MANDAMUS - OHIO

[State ex rel. Clark v. Twinsburg](#)

Supreme Court of Ohio - September 2, 2022 - N.E.3d - 2022 WL 4005808 - 2022-Ohio-3089

Relator sought a writ of mandamus ordering city, city Clerk of Council, and law director to transmit petition to county Board of Elections concerning a referendum seeking to replace resolution, which stated that the planning commission approved project's final site plan with condition that project's building height not exceed 35 feet.

The Supreme Court held that:

- Laches did not bar action;
- Jurisdictional-priority rule did not apply to bar action;
- Relator lacked an adequate remedy in the ordinary course of law due to the proximity of election; and
- Clerk of Council had a mandatory, ministerial duty to transmit referendum petition to Board of Elections for its signature verification after ten days had elapsed from filing of petition.

Laches did not bar action in which petitioner sought writ of mandamus to compel city, city Clerk of Council, and law director to transmit referendum petition to county Board of Elections seeking to replace resolution, which stated that planning commission approved project's final site plan with condition that project's building height not exceed 35 feet, even though case would not have been automatically expedited had petitioner filed sooner than 21 days, absent showing of material prejudice by delay; proximity to election of approximately two months made it likely that even if petitioner had filed at the earliest possible time after the case ripened, court would have ordered case to be expedited.

Jurisdictional-priority rule, providing that as between state courts of concurrent jurisdiction, tribunal whose power is first invoked acquires exclusive jurisdiction to adjudicate the whole issue and settle rights of parties, did not apply to bar action in which petitioner sought writ of mandamus to compel city, city Clerk of Council, and law director to transmit to county Board of Elections referendum petition to allow for a public vote on referendum seeking to replace resolution, which stated that planning commission approved project's final site plan with condition that project's building height not exceed 35 feet, even though petitioner had filed an administrative appeal in common pleas court before filing mandamus action, since administrative appeal, which could overturn resolution as improper, would not have provided remedy sought of a public vote on referendum.

Petitioner lacked an adequate remedy in the ordinary course of law due to the proximity of election, which was approximately two months away, as would support petition for writ of mandamus to compel city, city Clerk of Council, and law director to transmit to Board of Elections referendum petition seeking to replace resolution, which stated that planning commission approved project's final site plan with condition that project's building height not exceed 35 feet, since an administrative appeal would not have accomplished what petitioner sought of placing referendum on ballot.

City Clerk of Council had a mandatory, ministerial duty to transmit to Board of Elections for its signature verification after ten days had elapsed from filing date of referendum petition seeking to replace resolution, which stated that planning commission approved project's final site plan with condition that project's building height not exceed 35 feet, as would support issuance of limited writ of mandamus directing Clerk to transmit referendum petition and a certified copy of resolution to county Board of Elections, regardless of law director's judicial or quasi-judicial determination that resolution was administrative, rather than legislative, and therefore not subject to referendum.

EMINENT DOMAIN - PENNSYLVANIA

Frein v. Pennsylvania State Police

United States Court of Appeals, Third Circuit - August 30, 2022 - F.4th - 2022 WL 3724097

Parents of defendant who was convicted in connection with fatal shooting brought action against Pennsylvania State Police, district attorney, and prosecutors under § 1983, alleging that the failure to return gun seized from parents during investigation of shooting, which gun was never used at trial or on appeal, constituted a violation of Fifth Amendment's takings clause and of Second Amendment.

The United States District Court granted motion to dismiss for failure to state a claim. Parents appealed.

The Court of Appeals held that:

- Gun was pressed into public use, as could support takings claim;
- Unfavorable decision by state court on parents' motion seeking return of gun did not result in claim-preclusion bar to takings claim;
- Police and district attorney did not lawfully acquire gun using police powers, as would obviate requirement for compensation of parents pursuant to takings clause; and
- Fact that a citizen can retain or acquire another firearm does not prevent seizure of a firearm from burdening Second Amendment rights; but
- Pprocedure afforded to parents by state court, on parents' motion for return of gun under state criminal procedure rule, was sufficient to comply with due process.

MUNICIPAL ORDINANCE - ALABAMA

City of Center Point v. Atlas Rental Property, LLC

Supreme Court of Alabama - August 26, 2022 - So.3d - 2022 WL 3700376

Landlords sought preliminary and permanent injunctive relief from city ordinance requiring certificates of occupancy for rental-housing units.

The Circuit Court entered preliminary injunction enjoining ordinance's enforcement. City appealed.

The Supreme Court held that:

- The Alabama Uniform Residential Landlord and Tenant Act (AURLTA) expressly preempted the ordinance;

- Landlords demonstrated that they would suffer irreparable harm in the absence of a preliminary injunction; and
- Balance of harms favored entering a preliminary injunction.

Alabama Uniform Residential Landlord and Tenant Act (AURLTA) expressly preempted city ordinance requiring certificates of occupancy for rental-housing units; despite argument that the AURLTA governed only the landlord-tenant relationship, the AURLTA expressly prohibited ordinances relative to residential landlords, rental housing codes, or the rights and obligations governing residential landlord and tenant relationships.

Landlords alleging that the Alabama Uniform Residential Landlord and Tenant Act (AURLTA) preempted city ordinance requiring certificates of occupancy for rental-housing units demonstrated that they would suffer irreparable harm in the absence of a preliminary injunction, despite argument that landlord's alleged harm could remedied through an award of monetary damages; it was evident from the nature of the requirements of the ordinance, as well as the nature of the penalties for compliance with the ordinance, that it would be difficult, if not impossible, to accurately calculate the future damages that the landlords might suffer if the ordinance were allowed to stand, notwithstanding its determination that the ordinance was preempted by the AURLTA.

Balance of harms favored entering a preliminary injunction enjoining enforcement of city ordinance requiring certificates of occupancy for rental-housing units; city was attempting to regulate an area of the law that the legislature intended the Alabama Uniform Residential Landlord and Tenant Act (AURLTA) to exclusively occupy, and city had other avenues to protect the health and safety of its citizens, such as building regulations that governed the conditions and maintenance of all property, buildings, and structures within the city, not just rental-housing units.

BREACH OF CONTRACT - CALIFORNIA

[CAM-Carson, LLC v. Carson Reclamation Authority]()

Court of Appeal, Second District, Division 8, California - August 23, 2022 - Cal.Rptr.3d - 2022 WL 3593158 - 2022 Daily Journal D.A.R. 8974

Commercial real estate developer brought action against city and city reclamation authority for breach of contract and breach of the covenant of good faith and fair dealing, alleging that developer entered contracts with defendants to develop 40-acre site after defendants remediated soil and groundwater contamination, installed infrastructure, and built roads, that defendants engaged in gross mismanagement and malfeasance that created massive funding deficit which derailed project, causing damages to developer of over $80 million, and that city was alter ego of reclamation authority.

City demurred to the complaint. The Superior Court sustained demurrer. Developer appealed.

The Court of Appeal held that:

- The alter ego doctrine may be applied to a government entity in a case where the facts justify an equitable finding of liability;
- Developer alleged that city and reclamation authority were operated with integrated resources in pursuit of single business purpose, that city dominated reclamation authority such that reclamation authority had no separate mind, will or existence of its own, and that inequitable result would follow if acts in question were treated as those of reclamation authority alone, as required to state

claim against city under alter ego theory for breach of contract; and
- Developer alleged that city and reclamation authority were alter egos and that developer and city were also parties to development agreement, as required to state claim against city for breach of implied covenant of good faith and fair dealing.

ANTI-TRUST - FLORIDA

Town of Indian River Shores v. City of Vero Beach

United States District Court, S.D. Florida - August 23, 2022 - F.Supp.3d - 2022 WL 3593152

Town brought action against city, alleging antitrust violations of the Sherman Act arising from a service territory agreement between city and county that foreclosed town from obtaining essential water services from county in the future.

City moved to dismiss.

The District Court held that:

- Legal interests were sufficiently adverse to establish a substantial, ripe controversy;
- Town made sufficient showing of hardship for ripeness;
- Town plausibly alleged existence of a "horizontal market allocation" in violation of the Sherman Act;
- "Clear articulation" requirement for state-action immunity was not satisfied; and
- County was not a required party that had to be joined in the action.

Parties' legal interests in town's action against city, alleging anticompetitive harm under the Sherman Act arising from a service territory agreement between city and county that foreclosed town from obtaining essential water services from county in the future, were sufficiently adverse to establish a substantial, ripe controversy that was fit for judicial decision, irrespective of whether city ultimately decided to withhold its approval for services contract between town and county; town alleged existence of veto right implicating antitrust liability, as city allegedly engaged in ongoing monopolistic abuse of town by reducing competition for essential water services, and fact that parties had exhausted extensive dispute resolution procedures demonstrated parties' enduring disagreement.

Town made sufficient showing of hardship, as an element of ripeness analysis, in action against city, alleging anticompetitive harm under the Sherman Act arising from a service territory agreement between city and county that foreclosed town from obtaining essential water services from county in the future, where town showed that putting the case on hold pending future action by the city, exercising its alleged right under the agreement to refuse to allow tow to obtain essential water services from county, could force it to choose either between continuing to receive essential water services from city or potentially leaving residents without service.

Town plausibly alleged existence of a "horizontal market allocation" in violation of the Sherman Act related to a service territory agreement between city and county that allegedly foreclosed town from obtaining essential water services from county in the future, where town alleged that the agreement provided that county "shall not provide water or sewer service" within city service area without city's written approval, and that city construed the agreement as creating a permanent territorial allocation for water services that foreclosed city's existing customers, including town, from ever obtaining competing essential water services from county without city's consent, which was supported by a city letter to county asserting city's rights under the agreement.

City's alleged anticompetitive conduct, based on a service territory agreement between city and county, was not clearly authorized by the state so as to pass the "clear articulation" requirement for state-action immunity from federal antitrust law, in town's action alleging anticompetitive harm under the Sherman Act due to its being foreclosed by the agreement from obtaining essential water services from county in the future; while the Florida legislature authorized municipalities to develop public utilities for water services, it did not contemplate the alleged anticompetitive conduct that effectively granted one municipality exclusive market control over services of another incorporated municipality when same statute limited exercise of municipal corporate powers within corporate limits of another municipality.

County was not so situated that its absence in town's case against city, alleging anticompetitive harm under the Sherman Act from service territory agreement between city and county that allegedly foreclosed town from obtaining essential water services from county in the future, and thus, county was not a "required party" within meaning of the joinder rule; while county was party to the agreement that was at issue of the litigation, county had specifically disclaimed any interest in the litigation, and neither party had identified any other reason that would require presence of county in the litigation.

LIABILITY - INDIANA

Bohanon v. City of Indianapolis

United States Court of Appeals, Seventh Circuit - August 22, 2022 - F.4th - 2022 WL 3585003

Bar patron filed § 1983 against city alleging that off-duty police officers had used excessive force, in violation of his Fourth Amendment rights.

After jury entered verdict in patron's favor, the United States District Court granted city's motion for judgment as matter of law. Patron appealed.

The Court of Appeals held that city was not subject to municipal liability under § 1983 based on off-duty police officers' use of excessive force against bar patron.

City was not subject to municipal liability under § 1983 based on off-duty police officers' use of excessive force against bar patron, even though city's general order prohibiting officers under influence of alcohol from performing any law enforcement functions contained exception for extreme emergency situations; it was not obvious that policy prohibiting police action while drinking, subject to narrow and specific exception to protect life and limb, would lead off-duty officers to use excessive force, no similar incident—let alone pattern of similar incidents—had occurred since general order was enacted, officers violated city policy regarding use of force, and their actions did not fall within general order's narrow exception.

MANDAMUS - MINNESOTA

Spann v. Minneapolis City Council

Supreme Court of Minnesota - August 24, 2022 - N.W.2d - 2022 WL 3640919

City residents filed a petition for a writ of mandamus, seeking to compel city council and mayor to hire more police officers.

The District Court granted petition by issuing alternative writ requiring the mayor and city council to show cause why they have not employed and funded at least 731 sworn police officers, the equivalent of 0.0017 officers per resident based on the most current census data. City council and mayor appealed. The Court of Appeals reversed. Residents petitioned for further review, which was granted.

The Supreme Court held that:

- City council was obligated under city charter to fund a police force of at least 731 officers and provide for those employees' compensation;
- Mayor had a clear legal duty under city charter to employ 731 officers based on the most recent census data;
- City council did not violate its clear legal duty to provide funding to fund at least 731 officers;
- Residents were not entitled to supplement the record with later-created materials;
- Alternative writ of mandamus did not impermissibly instruct mayor how to exercise hiring discretion; and
- City council was meeting its uncontested clear legal duty under city charter to fund at least 731 sworn police officers, thus precluding issuance of alternative writ of mandamus requiring city council to fund at least 731 officers.

IMMUNITY - MISSOURI

Poke v. Independence School District

Supreme Court of Missouri, en banc.July 12, 2022647 S.W.3d 18

School-district employee brought action against district, asserting violation of state statute through alleged retaliation for filing workers' compensation claim.

The Circuit Court granted summary judgment to district. Employee appealed.

On transfer from the Court of Appeals, the Supreme Court held that statute creating private right of action for employees who are discharged, or discriminated against, by employer for exercising workers' compensation rights, read in conjunction with statute defining an "employer" for purposes of Workers' Compensation Law to include governmental entities, waived any sovereign immunity that school district had to employee's action; overruling *Krasney v. Curators of University of Missouri,* 765 S.W.2d 646; and *King v. Probate Division, Circuit Court of County of St. Louis,* 21st Judicial Circuit, 958 S.W.2d 92.

EMINENT DOMAIN - NEW YORK

Rag Herkimer, LLC v. Herkimer County

Supreme Court, Appellate Division, Fourth Department, New York - August 4, 2022 - N.Y.S.3d - 2022 WL 3097542 - 2022 N.Y. Slip Op. 04854

Former property owner brought action against county, seeking just compensation for property that county acquired through eminent domain.

Following bench trial, the Supreme Court, Herkimer County, entered judgment, determining the fair market value of the property was $575,600. Former owner appealed.

The Supreme Court, Appellate Division, held that the Supreme Court did not abuse its discretion in accepting comparable sales of county’s expert.

Trial court did not abuse its discretion in accepting comparable sales of county’s expert rather than comparable sales of former property owner’s expert in determining fair market value of owner’s property and amount of just compensation award for property that county acquired through eminent domain; even if comparable sales of county’s expert left “much to be desired,” trial court found that remote comparable sales of owner’s expert were derived from strikingly different markets, and trial court could accept sales of county’s expert as best basis for evaluating the property and utilize such sales with proper adjustment for differences from owner’s property.

EMINENT DOMAIN - NORTH CAROLINA

Anderson Creek Partners, L.P. v. County of Harnett

Supreme Court of North Carolina - August 19, 2022 - 876 S.E.2d - 2022 WL 3570917 - 2022-NCSC-93

Developers brought consolidated actions against county seeking refunds for one-time fees paid to county for water and sewer services to be furnished to their future real estate developments, which county imposed as precondition for its concurrence in developers’ applications to North Carolina Department of Environmental Quality (DEQ) for water and sewer permits, as well as seeking declaratory judgment that fee ordinance was invalid.

The Superior Court granted county’s motion for judgment on the pleadings, and developers appealed. The Court of Appeals affirmed. The Supreme Court granted discretionary review.

The Supreme Court held that:

- Water and sewer fees were impact fees, not user fees;
- As a matter of first impression, water and sewer fees constituted exactions;
- “unconstitutional conditions” doctrine required water and sewer fees to have essential nexus and rough proportionality with county’s costs of expanding water and sewer infrastructure into developments;
- Developers adequately alleged that county coerced them to pay fees in order to obtain land use permits;
- Developers’ admission precluded any argument that fees lacked essential nexus to costs of infrastructure expansion;
- Issue of whether fees were roughly proportional to costs of infrastructure expansion could not be resolved on motion for judgment on the pleadings; and
- New fee ordinance pursuant to new statute did not render action moot.

One-time fees that county charged developers for water and sewer services constituted impact fees, not user fees, for purpose of determining whether fees were takings without just compensation under “unconstitutional conditions” doctrine, even though county called fees “capacity use” fees; such fees were intended to cover cost of expanding water and sewer infrastructure to accommodate new development, rather than being paid by customers at fixed rate in accordance with their monthly water and sewer usage for purpose of paying for services they used at time of actual use.

Impact fees that county required developers to pay for water and sewer services as condition of county’s concurrence in water and sewer permit approval constituted exactions, for purpose of determining whether fees constituted takings without just compensation under “unconstitutional conditions” doctrine; fees were imposed on developers based on their respective prorated shares of cost of expanding utility services to developments, and term “exaction” included monetary exactions, not only a requirement that a developer dedicate land.

Under “unconstitutional conditions” doctrine, one-time impact fees that county charged developers as monetary exactions for water and sewer services, as precondition for county’s concurrence in developers’ water and sewer permit applications, were required to have essential nexus and rough proportionality with costs that proposed developments imposed on county’s water and sewer infrastructure in order for fees not to constitute takings, even though fees were not discretionary, administrative, or imposed in lieu of any dedication of land; each fee was linked to specific parcel of land proposed for development, and allowing county to increase fees or use fee proceeds for non-development-related purposes would enable county to pressure developers to give up property without just compensation.

Developers adequately alleged that county’s imposition of one-time sewer and water fees, which constituted impact fees and exactions, had effect of coercing developers into paying fees in order to obtain land use permits, supporting their claim against county for takings without just compensation under “unconstitutional conditions” doctrine, where developers alleged that county conditioned its concurrence in developers’ applications for sewer and water permits on developers’ payment of impact fees, that payment of fees was not merely necessary to permit developers to connect to water and sewer system, and that requiring fees before county would support developers’ applications for water and sewer permits necessary to record subdivision plots precluded development of properties as planned.

In developers’ action against county for violations of Takings Clause based on county’s imposition of impact fees for expansion of water and sewer system into planned developments, which developers alleged constituted unconstitutional condition on county’s consent to water and sewer permits, county, not developers, bore burden of showing that fees had essential nexus to and were roughly proportional to developments’ impact on county’s water and sewer infrastructure.

Developers’ admission, in their complaint against county for imposing monetary exaction in form of water and sewer impact fees as condition of county’s consent to water and sewer permits in violation of Takings Clause, that water and sewer impact fees were collected by county to pay for costs of future improvements to county’s water and sewer system precluded developers from arguing that fees lacked essential nexus to county’s objective of funding expansion of its water and sewer system capacity to serve proposed developments, as requirement for fees to be permissible under “unconstitutional condition” doctrine.

Issue of whether water and sewer impact fees that county imposed on developers as condition of its consent to developers’ water and sewer permit applications were roughly proportional to costs of expansion of water and sewer system to serve proposed developments, as necessary for fees to be permissible under “unconstitutional conditions” doctrine, could not be resolved on county’s motion for judgment on the pleadings with respect to developers’ complaint against county for violation of Takings Clause based on contention that fees constituted unconstitutional conditions on permits; county had not demonstrated that its estimates of water and sewer capacity expansion costs, upon which fees were estimated, were roughly proportional to actual cost of expanding water and sewer system to accommodate proposed developments.

ZONING & PLANNING - NORTH CAROLINA

Visible Properties, LLC v. Village of Clemmons

Court of Appeals of North Carolina - August 2, 2022 - S.E.2d - 2022-NCCOA-529 - 2022 WL 3031723

Outdoor advertising sign company petitioned for writ of certiorari after city zoning board of adjustment rejected company's application for zoning permit to construct billboard with digital technology on property bordering city highway.

The Superior Court granted petition and affirmed board's decision. Company appealed.

The Court of Appeals held that:

- City zoning ordinances allowed construction of company's proposed sign;
- Company's proposed sign, which periodically changed static digital images, was not "moving and flashing sign" prohibited by city zoning ordinances; and
- Company's proposed sign was not "electronic message board" prohibited by city zoning ordinances.

Provisions for off-premises signs contained in sign regulations portion of city zoning ordinances, which allowed off-premises signs on property near city highway, superseded two other more general ordinances governing property, which did not allow off-premises signs, and thus city zoning ordinances allowed outdoor advertising sign company to construct proposed billboard with digital technology on property; sign-specific rules directly applied to use at issue, and sign-specific rules stated that other zoning restrictions did not apply if proposed use was regulated by specific regulations of that section.

Outdoor advertising sign company's proposed digital billboard, which periodically changed static images, was not "moving and flashing sign" within meaning of city zoning ordinance prohibiting moving and flashing signs near city highway; ordinary usage of ambiguous terms "moving" and "flashing" did not squarely describe digital billboard, which was not capable of movement and had no sudden or transient display of lights, excluding billboards that changed static images did not render superfluous ordinance's exclusion of electronic time, temperature, and message signs, and specific examples of prohibited signs, including pennants, banners, and spotlights, were capable of either physically moving or shining light in sudden or intermittent manner.

Outdoor advertising sign company's proposed digital billboard, which periodically changed static images, was not "electronic message board" within meaning of city zoning ordinance prohibiting electronic message boards near city highway; reading ordinances to prohibit any electronic sign displaying any form of message would render "electronic message board" term superfluous, ordinary meaning of ambiguous term electronic message board referred to narrower category of sign, such as mobile electronic signs seen near road construction, or digital message boards often affixed beneath business's name or logo and listing business hours or product offerings, which would not be described as billboards like company's proposed sign.

DEDICATION - PENNSYLVANIA

In re Township of Jackson

Commonwealth Court of Pennsylvania - August 1, 2022 - A.3d - 2022 WL 3021688

Township petitioned for leave of court under the Donated or Dedicated Property Act to sell land dedicated for use as a public park, alleging that, due to the topography of the land as well as the cost to maintain the lot, it was not practicable to develop the lot as a public park.

After evidentiary hearings, the Court of Common Pleas denied the petition. Township appealed.

The Commonwealth Court held that:

- Procedural requirement that defense of equitable estoppel to be raised in responsive pleading did not apply to Donated or Dedicated Property Act proceedings;
- Evidence supported trial court's conclusion that township actively facilitated residents' belief that land would remain as open space;
- Township did not establish that retaining recreational use for which land was dedicated was no longer physically or financially practicable; and
- Evidence supported conclusion that maintaining land as pocket park continued to serve interest of the public.

Procedural requirement that defense of equitable estoppel be raised in responsive pleading did not apply to proceedings conducted under Donated or Dedicated Property Act, and thus testimony of township residents, as parties-in-interest under Act, could raise issue of whether township was equitably estopped from selling park land, in proceedings on township's petition for leave of court to sell land dedicated for use as public park; while no opponent of sale filed responsive pleading or expressly raised defense of equitable estoppel, Pennsylvania Rules of Civil Procedure had not been incorporated into proceedings conducted under Act, and local rules had not been adopted to cover such proceedings.

Substantial evidence supported trial court's conclusion that township actively facilitated residents' belief that land dedicated for use as public park would remain as open space, as grounds for application of doctrine of equitable estoppel in proceedings on township's Donated or Dedicated Property Act petition for leave to sell park; township approved land development plan designating land as proposed public park, township accepted donation of land and dedicated land to public park use, and township never advised public that it might use land for any other purpose.

Township did not establish, in proceedings on its Donated or Dedicated Property Act petition for leave to sell land dedicated for use as public park, that retaining recreational use for which land was dedicated was no longer physically or financially practicable, as requirement for grant of judicial relief under Act; township's supervisor acknowledged that township could keep land as open space in its unimproved state, which involved minimum maintenance, and township's consulting engineer testified that land could be developed with walking trail and basketball court.

Substantial evidence supported trial court's conclusion that maintaining land dedicated for recreational public use as a pocket park continued to serve the interest of the public, as grounds for denial of township's Donated or Dedicated Property Act petition for leave to sell the park, where a number of people representing a significant proportion of the development in which the park was located signed a petition seeking to save the park.

ZONING & PLANNING - CALIFORNIA

[CV Amalgamated LLC v. City of Chula Vista]

Court of Appeal, Fourth District, Division 1, California - August 12, 2022 - Cal.Rptr.3d - 2022 WL 3354984

Business petitioned for writ of mandate challenging city’s denial of its application for a license to operate a retail cannabis store in the city.

The Superior Court denied the petition. Business appealed.

The Court of Appeal held that:

- City had ministerial duty to follow mandatory procedures for issuing the license;
- City acted in an arbitrary and capricious manner in rescoring business’s application;
- Business did not have adequate remedy for city’s failure to follow its procedures; and
- No parties needed to be joined prior to granting the relief sought.

City had ministerial duty to follow mandatory procedures for issuing license to operate a retail cannabis store in the city, so that its failure to follow those procedures when it rejected business’s license application in first phase of two-phase licensing process for business’s failure to score high enough in merit-based evaluation conducted by the city provided basis for issuance of writ of mandate, where neither the relevant cannabis ordinance nor the cannabis regulations permitted the city to disqualify an applicant during the first phase of the process for not scoring high enough, but rather, both the ordinance and the regulations required that city deem an applicant to be qualified if it met the stated minimum requirements, which did not include any merit-based scoring requirement.

City acted in an arbitrary and capricious manner in rescoring business’s application for license to operate a retail cannabis store, following business’s appeal alleging that initial scoring was unfair, by limiting its efforts to only one of four relevant categories in the discretionary merit-based evaluation due to alleged formatting and organization errors, thus providing a basis for issuance of writ of mandate requiring city to carry out discretionary duty to rescore all four categories of business’s application, where reason provided for so limiting the rescoring, that only one category was impacted by the errors, was contradicted by evaluator’s testimony that all four categories were impacted by the errors, which compelled conclusion that rescoring each of the four categories was warranted.

Business’s claim for promissory estoppel against city, seeking recovery of expenses for application for license to operate a retail cannabis store that were lost when city allegedly wrongly rejected its application in breach of a purported promise, did not provide adequate legal remedy for city’s failure to follow mandatory procedures for issuing licenses for cannabis retail businesses as would provide the court with discretion to deny business’s petition for mandamus relief, because the remedy for promissory estoppel would not give business the relief it sought through traditional mandamus, namely, a chance to compete for and be awarded a license.

Other applicants for license to operate a retail cannabis store who scored higher than business on city’s merit-based evaluation and advanced to second phase of two-phase licensing process were not indispensable parties that business had to join in proceedings on its petition for writ of mandate as relief for city’s alleged improper denial of its application, since other applicants would not be prejudiced by any writ issued as relief to business, as relief that business sought did not include an order invalidating any licenses city may have issued to the other applicants.

ZONING & PLANNING - DISTRICT OF COLUMBIA

Lumen Eight Media Group, LLC v. District of Columbia

District of Columbia Court of Appeals - August 11, 2022 - A.3d - 2022 WL 3270077

District of Columbia brought action seeking injunctive relief against sign company and building owners alleging that defendants violated regulations that purportedly required defendants to obtain permits before erecting signs on private property that were located under building overhangs.

The Superior Court granted District's motion for summary judgment. Defendants appealed.

The Court of Appeals held that:

- Defendants did not forfeit their right to rely on Sign Regulation Act;
- Sign Regulation Act provision pertaining to mayor's ability to issue and amend regulations applied to dispute;
- Sign Regulation Act provision pertaining to mayor's ability to issue and amend regulations applied to rulemaking; and
- Emergency rule promulgated by mayor, by which mayor amended regulations pertaining to sign permitting requirements, was invalid.

Sign company and business owners did not forfeit their right to rely on Sign Regulation Act provision pertaining to mayor's ability to issue and amend regulations pertaining to displaying signs on public and private property, even though Court of Appeals raised issue sua sponte and parties based their arguments in trial court on a different statute; Court invited, and received, supplemental briefs from parties so that it was not procedurally unfair, question was too important to overlook as determining which provision applied was antecedent to and ultimately dispositive of whether trial court's judgment was able to stand, and it would have thwarted intent of legislature to rely on statute that did not apply simply because parties failed to identify correct one.

Sign Regulation Act provision pertaining to mayor's ability to issue and amend regulations pertaining to displaying signs on public and private property, and not Construction Code provision pertaining to mayor's ability to issue and amend regulations pertaining to Code, applied to dispute on whether sign company and businesses were required by regulations to obtain permits before erecting signs on private property under building overhangs and whether mayor was able to amend such regulations by promulgating emergency rule, despite contention provision of Act did not apply to interior signs and was titled "Outdoor Signs"; language of Act indicated that it applied to private property within public view, and emergency rule at issue was designed to clarify that provision.

Sign Regulation Act provision pertaining to mayor's ability to issue and amend regulations pertaining to display on signs of public and private property, and not Construction Code provision pertaining to mayor's ability to issue and amend regulations pertaining to Construction Code, applied to rulemaking by which mayor allegedly amended regulations governing permitting requirements for signs by promulgating emergency rule, for purposes of dispute on whether sign company and businesses were required to obtain permits before erecting signs on private property under building overhangs; while scope of Code included placing and maintenance of interior signs, Code provision pertaining to rule amendment said nothing specific about signs, and Act provision was enacted over 25 years after Code provision.

Emergency rule promulgated by mayor, by which mayor amended regulations pertaining to permitting requirements for display of signs on public and private property, did not receive the affirmative approval of the Council of the District of Columbia, and thus rule was invalid, for purposes of dispute on whether sign company and businesses were required to obtain permits before erecting signs on private property under building overhangs.

MUNICIPAL ORDINANCE - FLORIDA

Club Madonna Inc. v. City of Miami Beach

United States Court of Appeals, Eleventh Circuit - August 1, 2022 - 42 F.4th 1231

Fully-nude strip club filed § 1983 action against city raising First and Fourth Amendment challenges, along with preemption challenges, to city ordinance requiring nude strip clubs to follow a record-keeping and identification-checking regime to ensure that each performer was at least 18 years old.

The United States District Court for the Southern District of Florida granted city's motion to dismiss. Club appealed. The Court of Appeals affirmed in part, reversed in part, and remanded. The District Court granted renewed motion to dismiss in part, after which the District Court adopted in part a report and recommendation of Jonathan Goodman, United States Magistrate Judge and granted summary judgment in part. Club appealed and city cross-appealed.

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

- Ordinance was a valid time, place, and manner restriction complying with First Amendment free speech guarantee;
- Ordinance's warrantless-search provision satisfied administrative-search exception to warrant requirement for closely-regulated industries;
- Immigration Reform and Control Act (IRCA) preempted ordinance section concerning verification of an individual's employment authorization;
- Ordinance's penalty scheme was not preempted by Florida statute setting forth penalties for criminal and noncriminal violations; and
- Ordinance's unlawful section on verification of an individual's employment authorization was severable.

City ordinance requiring nude strip clubs to follow a record-keeping and identification-checking regime to ensure that each performer was at least 18 years old was a valid time, place, and manner restriction complying with the First Amendment free speech guarantee; although the ordinance's requirements, including log in/log out procedure for workers and performers requiring two forms of identification, were significant and time-consuming, they were not substantially broader than necessary to achieve the ordinance's aim of preventing minors and victims of human trafficking from dancing nude on a public stage, and the paperwork process still left club with plenty of hours in the day and night for its dancers to perform.

ZONING & PLANNING - IDAHO

City of Ririe v. Gilgen

Supreme Court of Idaho, Boise, February 2022 Term - August 9, 2022 - P.3d - 2022 WL 3206113

City petitioned for judicial review of decision of county board of commissioners to grant applicant a conditional use permit that allowed her to place mobile home on her property located in city's area of impact and sought declaratory relief.

After county filed notice of non-objection, the Seventh Judicial District Court granted petition, remanded the matter, and denied applicant's motions for reconsideration. Applicant appealed, and city cross-appealed.

The Supreme Court held that:

- City was required to file separate declaratory judgment action in order to obtain declaratory relief;
- City was not “affected person” allowed to seek judicial review under Local Land Use Planning Act (LLUPA) of board’s decision;
- Appropriate remedy for city to enforce county’s compliance with area of impact agreement adopted pursuant to LLUPA was to file original civil action; and
- City acted without reasonable basis in fact or law, such that applicant, as prevailing party on appeal, would be awarded appellate attorney fees.

In order to obtain declaratory relief, city was required to file separate declaratory judgment action, instead of attempting to request such declaratory relief in its petition for judicial review of decision of county board of commissioners to grant applicant a conditional use permit that allowed her to place mobile home on her property located in city’s area of impact; civil actions and administrative appeals were processed differently by the courts and governed by different standards.

Counties and city governments are considered “local governing bodies” rather than “agencies” for purposes of the Administrative Procedure Act (APA), which is intended to govern judicial review of decisions made by agencies, not local governing bodies.

City was not “affected person” allowed to seek judicial review under Local Land Use Planning Act (LLUPA) of decision of county board of commissioners to grant applicant a conditional use permit that allowed her to place mobile home on her property located within city’s area of impact; city did not have bona fide interest in real property outside city limits as it had no jurisdiction over such property.

Appropriate remedy for city to enforce county’s compliance with area of impact agreement adopted pursuant to Local Land Use Planning Act (LLUPA) was to file original civil action, not to file petition for judicial review of decision of county board of commissioners to grant applicant a conditional use permit that allowed her to place mobile home on her property located within city’s area of impact; LLUPA did not allow city to petition for judicial review as city did not have bona fide interest in real property outside city limits, but LLUPA allowed governing board, defined as city council or board of county commissioners, to institute civil action to enforce compliance with any ordinance enacted pursuant to LLUPA.

City acted without reasonable basis in fact or law in petitioning for judicial review of decision of county board of commissioners to grant applicant a conditional use permit that allowed her to place mobile home on her property located in city’s area of impact and in requesting declaratory relief in same petition, such that applicant, as prevailing party on appeal, would be awarded appellate attorney fees, although city defended position that was accepted by district court judge; Local Land Use Planning Act (LLUPA) did not authorize city to bring action as “affected person” for judicial review, and it was settled law that action for declaratory relief could not be combined with action for judicial review.

EMINENT DOMAIN - INDIANA

[Duke Energy Indiana, LLC v. Bellwether Properties, LLC]

Court of Appeals of Indiana - August 3, 2022 - N.E.3d - 2022 WL 3050699

Landowner brought action against electrical utility, asserting claim for inverse condemnation based on increase of required clearance around electrical lines, which increase extended clearance requirement beyond size of utility's easement to maintain such lines on landowner's property.

Utility filed motion to dismiss, asserting that landowner's claim was barred by six-year statute of limitations. The Circuit Court, Monroe County, Michael Hoff, J., granted utility's motion. Landowner appealed. The Court of Appeals reversed and remanded. Utility sought transfer, which was granted. The Supreme Court reversed. On remand, the Circuit Court denied electrical utility's motion for summary judgment. Electrical utility filed an interlocutory appeal.

The Court of Appeals held that:

- Electrical utility's alleged taking was regulatory, not physical, and
- Electrical utility's enforcement of horizontal clearance regulations did not constitute as a compensable regulatory taking.

Electrical utility's alleged taking, if valid, was regulatory in nature, rather than physical, after utility told landowner that it either had to redesign or move a proposed warehouse on its property based on utility's enforcement of horizontal clearance regulations, which increased extended clearance requirement beyond size of utility's easement to maintain electrical lines on landowner's property; utility's predecessor was the entity that installed transmission lines on landowner's property, and enactment of clearance requirement did not result in utility to physically intrude or require landowner to allow another entity to access property, but rather, placed limits on landowners' power to build on small portion of its land.

Electrical utility's enforcement of horizontal clearance regulations, which increased utility's clearance requirements and went beyond size of utility's easement to maintain electrical lines on landowner's property, did not constitute as a compensable regulatory taking after utility notified landowner that it either had redesign or move its proposed warehouse to comply with clearance regulations; impact of utility's enforcement of clearance regulations was minimal, enforcement did not interfere with landowner's reasonable investment-backed expectations of the land, and landowner could have reasonably avoided dispute by discovering clearance requirements prior to purchasing the land or when its architect designed its proposed warehouse.

LIABILITY - MARYLAND

[Hancock v. Mayor and City Council of Baltimore]

Court of Appeals of Maryland - August 15, 2022 - A.3d - 2022 WL 3350854

Estate of laborer who was employed by independent contractor and was buried alive while working at an excavation site filed a survivorship and wrongful death action against city which hired independent contractor to perform the excavation work and against subcontractor.

The Circuit Court granted city's and subcontractor's motions to dismiss, and estate appealed. The Court of Special Appeals affirmed. Estate filed a petition for writ of certiorari which was granted.

The Court of Appeals held that:

- As matter of first impression, one who hires independent contractor is not liable to an employee of that contractor for injuries caused by contractor's negligence in performing the work for which it was hired;
- As matter of first impression, city which hired independent contractor to perform excavation work did not owe laborer, who was independent contractor's employee, a duty in tort with respect to city's retention of independent contractor;
- As matter of first impression, subcontractor did not owe laborer a duty in tort to warn him of danger that subcontractor allegedly perceived; and
- As matter of first impression, duty of contractor or subcontractor on construction job to exercise due care to provide for protection and safety of the employees of other contractors or subcontractors is owed with respect to conditions that contractor or subcontractor creates or over which it exercises control.

BONDS - MINNESOTA

[Thompson v. St. Anthony Leased Housing Associates II, LP]

Supreme Court of Minnesota - August 24, 2022 - N.W.2d - 2022 WL 3640466

Tenant brought putative class action against landlords for breach of contract, breach of implied covenant of good faith and fair dealing, unjust enrichment, and violations of Uniform Deceptive Trade Practices Act and Consumer Fraud Act, alleging that landlords charged rent to rent-restricted tenants in apartment complex in excess of rate limits imposed by Minnesota Bond Allocation Act, which applied to privately-developed housing projects funded by municipal bond proceeds.

The District Court granted landlords' motion to dismiss for failure to state a claim. Tenant appealed. The Court of Appeals affirmed. The Supreme Court granted tenant's petition for further review.

The Supreme Court held that:

- Tenant had standing to bring claim against landlord for breach of contract based on rent increases in excess of amounts allowed by Bond Allocation Act, and
- Term "area fair market rent" in Bond Allocation Act meant fair market rent set for area by federal Department of Housing and Urban Development (HUD).

The Minnesota Bond Allocation Act does not provide a private cause of action to enforce its rent restrictions, and bond issuers have the sole enforcement authority.

Residential tenant's allegations that landlord charged her rent in excess of limits established by Minnesota Bond Allocation Act were sufficient to plead injury-in-fact, as necessary for standing to bring claim against landlord for breach of contract, even though Act did not provide tenant with private right of action to enforce its rent limits; tenant alleged that landlord promised in lease that any rent increases would be made in compliance with state and local laws, and that landlord's rent increases in excess of caused her economic injury.

Remedy provided by Minnesota Bond Allocation Act for developer's charging of excessive rent for tenants in housing project funded by municipal bond proceeds, namely statutory penalty payable to issuer, was not exclusive remedy for other parties that contracted with developer, and, thus, did not preclude tenant's claim against developer, as landlord, for violation of contractual promise not to increase rent beyond amounts permitted by Act.

Alleged failure by city, as issuer of municipal bond that funded development of housing project where tenant lived, to find that developer failed to comply with rent restrictions of Minnesota Bond Allocation Act and to assess statutory penalty did not preclude tenant's claim against developer, as landlord, for breach of contractual agreement not to increase rent beyond amounts authorized by Act; city's inaction did not govern whether developer violated lease by charging rent that exceeded statutory limit or whether tenant had standing to bring such claim against landlord.

Term "area fair market rent," as used in provision of Minnesota Bond Allocation Act requiring parties that received municipal bond proceeds for housing construction to offer at least 20% of units at rental rate that did not exceed "area fair market rent…as established by the federal Department of Housing and Urban Development" (HUD) had technical meaning of fair market rent figure set for area by HUD, not payment standard amount set by local public housing agency; Act's linking of rent restriction to rent figures set by HUD and mentioning of federal assistance programs indicated term had special meaning supplied by federal housing assistance law, payment standard was based on but did not equate to fair market rent, and HUD did not "establish," meaning generate, payment standards itself.

IMMUNITY - NORTH CAROLINA

Providence Volunteer Fire Department, Inc. v. Town of Weddington

Supreme Court of North Carolina - August 19, 2022 - S.E.2d - 2022 WL 3570915 - 2022-NCSC-100

Volunteer fire department brought action against town, its mayor, and rival fire department alleging breach of contract, fraud in inducement and actual fraud, deprivation of property and liberty without due process, and tortious interference with contract.

The Superior Court denied town's and mayor's motions to dismiss fraud-related claims, and they appealed. The Court of Appeals reversed and remanded. Fire department's request for discretionary review was granted.

The Supreme Court held that:

- Town was entitled to governmental immunity from liability for alleged fraud in connection with its sale and lease-back agreement involving fire station;
- As matter of first impression, legislative immunity is recognized bar to claims against North Carolina public officials; and
- Mayor was entitled to legislative immunity from liability for fraud-related claims arising from contracts' termination.

Activities in which town was engaged in course of its dealings with volunteer fire department were governmental, rather than proprietary, in nature, and thus town was entitled to governmental immunity from liability for alleged fraud in connection with its sale and lease-back agreement involving fire station, despite fire department's contention that transaction was proprietary in nature; fire protection services were traditionally provided by government—either directly or through contract with private entities—for purpose of protecting safety and well-being of its residents, town did not charge fee to its residents for fire protection services and did not make profit in connection with provision of such services, and agreement set out manner in which fire station would be provided.

Legislative immunity is recognized bar to claims against North Carolina public officials.

Local officials are entitled to legislative immunity from suit if (1) they were acting in legislative capacity at time of alleged incident; and (2) their acts were not illegal acts.

Mayor's actions in calling and setting agenda for town council meeting to vote to terminate town's contracts with volunteer fire department constituted legislative actions for which he was entitled to legislative immunity from liability for fraud-related claims arising from contracts' termination.

BANKRUPTCY - NORTH CAROLINA

[York County v. Appaloosa Management, LP]()

United States District Court, D. South Carolina, Rock Hill Division - August 17, 2022 - B.R. - 2022 WL 3572450

County filed complaint in state court alleging that related entities directed the misappropriation of $21,000,000 of statutorily restricted public funds for expanding road to five lanes and instead utilized the funds on football franchise's headquarters and practice facility, in connection with mixed-use development that included sports and entertainment venues.

Entities removed the case to federal district court, seeking ultimate reference to bankruptcy court, based on developer's Chapter 11 filing in the United States Bankruptcy Court for the District of Delaware. County moved to remand.

The District Court held that:

- County's removed action was "related to" developer's Chapter 11 case, but
- Court lacked "arising in" jurisdiction over county's action.

County's removed action alleging that related entities directed the misappropriation of $21,000,000 of statutorily restricted public funds for expanding road to five lanes and instead utilized the funds on football franchise's headquarters and practice facility, in connection with mixed-use development that included sports and entertainment venues, was "related to" developer's Chapter 11 case, for purposes of bankruptcy jurisdiction, because recovery by county against related entities could affect the claim that county asserted in developer's bankruptcy case for the same amount, existence of debtor's indemnification clause could conceivably have an effect on the administration of the bankruptcy estate, and debtor's adversary proceeding against county overlapped significantly with county's claims.

District Court lacked "arising in" jurisdiction over county's removed action alleging that related entities directed the misappropriation of $21,000,000 payment to Chapter 11 debtor-developer consisting of statutorily restricted public funds for expanding road to five lanes and instead utilized the funds on football franchise's headquarters and practice facility, in connection with mixed-use development that included sports and entertainment venues, because all of county's claims for civil conspiracy, negligence and negligence per se, interference with contractual relations, and negligent misrepresentation existed antecedent to debtor's bankruptcy filing, and a claim that pre-dated Chapter 11 filing could not be said to have arisen within that case.

