ANNEXATION - NEBRASKA

Sanitary and Improvement District No. 196 of Douglas County v. City of Valley

Supreme Court of Nebraska - February 6, 2015 - N.W.2d - 290 Neb. 1

Sanitary and improvement district brought declaratory judgment action against city, challenging city's annexation of land, which included district. The District Court granted summary judgment to city. District appealed.

The Supreme Court of Nebraska held that:

- Parcels of land adjacent to city had rational relation to legitimate purposes of annexation and thus could be annexed by city;
- Parcels of land used for mining gravel and sand were not agricultural land and thus could be annexed by city; and
- Particular parcel was contiguous with or adjacent to city, as would allow annexation.

Parcels of land adjacent to second-class city had rational relation to legitimate purposes of annexation and thus could be annexed by city, even if land was not already zoned and developed into a nonagricultural use, where landowner had made a request for proposals to several developers in the region to explore development opportunities on the land, and landowner financed part of the regional pumping station in order to reserve capacity for over 200 residential lots on site.

Parcels of land used for mining gravel and sand were not agricultural land and thus could be annexed by adjacent second-class city. Mining operations were not traditionally considered an agricultural use of land, there was no indication that instant mining operations were used to further an agricultural purpose, such as creation of pond to irrigate crops, and mining operations in no way involved the production of any plant or animal product.

Parcel of land was contiguous with or adjacent to second-class city, as would allow annexation of land by city, even if parcel itself did not share a common border with city, where annexed area in which parcel was situated had, as a whole, a significant shared border with existing corporate boundary of city.

Evidence that second-class city compared the relative financial health of different sanitary and improvement districts in determining what territory to annex was insufficient to establish that city's subsequent annexation of one of those districts was motivated solely by purpose of increasing tax revenue, as could make annexation unlawful. It would have been fiscally irresponsible for city to not at least take into consideration the debt load of the areas it was annexing, and debt level of district had no relation to increase in tax revenue that city stood to gain from an annexation.

EMINENT DOMAIN - NEW JERSEY

Columbia Gas Transmission, LLC v. 1.092 Acres of Land in Tp. of Woolwich, Gloucester County, N.J.

United States District Court, D. New Jersey - January 28, 2015 - Slip Copy - 2015 WL 389402

Plaintiff brought condemnation actions seeks to acquire a right-of-way (permanent easement), along with a temporary construction easement, for the construction of an interstate natural gas pipeline across Defendants' property.

Plaintiff moved for injunctive relief under the eminent domain authority of the Natural Gas Act, seeking orders establishing Plaintiff's right to condemn the easements across the Defendants' properties, and allowing Plaintiff to take immediate possession of such easements, prior to a final decision concerning the amount and payment of compensation to the Defendants as condemnees.

The District Court held that Plaintiff's FERC certificate gave it a substantive right to condemn Defendants' properties and granted Plaintiff equitable, intermediate relief in the form of immediate possession of Defendants' properties.

MUNICIPAL ORDINANCE - NEW YORK

D'Alessandro, ex rel. Vallemaio Properties, LLC v. Kirkmire

Supreme Court, Appellate Division, Fourth Department, New York - February 6, 2015 - N.Y.S.2d - 2015 N.Y. Slip Op. 01018

Petitioners commenced a hybrid CPLR article 78 proceeding and declaratory judgment action seeking to declare section 90–21 of the Municipal Code of the City of Rochester (Code) unconstitutional. That section of the Code permits the City to collect a "case management fee" (CMF) of $100 in any case in which a property owner has failed, for over one year, to comply with a notice and order notifying that owner of Code violations related to the property.

The Supreme Court, Monroe County, declared that the CMFs were valid, constitutional and legally imposed. Petitioners appealed.

The appeals court reversed, holding that section 90–21 of the Municipal Code of the City of Rochester was unconstitutional under the United States and New York Constitutions, because the CMFs were, in actuality, a fine that was imposed upon property owners without due process.

IMPROVEMENT DISTRICTS - NORTH DAKOTA

Nandan, LLP v. City of Fargo

Supreme Court of North Dakota - February 12, 2015 - N.W.2d - 2015 ND 37

Property owner brought action against city, challenging creation of improvement district. The District Court granted city's motion to dismiss. Property owner appealed.

The Supreme Court of North Dakota held that:

- Statute authorizing municipalities to enter into agreements with other government entities for certain improvements did not require city to adopt a resolution of necessity for drainage project,

but
- Property owner stated claim under statute requiring a resolution of necessity except where the improvement constitutes a water or sewer improvement.

City that entered into agreement with water district was not required to adopt a resolution of necessity for drainage project, and property owner had no right of protest, under statute authorizing a municipality to enter into an agreement with another government entity for certain improvements, where city bid out the project itself and entered into construction contract.

Property owner seeking to challenge creation of municipal improvement district without a resolution of necessity stated valid claim against city under statute requiring a resolution of necessity except where the improvement constitutes a water or sewer improvement. Complaint alleged that improvement district included street repairs, utilities and other items not specifically included in the description of a water or sewer improvement, and it was unknown whether such other repairs were merely incidental to the water and sewer repairs.

UTILITIES - NORTH CAROLINA

Fehrenbacher v. City of Durham

Court of Appeals of North Carolina - February 3, 2015 - S.E.2d - 2015 WL 426058

Property owners petitioned for certiorari review of city-county board of adjustment's decision upholding city planning director's interpretation of a concealed wireless communications facility to include a 120-foot tall cellular tower disguised as a pine tree, located on church property. The Superior Court affirmed the board's decision. Property owners appealed.

The Court of Appeals held that:

- Record provided to trial court was adequate even though a substantial portion of the testimony before the board was not recorded due to equipment malfunction;
- Statute governing appeals of municipal body decisions allows trial court to direct that matters other than those submitted to the decision-making board be included in the record on appeal;
- Proposed cellular tower would not have been readily identifiable as a cellular tower; and
- Proposed cellular tower's secondary function as a tree would have been aesthetically compatible with church property's existing use.

Cellular company's proposed tower, designed to look like a 120-foot tall pine tree, was not readily identifiable as a cellular tower, as required to qualify as a concealed wireless communications facility under city ordinance governing approval of such facilities, even though it was substantially taller and five times wider at its base than average nearby trees. Tower had authentic looking bark and branches, national planning association recommended it as nearly indistinguishable from real trees, from many vantage points tower was not visible while from others it had appearance of an unusually tall tree, proposed height of tower was within maximum height limitation set by local ordinance, base of tower was concealed from sight by actual trees, and there was no evidence in record that a reasonable person's reaction to sight of an unusually tall tree would have been to conclude that it was a cellular tower.

The test for determining whether a wireless communications facility is readily identifiable as such, under city ordinance governing approval of concealed facilities, is not whether or how quickly a longtime resident or passing motorist would notice its true nature; rather, the test is whether the

design serves a secondary function that helps camouflage the tower's function as a wireless communications facility.

Cellular company's proposed tower's secondary function as a tree, to be located on church property, was aesthetically compatible with the church property's existing use, as required to be considered a concealed wireless communications facility under city ordinance governing approval of such facilities, where church was located in a developing rural residential neighborhood, surrounded by houses and trees.

PUBLIC RECORDS - PENNSYLVANIA

Paint Tp. v. Clark

Commonwealth Court of Pennsylvania - February 5, 2015 - A.3d - 2015 WL 469434

Township appealed from decision of the Office of Open Records (OOR) in favor of requester, who made request under Right-to-Know Law (RTKL) for records contained on publicly funded cell phone of chairman of township's board of supervisors. After issuing order requiring township to disclose records, the Court of Common Pleas denied requester's petition for contempt, but ordered township to comply with its previous order, which required township to retrieve and provide any remaining data on publicly funded phone and to provide records of chairman's private phone. Township appealed.

The Commonwealth Court held that:

- Evidence demonstrated that records contained on phone provided by township to chairman no longer existed, such that township could not be ordered to retrieve that data, and
- Records contained on chairman's private phone constituted public records subject to disclosure.

Records contained on cell phone purchased directly by chairman of township's board of supervisors constituted public records, and thus township was required to provide the records in response to request made under Right-to-Know Law (RTKL), even though the phone was chairman's personal phone. That the phone was personal did not change the public nature of the records it contained, and township provided chairman partial reimbursement every month for the phone.

ZONING - PENNSYLVANIA

Riverfront Development Group, LLC v. City of Harrisburg Zoning Hearing Bd.

Commonwealth Court of Pennsylvania - January 30, 2015 - A.3d - 2015 WL 400542

Landowner sought review of city's decision to deny variance and special exception application. The Court of Common Pleas. Landowner appealed.

The Commonwealth Court held that:

- City zoning code provision permitting "one or two-family detached dwellings," without limiting how many detached dwellings were permitted on each lot, was ambiguous, and was to be construed in favor of landowner, and
- Landowner was not entitled to a deemed approval of special exception request.

BANKRUPTCY - PUERTO RICO

Franklin California Tax-Free Trust v. Puerto Rico

United States District Court, D. Puerto Rico - February 6, 2015 - F.Supp.3d - 2015 WL 522183

Holders of nearly two billion dollars of bonds issued by the Puerto Rico Electric Power Authority ("PREPA")
sought a declaratory judgment that the Puerto Rico Public Corporation Debt Enforcement and Recovery Act was unconstitutional.

The bondholders alleged that the Recovery Act eliminated the contractual rights guaranteed them under the PREPA Authority Act (which authorized PREPA to issue bonds) and the Trust Agreement (pursuant to which PREPA issued bonds to plaintiffs) by giving PREPA the right to participate in a new legal regime to restructure its debts.

The District Court held that the Recovery Act was preempted by the federal Bankruptcy Code and was therefore void pursuant to the Supremacy Clause of the United States Constitution. The Commonwealth was permanently enjoined from enforcing the Recovery Act.

For a more detailed explication of the ruling, see this Cadwalader memo.

MUNICIPAL ORDINANCE - WASHINGTON

U.S. Mission Corp. v. City of Mercer Island

United States District Court, W.D. Washington, at Seattle - February 10, 2015 - Slip Copy - 2015 WL 540182

Religious organization sought a preliminary injunction to prohibit City from enforcing its newly-enacted solicitation ordinance, which prohibited door-to-door solicitation after 7:00 pm. The City had not been enforcing the prior version of the ordinance because of fears that it contained unconstitutional restraints on free speech.

The District Court granted the motion, finding that the 7:00 curfew was not the least restrictive means for the City to meet its interests.

PENSIONS - WISCONSIN

Schwegel v. Milwaukee County

Supreme Court of Wisconsin - February 12, 2015 - N.W.2d - 2015 WI 12

County employees' union brought action against county, claiming a vested benefit contract required county to reimburse employees' Medicare Part B premiums when they retired, even though they were not yet retired when the county eliminated that benefit. The Circuit Court granted summary judgment in favor of union. County appealed. The Court of Appeals reversed and remanded. Union

petitioned for review, which was granted.

The Supreme Court of Wisconsin held that county employees who had not retired did not have vested contract right in reimbursement, and therefore county ordinance that prospectively eliminated Medicare Part B premium reimbursement upon retirement for county employees who did not retire before retirement dates established by county did not impermissibly abrogate a vested contract right.

Statute granting county specific home rule authority over county employee retirement system made no mention of health insurance benefits, health insurance benefits were not governed by same statutes and ordinances as county retirement system, memorandum summarizing proposed ordinance stated that only previously-retired employees had vested right in reimbursement, county payment for health insurance premiums was not defined in fixed way such that county payment was tied to specified benefit that always would follow, and county health insurance payments were not earned in increments as employees continued their employment.

LIABILITY - WYOMING

Halvorson v. Sweetwater County School Dist. No. 1

Supreme Court of Wyoming - February 4, 2015 - P.3d - 2015 WY 18

Student filed suit against school district after she slipped and fell in the locker room of junior high school. The District Court granted judgment in favor of the school district. Student appealed, and school district cross-appealed.

The Supreme Court of Wyoming held that District Court did not clearly err in finding that the school district exercised ordinary care to keep the shower facilities in locker room in reasonably safe condition.

Water carried from wet feet and bodies, as opposed to water “flowing” over a shower boundary, was generally unavoidable in a locker room and did not tend to indicate a substandard degree of care, there was no indication that the drainage system in the locker room was inadequately designed or constructed, plumber for school district stated that he had been required to use a “snake” to unclog drain in the locker room on only one occasion in 16 years, locker room floor was regularly cleaned by janitorial staff, school district implemented appropriate procedures to respond to complaints about slow drains resulting from hair and other debris, and experts agreed that the type of tile used in locker room was considered safe in the industry.

EMPLOYMENT - ALABAMA

McDaniel v. Ezell

Supreme Court of Alabama - January 30, 2015 - So.3d - 2015 WL 403076

Candidate for position of battalion chief with city fire and rescue department brought action against city and city civil service board seeking review of decision of board to promote other candidates to position. The Circuit Court entered judgment on jury verdict in favor of candidate. City, board, and promoted candidate appealed.

The Supreme Court of Alabama held that candidate failed to establish that he was an aggrieved

party within meaning of statute governing appeals from decisions of civil service boards, and therefore candidate lacked statutory right to appeal decision of city civil service board promoting other candidates to position of battalion chief within city fire and rescue department.

Candidate did not present any argument or evidence to establish that his legal rights had been adversely affected by the board's promotion decision, rather, his argument and evidence simply focused on his personal dissatisfaction with the way in which the board exercised its discretion pursuant to its internal rules and regulations.

Check this out:

Murdock, J., filed opinion concurring specially.
Moore, C.J., filed opinion concurring in the result.
Main, J., concurred in the result.
Shaw, J., filed dissenting opinion.
Bryan, J., filed dissenting opinion.

Can't we all get along?

EMPLOYMENT - CONNECTICUT

Town of Stratford v. International Federation of Professional and Technical Engineers, Local 134

Appellate Court of Connecticut - February 3, 2015 - A.3d - 155 Conn.App. 246

Town applied to vacate, and former town employee applied to confirm, an arbitration award that reinstated employee who had been terminated for swapping emergency medical technicians in his ambulance while transporting a patient. The Superior Court denied town's application to vacate and granted employee's motion to confirm. Town appealed.

The Appellate Court held that:

- Former employee's conduct in swapping emergency medical technicians while transporting a patient did not constitute a detrimental act and thus arbitration award did not violate public policy;
- Arbitration award did not limit town's legal right to manage contractual and disciplinary actions with regard to its employees;
- Town did not present sufficient evidence to establish partiality on the part of arbitrators; and
- Town failed to establish that arbitration panel did not provide a full and fair hearing by refusing to consider certain evidence.

Former town employee's conduct in swapping emergency medical technicians in his ambulance while transporting a patient did not constitute a detrimental act and thus arbitration award reinstating his employment did not violate public policy, where patient was not put in harm's way due to swap, patient was being transported to a hospital farther away at the request of family, the swap took no more than four minutes to complete, and such crew swaps took place routinely and were encouraged by town to avoid employee overtime.

SCHOOLS - LOUISIANA

Lapointe v. Vermilion Parish School Bd.

Court of Appeal of Louisiana, Third Circuit - February 4, 2015 - So.3d - 2014-919 (La.App. 3 Cir. 2/4/15)

Following her termination, tenured teacher challenged Section 3 of Act 1 of the 2012 Regular Session of the Louisiana Legislature as it amended La.R.S. 17:443 as unconstitutional because it violated the due process rights of tenured public school teachers.

The Court of Appeal found that the overall scheme of Section 3 of Act 1 of 2012 as it amended and reenacted La.R.S. 17:443 was unconstitutional, as it deprived a tenured public school teacher adequate due process before he or she is terminated. Pursuant to Act 1, only one person, the superintendent, makes the decision to terminate, the superintendent. While the teacher is allowed to oppose the charges brought by the superintendent, it is only after termination that a tenured teacher is allowed to submit her case, including witnesses, to a panel. While it would seem that a teacher receives due process at this post-termination proceeding because she is entitled to a full evidentiary hearing, the court found that this was not the case.

The court held that teacher was entitled to reinstatement and her full pay and any other benefits to which she would have been entitled had she not been terminated.

EMPLOYMENT - MARYLAND

Blue v. Arrington

Court of Special Appeals of Maryland - January 30, 2015 - A.3d - 2015 WL 404398

Employee, who was injured by co-worker while both men were acting within the scope of their city employment and who received workers' compensation for his injuries, brought a negligence action against co-worker for the same injuries. City filed, on co-worker's behalf, a motion to dismiss. The Circuit Court granted motion, and employee appealed.

The Court of Special Appeals held that:

- Local Government Tort Claims Act provision, stating that, if injury sustained is compensable under the Maryland Workers' Compensation Act, an employee may not sue a fellow employee for tortious acts, did not violate equal protection, and
- Local Government Tort Claims Act provision did not violate open access to courts provision of the Declaration of Rights.

UTILITIES - MASSACHUSETTS

Bay Colony R.R. Corp. v. Town of Yarmouth

Supreme Judicial Court of Massachusetts, Norfolk - January 29, 2015 - N.E.3d - 2014 WL 7693584

Railroad company brought action against town alleging breach of solid waster transportation contract. The Superior Court granted summary judgment in favor of company in part and entered judgment on jury verdict in favor of company. Town appealed.

The Supreme Judicial Court of Massachusetts held that:

- Federal Aviation Administration Authorization Act preempted state statute governing railroad operation of motor vehicles;
- Town owed duty under implied covenant of good faith and fair dealing to seek modification of Department of Environmental Protection (DEP) permit; and
- Waste acquisition agreement had not expired by operation of law.

Federal Aviation Administration Authorization Act preempted provision of state statute governing railroad corporations' operation of steamship companies, ferries, ferry boats, docks, motor vehicles, and aircraft that prohibited railroad from transporting solid waste by truck, due to provision allowing railroads to operate motor vehicles only in area served by railroad. Act expressly preempted state laws having connection with, or reference to, carrier rates, routes, or services, even if the law's effect on rates, routes, or services was only indirect, and provision regulated operation of motor vehicles by railroad companies for the transportation of freight.

Town owed duty to railroad company with which town contracted for solid waste transportation, under implied covenant of good faith and fair dealing, to make good faith effort to seek modification of town's Department of Environmental Protection (DEP) permit for operation of town's waste transfer station, which prohibited long-term trucking of solid waste to facility by transporter, following Commonwealth's termination of company's rail lease. Contract between town and company permitted company to transport waste by truck if rail lease was terminated, DEP prohibited long-term trucking of waste pursuant to town's manual of operating procedures, town, rather than DEP, had originally written provision of manual, and town was permitted to seek modification of permit from DEP.

LABOR - MASSACHUSETTS

City of Somerville v. Commonwealth Employment Relations Bd.

Supreme Judicial Court of Massachusetts, Suffolk - February 3, 2015 - N.E.3d - 2014 WL 7735812

City and school committee appealed decision by Commonwealth Employment Relations Board that city and the school committee had failed to satisfy their statutory bargaining obligations before unilaterally reducing contributions for retired employees' health insurance premiums.

The Supreme Judicial Court held that city and the school committee were not prohibited by statutes from unilaterally reducing their contribution to retirees' health insurance premiums without engaging in collective bargaining.

The legislature required retirees to pay full premium cost of their health insurance, subject to statutes, which, if accepted by a municipality, permitted it to pay a portion of the retirees' premiums, and the authority conferred on a municipality to decide whether and how much to contribute, within defined statutory percentages, would have been wholly undermined by an obligation to collectively bargain.

UTILITIES - MISSOURI

Dynasty Home, L.C. v. Public Water Supply District Number 3 of Franklin

County, Missouri

Missouri Court of Appeals, Eastern District, Division Four - February 3, 2015 - S.W.3d - 2015 WL 456399

Dynasty is the owner and landlord of residential rental properties in a subdivision in Franklin County, Missouri. The District is a public water supply district that supplies water and sewer service to the premises of the subdivision. While the District will open new accounts for water or sewer service in the name of Dynasty or in the name of the tenant, Dynasty requires its tenants to procure service with the District in their own names.

When a tenant is delinquent in payment for services by thirty days, the District is required to notify Dynasty of the delinquency. The District only discontinues services when accounts are delinquent by forty-five days. When a tenant's service is discontinued for nonpayment, the District requires the property owner, Dynasty, to pay up to ninety days of charges and late penalties assessed to the account.

Dynasty requested that the District terminate service to the listed tenants whose accounts are delinquent by thirty days. The District refused these requests because Dynasty is not the named customer on the account.

Dynasty filed a petition for inverse condemnation against the District for its refusal to terminate service as Dynasty requested, thereby increasing Dynasty's liability for delinquent service charges and late penalties. The trial court granted the District's summary judgment motion and Dynasty appealed.

The Court of Appeals affirmed. The court rejected Dynasty's argument that because the statute deems it to be a furnishee, it should have the same right to terminate service that the occupant has. While section 250.140.1 does deem services to be furnished to both owner and occupant, the statute does not state, and it does not follow, that both parties share equal rights over the terms of the service.

Dynasty did not assert that it was a "customer" within the meaning of the rules and regulations, as it does not use the incoming water services itself. If Dynasty established the accounts in its own name, then billed the tenants for the water they used, it would be a customer, and would have the right to terminate services at its discretion. Dynasty instead chose that its tenants establish accounts in their own names. The tenants therefore have a contractual relationship with the District, and they have the right to terminate services pursuant to the terms of the contract. Dynasty had elected not to be a party to the contract, and therefore it did not have the same rights as the parties have to end services.

"Dynasty has not met its burden to show that the District's rules and regulations bear no reasonable relationship to the legislative objective or that they are unreasonable and plainly inconsistent with section 250.140.1. Because the District's rules and regulations on the termination of service are valid, and because section 250.140.1 does not grant it any additional rights or powers, Dynasty does not have the right to terminate service at its request. Therefore, Dynasty does not have a property right to be infringed, and it has not suffered a taking."

PENSIONS - NEBRASKA

Board of Trustees of City of Omaha Police and Fire Retirement System v. City of Omaha

Supreme Court of Nebraska - January 30, 2015 - N.W.2d - 289 Neb. 993

Board of trustees of city retirement system brought action against city, seeking declaratory judgment as to whether board had authority to retain an actuarial consultant and private legal counsel at city expense. The District Court entered summary judgment in favor of board. City appealed and petitioned to bypass the Court of Appeals.

The Supreme Court of Nebraska held that:

- Board had authority to hire actuarial consultant;
- Consultant was required to be paid by city; but
- Board lacked authority to hire private legal counsel unless there was a conflict of interest preventing city attorney from serving.

LABOR - NEW JERSEY

Teaneck Firefighters Mut. Benev. Ass'n Local No. 42 v. Township of Teaneck

Superior Court of New Jersey, Appellate Division - February 3, 2015 - Not Reported in A.3d - 2014 WL 7735838

Teaneck Firefighters Mutual Benevolent Association Local Number 42 (FMBA) appealed from a final decision of the Public Employment Relations Commission (PERC) that determined the Township of Teaneck and FMBA's past practice of permitting up to four firefighters off per shift was not mandatorily negotiable because it prevented the Township from meeting its minimum staffing levels.

The parties agreed that the scheduling of time off and work hours is, as a general principle, mandatorily negotiable and that managerial prerogatives are non-negotiable. The central issue in this dispute was whether permitting four firefighters off on each shift fell into the former or latter category. The answer involved a fact-sensitive determination which PERC resolved when it concluded that "the underlying issue in this case primarily involves a minimum staffing level determination, not the allocation of time off."

The appeals court affirmed, finding PERC's decision supported by sufficient credible evidence on the record as a whole.

MUNICIPALITIES - NEW MEXICO

Einer v. Rivera

Court of Appeals of New Mexico - February 2, 2015 - P.3d - 2015 WL 433648

Resident of San Miguel County, submitted a form petition to the County Clerk, requesting that she approve the form of the petition for circulation to qualified electors. The petition requested the San Miguel County Commission to appoint a charter commission providing for the "home rule" government of the county.

The San Miguel County attorney responded to the request, advising that the clerk declined to act on the petition because the petition seeking incorporation of the county and adoption of a charter was

not authorized by law. Resident filed a writ of mandamus, requesting that the district court issue (1) a declaratory judgment that San Miguel County is a "municipality" under the Municipal Charter Act and that the form of petition met the requirements of Section 3–1–5(C); and (2) a peremptory or alternative writ of mandamus, compelling the clerk to approve the petition.

The Court of Appeals held that San Miguel County was not subject to the home rule charter process of the Home Rule Amendment of the New Mexico Constitution and the Municipal Charter Act. San Miguel County is not a "municipality" within the Municipal Charter Act or the Home Rule Amendment. The court further concluded that its holding did not violate the constitutional equal protection rights of resident.

UTILITIES - TENNESSEE

American Heritage Apartments, Inc. v. Hamilton County Water and Wastewater Treatment Authority

Court of Appeals of Tennessee, at Knoxville - January 30, 2015 - Slip Copy - 2015 WL 399215

American Heritage Apartments, Inc. brought a lawsuit to protest a monthly flat charge in the amount of $8.00 per unit imposed by the the Hamilton County Water and Wastewater Treatment Authority (WWTA) on all of its sewer customers. The charge was instituted to fund a program designed to repair and refurbish private service laterals. American Heritage sought a declaratory judgment that the WWA had exceeded its authority by imposing an unjust and discriminatory charge.

The trial court granted summary judgment in favor of the WWTA, finding that because the Utility District Law of 1937 (UDL) provided an administrative procedure for contesting utility charges, no private right of action was available. The court further ruled that in the alternative, if a private right of action were allowed by the appeals court, American Heritage's complaint could be certified as a class action lawsuit. American Heritage has appealed.

The Court of Appeals reversed, holding that the trial court erred by applying the Utility District Law of 1937 to a non-utility district water and wastewater treatment authority. Thus, the trial court erred by applying the administrative remedies available to utility users under the UDL to the instant action and thereby erred by finding that American Heritage had failed to pursue said remedies.

The Court of Appeals affirmed the trial court's ruling regarding class action certification.

CONSTITUTIONAL LAW - UTAH

Summum v. Pleasant Grove City

Supreme Court of Utah - January 30, 2015 - P.3d - 2015 UT 31

After the United States Supreme Court, 555 U.S. 460, 129 S.Ct. 1125, rejected religious organization's free speech claim and the federal district court subsequently rejected organization's federal establishment clause claim, organization filed a complaint in state court, alleging that city had violated the religious liberty clause of the Utah Constitution. The Fourth District Court granted summary judgment in favor of the city. Organization appealed.

The Supreme Court of Utah held that religious liberty clause did not require city to install a proposed religious monument in a public park where a Ten Commandments monument was already situated.

Requiring city to erect a second religious monument would not render the allocation of public property and money to the two monuments neutral, displaying monuments that communicate the beliefs of only two religious viewpoints would not amount to an impartial distribution of public property among the spectrum of religious views held by Utah citizens, and because allocation of public money or property to a permanent religious monument was per se not neutral, the appropriate remedy for monument constituting "religious worship, exercise or instruction" would not be the forced installation of a second monument.

LIABILITY - CALIFORNIA

Harb v. City of Bakersfield

Court of Appeal, Fifth District, California - January 23, 2015 - Cal.Rptr.3d - 2015 WL 302291

Patient, who suffered stroke while driving, filed negligence action against city, responding officer, ambulance company, and paramedic who drove first ambulance, alleging that delay in getting patient medical treatment made consequences of stroke much worse. Following jury trial, the Superior Court entered judgment in favor of defendants. Patient appealed.

The Court of Appeal held that:

- Patient provided adequate appellate record;
- Police immunity instruction was ambiguous in a way reasonably likely to cause jury to misunderstand and misapply instruction;
- As a matter of first impression, doctrine of contributory or comparative negligence was inapplicable; and
- Error in instructing jury on comparative negligence was prejudicial.

Police immunity jury instruction, which stated that officer responding to scene of accident was not liable in negligence action filed by patient, who suffered stroke while driving, if officer was exercising due care, was ambiguous in a way reasonably likely to cause jury to misunderstand and misapply jury instruction in action alleging that delay in getting patient medical treatment made consequences of stroke much worse. Jury was required to determine for itself what "due care" meant and whether instruction was redundant to negligence instructions, defense counsel emphasized police immunity instruction in closing argument, and evidence was not so one-sided that there was little chance of ambiguous instruction being misapplied.

Doctrine of contributory or comparative negligence was inapplicable based on alleged pretreatment negligence of patient, who suffered stroke while driving, in patient's negligence action against city, responding officer, ambulance company, and paramedic who drove first ambulance, alleging that delay in getting patient medical treatment made consequences of stroke much worse. First responders were required to take patient as they found him, and only legitimate application of doctrine of contributory fault was when fault took place concurrently with or after delivery of practitioner's care and treatment.

Error in instructing jury on comparative negligence based on patient's failure to take his blood

pressure medication was prejudicial, such that new trial was warranted on patient's negligence claims against city, responding officer, ambulance company, and paramedic who drove first ambulance, alleging that delay in getting patient medical treatment after he suffered stroke while driving made consequences of stroke much worse. Even though jury never reached question on special verdict form regarding comparative negligence, defense counsel's opening statements introduced jury to argument regarding who was to blame and position that patient's failure to take his medication was important, evidence regarding patient's failure to take his medication was presented at trial, and defense counsel reference patient's failure to take his medication during closing arguments.

EMINENT DOMAIN - CONNECTICUT

Department of Transp. v. Cheriha, LLC

Appellate Court of Connecticut - January 27, 2015 - A.3d - 155 Conn.App. 181

Property owner appealed after the Department of Transportation assessed $125,000 in damages for taking of property used for automotive related services. After a hearing, the Superior Court reassessed damages as $243,840. Property owner appealed.

The Appellate Court held that:

- Proffered testimony of prior prospective purchaser of the property was inadmissible opinion of nonexpert, nonowner;
- Sales comparison analysis of Department's expert was proper basis for making determination as to value of the property; and
- Trial court was not required to discuss opinion testimony of property's former owner in its decision on fair market value of property.

