PUBLIC UTILITIES - CALIFORNIA

Golden State Water Company v. Public Utilities Commission

Supreme Court of California - July 8, 2024 - P.3d - 2024 WL 3321648

Class A water utilities and an association that represented investor-owned water utilities' interests petitioned for writs of review to have set aside the Public Utilities Commission's order 2020 WL 5407872, as modified by 2021 WL 4627678, that, among other things, did away with a water-conservation mechanism allowed certain water companies to structure their rates in a way that decoupled revenue from the amount of water sold.

After issuing the writs of review, the Supreme Court consolidated the cases.

The Supreme Court held that:

- Enactment of new legislation concerning conservation-related decoupling mechanisms did not render the case moot;
- Commission did not give adequate notice that it would consider elimination of the water-conservation mechanism; and
- Assuming that a showing of prejudice was required in order to set aside the Commission's order due to lack of adequate notice, petitioners demonstrated such prejudice.

Enactment of new legislation concerning conservation-related decoupling mechanisms did not render moot petitions for review that were filed by Class A water utilities and an association representing investor-owned water utilities' interests and that sought the setting aside of Public Utilities Commission's order that did away with a water-conservation mechanism allowed certain water companies to structure their rates in a way that decoupled revenue from the amount of water sold; new legislation referred only to consideration of a mechanism for decoupling revenue from sales, and the statute's requirement that the Commission consider authorizing such a mechanism was not necessarily equivalent to what the petitioners were asking for.

Public Utilities Commission did not give adequate notice that it would consider elimination of a water-conservation mechanism allowed certain water companies to structure their rates in a way that decoupled revenue from the amount of water sold, as would warrant setting aside Commission's order eliminating the mechanism; the scoping memos covered a forecasting issue that did not fairly include the possibility that the Commission would order petitioners not to propose continuing existing water-conservation mechanisms.

Class A water utilities and an association that represented investor-owned water utilities' interests were prejudiced by failure of Public Utilities Commission's scoping memos to cover the possible elimination of a water-conservation mechanism allowed certain water companies to structure their rates in a way that decoupled revenue from the amount of water sold, as would warrant, assuming that a showing of prejudice was even required, setting aside Commission's order eliminating the mechanism; the lack of notice of the possible elimination of the mechanism deprived petitioners of

an adequate opportunity to present their case for preserving the mechanism.

PUBLIC UTILITIES - FEDERAL

Shell Energy North America (US), L.P. v. Federal Energy Regulatory Commission

United States Court of Appeals, District of Columbia Circuit - July 9, 2024 - F.4th - 2024 WL 3335557

Sellers of wholesale electricity, California Public Utilities Commission (CPUC), and investor-owned utility petitioned for review of orders of Federal Energy Regulatory Commission (FERC), 2022 WL 1058002, 2022 WL 5243242, 2022 WL 1154871, 2022 WL 5243289, 2022 WL 1208000, 2022 WL 4397219, 2022 WL 1208033, 2022 WL 5243177, 2022 WL 1208013, 2022 WL 5243180, 2022 WL 1208004, 2022 WL 4397324, 2022 WL 1208037, 2022 WL 4397517, 2022 WL 1601920, 2022 WL 12179536, 2022 WL 1601924, 2022 WL 12186014, 2022 WL 1601918, 2022 WL 12193846, 2022 WL 2188379, 2022 WL 17077042, 2022 WL 2188380, 2022 WL 17077046, 2022 WL 2191889, and 2022 WL 17077044, determining that sellers failed to justify their short-term electricity sales above soft price cap in western United States during summer heat wave and requiring partial refunds of sale prices that exceeded cap.

The Court of Appeals held that:

- FERC was required to find sellers' negotiated contract rates seriously harmed public interest before ordering refunds, and
- Claim by CPUC and utility that FERC erroneously calculated refunds that would lead to higher future electricity prices was moot.

Federal Energy Regulatory Commission's (FERC) final order, determining that sellers failed to justify their short-term electricity sales above soft price cap and requiring partial refunds of sale prices that exceeded cap, violated Mobile-Sierra doctrine, United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 76 S.Ct. 373; Federal Power Comm'n v. Sierra Pac. Power Co., 76 S.Ct. 368, guiding FERC's just-and-reasonable review of market-based-tariff contracts under FPA; FERC ordered refunds for rates that were mutually contracted by sellers and customers in competitive marketplace, yet FERC altered those negotiated rates by ordering refunds without first finding that rates seriously harmed public interest or that Mobile-Sierra framework did not apply. Federal Power Act § 205, 16 U.S.C.A. § 824d(a).

Under the *Mobile-Sierra doctrine, United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 76 S.Ct. 373; *Federal Power Comm'n v. Sierra Pac. Power Co.*, 76 S.Ct. 368, Federal Energy Regulatory Commission (FERC) can rebut the presumption that the electricity rate set out in a freely negotiated wholesale-energy contract meets the just and reasonable requirement, imposed by the FPA, only by making a particularized finding that a given contract seriously harms the public interest, even if that contract's price exceeds the soft price cap, or can avoid that inquiry by demonstrating that the presumption should not apply at all. Federal Power Act § 205, 16 U.S.C.A. § 824d(a).

California Public Utilities Commission's (CPUC) and investor-owned utility's challenge to Federal Energy Regulatory Commission's (FERC) order, which allegedly would lead to higher future electricity prices by purportedly erroneously calculating refunds required from sellers that failed to justify their short-term electricity sales above soft price cap, was rendered moot by determination that FERC's refund orders failed to satisfy preconditions, in violation of *Mobile-Sierra doctrine,*

United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 76 S.Ct. 373; *Federal Power Comm'n v. Sierra Pac. Power Co.*, 76 S.Ct. 368, since any judicial pronouncement about correctness of calculated refunds would not presently affect parties' rights or have more-than-speculative chance of affecting them in future.

EMINENT DOMAIN - INDIANA

Indiana Land Trust #3082 v. Hammond Redevelopment Commission

United States Court of Appeals, Seventh Circuit - July 10, 2024 - F.4th - 2024 WL 3353836

Owner of property subject to condemnation proceeding filed state-court action against city, city redevelopment commission that had commenced condemnation proceeding, and city's mayor, asserting federal constitutional violations relating to alleged conspiracy regarding the eminent domain proceeding, including § 1983 claim alleging violation of equal protection and Monell claim.

Following removal, the United States District Court for the Northern District of Indiana denied property owner's request for leave to amend complaint to add claims for violations of substantive due process and civil conspiracy under § 1983 and granted city's motion to dismiss the remaining claims. Property owner appealed.

The Court of Appeals held that:

- Interests of justice did not favor Court's abstention under Colorado River doctrine;
- Building of road to connect neighborhood and major roadway was rational basis to seek condemnation, and thus, there was no violation of equal protection under class-of-one theory;
- Owner failed to allege any impairment to interest in property, and thus failed to state claim for violation of substantive due process; and
- Owner was required to seek recourse in state court for objectionable land-use decision rather than transform objections into substantive due process claim.

EMINENT DOMAIN - LOUISIANA

Watson Memorial Spiritual Temple of Christ v. Korban

Supreme Court of Louisiana - June 28, 2024 - So.3d - 2024 WL 3218549 - 2024-00055 (La. 6/28/24)

Landowners filed petition for writs of mandamus and fieri facias against executive director of city's sewerage and water board, in his official capacity, seeking to compel the payment of damages that had been awarded to landowners in their prior inverse-condemnation actions against board but for which board had not allocated funds.

The District Court denied executive director's exception of res judicata, declining to give preclusive effect to a decision of the United States District Court for the Eastern District of Louisiana, as affirmed by the United States Court of Appeals for the Fifth Circuit, dismissing landowners' § 1983 action against board and its executive director seeking to collect their judgment, but the District Court granted executive director's exception of no cause of action. On landowners' appeal, the Fourth Circuit Court of Appeal reversed and remanded. Executive director petitioned for a writ of

certiorari.

The Supreme Court held that:

- Decision in prior federal suit did not have res judicata effect as to landowners' claims;
- As a matter of first impression, the payment of just compensation for a judgment arising from inverse condemnation is a ministerial, non-discretionary duty in light of the Louisiana Constitution's just-compensation clause, and mandamus may therefore issue to enforce a final judgment against a political subdivision for just compensation; and
- District court would be required, on remand, to tailor a plan to ensure satisfaction, within a reasonable period of time, of landowners' judgment for damages.

REFERENDUM PETITION - MARYLAND

Town of Bel Air v. Bodt

Supreme Court of Maryland - July 9, 2024 - A.3d - 2024 WL 3336797

Town residents brought action against town seeking declaratory relief, a writ of mandamus, and permanent injunctive relief after town commissioners refused to submit a purported referendum petition concerning a zoning ordinance to town board of election judges due to the petition's non-compliance with town charter.

Town and intervenor moved for summary judgment. The Circuit Court entered orders declaring the rights of the parties, directing town to take action, and partially granting injunctive and mandamus relief. Town and intervenor appealed, residents cross-appealed, and town petitioned for writ of certiorari, which was granted.

The Supreme Court held that:

- Commissioners could make preliminary determination of facial validity of purported referendum petition before verification of signatures;
- Petition did not satisfy requirements of town charter for being a referendum petition; and
- Commissioners were authorized to determine validity of petition by verbal motion at commissioners' meeting.

Whether town commissioners correctly determined that a purported referendum petition concerning a zoning ordinance did not comply with town charter, and whether commissioners were authorized to make such a determination by verbal motion at commissioners' meeting, were legal questions that the Supreme Court would consider de novo and without any deference to the trial court's conclusions, following the entry of a declaratory judgment on the basis of a motion for summary judgment.

Town commissioners had authority under town charter to make a preliminary determination as to facial validity of purported referendum petition concerning a zoning ordinance without first sending petition to town election board for verification of signatures, where text of charter did not contain any words that required a particular order or sequence when determining whether a petition satisfied the signature requirement, to be determined by board, and the general facial or textual requirement, to be determined by commissioners.

Purported referendum petition submitted to town following a comprehensive rezoning did not satisfy requirements of town charter for being a referendum petition, where information provided on

signature pages of petition called for the reversal of a zoning decision without identifying the mechanism for reversal with words like “petition,” “referendum,” or “vote,” and cover page that was affixed to petition as part of a refiling contained language seeking a referendum only on part of a zoning ordinance, which was impermissible.

Town commissioners were permitted under town charter to determine validity of a purported referendum petition concerning zoning ordinance by a verbal motion at a regular commissioners’ meeting that was memorialized in the minutes of the meeting, where charter did not require commissioners to consider validity of a referendum petition in a particular manner, charter authorized commissioners to adopt both ordinances and resolutions, and commissioners’ determination of validity of a referendum petition did not fall within any of the categories of government action that required an ordinance under the charter.

Verbal motion at a regular town commissioners’ meeting was the equivalent of a “resolution” by which the commissioners had authority under town charter to determine validity of a purported referendum petition concerning zoning ordinance; motion constituted a formal expression of commissioners’ opinion that was adopted by vote and memorialized in the minutes of the proceeding.

PUBLIC FINANCE - NORTH DAKOTA

East Central Water District v. City of Grand Forks

Supreme Court of North Dakota - July 5, 2024 - N.W.3d - 2024 WL 3308359 - 2024 ND 135

Water district brought federal action against city seeking, in part, a declaration that a water supply and service agreement with city was void ab initio due to absence of a public lending authority as a party to agreement.

The United States District Court for the District of North Dakota certified questions.

The Supreme Court held that:

- Supreme Court would exercise its discretion and answer certified questions, and
- As matter of first impression, failure to include public lending authority in a service agreement between political subdivisions makes the agreement void, not voidable.

Supreme Court would exercise its discretion and answer certified questions from federal court as to whether the failure to include the public lending authority that finances the construction of acquisition of an improvement in a service agreement between political subdivisions makes the agreement void or voidable pursuant to state statute governing protection of service during term of a loan, where interpretation of statute was a matter of first impression, and resolution of the questions of law could have been determinative of the matter, which involved a water supply and service agreement between city and water district.

Statutory language “invalid and unenforceable,” in statute providing that the failure to include the public lending authority that finances the construction or acquisition of an improvement for a service as a party to an agreement between political subdivisions for the provision of the service makes the agreement invalid and unenforceable, means void ab initio, not voidable and capable of ratification.

IMMUNITY - TEXAS

Hensley v. State Commission on Judicial Conduct

Supreme Court of Texas - June 28, 2024 - S.W.3d - 2024 WL 3210043 - 67 Tex. Sup. Ct. J. 1369

Justice of the peace brought suit against State Commission on Judicial Conduct and Commission officials, alleging that Commission's investigation and sanction of her for refusing to perform same-sex weddings was an ultra vires act which violated the Texas Religious Freedom Restoration Act (TRFRA) and the right to freedom of speech under the Texas Constitution.

The 459th District Court, Travis County, granted Commission's and officials' plea to the jurisdiction and dismissed the case. Justice petitioned for review, which was granted, and the Austin Court of Appeals affirmed. The Supreme Court granted justice's petition for review.

The Supreme Court held that:

- Justice of the peace was not required to exhaust her administrative remedies prior to bringing a suit to recover for violations of her rights under TRFRA and the Free Speech Clause;
- Notice sent by justice of the peace to the Commission was sufficient to invoke the TRFRA and its waiver of sovereign immunity;
- Statute providing that Commission was immune from liability did not create immunity from suit;
- Waivers of sovereign immunity found in the Uniform Declaratory Judgment Act (UDJA) and Texas Administrative Procedures Act (APA) did not apply to justice's request for declaratory relief; and
- Justice's allegation that Commission violated the TRFRA was sufficient to state a claim that the Commission engaged in an ultra vires act.

ZONING & PLANNING - VIRGINIA

Board of Supervisors of Fairfax County v. Leach-Lewis , Trustee of Rita M. Leach-Lewis Trust 18MAR13

Supreme Court of Virginia - June 20, 2024 - 902 S.E.2d 57

Trustee for trust homeowner church organization filed petition for a writ of certiorari challenging the decision of the Board of Zoning Appeals which concluded that home in residential conservation district was being used as an "office" in violation of a zoning ordinance.

The Fairfax Circuit Court upheld the decision. Trustee appealed, and the Court of Appeals reversed with instructions to remand. The Supreme Court granted the county board of supervisors an appeal.

The Supreme Court held that:

- Zoning ordinance did not provide that a zoning case cannot proceed if evidence is unconstitutionally seized or contain an rule calling for exclusion of evidence;
- Exclusionary rule did not apply;
- Statute did not require court to consider zoning ordinance when considering whether house was illegally being used as an office; and
- Church's use of houses it owned fell within the definition of "office."

IMMUNITY - VIRGINIA

Page v. Portsmouth Redevelopment and Housing Authority

Supreme Court of Virginia - July 3, 2024 - S.E.2d - 2024 WL 3281159

Building owner brought negligence action against adjacent building owner, which was city redevelopment and housing authority, alleging owner's building was damaged when adjacent owner demolished its building after city declared it to be unlawful nuisance.

The Portsmouth Circuit Court granted adjacent owner's plea in bar raising defense of tort immunity, and denied owner's motion to reconsider. Owner appealed. The Court of Appeals affirmed. Owner appealed.

The Supreme Court held that:

- Owner did not violate approbate-reprobate doctrine by asserting on appeal that adjacent owner was not entitled to tort immunity, and
- Housing authority's demolition was proprietary function to which tort immunity did not apply.

City redevelopment and housing authority's demolition of its building after city declared it to be unlawful nuisance was ministerial legal duty to perform a "proprietary function," not exercise of governmental discretion, and thus, housing authority was not entitled to immunity from adjacent building owner's negligence claim alleging its building was damaged during demolition; housing authority bought property that was unsafe for human occupancy, did nothing during ensuing five years to make it safe, allowed public to use building, and demolished building only after receiving notice from city that, if disobeyed, would have exposed housing authority to criminal prosecution and civil penalties, such that housing authority acted no differently than any other private landowner.

Building owner did not violate approbate-reprobate doctrine by asserting on appeal that adjacent building owner, which was city redevelopment and housing authority, was not entitled to immunity from owner's negligence claim alleging owner's building was damaged when adjacent owner demolished its building after city declared it to be unlawful nuisance; statement by owner's counsel before trial court that adjacent owner was acting in its proprietary role on behalf of city did not amount to concession that adjacent owner was acting on behalf of city, as statement included important qualifier of in "proprietary role," and counsel's next statement again asserted that adjacent owner was performing "a proprietary function."

SHORT TERM RENTALS - CONNECTICUT

9 Pettipaug, LLC v. Planning and Zoning Commission

Supreme Court of Connecticut - June 18, 2024 - A.3d - 349 Conn. 268 - 2024 WL 2982704

Homeowners sought review of decision of borough planning and zoning commission to approve a zoning amendment regulating short-term rentals of homes in borough that was a very small, largely seasonal community.

The Superior Court granted homeowners' motion for summary judgment after denying commission's motion to dismiss for lack of subject matter jurisdiction. Commission petitioned for certification to appeal, which was granted. The Appellate Court affirmed. Commission appealed.

The Supreme Court held that:

- Newspaper in which borough published notice of zoning changes satisfied the "substantial circulation" component of statutory notice requirement, and
- Borough's compliance with statutory notice requirement required dismissal of untimely zoning appeal.

Newspaper in which borough published notice of zoning amendment concerning short-term rentals of homes in borough was a newspaper having a substantial circulation in borough, under the "substantial circulation" component of statutory notice requirement for changes in zoning regulations, even though none of borough's 14 year-round households subscribed to newspaper and newspaper was not sold anywhere in borough, where newspaper focused on news items of general interest to borough residents, newspaper was readily available for purchase in commercial area of town in which borough was located, content of newspaper was readily accessible online, newspaper's website allowed free access to legal notices, and borough planning and zoning commission had a long history of using newspaper for its legal notices.

Borough's compliance with statutory publication requirement for notice of zoning amendment concerning short-term rentals of homes in borough required dismissal of homeowners' zoning appeal, which was untimely because it was commenced more than 15 days from the date that notice of the decision was published, without the benefit of the statutory savings provision.

IMMUNITY - GEORGIA

Guy v. Housing Authority of City of Augusta

Court of Appeals of Georgia - July 2, 2024 - S.E.2d - 2024 WL 3268630

Tenant in low-income apartment complex owned by city housing authority, who was allegedly shot in the leg on the front porch of her apartment, brought premises-liability action against authority, alleging that authority was negligent in failing to provide property security or take measures to keep property safe, or both.

The trial court granted authority's motion for summary judgment. Tenant appealed.

The Court of Appeals held that housing authority was an instrumentality of the city entitled to sovereign immunity.

City housing authority was a public corporation using public funds to perform for the city what the General Assembly had deemed to be an essential public and governmental purpose, and thus authority was an instrumentality of the city entitled to sovereign immunity, in premises-liability action brought against it by tenant who was allegedly shot on the front porch of her apartment in low-income apartment complex owned by the authority; authority was statutorily defined as a public body corporate and politic, legislation creating the authority provided that it exercised public and essential governmental functions, and General Assembly authorized authority's creation in order to address shortage of safe and sanitary dwelling accommodations that were affordable for persons of low income.

CHARTER AMENDMENTS - MAINE

Good v. Town of Bar Harbor

Supreme Judicial Court of Maine - July 2, 2024 - A.3d - 2024 WL 3262053 - 2024 ME 48

Residents brought action against town, seeking a declaratory judgment that voter-adopted modifications to the town's charter were null and void.

The Superior Court granted residents' motion for summary judgment and denied town's motion for summary judgment. Town moved to alter or amend the judgment, and the Superior Court denied the motion. Town appealed.

The Supreme Judicial Court held that:

- Charter commission's proposed changes to town's charter were modifications that could be presented to voters in separate questions, and
- Any procedural irregularities did not have a material and substantial adverse effect on the outcome sufficient to justify invalidating the vote of charter amendments.

Charter commission's proposed changes to town's charter were modifications under the Home Rule Act that could be presented to voters in separate questions rather than revisions which required a single question; the commission's discrete proposals reflected limited changes in 19 areas within the town's current charter structure rather than a major, integrated revision of the charter in its entirety.

The appellate record did not support a finding that any procedural flaw under the Home Rule Act in the election of voters to town's charter commission materially and substantially affected the ultimate vote on the commission's recommendation for charter amendments sufficient to justify invalidating the vote; residents challenging the results of the vote did not submit a copy of the charter in effect at the relevant time to support their argument that the commission members were not properly elected.

ZONING & PLANNING - MICHIGAN

Jostock v. Mayfield Township

Supreme Court of Michigan - July 1, 2024 - N.W.3d - 2024 WL 3261121

Objector brought declaratory judgment action against township board and property owner, alleging board's decision to rezone property to general commercial district, and to allow use of property for drag racing, was unlawful.

The Circuit Court entered declaratory judgment in favor of objector. Property owner appealed. The Court of Appeals affirmed. Leave to appeal was granted.

The Supreme Court held that for a proposed use to be valid under provision of Michigan Zoning Enabling Act (MZEA) allowing conditional rezoning in which an owner of land voluntarily offers certain use and development of the land as a condition to a rezoning of the land or an amendment to a zoning map, the proposed use must be a permitted use within the proposed zoning district, either by right or after special approval.

EMINENT DOMAIN - MISSISSIPPI

Fly v. Yalobusha County, Miss.

United States District Court, N.D. Mississippi, Western Division - June 11, 2009 - Not Reported in F.Supp.2d - 2009 WL 1658096

A county's alleged taking of road by including it in an official road plan was for a public use and, thus, did not constitute an illegal taking for private use. The road was open to all members of the community and it provided access to the property of at least three other property owners. The road was also used for the connection of utilities to multiple residences.

EMINENT DOMAIN - VIRGINIA

School Board of Stafford County v. Sumner Falls Run, LLC

Supreme Court of Virginia - July 3, 2024 - S.E.2d - 2024 WL 3281914

Owner of property near sites where county planned to build schools filed petition against county school board and Virginia Department of Transportation (VDOT) seeking declarations that school board could access site through private easement or county-owned road, that property owner had vested right to maintain existing intersection, that existing entrance of intersecting roads was exempt from VDOT's Access Management regulations, and that any taking of property beyond extending current easement would violate doctrine of necessity and Virginia Takings Clause.

The Stafford Circuit Court denied respondents' plea of sovereign immunity. Respondents filed interlocutory appeal.

The Supreme Court held that:

- Declaratory Judgment Act, by itself, is not an across-the-board waiver of sovereign immunity, and
- Property owner's claim for declaratory judgment that any taking of property beyond extension of easement would violate Takings Clause was not ripe for adjudication.

Property owner's claim against county school board, which was building schools nearby such property, for declaratory judgment that any taking of property beyond extension of existing easement would violate Virginia Takings Clause was not ripe for adjudication, where no taking had yet occurred, property owner did not allege that Commonwealth of Virginia or school board was on the cusp of damaging its property within the intendment of Takings Clause, and property owner did not dispute that any such taking would be for public purpose, as necessary to comport with Takings Clause.

MUNICIPAL ORDINANCE - WASHINGTON

Potter v. City of Lacey

Supreme Court of Washington, En Banc - July 3, 2024 - P.3d - 2024 WL 3282452

Owner of travel trailer, a vehicle-sheltered individual who was allegedly issued citation and threatened with impoundment of trailer, filed § 1983 suit against city and police chief, challenging constitutionality of municipal parking ordinance barring parking such large vehicles and trailers on

public lots and streets for more than four hours per day as violating his federal and state constitutional rights of freedom of travel and association, freedom from cruel and unusual punishment, and freedom from unreasonable searches and seizures.

After removal, the United States District Court for the Western District of Washington granted city's motion for summary judgment as to claims against city and police chief. Owner appealed. The United States Court of Appeals for the Ninth Circuit certified questions.

The Supreme Court held that parking ordinance of general applicability did not violate right to interstate travel as applied to owner, who sought to protect preferred method of residing in city.

City's ordinance barring parking of recreational vehicles, trailers, campers, and similar vehicles on public lots and streets for more than four hours per day did not violate state constitutional right to intrastate travel as-applied to owner of travel trailer, who was vehicle-sheltered individual who asserted that he had right not to intrastate travel, that is, right to reside in 23-foot trailer hitched to his truck on public streets and lots for indefinite period of time; city had right to enact health and safety law of general applicability, even if it limited owner's preferred method of residing in city.

PUBLIC EMPLOYMENT - CALIFORNIA

Los Angeles County Employees Retirement Association v. County of Los Angeles

Court of Appeal, Second District, Division 7, California - June 24, 2024 - Cal.Rptr.3d - 2024 WL 3100166

County employee retirement association brought action against county, seeking declaratory relief and a writ of mandate requiring county board of supervisors to include the employment classifications and salaries for association employees in the county's employment classifications and salary ordinance.

The Superior Court denied association's request for declaratory relief and its petition for a writ of mandate.

Association appealed.

The Court of Appeal held that:

- County employee retirement board had the authority to hire the personnel it deemed necessary to fulfill the board's fiduciary responsibility for administration of the system, including the number and type of personnel and their compensation;
- Constitutional provision giving county employee retirement board plenary authority over the county retirement system did not conflict with county's home rule authority; and
- County board of supervisors had a mandatory statutory duty to include in county classifications and salary ordinance the employment classes and compensation adopted by retirement association board for their employees.

County employee retirement board had the authority to hire the personnel the board deemed necessary or appropriate to fulfill the board's fiduciary responsibility for investment of moneys and administration of the system; that authority included determining the number and type of personnel required to do the job, as well as their compensation, and could not be overruled by the county board of supervisors.

Constitutional provision giving county employee retirement board plenary authority and fiduciary responsibility over the county retirement system did not conflict with county's home rule authority; the county employee retirement board provision was more recently enacted, more specific, and applied "notwithstanding any other provisions of law or this Constitution to the contrary," and thus county employee retirement board's authority carved out an exception to county's authority to establish classifications and fix compensation for county employees.

County board of supervisors had a mandatory statutory duty to include in county classifications and salary ordinance the employment classes and compensation adopted by the county employee retirement association board for their employees; retirement association board had the exclusive authority to appoint staff as required to accomplish the necessary work of the board, to determine job responsibilities, reporting relationships, and salaries for its employees, to create their own budgets, and to charge administrative expenses against their earnings, and the board of supervisors had no knowledge of or supervisory authority over the necessary work of the retirement board, and no control over retirement board's budget.

Statute stating that county employee retirement board appointments "shall be county employees" does not give county board of supervisors authority to classify and establish salaries for retirement system employees; retirement system employees are made county employees by statute for the limited purpose of participating in the retirement system and receiving county fringe benefits unless other benefits are established by the retirement system board.

EMINENT DOMAIN - MICHIGAN

Bruneau v. Michigan Department of Environment

United States Court of Appeals, Sixth Circuit - June 20, 2024 - F.4th - 2024 WL 3063766

Property owners, whose properties were flooded after dam collapsed after several days of rain due to static liquefaction, brought putative class action against counties in which dam was located, alleging gross negligence under Michigan law and violations of both Fifth Amendment's Takings Clause under § 1983 and Takings Clause of Michigan's constitution.

The United States District Court for the Eastern District of Michigan granted the counties' motion for summary judgment, and property owners appealed.

The Court of Appeals held that:

- Counties did not take the properties through petitioning efforts to maintain existing water levels behind dam, and
- Counties did not cause dam to collapse, and thus property owners lacked any inverse condemnation claim against counties under the Michigan Constitution.

Under the federal constitution, counties did not take landowners' properties, which were flooded after dam collapsed after several days of rain due to static liquefaction, through petitioning efforts to maintain existing water levels behind dam; petitions merely preserved the lake depth at the same level that had existed for roughly a century, counties played no part in regulating or controlling the dam's infrastructure, and lake levels had little to do with the dam's collapse, which was caused by soil vulnerabilities in place since the dam's construction.

Counties' action in petitioning to keep water levels behind dam at their historical level did not cause dam to collapse, and thus owners of properties flooded by the collapse lacked any inverse

condemnation claim against counties under the Michigan Constitution; dam collapse was caused by heavy rains and static liquefaction, neither of which were caused by the county, and the Federal Energy Regulatory Commission's independent forensic team found that lowering the lake level would not necessarily have stopped the dam's eventual failure from static liquefaction.

EDUCATION - MINNESOTA

Cajune v. Independent School District 194

United States Court of Appeals, Eighth Circuit - June 26, 2024 - F.4th - 2024 WL 3169925

Plaintiffs, including municipal taxpayers, parent of children in public school district, and unincorporated association of district residents and taxpayers, brought § 1983 action against district and its superintendent, asserting that district violated First Amendment Free Speech Clause by rejecting "All Lives Matter" and "Blue Lives Matter" posters and shirts while permitting the display of an inclusive poster series featuring two posters with the phrase "Black Lives Matter."

Defendants moved to dismiss amended complaint, and unnamed plaintiffs moved to proceed using pseudonyms. United States District Court for the District of Minnesota granted defendants' motion and denied unnamed plaintiffs' motion. Plaintiffs appealed.

The Court of Appeals held that:

- Fear of reprisal from political activists was insufficient to support allowing unnamed plaintiffs to proceed pseudonymously;
- Plaintiffs pled sufficient facts to support plausible inference that display of posters was private, not government, speech;
- District created a limited public forum, thereby opening school walls to discussion of similar topics under Free Speech Clause, when it allowed private persons to display posters with phrase "Black Lives Matter" on school walls; and
- Allegations were sufficient to state claim that district violated Free Speech Clause.

POLITICAL SUBDIVISIONS - MISSOURI

Salamun v. Camden County Clerk

Supreme Court of Missouri, en banc - June 25, 2024 - S.W.3d - 2024 WL 3161573

Owners of property management companies along with their businesses brought separate actions against respective counties, business districts, and various county officials seeking a declaration that statutes creating advisory board and mandating that area business districts transfer tax public money to advisory board, a private nonprofit entity, facially violated section of Missouri Constitution which prohibits a political subdivision from granting public money to a private entity.

Following bench trials, the Circuit Court declared statutes unconstitutional and modified statutes by striking phrase "which shall be a nonprofit entity." Challengers filed separate appeals and briefs in the Supreme Court.

The Supreme Court held that:

- Statutes, on their faces, violated Missouri Constitution, and

- Valid statutory sections were so inseparably connected with and dependent upon void unconstitutional sections thereby precluding severance.

Members of advisory board were not publicly elected nor appointed by public authority, and thus advisory board was a private entity and could not be delegated to disburse public tax money, such that statutes, on their faces, requiring area business districts to grant lodging tax, which was public money, to advisory board, which was a private entity, violated section of Missouri Constitution prohibiting a political subdivision from granting public money to a private entity, even though composition of advisory board was prescribed by statute, and even though advisory board was tasked with spending tax revenue for public purposes.

Valid statutes creating and dissolving lake area business districts were so inseparably connected with and dependent upon void statutes creating a governing body and its ability to impose and use lodging tax, which violated section of Missouri Constitution prohibiting a political subdivision from granting public money to a private entity, that Supreme Court could not presume the legislature would have enacted remaining statutes without void statutes, thereby precluding severance of unconstitutional statutes so that the entire statutory scheme was required to be stricken; without advisory board, there could be no lodging tax or an entity to spend lodging tax, and without the lodging tax to be used to promote tourism in the lake area business districts there was no purpose for creating the lake area business districts and no need for a method to dissolve them.

COLLECTIVE BARGAINING - TEXAS

Borgelt v. Austin Firefighters Association, IAFF Local 975

Supreme Court of Texas - June 28, 2024 - S.W.3d - 2024 WL 3210046

Taxpayers brought action against firefighters' union and city, asserting claims including that provision of collective bargaining agreement between city and union which provided a shared bank of paid leave for city firefighters to use for union activities, subject to contractual requirements and restrictions on its use, violated state constitution's Gift Clauses.

State intervened in support of taxpayers' challenge. The 419th District Court granted union's motion to dismiss and for attorney fees and sanctions under Texas Citizens Participation Act (TCPA), granted partial summary judgment to city and union, and, after bench trial, entered judgment in favor of city and union. Taxpayer and State appealed. The Austin Court of Appeals affirmed. Petition for review was granted.

The Supreme Court held that:

- Agreement as a whole provided public benefit as consideration for public funds;
- Grant of "association business leave" was supported by consideration;
- Grant of leave had predominantly public purpose;
- Any past misuses of leave did not establish agreement's text violated Gift Clause;
- City's retention of control over leave was sufficient to comport with Gift Clause; but
- Taxpayers satisfied their rebuttal burden in opposition to TCPA motion.

UBI - TEXAS

In re State

Supreme Court of Texas - June 14, 2024 - S.W.3d - 2024 WL 2983176 - 67 Tex. Sup. Ct. J. 1107

State sued county, alleging that a proposed program to provide no-strings-attached monthly cash payments to 1,928 county residents with income below 200% of the federal poverty line violated the Texas Constitution, and seeking an injunction blocking implementation of the proposed program.

The 165th District Court denied state's motion for a temporary injunction. State appealed, and the Houston Court of Appeals, Fourteenth District, denied state's request for a temporary order staying payments under the program while its appeal proceeded.

State petitioned for a writ of mandamus and filed a motion for temporary relief. The Supreme Court administratively stayed the payments pending consideration of state's motion for temporary relief.

The Supreme Court held that state was entitled to temporary injunctive relief preventing implementation of county's program pending its appeal of trial court's denial of its motion for a temporary injunction.

In original mandamus proceeding before the Supreme Court, state was entitled to temporary relief preventing implementation of county's payments to individuals under a poverty-relief program pending its appeal of trial court order denying its motion for a temporary injunction; state demonstrated the likelihood of success on the merits by raising serious doubt about the constitutionality of county's no-strings-attached program, the potential violation of the Texas Constitution's provisions prohibiting counties from granting public money to individuals without retaining public control could not be remedied or undone if payments were to commence while the underlying appeal proceeded, and the county and the public would not be harmed by a stay pending determination of the constitutionality of the county's program.

EMINENT DOMAIN - WISCONSIN

Sojenhomer LLC v. Village of Egg Harbor

Supreme Court of Wisconsin - June 19, 2024 - 2024 WI 25 - 7 N.W.3d 455

Property owner filed an action to enjoin village from acquiring the property through condemnation in order to build a sidewalk.

The Circuit Court granted village summary judgment. Property owner appealed. The Court of Appeals reversed and remanded. Village petitioned for review.

The Supreme Court held that sidewalks are not "pedestrian ways" as that term is defined in statutes that prohibit condemnation, including condemnation by villages, to acquire property to establish or extend pedestrian way.

REFERENDA - ARKANSAS

Reynolds v. Thurston

Supreme Court of Arkansas - May 30, 2024 - S.W.3d - 2024 Ark. 97 - 2024 WL 2755297

Petitioners, who had submitted two proposed measures to amend state constitution which were both rejected by state Attorney General, brought original-action complaint against Secretary of State and Board of Election Commissioners, seeking to have Supreme Court independently certify the legal sufficiency of the measures' ballot titles and popular names and order them placed on upcoming ballot and to declare unconstitutional certain statutes governing proposed measures.

Secretary and Board moved to dismiss for lack of original jurisdiction and for failure to state claim.

The Supreme Court held that:

- Supreme Court can exercise original jurisdiction over the sufficiency of petitions for referendum or initiative only after the Secretary of State has made a sufficiency determination in the first instance, and
- In a concurring opinion for a majority of the court, Kemp, C.J., further held Court lacked original jurisdiction over claims for declaratory judgment challenging constitutionality of statutes.

ANNEXATION. - UTAH

Summit County v. Town of Hideout

Supreme Court of Utah - June 13, 2024 - P.3d - 2024 WL 2967609 - 2024 UT 16

County brought declaratory judgment action against town challenging town's annexation of unincorporated area in county without an annexation petition and without county's consent, alleging violations of annexation code, Municipal Land Use, Development, and Management Act (LUDMA), and Open and Public Meetings Act (OPMA).

The Fourth District Court denied town's motion for summary judgment based on standing, granted county's summary judgment motion on a merits issue, and denied reconsideration. Town appealed.

The Supreme Court held that:

- Annexation code did not provide county with a legally protectible interest as a basis for standing;
- County Land Use, Development, and Management Act (CLUDMA) did not provide basis for standing;
- Statutes concerning a county's general enforcement authority did not provide basis for standing;
- OPMA section giving county attorneys authority to enforce OPMA did not provide basis for standing;
- LUDMA sections concerning judicial review of land-use regulations did not provide basis for standing; and
- County could not use public interest standing to overcome its lack of statutory standing.

STANDING - OKLAHOMA

Hayes v. Penkoski

Supreme Court of Oklahoma - June 11, 2024 - P.3d - 2024 WL 2933086 - 2024 OK 49

Same sex couple, who were officers of an equal rights advocacy group, brought action for a protection order pursuant to the Protection from Domestic Abuse Act against pastor who created social media posts about advocacy group and the couple's church and who protested at a pride event.

The District Court issued a permanent order of protection. Pastor appealed.

The Supreme Court held that:

- Pastor and couple lacked the requisite personal relationship for pastor's conduct to be "harassment" under Act, an
- Pastor's alleged acts of stalking under Act were not directed at any individual person.

EMINENT DOMAIN - FEDERAL

Confederated Tribes and Bands of Yakama Nation v. United States

United States Court of Federal Claims - June 3, 2024 - Fed.Cl. - 2024 WL 2821840

Confederated Tribes and Bands of the Yakama Nation and tribal corporation brought action against the United States alleging that United States breached its trust with the Tribe and a takings claim related to damages from wildfire.

The United States moved to dismiss.

The Court of Federal Claims held that:

- Yakama Nation plausibly pled that Government had conventional trust relationship and conventional fiduciary relationship, for purposes of establishing jurisdiction under Indian Tucker Act for claim of breach of trust;
- Yakama Nation plausibly alleged claim of breach of trust against United States;
- Yakama Nation's allegation that United States' authorized government action in failing to adequately address fire hazard was sufficient to allege that wildfire was direct, natural, or probable result of United States' action, as required to establish causation for takings claim;
- Yakama Nation's allegations of United States' general forest mismanagement and reallocation of firefighting resources were insufficient to state takings claim based on inverse condemnation;
- Yakama Nation plausibly alleged that United States preempted their right to enjoy their property for an extended period of time, as required to state takings claim based on inverse condemnation;
- Continuing claims doctrine applied to statute of limitations for Yakama Nation's claims; and
- Yakama Nation waived damages for harms or violations occurring before date of settlement agreement with United States.

PUBLIC RECORDS - IOWA

Teig v. Chavez

Supreme Court of Iowa - June 7, 2024 - N.W.3d - 2024 WL 2869282

Citizen filed suit against city, seeking production of records he had requested under the Open Records Act, statutory damages, and declaratory and injunctive relief.

The District Court granted city's motion for summary judgment and denied citizen's motion for additional discovery. Citizen appealed.

The Supreme Court held that:

- Citizen was not entitled to additional discovery after city had responded to more than 30 interrogatories;
- Applications from external job candidates were exempt from disclosure, but not applications submitted by then-current employees of the city;
- Legal opinion about whether the city council could review applications in a closed session was protected by attorney-client privilege and not subject to disclosure;
- City could recover the expense of searching and retrieving documents requested by citizen;
- City did not unreasonably delay responding to citizen's requests for documents related to requests by candidates to "close the interviews," city attorney job posting, or communications from city attorney to employees regarding citizen's litigation;
- Citizen was entitled to seek relief for city's 90-day delay in responding to his request for production of legal invoices;
- Citizen was entitled to costs and attorney fees related to his request for job applications from internal candidates, but not for damages for city's failure to produce the requested records or injunctive relief; and
- City was responsible for paying citizen's costs and reasonable attorney fees.

LIABILITY - NEW JERSEY

Padilla v. Young Il An

Supreme Court of New Jersey - June 13, 2024 - A.3d - 2024 WL 2967043

Pedestrian brought negligence action against owners of vacant commercial lot, alleging injury from tripping and falling while walking on the public sidewalk abutting lot.

The Superior Court, Law Division, granted summary judgment to owners. Pedestrian appealed. The Superior Court, Appellate Division, affirmed. Pedestrian filed petition for certification, which was granted.

The Supreme Court held that all commercial landowners, including owners of vacant commercial lots, must maintain public sidewalks abutting their property in reasonably good condition and can be held liable to pedestrians injured as result of their negligent failure to do so; overruling Abraham v. Gupta, 281 N.J. Super. 81, 656 A.2d 850.

PUBLIC UTILITIES - RHODE ISLAND

North Farm Home Owners Association, Inc. v. Bristol County Water Authority

Supreme Court of Rhode Island - June 14, 2024 - A.3d - 2024 WL 2983640

Condominium owners association brought action against county water authority, alleging breach of contract and seeking restitution damages, injunctive relief, and other damages after water authority refused to repair water pipe unless condominium reverted to an individual meter system or took title to the water systems from county.

Water authority filed motion for summary judgment on claims for injunctive relief and remedies. The Superior Court granted the motion, and condominium association filed interlocutory appeal.

The Supreme Court held that:

- No binding contract existed for the permanent conversion of condominium property from an individual meter system to a master meter system or establishing that water authority had a contractual obligation to maintain a master meter system in perpetuity;
- Water authority rules and regulations did not imply any obligation on the part of water authority and association's to agree on the type of water meter at condominium property;
- Allegation that pass-through water metering rate for condominium property was "discriminatory and unlawful" was insufficient to put water authority on notice of the type of claim that owners association was asserting; and
- Association's catch-all demand for "such other relief as may be available by law or equity" did not entitle it to any monetary or injunctive relief.

