plan to develop property as municipal park;
- Owners did not state claim against city for inverse condemnation;
- City was immune from suit on claim for breach of contract;
- Statute waiving governmental immunity from suit for written contracts "stating the essential terms of the agreement for providing goods or services to the local government entity" did not apply;
- City was immune from suit for declaratory relief challenging legality of city's actions in amending subdivision's original deed restrictions; and
- City was immune from suit on claim for misrepresentation.

CITIZEN SUITS - ALASKA

Seybert v. Alsworth

Supreme Court of Alaska - February 5, 2016 - P.3d - 2016 WL 471962

Registered voters brought action against mayor and former borough assembly member for violations of conflict of interest laws and unfair competition, seeking damages and injunctive relief. After the grant of a preliminary injunction was reversed on appeal, the Superior Court granted summary judgment to mayor and member in part, based on failure to exhaust administrative remedies. Voters petitioned for interlocutory review, which was granted.

The Supreme Court of Alaska held that:

- Statute does not require exhaustion of administrative remedies, and
- The Superior Court was not required to apply primary jurisdiction doctrine to stay claims.

Conflict of interest laws did not require a plaintiff to first exhaust administrative remedies before commencing a citizen suit.

Trial court was not required to apply primary jurisdiction doctrine to stay registered voters' claims against mayor and former borough assembly member for violations of conflict of interest laws pending resolution by Alaska Public Offices Commission (APOC). Citizen suit provision clearly designated courts as competent to hear conflict of interest claims, there was minimal risk of

inconsistent resolutions of issue, as similar claims raised with APOC had been dismissed, and judicial resolution of allegations was unlikely to encroach on APOC's regulatory responsibilities, as claims did not fall within APOC's regulatory expertise and did not collaterally attack APOC decision.

Whether to invoke primary jurisdiction to stay or dismiss pending litigation so as to enable a proper agency to initially pass upon the case is left to the discretion of the superior court because the doctrine is one of prudence, and not an absolute jurisdictional limitation.

PENSIONS - CALIFORNIA

San Diego Municipal Employees Association v. City of San Diego

Court of Appeal, Fourth District, Division 1, California - February 9, 2016 - Cal.Rptr.3d - 2016 WL 490175

City petitioned for writ of mandate to compel its public employee retirement agency to equalize employee contributions to match those of the city after the retirement system suffered investment losses. City employees' unions intervened. The Superior Court allowed the unions to intervene, denied judgment on pleadings for city, entered judgment on settlement agreement, and denied the private attorney general fee motion. Unions appealed.

The Court of Appeal held that:

- To recover private attorney general fees, unions were required to show their intervention was material to the ultimate result, and
- Unions failed to establish that their intervention was material to the ultimate result.

To recover attorney fees under the Private Attorneys General Act (PAGA) for intervening to oppose city's petition for writ of mandate to compel its public employee retirement agency to equalize employee contributions to match those of the city after the retirement system suffered investment losses, public employee unions were required to show their intervention was material to the ultimate result, since the public employee retirement agency was not acting as a volunteer in responding to the litigation, because the retirement agency's job and function was to ensure the soundness of the city retirement system.

Trial court acted within its discretion in concluding that public employees' unions' intervention to oppose city's petition for writ of mandate, which sought to compel city's public employee retirement agency to equalize employee contributions to match those of the city after the retirement system suffered investment losses, was not necessary to the settlement outcome achieved, in denying attorney fees under Private Attorneys General Act (PAGA), even though the unions took the lead in deposing key city witnesses during discovery and prepared a separate statement with many undisputed statements of fact, where the retirement agency itself submitted points and authorities and a separate statement of disputed material facts in opposition to city's motion for summary judgment, and the summary judgment motion was based on the same legal theory as the city's earlier unsuccessful motion for judgment on the pleadings.

LIABILITY - DELAWARE

McCaffrey v. City of Wilmington

Supreme Court of Delaware - February 4, 2016 - A.3d - 2016 WL 446946

Driver who was involved in collision with off-duty police offer who had run a red light, and subsequently made inappropriate sexual advances towards driver, brought action against city, officer, and police chief, alleging claims for negligence, recklessness, civil rights violations, negligent hiring, retention, and supervision, assault and battery, and intentional infliction of emotional distress. In a series of opinions, the Superior Court dismissed all claims against defendants other than the officer, and entered a final judgment excluding the officer. Driver appealed.

The Supreme Court of Delaware held that:

- Driver failed to allege in her second amended complaint that officer was acting as an agent, servant, or employee of the police department and the city, that officer acted within the scope of his employment, or that officer's negligence and recklessness were imputed to the police department and city, as required to state a claim against the city for any conduct other than car accident;
- Police chief was not wantonly negligent when he approved the hiring of police officer for purposes of exception to Tort Claims Act immunity;
- Police chief was not wantonly negligent in training and retaining police officer for purposes of exception to Tort Claims Act immunity; and
- Police officer's police identification, badge, gun, and magazine, did not fall under the Tort Claims Act's immunity exclusion for "other machinery or equipment," such that city could be found liable for officer's conduct.

EMINENT DOMAIN - FLORIDA

Orange County v. Buchman

District Court of Appeal of Florida, Fifth District - January 8, 2016 - So.3d - 2016 WL 81661 - 41 Fla. L. Weekly D144

County brought eminent domain proceeding against property owners. The Circuit Court entered judgment on a jury verdict that, among other things, awarded severance damages to the property owners. County appealed. The District Court of Appeal affirmed in part, reversed in part, and remanded. On remand, the jury returned a verdict that was not supported by the evidence, and the Circuit Court ordered an additur. County appealed, and property owners cross-appealed.

The District Court of Appeal held that trial court did not abuse its discretion by ordering additur.

Trial court did not abuse its discretion by ordering additur when jury returned a verdict that was not supported by the evidence in eminent domain case. Additur was permitted in eminent domain proceedings, additur did not infringe upon county's constitutional right to a jury determination of damages, and offer of a new trial in lieu of additur sufficiently preserved the right to trial by jury.

PUBLIC DUTY RULE - SOUTH CAROLINA

Repko v. County of Georgetown

Court of Appeals of South Carolina - January 6, 2016 - S.E.2d - 2016 WL 62342

Landowner brought negligence action against county after county allowed repeated reductions in financial guarantees posted by developer for infrastructure development on subdivision lots and

infrastructure development was left unfinished. County moved for a directed verdict at close of landowner's case. The Circuit Court, Georgetown County, Benjamin H. Culbertson, J., granted the motion. Landowner appealed.

The Court of Appeals held that:

- County's supposed disclaimer of liability in ordinance was preempted by Tort Claims Act;
- Landowner's claims qualified for special duty exception to public duty rule; and
- Issue of whether county was grossly negligent in exercising its licensing powers or functions was for jury.

County's supposed disclaimer of liability for negligence, in ordinance addressing developer's posting of financial guarantees in lieu of completing required infrastructure improvements for a subdivision as a prerequisite to selling lots, was expressly preempted by Tort Claims Act.

County ordinances, which allowed developer to post financial guarantees in lieu of completing required infrastructure improvements before selling undeveloped subdivision lots, imposed special duty on county to purchaser of two undeveloped lots to manage financial guaranty provided by developer, and therefore, county was not immune under public duty rule from owner's negligence action against county, filed after county allowed several reductions in guarantee, developer filed bankruptcy, and infrastructure was left unfinished. Ordinances imposed duty to oversee any reduction of guarantees on planning department and department of works, satisfying "specific public officer" requirement, and owners of property in the undeveloped subdivision were identifiable as a class before county agreed to reduce financial guarantee.

BALLOT INITIATIVES - WASHINGTON

Spokane Entrepreneurial Center v. Spokane Moves to Amend Constitution

Supreme Court of Washington - February 4, 2016 - P.3d - 2016 WL 455957

County, city residents, and others filed declaratory judgment action challenging validity of proposed local initiative containing provisions relating to zoning changes, water rights, workplace rights, and rights of corporations. The Superior Court ordered initiative to be struck from ballot. Sponsor appealed. The Court of Appeals reversed. Review was granted.

The Supreme Court of Washington held that:

- Challengers had standing to challenge initiative, and
- Initiative exceeded scope of local legislative authority.

River users and housing builders and developers had standing to challenge local initiative containing provisions relating to zoning changes, water rights, workplace rights, and rights of corporations. Initiative gave river its own water rights and required an additional level of approval from neighborhood residence for all major development, and users and builders would suffer harm if initiative were enacted.

Local initiative provision that would have required any proposed zoning changes involving large developments to be approved by voters in the neighborhood was outside scope of initiative power. City had already adopted processes for zoning and development, and the provision would have modified those processes for zoning and development decisions, which fell under the description of an administrative matter since it dealt with carrying out and executing laws or policies already in

existence.

Local initiative provision that would have given river the legal right to "exist and flourish," and would have given city residents the right to access and use water in city as well as right to enforce river's new rights, was directly contrary to water rights system established by State and was outside scope of city's authority. Provision dealt with an aquifer that was actually located in another state and would have dealt with how an existing regulatory scheme was implemented.

PROPERTY - WASHINGTON

Holmquist v. King County

Court of Appeals of Washington, Division 1 - February 8, 2016 - P.3d - 2016 WL 513178

Property owners brought quiet title action against county, in which city later intervened, asserting ownership of land underlying a vacated public highway between owners' two lots. The Superior Court entered summary judgment in favor of owners. County and city appealed, and city filed notice of supersedeas without bond. The Court of Appeals affirmed. Owners filed motion to award damages resulting from city's decision to supersede the judgment quieting title. The Superior Court denied the motion, and owners appealed.

The Court of Appeals held that:

- City was potentially liable for damages for supersession of enforcement of judgment;
- Property owners were damaged by city's supersession of the judgment due to loss of exclusive use of the property; and
- Rental value of property, as calculated using city's own formula for renting comparable properties, was appropriate measure of damages.

City was potentially liable for damages to property owners for supersession of enforcement of judgment quieting title in owners, where city was statutorily exempt from posting a supersedeas bond, city took advantage of this exemption by filing a notice of supersedeas without bond, and city's appeal was unsuccessful.

Property owners who prevailed in quiet title action against city were damaged by city's supersession of the judgment while on appeal due to loss of exclusive use, and thus were entitled to damages. While appeal was pending and judgment was superseded, public was allowed to continue using the property as a public beach.

Rental value of property, as calculated using city's own formula for renting comparable properties, was appropriate measure of property owners' damages which resulted from city's supersession of trial court's judgment quieting title in owners, even if they did not intend to rent the property and the city, which did not obtain supersedeas bond, did not have notice owners would seek to recover damages based on the property's rental value.

Property owners who were entitled to rental value of property as damages for city's supersession of trial court's judgment quieting title in owners while judgment was on appeal, were not entitled to additional damages equal to the benefits city received by physically appropriating the property as a public beach, as city's use of the property as a public beach and the owners' inability to exclude others from using the property were opposite sides of the same coin such that additional damages would amount to a double recovery for property owners' inability to exclude others from the property.

EMINENT DOMAIN - WISCONSIN

Hoffer Properties, LLC v. State, Dept. of Transp.

Supreme Court of Wisconsin - February 4, 2016 - N.W.2d - 2016 WL 418826 - 2016 WI 5

Landowner sought judicial review of amount of compensation provided by Department of Transportation (DOT) for elimination of property's direct connection to state highway. The Circuit Court granted partial summary judgment to DOT. Landowner appealed. The Court of Appeals affirmed. Landowner filed petition for review, which was granted.

The Supreme Court of Wisconsin held that:

- Replacement of direct highway access with circuitous access was exercise of police power not compensable under eminent domain statute, and
- Diminution in value based on loss of direct access points could not be included in compensation for taking of land.

After a valid controlled-access designation of a highway has been made by the Department of Transportation (DOT), the DOT may change an abutting owner's access to the highway without compensation, pursuant to the controlled-access highway statute, in whatever way it deems necessary and desirable, as long as it provides other access that does not deprive the abutting owner of all or substantially all beneficial use of the property; after a valid controlled-access designation is made, the abutting owner's rights are curtailed—and the DOT subsequently acts—pursuant to a duly authorized exercise of the police power.

Replacement of abutting landowner's direct access points to highway with circuitous access, following designation of highway as controlled-access by Department of Transportation (DOT), was done pursuant to exercise of police power duly authorized by the controlled-access highway statute, and thus diminution in value of property due to loss of direct access was not compensable under eminent domain statute. DOT validly designated highway as controlled-access, upon that designation, landowner lost its right to be compensated under eminent domain statutes for a change to existing access resulting in circuity of travel, landowner's right of access was curtailed to the controlled right to access, DOT determined it was necessary or desirable to change landowner's access to highway, and DOT provided alternate access to property.

Diminution in value of abutting landowner's property based loss of direct access points to highway following by designation of highway as controlled access by Department of Transportation (DOT) could not be included in compensation for DOT's taking of .72 acres of landowner's property, which did not contain direct access points. Landowner did not lose direct access points to highway because of taking of land, but rather it lost its direct access points due to DOT's decision to restrict access to the highway as part of another highway's relocation project, two separate acts occurred, namely the taking of the land and the elimination of the direct access points, and diminution in value was not consequence of taking of land.

ZONING - CONNECTICUT

Caruso v. Zoning Bd. of Appeals of City of Meriden

Supreme Court of Connecticut - February 2, 2016 - A.3d - 320 Conn. 315 - 2016 WL 338904

Objectors sought review of city zoning board of appeals' decision granting developer's application

for a use variance to build a used car dealership on property located in regional development district. The Superior Court sustained the appeal in part. Developer appealed and objectors filed a cross-appeal. The Appellate Court reversed. Developer appealed.

The Supreme Court of Connecticut held that substantial evidence did not support a determination that application of zoning regulations caused a practical confiscation of property so as to warrant a grant of use variance.

Substantial evidence did not support a determination that application of zoning regulations caused a practical confiscation of property in regional development district so as to warrant a grant of a use variance sought by developer to build a used car dealership. There was no specific evidence of any decrease in value of property by virtue of its classification, nor evidence that developer was unable to sell the property or develop it for any of the permitted uses, nor evidence that the zoning restriction greatly decreased or practically destroyed property's value for any of the uses to which it could reasonably be put.

PENSIONS - PENNSYLVANIA

Delaware Tp. Bd. of Auditors v. Delaware Tp.

Commonwealth Court of Pennsylvania - January 5, 2016 - A.3d - 2016 WL 47743

Township board of auditors brought action against township, supervisors, and pension trust for declaratory and injunctive relief after township approved creation of a new defined benefit pension plan that included supervisors who were also employees. The Court of Common Pleas sustained preliminary objections and dismissed complaint. Board appealed.

The Commonwealth Court held that:

- Board could not invalidate plan based on possible inaccuracies on which prior board based approval;
- Pension benefit for supervisors who were also employed by township was compensation for supervisors' role as employees, not role as elected officials; and
- Former supervisor who remained employee was still entitled to participate in plan without being reelected to new term.

Possible inaccuracies in alleged representations by township's former supervisors during meeting at which its former auditors approved pension plan including township supervisors did not permit township's current board of auditors to invalidate plan under statute requiring board to approve inclusion of supervisor-employees in township pension plans, paid for in whole or in part by the township, and to determine pension-benefit compensation. Differences in cost of plan were lower than estimates and were not material, actual contributions from state did not vary materially from estimate reflected in the minutes, nothing suggested that alleged estimates were intentionally false or made by anyone with corrupt motive, and looking behind signatures of elected officials was not justified.

Pension benefit for township supervisors who were also employed by township was compensation for supervisors' role as employees, not role as elected officials, and, thus, was not "compensation of the elected office" within meaning of statute making any change in compensation or emoluments of the elected office effective at beginning of supervisor's next term. Statute distinguished between compensation of supervisors as elected officials, whose salary was capped by statute for six years

until next term of office, and salary of supervisor-employees, whose salary was discretionary with board of auditors.

CONTRACTS - GEORGIA

Fairgreen Capital, LLC v. City of Canton

Court of Appeals of Georgia - January 26, 2016 - S.E.2d - 2016 WL 301160

Developer brought breach of contract action against city seeking payment of funds that developer advanced to city under written agreement governing construction of public road on city property benefiting developer's development. The trial court granted summary judgment in favor of city. Developer appealed.

The Court of Appeals held that:

- Contract that created debt required voter approval and, thus, was void as matter of law, and
- Trial court was not permitted to grant summary judgment on issue not raised in summary judgment motion.

Debt city owed developer for funds advanced to city under a written agreement governing construction of a public road on city property benefiting a development constituted a new debt obligation that extended beyond single fiscal year and required voter approval, and therefore, in absence of voter approval, contract creating debt was void and unenforceable as a matter of law. Agreement clearly arranged loan from developer to city for funds necessary to construct road on city property and created debt which city was obligated to repay regardless of whether city had sufficient impact fees to reimburse developer.

FINANCE - IOWA

Regional Utility Service Systems v. City of Mount Union

Supreme Court of Iowa - January 29, 2016 - N.W.2d - 2016 WL 359069

Judgment creditor garnished city's bank account when the city failed to pay a judgment. City moved to quash the garnishment on grounds the bank account was exempt from execution. The District Court denied the motion. City appealed.

The Supreme Court of Iowa held that:

- As matters of first impression, general funds in a municipal bank account constitute "other public property" exempt from execution so long as they are necessary and proper for carrying out the general purpose for which the municipality is organized, and
- Substantial evidence supported trial court's finding that general funds were necessary to the general purposes for which the city was organized.

PENSIONS - LOUISIANA

Dunn v. City of Kenner

Supreme Court of Louisiana - January 27, 2016 - So.3d - 2016 WL 314761 - 2015-1175 (La.

1/27/16)

Firefighters brought class action lawsuit against city, seeking retroactive adjustments and corrections to city's pension contributions, as well as retroactive and forward pay adjustments. The District Court granted summary judgment in favor of city. Firefighters appealed. The Court of Appeal reversed in part, vacated in part, and rendered summary judgment in favor of firefighters. City petitioned for writ of certiorari, which was granted.

The Supreme Court of Louisiana held that:

- Educational incentive pay was earnable compensation;
- Educational incentive pay was not irregular and nonrecurring;
- Seniority incentive pay was earnable compensation;
- Seniority incentive pay was not irregular and nonrecurring;
- Holiday pay was earnable compensation;
- Holiday pay was not irregular and nonrecurring;
- Acting pay was earnable compensation; and
- Acting pay was not irregular and nonrecurring.

PROPERTY - MAINE

Bradbury v. City of Eastport

Supreme Judicial Court of Maine - January 26, 2016 - A.3d - 2016 WL 308932 - 2016 ME 20

Objectors brought action against city seeking declaratory and equitable relief, alleging that city's sale of publicly owned oceanfront property failed to comply with city charter. The Superior Court granted summary judgment in favor of city. Objectors appealed.

The Supreme Judicial Court held that city's sale of 17 acres of publicly owned oceanfront property was advertised within the meaning of the city charter.

City's sale of 17 acres of publicly owned oceanfront property was advertised within the meaning of the city charter, where city conducted its dealings regarding the sale openly at public meetings and in the media, resulting in both publicity and public participation.

INVERSE CONDEMNATION - MARYLAND

Litz v. Maryland Dept. of Environment

Court of Appeals of Maryland - January 22, 2016 - A.3d - 2016 WL 280947

Former property owner brought action against Maryland Department of the Environment, town, and county alleging trespass, negligence, nuisance, and inverse condemnation in regards to pollution of lake located on property. The Circuit Court granted motions to dismiss. Owner appealed.

The Court of Appeals held that:

- As a matter of apparent first impression, an inverse condemnation claim is pleaded adequately where a plaintiff alleges a taking caused by a governmental entity's or entities' failure to act, in the face of an affirmative duty to act;
- Owner's complaint sufficiently stated a cause of action for inverse condemnation;

- Claim for inverse condemnation is not covered by notice provisions of either tort claims act; but
- Tort of trespass is subject to the notice requirement of Local Government Tort Claims Act.

Property owner's complaint sufficiently stated a cause of action for inverse condemnation by alleging that failure of state, Department of the Environment, county, and town to address pollution and sewage problems led directly to the substantial devaluing of her property, on which she had operated a popular lake-front recreational campground, and its ultimate loss through foreclosure.

IMMUNITY - NORTH CAROLINA

Irving v. Charlotte-Mecklenburg Bd. of Educ.

Supreme Court of North Carolina - January 29, 2016 - S.E.2d - 2016 WL 363595

Motorist brought action under Tort Claims Act against board of education, alleging negligence when activity bus owned by board and operated by football coach collided with rear of motorist's vehicle. The Industrial Commission granted board's motion for summary judgment. Motorist appealed. The Court of Appeals reversed and remanded. Board sought review.

The Supreme Court of North Carolina held that a school activity bus is not a school transportation vehicle so as to limit waiver of governmental immunity from lawsuits and as would confer jurisdiction over claim upon Commission.

A school activity bus is not a "school transportation service vehicle" so as to limit waiver of governmental immunity from lawsuits against county and city boards of education for negligent operation of school buses and school transportation service vehicles when certain criteria are met, and as would confer jurisdiction upon Industrial Commission to hear such claims. General Assembly and State Board of Education defined and managed school buses, activity buses, and school transportation service vehicles as distinct categories of vehicles, and legislature gave them differing treatment in other relevant respects.

EMINENT DOMAIN - OKLAHOMA

State ex rel. Dept. of Transp. v. Caliber Development Co., LLC

Court of Civil Appeals of Oklahoma, Division No. 2 - January 5, 2016 - P.3d - 2016 WL 74793 - 2016 OK CIV APP 1

Department of Transportation sought condemnation of land for highway expansion, and landowner sought jury trial. The District Court entered judgment on jury verdict for landowner and awarded costs and attorney fees. Department appealed.

The Court of Civil Appeals held that:

- Slide-back appraisal theory relied on by state's expert conflicted with constitutionally specified manner for determining just compensation;
- Department was not entitled to a second continuance;
- Trial court could refuse to give Department's proposed instruction explaining that Department was required to pay amount of commissioners' award before it could take property; and
- Attorney fee award was not abuse of discretion.

Slide-back appraisal theory relied on by state's expert in concluding that highway expansion did not "take" property since valuable highway frontage or corners slid back to new location and just compensation depended on valuation of "backland" remaining after expansion conflicted with constitutionally specified manner for determining just compensation, since it was not limited to determining value of the property taken and did not offset any benefits to the landowner only against any injury to the property not taken.

Trial court in eminent domain case could refuse to give Department of Transportation's proposed instruction explaining that Department was required to pay amount of commissioners' award before it could take property. Court instructed jury to base valuation on conditions known as of date that Department paid commissioners' award and not on conjecture, speculation, or guesswork, and that instruction resolved Department's concern.

Attorney fee award to landowner was not abuse of discretion in eminent domain case resulting in jury award of double amount awarded by commissioners for highway expansion, despite 1200 hours of attorney time by six different attorneys. Continuance at request of Department of Transportation added to amount of fees, landowner needed to depose Department's expert three times because he was not fully prepared, and landowner did not cause the duplication of effort.

EMINENT DOMAIN - PENNSYLVANIA

In Re Condemnation by Com., Dept of Transp.

Commonwealth Court of Pennsylvania - January 29, 2016 - A.3d - 2015 WL 9942103

Department of Transportation filed declaration of taking. Landowner filed preliminary objections arguing that Department's declaration of taking was untimely filed under the Eminent Domain Code. The Court of Common Pleas sustained landowner's preliminary objections, and Department appealed.

The Commonwealth Court held that:

- Section of the Eminent Domain Code, stating that condemnor shall file within one year of the action authorizing the declaration of taking a declaration of taking, cannot be interpreted or enforced as though it were a statute of limitation;
- Nothing in the Administrative Code or the Eminent Domain Code prohibited Department from starting the condemnation process over by its Secretary authorizing a revised plan or the original plan again; and
- Failure to file a declaration of taking within the one-year time period set forth in Eminent Domain Code results in the original declaration lapsing; overruling *In re Redevelopment Authority of City of Allentown*, 31 A.3d 321.

UTILITIES - PENNSYLVANIA

Kretschmann Farm, LLC v. Township of New Sewickley

Commonwealth Court of Pennsylvania - January 7, 2016 - A.3d - 2016 WL 72779

Landowners sought review of township's approval of gas utility's request for conditional use permit to construct gas compressor station. Township's board of supervisors affirmed the decision, and landowners sought review. The Court of Common Pleas affirmed. Landowners appealed.

The Commonwealth Court held that:

- Board's determination to uphold grant of conditional use permit to gas utility contained findings of fact and conclusions of law necessary for meaningful appellate review;
- Landowners' challenge to constitutionality of underlying ordinance was not preserved for appellate review; and
- Landowners failed to show that they were refused the opportunity to be fully heard at hearing on gas utility's conditional use application, and thus were not entitled to expand the record on appeal.

Determination of township's board of supervisors to uphold grant of conditional use permit to gas utility to construct gas compressor station contained findings of fact and conclusions of law necessary for meaningful appellate review, even though it did not refer to objecting landowners' testimony or documents, including e-mails expressing concern about environmental and health impact of compressor station. Gas utility satisfied requirements for conditional use approval, such that objectors needed to establish substantial evidence on which finding of harm could be based, and fact that board did not mention offered testimony and alleged evidence could reasonably be interpreted as board's conclusion that evidence presented was not compelling and did not warrant discussion.

Objecting landowners' challenge to the constitutionality of township ordinance amending zoning requirements with respect to oil and gas activities, on appeal from decision upholding grant of conditional use permit to gas utility for construction of gas compressor station, was rendered unpreserved for appellate review by landowners' failure to pursue their challenge in accordance with applicable procedures, including submission to zoning hearing board to governing body along with request for a curative amendment.

Objecting landowners failed to show that they were refused the opportunity to be fully heard at hearing on gas utility's conditional use application to construct gas compressor station, and thus were not entitled to expand the record, on appeal from decision affirming grant of conditional use permit, to include transcripts of two public hearings that took place on underlying ordinance. Landowners filed an appeal challenging the constitutionality of ordinance before township zoning hearing board, but subsequently withdrew the challenge.

PENSIONS - PENNSYLVANIA

City of Pittsburgh v. Fraternal Order of Police

Commonwealth Court of Pennsylvania - January 7, 2016 - A.3d - 2016 WL 72742

City petitioned for review of arbitration panel's supplemental award in favor of police union that modified the parties' collective bargaining agreement (CBA) by inserting a non-residency clause for police officers. The Court of Common Pleas affirmed the award, and city appealed.

The Commonwealth Court held that arbitration panel lacked the authority to issue award that contravened residence requirement for police officers, overruling *City of Wilkes–Barre v. City of Wilkes–Barre Police Benevolent Association*, 814 A.2d 285.

Adoption of amendment to home rule charter that imposed a residency requirement for city police officers removed arbitration panel's authority to issue an award in a Policemen and Firemen Collective Bargaining Act (Act 111) interest arbitration that contravened the residency requirement, overruling *City of Wilkes–Barre v. City of Wilkes–Barre Police Benevolent Association*, 814 A.2d 285.

43 P.S. § 217.1, et seq.

LIABILITY - WASHINGTON

Wuthrich v. King County

Supreme Court of Washington, En Banc - January 28, 2016 - P.3d - 2016 WL 348070

Motorcyclist who was injured by motorist who pulled out in front of him at an intersection brought action against County, alleging that County was liable for his injuries because overgrown blackberry bushes obstructed motorist's view of traffic at the intersection. The Superior Court entered summary judgment in County's favor. The Court of Appeals affirmed. Motorcyclist's petition for review was granted.

The Supreme Court of Washington held that:

- Factual dispute as to whether County breached its duty to provide reasonably safe roads precluded summary judgment, abrogating *Rathbun v. Stevens County*, 46 Wash.2d 352, 281 P.2d 853, *Bradshaw v. City of Seattle*, 43 Wash.2d 766, 264 P.2d 265, and *Barton v. King County*, 18 Wash.2d 573, 139 P.2d 1019, and
- Factual dispute as to whether County's alleged breach proximately caused motorcyclist's injuries precluded summary judgment.

INVERSE CONDEMNATION - CALIFORNIA

Pacific Shores Property Owners Association v. Department of Fish and Wildlife

Court of Appeal, Third District, California - January 20, 2016 - Cal.Rptr.3d - 2016 WL 234482 - 16 Cal. Daily Op. Serv. 830

Owners of undeveloped subdivision along lagoon's shore, whose properties suffered flooding damage when lagoon rose above certain level, filed inverse condemnation action against Department of Fish and Wildlife and Coastal Commission, alleging owners suffered a physical taking from Department's actions related to breaching lagoon's sandbar, and a regulatory taking by Commission retaining land use jurisdiction over subdivision instead of transferring it to county.

The Superior Court found Department and Commission liable for physical taking and awarded damages, but concluded owners' claim for regulatory taking was barred, awarded owners attorney fees, and denied owners any precondemnation damages. All parties appealed.

The Court of Appeal held that:

- Commission's approval of permit to breach sandbar triggered period in which owners were permitted to file writ petition challenging permit;
- Statute governing period in which aggrieved person was permitted to file writ petition applied to Commission's approval of permit and owners' inverse condemnation action;
- Inverse condemnation action against Department accrued when Department adopted management plan for lagoon;
- Department was liable for physical taking under theory of strict liability;
- Department actions related to breaching sandbar were unreasonable;

- Administrative jurisdiction exception to doctrine of exhaustion of remedies did not apply to regulatory taking claim asserted against Commission;
- Evidence supported determination that owners were not entitled to precondemnation damages; and
- Trial court properly limited attorney fees to amount owners agreed to pay under contingency agreement.

