

ZONING & PLANNING - GEORGIA

Hall County v. Cook Communities

Court of Appeals of Georgia - June 29, 2023 - S.E.2d - 2023 WL 4246126

Property developer filed lawsuit against county and its commissioners, in their individual capacities, challenging a rezoning decision and seeking declaratory, injunctive, and mandamus relief.

The Superior Court denied county's motion to dismiss developer's direct action, ultimately concluding that local zoning authority's decision on developer's request to rezone its property was legislative rather than quasi-judicial. County filed an application for interlocutory review, which the Court of Appeals granted.

The Court of Appeals held that county's rezoning decision was legislative, not quasi-judicial, and thus, proper method for property developer to challenge constitutionality of that decision was to file suit in Superior Court.

County's rezoning decision was legislative, not quasi-judicial, and thus, proper method for property developer to challenge constitutionality of that decision was to file suit in Superior Court, which could then conduct a de novo review, as developer was not limited to review of that decision by writ of certiorari; developer, alleging that rezoning conditions imposed an unconstitutional taking of its property and seeking declaratory, injunctive, and mandamus relief, presented a constitutional attack against conditions that county attached to approval of developer's application to rezone, which essentially amounted to a denial of its rezoning request.

ZONING & PLANNING - INDIANA

Shinall v. Board of Zoning Appeals for Town of Ogden Dunes

Court of Appeals of Indiana - June 16, 2023 - N.E.3d - 2023 WL 4038500

Homeowners petitioned for judicial review of decision of town board of zoning appeals granting neighbors a variance of residential building height restriction.

The Superior Court granted board's and neighbors' motion to dismiss for lack of standing, concluding that homeowners were not aggrieved by any perceived hindrance to their prospective lake views. Homeowners appealed.

The Court of Appeals held that homeowners clearly established that they were aggrieved for purposes of establishing standing to seek judicial review of zoning decision.

Allegations in homeowners' petition clearly established they were aggrieved by town board of zoning appeals' decision granting neighbors' proposed variance of residential building height restriction established by town zoning code, and thus homeowners had standing to seek judicial review of

board's decision; homeowners alleged that they had enjoyed a waterfront view of lake over roofline of neighbors' existing home for almost two decades, that they had a marketable interest in property value associated with waterfront view, and that neighbors' proposed height variance would obstruct homeowners' view of lake and diminish values of their property and adjacent properties, indicating that homeowners had a pecuniary injury beyond that which would be suffered by the community as a whole.

MUNICIPAL GOVERNANCE - NEBRASKA

[Dodge County Humane Society v. City of Fremont](#)

Supreme Court of Nebraska - July 14, 2023 - N.W.2d - 314 Neb. 714 - 2023 WL 4536101

Humane society, a nonprofit organization, filed petition in error that named city, with which it had entered into contract for animal control services, and city council after council approved motion that authorized city mayor to send humane society letter regarding termination of contract, alleging that city had no cause to terminate and had failed to comply with contractual termination prerequisites.

The District Court denied motion to dismiss brought by city and council and ordered contract reinstated. City and council appealed.

The Supreme Court held that city council was not exercising judicial function when it voted to approve motion for mayor to send letter.

City council was not exercising judicial function when it voted to approve motion for mayor to send letter to county humane society regarding termination of animal control contract into which parties had entered, and thus trial court lacked jurisdiction to hear humane society's petition in error; while council, at meeting, opened floor for members of public to comment on agenda item concerning motion to send notice of termination, and several residents, as well as humane society's attorney, commented, such public comment was not required, and council did not receive evidence or testimony into official record or render decision in adversarial proceeding consistent with due process.

EMINENT DOMAIN - NEW MEXICO

[McFarland Land and Cattle Inc. v. Caprock Solar 1, LLC](#)

Supreme Court of New Mexico - July 13, 2023 - P.3d - 2023 WL 4523156

Property owner sought injunction against limited liability company (LLC) and county related to the use of a road on property owner's land. County intervened and sought declaratory judgment against property owner.

Following a bench trial, the District Court concluded that LLC and county established the existence of a public prescriptive easement, permitting their use of the road. Property owner appealed, and the Court of Appeal reversed and remanded. County petitioned for writ of certiorari, which was granted.

The Supreme Court held that:

- When proving a public prescriptive easement claim, one does not need to prove a minimum

- number of users or frequency of use, but only need prove that use of the road in question was free and common to all who had occasion to use it as a public highway, and
- Evidence was sufficient to support finding that public used road at issue and that a public prescriptive easement existed over it at the low water crossing.
-

BANKRUPTCY - PUERTO RICO

[In re Financial Oversight and Management Board for Puerto Rico](#)

United States Court of Appeals, First Circuit - July 12, 2023 - F.4th - 2023 WL 4486289

Financial Oversight and Management Board for Puerto Rico moved for confirmation of proposed plan of adjustment for Puerto Rico Highways and Transportation Authority (HTA) discharging claims of current and former Puerto Rico Highways and Transportation Authority (PRHTA) employees who received extra compensation in addition to their salaries for their service as project administrators or project supervisors.

The United States District Court for the District of Puerto Rico of the Southern District of New York, sitting by designation determined that group's claims for additional compensation were dischargeable under plan. Group appealed.

The Court of Appeals held that claims were based only on PRHTA regulation that did not implement federal health or safety program, and any applicable federal regulations did not include obligation to pay group additional compensation, and therefore those claims were not exempt from discharge.

Claims of current and former Puerto Rico Highways and Transportation Authority (PRHTA) employees who received extra compensation in addition to their salaries for their service as project administrators or project supervisors were based only on PRHTA regulation that did not implement federal health or safety program, and any applicable federal regulations did not include obligation to pay group additional compensation, and therefore those claims were not exempt from discharge, even if claims were valid federal constitutional claims and PROMESA created exception to discharge.

EMPLOYMENT - RHODE ISLAND

[Sosa v. City of Woonsocket](#)

Supreme Court of Rhode Island - July 14, 2023 - A.3d - 2023 WL 4536168

Law enforcement officer who was fired after admitting before a Massachusetts court to a recitation of facts of the charged offenses of felony breaking and entering, felony assault with a dangerous weapon, and assault on a family member filed action against city for alleged violation of the Law Enforcement Officers' Bill of Rights (LEOBR).

The Superior Court granted officer's request for an order to show cause and ordered city to comply with LEOBR. City appealed.

The Supreme Court held that officer's admission to sufficient facts in Massachusetts court did not constitute a plea of guilty or nolo contendere sufficient to dismiss officer without a hearing under LEOBR.

Law enforcement officer's admission to sufficient facts for a finding of guilt, made pursuant to Massachusetts statute providing for continuation of felony charges against officer, did not constitute a plea of guilty or nolo contendere sufficient to dismiss officer without a hearing under Law Enforcement Officers' Bill of Rights (LEOBR); an admission to sufficient facts followed by a continuance without a finding was not a conviction under Massachusetts law, officer complied with the terms and the case was dismissed without a conviction, and LEOBR required a felony conviction to terminate officer without a hearing.

IMMUNITY - SOUTH CAROLINA

[Lockaby v. City of Simpsonville](#)

Court of Appeals of South Carolina - June 21, 2023 - S.E.2d - 2023 WL 4095956

City councilmember filed suit against city, former mayor, and city council's sergeant-at-arms, alleging claims of gross negligence, false imprisonment, and § 1983 claims for violation of her First Amendment and Fourth Amendment rights in connection with her ejection from a city council meeting.

The Circuit Court granted defendants' motion for summary judgment. Councilmember appealed.

The Court of Appeals held that mayor's decision to eject councilmember from meeting was legislative act protected by legislative immunity.

Mayor's decision to eject city councilmember from city council meeting was a legislative act, and thus legislative immunity barred councilmember's suit against city, mayor, and city council's sergeant-at-arms alleging claims under § 1983 for First and Fourth Amendment violations and claims for gross negligence and false imprisonment, which claims stemmed from her ejection from the meeting.

HEALTHCARE REIMBURSEMENT - CALIFORNIA

[County of Santa Clara v. Superior Court of Santa Clara](#)

Supreme Court of California - July 10, 2023 - P.3d - 2023 WL 4414084

Non-contracting hospitals brought action against county to recover reasonable compensation for emergency medical services provided to individuals enrolled in health care service plan operated by county.

The Superior Court overruled county's demurrer. On petition for writ of mandate, the Sixth District Court of Appeal granted petition. Review was granted.

The Supreme Court held that:

- Hospitals' compliance with Government Claims Act's claims presentation requirements did not establish that they sought money or damages covered by Act's immunity provisions, and
- Government Claims Act did not immunize county from hospitals' quantum meruit claims.

Government Claims Act's claims presentation requirements were broader in scope than Act's public entity immunity or liability provisions, and thus hospitals' compliance with Act's claims presentation

requirements when seeking compensation for emergency medical services provided to individuals enrolled in county's health care service plan did not establish that they sought money or damages covered by Act's immunity provisions.

Government Claims Act did not immunize county from non-contracting hospitals' quantum meruit claims to enforce statutory duty under Knox-Keene Act to reimburse them for reasonable cost of emergency medical services and care they provided to individuals enrolled in county's health care service plan, even though that duty would result in payment of money; county was subject to Knox-Keene Act's regulatory scheme because it chose to enter health care plan market, hospitals did not seek money damages, but to compel county to comply with its mandatory duty under Knox-Keene Act, and permitting hospitals to proceed furthered Knox-Keene Act's fundamental purpose of protecting California's health care delivery system's continued financial viability.

POLITICAL SUBDIVISIONS - GEORGIA

[Pass v. Athens Housing Authority](#)

Court of Appeals of Georgia - June 27, 2023 - S.E.2d - 2023 WL 4194714

Plaintiff brought action against city housing authority, alleging that he was shot four times at close range by a resident at housing authority property, and asserting claims for premises liability, nuisance, and negligence.

The State Court granted housing authority's motion to dismiss on the basis of sovereign immunity. Plaintiff appealed.

The Court of Appeals held that city housing authority was not an instrumentality of the state and thus was not entitled to sovereign immunity.

City housing authority was not an instrumentality, department, or agency of the state and thus was not entitled to sovereign immunity from suit brought by plaintiff shot while on housing authority property; although state law enabled housing authority's creation, it was created by city, governed by local authorities with no day-to-day state control, received no funding, tax revenue, or insurance coverage from the state, was required to abide by federal housing agency rules, its employees were not covered by state benefits, and its purpose was to serve residents of the county rather than the citizens of the state.

LIABILITY - GEORGIA

[Payton v. City of College Park](#)

Court of Appeals of Georgia - June 27, 2023 - S.E.2d - 2023 WL 4193455

Survivors and estate of decedent killed by errant gunfire filed a complaint against emergency response organizations and cities, asserting claims for negligence and wrongful death related to the timeliness of defendants' response to a 911 call.

The State Court granted defendants' motion to dismiss. Plaintiffs appealed.

The Court of Appeals held that:

- Plaintiffs' ante litem notice seeking "an amount not less than \$1 million" did not substantially comply with Georgia's ante litem notice requirements;
- Plaintiffs lacked standing to challenge the constitutionality of statute setting out requirements for ante litem notices to municipalities; and
- Plaintiffs' failure-to-render-aid claim did not fall within the intentional tort exception to statutory requirements for ante litem notices to municipalities.

MUNICIPAL FINANCE - IDAHO

[Bradbury v. City of Lewiston](#)

Supreme Court of Idaho - July 10, 2023 - P.3d - 2023 WL 4409927

City resident brought action against city for declaratory judgment and equitable relief, alleging that city had been collecting excessive utility fees and improperly spending municipal funds.

City moved to strike, alleging that resident's pleadings included confidential research memoranda prepared by city attorney. The Second Judicial District Court granted motion. Resident moved for reconsideration. The District Court denied motion. Parties filed cross-motions for summary judgment. The District Court granted and denied motions in part and declined to award any attorney fees or costs to either side. Resident appealed.

The Supreme Court held that:

- Research memoranda prepared by city attorney and submitted to city manager were protected by attorney-client privilege;
- City's transfers of funds from sanitation fund to golf-course fund and library fund were interdepartmental fund transfers that did not violate Idaho Constitution;
- Payments made by city to private entities were for contracted services, not donations;
- Resident's claim that street-impact fees assessed and allocated to city's water, wastewater, and sanitation funds amounted to illegal tax was brought in his individual capacity;
- Resident was not entitled to refund of street-impact fees;
- Trial court did not abuse its discretion by denying resident's request for attorney fees; and
- City was not entitled to attorney fees on appeal.

LIMITATION OF ACTIONS - MISSISSIPPI

[Moton v. City of Clarksdale](#)

Supreme Court of Mississippi - July 6, 2023 - So.3d - 2023 WL 4360567

Former city commissioner filed suit against city, executor of former mayor's estate, and police captain, asserting various tort claims and violations of state constitutional rights to free speech, due process, and equal protection, arising out of commissioner's arrests during two board of commissioners meetings.

The Circuit Court granted defendants' motion to dismiss for failure to state claim, on limitations grounds, and commissioner appealed.

The Supreme Court held that:

- Commissioner's claims for gross negligence, intentional infliction of emotional distress, negligent infliction of emotional distress, and civil conspiracy were governed by one-year limitations period for tort claims brought under Mississippi Tort Claims Act (MTCA);
- One-limitations period governing tort claims was not tolled;
- Commissioner's state constitutional claims were governed by general three-year limitations period for "[a]ll actions for which no other period of limitation is prescribed";
- Commissioner's causes of action for state constitutional violations accrued, and three-year limitations period governing claims began to run, on dates of arrests; and
- Commissioner's claim for malicious prosecution accrued, and one-year limitations period governing claim began to run, on date that charges against him were dismissed.

PUBLIC EMPLOYMENT - OHIO

[State ex rel. Casey v. Brown](#)

Supreme Court of Ohio - July 6, 2023 - N.E.3d - 2023 WL 4356527 - 2023-Ohio-2264

Captain of city fire department brought mandamus action against city officials, seeking promotion to rank of battalion chief, award of associated compensation and employment benefits, and awards of attorney fees and costs.

The Seventh District Court of Appeals dismissed captain's complaint. Captain appealed and filed motion to strike portions of officials' brief and motion for oral argument.

The Supreme Court held that:

- Documents attached to captain's complaint would not be stricken;
- Documents not attached to captain's complaint and officials' references to them would be stricken;
- Oral argument was unwarranted;
- Captain had adequate remedy by way of grievance procedure under collective bargaining agreement (CBA);
- Statutes governing promotion did not impact adequacy of remedy under CBA;
- Abandonment of captain's grievance by firefighters' union did not impact adequacy of remedy under CBA; and
- Grievance procedure under CBA was not rendered inadequate for not being complete, beneficial, or speedy.

PUBLIC EMPLOYMENT - TENNESSEE

[City of Memphis v. Edwards by and Through Edwards](#)

Supreme Court of Tennessee - July 5, 2023 - S.W.3d - 2023 WL 4414598

City filed petition for judicial review of administrative law judge's (ALJ) order concluding that city had wrongly denied firefighter's claim for benefits under city's on-the-job injury plan and its heart, hypertension, and lung program.

The Chancery Court granted motion filed by firefighter's widow, who had been substituted as party following firefighter's death during the administrative proceedings, to dismiss the petition for

judicial review due to city's failure to file the administrative record. City appealed. The Court of Appeals reversed and remanded. Widow filed application for permission to appeal.

The Supreme Court held that city's inadequate brief on appeal resulted in waiver of issue of whether trial court had erred in dismissing city's petition for judicial review.

City waived on appeal the issue of whether trial court had erred in dismissing city's petition for judicial review of administrative law judge's (ALJ) order concluding that city had wrongly denied firefighter's claim for benefits under city's on-the-job injury plan and its heart, hypertension, and lung program, where such issue was not designated by city as an issue in its appellate brief, and brief did not include argument on the issue that satisfied requirements of rule governing contents of an appellant's brief.

IMMUNITY - ALABAMA

[City of Orange Beach v. Boles](#)

Supreme Court of Alabama - June 16, 2023 - So.3d - 2023 WL 4038455

Property owner who had obtained building permits for multiple-level duplexes and a single-family dwelling brought action as to the duplexes against city and city's "chief building official," asserting claims for declaratory relief, injunctive, and monetary damages stemming from city's refusal to conduct a meter-release inspection until property owner returned a completed form listing information, including financial information, about subcontractors used.

The Circuit Court entered a preliminary injunction directing the city to conduct an electrical and meter-release inspection. Subsequently, city commenced its own action as to the single-family dwelling for a judgment declaring that its "chief building official" was authorized to require a building-permit holder to provide a completed subcontractor form for a permitted project and that the city was authorized to withhold scheduling meter-release inspections and/or a certificate of occupancy until the completed subcontractor form was provided.

Property owner filed counterclaims for injunctive relief, declaratory relief, and damages. The cases were consolidated on property owner's motion despite city's objection, and property owner was then permitted to demand a jury trial on his counterclaims.

After property owner settled his claims against city's "chief building official" and withdrew any claims for punitive damages, the Circuit Court entered judgment on a jury verdict for property owner. City appealed in each case, and the appeals were consolidated.

The Supreme Court held that the city had substantive immunity from property owner's claims.

City had substantive immunity from liability to property owner, who had obtained building permits for multiple-level duplexes and a single-family dwelling, in regard to its requirement that building-permit holders submit information, including financial information, about subcontractors before it would conduct the required meter-release inspection; the meter-release inspections were aimed at promoting public safety, and any resultant duty to perform the inspections was owed to the public at large rather than to any individual property owner.

EMINENT DOMAIN - GEORGIA

Kitchens v. Lincoln County

Court of Appeals of Georgia - June 26, 2023 - S.E.2d - 2023 WL 4170459

Land owners filed an action for a temporary and permanent injunction against county after county demanded they remove a gate that impeded access to a portion of a road that had previously been condemned by the federal government.

The Superior Court granted county's motion for summary judgment on the basis of sovereign immunity. Land owners appealed.

The Court of Appeals held that county's conduct amounted to a claim of inverse condemnation that waived its sovereign immunity.

County's conduct in threatening to remove or damage a gate on land owners' property to access a road to which it allegedly had no ownership interest created a condition that amounted to a claim of inverse condemnation that waived county's sovereign immunity and allowed land owners to seek injunctive relief; the disputed property had previously been condemned by the federal government and the county had not established title by prescription.

CONTRACTS - ILLINOIS

PML Development LLC v. Village of Hawthorn Woods

Supreme Court of Illinois - June 15, 2023 - N.E.3d - 2023 IL 128770 - 2023 WL 4003826

Developer brought action against village alleging breach of development agreement under which developer was authorized to fill and grade property in exchange for donating it to village, and village counterclaimed for breach of contract.

After a bench trial, the Circuit Court entered judgment for developer. Village appealed and developer cross-appealed. The Appellate Court affirmed in part, reversed in part, and vacated in part. Developer petitioned for leave to appeal, which was granted.

In a case of first impression, the Supreme Court held that:

- A non-breaching party's decision to continue performing after a material breach is a factual question reviewed under the manifest weight of the evidence standard;
- Record supported finding that developer elected to continue performing following village's material breach;
- Record supported finding that village elected to continue performing following developer's material breach;
- Village materially breached agreement via non-issuance of permit, imposition of noncontractual obligations, and interference with means and methods;
- Developer materially breached agreement via non-conveyance of property, non-funding of drawdown account, and failure to reconstruct road; and
- Each party had a viable breach of contract claim following material breaches by both parties but elections to continue.

POLITICAL SUBDIVISIONS - GEORGIA

[Files v. Housing Authority of City of Douglas](#)

Court of Appeals of Georgia - June 27, 2023 - S.E.2d - 2023 WL 4194717

Motorist filed a negligence and vicarious liability complaint against city housing authority and housing authority employee after motorist was injured in an automobile accident when his vehicle collided with city vehicle driven by employee.

The Superior Court granted housing authority summary judgment and motorist appealed.

The Court of Appeals held that city housing authority did not qualify as a State agency, department or instrumentality, and thus was not entitled to sovereign immunity.

City housing authority did not qualify as a State agency, department or instrumentality, and thus was not entitled to sovereign immunity in lawsuit filed against city housing authority and authority employee after motorist was injured when his vehicle was struck by city vehicle driven by authority employee; city housing authority was not indelibly intertwined with the State as it was created by a local entity and was governed primarily, if not wholly, by local authorities, its operation, functional purpose, and governance was to serve the citizens of city and nearby county, not the State, and there was no evidence that authority employees were connected to the State via the merit system, their retirement plans, or any other rules affecting State workers.

SCHOOL FINANCE - INDIANA

[Performance Services, Inc. v. Randolph Eastern School Corporation](#)

Supreme Court of Indiana - June 28, 2023 - N.E.3d - 2023 WL 4226265

School corporation brought declaratory judgment action seeking to void contract it entered into with wind turbine operator, and operator filed counterclaims for breach of contract and suit on account.

School corporation filed motion for summary judgment, and operator filed motion for partial summary judgment on its counterclaims. After a hearing, the Circuit Court granted school corporation's motion for summary judgment and denied operator's cross-motion for summary judgment. Operator appealed.

On petition to transfer, the Supreme Court held that contract constituted illegal investment by a school corporation under Home Rule Act and Public Investment Act and was void and unenforceable.

Contract in which school corporation agreed to make payments to wind turbine operator constituted illegal investment by a school corporation under Home Rule Act and Public Investment Act and was void and unenforceable, though operator argued school corporation agreed to make payments in exchange for tangible benefit of access to turbine and its data for educational purposes and did not "invest" any money; school corporation committed money to operator that it would use to sell power and renewable energy credits and then convert those sales into financial benefits for school corporation, tangible benefit of access to turbine did not preclude contract from constituting investment, and school corporation committed money both in exchange for access and in hopes of obtaining financial return.

EMINENT DOMAIN - KANSAS

Kansas Fire and Safety Equipment v. City of Topeka

Supreme Court of Kansas - June 30, 2023 - P.3d - 2023 WL 4278213

Multiple month-to-month tenants sued city for relocation benefits under Eminent Domain Procedure Act (EDPA) after they were forced to move once city bought property where they operated their businesses.

City filed motion for summary judgment. Tenants appealed. The District Court granted summary judgment to city. Tenants appealed. The Court of Appeals reversed and remanded. Tenants petitioned for review, which was granted. The Supreme Court affirmed decision of the Court of Appeals. On remand, city again sought summary judgment. The District Court granted summary judgment to city. Tenants appealed and city cross-appealed, and the Court of Appeals reversed and remanded with directions. The Supreme Court granted petitions for review.

The Supreme Court held that:

- Eminent Domain Procedure Act (EDPA) does not provide a private right of action;
- EDPA did not provide the district court with jurisdiction over tenants' claims for relocation expenses;
- Tenants' failure to pursue administrative remedy within the Kansas Relocation Assistance for Persons Displaced by Acquisition of Real Property Act (KRA) deprived the district court of subject matter jurisdiction; and
- Statute generally authorizing the court to review final judgments and orders of a political or taxing subdivision when it exercises judicial and quasi-judicial functions did not apply.

POLITICAL SUBDIVISIONS - LOUISIANA

Ojomo-Bakare v. Baton Rouge Community College

Court of Appeal of Louisiana, First Circuit - June 2, 2023 - So.3d - 2023 WL 3862305 - 2022-0970 (La.App. 1 Cir. 6/2/23)

Parents, individually and on behalf of their minor child, filed a petition for damages against community college, alleging that parent, a student at college, slipped and fell on campus as a result of an unknown substance causing her injury.

The District Court sustained college's declinatory exception raising objection of insufficiency of service of process and dismissed without prejudice. Parents appealed.

The Court of Appeal held that:

- Community college was a state agency, not a political subdivision, for purpose of determining which procedural rules governed service; and
- Parents timely requested service on the Board of Supervisors of the Louisiana Community and Technical Colleges System, the proper defendant.

Community college was a "state agency," not a political subdivision, for purpose of determining which procedural rules in the Louisiana Governmental Claims Act governing sufficiency of service applied to parents' slip-and-fall case against college individually and on behalf of their minor child; although statute establishing college called it an institution, that statute also provided that college would be under control, supervision, and management of the Board of Supervisors of Community and Technical Colleges, a state agency.

Parents timely requested service on the Board of Supervisors of the Louisiana Community and Technical Colleges System, the proper defendant in their slip-and-fall case against community college individually and on behalf of their minor child; although parents named college as original defendant and only requested service on college within 90 days of filing suit, parents 11 months later filed amending and supplemental petition, at which time the Board, identified as an agency of the state, was named as a defendant, triggering 90-day time period to request service of citation, and on same day, parents requested service of citation on the Board, the Attorney General, and the Office of Risk Management.

BONDS - MISSOURI

[Krupka v. Stifel Nicolaus & Co., Inc.](#)

United States District Court, E.D. Missouri, Eastern Division - July 5, 2023 - Slip Copy - 2023 WL 4350946

California Plaintiffs filed this putative class action in Missouri state court alleging that Missouri Defendant Stifel Nicolaus made negligent misrepresentations and was negligent in its underwriting of municipal bonds issued by the Illinois Finance Authority to fund low-income housing developments in Chicago.

Defendant removed the case to this Court under the Class Action Fairness Act and filed a motion for judgment on the pleadings.

Plaintiffs then moved to remand the case, arguing that their claims fall under CAFA's jurisdictional exception for actions related to securities. 28 U.S.C. § 1332(d)(9). Noting that the Eighth Circuit had not opined on the proper application of CAFA's securities exception, this Court followed other circuit and district court precedent and accordingly denied the motion and directed Plaintiffs to respond to Defendant's motion for judgment on the pleadings.

Plaintiffs then filed a petition for permission to appeal in the Eighth Circuit, during which the Court stayed the case pending a ruling by the appellate court. The Eighth Circuit summarily denied Plaintiffs' petition, after which the Court ordered Plaintiffs to file a response to Defendants motion for judgment on the pleadings by June 26, 2023. On that date, Plaintiffs filed the present motion to stay the case again pending their petition for writ of certiorari in the Supreme Court.

"The Court agrees with Defendant that further delay is not warranted here. Defendant's motion for judgment on the pleadings, which centrally asserts that Plaintiffs' claims are time-barred, has been pending for six months. Even accepting Plaintiffs' premise that Brady applies, in this Court's estimation their likelihood of success in the Supreme Court is tenuous. Further, the Court fails to see any material prejudice they would suffer from filing a responsive brief, particularly considering the resources they have expended seeking interlocutory appeals. In contrast, Defendant is prejudiced by the ongoing pendency of this lawsuit without a threshold ruling on its viability. Additionally, the Court finds that any further delays in this case would undermine the interests of judicial efficiency. The Court will therefore deny Plaintiffs' motion to stay the case while they await a ruling from the Supreme Court."

EMINENT DOMAIN - OKLAHOMA

Childers v. Arrowood

Supreme Court of Oklahoma - June 20, 2023 - P.3d - 2023 WL 4069005 - 2023 OK 74

Property owners filed condemnation action against neighbors, in order to obtain utility easement, under statute granting private party right of exercise of eminent domain for private ways of necessity.

The District Court granted easement, and neighbors appealed. The Court of Civil Appeals affirmed. Petition for certiorari was granted.

The Supreme Court held that:

- Property owners were not required to prove elements of common law easement by necessity in order to obtain utility easement under statute;
- Statute granting private person right to exercise of eminent domain for private ways of necessity did not require proof of public purpose for taking; and
- As matter of first impression, “private ways of necessity,” within meaning of statute that granted private landowner right of exercise of eminent domain for private ways of necessity, included access to utilities.

Property owners were not required to prove elements of common law easement by necessity in order to obtain utility easement over neighbors’ land, in condemnation action against neighbors under statute granting private party right of exercise of eminent domain for private ways of necessity.

“Private ways of necessity,” within meaning of statute that granted private landowner right of exercise of eminent domain for private ways of necessity, was not limited in scope to roadway necessary for ingress and egress to and from landlocked property, but encompassed access to utilities for effective and beneficial use of owners’ land in order to build residence on property.

Under the statute granting a private landowner the power of eminent domain for “private ways of necessity,” the issue of what is necessary to the effective and beneficial use of the property depends on the nature of the property.

“Necessary” rights, for purposes of statute granting private landowner right of exercise of eminent domain for “private ways of necessity” are not limited to those essential to enjoyment of owner’s property, but include those which are reasonably required to make effective use of property; what is necessary depends on nature and location of property, and may change over time.

ZONING & PLANNING - SOUTH CAROLINA

Ani Creation, Inc. v. City of Myrtle Beach Board of Zoning Appeals

Supreme Court of South Carolina - June 28, 2023 - S.E.2d - 2023 WL 4221865

Operators of smoke shops and tobacco stores petitioned for review of decision of city board of zoning appeals denying operators’ constitutional challenges to zoning overlay ordinance that prohibited operation of smoke shops and tobacco stores, among others, in city’s historic downtown.

The Circuit Court affirmed. Store operators appealed.

On rehearing, the Supreme Court held that:

- Two readings of ordinance were not so different that third reading was required prior to enactment of ordinance;
- As matter of first impression, creation of municipal zoning overlay district did not constitute impermissible reverse spot zoning;
- Even assuming that municipal zoning overlay district constituted spot zoning, any such spot zoning was permissible;
- Boundaries of zoning overlay district had a rational basis and thus did not violate store operators' equal protection rights;
- Ordinance did not violate store operators' due process rights due to failure to explicitly provide for a hearing for an affected vendor;
- Operators failed to establish that ordinance constituted an unconstitutional taking; and
- Ordinance was not preempted by state criminal laws.

IMMUNITY - TEXAS

[City of Houston v. Green](#)

Supreme Court of Texas - June 30, 2023 - S.W.3d - 2023 WL 4278246

Motorist brought action against city seeking to hold it vicariously liable for police officer's alleged negligence and independently liable for negligently hiring, training, and supervising officer following motor vehicle accident involving officer while he was responding to an emergency call.

The 133rd District Court, Harris County, denied city's motion for summary judgment alleging the Tort Claims Act did not waive city's governmental immunity. City appealed. The Houston Court of Appeals, Fourteenth District, affirmed. City petitioned for review, which was granted.

The Supreme Court held that officer did not act with reckless disregard when accident occurred, and thus, emergency exception to waiver of governmental immunity under Tort Claims Act applied.

Police officer did not act with reckless disregard for safety of others when he proceeded through red light into intersection while responding to emergency call and allegedly caused motor vehicle accident, and thus, emergency exception to waiver of governmental immunity under Tort Claims Act applied to city in motorist's personal injury claim; motorist provided no evidence to contradict that officer was responding to emergency call involving armed suspect, that officer activated overhead emergency lights, that officer averaged 35 to 40 miles per hour, that officer at least slowed his speed before proceeding through each intersection, that officer intermittently activated his audible siren, that other vehicles noticed officer and stopped, that those vehicles blocked officers view of the lane motorist was in, and that motorist was traveling in the dark without headlights.

POLITICAL SUBDIVISIONS - TEXAS

[CPS Energy v. Electric Reliability Council of Texas](#)

Supreme Court of Texas - June 23, 2023 - S.W.3d - 2023 WL 4140460

Municipally owned electric utility brought action against Electric Reliability Council of Texas (ERCOT) and ERCOT's former chief executive officer, alleging breach of contract, negligence, gross negligence, negligence per se, breach of fiduciary duty, and violations of Texas Constitution.

The 285th District Court denied ERCOT's plea to the jurisdiction. ERCOT and former chief executive

officer appealed, and the San Antonio Court of Appeals reversed. Utility petitioned for review, which was granted.

In second proceeding, power company brought action against ERCOT for fraud, negligent misrepresentation, and breach of fiduciary duty, alleging that ERCOT's electricity capacity, demand, and reserves reports misled power company to invest \$2.2 billion in building new power plants. ERCOT filed plea to the jurisdiction.

The 15th District Court denied plea. ERCOT filed interlocutory appeal and alternatively filed petition for writ of mandamus. The Dallas Court of Appeals consolidated cases, dismissed interlocutory appeal for want of jurisdiction, and granted mandamus petition.

Power company filed petition for writ of mandamus in the Supreme Court, and ERCOT filed conditional petition for review, both challenging the Court of Appeals' decision.

The Supreme Court dismissed petitions as moot. On remand, the District Court granted ERCOT's plea to the jurisdiction based on sovereign immunity. Power company appealed, and the Court of Appeals reversed and remanded. ERCOT filed petition for review, which was granted.

The Supreme Court held that:

- ERCOT was an "organ of government" within the meaning of the definition of "governmental unit" under the Texas Tort Claims Act;
- ERCOT derived its status and authority from statute, as required to fall within the definition of "governmental unit" under the Texas Tort Claims Act;
- Utilities Code provision constituted a pervasive regulatory scheme which imparted to the Public Utilities Commission (PUC) exclusive jurisdiction over ERCOT;
- Company's contention that ERCOT failed to properly perform Public Utility Regulatory Act (PURA) requirement that it publish capacity, demand, and reserves reports (CDRs) by issuing fraudulent CDRs fell within the PUC's exclusive jurisdiction;
- Allegations ERCOT failed to properly implement protocols to ensure the integrity of its system during winter storm and failed to take reasonable precautions to meet its load projections or corrective action when projections showed insufficient capacity came with PUC's exclusive jurisdiction; and
- ERCOT has sovereign immunity as an arm of the State.

A private, non-governmental entity can qualify as a "governmental unit" under the Texas Tort Claims Act, but only if (1) it is an institution, agency, or organ of government; and (2) it derives its status and authority as such from the Texas Constitution or statutes.

An "organ of government," which qualifies as a "governmental unit" under the Texas Tort Claims Act, is an entity that operates as part of a larger governmental system and performs a uniquely governmental function.

Electric Reliability Council of Texas (ERCOT) was an "organ of government" within the meaning of the definition of "governmental unit" under the Texas Tort Claims Act; ERCOT was part of the state's broader electricity-regulation system under Public Utility Regulatory Act (PURA), ERCOT performed the uniquely governmental function of utilities regulation under the direct oversight of the Public Utilities Commission (PUC) and was directly responsible and accountable to the PUC, and ERCOT exercised delegated authority from the PUC to adopt and enforce rules relating to the reliability of the regional electrical network, and enforced operating standards and established and oversaw payment procedures for transactions by market participants within the electrical network.

Electric Reliability Council of Texas (ERCOT) derived its status and authority from statute, as required to fall within the definition of “governmental unit” under the Texas Tort Claims Act, even though it was a private, nonprofit corporation; ERCOT was the independent service operator (ISO) established by the Public Utilities Commission (PUC) as required under the Public Utility Regulatory Act (PURA), such that its “status” as the ISO for the Texas power region and its “authority” to act in that capacity derived directly from PURA.

Utilities Code provision constituted a pervasive regulatory scheme which imparted to the Public Utilities Commission (PUC) exclusive jurisdiction over the Electric Reliability Council of Texas (ERCOT), as the independent system operator (ISO) certified for the Texas power region; Code granted PUC extensive and ultimate authority over an ISO which was directly responsible and accountable to the PUC, the PUC had complete authority to oversee and investigate ERCOT’s finances, budget, and operations to ensure adequate performance of ERCOT’s functions and duties, PUC had authority over ERCOT’s board makeup, its bylaws and protocols, and its ability to charge fees to its members, and PUC had adjudicatory power over ERCOT as well, and had the power to take appropriate action for ERCOT’s failure to adequately perform its functions or duties.

Power company’s contention that Electric Reliability Council of Texas (ERCOT) failed to properly perform Public Utility Regulatory Act (PURA) requirement that it publish capacity, demand, and reserves reports (CDRs) by issuing fraudulent CDRs that inaccurately reported the capability of existing electric generation resources to meet projected demand in the Texas power region fell within the exclusive jurisdiction of the Public Utilities Commission (PUC), even if PUC lacked authority to determine whether ERCOT complied with the relevant common-law standards or to provide a remedy; the proper performance of ERCOT’s operations, functions, and duties was within PUC’s “complete” authority over ERCOT, and PUC was statutorily authorized to hold ERCOT accountable if ERCOT failed to properly perform.

Electric utility’s allegations that Electric Reliability Council of Texas (ERCOT) failed to properly implement protocols to ensure the integrity of its system during winter storm, failed to take reasonable precautions to meet its load projections or corrective action when projections showed insufficient capacity, and failed to correct “an acknowledged \$16 billion error,” and electric utility’s requests for exemption from ERCOT’s short-pay and default-uplift procedures, came with exclusive jurisdiction of the Public Utilities Commission (PUC); issues implicated ERCOT’s operations and billing, which fell under the PUC’s “complete authority,” PUC had delegated authority to ERCOT to oversee transaction settlement payment procedures, and PUC was responsible under statute for ensuring that ERCOT “adequately performs [its] functions and duties.”

Fact that electric utility alleged an unconstitutional taking claim against Electric Reliability Council of Texas (ERCOT) based on short-pay and default-uplift procedures for charges relating to winter storm default did not exempt claim from exhaustion of administrative remedies doctrine, as a decision from the Public Utilities Commission (PUC) on the underlying issues could moot the constitutional claims; if the PUC ordered adjustment of the alleged overcharge pricing or resettlement of ERCOT’s payments to utility, it would cure the alleged violations and obviate the need to assert the constitutional claims in court, and, even if it did not, utility was not precluded from pursuing its constitutional claims after exhaustion or from seeking judicial review of any PUC rulings on issues underlying those claims.

Public Utility Regulatory Act (PURA) evinced a clear legislative intent to vest Electric Reliability Council of Texas (ERCOT) with the nature, purposes, and powers of an arm of the State government such that ERCOT had sovereign immunity; Public Utilities Commission (PUC) certified ERCOT as the independent service operator (ISO) required by PURA, and had authority over ERCOT’s operations, governance, finances, and budget, ERCOT was directly responsible to the PUC, which could

decertify ERCOT if ERCOT failed to adequately perform, ERCOT was subject to requirements typically reserved for state entities, including review under the Texas Sunset Act and open meetings requirements, and ERCOT's regulatory role over electric utilities was uniquely governmental.

Political, pecuniary, and pragmatic policies underlying immunity doctrines supported conclusion that Electric Reliability Council of Texas (ERCOT) had sovereign immunity; even though ERCOT was not funded with tax dollars, any damages payments would nevertheless come from the state and the public, the Public Utilities Commission (PUC) had authority over ERCOT's finances, including its ability to raise money and how it spent money, statute required ERCOT transfer its assets to a successor organization if PUC decertified ERCOT, and judicial imposition of a damages award against ERCOT would run afoul of the Legislature's determination that the PUC alone had "complete authority" over ERCOT's finances.

ZONING & PLANNING - WASHINGTON

[City of Olympia v. Western Washington Growth Management Hearings Board](#)

Court of Appeals of Washington, Division 1 - June 26, 2023 - P.3d - 2023 WL 4171044

City petitioned for review of denial by Western Washington Growth Management Hearings Board (Board) of city's motion to dismiss advocacy group's administrative appeal of hearing examiner's decision dismissing group's administrative challenge, in which group alleged that city failed to properly consider environmental impacts, to city's revisions to housing-related provisions in municipal code.

The Superior Court ruled that Board erred and that city was entitled to dismissal of group's administrative appeal and of proceeding. Advocacy group appealed.

The Court of Appeals held that:

- Amendments to statute governing city planning that precluded administrative and judicial review of certain actions taken by a city to increase its residential building capacity applied to group's administrative challenge because amendments were made before a final decision on group's challenge, and
- Those amendments barred group's administrative challenge.

BONDS - ARIZONA

[Crossfirst Bank v. Vieste SPE LLC](#)

United States District Court, D. Arizona - April 25, 2023 - Slip Copy - 2023 WL 3078656

Plaintiffs' purchased \$28,935,000 of industrial development bonds on April 17, 2013. Plaintiffs subsequently brought a complaint alleging aiding and abetting fraud, negligent misrepresentation, and common law fraud.

Plaintiffs sought class certification.

The District Court held that:

- The numerosity requirement is satisfied when the putative class consists of at least 40 members; and

- Plaintiffs, while alleging a class of at least 200 members, were unable to prove by a preponderance of the evidence that the putative class exceeded 7 members.

“Plaintiffs have not proven by a preponderance of the evidence that the putative class size exceeds 7 members, much less the speculation that the putative class exceeds 200 members. Because Plaintiffs have not established numerosity, the Court need not address the other Rule 23 requirements and will deny class certification.”

ZONING & PLANNING - CALIFORNIA

[Lucas v. City of Pomona](#)

Court of Appeal, Second District, Division 8, California - June 13, 2023 - Cal.Rptr.3d - 2023 WL 3962513

Property owner filed a petition for writ of mandate to overturn city’s creation of overlay district designating areas for permissible commercial cannabis activities, alleging that the city made the decision improperly by failing to conduct a new environmental impact review (EIR).

Following a hearing, the Superior Court denied the petition and entered judgment in favor of the city. Property owner appealed.

The Court of Appeal held that:

- Substantial evidence standard rather than a fair evidence standard applied;
- Substantial evidence supported city’s determination that the proposed commercial cannabis activities were exempt from CEQA as consistent with existing land uses and density covered by previous EIR;
- Substantial evidence supported city’s determination that overlay district had no project-specific effects requiring a new EIR; and
- Substantial evidence supported city’s determination that overlay district would not create environmental impacts beyond those identified in previous EIR.

IMMUNITY - CALIFORNIA

[Leon v. County of Riverside](#)

Supreme Court of California - June 22, 2023 - P.3d - 2023 WL 4112144

Widow of victim who was fatally shot by his neighbor brought action against county, alleging negligent infliction of emotional distress based on failure of county sheriff’s deputies to promptly cover victim’s body, with genitals exposed, or remove the body from the scene while deputies investigated the shooting and searched for the shooter.

The Superior Court granted summary judgment in favor of county. Widow appealed. The Court of Appeal affirmed and widow appealed.

The Supreme Court of California holds that:

- Provision of Government Claims Act immunizing public employees from claims of injury caused by wrongful prosecution expands the scope of immunity to include any claim of injury caused by wrongful prosecution, even if prosecution is merely negligent;

- Provision of Government Claims Act protects public employees from liability only for initiation or prosecution of official proceeding; disapproving *Amylou R. v. County of Riverside*, 28 Cal.App.4th 1205, 34 Cal.Rptr.2d 319; *Citizens Capital Corp. v. Spohn*, 133 Cal.App.3d 887, 184 Cal.Rptr. 269; *Jenkins v. County of Orange*, 212 Cal.App.3d 278, 260 Cal.Rptr. 645; *Baughman v. State of California*, 38 Cal.App.4th 182, 45 Cal.Rptr.2d 82; *Strong v. State of California*, 201 Cal.App.4th 1439, 137 Cal.Rptr.3d 249; *Doe v. State of California*, 8 Cal.App.5th 832, 214 Cal.Rptr.3d 391; *County of Los Angeles v. Superior Court*, 181 Cal.App.4th 218, 104 Cal.Rptr.3d 230; *Richardson-Tunnell v. Schools Ins. Program for Employees (SIPE)*, 157 Cal.App.4th 1056, 69 Cal.Rptr.3d 176; *Gillan v. City of San Marino*, 147 Cal.App.4th 1033, 55 Cal.Rptr.3d 158; *Ingram v. Flippo*, 74 Cal.App.4th 1280, 89 Cal.Rptr.2d 60; *Paterson v. City of Los Angeles*, 174 Cal.App.4th 1393, 95 Cal.Rptr.3d 333; *Javor v. Taggart*, 98 Cal.App.4th 795, 120 Cal.Rptr.2d 174; and
- Provision of Government Claims Act did not apply and, thus, did not immunize county from widow's negligent infliction of emotional distress claim.

EMINENT DOMAIN - FEDERAL

[Ideker Farms, Inc. v. United States](#)

United States Court of Appeals, Federal Circuit - June 16, 2023 - F.4th - 2023 WL 4035816

Farmers, landowners, and business owners brought takings action against United States, claiming their land was taken without just compensation based on actions by the Army Corps of Engineers to restore the Missouri River to a more natural state, which resulted in flooding of the plaintiffs' properties.

Following first phase of trial on liability, the Court of Federal Claims issued ruling for plaintiffs in part and for government in part. Both parties moved for reconsideration, and the motions were denied. Following a second phase of trial regarding three representative individual properties, the Court found that a taking of a permanent flowage easement had occurred and awarded damages. The Government appealed, and the plaintiffs cross-appealed.

The Court of Appeals held that:

- Stabilization doctrine applied;
- Takings claims did not accrue at time of initial flooding;
- Date which court selected as date on which takings claims accrued was not arbitrary on grounds it was not related to any physical event;
- Permanent recurring physical occupation by floodwaters constituted a per se taking;
- Baseline for determining whether changes to River caused flooding was to be measured from the time of the changes returning the river to its more natural state, rather than from earlier changes intended to reduce River flooding;
- Relative benefits doctrine did not apply; and
- Crops and other personal property destroyed by flooding were compensable.

Stabilization doctrine applied to determination of when farmers', landowners', and business owners' takings claims accrued following actions by the Army Corps of Engineers on the Missouri River which resulted in periodic flooding, as plaintiffs did not bring a tort claim for a single flood, but rather the events fixing the Government's liability were recurring floodings over several years that rose to a taking of a permanent flowage easement.

Farmers', landowners', and business owners' takings claims, following actions by the Army Corps of Engineers on the Missouri River which resulted in periodic flooding, did not stabilize, and thus

statute of limitations did not begin to accrue, at time of first flooding of their properties after Corps made initial changes to River, where Corps continued to make changes for an additional seven years, and modifications to the River's water flow and its effects were ongoing, dynamic, and complex.

Farmers, landowners, and business owners did not know nor reasonably should have known from initial flooding that changes to the Missouri River by the Army Corps of Engineers resulted in a taking of a permanent flowage easement on their properties, and thus takings claim did not accrue at time of initial flooding; single flood did not indicate any pattern of new and recurring flooding that would result in a permanent taking, the cause and effects of the recurring flooding were difficult to ascertain given the complex nature of the hydrology of the River, and some plaintiffs did not even experience the initial flooding.

Date which court selected as date on which farmers', landowners', and business owners' takings claims accrued following actions by the Army Corps of Engineers on the Missouri River which resulted in periodic flooding was not arbitrary on grounds it was not related to any physical event; plaintiffs did not learn of the full scope of the River and system changes and their effects on flooding until several years of recurring flooding, at that point plaintiffs consulted experts to confirm their suspicions about the cause of the flooding and filed suit within a few months of confirmation from those experts, and such causation and damages knowledge derived from expert opinions based on analysis of recurrent flooding during the prior seven year period.