ZONING & PLANNING - WEST VIRGINIA

Fleming v. Carmichael

West Virginia Intermediate Court of Appeals - May 13, 2024 - S.E.2d - 2024 WL 2126810

Residents of town which included area designated as tourism development district (TDD) under Tourism Development District Act brought action against Secretary of Department of Commerce and Director of Department of Economic Development in their official capacities, seeking to have Act declared void and to obtain injunction prohibiting Act's enforcement based on alleged constitutional violations.

The Circuit Court granted Secretary and Director's motion to dismiss and found that Act was constitutional. Residents appealed.

The Intermediate Court of Appeals held that:

- Act was "general law," and not constitutionally void "special legislation";
- Act was rationally related to achieve proper governmental purpose, and thus, was constitutional on equal protection grounds;
- Act did not impermissibly infringe upon constitutional rights of residents to regulate and control their town; and
- Act did nothing which would contravene anyone's constitutional right to vote in municipal elections.

MUNICIPAL GOVERNANCE - ARKANSAS

City of Helena-West Helena v. Williams

Supreme Court of Arkansas - June 6, 2024 - S.W.3d - 2024 Ark. 102 - 2024 WL 2855378

City resident filed a complaint against city and mayor, seeking a declaratory judgment that the previous mayor's veto of two city ordinances was proper and could not be rescinded by subsequent mayor.

Following a bench trial, the Circuit Court entered declaratory judgment for resident, finding that the veto had been proper and the ordinances were null and void. City and mayor appealed.

The Supreme Court held that:

- Previous mayor complied with statutory requirements to effectively veto ordinances passed by city

council, and
- Previous mayor was not required to present his written statement of reasons for the veto to the council at its next meeting.

Previous mayor complied with statutory requirements to effectively veto ordinances passed by city council, where mayor timely filed a written statement of his reasons for the veto by leaving a letter on the city clerk's desk on a Saturday at 11 p.m., and there was no evidence to refute mayor's testimony that he placed the letter on the clerk's desk before his term ended at midnight that day.

To effectively veto an action by the city council, mayor was not required to personally present his written statement of reasons for the veto to the council at its next meeting; by statute, the veto was effective unless over-ridden by a vote of two-thirds of the council after the written statement was laid before it.

LABOR - CALIFORNIA

People ex rel. International Association of Firefighters , Local 1319, AFL-CIO v. City of Palo Alto

Court of Appeal, Sixth District, California - June 3, 2024 - Cal.Rptr.3d - 2024 WL 2813174

City petitioned for writ of extraordinary relief annulling decision by Public Employment Relations Board (PERB) ordering city to rescind resolution referring measure to voters to alter provision of city charter requiring submission of certain labor disputes with public safety unions to binding interest arbitration.

The Court of Appeals determined that city violated provision of Meyers-Milias-Brown Act (MMBA) requiring city to consult with public safety unions in good faith prior to adopting resolution, declined to order city to rescind resolution based on separation of powers principles, and remanded with instructions. After PERB vacated its prior decision and ordered city to restore its charter to preamendment status, public safety union sought leave from Attorney General to file quo warranto action, and leave was granted.

The Superior Court determined that city violated MMBA but entered judgment declining to invalidate provision in public interest. Union appealed.

The Court of Appeal held that trial court abused its discretion in declining to invalidate new charter provision, after determining that city violated MMBA by failing to consult with public safety union prior to adopting resolution referring measure to voters.

Even if trial court had authority to issue remedy other than exclusion, after determining that city, by failing to consult with public safety union, violated meet-and-confer procedures of Meyers-Milia--Brown Act (MMBA) in adopting resolution referring measure to voters to alter provision of city charter requiring submission of certain labor disputes to binding interest arbitration, trial court abused its discretion in declining to invalidate new charter provision, in quo warranto proceeding brought by the People on behalf of public safety union; Public Employment Relations Board (PERB) had ordered return to status quo and that determination was entitled to some deference, trial court's order did not effectively restore status quo or invalidate provision, order did not provide sufficient deference to Attorney General's explanation for authorizing suit which was to promote compliance with MMBA procedures, and trial court decision rested on factors inconsistent with prior findings by PERB.

ZONING & PLANNING - CONNECTICUT

9 Pettipaug, LLC v. Planning and Zoning Commission

Supreme Court of Connecticut - June 18, 2024 - A.3d - 2024 WL 2982704

Homeowners sought review of decision of borough planning and zoning commission to approve a zoning amendment regulating short-term rentals of homes in borough that was a very small, largely seasonal community.

The Superior Court granted homeowners' motion for summary judgment after denying commission's motion to dismiss for lack of subject matter jurisdiction. Commission petitioned for certification to appeal, which was granted. The Appellate Court affirmed. Commission appealed.

The Supreme Court held that:

- Newspaper in which borough published notice of zoning changes satisfied the "substantial circulation" component of statutory notice requirement, and
- Borough's compliance with statutory notice requirement required dismissal of untimely zoning appeal.

MUNICIPAL ORDINANCE - MICHIGAN

Oakland Tactical Supply, LLC v. Howell Township, Michigan

United States Court of Appeals, Sixth Circuit - May 31, 2024 - F.4th - 2024 WL 2795571

Potential customers of shooting range, who wished to practice long-distance target shooting in their local area should an appropriate shooting range be built, brought action against township, alleging that township's zoning ordinance violated the Second Amendment and seeking damages and declaratory and injunctive relief.

The United States District Court for the Eastern District of Michigan granted township's motion for judgment on the pleadings. Potential customers appealed. The Court of Appeals vacated and remanded for reconsideration in light of intervening precedent. On remand, the District Court again granted judgment for township. Potential customers appealed.

The Court of Appeals held that:

- Ordinance did not facially violate Second Amendment as an effective ban on shooting ranges in township;
- Proposed course of conduct of engaging in commercial firearms training in a particular part of the township was not protected by plain text of Second Amendment; and
- Proposed course of conduct of engaging in long-distance firearms training within the township was not protected by plain text of Second Amendment.

POLITICAL SUBDIVISIONS - MONTANA

City of Great Falls v. Board of Commissioners of Cascade County

Supreme Court of Montana - June 4, 2024 - P.3d - 2024 WL 2828039 - 2024 MT 118

City filed petition seeking declaratory judgment that, pursuant to interlocal agreement that created consolidated city-county public health board, the consolidated board, as opposed to county board of commissioners, was the "local governing body" or "governing body" referenced in statutes providing such bodies with certain means of direct control and oversight over local health boards and that city mayor remained full voting member of consolidated board.

The District Court granted summary judgment in city's favor. County board of commissioners appealed.

The Supreme Court held that:

- City's claims were justiciable;
- Consolidated board was "governing body" referenced in statutes governing local health boards;
- City mayor or another designated commissioner was full voting member of consolidated board; and
- Intervening amendment of statute redefining term "local governing body" or "governing body" did not render appeal moot.

City's claims, seeking declaratory judgment that, pursuant to interlocal agreement forming consolidated city-county public health board, the consolidated board, not county board of commissioners, was "governing body" referenced in amended statutes providing local governing body or governing body with certain means of direct control and oversight over local health boards and that city mayor remained full voting member of consolidated board, were justiciable, not non-justiciable political questions; statutes did not invalidate, limit, or supersede terms of interlocal agreement, and issues did not involve determinations of local government policy, but effect of governing statutory law on contractual agreement the parties made in exercise of their respective legal and policy discretion.

Pursuant to interlocal agreement forming consolidated city-county public health board, the consolidated board, not county board of commissioners, was "governing body" referenced in amended statutes providing such body with certain means of direct control and oversight over local health boards, even though interlocal agreement made no reference to a governing body; legislature had long authorized counties and cities to create consolidated boards by mutual agreement, previous statutory scheme long required coequal representation of participating city and county governing bodies, and amended statutes did not manifest any express or implied legislative intent to alter such coequal representation or preclude consolidated board from being the "governing body."

City mayor or another designated commissioner was full voting member of consolidated city-county public health board; comprehensive statutory scheme specifically granted participating cities legal authority to participate, through consolidated city-county health boards, in the approval and enforcement of local health and safety regulations affecting entire county without regard for city and county jurisdictional limits, and such authority did not disenfranchise county residents living outside jurisdictional limits of city, as consolidated board was created upon mutual agreement of elected city and county governing bodies, and pursuant to interlocal agreement, consolidated board consisted of members coequally appointed by city and county governing bodies.

Intervening amendment of statute redefining term "local governing body" or "governing body," as referenced in statutes governing powers and duties of local boards of public health, local health officers, and local health regulations, did not render moot appeal by county board of commissioners from declaratory judgment that pursuant to interlocal agreement that created consolidated city-county public health board, the consolidated board, as opposed to county board of commissioners, was the "local governing body" or "governing body"; amendments continued to allow participating counties and cities to delegate all local public health regulatory authority to a consolidated board as

the “local governing body” or “governing body.”

IMMUNITY - NEBRASKA

Garcia v. City of Omaha

Supreme Court of Nebraska - June 7, 2024 - N.W.3d - 316 Neb. 817 - 2024 WL 2869406

Driver of garbage truck brought negligence action against city under the Political Subdivisions Tort Claims Act (PSTCA), seeking to recover for injuries that he received when his truck fell into a sinkhole on city street.

The District Court denied city’s motion for summary judgment based on sovereign immunity. City filed an interlocutory appeal.

The Supreme Court held that:

- Order denying summary judgment based on immunity was a final appealable order, and
- Factual issues as to whether city received notice of sinkhole and reasonable time to repair precluded summary judgment.

Order denying city’s motion for summary judgment based on sovereign immunity was a final appealable order, in negligence action against city under the Political Subdivisions Tort Claims Act (PSTCA) arising from a garbage truck falling into a sinkhole on city street, where city asserted in its motion that it had PSTCA immunity from liability claims relating to spot or localized defects in roadways, and trial court denied the motion.

Genuine issues of material fact existed as to whether city had actual or constructive notice of sinkhole in city street and a reasonable time to repair it at the time that garbage truck fell into sinkhole, thus precluding summary judgment based on sovereign immunity in truck driver’s negligence action against city under the Political Subdivisions Tort Claims Act (PSTCA) seeking to recover for his personal injuries.

BANKRUPTCY - PUERTO RICO

In re Financial Oversight and Management Board for Puerto Rico

United States Court of Appeals, First Circuit - June 12, 2024 - F.4th - 2024 WL 2952154

Financial Oversight and Management Board for Puerto Rico filed adversary complaint seeking, inter alia, disallowance of proof of claim filed by parties holding certain revenue bonds that had been issued by the Puerto Rico Electric Power Authority (PREPA) before it entered reorganization proceedings under Title III of the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA).

Bondholders counterclaimed for declaratory judgment. Numerous entities were allowed to intervene. The United States District Court for the District of Puerto Rico granted in part and denied in part the parties’ cross-motions for summary judgment and subsequently granted Board’s motion to dismiss remaining counts of bondholders’ counterclaim complaint. Bondholders appealed, Board and associated entities cross-appealed, and appeals were consolidated.

The Court of Appeals held that:

- Under Puerto Rico law, preamble of trust agreement under which revenue bonds were issued was not merely prefatory but, instead, was a granting clause;
- Trust agreement granted bondholders a lien on PREPA's "net revenues," not on its gross revenues;
- Bondholders' lien on PREPA's net revenues applied to future net revenues;
- Bondholders' lien was perfected with respect to net revenues that PREPA had acquired, and so lien could not be avoided by the Board using its powers as hypothetical judgment lien creditor;
- Proper amount of bondholders' allowed claim was face value of revenue bonds, that is, principal plus matured interest, or roughly $8.5 billion;
- Bondholders were nonrecourse creditors and, thus, if their collateral only satisfied part of their claim, they could not file deficiency claim for the remainder;
- PREPA was not itself a trustee with respect to all moneys received and, thus, the Title III court properly dismissed bondholders' breach-of-trust claim; but
- Bondholders properly pled a claim for an equitable accounting.

Under Puerto Rico law, preamble to trust agreement under which Puerto Rico Electric Power Authority (PREPA) issued revenue bonds was not merely a non-binding prefatory clause but, instead, was an operative lien-granting clause; although agreement began with table-setting "whereas" clauses, subsequent "Now, Therefore" clause stated that, in order to secure payment of revenue bonds, PREPA "[did] hereby pledge" to trustee the revenues of its system and other specified moneys, that language reflected a promise, not merely an aspiration or a description of background facts, and evinced an intent to create a security interest, and Commonwealth's Authority Act, which authorized PREPA to grant liens in its revenues, used same phrasing as preamble and thus expressly contemplated that "pledge" to "secure payment" of bond could create security interest.

Under Puerto Rico law, trust agreement under which Puerto Rico Electric Power Authority (PREPA) issued revenue bonds granted bondholders a lien on PREPA's net revenues, not on its gross revenues; although agreement did not define "revenues of the System" at issue, its "opinion of counsel" clause, which parties drafted to direct future counsel on how to describe collateral securing revenue bonds in connection with issuance and delivery of any such bonds, stated that agreement "create[d] a legally valid and effective pledge of the Net Revenues" and of "moneys, securities, and funds held or set aside" under agreement as security for bonds, nowhere did agreement state that bondholders' lien was secured by all of PREPA's revenues, and so agreement, read as a whole, clearly provided that "revenues of the System" meant "Net Revenues," that is, gross revenues minus current expenses.

Under Puerto Rico law, trust agreement under which Puerto Rico Electric Power Authority (PREPA) issued revenue bonds granted bondholders a lien on PREPA's net revenues, even if they were not placed in specified funds created by agreement; agreement's preamble stated in relevant part that PREPA pledged to trustee "the revenues of the System . . . and other moneys to the extent provided in [the] Agreement . . . as follows," and although more specific grants within agreement expressly provided for liens in certain "sinking" and "subordinate" funds, agreement's "opinion of counsel" clause drew clear grammatical distinction between PREPA's pledge of "Net Revenues" and its pledge of "moneys, securities, and funds held or set aside" under agreement, such that preamble's modifying phrase "to the extent provided" applied only to "other moneys," not to "revenues of the System," and agreement's pledge of net revenues was not limited to those deposited in sinking and subordinate funds.

Under Puerto Rico law, trust agreement under which Puerto Rico Electric Power Authority (PREPA) issued revenue bonds, which granted bondholders a lien on PREPA's net revenues, also granted a lien on the utility's future net revenues; Commonwealth law permitted bondholders to hold a

security interest in yet-to-be-acquired net revenues, and the Bankruptcy Code, as incorporated by the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), which governed PREPA's Title III restructuring proceeding, made clear that a lien on "special revenues" like those at issue in the case continued to attach to revenues acquired postpetition.

Under Puerto Rico law, even though floating lien in future net revenues granted to bondholders by trust agreement under which Puerto Rico Electric Power Authority (PREPA) issued revenue bonds did not permit bondholders to demand present payment of net revenues that PREPA would receive in five years, that did not mean that PREPA could not convey an initial overarching interest in any net revenues that would come through the door in five years.

Under Puerto Rico law, lien held by parties holding certain revenue bonds issued by Puerto Rico Electric Power Authority (PREPA) before it entered reorganization proceedings under Title III of the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA) was perfected with respect to net revenues that PREPA had acquired by providing electricity, and so lien could not be avoided by Financial Oversight and Management Board for Puerto Rico using its powers as hypothetical judgment lien creditor; bondholders' security interest was in an "account," that is, a right to payment of a monetary obligation for energy provided or to be provided, not in "money" or "deposit accounts," bondholders had filed a timely financing statement as required to perfect their interest, and there was no contention that financing statement insufficiently described bondholders' collateral or suffered from any other flaw that would have rendered the net revenue lien unperfected.

Under any plausible conception of Puerto Rico law, lien held by parties holding certain revenue bonds issued by Puerto Rico Electric Power Authority (PREPA) before it entered reorganization proceedings under Title III of the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), with respect to PREPA's future net revenues, was not avoidable by Financial Oversight and Management Board for Puerto Rico using its powers as hypothetical judgment lien creditor, whether under sweeping "stream" theory urged by bondholders, whereby their perfection of lien in net revenue "stream" meant they already held perfected interest in future-acquired net revenues, under modified "stream" theory whereby bondholders' lien would attach to future net revenues when PREPA acquired them, or under no "stream" theory at all, whereby perfection would occur as soon as PREPA acquired any future net revenues.

Upon determining, on appeal from Title III court's decision in adversary proceeding in which Financial Oversight and Management Board for Puerto Rico sought disallowance of proof of claim filed by parties holding revenue bonds issued by Puerto Rico Electric Power Authority (PREPA) before it entered reorganization proceedings under Title III of the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), that bondholders' lien covered PREPA's present and future net revenues, and that lien was not avoidable with respect to net revenues already acquired, the Court of Appeals would decline to address how Title III court should account for bondholders' lien in PREPA's restructuring; there was no insight from Title III court, which, having held that no net revenue lien existed, had no occasion to discuss how to account for such lien during PREPA's restructuring, and there was no focused appellate briefing on issue from the parties.

Proper amount of allowed claim held by parties holding revenue bonds issued by Puerto Rico Electric Power Authority (PREPA) before it entered reorganization proceedings under Title III of the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA) was face value of bonds, that is, principal plus matured interest, or roughly $8.5 billion; bondholders had legal "right to payment" rooted in covenants outlined in governing trust agreement, to which Commonwealth's Authority Act applied, trust agreement clearly required PREPA to pay bonds in full and expressly permitted bondholders to proceed at law to challenge any breach of agreement's covenants, there

was thus no need to estimate their "right to payment" under section of Bankruptcy Code governing allowance of claims or interests, and because bondholders' legal right to payment arose from debt instrument, proper amount of claim was full face amount of instrument.

Parties holding revenue bonds issued by Puerto Rico Electric Power Authority (PREPA) before it entered reorganization proceedings under Title III of the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA) were nonrecourse creditors and, thus, if their collateral only satisfied part of their claim, they could not file deficiency claim for the remainder; governing trust agreement expressly stated that revenue bonds were not general obligations of the Commonwealth of Puerto Rico, bondholders' secured claim was thus payable "solely" from special revenues, such that section of the Bankruptcy Code governing limitation on recourse against Chapter 9 debtors applied and bondholders' recourse was limited to their collateral, and nothing in the trust agreement said otherwise.

Under Puerto Rico law, Puerto Rico Electric Power Authority (PREPA) was not a trustee with respect to revenues and other moneys received, for purposes of breach-of-trust claim asserted by parties holding revenue bonds issued by PREPA before it entered reorganization proceedings under Title III of the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA); governing trust agreement clearly identified a third-party financial institution and its successors, not PREPA, as trustee, particular section of agreement was properly read as requiring PREPA to deposit moneys with "depositories," which then held the moneys in trust and applied them in accordance with agreement, and did not make PREPA itself a trustee, and Commonwealth's Authority Act required PREPA to account "as if" it were the trustee of an express trust, which language would have been unnecessary if PREPA were already a trustee with respect to all moneys received.

Parties holding revenue bonds issued by Puerto Rico Electric Power Authority (PREPA) before it entered reorganization proceedings under Title III of the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA) properly pled claim for equitable "accounting" against PREPA under Puerto Rico law; bondholders alleged that PREPA wrongfully diverted net revenues from debt service by spending them on unreasonable current expenses, thereby starving certain funds created by governing trust agreement of cash and slowing debt payments to bondholders, Commonwealth's Authority Act required PREPA to "account as if [it] were the trustee of an express trust," and parties' agreement did not limit that authority.

MUNICIPAL CORPORATIONS - VIRGINIA

City of Emporia v. County of Greensville

Court of Appeals of Virginia, Richmond - June 11, 2024 - S.E.2d - 2024 WL 2925292

County brought action against city, seeking a declaratory judgment that the city was required to pay its share of the county sheriff's entire budget.

The Greensville Circuit Court denied city's motion craving oyer, granted the county's motion for partial summary judgment, and ordered city to pay $676,924.94 to the county. City appealed.

The Court of Appeals held that:

- City was statutorily required to pay its proportional share of the salary of the county sheriff but was not required to pay a proportionate share of the county sheriff's entire budget, and

- City’s motion craving oyer was properly denied as seeking attachment of documents not essential to the county’s claim.

Following its transition from a town to a city, city was statutorily required to pay its proportional share of the salary of the county sheriff, as well as its share of jointly used county buildings, but was not required to pay a proportionate share of the county sheriff’s entire budget; statute providing for apportioning county costs and expenses required the costs and expenses of the circuit court to be apportioned, but only required apportionment of the salaries of county constitutional officers such as the sheriff, and statute itemized circuit court costs and expenses to be apportioned but did not mention costs or expenses of sheriff’s office.

City’s motion craving oyer, seeking to attach mutual aid document and other agreements between city and county in action by county for payment of city’s proportional share of sheriff’s expenses, was properly denied; the documents were not essential to county’s claim which was based solely on statutory interpretation and not for breach or enforcement of the parties’ agreements, and the court was not asked to interpret or rule on any of the documents at issue in the motion craving oyer.

INVERSE CONDEMNATION - CALIFORNIA

Simple Avo Paradise Ranch, LLC v. Southern California Edison Company

Court of Appeal, Second District, Division 7, California - May 23, 2024 - Cal.Rptr.3d - 2024 WL 2347470

Avocado farm brought action, by filing a short-form complaint that adopted and incorporated a master complaint that other plaintiffs had previously filed in related, consolidated proceedings, against privately owned public utility and its parent company, alleging claim for inverse condemnation and seeking damages arising from a major fire allegedly caused by utility’s unsafe electrical infrastructure.

Avocado farm and defendants settled, and a stipulated final judgment was entered by the Superior Court, under which farm was awarded $1.75 million in damages on its inverse-condemnation claim, but which stated that the judgment was without prejudice to utility’s right to appeal both the judgment and a prior order, entered before farm filed its complaint, of the Superior Court denying utility’s demurrer to the master complaint. Utility appealed.

The Court of Appeal held that:

- Appeal was not rendered moot by fact that judgment’s award of $1.75 million was contingent on appeal’s outcome;
- Stipulated judgment was appealable, despite appellate court’s serious reservations about whether it should be;
- Farm’s complaint sufficiently alleged that utility was a public entity, as required to state an inverse-condemnation claim;
- Farm’s complaint sufficiently alleged that its damages were substantially caused by utility, as required to state an inverse-condemnation claim;
- Farm’s complaint sufficiently alleged that its damages resulted from an inherent risk associated with utility’s infrastructure, as required to state an inverse-condemnation claim; and
- Farm’s complaint sufficiently alleged that utility’s infrastructure was for the public use, as required to state an inverse-condemnation claim.

Appeal by privately owned public utility of stipulated judgment against it awarding, contingent on appeal's outcome, $1.75 million in damages to avocado farm on farm's inverse-condemnation claim against utility for damages from fire allegedly caused by utility's unsafe electrical infrastructure was not rendered moot by the potential that, if utility did not prevail on appeal, utility would have to pay the stipulated damages to farm, but appellate court discouraged what amounted to a side bet on the outcome of an appeal.

Stipulated judgment against privately owned public utility awarding, contingent on appeal's outcome, $1.75 million in damages to avocado farm on farm's inverse-condemnation claim against utility for damages from fire allegedly caused by utility's unsafe electrical infrastructure was appealable, despite general rule that a stipulated judgment is not appealable and despite appellate court's serious reservations about applying the exception to that rule for a stipulated judgment agreed on merely to facilitate an appeal following an adverse determination of a critical issue, where the trial court had previously denied public utility's demurrer to similar claims in related consolidated cases, and the parties clearly intended to seek appellate review.

Allegations in avocado farm's complaint against privately owned public utility for inverse condemnation arising from damages to farm from fire allegedly caused by utility's unsafe electrical infrastructure were sufficient to allege that utility was a public entity, as required for farm to state an inverse-condemnation claim against it, where farm alleged that the utility enjoyed a state-protected monopoly or quasi-monopoly derived from its exclusive franchise provided by California, that its monopoly was guaranteed by the California Public Utilities Commission (CPUC), and that amounts the utility might have to pay in inverse condemnation could, under CPUC regulations, be included in rates and spread among ratepayers.

Allegations in avocado farm's complaint against privately owned public utility for inverse condemnation arising from damages to farm from fire allegedly caused by utility's unsafe electrical infrastructure were sufficient to allege that farm's damages were substantially caused by utility, as required for farm to state an inverse-condemnation claim against utility, where farm alleged that utility knew that its infrastructure was old and was improperly maintained for safety, but it failed to properly assess and remediate known risks of fire, including by failing to power down its infrastructure, despite warnings of high winds and hazardous conditions, before a major fire allegedly caused by electrical arcs in utility's distribution system.

Allegations in avocado farm's complaint against privately owned public utility for inverse condemnation arising from damages to farm from fire allegedly caused by utility's unsafe electrical infrastructure were sufficient to allege that farm's damages resulted from an inherent risk associated with the infrastructure, as required for farm to state an inverse-condemnation claim against utility, where farm alleged that utility deliberately chose to forgo regular monitoring and repair of its aging infrastructure, it did not meet its own target metrics for inspecting, assessing, and remediating electrical poles that did not meet modern safety standards, and it instead modified its monitoring software to recalculate safety factors and reduce the number of poles requiring remediation.

Allegations in avocado farm's complaint against privately owned public utility for inverse condemnation arising from damages to farm from fire allegedly caused by utility's unsafe electrical infrastructure were sufficient to allege that utility's infrastructure was for the public use, as required for farm to state an inverse-condemnation claim against utility, where farm alleged that the power lines that ignited the fire were part of an electrical distribution system that served thousands of acres in Central, Coastal, and Southern California.

JURISDICTION - CALIFORNIA

Eagle Fire and Water Restoration, Inc. v. City of Dinuba

Court of Appeal, Fifth District, California - May 30, 2024 - Cal.Rptr.3d - 2024 WL 2762495

Construction company brought action against city and city engineer, alleging breach of construction contract, negligence, and negligent misrepresentation in connection with construction project to reroof city's police station and courthouse building.

City filed cross-complaint alleging company did not perform the job in a workmanlike manner, failed to adequately cover roof with protective sheeting, failed to ensure roof drains were not clogged, and failed to procure proper insurance coverage.

Engineer also filed a cross-complaint against company, alleging breach of contract and indemnity.

The Superior Court granted engineer's motion for summary judgment on claims against engineer, granted city's motion to enforce parties' oral settlement agreement, and filed a judgment dismissing complaint and cross-complaint with prejudice. Company appealed, engineer voluntarily dismissed his cross-complaint against company without prejudice, and city moved to dismiss appeal as frivolous.

The Court of Appeal held that:

- Trial court had authority to enter judgment, and was therefore not required to expressly retain jurisdiction to enforce agreement;
- Company's appearance as a cross-defendant gave the court personal jurisdiction over company to enforce settlement agreement which was made while court maintained jurisdiction over the matter and the parties;
- Trial court had subject matter jurisdiction to enter judgment enforcing terms of settlement agreement;
- Personal jurisdiction over city engineer was not necessary for trial court to have authority to enforce company's covenant in settlement agreement with city to dismiss its appeal against engineer;
- Company was estopped from arguing that reporter's transcript of settlement proceedings omitted things said at pre-trial hearing;
- Statements made by city's lawyer on the record constituted substantial evidence supporting trial court's implied finding of materiality with respect to broad settlement term that agreement barred all claims that arose out of incident that formed the basis of complaint and cross-complaint; and
- Substantial evidence supported reasonable inference that trial judge resolved ambiguity, if any, in reporter's transcript of cross-talk.

EMINENT DOMAIN - FEDERAL

Collective Edge, LLC Ferg's Sports Bar & Grill, Inc.

United States Court of Federal Claims - May 16, 2024 - Fed.Cl. - 2024 WL 2227724

Landowners adjacent to and underlying railroad easement brought separate inverse condemnation

actions against the United States after Surface Transportation Board (STB) issued notice of interim trail use or abandonment (NITU) that resulted in railbanking and an easement for interim trail use, and the cases were consolidated.

After the government conceded liability, landowners sought damages for the diminished value of their land attributable to the new recreational trail use easement which trumped their prospective fee simple ownership upon the extinguishment of the historical railway easement. The United States thereafter filed a motion for reconsideration with respect to the nature and extent of the alleged Fifth Amendment taking, the parties filed cross-motions for partial summary judgment related to the size of one parcel of land vis-à-vis the railway easement, and a trial was held on damages.

The Court of Federal Claims held that:

- Execution of trail use agreement and transfer of ownership of railway easement through a duly-recorded quitclaim deed during the pendency of NITU constituted a taking, even if STB years later decided to reopen the matter years afterward and rescind its authorization post hoc;
- Court would discount first property owner's appraisal of parcel in the "before" condition by 15%, while accepting proffered property valuation in the "after" condition;
- Court would discount second property owner's appraisal of restaurant parcel in the "before" condition by 10%, while accepting proffered property valuation in the "after" condition;
- Court would adopt second landowner's appraiser's opinion as to parking lot property's "before" and "after" value and award $1.361 million;
- Third landowners failed to establish ownership of easement area;
- Highest and best use of third landowners' property was consistent with permissible "grandfathered" uses at sites zoned industrial traditional; and
- Court would value third landowners' property by taking the Government's appraisal, multiplying it by 300% to arrive at the "before" figure, and then using the Government's concession as to the value of the remainder property.

PUBLIC UTILITIES - INDIANA

Duke Energy Indiana, LLC v. City of Noblesville

Supreme Court of Indiana - May 30, 2024 - N.E.3d - 2024 WL 2761911

City brought action against electric utility, seeking declaratory and injunctive relief to enforce its ordinance requiring a demolition permit and either an improvement-location or building permit associated with utility's plan to build facility in city.

The Superior Court found for city, ordered utility to comply with ordinances and obtain permits, fined utility $150,000 for starting demolition without permits, and awarded city $115.679.10 in attorney fees, expert fees, and costs.

Utility appealed. The Court of Appeals affirmed and remanded for determination of whether to award appellate attorney fees. Transfer was granted.

The Supreme Court held that:

- Trial court had discretion to give Utility Regulatory Commission primary jurisdiction over city's claim against electric utility;
- Commission had primary jurisdiction to decide utility's counterclaim; and
- Trial court could not rule on city's claim on remand.

Trial court had discretion to give Utility Regulatory Commission primary jurisdiction over city's claim against electric utility, which sought declaratory and injunctive relief to enforce its ordinance requiring demolition and building permits for utility to build facility in city, or to retain jurisdiction over city's action, as either the trial court or the Commission could decide a claim seeking to enforce an ordinance against a public utility.

Resolution of electric utility's counterclaim against city, challenging city's authority to enforce ordinance requiring demolition and building permits before utility could build facility in city, required a determination that was placed within the special competence of the Utility Regulatory Commission by the utility code, which gave Commission expansive authority to decide whether a local ordinance improperly impeded a public utility's service, and thus Commission had primary jurisdiction to decide counterclaim; utility's garage and office projects were necessary to maintaining its transmission lines, which in turn were critical to providing reliable utility service to customers, and demolition of existing structure was an essential precursor to construction of new substation.

Trial court could not rule on city's request to enforce its ordinance requiring demolition and building permits before electric utility could proceed with building facility in city, on remand of city's action against utility seeking declaratory and injunctive relief to enforce its ordinance, as Utility Regulatory Commission had primary jurisdiction over utility's counterclaim challenging city's authority to enforce its ordinance against utility, which would dictate whether to grant city's request to enforce its ordinance.

IMMUNITY - MISSISSIPPI

Yazoo City v. Hampton

Supreme Court of Mississippi - May 30, 2024 - So.3d - 2024 WL 2760711

Following destruction of two properties by fire, the properties' respective owners brought action against city, alleging that fire department negligently failed to provide the knowledge and equipment to fight fires, to properly train and supervise firefighters, and to adequately maintain its fire hydrant system, and asserting claims for property damage, with one owner also asserting a personal injury claim seeking to recover for cardiac event and stroke allegedly caused by stress from the property damage.

Raising the Mississippi Tort Claims Act (MTCA) as a defense, city filed motion for summary judgment. The Circuit Court denied city's motion. City appealed.

The Supreme Court held that:

- City was immune under the MTCA from liability for property damage, and
- City was immune under the MTCA from liability on personal injury claim.

Absent any allegation that city fire department's actions were in reckless disregard of the safety and wellbeing of any person, city was immune under the Mississippi Tort Claims Act (MTCA) from liability for property damage allegedly caused by fire department's failure to effectively fight fire, in negligence action brought by property owners, based on lack of tank water in firetruck and delay in connecting to a fire hydrant; although property owners alleged that city showed reckless disregard by failing to provide the requisite knowledge and equipment to fight fires, property damage claims focused solely on criticizing how fire was fought, and thus claims arose directly from acts or

omissions of municipal employees engaged in the performance of their duties relating to fire protection.

City fire department's ineffective fighting of fire, resulting in destruction of property, did not come within the exception to immunity under the Mississippi Tort Claims Act (MTCA) for actions in disregard of the safety and wellbeing of a person, and thus city was immune under the MTCA from liability on property owner's personal injury claim, seeking to recover for cardiac event and stroke allegedly resulting from the stress caused by destruction of his property in fire, notwithstanding that property owner argued that the fire department acted in reckless disregard of his property, and linked such disregard to his injury.

POLITICAL SUBDIVISIONS - NEW JERSEY

In re Protest of Contract for Retail Pharmacy Design

Supreme Court of New Jersey - May 23, 2024 - A.3d - 2024 WL 2335151

Disappointed bidder on University Hospital's request for proposals (RFP) regarding contract to design, construct, and operate pharmacy filed notices of appeal with the Superior Court, Appellate Division, after Hospital's hearing officer denied disappointed bidder's post-award bid protest and its protest of Hospital's post-award change in location of proposed pharmacy.

Successful bidder's motion to intervene was granted.

The Superior Court, Appellate Division, dismissed appeals, holding that University Hospital was not "state administrative agency" within meaning of court rule allowing appeals to be taken as of right to Appellate Division to review decisions or actions of such agencies. Disappointed bidder's petitions for certification and motion to consolidate appeals were granted.

The Supreme Court held that University Hospital was not "state administrative agency."

University Hospital was not "state administrative agency" within meaning of court rule governing appeals from final decisions of such agencies, and thus, disappointed bidder was not entitled to file appeals from University Hospital's denial of post-award bid protests in Appellate Division, even though legislature designated Hospital "body corporate and politic" and "instrumentality of the State"; legislature did not place Hospital in an executive department or declare it to be "in but not of" such a department, as constitutionally necessary for Hospital to constitute "state administrative agency," legislature gave Hospital operational independence and unique power to offer itself for sale, and legislature did not charge Hospital with implementing or administrating healthcare policies.

BALLOT INITIATIVES - TEXAS

In re Rogers

Supreme Court of Texas - May 24, 2024 - S.W.3d - 2024 WL 2490520

Relators, who were signatories of petition to have local board of an emergency services district place on the ballot a proposition to alter sales tax rates within the district, sought in district court a writ of mandamus compelling the board to determine whether the petition contained the statutorily required number of signatures or, alternatively, ordering the board to call an election on the

petition.

During discovery, relators filed a petition for writ of mandamus in the Austin Court of Appeals, which denied relief without substantive opinion. Thereafter, relators filed their mandamus petition in the Supreme Court and then nonsuited their claims in the district court.

The Supreme Court held that:

- The Court had jurisdiction to grant mandamus relief against board;
- As long as the petition had the statutorily required number of signatures, the board had a ministerial, nondiscretionary duty to call an election; and
- Mandamus relief was an appropriate remedy.

The Supreme Court had jurisdiction to grant mandamus relief against the local board of an emergency services district in dispute in which relators, who were signatories of petition to have the board place on the ballot a proposition to alter sales tax rates within the district, were seeking a writ of mandamus compelling the board to determine whether the petition contained the statutorily required number of signatures or, alternatively, ordering the board to call an election on the petition; the Election Code waived any claim to immunity from mandamus relief by authorizing the Supreme Court, or a court of appeals, to compel the performance of a duty in connection with an election, and relators sought to compel performance of such a duty that the Health and Safety Code expressly assigned to the board of an emergency services district.

As a political subdivision of the State, an emergency services district is entitled to governmental immunity, which operates like sovereign immunity, and the district's board, as the governing entity, also retains immunity.

As long as petition had the statutorily required number of signatures, local board of an emergency services district had a ministerial, nondiscretionary duty to call an election on petition's proposition to alter sales tax rates within the district, despite argument that petition was legally defective as to the amount of the proposed change in the tax rate and as to the petition's alleged failure to match the mandatory ballot language to be used in an election to abolish the tax, which the proposition would arguably do in part; there was a strong preference in favor of holding elections on qualified ballot measures even where there was some question about whether the measure, if passed, would be subject to valid legal challenge, and board lacked discretion to conduct its own unauthorized legal analysis to keep an otherwise qualified petition off the ballot entirely.

Mandamus relief was an appropriate remedy for refusal of local board of an emergency services district to perform its ministerial, nondiscretionary duty to call an election on petition's proposition to alter sales tax rates within the district; the only factual question that could possibly be in dispute was the validity of the signatures, but the board had never challenged the qualifications or validity of any of the signatures, and the Election Code authorized appellate courts to grant mandamus relief to compel the performance of an election-related duty.

MUNICIPAL ORDINANCE - ALASKA

Alaska Trappers Association, Inc. v. City of Valdez

Supreme Court of Alaska - May 10, 2024 - P.3d - 2024 WL 2098108

State and national fur trappers associations brought action challenging city ordinance that limited trapping in certain areas, alleging that ordinance was invalid and unconstitutional, and preempted

by state law.

The District Court granted summary judgment to city and denied associations' motion for summary judgment. Associations appealed.

The Supreme Court held that:

- Ordinance did not implicate area of pervasive state authority, and
- Ordinance was not impliedly prohibited by state law.

Municipal ordinance limiting trapping within certain areas in city limits did not implicate area of pervasive state authority so as to be impliedly prohibited by state law; while state's Constitution, statutes and regulations provided state with authority to regulate natural resources, ordinance was explicitly enacted pursuant to two powers granted to home rule municipalities, public safety and land use, not to exercise control over natural resource management.

Municipal ordinance of home rule city limiting trapping in certain city areas for public safety purposes was not substantially irreconcilable with state's authority to adopt hunting and trapping regulations for purposes of conservation and development and was thus not impliedly prohibited by state law; ordinance did not directly manage taking of furbearers, create open and closed seasons, limit number, size, or sex of animals taken, and though it may have had incidental effect on number of furbearers taken, it did not have substantial effect on either the wildlife resource itself or Alaskans' use of that resource that was tantamount to wildlife resource regulation.

EMINENT DOMAIN - ARKANSAS

Watkins v. Lawrence County, Arkansas

United States Court of Appeals, Eighth Circuit - May 28, 2024 - F.4th - 2024 WL 2716422

Landowners brought action for damages and injunctive relief against county and county officials, alleging that the culvert bridge the county built over a slough to replace a wooden bridge acted as a dam and caused their farms to flood, resulting in an unlawful taking of their properties without providing just compensation, in violation of the United States Constitution and the Arkansas Constitution.

After the jury returned verdict for landowners, which awarded them less than they had requested, the United States District Court for the Eastern District of Arkansas denied the defendants' renewed motion for judgment as a matter of law and denied landowners' request for permanent injunctive relief ordering the county to remove the culvert bridge. The parties appealed.

The Court of Appeals held that:

- Whether fair and reasonable approximation of damages could be made, based on evidence of average daily rental value of landowners' farms and number of days they were flooded, was issue for jury;
- Issue of whether flooding that occurred on landowners' farms after a crop was gathered and sold could play into amount of damages was for the jury;
- Issue of whether $20,000 in repairs landowner made to his property were caused by additional flooding caused by the culvert bridge was for the jury;
- Evidence was sufficient for jury to conclude that the culvert bridge caused six tracts to flood even though they were outside reach of landowners' expert's model; and

- Trial court's heavy reliance on law of standing in denying permanent injunction made it unclear whether irrelevant considerations materially affected court's equitable discretion.

SCHOOLS - CALIFORNIA

Cajon Valley Union School District v. Drager

Court of Appeal, Third District, California - April 24, 2024 - Cal.Rptr.3d - 2024 WL 2207068

Public school districts brought action seeking a writ of mandate to compel county auditor-controller to make statutorily defined pass-through payments to them after the caps in their respective pass-through agreements with former redevelopment agency were reached.

The Superior Court denied the requested relief, and districts appealed.

The Court of Appeal held that statute did not require statutory payments in light of agreements between agency and districts.

Redevelopment agency statute, which provided that an agency shall pay "either" the amount required to be paid by a pass-through agreement if an agreement exists, or statutory pass-through amounts if an agreement does not exist, did not obligate county auditor-controller to make statutorily defined pass-through payments to school district after the caps in their respective pass-through agreements with former redevelopment agency were reached, as districts had agreements with the agency.

SCHOOLS - COLORADO

Education reEnvisioned BOCES v. Colorado Springs School District 11

Supreme Court of Colorado - May 20, 2024 - P.3d - 2024 WL 2264341 - 2024 CO 29

School district cooperative brought declaratory judgment action against nonmember school district, seeking to continue to operate a contract school within school district's boundaries without school district's consent, and school district filed counterclaim and third-party claim against school's operator also seeking a declaratory judgment.

The District Court denied school district's motion for partial summary judgment and granted cooperative and operator's motion for summary judgment. School district appealed. The Court of Appeals reversed and remanded. Cooperative and operator petitioned for certiorari review, which was granted.

The Supreme Court held that:

- School district's approval of charter school application for school did not moot the appeal;
- Case involved issue of great public importance as an exception to any mootness; and
- Cooperative lacked statutory authority to locate a contract school within a nonmember school district without that district's consent.

School district's approval, during pendency of proceedings, of charter school application for school district cooperative's contract school that served students with reading challenges did not moot appeal of grant of summary judgment for cooperative and school operator on claim seeking declaratory judgment that cooperative had statutory authority to locate a contract school within a

nonmember school district's boundaries without that district's permission, where a charter contract had not yet been executed, and school continued to operate as a contract school within school district's boundaries and without school district's consent.