PUBLIC WORKS - PENNSYLVANIA

[Ursinus College v. Prevailing Wage Appeals Board]

Commonwealth Court of Pennsylvania - August 4, 2022 - A.3d - 2022 WL 3093121

Private, non-profit college sought review of decision by Pennsylvania Prevailing Wage Appeals Board which reversed the decision of the Department of Labor and Industry, Bureau of Labor Law Compliance, concluding that construction project undertaken by college and financed by bonds issued by public authority was "public work" under the Pennsylvania Prevailing Wage Act, entitling members of labor union to prevailing wages for project work already completed.

The Commonwealth Court held that project was not "public work" under Pennsylvania Prevailing Wage Act.

Construction project undertaken by private, non-profit college and financed by bonds issued by public authority was not "public work" under Pennsylvania Prevailing Wage Act, although authority issued bonds and loaned funds to college under loan agreement, where authority was obligated to transfer funds to trustee, transfer took place before college received any funds for project, authority did not hold such funds, funds college used to pay for project were disbursed by trustee, rather than authority, college purchased bonds with private funds, college bore risk for repaying bonds, and Act required work be paid for out of funds of public body, rather than considering if college would have received funds "but for" acts of authority.

EMINENT DOMAIN - TEXAS

[State v. LBJ/Brookhaven Investors, L.P.]

Court of Appeals of Texas, Dallas - August 2, 2022 - S.W.3d - 2022 WL 3053893

Former owners of commercial property filed suit against State, Department of Transportation, Transportation Commission, Department's Executive Director, and Commission's Chairman, seeking to enforce their right of repurchase as to parcel of land along freeway that owners contended were taken in eminent domain proceedings and were no longer necessary to the project or public use.

The 134th District Court denied the State's plea to the jurisdiction. State appealed.

The Court of Appeals held that:

- State's failure to formally amend its condemnation petition to specifically reference parcel of land bordering its right of way did not deprive trial court of jurisdiction to render agreed judgment affecting parcel;
- State acquired parcel by eminent domain, for purposes of eminent domain right of repurchase statute; and
- Eminent domain statutes allow State to be sued in cases involving claims for property acquired by eminent domain, including issues involving right of repurchase statute.

State's failure to formally amend its condemnation petition to specifically reference parcel of land bordering State's right of way that was not included in State's original condemnation petition did not deprive trial court of jurisdiction to render agreed judgment in condemnation proceedings, and thus judgment was not void as to parcel; both sides were not only aware of the specific property that was being condemned, but they reached an agreement as to that property.

Agreed judgment entered in condemnation proceedings regarding state highway project unambiguously reflected that State acquired parcel of land bordering its right of way that were not included in its original condemnation proceedings by eminent domain, rather than by later-filed special warranty deed, for purposes of determining whether eminent domain right of repurchase statute applied to parcel; judgment provided that State was "condemning and acquiring" property described in exhibits that included parcel, decreed that State recover fee simple title to property described in exhibits, ordered State to pay property owners full compensation for condemnation, and, upon payment, released and discharged State of obligation to pay compensation for taking of property.

Statute setting district court's authority in eminent domain proceedings allows State to be sued in cases involving claims for property acquired by eminent domain, and gives district court authority over "all issues," not just condemnation and damages; these issues include those involving right of repurchase statute, which itself provides that district court may determine all issues in any suit regarding repurchase of real property interest acquired through eminent domain by former property owner or owner's heirs, successors, or assigns.

STATE MANDATES - CALIFORNIA

Coast Community College District v. Commission on State Mandates

Supreme Court of California - August 15, 2022 - P.3d - 2022 WL 3349232

Community college districts petitioned for writ of mandate challenging decision of Commission on State Mandates that funding entitlement regulations did not impose a state mandate under state constitutional provision requiring the State to reimburse local governments for state-mandated new programs or higher level of service.

The Superior Court denied petition and entered judgment. Districts appealed. The Court of Appeal reversed in part. Commissioner petitioned for review.

The Supreme Court held that funding entitlement regulations did not impose a state mandate under a legal compulsion theory.

Regulations specifying various conditions that community college districts were required to satisfy to avoid the possibility of having state aid reduced or withheld did not legally compel districts to comply, and thus regulations did not impose a state mandate under a legal compulsion theory for purposes of a local government's constitutional right to reimbursement for a state-mandated new program or higher level of service; fact that the standards set forth in regulations, including matriculation, hiring of faculty, and selecting curriculum, related to districts' core functions did not in itself establish that districts had a mandatory legal obligation to adopt those standards, and California Community Colleges Chancellor had discretion to pursue remedial measures for any noncompliance.

PUBLIC UTILITIES - FEDERAL

Consolidated Edison Company of New York, Inc. v. Federal Energy Regulatory Commission

United States Court of Appeals, District of Columbia Circuit - August 9, 2022 - F.4th - 2022 WL 3205886

Protesting entities separately petitioned for review of the Federal Energy Regulatory Commission's

(FERC) orders that approved regional transmission organization's cost allocations for upgrades to transmission owner's facilities.

After consolidation, the Court of Appeals held that:

- The FERC failed to reasonably explain why a "flow-based" method called the "solution-based distribution-factor analysis" (DFAX), which assigned costs based on how much each utility used a facility over time, was permissible to be used to allocate the costs of the upgrades;
- The "de minimis" threshold used in the DFAX violated the Federal Power Act's cost-causation principle and caused undue discrimination;
- The FERC reasonably explained its decision that netting the flows to each delivery point in a zone to calculate total flow in a zone did not violate the Federal Power Act's cost-causation principle and did not cause undue discrimination;
- It was reasonable to use a model of the flow of electricity that assumed that each zone was at peak demand;
- The FERC reasonably read the tariff as requiring an appropriate substitute proxy for the DFAX method;
- Responsibility of public utility outside of transmission organization's region to pay costs associated with the upgrades ended upon termination of its power exchange transmission service, or "wheeling," agreement with transmission owner; and
- The FERC reasonably came to and adequately explained conclusion that the overall cost allocation for entities outside the transmission organization's region was not unjust or unreasonable.

When approving regional transmission organization's cost allocations for upgrades to transmission owner's facilities, which upgrades were "non-flow-based" projects, the Federal Energy Regulatory Commission (FERC) failed to reasonably explain why a "flow-based" method called the "solution-based distribution-factor analysis" (DFAX), which assigned costs based on how much each utility used a facility over time, was permissible to be used to allocate the costs of the upgrades; when evaluating a separate project that also conferred non-flow-based benefits, the FERC had determined that using DFAX was not warranted, and although the FERC claimed that the upgrade projects involved resolving short-circuit issues in a way that made those projects like flow-based projects, the FERC conceded that, like the stability issue with the separate project, short-circuit problems were not directly caused by flow overloads on a facility.

When reviewing the Federal Energy Regulatory Commission's (FERC) orders that approved regional transmission organization's cost allocations for upgrades to transmission owner's facilities, the Court of Appeals had jurisdiction to consider argument that the FERC acted arbitrarily in treating the upgrade projects differently from a separate project when determining the appropriateness of the method used to assign costs; even though the protesting utilities failed to raise the argument when applying for rehearing of an initial FERC order, the FERC did not change its position as to the separate project until after the application for rehearing of the initial order, so the protesting utilities had a reasonable ground for failing to raise the argument.

The "de minimis" threshold used in the "flow-based" method called the "solution-based distribution-factor analysis" (DFAX) to allocate costs for upgrades to transmission owner's facilities violated the Federal Power Act's cost-causation principle and caused undue discrimination; under the threshold, if the "distribution factor," which was computed by dividing a zone's use of a facility by the zone's total load, was below 1%, then the zone would be assigned no costs, but such a threshold operated as a too-big-to-pay rule that bordered on the absurd.

Federal Energy Regulatory Commission (FERC) reasonably explained its decision that netting the flows to each delivery point in a zone to calculate total flow in a zone, which was a calculation process done as part of the “flow-based” method called the “solution-based distribution-factor analysis” (DFAX) to allocate costs for upgrades to transmission owner’s facilities, did not violate the Federal Power Act’s cost-causation principle and did not cause undue discrimination; under “netting,” receipt of electricity in a negative direction offset the receipt of electricity in a positive direction, but since counterflows increased capacity, it was reasonable to treat them as benefits that the zones could confer on the facilities.

When deciding on protesting entities’ petitions for review of the Federal Energy Regulatory Commission’s (FERC) orders that approved regional transmission organization’s cost allocations for upgrades to transmission owner’s facilities, the Court of Appeals lacked jurisdiction to consider certain arguments as to why netting the flows to each delivery point in a zone to calculate total flow in a zone violate the Federal Power Act’s cost-causation principle and caused undue discrimination; protesting utilities did not raise such argument in their applications for rehearing.

When deciding whether to approve regional transmission organization’s cost allocations for upgrades to transmission owner’s facilities, it was reasonable for the Federal Energy Regulatory Commission’s (FERC) to use a model of the flow of electricity that assumed that each zone was at peak demand; despite argument that the assumption overestimated the merchant transmission facilities’ use of the transmission facilities, the assumption was reasonable since transmission owner had to be able to meet peak load to guarantee system reliability.

When deciding whether to approve regional transmission organization’s cost allocations for upgrades to transmission owner’s facilities, the Federal Energy Regulatory Commission (FERC) reasonably read the tariff as requiring an appropriate substitute proxy for the “solution-based distribution-factor analysis” (DFAX) method to allocate costs of upgrades to transmission owner’s facilities only when the modeled flows were not consistent with the normal expected flow results that an engineer would expect to see; despite argument that the tariff required a departure from the DFAX method if it violated the Federal Power Act’s cost-causation principle, such an approach did not comport with requirement of FERC that costs be assigned ex ante.

Public utility’s responsibility to pay costs associated with upgrades to transmission owner’s facilities ended upon termination of its power exchange transmission service, or “wheeling,” agreement with transmission owner, and thus transmission organization for region that did not include utility could not allocate such costs to utility after the termination; post-wheeling-agreement settlement that clarified the parties’ rights and obligations made clear that utility had no liability for transmission enhancement charges after termination of term of service.

When reviewing Federal Energy Regulatory Commission’s (FERC) orders that approved regional transmission organization’s cost allocations for upgrades to transmission owner’s facilities, the Court of Appeals lacked jurisdiction to consider intervenor’s argument that the FERC’s decision to allow merchant transmission facility to avoid cost allocations for one of the upgrade projects was arbitrary; such an argument appeared nowhere in intervenor’s requests for rehearing before the FERC, which generally challenged the FERC’s handling of cost allocation.

When deciding whether to approve regional transmission organization’s cost allocations for upgrades to transmission owner’s facilities, the Federal Energy Regulatory Commission (FERC) reasonably came to and adequately explained conclusion that the overall cost allocation for entities outside the transmission organization’s region was not unjust or unreasonable; the FERC recognized that transmission organization was upgrade project’s planner, and the FERC relied on transmission organization’s statement that the project would still be needed in region even if there were no flows on the transmission facilities interconnecting the two regions at issue.

CONTRACTS - ILLINOIS

[PML Development LLC v. Village of Hawthorn Woods]

Appellate Court of Illinois, Second District - June 29, 2022 - N.E.3d - 2022 IL App (2d) 200779 - 2022 WL 2336455

Developer brought breach-of-contract action against village, alleging that village did not comply with agreement under which developer was authorized to fill and grade property in exchange for donating it, after filling and grading, to village. Village counterclaimed, alleging that developer breached agreement by failing to pay taxes on property.

Following a bench trial, the Circuit Court found that both parties had breached, but that village had breached first, and awarded developer much, but not all, of the damages it sought. Village appealed, and developer cross-appealed the damages award.

The Appellate Court held that:

- Trial court's finding that village had materially breached contract was not against the manifest weight of the evidence;
- Village violated its contractual obligation to act in good faith;
- Developer's decision to proceed under contract after village's breach meant that developer was not excused from its contractual obligations by village's breach;
- Village did not prevent developer from performing its contractual obligation to convey property to village;
- Developer's failure to pay taxes on property was misconduct that rendered developer's hands unclean and precluded developer from recovering under doctrine of unjust enrichment; and
- Developer's own material breach of contract, through its failure to pay property taxes, precluded developer's breach-of-contract claim against village.

EMINENT DOMAIN - INDIANA

[Nordin v. Town of Syracuse]

Court of Appeals of Indiana - July 14, 2022 - N.E.3d - 2022 WL 2721041

Property owners brought action against town for negligence, based on flooding of their cottage when a town worker accidentally turned on a water valve.

The Circuit Court granted summary judgment in favor of town. Property owners appealed.

The Court of Appeals held that:

- The Circuit Court erred in measuring damages based on difference between cottage's pre-flooding and post-flooding market value;
- Evidence supported the Circuit Court's determination as to cottage's pre-flooding market value;
- Genuine issue of material fact existed as to what repairs were necessary to restore cottage; and
- There was no evidence that costs associated with repairing cottage would have exceeded half of cottage's fair market value.

Trial court erred in measuring damages for flooding of a cottage based on difference between cottage's fair market value prior to flooding and after flooding, rather than simply cottage's pre-flooding market value, in property owners' negligence action against town which accidentally caused flooding; cottage could not be repaired and was rendered useless.

Evidence supported trial court's determination as to fair market value of cottage prior to flooding accidentally caused by town, for purposes of ruling on damages in property owners' negligence action; owners contended that town failed to show that pre-flooding property-tax assessment of cottage bore any resemblance to market value, but they cited no authority saying that tax assessment could not be evidence of market value, owners failed to explain how estimated costs of repairing cottage were reflective of pre-flooding market value, and it was undisputed that restored or rebuilt cottage would be significantly nicer and more valuable than old, unoccupied, and deteriorating structure which owner's purchased.

Genuine issue of material fact existed as to what repairs were necessary to restore cottage which was damaged when town accidentally caused flooding, precluding grant of town's motion for summary judgment on issue of loss of use in property owners' negligence action.

There was no evidence that costs associated with repairing a flooded cottage would have exceeded half of cottage's fair market value, precluding grant of town's motion for summary judgment on issue of loss of use in property owners' negligence action.

MUNICIPAL ORDINANCE - KANSAS

City of Wichita v. Trotter

Supreme Court of Kansas - August 12, 2022 - P.3d - 2022 WL 3330383

City charged defendant with violating municipal ordinances by operating an unlicensed after-hours establishment and operating an unlicensed entertainment establishment.

The Wichita Municipal Court found defendant guilty and ordered defendant to pay $200 fine and serve 12 months on nonreporting probation for after-hours violation, with underlying 90-day jail sentence, and ordered defendant to pay $200 fine for entertainment-licensing violation. Defendant appealed. On de novo review, the District Court dismissed the charges. City appealed. The Court of Appeals reversed and remanded with directions. Defendant petitioned for review, which was granted.

The Supreme Court held that:

- Defendant had standing to assert a First Amendment challenge;
- Defendant lacked standing to assert a Fourth Amendment challenge; and
- Licensing ordinances were overbroad in violation of First Amendment.

City ordinances requiring licenses for operation of after-hours establishments and criminalizing the operation of such establishments without a license were overbroad in violation of First Amendment right of assembly; although city had legitimate government interest in regulating late-night commercial activity, plain language of ordinances intruded into non-commercial gatherings during the hours from midnight until 6 a.m., including the right of assembly inside and around private homes.

ZONING & PLANNING - NORTH CAROLINA

Schooldev East, LLC v. Town of Wake Forest

Court of Appeals of North Carolina - July 19, 2022 - S.E.2d - 2022-NCCOA-494 - 2022 WL 2812335

After town planning board denied applicant's applications for major site plan and major subdivision approval to build a charter school, applicant filed a petition for writ of certiorari.

The Superior Court granted writ and affirmed the board's decision, and applicant appealed.

The Court of Appeals held that:

- Applicant's appeal from superior court's decision was not moot;
- Superior court erroneously exercised the whole record test in determining the preliminary legal question concerning the sufficiency of applicant's evidence;
- Term "street improvements" did not include sidewalk improvements, as that term was used in statute providing that city could only require "street improvements" related to schools that were required for safe ingress and egress to municipal street system;
- Statute providing that city could only require street improvements related to schools that were required for safe ingress and egress to the municipal street system did not prohibit towns from regulating pedestrian and bicycle connectivity; and
- Applicant failed to meet its burden of production to show that it satisfied town ordinance so as to establish prima facie case for entitlement to permits.

Court of Appeals had jurisdiction to address applicant's appeal from superior court's order entered upon review of a quasi-judicial decision by a municipality; town planning board denied applicant's applications for major site plan and major subdivision approval to build a charter school, and after certiorari was granted, superior court affirmed board's decision.

Applicant's appeal from trial court's decision affirming town planning board's denial of applications for major site plan and major subdivision approval to build charter school was not moot, even though applicant had allegedly renounced its legal right to "operate" charter school after filing its notice of appeal; applicant applied only for development permits under town's unified development ordinance (UDO), and it was a separate entity, namely charter school, that sought charter applications which would allow it to "operate" school, the questions originally in controversy between applicant and town were not moot, and decision on the existing controversy would have practical effect on applicant's ability to obtain the required development permits.

Superior court properly applied de novo standard of review in interpreting statute governing limitation on city requirements for street improvements related to schools and in reaching its decision that statute did not prohibit municipalities from regulating pedestrian and bicycle connectivity in relation to proposed new schools.

When reviewing town planning board's denial of applications for major site plan and major subdivision approval to build a charter school, superior court erroneously exercised the whole record test in determining the preliminary legal question concerning the sufficiency of applicant's evidence; instead, superior court should have applied de novo review to determine the initial legal issue of whether applicant had presented competent, material, and substantial evidence in support of its applications.

On review of town zoning board's decision, it was not prejudicial error when superior court erroneously exercised the whole record test, as opposed to de novo review, in determining the preliminary legal question concerning the sufficiency of applicant's evidence in support of its applications for major site plan and major subdivision approval to build a charter school, given that applicant failed to meet its burden of production to show it was entitled to the requested permits.

The Court of Appeals would review de novo whether statute governing limitation on city requirements for street improvements related to schools was properly interpreted in context of applicant's zoning applications for major site plan and major subdivision approval to build a charter school.

Term "street improvements" did not include sidewalk improvements, as that term was used in statute providing that city could only require "street improvements" related to schools that were required for safe ingress and egress to the municipal street system and that were physically connected to a driveway on the school site.

Statute providing that city could only require "street improvements" related to schools that were required for safe ingress and egress to the municipal street system and that were physically connected to a driveway on the school site did not prohibit towns from regulating pedestrian and bicycle connectivity in relation to proposed new schools; statutory term "street improvements" did not include sidewalk improvements.

Statute providing that charter school's specific location would not be prescribed or limited by a local board or other authority except a zoning authority did not prevent town from considering community plan policies with respect to schools and corresponding regulations, as town zoning board was acting as a zoning authority when denying applications for major site plan and major subdivision approval to build a charter school.

Town's community plan policy stating that public school locations should serve to reinforce desirable growth patterns rather than promoting sprawl was solely advisory, and thus, it was irrelevant to applications for major site plan and major subdivision approval to build a charter school and was not a proper basis for town zoning board to deny applicant's site plan application; community plan policy was a policy statement applicable to the planning of a new school location, and policy was not implemented by a zoning regulation.

Town's community plan policy providing that school campuses should be designed to allow safe pedestrian access from adjacent neighborhoods was a policy of the town's comprehensive plan to be implemented by a zoning regulation and could be changed at any time, and standing by itself, community plan policy was only advisory and did not have the force of law; however, the policy was implemented by town's unified development ordinance (UDO) requiring applicant for school to demonstrate how its plan would achieve walking and bicycle accessibility by schoolchildren to schools.

Applicant's failure to satisfy town's unified development ordinance (UDO), requiring applicant for school to demonstrate how its plan would achieve walking and bicycle accessibility by schoolchildren to schools, was a proper basis on which town denied applications for major site plan and major subdivision approval to build charter school.

Town's unified development ordinance (UDO) that was intended to regulate the development of land to be used for educational uses and required the provision of off-premise sidewalks and multi-use trails or paths to allow for accessibility by students to schools was a subdivision ordinance because it concerned a component of essential infrastructure for an elementary and secondary school within town's planning jurisdiction, and thus, superior court properly considered the ordinance in denying applicant's subdivision plan application in connection with charter school.

Applicant failed to show that it was not required to comply with town’s unified development ordinance (UDO) that was intended to regulate the development of land to be used for educational uses in order to satisfy conditions for approval of its applications for major site plan and major subdivision approval to build a charter school.

Town zoning board made ultimate decision as to whether applicant presented competent, material, and substantial evidence in support of its applications for major site plan and major subdivision approval to build a charter school and whether applicant met requirements of town unified ordinance that was intended to regulate the development of land to be used for educational uses.

Applicant failed to meet its burden of production to show that it met town unified development ordinance (UDO) requiring the provision of off-premise sidewalks and multi-use trails or paths to allow for accessibility by students to schools in order to establish a prima facie case for entitlement to permits for major site plan and major subdivision approval to build a charter school; applicant demonstrated that it would provide pedestrian connectivity to only one residential neighborhood through park located to the south of the proposed school.

Town’s local zoning ordinances requiring pedestrian connectivity and accessibility for schoolchildren to school were not preempted by statute providing that city could only require street improvements related to schools that were required for safe ingress and egress to the municipal street system and that were physically connected to a driveway on the school site.

EMINENT DOMAIN - NORTH DAKOTA

Northwest Landowners Association v. State

Supreme Court of North Dakota - August 4, 2022 - N.W.2d - 2022 WL 3096724 - 2022 ND 150

Landowners association brought action against State seeking a declaration that senate bill relating to subsurface pore space violated the state and federal takings clauses, and oil and gas company intervened as a defendant.

The District Court granted summary judgment for association. State and company appealed.

The Supreme Court held that:

- Portions of senate bill were a facially unconstitutional per se taking based on physical invasion of property;
- Unconstitutional portions of senate bill were severable from the remainder;
- Trial court acted within its discretion in denying further discovery as to value of pore space before ruling on summary judgment motion; and
- Association was entitled to attorney’s fees as prevailing party pursuant to § 1988.

Portions of senate bill relating to subsurface pore space, allowing a third-party oil and gas operator to use subsurface pore space, eliminating the right to compensation for “use of or lost value” to a surface owner’s pore space, and stating that injection or migration of substances into pore space for disposal operations, by itself, did not constitute trespass, nuisance, or other tort, constituted a per se taking that facially violated state and federal takings clauses based on physical invasion of property; those portions allowed oil and gas operators to physically invade a landowner’s property by injecting substances into the landowner’s pore space, restricted landowners from having any control over the timing, extent, or nature of the invasion, and prohibited the right to compensation for use of pore space.

The dominant mineral estate principle, arising from a severance of mineral rights from the surface creating an implied easement in favor of a mineral owner to use the surface estate as reasonably necessary to find and develop minerals, did not save portions of senate bill relating to subsurface pore space from facially violating state and federal takings clauses as a per se taking via physical invasion of property, where portions authorized subsurface disposal of waste by third-party oil and gas operators beyond scope of any implied easement and also barred surface owners from bringing a tort action for a trespass from disposal operations that were beyond scope of any implied easement.

Portions of senate bill relating to subsurface pore space, granting a broad authorization to third-party oil and gas operators to physically occupy landowners' pore space and barring demands for compensation or tort actions to secure rights, was an exercise of the State's police power which was limited by the state and federal takings clauses as a physical invasion of property, despite argument that landowners took title to pore space with an expectation that their title was limited by police power; landowners' takings claims were not premised on a regulation of what they could do with their property, and they did not take title subject to possibility that their property could be actually occupied or taken away without just compensation.

Facially unconstitutional provisions of senate bill relating to subsurface pore space, granting a broad authorization to third-party oil and gas operators to physically occupy landowners' pore space and barring demands for compensation or tort actions to secure rights in violation of state and federal takings clauses, were severable from remaining provisions, which included sections designating use of carbon dioxide as acceptable for enhanced recovery of oil, gas, and other minerals, granting North Dakota Industrial Commission (NDIC) authority to adopt and enforce rules and orders, and limiting application of certain other provisions in the context of existing contracts; remaining provisions were sufficiently distinct to operate independently from the unconstitutional provisions.

Landowners association's failure to expressly plead §§ 1983 and 1988 in its complaint seeking a declaration that a state senate bill relating to subsurface pore space was facially unconstitutional did not preclude an award of attorney fees to association as a prevailing party pursuant to § 1988 upon trial court's determination that the senate bill was a facially unconstitutional taking; attorney's fees could be awarded under § 1988 even if complaint did not expressly plead §§ 1983 and 1988, and complaint alleged a deprivation of a property right in violation of the Fifth and Fourteenth Amendments.

Landowners association that prevailed on its challenge to state senate bill relating to subsurface pore space as being a facially unconstitutional taking was entitled to attorney's fee pursuant to § 1988, despite argument that association lacked standing to assert its members' rights under § 1983; all that was required under § 1988 to award fees was that association prevail on a claim within scope of § 1983.

PUBLIC UTILITIES - OHIO

In re Application of Icebreaker Windpower, Inc.

Supreme Court of Ohio - August 10, 2022 - N.E.3d - 2022 WL 3220040 - 2022-Ohio-2742

Residents sought judicial review of decision of Ohio Power Siting Board granting certificate of environmental compatibility and public need for six-turbine wind-powered electric-generation facility to be built on submerged land in Lake Erie.

The Supreme Court held that:

- Evidence supported Board's determinations as to probable environmental impact on migrating birds and bats and steps for reducing such impact;
- Board properly determined that conditions on its grant of certificate were sufficient to protect birds and bats and ensure that facility represented minimum adverse environmental impact; and
- Board lacked jurisdiction to consider contention that proposed construction of facility violated public-trust doctrine.

Evidence supported Ohio Power Siting Board's determinations as to probable environmental impact with respect to migrating birds and bats and steps for reducing such impact, as relevant to request for certificate of environmental compatibility and public need for six-turbine wind-powered electric-generation facility to be built on submerged land in Lake Erie; Board cited studies that monitored birds and bats flying in vicinity of project site, Board cited evidence showing that small scale of project and location between eight and ten miles offshore severely reduced impact that facility would have on birds and bats, and Board cited radar studies showing that most migrating birds were expected to fly above rotor-swept zone of turbines.

Ohio Power Siting Board properly determined that conditions on its grant of certificate of environmental compatibility and public need for six-turbine wind-powered electric-generation facility to be built on submerged land in Lake Erie were sufficient to protect birds and bats and ensure that facility represented minimum adverse environmental impact; Board found that moving facility farther from shore and small scale of project minimized several potential adverse environmental impacts on wildlife, Board required certificate applicant to submit radar-monitoring plan prior to construction, and Board required applicant to install fully functioning collision-monitoring technology prior to operation.

Ohio Power Siting Board lacked jurisdiction to consider residents' contention that proposed construction of six-turbine wind-powered electric-generation facility to be built on submerged land in Lake Erie violated public-trust doctrine and, therefore, that project would not serve public interest, convenience, and necessity, so as to preclude certificate of environmental compatibility and public need; statutory provision setting forth condition that facility serve public interest, convenience, and necessity did not include language giving Board authority to make public-trust determinations concerning Lake Erie, nor did provision make mention of any obligation of state to hold waters and submerged land of Lake Erie in trust for people of Ohio.

ZONING & PLANNING - PENNSYLVANIA

In re Charlestown Outdoor, LLC

Supreme Court of Pennsylvania - August 16, 2022 - A.3d - 2022 WL 3364248

Property owner appealed decision of township zoning board, which denied property owner's challenge to validity of township's zoning ordinance that permitted construction of billboards in zoning district.

The Court of Common Pleas affirmed the zoning board's decision finding that the ordinance was not de facto exclusionary. Property owner appealed. The Commonwealth Court affirmed. Property owner's petition for allowance of appeal was granted.

The Supreme Court held that:

- Zoning ordinance was not the source of the exclusion, and thus ordinance was not de facto exclusionary, and
- Municipalities have no duty to review and revise zoning ordinances or to rezone for a particular use where a property owner's use is limited by third parties, including through governmental regulations beyond the municipality's control.

Ordinance that permitted billboards in zoning district did not impose conditions that rendered use impossible, rather, following construction of turnpike ramp subsequent to enactment of ordinance, it was Department of Transportation (PennDOT) regulation that precluded billboards in zoning district, and thus because zoning ordinance was not the source of the exclusion, ordinance was not de facto exclusionary in property owner's challenge to ordinance; ordinance permitted use on land that was rendered unusable for that purpose by intervening actions of a third party, other than setback provision, nothing in ordinance restricted placement of billboards in zoning district, and neither severing ordinance restrictions nor allowing property owner to erect a billboard were available as remedies.

Municipalities have no duty to review and revise their zoning ordinances or to rezone for a particular use where a property owner's use is limited by third parties, including through governmental regulations beyond the municipality's control.

To the extent that a de facto exclusion challenger to a zoning ordinance is successful, that success is limited to obtaining the opportunity to acquire and develop property in the zone where the use is permitted; if the defect asserted cannot be cured by severing restrictive provisions of ordinance, then the case stands in the same posture as one involving de jure exclusion, and the sole remedy is to allow use somewhere, and a successful litigant must receive that benefit in form of at least partial approval of a proposal.

SPECIAL ASSESSMENTS - CALIFORNIA

Broad Beach Geologic Hazard Abatement District v. 31506 Victoria Point LLC

Court of Appeal, Second District, Division 4, California - August 2, 2022 - Cal.Rptr.3d - 2022 WL 3053306

Property owners, including trust, filed petition for writ of mandate, seeking to set aside special assessment to fund shoreline fortification project as violative of state constitutional limitations on assessments.

The Superior Court entered judgment invalidating assessment, but subsequently denied property owners' motions for attorney fees under private attorney general statute. District appealed from judgment and property owners appealed from order denying attorney fees.

The Court of Appeal held that:

- Project would create general benefit of improved public beach;
- State agency's requirement that city district ensure public access to beach did not render beach cost of project rather than general benefit;
- District was required to apportion special benefits that revetment would confer on parcels behind it;
- District was required to assess county-owned parcels specially benefited by project;
- Possibility of new assessment in future did not render financial benefits from litigation so uncertain

as to warrant attorney fees;
- Trial court properly considered litigation benefits to property owners who joined litigation after petition was first filed in considering attorney fee award; and
- Trust had adequate financial motivation to participate in litigation absent award of attorney fees.

Shore fortification project would create wider, sandy beach that would benefit public in general, and, thus, constitutional provision governing assessments required city district to separate project's special benefits to certain parcels from general benefit, including beach, and include only portion of cost of project representing special benefits in special assessment used to fund project, even if general benefits did not impose additional costs and district did not subjectively intend to widen beach for recreational purposes; allowing any special benefit that also provided general benefits to support assessment for entire cost of project would be inconsistent with constitutional separation and quantification requirements, which depended on real-world effects rather than agency intent.

Coastal Commission's requirement that city district ensure public access to beach that would be enlarged and enhanced as a result of shore fortification project did not render enhanced public beach a cost of such project rather than general benefit, and, thus, did not exempt district from constitutional requirement of separating such general benefit from project's special benefit of protecting particular properties and include only costs attributable to special benefit when imposing special assessment on those properties; provision of wide, sandy beach was central to revetment project, not mere condition for approval or required consideration by agency, and Commission's action to ensure project would not cut off public's beach access did not transform project's general benefits into costs.

Revetment was integral part of city district's proposed shoreline fortification project, and, thus, constitutional article governing assessments required district, when imposing assessment to fund project, to apportion special benefits that revetment would confer by providing additional protection to parcels behind it so that assessment would be proportional to those parcels' relative special benefits, even though property owners constructed existing, temporary revetment and agreed to fund its relocation; State Lands Commission required district to pay for existing revetment's unauthorized use of state lands, district persuaded Coastal Commission to keep revetment, and Coastal Commission's conditions of approval required district to relocate revetment and mitigate its environmental impact.

Shoreline fortification project would provide special benefit of protection to county-owned parcels that contained stairs providing public access to beach, and, thus, constitutional article governing special assessments required city district to impose project-funding assessment against such parcels, even if project would not change stairs' function; project would protect shoreline, including stairs and parcels, by adding sand and maintaining revetment, each parcel encompassed large area, and constitution did not permit district to treat county parcels more favorably than it did privately-owned parcels that also received special benefit from project, such as by exempting county parcels from assessment or funding benefits to county parcels through in-kind contributions from homeowners.

LIABILITY - CALIFORNIA

Nunez v. City of Redondo Beach

Court of Appeal, Second District, Division 3, California - July 27, 2022 - Cal.Rptr.3d - 2022 WL 2965453 - 2022 Daily Journal D.A.R. 8078

Pedestrian filed a negligence lawsuit against city after she tripped on an elevated sidewalk slab and injured her left knee and right arm.

The Superior Court granted city summary judgment and pedestrian appealed.

The Court of Appeal held that city's policy to repair sidewalk tripping hazards greater than a half-inch did not create a triable issue of fact as to the triviality of sidewalk offset.

City's policy to repair sidewalk tripping hazards greater than a half-inch did not create a triable issue of fact as to the triviality of sidewalk offset, in pedestrian's negligence lawsuit against city after she tripped on an elevated sidewalk slab; minor defects to the alignment of city's sidewalk inevitably occur, and the continued existence of such nonalignments without warning or repair was not unreasonable and did not preclude the trial court from finding the sidewalk defect was trivial.

SCHOOL FINANCE - MISSISSIPPI

Wayne County School District v. Quitman School District

Supreme Court of Mississippi - July 28, 2022 - So.3d - 2022 WL 2980866

School district filed suit against neighboring school district seeking to recover pro rata distribution of funds arising from their shared trust property.

The Chancery Court entered judgment for plaintiff school district. Both sides appealed.

The Supreme Court, en banc, held that statute governing schools' division of revenue collected from shared townships was a condition precedent, not a statute of limitations.

Statute governing the manner in which revenue from shared townships was to be administered to school districts, which stated that "any school district failing to timely provide the list to the superintendent of the custodial school district shall forfeit its right to such funds" was not a statute of limitations that established a time limit for bringing a lawsuit; rather, it was a condition precedent school districts were required to fulfill.

EMINENT DOMAIN - NORTH CAROLINA

County of Moore v. Acres

Court of Appeals of North Carolina - July 5, 2022 - S.E.2d - 2022-NCCOA-446 - 2022 WL 2432952

County brought action against landowners, alleging that landowners had encroached on county's purported easement to access sewer and water mains on property by constructing fence and planting trees in easement area, and seeking injunctive and declaratory relief.

The Superior Court granted landowners' motion for summary judgment, and denied county's cross-motion for partial summary judgment on the issue of the county's ownership of the lines and easement. County appealed.

The Court of Appeals held that:

- Any inverse condemnation claim by landowners was untimely, and

- County held title to an easement along the surface of the property.

County held title to sewer and water mains under landowners' property, and thus held title to an easement along the surface of the property to service, maintain, and repair the utility mains, where county took possession of the lines more than two decades earlier and had continuously used and operated the lines for a public purpose.

PUBLIC UTILITIES - SOUTH DAKOTA

[Matter of Ehlebracht]

Supreme Court of South Dakota - August 3, 2022 - N.W.2d - 2022 WL 3097464 - 2022 S.D. 46

Intervenors impacted by potential wind energy farm appealed Public Utilities Commission's (PUC) approval of siting permit for wind energy farm.

The Circuit Court affirmed, and intervenors appealed.

The Supreme Court held that:

- PUC correctly applied legal standard requiring an applicant to comply with all applicable laws and rules;
- Application adequately complied with requirement that it include a "forecast" of the impact that the facility would have on solid waste management facilities;
- Adoption of noise levels set forth in amended county ordinance did not pose any danger to the health, safety, or welfare of the inhabitants living near the project;
- Applicant's failure to commission a field study to measure the ambient sound that existed naturally in area of proposed wind energy farm prior to construction did not indicate that applicant failed to meet its burden to show that the facility would not substantially impair the health, safety or welfare of the inhabitants;
- Applicant met its burden to show that the facility would not substantially impair the health, safety or welfare of the inhabitants as it related to the topic of infrasound; and
- Applicant was not required to submit an air quality study.

CHARTER SCHOOLS - TEXAS

[KIPP Texas, Inc. v. Doe #1]

Court of Appeals of Texas, Houston (1st Dist.) - June 30, 2022 - S.W.3d - 2022 WL 2347906

Parents of students sexually abused by counselor at charter school brought action against school's corporate operator, alleging claims for assault and negligence.

The District Court denied operator's plea to the jurisdiction, which asserted immunity from suit and liability. Operator appealed.

The Court of Appeals held that:

- Operator had governmental immunity from parents' suit;
- Open-courts provision of the State Constitution did not apply to preclude operator's governmental immunity; and

- Uncontroverted affidavit established operator’s status as an open-enrollment charter school.

Operator of open-enrollment charter school had governmental immunity from claims for assault and negligence brought by parents of students sexually abused by a counselor employed by operator at school, since a public school district would be immune from such claims.

Open-enrollment charter school had governmental immunity as a matter of common-law interpretation, rather than on the basis of statute, and thus open-courts provision of the State Constitution did not apply to preclude such immunity, so as to confer subject-matter jurisdiction over action against operator of open-enrollment charter school, brought by parents of children sexually abused by counselor, and asserting claims for assault and negligence; although the legislature enacted a statute granting governmental immunity to open-enrollment charter schools, the Supreme Court as a whole did not defer to such enactment in holding that open-enrollment charter schools have immunity.

Uncontroverted affidavit established operator of school as an open-enrollment charter school, as required for school’s governmental immunity from suit brought by parents of students sexually abused by school counselor, where parents did not object to the affidavit, did not file any evidence controverting the school’s status as an open-enrollment charter school, and sought a declaration that a certain statutory provision applicable only to open-enrollment charter schools violated the open-courts provision of the Texas Constitution, which was tantamount to a judicial admission of the school’s status as an open-enrollment charter school.

EMINENT DOMAIN - WASHINNGTON

Maslonka v. Public Utility District No. 1 of Pend Oreille County

Court of Appeals of Washington, Division 3 - August 2, 2022 - P.3d - 2022 WL 3037184

Landowners brought action against county public utility district, an operator of river dam that caused occasional flooding, seeking injunctive relief and asserting claims of inverse condemnation, trespass, nuisance, and negligence arising from flooding of their agricultural property.

Utility district counterclaimed for declaration of prescriptive easement to flood at water levels above those set forth in express easement.

On summary judgment, the Superior Court declared a prescriptive easement in favor of utility district and dismissed landowners’ claims. Landowners appealed.

The Court of Appeals held that:

- Continuous and uninterrupted use, as element of prescriptive easement, can be decided on summary judgment;
- As matter of first impression, a party asserting a prescriptive easement must prove each element by clear and convincing evidence;
- Factual issues precluded summary judgment on prescriptive easement claim;
- Factual issue as to applicability of subsequent purchaser rule precluded summary judgment on inverse condemnation claims as to riverfront parcel;
- Trespass and nuisance claims for riverfront parcel were not subsumed by inverse condemnation claims; and
- Utility district did not cause injury to inland agricultural parcel that allegedly flooded due to defect in diking improvements.

ADR - CALIFORNIA

People v. Maplebear Inc.

Court of Appeal, Fourth District, Division 1, California - July 28, 2022 - Cal.Rptr.3d - 2022 WL 2981169

City attorney brought an enforcement action under the Unfair Competition Law (UCL), on behalf of People, against operator of website and smart-phone application used to facilitate same-day, on-demand grocery shopping and delivery services, alleging that operator unlawfully misclassified its employees as independent contractors in order to deny them worker protections, harming its alleged employees and the public at large through a loss of significant payroll tax revenue, and giving operator unfair advantage against its competitors.

Operator moved to compel arbitration concerning city attorney's requests for injunctive relief and restitution. The Superior Court denied motion. Operator appealed.

The Court of Appeal held that city attorney was not bound by arbitration provisions of agreements between operator and its employees.

City, which brought action for restitution and injunctive relief under Unfair Competition Law (UCL) against operator of grocery-shopping and delivery smart-phone application, alleging that operator unlawfully misclassified its employees as independent contractors, was not bound by arbitration provisions of agreements between operator and its employees, where city was acting in its own law-enforcement capacity to seek civil penalties for labor violations traditionally prosecuted by state, city was indisputably not party to any arbitration agreement with operator, no individual employee had control over litigation and city did not need any individual employee's consent to bring action, and city's claims sought to vindicate public harms.

An action under the Unfair Competition Law (UCL) seeking injunctive relief and civil penalties filed by a public prosecutor on behalf of the People is not primarily concerned with restoring property or benefiting private parties; it is fundamentally a law-enforcement action with a public, penal objective.

Under the Broughton-Cruz rule, 988 P.2d 67, 66 P.3d 1157, agreements to arbitrate claims for public injunctive relief under the Consumers Legal Remedies Act (CLRA), the Unfair Competition Law, or the false advertising law are not enforceable in California; the central premise of the rule is that the judicial forum has significant institutional advantages over arbitration in administering a public injunctive remedy, which as a consequence will likely lead to the diminution or frustration of the public benefit if the remedy is entrusted to arbitrators.

EMINENT DOMAIN - INDIANA

701 Niles, LLC v. AEP Indiana Michigan Transmission Company, Inc.

Court of Appeals of Indiana - July 7, 2022 - N.E.3d - 2022 WL 2517441

Publicly-regulated utility company brought condemnation action against limited-liability corporation (LLC), seeking to obtain easements by eminent domain for an underground electric-transmission line.

The Circuit Court denied LLC's motion for preliminary injunction seeking to enjoin utility company from using the land for placement of a separate private transmission line for third-party private university. LLC filed interlocutory appeal.

The Court of Appeals held that:

- LLC did not knowingly waive any objections to use of the land for a wholly private purpose by third-party;
- Third-party could not be allowed to obtain easements for private use through utility company's condemnation action against LLC; and
- Placement of third-party's private electric-transmission line constituted a constitutionally-impermissible taking of a separate property right from LLC and therefore warranted injunctive relief.

Limited-liability corporation (LLC), which had been negotiating with publicly-regulated utility company regarding easements for an underground electric-transmission line across LLC's land, did not knowingly waive any objections to use of the land for a wholly private purpose by third-party university, in utility company's condemnation action against LLC, since utility company's condemnation complaint did not put LLC on notice of any intended use of the land by a private party, utility company only asserted a public use to which LLC had no objection, and utility company concealed its memorandum of understanding with university to allow the university to concurrently occupy the underground duct bank with the placement of a separate private transmission line.

Private university, as third-party, could not obtain easements for private use through publicly-regulated utility company's condemnation action against limited liability corporation (LLC), which sought to obtain easements on LLC's land by eminent domain for public use of underground electric-transmission line; private and public uses would not have been concurrent, separate line would have been installed and would separately need to be maintained for the university's sole private use, utility company acknowledged that arrangement with university to install separate line did not in any way further mission of transferring electric services to customers, and university's private line required extra construction materials and installation of additional manholes.

Placement of private electric-transmission line for sole use by private university, as third-party, on or through land owned by limited-liability corporation (LLC), which had negotiated with publicly-regulated utility company regarding placement of a transmission line intended only for public use, constituted a constitutionally-impermissible taking of a separate property right from LLC and therefore warranted injunctive relief enjoining utility company from installing the university's line to the duct bank without LLC's express consent, in utility company's condemnation action against LLC seeking to obtain easements by eminent domain, since the university's private line was separate and distinct from the line for public use sought by utility company.