Permanent recurring physical occupation of farmers', landowners', and business owners' land by floodwaters due to changes to the Missouri River by the Army Corps of Engineers constituted a per se taking; fact that the floodwaters might come and go during the year and were intermittent did not negate the existence of a taking, but bore only on the amount of compensation.

Baseline for determining whether changes to Missouri River by Army Corps of Engineers, in order to restore River to a more natural state, caused flooding was to be measured from the time of the changes returning the river to its more natural state, rather than from earlier changes under the Flood Control Act (FCA) which were intended to reduce River flooding; a reasonable property owner, at the time the Government took a permanent flowage easement, would have understood the later changes to not have been contemplated as part of the flood-control projects completed pursuant to the FCA, and such later changes, which increased the risk of flooding, were antithetical to the original FCA priorities of decreasing such risk.

Relative benefits doctrine did not apply in takings action by farmers, landowners, and business owners after the Army Corps of Engineers made changes to the Missouri River in order to return the river to a more natural state, which resulted in permanent recurring flooding of the plaintiffs' properties, even if original flood control projects being undone by the Corps had provided a benefit to the plaintiffs; original flood control project and later changes were different projects under different programs spread out over decades and directed to different purposes, and plaintiffs did not in any benefit from the recent changes, which were directed to mitigating environmental and wildlife degradation.

Crops and other personal property destroyed by flooding after Army Corps of Engineers made changes to the Missouri River in order to restore it to a more natural state were not merely an indirect result of the taking of a flowage easement, but rather were compensable under the Fifth Amendment, as government-induced periodic flooding directly took a permanent flowage easement on plaintiffs' land and also destroyed their crops and personal property.

Court of Appeals would remand takings action for district court to reconsider whether heavy

flooding of Missouri River in one particular year was the result of changes made by the Army Corps of Engineers to return the river to a more natural state; even if decision that year to release water was not part of the single purpose of protecting endangered species, changes made by the Corps could have impacted the severity of the flood damage, and the court also failed to consider, despite the record rainfall, whether the Corps' actions increased the severity or duration of the flooding compared to what was attributable to record rainfall.

ANNEXATION - GEORGIA

[City of Tucker v. City of Clarkston](#)

Court of Appeals of Georgia - June 15, 2023 - S.E.2d - 2023 WL 4009762

City brought a petition for declaratory judgment and injunctive relief against a neighboring city, county, county housing authority, and a developer, alleging that defendants had illegally annexed a 14-acre parcel, ownership of which was acquired by developer, which included four acres of land that was incorporated into the plaintiff city.

The trial court granted defendants' motion to dismiss, and plaintiff city appealed.

The Court of Appeals held that action was mooted when neighboring city de-annexed the contested four acres and developer delivered written request asking plaintiff city to annex that parcel.

City's petition for declaratory judgment and injunctive relief against neighboring city, county, county housing authority, and a developer, for allegedly illegally annexing a 14-acre parcel, ownership of which was acquired by developer, which included four acres of land that was incorporated into the petitioning city, was moot after neighboring city divided the 14-acre parcel into two parts and de-annexed the contested four acres, and developer delivered written request asking petitioning city to annex the four-acre parcel; neighboring city and developer took all necessary steps to return the four acres of incorporated land to petitioning city, and even if entire annexation was unlawful, petitioning city could only obtain relief over the four acres that fell within its borders.

ZONING & PLANNING - IDAHO

[Reese v. City of Blackfoot](#)

Supreme Court of Idaho, Boise, February 2023 Term - June 13, 2023 - P.3d - 2023 WL 3959031

Neighbors filed petition for judicial review of city council's approval of landowners' application for planned unit development in "residential ranchette" zoning district.

The Seventh Judicial District Court dismissed petition, and neighbors appealed.

The Supreme Court held that neighbors failed to establish that city council's approval of application for planned unit development prejudiced a substantial right, even if city had violated its own code by approving the development.

Neighbors failed to establish that city council's approval of application for planned unit development prejudiced a substantial right, and thus court would affirm city council's decision even if city had violated its own code by approving the development; neighbors relied on minutes from hearing

which described testimony focused on traffic, density of homes, parking availability, and other concerns, but such conclusory statements of harm did not establish prejudice in light of other factors limiting the potential harm, and neighbors failed to establish how an increase in the number of houses would negatively impact the property values in an already residential area.

Neighbors' appeal of city council's decision approving planned unit development, although unsuccessful, was not frivolous, unreasonable, or without foundation, and thus did not warrant award of attorney's fees; while city had violated its own code by approving the development, neighbors failed to show prejudice.

EMINENT DOMAIN - ILLINOIS

Pardilla v. Village of Hoffman Estates

Appellate Court of Illinois, First District, Fourth Division - May 25, 2023 - N.E.3d - 2023 IL App (1st) 211580 - 2023 WL 3636671

Landowners brought action against village, asserting claims for inverse condemnation, ejectment, and trespass and sought a temporary restraining order and preliminary injunction to order village to remove from their property fencing and materials used to rebuild a sanitary lift station.

After preliminary injunction was granted, owners filed petition for rule to show cause, alleging village continued to perform construction work in violation of the injunction.

The Circuit Court issued a rule to show cause, and following a hearing, found village in indirect civil contempt of the injunction, ordered village to pay fines for any future violations of the injunction, and awarded attorney's fees to landowners. Village appealed.

The Appellate Court held that:

- Term in preliminary injunction was not definite, clear, nor precise, and thus was unenforceable, and
- Landowners' offer of proof was not sufficient to satisfy landowners' burden of making prima facie showing that village violated preliminary injunction.

Orders relating to preliminary injunction prohibiting village from interfering with landowners' use of their property, finding that village was in contempt for violating injunction, and award of attorney's fees to landowners in connection with contempt proceedings were appealable, and thus, Appellate Court had jurisdiction to review orders, though injunction was moot as village completed what it was ordered to do and no longer sought to do what injunction prohibited; injunction was reviewable since village was found in contempt for violating injunction and it appealed contempt finding, and award of attorney's fees was a penalty imposed because of contempt finding, making contempt order reviewable.

Term in preliminary injunction prohibiting village from interfering with landowners' use of their property while also providing that village could appropriately exercise its easement rights over landowners' property to rebuild a sanitary lift station on adjoining property was not definite, clear, nor precise, and thus term of the injunction was unenforceable; order gave little more direction than a general command to obey the law, it failed to specify what village could or could not do, and it laid a foundation for inevitable future disputes.

Landowners' offer of proof, in which their attorney presented photographs and stated landowner

would testify that village was doing construction work on his property, was not sufficient to satisfy landowners' burden of making prima facie showing that village violated previously issued preliminary injunction requiring village to remove fencing and materials from landowners' property and prohibiting village from interfering with their property rights, and thus burden of proof did not shift to village in proceedings brought by landowners to hold village in contempt for violating the preliminary injunction; offer of proof was not called for when parties appeared on petition for rule to show cause since court had not excluded any evidence, rather, court essentially permitted attorney to make oral presentation of landowners' verified petition.

REAL PROPERTY CONVEYANCE - MARYLAND

[Board of County Commissioners of St. Mary's County v. Aiken](#)

Supreme Court of Maryland - June 20, 2023 - A.3d - 2023 WL 4072671

Landowners brought action against board of county commissioners for declaratory judgment, alleging that they owned disputed property lying to the east of their parcels.

County counterclaimed for declaratory judgment that it owned disputed property in fee simple, alleging that grantor, who was landowners' predecessor in interest, conveyed land to State Roads Commission and that Commission conveyed land to county.

Southern neighbors intervened, asserting claims for declaratory judgment, injunctive relief, and interference with easement against landowners and county, as well as claim to quiet title against landowners and inverse-condemnation claim against county. Parties all moved for summary judgment.

The Circuit Court granted county's motion, granted landowners' motion as to neighbors' claims for injunctive relief interference with easement, and otherwise denied motions. Landowners appealed, and neighbors cross appealed. The Court of Special Appeals affirmed in part, vacated in part, and remanded. County filed petition for writ of certiorari, which was granted.

The Supreme Court held that:

- Deed from landowners' predecessor to the State conveyed the entire interest in the disputed property in fee simple absolute;
- Deed and referenced plat were sufficient to establish predecessor's offer to dedicate road to public use; State accepted offer to dedicate property to public use by accepting the conveyance and recording the deed;
- Deed from the State to the county conveyed property as a public road; and
- County's adoption of ordinance closing road both effectively confirmed an acceptance of the State's offer to dedicate and effectively served as public notice of road closure, and was effective to close the road.

MUNICIPAL CORPORATIONS - MINNESOTA

[Zimmer v. Pine Lake Township](#)

Court of Appeals of Minnesota - May 22, 2023 - N.W.2d - 2023 WL 3574229

Property owners brought action against township for declaration that road abutting property was

owned and maintained by township and for writ of mandamus requiring township to repair and maintain road as public roadway.

Township filed motion to dismiss, which the District Court granted. On appeal, the Court of Appeals reversed and remanded. On remand, owners filed amended complaint, and the trial court denied owners' motion for summary judgment, and granted township's motion for summary judgment. Owners appealed.

The Court of Appeals held that township was not obligated to open and maintain road.

Township was not obligated to open and maintain the road abutting property owners' property, in property owners' action against township for declaration that the road was owned and maintained by township and for writ of mandamus requiring township to repair and maintain the road, alleging that the road had been used by the public and been "constructively dedicated" as a public road by a deed executed by the fee owners of the road.

PUBLIC RECORDS - NEW JERSEY

[Gannett Satellite Information Network, LLC v. Township of Neptune](#)

Supreme Court of New Jersey - June 20, 2023 - A.3d - 2023 WL 4066414

Newspaper publisher, which had requested copies of internal affairs file of former township police sergeant pursuant to both common law and Open Public Records Act (OPRA), brought action against township after it denied request, seeking to compel township to disclose records.

The Superior Court determined that records were exempt from disclosure under OPRA, but that publisher was entitled to a redacted version of the records under common law, and awarded publisher attorney's fees. Township appealed and publisher cross-appealed. The Superior Court, Appellate Division, affirmed in part and reversed in part. The Supreme Court granted publisher's petition for certification, limited to question of attorneys' fees.

The Supreme Court held that trial court was not authorized to award publisher attorney fees for prevailing on its common law right to access records claim.

Following its determination that newspaper publisher had a common law right of access to internal affairs file of former township police sergeant convicted of manslaughter, and that township should not have withheld the file, trial court was not authorized to award publisher attorney fees under any exception to American Rule, which provided that each party pay their own fees, even if Open Public Records Act (OPRA) authorized fees for violations of its provisions; Act did not extend to allow fees for common law claims, no other statute or rule provided for fees, the parties did not have a contract providing for fees, and case did not involve fiduciary malfeasance.

POLITICAL SUBDIVISIONS - WEST VIRGINIA

[Edward S. v. Raleigh County Housing Authority](#)

Supreme Court of Appeals of West Virginia - June 8, 2023 - S.E.2d - 2023 WL 3881268

Tenant whose rent was subsidized with a Section 8 housing voucher obtained through county housing authority, as administrator of children's estates, next friend and guardian to injured child,

and on his own behalf, brought action against authority and putative owners of rental house for wrongful deaths of his children and negligence after house caught fire.

The Circuit Court granted summary judgment in favor of authority on qualified immunity grounds. Tenant appealed.

The Supreme Court of Appeals held that county housing authority was “political subdivision,” as defined in Tort Claims Act.

County housing authority was a “political subdivision,” as defined in Tort Claims Act, although state created housing authority in county with the passage of the Housing Act; housing authority could not transact any business or exercise its powers until or unless county, by proper resolution, determined that there was need for an authority, and, when county commission passed such resolution, authority became established and authorized to transact business and exercise its powers under the Housing Act, rendering authority a public corporation established by county commission under the Housing Act and a “political subdivision,” as that term was defined in Tort Claims Act.

MUNICIPAL GOVERNANCE - CALIFORNIA

[San Bernardino County Board of Supervisors v. Monell](#)

Court of Appeal, Fourth District, Division 2, California - May 25, 2023 - Cal.Rptr.3d - 2023 WL 3643245 - 2023 Daily Journal D.A.R. 4954

County board of supervisors filed a combined complaint and writ petition in which board sought a declaration that voter-approved initiative that amended county charter to limit a supervisor to a single four-year term and to limit a supervisor’s compensation to \$5,000 a month was invalid and an injunction and writ of mandate preventing initiative’s enforcement.

After a trial as a writ petition, the Superior Court entered a ruling that granted the mandate petition and struck down the initiative in its entirety. Proponent of initiative appealed, and board cross-appealed.

The Court of Appeal held that:

- Passage of a superseding measure did not render the appeal and cross-appeal moot;
- Regulatory interests justified the term limit, which was not a severe restriction on rights under the First and Fourteenth Amendments;
- On its face, the compensation cap did not violate federal and state minimum-wage laws;
- Any conflict between the compensation cap and county ordinance that required elected county officials to be provided with certain benefits was not a basis to find that the compensation cap was invalid;
- The terms of the newly elected supervisors began on the date provided by the county charter, i.e., the first Monday in December following the election;
- Pursuant to state statute, initiative went into effect ten days after the vote was declared by the board;
- Term limit did not kick out of office those supervisors who were already serving a term beyond their first time, but it would bar them from serving another term later; and
- Compensation cap could not apply to supervisors elected at the same election that approved the initiative.

WATER LAW - CALIFORNIA

Los Angeles Waterkeeper v. State Water Resources Control Board

Court of Appeal, Second District, Division 1, California - June 2, 2023 - Cal.Rptr.3d - 2023 WL 3774587

Environmental-advocacy organization filed petitions for writs of mandate against state water resources control board and regional water quality control board, alleging that boards violated duty under California Constitution and Water Code by permitting four publicly owned treatment works (POTWs) to discharge treated wastewater without evaluating whether quantities discharged were reasonable or whether treated wastewater could be recycled or otherwise put to better use, and that regional board issued permits without making findings required under California Environmental Quality Act (CEQA).

Boards demurred. The Superior Court sustained demurrer as to regional board but overruled demurrer as to state board. Following bench trial, the Superior Court entered judgment for organization, issued writs of mandate, and awarded organization attorney fees. State board appealed and organization cross-appealed.

The Court of Appeal held that:

- Regional board had no duty to prevent purportedly unreasonable discharge of treated wastewater;
- Assuming state board had duty to prevent waste and unreasonable use of water, organization failed to allege that state board acted in derogation of duty and thus failed to state claim for mandamus; and
- CEQA did not require regional board to make findings regarding environmental impacts of wastewater discharge permits and whether there were feasible alternatives or mitigation measures.

Regional water quality control board had no duty, under section of California Constitution concerning conservation of water, to prevent purportedly unreasonable discharge of treated wastewater from four publicly owned treatment works (POTWs); regional board's role in state water law was to regulate water quality, and although Water Code broadly delegated to state water resources control board "the adjudicatory and regulatory functions of the state in the field of water resources" and power to "take all appropriate proceedings or actions...to prevent waste [and] unreasonable use" of water, nothing in Water Code granted regional board equivalent powers or suggested that regional board's role in regulating water quality included regulation of wasteful or unreasonable use of water.

CHARTER SCHOOLS - WEST VIRGINIA

Blair v. Brunett

Supreme Court of Appeals of West Virginia - June 8, 2023 - S.E.2d - 2023 WL 3881272

Public school teachers filed a lawsuit against Governor of West Virginia, alleging that allowing the West Virginia Professional Charter School Board (PCSB) to create public charter schools without a majority vote of the citizens where the schools would be located violated the West Virginia Constitution, and seeking a writ of mandamus and declaratory relief or, in the alternative, injunctive relief.

The Circuit Court granted teachers' motion for a preliminary injunction and denied Governor's motion to dismiss. Governor brought an interlocutory appeal.

The Supreme Court of Appeals held that:

- Teachers' alleged injury of being deprived of their constitutional right to vote was not causally connected to Governor's actions, as required for standing;
- Teachers' alleged injury was not redressable through injunctive relief against Governor, as required for standing; and
- Preliminary injunction issued against Governor by trial court did not bind the PCSB.

Public school teachers' alleged injury of being deprived of their constitutional right to vote by law allowing the West Virginia Professional Charter School Board (PCSB) to create public charter schools without a majority vote of residents was not causally connected to Governor's actions, and thus teachers lacked standing to seek injunctive relief against Governor; Governor's only role in relation to the law was signing it after its passage and appointing PCSB members, Governor had no veto authority over actions of PCSB, and Governor's alleged knowledge of the law's unconstitutionality when he signed it did not establish causation given that PCSB, a nonparty, exercised its own independent statutory authority to approve or reject charter school applications.

Public school teachers' alleged injury of being deprived of their constitutional right to vote by law allowing the West Virginia Professional Charter School Board (PCSB) to create public charter schools without a majority vote of residents was not redressable through injunctive relief against Governor, as required for standing; Governor did not control nonparty PCSB's ability to approve or reject charter school applications and thus could not be required to order PCSB to cease its activities.

Preliminary injunction issued against Governor by trial court in action brought by school teachers challenging the constitutionality of law allowing the West Virginia Professional Charter School Board (PCSB) to create public charter schools without a majority vote of residents did not bind the PCSB, where the PCSB was not a party to the action, was created by statute, and acted pursuant to its statutory authority and not on behalf of the Governor, and Governor could not direct or veto the PCSB's decision to approve a charter school application.

IMMUNITY - IOWA

[Nahas v. Polk County](#)

Supreme Court of Iowa - June 9, 2023 - N.W.2d - 2023 WL 3906488

Former county employee brought action against county and members of county board of supervisors asserting claims for libel per se, wrongful termination in violation of public policy, extortion, civil conspiracy, intentional infliction of emotional distress, and violations of open meetings and confidential records laws.

The District Court denied defendants' motion to dismiss, and they appealed.

The Supreme Court held that:

- Qualified immunity defenses were not available to members of board of supervisors;
- Employee's complaint had to comply with particularity and plausibility components of new heightened pleading standard for claims under the Iowa Municipal Tort Claims Act (IMTCA);

- Requiring compliance with “clearly established” component of new heightened pleading standard would be an impermissible retrospective application;
 - Libel per se claim satisfied the particularity and plausibility pleading standards;
 - Extortion claim failed the particularity and plausibility pleading standards;
 - Civil conspiracy claim satisfied the particularity and plausibility pleading standards; and
 - Open meetings violation claim failed the particularity and plausibility pleading standards.
-

PUBLIC MEETINGS - LOUISIANA

[Livingston Parish School Board v. Kellett](#)

Court of Appeal of Louisiana, First Circuit - May 18, 2023 - So.3d - 2023 WL 3556635 - 2022-1240 (La.App. 1 Cir. 5/18/23)

Parish school board sued elementary school student’s mother seeking injunctive relief to stop her from publicly discussing school board, special education program, and other individuals after she allegedly made social media posts that defamed and slandered the reputations of school board and school staff, based on communications recorded by electronic devices in her child’s clothing.

After school board obtained a temporary restraining order (TRO) and then a preliminary injunction prohibiting mother from using electronic devices and from making or publishing any defamatory, slanderous, libelous, frivolous, and/or fraudulent claims concerning school board and its employees, mother filed motion for dissolution of the preliminary injunction. The District Court granted the motion in part with respect to the prohibition on use of the electronic device and denied the motion in all other respects. Mother appealed. Court of Appeal issued and then recalled show cause order.

The Court of Appeal held that:

- Preliminary injunction against mother making defamatory statements was an unconstitutional prior restraint on speech, and
- Dissolution of portion of preliminary injunction prohibiting mother from engaging in any form of written or verbal disparagement was warranted.

Preliminary injunction enjoining elementary school student’s mother from making certain public statements about school board and its employees that were purportedly defamatory, including allegations of criminal conduct, constituted an unconstitutional prior restraint on speech protected by the First Amendment, where there had been no judicial determination that words allegedly spoken by mother and accusations purportedly made by her were defamatory or defamatory per se, nor did the trial court, in considering school board’s motion for preliminary injunctive relief, determine that mother in fact made the challenged statements and was liable for defamation.

EMINENT DOMAIN - FLORIDA

[D'Arcy v. Florida Gaming Control Commission](#)

District Court of Appeal of Florida, First District - May 24, 2023 - So.3d - 2023 WL 3608904

Owner of kennel business and business brought action against state Gaming Control Commission, alleging amendment to state Constitution forbidding racing of domesticated dogs for money violated takings clauses of state and federal Constitutions.

Commission filed motion for summary judgment, which the Circuit Court granted. Owner and business appealed.

The District Court of Appeal held that:

- Plaintiffs lacked reasonable expectation that their investment in dog racing could not be severely impacted by regulation, as would support takings claim, and
- Amendment was valid exercise of police power, rather than eminent domain, as would support takings claim.

Owner of kennel business and business lacked a reasonable expectation that their investment in dog racing could not be severely impacted by regulation, as would support owner and business's claim alleging the amendment to the state Constitution forbidding the racing of domesticated dogs in connection with a wager for money or other item of value violated the takings clauses of the state and federal Constitutions; amendment did not forbid dog racing per se, and it was not reasonable that owner had no expectation of future governmental interference with his and business's property investments, as pari-mutuel gambling had long been heavily regulated in the state.

Amendment to state Constitution forbidding the racing of domesticated dogs in connection with a wager for money or other item of value was a valid exercise of police power, rather than eminent domain, as would support claim brought by owner of kennel business and business, alleging that amendment violated the takings clauses of the state and federal Constitutions; amendment prevented a public harm.

MUNICIPAL ORDINANCE - IOWA

[Livingood v. City of Des Moines](#)

Supreme Court of Iowa - June 9, 2023 - N.W.2d - 2023 WL 3906367

Vehicle owners brought suit to challenge city's use of state income offset program to collect automated traffic citation penalties not reduced to judgment in municipal infraction proceedings.

The District Court denied owners' motion for summary judgment and granted city's motion for summary judgment. Owners appealed.

The Supreme Court held that:

- City's use of state income tax refunds to offset automated traffic citation penalties did not constitute "taking";
- Statute governing municipal infractions did not preempt ordinances allowing city to use state's income offset program to collect automated traffic citation penalties not reduced to judgment in municipal infraction proceeding;
- Damages were not available for vehicle owners "claim" of preemption;
- Two owners were not entitled to declaratory and injunctive relief;
- City's attempts to enforce civil penalties for automated traffic citations did not violate vehicle owners' due process rights; and
- Penalties that city assessed and referred to income offset program were not legally enforceable.

City's use of state income tax refunds to offset automated traffic citation penalties did not constitute "taking"; city was not taking property for public use, but was instead collecting penalties allegedly owed for violation of its laws.

Statute governing municipal infractions did not preempt ordinances allowing city to use state's income offset program to collect automated traffic citation penalties not reduced to judgment in municipal infraction proceeding; ordinance provided that recipient of notice of violation could voluntarily pay penalty, ordinance provided that recipient of notice could request that city proceed with municipal infraction proceeding, and ordinance stated that city would file municipal infraction if recipient of notice did not pay citation and did not request that city file municipal infraction.

Statute governing municipal infractions preempted city ordinance providing that if vehicle owner did not request administrative hearing or municipal infraction proceeding following issuance of automated traffic citation, notice of violation would be deemed a debt subject to placement in city's debt offset program; ordinance's declaration that civil penalty was a debt due, owing, and payable without municipal infraction judgment was directly contrary to and irreconcilable with statute.

Vehicle owner was entitled to declaratory and injunctive relief following successful claim that statute governing municipal infractions preempted city ordinance deeming a notice of violation a debt subject to placement in city's offset program following issuance of automated traffic citation; owner would be entitled to assert preemption defense as to any claim of offset.

City's attempts to enforce civil penalties for automated traffic citations did not violate vehicle owners' due process rights, where owners were provided with notices of violation and afforded opportunity to request hearing, owners were provided notice of city's intent to transfer matter to income offset program and opportunity to challenge transfer, owners were provided with notices of intent to offset, and owners failed to seek hearings in response to each of those notices.

Penalties that city assessed for automated traffic citations and referred to income offset program were not legally enforceable, where city failed to file municipal infraction proceeding as required by its own ordinance and instead proceeded to extrajudicial collection efforts.

Remand of vehicle owners' claims against city for unjust enrichment, arising from city's attempts to enforce civil penalties for automated traffic citations, was warranted for consideration of whether there were any defenses to claim of unjust enrichment and whether there were any disputed issues of material fact necessitating trial on that claim.

LIABILITY - IOWA

[Martin v. Tovar](#)

Supreme Court of Iowa - June 9, 2023 - N.W.2d - 2023 WL 3906432

After city police officer sexually assaulted intoxicated victim to whom he had provided courtesy ride, victim brought action against city and police officer, alleging causes of action for sexual assault, battery, intentional infliction of emotional distress (IIED), false imprisonment, and invasion of privacy.

The District Court granted city's motion for summary judgment. Victim appealed.

The Supreme Court held that:

- Sexual assault fell outside the scope of officer's employment;
- There was no evidence that sexual assault by officer was expected, foreseeable, or sanctioned by the city;
- Officer's poor performance evaluations were insufficient to create genuine issue of material fact

- regarding foreseeability of sexual assault;
 - Accusation that officer had assaulted another victim did not create genuine issue of material fact regarding foreseeability of sexual assault; and
 - The Supreme Court would decline to extend aided-by-agency theory to hold city vicariously liable for sexual assault.
-

CREDIT DEFAULT SWAPS - NEW MEXICO

In re Credit Default Swaps Auctions Litigation

United States District Court, D. New Mexico - June 5, 2023 - Slip Copy - 2023 WL 3821337

Plaintiffs – quasi-state funds that manage state and state-employee asset funds and retirement accounts – alleged that Defendants – *inter alia*, Investment Banks – impermissibly colluded and conspired to manipulate — or “fix” or “rig” — Credit Default Swap auctions in an anticompetitive manner, and that this conduct constituted: 1) a conspiracy to restrain trade in violation of the Sherman Act and the Clayton Act, 2) violations of the Commodity Exchange Act, and 3) unjust enrichment by civil conspiracy in violation of New Mexico law.

Defendants moved to dismiss.

The U.S. District Court held that:

- Plaintiffs adequately pled sufficient factual matter to invoke the fraudulent concealment doctrine, and concluded that the fraudulent concealment doctrine operates to equitably toll the applicable statutes of limitations, rendering Plaintiffs’ claims timely;
 - Plaintiffs plausibly alleged that a conspiracy existed and that several domestic Defendants’ overt acts in furtherance of the conspiracy were committed in the United States and are sufficient to subject co-conspirators to jurisdiction in the United States;
 - These are not “umbrella” claims in that Plaintiffs do not allege they were injured by non-conspirators who independently decided to charge artificial prices to keep pace with Defendants;
 - Plaintiffs clearly alleged a common motive, conduct against self-interest, inter-firm communications, and suspicious auction rules as context for the conspiracy sufficient to adequately allege an antitrust conspiracy;
 - Plaintiffs alleged sufficient facts to state a claim under the Commodity Exchange Act (CEA) against Defendants; and
 - Plaintiffs adequately stated a claim for unjust enrichment and may proceed with that claim as an alternative theory to the federal antitrust and CEA claims.
-

ANNEXATION - OHIO

Board of Township Trustees for Eaton Township v. KNG, Ltd.

Court of Appeals of Ohio, Ninth District, Lorain County - May 15, 2023 - N.E.3d - 2023 WL 3450412 - 2023-Ohio-1621

Township board brought action challenging decision of county board of commissioners to grant developer’s petition to annex certain township land into neighboring village.

The Court of Common Pleas affirmed commissioners’ decision. Township appealed.

The Court of Appeals held that developer and village failed to satisfy road maintenance requirements of annexation statute, as condition to annexation.

Developer and village failed to satisfy the road maintenance requirements of annexation statute, which precluded annexation if a road would be divided by the annexation unless the municipal corporation agreed to assume maintenance of the road as a condition of the annexation, in township's action challenging county board of commissioners' decision to grant developer's annexation petition, which would divide a road between township and village; board's resolution merely stated that village and county "desire to enter into a shared maintenance agreement whereupon each will share equally (1/2) the cost of maintenance" of the road, which was not the same as the "municipal corporation, as a condition of annexation, will assume the maintenance."

EMINENT DOMAIN - PUERTO RICO

[Dinh v. United States](#)

United States Court of Federal Claims - June 5, 2023 - Fed.Cl. - 2023 WL 3815051

Bondholders filed putative class action against United States, seeking just compensation under Fifth Amendment for alleged taking of their private property as owners of first subordinated secured bonds issued by instrumentality of Commonwealth of Puerto Rico, as alleged direct and intended result of Congress's enactment of Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), allowing Puerto Rico and its instrumentalities to adjust their debts in bankruptcy, that resulted in loss of significant portion of principal and interest on holder's bonds and their security interests and liens on revenues.

Government moved to dismiss for lack of subject matter jurisdiction or, alternatively, for failure to state claim.

The Court of Federal Claims held that:

- Subject matter jurisdiction could be exercised over claim;
- PROMESA did not displace jurisdiction over claim;
- Exercising jurisdiction was not impermissible collateral attack;
- Claims added in amended complaints related back to original timely complaint;
- Bondholders adequately alleged cognizable property interests;
- Collateral estoppel did not bar litigation of issue of PROMESA's enactment effecting taking; but
- Enactment of PROMESA did not constitute regulatory taking.

Bondholders' sufficiently alleged Fifth Amendment taking effected by Congress's enactment of Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA) that resulted in loss of significant portion of their principal and interest on bonds by allowing Puerto Rico to adjust its debts in bankruptcy, as required for exercise of Tucker Act jurisdiction over claim, since bondholders' complaint unambiguously alleged that federal action took their property without just compensation.

Tucker Act jurisdiction over bondholders' Fifth Amendment taking claims allegedly effected by Congress's enactment of Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA) that resulted in loss of significant portion of their bonds' principal and interest by allowing Puerto Rico to adjust its debts in bankruptcy, was not displaced by PROMESA, stating that any action against Oversight Board for Puerto Rico, and any action otherwise arising out of PROMESA, in whole or in part, "shall" be brought in United States district court for covered

territory, since PROMESA did not reflect Congress's unambiguous intent to displace Tucker Act jurisdiction, given that PROMESA did not waive sovereign immunity for monetary relief claims against United States, unlike Tucker Act.

Bondholders' claim for Fifth Amendment taking allegedly effected by Congress's enactment of Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), that resulted in loss of significant portion of bonds' principal and interest by allowing Puerto Rico to adjust its debts in bankruptcy, was not impermissible collateral attack on decision by district court confirming plan of debt adjustment under Title III of PROMESA, since district court's confirmation of plan simply described part of process that resulted in taking of bondholders' property to which they did not attribute any legal error, and their takings claim did not require Court of Federal Claims to scrutinize Title III court's reasoning or result in confirming plan.

Proposed amendment to bondholders' class action complaint to allege Fifth Amendment taking by additional bondholders related back, for purposes of six-year statute of limitations for claims before Court of Federal Claims, to original complaint claiming that taking was allegedly effected by Congress's enactment of Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA) that resulted in loss of significant portion of bonds' principal and interest by allowing Puerto Rico to adjust its debts in bankruptcy.

Bondholders sufficiently alleged property interest cognizable under Fifth Amendment Takings Clause, as required to state claim that taking was effected by Congress's enactment of Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA) allowing Puerto Rico and its instrumentalities to adjust their debts in bankruptcy, since bondholders alleged that enactment of PROMESA resulted in loss of significant portion of principal and interest on their bonds as well as their lien on revenues that could be enforced in event of default on their contractual right to repayment of principal and interest.

Prior proceeding in which district court assigned under Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA) determined that plan of debt adjustment for Puerto Rico and its instrumentalities and settlement agreement did not take bondholders' property without just compensation did not collaterally estop bondholders from litigating issue of whether United States was liable for taking based on Congress's enactment of PROMESA.

Congress's enactment of Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), allowing Puerto Rico and its instrumentalities to adjust their debts in bankruptcy, did not constitute Fifth Amendment regulatory taking of bondholders' property interests in their contractual right to repayment of principal and interest on bonds and liens against revenue, since bondholders' property interests were impaired only after Oversight Board for Puerto Rico, which was non-federal entity, took series of discretionary actions resulting in restructuring of debts under PROMESA, and taking involving third-party non-federal entities was insufficient to warrant just compensation, as Board did not act as agent of United States and was not coerced to file petition for adjustment under PROMESA.

BOND ISSUANCE - TEXAS

[In re Gaskill](#)

Court of Appeals of Texas, Beaumont - June 8, 2023 - Not Reported in S.W. Rptr - 2023 WL 3876506

Voters dissatisfied with the results of an election approving the Magnolia ISD's authority to issue \$228,000,000 in school bonds, filed a writ of mandamus almost six months after the election seeking to compel the Magnolia Independent School District's Board President to "take such actions as necessary to conduct" a recount for the 2022 Magnolia ISD Bond.

"The relators say they are not seeking to contest the election's results, but that they instead want information about the machines used in the election so they will know in upcoming elections how accurate the machines are in counting votes, including an election that will occur in May 2023."

The relators say they are not seeking to contest the election's results, but that they instead want information about the machines used in the election so they will know in upcoming elections how accurate the machines are in counting votes, including an election that will occur in May 2023.

"By waiting 171 days after the election to challenge Adcox's decision rejecting the petitions Relators submitted for a recount of the vote on a school bond measure approved by voters, the relators allowed the results of the election to become final and Adcox's duty to order a recount of the results to expire. We hold that we lack jurisdiction over this original proceeding. Accordingly, the Relator's petition for writ of mandamus is dismissed."

PUBLIC UTILITIES - CALIFORNIA

[Campana v. East Bay Municipal Utility District](#)

Court of Appeal, First District, Division 4, California - May 23, 2023 - Cal.Rptr.3d - 2023 WL 3596189 - 2023 Daily Journal D.A.R. 4803

Water utility customers brought putative class action against municipal utility district alleging that the tiered-rate water structure used by the utility to determine the cost of residential and commercial water service in two counties violated Proposition 218's procedural and substantive limitations on a local agency's ability to extend, impose, or increase property-related fees for services.

The Superior Court sustained utility's demurrer without leave to amend. Customers appealed.

The Court of Appeal held that:

- The complaint sought to invalidate utility's rate structure, and did not merely seek refund of excess fees, and thus was subject to 120-day limitations period;
- The limitations period did not run anew when, each month, the utility collected the allegedly illegal tax; and
- The Government Claims Act did not extend the 120-day statute of limitations applicable to customers' claims.

Water utility customers forfeited any claim that the tiered-rate water structure used by municipal utility district to determine cost of residential and commercial water service violated Proposition 218, which imposed procedural and substantive limitations on a local agency's ability to extend, impose, or increase property-related fees for services, by misusing revenues for a purpose other than providing service, where customers' complaint set forth no factual allegations specific to the alleged section misuse of funds claim, and they failed to develop any pertinent arguments in their briefing on appeal of superior court's decision to sustain utility's demurrer, including any explanation for their position that an inverse validation was inapplicable.

Water utility customers putative class action complaint, which alleged the tiered-rate structure used by municipal utility district determine cost of residential and commercial water service in two counties violated Proposition 218's limitations on local agency's ability to extend, impose, or increase property-related fees for services, sought to attack, review, set aside, void, or annul utility's rate structure, and did not merely seek refund of excess fees, and thus, customers' claims were subject to 120-day limitations period; complaint framed the claims as an attack on tiered-rate pricing, alleging the constitutional infirmities of this structure gave rise to partial refund claims, and effect of customers' allegations, if true, would be to invalidate the tiered-rate fee structure.

Provision of Proposition 218 stating that all fees or charges shall comply with the section imposing procedural and substantive limitations on a local agency's ability to extend, impose, or increase property-related fees for services, does not authorize a new challenge, subject to a new statute of limitations, with the assessment and collection of fees each month; the provision merely requires that all fees, existing at the time Proposition 218 was approved, be brought into line with the substantive requirements of the section.

The 120-day limitations period applicable to water utility customers' putative class action complaint alleging the tiered-rate structure used by municipal utility district to determine cost of residential and commercial water service in two counties violated Proposition 218's limitations on local agency's ability to extend, impose, or increase property-related fees for services, did not run anew when, each month, the utility collected the allegedly illegal tax; the complaint challenged the validity of the utility's resolution adopting service fees, and there was no ongoing statutory obligation the district had to fulfill after it adoption the resolution.

Assuming notice was required under the Government Claims Act for water utility customers' claims alleging the tiered-rate structure used by municipal utility district to determine cost of residential and commercial water service in two counties violated Proposition 218's limitations on local agency's ability to extend, impose, or increase property-related fees for services, any time requirements imposed by the Claims Act did not extend the 120-day statute of limitations applicable to customers' claims, because the gravamen of their complaint was a challenge to the tiered-rate structure adopted by the utility through resolutions.

WATER DISTRICTS - CALIFORNIA

[Barajas v. Sativa L.A. County Water District](#)

Court of Appeal, Second District, Division 2, California - May 25, 2023 - Cal.Rptr.3d - 2023 WL 3641453

Residents brought putative class action against local water district and fictitiously-named defendant for breach of contract, nuisance, and negligence based on district's alleged failure to provide potable drinking water.

After county's local agency formation commission (LAFCO) dissolved district, residents substituted county in lieu of fictitiously-named defendant, then voluntarily dismissed county.

Trial court certified class, then decertified class as to nuisance claim. The Superior Court, Los Angeles granted district's motion to dismiss, which it construed as motion for judgment on the pleadings, denied residents' motion for leave to amend complaint to name district as defendant "by and through" county, and denied residents' motion to vacate order that had granted their motion for voluntary dismissal of county as defendant. Residents appealed.

The Court of Appeal held that district was no longer valid defendant upon its dissolution because successor agency was appointed to wind up district's affairs.

County local agency formation commission (LAFCO) did not task water district with winding up its own affairs when dissolving district pursuant to Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000, and, thus, upon district's dissolution, district had no further function to carry out and was no longer valid defendant in residents' action for breach of contract, nuisance, and negligence; Act authorized LAFCO to name successor agency instead of permitting district to wind up its own affairs by default, which LAFCO did by designating county as successor, transferring district's assets to county, and explicitly tasking county with winding up district's affairs, and it would be absurd for district to retain winding-up power when county owned and controlled its assets.

The provisions of the Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000 stating that a local agency's dissolution terminates its powers except those necessary to wind up its affairs, although they might suggest that a district always continues to exist notwithstanding its dissolution for purposes of winding up its affairs, these provisions merely set up default terms and conditions for dissolution; the Act elsewhere provides that a local agency formation commission (LAFCO) has the power to specify the terms and conditions that apply upon dissolution in a specific case, and those specific terms control over the Act's general provisions governing dissolution.

When authorizing dissolution of specific water district and appointment of county as administrator and successor agency, legislature did not intend to preserve pending claims against district arising from its provision of water, and, thus, construing provisions of Cortese-Knox-Hertzberg Local Government Reorganization Act governing dissolution powers to preclude residents' action against district, or against county as successor responsible for winding up district's affairs, for negligence and other claims did not contravene legislature's intent; statute specifically addressing district explicitly granted immunity to county for claims arising from district's provision of water, so that county had incentive to assume stewardship despite district's water quality violations.

LIABILITY - CALIFORNIA

[Los Angeles Unified School District v. Superior Court of Los Angeles County](#) Supreme Court of California - June 1, 2023 - P.3d - 2023 WL 3745196

Public high school student brought tort action against school district, alleging that district employee sexually assaulted her.

The Superior Court denied district's motion to strike student's request for statutory enhanced damages based on the assault resulting from district allegedly covering up employee's sexual assault of another student. District petitioned for writ of mandate. The Court of Appeal granted a writ. Review was granted.

The Supreme Court held that:

- Government Claims Act's prohibition of public entity being held liable in tort for damages imposed primarily for sake of example and by way of punishing defendant applies not only to damages that are simply and solely punitive but also to damages that would function, in essence, as award of punitive or exemplary damages; overruling *People ex rel. Younger v. Superior Court*, 16 Cal.3d 30, 39, 127 Cal.Rptr. 122, 544 P.2d 1322; *San Francisco Civil Service Assn. v. Superior Court*, 16

Cal.3d 46, 127 Cal.Rptr. 131, 544 P.2d 1331; *Kizer v. County of San Mateo*, 53 Cal.3d 139, 279 Cal.Rptr. 318, 806 P.2d 1353; and

- Government Claims Act shields public entities from liability for statutory award of enhanced damages, not exceeding treble damages, when childhood sexual assault was result of cover up.

EMINENT DOMAIN - GEORGIA

[Kudzu Capital, LLC v. City of Decatur](#)

Court of Appeals of Georgia - June 7, 2023 - S.E.2d - 2023 WL 3859348

City brought condemnation action against subdivision property owner seeking to condemn the property and requested appointment of special master.

Following a hearing, the special master awarded property owner \$2,180,000. Both property owner and city appealed the award and requested a jury trial. In jury trial, the Superior Court incorporated the jury's verdict into a final judgment and awarded property owner \$1,400,000. Property owner appealed.

The Court of Appeals held that:

- Price owner paid for the property and the corresponding tax certificate were relevant in determining the fair market value of the property;
- Evidence of property owner's alleged right to require city to open right-of-way for vehicular use for roadway that abutted the property was inadmissible;
- Property owner was permitted by trial court to present evidence pertaining to its representative's dealings with city prior to the condemnation proceeding;
- Property owner's request to charge jury were adequately covered by the other general instructions given by the trial court; and
- Trial court did not err by charging jury that a county or municipality had no obligation to "open" an undeveloped road.

ZONING & PLANNING - MAINE

[Tominsky v. Ogunquit](#)

Supreme Judicial Court of Maine - May 23, 2023 - A.3d - 2023 WL 3590162 - 2023 ME 30

Property owner filed two appeals in the Superior Court, the first challenging code enforcement officer's issuance of building permits for six dwelling units on abutting property, and the second challenging the issuance of a certificate of occupancy for one of the dwelling units. Permittee filed appeal challenging town board of appeals' granting of good cause exception to owner for his untimely administrative appeal of the building permits.

The Superior Court denied owner's first appeal, dismissed owner's second appeal, and denied permittee's appeal. Owner and permittee appealed the decisions, and the appeals were consolidated for review.

The Supreme Judicial Court held that:

- As a matter of first impression, party that has obtained municipal approval need not and should not file its own appeal or cross-appeal to challenge the application of good cause exception to deadline

- for filing administrative appeal;
- Permittee lacked standing to file appeal town board of appeals' decision denying owner's appeal on the merits;
 - Owner's mistaken belief of law was not an extraordinary circumstance that would result in flagrant miscarriage of justice that could excuse his delay in filing appeal to town board of appeals; and
 - Issuance of certificate of occupancy was not an appealable event.
-

ZONING & PLANNING - MASSACHUSETTS

[Hume Lake Christian Camps, Inc. v. Planning Board of Monterey](#)

Supreme Judicial Court of Massachusetts, Suffolk - June 7, 2023 - N.E.3d - 2023 WL 3855265

Nonprofit Christian organization appealed planning board's denial of its application to build a recreational vehicle (RV) campground on its property, contending the proposed campground fell within Dover Amendment's limits on the ability of municipalities to "regulate or restrict the use of land or structures for religious purposes."

The Land Court Department entered judgment in part for organization. Board appealed, and organization cross-appealed. The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

The Supreme Judicial Court held that:

- Primary or dominant purpose of housing families at proposed RV campground would be to serve organization's religious mission;
- Primary or dominant purpose of housing volunteers and seasonal staff at RV campground would be to facilitate the operation, maintenance, and improvement of organization's religious family camp; and
- Primary or dominant purpose of religious family camp was to serve organization's evangelical mission, rather than recreation.

Primary or dominant purpose of religious family camp was to serve nonprofit Christian organization's evangelical mission, rather than recreation, and thus recreational vehicle (RV) campground for camp fell within Dover Amendment's limits on the ability of municipalities to "regulate or restrict the use of land or structures for religious purposes"; camp attendees were required to participate in two chapel sessions each day and to receive religious instruction, camp's guest retreats were available only to organizations that agree to abide by a schedule that included religious components, nonbelievers were allowed to attend camp programs in the service of proselytization, and recreational activities boosted interest in the camp's religious offerings.

ZONING & PLANNING - MISSISSIPPI

[City of Ocean Springs v. Illanne](#)

Supreme Court of Mississippi - April 27, 2023 - So.3d - 2023 WL 3113383

Neighbors appealed three separate zoning decisions of the city board of aldermen regarding subdivision application for townhouse development.

The Circuit Court consolidated the appeals, reversed the decisions in two of the appeals, and on motion to alter or amend, altered its ruling in part, and remanded to the city board. City appealed.

The Supreme Court held that remand was required for a factual determination as to whether subdivision applicant was acting as a “petitioner” entitled to notice as a necessary party.

Remand of zoning appeals was required for a factual determination as to whether subdivision applicant was acting as a “petitioner” before the board of aldermen or whether he was acting in a representative capacity on behalf of the petitioner, and thus whether neighbors who appealed zoning decision were required to name and give notice to applicant as a necessary party; in addition, Supreme Court would direct the trial court to determine all issues of fact that may arise out of any appeal submitted to the trial court for a determination and that may be necessary for disposition of cases on appeal.

APPROPRIATIONS - NEW YORK

[Schulz v. State](#)

Supreme Court, Appellate Division, Third Department, New York - May 11, 2023 - N.Y.S.3d - 2023 WL 3355650 - 2023 N.Y. Slip Op. 02575

Taxpayers brought hybrid Article 78 proceeding and declaratory judgment action, alleging that appropriations in Governor’s budget bill, relating to agreement between State, county, and National Football League (NFL) franchise in which State would appropriate \$600 million in funds to urban development corporation for services and expenses related to development of proposed football stadium in county, violated provisions of State Constitution prohibiting State and local governments from appropriating public funds in aid of private undertakings.

Government defendants filed motion to dismiss for failure to state cause of action. The Supreme Court dismissed taxpayers’ petition and denied petitioners’ motion to file surreply. Taxpayers filed separate appeals.