Costal Commission's approval of permit to breach lagoon's sandbar at eight to ten feet mean sea level (msl) triggered 60-day period in which owners of undeveloped subdivision along lagoon's shore were permitted to file petition for writ of administrative mandate challenging permit or any other decision or action of Commission, as required for owner's to file subsequent inverse condemnation action against Commission, stemming from flood damage to owners' properties that occurred when lagoon rose above eight feet msl.

Statute governing 60-day period in which aggrieved person was permitted to file petition for writ of administrative mandate challenging decision of Costal Commission and requirement that inverse condemnation claim be filed with petition applied to Commission's approval of permit to breach lagoon's sandbar at eight to ten feet mean sea level (msl) and inverse condemnation action filed by owners of undeveloped subdivision along lagoon's shore, stemming from flood damage to owners' properties that occurred when lagoon rose above eight feet msl; despite contention that 60-day statute and requirement to file writ petition first did not apply because Commission's actions constituted a physical taking, Commission did not physically invade or damage owners' properties, but rather Commission's actions were limited to denying and issuing permits.

Cause of action against Department of Fish and Wildlife for inverse condemnation filed by owners of undeveloped subdivision along lagoon's shore accrued under stabilization doctrine, and three-year statute of limitations for claims for damage to real property began to run, when Department adopted management plan for lagoon that called for breaching lagoon's sandbar at eight to ten feet mean sea level (msl) and subsequent resulting flooding of owners' lands, which suffered flooding damage when lagoon rose above eight feet msl, became certain. Although type of damage that occurred from breaching sandbar at eight feet msl was known prior to adoption of management plan, and although emergency and interim permits had been issued to breach sandbar at different levels, taking did not become permanent until management plan was approved.

Department of Fish and Wildlife was liable for physical taking under theory of strict liability in inverse condemnation action filed by owners of undeveloped subdivision along lagoon's shore, whose property flooded when lagoon rose above eight feet mean sea level (msl), based on Department's approval of management plan for lagoon that called for breaching lagoon's sandbar at eight to ten feet msl. Department's decision to breach sandbar at eight to ten feet msl was a decision to flood owners' properties intentionally whenever needed to protect environmental resources and did not constitute flood control project, and by its actions, Department chose to lessen flood protection that had been provided to owners for decades.

Department of Fish and Wildlife acted unreasonably in determining to breach, and actually breaching, lagoon's sandbar at eight to ten feet mean sea level (msl), and thus rule of reasonableness, as exception to strict liability for a physical taking, did not apply to Department in inverse condemnation suit filed by owners of undeveloped subdivision along lagoon's shore, stemming from flooding damage to their properties that occurred when lagoon rose above eight feet msl. Project was not designed to protect owners' properties from flooding, there was a feasible alternative that reduced risk of flooding, and owners bore disproportionate cost of Department's project.

Administrative jurisdiction exception to doctrine of exhaustion of remedies did not apply to regulatory taking claim asserted against Coastal Commission in inverse condemnation action filed by owners of undeveloped subdivision along lagoon's shore, alleging that Commission committed a regulatory taking by retaining land use jurisdiction over subdivision instead of transferring it to county, and thus owners were not excused from not filing a permit with Commission as a prerequisite for bringing claim for regulatory taking and then challenging Commission's decision on that application in administrative mandate. Commission had not acted, and was not acting, beyond its jurisdiction.

Substantial evidence supported trial court's determination that owners of undeveloped subdivision along lagoon's shore were not entitled to precondemnation damages in inverse condemnation suit based on Coastal Commission's actions in deferring certification of county's local coastal program for subdivision, combined with increased flooding that owners experienced when lagoon rose above eight feet mean sea level (msl). Evidence showed that delay arose from county's decision not to submit revised local coastal program for subdivision, that without that application, Commission was obligated to retain land use authority over subdivision, and that Commission had no duty to prepare a program for subdivision or to compel county to do so.

Trial court properly limited attorney fees awarded to owners of undeveloped subdivision along lagoon's shore, whose properties flooded when lagoon rose above eight feet mean sea level (msl), to amount owners agreed to pay under contingency agreement with their counsel in owners' inverse condemnation action against Department of Fish and Wildlife and Coastal Commission, stemming from adoption and approval of management plan that called for breaching lagoon's sandbar at eight to ten feet msl. Statute governing award of attorney fees in inverse condemnation actions limited fees to those actually incurred, and amount owners agreed to pay in contingency agreement constituted amount they were obligated to pay.

PUBLIC UTILITIES - CALIFORNIA

Monterey Peninsula Water Management Dist. v. Public Utilities Com'n

Supreme Court of California - January 25, 2016 - P.3d - 2016 WL 299103

Public Utilities Commission (PUC) approved privately owned water utility's request for a rate increase, but directed utility either to take over environmental mitigation work from the water management district or to meet and confer with the district to discuss the possibility of doing the mitigation work as a joint project. The Supreme Court granted district's petition for a writ of review.

The Supreme Court of California held that PUC lacked authority to review amount of environmental mitigation fee that district imposed on utility's customers.

Public Utilities Commission (PUC) lacked authority to review the amount of an environmental mitigation fee that a water management district imposed on a privately owned water utility's customers, even though the utility was under a legal obligation to take over the mitigation work from the district if the district ever stopped performing the mitigation work, absent evidence that the district had been acting as the utility's agent in performing the mitigation work.

MUNICIPAL ORDINANCE - COLORADO

Ryals v. City of Englewood

Supreme Court of Colorado - January 25, 2016 - P.3d - 2016 WL 297371 - 2016 CO 8

Registered sex offender brought action against municipality challenging constitutionality of residency ordinance that effectively barred him from living in 99% of the municipality's residences. The United States District Court for the District of Colorado entered judgment in favor of offender. Municipality appealed. The United States Court of Appeals certified question whether city ordinance was preempted by Colorado law to the Colorado Supreme Court.

The Colorado Supreme Court held that:

- City ordinance would have an extraterritorial impact on residents outside the municipality, as a factor in determining whether state law preempted city ordinance;
- Fact that city ordinance was a zoning ordinance did not require a finding that sex offender residency was a local matter, for purposes of determining whether state law preempted city ordinance;
- State constitution did not clearly favor either the state or the city as a factor in determining whether state law preempted city ordinance;
- Degree of cooperation needed between state and city with regard to the placement of sex offenders was not so stringent as to weigh in favor of state, as factor in determining whether state law preempted city ordinance;
- Legislature's declaration that it was necessary for public safety to comprehensively evaluate, identify, treat, manage, and monitor sex offenders did indicate that management of sex offenders was a matter of statewide concern, as a factor in determining whether state law preempted city ordinance;
- Sex offender residency was an issue of mixed state and local concern, as a factor in determining whether state law preempted city ordinance; but
- City ordinance did not conflict with state law, and therefore, was not preempted by state law.

IMMUNITY - ILLINOIS

Coleman v. East Joliet Fire Protection Dist.

Supreme Court of Illinois - January 22, 2016 - N.E.3d - 2016 IL 117952 - 2016 WL 280515

Administrator of decedent's estate filed claims for wrongful death and survival, alleging willful and wanton conduct by fire protection districts, ambulance crew, and county, among others, in responding to emergency call. The Circuit Court, Will County, granted summary judgment to defendants. Administrator appealed. The Court of Appeals affirmed. Administrator petitioned for leave to appeal, which was allowed.

The Supreme Court of Illinois held that common-law public duty rule, which had provided that local governmental entities owed no duty to individual members of the general public to provide adequate government services, and its special duty exception, are abolished, and therefore, in cases where the legislature has not provided immunity for certain governmental activities, traditional tort principles apply; abrogating *Zimmerman v. Village of Skokie*, 183 Ill.2d 30, 231 Ill.Dec. 914, 697 N.E.2d 699, *Schaffrath v. Village of Buffalo Grove*, 160 Ill.App.3d 999, 112 Ill.Dec. 417, 513 N.E.2d 1026, *Leone v. City of Chicago*, 156 Ill.2d 33, 188 Ill.Dec. 755, 619 N.E.2d 119, *Burdinie v. Village of Glendale Heights*, 139 Ill.2d 501, 152 Ill.Dec. 121, 565 N.E.2d 654, *Huey v. Town of Cicero*, 41 Ill.2d 361, 363,

243 N.E.2d 214.

ANNEXATION - INDIANA

Town of Zionsville v. Town of Whitestown

Supreme Court of Indiana - January 22, 2016 - N.E.3d - 2016 WL 280899

The Town of Whitestown brought a declaratory judgment action against the Town of Zionsville, seeking a declaration that the prior reorganization of Zionsville and the Township of Perry – pursuant to the Indiana Government Modernization Act (GMA) – was contrary to law and that Whitestown could initiate certain annexations. Defendant town filed counterclaim for declaratory judgment. The Superior Court granted summary judgment to Whitestown. Transfer was granted.

The Supreme Court of Indiana reversed, holding that:

- Upon reorganization, Zionsville had power to further reorganize;
- Perry and Zionsville met adjacency requirement for reorganization;
- Separate voting tallies were not required for Perry and Zionsville to reorganize; and
- Perry and Zionsville were protected from invasive annexations.

INITIATIVE / REFERENDUM - KANSAS

State ex rel. Schmidt v. City of Wichita

Supreme Court of Kansas - January 22, 2016 - P.3d - 2016 WL 275298

State brought action in quo warranto, seeking writ declaring null and void a city ordinance that reduced severity level of first-offense convictions for possession of 32 grams or less of marijuana and/or related drug paraphernalia from misdemeanor to "infraction" when offender was 21 years of age or older.

The Supreme Court of Kansas held that:

- The Court would maintain jurisdiction;
- Court would decline to determine whether ordinance was unconstitutional under Home Rule Amendment; and
- Proponents of ordinance failed to comply, absolutely or substantially, with requirement that proposed ordinance be filed with city clerk.

Supreme Court would maintain jurisdiction in quo warranto action, in which the State challenged city ordinance that reduced severity level of first-offense convictions for possession of 32 grams or less of marijuana and/or related drug paraphernalia from misdemeanor to "infraction" when offender was 21 years of age or older. Possible conflict between criminal statutes of the state and ordinance and possible significance of failure to comply with language of statute authorizing people to submit proposed law directly to city's governing body were questions of sufficient public concern to warrant potential relief in quo warranto.

Supreme Court would decline to determine whether city ordinance was unconstitutional under Home Rule Amendment, where procedural issue as to proper filing of the ordinance prior to its enactment was determinative of the case, so that any consideration of substantive constitutional

issue could have resulted in mere advisory opinion on constitutionality.

Proponents of proposed ordinance regarding punishment for first-offense convictions related to marijuana, by filing petition with city clerk, but only posting ordinance on its website and averring merely that ordinance was widely publicized in the media and that at least two members of city council had copies of the ordinance, failed to comply, absolutely or substantially, with requirement that ordinance and petition be filed together with city clerk. Submission of the petition alone left doubt as to validity of proponent's support, and failure to file ordinance impaired city council's ability to become fully aware of what could have become unalterable law and deprived electorate of opportunity for full awareness before voting.

ANNEXATION - NEW YORK

City of Johnstown v. Town of Johnstown

Supreme Court, Appellate Division, Third Department, New York - January 14, 2016 - N.Y.S.3d - 2016 WL 155582 - 2016 N.Y. Slip Op. 00220

City filed petition to determine whether proposed annexation of property in town was in over-all public interest. Property owner intervened. Town moved to dismiss.

The Supreme Court, Appellate Division held that owner's environmental assessment form (EAF) did not satisfy his obligation to provide environmental impact statement in support of annexation.

Property owner's submission of environmental assessment form (EAF) did not satisfy his obligation under State Environmental Quality Review Act (SEQRA) to provide environmental impact statement in support of city's proposed annexation of his property in neighboring town after town determined that action would include potential for at least one significant adverse environmental impact.

LIABILITY - TEXAS

City of El Paso v. Collins

Court of Appeals of Texas, El Paso - January 20, 2016 - S.W.3d - 2016 WL 240882

Parents brought premises liability and negligence action against city after child suffered injuries at a swimming pool owned and operated by city. City filed plea to the jurisdiction. The District Court denied plea. City appealed. The Court of Appeals affirmed in part, reversed in part, and remanded. On remand, parents filed amended petition, and city filed plea to the jurisdiction. The trial court denied plea. City appealed.

The Court of Appeals held that:

- Parents sufficiently alleged that city had subjective knowledge that dangerous conditions existed at pool on day of accident, as would be required under the Recreational Use Statute to defeat city's plea to the jurisdiction as to parents' premises liability claim; and
- Alleged condition of city's swimming pool, which purportedly had suction occurring at drain site that caused child to become entrapped or entangled, constituted a hidden defect that was capable of supporting a determination that city had duty to warn or rectify, and therefore parents' pleading of such defect precluded grant of city's plea to premises liability claim; but
- Parents' purported negligent use claim against city under the Tort Claims Act was not a separate,

valid claim from parents' premises liability claim.

BONDS - DELAWARE

Nichols v. City of RehoBoth Beach

United States District Court, D. Delaware - December 14, 2015 - Slip Copy - 2015 WL 8751180

Resident Jackie Nichols ("Nichols") brought suit against the City of Rehoboth Beach ("Rehoboth"), alleging federal and state constitutional violations arising from a special election to authorize the issuance $52,500,000 of general obligation bonds of Rehoboth to finance an ocean outfall project.

Specifically, Nichols challenged the constitutionality of the residency requirements contained in the section of the Rehoboth Charter that governs voting procedures for Special Elections to authorize the borrowing of money.

The District Court ruled in favor of the Rehoboth, finding that Nichols lacked standing to maintain her suit.

"The court agrees with Defendants that Nichols lacks standing. Initially, the court agrees with Defendants that Nichols is not contesting the expenditure of tax funds, but the legality of the Special Election. Second, the court notes that Nichols suffered no particularized injury as a result of the Special Election. Nichols is a property owner in the city and had the right to vote in the Special Referenda Election. Thus, she lacks the concrete personal injury necessary to bring suit. As a result, the court lacks the subject matter jurisdiction to hear this action. Therefore, the complaint must be dismissed."

PUBLIC MEETINGS - MAINE

Hughes Bros., Inc. v. Town of Eddington

Supreme Judicial Court of Maine - January 14, 2016 - A.3d - 2016 WL 159296 - 2016 ME 13

Requester filed a complaint seeking an injunction directing town to cease and desist from holding a public vote on proposed moratorium on quarries, and a declaration that any moratorium that might be approved was void because town violated open meeting requirements of Freedom of Access Act (FOAA) during a joint executive session it held with board of selectmen. The Superior Court entered judgment for town. Requester appealed.

The Supreme Judicial Court of Maine held that the boards conducted a valid executive session, invoked for purpose of consulting with legal counsel regarding wording in proposed moratorium ordinance.

Joint executive session of town planning board and board of selectmen, invoked for purpose of consulting with legal counsel concerning the boards' legal rights and duties to establish a moratorium ordinance on quarries, did not violate open meeting requirements of Freedom of Access Act (FOAA) and, therefore, moratorium ordinance ultimately approved in open town vote was not null and void. Town met its burden to show that the executive session was held for, and limited to, the authorized purpose of consulting with counsel to draft a legally sound ordinance amendment for proposal at a later public meeting.

ANNEXATION - MISSOURI

City of DeSoto v. Nixon

Supreme Court of Missouri, en banc - January 12, 2016 - S.W.3d - 2016 WL 142676

City and city resident brought action against state for declaration that statute's section that excluded any city that met six specific criteria from statute's procedures for making post-annexation payments to a fire protection district after the city annexed part of the fire protection district violated the constitutional prohibition against local or special laws. The Circuit Court entered summary judgment in favor of state. City and resident appealed.

The Supreme Court of Missouri held that law was a special law in violation of constitution.

Statute describing how a third-class city with a population between 6,000 and 7,000 inhabitants, located in a charter county with between 200,000 and 350,000 inhabitants, entirely surrounded by a single fire-protection district and which operated a fire department was to make post-annexation payments to a fire protection district after it annexed part of the district was a special law and thus violated constitutional prohibition against local or special laws. No other city met both population requirements, and while there were many cities with 6,000 to 7,000 residents, those either were not third-class cities, not in charter counties, or were not surrounded by a single fire protection district.

INVERSE CONDEMNATION - MISSOURI

Metropolitan St. Louis Sewer District v. City of Bellefontaine Neighbors

Supreme Court of Missouri, en banc - January 12, 2016 - S.W.3d - 2016 WL 142767

Sewer district sued city alleging inverse condemnation, trespass and negligence for damage to sewer lines allegedly caused in the course of a city street improvement project. The Circuit Court granted city's motion to dismiss for failure to state a claim. District appealed.

The Supreme Court of Missouri held that:

- As a matter of first impression, as another public entity, district was not entitled to sue city for inverse condemnation, and
- Sovereign immunity barred district's tort claims against city.

Missouri Constitution and Missouri statutes governing condemnation and inverse condemnation, providing for just compensation only for the taking of private property, did not entitle sewer district to sue city for inverse condemnation, for city's alleged damage done to sewer lines in the course of city street improvement project, where sewer district was seeking compensation for the unintentional taking of public property.

In the absence of an express statutory exception to sovereign immunity, or a recognized common law exception such as the proprietary function and consent exceptions, sovereign immunity is the rule and applies to all suits against public entities, including suits against them by another public entity.

BALLOT INITIATIVES - OHIO

State ex rel. Carrier v. Hilliard City Council

Supreme Court of Ohio - January 19, 2016 - N.E.3d - 2016 WL 259410 - 2016 -Ohio- 155

Petitioners sought writ of mandamus to compel city council to approve an ordinance placing a proposed city-charter amendment on the ballot that would, a) subject all zoning ordinances to referendum, and b) prohibit the creation of tax increment financing incentive districts for dwelling unit improvements.

The Supreme Court of Ohio held that:

- Laches did not bar action, and
- Initiative petition to amend city charter did not violate statute requiring that each part-petition contain a full and correct copy of the title and text of the proposed measure.

Laches did not bar action in which petitioners sought writ of mandamus to compel city council to approve an ordinance placing a proposed city-charter amendment on the ballot, although delay resulted in case becoming subject to an expedited election briefing schedule, where eight days elapsed between the city council's vote rejecting an ordinance to place the proposed charter amendment on the ballot and, to have avoided having the expedited schedule apply, suit would have needed to be filed within 24 hours of the city council's decision.

Initiative petition to amend city charter did not violate statute requiring that each part-petition contain a full and correct copy of the title and text of the proposed measure, where amendment consisted of merely two provisions, the text of which comprised four brief paragraphs, and the entire amendment, including explanatory captions, fit easily on a single page, and, thus, there was no risk that the captioning format would interfere with the petition's ability to fairly and substantially present the issue or mislead electors.

IMMUNITY - OHIO

Citizens in Charge, Inc. v. Husted

United States Court of Appeals, Sixth Circuit - January 19, 2016 - F.3d - 2016 WL 210313

Three non-profit organizations brought action against Ohio Secretary of State, seeking declaration that Ohio's statutory petition-circulator residency requirement violated the First and Fourteenth Amendments, an injunction prohibiting its enforcement, and damages against the Secretary.

The United States District Court declared the statute unconstitutional, enjoined enforcement of it, and denied Secretary's qualified immunity defense. Secretary appealed the qualified immunity ruling.

The Court of Appeals held that Secretary did not violate clearly established law or otherwise act unreasonably by enforcing statute requiring circulators of initiative-petitions to be Ohio residents, and thus Secretary was entitled to qualified immunity from money-damages liability in action challenging the residency requirement on First Amendment grounds.

Other circuits issued conflicting decisions on constitutionality of residency requirements for circulators, when Secretary enforced statute no court had held it to be unconstitutional, and although prior version of statute was held unconstitutional, the new statute was more narrowly tailored and differed from the prior statute in several ways.

REFERENDUM - OKLAHOMA

In re Initiative Petition No. 403

Supreme Court of Oklahoma - January 12, 2016 - P.3d - 2016 WL 147145 - 2016 OK 1

Contestants filed original proceeding to determine legal sufficiency of initiative petition that sought to add new constitutional article creating Oklahoma Education Improvement Fund.

The Supreme Court of Oklahoma held that petition did not violate "one general subject rule" for constitutional amendments.

"One general subject rule" applicable to constitutional amendments was not violated by initiative petition that sought to add new article creating Oklahoma Education Improvement Fund. Each section of proposed article was germane to creating and implementing Fund, including creation of Fund, levying of additional sales tax, distributing monies to both higher education and common education, and providing increase in teacher salaries.

LIABILITY - TEXAS

East Texas Medical Center Gilmer v. Porter

Court of Appeals of Texas, Tyler - January 13, 2016 - S.W.3d - 2016 WL 145825

Patron, who slipped and fell while walking into the emergency room "walk area" seeking treatment, brought action against hospital, alleging negligence in hospital's failure to keep "walk area" clean and safe. Hospital filed a motion to dismiss, alleging that patron's claim was a health care liability claim (HCLC) requiring an expert report. The District Court denied the motion. Hospital filed interlocutory appeal.

The Court of Appeals held that patron's claim against hospital was not an HCLC.

To qualify as health care liability claim (HCLC), a claim alleging departure from safety standards need not be directly related to health care, but it must have a substantive relationship with the providing of medical or health care; that is, there must be a substantive nexus between the safety standards allegedly violated and the provision of health care.

Claim brought by patron, who slipped and fell while walking into hospital's emergency room "walk area" seeking treatment, alleging negligence in hospital's failure to keep "walk area" clean and safe, was not a health care liability claim (HCLC) requiring an expert report. Patron was not yet a patient at the time she fell, she had not yet received any treatment, and her injury did not occur in an area where patients might be while receiving care, and, furthermore, the record did not support the conclusion that the regulatory standards asserted by hospital established a substantive nexus between the provision of health care and the underlying facts of patron's claim.

ZONING - WASHINGTON

Snohomish County v. Pollution Control Hearings Bd.

Court of Appeals of Washington, Division 2 - January 19, 2016 - P.3d - 2016 WL 225256

Counties and building industry association appealed Pollution Control Hearings Board's order

holding that Department of Ecology's permit condition, which required counties to apply new stormwater regulations to certain property development applications, did not violate vested rights of property developers. The Superior Court consolidated the appeals, and counties and association sought direct review, which the Court of Appeals granted.

The Court of Appeals held that:

- Stormwater regulations conflicted with vested rights doctrine and were invalid, and
- Clean Water Act (CWA) did not preempt vested rights doctrine.

Department of Ecology's stormwater permit condition, which required counties to apply new stormwater drainage regulations to previously submitted development applications if construction was not started by future deadline, conflicted with statutory vested rights doctrine, and therefore permit condition was invalid. Development rights vested upon filing completed building or land division application, and permit condition could have required counties to enforce land use control ordinances and development standards or regulations adopted after development rights had vested.

Federal Clean Water Act (CWA) did not preempt state's statutory vested rights doctrine, which required that certain land development applications be processed under land use regulations in effect when application was submitted, based on Department of Ecology's requirement, issued under CWA's delegation of permit authority, that counties apply new stormwater regulations to previously submitted applications. Even though vested rights doctrine may have delayed application of Department's requirements, nothing in CWA directly conflicted with vested rights statutes, CWA only required pollutant discharge controls to maximum extent practicable, and statutes did not prevent accomplishment of Congress's broad purposes and objectives.

INSURANCE - ILLINOIS

City of Elgin v. Arch Ins. Co.

Appellate Court of Illinois, Second District - December 10, 2015 - N.E.3d - 2015 IL App (2d) 150013 - 2015 WL 8526250

City, which had entered into agreement with developer to develop certain property and make improvements to property, brought action against surety, from which developer had received bonds guaranteeing its performance, and buyer of remaining property after developer went bankrupt, which refused city's demands that it complete improvements required by annexation agreement between city and developer. Surety filed counterclaim against buyer alleging that it should be held primarily liable for improvements. The Circuit Court granted buyer's motion to dismiss surety's counterclaim. Surety appealed.

The Appellate Court held that:

- Buyer assumed developer's underlying obligation to complete improvements to property;
- Surety sufficiently pled claim of unjust enrichment in counterclaim; and
- Surety's failure to name as counter-defendants those individual homeowners who bought home in development did not warrant dismissal of counterclaim.

Buyer of remaining property after developer went bankrupt assumed developer's underlying obligation to complete improvements to property, pursuant to developer's annexation agreement with city, even though surety, from which developer had received bonds guaranteeing its performance, was not party to agreement. Agreement provided that it was binding on successors

and assigned that its terms constituted covenant running with land, and obligations secured by bonds arose out of agreement, even if that agreement was not specifically mentioned in bonds.

Surety, from which developer had received bonds guaranteeing its performance, sufficiently pled claim of unjust enrichment in its counterclaim against buyer of remaining property after developer went bankrupt, in city's action against surety and buyer, after buyer refused city's demands to complete improvements to property required by annexation agreement between city and developer. Surety alleged that buyer was primary obliger bounds to perform underlying obligation under agreement that was secured by bounds issued by surety, that city sought payment from surety because buyer did not perform that obligation, that any recovery city received from surety must have been used to make improvements required by agreement, that buyer would be benefited by those improvements, and that it was unjust for buyer to retain benefit when its own wrongful failure to perform underlying obligation gave rise to surety's liability.

Surety's failure to name as counter-defendants those individual homeowners who had bought homes in development did not warrant dismissal of its counterclaim against buyer of remaining property after developer went bankrupt, in city's action against surety, from which developer had received bonds guaranteeing its performance, and buyer, after buyer refused city's demands to complete improvements to property required by annexation agreement between city and developer. Although counterclaim alleged that buyer was current owner of some or all of property in development, counterclaim did not allege that there were, in fact, any other owners, and causes of action pled in counterclaim did not show that homeowners were necessary parties.

INVERSE CONDEMNATION - LOUISIANA

Sid-Mar's Restaurant & Lounge, Inc. v. State ex rel. Governor

Court of Appeal of Louisiana, Fifth Circuit - December 9, 2015 - So.3d - 2015 WL 8543950 - 15-326 (La.App. 5 Cir. 12/9/15)

Restaurant owners brought action against state for inverse condemnation, alleging that their restaurant property was commandeered/taken by executive order of the Governor for a flood control project after Hurricane Katrina.

Following bench trial for compensation, the District Court entered judgment in favor of restaurant owners for approximately $2.02 million and a separate judgment for attorney fees of approximately $850,000. State moved for suspensive appeal, and owners and estate answered appeal.

The Court of Appeal held that:

- Amendment to eminent domain provision of state constitution and statute did not apply retroactively;
- Owners were not entitled to an award of damages for mental anguish;
- Trial court did not abuse its discretion in awarding ten years of economic damages;
- Interest was due from the date the state took the restaurant's land;
- Owners were not entitled to recover attorney fees that they incurred in related federal litigation; and
- Owners were not entitled to recover appellate attorney fees.

ZONING - MASSACHUSETTS

Parkview Electronics Trust, LLC v. Conservation Com'n of Winchester

Appeals Court of Massachusetts, Middlesex - January 12, 2016 - N.E.3d - 2014 WL 10987315

Property owner brought action in the nature of certiorari contending that town conservation commission's order of resource area delineation (ORAD) was invalid. The Superior Court granted commission's motion for judgment on the pleadings. Property owner appealed.

The Appeals Court held that:

- Commission was permitted to apply both local by-law and state law in determining compliance with wetlands protection standards, and
- By-law's definition of "land subject to flooding" was not so vague as to violate due process.

IMMUNITY - MISSISSIPPI

Crum v. City of Corinth

Supreme Court of Mississippi - January 14, 2016 - So.3d - 2016 WL 159399

City resident filed suit against city for negligence, based on its alleged breach of duty to maintain and repair sewer system, arising out overflow sewage backing up into her home and garage on two occasions.

The Circuit Court granted city's motion to dismiss for failure to state claim, based on determination that city was entitled to governmental immunity, and resident appealed.

The Supreme Court of Mississippi held that:

- Resident stated adequate claim against city for negligence sufficient to survive dismissal on grounds of immunity, and
- Allowing resident to amend complaint, rather than dismissal for failure to state claim, was appropriate remedy for any failure by resident to adequately allege that maintenance and repairs of sewer systems was ministerial, rather than discretionary function of city.

City resident stated adequate claim against city for negligence based on its alleged breach of duty to maintain and repair sewer systems, arising out of sewage overflow that backed up into her home and garage, as required to overcome city's defense of sovereign immunity that was based on assertion that its duty to maintain repair sewer systems was discretionary, and not ministerial. Resident alleged that backflow of sewage into home was due to fault of city in not properly maintaining sewer system and/or its manholes and/or city caused sewer system and/or manholes to flood, and state regulation imposed ministerial duty on city to maintain such systems, and thus, city could not show that there were no set of facts under which resident could survive dismissal on grounds of governmental immunity. (Per Kitchens, J., with one justice concurring in result only, one justice concurring in part and in result, and two justices concurring).

Allowing city resident to amend complaint for negligence against city, rather than dismissal for failure to state claim, was appropriate remedy for any failure by resident to allege that city's duty to maintain and repair sewer systems was ministerial, rather than discretionary, as required to defeat

city's governmental immunity from suit, and that her injuries were caused by act done in course of performing such duty made ministerial by statute, ordinance, or regulation.

MUNICIPAL ORDINANCE - MISSOURI

Duffner v. City of St. Peters

Missouri Court of Appeals, Eastern District, Division Two - January 12, 2016 - S.W.3d - 2016 WL 145556

Property owners filed suit against city challenging constitutionality and validity of city ordinance requiring owners to maintain turf grass on at least 50% of residential yard. The Circuit Court granted city's motion to dismiss for lack of jurisdiction, and owners appealed.