Whether school district cooperative had statutory authority to locate a contract school like its academy for students with reading challenges within a nonmember school district's boundaries without that district's consent was a matter of great public importance, as exception to mootness doctrine, on appeal of grant of summary judgment for cooperative and academy operator on claim seeking declaratory judgment on the issue, especially since cooperative planned to continue opening more schools like academy in the future.

Statute allowing a school district cooperative to construct, purchase, or lease sites, buildings, and equipment to provide facilities necessary for operation of cooperative service program at "any appropriate location" does not give a cooperative authority to locate a contract school within a nonmember school district's boundaries without that district's consent.

SCHOOLS - MISSISSIPPI

Midsouth Association of Independent Schools v. Parents for Public Schools

Supreme Court of Mississippi - May 2, 2024 - So.3d - 2024 WL 1923257

Nonprofit organization, whose members included parents of public school children along with teachers and other public school officials, brought action against Department of Finance challenging constitutionality of laws allowing private schools to apply for reimbursable grants for investments in water, sewer, or broadband infrastructure projects.

The Chancery Court entered judgment for organization. Department appealed.

The Supreme Court held that:

- Organization lacked associational standing, and
- Organization lacked taxpayer standing.

Nonprofit organization, whose members included parents of public school children along with teachers and other public school officials, did not face adverse impact sufficient to confer associational standing for organization to challenge constitutionality of laws allowing private schools to apply for reimbursable grants for investments in water, sewer, or broadband infrastructure projects; funding for grants came from funds given to state by federal government and thus did not take finite government educational funding away from public schools.

Nonprofit organization, whose members included parents of public school children along with teachers and other public school officials, did not have taxpayer standing to challenge constitutionality of laws allowing private schools to apply for reimbursable grants for investments in water, sewer, or broadband infrastructure projects; members of organization were simply general taxpayers challenging general government spending, and funds at issue were federal funds earmarked for specific infrastructure needs.

FINES - NORTH CAROLINA

Fearrington v. City of Greenville

Supreme Court of North Carolina - May 23, 2024 - S.E.2d - 2024 WL 2338356

Motorists who received citations through city's red light camera enforcement program (RLCEP) brought action against city and county board of education, seeking declaratory judgments that the RLCEP violated the Fines and Forfeitures Clause (FFC) of the North Carolina Constitution governing county school fund, statutes governing the lawful practice of engineering, and due process.

The Superior Court granted defendants' motions to dismiss, denied motorists' motion for summary judgment, and granted summary judgment for city on remaining claims. Motorists appealed. The Court of Appeals affirmed in part, reversed in part, and remanded with instructions. Board and city petitioned for discretionary review, which was granted.

The Supreme Court held that:

- Plaintiffs effectively sued on behalf of county board of education by disclosing their status as taxpayers;
- Plaintiffs asserted a direct injury linked to allegedly unlawful government expenditure;
- Plaintiffs effectively demanded, and board effectively declined, to vindicate any claim to a larger share of red light penalties;
- Plaintiffs exceeded compass of taxpayer standing in seeking damages;
- Act allowing city to enter into a contract with a contractor for the lease, lease-purchase, or purchase of a red light camera system did not violate statute that promised county schools at least 90% of collected funds;
- Board retained clear proceeds of fines collected through RLCEP; and
- Act aligned with core purposes of FFC.

PUBLIC UTILITIES - OHIO

State ex rel. East Ohio Gas Company v. Corrigan

Supreme Court of Ohio - May 24, 2024 - N.E.3d - 2024 WL 2457106 - 2024-Ohio-1960

Gas company brought action against judge of Court of Common Pleas seeking writ of prohibition preventing judge from exercising jurisdiction over and to vacate orders issued in underlying case, in which executor of property owner's estate sued company on claims relating to shutoff of natural-gas service to property owner's residence.

The executor intervened as respondent.

The Supreme Court held that:

- Complaint against gas company alleged claims arising from termination of service, and, thus, claims required Public Utilities Commission's expertise to resolve, for purposes of determining whether Commission or Court of Common Pleas had jurisdiction over complaint, and
- Gas company's termination of natural-gas service was practice normally authorized by a public utility, for purposes of whether Public Utilities Commission or Court of Common Pleas had jurisdiction over claims against gas company.

Complaint against gas company alleged claims arising from termination of service, and, thus, claims required Public Utilities Commission's expertise to resolve, for purposes of determining whether Commission or Court of Common Pleas had jurisdiction over complaint; complaint repeatedly

pointed to shutoff of gas service to residence as basis for claims asserted against gas company, including statutory limits on when during year gas service could be shut off, counts for negligence and wrongful death faulted gas company for shutting off gas and causing property owner's death, and count for destruction of property alleged that shutoff of gas caused property damage.

Gas company's termination of natural-gas service to property owner's residence was practice normally authorized by a public utility, for purposes of whether Public Utilities Commission or Court of Common Pleas had jurisdiction over claims against gas company related to shutoff of gas service to residence; caselaw, statutory law, and regulatory law recognized gas company's authority to terminate service, and gas company's tariff permitted it to disconnect service if customer refused access to company's equipment for testing and repairs.

EMINENT DOMAIN - OREGON

Walton v. Neskowin Regional Sanitary Authority

Supreme Court of Oregon - May 23, 2024 - P.3d - 372 Or. 331 - 2024 WL 2348864

Landowners brought inverse-condemnation action against regional sanitary authority for the physical occupation of a main sewer line installed on their property.

The Circuit Court granted sanitary authority's motion for summary judgment. Landowners appealed. The Court of Appeals affirmed. Landowners petitioned for review, which was allowed.

The Supreme Court held that:

- Even if discovery rule applied, landowners' inverse condemnation claim accrued, and six-year limitations period began to run, no later than when previous landowner allegedly entered into agreement with sanitary authority, and
- Landowners' inverse condemnation claim accrued, and six-year limitations period began to run, when sewer line was installed.

Even if discovery rule applied, landowners' inverse condemnation claim under state constitutional takings clause based on regional sanitary authority's installation of a main sewer line on their property accrued, and six-year limitations period began to run, no later than when previous landowner allegedly entered into agreement with sanitary authority for free hook-up to sewer system when needed in exchange for easement.

A property owner's inverse condemnation claim under the state constitutional takings clause based on a physical occupation of the property accrues, thereby triggering the six-year statute of limitations for an action for interference with or injury to any interest of another in real property, as soon as the state or other governmental entity physically occupies the owner's property, not when the owner requests and is denied compensation.

A property owner's inverse condemnation claim under the federal constitutional takings clause based on a physical occupation of the property accrues, thereby triggering Oregon's six-year statute of limitations for an action for interference with or injury to any interest of another in real property, as soon as the government takes the owner's property without paying for it, not when the owner requests and is denied compensation.

Landowners' inverse condemnation claim under state and federal constitutions alleging main sewer line on their property constituted a taking accrued, and six-year limitations period began to run,

when regional sanitary authority installed sewer line, not when sanitary authority refused to honor alleged agreement with prior landowner for free hook-up to sewer system when needed in exchange for easement.

EMINENT DOMAIN - TEXAS

Texas Department of Transportation v. Self

Supreme Court of Texas - May 17, 2024 - S.W.3d - 2024 WL 2226295

Landowners brought action against Texas Department of Transportation (TxDOT) and its contractor, alleging inverse condemnation and negligence arising from contractor's alleged removal of trees from portion of landowners' property that was outside TxDOT right-of-way across property while contractor was in the process of removing trees from the right-of-way.

The 97th District Court denied TxDOT's plea to the jurisdiction. TxDOT appealed, and the Fort Worth Court of Appeals affirmed in part and reversed in part.

The Supreme Court held that:

- Subcontractor's workers were not in the paid service of TxDOT and therefore were not TxDOT employees;
- TxDOT employees did not operate or use motor-driven equipment that cut down trees on landowners' property; and
- Allegations and evidence established claim for inverse condemnation, even if TxDOT did not intend to cut down any trees outside of easement.

BONDS - ALABAMA

Water Works and Sewer Board of City of Prichard v. Synovus Bank

Supreme Court of Alabama - May 17, 2024 - So.3d - 2024 WL 2229194

Trustee under bond indenture of city water works and sewer board brought breach-of-contract action against board, alleging that board defaulted in several respects under the indenture and requesting, among other things, the appointment of a receiver pursuant to the indenture.

The Circuit Court entered order appointing a receiver to administer the water works and sewer system. Board appealed.

The Supreme Court held that:

- Trial court properly considered not only the provision of the indenture allowing for the appointment of a receiver, but also the factors set forth in Carter v. State ex rel. Bullock Cnty., 393 So.2d 1368, for appointing a receiver pursuant to statute;
- Board had the power under state statute to agree contractually to the appointment of a receiver under an indenture;
- Sufficient evidence supported finding that irreparable harm would have occurred to the system had a receiver not been appointed; and
- Trial court properly exercised its discretion in vesting the receiver with all powers necessary to administer and operate the system.

When deciding motion by trustee under bond indenture of city water works and sewer board to have a receiver appointed, the trial court properly considered not only the provision of the indenture allowing for the appointment of a receiver, but also the factors set forth in *Carter v. State ex rel. Bullock Cnty.*, 393 So.2d 1368, for appointing a receiver pursuant to statute; the appointment of a receiver was an extraordinary remedy, and trustee sought the appointment of a receiver under the indenture and pursuant to Alabama law.

Water works and sewer board had the power under state statute to agree contractually to the appointment of a receiver under an indenture; although board could not contractually agree to the foreclosure of a mortgage or deed of trust encumbering the system, legislature did not prohibit a public-utility corporation, such as the board, from contractually agreeing to a receivership over its system.

Sufficient evidence supported finding that irreparable harm would occur to city water works and sewer system if a receiver were not appointed, as would support trial court's granting of motion by trustee under bond indenture of city water works and sewer board to have a receiver appointed pursuant to the indenture and Alabama law due to events of default; condition of the system had developed into a crisis because of years of mismanagement and fiscal irresponsibility.

When granting motion by trustee under bond indenture of city water works and sewer board to have a receiver appointed pursuant to the indenture and Alabama law due to events of default, trial court properly exercised its discretion in vesting the receiver with all powers necessary to administer and operate the system, despite argument that receiver's powers should have been limited to the enforcement of ministerial duties of the board and trustee's should not have had control of the receiver's decisions; trial court balanced the competing interests of the parties by considering their respective equities and obligations, all for the benefit of creating a viable system to provide water and sewer services that would enable the bondholders to not lose their investments.

ZONING & PLANNING - GEORGIA

Clay v. State

Court of Appeals of Georgia - February 2, 2024 - 370 Ga.App. 482 - 897 S.E.2d 886

Residents who owned, leased, and lived on property zoned for agricultural use filed action against state, seeking declaratory judgment that development and construction of electric vehicle manufacturing facilities on state-owned property violated local and state law, and seeking injunction to halt project.

State filed counterclaim seeking declaratory relief that zoning ordinances did not apply and moved for surety bond.

Following hearing, the Superior Court granted motion for bond and ordered residents to post surety bond in amount of $364,619.55. Residents appealed.

The Court of Appeals held that:

- Trial court did not improperly shift burden of proof to residents to show why surety bond should not be granted, but
- Imposition of bond was improper where trial court failed to address whether all claims asserted by residents were meritorious.

Trial court did not improperly shift burden of proof to residents who owned, leased, and lived on property zoned for agricultural use to show why surety bond should not be granted in action filed by residents against state, seeking declaratory judgment that project to develop and construct electric vehicle manufacturing facilities on state-owned property violated local and state law and seeking injunction to halt project; court placed burden on residents to show why bond should not be granted after first determining whether state had met its burden to show it was a political subdivision, that the lawsuit qualified as a public lawsuit to justify imposition of bond, that the claims lacked merit, and that the bond was in the public interest, which was consistent with statutory requirements.

Imposition of surety bond against residents who owned, leased, and lived on property zoned for agricultural use was improper in action against state seeking declaratory judgment that project to develop and construct electric vehicle manufacturing facilities on state-owned property violated local and state law and seeking injunction to halt project, where trial court determined that state was likely to prevail by focusing only on claims regarding zoning issues without considering merits of other arguments asserted by residents, and it appeared from the record that at least one claim had merit.

ROADS - MISSISSIPPI

Newton County v. Deerfield Estates Subdivision Property Owners Association, LLC

Supreme Court of Mississippi - May 9, 2024 - So.3d - 2024 WL 2075094

Subdivision property owners association brought action seeking a declaratory judgment that subdivision roads were county roads and injunctive relief requiring county to add roads to official maps and mandating county to allocate funds for repair of roads.

County filed motion for summary judgment, alleging that claims were barred by the doctrine of laches or by the general statute of limitations and, in the alternative, arguing substantively that the roads were private roads.

The Chancery Court granted summary judgment in part, and, following bench trial, entered judgment declaring that roads were public roads by reason of express dedication and acceptance and requiring their inclusion on county maps. County appealed.

The Supreme Court held that:

- County had accepted common law dedication of subdivision roads at public meeting, and
- As a matter of first impression, county could not invoke the doctrine of laches or the general three-year statute of limitations to bar request for a declaratory judgment that roads were public.

County had accepted common law dedication of subdivision roads at public meeting, even though the minutes did not include a statement that the public interest or convenience required acceptance of the dedication and roads only served subdivision and county failed to add the roads to the registry and the county map in a timely manner; subdivision developer had sought to dedicate the roads to the county, minutes reflected that county had unanimously voted to accept the two roads into the county road system, and entry of acceptance of the dedication was a formal act of the proper authority competent to speak and act for the public.

County could not invoke the doctrine of laches or the general three-year statute of limitations to bar

subdivision property owners association's request for a declaratory judgment that subdivision roads were public roads pursuant to an accepted dedication; minutes of meeting where county accepted the dedication operated as the controlling official record, and county had not complied with statutory requirements for abandoning county roads.

REFERENDA - MISSOURI

Lucas v. Ashcroft

Supreme Court of Missouri, en banc - April 30, 2024 - S.W.3d - 2024 WL 1904608

Mayor filed election-contest petition as original action in the Supreme Court, alleging that fiscal note summary printed on ballots cast in most recent general election materially misstated fiscal note for proposed constitutional amendment increasing minimum funding for city's police force.

State moved to dismiss, and mayor filed amended petition with proper verification. The Supreme Court overruled State's motion.

The Supreme Court held that:

- Supreme Court had original jurisdiction over post-election contest involving constitutional amendment;
- Amended petition related back to date of original, unverified petition;
- Mayor had standing to bring post-election contest in his capacity as registered Missouri voter;
- Amendment's deemed approval 30 days after election did not preclude election contest filed more than 30 days after election;
- Fiscal note summary was materially inaccurate and misleading;
- Amendment had "fiscal impact" on city; and
- Defective fiscal note summary warranted new election on proposed amendment.

Provision of Missouri Constitution stating that contested elections for "executive state officers shall be had before the supreme court," that "trial and determination of contested elections of all other public officers in the state shall be by courts of law," and that "general assembly shall designate by general law the court or judge by whom the several classes of election contests shall be tried" authorized enactment of statute granting Supreme Court original jurisdiction over all election contests not involving statewide executive-branch officers, including challenge to voter-approved constitutional amendment; "the several classes of election contests" encompassed all election contests not constitutionally committed to Supreme Court, not only those involving public officers.

Mayor's amended, properly-verified election-contest petition, which he filed in Supreme Court's original jurisdiction and by which he challenged voter-approved constitutional amendment, related back to date of his original, unverified election-contest petition, for purpose of 30-day statute of limitations for election contests; mayor's amendment added no new parties and no new claims, but rather, merely cured defect in verification.

Statute allowing "one or more registered voters from the area in which [an] election was held" to contest result of any election granted mayor standing to file election contest challenging voters' approval of proposed constitutional amendment relating to minimum funding for city police force, even if city was directing the litigation and paying for mayor's representation using both city counselor's office and private counsel; mayor was registered Missouri voter and brought action in his individual capacity as voter.

Statutes allowing a registered voter to contest "result of any election on any question" after an election has been held, requiring "all contests to the results of elections on constitutional amendments" to be heard and determined by Supreme Court, and allowing a court to order new election on contested question upon determining "there were irregularities of sufficient magnitude to cast doubt on the validity of the initial election" authorized mayor, as registered voter, to file post-election contest challenging voter-adopted constitutional amendment on basis of allegedly inaccurate and misleading ballot title language, seeking new election on basis that fiscal note summary for proposed amendment was materially misstated.

Fact that, under Missouri Constitution, voter-approved constitutional amendment relating to minimum funding of city police force became effective 30 days after election did not preclude voter from filing election contest challenging such amendment on basis of allegedly inaccurate and misleading fiscal note summary, even though mayor failed to file election contest within 30 days of election; Constitution explicitly authorized election contests to proceed in manner prescribed by statutes, and statutes governing election contests, which precluded filing of election contest before Secretary of State announced election results, avoided absurd results by stating proposed constitutional amendment is deemed approved or disapproved in accordance with election returns until contest is decided.

The amendment to the statute providing a pre-election vehicle to challenge a ballot title so as to state that "[a]ny action brought under this section that is not fully and finally adjudicated within one hundred eighty days of filing, and more than fifty-six days prior to the election in which the measure is to appear, including all appeals, shall be extinguished" does not preclude post-election contests to ballot language; the time limits in the amended statute apply only to any action under that section, saying nothing about post-election contests which arise other under statutes.

Fiscal note summary for proposed constitutional amendment that would authorize laws to "increase minimum funding for a police force established by a state board of police commissioners," which told voters only that "[s]tate and local governmental entities estimate no additional costs or savings related to the proposal," was materially inaccurate and misleading; fiscal note, which incorporated uncontradicted information from only city whose police force would be affected, stated that amendment would increase amount that city must fund its police department by $38,743,646, representing increase from 20% to 25% of city's general revenue, but summary omitted such information.

Voter-approved constitutional amendment authorizing legislature to increase minimum funding for city's police force had "fiscal impact" on city within meaning of statute requiring state auditor to assess fiscal impacts of a ballot proposition in fiscal note and to write fiscal note summary, and thus, auditor could not exclude from fiscal note summary city's estimate of fiscal impact of amendment, and of amendment-authorized bill increasing city's funding obligation from 20% to 25% of its general revenue, on basis that city was already funding police at 25% level; legislature's proposal of amendment showed it understood funding-increase bill would impose new or additional costs, and police funding increase would limit city's budgeting discretion and decrease funding for other services.

Materially inaccurate and misleading fiscal note summary for proposed constitutional amendment authorizing increase in mandatory funding for city's police force, which failed to disclose that amendment and amendment-authorized statute would require city to increase its police funding from 20% to 25% of its general revenue and instead told voters that state and local governments "estimate no additional costs or savings related to the proposal," was irregularity casting doubt on entire election sufficient to justify setting aside voters' approval of amendment and granting new election on the matter; fiscal note summary was last thing voters saw before voting, and majority of

voters surveyed would likely have rejected amendment had they known of its negative fiscal impact on city.

EMINENT DOMAIN - TEXAS

Texas Department of Transportation v. Self

Supreme Court of Texas - May 17, 2024 - S.W.3d - 2024 WL 2226295

Landowners brought action against Texas Department of Transportation (TxDOT) and its contractor, alleging inverse condemnation and negligence arising from contractor's alleged removal of trees from portion of landowners' property that was outside TxDOT right-of-way across property while contractor was in the process of removing trees from the right-of-way.

The 97th District Court denied TxDOT's plea to the jurisdiction. TxDOT appealed, and the Fort Worth Court of Appeals affirmed in part and reversed in part.

The Supreme Court held that:

- Subcontractor's workers were not in the paid service of TxDOT and therefore were not TxDOT employees;
- TxDOT employees did not operate or use motor-driven equipment that cut down trees on landowners' property; and
- Allegations and evidence established claim for inverse condemnation, even if TxDOT did not intend to cut down any trees outside of easement.

Landowners' allegations and evidence that Texas Department of Transportation (TxDOT) intended to damage their property while clearing trees from easement were sufficient to establish claim for inverse condemnation, even if TxDOT did not intend to cut down any trees outside of easement; landowners' allegations and evidence included that a TxDOT employee expressly directed TxDOT's agents to cut down the trees at issue, which destroyed their personal property, landowners owned the land on which the trees stood, and thus the trees themselves, both within and outside TxDOT's right-of-way easement, at least 20 of the felled trees were wholly or partially outside the easement, and there was evidence TxDOT directed the trees' destruction as part of exercising its authority to maintain the highway right-of-way for public use.

IMMUNITY - TEXAS

City of Houston v. Sauls

Supreme Court of Texas - May 10, 2024 - S.W.3d - 2024 WL 2096554

Bicyclist's heirs and estate brought wrongful death action against city arising from officer's automobile accident with bicyclist while responding to a suicide call.

The 113th District Court denied summary judgment, and city filed interlocutory appeal. Houston Court of Appeals affirmed and later denied rehearing and reconsideration en banc. City filed petition for review, which was granted.

The Supreme Court held that:

- Officer was performing a “discretionary” duty when responding to the suicide call;
- City satisfied burden of making prima facie showing officer acted in good faith based on need factor;
- City satisfied burden of making prima facie showing officer acted in good faith based on risk factor; and
- Heirs and estate failed to controvert city’s showing of good faith.

WHISTLE BLOWING - WASHINGTON

Hockett v. Seattle Police Department

Court of Appeals of Washington, Division 1 - May 6, 2024 - P.3d - 2024 WL 1985784

Police sergeant who was exposed to excessive levels of carbon monoxide in patrol vehicle garage sued city and police department, alleging claims for negligence, failure to accommodate in violation of the Washington Law Against Discrimination (WLAD), and whistleblower retaliation in violation of the Seattle Municipal Code.

The Superior Court entered jury’s $1,325,000 judgment for sergeant, and denied defendants’ post-trial motion for judgment as a matter of law and motion for reconsideration. Defendants appealed.

The Court of Appeals held that:

- Sergeant satisfied the exhaustion requirement for a retaliation claim by filing a sufficient and timely administrative whistleblower complaint, and
- Defendants failed to make timely and sufficient objections to administrative finding that sergeant’s whistleblower complaint was sufficient to state a claim for retaliation.

Police sergeant satisfied the exhaustion requirement for a retaliation claim under the Seattle Municipal Code by filing a sufficient and timely administrative whistleblower complaint; sergeant’s administrative complaint alleged that, after he had reported his concerns about excess levels of car exhaust in the patrol vehicle garage to his superiors, police department personnel began mocking him by calling him derogatory names and writing his name on a whistleblower pamphlet, and placing a picture in his office calling him “institutionalized,” the complaint alleged ongoing harassment and thus was filed within 180 days of when sergeant reasonably should have known of the retaliation, and the city’s ethics and elections commission executive director found the complaint sufficient.

City and police department failed to make timely and sufficient objections to administrative finding that sergeant’s whistleblower complaint was sufficient to state a claim for retaliation; if the city or department disagreed with the determination or believed it to be unclear, they were required to plead a claim for relief from or review of the determination, but they instead waited over a year until trial was about to begin to assert the argument that sergeant had failed to exhaust his administrative options before pursuing a private cause of action in superior court.

ZONING & PLANNING - ALABAMA

City of Orange Beach v. Lamar Companies

Supreme Court of Alabama - May 17, 2024 - So.3d - 2024 WL 2229839

Under case numbers assigned in billboard company's prior appeal from board of adjustment decision and company's separate action against city, city filed a "Motion to Enforce Judgment and for Finding of Contempt," pursuant to which it sought an order directing billboard company, pursuant to consent decrees entered in those prior cases, to remove a non-confirming billboard.

The Circuit Court entered order denying city's motion. City appealed.

The Supreme Court held that:

- The denial constituted a denial of a request for injunctive relief, and thus city could appeal the denial within 14 days, and
- The city could require the billboard's removal.

Circuit court's order denying city's motion to enforce consent decrees so as to require billboard company to remove a billboard that did not conform with city zoning ordinance constituted a denial of a request for injunctive relief, and thus city could appeal the denial within 14 days, even though billboard company's motion to enjoin city from requiring billboard's removal remained pending before the circuit court.

Pursuant to consent decrees, city could require removal of billboard that did not conform to zoning ordinance; consent decrees' terms were unequivocal that billboard had to be removed 12 years after the date the permit for it was issued, it was undisputed that billboard had been removed even though the 12-year term had expired, and although billboard company had moved to enjoin billboard's removal on the basis of allegations of selective enforcement that had occurred since the consent decrees, that motion sought to challenge city's current manner of enforcing the zoning ordinance, which meant that billboard company had to raise such claims in a new action.

TELECOM - CALIFORNIA

Assurance Wireless USA, L.P. v. Reynolds

United States Court of Appeals, Ninth Circuit - April 26, 2024 - F.4th - 2024 WL 1819657 - 2024 Daily Journal D.A.R. 3576

Telecommunications carriers filed suit challenging California Public Utilities Commission's (CPUC) new access line rule, imposing surcharges on carriers based on number of active accounts, called access lines, rather than based on revenue, thereby changing mechanism for charging telecommunications providers to fund California's universal service program expanding public access to communications services, and claiming that new rule was expressly preempted by Telecommunications Act, as inconsistent with Federal Communications Commission's (FCC) rules that preserved and advanced universal service on equitable and nondiscriminatory basis, which FCC interpreted to require competitive neutrality, and as inequitable and discriminatory contrary to Telecommunications Act, which charged carriers by revenue.

The United States District Court for the Northern District of California denied carriers' motion for preliminary injunction preventing enforcement of access line rule, and denied stay pending appeal. Carriers appealed.

The Court of Appeals held that:

- In matter of first impression, Telecommunications Act's preemption of state regulations inconsistent with FCC rules requires abrogation or abandonment of federal rule;

- Carriers were not likely to succeed on merits of claim that access line rule was preempted as inconsistent with FCC rules;
- Carriers were not likely to succeed on merits of claim that access line rule was preempted as inequitable and discriminatory contrary to Telecommunications Act; and
- Preliminary injunctive relief was precluded regardless of irreparable harm to carriers from new access line rule.

The Telecommunications Act's use of "inconsistent with," in preempting state regulations promulgated to ensure the preservation and advancement of universal service in that state that are inconsistent with Federal Communications Commission (FCC) rules that preserve and advance universal service, unambiguously requires abrogation or abandonment of the federal rules.

Telecommunications carriers seeking preliminary injunction preventing enforcement of California Public Utilities Commission's (CPUC) new access line rule, imposing surcharges on carriers to fund California's universal service program based on number of active access lines rather than revenue, were not likely to succeed on merits of their claim that rule was expressly preempted by Telecommunications Act as "inconsistent with" Federal Communications Commission (FCC) rule imposed on carriers for funding interstate universal service programs, even though CPUC's access line was different from FCC rule, since CPUC's access line rule did not burden interstate universal service programs funded by FCC rule, that said nothing about funding of state universal service programs.

Telecommunications carriers seeking preliminary injunction preventing enforcement of California Public Utilities Commission's (CPUC) new access line rule, imposing surcharges on carriers to fund California's universal service program based on number of active access lines rather than revenue, were not likely to succeed on merits of their claim that rule was expressly preempted by Telecommunications Act as "inequitable and discriminatory," since CPUC's access line rule was not unfairly discriminatory, as it treated all customers, including wireline, voice over internet protocol, and wireless, the same regardless of service type, it applied to all carriers, and it was fair response to real problem of declining revenues generated from landline services.

Telecommunications carriers seeking preliminary injunction against enforcement of California Public Utilities Commission's (CPUC) new access line rule, imposing surcharges on carriers to fund California's universal service program based on number of active access lines rather than revenue, were not likely to succeed on merits of their claim that rule was expressly preempted by Telecommunications Act as "inequitable and discriminatory" by treating carriers that received support under federal Affordable Connectivity Program (ACP) differently than carriers serving low-income participants in California LifeLine Program; federal and state programs were materially distinct as they were funded differently, only one member of household was eligible for LifeLine benefits, and carriers receiving ACP support could also join LifeLine.

Although telecommunications carriers faced irreparable harm, from lack of goodwill and injury to their pro-consumer brands by passing surcharge on to their customers or from inability to recover surcharges later from California, due to its Eleventh Amendment immunity, they still were not entitled to preliminary injunction preventing enforcement of California Public Utilities Commission's (CPUC) new access line rule, imposing surcharges on carriers based on number of active access lines rather than revenue, since carriers were not likely to succeed on merits of their claims that access line rule was preempted by Telecommunications Act.

BALLOT INITIATIVE - COLORADO

Colorado v. Griswold

United States Court of Appeals, Tenth Circuit - April 26, 2024 - 99 F.4th 1234

Organization and individuals who sponsored two tax reduction ballot measures, which were subject to recently enacted Colorado law that required the title of citizen-initiated ballot measures containing a tax change to incorporate a phrase stating the change's impact on state and local funding priorities, brought action against Secretary of State of Colorado alleging the law unconstitutionally compelled their political speech.

The United States District Court for the District of Colorado denied plaintiffs' motion for a preliminary injunction, and they appealed.

The Court of Appeals held that Colorado's titling system for citizen-initiated ballot measures was government speech, and thus, the titles did not unconstitutionally compel plaintiffs' political speech.

Colorado's titling system for citizen-initiated ballot measures, pursuant to which the titles of proposed ballot measures to limit property tax increases and reduce sales and use tax rates stated the impact of the proposed measures on state and local funding priorities, qualified as government speech under First Amendment, and thus, the titles did not unconstitutionally compel the political speech of the sponsors of the measures; Colorado Ballot Title Setting Board had existed and set ballot titles in similar manner for over 80 years, which reflected government's substantial control over initiative titles and its legitimate interest in providing standardized process for presenting measures to voters, and disclaimer shown immediately above ballot titles indicated the language was designated and fixed by the Board.

DEDICATION - COLORADO

Great Northern Properties, LLLP v. Extraction Oil and Gas, Inc.

Supreme Court of Colorado - May 6, 2024 - P.3d - 2024 WL 1979403 - 2024 CO 28

Successor-in-interest to real estate developer that dedicated a city street brought action against owners of lots that abutted street and mineral developer to quiet title to mineral estate beneath street.

The District Court entered a judgment quieting title in lot owners after grant of mineral developer's motion for a determination of a question of law and denial of successor-in-interest's motion for summary judgment. Successor-in-interest appealed. The Court of Appeals affirmed in part and reversed in part. Successor-in-interest petitioned for certiorari review, which was granted.

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

- Conveyance of land abutting a right-of-way is presumed to carry title to the centerline of both the surface and mineral estates;
- Application of centerline presumption does not require a grantor to completely divest all property it owns abutting the right-of-way;
- Statutory dedication of street did not horizontally sever mineral estate under street from lots abutting street; and
- Centerline presumption applied so that lot owners took title to surface and mineral estates to centerline of road.

PACE FUNDING - FLORIDA

Florida PACE Funding Agency v. Pinellas County

District Court of Appeal of Florida, Second District - March 27, 2024 - So.3d - 2024 WL 1288194 - 49 Fla. L. Weekly D660

County brought action against Florida Property Assessed Clean Energy (PACE) Funding Agency (FPFA) for declaratory and injunctive relief, alleging that FPFA breached interlocal agreement by financing residential improvements in violation of county code.

The Circuit Court denied FPFA's motion to dismiss for improper venue. FPFA appealed.

The District Court of Appeal held that:

- Sword-wielder doctrine as exception to FPFA's home-venue privilege did not apply;
- Forum selection clause in interlocal agreement, at the least, applied to legal or equitable disputes that arose between the parties while agreement was still in effect;
- County's declaratory relief claim arose while agreement was still in effect, and thus forum selection clause applied to claim; and
- County's claim seeking injunctive relief arose while agreement was still in effect, and thus forum selection clause applied to claim.

Sword-wielder doctrine as exception to home-venue privilege did not apply based on county's allegations that bond validation judgment, which permitted Florida Property Assessed Clean Energy (PACE) Funding Agency (FPFA) to finance residential improvements statewide without regard to county ordinance, violated county's constitutional "home rule" powers, in action against FPFA; sword wielder doctrine's protections did not apply to showdown between two governmental parties, bond validation judgment purported to apply statewide, and primary purpose of county's complaint was a collateral attack on bond validation judgment, rather than contention that FPFA was directly violating county's constitutional rights.

Forum selection clause in interlocal agreement between county and Florida Property Assessed Clean Energy (PACE) Funding Agency (FPFA), which expressly covered "any legal or equitable action involving the County the Agency or its program in" county, at the least, applied to legal or equitable disputes that arose between the parties while the interlocal agreement was still in effect; FPFA and the county contracted for a broad forum selection clause that was not limited just to claims "arising under" the interlocal agreement or to claims requiring interpretation of the agreement's substantive provisions.

County's declaratory relief claim arose while interlocal agreement between county and Florida Property Assessed Clean Energy (PACE) Funding Agency (FPFA) was still in effect, and thus forum selection clause in agreement, which expressly covered "any legal or equitable action involving the County the Agency," applied to claim, in action against FPFA, seeking declaration that county could enforce its PACE ordinance against FPFA, notwithstanding bond validation judgment stating otherwise; FPFA wrote county before expiration that in light of judgment, it would operate without regard to county's ordinance, that it would offer financing for PACE improvements to residential property owners, and that it would do so even if it never entered into another interlocal agreement with county.

County's claim seeking injunctive relief arose while interlocal agreement between county and Florida Property Assessed Clean Energy (PACE) Funding Agency (FPFA) was still in effect, and thus

forum selection clause in agreement, which expressly covered "any legal or equitable action involving the County the Agency," applied to claim, in action against FPFA, seeking an injunction enjoining FPFA from conducting any PACE business in county unless it complied with county code; county alleged that FPFA began providing PACE financing to residential property owners in violation of the county's ordinance immediately after bond validation judgment issued, well before the interlocal agreement expired, and that such operation violated state law, local ordinance, and the provisions of the agreement.

SURETY BOND - GEORGIA

Clay v. State

Court of Appeals of Georgia - February 2, 2024 - 370 Ga.App. 482 - 897 S.E.2d 886

Residents who owned, leased, and lived on property zoned for agricultural use filed action against state, seeking declaratory judgment that development and construction of electric vehicle manufacturing facilities on state-owned property violated local and state law, and seeking injunction to halt project. State filed counterclaim seeking declaratory relief that zoning ordinances did not apply and moved for surety bond.

Following hearing, the Superior Court granted motion for bond and ordered residents to post surety bond in amount of $364,619.55. Residents appealed.

The Court of Appeals held that:

- Trial court did not improperly shift burden of proof to residents to show why surety bond should not be granted, but
- Imposition of bond was improper where trial court failed to address whether all claims asserted by residents were meritorious.

Court of Appeals had jurisdiction to review grant of motion for surety bond on interlocutory review in action filed by residents who owned, leased, and lived on property zoned for agricultural use against state seeking declaratory judgment that development and construction of electric vehicle manufacturing facilities on state-owned property violated local and state law, and seeking injunction to halt project, where order was subject to direct appeal but residents did not file notice of appeal until after grant of interlocutory review.

Residents who owned, leased, and lived on property zoned for agricultural use abandoned argument for review that project to develop and construct electric vehicle manufacturing facilities on state-owned property did not involve political subdivisions and that action was not a public lawsuit, as would preclude imposition of surety bond on residents in action against state seeking declaratory judgment that project violated local and state law and seeking injunction to halt project; while residents challenged state's contention that project involved political subdivisions and that action was a public lawsuit at bond hearing, residents did not contest trial court's findings on appeal.

Use of state-owned land to develop and construct electric vehicle manufacturing facilities qualified as a government purpose, as would support grant of state's request for surety bond in action filed by residents who owned, leased, and lived on property zoned for agricultural use against state, seeking declaratory judgment that project violated local and state law and seeking injunction to halt project; project would provide extensive economic benefits to state through employment opportunities and additional tax revenue, as well as increased construction jobs, housing, and retail development.

Trial court did not improperly shift burden of proof to residents who owned, leased, and lived on property zoned for agricultural use to show why surety bond should not be granted in action filed by residents against state, seeking declaratory judgment that project to develop and construct electric vehicle manufacturing facilities on state-owned property violated local and state law and seeking injunction to halt project; court placed burden on residents to show why bond should not be granted after first determining whether state had met its burden to show it was a political subdivision, that the lawsuit qualified as a public lawsuit to justify imposition of bond, that the claims lacked merit, and that the bond was in the public interest, which was consistent with statutory requirements.

Imposition of surety bond against residents who owned, leased, and lived on property zoned for agricultural use was improper in action against state seeking declaratory judgment that project to develop and construct electric vehicle manufacturing facilities on state-owned property violated local and state law and seeking injunction to halt project, where trial court determined that state was likely to prevail by focusing only on claims regarding zoning issues without considering merits of other arguments asserted by residents, and it appeared from the record that at least one claim had merit.

IMMUNITY - NEW YORK

Certain Underwriters at Lloyd's London v. Edouch Elsa Independent School District

United States District Court, S.D. New York - April 8, 2024 - F.Supp.3d - 2024 WL 1514020

After party-appointed arbitrators were unable to agree upon umpire, commercial property insurers filed petition asking court to designate and appoint umpire under arbitration agreement with insured school district and Federal Arbitration Act (FAA).

Insured moved to dismiss petition for lack of subject matter jurisdiction.

The District Court held that:

- School district was not arm of state and, thus, was not entitled to Eleventh Amendment immunity;
- District court had authority to appoint neutral umpire under arbitration agreement;
- Party-appointed arbitrator was not required to file petition asking court to designate and appoint umpire, and thus insurers properly filed petition; and
- Retired magistrate judge of Southern District of New York, rather than retired Texas state court judge, was best suited to serve as umpire.

IMMUNITY - OHIO

Heeter v. Bowers

United States Court of Appeals, Sixth Circuit - April 29, 2024 - 99 F.4th 900

Plaintiffs filed § 1983 action in state court against city police department and police officer alleging that officer used excessive force against suicidal individual and failed to administer aid after shooting him.

After removal, the United States District Court for the Southern District of Ohio denied defendants' motion for summary judgment, and they appealed.

The Court of Appeals held that:

- It had jurisdiction over defendants' interlocutory appeal;
- Summary judgment on qualified immunity grounds was not warranted on excessive force claim against officer;
- It was clearly established that suicidal individual had right not to be shot unless he posed threat of serious or deadly harm to officers;
- Summary judgment on qualified immunity grounds was not warranted on claim of deliberate indifference to serious medical need;
- It was clearly established at time of shooting that officer had obligation under Due Process Clause to provide adequate medical care after shooting;
- It had jurisdiction to review district court's denial of state law immunity;
- City was statutorily immune from liability arising from incident; and
- Summary judgment on basis of state law immunity was not warranted with regard to officer.

ZONING & PLANNING - RHODE ISLAND

Thompson v. Town of North Kingstown Zoning Board of Appeals

Supreme Court of Rhode Island - May 7, 2024 - A.3d - 2024 WL 2003053

Neighbor brought action for declaratory judgment after unsuccessfully appealing planning commission's approval of golf course development application pursuant to consent judgment in federal court litigation between developers and town.

The Superior Court granted town's and developers' motion for summary judgment, and neighbor appealed.

The Supreme Court held that:

- Neighbor lacked standing or grounds for successful collateral attack against consent judgment;
- Town had authority to enter into consent judgment; and
- Consent judgment did not illegally amend the town's zoning ordinance.

Neighbor lacked standing or grounds for successful collateral attack, through state court declaratory judgment action, against consent judgment in federal court litigation between town and developers regarding development of golf course property; neighbor was not a party to the consent judgment, and, as a nonparty, lacked the requisite standing to challenge the agreement and was thus barred from making a collateral attack on what was a valid, final judgment in federal court.

Town had authority to enter into agreement with developer regarding development of golf course property, and consent judgment did not illegally constrain town planning commission's authority; town council approved the consent judgment, and the planning commission approved the developers' application for a preliminary plan, the proceedings were open to the public and did not occur behind closed doors or without a formal vote, and the town had authority to enter into the consent judgment pursuant to the town charter.

Consent judgment between town and developer regarding project to develop golf course property did not illegally amend the town's zoning ordinance; pursuant to the consent judgment, the developers were entitled to up to 26,000 square feet of nonresidential commercial space, which was consistent with the zoning ordinance at the relevant time, and the developers previously had obtained master plan approval for commercial space between 24,000 square feet and 40,000 square

feet and had certain vested rights and preexisting approvals in the project when the town council revised the ordinances, which after amendment were inconsistent with the approvals that the developers had previously obtained.

IMMUNITY - TEXAS

Texas State University v. Tanner

Supreme Court of Texas - May 3, 2024 - S.W.3d - 2024 WL 1945340

Passenger who was thrown from golf cart being driven by employee of state university brought personal injury action under Texas Tort Claims Act against employee, university, and university system.

After system's plea to the jurisdiction was granted, university filed plea to the jurisdiction and alternative motion for summary judgment.

The 207th District Court granted university's plea on basis of sovereign immunity. Passenger appealed. The Austin Court of Appeals reversed and remanded. University filed petition for review.

The Supreme Court held that:

- Achieving timely service of process was "statutory prerequisite" within meaning of waiver-o--sovereign-immunity statute, and thus was jurisdictional requirement;
- Passenger failed to establish that she was diligent in attempting to serve university, precluding relation back of untimely service to date that petition was filed; but
- Remand was warranted for resolution, in first instance, of whether passenger's service on employee constituted service on university.

Compliance with two-year statute of limitations for personal injury actions under Texas Tort Claims Act and achieving timely service of process were "statutory prerequisites," and thus "jurisdictional requirements," within meaning of waiver-of-sovereign-immunity statute, in golf cart passenger's personal injury action against state university under Act.