ZONING & PLANNING - MARYLAND

Town of Upper Marlboro v. Prince George's County Council

Court of Appeals of Maryland - August 1, 2022 - A.3d - 2022 WL 3025099

Town filed petition for review of county council's adoption of minor amendment to remove schoolhouses from county historic sites and districts plan.

The Circuit Court denied petition, and town appealed. The Court of Special Appeals affirmed.

Certiorari was granted.

The Court of Appeals held that:

- Council's initiating resolution was not final agency action subject to judicial review;
- Council's adoption of minor amendment was judicially reviewable final agency action;
- Town could challenge council's passage of minor amendment by alleging procedural deficiencies in initiating resolution;
- Council's decision to adopt minor amendment was legislative action;
- County code provision stating that minor amendment process "may" be utilized for two specific purposes did not require minor amendment to fulfill either purpose;
- Council's initiating resolution adequately set forth minor amendment's purpose; and
- Initiating resolution adequately set forth minor amendment's scope.

HOSPITALS - MISSISSIPPI

SRHS Ambulatory Services, Inc. v. Pinehaven Group, LLC

Supreme Court of Mississippi - July 21, 2022 - So.3d - 2022 WL 2841696

Nonprofit corporation formed by county-owned community hospital, which entered into purchase agreement for property, filed action against vendor and title insurer, seeking declaration that the purchase of the property was void for lack of ratification by county board of supervisors, benefits under title insurance policy, and damages for title insurer's negligence.

Vendor counterclaimed for declaration of parties' rights under disputed purchase contract. The Circuit Court denied nonprofit's motion for summary judgment and granted vendor's motion for declaratory judgment. Nonprofit appealed.

The Supreme Court held that purchase was valid without ratification by county board of supervisors.

Purchase of property by nonprofit corporation formed by county-owned community hospital was valid without ratification by county board of trustees under statute governing operations of boards of trustee of community hospitals, which mandated owners' approval of real estate transactions when board acquired property; hospital board of trustees was not acquiring the property, hospital's board approved and financed nonprofit's acquisition of the property, nonprofit's board of directors voted to enter into contract with vendor for purchase, hospital board agreed in its meeting minutes to provide financial services to corporation, and hospital board approved in its resolutions the initial price needed to secure the property and the final price to complete the purchase.

EMINENT DOMAIN - TEXAS

State by and Through Texas Transportation Commission v. Suleiman

Court of Appeals of Texas, Houston (14th Dist.) - June 30, 2022 - S.W.3d - 2022 WL 2350048

Landowner and its registered agent brought action against State seeking declaration that prior settlement between registered agent, who owned adjacent parcel, and State precluded State from condemning landowner's property, and seeking injunction prohibiting State from taking landowner's property.

The District Court denied the State's motion to dismiss for lack of jurisdiction, and motion to abate the case. State brought interlocutory appeal challenging denial of motion to dismiss, and petitioned for writ of mandamus challenging denial of motion to abate.

The Court of Appeals held that county court had exclusive jurisdiction to determine issues raised in objections to condemnation award, and thus district court lacked subject matter jurisdiction over proceeding.

Landowner's filing of objections to special commissioners' award provided county court with exclusive jurisdiction to determine issues raised in objections, including landowner's contention that condemnation violated settlement agreement between State and landowner's registered agent concerning State's condemnation of adjoining parcel owned by agent, and thus district court lacked subject matter jurisdiction over proceeding brought by landowner and registered agent to enjoin State from condemning landowner's property based upon alleged violation of settlement agreement; request to enjoin state from violating settlement was not materially different from asking district court to enjoin condemnation proceeding, over which county court had exclusive jurisdiction.

LIABILITY - TEXAS

Doe v. Beaumont Independent School District

United States District Court, E.D. Texas, Beaumont Division - July 14, 2022 - F.Supp.3d - 2022 WL 2783047

Female public middle school students brought § 1983 action against school district and male former teacher, alleging violation of the Due Process Clause, for the deprivation of their rights of personal safety, security, and bodily integrity, and violations of the Equal Protection Clause in connection with relationship between former teacher and students and allegations of sexually abusive contact, and seeking damages and declaratory relief under Title IX.

School district moved to dismiss, and plaintiffs moved for protective and sealing orders.

The District Court held that:

- Student stated claim for the denial of substantive due process right to bodily integrity;
- Plaintiffs sufficiently alleged that school district's "pass the trash" policy created a breeding ground for sexual predators to exploit vulnerable schoolchildren so as to constitute a deprivation of the right to equal protection;
- Plaintiffs sufficiently alleged that school district's policy uniquely affected minor female students;
- Plaintiffs' irreparable injures had been caused as a result of policy so as to constitute a deprivation of the right to equal protection;
- Students sufficiently alleged existence widespread practice so as to state § 1983 *Monell* claim;
- Plaintiffs sufficiently alleged causal link between policy, *Monell's* scienter requirement, and students' injuries so as to establish deliberate indifference for purposes of "moving force" element of § 1983 *Monell* claim; and
- Plaintiffs sufficiently pled actual notice to an appropriate person of employee-on-student sexual harassment and abuse to state Title IX claim.

BOND VALIDATION - VERMONT

Soares v. Barnet Fire District #2

Supreme Court of Vermont - July 22, 2022 - A.3d - 2022 WL 2898896 - 2022 VT 34

Plaintiff brought action against fire district and municipal bond bank, challenging approval of municipal bond for loan to acquire fire district's private water system and secure state funding for its rehabilitation.

The Superior Court ruled on partial summary judgment and, following two-day trial, entered declaratory judgment for plaintiff but denied request to invalidate the bond vote, denied motion for reconsideration, and denied motion for attorney's fees. Plaintiff appealed.

The Supreme Court held that:

- Defects in bond approval procedure were subsequently cured by the committee's validation resolution;
- Open Meeting Law provision allowing attorney's fees did not apply retroactively; and
- Committee had authority to charge curb-stop fee.

Defects in procedure which fire district used to obtain approval for municipal bond for loan to acquire fire district's private water system and secure state funding for its rehabilitation, including failing to properly adopt a necessity resolution at a meeting before the bond vote and adopting warning and proposal for a bond vote at a districtwide meeting rather than at a prudential committee meeting, were the result of oversight, inadvertence, and mistake which were subsequently cured by the committee's validation resolution; committee consistently attempted to promote the interests underlying the Open Meeting Law and it acted in a transparent way throughout the process, and validation statute did not contain any exception for Open Meeting Law violations.

Plaintiff failed to establish on appeal that trial court, in action challenging approval of municipal bond, erred by failing to explicitly address his request for a new trial, in which he sought admit into evidence an exhibit and related testimony that was offered at trial as proof of the harm caused to him and the fire district community by violations of the Open Meeting Law; while plaintiff referenced evidence and testimony that the trial court apparently excluded at trial, he provided no transcript of the proceedings below and the Supreme Court had no record on which to evaluate his claim that the trial court should have admitted such evidence.

Open Meeting Law provision allowing attorney's fees did not apply retroactively to fire district committee's violation of the Law while approving municipal bond; provision was not solely remedial or procedural, but created a substantive change in the law by setting forth a process by which municipalities could become obligated to pay attorney's fees for violations of the Open Meeting Law where they had no such exposure before, and including a process by which municipalities could avoid such obligations, and it would be unfair to apply it to support an award of attorney's fees when committee had no ability to take the steps to avoid liability under the statute.

Fire district's prudential committee had authority, when approving municipal bond for loan to acquire fire district's private water system and secure state funding for its rehabilitation, to charge curb-stop fee; statutory authority to require existing customers to remain connected to the municipal water system necessarily encompassed the power to charge a fee to those who seek to leave that system.

PUBLIC RECORDS - CALIFORNIA

[Essick v. County of Sonoma]

Court of Appeal, First District, Division 4, California - June 29, 2022 - Cal.Rptr.3d - 80 Cal.App.5th 562 - 2022 WL 2339453

Elected county sheriff, against whom harassment complaint had been filed with county, moved for preliminary injunction to bar county's release of complaint, as well as report and related documents prepared by independent investigator, after local newspaper requested such release pursuant to California Public Records Act (CPRA).

The Superior Court denied motion. Sheriff appealed.

The Court of Appeal held that:

- County was not sheriff's employing agency;
- County did not take on role of sheriff's employer; and
- County's agreement that investigation would comply with Public Safety Officers Procedural Bill of Rights Act (POBRA) did not estop county from disclosing complaint, report, and related documents.

County, with which harassment complaint had been filed regarding county sheriff, was not sheriff's "employing agency," and thus complaint, as well as report and documents prepared by investigator, were not personnel records, as used in statute that protected as confidential information obtained from peace officers' personnel records, or confidential files related to investigation of complaint by member of public, for purposes of provision of California Public Records Act (CPRA) that protected from disclosure records the disclosure of which was prohibited by law, even though county paid sheriff; sheriff was public official elected by county voters, county board of supervisors, which had oversight responsibility over sheriff, lacked power to hire, fire, or discipline him, and complaint, report, and documents had no consequence for sheriff's duties or compensation.

County, by commissioning investigatory report after member of public filed harassment complaint against elected county sheriff, did not take on role of county sheriff's employer, for purposes of statutes that protected as confidential information obtained from peace officers' personnel records and confidential files related to investigation of complaint by member of public, and thus provision of California Public Records Act (CPRA) that protected from disclosure records the disclosure of which was prohibited by law did not apply.

County's agreement that investigation into harassment complaint filed against elected county sheriff would comply with Public Safety Officers Procedural Bill of Rights Act (POBRA) did not estop county from disclosing complaint, or subsequent investigatory report and related documents, pursuant to California Public Records Act (CPRA), even though sheriff argued such agreement created enforceable legal promise that records would be confidential; nothing in POBRA statutory scheme explicitly granted or mentioned confidentiality from CPRA requests, such that there was no misrepresentation or concealment of material facts, and if report and findings were to be treated as confidential, only protection came outside of POBRA, from penal code provisions related to disclosure of documents.

EMINENT DOMAIN - FLORIDA

Lemon Bay Cove, LLC v. United States

United States Court of Federal Claims - July 15, 2022 - Fed.Cl. - 2022 WL 2793949

Owner of wetlands comprised of submerged land and mangroves filed suit against United States, claiming that Army Corps of Engineers effected taking by denying owner Clean Water Act (CWA) permit to fill property in order to build 12-unit residential development on property.

Bench trial was held.

The Court of Federal Claims held that:

- Corps' denial of permit did not effect categorical taking, and
- Corps' denial of permit did not effect regulatory taking under *Penn Central*.

Army Corps of Engineers' denial of Clean Water Act (CWA) permit to fill 2.08 acres and to build 12-unit residential project on owner's wetlands comprised of submerged land and mangroves did not constitute categorical taking requiring just compensation, under Fifth Amendment; Corps' denial of permit did not deprive property of all economic value, as owner's persistence in pursuing development of 12-unit footprint for its own financial reasons, rather than considering smaller footprint, prevented Corps' consideration of any other economically viable uses of property.

Owner of wetlands comprised of submerged land and mangroves lacked reasonable investment-backed expectations sufficient to satisfy *Penn Central* regulatory taking requirements, based on Army Corps of Engineers' denial of Clean Water Act (CWA) permit for owner to fill 2.08 acres of property and build 12-unit residential project, where owner was aware at time of purchase that Corps' requirement of obtaining permit was longstanding regulatory restraint impacting potential development of owner's property.

MUNICIPAL ORDINANCE - INDIANA

City of Gary v. Nicholson

Supreme Court of Indiana - July 21, 2022 - N.E.3d - 2022 WL 2841364

State residents filed action seeking declaratory judgment that city's "welcoming ordinance" establishing commitment to protecting rights of immigrants violated state law and injunction preventing city from enforcing it.

Parties filed cross-motions for summary judgment, and the State intervened. The Superior Court entered summary judgment in favor of residents and entered injunction. City appealed. The Court of Appeals affirmed in part, reversed in part, and remanded with instructions.

On petition to transfer, the Supreme Court held that:

- Statute providing private right of action to compel enforcement with immigration laws did not confer standing;
- Residents lacked standing under public-standing doctrine; and
- State's intervention did not preclude dismissal based on residents' lack of standing.

Statute providing that, if a governmental body violates laws relating to citizen and immigration status information and enforcement of federal immigration laws, a person lawfully domiciled in Indiana may bring an action to compel the governmental body to comply with the laws, creates a private right of action, but it does not confer standing to bring such an action because it lacks an injury requirement; thus, a person lawfully domiciled in Indiana may have a statutory cause of action, but that does not mean the person has necessarily sustained an injury essential to obtaining judicial relief.

Indiana residents lacked standing under public-standing doctrine to bring action seeking declaratory judgment that city's "welcoming ordinance" establishing commitment to protecting rights of immigrants violated state law and injunction preventing city from enforcing it, in absence of allegations that they were injured.

State's intervention in action by Indiana residents seeking declaratory judgment that city's "welcoming ordinance" establishing commitment to protecting rights of immigrants violated state law and injunction preventing city from enforcing it did not preclude dismissal based on residents' lack of standing, where state did not file separate complaint, sought no relief from city, intervened only to offer its view of the meaning of the relevant statutory provisions, and conceded that dismissal would be appropriate if residents lacked standing.

ZONING & PLANNING - MASSACHUSETTS

City of Boston v. Conservation Commission of Quincy

Supreme Judicial Court of Massachusetts, Suffolk - July 25, 2022 - N.E.3d - 2022 WL 2911830

City sought certiorari review of local conservation commission's denial of city's application for permission to build a bridge that would impact wetlands, pursuant to Wetlands Protection Act and local wetlands ordinance.

The Superior Court Department allowed city's motion for partial judgment on the pleadings, after which the Superior Court Department entered a final judgment. Commission appealed.

The Supreme Judicial Court held that Department of Environmental Protection's (DEP) superseding order of conditions preempted the commission's denial of city's application.

Department of Environmental Protection's (DEP) superseding order of conditions pursuant to Wetlands Protection Act preempted local conservation commission's denial of city's application for permission to build a bridge to the extent that commission's decision was premised on impacts related to access road, where commission stated that it was unable to assess cumulative wetlands impacts under local wetlands ordinance, the impacts with which commission's consultants and commission were concerned were within DEP's purview, and differing analyses for any consideration by commission of impacts other than those that the DEP found meaningful were not due to local ordinance being more stringent than Act.

ZONING & PLANNING - MICHIGAN

Saugatuck Dunes Coastal Alliance v. Saugatuck Township

Supreme Court of Michigan - July 22, 2022 - N.W.2d - 2022 WL 2903871

Environmental organization with local residents as members brought action in which it sought review of township zoning board of appeals' separate decisions that organization lacked standing to appeal the grant of conditional, preliminary approval and the later grant of final approval to proposed residential site condominium project that included a marina and boat basin with boat slips.

The Circuit Court affirmed the board's determination that organization lacked standing to appeal the conditional, preliminary approval, the Circuit Court, affirmed the board's determination that organization lacked standing to appeal the final approval. Organization appealed both circuit court decisions. After consolidating the actions, the Court of Appeals affirmed in part and remanded. Organization applied for leave to appeal.

On the application for leave to appeal, the Supreme Court held that to be a "party aggrieved" by a zoning board of appeals decision, an appellant must have participated in the challenged proceedings by taking a position on the contested proposal or decision, must claim some protected interest or protected personal, pecuniary, or property right that will be or is likely to be affected by the challenged decision, and must provide some evidence of special damages arising from the challenged decision; overruling to a limited extent *Joseph v Grand Blanc Twp*, 5 Mich App 566, 147 N.W.2d 458; *Olsen v Chikaming Twp*, 325 Mich App 170, 924 N.W.2d 889; and other cases.

DISCIPLINE - NEW YORK

Matter of Genova

Supreme Court, Appellate Division, Second Department, New York - July 13, 2022 - N.Y.S.3d - 2022 WL 2709358 - 2022 N.Y. Slip Op. 04548

As part of attorney disciplinary proceeding, the Attorney Grievance Committee (AGC) moved to confirm special referee's report sustaining charges of professional misconduct against attorney, who was deputy town supervisor, and to impose discipline.

The Supreme Court, Appellate Division, held that disbarment was warranted for attorney's misconduct involving dishonesty, fraud, deceit, or misrepresentation.

Disbarment was warranted for misconduct of attorney, who was deputy town supervisor, in helping bidder on municipal contracts in acquiring unfair advantage, orchestrating loan guarantees by town for bidder, accepting bribes from bidder in form of car rides, meals, and discounts, and failing to disclose that town was guarantor for bidder on various financial documents; in aggravation, attorney engaged in corruptive practices as public official for personal and professional benefit, jeopardized financial well-being of town, received thousands of dollars in benefits from bribes, and damaged public's trust.

IMMUNITY - NORTH DAKOTA

Lovro v. City of Finley

Supreme Court of North Dakota - July 21, 2022 - N.W.2d - 2022 WL 2840065 - 2022 ND 145

Property owner brought action against city alleging negligence, gross negligence, and breach of contract seeking damages after city's water line broke and caused damage to owner's driveway and basement.

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

The Supreme Court held that:

- District court did not abuse its discretion in refusing to allow additional time for owner to conduct discovery before deciding city's motion for summary judgment;
- Owner failed to establish that city could or did waive its governmental immunity, and thus, owner's claims were barred by governmental immunity; and
- Owner waived issue for appellate review that district court erred in granting summary judgment dismissing his breach of contract claim.

Property owner failed to establish that city could or did waive its governmental immunity, and thus, owner's claims were barred by governmental immunity in action seeking damages against city alleging negligence and gross negligence after city's water line broke and caused damage to owner's driveway and basement; owner failed to cite any case law which provided that the discretionary function exception could be waived, and owner alleged the damages were caused by city's failure to property operate, maintain, repair, and inspect their water system.

BANKRUPTCY - PUERTO RICO

In re Financial Oversight and Management Board

United States Court of Appeals, First Circuit - July 18, 2022 - F.4th - 2022 WL 2800724

In Title III debt restructuring proceedings brought pursuant to the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), Financial Oversight and Management Board for Puerto Rico filed motion for confirmation of modified eighth amended proposed joint plan of adjustment for Commonwealth of Puerto Rico, Employees Retirement System of the Government of the Commonwealth of Puerto Rico and the Puerto Rico Public Buildings Authority.

Creditors objected. The United States District Court for the District of Puerto Rico overruled objections, and confirmed plan. Teachers' associations appealed and filed motions for stay pending appeal. The District Court denied stay motions. Board appealed to challenge ruling of Title III court that Fifth Amendment precluded plan from impairing prepetition claims for just compensation that arose under Takings Clause.

The Court of Appeals held that:

- Confirmation order under Title III of PROMESA could not be considered as categorically exempting takings claims from discharge as exercise of discretion;
- On issue of first impression, Fifth Amendment precluded impairment or discharge of prepetition claims for just compensation in bankruptcy under Title III of PROMESA; and
- Fifth Amendment did not permit impairment of prepetition claims for just compensation simply because claimants no longer possessed rights in taken property postpetition.

Live controversy existed over issue of otherwise valid Fifth Amendment takings claims arising prepetition could be discharged in bankruptcy proceedings under Title III of the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA) without payment of just compensation; although confirmed plan of adjustment provided for full payment of takings claims, plan expressly provided for such full payment only if Title III court's ruling on takings claims was upheld on appeal.

Confirmation order under Title III of Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA) could not be considered as categorically exempting takings claims from discharge as exercise of discretion, since Title III court necessarily determined that discharging valid, prepetition takings claims for less than just compensation would violate Fifth Amendment and render plan providing for such discharge unconfirmable under PROMESA, Title III court never purported to exercise any discretionary authority in exempting takings claims from discharge, and Title III court would have to had reason for exercising its discretion in that manner and only possible reason could be that Fifth Amendment required exempting takings claims from discharge.

Fifth Amendment precluded impairment or discharge of prepetition claims for just compensation in bankruptcy under Title III of the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA).

Fifth Amendment did not permit impairment of prepetition claims for just compensation simply because claimants no longer possess rights in taken property after governmental obligor has sought bankruptcy relief.

EMINENT DOMAIN - RHODE ISLAND

Johnston Equities Associates, LP v. Town of Johnston

Supreme Court of Rhode Island - July 1, 2022 - A.3d - 2022 WL 2378319

Owner of federally subsidized affordable-housing apartment complex brought continuing trespass action against town, town finance director, and town director of public works, alleging that they allowed sewage from town's sewer pipelines to be discharged into apartment complex's private sewer line.

The Superior Court entered judgment on jury verdict for complex owner but reduced $1.2 million award to $100,000 based on statutory cap on damages. Complex owner appealed, and town cross-appealed.

The Supreme Court held that:

- Complex's general contractor, who was a partner in complex's owner, did not have apparent authority to enter into agreement with town to transfer ownership of private sewer line to town;
- Evidence was insufficient to show that town's use of apartment complex's private sewer line was open and notorious, and thus town did not have a prescriptive easement;
- Town's continuing trespass was a "proprietary function" to which the statutory cap on tort damages did not apply;
  Public duty doctrine did not apply;
- Complex owner could recover prejudgment interest beginning from date on which it submitted presentment letter to the town council seeking damages;
- Evidence was sufficient to support finding of causation; and
- Bills, invoices, and general ledgers were supported by testimony of parties who performed the work that was the subject of those documents, and thus were admissible.

Town's continuing trespass through connection of town sewer line to apartment complex's private sewer line was not part of the design and construction of the system, and thus was not a "governmental function" but instead was a "proprietary function" to which the statutory cap on tort damages did not apply; town was unaware of the connection until shortly before the trespass action was filed, plans and maps did not show any plan for the town to tie into the private line, and claim was that town, by allowing its sewage to flow into the private line, wrongfully operated the town's sewage system.

LIABILITY - TEXAS

[Vess v. City of Dallas]()

United States District Court, N.D. Texas, Dallas Division - June 23, 2022 - F.Supp.3d - 2022 WL 2277504

City resident experiencing homelessness brought action against city and city fire-rescue department employee, asserting claims under § 1983 for excessive force and municipal liability arising from incident in which employee assaulted resident when employee responded to grass fire. Employee moved for judgment on the pleadings, city moved to dismiss.

The District Court held that:

- Resident was seized when employee kicked him in the head;
- Resident failed to state claim for municipal liability based on alleged custom or practice of inaction and attitude of indifference towards providing medical treatment for persons with mental health conditions and persons experiencing homelessness;
- Resident sufficiently alleged that city had practice or custom of protecting previously-disciplined and unfit fire department employees, as element of § 1983 claim for municipal liability;
- Resident sufficiently alleged that city's practice or custom of protecting previously-disciplined and unfit fire department employees was moving force behind department employee's actions; but
- Resident failed to sufficiently allege that city was deliberately indifferent in providing inadequate training regarding how to detain and treat persons with mental health conditions and persons experiencing homelessness.

IMMUNITY - VIRGINIA

[Patterson v. City of Danville]()

Supreme Court of Virginia - July 7, 2022 - S.E.2d - 2022 WL 2517205

Inmate's estate brought action against city jail physician, alleging that physician committed medical malpractice by failing to provide appropriate care to inmate, who died a few months after suffering from cardiac arrest in jail.

Danville Circuit Court granted physician's plea in bar to estate's negligence claim and granted physician's demurrer to estate's gross negligence claim. Estate appealed.

The Supreme Court held that:

- Physician was entitled to derivative sovereign immunity, and
- Physician's conduct did not rise to level of gross negligence.

Provision of constitutionally and statutorily required medical care to inmates at city jail involved exercise of powers and duties of a government conferred by law on the municipality, so as to qualify as a governmental function subjecting the city to sovereign immunity from tort liability arising therefrom, for purposes of determining jail physician’s derivative sovereign immunity, as a municipal employee, from medical negligence claim alleging that physician failed to provide appropriate care to inmate who died a few months after suffering from cardiac arrest in the jail.

City jail physician was entitled to derivative sovereign immunity from inmate’s estate’s medical negligence claim arising from allegations that inmate died after suffering from cardiac arrest at jail, for which physician failed to provide appropriate care; physician’s city employer had constitutional and statutory duty to provide medical care to incarcerated patients and chose physician as its agent to fulfill that duty, all of the allegations in the complaint involved discretionary, not ministerial, medical decisions made by physician, and city had great measure of control over physician, as he had no control over patients he was obligated to treat, he did not bill inmates for his services, he was required to treat inmates at the jail using city-owned equipment and supplies, and he was subject to supervision of jail director.

Inmate’s estate’s allegations of jail physician’s medical malpractice concentrated on physician’s inadequacy in treating inmate, who died a few months after suffering from cardiac arrest in jail, not a heedless and palpable violation of legal duty by a physician who refused to show even slight diligence or scant care, and thus, the allegations did not rise to level of gross negligence that would pierce physician’s derivative sovereign immunity defense; complaint provided long list of medical tests and treatments that inmate received and alleged that physician misdiagnosed inmate, but physician’s multiple efforts to treat inmate, whether or not negligently performed, demonstrated that physician was exercising some degree of care in his capacity as a physician.

EMINENT DOMAIN - FEDERAL

Graves v. United States

United States Court of Federal Claims - July 7, 2022 - Fed.Cl. - 2022 WL 2525366

Landowners brought action against United States, alleging physical taking, and land use exaction, of private right-of-way interest in United States Forest Service forest road offshoot that granted them exclusive use without just compensation, in violation of Fifth Amendment, and seeking declaratory and injunctive relief. United States moved to dismiss for lack of subject matter jurisdiction.

The Court of Federal Claims held that:

- Landowners objectively should have known of United States’ alleged physical taking of private right-of-way interest when they signed Federal Land Policy and Management Act (FLPMA) easement;
- Landowners failed to establish alleged taking was inherently unknowable; and
- Landowners failed to establish United States concealed alleged taking.

Landowners objectively should have known of United States’ alleged physical taking of private right-of-way interest in United States Forest Service (USFS) road offshoot, and thus takings claim accrued and six-year statute of limitations began to run, when they signed Federal Land Policy and Management Act (FLPMA) easement, even though owners argued claim accrued five years later, when they were first told that USFS was claiming ownership of road; takings claim was that USFS’ requirement that owner maintain easement, pay fees, obtain special use permit, and allow other landowners to use easement constituted taking, and such requirements were all included in easement owners signed, and owners had previously signed easement that placed upon them exact limitations and restrictions they disputed in instant proceeding.

Landowners failed to establish that United States' alleged physical taking of private right-of-way interest in United States Forest Service (USFS) road offshoot was inherently unknowable as of accrual date of takings claim, as would have suspended accrual of six-year statute of limitations for bringing such claim in Court of Federal Claims, pursuant to accrual suspension rule; all of the United States' actions that landowners alleged constituted takings claim, including that United States Forest Service (USFS) required them to pay fees, maintain permit, and allow others to use road, were requirements found in easements landowners had previously signed.

Landowners failed to establish that United States concealed its alleged physical taking of private right-of-way interest in United States Forest Service (USFS) road offshoot with result that they were unaware of acts' existence, as would have suspended accrual of six-year statute of limitations for bringing such claim in Court of Federal Claims, pursuant to accrual suspension rule, even though their complaint referenced conversation with United States Forest Service (USFS) official who landowners alleged put them on notice and landowners' counsel indicated at oral argument that there was outside agreement; landowners did not allege USFS prevented them from understanding easement into which they entered with United States or otherwise fraudulently concealed material facts to prevent them from learning of alleged taking.

INTERLOCAL AGREEMENTS - KANSAS

Delaware Township v. City of Lansing

Supreme Court of Kansas - July 8, 2022 - P.3d - 2022 WL 2661879

Municipalities petitioned for declaratory judgment to stop city's dissolution or alteration of fire district that was created by Board of County Commissioners under the Fire Protection Act and disposition of fire district property, and city counterclaimed seeking declaratory judgment that interlocal cooperation agreement governing joint operation and management of fire district was enforceable in its entirety, including agreement's termination and asset division provisions.

The District Court determined that city could not unilaterally alter or disorganize fire district and could not force a disposition of property as a matter of public policy. City appealed. The Court of Appeals affirmed. City petitioned for review, which was granted.

The Supreme Court held that:

- Agreement was enforceable on its own terms without placing fire district itself in any jeopardy of being unlawfully dissolved;
- Termination provision was not void as against public policy; and
- No party was prejudiced by unfair surprise.

Interlocal cooperation agreement governing joint operation and management of fire district, including termination and asset division provisions, was enforceable on its own terms without placing fire district itself in any jeopardy of being unlawfully dissolved; agreement acknowledged that there was a functional distinction between terminating the fire district and the agreement, and the power of any party to terminate agreement was clearly bargained for.

Termination provision of interlocal cooperation agreement governing joint operation and management of fire district was not void as against public policy; there was no reason to believe that individual party ownership of fire district assets was an inherent threat to public safety, municipalities had retained title to their own assets when they initially entered into agreement, there was no reason to believe any citizen would be left without adequate fire protection as assets would be fairly distributed and liabilities would be relatively allocated across all parties, leaving no party with disproportionate access to resources or stuck with disproportionate liabilities, and agreement required arbitration by a third party if parties could not agree on fairness.

No party was prejudiced by unfair surprise in connection with termination of interlocal cooperation agreement governing joint operation and management of fire district, and thus city's notice of termination of agreement was effective, such that municipalities were required to allocate assets and liabilities per agreement's terms; notice of 18 months was required for termination and that term was surely bargained for to allow the parties to make appropriate arrangements.

COUNTIES - MARYLAND

Prince George's County v. Thurston

Court of Appeals of Maryland - July 13, 2022 - A.3d - 2022 WL 2709752

82Petitioners sought a temporary restraining order and preliminary injunction to enjoin the use of Council Resolution, an alternative redistricting plan proposed by county council.

The Circuit Court declared the resolution was ineffective and determined the county redistricting commission's redistricting plan had become law. County petitioned for writ of certiorari, which was granted.

The Court of Appeals held that county council was required to use a bill and pass a law, and could not rely upon a resolution to enact an alternative redistricting plan.

County council was required to use a bill and pass a law, and could not rely upon a resolution to enact an alternative redistricting plan, when it elected not to adopt the plan of the redistricting commission following receipt of federal decennial census data, and council's failure to do so resulted in adoption of the commission's redistricting plan on the last day of November, pursuant to county charter.

Express Powers Act did not allow county council to enact an alternative redistricting plan different from the plan proposed by appointed redistricting commission by resolution, as argued by county, rather than by bill; while local government article provided that "[a] county may create and revise election districts and precincts," county charter, which was ratified by county voters, included redistricting provisions that expressly addressed creating and revising election districts.

State legislative districting process in state constitution did not allow county council to enact an alternative redistricting plan different from the plan proposed by appointed redistrict commission by resolution, as argued by county; statewide legislative districting was governed by the Constitution of Maryland and councilmanic redistricting was governed by the county charter, state and county have separate and distinct redistricting procedures, and the terms "joint resolution" and "resolution," and used by the general assembly and in county charter differed.

TRANSPORTATION IMPACT FEE CREDITS - MARYLAND

Anne Arundel County v. 808 Bestgate Realty, LLC

Court of Appeals of Maryland - July 7, 2022 - A.3d - 2022 WL 2526948

Developer petitioned for judicial review of decision of county board of appeals denying developer's request for transportation impact fee credits in connection with certain road improvements that it made to county road as part of redevelopment project.

The Circuit Court reversed board's decision. County appealed. The Court of Special Appeals affirmed in part and reversed in part. Developer and county filed petition for writ of certiorari, which the Court of Appeals granted.

The Court of Appeals held that:

- County code required county to award transportation impact fee credits to developer for improvements that exceeded road provisions and were approved by county's engineer administrator, and
- Remand for county board of appeals to address issue of whether developer's improvements were "site-related" improvements for which transportation impact fee credits could not be given was unnecessary.

County code provision stating that transportation impact fee credits "shall" be allowed for improvements providing capacity over provisions for adequate road facilities required county to award transportation impact fee credits to developer for improvements to county road that exceeded road provisions and were approved by county's engineer administrator, although developer satisfied road provisions without need for mitigation plan; the word "shall" was mandatory, not discretionary, nothing in code conditioned entitlement to credits on necessity of mitigation plan, and county had approved requests for credits where no mitigation was necessary to satisfy road provisions.

Remand for county board of appeals to address issue raised sua sponte by Court of Special Appeals of whether developer's improvements to county road as part of redevelopment project were "site-related" improvements for which transportation impact fee credits could not be given was not necessary or desirable to avoid the expense and delay of another appeal, given stipulation by county and developer in briefs and oral arguments before Court of Appeals that improvements were not "site-related."

IMMUNITY - MISSOURI

Torres v. City of St. Louis

United States Court of Appeals, Eighth Circuit - July 1, 2022 - F.4th - 2022 WL 2374560

Surviving family members of suspect who was shot and killed during the execution of a search warrant at his grandfather's home brought action against police officers and city, alleging unlawful seizure, use of excessive force, and conspiracy under § 1983 in violation of the Fourth Amendment, and alleging state-law claims for wrongful death and infliction of emotional distress. Additionally, grandfather filed action, alleging unlawful seizure.

The United States District Court denied officers' motion for summary judgment. Officers filed interlocutory appeal.

The Court of Appeals held that:

- Two officers could not be liable for use of excessive force;
- Court of Appeals lacked jurisdiction to consider whether officers were entitled to qualified immunity;
- Grandfather was not unlawfully seized in violation of Fourth Amendment; and
- Court of Appeals lacked jurisdiction to determine whether officers were entitled to official immunity.

Court of Appeals lacked jurisdiction to decide whether police officers who shot and killed suspect were entitled to qualified immunity, in § 1983 Fourth Amendment excessive force claim brought by surviving family members of suspect, where District Court denied qualified immunity based on genuine factual disputes as to whether suspect fired semi-automatic weapon at police and was armed when he was shot.

Suspect was not "seized" by police officers, within meaning of Fourth Amendment, although officers entered suspect's home and allegedly shot their firearms, where suspect did not acquiesce to officers' show of authority and his freedom of movement was not restrained.

Court of Appeals lacked jurisdiction to decide whether police officers who shot and killed suspect were entitled to official immunity, under Missouri law, from liability, in claims for wrongful death and negligent infliction of emotional distress brought by surviving family members of suspect, where District Court denied official immunity based on genuine factual disputes as to whether suspect fired semi-automatic weapon at police and was armed when he was shot.

PUBLIC EMPLOYMENT - MISSOURI

Poke v. Independence School District

Supreme Court of Missouri, en banc - July 12, 2022 - S.W.3d - 2022 WL 2707806

School-district employee brought action against district, asserting violation of state statute through alleged retaliation for filing workers' compensation claim.

The Circuit Court granted summary judgment to district. Employee appealed.

On transfer from the Court of Appeals, the Supreme Court held that statute creating private right of action for employees who are discharged, or discriminated against, by employer for exercising workers' compensation rights, read in conjunction with statute defining an "employer" for purposes of Workers' Compensation Law to include governmental entities, waived any sovereign immunity that school district had to employee's action; overruling *Krasney v. Curators of University of Missouri*, 765 S.W.2d 646; and *King v. Probate Division*, Circuit Court of County of St. Louis, 21st Judicial Circuit, 958 S.W.2d 92.

BONDS - NEW JERSEY

Goodman v. UBS Financial Services, Inc.

United States District Court, D. New Jersey - June 30, 2022 - Slip Copy - 2022 WL 2358403

Richard Goodman ("Bondholder") purchased – at a premium – a significant number of taxable municipal bonds, which he held in a brokerage account controlled by UBS Financial Services, Inc. ("UBS"). Bondholder alleged that for the tax years between 2015 and 2018, UBS incorrectly reported the amount of the amortized bond premiums on his 1099 Tax Form, causing him to significantly overpay his federal taxes.

Bondholder alleged that instead of following the policy set out in the UBS Form 1099 Guide, the Form 1099s that UBS provided to him, included only the amount of interest, without including the amortizable bond premium, either as a gross amount or as part of a net calculation.

Bondholder brought contract and tort claims on behalf of himself and similarly situated individuals and UBS moved to dismiss.

The United States District Court held that:

- Bondholder plausibly alleged that UBS violated two interrelated implied terms of the Client Relationship Agreement ("CRA"). The Court found that it is implied in the CRA that UBS would provide accurate tax forms and that UBS would follow its stated policies in providing tax forms;
- Bondholder failed to state a claim for the violation of the implied covenant of good faith and fair dealing;
- Bondholder had not plausibly alleged that there was a fiduciary relationship between him and UBS related to tax information reporting, and thus could not state a claim for breach of fiduciary duty;
- Bondholder failed to plausibly allege a duty of care that sufficed to state a claim for negligent misrepresentation; and
- Bondholder stated a claim for negligence. Factual issues precluded dismissal at this stage and the economic loss rule did not bar his claim.

IMMUNITY - VIRGINIA

[Patterson v. City of Danville]

Supreme Court of Virginia - July 7, 2022 - S.E.2d - 2022 WL 2517205

Inmate's estate brought action against city jail physician, alleging that physician committed medical malpractice by failing to provide appropriate care to inmate, who died a few months after suffering from cardiac arrest in jail.

Danville Circuit Court granted physician's plea in bar to estate's negligence claim and granted physician's demurrer to estate's gross negligence claim. Estate appealed.

The Supreme Court held that:

- Physician was entitled to derivative sovereign immunity, and
- Physician's conduct did not rise to level of gross negligence.

City jail physician was entitled to derivative sovereign immunity from inmate's estate's medical negligence claim arising from allegations that inmate died after suffering from cardiac arrest at jail, for which physician failed to provide appropriate care; physician's city employer had constitutional and statutory duty to provide medical care to incarcerated patients and chose physician as its agent to fulfill that duty, all of the allegations in the complaint involved discretionary, not ministerial, medical decisions made by physician, and city had great measure of control over physician, as he had no control over patients he was obligated to treat, he did not bill inmates for his services, he was required to treat inmates at the jail using city-owned equipment and supplies, and he was subject to supervision of jail director.

Inmate's estate's allegations of jail physician's medical malpractice concentrated on physician's inadequacy in treating inmate, who died a few months after suffering from cardiac arrest in jail, not a heedless and palpable violation of legal duty by a physician who refused to show even slight diligence or scant care, and thus, the allegations did not rise to level of gross negligence that would pierce physician's derivative sovereign immunity defense; complaint provided long list of medical tests and treatments that inmate received and alleged that physician misdiagnosed inmate, but physician's multiple efforts to treat inmate, whether or not negligently performed, demonstrated that physician was exercising some degree of care in his capacity as a physician.

PUBLIC UTILITIES - COLORADO

Danks v. Colorado Public Utilities Commission

Supreme Court of Colorado - June 13, 2022 - P.3d - 2022 WL 2112965 - 2022 CO 26

Owner of property near proposed pipelines for gas-gathering system, which collected and delivered raw gas from wells on private property to processing facilities, sought review of decision of Public Utilities Commission (PUC) denying in part owner's exceptions to administrative law judge's (ALJ) decision and determining that, with respect to operations upstream from processing facility, gas-gathering system was not "public utility" subject to regulation by PUC or statutory requirement that utility obtain certificate of public convenience and necessity (CPCN) before constructing new facility.

The District Court affirmed. Owner appealed.

The Supreme Court held that:

- PUC regularly pursued its authority;
- PUC reached just and reasonable decision;
- Substantial evidence supported PUC's decision; and
- PUC reasonably determined that no evidentiary hearing was necessary.

District court's order affirming decision of Public Utilities Commission (PUC) that, with respect to operations upstream from processing facility, gas-gathering system delivering raw gas from private wells to processing facilities was not "public utility" requiring certificate of public convenience and necessity (CPCN) was "final judgment" reviewable by Supreme Court, although PUC's decision purported to dismiss some allegations of owner of property near system's proposed pipelines without prejudice; PUC addressed owner's substantive claims, concluded that system was not public utility, and made clear that if PUC would find issue with downstream operations, then owner would be free to pursue claims relating to distinct operations in future proceedings, and district court affirmed rulings.

Public Utilities Commission (PUC) regularly pursued its authority in deciding that, with respect to operations upstream from processing facility, gas-gathering system delivering raw gas from private wells to facility using pipelines was not "public utility" subject to regulation by PUC or statutory requirement that utility obtain certificate of public convenience and necessity (CPCN) before constructing new facility; PUC looked to text of statute providing definition of "public utility," noted that Supreme Court had previously emphasized the phrase "for the purpose of supplying the public" when analyzing whether entity was public utility, and concluded that system did not meet definition as operator did not market raw gas that it gathered in its system.

Substantial evidence supported Public Utilities Commission's (PUC) decision that, with respect to operations upstream from processing facility, gas-gathering system delivering raw gas from private wells to facility using pipelines was not operated for purposes of supplying the public, such that it was not "public utility" subject to regulation by PUC or statutory requirement that utility obtain certificate of public convenience and necessity (CPCN) before constructing new facility; property owner who commenced administrative proceeding alleged in complaint that system's operator did not market the raw gas it owned, and ALJ found that operator did not market or sell any of the raw gas in its gathering system.

Public Utilities Commission (PUC) reasonably determined that no evidentiary hearing was necessary before deciding jurisdictional issues and dismissing property owner's complaint on the basis that, with respect to operations upstream from processing facility, gas-gathering system delivering raw gas from private wells to facility using pipelines was not "public utility" subject to regulation by PUC or statutory requirement that utility obtain certificate of public convenience and necessity (CPCN) before constructing new facility; PUC looked to civil procedure rules for guidance, under civil procedure rules, PUC could determine jurisdictional issues without evidentiary hearing if it accepted all complaint's assertions of fact as true, and PUC accepted owner's factual allegations as true.

EMINENT DOMAIN - FEDERAL

Haggart v. United States

United States Court of Appeals, Federal Circuit - June 22, 2022 - F.4th - 2022 WL 2231886

Landowners filed rails-to-trails class action against United States, claiming that conversion of their properties into recreational trail pursuant to National Trails System Act resulted in taking without just compensation.

After parties reached settlement agreement, the Court of Federal Claims granted landowners' motion to approve settlement and entered final judgment. Two class members objected to settlement and appealed. The United States Court of Appeals for the Federal Circuit vacated and remanded. On remand, the Court of Federal Claims again granted landowners' motion for approval of settlement. Government appealed. The Court of Appeals affirmed. Landowners then filed five separate motions for statutory attorney fees and costs, pursuant to Uniform Relocation Assistance and Real Property Acquisition Policies Act (URA). The Court of Federal Claims granted motions in part, and upon reconsideration denied landowner's motion for attorney fees and costs for legal work performed by her husband, who was attorney, joint owner of subject property, and co-plaintiff. Landowner appealed.

The Court of Appeals held that:

- Landowner was not entitled under URA to attorney fees, but
- Landowner's lack of entitlement to attorney fees did not preclude her from seeking recovery of certain expenses.

Landowner was not entitled under Uniform Relocation Assistance and Real Property Acquisition Policies Act (URA) to attorney fees for legal work performed by her husband, who was an attorney, following settlement of rails-to-trails class action alleging that conversion of properties into recreational trail resulted in taking without just compensation; there was absence of attorney-client relationship, even if there was attorney-client relationship, underlying claim was about taking of a property interest that was owned jointly by landowner and her husband as community property, and they pursued essentially unitary claim jointly, as co-plaintiffs, such that legal work amounted to pro se representation.