The Court of Appeals held that:

- Circuit court had general plenary jurisdiction over owners claims challenging validity of ordinance on grounds that it violated due process and amounted to regulatory taking;
- Claim that ordinance violated equal protection was collateral attack of decision of board of adjustment on application for variance, and thus, petition for writ of certiorari review to circuit was owners' exclusive remedy for that claim;
- Owners did not waive due process and takings claims, so as to deprive circuit court of subject matter jurisdiction, by applying for variance and failing to raise claims with board of adjustment;
- Owners' allegations failed to state claim that ordinance violated their substantive due process right to control their property;
- Owners stated claim for regulatory taking without just compensation; and
- Owners' allegations stated claim that city's enactment of ordinance impermissibly exceeded scope of powers granted by statute.

Allegation that city ordinance requiring owners to maintain turf grass on at least 50% of their residential yards inhibited property owners' use and enjoyment of their yard, regardless of whether city's intention was to benefit public generally or to benefit private owners through subsidizing residential property values, stated claim against city for regulatory taking without just compensation, under Missouri Constitution.

Property owners stated claim that city's enactment of zoning ordinance requiring owners to maintain turf grass on at least 50% of their residential yard impermissibly exceeded scope of powers granted by statute. Owners alleged that requirement of specific amount of land devoted to specific type of plant was not included in general police powers to "promote health, safety, morals or general welfare," and that ordinance did not fall within scope of statutory authority to regulate and restrict height, number of stories, and size of buildings and other structures, to regulate percentage of lot that could be occupied, size of yards, courts, and other open spaces, to regulate density of population, to preserve features of historical significance, and to regulate location and use of buildings, structures and land for trade, industry, residence or other purposes.

EMINENT DOMAIN - SOUTH CAROLINA

South Carolina Dept. of Transp. v. Powell

Court of Appeals of South Carolina - December 9, 2015 - S.E.2d - 2015 WL 8323392

On August 27, 2010, the South Carolina Department of Transportation (SCDOT) filed a notice of condemnation acquiring 0.183 acres of a 2.51 acre tract of unimproved land owned by David Powell. The acquisition occurred in conjunction with a highway improvement project involving nearby Highway 17. SCDOT offered Powell $72,000 for the condemned property. Powell rejected SCDOT's offer and requested a jury trial to determine just compensation.

The Circuit Court entered summary judgment for Department, finding that Powell was not entitled to any compensation Powell appealed.

The Court of Appeals affirmed, holding that any diminution in value of landowner's property as a result of the change in road access was not compensable.

Any diminution in value of landowner's property as a result of the change in road access was not compensable in condemnation case involving Department of Transportation, which condemned portion of landowner's property as part of its overall road project. Any damage to the remainder of landowner's property as a result of the closure of the intersection of road and highway was not compensable, and landowner had not lost his right of ingress or egress to and from his property.

In condemnation context, landowner has no vested rights in the continuance of a public highway and in the continuation of maintenance of traffic flow past his property.

The taking of part of landowner's property by Department of Transportation was only an incidental result of the closure of highway's intersection and was not indispensable to and inseparable from overall highway project, and thus landowner was not entitled to compensation for loss of access to remainder of his property. Property was taken to round intersection of road and a second highway, and taking of landowner's property was not a substantial part of overall project given that Department could have closed intersection without taking part of landowner's property.

EMINENT DOMAIN - WASHINGTON

Haggart v. Woodley

United States Court of Appeals, Federal Circuit - January 8, 2016 - F.3d - 2016 WL 97520

Landowners filed rails-to-trails class action against United States, claiming that National Trails System Act (NTSA) provision, authorizing "railbanking" as alternative to abandonment of railroad right-of-way that would be operated as recreational trail, effected Fifth Amendment taking of landowners' reversionary rights to property underlying railroad right-of-way.

The United States Court of Federal Claims approved settlement agreement and awarded attorney fees to class counsel under common fund doctrine. Objectors appealed.

The Court of Appeals held that:

- Government had standing to challenge Court of Federal Claims' award of attorney fees;
- Government did not waive arguments;
- Government was not barred, under doctrine of judicial estoppel, from raising arguments;
- Court of Federal Claims abused its discretion in finding that class counsel's explanation of methodology used to calculate fair market value for properties was fair, reasonable, and adequate; and
- Fee-shifting statute foreclosed application of common fund doctrine to action.

Government had standing to challenge Court of Federal Claims' award of attorney fees under common fund doctrine in landowners' class action against United States, in which taking of landowners' reversionary right to property underlying railroad right-of-way, in violation of the Fifth Amendment Takings Clause, was alleged, since government possessed institutional interest in assuring that court did not abrogate Congress's intent by impermissibly substituting common fund doctrine in place of a fee-shifting statute requiring government to assume litigation expenses of counsel in bringing forth takings claims when awarding attorney fees, and in defending Attorney General's determination that fees determined in accordance with fee-shifting statute constituted reasonable attorney fees.

Government's failure to take position, before Court of Federal Claims, on issue of class counsel's disclosure of information to class members or class counsel's motion for additional attorney fees, in landowners's class action against United States in which taking of landowners' reversionary right to property underlying railroad right-of-way, in violation of the Fifth Amendment Takings Clause, was alleged, did not waive government's argument, on appeal, that class counsel improperly refused to disclose information necessary to allow class members to asses fairness and reasonableness of proposed settlement, or that award of additional attorney fees to class counsel, under common fund doctrine, was improper.

Government was not precluded, under doctrine of judicial estoppel, from arguing, on appeal from Court of Federal Claims' decision approving settlement and award of additional attorney fees to class counsel under common fund doctrine, in landowners' class action against United States in which taking of landowners' reversionary rights to property underlying railroad right-of-way, in violation of the Fifth Amendment Takings Clause, was alleged, that class counsel improperly refused to disclose information necessary to allow class members to asses fairness and reasonableness of proposed settlement, or that award of additional attorney fees to class counsel was improper, where government did not take position in Court of Federal Claims on issues of proposed settlement agreement or attorney fees.

Court of Federal Claims abused its discretion in finding that class counsel's explanation of methodology used to calculate fair market value for properties, which served as basis for allocation of settlement award among class members in landowners' class action against the United States, in which taking of landowners' reversionary right to property underlying railroad right-of-way, in violation of the Fifth Amendment Takings Clause, was alleged, was fair, reasonable, and adequate, where, due to large number of individual properties, only certain representative properties were appraised, fair market values of non-representative properties were extrapolated from the appraised properties, and class counsel did not provide class members who owned non-appraised properties with information about properties from which their properties' values were extrapolated or how any variable inputs were valued in calculating their fair market values, such that class members were unable to determine whether their individual settlement awards were fair, reasonable, or adequate.

Common fund existed in landowners class action against United States, in which taking of landowners' reversionary right to property underlying railroad right-of-way, in violation of the Fifth Amendment Takings Clause, was alleged, where, under settlement agreement, lump sum was to be paid by government, and each landowner's individual ascertainable claim was fair market value of his property.

Inequity existed with respect to class members in landowners' class action against the United States in which taking of landowners' reversionary right to property underlying railroad right-of-way, in violation of the Fifth Amendment Takings Clause, was alleged, as required for common fund doctrine to apply to action, where approximately 27% of class members signed contingency fee agreements with class counsel prior to certification of the class, and were thus contractually obligated to

contribute to payment of attorney fees incurred on their behalf, and approximately 73% of class members did not sign contingency fee agreements with class counsel, and were thus not contractually obligated to contribute to payment of attorney fees incurred on their behalves.

Application of common fund doctrine was foreclosed in settlement of landowners' class action against United States, in which taking of landowners' reversionary right to property underlying railroad right-of-way, in violation of the Fifth Amendment Takings Clause, was alleged, where statute requiring government to assume litigation expenses of counsel in bringing forth takings claims existed, and government, rather than class counsel or members of class, thus bore the reasonable cost of action, such that inequity between class members did not exist.

EMINENT DOMAIN - WASHINGTON

TT Properties v. City of Tacoma

Court of Appeals of Washington, Division 2 - January 12, 2016 - P.3d - 2016 WL 123523

Owner of two properties brought action against city for unconstitutional taking, relating to transit authority's rail service plans. The Superior Court granted summary judgment to city. Owner appealed.

The Court of Appeals held that:

- City's destruction of a property's access to a particular street is not a per se taking;
- Genuine issue as to substantial impairment of access to one property precluded summary judgment;
- No compensable taking occurred as to other property; and
- Genuine issue as to whether city acted in proprietary or regulatory capacity precluded summary judgment.

Placement of utility bungalow on city right-of-way abutting alley near property, which made it impossible for trucks to swing wide across right-of-way to enter alleyway and reach property, did not substantially impair property owner's access to property, and therefore there was no compensable taking. Even though bungalow encroached about one foot into alleyway, encroachment was minimal, remaining width of alley was more than city's minimum required alley width, and owner did not have property right to swing wide over city's property beyond alley to enter alley.

BANKRUPTCY - CALIFORNIA

In re Community Facilities District No. 1990-1 (Wildwood Estates), Nevada County, California

United States Bankruptcy Court, E.D. California, Sacramento Division - November 23, 2015 - Slip Copy - 2015 WL 7568566

Bankruptcy Court adopts Findings of Fact and Conclusions of Law in Support of Order Confirming Amended Plan for Adjustment of Debts for the Community Facilities District No. 1990–1 (Wildwood Estates), Nevada County, California.

Uncontested proceeding with only two proofs of claim filed. The first by the Fiscal Agent on behalf of the holders of Special Tax Bonds, Series E–1990 (Base CUSIP® No. 64126M) in the current

principal amount of $4,840,000 secured by a special tax lien on the property within the boundaries of CFD 1990–1 and the second by the County for unreimbursed amounts paid by the County to satisfy the administrative expenses of CFD 1990–1 for the past several years, which amounts are also secured by the special tax lien on the property within the boundaries of CFD 1990–1.

PUBLIC UTILITIES - CALIFORNIA

San Pablo Bay Pipeline Company, LLC v. Public Utilities Commission

Court of Appeal, Fifth District, California - December 22, 2015 - Cal.Rptr.3d - 2015 WL 9412765 - 15 Cal. Daily Op. Serv. 13, 531

Pipeline company petitioned for writ of review of a ratesetting decision of the Public Utilities Commission (PUC) requiring a refund to pipeline users.

The Court of Appeal held that PUC had authority to bifurcate the matter into two phases and to conclude the limitations period did not run after initiation of the first phase.

The Public Utilities Commission (PUC) acted within its constitutional and statutory authority in tolling or stopping the running of the two-year statute of limitations for a complaint resulting from a violation of the Public Utilities Act between the filing of the initial complaint in oil shippers' bifurcated proceeding for a refund from a pipeline company and the initiation of the second phase, even though the PUC used the unusual procedural device of an administratively final decision to conclude the first phase, and the PUC used the equally unusual procedural device of initiating the second phase by the filing of new complaints and a ratemaking application.

Public Utilities Commission's (PUC) bifurcation of oil shippers' proceeding for damages from a pipeline company under the Public Utilities Act into separate jurisdictional and ratemaking phases did not offend constitutional limitations relating to statutes and due process, even though the PUC tolled or stopped the running of the statute of limitations between the filing of the initial complaint and the initiation of the second phase, where the parties agreed to the bifurcation of the proceeding, and the PUC explicitly found the pipeline company advocated and benefited from the bifurcation of the proceedings.

The Public Utilities Commission (PUC) acted within its equitable authority in tolling the two-year statute of limitations for a complaint resulting from a violation of the Public Utilities Act between the filing of the initial complaint in oil shippers' bifurcated proceeding for a refund from a pipeline company and the initiation of the second phase, even though the PUC used the unusual procedural device of an administratively final decision to conclude the first phase, and the PUC used the equally unusual procedural device of initiating the second phase by the filing of new complaints and a ratemaking application.

MUNICIPAL ORDINANCE - ILLINOIS

Blanchard v. Berrios

Appellate Court of Illinois, First District, Second Division - December 8, 2015 - N.E.3d - 2015 IL App (1st) 142857 - 2015 WL 8328321

County independent inspector brought action to enforce subpoena that Office of Independent Inspector General (OIIG) directed to county assessor. The Circuit Court entered order requiring

assessor to produce subpoenaed documents. Assessor appealed.

The Appellate Court held that county did not exceed constitutional authority in enacting ordinances empowering OIIG to issue subpoenas.

Ordinances purportedly empowering the Office of the Independent Inspector General (OIIG) to issue subpoenas directed to elected county officials and requiring the officials to cooperate with the OIIG did not exceed county board of commissioners' constitutional home rule authority. Board had the power to investigate allegations that county officials had abused their powers or committed fraud in their official capacities, as the corruption of county officials pertained to the county's government and affairs within the meaning of the state constitution.

INSURANCE - MICHIGAN

Employers Mut. Cas. Co. v. Helicon Associates, Inc.

Court of Appeals of Michigan - December 1, 2015 - N.W.2d - 2015 WL 7738601

This case arose out of the outcome of a prior federal suit initiated by several fund (Funds) in this matter against parties who were insured by Employers Mutual Casualty Company (EMC). Briefly, the Funds had purchased approximately $7 million in bonds issued by a charter school operated by Helicon Associates, Inc. The charter school was, however, not legally authorized to issue its own debt. Facing the threat of having its charter revoked, the school had to unwind the bond issue and the Funds accepted $3.2 million in newly issued bonds in lieu of their original $7 million investment.

In the ensuing federal court securities action, the Funds pursued claims pertaining to the bond issuance, including violations of various securities and "blue sky" laws, in addition to tort claims. The federal action resulted in a consent judgment acknowledging violation of the Connecticut Uniform Securities Act and awarding the Funds more than $4 million.

EMC provided Helicon with a defense in the federal action under a reservation of rights, but commenced this declaratory judgment action seeking to establish that indemnity coverage was not available, under its Linebacker or Umbrella policies with Helicon, for the claims asserted in the federal action. EMC did not dispute that Helicon was an insured, but argued that four separate exclusions (return of remuneration, personal profit or advantage, guarantee on bonds, and fraud or dishonesty) applied, each of which would independently preclude coverage. Helicon counterclaimed for breach of contract and "bad faith." The trial court found that three of the four cited exclusions applied, and it therefore granted summary disposition in favor of EMC.

The Funds appealed.

The Court of Appeals affirmed, holding that the "fraud or or dishonesty" exclusion of the Linebacker policy applied, as Helicon had committed acts amounting to fraud and dishonesty and the consent judgment constituted a "judgment or adjudication."

"Based on our finding that the trial court correctly determined the applicability of the fraud and dishonesty exclusion, we need not consider the remaining policy exclusions."

BONDS - MICHIGAN

Sylvan Tp. v. City Of Chelsea

Court of Appeals of Michigan - November 24, 2015 - N.W.2d - 2015 WL 7459035

In September 2000, several qualified electors petitioned the State Boundary Commission (the Commission) to consider the incorporation of Chelsea as a home rule city. Chelsea was a village at the time. The petitioners' proposed boundaries for the city included all the territory of the village and some territory from Sylvan and Lima Townships. Beginning in March 2001, Sylvan opposed Chelsea's petition to incorporate before the Commission and in Ingham Circuit Court.

In October 2001, representatives from Chelsea, Sylvan, Lima Township, and a representative of the petitioners for incorporation entered into a joint settlement agreement. As part of the settlement, Chelsea agreed that it would annex less territory from Sylvan and Sylvan agreed to no longer oppose the incorporation of Chelsea as a home rule city. Chelsea became a city in March, 2004.

In March 2014, Sylvan sued Chelsea for declaratory relief. It alleged that, under MCL 117.14, Chelsea assumed a proportionate share of Sylvan's liabilities when it became a city, which included a share of Sylvan's liability for the repayment of the bond debt incurred to construct improvements for the treatment of waste water. Sylvan asked the trial court to declare that Chelsea was liable for a proportionate share of Sylvan's liabilities under the bond contracts, must reimburse Sylvan for Chelsea's share of the debt already paid by Sylvan, and was obligated to pay its share of all future payments on the bonds as they came due.

Chelsea moved for summary disposition, arguing that Sylvan specifically waived any right to contribution that it might have had when it settled its dispute over Chelsea's petition to incorporate. Chelsea further maintained that Sylvan's claim was barred under the doctrine of res judicata because Sylvan raised the issue with the Commission and the Commission did not require Chelsea to assume any portion of Sylvan's liabilities as part of its decision. Chelsea also argued that Sylvan had to assert its right to a division of liabilities under MCL 117.14 at the time of the city's incorporation and failed to do so. For that reason, Chelsea asserted, Sylvan's complaint for declaratory relief was untimely. Chelsea similarly argued that Sylvan unduly delayed asserting its claim, which prejudiced Chelsea, and engaged in inequitable conduct that warranted barring the claim under the doctrines of laches and equitable estoppel.

The trial court granted Chelsea's motion and Sylvan appealed.

The Court of Appeals reversed, holding that:

- The Commission had no authority to make an equitable division of the assets or determine liabilities as provided under MCL 117.14 arising from Chelsea's incorporation as a city.
- Sylvan did not affirmatively waive its rights under MCL 117.14 in the settlement agreement and, for that reason, the agreement could not have induced Chelsea to believe that Sylvan would not assert its rights.
- Because a new city assumes its share of the township's liabilities by operation of law, the township has no obligation to take steps to formalize the assumption of liability by the newly formed city.
- The six-year period of limitations provided under MCL 600.5813 applies to an action to enforce MCL 117.14.
- Sylvan's claim against Chelsea for an accounting of the debts and liabilities accrued when Chelsea first failed to pay its share of the assumed liability, without regard to whether Sylvan itself paid Chelsea's share.
- Chelsea did not assume any liability related to the bonds incurred post-incorporation.
- Further development of the record was necessary in order to determine when it was practicable for Sylvan to assert its claim before the court could rule on Chelsea's laches defense.

The Commission had no authority to make an equitable division of the assets or determine liabilities as provided under MCL 117.14 arising from Chelsea's incorporation as a city. Because the parties could not have resolved the issues involved in this suit before the Commission or in the related litigation concerning the Commission's actions, the trial court erred as a matter of law when it applied res judicata to bar Sylvan's claim.

Sylvan did not affirmatively waive its rights under MCL 117.14 in the settlement agreement and, for that reason, the agreement could not have induced Chelsea to believe that Sylvan would not assert its rights. There was no evidence that Sylvan stood by and neglected its rights under MCL 117.14 while Chelsea changed its position in reliance on Sylvan's silence. In the absence of such evidence, the trial court should have denied Chelsea's motion to the extent that it argued that Sylvan's claim was barred by equitable estoppel.
Sylvan did not waive its right to enforce MCL 117.14 in the settlement agreement, and thus the trial court should have granted Sylvan's request for summary disposition on this defense.

The Legislature did not provide any specific procedure for effecting the assumption of liabilities under MCL 117.14. The statute merely provides that, for a new city, the liabilities "shall be … assumed" by the new city effective "as of the date of filing the certified copy of the charter" and using "the same ratio" provided for cases where a city annexes a portion of a township. MCL 117.14. Because the new city apparently assumes its share of the township's liabilities by operation of law, the township has no obligation to take steps to formalize the assumption of liability by the newly formed city; the township may rely on MCL 117.14 and require the new city to meet its share of the township's obligations as those obligations come due.

Because no specific period of limitations encompasses an action to enforce MCL 117.14, we conclude that the six-year period of limitations provided under MCL 600.5813 applies.

Any claim that Sylvan had against Chelsea for an accounting of the debts and liabilities accrued when Chelsea first failed to pay its share of the assumed liability, without regard to whether Sylvan itself paid Chelsea's share. To the extent that Sylvan incurred new or additional liabilities related to the bonds after the date of Chelsea's incorporation (such as by increasing the obligations through misconduct), Chelsea did not assume any portion of the new or additional debt.

In this case, the trial court did not grant Chelsea's motion for summary disposition on the grounds that it was time-barred and the parties did not develop the record sufficiently to identify the applicable accrual date as a matter of law. It is unclear whether and when Chelsea might have become obligated to make a payment on the shared liability (assuming there to be a shared liability). For example, Sylvan's agreement with the county provides that the township will pay principal and interest on the bonds without regard to the source of the funds used to make the payments. Stated another way, the obligation appears to be absolute—it does not apparently depend on whether there are special assessments. Thus, Chelsea might have been obligated to pay its share of the payments immediately after it incorporated, notwithstanding that there were special assessments available to Sylvan to make the payments. For that reason, Sylvan's failure to assert its rights under MCL 117.14 might be time-barred as to the earlier payments. But see Dearborn Twp, 308 Mich. at 295–296 (noting that the right to have contribution does not arise until a contingent liability becomes a fixed liability). It is also unclear how the refunding of the bonds might have affected the nature and extent of the liability at issue. Because the parties did not adequately address these issues and did not have occasion to develop the record concerning the timing and nature of the required payments, we decline to further address whether and to what extent Sylvan's claim might be barred under the applicable period of limitations.

For similar reasons, we decline to consider whether laches might properly apply to bar Sylvan's

claim in whole or in part; as we have explained, the primary inquiry when applying the doctrine of laches is whether the plaintiff's failure to earlier assert his or her claim prejudiced the defendant.

In order to determine whether Chelsea suffered prejudice as a result of Sylvan's delay, it is essential to determine when it was practicable for Sylvan to assert its claim. Sylvan argues that it was not practicable until it became necessary for Sylvan to refinance the bonds and raise taxes to cover the expenses. But that assertion may be incorrect. If Chelsea had an obligation to pay its share earlier—perhaps years earlier—and Sylvan failed to assert its rights, the trial court might reasonably conclude that Sylvan should be charged with laches if the delay prejudiced Chelsea's rights. For example, had Sylvan earlier asserted its rights under MCL 117.14, Chelsea might have been able to intervene in a way that prevented Sylvan from jeopardizing the special assessments or might have been able to otherwise take actions to limit its exposure to liability. On this record, we cannot determine when it was practicable for Sylvan to assert its rights or determine whether Chelsea suffered prejudice warranting the application of laches.

EMINENT DOMAIN - MISSOURI

Tubbs v. Surface Transp. Bd.

United States Court of Appeals, Eighth Circuit - December 28, 2015 - F.3d - 2015 WL 9465907

Property owners filed petition for review of the decision of the Surface Transportation Board (STB) that their state-law claims against railroad, in connection with damage to their property due to flooding, were preempted by the Interstate Commerce Commission Termination Act (ICCTA).

The Court of Appeals held that:

- In determining whether the ICCTA preempted state-law claims, the STB should ask whether those claims would have the effect of unreasonably burdening or interfering with rail transportation, and
- State-law claims were preempted by the ICCTA.

State-law claims for trespass, nuisance, negligence, inverse condemnation, and statutory trespass asserted by property owners against railroad, in connection with property damage due to flooding after elevated railroad embankment on owners' property failed, were preempted by the Interstate Commerce Commission Termination Act (ICCTA). The claims arose from railroad's alleged actions in designing, constructing, and maintaining an active rail line, which would unreasonably burden or interfere with rail transportation.

MUNICIPAL ORDINANCE - NEVADA

Scott v. First Jud. Dist. Ct.

Supreme Court of Nevada - December 31, 2015 - P.3d - 2015 WL 9586796 - 131 Nev. Adv. Op. 101

Defendant appealed his conviction for violating municipal ordinance making it unlawful for any person to hinder, obstruct, resist, delay, molest any member of the sheriff's office in the discharge of his official duties. The District Court affirmed. Defendant petitioned for writ of certiorari.

The Supreme Court of Nevada held that:

- Ordinance was unconstitutionally overbroad, and
- Ordinance was unconstitutionally vague.

Municipal ordinance prohibiting any conduct that may "hinder, obstruct, resist, delay, or molest" a police officer in the discharge of his official duties, regardless of intent, was unconstitutionally overbroad on its face, in violation of First Amendment, where the ordinance encompassed protected speech and was not narrowly tailored to prohibit only disorderly conduct or fighting words.

Municipal ordinance prohibiting any conduct that in any way may "hinder, obstruct, resist, delay, or molest" a police officer in the discharge of his official duties, regardless of intent, was unconstitutionally vague, in violation of due process. Ordinance was worded so broadly that sheriffs deputies were given unfettered discretion to arrest individuals for words or conduct that annoyed or offended them.

TORT CLAIMS ACT - OREGON

Heng-Nguyen v. Tigard-Tualatin School Dist. 23J

Court of Appeals of Oregon - December 30, 2015 - P.3d - 2015 WL 9587506

Driver injured in automobile collision with public school employee brought action against school. The Circuit Court entered summary judgment in favor of school. Driver appealed.

The Court of Appeals held that telephone call between driver and school's liability insurance representative regarding driver's traffic accident with school employee provided actual notice of personal-injury claim under Oregon Tort Claims Act (OTCA).

Telephone call between driver and public school's liability insurance representative regarding driver's traffic accident with school employee provided actual notice of personal-injury claim under Oregon Tort Claims Act (OTCA), notwithstanding representative's understanding that driver sought recovery for property damages only. Driver sought reimbursement for damage to her car based on accident involving a school employee who was acting in the course of employment, insurance representative referred to driver as "claimant" in the closing report, and back of the check that representative sent to driver stated that, by negotiating the check, driver released school from all claims except a personal-injury claim.

INVERSE CONDEMNATION - TENNESSEE

Bobo v. City of Jackson

Court of Appeals of Tennessee, at Jackson - December 4, 2015 - Slip Copy - 2015 WL 7890526

Landowner brought inverse condemnation action against city after home on landowner's property was demolished. The Circuit Court dismissed action as time-barred. Landowner appealed.

The Court of Appeals held that:

- Landowner, who acquired property during pendency of demolition proceeding, was never made party to such proceeding, and therefore accrual of limitations on inverse condemnation claim could not have been triggered by landowner's purported party status in demolition proceeding, but

- Landowner had constructive knowledge of impending demolition of home at time landowner acquired property, triggering accrual of limitations on inverse condemnation claim.

BONDS - UTAH

USAA Mutual Funds Trust v. Jordanelle Special Service District

United States District Court, D. Utah - December 9, 2015 - Slip Copy - 2015 WL 8489959

In 2005, the Wasatch County Council created the "Jordanelle Special Service District Special Improvement District No. 2005-2" (JSSD) for the purpose of financing water and sewer improvements to benefit certain properties within the Assessment Area. The resolution contemplated that the bonds financing the improvements would be repaid with revenue from special assessments to be levied against properties to be improved.

In 2009, JSSD adopted an Assessment Ordinance to levy assessments on properties located within the Assessment Area. The Assessment Ordinance imposed a lien against all the assessed properties within the Assessment Area, subjecting the properties to foreclosure by JSSD.

JSSD subsequently issued three series of Special Assessment Bonds (the "Bonds") with an aggregate principal amount of $40,850,000. USAA Mutual Funds Trust (the "Bondholders") purchased the Bonds.

Ultimately, certain property owners in the Assessment Area failed to make assessment payments. Those properties were foreclosed by JSSD and JSSD took title to those properties. JSSD attempted to transfer the foreclosed properties to the Bondholders in full satisfaction of its obligations under the Indenture, giving rise to Bondholders' breach of contract claim against JSSD. In addition, the Bondholders alleged that JSSD had failed to pay all delinquent and current assessments on those properties. Bondholders further alleged that JSSD breached its representations and covenants in the Indenture by misusing the bond proceeds and assessment funds.

Bondholders brought claims against JSSD and Wasatch County for breach of contract, breach of the covenant of good faith and fair dealing, unjust enrichment, constructive trust, appointment of a receiver, accounting, and for declaratory judgment. JSSD and Wasatch County moved to dismiss.

The District Court held that:

- Wasatch County was immune from suit under Utah state law, as the Bonds were clearly limited obligations of JSSD (also rejecting Bondholders' alter ego claims).
- JSSD's purported attempt to transfer the foreclosed properties absent the direction of Bondholders constituted a breach of the Indenture, as Bondholders had the sole right under the Indenture to elect to direct JSSD to transfer ownership of the foreclosed properties. Absent such direction, JSSD was required to pay all assessments on the properties so long as JSSD retained ownership of the property.
- Bondholders had sufficiently pled their allegations of mismanagement of the bond proceeds to survive JSSD's motion to dismiss Bondholders' breach of contract claim.
- JSSD's failure to repurchase the bonds tendered by Bondholders – as provided for in the Indenture – constituted an Event of Default under the Indenture.
- Bondholders had sufficiently plead their claim for Breach of the Implied Covenant of Good Faith and Fair Dealing, as there existed plausible evidence that JSSD's actions had devalued the properties serving as Bondholders' collateral.
- Bondholders' equitable claims of Unjust Enrichment and Constructive Trust (arising from

assessments received by JSSD from properties located outside the Assessment Area) were covered by the Indenture and thus would be dismissed.
- Bondholders cause of action seeking appointment of a receiver would be dismissed, with the understanding that Bondholders could subsequently seek the appointment of a receiver as a remedy.
- Bondholders cause of action seeking an accounting would be dismissed, with the understanding that the Bondholders could subsequently seek an accounting as a remedy.
- Bondholders lacked standing to seek a declaration that the water interest exactions imposed by JSSD on the assessed properties were excessive and, therefore, violated state and federal law.

KITCHEN KNIVES - WASHINGTON

City of Seattle v. Evans

Supreme Court of Washington, En Banc - December 31, 2015 - P.3d - 2015 WL 9587541

Defendant was convicted in the trial court of unlawful use of weapons. Defendant appealed. The Superior Court affirmed. Defendant petitioned for discretionary review, which was granted. The Court of Appeals affirmed. Defendant petitioned for review, which was granted.