The Supreme Court, Appellate Division, held that:

- State’s appropriations did not violate State Constitution, even though appropriations would aid private undertaking;
- Any funds provided by county would not violate State Constitution; and
- Declaratory judgment, rather than dismissal of petition, was appropriate remedy.

Appropriation of State funds, relating to agreement between State, county, and National Football League (NFL) franchise in which State would appropriate \$600 million in funds to public development corporation for services and expenses pertaining to development of proposed sports stadium, did not violate State Constitution’s prohibition on appropriations of public funds for private undertakings, even though appropriations would aid private undertaking; private benefit was merely incidental, appropriations for stadium rebuild were expressly authorized by statute, and Legislature recognized public purpose of sports stadiums in creating and retaining jobs, attracting business investment, and enhancing State’s reputation.

Any funds appropriated by county, relating to development of sports stadium located in county, would not violate State Constitution’s prohibition on appropriation of funds by local governments for private undertakings; if county appropriated funds to private benefit corporation, those funds would not be subject to constitutional prohibition on gifting money to private entities, and if county

appropriated money directly to private parties for stadium project, appropriations would not be barred by constitutional prohibition given predominantly public purpose of stadium.

Issuance of declaratory judgment, rather than dismissal of petition, was proper remedy in taxpayers' hybrid Article 78 proceeding and declaratory judgment action challenging appropriations of State funds related to development of sports stadium, upon determination that appropriations by State and county would not violate State Constitution's prohibitions on appropriations of public funds for private undertakings, since there were no questions of fact.

OPEN MEETINGS - OKLAHOMA

[Hirschfeld v. Oklahoma Turnpike Authority](#)

Supreme Court of Oklahoma - May 31, 2023, - P.3d - 2023 WL 3735825 - 2023 OK 59

Landowners petitioned for declaratory judgment and injunctive relief, claiming that Oklahoma Turnpike Authority (OTA) violated Open Meeting Act (OMA) by not providing sufficient notice of proposed new turnpikes in OTA's meeting agendas.

The District Court granted summary judgment for landowners. OTA appealed.

The Supreme Court held that:

- Agenda items about short-term financing for "certain turnpike projects" were sufficient;
- Agenda item about consideration of a consulting engineering services contract was sufficient;
- Agenda items about contracts for bond and capital program for turnpike program were sufficient;
- Governor's mere announcement of turnpike program during meeting did not violate OMA notice requirement; and
- Supreme Court had exclusive jurisdiction to consider landowners' request for declaratory relief.

Agenda items in Oklahoma Turnpike Authority's (OTA) notice of regular board meeting, stating that a resolution authorizing short-term financing for "certain turnpike projects" would be considered and acted upon at the meeting, complied with Open Meeting Act (OMA) section governing notice of public meetings, even though the notice did not specify whether the financing was for one of three proposed new turnpikes that were part of turnpike improvement program, where "turnpike project" was a statutorily-defined term, OTA included with the agenda a copy of the resolution which referred to interim financing for "turnpike projects," and board considered and approved resolution without any modifications, additions, or amendments.

Agenda item in Oklahoma Turnpike Authority's (OTA) notice of regular board meeting, stating that the engineering division would submit a consulting engineering services contract for board's consideration and action, complied with Open Meeting Act (OMA) section governing notice of public meetings, even if notice lacked specificity about which turnpikes were involved in a long-range turnpike improvement and expansion program that OTA announced at a subsequent meeting, where contract was for program management services, which was what was specified in agenda item, rather than for construction of a specific component of any turnpike project, and board considered and took action only on the contract expressly stated in the agenda without any modifications, additions, or amendments.

Agenda items in Oklahoma Turnpike Authority's (OTA) notice of regular board meeting, stating that the board was to consider various design, right of way, and utility management contracts for the bond and capital program for turnpike construction and improvement program, complied with Open

Meeting Act (OMA) section governing notice of public meetings, even if notice lacked specificity as to whether contracts involved the construction of one of three proposed new turnpikes, where board considered and took action only on the contract expressly stated in the agenda, board's approval of agenda items did not include a contract for a specific component of any turnpike project, and items of business dealt with several turnpike projects on a larger scale than the possible construction or proposed route of one turnpike.

Governor's announcement of a turnpike construction and improvement program during the director's report section of Oklahoma Turnpike Authority's (OTA) regular board meeting, without prior notice in an agenda item in OTA's notice of public meeting, did not violate notice requirements of Open Meeting Act (OMA), where announcement was for informational purposes only, and board did not take any action at meeting regarding the program.

Supreme Court had exclusive jurisdiction to consider landowners' request for declaratory relief to prevent Oklahoma Turnpike Authority (OTA) from exercising its eminent domain power to construct proposed new turnpike, upon OTA's filing of application to validate proposed bonds to construct and operate turnpike.

IMMUNITY - TEXAS

[City of Austin v. Quinlan](#)

Supreme Court of Texas - June 2, 2023 - S.W.3d - 2023 WL 3767092

Restaurant patron brought premises liability action against city and restaurant that operated sidewalk café, arising out of ankle injury sustained when patron fell more than one foot from sidewalk to street.

The 98th District Court denied city's plea to jurisdiction, and city appealed. The Austin Court of Appeals affirmed in part and reversed in part. Petition for review was granted.

The Supreme Court held that:

- Sidewalk café maintenance agreement between restaurant and city did not impose nondiscretionary duty on city, and thus, claims against city did not fall outside "discretionary function" exception to waiver of immunity, under Texas Tort Claims Act;
- City's alleged control over sidewalk café, under agreement, had no bearing on issue whether "discretionary function" exception to city's waiver of governmental immunity applied;
- Statutes governing municipality's authority to issue permit for use of municipal street or sidewalk for public convenience or private use did not impose nondelegable, nondiscretionary duty on city, for which alleged breach fell outside "discretionary function" exception to waiver of immunity; and
- Dismissal of complaint, rather than remand to allow patron opportunity to amend, was appropriate.

IMMUNITY - TEXAS

[City of League City v. Jimmy Chngas, Inc.](#)

Supreme Court of Texas - June 9, 2023 - S.W.3d - 2023 WL 3909986

Restaurant developer sued city for breach of contract for nonpayment of reimbursements for certain expenditures made in connection with construction and operation of a restaurant within city limits.

The District Court denied city's plea to the jurisdiction. City brought interlocutory appeal. The Houston Court of Appeals affirmed. City petitioned for review, which was granted.

The Supreme Court held that:

- Activity was not included in statutory list of governmental functions; disapproving *CHW-Lattas Creek, L.P. v. City of Alice*, 565 S.W.3d 779;
- Activity was discretionary, weighing in favor of concluding that city engaged in a proprietary function;
- Activity was primarily for benefit of those within corporate limits of municipality, weighing in favor of concluding that city engaged in a proprietary function;
- Terms and requirements of agreement did not indicate in any way that city entered into agreement on state's behalf, weighing towards a proprietary function; and
- City's discretionary decision to enter into agreement with restaurant developer was not essential to any governmental function, weighing in favor of holding that city engaged in a proprietary function.

City's activity of entering into agreement with restaurant developer as an economic-development activity and not as a community-development or urban-renewal activity was not included in statutory list of governmental functions protected by sovereign immunity under Tort Claims Act, for purposes of deciding city's plea to the jurisdiction in developer's breach of contract action against city for nonpayment of reimbursement of expenditures in constructing and operating restaurant in city; purpose of agreement was to stimulate business and commercial activity, create local jobs, and increase state sales tax revenue, not to undertake urban renewal activities; disapproving *CHW-Lattas Creek, L.P. v. City of Alice*, 565 S.W.3d 779.

ZONING & PLANNING - WISCONSIN

[Miller v. Zoning Board of Appeals of Village of Lyndon Station](#)

Supreme Court of Wisconsin - June 6, 2023 - N.W.2d - 2023 WI 46 - 2023 WL 3829573

Objecting property owner sought certiorari review of village zoning board of appeals' upholding of village board's decision to grant neighboring property owners' application to rezone residential property for commercial use.

After neighboring property owners intervened, the Circuit Court reversed. Neighboring property owners appealed. The Court of Appeals reversed. Objecting property owner sought statutory certiorari review.

The Supreme Court held that village board's vote to rezone property was a "legislative act," and thus board member's alleged partiality from being the mother of one of the neighboring property owners who applied for the rezoning did not violate the procedural due process rights of the objecting property owner.

Village board's vote to amend zoning ordinance and rezone applicants' property from residential use to commercial use was "legislative act" rather than "adjudicative act," and thus board member's alleged partiality from being mother of one applicant did not violate procedural due process rights of objecting neighboring property owner; although vote only occurred in response to rezoning application, board made prospective change by enacting, repealing, or amending existing generally applicable law, and when legislative actions were at issue in dispute about procedural due process,

those affected by legislation were not entitled to any process beyond that provided by legislative process.

REDEVELOPMENT AGENCIES - CALIFORNIA

[City of Chula Vista v. Stephenshaw](#)

Court of Appeal, Third District, California - April 14, 2023 - Cal.Rptr.3d - 2023 WL 3336400

City and successor redevelopment agency filed petition for writ of mandate and complaint for declaratory and injunctive relief seeking a writ to compel Department of Finance to recognize reimbursement agreements as enforceable obligations and approve use of property tax revenues for such items on all current and futures recognized obligation payment schedules (ROPS).

The Superior Court denied petition. Plaintiffs appealed.

The Court of Appeal held that:

- Reimbursement agreements qualified as enforceable obligations;
- Department did not abuse its discretion in denying reimbursement of lease payments made in connection with debt instruments that were unenforceable obligations; and
- Department was not estopped from denying ROPS.

Under “tax increment financing method,” tax revenues available for local redevelopment agencies from land within a redevelopment area are frozen as of the date a redevelopment plan is adopted, and any tax revenues generated by an increase in property values after adoption of the plan, the tax increment, are paid to the redevelopment agency for use in financing the redevelopment project.

A primary purpose of legislation to dissolve redevelopment agencies and create a process for wind down of their affairs was to eliminate tax increment financing, and redirect, to the maximum extent possible, the revenues and assets of the former redevelopment agencies to local governments to help fund core governmental services; as part of the wind down process, the law established successor agencies and empowered them to continue to make payments due for enforceable obligations.

To obtain funds to make payments required by enforceable obligations, a successor redevelopment agency must periodically prepare recognized obligation payment schedules (ROPS) setting forth the minimum payment amounts for each enforceable obligation and identify one or more sources of payment, and submit the ROPS to the oversight board for approval; the Department of Finance makes its determination of the enforceable obligations and the amounts and funding sources of the enforceable obligations.

Reimbursement agreements between city and former redevelopment agency qualified as enforceable obligations under statutory exception for contemporaneous written agreements between city or county and former redevelopment agency at time of issuance of indebtedness obligations solely for purpose of securing or repaying those indebtedness obligations for purposes of recognized obligation payment schedules (ROPS), and thus Department abused its discretion in determining that agreements were not enforceable obligations; agreements were written agreements entered into at time indebtedness was incurred for purpose of securing or repaying that debt, parties expressly agreed that city would be entitled to exercise any and all remedies available pursuant to law if tax increment revenues were available but unpaid to city, and implied covenant of good faith and fair dealing required tax increment revenues be pledged to repayment of indebtedness honestly and in good faith.

There was no reimbursement agreement or amendment to an existing reimbursement agreement executed contemporaneously with debt instruments, and thus Department of Finance did not abuse its discretion in denying reimbursement of lease payments made in connection with those debt instruments as unenforceable obligations that were not required to be reimbursed to successor redevelopment agency or city for purposes of recognized obligation payment schedules (ROPS), although timing of reimbursement obligation was contingent on unpledged tax increment revenues being available; legislature did not make explicit any attempt to exclude agreements containing contingent repayment obligations, and Department failed to explain why contingency rendered repayment obligation illusory.

Department of Finance was not estopped from denying recognized obligation payment schedules (ROPS) for former redevelopment agency due to its approval of those items in prior ROPS; city and successor redevelopment agency could not show that they reasonably relied on Department's past ROPS approvals because the relevant transactions occurred years before Department's ROPS determinations, Department's ROPS determination letters expressly warned that past approval of an item would not prevent Department from revisiting that item on future ROPS, and estoppel would have nullified a strong rule of public policy.

PUBLIC UTILITIES - CALIFORNIA

[TruConnect Communications, Inc. v. Maximus, Inc.](#)

Court of Appeal, First District, Division 1, California - May 11, 2023 - 308 Cal.Rptr.3d 365

Provider of telephone services to lower-income residents of state under a program administered by the California Public Utilities Commission (CPUC) filed first amended complaint against administrator, hired by CPUC to manage program enrollment, and its subcontractor, for negligence, intentional and negligent interference with prospective economic relations, violations of the Unfair Competition Law, quantum meruit, unjust enrichment, and related claims, claiming that they botched the rollout of a new software platform used to enroll people in the program, causing provider to lose millions of dollars.

The Superior Court sustained companies' demurrers. Provider appealed.

The Court of Appeal held that:

- Trial court's jurisdiction over provider's action was not statutorily barred on basis that a decision by trial court in the action would be inconsistent with a CPUC order or decision;
- Trial court's jurisdiction over provider's action was not statutorily barred on basis that recovery in action would enjoin, restrain, or interfere with CPUC in the performance of its official duties; and
- Remand to trial court was warranted so that it could consider whether CPUC was an indispensable party to the action.

A trial court decision in action brought by provider of telephone services to lower-income residents of state, under a program administered by the California Public Utilities Commission (CPUC), against two companies, hired by CPUC to manage program enrollment, claiming that they botched the rollout of new software used for program enrollment, causing provider to lose millions of dollars, would not be inconsistent with any CPUC order or decision, and thus trial court retained jurisdiction over case; CPUC's determination that provider was not eligible for reimbursement from CPUC's program's fund did not affect whether provider was potentially entitled to damages from companies under tort and related theories, and provider would not have to establish that CPUC erred in making

its determination in order to prevail in its action against companies.

Recovery in trial court action brought by provider of telephone services to lower-income residents of state, under a program administered by the California Public Utilities Commission (CPUC), against two companies, hired by CPUC to manage program enrollment, claiming that they botched the rollout of new software used for program enrollment, causing provider to lose millions of dollars, would not enjoin, restrain, or interfere with CPUC in the performance of its official duties, and thus trial court retained jurisdiction over case; crux of provider's action was to recover damages, not to constrain any of CPUC's findings or to interfere with CPUC's oversight of the program, and CPUC did not authorize or direct companies to injure third parties with software malfunctions and errors, thereby immunizing them from claims by those parties.

Remand to trial court was warranted so that it could consider whether the California Public Utilities Commission (CPUC) was an indispensable party to action brought by provider of telephone services to lower-income residents of state, under a program administered by CPUC, against two companies, hired by CPUC to manage program enrollment, claiming that they botched the rollout of new software used for program enrollment, since the trial court never reached the indispensable-party issue when sustaining companies' demurrers, and therefore never weighed the relevant factors or made any findings.

BALLOT INITIATIVE - CALIFORNIA

[Travis v. Brand](#)

Court of Appeal, Second District, Division 8, California - May 19, 2023 - Cal.Rptr.3d - 2023 WL 3558102

City residents brought action for injunctive relief against city mayor, city councilmember, political action committee (PAC) created to support ballot measure limiting waterfront development, and other supporters of measure, alleging that defendants violated Political Reform Act by failing to designate PAC as primarily formed and as candidate-controlled, then failing to follow naming and disclosure requirements for primarily formed and candidate-controlled committees.

Following bench trial, the Superior Court entered judgment in defendants' favor and awarded statutory attorney fees. Plaintiffs appealed and appeals were consolidated. The Second District Court of Appeal affirmed in part and reversed in part. Plaintiffs' petition for review was granted. The Supreme Court reversed and remanded for determination of whether residents brought or maintained suit without foundation, as necessary to support award of attorney fees to defendants under Act.

On remand, the Court of Appeal held that:

- Findings that residents had improper motive and outside funding did not establish their claims lacked foundation;
- Factual foundation existed for claim that PAC was misdesignated as general purpose committee;
- Factual foundation existed for claim that PAC was controlled by candidates;
- Claims had legal foundation;
- Defendants did not advance important rights affecting public interest, as necessary for private attorney general fee award; and
- Defendants did not confer benefit upon general public or large class.

EMINENT DOMAIN - FEDERAL

[Etchegoinberry v. United States](#)

United States Court of Federal Claims - May 19, 2023 - Fed.Cl. - 2023 WL 3574352

Landowners filed class action against United States, claiming that failure of Bureau of Reclamation, Department of Interior (DOI), to comply with statutory obligation, under San Luis Act, to provide irrigation drainage for owners' farmlands in water district resulted in gradual physical taking of property without just compensation.

Government moved to dismiss for failure to state claim.

The Court of Federal Claims held that takings claims were time barred.

Landowners' takings claims for just compensation, based on Bureau of Reclamation's failure to provide drainage for water district and owners' irrigated and drainage-impaired farmland within district, accrued, under six-year statute of limitations for claims against United States under Tucker Act, when landowners should have been aware that their claims had stabilized given numerous actions and decisions by government and extensive litigation history over several decades regarding government's failure to provide solution to drainage problem that should have alerted owners as to permanency of alleged taking and ended any justifiable uncertainty they had about accrual of their claims.

NEGLIGENCE - GEORGIA

[Mercy Housing Georgia III, L.P. v. Kaapa](#)

Court of Appeals of Georgia - May 30, 2023 - S.E.2d - 2023 WL 3710032

Son of elderly tenant in section 8 housing filed a wrongful death, negligence, and negligence per se action against owners and managers of apartment complex after complex failed to provide tenant with an emergency call device, in compliance with the Department of Housing and Urban Development (HUD) regulations, resulting in tenant being unable to call for assistance after he had a stroke, causing a delay in tenant obtaining treatment and tenant's eventual death.

Son filed a motion for summary judgment on issue of negligence per se, and defendants moved for summary judgment on the issues of causation, punitive damages, and owner's status as a defendant. The State Court granted son partial summary judgment and denied defendants' motions for summary judgment. Defendants appealed.

The Court of Appeals held that:

- Trial court's admission of expert testimony from property manager was not an abuse of discretion;
- Owners and managers of apartment complex failed to provide tenant with an emergency call device, in compliance with HUD regulations, and thus were negligent per se; and
- Genuine issue of material fact existed as to whether the lack of an emergency call system actually delayed elder tenant's rescue and treatment following a stroke.

BALLOT INITIATIVE - MAINE

Jortner v. Secretary of State

Supreme Judicial Court of Maine - April 10, 2023 - A.3d - 2023 WL 2856124 - 2023 ME 25

Citizens filed petition for judicial review of decision of the Secretary of State that determined the wording of a ballot question for citizen-initiated legislation that would create a non-profit electric utility, challenging use of the term “quasi-governmental power company” to describe the proposed utility and requesting substitution with the term “consumer-owned transmission and distribution utility.”

The Superior Court vacated Secretary’s decision and remanded matter to Secretary to revise the wording of the ballot question. Secretary appealed.

The Supreme Judicial Court held that use of term “quasi-governmental” in describing the proposed utility resulted in the question being not understandable to a reasonable voter reading the question for the first time, and thus ballot question did not satisfy statutory standard.

Use of term “quasi-governmental” in describing proposed non-profit electric utility as a “quasi-governmental power company,” in ballot question for citizen-initiated legislation that would create a non-profit electric utility, resulted in the question being not understandable to a reasonable voter reading the question for the first time, and thus ballot question did not satisfy statutory standard, although some features of the new utility would be governmental in nature; term “quasi-governmental” did not appear in the proposed legislation and did not have a clear dictionary definition, the prefix “quasi-” had multiple meanings, and there was no existing statutory definition of the term.

BALLOT INITIATIVE - MINNESOTA

Kranz v. City of Bloomington

Supreme Court of Minnesota - May 24, 2023 - N.W.2d - 2023 WL 3606470

Residents of home-rule charter city whose proposed city-charter amendment to repeal the use of ranked-choice voting to elect candidates to municipal office was rejected by city council because one of its four sections was manifestly unconstitutional filed petition in the district court for correction of ballot error, seeking declaratory and injunctive relief to, inter alia, require city to sever the section deemed unconstitutional and to submit remainder of amendment to the voters.

The District Court denied the petition. Residents appealed, and their petition for accelerated review was granted.

The Supreme Court held that assuming without deciding that courts have the power under the Minnesota constitution to sever unlawful portions of a proposed city-charter amendment, the proposed amendment in the present case failed to satisfy the high bar required to establish that severance was appropriate.

Assuming without deciding that, under state constitution, Minnesota courts may sever unlawful portions of a proposed city-charter amendment pre-enactment, that is, after signature collection but before presentation to voters, unconstitutional provision of residents’ proposed amendment to repeal use of ranked-choice voting, which required a supermajority of voters to approve such voting in future elections, did not satisfy the high bar required for severance; although other parts of amendment would effectively repeal ranked-choice voting even without the unconstitutional

provision, amendment's purpose was twofold, both to repeal ranked-choice voting and, through the unconstitutional provision, to prevent its future reinstatement, so the subject provision provided a substantial portion of the efficacy or strength of the proposal, and it could not be ascertained whether signers of petition would have wanted remainder of amendment to proceed without the unconstitutional portion.

BOND VALIDATION - OKLAHOMA

[Pike Off OTA, Inc. v. Oklahoma Turnpike Authority](#)

Supreme Court of Oklahoma - May 23, 2023 - P.3d - 2023 WL 3592641 - 2023 OK 57

Plaintiffs brought action against the Oklahoma Turnpike Authority (OTA) for injunctive and/or mandamus relief, challenging the OTA's authority to construct three proposed turnpikes.

The District Court granted the OTA's motion to dismiss. Plaintiffs appealed, and the Supreme Court retained the case.

The Supreme Court held that:

- Oklahoma Constitution permitted Legislature to enact statute conferring exclusive original jurisdiction upon Supreme Court to hear and determine application for bond validation to construct and operate turnpikes;
- Plaintiffs' claims fell within the Supreme Court's exclusive jurisdiction; and
- Plaintiffs not have a clear legal right to the mandatory injunctive and/or mandamus relief they sought.

The Oklahoma Constitution permitted the Legislature to enact statute conferring exclusive original jurisdiction upon the Supreme Court to hear and determine an application for bond validation to construct and operate turnpikes, and thus, the statute was constitutional, notwithstanding provision of the Constitution that gave all district courts unlimited original jurisdiction, since the district courts' jurisdiction was limited where otherwise provided in the Constitution, and the Constitution expressly empowered the Supreme Court to exercise jurisdiction conferred by statute, including the jurisdiction conferred upon it in the turnpike statute.

Claims brought in action for injunctive and/or mandamus relief, which alleged the Oklahoma Turnpike Authority (OTA) did not have statutory authorization to construct proposed turnpikes and that OTA exceeded its statutory authorization by seeking an additional bond issue to complete a turnpike, fell within the Supreme Court's exclusive jurisdiction, and the Court gained exclusive jurisdiction to consider the questions raised by the action when the OTA filed its own application with the Court to validate the proposed bonds for these turnpikes.

Plaintiffs who brought action challenging Oklahoma Turnpike Authority's (OTA) authority to construct three proposed turnpikes did not have a clear legal right to the mandatory injunctive and/or mandamus relief they sought compelling OTA to perform, comply with, and abide by all legal duties, obligations, and due process rights of plaintiffs and other Oklahoma citizens; plaintiffs failed to specify any legal duty or obligation that OTA would violate at some point in the future, and their claim demanding OTA comply with some undefined laws or statutory duties was contingent upon whether Supreme Court approved OTA's proposed bond issue for these turnpikes, and so the claim was dependent upon the Court exercising its exclusive jurisdiction in OTA's separate bond validation proceeding.

EMINENT DOMAIN - TEXAS

[City of Webster v. Moto Kobayashi Trust](#)

Court of Appeals of Texas, Houston (1st Dist.) - May 9, 2023 - S.W.3d - 2023 WL 3311470

Owners of unoccupied, commercial buildings in city brought inverse condemnation action against city, alleging that city ordinance requiring the removal or demolition of their properties as a public nuisance abatement measure was an unconstitutional taking.

The 152nd District Court, Harris County, denied city's plea to the jurisdiction, and city appealed.

The Court of Appeals held that district court in Harris County lacked jurisdiction over inverse condemnation claims.

District court in Harris County lacked jurisdiction over inverse condemnation claims brought against city by owners of unoccupied, commercial buildings, alleging that city ordinance requiring the removal or demolition of their properties as a public nuisance abatement measure was an unconstitutional taking; legislature had mandated that inverse condemnation claims in Harris County be brought in the civil courts at law.

EMINENT DOMAIN - CALIFORNIA

[Shenson v. County of Contra Costa](#)

Court of Appeal, First District, Division 2, California - March 30, 2023 - 89 Cal.App.5th 1144 - 306 Cal.Rptr.3d 584 - 2023 Daily Journal D.A.R. 2797

Owners of creekside properties sued county and flood control district for inverse condemnation and parallel tort causes of action after drainage improvements failed and their properties were damaged by erosion and subsidence.

The Superior Court granted defendants' motion for summary judgment. Owners appealed.

The Court of Appeal held that:

- County's requirement that developer make drainage-related improvements and offer to dedicate an easement as conditions of subdivision approval did not convert spillway into a public drainage system;
- Fees collected by flood control district did not establish that subdivision's drainage improvements were incorporated into a public drainage system;
- Failure of defendants to require mitigation by upstream property owners did not establish that subdivision's drainage improvements were a public work; and
- Any error in trial court's exclusion of expert's statement regarding county's custom and practice was harmless.

County's requirement that private developer make drainage-related improvements and offer to dedicate an easement as conditions of approval of subdivision did not convert spillway constructed by developer into a public drainage system, as alleged in inverse condemnation action brought by subdivision property owners, where county never expressly accepted the easement offer and never maintained or repaired the spillway or installed any improvements.

The fact that drainage improvements required for county approval of subdivision served some off-subdivision needs did not convert the improvements into public works in inverse condemnation action brought by subdivision property owners; county ordinance requiring easements for off-subdivision drainage merely recognized that waters from landlocked properties must at times be conveyed through drainage improvements on other properties to reach a natural watercourse.

County's failure to act on developer's offer of dedication of subdivision's drainage improvements did not convert the improvements into public works in inverse condemnation action brought by subdivision property owners; the county's acceptance of the offer only for the purpose of recording the deed was not an equivocal acceptance of the offer for the purpose it was offered, i.e., to access the improvements, and county made no effort to maintain or repair the improvements.

County's requirement that subdivision developer install drainage improvements and county's acceptance "for recording only" of offer of dedication of the improvements did not create an implied acceptance of the drainage easements as public works in inverse condemnation action brought by subdivision property owners; county was not involved in the construction of the improvements and did not perform maintenance or repair work on them.

Fees collected from subdivision property owners by flood control district were not evidence that subdivision's drainage improvements were incorporated into a public drainage system in inverse condemnation action brought by owners against district and county; fees were collected pursuant to a drainage fee ordinance to be placed in a fund intended to cover a local match to a proposed federal flood-control project that was never built.

ATTORNEYS' FEES - CALIFORNIA

[Kennedy Commission v. City of Huntington Beach](#)

Court of Appeal, Fourth District, Division 2, California - May 11, 2023 - Cal.Rptr.3d - 2023 WL 3372378

Objector filed petition for alternative writ of mandate and complaint for declaratory and injunctive relief against city and city council, alleging that amended housing plan was inconsistent with city's housing element, which identified sufficient sites to accommodate city's regional housing needs allocation (RHNA) of low-income housing.

Action was transferred from the Superior Court, Orange County. The Superior Court, Los Angeles County granted petition for writ of mandate and, later, the Superior Court awarded attorney fees to objector. City and city council appealed each decision. The Court of Appeal reversed, granting of petition for writ of mandate and reversed attorney fees award. On remand, objector filed first amended petition for writ of mandate and declaratory relief. After parties stipulated to dismissal of first amended petition, objector filed motion for attorney fees. The Superior Court granted attorney fees in amount of \$3,531,201.10. City and city council appealed.

The Court of Appeal held that:

- Objector satisfied causation element to recover attorney fees under catalyst theory pursuant to statute allowing award of fees in action resulting in enforcement of important right affecting public interest;
- Action was not frivolous, as supported award of attorney fees;
- Trial court acted within its discretion in finding that objector reasonably attempted to settle its

case before suing;

- Objector satisfied prong requiring enforcement of important right;
- Action conferred a significant benefit on public;
- Sufficient evidence supported trial court's finding that 4,165.7 hours spent litigating case was reasonable; and
- Trial court acted within its discretion when it applied multiplier of 1.4 to lodestar amount.

Objector's persistence in requiring city to meet city's regional housing needs allocation (RHNA) of low-income housing was substantial factor in city's adoption of second housing element, which complied with RHNA, and thus objector satisfied causation element to recover attorney fees under catalyst theory pursuant to statute allowing award of fees in action resulting in enforcement of important right affecting public interest, in action seeking writ of mandate and declaratory relief regarding amended housing plan; objector's litigation caused Legislature to change law to require consistency by charter cities and prompted Department of Housing and Community Development (HCD) to file suit against city, and objector achieved its primary objective of city complying with RHNA.

ANNEXATION - ILLINOIS

[Village of Kirkland v. Kirkland Properties Holdings Company, LLC I](#)

Supreme Court of Illinois - May 18, 2023 - N.E.3d - 2023 IL 1286122023 WL 3516672

Village brought action against purported successor owners of original landowner, alleging they breached recorded annexation agreement for 114-acre residential subdivision by refusing its request for a letter of credit, in amount proportionate to the number of their lots, to secure completion of roads in the subdivision, and sought damages or, in the alternative, injunctive relief in form of specific performance.

The Circuit Court granted defendants' motion to dismiss on the pleadings and awarded attorney fees in their favor. Village appealed. The Appellate Court reversed in part, vacated in part, and remanded. Defendants' petition for leave to appeal was allowed.

The Supreme Court held that:

- Village's notice of appeal was sufficient to confer appellate jurisdiction over its challenge to the circuit court's award of attorney fees and the circuit court's dismissal of village's third amended complaint, on which the circuit court based its award of attorney fees;
- Defendants were "successor owners of record of the land" subject to the annexation agreement, even though they owned only a portion of the original configuration;
- The annexation agreement was binding on defendants; and
- Because the Municipal Code expressly authorized specific performance as a remedy, village's requests for specific performance remained viable despite the availability of other avenues of relief.

LIABILITY - IOWA

[Sutton v. Council Bluffs Water Works](#)

Supreme Court of Iowa - May 19, 2023 - N.W.2d - 2023 WL 3555502

Homeowners brought action against city for strict liability and negligence, alleging that underground water main broke and that this water caused their house to settle, resulting in damage to its foundation, interior walls, garage floors, and doors.

The District Court denied city's motion to dismiss the strict liability claim, and city sought interlocutory appeal.

The Supreme Court held that:

- Municipal Tort Claims Act did not bar homeowners' strict liability claim against city, and
- Municipal Tort Claims Act's language defining "tort" as every civil wrong which results in wrongful death or injury embraces strict liability claims.

Municipal Tort Claims Act did not bar homeowners' strict liability claim against city for damages allegedly caused when underground water main broke and the water caused their house to settle, resulting in damage to its foundation, interior walls, garage floors, and doors; strict liability claims were "torts" for which parties could pursue claims under the Act, and sections of Act granting immunity to municipalities for tort claims based on claims of negligent design and construction of public facilities or failure to upgrade public facilities were not applicable since homeowners alleged no negligence in design and made no allegation of any failure by city to upgrade, improve, or alter any part of water distribution system to a new, changed, or altered design standard.

Municipal Tort Claims Act section granting immunity to municipalities for tort claims based on claims of failure to upgrade public improvements or facilities is not limited to negligence, and it bars claims based on an alleged failure to upgrade existing public facilities when a new-and-improved design standard emerges.

EMINENT DOMAIN - MASSACHUSETTS

[Smiley First, LLC v. Department of Transportation](#)

Supreme Judicial Court of Massachusetts, Suffolk - May 23, 2023 - N.E.3d - 2023 WL 3589087

Landowner brought action against Massachusetts Department of Transportation (MassDOT), seeking declaratory and equitable relief as to MassDOT's contention that its purported taking of landowner's property merely confirmed rights that MassDOT already held under previous taking.

On cross-motions for summary judgment, the Superior Court granted summary judgment to MassDOT. Landowner appealed to Appeals Court, and the Supreme Judicial Court transferred case on Supreme Judicial Court's own motion.

The Supreme Judicial Court held that:

- Whether easement has been established by eminent domain or granted privately, as general rule, doubts as to extent of restriction in easement should be resolved in favor of freedom of land from servitude, and
- Easement condemned by MassDOT's predecessor-in-interest for relocating railroad facilities displaced by road construction project did not encompass project for construction of test track and 6,000 square foot building for storage of railway vehicles on burdened land, and thus such project constituted an additional taking for which compensation was required.

Whether easement has been established by eminent domain or granted privately, as general rule, doubts as to extent of restriction in easement should be resolved in favor of freedom of land from servitude.

Easement condemned by Department of Public Works, the predecessor-in-interest to Massachusetts Department of Transportation (MassDOT), for relocating railroad facilities displaced by road construction project did not encompass project for construction of test track and 6,000 square foot building for storage of railway vehicles on burdened land, and thus such project constituted an additional taking for which compensation was required; easement was limited in space and time by air rights reserved to fee holder, providing for railroad to relocate a single track to property and thereafter fixing scope of easement to the right of way occupied by track and vertical dimension above it, and overall purpose set out in easement was to relocate the facilities being displaced.

License agreement entered into between Commonwealth and Department of Public Works, the predecessor-in-interest to Massachusetts Department of Transportation (MassDOT), which permitted easement condemned by Department for relocating railroad facilities displaced by road construction project to be used by railroad for ancillary activities that constituted railroad purposes, could not unilaterally expand scope of permissible use of the burdened land beyond what was stated in the taking.

Where a right of way, or other easement, is granted by deed without fixed and defined limits, the practical location and use of such way or easement by the grantee under the deed, acquiesced in by the grantor at the time of the grant and for a long time subsequent thereto, operate as an assignment of the right, and are deemed to be that which was intended to be conveyed by the deed, and are the same, in legal effect, as if it had been fully described by the terms of the grant.

Easement condemned by Department of Public Works, the predecessor-in-interest to Massachusetts Department of Transportation (MassDOT), for relocating railroad facilities displaced by road construction project, providing for railroad to relocate a single track to property and thereafter fixing scope of easement to the right of way occupied by track and vertical dimension above it, did not give railroad a right to occupy the entire parcel of burdened land in perpetuity; rather, railroad only possessed a right to place its tracks and facilities in the place of its choosing on the burdened land.

EMINENT DOMAIN - PENNSYLVANIA

[In re General Municipal Authority of City of Nanticoke](#)

Commonwealth Court of Pennsylvania - March 27, 2023 - A.3d - 2023 WL 2637071

Condemnees brought separate preliminary objections to amended declarations of taking of their respective properties by city's general municipal authority, which declarations were for construction of multi-use building.

The Court of Common Pleas overruled condemnees' objections and, after condemnees filed notices of appeal, directed condemnees to file concise statements of errors. After trial judge's retirement, Tina Polachek Gartley, J., issued supporting opinion.

The Commonwealth Court held that:

- Provisions of the Municipality Authorities Act (MAA) allowing takings for partial public uses, uses not exclusively designated as public or non-public, and uses for industrial development did not

- facially violate federal or state constitutional protections;
- Trial court allowed amendment of declarations after condemnees brought preliminary objections, and thus, amended declarations were not improperly filed;
- Absent any prejudice resulting from listing of incorrect location for examination of minutes of meeting by authority authorizing declarations, declarations were validly authorized;
- Any inadequacy in description of condemnee's property in original declaration was rectified by amended declaration; but
- Remand was required for trial court to hold de novo hearing and to make findings of fact and conclusions of law.

OPEN MEETINGS - VIRGINIA

[Gloss v. Wheeler](#)

Supreme Court of Virginia - May 18, 2023 - S.E.2d - 2023 WL 3513381

County residents filed a petition for mandamus and injunction against members of the county board of supervisors, alleging violation of the Virginia Freedom of Information Act (VFOIA).

The Prince William Circuit Court granted defendants' motion to strike made at the conclusion of residents' evidence at trial, and denied residents' motion for reconsideration. Residents appealed.

The Supreme Court held that meeting of county's citizens advisory board and a majority of supervisors was subject to the open meeting provisions of VFOIA and did not fall within an exception to the definition of "meeting."

In action brought by county residents against members of the county board of supervisors for alleged violation of the Virginia Freedom of Information Act (VFOIA), meeting of county's citizens advisory board and a majority of supervisors did not fall outside the VFOIA definition of "meeting" based on participants' failure to discuss public business, where the meeting was called specifically to discuss matters of county policy related to riots occurring in the county and police response to those riots, such discussions occurred as planned, the same issues were placed on county board's agenda for a subsequent emergency meeting, and sufficient evidence supported a conclusion that county business was transacted regarding the contents of a requested law enforcement report about the riots.

MUNICIPAL CORPORATIONS - WASHINGTON

[Messersmith v. Town of Rockford](#)

Court of Appeals of Washington, Division 3 - May 18, 2023 - P.3d - 2023 WL 3514210

Property owners brought action against town, seeking to quiet title to strips of land that fell within platted roads and alleyway.

The Superior Court granted property owners' motion for summary judgment. Town appealed.

The Court of Appeals held that platted roads and alleyway were not subject to the nonuser statute and thus did not revert to property owners.

Platted roads and alleyway which were never developed were not subject to the nonuser statute and

thus did not revert to property owners in quiet title action against town, where the plain language of the nonuser statute as it existed at relevant times limited its application to “county” roads and ceased to apply to the roads on property owners’ land when the property was annexed into and became part of the town one year after having been platted.

EMINENT DOMAIN - FEDERAL

Angelly v. United States

United States Court of Federal Claims - May 11, 2023 - Fed.Cl. - 2023 WL 3398155

Owners of land and other property along two rivers filed suit against United States, seeking just compensation for alleged physical taking of flowage easements by Army Corps of Engineers’ construction of river training structures designed to deepen and provide better alignment for rivers’ navigational channels thereby causing atypical and unseasonal flooding on their land. Government moved to dismiss for lack of subject matter jurisdiction and for failure to state claim.

Holdings:

- Takings claims were not time barred, and
- Landowners’ complaint sufficiently stated takings claims.

Landowners’ allegations of atypical and unseasonal flooding of their property, which would not have occurred absent Corps of Engineers’ construction of river training structures for navigational channels, would be accepted as true on government’s motion to dismiss takings claims for lack of subject matter jurisdiction, so Court of Federal Claims would presume owners rarely experienced flooding outside of typical flooding season until specified years; government failed to controvert owners’ allegations and instead provided evidentiary support for assertion that flooding occurred regularly for many years, but nowhere in its motion or attached exhibits presented evidence calling jurisdictional facts into question contrary to owners’ allegations of new atypical flooding during growing season.

When the government decides to forego the opportunity to define precisely when a Fifth Amendment taking occurs, and instead leaves the taking to physical events, it is thereby putting on the owner the onus of determining the decisive moment when the fact of the taking could no longer be in controversy; these circumstances would allow the government to place an unfair burden on the property owner, so strict application of accrual principles is discouraged in cases where the taking is the result of a gradual process.

Under the “stabilization doctrine,” the statute of limitations does not bar an action under the Tucker Act for a Fifth Amendment taking by flooding when it is uncertain at what stage in the flooding operation the land has become appropriated for public use; rather, stabilization occurs when it becomes clear that the gradual process set into motion by the government has effected a permanent taking, not when the process has ceased or when the entire extent of the damage is determined.

During the time when it is uncertain whether the gradual process will result in a permanent taking, under the Fifth Amendment, the plaintiff need not sue the government; however, once it is clear that the process has resulted in a permanent taking and the extent of the damage is reasonably foreseeable, the claim accrues and the statute of limitations begins to run.

Under stabilization doctrine, landowners’ claims seeking just compensation under Tucker Act, for atypical and unseasonal flooding of their property due to Army Corps of Engineers’ construction of

river training structures for navigational channels, accrued under six-year statute of limitations for takings claims, on date that flooding stabilized when it became clearly apparent by passage of time that such atypical and unseasonable intermittent flooding was of permanent nature.

Landowners claiming that Army Corps of Engineers effected taking of their property, by atypical and unseasonal flooding due to construction of river training structures for navigational channels, were not required to pinpoint precise action constituting conduct that government could not engage in without paying just compensation, in order to state Fifth Amendment takings claim, since pinpointing requirement for regulatory taking claim did not apply to landowners' physical takings case, and even if pinpointing requirement applied, owners sufficiently alleged their claims with enough specificity to pinpoint what government actions allegedly led to taking of their properties.

Landowners claiming that Army Corps of Engineers effected taking of their property, by atypical and unseasonal flooding due to construction of river training structures for navigational channels, were not required to affirmatively and literally plead that alleged flooding fell outside of United States' navigational servitude, in order to state Fifth Amendment takings claim, since owners' properties did not sit in riverbed, and it was not location of river training other structures that was relevant, but rather, location and permanence of effect of government action causing flooding.

Court of Federal Claims conducts a two-part test to distinguish torts from takings: (1) a property loss compensable as a taking only results when the government intends to invade a protected property interest or the asserted invasion is the direct, natural, or probable result of an authorized activity and not the incidental or consequential injury inflicted by the action, and (2) the nature and magnitude of the government action must be considered.

Landowners seeking just compensation for atypical and unseasonal flooding of their properties due to Army Corps of Engineers' construction of river training structures for navigational channels stated claim for Fifth Amendment taking, not claim sounding in tort, since owners alleged they could establish their takings claims by proving that flooding allegedly invading their properties was direct, natural, and probable result of Corps' actions to maintain navigable river channel.

In analyzing whether the invasion of owners' property was the direct, natural, or probable result of the government action, as required to state a Fifth Amendment takings claim, Court of Federal Claims must look at whether the result was predictable; in other words, the injury must be the foreseeable result of the action.

SECURITIES - CALIFORNIA

[Quinn v. LPL Financial LLC](#)

Court of Appeal, Second District, Division 8, California - May 10, 2023 - Cal.Rptr.3d - 2023 WL 3334992

Registered securities broker-dealers and investment advisers brought action alleging that brokerage firm misclassified them as independent contractors, rather than employees, and failed to reimburse for business expenses and made unlawful wage deductions.

The Superior Court granted firm's motion for summary adjudication. Plaintiffs appealed.

The Court of Appeal held that:

- Statute creating different test for determining whether broker-dealers and advisors were

- employees did not violate their equal protection rights, and
- Retroactive application of the statute did not violate due process.

Statute stating that *Borello*, 48 Cal.3d 341, 256 Cal.Rptr. 543, 769 P.2d 399, rather than *Dynamex*, 4 Cal.5th 903, 232 Cal.Rptr.3d 1, 416 P.3d 1, test for determining status as employee or independent contractor applied to registered securities broker-dealers and investment advisers had rational basis and did not violate equal protection rights of advisors and broker-dealers, even if the exemption resulted from lobbying efforts; legislature rationally could believe such professionals, who asked people to trust them with wealth and finances, had more skill and bargaining power than the average worker and therefore were less vulnerable to exploitation by misclassification as independent contractors.

Registered securities broker-dealers and investment advisers had no vested right in a particular test for determining whether they were employees or independent contractors, and, thus, retroactive application of statute stating that *Borello*, 48 Cal.3d 341, 256 Cal.Rptr. 543, 769 P.2d 399, rather than *Dynamex*, 4 Cal.5th 903, 232 Cal.Rptr.3d 1, 416 P.3d 1, test for determining status as employee or independent contractor applied to registered securities broker-dealers and investment advisers did not violate due process.

MUNICIPAL GOVERNANCE - CALIFORNIA

[Childhelp, Inc. v. City of Los Angeles](#)

Court of Appeal, Second District, Division 7, California - April 17, 2023 - Cal.Rptr.3d - 2023 WL 3274645

Nonprofit tenant brought action against city landlord for declaratory relief, writ of mandate, and promissory estoppel after city declined to transfer property to tenant in exchange for tenant's agreement to continue using the property to provide services for victims of child abuse.

City filed unlawful detainer action, and actions were consolidated. The Superior Court granted city's motions for summary adjudication on promissory estoppel cause of action, sustained city's demurrer without leave to amend to tenant's causes of action for declaratory relief and writ of mandate, and granted summary judgment to city on unlawful detainer complaint. Tenant appealed.

The Court of Appeal held that:

- City council resolution directing various city departments and officials to prepare and execute the necessary approvals and agreements was not an ordinance or contract which required city to transfer the property;
- Tasks described in city council resolution were discretionary rather than ministerial; and
- City could not be promissorily estopped from entering into any contract which violated city charter.

City council resolution directing various city departments and officials to prepare and execute the necessary approvals and agreements to convey property to nonprofit tenant, in exchange for tenant's agreement to continue using the property to provide services for victims of child abuse, was not an ordinance or contract which required city to transfer the property; city did not comply with

the requirements in the city charter and administrative code for contracting and selling real property, and there was no ordinance prescribing the terms and conditions of the sale or a written contract signed by the mayor or other authorized personnel and approved by the city attorney.

Tasks described in city council resolution directing various city departments and officials to prepare and execute the necessary approvals and agreements to convey property to nonprofit tenant, in exchange for tenant's agreement to continue using the property to provide services for victims of child abuse, were discretionary rather than ministerial, and thus tenant was not entitled to writ of mandate compelling city to transfer the property; although the resolution directed certain City officers and departments to take certain actions, it did not specify how these actions should be carried out, and there was no contract, or even agreement on key terms, at the time the resolution was passed.

City could not be promissory estopped from entering into any contract to convey premises to nonprofit tenant, in exchange for tenant's agreement to continue using the property to provide services for victims of child abuse, which violated city charter, even if city council had passed resolution directing various city departments and officials to prepare and execute the necessary approvals and agreements and had induced tenant not to look for other, affordable properties; the reasonable value of the property exceeded \$5,000, city attorney had not approved the form of any agreement to sell the property, and city had not passed an ordinance or entered into a written contract to sell the property to tenant.