Passenger thrown from golf cart being driven by employee of state university failed to establish diligence in attempting to serve university following running of two-year statute of limitations for personal injury claims under Texas Tort Claims Act, and thus, untimely service on university did not relate back to date she filed personal injury petition against university and employee under Act; university's alleged actual notice of the claim was not sufficient to satisfy service of process requirements since notice and service were separate issues, university's delay in moving to dismiss employee did not excuse passenger's delay in achieving service, and common representation between employee and university did not explain the delay between serving employee and university.

The Supreme Court would reverse the appellate court order granting state university's plea to the jurisdiction based on sovereign immunity and remand golf cart passenger's personal injury action against state university under the Texas Tort Claims Act for resolution, in the first instance, of the potentially dispositive legal question of whether passenger's service on state university employee constituted service on university itself, since passenger's argument presented an alternative legal basis to deem satisfied any obligation to serve the university.

ZONING & PLANNING - VIRGINIA

Rebh v. County Board of Arlington County

Court of Appeals of Virginia, Winchester - May 7, 2024 - S.E.2d - 2024 WL 2001066

Condominium building residents filed complaint for declaratory and injunctive relief against county board alleging that board's adoption of sector plan and zoning ordinance amendments allowing taller building heights and bigger densities for certain city zoning districts was void ab initio because board did not satisfy zoning statute's resolution and certification, notice, and uniformity requirements.

The Arlington Circuit Court sustained board's demurrer. Residents appealed.

The Court of Appeals held that:

- Resolution requirement was satisfied;
- Certification requirement was satisfied;
- Public notice did not satisfy the descriptive summary requirement; and
- Uniformity requirement was satisfied.

BOND VALIDATION - CALIFORNIA

City of San José v. Howard Jarvis Taxpayers Association

Court of Appeal, Sixth District, California - April 29, 2024 - Cal.Rptr.3d - 2024 WL 1855412

Charter city filed a complaint for validation of the issuance of pension obligation bonds and related agreements that were aimed to address unfunded liabilities in city's retirement plans.

Taxpayer advocacy groups filed an answer to the complaint for validation, alleging that the city lacked authority to issue the bonds and seeking a declaration that the resolution approving the bonds and the proposed issuance of the bonds were invalid.

The Superior Court entered judgment validating the resolution, the issuance and sale of the bonds, and related agreements. Advocacy groups appealed.

The Court of Appeal held that:

- Resolution allowing for the issuance of pension obligation bonds did not incur any new indebtedness that required voter approval under the California Constitution, and
- City had statutory authority to issue pension obligation bonds as refunding bonds to refund unfunded pension liabilities.

A municipal bond is not an "indebtedness or liability" within meaning of state constitutional debt limitation applicable to cities—it is only the evidence or representative of an indebtedness, and a mere change in the form of the evidence of indebtedness is not the creation of a new indebtedness within meaning of constitutional debt limitation.

The constitutional debt limitation was enacted for the purpose of curtailing "municipal extravagance" in the form of unchecked capital investments that resulted in large, long-term debt; in contrast to disfavored "municipal extravagance," public policy in California encourages pension plans as a means by which governments may induce and reward long-term public service to a

municipality's citizens.

Under California law there is a strong preference for construing governmental pension laws as creating contractual rights for the payment of benefits, and when feasible to do so such laws should be construed as guaranteeing full payment to those entitled to its benefits with the provision of adequate funds for that purpose; actuarial soundness of the pension system is necessarily implied in the total contractual commitment, because a contrary conclusion would lead to express impairment of employees' pension rights.

The phrase "other evidence of indebtedness" in statute defining revenue bonds may include unfunded liability, such as a city's deferred obligation to pay its employees.

The refunding of an unfunded municipal liability using the proceeds from the issuing of refunding bonds converts the debt represented by the unfunded liability into debt in the form of bonds; such refunding does not create new debt for purposes of the constitutional debt limitation applicable to cities.

PUBLIC UTILITIES - CALIFORNIA

Sacramento Municipal Utility District v. Kwan

Court of Appeal, Third District, California - April 30, 2024 - Cal.Rptr.3d - 2024 WL 1874962

Municipal electric utility brought action against customer, asserting claims for power theft, conversion, and account stated, based on allegations that power was diverted for cannabis grow operation.

Following court trial, the Superior Court, Sacramento County found customer liable for aiding and abetting utility diversion and awarded $82,661.13 as treble damages plus $82,000 as costs and attorney fees. Customer appealed.

The Court of Appeal held that:

- Substantial evidence supported finding that customer aided and abetted power diversion;
- Utility established fact of proximately caused injury from date of account creation with reasonable certainty; and
- Trial court acted within its discretion in awarding treble damages and attorney fees.

IMMUNITY - IOWA

Randolph v. Aidan, LLC

Supreme Court of Iowa - May 3, 2024 - N.W.3d - 2024 WL 1944714

User of stairs at rental property brought personal injury action against rental property owner arising from fall on stairs, and owner filed third-party claim against city for negligent hiring, retaining, or supervising of an allegedly unqualified city employee who inspected the property.

The District Court denied city's motion to dismiss the third-party claim. User and owner both sought interlocutory review, which was granted.

The Supreme Court held that city had statutory immunity from the negligent hiring claim.

ZONING & PLANNING - MICHIGAN

Long Lake Township v. Maxon

Supreme Court of Michigan - May 3, 2024 - N.W.3d - 2024 WL 1960615

Township filed action against homeowners for violating zoning ordinance, creating nuisance, and breaching previous settlement agreement.

The Circuit Court denied owners' motion to suppress aerial photographs taken using drone, and owners appealed. The Court of Appeals reversed. Township filed application for leave to appeal. In lieu of granting leave to appeal, the Supreme Court vacated and remanded. On remand, the Court of Appeals affirmed, and owners appealed.

The Supreme Court held that exclusionary rule did not apply to preclude township from introducing aerial photographs of property taken using drone without warrant or owners' consent.

Exclusionary rule did not apply to preclude township from introducing aerial photographs of property taken using drone without warrant or owners' consent in township's action alleging violation of its zoning ordinance, nuisance, and breach of settlement agreement; very little of property was visible from public vantage-point, without drone's photographs and video, township did not seek any criminal or monetary penalties, and applying exclusionary rule would prevent township from effectuating its nuisance and zoning ordinances and would do so for little benefit, given that exclusion of photographs and video would not deter future misconduct by law enforcement officers or their adjuncts, proxies, or agents.

ZONING & PLANNING - MISSOURI

Sachtleben v. Alliant National Title Insurance Co.

Supreme Court of Missouri, en banc - April 30, 2024 - S.W.3d - 2024 WL 1904591

Insured purchasers of real property brought action against title insurer, alleging breach of contract based on insurer's refusal to defend insureds against city's pre-existing lawsuit against vendors regarding alleged local zoning ordinance violations related to barn built by vendors.

The Circuit Court granted partial summary judgment in favor of insurer. Insureds appealed.

On transfer from the Court of Appeals, the Supreme Court held that:

- Trial court did not abuse its discretion in finding that partial summary judgment in favor of insurer was final for purposes of appeal;
- Insurer's actual notice of city's lawsuit did not trigger coverage under policy section providing coverage if notice was recorded in public records setting forth violation or intention to enforce building or zoning law, ordinance, permit, or governmental regulation;
- City's lawsuit did not constitute "public record" within meaning of same coverage provision; and
- Policy exclusion for loss from any ordinance restricting, regulating, prohibiting, or relating to land use or character, dimensions, or location of any improvement on land unless claim met requirements of same coverage provision applied.

IMMUNITY - NEBRASKA

Joshua M. v. State

Supreme Court of Nebraska - May 3, 2024 - N.W.3d - 316 Neb. 446 - 2024 WL 1946196

Foster siblings brought action against Department of Health and Human Services (DHHS) for alleged negligent acts or omissions of DHHS employees in failing to protect siblings from being physically and sexually abused by foster parent and by their biological father upon their placement with him.

The District Court denied DHHS's motion for directed verdict and, after bench trial, entered judgment for DHHS. Siblings appealed.

The Supreme Court held that:

- Assault or battery exemption to waiver of sovereign immunity under STCA and the Political Subdivisions Tort Claims Act (PSTCA) can apply to a claim framed as negligent failure to protect against assault or battery; overruling *Koepf v. County of York*, 198 Neb. 67, 251 N.W.2d 866, and
- Assault or battery exemption under STCA applied to bar siblings' claims.

EMINENT DOMAIN - NEW YORK

HBC Victor LLC v. Town of Victor

Supreme Court, Appellate Division, Fourth Department, New York - March 22, 2024 - N.Y.S.3d - 225 A.D.3d 1254 - 2024 WL 1227054 - 2024 N.Y. Slip Op. 01625

Following annulment of town's prior determination authorizing condemnation of vacant commercial real property, owner of property brought action against town under Eminent Domain Procedure Law (EDPL) to annul town's determination authorizing the condemnation of the property.

The Supreme Court, Appellate Division, held that:

- Town established legitimate qualifying public purpose or use of property, and
- Public purposes articulated by town's comprehensive plan were not merely incidental to private benefits arising from condemnation and were sufficient to support condemnation action.

Town established legitimate qualifying public purpose or use of owner's vacant commercial real property, as supported condemnation of property; one of town's stated public purposes was to facilitate economic redevelopment project that would permit vacant and underutilized property to be turned into space appropriate for lease to international department store and grocer, both of which had expressed interest in becoming tenants, and town's proposed use of a portion of the building for an 11,000-square-foot community and recreation space was a viable public purpose.

Public purposes articulated by town's comprehensive plan were not merely incidental to private benefits arising from condemnation and were sufficient to support town's condemnation action against owner of vacant commercial real property; despite property owner's contention that public use proposed for part of property to be leased by town was illusory, town initially stated at public hearing that it had not yet determined what it would do with that portion of the property, town subsequently narrowed its public use in its determination and findings to a community and recreation center space to provide for and enhance town's public services as part of creating a

vibrant, sought-after retail, community and recreation destination on the property.

MUNICIPAL ADVISORS - NEW YORK

Securities and Exchange Commission v. City of Rochester, New York

United States District Court, W.D. New York - April 15, 2024 - F.Supp.3d - 2024 WL 1621541

Securities and Exchange Commission (SEC) brought action against city's municipal advisor, its principals, and others for, among other things, failure to comply with Municipal Securities Rulemaking Board (MSRB) rules requiring municipal advisors to disclose material conflicts of interest and to establish, implement, and maintain written supervisory procedures, as well as breach of fiduciary duty and violation of Securities Exchange Act provision prohibiting municipal advisors from contravening MSRB rules.

SEC, advisor, and principals cross-moved for summary judgment as to liability on claims arising under MSRB rules.

The District Court held that:

- As a matter of apparent first impression, MSRB rule required advisor to disclose all contingency fee arrangements based on size or closing of a transaction;
- MSRB was authorized to depart from general securities-law definition of "materiality" in its disclosure rule;
- Disclosure rule was subject to rational review under First Amendment;
- Disclosure rule was reasonably related to legitimate government interest in regulating municipal securities market;
- As a matter of apparent first impression, negligence standard governed statutory and regulatory claims of a municipal advisor's breach of fiduciary duty to a municipal client;
- Advisor's email to clients inadequately disclosed conflicts of interest arising from contingency fee arrangements; and
- Failure to disclose conflicts of interest arising from contingency fee arrangements breached advisor's fiduciary duty of loyalty.

The unambiguous meaning of the Municipal Securities Rulemaking Board (MSRB) rule requiring a municipal advisor, "prior to or upon engaging in municipal advisory activities," to "provide to the municipal entity or obligated person client full and fair disclosure in writing of…all material conflicts of interest, including…any conflicts of interest arising from compensation for municipal advisory activities to be performed that is contingent on the size or closing of any transaction as to which the municipal advisor is providing advice" is that conflicts of interest arising from contingency-fee arrangements based on the size or closing of the transaction are material conflicts of interest subject to mandatory disclosure.

The Municipal Securities Rulemaking Board (MSRB) rule requiring a municipal advisor, "prior to or upon engaging in municipal advisory activities," to "provide to the municipal entity or obligated person client full and fair disclosure in writing of…all material conflicts of interest, including…any conflicts of interest arising from compensation for municipal advisory activities to be performed that is contingent on the size or closing of any transaction as to which the municipal advisor is providing advice" does not vest the municipal advisor with discretion to determine whether a contingency arrangement based on the size or closing of a transaction creates a material conflict of interest.

When fulfilling its congressional mandate to “provide professional standards” for municipal advisors and prescribe “means reasonably designed to prevent acts, practices, and courses of business” inconsistent with their fiduciary duties, Municipal Securities Rulemaking Board (MSRB) had authority to deem certain fee arrangements as presenting material conflicts of interest as a matter of law in its rule requiring municipal advisors to disclose all material conflicts of interest, even though federal securities laws generally treated materiality as mixed question of law and fact; deeming certain conflicts “material” was consistent with MSRB’s mandate, and nothing in Exchange Act required MSRB to adopt general securities-law definition of materiality. Securities Exchange Act of 1934 § 15B.

The materiality of a municipal advisor’s contingent fee arrangement, for purposes of the Municipal Securities Rulemaking Board (MSRB) rule requiring advisors to disclose all material conflicts of interest including “any conflicts of interest arising from compensation for municipal advisory activities to be performed that is contingent on the size or closing of any transaction as to which the municipal advisor is providing advice,” is not measured by whether a fee is material to the municipal advisor; rather, materiality is evaluated through the viewpoint of the municipal clients, whom the rule is meant to protect.

In imposing a fiduciary duty on investment advisers through the Investment Advisers Act of 1940, Congress created both an affirmative obligation to employ reasonable care to avoid misleading clients and an affirmative duty of utmost good faith; thus, investment advisers must tell their clients about all conflicts of interest which might incline an investment adviser, consciously or unconsciously, to render advice which is not disinterested. Investment Advisers Act of 1940 § 206.

Municipal Securities Rulemaking Board (MSRB) rule requiring municipal advisors to disclose all material conflicts of interest including “any conflicts of interest arising from compensation for municipal advisory activities to be performed that is contingent on the size or closing of any transaction as to which the municipal advisor is providing advice” was informational disclosure rule, and thus, district court would apply rational review to determine whether rule comported with First Amendment; rule only required disclosure of factual, uncontroversial information about an advisor’s own products and services, and rule did not limit what advisors could say in defense of contingency fee arrangements or prevent them from offering their opinions concerning any potential conflicts.

Municipal Securities Rulemaking Board (MSRB) rule requiring municipal advisors to disclose all material conflicts of interest including “any conflicts of interest arising from compensation for municipal advisory activities to be performed that is contingent on the size or closing of any transaction as to which the municipal advisor is providing advice” was reasonably related to legitimate government interest in regulating municipal securities market, as necessary for such information disclosure rule to comport with First Amendment free speech principles; MSRB determined that mandatory disclosure of conflicts of interest inherent in contingency fee arrangements would protect municipal entity clients by allowing them to better evaluate advisors’ advice and whether such advice might be colored by conflicts.

Municipal Securities Rulemaking Board (MSRB) rule requiring municipal advisors to disclose all material conflicts of interest including “any conflicts of interest arising from compensation for municipal advisory activities to be performed that is contingent on the size or closing of any transaction as to which the municipal advisor is providing advice,” which was intended to protect municipal entity and obligated person clients, did not unduly burden speech, and thus, such information disclosure rule comported with First Amendment free speech principles; advisors were free to make clear that information disclosed represented MSRB’s views and to tell clients why, in their view, contingency nature of fee arrangements would not impact advice given or otherwise harm their clients.

Municipal Securities Rulemaking Board (MSRB) rule requiring municipal advisors to disclose all material conflicts of interest including "any conflicts of interest arising from compensation for municipal advisory activities to be performed that is contingent on the size or closing of any transaction as to which the municipal advisor is providing advice" provided a person of ordinary intelligence a reasonable opportunity to know what conduct was required, and thus, rule comported with due process; rule unambiguously required disclosure of all material conflicts of interest and defined certain contingency agreements as posing material conflicts of interest as matter of law, and Securities and Exchange Commission (SEC) issued guidance on contingency-fee-related conflicts subject to disclosure.

Where the Securities and Exchange Commission (SEC) has, through its regulations, written guidance, litigation, or other actions, provided a reasonable person operating within the defendant's industry fair notice that their conduct may prompt an enforcement action by the SEC, it has satisfied its obligations against vagueness under the Due Process Clause.

Written supervisory procedures that municipal advisor implemented during specified time period were not reasonably designed to ensure that municipal advisory activities of advisor and its associated persons were in compliance with Municipal Securities Rulemaking Board (MSRB) rule requiring municipal advisors to disclose all material conflicts of interest, and thus, such procedures violated MSRB rule requiring municipal advisors to establish, implement, and maintain written supervisory procedures that were reasonably designed to ensure such conduct was in compliance with applicable MSRB rules, even if advisor monitored employees' outside business activities for conflicts; documents did not address conflicts of interest at all, and monitoring did not constitute written supervisory procedure.

The standard for determining whether a municipal advisor has breached a fiduciary duty owed to a municipal client under the Exchange Act and the Municipal Securities Rulemaking Board (MSRB) rule governing the fiduciary relationship between municipal advisors and their clients is the same negligence standard applied under the Investment Advisers Act. Securities Exchange Act of 1934 § 15B, 15 U.S.C.A. § 78o-4(c)(1); Investment Advisers Act of 1940 § 201, 15 U.S.C.A. § 80b-1 et seq.

Email that municipal advisor sent clients, which stated advisor "may have conflicts of interest arising from compensation for municipal activities to be performed that are contingent on the size or closing of such transaction…if [advisor] should fail to get paid for its work on a transaction in the event that the transaction does not close," did not satisfy Municipal Securities Rulemaking Board (MSRB) rule requiring advisor to disclose, before or upon engaging in municipal advisory activities, any conflicts of interest arising from contingency fee arrangements based on size or closing of a transaction; single email over six-year period was not sent at beginning of activities and suggested that only potential conflict was if advisor ultimately was not paid for its work, without disclosing conflicts were inherent to such arrangements.

Municipal advisor's failure to inform each municipal client, prior to or upon engaging in municipal advisory activities, each actual or potential conflict of interest that was inherently created by its contingent fee arrangements based on size or closing of transactions, which failed to satisfy Municipal Securities Rulemaking Board (MSRB) rule requiring disclosure of any material conflict of interest including any such fee arrangement, breached advisor's fiduciary duty of loyalty under Exchange Act and MSRB rules, even if advisor disclosed all forms of compensation it received in connection with any sales of debt securities and even if neither advisor nor its employees received any financial benefit from any other person. Securities Exchange Act of 1934 § 15B, 15 U.S.C.A. § 78o-4(c)(1).

MUNICIPAL ORDINANCE - PENNSYLVANIA

Barris v. Stroud Township

Supreme Court of Pennsylvania - February 21, 2024 - 310 A.3d 175

Landowner filed complaint seeking declaratory judgment that township ordinance prohibiting discharging of firearms within township, alongside zoning ordinances limiting shooting ranges to two non-residential districts in township, violated Second Amendment on its face.

The Court of Common Pleas entered summary judgment in township's favor, and landowner appealed. The Commonwealth Court reversed. Leave to appeal was granted.

The Supreme Court held that:

- Owner's conduct in discharging firearms on his own property in order to gain proficiency in their use was covered by Second Amendment, but
- Ordinance did not violate Second Amendment on its face.

Property owner's conduct in discharging firearms on his own property in order to gain proficiency in their use was covered by Second Amendment's plain text, where owner faced confiscation of his lawfully-owned firearms pursuant to township ordinance for doing so.

Township ordinance prohibiting discharging of firearms within township except in shooting ranges within non-residential districts was fully consistent with Nation's historical tradition of firearm regulation, and thus did not violate Second Amendment on its face; colonial, founding, and antebellum generations recognized states' longstanding power to regulate when and where firearms could be used for non-self-defense purposes, number of firearm discharge regulations proliferated after Second Amendment's ratification, number of regulations during this time were aimed specifically at shooting ranges and target practice, and township adopted ordinance for protection of public health and safety and general welfare of residents and visitors.

BLOWING OF THE WHISTLE - TEXAS

City of Denton v. Grim

Supreme Court of Texas - May 3, 2024 - S.W.3d - 2024 WL 1945118

Former city employees filed suit against city under Whistleblower Act, based on allegations that they were terminated for having reported violations of law by city council member who leaked confidential vendor information to reporter for local newspaper in context of story about controversial plan for construction of new power plant.

The 68th District Court, Dallas County, denied city's motions for directed verdict and for judgment notwithstanding verdict (JNOV), entered judgment on jury's verdict for employees, and denied city's

motion for new trial.

City appealed, and Dallas Court of Appeals affirmed. Petition for review was granted.

The Supreme Court held that:

- Alleged violations by city council member, who was not public employee, of Public Information Act and Open Meetings Act, could not be imputed to city, and thus, council member's violations of law were not violations of law by city, as employing governmental entity, within meaning of Whistleblower Act;
- Council member was not acting as agent for city when she allegedly violated law, and thus, council member's violations of law were not violations of law by city, as employing governmental entity;
- Whether government official who had no authority to act on behalf of government entity was acting in his or her individual or official capacity at time of violation of law had no bearing on issue whether official's violation of law constituted violation of law by employing government entity, within meaning of Whistleblower Act, disapproving *City of Cockrell Hill v. Johnson*, 48 S.W.3d 887; and
- Goal of Whistleblower Act to encourage public employee's reports of violations of law that were detrimental to public good or society in general without fear of retribution had no bearing on whether violation of law by governmental official who had no authority to act on behalf of governmental entity constituted violation of law by employing governmental entity, within meaning of Act, disapproving Housing Authority of the *City of El Paso v. Rangel*, 131 S.W.3d 542.

EMINENT DOMAIN - WISCONSIN

Antosh v. Village of Mount Pleasant

United States Court of Appeals, Seventh Circuit - April 25, 2024 - F.4th - 2024 WL 1786287

Property owners brought action challenging village's use of its eminent domain power to acquire their property.

The United States District Court for the Eastern District of WisconsiN granted village's motion to dismiss, and owners appealed.

The Court of Appeals held that:

- Owners' state and federal actions were parallel for purposes of Colorado River abstention, and
- District court did not abuse its discretion in dismissing action on basis of Colorado River abstention.

Property owners' state and federal actions challenging village's use of its eminent domain power to acquire their property were parallel for purposes of Colorado River abstention, even though state action contested amount of compensation they were owed, and federal action challenged validity of using eminent domain for private purpose; owners did not file federal action until two years after commencing state court, only after state court issued evidentiary ruling that limited compensation they could recover did they decide to file federal complaint, it was unlikely that owners were unaware of their Fifth Amendment claim prior to that ruling, and owners pled identical equal

protection claims in both actions.

District court did not abuse its discretion in dismissing property owners' action challenging village's use of its eminent domain power to acquire their property on basis of Colorado River abstention; owners filed state action two years before federal action and did not file federal complaint until four days before trial and until after evidentiary ruling that limited compensation they could recover, both suits were about rights in same real property, village had already built road across property, and nothing would have prevented owners from asserting public-use takings claim in state action.

STATUTE OF LIMITATION - IDAHO

Hastings v. Idaho Department of Water Resources

Supreme Court of Idaho, Boise, - February 2024 Term - April 24, 2024 - P.3d - 2024 WL 1750063

Landowner brought action seeking declaratory judgment that Department of Water Resources could no longer pursue an enforcement action against him under Stream Channel Alteration Act, and Department counterclaimed for enforcement of consent order concerning landowner's unauthorized river alterations.

The Fourth Judicial District Court granted summary judgment for Department on counterclaim after taking judicial notice and denying motion for a continuance to conduct discovery. Landowner appealed.

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

- Two-year statute of limitations for enforcement action under Act began running when landowner brought declaratory judgment action;
- Trial court acted within its discretion in taking judicial notice of conditional permit issued by Department for river restoration work;
- Trial court acted within its discretion in denying motion for a continuance to conduct discovery; and

  Department was not entitled to statutory attorney fees on appeal as prevailing party.

EMINENT DOMAIN - ILLINOIS

Alan Josephsen Co. Inc. v. Village of Mundelein

Appellate Court of Illinois, First District - March 8, 2024 - N.E.3d - 2024 IL App (1st) 230641 - 2024 WL 1005468

Recycling company sought judicial review of village's administrative decision, denying certain relocation expenses under federal Uniform Relocation Assistance and Real Property Acquisition Policy Act of 1970 (URA) claimed by recycling company whose property was taken by village through eminent domain.

The Appellate Court held that:

- Village did not violate URA by basing its relocation payments to recycling company on multiple estimates from different moving companies;

- Recycling company failed to demonstrate that village's designee for administrative official adjudged the facts or the law prior to hearing the case, as required for recycling company to show that administrative official was biased;
- Administrative proceedings comported with due process and did not require an evidentiary hearing or additional discovery;
- Village's estimates of self-move relocation costs under URA for recycling company satisfied language of regulations; and
  Sufficient evidence supported village's relocation payments to recycling company under URA, such that administrative official's factual findings were not against manifest weight of the evidence.

MUNICIPAL CORPORATIONS - LOUISIANA

Broome v. Rials

Supreme Court of Louisiana - April 26, 2024 - So.3d - 2024 WL 1825148 - 2023-01108 (La. 4/26/24)

Mayor-president of city-parish and member of council for city-parish filed petition challenging incorporation of area adjacent to city as new municipality against proponents of incorporation.

Proponents filed exceptions of no right of action, which the District Court denied. Following bench trial, the trial court entered judgment for plaintiffs, finding incorporation was unreasonable and would adversely affect city. Proponents appealed, and the First Circuit Court of Appeal granted proponents' re-urged exception of no right of action as to mayor, but denied it as to council member, and affirmed denial of incorporation. Proponents filed separate applications for writ of certiorari.

The Supreme Court held that:

- Member lacked standing to challenge sufficiency of petition for incorporation;
- Member had standing to challenge whether area could provide services within reasonable period of time, and whether incorporation was reasonable;
- Area had sufficient revenue to provide non-parish-provided services within reasonable time, supporting incorporation;
- Factor considering whether area proposed for incorporation had definite characteristics of village weighed in favor of finding that incorporation was reasonable;
- Factor considering whether area residents had taken initial steps toward incorporation weighed in favor of finding that incorporation was reasonable;
- Factor considering whether nearby city had initiated preliminary proceedings toward annexation weighed in favor of finding that incorporation was reasonable; and
- Factor considering whether there had been any financial commitments toward incorporation weighed in favor of finding that incorporation was reasonable.

EMINENT DOMAIN - NEW YORK

Brinkmann v. Town of Southold, New York

United States Court of Appeals, Second Circuit - March 13, 2024 - 96 F.4th 209

Property owners filed § 1983 action alleging that town violated Takings Clause by exercising eminent domain to take their property for creation of park as pretext for defeating their commercial use.

The United States District Court for the Eastern District of New York denied owners' motion for preliminary injunction and dismissed complaint. Owners appealed.

The Court of Appeals held that town's exercise of eminent domain to take property for creation of park did not violate Takings Clause.

Town's exercise of eminent domain to take property for creation of park did not violate Takings Clause, even if town took land to prevent owners' commercial use; public park was public use, town paid fair compensation, and there was no indication that town meant to confer any private benefit or intended to use property for anything other than public park.

POLITICCAL SUBDIVISION - RHODE ISLAND

Preserve at Boulder Hills, LLC v. Kenyon

Supreme Court of Rhode Island - April 24, 2024 - A.3d - 2024 WL 1750068

Following delays in approval of resort and hotel development project, developers brought action against town for violations of substantive due process, tortious interference with contract, tortious interference with prospective business advantages, civil liability for crimes and offenses, and a violation of the civil Racketeer Influenced and Corrupt Organizations (RICO) statute.

The Superior Court granted city's motion for judgment on the pleadings. Developers appealed, and town cross-appealed.

The Supreme Court held that:

- Three-year statute of limitations for claims in tort against a political subdivision applied to developers' claims for civil liability for crimes and offenses;
- As a matter of first impression, three-year statute of limitations for claims in tort against a political subdivision applied to developers' civil RICO claims; and
- Causes of action for tortious interference were not based on any continuing tort which tolled three-year statute of limitations.

EMINENT DOMAIN - TEXAS

Rhone v. City of Texas City, Texas

United States Court of Appeals, Fifth Circuit - February 14, 2024 - 93 F.4th 762

Owner of three apartment buildings in city brought appeal, in state district court, from order of nuisance abatement issued by a Municipal Court of Record, asserting claims under § 1983 for inverse condemnation, denial of procedural due process, and unconstitutional seizure, and seeking declaratory judgment.

After removal by city, the United States District Court for the Southern District of Texas granted summary judgment to city on due process claim, and later granted summary judgment to city on remaining claims. Owner appealed and filed motion to restrain and enjoin damage to or demotion of buildings. The Court of Appeals denied the motion without prejudice, and buildings were demolished by city during pendency of appeal.

The Court of Appeals held that:

- Owner satisfied requirement for exception to mootness, for issues capable of repetition yet evading review, that duration of challenges, to Municipal Court of Record's nuisance finding and court's constitutionality, was too short for complete judicial review and sufficient relief;
- Theoretical possibility of future procedural due process and seizure violations did not support exception to mootness;
- Appeal was not moot as to takings claim; and
- City's imposition of compliance costs for repairing conditions at apartment buildings did not violate doctrine of unconstitutional conditions.

PUBLIC UTILITIES - UTAH

Utah Associated Municipal Power Systems v. 3 Dimensional Contractors Inc.

Court of Appeals of Utah - March 21, 2024 - P.3d - 2024 WL 1202505 - 2024 UT App 35

Interlocal electric energy services agency, a political subdivision of the state formed under Utah Interlocal Cooperation Act (UICA), sued subdivision developer for nuisance and trespass and sought declaratory and injunctive relief, alleging that developer's placement of house on subdivision lot interfered with agency's utility easement.

Developer counterclaimed for declaratory and injunctive relief, seeking removal of agency's support pole and relocation of guy wires that were near house. The Fifth District Court granted summary judgment to agency on its claim for easement interference, awarding declaratory and injunctive relief. The District Court then entered summary judgment in favor of agency on developer's counterclaims and entered final judgment, finding that the agency's trespass and nuisance claims were moot due to agency's election of remedies, and ordering developer to remove any portions of the house encroaching on the easement. The District Court also denied developer's request for attorney fees, pertaining to agency's trespass and nuisance claims, under bad-faith statute. Developer appealed.

The Court of Appeals held that:

- Developer was not required to provide notice of counterclaims to agency under Utah Governmental Immunity Act (UGIA);
- Agency was subject to easement realignment statute, which gave servient estate owners the right to realign municipal easements;
- Realignment statute included right to relocate existing utility infrastructure in the process of realigning boundaries of easement;
- Doctrine of unclean hands did not prevent developer from asserting its rights under easement realignment statute;
- Developer bore burden of proof on realignment claim;
- Expert reports of developer's engineer and surveyor complied with disclosure rule; and
- Developer was not entitled, under bad-faith attorney fees statute, to attorney fees pertaining to agency's trespass claim.

INJUNCTION - WEST VIRGINIA

T & C Construction Services, LLC v. City of St. Albans

Supreme Court of Appeals of West Virginia - April 25, 2024 - S.E.2d - 2024 WL 1793824

City brought enforcement proceeding seeking injunctive relief against operators of residential rental building in connection with citations issued and criminal fines imposed by municipal court for fire prevention and building code violations.

The Circuit Court issued a cease-and-desist order that enjoined operators from operating rental business at building, granted city a money judgment for the criminal fines, and appointed city's counsel as special commissioner to sell the property and satisfy the judgment. Operators appealed.

The Supreme Court of Appeals held that:

- Statute that specifically applied to every judgment for a fine rendered by a circuit court, or other court of record having jurisdiction in criminal cases, rather than statute that referred generally to liens resulting from a judgment, applied;
- City had authority to bring a civil action in Circuit Court to obtain an injunction to enjoin operators from violating city's building and fire prevention codes;
- Circuit Court had jurisdiction to grant city's request for injunctive relief;
- Sufficient evidence supported circuit court's decision to grant injunctive relief; and
- Circuit Court's failure to follow fieri facias statutory process for execution of money judgment precluded, as premature, appointment of city's counsel as special commissioner to sell property to satisfy money judgment.

ZONING & PLANNING - WISCONSIN

Greenwald Family Limited Partnership v. Mukwonago

United States Court of Appeals, Seventh Circuit - April 29, 2024 - F.4th - 2024 WL 1854665

Developer brought action against village which challenged the use of eminent domain to take land for road from developer's five-acre parcel. After the village returned that strip of land, developer filed an amended complaint adding a class of one equal protection claim under the Fourteenth Amendment and several new claims under state law regarding previous unfavorable land use decisions.

Following removal to federal court, the village filed a motion for summary judgment on the equal protection claim. United States District Court for the Eastern District of Wisconsin granted the motion, entered summary judgment for the village, and relinquished jurisdiction over the state-law claims. Developer appealed.

The Court of Appeals held that:

- Village's requirements for final approval of developer's certified survey map before approving developer's proposed division of four-acre parcel from vendor's larger property were clearly rational;
- Village had a rational reason for refusing to construct developer's preferred north–south road connection;
- Villages' refusal to take over the maintenance of a private, unimproved roadway on developer's property without a developer's agreement in place was not a violation of developer's equal protection rights;
- Village's refusal to remove trees from one of developer's properties was reasonable;
- Village's denial of developer's request for tax-incremental financing (TIF) was rational; and
- Imposition of a special assessment on all properties, including developer's property, that benefited from the municipal improvements in development area was rational.

IMMUNITY - ALABAMA

Ex parte City of Montgomery

Supreme Court of Alabama - April 19, 2024 - So.3d - 2024 WL 1685063

Administrator and personal representative of suspect's estate filed a wrongful death complaint against city and police detectives after suspect was shot and killed after she refused detective's commands and struck two detectives with her vehicle.

Defendants filed a motion for summary judgment based on peace-officer immunity. The Circuit Court denied the motion. City and detectives filed a petition for a writ of mandamus directing the circuit court to grant their motion for summary judgment.

The Supreme Court held that police detectives were entitled to peace-officer immunity from liability in wrongful death lawsuit.

EMINENT DOMAIN - FEDERAL

DeVillier v. Texas

Supreme Court of the United States - April 16, 2024 - 601 U.S. - 144 S.Ct. 938

Owners of properties near one side of interstate highway brought actions in state court against State, asserting inverse-condemnation claims under Takings Clause and Texas Constitution, based on allegations of flooding, during a hurricane and a tropical storm, caused by State's projects to facilitate use of highway as flood-evacuation route by installing barrier along highway median to act as dam to prevent stormwater from covering other side of highway.

After removal and consolidation, the United States District Court for the Southern District of Texas adopted the report and recommendation of the United States Magistrate Judge and denied State's motion to dismiss for failure to state a claim certified the order for permissive interlocutory appeal.

The United States Court of Appeals for the Fifth Circuit vacated and remanded, and rehearing en banc was denied. Certiorari was granted.

In a unanimous opinion, the Supreme Court held that inverse-condemnation cause of action under Texas law provides vehicle for claims under the Takings Clause.

The inverse-condemnation cause of action under Texas law provides a vehicle for takings claims based on both the Texas Constitution and the Fifth Amendment's Takings Clause.

ANNEXATION - KENTUCKY

Calhoun v. Tall Oak, LLC

Court of Appeals of Kentucky - March 22, 2024 - S.W.3d - 2024 WL 1222076

City residents, who lived next to property that was formerly country club, appealed decision of city commission to rezone property from agricultural to residential to allow for development of residential subdivision.

The Circuit Court affirmed commission's decision. Residents appealed.

The Court of Appeals held that:

- Residents waived argument that commission failed to comply with statute regarding amendment of comprehensive plan prior to annexation;
- Commission did not exceed its statutory powers in deciding to annex and rezone property without amending its comprehensive plan; and
- Property developer was not required by applicable city ordinances to submit storm water management plan along with rezoning request, and thus, commission's decision was not arbitrary.

City residents, who lived next to property that was formerly country club, waived argument that city commission failed to comply with statute regarding amendment of comprehensive plan prior to annexation, on resident's appeal of trial court's affirmance of commission's decision to rezone property from agricultural to residential to allow for development of residential subdivision, where residents did not raise such argument to city planning commission prior to developer's appeal to city commission.

City commission did not exceed its statutory powers in deciding to annex property that was formerly country club and to rezone property from agricultural to residential to allow for development of residential subdivision without amending its comprehensive plan; commission adopted ordinance expressing its intention to annex property prior to public hearing on application for city to annex and rezone property, commission took final action by adopting separate ordinance reversing decision of city's planning commission and annexing property, no amendment to plan was required to bring zoning amendment into conformity with it, requiring amendment of plan for every change to zoning map would yield absurd results, and other statutes contemplated changes to city zoning map without plan amendment.

Developer, who purchased property that was formerly country club with plan to develop it into residential subdivision, was not required by applicable city ordinances to submit storm water management plan along with request to have property rezoned from agricultural to residential, and thus, city commission's decision to annex and rezone property pursuant to developer's request was not arbitrary; ordinances required submission of storm water management plans as prerequisite for land disturbance activity, rather than initial approval of development plan or approval of rezoning request.

PUBLIC CONTRACTS - LOUISIANA

Robinson-Carter o/b/o Robinson-Carter v. St. John the Baptist Parish School Board

Court of Appeal of Louisiana, Fifth Circuit - April 3, 2024 - So.3d - 2024 WL 143208123-397 (La.App. 5 Cir. 4/3/24)

Unsuccessful bidder, individually and on behalf of her accounting firm, filed complaint against parish school board for detrimental reliance, fraud, and emotional distress, alleging board intentionally misrepresented aspects of its request for qualifications for contract to conduct tax collection services.

In a bench trial, the District Court rendered judgment in favor of board. Bidder appealed.

The Court of Appeal held that:

- Trial court's alleged mischaracterization of bidder's claims as being based on verbal agreement, and court's failure to address unsuccessful bidder's evidence did not constitute reversible error;
- Request's disqualification provision did not apply to warrant disqualifying or assessing lower score to successful bidder's response;
- Unsuccessful bidder could not recover costs incurred preparing response to request for qualifications under theory of detrimental reliance;
- Unsuccessful bidder failed to demonstrate that board misrepresented truth regarding process for analyzing responses to request for qualifications, as required to support fraud claim; and
- Unsuccessful bidder failed to demonstrate that board intended to obtain unjust advantage or to cause damage or inconvenience to bidder, as required to support fraud claim.

IMMUNITY - NEBRASKA

Barber v. State

Supreme Court of Nebraska - April 19, 2024 - N.W.3d - 316 Neb. 398 - 2024 WL 1694663

Inmate brought negligence action against State pursuant to the State Tort Claims Act (STCA), alleging that Department of Correctional Services' (DCS) staff negligently subjected him to an involuntary medication order (IMO) and injected him with antipsychotic medication against his will.

The District Court dismissed for lack of subject matter jurisdiction. Inmate appealed.

The Supreme Court held that:

- Inmate's claim of medical treatment without consent presented a claim of battery, and
- STCA's exception to waiver of sovereign immunity for claims arising out of a battery applied.

Inmate's claim that Department of Correctional Services' (DCS) staff injected him with antipsychotic medication against his will pursuant to an involuntary medication order (IMO) presented a claim of "battery," for purposes of the intentional tort exception to the State's waiver of sovereign immunity under the State Tort Claims Act (STCA); claim alleged medical treatment without consent.

Inmate's claim that Department of Correctional Services' (DCS) staff negligently subjected him to an involuntary medication order (IMO) and injected him with antipsychotic medication against his will was a claim that arose out of an alleged battery and, thus, the intentional tort exception to State's waiver of sovereign immunity under State Tort Claims Act (STCA) applied to bar inmate's claim; gravamen of inmate's complaint was that the acts or omissions of DCS staff in administering medication against his will resulted in his personal injury.

EMINENT DOMAIN - NEVADA

City of Las Vegas v. 180 Land Co., LLC

Supreme Court of Nevada - April 18, 2024 - P.3d - 2024 WL 1689634 - 140 Nev. Adv. Op. 29

Owner of 250-acre former golf course property brought action against city for inverse condemnation following the denials of landowner's development applications for 35-acre parcel, alleging a per se regulatory taking.

After taking evidence and holding multiple hearings, the District Court granted summary judgment for landowner on its takings claims and awarded just compensation, attorney's fees, and prejudgment interest which totaled $48,114,039.30. Landowner and city both appealed.

The Supreme Court held that:

- Zoning ordinance, which designated golf course property as residential planned unit development, prevailed over land designation in master plan which classified the property as "Parks/Schools/Recreation/Open Space";
- Appropriate denominator parcel of land for per se regulatory takings claim was 35 acre parcel for which landowner sought approval of housing project, rather than entire 250 acres;
- Per se regulatory takings claim was ripe;
- Denials of landowner's applications for development constituted a per se regulatory taking;
- Evidence was sufficient to support finding that valuation of 35-acre parcel at its highest and best use was $34,135,000 as stated in landowner's expert's report; and
- Landowner was not entitled to interest at a rate that would reimburse it for the purported profit it lost had it been able to develop the land.

PREJUDGMENT INTEREST - OHIO

Vandercar, L.L.C. v. Port of Greater Cincinnati Development Authority

Supreme Court of Ohio - April 23, 2024 - N.E.3d - 2024 WL 1723420 - 2024-Ohio-1501

Purchaser of hotel brought action against assignee of purchaser's interest in hotel, which was city port authority, for breach of contract arising out of assignee's failure to pay purchaser redevelopment fee, under assignment agreement.