Proffered testimony of prior prospective purchaser of property that was subject of condemnation proceeding initiated by Department of Transportation, describing the amount purchaser offered to pay for the property, constituted inadmissible opinion of nonexpert, nonowner as to the property's value, in proceedings for reassessment of damages. Although prospective purchaser could have testified to uses of the property other than for automotive-related services and had experience buying and selling commercial properties, he was neither an expert in property valuation nor was he the owner of the property, and thus he could not testify regarding market value, his intended use of the property was speculative, and the highest and best use of the property was a concept for experts to discuss.

Sales comparison analysis of condemnor's expert was proper basis for making determination as to value of property in eminent domain proceeding initiated by Department of Transportation, though expert's analysis excluded other legally conforming uses for the property, and expert's report referred to incorrect zone for the property. Property owner's own experts used automotive related services as highest and best use of the property, court reached its opinion as to market value based on properties commercially zoned and used for similar purposes, and condemnor's expert report properly identified existing use of subject property and found comparable properties based on their use for similar purposes.

MUNICIPAL ORDINANCE - INDIANA

View Outdoor Advertising, LLC v. Town of Schererville Board of Zoning Appeals

United States District Court, N.D. Indiana, Hammond Division - January 22, 2015 - Slip Copy - 2015 WL 331940

View Outdoor Advertising brought suit against the Town of Schererville, claiming that its ordinance prohibiting all billboards violated its free speech rights, that it did not receive proper due process regarding its request for a variance, and that the Town's decision to deny the variance was arbitrary and capricious.

The District Court held that:

- The ordinance was sufficiently narrowly tailored to directly advances the Town's interests in aesthetics; and
- There existed no due process violation, as View had been given notice and a robust opportunity to be heard at the hearing before the Board of Zoning Appeals.

Having dismissed all federal claims, the District Court remanded all remaining state claims (including the arbitrary and capricious claim) to the state court.

MUNICIPAL ORDINANCE - NEW JERSEY

Newfield Fire Co. No. 1 v. Borough of Newfield

Superior Court of New Jersey, Appellate Division - January 23, 2015 - A.3d - 2015 WL 302648

Volunteer firefighter company filed complaint in lieu of prerogative writs, seeking to invalidate, as ultra vires, municipal ordinance requiring company's officers to be appointed by municipality's governing body. The Superior Court upheld the ordinance as enforceable after excising three specific provisions. Company appealed.

The Superior Court, Appellate Division, held that municipality was unambiguously permitted by statute to use ordinance as contractual basis to set forth provisions assuring municipal supervision and control of company's members.

MUNICIPAL ORDINANCE - NEW MEXICO

Swepi, LP v. Mora County, N.M.

United States District Court, D. New Mexico - January 19, 2015 - F.Supp.3d - 2015 WL 365923

On April 29, 2013, the Mora County Board of County Commissioners adopted the (insufferably self-righteous) "Mora County Community Water Rights and Local Self–Government Ordinance" prohibiting (among many other things) the extraction of oil, natural gas, or other hydrocarbons within the County.

SWEPI, LP, which had entered into an oil-and-gas lease with the State of New Mexico in 2010, sought an injunction to prohibit the County from enforcing the Ordinance and seeking monetary damages.

The District Court invalidated the Ordinance, finding that:

- SWEPI, LP had standing to bring each of its claims, because it had suffered an injury in fact;
- Because the County had already enacted the Ordinance, and because SWEPI, LP would suffer harm if the Court delayed considering its claims, each of SWEPI, LP's claims was ripe, except for its claim under the Takings Clause;
  Because SWEPI, LP had not sought just compensation through a state inverse condemnation action, its takings claim was not ripe;
- SWEPI, LP could bring its claim under the Supremacy Clause, because it could bring independent claims, through 42 U.S.C. § 1983, under the constitutional provisions that it asserted trumped the Ordinance;
- The Ordinance violated the Supremacy Clause, because it conflicted with federal law;
- The Ordinance did not violate SWEPI, LP's substantive due-process rights or the Equal Protection Clause, because the County had a legitimate state interest for enacting the Ordinance;
- The Ordinance violated the First Amendment by chilling protected First Amendment conduct;
- Because the County lacked the authority to enforce zoning laws on New Mexico state lands, it could not enforce the Ordinance on state lands;
- Because there is room for concurrent jurisdiction between state and local law, New Mexico state law does not preempt the entire oil-and-gas production field;
- The Ordinance conflicted with state law by prohibiting activities that state law permits: the production and extraction of oil and gas; and
- The invalid provisions of the Ordinance were not severable from the valid provisions, making the Ordinance, in its entirety, invalid.

I read a 100-page opinion for you ingrates!

Shout out to my peeps at Holland & Hart for surviving this nonsense.

PENSIONS - PENNSYLVANIA

Loscombe v. City of Scranton

United States Court of Appeals, Third Circuit - January 28, 2015 - Fed.Appx. - 2015 WL 348055

Fire Captain for the City of Scranton was forced to retire due to injuries he sustained in a work-related accident. For his service, he received a disability retirement pension from the City's Fire Department. Following his retirement from the Fire Department, Captain accepted an offer to serve as a member of the Scranton City Council. Because Captain was serving as a City Council member, the City directed the Pension Board to suspend his pension, in accordance with municipal ordinance requiring that any pensioned firefighter who becomes employed by the City shall have his pension suspended during the term of that employment.

Captain raised a series of constitutional claims challenging the Ordinance and the suspension of his pension benefits. The District Court ruled in favor of the City and Pension Board, finding no constitutional violations. Captain appealed and the Court of Appeals affirmed.

CONTRACTS - SOUTH DAKOTA

Lowe v. City of Hot Springs

Supreme Court of South Dakota - January 28, 2015 - N.W.2d - 2015 S.D. 3

After city accepted corporation's proposal to lease real property belonging to city, private entity, whose proposal had been rejected, sued city and corporation, seeking to require city to reject all proposals and restart process, based on allegation that city failed to adhere to statutory service procurement requirements. The Circuit Court granted city and corporation summary judgment. Private entity appealed.

The Supreme Court of South Dakota held that city's request for proposals and contract with corporation did not involve procurement services.

City's request for competitive sealed proposals for continued utilization of its real property and subsequent contract with corporation to lease property for sand and gravel extraction did not involve procurement of services, such that city was not required to adhere to statutory service procurement requirements. Even though lease required corporation to use its efforts with respect to certain matters, terms requiring corporation's efforts were all integrally related to city's historical use of property, transaction involved bona fide lease, and city paid no monetary compensation for corporation's efforts.

SIGNAGE - TEXAS

Garrett Operators, Inc. v. City of Houston

Court of Appeals of Texas, Houston (1st Dist.) - January 22, 2015 - S.W.3d - 2015 WL 293305

Owner of billboard was prohibited by City from installing an LED display on the sign, although the local Sign Code contained no reference to LED lights. The City subsequently amended the Code (the "Amendments") to prohibit electronic signs.

Owner sued, arguing, inter alia, that any application of the Amendments to him was a violation of the Texas Constitution's prohibition against retroactive laws under Article I, section 16.

The Court of Appeals held that:

- The trial court erred in ruling that Owner was barred by the statute of limitations;
- Owner's proposed conversion of the billboard but was a reconstruction or alteration of the billboard requiring a permit from the Sign Administration;
- Because Owner was required to, but had not requested a permit from the Sign Administration at the time he filed suit, he had no vested interest in converting its sign to LED without a permit; and
- Because Owner had no vested interest in converting his sign without a permit, the amendments to the Sign Code were not unconstitutionally retroactive when applied to him.

PUBLIC RECORDS - WASHINGTON

Worthington v. Westnet

Supreme Court of Washington - January 22, 2015 - P.3d - 2015 WL 276401

Records requester brought action against regional drug task force, alleging that task force formed

under the Interlocal Cooperation Act (ICA) had wrongfully denied his request for records pursuant to the Public Records Act (PRA). The Superior Court granted task force's motion to dismiss. Requester appealed. The Court of Appeals affirmed. The Supreme Court granted review.

The Supreme Court of Washington held that:

- Provision of interlocal agreement stating that task force was not an "agency" for purposes of PRA was not binding on the courts, and
- Interlocal agreement could not designate task force as a nonentity if doing so would conflict with PRA obligations and requirements.

Self-imposed terms of interlocal agreement stating that drug task force was not an "agency" for purposes of the Public Records Act (PRA) did not establish as a matter of law that the task force was not an agency, absent evidence of whether the task force operated independently, maintained its own records, or effectively existed as a separate government agency.

Under the provision stating that the Public Records Act (PRA) governs in the event of conflict with any other act, an interlocal agreement creating a drug task force could not designate the task force as a nonentity if doing so would conflict with PRA obligations and requirements, unless another contributing agency could satisfy the task force's PRA obligations on the task force's behalf.

EMINENT DOMAIN - WASHINGTON

Public Utility Dist. No. 1 of Okanogan County v. State

Supreme Court of Washington, En Banc - January 29, 2015 - P.3d - 2015 WL 388301

Public utility district (PUD) filed a condemnation petition against property owners to obtain easements that were necessary to build a new electrical transmission line. One property owner was the state, which owned school trust lands that were required for the project. Conservation group filed a motion to intervene, which was granted. Group and Department of Natural Resources (DNR) each filed a motion for summary judgment, arguing that PUD did not have the authority to condemn the school trust lands. The Superior Court denied the motions and granted summary judgment in favor of PUD. Group and DNR appealed, and PUD cross appealed. The Court of Appeals affirmed. DNR and PUD sought review, which the Supreme Court granted.

The Supreme Court of Washington held that:

- Statute does not prohibit a court from exercising its authority under the court rules to join individuals challenging a condemnor's authority with respect to certain property;
- Trial court could allow group to be a permissive intervenor;
- Public utility districts have express statutory authority to condemn school lands held in trust by the state;
- A present or prospective public use does not categorically exempt property from condemnation by a municipal corporation; abrogating *State ex rel. City of Cle Elum v. Kittitas County*, 107 Wash. 326, 173 P. 698;
- Condemnation of an easement through school lands by public utility districts does not violate the Washington Constitution; and
- Legislative grant of authority to public utility districts to condemn school lands is not a breach of the state's fiduciary duties as trustee of school lands.

PUBLIC RECORDS - CALIFORNIA

Bertoli v. City of Sebastopol

Court of Appeal, First District, Division 4, California - January 20, 2015 - Cal.Rptr.3d - 2015 WL 251444

Pedestrian, who was struck by car as she walked inside crosswalk located on highway owned by city, and pedestrian's attorney filed writ of mandate seeking order requiring city and its departmental employees to produce electronically stored information (ESI) responsive to attorney's Public Records Act (PRA) request for documents sought in anticipation of litigation related to accident.

The Superior Court denied petition. Pedestrian and attorney filed extraordinary writ challenging the trial court's decision. The Court of Appeal summarily denied writ. Pedestrian and attorney filed petition for review. The Supreme Court denied petition. City and employees filed request for attorney fees and costs. The trial court granted request. Pedestrian and attorney appealed.

The Court of Appeal held that petition was not clearly frivolous, such that award of fees and costs was improper.

Petition for writ of mandate seeking order requiring city and its departmental employees to produce electronically stored information (ESI) responsive to Public Records Act (PRA) request for documents sought in anticipation of litigation stemming from accident in which pedestrian was struck by car as she walked inside crosswalk located on highway owned by city was not clearly frivolous, such that award of attorney fees and costs in favor of city and its employees was improper. Petition was not filed to harass city or its employees or for purposes of delay, and petition itself did not entirely lack merit, even though, as drafted, petition was unduly burdensome, overbroad, and would significantly compromise interest in privacy and confidentiality.

CONTRACTS - CONNECTICUT

Bellsite Development, LLC v. Town of Monroe

Appellate Court of Connecticut - January 27, 2015 - A.3d - 2015 WL 248939

Bellsite Development, LLC filed a civil action against the Town of Monroe after the Town reneged on its commitment to place Police Department telecom equipment in a communications tower to be built by Bellsite. Bellsite alleged three counts: breach of contract, promissory estoppel, and negligent misrepresentation. Following a trial, the jury returned a verdict in favor of the plaintiff on the breach of contract and negligent misrepresentation claims, and a verdict in favor of the defendants on the promissory estoppel claim. The jury awarded the plaintiff $700,000 in damages. After receiving the jury verdict, the defendants filed a motion to set aside the verdict, which was denied. Defendant appealed.

On appeal, the defendants claim that the court erred in denying the motion to set aside the jury's verdict as the jury's findings of a breach of contract and negligent misrepresentation were not supported by the evidence adduced at trial.

The appeals court reversed, setting aside the jury verdict. The court found that the Town selectman who had been negotiating with Bellsite had neither express, nor apparent, authority to bind the Town. The court also found no evidence that the town council acted in any way that could reasonably be interpreted as ratification of the agreement, as the town never accepted or received any benefit

from the purported agreement. The court also rejected the negligent misrepresentation claim, as there had been no false statement.

LABOR - ILLINOIS

McGreal v. Village of Orland Park

Appellate Court of Illinois, First District, Second Division - January 20, 2015 - Not Reported in N.E.3d - 2015 IL App (1st) 141412-U

The Metropolitan Alliance of Police, Orland Park Police Chapter No. 159 (MAP), filed an unfair labor practice charge against the Village of Orland Park concerning the Village's treatment of Officer Joseph McGreal. The Illinois Labor Relations Board dismissed the charge in accord with an arbitrator's recommendation. McGreal then filed in the circuit court a petition to vacate the arbitrator's award. The circuit court dismissed the petition. McGreal appealed.

The appeals court found that McGreal lacked standing to petition to vacate the arbitrator's award, holding that when parties to a collective bargaining agreement use procedures established in the agreement to arbitrate a grievance, only the parties to the collective bargaining agreement have standing to petition to vacate the arbitrator's award, unless the individual employee can show that the union breached its duty of fair representation.

SCHOOLS - ILLINOIS

Lutkauskas v. Ricker

Supreme Court of Illinois - January 23, 2015 - N.E.3d - 2015 IL 117090

Taxpayers brought actions, which were consolidated, against school district employees, district's accountant, and district board members, alleging employees and members engaged in or permitted improper spending of money from district's working cash fund. The Circuit Court dismissed action. Taxpayers appealed. The Appellate Court affirmed. Taxpayers appealed.

The Supreme Court of Illinois held that:

- Taxpayers did not have standing to seek employees' and board members' forfeiture of office or payment of fines, and
- Particular taxpayer's action arose out of same set of facts as other taxpayer's prior action and was barred by res judicata.

Taxpayers did not have standing to seek school district employees' and school district board members' forfeiture of office or payment of fines, for alleged improper transfer of money from district's working cash fund; statute providing for forfeiture and fines created only a criminal offense with criminal penalties.

TAKINGS - LOUISIANA

Progressive Waste Solutions of La, Inc. v. Lafayette Consolidated Government

United States District Court, W.D. Louisiana, Lafayette Division - January 14, 2015 - Slip

Copy - 2015 WL 222396

On June 7, 2011, Progressive Waste Solutions entered into a Lease Agreement with Option to Purchase with Waste Facilities of Lafayette for the construction and operation of a dual transfer station and hauling facility. The Lease would not commence until Progressive obtained an Occupancy License from the Lafayette Consolidated Government (LCG).

Following the LCG Planning, Zoning & Codes Department's review, on September 19, 2011, Waste Facilities obtained a building permit and began construction on the waste transfer station. Subsequently, on October 18, 2011, the Lafayette City–Parish Council approved an Ordinance prohibiting the establishment or siting of any new waste transfer station within the Parish of Lafayette and directed the City–Parish President to withdraw and revoke any and all permits for any waste transfer stations permitted but not yet in operation on the effective date of the ordinance. The Ordinance became law on October 29, 2011 and Waste Facilities' building permit was revoked on October 31, 2011.

Progressive sued, claiming that its Lease Agreement with Waste Facilities gave it status as a "lessee" in the District Court and therefore asserting a takings claim based upon the revocation of the building permit issued to Waste Facilities. LCG argued that Progressive's taking claim was not ripe as it had failed to exhaust all state law remedies, and alternatively that Progressive did not have a legally protectable property interest to assert a takings claim. In addition to addressing the takings claim, LCG asserted that Progressive's substantive due process and equal protection claims must fail and that Progressive had failed to state a cause of action as to its State law claims for intentional interference with a contract and detrimental reliance.

The District Court held that:

- Even assuming *arguendo* that Progressive's takings claim was ripe under the "futility exception," Progressive failed to meet its burden of proving that its status as a putative or "would be" lessee entitled it to a vested right in order to pursue a Federal takings claim; and
- A "contract of lease," binding the parties to the Lease Agreement never occurred because the suspensive condition that an Occupancy License would be issued had not been fulfilled making the Lease void *ab initio*, nor had Progressive expended significant funds in good faith reliance on the building permit.

The Court also denied Progressive's other claims, granting the LCG's motion to dismiss.

IMMUNITY - NEBRASKA

Brothers v. Kimball County Hospital

Supreme Court of Nebraska - January 16, 2015 - N.W.2d - 289 Neb. 879

After receiving treatment at Kimball County Hospital, patient filed a tort claim pursuant to the Political Subdivisions Tort Claims Act (Act) and later filed suit against the County, the hospital, and a physician. The district court dismissed the county and entered summary judgment in favor of the hospital and the physician. The Nebraska Court of Appeals affirmed.

The patient appealed, alleging that the Court of Appeals erred by (1) finding that the County was properly dismissed and failing to reverse and remand for a summary judgment hearing at which patient would have the opportunity to present evidence and (2) determining that Kimball County Hospital and physician were properly dismissed based on lack of service of the tort claim pursuant

to the Act.

The Supreme Court of Nebraska affirmed, holding that:

- As a matter of law, a county hospital is a separate and distinct political subdivision from the county, and thus any error in failing to allow the patient to present evidence on the county's motion to dismiss was harmless;
- Because the patient did not file his tort claim with the statutorily designated individual, he failed to comply with notice requirements of the Act.

PUBLIC RECORDS - NEBRASKA

Frederick v. City of Falls City

Supreme Court of Nebraska - January 16, 2015 - N.W.2d - 289 Neb. 864

The issue presented in this appeal was whether certain documents in the possession of a private corporation which had an ongoing contractual relationship with a city were "public records" within the meaning of Neb.Rev.Stat. §§ 84–712 and 84–712.01.

Falls City Economic Development and Growth Enterprise, Inc. (EDGE), a Nebraska nonprofit corporation, provides economic development services to the City of Falls City, Nebraska, and other entities. A Nebraska citizen asked EDGE to produce documents relating to a specific economic development project, and EDGE denied the request on the ground that the requested documents were not public records as defined by § 84–712.01(1). The citizen then brought an action for a writ of mandamus to compel production of the requested documents. Except for certain documents which it determined to be privileged, the district court granted the writ. EDGE appealed, and Falls City cross-appealed, aligning itself with EDGE. The citizen also cross-appealed, contending the district court erred in not requiring production of all of the requested documents.

A four-part functional equivalency test is the appropriate analytical model for determining whether a private entity which has an ongoing relationship with a governmental entity can be considered an agency, branch, or department of such governmental entity within the meaning of Neb.Rev.Stat. § 84–712.01(1), such that its records are subject to disclosure upon request under Nebraska's public records laws. The factors to be considered in applying this test are (1) whether the private entity performs a governmental function, (2) the level of governmental funding of the private entity, (3) the extent of government involvement with or regulation of the private entity, and (4) whether the private entity was created by the government.

In applying the functional equivalency test to determine whether a private entity is the equivalent of a public agency, branch, or department, it is not necessary that an entity strictly conform to each factor, but the factors should be considered and weighed on a case-by-case basis.

In its analysis, the court noted that the fact that EDGE receives 63 percent of its funding from public sources lent some support to the argument that it is the equivalent of a public agency, branch, or department, but concluded that the remaining factors lend no support to a determination that EDGE is the functional equivalent of a city agency, branch, or department. EDGE was formed by private parties. Its employees are not Falls City employees, its offices are not housed in city buildings, and its financial and other records are kept separately from those of Falls City. The city does not control EDGE's board.

PENSIONS - NEW HAMPSHIRE

American Federation of Teachers v. State

Supreme Court of New Hampshire - January 16, 2015 - A.3d - 2015 WL 222181

Members of state employee pension plan and organizations representing groups of such members brought action against state and others challenging the constitutionality of certain statutory amendments affecting the calculation of benefits under the pension plan. The Superior Court entered judgment finding that amendments to the definition of "earnable compensation" violated the contract clauses of the state and federal constitutions, but amendments to the statutes providing for cost of living adjustments (COLAs) did not. State appealed, and pension plan members and organizations cross-appealed.

The Supreme Court of New Hampshire held that:

- Statute defining "earnable compensation" did not create contractual right to fixed definition of the term, and
- Pension plan members did not have vested rights to a COLA.

Statute defining "earnable compensation" for purposes of state employee pension plan did not create contractual right to fixed definition of the term, and thus amendment to statute that excluded from the definition certain "other compensation" paid by the employer did not violate the contract clauses of federal and state constitutions, even though state employees became vested in pension plan after 10 years of creditable service. Vesting was not synonymous with a contractual right, statute contained no clear language indicating legislative intent to be bound by the definition of earnable compensation, and change in the definition did not retroactively affect calculation of pension benefits.

Members of state employee pension plan did not have vested rights to a COLA, and thus statutory amendment changing the manner of funding COLAs did not violate the contract clauses of the state and federal constitutions. COLA was not the same thing as the underlying retirement benefit, and statutes defining the "retirement allowance" collectible by eligible members of the pension plan did not state that the retirement allowance included COLAs.

ZONING - NEW JERSEY

Griepenburg v. Township of Ocean

Supreme Court of New Jersey - January 22, 2015 - A.3d - 2015 WL 263913

Landowners brought action against township, challenging validity of zoning ordinance rezoning a large tract of land, including most of landowners' property, from residential and commercial use to an Environmental Conservation district. Following a bench trial, the Superior Court dismissed landowners challenge. The Superior Court, Appellate Division reversed. Township petitioned for certification.

The Supreme Court of New Jersey held that ordinances were valid.

Township zoning ordinances, rezoning a large tract of land from residential and commercial use to an Environmental Conservation district, were a valid exercise of municipal zoning power and were not arbitrary, capricious, or unreasonable; ordinances represented a legitimate exercise of the

municipality's power to zone property consistent with its Master Plan and Municipal Land Use Law goals.

ANNEXATION - NEW YORK

City of Gloversville v. Town of Johnstown

Supreme Court, Appellate Division, Third Department, New York - January 22, 2015 - N.Y.S.2d - 2015 N.Y. Slip Op. 00575

Owners of unimproved real property located in the Town of Johnstown requested in 2012 that the property be annexed by the City of Gloversville. After a joint public hearing, the Town Board voted to deny the request while the City's Common Council voted in favor of annexation.

The City thereafter commenced a special proceeding pursuant to General Municipal Law § 712 seeking a judgment that annexation was in the overall public interest, and the owners of the property were permitted to intervene. The court then designated a panel of three Referees to hear and report on the proposed annexation. Following a trial, the Referees visited the property, viewed the surrounding area and issued a report unanimously recommending annexation. The City then moved to confirm the report, and the Town moved to reject it.

The appeals court held that any detriment to the Town was far outweighed by the benefits of annexation to the City, based on the City's municipal water and sewer services, as well as its professional, higher-rated emergency services and the resulting ability to develop the property in the same manner and with the same services and facilities. Accordingly, the court agreed with the unanimous conclusion of the Referees that annexation would be in the overall public interest.

IMMUNITY - OHIO

Estate of Smith v. Western Brown Local School Dist.

Court of Appeals of Ohio, Twelfth District, Brown County - January 20, 2015 - N.E.3d - 2015 -Ohio- 154

Estate of high school student who committed suicide filed wrongful death action against superintendent, principal, and assistant principal. The Court of Common Pleas granted summary judgment in favor of school officials. Estate appealed.

The Court of Appeals held that:

- Trial court acted within its discretion in finding that professor was not qualified to testify as an expert;
- Student's suicide was not foreseeable under the circumstances, and thus parents failed to support wrongful death action; and
- School officials were entitled to immunity from tort liability.

Trial court acted within its discretion in finding that professor was not qualified to testify as an expert in wrongful death action as to duty of school district superintendent, principal, and assistant principal to notify parents of high school student who committed suicide of threatening notes student had allegedly received. Professor had relative unfamiliarity with subject matter central to issues involved, although professor was principal investigator on survey assessing whether schools

were complying with bullying policy, survey did not explore or link effects of policy and likelihood of student suicide, and professor's experience with bullying policies was not relevant to circumstances surrounding student's suicide, as it appeared student was the author of the notes as part of a ruse.

High school student's suicide was not foreseeable under the circumstances, and thus school district superintendent, principal, and assistant principal did not have a duty to inform student's parents of situation involving student, girlfriend, and apparent rival at time officials were notified of threatening notes, as was required to support parents' wrongful death action. School officials acted quickly and efficiently to gather information about notes, by the next afternoon officials had formulated the suspicion that student was the author of the notes as ruse to draw girlfriend closer to student, student had not exhibited any signs of suicide at that time, student's threatening text messages to rival were unknown to officials, and threat to kill rival and then himself had yet to occur.

There was no evidence that school district superintendent, principal, or assistant principal acted in wanton or reckless manner with respect to situation involving high school student who committed suicide, student's girlfriend, and apparent rival, which involved investigation into threatening notes, and thus school officials were entitled to immunity from tort liability generally applied to employees of a political subdivision, in wrongful death action by student's parents. Although student's death was tragic and an immense loss, school officials had gone to great lengths to gather information, assess the nature of threats contained in the notes, and ultimately to contact student's parents.

LIABILITY - OHIO

Argabrite v. Neer

Court of Appeals of Ohio, Second District, Montgomery County - January 16, 2015 - N.E.3d - 2015 -Ohio- 125

Innocent driver filed negligence action against officers in involved in pursuit of burglary suspect to recover damages for her injuries. The Court of Common Pleas Court granted summary judgment for the officers. Driver appealed.

The Court of Appeals held that officers' conduct in pursuing burglary suspect driver was not outrageous or extreme, and thus officers' pursuit of fleeing driver was not the proximate cause of injuries to innocent driver.

EMINENT DOMAIN - PENNSYLVANIA

Hess v. Pennsylvania Public Utility Com'n

Commonwealth Court of Pennsylvania - December 22, 2014 - A.3d - 2014 WL 7242855

Landowners sought review of Public Utility Commission order that approved electric utility's applications to exercise the power of eminent domain to acquire rights-of-way and easements over their land for construction of a new 69 kilovolt transmission line and substation. Utility intervened.

The Commonwealth Court held that:

- Line and substation were necessary;
- Commission properly considered utility's reliability principles and practices manual; and

- Substantial evidence supported Commission's finding that utility considered alternative solutions to the problem.

New 69 kilovolt transmission line and substation were necessary, as required for electric utility to exercise its power of eminent domain to acquire rights-of-way and easements over landowners' property, where an inordinate number of customers in the project area were at risk of sustained outage if a single-contingency outage occurred, there was no existing load-transfer capability in the project area, ability to transfer load shortened the duration of outages, and utility had attempted to resolve the issues by other means to no avail, and considered other alternatives before presenting the proposal for the new line and substation to the Public Utility Commission.

Public Utility Commission properly considered electric utility's reliability principles and practices manual in determining whether new 69 kilovolt transmission line and substation were necessary, as required for electric utility to exercise its power of eminent domain to acquire rights-of-way and easements over landowners' property; Commission's regulations required electric utilities to design and maintain procedures and criteria to ensure continuous, safe, and reliable electric service, and required electric utilities to establish their own inspection, maintenance, repair and replacement standards based on the unique circumstances facing each utility.

Substantial evidence supported Public Utility Commission's finding, in proceeding in which landowners challenged electric utility's applications to exercise the power of eminent domain to acquire rights-of-way and easements over their land for construction of a new 69 kilovolt transmission line and substation, that electric utility considered alternative solutions to problem of inordinate number of customers in the project area who were at risk of sustained outage if a single-contingency outage occurred, where utility thoroughly examined other transmission alternatives and found that they were more expensive, less viable, or failed to achieve utility's reliability objectives in the project area, and utility's witnesses rebutted landowners' alternatives.

ZONING - PENNSYLVANIA

Oakland Planning and Development Corp. v. City of Pittsburgh Planning Com'n

Commonwealth Court of Pennsylvania - January 9, 2015 - A.3d - 2015 WL 116560

Owner of rental property sought review of decision of municipal planning commission approving applicant's development plan application to construct an adjacent nine-story office building. The Court of Common Pleas affirmed. Owner appealed.

The Commonwealth Court held that:

- Applicant bore the burden of providing sufficient evidence to support approval of project development plan;
- Objectors have the burden to show that a project development plan adversely affects a community's health, safety, and morals; and
- Evidence supported finding that project development plan met the Zoning Code's requirements for approval.

IMMUNITY - CALIFORNIA

Pierce v. San Mateo County Sheriff's Department

Court of Appeal, First District, Division 1, California - December 31, 2014 - Cal.Rptr.3d - 15 Cal. Daily Op. Serv. 100 - 2015 Daily Journal D.A.R. 46

Resident brought action against sheriff's department and individual officers under § 1983 to challenge a warrantless search of her home. The Superior Court sustained demurrer without leave to amend. Resident appealed.

The Court of Appeal held that:

- Resident stated claim that warrantless search of her home violated Fourth Amendment;
- County sheriff's department was not a "person" subject to a suit for damages under section 1983; and
- Officers of sheriff's department were "persons" potentially liable under section 1983 to the extent that they were sued in their individual capacity.

DAMAGES - ILLINOIS

Geraty v. Village of Antioch

United States District Court, N.D. Illinois, Eastern Division - January 8, 2015 - Not Reported in F.Supp.3d - 2015 WL 127917

A jury found that the Village of Antioch discriminated against Geraty, a police officer in the Village, on the basis of her gender by failing to promote her to the position of sergeant and by failing to transfer her to the position of detective. The jury awarded Geraty $250,000 in compensatory damages.