Landowner's lack of entitlement to attorney fees under Uniform Relocation Assistance and Real Property Acquisition Policies Act (URA) for legal work performed by her husband, who was an attorney, joint owner of subject property, and co-plaintiff, did not preclude her from seeking recovery of certain expenses under the URA, following settlement of rails-to-trails class action alleging that conversion of properties into recreational trail resulted in taking without just compensation, even if such expenses were related to legal work, since URA treated attorney fees and expenses separately.

PUBLIC UTILITIES - FEDERAL

[Belmont Municipal Light Department v. Federal Energy Regulatory Commission]()

United States Court of Appeals, District of Columbia Circuit - June 17, 2022 - F.4th - 2022 WL 2182810

Municipal electric utilities, state entities, and environmental groups petitioned for review of orders of Federal Energy Regulatory Commission (FERC) accepting tariff revisions by Independent System Operator for New England (ISO-NE), under Federal Power Act (FPA), to compensate generators for maintaining inventory of energy during upcoming winter months, and approving Inventoried Energy Program (IEP), under which ISO-NE would provide additional payments to generators to maintain up to three days' worth of fuel on-site and convert it into electricity and denying rehearing.

The Court of Appeals held that:

- Municipal electric utilities group had standing;
- State entities had standing;
- FERC's approval of portion of IEP that included coal, nuclear, biomass, and hydroelectric generators was arbitrary and capricious; and
- Portion of IEP that included coal, nuclear, biomass, and hydroelectric generators was severable and warranted vacatur.

Group of municipally-owned electric utilities had standing, under Article III and FPA, to challenge order of Federal Energy Regulatory Commission (FERC), approving Inventoried Energy Program (IEP), under which Independent System Operator for New England (ISO-NE) would provide additional payments to generators to maintain up to three days' worth of fuel on-site and convert it into electricity; group established imminent injury-in-fact by representing electrical utilities that would be expected to pay ISO-NE's designated rates under IEP, group's injuries were traceable to FERC's approval of IEP, and granting group's petition, vacating FERC's approval of ISO-NE's tariff provisions implementing IEP, and remanding to FERC would redress those injuries.

New Hampshire Office of Consumer Advocate, New Hampshire Public Utilities Commission (PUC), and Massachusetts Attorney General had standing, under Article III and FPA, to challenge order of Federal Energy Regulatory Commission (FERC), approving Inventoried Energy Program (IEP), providing additional payments to generators to maintain up to three days' worth of fuel on-site and convert it into electricity; state entities established imminent injury-in-fact by representing interests of states in protecting their citizens and electric ratepayers in traditional government field of utility regulation, injuries were traceable to FERC's approval of IEP, and granting state entities' petition, vacating FERC's approval of tariffs implementing IEP, and remanding to FERC would redress those injuries.

Federal Energy Regulatory Commission's (FERC) order, approving Inventoried Energy Program (IEP), under which Independent System Operator for New England (ISO-NE) would provide additional payments to generators to maintain up to three days' worth of fuel on-site and convert it into electricity, lacked adequate reasoning as to challenge that IEP added $40 million per year in new payments to nuclear, coal, biomass, and hydroelectric resources that were unlikely to change their behavior; FERC summarily accepted ISO-NE's contention that IEP's broad eligibility appropriately provided similar compensation for similar service, which completely disregarded challengers' argument, that IEP was overly inclusive and would give windfall payments to those resources, and ignored FERC's past precedents.

Federal Energy Regulatory Commission's (FERC) order, approving Inventoried Energy Program (IEP) under which Independent System Operator for New England (ISO-NE) would provide additional payments to generators to maintain up to three days' worth of fuel on-site and convert it into electricity, was severable and would be vacated as to arbitrary and capricious approval of IEP provisions concerning coal, nuclear, biomass, and hydroelectric generators that would not change their behavior in response to incentives thereby resulting in windfall payments to those resources; there was no substantial doubt that FERC would have adopted IEP without inclusion of nuclear, coal, biomass, and hydroelectric generators on its own, and remaining IEP provisions functioned sensibly without vacated portion.

INSURANCE - FLORIDA

Public Risk Management of Florida v. Munich Reinsurance America, Inc.

United States Court of Appeals, Eleventh Circuit - June 29, 2022 - F.4th - 2022 WL 2338572

Reinsured, a self-insured risk-management program that insured various local government entities in Florida, brought action against reinsurer, alleging breach of contract and seeking declaratory relief that reinsured was obligated to reimburse reinsurer for defense and coverage it provided to reinsured in underlying § 1983 and inverse condemnation action.

Reinsured brought counterclaims, seeking declaratory judgment that it had no duty to reimburse reinsured. The United States District Court for the Middle District of Florida adopted Report and Recommendation of United States Magistrate Judge and entered summary judgment for reinsurer. Reinsured appealed.

The Court of Appeals held that:

- Reinsured did not have duty to defend insured city, under public officials errors and omissions (E&O) policy, in underlying action;
- Reinsured, a self-insured risk-management program, did not have duty to indemnify insured city for settlement of § 1983 claim in underlying action; and
- Reinsurer did not have duty to reimburse reinsured, a self-insured risk-management program, for its defense and indemnification of city in underlying action.

Under Florida law, insurer, a self-insured risk-management program, did not have duty to defend insured city, under public officials errors and omissions (E&O) policy, in underlying § 1983 and inverse condemnation proceeding, as plaintiffs' alleged Fourth Amendment violations occurred prior to relevant coverage period under policy, and every alleged infringement by city of plaintiffs' possessory interest in their property was part of a series of related wrongful acts and, thus, a single "occurrence" under policy.

Under Florida law, reinsurer did not have duty to reimburse reinsured, a self-insured risk-management program, for its defense and indemnification of city in underlying § 1983 and inverse condemnation action, despite contention that "follow the fortunes" doctrine, which generally bound reinsurers to reinsured's decision to pay claim and required reinsurers to refrain from second guessing a good faith decision to do so, required reinsurer to reimburse reinsured; reinsurance agreement expressly required reinsured to submit to reinsurer proof it paid insured city as well as proof that agreement provided coverage for such payment, but underlying plaintiffs' alleged claims occurred prior to relevant coverage period under governing errors and omissions (E&O) policy.

Under Florida law, as predicted by the District Court, "follow the fortunes" doctrine, which generally bound reinsurers to reinsured's decision to pay claim and required reinsurers to refrain from second guessing a good faith decision to do so, would not be inferred to require reinsurer to reimburse reinsured, a self-insured risk-management program, for its defense and indemnification of city in underlying § 1983 and inverse condemnation proceeding; parties' reinsurance agreement contained terms that were plainly and unambiguously inconsistent with the doctrine, as it expressly required reinsured to submit to reinsurer proof it paid insured city, as well as proof the agreement provided coverage for such payment.

COUNTIES - IOWA

Landowners v. South Central Regional Airport Agency

Supreme Court of Iowa - June 24, 2022 - N.W.2d - 2022 WL 2277119

After two cities and county entered into joint powers agreement to create regional airport agency that would build and operate a new regional airport, cities filed suit to enforce county's obligations under the agreement, and landowners filed separate suit against cities and county, seeking judgment declaring that agreement was illegal and an injunction against agency to prevent it from acquiring land for airport via eminent domain.

The District Court granted summary judgment in favor of cities and against the county and landowners. County and landowners appealed, and appeals were consolidated.

The Supreme Court held that:

- Provisions of Iowa Code regarding county home rule authority did not preclude county from participating in regional airport agency formed pursuant to joint powers agreement, rather than mechanisms described in statutes;
- Statute providing that political subdivisions could establish joint airport commission was not exclusive mechanism for county's participation in regional airport agency;
- Statute providing mechanism for local governments to jointly create an airport authority did not preclude county's participation in agency;
- Agreement unconstitutionally bound future county board of supervisors in its exercise of legislative powers; and

- Agreement unlawfully restricted county’s ability to end its delegation of powers to agency.

Provisions of Iowa Code regarding county home rule authority did not preclude county from participating in regional airport agency formed pursuant to joint powers agreement, rather than mechanisms described in statutes providing for establishment and creation of joint airport commission or airport authority; statutory provisions describing county’s specific home rule powers related to airports listed specific powers county could exercise, but allowed county to exercise these or similar powers under its home rule powers or other provisions of law, unambiguously indicating that home rule powers related to airports were nonexclusive.

Statute providing that political subdivisions could establish joint airport commission was not exclusive mechanism for county’s participation in regional airport agency, and thus did not preclude county from participating in agency formed pursuant to joint powers agreement; language stating that political subdivisions “may provide for the creation and establishment of a joint airport commission which, when so created or established, shall function in accordance with the provisions” of statute meant only that if county chose to create a joint airport commission, then it must comply with the provisions of statute, but did not suggest that a joint airport commission was only mechanism for joint creation of airport by a county.

Statute providing mechanism for local governments to jointly create an airport authority did not preclude county from participating in regional airport agency formed pursuant to joint powers agreement, rather than mechanisms described in statute, where statute provided that it was intended to provide alternative and complete method for exercise of the powers to establish a joint airport authority, not that it was exclusive mechanism for doing so.

County’s home rule authority allowed it to exercise power jointly with cities pursuant to joint powers agreement creating regional airport agency that would build and operate new regional airport, rather than in manner described in statutes providing for establishment and creation of joint airport commission or airport authority; statute authorizing joint exercise of governmental powers allowed for the joint exercise of powers “already vested” in cooperating entities, and county already possessed power to establish airports under its home rule authority.

Provision of joint powers agreement between county and cities creating regional airport agency that would build and operate new regional airport, prohibiting amendment or termination of agreement without unanimous consent of all parties, unconstitutionally bound future county board of supervisors in its exercise of legislative powers; provision inextricably bound county to agency, provision bound county to exercise its legislative functions, such as its powers over zoning, road relocations, eminent domain, and issuing building permits, for an indefinite period, even if a new slate of supervisors was elected, and since county could not amend or terminate agreement without consent of cities, it was functionally bound to adhere to cession of core legislative functions for an indefinite period.

Joint powers agreement between county and cities, creating regional airport agency that would build and operate new regional airport, unlawfully restricted county’s ability to end its delegation of powers to agency; county entered agreement delegating to agency several governmental powers, including those over zoning, road relocations, eminent domain, and issuing building permits, and agreed to participate in agency after majority vote of its board of supervisors, but process for terminating agreement and withdrawing from agency was much more onerous, requiring consent of cities that were party to agreement.

ANNEXATION - KANSAS

City of Olathe v. City of Spring Hill

Supreme Court of Kansas - July 1, 2022 - P.3d - 2022 WL 2377171

First city brought action against second city, alleging breach of agreement not to annex certain property and seeking declaratory relief, preliminary and permanent injunctive relief, and temporary restraining order (TRO).

The District Court issued TRO, entered judgment that agreement was unenforceable as a governmental action that could not bind subsequent city councils, denied request for injunctive relief, and dismissed action. First city appealed and second city cross-appealed, and the District Court entered an order staying its ruling pending appeal. Second city filed motion to stay, modify, or vacate the stay, and the Court of Appeals denied motion, issued its own stay and injunction pending appeal, and granted first city's motion to transfer case to the Supreme Court.

The Supreme Court held that agreement was governmental in nature, and thus did not bind subsequent city councils.

Agreement between first city and second city not to annex certain land was governmental, and thus did not bind subsequent elected city councils; agreement addressed development, introduction, or improvement of services, which were quintessential policy considerations, and agreement had no hallmarks of contract for provision of services and did not call for any specific services to be provided.

IMMUNITY - MICHIGAN

Champine v. Department of Transportation

Supreme Court of Michigan - July 6, 2022 - N.W.2d - 2022 WL 2525392

Motorist brought action against state department of transportation alleging negligence and asserting the "highway exception" to the governmental tort liability act (GTLA), arising from injuries motorist allegedly sustained when a chunk of concrete from road struck his vehicle.

The Court of Claims granted department's motion for summary judgment, which was affirmed on appeal. Motorist appealed.

The Supreme Court held that motorist's complaint served as "notice" under the GTLA.

Motorist's complaint against state department of transportation served as "notice" of the occurrence of the injury and the defect, as required for application of the highway exception to governmental immunity under the governmental tort liability act (GTLA) in order to allow motorist to bring negligence claim, arising from injuries motorist allegedly sustained when a chunk of concrete from road struck his vehicle; complaint was brought within 120 days of the occurrence as specified by the GTLA, and text of GTLA did not indicate that there needed to be some temporal gap between the filing of a notice and the initiation of a lawsuit.

Nothing in the text pertaining to the notice requirements in order to assert an exception under the governmental tort liability act (GTLA) suggests that notice cannot be provided through the filing of a plaintiff's complaint within the statutory notice period.

A complaint filed within the statutory notice period, listing the factual circumstances and legal theories relevant to the cause of action, gives sufficient warning or legal notification of the occurrence of the injury and the defect, in order to meet the notice requirement in order to assert an exception under the governmental tort liability act (GTLA).

SCHOOLS - NORTH CAROLINA

Peltier v. Charter Day School, Inc.

United States Court of Appeals, Fourth Circuit - June 14, 2022 - 37 F.4th 104

Female students, through their parents, brought action against private nonprofit corporation that operated charter school, members of corporation's board, and for-profit corporation that managed school's day-to-day operation alleging that charter school's dress code, which required only female students to wear skirts, violated their rights under Equal Protection Clause, Title IX, and state law.

The United States District Court entered summary judgment in students' favor on equal protection claim and in defendants' favor on Title IX claim. Parties filed cross-appeals. The Court of Appeals reversed and remanded.

The Court of Appeals, on rehearing en banc, held that:

- Operator of charter school performed "state action" in implementing school's dress code, as required to support operator's liability, in § 1983 equal protection challenge;
- For-profit corporation did not perform "state action" in implementing school's dress code, as required for § 1983 liability;
- Charter school's dress code violated the Equal Protection Clause;
- For-profit corporation that managed school's day-to-day operations was "recipient" of federal financial assistance subject to Title IX; and
- Title IX applied to sex-based dress codes.

Private operator of charter school designated as public, under North Carolina law, performed "state action" in implementing school's dress code, which required only female students to wear skirts, as required to support operator's liability, in § 1983 equal protection challenge to dress code; under North Carolina's charter school system, state delegated to charter school operators part of state's traditional constitutional duty to provide free, universal elementary and secondary education to students, and school's dress code was central component of school's educational philosophy of providing a traditional educational environment with traditional manners.

For-profit corporation that contracted with private operator of charter school designated as public, under North Carolina law, to manage charter school's day-to-day operations did not perform "state action" in implementing school's dress code, which required only female students to wear skirts, as required to support for-profit corporation's liability, in § 1983 equal protection challenge to dress code; corporation had no direct relationship with state and was not party to the charter agreement between North Carolina and charter school operator, North Carolina did not otherwise delegate its constitutional duty to provide free, universal elementary and secondary education to for-profit management corporation, and the corporation contracted only with operator to provide management services.

Public charter school's dress code, which required only female students to wear skirts, violated the Equal Protection Clause; the skirts requirement was gender-based, it promoted impermissible gender stereotypes, including that girls were “fragile” and required protection by boys, and it did not serve any important governmental objective.

For-profit corporation that managed public charter school’s day-to-day operations was “recipient” of federal financial assistance through an intermediary, and thus, was subject to Title IX; it was undisputed that corporation received 90% of its funding from operator of charter school that it contracted with, and operator, in turn, received nearly all of its funding from public sources, including the federal government.

Title IX applied to sex-based dress codes promulgated by covered educational entities.

AIRPORT FEES - CALIFORNIA

Turo Inc. v. Superior Court of City and County of San Francisco

Court of Appeal, First District, Division 2, California - June 28, 2022 - Cal.Rptr.3d - 2022 WL 2314801

Operator of online platform that allowed car owners to rent their cars to other platform users petitioned for writ of mandate directing Superior Court to vacate order granting state’s and city’s motion for summary adjudication of his cause of action for declaratory judgment that it was not in the business of renting vehicles to the public for purposes of statute authorizing municipal airports to require rental companies to collect a fee from customers on behalf of the airports.

The Court of Appeal held that operator was neither a “renal car company” nor a “rental company” subject to the airport permit and fee collection requirements.

Operator of online platform that allowed car owners to rent their cars to other platform users was neither a “rental car company” nor a “rental company” within meaning of state law, and thus, it was not required to comply with statute authorizing the municipal airport to require a rental car company permit and the collection of fees from rental customers on behalf of the airport, since operator itself did not own, possess, or control the vehicles listed on its platform; under relevant statutes, the act of renting a vehicle required ownership or control of the vehicle.

INVERSE CONDEMNATION - MONTANA

Wittman v. City of Billings

Supreme Court of Montana. - July 5, 2022 - P.3d - 2022 WL 2437885 - 2022 MT 129

Homeowners brought inverse condemnation action against city arising from a single-event backup of raw sewage into their basement caused by a grease clog in city’s sewer main.

The District Court granted summary judgment for city. Homeowners appealed.

The Supreme Court held that sewage backup was not a constitutional damaging of homeowners’ property for public use.

A single-event backup of raw sewage into homeowners’ basement caused by grease clog in city’s sewer main was not a constitutional damaging of homeowners’ property for public use under the law of inverse condemnation, where city did not deliberately plan and build its sewer system in such a way that made damaging homeowners' property foreseeable, and backup was caused by misuse of system by people discharging grease into system.

Statistical possibility that homeowners could sustain damage from a backup of raw sewage into their basement from city's sewer system could not be used to establish an inverse condemnation claim against city arising from such a backup arising from a grease clog in the sewer main; fact that 0.04687 percent of sewer users across city experienced some form of a sanitary sewer overflow in a given year, from all causes, did not render homeowners' single-event backup foreseeable, and damage sustained from backup was properly considered an incidental or inadvertent consequence of operation of system.

EMINENT DOMAIN - OKLAHOMA

Snow v. Town of Calumet

Supreme Court of Oklahoma - June 21, 2022 - P.3d - 2022 WL 2204860 - 2022 OK 63

Landowners brought action against town for trespass and inverse condemnation, alleging that after expiration of two temporary easements that had been granted by their predecessors in interest, for town's installation and maintenance of two municipal sewer lines across the property, town continued to maintain the sewer lines, and town counterclaimed to quiet title based on easements by prescription.

The District Court granted summary judgment to town on owners' claims and granted summary judgment to owners on town's counterclaim. Owners appealed as to inverse condemnation claim, and the Supreme Court retained the appeal.

The Supreme Court held that inverse condemnation claim did not accrue until temporary easements expired, and thus, landowners had standing to sue.

Inverse condemnation claim did not accrue until two temporary easements granted by prior owners of land, for town's installation and maintenance of two municipal sewer lines across the property, expired, which expiration occurred after prior owners had sold the property to current owners, and thus, current owners had standing to bring inverse condemnation action against town, alleging town's maintenance of the sewer lines after expiration of the temporary easements.

EMINENT DOMAIN - TEXAS

Miles v. Texas Central Railroad & Infrastructure, Inc.

Supreme Court of Texas - June 24, 2022 - S.W.3d - 2022 WL 2282641 - 65 Tex. Sup. Ct. J. 1599

Owner of real property along proposed high-speed rail route brought action that sought, among other things, a declaratory judgment that the corporations that wished to survey the property lacked eminent-domain authority.

The District Court entered summary judgment in favor of property owner, awarded him attorney fees, and dismissed corporations' counterclaims with prejudice. Corporations appealed. The Corpus Christi-Edinburg Court of Appeals reversed, rendered judgment, and remanded. Property owner petitioned for review.

The Supreme Court held that the corporations qualified as “interurban electric railway companies” under the Transportation Code.

Corporations conducting surveys for a high-speed rail route qualified as “interurban electric railway companies” under the Transportation Code’s provision granting eminent-domain powers to corporations chartered for the purpose of constructing, acquiring, maintaining, or operating lines of electric railway between municipalities in Texas for the transportation of freight, passengers, or both, and thus corporations had eminent-domain powers under that statute; even though high-speed rail was unimaginable when the statute was enacted, rail project was an electric railway between municipalities in Texas, corporations were actually chartered for the statutorily authorized purpose of constructing, acquiring, maintaining, or operating lines of electric railway between municipalities in Texas for the transportation of freight, passengers, or both, and corporations were engaged in activities in furtherance of that purpose.

That corporation’s proposed railway would connect to the interstate rail system, and thus be subject to the Surface Transportation Board’s jurisdiction, did not mean that the railway could not be an “interurban railway,” as relevant to determining if corporation had eminent-domain powers under the Transportation Code for being an interurban electric railway company.

Corporations conducting surveys for high-speed rail route did not have to show that there was a reasonable probability of completing the route in order for them to have eminent-domain powers under Transportation Code’s provision that granted such powers to corporations chartered for the purpose of constructing, acquiring, maintaining, or operating lines of electric railway between municipalities in Texas for the transportation of freight, passengers, or both.

Statute that required companies with eminent-domain powers to submit by a certain date a letter to the comptroller containing information about such powers did not apply to corporation that qualified as an interurban electric railway company such that it had eminent-domain powers under the Transportation Code, and thus corporation’s failure to send such a letter did not extinguish its eminent-domain powers; it was not until after the deadline listed in that statute that corporation amended its charter to state that corporation’s purpose was to operate an interurban electric railway company, which was a necessary component of its acquisition of eminent-domain authority under the Transportation Code provision at issue.

EMINENT DOMAIN - TEXAS

In re Breviloba, LLC

Supreme Court of Texas - June 24, 2022 - S.W.3d - 2022 WL 2282598 - 65 Tex. Sup. Ct. J. 1679

Following proceeding in which landowner filed petition for writ of mandamus seeking to compel the County Court at Law to set aside order denying landowner’s plea to the jurisdiction and motion to transfer proceedings to district court in action in which pipeline builder sought to condemn portion of landowner’s property and landowner asserted counterclaims, in which the Waco Court of Appeals granted the petition, pipeline builder petitioned for writ of mandamus in which it argued county court at law had jurisdiction over counterclaims and therefore entire case.
Holding:

The Supreme Court held that county court at law had jurisdiction over pipeline builder’s action seeking to condemn portion of landowner’s property and landowner’s asserted counterclaims.

County court at law had jurisdiction over pipeline builder's action seeking to condemn portion of landowner's property and landowner's asserted counterclaims totaling over $13 million, though counterclaims exceeded court's statutory jurisdictional limit; counterclaims were part of eminent domain case as gravamen of landowner's counterclaims was challenge to pipeline builder's eminent domain authority, and concurrent jurisdiction statute granted court jurisdiction over eminent domain cases which was not subject to an amount-in-controversy limitation.

ZONING & PLANNING - UTAH

Salt Lake City Corporation v. Utah Inland Port Authority

Supreme Court of Utah - June 29, 2022 - P.3d - 2022 WL 2337654 - 2022 UT 27

City brought action to challenge Utah Inland Port Authority Act, which required that certain municipalities adopt specific zoning regulations and permissions favorable to developing an inland port and directed certain taxes to the project.

The District Court granted Utah Inland Port Authority's motions for summary judgment, and city appealed.

The Supreme Court held that:

- Act's disparate treatment of three cities was rationally related to a legitimate legislative purpose and thus did not violate the Uniform Operation of Laws Clause of the Utah Constitution;
- Court would decline to reach merits of issue of whether the Act violated the Uniform Operation of Laws Clause by redirecting property taxes, as legislature had amended the Act;
- Act's requirement that three cities "allow an inland port," and prohibition against them outlawing the "transporting, unloading, loading, transfer, or temporary storage of natural resources" on authority jurisdictional land, did not violate the Utah Constitution; and
- Court would decline to reach merits of issue of whether the Act violated the Utah Constitution through the redirection of tax revenue to an outside group or entity.

Utah Inland Port Authority Act's disparate treatment of three cities, by requiring them to have certain zoning regulations permitting port area and prohibiting certain regulations of port area activity, was rationally related to a legitimate legislative purpose and thus did not violate the Uniform Operation of Laws Clause of the Utah Constitution; Act's statewide public purpose was to maximize the long-term economic and other benefit for the state, studies projected that an inland port could create thousands of jobs, develop natural resource extraction industries, and make Utah a bigger player in the global economy, and classification cleared the way for the port by requiring the three cities to "allow an inland port" and preventing them from prohibiting activities necessary to operate it.

Utah Inland Port Authority Act's requirement that three cities "allow an inland port," and prohibition against them outlawing the "transporting, unloading, loading, transfer, or temporary storage of natural resources" on authority jurisdictional land, did not violate the Ripper Clause of the Utah Constitution, which prohibited delegation of authority to an outside group or entity; rather, Act's legislative mandates were aimed at certain municipalities.

Supreme Court would decline to reach merits of issue of whether Utah Inland Port Authority Act violated the Ripper Clause of the Utah Constitution through the redirection of tax revenue to an outside group or entity, as legislature had amended the Act to make substantive changes to the funding provisions; instead, Court would order the parties to submit supplemental briefing on whether the tax challenges to the Act were moot and should be dismissed.

IMMUNITY - WASHINGTON

Estate of McCartney by and through McCartney v. Pierce County

Court of Appeals of Washington, Division 2 - June 28, 2022 - P.3d - 2022 WL 2311855

Estate of deceased sheriff's deputy, by and through its personal representative, and members of deputy's family filed wrongful death action against county, alleging that county's failure to properly staff and train sheriff's department resulted in deputy's death in the line of duty, and sought a writ of mandamus ordering county to provide department with sufficient staffing.

The Superior Court granted county's motion for judgment on the pleadings. Plaintiffs appealed.

The Court of Appeals held that:

- Trial court could take judicial notice of county records regarding county's decisions on sheriff's department funding;
- Governmental discretionary immunity applied to county's decisions on funding for staffing of sheriff's department and sheriff's deputy allocation;
- Professional rescuer doctrine barred recovery by estate and family; and
- Workplace safety laws did not prescribe and define county's duty regarding sheriff's department staffing with such precision as to leave nothing to the exercise of discretion or judgment.

PUBLIC RECORDS - WISCONSIN

Friends of Frame Park, U.A. v. City of Waukesha

Supreme Court of Wisconsin - July 6, 2022 - N.W.2d - 2022 WL 2444511 - 2022 WI 57

Requester of a draft contract between city and private entity concerning terms under which entity's baseball team would play in stadium to be constructed in city park brought mandamus action seeking access to the contract.

After releasing the requested record, city moved for summary judgment. The Circuit Court entered summary judgment for city, denied requester's motion for attorney fees, and dismissed action in its entirety. Requester appealed. The Court of Appeals reversed and remanded with directions. City petitioned for review.

The Supreme Court held that:

- As a matter of apparent first impression, to "prevail in whole or in substantial part," as that phrase is used in statute allowing requester of public records to recover attorney fees if requester prevails in whole or part in action for release of records, means requester must obtain judicially sanctioned change in parties' legal relationship; abrogating *Racine Education Ass'n v. Board of Education for Racine Unified School District*, 129 Wis.2d 319, 385 N.W.2d 510; State ex rel. Vaughan v. Faust, 143 Wis.2d 868, 422 N.W.2d 898; *Merco Distrib. Corp. v. Com. Police Alarm Co.*, 84 Wis.2d 455, 267 N.W.2d 652; and *WTMJ, Inc. v. Sullivan*, 204 Wis.2d 452, 555 N.W.2d 140, and
- Public interest warranted city's withholding of draft contract until consultation with common

council.

IMMUNITY - ALABAMA

Ex parte City of Warrior

Supreme Court of Alabama - June 24, 2022 - So.3d - 2022 WL 2286244

Personal representative of estate of motorist killed in collision with vehicle going the wrong way while its driver was attempting to flee police brought negligence action against fictitiously named defendants, who, personal representative claimed, were yet-to-be-named police officers or individuals who were in pursuit of the wrong-way vehicle's driver.

Personal representative later amended the complaint to substitute the names of police officers for the fictitiously named defendants. The Circuit Court denied police officers' motion for summary judgment. Officers petitioned for mandamus relief. The Supreme Court granted the petition and issued the writ. City and town filed motions for summary judgment. The Circuit Court denied city and town's motions for summary judgment. City and town filed a petition for a writ of mandamus directing the Circuit Court to vacate its order denying their motions for summary judgment in tort action.

The Supreme Court held that city and town were entitled to immunity.

City and town were entitled to immunity in estate of motorist's action alleging city and town were vicariously liable under doctrine of respondeat superior for the purported wrongful conduct of their police officers, who engaged in a high speed pursuit of defendant driver, during which driver drove the wrong way on interstate and caused a head-on collision with motorist, resulting in the death of motorist; police officers were performing discretionary law enforcement functions in pursuing defendant driver's vehicle in an attempt to place him under arrest for evading a lawful traffic stop, and thus officers were entitled to State-agent immunity from liability on claims filed by estate of motorist.

ATTORNEYS' FEES - CALIFORNIA

City of Los Angeles Department of Airports v. U.S. Specialty Insurance Company

Court of Appeal, First District, Division 5, California - June 15, 2022 - Cal.Rptr.3d - 2022 WL 2156119

City department of airports brought action against manufacturer of airport firefighting trucks and surety on performance bond alleging that manufacturer breached build contract and seeking enforcement of performance bond.

Manufacturer brought separate contract action against department and actions were consolidated.

The Superior Court entered judgment upon jury verdict in favor of city on all claims, awarded department $1 in nominal damages, and denied motions by department and surety for contractual attorney fees. Department and surety appealed. The Court of Appeal reversed and remanded. On remand, the Superior Court denied applications by department and surety for contractual attorney fees as a prevailing party. Surety appealed.

The Court of Appeal held that trial court did not abuse its discretion in determining that surety was not prevailing party entitled to contractual attorney fees.

Trial court did not abuse its discretion in determining that surety on performance bond with manufacturer who agreed to build airport firefighting trucks for city department of airports was not “prevailing party” entitled to contractual attorney fees, in consolidated contract actions by department and manufacturer, even though surety asserted no affirmative claims for damages against department and department was limited to nominal damages, since surety and manufacturer were represented by same counsel at trial, submitted joint trial brief, and agreed to joint jury instructions rendering surety liable if manufacturer was found liable, such that success on contract claims was important objective, not just limiting damages, and jury found in favor of department on all contract claims.

EMINENT DOMAIN - LOUISIANA

City of Baton Rouge v. Mucciacciaro

Court of Appeal of Louisiana, First Circuit - May 25, 2022 - So.3d - 2022 WL 1658374 - 2021-0656 (La.App. 1 Cir. 5/25/22)

City filed petition for expropriation seeking to acquire for the expansion of a roadway three separate parcels of land owned by landowner that contained restaurant, office, and rental property.

The District Court entered an order of expropriation, expropriating the three parcels, ordered city to deposit the sum of $1,515,278 into the registry of the court, and ordered landowner to surrender the properties.

Following landowner’s answer and reconventional demand seeking additional compensation, in a bench trial the District Court awarded landowner $3,669,143 as just compensation in addition to the earlier deposit, twenty-five percent attorney fees, and all court costs. City appealed.

The Court of Appeal held that:

- Trial court abused its discretion by limiting testimony of city’s real estate appraisal expert regarding valuation of restaurant property in not permitting expert to expound on her calculated just compensation and refusing to allow city to fully question her concerning whether property was unique or indispensable;
- Restaurant property was not considered unique and indispensable and thus landowner was not entitled to replacement cost without depreciation as just compensation for partial expropriation;
- Landowner failed to prove by preponderance of the evidence his entitlement to higher value of just compensation than the $1,325,238 deposited for expropriated portion of restaurant property;
- Remainder of restaurant property not subject to expropriation did not constitute uneconomic remainder but did result in parcel to have more limited utility and thus landowner was entitled to severance damages of $262,495;
- Trial court manifestly erred in finding landowner met burden of proving another highest and best use for his office property and thus just compensation of $71,500 was appropriate;
- Trial court did not manifestly err in finding landowner met burden of proving that city did not justly compensate him for taking of portion of rental property; and
- Trial court did not manifestly err in finding landowner was entitled to lost rental profits of $8,000 for rental property.

SCHOOL FUNDING - FEDERAL

Carson as next friend of O. C. v. Makin

Supreme Court of the United States - June 21, 2022 - S.Ct. - 2022 WL 2203333

Parents of secondary school students filed § 1983 action against Commissioner of Maine Department of Education, alleging the “nonsectarian” requirement of Maine’s tuition assistance program for private secondary schools violated the Free Exercise Clause and the Establishment Clause of the First Amendment, as well as the Equal Protection Clause of the Fourteenth Amendment, and seeking declaratory and injunctive relief against enforcement of the requirement.

The United States District Court for the District of Maine granted the Commissioner’s motion for judgment on a stipulated record. Parents appealed. The United States Court of Appeals for the First Circuit affirmed. Certiorari was granted.

The Supreme Court held that:

- Program’s “nonsectarian” requirement conditioned benefits solely due to a school’s religious character, and thus was subject to strictest scrutiny;
- Program’s “nonsectarian” requirement violated the Free Exercise Clause of the First Amendment; and
- Program’s “nonsectarian” requirement could not be justified on ground it imposed a use-based, and not a status-based, restriction on state funds.

Maine law, which required that any private secondary school receiving state funds from its otherwise generally available tuition assistance program be “nonsectarian,” conditioned the availability of benefits solely due to a school’s religious character, and thus, the law was subject to the strictest scrutiny, on § 1983 claim brought by parents of secondary school students, who alleged the law violated the Free Exercise Clause of the First Amendment; the program effectively penalized the free exercise of religion by disqualifying some private schools from a generally available benefit for families whose school district did not provide a public secondary school solely because the schools were religious.

Maine’s requirement, that any private secondary school receiving state funds from its otherwise generally available tuition assistance program be “nonsectarian,” violated the Free Exercise Clause of the First Amendment; regardless of how the benefit and restriction were described, the program was not neutral, as it operated to identify and exclude otherwise eligible schools on the basis of their religious exercise, the exclusion of religious schools from the program promoted stricter separation of church and state than the Federal Constitution required, and under the program a private school did not have to offer an education that was equivalent to that available in Maine public schools in order to be eligible for state funds.

Maine law requiring that any private secondary school receiving state funds from tuition assistance program be “nonsectarian” could not be justified, under the First Amendment’s Free Exercise Clause, on the ground the law imposed a use-based restriction on state funds, and not a restriction based on religious status; any attempt to give effect to such a distinction by scrutinizing whether and how a religious school pursued its educational mission would raise serious concerns about state entanglement with religion and denominational favoritism, and Maine conceded that it barely engaged in any such scrutiny when enforcing the “nonsectarian” requirement.

PUBLIC UTILITIES - RHODE ISLAND

Borgo v. Narragansett Electric Company

Supreme Court of Rhode Island - June 6, 2022 - A.3d - 2022 WL 1919030

Admitted trespasser brought negligence action against utility company seeking damages for injuries she sustained in an accident at an active electrical substation.

The Superior Court entered summary judgment for utility company. Trespasser appealed.

The Supreme Court held that:

- Utility company did not owe a duty of care absent actual discovery of trespasser in position of peril, and
- Public Utilities Commission (PUC) safety regulations did not create a duty owed to trespasser.

Evidence of frequent trespassers at active electrical substation, including ladder inside the building that was not placed there by utility company, did not give rise to a duty of care owed by utility company to admitted trespasser, absent actual discovery of trespasser in position of peril by utility company, thus precluding trespasser's negligence claim seeking damages for injuries, including an amputated hand, incurred as result of accident at substation, which she entered by crawling under a closed fence.

It could not be discerned from Public Utilities Commission (PUC) safety regulations that PUC intended to protect members of the general public harmed at an electrical facility, and thus, the regulations did not create duty owed by utility company to admitted trespasser who was injured at an electrical substation; there was no language in the regulations that gave any indication that the imposition of safety standards on public utilities was designed to protect members of the general public, nor was there any mention of a purpose or concern for safety of the general public.

SPECIAL SERVICE DISTRICTS - UTAH

Cove at Little Valley Homeowners Association v. Traverse Ridge Special Service District

Supreme Court of Utah - June 16, 2022 - P.3d - 2022 WL 2165344 - 2022 UT 23

Homeowners association brought action against special service district, alleging that it paid assessments for street plowing services but did not receive any such services, and seeking an order requiring district to provide services to all areas and a refund of payments made.

The Third District Court granted district's motion to dismiss for failure to state a claim, and association appealed.

The Supreme Court held that:

- Association failed to preserve for appeal claim that code provision conflicted with state law;
- Argument that district lacked "standing" to enforce development agreement did not implicate court's subject matter jurisdiction;
- Court's failure to realize that city code conflicted with the Utah Special Service Act was not plain error, assuming that plain error could apply; and

- Court could not rely on prior case law to determine that assessments were a “tax” which had to be challenged under the Utah Tax Act.

Sentences in homeowners association’s complaint that referenced city code provision stating that private streets shall be maintained by the subdivider or other private entity was not sufficient to preserve for appeal claim that code provision conflicted with state law and thus did not control whether city special service district was required to provide snow plowing services to subdivision; association did not even mention the sentences in the opposition to city special service district’s motion to dismiss, let alone build an argument around them, and there was no indication that district court understood that the association believed that the city code did not control because it conflicted with state law.

Argument that services district lacked “standing” to enforce development agreement which provided that private subdivision streets had to be privately maintained did not implicate the court’s subject matter jurisdiction and thus could be raised by homeowners association for the first time on appeal in action seeking to require district to provide snow plowing services to subdivision; even if court could not enforce the development agreement, court would not lose subject matter jurisdiction to adjudicate the claims the association brought against the district seeking to compel the district to provide snow plowing services and seeking a refund of assessments paid to the district.

District court’s failure to realize that city code, which stated that private streets shall be maintained by the subdivider or other private entity, conflicted with the Utah Special Service Act was not plain error, assuming that plain error could apply to unpreserved issues in civil cases; association in fact failed to meet its burden of even demonstrating the correctness of the legal conclusion embedded in that argument.

District court could not rely on prior case law to determine that assessments which homeowners paid to city special service district for purposes of the provision of street services, including snow removal, street lighting services, repairing and maintaining roads, and sweeping and disposal services, were a “tax” which had to be challenged under the Utah Tax Act, as, in prior action, statement that assessments were a “tax” was dicta; issue of whether the assessment was a tax or fee was not necessary to the outcome of the case, and the court in the prior case had not questioned the way the parties had characterized the levy.

ZONING & PLANNING - VIRGINIA

Anders Larsen Trust v. Board of Supervisors of Fairfax County

Supreme Court of Virginia - May 26, 2022 - 872 S.E.2d 449

Neighbors filed petition for certiorari, seeking to challenge opening of proposed residential treatment center for teenage girls.

The Fairfax Circuit Court dismissed the action for lack of standing, and neighbors appealed.

The Supreme Court held that neighbors had standing to seek judicial review of zoning approval of residential treatment center.

Neighbors had standing to seek judicial review of zoning approval of residential treatment center for teenage girls, where neighbors lived immediately adjacent to the center, neighbors alleged that their property values would be diminished by the operation of the facility in the otherwise entirely residential neighborhood, and neighbors alleged that their enjoyment of their property would be diminished by the fact that there would be three shifts of staff coming and going, and residents and visitors likewise driving to and from the property.

REAL PROPERTY CONVEYANCE - FLORIDA

1000 Brickell, Ltd. v. City of Miami

District Court of Appeal of Florida, Third District - June 8, 2022 - So.3d - 2022 WL 2062512

Grantor, a company through which real property owner deeded property to city, brought action against city, alleging that, because city allowed property to be used by a restaurant rather than as a park, property reverted back to grantor under automatic-reverter clause in deed conveying the property.

The Circuit Court granted city's motion for summary judgment. Grantor appealed.

The District Court of Appeal held that conveyance-to-government statutory exception from statute voiding reverter provisions in deeds conveying real estate after 21 years applied.

Conveyance-to-government statutory exception from statute voiding reverter provisions in deeds conveying real estate after 21 years, as opposed to statute imposing time restriction on challenges of dedications of land to municipalities of 30 years after recordation, applied in action asserting that property that was deeded to city reverted back to grantor under automatic-reverter clause stating that property would revert if it was used for any purpose other than public-park purposes; deed conveying the property was a fee simple determinable estate subject to the automatic-reverter clause, not a dedication.

IMMUNITY - MAINE

Bean v. City of Bangor

Supreme Judicial Court of Maine - May 31, 2022 - A.3d - 2022 WL 1744191 - 2022 ME 30

Pedestrian's estate brought action against city, alleging negligence, wrongful death, and loss of consortium after pedestrian died following fall.

The Superior Court denied city's motion for summary judgment based on immunity under the Maine Tort Claims Act (MTCA). City appealed.

The Supreme Judicial Court held that:

- City had burden of proof as to its affirmative defense of immunity under MTCA, and
- Interlocutory appeal of denial of city's summary-judgment motion was not available under the "immunity" exception to final judgment rule.

City had burden of proof as to its affirmative defense of immunity under the Maine Tort Claims Act (MTCA), including the burden to establish lack of insurance coverage, in pedestrian's estate's negligence action against city arising from pedestrian's death following fall.

Interlocutory appeal of denial of city's summary-judgment motion was not available under the "immunity" exception to final judgment rule, which allowed immediate review of denial of a dispositive motion asserting immunity from suit, in pedestrian's estate's negligence action against city, even though city's motion for summary judgment was based on assertion of immunity pursuant to Maine Tort Claims Act (MTCA), where the summary judgment record left unresolved the question of the applicability of insurance to indemnify city for the claims presented in the case, as would determine applicability of immunity under MTCA.

PUBLIC UTILITIES - MASSACHUSETTS

[Tracer Lane II Realty, LLC v. City of Waltham]

Supreme Judicial Court of Massachusetts, Suffolk - June 2, 2022 - 489 Mass. 775 - 187 N.E.3d 1007

Developer of proposed large-scale solar energy system brought action against city seeking declaration that city could not prohibit developer from building a road on its property in residential zone to access system, which was to be located in commercial zone of neighboring town.

The Land Court Department granted summary judgment for developer. City appealed.

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

- Statutory protections afforded to solar energy systems against local zoning regulations applied to access road, and
- City's arguably allowing solar energy systems in industrial zones did not preclude developer from laying road.

Proposed road on developer's property in city's residential zone, to be used to access a planned large-scale solar energy system that was to be located in commercial zone of neighboring town, was part of the solar energy system, and thus the road had statutory protections afforded to such systems against local zoning regulation except when necessary to protect the public health, safety, or welfare, where the road would facilitate the primary system's construction, maintenance, and connection to electrical grid.

Statutory protections for solar energy systems against local zoning regulation except when necessary to protect the public health, safety, or welfare allowed developer to lay a road on its property in city's residential zone to access its planned large-scale solar energy system in commercial zone in neighboring town, even if city's zoning code allowed solar energy systems in industrial zones, where industrial zones encompassed only one to two percent of city's total land area, and code's ban on systems in all but one to two percent of city restricted rather than promoted the legislative goal of promoting solar energy.

INVERSE CONDEMNATION - MISSISSIPPI

[Hardin v. Town of Leakesville]

Supreme Court of Mississippi - June 9, 2022 - So.3d - 2022 WL 2070950

Homeowner brought action against town alleging that town negligently failed to maintain its drainage ditches around her home resulting in structural damage caused by water seeping up from ground into crawlspace during heavy rains.