The Supreme Court of Washington held that:

- A fixed-blade paring knife was not a protected arm under the State Constitution;
- As a matter of first impression, the right to bear arms protected instruments that were designed as weapons traditionally or commonly used by law abiding citizens for self-defense; and
- Knife was not a protected arm under the Federal Constitution, and thus, city ordinance prohibiting the unlawful use of weapons premised on the possession of such knife was not unconstitutional as applied to defendant.

BANKRUPTCY - CALIFORNIA

In re City of Stockton, California

United States Bankruptcy Appellate Panel of the Ninth Circuit - December 11, 2015 - B.R. - 2015 WL 8793569

Capital market creditor objected to city's failure to provide for modification of its pensions in its proposed Chapter 9 plan, and the California Public Employees' Retirement System (CalPERS), the administrator of pensions, responded by asserting that pension benefits were not subject to being modified. Creditor also objected to plan's good faith and to classification of its unsecured claim.

The United States Bankruptcy Court for the Eastern District of California confirmed the plan. Creditor appealed. City filed motion to dismiss the appeal as equitably moot.

The Bankruptcy Appellate Panel held that:

- City did not waive argument that creditor's appeal from confirmation order was equitably moot by raising it through motion to dismiss the appeal rather than in its answering brief;

- Creditor's appeal of bankruptcy court's order confirming city's Chapter 9 plan generally was equitably moot;
- To the extent creditor sought through its appeal only a greater payment on its unsecured claim, an effective remedy was theoretically possible, and thus, that claim was not equitably moot;
- Bankruptcy court did not clearly err in finding that city's Chapter 9 plan was proposed in good faith;
- Bankruptcy court did not clearly err in finding that separate classification of capital markets/bond creditor claims was appropriate;
- Bankruptcy court did not clearly err in finding that city's Chapter 9 plan properly included capital market creditor's unsecured claim and other unsecured claims in same class;
- Bankruptcy court did not clearly err in finding that city's Chapter 9 plan satisfied the "best interests of creditors" test; and
- Bankruptcy court did not err in not discounting retiree health benefit claims in class of general unsecured claims to present value.

Debtor city did not waive argument that creditor's appeal from confirmation order in Chapter 9 case was equitably moot by raising it through motion to dismiss the appeal rather than in its answering brief. Creditor was not prejudiced or harmed by city's raising the equitable mootness issue in the motion to dismiss.

Capital market creditor's appeal of bankruptcy court's order confirming city's Chapter 9 plan generally was equitably moot. Creditor attempted to obtain a stay of the confirmation order pending appeal, but the stay motion was denied and the plan had been substantially consummated, and to reverse the confirmation order at this point would have a potentially devastating impact on creditor constituencies whose settlements with the city were incorporated in the plan and who were not appearing before the reviewing court, and reversing the confirmation order would knock "the props out from under the" plan and would leave the bankruptcy court with an unmanageable situation on remand.

To the extent capital market creditor sought through its appeal of bankruptcy court's order confirming city's Chapter 9 plan only a greater payment on its unsecured claim, an effective remedy was theoretically possible, and thus, that claim was not equitably moot.

Bankruptcy court did not clearly err in finding that city's Chapter 9 plan was proposed in good faith. The plan was the product of extended negotiations over a period of years pre- and post-petition resulting in multiple collective bargaining agreements and settlements with creditor constituencies, and while capital market creditor asserted that city gerrymandered class of general unsecured class to minimize creditor's vote against confirmation of the plan, treatment of its claim was the same as the treatment of the claims of all other creditors in class.

Bankruptcy court did not clearly err in finding that separate classification of capital markets/bond creditor claims was appropriate in city's Chapter 9 case. Through a combination of different disposition arrangements for their collateral and different payment terms for the secured and unsecured portions of the city's debts to each bond creditor, including different percentage recoveries, separate classification of the bond creditor claims made legitimate business and economic sense.

Bankruptcy court did not clearly err in finding that city's Chapter 9 plan properly included capital market creditor's unsecured claim and other unsecured claims, including retiree health benefit claimants, in same class. Within the class, all creditors received the same percentage payout on their allowed unsecured claims.

Bankruptcy court did not clearly err in finding that city's Chapter 9 plan satisfied the "best interests of creditors" test. Although capital market creditor asserted it received an approximate 1% distribution on its unsecured claim and other creditors received higher percentages on their claims, creditor's argument ignored the 100% payout it received on its allowed secured claim on the effective date of the plan and the approximately $2 million distribution it was entitled to receive from the reserve fund held by its bond indenture trustee, and creditor received the same payment treatment on its unsecured claim afforded to all of the other general unsecured claimants in the class.

Bankruptcy court did not err in not discounting retiree health benefit claims in class of general unsecured claims to present value in city's Chapter 9 case. Bankruptcy Code provision governing allowance of claims did not require the court to discount the claims to present value.

ATTORNEYS' FEES - CALIFORNIA

Kerkeles v. City of San Jose

Court of Appeal, Sixth District, California - December 18, 2015 - Cal.Rptr.3d - 2015 WL 9253865

After dismissal of criminal charges, former suspect brought action against city and police officer for violation of his civil rights under § 1983 and the Civil Code, abuse of process, malicious prosecution, false imprisonment, intentional and negligent infliction of emotional distress, negligence, and, against the city, negligent hiring, retention, training, supervision, and discipline.

The parties settled but reserved the issue of attorney fees. The Superior Court awarded suspect 20 percent of the attorney fees he requested under § 1988. Suspect appealed.

The Court of Appeal held that trial court's cursory explanation was insufficient to support 50 percent reduction in number of hours in suspect's attorney fee request.

Absent some clear ground for an exception, and regardless of whether the case was taken on a contingency basis, fees in a § 1983 case should be determined under the "lodestar" method, which requires the court to (1) determine the number of hours reasonably expended in obtaining the result, (2) determine a reasonable hourly rate, (3) multiply the first figure by the second figure, and (4) adjust the result to reflect other pertinent factors.

In making the attorney fee award under § 1988, the district court must strike a balance between granting sufficient fees to attract qualified counsel to civil rights cases and avoiding a windfall to counsel, and the way to do so is to compensate counsel at the prevailing rate in the community for similar work; no more, no less.

There is a strong presumption that the lodestar figure is reasonable for an attorney fee award under § 1988, and the presumption may be overcome only in certain rare and exceptional cases, supported by both specific evidence on the record and detailed findings by the lower courts.

In making an adjustment to the lodestar figure for an attorney fee award under section 1988, the court must employ a methodology that permits meaningful appellate review rather than fashioning the award on an impressionistic basis.

A downward adjustment to the lodestar figure for an attorney fee award under § 1988 may reflect inadequate documentation of the hours worked, hours that were not reasonably expended, or an

amount expended for unsuccessful claims.

When a voluminous fee application is made under § 1988, the court may make across-the-board percentage cuts either in the number of hours claimed or in the final lodestar figure, but such percentage cuts to large fee requests are subject to heightened scrutiny and the use of percentages, in any case, neither discharges the district court from its responsibility to set forth a "concise but clear" explanation of its reasons for choosing a given percentage reduction nor from its duty to independently review the applicant's fee request.

Where the difference between the number of hours requested in a lawyer's § 1988 lodestar attorney fee application and the court's award is greater than 10 percent, the court must explain why it chose to cut the number of hours or the lodestar by the specific percentage it did.

After city settled former suspect's civil rights lawsuit arising from police officer's use of fabricated evidence in preliminary hearing, trial court's cursory explanation that the number of hours billed on a contingent basis in suspect's § 1988 lodestar attorney fee request was "far more time than a reasonable attorney could ever bill a paying client for" was insufficient to support the trial court's 50 percent reduction in the number of hours allowed, which was part of an overall reduction of the fee request by more than 80 percent, absent any explanation of how the trial court believed the hours were padded, of how the attorneys would have done the same work in less time for a paying client, or of how a paying client would not have accepted the same degree of effort on the case.

BALLOT INITIATIVE - FLORIDA

In re Advisory Opinion to Atty. Gen. re Use of Marijuana for Debilitating Medical Conditions

Supreme Court of Florida - December 17, 2015 - So.3d - 2015 WL 9258263

Attorney General petitioned for an opinion as to the validity of initiative petition allowing medical use of marijuana for individuals with debilitating medical conditions.

The Supreme Court of Florida held that:

- Petition met the single-subject requirement;
- Ballot title and summary met the statutory clarity requirements; and
- Financial impact statement complied with the word limit and met the other statutory requirements.

Initiative petition allowing medical use of marijuana for individuals with debilitating medical conditions met the single-subject requirement. Initiative's logical and natural purpose was to include a provision in the state constitution permitting the medical use of marijuana, provisions regarding Department of Health's role and removing state-imposed penalties and liability from those involved in the authorized use of medical marijuana were directly connected with the amendment's purpose, and proposed amendment did not substantially alter or perform the functions of multiple branches of government.

Ballot title and summary for initiative petition allowing medical use of marijuana for individuals with debilitating medical conditions met the statutory clarity requirements and accurately represented the proposed amendment on the ballot, where the title and summary complied with the statutory word limitations and fairly informed voters of the purpose of the amendment, and language was clear and did not mislead voters regarding the actual content of the proposed amendment.

Financial impact statement for initiative petition allowing medical use of marijuana for individuals with debilitating medical conditions complied with the word limit and met the other statutory requirements. It clearly and unambiguously stated that there would likely be increased costs associated with the additional regulatory and enforcement activities that the proposal would require, but that the amount could not be determined, and fees could offset a portion of the increased costs.

MUNICIPAL ORDINANCE - FLORIDA

Buehrle v. City of Key West

United States Court of Appeals, Eleventh Circuit - December 29, 2015 - F.3d - 2015 WL 9487716

Applicant for license to open tattoo establishment brought action in state court against city, alleging its prohibition of tattoo establishments in historic district violated First Amendment. City removed action to federal court. The United States District Court for the Southern District of Florida granted city's motion for summary judgment. Applicant appealed.

The Court of Appeals held that:

- As a matter of first impression, act of tattooing is artistic expression protected by First Amendment, and
- City failed to meet its burden of demonstrating that ban served its alleged significant governmental interest of protecting historic district from deterioration.

City failed to meet its burden of demonstrating that its ban on tattoo establishments in historic district served its alleged significant governmental interest of protecting historic district from deterioration, and thus ordinance was not narrowly tailored to serve a significant governmental interest, as required to survive scrutiny under First Amendment, where statements by city's director of planning that tattoo establishments would impact the character and fabric of historic district and impact tourism were made after enactment of ordinance, director's statements were unsubstantiated by records regarding tattoo establishments prior to blanket ban in historic district, city did not rely on any studies regarding tattoo establishments in enacting ban, and city conceded absence of any ill effect from two tattoo establishments that were currently permitted in historic district.

PUBLIC EASEMENTS - MAINE

Edwards v. Blackman

Supreme Judicial Court of Maine - December 31, 2015 - A.3d - 2015 WL 9589588 - 2015 ME 165

Servient tenement owners brought declaratory judgment action against dominant tenement owners and town, challenging validity of dedication of public easement over way and cul-de-sac, or that an easement had been created over the servient estate benefiting the dominant estate, and the dominant tenement owners counterclaimed, asserting rights to the way and beach located on the servient estate by virtue of prescriptive and deeded easements and common law rights to the intertidal zone.

Following a bench trial, the Superior Court entered judgment in favor of town and dominant tenement owners, and servient tenement owners appealed.

The Supreme Judicial Court of Maine held that:

- The 30 day period for servient tenement owners to challenge town's acceptance of a dedication of a public easement over way and cul-de-sac began to run on the date town residents accepted by vote the public easement;
- Competent evidence existed to support a finding that way and cul-de-sac located on servient tenement owners' property were to be included in dedication that created a public easement;
- Deed that explicitly granted beach rights created an express easement appurtenant to the lots conveyed by the grantor to the grantee;
- Grantee's beach easement passed through subsequent transfers of grantee's estate as an appurtenance thereof, survived the division of the grantee's estate, and continued to benefit the current owners of the dominant estate; and
- Evidence was sufficient to support a finding that beach located on servient estate was to be included in express easement that benefited dominant estate owners.

ANNEXATION - MICHIGAN

Teridee LLC v. Charter Tp. of Haring

Court of Appeals of Michigan - December 8, 2015 - Not Reported in N.W.2d - 2015 WL 8286094

This case involves 1984 PA 425, MCL 124.21 et seq. (Act 425), which enables two local units of government – in this case Charter Township of Haring and Township of Clam Lake – to conditionally transfer property by written agreement for the purpose of economic development projects.

Plaintiff LLCs owns approximately 140 acres of vacant land in Clam Lake Township, which they intend to develop into a mixed-use development. In June 2011, plaintiffs sought to annex their property to the city of Cadillac to gain access to the city's water and sewer services, which are located within one-quarter mile from the property. According to plaintiffs, the Townships did not have the infrastructure or was unable to provide the property with public water and sewer services in a timely manner. The Townships opposed the annexation.

The Townships entered into an Act 425 agreement on June 5, 2013 to conditionally transfer property – including all of plaintiffs' property – from Clam Lake to Haring. This was of significance to plaintiffs because while an Act 425 agreement is in effect, annexation cannot occur.

Plaintiffs alleged that although the Act 425 agreement proposed a mixed-use development, the development restrictions and regulations in the agreement to be implemented by Haring were so strict that they effectively restricted any reasonable commercial development. Plaintiffs also alleged that the agreement was simply an attempt to prevent plaintiffs' property from being annexed to Cadillac.

The trial court determined that the agreement divested Haring of its legislative zoning authority, which made the contract void. It also determined that the unlawful provisions were central to the agreement and could not be severed. Townships appealed and the Court of Appeals affirmed.

SPECIAL ASSESSMENTS - MINNESOTA

Pavek v. City of Prior Lake

Court of Appeals of Minnesota - December 14, 2015 - Not Reported in N.W.2d - 2015 WL 8548972

In May 2013, Prior Lake adopted special assessments against property owners to help fund the Welcome Avenue project to improve Welcome Avenue by widening and paving the road, providing municipal water and sewer services to properties in the area, and alleviating flooding in Markley Lake by building a pond to collect run-off from surrounding properties.

Property owner Archie J. Pavek received assessments for street improvements and the stormwater pond that totaled $76,479. Pavek appealed Prior Lake's assessment. During a bench trial, the district court heard testimony from two appraisers, Cal Haasken and Paul Gleason.

Haasken completed an appraisal for Pavek and concluded that "general industrial" is the highest and best use of Pavek's property. Haasken also stated that it is not economically viable to subdivide Pavek's property. Haasken utilized an income approach, a market-data approach, and a replacement-cost approach to determine the market value of Pavek's property. Haasken considered both the land and the improvements on Pavek's property. Haasken concluded that the Welcome Avenue project did not increase the value of Pavek's property.

Gleason completed an appraisal for Prior Lake and concluded that "light industrial" is the highest and best use of Pavek's property. Gleason concluded that the Welcome Avenue project did not affect the value of the improvements on Pavek's property. He stated that only Pavek's land benefited from the Welcome Avenue project. Gleason used a direct-sales-comparison approach to estimate the value of Pavek's land before and after the Welcome Avenue project. Gleason concluded that the Welcome Avenue project increased the market value of Pavek's property by $103,000.

At the conclusion of the bench trial, the district court ordered the assessment against Pavek's property to be set aside. The district court found Haasken's appraisal persuasive because he determined the market value of the land and buildings, not the land only. The district court, however, determined that 1.5 acres on the eastern border of Pavek's property could benefit from the Welcome Avenue project if developed. The district court ordered Prior Lake to reassess Pavek's property in an amount not to exceed $24,829. Prior Lake appealed.

The Court of Appeal affirmed. "Haasken's opinion conflicted with Gleason's opinion, and the district court found Haasken's appraisal more persuasive. The weight and credibility given to each appraiser's opinion, however, was an issue for the district court to determine. Further, whether the market value of Pavek's property increased is a question of fact that will not be set aside unless it is clearly erroneous. Thus, the district court did not err by finding Haasken's appraisal more persuasive."

ZONING - TEXAS

City of Anahuac v. Morris

Court of Appeals of Texas, Houston (14th Dist.) - December 17, 2015 - S.W.3d - 2015 WL 9249830

Owner of manufactured home brought declaratory judgment action against city, alleging city ordinance that regulated placement of manufactured homes was preempted. The District Court rendered a declaratory judgment in favor of owner, and city appealed.

The Court of Appeals held that:

- Owner of manufactured home had standing to bring declaratory judgment action against city;
- District Court had subject matter jurisdiction to render a non-advisory judgment that was binding on city and owner of manufactured home;
- City ordinance that prohibited the installation of all manufactured homes that failed to meet certain construction standards was preempted as to plaintiff owner's manufactured home; and
- Declaratory judgment, in which the District Court declared that the language "zone 3 or better specifications" in city ordinance was invalid, illegal, and unconstitutional, was overbroad.

Owner of manufactured home had standing to bring declaratory judgment action against city, challenging city ordinance, after city denied owner's permit application; city's refusal to issue permit resulted in a particular injury to owner, who could not complete the installation of his manufactured home.

Trial court had subject matter jurisdiction to render a non-advisory judgment that was binding on city and owner of manufactured home, after city refused to issue owner permit to allow him to complete installation of home. City's enforcement of ordinance created a justiciable controversy, and owner's suit sought to resolve that controversy by asking whether or not the ordinance in question was enforceable.

Ordinance that prohibited the installation of all manufactured homes that failed to meet certain construction standards was preempted as to plaintiff owner's manufactured home by statute that provided that manufactured homes of a certain age could be installed in county without regard to city's construction standard. Even if city's ordinance was adopted to protect the aesthetics and property values of the community, city's use of its police power could not supplant or take supremacy over a contrary act of the state legislature.

Declaratory judgment, in which the court declared that the language "zone 3 or better specifications" in city ordinance was invalid, illegal, and unconstitutional, was overbroad, because it did not distinguish between homes covered by the grandfather clause in statute governing wind zone regulations, and those that were not; manufactured home owner brought his declaratory judgment action challenging city ordinance on the basis he owned an older model home, and did not argue that his home was built according to wind zone II standards, which would have implicated a different provision of the statute.

MUNICIPAL ORDINANCE - CALIFORNIA

Harrison v. City of Rancho Mirage

Court of Appeal, Fourth District, Division 2, California - December 18, 2015 - Cal.Rptr.3d - 2015 WL 9258957

Condominium owner brought complaint for declaratory and injunctive relief, alleging that city ordinance, which provided rules and regulations for renting private homes as short-term vacation rentals and required that a person over the age of 30 sign a contract, violated Unruh Civil Rights Act. The Superior Court granted city's demurrer without leave to amend, and owner appealed.

The Court of Appeal held that:

- City was not acting as a "business establishment" under the Unruh Act, and
- Owner could not amend complaint to challenge ordinance on grounds it violated planning and land

use law.

City was not acting as a "business establishment" when it amended existing municipal code regarding short term vacation rentals of private homes to require that a person over the age of 30 sign a contract, and thus Unruh Civil Rights Act did not apply to city's action; city merely increased the minimum age of a responsible person from the age of 21 years to 30, and city was not directly discriminating against anyone.

ZONING - CONNECTICUT

E and F Associates, LLC v. Zoning Bd. of Appeals of Town of Fairfield

Supreme Court of Connecticut - December 22, 2015 - A.3d - 320 Conn. 9 - 2015 WL 8730002

Abutting landowner appealed decision of zoning board of appeals granting a zoning variance that allowed the vertical expansion of a nonconforming building in a business district zone. The Superior Court dismissed appeal. Abutting landowner appealed.

The Supreme Court of Connecticut held that peculiar characteristics of property that made it difficult to construct a second story on building that would comply with zoning setback requirements did not justify granting a variance, overruling *Stillman v. Zoning Board of Appeals*, 25 Conn.App. 631, 596 A.2d 1; *Jersey v. Zoning Board of Appeals*, 101 Conn.App. 350, 360, 921 A.2d 683; *Giarrantano v. Zoning Board of Appeals*, 60 Conn.App. 446, 453, 760 A.2d 132.

ANNEXATION - IOWA

Concerned Citizens of Southeast Polk School Dist. v. City Development Bd. of State

Supreme Court of Iowa - December 11, 2015 - N.W.2d - 2015 WL 8526410

Citizens group sought review of decision of city development board approving annexation of land near high school. The District Court affirmed. Citizens group appealed.

The Supreme Court of Iowa held that the notice of appeal from a final judgment or order of the district court must be filed within 30 days of the date the judgment or order was electronically filed, not the date of the notice of filing.

UTILITY DISTRICT - MISSOURI

U.S. v. Geranis

United States Court of Appeals, Eighth Circuit - December 15, 2015 - F.3d - 2015 WL 8957488

United States filed lawsuit on behalf of United States Department of Agriculture (USDA), seeking to enjoin dissolution of county sewer district. Group of voters, customers, ratepayers, and property owners moved to intervene. The United States District Court denied motion, and group appealed. While appeal was pending, parties sought court approval for asset purchase agreement to sell

district's assets to private entity and finally dissolve district, and group renewed its motion to intervene. The District Court denied motion, and group appealed.

The Court of Appeals held that alleged violation of group's interest in upholding vote to dissolve county sewer district did not establish standing to intervene.

Alleged violation of interest of group of voters, customers, ratepayers, and property owners in upholding vote to dissolve county sewer district and immediately dissolving district did not state specific individualized injury necessary to establish standing in federal court to intervene in United States government's action seeking to enjoin dissolution of county sewer district, since interests were shared by all voters who voted to dissolve district, and existing parties had not ignored or attempted to undermine vote in support of dissolution, and sought to effectuate district's dissolution in accordance with Missouri law, which required "no district shall be dissolved until all of its outstanding indebtedness has been paid."

Group of voters, customers, ratepayers, and property owners failed to show that any injury to interest in opposing repayment of revenue bond county sewer district issued to United States Department of Agriculture (USDA) was actual or imminent, and thus group did not state specific individualized injury necessary to establish standing in federal court to intervene in United States government's action seeking to enjoin dissolution of county sewer district. Through lawsuit, parties arranged a solution for repaying USDA that would lower rates, and group's alleged injury would arise only if sale of district's sewer system failed to close, USDA continued to demand payment on revenue bond, and district raised rates to pay the bond obligation.

Group of voters, customers, ratepayers, and property owners failed to establish that enforcement of Missouri environmental and administrative regulations amounted to a "personal and individual" injury necessary to establish standing in federal court to intervene in United States government's action seeking to enjoin dissolution of county sewer district, where group asserted only a generalized grievance, which was available to all members of sewer district.

Alleged violation of interest of group of voters, customers, ratepayers, and property owners in proposing on-site sewage treatment alternatives did not state specific individualized injury necessary to establish standing in federal court to intervene in United States government's action seeking to enjoin dissolution of county sewer district, since any injury group could suffer with regard to ability to construct on-site systems was not "personal and individual" to group, and it was not caused by dissolution of district.

BONDS - NEW JERSEY

Ordinance 2354-12 of Tp. of West Orange, Essex County v. Township of West Orange

Supreme Court of New Jersey - December 21, 2015 - A.3d - 2015 WL 9282972

Challengers filed action in lieu of prerogative writs, claiming that township's redevelopment bond ordinance was invalid. The Superior Court dismissed action. Challengers appealed. The Superior Court, Appellate Division affirmed.

On certification, the Supreme Court of New Jersey held that:

- Ordinance was not subject to referendum, and

- Filing of referendum petition did not modify 20-day time limitation for filing prerogative-writs action challenging validity of bond ordinance.

Township's redevelopment bond ordinance was not subject to referendum, where township passed ordinance through exercise of redevelopment powers conferred on municipalities by Local Redevelopment and Housing Law.

Challengers' filing of referendum petition challenging township's municipal bond ordinance did not modify 20-day time limitation for filing prerogative-writs action challenging validity of a bond ordinance.

LIABILITY - NEW YORK

Giordanella v. City of New York

Supreme Court, Appellate Division, Second Department, New York - December 16, 2015 - N.Y.S.3d - 2015 WL 8825545 - 2015 N.Y. Slip Op. 09251

Employee of city department of sanitation brought personal injury action against city after he was assaulted by participant in community service program with rake, alleging city failed to provide proper security. City moved for summary judgment. The Supreme Court, Queens County, granted motion. Employee appealed.

The Supreme Court, Appellate Division, held that:

- City did not owe special duty to employee to provide proper security, and
- City did not owe statutory duty to employee pursuant to statute directing employers to comply with health and safety regulations.

City did not voluntarily assume duty to city employee, who worked for department of sanitation, for injuries he sustained when he was assaulted with rake by community service participant, and thus city did not owe special duty to employee.

City did not owe statutory duty to department of sanitation employee, who was injured when community service participant assaulted employee with rake, pursuant to statute which applies to recognized hazards that are causing or are likely to cause death or serious physical harm to its employees and directs employer to comply with health and safety regulations.

IMMUNITY - OKLAHOMA

Gowens v. Barstow

Supreme Court of Oklahoma - December 15, 2015 - P.3d - 2015 WL 8922587 - 2015 OK 85

Motorist brought action against driver of emergency vehicle, who was paramedic supervisor, and his employer, for property damage and injuries sustained in automobile collision. The District Court found that driver was negligent and reckless and awarded motorist damages capped at $125,000 under the Government Tort Claims Act (GTCA). Employer appealed. The Court of Civil Appeals reversed. Motorist petitioned for writ of certiorari, which was granted.

The Supreme Court of Oklahoma held that:

- Trial court's finding that driver was acting within scope of his employment when he collided with motorist was reasonable;
- Acts performed with reckless disregard do not automatically rise to level constituting malice or bad faith, as to result in acts being outside of scope of employment under GTCA, overruling *Fehring v. State Ins. Fund*, 19 P.3d 276;
- Evidence supported finding that driver acted with reckless disregard for safety of others;
- Trial court was not required to apportion liability to city; and
- Motorist was entitled to cap of $125,000 in damages.

Acts performed with reckless disregard do not automatically rise to a level constituting malice or bad faith, as to result in those acts being outside of the scope of employment under the Governmental Tort Claims Act (GTCA) and, while malice or bad faith can be inferred from conduct exhibiting reckless disregard for the rights of others, such determination shall be made on a case-b--case basis; overruling *Fehring v. State Ins. Fund*, 19 P.3d 276.

ZONING - PENNSYLVANIA

Wyomissing Area School Dist. v. Zoning Hearing Bd. of Wyomissing Borough

Commonwealth Court of Pennsylvania - November 25, 2015 - A.3d - 2015 WL 7566242

School district applied for zoning permit to erect a fence around athletic fields. Zoning hearing board denied the application. School district appealed, also filing a complaint in mandamus and a motion for peremptory judgment in mandamus, seeking to compel the grant of application. The Court of Common Pleas, Berks County, affirmed, dismissing the mandamus action. School district appealed.

The Commonwealth Court held that:

- Construction of fence around athletic fields located on school property would not amount to an expansion of property's current accessory athletic use, and thus did not require school district to request a special exception under borough ordinance;
- Construction of fence would not create a new "stadium use" and, thus, did not require school district to request a special exception under borough ordinance; and
- Evidence was insufficient to support finding that construction of fence would violate borough ordinance.

UTILITIES - TEXAS

Kidd v. Texas Public Utility Commission

Court of Appeals of Texas, Austin - November 25, 2015 - S.W.3d - 2015 WL 7697794

Individuals brought action against Public Utilities Commission, following denial of their request for public hearing on their request for rulemaking processes to address concerns related to deployment of certain meters by electric utilities.

The District Court granted Commission's plea to jurisdiction seeking dismissal of individuals' claims. Individuals appealed.

The Court of Appeals held that individuals did not have right to public hearing by Commission and,

thus, trial court did not have subject matter jurisdiction over action.

Individuals, who requested that Public Utilities Commission conduct public hearing on their request for rulemaking processes to address concerns related to deployment of certain meters by electric utilities, did not have right to hearing, and, thus, trial court did not have subject matter jurisdiction, under Administrative Procedure Act, over their action brought against Commission following denial of their request for hearing. While provision of Act waiving sovereign immunity for declaratory judgment action challenging validity of agency rule required individuals to complain of Commission rule to successfully invoke court's jurisdiction, individuals' claims arose in admitted absence of rule and focused on procedure Commission employed prior to its decision not to adopt a rule, and provision of Act governing opportunity for public hearing prior to adopting rule did not impose non-discretionary duty upon Commission to provide individuals with hearing.

ZONING - WASHINGTON

Concerned Friends of Ferry County v. Ferry County

Court of Appeals of Washington, Division 2 - December 15, 2015 - P.3d - 2015 WL 8927147

Citizens and public interest groups filed petition in the Superior Court for review of Management Hearings Board order finding county in compliance with Growth Management Act (GMA) for designation of agricultural lands of long–term commercial significance. The Board then granted certificate of appealability allowing direct review which was granted.

The Court of Appeals held that:

- County's point system for designating agricultural resource lands was consistent with GMA; Ordinance assigning point values to parcels from least to most suitable soils was consistent with GMA and comprehensive plan;
- Ordinance could assign one point to parcels more than five miles from urban growth area and zero points to parcels within five miles;
- Ordinance could calculate farm size based only on ownership of contiguous parcels;
- Setting contiguous block of 500 acres or more for designation as agricultural land was reasonable attempt to find the smallest minimum size that would prevent scatter; but
- Failure to designate as agricultural resource land over 2,816 acres qualifying under county ordinance failed to comply with comprehensive plan and GMA.