At issue here was which Title VII damages cap was applicable. If the Village had 200 or fewer employees during the relevant time period, Geraty's compensatory damages are capped at $100,000, but if the Village had 201 or more employees, a $200,000 cap applies.

After an exhaustive analysis of the definition of "employee" and the arguments of the parties regarding the applicable criteria for designating an individual as an "employee," the court ruled that the $200k cap applied.

MUNICIPAL ORDINANCE - INDIANA

Anderson v. Gaudin

Court of Appeals of Indiana - January 12, 2015 - N.E.3d - 2015 WL 143920

In 2007 the Brown County Commissioners enacted an ordinance establishing a county-wide fire-protection district. In 2011 the Commissioners amended the ordinance, reducing dramatically the scope of the ordinance and the powers granted to the Board of Trustees. County-resident freeholders first filed suit for declaratory judgment, and then the Commissioners and the freeholders filed cross motions for summary judgment, asking the trial court to determine whether the amended ordinance was a valid exercise of the Commissioners' authority.

The trial court granted summary judgment in favor of the freeholders, finding that the amendment was a de facto dissolution of the ordinance, in contravention of the Fire District Act. The

Commissioners appealed, contending that the amended ordinance was a valid exercise of their authority.

The Court of Appeals affirmed, finding that the "amendment" made to the ordinance amounted to a de facto dissolution, and that the Commissioners did not have the authority to amend the ordinance at all.

LIABILITY - MISSISSIPPI

Hill v. City of Horn Lake

Supreme Court of Mississippi - January 15, 2015 - So.3d - 2015 WL 179270

Construction company employee, who was seriously injured when trench he was working in collapsed, and wrongful death beneficiaries of another company employee, who was killed in trench incident, brought action against city, alleging that city was liable for company's negligence on the basis of respondeat superior and also for its own negligence in maintaining the site. The Circuit Court granted the city's motion for summary judgment on all issues. Employee and wrongful death beneficiaries appealed.

The Supreme Court of Mississippi, en banc, held that:

- City, which had contracted with construction company, was not vicariously liable for company's negligence;
- Though an important factor, the existence of a formal contract is not a prerequisite for a finding of independent-contractor status; and
- Statute, requiring parties entering into a construction or public works contract with a municipality to furnish proof of general liability insurance coverage if the contract exceeds $25,000, was not applicable, and thus, employee and beneficiaries could not establish negligence per se claim against city based on this statute.

City, which had contracted with construction company, did not exercise more than a supervisory role over the construction project, which was not sufficient to trigger a master-servant relationship, and as such, city was not vicariously liable for company's negligence which resulted in serious injuries to company's employees at construction site. Company was responsible for obtaining its own equipment to complete the project, record did not indicate that company had anything but full discretion in choosing the equipment used for the project, city did not assist in construction, and city's involvement at planning stage was not enough to trigger a master-servant relationship.

Statute, requiring parties entering into a construction or public works contract with a municipality to furnish proof of general liability insurance coverage if the contract exceeds $25,000, was not applicable since contract between city and company for the completion of the project did not exceed $25,000, and thus, construction company employees, who were injured at construction site, could not establish negligence per se claim against city based on this statute.

ZONING - NEW JERSEY

Myers v. Ocean City Zoning Bd. of Adjustment

Superior Court of New Jersey, Appellate Division - January 16, 2015 - A.3d - 2014 WL 7565888

Landowners brought action against city seeking to compel city to adopt zoning change or to endorse, affirmatively, maintenance of zoning ordinance notwithstanding proposed change. The Superior Court entered judgment in favor of landowners. City appealed.

The Superior Court, Appellate Division, held that statute addressing a governing body's authority to adopt a zoning ordinance and the ordinance's conformity with municipality's master plan, stating that the body "may adopt or amend a zoning ordinance" and that "[s]uch ordinance shall be adopted after the planning board has adopted the land use plan element and the housing plan element of a master plan" does not require a governing body to affirmatively act in response to a master plan re-examination report; rather, the statute imposes conditions upon a governing body when it decides to act.

LIABILITY - NEW YORK

Pierre v. Ramapo Cent. School Dist.

Supreme Court, Appellate Division, Second Department, New York - January 14, 2015 - N.Y.S.2d - 2015 N.Y. Slip Op. 00348

Student was injured while competing in her high school's "self-defense tournament," a voluntary competition open to female students who were enrolled in a self-defense class taught by physical education teacher. The self-defense class was one of several electives that female students could take to satisfy the district's physical education requirement.

Plaintiffs alleged that, since the self-defense class was in actuality a mixed martial arts class, the defendant breached its duty of care to the infant plaintiff by allowing the class to be instructed by a person with little martial arts training, and allowing that person to referee the tournament. The plaintiffs contended that the students in the class were not properly or sufficiently trained and that teacher did not have the requisite knowledge and experience to recognize the dangers posed by the moves being performed in the tournament.

The defendant moved for summary judgment dismissing the complaint, arguing that the doctrine of primary assumption of risk barred the action and that any negligent supervision on its behalf was not a proximate cause of the infant plaintiff's injuries in any event.

The appellate court denied defendant's motion, holding that:

- Student had not, by voluntarily participating in the self-defense tournament, consented to the risks associated with the move that ultimately caused her injuries; and
- Defendant also failed to establish, prima facie, that its alleged lack of adequate supervision was not a proximate cause of the infant plaintiff's injuries.

ZONING - NEW YORK

Mimassi v. Town of Whitestown Zoning Bd. of Appeals

Supreme Court, Appellate Division, Fourth Department, New York - January 2, 2015 - N.Y.S.2d - 2015 N.Y. Slip Op. 00075

Petitioner commenced Article 78 proceeding seeking, inter alia, to annul town zoning board of appeals determination to deny his application for area variance. The Supreme Court, Onondaga

County, denied petition, and petitioner appealed.

The Supreme Court, Appellate Division, held that:

- Determination was not arbitrary and capricious because board failed to adhere to its precedent, but
- Board was required to engage in necessary balancing test, weighing benefit to applicant of granting variance against any detriment to health, safety and welfare of the neighborhood or community affected thereby, taking into account five statutory factors.

PUBLIC CONTRACTS - PENNSYLVANIA

Perrotto Builders, Ltd. v. Reading School Dist.

Commonwealth Court of Pennsylvania - January 9, 2015 - A.3d - 2015 WL 117020

Perrotto Builders, Ltd. appealed the order of the County Court of Common Pleas that denied its request for a preliminary injunction to stop the implementation of a construction contract to renovate several school buildings in the Reading School District.

Perrotto contended that the School District did not adhere to the terms of its own bidding procedures because it changed the stated basis for awarding the contract after the bids were opened when the School District reduced the budget amount for the project from $40 million to $33 million in order to fund emergency repairs that were expected to develop until such time as it could issue new bonds. The School District removed the elementary schools from the scope of work involved and recomputed the total base bid on the remaining project for each bidder, which resulted in the contract being awarded to another contractor.

Perrotto acknowledged that the School District could revise the scope of the work for budgetary reasons, but contended that the School District had to award the contract solely on the basis of the lowest total base bid on the full project. The School District would then be required to award the contract to Perrotto and then use a change order to reduce the scope of work.

The trial court refused to grant the preliminary injunction for several reasons. Chief among them was its finding that the School District did, in fact, follow the terms of its bid procedures.

The appeals court affirmed, holding that the School District was permitted by the bidding documents to change the scope of the project and the calculation of the lowest total base bid after opening the bids.

LABOR - RHODE ISLAND

Town of North Kingstown v. International Ass'n of Firefighters, Local 1651 AFL-CIO

Supreme Court of Rhode Island - January 9, 2015 - A.3d - 2015 WL 127889

Firefighters union brought declaratory judgment action against town, alleging ordinance reorganizing fire department was invalid, that town had violated the Firefighters Arbitration Act (FFAA) and the State Labor Relations Act (SLRA), and seeking injunctive relief. The Superior Court issued decision finding ordinance invalid, and that unilateral changes to wages, hours, and terms

and conditions of employment was improper. Town appealed.

The State Labor Relations Board (SLRB) issued a complaint against town, alleging the manner in which town implemented a three-platoon structure for fire department violated state law. Town appealed. Town brought declaratory judgment action alleging SLRB was without jurisdiction to enforce unfair labor practice charge, that its implementation of the three-platoon system was lawful, and seeking to stay arbitration with firefighters union. The Superior Court found the town's actions in implementing the three-platoon system to be unlawful, that the SLRB had jurisdiction over the unfair labor practice charge, that the arbitration panel had no jurisdiction to decide any unresolved issue between town and union, and ordered town to reinstate wages, hours, and other terms of employment that existed prior to the implementation of the three-platoon system. Town appealed.

Following consolidation of the three appeals, the Supreme Court of Rhode Island held that:

- Town's decision to implement a three-platoon structure for fire department was a lawful management right of the town;
- The 120-day period for the union to provide notice of a request for collective bargaining with regard to any such appropriation began to run 120 days before the first Wednesday in May, the ordinary date for final approval of the town's budget;
- The 30-day period for union to provide notice to town of its demand for arbitration on any unresolved matters began to run on the first date bargaining occurred with regard to matters requiring the appropriation of money; and
- Firefighters union waived its right to demand interest arbitration by failing to provide town with the requisite notice, and thus, the arbitration panel was without jurisdiction to determine the town's decision to implement the new structure, or to decide any unresolved issues between the parties.

IMMUNITY - TEXAS

Texas Department of Aging and Disability Services v. Cannon

Supreme Court of Texas - January 9, 2015 - S.W.3d - 2015 WL 127829

Representative of state school resident's estate filed suit against Department of Aging and Disability Services, which operated school, and several school employees, asserting claims for wrongful death and survival and claims under § 1983, arising out of resident's death by asphyxiation while employees were attempting to physically restrain resident. The District Court denied Department's plea to jurisdiction and employees' motion to dismiss. Defendants appealed. The Houston Court of Appeals affirmed in part and reversed in part. Defendants petitioned for review.

The Supreme Court of Texas held that trial court could consider amended petition, asserting § 1983 claims against employees, which was filed after Department and employees filed motion to dismiss, disapproving Villasan v. O'Rourke, 166 S.W.3d 752, City of Arlington v. Randall, 301 S.W.3d 896, and Brown v. Ke–Ping Xie, 260 S.W.3d 118.

Department of Aging and Disability Services employees did not have an absolute right to dismissal of action upon filing of motion to dismiss under election of remedies provision of Tort Claims Act, but instead, a court order along with certain findings was required to effectuate dismissal, and thus trial court could consider amended petition, asserting § 1983 claims against employees, which was filed after Department and employees filed motion to dismiss, in tort action arising when state school resident died while Department employees were attempting to restrain him. Although election of remedies provision required that employees be "immediately" dismissed upon filing of motion, such

language indicated only that dismissal by the trial court is mandatory, not discretionary, and did not preclude court from considering claims in amended petition prior to ruling on the motion, disapproving Villasan v. O'Rourke, 166 S.W.3d 752, City of Arlington v. Randall, 301 S.W.3d 896, and Brown v. Ke–Ping Xie, 260 S.W.3d 118.

In an action under the Tort Claims Act that has been filed against both a governmental unit and its employees, when the governmental unit files a motion to dismiss the employees under the election of remedies provision of Tort Claims Act, the plaintiff is not foreclosed from amending her petition to assert claims that are not brought under the Tort Claims Act, and such claims are properly before the court for its consideration in ruling on the motion to dismiss.

INVERSE CONDEMNATION - TEXAS

City of Galveston v. Murphy

Court of Appeals of Texas, Houston (14th Dist.) - January 13, 2015 - S.W.3d - 2015 WL 167178

Two multi-family dwellings were flooded by Hurricane Ike. The City of Galveston required a series of repairs and renovations, during which time the City declared the property unfit for habitation and evacuated the tenants.

During the course of the repairs, City officials suddenly informed the property owners that, because the property had been unoccupied for over six months, it had lost its "grandfathered" non-conforming status and would require a Specific Use Permit (SUP) to be occupied as multi-family dwellings. The property owners duly submitted an application for a SUP to the City Council, which was denied.

The Property Owners filed suit against the City, alleging that the SUP denial, as well as the City's "purported" invocation of the six-month vacancy used to then require the SUP, constituted a regulatory taking under both the Texas and federal constitutions.

The City filed a plea to the jurisdiction, which the trial court denied. The City appealed, asserting that the trial court lacked subject-matter jurisdiction because the property owners' claims were not ripe for review because they never obtained a final decision regarding their use of the property as an apartment complex. According to the City, its denial of the SUP primarily was based on code safety and structural concerns with the property and that it had encouraged the owners to bring the property within compliance and reapply, which they had not done.

The property owners responded that their case is ripe. In particular, the property owners contend the record contradicts the City's position that the SUP application was denied due to safety concerns. The property owners also argued that the City Council hearing was a "sham" designed to wear them down into acquiescing to demands for density reduction, and that any attempts to make further applications of any kind would be futile.

The Court of Appeals held that:

- City's denial of the SUP did not constitute a final decision such that one could know to a reasonable degree of certainty the extent of permitted usage of the property; but
- Property owners had sufficiently alleged a regulatory taking with regard to the City's earlier decision to revoke the property's grandfathered non-conforming status.

ZONING - WHOLE DAMN COUNTRY

T-Mobile South, LLC v. City of Roswell, Ga.

Supreme Court of the United States - January 14, 2015 - S.Ct. - 2015 WL 159278

Telecommunications service provider brought action against city, challenging its denial of provider's application to build a cell phone tower as violative of Telecommunications Act. The District Court entered summary judgment for provider, and city appealed. The Court of Appeals reversed, and provider appealed.

The Supreme Court of the US of A held that:

- A locality must provide reasons when it denies a siting application;
- A locality's reasons for denying a siting application need not appear in same writing that conveys locality's denial, but the locality must provide or make available its written reasons at essentially the same time as it communicates its denial; and
- City did not comply with Telecommunications Act's requirement that its decision be in writing and supported by substantial evidence.

A locality must provide reasons when it denies an application to place, construct, or modify a cell phone tower under the Telecommunications Act; however, those reasons need not be elaborate or even sophisticated, but simply clear enough to enable judicial review.

A locality's reasons for denying an application to place, construct, or modify a cell phone tower under the Telecommunications Act need not appear in the same writing that conveys the locality's denial of the application; abrogating *Southwestern Bell Mobile Systems, Inc. v. Todd*, 244 F.3d 51; *New Par v. City of Saginaw*, 301 F.3d 390; and *MetroPCS, Inc. v. City and County of San Francisco*, 400 F.3d 715. However, a locality cannot stymie or burden the judicial review contemplated by the Telecommunications Act by delaying the release of its reasons for a substantial time after it conveys its written denial of an application to place, construct, or modify a cell phone tower; rather, the locality must provide or make available its written reasons at essentially the same time as it communicates its denial.

City's denial of telecommunications service provider's application to build a cell phone tower did not comply with Telecommunications Act's requirement that city's decision be in writing and supported by substantial evidence, even though city provided its reasons in writing in form of detailed minutes from a city council meeting, where city failed to provide its reasons essentially contemporaneously with its written denial, in that it issued its minutes 26 days after date of its written denial and just four days before provider's time to seek judicial review was to expire.

PENSIONS - ALABAMA

Ex parte Bronner

Supreme Court of Alabama - December 31, 2014 - So.3d - 2014 WL 7403996

Public employee and teacher brought putative class action against CEO of Employees' Retirement System, who was also the CEO of the Teachers' Retirement System, and the Retirement Systems, and officers and members of the boards of the Systems, alleging that defendants breached their fiduciary duties. More specifically, the plaintiffs objected to the investment in Alabama-based investments that they alleged resulted in lower returns than could have been obtained via other

investments. The Circuit Court denied defendants' motion to dismiss. Defendants sought writ of mandamus.

The Supreme Court of Alabama held that:

- Prudent-man rule did not advance a specific duty that could have served as a basis for a court order to the executive branch to take certain action going forward, as would surmount sovereign immunity;
- Beyond-authority exception to sovereign immunity did not apply; and
- Permanent injunction requiring Systems to follow prudent-man rule would have run afoul of the separation of powers.

The "prudent-man rule," which allows boards of state retirement systems to approve, with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with the matters would use in the conduct of an enterprise of a like character and with like aims, investments in bonds, mortgages, stocks, and other investments, did not advance a specific duty that could have served as a basis for a court order to the executive branch to take certain action going forward, as would surmount the wall of sovereign immunity from action by public employee and teacher against CEO of the retirement systems, and officers and members of their boards for breach of fiduciary duty.

Granting permanent injunction to public employees requiring state retirement systems to follow the prudent-man rule and refrain from investing in any Alabama-based investment that the CEO, officers, or boards of the systems were aware or expected would yield less of a return than alternative or other investments would have run afoul of the separation of powers. Employee and teacher sought a mere reiteration in a court order of what was already the statutorily-prescribed standard applicable to the investment decisions, and the complex task of continually analyzing, comparing, and choosing from among the myriad of different investment vehicles available in the sophisticated investment world was a task delegated by the legislature to the executive branch and to the boards of control in particular.

CONTRACTS - ALABAMA

WM Mobile Bay Environmental Center, Inc. v. City of Mobile Solid Waste Authority

United States District Court, S.D. Alabama, Southern Division - December 22, 2014 - Slip Copy - 2014 WL 7336095

The City of Mobile Solid Waste Authority (SWA) and WM Mobile Bay Environmental Center, Inc. (WM Mobile) (as successor in interest) are parties to a 1993 Solid Waste Management Contract for landfill operations and other solid waste management operations (the Contract).

In 2003, SWA entered into a Lease Agreement with Waste Away Group, Inc. (Waste Away) – WM Mobile's parent company – whereby Waste Away leased the Landfill from SWA for a term ending October 2038. The Lease was part of a bond issue by SWA in which tax-exempt bonds were issued and the proceeds were used by Waste Away to obtain new disposal cells and liner systems, improve the leachate and methane gas collection systems, and acquire equipment for the landfill.

WM Mobile brought suit against SWA for breach of the terms of the 1993 Contract. WM Mobile sought a declaratory judgment to establish the current rates for waste disposal at the Landfill and

hauling waste from the transfer station to the Landfill. WM Mobile also sought a declaratory judgment as to SWA's contract obligation to work with WM Mobile to expand the service area for the Landfill. SWA filed a counterclaim for breach of contract against WM Mobile alleging that royalties had been underpaid for 2012 and 2013.

In response, SWA argued that the 2003 Lease Agreement between Waste Away and SWA was dispositive of all the claims relating to the financial relationship between the parties because the Lease restructured the financial obligations and other terms of the 1993 Contract.

WM Mobile argued that the Lease had no bearing on this litigation, as it was not a party to the Lease. WM Mobile also argued that the Contract provided that it "may be modified, amended, discharged or waived only by an agreement in writing signed by each party" but there was no such agreement and no clear expression in the Lease that it was intended to modify or amend the Contract.

The District Court held that:

- The 2003 Lease Agreement did not supplant the 1993 Contract, denying all of SWA's motions for summary judgment brought under this argument;
- There existed a genuine issue of material fact as to whether SWA failed to negotiate price adjustments and reimbursements in good faith, and whether WM Mobile provided sufficient documentation, denying WM Mobile's motion for summary judgment on this issue;
- SWA officially approved the expansion of the landfill on two occasions, but that the expansion efforts were thwarted by the
- City's and County's inaction, granting SWA's motion for summary judgment on this issue;
- WM Mobile was owed reimbursement and indemnification in the amount of $23,064.50;
- WM Mobile owed royalties on the solid waste deposited by Waste Management and its affiliates, and therefore, WM Mobile was not entitled to summary judgment as to this count;
- SWA had breached the Contract by delivering certain City of Mobile waste to another landfill, with the issue of damages to be determined at trial.

Shout out to my peeps at Maynard, Cooper & Gale!

LAW ENFORCEMENT - CALIFORNIA

Los Angeles Police Protective League v. City of Los Angeles

Court of Appeal, Second District, Division 8, California - December 26, 2014 - Cal.Rptr.3d - 14 Cal. Daily Op. Serv. 14, 302

Taxpayer and association representing sworn peace officers employed by city sued city, chief of police department, and board of police commissioners, seeking to invalidate police department's special order regarding impounding vehicles driven by unlicensed drivers. The Superior Court granted taxpayer and association summary judgment. Defendants appealed and petitioned for writ of supersedeas, which was granted.

The Court of Appeal held that:

- Special order was matter within discretion of police chief, such that taxpayer lacked standing, and
- Association lacked standing to challenge special order.

Special order that instructed police officers when to impound vehicles driven by unlicensed drivers

was matter within wide discretion of police chief, as public official, such that taxpayer lacked standing to challenge special order on ground that it was preempted by statutes governing impounding of vehicles driven by unlicensed drivers. Special order did not create new law or conflict with existing law, but rather special order simply implemented existing law by providing guidance to ensure uniform enforcement of Vehicle Code, and police chief was permitted to set policies for city on police matters as authorized policymaker.

Association representing sworn peace officers employed by city lacked standing to challenge special order adopted by board of police commissioners that instructed police officers when to impound vehicles driven by unlicensed drivers, despite contention that association's members might violate state law by complying with special order and that statute allowing peace officer to impound vehicle when officer determined that person was driving vehicle without ever having been issued a driver's license vested discretion solely in individual officer. Legislature did not intend to remove police chief's discretion in implementing statutes regulating impoundment of vehicles driven by unlicensed drivers, special order implemented state law, and implementation of state law did not concern matter within association's scope of representation.

PENSIONS - CALIFORNIA

California v. U.S. Dept. of Labor

United States District Court, E.D. California - December 30, 2014 - F.Supp.3d - 2014 WL 7409478

Under Section 13(c) of the Urban Mass Transportation Act (UMTA), state and local governments seeking federal grants for transit assistance must seek certification from the Department of Labor (DOL) that the "interests of employees affected by the assistance" are protected by "fair and equitable" arrangements. These employee protective arrangements are called 13(c) agreements.

In 2012, California enacted the Public Employees' Pension Reform Act of 2013 (PEPRA) "to reform California's public employee pension systems and to bring the staggering cost of funding such systems under fiscal control." Under PEPRA, employees hired after January 1, 2013 must contribute at least 50 percent of the normal costs of their defined benefit plan, and PEPRA establishes a cap on the amount of compensation that can be used to calculate a retirement benefit for new and "classic" employees. The law ends the ability of public employees to purchase nonqualified service time, or "airtime," toward their pensions, with no further applications for such credit accepted after January 1, 2013. In addition, it implements a two percent at age 62 defined benefit for all new non-safety employees and uses the highest average annual compensation over a three-year period as final compensation for pension calculations, excluding bonuses, unplanned overtime and unused vacation or sick leave from this calculation.

Subsequently, certain California transit agencies ("Plaintiffs") were informed by the DOL that the implementation of PEPRA prevented 13(c) certification due to the DOL's conclusion that PEPRA infringed on the collective bargaining rights guaranteed by Section 13(c). This ruling had the effect of eliminating all federal funding of state transportation projects. Plaintiffs sued, alleging violations of the Administrative Procedures Act (APA) and the Spending Clause of the U.S. Constitution. Both parties moved for summary judgment.

The District Court held that:

- The DOL's interpretation of PEPRA and Section 13(c) was arbitrary and capricious in violation of

the APA, as PEPRA did change the parameters within which collective bargaining could proceed but did not give a transit agency unilateral authority to eliminate collective bargaining in its entirety (granting Plaintiffs' motion for summary judgment);
- In rejecting 13(c) certification based on its evaluation of PEPRA's impact on new employees, DOL misinterpreted the law when it rejected state law defining when a public employee becomes entitled to pension benefits (granting Plaintiffs' motion for summary judgment); and
- DOL's refusal to grant 13(c) certification was not inconsistent with limits on federal power embodied in the Spending Clause and did not violates the state's fiscal sovereignty in violation of the Tenth Amendment (granting Defendant's motion for summary judgment).

The matter was remanding to the DOL for further proceedings consistent with the order.

BANKRUPTCY - COLORADO

In re Ravenna Metropolitan District

United States Bankruptcy Court, D. Colorado - December 15, 2014 - B.R. - 2014 WL 7494935

In connection with its development of a residential community, Developer organized the Ravenna Metropolitan District in 2004 under the Colorado Special District Act to provide public infrastructure and services. The District issued $10 million in bonds. The District pledged the revenues from its annual ad valorem mill levy imposed on all taxable property within the District. Colorado BondShares ("CBS") owns the bonds.

The District entered into a series of agreements with United Water and Sanitation District, a larger and more experienced special district to develop water facilities for both districts. In 2007, the District and an enterprise formed by the District (the "District Enterprise") entered into a Lease with the United. Under the Lease, the District Enterprise agreed to lease the water system from the United.

Around the same time, United issued $5.8 million in special revenue bonds that were intended to fund the construction of the water system. Pursuant to the Lease, the District Enterprise was required to make semi-annual lease payments to be used to pay United's bonds. Upon redemption of the United bonds, United would convey the water system to the District. The District Enterprise agreed to fund the semi-annual payments, in part, through the imposition of a fee on District property owners called the Facilities Acquisition Fee ("FA Fee"). The Lease also imposed a "moral obligation" on the District to use its mill levy to cover the Lease payments if the collected FA Fees were insufficient to fund Lease payments.

After years of fluctuating financial fortunes and negotiations amongst the parties, the District filed a chapter 9 bankruptcy petition on April 2, 2014. Both CBS and United filed objections to the District's petition, arguing it did not meet the eligibility requirements set forth in 11 U.S.C. § 109(c) and that the petition was not filed in good faith and should be dismissed under § 921(c).

The Bankruptcy Court held that the District had not met its burden of showing that it was insolvent under the current-state-of-affairs test.

That ruling resulted from the following:

1. The Bonds were not "due." The Court relied on *Hamilton Creek Metro. Dist. v. Bondholders Colo. BondShares* (In re Hamilton Creek Metro. Dist.), 143 F.3d 1381, 1384 (10th Cir. 1998) in its

analysis, finding that the District's only obligation under the bond agreement was to impose the mill levy and apply the proceeds to the bonds. The failure to make a full interest payment was not an event of default under the bond agreement, partial payments were contemplated, and thus the bonds were not "due," as the debt was not "presently enforceable."
2. There existed a bona fide dispute as to whether the District could be held liable for the District Enterprise's payment obligations under the Lease.
3. The District had sufficient ability to fund its existing operational and maintenance costs.

The Court also held that the District had failed to meet the second test of insolvency, known as the forward-looking test and defined in the statute as "unable to pay its debts as they become due."

The Court then held that the District had failed to demonstrate either that negotiations were impracticable or that it negotiated in good faith, or that it fully explored other alternatives prior to filing to bankruptcy.

And finally, the Court held that the petition had not been filed in good faith due, as it had been done primarily to obtain leverage in its negotiations with its creditors.

ZONING - CONNECTICUT

Town of Rocky Hill v. SecureCare Realty, LLC

Supreme Court of Connecticut - January 6, 2015 - A.3d - 315 Conn. 265

Town sought declaratory and injunctive relief that group of private entities, who together had contracted with state to provide nursing home services to state prisoners and others in state custody, were prohibited from opening or operating the proposed facility on the property because such use would be noncompliant with town zoning regulations. The Superior Court granted group's motion to dismiss for lack of subject matter jurisdiction. Town appealed.

The Supreme Court of Connecticut held that:

- Group was not an arm of the state entitled to assert sovereign immunity defense, and
- Town zoning regulation was not preempted by statute allowing the state to contract to establish nursing home services.

Group of private entities that together had contracted with state to provide nursing home services to state prisoners and others in state custody was not an "arm of the state" entitled to assert sovereign immunity as defense in declaratory and injunctive relief action that town had brought against the group regarding zoning violation. Though group was performing an important government function and the financial impact of an adverse judgment would fall partly and significantly on the state, group was not entirely financially dependent on the state, group's budget was not closely monitored by the state, the state did not have comprehensive control over the group, it's officers and directors were not state functionaries, and nursing home staff were not state employees, state did not "create" the group of privately held entities, rather it contracted out for their services, and state itself intended compliance with local regulation.

Town zoning regulation was not preempted by statute allowing state to establish or contract to establish nursing home services to state prisoners and others in state custody, as legislature did not intend statute to limit the application of local zoning regulations to nursing home projects established under the authority of the statute, and regulation did not irreconcilably conflict with the statute or frustrate state's statutory objective of establishing nursing homes for those in state

custody.

LIABILITY - LOUISIANA

Waterstraat v. Vernon Parish School Bd.

Court of Appeal of Louisiana, Third Circuit - December 30, 2014 - Not Reported in So.3d - 2014-623 (La.App. 3 Cir. 12/30/14)

Pedestrian was struck by high school teacher/football coach when he left the school grounds during school hours to fetch an undershirt to wear under his coaching uniform.

The trial court found that teacher was acting in the course and scope of his employment with the School Board at the time of the accident, and that the School Board was liable to pedestrian for the damages she sustained in the accident pursuant to the doctrine of respondeat superior. School board appealed.

A lengthy, amusing analysis of the nature and role of the undershirt ensues.

The Court of Appeal affirmed, finding no error in the trial court's ruling that teacher's act of driving home, during school hours, to secure an undershirt, was a reasonably foreseeable act actuated by a desire to serve his employer.

In reaching this conclusion, the court also noted that the school policy as set forth in the Teacher Handbook did not provide mandatory language, but rather requested that a faculty or staff member not to leave during school hours, and to sign out and obtain permission of the principal before doing so. The would seem to suggest that School Boards could strengthen their arguments that an employee was acting outside the scope of his/her employment by requiring, rather than requesting, that they obtain permission and sign out prior to leaving school grounds.