The Circuit Court granted summary judgment for town. Homeowner appealed.

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

- Homeowner’s claim required specialized knowledge of an expert to establish proximate cause, and
- Homeowner’s summary judgment evidence was too speculative to create factual issue on proximate cause.

Homeowner’s claim that town negligently failed to maintain its drainage ditches around her home, resulting in structural damage caused by water seeping up from ground into crawlspace during heavy rains, required specialized knowledge of an expert to establish proximate cause, where neither homeowner nor her witnesses observed water seep or flow into crawlspace underneath home.

Home inspection reports of town’s expert, who was a summary judgment affiant, did not contain contradictions or a statement against interest that would corroborate homeowner’s speculative summary judgment deposition testimony to create a triable issue of fact on proximate cause sufficient to defeat summary judgment on homeowner’s claim that town negligently failed to maintain its drainage ditches around her home resulting in structural damage caused by water seeping up from ground into crawlspace during heavy rains, where expert’s second report reaffirmed his conclusions and opinions in first report, and neither report corroborated homeowner’s testimony.

BALLOT INITIATIVE - OREGON

Salsgiver v. Rosenblum

Supreme Court of Oregon, En Banc - May 27, 2022 - P.3d - 369 Or. 724 - 2022 WL 1701721

Electors filed petitions challenging ballot title that attorney general certified for initiative petition to amend state constitution to prohibit highway fees and tolls without voter approval.

The Supreme Court held that:

- Ballot title failed to adequately inform voters about measure’s temporal limitation, and
- Ballot title summary inaccurately suggested that measure would require all existing tollways to stop collecting tolls until they obtained voter approval.

Ballot title for initiative petition to amend state constitution to prohibit highway fees and tolls without voter approval “after certain date” failed to adequately inform voters about measure’s temporal limitation; measure would operate to invalidate any toll that was not in operation by end of 2017, even if toll already had been approved by public body—unless and until such toll was placed before voters in relevant counties and they gave their approval, but title would likely be understood by voters as referring to date sometime in future.

Ballot title summary for initiative petition to amend state constitution to prohibit highway fees and tolls without voter approval, which stated that measure applied to “tolls collected after December 31, 2017, including forthcoming I-205 and I-5 tolls,” inaccurately suggested that measure would require all existing tollways to stop collecting tolls until they obtained approval of voters in nearby counties; measure expressly excepted tolls that were “in operation before January 1, 2018,” from its prohibition on “assess[ing]” tolls without voter approval, regardless of whether toll was “collected after December 31, 2017.”

ZONING & PLANNING - TEXAS

[Schroeder v. Escalera Ranch Owners' Association, Inc.]

Supreme Court of Texas - June 3, 2022 - S.W.3d - 2022 WL 1815042 - 65 Tex. Sup. Ct. J. 1318

Homeowners association brought action against city zoning and planning commission commissioners, in their official capacities, after commission approved proposed subdivision, seeking mandamus relief directing commissioners to rescind approval of plat.

After the District Court granted the commission's plea to the jurisdiction, the Court of Appeals reversed. Commission members petitioned for review.

The Supreme Court held that:

- Commission did not clearly abuse discretion in approving plat, and
- Supreme Court would not grant association opportunity to replead claim to allege that commissioners utilized improper considerations.

City zoning and planning commission did not clearly abuse its discretion in approving plat for proposed subdivision, and thus commission was protected by governmental immunity and writ of mandamus to compel commission members to rescind approval was not permitted in action brought by homeowners' association against commissioners, challenging approval; only restriction that city's unified development code placed on commission's discretion to determine whether preliminary plat conformed to requirements was that it needed to consider plat application, director's report, state law, and compliance with code, and commission members, after concluding that conformance to applicable standards had been demonstrated, approved plat, as required by statute.

Supreme Court would not grant homeowners association opportunity to replead claim, in action brought against city zoning and planning commission, challenging commission's approval of plat for proposed subdivision, to allege that commissioners utilized improper considerations in determining that plat conformed with applicable law; record established that commission considered director's report, which determined that all requirements of city's unified development code were met, recognized ministerial duty under state law to approve conforming plat, and addressed specific compliance concerns raised by association.

EMINENT DOMAIN - VIRGINIA

[Board of Supervisors of County of Albemarle v. Route 29, LLC]

Supreme Court of Virginia - June 2, 2022 - S.E.2d - 2022 WL 1787517

Shopping center owner filed complaint and petition for review of alleged zoning violation in which county sought to enforce transit payments which were condition of rezoning approval.

The Circuit Court overruled county's demurrer and denied plea in bar, denied county's motion to strike the evidence, and, following trial, denied county's renewed motion to strike and entered judgment for owner. County appealed.

The Supreme Court held that:

- Unconstitutional conditions doctrine applied, and
- Commuter bus route did not bear a nexus to, nor was proportional to, the impact of shopping center on traffic, and thus conditional proffer to contribute to a public transportation service was an unconstitutional taking.

Unconstitutional conditions doctrine applied to shopping center developer's voluntary conditional proffer to contribute cash to a public transportation service provided to the shopping center project; proffer was a conditional proffer which was agreed to for the purpose of receiving a land-use permit, which required the amendment of a zoning ordinance, and shopping center owner claimed that proffer could not be enforced if the payments demanded did not have a nexus to the projected impacts resulting from the rezoned development.

Commuter bus route did not bear a nexus to, nor was proportional to, the impact of shopping center on traffic, and thus shopping center developer's voluntary conditional proffer to contribute cash to a public transportation service, as condition for zoning change, was an unconstitutional taking, where bus commuter route at the center actually brought additional vehicular traffic to the center, route did not run during the times at which traffic to the center was greatest, there was little-to-no discussion at county meeting concerning the identification or mitigation of traffic impacts resulting from the transportation project, and board members openly stated that ridership on the route would increase as the population grew in commuter communities.

EMINENT DOMAIN - LOUISIANA

Lafaye v. City of New Orleans

United States Court of Appeals, Fifth Circuit - June 1, 2022 - F.4th - 2022 WL 1764044

Motorists who had paid fines for traffic violations captured by city's automated traffic enforcement system (ATES) brought action alleging that city's failure to comply with state court order to refund fines constituted unlawful taking.

The United States District Court denied city's motion to dismiss, and city filed interlocutory appeal.

The Court of Appeals held that city's retention of fines did not constitute "taking."

City's retention of fines it had collected for traffic violations based on its use of automated traffic enforcement system (ATES) that was subsequently held to be unlawful did not constitute "taking" under Fifth Amendment, even though motorists who had paid fines had obtained state court judgment ordering city to refund fines; city acquired motorists' money not through eminent domain nor through any other lawful power, but rather through ultra vires implementation of ATES.

EMINENT DOMAIN - MASSACHUSETTS

FBT Everett Realty, LLC v. Massachusetts Gaming Commission

Supreme Judicial Court of Massachusetts, Middlesex - May 23, 2022 - 489 Mass. 702 - 187 N.E.3d 373

Vendor, which bought land before legalization of casino gaming and then after legalization entered into agreement for option to purchase contingent on purchaser securing license to operate casino on the land, filed action against state gaming commission, asserting claims for intentional interference with contract and regulatory taking, alleging that commission's concerns about hidden criminal ownership interests in vendor resulted in its refusal to approve purchaser's application for license to operate casino on land unless purchase price was lowered so that value of casino-use premium on sale of land was transferred from vendor to purchaser.

The Superior Court Department granted commission's motion to dismiss intentional interference claim and granted commission's motion for summary judgment on regulatory taking claim. Vendor applied for direct appellate review, and the Supreme Judicial Court granted the application.

The Supreme Judicial Court held that:

- Trial court was required to consider all three *Penn Central* factors before deciding whether to grant commission's motion for summary judgment on vendor's regulatory taking claim;
- Genuine issues of material fact existed as to whether commission directed a compelled transfer of property or merely accepted it as cure to its concerns about undisclosed criminal ownership interest in vendor, precluding summary judgment on vendor's regulatory taking claim; and
- Commission was "public employer" immune from liability for intentional interference with contractual relations under Massachusetts Tort Claims Act (MTCA).

Trial court was required to consider all three Penn Central factors, including economic impact, interference with investment-backed expectations, and character of government action, before deciding whether to grant state gaming commission's summary judgment motion on vendor's regulatory taking claim, alleging that commission's concerns about hidden criminal ownership interests in vendor resulted in its refusal to approve purchaser's application for license to operate casino on land unless purchase price was lowered so that value of casino-use premium was transferred to purchaser; investment-backed expectations was only one factor that courts had to consider, and other factors were important, given the significant diminution in value and unusual and disputed character of government action.

Genuine issues of material fact existed as to whether state gaming commission directed a compelled transfer of property or merely accepted it as cure to its concerns about undisclosed criminal ownership interest in vendor, precluding summary judgment on vendor's regulatory taking claim against commission based on commission's purported refusal to approve purchaser's application for license to operate casino on land unless purchase price was lowered so that value of casino-use premium on sale of land was transferred from vendor to purchaser.

Factor of reasonable investment-backed expectations weighed heavily against finding a regulatory taking, in vendor's action alleging that state gaming commission's concerns about hidden criminal ownership interests in vendor resulted in its refusal to approve purchaser's application for license to operate casino on land unless purchase price was lowered so that value of casino-use premium on sale of land was transferred from vendor to purchaser; vendor bought land two years before gaming was legalized and could not have reasonably expected to sell property as site for development of casino, and vendor's investments in the land after gaming was legalized remained subject to commission's discretionary decision of whether to award gaming license for development of casino on the property.

Substantial economic impact weighed in favor of finding regulatory taking, in vendor's action alleging that state gaming commission's concerns about hidden criminal ownership interests in vendor resulted in its refusal to approve purchaser's application for license to operate casino on land unless purchase price was lowered so that value of casino-use premium on sale of land was transferred from vendor to purchaser; vendor had negotiated agreement that purchaser would pay $100,000 per month for the right to buy the land for $75 million if purchaser were awarded license, and commission's purported actions intended to deprive vendor of any casino-use premium and reduced purchase price to $35 million causing $40 million reduction in value of the land.

Factor of character of government action weighed in favor of finding regulatory taking, in vendor's action alleging that state gaming commission's concerns about hidden criminal ownership interests in vendor resulted in its refusal to approve purchaser's application for license to operate casino on land unless purchase price was lowered so that value of casino-use premium on sale of land was transferred from vendor to purchaser; character of action was highly unusual as commission did not continue to investigate until it could determine whether there was in fact some undisclosed criminal ownership interest but instead purportedly compelled transfer of property for $40 million less than agreed upon price.

State gaming commission was "public employer" immune from liability under Massachusetts Tort Claims Act (MTCA) for vendor's claim alleging that commission intentionally interfered with contract for option to purchase land by purportedly refusing to approve purchaser's application for license to operate casino on land unless purchase price was lowered so that value of casino-use premium on sale of land was transferred from vendor to purchaser; legislature's rejection of express proposal to fully waive gaming regulation and enforcement agency's tort immunity suggested that legislature did not intend for commission to be liable, and commission enjoyed substantially less political independence and financial independence than port authority.

PUBLIC EMPLOYMENT - TEXAS

City of Fort Worth v. Pridgen

Supreme Court of Texas - May 27, 2022 - S.W.3d - 2022 WL 1696036 - 65 Tex. Sup. Ct. J. 1245

Supervisors of city police department's internal affairs and special investigations units brought action against city under Texas Whistleblower Act alleging that they were unlawfully disciplined for making good faith report of violation of law.

The District Court denied city's motion for summary judgment, and it appealed. The Court of Appeals affirmed, and city petitioned for review.

The Supreme Court held that supervisors' statements regarding consequences they believed that officer should have faced for misconduct did not constitute "reports" protected by Whistleblower Act.

Statements by supervisors of city police department's internal affairs and special investigations units to police chief regarding department's internal policies and consequences they believed that officer should have faced for misconduct did not constitute "reports" protected by Whistleblower Act; supervisors did not supply chief with new information about officer's conduct or corroborate facts that were unverified or subject to dispute, and their objective was not to unearth or prove unlawful conduct, but to persuade chief to classify officer's known actions as criminal conduct and to terminate his employment.

EMINENT DOMAIN - UTAH

[Cardiff Wales, LLC v. Washington County School District]

Supreme Court of Utah - May 26, 2022 - P.3d - 2022 WL 1672215 - 2022 UT 19

Former landowner brought action against school district and developer for declaratory relief and to set aside school district's sale of landowner's former property to developer after school district decided not to build high school on property, alleging violation of statutory right of first refusal for property acquired under threat of condemnation.

The District Court dismissed. Former landowner appealed, and the Court of Appeals affirmed. Landowner petitioned for writ of certiorari, which was granted.

The Supreme Court held that:

- Property is acquired under "threat of condemnation" when government entity has specifically authorized the use of eminent domain to acquire the real property;
- Person claiming a right of first refusal to reacquire property must plead and prove that the entity to which she sold her property had, in some way, specifically authorized the use of eminent domain to take it; and
- Former landowner sufficiently alleged that school district took some sort of action that transformed its general eminent domain power into a specific threat to take landowner's parcel by eminent domain.

Property is acquired under "threat of condemnation," for purposes of requirement that seller have a right of first refusal if the acquired property is subsequently conveyed, when an official body of the state or a subdivision of the state, having the power of eminent domain, has specifically authorized the use of eminent domain to acquire the real property, rather than when there is a threat to authorize the use of eminent domain.

A landowner alleging a right of first refusal to reacquire property taken by threat of eminent domain cannot simply claim she sold her land to the government because of a general fear that the government might have taken it had she not sold; instead, to meet her statutory burden of showing a threat of condemnation, a landowner must plead and prove some government action that indicates the government has authorized the use of its eminent domain authority in a way that bespeaks a specific intent to condemn the landowner's property.

Former landowner sufficiently alleged that school district took some sort of action that transformed its general eminent domain power into a specific threat to take landowner's parcel by eminent domain, as required for landowner to have the right of first refusal to reacquire the parcel after school district decided the parcel was unnecessary for its plans; although landowner did not use the words "specifically authorize" in its complaint, it alleged that school district stated it wanted to buy the property for a new high school and "intended to acquire the Parcel through condemnation if necessary," landowner explained that it ultimately sold the parcel "in order to avoid an eminent domain lawsuit," and letter from school district stated that, if agreeable terms could not be reached, the district "would be forced to use eminent domain powers."

ECONOMIC DEVELOPMENT - WEST VIRGINIA

[Jefferson County Foundation, Inc. v. West Virginia Economic Development Authority]

Supreme Court of Appeals of West Virginia - June 8, 2022 - S.E.2d - 2022 WL 2063006

Nonprofit organization that advocated for effective and accountable government brought action against West Virginia Economic Development Authority (WVEDA) and insulation manufacturer seeking declaration that WVEDA lacked statutory authority to enter into transactions to finance construction of manufacturing plant using a sale-leaseback arrangement and that transactions were a de facto tax abatement in violation of state constitutional guarantee of equal and uniform taxation.

The Circuit Court dismissed. Organization appealed.

The Supreme Court of Appeals held that:

- Organization had representative standing;
- Controversy did not present a nonjusticiable political question;
- Sale-leaseback arrangement was not a de facto tax exemption;
- WVEDA had statutory authority to enter into the sale-leaseback;
- No conflict existed in statutory tax exemption provisions; and
- Sale-leaseback did not violate constitutional guarantee of equal and uniform taxation.

Nonprofit organization that advocated for effective and accountable government had representative standing for its action against West Virginia Economic Development Authority (WVEDA) and insulation manufacturer seeking declaration that WVEDA lacked statutory authority to enter into transactions to finance construction of manufacturing plant using a sale-leaseback arrangement and that transactions amounted to a de facto tax abatement in violation of state constitutional guarantee of equal and uniform taxation, where organization sought a declaration regarding impact that a public contract would have on its members' interests that arguably fell within state constitutional protections.

Controversy about proposed transactions between a public entity, the West Virginia Economic Development Authority (WVEDA), and a private manufacturer to finance construction of manufacturing plant using a sale-leaseback arrangement did not present a nonjusticiable political question, where objector sought declaration that WVEDA lacked statutory authority to enter into proposed transactions and that transactions amounted to a de facto tax abatement in violation of state constitutional guarantee of equal and uniform taxation, and the court had duties to apply and enforce a statute unless statute was clearly unconstitutional.

Sale-leaseback arrangement involving West Virginia Economic Development Authority (WVEDA) and insulation manufacturer to finance construction of manufacturing plant was not a de facto tax exemption, and thus the West Virginia Economic Development Authority Act, as source of WVEDA's powers, did not need to be strictly construed in action seeking declaration WVEDA lacked statutory power for its actions and that the sale-leaseback violated state constitutional guarantee of equal and uniform taxation, where sale-leaseback was a series of transactions resulting in two, distinct interests of a fee interest and a leasehold, and WVEDA's resolution to enter into sale-leaseback did not declare that the leasehold interest produced by sale-leaseback would be exempt from taxation.

West Virginia Economic Development Authority (WVEDA) had authority, under West Virginia Economic Development Authority Act, to adopt resolution to enter into a sale-leaseback agreement with insulation manufacturer to finance construction of manufacturing plant, where Act authorized WVEDA to engage in the specific transactions set forth in resolution, including issuing revenue bonds, exchanging bonds with manufacturer for property, purchasing fee interest in property from manufacturer, leasing property to manufacturer, and selling property to manufacturer at end of lease term.

Statute exempting property acquired or used by West Virginia Economic Development Authority

(WVEDA) from taxation did not conflict with statute identifying types of property exempt from taxation, as applied to sale-leaseback arrangement involving WVEDA and insulation manufacturer to finance construction of manufacturing plant, where the sale-leaseback was a series of legislatively-authorized transactions and not a tax exemption, and statute identifying property tax exemptions was not, by its plain terms, an exhaustive list of types of property the Legislature exempted from taxation.

Sale-leaseback arrangement involving West Virginia Economic Development Authority (WVEDA) and insulation manufacturer to finance construction of manufacturing plant did not violate state constitutional guarantee of equal and uniform taxation, despite argument that the sale-leaseback was a sham structure hiding a huge property tax break for manufacturer, where sale-leaseback was a series of transactions resulting in two, distinct interests of a fee interest and a leasehold, WVEDA's resolution to enter into sale-leaseback did not declare that the leasehold interest produced by sale-leaseback would be exempt from taxation, and leasehold interest was subject to general rules of valuation of a leasehold.

Objector's due process challenge, including a claim of vagueness, to statute providing tax-exempt status to property acquired or used by West Virginia Economic Development Authority (WVEDA) was moot on appeal in declaratory judgment action raising statutory and constitutional challenges to sale-leaseback arrangement involving WVEDA and insulation manufacturer to finance construction of manufacturing plant, where the sale-leaseback was comprised of a series of transactions to be affected by WVEDA pursuant to its statutory authority, and WVEDA's resolution to enter into sale-leaseback did not claim to extend the disputed tax exemption to the leasehold produced by the sale-leaseback.

PUBLIC CONTRACTS - CALIFORNIA

San Luis Obispo Local Agency Formation Commission v. Central Coast Development Company

Court of Appeal, Second District, Division 6, California - May 5, 2022 - Cal.Rptr.3d - 78 Cal.App.5th 363 - 2022 WL 1419943

After property developer seeking to construct housing units on property, as well as city that approved permit, refused to pay more than $400,000 in attorney fees and costs to county's local agency formation commission, which prevailed in company and city's lawsuit against it for its denial of company and city's annexation application, commission brought action against developer and city, seeking attorney fees and costs.

The Superior Court granted developer and city's judgment on pleadings. Commission appealed. While that appeal was pending, developer and city moved for attorney fees. The Superior Court granted the motion, awarding $428,864 to developer and $172,850 to city. Commission appealed.

On rehearing, the Court of Appeal held that:

- Indemnity agreement contained in annexation application being void for illegality meant that commission was not subject to liability for attorney fees based on statute governing award of attorney fees in contract actions, and
- Doctrine of in pari delicto did not apply to allow enforcement of indemnity agreement.

Indemnity agreement contained in property developer and city's property-annexation application that they submitted to county's local agency formation commission was void for illegality, and therefore commission was not subject to liability for attorney fees based on statute governing award of attorney fees in contract actions, in action arising from commission's denial of application to annex property for construction of housing units; commission was not authorized by statute to make indemnity agreement.

A public agency that was not authorized to make the agreement, resulting in that contract being void and the public agency not being able to enforce nor be liable on the contract, is not liable for attorney fees pursuant to statute governing award of attorney fees in a contract action.

Indemnity agreement contained in property developer and city's property-annexation application that they submitted to county's local agency formation commission was void for illegality, and therefore commission was not subject to liability for attorney fees based on statute governing fees and charges incurred in the processing of an application with the commission, in action arising from commission's denial of application to annex property for construction of housing units; commission was not authorized by statute to make indemnity agreement.

Doctrine of in pari delicto did not apply to allow enforcement of indemnity agreement, which was void for illegality, contained in property developer and city's property-annexation application that they submitted to county's local agency formation commission, and therefore commission was not subject to liability for attorney fees based on statute governing award of attorney fees in contract actions, in action arising from commission's denial of application to annex property for construction of housing units; commission was public entity for which there was overriding public interest in limiting its contractual obligations.

WATER LAW - CALIFORNIA

City of San Buenaventura v. United Water Conservation District

Court of Appeal, Second District, Division 6, California - May 26, 2022 - Cal.Rptr.3d - 2022 WL 1679400

City petitioned for writ of mandate and filed complaint for determination of invalidity and declaratory relief asserting that groundwater extraction charge adopted by water conservation district for non-agricultural users that was three times the charge for agricultural users was a tax that required voter approval, and alleging that statute that required at least a three-to-one ratio between charges was facially unconstitutional.

The Superior Court entered judgment declaring charge invalid and finding statute unconstitutional. District appealed.

The Court of Appeal held that:

- City's claim challenging validity of charge was subject to independent, not rational basis, review;
- Charge was tax that required voter approval; and
- Statute requiring minimum of three-to-one ratio between charges was facially unconstitutional.

City's claim challenging validity of groundwater extraction charge adopted by water conservation district for non-agricultural users that was three times charge for agricultural users on basis that charge was unconstitutional tax without voter approval was subject to independent, not rational basis, review of administrative record; validity of charges presented constitutional question, and one purpose of constitutional provision that broadened definition of taxes that required voter approval was to curtail deference that had been traditionally accorded legislative enactments on fees, assessments, and charges.

Groundwater extraction charge adopted by water conservation district for non-agricultural users that was three times charge for agricultural users did not bear reasonable relationship to burdens or benefits of district's conservation activities, and thus, was not excepted from constitutional requirement of voter approval of any levy, charge, or exaction of any kind imposed by local governments, even if agricultural land had greater natural recharge of water than non-agricultural land, since agricultural land's relatively high recharge rate per acre-foot was swamped by its total pumpage, which accounted for 77% of net extractions.

Statute requiring a water conservation district to adopt a groundwater extraction charge for non-agricultural users that was at least three times more than charge for agricultural users facially violated constitutional requirement of voter approval of any levy, charge, or exaction of any kind imposed by local governments unless that charge bore reasonable relationship to payor's burdens on, or benefits received from, the governmental activity, even if there might be circumstances in which three-to-one ratio was justified, since such justification would have nothing to do with requirements under statute.

PUBLIC DUTY DOCTRINE - IOWA

Estate of Farrell by Farrell v. State

Supreme Court of Iowa - May 13, 2022 - N.W.2d - 2022 WL 1509713

Estates of motor vehicle occupants who died as result of head-on collision with another vehicle traveling the wrong way on state highway brought action against state and two municipalities, alleging the defendants negligently designed, constructed, and operated a confusing interchange used by the errant driver.

The District Court denied defendants' motion for judgment on the pleadings. Defendants filed interlocutory appeal. The Court of Appeals reversed and remanded. Application for review was granted.

The Supreme Court held that public-duty doctrine did not bar action.

Public-duty doctrine did not bar claims against state and municipalities brought by estates of motor vehicle occupants who died as result of head-on collision with another vehicle traveling the wrong way on state highway, alleging that states and municipalities negligently designed, constructed, and operated a confusing highway interchange, with inadequate lighting and signage, used by the errant driver, which induced the driver mistakenly to drive into oncoming traffic; defendants' alleged affirmative negligence created a dangerous condition on their own property that was allegedly a cause of the fatal accident.

EMINENT DOMAIN - KENTUCKY

Commonwealth v. Louisville Gas and Electric Company

Court of Appeals of Kentucky - April 22, 2022 - S.W.3d - 2022 WL 1194180

Public utility initiated condemnation proceedings to take property upon which the Kentucky

Heritage Land Conservation Fund Board owned a conservation easement for construction of underground natural gas pipeline.

The Circuit Court denied Board's motion to dismiss on issue of sovereign immunity. Board filed interlocutory appeal.

The Court of Appeals held that:

- Condemnation proceedings to take conservation easement impacted Commonwealth's property rights; and
- Board was competent to defend Commonwealth's interests by asserting defense of sovereign immunity; but
- As matter of first impression, statutory mandate that eminent domain powers are exercisable as if conservation easements do not exist constitutes waiver of sovereign immunity; and
- Doctrine of prior public use did not bar utility from taking property.

Condemnation proceedings against property upon which Kentucky Heritage Land Conservation Fund Board owned a conservation easement impacted the property rights of the Commonwealth itself, and thus doctrine of sovereign immunity applied to entitle the Board to immunity in the absence of waiver by the legislature; Board used state funds to acquire the easement, and the easement was granted in the name of the "Commonwealth of Kentucky, by and through the Finance and Administration Cabinet, for the use and benefit of the Kentucky Heritage Land Conservation."

Attorney General was not required to formally decline to participate in condemnation proceedings impacting Commonwealth's rights to property upon which Kentucky Heritage Land Conservation Fund Board owned conservation easement, and thus Board was competent to defend Commonwealth's interests by asserting defense of sovereign immunity; suit did not challenge constitutionality of a statute.

Statute prohibiting a conservation easement from operating to impair or restrict any right or power of eminent domain created by statute and mandating that such rights and powers shall be exercisable as if the conservation easement does not exist constitutes a waiver of sovereign immunity where a governmental interest in a conservation easement is asserted as a defense to condemnation proceedings initiated by a party with a statutory right of eminent domain.

Statute mandating that eminent domain powers were exercisable as if conservation easements did not exist operated to prevent doctrine of prior public use from barring public utility's action to take property upon which Kentucky Heritage Land Conservation Fund Board owned a conservation easement; assuming, pursuant to statute, that Board's easement did not exist, then there was no prior public use to impede exercise of utility's right of eminent domain.

The doctrine of prior public use, which provides that land devoted to one public use cannot be taken for another public use in the absence of express legislative authority for the taking, operates to resolve competing claims to property under a right of eminent domain.

EMINENT DOMAIN - MICHIGAN

Barber v. Charter Township of Springfield, Michigan

United States Court of Appeals, Sixth Circuit - April 11, 2022 - 31 F.4th 382

Property owner filed state court action against township, county, and their parks and recreation departments alleging that their proposed removal of dam near her property amounted to unconstitutional taking and trespass.

Following removal, the United States District Court entered judgment on pleadings in defendants' favor, and owner appealed.

The Court of Appeals held that:

- Owner's claim for injunctive relief was ripe for adjudication, and
- Owner faced sufficiently concrete, particularized, and imminent injury-in-fact to establish her standing.

Property owner's claim for injunctive relief was ripe for adjudication in her action against county and township alleging that their proposed removal of dam near her property amounted to unconstitutional taking and trespass, even though dam had not yet been removed, where county and township had reached final decision to remove dam.

Property owner faced sufficiently concrete, particularized, and imminent injury-in-fact to establish her standing to assert claim that proposed removal of dam near her property by county and township amounted to unconstitutional taking and trespass, even though removal had not commenced; county and township had made final decision to remove dam and invested at least $600,000 into dam removal and restoration project, owner claimed that removing dam would change flow of water on her property and likely alter its configuration, and harms she faced were particular to her property.

IMMUNITY - OKLAHOMA

Kamphaus v. Town of Granite

Supreme Court of Oklahoma - May 17, 2022 - P.3d - 2022 WL 1550074 - 2022 OK 46

Mother of child, who was injured when headstone fell on him while visiting cemetery, brought action against town, the operator of the cemetery, for negligence.

The District Court granted summary judgment in favor of town. Mother appealed. The Court of Civil Appeals reversed. Town filed petition for certiorari.

The Supreme Court held that:

- Town had no duty to maintain headstone, and
- Town had no duty to inspect headstone.

Town had no duty to maintain headstone, which fell on child while visiting cemetery operated by town; town only provided routine maintenance to common areas of cemetery, such as roadways, fences, and shrubbery, and mowing services, and town had no property interest in headstone placed on easement belonging to purchaser of cemetery plot.

Town had no duty to inspect headstone, which fell on child while visiting cemetery operated by town, where headstone was not owned, placed, or controlled by town.

BONDS - OKLAHOMA

Matter of Oklahoma Development Finance Authority

Supreme Court of Oklahoma - May 24, 2022 - P.3d - 2022 WL 1634775 - 2022 OK 48

Oklahoma Development Finance Authority requested that Supreme Court assume original jurisdiction and approve the issuance of ratepayer-backed bonds pursuant to the February 2021 Regulated Utility Consumer Protection Act.

The Supreme Court held that ratepayer-backed bonds to secure fuel costs incurred by public utility during extreme winter weather event were constitutional.

BONDS - OKLAHOMA

Matter of Oklahoma Development Finance Authority

Supreme Court of Oklahoma - May 24, 2022 - P.3d - 2022 WL 1635165 - 2022 OK 47

Oklahoma Development Finance Authority requested that Supreme Court assume original jurisdiction and approve the issuance of ratepayer-backed bonds pursuant to the February 2021 Regulated Utility Consumer Protection Act.

The Supreme Court held that:

- Bonds were constitutional;
- Oklahoma Corporation Commission's final financing order was not appealed and thus final; and
- Commission did not violate the Open Meetings Act when it issued final financing order regarding ratepayer-backed bonds.

Ratepayer-backed bonds issued pursuant to Regulated Utility Consumer Protection Act to cover the debt incurred by natural gas utility during winter weather event were constitutional; proposed bonds, which would allow customers to pay their utility bills at a lower amount over a longer period of time, involved traditional, self-liquidating bonds.

Oklahoma Corporation Commission's final financing order regarding ratepayer-backed bonds issued to cover the debt incurred by natural gas utility during winter weather event was final, as no party had appealed the financing order, and thus Supreme Court considering approval of the bonds would decline to consider issues regarding the filed-rate doctrine and whether the utility's fuel costs were prudently incurred.

Oklahoma Corporation Commission did not violate the Open Meetings Act when it issued final financing order regarding ratepayer-backed bonds issued to cover the debt incurred by natural gas utility during winter weather event, even if Commission failed to post agenda for meeting, where Commission met five days earlier as part of regular meeting where it decided to continue that meeting, Commission properly continued that meeting by providing a public announcement for the continued meeting with the date, time, and place, and Commission only discussed matters which were on the agenda for the prior meeting.

EMINENT DOMAIN - RHODE ISLAND

Mitola v. Providence Public Buildings Authority

Supreme Court of Rhode Island - May 9, 2022 - A.3d - 2022 WL 1446737

Property owners filed petition for assessment of damages, and petition to compel purchase in fee.

The Superior Court denied petition to compel purchase in fee, and entered final judgment. Owners appealed.

The Supreme Court held that:

- On issue of first impression, obligation of public building authority to purchase property in fee simple, if property owner so requested, was time limited;
- Petition to compel purchase in fee was timely filed;
- Owners' nearly four-year delay in bringing petition to compel purchase in fee was not inexcusable;
- Authority was not significantly prejudiced by owners' delay in bringing petition to compel purchase in fee; and
- Taking in fee by public building authority had to be based on value of property at time of taking.

EMINENT DOMAIN - TEXAS

Hlavinka v. HSC Pipeline Partnership, LLC

Supreme Court of Texas - May 27, 2022 - S.W.3d - 2022 WL 1696443

Pipeline company initiated condemnation proceedings after landowners rejected its offer to purchase a pipeline easement.

The County Court granted company's motions for summary judgment and to exclude landowner's testimony, and denied landowners' plea to the jurisdiction. Landowners appealed. The Houston Court of Appeals affirmed in part, reversed in part, and remanded. Both parties petitioned for review, and both petitions were granted.

The Supreme Court held that:

- Polymer-grade propylene product that company's pipeline carried qualified as an "oil product";
- Pipeline company met public use standard for common-carrier status that was required for condemnation authority; and
- Trial court's exclusion of landowner's testimony about sales of easements to other pipelines constituted harmful error that warranted new trial as to market value.

Pipeline company established that polymer-grade propylene that it carried qualified as an "oil product," as required for company to have statutory condemnation authority to build and construct a common-carrier pipeline to transport it, because the Natural Resources Code defined oil as "crude petroleum oil," and polymer-grade propylene was a product derived from crude oil's refinement and distillation, and further, the Railroad Commission, which authorized company to operate a pipeline, defined "product" to include all liquid products or by-products derived from crude petroleum oil or gas.

Pipeline company served at least one unaffiliated customer, and accordingly, it met the public use standard for common-carrier status under statute granting condemnation authority to common-carrier pipelines that transported oil products, where company had a transportation contract with an unaffiliated customer, its pipeline connected to existing pipeline networks making the transportation network feasible, pipeline had additional capacity and terminated near other potential customers, and company publicly filed a tariff with the Railroad Commission, demonstrating that it offered and marketed the pipeline for public hire.

Trial court's exclusion of one landowner's testimony about sales of easements to other pipelines, in pipeline company's condemnation proceedings, denied landowners the opportunity to rebut presumption that land's highest and best use was purely agricultural and that there was reasonable probability the easement that was condemned would likely have been sold, and thus, the exclusion constituted harmful error that warranted a new trial as to market value; recent sales of comparable easement rights on the same property to other pipeline companies, combined with existence of pipelines running parallel and adjacent to condemning pipeline company's pipeline, provided some evidence from which a factfinder reasonably could conclude that landowners could have sold to another the easement that they were instead compelled to sell to pipeline company.

BONDS - FEDERAL

[Ponsa-Rabell v. Santander Securities LLC]()

United States Court of Appeals, First Circuit - May 20, 2022 - F.4th - 2022 WL 1598018

Customers who had purchased municipal bonds from broker brought securities fraud class action against brokerage firm asserting it made material omissions when making the sales, in violation of Securities Exchange Act and Puerto Rico law.

The United States District Court for the District of Puerto Rico adopted report and recommendation of United States Magistrate Judge and dismissed. Customers appealed.

The Court of Appeals held that:

- Brokerage firm was under no duty to repeat information already known or readily accessible to investors, and
- There was no evidence of a special relationship between broker and its customers, as would impose duty on firm to disclose omitted information.

Brokerage firm selling municipal bonds to its customers was under no duty to repeat information already known or readily accessible to the investors to avoid later claim for securities fraud based on the omission; although customers asserted that firm should have disclosed to them in fund prospectus information regarding the deteriorating market conditions for Puerto Rico bonds, it was commonly known to public at the time of the purchase that Puerto Rico was experiencing an economic recession and that its debts might become unpayable.

There was no evidence of a special relationship between brokerage firm and customers who purchased municipal bonds from the firm, as would impose duty on the firm, under securities law, to disclose to customers that, at time of sale, it was actively trying to rid itself of its inventory of municipal bonds because of its concern of risk exposure, given the direction of the market; there was no indication that firm made any special promises to its customers to outline the risks of their investment, or to inform them that any projected risks were materializing.

EMINENT DOMAIN - INDIANA

Town of Linden v. Birge

Court of Appeals of Indiana - April 18, 2022 - N.E.3d - 2022 WL 1132791

Property owners brought inverse condemnation action against town, county, and county officials after improvements to an existing regulated agricultural drain to alleviate flooding issues in town and surrounding areas caused flooding on their property.

The Circuit Court granted town's motion to dismiss. The Court of Appeals reversed and remanded. On remand, the Circuit Court entered an order finding that there had been a permanent physical invasion of owners' property and set matter for determination of damages. Defendants filed interlocutory appeal.

The Court of Appeals held that:

- Temporary but frequent flooding of landowners' property did not constitute a per se taking;
- Evidence regarding highest and best use of landowners' property was irrelevant for purposes of establishing whether a taking had occurred; and
- Sufficient evidence supported finding that flooding on landowners' property was caused by improvements to drain.

Temporary but frequent flooding of landowners' property, allegedly caused by improvements to regulated agricultural drain that ran through pre-existing drainage easement on landowners' property in order to alleviate flooding issues in town and surrounding areas, did not constitute a per se taking as a permanent physical invasion of landowners' property; instead, whether temporary but frequent flooding of landowners' property was compensable taking was required to be analyzed under expanded *Penn Central* factors.

Evidence regarding highest and best use of landowners' property was irrelevant for purposes of establishing whether a taking had occurred, and thus was inadmissible in landowners' inverse condemnation action against town, county, and county officials arising after improvements to an existing regulated agricultural drain that ran through pre-existing drainage easement on landowners' property to alleviate flooding issues in town and surrounding areas allegedly caused flooding on landowners' property.

Sufficient evidence supported finding that flooding on landowners' property was caused by improvements to regulated agricultural drain that ran through pre-existing drainage easement on landowners' property, in inverse condemnation action against town, county, and county officials, although defendants presented evidence and expert testimony that flooding was caused by increased rainfall, topology of landowners' farmland, and failure of landowners to connect their private lateral drains to improved drain; landowners presented evidence that they had little issue with flooding prior to improvements to the drain, and landowners' expert witness testified that drain, as reconstructed, caused flooding issues on landowners' property.

In determining whether frequent flooding of landowners' property as an alleged result of improvements to regulated agricultural drain that ran through pre-existing drainage easement on landowners' property in order to alleviate flooding issues in town and surrounding areas constituted a taking, trial court was to limit its consideration to the impact of the flooding on those portions of landowners' property that were outside of pre-existing 75-foot drainage easement that was created by statute and needed to specify the land affected if a taking was determined.

EMINENT DOMAIN - KENTUCKY

Commonwealth v. Louisville Gas and Electric Company

Court of Appeals of Kentucky - April 22, 2022 - S.W.3d - 2022 WL 1194180

Public utility initiated condemnation proceedings to take property upon which the Kentucky Heritage Land Conservation Fund Board owned a conservation easement for construction of underground natural gas pipeline.

The Circuit Court denied Board's motion to dismiss on issue of sovereign immunity. Board filed interlocutory appeal.

The Court of Appeals held that:

- Condemnation proceedings to take conservation easement impacted Commonwealth's property rights; and
- Board was competent to defend Commonwealth's interests by asserting defense of sovereign immunity; but
- As matter of first impression, statutory mandate that eminent domain powers are exercisable as if conservation easements do not exist constitutes waiver of sovereign immunity; and
- Doctrine of prior public use did not bar utility from taking property.

Statute prohibiting a conservation easement from operating to impair or restrict any right or power of eminent domain created by statute and mandating that such rights and powers shall be exercisable as if the conservation easement does not exist constitutes a waiver of sovereign immunity where a governmental interest in a conservation easement is asserted as a defense to condemnation proceedings initiated by a party with a statutory right of eminent domain.

The doctrine of prior public use, which provides that land devoted to one public use cannot be taken for another public use in the absence of express legislative authority for the taking, operates to resolve competing claims to property under a right of eminent domain.

PERMITS - LOUISIANA

In re Revocation of an Alcoholic Beverage Permit for Riteway Liquor Store

Court of Appeal of Louisiana, Second Circuit - April 13, 2022 - So.3d - 2022 WL 1100505 - 54,431 (La.App. 2 Cir. 4/13/22)

Owner and operator of liquor store sought judicial review of city's revocation of its alcoholic beverage permit.

Following a de novo trial, the District Court affirmed revocation of the permit. Owner and operator of liquor store appealed.

The Court of Appeal held that:

- Notice of city council meeting to consider rescinding alcoholic beverage permit was sufficient to put permit holder on notice as to allegations against it and to prepare its defense thereto;
- Sufficient evidence supported revocation of permit; and
- Any potential error in allowing city council transcript into record had no substantial effect on outcome of case.

EMINENT DOMAIN - NORTH DAKOTA

City of West Fargo v. McAllister

Supreme Court of North Dakota - May 12, 2022 - N.W.2d - 2022 WL 1493547 - 2022 ND 94

City filed quick-take eminent domain proceeding to acquire right-of-way across landowner's property for a sewer improvement project.

The District Court entered judgment in favor of city. Landowner appealed.

The Supreme Court held that:

- Quick-take condemnation procedure applied to city's acquisition of right-of-way across landowner's property for sewer improvement project;
- City was not required to pay for a sewer improvement project with special assessments in order to use the quick-take procedure; and
- Exclusion of portion of expert testimony was warranted.

Quick-take condemnation procedure, which allowed municipality to immediately take possession of right-of-way after making an offer to purchase and depositing the amount of the offer with the clerk of court, was not limited only to a right-of-way for highway or roadway purposes, and applied to city's acquisition of right-of-way across landowner's property for sewer improvement project.

City was not required to pay for a sewer improvement project with special assessments in order to use the quick-take procedure, which allowed municipality to immediately take possession of right-o--way after making an offer to purchase and depositing the amount of the offer with the clerk of court, to acquire right-of-way across landowner's property as part of project.

PREEMPTION - OHIO

Newburgh Heights v. State

Supreme Court of Ohio - May 19, 2022 - N.E.3d - 2022 WL 1572051 - 2022-Ohio-1642

Village filed complaint seeking declaratory judgment and a motion for preliminary and permanent injunction against State, seeking to enjoin enforcement of provisions allegedly infringing on home rule authority to enact and operate photo traffic enforcement systems, including by reducing local funding, granting exclusive jurisdiction over photo enforcement actions to courts, and requiring local authorities to pay advance court deposits to cover costs.

City filed motion to intervene, complaint, and motions for injunctions on the same basis. After allowing intervention and following hearing, the Court of Common Pleas granted motions for preliminary injunction in part, but denied motions as to funding, jurisdiction, and deposits. Village and city appealed. The Court of Appeals affirmed in part, reversed in part, and remanded. The State filed a discretionary appeal.

The Supreme Court held that:

- No conflict existed between a municipality's ordinance allowing the use of traffic cameras and state law allowing a reduction of a municipality's share of the state's local-government funds based on the amount of traffic-camera fines collected, and
- No conflict existed between a municipality's ordinance allowing the use of traffic cameras and state law requiring a municipality to pay an advance deposit to cover court costs and fees when litigating a citation for a violation based on the use of traffic camera.

SCHOOL FINANCE - TENNESSEE

Metropolitan Government of Nashville and Davidson County v. Tennessee Department of Education

Supreme Court of Tennessee - May 18, 2022 - S.W.3d - 2022 WL 1561546

Municipality and county brought declaratory judgment action against Governor and Department of Education, asserting that the Education Savings Account Pilot Program (ESA Act) was unconstitutional under the Home Rule Amendment and under the due-process and education clauses.

The Chancery Court entered judgment finding ESA Act unconstitutional under Home Rule Amendment. The Court of Appeals affirmed. Governor and Department applied for permission to bring interlocutory appeal, which was granted.

The Supreme Court held that:

- Municipality and county asserted a sufficient palpable injury to support standing, but
- ESA Act was not "applicable" to municipality or county and therefore did not implicate the Home Rule Amendment.