EASEMENTS - ALASKA

Laybourn v. City of Wasilla

Supreme Court of Alaska - December 11, 2015 - P.3d - 2015 WL 8521290

After city failed to fulfill its promise to build access road across property owners' land in exchange for property owners' grant of utility easement to city, subject to obtaining permits and funding, property owners sued city, claiming that city had fraudulently induced them to sign the easement agreement, breached the agreement, and breached the covenant of good faith and fair dealing. Following a bench trial, the Superior Court ruled against property owners and they appealed.

The Supreme Court of Alaska held that:

- City’s obligation to build the road was unambiguously conditioned upon available funding and permitting approval;
- Evidence supported finding that city had made no misrepresentations of material fact to property owners;
- City did not breach the agreement; and
- City did not breach covenant of good faith and fair dealing.

MUNICIPAL CORPORATIONS - ALASKA

City & Borough of Juneau v. State

Supreme Court of Alaska - December 4, 2015 - P.3d - 2015 WL 7873718

Neighboring borough petitioned for review of decision of local Boundary Commission granting city’s petition to dissolve itself and incorporate a new borough, over objection of neighboring borough, which had sought to annex some of area included in new borough. The Superior Court affirmed. Neighboring borough appealed.

The Supreme Court of Alaska held that:

- Commission was not required to conduct head-to-head analysis as between dissolving city and neighboring borough to determine whether city had superior common interests to contested area, in order to satisfy its constitutional obligation to make borough decisions from a statewide perspective prior to granting city’s petition, and
- Trial court’s decision to award less than 30% portion of city’s requested attorney fees was not manifestly unreasonable.

Local Boundary Commission was not required to conduct head-to-head analysis as between dissolving city and neighboring borough to determine whether city seeking to dissolve itself and incorporate new borough had superior common interests to contested area sought to be incorporated by new borough, in order to satisfy its constitutional obligation to make borough decisions from a statewide perspective prior to granting city’s petition. Rather, Commission was only required to determine whether proposed borough embraced an area with common interests to maximum degree possible, which presupposed thorough consideration of alternative boundaries and a decision as to what boundaries would be optimal.

Superior Court’s decision to award city only $1,500 in prevailing party attorney fees, on administrative appeal from decision granting its petition to dissolve itself and incorporate new borough, over neighboring borough’s objection, as opposed to $9,594, or 30% of fees requested, was not manifestly unreasonable. Despite arguably lengthy administrative record, complexity of arguments, and importance of issues on appeal, court had discretion whether to award such fees at all.

EMINENT DOMAIN - ARIZONA

Catalina Foothills Unified School Dist. No. 16 v. La Paloma Property Owners Ass'n, Inc.

Court of Appeals of Arizona, Division 1 - November 24, 2015 - P.3d - 2015 WL 7454106

School district brought action against homeowners association to condemn private road to allow

safest vehicular access into early childhood learning center. The Superior Court granted district immediate possession of road, and later granted district's motion in limine to preclude association's expert appraisal of severance damages, entered partial judgment limiting issue at trial to be just compensation, and, after jury trial, awarded association fair market value and cost-to-cure severance damages.

Association appealed, and district cross-appealed.

The Court of Appeals held that:

- A district's power to condemn for buildings necessarily includes power to condemn to create access;
- Evidence was sufficient to conclude that condemnation was necessary;
- District obtained fee simple interest;
- Association was not deprived of opportunity to present severance damages;
- District did not violate statutes regarding voter approval of purchase or sale of school sites;
- District's complaint did not fail to name indispensable parties; and
- Prejudgment interest rate was prime-rate-plus-1%.

A school district's power to condemn property for use as buildings or grounds necessarily must include the power to condemn property to create access to school buildings and grounds.

Evidence was sufficient to support conclusion that school district's condemnation of private road owned by homeowners association was necessary to allow safe vehicular access into early childhood learning center. Even if there were other means of entry to center, district presented evidence that road provided safest access to center because there was traffic signal at intersection but not at any other location that afforded access, and association offered no persuasive argument for upsetting district's determination.

School district, after condemning private road owned by homeowners association, obtained fee simple interest, and therefore did not violate statute requiring fee simple interest in lands taken for public buildings or grounds. Even though district ultimately granted association perpetual nonexclusive easement over road, thereby allowing subdivision owners to use road to drive to and from their homes, district's complaint sought "fee title" to road, and district's conveyance back of easement did not change nature of interest district acquired by condemnation.

Homeowners association, as previous owner of private road condemned by school district, was not deprived of opportunity to present claim for severance damages to jury by superior court's exclusion of association's expert report estimating severance damages as more than $1 million, and therefore court did not rule that association was obligated to accept easement from district to mitigate severance damages. Even though court found easement was a cure of severance damages, expert report was based on incorrect premise that district lacked power to convey easement to association, and conclusion that easement cured severance damages did not preclude association from offering other evidence of severance damages or cost of other reasonable steps to cure.

School district did not violate statute requiring voter approval for purchase of school sites by condemning private road owned by homeowners association to provide vehicular access into early childhood learning center. District received approval in bond election in which voters approved proposal to authorize district to acquire property and expend funds for new preschool facility, and district had independent statutory power to acquire property by condemnation at time of bond election.

School district did not violate statute requiring voter approval for sale of school sites by conveying easement to homeowners association on road formerly owned by association and condemned by district. Easement did not prevent district from using school property for its intended purpose, nor did easement cause district to lose any rights in use of school property.

School district's complaint for condemnation of private road owned by homeowners association was not deficient for failure to name owners of individual lots within subdivision as indispensable parties. Property taken was not owned by lot owners, declaration of covenants, conditions, and restrictions granted owners non-exclusive easement to use common areas and authorized association to represent interested persons in proceedings to condemn common areas, and association offered evidence that owners suffered injury to individual parcels at trial, which jury rejected.

Prejudgment interest rate for school district's condemnation of private road was prime-rate-plus-1%, applicable to any judgment unless specifically provided for in statute or different rate was contracted for in writing, rather than 10%, applicable to interest owed on any loan, indebtedness, or "other obligation." Rate applicable to "other obligation" was limited to those akin to loan or indebtedness, and interest for condemnation was calculated on amount of jury's determination of just compensation, which could not have been known until verdict and final judgment.

IMMUNITY - CALIFORNIA

Hampton v. County of San Diego

Supreme Court of California - December 10, 2015 - P.3d - 2015 WL 8460616

A motorist who was involved in a collision while turning left across an oncoming lane brought an action against the motorist in the oncoming lane and the county, alleging dangerous condition of public property.

The Superior Court granted county's motion for summary judgment on grounds of design immunity, and turning motorist appealed. The Court of Appeal affirmed. Turning motorist petitioned for review. The Supreme Court granted review, superseding the opinion of the Court of Appeal.

The Supreme Court of California held that:

- Discretionary approval element of the design immunity defense for injuries caused by dangerous conditions of public property does not require the employee who approved the plans to have been aware of design standards or aware that the design deviated from those standards, disapproving *Levin v. State of California*, 146 Cal.App.3d 410, 194 Cal.Rptr. 223, and *Hernandez v. Department of Transportation*, 114 Cal.App.4th 376, 7 Cal.Rptr.3d 536, and
- Design of intersection received discretionary approval.

Design of intersection where automobile collision occurred received discretionary approval prior to construction, as required for county to rely on design immunity for injuries caused by any dangerous condition of the intersection, even if the plans deviated from county's visibility standards, where the intersection plans were approved before construction by a civil engineer who was in charge of the county's Design Engineering Section, "as-built" plans were approved and signed after construction by another civil engineer, and those two civil engineers had authority to approve the designs, absent evidence that the engineers lacked authority to approve designs that deviated in any respect from county standards.

HIGHWAYS - FLORIDA

Conservation Alliance of St. Lucie County v. United States Department of Transportation

United States District Court, S.D. Florida - November 5, 2015 - F.Supp.3d - 2015 WL 7351544

Environmental organizations brought action against United States Department of Transportation (USDOT) and Federal Highway Administration (FHWA), challenging approval of a bridge and highway project that would cross a river and encompass two public parks and surface water along the river. USDOT and FHWA moved for summary judgment.

The District Court held that:

- FHWA acted within the scope of its authority and reasonably concluded that alternative highway route with spliced beam construction method was not prudent alternative, and
- FHWA's conclusion that alternative highway route, which crossed river and encompassed two public parks and surface water along the river, would cause least overall harm was not arbitrary and capricious.

Federal Highway Administration (FHWA) acted within the scope of its authority and reasonably concluded that alternative highway route with spliced beam construction method was not prudent alternative to using public parkland for federal highway project. Impacts to wetlands and essential fish habitats would be 69 times greater using spliced beam bridging, alternative route would cross six residential streets, creating substantial community cohesion and local mobility impacts, and route would affect neighborhoods with higher number of minority households.

Federal Highway Administration's (FHWA) conclusion that alternative highway route, which crossed river and encompassed two public parks and surface water along the river, would cause least overall harm was not arbitrary and capricious. FHWA found that route had modest impacts in light of mitigation plan, which included four water quality improvement projects, that route would provide most balanced traffic relief for two existing bridges, and that route had least net harm to wetlands, upland habitats, essential fish habitat, and protected species.

ATTORNEYS' FEES - ILLINOIS

Storino, Ramello and Durkin v. Rackow

Appellate Court of Illinois, First District, Second Division - November 24, 2015 - N.E.3d - 2015 IL App (1st) 142961 - 2015 WL 7568673

The law firm of Storino, Ramell & Durkin (SRD) represented property owners in an action by the Village of Bensenville in which the Village sought to levy a special assessment against properties located within a business district. The Village voluntarily dismissed the underlying action with prejudice. Consequently, the property owners, avoided the special assessment altogether. SRD's contingent fee agreement stated that "at the time of recovery," SRD was entitled to "One-fourth (1/4th) of whatever savings may be realized as a result of the objections to the Petition." In an action to collect its fee, the trial court granted SRD's summary judgment motion and awarded $109,595.76.

On appeal, the court took up the question of whether SRD was entitled to attorney fees under contingent fee agreements based, not on the total amount recovered, but on a percentage of the

savings from a proposed special assessment.

The Appellate Court held that:

- Firm was entitled to 1/4 of the amount that village had sought to assess;
- Trial court did not abuse its discretion in denying motion to transfer venue; and
- Trial court did not abuse its discretion by denying clients' discovery demand for copies of attorney fee contracts between firm and other clients.

A reduction to zero through the dismissal with prejudice of proceeding in which village petitioned to impose a special assessment on clients' property constituted the ultimate decrease in the amount assessed on clients' property, and, thus, law firm that represented clients by filing objections, retaining an expert witness, conducting and responding to discovery, and engaging in settlement negotiations was entitled pursuant to contingency fee agreement to 1/4 of the amount the village sought to assess.

Trial court did not abuse its discretion in denying motion to transfer venue to county where underlying special assessment lawsuit occurred and where clients' property was located in action by law firm against clients to recover attorney fees earned pursuant to contingency fee agreement, where the agreement was prepared and signed at the law firm's offices in Cook County, and that was where 90% of the work that law firm performed took place.

Trial court did not abuse its discretion in action against clients for attorney fees earned pursuant to contingency fee agreement by denying clients' demand for copies of attorney fee contracts between law firm and the other property owners that it represented in the same special assessment lawsuit, and answers to interrogatories that firm filed on behalf of those clients. Lawsuit was, not for the collection of fees on an hourly basis, but for a contingent fee based on the amount of savings each individual client realized, and clients knew that firm was entering into similar contingent fee agreements with other landowners and knew that the objections to the village's petition were filed on behalf of a number of clients.

DEVELOPER IMPACT FEES - NEW HAMPSHIRE

Town of Londonderry, v. Mesiti Development, Inc.

Supreme Court of New Hampshire - December 4, 2015 - A.3d - 2015 WL 7816131

Town filed bill of interpleader to determine whether surplus impact fees collected under impact fee ordinance should be refunded to developers who had paid the fees or to the current owners of properties for which the fees had been paid.

Developers filed counterclaims alleging violation of impact fee statute, negligence, and violation of fiduciary duties owed to impact fee payors. The Superior Court dismissed counterclaims. Developers appealed.

The Supreme Court of New Hampshire held that:

- Developers lacked standing to seek refund of legally assessed, but unspent or unencumbered fees;
- Town was not escrow agent to hold impact fees for benefit of payors and owed no fiduciary duties to developers; and
- Town owed no duty to developers in administering its impact fee ordinance and supervising its employees.

Real estate developers lacked standing to seek refund of legally assessed, but unspent or unencumbered impact fees from town, where they no longer owned the properties.

Statute governing unspent impact fees paid by real estate developers did not designate town as escrow agent to hold impact fees for benefit of fee payors and did not impose upon town fiduciary duties owed to developers. Statute did not require town to hold collected impact fees for benefit of original payors and return them to the payors if unspent, but could be satisfied by paying the funds to current property owners.

Town owed no duty to real estate developers in administering its impact fee ordinance and supervising its employees, and, thus, developers had no claim against town for negligently shifting disproportionate share of new capital facility costs to new development, failing to meet express requirements of rational nexus, proportionality, and special benefit to fee payer, and negligently supervising employees, even if town violated impact fee statute. Developers established no tort or other wrongful act committed by town employees.

PUBLIC UTILITIES - OHIO

Duke Energy Ohio, Inc. v. Cincinnati

Court of Appeals of Ohio, First District, Hamilton County - November 25, 2015 - N.E.3d - 2015 WL 7573197 - 2015 -Ohio- 4844

Electric utility filed complaint for declaratory judgment seeking a declaration that city ordinance, as it related to relocation costs for city's streetcar project, was invalid and that the city was required to pay the costs associated with the relocation of underground utilities. Parties filed competing motions for summary judgment. The Court of Common Pleas granted summary judgment to utility. City appealed.

The Court of Appeals held that:

- Ordinance involved an exercise of city's police powers for purposes of Home Rule Amendment, and
- City was responsible for costs incurred by utility to relocate its utilities to accommodate the governmentally-owned streetcar system.

City ordinance, requiring gas and electric utility to bear costs of relocating its underground utilities to accommodate city's street car project, involved an exercise of the city's police powers, and did not relate solely to matters of self-government, for purposes of determining whether, under Home Rule Amendment, ordinance could be invalidated for conflicting with statute governing access to public ways. Language in preamble and ordinance itself indicated that city's purpose in enacting the ordinance was to manage city streets in order to provide for the public welfare through safe, timely, and efficient transportation of persons and goods.

Because city's order for gas and electric utility to relocate its underground utilities at its own expense to accommodate city's streetcar system was not a valid exercise of the city's local police power, city ordinance dealing with determining whether a utility company was responsible for such costs, could not, under Home Rule Amendment, serve as basis for imposing upon utility cost to relocate its own utilities. City was responsible for costs incurred by utility to relocate its utilities to accommodate the governmentally-owned streetcar system.

ZONING - SOUTH DAKOTA

High Plains Resources, LLC v. Fall River County Bd. of Com'rs

Supreme Court of South Dakota - December 9, 2015 - N.W.2d - 2015 WL 8482740 - 2015 S.D. 95

Applicant sought writ of prohibition seeking to prohibit county board of commissioners from rescinding approval of proposed petroleum-contaminated soil farm. The Circuit Court issued writ. Board appealed.

The Supreme Court of South Dakota held that:

- Board had authority to consider whether to rescind resolution, and
- Applicant could have challenged decision through direct appeal.

County board of commissioners had authority to consider whether to rescind resolution approving proposed petroleum-contaminated soil farm, even though statute prohibited rescission unless certain conditions had been met. Commission had to deliberate whether those conditions had been met in determining whether rescission was authorized and warranted.

Applicant could not use writ of prohibition to challenge decision of board of county commissioners rescinding approval of proposed petroleum-contaminated soil farm, where applicant had right to directly appeal board's decision.

IMMUNITY - TEXAS

Texas Department of Public Safety v. Bonilla

Supreme Court of Texas - December 4, 2015 - S.W.3d - 2015 WL 7786856

Motorist filed suit against Department of Public Safety (DPS), seeking recovery for injuries sustained in collision with state trooper who was pursuing speeding vehicle. The District Court denied DPS's plea to jurisdiction and motion for summary judgment, which were based on defense of official immunity. DPS appealed. The El Paso Court of Appeals affirmed. DPS petitioned for review.

The Supreme Court of Texas reversed, holding that:

- Trooper was not acting in good faith performance of discretionary duties if no reasonably prudent officer in trooper's position would have assessed need for pursuit and risk of harm to public in same manner under circumstances, and
- Trooper considered alternative course of action in assessing need to pursue speeding vehicle and risk of harm to public, for purposes of determining whether trooper performed discretionary duties in good faith.

Whether state trooper acted in good faith in performance of discretionary duties in pursuit of vehicle, for which trooper would be entitled to official immunity from suit brought by motorist for injuries sustained in collision with trooper, did not depend on whether reasonably prudent officer could have decided on different course of action after balancing need to stop speeding vehicle against risk of harm to public. Rather, trooper was not acting in good faith performance of discretionary duties if no reasonably prudent officer in trooper's position would have assessed need for pursuit and risk of harm to public in same manner under circumstances.

A law enforcement officer can obtain summary judgment on the basis of official immunity from suit arising from a pursuit or emergency response by proving that a reasonably prudent officer, under the same or similar circumstances, could have believed the need for the officer's actions outweighed a clear risk of harm to the public from those actions, and in this context, "need" refers to the urgency of the circumstances requiring police intervention, while "risk" refers to the countervailing public safety concerns.

An officer's good faith performance of discretionary duties for which the officer is entitled to official immunity from suit does not require proof that all reasonably prudent officers would have resolved the need/risk analysis in the same manner under similar circumstance. Correspondingly, evidence of good faith is not controverted merely because a reasonably prudent officer could have made a different decision, but rather, when the summary-judgment record bears competent evidence of good faith, that element of the official-immunity defense is established unless the plaintiff shows that no reasonable person in the officer's position could have thought the facts justified the officer's actions.

MUNICIPAL CORPORATIONS - ARIZONA

DBT Yuma, L.L.C. v. Yuma County Airport Authority

Supreme Court of Arizona - November 24, 2015 - P.3d - 2015 WL 7444013

Sublessees of airport land brought breach of contract action against county airport authority and county.

The Superior Court granted summary judgment in favor of county. Sublessees appealed. The Court of Appeals affirmed. Review was granted.

The Supreme Court of Arizona held, as a matter of first impression, that airport authority was not county agent for purposes of imputed liability.

Statute treating nonprofit corporation that leased airport property from a county as an agency or instrumentality of the county did not establish a principal-agent relationship for imputed liability purposes between a governmental entity and its authorized airport authority, and, thus, statute did not make county airport authority an agent subjecting county to imputed liability for authority's alleged breach of sublease, particularly considering the airport authority's separate "body politic and corporate" status.

PUBLIC FINANCE - CALIFORNIA

San Diegans for Open Government v. City of San Diego

Court of Appeal, Fourth District, Division 1, California - November 20, 2015 - Cal.Rptr.3d - 2015 WL 7352188

Objector brought reverse validation action against city, city redevelopment agency's successor agency, a joint powers authority formed by the city and the redevelopment agency, and the city housing authority to challenge a lease-back financing plan adopted to fund public infrastructure improvements.

The Superior Court denied objector any relief. Objector appealed.

The Court of Appeal held that:

- Bonded debt held by joint powers authority did not trigger constitutional two-thirds vote requirement;
- Bonded debt held by joint powers authority did not require two-thirds vote under city charter; and
- Redevelopment agency's successor agency was authorized to enter into joint powers agreement.

Bonded debt held by a joint powers authority reconstituted by a city, the successor to the city's redevelopment agency, and the city's housing authority was not counted in determining whether the city violated the constitutional provision prohibiting cities from incurring any indebtedness "exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the qualified electors," even though the joint powers authority's governing board was comprised exclusively of city council members, the joint powers authority had never owned tangible property, and the city's annual financial report deemed the joint powers authority to be a "blended component unit" of the city pursuant to generally accepted accounting principles (GAAP).

A city charter provision stating that every "ordinance or resolution determining that the public interest or necessity demands" a municipal improvement authorized to be acquired, constructed, completed, or maintained by the city, "the cost of which will be too great to be paid out of the ordinary annual income and revenue," shall require a vote of two-thirds of the voters in an election, did not require such a two-thirds vote for public infrastructure improvements funded by a joint powers authority's bonded debt under a lease-back arrangement with the city.

City housing authority was authorized to enter into a joint powers agreement with city and city redevelopment agency's successor agency to create a joint powers authority to finance public infrastructure improvements, even if the improvements were not housing projects.

The statutes providing that a redevelopment agency's successor agency generally shall not "create new enforceable obligations or begin redevelopment work," and setting forth the mandatory duties of successor agencies, did not preclude a successor agency from entering into a joint powers agreement with city and city housing authority to reconstitute a joint powers authority to finance public infrastructure improvements.

The statute providing that a redevelopment agency's successor agency generally shall not "create new enforceable obligations or begin redevelopment work" did not prohibit the issuance of bonds by a joint powers authority reconstituted by a redevelopment agency's successor agency, a city, and a housing authority.

LIABILITY - CALIFORNIA

B.H. v. County of San Bernardino

Supreme Court of California - November 30, 2015 - P.3d - 2015 WL 7708297

Child, through guardian ad litem, brought action against county, deputy sheriff, and others for failing to cross-report initial child abuse allegations to child welfare agency, in violation of the Child Abuse and Neglect Reporting Act (CANRA).

The Superior Court granted county's and deputy sheriff's motion for summary judgment based on immunity. Child appealed, and the Court of Appeal affirmed. The Supreme Court granted review, superseding the opinion of the Court of Appeal.

The Supreme Court of California held that:

- County sheriff's department had a duty under CANRA to inform child welfare agency of initial 911 emergency phone call in which nonmandated reporter noted possible abuse of child, and
- Deputy sheriff investigating initial report of potential child abuse did not have a duty as a mandated reporter under CANRA to make additional reports about the same incident, disapproving *Alejo v. City of Alhambra*, 75 Cal.App.4th 1180, 89 Cal.Rptr.2d 768.

REDEVELOPMENT AGENCY - CALIFORNIA

County of San Bernardino v. Cohen

Court of Appeal, Third District, California - November 30, 2015 - Cal.Rptr.3d - 2015 WL 7717217

County petitioned for a writ of mandate to challenge the Department of Finance's rejection of repayment of county's loan to county's former redevelopment agency. The Superior Court denied petition. County appealed.

The Court of Appeal held that:

- Department of Finance's rejection of repayment of county's loan to former redevelopment agency was not a reallocation of local tax revenues in violation of the state constitution, and
- Redevelopment agency's agreement to repay county for loan was unenforceable under Dissolution Law.

Department of Finance's rejection of repayment of county's loan to county's former redevelopment agency did not constitute a reallocation of local tax revenues in violation of the state constitution, since the money loaned to the former redevelopment agency did not retain its character as tax revenue, absent evidence that the loan agreement attached contingencies to the redevelopment agency's use of the proceeds.

Under the statute providing that "enforceable obligations" of former redevelopment agencies include loans of moneys borrowed by the redevelopment agency but exclude any agreements, contracts, or arrangements with the city or county that created the redevelopment agency, the overriding provision is the one limiting the definition of "enforceable obligation," and thus a contract to borrow money from the city or county that created the redevelopment agency is not an "enforceable obligation."

Under the statute providing that "enforceable obligations" of former redevelopment agencies exclude any agreements, contracts, or arrangements with the city or county that created the redevelopment agency, a redevelopment agency's agreement to repay a loan to the county that created the agency was unenforceable, even if the ratepayers were third party beneficiaries of the agreement, since the ratepayers would have benefited only incidentally from the performance of the agreement.

UTILITIES - FLORIDA

City of Fort Pierce v. Australian Properties, LLC

District Court of Appeal of Florida, Fourth District - November 12, 2015 - So.3d - 2015 WL

7245219

Property owners brought action against city to challenge city's levy of fees for stormwater management services. The Circuit Court granted owners' motion to certify class. City appealed.

The District Court of Appeal held that action was barred by statute of limitations. Four-year limitations period for property owners to challenge city's levy of fees for stormwater management services began to run when ordinance was enacted, rather than running anew with each annual assessment. Utility fee was akin to a special assessment.

BENEFITS - GEORGIA

Georgia Dept. of Community Health v. Neal

Court of Appeals of Georgia - November 20, 2015 - S.E.2d - 2015 WL 7306180

Public school employee filed an action seeking class certification on behalf of Gold and Silver members of the State Health Benefits Plan ("SHBP") for 2014. The complaint alleged that the Georgia Department of Community Health ("the Department") breached its contract with these members when it retroactively eliminated the three tiers of coinsurance for healthcare services and instead combined them into a single schedule of co-payments, adding co-payments for pharmacy benefits and certain medical visits, and also refused to reduce premiums.

The Department moved to dismiss on the ground of sovereign immunity, but the trial court denied the motion on the ground that the Plan documents, read with relevant statutes and regulations, created a written contract that established a waiver of sovereign immunity.

The Court of Appeals reversed, holding that:

- SHBP plan documents did not create contract, and thus, claim for breach of contract did not come within waiver of sovereign immunity based on written contract entered into by State, departments, or agencies;
- Regulation authorizing Department to terminate coverage for any group that contracted with State for SHBP coverage did not create contract with State; and
- "Definitions" provision of regulations governing SHBP did not create contract.

UTILITIES - MISSOURI

Staff of Missouri Public Service Commission v. Consolidated Public Water Supply District C-1 of Jefferson County, Missouri

Missouri Court of Appeals, Western District - November 17, 2015 - S.W.3d - 2015 WL 7253149

The Public Service Commission issued a report and order concluding that the Consolidated Public Water Supply District C–1 of Jefferson County, Missouri (CPWSD) and the City of Pevely violated section 247.1721 by failing to submit to the Commission for approval a written contract addressing the provision of water services. The Commission ordered CPWSD and Pevely to submit a territorial agreement to the Commission for approval.

CPWSD appealed, arguing that section 247.172 did not apply to its agreement with Pevely, and that

in any event, the Commission lacked jurisdiction and statutory authority to determine whether the agreement violated section 247.172 and to order CPWSD and Pevely to submit a territorial agreement for Commission approval.

The Court of Appeals held that:

- The Commission had no statutory authority to determine whether an agreement between a public water supply district and a municipally owned utility is unlawful; and
- The Commission had no authority to order a public water supply district and a municipally owned utility to submit an agreement regarding the provision of water services to the Commission for approval.

LIABILITY - MONTANA

Not Afraid v. State

Supreme Court of Montana - December 1, 2015 - P.3d - 2015 WL 7738299 - 2015 MT 330

Passenger, who was paralyzed after being ejected from vehicle driven by intoxicated and speeding driver on a steep, winding, narrow road, brought action against state, county, and city, alleging negligence in placement, installation, and maintenance of concrete barriers. The District Court entered summary judgment in favor of defendants. Passenger appealed.

The Supreme Court of Montana held that:

- Passenger was required to produce expert testimony to establish the standard of care by which to measure defendants' actions, and
- Passenger failed to establish degree of prudence, attention, and caution that county exercised in placing and installing the barriers.

Passenger, who was injured in single-vehicle accident and was required after summary judgment burden shifted to establish with substantial evidence that genuine issues of material fact existed regarding essential elements of passenger's negligence claims, was required to produce expert testimony to establish the standard of care by which to measure the actions of state, county, and city with regard to placement, installation, and maintenance of concrete barriers where accident occurred. Expert testimony would have assisted in determining whether defendants' placement, installation, and maintenance of the barriers kept road reasonably safe.

There was no evidence as to standard of care that applied to city's maintenance of concrete barriers along sharp curve on steep, winding, narrow road, and thus city could not be held liable for injuries that automobile passenger sustained when automobile went over barriers and down steep hillside.

PUBLIC RECORDS - OHIO

State ex rel. DiFranco v. S. Euclid

Supreme Court of Ohio - December 2, 2015 - N.E.3d - 2015 WL 7766690 - 2015 -Ohio- 4915

Public records requester sought writ of mandamus compelling city to produce records. The Court of Appeals granted summary judgment to city after it produced the records, and, after remand from the Supreme Court awarded damages. Requester filed a motion for sanctions against city and its

counsel, which the Court of Appeals denied. Requester appealed.

The Supreme Court of Ohio held that:

- Deadline for bringing motion was 30 days after the Court of Appeals' final order on the merits, and
- City did not engage in frivolous conduct.

Deadline for bringing motion for sanctions in public records requester's mandamus action was 30 days after entry of final order on merits in Court of Appeals, and therefore requester's motion filed after appeal and remand from Supreme Court on issue of statutory damages and attorney's fees was untimely, where requester's appeal to Supreme Court did not involve merits.

City did not engage in "frivolous conduct," as required to support award of attorney's fees as sanction, by asserting in mandamus action it had produced all public records responsive to request and later producing more documents when requester presented affidavit of accountant asserting that additional documents must have existed. City cooperated with accountant to determine what documents accountant considered still outstanding and produced those documents, and city did not deny accountant's conclusions or continue to claim that all documents had been produced when faced with evidence that some documents were still outstanding.

AMBULANCE FEES - WEST VIRGINIA

Randy Waugh/Waugh's Mobile Home Park v. Morgan County Emergency Medical Services Bd., Inc.

Supreme Court of Appeals of West Virginia - November 4, 2015 - S.E.2d - 2015 WL 6829826

The Circuit Court of Morgan County ruled in favor of the Morgan County Emergency Medical Services Board, Inc. in the Board's action against the owner of a mobile home park for the collection of delinquent special emergency ambulance service fees. Owner appealed.