The Court of Common Pleas granted purchaser's motion for summary judgment but denied its motion for prejudgment interest. Both parties appealed. The First District Court of Appeals affirmed. Purchaser appealed, and the Supreme Court accepted jurisdiction.

The Supreme Court held that port authority, as assignee of purchaser's interest in hotel, was liable to pay prejudgment interest to purchaser for breach of redevelopment agreement, abrogating Beifuss v. Westerville Bd. of Edn., 37 Ohio St.3d 187, 525 N.E.2d 20, State ex rel. Brown v. Milton-Union Exempted Village Bd. of Edn., 40 Ohio St.3d 21, 531 N.E.2d 1297, and State ex rel. Stacy v. Batavia Local School Dist. Bd. of Edn., 105 Ohio St.3d 476, 829 N.E.2d 298.

Port authority, as assignee in assignment agreement, was liable to pay prejudgment interest to assignor, for port authority's breach of agreement by failing to pay redevelopment fee as required under agreement, although port authority argued that, because it was state actor, it was immune from liability for prejudgment interest; statutes governing immunity from liability for port authorities did not include immunity for prejudgment interest, and no exception to application of prejudgment interest for judgments requiring payment of money arising out of a contract existed.

Where a statute does not expressly exempt a subordinate political subdivision from its operation, the exemption therefrom does not exist; abrogating Beifuss v. Westerville Bd. of Edn., 37 Ohio St.3d 187, 525 N.E.2d 20, State ex rel. Brown v. Milton-Union Exempted Village Bd. of Edn., 40 Ohio St.3d 21, 531 N.E.2d 1297, and State ex rel. Stacy v. Batavia Local School Dist. Bd. of Edn., 105 Ohio St.3d 476, 829 N.E.2d 298.

MUNICIPAL ORDINANCE - ALABAMA

City of Gulf Shores v. Coyote Beach Sports, LLC

Supreme Court of Alabama - April 12, 2024 - So.3d - 2024 WL 1592183

Company that rented out motor scooters, which were deemed motor-driven cycles under state law, brought action against city for a judgment declaring that city ordinance that required renters of motor scooters to have a motorcycle license or motorcycle license endorsement was invalid.

Company also sought monetary damages and attorney fees and costs.

After a jury trial, the Circuit Court entered final judgment that declared that the ordinance was preempted by state law and that awarded company compensatory damages pursuant to the jury's verdict. and the Court later entered an order that awarded company attorney fees. City appealed both the judgment and the order, and the Supreme Court consolidated those appeals.

The Supreme Court held that state law did not preempt the ordinance.

MUNICIPAL CORPORATIONS - CALIFORNIA

City of Santa Cruz v. Superior Court of Santa Cruz County

Court of Appeal, Sixth District, California - April 16, 2024 - Cal.Rptr.3d - 2024 WL 1633744

City filed petition for writ of mandate directing the Superior Court to vacate order sustaining in part and overruling in part city's demurrer and to enter new order sustaining demurrer to county's entire first amended complaint alleging county incurred more than $1.2 million in costs for emergency repairs to portion of road located within city's jurisdiction on ground that county failed to plead its compliance with city ordinance's claim-presentation requirement.

The Court of Appeal held that:

- City ordinance applied to claims expressly excepted by the Government Claims Act from its claim-presentation requirement, and
- City ordinance applied to all of county's claims against city, including cause of action for declaratory relief.

Phrase "not governed by," as used in city ordinance establishing pre-suit presentation requirement for claims which were not governed by Government Claims Act section imposing presentation requirement for all claims except for enumerated claims, encompassed claims expressly excepted by the Act from its claim-presentation requirement, even if using "not excepted by" instead of "not governed by" would have been clearer; ordinance expressed clear intent to broadly impose requirement, such that there would be no reason why city would adopt ordinance expressly excluding claims already excluded by Government Claims Act, and ordinance language and structure tracked Government Claims Act section empowering local public entities to establish presentation policies and procedures for exempted claims.

City ordinance establishing pre-suit presentation requirement for claims which were not governed by Government Claims Act section imposing presentation requirement for all claims except for enumerated claims applied to all of county's claims against city in connection with $1.2 million incurred by county for emergency repairs to portion of road located within city's jurisdiction,

including cause of action for declaratory relief; primary purpose of county's action was to obtain damages.

LIABILITY - GEORGIA

Fleureme v. City of Atlanta

Court of Appeals of Georgia - April 12, 2024 - S.E.2d - 2024 WL 1594606

Plaintiff filed suit against city and city employee for injuries sustained when employee "failed to yield" and struck plaintiff on public sidewalk.

City filed motion to dismiss due to plaintiff's noncompliance with ante litem notice statute. The State Court granted motion, and plaintiff appealed.

The Court of Appeals held that:

- General service statute did not control over specific statute governing claim for money damages against municipality, which mandated that service of ante litem notice of such claim "shall be served" upon mayor or chairperson of city council or city commission "personally or by certified mail or statutory overnight delivery";
- Plaintiff's service by statutory overnight mail of ante litem notice of claim with envelope addressed to "[city] City Hall[, city] City Council" failed to strictly comply with statute mandating that notice of claim be served upon mayor or chairperson of city council or city commission, as prerequisite to suit; and
- Service by statutory overnight mail of ante litem notice with envelope mailing label addressed to "Office of the Mayor," failed to strictly comply with statute mandating that ante litem notice of claim be served upon mayor or chairperson of city council or city commission.

PUBLIC RECORDS - NEW JERSEY

American Civil Liberties Union of New Jersey v. County Prosecutors Association of New Jersey

Supreme Court of New Jersey - April 17, 2024 - A.3d - 2024 WL 1644543

Civil rights group brought action against nonprofit organization comprised of county prosecutors seeking order compelling production of requested documents, including meeting minutes and funding records, as well as declaratory judgment stating that organization was subject to Open Public Records Act (OPRA) and common law public right of access.

The Superior Court granted organization's motion to dismiss for failure to state a claim. Civil rights group appealed. The Superior Court, Appellate Division, affirmed. Civil rights group's petition for certification was granted.

The Supreme Court held that:

- Organization was not a "public agency" required to disclose records pursuant to OPRA, and
- Organization was not a "public entity" subject to common law right of access to records.

Nonprofit organization comprised of county prosecutors was not a "public agency" required to

disclose its records pursuant to the Open Public Records Act (OPRA); organization was distinct from county prosecutors, not their alter ego, it instead constituted an association in which county prosecutors were members and had no constitutional or statutory powers of any kind, nor was it authorized to investigate, arrest, or prosecute anyone.

Nonprofit organization comprised of county prosecutors was not a "public entity" subject to common law right of access to records and accordingly was not required to provide requested documents concerning meeting minutes and membership to civil rights group; organization was a private, tax-exempt, and unstaffed entity, its governing body was comprised of seven voting members, no statute, regulation, or other mandate required organization to create or maintain the documents in dispute, and the documents were not maintained in a public office.

SCHOOL FUNDING - OKLAHOMA

Independent School District #52 of Oklahoma County v. Walters

Supreme Court of Oklahoma - April 2, 2024 - P.3d - 2024 WL 1399463 - 2024 OK 23

School districts brought action for writs of mandamus against defendants including Department of Education, alleging that districts received insufficient state aid payments for certain years. Other school districts intervened, and case was consolidated with a separate action that had been filed with another school district.

The District Court granted summary judgment to intervening districts, finding no requirement for defendants to seek repayment of excessive state aid payments made to certain schools until an audit was performed by auditors approved by the State Auditor and Inspector.

Plaintiff districts appealed. The Supreme Court affirmed in part, reversed in part, and remanded for District Court to adjudicate whether school districts had standing to bring claims. On remand, the District Court granted defendants' summary judgment motion, and denied plaintiffs cross-motion for summary judgment. Plaintiffs appealed.

The Supreme Court held that:

- State aid funds were general revenue funds that had lapsed within 30 months of their appropriation;
- State Board of Education's statutory mechanism for recoupment of state aid funds did not confer standing on school districts to seek to recover funds from lapsed past appropriations of state aid through mandamus action;
- State aid funds sought by school districts were not ad valorem revenue;
- Tolling exception did not apply; and
- Date to determine whether state aid appropriations sought by school districts had lapsed was the date school districts commenced action in District Court.

PUBLIC CONTRACTS - TEXAS

Campbellton Road, Ltd. v. City of San Antonio by and through San Antonio Water System

Supreme Court of Texas - April 12, 2024 - S.W.3d - 2024 WL 1590000

Property developer, which owned 585 acres within city's extra-territorial division, brought breach of contract and declaratory judgment action against city by and through city's water agency, arising from water agency's agreement with developer that agency would provide sewer service for proposed residential developments on property.

The 150th District Court denied water agency's plea to the jurisdiction, and motion to dismiss for lack of subject matter jurisdiction. Water agency filed interlocutory appeal. On appeal, the San Antonio Court of Appeals reversed and remanded, finding the Local Government Contract Claims Act did not apply to waive city's immunity. Developer filed petition for review.

The Supreme Court held that:

- Developer sufficiently pleaded that written, bilateral contract was formed, as would support waiver of city's sovereign immunity under the Act;
- Developer sufficiently pleaded that written, unilateral contract was formed, as would support waiver of city's sovereign immunity under the Act;
- Contract terms contemplated that agency had right to developer's participation in project upon contract signing, as would support waiver of city's sovereign immunity under the Act; disapproving *Big Blue Props. WF, LLC v. Workforce Res., Inc.*, 2022 WL 1793516; *W. Travis Cnty. Pub. Util. Agency v. Travis Cnty. Mun. Util. Dist. No. 12*, 537 S.W.3d 549; *CHW-Lattas Creek, L.P. v. City of Alice*, 565 S.W.3d 779;
- Contract terms contemplated provision of payment to developer, as required to trigger waiver of sovereign immunity under the Act; and
- Developer sufficiently pleaded that contract contemplated provision of services to agency, as required to trigger waiver of sovereign immunity under the Act.

PUBLIC CONTRACTS - TEXAS

San Jacinto River Authority v. City of Conroe

Supreme Court of Texas - April 12, 2024 - S.W.3d - 2024 WL 1590001

Private utilities filed suit against San Jacinto River Authority (SJRA), claiming breach of groundwater reduction plan (GRP contracts. SJRA filed counterclaims against utilities and third-party claims against cities, claiming breach of GRP contracts by failing to pay required water rates and pumpage fees for surface water sold to cities in order to transition from groundwater use to surface water use.

The 284th District Court granted cities' pleas to jurisdiction, asserting their statutory immunity had not been waived under Local Government Contract Claims Act, and dismissed SJRA's claims against cities. SJRA filed interlocutory appeal. The Beaumont Court of Appeals affirmed. SJRA petitioned for review.

The Supreme Court held that:

- In matter of first impression, contractual adjudication procedures made enforceable by Local Government Contract Claims Act are not limitations on Act's immunity waiver;
- Government Code provision stating that statutory prerequisites to suit were jurisdictional in suits against governmental entity did not apply;
- Pre-suit mediation procedures in GRP contracts did not apply; and
- GRP contracts stated essential terms so cities waived immunity.

COMMON INTEREST COMMUNITIES - CALIFORNIA

Colyear v. Rolling Hills Community Association of Rancho Palos Verdes

Court of Appeal, Second District, Division 4, California - March 1, 2024 - 100 Cal.App.5th 110 - 318 Cal.Rptr.3d 805 - 2024 Daily Journal D.A.R. 1805

Following initial dismissal of neighbor from lawsuit, subdivision filed amended complaint against community association, seeking declaratory relief, an injunction, quiet title relief, and damages for breach of fiduciary duty arising out of the association's tree-trimming covenant.

The Superior Court, Los Angeles County, entered judgment for lot owner on his claims for declaratory and injunctive relief and for breach of fiduciary duty, but denied quiet title claim. Association appealed, and lot owner cross-appealed.

The Court of Appeal held that:

- Original declaration containing tree cutting covenant, on its own terms, did not apply to lot owner's property;
- Subsequent subdivision declaration which applied to lot owner's property did not sufficiently incorporate tree cutting covenant;
- References to original subdivision declaration in subsequent declaration did not put lot owner on constructive or inquiry notice; and
- Lot owner's enjoyment of benefits of subdivision's roads, gates, and other facilities did not subject him to tree trimming covenant.

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EMINENT DOMAIN - FEDERAL

Hyatt v. United States

United States Court of Federal Claims = March 13, 2024 - Fed.Cl. - 2024 WL 1090727

In rails-to-trails case, owners of property adjacent to and underlying rail corridor right-of-way filed suit claiming just compensation for taking of their property allegedly effected by Surface Transportation Board (STB) issuing notice of interim trail use (NITU), railbanking corridor, and authorizing interim recreational trail use, under National Trails System Act.

Parties cross-moved for summary judgment.

The Court of Federal Claims held that:

- Taking was effected by issuing NITU and expanding easement that was meant specifically for railroad purposes;
- Genuine disputes of material fact remained as to precise dimensions of taking; and
- Owners were entitled to complete expert discovery as to property valuation.

EMINENT DOMAIN - FEDERAL

Sheetz v. County of El Dorado, California

Supreme Court of the United States - April 12, 2024 - S.Ct. - 2024 WL 1588707

Landowner filed petition for writ of mandate and complaint for declaratory and injunctive relief, challenging $23,420 traffic impact mitigation fee imposed by county, as a condition of issuing him a building permit for the construction of a single-family residence on his property, as violating the California Mitigation Fee Act as well as the Takings Clause of the United States Constitution.

The Superior Court sustained county's demurrer in part and denied the petition for writ of mandate. Landowner appealed, and the Third District Court of Appeal affirmed. After the California Supreme Court denied further review, landowner petitioned the United States Supreme Court for certiorari review. Certiorari was granted.

In a unanimous opinion, the Supreme Court held that the Nollan/Dolan test for determining whether a fee imposed as a condition for a land use permit constitutes an unconstitutional taking under the Fifth Amendment applies to both legislative and administrative permit conditions; abrogating St. Clair Cty. Home Builders Assn. v. Pell City, 61 So. 3d 992, and Home Builders Assn. of Central Ariz. v. Scottsdale, 187 Ariz. 479, 930 P. 2d 993.

BOND VALIDATION - FLORIDA

Florida PACE Funding Agency v. Pinellas County

District Court of Appeal of Florida, Second District - March 27, 2024 - So.3d - 2024 WL 1288194

Florida PACE Funding Agency (FPFA) is a local government entity created under section 163.01(7), Florida Statutes (2010). It finances energy conservation and hurricane "hardening" improvements on residential and commercial properties.

FPFA entered into an interlocal agreement in 2019 to operate a non-residential PACE program within Pinellas County. FPFA agreed that, in addition to the limitations and requirements of applicable state and federal law, it must also comply with the limitations and requirements of the County PACE Ordinance.

In October 2022, a circuit court in Leon County validated a series of FPFA bonds worth up to $5 billion. "Significantly, that same judgment includes language that seemingly permits FPFA to finance commercial and residential improvements statewide, without regard to municipal or county ordinances that regulate PACE local governments."

"With the bond validation judgment in its pocket, FPFA sent a letter to the County on January 20, 2023, notifying the County that it was terminating the interlocal agreement effective March 21, 2023, and stating, 'Henceforth, the [FPFA's] program will be conducted independently, and not under the Agreement.' FPFA asserted that the '[judicial validation] process clarified that the [FPFA] has independent authority to carry out its mission of offering PACE financing statewide, without requiring additional efforts from individual counties or cities.'

In the County's subsequent suit, and without weighing in on the merits of FPFA's claims, the District Court of Appeal upheld the interlocal agreement's broad forum selection clause and denied FPFA's motion for a change of venue.

EMINENT DOMAIN - GEORGIA

City of Canton v. Brandreth Holdings, LLC

Court of Appeals of Georgia - April 1, 2024 - S.E.2d - 2024 WL 1360766

Property owners, which were two limited liability companies (LLCs), brought inverse-condemnation action against city, alleging that city failed to maintain its sewer system and failed to make necessary improvements and repairs in a timely manner, causing damage to owners' property that constituted a taking for which compensation was due.

The Superior Court denied city's motion to dismiss. Upon grant of its application for interlocutory appeal, city appealed.

The Court of Appeals held that owners were not required to provide notice pursuant to municipal ante litem notice statute before bringing their claim.

MUNICIPAL ORDINANCE - ILLINOIS

Cammacho v. City of Joliet

Supreme Court of Illinois - April 4, 2024 - N.E.3d - 2024 IL 129263 - 2024 WL 1449094

Commercial truck drivers filed complaint for review of decision of city administrative hearing officer finding drivers liable, under city ordinance, for driving semitruck trailers on posted "No Truck" routes and nondesignated state or local roadways, and imposing fines.

The Circuit Court affirmed. Drivers appealed. The Appellate Court reversed. City's appeal was allowed.

The Supreme Court held that:

- Municipal Code did not operate as jurisdictional limit on a home rule municipality's authority to administratively adjudicate violations of its ordinances; overruling Catom Trucking, Inc. v. City of Chicago, 351 Ill.Dec. 797, 952 N.E.2d 170, but
- City's ordinances regulating weight and length of vehicles driving over nondesignated state or local roadways were similar to Vehicle Code provisions regulating movement of vehicles over a certain weight or length, so that violations of ordinances were "reportable offenses," within meaning of Vehicle Code and city's administrative adjudication code, and thus, city ordinances required that drivers appear in circuit court.

Even if General Assembly intended that definition of "system of administrative adjudication" set forth in Municipal Code, which definition excluded municipal offenses that were similar to offenses prohibited in traffic regulations governing movement of vehicles or to reportable offenses under Vehicle Code, would operate as jurisdictional limit on a home rule municipality's authority to administratively adjudicate violations of its ordinances by issuing orders, General Assembly did not satisfy requirement, for valid limit of a home-rule municipality's constitutional powers, of expressly stating that a home-rule municipality's constitutional powers would be limited; overruling *Catom Trucking, Inc. v. City of Chicago*, 351 Ill.Dec. 797, 952 N.E.2d 170.

Home rule city's ordinances regulating weight and length of vehicles driving over nondesignated state or local roadways were similar to Vehicle Code provisions regulating movement of vehicles

over a certain weight or length, so that violations of ordinances were "reportable offenses," within meaning of city's administrative adjudication code, which incorporated Code's definition of that term, and thus, city ordinances required that commercial truck drivers be issued uniform traffic citations, rather than notices of ordinance violation, and that drivers be required to appear in circuit court to have their objections adjudicated, rather than appearing at city's code hearing unit, though city ordinances differed from Code in method used to measure weight of vehicles, maximum weight allowed, and designation of specific truck routes in city.

PUBLIC EMPLOYMENT - MISSISSIPPI

Barker v. Ivory

Supreme Court of Mississippi - April 2, 2024 - So.3d - 2024 WL 1406576

Objector filed petition for judicial review challenging finding of political party's executive committee that candidate for city alderman was a qualified candidate.

After evidentiary hearing, the Circuit Court entered judgment finding candidate not qualified for failure to satisfy residency requirement. Candidate appealed.

The Supreme Court, en banc, held that evidence was sufficient to support finding that candidate was a resident of city in another state rather than of city in which candidate sought office of alderman, as would preclude candidate from being qualified to be placed on ballot.

Evidence was sufficient to support finding, after evidentiary hearing before bench, that candidate for city alderman was a resident of city in another state rather than of city in which candidate sought office of alderman, as would preclude candidate from being qualified to be placed on ballot; home in which candidate asserted he resided in city in which office was sought was owned by candidate's late aunt's husband rather than by candidate, candidate owned several properties in city in other state, candidate had claimed homestead exemption on one of those properties for previous 11 years, and candidate remained a registered voter in other state.

PUBLIC LANDS - MISSISSIPPI

State v. Aldrich

Supreme Court of Mississippi - April 4, 2024 - So.3d - 2024 WL 1455595

Owners of acre of coastal land and others filed complaint challenging Secretary of State's preliminary drawing of map demarcating boundary line between owner's property and State-owned Public Trust Tidelands.

State answered and filed counterclaim that it held fee simple title to disputed property.

The Chancery Court granted State's motion to dismiss plaintiffs' complaint for failure to prosecute, but did not dismiss State's counter-claim, granted motions by city, county, and public school district to intervene.

After both owners passed, owner's son filed amended answer to State's counterclaim. Following

bench trial, the Chancery Court entered judgment for owner's son, and State appealed.

The Supreme Court held that:

- City, county, and public school district were entitled to intervene as of right;
- State did not acquire disputed acre of coastal land from United States in 1817 when Mississippi became state;
- Chancery court's dismissal with prejudice of son's complaint for failure to prosecute did not conclusively establish boundaries in map as final and therefore no longer subject to revision, on son's answer to State's counterclaim that was not dismissed;
- Evidence supported finding that artificial accretions to subject coastal land from accumulation of oyster shells that were replanted on reefs and dredging operations by United States Army Corps of Engineers prior to July 1, 1973 were done pursuant to legislative enactment and for higher purpose, and thus property accretions accrued to owner's son, and not State; and
- Supreme Court would not apply doctrine of equitable estoppel to estop State from asserting that disputed acre of coastal land that lay north of shoreline was included in Public Trust Tidelands.

ZONING & PLANNING - NEW HAMPSHIRE

Mojalaki Holdings, LLC v. City of Franklin

Supreme Court of New Hampshire - April 9, 2024 - A.3d - 2024 N.H. 17 - 2024 WL 1514612

Landowner and solar energy company appealed decision of the city planning board that denied a site plan application to install a solar panel array.

The Superior Court affirmed, and landowner and company appealed.

The Supreme Court held that:

- Planning board improperly relied on purpose provisions of city site plan regulations when denying application, and
- Landowner and solar energy company were entitled to builder's remedy to construct proposed solar panel array.

City planning board improperly relied on purpose provisions of city site plan regulations when denying application to install solar panel array which satisfied all of the site-specific technical regulations applicable to the project; board, which had concerns about constructing the solar panel array in a rural residential area, relied on purpose provisions stating that the regulations were to provide for harmonious and aesthetically pleasing development, to provide for building purposes which would not endanger the health, safety, and welfare of the general public and the abutting properties, and provide for the protection of trees and other natural features.

Landowner and solar energy company were entitled to builder's remedy to construct proposed solar panel array, where their site plan application met the specific, applicable site plan regulations, and planning board improperly relied on purpose provisions of the city site plan regulations to deny the application.

ZONING & PLANNING - NEW HAMPSHIRE

Newfound Serenity, LLC v. Town of Hebron

Supreme Court of New Hampshire - April 3, 2024 - A.3d - 2024 WL 1423559

Site plan applicant petitioned for judicial review of decisions of town planning board and town zoning board of adjustment (ZBA) relating to planning board's denial of application for site plan approval for seasonal recreational vehicle park, after town housing appeals board (HAB) dismissed applicant's initial appeal as untimely and ZBA then ruled on applicant's appeal to ZBA.

The Superior Court dismissed. Applicant appealed.

The Supreme Court held that:

- Applicant's complaint seeking judicial review two weeks after ZBA finally resolved appeal was timely, and
- HAB's dismissal of premature appeal did not have preclusive effect as to appeals to superior court from planning board and ZBA decisions.

Site plan applicant's complaint seeking judicial review of decisions of town planning board and town zoning board of adjustment (ZBA) relating to planning board's denial of application for site plan approval for seasonal recreational vehicle park was timely, where applicant filed complaint approximately two weeks after ZBA finally resolved applicant's appeal via dismissal of applicant's motion for rehearing.

Town housing appeals board's (HAB) dismissal of site plan applicant's premature appeal of town planning board's adverse decision, while applicant's appeal of planning board's decision to town zoning board of adjustment (ZBA) was pending, did not foreclose applicant from pursuing its complaint in superior court seeking review of both the planning board and ZBA decisions, which related to applicant's proposed seasonal recreational vehicle park, since the applicable statutes contemplated final resolution of zoning-related issues by ZBA before an appeal of a planning board decision to the superior court or the HAB became timely.

BONDS - ARIZONA

Greenwich Investment Management Incorporated v. Aegis Capital Corporation

United States District Court, D. Arizona - March 18, 2024 - Slip Copy - 2024 WL 1156568

In 2019, Greenwich Investment Management Inc. (Plaintiff) purchased from Aegis Capital Corp. (Defendant or Underwriter) two series of municipal bonds issued by the Arizona Industrial Authority for $22,040,000. Plaintiff initially did not purchase the bonds for itself, but rather on behalf of its clients as their investment adviser.

The bonds were meant to fund the operations of Harvest Gold Silica, Inc. (HGS), which is in the business of remediating mine solid waste into silica-based products.

Defendant underwrote the bonds and published several documents meant to induce Plaintiff's purchase.

In 2020, UMB Bank, N.A., the trustee for the bonds, found HGS to be insolvent.

In June 2021 – after HGS was declared insolvent and a few months before Plaintiff filed the first

complaint related to this suit – Plaintiff purchased a $5,000 Series 2019B bond and a $5,000 Series 2019A bond on the secondary market for its own account.

Plaintiff brought this suit against Underwriter, alleging violations of the Arizona Securities Act, the Connecticut Securities Act, and the Texas Securities Act, as well as raising claims of fraud and negligent misrepresentation.

Defendants moved to dismiss Plaintiff's claims, arguing that the Court lacked subject matter jurisdiction. Specifically, Defendants argued that Plaintiff did not have standing to pursue its claims because Plaintiff lacked the minimum requirement for an injury-in-fact – that a plaintiff have legal title to, or a proprietary interest in, the claim.

As an initial matter the District Court held that to have an injury-in-fact, a plaintiff must have legal title to, or a proprietary interest in, the claims asserted. It is not enough that plaintiff is the attorney-in-fact for its clients and has discretionary authority to make investments on their behalf.

In its Complaint, Plaintiff alleged that it "purchased all of the bonds, some for its own account and some for its clients" and thus alleged it suffered an injury-in-fact. But Defendants, making a factual attack, point to evidence refuting Plaintiff's allegation that it purchased any of the bonds for itself at the initial issuance. However, Plaintiff later conceded that it had purchased the full bond amount "on its clients' behalf."

Plaintiff argued that its allegation in the Complaint that it purchased some bonds for its own account and some bonds for its clients was technically not incorrect because Plaintiff purchased two $5,000 bonds (of the $22 million sold) for its own account. But Plaintiff purchased those two bonds on the secondary market, two years after the initial issuance and after UMB Bank had declared HGS to be insolvent. Plaintiff conceded that its claims against Defendants based on purchases Plaintiff made for its clients relying on alleged misrepresentations leading up to the initial issuance could not also be premised on the two bonds Plaintiff purchased for its own account on the secondary market two years later.

"The Complaint otherwise fails to allege injury to Plaintiff, only to Plaintiff's clients. The Complaint also does not include any allegation that Plaintiff's clients have assigned their claims to Plaintiff. In its Response, Plaintiff informed the Court that it has since obtained 181 assignments from its bond-buying clients and, as such, Plaintiff requests leave to amend the Complaint. But these recent assignments do not affect the Court's analysis of whether Plaintiff's Complaint establishes constitutional standing. Because Plaintiff has not pled facts sufficient to demonstrate legal title to, or a proprietary interest in, the claims brought, Plaintiff has not pled an injury-in-fact and does not have standing to pursue its claims."

The Court noted that a supplemental pleading (even if characterized as a motion to amend) can be used to cure a jurisdictional defect, in this case Plaintiff's assignments from its bond-buying clients.

However, "While the Court recognizes there is a presumption to allow a plaintiff to supplement the complaint in ordinary circumstances under *Eminence Capital, LLC*, 316 F.3d at 1052, the Court finds the dilatory tactics on the part of Plaintiff and resulting undue prejudice to Defendants rise to such a level in this case that the Court must exercise its discretion to deny Plaintiff's request to supplement the Complaint."

ZONING & PLANNING - CALIFORNIA

Aids Healthcare Foundation v. Bonta

Court of Appeal, Second District, Division 2, California - March 28, 2024 - Cal.Rptr.3d - 2024 WL 1336414

Objectors petitioned for writ of mandate against State, alleging that statute granting local legislative bodies, including those of charter cities, the discretion to supersede local housing density caps, including caps adopted by voter initiative, on a parcel-by-parcel basis facially violated the state constitutional power of voter initiative.

The Superior Court, Los Angeles County, denied petition. Objectors appealed.

The Court of Appeal held that:

- Statute satisfied requirements to displace local laws affecting municipal affairs of charter cities;
- Statute displaced local housing density caps under law governing preemption of local laws by state law;
- Statute satisfied the more exacting standard for preemption of local voter initiatives;
- Legislature's delegation of parcel-by-parcel discretion did not violate the power of initiative; and
- Already-existing initiative-based caps were not excepted from local discretion to supersede.

Statute granting local legislative bodies, including those of charter cities, the discretion to supersede local housing density caps, including caps adopted by voter initiative, on a parcel-b--parcel basis addressed a statewide concern of housing shortage and was reasonably related to addressing that concern, as required for statute to displace local laws affecting municipal affairs of charter cities, where sub-issue of ensuring affordable housing had been a matter of statewide concern as well as statutes directed at localities for many years, rise in housing prices at every income level in state was logically linked to insufficient supply of housing at all income levels, and task of ensuring a great supply of housing was one that was logically handled at state level to avoid local government susceptibility to "not in my backyard" (NIMBY) pressure.

Local housing density caps, including caps adopted by voter initiative, conflicted with and were inimical to statute granting local legislative bodies, including those of charter cities, the discretion to supersede local housing density caps on a parcel-by-parcel basis under certain circumstances, and therefore statute effected a limited preemption of local housing density caps; local caps prohibited what the statute permitted or authorized.

Statute granting local legislative bodies, including those of charter cities, the discretion to supersede local housing density caps, including caps adopted by voter initiative, on a parcel-b--parcel basis preempted local housing density caps, where statute sought to promote higher density housing projects and allow for more stringent local regulation of housing projects, but local housing density caps were being used to frustrate the statute's purpose.

Statute granting local legislative bodies, including those of charter cities, the discretion to supersede local housing density caps, including caps adopted by voter initiative, on a parcel-b--parcel basis preempted local housing density caps based on conflict preemption, despite argument that the statute would not always alter the outcome of individual zoning decisions because a local legislative body might elect not to supersede a local cap; there was a conflict regardless of whether the outcomes might have been different for any given zoning decision, since the local caps prohibited what the statute authorized, that being the discretion to supersede.

Statute granting local legislative bodies, including those of charter cities, the discretion to supersede local housing density caps, including caps adopted by voter initiative, on a parcel-b--parcel basis preempted local housing density caps based on conflict preemption, despite argument that it was possible to ask the local electorate whether to supersede an initiative-based housing density cap, thereby sidestepping any conflict, where main reason the Legislature enacted statute was because local electorates were blocking attempts to increase housing density, and the suggestion that the statute's mechanism could be swapped out for "letting the voters decide" on a parcel-by-parcel basis would have perpetuated the existing paralysis and completely frustrated a main reason for the statute's enactment.

Statute granting local legislative bodies, including those of charter cities, the discretion to supersede local housing density caps, including caps adopted by voter initiative, on a parcel-b--parcel basis satisfied the more exacting standard for preemption of local voter initiatives, where express statutory language, including a separate and higher procedural requirement for superseding an initiative-based housing density cap than for superseding a legislatively-enacted cap, left no doubt that the Legislature explicitly contemplated that the statute would be used to supersede local voter initiatives.

Legislature's delegation of its preemptive power to local legislative bodies, including charter cities, via statute granting local legislative bodies the discretion to supersede local housing density caps, including caps adopted by voter initiative, on a parcel-by-parcel basis did not facially violate the state constitutional power of voter initiative; Legislature could have passed a state law that preempted all local housing density caps instead of granting parcel-by-parcel discretion to local legislative bodies, and imbuing local legislative bodies with the discretion on whether to supersede local caps was ostensibly more solicitous of the initiative power than a wholesale invalidation of all local caps in the state.

Statute granting local legislative bodies, including those of charter cities, the discretion to supersede local housing density caps, including caps adopted by voter initiative, on a parcel-b--parcel basis applied to existing local caps adopted by initiative, despite argument that existing initiatives operated as a preemptive decision by local jurisdictions not to supersede local caps, where statute did not have an exception for already-existing initiatives, denying local legislative bodies the discretion to supersede existing caps would have substantially narrowed local legislative bodies' discretion, and treating previously made substantive decisions enacted through voter initiative as forever binding would have frustrated statute's purpose in addressing severe shortage of housing in state.

EMINENT DOMAIN - FEDERAL

Nicholson v. United States

United States Court of Federal Claims - March 13, 2024 - Fed.Cl. - 2024 WL 1090607

In rails-to-trails case, owners of property adjacent to and underlying rail corridor right-of-way filed suit claiming just compensation for taking of their property allegedly effected by Surface Transportation Board (STB) issuing notice of interim trail use (NITU), railbanking corridor, and authorizing interim recreational trail use, under National Trails System Act.

Parties cross-moved for summary judgment.

The Court of Federal Claims held that:

- Taking was effected by issuing NITU and expanding easement that was meant specifically for railroad purposes;
- Genuine disputes of material fact remained as to precise dimensions of taking; and
- Owners were entitled to complete expert discovery as to property valuation.

PUBLIC EMPLOYMENT - GEORGIA

Olsen v. State

Court of Appeals of Georgia - March 12, 2024 - S.E.2d - 2024 WL 1066937

Defendant, who was police officer, was convicted in the Superior Court, DeKalb County, LaTisha Dear Jackson, J., of aggravated assault, violation of oath by public officer based upon a violation of county police department's use of force policy, and violation of oath by a public officer based upon making a false statement.

Defendant appealed.

The Court of Appeals held that:

- Directives contained in police department's use-of-force policy were in conflict with Georgia's law of self-defense, and thus, these directives were null and void;
- Trial court erred by admitting into evidence police department's use-of-force policy without first identifying and redacting those portions of policy that conflicted with Georgia's law of self-defense;
- Evidence was legally sufficient to sustain defendant's conviction on aggravated assault, such that he could be retried on that count should the State opt to do so; and
- Evidence was not legally sufficient to sustain defendant's conviction for violation of oath of office, and thus, he could not be retried on that count should the State opt to do so.

ZONING & PLANNING - MAINE

Brooks v. Town of Bar Harbor

Supreme Judicial Court of Maine - March 26, 2024 - A.3d - 2024 WL 1261185 - 2024 ME 21

Real property owners brought action seeking declaratory judgment that town's amendment to its land use ordinance regarding vacation rentals was void because it was passed with less than a supermajority.

The Superior Court granted town's motion for summary judgment, and property owners appealed.

The Supreme Judicial Court held that only simple majority vote was required for town to adopt amendment.

As town's charter did not provide otherwise, only simple majority vote was required for town to adopt amendment to its land use ordinance regarding vacation rentals.

PUBLIC EMPLOYMENT - NEBRASKA

Simpson v. Lincoln Public Schools

Supreme Court of Nebraska - March 22, 2024 - N.W.3d - 316 Neb. 246 - 2024 WL 1221975

Terminated employee of public school district brought wrongful discharge action against school district, alleging that termination was retaliation for filing workers' compensation claim, and thus violation of Nebraska public policy.

Asserting an immunity defense under the discretionary function exemption of the Political Subdivisions Tort Claims Act (PSTCA), school district moved for summary judgment. Finding that school district was not entitled to immunity, the District Court denied summary judgment motion. School district appealed and petitioned to bypass review by the Court of Appeals, which was granted.

The Supreme Court held that:

- Denial of school district's summary judgment motion was appealable as a final order;
- Employee's termination involved an element of judgment; and
- As matter of apparent first impression, employee's termination involved judgment of the kind that PSTCA's discretionary function exemption was designed to shield.

EMINET DOMAIN. - PENNSYLAVANIA

Borough of Pleasant Hills v. Commonwealth Department of Transportation

Commonwealth Court of Pennsylvania - March 6, 2024 - A.3d - 2024 WL 948162

Borough filed complaint against Department of Transportation, stating claims for negligence, eminent domain or de facto taking, alteration of lateral support, negligent alteration of lateral support, and trespass, and requesting declaratory judgment related to maintenance and repair of slope located at intersection and sight distance for vehicles traveling in the area, which was allegedly altered when Department widened highway at intersection as a result of condemnation of the area at issue.

Following bench trial, the Court of Common Pleas entered modified verdict granting borough's motion for declaratory judgment, finding that Department was responsible both for the condition of the area and maintenance and repair of slope and to restore sight distance, granting request for damages on claim for eminent domain or de facto taking, and referring matter to board of viewers for award of damages. Department appealed.

The Commonwealth Court held that:

- Core of complaint was a tort and eminent domain action seeking monetary damages, and thus Commonwealth Court lacked original jurisdiction over action;
- Assigning Department maintenance duties was not contrary to statute requiring Department to improve and maintain state highways as determined by Secretary of Transportation;
- Ruling requiring Department to restore safe sight distances at intersection was not contrary to State Highway Law provision addressing issuance of permits;
- Borough was not required to bring de facto taking claim in separate action; and
- Department was liable for de facto taking regarding slope.

PUBLIC CONTRACTS - ALABAMA

NSH Corporation v. City of Calera

Supreme Court of Alabama - March 22, 2024 - So.3d - 2024 WL 1223810

City brought breach-of-contract action against building company that had purchased and built on lots in bankrupt residential development project, alleging that company's failure to finish the development's roads or have the bank that had financed the development finish them breached the three-way post-bankruptcy contract between the company, the city, and the bank, pursuant to which the bank was to finish the development's roads and the company was to pay the costs of completing the roads insofar as those costs exceeded $58,000.

After a bench trial, the Circuit Court entered judgment for the city and awarded it damages. Company appealed.

The Supreme Court held that:

- Adequate consideration supported the contract, but
- Building company's failure to respond to city's letter asking company to coordinate with bank to have development's roads completed did not constitute a breach of company's payment obligation under the contract.

Adequate consideration supported three-way contract between city, bank that had financed residential development project that eventually went bankrupt, and building company that had purchased and built on lots in the project following the bankruptcy, which was a contract that called for bank to finish the development's roads and that called for building company to pay the costs of completing the roads insofar as those costs exceeded $58,000; city had agreed to issue building permits in exchange for building company's promise to pay, and despite argument that such a promise was illusory, there was no showing that any law required city to issue building permits to company.

Failure by building company, which had purchased and built on lots in bankrupt residential development project, to respond to city's letter asking company to coordinate with bank, which had financed project, to have development's roads completed did not constitute a breach of company's payment obligation under three-way contract between company, city, and bank, pursuant to which bank was to finish development's roads and company was to pay costs of completing roads insofar as those costs exceeded $58,000; despite argument that letter was a written demand for company to pay for road work, neither the letter nor any communications leading up to it indicated what the costs were.

ZONING & PLANNING - IOWA

Lime Lounge, LLC v. City of Des Moines

Supreme Court of Iowa - March 22, 2024 - N.W.3d - 2024 WL 1221415

Bar owner brought action for declaratory judgment to challenge city's requirement of conditional use permit to operate bar, alleging that the permit requirement was preempted by state statute.

The District Court granted bar owner's motion for a temporary injunction, but, following a bench trial, the District Court dissolved the temporary injunction and dismissed the action with prejudice.

Bar owner appealed, and, following transfer, the Court of Appeals affirmed. Bar owner applied for further review, which was granted.

The Supreme Court held that:

- City zoning ordinance requiring an establishment to obtain a conditional use permit to sell alcohol was not expressly preempted by state statute;
- State statute did not expressly prohibit city from charging an application fee for a conditional use permit;
- City zoning ordinance requiring an establishment to obtain a conditional use permit to sell alcohol was not preempted, under implied-conflict preemption, by state statute;
- Statutes reserving to the state the ability to regulate traffic of alcoholic beverages did not, under implied-field preemption, preempt city zoning ordinance;
- Ordinance requiring conditional use permit did not violate bar owner's equal protection rights; and
- Ordinance did not result in improper spot zoning.

MUNICIPAL CORPORATIONS - LOUISIANA

Council of City of New Orleans v. Donation

Supreme Court of Louisiana - March 22, 2024 - So.3d - 2024 WL 1229122 - 2023-01106 (La. 3/22/24)

City council brought action against mayor, trust management board, and members of board, seeking declaration that agreement entered into by mayor and trust beneficiaries, under which 100-year term of trust instrument donating land to city was extended, was illegal disposition of public property to private persons and entities, impermissible modification of trust, and absolute nullity, and to enjoin defendants from making further distributions of trust proceeds to beneficiaries.

The District Court, Orleans Parish denied defendants' exception of lack of procedural capacity and granted council's motion for preliminary injunction. Board appealed. The Court of Appeal reversed and denied council's motion for rehearing. Council sought writ of certiorari, which was granted.

The Supreme Court held that city's home rule charter granted council procedural capacity.

City's home rule charter granted city council procedural capacity to bring action against mayor and others challenging agreement entered into by mayor and trust beneficiaries, under which 100-year term of trust instrument donating land to city was extended; home rule charter provisions stated that council could employ special counsel "for itself" and for "any" matter, including to "institute" suit, if council could not hire outside attorneys when its legislative branch positions conflicted with those of executive branch, including mayor and law department, then home rule charter provision expressly granting authority to council to institute "any and all suits" to protect the "rights and interests" of city would be rendered meaningless.

CLASS CERTIFICATION - MARYLAND

Westminster Management, LLC v. Smith

Supreme Court of Maryland - March 25, 2024 - A.3d - 2024 WL 1245278

Former residential tenants brought putative class action against property manager and its

predecessor, seeking declarative relief and asserting claims of breach of contract, claims that property manager violated the Maryland Consumer Debt Collection Act (MCDCA) and the Maryland Consumer Protection Act (MCPA), and other claims, all of which arose from contention that property manager and predecessor charged excessive fees, including late fees and fees related to summary ejectment, and improperly allocated payments.