Municipality and county asserted a sufficient palpable injury to support standing at motion-t--dismiss stage of their declaratory judgment action against Governor and Department of Education, asserting that the Education Savings Account Pilot Program (ESA Act) was unconstitutional under the Home Rule Amendment, where municipality and county asserted an injury to local control of local affairs, which the Home Rule Amendment was enacted to protect.

Education Savings Account Pilot Program (ESA Act), allowing a limited number of students to directly receive their share of state and local education funds, which would ordinarily be provided to the public-school system they attended, and use such funds to pay for a private school education, was not "applicable" to municipality or county and therefore did not implicate the Home Rule Amendment, even though municipality and county might be affected by Act; facially, Act governed only the conduct of local education agencies (LEAs), not of municipality or county, and financial connections between LEAs and municipality or county did not change fact that entities were distinct from each other.

EMINENT DOMAIN - TEXAS

[City of Baytown v. Schrock]

Supreme Court of Texas - May 13, 2022 - S.W.3d - 2022 WL 1510310 - 65 Tex. Sup. Ct. J. 985

Property owner brought regulatory-taking and declaratory-judgment claims against city, alleging that city denied him all economically viable use of property by refusing to provide water service to his property and seeking declaration that city's enforcement of ordinance against him resulted in inverse condemnation of his property for which no just compensation was paid.

Following rendition of summary judgment against property owner, which was overturned by the Court of Appeals the County Civil Court at Law granted city's motion for directed verdict after property owner rested his case at jury trial. Property owner appealed, and the Houston Court of Appeals affirmed in part, reversed in part, and remanded. City petitioned for review, which was granted.

The Supreme Court held that city's refusal to reconnect property owner's utility service, due to outstanding utility bills, which prohibited owner from renting out the property did not constitute a regulatory taking.

City's refusal to reconnect property owner's utility service, due to outstanding utility bills, which prohibited owner from renting out the property did not constitute a regulatory taking; ordinance did not regulate land use, but instead permitted the city to refuse to connect utility service to the property until outstanding utility bills associated with the property were satisfied, city's regulation of utility service was not a regulation of the property itself, and property owner's claim was for city's alleged wrongful enforcement of its ordinance, rather than for a taking of private property.

LICENSING FEES - TEXAS

[Builder Recovery Services, LLC v. Town of Westlake]

Supreme Court of Texas - May 20, 2022 - S.W.3d - 2022 WL 1591976 - 65 Tex. Sup. Ct. J. 1151

Construction waste disposal business brought declaratory-judgment action, challenging town's power to pass ordinance requiring business to obtain license to conduct its business and seeking declaration that 15% license fee on business's gross revenue pursuant to ordinance was unlawful.

Business also sought to recover attorney fees. After bench trial, the District Court ruled in favor of business on its claim that 15% licensee fee was unlawful, awarded attorney fees in sum of $8,523, and ruled in favor of town on all other claims. Business appealed. The Court of Appeals affirmed in part, reversed in part, and remanded. Plaintiff petitioned for review, which was granted.

The Supreme Court held that:

- Claim that town lacked authority to impose license fee based on any percentage of revenue was not mooted by intervening downward adjustment to the size of fee;
- General-law municipality's express power to regulate construction trash hauling did not include implied power to charge licensing fees based on a percentage of revenue; and
- Parties' failure to address severability warranted remand.

EMINENT DOMAIN - FEDERAL

[ATS Ford Drive Investment, LLC v. United States]

United States Court of Federal Claims - April 1, 2022 - Fed.Cl. - 2022 WL 986300

In rails-to-trails case, owners of real property adjacent to railroad corridor filed suit against United States, claiming Fifth Amendment taking by Surface Transportation Board's (STB) issuance of notice of interim trail use (NITU) authorizing conversion of railroad line into recreational trail pursuant to National Trail Systems Act, thus acquiring owners' property by inverse condemnation.

Parties cross-moved for summary judgment.

The Court of Federal Claims held that:

- Owners adjacent to corridor along public road lacked cognizable property interest;
- Owners adjacent to corridor acquired by railroad through court decision had cognizable property interest;
- Owners adjacent to corridor acquired by railroad via lost conveyance instruments had cognizable property interest;
- Owners adjacent to corridor acquired by railroad via warranty deed lacked cognizable property interest;
- Summary judgment was precluded as to property interest of owners adjacent to corridor acquired by railroad via quitclaim deed;
- Owners adjacent to corridor acquired by railroad via releases lacked cognizable property interest;
- Owners of parcels adjacent to street running parallel to corridor had cognizable property interest up to centerline of street; but
- Owners of parcels adjacent to street lacked cognizable property interest in other half of street.

EMINENT DOMAIN - FLORIDA

[Orlando Bar Group, LLC v. DeSantis]

District Court of Appeal of Florida, Fifth District - April 8, 2022 - So.3d - 2022 WL 1051484 - 47 Fla. L. Weekly D827

Restaurant group which operated several bars brought suit against the governor, in his official capacity, the Department of Business and Professional Regulations, and a county, alleging the temporary COVID-19 restrictions enacted by defendants amounted to inverse condemnation entitling the group to compensation.

The Circuit Court granted defendants' motion to dismiss with prejudice and without leave to amend. Restaurant group appealed.

The District Court of Appeal held that:

- *Penn Central* test applied to the determination of whether temporary COVID-19 restrictions on restaurant group's bars constituted a regulatory taking;
- Temporary COVID-19 restrictions did not amount to a categorical regulatory taking;
- Temporary COVID-19 restrictions did not amount to an as-applied regulatory taking; and
- Restaurant group failed to preserve for appeal issue of whether dismissal of its complaint with prejudice and without need to amend was improper.

Penn Central test applied to the determination of whether the temporary COVID-19 restrictions on restaurant group's bars, enacted by governor, Department of Business and Professional Regulations, and county, constituted a regulatory taking, in restaurant group's suit to recover damages for its alleged losses caused by the restrictions; the COVID-19 restrictions did not result in a physical appropriation and per se taking of restaurant group's property, but were merely regulations affecting restaurant group's use of their properties.

Temporary COVID-19 restrictions enacted by governor, Department of Business and Professional Regulations, and county, which prohibited restaurant group from selling alcohol completely for 17 days in its various bars, and incrementally removed these restrictions over the following six months, did not amount to a categorical regulatory taking; the COVID-19 restrictions did not result in a complete or permanent loss of restaurant group's ability to do business.

Under the *Penn Central* test, temporary COVID-19 restrictions enacted by governor, Department of Business and Professional Regulations, and county, which prohibited restaurant group from selling alcohol completely for 17 days in its various bars, and incrementally removed these restrictions over the following six months, did not amount to an as-applied regulatory taking; even though the COVID-19 restrictions economically impacted the restaurant group's various bars, the governor was empowered by the state's emergency powers statute to prohibit the sale of alcohol, and the COVID-19 restrictions were a valid use of the State's police power to protect the general welfare.

COUNTIES - MISSISSIPPI

[Board of Supervisors of Jackson County v. Qualite Sports Lighting, LLC]

Supreme Court of Mississippi - May 5, 2022 - So.3d - 2022 WL 1420151

Unsuccessful bidder for project involving athletic field lighting system appealed decision of county board of supervisors, which awarded contract to competing bidder.

The Circuit Court denied unsuccessful bidder's motion for entry of scheduling order to extent that it requested a discovery period, denied board's motion to quash subpoenas issued by unsuccessful bidder, and ordered supplementation of record. Board petitioned for interlocutory appeal, which was granted.

The Supreme Court held that statute providing for appeal of a decision of a county board of supervisors, stating that the notice of appeal must designate "all matters that the appellant desires to be made part of the record," does not permit consideration of new evidence on appeal.

On appeal from a decision of a county board of supervisors, if the parties disagree as to what matters should or should not be included as part of the record for the appeal, then the differences should be settled by the circuit court; the circuit court should conduct a hearing to determine which matters are necessary to convey a fair, accurate, and complete account of the proceedings before the board.

PUBLIC PENSIONS - PUERTO RICO

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

United States Court of Appeals, First Circuit - April 26, 2022 - 32 F.4th 67

In Title III debt restructuring proceedings brought pursuant to the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), Financial Oversight and Management Board for Puerto Rico filed motion for confirmation of modified eighth amended proposed joint plan of adjustment for Commonwealth of Puerto Rico, Employees Retirement System of the Government of the Commonwealth of Puerto Rico and the Puerto Rico Public Buildings Authority.

Creditors objected. The United States District Court for the District of Puerto Rico overruled objections, and confirmed plan. Teachers' associations appealed and filed motions for stay pending appeal. The District Court denied stay motions.

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

- Forward-going teachers' pension obligations under existing retirement regime were a contractual commitment which Commonwealth could reject;
- Notice and hearing was properly provided for rejection of teachers' pension obligations in joint plan of adjustment;
- PROMESA preempted Commonwealth laws calling for forward-going teachers' pension obligations under existing retirement regime;
- Lack of specific legislation permitting the plan to modify Commonwealth's pension obligations to public school teachers did not bar confirmation of plan; and
- New bond legislation authorized issuance of new bonds, conditioned on further accruals or cost-o--living eliminations for participants in teachers' pension plan.

In Title III debt restructuring proceedings brought pursuant to the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), forward-going teachers' pension obligations under existing retirement regime, while effected by statute, were a contractual commitment as between the Commonwealth of Puerto Rico and its covered employers, which Commonwealth could reject in joint plan of adjustment for Commonwealth of Puerto Rico, Employees Retirement System of the Government of the Commonwealth of Puerto Rico and the Puerto Rico Public Buildings Authority.

In confirming proposed joint plan of adjustment for Commonwealth of Puerto Rico, Employees Retirement System of the Government of the Commonwealth of Puerto Rico and the Puerto Rico Public Buildings Authority, in Title III debt restructuring proceedings, Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA) preempted Commonwealth laws calling for forward-going teachers' pension obligations under existing retirement regime.

In Title III debt restructuring proceedings brought pursuant to the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), lack of specific legislation permitting the plan to modify Commonwealth of Puerto Rico's pension obligations to public school teachers did not bar confirmation of proposed joint plan of adjustment for Commonwealth of Puerto Rico, Employees Retirement System of the Government of the Commonwealth of Puerto Rico and the Puerto Rico Public Buildings Authority; PROMESA only required any approval necessary under applicable law and did not by its plain terms require enabling legislation for every component of the plan, and plan's adjustment of pension obligations was in fact authorized by enabling legislation.

In Title III debt restructuring proceedings brought pursuant to the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), new bond legislation authorized issuance of new bonds, conditioned on further accruals or cost-of-living eliminations for participants in teachers' pension plan, in joint plan of adjustment for Commonwealth of Puerto Rico, Employees Retirement System of the Government of the Commonwealth of Puerto Rico and the Puerto Rico Public Buildings Authority.

IMMUNITY - RHODE ISLAND

Battaglia v. Lombardi

Supreme Court of Rhode Island - May 5, 2022 - A.3d - 2022 WL 1416719

Pedestrian who was injured when he fell into manhole brought negligence action against city.

After jury verdict for pedestrian, the Superior Court granted city's motion for judgment as a matter of law. Pedestrian appealed, and city cross-appealed.

The Supreme Court held that:

- Trial justice plainly erred by making factual determinations to determine the applicability of the egregious conduct exception to public duty doctrine at the "judgment as matter of law" stage of trial, and
- Whether egregious conduct exception to the public duty doctrine applied was for jury.

Trial justice plainly erred by making factual determinations to determine the applicability of the egregious conduct exception to public duty doctrine at the "judgment as matter of law" stage of trial in negligence action brought against city by pedestrian who was injured when he fell into manhole; factual determinations were impermissibly drawn by the trial justice, who also failed to consider the evidence in the light most favorable to pedestrian as nonmovant and draw all reasonable inferences that supported his position.

Whether egregious conduct exception to the public duty doctrine applied was for jury in negligence action brought against city by pedestrian who was injured when he fell into manhole, given that there were factual disputes as to whether city created circumstances that would force a reasonably prudent person into position of extreme peril, whether city had actual or constructive notice of the perilous circumstances, and whether it failed to remedy that condition after a reasonable amount of time.

PUBLIC UTILITIES - RHODE ISLAND

Freepoint Solar LLC v. Richmond Zoning Board of Review

Supreme Court of Rhode Island - May 11, 2022 - A.3d - 2022 WL 1482502

Solar company sought review of decision of town zoning board of review denying company's application a special use permit to construct a ground-mounted solar energy system in residential zoning district.

The Superior Court reversed. Town petitioned for writ of certiorari.

The Supreme Court held that special use permit requirement of system being within two miles of utility substation did not mean only a substation of specific named utility that provided electricity in area.

Term "utility substation," in town zoning ordinance allowing for ground-mounted commercial solar energy systems within an R-3 residential zoning district by special use permit if certain requirements were met including location of entire lot on which the solar energy system was placed being within two miles of a utility substation, could include an electrical substation with three transformers and did not mean only a substation of a specific named utility that provided electricity in area.

IMPACT FEES - WASHINGTON

Viking JV, LLC v. City of Puyallup

Court of Appeals of Washington, Division 2 - May 10, 2022 - P.3d - 2022 WL 1467526

Commercial builder filed Land Use Petition Act (LUPA) petition challenging city hearing examiner's decision denying builder's request to reduce park impact fee assessed by city as condition of commercial building permit for commercial warehouse.

City filed motion to dismiss, and the Superior Court denied the motion and subsequently denied builder's petition on the merits. Builder appealed, and city cross appealed.

The Court of Appeals held that:

- City's two-tiered hearing examiner review process for reviewing local project permits was not preempted by state law, and
- Builder failed to exhaust its administrative remedies and thus lacked standing to bring LUPA petition.

City's two-tiered hearing examiner review process for reviewing local project permits was not preempted by state law; city code's allowance for no more than one open record hearing and one closed record appeal was consistent with statute governing local government review of project permit applications, city's designation that each examiner's decision may be given effect of final decision of legislative body was consistent with statute governing legal effect of decisions made by examiner, and nothing in statute governing hearing examiner system expressly prohibited two-tiered internal review system.

Commercial builder failed to exhaust its administrative remedies and thus lacked standing to bring Land Use Petition Act (LUPA) petition challenging city hearing examiner's decision denying builder's request to reduce park impact fee assessed by city as condition of commercial building permit for commercial warehouse; city's appellate examiner review process was lawful, builder failed to procure a final determination by city's officer with highest level of authority to make determination so there was no land use decision under LUPA that would permit judicial review of builder's claims, and there were no equitable exceptions to LUPA's exhaustion requirement.

IMMUNITY - ILLINOIS

Robinson v. Village of Sauk Village

Supreme Court of Illinois - April 21, 2022 - N.E.3d - 2022 IL 127236 - 2022 WL 1180112

Pedestrian brought personal injury action against police officers and villages arising from his being struck by vehicle driven by car theft suspect who engaged in police chase involving his taking off from parking lot after initial chase, switching vehicles, and then hitting pedestrian during more police chase.

The Circuit Court granted summary judgment for officers and villages under Local Government and

Governmental Employees Tort Immunity Act. Pedestrian appealed. The Appellate Court reversed. Officers and villages petitioned for leave to appeal, which was allowed.

The Supreme Court held that:

- Direct restriction or control of freedom of movement is needed to show custody for purposes immunity under Act for injury inflicted by an escaped or escaping prisoner, overruling *Townsend v. Anderson*, 2019 IL App (1st) 180771, 443 Ill.Dec. 87, 161 N.E.3d 211, and
- Suspect was not an “escaped or escaping prisoner” at time he hit pedestrian.

A mere show of authority by police officers is not sufficient to establish that a person is “held in custody” under section of Local Governmental and Governmental Employees Tort Immunity Act giving local public entities and public employees absolute immunity from liability for any injury inflicted by an escaped or escaping prisoner, as defined in Act to be a person “held in custody”; rather, “custody” requires direct restriction or control of a person’s freedom of movement to a particular place for at least a limited period of time; overruling *Townsend v. Anderson*, 2019 IL App (1st) 180771, 443 Ill.Dec. 87, 161 N.E.3d 211.

Car theft suspect was not in “custody” when police officers pointed their weapons at him and ordered him to show his hands in church parking lot after first part of police chase, and thus suspect was not an “escaped or escaping prisoner” under section of Local Governmental and Governmental Employees Tort Immunity Act giving local public entities and public employees absolute immunity from liability for any injury inflicted by an escaped or escaping prisoner, as defined by Act to be a person “held in custody,” where suspect remained in vehicle with engine running and door closed, officers did not block suspect’s path with squad cars or otherwise limit his movement, and suspect drove out of parking lot with no physical impediment a little over one minute after arriving.

DEVELOPMENT - INDIANA

Munster Steel Co., Inc. v. CPV Partners, LLC

Court of Appeals of Indiana - March 28, 2022 - N.E.3d - 2022 WL 893777

Property seller brought action against property buyers, asserting that buyers’ development agreement with town, municipal development commission, and municipal redevelopment commission triggered sale contract’s subsequent-sale provision, which required buyers to pay a fee to seller if they resold the property within two years following the closing of the sale contract.

The Superior Court denied seller’s motion for summary judgment and granted buyers’ motion for summary judgment, determining that the development agreement constituted an equitable mortgage, not a sale. Seller appealed.

The Court of Appeals held that agreement was executed to secure a subsisting debt, and thus agreement constituted an equitable mortgage, not a sale for which property seller could collect fee under subsequent-sale provision.

Development agreement between property buyer and town was executed to secure a subsisting debt, and thus the agreement constituted an equitable mortgage, not a sale for which property seller could collect a fee from buyer under subsequent-sale provision of contract in which seller sold the property to buyer; transfer of property to town under the agreement was intended as security for the performance of buyer’s obligations to complete the first segment of development project and to secure funding for second segment of the project, and agreement called for reconveyance of town’s right, title, and interest in the property simultaneously with buyer's deposit of the funds for the second segment as satisfaction of a debt.

EMINENT DOMAIN - IOWA

Matter of Condemnation of Certain Rights in Land for Extension of Armar Drive Project By City of Marion

Supreme Court of Iowa - May 6, 2022 - N.W.2d - 2022 WL 1434872

Family trust that owned undeveloped land appealed determination of Compensation Commission awarding it $403,000 as just compensation for city's condemnation of part of the land.

The District Court limited testimony of trust beneficiary, who testified as property owner, regarding comparable sales and, following a jury trial, entered judgment awarding owner $82,900 in damages. Trust appealed. The Court of Appeals affirmed. Trust applied for further review, which was granted.

The Supreme Court held that:

- Beneficiary's testimony and evidence of comparable sales, which included deeds, were not inadmissible on hearsay grounds;
- Beneficiary acquired personal knowledge of comparable sales, as required for admission of lay opinion testimony; but
- As an issue of first impression, beneficiary was unqualified to testify as expert regarding specific allegedly comparable sales of developed property.

Property owner's testimony and evidence of allegedly comparable sales, including deeds for other property sales from which sale price could be calculated within $500 based on the transfer tax paid, were not inadmissible on hearsay grounds, in condemnation proceeding regarding owner's property that was subject to partial taking, under exceptions to hearsay rule for public records, for records of documents that affect interest in property, and for statements in documents that affect an interest in property, statute governing instruments affecting real estate, and rules governing authentication of records.

Property owner acquired personal knowledge of allegedly comparable sales of other properties, as required for admission of lay opinion witness testimony as to value of owner's property in condemnation proceeding to determine just compensation for partial taking of land, even though owner was not buyer, seller, or real estate agent in the other sales transactions, where owner reviewed public real estate records and personally inspected the other sites.

Property owner of undeveloped land was unqualified to testify as expert regarding specific allegedly comparable sales of developed property, for purposes of valuing owner's property that was partially taken in condemnation proceeding, where owner was former restaurant manager with limited real estate experience.

EMINENT DOMAIN - NEW YORK

Chynn v. County of Suffolk

Supreme Court, Appellate Division, Second Department, New York - April 20, 2022 - N.Y.S.3d - 2022 WL 1160930 - 2022 N.Y. Slip Op. 02541

Claimants brought actions seeking just compensation and direct damages for loss of oceanfront properties condemned by county as part of extensive project to reconstruct beaches and restore dune network on several barrier islands that were damaged during hurricane.

Following joint bench trial, the Supreme Court, Suffolk County, entered judgments awarding first claimant $1,750,000 and second claimant $1,830,000 as just compensation for the taking of real property. County appealed.

The Supreme Court, Appellate Division, held that:

- Upward adjustment of 3% to value of claimants' homes to account for changing market conditions was not warranted;
- Downward adjustment of 2% to market value of claimants' homes based on market conditions was not warranted; and
- Upward adjustment of 5% to market value of claimants' homes to account for condemnation blight was not warranted.

Upward adjustment of 3% per year to market value of claimants' homes to account for changing market conditions between date of the common comparable sale and vesting date was not warranted in condemnation proceeding seeking just compensation for claimants' loss of oceanfront properties condemned by county as part of extensive project to reconstruct beaches and restore dune network on several barrier islands that were damaged during hurricane, although claimants' expert appraiser testified that review of market conditions in the area showed that market had been increasing during relevant period; expert also testified that he did not have any data or other evidence to support proposed market conditions adjustment.

Downward adjustment of 2% to market value of claimants' homes based on market conditions was not warranted in condemnation proceeding brought by claimants seeking just compensation for loss of oceanfront properties condemned by county as part of extensive project to reconstruct beaches and restore dune network on several barrier islands that were damaged during hurricane; county's expert appraiser based determination that downward adjustment was warranted on sales survey created by real estate company, but there was no way to determine how mean and median values reported in survey were calculated, and there was no data to support expert's theory that the housing market in relevant area was similar to that in survey during relevant period.

Upward adjustment of 5% to market value of claimants' homes to account for condemnation blight was not warranted in condemnation proceeding seeking just compensation for claimants' loss of oceanfront properties condemned by county as part of extensive project to reconstruct beaches and restore dune network on several barrier islands that were damaged during hurricane; claimants failed to establish that any affirmative conduct by county unreasonably interfered with or further depressed value of subject properties sufficient for condemnation blight theory to apply.

EMINENT DOMAIN - NORTH DAKOTA

Sauvageau v. Bailey

Supreme Court of North Dakota - April 28, 2022 - N.W.2d - 2022 WL 1260311 - 2022 ND 86

County Joint Water Resource District filed petition seeking to take landowners' property by quick take eminent domain for flood control easement.

The District Court denied landowners' motion to dismiss and landowners' motion for a preliminary injunction. Landowners filed petition for supervisory writ.

The Supreme Court held that district was acquiring more than flood control easement over landowners' property, and thus could not use quick take procedure.

County joint water resource district was acquiring more than flood control easement over landowners' property, and thus could not use quick take procedure to acquire the property interest, where district intended to close the public road, remove all structures from the property, engage in disturbance of the surface and subsurface, and inundate the property with water, and landowners would be left with only a reverter interest with no value.

EMINENT DOMAIN - TEXAS

Harris County Fresh Water Supply District No. 61 v. Magellan Pipeline Company, L.P.

Court of Appeals of Texas, Houston (1st Dist.) - April 19, 2022 - S.W.3d - 2022 WL 1144636

After administrative phase of condemnation proceeding for pipeline-installation easement resulting in award to fresh-water-supply district of $160,000 over amount pipeline companies had already paid district for the easement, district filed a plea to the jurisdiction and objections to the award, arguing that the award failed to award district adequate compensation for companies' acquisition of the easement.

The County Civil Court at Law granted companies a permanent easement, awarded the district the $160,000 additional compensation, and denied district's request for additional compensation. District appealed.

The Court of Appeals held that:

- District was not operating within governmental immunity's bounds with respect to condemnation proceeding, and thus district's governmental immunity from suit was abrogated;
- District waived its right to assert either that companies lacked condemnation authority because they were not common carriers or that condemnation was precluded by paramount-publi--importance doctrine; and
- Even if district could dispute companies' common-carrier status, sufficient evidence supported finding that companies qualified as common carriers.

Fresh-water-supply district was not operating within governmental immunity's bounds with respect to condemnation proceeding in which pipeline companies sought easement to install pipeline underneath district's property, and thus district's governmental immunity from suit was abrogated; proceeding was filed by companies at district's request, district entered contractual agreements with companies in which it was contractually obligated to participate in the proceeding, district initiated the judicial phase of the proceeding by filing objections to compensation award that it received at close of administrative phase, and, in the judicial phase, district affirmatively sought to oppose the condemnation and to recover damages for companies' alleged breach of the agreements.

Fresh-water-supply district waived its right to assert either that pipeline companies lacked authority to condemn an easement underneath district's property that companies sought for building a pipeline because they were not common carriers or that condemnation was precluded because district's use of the property companies sought to condemn served an issue of paramount public importance over companies' use, where district entered contract with companies in which it agreed that it would not contest companies' authority to condemn the easement and that the scope of condemnation proceeding would be limited to any additional compensation that district might be due in excess of compensation that companies paid it before initiating the proceeding.

Sufficient evidence supported finding that pipeline would be used to serve customers unaffiliated with companies that owned pipeline and, thus, supported a finding that companies qualified as common carriers, as required for companies to have authority to condemn a pipeline-installation easement underneath fresh-water-supply district's property; evidence indicated that third parties unaffiliated with the companies used pipeline to transport refined petroleum products, and eventual pipeline was being built to accommodate volume commitments from those third parties.

ZONING & PLANNING - WASHINGTON

Kanam v. Kmet

Court of Appeals of Washington, Division 2 - May 3, 2022 - P.3d - 2022 WL 1397407

County resident brought action against city seeking declaratory judgment declaring invalidity of two city zoning ordinances.

Superior Court granted city's motion to dismiss and denied resident's motion for reconsideration.

The Court of Appeals held that:

- Resident lacked standing, and
- City's joint comprehensive growth management plan with county did not confer taxpayer standing.

County resident failed to show that he was affected in any material way by ordinances of city that he did not inhabit, and thus, he lacked standing to bring action against city to obtain judgment declaring the invalidity of two city zoning ordinances which made using building he sought to purchase for storage purposes a non-conforming use that would require him to obtain a conditional use permit, where he did not allege that he was a city purchaser, did not allege he was a city resident or that he owned any real property in the city, and did not allege that his interest in the building at issue was more than speculative.

City's joint comprehensive growth management plan with county did not make county resident a city taxpayer so as to confer taxpayer standing to bring action against city he did not inhabit to obtain declaratory judgment to declare invalidity of two city ordinances which made using building he sought to purchase for storage purposes a non-conforming use that would require him to obtain a conditional use permit; prospective purchaser did not show that city ordinances were connected in any way to the joint plan, as nothing in the plan universally adopted or even cited the ordinances, nor did he show that county could jointly enforce the city ordinances.

ANNEXATION - ILLINOIS

Village of Kirkland v. Kirkland Properties Holdings Company, LLC I

Appellate Court of Illinois, Second District - April 21, 2022 - N.E.3d - 2022 IL App (2d) 200780 - 2022 WL 1183531

Village brought action against successor owners of original landowner, alleging they breached a recorded annexation agreement, and sought damages or, in the alternative, injunctive relief in form of specific performance.

The Circuit Court granted successor owners' motion to dismiss for failure to state a claim and awarded attorney's fees in their favor. Village appealed.

The Appellate Court held that:

- Annexation agreement was a covenant that rant with land to bind successor owners, and
- Village sufficiently pled a claim that successor owners that purchased portion of subject property were bound to terms of annexation agreement.

Annexation agreement between village and original landowner was a covenant that ran with the land that bound successor owners to its terms and obligations, where agreement expressly stated that it was "binding upon heirs, executors, administrators, successors, and assigns," and on parties to agreement, very purpose of agreement was for village to annex property to develop it, and agreement clearly provided privity of estate between village and successor owners as it provided that it was binding on successors, and thus, village and each successor owner had a legally recognized interest in the development of the property.

Village sufficiently pled a claim that successor owners that only purchased a portion of the subject property were bound to terms of an annexation agreement between village and original landowner, which required successors to extend credit to village proportionate to amount of lots they owned in a subdivision in order for village to construct roads; although agreement neither expressly provided for nor expressly precluded application of terms of the agreement when a subsequent owner purchased less than entire property, terms clearly contemplated possibility that the subject property would be subdivided and developed in stages and phases, which was entirely consistent with proportionally burdening successor owners with obligations.

PUBLIC UTILITIES - CALIFORNIA

California Public Utilities Commission v. Federal Energy Regulatory Commission

United States Court of Appeals, Ninth Circuit - March 17, 2022 - 29 F.4th 454 - 22 Cal. Daily Op. Serv. 2913 - 2022 Daily Journal D.A.R. 2667

California Public Utilities Commission (CPUC) and other state agencies petitioned for review of Federal Energy Regulatory Commission's (FERC) decisions, awarding to three California-based public utilities upward adjustments, or "incentive adders," to their rate of return on equity, over CPUC's objection that utilities should not receive awards as their participation in California independent system operator (CAISO) was involuntary and mandated by state law, so adder could not induce utilities to remain members of CAISO.

The United States Court of Appeals for the Ninth Circuit granted petitions and remanded. On remand, FERC determined that utilities' membership in CAISO was voluntary under California law, so incentive adders were warranted. CPUC and other California agencies petitioned for review of remand orders.

The Court of Appeals held that:

- FERC's remand orders did not violate mandate rule;
- *Erie* doctrine did not apply to require FERC to defer to California's interpretation of California law; and
- FERC reasonably interpreted California law as allowing utilities to voluntarily leave CAISO.

Federal Energy Regulatory Commission (FERC) did not violate mandate rule, in remand orders reaffirming award of incentive adders to public utilities' rate of return on equity because their participation in California independent system operator (CAISO) was voluntary and not mandated by California law; on remand FERC did not decide issue that Court of Appeals had already decided, as court did not definitively hold that California law prevented utilities from leaving CAISO without approval, or deviate from court's mandate that remanded case for further proceedings and instructed FERC to inquire into utility's specific circumstances as to whether it could unilaterally leave CAISO and, thus, whether incentive adder could induce utility to remain in CAISO.

Federal Energy Regulatory Commission's (FERC) conclusion, in remand orders reaffirming award of incentive adders to public utilities' rate of return on equity because their participation in California independent system operator (CAISO) was voluntary and not mandated by California law, that Erie doctrine did not apply, was not arbitrary, capricious, or contrary to law, since incentive adder and requirement that utility be voluntary member of CAISO to qualify for adder arose from federal law, and federal law as source of right sued upon did not change merely because California law dictated whether membership in CAISO was voluntary.

Court of Appeals would apply de novo review, rather than according deference, to Federal Energy Regulatory Commission's (FERC) interpretation of California law, in remand orders reaffirming award of incentive adders to public utilities' rate of return on equity because their participation in California independent system operator (CAISO) was voluntary and not mandated by California law, since FERC was not interpreting its own electricity regulations and instead was interpreting California law and public policy, in which FERC lacked specific expertise, and Congress had not assigned FERC task of interpreting state statutes.

Under California law, as predicted by Court of Appeals, Federal Energy Regulatory Commission's (FERC) interpretation, in remand orders reaffirming award of incentive adders to public utilities' rate of return on equity, that utilities' participation in California independent system operator (CAISO) was voluntary and not mandated by California law, was not arbitrary, capricious, or contrary to law, under Administrative Procedure Act (APA); California failed to identify any California Code provision mandating CAISO membership, statutory provisions that California relied on merely directed creation of CAISO and encouraged utilities to join, and California courts would not defer to prior administrative decision suggesting the contrary, as it was inconsistent with relevant California statute.

IMMUNITY - ILLINOIS

Schultz v. St. Clair County

Supreme Court of Illinois - April 21, 2022 - N.E.3d - 2022 IL 126856 - 2022 WL 1180973

Husband, as special administrator of wife's estate, brought wrongful death and survival action against county, county 911 agency, county emergency telephone system board, and unidentified 911 dispatchers, alleging that defendants engaged in willful and wanton conduct by refusing to dispatch 911 services, which resulted in wife's death.

Defendants moved to dismiss, arguing that they were entitled to absolute immunity under the Local Governmental and Governmental Employees Tort Immunity Act and that wife's conduct was sole proximate cause of her injuries and death.

The Circuit Court granted motion. Husband appealed. The Appellate Court affirmed. Husband petitioned for leave to appeal and petition was allowed.

The Supreme Court held that:

- As matter of apparent first impression, husband's allegations implicated limited immunity provided by Emergency Telephone System (ETS) Act, rather than absolute immunity provided by Tort Immunity Act, but
- Dispatcher's refusal to dispatch police to convenience store to prevent wife from driving under the influence of alcohol was not proximate cause of wife's death.

Husband's allegations that public safety answering point (PSAP) employee's intentional or reckless refusal to dispatch vital emergency services resulted in wife's death implicated limited immunity provided by Emergency Telephone System (ETS) Act, rather than absolute immunity provided by Local Governmental and Governmental Employees Tort Immunity Act; ETS Act's limited immunity provision, by its plain language, governed scope of liability relating to PSAP employee's "performance…or provision of 9-1-1 service[,]" and, further, ETS Act, which provided comprehensive rules and regulations applicable to 911 dispatchers in relation to answering, receiving, or dispatching emergency services, was both more specific and more recent than Tort Immunity Act, indicating that legislature intended it to govern.

Emergency dispatcher's refusal to dispatch police to convenience store to prevent motorist from driving under the influence of alcohol was not proximate cause of motorist's death, which occurred when motorist drove her vehicle off the road while driving away from convenience store, where dispatcher did not furnish motorist with vehicle or alcohol or facilitate her decision to get into her vehicle and drive while intoxicated, and, at most, dispatcher's alleged conduct furnished condition by which motorist's injury was made possible, and thus it could not be established that injury to motorist would not have occurred absent dispatcher's alleged refusal to dispatch police.

BONDS - OKLAHOMA

Matter of Oklahoma Development Finance Authority for Approval of Not to Exceed $800,000,000 Ratepayer-Backed Bonds

Supreme Court of Oklahoma - May 3, 2022 - P.3d - 2022 WL 1312957 - 2022 OK 41

Oklahoma Development Finance Authority (ODFA) filed application for approval of issuance of ratepayer-backed bonds pursuant to February 2021 Regulated Utility Consumer Protection Act to finance recovery of natural gas costs incurred by public utility during two-week period of record cold temperatures.

Ratepayers filed protests challenging bonds.

On assumption of original jurisdiction, the Supreme Court held that:

- ODFA followed correct statutory process for authorization to issue bonds, and
- Bonds did not violate constitutional debt-limitation provisions.

Oklahoma Development Finance Authority (ODFA) followed correct statutory process pursuant to February 2021 Regulated Utility Consumer Protection Act for authorization to issue ratepayer-backed bonds to finance recovery of natural gas costs incurred by public utility during two-week period of record cold temperatures; ODFA gave proper notice of its application and required hearing, and final financing order set out parameters of bonds' issuance, terms, conditions, requirements, and interest.

Ratepayer-backed bonds issued by Oklahoma Development Finance Authority (ODFA) pursuant to February 2021 Regulated Utility Consumer Protection Act to finance recovery of natural gas costs incurred by public utility during two-week period of record cold temperatures did not violate constitutional debt-limitation provisions; bonds would be repaid through a charge on each ratepayer's monthly bill, such charge was secure revenue source, and money to directly pay bonds was reliable, predictable fees from outside sources, rather than from one state entity to another.

PUBLIC RECORDS - OREGON

City of Portland v. Bartlett

Supreme Court of Oregon - April 28, 2022 - P.3d - 369 Or. 606 - 2022 WL 1260316

City sought declaratory judgment that public records sought by requester, and ordered produced by district attorney, were exempt from disclosure as attorney-client privileged material.

Requester filed counterclaim seeking declaratory judgment that records must be disclosed. The Circuit Court granted city's motion for summary judgment and denied requester's motion for summary judgment. Requester appealed. The Court of Appeals reversed and remanded. City obtained leave to appeal.

The Supreme Court held that:

- Communications between city attorney and city officials that were over 25 years old were not exempt from disclosure under public records law on ground that they were subject to attorney-client privilege, and
- Public records law prevailed over any inconsistent city law.

Communications between city attorney and city officials that were over 25 years old were not exempt from disclosure under public records law on ground that they were subject to attorney-client privilege; although documents were exempt from disclosure at time they were prepared, 25-year sunset provision applied to all public records.

Application of public records law for disclosure of communications between city attorney and city officials that were over 25 years old did not interfere with "structure and procedures" of city's government, and therefore home rule under Oregon Constitution, but instead was application of general law addressed primarily to substantive social, economic, or other regulatory objectives of the state, and therefore public records law prevailed over any inconsistent city law; even legislature's disclosure requirement and that provision's related effect on evidentiary privilege, as applied to city's attorney-client communications, were somehow inconsistent with provisions of city code that made reference to that privilege, city would have to comply.

MUNICIPAL ORDINANCE - WASHINGTON

Bass v. City of Edmonds

Supreme Court of Washington - April 21, 2022 - P.3d - 2022 WL 1178491

Individual gun owners brought action against city under the Uniform Declaratory Judgment Act challenging city ordinance that made it a civil infraction to allow a minor, at-risk person, or prohibited person access to a firearm that was not secured by a locking device, or to store unlocked firearm.

The Superior Court granted gun owners' motion for summary judgment in part and concluded that the ordinance provision that made it a civil infraction if a minor, at-risk person, or prohibited person obtained a firearm from an owner's premises that was not secured by a locking device was preempted by state law. City appealed. The Court of Appeals affirmed in part and reversed in part by concluding that the entire ordinance was preempted by state law. Supreme Court granted review.

The Supreme Court held that:

- Individual gun owners had standing to challenge unauthorized access provision of city ordinance that made it civil infraction to knowingly or reasonably allow minor, at-risk person, or prohibited person access to firearm and that person obtains firearm, and
- City ordinance that made it a civil infraction to allow minor, at-risk person, or prohibited person access to firearm that was not secured by locking device or to store unlocked firearms was preempted by state statute that preempted entire field of firearms regulation.

INSURANCE - FLORIDA

White v. Ascendant Commercial Insurance, Inc.

District Court of Appeal of Florida, Third District - March 30, 2022 - So.3d - 2022 WL 945497 - 47 Fla. L. Weekly D774

Passenger, who was injured in automobile accident with school board's bus while riding in his employer's work vehicle, brought action against school board and his employer's liability insurer.

After passenger settled with school board for $175,000 and school board was dismissed with prejudice, passenger sought to recover uninsured motorist (UM) benefits from his employer's insurer. The Circuit Court granted insurer's motion for summary judgment. Passenger appealed.

The District Court of Appeal held that:

- School board was not self-insured government entity, for purposes of being classified as uninsured or underinsured;
- Passenger did not exhaust school board's liability insurance policy limits, and, thus, UM coverage under employer's insurance policy was not triggered; and
- Trial court could make determination that school board was not underinsured without jury first determining passenger's total damages.

School board was not self-insured government entity, for purposes of being classified as uninsured or underinsured under uninsured motorist (UM) statute, with regard to accident involving school board bus; school board regularly paid premiums to insurance company for liability coverage, school board's $200,000 retained limit did not render it a self-insurer, and insurance policy plainly indicated that school board was not self-insured.

Passenger, who was injured in automobile accident with school board's bus while riding in his employer's work vehicle, did not exhaust school board's liability insurance policy limits, and, thus, uninsured motorist (UM) coverage under employer's insurance policy was not triggered; school board's insurance policy provided limit of $200,000, passenger settled with school board for $175,000, and UM coverage under employer's policy was only triggered when tortfeasor's insurance coverage was exhausted through payment of judgments or settlements.

Trial court could make determination that school board was not underinsured, with regard to incident in which passenger was injured in automobile accident with school board's bus while riding in his employer's work vehicle, based on amount of passenger's settlement agreement with school board, without needing jury to first determine passenger's total damages, in passenger's action against his employer's insurer to recover uninsured motorist (UM) coverage; it was trial court's proper function to make the initial determination of law as to whether UM coverage was available.

MUNICIPAL CORPORATIONS - LOUISIANA

In re City of St. Martinville

Court of Appeal of Louisiana, Third Circuit - March 23, 2022 - So.3d - 2022 WL 853866 - 2021-700 (La.App. 3 Cir. 3/23/22)

After mayor vetoed ordinance passed by city council amending its special legislative charter to convert mayoral position from full-time to part-time, city filed petition for declaratory judgment, seeking judgment declaring that mayor was precluded from vetoing actions taken by city council.

Following hearing, the District Court, the Judicial District granted declaratory judgment in favor of city. Mayor appealed.

The Court of Appeal held that:

- Mayor had power to veto actions of city council, and
- City, rather than mayor, was responsible for costs associated with action.

Mayor of city that had adopted special legislative charter had power to veto actions of city council as provided in statute specifying that Lawrason Act applied if city charter of municipality governed by special legislative charter was silent on a matter; while Act previously only applied to municipalities not governed by special legislative charter, change to existing law made it clear that distinction existed between a charter being silent on an issue versus conflicting with Act by specifying the Act applied when charter was silent, and city's special legislative charter was silent on the issue of veto.

City that had adopted special legislative charter, rather than mayor, was responsible for costs associated with declaratory judgment action filed by city seeking judgment declaring that mayor was precluded from vetoing actions taken by city council; city instituted litigation and named mayor as a person of interest, and mayor responded to suit in her capacity as mayor for the city.

PUBLIC UTILITIES - NORTH CAROLINA

Daedalus, LLC v. City of Charlotte

Court of Appeals of North Carolina - April 5, 2022 - S.E.2d - 2022-NCCOA-203 - 2022 WL 1009836

Developer brought action against city, alleging that city's collection of sewage and water capacity fees as mandatory precondition of connecting developer's existing water and sewer infrastructure to city's water and sewer systems constituted an unlawful ultra vires action.

The Superior Court partially granted developer's summary judgment motion, ruling that city's collection of capacity fees were ultra vires, granted developer's motion to amend order to correct clerical error, and granted city's motion for certification of judgment by issuing a second amended order stating that the order was certified for appeal.
City appealed.

The Court of Appeals held that:

- Trial court did not properly certify interlocutory order for appeal;
- Interlocutory order did not compel immediate payment of a significant amount of money;
- Court of Appeals would exercise its discretion to grant city's petition for writ of certiorari to reach merits of city's appeal of interlocutory order; and
- City's collection of fees was ultra vires.

Sewage and water capacity fees charged to developer by city were charged for future discretionary spending and not for contemporaneous use of system or for services furnished, as required by version of statute in effect at time, and thus city's collection of fees was ultra vires, although city collected fees at time user requested service and not at time property owner sought building approval and fees were used to reserve specific capacity space; fees were charged to pay for capacity costs associated with serving new growth, fees were paid at time of application for new service, service connection fees consisted of tapping fee and capacity fee, and funds from collected fees were deposited into city's general water and sewer fund that carried over time to fund future operations.

DEVELOPMENT FEES - NORTH CAROLINA

TAC Stafford, LLC v. Town of Mooresville

Court of Appeals of North Carolina - April 5, 2022 - S.E.2d - 2022-NCCOA-217 - 2022 WL 1009481

Real estate developer brought action against town alleging inverse condemnation, refund of illegally exacted fees, and breach of contract, and further seeking declaratory, injunctive, and mandamus relief in connection with town's requirement that developer make off-site improvements as condition of development approval.