The Supreme Court of Appeals of West Virginia held that:

- A county commission may impose and collect special emergency ambulance service fees;
- An ambulance authority created by a county commission may bring a civil action to collect special emergency ambulance service fees; and
- An emergency ambulance service fee that taxes each household regardless of the number of members $25 a year to support ambulance services succeeds in tying the burden of the fee to the usage of the service in a sufficiently reasonable way and is valid, lawful and enforceable.

EMINENT DOMAIN - CALIFORNIA

Young's Market Company v. Superior Court

Court of Appeal, Fourth District, Division 1, California - November 19, 2015 - Cal.Rptr.3d - 2015 WL 7302204

School district petitioned for a right of entry against adjacent landowner – pursuant to the Eminent Domain Law – for the purpose of taking soil samples to assess the possibility of acquiring the property by eminent domain. The Superior Court granted petition. Landowner petitioned for writ of mandate, prohibition, or other appropriate relief.

The Court of Appeal held that:

- Order granting right of entry to take samples was within the scope of the entry statutes, and
- Order granting right of entry to take samples did not amount to a taking under the federal and state constitutions.

Trial court's order granting school district's petition for a right of entry against the owner of a building containing an indoor cart racing center, to assess the possibility of acquiring the property by eminent domain by boring holes in the ground and taking samples of soil and building materials, was within the scope of the Eminent Domain Law entry statutes.

Trial court's order granting school district's petition for a right of entry against landowner, to assess the possibility of acquiring the property by eminent domain by boring holes in the ground and taking samples of soil and building materials, did not amount to a taking under the federal and state constitutions, since the challenged activities constituted a temporary and incidental disruption which did not affect the property's suitability for its uses as a parking lot and indoor cart racing center.

SCHOOLS - FLORIDA

Mech v. School Bd. of Palm Beach County, Fla.

United States Court of Appeals, Eleventh Circuit - November 23, 2015 - F.3d - 2015 WL 7428915

Owner of tutoring business brought action against county school board, alleging violation of his First Amendment right to Free Speech when three schools removed banners for his business from their fences. Both parties moved for summary judgment. The United States District Court granted school board's motion. Owner appealed.

The Court of Appeals held that:

- Schools endorsed banners, and
- Schools exercised substantial control over messages conveyed by banners.

Tutoring business banners hung on schools' fences bore imprimatur of schools, and thus factor regarding whether observers would reasonably have believed government had endorsed message strongly suggested that banners were government speech, as would support finding that Free Speech Clause of First Amendment was not violated when school board removed banners, where banners bore schools' initials, were printed in school colors, identified sponsor as partner, observers who saw banners for tutoring services on school property with imprimatur would reasonably conclude that school was endorsing services, purpose of banner program was to recognize partners that provided vital role in sponsorship, and schools had interest in expressing gratitude, regardless of services or quality of services provided.

Schools exercised substantial control over messages conveyed by banners hung on schools' fences, and thus government's control over message factor strongly suggested that banners were government speech, rather than private speech, as would support finding that removal of tutoring business banners did not violate Free Speech Clause of First Amendment, where schools controlled design, typeface, and color of banners, dictated information contained on banner, regulated size and location of banners, required banners to include school's initials and message "Partner in Excellence," and principals were required to approve every banner before it went on fence, and schools did not allow banners to list anything but sponsor's name, contact information, and

preexisting business logo.

UTILITIES - IOWA

Western Minnesota Mun. Power Agency v. Federal Energy Regulatory Com'n

United States Court of Appeals, District of Columbia Circuit - November 20, 2015 - F.3d - 2015 WL 7423719

The Western Minnesota Municipal Power Agency ("Western Minnesota") submitted an application pursuant to the Federal Power Act ("FPA") for a preliminary permit for a hydroelectric project in Polk County, Iowa. A private developer, FFP Qualified Hydro 14, LLC ("FFP"), also submitted a permit application for the same project on the same day. Despite Western Minnesota's status as a municipality, the Federal Energy Regulatory Commission concluded that the municipal preference under Section 7(a) of the FPA applies only to municipalities "located in the vicinity" of the water resources to be developed.

FPP was awarded the permit and Western Minnesota appealed.

The Court of Appeals held that Federal Power Act (FPA) unambiguously provided preference to preliminary hydroelectric permit applications by states and municipalities without any geographic restriction.

There was no statutory language qualifying or restricting which states or municipalities were to be favored, use of phrase "shall give preference" indicated a mandatory directive to Federal Energy Regulatory Commission (FERC), FPA's notice provision did not limit the scope of the municipal preference, legislative history suggested that Congress did not intend for FERC to have discretion in picking among states and municipalities, and there was nothing patently unreasonable in favoring all municipalities over private applicants.

BONDS - LOUISIANA

Coves of Highland Community Development Dist. v. SCB Diversified Mun. Portfolio

United States District Court, E.D. Louisiana - November 10, 2015 - Slip Copy - 2015 WL 7016965

The Coves of the Highland Community Development District ("District") was formed under Louisiana law in 2006 for the purpose of financing and managing the infrastructure of a planned residential community called The Coves of the Highland (the "Project"). MGD Partners, LLC, (MGD) purchased approximately 324 acres at the site of the Project in March 2006. Thereafter, the District entered into a development agreement with MGD. On November 16, 2006, The District authorized and issued $7,695,000 in bonds, primarily to finance infrastructure improvements for the Project. These bonds were purchased by SCB Diversified Municipal Portfolio (SCB).

The Project was ultimately unsuccessful. After much of the infrastructure was in place, the Army Corps of Engineers issued a report dated December 12, 2008, stating that from 1942 to 1945 the United States Government leased the land upon which the Project was situated for use as a practice bombing range. Because of the gunnery, rocket, and bombing practice that had taken place on the property, the Corps discussed the potential of unexploded ordnance and munitions on the property.

Because of this report, Tangipahoa Parish refused to issue further permits for the Project. Ultimately, though the streets and other infrastructure were in place, no lots were sold and Plaintiff was unable to meet its financial obligations under the bond agreements.

The District requested a declaratory judgment that $7,695,000 worth of bonds issued by the District and purchased by SCB have prescribed due to alleged lack of payment or acknowledgement of the debt by the District for a period exceeding five years.

Under Louisiana law, municipal bonds prescribe in five years. This prescription is interrupted by acknowledgement of the debt or by the filing of suit within the relevant prescriptive period. The jurisprudence holds that partial payment by a third party constitutes acknowledgement of a debt which interrupts prescription only if such payment has been made with the authority of the debtor. Acknowledgement of a debt may be express or tacit and need not take any particular form.

The District argued that summary judgment is warranted because no revenue stream was ever established, and it made no payments on the bonds. It avers that because it has been in default for more than five years, the debt has prescribed.

SCB, however, disputed the District's assertion that the debt has not been acknowledged. They point to certain payments made by the Trustee from the Debt Services Reserve Account as an acknowledgement of the debt. These payments were made pursuant to the contractual scheme governing this transaction. They argue that the Trustee was, per the terms of the bond agreements, acting as the District's agent when making payments from the Debt Services Reserve Account. The District denied that the Trustee was its agent for the purpose of these transactions.

The District Court hold that the resolution of this matter necessarily involved factual findings regarding the Trustee's authority to acknowledge on behalf of the District. As discovery was warranted, the motion for summary judgment was denied.

ZONING - MAINE

Desfosses v. City of Saco

Supreme Judicial Court of Maine - November 24, 2015 - A.3d - 2015 WL 7444365 - 2015 ME 151

Abutting landowner sought review of decisions of city planning board and zoning board of appeals allowing construction of vehicle dealership. The Superior Court affirmed. Landowner appealed.

The Supreme Judicial Court held that:

- City ordinance provided that any party with standing, whether applicant or non-applicant, may timely appeal a city planner's decision on a site plan amendment, whether major or minor site, to the city's planning board, and
- Zoning board of appeals had jurisdiction to consider abutting landowner's appeal of issuance, by city's code enforcement officer (CEO), of a certificate of occupancy to dealership.

ZONING - MARYLAND

Sizemore v. Town of Chesapeake Beach

Court of Special Appeals of Maryland - November 25, 2015 - A.3d - 2015 WL 7573409

Property owners petitioned for judicial review of decision of Town Board of Zoning Appeals revoking permit to construct restaurant on property, after property had been rezoned to residential-village, due to owners' failure to progress satisfactorily on construction. The Circuit Court upheld Board's decision, and owners appealed. Appeal was subsequently abandoned. Owners then applied for new permit. The Town denied permit, and Board upheld denial. Owners petitioned for judicial review. The Circuit Court affirmed, and owners appealed.

The Court of Special Appeals held that:

- Owners had vested right in permit for construction of restaurant after property was rezoned from commercial high-density use to residential-village use;
- As matter of first impression, vested right to continue construction under existing permit following change in zoning ordinance could be abandoned under terms of zoning statute or if owners demonstrated intent to abandon permit;
- Owners abandoned vested right in permit;
- Res judicata barred consideration of owners' claim of vested right on appeal from denial of request for new permit; and
- Expiration of tolling bill rendered moot property owners' claim that bill applied to reinstate permit.

ENVIRONMENTAL - NEW YORK

Sierra Club v. Village of Painted Post

Court of Appeals of New York - November 19, 2015 - N.E.3d - 2015 WL 7288109 - 2015 N.Y. Slip Op. 08452

Village resident and other petitioners brought article 78 proceeding, raising State Environmental Quality Review Act (SEQRA) challenge to village resolutions authorizing sale and export of excess water from the municipal water supply and permitting construction of a water transloading facility.

The Supreme Court, Steuben County, denied village's motion to dismiss for lack of standing, and it appealed. The Supreme Court, Appellate Division, reversed, and leave to appeal was granted.

The Court of Appeals held that resident had standing to bring SEQRA challenge.

Village resident who alleged that train noise caused by increased train traffic kept him awake at night had standing to bring State Environmental Quality Review Act (SEQRA) challenge to village resolutions authorizing sale and export of excess water from the municipal water supply and permitting construction of transloading facility. Although other village residents who lived along the tracks also suffered noise impacts, petitioner was not alleging an indirect, collateral effect from increased train noise that would be experienced by public at large, but rather a particularized harm that could also be inflicted upon others in community who lived near the tracks.

BONDS - WISCONSIN

Stifel, Nicholaus & Co., Inc. v. Godfrey & Kahn

United States Court of Appeals, Seventh Circuit - November 24, 2015 - F.3d - 2015 WL

7454484

Non-Indian brokerage firm and bondholders that were involved in commercial transaction with tribal economic development corporation brought action seeking declaratory judgment that tribal court lacked subject-matter jurisdiction over them and preliminary injunction preventing any further action by tribe and its economic development corporation in pending matter against them in that forum.

The United States District Court granted plaintiffs' motion for a preliminary injunction in part and denied it in part. Parties appealed.

The Court of Appeals held that:

- Tribal court exhaustion was not required;
- District court did not abuse its discretion in limiting presentation of evidence and argument concerning preliminary injunction;
- Tribal economic development corporation was not fraudulently induced into entering bond transaction;
- Resolutions operated as waivers of sovereign immunity;
- Resolutions were not void as unapproved management contracts;
- Tribal court action did not fall within exception for tribe to exercise jurisdiction over nonmembers;
- Federal court had authority to determine limits of tribal court's jurisdiction, as matter "arising under" federal law; and
- Counsel to tribal economic development corporation, who also was bond counsel to bond transaction, could rely on forum selection clauses in bond documents.

Tribal court exhaustion was not required in action brought by non-Indian brokerage firm and bondholders that were involved in commercial transaction with tribal economic development corporation seeking declaratory judgment that tribal court lacked subject-matter jurisdiction over them and preliminary injunction preventing any further action by tribe and its economic development corporation in pending matter against them in that forum, since documents governing transaction contained valid and effective waivers of tribal sovereign immunity and consent to jurisdiction of Wisconsin courts to exclusion of any tribal courts. Although tribal action was pending, principal dispute between parties concerned application of federal statute.

District court did not abuse its discretion in limiting presentation of evidence and argument concerning preliminary injunction, in action brought by non-Indian brokerage firm and bondholders that were involved in commercial transaction with tribal economic development corporation seeking declaratory judgment that tribal court lacked subject-matter jurisdiction over them and preliminary injunction preventing any further action by tribe and its economic development corporation in pending matter against them in that forum. Plaintiffs did not impede ability of corporation to obtain evidence needed to raise defense during course of preliminary injunction briefing and district court provided it with adequate time to develop its arguments.

Tribal economic development corporation was not fraudulently induced under Wisconsin law into entering bond transaction with non-Indian brokerage firm and bondholders that contained waivers of tribal sovereign immunity and consent to jurisdiction of Wisconsin courts to exclusion of any tribal courts. Corporation did not rely on alleged misstatements in approving bond transaction, and statements by representative of brokerage were not false.

Tribal and bond resolutions affirmatively approving and acknowledging actions that already had been taken, namely that tribe had "provide[d] a limited waiver of sovereign immunity from suit,"

operated as waivers of sovereign immunity, including as to tribal economic development corporation, in bond transaction with non-Indian brokerage firm and bondholders, where resolutions provided that "Corporation waive[d] its immunity from suit with respect to any dispute or controversy arising out of the Indenture, the Security Agreement, the Bond Placement Agreement, the Bonds, this Bond Resolution and including any amendment or supplement which may be made thereto, or to any transaction in connection therewith."

Tribal and bond resolutions that contained waivers of sovereign immunity were not void as unapproved management contracts. Although tribal resolution required bondholder approval for choice of replacements, it did not require bondholder approval to remove key management employees, and otherwise did not fundamentally alter language in governing documents.

Tribal court action seeking to void bond documents on basis that they were unapproved management contracts under IGRA, and seeking to void tribal agreement and tribal resolution because they were not approved by referendum vote of members of tribe or Secretary of the Interior as required by Tribal Constitution, did not fall within exception for tribe to exercise jurisdiction over nonmember initial purchaser of bonds, since action did not seek to regulate any of purchaser's activities on reservation. Actions of nonmembers outside of reservation did not implicate tribe's sovereignty.

Tribal court action seeking to void bond documents on basis that they were unapproved management contracts under IGRA, and seeking to void tribal agreement and tribal resolution because they were not approved by referendum vote of members of tribe or Secretary of the Interior as required by Tribal Constitution, did not fall within exception for tribe to exercise jurisdiction over nonmember initial purchaser of bonds. Action did not address any on-reservation actions, much less actions that threatened tribal self-rule, action focused only on financial consequences of adhering to freely negotiated commercial transactions, and exception was not so broad to include economic effects of its commercial agreements that affected tribe's ability to provide services to its members.

Federal court had authority to determine limits of tribal court's jurisdiction, as matter "arising under" federal law, even though adjudicative authority of Indian tribe allegedly was limited by contract and plaintiff's claims were not premised on federal law.

Counsel to tribal economic development corporation, who also was bond counsel to bond transaction, could rely on forum selection clauses in bond documents. Although counsel was not party to bond transaction, "affiliation" was not limited to entities that were only related through corporate structure, and it was intimately involved in negotiations leading to, and documents embodying, bond transaction, and would have been bound by forum selection clauses in bond documents.

SPECIAL ASSESSMENTS - WISCONSIN

First State Bank v. Town of Omro

Court of Appeals of Wisconsin - November 11, 2015 - Slip Copy - 2015 WL 6952945

The Barony subdivision, a seventy-four lot subdivision in the Town of Omro, received final plat approval in 2004. By 2009, only a few of the lots had been sold and First State Bank had acquired all sixty-five remaining lots in lieu of foreclosure. As of 2009, the roads in the subdivision had not been paved. In 2013, the Town authorized finishing the roads and specially assessed the lots within the Barony subdivision for the cost of completing the roads.

The Bank challenged the Town's authority to levy the special assessments as to all lots and specifically challenged the assessments as to lots four, five, and fifty-five, which do not abut any of the roads built by the Town.

The issue presented was whether a municipality may use its police powers to build roads and levy special assessments against the land benefitted after a developer defaults in its obligation to build the roads.

The Court of Appeal:

- Ratified the Town's special assessment against the lots that benefited from the road project; and
- Reversed that part of the trial court's decision that found that the three lots not abutting the improved roads received special benefits, as there was a genuine factual dispute over this issue, making it inappropriate for resolution at the summary judgment stage. The court found that a reasonable jury could find that these three lots received no greater benefit from the roads than any other owner of Town property located outside of the subdivision.

EMINENT DOMAIN - CALIFORNIA

Otay Mesa Property, L.P. v. United States

United States Court of Federal Claims - November 6, 2015 - Fed.Cl. - 2015 WL 6769105

Landowners, after succeeding on their claim against government for permanent physical taking of easement over certain property – a strip of land along the border with Mexico – moved for recovery of attorneys' fees and costs under Uniform Relocation Assistance and Real Property Acquisition Policies Act (URA).

Otay Mesa requested attorneys' fees in the amount of $1,705,631.59 and expenses in the amount of $397,943.01, plus costs of $85,242.82. The attorneys' fees were based on 5,725.50 hours billed by two firms. The total attorneys' fee amount included a ten percent contingency fee of $80,472.84. Otay Mesa's requested expenses range from early 2006 through September 30, 2015.

The Court of Federal Claims – in awarding $1.1 million in attorneys' fees and $276k in costs – held that:

- Flat fee of $10,000 for litigation strategy memorandum prepared prior to complaint was not reimbursable;
- Fees that landowners incurred for work by outside attorneys were reimbursable;
- Awarding landowners $11,860 for attorneys' fees on their motion for attorneys' fees and closing costs was reasonable;
- Including contingency fee due to landowners' counsel in attorneys' fees award was appropriate;
- Deducting any amount from attorneys' fees award based on partial success by certain of landowners' businesses was unwarranted;
- Landowners were entitled to recover 60% of fees and costs for period before first appeal; and
- Landowners were entitled to recover all fees and costs for period following first appeal.

Flat fee of $10,000 that landowners paid to law firm for litigation strategy memorandum that firm prepared prior to filing complaint was not reimbursable under the URA following landowners' success on their claim against government for permanent physical taking of easement over certain property, even though firm may have used factual and legal knowledge it gained by drafting the preliminary report in litigating landowners' claim, this fee was not incurred "because of such

proceeding," but rather preceded any such proceeding.

Fees that landowners incurred for work by outside attorneys were reimbursable under the URA following landowners' success on their claim against government for permanent physical taking of easement over certain property, where single firm represented landowners throughout nearly ten years of litigation in this case, and landowners' requests for fees it incurred by hiring specialized appellate attorney and expert on land use and zoning were neither excessive nor redundant.

Generally, when the Court of Federal Claims is determining reasonable attorneys' fees pursuant to a federal fee-shifting statute, costs associated with administrative services are more appropriately charged to overhead and should therefore be included within an attorney's hourly rate.

Reimbursing landowners for 1.6 hours at paralegal rate of $85, rather than at associate rate of $295, was appropriate under the URA following landowners' success on their claim against government for permanent physical taking of easement over certain property, where disputed time entries described required legal duties such as summarizing billing information for motion for award of attorneys' fees and costs.

Awarding landowners $11,860 for attorneys' fees on their motion for attorneys' fees and closing costs was reasonable under the URA following landowners' success on their claim against government for permanent physical taking of easement over certain property, including $9,360 for 24 hours of time landowners' counsel spent on matter before oral argument and $2,500 incurred at oral argument, in light of government's comprehensive, if not excessive, objections to landowners' request for reimbursement.

Including $80,472.84 contingency fee due to landowners' counsel in attorneys' fees award to landowners was appropriate under the URA following success on their claim against government for permanent physical taking of easement over certain property, where landowners actually incurred such fee when it made payment and including contingency fee in calculating average hourly rate still produced billing rate well below average market rate in Washington, D.C. local market.

Reducing attorneys' fees award by $85,000 credit that counsel issued to landowners after landowners disputed fees already paid in another matter was unwarranted in determining reasonable fees under the URA following landowners' success on their claim against government for permanent physical taking of easement over certain property, where counsel issued landowners credit for disputed amount rather than writing check to landowners, and landowners then applied some of this credit toward amounts due in this case, but nothing in that scenario made those amounts due any less "incurred" than they would be had landowners paid with check.

Deducting any amount from attorneys' fees award based on partial success by certain of landowners' businesses was unwarranted in determining reasonable fees under the URA following landowners' success on their claim against government for permanent physical taking of easement over certain property, where all businesses involved in this case were owned and operated by landowners, as family, counsel represented family through its businesses from outset of litigation, court considered claims raised throughout litigation as belonging to common entity, and all businesses shared in damages award.

Reducing number of hours by 40% was appropriate for period of time between landowners' filing of initial complaint through first appeal, including discovery efforts leading to government's partial stipulation and first and second trials, under the URA following landowners' success on their claim against government for permanent physical taking of easement over certain property, where, except for stipulation, landowners' claims were timed-barred and reimbursement was not warranted for

time spent pursuing such stale claims, although counsel's dogged efforts were important in obtaining stipulation.

Landowners were entitled to recover for all hours expended by their counsel during period of time covering remand trial on damages, second appeal, calculation of interest, and landowners' motion for attorneys' fees under the URA following landowners' success on their claim against government for permanent physical taking of easement over certain property, where only remaining issue during this period was amount landowners should recover as just compensation for easement to which government had stipulated.

Landowners were entitled to recover 60% of costs incurred during period of time between landowners' filing of initial complaint through first appeal, and all costs incurred for period of time covering remand trial on damages, second appeal, calculation of interest, and landowners' motion for attorneys' fees under the URA following landowners' success on their claim against government for permanent physical taking of easement over certain property, where first phase involved several claims that were time-barred, while second phase involved only remaining issue as to amount landowners should recover as just compensation for easement to which government had stipulated.

EMPLOYMENT - GEORGIA

City of Albany v. Pait

Court of Appeals of Georgia - November 18, 2015 - S.E.2d - 2015 WL 7270546

Firefighter sought review of decision of city manager terminating firefighter's employment. Firefighter also asserted civil claims against city, fire chief and deputy fire chief. The trial court reversed termination but granted summary judgment to fire chief and deputy fire chief as to certain of firefighter's civil claims. City, fire chief, and deputy fire chief appealed and firefighter cross-appealed.

The Court of Appeals held that:

- Evidence was sufficient to support finding of city manager that firefighter committed theft, as could warrant termination of firefighter's employment;
- Termination notice sent to firefighter before termination of firefighter's employment was sufficient to comport with due process; and
- Remand was required for trial court to reconsider all issues relating to attorney fee award.

Evidence was sufficient to support finding of city manager that firefighter committed theft, as could warrant termination of firefighter's employment. Firefighter entered guilty pleas to theft in relevant criminal prosecutions, even though pleas, as first offender pleas, did not constitute convictions at time of termination hearing, and firefighter himself admitted at termination hearing that he had taken the items in question from the property of another.

Termination notice sent to firefighter before termination of firefighter's employment was sufficient to comport with due process, where notice was written, and notice expressly informed firefighter that he was being terminated for theft and that he had the right to appeal the termination decision to the city manager in writing within ten days.

Remand was required for trial court to reconsider all issues relating to attorney fee award, in case in which trial court awarded firefighter a lump sum in fees as sanctions, in firefighter's action seeking review of decision of city manager terminating firefighter's employment, where order awarding fees

did not indicate how the court apportioned the award based on the supposedly improper conduct and failed to articulate why it awarded that amount as opposed to any other amount.

LIABILITY - GEORGIA

Metropolitan Atlanta Rapid Transit Authority v. Morris

Court of Appeals of Georgia - November 16, 2015 - S.E.2d - 2015 WL 7162182

Motorists brought action against city transit authority, alleging that it was vicariously liable for negligence of unidentified bus driver who struck their vehicle. Following a trial in the trial court, jury returned a verdict for motorists. Transit authority appealed.

The Court of Appeals held that:

- Transit authority waived its challenge, on appeal, to admission of motorist's hearsay statement;
- Evidence supported finding that driver was a city transit authority employee acting in the scope of his employment at time he struck vehicle, as required to hold transit authority vicariously liable;
- Evidence supported finding that driver was negligent in striking motorists' vehicle, as required to hold transit authority vicariously liable; and
- Jury instruction on apportionment of liability was not warranted.

EMINENT DOMAIN - GEORGIA

Fincher Road Investments, LLLP v. City of Canton

Court of Appeals of Georgia - November 13, 2015 - S.E.2d - 2015 WL 7042602

City filed petition for condemnation and declaration of taking with respect to property owned by landowner. Landowner filed petition to set aside declaration of taking which the superior court denied. On interlocutory appeal, the Court of Appeals remanded for hearing on merits of petition. On same day remittitur was issued, city filed notice to dismiss its condemnation action. The Superior Court determined landowner was entitled to attorney fees and costs but was not entitled to any other compensation. Landowner applied for interlocutory appeal.

The Court of Appeals held that landowner was entitled to attorney fees and costs, as well as just compensation for the temporary taking.

While city's abandonment of its condemnation action undoubtedly entitled landowner to attorney fees and costs under statute governing reimbursement of condemned owner's costs and expenses, city's abandonment and obligation to pay those statutory damages in no way relieved it of the duty to provide just and adequate compensation for the period during which the taking was effective. Given the timing of the city's dismissal, trial court had not made a determination on issue of compliance and actually exercised its authority to set aside, vacate, or annul the declaration of taking.

PENSIONS - NEW JERSEY

Piatt v. Police and Firemen's Retirement System

Superior Court of New Jersey, Appellate Division - November 18, 2015 - A.3d - 2015 WL

7260608

State corrections officers, who were hired after they turned 35 years old and were enrolled in Public Employees Retirement System (PERS), brought action against Department of Corrections and Police and Firemen's Retirement System (PFRS), claiming that they should be transferred to PFRS.

The Superior Court granted summary judgment for Department and PFRS and denied partial summary judgment for officers. Officers appealed.

The Superior Court, Appellate Division, held that a person who becomes state corrections officer after age 35 is not age eligible for membership in PFRS.

Administrative rule setting forth age limitation of 35 years for membership in Police and Firemen's Retirement System (PFRS) did not conflict with statute governing requirements for county sheriff's membership in PFRS, which set age limit of 37 years, as to invalidate rule. Statute was part of amendment that permitted incumbent sheriff to transfer from Public Employees Retirement System (PERS) to PFRS under some circumstances and only created 37-year entry-age on transferees during 90-day period allowed and, thus, statute did not invalidate otherwise-applicable 35-year age limit set forth in rule and statute governing membership in PFRS.

LIABILITY - NEW YORK

Rusin v. City of New York

Supreme Court, Appellate Division, Second Department, New York - November 12, 2015 - N.Y.S.3d - 2015 WL 6971574 - 2015 N.Y. Slip Op. 08155

Pedestrian brought action against city, seeking damages for injuries sustained when he slipped and fell on snow and ice while walking in the crosswalk across a roadway. City moved for summary judgment. The Supreme Court, Kings County, granted motion. Pedestrian appealed.

The Supreme Court, Appellate Division, held that under storm in progress rule, city could not be held liable for injuries sustained by pedestrian.

Under the storm in progress rule, the city generally cannot be held liable for injuries sustained as a result of slippery conditions that occur during an ongoing storm, or for a reasonable time thereafter. A "reasonable period of time" is the period within which the municipality should have taken notice of the icy condition and, in the exercise of reasonable care, remedied it.

City did not have reasonable opportunity to remedy allegedly dangerous condition that was created by extraordinary snowstorm that resulted in a total of approximately 20 inches of snow, after which temperature rose above, and fell below, freezing, and thus under storm in progress rule, city could not be held liable for injuries sustained by pedestrian when he slipped and fell on snow and ice while walking in the crosswalk across a roadway 57 hours after end of snow storm.

MUNICIPAL ORDINANCE - PENNSYLVANIA

Diefenderfer v. Palmer Township Bd. of Sup'rs

Commonwealth Court of Pennsylvania - November 10, 2015 - A.3d - 2015 WL 6919451

Residents brought land use appeal against township board of supervisors and requested a declaration that an ordinance allowing digital advertising billboards was null and void. The Court of Common Pleas dismissed appeal. Residents appealed.

The Commonwealth Court held that:

- Proposed change to ordinance increasing the permitted hours of illumination from 17 to 24 hours per day was a substantial amendment, and thus township was required to re-advertise the change prior to enactment of ordinance, and
- Ordinance was void from its inception.

Proposed change to township ordinance allowing digital advertising signs and billboards, which increased the permitted hours of illumination from 17 to 24 hours per day, was a substantial amendment, and thus township was required to re-advertise the change at least ten days prior to enactment of ordinance, even though change appeared minor in grand scheme of ordinance. Light emanating from billboard interfered with adjacent residents' sleep and impacted their use and enjoyment of property, residents would have enjoyed seven hours of darkness each night under earlier version of ordinance, and change significantly altered township's regulation of nighttime billboard use.

Ordinance allowing digital advertising signs and billboards, including an amendment which increased the permitted hours of illumination from 17 to 24 hours per day, was void from its inception, in land use appeal that was filed more than 30 days but less than two years after enactment of ordinance. Billboard interfered with adjacent residents' use and enjoyment of their property, and township did not comply with statutory procedure when it did not advertise amendment prior to its enactment, which prevented residents and similarly situated landowners from commenting on proposed amendment before it was enacted.

SCHOOL DISTRICTS - SOUTH DAKOTA

Schaefer v. Tea Area School Dist. 41-5

Supreme Court of South Dakota - November 10, 2015 - N.W.2d - 2015 WL 7074791 - 2015 S.D. 87

City residents petitioned to area school board to have school district boundary changed to exclude their residences. The board denied the residents' request, and they appealed. The Second Judicial Circuit Court affirmed. Residents appealed.