After one judge denied class certification, the Circuit Court granted motion by property manager and predecessor for summary judgment, denied motion by former tenants for summary judgment, and did not enter a declaration of the rights and obligations of the parties. Former tenants appealed. The Appellate Court reversed and remanded. Property manager and predecessor petitioned for a writ of certiorari, former tenants filed a cross-petition, and both of those petitions were granted.

The Supreme Court of Maryland held that:

- Term "rent," as used in statute that allows a summary-ejectment action for nonpayment of rent, means the fixed, periodic payments a tenant owes for use or occupancy of a rented premises;
- Residential lease's "Application of Payments" clause, which allowed landlord the option of determining the order in which to apply payments from tenants, violated statutory prohibition on lease provisions requiring tenants to waive or forego rights under law;
- Residential lease's fees clauses violated statute that prohibited a penalty for the late payment of rent in excess of 5% of the amount of rent due;
- As a matter of apparent first impression, a circuit court should generally consider the merits of a timely motion concerning class certification if the motion is based on a material change in circumstances and is not otherwise deficient; and
- Former tenants' subsequent motion for class certification in the trial court presented the required material change in circumstances so as to warrant the trial court's consideration of that subsequent motion on the merits.

IMMUNITY - NORTH CAROLINA

Estate of Graham v. Lambert

Supreme Court of North Carolina - March 22, 2024 - S.E.2d - 2024 WL 1223374

Estate of pedestrian struck and killed by police cruiser filed complaint against officer driving cruiser, in his individual and official capacity, city, and police department, alleging claims of negligence, gross negligence, and wrongful death.

The Superior Court granted summary judgment in favor of police department, but denied summary judgment as to officer and city. Officer and city appealed. The Court of Appeals reversed. Estate filed an appeal, and city and officer filed a petition for discretionary review.

The Supreme Court of North Carolina held that:

- Court of Appeals, when reviewing trial court order granting police department summary judgment and denying officer and city summary judgment, should have asked whether evidence raised a genuine issue of material fact as to whether city had waived governmental immunity by purchasing insurance, and thus vacation of orders, and remand for proper analysis was warranted, and
- Statute, which exempted police officers from speed limits when chasing or apprehending criminal absconders, did not waive city's governmental immunity.

SCHOOLS - WYOMING

Carson v. Albany County School District #1 Board of Trustees

Supreme Court of Wyoming - January 26, 2024 - 542 P.3d 184 - 2024 WY 11

Parents of minor school children filed petition for writ of mandamus seeking to compel school district board of trustees and superintendents to approve, build, and staff a rural school on their family ranch, which was located over 40 miles from the nearest paved road.

The District Court granted defendants' motion to dismiss and denied the writ. Parents appealed.

The Supreme Court held that:

- Statute pertaining to reconfiguration of grades in school district did not establish a ministerial duty that would support mandamus relief;
- Parents did not have right to require school district to build school under statute allowing them to request transportation or maintenance payments; and
- Parents did not have constitutional right enforceable through mandamus to compel school district to build the school.

IMMUNITY - WYOMING

Williams v. Lundvall

Supreme Court of Wyoming - March 26, 2024 - P.3d - 2024 WL 1268153 - 2024 WY 27A

Atheist citizen brought civil rights action against city mayor and other unnamed city officials, alleging that his state constitutional rights to religious liberty and to peaceably assemble were violated by limit placed on the number of invocations that he could give at city council meetings, and asserting a claim under the Wyoming Governmental Claims Act (WGCA).

Mayor moved to dismiss for failure to state a claim, or for a more definite statement. The District Court dismissed for failure to state a claim. Citizen appealed.

The Supreme Court held that:

- Mayor and officials were entitled to the general grant of immunity provided by the WGCA, and
- No exception to governmental immunity in the WGCA authorized citizen's direct constitutional claim.

City mayor and officials were acting "within the scope of their duties" when they allegedly limited the number of invocations that atheist citizen could give at city council meetings, and thus mayor and officials were entitled to the general grant of immunity provided by the Wyoming Governmental Claims Act (WGCA), for purposes of citizen's claim alleging that limitation on invocations violated his state constitutional rights to religious liberty and to peaceably assemble, despite citizen's assertion that mayor and officials acted unconstitutionally in imposing such limitation; the assertion that mayor and officials' conduct was unconstitutional did not remove them from their official roles during such conduct.

No exception to governmental immunity in the Wyoming Governmental Claims Act (WGCA) authorized atheist citizen's direct constitutional claim against city mayor and officials that his rights to religious liberty and to peaceably assemble were violated by a limit on the number of invocations

he could give at city council meetings, and thus mayor and officials were immune from such claim.

WHISTLE-BLOWER ACT - FLORIDA

School Board of Palm Beach County v. Groover

District Court of Appeal of Florida, Fourth District - February 28, 2024 - So.3d - 2024 WL 820040

Employee brought action Act against school board alleging violations of Whistle-blower's Act.

The Circuit Court denied school board's motion for summary judgment. School board petitioned for certiorari review.

The District Court of Appeal held that:

- Employee was required to exhaust administrative remedies with Division of Administrative Hearings (DOAH) prior to filing suit against school board under Whistle-blower's Act, and
- Even assuming school board's whistleblower protection policy was adopted as an alternative to DOAH procedure, employee's filing of generalized grievance did not exhaust alternative policy, thus precluding employee's suit.

DEVELOPMENT AUTHORITIES - GEORGIA

College Park Business and Industrial Development Authority v. College Park MOB, LLC

Court of Appeals of Georgia - March 13, 2024 - S.E.2d - 2024 WL 1087792

Purchaser brought action against vendor, a city development authority, alleging that vendor breached parties' real property purchase and sale agreement, and sought specific performance. Vendor asserted counterclaims including breach of contract.

The Superior Court entered summary judgment in purchaser's favor on all claims. Vendor appealed.

The Court of Appeals held that:

- Genuine issue of material fact precluded summary judgment on purchaser's claim for specific performance;
- Trial court did not err by failing to examine vendor's parol evidence to determine what parties negotiated and agreed to;
- Vendor did not demonstrate error or harm from trial court's failure to determine whether term "Project" in the agreement was ambiguous;
- Vendor was not entitled rescission or reformation based on mutual mistake; and
- Vendor's argument that purchaser repudiated the agreement was deemed waived.

ZONING & PLANNING - IDAHO

Renaissance Project Development, LLC v. Twin Falls County

Supreme Court of Idaho, Boise, December 2023 Term - March 5, 2024 - P.3d - 2024 WL

925897

Developer filed petition for judicial review of county board of commissioners' affirmance of zoning and planning commission's denial of a preliminary plat application for phases two through five of subdivision.

The Fifth Judicial District Court affirmed and dismissed the petition, and developer appealed.

The Supreme Court held that:

- County's reasoned statement provided a sufficient basis for understanding the criteria applied and the rationale for affirming the denial of subdivision plat application due to health and safety concerns;
- Commission failed to make adequate findings of fact to support conclusion that traffic on road and at intersection was a sufficient reason to deny subdivision plat application;
- Denial of subdivision plat due to health and safety concerns posed by the lack of a second egress was supported by sufficient facts;
- Commission's written decision denying application for subdivision plat was required by city ordinance to address the project's compliance with the comprehensive plan;
- Commission's failure to address whether application for subdivision plat was compliant with the comprehensive plan did not prejudice developer's substantial rights;
- Court would decline to consider whether it was fundamentally unfair under the terms of land trade agreement between city and developer for city to retain traded land following the denial; and
- Commission's written decision denying subdivision plat application on health and safety grounds due to single egress, and county's decision affirming that decision, were not arbitrary, capricious, or influenced by bias.

MUNICIPAL ORDINANCE - KANSAS

City of Wichita v. Griffie

Supreme Court of Kansas - March 15, 2024 - P.3d - 2024 WL 1123460

Protestor sought judicial review of municipal court decision finding her guilty of violating city ordinance criminalizing noisy conduct.

The District Court entered judgment on jury's verdict finding protester guilty of unlawful assembly. Protester appealed, and the Court of Appeals affirmed. Protester petitioned for review.

The Supreme Court held that:

- The scope of the ordinance extended to conduct protected by the First Amendment;
- Ordinance criminalized a substantial amount of First Amendment protected activity in relation to its plainly legitimate sweep;
- Ordinance's actus reus or mens rea did not place any meaningful restriction on the law's application to First Amendment protected activity; but
- "Noisy conduct" provision of city's disorderly conduct ordinance was facially overbroad in violation of the First Amendment but could be severed from the rest of the ordinance.

IMMUNITY - MISSISSIPPI

Federinko v. Forrest County

Supreme Court of Mississippi - March 7, 2024 - So.3d - 2024 WL 978319

Father of decedent filed a complaint against county under the Mississippi Tort Claims Act (MTCA), alleging that county's coroner and deputy coroner failed to perform the ministerial duty of ordering an autopsy following his daughter's death.

The County Court granted county's motion for summary judgment and denied father's cross-motion for partial summary judgment. Father appealed.

The Supreme Court held that:

- County did not have a ministerial duty to conduct an autopsy following decedent's death;
- Father did not establish that county's medical examiners violated the statutory duty to obtain or attempt to obtain postmortem blood;
- County coroners did not breach any duty regardless of decedent's actual cause of death, and
- The question of county's alleged discretionary-function immunity was moot.

MUNICIPAL CORPORATIONS - MISSISSIPPI

City of Picayune v. Landry Lewis Germany Architects, P.A.

Supreme Court of Mississippi - March 14, 2024 - So.3d - 2024 WL 1106405

After city dismissed its negligence claims against architect, architect amended its answer to file negligence counterclaims against city and other individuals.

Following a bench trial, the Circuit Court awarded architect $210,000 in damages. City appealed.

The Supreme Court held that city did not owe a duty of care in tort to architect, that was breached by city's failure to directly inform the trial court, after city had informed its attorney and attorney failed to inform the trial court, that potential juror was the son of city councilman.

City did not owe a duty of care in tort to architect, who had filed negligence lawsuit against city, that was breached by city's failure to directly inform the trial court, after city had informed its attorney and attorney failed to inform the trial court, that potential juror was the son of city councilman; caselaw indicated that tort lawsuits were not permitted for most litigation-related behavior as there were other mechanisms for enforcing rules and codes of conduct in litigation, and trials and voir dire were adversarial processes, with juror's juror information card being available to both parties.

PUBLIC RECORDS - NEBRASKA

Nebraska Journalism Trust v. Nebraska Department of Environment and Energy

Supreme Court of Nebraska - March 15, 2024 - N.W.3d - 316 Neb. 174 - 2024 WL 1121890

News organization petitioned for writ of mandamus against Department of Environment and Energy (NDEE) seeking an accurate cost estimate in response to organization's public records request for emails containing certain keyword like "nitrate" and "fertilizer."

After a bench trial, the District Court granted petition. NDEE appealed, and a petition to bypass was granted.

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

- Mandamus may be used to enforce public records statutes regarding agency fee estimates, and
- An agency may include a special service charge for non-attorney review time for requested emails obtained in keyword computer search.

ANTI-SLAPP STATUTE - NEVADA

Clark County v. 6635 W Oquendo LLC

Supreme Court of Nevada - March 14, 2024 - P.3d - 2024 WL 1106453 - 140 Nev. Adv. Op. 15

Landowner filed action against county, alleging that county lacked the authority to impose civil penalties and to record liens against the property for landowner's violation of county code, namely operating residential property as a short-term rental and party house.

County filed an anti-SLAPP motion, arguing that the conduct forming the basis for landowner's claims—recording liens against the property—was protected speech covered by the anti-SLAPP statutes.

The District Court denied county's special motion to dismiss, and county appealed.

The Supreme Court held that county was not a "person" for purposes of the anti-SLAPP statutes.

EMINENT DOMAIN - OHIO

Mentor v. Cleveland Electric Illuminating Company

Court of Appeals of Ohio, Eleventh District, Lake County - February 5, 2024 - N.E.3d - 2024 WL 414321 - 2024-Ohio-399

City brought action against electric utility seeking declaratory relief, alleging utility refused to relocated its facilities within utility easement as city requested, in order for city to complete improvement project on road where easement was located.

The Court of Common Pleas granted city's motion for summary judgment and denied utility's motion for summary judgment. Utility appealed.

The Court of Appeals held that:

- Utility was not entitled to just compensation under the doctrine of eminent domain;
- Utility easement fell within the statutory definition of a "public way"; and
- Statute providing that a legislative authority undertaking a public improvement shall pass an ordinance was inapplicable.

Electric utility was not entitled to just compensation from city under the doctrine of eminent domain for any costs or expenses involved in relocation of its facilities as a result of city's improvement for widening of a street, which was the subject of a dedication plat that granted a perpetual public right-

of-way for highway and utilities to city, utility, and others, inasmuch as the street improvement constituted a valid exercise of a governmental function in furtherance of the public safety and welfare.

Utility easement that was 60-foot-wide and created by dedication plat constituted a public easement, rather than a private easement, and thus fell within statutory definition of a "public way"; nowhere in language of the plat was there an indication that individual grantees possessed rights distinguishable from other grantees, plat contained a dedication of the street to "public use" and, concomitantly, granted a permanent right-of-way easement to city, utility, and others, and plat contained the grant of a permanent right-of-way easement ten feet in width located on both sides of the street for underground and above-ground facilities, in accordance with city ordinance at the time of dedication.

Statute providing that a legislative authority undertaking a public improvement shall pass an ordinance was inapplicable in determining whether city could order electric utility to relocate its facilities at its own expense due to city's street-widening improvement; city's improvement was not being funded by special assessments, and city engineer was expressly authorized by municipal law to order relocation of utility's facilities, citing relevant state statutes and municipal ordinances in a letter to utility's representative.

RECEIVERSHIP - PENNSYLVANIA

Siger v. City of Chester

Supreme Court of Pennsylvania - January 29, 2024 - A.3d - 2024 WL 316333

Receiver was appointed over financially distressed city, and the Commonwealth Court approved recovery plan.

The Commonwealth Court granted receiver's petition for writ of mandamus that, among other things, required city councilman who was also head of city's department of finance and human resources to share information with receiver. Receiver sought approval of modifications to city's recovery plan, proposing various initiatives relating to administrative duties and professional management within city government, core internal administrative functions and ethics, and economic development.

After evidentiary hearing, the Commonwealth Court struck several initiatives and confirmed plan modification for other initiatives. City requested review, and the Supreme Court assumed King's Bench jurisdiction.

In a case of first impression, the Supreme Court, in an opinion delivering the Opinion of the Court and an opinion in support of affirmance, held that:

- A recovery plan does not "change the form of government" of a distressed municipality;
- Suspension of administrative duties of city's department heads did not violate constitutional provision on removal of elected and appointed officials;
- Municipalities Financial Recovery Act authorized such suspension;
- Sufficient evidence supported finding that allowing department heads to continue exercising their authority would interfere with receiver's powers or goals of recovery plan;
- Act authorized modification of recovery plan to allow receiver to direct city council's removal of items from legislative agenda;

- Receiver was not judicial officer; and
- Requiring city solicitor to disclose city officials' and employees' noncompliance with confirmed plan or court order did not conflict with rule of professional conduct governing representation-related disclosures.

The provision of the Municipalities Financial Recovery Act stating that the confirmation of a recovery plan for a financially distressed municipality, or any modification thereto, "shall not be construed to…change the form of government of the distressed municipality" is an unambiguous instruction to those who might "construe" a recovery plan, such as reviewing courts, that they should not view a recovery plan as "changing the form of government" of a distressed municipality, as changes to governmental operations that may be needed in the interest of financial recovery during a temporary receivership do not permanently alter the municipal government; this provision is not a limitation upon recovery plans.

Mayor and other elected officials did not have any prerogative to interfere with receiver appointed over financially distressed city pursuant to Municipalities Financial Recovery Act, and thus, receiver's proposed amendment of recovery plan so as to prohibit mayor and other elected officials from interfering with directives of chief of staff and receiver did not violate any such prerogative; Act expressly empowered receiver to issue orders to elected or appointed officials to implement any provision of recovery plan and "refrain from taking any action that would interfere with the powers granted to receiver or the goals of the recovery plan" and stated confirmation of recovery plan imposed "mandatory duty" on city's officials to "undertake the acts set forth in the recovery plan."

Receiver's proposed modification to financially distressed city's recovery plan so as to suspend administrative duties of officials who served as heads of city's various departments did not violate constitutional provision stating that impeachment process was necessary to remove elected officials' administrative duties, even though officials were also elected city council members; receiver only sought to suspend officials' duties with respect to their appointed offices, not their duties in their legislative roles as city council members.

Receiver's proposed modification to financially distressed city's recovery plan so as to suspend administrative duties of officials who served as heads of city's various departments did not violate constitutional provision stating that appointed officers "may be removed at the pleasure of the power by which they shall have been appointed," even though officials were appointed as department heads by mayor, who opposed receiver's plan modification; receiver did not seek to remove officials from their offices, only to suspend their administrative duties until expiration of receivership.

Receiver's proposed modification to financially distressed city's recovery plan so as to suspend administrative duties of officials who served as heads of city's various departments, pursuant to provision of Municipalities Financial Recovery Act stating that confirmation of a recovery plan modification had effect of "suspending the authority of the elected and appointed officials" to the extent such authority conflicted with plan's goals, did not violate Act provision stating legislature generally intended to leave principal responsibility for city's affairs to elected officials, even though officials at issue were also elected city council members; receiver contended officials refused to cooperate with plan, and legislature intended to prioritize plan over local officials' prerogatives.

The Municipalities Financial Recovery Act cannot be read to suggest the authority of local officials must be preserved at all costs, in the face of their dereliction of official duty and notwithstanding conduct on their part that causes a breakdown in the function of municipal government, constitutes a failure to uphold their paramount public duty to safeguard the health, safety, and welfare of their citizens, and poses a threat to the fiscal stability of neighboring communities; indeed, the purpose

and the expressly-stated intent of the Act is precisely to remedy such dereliction.

Receiver's proposed modification to financially distressed city's recovery plan so as to suspend administrative duties of officials who served as heads of city's various departments, on basis that officials refused to cooperate with receiver, did not violate provision of Municipalities Financial Recovery Act stating that during fiscal emergency, officials "shall continue to carry out [their] duties…except that no decision or action shall conflict with an emergency action plan, order or exercise of power by the Governor"; receivership operated under other chapter of Act, which authorized receiver to order officials to implement recovery plan and refrain from interference, specific receivership provisions controlled over general provision, and recovery plan superseded emergency action plan.

The section of the Municipalities Financial Recovery Act providing that a receiver's recovery plan has the effect of "suspending the authority of the elected and appointed officials of the distressed municipality…to exercise power on behalf of the distressed municipality" to the extent the officials' authority "would interfere with the powers granted to the receiver or the goals of the recovery plan" is not limited to situations where the local officials' actions contradict some specific and already extant provision of the recovery plan; rather, the officials' authority may be suspended where its exercise conflicts with, among other things, the goals of the recovery plan.

Sufficient evidence supported Commonwealth Court's conclusion that allowing city's appointed department heads to continue exercising their administrative authority would interfere with receiver's powers or goals of recovery plan, supporting approval of receiver's proposed plan modification to suspend administrative authority of department heads in order to effectuate recovery plan and remedy city's condition; receiver presented evidence that, among other things, official who was head of finance and human resources departments withheld information about his waste of $400,000 in city funds despite writ of mandamus ordering him to share financial information with receiver, and officials stymied receiver's investigations and countermanded receiver's orders to city employees.

A receiver's complete suspension of municipal officials' duties, pursuant to the Municipalities Financial Recovery Act provision authorizing such suspension to the extent the officials' authority "would interfere with the powers granted to the receiver or the goals of the recovery plan," is an extraordinary measure, one that will be warranted only very rarely; if, for example, a receiver sought to take this step immediately upon appointment, with no evidence that the local officials' conduct posed an obstacle to the municipality's financial recovery, it would be entirely appropriate for the Commonwealth Court to reject such an initiative as arbitrary or capricious under its prescribed standard of review of proposed recovery plans and modifications to plans

Provision of Municipalities Financial Recovery Act authorizing receiver to suspend "authority of the elected and appointed officials of [a] distressed municipality…to exercise power on behalf of the distressed municipality" pursuant to city's charter to the extent that officials' authority would interfere with receiver's powers or recovery plan's goals authorized receiver's proposed modification of recovery plan so as to allow receiver to direct city council to remove items from its legislative agenda, where receiver asserted that city council members had history of adding agenda items that could impact city's financial health without providing adequate advance notice to receiver, impacting receiver's ability to provide for city's financial recovery.

A receiver appointed for a municipality under the Municipalities Financial Recovery Act is not a "judicial officer"; a receiver's power is granted by statute, not by an act of the judiciary, the receiver is selected by executive branch officials, whereas the Commonwealth Court's role in a receiver's appointment is limited to confirming the executive branch officials' choice of receiver upon

demonstration of the statutory prerequisites for receivership, and the Commonwealth Court exercises no control over a receiver's day-to-day activities and is not authorized to direct a receiver to take any particular action.

Receiver's proposed initiative that would empower him to waive residency requirement for employees of financially distressed city, whose home rule charter gave city council discretion to employ qualified non-residents if no qualified city residents were available for a particular position, was proposed amendment to city's recovery plan, not city charter, and thus, did not violate constitutional requirement that amendment of a home rule charter be by referendum; initiative, which quoted charter provision and stated "this initiative substitutes 'the Receiver' for 'Council,' " sought to vest power in receiver that would otherwise be committed to city council, but did not seek to amend charter itself.

Receiver's proposed modification of financially distressed city's recovery plan so as to require city solicitor to inform receiver if solicitor became aware that any city official or employee was not complying with Commonwealth Court's orders or with recovery plan or plan modification confirmed by court order would not require solicitor to violate rule of professional conduct generally prohibiting lawyers from revealing information relating to representation of client without informed consent; rule provision contained exception allowing a lawyer to reveal such information to extent lawyer reasonably believed necessary to comply with law or court order, such that disclosure of noncompliance with court orders and court-confirmed recovery plan was consistent with rule.

Receiver appointed over financially distressed city was not required to seek narrower relief in form of writ of mandamus before requesting Commonwealth Court's confirmation of modifications to recovery plan, but rather, had express authority under Municipalities Financial Recovery Act to seek confirmation of proposed modifications based on receiver's determination that such measures, including suspension of administrative duties of appointed department heads, were necessary to achieve financial stability in city.

Under the Municipalities Financial Recovery Act, a receiver's authority is not limited to requiring, directing, and ordering a distressed municipality's officials to take actions to implement a recovery plan, even though a provision of the Act authorizes the receiver to "issue an order to an elected or appointed official of the distressed municipality"; elsewhere, the Act expressly empowers the receiver to "require the distressed municipality" itself, not its officials, to take actions necessary to implement the plan and negotiate intergovernmental cooperations and to "direct the distressed municipality" to take any other actions to implement the plan, thereby treating the municipality as an entity distinct from its officials.

INSURANCE - SOUTH CAROLINA

Renewable Water Resources v. Insurance Reserve Fund

Court of Appeals of South Carolina - January 3, 2024 - 897 S.E.2d 558

Insured wastewater treatment district brought action against its insurer for recovery under property insurance policy following introduction of polychlorinated biphenyls (PCBs) into holding tanks at insured's water treatment facilities through an act of vandalism.

The Circuit Court found, following a bench trial, that policy covered most of insured's remediation expenses, entered a judgment awarding insured $5,824,924.49 in damages, and denied insurer's motion for a new trial. Insurer appealed.

The Court of Appeals held that:

- Expenses associated with cleaning holding tanks were covered under policy;
- Expenses associated with preventing further contamination were covered under policy;
- Insured was not entitled to consequential damages under policy;
- Expense summary documents were admissible as summary exhibits; and
- Circuit court was required to account for insurance deductible in calculating damages award.

PUBLIC PENSIONS - TEXAS

City of Dallas v. Employees' Retirement Fund of City of Dallas

Supreme Court of Texas - March 15, 2024 - S.W.3d - 2024 WL 1122438

Pension fund for city employees brought action against city for declaratory judgment that a city ordinance that placed term limits on fund's directors was void and unenforceable.

City filed counterclaims, seeking to enjoin the fund from seating two elected board members for additional terms in violation of the ordinance.

The 44th District Court granted summary judgment in favor of the city. Fund appealed. The Dallas Court of Appeals reversed and rendered. City's petition for review was granted.

The Supreme Court held that:

- Ordinance creating term limits for board members repealed by implication ordinance in different chapter requiring board approval, and
- Veto power was unenforceable.

REFERENDA - CALIFORNIA

Move Eden Housing v. City of Livermore

Court of Appeal, First District, Division 5, California - March 6, 2024 - Cal.Rptr.3d - 2024 WL 959630

Objectors petitioned for writ of mandate seeking to compel city, pursuant to Elections Code, to process objectors' referendum petition challenging city's resolution approving affordable housing project that contained component of a new public park.

Developer moved for bond.

The Superior Court granted motion for bond and denied petition. Objectors appealed.

The Court of Appeal held that:

- City's adoption of resolution was a legislative act subject to local referendum power;
- City did not act as state's administrative agent under statutes dissolving community redevelopment agencies; and
- Proceeding was to enforce Elections Code thus precluding statutory bond requirement.

City's adoption of resolution approving amendments to agreement with developer of affordable

housing project was a legislative act subject to local referendum power, where resolution included decision to construct and improve a new public park.

City did not act as state's administrative agent under statutes dissolving community redevelopment agencies when city adopted resolution approving an affordable housing project, with a new public park component, on property that was a "housing asset" transferred to city as a successor to a former redevelopment agency, and thus city's adoption of resolution was a legislative act subject to local referendum power, even though the state-approved long range property management plan specified the use of the property as high density housing with an affordable component, where, in deciding to construct and improve a park, city made discretionary policy determinations that were not dictated by long range plan or any provision of dissolution statutes.

Proceeding on petition for writ of mandate seeking to compel city, pursuant to Elections Code, to process objectors' referendum petition challenging city's resolution approving affordable housing project that contained component of a new public park did not fall within scope of statute allowing a trial court to require the furnishing of a bond in actions brought to delay or thwart an affordable housing project, and therefore objectors were not required to furnish a bond; proceeding was brought to enforce provisions of Elections Code and secure for the city's voters their right to referendum, rather than to challenge project.

ZONING & PLANNING - CALIFORNIA

Temple of 1001 Buddhas v. City of Fremont

Court of Appeal, First District, Division 4, California - March 6, 2024 - Cal.Rptr.3d - 2024 WL 973921

Property owners filed petition for writ of mandamus as well as declaratory and injunctive relief, challenging a city hearing officer's administrative decision upholding city's nuisance determinations and orders related to construction of a residence on grounds of procedural due process and preemption of city's appeals process.

The Superior Court, San Francisco County, sitting by designation, denied the petition. Owners appealed.

The Court of Appeal held that:

- City's appeals process was preempted by state law;
- Issuance of traditional writ of mandate was warranted;
- Owners could not show present and actual controversy entitling them to declaratory relief;
- City's appeals process was not preempted to extent that nuisance determinations rested on zoning ordinance violations;
- Hearing officer did not act in excess of her jurisdiction by ordering owners to abate the nuisance;
- Owners did not establish there was financial bias that rendered hearing procedurally unfair arising from hearing officer's contract; and
- Deputy city attorney's presence at administrative appeal hearing was not a due process violation.

PACE - CALIFORNIA

Andrade v. Western Riverside Council of Governments

Court of Appeal, Fourth District, Division 1, California - February 20, 2024 - 318 Cal.Rptr.3d 396 - 2024 Daily Journal D.A.R. 1433

Homeowner brought action against association that was member of a regional government organization, alleging that a contractor fraudulently enrolled homeowner in a property assessed clean energy (PACE) program and seeking rescission of PACE loan agreements with association.

After association released its assessment and lien on homeowner's property and reimbursed her for certain property tax payments, homeowner moved for attorney fees. The Superior Court denied motion. Homeowner appealed.

The Court of Appeal held that:

- Action was an "action on a contract" under statute governing attorney fees for actions on a contract;
- Attorney fee statute operated to extend the mutual right to obtain attorney fees to the entire contract; and
- Remand was warranted for an assessment of whether homeowner was a prevailing party under attorney fee statute.

Homeowner's action against association that was member of a regional government organization, alleging that a contractor fraudulently enrolled homeowner in a property assessed clean energy (PACE) program and seeking rescission of PACE loan agreements with association, was an "action on a contract" under statute governing attorney fees for actions on a contract, where homeowner's claims principally concerned whether loan agreements were valid and enforceable.

ZONING & PLANNING - GEORGIA

Clay v. State

Court of Appeals of Georgia - February 2, 2024 - S.E.2d - 2024 WL 392996

Residents who owned, leased, and lived on property zoned for agricultural use filed action against state, seeking declaratory judgment that development and construction of electric vehicle manufacturing facilities on state-owned property violated local and state law, and seeking injunction to halt project.

State filed counterclaim seeking declaratory relief that zoning ordinances did not apply and moved for surety bond. Following hearing, the trial court granted motion for bond and ordered residents to post surety bond in amount of $364,619.55. Residents appealed.

The Court of Appeals held that:

- Trial court did not improperly shift burden of proof to residents to show why surety bond should not be granted, but
- Imposition of bond was improper where trial court failed to address whether all claims asserted by residents were meritorious.

Residents who owned, leased, and lived on property zoned for agricultural use abandoned argument for review that project to develop and construct electric vehicle manufacturing facilities on state-owned property did not involve political subdivisions and that action was not a public lawsuit, as

would preclude imposition of surety bond on residents in action against state seeking declaratory judgment that project violated local and state law and seeking injunction to halt project; while residents challenged state's contention that project involved political subdivisions and that action was a public lawsuit at bond hearing, residents did not contest trial court's findings on appeal.

Use of state-owned land to develop and construct electric vehicle manufacturing facilities qualified as a government purpose, as would support grant of state's request for surety bond in action filed by residents who owned, leased, and lived on property zoned for agricultural use against state, seeking declaratory judgment that project violated local and state law and seeking injunction to halt project; project would provide extensive economic benefits to state through employment opportunities and additional tax revenue, as well as increased construction jobs, housing, and retail development.

Trial court did not improperly shift burden of proof to residents who owned, leased, and lived on property zoned for agricultural use to show why surety bond should not be granted in action filed by residents against state, seeking declaratory judgment that project to develop and construct electric vehicle manufacturing facilities on state-owned property violated local and state law and seeking injunction to halt project; court placed burden on residents to show why bond should not be granted after first determining whether state had met its burden to show it was a political subdivision, that the lawsuit qualified as a public lawsuit to justify imposition of bond, that the claims lacked merit, and that the bond was in the public interest, which was consistent with statutory requirements.

Imposition of surety bond against residents who owned, leased, and lived on property zoned for agricultural use was improper in action against state seeking declaratory judgment that project to develop and construct electric vehicle manufacturing facilities on state-owned property violated local and state law and seeking injunction to halt project, where trial court determined that state was likely to prevail by focusing only on claims regarding zoning issues without considering merits of other arguments asserted by residents, and it appeared from the record that at least one claim had merit.

PUBLIC UTILITIES - GEORGIA

City of Winder v. Barrow County

Supreme Court of Georgia - March 5, 2024 - S.E.2d - 2024 WL 923102

County brought action against city under the dispute resolution provisions of the Service Delivery Strategy (SDS) Act, challenging the manner of funding road maintenance and rates assessed for water utility services.

The Superior Court denied city's motion to dismiss and for summary judgment, and granted county's motion for partial summary judgment. City appealed, and the Court of Appeals affirmed. City petitioned for certiorari.

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

- Determining whether the maintenance of county roads primarily benefited the unincorporated area of a county required consideration of the totality of the circumstances involved and could not be resolved as a matter of law;
- Services primarily for the benefit of the unincorporated area of the county must be funded through the mechanisms listed in the SDS Act; and
- Superior court did not have authority under the SDS Act to determine whether city's water charges

were an illegal tax on residents of unincorporated areas of the county, or whether city could transfer profits from providing water services to its general fund.

EMINENT DOMAIN - INDIANA

Gerlach v. Rokita

United States Court of Appeals, Seventh Circuit - March 6, 2024 - F.4th - 2024 WL 956858

Owner of dormant property, some of which she had reclaimed, brought § 1983 action against Indiana officials in their official and individual capacities, alleging that they violated the Fifth Amendment's Takings Clause by failing to pay her for interest accrued while reclaimed property was in state custody, and seeking just compensation as well as declaratory and injunctive relief.

Defendants moved for judgment on the pleadings. The United States District Court for the Southern District of Indiana granted defendants' motion and dismissed complaint with prejudice. Owner appealed, and while appeal was pending, Indiana modified governing statute to require that interest be paid on all property recovered thereunder, even if that property did not earn interest prior to state taking custody.

The Court of Appeals held that:

- In light of the change to the Revised Indiana Unclaimed Property Act, owner's claim for prospective relief was moot;
- Even if the Fifth Amendment Takings Clause created an implied direct cause of action by its text alone, owner's claims against Indiana officials in their official capacities for past Takings Clause violations, which were, in effect, claims against the State of Indiana itself, were barred by Eleventh Amendment sovereign immunity;
- Owner's § 1983 claim for compensatory relief against current and former Indiana officials in their individual capacities was really a claim against the state; and
- Because owner's § 1983 claim for compensatory relief against current and former Indiana officials in their individual capacities was really a claim against the state, it was doubly barred, first because § 1983 did not create a cause of action against the state and, second, because Indiana enjoyed sovereign immunity under the Eleventh Amendment.

EMINENT DOMAIN - LOUISIANA

Campo v. United States

United States Court of Federal Claims - February 9, 2024 - Fed.Cl. - 2024 WL 504316

Lessees of oyster beds and reefs filed putative class action seeking just compensation from United States for alleged permanent taking of their property by Army Corps of Engineers opening spillway as flood control structure, releasing nearly ten trillion gallons of freshwater from Mississippi River into oyster estuaries, thereby lowering natural and essential salinity levels of waters and marshes where lessees' oyster leases were located which increased mortality rate of oyster reefs, depriving lessees of their use, occupancy, and enjoyment of their property rights in their oysters and oyster leases.

Government moved to dismiss for failure to state claim or, alternatively, for summary judgment.

The Court of Federal Claims held that:

- Takings claim was barred by Louisiana law;
- Takings claim was barred by lease agreements; and
- Louisiana law did not violate unconstitutional conditions doctrine.

Under Louisiana law, as predicted by Court of Federal Claims, spillway from which Army Corps of Engineers released nearly ten trillion gallons of freshwater from river into oyster estuaries, thereby lowering natural and essential salinity levels of waters and marshes where lessees' oyster leases were located, constituted "integrated coastal protection" project intended to provide "flood control," within meaning of Louisiana statutes, prohibiting oyster lessees from maintaining any action against United States for any claim arising from project in relation to integrated coastal protection, thus barring lessees' takings claim arising from increased mortality rate of their oyster reefs and deprivation of their use, occupancy, and enjoyment of property rights in their oysters and oyster leases.

Under Louisiana law, lessees of oyster beds and reefs lacked any right to sue United States for Fifth Amendment taking arising from Army Corps of Engineers' opening of spillway and releasing nearly ten trillion gallons of freshwater from river into oyster estuaries, under lease agreements requiring lessees to abide by Louisiana's myriad restrictions in harvesting of oysters, seeding of oysters, and filing of lawsuits for harm to oysters, since Louisiana statutes prohibited oyster lessees from maintaining any action against United States for any claim arising from project in relation to integrated coastal protection, and spillway was such integrated coastal protection project intended to provide flood control.

Louisiana statutes, prohibiting oyster lessees from maintaining any action against United States for any claim arising from project in relation to integrated coastal protection, did not violate unconstitutional conditions doctrine, preventing states from imposing conditions requiring relinquishment of constitutional rights, although Louisiana statutes barred lessees' takings claim arising from increased mortality of their oyster reefs and deprivation of their use and enjoyment of property rights in their oysters and oyster leases due to Army Corps of Engineers' release of water from spillway that was integrated coastal protection project, since oyster leases precluded lessees from suing United States, so Louisiana did not impose condition resulting in relinquishment of right they never had.

EMINENT DOMAIN - NEW YORK

Board of Managers of Lido Beach Towers Condominium v. City of Long Beach

Supreme Court, Appellate Division, Second Department, New York - January 24, 2024 - 223 A.D.3d 774 - 204 N.Y.S.3d 145 - 2024 N.Y. Slip Op. 00290

Board of managers for condominium brought action against city, inter alia, to recover damages for inverse condemnation, arising from city's alleged failure to timely seek permanent easement over condominium property via condemnation.

The Supreme Court, Nassau County, denied city's motion to dismiss claim as time-barred, and city appealed.

The Supreme Court, Appellate Division, held that three-year statute of limitations for damages to property applied to claim.

Three-year statute of limitations for damages to property, rather than one-year-and-ninety-day statute of limitations for damages claims against political subdivisions, applied to inverse condemnation claim by board of managers for condominium against city, since inverse condemnation claims did not sound in tort.

EMINENT DOMAIN - NEW YORK

Brinkmann v. Town of Southold, New York

United States Court of Appeals, Second Circuit - March 13, 2024 - F.4th - 2024 WL 1080032

Property owners filed § 1983 action alleging that town violated Takings Clause by exercising eminent domain to take their property for creation of park as pretext for defeating their commercial use.

The United States District Court for the Eastern District of New York denied owners' motion for preliminary injunction and dismissed complaint. Owners appealed.

The Court of Appeals held that town's exercise of eminent domain to take property for creation of park did not violate Takings Clause.

Town's exercise of eminent domain to take property for creation of park did not violate Takings Clause, even if town took land to prevent owners' commercial use; public park was public use, town paid fair compensation, and there was no indication that town meant to confer any private benefit or intended to use property for anything other than public park.

EMINENT DOMAIN - OHIO

State ex rel. AWMS Water Solutions, L.L.C. v. Mertz

Supreme Court of Ohio - January 24, 2024 - N.E.3d - 2024 WL 251182 - 2024-Ohio-200

Operator of saltwater-injection wells associated with oil and gas production filed petition for writ of mandamus to compel state to commence proceedings for property appropriation, alleging that state's suspension order with respect to one of its two wells effected a governmental taking of operator's property, requiring the state to pay it just compensation.

The Eleventh District Court of Appeals granted the state's motion for summary judgment. Operator appealed. The Supreme Court reversed and remanded. On remand, the Court of Appeals denied operator's petition for writ of mandamus. Operator appealed.

The Supreme Court held that:

- Court of Appeals ventured beyond scope of Supreme Court's remand order by determining that operator lacked cognizable property interest, and
- Court of Appeals' determination that operator lacked cognizable property interest for operator's takings claim violated doctrine of the law of the case.

Court of Appeals ventured beyond scope of Supreme Court's remand order by determining that operator of saltwater-injection wells lacked cognizable property interest, and, thus, erred in denying

writ of mandamus to compel state to commence proceedings for property appropriation; Supreme Court specified that, on remand, Court of Appeals was required to weigh parties' evidence related to operator's takings claim and to weigh parties' evidence in accordance with Supreme Court's opinion and to balance all Penn Central factors to determine whether operator suffered partial taking, and, instead, Court of Appeals sua sponte ordered parties to file supplemental briefs as to whether operator had cognizable property interest under Takings Clause and denied writ without weighing parties' evidence.

Court of Appeals' determination that operator of saltwater-injection wells lacked cognizable property interest for operator's takings claim violated doctrine of the law of the case, in mandamus proceedings to compel state to commence proceedings for property appropriation; Supreme Court recognized that operator's leasehold was a property interest that triggered takings analysis, and, on remand, Court of Appeals determined that Supreme Court had not deemed that interest to be property interest for purposes of Takings Clause, that question of whether operator had cognizable property interest had not been at issue before Supreme Court, and that Supreme Court noted only that operator was prima facie entitled to invoke constitutional right to just compensation.

SCHOOLS - VIRGINIA

Ibanez v. Albemarle County School Board

Court of Appeals of Virginia, Richmond - February 20, 2024 - 80 Va.App. 169 - 897 S.E.2d 300

Parents, on behalf of themselves and their children, brought action alleging that county school board's anti-racism policy violated their rights under Virginia Constitution and Virginia statute.

The Circuit Court dismissed complaint, and parents appealed.

The Court of Appeals held that:

- Virginia Constitution's due process, equal protection, and free speech provisions were self-executing;
- Statute providing parents with fundamental right to make decisions concerning upbringing, education, and care of their children was not self-executing;
- Parents lacked standing to bring action seeking declaratory judgment that policy violated Virginia Constitution's guarantee of freedom from government discrimination;
- Policy did not compel speech, in violation of Virginia Constitution's free speech provision;
- Policy did not amount to viewpoint discrimination under free speech provision;
- Policy was not unconstitutionally vague; and
- Policy did not violate parents' due process right to direct upbringing, education, and control of their children.

GOVERNMENT CONTRACTS - LOUISIANA

Ramelli Janitorial Service, Inc. v. H&O Investments, LLC

Court of Appeal of Louisiana, Fifth Circuit - September 21, 2022 - 350 So.3d 191 - 22-265 (La.App. 5 Cir. 9/21/22)

Unsuccessful bidder for grass-cutting contract with parish brought action against parish and

successful bidder, seeking declaratory and injunctive relief on ground that contract violated public bid law and seeking damages from successful bidder for unfair trade practices and from parish for detrimental reliance.

The District Court denied successful bidder's peremptory exceptions of prescription, no cause of action, and no right of action. Successful bidder filed application for supervisory writ.

The Court of Appeal held that contract was service contract, not public works contract, and thus public bid law's section providing for injunctive relief regarding public works contracts that were contrary to provisions of public bid law's part governing letting of contracts did not apply.