ELECTIONS - LOUISIANA

Fontenot v. Lartigue

Court of Appeal of Louisiana, Third Circuit - December 30, 2014 - So.3d - 2014-1327 (La.App. 3 Cir. 12/30/14)

Unsuccessful police chief candidates brought action against newly elected police chief contesting his election. The District Court entered judgment sustaining exceptions of prescription, peremption, and no cause of action and denied unsuccessful candidates' motions for new trial and to amend judgment. Unsuccessful candidates appealed.

The Court of Appeal held that:

- The seven day period for challenging a candidate's qualifications, rather than the nine day period for contesting an election applied to action challenging police chief's qualifications for the office of police chief, and
- Claim filed after the seven day period permitted by statute was subject to the exception of no cause of action.

ZONING - MAINE

Beckford v. Town of Clifton

Supreme Judicial Court of Maine - December 31, 2014 - A.3d - 2014 ME 156

Property owners petitioned for judicial review of decision of town Zoning Board of Appeals (ZBA) which denied their appeal from Planning Board's decision to approve application for permit to construct and operate five-turbine wind energy project. The Superior Court vacated decision of ZBA to approve permit application. Applicant and town appealed. Property owners cross-appealed.

The Supreme Judicial Court held that Superior Court lacked jurisdiction over appeal from ZBA's decision, ruling that the appeal period began on the date the ZBA held its vote, not on the date the ZBA issued its written findings.

BANKRUPTCY - MICHIGAN

In re City of Detroit

United States Bankruptcy Court, E.D. Michigan, Southern Division - December 31, 2014 - B.R. - 2014 WL 7409724

Chapter 9 debtor-city sought confirmation of eighth amended plan of adjustment, and approval of settlements with creditors.

The Bankruptcy Court held that:

- Proposed settlement was fair and equitable, warranting its approval;
- Plan was in the best interests of creditors, as required for confirmation;
- Plan was feasible, as required for confirmation;
- Plan was proposed in good faith, as required for confirmation;
- Plan did not discriminate unfairly in favor of pension classes, as required for confirmation;
- Impairing and discharging § 1983 claims against city would not violate Fourteenth Amendment; and
- Takings Clause claims against city would be excepted from discharge.

FIRST AMENDMENT RETALIATION - MISSISSIPPI

Advanced Technology Bldg. Solutions, LLC v. City of Jackson, Miss.

United States District Court, S.D. Mississippi., Northern Division - January 2, 2015 - Slip Copy - 2015 WL 46167

Advanced Technology Building Solutions (ATBS) filed a First Amendment retaliation lawsuit against the City of Jackson after it was unable to obtain funding for an urban redevelopment project. A jury awarded damages in the amount of $600,000 to ATBS. The City filed a Motion for Judgment Notwithstanding the Verdict, asserting that its policymaker, the City Council, never had the opportunity to decide whether to grant funding to ATBS, because ATBS's request for funding stalled while under consideration by a separate entity, the Jackson Redevelopment Authority (JRA).

The District Court granted the City's Motion, finding that ATBS had failed to present any evidence that the City of Jackson, through its duly elected City Council, committed an "adverse action."

“The bulk of Plaintiff’s evidence at trial centered around the individual conduct of the Mayor and his communications with the director and individual members of the JRA. ATBS’s contention that the City of Jackson should be held liable for the Mayor’s actions because a separate entity, the JRA, may have delegated some authority to the Mayor was without merit. The Mayor’s interaction with the JRA director and the JRA board members, no matter how those actions are characterized, cannot bind the City of Jackson without the approval of the Jackson City Council.”

“Because the City Council never decided to deny ATBS’s request for funding, ATBS cannot demonstrate that the City of Jackson, through official policy or act, committed an adverse action. An adverse action by the City of Jackson is a essential element of a First Amendment retaliation claim, and absent such proof the jury’s verdict in this matter must be set aside. For the foregoing reasons, the Court finds that the City of Jackson is entitled to judgment as a matter of law.”

ZONING - MISSISSIPPI

Hotboxxx, LLC v. City of Gulfport

Supreme Court of Mississippi - January 8, 2015 - So.3d - 2015 WL 110614

Privilege license applicant brought action against city, challenging constitutionality of city zoning ordinance which restricted areas of town in which adult businesses could be located. Action was removed from Chancery Court to federal court, which dismissed action without prejudice for lack of standing. Applicant brought second action, citing same issues presented in first case. The Chancery Court issued order of dismissal with prejudice for lack of standing. Applicant appealed.

The Supreme Court of Mississippi held that:

- Chancellor did not commit reversible error in finding that privilege license application was incomplete and invalid, and
- Applicant’s initial status as lessor of commercial property located in area of city affected by ordinance did not create colorable interest required to confer standing.

Initial status of owner of adult business as lessor of commercial property located in area of city affected by city zoning ordinance which restricted areas in which adult businesses could be located was insufficient to demonstrate that owner had colorable interest required to confer standing for action challenging constitutionality of ordinance, where, under terms of contract, lease was voided by time of action due to owner’s inability to obtain necessary business licenses or approvals from city.

BANKRUPTCY - PENNSYLVANIA

In re the Baptist Home of Philadelphia

United States Bankruptcy Court, E.D. Pennsylvania - December 31, 2014 - B.R. - 2014 WL 7409545

The Baptist Home of Philadelphia (“Debtor”), a nonprofit corporation, filed a chapter 11 bankruptcy case on April 25, 2014. At the time, the Debtor operated a senior care facility with 206 licensed skilled nursing beds and 126 independent living and personal care units in the northeast section of the City of Philadelphia.

Among the secured debts included in the bankruptcy schedules was approximately $24 million owed to U.S. Bank, the Bond Trustee.

A Joint Motion of the Debtor and the Bond Trustee for Relief from the Automatic Stay was filed seeking authorization for a pre-confirmation distribution on account of the Bond Trustee's claim. All interested parties, including the Committee, agree that a pre-confirmation distribution to the Bond Trustee was in the best interests of the estate and creditors and that a complete payoff of the Bond Trustee's claim was desirable given the interest running on the Bond Trustee's claim.

Before a complete distribution to the Bond Trustee could be made, the court was required to resolve a dispute regarding the appropriate amount of the distribution necessary to pay off the Bond Trustee's claim. The dispute arose from divergent interpretations of a settlement agreement (the "Settlement Agreement") approved by this court in June 2014. The parties referred to the dispute as the "Carve–Out Dispute" and the parties reported that the amount at issue was approximately $460,000. Resolution of the Carve–Out Dispute was important to all parties because once the extent of the Bond Trustee's distribution entitlement was known, the court could authorize distribution of the balance of the Bond Trustee's claim, thereby terminating the accrual of interest and expenses.

By order dated December 18, 2014, the court entered an interim order authorizing the Debtor to pay the Bond Trustee's claim less the roughly $460,000 at issue in the Carve–Out Dispute (the "Holdback"). The specific issue before the court was whether the Bond Trustee or the Committee had the superior claim to the Holdback in the event that the ultimate distribution in the case was insufficient to pay in full both the Bond Trustee's claim and the allowed unsecured claims.

The court agreed with the Debtor and the Bond Trustee that the Settlement Agreement unambiguously expressed the parties' intent to provide a minimum recovery to unsecured creditors from the sale proceeds derived from the Bond Trustee's collateral and was not intended to reduce the Bond Trustee's allowed secured claim or subordinate any portion of that claim in favor of the unsecured creditors. Consequently, the court entered an order authorizing the Debtor to distribute the Holdback to the Bond Trustee.

BENEFITS - VIRGINIA

City of Danville v. Tate

Supreme Court of Virginia - January 8, 2015 - S.E.2d - 2015 WL 114064

City brought action against retired firefighter, seeking recovery of firefighter's sick leave pay. The Circuit Court, City of Danville, dismissed, and city appealed.

The Supreme Court of Virginia held that:

- Workers' Compensation Commission had no jurisdiction to decide dispute between city and retired fireman over city's claim for recovery of its sick leave payments, and
- City had no authority under city ordinance or regulation to recover sick leave pay from retired firefighter on the basis that he had also received workers' compensation for the same disability period.

Workers' Compensation Commission had no jurisdiction to decide dispute between city and retired fireman over city's claim for recovery of its sick leave payments to firefighter, where city never requested a credit against a workers' compensation award for amounts paid firefighter during the same period for sick leave under statutory provision that allowed an employer to request credit

subject to the approval of the Commission.

City had no authority under city ordinance or regulation to recover sick leave pay from retired firefighter on the basis that he had also received workers' compensation for the same disability period, as the recovery authorized by the provisions relied on by city pertained to a distinct type of claim by the city against an employee's workers' compensation payment, and not his sick leave payments.

MUNICIPAL ORDINANCE - WASHINGTON

City of Bonney Lake v. Kanany

Court of Appeals of Washington, Division 2 - December 30, 2014 - P.3d - 2014 WL 7403963

City brought action against property owner, asserting he maintained an impermissible accessory dwelling unit (ADU) above garage in violation of municipal code, and seeking to collect fines. The Superior Court granted summary judgment in favor of city for $48,000. Property owner appealed.

The Court of Appeals held that enforcement of municipal code provisions governing imposition of building code violation fines did not deprive property owner of procedural due process.

There was nothing discretionary about the daily fines at issue, they were automatic, and property owner had the full opportunity to appeal all aspects of his specific violation, including the ongoing daily fine, and whether fines accrued before or after the initial appeal period.

MUNICIPAL ORDINANCE - ILLINOIS

City of Chicago v. Alexander

Appellate Court of Illinois, First District, Second Division - December 23, 2014 - N.E.3d - 2014 IL App (1st) 122858

Chicago Park District Code prohibits persons from remaining in Chicago parks from 11 p.m. to 6 a.m. Defendants were arrested when they failed to vacate Grant Park after being advised of the terms of the ordinance and after numerous warnings that they were in violation of the ordinance.

The circuit court dismissed the charges, finding the ordinance was facially unconstitutional and unconstitutional as applied to defendants as it violated principals of equal protection. The City of Chicago appealed.

The appeals court reversed, rejecting defendants' facial and as-applied challenges to the park district ordinance. The court similarly rejected defendants' arguments that the selective enforcement of the ordinance violated the equal protection clause of the fourteenth amendment.

MUNICIPAL ORDINANCE - INDIANA

Gul v. City of Bloomington

Court of Appeals of Indiana - December 22, 2014 - N.E.3d - 2014 WL 7243326

Alexander Gul believes that modern day lawn maintenance practices are harmful to the

environment. As a result, he refused to mow his lawn to comply with an ordinance requiring that the height of grass in one's yard may not exceed eight inches.

He appealed the trial court's order granting summary judgment in favor of the City of Bloomington on Gul's complaint against Bloomington appealing an administrative conclusion that Gul had violated the grass height ordinance.

Gul argued that the ordinance at issue (1) violated his freedom of conscience under the Indiana Constitution; (2) violated his freedom of expression under the United States and Indiana Constitutions; (3) was facially invalid because it conflicted with two Indiana Code provisions; and (4) was void for vagueness under the federal Due Process clause.

The Court of Appeals held that:

- Article 1, Section 3 of the Indiana Constitution (freedom of conscience) was intended to apply to religious, rather than non-religious, matters of conscience;
- Even if the freedom of conscience provision includes non-religious matters of conscience, it protects only the right to hold one's own opinions, and does not protect the right to act on one's own opinions in contravention of the law;
- The decision to refrain from mowing one's yard does not constitute expression that is protected by the First Amendment to the United States Constitution;
- The city's determination that Gul had abused his right to expression was rational, and thus not a violation of Article 1, Section 9 (freedom of expression) of the Indiana Constitution;
- The ordinance did not mandate use of an administrative proceeding, and thus there was no violation of Indiana Code section 36–1–6–9; and
- The ordinance was not unconstitutionally vague as a result of its failure to define "grass."

"After cutting through Gul's arguments, we affirm." Ugh.

SCHOOLS - IOWA

Northeast Community School Dist. v. Easton Valley Community School Dist.

Supreme Court of Iowa - December 19, 2014 - N.W.2d - 2014 WL 7202772

After first and second school districts entered into whole grade sharing agreement, and after second district merged with third school district to form reorganized school district, first district brought declaratory judgment action against reorganized district, alleging that reorganized district was bound by whole grade sharing agreement. The District Court entered summary judgment for reorganized district. First district appealed.

The Supreme Court of Iowa held that:

- First school district was not a "school district affected" by reorganization of second and third school districts into reorganized school district, and
- Reorganized district was bound by whole grade sharing agreement between first and second districts.

First school district was not a "school district affected" by reorganization of second school district and third school district into reorganized school district, and thus was not required to participate in negotiations of assets and liabilities following reorganization under statute governing reorganization of school districts, where reorganization petition did not name first district as a party.

Whole grade sharing agreement between first and second school districts was binding on reorganized school district, which came into existence when second and third school districts merged, despite argument that voters had determined that reorganization was the best way to educate children, since fact that reorganized district came about as result of merger met requirement for exception to general principle that, after a corporation purchases the assets of another corporation, the purchasing corporation assumes no liability for the transferring corporation's debts and liabilities.

LABOR - KANSAS

Wing v. City of Edwardsville

Court of Appeals of Kansas - December 19, 2014 - P.3d - 2014 WL 7202822

Fire department employees requested a temporary injunction against city ordering the city to comply with its collective bargaining obligations under the Public Employer-Employee Relations Act. The District Court ordered a temporary injunction. City appealed.

The Court of Appeals held that:

- Employees were substantially likely to prevail on the merits of their claim;
- Damages would not provide an adequate legal remedy to employees whose right to collectively bargain with city was violated;
- Substantial evidence existed to support finding of probable irreparable harm to employees from city's refusal to bargain with employees;
- Substantial evidence existed to support finding that the threatened injury to employees from city's refusal to bargain with employees outweighed the damage an injunction would cause to the city;
- Substantial evidence existed to support finding that the injunction was not against the public interest;
- Trial court's order granting preliminary injunction was sufficiently specific and detailed; and
- The city had reasonable notice of the temporary injunction.

TORTS - KANSAS

Whaley v. Sharp

Supreme Court of Kansas - December 24, 2014 - P.3d - 2014 WL 7331586

Coexecutor of municipal hospital patient's estate filed suit against physician for wrongful death and survival, based on claim that physician misdiagnosed patient's condition and negligently treated her. The District Court entered summary judgment for physician based on coexecutor's noncompliance with written 120-day notice of claim requirement under Kansas Tort Claims Act. Coexecutor appealed. The Court of Appeals affirmed. Coexecutor petitioned for review.

The Supreme Court of Kansas held that written 120-day notice of claim, as prerequisite to suit against municipality, did not apply to suit against municipal employees; overruling *King v. Pimentel*, 20 Kan.App.2d 579, 890 P.2d 1217.

NON-PROFITS - KENTUCKY

St. Joseph Catholic Orphan Society v. Edwards

Supreme Court of Kentucky - December 18, 2014 - S.W.3d - 2014 WL 7240055

After being removed from their seats on St. Joseph Catholic Orphan Society's Board of Trustees, plaintiffs filed suit challenging the validity of the Board's resolution effectuating their removal and seeking reappointment of the ousted members to St. Joseph's Board of Trustees.

St. Joseph sought dismissal of the suit, arguing that the trial court was without subject-matter jurisdiction because of the application of the ecclesiastical-abstention doctrine. The trial court denied St. Joseph's motion to dismiss because it found the ecclesiastical-abstention doctrine inapplicable. St. Joseph appealed. The Court of Appeals held that ecclesiastical abstention did not apply because the underlying case could be adjudicated on the basis of neutral principles of law. St. Joseph appealed.

The Supreme Court of Kentucky held that:

- The ecclesiastical-abstention doctrine does not divest state courts of subject-matter jurisdiction to hear cases they are otherwise authorized to adjudicate;
- As such, the issuance of a writ of mandamus is no longer the appropriate remedy;
- The ecclesiastical-abstention doctrine is to be applied as an affirmative defense akin to the ministerial exception, including the right to an interlocutory appeal following a trial court's denial of its application;
- The underlying action in this case presented a question of ecclesiastical governance, thus the trial court erred in denying St. Joseph's motion to dismiss on the basis of ecclesiastical abstention.

INVERSE CONDEMNATION - LOUISIANA

St. Charles Land Co. II, L.L.C. v. City of New Orleans ex rel. New Orleans Aviation Bd.

Court of Appeal of Louisiana, Fifth Circuit - December 23, 2014 - So.3d - 14-101 (La.App. 5 Cir. 12/23/14)

The issue in this inverse condemnation case concerned the amount of compensation due Landowners as a result of the taking of their land by the New Orleans Aviation Board (NOAB). On appeal, Landowners challenged the trial court's judgment finding the amount of just compensation owed by NOAB for taking the subject property to be $30,740.00.

The trial court heard testimony from the Landowner's appraisers, both of whom valued the property at approximately $1.5 million. One of NOAB's appraisers valued the property at approximately $25,000 and the other at approximately $500,000.

The biggest discrepancy between the testimonies was NOAB's appraisers valued the property as "wet," or undeveloped and outside levee protection, and Landowner's appraisers both valued the property as "high and dry," or cleared and filled and within the protection of a levee system.

In its reasons for judgment, the trial court found the subject property was unimproved wetlands and canal bottom that was outside any hurricane protection system at the time of the taking. It noted the Landowners had presented no competent evidence that the 8.08 acres would have been included in the Army Corps of Engineers' planned hurricane protection system for St. Charles Parish. Conversely, the trial court found NOAB demonstrated that it anticipated providing and ultimately

provided hurricane protection for the runway extension, which included the 8.08 acres, at its own expense.

The trial court also concluded that had the 8.08 acres not been included in the runway extension project, the property would not have qualified for a permit to allow development of the wetlands. The trial court further determined the Landowners were not entitled to benefit from any increase in value to the property resulting from the proposed runway project or from any improvements made by NOAB.

The trial court concluded the property should be valued in its condition at the time of the taking, which it determined to be unimproved, unprotected wetlands and canal bottom.

The appeals court found that the trial court committed manifest error in valuing the property at issue as unimproved wetlands and canal bottom outside the levee protection system, or "wet."

The first step in valuing appropriated land is to determine the highest and best use of the property. the current use of the property is presumed to be the highest and best use. However, the landowner may overcome this presumption by proving a different highest and best use based on a potential future use and, in this case, the Landowners had shown that the future use of the property was "high and dry."

Because it found that the trial court was manifestly erroneous in valuing the appropriated property as "wet," the appeals court conducted a *de novo* review of the record to determine the amount of just compensation owed by NOAB.

The appeals court valued the property at $497,580.00, agreeing with the appraiser who was instructed by NOAB to value the property as "high and dry." With this assumption that the property was "high and dry," that appraiser determined the highest and best use of the subject property was light industrial or commercial property. He explained that according to the Department of Transportation and Development and airport regulations, the land must be appraised without giving any consideration to the existence of the airport. After considering several comparable sales, he concluded that the value of the 8.08 acres as "high and dry" was $563,000.00.

The appeals court also increased the award of attorneys fees to 25% of the compensation owed to the Landowners.

PENSIONS - MICHIGAN

Irla v. Public School Employees Retirement System

Court of Appeals of Michigan - December 23, 2014 - Not Reported in N.W.2d - 2014 WL 7338900

Michael Irla worked for the Lamphere School District as a psychologist for more than 30 years. During that time, he earned a pension and was entitled to participate in a medical benefit plan for retirees. In June 2010, he applied for his retirement benefits and retired effective July 1, 2010. After retiring, Irla applied for part-time work as a school psychologist with Therapy Solutions Unlimited. Therapy Solutions placed Irla as a school psychologist with several schools in the Lamphere district over the course of the 2010 to 2011 school year.

Just a few weeks before Irla's retirement, on May 19, 2010, the governor signed 2010 PA 75, which took immediate effect. That act added MCL 38.1361(8). Under that statute, a retiree will forfeit his

or her retirement allowance and health care benefit during any period that he or she performs core services for a reporting unit through a third-party or as an independent contractor.

Irla was ordered to repay $34,000 in pension and insurance payments that were paid on his behalf during the period within which he performed core services for a reporting unit.

In April 2013, Irla sued the Public School Employees Retirement System for declaratory and injunctive relief. He alleged that the Legislature did not have the authority to enact MCL 38.1361(8) because that forfeiture provision impaired or diminished his accrued pension benefit in violation of Const 1963, art 9, § 24. In a second count, Irla alleged that the statute violated Michigan's due process clause, Const 1963, art 1, § 17, by arbitrarily and unnecessarily interfering with his right to pursue his profession.

The Court of Appeals ruled that the trial court correctly determined that MCL 38.1361(8) does not violate Const 1963, art 9, § 24, or Const 1963, art 1, § 17.

LAND USE ORDINANCE - MINNESOTA

Helga Tp. v. Crosby

Court of Appeals of Minnesota - December 15, 2014 - Not Reported in N.W.2d - 2014 WL 7011268

Douglas Crosby contracted with Reierson Construction to excavate and haul more than 1,000 cubic yards of rock and top soil from his property in order to prepare his land for livestock grazing. Helga Township informed Crosby that the township land-use ordinance required him to obtain an interim use permit (IUP) for these activities. When Crosby refused to comply, the township brought this enforcement action against him in District Court. The Township sought a declaratory judgment that excavation and removal of mineral materials without an IUP violates the township's land-use ordinance, and also sought to permanently enjoin Crosby and Reierson from excavating and removing mineral materials and top soil without an IUP.

The District Court granted the Township's motion for summary judgment. Crosby appealed, arguing that his activities are properly characterized as an accessory use to his agricultural pursuits, and should therefore be considered a permitted use under the ordinance.

The Court of Appeals affirmed, noting that a landowner must still comply with any applicable performance standards even when the landowner's activities fall under a permitted use of the ordinance. In other words, the performance standards are read into the permitted uses when the landowner's activity is covered by a performance standard, regardless of the landowner's purpose for engaging in the activity. Crosby engaged in excavation and removal of mineral material and top soil from his land, and regardless of his ultimate purpose for doing so, the ordinance required that he obtain an IUP.

SCHOOLS - MISSISSIPPI

Bell v. Itawamba County School Bd.

United States Court of Appeals, Fifth Circuit - December 12, 2014 - F.3d - 2014 WL 7014371

Public high school student and his mother brought action against school board, superintendent, and principal alleging his suspension and transfer for posting on the Internet a video of him singing a song that alleged that two coaches at school had had improper contact with female students violated student's free speech rights and mother's parenting rights. The District Court granted summary judgment for defendants. Plaintiffs appealed.

The Court of Appeals held that:

- School officials could not reasonably forecast substantial disruption from, and no actual disruption occurred due to, student's posting video, and
- Speech was not a true threat.

School officials may prohibit student speech and expression under the First Amendment upon showing facts which might reasonably have led school authorities to forecast that the proscribed speech would cause substantial disruption of or material interference with school activities, but school officials must be able to show that their actions were caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.

Assuming public school could prohibit student's off-campus speech upon forecasting that it would cause substantial disruption of or material interference with school activities, school officials could not reasonably forecast substantial disruption from, and no actual disruption occurred due to, high school student's posting on Internet video of him singing song that alleged that two coaches at school had had improper contact with female students, and therefore, suspension and transfer of student violated his First Amendment speech rights. Song was composed, recorded, and posted to Internet entirely off campus, school computers blocked social networking site, school policy prohibited possession of phones, and there was no commotion, boisterous conduct, interruption of classes, or any lack of order, discipline and decorum at school, as result of student's posting his song.

Public high school student's speech, contained in video posted on Internet of him singing song that alleged that two coaches at school had had improper contact with female students, was not a true threat that was not protected by the First Amendment. Student recorded rap song to draw attention to alleged misconduct but also to attract attention of record labels and potential fans, song was broadcast publicly and not conveyed privately or directly to coaches, and purported threats in song were conditional in nature.

LABOR - NEW JERSEY

In re Township of Edison, Intern. Ass'n of Firefighters, Local 1197

Superior Court of New Jersey, Appellate Division - December 23, 2014 - Not Reported in A.3d - 2014 WL 7261765

The Township of Edison appealed from a decision of the Public Employment Relations Commission (PERC) denying the township's petition to restrain binding arbitration of a grievance. It was filed by Local 1197 of the International Association of Firefighters (IAFF) regarding compensation of certain firefighters who were also trained and licensed emergency medical technicians (firefighter/EMTs).

Local 1197's grievance arose from the township's January 2011 decision to remove from service an ambulance utilized by the Division of Fire and staffed by firefighter/EMTs, and to eliminate a so-called rotation of thirty-six firefighters, trained as emergency medical technicians, who received pay

enhancements under the 2010–2013 collective negotiations agreement (CNA) between the local and the township.

In this case, the township decided to reallocate to civilian employees and volunteers a service previously provided by firefighter/EMTs who staffed the Fire Division's ambulance. However, the local contended that firefighter/EMTs continue to provide emergency medical services as first responders, regardless of whether fire suppression activities are involved. Although the ambulance had been removed, Local 1197 argued that firefighter/EMTs continue to perform the same work, yet the township has withheld the pay differential.

The township argued that the arbitration would infringe upon its managerial prerogative.

The appeals court agreed that the disposition of these disputes were for the arbitrator, affirming the PERC's decision.

INVERSE CONDEMNATION - OHIO

Sommer v. Ohio Dept. of Transp.

Court of Appeals of Ohio, Tenth District, Franklin County - December 23, 2014 - Slip Copy - 2014 -Ohio- 5663

The construction of new west-bound lanes of a bridge project by the Ohio Department of Transportation (ODOT) "required the driving of steel beams, called piles, down 180–200 feet to bedrock" to support the new bridge.

Homeowners filed a complaint against ODOT, alleging that the work on the bridge project resulted in "extreme noise, pounding and vibrations * * * separate and distinct from that experienced by other affected properties," and causing appellants' home to be uninhabitable. The complaint alleged causes of action for inverse condemnation, as well as public and private nuisance.

The Court of Claims of Ohio granted summary judgment in favor of ODOT and homeowners appealed. Homeowners contended that the Court of Claims erroneously interpreted Ohio law to require a physical invasion of their property or a total denial of access, and that genuine issues of material fact remained as to whether ODOT substantially interfered with the use and enjoyment of their property.

The Court of Appeals affirmed, finding that the evidence submitted by homeowners on summary judgment did not create a genuine issue of material fact as to whether the actions of ODOT constituted a substantial interference with appellants' dominion and control of their property giving rise to a compensable takings claim.

EMPLOYMENT - OHIO

Lee v. Cardington

Supreme Court of Ohio - December 17, 2014 - N.E.3d - 2014 -Ohio- 5458

Former employee brought action against village, alleging violations of the whistleblower statute and wrongful termination in violation of public policy due to complaints of criminal conduct which violated environmental protection laws. The Common Pleas Court entered summary judgment for village, and employee appealed. The Court of Appeals affirmed in part, reversed in part, and remanded. Village sought review.

The Supreme Court of Ohio held that former employee failed to strictly comply with whistleblower statute as required for him to state a claim for wrongful termination.

Although employee submitted a supervisor's report which identified equipment failures that resulted from discharge by village's largest employer, an automotive-parts manufacturer, the report did not qualify as a report that sufficiently identified and described any crimes involving the village, as the statute required. The report did not reveal that village was knowingly placing glycol into the water supply, and report was written too late, as it was filed after years of discussing the equipment failures with Environmental Protection Agency (EPA) officials.

CAMPAIGN FINANCE - PENNSYLVANIA

O'Connor v. City of Philadelphia Bd. of Ethics

Supreme Court of Pennsylvania - December 15, 2014 - A.3d - 2014 WL 7101300

Creditor law firm brought declaratory judgment action against city and city ethics board, seeking declaration that post-election debt forgiveness to mayoral candidate's campaign committee was not a "contribution" to candidate's campaign under municipal campaign finance law. The Court of Common Pleas dismissed action based on lack of standing, and the Commonwealth Court affirmed. Firm appealed.

The Supreme Court of Pennsylvania held that law firm's forgiveness of mayoral candidate's campaign committee's debt did not constitute a "contribution" to candidate's political campaign.

Debt incurred in favor of law firm by political campaign committee, for legal fees to defend mayoral candidate in ballot challenge litigation, was not debt incurred for use in advocating or influencing the election of the candidate, and therefore firm's post-election forgiveness of such debt did not constitute a "contribution" to candidate's political campaign, as would be subject to contribution limitation of city's campaign finance law, where firm did not agree to represent candidate in the ballot litigation pro bono or at a discounted rate in an effort to promote him as candidate, and there was no evidence that committee, at time it retained firm, anticipated that firm would forgive debt once election was over.

INVERSE CONDEMNATION - TEXAS

City of Houston v. Carlson

Supreme Court of Texas - December 19, 2014 - S.W.3d - 2014 WL 7204431

Former condominium unit owners filed suit against city for inverse condemnation. The County Court granted city's plea to jurisdiction, and owners appealed. The Court of Appeals reversed and remanded. City's petition for review was granted.

The Supreme Court of Texas held that owners failed to allege regulatory taking, as required to state

claim for inverse condemnation.

Condominium unit owners' allegations that city did not specify alleged building code violations and that punishment, namely, order to vacate property within 31 days, was excessive, that safety regulations were misapplied vis-a-vis their property, and that city's procedure failed to afford them constitutionally adequate notice or hearing, did not allege regulatory taking of their units, as required to state claim for inverse condemnation.

MUNICIPAL CHARTER - CONNECTICUT

DeMayo v. Quinn

Supreme Court of Connecticut - December 23, 2014 - A.3d - 315 Conn. 37

Registered voters petitioned for a writ of quo warranto based on their allegation that attorney's appointment to the office of city corporation counsel violated city charter. The Superior Court granted the writ, finding attorney failed to demonstrate he was entitled to hold the office of corporation counsel, and declared the office vacant. Attorney appealed.

The Supreme Court of Connecticut held that attorney who lacked the recommendation of the current mayor was not eligible to hold the appointed office of corporation counsel.

Attorney who lacked the recommendation of the current mayor was not eligible to hold the appointed office of city corporation counsel; the city charter required the recommendation of the mayor for appointment of the city's corporation counsel, and as a specified mode of appointment, strict compliance was required.