LIABILITY - IOWA

[White v. Harkrider](#)

Supreme Court of Iowa - May 12, 2023 - N.W.2d - 2023 WL 3395946

Arrestee's spouse brought action against city, county, police officer, and deputy sheriff, alleging state constitutional tort claims, as well as claims for intentional infliction of emotional distress, trespass, and assault, arising out of warrantless arrest which occurred at their residence.

The District Court granted in part and denied in part defendants' motion to dismiss for failure to state claim. Application of spouse and cross-application of defendants for interlocutory appeal was granted.

The Supreme Court held that:

- Defendants' alleged conduct in effecting warrantless arrest was not outrageous, precluding claim for intentional infliction of emotional distress;
- Officers did not commit trespass when they entered spouse's property; but
- Spouse sufficiently stated claim for assault.

BONDS - MISSOURI

[Krupka v. Stifel Nicolaus & Co., Inc.](#)

United States District Court, E.D. Missouri, Eastern Division - May 11, 2023 - Slip Copy - 2023 WL 3376356

California Plaintiffs filed a putative class action in Missouri state court alleging that Missouri

Defendant Stifel Nicolaus made negligent misrepresentations and was negligent in its underwriting of municipal bonds issued by the Illinois Finance Authority (IFA) to fund low-income housing developments in Chicago.

In January 2023, Defendant removed the case to the District Court of Missouri under the Class Action Fairness Act (CAFA). Plaintiffs moved to remand the case, arguing that their claims fell under CAFA's jurisdictional exception for actions related to securities.

The District Court held that:

- CAFA confers original federal jurisdiction when the putative class has over 100 members, the amount in controversy exceeds \$5 million, and the parties are minimally diverse in citizenship;
- CAFA does not apply to "any class action that solely involves a claim that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security;"
- The party seeking remand bears the burden of proving a CAFA exception, and any doubt is resolved against remand;
- In cases where remand was granted, the plaintiffs sued in their capacity as holders alleging breach of fiduciary duties owed by the defendant trustees or corporate board members and related claims predicated on the breach;
- By contrast, in cases where plaintiffs have sued as purchasers alleging misrepresentation in the sale of securities, courts have denied remand; and
- Remand was not warranted under the CAFA securities exception.

"Here, Plaintiffs have not sued the trustee and do not plead the existence of a fiduciary relationship on which their claims depend. Rather, they allege injury from Stifel's negligent due diligence and resulting misrepresentations in the offering memorandum provided to potential investors as purchasers. Applying the foregoing caselaw to this set of facts, the Court concludes that remand is not warranted under the CAFA securities exception."

"The Court acknowledges Plaintiffs' argument that a straightforward reading of the statute could be construed to encompass their claims, given its broad 'related to' language. But while the Eighth Circuit has yet to opine on this issue, the Circuit has instructed in a similar context that courts are to interpret CAFA jurisdiction broadly and exceptions narrowly, with any doubt resolved against remand."

"Mindful of this directive and guided by the reasoning of other Circuit and district courts, the Court declines to extend the securities exception to cover claims involving the performance of non-fiduciary functions vis-à-vis potential investors based on an alleged duty of care not grounded in the securities themselves. Rather, this case appears to present the type of 'interstate class action of national importance' that Congress intended to place in federal court."

ZONING & PLANNING - NEW HAMPSHIRE

[Anthony v. Town of Plaistow](#)

Supreme Court of New Hampshire - May 16, 2023 - A.3d - 2023 WL 3471177

Landowners sought review of town planning board's granting of site-plan approval for the development and consolidation of two neighboring lots in town's commercial zoning district.

The Superior Court affirmed. Landowners appealed.

The Supreme Court held that:

- Landowners could not raise argument that board erred when it determined that use of lots complied with zoning ordinance;
- Board adequately considered the potential for regional impact; and
- Board acted reasonably and lawfully in approving site plan.

To the extent that landowners were seeking appellate review of trial court's judgment affirming zoning board of appeal's (ZBA) decision that it lacked jurisdiction to consider landowners' challenge to decision that a neighboring landowner's proposed use of lots complied with zoning ordinance, that issue was not properly before the Supreme Court; landowners did not appeal trial court's judgment before it became final, which meant that any appeal was deemed waived.

When appealing from superior court's affirmance of town planning board's granting of site-plan approval for the development and consolidation of two lots in town's commercial zoning district, neighboring landowners could not raise argument that board erred when it determined that use of lots complied with zoning ordinance; neighboring landowners had already appealed to have zoning board of appeals (ZBA) review the compliance determination, but the ZBA had dismissed that appeal.

Planning board adequately considered the potential for regional impact when approving site plan for the development and consolidation of two lots in town's commercial zoning district; at the public hearing, town's planning director discussed regional impact issues and testified that in his 16 years of experience, he had never worked on a commercial development that had caused any regional impact, and board was also aware that the project would not impact ground or surface water, that the site was located in the center of the town, and that the project would minimally affect traffic in the area.

Town's planning board acted reasonably and lawfully in approving site plan for the development and consolidation of two lots in town's commercial zoning district; board subjected application to a rigorous review process, including numerous public hearings and a site visit, and at each stage of the process, abutters' concerns about water quality, wetlands preservation, pollution, noise, and buffering were addressed by applicant or board.

EMINENT DOMAIN - SOUTH CAROLINA

[Braden's Folly, LLC v. City of Folly Beach](#)

Supreme Court of South Carolina - April 5, 2023 - S.E.2d - 2023 WL 2778717

Owner of two small, contiguous, developed coastal lots brought action for regulatory taking against city, alleging that city amended ordinance to require certain contiguous properties under common ownership, including owner's properties, to be merged into a single, larger property, and that merger ordinance interfered with owner's investment-backed expectation.

Parties filed cross-motions for summary judgment. The Circuit Court granted owner's motion. City appealed.

The Supreme Court held that:

- Treatment-of-the-land factor weighed in favor of identifying relevant parcel as both lots combined;
- Physical-characteristics factor weighed in favor of identifying relevant parcel as both lots combined;
- Value-of-the-property factor weighed in favor of identifying relevant parcel as both lots combined;
- Economic impact of ordinance weighed heavily in favor of finding that ordinance did not amount to regulatory taking;
- Extent to which ordinance interfered with owner's investment-backed expectations did not weigh in favor of either party; and
- Character of ordinance weighed in favor of finding that ordinance did not amount to regulatory taking.

Treatment-of-the-land factor for defining relevant parcel for purposes of regulatory-taking claim brought by owner of two contiguous, beachfront lots, who challenged city ordinance requiring lots to be merged, weighed in favor of identifying relevant parcel as both lots combined, where lots were currently merged under state and local law, there were no physical or topographical boundaries that would have limited joint treatment or development of lots, lots had always been owned and sold as single unit and were even redeveloped by owner at same time, and due to city's zoning ordinances and dune-management ordinances, owner was prohibited from selling lots separately or from building separate homes on each should one of the existing homes be more than 50% destroyed.

Physical-characteristics factor for defining relevant parcel for purposes of regulatory-taking claim brought by owner of two contiguous lots, who challenged city ordinance requiring lots to be merged, weighed in favor of identifying relevant parcel as both lots combined, where lots were located on beach, which was quintessential example of area that was heavily regulated and likely to become subject to additional environmental regulations.

Value-of-the-property factor for defining relevant parcel for purposes of regulatory-taking claim brought by owner of two contiguous lots, who challenged city ordinance requiring lots to be merged, weighed in favor of identifying relevant parcel as both lots combined; any economic impact resulting from merger ordinance was mitigated by benefits of using property as integrated whole since, regardless of merger ordinance, one lot contained beachfront property that was restricted by city's dune-management ordinances, which prevented any redevelopment on lot if existing house was destroyed by 50% or more, and thus merger of lots would allow owner to maintain beach house on other lot while simultaneously enjoying beach access from beachfront lot.

Economic impact of city ordinance requiring merger of property owner's two contiguous, beachfront lots weighed heavily in favor of finding that ordinance did not amount to regulatory taking, although owner claimed that if lots were sold separately, they were worth \$508,000 more than if they were sold as single, merged lot, where \$508,000 difference amounted to 23% reduction in value, which, while not insignificant, was far less than other reductions in value found constitutional by United States Supreme Court, owner remained able to rent out houses on each lot separately, with average gross receipts amounting to approximately \$117,000 per year, and during pendency of lawsuit, buyer offered owner its full asking price of \$2.55 million for both lots.

Extent to which city ordinance requiring merger of property owner's two contiguous, beachfront lots interfered with owner's investment-backed expectations did not weigh in favor of either party, for purposes of owner's regulatory-takings claim, although ordinance was enacted after owner redeveloped house on first lot and built new house on second lot, with plans to sell lots separately, where owner used lots for family vacations and as rental properties for several decades, owner delayed selling lots after redevelopment and made little to no effort to actually sell once lots were placed on market, lots were located in coastal area with dynamic, fragile environment, and size, shape, and orientation of lots provided objective indicia that owner's expectation of selling second

lot was unreasonable.

Character of city ordinance requiring merger of property owner's two contiguous, beachfront lots weighed in favor of finding that ordinance did not amount to regulatory taking, where ordinance did not unfairly single out owner's lots, ordinance was reasonable land-use regulation enacted as part of coordinated effort to protect beach and surrounding land by preserving federal funding for beach renourishment, and although owner was slightly burdened by ordinance, it in turn would benefit greatly from the restrictions that were placed on others.

EMINENT DOMAIN - TEXAS

[Hidalgo County Water Improvement District No. 3 v. Hidalgo County Irrigation District No. 1](#)

Supreme Court of Texas - May 19, 2023 - S.W.3d - 2023 WL 3556685

Water improvement district brought action against county irrigation district for the condemnation of property to extend an underground irrigation pipeline.

Special commissioners were appointed and assessed damages to irrigation district. Irrigation district then filed plea to the jurisdiction, arguing it had governmental immunity from condemnation suit. The County Court at Law granted irrigation district's plea to the jurisdiction and dismissed for want of subject matter jurisdiction based on governmental immunity.

Water improvement district appealed. The Corpus Christi affirmed. Water improvement district petitioned for review.

The Supreme Court held that irrigation district did not have governmental immunity from condemnation suit.

Irrigation district did not have governmental immunity from water improvement district's eminent domain proceeding for the condemnation of property to extend underground irrigation pipeline, considering the purpose that governmental immunity served, its nature, and development of immunity and eminent domain precedent; condemnation proceeding, being in rem in nature, did not threaten the public treasury, separation-of-powers underlying immunity were not threatened, recognizing immunity in condemnation proceedings would be contrary to legislative scheme that preferred pre-taking adjudication and would require the taking to occur first and consequences be sorted out later, and wholly immunizing irrigation district would undermine condemnation power the Legislature chose to grant condemnors to fulfill an identified public need.

IMMUNITY - CALIFORNIA

[Stack v. City of Lemoore](#)

Court of Appeal, Fifth District, California - May 3, 2023 - Cal.Rptr.3d - 2023 WL 3220918

After breaking his wrist when he tripped and fell on defect caused by uneven sidewalk, jogger sued city for general negligence and under the Government Claims Act for maintaining a dangerous condition of public property.

Following judgment of nonsuit on negligence cause of action, and denial of city's motions for a

nonsuit and for a directed verdict on the cause of action for maintaining a dangerous condition, the Superior Court entered judgment on jury verdict in favor of jogger, awarding \$90,000 in damages. City appealed.

The Court of Appeal held that:

- Height differential between slabs of sidewalk weighed heavily against finding that defect was trivial as a matter of law;
- Factor of the nature of the defective condition weighed against ruling that defect was trivial as a matter of law;
- Factor of the quality of the defect weighed against ruling that defect was trivial as a matter of law;
- Factor of obstruction of the defect weighed against ruling that defect was trivial as a matter of law; and
- Factors of weather and lighting conditions weighed in favor of ruling that defect was trivial as a matter of law.

IMMUNITY - IDAHO

[Mattson v. Idaho Department of Health and Welfare](#)

Supreme Court of Idaho, Boise - January 2023 Term - May 4, 2023 - P.3d - 2023 WL 3236922

Patient and her husband brought action against Idaho Department of Health and Welfare and certified physician assistant, alleging medical malpractice and failure to obtain informed consent.

The First Judicial District Court granted summary judgment in favor of defendants. Patient and husband appealed.

The Supreme Court held that:

- Idaho Tort Claims Act provided immunity for claims arising out of injuries to person receiving services from state mental health center, hospital, or similar facility;
- Provision of Idaho Tort Claims Act providing immunity for claims arising out of injury to “person receiving services from a mental health center, hospital or similar facility” included noncustodial outpatient services provided by state; and
- Fact issue existed as to whether defendants’ alleged negligence amounted to “reckless, willful and wanton conduct.”

TELECOM - LOUISIANA

[City of Kenner v. Netflix, Inc.](#)

Court of Appeal of Louisiana, Fifth Circuit - May 3, 2023 - So.3d - 2023 WL 3216197 - 22-466 (La.App. 5 Cir. 5/3/23)

City brought putative class action on behalf of itself and all of Louisiana’s political subdivisions similarly situated against video streaming platforms seeking to collect franchise fees under Consumer Choice for Television Act (CCTA).

The District Court sustained platforms’ exceptions of no cause of action and no right of action, and dismissed city’s claims against platforms with prejudice. City appealed.

The Court of Appeal held that:

- City had no right of action to enforce CCTA provisions against platforms that did not hold franchise certificates, and
- Video streaming platforms were not “video service providers” within meaning of the CCTA, and thus platforms were not required to obtain certificates of franchise from Secretary of State, so that city had no cause of action against platforms.

City had no right of action to enforce provisions of Consumer Choice for Television Act (CCTA) requiring franchise certificate holders to pay franchise fees against video streaming platforms that did not hold franchise certificates; CCTA did not grant local governmental subdivisions right to enforce its provisions by filing suit against non-holders of certificates.

Video streaming platforms were not “video service providers” within the meaning of the Consumer Choice for Television Act (CCTA), in that the platforms did not operate or maintain their own wire line facilities in the public right of way, and thus platforms were not required to obtain certificates of franchise from Secretary of State under CCTA, so that city had no cause of action to seek franchise fees from platforms under CCTA; platforms’ customers accessed video services through customers’ own devices via an internet connection provided by a third-party internet service provider (ISP), and platforms were not ISPs.

MUNICIPAL ORDINANCE - NEW HAMPSHIRE

[Town of Conway v. Kudrick](#)

Supreme Court of New Hampshire - May 2, 2023 - A.3d - 2023 WL 3185072

Town brought action against property owner seeking judgment declaring that zoning ordinance prohibited short-term rentals in residential districts that were not owner-occupied.

Parties filed cross-motions for judgment on the pleadings. The Superior Court granted owner’s motion and denied town’s motion. Town appealed.

The Supreme Court held that non-occupying owner’s use of property as a short-term rental was permitted under town’s zoning ordinance.

Non-occupying owner’s sole use of a property as a short-term rental satisfied definition of a “residential/dwelling unit” as required to be permitted in a residential zone under town zoning ordinance, notwithstanding town’s contentions that ordinance was not intended to permit transient stays; ordinance applied to occupants living as a household, which required that the property be used for residential purposes regardless of duration, and the occupants of the short-term rental property exclusively engaged in residential activities.

BANKRUPTCY - PUERTO RICO

[In re Financial Oversight and Management Board for Puerto Rico](#)

United States District Court, D. Puerto Rico - May 3, 2023 - B.R. - 2023 WL 3213960

Financial Oversight and Management Board for Puerto Rico brought adversary proceeding to disallow bondholders’ proofs of claim for amounts due pursuant to trust agreement with Puerto Rico

Electric Power Authority (PREPA).

Bondholders counterclaimed for declaratory judgment. Numerous entities were allowed to intervene. Parties moved for summary judgment, and the United States District Court for the District of Puerto Rico granted the motions in part and denied in part.

Bondholders and official committee of unsecured creditors filed motions requesting certification of the court court's summary judgment order for immediate appeal.

The District Court held that:

- Immediate appeal of summary judgment order would not materially advance the progress of the case or proceeding;
- Summary judgment order did not involve a question of law as to which there was no controlling decision; and
- Summary judgment order did not involve a matter of public importance.

Immediate appeal of Bankruptcy Court's order granting in part and denying in part summary judgment motions would not materially advance the progress of the case or proceeding, as may warrant appeal of interlocutory orders under Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), in adversary proceeding brought by Financial Oversight and Management Board for Puerto Rico seeking to disallow bondholders' proofs of claim for amounts due pursuant to trust agreement with Puerto Rico Electric Power Authority (PREPA); appeals would most efficiently be handled comprehensively, based upon final orders, and simultaneously, rather than piecemeal.

Bankruptcy Court's order granting in part and denying in part summary judgment motions did not involve a question of law as to which there was no controlling decision, as may warrant immediate appeal of interlocutory orders under Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), in adversary proceeding brought by Financial Oversight and Management Board for Puerto Rico seeking to disallow bondholders' proofs of claim for amounts due pursuant to trust agreement with Puerto Rico Electric Power Authority (PREPA); holdings from summary judgment order that parties sought to challenge were predominantly the application of settled law to interpretation of the trust agreement.

Bankruptcy Court's order granting in part and denying in part summary judgment motions did not involve a matter of public importance, as may warrant immediate appeal of interlocutory orders under Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), in adversary proceeding brought by Financial Oversight and Management Board for Puerto Rico seeking to disallow bondholders' proofs of claim for amounts due pursuant to trust agreement with Puerto Rico Electric Power Authority (PREPA); parties requesting certification of summary judgment order for immediate appeal did not support their conclusory assertions of public importance with respect to the advancement of jurisprudence, nor did they support their assertion that the decision would affect a large number of jobs or other vital interests in a community.

POLITICAL SUBDIVISIONS - VIRGINIA

[Oreze Healthcare LLC v. Eastern Shore Community Services Board](#)

Supreme Court of Virginia - May 4, 2023 - S.E.2d - 2023 WL 3237365

Operator of assisted living facility brought breach of lease action against Eastern Shore Community Services Board, a political subdivision of the Virginia Department of Behavioral Health and

Developmental Services which had leased facility buildings and agreed to maintain them, alleging Board acted or failed to act with regard to the buildings , which had flooded.

After operator conveyed the property by general warranty deed to a third party, Board filed motion for summary judgment, alleging that deed had conveyed breach of lease claims. The Portsmouth Circuit Court granted the motion, and operator appealed.

The Supreme Court held that:

- Lease did not merge into warranty deed, and
- Breach of lease claim was a chose in action “owned” by operator that did not transfer simply by execution of warranty deed to third party.

Lease between operator of assisted living facility and Eastern Shore Community Services Board, which had leased facility buildings and agreed to maintain them, did not merge into warranty deed which operator conveyed to third-party; Board was neither grantor nor grantee, lease was not a collateral agreement made in connection with the sale, and lease terminated before the deed was executed.

Assisted living facility operator’s breach of contract claim against Eastern Shore Community Services Board, which had leased facility buildings and agreed to maintain them, was a chose in action “owned” by operator that did not transfer simply by execution of warranty deed to third party; while operator could have assigned its right to the breach of contract claim to the third party, the deed conveying the property was silent as to that claim.

BALLOT INITIATIVE - VIRGINIA

[Williams v. Legere](#)

Court of Appeals of Virginia, Norfolk - May 2, 2023 - S.E.2d - 2023 WL 3183162

City resident who circulated petition for referendum on question of whether school board members were to be elected directly by city voters filed motion for emergency declaratory judgment, a temporary injunction, and writ of mandamus, seeking to enjoin city registrar and officials on city election board from enforcing statutory residency requirement for circulator and witnesses of referendum petition and challenging the constitutionality of the witness-circulator residency requirement.

The Circuit Court granted city’s motion to intervene and dismiss, granted election board’s demurrer, and denied resident’s motions. Resident filed petition for review with the Supreme Court as to the denial of injunction, which was denied. Resident appealed the denials of the other requested relief to the Court of Appeals.

The Court of Appeals held that:

- As a matter of first impression, witness-circulator residency requirement significantly burdened resident’s right to political speech secured by First Amendment, and thus strict scrutiny, rather than rational basis review, applied to resident’s constitutional challenge to the requirement, and

- Exception to mootness doctrine for disputes capable of repetition, yet evading review applied to the proceeding.

Statute imposing locality residency requirement on witnesses and circulators of referendum petitions constituted a restriction on political speech that was a clear deprivation of a right guaranteed in the First Amendment, and thus strict scrutiny, rather than rational basis review, applied to city resident's constitutional challenge to the validity of the witness-circulator residency requirement; requirement limited the number of registered voters that resident, as proponent of referendum petition, could reach and decreased the likelihood that she would be able to get her initiative on the ballot, and the requirement substantially restricted resident's ability to engage in core political speech.

Exception to mootness doctrine for disputes capable of repetition, yet evading review applied to proceeding brought by city resident, as proponent of referendum petition, for declaratory judgment and writ of mandamus, challenging constitutionality under First Amendment of statutory residency requirement for witnesses and circulators of referendum petitions; although deadline to get resident's referendum on ballot had long since passed, resident expressed an intent to file future referendum petitions and had reasonable expectation that city would enforce the residency requirement in the future.

POLITICAL SUBDIVISIONS - WEST VIRGINIA

[City of Wheeling v. Public Service Commission of West Virginia](#)

Supreme Court of Appeals of West Virginia - April 24, 2023 - S.E.2d - 2023 WL 3051738

City appealed from decision of Public Service Commission (PSC) which re-calculated rate for sewer treatment services sold by city to other city, and from decision of PSC, which denied city's petition for reconsideration and motion for stay.

On rehearing, the Supreme Court of Appeals held that 120-day dispute resolution period set forth in statute governing PSC's jurisdiction over certain political subdivisions providing separate or combined water or sewer services commenced on date request for investigation was filed with PSC pursuant to that statute.

The 120-day dispute resolution period set forth in the statute governing the Public Service Commission's (PSC) jurisdiction over certain political subdivisions providing separate or combined water or sewer services commences on the date a request for investigation is filed with the PSC pursuant to that statute.

ZONING & PLANNING - WASHINGTON

[Kenmore MHP LLC v. City of Kenmore](#)

Supreme Court of Washington, En Banc - May 4, 2023 - P.3d - 2023 WL 3238559

Property owner sought judicial review of decision of Growth Management Hearings Board that granted city's motion for summary judgment and dismissed property owner's petition for review challenging city land-use ordinance, based on determination that property owner did not substantially comply with service requirements.

The Superior Court reversed and remanded to Board. City appealed. The Court of Appeals reversed the Superior Court and upheld the Board's decision. Property owner filed petition for review, which was granted.

The Supreme Court held that:

- Property owner substantially complied with service requirements, and
- Board's failure to correctly apply test for substantial compliance and failure to consider prejudice as a factor was arbitrary and capricious in violation of Washington's Administrative Procedure Act (APA).

Petitioner substantially complied with service requirements under regulation governing petitions for review before the Growth Management Hearings Board relating to whether or not an adopted comprehensive plan was in compliance with the goals of the Growth Management Act, even though petitioner was not in actual compliance when it served city after the date it filed petition with Board; city was in the same position it would have been had petitioner actually complied with the order of service, and city did not claim that it was prejudiced.

Growth Management Hearings Board's dismissal of petition for review based on petitioner's alleged failure to substantially comply with regulatory service requirements by serving city after filing petition with Board was arbitrary and capricious in violation of Washington's Administrative Procedure Act (APA); Board failed to correctly apply test for substantial compliance with service requirement when it did not consider prejudice to city as a factor.

VARIABLE RATE DEMAND OBLIGATIONS - CALIFORNIA

[State ex rel. Edelweiss Fund, LLC v. JPMorgan Chase & Company](#)

Court of Appeal, First District, Division 4, California - April 27, 2023 - Cal.Rptr.3d - 2023 WL 3115668

Relator filed seventh amended qui tam complaint under the California False Claims Act (CFCA) against financial institutions and subsidiaries that served as remarketing agents for State that managed variable rate demand obligations (VRDO), alleging that they engaged and conspired to engage in "robo-resetting" scheme, in which they mechanically set interest rates for the VRDO en masse, without consideration of individual characteristics of the bonds, associated market conditions, or investor demand, which resulted in artificially high interest rates, in violation of contractual obligation to reset each VRDO's interest rate at the lowest possible level to enable them to sell the series at face value.

The Superior Court sustained defendants' demurrer without leave to amend. Relator appealed.

The Court of Appeal held that:

- Relator's allegations that comparison of defendants' average interest rates with average commercial paper rate showed artificial inflation were insufficient to support CFCA claim;
- Relator's allegations about forensic analysis and study that it performed to evaluate interest rate resetting by defendants were sufficient to support CFCA claim;
- Relator's allegations that seven former employees of defendants stated and corroborated that defendants engaged in "robo-resetting" scheme were sufficient to support CFCA claim;
- Relator stated claim against defendants for conspiracy to violate CFCA;
- Commercial paper comparison information on websites providing business and market news could

- not support application of CFCA's public disclosure bar;
- Interest rate reset information on website that published information on all municipal bonds was not a "report" of the state, as required for public disclosure bar to apply; and
- Interest rate reset information on website that published information on all municipal bonds did not constitute a public disclosure in "news media," as required for public disclosure bar to apply.

Relator alleged an implied certification claim under the California False Claims Act (CFCA) against remarketing agents for State that managed variable rate demand obligations (VRDO), but not a "literal false or fraudulent" claim for payment, under the federal False Claims Act (FCA); relator alleged that agents impliedly certified compliance with their contractual obligations reset each VRDO's interest rate at the lowest possible level to enable them to sell the series at face value by submitting claim for payment for remarketing services, and that implied certification was false because agents knew those services had not been performed, but relator did not allege any other express false statements in agents' claims for payment.

Compliance by remarketing agents for State that managed variable rate demand obligations (VRDO), with express contractual obligation to reset each VRDO's interest rate at the lowest possible level to enable them to sell the series at face value, was material government's payment decision, such that agents' false implied certification of compliance with that contractual term could support qui tam action against agents under California False Claims Act (CFCA); although the remarketing agreements did not mandate a specific process that agents had to use to reset the interest rate levels, it followed from the rate-resetting obligation that agents had to employ some methodology that was capable of allowing them to set the rates at the lowest possible level.

Relator's seventh amended complaint satisfied heightened pleading requirements for maintaining qui tam action under California False Claims Act (CFCA) against remarketing agents that managed variable rate demand obligations (VRDO), by alleging that during specific time frame, agents submitted claims for payment, impliedly certifying that they complied with contractual obligation to reset each VRDO's interest rate at the lowest possible level to enable them to sell the series at face value, and that those claims were false because agents mechanically set interest rates for VRDO en masse, without any consideration of individual characteristics of the bonds, associated market conditions, or investor demand, which resulted in artificially high interest rates.

Qui tam relator's allegations that comparison of State remarketing agents' average interest rates for variable rate demand obligations (VRDO) with average commercial paper rate showed that agents artificially inflated their interest rates for the VRDO by mechanically setting them en masse were insufficient to support claim, under California False Claims Act (CFCA), arising from false implied certification of compliance with express contractual obligation to reset each VRDO's interest rate at the lowest possible level to enable them to sell the series at face value; relator's complaint also contained allegations that agents' mechanical rate setting practices were the same both when the average VRDO rate was lower than the average commercial paper rate and when it was higher.

Qui tam relator's allegations about forensic analysis and study that it performed to evaluate interest rate resetting for variable rate demand obligations (VRDO) by remarketing agents were sufficient to support relator's claims, under California False Claims Act (CFCA), for false implied certification of compliance with contractual obligation to reset each VRDO's interest rate at the lowest possible level; relator alleged that forensic analysis revealed that agents grouped collections of VRDOs into "buckets" and applied to each "bucket" an identical pricing spread which moved the interest rate of each bond in the bucket up or down in lock-step fashion, and that study provided dozens of specific instances in which interest rate of a VRDO was set at a level higher than it should have been.

Qui tam relator's allegations that seven former employees of remarketing agents stated and

corroborated that agents shirked their contractual and regulatory obligations to reset interest rates for variable rate demand obligations (VRDO) at the lowest possible level to enable them to sell the series at face value, by engaging in rate-setting misconduct that relator's forensic analyses revealed, were sufficient to support relator's false implied certification claim, under California False Claims Act (CFCA); taken together, employees' statements added support for inference from rate-setting data that agents did not evaluate factors such as credit quality, revenue source, economic sector, and size, for each VRDO, and that their failure to do so resulted in rates that were too high.

Qui tam relator stated a claim against State remarketing agents that managed variable rate demand obligations (VRDO), for conspiracy to violate California False Claims Act (CFCA), arising from collusion to inflate VRDO interest rates; complaint alleged "cross-bank bucketing" of VRDO interest rate resets, that agents agreed to ignore a downgrade to short-term credit rating of one defendant, which would have lowered interest rates on VRDO, and to continue coordinated pricing, that agents used indexing services to exchange information about future VRDO rate-setting, and facts showing agents had the opportunity and incentive to inflate VRDO rates.

Seventh amended qui tam complaint against State remarketing agents that managed variable rate demand obligations (VRDO), rather than original complaint, was the operative pleading for purposes of determining whether California False Claims Act's (CFCA) public disclosure bar foreclosed CFCA claims based on allegations that agents set artificially high interest rates on VRDO, in violation of contractual obligation to reset each VRDO's interest rate at the lowest possible level to enable them to sell the series at face value.

Commercial paper comparison information available on website providing business and market news and on the Federal Reserve Economic Data (FRED) website were not material to relator's claims against State remarketing agents that managed variable rate demand obligations (VRDO), under California False Claims Act (CFCA), for false implied certification of compliance with express contractual obligation to reset each VRDO's interest rate at the lowest possible level to enable them to sell the series at face value, and thus could not support application of CFCA's public disclosure bar; relator's allegations that comparison of agents' average interest rates for VRDO with commercial paper rates showed that agents' rates were artificially inflated were insufficient to support his CFCA claim.

Interest rate reset information on website that published information on all municipal bonds was not a "report" of the state, as required for California False Claims Act's (CFCA) public disclosure bar to apply, in relator's qui tam action against State remarketing agents that managed variable rate demand obligations (VRDO) for false implied certification of compliance with express contractual obligation to reset each VRDO's interest rate at the lowest possible level to enable them to sell the series at face value; the information on the website was provided by remarketing agents and made available by the Municipal Securities Rulemaking Board (MSRB), a non-governmental self-regulatory organization.

Interest rate reset information on website that published information on all municipal bonds did not constitute a public disclosure in "news media," as required for California False Claims Act's (CFCA) public disclosure bar to apply, in relator's qui tam action against State remarketing agents that managed variable rate demand obligations (VRDO) for false implied certification of compliance with contractual obligation to reset each VRDO's interest rate at the lowest possible level to enable them to sell the series at face value; an online repository containing agents' daily or weekly submission of interest rate reset data was not generally newsworthy, and if interest rate data were considered a disclosure by "news media" simply because it was on a publicly available website, it would effectively swallow for limitations in CFCA.

IMMUNITY - CALIFORNIA

[Tansavatdi v. City of Rancho Palos Verdes](#)

Supreme Court of California - April 27, 2023 - P.3d - 2023 WL 3107312

Mother of bicyclist who was killed when his bicycle collided with a turning truck on city street brought action against city, alleging that city created a dangerous condition by removing a bicycle lane from the area of the accident, and had failed to warn of that dangerous condition, leading to accident and bicyclist's death.

The Superior Court entered summary judgment for city. Mother appealed, and the Court of Appeal affirmed in part, vacated in part, and remanded. City filed petition for review, which was granted.

The Supreme Court held that design immunity under the Government Claims Act does not categorically preclude failure to warn claims that involve a discretionarily approved element of a roadway; disapproving *Weinstein v. Department of Transportation*, 139 Cal.App.4th 52, and *Compton v. City of Santee*, 12 Cal.App.4th 591.

IMMUNITY - CALIFORNIA

[Hernandez v. City of Stockton](#)

Court of Appeal, Third District, California - April 28, 2023 - Cal.Rptr.3d - 2023 WL 3142328

Plaintiff filed a personal injury action after the city rejected his government claim for damages sustained in a fall caused by an allegedly defective public sidewalk.

The Superior Court granted the city's motion for summary judgment. Plaintiff appealed.

The Court of Appeal held that:

- Plaintiff's failure to comply with Government Claims Act precluded him from bringing a civil action for injuries allegedly caused by a defective public sidewalk;
- Plaintiff did not substantially comply with the claims presentation requirement of the Act; and
- Plaintiff was not excused from compliance with the Act even in the face of city's actual knowledge.

Plaintiff's failure to comply with the claim presentation requirement of the Government Claims Act precluded him from bringing a civil action against city for injuries sustained in a fall allegedly caused by a defective public sidewalk, where plaintiff's government claim specifically and solely identified an "uplifted sidewalk" as the dangerous condition that caused his injuries, but his civil action, liability was premised on a different dangerous condition, i.e. a hole created by an empty tree well.

Plaintiff who brought a civil action against city for injuries sustained in a fall allegedly caused by a defective public sidewalk did not substantially comply with the claims presentation requirement of the Government Claims Act, where he specifically identified the dangerous condition as an "uplifted sidewalk" in his government claim, but identified the defect in his civil action as hole caused by an empty tree well, which was not a further description or clarification of his allegation of an uplifted sidewalk, but was an entirely different description.

City engineer's deposition testimony that, after reviewing plaintiff's deposition transcript, he knew

plaintiff's claim against city was based on plaintiff tripping in a hole created by an empty tree well did not require reversal of trial court's grant of summary judgment for city based on plaintiff's failure to comply with notice requirements of the Government Claims Act, where plaintiff was not excused from compliance with the Act even in the face of city's actual knowledge, and there was nothing in the record showing that the city was aware of the actual cause of plaintiff's fall prior to the rejection of his government claim.

BOND VALIDATION - GEORGIA

[Joint Development Authority of Jasper County v. McKenzie](#)

Court of Appeals of Georgia - April 28, 2023 - S.E.2d - 2023 WL 3142214

State filed petition for order validating taxable revenue bonds and other aspects of project to develop and construct electric vehicle manufacturing facility pursuant to agreements between manufacturer, State, and multi-county joint development authority (JDA).

County citizens intervened in opposition to petition. Following evidentiary hearing, the Superior Court denied petition, finding project and bonds were not sound, feasible, and reasonable, that JDA failed to demonstrate project would promote welfare of local communities, and that rental agreement created taxable estate for years and did not create bailment for hire. JDA and State appealed, and proceedings on appeal were consolidated.

The Court of Appeals held that:

- State and JDA made out prima facie case that bonds and project were sound, feasible, and reasonable;
- Citizens failed to rebut prima facie showing that bonds and project were sound, feasible, and reasonable;
- Trial court could not deny petition on basis that it was not sound, feasible, or reasonable to exempt project from public audits;
- Citizens failed to rebut prima facie showing that bonds and project would promote local community's general welfare;
- Rental agreement did not give manufacturer bailment for hire as to personal property; and
- Rental agreement gave manufacturer usufruct in real property.

State and multi-county joint development authority (JDA) made out prima facie case, in State's petition to validate revenue bonds for car manufacturing facility project, that bonds and project were sound, feasible, and reasonable; petitioners showed that manufacturer had over \$21 billion in assets and \$16.4 billion in cash, bonds would be privately funded and would not subject State to pecuniary liability, manufacturer promised to create 7,500 new jobs with average salary of \$56,000, witnesses with background in development deals testified about benefits to local communities from jobs, tax revenue, and relocation of suppliers, and State committed to providing subsidies to defray project's costs.

In its petition to validate revenue bonds associated with project to develop and construct electric car manufacturing facility, State was not required to establish economic feasibility of bonds and project as part of its prima facie burden to show bonds and project were sound, feasible, and reasonable.

Citizens who opposed State's petition to validate revenue bonds for electric car manufacturing facility project failed to rebut State's prima facie showing that bonds and project were sound,

feasible, and reasonable; citizens only presented Securities and Exchange Commission (SEC) filings containing cautionary language about manufacturer and presented evidence that manufacturer had spent a lot of the capital it initially raised, but State's witnesses testified that SEC filings did not alarm them, and no evidence supported inference that manufacturer's financial condition would render project unsound, unfeasible, or unreasonable.

Trial court could not deny State's petition to validate revenue bonds for project to construct electric car manufacturing facility on basis that it was not sound, feasible, or reasonable to exempt project from public audits, where multi-county joint development authority (JDA), as bond issuer, complied with statutory procedure for waiving audit requirement, namely by providing public notice soliciting public preapproval of bond issue language that expressly indicated no associated performance audit or performance review would be conducted.

Citizens who opposed State's petition to validate revenue bonds for project to construct electric car manufacturing facility failed to rebut State's prima facie showing that bonds and project would promote local community's general welfare, and, thus, trial court could not deny petition based on finding that project would not benefit local community; citizens only cross-examined State's witnesses about lack of information regarding cost community would bear in supporting project but provided no affirmative evidence about such cost, and absent such evidence, trial court was required to defer to finding by multi-county joint development authority.

Rental agreement between manufacturer and multi-county joint development authority (JDA) for equipment and other property involved with project to develop car manufacturing facility did not give manufacturer bailment for hire as to equipment, even though agreement stated parties intended to create such bailment; agreement granted manufacturer rights that were greater than mere use of property and inconsistent with lack of ownership, such as right to dispose of equipment owned by JDA at manufacturer's discretion without transfer of title and without need to notify or compensate JDA up to specified cumulative value of non-replaced equipment, and allowed manufacturer to demand that JDA quitclaim its title to manufacturer.

A usufruct is created when the owner of real estate grants to another person the right simply to possess and enjoy the use of such real estate either for a fixed time or at the will of the grantor; in such a case, no estate passes out of the landlord and the usufruct may not be conveyed except by the landlord's consent, nor is it subject to levy and sale.

A lease of real estate for a period of less than five years is presumed to be a non-taxable usufruct, and there is a rebuttable presumption that a lease for five years or more is a taxable estate for years.

Express description of manufacturer's rights to land in rental agreement between manufacturer and multi-county joint development authority (JDA), which concerned land to be used in car manufacturing facility project, weighed in favor of finding that agreement merely granted usufruct to manufacturer, not taxable estate for years, where agreement specifically provided it granted only a usufruct, that manufacturer did not have a right to use project land in as absolute a manner as it could if it were owner or lessee with estate for years, and that agreement "does not grant and shall not be construed as a grant of title or leasehold estate" to manufacturer.

In agreement between manufacturer and multi-county joint development authority (JDA) concerning land for car manufacturing facility project, provisions discussing liability for ad valorem taxes weighed in favor of finding that parties intended to grant manufacturer a usufruct rather than an estate for years; agreement stated it created usufruct, which was not "taxable interest for purposes of ad valorem taxation," and stated that, while JDA could not guarantee "any particular ad valorem tax treatment," it would help manufacturer contest any ad valorem taxes that were levied and would

credit any payments of such taxes against manufacturer's obligations to make payment in lieu of taxes (PILOT).

In agreement between manufacturer, State, and multi-county joint development authority (JDA) concerning land for car manufacturing facility project, provisions discussing dominion or control over property weighed overall in favor of finding that agreement created usufruct, even though agreement let manufacturer engage in construction and alterations costing less than \$15 million without JDA's consent, which indicated estate for years; State fully owned buildings on property, manufacturer could only use property for specified purposes, JDA could inspect property, and manufacturer was bound by specified zoning and environmental provisions, restrictions on billboards and signage, and health, environmental, safety, and anti-discrimination laws, which JDA could enforce.

In agreement between manufacturer and multi-county joint development authority (JDA) concerning land for car manufacturing facility project, provisions discussing duties to keep and maintain premises and appurtenances of property weighed in favor of finding that agreement created usufruct; agreement stated that manufacturer was required to maintain, repair, and insure project and keep conditions safe, that JDA had no obligation to do so, that manufacturer would spend at least \$5 million or sum equivalent to revenue bonds in developing and improving project despite State's retention of title to buildings, improvements, and fixtures, and that JDA had certain rights and control regarding insurance.

In rental agreement between manufacturer and multi-county joint development authority (JDA) concerning land for car manufacturing facility project, provisions discussing manufacturer's ability to sublet or assign its rights weighed in favor of finding that agreement created usufruct; agreement did not allow manufacturer to create lien or encumbrance on property, convey any rights, interests, or duties in agreement, or sublet property to non-affiliate unless JDA first consented, and even with consent to subletting, which JDA could withhold unreasonably as to any subtenant other than manufacturer's suppliers, property could still be used solely for activities related to vehicle manufacturing.

State's decision not to present its own evidence at hearing on its petition to validate revenue bonds and other aspects of project to develop car manufacturing facility, instead deferring to multi-county joint development authority (JDA) to present evidence supporting petition, did not deprive State of standing to appeal from petition's denial; State retained standing to appeal as party to petition.

ZONING & PLANNING - MISSISSIPPI

[City of Ocean Springs v. Illanne](#)

Supreme Court of Mississippi - April 27, 2023 - So.3d - 2023 WL 3113383

Neighbors appealed three separate zoning decisions of the city board of aldermen regarding subdivision application for townhouse development.

The Circuit Court consolidated the appeals, reversed the decisions in two of the appeals, and on motion to alter or amend, altered its ruling in part, and remanded to the city board. City appealed.

The Supreme Court held that remand was required for a factual determination as to whether subdivision applicant was acting as a "petitioner" entitled to notice as a necessary party.

Remand of zoning appeals was required for a factual determination as to whether subdivision

applicant was acting as a “petitioner” before the board of aldermen or whether he was acting in a representative capacity on behalf of the petitioner, and thus whether neighbors who appealed zoning decision were required to name and give notice to applicant as a necessary party; in addition, Supreme Court would direct the trial court to determine all issues of fact that may arise out of any appeal submitted to the trial court for a determination and that may be necessary for disposition of cases on appeal.

ANNEXATION - NEW YORK

[Wagschal v. Szegedin](#)

Supreme Court, Appellate Division, Second Department, New York - April 12, 2023 - N.Y.S.3d - 2023 WL 2904405 - 2023 N.Y. Slip Op. 01899

Petitioners brought article 78 proceeding against town and existing village to prohibit town from exercising jurisdiction over certain proposals for annexation of certain territories of existing village.

The Supreme Court, Orange County, denied existing village’s motion to dismiss, granted portion of petition prohibiting town officials from exercising jurisdiction over annexation proposals until town considered proposed village’s incorporation petition, and dismissed petition to extent it sought to permanently prohibit town from considering annexation proposals. Town and existing village appealed.

The Supreme Court, Appellate Division, held that:

- Order was ripe for appellate review, and
- Prior jurisdiction rule required town to determine proposed village’s petition of incorporation before considering proposals to annex certain territories of existing village.

Trial court’s order in article 78 proceedings denying village’s motion to dismiss petition of prohibition to prohibit town and its officials to annex certain territories of village was ripe for appellate review, where village sought determination of whether town and its officials were about to proceed without or in excess of jurisdiction.

Prior jurisdiction rule required town to determine proposed village’s petition of incorporation before considering proposals to annex certain territories of existing village, where incorporation petition was filed before existing village filed any complete and formal annexation petition for same land, and incorporation petition superseded prior petitions filed for incorporation of proposed village.

OPEN MEETINGS - VIRGINIA

[Suffolk City School Board v. Wahlstrom](#)

Supreme Court of Virginia - April 27, 2023 - S.E.2d - 2023 WL 3103622

Resident brought action against city school board and two board members individually and in their official capacities, alleging board and members violated the Virginia Freedom of Information Act (FOIA) by denying her free entry to a public meeting of the board.

Following bench trial, the Suffolk Circuit Court entered judgment awarding relief against board and sustaining demurrer as to members’ individual liability. Defendants appealed and resident cross-

appealed.

The Supreme Court held that:

- Board violated VFOIA by denying resident “free entry” to meeting;
- Board’s VFOIA violation warranted injunctive relief;
- There is no requirement that a trial court making finding, express or implied, of a willful and knowing violation of VFOIA before it may issue a VFOIA injunction, overruling *Hale v. Washington Cnty. Sch. Bd.*, 241 Va. 76, 81, 400 S.E.2d 175;
- Resident “substantially prevailed,” as required for attorney fee award;
- Board did not present “special circumstances” sufficient to make attorney fee award unjust;
- Trial court erred in concluding that VFOIA did not permit civil penalties to be assessed against members in their individual capacities; and
- Members’ violations of VFOIA were not “knowingly made,” as required for imposition of civil penalties.

SCHOOL FINANCE - CALIFORNIA

[Davis v. Fresno Unified School District](#)

Supreme Court of California - April 27, 2023 - P.3d - 2023 WL 3107288

Taxpayer brought action against school district and contractor alleging that a lease-leaseback agreement for construction of new middle school, which was financed through bond proceeds, violated competitive bidding requirements, rules governing conflicts of interest, and education statutes.

The Superior Court sustained defendants’ demurrer and the Court of Appeal reversed in part. On remand, the Superior Court granted defendants’ motion for judgment on the pleadings. Taxpayer appealed. The Court of Appeal reversed. Defendants petitioned for review, which was granted.

The Supreme Court held that lease-leaseback arrangement was not a local agency “contract” subject to statutory validation as being inextricably bound to government indebtedness or debt financing; disapproving *McGee v. Balfour Beatty Construction, LLC*, 247 Cal.App.4th 235, 202 Cal.Rptr.3d 251.

A local agency contract is subject to validation under statute providing for an action to determine the validity of a local agency’s bonds, warrants, contracts, obligations, or evidences of indebtedness if the contract is inextricably bound up with government indebtedness or with debt financing guaranteed by the agency, and to satisfy this standard, the contract must be one on which the debt financing of the project directly depends.

A lease-leaseback arrangement between school district and contractor for construction of new middle school was not a local agency “contract” subject to statutory validation as being inextricably bound up with government indebtedness or debt financing guaranteed by the agency, where underlying project was fully funded by district’s prior sale of general obligation bonds, payment of debt service on bonds was from ad valorem property taxes, nothing in documents that were connected to approval and sale of bonds suggested any link to or dependence upon validity of lease-leaseback arrangement, and nothing in lease-leaseback documentation was concerned with project financing; disapproving *McGee v. Balfour Beatty Construction, LLC*, 247 Cal.App.4th 235, 202 Cal.Rptr.3d 251.