Grass-cutting contract with parish was "service contract," not "public works contract," and thus public bid law's section providing for injunctive relief regarding public works contracts that were contrary to provisions of public bid law's part governing letting of contracts did not apply; contract did not concern erection, construction, alteration, improvement, or repair of any public facility or immovable property.

PUBLIC MEETINGS - MAINE

McBreairty v. Miller

United States Court of Appeals, First Circuit - February 21, 2024 - F.4th - 2024 WL 702383

Plaintiff brought action against local school board and board chair, alleging that board's speech restrictions, which had been applied to plaintiff and had resulted in his removal by the police from two board meetings, violated the First Amendment and the Maine Constitution's free-speech and petition protections and seeking damages and injunctive relief.

The United States District Court for the District of Maine denied plaintiff's emergency motion for a temporary restraining order (TRO) and preliminary injunction. Plaintiff appealed.

The Court of Appeals held that plaintiff lacked Article III standing to seek injunctive relief because he failed to allege that he intended in the future to engage in conduct that would violate the challenged speech restrictions.

Plaintiff failed to allege in his complaint that he intended in the future to engage in conduct that would violate school board's restrictions on speech at board meetings, and plaintiff thus lacked standing under Article III to seek injunctive relief in action challenging board's restrictions under the First Amendment; present-tense allegations about the restrictions at issue merely alleged that the restrictions were in continued operation, plaintiff's allegation that he "reasonably fears imminent injury" was a mere legal conclusion, and the fact that plaintiff requested injunctive relief was insufficient to establish his future intention to engage in conduct that would result in board's application to plaintiff of the restrictions at issue.

ANTI-SLAPP - MASSACHUSETTS

Bristol Asphalt, Co., Inc. v. Rochester Bituminous Products, Inc.

Supreme Judicial Court of Massachusetts, Plymouth - February 29, 2024 - N.E.3d - 2024 WL 849711

Asphalt companies brought action against competitors, alleging competitors' underlying judicial and regulatory challenges to town's approval of asphalt companies' proposed asphalt plant constituted unfair or deceptive acts or practices in the conduct of trade or commerce, conspiracy in restraint of trade or commerce, and abuse of process.

Competitors filed special motion to dismiss under anti-SLAPP (strategic litigation against public participation) statute or, alternatively, motion to dismiss for failure to state a claim. The Superior Court Department denied special motion to dismiss, finding that competitors' petitioning activities were a sham, but granted motion to dismiss claim for abuse of process. Competitors filed interlocutory appeal. The Appeals Court affirmed. Competitors' application for further appellate review was allowed.

The Supreme Judicial Court held that:

- At first stage of resolving anti-SLAPP motion, movant must show the challenged claim lacks substantial basis in conduct other than or in addition to movant's petitioning activity, abrogating *Blanchard v. Steward Carney Hospital, Inc.*, 75 N.E.3d 21, *Blanchard v. Steward Carney Hospital, Inc.*, 130 N.E.3d 1242, and *Reichenbach v. Haydock*, 90 N.E.3d 791;
- Appellate review of both stages of anti-SLAPP inquiry is de novo, abrogating *Baker v. Parsons*, 434 Mass. 543, 750 N.E.2d 953, and *McLarnon v. Jokisch*, 431 Mass. 343, 727 N.E.2d 813;
- Companies' claims were based solely on competitors' petitioning activity;
- Competitors' underlying argument that asphalt plan was not use permitted as of right in town's industrial district lacked reasonable factual support or arguable legal basis;
- Competitors' underlying arguments regarding noise and traffic problems lacked reasonable factual support or arguable legal basis;
- Competitors' underlying challenges to extension of order of conditions lacked reasonable factual support or arguable legal basis; and
- Competitors' fail-safe petitions for review under Massachusetts Environmental Protection Act (MEPA) did not constitute legitimate petitioning activity.

ZONING & PLANNING - NEW HAMPSHIRE

Harvey v. Town of Barrington

Supreme Court of New Hampshire - February 27, 2024 - A.3d - 2024 N.H. 10 - 2024 WL 791539

Property owner sought judicial review of decision by town's planning board that affirmed the zoning board of adjustment's (ZBA) grant of a variance allowing adjoining lot to be subdivided into two residential lots, each with access via an easement over property owner's lot.

The Superior Court affirmed planning board.

The Supreme Court held that:

- Town's ZBA lacked the authority to modify limited easement over property owner's lot to allow access to two residential lots, and
- Town planning board was precluded from approving the subdivision of single lot into two residential lots absent legal street access to the lots.

EMINENT DOMAIN - NEW YORK

Bowers Development, LLC v. Oneida County Industrial Development Agency

Supreme Court, Appellate Division, Fourth Department, New York - February 2, 2024 - N.Y.S.3d - 2024 WL 395766 - 2024 N.Y. Slip Op. 00523

Owners of certain real property that had been condemned by county industrial-development agency for use as a surface parking lot associated with a private medical facility petitioned to annul the agency's condemnation determination.

The Supreme Court, Appellate Division granted owners' petition. Agency appealed. The Court of Appeals reversed.

Upon remittitur, the Supreme Court, Appellate Division, held that:

- Proper procedural vehicle for owners' contention that agency's financial assistance to construction project violated statutory anti-pirating provisions was proceeding pursuant to article 78;
- Agency's determination to exercise eminent domain power to acquire property for use as parking lot was rationally related to public purpose; and
- Agency did not improperly segment its environmental review.

County industrial-development agency's determination to exercise its eminent domain power to acquire owners' property for use as a surface parking lot was rationally related to a conceivable public purpose, notwithstanding the fact that the need for the parking lot was due in part to the construction of a private medical facility; agency's acquisition of the property would serve the public use of mitigating parking and traffic congestion.

MUNICIPAL GOVERNANCE - OHIO

State ex rel. Peterson v. Licking County Board of Elections

Supreme Court of Ohio - February 21, 2024 - N.E.3d - 2024 WL 699836 - 2024-Ohio-646

Village mayor filed action against two county boards of elections, their members, village, and village's council president for writs of mandamus and prohibition to prevent boards and village from setting date for recall election, from conducting recall election to recall mayor, and to order boards to remove recall election from ballot.

The Supreme Court held that:

- Conflict of interest was not present with village solicitor's representation of village and village council president, and, thus, disqualification of village solicitor was not warranted;
- Village solicitor's alleged disclosure of information protected by attorney-client privilege at public village council meeting did not warrant disqualification of village solicitor on ground of conflict of interest;
- Village solicitor was, in fact, village solicitor, and, thus, disqualification of village solicitor on ground that village solicitor was no longer village solicitor was not warranted;
- County boards of elections did not exercise quasi-judicial authority in matter, and, thus, village mayor was not entitled to writ of prohibition to prevent boards from holding recall election;
- Village and its counsel did not exercise quasi-judicial authority in matter, and, thus, village mayor was not entitled to writ of prohibition to prevent village and council from setting day for holding

recall election; and
- Village mayor was not entitled to writ of mandamus to order county boards of elections to remove special recall election from ballot.

ZONING & PLANNING - VERMONT

Town of Pawlet v. Banyai

Supreme Court of Vermont - March 1, 2024 - A.3d - 2024 WL 877863 - 2024 VT 13

Town filed a motion for contempt against landowner for his alleged noncompliance with court orders requiring that he remove structures constructed as part of a "firearms training facility" that violated town's zoning ordinances.

The Superior Court, Environmental Division, found landowner in contempt and imposed sanctions, denied landowner's motion for reconsideration, granted in part landowner's request for an extension of deadlines, and, after deadlines had expired, granted town's motion to enforce the sanctions. Landowner appealed the enforcement order.

The Supreme Court held that landowner's failure to appeal contempt order foreclosed him from collaterally attacking the sanctions imposed for violations of town's zoning ordinances.

Landowner was foreclosed from collaterally attacking any determinations made final in trial court's contempt order, including whether the sanctions imposed by the order for his violations of town's zoning ordinances violated the Excessive Fines Clause, where landowner never challenged the contempt order or trial court's denial of his motion to reconsider, but instead sought to challenge the trial court's determinations in contempt order on appeal from an order enforcing the sanctions.

TELECOM - CALIFORNIA

City of Lancaster v. Netflix, Inc.

Court of Appeal, Second District, Division 3, California - February 22, 2024 - Cal.Rptr.3d - 2024 WL 725166

City brought putative class action on behalf of itself and other local governments against video streaming services seeking unpaid past franchise fees for video services under the Digital Infrastructure and Video Competition Act and declaratory relief compelling providers to obtain state franchises and pay franchise fees going forward.

The Superior Court sustained providers' demurrer to the complaint without leave to amend, and entered judgment. City appealed.

The Court of Appeal held that:

- Act did not expressly create a private right of action for local governments against non-franchise holders;
- Act did not contain an implied private right of action for local governments against non-franchise holders; and
- Trial court appropriately preserved Public Utilities Commission's jurisdiction.

Private right of action created by the Digital Infrastructure and Video Competition Act, which

required video service providers to obtain a franchise from the Public Utilities Commission and pay franchise fees to local governments in exchange for use of public rights-of-way to operate video service networks, did not expressly create a private right of action for city and local government entities against streaming services that were non-franchise holders for unpaid video service provider fees; Act made clear that fees to be collected from video service providers operating within local government's jurisdiction were franchise fees, and that only "holders" of a state franchise were obligated to pay the required fees.

Digital Infrastructure and Video Competition Act, which required video service providers to obtain a franchise from the Public Utilities Commission and pay franchise fees to local governments in exchange for use of public rights-of-way to operate video service networks, did not contain an implied private right of action for local governments against non-franchise holders for collection of video service provider fees; structure of the Act indicated it was legislative intent for Commission, not local governments, to be responsible for enforcement issues relating to state franchise requirement, as it provided for Commission to bring suit on its own against video service providers that failed to obtain state franchise, while the Act's legislative history made no mention of private right of action against non-franchise holders.

Trial court appropriately preserved Public Utilities Commission's jurisdiction by sustaining demurrer to city's declaratory relief claim against video streaming services seeking judicial declaration that services must obtain state-issued franchises through the Commission, where claim was wholly derivative of city's claim asserting private cause of action under the Digital Infrastructure and Video Competition Act seeking past due video service provider fees allegedly owed by providers, which was meritless because the Act granted enforcement authority to Commission and not local governments, and further, city's claim was essentially a thinly veiled request that court order the Commission to issue franchises to providers or to institute enforcement action against them.

IMMUNITY - COLORADO

Hice v. Giron

Supreme Court of Colorado - February 20, 2024 - P.3d - 2024 WL 677222 - 2024 CO 9

Following chase that police officer began before activating his vehicle's emergency lights, and which ended with vehicle colliding into van, fatally injuring van's driver and passenger, relatives and estate representatives of driver and passenger brought wrongful death action against officer and town.

Defendants asserted immunity defense under the Colorado Governmental Immunity Act (CGIA). The District Court dismissed on the basis of immunity. Relatives and estate representatives appealed. The Court of Appeals reversed, finding that defendants were not entitled to immunity because officer did not activate his lights and siren for the entire time he exceeded speed limit. The Supreme Court granted certiorari review.

The Supreme Court held that:

- To waive immunity under the CGIA, a minimal causal connection was required between fatal injuries and officer's failure to use lights and siren;
- Officer did not violate traffic code without privilege so as to waive immunity under the CGIA;
- Statute providing CGIA immunity "only when" making use of audible or visual signals did not require officer to use lights or sirens as soon as he began speeding; and
- Any statutory discretion afforded police officer not to use lights and siren did not mandate that

officer waived immunity under the CGIA.

EMINENT DOMAIN. - DISTRICT OF COLUMBIA

Gordon v. District of Columbia

District of Columbia Court of Appeals - February 15, 2024 - A.3d - 2024 WL 630165

Property owners who sought to sell their family home filed action against the District of Columbia and several District employees, asserting constitutional and common-law claims related to the designation of the home as a historic property.

The Superior Court granted in part and denied in part the District's motion to dismiss and granted the District's motion for summary judgment on the remainder of the claims. Property owners appealed.

The Court of Appeals held that:

- Historic Preservation Office (HPO) employee was entitled to qualified immunity from property owners' Fourth Amendment claim;
- Property owners' allegations were insufficient to establish District's liability under § 1983 for HPO employee's unauthorized entry into property owners' home under a "single instance" theory;
- Property owners' allegations were insufficient to support failure-to-train claim against employee's supervisor;
- Remand was necessary on the issue of whether HPO employee was entitled to absolute official immunity from property owners' common law trespass claim;
- District's designation of property owners' home as a historic landmark was not a regulatory taking under the Fifth Amendment; and
- Historic Preservation Review Board (HPRB) hearing regarding the proposed historic designation of home did not deprive property owners of procedural due process.

IMMUNITY - OKLAHOMA

Jackson County Emergency Medical Service District v. Kirkland

Supreme Court of Oklahoma - February 13, 2024 - P.3d - 2024 WL 564543 - 2024 OK 4

Toll worker who was injured when ambulance collided with a turnpike tollbooth filed a negligence action against ambulance driver and county emergency medical services (EMS) district.

The District Court denied defendants' motions for summary judgment and to substitute parties. EMS district filed an application to assume original jurisdiction and a petition for writ of prohibition.

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

- Board of trustees, as the EMS district's governing body, should have been substituted as a party;
- EMS district, vis-a-vis the board of trustees, was subject to immunity from liability to the same extent as municipalities and counties within the state enjoyed such immunity; and
- EMS district, vis-a-vis the board of trustees, was immunity from liability in negligence action brought by toll worker who had received workers' compensation benefits.

Board of trustees for county emergency medical services (EMS) district should have been

substituted for the EMS district in negligence action brought by highway toll worker injured in ambulance collision with toll booth; EMS district and its board of trustees were not distinctly created entities which could be separated from each other, and EMS district's board of trustees was the expressed entity to be sued as EMS district's sole governing body.

County's emergency medical services (EMS) district, vis-a-vis the board of trustees, was subject to immunity from liability in negligence action brought by toll worker injured in an ambulance collision to the same extent as municipalities and counties within the state enjoyed such immunity under the Oklahoma Governmental Tort Claims Act (GTCA).

County's emergency medical services (EMS) district, vis-a-vis the board of trustees, was immune from liability in negligence action brought by toll worker injured in an ambulance collision under the Oklahoma Governmental Tort Claims Act (GTCA), where the GTCA precluded liability if the injury was covered by workers' compensation, and it was undisputed that workers' compensation benefits had been paid to toll worker as a result of the accident.

LIABILITY - PENNSYLVANIA

Donahue v. Borough of Collingdale

United States District Court, E.D. Pennsylvania - February 1, 2024 - F.Supp.3d - 2024 WL 387455

Bystander injured and administratrix of estate of bystander killed when vehicle of which bystanders were occupants was struck by vehicle being chased by police in high speed pursuit, as well as decedent bystander's sister, brought action against individual police officers and boroughs, asserting claims under § 1983 for due process violations and municipal liability and under state law.

Officers and boroughs moved for summary judgment.

The District Court held that:

- Individual officers were not liable on substantive due process claim under state-created danger theory;
- Fact issues existed as to whether boroughs' allegedly defective customs and training related to pursuits were moving force of constitutional violations, precluding summary judgment on claims for municipal liability; and
- Bifurcation of § 1983 claims and state law claims was appropriate.

MUNICIPAL ORDINANCE - PENNSYLVANIA

Barris v. Stroud Township

Supreme Court of Pennsylvania - February 21, 2024 - A.3d - 2024 WL 696822

Landowner filed complaint seeking declaratory judgment that township ordinance prohibiting discharging of firearms within township, alongside zoning ordinances limiting shooting ranges to two non-residential districts in township, violated Second Amendment on its face.

The Court of Common Pleas entered summary judgment in township's favor, and landowner appealed. The Commonwealth Court reversed. Leave to appeal was granted.

The Supreme Court held that:

- Owner's conduct in discharging firearms on his own property in order to gain proficiency in their use was covered by Second Amendment, but
- Ordinance did not violate Second Amendment on its face.

Property owner's conduct in discharging firearms on his own property in order to gain proficiency in their use was covered by Second Amendment's plain text, where owner faced confiscation of his lawfully-owned firearms pursuant to township ordinance for doing so.

Township ordinance prohibiting discharging of firearms within township except in shooting ranges within non-residential districts was fully consistent with Nation's historical tradition of firearm regulation, and thus did not violate Second Amendment on its face; colonial, founding, and antebellum generations recognized states' longstanding power to regulate when and where firearms could be used for non-self-defense purposes, number of firearm discharge regulations proliferated after Second Amendment's ratification, number of regulations during this time were aimed specifically at shooting ranges and target practice, and township adopted ordinance for protection of public health and safety and general welfare of residents and visitors.

PREVAILING WAGE ACT - PENNSYLVANIA

Ursinus College v. Prevailing Wage Appeals Board

Supreme Court of Pennsylvania - February 21, 2024 - A.3d - 2024 WL 696765

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" covered by the Pennsylvania Prevailing Wage Act (PWA), entitling members of labor union to prevailing minimum wages for project work already completed.

The Commonwealth Court reversed. Discretionary review was granted.

The Supreme Court held that the project was not paid for in whole or in part with public funds and, thus, did not constitute a "public work" within meaning of the PWA.

As shown by relevant dictionary definitions, plain reading of phrase "paid for in whole or in part out of the funds of a public body," as used in provision of the Pennsylvania Prevailing Wage Act (PWA) defining "public work" to mean construction, reconstruction, demolition, alteration, and/or repair work other than maintenance work, done under contract and paid for in whole or in part out of the funds of a public body where estimated cost of total project is in excess of $25,000, requires the work to be marked by the receipt of payment, in whole or in part, from available pecuniary resources from or possessed by the Commonwealth of Pennsylvania, any of its political subdivisions, any authority created by the General Assembly of the Commonwealth of Pennsylvania, and any instrumentality or agency of the Commonwealth of Pennsylvania.

Construction project undertaken by private, non-profit college and financed by bonds issued by public authority was not paid for in whole or in part with public funds, and so was not a "public work" covered by Prevailing Wage Act (PWA); in providing conduit financing for project, a private endeavor, authority assigned loan agreement to trustee and then sold bonds to private underwriter, which paid purchase price with private monies directly to trustee, which deposited monies into

project fund and then disbursed monies to college or others designated by it for project costs, college alone repaid bond debt from its own revenue, again directly to trustee, which deposited funds into bond fund from which bondholders were paid, at no time did relevant monies flow through authority's coffers, and neither authority nor taxpayers bore any risk or liability relative to the bonds.

For a construction project to be a "public work" covered by the Pennsylvania Prevailing Wage Act (PWA), the statute's clear requirement that the project be "paid for in whole or in part out of the funds of a public body" cannot be satisfied by either the mere involvement of a public body in the transaction or a "but for" test pursuant to which "but for" the public body's involvement in the transaction the project could not have occurred; allowing a "but for" test or mere involvement of the public body to suffice would require court to impermissibly add to or otherwise modify statutory language to expand the PWA's coverage beyond its plain terms.

EMINENT DOMAIN - SOUTH CAROLINA

Applied Building Sciences, Inc. v. South Carolina Department of Commerce, Division of Public Railways

Supreme Court of South Carolina - January 17, 2024 - S.E.2d - 2024 WL 174157

Engineering firm that was tenant in building condemned for public use asserted an inverse condemnation claim against Division of Public Railways, as condemnor, seeking reimbursement of reestablishment expenses.

The Circuit Court granted Division's motion for summary judgment. Firm appealed, and case was certified for review.

The Supreme Court held that:

- Reestablishment expenses related to the moving of small businesses, farms, and non-profit organizations are separate from constitutional just compensation, and
- The $50,000 statutory limit on reimbursement of reestablishment expenses does not violate the federal and state takings clauses.

Reestablishment expenses related to the moving of small businesses, farms, and non-profit organizations due to a condemnation for public use are separate from constitutional just compensation in an eminent domain action.

The $50,000 statutory limit on reimbursement of reestablishment expenses related to the moving of small businesses, farms, and non-profit organizations due to a condemnation for public use does not violate the takings clauses of the Federal and State Constitutions.

EMINENT DOMAIN - CALIFORNIA

Mojave Pistachios, LLC v. Superior Court of Orange County

Court of Appeal, Fourth District, Division 3, California - February 8, 2024 - Cal.Rptr.3d - 2024 WL 489446

Limited liability company (LLC) that operated a pistachio orchard in the desert filed an action

against local water agency, alleging that agency violated LLC's common law and constitutional rights to water by granting groundwater pumping allotments to other users but not to LLC, and that agency's actions amounted to a taking.

The Superior Court sustained agency's demurrer. LLC petitioned for a writ of mandate.

The Court of Appeal held that:

- As a matter of first impression, a person challenging a groundwater fee imposed under the Sustainable Groundwater Management Act (SGMA) must first pay the fee before bringing an action for a refund;
- LLC was required to first pay the assessed groundwater replenishment fee before bringing any cause of action challenging the fee;
- LLC was required to pay the groundwater basin replenishment fee before it could challenge the local water agency's exempted pumping allotments; and
- LLC's challenge to agency's implementation actions other than the replenishment fee did not support a cause of action for a taking.

EMINENT DOMAIN - NEBRASKA

Sanitary and Improvement District No. 596 of Douglas County v. THG Development, L.L.C.

Supreme Court of Nebraska - February 16, 2024 - N.W.3d - 315 Neb. 926 - 2024 WL 649268

County sanitary and improvement district (SID) filed petition in county court seeking condemnation of portion of landowner's property that was outside SID boundaries.

After landowner was awarded $56,390 for the taking, landowner appealed.

The District Court entered judgment upon jury verdict and denied landowner's motion for new trial. In second case, SID sought to levy a special assessment, and landowner counterclaimed for declaratory relief. The District Court granted landowner's motion for summary judgment in part and denied motion for attorney fees. Landowner appealed in first case, SID appealed and landowner cross-appealed in second case, and appeals were consolidated.

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

- Landowner did not strictly comply with statute governing notice of constitutional questions;
- As matter of first impression, SID does not have statutory authority to levy a special assessment on property outside its boundaries;
- Any error in admission of special benefits evidence in condemnation case was not reversible error;
- Trial court acted within its discretion in admitting expert testimony about value of remaining property in condemnation case;
- Mistrial of condemnation case was not warranted based on closing comment of SID counsel;
- Special assessment case did not involve frivolous or bad faith claims warranting attorney fees against SID; and
- Eminent domain statutes did not authorize attorney fees for special assessment case; disapproving *Simon v. City of Omaha,* 267 Neb. 718, 677 N.W.2d 129.

ZONING & PLANNING - OHIO

State ex rel. Thomas v. Wood County Board of Elections

Supreme Court of Ohio - February 2, 2024 - N.E.3d - 2024 WL 396636 - 2024-Ohio-379

Property owner, who sought to amend zoning for property to commercial sought writs of mandamus and prohibition to order county board of elections to remove zoning amendment referendum from primary-election ballot.

The Supreme Court held that:

- Property owner lacked adequate remedy in the ordinary course of the law, as required to obtain writs of mandamus or prohibition;
- County board of elections did not act in clear disregard of applicable law in determining that eight percent statutory signature requirement for referendum petition controlled number of signatures required for referendum;
- Summary of zoning amendment in referendum petition satisfied statutory requirements;
- County board of elections did not abuse its discretion or disregard applicable law in certifying zoning amendment referendum for placement on primary-election ballot;
- Notice for board meeting at which referendum petition was considered met statutory notice requirements, and, thus, certification of petition for placement on primary-election ballot was valid; and
- Notice for board meeting did not violate property owner's procedural due-process rights.

EMINENT DOMAIN - TEXAS

Rhone v. City of Texas City, Texas

United States Court of Appeals, Fifth Circuit - February 14, 2024 - F.4th - 2024 WL 617246

Owner of three apartment buildings in city brought appeal, in state district court, from order of nuisance abatement issued by a Municipal Court of Record, asserting claims under § 1983 for inverse condemnation, denial of procedural due process, and unconstitutional seizure, and seeking declaratory judgment.

After removal by city, the United States District Court granted summary judgment to city on due process claim, and later granted summary judgment to city on remaining claims. Owner appealed and filed motion to restrain and enjoin damage to or demotion of buildings. The Court of Appeals denied the motion without prejudice, and buildings were demolished by city during pendency of appeal.

The Court of Appeals held that:

- Owner satisfied requirement for exception to mootness, for issues capable of repetition yet evading review, that duration of challenges, to Municipal Court of Record's nuisance finding and court's constitutionality, was too short for complete judicial review and sufficient relief;
- Theoretical possibility of future procedural due process and seizure violations did not support exception to mootness;
- Appeal was not moot as to takings claim; and
- City's imposition of compliance costs for repairing conditions at apartment buildings did not violate doctrine of unconstitutional conditions.

ZONING & PLANNING - VIRGINIA

Hartley v. Board of Supervisors of Brunswick County

Court of Appeals of Virginia, Richmond - February 13, 2024 - S.E.2d - 2024 WL 558069

Opponents sought judicial review of county zoning board's upzoning decision which rezoned a property from agricultural to business use to allow development of a retail store.

The Brunswick Circuit Court partially sustained board's demurrer, and then granted board's motion for summary judgment, denied opponents' motion for continuance, and issued final order. Opponents appealed.

The Court of Appeals held that:

- Board's deviation from comprehensive plan did not render its decision unreasonable as a matter of law;
- Board's failure to consider statutory factors did not render its decision arbitrary and capricious;
- Board met its burden to put forward evidence of reasonableness sufficient to make question fairly debatable;
- Timing of summary judgment was not an abuse of discretion;
- Board's failure to follow Virginia Department of Transportation (VDOT) guidelines did not render decision unreasonable as a matter of law;
- Board's alleged violation of county subdivision ordinance did not render its decision unreasonable as a matter of law; and
- Board's alleged violation of its own zoning ordinance did not render its decision unreasonable as a matter of law.

ENVIRONMENTAL LAW - WASHINGTON

SkyCorp Ltd v. King County

Court of Appeals of Washington, Division 2 - February 13, 2024 - P.3d - 2024 WL 562169

Company that had been fined by county for disposing of mixed and nonrecyclable construction and demolition waste in an out-of-county facility that was licensed but that county had not designated for the disposal of such waste brought action against county, alleging that county regulation requiring disposal of such waste generated within the county at a designated facility violated both the Washington Constitution's privileges and immunities clause and its provision granting police powers to local governments by regulating conduct outside the county and infringing company's right to dispose of its property.

The Superior Court granted summary judgment to county. Company appealed.

The Court of Appeals held that:

- Regulation had only incidental effects on out-of-county activities and thus had not been shown beyond a reasonable doubt to violate constitutional provision granting police powers to local governments;
- Regulation did not directly and irreconcilably conflict with statute barring the disposal of solid waste except at a disposal site with a valid permit or as otherwise provided in the statute, and regulation thus was not shown to violate constitutional provision granting police powers to local

governments by conflicting with state law;
- Regulation was not so unreasonable, arbitrary, or capricious that it exceeded county's authority under constitutional provision granting police powers to local governments;
- The right to dispose of solid waste was not a fundamental right, so regulation did not violate company's rights under the privileges and immunities clause;
- Trial court did not abuse its discretion in declining to strike declaration filed by county; and
- Any error committed by trial court in declining to strike declaration filed by county was harmless.

PUBLIC CONTRACTS - ARIZONA

Neptune Swimming Foundation v. City of Scottsdale

Supreme Court of Arizona - February 6, 2024 - P.3d - 2024 WL 440990

Private swim club filed complaint seeking a writ of mandamus compelling city to award club operating license to operate youth competitive swimming program in city's facilities under request-for-proposal (RFP) process and alleging violation of the "gift clause" of State Constitution and claiming license issued to club's competitor was not supported by adequate consideration, given club's bid for higher rate per lane hour.

The Superior Court, Maricopa County, granted summary judgment to city, and club appealed. The Court of Appeals affirmed. Club filed petition for review.

The Supreme Court held that:

- Operating license for party to operate youth competitive swimming program in city's facilities under RFP process satisfied first prong of inquiry under "gift clause" in State Constitution;
- Consideration prong of State Constitution's "gift clause" applied to club's claim;
- Club's failed competitive proposal was relevant to determining objective fair market value, but club's willingness to pay higher fees for operating license than competitor did not conclusively establish fair market value;
- Club's failed bid for operating license was not sufficient to prove that what city gave in operating license to competitor far exceeded what it received in return, and thus, there was no violation of gift clause;
- City did not have ministerial duty to award operating license to private swim club after city determined that club had scored the most points under RFP process;
- Whether city engaged in favoritism by canceling RFP after club submitted more advantageous proposal than its competitor precluded grant of summary judgment to city on club's claim that city violated its own procurement process; and
- Private swim club was not entitled to attorney fees under the private attorney general doctrine.

MUNICIPAL ORDINANCE - CALIFORNIA

City of Norwalk v. City of Cerritos

Court of Appeal, Second District, Division 2, California - February 1, 2024 - Cal.Rptr.3d - 2024 WL 376168

Neighboring city brought public nuisance action against city, alleging that city ordinance limiting commercial and heavy truck traffic through the city to certain major arteries caused extra traffic to travel through neighboring city and resulted in adverse consequences.

The Superior Court, Los Angeles County, sustained city's demurrer without leave to amend, and neighboring city appealed.

The Court of Appeal held that:

- Courts assessing whether an alleged nuisance is a "necessary implication" of a statute's express authorization, and thus whether statutory public nuisance immunity applies, should ask whether the alleged nuisance is an inexorable and inescapable consequence that necessarily flows from the statutorily authorized act;
- City had statutory immunity from neighboring city's public nuisance claims;
- Ordinance restricting traffic was not so unreasonable as to make void the delegation of regulatory authority to the city to enact such restrictions; and
- Ordinance was not invalid due to its failure to specifically exclude state and federal highways.

City had statutory immunity from neighboring city's public nuisance claims stemming from adverse effects of heavy truck traffic diverted into neighboring city by virtue of city municipal ordinance limiting heavy truck traffic to certain streets in city; statutes delegated to city the authority to prohibit the use of a street by any commercial vehicle or by any vehicle exceeding a maximum gross weight limit and to prohibit the use of particular highways by certain vehicles, and adverse effects to neighboring city inexorably and inescapably flowed from those statutorily authorized actions.

REVENUE BONDS - CALIFORNIA

Planning and Conservation League v. Department of Water Resources

Court of Appeal, Third District, California - January 5, 2024 - 98 Cal.App.5th 726 - 317 Cal.Rptr.3d 53 - 23 Cal. Daily Op. Serv. 359

Department of Water Resources filed action to validate amendments to long-term contracts with local government contractors receiving water through State Water Project, extending contract terms, expanding facilities listed as eligible for revenue bond financing, and making other changes to contracts' financial provisions.

Conservation groups and public agencies answered, some asserting affirmative defenses and contesting validation and others supporting validation. Conservation groups and other entities filed two separate actions for writs of mandate and for declaratory and injunctive relief challenging approval of amendments under California Environmental Quality Act (CEQA), Sacramento-San Joaquin Delta Reform Act, and public trust doctrine. Contractors intervened.

In coordinated proceeding, the Superior Court, Sacramento County, entered judgment in Department's favor in all three cases. Parties opposing validation appealed. Appeals were consolidated.

The Court of Appeal held that:

- Baseline for evaluation of environmental effects of proposed contract amendments was environmental setting under current contract conditions;
- Amendments were not part of larger project, such that they were properly studied in their own environmental impact report (EIR);
- CEQA did not require Department to consider environmental impacts of all potential projects which could be funded using revenue bonds issued under amendments;
- EIR adequately examined range of reasonable project alternatives;

Amendments did not constitute "covered action" under Delta Reform Act;
- Sufficient evidence supported conclusion that amendments would not impact public trust resources; and
- Department complied with statute requiring it to present amendments to legislative committees.

Where a project involves ongoing operations or a continuation of past activity, the established levels of a particular use and the physical impacts thereof are considered to be part of the existing environmental baseline, for purposes of determining whether a project is likely to have significant environmental effects under the California Environmental Quality Act (CEQA); this rule applies to renewal of a permit or other approval for an existing facility even though the facility and its operations have not been previously reviewed under CEQA.

Baseline for evaluation by Department of Water Resources of whether proposed amendments to long-term contracts with local government agencies that received water through State Water Project would have significant environmental effects under California Environmental Quality Act (CEQA) was environmental setting under current contract conditions, not hypothetical environmental setting if contracts were not in place.

Proposed amendments to long-term contracts between Department of Water Resources and local government agencies receiving water through State Water Project were not part of larger project to build new water conveyance for Sacramento-San Joaquin Delta, and thus, Department's environmental review of proposed contract amendments alone did not constitute improper piecemealing of single project in violation of California Environmental Quality Act (CEQA), even though legislative oversight materials indicated relationship between contract amendments and financing of proposed conveyance project; amendments served independent purpose from conveyance, namely fixing financing problems with State Water Project, and amendment was only small step towards conveyance, which faced significant other hurdles.

On appeal from judgment in favor of Department of Water Resources in California Environmental Quality Act (CEQA) action, conservation groups forfeited their argument that addendum to coordinated operations agreement between Department of Water Resources and United States Bureau of Reclamation, which Department allegedly negotiated at same time it was reviewing proposed amendments to long-term contracts with local government agencies receiving water through State Water Project, indicated amendments and addendum were part of same project, such that CEQA would have required environmental impact report (EIR) for amendments to consider addendum's impact; groups presented inadequate analysis and evidence indicating addendum was reasonably foreseeable consequence of amendments.

Existing State Water Project operations were part of baseline for environmental review of proposed amendments extending terms of and changing financing for long-term contracts with local government agencies that received water through Project, and thus, in environmental impact report (EIR) for proposed contract amendments, Department of Water Resources was not required to consider environmental impacts of extended period of existing operations; amendments would continue existing operations without change.

Links between proposed amendments to duration and financing provisions of long-term contracts with local government agencies receiving water through State Water Project and potential future projects involving existing State Water Project facilities, such as possible use of revenue bonds issued under amendments to repair aqueduct and reinforce dam, were too attenuated for California Environmental Quality Act (CEQA) to require Department of Water Resources, when assessing environmental impacts of proposed contract amendments, to forecast impacts of all such potential projects; amendments did not commit Department to, authorize revenue bonds for, or cause

potential projects, and government funding mechanisms with no commitment to specific projects were specifically excluded from CEQA review.

In environmental impact report (EIR) regarding proposed amendments to terms and financial provisions of long-term contracts with local government agencies receiving water through State Water Project, project alternative of excluding amendment to revenue bond provisions was substantially similar to alternatives that Department of Water Resources, as lead agency, discussed in detail, and thus, California Environmental Quality Act (CEQA) Guideline governing discussion of range of reasonable alternatives did not require Department to discuss exclusion of revenue bond amendment in detail, where exclusion of revenue bond amendment could be understood from specifics of no-project alternative and alternative that only extended terms of contracts.

Decision of Department of Water Resources, in environmental impact report (EIR) for proposed amendments to terms and financing provisions of long-term contracts with local government agencies receiving water through State Water Project, to reject project alternatives to reduce water amounts that agencies would receive under contracts and to implement new water conservation management provisions did not constitute failure to analyze range of reasonable project alternatives, as required by California Environmental Quality Act (CEQA); EIR for proposed contract amendments had limited objective of addressing financial issues with existing contracts, and Department would have needed to add objectives to EIR to develop alternatives regarding water reductions or conservation measures.

In environmental impact report (EIR) issued by Department of Water Resources for proposed amendments extending terms and changing financial provisions of long-term contracts with local government agencies receiving water through State Water Project, no-project alternative was based on plausible, fact-based forecast that agencies would each elect to extend their existing contracts pursuant to evergreen clause, rather than prediction that some or all agencies would fail to extend contracts, and thus, EIR satisfied California Environmental Quality Act (CEQA) requirement of analyzing no-project alternative; State Water Project had long history and played critical role in distributing water to many residents and much farmland, making it unlikely that agencies would terminate contracts.

Proposed amendments to long-term contracts with local government agencies receiving water through State Water Project, which extended terms of existing contracts and expanded ability of Department of Water Resources to use revenue bonds to finance betterments for State Water Project facilities and build new facilities, did not occur in Sacramento-San Joaquin Delta or change developed uses of State Water Project, and thus, amendments did not constitute “covered action” subject to certification requirements of Sacramento-San Joaquin Delta Reform Act; facilities were not located in Delta, term extensions did not expand State Water Project’s existing operations, and financing amendments were not equivalent to future projects that would use revenue bond funds raised as result of amendments.

Sufficient evidence supported conclusion of Department of Water Resources that no public trust resource would be impacted by proposed amendments extending terms and changing financial provisions of long-term contracts with local government agencies receiving water through State Water Project, such that Department’s approval of contract amendments did not violate public trust doctrine; State Water Resources Control Board or its predecessor had granted water rights to Department for State Water Project decades previously and amended such rights several times, contracts at issue were executed decades prior and allowed local agencies to extend their contractual interests indefinitely, and any use of preexisting financing mechanism that amendments broadened was speculative.

Public trust doctrine did not impose general duty of ongoing supervision on Department of Water Resources as to water rights with which it operated State Water Project, and thus, Department had no duty to weigh public trust interests or consider additional protections to those interests when considering proposed amendments extending terms and changing financing provisions of long-term contracts with local government agencies receiving water through State Water Project, where amendments had no impact on public trust uses, as they merely extended longstanding arrangements under State Water Project and bore only attenuated relationships to any projects that might be funded in future using revenue raised under amendments.

The statute requiring the Department of Water Resources to make a presentation to certain legislative committees at an informational hearing at least 60 days before the approval of a renewal or extension of a long-term water supply contract does not contemplate that the contract is in its final form when it is presented to the committees; the goal of the statute is to provide high-level oversight into the renewal or extension of State Water Project long-term contracts, but not to insert such oversight into the details of finalizing the renewal or extension by requiring an additional hearing as to any changes made following the committee hearing.

Failure by Department of Water Resources, at informational hearing before legislative committee regarding proposed amendments to long-term contracts with local government agencies receiving water through State Water Project, to mention that it had received but not yet responded to public comments on draft environmental impact report (EIR) for contract amendments did not violate statute requiring Department to make legislative presentations at least 60 days before approving renewal or extension of long-term water supply contract under State Water Project; statute did not require presentation to include details about EIR, and Department stated when seeking hearing that draft EIR had been prepared and final EIR would be completed in future.

Granting request by Department of Water Resources for validation of proposed amendments to long-term contracts with local government agencies receiving water through State Water Project would not confer absolute power on Department to assume unbounded contracts; validation action was statutorily limited to contracts in the nature of, or directly relating to, revenue bonds issued by Department under State Water Project, and Department acted within its general contracting authority under State Water Project in approving and executing amendments.

IMMUNITY - COLORADO

County of Jefferson v. Stickle

Supreme Court of Colorado - February 5, 2024 - P.3d - 2024 WL 413484 - 2024 CO 7

Pedestrian brought premises liability action against county arising out of injuries she sustained when she fell in a public parking structure maintained by the county. County filed motion to dismiss for lack of subject matter jurisdiction, alleging immunity under the Colorado Governmental Immunity Act (CGIA).

Following an evidentiary hearing, the District Court denied the county's motion to dismiss. County appealed, and the Court of Appeals affirmed. County petitioned for certiorari review, which was granted.

The Supreme Court held that:

- As a matter of first impression, parking structure where pedestrian fell was a "building" under the

CGIA, and
- Optical illusion created by parking structure's surface coloring resulted at least in part from maintenance of the facility, and thus CGIA waived immunity.

Parking structure where pedestrian fell was a "building" within waiver provision of the Colorado Governmental Immunity Act (CGIA), where structure was a permanent two-level structure made of concrete and masonry materials, lower level was not entirely enclosed but had a knee-high wall surrounding it with support columns at regular intervals, and while building did not have heating, ventilation, or air conditioning, it had electricity, lighting, and a fire suppression system.

Optical illusion created by parking structure's surface coloring resulted at least in part from maintenance of the facility and was not solely a design decision, and thus Colorado Governmental Immunity Act (CGIA) waived immunity for accident in which pedestrian fell in garage allegedly due to illusion that caused walkway and parking surface to appear as a single flat surface; even if resurfacing both walkway and parking surface with the same materials was a design decision, the decision was part of a broader maintenance process.

COUNTIES - GEORGIA

First Center, Inc. v. Cobb County

Supreme Court of Georgia - February 6, 2024 - S.E.2d - 2024 WL 422804

Plaintiffs brought action against county, county commissioner, and county zoning division manager seeking declaratory, injunctive, and mandamus relief relating to a dispute about rules dictating the height of a wall surrounding a subdivision.

The Superior Court denied mandamus relief and dismissed other claims for failure to state a claim. Plaintiffs applied for discretionary review, which was granted after transfer.

The Supreme Court held that suit was not brought exclusively against and in the name of the county, as required for constitutional waiver of sovereign immunity.

Suit against county seeking declaratory, injunctive, and mandamus relief relating to a dispute about rules dictating the height of a wall surrounding a subdivision did not comply with state constitutional provision waiving sovereign immunity only for claims brought exclusively against and in the name of the state or local government, and therefore the entirety of the case was due to be dismissed, where plaintiffs sued the county but also named as defendants a county commissioner and the county zoning division manager.

IMMUNITY - MARYLAND

Mayor of Baltimore v. Wallace

Appellate Court of Maryland - February 1, 2024 - A.3d - 2024 WL 378084

Bicyclist, who was ejected from her bicycle when wheel of her bicycle became stuck in a gap between the granite bulkhead and brick pavers in public pedestrian walkway and shared use bicycle path, brought negligence action against city, alleging that city breached its duties to her by negligently causing, allowing to remain, and failing to warn her of a dangerous and defective condition on the premises, of which city had actual and/or constructive knowledge.