EMPLOYMENT - CONNECTICUT

Town of Stratford v. American Federation of State, County and Municipal Employees, Council 15, Local 407

Supreme Court of Connecticut - December 23, 2014 - A.3d - 315 Conn. 49

Union filed a grievance on police officer's behalf, alleging that the town violated the parties' collective bargaining agreement by terminating officer without just cause. Arbitration panel sustained the grievance, and town filed an application to vacate the arbitration award. The Superior Court denied the town's application to vacate arbitration award, and town sought review. The Appellate Court reversed and remanded. Union appealed.

The Supreme Court of Connecticut held that officer's dishonesty with independent medical examiner regarding his epilepsy was not so egregious as to require nothing less than officer's termination.

BONDS - LOUISIANA

City of New Orleans v. AMBAC Assurance Corp.

United States District Court, E.D. Louisiana - December 12, 2014 - Slip Copy - 2014 WL 7140056

In 2000, the City of New Orleans issued $170 million of variable rate municipal bonds the principal amount of $170,660,000 to fund the City's firefighter pension fund.

Defendants (PaineWebber, Inc., later UBS, as successor-in-interest) served as underwriter for the bonds. To manage the variable interest rate risk associated with the bonds, the City entered into an interest rate swap agreement (the "Swap") with Defendants, whereby the City agreed to pay Defendants a fixed rate of interest, and Defendants paid the weekly variable rate. Unbeknownst to the City, Defendants then entered into a reciprocal swap ("Reciprocal Swap") with an AMBAC affiliate, AMBAC Financial Services, LLC ("AFS"), whereby Defendants agreed to pay AFS a fixed rate, and AFS assumed the risk of the variable rate. In the financial crisis of 2008, the bonds became unmarketable causing AMBAC to exercise its rights under the Reciprocal Swap, thereby triggering a provision of the Swap between Defendants and the City. As a result, the City was forced to refinance the bonds and terminate the Swap.

The City brought suit against AMBAC, AFS, and Defendants. All claims against AMBAC and AFS were subsequently dismissed. In October of 2011, the parties administratively closed the case pending potential settlement negotiations. After such talks proved ineffective, the City moved to reopen the case in November of 2013, and the Court granted the motion. The Court issued an updated scheduling order indicating that the time to amend pleadings, cross-claims, and counter-claims had passed.

During the additional discovery period, the City served on Defendants answers to interrogatories which included the following new allegations of misrepresentations: (1) UBS provided false information to the City, which allowed UBS to price the Swap at a considerably higher rate; (2) UBS provided false information regarding the savings that the synthetic fixed rate bonds would achieve; (3) UBS assured the City that its 10.7% rate of return was reasonable; and (4) UBS told the City that it was not entering into a novel deal, but the same kind of deal other municipalities had previously conducted.

Defendants moved for a Rule 16 Conference to define the scope of the Second Amended Complaint as it pertained to the "new allegations" of misrepresentation. During that conference, this Court directed the parties to file motions in limine to address the issues raised in their Rule 16 Motion. Specifically, the Court directed the City to indicate why these "new allegations" were being raised at such a late date when evidence of these assertions was available to the parties back in 2008.

The Court granted Defendants' motion requesting that the Court to limit the City's claims to the existing causes of action left in the original complaint (fraud in the inducement, negligent misrepresentation, and breach of the Swap agreement) and to prohibit introduction of evidence relating to these four alleged misrepresentation at trial.

The Court rejected City's argument that it had no intention of raising the misrepresentations as substantive claims, instead, that the City intended to rely on the misrepresentations as evidence "that goes toward the fraud and breach of contract claims already pled."

"Even if the Court were inclined to disregard the reasons stated above, the Court finds that the misrepresentations are not relevant of materiality to the City's existing fraud and breach of contract claims under Rule 401 of the Federal Rules of Evidence, nor are they probative of intent under Rules 403 and 404 such that the Court should allow evidence of these assertions at trial. In particular, the misrepresentations are distinct acts that do no pertain to omissions regarding the structure and risks associated with the structure of the transaction or any alleged conflict of interest, and, thus, they are not relevant to proving any of the elements necessary to the City's existing claims."

FORECLOSURE - MASSACHUSETTS

Easthampton Sav. Bank v. City of Springfield

Supreme Judicial Court of Massachusetts, Suffolk - December 19, 2014 - N.E.3d - 2014 WL 7192460

Several banks brought action for declaratory and injunctive relief against city, challenging ordinances that required property "owners," which was defined to include mortgagees that had initiated foreclosure proceedings, to maintain property during foreclosure and post a $10,000 cash bond per foreclosure to the city, and that required mortgagees to attempt a settlement before foreclosing. City removed case to federal court. The District Court granted summary judgment for city. Banks appealed. The Court of Appeals certified question.

The Supreme Judicial Court of Massachusetts held that:

- Portion of foreclosure ordinance establishing a program requiring mandatory mediation conflicted with state foreclosure statute;
- Portion of ordinance requiring owners to register with the city did not conflict with foreclosure statute;
- Portion of ordinance requiring owners to register with the city conflicted with Oil and Hazardous Material Release Prevention Act;
- Portion of ordinance requiring owner to post a bond to ensure compliance with the ordinance, conflicted with state Sanitary Code; and
- Administrative fee was a lawful fee, rather than a tax.

PUBLIC RECORDS - MICHIGAN

Amberg v. City of Dearborn

Supreme Court of Michigan - December 16, 2014 - N.W.2d - 2014 WL 7151746

The Supreme Court of Michigan took of the issue of whether copies of video surveillance recordings created by third parties but received by defendants during the course of pending criminal misdemeanor proceedings constitute "public records" within the meaning of the Freedom of Information Act (FOIA), MCL 15.231 et seq., thus requiring their disclosure by defendants.

The court held that, contrary to the lower courts' opinions, the video surveillance recordings are public records within the meaning of FOIA.

MUNICIPAL ORDINANCE - NEBRASKA

City of Beatrice v. Meints

Supreme Court of Nebraska - December 5, 2014 - N.W.2d - 289 Neb. 558

Defendant was convicted in the Gage County Court of violating city ordinance prohibiting the prolonged parking of unregistered motor vehicles on private property. Defendant petitioned for further review.

The Supreme Court of Nebraska held that:

- Probable cause, standing alone, is not an exception to the search warrant requirement of the Fourth Amendment as applied to real property, but
- Police officer did not conduct a "search" of defendant's property, since property was an "open field."

PERFORMANCE BONDS - NORTH CAROLINA

Town of Black Mountain v. Lexon Ins. Co.

Court of Appeals of North Carolina - December 16, 2014 - S.E.2d - 2014 WL 7124838

The Town of Black Mountain, North Carolina and the County of Buncombe, North Carolina filed suit against Lexon Insurance Company and Bond Safeguard Insurance Company seeking to enforce a series of subdivision performance bonds. The bonds were entered into in connection with a subdivision to be constructed on County property and thus the County was the obligee. At around the same time, the Town annexed the property covered by the bonds from the County, which assigned the bonds to the Town. Defendants did not consent to the assignment.

Defendants first argued that neither the Town nor the County had standing to bring suit. Specifically, defendants contended that once the Town annexed the property covered by the bonds, the bonds were extinguished, leaving no rights for the County to assign. The court disagreed, finding nothing in the law or within the agreements themselves indicating that assignment of the bonds from the County to the Town was impermissible or without legal effect.

In addition, the court found that plaintiffs were engaged in a governmental function and were therefore exempt from the otherwise applicable statute of limitation.

SPECIAL ASSESSMENTS - MINNESOTA

DRB No. 24, LLC v. City of Minneapolis

United States Court of Appeals, Eighth Circuit - December 23, 2014 - F.3d - 2014 WL 7268743

Owner of vacant building brought putative class action in Minnesota state court against city, challenging city's special assessments of annual fees under registration program for vacant buildings. The District Court granted summary judgment to city. Owner appealed.

The Court of Appeals held that:

- City's notices of special assessments complied with requirement in city code of disclosing basis of costs;
- City code required notices of special assessment to disclose availability of deferments but not availability of waivers or suspensions; and
- Statutory deadline for appeal to state court applied to common-law claims challenging special assessments.

INVERSE CONDEMNATION - MISSOURI

Jacobson v. Metropolitan St. Louis Sewer Dist.

United States District Court, E.D. Missouri, Eastern Division - December 11, 2014 - Slip Copy - 2014 WL 7027881

An unrecorded storm water sewer was discovered on Plaintiff's property when a contractor hit and damaged it during the demolition of a house on neighboring property. When the Metropolitan St. Louis Sewer District (MSD) discovered the sewer, it disconnected the sewer and rerouted it away from the neighboring demolished property and directly through Plaintiffs' property.

Plaintiffs sued, alleging that MSD did not have an easement on Plaintiffs' property, and thus the existence of the sewer was a continuing trespass. Plaintiffs brought inverse condemnation, assault, slander, and negligence claims.

Upon review of Plaintiffs' petition, the Court finds that Plaintiffs have sufficiently stated a claim for inverse condemnation sounding in trespass.

LIABILITY - NEW YORK

Gammons v. City of New York

Court of Appeals of New York - December 18, 2014 - N.E.3d - 2014 N.Y. Slip Op. 08869

City police officer who was injured when she fell from a police flatbed truck while loading wooden police barriers onto it brought action against city and its police department, seeking to recover damages both under common law negligence theory and under statute creating cause of action for a police officer injured by another's failure to comply with requirements of any statute, ordinance, rule, or order, predicated upon violation of Public Employee Safety and Health Act (PESHA), which set forth safety and health standards for public employees. The Supreme Court, Kings County, granted defendants' motion for summary judgment as to officer's common law negligence claim, but denied it as to statutory claim. Parties cross-appealed. The Supreme Court, Appellate Division affirmed. Defendants appealed.

The Court of Appeals held that:

- PESHA's general duty clause was proper predicate for police officer's statutory claim, and
- Defendants failed to establish their prima facie entitlement to judgment as a matter of law on the statutory claim.

ANNEXATION - OHIO

State ex rel. Cornell v. Greene Cty. Bd. Commrs.

Court of Appeals of Ohio, Second District, Greene County - December 19, 2014 - Slip Copy - 2014 -Ohio- 5584

A petition for mandamus was filed by landowner requesting that the court order the Greene County Board of County Commissioners to review and grant landowner's petitions to annex property located in Beavercreek Township into the City of Beavercreek.

The Court of Appeals held that:

- Rather than exercise discretion, County Commissioners are required to approve annexation if a petition complies with the technical statutory requirements;
- Landowner's filing of a second, corrected, annexation petition triggered the Commissioners' clear legal duty to act on the petition within the statutory timeframe;
- The Commissioners had a clear legal duty to grant the petition, and landowner had a clear legal right to have it granted;
- As landowner was entitled to have the petition granted, and there was available no adequate remedy at law, the petition for writ of mandamus was granted.

HOSPITALS - OHIO

The CIT Group/Equipment Fin., Inc. v. Brown Cty.

Court of Appeals of Ohio, Twelfth District, Brown County - December 15, 2014 - Slip Copy - 2014 -Ohio- 5489

Two municipal lease agreements were entered into by CIT and Brown County General Hospital (the Hospital). CIT is a company that leases medical equipment. The Hospital is a county hospital created by statute whereby a board of Hospital Trustees (Hospital Trustees) is appointed to govern the Hospital. The lease agreements were entered into by CIT and the Hospital in early 2008 regarding an MRI and related site improvements. Both leases were signed by the president and CEO of the Hospital, Michael C. Patterson, and authorized by the Hospital Trustees.

In 2007, the Hospital was facing financial troubles and to alleviate the budget crisis, the Hospital Trustees presented the Brown County Board of Commissioners (Board of Commissioners) with a request to issue $5 million in bonds. The Board of Commissioners approved the issuance of $5 million worth of revenue bonds. These revenue bonds were secured solely by the Hospital's revenues as opposed to the full faith and credit of the county.

On January 6, 2011, having defaulted on the leases and facing the insolvency, the Hospital was sold to Southwest Healthcare Services, LLC (Southwest).

On August 7, 2013, CIT filed suit against Southwest and Brown County, claiming that they were jointly and severally liable for default on the two leases. Motions for summary judgment were subsequently filed by CIT and Brown County. The trial court granted summary judgment in favor of CIT in regard to its claim against Southwest. Regarding CIT's claim against Brown County, the trial court granted summary judgment in favor of Brown County. The trial court found that as a matter of law, no principal/agent relationship existed between Brown County and the Hospital, either by statute or conduct. Further, the trial court found that the language in the previously-executed Forbearance and Assignment and Assumption Agreements was clear that CIT was to look to the Hospital exclusively for satisfaction of the leases. In turn, Southwest had assumed the Hospital's obligations. CIT appealed as to the grant of summary judgment in favor of Brown County.

The Court of Appeals affirmed, finding that Brown County was entitled to judgment as a matter of law because no agency relationship existed between Brown County and the Hospital Trustees. In addition, even if such a relationship did exist, the proper procedures were not satisfied in order to bind the county to the contracts.

MUNICIPAL ORDINANCE - OHIO

Walker v. Toledo

Supreme Court of Ohio - December 18, 2014 - N.E.3d - 2014 -Ohio- 5461

Motorist, who paid civil penalty after his vehicle was photographed by automated red light enforcement system during a red light violation, brought putative class action against city and traffic enforcement camera company, alleging that penalty collected was unlawful, and seeking return of such money taken under the doctrine of unjust enrichment. The Court of Common Pleas dismissed complaint for failure to state a claim upon which relief could be granted. Motorist appealed. The Court of Appeals reversed and remanded. City and company sought review.

The Supreme Court of Ohio held that:

- Municipalities act within their constitutional home-rule powers when they establish automated systems for imposing civil liability on traffic-law violators through an administrative enforcement system;
- Constitutional provision and statute do not endow municipal courts with exclusive authority over traffic-ordinance violations;
- Statute that sets the jurisdiction of municipal courts does not confer exclusive jurisdiction over traffic-ordinance violations on municipal courts; and
- Municipalities have home-rule authority to establish presuit civil administrative proceedings.

LIABILITY - OKLAHOMA

Perry v. City of Norman

Supreme Court of Oklahoma - December 16, 2014 - P.3d - 2014 OK 119

Arrestee brought action against city to recover for excessive force by police officers. The District Court dismissed the action. Arrestee appealed, and Supreme Court retained the case.

The Supreme Court of Oklahoma held that arrestee had no claim against city since cause of action was available under Oklahoma Governmental Tort Claims Act (OGTCA).

EMPLOYMENT - RHODE ISLAND

Fabrizio v. City of Providence

Supreme Court of Rhode Island - December 19, 2014 - A.3d - 2014 WL 7229270

Firefighters brought action against mayor, fire chief, and city alleging a variety of state and federal claims stemming from requirement that firefighters serve as part of crew of fire engine in parade to celebrate pride and diversity of lesbian, gay, bisexual, and transgender community. The Superior Court denied mayor's and chief's motion for summary judgment. Mayor and chief petitioned for writ of certiorari, which was granted.

The Supreme Court of Rhode Island held that requirement that firefighters participate in LGBT parade did not violate firefighters' right to freedom of religion, speech, or association.

EASEMENTS - CONNECTICUT

Town of Granby v. Feins

Appellate Court of Connecticut - December 23, 2014 - A.3d - 154 Conn.App. 395

Town brought action against landowner, seeking declaratory judgment that land contained public right-of-way granting public access to nearby cemetery and permanent injunction preventing landowner's obstruction of right-of-way. The Superior Court entered judgment for town and granted injunction. Landowner appealed.

The Appellate Court held that:

- Previous landowner manifested intent to dedicate right-of-way, and
- Evidence supported conclusion that general public accepted dedication by its use of right-of-way over period of many years.

PUBLIC RECORDS - CALIFORNIA

Ardon v. City of Los Angeles

Court of Appeal, Second District, Division 6, California - December 10, 2014 - Cal.Rptr.3d - 2014 WL 6968719

City resident filed putative class action lawsuit against city, alleging that city's telephone users tax was an illegal tax and seeking a refund of the tax. The Superior Court granted city's motion to strike resident's class action allegations, and resident appealed. The Court of Appeal affirmed. The Supreme Court granted review, superseding the opinion of the Court of Appeal, and reversed and remanded. City moved to compel resident to return privileged documents city turned over to his counsel pursuant to a Public Records Act (PRA) request and to disqualify his counsel. The Superior Court denied the motion. City appealed.

The Court of Appeal held that:

- City's inadvertent production of documents under PRA waived any privilege that might have once existed as to them, and
- Attorney's use of PRA to obtain documents for litigation did not violate Rules of Professional Ethics.

City's inadvertent production of three documents covered by the attorney-client privilege as part of its response to city resident's Public Records Act request waived any attorney-client or work product privilege that might have once existed as to those documents, even though the resident was engaged in litigation against the city, and even if the documents were produced by "low level" employees not explicitly authorized to waive the privilege.

Attorney's use of Public Records Act to request documents relating to the adoption of a citywide tax ordinance which was the subject of the lawsuit in which the attorney represented a resident suing the city did not violate the Rules of Professional Ethics, even though attorney made the records request by contacting a city official while the city was represented by counsel, since the records request was within attorney's statutory and constitutional rights to petition her government regarding a matter of public importance.

EASEMENTS - IDAHO

H.F.L.P., LLC v. City of Twin Falls

Supreme Court of Idaho, Boise, October 2014 Term - December 8, 2014 - P.3d - 2014 WL 6865494

Purported dominant estate owner brought action against city, alleging existence of prescriptive easement over city-owned property. Following a bench trial, the District Court entered judgment in favor of city. Purported dominant estate owner appealed.

The Supreme Court of Idaho held that:

- Federal district court did not have exclusive subject matter jurisdiction over dispute;
- Use of road was not continuous and uninterrupted;
- Use of road was permissive, rather than adverse;
- Easement by necessity claim was tried by implied consent; and
- Purported dominant estate owner did not establish unity of title to support easement by necessity claim.

CODE ENFORCEMENT - ILLINOIS

Sequoia Financial Solutions, Inc. v. City of Chicago

United States District Court, N.D. Illinois, Eastern Division - December 9, 2014 - Not Reported in F.Supp.3d - 2014 WL 6910494

After the City of Chicago sued Sequoia Financial Solutions, Inc. in Illinois state court for violating the City's building code, Sequoia demolished the allegedly offending structure rather than continue to defend the suit, which the City then dismissed. Two months later, Sequoia brought a case against the City and several City employees for allegedly falsifying an inspection report and coercing Sequoia into tearing down the structure through its allegedly baseless state court suit.

The District Court dismissed, struggling to make sense of Sequoia's claims and noting that Sequoia had at all times been entitled to undertake its own inspection and to challenge the City's findings in state court.

EMINENT DOMAIN - ILLINOIS

Rock River Water Reclamation Dist. v. Sanctuary Condominiums of Rock Cut

Appellate Court of Illinois, Second District - December 11, 2014 - N.E.3d - 2014 IL App (2d) 130813

In order to build a sewer extension, the Rock River Water Reclamation District sought to obtain a permanent easement and a temporary construction easement from The Sanctuary Condominiums of Rock Cut to run a trunk line through its property. As a result, plaintiff sought to obtain from defendant both a permanent easement and a temporary construction easement. After discussions to acquire the easements broke down, the District filed a complaint for condemnation in the circuit court. On Condo's motion, the trial court dismissed the District's complaint on the bases that the ordinance authorizing construction of the Oak Crest project failed to state that a taking of

defendant's property was necessary and failed to describe with reasonable certainty the property sought to be taken.

Thereafter, the District enacted another ordinance in an effort to cure the deficiencies identified by the trial court. The District then offered defend $2,700 for the easements, double their appraised value. Condo rejected District's offer and District initiated a new condemnation action. The trial court determined that $1,350 was just compensation for the easements. Condo Appealed.

The Appellate Court held that:

- Condo was not entitled to dismissal of the second condemnation action on the ground of res judicata;
- District had the authority to condemn property; and
- The trial court did not err in refusing to compensate Condo for any damage that installation of the proposed trunk line would cause to its property.

"In light of the foregoing cases, we conclude that the two lawsuits in this case do not share an identity of causes of action, because they are based upon different sets of operative facts. The second condemnation action is based upon the 2011 Ordinance whereas the first condemnation action was based upon the 2010 Ordinance. The 2010 Ordinance provided for the construction of sanitary sewers in the Oak Crest Sanitary Sewer Area and provided for a special assessment to pay for the project. Plaintiff's first condemnation action was dismissed after the trial court concluded that the 2010 Ordinance neither stated that a taking of defendant's property was necessary nor described the portion of defendant's property to be taken. In an attempt to cure these deficiencies, plaintiff enacted the 2011 Ordinance, which states that an easement across defendant's property is necessary, incorporates a description of defendant's property by reference, provides that plaintiff's attempts to negotiate for the easement have been unsuccessful, and authorizes plaintiff to initiate condemnation proceedings to acquire the defendant's property. In other words, the 2010 Ordinance's deficiencies identified by the trial court in the first condemnation action were not at issue in the second condemnation action."

ZONING - KENTUCKY

Bardstown Junction Baptist Church, Inc. v. Shepherdsville City Council

Court of Appeals of Kentucky - December 5, 2014 - Not Reported in S.W.3d - 2014 WL 6879919

The City of Shepherdsville approved three separate zoning map amendment applications, each of which rezoned property from "Agriculture" to "General Industrial."

Bardstown Junction Baptist Church, Inc., a neighboring property, appealed the City Council's by bringing an action in Circuit Court. The Church's primary objections were that the rezoning would result in increased traffic and flooding. The Circuit Court ruled against Church and Church appealed.

The Court of Appeals noted that the Planning Commission's findings were as follows: (1) the requested rezonings were not in agreement with the adopted Comprehensive Plan; (2) the existing zoning classification given to the property was not inappropriate; but (3) there had been major changes of an economic, physical, or social nature within the area involved which were not anticipated in the adopted comprehensive plan and which have substantially altered the basic

character of the area.

The Court of Appeals reversed the Circuit Court's decision and found the City Council's actions void. The record introduced before the Planning Commission, and even after reviewing the numerous other records the applicants and City Council appellees improperly introduced before the Circuit Court, the Court of Appeals could locate no evidence, per KRS 100.213.(1)(b), demonstrating "major changes of an economic, physical, or social nature within the area involved which were not anticipated in the adopted comprehensive plan and which have substantially altered the basic character of the area."

ZONING - MICHIGAN

Forest Hill Energy-Fowler Farms, L.L.C. v. Township of Bengal

Court of Appeals of Michigan - December 4, 2014 - Not Reported in N.W.2d - 2014 WL 6861254

Plaintiff obtained a special land use zoning permit from Clinton County that allowed it to operate a wind energy system. While plaintiff's application for a special use permit was pending, two townships located within the county adopted ordinances imposing more restrictive requirements for wind energy systems, which they contended were enacted pursuant to their general police powers, not as a zoning regulation. Plaintiff filed a declaratory judgment action requesting the trial court to declare defendants' ordinances invalid and unenforceable. The trial court granted plaintiff's motion for summary disposition under MCR 2.116(C)(10), ruling that defendants' ordinances were in substance zoning regulations that were unenforceable because they were not enacted under the Michigan Zoning Enforcement Act (MZEA) and conflicted with the county's ordinance, which had been enacted under the MZEA.

The Court of Appeals affirmed.

OPEN MEETINGS LAW - MICHIGAN

Citizens United Against Corrupt Government v. Troy City Council

Court of Appeals of Michigan - December 4, 2014 - Not Reported in N.W.2d - 2014 WL 6852960

The Troy City Council held a closed session meeting for the stated purpose of reviewing applications for the position of City Manager and selecting finalists who would then be interviewed at a subsequent open meeting. Following the closed meeting, five finalist candidates were announced. The City Council then held an open meeting and, after public interviews, selected a new City Manager.

Plaintiff requested a copy of the minutes from the closed session, but defendant denied the request on the basis that the Open Meetings Act (OMA) did not warrant disclosure. Plaintiff then filed suit seeking injunctive relief and a declaratory judgment that defendant violated the OMA by holding the closed session and that the minutes from that session should be disclosed.

The Court of Appeals held that plaintiff did not establish an actual controversy pursuant to MCR 2.605. Even though the Council's closed session may have violated plaintiff's rights, declaratory judgment in this circumstance would not guide plaintiff's future conduct in order to preserve

plaintiff's legal rights. The alleged injuries—the improper holding of a closed session and the improper withholding of the minutes of that session—have already occurred.

Plaintiff did not seek to prevent further injury, only to see the minutes from the closed session and a declaration that the session was improperly held. Any future injury plaintiff would seek to prevent is merely hypothetical, especially given plaintiff's very specific request for relief, which only related to the closed session. Thus, the court was unconvinced that a declaratory judgment would guide plaintiff's conduct in order to preserve plaintiff's legal rights.

LIABILITY - MISSISSIPPI

Brantley v. City of Horn Lake

Supreme Court of Mississippi - December 4, 2014 - So.3d - 2014 WL 6843494

Ambulance patient filed a personal injury action against city that alleged he was injured by the negligence of a city fire department emergency medical technician (EMT). The Circuit Court granted city summary judgment. Patient appealed.

The Supreme Court of Mississippi held that EMT's actions as part of ambulance crew that transported patient to hospital did not constitute fire protection, for the purpose of the police-or-fi-e-protection exception under the Mississippi Tort Claims Act, and thus city was not shielded from liability based on the exception in patient's lawsuit against city after EMT, who was a member of city fire department, dropped patient while unloading him at hospital.

DEVELOPMENT IMPACT FEES - NEW HAMPSHIRE

K.L.N. Construction Company, Inc. v. Town of Pelham

Supreme Court of New Hampshire - December 10, 2014 - A.3d - 2014 WL 6967664

Developers brought a petition for declaratory judgment and writ of mandamus seeking the return of development impact fees (DIF) paid to the Town of Pelham. The Town's DIF ordinance provided that, if the Town had not spent or otherwise encumbered the impact fees within six years, current owners of property on which impact fees had been paid could apply for a full or partial refund of such fees.

The Supreme Court of New Hampshire held that the Town was within its authority to enact an ordinance directing that any refund of impact fees be paid to the current property owner. "Because there is no dispute that the petitioners no longer own any of the properties for which they paid the impact fees at issue, we conclude that the petitioners have no standing to seek a refund of the unencumbered fees. Accordingly, the trial court did not err when it dismissed the case."

BANKRUPTCY - NEW YORK

In re MA Salazar Inc.

United States Bankruptcy Court, E.D. New York - December 8, 2014 - Slip Copy - 2014 WL 6888442

MA Salazar Inc. (the "Debtor") appealed the Bankruptcy Court's decision denying its request to hold

the Incorporated Village of Atlantic Beach (the "Village") in contempt for violating an order of the Bankruptcy Court, and for failing to obtain an order from the Bankruptcy Court regarding the applicability of the automatic stay prior to taking action against the Debtor's property. The order in question prohibited any party from entering the Debtor's premises.

Prepetition, the Village after extensive litigation had been authorized to demolish the Debtor's property, as the State Court ruled that demolition was necessary to protect the public from the unsafe structure on the Debtor's property. After the order prohibiting any party from entering the Debtor's premises was entered, the Bankruptcy Court found that the automatic stay did not apply to the proposed acts of the Village. The Village failed to submit an order memorializing the Court's decision, and immediately proceeded to demolish the building. In denying the request for sanctions, the Bankruptcy Court held that the automatic stay did not apply, therefore the Village could not be sanctioned based on a violation of 11 U.S.C. § 362(a). The Bankruptcy Court further held that it did not have the authority to impose sanctions based on a prior order that did not clearly set forth that the Village could be held in contempt for its failure to abide by the prior order.

The District Court reversed in part, holding that the Bankruptcy Court had inherent authority to sanction the Village for a violation of the automatic stay, and that the Bankruptcy Court had the inherent power to impose submission to its lawful mandates. Because the prior order directing parties not to enter the Debtor's property was specific enough to put the Village on notice, and the Village's acts violated that order, the matter would be remanded for the Bankruptcy Court to make the following determinations: whether 1) the Court ruled that the stay did not apply to the Village pursuant to section 362(b)(4), or whether the stay applied and the Court vacated the automatic stay to permit the Village to demolish the Debtor's building, 2) whether the Village should be sanctioned for violating the order prohibiting any party from entering the Debtor's property, and 3) whether the Village should be sanctioned for its failure to submit an order regarding the applicability of the stay prior to demolishing the Debtor's property.

First, the Bankruptcy Court clarified that the automatic stay did not apply to the Village as its actions were taken in the exercise of its police and regulatory powers under Bankruptcy Code § 362(b)(4). Second, the Village's violation of the order prohibiting any party from entering the Debtor's property was not sanctionable. The Village believed in good faith that its conduct did not run afoul of this order. Its belief stemmed from the fact that the Bankruptcy Court ruled that the stay did not apply to the Village, and parties were prohibited from entering the Debtor's property for their own protection. If anything, the Village's actions served to further the protection of the public. In addition, the record in the case demonstrated there was honest confusion over whether this order was meant to keep the Village from demolishing the Debtor's property once the Court ruled that the automatic stay did not apply. Third, the Village's failure to submit an order regarding the applicability of the automatic stay prior to demolishing the Debtor's property did not demonstrate bad faith. Without a finding of bad faith, the Village's conduct did not warrant the imposition of sanctions.

LIABILITY - NEW YORK

Ritchie v. Churchville-Chili Central School Dist.

Supreme Court, Appellate Division, Fourth Department, New York - November 14, 2014 - N.Y.S.2d - 122 A.D.3d 1265 - 2014 N.Y. Slip Op. 07792

Mother of student injured when he was struck by motor vehicle while crossing street to attend school fundraiser brought personal injury action against school district and its employees.

Defendants moved for summary judgment. The Supreme Court, Monroe County, granted motion. Mother appealed.