IMMUNITY - GEORGIA

Thomas v. Henry County Water Authority

Court of Appeals of Georgia - April 18, 2023 - S.E.2d - 2023 WL 2983097

Motorist brought personal-injury action against public water authority, which operated and maintained water system within county, and its employee, alleging that motorist suffered catastrophic injuries when authority's truck, which was being driven by employee, collided with motorist's automobile.

The Superior Court granted defendants' motion to dismiss. Motorist appealed.

The Court of Appeals held that:

- Limited waiver of sovereign immunity for automobile injury claims that are brought against counties and other local government entities is not conditioned on presentment of an ante litem notice of claim;
- Water authority was not entitled to be treated as a county for purposes of ante-litem-notice requirement;
- County is not immune from suit when a claimant fails to timely present ante litem notice of claim, as the suit is nonexistent; and
- Motorist's allegation that employee acted outside scope of employment precluded granting dismissal based on immunity for local governmental employee who committed tort involving use of motor vehicle while in performance of official duties.

ZONING & PLANNING - KENTUCKY

Friends of Louisville Public Art, LLC v. Louisville/Jefferson County Metro Historic Landmarks and Preservation Districts Commission

Supreme Court of Kentucky - April 27, 2023 - S.W.3d - 2023 WL 3113325

Organizations and individuals who opposed the city's attempt to move a statute from an historic preservation district sought judicial review of city landmark commission's reversal of the district architectural review committee's denial of the city's request to move the statute.

The Circuit Court affirmed the commission's decision. Plaintiffs appealed, and the Court of Appeals affirmed. Plaintiffs moved for discretionary review.

The Supreme Court held that:

- Votes of three city employees as members of landmark commission to reverse architectural review committee's decision denying the city's request to move a statute was a violation of due process, and
- Landmarks commission was without authority to review decision of the architectural review committee absent written findings.

The votes of three city employees as members of the city landmark commission to reverse the historic preservation district architectural review committee's decision denying the city's request to move a statute was a denial of procedural due process for those opposed to moving the statute and rendered the commission's reversal inherently arbitrary, where the employees had a patent conflict

of interest in being decisionmakers in a dispute involving their employer.

Under city ordinances, city's landmarks commission was without authority to review the decision of the historic preservation district architectural review committee denying city's request to move a statute, where the architectural review committee failed to make the required written findings of fact to support its decision.

MUNICIPAL ORDINANCE - KENTUCKY

[City of Pikeville v. Kentucky Concealed Carry Coalition, Inc.](#)

Supreme Court of Kentucky - April 27, 2023 - S.W.3d - 2023 WL 3113397

Nonprofit corporation with members seeking to protect Second Amendment rights from over-regulation brought action against city, mayor, city manager, and city board of commissioners alleging city's prohibition on firearms within city properties violated statute generally prohibiting local regulation of firearms, and seeking declaratory relief, injunctive relief, and attorney fees.

The Circuit Court granted summary judgment in favor of defendants and awarded prevailing party attorney fees. Nonprofit corporation appealed. The Court of Appeals reversed and remanded. Discretionary review was granted.

The Supreme Court held that nonprofit corporation did not have associational standing.

Quantum of proof necessary to establish associational standing depends on stage of proceeding: at pleading stage, less specificity is required, and association may speak generally of injuries to some of its members, for presumption is that general allegations embrace those specific facts that are necessary to support claim; by summary judgment stage, however, more particulars regarding association's membership must be introduced or referenced; finally, before favorable judgment can be attained, association's general allegations of injury must clarify into concrete proof that one or more of its members has been injured.

Nonprofit corporation with members seeking to protect Second Amendment rights from over-regulation did not have associational standing to bring claims alleging city unlawfully prohibited firearms within city properties; desire of unidentified members to access various city-owned sites without fear their rights to carry firearms would be denied was too speculative, unsupported allegation concerning actual denial of entry to unidentified members lacked sufficient specificity, and any existence of statutory standing did not equate to constitutional standing.

PUBLIC EMPLOYMENT - LOUISIANA

[Marvin v. Berry](#)

Supreme Court of Louisiana - April 25, 2023 - So.3d - 2023 WL 3073565 - 2023-00214 (La. 4/25/23)

District attorney petitioned for declaratory judgment as to whether the Dual Officeholding and Dual Employment Law prohibited member of board of commissioners for recreation and water-conservation district from also serving as the district's executive director.

The District Court denied Attorney General's petition to intervene on state's behalf and granted

summary judgment to district and board member. Attorney General appealed. The Court of Appeal affirmed the denial of Attorney General's petition to intervene and did not address the merits of summary judgment. Attorney General sought a writ of certiorari. The Supreme Court granted the writ and remanded for consideration of Attorney General's assignments of error about summary judgment. On remand, the Court of Appeal affirmed. Attorney General sought a writ of certiorari.

The Supreme Court held that the Dual Officeholding and Dual Employment Law prohibited district's board member from also serving as district's executive director.

The Dual Officeholding and Dual Employment Law prohibits the same person from holding two public offices or jobs if the incumbent of one, alone or in conjunction with others, has the power to appoint or remove the incumbent of the other.

Dual Officeholding and Dual Employment Law prohibited member of board of commissioners for recreation and water-conservation district from also serving as the district's executive director; board of commissioners had the power to appoint and remove the executive director, and despite argument that the particular commissioner abstained from the board's selection and oversight of the executive director, his authority over the executive-director position could not be divested by a majority vote of the board.

BONDS - MINNESOTA

[Rochester MSA Building Company v. UMB Bank, N.A.](#)

United States District Court, D. Minnesota - April 17, 2023 - Slip Copy - 2023 WL 2976057

The Plaintiffs in this case – Minnesota nonprofit corporations that own and operate two public charter schools —borrowed more than \$15 million in bond proceeds from the City of Rochester, Minnesota, to finance the improvement and expansion of the schools' facilities.

After Plaintiffs defaulted on promises to maintain minimum levels of cash-on-hand and income available for debt service, they entered a Forbearance Agreement with Defendant UMB Bank, the indenture trustee of the bonds. In that agreement, Plaintiffs accepted new obligations. These new obligations included replacing a financial vendor, retaining and giving some additional authority to an interim business manager, and paying certain fees and expenses UMB incurred in connection with the default.

Plaintiffs brought this case to challenge the reasonableness of fees UMB charged under the Forbearance Agreement. UMB counterclaimed, alleging that Plaintiffs defaulted on their obligations under the Forbearance Agreement and the underlying bond agreements.

The District Court held that:

- The Forbearance Agreement was ambiguous regarding the scope of the authority held by the interim business manager appointed pursuant to the Forbearance Agreement;
- UMB Bank failed to provide Plaintiffs with documentation establishing the reasonableness of its invoiced legal fees;
- Whether a Forbearance Termination Event resulted because of Plaintiffs' nonpayment of the invoiced legal fees remained an open question due to UMB Bank's withdrawal of the charged amount from Plaintiffs' debt service reserve fund (which occurred only 17 days after the invoices were received);
- Summary judgment was not appropriate with respect to the attorneys' fees issue, meaning that the

- Parties' competing claims on that issue were trial-worthy;
- Plaintiffs' failure to replace its existing financial vendor constituted a Forbearance Termination Event;
 - UMB's request that a Rule 54(b) judgment be entered against Plaintiffs for the outstanding principal and interest due under the Bond Documents, as well as an order directing that it was entitled to foreclose on the collateral, would be denied; and
 - Entry of judgment under Rule 54(b) was not appropriate due to the fact that Plaintiffs' fee-related claims could result in a setoff against the judgment sought to be made final and the risk of a piecemeal appeals process.

ZONING & PLANNING - SOUTH DAKOTA

[Kirwan v. City of Deadwood](#)

Supreme Court of South Dakota - April 26, 2023 - N.W.2d - 2023 WL 3111176 - 2023 S.D. 20

Building owner appealed city historic district commission's denial of certificate of appropriateness to conduct renovations on saloon building.

The Circuit Court affirmed, and building owner appealed.

The Supreme Court held that:

- As a matter of first impression, clearly erroneous standard of review applies to appeals from the decision of a historic district commission;
- Commission considered the relevant factors as required by ordinance when denying building owner's application;
- Commission placed upon the record the reasons for its denial, as required by statute;
- Letter from historic preservation officer denying certificate of appropriateness satisfied statutory requirement that commission furnish the applicant a copy of its reasons for the decision;
- Commission's failure to provide building owner with an "attested copy" of the reasons for its denial did not require reversal; and
- Record supported commission's denial of building owner's application.

CHARTER AMENDMENTS - TEXAS

[Hotze v. Turner](#)

Supreme Court of Texas - April 21, 2023 - S.W.3d - 2023 WL 3027869

Citizen who had helped to initiate city charter amendment to govern limitations in increases in city revenues, which amendment was approved by voters in the same election in which they approved a council-proposed amendment on the same topic, brought action against city for a declaratory judgment that both the citizen-initiated and the council-proposed amendment were in effect, which was a dispute that stemmed from associated election ordinance's "primacy clause" that stated that the council-proposed amendment would prevail over the citizen-initiated amendment if the voters approved the council-proposed amendment by more votes than the citizen-initiated one, which is what occurred.

The 333rd District Court denied city's plea to the jurisdiction. The Houston Court of Appeals affirmed. The 333rd District Court entered partial summary judgment that "primacy clause" rendered citizen-initiated ordinance ineffective and, after a bench trial, entered judgment that city had fully complied with council-proposed ordinance.

Citizen appealed the summary-judgment order, and city cross-appealed. The Houston Court of Appeals affirmed the summary judgment. Voter petitioned for review.

The Supreme Court held that:

- An election challenge was not the exclusive remedy for citizen seeking to challenge the council-proposed amendment;
- Council-proposed amendment's "primacy clause" violated state statute that required a municipality to adopt a charter amendment that was approved by voters at an election;
- As a matter of apparent first impression under state statute governing adoption of amendments to municipal charters, the amendments became effective when the city declared them to have been adopted; and
- State statute governing adoption of amendments to municipal charters does not require a municipality to achieve the impossible by giving effect to two conflicting charter amendments adopted at the same election.

An election challenge was not the exclusive remedy for citizen seeking to challenge the effectiveness of voter-approved city charter amendment that been proposed by city council, which challenge stemmed from associated election ordinance's "primacy clause" that stated that the council-proposed amendment would prevail over the citizen-initiated amendment if the voters approved the council-proposed amendment by more votes than the citizen-initiated one, which is what occurred, and thus citizen could bring challenge as a declaratory-judgment action; citizen's challenge concerned the city's decision not to enforce parts of its charter as it existed after the election.

Election ordinance's "primacy clause" that stated that if a city council-proposed amendment to city charter received more votes at the election than a citizen-initiated amendment, then the council-proposed amendment would take effect, even if voters approved both amendments, violated state statute that required a municipality to adopt a charter amendment that was approved by voters at an election, and thus the "primacy clause" was void for conflicting with state law.

Pursuant to state statute that provided that a city charter or an amendment did not take effect until the governing body of the municipality entered an order in the records of the municipality declaring that the charter or amendment was adopted, voter-approved amendment to home rule city's charter became effective when city declared amendment to have been adopted, despite argument that the effective date was a matter for the city's discretion; the proposition that an adopted amendment could be added to the city charter without ever becoming effective absent further city approval was incompatible with the statute.

Statute governing adoption of amendments to a municipality's charter does not require a municipality to achieve the impossible by giving effect to two conflicting charter amendments adopted at the same election.

Martinez v. City of Clovis

Court of Appeal, Fifth District, California - April 7, 2023 - Cal.Rptr.3d - 2023 WL 2820092

Resident brought action against city, its manager, and city council for declaratory and injunctive relief and petitioned for writ of mandate claiming violations of Housing Element Law. She also alleged discrimination against lower income housing, violations of Fair Housing Act (FHA), California's Fair Employment and Housing Act (FEHA), and duty to affirmatively further fair housing.

The Superior Court overruled demurrer in part and sustained it in part, granted petition for writ of mandate in part, and entered judgment in favor of resident. City appealed, and resident filed cross-appeal.

The Court of Appeal held that:

- As a matter of first impression, overlapping densities in zoning did not comply with Housing Element Law;
- Resident stated claim of disparate impact in violation of FHA;
- Resident stated claim of disparate impact in violation of FEHA;
- Disparate income claims are cognizable for discrimination against development intended for lower income persons;
- As a matter of first impression, statute requiring public agency to affirmatively further fair housing does more than simply prohibit public agencies from discriminating in housing programs and zoning;
- As a matter of first impression, violations of Housing Element Law compelled finding that city violated statutory duty to affirmatively further fair housing;
- As a matter of first impression, practice with a discriminatory effect on persons of color or housing intended to be occupied by lower income households violates public agency's affirmative duty; and
- As a matter of first impression, the affirmative duty is enforceable in court by writ of mandate.

Overlapping density provisions after city attempted to bring its housing element into compliance by allowing approval of multi-family housing at density of 35 to 43 units per acre, but did not change base zoning that permitted development at densities below 20 units per acre, did not substantially comply with statute stating property "shall be" zoned with minimum density of 20 units per acre; base zoning allowed for development at a lower density, term "minimum density and development standards" required zoning with at least a density of 20 units per acre, and the statute imposed minimum density requirement when jurisdiction as required to rezone sites to accommodate a shortfall for current planning period or carryover from prior planning period.

Resident's allegations about city's violations of Housing Element Law to accommodate need for lower income housing identified with sufficient particularity the practice element of cause of action alleging disparate impact in violation of Fair Housing Act (FHA); resident alleged in detail that city failed to accommodate and to provide opportunities to develop lower income housing, and resident alleged a continuing failure to implement program by its deadline resulting in the Department of Housing and Community Development's (HCD) written findings that the 2015-2023 housing element did not substantially comply with the Housing Element Law.

Resident's allegations detailing city's failure to comply with Housing Element Law to accommodate need for lower income housing adequately alleged that city's practice lacked a sufficient justification in action alleging disparate impact in violation of Fair Housing Act (FHA); city's violation of the Housing Element Law was not a valid government policy and thus could not be regarded at the pleading stage as necessary for achieving legitimate objectives.

Resident's causation allegations contained enough particularity to adequately allege that city's practice of noncompliance with Housing Element Law to accommodate need for lower income housing predictably resulted in a disparate impact on persons of color in violation of Fair Housing Act (FHA); in addition to allegations of discriminatory intent, resident alleged statistical facts about income and housing burden within city and county and facts about the city's persistent failure to comply with the Housing Element Law during planning cycles.

Resident's allegations that city's violations of Housing Element Law to accommodate need for lower income housing had adverse and disparate impact on people of color and the disparate impacts were predictable, statistically significant, and did not occur by chance satisfied requirement to plead disparate impact on a group of persons because of a protected characteristic in violation of Fair Housing Act (FHA); existence of a disparate impact, which was intertwined with the causation element, was supported by allegations of statistics about the racial and economic composition of city and county.

Resident's allegations of statistics about the racially and economic composition of city and county from a historical perspective were sufficient to adequately allege that city's practice of noncompliance with the Housing Element Law to accommodate need for lower income housing during planning periods perpetuated segregated housing patterns and, thus, stated a segregative effect claim under Fair Housing Act (FHA); even though fifth cause of action for violation of the FHA did not use the words "perpetuate," "segregation," or variants of those terms, seventh cause of action alleged the city's acts and omissions created barriers to overcoming patterns of segregation, rather than fostering inclusive communities free from barriers.

City resident adequately alleged disparate impact and a segregative effect of city's violations of Housing Element Law in suit under Fair Employment and Housing Act (FEHA); resident claimed that city's violations of Housing Element Law had adverse and disparate impact on people of color and the disparate impacts were predictable, statistically significant, and did not occur by chance, and she alleged statistics about the racially and economic composition of city and county from a historical perspective.

Word "discriminate" in Planning and Zoning Law making it illegal for city to discriminate against any residential development in the enactment or administration of ordinances encompasses practices with a discriminatory effect, which includes a disparate impact, and, thus, disparate income claims are cognizable for discrimination against development intended for lower income persons; legislature declared that discriminatory practices inhibiting the development of housing for persons and families of very low, low, moderate, and middle incomes, or emergency shelters for the homeless were a matter of statewide concern.

Statute requiring public agency to affirmatively further fair housing does more than simply prohibit public agencies from discriminating in housing programs and zoning.

City's violations of Housing Element Law with regard to lack of zoning for regional housing needs allocation carryover for lower income housing compelled finding that city violated statutory duty to affirmatively further fair housing; city's acts and omissions related to amended housing element after effective date of statutory duty qualified as administration of "programs and activities relating to housing and community development" for purposes of duty to administer programs and activities relating to housing and community development in a manner to affirmatively further fair housing, and one purpose of Housing Element Law and its requirement for zoning of sufficient sites to accommodate regional housing needs allocation is to further affordable housing for lower income households.

Practice with a discriminatory effect on persons of color or housing intended to be occupied by lower income households violates public agency's duty to administer its programs and activities relating to housing and community development in a manner to affirmatively further fair housing.

Public agency's duty to affirmatively further fair housing is enforceable in court, and an ordinary writ of mandate is an appropriate mechanism for enforcing that duty.

MUNICIPAL GOVERNANCE - ILLINOIS

[Uetricht v. Chicago Parking Meters, LLC](#)

United States Court of Appeals, Seventh Circuit - April 7, 2023 - F.4th - 2023 WL 2818008

Drivers living in city brought putative class action against private entity that had been granted a 75-year concession over city's parking meters, alleging claims under the Sherman Act and the Illinois Consumer Fraud and Deceptive Business Practices Act (ICFA).

The United States District Court dismissed drivers' Sherman Act claim for failure to state a claim based on the state-action immunity doctrine and relinquished jurisdiction over drivers' ICFA claim. Drivers appealed.

The Court of Appeal held that:

- City had authority under Illinois law, pursuant to a clearly articulated and affirmatively expressed state policy, to regulate parking on city streets, and city was thus entitled to state-action immunity under the Sherman Act for its decisions with respect to parking spaces and meters, and
- Under contract granting concession to entity, city had sufficient control, amounting to active state supervision, over entity's administration of parking meters such that state-action immunity precluded drivers' Sherman Act claim against entity.

IMMUNITY - NEBRASKA

[Angel v. Nebraska Department of Natural Resources](#)

Supreme Court of Nebraska - April 14, 2023 - N.W.2d - 314 Neb. 1 - 2023 WL 2939979

Following failure of dam, which resulted in one death and property damage, special administrator of decedent's estate and owners of property, including administrator and corporation, sued defendants including the Department of Natural Resources, asserting claims for negligence and nuisance.

The Department asserted immunity as an affirmative defense. The District Court granted the Department's motion for summary judgment based on immunity provision of the Safety of Dams and Reservoirs Act. Administrator and owners appealed, and petition to bypass review by the Court of Appeals was granted.

The Supreme Court held that:

- The Department's immunity included immunity for conduct prior to the effective date of the Act;
- Duties of the Department to inspect dam and determine its hazard potential classification fell within the Act's immunity provision;
- The Department was immune under the Act from claim that it was negligent in approving revised plans to reconstruct dam;

- The Department was immune under the Act from claim that it was negligent in conducting inspections of the dam;
- The Department was immune under the Act from claims alleging negligence based on dam's classification and lack of emergency plan;
- The Department was immune under the Act from negligence claim based on failure to train and supervise its agents or employees; and
- The Department's allegedly negligent inspections and adjudications of dam's hazard potential did not come within emergency exception to immunity for negligent acts .

Department of Natural Resources did not assume control of failed dam during an "emergency," and thus Department's allegedly negligent inspections of dam and adjudications of its hazard potential did not come within emergency exception to the Department's immunity for negligent acts under the Safety of Dams and Reservoirs Act, so as to make Department liable on claims brought by owners of damaged property and administrator of estate of individual who died as result of dam failure; the Department was not aware of the dam's failure or of the conditions leading to failure until after dam had been breached, and allegations against the Department were not based on any acts or omissions during an emergency.

IMMUNITY - NEW YORK

[Anderson v. Commack Fire District](#)

Court of Appeals of New York - April 20, 2023 - N.E.3d - 2023 WL 3010345 - 2023 N.Y. Slip Op. 02028

Driver commenced action against fire district and volunteer firefighter to recover damages for personal injuries that she sustained when the vehicle she was driving collided with a fire truck that volunteer firefighter, with lights and sirens on, was driving through an intersection on a red light.

The Supreme Court, Suffolk County, granted defendants' motion for summary judgment as to firefighter but denied the motion as to fire district. Fire district appealed. The Supreme Court, Appellate Division, affirmed and granted district leave to appeal.

The Court of Appeals held that the "reckless disregard" standard applicable to privileged actions that the Vehicle and Traffic Law allows emergency vehicles to take applies when a fire district is alleged to be vicariously liable for conduct that is privileged under that provision.

The "reckless disregard" standard applicable to privileged actions that the Vehicle and Traffic Law allows emergency vehicles to take, such as proceeding past red lights when involved in emergency operations, demands more than a showing of a lack of due care under the circumstances—the showing typically associated with ordinary negligence claims; rather, there must be evidence that the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow and has done so with conscious indifference to the outcome.

The "reckless disregard" standard applicable to privileged actions that the Vehicle and Traffic Law allows emergency vehicles to take, such as proceeding past red lights when involved in emergency operations, applies when a fire district is alleged to be vicariously liable for conduct that is privileged under that provision.

ZONING & PLANNING - OHIO

[State ex rel. Pinkston v. Delaware County Board of Elections](#)

Supreme Court of Ohio - March 30, 2023 - N.E.3d - 2023 WL 2706811 - 2023-Ohio-1060

Township-zoning referendum proponent filed petition for writ of mandamus compelling county board of elections to place referendum on the ballot for the general primary election or ballot for the general election after board had sustained a protest to the referendum petition.

The Supreme Court held that:

- Laches did not apply;
- Proponent lacked adequate remedy at law as required for mandamus relief;
- Petition summary did not borrow text from a zoning resolution;
- Petition summary met basic statutory requirements;
- Petition summary was not deficient for failing to indicate number of homes being proposed in residential development; and
- County elections board abused its discretion by finding that the summary improperly omitted description of developer's earlier rezoning applications.

Township-zoning referendum proponent did not have actual or constructive knowledge that his delay in filing complaint for mandamus compelling county elections board to place referendum on primary election ballot after board sustained a protest to referendum petition would cause harm to the board, as required for laches to apply, where there was no evidence that proponent actually knew that a two-week delay in filing his lawsuit would cause board not to prepare to hold a primary election, nor was there any evidence justifying the imputation of such knowledge to proponent.

Township-zoning referendum proponent lacked an adequate remedy at law, as required to obtain writ of mandamus compelling county elections board to place referendum on primary election ballot after board sustained a protest to referendum petition, given the proximity of the board's decision in late February and the primary election in May.

Township-zoning referendum petition's summary did not borrow text from a zoning resolution but rather, borrowed language from minutes of township board of trustees' meeting approving developer's final application for rezoning property to a planned residential district, and thus, proponent did not show that using the borrowed language satisfied statutory requirements for the summary; zoning amendment at issue was proposed by developer's application, not be resolution of the board of trustees.

Township-zoning referendum petition's summary met basic statutory requirements that it identify location of the property at issue, its current zoning status, and nature of the requested change, where summary provided parcel numbers and an address for the property, along with its current zoning, planned institutional district, and proposed zoning, planned residential district, and nature of proposed development, single-family homes.

Township-zoning referendum petition's summary was not deficient for failing to indicate number of homes being proposed in residential development, because the summary unambiguously apprised readers of the specific use the proposal would permit, namely, the development of single-family homes, and as such, it was not ambiguous or misleading.

Proponent of township-zoning referendum was not required to describe developer's earlier rezoning applications in petition's summary of zoning amendment, and thus, county elections board abused its

discretion and acted contrary to law in finding that the summary improperly omitted that information; developer, which filed protest to the petition, argued that because petition summary did not include information about modifications, it conveyed the false impression that rezoning as approved was same as rezoning as initially proposed, but it was the zoning amendment as adopted by the township that had to be summarized in the petition.

ZONING & PLANNING - SOUTH CAROLINA

[Ani Creation, Inc. v. City of Myrtle Beach Board of Zoning Appeals](#)

Supreme Court of South Carolina - April 19, 2023 - S.E.2d - 2023 WL 2996979

Store operators appealed decision of city's board of zoning appeals which denied their challenges to municipal zoning overlay district which prohibited the operation of smoke shops and tobacco stores, among others, in the city's downtown.

The Circuit Court affirmed, and store operators appealed.

The Supreme Court held that:

- Two readings of ordinance were not so different that third reading was required prior to enactment of ordinance;
- As a matter of first impression, creation of municipal zoning overlay district did not constitute impermissible reverse spot zoning;
- Even assuming that municipal zoning overlay district constituted spot zoning, any such spot zoning was permissible;
- Boundaries of municipal overlay district had a rational basis and thus did not violate store operators' equal protection rights;
- Ordinance did not violate store operators' due process rights due to failure to explicitly provide for a hearing for an affected vendor; and
- Operators failed to establish that municipal zoning ordinance constituted an unconstitutional taking.

Creation of municipal zoning overlay district which prohibited the operation of smoke shops and tobacco stores, among others, in the city's downtown did not constitute impermissible reverse spot zoning; prohibited retail uses in the overlay district were not the result of a zoning "island" that developed as the surrounding area was rezoned while the district was left behind, but instead the prohibition was created by an affirmative legislative act by the city.

IMMUNITY - CALIFORNIA

[Hacala v. Bird Rides, Inc.](#)

Court of Appeal, Second District, Division 3, California - April 10, 2023 - Cal.Rptr.3d - 2023 WL 2851729

Pedestrian and her family members brought action against city and operator of electric motorized scooter rental business alleging negligence, negligent infliction of emotional distress, loss of consortium, and public nuisance arising from pedestrian's trip and fall on a dockless rental scooter that an unknown third party left partially sticking out from behind a trash can on sidewalk.

The Superior Court, Los Angeles County, sustained defendants' demurrer without leave to amend. Pedestrian appealed.

The Court of Appeal held that:

- City had immunity under Government Claims Act;
- City's alleged failure to remove improperly parked scooters was not a physical deficiency in public property;
- City's failure to create sidewalk markings for scooter parking did not increase danger from third-party negligence;
- Requisite special relationship for imposing a duty for harm relating to third-party conduct did not apply;
- Operator had a general duty to use ordinary care or skill in management of its property;
- Public policy did not support an exception to general duty of care; and
- Pedestrian alleged sufficient facts to assert a private action for public nuisance.

City had discretion, but was not under a mandatory duty, to remove improperly parked electric rental scooters or to revoke scooter rental company's permit for noncompliance, and therefore city was immune from liability under the Government Claims Act in pedestrian's negligence action arising from her alleged trip and fall on dockless rental scooter that an unknown third party left partially sticking out from behind a trash can on sidewalk, where permit reserved in city the right to amend, modify, or change the terms and conditions of the dockless scooter pilot program at its discretion, and permit did not specify ministerial steps for removing scooters and imposing fees for such removals.

CIVIL RIGHTS - COLORADO

[Irizarry v. City and County of Denver](#)

United States District Court, D. Colorado - March 15, 2023 - F.Supp.3d - 2023 WL 2528782

Protestors brought § 1983 action against city, transit authority, and police officer, alleging that officer arrested both of them after they shouted "fuck the police" while protesting police brutality in public plaza and that officer later arrested one of them after protestor returned to plaza to protest previous arrest.

Defendants moved to dismiss for failure to state a claim.

The District Court held that:

- Arrestees stated Fourth Amendment unlawful arrest claim;
- Officer was not entitled to qualified immunity from arrestees' unlawful arrest claim;
- Arrestee stated Fourth Amendment unlawful arrest claim;
- Arrestee stated retaliatory arrest claim;
- Officer was not entitled to qualified immunity from retaliatory arrest claim;
- Arrestee stated First Amendment violation claim; and
- City was not liable for § 1983 claims.

ZONING & PLANNING - FLORIDA

Gay v. Jupiter Island Compound, LLC

District Court of Appeal of Florida, Fourth District - April 12, 2023 - So.3d - 2023 WL 2904054

Landowners brought action against member/chairperson of town's impact review committee, alleging tortious interference with business relationships.

The Circuit Court issued nonfinal order summarily denying member/chairperson's motion to dismiss based on common-law absolute immunity and statutory immunity. Member/chairperson petitioned for certiorari review as to common-law absolute immunity and appealed as to statutory immunity.

The District Court of Appeal held that:

- Member/chairperson was entitled common-law absolute immunity, but
- Landowners' complaint sufficiently alleged member/chairperson acted in bad faith or with malicious purpose, as exception to statutory immunity.

Alleged conduct of member/chairperson of town's impact review committee occurred within scope of duties as public official, and thus, member/chairperson was entitled to common-law absolute immunity from liability for tortious interference with business relations; while landowners alleged that member/chairperson made false representations about ex parte communications that were intended to delay and ultimately deny landowners' construction applications, member/chairperson had authority in those roles to address landowners' constructions applications, regardless of whether she made false statements.

Landowners' complaint for tortious interference with business relations sufficiently alleged that member/chairperson of town's impact review committee acted in bad faith or with malicious purpose, as exception to a public official's statutory immunity from tort liability for acts or omissions in scope of employment or function; landowners alleged that member/chairperson embarked upon series of acts with three co-conspirators to delay landowners' construction applications and interfered with their relationships with their retained professionals, and that she failed to disclose, and instead falsely stated, that she had not had any ex parte communications regarding landowners' applications.

POLITICAL SUBDIVISIONS - IOWA

Sand v. An Unnamed Local Government Risk Pool

Supreme Court of Iowa - April 7, 2023 - N.W.2d - 2023 WL 2817479

State Auditor filed application to enforce subpoena for financial records of local government risk pool.

The District Court denied application. Auditor appealed.

The Supreme Court held that pool was not a "governmental subdivision" over which Auditor had statutory authority.

Local government risk pool organized as an unincorporated nonprofit association was not an entity organized under chapter 28E on joint exercise of governmental powers and was thus not a "governmental subdivision" over which the State Auditor had statutory authority.

Government entities have statutory authority to establish, join, and pay funds into a local government risk pool; the repeated statutory authorizations to establish, join, and pay into a local government risk pool implicitly confer the authority to create a local government risk pool outside of chapter 28E on joint exercise of governmental powers.

PUBLIC UTILITIES - IOWA

[LS Power Midcontinent, LLC v. State](#)

Supreme Court of Iowa - March 24, 2023 - N.W.2d - 2023 WL 2618192

Competitor electric transmission companies brought action against Iowa Utilities Board (IUB), IUB's chair, director of Legislative Services Agency, and the State's code editor, seeking declaratory judgment that statute granting incumbent electric transmission owners a right of first refusal to construct and maintain lines to be connected to existing facility violated the single-subject, title, and equal protection provisions of the Iowa Constitution and seeking temporary injunction prohibiting enforcement of the statute.

The District Court dismissed for lack of standing. Companies appealed. The Court of Appeals affirmed. Companies applied for further review, and application was granted.

The Supreme Court held that:

- Companies had standing to pursue action challenging constitutionality of statute;
- Briefing and existing record were adequate for Supreme Court to decide whether to issue temporary injunction staying enforcement of statute, and, thus, Supreme Court would exercise its discretion to decide injunction issue;
- Companies were likely to succeed on merits of claim that title of appropriations bill granting right of first refusal violated constitutional title requirement, as required to obtain temporary injunction;
- Title "legal and regulatory responsibilities" as catchall for disparate subjects does not meet constitutional requirement that the title of an act express the subject matter of the act; abrogating *Rush v. Reynolds*, 2020 WL 825953;
- Companies were likely to succeed on merits of claim that title of appropriations bill violated single-subject requirement of constitution, as required to obtain temporary injunction;
- Companies would likely suffer irreparable harm in absence of temporary injunction; and
- Public interest supported temporary injunction.

Competitor electric transmission companies had particularized injury distinct from general population, as required for standing to pursue action against Iowa Utilities Board (IUB) and state officials seeking declaratory judgment that statute granting incumbent electric transmission owners a right of first refusal to construct and maintain lines connected to existing facility violated state constitution's single-subject, title, and equal protection provisions; unlike members of general public, companies were approved to complete transmission projects in the state, and statute injured companies by precluding them from bidding on new projects unless incumbent failed to exercise its right of first refusal.

Competitor electric transmission companies suffered competitive injury at time of enactment of statute granting incumbent electric transmission owners a right of first refusal to construct and maintain lines connected to existing facility, and did not need to identify specific project lost to incumbent to have standing to pursue action against Iowa Utilities Board (IUB) and state officials seeking declaratory judgment that statute violated state constitution's single-subject, title, and equal

protection provisions; companies were qualified and competent to supply transmission lines for in-state projects, but statute effectively blocked companies from competing unless incumbent declined to exercise its right of first refusal.

Competitor electric transmission companies' competitive injury was traceable to state's actions, as required for standing to pursue action against Iowa Utilities Board (IUB) and state officials seeking declaratory judgment that statute granting incumbent electric transmission owners a right of first refusal to construct and maintain lines connected to existing facility violated state constitution's single-subject, title, and equal protection provisions; state's grant of right of first refusal to incumbent caused harm to companies by blocking companies from competing unless incumbent declined to exercise its right of first refusal.

Favorable decision would redress competitor electric transmission companies' competitive injury, as required for standing to pursue action against Iowa Utilities Board (IUB) and state officials seeking declaratory judgment that statute granting incumbent electric transmission owners a right of first refusal to construct and maintain lines connected to existing facility violated state constitution's single-subject, title, and equal protection provisions; blocking enforcement of right of first refusal would allow companies to supply transmission lines for in-state projects.

Competitor electric transmission companies' injury in the form of lost future profits was sufficiently imminent for standing to pursue action against Iowa Utilities Board (IUB) and state officials seeking declaratory judgment that statute granting incumbent electric transmission owners a right of first refusal to construct and maintain lines connected to existing facility violated state constitution's single-subject, title, and equal protection provisions; companies alleged that regional transmission organizations would approve \$30 billion in new electric transmission projects over the next ten years and that organizations had begun studying ways to expand transmission grid in midwest, including in the state, and companies would lose profits when incumbents received new projects.

Briefing and existing record were adequate for Supreme Court to decide whether to issue temporary injunction staying enforcement of statute granting incumbent electric transmission owners a right of first refusal to construct lines connected to existing facility, pending resolution of constitutional claims, and, thus, Supreme Court would exercise its discretion to decide injunction issue, instead of remanding issue to district court, following its decision that competitor electric transmission companies had standing to pursue action challenging statute; appellate briefing squarely addressed injunction issue, companies briefed merits of constitutional claims on appeal, all parties briefed merits of claims below, and claims turned on question of law that did not require further record development.

Competitor electric transmission companies were likely to succeed on merits of claim that title of appropriations bill granting incumbent electric transmission owners a right of first refusal to construct lines connected to existing facility violated constitutional title requirement, as required for temporary injunction staying enforcement of statutory right of first refusal pending resolution of constitutional claims; title, "An Act relating to state and local finances by making appropriations, providing for legal and regulatory responsibilities, providing for other properly related matters, and including effective date and retroactive applicability provisions" did not give notice of right of first refusal provision, and title failed to clearly communicate subject matter of bill.

Competitor electric transmission companies were likely to succeed on merits of claim that title of appropriations bill granting incumbent electric transmission owners a right of first refusal to construct lines connected to existing facility violated single-subject requirement of state constitution, as required for temporary injunction staying enforcement of statutory right of first refusal pending resolution of constitutional claims; bill contained medley of appropriations

provisions and granted substantive rights, and right of first refusal failed to garner sufficient votes for enactment as standalone bill.

Competitor electric transmission companies would likely suffer irreparable harm through loss of opportunity to land multi-million-dollar electric transmission projects in the state in absence of temporary injunction against Iowa Utilities Board (IUB) and state officials staying enforcement of statute granting incumbent electric transmission owners a right of first refusal to construct lines connected to existing facility, pending resolution of claims challenging constitutionality of statute.

Balance of harms favored temporary injunction against Iowa Utilities Board (IUB) and state officials staying enforcement of statute granting incumbent electric transmission owners a right of first refusal to construct lines connected to existing facility, pending resolution of constitutional challenges to statute brought by competitor electric transmission companies; companies were harmed by loss of opportunity to compete for new projects, intervenors, who were shielded from competition by statute, argued that new projects were years away and faced no harm while case was pending, and companies were likely to succeed on claims, thereby diminishing any harm resulting from state not being allowed to enforce statute.

Public interest supported temporary injunction against Iowa Utilities Board (IUB) and state officials staying enforcement of statute, granting incumbent electric transmission owners a right of first refusal to construct lines connected to existing facility, pending resolution of constitutional challenges to statute brought by competitor electric transmission companies; public had interest in reliable electric service at reasonable rates, and statute would decrease competition and increase cost of electricity.

BALLOT INITIATIVE - MAINE

[Jortner v. Secretary of State](#)

Supreme Judicial Court of Maine - April 10, 2023 - A.3d - 2023 WL 2856124 - 2023 ME 25

Citizens filed petition for judicial review of decision of the Secretary of State that determined the wording of a ballot question for citizen-initiated legislation that would create a non-profit electric utility, challenging use of the term “quasi-governmental power company” to describe the proposed utility and requesting substitution with the term “consumer-owned transmission and distribution utility.”

The Superior Court vacated Secretary’s decision and remanded matter to Secretary to revise the wording of the ballot question. Secretary appealed.

The Supreme Judicial Court held that use of term “quasi-governmental” in describing the proposed utility resulted in the question being not understandable to a reasonable voter reading the question for the first time, and thus ballot question did not satisfy statutory standard.

Use of term “quasi-governmental” in describing proposed non-profit electric utility as a “quasi-governmental power company,” in ballot question for citizen-initiated legislation that would create a non-profit electric utility, resulted in the question being not understandable to a reasonable voter reading the question for the first time, and thus ballot question did not satisfy statutory standard, although some features of the new utility would be governmental in nature; term “quasi-governmental” did not appear in the proposed legislation and did not have a clear dictionary definition, the prefix “quasi-” had multiple meanings, and there was no existing statutory definition

of the term.

IMMUNITY - MISSISSIPPI

[Moton v. City of Clarksdale](#)

Supreme Court of Mississippi - April 6, 2023 - So.3d - 2023 WL 2804785

Following his arrests at two city commissioners meetings, former city commissioner brought action against defendants including city, police captain, and executor of former mayor's estate, alleging violations of his rights under the Mississippi Constitution to free speech, due process, and equal protection, and also asserting claims for malicious prosecution, civil conspiracy, and intentional and negligent infliction of emotional distress.

Finding commissioner's claims time-barred, the Circuit Court granted defendants' motion to dismiss for failure to state a claim.

The Supreme Court held that:

- Commissioner's filing of suit did not toll one-year limitations period applicable to common law claims under the Mississippi Tort Claims Act;
- Three-year general statute of limitations applied to commissioner's constitutional claims; and
- Commissioner's claim for malicious prosecution accrued when charges against him were dismissed for failure to prosecute.

Former city commissioner's filing of suit against city, police captain, and former mayor's estate did not toll the one-year limitations period applicable to his common law claims against such defendants brought under the Mississippi Tort Claims Act, where the time providing for presuit notice and for filing suit had already run at the time the suit was filed, and commissioner had undisputedly not complied with the procedural requirements of the Act.

Mississippi's three-year general statute of limitations, rather than one-year limitations period under the Mississippi Tort Claims Act, applied to former city commissioner's constitutional claims against city, police captain, and former mayor's estate, alleging violations of his rights under the Mississippi Constitution to free speech, substantive due process, and equal protection, stemming from his arrests at city commissioners meetings.

Former city commissioner's claim for malicious prosecution accrued, and one-year limitations period began to run, when charges against commissioner were dismissed for failure to prosecute, for purposes of commissioner's suit against city, police captain, and former mayor's estate, stemming from his arrests at city commissioners meetings.

BANKRUPTCY - PENNSYLVANIA

[In re City of Chester](#)

United States Bankruptcy Court, E.D. Pennsylvania - March 14, 2023 - B.R. - 2023 WL 2504708

City, through receiver appointed under Pennsylvania's Municipalities Financial Recovery Act, filed Chapter 9 petition. Certain elected city officials and holder of city-issued bond objected.

The Bankruptcy Court held that:

- City was specifically authorized to file its voluntary petition by a governmental officer empowered by Pennsylvania state law, as required to be eligible for Chapter 9 relief;
- City was insolvent, as required to be eligible for Chapter 9 relief;
- City desired to effect a plan to adjust its debts, as required to be eligible for Chapter 9 relief;
- City negotiated in good faith with those of its major creditor constituencies with which it was practical to negotiate, as required to be eligible for Chapter 9 relief; and
- City filed its voluntary petition in good faith.

City was a “political subdivision” of Pennsylvania and, thus, a “municipality” within the meaning of the Bankruptcy Code, for purposes of determining its eligibility for relief under Chapter 9; the oldest city in the state, city maintained a fire department with approximately 61 sworn personnel and a police department with approximately 83 sworn officers, and had the ability to tax its residents.

Under Pennsylvania law, city, through receiver appointed under Pennsylvania’s Municipalities Financial Recovery Act, was specifically authorized to file its voluntary bankruptcy petition, as required to be eligible for Chapter 9 relief; Secretary of Pennsylvania Department of Community and Economic Development (DCED) authorized receiver to commence a municipal debt adjustment action in writing, and receiver subsequently consulted with Municipal Financial Recovery Advisory Committee (MFRAC) regarding city’s financial problems, such that receiver followed all procedural requirements of Act for initiating a municipal debt adjustment action.

Elected city officials did not have standing to object to city’s eligibility to be a debtor under Chapter 9 of the Bankruptcy Code; officials did not have “personal stake” in outcome of controversy and were not creditors of city or able to assert an equitable claim against the bankruptcy estate.

City was insolvent, as required to be eligible for Chapter 9 relief, where city had current and long-term inability to pay its debt obligations as they came due; city’s prolonged financial distress satisfied both “generally not paying its debts as they become due” and “is unable to pay its debts as they become due” prongs of the Bankruptcy Code’s definition of “insolvent,” as city was currently unable to fund, and historically had been unable to fund, its substantial obligations under pension funds established for city employees, which were unconditionally owed and presently enforceable, over \$100 million remained due and owing under the pension plans, which city lacked resources to pay, in addition to other substantial debt obligations, city’s baseline general fund projections showed deficits of \$46.5 million to \$16.3 million over upcoming five-year period, and city was in state of “bona fide financial distress” unlikely to be resolved absent bankruptcy.

City desired to effect a plan of adjustment, as required to be eligible for Chapter 9 relief; there was no evidence that city filed its bankruptcy petition with ulterior motive such as evading creditors, city, through receiver appointed under Pennsylvania’s Municipalities Financial Recovery Act, attempted to resolve claims with its creditors for months prior to filing petition, but to no avail, city submitted a memorandum of law in support of its eligibility to be a debtor with its voluntary petition which stated that city was “presently developing a plan of adjustment[] and [was] seeking mediation with its major constituencies to expedite and mediate a path towards such a plan,” city requested mandatory mediation at outset of case, further confirming its desire to expeditiously effect a plan of adjustment, and receiver made pre- and postpetition efforts to implement city’s recovery plans.

City negotiated in good faith with those of its major creditor constituencies with which it was practical to negotiate, as required to be eligible for Chapter 9 relief; city engaged in well-documented meetings with its unions and made numerous attempts at follow-up communication prior to filing its petition, city had a constructive meeting and attempted to follow up with one group

of bondholders, city made multiple unsuccessful attempts to negotiate with second bondholder and negotiated in good faith even though the parties ultimately could not reach consensual resolution outside of bankruptcy, and it was impracticable for city to negotiate with its approximately 268 retirees, given the volume of potential retiree claims and their lack of centralized representation prepetition.

In context of determining whether a municipality negotiated with creditors in good faith for purposes of Chapter 9 eligibility, the creditor's response, and the amount of time the creditor has to respond, may be factors; if creditor has had a relatively short time to respond to municipality's offer to negotiate, lack of detail in the opening communication might weigh against municipality rushing to file, while on the other hand, where creditor has been apprised of the possibility of a debt adjustment and declined to respond after a reasonable period of time, or where creditor has explicitly responded with a refusal to negotiate, its position as an objector is significantly weakened.

In context of determining whether a municipality negotiated with creditors in good faith for purposes of Chapter 9 eligibility, it is impossible to negotiate with a "stonewall," that is, a creditor whose position has remained virtually unchanged over a period of time, and a municipality is not required to wait until it has reached an impasse after extensive prepetition negotiations to invoke the subject provision of the Bankruptcy Code.

City filed its voluntary Chapter 9 petition in good faith; financial problems that city had faced for decades were of type contemplated by, and meant to be addressed in, a Chapter 9 filing, city's decision to file voluntary petition and its pursuit of plan of recovery in the face of "crippling liabilities" and insufficient revenue to meet current and future liabilities was consistent with Chapter 9's objective of providing protection to a financially distressed municipality from creditors while it develops a plan to adjust its debts, city had been and remained insolvent despite its receiver's efforts to cut expenses and find sources of funding, city's prepetition negotiations with creditors to avoid bankruptcy had not been fruitful and Chapter 9 appeared to be the only viable option, and city's residents, who were burdened by high taxes while facing diminishing essential services, would be prejudiced by denial of Chapter 9 relief.

EMINENT DOMAIN - SOUTH CAROLINA

[Braden's Folly, LLC v. City of Folly Beach](#)

Supreme Court of South Carolina - April 5, 2023 - S.E.2d - 2023 WL 2778717

Owner of two small, contiguous, developed coastal lots brought action for regulatory taking against city, alleging that city amended ordinance to require certain contiguous properties under common ownership, including owner's properties, to be merged into a single, larger property, and that merger ordinance interfered with owner's investment-backed expectation.

Parties filed cross-motions for summary judgment. The Circuit Court, Charleston County, Roger M. Young, J., granted owner's motion. City appealed.

The Supreme Court held that:

- Treatment-of-the-land factor weighed in favor of identifying relevant parcel as both lots combined;
- Physical-characteristics factor weighed in favor of identifying relevant parcel as both lots combined;
- Value-of-the-property factor weighed in favor of identifying relevant parcel as both lots combined;

- Economic impact of ordinance weighed heavily in favor of finding that ordinance did not amount to regulatory taking;
- Extent to which ordinance interfered with owner's investment-backed expectations did not weigh in favor of either party; and
- Character of ordinance weighed in favor of finding that ordinance did not amount to regulatory taking.