The Supreme Court of North Dakota held that:

- Notice of appeal was not rendered defective because it failed to individually name each of originally petitioning residents, and
- Substantial evidence supported school board's decision to deny petition.

Substantial evidence supported school board's denial of city residents' petition to have school district boundary changed to exclude their residences. Community alignment factor did not apply, given that more than one school district existed within community, and regardless, residents moved into district knowingly, school district provided bussing, and free parking, to area identified in petition, granting petition would serve to further blur otherwise clean district boundaries, no proof was offered to board regarding special needs, and residents who asserted on appeal that their children had special needs also indicated they were pleased with current instruction, new nearby

school in district was being built, and all students at issue were in other district through open enrollment.

ELECTION LAW - ARIZONA

Public Integrity Alliance, Inc. v. City of Tucson

United States Court of Appeals, Ninth Circuit - November 10, 2015 - F.3d - 2015 WL 6875310

Voters and advocacy organization brought action alleging that city's system for electing members of its city council violated state and federal constitutions by depriving voters of their right to vote in primary elections for individuals who would ultimately serve as their at-large representatives.

The United States District Court for the District of Arizona entered judgment in city's favor, and plaintiffs appealed.

The Court of Appeals held that:

- City's hybrid system for electing members of its city council designated single geographical unit, and
- System discriminated among residents of same governmental unit by excluding out-of-ward voters from primary elections.

City's hybrid system for electing members of its city council, pursuant to which candidates were nominated in partisan primaries held in each of city's six wards, but all city residents voted for one council member from each ward that held primary during same election cycle, designated single geographical unit, for purposes of determining its constitutionality, where each city council member represented entire city, not ward from which he or she was nominated.

City's hybrid system for electing members of its city council, pursuant to which candidates were nominated in partisan primaries held in each of its six wards, but all city residents voted for one council member from each ward that held primary during same election cycle, discriminated among residents of same governmental unit, in violation of Equal Protection Clause, by excluding out-o--ward voters from primary elections.

ANNEXATION - ARIZONA

Nation v. City of Glendale

United States Court of Appeals, Ninth Circuit - November 6, 2015 - F.3d - 2015 WL 6774044

Indian tribe brought action against city and State of Arizona, challenging the constitutionality of a law that allowed a city or town within populous counties to annex certain surrounding, unincorporated lands, as preempted by the Gila Bend Indian Reservation Lands Replacement Act.

The United States District Court for the District of Arizona granted summary judgment to the tribe. City and State appealed and tribe cross-appealed.

The Court of Appeals held that the Gila Bend Indian Reservation Lands Replacement Act preempted

the Arizona annexation law.

The effect of an Arizona law, which allowed a city or town within populous counties to annex certain surrounding, unincorporated lands when a landowner submitted a request to the federal government to take ownership or hold the lands in trust, was an obstacle to the accomplishment and execution of the Gila Bend Indian Reservation Lands Replacement Act, and thus the Arizona law was preempted under obstacle preemption, where the Act sought to compensate an Indian tribe for the destruction of tribal land from flooding created by federally constructed dam, but the Arizona law would allow a city to effectively veto the tribe's application for land to be taken into trust under the Act, as the city could immediately annex the land in response to the tribe's application for the federal government to hold the land in trust, rendering the land ineligible to be held in trust.

PUBLIC RECORDS - FLORIDA

Economic Development Com'n v. Ellis

District Court of Appeal of Florida, Fifth District - October 30, 2015 - So.3d - 2015 WL 6567677

County clerk of courts brought action against private economic development company that contracted with county to provide services, seeking disclosure of company's records under Public Records Act.

The Circuit Court entered judgment requiring company to provide records to clerk. Company appealed, and clerk cross-appealed court's denial of his request for attorney's fees.

The District Court of Appeal held that delegation of function test did not apply to determine whether company was an agent of the county.

Delegation of function test did not apply to determine whether private economic development company that contracted with county to provide services was an agent of the county subject to the Public Records Act, but rather, remand was required for application of Schwab factors; company was county's primary, but not sole, agent for economic development activity, county continued to carry out economic development activities itself, and economic development activities were not traditional governmental obligations or functions.

CHICKENS - ILLINOIS

City of Sparta v. Page

Appellate Court of Illinois, Fifth District - October 22, 2015 - Not Reported in N.E.3d - 2015 IL App (5th) 140463-U - 2015 WL 6440338

The City of Sparta brought an ordinance violation action against defendant, Tim Page, alleging that Page was conducting an unpermitted use in a residential district, contrary to the provisions of the local zoning ordinance.

The appeals court upheld the trial court's ruling that raising of chickens in a residential district was not an agricultural use and was merely incidental to the permitted residential use of the property.

MUNICIPAL ORDINANCE - MINNESOTA

Working America, Inc. v. City of Bloomington

United States District Court, D. Minnesota - November 4, 2015 - F.Supp.3d - 2015 WL 6756089

Advocacy organization focusing on labor issues brought action challenging city ordinance that required certain door-to-door solicitors to obtain a solicitor's license prior to soliciting and that imposed an 8:00 p.m. curfew, and seeking a declaratory judgment that city's ordinance unconstitutionally infringed on organization's First and Fourteenth Amendment rights. Organization and city cross-moved for summary judgment.

The District Court held that:

- Ordinance was content based restriction on speech;
- Ordinance was not narrowly tailored to further compelling government interest, and thus ordinance could not withstand strict scrutiny;
- Ordinance vested city's licensing authority with subjective discretion to deny someone solicitor's license on grounds that applicant was not of good moral character or repute, and thus was facially unconstitutional;
- Under First Amendment, curfew ordinance facially discriminated based on content of message being spoken and thus was content based restriction on speech; and
- Ordinance imposing curfew restriction was not narrowly tailored to further compelling government interest, and thus ordinance could not withstand strict scrutiny.

ZONING - NORTH CAROLINA

Morningstar Marinas/Eaton Ferry, LLC v. Warren County

Supreme Court of North Carolina - November 6, 2015 - S.E.2d - 2015 WL 6777106

Neighbor filed petition for writ of mandamus, seeking to compel county planning and zoning administrator to place, on Board of Adjustment's agenda, neighbor's appeal from administrator's determination that easement connecting landowner's residential and commercial properties did not constitute a commercial use of residential property.

The Superior Court issued a writ of mandamus, and zoning administrator appealed. The Court of Appeals affirmed. Zoning administrator petitioned for discretionary review, which was denied. Zoning administrator then appealed as of right.

The Supreme Court of North Carolina held that neighbor had clear legal right to have its appeal transmitted to Board and placed on Board's agenda, thus warranting issuance of writ of mandamus to compel administrator to take such action.

Neighbor had a clear legal right to have its appeal, from determination by county planning and zoning administrator that easement connecting landowner's residential and commercial properties did not constitute a commercial use of residential property, transmitted to Board of Adjustment and placed on Board's agenda, thus warranting issuance of writ of mandamus to compel administrator to take such action after he refused to do so based on his judgment that neighbor lacked standing to appeal. Statute governing Board of Adjustment appeals specifically stated that the officer from whom the appeal was taken "shall" forthwith transmit to the board all the papers constituting the

record upon which action appeal from was taken, and no exceptions were established.

UTILITIES - TEXAS

Texas Transportation Commission v. City of Jersey Village

Court of Appeals of Texas, Houston (14th Dist.) - October 15, 2015 - S.W.3d - 2015 WL 6081972

City brought action against transportation commission and its commissioner in his official capacity, seeking reimbursement for costs incurred in obtaining replacement easements in which to place its utility lines that were relocated to accommodate Department of Transportation's highway construction project, claiming acquisition of replacement easements constituted compensable utility relocation costs.

The District Court denied defendants' plea to the jurisdiction, which was based on an assertion of sovereign immunity, and entered summary judgment in City's favor. Defendants appealed.

The Court of Appeals held that:

- City's claim did not qualify for exception to sovereign immunity as a challenge to validity of utilities relocation statute;
- Costs associated with obtaining replacement easements did not constitute compensable utility relocation costs; and
- City's claim did not qualify for ultra vires exception to sovereign immunity.

City's claim against transportation commission and its commissioner in his official capacity, seeking reimbursement for costs incurred in obtaining replacement easements in which to place its utility lines that were relocated to accommodate Department of Transportation's highway construction project, did not qualify for exception to sovereign immunity as a challenge to validity of utilities relocation statute under which it sought reimbursement. Instead, it constituted an ultra vires claim contending that the commission, a state agency, and its commissioner, a state official, had refused to perform a ministerial act by refusing to pay the relocation costs as required by the statute.

Costs incurred by City in obtaining replacement easements in which to place its utility lines that were relocated to accommodate Department of Transportation's highway construction project did not constitute compensable utility relocation costs under the utilities relocation statute. Although City had a compensable property interest in its easements, whether they be private or public, so as to entitle it to make a relocation of its utility facilities at the expense of the State. the replacement of those easements themselves was not a cost that was "properly attributable to the relocation," as contemplated by the statute.

Commissioner of transportation commission did not fail to perform a ministerial act in refusing to reimburse City for costs it incurred in obtaining replacement easements in which to place its utility lines that were relocated to accommodate Department of Transportation's highway construction project, and thus, City's claim against commissioner did not qualify for ultra vires exception to sovereign immunity. Although utilities relocation statute entitled City to reimbursement for costs associated with relocating its utility lines, the replacement of easements was not a cost that was "properly attributable to the relocation," as contemplated by the statute.

EMINENT DOMAIN - TEXAS

In re Electric Transmission Texas, LLC

Court of Appeals of Texas, Corpus Christi-Edinburg - November 2, 2015 - Not Reported in S.W.3d - 2015 WL 6759238

This petition for writ of mandamus arose from an eminent domain proceeding instituted by Electric Transmission Texas, LLC (ETT) for the purpose of acquiring an easement and right of way access across a 6.420 acre of land owned by the real party in interest, Wyatt Agri Products Corporation, LLC ("Wyatt"). ETT sought the easement in order to install a double-circuit-capable electric transmission line for the purpose of transmitting and delivering electricity.

At a subsequent hearing, the trial court granted a Wyatt's motion for a continuance. At the haring, counsel for ETT reiterated its position that the trial court lacked jurisdiction to grant a continuance

ETT then brought this mandamus petition. ETT contended that the trial court did not have jurisdiction to hear or rule on the matters raised by Wyatt in its plea in abatement because the trial court's jurisdiction to act was limited to that conferred by statute. ETT further specifically contended that the trial court's failure to appoint the three special commissioners constituted an abuse of discretion and the trial court's orders issued to date were void.

The Court of Appeals agreed with ETT, concluding that the trial court abused its discretion in failing to appoint the special commissioners and in scheduling a hearing on Wyatt's plea in abatement.

EMINENT DOMAIN - FLORIDA

Joseph B. Doerr Trust v. Central Florida Expressway Authority

Supreme Court of Florida - November 5, 2015 - So.3d - 2015 WL 6748858

The Orlando–Orange County Expressway Authority, now the Central Florida Expressway Authority (the Authority), began a condemnation proceeding to acquire 9.81 acres of land identified as Parcel 406. Parcel 406 was owned by Joseph B. Doerr. On June 5, 2006, the Authority submitted to Doerr a presuit written offer to purchase Parcel 406 for $4,914,221. Doerr rejected the offer, and in August 2006, the Authority filed an action to condemn the property. In February 2008, a jury trial was held to determine the value of Parcel 406. The jury found that the land had a fair market value of $5,744,830.

Thereafter, Doerr filed a motion for attorney's fees. The Authority sought to limit the fees to the benefits achieved formula under section 73.092(1), which generated an award of $227,652.25. On the other hand, the Landowners asserted that they were entitled to attorney's fees under section 73.092(2), which requires a trial court to consider qualitative and quantitative factors in determining the amount of a fee award.

The trial court awarded fees under subsection (2) because it concluded that the Authority's presuit written offer was insufficient to calculate the benefits achieved by each Landowner in the final judgment so as to permit a fee award under subsection (1). Applying the factors listed in section 73.092(2), the trial court awarded the Landowners $816,000 in attorney's fees for the proceedings that involved the valuation of Parcel 406.

The District Court of Appeal reversed and remanded, concluding that the attorney's fees for the

valuation proceedings were limited to those allowed by section 73.092(1), it remanded to the trial court for consideration of the Landowners' claim that the application of the benefits achieved formula violated their constitutional right to full compensation because the Authority caused excessive litigation.

The Supreme Court of Florida held that when condemning authority causes excessive litigation, to calculate attorney fees, trial court shall utilize section 73.092(2), which requires a trial court to consider qualitative and quantitative factors in determining the amount of a fee award.

Although the Legislature may establish reasonable parameters for the award of attorney fees in eminent domain proceedings, a statute cannot operate in a manner to so reduce a fee award that it runs afoul of the constitutional guarantee that private property owners receive full compensation for a taking of their property.

Where private property owners are forced to defend against excessive litigation caused by a condemning authority, a mandatory statutory formula that generates a fee award below that which is considered reasonable denies those property owners their right to the full compensation that is guaranteed by the state constitution.

When a condemning authority engages in tactics that cause excessive litigation, to calculate a reasonable attorney fee, a trial court shall utilize provision setting forth considerations in assessing attorney fees incurred of statute governing attorney fees for eminent domain matters, but only for those hours incurred in defending against the excessive litigation or that portion that is considered to be in response to or caused by the excessive tactics. Remainder of the fee shall be calculated pursuant to benefits achieved formula in statute and the two amounts added together shall be the total fee.

Landowners were not required to pursue sanctions in lieu of challenging constitutionality of benefits achieved formula in statute governing attorney fees for eminent domain matters as applied to excessive litigation by county expressway authority. Sanctions were not sufficient to protect landowner's constitutional right to full compensation for taking of private property, which included reasonable attorney fee.

UTILITIES - INDIANA

Citizens Action Coalition of Indiana, Inc. v. Southern Indiana Gas and Elec. Co.

Court of Appeals of Indiana - October 29, 2015 - N.E.3d - 2015 WL 6550654

Citizens group and Office of Utility Consumer Counselor (OUCC) sought review of decision of the Indiana Utility Regulatory Commission granting the petition of public electric utility seeking approval of projects to modify current coal powered generating stations and requesting financial incentives and reimbursement from ratepayers for costs associated with the projects.

The Court of Appeals held that:

- Request for judicial review was not rendered moot by substantial work on projects;
- Portion of proposed modification was clean coal technology (CCT) that required a certificate of public convenience and necessity (CPCN);
- CPCN granted under different statutory section was insufficient;

- Commission made sufficient findings regarding whether specific unit was necessary for meeting electricity needs; and
- Commission was not required to make findings regarding utility's delay in filing petition.

Request for judicial review of decision of Indiana Utility Regulatory Commission granting petition of public electric utility seeking approval of projects to modify current coal powered generating stations and requesting financial incentives and reimbursement from ratepayers for costs associated with the projects was not rendered moot by utility's completion and use of many of projects due to objectors' failure to obtain stay pending appeal. Utility began work on projects while appeal was pending at its own risk, and appellate court had power to grant relief sought, which included remand to Commission with instructions to make additional findings.

Public electric utility's proposed modification of current coal powered generating stations so as to meet new Environmental Protection Agency (EPA) standards constituted clean coal technology (CCT) that required a certificate of public convenience and necessity (CPCN). Statutory definition of CCT applied to technologies which reduced emissions of sulfur or nitrogen based pollutants, and utility proposed two injection systems designed to mitigate sulfur emissions.

Certificate of public convenience and necessity (CPCN) granted under statutory section governing a utility seeking to recover federally mandated costs was insufficient to satisfy requirement of CPCN for approval of clean coal technology (CCT) project requested by public electric utility, where different sections governing different types of CPCNs had different requirements in order to issue CPCNs thereunder, and different sections served different purposes.

Indiana Utility Regulatory Commission made sufficient findings regarding whether specific unit was necessary for meeting electricity need of utility's customers in considering public electric utility's petition for approval of proposed modification of current coal powered generating stations so as to meet new Environmental Protection Agency (EPA) standards, where Commission specifically addressed issue of electricity demand when it found that retiring certain facilities prematurely would have resulted in reliability risks for consumers based on capacity shortfall projections, and utility did not request approval of any project tied only to specific unit.

Indiana Utility Regulatory Commission was not required to made findings regarding whether utility's delay in filing its petition was unreasonable in considering public electric utility's petition for approval of proposed modification of current coal powered generating stations so as to meet new Environmental Protection Agency (EPA) standards, where there was no evidence that delay was effort to reduce feasibility of alternative compliance options.

PENSIONS - NEW YORK

Pitzel v. Dinapoli

Supreme Court, Appellate Division, Third Department, New York - November 5, 2015 - N.Y.S.3d - 2015 WL 6741039 - 2015 N.Y. Slip Op. 08015

Retired police officer brought article 78 proceeding challenging determination of State Comptroller denying officer's application for recalculation of his final average salary. The Supreme Court, Albany County, transferred proceeding.

The Supreme Court, Appellate Division, held that substantial evidence supported determination that wages earned on special-duty details were properly excluded from officer's final average salary

calculation.

Substantial evidence supported State Comptroller's determination that police officer did not provide service to police department while he was on special-duty details, as would preclude consideration of wages earned for those details in calculation of officer's final average salary for retirement purposes. Private entities paid police department so that officers would provide services to them on special-duty details, officer acknowledged that he volunteered to perform services on special-duty details, and there was no evidence that the department had ever ordered officer or his fellow officers to perform special-duty details.

UTILITIES - NORTH CAROLINA

Point South Properties, LLC v. Cape Fear Public Utility Authority

Court of Appeals of North Carolina - October 20, 2015 - S.E.2d - 2015 WL 6142998

Developers who paid water and sewer impact fees brought actions against water and sewer authority and county, seeking refunds. The Superior Court entered summary judgment in favor of developers. County and authority appealed. Appeals were consolidated.

The Court of Appeals held that:

- Claims were not subject to statute of limitations for claims based upon a liability created by statute;
- Statute of limitations for action against a local unit of government upon a contract did not apply;
- Catch-all statute of limitations applied;
- Doctrine of laches did not apply; and
- Fees were not "to be furnished" to developer's properties as would have authorized the fees.

Developers' claims against water and sewer authority and county for refunds of water and sewer impact fees on the basis that authority and county lacked authority to impose the fees were not based on authority's and county's breach of a duty or liability established by statute that granted authority and county the power to levy fees for water and sewer services furnished or to be furnished and, thus, were not subject to three-year statute of limitations for claims based upon a liability created by statute.

Two-year statute of limitations for action against a local unit of government upon a contract, obligation, or liability arising out of a contract did not apply to developers' claims against water and sewer authority and county for refunds of water and sewer impact fees on the basis that they lacked authority to impose the fees, where developers, who retained private utility company to provide water and sewer service, did not assert that authority and county were obligated to immediately provide them with sewer services.

Ten-year catch-all statute of limitations applied to developers' claims against water and sewer authority and county for refunds of water and sewer impact fees on the basis that they lacked authority to impose the fees.

Doctrine of laches did not apply to developers' claims against water and sewer authority and county for refunds of water and sewer impact fees on the basis that they lacked authority to impose the fees. Claims were legal, rather than equitable, and water and sewer authority and county failed to show that they were prejudiced by delay in bringing claims.

Water and sewer impact fees that were imposed by county and water and sewer district were not for service "to be furnished" to developers' properties, for purposes of statute permitting county water and sewer districts to collect fees for use of services to be furnished, although county and authority expressed a goal of extending service to areas including the properties, where county and authority had not decided or planned for service to be furnished to the properties, agency plans going three years ahead did not include any specific commitment to extend service to any of the properties, and a private utility company had continuously provided water and sewer service for the properties.

ZONING - PENNSYLVANIA

Scott v. City of Philadelphia

Supreme Court of Pennsylvania - October 29, 2015 - A.3d - 2015 WL 6675465

Objector to proposed condominium development sought review of zoning board of adjustment's decision granting developer variances to construct development. The Court of Common Pleas granted developer's motion to quash appeal. Resident appealed. The Commonwealth Court reversed. Allowance of appeal was granted.

The Supreme Court of Pennsylvania held that developer's first opportunity to challenge standing of objector before board was when objector took appeal to trial court, rather than when objector appeared before board, disapproving *South of South Street Neighborhood Ass'n v. Philadelphia Zoning Bd. of Adjustment*, 54 A.3d 115.

UTILITIES - SOUTH DAKOTA

Pesall v. Montana Dakota Utilities, Co.

Supreme Court of South Dakota - November 4, 2015 - N.W.2d - 2015 WL 6750305 - 2015 S.D. 81

Utility and power company applied for permit to construct a high-voltage electrical transmission line. Farmer objected because he was concerned that excavating and moving soil to construct the project might unearth and spread a crop parasite. Public Utilities Commission granted permit on conditions, including condition to identify and mitigate the potential parasite problem. Farmer sought judicial review. The Circuit Court affirmed. Farmer appealed.

The Supreme Court of South Dakota held that:

- Commission did not delegate its regulatory authority to applicants, and
- Commission did not exceed twelve-month time limit for rendering complete findings on the application.

Decision to grant permit to construct high-voltage electrical transmission line subject to crop parasite mitigation conditions, rather than requiring utility company and power company to reapply in order to provide more specificity regarding mitigation proposal, was expressly authorized by legislature and within Public Utilities Commission's area of expertise and therefore within the Commission's discretion.

Modified condition of permit to construct high-voltage electrical transmission line, requiring applicants to identify and mitigate potential crop parasite problem, did not improperly delegate

Public Utilities Commission's authority to a private party. On the contrary, the permit and the Commission's modifications of the condition reflected that the Commission retained its authority to make the ultimate decision regarding the crop parasite mitigation, and applicants did not have ultimate authority to choose final mitigation plan.

Public Utilities Commission did not exceed statutory twelve-month time limit for rendering complete findings on application for permit to construct high-voltage electrical transmission line, which was subject to crop parasite mitigation conditions, even though it did not order a specific mitigation plan within the twelve-month statutory period. Fact that the Commission retained jurisdiction to enforce its conditions did not mean it had failed to render complete findings on the permit.

UTILITIES - UTAH

Metropolitan Water Dist. of Salt Lake & Sandy v. Questar Gas Co.

Court of Appeals of Utah - October 29, 2015 - P.3d - 2015 WL 6567671 - 2015 UT App 265

Local water district brought action against public utility that operated natural gas pipeline on district's easement, seeking a declaratory judgment that district had statutory authority to require a licensing agreement for utility's continued occupancy in the easement, and that the utility's continued presence in the easement amounted to trespass, interference with waterway, and public nuisance as a matter of law.

District filed motion for summary judgment. The Third District Court denied the motion. District appealed.

The Court of Appeals held that:

- District enjoyed no express or implied statutory authority to regulate utility's pipeline, and
- Utility's pipeline did not unreasonably interfere with district's water pipeline.

Local water district had no express statutory authority to regulate public utility's natural gas pipeline located within its non-exclusive easement, since nothing in the relevant statutes expressly authorized local districts to regulate any public utility.

Local water district had no implied statutory authority to regulate public utility's natural gas pipeline located within its non-exclusive easement. Existence of gas pipeline on opposite side of street from water pipeline did not affect district's ability to carry out its duties, even if gas pipeline crossed the water pipeline in four locations, and authority exercised by other government entities in regulating utilities was with express statutory grants of power, which district lacked.

Public utility's gas pipeline located within local water district's non-exclusive easement did not unreasonably interfere with district's water pipeline so as to justify removal. District's concerns about costs of future rehabilitation and replacement for its pipeline being affected by the existence of the gas pipeline were speculative since it had no present construction plans, and pipelines had peacefully coexisted underground for more than 60 years.

PUBLIC RECORDS - WASHINGTON

West v. Washington State Ass'n of Dist. and Mun. Court Judges

Court of Appeals of Washington, Division 1 - November 2, 2015 - P.3d - 2015 WL 6680205

Requester brought declaratory judgment action alleging violations by District and Municipal Court Judges' Association (DMCJA) of the Public Records Act, as well as the Fair Campaign Practices Act. The King County Superior Court granted DMCJA summary judgment. Requester appealed.

The Court of Appeals held that:

- DMCJA was part of judiciary and was therefore not an "agency" subject to the Public Records Act;
- Requester was required to comply with statutory notice procedures to attorney general and local prosecutor prior to bringing action against DMCJA for alleged violation of the Fair Campaign Practices Act; and
- Judge's recusal was not warranted by her status as former member of DMCJA.

REFERENDUM - ARIZONA

Respect Promise in Opposition to R-14-02-Neighbors for a Better Glendale v. Hanna

Court of Appeals of Arizona, Division 1 - September 18, 2015 - P.3d - 2015 WL 5474447 - 721 Ariz. Adv. Rep. 33

Citizen filed application for writ of mandamus seeking to compel city and city clerk to accept and file referendum petitions challenging the city council's approval of a resolution and settlement agreement, under which city agreed to drop its opposition to Indian tribe's proposed casino project on land contiguous to city's border. The Superior Court denied the application. Citizen appealed.

The Court of Appeals held that:

- Provisions of resolution unrelated to settlement agreement were not legislative acts subject to referendum;
- Settlement agreement was not referable; and
- City clerk had authority to reject referendum petitions.

Provisions of city council resolution that affirmed or acknowledged prior resolutions of the council, expressed support for Indian tribe's proposed gaming project on land contiguous to city's border, and urged the State and its representatives to withdraw their opposition to the project, reflected the council's changed position and did not amount to "legislation," and thus provisions were not subject to referendum. Resolution merely reflected city council's changed position as to the proposed gaming project.

City council's approval of settlement agreement between city, Indian tribe, and gaming enterprise was not "legislation" subject to referendum, although the agreement was a substantive measure that obligated the city to construct infrastructure for the benefit of the gaming project. Council determined that it was in the city's best interests to stop its challenges to the tribe's proposed gaming facility and to end the disputes between them, city's agreement to initially fund off-site infrastructure was a non-referable administrative act, and allowing city's voters to control litigation would result in chaotic and absurd result if settlement agreement was later rejected by voters.

City clerk had authority to reject referendum petitions challenging city council's approval of a resolution and related settlement agreement in support of construction of a casino on land

contiguous to city's borders, taken in trust by the Secretary of the Department of the Interior on behalf of Indian tribe, although statute governing challenges to a legislative measure via referendum couched clerk's duties in response to a petition in terms of what the clerk "shall" do in response. Petitions professed to challenge a non-legislative act of the city council, and statutory scheme and relevant constitutional provisions revealed that clerk had authority to reject petitions challenging non-legislative and non-referable acts.

MUNICIPAL CODE - CONNECTICUT

Brown v. City of Hartford

Appellate Court of Connecticut - October 27, 2015 - A.3d - 160 Conn.App. 677 - 2015 WL 6142877

Property owner brought action against city, alleging claims for negligence and nuisance, violations of city code, and denial of due process and equal protection after city demolished porches and stairways that a city building inspector determined were in immediate danger of falling so as to endanger life.

The Superior Court denied property owner's motion to disqualify city's office of corporation counsel, and following a bench trial rendered judgment for city. Property owner appealed.

The Appellate Court held that:

- Emergency provision of city code did not violate property owner's due process rights on the basis it did not contain an appeal provision;
- Superior Court did not abuse its discretion by denying property owner's motion to disqualify the city's office of corporation counsel;
- Property owner, through counsel, waived his right to a jury trial;
- Property owner did not have a due process right to prior notice and a pre-deprivation hearing before city demolished outside stairways and porches;
- Superior Court did not err by failing to give preclusive effect to mayor's opinion that city violated property owner's right to due process;
- Superior Court did not abuse its discretion by allowing building inspectors to testify as to their observations of property owner's premises; and
- Evidence was insufficient to support property owner's claim for pecuniary damages.

MUNICIPAL CORPORATIONS - CONNECTICUT

Brusby v. Metropolitan Dist.

Appellate Court of Connecticut - October 20, 2015 - A.3d - 160 Conn.App. 638 - 2015 WL 5949276

Landowner brought action against municipal corporation that provided her and other customers with potable water and sewerage services, alleging that its negligent acts caused her to suffer personal injuries and damages to her property as the result of raw sewage entering into and flooding her basement.

The Superior Court entered summary judgment in favor of corporation. Landowner appealed.

The Appellate Court held that:

- Material fact issue regarding whether provision of sanitary sewer services was a proprietary function precluded summary judgment;
- Corporation's allegedly negligent acts or omissions fell under discretionary act exception;
- Landowner was not an identifiable person subject to imminent harm;
- Continuing course of conduct doctrine was not applicable;
- Statute of limitations began to run on landowner's claim when second flooding event occurred; and
- Tort statute of limitations applied to contract claims.

EMPLOYMENT - GEORGIA

Dowdell v. Fitzgibbon

Court of Appeals of Georgia - October 23, 2015 - S.E.2d - 2015 WL 6396156

Following county personnel board's decision to suspend, rather than terminate, county tax assessor, the assessor filed petition for writ of certiorari. The Superior Court reversed. Assessor filed application for discretionary appeal.

The Court of Appeals held that omission of certified copy of relevant personnel regulations in record required reversal.

On discretionary appeal from superior court's reversal of a decision by county personnel board to suspend tax assessor's employment with county board of assessors rather than terminate him, omission of certified copy of relevant personnel regulations in record required reversal. Although copies of the relevant regulations appeared in certified copy of proceedings before the board, which were then transmitted to the superior court, a certified copy of the regulations was neither filed with nor tendered to the superior court, and thus Court of Appeals could not take judicial notice of the regulations.