The Supreme Court, Appellate Division, held that school district owed no duty of care to student, where mother had told student to stay on that side of road and school district employees had not yet gained the physical custody or control of student at time of accident.

IMMUNITY - NORTH CAROLINA

AGI Associates, LLC v. City of Hickory, N.C.

United States Court of Appeals, Fourth Circuit - December 11, 2014 - F.3d - 2014 WL 6981327

Lender brought diversity action against borrower and city, who had contracted with borrower for aviation services, alleging judicial foreclosure, accounting, disgorgement of rents, and unjust enrichment claims. City moved to dismiss for failure to state a claim and for lack of subject matter jurisdiction. The City's motion was based upon the argument that it was entitled to governmental immunity. The District Court held that by acting in a proprietary, as opposed to governmental, capacity in operating the airport, city waived its governmental immunity and therefore denied the motion to dismiss for lack of subject matter jurisdiction.

The Court of Appeals held that under North Carolina law, as predicted by Court of Appeals, governmental immunity from equitable claims is waived when a county or municipality acts in a proprietary, rather than governmental, capacity.

LAND USE - WASHINGTON

Durland v. San Juan County

Supreme Court of Washington, En Banc. - December 11, 2014 - P.3d - 2014 WL 7003787

Objectors filed a petition under Land Use Petition Act (LUPA), challenging county's grant of a building permit. County and applicant moved to dismiss the action. The Superior Court dismissed with prejudice. In a second action, objectors filed a complaint and land use petition challenging the dismissal as a violation of their constitutional right to due process. The San Juan County hearing examiner dismissed the appeal as untimely. Objectors then filed a § 1983 claim. The Superior Court dismissed the LUPA petition and granted county and applicant's motion for summary judgment. Objectors appealed both Superior Court judgments. The Court of Appeals affirmed. Further review was sought.

Following consolidation, the Supreme Court of Washington held that:

- In the first action challenging county's grant of a building permit, the Superior Court lacked jurisdiction to hear the petition;
- In the first action, objectors' failure to exhaust administrative remedies deprived them of standing to file a LUPA petition;
- County code provision that imposed a height and size limitation on the construction of residential structures, including garages, did not create a property interest in neighbors' view of the water, or in the denial of a third-party's building permit for purposes of the Due Process Clause;
- Under statutory provision allowing for an award of attorney fees to a prevailing party on appeal of

a land use decision, fees may be awarded to private parties who prevail on procedural or substantive grounds, but may be awarded to a public entity that made the permitting decision only when it succeeds in defending its decision on the merits, disapproving *Coy v. City of Duvall*, 174 Wash.App. 272, 298 P.3d 134, *Witt v. Port of Olympia*, 126 Wash.App. 752, 759, 109 P.3d 489, *Overhulse Neighborhood Ass'n v. Thurston County*, 94 Wash.App. 593, 601, 972 P.2d 470, and *Northshore Investors, LLC v. City of Tacoma*, 174 Wash.App. 678, 700–01, 301 P.3d 1049;

- Applicants were entitled to an attorney fee award in first action; and
- While applicants were not entitled to attorney fee award with regard to objectors' § 1983 complaint in second action, they were entitled to attorney fee award to the extent objectors' action related to their LUPA petition.

PUBLIC RECORDS - WASHINGTON

City of Lakewood v. Koenig

Supreme Court of Washington, En Banc - December 11, 2014 - P.3d - 2014 WL 7003790

City brought an action against requester for a declaratory judgment that city complied with requests under the Public Records Act (PRA). The Superior Court granted summary judgment in favor of city and denied requester's request for costs and attorney fees. Requester appealed. The Court of AppealS reversed and remanded.

After grant of city's petition for review, the Supreme Court of Washington held that:

- City violated requirement of PRA that city provide brief explanation of how disclosure exemptions applied to redacted information, and
- Determination that city violated brief explanation requirement of PRA was a vindication of requester's right to receive a response, as would entitle requester to attorney fees.

EMINENT DOMAIN - WISCONSIN

118th Street Kenosha, LLC v. Wisconsin Dept. of Transp.

Supreme Court of Wisconsin - December 10, 2014 - N.W.2d - 2014 WI 125

After the Department of Transportation (DOT) recorded an award of damages for a temporary easement on property, property owner challenged the award. The DOT filed a motion in limine to prohibit property owner from introducing any evidence that it was entitled to compensation "for any item whatsoever other than the temporary limited easement." The Circuit Court granted the motion. Property owner appealed. The Court of Appeals reversed and remanded. DOT petitioned for review, which was granted.

The Supreme Court of Wisconsin held that property owner was not entitled to diminution of value damages caused by previous relocation of access road.

Temporary limited easement that authorized DOT to construct new driveway connecting commercial property to a different road did not cause commercial property to lose direct access and proximity to previous access road, and therefore property owner was not entitled to damages in eminent domain proceeding regarding easement for commercial property's diminution in value resulting from its loss of direct access and proximity to previous access road. It was the previous access road's relocation that caused the loss of direct access, rather than the subsequent temporary limited easement.

EMINENT DOMAIN - ALASKA

Brewer v. State

Supreme Court of Alaska - November 28, 2014 - P.3d - 2014 WL 6712638

Landowners, whose property was intentionally set on fire by firefighters under direction of State Department of Forestry to deprive advancing wildfire of fuel, brought constitutional taking and tort claims against the State. The Superior Court entered judgment in favor of State, finding it was immune from tort claims and that action was valid exercise of police powers. Landowners appealed.

The Supreme Court of Alaska held that:

- State's action in conducting burnouts was exercise of police power, and thus damage was for a public use;
- Landowners' had no constitutional right to compensation if State's actions were justified by doctrine of necessity; and
- State was immune from tort claims.

PUBLIC FINANCE - ARIZONA

Price v. City of Mesa

Court of Appeals of Arizona, Division 1 - December 2, 2014 - P.3d - 2014 WL 6769877

In January 2014, the Mesa Mayor and City Council passed a resolution authorized the issuance of Transportation Project Advancement Notes (TPANS) to finance a light rail project. The resolution required Mesa to secure payment on the TPANS' interest and principal by a pledge of "Transportation Project Advance Revenues" (TPARS) and "excise taxes" as defined in A.R.S. sections 28–7691 through–7697. The resolution further noted that TPANS did not constitute "an obligation … to levy or pledge any form of ad valorem property taxation nor will [they] constitute an indebtedness of the City … within the meaning of the Constitution of the State of Arizona … but shall instead be limited obligations payable solely out of the pledged sources of funds…."

A Mesa resident brought suit, contending that Mesa's proposed sale of notes required an election under Article 7, Section 13 of the Arizona Constitution.

Mesa countered that, because it did not assume "a general liability to repay the borrowing," the TPANS financing scheme was not subject to the indebtedness limit or the constitutional election requirement of Article 9, Section 8 and Article 7, Section 13 of the Arizona Constitution, respectively.

The Court of Appeals of Arizona held that Mesa was not required to obtain voter approval before issuing notes to finance the light rail project, as Mesa had not pledged its general funds.

Shout-out to my peeps at Gust Rosenfeld!

EMPLOYMENT - ILLINOIS

Simpson v. Wayne County, Illinois

United States District Court, S.D. Illinois - November 26, 2014 - Not Reported in F.Supp.3d

- 2014 WL 6705277

Office manager for the Wayne County Highway Department was terminated and brought a claim for gender discrimination and retaliation. The County moved for summary judgment.

The District Court held that:

- Employee's actions were not time-barred, citing the Lilly Ledbetter Fair Pay Act which provides that the statute of limitations for filing an EEOC charge alleging pay discrimination resets with each paycheck affected by a discriminatory decision;
- Employee had presented sufficient evidence of gender-based pay discrimination to survive summary judgment;
- Employee had presented enough circumstantial evidence for a jury to infer retaliation and therefore to survive summary judgment on her claim of retaliation.

PUBLIC CONTRACTS - MARYLAND

Balfour Beatty Const. v. Maryland Dept. of General Services

Court of Special Appeals of Maryland - December 2, 2014 - A.3d - 2014 WL 6769898

Contractors sought review of Board of Contract Appeals' decision affirming Department of General Services' (DGS) denial of their pre-award bid protest challenging inclusion of project labor agreement (PLA) as evaluation factor in state's request for proposals (RFP) for construction of new detention facility. The Circuit Court affirmed Board's determinations. Contractors appealed.

The Court of Special Appeals held that:

- Inclusion of PLA did not constitute regulation mandating predicate rulemaking under Administrative Procedure Act (APA), and
- Evidence was sufficient to support Board's determination that PLA specification was not unreasonably restrictive and advanced legitimate state interests.

First-time inclusion of project labor agreement (PLA) as evaluation factor in state's request for proposals (RFP) for construction of new detention facility, without more, did not constitute regulation under Administrative Procedure Act (APA), such that inclusion of PLA in RFP did not mandate predicate rulemaking under APA. Inclusion of PLA did not change existing procurement law or formulate new policy or widespread application of future effect, but rather use of PLA was pilot project.

Evidence was sufficient to support Board of Contract Appeals' determination, in affirming Department of General Services' (DGS) denial of contractors' pre-award bid protest challenging state's inclusion of project labor agreement (PLA) as evaluation factor in state's request for proposals (RFP) for construction of new detention facility, that inclusion of PLA evaluation factor was not unreasonably restrictive and advanced legitimate interests of state. There was evidence that project would meet critical need for community and that importance of project would benefit from organization and guarantees provided by PLA, record indicated that DGS spent considerable amount of time evaluating PLAs and consulting with various entities regarding efficacy of PLAs, and prediction offered by contractors' expert that inclusion of PLA would unduly restrict competition was not borne out, as DGS received seven proposals.

DRAINAGE ASSESSMENT - MICHIGAN

Charter Tp. of Lansing v. Ingham County Drain Com'r

Court of Appeals of Michigan - December 2, 2014 - Not Reported in N.W.2d - 2014 WL 6778948

The Charter Township of Lansing appealed two separate orders denying it relief regarding a very expensive drain project for which the Township was assessed a substantial portion of responsibility.

In the first order, the trial court dismissed for a want of subject-matter jurisdiction the Township's claim that the apportionment constituted a deprivation of property without due process. In the second order, the trial court denied the Township's petition for certiorari review of the Drainage Board of Review's final determination upholding the apportionment.

The Court of Appeals affirmed, finding that the Township had not shown that the trial court clearly erred in finding the Board of Review's conclusion to have been based on competent, material, and substantial evidence on the whole record and to have not been a product of an incorrect application of the law.

"The Township has simply not shown that the trial court clearly erred in finding that the Board of Review's decision was either arbitrary or not based on competent, substantial, and material evidence on the whole record. The fact that there is no precise formula specifying the apportionment is not fatal; a certain amount of subjective 'judgment call' is inherent in the operation of a drain commissioner and a board of review. The Township provides no evidence tending to show that it would not be benefitted by the Drain; indeed, it concedes the opposite. Rather, the Township's arguments largely amount to an assertion that the apportionment is disproportionate either because the absolute dollar value is extremely high or because the drain will not directly benefit each individual parcel of property within the Township, neither of which is a valid reason for overturning an apportionment. Courts generally will not reverse drain proceedings 'except for very substantial faults.' The Township has not articulated a legally cognizable substantial fault in the apportionment at issue here, so we cannot disturb it, even if the financial burden will be, as seems likely, quite significant.

LIABILITY - MISSISSIPPI

Elliott v. First Sec. Bank

Court of Appeals of Mississippi - November 25, 2014 - So.3d - 2014 WL 6647744

Pedestrian, who was injured when she tripped and fell while walking on a city sidewalk for which bank maintained an easement, brought a premises liability suit against bank. The Circuit Court granted summary judgment in bank's favor, and pedestrian appealed.

The Court of Appeals held that:

- Pedestrian's status as city's invitee could not be imputed to bank;
- Pedestrian was a licensee with respect to bank; and
- Bank did not breach the duty of care it owed to pedestrian as licensee.

Pedestrian's status as invitee with respect to city could not be imputed equally to bank, which maintained an easement for sidewalk owned by city, for purposes of determining duty owed by bank

to pedestrian who tripped and fell on sidewalk in front of bank. Pedestrian's status with respect to bank was to be analyzed separately from her status with respect to city.

LAND USE - NEW JERSEY

Shipyard Associates, L.P. v. City of Hoboken

United States District Court, D. New Jersey - November 26, 2014 - Slip Copy - 2014 WL 6685467

Shipyard Associates, L.P., a developer, brought a Section 1983 action against the City of Hoboken to invalidate two municipal ordinances. Shipyard owns waterfront property and wishes to construct a two residential towers.

In December 2013, following the aftermath of Superstorm Sandy, Hoboken adopted two municipal Ordinances addressing issues relating to flooding in Hoboken. These Ordinances, among other things, prohibit construction on properties that are located on piers and platforms that project into the Hudson River. The effect of these Ordinances is to prevent construction of Shipyard's project.

The Fund for Better Waterfront (FBW), a nonprofit public interest group comprised of Hoboken residents focused on issues such as open space preservation and recreation along the Hudson River waterfront in Hoboken brought a motion to intervene as a party defendant pursuant to Federal Rule of Civil Procedure 24.

Shipyard opposed the motion, contending that the FBW had failed to establish the necessary grounds to support intervention. Shipyard argued, in particular, that FBW did not have a sufficient, legally recognized interest in the litigation, and that any interest they could have is adequately represented by the City of Hoboken.

The District Court granted FBW's motion to intervene, finding that FBW had carried its burden to show the possibility that its interests would not be fully protected by the City of Hoboken.

LABOR - PENNSYLVANIA

Borough v. Pennsylvania Labor Relations Bd.

Commonwealth Court of Pennsylvania - December 4, 2014 - A.3d - 2014 WL 6807216

Local 1813 Union (Union) is a chapter of the International Association of Fire Fighters (IAFF), and served as the bargaining unit for twenty-one full-time firefighters employed by the Borough. The Chambersburg Borough and the Union had a CBA) in effect which governed their employment relationship through the beginning of 2012. In addition to paid firefighters, the Borough's fire department utilized the services of four volunteer fire companies.

In July 2011, during negotiations for a successor CBA between the Borough and the Union, the Borough informed the Union that the Borough would need to downsize the number of paid firefighters due to budget constraints. At the time of the negotiations, Patrick Martin was employed as a shift captain in the Borough's fire department, and was also president of the Union.

Martin sent a letter to local IAFF members, including twenty-four IAFF members who provided volunteer fire services, informing them of the proposed reductions and exhorting volunteers to

refrain from responding to fire calls within the Borough.

The Borough disciplined Martin and also filed a charge of unfair labor practices against the Union based on the issuance of the letter.

A Pennsylvania Labor Relations Board hearing examiner found that, because the Union did not engage in an unlawful secondary boycott by issuing the letter, the Union did not commit any unfair labor practices under Sections 6(2)(d) or 6(2)(e). Finding no unprotected secondary boycott, the hearing examiner determined that Martin's suspension based on sending the letter was discriminatory, resulting in unfair labor practices under Sections 6(1)(a) and 6(1)(c). Borough Appealed.

The Commonwealth Court reversed, holding that:

- The Union engaged in a secondary boycott when it sent the letter to the volunteer firefighters, who were also members of the IAFF, inducing them to refrain from responding to fires in the Borough; and
- As the Union committed an unfair labor practice in violation of Section 6(2)(d) of the PLRA by engaging in a secondary boycott, Martin's letter was not protected under the PLRA and thus the Board also erred in finding that the Borough committed violations of Sections 6(1)(a) or 6(1)(c) by disciplining Martin for sending the Letter. Accordingly, the Borough was within its rights to discipline Martin.

LIABILITY - RHODE ISLAND

Maguire v. City of Providence

Supreme Court of Rhode Island - November 28, 2014 - A.3d - 2014 WL 6724406

Pedestrian, who fell to public sidewalk when her crutch slipped into a hole in the pavement, brought action against tenants of property abutting the sidewalk. The Superior Court granted summary judgment to the tenants. Pedestrian appealed.

The Supreme Court of Rhode Island held that tenants did not owe pedestrian a duty to maintain the sidewalk abutting their premises.

Tenants of property abutting public sidewalk did not owe pedestrian, who fell to the sidewalk when her crutch slipped into a hole in the pavement, a duty to maintain the sidewalk abutting their establishments in a safe condition, and absent duty, pedestrian did not establish negligence claim against either tenant, where there was no evidence that either tenant took action to create the dangerous condition.

MUNICIPAL ORDINANCE - NEW YORK

Turner v. Municipal Code Violations Bureau of City of Rochester

Supreme Court, Appellate Division, Fourth Department, New York - November 21, 2014 - N.Y.S.2d - 122 A.D.3d 1376 - 2014 N.Y. Slip Op. 08156

The Rochester City Council enacted an ordinance prohibiting "outdoor storage" in all districts except specifically enumerated commercial districts. The ordinance defined "outdoor storage" as "[s]torage of any materials, merchandise, stock, supplies, machines and the like that are not kept in a structure having at least four walls and a roof, regardless of how long such materials are kept on the premises."

Plaintiffs challenged the ordinance as unconstitutionally void for vagueness and the appeals court agreed.

The court concluded that the ordinance failed to pass either part of the vagueness test. With respect to the first part of the test, the ordinance gave ordinary people virtually no guidance on how to conduct themselves in order to comply with it. With respect to the second part of the test, the vague language of the ordinance did not provide clear standards for enforcement and, thus, a determination of whether the ordinance has been violated leaves virtually unfettered discretion in the hands of the code enforcement officer.

EMPLOYMENT - ALABAMA

Trenier v. City of Prichard

Supreme Court of Alabama - November 21, 2014 - So.3d - 2014 WL 6608552

City Fire Chief was informed by Mayor that his employment was terminated following the expiration of his five-year employment agreement with the City. Fire Chief sued the City, challenging the Mayor's "unilateral" action and alleging that he could be removed from office only upon the recommendation by the mayor with the approval of four council members.

The City, on the other hand, asserted that it was common practice on the part of the mayor and the city council to use employment agreements for specific limited terms to effectuate both the appointment and removal mandates of § 11–43C–38(a) (governing the appointment and removal from office of fire chiefs and police chiefs in Class 5 municipalities) and that once the city council voted to approve the Fire Chief's agreement for a limited term, no further action was needed to remove him from office in the event he was not reappointed.

The Supreme Court of Alabama agreed with the City, holding that nothing in the plain language of § 11–43C–38(a) prohibits a city from using an employment agreement with a limited term for the purpose of satisfying both the approval and/or removal mandates of the statute. The City Council's initial action approving the employment agreement that was due to expire on April 19, 2012, impliedly satisfied the removal mandates of § 11–43C–38(a), and it was unnecessary for the City Council to formalize what it had already approved, because requiring it to do so would be illogical and would produce the same result.

BONDS - ALABAMA

Houston County Economic Development Authority v. State

Supreme Court of Alabama - November 21, 2014 - So.3d - 2014 WL 6608547

State instituted a civil-forfeiture proceeding, seeking forfeiture of items and currency seized during search of bingo gaming facility. Facility operator intervened. The Circuit Court entered judgment condemning 691 allegedly illegal gambling devices, $288,657.68 in cash, and various documents

allegedly related to illegal gambling. Operator appealed.

The Supreme Court of Alabama held that:

- Game played on electronic machines was not the game commonly or traditionally known as "bingo," permitted by amendments excepting bingo from the general constitutional prohibition on lotteries;
- Table game combining elements of roulette and bingo was not the game commonly or traditionally known as "bingo";
- Prior bond-validation proceeding was not conclusive as to the legality of particular gaming machines; and
- Evidence supported forfeiture of currency and gambling records.

IMMUNITY - CALIFORNIA

Conway v. County of Tuolumne

Court of Appeal, Fifth District, California - November 24, 2014 - Cal.Rptr.3d - 2014 WL 6657095

Mobile-home owner brought action against county for negligence, nuisance, trespass, and strict liability for ultra-hazardous activity, alleging that his mobile home was rendered uninhabitable as result of use of tear gas by county's special weapons and tactics (SWAT) team while attempting to apprehend owner's son, who allegedly shot at owner. The Superior Court granted county's motion for summary judgment. Owner appealed.

As a matter of first impression, the Court of Appeal held that decision to use tear gas was discretionary act, and thus county was entitled to discretionary-acts immunity.

EMPLOYMENT - IDAHO

Turner v. City of Lapwai

Supreme Court of Idaho., Boise, November 2014 Term - November 28, 2014 - P.3d - 2014 WL 6713197

Former city employee brought action against city, claiming she was owed compensation and reimbursement for expenses incurred during her employment. The District Court granted summary judgment in favor of city, and former employee appealed.

The Supreme Court of Idaho held that former city employee's failure to file her claim with the city clerk's office, as required by the notice provisions of the Tort Claims Act, barred any such claim, despite the absence of any prejudice to the city, abrogating *Huff v. Uhl*, 103 Idaho 274, 647 P.2d 730.

LIABILITY - MARYLAND

Holloway-Johnson v. Beall

Court of Special Appeals of Maryland - November 25, 2014 - A.3d - 2014 WL 6674143

Parent of motorcyclist, individually and as personal representative of motorcyclist's estate, brought a wrongful-death action against city police officer who was involved in a vehicular collision that resulted in motorcyclist's death, alleging negligence, gross negligence, battery, and violation of the Maryland Declaration of Rights. At the close of trial, the court entered judgment in favor of police officer on the gross negligence, battery, constitutional, and punitive damages claims. The negligence claim went to a jury, which returned a verdict in favor of parent in the amount of $3.505 million. Judgment was entered. In response to officer's subsequent motion, the Circuit Court ordered that officer was entitled to a new trial and, alternatively, ordered the judgment reduced to $200,000 in accordance with the Local Government Tort Claims Act (LGTCA). Parent appealed.

The Court of Special Appeals held that:

- Officer had no authority to waive for his employer, the city's police department, the LGTCA's cap on damages that parent could collect from the police department;
- Issue of whether officer was grossly negligent was for the jury;
- Issue of whether contact by police officer's cruiser with the motorcycle constituted battery by officer was for the jury;
- Issue of whether officer used excessive force, so as to violate the Maryland Declaration of Rights, was for the jury;
- Issue of whether officer's conduct was so egregious as to call for an award of punitive damages was for the jury; and
- Officer was not operating his cruiser in the performance of emergency services at the time of the collision, for immunity purposes.

IMMUNITY - MISSISSIPPI

O.R. Garretson v. Mississippi Dept. of Transp.

Supreme Court of Mississippi - November 20, 2014 - So.3d - 2014 WL 6480534

Property owners brought action against the Department of Transportation, seeking damages as a result of silt flooding from bypass construction, and alleging trespass.

The Supreme Court of Mississippi held that:

- The Department of Transportation was entitled to immunity for all of property owners' claims pursuant to the Tort Claims Act provision governing immunity for any act arising out of a plan or design for construction of an improvement to public property, and
- Allegations in property owners' complaint were insufficient to state a taking claim.

The crux of property owners' complaint was that the design of the bypass itself changed the naturally occurring drainage and caused silt to flow onto their land, which had not occurred before, and thus, all of property owners' causes of action, including their request for injunctive relief, fell within the realm of road design, and sounded in tort.

MUNICIPAL ORDINANCE - MONTANA

City of Helena v. Svee

Supreme Court of Montana - November 25, 2014 - P.3d - 2014 MT 311

City filed complaint against owners of property located within wildland-urban district for violation of ordinance dictating permissible roofing materials. Owners answered and petitioned for declaratory judgment that ordinance was building regulation that city lacked authority to promulgate. The First Judicial Court entered summary judgment for owners, but denied their motion for attorney fees. City appealed, and owners cross-appealed denial of their motion for attorney fees.

The Supreme Court of Montana held that:

- Ordinance requiring that roofs on property located within wildland-urban district may not have exposed, wooden roofing materials, whether treated or untreated, and must have noncombustible or fire resistant roofing materials rated Class C or higher, was building regulation that city lacked authority to promulgate, and
- Equities warranted award of attorney fees to property owners under Uniform Declaratory Judgments Act.

EMINENT DOMAIN - MONTANA

Wohl v. City of Missoula

Supreme Court of Montana - November 25, 2014 - P.3d - 2014 MT 310

Abutting landowners brought action against city arising out of dispute concerning the width of public right-of-way constituting avenue. Following a bench trial, the District Court determined the width of the right-of-way, and awarded landowners compensation for a taking, plus a portion of requested costs and fees. City appealed, and landowners cross-appealed.

The Supreme Court of Montana held that District Court's decision to award landowners appellate attorney fees as prevailing parties was not precluded by the law of the case doctrine.

In an inverse eminent domain action brought by landowners against city, trial court's decision to award landowners appellate attorney fees as prevailing parties was not precluded by the law of the case doctrine, even though the Supreme Court refused to award fees in its order on rehearing. In its rehearing order, the Supreme Court did not pronounce a principle or rule of law necessary to the decision, but rather, simply observed that it had not expressly awarded attorney fees in a prior decision and declined to do so again, and the rehearing order did not address the substantive question of whether the landowners were entitled to appellate attorney fees.

PENSIONS - NEW JERSEY

Moran v. Board of Trustees, Police and Firemen's Retirement System

Superior Court of New Jersey, Appellate Division - November 25, 2014 - A.3d - 2014 WL 6634502

After suffering disabling injuries while saving two victims from a burning building by kicking in the building's front door, firefighter applied for an accidental disability retirement pension. The Board of Trustees of the Police and Firemen's Retirement System (PFRS) denied the application, rejecting the legal conclusion of the Office of Administrative Law that the incident was undesigned and

unexpected. Firefighter appealed.

The Superior Court, Appellate Division, held that firefighter suffered an undesigned and unexpected traumatic event and was entitled to accidental disability pension.

Firefighter who suffered disabling injuries after saving two victims from a burning building by kicking in building's front door suffered an undesigned and unexpected traumatic event, and thus firefighter was entitled to an accidental disability retirement pension, even though event was not a classic accident. Event resulted from combination of unusual circumstances that led to firefighter's injury, including failure of truck company unit that was responsible for forcing entry and rescuing occupants to arrive, discovery of victims trapped inside a fully engulfed burning building that was reported to have been vacant, training that had not prepared firefighter to break into burning buildings without battering rams or other specialized equipment used by truck company unit, and fact that victims would have died had firefighter not responded immediately to break down door.

PUBLIC UTILITIES - NEW JERSEY

United Water New Jersey, Inc. v. Borough of Hillsdale

Superior Court of New Jersey, Appellate Division - November 26, 2014 - A.3d - 2014 WL 6675036

Public utility filed an action in lieu of prerogative writs alleging that borough had adopted and sought to enforce ordinances that were preempted by state law, and that the New Jersey Department of Environmental Protection (NJDEP) had exclusive jurisdiction over dam improvement project. The Superior Court permitted flood solution group and water customers to intervene, and following a bench trial, found that NJDEP had exclusive jurisdiction over the project. Intervenors appealed.

The Superior Court, Appellate Division, held that borough was preempted by state law from applying its ordinances to dam project.

Borough was preempted by state Safe Dam Act and Water Supply Management Act from applying its conditional use and tree removal ordinances to public utility's dam improvement project, where state's regulatory scheme for dams and reservoirs was pervasive and comprehensive, thereby precluding the co-existence of municipal regulation reflected in borough's ordinances.

LIABILITY - NEW YORK

Coleson v. City of New York

Court of Appeals of New York - November 24, 2014 - N.E.3d - 2014 N.Y. Slip Op. 08213

Wife who was stabbed by her husband brought action on behalf of herself and her son against city and city police department, alleging that defendants were negligent in failing to protect plaintiffs from attacks by husband, and asserting claim for negligent infliction of emotional distress. The Supreme Court, Bronx County granted defendants' motion for summary judgment, and wife appealed.

The Court of Appeals held that:

- Fact issues precluded summary judgment on negligence claim, but
- Son was not in zone of danger for purposes of negligent infliction of emotional distress claim.

Genuine issues of material fact existed as to whether special relationship existed between wife, who was stabbed by her husband after husband was arrested in connection with domestic violence incident and then released, and city, and as to whether wife justifiably relied on police officer's assurances that husband would remain in jail, precluding summary judgment as to wife's negligence claim arising from city's failure to protect her from attack.

Child was not in zone of danger at time his mother was stabbed by his father, as would subject city to liability for negligent infliction of emotional distress arising from its handling of domestic violence situation. Child was in broom closet while mother was stabbed, and thus he neither saw incident nor was immediately aware of incident at time it occurred.

PENSIONS - PENNSYLVANIA

United Police Society of Mt. Lebanon v. Mt. Lebanon Comm'n

Supreme Court of Pennsylvania - November 24, 2014 - A.3d - 2014 WL 6634130

Municipality adopted police pension plan (the "Plan") pursuant to a collective bargaining agreement (CBA). Thereafter, the municipality administered the plan term along the lines of the incomplete or inaccurate assessment that resulted from the incomplete or inaccurate information submitted to the actuary, in effect unilaterally modifying both the plan and the CBA.

The Commonwealth Court determined that because Act 205 had statutory primacy over any CBA, the plan must be administered as understood by the actuary when it made its Act 205 cost study, even if this effectively alters a bargained-for term of the parties.

The Supreme Court of Pennsylvania took up the case.

"However, we must nevertheless consider how Act 205 affects the proper disposition of this case. Because the Municipality provided the wrong information to the actuary performing the Act 205 cost study with respect to the COLA cap for early retirees, the Municipality failed to obtain a "complete and accurate" actuarial cost estimate, as required by Act 205. Thus, as here, the implementation of a pension plan based on an incomplete and inaccurate cost estimate is a violation of Act 205 in itself. For this reason, the Commission erred by ordering the Plan's implementation along the lines of the incomplete and inaccurate Act 205 cost study, which was, in turn, based on the incomplete and inaccurate information supplied by the Municipality."

"The only appropriate remedy available is to remand the matter for an order directing the Municipality to comply with its mandate under Section 305: to make a complete and accurate cost study that includes the correct COLA cap for certain early retirees, as herein determined."