Treatment-of-the-land factor for defining relevant parcel for purposes of regulatory-taking claim brought by owner of two contiguous, beachfront lots, who challenged city ordinance requiring lots to be merged, weighed in favor of identifying relevant parcel as both lots combined, where lots were currently merged under state and local law, there were no physical or topographical boundaries that would have limited joint treatment or development of lots, lots had always been owned and sold as single unit and were even redeveloped by owner at same time, and due to city's zoning ordinances and dune-management ordinances, owner was prohibited from selling lots separately or from building separate homes on each should one of the existing homes be more than 50% destroyed.

Physical-characteristics factor for defining relevant parcel for purposes of regulatory-taking claim brought by owner of two contiguous lots, who challenged city ordinance requiring lots to be merged, weighed in favor of identifying relevant parcel as both lots combined, where lots were located on beach, which was quintessential example of area that was heavily regulated and likely to become subject to additional environmental regulations.

Value-of-the-property factor for defining relevant parcel for purposes of regulatory-taking claim brought by owner of two contiguous lots, who challenged city ordinance requiring lots to be merged, weighed in favor of identifying relevant parcel as both lots combined; any economic impact resulting from merger ordinance was mitigated by benefits of using property as integrated whole since, regardless of merger ordinance, one lot contained beachfront property that was restricted by city's dune-management ordinances, which prevented any redevelopment on lot if existing house was destroyed by 50% or more, and thus merger of lots would allow owner to maintain beach house on other lot while simultaneously enjoying beach access from beachfront lot.

Economic impact of city ordinance requiring merger of property owner's two contiguous, beachfront lots weighed heavily in favor of finding that ordinance did not amount to regulatory taking, although owner claimed that if lots were sold separately, they were worth \$508,000 more than if they were sold as single, merged lot, where \$508,000 difference amounted to 23% reduction in value, which, while not insignificant, was far less than other reductions in value found constitutional by United States Supreme Court, owner remained able to rent out houses on each lot separately, with average gross receipts amounting to approximately \$117,000 per year, and during pendency of lawsuit, buyer offered owner its full asking price of \$2.55 million for both lots.

Extent to which city ordinance requiring merger of property owner's two contiguous, beachfront lots interfered with owner's investment-backed expectations did not weigh in favor of either party, for purposes of owner's regulatory-takings claim, although ordinance was enacted after owner redeveloped house on first lot and built new house on second lot, with plans to sell lots separately, where owner used lots for family vacations and as rental properties for several decades, owner delayed selling lots after redevelopment and made little to no effort to actually sell once lots were placed on market, lots were located in coastal area with dynamic, fragile environment, and size, shape, and orientation of lots provided objective indicia that owner's expectation of selling second lot was unreasonable.

Character of city ordinance requiring merger of property owner's two contiguous, beachfront lots weighed in favor of finding that ordinance did not amount to regulatory taking, where ordinance did

not unfairly single out owner's lots, ordinance was reasonable land-use regulation enacted as part of coordinated effort to protect beach and surrounding land by preserving federal funding for beach renourishment, and although owner was slightly burdened by ordinance, it in turn would benefit greatly from the restrictions that were placed on others.

IMMUNITY - TEXAS

[Bonin v. Sabine River Authority](#)

United States Court of Appeals, Fifth Circuit - April 14, 2023 - F.4th - 2023 WL 2943004

Property owners brought action alleging that river authority took, damaged, or destroyed their property by causing or contributing to a flood when they opened spillway gates into the river.

The United States District Court for the Eastern District of Texas denied river authority's motion to dismiss complaint for lack of subject matter jurisdiction and later denied river authority's motion to dismiss amended complaint for lack of subject matter jurisdiction. River authority appealed.

The Court of Appeals held that:

- Characterization of river authority under Louisiana law weighed in favor of finding that it was entitled to Eleventh Amendment immunity, but only modestly;
- Source of river authority's funding weighed against finding that it was entitled to Eleventh Amendment immunity;
- River authority's autonomy weighed minimally against finding that it was entitled to Eleventh Amendment immunity;
- River authority was concerned primarily with local, as opposed to statewide, problems, which weighed against finding that it was entitled to Eleventh Amendment immunity;
- River authority's statutorily conferred right to sue in its own name weighed against finding that it was entitled to Eleventh Amendment immunity; and
- River authority's right to hold and use property weighed against finding that it was entitled to Eleventh Amendment immunity.

Characterization of river authority under Louisiana law weighed in favor of finding that authority was an "arm of the state" entitled to Eleventh Amendment immunity, but only modestly, in property owners' action alleging that authority took, damaged, or destroyed their property by causing or contributing to a flood when they opened spillway gates into the river; language in state statutes describing authority as "an agency and instrumentality of the state" was inconsistent, as it also described authority as a "corporation and body politic and corporate" invested with "all powers, privileges, rights, and immunities conferred by law upon other corporations of like character," and belated placement of authority in executive branch was partly undercut by authority's retention of significant operational autonomy.

Source of river authority's funding weighed against finding that authority was an "arm of the state" of Louisiana entitled to Eleventh Amendment immunity, in property owners' action alleging that authority took, damaged, or destroyed their property by causing or contributing to a flood when they opened spillway gates into the river; while the Louisiana legislature had discretion to appropriate state funds to the authority, authority generated its own revenues, could incur debts and borrow money, and was obligated to pay its debts out of its funds, without drawing on state resources.

River authority's autonomy weighed minimally against finding that authority was an "arm of the

state” of Louisiana entitled to Eleventh Amendment immunity, in property owners’ action alleging that authority took, damaged, or destroyed their property by causing or contributing to a flood when they opened spillway gates into the river; while entire board of commissioners who governed authority were appointed by and served at the pleasure of the Louisiana governor, authority had significant independent management autonomy given to it by the state, including the power to acquire property, enter into contracts, incur debts and borrow money, and even establish and maintain a law enforcement division within the authority.

River authority was concerned primarily with local, as opposed to statewide, problems, which weighed against finding that authority was an “arm of the state” of Louisiana entitled to Eleventh Amendment immunity, in property owners’ action alleging that authority took, damaged, or destroyed their property by causing or contributing to a flood when they opened spillway gates into the river; although authority generated some statewide benefits, its activities were localized, and it had a territorial jurisdiction.

River authority’s statutorily conferred right to sue and be sued in its own name weighed against finding that authority was an “arm of the state” of Louisiana entitled to Eleventh Amendment immunity, in property owners’ action alleging that authority took, damaged, or destroyed their property by causing or contributing to a flood when they opened spillway gates into the river.

River authority’s right to hold and use property weighed against finding that authority was an “arm of the state” of Louisiana entitled to Eleventh Amendment immunity, in property owners’ action alleging that authority took, damaged, or destroyed their property by causing or contributing to a flood when they opened spillway gates into the river; although Louisiana statute describing authority’s powers stated that authority held property as an instrumentality of the state, the same statute also said that title to all property acquired by the authority was taken in its corporate name.

MANDAMUS - ALABAMA

[Ex parte City of Muscle Shoals](#)

Supreme Court of Alabama - March 31, 2023 - So.3d - 2023 WL 2721348

Residents of subdivision filed a complaint against city seeking an injunction directing city to enact a comprehensive stormwater-management plan or to enforce its existing stormwater-management ordinances to prevent retention pond from overflowing.

City moved to dismiss arguing it was entitled to substantive immunity. The Circuit Court denied the motion to dismiss. City petitioned for a writ of mandamus directing the circuit court to dismiss residents’ claim based on its entitlement to substantive immunity.

The Supreme Court held that city was entitled to substantive immunity from residents’ claim for injunctive relief.

City was entitled to substantive immunity from residents’ claim for injunctive relief, which sought an injunction directing city to enact a comprehensive stormwater-management plan or to enforce its existing stormwater-management ordinances to prevent retention pond from overflowing; city’s decisions about its enactment of a plan or its enforcement of existing ordinances concerning its drainage systems were public-policy decisions made in connection with the city’s responsibility to provide for the public’s safety, health, and general welfare and were so laden with the public interest as to outweigh the incidental duty to individual citizens, and thus fell into the category of

actions excepted from the general rule of liability.

EMINENT DOMAIN - CALIFORNIA

[Shenson v. County of Contra Costa](#)

Court of Appeal, First District, Division 2, California - March 30, 2023 - Cal.Rptr.3d - 2023 WL 2706499

Owners of creekside properties sued county and flood control district for inverse condemnation and parallel tort causes of action after drainage improvements failed and their properties were damaged by erosion and subsidence.

The Superior Court granted defendants' motion for summary judgment. Owners appealed.

The Court of Appeal held that:

- County's requirement that developer make drainage-related improvements and offer to dedicate an easement as conditions of subdivision approval did not convert spillway into a public drainage system;
- Fees collected by flood control district did not establish that subdivision's drainage improvements were incorporated into a public drainage system;
- Failure of defendants to require mitigation by upstream property owners did not establish that subdivision's drainage improvements were a public work; and
- Any error in trial court's exclusion of expert's statement regarding county's custom and practice was harmless.

County's requirement that private developer make drainage-related improvements and offer to dedicate an easement as conditions of approval of subdivision did not convert spillway constructed by developer into a public drainage system, as alleged in inverse condemnation action brought by subdivision property owners, where county never expressly accepted the easement offer and never maintained or repaired the spillway or installed any improvements.

Fees collected from subdivision property owners by flood control district were not evidence that subdivision's drainage improvements were incorporated into a public drainage system in inverse condemnation action brought by owners against district and county; fees were collected pursuant to a drainage fee ordinance to be placed in a fund intended to cover a local match to a proposed federal flood-control project that was never built.

Failure of the county or flood control district to require upstream property owners to install mitigation measures to offset the downstream runoff through subdivision was not an affirmative act that demonstrated public control or dominion over subdivision's drainage improvements in inverse condemnation action brought by subdivision property owners.

Trial court's error, if any, in excluding expert's statement about county's custom and practice regarding assumption of responsibility for maintaining privately-constructed drainage improvements was harmless in inverse condemnation action brought by subdivision homeowners; evidence of custom and practice could not establish that county created a contract by accepting subdivision developer's offer of dedication and thereby undertook to maintain the improvements, and the terms implied by expert conflicted with express terms of the agreement between county and developer.

LIABILITY - LOUISIANA

[Green v. East Carroll Parish School District/Board](#)

Court of Appeal of Louisiana, Second Circuit - March 1, 2023 - So.3d - 2023 WL 2289434 - 54,910 (La.App. 2 Cir. 3/1/23)

Mother of a child with a disability filed petition for damages against school board, individually and on behalf of child, alleging that school board was negligent for failing to provide required transportation and services to her wheelchair-using son, and that this failure caused her to fall and be injured on day when she elected to transport him herself since special services school bus equipped with a wheelchair lift was not functioning properly.

The District Court granted school board's motion for summary judgment, finding that the only reason for mother's fall was her own haste and negligence. Mother appealed.

The Court of Appeal held that:

- School board's motion for summary judgment was timely served;
- School board did not owe a duty to mother to prevent her from sustaining an injury while transporting her children;
- Mother's injury was too attenuated from school board's duty to provide safe transportation for child; and
- Trial court properly dismissed child's claims for personal injury against school board.

School board did not owe a duty to mother of student with a disability to prevent her from sustaining an injury while transporting her children, and thus, mother could not prevail on her negligence claim against school board, though she was injured while transporting her disabled student to school on morning special services bus equipped with a wheelchair lift was not working; board owed a duty of care to student pursuant to his individualized education program, but that duty did not extend to student while he was being voluntarily transported in his mother's vehicle, and mother had multiple options when required special services transportation was not available, but did not seek any of them and instead elected to drive her student to school.

Mother's injury, which she sustained while transporting her student with a disability to school, was too attenuated from school board's duty to provide safe transportation for student, pursuant to his individualized education program, to establish school board's liability for negligence, though she elected to transport student to school on morning special services bus equipped with a wheelchair lift was not working; risk of mother falling was not in scope of school board's duty to provide transportation to student.

SPECIAL ASSESSMENTS - NORTH DAKOTA

[Senske Rentals, LLC v. City of Grand Forks](#)

Supreme Court of North Dakota - March 31, 2023 - N.W.2d - 2023 WL 2718043 - 2023 ND 55

Property owner appealed after city council upheld decision of city special assessment commission to specially assess property for street improvements. The District Court upheld commission's decision. Property owner appealed.

The Supreme Court held that:

- Judicial notice would not be taken of city's published documents relating to special assessment amount;
- Record was inadequate for property owner to meet burden to demonstrate that city or commission acted arbitrarily, capriciously, or unreasonably in determining benefit of project; and
- Commission's assessment method did not violate statutory requirements.

Supreme Court would decline to take judicial notice of city's published documents relating to special assessment amount of street-improvement project when reviewing district court's order upholding decision of city special assessment commission; documents related to information gathered nearly two years after determination of special-assessment amount, and documents were not in the record given that they were not presented to district court, city council, which upheld commission's decision, or commission.

Record in property owner's appeal of special assessment was inadequate for property owner to meet burden to demonstrate that city or city special assessment commission acted arbitrarily, capriciously, or unreasonably in determining benefit of street-improvement project, where record did not reflect that property owner made a specific argument on method that commission used to determine benefit.

City special assessment commission's assessment method, under which commission calculated assessment amount for street-improvement project by taking cost of construction and dividing it by square footage of the property and assessing it according to lot frontage, did not violate requirements of statute governing determination of special assessments by commission, despite contention that complex nature of project was not comparable to other projects that had lent themselves to a simple form of calculation.

Supreme Court would decline to consider property owner's claim that constitutional taking occurred because special assessments imposed by city special assessment commission regarding street-improvement project were as much as improved value of the parcels when Court reviewed district court's affirmance of commission's decision, where property owner did not raise claim in district court.

EMINENT DOMAIN - OHIO

[State ex rel. US Bank Trust, National Association v. Cuyahoga County](#)

Supreme Court of Ohio - April 4, 2023 - N.E.3d - 2023 WL 2762497 - 2023-Ohio-1063

Relator sought mandamus relief compelling counties to begin appropriation proceedings regarding properties foreclosed upon through expedited tax foreclosure proceedings for abandoned land.

The Eighth District Court of Appeals, the Sixth District Court of Appeals, and the Ninth District Court of Appeals dismissed. Relator appealed.

The Supreme Court held that:

- Relator had standing with respect to one property as owner of mortgage at time of foreclosure;
- Relator lacked standing with respect to another property as non-owner of mortgage at time of foreclosure; and
- Relator had adequate remedy in ordinary course of law, precluding mandamus relief.

Relator had standing to seek mandamus relief compelling county to begin appropriation proceedings regarding property that was foreclosed upon through expedited tax foreclosure proceeding for abandoned land, even though the mortgage assignment to relator was recorded almost a month after adjudication of foreclosure, where mortgage assignment was executed a month before adjudication.

Relator lacked standing to seek mandamus relief compelling county to begin appropriation proceedings regarding property that was foreclosed upon through expedited tax foreclosure proceeding for abandoned land, where relator did not own mortgage on the property at time of alleged taking, and relator made no showing that takings claim was assigned to it when it acquired the mortgage.

Relator had adequate remedy in ordinary course of law regarding two properties foreclosed upon through expedited tax foreclosure proceeding for abandoned land, and thus relator was not entitled to mandamus relief compelling county to begin appropriation proceedings; relator could have redeemed properties by paying what was due on tax liens, relator could have sought transfers of foreclosure actions from boards of revision to common pleas courts, and relator could have appealed boards' adjudications of foreclosure to common pleas courts.

PUBLIC EMPLOYMENT - TENNESSEE

[Moss v. Shelby County Civil Service Merit Board](#)

Supreme Court of Tennessee - March 21, 2023 - S.W.3d - 2023 WL 2579880

Firefighter filed writ of certiorari seeking review of decision of county civil service merit board upholding firefighter's termination.

The Chancery Court affirmed. Firefighter appealed. The Court of Appeals reversed. Board applied for permission to appeal, which was granted. The Supreme Court reversed and remanded. On remand, the Court of Appeals affirmed in part, vacated in part, and remanded. Board filed application for permission to appeal, which was granted.

The Supreme Court held that board's decision at termination hearing to disallow firefighter's questions about more lenient discipline imposed on other employees was not clear error in judgment.

Firefighter's disparate discipline evidence, pertaining to discipline imposed on other fire department employees, was irrelevant to whether there was just cause to terminate firefighter's employment, and thus, county civil service merit board's decision at termination hearing to disallow firefighter's questions about more lenient discipline imposed on other employees was not clear error in judgment that rendered board's decision arbitrary or capricious; essential facts of consequence to board's decision involved firefighter's conduct, and evidence about discipline that might have been imposed on other employees in other situations did not tend to make the facts about firefighter's conduct more or less probable, and he did not claim equal protection violation based on membership in protected class.

PUBLIC EMPLOYMENT - ALABAMA

[City of Houston v. Houston Professional Fire Fighters' Association, Local 341](#)

Supreme Court of Texas - March 31, 2023 - S.W.3d - 2023 WL 2719477 - 66 Tex. Sup. Ct. J.

City firefighters' union filed suit against city over claim that city violated the Fire and Police Employee Relations Act by failing to provide firefighters with substantially equal compensation and conditions of employment that prevailed in comparable private sector employment. Union also requested a declaration of compensation and conditions of employment for one year pursuant to the Act.

The 234th District Court denied city's jurisdictional plea, denied city's motion for summary judgment on claim that Act's judicial-enforcement provisions were unconstitutional, entered partial summary judgment for union, and permitted city to file an interlocutory appeal. City took an appeal as of right concerning the denial of its jurisdictional plea and took an interlocutory appeal of the rejection of its constitutional claim. The Houston Court of Appeals affirmed. In a separate action, city police officers' union brought action for a declaration that Act preempted city charter amendment that would require city to set firefighter compensation commensurate with police officer compensation at similar ranks, which was a claim that the city joined. The 157th District Court entered summary judgment that the amendment was preempted by the Act. Firefighters' union and individual firefighters who had intervened appealed. The Houston Court of Appeals reversed and remanded. Review was granted in both actions.

The Supreme Court held that:

- Act's judicial-enforcement provision was not an unconstitutional abdication of legislative authority under the Texas Constitution;
- Act's compensation standards were not so vague as to render their judicial application unconstitutional under the Texas Constitution; abrogating *International Ass'n of Firefighters, Local Union No. 2390 v. City of Kingsville*, 568 S.W.2d 391;
- Firefighters' union was not required to propose particular private-sector standards during collective bargaining in order to be entitled to have the courts establish compensation under the Act; and
- Act preempted the city charter amendment.

Fire and Police Employee Relations Act's judicial-enforcement provision, which required courts to establish compensation in the event of an impasse in collective bargaining, was not unconstitutional abdication of legislative authority under the Texas Constitution, despite argument that the provision required courts to establish compensation in the first instance; the Act, which required local governments to provide firefighters with substantially equal compensation and conditions of employment that prevailed in comparable private sector employment, provided a legislatively defined standard by which to assess compensation structure and linked judicial enforcement of that standard to an evaluation of existing compensation.

Compensation standards laid out in the Fire and Police Employee Relations Act, which required local governments to provide firefighters with substantially equal compensation and conditions of employment that prevailed in comparable private sector employment, were not so vague as to render their judicial application invalid as result of unconstitutional delegation of legislative authority; the Act expressed the Legislature's policy judgment that firefighters' employment conditions should mirror the private sector; abrogating *International Ass'n of Firefighters, Local Union No. 2390 v. City of Kingsville*, 568 S.W.2d 391.

City firefighters' union was not required to propose particular private-sector standards during collective bargaining in order to be entitled to have the courts establish compensation under the Fire and Police Employee Relations Act, which, in a waiver of governmental immunity, allowed

courts to do so in the event of an impasse and which required local governments to provide firefighters with substantially equal compensation and conditions of employment that prevailed in comparable private sector employment; Act's good-faith provision did not require either party to negotiate based on a particular standard or agree to particular terms.

Fire and Police Employee Relations Act's provision that required local governments to provide firefighters and police officers with substantially equal compensation and conditions of employment that prevailed in comparable private sector employment preempted city charter amendment that would require city to set firefighter compensation commensurate with police officer compensation at similar ranks; Act expressed an overarching state policy with respect to collective-bargaining compensation, Act provided that fire and police departments had to bargain independently with their public employer unless they voluntarily joined together, and Act provided a specific compensation standard for claims for judicial enforcement, i.e., private-sector employment, which conflicted with the amendment.

Fire and Police Employee Relations Act's provision that required local governments to provide firefighters with substantially equal compensation and conditions of employment that prevailed in comparable private sector employment establishes the standard for judicial enforcement of firefighter compensation to the exclusion of local law.

UTILITY FEES - ARKANSAS

[City of Fort Smith v. Merriott](#)

Supreme Court of Arkansas - March 16, 2023 - S.W.3d - 2023 Ark. 51 - 2023 WL 2530753

Class of city citizens and taxpayers brought action against city after discovering that it was dumping recycling in landfill, contending that collection of monthly sanitation charges, which purportedly included fees for recycling, was an illegal exaction and that city had been unjustly enriched.

Following certification of class and denial of city's motion for summary judgment, the Circuit Court denied city's motion to compel class notice on grounds city had waived notice. City appealed, and the Supreme Court reversed and remanded. Following a bench trial on remand, the Circuit Court entered judgment for class and awarded damages. City appealed.

The Supreme Court held that:

- Single sanitation fee which city charged for curbside pickup of trash, recyclables, and yard waste bore a reasonable relationship to the benefits conferred thus was not an illegal exaction, and
- Evidence of the cost of city's fake recycling program was insufficient to show the value of the benefit which city received, and thus did not support claim for restitution.

Single sanitation fee which city charged for curbside pickup of trash, recyclables, and yard waste bore a reasonable relationship to the benefits conferred on those receiving the services and thus was not an illegal exaction, even though city dumped collected recycling while continuing to run a separate curbside-recycling program and gave warning stickers to residents that failed to properly separate their trash; city ordinance set a single fee for the cost of residential collection and disposal of solid waste, recycling, and yard waste, city spent the funds on the collection and disposal of solid

waste, recycling, and yard waste, charges were maintained in the sanitation enterprise fund, and residents were never charged a separate fee specifically designated for recycling.

Evidence of the cost of city's fake recycling program was insufficient to show the value of the benefit which city received from class of city citizens who paid a single sanitation fee for sanitation services that included recycling, and thus citizens could not recover that cost as restitution for unjust enrichment; there was no evidence that city, which collected recycling separate from garbage but dumped them both together, gained anything from its deception or profited or otherwise benefited from its actions.

PUBLIC UTILITIES - HAWAII

[Matter of Hawai'i Electric Light Company, Inc.](#)

Supreme Court of Hawai'i - March 13, 2023 - P.3d - 2023 WL 2471890

After Supreme Court vacated Public Utilities Commission (PUC) decision approving electric utility's proposed purchase of electricity from power company's proposed biomass power plant, energy company appealed PUC's decision on remand reconsidering its earlier grant of waiver to utility, and denying waiver from competitive bidding process for acquisition of new renewable energy generation sources, and it also appealed from PUC's decision denying its motion for reconsideration.

The Supreme Court vacated and remanded. Following new contested case hearing, the PUC declined to approve amended power purchase agreement, and power company appealed.

The Supreme Court held that:

- PUC had duty to consider energy prices when considering electric utility's proposed purchase of electricity from power company's proposed biomass power plant;
- PUC was not restricted to comparing biomass power plant to fossil-fuel plants when considering potentially harmful climate change due to the release of harmful greenhouse gases; and
- PUC could apply carbon neutrality standard when evaluating proposed biomass power plant.

Public Utilities Commission (PUC) on remand, had duty to consider energy prices when considering electric utility's proposed purchase of electricity from power company's proposed biomass power plant; mandate on remand from Supreme Court expressly required consideration of whether the cost of energy under the Amended power purchase agreement was reasonable and whether the terms of the agreement were prudent and in the public interest, and PUC had a duty to act in the public interest.

Public Utilities Commission (PUC), when considering whether costs of proposed biomass power plant were reasonable as part of proposed power purchase agreement, was not restricted to comparing biomass power plant to fossil-fuel plants when considering potentially harmful climate change due to the release of harmful greenhouse gases.

Public Utilities Commission (PUC) findings, when declining to approve power purchase agreement for purchase of power from proposed biomass power plant project, did not indicate that PUC improperly tried to become its own "expert," where PUC merely compiled data provided by power company's expert into a table and calculated that project would reach cumulative carbon neutrality 12 years after it reached annual carbon neutrality, and two years after the statutory cutoff for full carbon neutrality.

Public Utilities Commission's (PUC) critical evaluation of the evidence power company presented when seeking approval of power purchase agreement for electric utility to purchase energy from power company's proposed biomass power plant did not equate to improper application of a higher evidentiary standard, even if power company and electric utility were the only ones to introduce expert evidence; PUC simply did not find power company persuasive.

Public Utilities Commission (PUC) could apply carbon neutrality standard when evaluating power purchase agreement for electric utility to purchase electricity from power company's proposed biomass power plant; power company had pledged to be carbon negative, carbon neutrality went directly to the reasonability of its costs in light of its greenhouse gas emissions, and PUC was not convinced by power company's argument that increased emissions would be offset by tree planting.

PUBLIC UTILITIES - IOWA

[LS Power Midcontinent, LLC v. State](#)

Supreme Court of Iowa - March 24, 2023 - N.W.2d - 2023 WL 2618192

Competitor electric transmission companies brought action against Iowa Utilities Board (IUB), IUB's chair, director of Legislative Services Agency, and the State's code editor, seeking declaratory judgment that statute granting incumbent electric transmission owners a right of first refusal to construct and maintain lines to be connected to existing facility violated the single-subject, title, and equal protection provisions of the Iowa Constitution and seeking temporary injunction prohibiting enforcement of the statute.

The District Court dismissed for lack of standing. Companies appealed. The Court of Appeals affirmed. Companies applied for further review, and application was granted.

The Supreme Court held that:

- Companies had standing to pursue action challenging constitutionality of statute;
- Briefing and existing record were adequate for Supreme Court to decide whether to issue temporary injunction staying enforcement of statute, and, thus, Supreme Court would exercise its discretion to decide injunction issue;
- Companies were likely to succeed on merits of claim that title of appropriations bill granting right of first refusal violated constitutional title requirement, as required to obtain temporary injunction;
- Title "legal and regulatory responsibilities" as catchall for disparate subjects does not meet constitutional requirement that the title of an act express the subject matter of the act; abrogating *Rush v. Reynolds*, 2020 WL 825953;
- Companies were likely to succeed on merits of claim that title of appropriations bill violated single-subject requirement of constitution, as required to obtain temporary injunction;
- Companies would likely suffer irreparable harm in absence of temporary injunction; and
- Public interest supported temporary injunction.

Competitor electric transmission companies had particularized injury distinct from general population, as required for standing to pursue action against Iowa Utilities Board (IUB) and state officials seeking declaratory judgment that statute granting incumbent electric transmission owners a right of first refusal to construct and maintain lines connected to existing facility violated state constitution's single-subject, title, and equal protection provisions; unlike members of general public, companies were approved to complete transmission projects in the state, and statute injured companies by precluding them from bidding on new projects unless incumbent failed to exercise its

right of first refusal.

Competitor electric transmission companies suffered competitive injury at time of enactment of statute granting incumbent electric transmission owners a right of first refusal to construct and maintain lines connected to existing facility, and did not need to identify specific project lost to incumbent to have standing to pursue action against Iowa Utilities Board (IUB) and state officials seeking declaratory judgment that statute violated state constitution's single-subject, title, and equal protection provisions; companies were qualified and competent to supply transmission lines for in-state projects, but statute effectively blocked companies from competing unless incumbent declined to exercise its right of first refusal.

Competitor electric transmission companies' competitive injury was traceable to state's actions, as required for standing to pursue action against Iowa Utilities Board (IUB) and state officials seeking declaratory judgment that statute granting incumbent electric transmission owners a right of first refusal to construct and maintain lines connected to existing facility violated state constitution's single-subject, title, and equal protection provisions; state's grant of right of first refusal to incumbent caused harm to companies by blocking companies from competing unless incumbent declined to exercise its right of first refusal.

Favorable decision would redress competitor electric transmission companies' competitive injury, as required for standing to pursue action against Iowa Utilities Board (IUB) and state officials seeking declaratory judgment that statute granting incumbent electric transmission owners a right of first refusal to construct and maintain lines connected to existing facility violated state constitution's single-subject, title, and equal protection provisions; blocking enforcement of right of first refusal would allow companies to supply transmission lines for in-state projects.

Competitor electric transmission companies' injury in the form of lost future profits was sufficiently imminent for standing to pursue action against Iowa Utilities Board (IUB) and state officials seeking declaratory judgment that statute granting incumbent electric transmission owners a right of first refusal to construct and maintain lines connected to existing facility violated state constitution's single-subject, title, and equal protection provisions; companies alleged that regional transmission organizations would approve \$30 billion in new electric transmission projects over the next ten years and that organizations had begun studying ways to expand transmission grid in midwest, including in the state, and companies would lose profits when incumbents received new projects.

Briefing and existing record were adequate for Supreme Court to decide whether to issue temporary injunction staying enforcement of statute granting incumbent electric transmission owners a right of first refusal to construct lines connected to existing facility, pending resolution of constitutional claims, and, thus, Supreme Court would exercise its discretion to decide injunction issue, instead of remanding issue to district court, following its decision that competitor electric transmission companies had standing to pursue action challenging statute; appellate briefing squarely addressed injunction issue, companies briefed merits of constitutional claims on appeal, all parties briefed merits of claims below, and claims turned on question of law that did not require further record development.

Competitor electric transmission companies were likely to succeed on merits of claim that title of appropriations bill granting incumbent electric transmission owners a right of first refusal to construct lines connected to existing facility violated constitutional title requirement, as required for temporary injunction staying enforcement of statutory right of first refusal pending resolution of constitutional claims; title, "An Act relating to state and local finances by making appropriations, providing for legal and regulatory responsibilities, providing for other properly related matters, and including effective date and retroactive applicability provisions" did not give notice of right of first

refusal provision, and title failed to clearly communicate subject matter of bill.

Competitor electric transmission companies were likely to succeed on merits of claim that title of appropriations bill granting incumbent electric transmission owners a right of first refusal to construct lines connected to existing facility violated single-subject requirement of state constitution, as required for temporary injunction staying enforcement of statutory right of first refusal pending resolution of constitutional claims; bill contained medley of appropriations provisions and granted substantive rights, and right of first refusal failed to garner sufficient votes for enactment as standalone bill.

Competitor electric transmission companies would likely suffer irreparable harm through loss of opportunity to land multi-million-dollar electric transmission projects in the state in absence of temporary injunction against Iowa Utilities Board (IUB) and state officials staying enforcement of statute granting incumbent electric transmission owners a right of first refusal to construct lines connected to existing facility, pending resolution of claims challenging constitutionality of statute.

Balance of harms favored temporary injunction against Iowa Utilities Board (IUB) and state officials staying enforcement of statute granting incumbent electric transmission owners a right of first refusal to construct lines connected to existing facility, pending resolution of constitutional challenges to statute brought by competitor electric transmission companies; companies were harmed by loss of opportunity to compete for new projects, intervenors, who were shielded from competition by statute, argued that new projects were years away and faced no harm while case was pending, and companies were likely to succeed on claims, thereby diminishing any harm resulting from state not being allowed to enforce statute.

Public interest supported temporary injunction against Iowa Utilities Board (IUB) and state officials staying enforcement of statute, granting incumbent electric transmission owners a right of first refusal to construct lines connected to existing facility, pending resolution of constitutional challenges to statute brought by competitor electric transmission companies; public had interest in reliable electric service at reasonable rates, and statute would decrease competition and increase cost of electricity.

ZONING & PLANNING - MASSACHUSETTS

[Reilly v. Town of Hopedale](#)

Appeals Court of Massachusetts, Worcester - March 7, 2023 - N.E.3d - 2023 WL 2375559

Citizens brought action against town and railroad, seeking a declaration that town's waiver of its statutory option to purchase forest lands, entered into as part of settlement agreement with railroad, was invalid and unenforceable.

The Superior Court Department granted railroad's motion for judgment on the pleadings. In consolidated case, the Land Court Department denied citizens' motion for expedited treatment of their motion to intervene and their motion to intervene in suit brought by town against railroad. Citizens appealed.

The Appeals Court held that:

- Citizens lacked standing to seek declaratory relief under statute allowing for taxpayers to petition to restrain illegal appropriations;
- Citizens lacked standing to bring a claim under statute creating tax incentives for preserving and

- maintaining forest lands;
 - Citizens lacked standing to pursue a mandamus action under statute allowing town to assign its option to purchase classified forest lands;
 - Citizens' motion to intervene in Land Court action was not moot and would be remanded; and
 - Citizens' post-judgment motion to intervene in Land Court action was not untimely.
-

ANNEXATION - MISSISSIPPI

[City of Jackson v. City of Pearl](#)

Supreme Court of Mississippi - March 16, 2023 - So.3d - 2023 WL 2532971

Cities and county sought review of a third city's ordinance incorporating undeveloped land that was located in county, which was not city's county, and that surrounded an airport that city had previously incorporated.

The Circuit Court entered order voiding the ordinance. City appealed.

The Supreme Court held that city needed approval from county board of supervisors for its attempted annexation to enlarge existing airport.

Statute governing municipal incorporation of property in another county, relating to statutory process for municipalities of more than 100,000 people to incorporate noncontiguous airport property, required city to obtain approval from county board of supervisors for city ordinance that incorporated undeveloped land that was located in county, which was not city's county, and that surrounded an airport that city had previously incorporated; city could not use statute as a jumping off point for future annexations into county to enlarge existing airport after receiving a one-time pass, via the statute, from the requirements of general annexation law.

ANNEXATION - NEBRASKA

[Darling Ingredients Inc. v. City of Bellevue](#)

Supreme Court of Nebraska - March 24, 2023 - N.W.2d - 313 Neb. 853 - 2023 WL 2618705

Landowner brought action against city challenging validity of annexation ordinance, seeking declaratory and injunctive relief.

The District Court entered judgment for landowner on two bases for relief without addressing third basis. City appealed. The Supreme Court reversed and remanded. On remand, the District Court entered judgment for city. Landowner appealed.

The Supreme Court held that:

- Trial court acted within scope of remand by deciding case without receiving additional evidence as to third basis to challenge ordinance, and
- Annexation ordinance was not for an improper purpose of solely seeking to increase tax revenue.

Trial court acted within scope of Supreme Court's remand to consider landowner's "improper purpose" challenge to city's annexation ordinance when trial court decided case on remand without receiving additional evidence, on remand following reversal of judgment declaring ordinance invalid on two of three bases raised by landowner, where proof on all three of landowner's bases for relief

was fully presented at trial, trial court found for landowner on the first two bases for relief at close of the evidence but did not address the third basis for relief which was whether ordinance was enacted for an improper purpose, Supreme Court observed that trial court did not render any decision as to the “improper purpose” challenge, and landowner did not seek leave to amend pleadings, seek additional discovery, or offer new evidence at a subsequent trial.

City’s annexation ordinance that included rural area which was not contiguous or adjacent to city was not for an improper purpose of solely seeking to increase tax revenue, where city was motivated to annex area in question, at least in part, to foster natural growth and development of city.

ELECTIONS - OHIO

[State ex rel. Richardson v. Gowdy](#)

Supreme Court of Ohio - March 24, 2023 - N.E.3d - 2023 WL 2624185 - 2023-Ohio-976

City elector filed action against city council president and county board of elections for writ of mandamus to president to appoint clerk of council to complete recall-petition process related to removal of three members of city council, in time to place recall elections on primary-election ballot, or, in the alternative, to compel board of elections to certify number of valid signatures on submitted petitions, and seeking attorney fees and costs.

The Supreme Court held that:

- City elector’s claim for writ of mandamus to compel city council president to appoint clerk of council was moot;
- Elector was not entitled to writ of mandamus to compel city council president to certify number of signatures;
- Elector was not entitled to writ of mandamus to compel county board of elections to certify number of valid signatures for each recall petition submitted to board;
- Elector was not entitled to attorney fees; but
- City elector was entitled to costs.

City elector’s claim for writ of mandamus to compel city council president to appoint clerk of council to perform ministerial task of certifying number of valid signatures on recall petitions for removal of members of city council was moot, where city council president had already performed action that elector sought to compel.

City elector was not entitled to writ of mandamus to compel city council president to certify number of signatures on recall petitions for removal of members of city council; city council president had no legal duty to certify number of signatures, and clerk of council, who did have duty to certify number of signatures, was not party to case.

City elector was not entitled to writ of mandamus to compel county board of elections to comply with city charter and statute governing recall petitions for members of city council to complete ministerial task of certifying number of valid signatures for each recall petition submitted to board; statute governing recall petitions was not adopted as part of city charter.

City elector was not entitled to attorney fees in her action for writ of mandamus to compel city council president to appoint clerk of council to certify valid signatures on recall petitions for removal of city council members, on basis of council president’s bad faith actions and city law director declining to bring mandamus action, where judgment was not being ordered in elector’s favor.

City elector was entitled to costs in her action for writ of mandamus to compel city council president to appoint clerk of council to certify valid signatures on recall petitions for removal of city council members, where elector had good cause to believe that her claim was well founded.

IMMUNITY - TEXAS

[Fraleley v. Texas A&M University System](#)

Supreme Court of Texas - March 24, 2023 - S.W.3d - 2023 WL 2618532 - 66 Tex. Sup. Ct. J. 515

Motorist brought premises-defect action against public university which was charged with maintaining road on which motorist was injured in an accident, alleging that a lack of lighting, barricades, and warning signs around the intersection caused his injuries.

The 361st District Court denied university's plea to the jurisdiction. University appealed. The Amarillo Court of Appeals reversed. Review was granted.

The Supreme Court held that:

- Ditch encountered by motorist when he left roadway by proceeding straight through a T-shaped intersection was not a "special defect" and thus did not support application of Tort Claims Act exception to governmental immunity for discretionary decisions about design and signage;
 - University's decision to redesign four-way intersection to a three-way, T-shaped intersection and place a yield sign, rather than a stop sign or some other signal, was discretionary and thus subject to governmental immunity under Tort Claims Act; and
 - Court of Appeals properly ordered action dismissed rather than remanded for re-pleading.
-

IMMUNITY - WASHINGTON

[Hanson v. Carmona](#)

Supreme Court of Washington, En Banc - March 23, 2023 - P.3d - 2023 WL 2604579

Motorist brought claims for negligence and vicarious liability against local governmental entity that administered for multiple counties grants for programs under Senior Citizens Services Act, and entity's employee, relating to collision when employee was driving vehicle owned by entity.

Defendants filed motion for summary judgment, alleging motorist's failure to comply with statutory presuit notice requirement, and motorist filed amended complaint that removed all references to entity and to allegations that employee was acting in scope of employment.

The Superior Court granted partial summary judgment to entity, allowed case to proceed against employee in her individual capacity, and certified its order for discretionary review. The Court of Appeals reversed. Review was granted.

The Supreme Court held that:

- Statutory presuit notice requirement applies to a tort action alleging that a local governmental employee was acting within scope of employment, even if employee is sued in their individual capacity, and
- Statutory presuit notice requirement does not violate constitutional separation of powers.

Statutory presuit notice requirement applies to a tort action alleging that a local governmental employee was acting within scope of employment, even if employee is sued in their individual capacity and governmental entity technically is not sued; statute encompasses acts within scope of employment, and governmental entity rather than employee would be bound by any judgment.

In light of legislature's constitutional power to decide conditions precedent to suing state and local governments, statutory presuit notice requirement for tort actions did not violate constitutional separation of powers, as applied to motorist's tort action alleging that employee of local government entity that administered for multiple counties grants for programs under Senior Citizens Services Act was acting within scope of employment at time of collision between motorist's vehicle and entity-owned vehicle driven by employee, despite conflict with a civil rule for courts, i.e., presuit notice requirement changed court rule's procedure for commencing a lawsuit, by adding a precondition not found in court rule.

IMMUNITY - ALABAMA

Fernando v. City of Chickasaw

Supreme Court of Alabama - March 17, 2023 - So.3d - 2023 WL 2543794

Administrator of estate of arrestee who died in city jail after being arrested on suspicion of driving under the influence (DUI) brought action in which he asserted wrongful-death claims under state law and various claims under federal law against city, city's public-safety director, first jailer, and numerous fictitiously named defendants.

Following removal, the United States District Court for the Southern District of Alabama entered summary judgment for defendants on the federal claims and dismissed the wrongful-death claim. Estate administrator then commenced a second action in which he asserted wrongful-death claims and named a police officer and a second jailer as additional defendants, whom he later sought to substitute for the fictitiously named defendants.

After granting administrator's motion to reinstate the first action and consolidate the two actions, the Circuit Court entered a summary judgment in both actions in favor of all defendants. Estate administrator filed a notice of appeal in each action, and the appeals were consolidated.

The Supreme Court held that:

- After federal court's judgment, trial court lacked jurisdiction to consider motion to reinstate the initial action as well as to consider any other subsequent pleadings or motions purportedly filed in that action;
- Federal removal statute's tolling provision did not apply to the state-law-based wrongful-death claims that administrator asserted against the additional defendants;
- Administrator's naming of the additional defendants in the second action did not substitute those individuals for the fictitiously named defendants in the initial action;
- Consolidation of the actions did not mean that the additional defendants were substituted for the fictitiously named defendants in the initial action;
- Administrator did not present the required substantial evidence to show that failure of city's public-safety director to provide any medical training to police officers and jailers was conduct that was beyond his authority so as to deprive him of State-agent immunity;
- Administrator failed to present the required substantial evidence to show that first jailer acted beyond her authority when she failed to contact emergency medical services;

- Administrator failed to show that first jailer acted beyond her authority when she failed to check on arrestee every 30 minutes; and
- Administrator failed to show that first jailer acted beyond her authority when she allegedly violated the jail's operations policy for booking, housing, and releasing inmates.

BALLOT INITIATIVE - CALIFORNIA

No on E, San Franciscans Opposing the Affordable Housing Production Act v. Chiu

United States Court of Appeals, Ninth Circuit - March 8, 2023 - F.4th - 2023 WL 2397500 - 2023 Daily Journal D.A.R. 1843

Political committee, its treasurer, and contributor brought action alleging that municipality's ordinance requiring it to disclose identities of major donors to its top contributors violated First Amendment.

The United States District Court for the Northern District of California denied plaintiffs' motion for preliminary injunction, and they appealed.

The Court of Appeals held that:

- Appeal fell within scope of mootness exception for controversies capable of repetition, yet evading review;
- District court did not abuse its discretion by concluding that disclosure requirement was substantially related to municipality's strong governmental interest in informing voters about who funded political advertisements;
- Plaintiffs were not likely to succeed on merits of their argument that ordinance was impermissible burden on speech as applied to longer advertisements;
- District court did not abuse its discretion by concluding that disclosure requirement did not impose impermissible burden on speech as applied to shorter advertisements;
- District court did not abuse its discretion in concluding that plaintiffs failed to demonstrate that disclosure requirement actually and meaningfully deterred contributors;
- District court did not abuse its discretion by concluding that disclosure requirement was narrowly tailored to municipality's strong interest in informing voters about who funded political advertisements; and
- Public interest and balance of hardships weighed in favor of denying preliminary injunction.

BONDS - ILLINOIS

Dale v. NFP Corp.

United States District Court, N.D. Illinois, Eastern Division - March 1, 2023 - Slip Copy - 2023 WL 2306825

Board of Trustees of a pension plan (Plaintiff) brought an action under ERISA on behalf of the Plan and its participants. Plaintiffs alleged that Defendants, the Plan's administrators and investment advisors, breached their fiduciary duties by structuring investments to generate excessive direct and indirect compensation for themselves; failing to disclose to Plaintiffs all compensation received from investment of Plan assets; providing false or inadequate reports on investment performance; providing inadequate or misleading investment advice; and investing Plan assets in imprudent and

illiquid investments.

Defendants moved to dismiss.

With regard to Plaintiffs' claims regarding Defendants' treatment of bonds in the portfolio, the District Court held that:

- Plaintiffs' stated a claim that Defendants' had engaged in churning of the bonds based on an excessive volume of trades, not the value of the commission on each trade; and
- The churning claim did not require that the Plaintiffs' supply every trading metric necessary for proving the churning claim at the motion to dismiss stage.

"Defendants contend that Plaintiffs' claim should be dismissed because there is 'no meaningful data establishing a purported reasonable commission on bond trades....' If Plaintiff's claim was premised solely on the value of the mark-ups—in other words, whether a 1.0-2.5% mark-up on bond trades was excessive, Defendants would have a viable argument. But Plaintiffs' 'churning' claim is based on an excessive volume of trades, not the value of the commission on each trade. To the extent Defendants traded bonds excessively to generate commissions for themselves, not to maximize the Plan's financial performance, Defendants failed to 'discharged their duties with respect to a plan solely in the interest of the participants.'"

"Defendants also argue that Plaintiffs fail to provide 'a metric for bond laddering.' Bond laddering is an investment strategy that involves buying bonds with different maturity dates to protect against 'interest rate risk, the risk that interest rates will change over the life of a bond.' In other words, laddering helps diversify a bond portfolio. Defendants say bond laddering explains the selling of bonds before maturity. That may be so. But at the motion to dismiss stage, Plaintiff is not required to supply every trading metric necessary for proving the churning claim. Metrics relevant to churning, such as the 'applicable turnover ratio or percentage of the account value paid in commissions,' will be calculated after discovery. Accordingly, Plaintiffs have pleaded sufficient facts to establish a churning claim. Defendants motion to dismiss Count III is denied."

PUBLIC UTILITIES - MISSISSIPPI

[City of Canton v. Slaughter](#)

Supreme Court of Mississippi. - March 16, 2023 - So.3d - 2023 WL 2533264

Two municipal utilities commissioners sought judicial review of decision by city board of aldermen to remove them from their appointed positions. The Circuit Court reversed the board's decision. Board appealed.

The Supreme Court held that:

- Commissioners' notice of appeal naming board rather than city complied with statutory requirements;
- Commissioners' notice of appeal satisfied requirement that such notices contain a description or designation of the record;
- Commissioners' notice of appeal was timely filed;
- Commissioners were "public officers" entitled to notice and opportunity to be heard; and
- Commissioners were improperly removed from their positions because board failed to override mayor's veto of their resolution to issue notice and opportunity to be heard.