The Superior Court granted developer's motion for summary judgment and petition for writ of mandamus, denied town's motion for summary judgment, and reserved determination of financial issues. Town appealed and moved to stay or enjoin execution or enforcement of the order and writ of mandamus. The same Court subsequently granted developer's motion for attorney fees and costs, granted in part developer's motion for reimbursement of expenditures, and dismissed developer's remaining claims. Town and developer appealed.

The Court of Appeals held that:

- Town lacked statutory authority to withhold issuance of certificates of occupancy or other development approvals for subdivision or to condition such approvals on completion of off-site improvements;
- Real estate developer was entitled to award of mandatory attorney fees;
- As matter of apparent first impression, funds paid by developer to entities other than town were not “exactions” under statute requiring municipalities to return illegally exacted funds with interest;
- Remand was required for trial court to conduct additional proceedings to determine how much developer was entitled to recover from town; and
- Issuance of writ of mandamus rendered moot all other claims by developer against town.

IMMUNITY - WASHINGTON

Ghodsee v. City of Kent

Court of Appeals of Washington, Division 1 - April 18, 2022 - P.3d - 2022 WL 1133772

Detainee, who had been shot by county police officer and detained pursuant to Involuntary Treatment Act, and detainee’s mother brought negligence action against city and county.

The Superior Court granted summary judgment in favor of city and county. Detainee appealed.

The Court of Appeals held that:

- Issue of whether county owed duty to detainee pursuant to special relationship exception to public duty doctrine was properly before court;
- Designated mental health professionals (DMHP) did not have definite, established, and continued relationship with detainee;
- Language of non-emergency detention (NED) order did not create “take charge” duty;
- Police officers did not owe detainee duty to detain him more swiftly; and
- City and county were entitled to statutory immunity.

City and county were entitled to statutory immunity for actions with regard to decision to detain detainee pursuant to Involuntary Treatment Act, in negligence action brought by detainee and mother against city and county; statute plainly provided immunity for actions, as well as decision-making, taken related to decision regarding whether to detain person for evaluation and treatment, and detainee did not demonstrate that either city or county owed him individualized duty of care as matter of law, as necessary to establish gross negligence.

REFUNDING BONDS - KANSAS

Snodgrass v. City of Wichita

Court of Appeals of Kansas - April 1, 2022 - Slip Copy - 2022 WL 982008

After accepting a developer’s petition to finance street, sewer, and water improvements for a housing development under, the City of Wichita levied special assessments against Appellants and other property owners in 2004.

The City issued bonds to pay for the improvements, then in 2011 issued refunding bonds to benefit from lower interest rates. But the City did not refund to property owners any of the money it saved by doing so. Appellants sued the City, asserting an entitlement to money based on the difference between the interest rate on the original bonds in 2004 and the interest rate of refunding bonds issued in 2011.

The City responded and moved for summary judgment, arguing that it was not legally required to reduce any assessments after issuing the refunding bonds. The City also asked the district court to dismiss Appellants' motion based on the statute of limitations, lack of notice, and immunity.

Appellants argued that their claims were unrelated to the City's original assessment, so they need not comply with the 30-day statute of limitations in K.S.A. 12-6a11 — theirs was not a "suit to set aside the said assessments or otherwise question the validity of the proceedings." Instead, Appellants argued that they sued soon after learning the City had issued refunding bonds for their property.

The Court of Appeals found – viewing the pleading and the facts in the light most favorable to Appellants – that the City failed to show that Appellants' suit questioned the validity of the assessment proceedings, and thus the City failed to show that the 30-day statute of limitations under K.S.A. 12-6a11 applied.

However, Appellants failed to show that the three-year statute of limitations applicable to implied contracts under K.S.A. 60-512 was tolled. Thus, their implied contract claims were barred by that statute.

As to the takings claim, the court held that Appellants did not sue until seven years after the City published notice of the refunding bonds, and thus their takings claim under § 1983 was barred by the two-year statute of limitations in K.S.A. 60-513(a)(4).

Appellants also argued that a property owner cannot be assessed any more than the special benefit incurred because that would constitute a taking of private property for public use without compensation, regardless of the amount. But the Court noted that precedent limited takings claims to those that show a "substantial excess" of cost over benefit.

In this instance, the Court focused on the $300 purportedly lost by the Appellants – as opposed to the $60 million saved by the City – and held that Appellants thus failed to show the City exacted "the cost of a public improvement in substantial excess of the special benefits accrued."

EMINENT DOMAIN - MICHIGAN

[Gym 24/7 Fitness, LLC v. State]

Court of Appeals of Michigan - March 31, 2022 - N.W.2d - 2022 WL 982050

Gym owner filed suit against the State, alleging an unconstitutional taking of its business property by operation of the governor's executive orders issued during the COVID-19 pandemic.

The Court of Claims denied State's motion for summary disposition. Appeals were taken.

The Court of Appeals held that:

- Executive orders did not involve a physical taking;

- Executive orders did not deprive gym owner of all economically productive or beneficial use of its private property; and
- Executive orders did not constitute a regulatory taking under Penn Central.

Governor's executive orders that temporarily closed and imposed restrictions on gym owner's business during the COVID-19 pandemic did not involve a physical taking of its property, as required for gym owner to be entitled to reasonable compensation, where there was no allegation or evidence that the State physically acquired, took possession of, occupied, or appropriated the gym owner's private property.

Governor's executive orders that temporarily closed and imposed restrictions on gym owner's business during the COVID-19 pandemic did not deprive gym owner of all economically productive or beneficial use of its property, and thus, there was no regulatory taking for gym owner to be entitled to reasonable compensation; closure of fitness centers for six months was temporary and considerably short in duration, there was no allegation or evidence that gym owner suffered a total loss or the complete elimination or obliteration of value by operation of the executive orders, property clearly still had value, even if no revenue or profit was generated during the closure, and any lost value relative to real and personal property likely recovered as soon as temporary closure was lifted.

Governor's executive orders that temporarily closed and imposed restrictions on gym owner's business during the COVID-19 pandemic did not constitute a regulatory taking under Penn Central, as required for gym owner to be entitled to reasonable compensation; character of government's action of temporarily closing gym owner's business was compelling in that the aim of executive orders was to stop the spread of the COVID-19, gym owner accepted that governor's executive orders were issued solely for a public purpose, and it did not contest the prudence of the governor's actions or her authority to issue the executive orders.

EMINENT DOMAIN - MICHIGAN

Barber v. Charter Township of Springfield, Michigan

United States Court of Appeals, Sixth Circuit - April 11, 2022 - F.4th - 2022 WL 1077308

Property owner filed state court action against township, county, and their parks and recreation departments alleging that their proposed removal of dam near her property amounted to unconstitutional taking and trespass.

Following removal, the United States District Court entered judgment on pleadings in defendants' favor, and owner appealed.

The Court of Appeals held that:

- Owner's claim for injunctive relief was ripe for adjudication, and
- Owner faced sufficiently concrete, particularized, and imminent injury-in-fact to establish her standing.

Property owner's claim for injunctive relief was ripe for adjudication in her action against county and township alleging that their proposed removal of dam near her property amounted to unconstitutional taking and trespass, even though dam had not yet been removed, where county and township had reached final decision to remove dam.

Property owner faced sufficiently concrete, particularized, and imminent injury-in-fact to establish her standing to assert claim that proposed removal of dam near her property by county and township amounted to unconstitutional taking and trespass, even though removal had not commenced; county and township had made final decision to remove dam and invested at least $600,000 into dam removal and restoration project, owner claimed that removing dam would change flow of water on her property and likely alter its configuration, and harms she faced were particular to her property.

ZONING & PLANNING - NORTH CAROLINA

Town of Midland v. Harrell

Court of Appeals of North Carolina - March 15, 2022 - S.E.2d - 2022-NCCOA-167 - 2022 WL 775040

Town filed action against developers, seeking order of abatement, a permanent mandatory injunction, and collection of civil penalties, costs, and attorney's fees after developers failed to maintain subdivision roads.

Town and developers filed cross-motions for summary judgment. The Superior Court granted summary judgment in favor of town, and denied developers' motion for relief from judgment. Developers appealed.

The Court of Appeals held that:

- Town had standing to pursue action against developers;
- Developers failed to establish they had a right to appeal civil penalties imposed;
- Remand of trial court's permanent injunction and abatement order was required; and
- Developers were entitled to an award of attorney's fees.

Town had standing to pursue action against developers after they allegedly failed to maintain subdivision roads as part of their development project, where town sought to exercise its powers granted to it under state law to seek fines, a mandatory injunction, and an order of abatement against developers, town also sought to exercise its power to enforce its own zoning ordinances, and based on town's own ordinances, town council was not required to adopt a resolution to authorize town to file its complaint against developers.

Civil penalties imposed by zoning administrator did not constitute a "final and binding order, requirement or determination made in writing" under statute governing quasi-judicial zoning decisions, and thus, developers did not establish that they had right to appeal them, where civil penalties imposed simply enforced judgment that found developers committed zoning violations, which they previously and unsuccessfully appealed town's zoning and subdivision administrator's issuance of notice of violation, and pursuant to town's ordinances, there was no other avenue available to challenge enforcement of that judgment in form of civil penalties.

Remand of trial court's mandatory permanent injunction and order of abatement was required for trial court to make further findings of fact of whether developers failed to meet specific Department of Transportation (DOT) standards and what was required for compliance after developers allegedly failed to maintain subdivision roads, where trial court failed to resolve dispute between town and developers as to exactly how to bring development roads into compliance with DOT standards, and as written, developers could not know from terms of trial court's injunction and abatement order what they had to do to bring roads into compliance.

Developers were entitled to award of attorney's fees for fees incurred contesting over 200 civil penalties assessed against them during pendency of earlier appeal of their lawsuit against town board of adjustment after its zoning and subdivision administrator issued a notice of violation for developers' alleged failure to maintain subdivision roads, where town was not authorized to impose penalties while developers' first lawsuit was on appeal, and attorney's fees statute provided that fees would be awarded when a city violated a state or case law setting forth unambiguous limits on its authority.

ZONING & PLANNING - OHIO

Rice v. Village of Johnstown, Ohio

United States Court of Appeals, Sixth Circuit - April 8, 2022 - F.4th - 2022 WL 1055496

Property owners filed § 1983 action alleging that village had unlawfully delegated legislative authority to its planning and zoning commission, violating its due process rights under United States and Ohio Constitutions.

The United States District Court entered summary judgment in village's favor, and owners appealed.

The Court of Appeals held that:

- Village's purportedly unconstitutional delegation of its legislative authority constituted procedural injury sufficient to support owners' standing, and
- Owners satisfied causation requirement for standing.

Village's purportedly unconstitutional delegation of its legislative authority to its planning and zoning commission in deciding whether to approve property owners' proposed annexation and rezoning proposal for residential development constituted procedural injury sufficient to support owners' standing to assert due process claim against village, even though property in question was in neighboring township, and property's zoning status had not changed; owners' procedural injury was tied to their economic interest in developing its property, their development plans could not proceed without commission's approval, and annexation by village was not prerequisite to entering zoning process.

Property owners' procedural injury arising from village's purportedly unconstitutional delegation of its legislative authority to its planning and zoning commission in deciding whether to approve their proposed annexation and rezoning proposal for residential development was fairly traceable to village's allegedly unconstitutional process, as required to satisfy causation requirement for standing in their action alleging denial of procedural due process, despite village's contention that owners' injury also arose from denial of annexation, and owners had not challenged denial of annexation, where village permitted petition for annexation to lapse after commission denied preliminary zoning application.

EMINENT DOMAIN - PENNSYLVANIA

Trinidad v. Department of Transportation

Commonwealth Court of Pennsylvania - March 30, 2022 - A.3d - 2022 WL 945548

Department of Transportation (DOT) brought condemnation action against landowners, seeking to quiet title and issuance of a writ of possession of commercial property after landowners failed to vacate the premises.

The Court of Common Pleas dismissed DOT's motion for writ of possession. DOT appealed.

The Commonwealth Court held that:

- Issue of whether DOT was entitled to possession of condemned property was separate from ongoing litigation;
- Issue of whether DOT was entitled to possession of condemned property was an important issue to the public;
- Denial of DOT's appeal would have resulted in an irreparable loss; and
- DOT was entitled to writ of possession.

Issue of whether Department of Transportation (DOT) was entitled to possession of landowners' condemned commercial property was separate from ongoing litigation, as required for trial court's denial of DOT's motion for writ of possession to be a final appealable order under collateral order doctrine; there was no dispute that amount of just compensation, as estimated by DOT, had been paid to landowners, thus, issue of right to possession remained, and that issue was significantly different from questions underlying the issue of landowners' entitlement for full compensation from condemnation of its commercial property.

Issue of whether Department of Transportation (DOT) was entitled to possession of landowners' condemned commercial property was an important issue that went beyond the present litigation, as required for trial court's denial of DOT's motion for writ of possession to constitute a final appealable order under collateral order doctrine; landowners' right to just compensation from DOT's taking and their subsequent divestment of all interests in the property, in addition to DOT's right to make use of property for public use to which it had established a legal right to possession, involved rights that were deeply rooted and involved important public policy considerations.

Denial of Department of Transportation's (DOT) appeal would have resulted in an irreparable loss, as required for trial court's order that denied DOT's motion for writ of possession to constitute a final appealable order under collateral order doctrine, where if order was not immediately appealable, DOT would been required to wait until Board of Viewers issued its decision on landowners' claim for full compensation, which would have caused DOT and the public to suffer losses, and substantial costs that DOT would incur due to delays and violations of contracts with third parties if it was forced to litigate its appeal from Board's decision prior to taking possession would not have been adequately vindicable and, effectively, could not be undone.

Department of Transportation (DOT) was entitled to a writ of possession for commercial property that was part of DOT's condemnation action against landowners, where landowners did not file preliminary objections to DOT's declaration of taking, DOT paid, and landowners accepted, initial and subsequent estimated amounts of compensation for its taking of landowners' commercial property, and Federal Residential Eviction Halt did not apply to DOT's condemnation action because it only pertained to residential evictions.

BANKRUPTCY - TEXAS

In re Jack County Hospital District

United States Bankruptcy Court, N.D. Texas, Fort Worth Division - March 18, 2022 - Slip Copy - 2022 WL 829172

Jack County Hospital District commenced a municipal debt adjustment case by filing a voluntary petition for relief under chapter 9 of Title 11 of the United States Code in the United States Bankruptcy Court for the Northern District of Texas on June 11, 2020.

The Bankruptcy Court entered its Findings of Fact, Conclusions of Law, and Order Confirming the Second Amended Plan of Adjustment on March 18, 2022.

PUBLIC FINANCE - ARIZONA

State v. Arizona Board of Regents

Supreme Court of Arizona - April 5, 2022 - P.3d - 67 Arizona Cases Digest 34 - 2022 WL 1011795

Attorney General brought action against Arizona Board of Regents (ABOR) and vice president of state university, seeking injunctive relief and relief under quo warranto statute related to an agreement between ABOR and operator of hotels to build and operate hotel and conference center on ABOR's property, and alleging that agreement violated state constitution's gift clause and constituted illegal payment of public money.

The Superior Court granted ABOR's motion for summary judgment on claim under gift clause, granted ABOR's motions to dismiss remaining counts, entered judgment for ABOR and vice president, and awarded ABOR and vice president attorney fees and costs. Attorney General appealed. The Court of Appeals affirmed. Attorney General filed petition for review, which was granted.

The Supreme Court held that:

- Attorney General lacked authority to bring claim that ABOR abused its tax-exempt status and improperly diverted property tax revenues;
- Attorney General lacked authority to bring quo warranto action based on claim that ABOR made conveyance to operator in order to evade taxes;
- Attorney General had authority to bring quo warranto action based on claim that ABOR violated statute and non-delegation doctrine in lease provision of agreement with operator;
- Five-year, rather than one-year, statute of limitations applied to claim that ABOR violated "Gift Clause" of state constitution; and
- Amended complaint related back to original complaint, for limitations purposes.

Property held by Arizona Board of Regents (ABOR), which was a state agency, was tax-exempt state property, and thus Attorney General lacked authority under statute authorizing it to enforce payment of taxes to bring claim that ABOR abused its tax-exempt status and improperly diverted property tax revenues by entering into agreement with operator of hotels to build and operate hotel and conference center on ABOR's land.

Attorney General lacked authority under quo warranto statute to bring action against Arizona Board of Regents (ABOR) based on claim that ABOR unlawfully exercised its authority by making conveyance to evade taxes in agreement with operator of hotels to build and operate hotel and conference center on ABOR's land; property held by ABOR was tax-exempt state property, such that there was no applicable tax to evade.

Attorney General had authority to bring quo warranto action against Arizona Board of Regents (ABOR) alleging that portion of agreement between ABOR and operator of hotels to build and operate hotel and conference center on ABOR's property that allowed operator to lease the hotel and conference center property from ABOR for 60 years, and to purchase property from ABOR at end of lease term for a nominal fee, was not for benefit of state, as required by statute governing ABOR's authority, but rather for the benefit and use of operator, and that lease violated non-delegation doctrine, where claim was based on allegation that ABOR unlawfully exercised its franchise.

Five-year statute of limitations under statute governing actions brought by Attorney General to recover state monies illegally paid, rather than one-year statute of limitations applicable to actions to enjoin illegal payments against any public entity or public employee, applied to Attorney General's claim alleging that money Arizona Board of Regents (ABOR) agreed to contribute towards construction of conference center in agreement with operator of hotels to build and operate hotel and conference center on ABOR's property violated "Gift Clause" of state constitution; five-year statute of limitations created exception for public-monies claims brought by Attorney General that supplanted the one-year statute of limitations, and exempted such claims from entirety of one-year statute of limitations.

Amended complaint's count alleging violation of state constitution's "Gift Clause" and illegal payment of public money related back to filing of original complaint, for limitations purposes, in action brought by Attorney General against Arizona Board of Regents (ABOR) challenging ABOR's agreement with operator of hotels to build and operate hotel and conference center on ABOR's land, even if the operative facts supporting the added claim differed from those supporting the original claims; claims in amended complaint and claims in original complaint all arose from the agreement between ABO and operator and, thus, arose from the same transaction.

ZONING & PLANNING - CALIFORNIA

Keen v. City of Manhattan Beach

Court of Appeal, Second District, Division 8, California - April 6, 2022 - Cal.Rptr.3d - 2022 WL 1021928

Owner of property rented on short-term basis petitioned for writ of mandate to enjoin city from enforcing zoning ordinances prohibiting short-term rentals.

The Superior Court enjoined ban on short-term rentals pending approval of zoning ordinances by Coastal Commission. City appealed.

The Court of Appeal held that:

- City's residential zoning ordinances always permitted short- and long-term rentals, and thus ban on short-term rentals was amendment to local coastal program requiring approval by Coastal Commission;

- Short-term residential rentals did not fall within definition of “hotels, motels, and time-share facilities”; and
- Court of Appeal would not take judicial notice of decades-old definition of “hotel.”

ZONING & PLANNING - CONNECTICUT

McLoughlin v. Planning and Zoning Commission of Town of Bethel

Supreme Court of Connecticut - April 5, 2022 - A.3d - 342 Conn. 737 - 2022 WL 1002241

Applicants sought review of town planning and zoning commission’s denial of application for special permit to construct and operate a crematory in business park in industrial zone.

The Superior Court dismissed. The Appellate Court affirmed. Applicants appealed.

The Supreme Court held that:

- Objections based on general standards in zoning regulations may serve as a basis to deny a special permit application; but
- Substantial evidence did not support commission’s determination as adverse environmental effects from emissions;
- Substantial evidence did not support determination as to detrimental effect on neighbors or development;
- Substantial evidence did not support determination as to harmonious and orderly development; and
- Substantial evidence did not support determination as to suitability of design elements on other properties’ value.

PUBLIC LAWSUITS - INDIANA

Williamson v. Razer

Court of Appeals of Indiana - March 31, 2022 - N.E.3d - 2022 WL 965211

County residents brought actions against county council and county redevelopment commission for violations of Open Door Law, and seeking declaratory judgment voiding ordinances and resolution related to project to construct zinc oxide manufacturing plant and other public improvements.

Actions were consolidated, and county filed motion for residents to post bond under Public Lawsuit Statute, which the Superior Court denied. County filed interlocutory appeal.

The Court of Appeals held that:

- Action was “public lawsuit” within meaning of Public Lawsuit Statute, and
- Claims sought to vindicate public, rather than private interests, as required to warrant bond under Public Lawsuit Statute.

Consolidated lawsuit alleging violations of Open Door Law and seeking to void county ordinances and resolution related to project to construct zinc oxide manufacturing plant and other public improvements was a “public lawsuit,” within meaning of provision of Public Lawsuit Statute requiring plaintiffs to post a bond, in action brought by county residents against county council and county redevelopment commission; alleged Open Door Law violations directly challenged the validity of the financing of the project, which would prevent the funding and construction of the project.

County residents' claims alleging violations of Open Door Law and seeking to void county ordinances and resolution related to project to construct zinc oxide manufacturing plant and other public improvements sought to vindicate public, rather than private interests, thus warranting requirement that residents post bond under Public Lawsuit Statute, where complaint alleged that county created a secret committee that negotiated with the manufacturing plant certain financial and environmental terms for the construction of the project, that the negotiated terms were incorporated into the resolution, and that the public was not granted proper access to the meeting in which the ordinances required for the construction of the project were passed.

PUBLIC UTILITIES - MAINE

General Marine Construction Corporation v. Public Utilities Commission

Supreme Judicial Court of Maine - March 31, 2022 - A.3d - 2022 WL 964164 - 2022 ME 20

Water utility customer sought review of Public Utilities Commission's (PUC) order declining to open a formal investigation into a water billing dispute after the Consumer Assistance and Safety Division (CASD) of PUC conducted a summary investigation of customer's complaint.

The Supreme Judicial Court held that:

- CASD process for resolving utility billing disputes is a voluntary, informal dispute resolution alternative to formal civil litigation, and
- PUC's declining to open formal investigation was not a final decision of PUC from which an appeal could be taken.

Process for resolving utility billing disputes, in which Consumer Assistance and Safety Division (CASD) of Public Utilities Commission (PUC) conducts a summary investigation of a customer's complaint after the customer first makes a direct attempt to settle dispute with utility, is a voluntary, informal dispute resolution alternative to formal civil litigation, and is not an adjudicatory, binding decision of PUC requiring due process akin to a formal court proceeding.

Public Utilities Commission's (PUC) order declining to open a formal investigation into a water billing dispute between water utility and its customer following informal investigation of customer's complaint by Consumer Assistance and Safety Division (CASD) of PUC was not a final decision of PUC from which an appeal could be taken; PUC's action was a decision not to proceed to a formal adjudicatory action.

UNDERWRITING - MICHIGAN

In re Flint Water Cases

United States District Court, E.D. Michigan, Southern Division - March 29, 2022 - Slip Copy - 2022 WL 957542

Plaintiffs brought suit against Defendant financial institutions – J.P. Morgan Securities LLC, Wells Fargo Bank N.A., and Stifel, Nicolaus & Company, Inc. – that acted as underwriters for approximately $300 million in municipal bonds used to fund the infrastructure behind the Karegnondi Water Authority ("KWA"). The KWA is a municipal water supply system, incorporated under Michigan law, whose formation required the installation of a water intake structure, pipelines, and multiple pumping stations to process and distribute raw water to an area in the State of Michigan including the City of Flint.

Plaintiffs alleged that Defendants conspired with various governmental officials to violate Plaintiffs' bodily integrity when Defendants underwrote the bonds that funded the KWA project. They also allege that Defendants were professionally negligent when they failed to require that the Flint Water Treatment Plant ("FWTP") be upgraded or that there exist a feasible funding mechanism to pay for the necessary upgrades.

The District Court held that:

- Plaintiffs' conspiracy claim failed because it did not allege that Defendants acted with the purpose of violating their constitutional rights, nor did Plaintiffs plead the alleged conspiracy with sufficient specificity;
- Plaintiffs did not adequately plead that Defendants acted under color of state law;
- As to its ordinary negligence claim, Plaintiffs failed to sufficiently allege a relationship between Defendants and Plaintiffs sufficient to create a duty of care; and
- Even if the Court had found that Plaintiffs had adequately pleaded that a legal duty existed to sustain a negligence claim, that claim fails on public policy grounds.

"Defendants ultimately aimed to secure a deal and sell the bonds at a favorable rate. To be sure, Defendants' conduct was one step in the causal chain that ultimately led to the violation of Plaintiffs' rights. But even as Plaintiffs tell the story, Defendants did not have the objective of violating Plaintiffs' rights. At most, Defendants acted without considering the possible harm to Plaintiffs. A section 1983 conspiracy claim requires a 'single plan' with the 'objective to deprive plaintiffs of their constitutional rights,' *Marvaso*, 971 F.3d at 606. To the extent it is possible to conspire to be careless, such a conspiracy would be legally insufficient to make out a claim under section 1983."

"Plaintiffs' allegations that a reasonable underwriter would not have funded the KWA project in light of the City's finances and the condition of the FWTP may be more properly understood as an argument that underwriters have a duty to evaluate the externalities of the municipal projects they fund before they fund them. But even if the Court were to accept this as true, which it does not, it does not follow that Defendants here conspired with state actors to violate Plaintiffs' rights."

"The issuing of a loan is therefore not an undertaking that ordinarily gives rise to a duty of due care to third parties. As Plaintiffs acknowledge, the underwriting of a municipal bond is a kind of lending. Accordingly, Plaintiffs have not shown that Defendants' underwriting of the KWA bonds gave rise to a duty of reasonable care to avoid harms to Plaintiffs."

"SIFMA persuasively argues that under Plaintiffs' theory, '[u]nderwriters would suddenly be responsible to a municipality's residents for judgments made by elected officials as to how best to govern, manage, and operate their own city, town, or state—matters over which the underwriters have no control.'"

"KWA is a municipal entity. Those who determined whether and how to build the KWA project were elected officials and individuals appointed by elected officials. Those officials answer to the public through the political process, and in this case, some of them answer through the judicial process. Imposing a duty on Defendants could result in our nation's banks making decisions on behalf of municipalities. Banks are not accountable to the public in the voting booth. On balance, the burdens and benefits weigh against imposing a duty on Defendants in this case."

MUNICIPAL CORPORATIONS - WASHINGTON

Stevens County ex rel. Rasmussen v. Travelers Surety and Casualty Company of America

Court of Appeals of Washington, Division 3 - March 31, 2022 - P.3d - 2022 WL 965155

County prosecutor sued county commissioners and sureties on their official bonds claiming they were individually liable on their bonds for voting to approve unconstitutional gifts to homeless fund.

The Superior Court entered summary judgment in favor of prosecutor. Commissioners appealed.

The Court of Appeals held that:

- Commissioners could not be held individually liable on official bonds, and
- Constitutional requirement of strict accountability of county officers for public money coming into their possession did not apply.

County commissioners who had approved allegedly unconstitutional gift of public money to homeless fund could not be held individually liable on official bonds; commissioners acted as legislative body, bonds covered commissioners in individual capacity, and propriety of their votes could not make them liable under terms of their official bonds.

Constitutional requirement of strict accountability of county officers for public money coming into their possession did not apply to commissioners' involvement in legislatively authorizing allegedly unconstitutional appropriation for homeless fund; commissioners themselves never handled public money so as to expose themselves to absolute liability.

Mere errors of judgment or misconstruction of statutes do not meet standard for holding county commissioners individually liable on their bonds for nonministerial acts upon finding of abuse of discretion; instead, liability requires proof not only that official made error or mistake, but that error or mistake was product of corrupt or malicious motives.

PUBLIC EMPLOYMENT - ARKANSAS

Johnson v. Wright

Supreme Court of Arkansas - March 10, 2022 - 2022 Ark. 57 - 640 S.W.3d 401

Former members and employees of City Advertising and Promotion Commission (CAPC) brought action against city officials alleging, among other things, that other members' appointments to the CAPC violated the Arkansas Constitution.

The Circuit Court denied plaintiffs' motion for emergency injunction and denied their motion to reconsider. Plaintiffs brought interlocutory appeal.

The Supreme Court held that:

- CAPC at-large member met the qualifications of an elector under Arkansas constitution, and
- CAPC appointments were not barred by statute prohibiting city council members from being appointed to another municipal office while they were serving on a city council.

City Advertising and Promotion Commission (CAPC) at-large member met the qualifications of an elector under Arkansas constitution, and thus was not prohibited from appointment to CAPC, despite contention that member did not reside in the subdivision she sought to serve; there was no statute requiring member to be a city resident, and member was not seeking election to a city office, nor was she appointed to fill a vacancy in an elected office, and instead member was appointed to a commission position that was authorized not only by statute but also by city municipal ordinance.

Appointments of members to City Advertising and Promotion Commission (CAPC) were not barred by statute prohibiting city council members from being appointed to another municipal office while they were serving on a city council, even though members were city council members at time of their appointments; statute was a statute of general applicability, and specific statute relevant to the CAPC required such an appointment.

IMMUNITY - CALIFORNIA

Cleveland v. Taft Union High School District

Court of Appeal, Fifth District, California - March 25, 2022 - Cal.Rptr.3d - 2022 WL 883855 - 22 Cal. Daily Op. Serv. 3109

High school student who was shot in stomach by classmate brought action against district, superintendent, principal, and assistant principal, alleging claims for negligence, premises liability, and negligent infliction of emotional distress.

District defendants filed cross-complaint against classmate and his family members for indemnity and apportionment of fault.

After district defendants' motion in limine, seeking to exclude evidence pertaining to district employees' threat assessment of classmate, was granted, the Trial Court entered judgment upon jury verdict against district in amount of $2,052,000 based on apportioned percentage of district employees' negligence, and thereafter denied district's motion for judgment notwithstanding the verdict, in which district argued that its employees were shielded under statute providing immunity to public employees for failing to make adequate physical or mental examination. District appealed.

As a matter of first impression, the Court of Appeal held that various actions by high school employees in conducting threat assessment were not part of a "mental examination" for which employees had statutory immunity.

Failures by district superintendent, high school principal, and assistant principal to collectively carry out threat assessment of potentially violent student, adequately communicate with student's parents, recommend counseling as intervention technique, monitor student and reassess safety plan, and include school resource officer in threat assessment team, were not part of a "mental examination" for which employees were shielded from liability under statute providing immunity to public employees for failing to conduct or failing to adequately conduct mental examination, in negligence action against district brought by classmate who was shot in stomach by student; "mental examination" was limited to process of inspecting the physical, visual, emotional, and mental state of student.

PUBLIC UTILITIES - DISTRICT OF COLUMBIA

Newman v. Federal Energy Regulatory Commission

United States Court of Appeals, District of Columbia Circuit - March 9, 2022 - 27 F.4th 690

Customers petitioned for review of orders of Federal Energy Regulatory Commission (FERC) that raised their electricity rates. Developer that sought to build proposed electric power transmission line was granted leave to intervene in support of FERC.

The Court of Appeals held that:

- Clause stating that account shall include expenditures “for the purpose of influencing the decisions of public officials” included expenditures for purpose of indirectly, as well as directly, influencing decisions of public officials;
- Regulatory text favored reading clause to include expenditures for purpose of indirectly, as well as directly, influencing decisions of public officials;
- Regulatory history of account favored reading clause to include expenditures for purpose of indirectly, as well as directly, influencing decisions of public officials;
- FERC precedent favored reading clause to include expenditures for purpose of indirectly, as well as directly, influencing decisions of public officials;
- Regulatory purpose of account favored reading clause to include expenditures for purpose of indirectly, as well as directly, influencing decisions of public officials; and
- Accounts pertaining to “outside services employed” and “general advertising expenses” were not appropriate categories for disputed expenditures.

REFERENDA - ILLINOIS

McHenry Township v. County of McHenry

Supreme Court of Illinois - March 24, 2022 - N.E.3d - 2022 IL 127258 - 2022 WL 869540

Township sought writ of mandamus compelling county and county clerk to place on township’s general election ballot a referendum proposition, initiated by township’s board of trustees, to dissolve township.

The Circuit Court granted defendants’ motion to dismiss. Township appealed. The Appellate Court reversed and remanded. Defendants filed petition for leave to appeal, which was allowed.

The Supreme Court held that:

- Issues raised on appeal regarding whether clerk could refuse to place referendum proposition on ballot were moot;
- Public-interest exception to mootness doctrine applied; and
- Clerk was not authorized to make legal determinations about whether referendum proposition was made in accordance with general election law or was prohibited by time limitation against same proposition appearing on ballots based on comparison of proposition to referendum that appeared on recent primary election ballot.

ZONING & PLANNING - KENTUCKY

Seiller Waterman, LLC v. Bardstown Capital Corporation

Supreme Court of Kentucky - March 24, 2022 - S.W.3d - 2022 WL 883677

Property developer filed complaint against neighboring property owners who opposed one if its development and rezoning proposals and their law firm, seeking damages for wrongful use of civil proceedings in continued opposition to approved zoning changes, stating it had lost profits of $12 million and incurred legal fees totaling $73,752.33.

The Circuit Court granted law firm's motion for summary judgment and dismissed developer's claims for wrongful use of civil proceedings and abuse of process. Developer appealed. The Court of Appeals affirmed in part, reversed in part, and remanded. Property owners' and law firm's petition for discretionary review was granted.

The Supreme Court held that:

- On issue of first impression, *Noerr-Pennington* doctrine protected First Amendment petitioning of government in zoning litigation;
- Statutory appeals from zoning decisions were not limited to neighboring property owners, but could be utilized by rezoning applicants or anyone otherwise injured or aggrieved by zoning decision;
- Neighboring property owners, represented by law firm, used lawful and legislatively-prescribed means to challenge development and zoning activities on substantive grounds;
- Developer, as applicant that initiated zoning proceedings, was necessary party to appeal by neighboring homeowners protesting zoning change;
- Property owner's action was not objectively baseless, and therefore sham exception to *Noerr-Pennington* doctrine did not apply; and
- Adjoining neighboring property owners had statutory standing to bring action.

JURISDICTION - LOUISIANA

St. Tammany Parish Hospital Service District No. 2 v. Zurich American Insurance Company

United States District Court, E.D. Louisiana - March 14, 2022 - Slip Copy - 2022 WL 766318

Plaintiff St. Tammany Parish Hospital Service District alleged that, as a result of COVID-19 and governmental measures taken at both the federal and state levels, it had suffered substantial financial losses.

Plaintiff further alleges the losses it suffered and expenses it incurred are covered as "EXTRA EXPENSE" under the insurance policies provided by Defendant Zurich American Insurance Company.

Plaintiff brought this insurance coverage action for declaratory judgment and breach of contract arising from the refusal of Defendants to provide coverage to Plaintiff under a comprehensive loss policy issued by the Defendants called "The Zurich Edge Healthcare Policy": a unique policy targeting healthcare facilities with the marketing promise of "higher limits, broader coverage and greater flexibility" and which expressly provides coverage for the losses Plaintiff sustained as a result of COVID-19.

Defendants filed a Notice of Removal, invoking this Court's diversity jurisdiction under 28 U.S.C. §

1332. Plaintiff filed a motion to remand to state court, arguing complete diversity is lacking because Plaintiff is an arm of the state and that "[a]s a matter of law, an arm of the state has no citizenship and cannot be removed to federal court under 28 U.S.C. § 1332(a)." Plaintiff further argued that hospital service districts such as Plaintiff are alter egos or arms of the state "such that they are immune from suit in federal court pursuant to the Eleventh Amendment.

Defendants argued that complete diversity, and federal subject matter jurisdiction exist because Plaintiff is a citizen of the State of Louisiana and is not an arm or alter ego of the State of Louisiana.

The District Court held that:

- Louisiana's statutes and case law support the conclusion that hospital service districts such as Plaintiff are political subdivisions, and not arms of the state.
- The Court must address the question of whether Plaintiff, a political subdivision of the State of Louisiana, is a citizen of Louisiana for purposes of diversity jurisdiction.
- The Court must also determine whether Plaintiff is an arm or alter ego of the State of Louisiana.
- The Fifth Circuit takes a case-by-case approach to determining whether a state is the real party in interest in suits brought against entities which appear to be alter egos or arms of the state.
- The Fifth Circuit utilizes six factors (the "Clark Factors") to determine whether an entity is an arm of the state: (1) Whether the state statutes and case law characterize the agency as an arm of the state; (2) The source of funds for the entity; (3) The degree of local autonomy the entity enjoys; (4) Whether the entity is concerned primarily with local, as opposed to state-wide, problems; (5) Whether the entity has authority to sue and be sued in its own name; and (6) Whether the entity has the right to use and hold property.
- The Court found that each of the six Clark factors pointed inexorably to the conclusion that Plaintiff is not an arm of the State of Louisiana. As a political subdivision that is not an arm of the state, it is a citizen of the State of Louisiana. Because neither Defendant is a citizen of the State of Louisiana, complete diversity exists in this case. Accordingly, the Court concluded it has subject matter jurisdiction over this action under 28 U.S.C. § 1332.

MUNICIPAL ORDINANCE - LOUISIANA

Mellor v. Parish of Jefferson

Supreme Court of Louisiana - March 25, 2022 - So.3d - 2022 WL 884001 - 2021-0858 (La. 3/25/22)

Motor vehicle drivers who paid fines under parish ordinance for overtaking and passing a school bus with its visual signals activated brought class action against parish, seeking damages and declaration that ordinance was unconstitutional.

The District Court, Jefferson Parish, granted drivers' motion for summary judgment. Parish appealed.

The Supreme Court held that ordinance was unconstitutional for regulating parish school board.

Parish ordinance establishing civil fines against motor vehicle drivers for overtaking and passing a school bus with its visual signals activated was unconstitutional under section of Louisiana Constitution prohibiting any provision in a home rule charter affecting a school board; ordinance not only outlined a system of cameras for tracking and notifying violators, but also specifically directed parish school board to administer the system, stating that school board was "responsible for the administration of the system and for notification of the violation," and it was of no consequence that school board did not object to ordinance.

EMINENT DOMAIN - BALTIMORE

[Xu v. Mayor of Baltimore]

Court of Special Appeals of Maryland - March 30, 2022 - A.3d - 2022 WL 951849

City filed condemnation action regarding vacant property.

After bench trial, entered judgment as to just compensation. Landowner appealed.

The Court of Special Appeals held that:

- Landowner did not waive right to jury trial, and
- Trial court abused its discretion in precluding landowner from testifying as to property's value and as to how landowner arrived at that value.

Landowner, who was proceeding pro se, did not waive her right to jury trial of condemnation action by initially agreeing to bench trial during telephone status conference and by stating at subsequent hearing that she had not filed anything in writing with court clerk since date of status order entered one day after landowner filed written request for jury trial; landowner clearly expressed desire for jury trial and had requested one in a writing filed with court, there was no evidence of discovery violation with a resulting sanction or that landowner was trying to frustrate the efficient adjudication of court system, and there was no written election for bench trial by all parties.

Trial court abused its discretion in precluding landowner from testifying in condemnation proceeding as to her property's value and as to how she arrived at that value, based on determination that landowner had not been qualified as an expert; as owner, landowner was presumptively competent to give opinion as to value of property, and thus it followed that landowner was able to testify as to how she arrived at that opinion, and any lack of expert status went to weight of testimony rather than admissibility.

ZONING & PLANNING - MONTANA

[Egan Slough Community v. Flathead County Board of County Commissioners]

Supreme Court of Montana - March 22, 2022 - P.3d - 2022 WL 841994 - 2022 MT 57

Community organization brought action against county and operator of commercial water bottling plant following expansion of a citizen-initiated agricultural zoning district through a citizen initiative, seeking mandamus relief to enforce zoning regulations and a declaratory judgment against water bottling operations.

Operator filed counterclaims alleging illegal reverse spot zoning and violations of due process, equal protection, and takings clauses. The District Court entered summary judgment orders and denied operator's motions to compel discovery and for attorney fees. Organization appealed and operator cross-appealed.

The Supreme Court held that:

- Water bottling plant was a valid nonconforming use;
- Initiative complied with statutory requirement of setting out fully the resolution to be repealed;
- Initiative did not impermissibly legislate on multiple subjects;
- Initiative did not create illegal reverse spot zoning;
- Initiative did not violate procedural due process;
- Initiative did not violate equal protection;
- A compensable regulatory taking did not occur; and
- Trial court acted within its discretion in denying attorney fees for defense of petition for writ of mandate.

STATE FINANCE - OKLAHOMA

Matter of Oklahoma Capitol Improvement Authority

Supreme Court of Oklahoma - April 5, 2022 - P.3d - 2022 WL 1011832 - 2022 OK 31

Oklahoma Capitol Improvement Authority (OCIA) filed application seeking approval to enter into federal loans, secured with Transportation Infrastructure Finance and Innovation Act (TIFIA) notes, for rural highway improvement projects.

The Supreme Court held that approval of OCIA's application was warranted.

Approval of application by Oklahoma Capitol Improvement Authority (OCIA) to enter into federal loans, secured with Transportation Infrastructure Finance and Innovation Act (TIFIA) notes, for rural highway improvement projects was warranted, where legislature authorized proposed TIFIA loans as an essential governmental function, OCIA gave valid notice of its application, and OCIA's application was uncontested.

PUBLIC UTILITIES - SOUTH DAKOTA

Ehlebracht v. Crowned Ridge Wind II, LLC

Supreme Court of South Dakota - March 23, 2022 - N.W.2d - 2022 WL 869874 - 2022 S.D. 19

Neighboring residents appealed decision of Public Utilities Commission (PUC) granting permit to construct large-scale wind energy farm.

The Circuit Court affirmed. Residents appealed.

The Supreme Court held that:

- Statute granting PUC the authority to promulgate rules regarding the permitting and construction of wind-energy facilities, in combination with statute setting out legislative finding that it was necessary to ensure that the location, construction, and operation of energy facilities would produce minimal adverse effects, did not create obligation for PUC to promulgate specific rules defining "minimal adverse effects" associated with proposed wind-energy projects;
- To extent that PUC was required to ensure that proposed project would produce minimal adverse effects, it sufficiently did so;
- Residents failed to state claim for equal-protection violation;
- PUC's issuance of permit was not the de facto grant of an easement over residents' property;

- Issuance of permit was not a per se taking of residents' property;
- Residents failed to state claim for taking based on consequential-damages theory; and
- Issuance of permit, which had effect of foreclosing any future nuisance claim by residents for permitted activity, did not constitute a compensable taking.

IMMUNITY - COLORADO

Heard v. Dulayev

United States Court of Appeals, Tenth Circuit - March 29, 2022 - F.4th - 2022 WL 905105

Suspect brought § 1983 action against police officer and city, alleging that officer used excessive force against him in violation of his Fourth Amendment rights, and that city failed to adequately train and supervise its officers with respect to the use of force.

The United States District Court for the District of Colorado denied defendants' motion for summary judgment. Suspect appealed.

The Court of Appeals held that:

- Court of Appeals had appellate jurisdiction to decide whether officer's use of a stun gun was justified;
- Officer was entitled to qualified immunity; and
- Court of Appeals would decline to exercise pendent appellate jurisdiction over § 1983 claim against city.

EMINENT DOMAIN - GEORGIA

Wise Business Forms Inc. v. Forsyth County

Court of Appeals of Georgia - March 15, 2022 - S.E.2d - 2022 WL 780001

Property owner brought action against county and Georgia Department of Transportation (GDOT) alleging per se taking and inverse condemnation in that road expansion increased surface and stormwater runoff flowing under its property, which created sinkhole in its parking lot.

The Superior Court dismissed complaint, and owner appealed.