The Court concluded that it was error to impose a unilateral change to the Plan at odds with its plain language based on the results of an incomplete and inaccurate Act 205 cost study. It therefore reversed the order of the Commonwealth Court and remanded the case to that court for further remand to effectuate a complete and accurate Section 305 cost study.

FIRST AMENDMENT - PUERTO RICO

Watchtower Bible and Tract Society of New York, Inc. v. Municipality of San Juan

United States Court of Appeals, First Circuit - November 20, 2014 - F.3d - 2014 WL 6482932

Distributors of religious tracts brought § 1983 action against municipalities, alleging implementation of Puerto Rico's Controlled Access Law (CAL), which allowed municipalities to authorize neighborhood associations to erect gates enclosing public streets, violated First Amendment right to free speech. The District Court imposed remedial scheme requiring unmanned gated communities provide distributors with gate keys upon distributors' disclosure of their identities and purpose. Parties cross-appealed.

The Court of Appeals held that:

- Action was not moot;
- Substantial evidence supported district court's factual findings;
- Municipalities bore legal responsibility for injury caused to distributors as result of implementation of CAL;
- District court sufficiently explained reasons for issuing injunction;
- District court did not violate mandate rule;
- District court's remedial scheme was narrowly tailored; and
- Distributors were not prejudiced by district court's sua sponte dismissal of Commonwealth defendants.

In § 1983 action alleging Puerto Rico's Controlled Access Law (CAL), which allowed municipalities to authorize neighborhood associations to erect gates enclosing public streets, violated First Amendment rights of religious tract distributors who sought access to those streets for protected speech activities, district court sufficiently explained reasons for issuing injunction requiring municipalities to allow distributors access to gated public streets upon distributors' disclosure of their purpose and identities, where, in crafting injunction, court sought to balance parties' rights of free speech and personal security, while avoiding the imposition of undue administrative and financial burdens on municipalities and gated communities.

IMMUNITY - UTAH

Cope v. Utah Valley State College

Supreme Court of Utah - November 21, 2014 - P.3d - 2014 UT 53

State college student filed suit against college for head injury sustained during performance of ballroom dance maneuver at direction of instructor. The District Court entered summary judgment for college and dismissed complaint, and student appealed. The Court of Appeals reversed in part based on determination that special relationship exception to public duty doctrine applied. Certiorari review was granted.

The Supreme Court of Utah held that:

- Utah's limitation of its sovereign immunity did not abrogate public-duty doctrine;
- Public duty doctrine did not apply to harm to plaintiff caused by government defendant's affirmative misconduct; overruling Webb v. University of Utah, 125 P.3d 906; and
- Public duty doctrine did not apply to state student's negligence claim against college.

LIABILITY - CONNECTICUT

Robinson v. Cianfarani

Supreme Court of Connecticut - November 25, 2014 - A.3d - 2014 WL 6435084

Pedestrian filed suit against owners of property that abutted public sidewalk for injuries sustained in slip and fall on snow and ice that had accumulated on sidewalk. The trial court entered summary judgment for owners, and pedestrian appealed.

The Supreme Court of Connecticut held that town ordinance imposing fines on owners of property abutting public sidewalks for failure to keep sidewalk clear of ice and snow did not transfer town's civil liability for pedestrian's injuries to landowners.

LIABILITY - DISTRICT OF COLUMBIA

District of Columbia v. Bamidele

District of Columbia Court of Appeals - November 13, 2014 - A.3d - 2014 WL 5858952

Restaurant patron and his wife brought action against off-duty police officers and their employer after officers allegedly assaulted and battered them. Following a jury trial, the Superior Court entered judgment in favor of patrons. Officers and employer appealed.

The Court of Appeals held that:

- Compensatory damage awards to patron and his wife of $60,000 and $10,000, respectively, were not excessive;
- Officers' conduct in assaulting patron was sufficiently aggravated to support an inference that they intended to injure patron, as required to support award of punitive damages;
- Officers' assaultive conduct against patron was not within the scope of their employment; and
- Jury's findings that officers acted within the scope of their employment were not legally sufficient to make employer vicariously liable for punitive damages.

PUBLIC UTILITIES - ILLINOIS

People ex rel. Madigan v. Illinois Commerce Com'n

Supreme Court of Illinois - November 20, 2014 - N.E.3d - 2014 IL 116642

State appealed decision of the Illinois Commerce Commission granting water utility's request for approval of its annual reconciliation of purchased water and purchased sewage treatment surcharges. The Appellate Court dismissed appeal as untimely. State petitioned for leave to appeal and Commerce Commission filed separate petition to appeal as a matter of right or for leave to appeal, both of which were granted and appeals were consolidated.

The Supreme Court of Illinois held that 35-day period specified in Public Utilities Act, rather than 30-day period in court rule, applied to review of decision of Commerce Commission.

ZONING - ILLINOIS

Affordable Recovery Housing v. City of Blue Island

United States District Court, N.D. Illinois, Eastern Division - November 17, 2014 - F.Supp.3d - 2014 WL 6461596

Affordable Recovery Housing (ARH) obtained a license from the Illinois Department of Human Services (DHS) to operate a Recovery Home. The DHS is charged with regulating and licensing Recovery Homes, which provide substance abuse services and housing for recovering alcoholics and substance users.

Pursuant to the statutory authority granted to it in the Alcoholism and Other Drug Abuse and Dependency Act, 20 ILCS 301 et seq., DHS enacted a comprehensive regulatory scheme regarding Recovery Homes. Under the DHS regulations, ARH is not required to install sprinkler systems for fire safety purposes in its buildings. Under the Life Safety Code adopted by the City of Blue Island, however, sprinkler systems are required. ARH challenged the City Code.

The District Court held that the DHS regulations preempt the City's Life Safety Code such that the City may not enforce its sprinkler requirements against ARH.

EMPLOYMENT - MASSACHUSETTS

Fernandes v. Attleboro Housing Authority

Supreme Judicial Court of Massachusetts, Bristol - November 19, 2014 - N.E.3d - 2014 WL 6460260

Employee brought action against employer, alleging violations of the Wage Act. Following jury verdict in favor of employee, the Superior Court Department denied employer's motion for judgment notwithstanding the verdict (JNOV), employee's motion for reinstatement of employment, and employee's motion for new trial on damages. Employer appealed and employee cross-appealed. The case was transferred from the Appeals Court.

The Supreme Judicial Court held that:

- Civil Service Commission did not have exclusive authority over Wage Act claim filed by housing authority employee;
- Reinstatement of employment was not available remedy under Wage Act; and
- $130,000 award of damages was supported by sufficient evidence.

Civil Service Commission did not have exclusive authority, pursuant to civil service law, over housing authority employee's claims under the Wage Act, and therefore dismissal of employee's judicial action against employer was not required under doctrine of primary jurisdiction.

Reinstatement of employment following termination was not an available remedy for violations of the Wage Act, where Act provides that employee claiming to be aggrieved by violation of Act could bring civil action for injunctive relief, for any damages incurred, and for any lost wages and other benefits, and Act did not expressly authorize reinstatement as available remedy.

EMPLOYMENT - MASSACHUSETTS

Kelley v. Boston Fire Dept.

Appeals Court of Massachusetts - November 18, 2014 - N.E.3d - 2014 WL 6390168

Fire lieutenants employed by city fire department filed appeal claiming to be aggrieved by practice of appointing out-of-grade acting captains without following provisions of civil service laws. The Civil Service Commission determined that the city violated the civil service laws, but ultimately dismissed the appeal, concluding that compliance with the statutory procedures was ministerial, and that the lieutenants had failed to demonstrate that the appointments did not meet the statutory criteria. Lieutenants appealed. The Superior Court Department vacated and remanded. City appealed.

The Appeals Court held that Superior Court order remanding to Civil Service Commission was interlocutory order not immediately appealable.

IMMUNITY - MISSISSIPPI

K.N. v. Moss Point School Dist.

Court of Appeals of Mississippi - November 18, 2014 - So.3d - 2014 WL 6433486

High school student was injured when a vertically placed, metal divider fell from the door of the band hall and hit her on the head. Student sued. The school district filed a motion for summary judgment, which the circuit court granted after finding that the school district was immune from liability under the discretionary-function exception. Student appealed.

The Appeals Court reversed, holding that the school district created the dangerous condition by leaving the metal divider unsecured, thereby preventing summary judgment.

ZONING - NEW HAMPSHIRE

Dembiec v. Town of Holderness

Supreme Court of New Hampshire - November 13, 2014 - A.3d - 2014 WL 5859514

Landowners brought declaratory judgment action alleging that town was estopped from enforcing zoning ordinance in regard to landowners' property. The Superior Court dismissed petition. Landowners appealed.

The Supreme Court of New Hampshire held that zoning board lacked authority to grant relief requested, and thus landowners were not required to exhaust administrative remedies.

Zoning board lacked authority to grant relief requested by landowners in their declaratory judgment action, and therefore landowners were not required to exhaust administrative remedies before bringing declaratory judgment action asserting that town was estopped from enforcing one-dwellin--per-lot zoning ordinance with regard to landowners' property, after zoning compliance officer advised landowners that he would not issue certificate of compliance for newly-built home on property due to existence of other dwelling unit on property, even if action required resolution of factual issues. Applicable statutes did not confer general equitable jurisdiction upon zoning board, and landowners failed to meet requirements for either a variance or an equitable waiver from

ordinance's dimensional requirements.

ZONING - NORTH CAROLINA

Byrd v. Franklin County

Court of Appeals of North Carolina - November 18, 2014 - S.E.2d - 2014 WL 6435679

Landowners appealed from a superior court's order affirming a decision by Franklin County, made by its Board of Adjustment, determining that Landowners could not operate a shooting range on their property without a special use permit, requiring approval by the County's Board of Commissioners.

Landowners contended that the superior court erred in its interpretation of the Franklin County Unified Development Ordinance (UDO). Specifically, Landowners argued that the UDO does not regulate shooting ranges and, therefore, they did not need any approval from the County to operate a shooting range on the Property. Landowners also argued that the superior court erred by concluding that shooting ranges were regulated by the UDO as an Open Air Game.

The Court of Appeals agreed with the Landowners that the superior court erred in its interpretation of the UDO by concluding that the shooting range fell within the Open Air Games category in the Table. However, it disagreed with the Landowners that the UDO did not regulate shooting ranges at all, and that it did in fact prohibit shooting ranges anywhere in the County by providing that "[u]ses not specifically listed in the Table [ ] are prohibited." Accordingly, the court held that the superior court did not err in affirming the County's order that Landowners cease and desist from operating a shooting range on the Property.

BENEFITS - PENNSYLVANIA

Stermel v. W.C.A.B.

Commonwealth Court of Pennsylvania - November 13, 2014 - A.3d - 2014 WL 5849344

Police officer petitioned for review of an adjudication of the Workers' Compensation Appeal Board finding that city employer was entitled to recover a portion of the Heart and Lung benefits it paid officer from officer's third party tort claim settlement.

The Commonwealth Court held that:

- Employer did not waive issue of whether it was entitled to subrogation because Heart and Lung benefits constituted payments under Workers' Compensation Act; and
- Employer was not entitled to subrogation.

Motor Vehicle Financial Responsibility Law precluded officer from recovering the amount of benefits paid under the Heart and Lung Act from the responsible tortfeasor, and therefore, there could be no subrogation out of a tort recovery that did not include those benefits.

LIABILITY - PENNSYLVANIA

Zauflik v. Pennsbury School Dist.

Supreme Court of Pennsylvania - November 19, 2014 - A.3d - 2014 WL 6474931

Student who lost her leg when school district bus ran over her filed action against school district under Political Subdivision Tort Claims Act (PSTCA). District admitted liability. After jury awarded over $14 million in damages to student, the Court of Common Pleas amended verdict to $500,000 to reflect statutory cap on damages and sanctioned district $5,000 for not timely disclosing an excess insurance policy. Student appealed.

The Supreme Court of Pennsylvania held that:

- Classification created by statutory damages cap of PSTCA, distinguishing between plaintiffs suing public tortfeasors and those suing private defendants, did not violate equal protection;
- Damages cap of PSTCA did not violate open courts provision of State Constitution; and
- Damages cap in PSTCA did not violate constitutional right to jury trial of student.

BRIBERY - PENNSYLVANIA

Com. v. Moran

Supreme Court of Pennsylvania - November 20, 2014 - A.3d - 2014 WL 6491605

Defendant was convicted in the Court of Common Pleas of three counts of bribery in official and political matters. Defendant appealed.

The Supreme Court of Pennsylvania held that:

- Evidence was sufficient to support conviction for bribery in official and political matters;
- The trial court erred when it failed to instruct the jury that the default culpability requirement of reckless conduct applied to offense of bribery in official and political matters; and
- The error was harmless.

Defendant, a publicly elected official, stated to purchaser, who was purchasing land from town, that zoning approval could be expedited if purchaser paid an additional $500,000, the bribery statute did not require defendant to act with a corrupt motive, and it did not require that defendant solicit a benefit for himself, rather, benefit was defined to include situations where a public servant solicited money, gain, or an advantage for any other person or entity in whose welfare the servant was interested, and defendant sought to provide a benefit to town.

BONDS - RHODE ISLAND

Lifespan Corp. v. National Union Fire Ins. Co. of Pittsburgh, Pa.

United States District Court, D. Rhode Island - November 17, 2014 - F.Supp.3d - 2014 WL 6433361

In January of 1997, Lifespan and New England Medical Center (NEMC) executed an MOU proposing an affiliation in which Lifespan would become NEMC's corporate parent, and NEMC would in turn become one of the hospital subsidiaries in Lifespan's system.

At the conclusion of the litigation that ensued following the disaffiliation of the parties, NEMC and

the Massachusetts Attorney General obtained a judgment against Lifespan in the amount of $29,605,282.93 stemming from breaches of fiduciary duties and gross negligence in connection with the negotiation of NEMC's health insurer contracts and an interest rate swap transaction.

The interest rate swap was entered into in connection with the refinancing of $100 million in NEMC revenue bonds. Morgan Stanley served as underwriter of the refi. Lifespan's CFO had a close, longstanding personal friendship with the Morgan Stanley broker who proposed the swap. Lifespan's CFO approved the swap over the objection of NEMC's CFO. Lifespan's CFO neglected to disclose the relationship and was possibly motivated by his desire to join the broker's wine club. Spoiler alert: the swap goes bad.

Lifespan sued its D&O insurers after they refused to cover its losses.

The District Court held that the insurance policy's Unlawful Advantage Exclusion, Deliberate Fraudulent Acts Exclusion, Contractual Liability Exclusion, and Professional Services Exclusion were not applicable to Lifespan's claim against the policy.

The court then took up the issue of whether the Securities Exclusion – pertaining to claims related to the purchase or sale of securities – applied. The Securities Exclusion reads as follows:

"[t]he Insurer shall not be liable to make any payment for Loss in connection with a Claim made against an insured …

(m) alleging, arising out of, or in any way relating to any purchase or sale of securities by the Named Organization, Subsidiary or Affiliate or Claims brought by securities holders of the Organization in their capacity as such; provided, however, this exclusion shall not apply to the issuance by the Organization of tax exempt bond debt or Claims brought by tax exempt bond debt holders."

As the court noted, "Whether this exclusion applies depends on which law defines the term "security" and whether the interest rate swap falls within that definition."

The court began its analysis by holding that New York law governed the swap transaction due to the choice of law provision of the Master Agreement between Morgan Stanley and NEMC.

To be a security under Commercial Code § 8–102, an interest rate swap must fulfill the requirements of subparagraphs (i) (the transferability test), (ii) (the divisibility test) and (iii) (the functional test). The court concluded that the swap fulfilled none of the tests, much less all three. Consequently, the swap was not a security, and thus the Securities Exclusion did not apply.

The court also noted that the swap would not be a security for purposes of either Rhode Island, or Federal, law.

Lastly, the court found that even if the interest rate swap was a "arising out of, or in any way relating to any purchase or sale of securities," there would be coverage because of the tax-exempt bond debt exception to the exclusion. Exclusion 4(m) states that it "shall not apply to the issuance by the Organization of tax exempt bond debt or Claims brought by tax exempt bond debt holders." The interest rate swap, as described by the court in the underlying suit, was "a bond refinancing proposal" presented to NEMC by Morgan Stanley. Based on these facts from the underlying suit, Lifespan had met its burden to show that the interest rate swap's refinancing of the tax-exempt bond debt of non-profit NEMC was part of "the issuance … of tax-exempt bond debt." Consequently, even if the interest rate swap was "arising out of, or in any way relating to any purchase or sale of securities," there was insurance coverage because of the tax-exempt bond debt exception to Exclusion 4(m).

TAX - NEW YORK

Merry-Go-Round Playhouse, Inc. v. Assessor of City of Auburn

Court of Appeals of New York - November 18, 2014 - N.E.3d - 2014 N.Y. Slip Op. 07928

Non-profit corporation engaged in performing arts commenced proceeding for review of city's determination that two properties used to house staff and actors employed in corporation's seasonal theaters were not tax exempt. The Supreme Court, Cayuga County granted city's motion, treated as one for summary judgment, and denied corporation's cross-motion for summary judgment. Corporation appealed. The Supreme Court, Appellate Division, reversed. City appealed.

The Court of Appeals held that:

- Corporation was organized exclusively for tax exempt purpose, and
- Primary use of apartment buildings was in furtherance of corporation's primary purpose.

Court of Appeals holds that primary use of apartment buildings owned by non-profit corporation engaged in performing arts was in furtherance of corporation's primary purpose of education and promoting moral or mental improvement of area residents, as required for those properties to be granted tax-exempt status. Housing was used to attract talent that would otherwise look elsewhere, living arrangements fostered sense of community, and building residents spent significant portion of their off-hours in furtherance of theater-related pursuits.

INVERSE CONDEMNATION - FLORIDA

Hussey v. Collier County

District Court of Appeal of Florida, Second District - November 14, 2014 - So.3d - 2014 WL 5900018

Francis and Mary Hussey sued Collier County claiming that the County's amendment of its comprehensive future land use plan destroyed any reasonable economic use of their land, a large, undeveloped acreage in a rural area known as North Belle Meade. They sought compensation under the Bert J. Harris Private Property Rights Act, § 70.001, Fla. Stat. (2007) (the Harris Act), and on a theory of inverse condemnation.

The Circuit Court dismissed both causes of action with prejudice and the Husseys appealed.

The District Court of Appeal held that:

- The Husseys were not prohibited from seeking compensation under the Harris Act as the amendment to the County's comprehensive plan reclassified the land use category of their property; and
- The Husseys inverse condemnation claim for a regulatory taking was barred by the statute of limitations.

IMMUNITY - FLORIDA

Beach Community Bank v. City of Freeport

Supreme Court of Florida - November 13, 2014 - So.3d - 2014 WL 5856331

Bank that had issued loan to developer brought negligence action against city, alleging that city, in approving development of residential project, had failed to ensure that developer posted adequate security and failed to determine legitimacy of purported surety that had issued fraudulent or uncollectible letter of credit as bond for project. The Circuit Court denied city's motion to dismiss based on sovereign immunity. City petitioned for writ of certiorari. The District Court of Appeal granted petition. Bank appealed.

The Supreme Court of Florida held that:

- Certiorari review of non-final order denying motion to dismiss based on sovereign immunity was permitted, and
- City was entitled to sovereign immunity.

Action related to a discretionary function of government, rather than an operational function, and therefore city was entitled to sovereign immunity in negligence action brought by bank that had issued loan to real estate developer, alleging that city failed to ensure developer posted adequate security for completion of infrastructure and failed to conduct reasonable investigation to ascertain authenticity and adequacy of a letter of credit. City's decision that receipt of written guarantee of security was sufficient compliance with municipal code fell within municipality's inherent, fundamental policy-making authority.

LIABILITY - GEORGIA

City of Atlanta v. Kovalcik

Court of Appeals of Georgia - November 12, 2014 - S.E.2d - 2014 WL 5838538

Parents of passenger who died as a result of injuries sustained in rollover accident brought wrongful death action against city. The trial court denied city's motion for summary judgment, and it appealed.

The Court of Appeals held that:

- Even if city had no duty to provide working lighting at newly constructed intersection, absence of lighting could be considered as evidence on the issue of whether, at the time and place of the accident, the newly constructed intersection was being maintained in a reasonably safe condition, and
- Genuine issue of material fact as to whether city did assume, or should have assumed responsibility for lighting at newly constructed intersection precluded summary judgment on wrongful death action.

IMMUNITY - GEORGIA

Lightfoot v. Henry County School Dist.

United States Court of Appeals, Eleventh Circuit - November 10, 2014 - F.3d - 2014 WL 5803575

Public school teacher brought action against public school district and school board, alleging violations of the Family and Medical Leave Act (FMLA) and the Americans with Disabilities Act (ADA). The District Court granted summary judgment in favor of school district. Teacher appealed.

The Court of Appeals held that:

- School district and school board were not "arms of the state" of Georgia, and thus, were not entitled to Eleventh Amendment immunity, and
- Teacher could not establish ADA retaliation claim.

Public school district and school board were not "arms of the state" of Georgia, and thus, were not entitled to Eleventh Amendment immunity from liability, in terminated school employee's Family and Medical Leave Act (FMLA) and Americans with Disabilities Act (ADA) claims. Although the state set minimum standards for schools and teachers, and the state provided funding to school districts and approved school district budgets, Georgia law viewed school districts and boards as political subdivisions, distinct from the state, Georgia granted school districts significant amount of autonomy, under Georgia law, school districts were subject to control and management of county boards of education, not the state, school district could levy property taxes to raise funds, and state had no obligation to pay any judgment against district or board.

TAX - ILLINOIS

In re Kane County Collector

Appellate Court of Illinois, Second District - November 6, 2014 - N.E.3d - 2014 IL App (2d) 140265

On October 25, 2010, after a public tax sale, the County of Kane and the Kane County treasurer and collector issued to Purchaser pursuant to section 21–250 of the Code, tax sale certificates for 11 tracts of land.

Purchaser later filed a motion requesting a declaration of a sale in error and a refund of its tax sale purchases because the County issued it tax sale certificates that listed a total purchase amount without specifically itemizing that amount into taxes, special assessments, interest, and costs.

The court dismissed, finding that the statute contained no requirement that the County itemize.

EMPLOYMENT - LOUISIANA

Alexander v. City of Alexandria

Court of Appeal of Louisiana, Third Circuit - November 5, 2014 - So.3d - 2014-452 (La.App. 3 Cir. 11/5/14)

Firefighter, who was terminated after his drug test results came back as diluted, appealed his termination. The Municipal Fire & Police Service Board affirmed, and firefighter appealed. The District Court affirmed, and firefighter appealed.

The Court of Appeal held that fire department satisfied statutory minimum standards for terminating firefighter who was under investigation after he delayed drug test and drug test results came back as diluted.

Firefighter signed the Firefighters' Bill of Rights, which was a reproduction of the provisions of statute governing minimum standards during investigation, firefighter had a letter from fire chief that indicated the nature of the investigation, firefighter was provided with all required written

information, he used that information to provide a rebuttal document, he had the written notice with him while he was interrogated, he knew exactly what was occurring in relation to the investigation, and through the written notice and his copies of the bill of rights, he knew the identity of all persons present at each meeting with fire chief.

TAX - MASSACHUSETTS

Community Involved in Sustaining Agriculture, Inc. v. Board of Assessors of Deerfield

Appeals Court of Massachusetts - November 10, 2014 - Slip Copy - 2014 WL 5801445

Community Involved in Sustaining Agriculture, Inc. (CISA) appealed the decision of a single member of the Appellate Tax Board (board) that CISA was not exempt from property taxes. The board concluded that CISA was not a charitable organization as defined in the statute because its dominant purpose is to benefit farmers, and "any benefit derived by the public [is] incidental." On appeal, CISA argued that the board erred in construing the statute too narrowly.

The Appeals Court agreed, concluding that CISA more closely resembled a traditionally charitable organization than it did a commercial enterprise. "On the facts before it, the board erred in concluding that the primary beneficiaries of CISA's services are its members, and any public benefit is incidental. Rather, the facts establish that CISA's programs benefit an indefinite number of people, many of whom are not members, and any benefit to farmers 'is but the means adopted for this purpose.'"

TAX - MASSACHUSETTS

Cape Cod Shellfish & Seafood Co., Inc. v. City of Boston

Appeals Court of Massachusetts, Suffolk - November 12, 2014 - N.E.3d - 2013 WL 9868281

Lessees brought declaratory judgment action against city seeking determination that lessees were not liable for real estate taxes on properties. The Superior Court granted summary judgment in favor of city. Lessees appealed.

The Appeals Court held that lessees who remained on Massachusetts Port Authority property after lease terms expired remained liable as lessees for real estate taxes.

Business lessees who remained on property owned by Massachusetts Port Authority after end of lease terms constituted lessees, and therefore continued to remain liable as lessees for real estate taxes assessed during holdover period, where holdover provision in the leases set out the conditions of a continued tenancy after expiration of the lease term, and expressly stated that any holding over was subject to the applicable provisions of the lease.

TAX - PENNSYLVANIA

Reading Housing Authority v. Board of Assessment Appeals of Berks County

Commonwealth Court of Pennsylvania - November 12, 2014 - A.3d - 2014 WL 5839919

The Court of Common Pleas of Berks County held that the subject property, an apartment building owned by the Reading Housing Authority (RHA), which houses a mix of 20% low-income and 80% market-rate tenants, was immune from real estate tax. The Board of Assessment Appeals of Berks County appealed.

The Commonwealth Court affirmed, holding that the RHA, which undertook the mixed-use project at issue pursuant to Section 10.1 of the Housing Authorities Law, was using the property for an essential public and governmental purpose such that it is not taxable.

LIABILITY - RHODE ISLAND

Berman v. Sitrin

Supreme Court of Rhode Island - November 10, 2014 - A.3d - 2014 WL 5818980

Tourist, who was severely injured in fall from public walkway along oceanside cliff, brought negligence action against state and other defendants.

The Supreme Court of Rhode Island held that:

- Trial court acted within its discretion in denying motion for change of venue;
- Trial court acted within its discretion in taking jury to view walkway;
- Trial court's determinations during trial did not violate law of case doctrine;
- Any error in admitting irrelevant evidence regarding ownership of land was not prejudicial;
- Trial court acted within its discretion in excluding letter from college president regarding death of student from fall;
- Trial court's instruction regarding city's liability insurance did not violate rule barring admission of evidence of such insurance; and
- Trial court acted within its discretion in denying motion to vacate judgment based on claims of newly discovered evidence.

EMINENT DOMAIN - TEXAS

City of Blue Mound v. Southwest Water Co.

Court of Appeals of Texas, Fort Worth - November 13, 2014 - S.W.3d - 2014 WL 5878039

City filed condemnation proceedings for the acquisition of the real property and fixtures of the Blue Mound Water and Wastewater System – a privately owned and operated water and wastewater system that was currently serving residents of the City. The City's condemnation petition alleged that the City sought to exercise its powers of eminent domain under Texas Local Government Code section 251.001 and Texas Property Code chapter 21 to acquire the entire water and wastewater system.

The Court of Appeals held that no statutory procedures exist permitting a municipality's condemnation in a Texas district court of a privately-owned public utility as a going concern, affirming the trial court's grant of summary judgment against the City.

MUNICIPAL ORDINANCE - WASHINGTON

Morawek v. City of Bonney Lake

Court of Appeals of Washington, Division 2 - November 13, 2014 - P.3d - 2014 WL 6061489

Dog owner appealed hearing examiner's dangerous dog designation. The Superior Court upheld the dangerous dog designation, and dog owner appealed.

The Court of Appeals held that hearing examiner's finding that owner's dog killed neighbor's cat without provocation was not supported by substantial evidence, as required to uphold dangerous dog designation.

Hearing examiner's finding that owner's dog killed neighbor's cat without provocation was not supported by substantial evidence, as required to uphold dangerous dog designation, even though the killing occurred on neighbor's property, as required to satisfy the "location" element of the dangerous dog definition. Nobody saw how the fight between dog and cat began, the cat roamed freely and passed through dog owner's front yard regularly, dog had been trained to stay on owner's property, and it was possible cat had provoked the attack by scratching dog's nose when dog stuck it under a bush on owner's property.

EMPLOYMENT - ALABAMA

Wright v. City of Mobile

Court of Civil Appeals of Alabama - October 24, 2014 - So.3d - 2014 WL 5394526

Police dispatcher sought judicial review of city's decision to terminate her for disciplinary reasons. The Circuit Court upheld city's decision to discipline dispatcher, but determined that she should only have been suspended. Dispatcher appealed.

The Court of Civil Appeals held that:

- Trial court did not have jurisdiction to consider dispatcher's constitutional arguments, and
- Failure of mayor to attend hearing did not void dispatcher's discipline.

County personnel board rule authorizing pre-disciplinary hearings did not require official with decision-making power to attend city police dispatcher's pre-disciplinary hearing and thus, failure of mayor to attend hearing did not void dispatcher's discipline. Rule, in referring to the official, or the designated representative of the official charged with responsibility of making disciplinary decision, specifically authorized pre-disciplinary hearings to be conducted by either the official charged with making the disciplinary decision or designated representative of that official, and fact that mayor was identified as designated appointing authority did not amount to declaration that he was designated representative.

BANKRUPTCY - ALABAMA

PNC Bank, N.A. v. Presbyterian Retirement Corp., Inc.

United States District Court, S.D. Alabama, Southern Division - November 4, 2014 - Slip Copy - 2014 WL 5596646

Presbyterian Retirement operates Westminster Village, a continuing care retirement community. Presbyterian defaulted on its obligations, which included loans from PNC Bank and revenue bonds

guaranteed by Infirmary Health System. Infirmary Health made good on the guarantee, paying out $13.5 million to the bondholders. Presbyterian is contractually obligated to reimburse Infirmary Health. Both PNC Bank and Infirmary Health hold security interests in Westminster Village.