Municipal utilities commissioners fell within definition of “public officer,” and thus, decision by city board of aldermen to remove them from their appointed positions for without providing them notice and opportunity to be heard prior to removal violated commissioners’ procedural due process rights, notwithstanding statute providing for removal of commissioners for inefficiency or incompetency or any other cause, since commissioners were appointed to discharge a designated duty concerning the public.

City board of aldermen’s four-to-one vote to override mayor’s veto of their resolution to issue notice and opportunity to be heard to two municipal utilities commissioners failed to pass since it lacked the requisite two-thirds majority of board members, thus resulting in improper removal of the commissioners from their appointed positions, where vote cast by alderman acting his capacity as mayor pro tempore did not count because he was serving in place of the mayor and by statute could only vote as the mayor would, that is, in case of a tie.

EMINENT DOMAIN - NORTH CAROLINA

[Epcon Homestead, LLC v. Town of Chapel Hill](#)

United States Court of Appeals, Fourth Circuit - March 21, 2023 - F.4th - 2023 WL 2564355

Housing developer filed § 1983 action in state court alleging that town’s special use permit condition requiring that it set aside portion of its development for low-income residents or pay fee in lieu of that condition effected unconstitutional taking and violated state law and due process.

After removal, the United States District Court dismissed complaint, and developer appealed.

The Court of Appeals held that:

- Developer’s claims accrued when it began purchasing land subject to special use permit, rather than when it was compelled to pay challenged fees, and
- Continuing wrong doctrine did not toll statutory period for developer to commence § 1983 action.

Housing developer’s claim that town’s special use permit condition requiring that it set aside portion of its development for low-income residents or pay fee in lieu of that condition effected unconstitutional taking and violated its substantive due process rights accrued, and limitations period for filing § 1983 action commenced, when developer began purchasing land subject to special use permit, rather than when it was compelled to pay challenged fees as condition of town issuing certificates of occupancy for its development project, where developer learned of permit condition when it purchased land.

Under North Carolina law, continuing wrong doctrine did not toll statutory period for housing developer to commence § 1983 action alleging that town’s special use permit condition requiring that it set aside portion of its development for low-income residents or pay fee in lieu of that condition effected unconstitutional taking; while essence of developer’s state return-of-fees claim was arguably unlawful fee payments exacted, its § 1983 injury was inflicted by special use permit condition requiring it to set aside part of its property or pay fee-in-lieu.

BANKRUPTCY - PUERTO RICO

In re Financial Oversight and Management Board for Puerto Rico

United States District Court, D. Puerto Rico - March 22, 2023 - B.R. - 2023 WL 2589708

Financial Oversight and Management Board for Puerto Rico brought adversary proceeding to disallow bondholders' proofs of claim for amounts due pursuant to trust agreement with Puerto Rico Electric Power Authority (PREPA). Bondholders counterclaimed for declaratory judgment. Numerous entities were allowed to intervene. Parties moved for summary judgment.

The District Court held that:

- Adversary proceeding was ripe for adjudication;
- Resolutions for bonds issued by PREPA gave bondholders security interests under trust agreement only in moneys actually received and deposited into fund created by trust agreement and subjected to lien and charge for payment on bonds (sinking fund) and funds explicitly made subject to liens by terms of trust agreement, subject to perfection of those liens, limiting bondholders' recovery under proofs of claim for amounts due;
- PREPA did not use authority to grant security interest in future revenues when it issued bonds, and therefore bondholders did not have security interest in future revenues not yet received for energy not yet generated;
- PREPA bondholders had perfected liens in sinking fund to extent that deposit accounts comprising funds were in control of trustee for bondholders;
- Factual issue as to whether bondholders had perfected liens on construction fund or capital improvement fund precluded summary judgment on issue of whether Oversight Board could avoid for benefit of PREPA any unperfected security interests of PREPA's bondholders;
- PREPA bond claim had to be disallowed to extent it asserted security interest, perfected or otherwise, in moneys beyond those actually deposited into sinking fund as of time of discharge, if and when PREPA plan of adjustment was confirmed; and
- PREPA bondholders had unsecured net revenue claim arising from covenants of trust agreement to pay bond principal and interest from pledged net revenues of system, which was partially secured by moneys in sinking fund, and otherwise was unsecured, and remedies provisions of trust agreement provided bondholders with ability to obtain relief against PREPA.

PUBLIC PENSIONS - WISCONSIN

Milwaukee Police Supervisors Organization v. City of Milwaukee

Supreme Court of Wisconsin - March 21, 2023 - N.W.2d - 2023 WL 2577560 - 2023 WI 20

Labor unions representing police supervisors and firefighters brought action challenging city employee retirement system's decision to start excluding a "pension offset payment," i.e., a payment that was made pursuant to the collective bargaining agreements (CBAs) and that was conditioned on an employee-paid pension contribution, from the calculation of "current annual salary" for the purpose of calculating duty disability retirement (DDR) benefits.

The Circuit Court entered summary judgment for unions. City appealed. The Court of Appeals affirmed the judgment as to the police union but reversed the judgment as to the firefighters union. Firefighters union petitioned for review.

The Supreme Court held that under the city charter and CBA with firefighters union, the "pension offset payment" was part of the "current annual salary" for the purpose of calculating DDR benefits.

Pursuant to city charter and city's collective bargaining agreement (CBA) with labor union representing firefighters, "pension offset payment," i.e., payment that was made pursuant to CBA and that was conditioned on employee-paid pension contribution, was part of "current annual salary" for purpose of calculating duty disability retirement (DDR) benefits; despite argument that DDR beneficiaries did not make the requisite contribution, charter provided that DDR beneficiaries were to be paid percentage of "current annual salary" for position held at time of injury, "current annual salary" meant base salary, and salary grids listed in CBA included "pension offset payment" in base salaries listed.

ZONING & PLANNING - CALIFORNIA

[Pacific Palisades Residents Association, Inc. v. City of Los Angeles](#)

Court of Appeal, Second District, Division 8, California - March 8, 2023 - Cal.Rptr.3d - 2023 WL 2401079

Neighbors association brought writ proceeding against city and California Coastal Commission, challenging approval of eldercare facility in city.

The Superior Court denied the petition, and neighbors appealed.

The Court of Appeal held that:

- Proposed eldercare facility was not subject to city zoning code's yard requirements;
- Evidence was sufficient to support city's determination that facility was compatible with the neighborhood, and thus that Class 32 categorical California Environmental Quality Act (CEQA) exemption for in-fill development projects applied;
- Evidence was sufficient to support city's determination that facility did not violate community plan's policy of preserving and protecting views from hillsides, public lands, and roadways; and
- Evidence was sufficient to support California Coastal Commission's determination that proposed eldercare facility presented no substantial issue under the Coastal Act.

Proposed eldercare facility was not subject to city zoning code's yard requirements pursuant to ordinance stating that no such requirements apply to the residential portions of buildings located on lots "[1] used for combined commercial and residential uses, if [2] such portions are used exclusively for residential uses, [3] abut a street, private street or alley, and [4] the first floor of such buildings at ground level is used for commercial uses or for access to the residential portions of such buildings," where facility was to have ground floor bistro open to the public, facility contained private individual rooms where resident elders would sleep, and residential portions of the facility would abut streets.

IMMUNITY - GEORGIA

[Georgia Department of Transportation v. White](#)

Court of Appeals of Georgia - March 6, 2023 - S.E.2d - 2023 WL 2362728

Landowner filed claims against Department of Transportation (DOT) for inverse condemnation and for judicial review of DOT's decision denying landowner's request for permits to build two full-access commercial driveways on his property.

The trial court granted landowner's motion for partial summary judgment on judicial-review claim. DOT's petition for discretionary review was granted.

The Court of Appeals held that DOT's denial of landowner's driveway permits was not a "contested case" under the Administrative Procedure Act (APA), and thus DOT did not waive sovereign immunity as to landowner's claim for judicial review under APA.

Landowner was not entitled to a hearing to contest Department of Transportation's (DOT's) decision denying his request for permits to build two full-access commercial driveways on his property, so that DOT's denial did not amount to a "contested case" under the Administrative Procedure Act (APA), and thus DOT never waived its sovereign immunity as to landowner's claim for judicial review of DOT's permit denials under the APA; statutes governing permitting process for commercial driveways did not provide for a hearing, other statutes governing DOT decisions did provide for hearing, and finding otherwise would have vitiated other APA provisions regarding administrative hearings and transmission of record to trial court.

EMINENT DOMAIN - INDIANA

[Town of Linden v. Birge](#)

Supreme Court of Indiana - March 7, 2023 - N.E.3d - 2023 WL 2383795

Property owners brought action against county and town after modifications to a town drainage system caused flooding on their property, asserting claims for nuisance, civil conspiracy, and inverse condemnation.

The Circuit Court granted town's motion to dismiss, and property owners appealed. The Court of Appeals reversed. On remand, the Circuit Court concluded that a taking had occurred and set the matter for a determination of damages. County and town filed interlocutory appeal, and the Court of Appeals reversed. The Supreme Court granted petition to transfer.

The Supreme Court held that

- Floodings were to be analyzed as a per se taking;
- Whether flooding resulted in substantial damage, and thus amounted to a permanent physical invasion, required remand; and
- Statute exempting county for liability for entry on private property for drain "reconstruction or maintenance" did not insulate it from liability.

Floodings of farmland property following county's and town's drainage improvement plan were repetitive and of indefinite duration and thus were to be analyzed as a per se taking; drain reconstruction project resulted in repeated flooding events on the property due to increased pressurization at water pipe transfer point during every heavy rainfall, and while flooding was intermittent, overflows inevitably recurred if the property sustained heavy rainfall.

Whether intermittent but inevitable flooding of farm owners' property following county's and town's drainage reconstruction project resulted in substantial damage, and thus amounted to a permanent physical invasion, required remand for additional fact-finding; while farm owners presented evidence of the flooding's interference with their use of the property, including testimony by tenant farmer that property was "almost always" wet, creating "root issues" for the crops and preventing him in some years from farming it "at all without getting equipment stuck," and by delaying the annual planting season by up to a month, preventing tenant from ever attaining the "maximum

yield,” trial court only found that the flooding made farming “more difficult” than before.

Statute giving county a “right of entry over and upon land” lying within 75 feet of a regulated drain and exempting it from liability for any necessary drain “reconstruction or maintenance” that results in damage to crops grown within that right of way did not exempt county from liability for a taking of farm owners’ property following drainage reconstruction project which resulted in intermittent but inevitable flooding of farm property; property intrusions contemplated by the statute were merely incidental, minimal, and infrequent, and would permit a farmer to continue to use the land, while the complete destruction of crops from intermittent yet inevitably recurring flooding did not.

ZONING & PLANNING - KANSAS

[American Warrior, Inc. v. Board of County Commissioners of Finney County](#) **Court of Appeals of Kansas - February 10, 2023 - P.3d - 2023 WL 1876581**

Plaintiffs brought suit against board of county commissioners and operator of sand and gravel quarry, challenging the validity of conditional-use permit issued by the county board of zoning appeals (BZA) to operate the quarry.

The District Court granted defendants’ motion for summary judgment and denied plaintiffs’ motion for summary judgment. Plaintiffs appealed.

The Court of Appeals held that conditional-use permit issued by BZA and not approved by board was void and unenforceable.

Conditional-use permit issued by county board of zoning appeals (BZA) to operator of sand and gravel quarry was void and unenforceable, where zoning laws required that conditional-use permits be first reviewed by a governing body’s planning commission and then voted upon by the governing body itself, and board of county commissioners instead allowed its BZA to independently review and issue the conditional-use permit.

MUNICIPAL GOVERNANCE - MISSISSIPPI

[Lumumba v. City Council of Jackson](#) **Supreme Court of Mississippi - March 9, 2023 - So.3d - 2023 WL 2420981**

City council brought action against mayor, seeking declaratory and injunctive relief arising from mayor’s attempt to veto a negative vote of council, and mayor counterclaimed for declaration that he had authority to veto such a vote.

The Chancery Court entered summary judgment in favor of council. Mayor appealed.

The Supreme Court held that:

- Exhibits of public records sought to be introduced by city council were “on file” and thus admissible at summary judgment stage;
- Statute providing a mayor in a mayor-council municipality with authority to veto an ordinance that has been adopted by city council does not provide mayor with authority to veto a negative vote or non-action of a city council; and

- City code also did not provide mayor with such authority.

ZONING & PLANNING - NEW JERSEY

[Malanga v. Township of West Orange](#)

Supreme Court of New Jersey - March 13, 2023 - A.3d - 2023 WL 2467376

Taxpayer brought action to challenge township's designation of library as an area in need of redevelopment.

The Superior Court, Law Division, summarily dismissed the complaint. Taxpayer appealed, and the Superior Court, Appellate Division, affirmed. Taxpayer petitioned for certification to appeal, which was granted, and townships subsequently authorized the sale of the library to a private developer.

The Supreme Court held that:

- Township's sale of library to private developer did not render appeal moot;
- Evidence was insufficient to support finding that library suffered from "obsolescence," as a ground for township's designation of library as an area in need of redevelopment; and
- Evidence was insufficient to support determination that, as a result of any faulty arrangement or obsolete layout, library site was detrimental to the welfare of the community.

Township's sale of library to private developer did not render moot taxpayer's appeal challenging township's designation of library as an area in need of redevelopment under the Local Redevelopment and Housing Law (LRHL), where resolution designating the library site as an area in need of redevelopment was still in force, and, if the sale fell through, township would want the designation to remain in place.

Proper interpretation of Local Redevelopment and Housing Law (LRHL) standard for designating property for redevelopment was an issue of substantial public importance such that Supreme Court would address merits of taxpayer's allegedly moot appeal in action challenging township's designation of library as an area in need of development; library had been sold to a private developer after taxpayer appealed.

Proof that a property is not used in an optimal manner or that it could function better is not an independent basis for redevelopment under Local Redevelopment and Housing Law (LRHL) subdivision providing for a determination that a property is in need of redevelopment if it contained buildings which, by reason of "dilapidation, obsolescence, overcrowding, faulty arrangement or design, lack of ventilation, light and sanitary facilities, excessive land coverage, deleterious land use or obsolete layout, or any combination of these or other factors, are detrimental to the safety, health, morals, or welfare of the community."

Evidence was insufficient to support finding that library suffered from "obsolescence," as a ground for township's designation of library as an area in need of redevelopment; both consultant and the mayor recognized the Library was a functioning building, members of the community actively used it more than 150,000 times a year, and needed improvements and upgrades were not uncommon for older buildings and did not present code violations.

Evidence was insufficient to support determination that, as a result of any faulty arrangement or obsolete layout, library site was detrimental to the welfare of the community, and thus did not support township's determination that library was an area in need of redevelopment; while

consultant stated that, because of its physical obsolescence and layout, the library could not add more computers or programming, and was not “up to the benchmark standard of modern libraries,” benchmarks used did not clearly show how library compared to its peers or how its programming and the number of computers it had compared to other libraries, and needed repair work and mere references to asbestos did not establish actual detriment to the welfare of the community.

IMMUNITY - TEXAS

[Rattray v. City of Brownsville](#)

Supreme Court of Texas - March 10, 2023 - S.W.3d - 2023 WL 2438952

Homeowners brought negligence action against city alleging that city’s negligent use of motor-driven equipment to open and close sluice gates in resaca and to pump water resulted in stormwater accumulation that flooded their homes.

The 107th District Court denied city’s plea to the jurisdiction. City filed interlocutory appeal, and the Corpus Christi – Edinburg Court of Appeals reversed and remanded with instructions. Homeowners filed petition for review, which was granted.

The Supreme Court held that:

- Sluice gate was put to “operation or use” within meaning of Texas Tort Claims Act, and
- Homeowners met their burden at motion to dismiss stage to create a fact issue on whether their property damage arose from city’s closure of sluice gate.

Under Tort Claims Act sections providing an exception to immunity for property damage, injury, and death “proximately caused” by the negligence of an employee if such damage, injury, or death “arises from” the operation of a motor-driven vehicle or equipment, the “proximately cause” and “arises from” requirements are separate and independent, so that satisfying the “arises from” requirement does not excuse a plaintiff from demonstrating proximate cause.

Motor-driven sluice gate in resaca was put to “operation or use” within meaning of Texas Tort Claims Act provision waiving immunity for the damage which “arises from the operation or use of a motor-driven vehicle or motor-driven equipment,” where city employees closed the gate during a rainstorm, gate blocked the water in the resaca as intended, and the flooding of properties happened within about an hour of the closure; while city claimed that the owners of the flooded properties were actually complaining about the city’s failure to open the gate, such nonuse was only a factor due to the city’s initial use and operation of the gate by closing it.

Homeowners met their burden to create a fact issue on whether their property damage arose from city’s closure of motor-driven sluice gate in resaca during rainstorm which flooded homeowners’ properties, as required to survive city’s plea to the jurisdiction; rainstorm, the gate’s closure, and the flooding all happened within the same episode of events, one closely following the occurrence of the other, there was no significant geographical attenuation between the gate and the homeowners’ properties, and homeowners potentially could show that rainstorm itself did not make property damage inevitable absent the closure of the gate.

EMINENT DOMAIN - WASHINNGTON

City of Sammamish v. Titcomb

Court of Appeals of Washington, Division 1 - March 13, 2023 - P.3d - 2023 WL 2473120

City filed a petition in eminent domain after enacting an ordinance condemning property rights in water flowing through homeowners' property.

The Superior Court denied city's motion for an order adjudicating public use and necessity, denied city's motion for reconsideration, and granted homeowners' motion for attorney fees and costs. City appealed.

The Court of Appeals held that:

- City had statutory authority to condemn homeowners' property to divert stream for stormwater facilities improvement project;
- Homeowners' argument that city's receipt of funding pursuant to the Salmon Recovery Act precluded condemnation was not properly before the Court of Appeals;
- Homeowners were not entitled to remand for an evidentiary hearing regarding public use and necessity;
- City's condemnation of homeowners' property for a stormwater facilities improvement project constituted a public use;
- City's condemnation of homeowners' property was necessary to accomplish the public use of a stormwater facilities improvement project; and
- Homeowners were not entitled to an award of attorney fees and costs.

City had statutory authority to condemn homeowners' property to divert stream for stormwater facilities improvement project, although the project additionally provided fish passage benefits; the condemnation ordinance stated that the current infrastructure was not adequate to convey the two-year storm event and that the purpose of the project was to reduce or eliminate storm drainage conveyance system capacity issues, improve traffic safety of adjacent roadways by reducing hazardous flooding conditions, and provide greater flood protection, and the project was required by state law to provide for fish passage.

City's condemnation of homeowners' property was necessary to accomplish the public use of a stormwater facilities improvement project; the city considered the merits of four project alternatives and concluded that acquisition of homeowners' property was the only alternative that met critical project requirements, including state fish passage rules, the capacity to convey a 100-year flow event, and the requisite federal permitting, and there was no evidence of actual fraud or arbitrary and capricious conduct.

BONDS - WISCONSIN

In re Atrium of Racine, Inc.

Supreme Court of Wisconsin - March 16, 2023 - N.W.2d - 2023 WL 2530355 - 2023 WI 19

Residents of senior-living facility that had gone into receivership after defaulting on debt-service payments objected to receiver's motion to authorize sale of facility and also sought an order that would reiterate and state finality for purposes of appeal a prior order that declared that bondholders' mortgage lien was superior to residents' claim under their residency agreements that they were entitled to reimbursement of their entrance fees.

The Circuit Court entered order authorizing the sale while also granting residents' motion for a reiteration of the prior order. Residents appealed both the sale order and the order reiterating the prior order, and the appeals were consolidated. The Court of Appeals reversed and remanded. Bondholders and receiver petitioned for review.

The Supreme Court held that:

- Bond underwriter's "official statement" could not be a basis for finding that bondholders subordinated mortgage to residents' claims for entrance fees, and
- Finance documents concerning issuance of bonds and corresponding mortgage lien did not provide that bondholders subordinated mortgage to residents' claims for entrance fees.

Bond underwriter's "official statement" concerning issuance of bonds and corresponding mortgage lien on senior-living facility could not be basis for finding that bondholders subordinated mortgage to residents' claims to have entrance fees reimbursed pursuant to their residency agreements; although residents' claims to entrance fees were among liens permitted under "official statement," which stated that mortgage lien was subject to permitted liens, "official statement" was not agreement at all but rather government-required notice to investors about investment risks.

Financing documents concerning issuance of bonds and corresponding mortgage lien on senior-living facility did not provide that bondholders subordinated mortgage to residents' claims to have entrance fees reimbursed pursuant to their residency agreements; documents merely contemplated that mortgage could be subordinated to other liens, and entrance fees were nothing more than unsecured, contingent liabilities and were not liens.

Senior-living facility residents did not properly develop argument challenging court of appeals' decision holding that receiver, who had been appointed when facility defaulted on debt-service payments, did not violate his fiduciary duties to residents when he moved circuit court to issue order on priority concerning bondholders' mortgage lien and residents' claim to reimbursement of entrance fees, and thus supreme court would not address argument; residents did not engage in any detailed analysis to support argument and did not request any remedy.

"Under Wis. Stat. § 128.17, the bondholders' Mortgage lien has priority over the residents' entrance fee claims. No provision of the Financing Documents subordinates the bondholders' lien, and Episcopal Homes does not extend to the proceeds from the sale of real property with a properly perfected mortgage lien. The bondholders are therefore entitled to first payment from the proceeds of the sale of the Atrium's assets."

ZONING & PLANNING - CALIFORNIA

[Spencer v. City of Palos Verdes Estates](#)

Court of Appeal, Second District, Division 5, California - February 27, 2023 - Cal.Rptr.3d - 2023 WL 2237502

Non-local surfers, who encountered alleged harassment from local surf group when trying to access premier surf spot at city beach, and non-profit organization dedicated to preserving coastal access brought action against surf group, some of group's individual members, and city alleging conspiracy

to deny access under California Coastal Act.

The Superior Court granted city's motion for judgment on the pleadings. Plaintiffs appealed.

The Court of Appeal held that:

- Masonry and wood fort built on city beach qualified as "development" requiring permit under Act;
- City, as landowner, could be held strictly liable under Act for unpermitted fort; and
- Plaintiffs stated conspiracy claim against city under Act based on alleged harassment.

Masonry and wood fort built on city beach qualified as "development" requiring permit under California Coastal Act, since fort was indisputably a structure, which term was included in statutory definition of "development."

City, as landowner, could be held strictly liable under California Coastal Act for unpermitted masonry and wood fort built on city beach, although city did not construct fort and did not possess a private landowner's right to exclude others from public beach, since any property owner who maintained a development undertook activity within meaning of Act, even if built by prior owner or trespasser, Act was not concerned with potential exclusion of local surf group that allegedly built fort, but with construction of unpermitted fort which city allowed to remain in its location for over 30 years, and city possessed ability to remove fort.

Non-local surfers sufficiently alleged city's participation in purported conspiracy with local surf group to deny access to city beach, as required to state claim against city under California Coastal Act based on conspiracy liability, where non-local surfers alleged many city residents and city council did not want "outsiders" in city, local surf group had decades-long practice of blocking access to city beach, by words and acts, city was aware of such conduct by local surf group and complicit in it, and city did not enforce its laws against local surf group, but acted to exclude "outsiders" by targeting them with traffic citations, parking tickets, and towing.

EMINENT DOMAIN - CALIFORNIA

[Robinson v. Superior Court of Kern County](#)

Court of Appeal, Fifth District, California - March 2, 2023 - Cal.Rptr.3d - 2023 WL 2338102

Investor-owned electric utility filed complaint in eminent domain seeking to condemn easement across landowner's property for purpose of accessing and maintaining existing power transmission lines.

The Superior Court granted utility's motion for order of prejudgment possession. Landowner petitioned for writ of mandate.

The Court of Appeal held that:

- Utility was a "public utility" to which right of eminent domain could extend;
- Utility was not a "public entity" which would be required, pursuant to Eminent Domain Law, to adopt a resolution of necessity before initiating suit to condemn property;
- Utility was not required to obtain approval of its regulator before instituting eminent domain action;
- A "public agency," as would be required to comply with the California Environmental Quality Act (CEQA) before commencing an eminent domain action, does not include investor-owned public

utilities;

- As a matter of first impression, a nonpublic entity is “entitled to take the property by eminent domain,” as could support order for prejudgment possession of property pursuant to “quick take” procedure, when the plaintiff establishes it is statutorily authorized to exercise power of eminent domain and proves by preponderance of evidence that all the requirements of statute setting out general limitations on exercise of eminent domain are met; and
- As a matter of first impression, trial court was required to make explicit findings as to whether all requirements of statute setting out general limitations on exercise of eminent domain were met when granting motion for order of prejudgment possession.

Investor-owned electric utility was a “public utility” to which right of eminent domain could extend so as to allow utility to condemn easement across landowner’s property for purpose of accessing and maintaining existing power transmission lines, where transmission lines were part of an electrical plant, and utility was an electrical corporation.

Investor-owned electric utility was not a “public entity” which would be required, pursuant to Eminent Domain Law, to adopt a resolution of necessity before initiating suit to condemn easement on landowner’s property for purpose of accessing and maintaining existing power transmission lines, even though utility was a “public utility” to which right of eminent domain could extend; utility was not a political subdivision.

Investor-owned public electric utility was not required to obtain approval of its regulator, the California Public Utilities Commission (CPUC), before instituting action to condemn easement on landowner’s property for purpose of accessing and maintaining existing power transmission lines, where easement was not sought for competitive purposes.

A “public agency,” as would be required to comply with the California Environmental Quality Act (CEQA) before commencing an eminent domain action, does not include investor-owned public utilities.

A nonpublic entity is “entitled to take the property by eminent domain,” as could support order for prejudgment possession of property pursuant to “quick take” procedure, when the plaintiff establishes it is statutorily authorized to exercise power of eminent domain and proves by preponderance of evidence that all the requirements of statute setting out general limitations on exercise of eminent domain are met.

Trial court was required to make explicit findings as to whether all requirements of statute setting out general limitations on exercise of eminent domain were met, when granting investor-owned electric utility’s motion for order of prejudgment possession pursuant to “quick take” procedure in utility’s action to condemn easement across landowner’s property for purpose of accessing and maintaining existing power transmission lines; property rights being taken from landowner were significant, potential adverse effects, including widening of existing roadway to 16 feet, were substantial and not quickly remediated, and utility’s original moving papers did not acknowledge necessity of findings that statutory requirements were satisfied.

Evidence was insufficient to support any implied finding that easement sought to be condemned by investor-owned electric utility to access and maintain existing power transmission lines, in form of roadway 16 feet in width, satisfied condemnation requirement of necessity, as would be required to support utility’s motion for order of prejudgment possession pursuant to “quick take” procedure; declaration of utility’s employee implied that existing roadways would provide adequate access to transmission lines since those roadways had been used in past, and declaration of utility’s real estate advisor stated that a 16-foot wide access easement was the most feasible method of access but did

not provide any facts to support that opinion.

TELECOM - GEORGIA

[Gwinnett County v. Netflix, Inc.](#)

Court of Appeals of Georgia - March 8, 2023 - S.E.2d - 2023 WL 2398217

County, city, and unified government consisting of former county and city brought putative class action against video-streaming service providers alleging providers violated Consumer Choice for Television Act and local ordinances by providing streaming services without obtaining franchises and paying franchise fees to local governments, asserting unjust enrichment claims, and seeking declaratory relief, accounting of all monies owed, and injunctive relief.

Following removal and remand, one provider asserted counterclaim under § 1983 alleging imposition of franchise fees would violate its civil and constitutional rights. The Superior Court granted defendants' motions to dismiss for failure to state a claim and conditionally dismissed counterclaim. Plaintiffs appealed.

The Court of Appeals held that:

- Plaintiffs did not have express right of action under the Act;
- Plaintiffs did not have implied right of action under the Act;
- Amendments to the Act rendered declaratory judgment claim moot;
- Lack of any private right of action under the Act precluded declaratory judgment claim; and
- Providers were not unjustly enriched by their failure to pay franchise fees.

Express right of action under Consumer Choice for Television Act provided to an affected local governing authority seeking to recover additional amount of franchise fee alleged to be due after performing an audit of business records or by a franchise holder seeking refund of alleged overpayment did not apply to allow county, city, and unified government consisting of former county and city to bring action against video-streaming service providers alleging they provided streaming services without obtaining franchises and paying franchise fees to local governments, where plaintiffs did not allege that providers were franchise holders or that plaintiffs conducted any audits of providers' business records.

Express right of action under Consumer Choice for Television Act provided to local governing authorities if mediation failed to resolve complaint by residential subscribers who believed they were being denied access based on low-income status did not apply to allow county, city, and unified government consisting of former county and city to bring action against video-streaming service providers alleging they provided streaming services without obtaining franchises and paying franchise fees to local governments, since enforcement powers granted to local governing authorities under such provision did not extend to a service provider's failure to obtain or apply for a franchise.

County, city, and unified government consisting of former county and city did not have implied right of action under Consumer Choice for Television Act to bring action against video-streaming service providers alleging they provided streaming services without obtaining franchises and paying franchise fees to local governments; by terms of Act's definition of franchise, obligation to obtain franchise was triggered only where a cable or video service provider constructed or operated a network in public rights of way, which providers of video-streaming services did not do, and Act's

franchise fee obligation arose only in connection with issuance of a state franchise, over which municipalities and counties had no authority.

Amendments to Consumer Choice for Television Act rendered moot claim by county, city, and unified government consisting of former county and city seeking declaratory judgment that video-streaming service providers offered “video service” within meaning of the Act, failed to comply with the Act, and owed franchise fees; change to Act’s definition of “video service” expressly excluded streaming video, and any debt for past-due fees did not arise under any contract or unclear judgment that was subject to prior definition.

Lack of any private right of action by county, city, and unified government consisting of former county and city to bring action under Consumer Choice for Television Act against video-streaming service providers for failure to pay franchise fees precluded claim by county, city, and unified government for declaratory judgment that providers owed franchise fees; Declaratory Judgment Act merely created procedural device for declaration of rights between parties, and Consumer Choice for Television Act was sole basis for any obligation on part of providers to pay franchise fees, as county, city, and unified government failed to produce for the record local ordinances that purportedly required payment of franchise fees.

Video-streaming service providers were not unjustly enriched by their failure to pay franchise fees to county, city, or unified government consisting of former county and city, since providers were not obligated under Consumer Choice for Television Act to pay such fees, as they were not franchise holders.

IMMUNITY - GEORGIA

[Griffith v. Robinson](#)

Court of Appeals of Georgia - February 22, 2023 - S.E.2d - 2023 WL 2153157

Principal of public high school sued school’s assistant principal, alleging that he made defamatory statements about principal in a complaint filed with the Professional Standards Commission, and asserting claims including libel and slander.

The Superior Court granted assistant principal’s motion for summary judgment based on sovereign immunity and official immunity. Principal appealed.

The Court of Appeals held that:

- Georgia Tort Claims Act did not waive assistant principal’s sovereign immunity from claims against him in his official capacity, and
- There was no evidence that assistant principal negligently performed a ministerial task or performed a discretionary act with malice.

Georgia Tort Claims Act did not waive assistant high school principal’s sovereign immunity from libel and slander claims brought against him in his official capacity by school’s principal, alleging that assistant principal made defamatory statements about principal in a complaint that he filed with the Professional Standards Commission; although the Act provided a limited waiver of the State’s sovereign immunity for torts of state officers and employees, the term “state,” as defined in the Act, specifically excluded school districts.

There was no evidence that assistant principal of public high school negligently performed a

ministerial task or performed a discretionary act with malice, and thus school's principal could not overcome assistant principal's official immunity from principal's claims against assistant principal in his individual capacity for libel and slander, based on his allegedly defamatory statements in complaint filed with the Professional Standards Commission.

EMINENT DOMAIN - ILLINOIS

[130 E. Devon, LLC v. Village of Elk Grove, Illinois](#)

United States District Court, N.D. Illinois, Eastern Division - February 7, 2023 - F.Supp.3d - 2023 WL 1800278

Owner of vacant lot brought action against village, alleging that village violated Fifth Amendment by engaging in regulatory taking when it forcibly annexed lot, zoned it as residential district, and refused to grant owner special use permit that would have enabled owner to sell lot to developer for use as truck and trailer parking facility.

Village moved to dismiss.

The District Court held that lot owner failed to state claim for regulatory taking.

Owner of vacant lot, which owner purportedly sought to sell to developer who planned to operate it as truck and trailer parking facility, failed to state claim for regulatory taking as result of village's acts of forcibly annexing lot, zoning it as residential district, and refusing to grant special use permit to operate parking lot; lot owner failed to quantify value of lot in light of village's annexation and zoning and provided only conclusory allegations that zoning-compliant uses were not economically viable, owner did not claim to have incurred significant costs or invested substantial resources to develop or market property for particular use, and village's exercise of authority to annex lot and imposition of zoning regulations were garden-variety measures to promote common good.

ZONING & PLANNING - MISSISSIPPI

[State by and through Watson v. RW Development, LLC](#)

Supreme Court of Mississippi - March 2, 2023 - So.3d - 2023 WL 2323012

State brought action against city and developer, seeking declaratory judgment that State was the sole and exclusive authority to lease particular property which was intended to be developed as pier.

The Chancery Court entered judgment in favor of city and developer. State appealed.

The Supreme Court, en banc, held that:

- Statutes granting Secretary of State charge of public lands and empowering Secretary, with approval of Governor, to rent or lease all lands belonging to state "except as otherwise provided by law" did not preclude city from exercising its statutory authority, as municipality with port or harbor that met specified prerequisites, to construct piers;

- Developer which contracted with city for pier rebuilding project changed position as result of its belief and reliance on State's representation that no tidelands lease would be required for rebuilding of pier, as could support finding that State was equitably estopped from requiring such a lease; and
- Such change in position was detrimental to developer.

Statutes granting Secretary of State charge of public lands and empowering Secretary, with approval of Governor, to rent or lease all lands belonging to state "except as otherwise provided by law" did not preclude city from exercising its statutory authority, as municipality with port or harbor that met specified prerequisites, to construct piers; statutes setting out Secretary's authority were general statutes, and phrase "except as otherwise provided by law" made room for other, more specific statutes.

Developer which contracted with city for pier rebuilding project changed position as result of its belief and reliance on State's representation that no tidelands lease would be required for rebuilding of pier, as could support finding that State was equitably estopped from requiring such a lease, where, based on State's representation, developer had undertaken expense and effort of planning and agreeing to rebuild.

State's change in position, in which it determined that, contrary to its prior representation, a tidelands lease was required for city's development of pier, caused detriment to developer with which city had contracted for pier rebuilding project, as could support finding that State was equitably estopped from requiring such a lease, where developer asserted that State's change in position had added expense and delay to project and that, because developer was not being allowed to proceed, citizens were being denied use of pier.

IMMUNITY - OHIO

[Emanuel's LLC v. Restore Marietta, Inc.](#)

Court of Appeals of Ohio, Fourth District, Washington County - January 17, 2023 - N.E.3d - 2023 WL 311525 - 2023-Ohio-147

Corporate liquor licensee brought action against city, nonprofit organization that partnered with city to establish designated outdoor refreshment area (DORA) in city's downtown, and organization's executive director, seeking preliminary injunction and damages for alleged tortious interference with business relations and monopoly in violation of state antitrust statute, relating to requirement of purchasing designated cups that could be carried by customers in DORA.

The Court of Common Pleas granted defendants' motion for judgment on the pleadings. Licensee appealed.

The Court of Appeals held that:

- Exception to city's general statutory immunity in cases involving negligent performance of proprietary functions did not apply to tortious interference and Valentine Act claims, and
- Licensee failed to sufficiently allege particular business relationships with which organization and director interfered.

Even if city's alleged conduct, in requiring liquor licensees to purchase designated cups that could be carried by customers in designated outdoor refreshment area (DORA) in city's downtown, and relating to plaintiff licensee not be allowed to purchase cups, involved proprietary functions, alleged

conduct was intentional or purposeful rather than negligent, and thus, exception to general statutory immunity from tort liability, in cases involving negligent performance of proprietary functions, did not apply to licensee's claims for tortious interference with business relations, and monopoly in violation of Valentine Act.

Vague assertion in liquor licensee's complaint, that nonprofit organization that partnered with city to establish designated outdoor refreshment area (DORA) in city's downtown, and organization's executive director, interfered with certain unspecified business relationships, was insufficient to allow inference that defendants interfered with licensee's business relationships with members of public by preventing it from being able to purchase designated cups that could be carried by customers in DORA, and thus, licensee failed to sufficiently allege a prospective business relationship with which defendants interfered, as would be required to state a claim for tortious interference with business relations.

BALLOT INITIATIVE - CALIFORNIA

[City of Oxnard v. Starr](#)

Court of Appeal, Second District, Division 6, California - January 19, 2023 - 87 Cal.App.5th 731 - 303 Cal.Rptr.3d 819 - 2023 Daily Journal D.A.R. 481

City brought action against proponent of city initiatives, seeking to have two initiatives passed by voters declared void.

Proponent brought anti-SLAPP motion seeking dismissal of the suit and attorney fees. The Superior Court denied the anti-SLAPP motion. Proponent appealed.

The Court of Appeal held that:

- City's post-election lawsuit against proponent implicated protected activity for anti-SLAPP purposes;
- City had power to seek to invalidate initiatives and did not have duty to defend initiatives, for purposes of proponent's anti-SLAPP motion;
- Proponent was proper defendant in city's lawsuit, for purposes of proponent's anti-SLAPP motion;
- Initiative modifying rules governing city's legislative bodies was not invalid under exclusive delegation rule, for purposes of proponent's anti-SLAPP motion;
- Initiative modifying rules governing city's legislative bodies was legislative in nature and thus was not invalid, for purposes of proponent's anti-SLAPP motion; and
- Initiative amending sunset date of local sales and use tax increase was administrative in nature and thus was invalid, for purposes of proponent's anti-SLAPP motion.

City's post-election lawsuit against proponent of city initiatives implicated protected activity for anti-SLAPP purposes, in proceeding in which proponent brought anti-SLAPP motion seeking dismissal of city's suit against proponent which sought to have two initiatives passed by voters declared void; proponent was sued because he was the proponent of the initiatives, and being a proponent of an initiative was an activity that clearly constituted protected speech and petitioning.

City had power to seek to invalidate initiatives and did not have duty to defend initiatives, for purposes of initiative proponent's anti-SLAPP motion seeking dismissal of city's suit against proponent which sought to have two initiatives passed by voters declared void; statute governing action for declaration of rights or duties with respect to another unequivocally gave city standing to

challenge validity of initiatives.

Initiative proponent was proper defendant in city's post-election lawsuit which sought to have two initiatives passed by voters declared void, for purposes of proponent's anti-SLAPP motion seeking dismissal of city's suit against proponent; city was not forcing proponent to bear any legal or financial burden, city was seeking only declaratory relief and was not seeking damages against proponent, proponent's vigorous defense of initiatives showed he was acting voluntarily, proponent proposed both measures to citizens of city, measurers expressly gave proponent standing to defend them, and there was no reason proponent could not be named as defendant's in action challenging initiative, particularly where there was no other logical defendant.

Initiative modifying rules governing city's legislative bodies was not invalid under exclusive delegation rule, for purposes of initiative proponent's anti-SLAPP motion seeking dismissal of city's suit against proponent which sought to have initiative passed by voters declared void, though city argued initiative intruded into subject exclusively delegated to city council by statute governing procedural rules for conduct of city council proceedings; statute established no specific rules for conduct of city council proceedings, statute left to each municipality to establish its own rules and thus establishment of rules was purely municipal affair, and section of Brown Act defining legislative body strongly supported conclusion that legislature did not intend to preclude action by electorate.

Statute governing procedural rules for conduct of city council proceedings establishes no specific rules for the conduct of city council proceedings; instead, it leaves it to each municipality to establish its own rules and thus the establishment of such rules is purely a municipal affair.

Initiative modifying rules governing city's legislative bodies was legislative in nature and thus was not invalid, for purposes of initiative proponent's anti-SLAPP motion seeking dismissal of city's suit against proponent which sought to have initiative passed by voters declared void; initiative did not simply carry out a plan already adopted, initiative created new rules for conduct of city council meetings that were reasonable, and rules stated in initiative were intended to increase public's ability to have information about and to participate in the decisions made by its public agencies.

Initiative amending sunset date of local sales and use tax increase was administrative in nature and thus was invalid, for purposes of initiative proponent's anti-SLAPP motion seeking dismissal of city's suit against proponent which sought to have initiative passed by voters declared void; initiative required city to expend general fund monies on road maintenance and failure of city to comply would result in loss of tax increases, manifest purpose of initiative was to ensure that tax revenue was expended for road repair and initiative even set precise dates for completion of work, and determination of how funds from tax increases should be spent was administrative in nature.

ZONING & PLANNING - FLORIDA

[Citizens for Responsible Development, Inc. v. City of Dania Beach](#)

District Court of Appeal of Florida, Fourth District - February 15, 2023 - So.3d - 2023 WL 1999800

Public interest nonprofit corporation and city resident filed complaint for declaratory judgment and injunctive relief against city, county, and entertainment company, challenging procedures that city used to approve development agreements that allowed company to expand entertainment facility, and disputing county's comportment with its required review process for facility expansion.

The Circuit Court granted summary judgment for defendants on basis that plaintiffs lacked standing. Plaintiffs appealed.

On rehearing, the District Court of Appeal held that:

- Resident lacked standing to challenge city's procedures;
- Corporation lacked standing to challenge city's procedures; and
- Corporation and resident lacked standing to bring claims against county.

City resident failed to establish injury-in-fact or special injury, and thus lacked standing to challenge procedures that city used to approve development agreements allowing entertainment company to expand its entertainment facility, despite resident's assertion that, because he was legally blind, increased traffic resulting from expansion led to increased risk of being hit by car; alleged injury was purely conjectural, and increase in traffic congestion would be suffered alike by all property owners similarly situated and was condition incident to urban living.

Public interest nonprofit corporation lacked standing to challenge procedures that city used to approve development agreements allowing entertainment company to expand its entertainment facility; corporation relied on alleged injury of one of its members, who was city resident, but such alleged injury was insufficient to constitute injury-in-fact or special injury because it was purely conjectural.

Public interest nonprofit corporation and city resident lacked standing to bring claims against county in action challenging procedures that city used to approve development agreements allowing entertainment company to expand its entertainment facility; corporation's and resident's alleged injury related solely to city's alleged defective approval of agreements, county was not party to agreements, and county played no role in agreements.

LABOR & EMPLOYMENT - IOWA

[City of Ames v. Iowa Public Employment Relations Board](#)

Supreme Court of Iowa - February 24, 2023 - N.W.2d - 2023 WL 2192913

City filed petition for judicial review challenging Public Employee Relations Board's (PERB) ruling that broader bargaining rights must be extended to the city's nontransit employees in a bargaining unit consisting of at least 30 percent transit employees.

The District Court denied the petition. City appealed.

The Supreme Court held that city was not required to provide broader bargaining rights to nontransit employees in bargaining unit with 30 percent transit employees.

City employer was not required to provide broader bargaining rights to nontransit employees in a bargaining unit, regardless of whether the bargaining unit had 30 percent transit employees, pursuant to provision of the Iowa Public Employee Relations Act (PERA) that extended the rights of public safety workers to transit employees as necessary to avoid the loss of federal transit funding under the Urban Mass Transportation Act (UMTA), which was conditioned upon labor protections for transit workers; scope of the PERA provision was limited to determining the substantive bargaining rights of transit employees, and extending broader bargaining rights to nontransit employees had nothing to do with provision's purpose of protecting federal funding.

ZONING & PLANNING - NEBRASKA

[Preserve the Sandhills, LLC v. Cherry County](#)

Supreme Court of Nebraska - February 24, 2023 - N.W.2d - 313 Neb. 590 - 2023 WL 2193414

Organization dedicated to preservation of sand dune region, along with landowner, brought action under Nebraska Political Accountability and Disclosure Act (NPADA) to enjoin county board of commissioners from voting on a conditional use permit (CUP) application for wind turbine project on basis of alleged conflicts of interest.

The District Court dismissed for lack of standing. Organization and landowner appealed.

The Supreme Court held that:

- Landowner lacked requisite injury in fact for standing due to 40-mile distance of her property from project;
- Landowner did not have injury in fact based on her neighbor's lease/easement agreement with CUP applicant's affiliate;
- County zoning regulations did not confer standing on organization and landowner;
- Statute conferring standing on affected real estate owners to challenge an alleged zoning violation did not apply; and
- Standing was not created via organization and landowner's appearance in CUP application process without objection.

LABOR & EMPLOYMENT - OHIO

[State ex rel. Ohio Bureau of Workers' Compensation v. O'Donnell](#)

Supreme Court of Ohio - February 16, 2023 - N.E.3d - 2023 WL 2025360 - 2023-Ohio-428

Relator, the Ohio Bureau of Workers' Compensation, filed petition for writ of prohibition ordering Court of Common Pleas to stop exercising jurisdiction over underlying case, a class action brought by city, alleging that Bureau illegally overcharged the public employers group-rated workers' compensation premiums and seeking refund of excessive premiums paid, and also filed petition for writ of mandamus ordering the dismissal of the underlying case.

The Supreme Court denied Judge's motion to dismiss, denied city's motion to intervene, and granted an alternative writ, and subsequently granted city's second motion to intervene.

The Supreme Court held that city's claims for injunctive and declaratory relief were subject to exclusive jurisdiction of the Court of Claims.

City's claim against Bureau of Workers' Compensation seeking injunction prohibiting Bureau from refusing to furnish refunds of excessive workers' compensation premiums sounded in law, and therefore, Court of Claims had exclusive jurisdiction over case, notwithstanding city's additional claim for declaratory relief, because objective of city's request for injunctive and declaratory relief was to obtain money damages, for loss resulting from Bureau's alleged breach of legal duty, by compelling Bureau to issue refunds.

PUBLIC UTILITIES - RHODE ISLAND

[In re Block Island Power Company](#)

Supreme Court of Rhode Island - February 10, 2023 - A.3d - 2023 WL 1872317

Electric utility provider for town located on island filed petition for writ of certiorari, seeking review of order of the Public Utilities Commission (PUC) denying provider's petition for judgment declaring that statute, which authorized construction of five-turbine wind farm off the coast of island, required the costs for provider's interconnection facilities and backup transformer to be socialized across all electric ratepayers in the State, not just those in the town.