The Court of Appeals held that:

- Owner was not required to file expert affidavit with its complaint;
- Statute of limitation began to run against owner's permanent nuisance claim when road expansion project was completed; and
- Owner's inverse condemnation claim was based on permanent, rather than abatable, nuisance.

Property owner was not required to file expert affidavit with its complaint asserting inverse condemnation by nuisance claim against county and Georgia Department of Transportation (GDOT) premised on their failure to mitigate increased runoff following road expansion, which channeled stormwater through pipe running underneath its property, thereby causing sinkhole in its parking lot, where complaint did not assert any claims of negligence.

Statute of limitation began to run against property owner's permanent nuisance claim against county and Georgia Department of Transportation (GDOT) when road expansion project was complete, rather than when owner noticed sinkhole in its parking lot 20 years later; claim was premised on county's and GDOT's failure to mitigate increased runoff following road expansion, which channeled stormwater through pipe running underneath its property, thereby causing sinkhole, and alleged dramatic increase in stormwater runoff would have been immediately observable.

Property owner's inverse condemnation claim against county and Georgia Department of Transportation (GDOT), premised on their failure to mitigate increased runoff following road expansion, which channeled stormwater through pipe running underneath its property, thereby causing sinkhole in its parking lot, was based on permanent, rather than abatable, nuisance; expansion project included design and installation of stormwater drainage system and decision not to build detention facilities to address alleged increased runoff, which constituted enduring features of construction project.

IMMUNITY - MISSOURI

KITC Homes, LLC v. City of Richmond Heights

Missouri Court of Appeals, Eastern District, DIVISION TWO - March 8, 2022 - S.W.3d - 2022 WL 677654

Developers brought action against city, raising claims of tortious interference, negligence, and impairment of contract under the Contracts Clause, after city allegedly delayed in sending developers an invoice for demolition costs on property before sale after developers had purchased the property from the city.

The Circuit Court granted city's motion to dismiss on sovereign immunity grounds and for failure to state a Contracts Clause claim. Developers appealed.

The Court of Appeals held that:

- Proprietary-function exception to sovereign immunity applied to developer's tortious interference and negligence claims, but
- Developer failed to state a Contracts Clause Claim.

Proprietary-function exception to sovereign immunity applied to developer's tortious interference and negligence claims against city, where developers alleged that city, for the purpose of receiving income to benefit itself as a corporate entity, demolished improvements on property, and delayed in submitting to developer a special assessment for the cost of the demolition until after developer purchased property.

Developer, who alleged that city delayed in issuing it a special assessment for costs that city incurred after demolishing buildings on land before selling it to developer until after developer had purchased land, failed to state a Contracts Clause claim, where city's assessment was not a law of the state or change in state law that impaired the alleged contractual relationship between the city and developer.

MUNICIPAL ORDINANCE - OKLAHOMA

Magnum Energy, Inc. v. Board of Adjustment for City of Norman

Supreme Court of Oklahoma - March 22, 2022 - P.3d - 2022 WL 840198 - 2022 OK 26

Oil and gas operator appealed decision of city board of adjustment denying operator's application for variance from ordinance requiring oil and gas operators to maintain an umbrella insurance policy with at least $2 million in coverage.

The District Court granted operator's motion for summary judgment. Board appealed. The Court of Civil Appeals reversed. Operator filed petition for certiorari, which was granted.

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

- Municipal authority to regulate oil and gas is limited in scope to those areas reserved in statute governing municipal regulation of oil and gas activities and elsewhere in statute, and
- Ordinance exceeded scope of authority to regulate oil and gas production reserved for municipalities.

City ordinance requiring oil and gas operators to maintain an umbrella insurance policy with at least $2 million in coverage exceeded scope of authority to regulate oil and gas production reserved for municipalities; umbrella-insurance requirement did not fall within any of the categories reserved for municipal regulation under statute governing municipal regulation of oil and gas activities, and statute governing cities' jurisdiction over permit fees for drilling and operation of oil and gas wells did not apply given that satisfying umbrella-insurance requirement could not be fairly characterized as permit fee.

MUNICIPAL CORPORATIONS - PENNSYLVANIA

County of Delaware v. Delaware County Regional Water Quality Control Authority

Commonwealth Court of Pennsylvania - March 3, 2022 - A.3d - 2022 WL 619580

County filed complaint for writ of mandamus and other relief from execution by regional water quality control authority of contract to sell authority's assets to private buyer.

Authority, buyer, and others intervened and asserted counterclaims, including for injunctive relief.

Following bench trial, the Court of Common Pleas granted injunctive relief and denied mandamus relief based on findings that asset purchase agreement (APA) was valid and enforceable, that Municipality Authorities Act (MAA) did not authorize county to dissolve or obtain authority or its assets so as to interfere with authority's contractual performance, and that county did not assume authority's contractual obligations. County appealed.

The Commonwealth Court held that:

- Ordinance was valid and enforceable under MAA provision allowing municipalities to dissolve authorities and acquire assets, and
- County's alleged inability to perform under terms of contract did not preclude county from dissolving authority and assuming its contractual obligations.

County ordinance directing termination or dissolution of regional water quality control authority and requiring authority to engage in conduct necessary to effectuate transfer of its assets to county and assumption of its liabilities and obligations by county was valid and enforceable under statute allowing municipalities to dissolve authorities' projects, acquire their assets, and assume associated obligations, even if county did not explicitly assume authority's obligations in ordinance; county could not direct transfer of any specific assets until it had verified information about such assets, and ordinance complied with statutory process of adopting ordinance to signify desire to acquire project, then completing assumption of obligations, and finally accepting conveyance of project.

Any inability on county's part to fulfill terms of contract by which regional water quality control authority agreed to sell its assets to private buyer did not impede county from exercising its power under Municipal Authorities Act (MAA) to terminate authority, assume its obligations, and obtain its assets prior to full performance under contract; if authority could simply incur contractual obligations to prevent county from terminating authority, clause in MAA allowing county to assume authority's obligations when terminating authority would be rendered nugatory, and authority had not obtained any continuing debt to be repaid on immediate or continuing basis, rendering county's ability to perform under contract irrelevant to county's power to dissolve authority.

PUBLIC UTILITIES - WASHINGTON

Walter Family Grain Growers, Inc. v. Foremost Pump & Well Services, LLC

Court of Appeals of Washington, Division 3 - March 24, 2022 - P.3d - 2022 WL 869673

Farming company brought action against electric utility, among others, asserting negligence claim based on allegations that excessive voltage destroyed newly-installed irrigation and power equipment and resulted in lost crops.

The Superior Court granted summary judgment for utility company. Farming company appealed.

The Court of Appeals held that:

- Utility owed company ordinary duty of care, and
- Genuine issue of material fact precluded summary judgment.

Electric company owed farming company ordinary duty of care, rather than heightened duty of care, for purposes of company's negligence claim against utility arising from allegations that excessive voltage service destroyed newly-installed irrigation and power equipment and resulted in lost crops, where 480-volt service provided by utility company was low voltage and of minimal danger.

Genuine issue of material fact existed as to whether electric utility breached its duty of ordinary care owed to farming company, precluding summary judgment for utility in negligence action brought by company arising from allegations that excessive voltage service destroyed newly-installed irrigation and power equipment and resulted in lost crops.

MUNICIPAL ORDINANCE - WASHINGTON

Rental Housing Association v. City of Seattle

Court of Appeals of Washington, Division 1 - March 21, 2022 - P.3d - 2022 WL 831450

Landlords brought action against city, challenging ordinance limiting landlord's ability to evict tenant for nonpayment of rent during three winter months, ordinance prohibiting landlord from evicting tenant for nonpayment of rent for six months after end of COVID-19 civil emergency, and ordinance requiring landlord to accept installment payments of unpaid rent for certain period of time after end of civil emergency.

On cross-motions for summary judgment, the Superior Court upheld ordinances' provisions except for provision banning accrual of interest on unpaid rent during civil emergency and for one year thereafter. Landlords appealed, and city cross-appealed.

The Court of Appeals held that:

- Ordinances imposing eviction bans did not irreconcilably conflict with Residential Landlord Tenant Act (RLTA), unlawful-detainer statute, or ejectment statute and thus were not preempted;
- Ordinance requiring landlords to accept installment payments did not on its face conflict with statutory payment plan structure for renters experiencing financial hardship due to COVID-19 pandemic, and thus ordinance was not preempted;
- Prejudgment-interest statute preempted ordinance banning accrual of interest on unpaid rent during COVID-19 civil emergency and for one year thereafter;
- Neither ordinance imposing eviction ban constituted per se physical taking in violation of state constitution's takings clause;
- Landlords had property rights that were protected by right to procedural due process under state constitution;
- Ordinance prohibiting eviction for nonpayment of rent for six months after end of civil emergency violated landlords' right to procedural due process under state constitution; and
- Ordinances did not implicate fundamental rights of landlords and thus did not violate state constitution's privileges and immunities clause.

PUBLIC UTILITIES - CALIFORNIA

California Public Utilities Commission v. Federal Energy Regulatory Commission

United States Court of Appeals, Ninth Circuit - March 17, 202 - F.4th - 2022 WL 803838 - 22 Cal. Daily Op. Serv. 2913 - 2022 Daily Journal D.A.R. 2667

California Public Utilities Commission (CPUC) and other state agencies petitioned for review of Federal Energy Regulatory Commission's (FERC) decisions, awarding to three California-based public utilities upward adjustments, or "incentive adders," to their rate of return on equity, over CPUC's objection that utilities should not receive awards as their participation in California independent system operator (CAISO) was involuntary and mandated by state law, so adder could not induce utilities to remain members of CAISO.

The United States Court of Appeals for the Ninth Circuit granted petitions and remanded. On remand, FERC determined that utilities' membership in CAISO was voluntary under California law, so incentive adders were warranted. CPUC and other California agencies petitioned for review of remand orders.

The Court of Appeals held that:

- FERC's remand orders did not violate mandate rule;
- Erie doctrine did not apply to require FERC to defer to California's interpretation of California law;

and
- FERC reasonably interpreted California law as allowing utilities to voluntarily leave CAISO.

Federal Energy Regulatory Commission (FERC) did not violate mandate rule, in remand orders reaffirming award of incentive adders to public utilities' rate of return on equity because their participation in California independent system operator (CAISO) was voluntary and not mandated by California law; on remand FERC did not decide issue that Court of Appeals had already decided, as court did not definitively hold that California law prevented utilities from leaving CAISO without approval, or deviate from court's mandate that remanded case for further proceedings and instructed FERC to inquire into utility's specific circumstances as to whether it could unilaterally leave CAISO and, thus, whether incentive adder could induce utility to remain in CAISO.

Federal Energy Regulatory Commission's (FERC) conclusion, in remand orders reaffirming award of incentive adders to public utilities' rate of return on equity because their participation in California independent system operator (CAISO) was voluntary and not mandated by California law, that Erie doctrine did not apply, was not arbitrary, capricious, or contrary to law, since incentive adder and requirement that utility be voluntary member of CAISO to qualify for adder arose from federal law, and federal law as source of right sued upon did not change merely because California law dictated whether membership in CAISO was voluntary.

Court of Appeals would apply de novo review, rather than according deference, to Federal Energy Regulatory Commission's (FERC) interpretation of California law, in remand orders reaffirming award of incentive adders to public utilities' rate of return on equity because their participation in California independent system operator (CAISO) was voluntary and not mandated by California law, since FERC was not interpreting its own electricity regulations and instead was interpreting California law and public policy, in which FERC lacked specific expertise, and Congress had not assigned FERC task of interpreting state statutes.

Under California law, as predicted by Court of Appeals, Federal Energy Regulatory Commission's (FERC) interpretation, in remand orders reaffirming award of incentive adders to public utilities' rate of return on equity, that utilities' participation in California independent system operator (CAISO) was voluntary and not mandated by California law, was not arbitrary, capricious, or contrary to law, under Administrative Procedure Act (APA); California failed to identify any California Code provision mandating CAISO membership, statutory provisions that California relied on merely directed creation of CAISO and encouraged utilities to join, and California courts would not defer to prior administrative decision suggesting the contrary, as it was inconsistent with relevant California statute.

INTERGOVERNMENTAL AGREEMENTS - GEORGIA

Driskell v. Dougherty County

Court of Appeals of Georgia - March 16, 2022 - S.E.2d - 2022 WL 793864

Motorist filed suit against city, city code enforcement officer, and county for injuries sustained when officer collided with motorist's vehicle.

The State Court granted county's motion for summary judgment, and denied city's motion for summary judgment and motorist's cross-motion for summary judgment. Motorist and city appealed denial of their respective motions.

The Court of Appeals held that:

- Mutual control is essential element of joint venture between contracting government entities, disapproving *City of Eatonton v. Few*, 189 Ga. App. 687, 377 S.E.2d 504, *DeKalb County v. Lenowitz*, 218 Ga. App. 884, 463 S.E.2d 539, *Lafontaine v. Alexander*, 343 Ga. App. 672, 808 S.E.2d 50, and *Ga. Dept. of Transp. v. Delor*, 351 Ga. App. 414, 830 S.E.2d 519;
- No joint venture existed between city and county that rendered county liable for city officer's alleged negligence;
- County was not liable for officer's alleged negligence under borrowed-servant doctrine; and
- County was not liable for officer's alleged negligence under agency theory of liability.

BONDS - MISSISSIPPI

Green Hills Development Company, LLC v. Oppenheimer Funds, Inc.

United States District Court, S.D. Mississippi, Northern Division, Northern Division - February 9, 2022 - Slip Copy - 2022 WL 409948

In 2007, the Rankin County Board of Supervisors created the Stonebridge Public Improvement District to manage and finance public-improvement services for property located within the then newly established Stonebridge development.

In September 2007, Stonebridge's board issued bonds through a Trust Indenture. UMB Bank later became Successor Trustee. Under the terms of the Trust Indenture, Stonebridge was to levy special assessments on properties within the development and remit the revenues collected to the Trustee to service the debt on the bonds.

After Stonebridge failed to remit amounts necessary to service the debt, UMB Bank filed a summary judgment motion against Stonebridge alleging breach of Stonebridge's contractual obligations under the Trust Indenture. UMB Bank also asked the court to appoint a receiver. Stonebridge counter-claimed.

The United States District Court denied both motions for summary judgement, as well as the motion to appoint a receiver.

The District Court found that none of the numerous issues raised by both parties could be adjudicated due to the incomplete, inadequate arguments and pleadings by both parties. The court opted to allow the litigation process to continue in the hope that some clarity would somehow emerge.

> "Here, the Court spent considerable time studying the legal briefs, independently researching the arguments, and examining the record, but the factual and legal pictures remain unclear. The Court acknowledges that some of its questions may flow from its own misunderstanding of this highly complicated and voluminous record. On the other hand, the parties often offer argument snippets unsupported by relevant legal authority or supporting record evidence. They also ignore, or lightly touch, what appear to be significant arguments offered by opposing parties."
>
> "It is certainly possible that somewhere in this massive record are documents supporting some of their assertions."

These issues included:

- Statutes of limitations;
- Res judicata;
- Collateral estoppel;
- Claim preclusion;
- Choice of law;
- Service of process;
- Anticipatory breach; and
- So, so many more.

IMMUNITY - NEW YORK

Ferreira v. City of Binghamton

Court of Appeals of New York - March 22, 2022 - N.E.3d - 2022 WL 8375662022 N.Y. Slip Op. 01953

Unarmed occupant of home subject to no-knock search warrant, who was shot in stomach by police officer during execution of search warrant, brought negligence action against officer, police department, and city.

Following trial in which jury found in favor of occupant against city and awarded him $3 million in damages, but found in favor of officer, the United States District Court granted city's motion for judgment as a matter of law and set aside the damage award and denied occupant's motion to overturn the verdict in favor of officer. Occupant appealed. The Court of Appeals affirmed in part and certified question.

The Court of Appeals held that:

- Plaintiffs must establish that municipality owed them special duty when they assert negligence claim based on actions taken by municipality acting in governmental capacity, and
- Plaintiffs asserting negligence claim based on actions taken by municipality acting in governmental capacity may establish special duty when municipality, acting through its police force, plans and executes no-knock search warrant at person's home, and such duty runs to individuals within targeted premises at time warrant is executed.

POLITICAL SUBDIVISIONS - NORTH DAKOTA

Hagen v. North Dakota Insurance Reserve Fund

Supreme Court of North Dakota - March 17, 2022 - N.W.2d - 2022 WL 803334 - 2022 ND 53

Records requester brought petition for writ of mandamus against insurer, a government self-insurance pool, seeking to require disclosure of documents under open records law.

The District Court granted petition. Insurer appealed and requester cross-appealed.

The Supreme Court held that:

- Requester's amended petition related back to original petition and thus was timely;
- As a matter of apparent first impression, insurer was an "agency" of city and thus was a public entity subject to open records law;
- Past liability cannot form the basis for the "potential liability" exception to required disclosure under the open records law; and
- Trial court acted within its discretion in declining to award costs and fees to requester.

IMMUNITY - TEXAS

Hunnicutt v. City of Webster

Court of Appeals of Texas, Houston (14th Dist.) - February 17, 2022 - S.W.3d - 2022 WL 481795

Property owner and co-owner sought declaratory relief that owner's conveyance of 4.41 acres to the city was void or, alternatively, for rescission of her conveyance, as well as declaratory relief as to their ultra-vires claim against city's director of economic development for making allegedly false representations and promises in order to induce sale of the acreage.

The 190th District Court granted city's plea to the jurisdiction and rendered judgment in favor of the city and director. Owners appealed.

The Court of Appeals held that:

- Co-owner did not have an individual, justiciable interest in the case and therefore lacked standing;
- City was performing a governmental function when it solicited, designed, and constructed the roads on the conveyed property;
- Owner did not establish any waiver of governmental immunity;
- Owner did not articulate a viable claim against the city and thus could not substantiate a claim for remedy of rescission; and
- The allegedly false representations and promises made by director did not support an ultra-vires claim.

EASEMENTS - WASHINGTON

Maslonka v. Public Utility District No. 1 of Pend Oreille County

Court of Appeals of Washington, Division 3 - March 3, 2022 - P.3d - 2022 WL 619944

Landowners brought action against county public utility district, an operator of river dam that caused occasional flooding, seeking injunctive relief and asserting claims of inverse condemnation, trespass, nuisance, and negligence arising from flooding of their agricultural property.

Utility district counterclaimed for declaration of prescriptive easement to flood at water levels above those set forth in express easement. On summary judgment, the Superior Court declared a prescriptive easement in favor of utility district and dismissed landowners' claims. Landowners appealed.

The Court of Appeals held that:

- Continuous and uninterrupted use, as element of prescriptive easement, can be decided on summary judgment;

- As matter of first impression, a party asserting a prescriptive easement must prove each element by clear and convincing evidence;
- Factual issues precluded summary judgment on prescriptive easement claim;
- Factual issue as to applicability of subsequent purchaser rule precluded summary judgment on inverse condemnation claims as to riverfront parcel;
- Trespass and nuisance claims for riverfront parcel were not subsumed by inverse condemnation claims; and
- Utility district did not cause injury to inland agricultural parcel that allegedly flooded due to defect in diking improvements.

IMMUNITY - IDAHO

Williamson v. Ada County

Supreme Court of Idaho, Boise, November 2021 Term - February 25, 2022 - P.3d - 2022 WL 575967

Inmate of county jail brought action against county and sheriff, alleging negligence arising from incident in which inmate suffered head injury during request that he stand for roll call.

The District Court dismissed action. Inmate appealed.

The Supreme Court held that:

- County's decision to use ladderless bunk beds in county jail was discretionary function for which county had discretionary-function immunity under the Idaho Tort Claims Act (ITCA);
- Fact issue as to whether county's decision to require county jail inmate to descend from top bunk bed for roll call was a discretionary function, for which discretionary-function exception to liability under ITCA could apply, precluded grant of county's motion to dismiss; and
- County was not a prevailing party that could recover attorney fees on appeal.

IMMUNITY - NEBRASKA

Clark v. Sargent Irrigation District

Supreme Court of Nebraska - March 11, 2022 - N.W.2d - 311 Neb. 123 - 2022 WL 727360

Landowners brought negligence action against irrigation district alleging that irrigation district's employee negligently mixed and over-applied an off-label herbicide mixture on trees near canal causing damage to landowners' corn crops.

The District Court denied irrigation district's motion for summary judgment. Irrigation district filed interlocutory appeal.

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

- Denial of summary judgment motion challenging compliance with presuit procedures of tort claims acts is not a final appealable order involving assertion of sovereign immunity, disapproving Great Northern Ins. Co. v. Transit Auth. of Omaha, 305 Neb. 609, 941 N.W.2d 497; Great Northern Ins. Co. v. Transit Auth. of Omaha, 308 Neb. 916, 958 N.W.2d 378;
  Denial of summary judgment motion asserting discretionary function exemption of Political Subdivisions Tort Claims Act (PSTCA) was a final appealable order; and

- Discretionary function exemption of PSTCA did not apply to bar landowners’ claim.

When the State or a political subdivision moves for summary judgment asserting the plaintiff’s failure to comply with presuit claim presentment procedures of State Tort Claims Act (STCA) or Political Subdivisions Tort Claims Act (PSTCA), the motion is not based on the assertion of sovereign immunity, within meaning of statute providing that a final order, which may be appealed, includes an order denying a motion for summary judgment when such motion is based on the assertion of sovereign immunity; disapproving Great Northern Ins. Co. v. Transit Auth. of Omaha, 305 Neb. 609, 941 N.W.2d 497; Great Northern Ins. Co. v. Transit Auth. of Omaha, 308 Neb. 916, 958 N.W.2d 378. Neb. Rev. Stat. §§ 13-905, 25-1902(1)(d), 81-8,212.

Irrigation district’s summary judgment motion alleging discretionary function exemption of Political Subdivisions Tort Claims Act (PSTCA) as a bar to landowners’ negligence claim against district arising from application of herbicide along canal near crops was based on the assertion of sovereign immunity, and thus the denial of motion was a final appealable order.

Discretionary function exemption to waiver of sovereign immunity under Political Subdivisions Tort Claims Act (PSTCA) did not apply to bar landowners’ negligence claim against irrigation district alleging that irrigation district’s employee negligently mixed and over-applied an off-label herbicide mixture on trees near canal causing damage to landowners’ corn crops, where Pesticide Act specifically prescribed course of conduct that holders of noncommercial applicator licenses, like employee, were required to follow when mixing and applying herbicides, and as a result employee and had no choice but to adhere to that course of conduct.

INVERSE CONDEMNATION - NEW MEXICO

van Buskirk v. City of Raton

Court of Appeals of New Mexico - February 11, 2022 - P.3d - 2022 WL 441568

Landowners filed complaint alleging negligence by city for failing to properly cover trash in landfill that was adjacent to property, filed amended complaint alleging inverse condemnation, and filed third complaint instead pleading a cause of action for quintuple damages for inverse condemnation.

Following grant of summary judgment to city on third complaint, landowners filed fourth complaint seeking quintuple damages for inverse condemnation, claiming they had standing based upon previous sale of a 64.77-acre tract to city. The District Court granted summary judgment in favor of city. Landowners appealed.

The Court of Appeals held that landowners’ previous grant to city of parcel, which was not landfill that landowners alleged caused damage to their adjacent property, could not serve as basis for inverse condemnation claim for quintuple damages.

Landowners’ previous grant to city of parcel, which was not the landfill that landowners alleged caused damage to their adjacent property, could not serve as basis for inverse condemnation claim seeking quintuple damages, in which landowners sought quintuple damages for damage to their 214-acre grazing land caused by trash blowing from landfill; landowners were not the grantors from whom city purchased the landfill that caused the damage alleged, and there was no evidence of subsequent damage resulting from the original transaction the landowners relied upon in their inverse condemnation claim seeking quintuple damages.

EMINENT DOMAIN - OKLAHOMA

Barnett v. Okay Public Works Authority

Supreme Court of Oklahoma - March 8, 2022 - P.3d - 2022 WL 680380 - 2022 OK 24

Mobile home community owner brought inverse condemnation action against city public works authority arising out of installation of wastewater sewer lines on the premises.

The District Court entered judgment on jury verdict for landowner and granted public works authority an easement. Public works authority appealed, and the Court of Civil Appeals reversed. The Supreme Court granted certiorari.

The Supreme Court held that:

- Public works authority's statutory power of eminent domain included power to construct and install pipelines to transport and deliver wastewater to its plant for treatment, and
- Installation of wastewater sewer lines on mobile home community premises as part of sanitary system project was for public use.

City public works authority's statutory power of eminent domain to undertake "projects for the transportation, delivery, treatment or furnishing of water for domestic purposes" included power to construct and install pipelines to transport and deliver wastewater to its plant for treatment.

City public works authority's installation of wastewater sewer lines on mobile home community premises as part of sanitary system project was for public use of improving the system that transports, delivers, treats, and furnishes water for city, as required for mobile home community owner to maintain inverse condemnation action; project was not confined to mobile home community premises, but rather connected to adjoining subdivision on one side and convenience store on other side, sanitary collection system received wastewater both from mobile home community and from other properties in city, and authority's facility treated all of that wastewater.

ZONING & PLANNING - RHODE ISLAND

Nerney v. Town of Smithfield

Supreme Court of Rhode Island - March 4, 2022 - A.3d - 2022 WL 627817

Citizen brought action against town seeking writ of mandamus ordering town to remove several trees and plants that were planted on town's property by neighboring landowners who had a permit for plantings to prevent soil erosion on their property.

The Superior Court granted town's motion to dismiss for failure to state a claim. Citizen appealed.

The Supreme Court held that town's decision as to how to deal with the trees was within town's discretionary authority, and thus, could not serve as basis for issuance of writ of mandamus.

Town's decision as to how to deal with several trees planted on its property by neighboring landowners, who had a permit for plantings to prevent soil erosion on their property, was within town's discretionary authority, and thus, decision could not serve as basis for issuance of writ of mandamus to require town to remove trees; decision was part of town's executive function to enforce the laws and to require neighboring landowners to comply with express terms of their permit.

IMMUNITY - GEORGIA

Williams v. City of Tybee Island

Court of Appeals of Georgia - February 24, 2022 - S.E.2d - 2022 WL 555653

Parents of beach patron filed suit against city for wrongful death after patron drowned while attempting to rescue swimmers who were in distress, after they were caught in ocean current. The trial court granted city's motion for summary judgment, and parents appealed.

The Court of Appeals held that:

- Patron voluntarily exposed himself to risk of drowning while attempting to assist other swimmer struggling against ocean current as tide was rising in sandbar, as required for city to establish assumption of risk as affirmative defense to claims for wrongful death;
- City was not liable for patron's death under rescuer doctrine;
- Under "public duty" doctrine, city was not subject to liability for patron's drowning death.

PUBLIC UTILITIES - HAWAII

Matter of Maui Electric Company, Limited

Supreme Court of Hawaiʻi - March 2, 2022 - P.3d - 2022 WL 612072

Community group sought review of the Public Utilities Commission's (PUC) approval of power purchase agreement (PPA) to purchase solar energy, 2020 WL 6018521, and denial of group's motion for reconsideration.

The Supreme Court held that:

- Statutes governing PUC's PPA review reflect core state constitutional public trust principles;
- PUC discharged its statutory duty to assess the public interest and consider potential anticompetitive issues; and
- PUC complied with its statutory obligation to consider the need to reduce state's reliance on fossil fuels.

Statutes governing the Public Utilities Commission's (PUC) power purchase agreement (PPA) review reflect core state constitutional public trust principles, in that the state and its agencies must protect and promote the justified use of Hawaiʻi's natural beauty and natural resources; thus, when there is no reasonable threat to a trust resource, satisfying those statutory provisions fulfills the PUC's obligations as trustee.

Public Utilities Commission (PUC) discharged its statutory duty to assess the public interest and consider potential anticompetitive issues in approving power purchase agreement (PPA) for purchase of solar energy, despite contention that after bid selection all finalists hired same legal counsel to negotiate non-price PPA terms and some of those terms were similar or identical across projects; PUC did not dodge concerns about shared counsel and investigated and made specific findings, approval order reflected that PUC considered vetting mechanisms built into procurement process and concluded it had sufficient assurance that PPA was negotiated in good faith and without collusion, and PUC determined that solar company's choice of counsel did not have any adverse impact on pricing and terms.

Public Utilities Commission (PUC) complied with its statutory obligation to consider the need to reduce state's reliance on fossil fuels through energy efficiency and increased renewable energy generation when approving power purchase agreement (PPA) for purchase of solar energy; PUC reviewed electric company's greenhouse gas analysis, methodology, and data and found that project would result insignificant reduction in emissions, PUC evaluated state's energy policy and project's anticipated financial savings, PUC considered benefits of having dispatchable renewable energy, PUC identified permits that solar company would have to obtain, impact studies related to those permits, and agency review, and PUC considered solar company's efforts to explore an alternative site.

PUBLIC UTILITIES - IDAHO

Groveland Water and Sewer, District v. City of Blackfoot

Supreme Court of Idaho, Boise, January 2022 Term - March 3, 2022 - P.3d - 2022 WL 620634

Sewer district brought action against city, alleging that it violated sewer district's jurisdictional sovereignty by requiring individuals and entities located outside city limits but within sewer district to sign a "consent to annex" form in order for city to agree to connect them to sewer services, and seeking declaratory and injunctive relief as well as a finding of anticipatory breach of contract.

The Seventh Judicial District Court granted sewer district's request for preliminary injunction, entered summary judgment for sewer district on its anticipatory breach of contract claim, and denied city's motion to dismiss. City appealed.

The Supreme Court held that:

- City failed to provide adequate record for the Court to consider merits of its claims on appeal;
- Sewer district demonstrated an injury in fact sufficient to have standing to bring declaratory judgment claim;
- Sewer district established privity for standing to bring anticipatory breach claim;
- Sewer district was entitled to attorney fees and costs under terms of its contract with city; and
- Sewer district was entitled to statutory award of attorney fees for being the prevailing party on an appeal that was brought frivolously, unreasonably, or without foundation.

IMMUNITY - KANSAS

Schreiner v. Hodge

Supreme Court of Kansas - February 18, 2022 - P.3d - 2022 WL 497348

Petitioner filed pro se action against police officer and police sergeant alleging causes of action for assault, battery, false arrest, and false imprisonment after he was detained by police during an investigation concerning a suspicious vehicle.

Defendants removed case to federal court, and petitioner moved to remand. The United States District Court for the District of Kansas granted motion, and remanded to state court. The District

Court granted officer and sergeant summary judgment based on discretionary function immunity under Kansas Tort Claims Act (KTCA). Petitioner appealed. The Court of Appeals affirmed. Petition for review was granted.

The Supreme Court held that:

- Officers did not have reasonable suspicion of criminal activity required to detain petitioner, and
- Officers were entitled to discretionary function immunity under the KTCA.

Police officers did not have reasonable suspicion of criminal activity required to detain petitioner, who had parked his vehicle in a residential area and entered a nearby wooded area from which he emerged three hours later, although petitioner's vehicle was parked in an area where officers were aware other crimes had taken place, and petitioner refused to reply when officer asked if he owned the vehicle; petitioner's vehicle was parked legally, officers did not have reasonable suspicion to believe that petitioner had committed, was committing, or was about to commit a crime, and his refusal to answer questions and attempt to leave could not be basis of such suspicion.

Although police officers did not have reasonable suspicion of criminal activity required to detain petitioner, who had parked his vehicle in a residential area and refused to answer officer's questions when he emerged three hours later, they were entitled to discretionary function immunity under the Kansas Tort Claims Act (KTCA) from petitioner's tort claims; their investigation of petitioner, along with their reasonable suspicion determination, were discretionary functions implicating matters of policy.

ZONING & PLANNING - MAINE

Zappia v. Town of Old Orchard Beach

Supreme Judicial Court of Maine - March 1, 2022 - A.3d - 2022 WL 599183 - 2022 ME 15

Property owner sought judicial review of decision of town's Zoning Board of Appeals upholding town's Code Enforcement Officer's (CEO) denial of owner's application to build a greenhouse in the front yard of her residential property.

The Superior Court affirmed. Plaintiff appealed.

The Supreme Judicial Court held that:

- Zoning ordinance provided for the Board to conduct de novo review, and therefore, the operative decision for purposes of Supreme Judicial Court review was that of the Board, and
- Phrase "required front yard" in town's zoning ordinance relating to accessory buildings referred to the portion of the front yard that was required to be free of accessory structures under the applicable space and bulk regulations for the zoning district within which the property was located.

PUBLIC UTILITIES - NEVADA

Southwest Gas Corporation v. Public Utilities Commission of Nevada

Supreme Court of Nevada - February 17, 2022 - P.3d - 2022 WL 495029 - 138 Nev. Adv. Op. 5

Natural gas provider petitioned for judicial review of decision of Public Utilities Commission (PUC) in rate setting case to deny provider's request for reimbursement for costs related to software upgrade projects and pension expenses and to set return on equity lower than what the provider requested.

The District Court denied petition. Provider appealed.

The Supreme Court held that:

- Public utilities do not enjoy a presumption of prudence with respect to the expenses they incur;
- Constitutional-fact doctrine does not apply to Supreme Court's review of decisions of PUC;
- Provider had notice and opportunity to present its case on issue of normalizing pension expenses, as required for PUC's rate-setting procedures to conform with procedural due process;
- PUC's decision to adopt three-year normalization of pension expenses was not arbitrary or capricious;
- PUC's selection of 9.25% return on equity was not unconstitutional confiscatory taking;
- PUC's decision to disallow provider to recover its costs related to software upgrade projects was supported by substantial evidence; and
- PUC's decision to disallow provider to recover its pension expenses was supported by substantial evidence.

Natural gas provider was not entitled to rebuttable presumption of prudence with respect to expenses for pension and software upgrade projects that provider sought to recover by filing general rate application with Public Utilities Commission (PUC) seeking to increase service rates charged to customers; provider was best positioned to prove the prudence of the expenses it incurred and could petition the courts for review if PUC rejected expenditures in arbitrary and capricious manner, and regulations required utilities to ensure material relied upon would serve as its complete case.

Public Utilities Commission's (PUC) rate-setting procedures to conform with procedural due process in proceeding in which provider sought to raise its service rates to recover adjusted pension expenses; normalization issue was raised in prefiled direct testimony, but provider did not address it in direct testimony or in rebuttal at the hearing.

Public Utilities Commission (PUC) did not deprive natural gas provider of opportunity to explain its proposal to reduce discount rate used to calculate amount it needed to set aside to fund future pension obligations in proceeding in which provider sought to raise its service rates to recover adjusted pension expenses, and thus did not violate procedural due process requirements; regulatory professional for provider was asked at hearing how discount rate was determined and she merely stated that decision was made in conjunction with actuary, that she could not provide any further information, and that provider had no other witnesses who could do so.

Public Utilities Commission's (PUC) decision to adopt three-year normalization of pension expenses was not arbitrary or capricious in proceeding in which natural gas provider sought to raise its service rates to recover adjusted pension expenses and costs related to software upgrade projects; adopting normalization procedure for the first time in response to significant fluctuation made sense as the nature of averaging meant that provider would be somewhat undercompensated in high-cost years but overcompensated in low-cost years.

Public Utilities Commission's (PUC) selection of zone of reasonableness for return on equity between 9.10% to 9.70% was not arbitrary or capricious but was supported by substantial evidence in proceeding in which natural gas provider sought to raise its service rates to recover adjusted pension expenses, costs related to software upgrade projects, and return on equity; PUC considered expert testimony and provider's circumstances, such as its capital structure and risk profile, and PUC was free to fix any return on equity within range of reasonableness and permissibly settled on rate of 9.25% after balancing interests of ratepayers and shareholders.

Public Utilities Commission's (PUC) selection of 9.25% return on equity, in proceeding in which natural gas provider sought to raise its service rates to recover adjusted pension expenses, costs related to software upgrade projects, and return on equity, was not unconstitutional confiscatory taking; 9.25% return on equity was commensurate with other utilities with corresponding risks and maintained provider's ability to attract capital.

Public Utilities Commission's (PUC) decision to disallow natural gas provider to recover its costs related to software upgrade projects was supported by substantial evidence in proceeding in which provider sought to raise its service rates; provider submitted scant evidence substantiating projects' work order expenses, provider presented no witnesses who were directly involved in execution of projects or who could explain basis for incurring costs, and PUC's skepticism of expenses was warranted in light of provider's earlier attempt to obtain reimbursement for number of questionable expenses, including biweekly massages and home theater system.

Public Utilities Commission's (PUC) decision to disallow natural gas provider to recover its pension expenses was supported by substantial evidence in proceeding in which provider sought to raise its service rates; provider did not provide evidence to support its proposal to reduce discount rate used to calculate amount it needed to set aside to fund future pension obligations as witness was unable to explain how provider made decision to significantly reduce the discount rate.

EDUCATION - CALIFORNIA

Srouy v. San Diego Unified School District

Court of Appeal, Fourth District, Division 1, California - February 24, 2022 - Cal.Rptr.3d - 2022 WL 557183 - 2022 Daily Journal D.A.R. 1868

Former high school student brought action against public school district seeking declaration that school district was obligated to indemnify student for his defense costs in underlying personal injury action that referee brought against student, following graduation, for injuries referee received during an "away" varsity football game in which student might have made a late hit on another athlete.

The Superior Court granted school district's demurrer without leave to amend and dismissed. Student appealed.

The Court of Appeal held that:

- Free school guarantee of State Constitution did not impose a mandatory duty on school district to provide student a free legal defense;
- School district's refusal to defend student did not result in student's incurring a statutorily-prohibited charge for an extracurricular activity;
- School district did not have mandatory duty to defend based on Education Code section governing liability for activities off school grounds; and
- Student did not have a viable equal protection claim.

IMMUNITY - COLORADO

[Maphis v. City of Boulder]

Supreme Court of Colorado - February 22, 2022 - P.3d - 2022 WL 521907 - 2022 CO 10

Pedestrian brought personal injury action against city after tripping over a deviation in a city sidewalk.

The District Court denied city's motion to dismiss for lack of subject matter jurisdiction. City appealed, and the Court of Appeals reversed. The Supreme Court granted certiorari review.

The Supreme Court held that:

- To prove "dangerous condition" element of governmental immunity waiver under the Colorado Governmental Immunity Act (CGIA), a plaintiff must show that the condition created a chance of injury, damage, or loss which exceeded the bounds of reason, and
- Sidewalk deviation did not create a chance of injury, damage, or loss which exceeded the bounds of reason.

EMINENT DOMAIN - INDIANA

[624 Broadway, LLC v. Gary Housing Authority]

Court of Appeals of Indiana - December 27, 2021 - N.E.3d - 2021 WL 6110010

Condemnee brought action against municipal housing authority, seeking injunctive relief and damages based on allegations that authority unlawfully exercised eminent domain over condemnee's real property and violated condemnee's constitutional and statutory procedural rights.

The Superior Court granted authority's motion for summary judgment and denied condemnee's motion for summary judgment. Condemnee appealed.

The Court of Appeals held that:

- Indiana's statutory membership and quorum requirements for local housing authorities are preempted by federal law governing administrators appointed by United States Department of Housing and Urban Development (HUD) over local housing authorities in substantial default of agreements with HUD;
- Indiana's statutory requirement that local housing authority obtain approval from local fiscal body before exercising eminent domain is preempted by federal law governing HUD administrators;
- Uniform Relocation Assistance and Real Property Acquisition Policies Act creates no right in a condemnee to judicial review of an agency's property-acquisition practices;
- Authority's use of notice by publication for hearing regarding exercise of eminent domain, rather than providing actual notice to condemnee's agent whose name and address were known to authority, violated condemnee's right to due process; and
- Fact that agent eventually learned of and attended hearings did not render harmless authority's failure to attempt service method likely to give condemnee actual notice of the meetings.

ZONING & PLANNING - MARYLAND

[City of Hyattsville v. Prince George's County Council]

Court of Special Appeals of Maryland - February 23, 2022 - A.3d - 2022 WL 533996

City and residents petitioned for judicial review of decision of county council, sitting as district council, to rezone part of property located within city from “open space” zone to “one-family detached residential” zone and to amend list of allowed uses to permit townhouses to be constructed on the property.

The Circuit Court affirmed decision. City and residents appealed.

The Court of Special Appeals held that:

- County zoning ordinances, which treated district council as primary and final decision maker on request to change underlying zone or allowed uses for property in development district overlay zone, did not violate division of authority established by Maryland-Washington Regional District Act (RDA);
- District council’s decision to approve application to rezone part of property and to amend list of allowed uses was, in substance, a decision to approve zoning map amendment that RDA required council to make;
- District council’s decision to establish approval criteria for changes to underlying zone without any reference to change-mistake requirement was appropriate exercise of council’s zoning powers;
- Substantial evidence supported district council’s conclusion that rezoning and amending list of allowed uses conformed with purposes and recommendations for development district overlay zone, as stated in sector plan, and did not substantially impair implementation of sector plan;
- Footnote attached to top line of table of standards for development district overlay zone did not operate to prohibit changes to list of allowed uses, and, thus, district council was authorized under county zoning ordinances to change list of allowed uses for property, provided that council found proposal met criteria in ordinances for approving zoning request; but
- District council was required under county zoning ordinances to approve maximum densities in terms of dwelling units per net acre of net lot or tract area, instead of dwelling units per acre.

EMINENT DOMAIN - OKLAHOMA

[Rocket Properties, LLC v. LaFortune]

Supreme Court of Oklahoma - January 18, 2022 - 502 P.3d 1112 - 2022 OK 5

In city’s action for eminent domain, property owner asserted claim for inverse condemnation.

The District Court granted city summary judgment and dismissed property owner’s claim on grounds that it was governed by the Oklahoma Governmental Tort Claims Act (GTCA). Property owner filed petition for writ of prohibition.

The Supreme Court held that action for inverse condemnation was not a “tort” governed by GTCA.

A cause of action grounded on inverse condemnation is not a tort governed by Governmental Tort Claims Act (GTCA); rather, it is a special statutory proceeding for the purpose of ascertaining the compensation to be paid for appropriated or damaged property.

EMINENT DOMAIN - TEXAS

[Preston Hollow Capital, L.L.C. v. Cottonwood Development Corporation]

United States Court of Appeals, Fifth Circuit - January 14, 2022 - 23 F.4th 550

Lender, which made loan to city in connection with development project, brought § 1983 action against city, alleging city violated Takings Clause when it failed to return loaned funds.

The United States District Court adopted magistrate's report and recommendation and dismissed action. Lender appealed.

The Court of Appeals held that:

- Lender's pre-existing title to its own money did not allow lender to bring takings claim, as opposed to breach of contract claim, against city, and
- Neither city's statements asserting belief that loan agreement was void or voidable nor its adoption of resolution stating that transaction with lender was "legally defective" were sovereign acts, and therefore such acts could not support takings claim.

Lender's pre-existing title to its own money did not allow lender to bring takings claim, as opposed to breach of contract claim, against city based on city's failure to return funds lent to city by lender pursuant to parties' loan agreement; lender exchanged its pre-existing title for various rights laid out in loan agreement, such as a promissory note, and thus rights at issue in takings action were not independent of parties' contract.

Neither municipal borrower's statements asserting belief that loan agreement was void or voidable nor its adoption of resolution stating that transaction with lender was "legally defective" were sovereign acts, and therefore such acts could not support takings claim by lender after borrower failed to return loaned funds; borrower did not act pursuant to statute, ordinance, or regulation.