PENSIONS - GEORGIA

Borders v. City of Atlanta

Supreme Court of Georgia - November 2, 2015 - S.E.2d - 2015 WL 6630457

Members of defined benefit pension plans brought class action against city for breach of contract and unconstitutional impairment of contract, requesting declaratory and injunctive relief, after city enacted ordinance increasing members' prospective annual contributions to plans.

The trial court granted summary judgment to city. Members appealed.

The Supreme Court of Georgia held that:

- City's provision of retirement benefits must be read in conjunction with local law, and
- Members did not acquire vested contractual rights to plans unaltered by increase to contributions.

A municipal corporation's provision of retirement or pension benefits to its employees must be read in conjunction with the terms of local law and ordinances, that is, that such provision of benefits be supplemented by local law such as that contained in the city code and the city charter.

Members of defined benefit pension plans did not acquire vested contractual rights to plans unaltered by increase in annual contributions, and therefore city ordinance did not breach members' employment contracts or violate impairment clause of state constitution. Even though there was no express statement in governing laws that plan members would not have vested rights, enrollment provisions of plans unambiguously stated that receipt of an member's executed enrollment or application card evidenced member's irrevocable consent to participate in the applicable retirement plan and that member would do so under plan's governing laws as then amended, or as might be amended in the future.

INVERSE CONDEMNATION - ILLINOIS

Sorrells v. City of Macomb

Appellate Court of Illinois, Third District - October 23, 2015 - N.E.3d - 2015 IL App (3d) 140763 - 2015 WL 6437333

Landowners brought action against neighboring developer for flooding that occurred on their property allegedly caused by the development, and amended complaint to add claim for inverse condemnation against city.

The Circuit Court granted city's motion to dismiss for failure to state a cause of action, and landowners appealed.

The Appellate Court held that flooding was not a taking by the city.

Flooding of landowners' property from neighboring development was not a "taking" by the city, despite claim that development's streets had been dedicated to the city and city had taken landowners' property in the form of a "drainage easement" for the drainage of its streets, where development was not a public property, water allegedly invading the property was drainage from two storm water detention basins or other drainage basins rather than from the dedicated streets, and there was no claim that flooding was the intended or foreseeable result of the city's actions rather than that of the development.

EMINENT DOMAIN - MISSISSIPPI

Ward Gulfport Properties, L.P. v. Mississippi State Highway Com'n

Supreme Court of Mississippi - October 22, 2015 - So.3d - 2015 WL 6388832

Property owner brought action seeking injunction for State Highway Commission's alleged taking arising out of Commission seeking permit to fill wetlands in roadbed of proposed limited-access road and pledging 1,300 acres of property as wetlands mitigation.

The Circuit Court granted summary judgment for Commission. Owner appealed.

The Supreme Court of Mississippi held that:

- Owner's claims were not barred by res judicata;
- Owner's claims were not barred by collateral estoppel;
- Genuine issue of material fact as to whether seeking permit constituted categorical taking precluded summary judgment; and

- Genuine issue of material fact as to whether seeking permit constituted partial regulatory taking precluded summary judgment.

Property owner's claims against State Highway Commission, alleging unlawful taking arising out of Commission seeking permit to fill wetlands in roadbed of proposed limited-access road and pledging 1,300 acres of property as wetlands mitigation, were not barred by res judicata. While owner had previously filed action in federal court against entity that granted permit to have permit invalidated, owner did not split claim, as it filed one action against Commission and another against entity, and subject matter before federal court was whether entity violated specific federal acts in issuing permit, while subject matter in state court was whether Commission's actions in seeking permit effected cognizable taking.

Property owner's claims against State Highway Commission, alleging unlawful taking arising out of Commission seeking permit to fill wetlands in roadbed of proposed limited-access road and pledging 1,300 acres of property as wetlands mitigation, were not barred by collateral estoppel. While owner had previously filed action in federal court against entity that granted permit to have permit invalidated, causation issue decided by federal court was whether entity violated federal acts in issuing permit so that it could invalidate permit, while causation issue in state court was whether Commission's actions effectuated taking without just compensation, and any alleged wrongdoing by Commission was not necessary to resolution in federal court, just as entity's actions were not necessary to resolution in state court.

Genuine issue of material fact as to whether permit sought by State Highway Commission to fill wetlands in roadbed of proposed limited-access road and pledge of 1,300 acres of property as wetlands mitigation was a permanent restriction cut short which left property owner without economically viable use of the property for the duration of the permit, as to constitute categorical taking, precluded summary judgment for Commission, in owner's action seeking injunction against Commission for alleged taking.

Genuine issue of material fact as to whether permit sought by State Highway Commission to fill wetlands in roadbed of proposed limited-access road and pledge of 1,300 acres of property as wetlands mitigation constituted partial regulatory taking precluded summary judgment for Commission, in owner's action seeking injunction against Commission for alleged taking.

UTILITIES - NEW HAMPSHIRE

Aranosian Oil Co., Inc. v. State

Supreme Court of New Hampshire - October 27, 2015 - A.3d - 2015 WL 6473550

Oil importers and distributors brought action against State, seeking declaration that fees paid by importers and distributors into excess insurance fund were unconstitutional.

After bench trial, the Hillsborough Superior Court denied petition. Importers and distributors appealed.

The Supreme Court of New Hampshire held that:

- Fees paid into fund did not become unconstitutional taxes as result of State's recovery in unrelated litigation, despite argument that State obtained alternative source of funds that addressed same expense as fee program, and
- Equitable subrogation and unjust enrichment claims were barred by sovereign immunity.

Fees paid by oil importers and distributors into statutorily-created excess insurance fund for disposal and cleanup of underground storage tanks did not become unconstitutional taxes as result of State's recovery in litigation against gasoline suppliers, pursuant to which State was awarded damages, despite argument that State's recovery rendered fees disproportionate because State obtained alternative source of funds that addressed the same expense as fee program.

Oil importers' and distributors' equitable subrogation and unjust enrichment claims against State, challenging fees paid by importers and distributors into excess insurance fund for disposal and cleanup of underground storage tanks, were barred by sovereign immunity, where equitable claims were unrelated to alleged constitutional deficiency in fees, and constitutional claims that plaintiffs did make were unsuccessful.

WHISTLEBLOWER STATUTE - NEW YORK

Tipaldo v. Lynn

Court of Appeals of New York - October 22, 2015 - N.E.3d - 2015 WL 6180903 - 2015 N.Y. Slip Op. 07698

Former city employee brought action against municipality and agency decisionmakers in their official capacity for violation of state "whistleblowers' statute."

The Supreme Court, New York County, granted summary judgment for defendants and employee appealed. The Supreme Court, Appellate Division reversed and remanded. On remand, the Supreme Court, New York County, after nonjury trial on issue of damages, awarded employee $175,000 in back pay without interest. Employee appealed. The Supreme Court, Appellate Division, modified the judgment to include prejudgment interest and ordered reinstatement of employee. Defendants appealed.

The Court of Appeals held that:

- Employee made good faith efforts to report misconduct under whistleblower statute, and
- Prejudgment interest was properly awarded.

Good-faith efforts of city employee in manner and timing of his reporting, first informally to his immediate supervisors and then soon thereafter to Department of Investigation, satisfactorily met requirements for reinstatement and compensation for retaliatory action taken by employer, where reporting of violation to internal "appointing authority" would have been futile in that individuals who employee alleged had improperly procured signs in connection with traffic reconfiguration project were Commissioner and First Deputy Commissioner.

Prejudgment interest is generally available to plaintiffs bringing claims under state's whistleblowers' statute, since intent of statute is to make plaintiffs whole.

When a statute does not specifically list interest as recoverable, interest may be available when the statute's legislative intent is to make its victims whole and its language does not limit the recovery available.

LIABILITY - TENNESSEE

Epperson v. City of Humboldt, Tenn.

United States District Court, W.D. Tennessee, Eastern Division - October 21, 2015 - F.Supp.3d - 2015 WL 6440740

Decedent's mother, sister, and daughter filed § 1983 action in state court against city, its police chief, and police officers alleging that officers' use of excessive force during detention caused decedent's death. After removal, defendants' moved to dismiss.

The District Court held that:

- Decedent's mother and sister lacked standing to file § 1983 action;
- City was not subject to liability under § 1983;
- Officers did not deprive decedent of his substantive due process rights; and
- Court would not exercise supplemental jurisdiction over plaintiffs' claims under Tennessee Governmental Tort Liability Act (GTLA).

City was not subject to liability in § 1983 action alleging that its police officers used excessive force against mentally impaired person, absent showing that city was on notice of pattern or practice of unconstitutional uses of force by officers in its employ against mentally impaired persons or others who could not comply with instructions, that it had custom of ignoring violations or failing to discipline officers who engaged in such behavior, or that city failed to adequately prepare for recurring situations where constitutional violation would be likely to take place.

PUBLIC UTILITIES - CALIFORNIA

Green Valley Landowners Association v. City of Vallejo

Court of Appeal, First District, Division 1, California - October 16, 2015 - Cal.Rptr.3d - 2015 WL 6121779

Nonresident water customer brought class action seeking to preserve its alleged right to continue receiving water at reasonable rates from an historical water delivery system owned and operated by the City of Vallejo. Customer sued for breach of contract, breach of implied covenant of good faith and fair dealing, breach of duty to charge reasonable water rates, breach of fiduciary duty, specific performance, declaratory and injunctive relief, and accounting. The Superior Court sustained demurrer without leave to amend. Customer appealed.

The Court of Appeal held that:

- Charter city was governed by general law providing that all contracts with a city must be in writing to be valid;
- City could not be sued under an implied-in-law or quasi-contract theory;
- Right to Vote on Taxes Act precluded city from owing any fiduciary duty to continue prior fee ratio; and
- Injunction claims were premature.

INVERSE CONDEMNATION - COLORADO

American Family Mutual Insurance Company v. American National Property

and Casualty Company

Colorado Court of Appeals, Div. I - September 24, 2015 - P.3d - 2015 WL 5607602 - 2015 COA 135

Insurers brought subrogation action against Water Board and Colorado Department of Public Safety, alleging inverse condemnation and negligence, after embers from prescribed burn on Water Board land caused wildfire which resulted in significant property damage. The District Court dismissed the inverse condemnation claims for failure to state a claim. Insurers appealed.

The Court of Appeals held that:

- Insurers had standing to assert inverse condemnation claims;
- Alleged taking of insureds' property did not serve nor was intended to serve a public purpose;
- Insurers lacked good cause to conduct discovery in order to respond to motion to dismiss; and
- Any error by trial court in denying insurers' request to conduct discovery was not prejudicial.

Insurers had standing to bring inverse condemnation claims against Water Board and Colorado Department of Public Safety after embers from prescribed burn on Water Board land caused wildfire which resulted in significant property damage, where insurers had paid or expected to pay claim to their insureds as a result of damage caused by the wildfire such that they were subrogated to their insureds' claims to the extent of monies paid and to be paid, and insureds held right to pursue inverse condemnation claim, as they were the property owners at the time of the wildfire and had suffered injuries-in-fact to legally protected interests as a result of the wildfire.

Alleged taking of insureds' property by Water Board and Colorado Department of Public Safety arising out of prescribed burn on Water Board land which resulted in wildfire that caused significant property damage, did not serve nor was intended to serve a public purpose, as required for insurance carriers to maintain inverse condemnation claims in subrogation action. While the prescribed burn may have been for a public purpose and the alleged taking may have been a natural or probable consequence of that burn, damage to private property was not for a public purpose and in fact was the opposite of the intent of the prescribed burn.

EMINENT DOMAIN - FLORIDA

General Commercial Properties, Inc. v. State Dept. of Transp.

District Court of Appeal of Florida, Fourth District - October 14, 2015 - So.3d - 2015 WL 5948530

Department of Transportation (DOT) brought eminent domain proceedings against landowner. After final judgment was entered awarding an amount for the parcel, landowner sought attorney's fees based on the DOT's offer to purchase the land made seven years prior to initiating eminent domain proceedings at an amount significantly lower than the judgment amount. The Circuit Court awarded fees based on percentage of difference between final judgment and pre-suit offer made closer to commencement of eminent domain proceedings. Landowner appealed.

The District Court of Appeal held that attorney's fee would be calculated using the later offer.

Department of Transportation's offer to purchase landowner's property seven years before initiation of eminent domain proceedings was not the "first written offer" under eminent domain statute, which provides for an award of attorney's fees to a landowner based on a percentage of the

difference between amount of final judgment and first written offer. The offer was made in an arms-length negotiation during department's early acquisition program before project was funded or plans were finalized and before department was certain landowner's property would be needed, and offer was extended on condition that it not be used to determine attorney's fees in a subsequent condemnation proceeding.

IMMUNITY - FLORIDA

City of Fort Lauderdale v. Israel

District Court of Appeal of Florida, Fourth District - October 14, 2015 - So.3d - 2015 WL 5948627

County sheriff brought action against city for breach of contract, unjust enrichment, and open account, and city moved for summary judgment based on sovereign immunity. The Circuit Court denied city's motion. City appealed.

The District Court of Appeal held that sovereign immunity barred sheriff's action.

Sovereign immunity barred county sheriff's action against city for breach of contract, unjust enrichment, and open account, arising out of payments allegedly owed to sheriff for services provided to city after contract had expired, where there was no written contract between sheriff and city.

A municipality waives the protections of sovereign immunity only when it enters into an express contract. When an alleged contract is merely implied, however, these sovereign immunity protections remain in force.

BALLOT INITIATIVES - FLORIDA

In re Advisory Opinion to Atty. Gen. re Limits or Prevents Barriers to Local Solar Electricity Supply

Supreme Court of Florida - October 22, 2015 - So.3d - 2015 WL 6387952

The Attorney General of Florida petitioned for an advisory opinion as to the validity of a citizen initiative amendment to the state constitution and the corresponding financial impact statement submitted by the financial impact estimating conference.

The Supreme Court of Florida held that:

- Proposed citizen initiative amendment complied with single subject requirement;
- Proposed citizen initiative amendment complied with ballot title and summary requirement; and
- Financial impact statement accompanying amendment complied with constitutional requirements.

Proposed citizen initiative amendment to state constitution regarding limitations on local solar electricity supply complied with the single subject requirement of the state constitution. Although the proposed amendment contained a number of provisions, some dealing with economic barriers to supply of solar electricity and others dealing with government regulation with respect to rates, service, or territory, various provisions were all directly connected to the amendment's purpose of removing legal and regulatory barriers to local solar electricity suppliers who sought to supply and

sell up to 2 megawatts of solar generated electricity to purchasers on the same or contiguous property to the supplier, and there was no indication that amendment would have interfered with state's energy policy.

Proposed citizen initiative amendment to state constitution regarding limitations on local solar electricity supply complied with statutory ballot title and summary requirements, where title and summary clearly and unambiguously informed the voter that the amendment would prevent government and electric utilities from imposing regulatory barriers to supplying local solar electricity up to 2 megawatts to customers at the same or contiguous property, and summary explained that the regulations which would be limited or prevented included government regulation of local solar electricity suppliers' rates, service and territory, and unfavorable electricity rates, charges, or terms of service.

Financial impact statement accompanying proposed citizen initiative amendment to state constitution regarding limitations on local solar electricity supply complied with requirements of the state constitution, where statement was 62 words in length, statement addressed only estimate increase or decrease in revenue and costs to state and local governments, statement clearly and unambiguously stated that there would be decreased revenues for state and local governments and that the fees may have offset a portion of any increased costs, and statement clearly and unambiguously explained that timing and magnitude of decreased revenues could not be determined because of various technological and economic factors.

LIABILITY - GEORGIA

Guice v. Brown

Court of Appeals of Georgia - October 20, 2015 - S.E.2d - 2015 WL 6143383

Motorist brought action against city employee, who was driving city-owned vehicle covered by city's liability insurance policy when he was struck by motorist's vehicle. The trial court denied employee's motion for summary judgment. Employee appealed.

The Court of Appeals held that:

- Motorist failed to demonstrate that employee violated city ordinance and county ordinance;
- Motorist failed to demonstrate that employee violated statute governing obedience to traffic-control devices; and
- Motorist failed to demonstrate that employee committed criminal trespass.

INDEBTEDNESS - IDAHO

Greater Boise Auditorium Dist. v. Frazier

Supreme Court of Idaho, Boise, September 2015 Term - October 15, 2015 - P.3d - 2015 WL 6080521

Auditorium district, a governmental subdivision, filed petition for judicial confirmation that proposed real estate transaction did not violate state constitution's prohibition on municipal bodies, without voter approval, incurring indebtedness or liabilities greater than it has funds to pay for in the fiscal year. The District Court denied the petition. District appealed.

The Supreme Court of Idaho held that:

- Courts have duty to examine other documents affecting question submitted in petition for confirmation;
- Lease did not violate constitution; and
- Overall agreement did not violate constitution.

In deciding petitions for judicial confirmation of the validity of agreements brought by the governing bodies of political subdivisions, courts have a duty to examine other documents which affect the questions submitted and then to determine the propriety of the contracts before them.

Lease between auditorium district, a governmental subdivision, and urban renewal agency did not subject district to more liability than it could pay in year in which it was entered, and therefore entering lease without voter approval did not violate state constitution, despite contention that entire financing structure could have failed and resulted in financier pursuing remedies against district. Lease bound district to pay rent of one year, which it had funds to do, lease allowed district option to renew lease in subsequent years if it had funds to do so, constitution did not bar government subdivisions from incurring all potential liabilities without voter approval, and whether lease was, in fact, equitable mortgage did not create specific liability.

Overall agreement entered into by auditorium district, a governmental subdivision, in which district was obligated to purchase facility upon completion of construction did not subject district to long-term liability greater than it had the funds to pay for in the year in which it was entered, and therefore entering agreement without voter approval did not violate state constitution, despite contention that district was subject to continuing liability of lender's right to impose security interest on facility. Cost of purchase was covered by urban renewal agency if overall agreement was confirmed by court or by district's cash on hand, and any liens imposed by lender would have had to be released before sale, based on requirement of developer to convey clear title.

MUNICIPAL ORDINANCE - ILLINOIS

Zollar v. City of Chicago Dept. of Administrative Hearings

Appellate Court of Illinois, First District, Third Division - October 14, 2015 - N.E.3d - 2015 IL App (1st) 143426 - 2015 WL 5996813

Dog owner sought review of city animal control commission declaring dog to be a dangerous animal. The Circuit Court affirmed. Owner appealed.

The Appellate Court held that:

- Dog was dangerous animal within meaning of city ordinance;
- Any error in admission of investigative report did not prejudice owner; and
- Dangerous animal ordinance was not void for vagueness.

EMPLOYMENT - LOUISIANA

Jackson v. St. John Baptist Parish School Bd.

Court of Appeal of Louisiana, Fifth Circuit - October 14, 2015 - So.3d - 2015 WL 6081000 - 15-254 (La.App. 5 Cir. 10/14/15)

Former school bookkeeper filed petition for payment of sick leave and restoration of sick leave days against school board, following diagnosis of anxiety order stemming from incident where student struck her on school campus. The District Court rendered judgment in favor of bookkeeper and awarded her $9,105.71, plus interest and costs. School board appealed.

The Court of Appeal held that bookkeeper was not required to have diagnosis by licensed psychiatrist or psychologist to receive sick leave benefits.

Former school bookkeeper was not required to have a diagnosis by a licensed psychiatrist or psychologist to receive sick leave benefits from school board that employed her, following diagnosis of anxiety disorder stemming from incident where student struck her on school campus. While workers' compensation statute defining injury required clear and convincing evidence of a mental injury and a diagnosis by licensed psychiatrist or psychologist, bookkeeper sought sick leave benefits, not workers' compensation benefits, statute governing sick leave for school employees only required physician to certify an injury or disability, and bookkeeper provided school board with letter from her physician certifying that she was under his care for anxiety order and that it was his opinion that she should not return to work environment for foreseeable future.

ZONING - NEW JERSEY

Jacoby v. Zoning Bd. of Adjustment of Borough of Englewood Cliffs

Superior Court of New Jersey, Appellate Division - October 21, 2015 - A.3d - 2015 WL 6160248

Residents filed separate complaints in lieu of prerogative writs, challenging zoning board of adjustment's site plan approval and variance grants for 143.8-foot tall office building in business zone where maximum permitted height was 35 feet. After consolidation and grant of motions to intervene, the Superior Court affirmed, and residents and intervenors appealed.

The Superior Court, Appellate Division, held that:

- Landowner failed to establish undue hardship warranting variance;
- Board, when considering "special reasons" for variance, was required to consider the main building's effect on the general landscape;
- Board was required to address the historic and scenic importance of the unique location when considering variance;
- Landowner was not entitled to bulk variance from parking requirements on grounds that the physical condition of the property prevented it from conforming to parking requirements; and
- Evidence was sufficient to support grant of bulk zoning variance allowing reduction in required parking spaces on grounds that any harm was substantially outweighed by the benefits.

MUNICIPAL ORDINANCE - TEXAS

Weiderman v. City of Arlington

Court of Appeals of Texas, Fort Worth - October 15, 2015 - Not Reported in S.W.3d - 2015 WL 5461516

City resident filed suit for declaratory judgment against city and mayor, alleging that city charter did not permit citizen-initiated referendum to amend city's charter to ban use of red-light cameras. The

District Court granted defendants' plea to jurisdiction and dismissed petition. Citizen appealed.

The Court of Appeals held that resident lacked standing to challenge amendment to city's charter to ban use of red-light cameras that had been placed on ballot and approved by majority of voters.

City resident lacked standing to challenge ordinance adopting proposition to amend home-rule city's charter to ban use of red-light cameras that had been placed on ballot and approved by majority of voters, which challenge was based on resident's claim that city's charter did not provide for citizen-initiated referendum, where resident did not allege any injury separate and distinct from injuries suffered by any other voter who voted against proposition, but admitted that he was no different than any other citizen who believed that red-light camera program was good.

EDUCATION FINANCE - PENNSYLVANIA

U.S. ex rel. Oberg v. Pennsylvania Higher Educ. Assistance Agency

United States Court of Appeals, Fourth Circuit - October 21, 2015 - F.3d - 2015 WL 6163007

Relator, on behalf of United States, brought qui tam action under False Claims Act (FCA) alleging that state-created corporate entity intended to facilitate issuance of student loans, the Pennsylvania Higher Education Assistance Agency (PHEAA), defrauded the United States Department of Education.

The Court of Appeals held that:

- State was not functionally liable for FCA claim;
- Autonomy factor weighed against finding that PHEAA was an arm of the state;
- State concern factor weighed in favor of finding that PHEAA was an arm of the state;
- Treatment under state law factor weighed in favor of finding that PHEAA was an arm of the state; and
- PHEAA was not an arm of the state.

The Pennsylvania Higher Education Assistance Agency (PHEAA) was a political subdivision of the State of Pennsylvania, rather than an arm-of-the-state, and thus was a "person" subject to liability under a False Claims Act (FCA) claim by a relator bringing a qui tam action, notwithstanding that much of its revenue was generated from out-of-state activities, and that it was treated as an arm of the state under Pennsylvania law. Pennsylvania was not liable for judgments against PHEAA, and PHEAA exercised significant autonomy from the State.

PUBLIC UTILITIES - PENNSYLVANIA

GSP Management Co. v. Duncansville Mun. Authority

Commonwealth Court of Pennsylvania - October 19, 2015 - A.3d - 2015 WL 6119434

Operator of mobile home park brought declaratory judgment action against municipal authority, challenging on its face and as applied the authority's rate structure for sewer system use, pursuant to which the rate increased on sliding scale corresponding to amount of metered water supplied to customer. The Court of Common Pleas entered judgment in favor of authority. Operator appealed.

The Commonwealth Court held that:

- Authority's rate structure was valid on its face, but
- Operator was entitled to relief for months in which metered water delivered to park greatly exceeded amount of discharge into sewer system.

Municipal authority's rate structure for calculation of sewer bill, pursuant to which the rate for sewer use increased on sliding scale corresponding to amount of metered water supplied to customer, was not facially invalid under Municipality Authorities Act.

Relief from amounts municipal authority billed operator of mobile home park for use of sewer system during certain months was appropriate in operator's action challenging authority's rate structure, pursuant to which the rate for sewer use increased on sliding scale corresponding to amount of metered water supplied to customer. Operator consumed approximately 40,000 gallons of metered water per month on average, operator's metered water use ranged from 110,000 to 580,000 gallons per month during months at issue due to water loss between metering point and point of discharge into authority's sewer system, and unplanned increase in metered water imposed no increase on burden of sewer system.

Where there is an extraordinary water loss between the point of metering and the point of discharge into a municipal sewer system that is substantial in quantity and unplanned or unanticipated, relief from the sewer charges during those periods of extraordinary water loss would be warranted to ensure that the amount billed and collected is not unreasonable in relation to the service rendered, crossing the line between a permitted fee and an unauthorized tax.

PUBLIC UTILITIES - PENNSYLVANIA

Metropolitan Edison Co. v. City of Reading

Commonwealth Court of Pennsylvania - October 15, 2015 - A.3d - 2015 WL 5974066

Utility brought action against city, alleging that negligence of city's employees during excavation led to collapse of utility's electrical duct bank. City filed motion for summary judgment, asserting immunity under Political Subdivision Tort Claims Act. The Court of Common Pleas denied city's motion and, following bench trial, entered judgment in favor of utility. City appealed.

The Commonwealth Court held that exception to immunity under the Act for injury resulting from dangerous conditions of utility service facilities did not apply, and thus city was immune.

Exception to governmental immunity under Political Subdivision Tort Claims Act for dangerous conditions of utility service facilities did not apply in utility's action against city, in which utility alleged that city's excavation work led to collapse of utility's electrical duct bank, and thus city was immune from suit, where dangerous condition that led to collapse did not originate from city's facilities, but from the conduct of city's employees in excavating beneath the duct bank without using support or shoring to stabilize it.

PUBLIC UTILITIES - PENNSYLVANIA

PPL Elec. Utilities Corp. v. City of Lancaster

Commonwealth Court of Pennsylvania - October 15, 2015 - A.3d - 2015 WL 5974272

Public utility filed petition for review seeking declaratory and injunctive relief against city and Public Utility Commission, arguing that ordinances city enacted as part of comprehensive program for management of city's rights-of-way were preempted by the Public Utility Code. Utility filed an application for summary relief.

The Commonwealth Court held that:

- Ordinance purporting to authorize city to inspect public utility facilities to ensure that such facilities did not constitute a public safety hazard and remained in compliance with Public Utility Commission (PUC) standards was preempted;
- Ordinance purporting to grant city the power to order a public utility to remove, relocate, change, or alter the position of any facilities within right-of-way was preempted;
- Ordinance which imposed an annual maintenance fee on any public utility with facilities in city's rights-of-way was not preempted; and
- Ordinance purporting to permit city to bring a complaint against public utilities for violation of a PUC regulation, standard, or order and to fine utility for such violations was preempted.

INSURANCE - ALABAMA

St. Paul Fire and Marine Insurance Company v. Town of Gurley

United States District Court, N.D. Alabama, Northeastern Division - September 8, 2015 - Slip Copy - 2015 WL 5286915

St. Paul Fire and Marine Insurance Company sought a declaratory judgment that it had no duty to defend the Town of Gurley from the claims and damages asserted in underlying litigation between the and M & N Materials, Inc.

M & N sued the Town for inverse condemnation and other causes of action after the Town annexed property on which M & N had planned to operate a rock quarry and subsequently implemented regulations prohibiting this use.

St. Paul had issued a Public Entity Composite Policy to the Town. The Policy contained Public Entity Management Liability Protection ("PEML") and Public Entity General Liability Protection ("PEGL").

The court held that St. Paul had a duty to defend the Town against M & N's claims. The court reserved the issue of indemnification, pending the outcome of the trial.

EMINENT DOMAIN - CALIFORNIA

Los Angeles County Metropolitan Transportation Authority v. KBG I Associates, LLC

Court of Appeal, Second District, Division 5, California - October 7, 2015 - Not Reported in Cal.Rptr.3d - 2015 WL 5841977

KBG I Associates, LLC (KBG) appealed from the trial court's orders excluding the property valuation reports prepared by KBG's expert in an eminent domain action.

According to KBG, the orders deprived it of its constitutional right to have a jury determine the issue of just compensation. KBG contended that the trial court erred when it ruled that KBG's appraiser

could not consider the loss of direct access to its property caused by the construction of a public works project and the revocation by the Los Angeles County Metropolitan Transportation Authority (MTA) of a revocable license providing access to the property. KBG also contended that the trial court erred when it excluded from KBG's property valuation other evidence of impaired access caused by the project.

The Court of Appeal held that the termination of a revocable license concerning access to a property, work on a public street, and non-substantial changes in access to the property are not compensable. Thus, the trial court's orders prohibiting KBG's expert from considering evidence of the loss of direct access and other impairments of access to KBG's property were correct.

BOND VALIDATION - CONNECTICUT

Arras v. Regional School Dist. Number 14

Supreme Court of Connecticut - October 20, 2015 - A.3d - 2015 WL 5945416

Town residents brought action against town and board of education, contending that failure to publish warning of referendum in newspaper as statutorily required rendered the referendum null and void ab initio. Both parties moved for summary judgment. The Superior Court denied residents' motion for summary judgment and granted defendants' motion. Residents appealed and the case was transferred.

The Supreme Court of Connecticut held that failure to strictly comply with statutory notice provisions by publishing an official warning of referendum did not require invalidation of the referendum, overruling *Pollard v. Norwalk*, 108 Conn. 145, 142 A. 807.