The Supreme Court held that phrase "related facilities" in statute excluded costs of provider's interconnection facilities and backup transformer, such that costs were not required to be socialized across all ratepayers in the State.

Phrase "related facilities" in section of statute, governing cost allocation associated with transmission cable that transferred wind-generated power, unused by customers of electric utility provider for town located on island, from island to the mainland, excluded costs of provider's interconnection facilities and backup transformer, such that costs were not required to be socialized across all electric ratepayers in the State; legislature coupled the phrase with conjunctive connector "and" along with "the transmission cable," indicating that "related facilities" referred only to those facilities directly involved with transmission cable project, and statute section covered transmission cable project only and was not required to advance general policy goals for wind farm project.

ANNEXATION - SOUTH CAROLINA

[City of Charleston v. City of North Charleston](#)

Court of Appeals of South Carolina - February 1, 2023 - S.E.2d - 2023 WL 1424899

City brought action challenging two annexations by neighboring municipality.

The Court of Common Pleas granted neighboring municipality's motion to dismiss. City appealed.

The Court of Appeals held that:

- Municipality sufficiently complied with statutory annexation requirements, and
- City's argument that it possessed standing to challenge municipality's annexation was moot.

Municipality sufficiently complied with statutory annexation requirements by including a description of the property to be annexed and attaching a plat of the area in annexation ordinance, although ordinance inadvertently incorporated a parcel already annexed by neighboring city; municipality's inadvertent inclusion of already-annexed parcel based on existing county information was a technical deficiency capable of correction by municipality's subsequent ordinance.

City's argument that it possessed standing to challenge neighboring municipality's annexation based on municipality's infringement of city's statutory and proprietary rights by including parcel already annexed by city was moot; municipality's initial ordinance relied on existing county information and inadvertently included parcel already annexed by city, and subsequent ordinance corrected the description of the property to be annexed to omit parcel annexed by city

UTILITY FEES - UTAH

[Utah Sage, Inc. v. Pleasant Grove City](#)

Supreme Court of Utah - February 23, 2023 - P.3d - 2023 WL 2172352 - 2023 UT 2

Property owners brought action against city, seeking to block implementation of a three-tiered transportation utility fee, dedicated to roadway repair and maintenance, under which property owners would be charged a monthly fee corresponding to the intensity with which they used city roads.

Property owners and city filed cross-motions for summary judgment. The Fourth District Court entered judgment that city had authority to enact fee but that fee was a tax. Property owners and city both appealed.

The Supreme Court held that:

- City had authority under general welfare statute to enact transportation utility fee, and
- Purpose of the transportation utility fee was characteristic of a service fee.

City had authority under general welfare statute to enact transportation utility fee dedicated to roadway repair and maintenance, under which property owners would be charged a monthly fee corresponding to the intensity with which they used city roads; although transportation utility was not listed in statute giving cities right to construct utility and telecommunications services, or in other statute defining “utility,” those statutory lists were not exhaustive, and it was undisputed that city had right to repair and maintain roads.

Purpose of transportation utility fee, which city charged property owners corresponding to the intensity with which they used city roads, was characteristic of a service fee, for purposes of whether fee was a service fee or a tax, even if service provided also benefited the general public; purpose of the fee to generate funds for the repair and maintenance of city roads by charging a three-tiered fee that correlated with the fee payer’s “intensity of use” of those roads, fee related to specific service of the use of city roadways, and funds generated by the fee could only be used to compensate the city for the repair and maintenance of its roadways.

REFERENDA - ARIZONA

[Workers for Responsible Development v. City of Tempe](#)

Court of Appeals of Arizona, Division 1 - January 26, 2023 - P.3d - 2023 WL 406245

Challengers brought action against city seeking writ of mandamus to compel city clerk to file and process their petition to challenge by referendum city ordinance, which authorized mayor to enter into development agreement to execute sale of city-owned land to real estate developer, and permanent and preliminary injunctions to prohibit the ordinance from taking effect.

The Superior Court held that the ordinance constituted a legislative act subject to referendum but concluded that challengers’ petition form was invalid. Challengers appealed.

The Court of Appeals held that:

- Challengers’ referendum petition strictly complied with statute governing form of referendum

petitions;

- In matter of apparent first impression, word “form” in statute governing form of referendum petitions does not mandate that the “Referendum Description” section must always precede the “Petition for Referendum” section;
- Ordinance was permanent in nature;
- Ordinance was general legislative act; and
- Ordinance was matter of policy creation rather than implementation of previously declared policy.

Challengers’ referendum petition strictly complied with statute governing form of referendum petitions, although petition had statutorily required “Referendum description” and “Petition for Referendum” sections in reverse order as it appeared in statute, where petition form and both “Petition for Referendum” and “Referendum description” sections appeared on same page as signature lines, as required by statute, and petition provided signers with all required information on one page.

EMINENT DOMAIN - CALIFORNIA

[Ventura29 LLC v. City of San Buenaventura](#)

Court of Appeal, Second District, Division 6, California - January 4, 2023 - 87 Cal.App.5th 1028 - 304 Cal.Rptr.3d 122 - 2023 Daily Journal D.A.R. 774

Developer brought action against city, asserting causes of action for inverse condemnation, private nuisance, trespass, and negligence, arising from city engineer’s modification of approved grading plan to require developer to remove uncertified fill, which city had dumped on the property 38 years before developer acquired it.

The Superior Court sustained city’s demurrer to the complaint without leave to amend. Developer appealed.

The Court of Appeal held that:

- Developer’s contention that time-sensitive construction would come to a grinding halt with no forward progress did not excuse its failure to exhaust administrative remedies;
- City engineer’s alleged oral modification of the grading plan did not excuse developer from having to exhaust administrative remedies;
- Developer’s lack of knowledge of its right to appeal did not excuse its failure to exhaust administrative remedies;
- City was not equitably estopped from asserting that developer forfeited its inverse condemnation claim by failing to exhaust administrative remedies; and
- Developer’s concession that prior owners may have known of the uncertified fill on the property precluded application of the discovery rule.

EMINENT DOMAIN - FLORIDA

[TR Investor, LLC v. Manatee County](#)

District Court of Appeal of Florida, Second District - February 3, 2023 - So.3d - 2023 WL 1483829 - 48 Fla. L. Weekly D249

Landowners who obtained a permit to develop a subdivision in county brought a regulatory takings

action against county, claiming that requiring 30-foot wetland buffers was tantamount to an unconstitutional taking without just compensation.

The Circuit Court granted county's motion to dismiss, concluding that landowners could not state a cause of action for an unlawful exaction or a permanent physical occupation upon their land. Landowners appealed.

The District Court of Appeal held that:

- County's wetland buffers did not amount to an illegal exaction, and
- County's wetland buffer regulations did not operate as a per se taking in the form of a permanent physical occupation.

County's wetland buffers, which it required from landowners who obtained a permit to develop a subdivision in county, did not amount to an illegal exaction, in landowners' regulatory takings action against county; county did not require any property rights, easement, dedication of land, or monetary payment as a condition of approval of landowners' permit, but instead, landowners retained complete ownership of wetland buffer area, and landowners did not submit applications or wetland impact studies to county in conjunction with development approval proposal in order to request a reduction of buffer areas, pursuant to procedures county had in place, but instead claimed they submitted a request to and received approval from a separate agency with no authority to approve such reductions.

County's wetland buffer regulations did not operate as a per se taking in the form of a permanent physical occupation by government, its agents, or the public at large, in regulatory takings action against county by landowners who obtained a permit to develop a subdivision in county; regulations did not require that strangers be allowed to pass over property, there was no required acquiescence as necessary for landowners to state a facially sufficient per se takings claim, regulations did not leave landowners without any practical use or value in land, and landowners retained complete ownership of wetland buffers and all property rights, including right to exclude others.

BONDS - INDIANA

[Indiana Municipal Power Agency v. United States](#)

United States Court of Appeals, Federal Circuit - February 17, 2023 - F.4th - 2023 WL 2052785

Issuers of Direct Payment Build America Bonds under authority of American Recovery and Reinvestment Act (ARRA) brought action against the United States, claiming violation of statutory duty under ARRA and breach of contract based on IRS failing to refund 35% of interest payable under bonds.

The Court of Federal Claims granted government's motion to dismiss for failure to state a claim and denied issuers' motion for reconsideration. Issuers appealed.

The Court of Appeals held that:

- Sequestration applied to tax refunds, and
- ARRA section authorizing bonds did not create contract requiring government to pay tax refund equal to 35% of interest paid by issuers.

Sequestration pursuant to Budget Control Act and American Taxpayer Relief Act applied to tax refunds of 35% of interest payable on Direct Payment Build America Bonds issued under authority of American Recovery and Reinvestment Act (ARRA), since refunds were issued from permanent, indefinite appropriation of necessary amounts for refunding internal revenue collections provided by statute, which constituted direct spending.

Section of American Recovery and Reinvestment Act (ARRA) authorizing Direct Payment Build America Bonds did not create contract requiring government to pay tax refund equal to 35% of interest paid by bond issuers; ARRA did not provide for execution of written contract on behalf of United States or reflect any language establishing a contract, but instead, it merely set forth payment program for bond issuers.

MANDAMUS - LOUISIANA

[Crooks v. State Through Department of Natural Resources](#)

Supreme Court of Louisiana - January 27, 2023 - So.3d - 2023 WL 526075 - 2022-00625 (La. 1/1/23)

Property owners, who had been recognized as owners of riverbanks and awarded damages for mineral royalties received from riverbank leases in class action suit brought against Louisiana Department of Natural Resources (LDNR) petitioned for writ of mandamus to enforce payment of royalties judgment.

The District Court denied writ and the Third Circuit Court of Appeal reversed. Department applied for writ of certiorari, which was granted.

The Supreme Court held that mandamus did not lie to compel payment of judgment.

Satisfaction of judgment awarded to landowners in underlying proceeding, in which landowners were recognized as owners of riverbanks and granted damages for mineral royalties received from riverbank leases, required legislative appropriation, and thus payment of judgment was discretionary, rather than ministerial duty, and mandamus did not lie to compel payment, even though landowners argued funds sought were not public funds; landowners cited no controlling constitutional or statutory provisions that allocated funds for purpose of executing judgment such as one at issue, and funds received from mineral leases were deposited into state's general fund.

MUNICIPAL ORDINANCE - OHIO

[Kinzel v. Ebner](#)

Court of Appeals of Ohio, Sixth District, Erie County - January 20, 2023 - N.E.3d - 2023 WL 334768 - 2023-Ohio-164

Neighbor filed complaint against owner of two residential properties seeking injunctive relief and damages based on allegations that owner's use of properties for short-term rentals violated deed restrictions and city ordinances. Owner filed counterclaim against neighbor, neighbor's husband, and city challenging constitutionality of ordinances, and claiming that city's criminal enforcement action against him under city code prohibiting transient rentals of property violated equal protection.

The Court of Common Pleas granted partial summary judgment to neighbor, granted summary judgment to city on owner's counterclaims other than equal protection claim. Neighbor and owner appealed. The Sixth District Court of Appeals affirmed in part, reversed in part, and dismissed certain assignments of error. On remand, the Court of Common Pleas awarded summary judgment to city on owner's equal protection counterclaim, and parties settled remaining claims, leaving intact trial court's previous holding that ordinances were valid and constitutional. Owner appealed.

The Court of Appeals held that:

- City was not required to comply with public notice and hearing requirements before passing ordinance as an emergency measure;
- City failed to substantially comply with requirement that planning commission's recommendation and report be available for public examination for at least 30 days before hearing, and thus city's ordinance amending prior ordinance was invalid;
- Ordinance prohibiting short-term rentals was not unconstitutionally vague;
- Ordinance was rationally related to legitimate governmental interest, and thus was not facially unconstitutional on due process grounds;
- Ordinance was not unconstitutional as applied to property owner; and
- City's enforcement of zoning ordinances against property owner did not violate equal protection clauses of federal and state constitutions.

LIABILITY - OHIO

[State ex rel. Hunt v. East Cleveland](#)

Supreme Court of Ohio - February 15, 2023 - N.E.3d - 2023 WL 1998874 - 2023-Ohio-407

After driver and passenger had obtained a civil judgment of nearly \$8 million dollars against city and former city police officer, they sought a writ of mandamus ordering city to satisfy the monetary judgment, plus pre- and postjudgment interest.

The Supreme Court held that:

- Driver and passenger were entitled to writ of mandamus compelling city to pay principal amount of judgment, prejudgment interest, and postjudgment interest;
- Civil judgment was not ambiguous; and
- City's argument that it could not be held liable for the entire amount of the jury's verdict against city and former police officer because there was no apportionment of damages constituted an impermissible collateral attack on the trial court's judgment.

Driver and passenger, who had obtained a monetary judgment against city and former police officer after they were injured when officer, while driving his police vehicle at a high rate of speed, collided with driver's vehicle injuring driver and passenger, were entitled to writ of mandamus compelling city to pay principal amount of judgment, prejudgment interest, and postjudgment interest; driver and passenger had a clear legal right to enforcement of their judgment, city had a clear legal duty to satisfy the judgment, and driver and passenger lacked an adequate remedy in the ordinary course of the law as city was immune from execution.

Trial court civil judgment awarding driver and passenger nearly \$8 million in damages, after jury found injuries sustained by driver and passenger in collision with police officer were caused by negligence of officer and city, was not ambiguous, as would preclude driver and passenger from establishing clear legal entitlement to have city satisfy judgment, as needed for mandamus relief;

trial court issued judgment entry on form indicating case was disposed pursuant to jury trial, journal entry recited jury's award, form noted it was a disposition of case, and fact that judgment did not specifically state city was liable did not invalidate judgment, as jury found officer was liable, and political subdivisions were liable for injuries caused by negligent operation of motor vehicles by employees.

City's argument that it could not be held liable for the entire amount of the jury's verdict against city and former police officer because there was no apportionment of damages constituted an impermissible collateral attack on the trial court's judgment, which awarded driver and passenger nearly \$8 million in damages after jury found the injuries driver and passenger sustained in collision with police officer were caused by the negligence of officer and city; city had the burden to establish at trial whether an apportionment of damages was appropriate, and the absence of an apportionment of damages did not call into question city's liability to pay the entire judgment, rather, the absence of apportionment was consistent with joint and several liability among tortfeasors.

BONDS - PENNSYLVANIA

[Ursinus College v. Prevailing Wage Appeals Board](#)

Supreme Court of Pennsylvania - February 22, 2023 - Slip Copy - 2023 WL 2153745

AND NOW, this 22nd day of February, 2023, the Petition for Allowance of Appeal is **GRANTED**. The issue, as stated by petitioner, is:

(1) Whether the Commonwealth Court's [o]rder concluding that a construction project that was funded by the issuance and sale of tax-exempt municipal bonds by a public authority did not constitute "public works" severely undermines the purposes of the Pennsylvania Prevailing Wage Act, and will allow employers to circumvent the requirements of the Act, thus undermining Pennsylvania public policy?

ANNEXATION - SOUTH CAROLINA

[National Trust for Historic Preservation in United States v. City of North Charleston](#)

Court of Appeals of South Carolina - February 1, 2023 - S.E.2d - 2023 WL 1425317

City and property owner brought action against neighboring city, alleging its annexation of one-acre tract was void because tract was not contiguous or adjacent to neighboring city and portion of tract belonged to owner and had already been annexed into city.

Neighboring city counterclaimed. The Circuit Court dismissed city and owner's complaint for lack of standing, determined in the alternative that neighboring city failed to properly annex tract, and denied all parties' motions to reconsider. Parties cross-appealed.

The Court of Appeals held that:

- City and owner lacked standing under annexation statute, and
- City and owner lacked standing under public-interest doctrine.

City and property owner lacked standing under annexation statute to challenge neighboring city's annexation of one-acre tract, even if tract included four inches of property that belonged to owner and already had been annexed by city; neighboring city annexed tract pursuant to statute that provided for annexation only of property wholly owned by municipalities, neighboring city only intended and claimed to annex property within its proprietary rights, and any deviations in legal description or plat, or belief by neighboring city that it did own contested four inches, did not affect city's or owner's ownership rights.

City and property owner lacked standing under public-interest doctrine to challenge neighboring city's annexation of one-acre tract based on allegations that tract included four inches of property that belonged to owner and already had been annexed by city; annexation incited nothing more than boundary dispute between two municipalities, absence of challenge to annexation by state illustrated its position that matter did not rise to level of public concern, and neighboring city did not engage in any deceitful conduct that would necessitate finding standing under public-interest doctrine.

BALLOT INITIATIVES - SOUTH DAKOTA

[SD Voice v. Noem](#)

United States Court of Appeals, Eighth Circuit - February 17, 2023 - F.4th - 2023 WL 2055397

Ballot question committee brought action against South Dakota officials seeking permanent injunction against enforcement of South Dakota statutes regulating ballot initiative campaigns.

The United States District Court for the District of South Dakota entered judgment for committee in part. Parties cross-appealed. The Court of Appeals dismissed appeal and remanded. After a bench trial, the District Court permanently enjoined enforcement of one-year filing deadline for ballot initiative petitions and denied motion for a stay of ruling pending appeal. Officials appealed and committee cross-appealed.

The Court of Appeals held that:

- One-year filing deadline to submit petitions to initiate state statutes violated First Amendment right to free speech;
- Filing deadline to submit initiative petitions to amend the State Constitution violated First Amendment; and
- District court lacked authority to impose a new filing deadline.

South Dakota statute providing that petitions to initiate state statutes be filed at least one year before the next general election implicated First Amendment right to free speech, where the one-year filing deadline limited the number of voices who would convey the proposed message during the year before the election and burdened the ability to express a position on a political matter by signing an initiative petition.

South Dakota statute providing that petitions to initiate state statutes be filed at least one year before the next general election imposed a burden on political speech that South Dakota failed to justify with the interest of election integrity, and thus, statute violated First Amendment free speech guarantee; although South Dakota's interest in protecting the integrity of the initiative process was a paramount interest, there was nothing to suggest that the one-year filing deadline lent anything of

value to South Dakota, and South Dakota had validated prior referenda petitions in as little as two days using a random sample of collected signatures, and spent at most five months reviewing all petitions in prior years.

South Dakota statute providing that petitions to initiate state statutes be filed at least one year before the next general election imposed a burden on political speech that South Dakota failed to justify with an interest of administrative efficiency, and thus, statute violated First Amendment free speech guarantee; although administrative efficiency was a legitimate interest that was noteworthy because of South Dakota's small staff of 14 people, South Dakota had no trouble complying with various deadlines in past years including the 12-week deadline to certify ballot questions before the general election.

South Dakota statute providing that petitions to initiate state statutes be filed at least one year before the next general election imposed a burden on political speech that South Dakota failed to justify with an interest of the legislature's ability to respond to petitions, and thus, statute violated First Amendment free speech guarantee; assuming that such an interest existed, the one-year filing deadline did virtually nothing to advance it, and South Dakota already had an intervening legislative session between a general election and the date an initiated law became effective.

South Dakota statute providing that initiative petitions to amend the State Constitution be filed at least one year before the next general election violated the First Amendment right to free speech; statute imposed a burden on political speech that South Dakota failed to justify with asserted interests of election integrity, administrative efficiency, or the legislature's ability to respond to petitions.

District court lacked authority to impose a new filing deadline upon its determination that South Dakota statute setting forth a one-year filing deadline for petitions to initiate state statutes was facially violative of First Amendment right to free speech; court could only grant request for permanent injunction against enforcement of filing deadline and allow the legislature to decide how to respond.

LIABILITY - TENNESSEE

[Lawson v. Hawkins County](#)

Supreme Court of Tennessee - February 16, 2023 - S.W.3d - 2023 WL 2033336

Deceased motorist's widow brought wrongful death action against county, county emergency communications district, county emergency management agency, and others following fatal accident in which motorist hit rock embankment on road blocked by trees and mudslide and flipped down mountain.

The Circuit Court granted county defendants' motions for judgment on the pleadings on immunity grounds. Widow appealed, and the Court of Appeals reversed. The Supreme Court granted county defendants' application for permission to appeal.

The Supreme Court held that term "negligence" in Government Tort Liability Act statute lifting immunity for "injury proximately caused by a negligent act or omission of any employee within the scope of his employment" does not include recklessness or gross negligence.

ZONING & PLANNING - VIRGINIA

Morgan v. Board of Supervisors of Hanover County

Supreme Court of Virginia - February 2, 2023 - S.E.2d - 2023 WL 1456752

Neighbors brought an action seeking declaratory judgment and injunctive relief and claiming that the county board of supervisors violated Virginia law when it approved rezoning and special-exception requests that authorized the construction of a large distribution and warehousing facility nearby.

The Hanover Circuit Court sustained board's demurrer, and dismissed the complaint. Neighbors appealed.

The Supreme Court held that:

- Neighbors sufficiently alleged a likelihood of harm to have standing;
- Action was not an untimely effort to challenge county's original decision to rezone the property;
- Neighbors alleged a non-speculative, direct cause-and-effect relationship between the county's decision and specific, detailed harm; and
- Neighbors asserted a sufficiently "ripe" controversy.

Neighbors' complaint sufficiently alleged a likelihood of harm as required for standing to challenge rezoning and approval of warehouse expansion project; neighbors did not generalize about industrial sites in the abstract or speculate about potential harms, but rather alleged specific harms, including tractor-trailer traffic on specific feeder roads surrounding the facility, the increased level of noise caused by back-up alarms from these trucks, anticipated flooding caused by the topography of the project, and the night-sky light pollution from taller lighting poles in the parking area.

Neighbors' challenge to county's approval of warehouse expansion project was not an untimely effort to challenge county's original decision to rezone the property, but rather their injury was fairly traceable to county's approval of the specific development plan such that neighbors had standing to assert the challenge; original rezoning authorized over 100 specific uses, and while property owner argued it could have developed the property pursuant to that original rezoning ordinance without ever asking the county to supersede its prior zoning ordinance with a revised set of proffers and a special exception, property owner did in fact ask for and receive a favorable decision from the county.

Neighbors alleged a non-speculative, direct cause-and-effect relationship between the county's decision to approve rezoning and special-exception requests for distribution and warehousing facility and specific, detailed harm, as required to maintain declaratory judgment action to challenge the decision; neighbors alleged that property owner's conceptual development plan, as approved, would encroach into resource protection areas, that the facility would violate the county's noise ordinance during construction and operation based upon a county sound study, and that the project would constitute an unlawful nuisance because of the deleterious effects of the site development, including the tractor-trailer traffic, the night-sky light pollution, the unlawful levels of noise, the impact on wetlands and wildlife, and the reduction of property values.

Neighbors asserted a sufficiently "ripe" controversy arising from county's decision to approve rezoning and special-exception requests for distribution and warehousing facility as required to maintain claim for declaratory judgment; neighbors alleged that conceptual development plan, as approved, would encroach into resource protection areas, that the facility would violate the county's

noise ordinance during construction and operation based upon a county sound study, and that the project would constitute an unlawful nuisance because of the deleterious effects of the site development, including the tractor-trailer traffic, the night-sky light pollution, the unlawful levels of noise, the impact on wetlands and wildlife, and the reduction of property values.

POLITICAL SUBDIVISIONS - CALIFORNIA

[Stone v. Alameda Health System](#)

Court of Appeal, First District, Division 5, California - February 3, 2023 - Cal.Rptr.3d - 2023 WL 1508276

Health system employees brought class action against health system employer alleging failure to provide off-duty meal periods, failure to provide off-duty rest breaks, failure to keep accurate payroll records, failure to provide accurate itemized wage statements, unlawful failure to pay wages, failure to timely pay wages, and a Private Attorneys General Act (PAGA) claim.

Employer demurred, and the Superior Court sustained the demurrer as to all seven class action claims. Employees appealed.

The Court of Appeal held that:

- Death knell doctrine applied to trial court's order sustaining demurrer and thus order was appealable;
- Hospital authority enabling statute did not contain positive indicia of a contrary legislative intent to exempt health system from general words of statute under the sovereign powers principle;
- Industrial Welfare Commission (IWC) wage order did not contain positive indicia of a contrary legislative intent to exempt health system from general words of relevant labor code statutes under the sovereign powers principle;
- Subjecting health system to IWC wage order or relevant Labor Code provisions would not result in infringement of sovereign governmental powers in context of sovereign powers principle;
- Health system was not a statutorily exempt municipal corporation for purposes of statute requiring employers to timely pay wages semimonthly;
- Health system was an "other governmental entity" within meaning of section of itemized statements statute that exempted state, city, county, district, or other governmental entity; and
- Section of Labor Code defining "person" provided no ground for sustaining demurrer as to PAGA claim.

Health system was an "other governmental entity" within meaning of section of itemized statements statute that exempted state, city, county, district, or other governmental entity, in health system employees' class action against health system alleging failure to provide accurate itemized wage statements; system was established by county government, system's establishment required special authorization from state legislature, and system bore all the rights and duties set forth in state law with respect to hospitals owned or operated by a county.

RAILS-TO-TRAILS - FEDERAL

[Bradley v. United States](#)

United States Court of Federal Claims - February 1, 2023 - Fed.Cl. - 2023 WL 1432639

In rails-to-trails case, owners of real property adjacent to railroad line sued United States, claiming just compensation for alleged taking of their property by authorizing conversion of right-of-way for railroad line into recreational trail pursuant to National Trail Systems Act.

After entering settlement agreement, in which owners obtained award of just compensation and interest from government, eight owners moved for award of attorneys' fees and costs, under Uniform Relocation Assistance and Real Property Acquisition Policies Act (URA).

The Court of Federal Claims held that:

- Owners' recovery of attorneys' fees was not limited by contingency fee agreement;
- Owners were entitled to fees and costs for prelitigation work by prior counsel;
- Owners moving for award of fees and costs were entitled to \$183,999.96 for work performed by one law firm; and
- Owners moving for award of fees and costs were entitled to \$21,101.92 for prelitigation work by prior counsel.

EMINENT DOMAIN - FLORIDA

[Lake Lincoln, LLC v. Manatee County](#)

District Court of Appeal of Florida, Second District - January 13, 2023 - So.3d - 2023 WL 175208 - 48 Fla. L. Weekly D144

Developer brought inverse condemnation action against county, alleging categorical regulatory taking based on county's denial of its application to amend development order and zoning ordinance for developer's 10.32-acre parcel within a 1,124-acre development of regional impact (DRI).

The Circuit Court granted county's motion for summary judgment. Developer appealed.

The District Court of Appeal held that "relevant parcel" for purposes of takings analysis included only developer's 10.32-acre parcel within DRI, and not entire 1,124-acre DRI.

For purposes of Fifth Amendment takings analysis stemming from county's denial of developer's application to amend development order and zoning ordinance for 1,124-acre development of regional impact (DRI), "relevant parcel" included only a 10.32-acre parcel located within the DRI, rather than the entire DRI itself; developer's request to develop its 10.32-acre parcel was physically and temporally remote from other existing developments within DRI, and undisputed facts demonstrated that landowner could achieve no economic use on its 10.32-acre parcel as a result of county's restriction to uses for only open spaces and wetlands during a nearly nine-year period.

EMINENT DOMAIN - GEORGIA

[Schroeder Holdings, LLC v. Gwinnett County](#)

Court of Appeals of Georgia - January 5, 2023 - S.E.2d - 2023 WL 109401

Landowner and others filed complaint and petition for writ of certiorari against county to recover damages and equitable relief after county denied rezoning application resulting in inverse condemnation and violation of substantive due process.

The Superior Court granted county's motion for summary judgment. Plaintiffs appealed.

The Court of Appeals held that:

- Denial of rezoning application was not quasi-judicial decision that could only be challenged by writ of certiorari;
- Just Compensation Provision of state constitution was waiver of sovereign immunity with respect to inverse condemnation claim; and
- Landowner failed to establish that county waived sovereign immunity barring substantive due process claim.

Just Compensation Provision of state constitution was waiver of sovereign immunity with respect to landowner's inverse condemnation claim seeking damages and equitable relief after county denied rezoning application; nothing indicated that county had invoked the power of eminent domain.

Landowner failed to establish that county waived sovereign immunity barring substantive due process claim arising out of denial of rezoning application, where landowner did not cite any constitutional or statutory authority that expressly or impliedly waived sovereign immunity for all zoning cases.

EDUCATION FUNDING - GEORGIA

[Jackson County Board of Education v. City of Commerce Board of Education](#)

Court of Appeals of Georgia - February 13, 2023 - S.E.2d - 2023 WL 1957290

County board of education filed declaratory judgment action seeking declaration that written agreement it entered into with city board of education was in effect and enforceable.

The trial court granted city board's motion to dismiss and/or for judgment on the pleadings, finding agreement unenforceable pursuant to the Intergovernmental Contracts Clause of the Georgia Constitution. County board's application for interlocutory review was granted, and appeal was transferred from Supreme Court.

The Court of Appeals held that county board sufficiently alleged that agreement was for the provision of services, precluding judgment on the pleadings as to county board's declaratory-judgment claim.

County board of education sufficiently alleged that agreement between city and county boards, which provided that boards would share tax revenue for education of students residing within one district that attended schools in other district, known as "crossover students," was a contract for the provision of services, so as to preclude judgment on the pleadings on county board's declaratory-judgment claim asserting that agreement complied with Intergovernmental Contracts Clause of State Constitution; agreement tied revenue-sharing, which was based on per pupil tax base, to service being provided, which was to educate crossover students, taxes being divided could only be used to support public schools, and both boards educated crossover students while agreement was suspended.

ZONING & PLANNING - MISSISSIPPI

[Heritage Hunter Knoll, LLC v. Lamar County](#)

Supreme Court of Mississippi - February 9, 2023 - So.3d - 2023 WL 1854308

Following federal court settlement and denial of its proposed variances from county ordinance denying waste collection and disposal services for multi-family properties, property owner brought action to appeal county board of supervisors decisions to amend ordinance to deny waste collection and disposal services and to deny proposed variances.

The Circuit Court dismissed the appeal for lack of jurisdiction, and property owner appealed.

The Supreme Court held that:

- Appeal of board's amendment of ordinance was untimely;
- Appeal of the variance denials was timely; and
- Property owner did not engage in improper claim splitting when it filed a notice of appeal as well as federal action.

Denial of two of property owner's requested variances from ordinance denying waste collection and disposal services for multi-family properties finally disposed of the controversy such that property owner had ten days from that date to appeal board's amendment of ordinance to deny waste collection and disposal services; letter from board advised property owner that anyone "affected or aggrieved by" the amendment could apply for a variance, property owner thereafter submitted three variance requests, and the board denied two of the variance requests, but property owner did not appeal the amendment for another four months.

Property owner filed appeal of county's denial of its two resubmitted requests for variances from county ordinance denying waste collection and disposal services for multi-family properties within ten days of the decision of the county board of adjustment, and thus appeal of the variance denials was timely; as part of federal court settlement, property owner resubmitted variance requests, which county board of supervisors had previously denied, and, on resubmission, the board denied the variance requests a second time.

Property owner did not engage in improper claim splitting when it filed a notice of appeal regarding county board of supervisors amendment to ordinance denying waste collection and disposal services for multi-family properties and the denial of property owner's variance requests, and in separate federal action asserted causes of action for violations of due process and equal protection, although some of property owner's claims asserted in its federal case were incorporated in the issues presented in its appeal; notice of appeal asserted that the board's amendment to the waste ordinance was arbitrary and capricious, beyond the board's scope and power, and in violation of statutory and constitutional rights, and property owner further asserted that the denial of its variance requests was arbitrary and capricious.

IMMUNITY - MISSOURI

[Zang v. City of St. Charles](#)

Supreme Court of Missouri, en banc - January 31, 2023 - S.W.3d - 2023 WL 1384032

Bicyclist injured after falling on open-grated bridge filed suit against defendants including city, alleging claims including premises liability.

The Circuit Court granted city's motion to dismiss premises liability claim for failure to provide required notice of suit. Bicyclist appealed.

On transfer from the Court of Appeals, the Supreme Court, en banc, held that:

- Statute imposing notice requirement for municipalities larger than city did not preempt notice requirement;
- Statute waiving sovereign immunity for injuries caused by the condition of a public entity's property did not preempt notice requirement;
- There was no field preemption of notice requirement;
- Statute of limitations did not preempt notice requirement; and
- Statute declining to impose notice requirement for premises liability claims on all negligence claims did not preempt notice requirement.

Statute imposing a notice requirement for personal injury actions against cities of at least a certain population did not prohibit city, which had a population below such threshold, from enacting its own statutory notice requirement, and thus statute did not preempt notice requirement in city's charter that barred premises liability claim brought against city by bicyclist injured when he fell on open-grated metal bridge, even though statute limited statutory waiver of sovereign immunity for injuries caused by condition of a public entity's property; statute's language and population requirement were clear, unambiguous, and entirely inapplicable to city, and nothing in the statute indicated that legislature intended it to apply to cities that did not meet the population requirement.

Provision of city charter requiring notice to city in order to maintain personal injury action against city did not prohibit anything permitted by statute waiving sovereign immunity for injuries caused by the condition of a public entity's property, and thus statute did not preempt charter's notice requirement, which barred premises liability claim brought without notice against city by bicyclist injured when he fell while crossing open-grated metal bridge.

Legislature evinced no intent to occupy the legislative field by preventing constitutional charter cities with populations below a certain threshold from creating notice requirements for actions against such cities, and thus there was no field preemption of notice requirement in city's charter that barred premises liability claim brought against city by injured bicyclist, even though legislature enacted statutes waiving sovereign immunity for injuries caused by the condition of a public entity's property and imposing a notice requirement for cities above the population threshold; although statutes imposing notice requirements covered the majority of cities in the state, legislature did not express an intention to limit notice requirements to those cities, as it could have done.

Provision of city charter requiring 90 days' notice to city in order to maintain personal injury action against city did not irreconcilably conflict with applicable five-year statute of limitations, and thus statute of limitations did not preempt notice requirement that barred premises liability claim brought against city by bicyclist injured in fall on open-grated metal bridge, despite bicyclist's argument that both provision and statute created time restrictions for action; although notice requirement might have restricted who was eligible to bring suit against city, it did not change what type of suits could be brought against city or how long a claimant had under the statute of limitations, which functioned independently of the notice requirement and served a different purpose.

Provision of city charter requiring notice to city in order to maintain personal injury action growing out of any negligence of the city did not irreconcilably conflict with statute that declined to impose on certain negligence claims the notice requirement that state law imposed on premises liability claims, and thus statute did not preempt notice requirement in city's charter that barred premises liability claim brought against city by bicyclist injured while crossing open-grated metal bridge; statute did not permit what the charter provision prohibited and did not contain any indication of an intent by the legislature to occupy the legislative field.

INSURANCE - NEW JERSEY

Statewide Insurance Fund v. Star Insurance Company

Supreme Court of New Jersey - February 16, 2023 - A.3d - 2023 WL 2026832

Public entity joint insurance fund (JIF) brought action against commercial general liability (CGL) insurer, seeking declaratory judgment for excess coverage in connection with underlying negligence action brought against one of JIF's member cities.

After parties settled action, the Superior Court entered summary judgment for JIF, meaning insurer was solely responsible for payment of settlement. Insurer appealed. The Superior Court, Appellate Division, affirmed. Insurer petitioned for certification, which was granted.

The Supreme Court held that CGL insurer provided primary, rather than excess, coverage to city in connection with settlement of underlying action.

City obtained "self-insurance" liability protection, rather than insurance, by joining public entity joint insurance fund (JIF) and, thus, JIF did not trigger commercial general liability (CGL) insurer's "other insurance" clause, such that CGL insurer provided primary, rather than excess, coverage to city in connection with settlement of underlying negligence action brought against city; JIFs did not provide insurance through authorized carrier in exchange for premiums but, instead, JIF members reduced insurance costs by pooling financial resources, distributing and retaining risk, and paying claims through member assessments.

ZONING & PLANNING - NEW YORK

Town of Southampton v. New York State Department of Environmental Conservation

Court of Appeals of New York - February 9, 2023 - N.E.3d - 2023 WL 1824432 - 2023 N.Y. Slip Op. 00689

Town, civic organizations, environmental organizations, and neighboring landowners commenced article 78 proceeding seeking to annul settlement agreement between owner and operator of sand and gravel mine and Department of Environmental Conservation (DEC), DEC's amended negative declaration with respect to application for modification permit seeking expansion of mining operations, and DEC's issuance of renewal permit for mining operations, and seeking to enjoin DEC from processing modification application.

After DEC granted modified permit, petitioners filed supplemental petition seeking to annul modified permit. The Supreme Court, Albany County, denied petitions. Petitioners appealed. The Supreme Court, Appellate Division, modified. Operator was granted leave to appeal.

The Court of Appeals held that:

- The phrase "permit to mine," as used in the statute barring agencies from considering an application for a permit to mine as complete or processing such an application if local zoning laws or ordinances prohibit mining uses within the area proposed to be mined, encompasses all applications to mine, including applications for renewal and modification, and
- Statute does not eliminate or alter non-conforming use.

The statute barring agencies from considering an application for a permit to mine as complete or processing such an application if local zoning laws or ordinances prohibit mining uses within the area proposed to be mined does not eliminate or alter non-conforming use; rather, the statute acts only as a protection against further expansion of those mining activities beyond the permissible non-conforming use.

EMINENT DOMAIN - NEW YORK

[HBC Victor LLC v. Town of Victor](#)

Supreme Court, Appellate Division, Fourth Department, New York - December 23, 2022 - N.Y.S.3d - 212 A.D.3d 121 - 2022 WL 17882656 - 2022 N.Y. Slip Op. 07313

Owner of vacant commercial real property that was formerly occupied by a department store brought action against town under Eminent Domain Procedure Law (EDPL) to annul town's determination authorizing the condemnation of the property.

The Supreme Court, Appellate Division, held that:

- Absent any specification by town of a public purpose for the condemnation, the condemnation was not a valid taking under the EDPL, and
- Remediation of blight, based on property's vacancy alone, did not support town's condemnation of property, since property was not in a blighted condition.

Absent any specification by town of the public purpose for which town had condemned owner's real property, which was connected to a mall and was formerly occupied by a department store, the condemnation was not a valid taking under the Eminent Domain Procedure Law (EDPL), even though the property was allegedly vacant and underutilized, where neither town's condemnation notice nor its determination and findings identified or described a legitimate public project, and the town stated in its determination and findings that "no specific future uses or actions have been formulated and/or specifically identified.

Remediation of substandard conditions, i.e., urban blight, did not support town's determination to condemn owner's real property, which was connected to a mall and was formerly occupied by a department store, even though the property was vacant, where the property was not in a blighted condition, the vacancy had occurred unexpectedly in the midst of the global COVID-19 pandemic, owner had cleaned and maintained the premises since they had become vacant, and owner continued to pay property taxes at the assessed value of more than \$4 million.

BONDS - NORTH DAKOTA

[UMB Bank, N.A. v. Eagle Crest Apartments, LLC](#)

Supreme Court of North Dakota - January 5, 2023 - 984 N.W.2d 360 - 2023 ND 4

Successor trustee for owners of bonds issued by city to finance construction of apartment complex brought action against construction limited liability company (LLC) and member for breach of contract and foreclosure, and, after apartment complex was sold at a sheriff's sale, successor trustee amended its complaint multiple times to add claims for fraudulent transfers, deceit, and exemplary damages against individual with ownership interest in company which was the LLC's sole member, and numerous entities associated with him.

Following a jury trial, the District Court entered judgment on jury verdict against defendants, jointly and severally, piercing the corporate veil. Defendants appealed.

The Supreme Court held that trial court appropriately pierced the corporate veil.

Trial court appropriately pierced the corporate veil to find individual's numerous separate entities liable for deficiency judgment against construction limited liability company (LLC) following foreclosure on apartment complex financed by municipal bonds; testimony and evidence indicated that individual disregarded the entities' corporate form and used them for personal purposes, jury found each defendant was the alter ego of both individual and the other defendants, and also found they fraudulently transferred roughly \$2.9 million to the detriment of investors and engaged in a conspiracy to commit deceit.

IMMUNITY - TEXAS

[Christ v. Texas Department of Transportation](#)

Supreme Court of Texas - February 10, 2023 - S.W.3d - 2023 WL 1871560

Motorists injured as result of head-on collision in construction zone brought action against Texas Department of Transportation and others, alleging premises liability based on condition of construction zone.

The District Court denied Department's plea to the jurisdiction and no-evidence motion for summary judgment. Department filed interlocutory appeal. The Corpus Christi reversed and dismissed for want of jurisdiction. Motorists' petition for review was granted.

The Supreme Court held that use of painted stripes and buttons to separate opposing lanes of traffic when engineer-sealed traffic control plan called for concrete barriers did not create unreasonably dangerous condition that would allow motorists to invoke waiver of sovereign immunity under Tort Claims Act.

Use of painted yellow stripes and buttons to separate opposing lanes of traffic in construction zone did not create "unreasonably dangerous condition," and thus, did not waive Texas Department of Transportation's sovereign immunity under Tort Claims Act from premises defect claim by motorists injured as result of head-on collision in construction zone, although engineer-sealed traffic control plan called for concrete barriers; stripes and buttons themselves were not defective, there was absence of any other accident or injury occurring at collision site, and use of stripes and buttons to separate travel lanes on roadways was ordinary, commonplace, and standard engineering practice, absent any inference that some aspect of construction site rendered use more dangerous than usual.

MUNICIPAL UTILITY DISTRICTS - TEXAS

[The Hanover Insurance Company v. Binnacle Development, L.L.C.](#)

United States Court of Appeals, Fifth Circuit - January 12, 2023 - 57 F.4th 510

Construction contractor's payment-bond surety, as contractor's assignee, brought action under Texas law against land developers to recover amounts allegedly due on contracts that developers had with contractor to complete paving and infrastructure projects in county municipal utility district.

The United States District Court for the Southern District of Texas granted surety's motion for summary judgment. Developers appealed.

The Court of Appeals held that:

- Texas Water Code section authorizing economic disincentive clauses for construction delay in district contracts did not apply, and
- Damages clause was an unenforceable liquidated damages clause seeking penalties.

Texas Water Code section authorizing economic disincentive clauses for late completion of construction work on a district contract "made by the board" did not apply to contracts between land developers and contractor to complete paving and infrastructure projects in county municipal utility district, even though county managed the public bidding process, which contractor won, and county planned to purchase the infrastructure after completion, where county was not a party to any of the contracts.

Texas Water Code section authorizing economic disincentive clauses for late completion of construction work on a district contract "made by the board" required county municipal utility district to be a contracting party to contracts that land developers had with contractor to complete paving and infrastructure projects in the district, in order for section to apply; section limited its applicability to contracts "made by the board," and boards governed districts.

Texas Water Code section authorizing economic disincentive clauses for late completion of construction work on a district contract "made by the board" required county municipal utility district to be a contracting party to contracts that land developers had with contractor to complete paving and infrastructure projects in the district, in order for section to apply; section limited its applicability to contracts "made by the board," and boards governed districts.

Chapter of Texas Water Code governing "Provisions Applicable to All Districts," including a section authorizing economic disincentives for late completion of construction work on a district contract "made by the board," applies only to districts unless a section narrows its application to certain types of districts.

Incorporation of Texas Government Code chapter governing performance and payment bonds on public works projects into Water Code did not convert private contracts between land developers and contractor to complete paving and infrastructure projects in county municipal utility district into district contracts that would be subject to Water Code section authorizing economic disincentive clauses for late completion of construction work on a district contract "made by the board"; whether Government Code chapter even applied was unclear due to absence of any public entity in contracts, and even if chapter did apply, it was not inconsistent to conclude that the Water Code section in issue applied only to contracts "made by the board" of a district.

Definition of "district facility" under Texas Water Code, as any plant or equipment supplied for the business or operations of a district, did not alter the requirement that a contract be made by a district board in order to trigger applicability of Water Code section authorizing economic disincentive clauses for late completion of construction work on a district contract, in action concerning private contracts that land developers had with contractor to complete paving and infrastructure projects in county municipal utility district.

Texas Water Code section authorizing economic disincentive clauses for late completion of construction work on a district contract "made by the board" could not be incorporated into land developers' private contracts with contractor for paving and infrastructure projects in county

municipal utility district; there was no statutory text suggesting that private parties could rely on, or were protected by, section when there was no contract executed by a district board, and developers were trying to make Water Code apply to contracts between private parties that one day might have been assumed by a district.

Texas Water Code section authorizing economic disincentive clauses for late completion of construction work on a district contract “made by the board” allows economic disincentive clauses only in contracts where a district is a contracting party.

Under Texas law, damages clause in private contracts between land developers and contractor to complete paving and infrastructure projects in county municipal utility district was not a limitation of liability clause but rather was an unenforceable liquidated damages clause seeking a penalty, where clause was entitled “liquidated damages for delay/economic disincentive,” clause expressly provided for liquidated damages of \$2,500 for each calendar day of delay, and clause did not set a ceiling on liability.

PUBLIC PENSIONS - CALIFORNIA

[Casson v. Orange County Employees Retirement System](#)

Court of Appeal, Fourth District, Division 3, California - January 30, 2023 - Cal.Rptr.3d - 2023 WL 1097958 - 2023 Daily Journal D.A.R. 888

Retired firefighter, who suffered on-the-job injury and received a disability pension from county retirement system, filed petition for writ of mandate after county retirement system imposed a “disability offset” due to firefighter’s receipt of pension from California Public Employees Retirement System (CalPERS) from his prior job.

The Superior Court denied the petition, and retired firefighter appealed.

The Court of Appeal held that disability pension was not subject to offset, as firefighter did not elect reciprocity.

Retired firefighter’s disability pension from county retirement system was not subject to a “disability offset” based on firefighter’s receipt of pension from California Public Employees Retirement System (CalPERS) from his prior job, where firefighter did not elect reciprocity, but chose to treat the two pensions as separate.

When a pensioner receives a service retirement under a pension governed by the County Employees Retirement Law of 1937 and becomes a member of a second pension governed by that law, but does not elect reciprocity, his or her first service pension cannot be considered part of a “disability allowance” under statute prohibiting a pensioner from receiving a disability allowance from two pensions greater than the amount that would have been received if all the pensioner’s service had been with only one entity.