The Circuit Court entered judgment on jury verdict for bicyclist, and city appealed.

The Appellate Court held that:

- Pedestrian walkway and shared use bicycle path did not serve as a property, park or land that was made available for recreational purposes for purposes of determining if Maryland Recreational Use Statute (MRUS) applied, and
- MRUS did not apply, and thus, it did not override city's common law duty of care.

MUNICIPAL CORPORATIONS - SOUTH DAKOTA

Bohn v. Bueno

Supreme Court of South Dakota - February 7, 2024 - N.W.3d - 2024 WL 483676 - 2024 S.D. 6

Citizens applied for writ of mandamus against city officials after city finance officer declined to certify their petition to hold election to remove position of city manager from city's government.

The Circuit Court granted summary judgment for city. Citizens appealed.

The Supreme Court held that:

- Citizens' petition was in the required form under State Election Board regulation;
- Finance officer lacked authority to inquire into the petition's subject matter;
- Finance officer had a clear duty to certify petition and present it to city council;
- Petition was authorized under statute governing petitions for employment of a city manager;
- Petition's citation to incorrect statute did not preclude election pursuant to correct authorizing statute;
- Citizens were not entitled to statutory appellate attorney fees;
- Citizens were not entitled to attorney fees for frivolous or malicious defense; and
- Citizens were prevailing parties entitled to costs.

WATER LAW - WASHINGTON

West Terrace Golf LLC v. City of Spokane

Court of Appeals of Washington, Division 3 - February 6, 2024 - P.3d - 2024 WL 440584

Water users, who resided outside city and purchased water from city, brought action against city for, among other things, declaratory ruling that city's higher water rates for nonresident users violated statutes in title governing water companies.

City brought separate action for declaratory ruling that statute governing municipal utilities applied to a municipality's setting of its water rates.

The Superior Court, Spokane County entered order in city's favor, holding that statute governing municipal utilities and city's municipal code, not title governing water companies, governed city's authority to establish water rates at issue, and certified its order for interlocutory review. Water users sought direct review in Supreme Court, which denied direct review and transferred consolidated action to Court of Appeals, which accepted discretionary review.

The Court of Appeals held that:

- As a matter of apparent first impression, when classifying customers and service for rate-setting purposes, a municipal water supplier may only consider reasonable grounds for distinction;
- Statute requiring water rates to be "just, fair, reasonable and sufficient" was not repealed by implication as applied to municipal water suppliers; and
- As a matter of apparent first impression, a municipal water supplier must charge a uniform, just, fair, reasonable, and sufficient rate for a given class of customers or service.

The statute listing factors that a municipal water "may in its discretion consider" in "classifying customers served or service furnished" for rate-setting purposes, in which the last enumerated factor is "any other matters which present a reasonable difference as a ground for distinction," only allows cities and towns to base a rate classification on a factor, including the enumerated factor of the "location of the various customers within and without the city or town," if the factor is in fact a reasonable ground for distinction; the last factor, an omnibus clause, marks the common attribute that connects the specific items listed, and this interpretation is consistent with other statutes prohibiting unreasonable rate preferences and rate discrimination.

Because the statute authorizing cities and towns to construct water works and classify services and water users for rate-setting purposes concerns only rate classifications, it does not preclude the statute requiring gas, electricity, and water rates in general to be "just, fair, reasonable and sufficient" from applying to particular rates set by municipal water suppliers.

Legislature's repeal of statutory language requiring rates set by a municipal water supplier to be "just and reasonable" did not repeal by implication the earlier statute requiring water rates set by utilities in general to be "just, fair, reasonable and sufficient" to the extent such statute applied to municipal water suppliers; statute governing municipal water suppliers did not, by itself, cover entire field of municipal water rates, legislature did not signal intent to recede from "just, fair, reasonable and sufficient" standard for municipal water suppliers but not for other classes of public or private utilities, and requirement of reasonableness in utility rates was longstanding.

Under the statute authorizing municipal water works, a municipal water supplier must charge a uniform rate for a given, statutorily permissible classification of customers or service, and under the statute governing water rates set by utilities in general, the rate must be just, fair, reasonable, and sufficient.

A municipal water supplier has reasonable discretion to fix rates, its rates are presumptively reasonable, and those challenging the rates bear the burden of proof to show the rates are excessive and disproportionate to the service rendered.

The inquiry into whether the rates charged by a municipal water supplier are excessive and disproportionate to the service rendered is governed by two controlling considerations: the value of the services to the public and fair compensation for the supplier.

ZONING & PLANNING - CALIFORNIA

Riddick v. City of Malibu

Court of Appeal, Second District, Division 5, California - February 1, 2024 - Cal.Rptr.3d - 2024 WL 376305

Landowner filed complaint against city after city denied their application for a permit to add an

accessory dwelling unit (ADU) to their residence, alleging administrative and traditional mandate as well as a violation of the Housing Accountability Act.

The Superior Court granted claim for traditional mandate. City appealed, and landowners cross-appealed.

The Court of Appeal held that:

- City's interpretation of ordinance was not entitled to deference on appeal;
- Under city ordinance, attached accessory dwelling units were in the class of improvements to existing single-family residences that were exempt from coastal development permit requirements; and
- Whether landowners were entitled to a permit within 60 days of their completed application for an attached accessory dwelling unit was not properly before the Court of Appeal.

City's interpretation of provision of local coastal program ordinance providing for exemptions from coastal development permits for improvements to existing single-family residences was not entitled to deference on appeal in action stemming from city's denial landowner's application for a permit to add an accessory dwelling unit to their residence; neither the language of the ordinance nor its legislative history were ambiguous, any ambiguity was not of a technical or obscure nature which required specialized expertise, city's interpretation was not the result of careful consideration by senior agency officials or a consistent position maintained over a long period of time, and ordinance language was not crafted by city planning officials but rather was based, almost verbatim, on an implementing regulation promulgated by the Coastal Commission.

Under city ordinance, attached accessory dwelling units (ADUs) were in the class of improvements to existing single-family residences that were exempt from coastal development permit requirements; ordinance noted that improvements to existing single-family residences were exempt as a class "except those noted below," improvements were defined as all structures directly attached to the residence as well as other structures normally associated with a single-family residence, which created two apparent classes of attached and detached structures, and while ordinance specified guest houses and accessory self-contained residential units was excluded from the list of other structures, that exclusion only applied to apparent class of detached structures.

Issue of whether landowners were entitled to a permit within 60 days of their completed application for an attached accessory dwelling unit was not properly before the Court of Appeal on landowners' cross appeal from determination that they were entitled to a writ of traditional mandate requiring city to consider their application as compliant with the relevant ordinance, as arguments on cross-appeal appeared to arise from matters that occurred following the final ruling on which the judgment was based.

PUBLIC UTILITIES - MAINE

Office of the Public Advocate v. Public Utilities Commission

Supreme Judicial Court of Maine - January 30, 2024 - A.3d - 2024 WL 339770 - 2024 ME 11

Office of the Public Advocate (OPA) sought judicial review of order of the Public Utilities Commission extending a waiver of the standard depreciation rate for the Maine Water Company (MWC).

The Supreme Judicial Court held that:

- Its review of Commission's decision was highly deferential;
- Plain language of Commission's rule did not authorize Commission to change or refrain from enforcing rule, and instead, provided a standard and alternative depreciation rate formula; and
- Commission did not abuse its discretion.

Plain language of Public Utilities Commission's rule providing that Commission may grant a request for a substantive deviation or waiver upon a finding of good cause or that compliance would be unduly burdensome and a finding that the deviation or waiver is not inconsistent with the purposes of the chapter or applicable statute from which the deviation or waiver is sought did not authorize Commission to change or refrain from enforcing rule, and instead, provided a standard and alternative depreciation rate formula, and therefore in the absence of a waiver provision specific to the standard and alternative approaches, the general waiver rule applied when determining whether to grant waiver as to depreciation rate for water utilities.

Public Utilities Commission did not abuse its discretion in setting water utility rates for Maine Water Company (MWC) by extending waiver of standard depreciation rate in anticipation of a gradual movement toward removal of cap on depreciation expenses that would otherwise have been charged to ratepayers and to use a phased-in approach when returning to a full charge of those expenses; by extending the cap temporarily and anticipating a gradual movement toward reduction of cap after MWC investigated impact of movement on customers, Commission's decision comported with statutory rate-setting goal and avoided rate shock.

Office of the Public Advocate (OPA) waived for Supreme Judicial Court review claims that Public Utilities Commission failed to create an evidentiary record in water utility rate setting proceeding, and that extending waiver of standard depreciation rate for Maine Water Company (MWC) was therefore unsupported by evidence in the record, by failing to raise issue with Commission; OPA knew that hearing examiners' report relied on parties' filings and MWC's data responses to OPA, but OPA made no challenge to recommendation and did not assert that this reliance was improper in its exceptions to the examiner's report.

ZONING & PLANNING - MARYLAND

Heard v. County Council of Prince George's County

Appellate Court of Maryland - February 2, 2024 - A.3d - 2024 WL 389025

Neighbor brought petition for judicial review of county council's enactment of zoning ordinance which amended single-family detached residential zone to allow for the adaptive reuse of an abandoned public-school building by nonprofit human services organization.

The Circuit Court dismissed the petition for lack of standing, and neighbor appealed.

The Appellate Court held that:

- Neighbor was specially aggrieved by and thus had standing to contest the ordinance;
- Maryland-Washington Regional District Act (RDA) superseded county charter's zoning provisions with respect to the subject property;
- Adaptive reuse was consistent with county's comprehensive plan, for purpose of whether alleged spot zoning was improper; and
- Reuse yielded an overall public benefit such that, even if amendment constituted spot zoning, it was not improper.

EMINENT DOMAIN - MINNESOTA

Fletcher Properties, Inc. v. City of Minneapolis

Court of Appeals of Minnesota - January 16, 2024 - N.W.3d - 2024 WL 157770

Landlords brought action challenging city ordinance aimed at preventing housing discrimination based on public assistance, alleging that ordinance violated the Takings Clause of the state's constitution and was preempted by state law.

The District Court granted summary judgment to landlord, and entered permanent injunction against enforcement of the ordinance, 2018 WL 9364046. City appealed. The Court of Appeals reversed and remanded, and the Supreme Court affirmed. On remand, the District Court dissolved the permanent injunction, granted city's motion for summary judgment, denied landlord's motion for summary judgment, and granted motions for leave to submit amici briefs. Landlord appealed.

The Court of Appeals held that:

- Ordinance did not constitute a per se physical taking in all applications;
- Ordinance did not constitute a regulatory taking;
- Ordinance was not barred by conflict preemption;
- Ordinance was not barred by field preemption; and
- Trial court did not abuse its discretion by granting amici leave to participate.

On its face, city ordinance addressing housing discrimination based on public assistance did not appropriate private property or a landlord's right to exclude others from private property, and therefore did not constitute a per se physical taking in all applications; instead, ordinance imposed restrictions on how landlords, having chosen to let their premises, may do so.

Housing-quality-standards inspections imposed on landlords for each lease renewal under city ordinance aimed at preventing housing discrimination based on public assistance was not, on its face, type of property appropriation giving rise to per se physical taking in every application in violation of Takings Clause in state's constitution; it was lawful for government to require property owners to cede right of access as condition of receiving certain benefits without causing a taking.

Record did not establish that in every instance a negative impact would occur and thus, landlord did not carry its burden for establishing that city ordinance that made it unlawful to discriminate based on tenant's receipt of public assistance constituted a regulatory taking under state constitution's Takings Clause, where ordinance included an procedure by which a landlord could be excepted from letting to a tenant for economic reasons and assert an undue-hardship defense to a discrimination claim, and two impact studies concluded that degree of impact that ordinance would have on operating expenses would vary depending on the specific property.

City ordinance aimed at housing discrimination based on public assistance, which required landlords to participate in federal housing choice voucher program, did not interfere with landlord's investment-backed expectations as would satisfy element of landlord's regulatory takings claim under the state constitution; although landlords were not required to participate in voucher program before enactment of the ordinance, the ordinance did not alter the ability to rent property, which was primary expectation regarding the property.

Requirement of city ordinance which made it unlawful for landlords to discriminate based on a tenant's receipt of public assistance, that Minnesota Public Housing Authority (MPHA) had to consent to sale of landlord's property subject to housing-assistance payment (HAP) contract between

MPHA and landlord, did not necessarily amount to interference with investment-backed expectations as would satisfy element of landlord's regulatory takings claim under state constitution; although landlord argued that the requirement imposed burdens on its ability to dispose of its property, landlord cited no authority concluding that such burden established a regulatory taking in all applications, since HAP contract also limited circumstances in which MPHA may reject a proposed sale.

City ordinance that made it unlawful for landlords to discriminate based on a tenant's receipt of public assistance, including federal housing assistance vouchers, did not forbid what state's anti-discrimination statute expressly permitted as would render ordinance subject to conflict preemption; although anti-discrimination statute did not require participation in housing voucher program, it did not grant right not to participate in the program, and so there was no irreconcilable conflict by requiring landlords to accept housing vouchers and state law based on implied statutory permission.

City ordinance addressing housing discrimination based on public assistance, by permitting tenants to make claims of unlawful discrimination based on a landlord's refusal to let to them because of tenants' participation in federal housing assistance voucher program, did not permit action that was forbidden by state's anti-discrimination statute as would render ordinance subject to conflict preemption; while express purpose of state statute included protecting all persons from wholly unfounded charges of discrimination, a claim that a landlord was motivated not to rent to a person based on requirements of a public-assistance program was not necessarily a wholly unfounded claim of discrimination under anti-discrimination statute.

City ordinance addressing housing discrimination based on public assistance, by allegedly expanding list of prohibited reasons for refusing to rent property set forth in state's anti-discrimination statute, did not frustrate purposes of state law as would render it subject to conflict preemption; ordinance was merely complementary to the anti-discrimination statute and provided landlords with an affirmative defense for undue hardship.

RECEIVERSHIP - PENNSYLVANIA

Siger v. City of Chester

Supreme Court of Pennsylvania - January 29, 2024 - A.3d - 2024 WL 316333

Receiver was appointed over financially distressed city, and the Commonwealth Court approved recovery plan. The Commonwealth Court granted receiver's petition for writ of mandamus that, among other things, required city councilman who was also head of city's department of finance and human resources to share information with receiver.

Receiver sought approval of modifications to city's recovery plan, proposing various initiatives relating to administrative duties and professional management within city government, core internal administrative functions and ethics, and economic development. After evidentiary hearing, the Commonwealth Court struck several initiatives and confirmed plan modification for other initiatives. City requested review, and the Supreme Court assumed King's Bench jurisdiction.

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

- A recovery plan does not "change the form of government" of a distressed municipality;
- Suspension of administrative duties of city's department heads did not violate constitutional provision on removal of elected and appointed officials;

- Municipalities Financial Recovery Act authorized such suspension;
- Sufficient evidence supported finding that allowing department heads to continue exercising their authority would interfere with receiver's powers or goals of recovery plan;
- Act authorized modification of recovery plan to allow receiver to direct city council's removal of items from legislative agenda;
- Receiver was not judicial officer; and
- Requiring city solicitor to disclose city officials' and employees' noncompliance with confirmed plan or court order did not conflict with rule of professional conduct governing representation-related disclosures.

The provision of the Municipalities Financial Recovery Act stating that the confirmation of a recovery plan for a financially distressed municipality, or any modification thereto, "shall not be construed to…change the form of government of the distressed municipality" is an unambiguous instruction to those who might "construe" a recovery plan, such as reviewing courts, that they should not view a recovery plan as "changing the form of government" of a distressed municipality, as changes to governmental operations that may be needed in the interest of financial recovery during a temporary receivership do not permanently alter the municipal government; this provision is not a limitation upon recovery plans.

Mayor and other elected officials did not have any prerogative to interfere with receiver appointed over financially distressed city pursuant to Municipalities Financial Recovery Act, and thus, receiver's proposed amendment of recovery plan so as to prohibit mayor and other elected officials from interfering with directives of chief of staff and receiver did not violate any such prerogative; Act expressly empowered receiver to issue orders to elected or appointed officials to implement any provision of recovery plan and "refrain from taking any action that would interfere with the powers granted to receiver or the goals of the recovery plan" and stated confirmation of recovery plan imposed "mandatory duty" on city's officials to "undertake the acts set forth in the recovery plan."

Receiver's proposed modification to financially distressed city's recovery plan so as to suspend administrative duties of officials who served as heads of city's various departments did not violate constitutional provision stating that impeachment process was necessary to remove elected officials' administrative duties, even though officials were also elected city council members; receiver only sought to suspend officials' duties with respect to their appointed offices, not their duties in their legislative roles as city council members.

Receiver's proposed modification to financially distressed city's recovery plan so as to suspend administrative duties of officials who served as heads of city's various departments did not violate constitutional provision stating that appointed officers "may be removed at the pleasure of the power by which they shall have been appointed," even though officials were appointed as department heads by mayor, who opposed receiver's plan modification; receiver did not seek to remove officials from their offices, only to suspend their administrative duties until expiration of receivership.

Receiver's proposed modification to financially distressed city's recovery plan so as to suspend administrative duties of officials who served as heads of city's various departments, pursuant to provision of Municipalities Financial Recovery Act stating that confirmation of a recovery plan modification had effect of "suspending the authority of the elected and appointed officials" to the extent such authority conflicted with plan's goals, did not violate Act provision stating legislature generally intended to leave principal responsibility for city's affairs to elected officials, even though officials at issue were also elected city council members; receiver contended officials refused to cooperate with plan, and legislature intended to prioritize plan over local officials' prerogatives.

The Municipalities Financial Recovery Act cannot be read to suggest the authority of local officials must be preserved at all costs, in the face of their dereliction of official duty and notwithstanding conduct on their part that causes a breakdown in the function of municipal government, constitutes a failure to uphold their paramount public duty to safeguard the health, safety, and welfare of their citizens, and poses a threat to the fiscal stability of neighboring communities; indeed, the purpose and the expressly-stated intent of the Act is precisely to remedy such dereliction.

Receiver's proposed modification to financially distressed city's recovery plan so as to suspend administrative duties of officials who served as heads of city's various departments, on basis that officials refused to cooperate with receiver, did not violate provision of Municipalities Financial Recovery Act stating that during fiscal emergency, officials "shall continue to carry out [their] duties…except that no decision or action shall conflict with an emergency action plan, order or exercise of power by the Governor"; receivership operated under other chapter of Act, which authorized receiver to order officials to implement recovery plan and refrain from interference, specific receivership provisions controlled over general provision, and recovery plan superseded emergency action plan.

The section of the Municipalities Financial Recovery Act providing that a receiver's recovery plan has the effect of "suspending the authority of the elected and appointed officials of the distressed municipality…to exercise power on behalf of the distressed municipality" to the extent the officials' authority "would interfere with the powers granted to the receiver or the goals of the recovery plan" is not limited to situations where the local officials' actions contradict some specific and already extant provision of the recovery plan; rather, the officials' authority may be suspended where its exercise conflicts with, among other things, the goals of the recovery plan.

Sufficient evidence supported Commonwealth Court's conclusion that allowing city's appointed department heads to continue exercising their administrative authority would interfere with receiver's powers or goals of recovery plan, supporting approval of receiver's proposed plan modification to suspend administrative authority of department heads in order to effectuate recovery plan and remedy city's condition; receiver presented evidence that, among other things, official who was head of finance and human resources departments withheld information about his waste of $400,000 in city funds despite writ of mandamus ordering him to share financial information with receiver, and officials stymied receiver's investigations and countermanded receiver's orders to city employees.

A receiver's complete suspension of municipal officials' duties, pursuant to the Municipalities Financial Recovery Act provision authorizing such suspension to the extent the officials' authority "would interfere with the powers granted to the receiver or the goals of the recovery plan," is an extraordinary measure, one that will be warranted only very rarely; if, for example, a receiver sought to take this step immediately upon appointment, with no evidence that the local officials' conduct posed an obstacle to the municipality's financial recovery, it would be entirely appropriate for the Commonwealth Court to reject such an initiative as arbitrary or capricious under its prescribed standard of review of proposed recovery plans and modifications to plans.

Provision of Municipalities Financial Recovery Act authorizing receiver to suspend "authority of the elected and appointed officials of [a] distressed municipality…to exercise power on behalf of the distressed municipality" pursuant to city's charter to the extent that officials' authority would interfere with receiver's powers or recovery plan's goals authorized receiver's proposed modification of recovery plan so as to allow receiver to direct city council to remove items from its legislative agenda, where receiver asserted that city council members had history of adding agenda items that could impact city's financial health without providing adequate advance notice to receiver, impacting receiver's ability to provide for city's financial recovery.

A receiver appointed for a municipality under the Municipalities Financial Recovery Act is not a "judicial officer"; a receiver's power is granted by statute, not by an act of the judiciary, the receiver is selected by executive branch officials, whereas the Commonwealth Court's role in a receiver's appointment is limited to confirming the executive branch officials' choice of receiver upon demonstration of the statutory prerequisites for receivership, and the Commonwealth Court exercises no control over a receiver's day-to-day activities and is not authorized to direct a receiver to take any particular action.

Receiver's proposed initiative that would empower him to waive residency requirement for employees of financially distressed city, whose home rule charter gave city council discretion to employ qualified non-residents if no qualified city residents were available for a particular position, was proposed amendment to city's recovery plan, not city charter, and thus, did not violate constitutional requirement that amendment of a home rule charter be by referendum; initiative, which quoted charter provision and stated "this initiative substitutes 'the Receiver' for 'Council,' " sought to vest power in receiver that would otherwise be committed to city council, but did not seek to amend charter itself.

Receiver's proposed modification of financially distressed city's recovery plan so as to require city solicitor to inform receiver if solicitor became aware that any city official or employee was not complying with Commonwealth Court's orders or with recovery plan or plan modification confirmed by court order would not require solicitor to violate rule of professional conduct generally prohibiting lawyers from revealing information relating to representation of client without informed consent; rule provision contained exception allowing a lawyer to reveal such information to extent lawyer reasonably believed necessary to comply with law or court order, such that disclosure of noncompliance with court orders and court-confirmed recovery plan was consistent with rule.

Receiver appointed over financially distressed city was not required to seek narrower relief in form of writ of mandamus before requesting Commonwealth Court's confirmation of modifications to recovery plan, but rather, had express authority under Municipalities Financial Recovery Act to seek confirmation of proposed modifications based on receiver's determination that such measures, including suspension of administrative duties of appointed department heads, were necessary to achieve financial stability in city.

Under the Municipalities Financial Recovery Act, a receiver's authority is not limited to requiring, directing, and ordering a distressed municipality's officials to take actions to implement a recovery plan, even though a provision of the Act authorizes the receiver to "issue an order to an elected or appointed official of the distressed municipality"; elsewhere, the Act expressly empowers the receiver to "require the distressed municipality" itself, not its officials, to take actions necessary to implement the plan and negotiate intergovernmental cooperations and to "direct the distressed municipality" to take any other actions to implement the plan, thereby treating the municipality as an entity distinct from its officials.

INSURANCE - PENNSYLVANIA

In re Senior Health Insurance Company of Pennsylvania

Supreme Court of Pennsylvania - January 29, 2024 - A.3d - 2024 WL 359474

Insurance Commissioner, in her capacity as statutory rehabilitator of insolvent long-term care insurer, filed second amended application for approval of her plan to correct the conditions that caused insurer's hazardous financial condition, and various states' regulators intervened.

Following a hearing, Commissioner moved for directed verdict on a certain option under the plan, which the trial court granted. Regulators filed motion for reconsideration. The Commonwealth Court approved the plan. Regulators appealed.

The Supreme Court held that:

- Regulators lacked standing to assert policyholders' interests;
- They had standing to assert that plan superseded authority of insurance regulators in other states and violated Full Faith and Credit Clause;
- Plan did not unlawfully displace regulatory authority of other states; and
- It did not violate Full Faith and Credit Clause.

Insurance regulators challenging plan to rehabilitate long-term care insurer did not assert harm to direct interest that could be avoided through judicial resolution and thus lacked standing to assert on appeal that plan was not reasonably likely to succeed in restoring insurer to solvency, plan disregarded best financial interest of policyholders and statutory guaranty association system, failed to place policyholders in at least as good a position as liquidation, and treated policyholders in different states unequally; regulators asserted detrimental impacts on financial and personal interests of policyholders, not regulators themselves, but had disavowed acting in either a parens patriae or a representative capacity for individual policyholders.

Insurance regulators challenging plan to rehabilitate long-term care insurer had standing to assert on appeal that plan sought to set rates in states other than Pennsylvania, superseded authority of insurance regulators in other states, and violated Full Faith and Credit Clause and that provision allowing states to opt out did not cure the problems; regulators' challenges were based on their assertions that plan affected their statutory functions, duties, and responsibilities regarding setting of insurance rates within their states.

Rehabilitation plan for long-term care insurer did not unlawfully displace regulatory authority of other states by restructuring benefits and premiums to address gap between premium revenues and benefits paid, raising premiums for policyholders to preserve current coverage, or allowing policyholders to reduce their current level of coverage to avoid, or reduce, the amount of increased premiums; plan's reformation of existing contracts was legitimately designed to ameliorate financial hazard for good of all involved, regulators could elect to opt out of the plan altogether, and rehabilitator could not automatically and unilaterally raise rates within state that opted out, but was obligated to file an application with regulators.

Rehabilitation plan for long-term care insurer did not violate Full Faith and Credit Clause by restructuring benefits and premiums to address gap between premium revenues and benefits paid; regulators could elect to opt out of plan altogether, it carefully followed contours of Commonwealth's statutes governing rehabilitation of insolvent insurer and sensitively applied principles of comity with healthy regard for sovereign status of sister states, and plan provisions to ensure that assets would not be unduly depleted by payment of benefits both disproportionate to premiums paid, as well as discriminatory with respect to other policyholders, was consistent with framework and undergirding purposes of statutes of regulators' states.

IMMUNITY - WYOMING

City of Laramie v. University of Wyoming

Supreme Court of Wyoming - January 31, 2024 - P.3d - 2024 WL 356461 - 2024 WY 13

City brought declaratory judgment action against state university pertaining to university's drilling and operation of two wells for watering university's landscaping including golf course, and university filed counterclaims challenging city's attempted regulation of university.

The District Court dismissed in part and granted summary judgment for university on remaining claims and counterclaims. City appealed.

The Supreme Court held that:

- University had common-law sovereign immunity from city's attempt to enforce restrictive deed covenant against water wells;
- University was not similarly situated to other entities for purposes of equal protection challenge to statute governing university's water system;
- Statute governing university's water system was not an unconstitutional special law;
- Statute governing university's water system did not unconstitutionally delegate municipal power; and
- City was statutorily barred from enforcing ordinance requiring city approval of nonmunicipal water drilling or systems within city.

ATTORNEYS' FEES - DELAWARE

In re Delaware Public Schools Litigation

Supreme Court of Delaware - January 30, 2024 - A.3d - 2024 WL 332738

Non-profit organizations brought actions for declaratory and injunctive relief against county officials responsible for property tax collection, seeking increased funding for state's public schools.

After trial on the merits, the Court of Chancery concluded that officials used methodologies in preparing property tax assessments that violated state's True Value Statute and state Constitution's Uniformity Clause, and at remedial phase, parties reached settlement, pursuant to which a general property tax reassessment would be conducted.

Organizations moved for award of attorneys' fees and expenses. The Court of Chancery determined that organizations were entitled to attorneys' fees under common benefit doctrine, as exception to American Rule that litigants bear their own cost of being represented by counsel, and later awarded organizations $1,476,001.88 in attorneys' fees and $73,470.02 in uncontested expenses. County officials appealed.

The Supreme Court held that:

- Benefit from county officials being compelled to perform properly was insufficient to warrant attorneys' fee award under common benefit doctrine;
- Speculative benefit from school districts choosing to increase taxes did not support fee award under common benefit doctrine;
- Benefit from updated property tax reassessments did not support fee award under common benefit doctrine;
- Benefit from achieving "vertical equity" in "regressive" tax system did not support fee award under common benefit doctrine;
- Precedent rejecting private attorney general doctrine, as exception to American Rule, would not be revisited;
- Organizations lacked taxpayer standing, for purposes of taxpayer-suit theory for common benefit

doctrine; and
- Organizations failed to meet taxpayer-suit theory's requirement of quantifiable, non-speculative monetary benefit for all taxpayers.

SCHOOLS - FLORIDDA

PEN American Center, Inc. v. Escambia County School Board

United States District Court, N.D. Florida, Pensacola Division - January 12, 2024 - F.Supp.3d - 2024 WL 133213

Parents, authors, publisher, and literary organization brought action against county school board, alleging violations of First and Fourteenth Amendments arising from board's decision to remove or restrict certain books from its school libraries.

Board moved to dismiss.

The District Court held that:

- Complaint was not an impermissible shotgun pleading;
- Parents sufficiently alleged an injury that would support standing;
- Action was not rendered unripe or moot due to existence of state statute creating a special magistrate process available to parents when a local school board denied an objection to a book being made available in a school library;
- Fact issue existed as to whether content of county's school libraries was "government speech," as would be exempt from First Amendment constraints;
- Allegations of complaint were sufficient to state claim for violation of First Amendment rights to receive information and to be free from viewpoint discrimination; and
- Allegations of complaint were insufficient to state equal protection claim based on theory of disparate impact.

MUNICIPAL ORDINANCE - MISSOURI

State v. Nowicki

Supreme Court of Missouri, en banc - January 30, 2024 - S.W.3d - 2024 WL 341017

Following plea of guilty to failure to drive on right half of roadway and operating a motor vehicle without maintaining financial responsibility, defendant was convicted in the Circuit Court of driving while intoxicated for which he was sentenced as a chronic offender. Defendant appealed.

On transfer from Court of Appeals, the Supreme Court held that:

- Plain error review did not apply;
- Statute rendering Missouri uniform law enforcement system (MULES) records admissible evidence to show a defendant's status as a chronic offender did not create a rebuttable presumption that any conviction listed in such record qualified as intoxication-related traffic offense (IRTO);
- Proof of defendant's prior convictions for driving while intoxicated with nothing more were insufficient to prove that defendant's conduct underlying the convictions involved him actually physically driving a vehicle while intoxicated;
- Records showing that defendant was previously arrested for a "local BAC offense" and convicted of

the charged offense did not establish that the conviction was for driving while intoxicated;
- Records showing defendant was convicted of stop sign violation on same day he was convicted of "local BAC offense" did not permit inference that defendant was actually physically driving while intoxicated;
- Records showing that defendant was previously arrested for "Dwi-Alcohol" and pled guilty to "excessive blood alcohol" did not establish the prior conviction was for actually physically driving a vehicle; and
- Records showing that defendant was previously arrested for "Dwi-Alcohol" and was convicted of "stop sign violation" on same day he pled guilty to "excessive blood alcohol" did not establish the "excessive blood alcohol" conviction was for actually physically driving a vehicle.

BONDS - MISSOURI

Krupka v. Stifel Nicolaus & Co., Inc.

United States District Court, E.D. Missouri, Eastern Division - January 30, 2024 - Slip Copy - 2024 WL 340739

California Plaintiffs brought a putative class action, alleging that Stifel negligently underwrote municipal bonds issued by the Illinois Finance Authority (IFA) to finance low-income housing projects in Chicago.

Specifically, the Offering Statement asserted that the operator of the projects, the Better Housing Foundation (BHF), would issue a certificate to bondholders representing that no litigation or other proceedings were pending or threatened against it. In fact, BHF had actually received 27 notices of ordinance violations regarding the management and conditions of several of the projects that were not disclosed in the Statement. BHF subsequently defaulted and Plaintiffs sued.

Stifel responded, arguing that Plaintiffs' claims were barred by Missouri's borrowing statute and California's two-year statute of limitations for professional negligence and negligent misrepresentation claims.

The District Court began its analysis by noting that a federal court exercising diversity jurisdiction applies the law of the forum when ruling on statutes of limitations.

Missouri had adopted a borrowing statute providing that "[w]henever a cause of action has been fully barred by the laws of the state, territory or country in which it originated, said bar shall be a complete defense to any action thereon, brought in any of the courts of this state." Mo. Rev. Stat. § 516.190. Thus, if a cause of action is time-barred by the statute of limitations of the state in which it originated, it is barred in Missouri as well.

Stifel also argued that Plaintiffs' claims originated in California on April 17, 2019, when Plaintiffs received notice of BHF's defaults and violations of the loan agreement. Because they did not file their complaint until November 2022, Stifel argued that their claims are barred by California's two-year statute of limitations for professional negligence and negligent misrepresentation claims.

Plaintiffs agreed that their claims accrued on April 17, 2019. But they argued that their claims originated either in Missouri or Illinois, the states in which the acts giving rise to their claims purportedly took place, and that they timely filed their complaint under the five-year statutes of limitations of those states.

The District Court held that:

- Missouri's borrowing statute holds that plaintiffs are financially damaged where they are located;
- Plaintiffs were financially damaged in California.
- Because there existed no genuine dispute that Plaintiffs' claims originated in California, their claims are subject to California's statute of limitations. If California law bars Plaintiffs' claims, Missouri's borrowing statute does so as well.
- In California, professional negligence and negligent misrepresentation claims are governed by the two-year statute of limitations set forth in section 339 of the California Code of Civil Procedure.
- Plaintiffs' claims are barred by California's statute of limitations. Missouri's borrowing statute therefore provides a complete defense to Plaintiffs' claims.

IMMUNITY - NEVADA

Abbott v. City of Henderson

Supreme Court of Nevada - January 25, 2024 - P.3d - 2024 WL 313432 - 140 Nev. Adv. Op. 3

Parents filed negligence and loss of consortium action against city after mother slipped while assisting youngest child on residential playground at park.

The District Court granted city's motion for summary judgment on grounds of recreational use immunity. Parents appealed, and the Court of Appeals reversed and remanded. City petitioned for review, which was granted.

The Supreme Court held that:

- Playground fell within protections of the recreational use statute;
- Mother was engaged in a recreational activity, within meaning of recreational use statute; and
- City did not willfully or maliciously fail to guard against the dangerous condition of park's playground surface.

EMINENT DOMAIN - NORTH DAKOTA

Sargent County Water Resource District v. Beck

Supreme Court of North Dakota - December 15, 2023 - 999 N.W.2d 175 - 2023 ND 230

County water resource district brought eminent domain action seeking to condemn landowners' property for a drainage project.

Following a bench trial, the District Court condemned property, denied landowners' motion for a new trial, but concluded that landowners' arguments were not foreclosed for failure to appeal water district's "Resolution of Necessity" or barred by res judicata or collateral estoppel.

Landowners appealed, and water district cross-appealed.

The Supreme Court held that:

- Applying doctrine of res judicata to bar any further review would have been unjust;
- Landowners' arguments against eminent domain were not barred by collateral estoppel;
- Water district's board obligated costs for drainage project beyond maximum maintenance levy and

authorized accumulation of a fund exceeding six-year maximum levy without landowner approval, in violation of statute governing maintenance of drainage projects; and
- Project did not satisfy additional cost limitations for public use under statute authorizing eminent domain for certain public uses.

EMINENT DOMAIN - OHIO

State ex rel. AWMS Water Solutions, L.L.C. v. Mertz

Supreme Court of Ohio - January 24, 2024 - N.E.3d - 2024 WL 25118 - 22024-Ohio-200

Operator of saltwater-injection wells associated with oil and gas production filed petition for writ of mandamus to compel state to commence proceedings for property appropriation, alleging that state's suspension order with respect to one of its two wells effected a governmental taking of operator's property, requiring the state to pay it just compensation.

The Eleventh District Court of Appeals granted the state's motion for summary judgment. Operator appealed. The Supreme Court reversed and remanded. On remand, the Court of Appeals denied operator's petition for writ of mandamus. Operator appealed.

The Supreme Court held that:

- Court of Appeals ventured beyond scope of Supreme Court's remand order by determining that operator lacked cognizable property interest, and
- Court of Appeals' determination that operator lacked cognizable property interest for operator's takings claim violated doctrine of the law of the case.

Court of Appeals ventured beyond scope of Supreme Court's remand order by determining that operator of saltwater-injection wells lacked cognizable property interest, and, thus, erred in denying writ of mandamus to compel state to commence proceedings for property appropriation; Supreme Court specified that, on remand, Court of Appeals was required to weigh parties' evidence related to operator's takings claim and to weigh parties' evidence in accordance with Supreme Court's opinion and to balance all Penn Central factors to determine whether operator suffered partial taking, and, instead, Court of Appeals sua sponte ordered parties to file supplemental briefs as to whether operator had cognizable property interest under Takings Clause and denied writ without weighing parties' evidence.

Court of Appeals' determination that operator of saltwater-injection wells lacked cognizable property interest for operator's takings claim violated doctrine of the law of the case, in mandamus proceedings to compel state to commence proceedings for property appropriation; Supreme Court recognized that operator's leasehold was a property interest that triggered takings analysis, and, on remand, Court of Appeals determined that Supreme Court had not deemed that interest to be property interest for purposes of Takings Clause, that question of whether operator had cognizable property interest had not been at issue before Supreme Court, and that Supreme Court noted only that operator was prima facie entitled to invoke constitutional right to just compensation.

EMINENT DOMAIN - TEXAS

Capps v. City of Bryan

Court of Appeals of Texas, Waco - January 11, 2024 - S.W.3d - 2024 WL 118470

Landowner brought action against city for inverse condemnation, alleging that city committed a new taking when it constructed a new electric transmission line outside of the areas of right-of-way easement previously granted to city and across landowner's property in which he owned full interest at the time and that city abandoned original easement when old transmission line was removed.

The 361st District Court granted city's plea to the jurisdiction in part. Landowner filed interlocutory appeal.

The Court of Appeals held that landowner had standing to bring action.

Landowner had standing to bring inverse-condemnation action against city regarding city's construction of a new electric transmission line to replace prior transmission line, which was built within original easement on land, including standing for merits determination of whether city abandoned original easement and, if not, whether current use of new transmission line exceeded scope of permitted use under original easement, although landowner did not own land when original easement was granted; landowner alleged that taking occurred when city constructed new transmission line, entirety of dispute was about scope and damages to land for taking arising from new transmission line, and landowner owned land when new transmission line was built.

EMINENT DOMAIN - TEXAS

JRJ Pusok Holdings, LLC v. State

Court of Appeals of Texas, Houston (14th Dist.) - December 28, 2023 - S.W.3d - 2023 WL 8939318

Successor-in-interest of landowners brought action against the State and the Department of Transportation's Director of Right of Way in his official capacity, asserting violations of its statutory right to repurchase, inverse condemnation, ultra vires, and sought mandamus and declaratory relief.

The County Civil Court granted defendants' plea to the jurisdiction. Successor-in-interest appealed.

The Court of Appeals held that:

- Successor-in-interest alleged a valid waiver of State's sovereign immunity;
- Successor-in-interest's right to repurchase was not vested; and
- Ultra vires exception to sovereign immunity did not apply.

Landowners' successor-in-interest alleged a valid waiver of State's sovereign immunity based on violations of its statutory right to repurchase if the property subsequently becomes unnecessary for public use, in successor-in-interest's action against the State, alleging that the State acquired a portion of landowners' property though eminent domain for the development of a highway improvement project when landowners entered into a settlement with the State; State took landowners' property for the project and compensated them for the taking, and any language in landowners' settlement or deed executed pursuant to the settlement did not change the manner of acquisition, which was fundamentally involuntary and in the manner of eminent domain.

Landowners' successor-in-interest's statutory right to repurchase if the property acquired through eminent domain subsequently becomes unnecessary for public use was not vested, and thus successor-in-interest failed to plead a valid inverse condemnation claim, in successor-in-interest's action against the State, alleging that the State acquired a portion of landowners' property though eminent domain for the development of a highway improvement project when landowners entered

into a settlement with the State; although successor suggested that it retained a statutory reversionary interest, that interest could be changed or abolished at any time, and deed executed pursuant to the settlement contained no reversionary or future interest, it merely contained a reservation for oil, gas, and sulfur.

Ultra vires exception to sovereign immunity did not apply, in landowners' successor-in-interests' action for mandamus and declaratory relief against the Department of Transportation's Director of Right of Way in his official capacity, asserting violations of its statutory right to repurchase if the property acquired through eminent domain subsequently becomes unnecessary for public use, which was based on Director's alleged failure to comply with statutory notice and offer requirements; Director had authority to determine whether successor-in-interest was entitled to repurchase the property.

MUNICIPAL GOVERNANCE - VIRGINIA

Fauber v. Town of Cape Charles

Court of Appeals of Virginia, Norfolk - January 30, 2024 - S.E.2d - 2024 WL 330737

Former town employee who had worked as the director of public works and utilities brought wrongful-termination action against town and mayor, alleging that mayor's exercise of powers of town manager during temporary vacancy in office of town manager pursuant to town's charter by firing director violated Virginia Constitution section providing that a person elected to the governing body of a locality is ineligible, during the term of office for which he was elected or appointed, to hold any office filled by the governing body.

The Northampton Circuit Court granted defendants' summary judgment motion. Former director appealed.

The Court of Appeals held that:

- Plain language of town charter empowered mayor to exercise town manager's powers and duties until a successor town manager was appointed, including to remove town employees like director;
- Former director failed to rebut presumption of constitutionality of town charter provision permitting mayor to simultaneously exercise duties and powers of town manager during vacancy in town manager position until successor was appointed;
- Mayor's inability to unilaterally eliminate director position did not prevent mayor from firing director during vacancy of town manager position;
- Question whether mayor could have unilaterally amended town ordinance that created director position was not material; and
- Mayor's summary-judgment deposition testimony answered in a way that suggested he was the town manager did not create a material fact issue.