PNC Bank commenced this lawsuit against Presbyterian, seeking expedited appointment of a receiver to manage Westminster Village pending a contemplated foreclosure sale that PNC Bank has noticed for March 2015. PNC did not name Infirmary Health as a party.

Infirmary Health moved to intervene, expressing profound disagreement with PNC Bank's proposed strategy of appointing a receiver to manage Westminster Village. Infirmary Health asserted that the pathway charted by PNC Bank would impair the value of the facility rather than preserve it, thereby damaging Infirmary Health's interests in such collateral.

The District Court granted Infirmary Health's motion to intervene, finding that Infirmary Health had met its burden of showing that existing parties and any duly appointed receiver might not adequately represent its interests.

IMMUNITY - ALABAMA

Walker v. Jefferson County Bd. of Educ.

United States Court of Appeals, Eleventh Circuit - November 4, 2014 - F.3d - 2014 WL 5575607

In two unrelated cases, school employees brought actions against county boards of education, challenging employment decisions. Boards moved to dismiss on Eleventh Amendment immunity grounds. In one case, the United States District Court denied motion, while, in the other, the District Court, granted motion. Parties appealed and appeals were consolidated.

The Court of Appeals held that school boards in Alabama counties were not arms or alter egos of state, and thus did not have Eleventh Amendment immunity.

IMMUNITY - CONNECTICUT

Haynes v. City of Middletown

Supreme Court of Connecticut - November 4, 2014 - A.3d - 314 Conn. 303

Student's mother, on her own behalf and as student's parent and next friend, brought action against city, seeking damages for injuries student had allegedly sustained when classmate at high school pushed him into broken locker. After jury returned verdict in favor of plaintiffs, the Superior Court granted city's motion to set aside verdict and rendered judgment in favor of city on governmental immunity grounds. Plaintiffs appealed.

The Supreme Court of Connecticut held that:

- Issue of whether broken locker with exposed jagged edge in high school boys' locker room created an imminent risk of harm, as required for student who was pushed into locker during horseplay to establish exception to city's special defense of governmental immunity, was for the jury, and
- The proper standard for determining whether a harm was imminent, as required to establish imminent harm exception to the general rule of governmental immunity, is whether it was

apparent to the municipal defendant that the dangerous condition was so likely to cause harm that the defendant had a clear and unequivocal duty to act immediately to prevent the harm, overruling *Burns v. Board of Education*, 228 Conn. 640, 638 A.2d 1, and *Purzycki v. Fairfield*, 244 Conn. 101, 708 A.2d 937.

CONTRACTS - GEORGIA

Effingham County v. Roach

Court of Appeals of Georgia - October 30, 2014 - S.E.2d - 2014 WL 5471744

Developer, through his bankruptcy trustee, filed breach of contract action arising out of county's failure to bring water and sewer utilities to property. The trial court denied county's motion for summary judgment. County appealed.

The Court of Appeals held that:

- Even if developer impact fee provision was invalid, provision was severable and remainder of contract was enforceable;
- County waived sovereign immunity over breach of contract action; and
- Genuine issues of material fact precluded summary judgment.

Even if impact fee provision in contract between developer and county was invalid, provision was severable, and thus the remainder of contract was enforceable, including county's obligation to provide water and sewer utilities to property. Contract specifically provided that invalid or unenforceable parts of contract were severable, contract contained several promises by each party other than the promise to pay impact fees, and those other obligations were severable.

County waived sovereign immunity over developer's breach of contract claim alleging county breached obligation to bring water and sewer utilities to property, where developer's action was based on enforceable contract.

Genuine issue of material fact existed as to whether no-damages-for-delay clause in contract between county and developer precluded developer's claim for damages resulting from delay due to county's protracted discussions with city about which governmental entity was going to provide water and sewer utilities to property, thus precluding summary judgment on developer's breach of contract claim against county.

ANNEXATION - ILLINOIS

Union Drainage Dist. No. 1 of Towns of Pana, Assumption, Christian County v. Wilhour

Appellate Court of Illinois, Fifth District - October 31, 2014 - Not Reported in N.E.3d - 2014 IL App (5th) 130440-U

Drainage District filed a petition to annex certain tracts of land and, thereafter, to assess the parcels pursuant to an annual drainage district assessment of $9 per acre. District also sought to assess certain lands currently located in the drainage district at $9 per acre. The circuit court of Christian County denied District's request to annex the tracts of land and further ruled that those lands already located within the district could not be assessed at $9 per acre.

The Appeals Court affirmed, holding that the Drainage District failed to establish what benefit the Objectors' lands would receive from being annexed and assessed.

SCHOOLS - LOUISIANA

Oliver v. Orleans Parish School Bd.

Supreme Court of Louisiana - October 31, 2014 - So.3d - 2014-0329 (La. 10/31/14)

Employees of parish school board who were terminated by reduction in force (RIF) after failing schools in parish were transferred to Recovery School District (RSD) filed putative class action against school board, state, Louisiana Department of Education (LDOE), and State Board of Elementary and Secondary Education for wrongful termination and also asserted claim against LDOE for tortious interference with employment contracts.

The Supreme Court of Louisiana held that:

- Global settlement dismissing with prejudice two actions against school board was valid, final judgment, for res judicata purposes;
- Causes of action arose out of transaction or occurrence that was subject matter of prior lawsuits and arbitrations;
- Causes of action existed at time of final judgment in prior action;
- Identity of parties was the same;
- As a matter of first impression, that former employees only received minimal consideration in settlement in prior action was not "exceptional circumstance" that would have barred application of res judicata;
- As a matter of first impression, that class action was not particularly dismissed in global settlement was not "exceptional circumstance" that would have barred application of res judicata; and
- School board's method of attempting to rehire teachers following Hurricane Katrina was sufficient to satisfy due process.

ZONING - MAINE

Town of Madawaska v. Cayer

Supreme Judicial Court of Maine - November 4, 2014 - A.3d - 2014 ME 121

Property owners filed a special motion to dismiss town's amended complaint alleging zoning violations pursuant to the anti-SLAPP (Strategic Lawsuit Against Public Participation) statute. The Superior Court denied motion. Owners appealed.

The Supreme Judicial Court of Maine held that town's zoning enforcement action against property owners for a violation of shoreland zoning ordinance was not an appropriate occasion for application of the anti-SLAPP statute.

Nothing in the anti-SLAPP statute or its history expressed or implied that it would protect property owners from the town's efforts to enforce an ordinance limiting the number of trailers that they were permitted to maintain on their land.

MUNICIPAL ORDINANCE - MAINE

Dubois Livestock, Inc. v. Town of Arundel

Supreme Judicial Court of Maine - November 4, 2014 - A.3d - 2014 ME 122

Following town's code enforcement officer's notice of violation of agricultural composting operator's conditional use permit, operator appealed to town's Zoning Board of Appeals. Board denied his appeal and upheld notice of violation. Operator challenged board's decision and the Superior Court affirmed Board's decision. Operator appealed.

The Supreme Judicial Court of Maine held that:

- Agriculture Protection Act did not preempt town's solid waste facilities ordinance, and
- Solid Waste Act did not preempt town's solid waste facilities ordinance.

Even if agricultural composting operator was a "farm" for purposes of Agriculture Protection Act, producing agricultural products, as defined by the Act, on site, the Act did not preempt town's solid waste facilities zoning ordinance as applied to operator. Although Act prohibited a municipality from determining that a farm's method of operation violated a local ordinance if the farm had used best management practices, operator made no showing that it was following best practices when it violated the ordinance by failing to report its annual intake to town or to allow town representatives to inspect its premises.

Solid Waste Act did not preempt town's solid waste facilities zoning ordinance as applied to agricultural composting operator, where the standards in the ordinance were not stricter than those in the Act, the ordinance's definitions were not inconsistent with those in the Act, and the ordinance's provisions did not frustrate the purpose of the Act.

TAX - OHIO

Olentangy Local Schools Bd. of Edn. v. Delaware Cty. Bd. of Revision

Supreme Court of Ohio - October 28, 2014 - N.E.3d - 2014 -Ohio- 4723

School board sought review of decision of the board of tax appeals that auction sale price of property was the best evidence of its true value for tax purposes.

The Supreme Court of Ohio held that:

- Presumption that auction price does not represent value of property may be rebutted by evidence showing that the sale occurred at arm's length between typically motivated parties, and
- Auction sale of foreclosed property was voluntary and occurred at arm's length such that auction price represented value of property for tax purposes.

ZONING - OHIO

SP9 Ent. Trust v. Brauen

Court of Appeals of Ohio, Third District, Allen County - November 3, 2014 - Slip Copy - 2014 -Ohio- 4870

Following receipt of notice of violation (NOV) of zoning resolution related to operation of rolloff business on property zoned for general business uses, operator of rolloff business and owner of property on which business was operated filed declaratory judgment action against township, claiming that business's use of property was permitted use under resolution, and in the alternative, that business's operation on property was nonconforming use for which no permit was necessary. The Court of Common Pleas denied township summary judgment, and following bench trial, dismissed complaint. Operator and owner appealed, and township cross-appealed.

The Court of Appeals held that:

- Rules of Civil Procedure were not applicable to service of NOV; but
- Error in applying Rules was harmless;
- Business operator and property owner had standing to appeal NOV to board of zoning appeals (BZA);
- BZA had ability to provide relief sought by business operator and property owner in declaratory judgment action; and
- Cross-appeal was improper.

ZONING - OHIO

Cleveland Clinic Found. v. Cleveland Bd. of Zoning Appeals

Supreme Court of Ohio - November 5, 2014 - N.E.3d - 2014 -Ohio- 4809

Hospital landowner petitioned for judicial review of a decision by city board of zoning appeals (BZA) denying hospital's application to construct a helipad because proposed helipad was prohibited use for local retail business district. The Court of Common Pleas reversed. Board appealed. The Court of Appeals reversed. Hospital sought further review, which was granted.

The Supreme Court of Ohio held that:

- Appellate court was only permitted to reverse decision of court of common pleas reviewing zoning decision if common pleas court decision was unsupported by substantial, reliable, and probative evidence on whole record, and
- Helipad was permissible accessory use of hospital.

Helipad was accessory use of hospital that was permitted in city's multi-family district, and therefore was permitted use in area zoned local retail business district, where zoning ordinances contained no express prohibition on helipads, every other hospital in city had a helipad, and 88% of hospitals in the metropolitan area had helipads.

BENEFITS - OREGON

Miller v. City of Portland

Supreme Court of Oregon - October 30, 2014 - P.3d - 2014 WL 5474513

City firefighters who had suffered disabling injuries at work brought breach of contract action against city after city discontinued disability benefits. The Circuit Court granted summary judgment to city. Firefighters appealed.

The Supreme Court of Oregon held that:

- A firefighter's "required duties," as used in city charter provision allowing for disability benefits to a firefighter who is unable to perform required duties due to an employment-related injury or illness, refers to the core duties, that is, those that are necessary or essential, of whatever job classification the firefighter held at time he became disabled, and
- Court would decline to apply exhaustion doctrine to particular firefighter plaintiff.

A firefighter's "required duties," as used in city charter provision allowing for disability benefits to a firefighter who is unable to perform required duties due to an employment-related injury or illness, refers to the core duties, that is, those that are necessary or essential, of whatever job classification the firefighter held at time he became disabled, not to whatever subset of duties within firefighter's former job classifications that city chooses to require after firefighter becomes disabled.

IMMUNITY - VIRGINIA

McBride v. Bennett

Supreme Court of Virginia - October 31, 2014 - S.E.2d - 2014 WL 5487632

Bicyclist's estate brought negligence action against police officers after police vehicle struck and killed bicyclist. The Circuit Court granted summary judgment to officers. Estate appealed.

The Supreme Court of Virginia held that police officers exercised their judgment and discretion while driving police vehicle in an emergency manner in response to dispatch report of domestic disturbance, as would trigger application of sovereign immunity.

EMPLOYMENT - VIRGINIA

Payne v. Fairfax County School Bd.

Supreme Court of Virginia - October 31, 2014 - S.E.2d - 2014 WL 5487610

Food and nutrition services manager at middle school, who was suspended for allegedly violating public schools' regulations, brought declaratory judgment action, seeking declaration that statute, governing grounds and procedure for suspensions, required school boards to conduct a hearing prior to suspending an employee without pay. The Circuit Court granted the school board's motion for summary judgment, and manager appealed.

The Supreme Court of Virginia held that:

- Any due process rights manager might have had as a non-teaching employee were fulfilled by the grievance process, and
- Education statute, governing grounds and procedure for suspensions, does not require a school board to hold a hearing before suspending a non-teaching employee without pay for fewer than five days.

EMPLOYMENT - WASHINGTON

City of Medina v. Skinner

Court of Appeals of Washington, Division 1 - November 3, 2014 - P.3d - 2014 WL 5571310

City sought judicial review of city civil service commission order modifying police officer's discipline and award of back pay as a remedy. The Superior Court granted city's application for a statutory writ of review, and officer appealed.

The Court of Appeals held that:

- Statutory writ of certiorari was not available to city as means of seeking judicial review of decision of city civil service commission, and
- The commission acted illegally to the extent it purported to retain jurisdiction over employment dispute to award back pay to police officer.

Statutory writ of certiorari was not available to city as means of seeking superior court's review of decision of city civil service commission, in which commission found that city did not have cause to terminate police officer, and instead of termination, ordered 60 days without pay, demotion to patrol officer, and back pay. The legislature created a procedure for appeal that gave only the disciplined police officer the right to appeal, and did not provide the city with a right to appeal the commission's decision.

City civil service commission acted illegally to the extent it purported to retain jurisdiction over employment dispute to award back pay to police officer, after the commission suspended police officer in lieu of removal, set a 60-day period of suspension without pay, and demoted officer to patrol officer. The commission only had the authority granted by statute, which provided it with the authority to affirm, modify, or reverse discipline, but which did not authorize it to award damages or other remedies such as back pay, and if the city does not honor its compensation obligations to officer, his remedy is in court, not before the commission.

MUNICIPAL ORDINANCE - WASHINGTON

State, Dept. of Ecology v. Wahkiakum County

Court of Appeals of Washington, Division 2 - November 4, 2014 - P.3d - 2014 WL 5652318

Department of Ecology brought action against county, seeking injunction and declaratory judgment alleging that county's ordinance banning use of most common class of biosolids within county conflicted with state law and, thus, violated state constitution. The Superior Court granted summary judgment in favor of county. Department appealed.

The Court of Appeals held that:

- County ordinance banning use of biosolids prohibited what state law allowed;
- County ordinance banning use of biosolids thwarted legislative purpose of state law; and
- County ordinance banning use of biosolids exercised power legislature did not confer on local governments.

PENSIONS - FLORIDA

Brown v. Denton

District Court of Appeal of Florida, First District - October 21, 2014 - So.3d - 39 Fla. L. Weekly D2203

In February 2013, the Jacksonville Association of Fire Fighters filed suit against the City of Jacksonville and the Jacksonville Police and Fire Pension Fund Board of Trustees ("Board") in District Court.

All parties voluntarily sought mediation in the federal case. For the next few months, several closed-door mediation sessions were held at a stipulated mediator's office. No party informed the federal court that the negotiations would entail collective bargaining or that the provisions of the Florida Statutes and Constitution may require such collective bargaining to be conducted in public. There was no public notice of the mediation sessions nor was any transcript made of the proceedings.

The end result of the private mediation sessions was a Mediation Settlement Agreement (MSA), which, on its face, changed the specific, defined pension benefits of City employees in the Unions. The parties were to use their best efforts to obtain approval from their respected officials necessary for implementation of the MSA.

Newspaper editor brought action for declaratory and injunctive relief, alleging that closed-door federal mediation sessions violated the state Sunshine Law.

The circuit court found that the Board acted as the Unions' representative and bargaining agent in the negotiations or the Unions themselves participated to some degree in negotiating the MSA. As such, the circuit court held that the federal mediation sessions violated the Sunshine Law, voided the MSA ab initio, and enjoined "the parties from conducting further proceedings entailing collective bargaining of the police officer and firefighter pension funds in private outside of the sunshine."

The District Court of Appeal affirmed.

MUNICIPAL ORDINANCE - FLORIDA

Anderson v. City of St. Pete Beach

District Court of Appeal of Florida, Second District - October 15, 2014 - So.3d - 39 Fla. L. Weekly D2180

Challenger brought action against city, alleging amendment to city's comprehensive plan was void due to failure to publish notice, and that city violated the Sunshine Law. The Circuit Court rejected the challenge to the amendment, and granted summary judgment in favor of city on challenger's Sunshine Law claim. Challenger appealed.

The District Court of Appeal held that:

- Commission's failure to comply with the notice provisions of statute that governed adoption of a municipal ordinance rendered ordinance that purported to amend city's comprehensive plan null and void;
- Commission's discussions at a series of seven closed shade meetings exceeded the scope of the Sunshine Law exemption for shade meetings; and
- The doctrine of cure did not apply to reinstate or cure city commission's violation of the Sunshine Law.

LIABILITY - GEORGIA

Strauss v. City of Lilburn

Court of Appeals of Georgia - October 24, 2014 - S.E.2d - 2014 WL 5394151

Pedestrian brought action against city seeking damages stemming from trip and fall on city sidewalk. The trial court granted summary judgment in favor of city. Pedestrian appealed.

The Court of Appeals held that genuine issue of material fact existed regarding whether city had superior knowledge of hazard caused by two-tiered sidewalk, precluding summary judgment.

"I knew I was coming up to the steps, so I paid attention. I just didn't see the step there…. The next thing, I just sort of-I was going-I just shot out like that, and my head was going towards the car that was parked there, and I thought I was going to hit the car head-on. And then I just splatted on the sidewalk."

SCHOOLS - LOUISIANA

Louisiana Federation of Teachers, et. al. v. State of Louisiana

Supreme Court of Louisiana - October 24, 2014 - So.3d - 2014-0691 (La. 10/24/14)

In 2012, the Louisiana Legislature passed House Bill 974, which was enacted as Act 1 of 2012 ("Act 1"). Act 1 is a comprehensive repeal and reenactment of the State's education laws. Act 1 amended and reenacted nine statutes, enacted two statutes, and repealed twenty-nine statutes.

Teachers filed a petition for declaratory judgment against the State, alleging that Act 1 was passed in violation of the "single object" requirement of La. Const. Art. III, § 15(A) and (C).

The Supreme Court of Louisiana held that Act 1 does not violate the single object requirement of La. Const. art. III, § 15(A).

The court found that analysis of the statutory provisions encompassed by Act 1 led to the conclusion that the main general purpose of Act 1 was improving elementary and secondary education through tenure reform and performance standards based on effectiveness and that all of the provisions of Act 1 were naturally connected with, and incidental or germane to the unifying object of improving education through tenure reform and performance standards based on effectiveness.

SPECIAL ASSESSMENTS - MICHIGAN

Landon v. City of Flint

Court of Appeals of Michigan - October 21, 2014 - Not Reported in N.W.2d - 2014 WL 5364172

In 2012, Flint's emergency manager established a special assessment district to help pay for improvements to the street-lighting system in the city. The assessment was spread equally among all parcels in the city, for a total cost of $66.05 per parcel.

Petitioner contested the special assessment on his properties, and initiated this suit before the Tax Tribunal. He argued that the special assessment was unlawful because: (1) it did not raise the

market value of his property and was not proportional to the value of the services provided; (2) it did not constitute an "improvement" as required by statute; and (3) it included a special assessment for garbage collection, despite the fact that it professed to only raise funds for streetlight maintenance. Respondent stated that: (1) petitioner failed to provide sufficient evidence to overcome the statutory presumption that special assessment districts are valid; (2) the special assessment was consistent with the law; and (3) Flint's garbage disposal services were paid for by a fee imposed on landowners within the city, not the special assessment district, and petitioner offered no evidence to show otherwise.

The Tribunal agreed with respondent and dismissed petitioner's case. In a written opinion, it held that: (1) petitioner's case involved only one parcel, as he failed to pay the filing fee for the other parcels he owned, and thus did not invoke the Tribunal's jurisdiction over those parcels; (2) petitioner did not establish that the cost of the assessment was disproportionate to its benefit; (3) MCL 117.4d(1)(a) allowed the city to levy a special assessment to cover the operational and maintenance costs of street lighting; and (4) the garbage collection service was provided by a fee, not by the instant special assessment district.

The Court of Appeals affirmed.

PROPERTY - NEW HAMPSHIRE

Lynch v. Town of Pelham

Supreme Court of New Hampshire - October 24, 2014 - A.3d - 2014 WL 5395008

Former owner of property purchased by town brought action against town for declaratory and injunctive relief, asserting that town violated covenants in deed conveying real property to town. The Superior Court granted town's motion to dismiss. Former owner appealed.

The Supreme Court of New Hampshire held that:

- Covenants relating to aesthetics of buildings that town would construct on property were in gross, not appurtenant;
- Section of Restatement (Third) of Property: Servitudes providing that an entity that holds the benefit of a covenant in gross can enforce it if it can establish a legitimate interest in enforcement would be adopted; and
- Former owner had legitimate interest in enforcing deed's in gross covenants and thus had standing to bring action.

PUBLIC UTILITIES - NEW JERSEY

New Jersey Natural Gas Co. v. Borough of Red Bank

Superior Court of New Jersey, Appellate Division - October 28, 2014 - A.3d - 2014 WL 5431175

Natural gas utility brought action against borough and special improvement district, seeking injunctive and declaratory relief from borough's refusal to issue construction permits so that utility could remove underground gas regulators and replace them with above-ground regulators. The Superior Court entered summary judgment in favor of utility. Borough and district appealed.

The Superior Court, Appellate Division, held that:

- Statute that granted gas utilities the power to lay conductors and install related facilities for conducting gas through municipality covered above-ground gas regulator;
- Utility's decision to install regulators through public sidewalks did not comply with its obligation to restore street or public place, such as a sidewalk, under borough resolution; and
- Utility's regulators were not exempt from regulation by borough.

SCHOOLS - NEW MEXICO

Moses v. Skandera

Court of Appeals of New Mexico - October 27, 2014 - P.3d - 2014 WL 5454834

Action was brought against State of New Mexico Public Education Department, challenging constitutionality of provisions of Instructional Material law (IML), providing for the purchase and distribution of instructional material to private schools. The District Court entered summary judgment in favor of State. Plaintiffs appealed.

The Court of Appeals held that:

- IML did not violate state constitutional provision prohibiting the use of state funds for the support of sectarian, denominational, and private schools;
- IML did not violate state constitutional Anti–Donation Clause;
- IML did not violate state constitutional provision prohibiting appropriations for educational purposes to any institution not under the absolute control of the state; and
- IML did not violate federal or state constitutional provisions prohibiting the support of any religious sect or denomination.

AUCTION RATE SECURITIES - NEW YORK

Rotz v. Van Kampen Asset Management

Supreme Court, New York County, New York - October 22, 2014 - Slip Copy - 45 Misc.3d 1211(A) - 2014 N.Y. Slip Op. 51537(U)

Shareholders in investment funds organized as business trusts under Massachusetts law (the "Trusts") brought shareholder derivative suits alleging that the Trusts and the Trusts' former investment advisers ("Adviser") breached their fiduciary duties and wasted corporate assets by causing the trusts to redeem auction rate preferred securities ("ARPS") at their liquidation value, at a time when the market valued the shares at a lower rate. Plaintiffs further alleged that Morgan Stanley, the parent company of the former investment advisers, aided and abetted the breaches.

These liquidations occurred in 2008 when the ARS market dried up. The Trusts, with the approval of their boards, used tender option bonds (TOBs) or debt financing to redeem the ARPS. Plaintiffs allege that TOBs and debt financing increased the costs and the risks to the Trusts without concomitant benefit. Specifically, TOBs forced the Trusts to sell lower grade bonds into a distressed market and to hold municipal bonds, which paid a lower interest rate and prevented the Trusts from making other investments which would have been more profitable. TOBs also required the Trusts to post more assets to satisfy the debt coverage ratio than the ARPS did and cost additional fees. Plaintiffs alleged that the Trusts could have marked the ARPS down below their liquidation value

and redeemed them at market value at much lower cost to investors.

Plaintiffs contended that the Adviser gave priority to their own interests in determining to redeem the ARPS at liquidation value and, thus, breached their fiduciary duties to the common shareholders. Plaintiffs alleged that the redemption of the ARPS at liquidation value benefited ARPS holders—largely institutional investors and high net worth individuals, and broker-dealers—and that the Adviser sought to preserve their business relationships with those investors to the detriment of the shareholders of the Trusts.

In April 2010, plaintiffs sent letters to the Trusts demanding that the boards "take action" against the Adviser and the officers of the Trusts for alleged breaches of fiduciary duty, aiding and abetting of those breaches, and corporate waste.

The Trusts responded by forming special litigation committees ("SLCs") comprised of independent trustees. The SLCs engaged independent counsel, conducted lengthy investigations, and produced voluminous reports concluding that it was not in the best interests of the Trusts to pursue litigation and recommending that the Trusts move to dismiss the pending lawsuits.

All defendants contended that, because the trustees were independent and conducted an investigation through the SLCs, the decision not to prosecute this action was protected by the business judgment rule, and the mandatory language of MBCA Section 7.44 compelled dismissal of this action.

Plaintiffs contended that the SLCs' investigations and reports, upon which the determination not to proceed with litigation was indisputably based, were not undertaken in good faith after a reasonable inquiry "because the evidence overwhelmingly disproves the SLC's conclusions."

The court noted that where a majority of independent trustees reject a plaintiff's demand to pursue derivative litigation based on the report of an independent SLC, the business judgment rule applies to the decisions of both the trustees and the SLCs.

The court held that plaintiffs' claims must be dismissed. Applying the burden shifting standards of MBCA section 7.44 and the business judgment rule in reviewing the SLCs' investigations and the independent trustees' determinations to reject plaintiffs' demands based the recommendations, the court holds that plaintiffs had failed to rebut the Trusts' showing and to demonstrate that the independent trustees' determinations were not made in good faith after reasonable inquiry. The investigation process was reasonably comprehensive, and the SLCs' findings, which the trustees' adopted, were not illogical and could be attributed to a rational business judgment.

The court noted that the plaintiffs misconstrued the standard under the Massachusetts statute for judicial review of the trustees' determinations. Plaintiffs contended repeatedly that the findings and recommendations of the SLCs were against the weight of the evidence. However, it is not the courts' role to weigh the evidence or assess the correctness of the SLCs' or trustees' reasoning, where, as here, the decision of disinterested trustees, based on a comprehensive report of a disinterested special litigation committee, is protected by the business judgment rule.

LIABILITY - NEW YORK

Brunero v. City of New York Dept. of Parks and Recreation

Supreme Court, Appellate Division, First Department, New York - October 30, 2014 - N.Y.S.2d - 2014 N.Y. Slip Op. 07444

The City of New York and the Central Park Conservancy entered into the 2006 Central Park Agreement, a contract between the City and the Conservancy, a nonprofit organization, in which they acknowledged that they had formed an effective "public/private partnership." Under the Agreement, the Conservancy is required to provide specified maintenance services in Central Park to the "reasonable satisfaction" of the City, and the City is broadly required to indemnify the Conservancy from liability.

In a negligence action against the City, plaintiff moved for leave to amend the complaint to add the Conservancy as a defendant, arguing that it was united in interest with the City. Since the statute of limitations had run as to the Conservancy, plaintiff argued that the relation back doctrine applied.

The Appeals Court held that:

- The City was vicariously liable for the Conservancy's negligence in the course of providing maintenance in Central Park by virtue of the contractual indemnification provision, and the parties were thus united in interest.
- Since the City has a nondelegable duty to maintain Central Park, it was vicariously liable for negligence committed by the contractor in the course of fulfilling that duty.
- However, the City was correct that its interests were not united with those of the Conservancy with respect to the proposed gross negligence claim, and leave to assert that claim against the Conservancy was therefore denied.

BONDS - OHIO

Kozel v. Andrews

Court of Appeals of Ohio, Fifth District, Tuscarawas County - October 28, 2014 - Slip Copy - 2014 -Ohio- 4793

In October, 2010, Twin City Hospital – a small, rural acute-care facility – filed Chapter 11 Bankruptcy. The Bankruptcy Trustee subsequently sued Twin City's former board members, alleging that they had acted improperly by issuing approximately $17.3 million in tax exempt revenue bonds to fund new construction and renovations to Twin City and to refinance the hospital's outstanding long-term obligations while its finances were in poor condition.

The trial court entered summary judgment in favor of the defendants. Trustee appealed, claiming that issues of fact existed that should be resolved by a jury. Trustee argued that the trial court's finding that defendants proved their case by a preponderance of the evidence precluded summary judgment and that it was error for the trial court to factor the trial standard of clear and convincing evidence into its decision to grant defendants' motion for summary judgment.

The Court of Appeals held that:

- The trial court did not err in considering the "clear and convincing" burden of proof at trial.
- Trustee was required to present sufficient evidence that members of the board consciously disregarded the risk that approval of the capital project in this matter would result in injury/damage to the hospital and that Trustee failed to satisfy this burden.
- Trustee failed to demonstrate a genuine issue of material fact that would require submitting any of his claims to a jury.

ZONING - SOUTH DAKOTA

In re Conditional Use Permit No. 13-08

Supreme Court of South Dakota - October 29, 2014 - N.W.2d - 2014 S.D. 75

Landowners of property across the road from proposed agronomy facility appealed approval by county commission of applicant's conditional use permit for the facility. The Circuit Court affirmed. Landowners appealed.

The Supreme Court of South Dakota held that:

- Commission's reliance on zoning ordinance criteria was not arbitrary and capricious, and
- Landowners did not meet their burden to prove that commissioner's pre-hearing investigation and ex parte communication with applicant so that the proceeding violated the landowners' due process rights.

BALLOT INITIATIVES - UTAH

Cook v. Bell

Supreme Court of Utah - October 24, 2014 - P.3d - 2014 UT 46

Initiative proponents brought declaratory judgment action against Lieutenant Governor and County Clerk, alleging amended provisions for placing a local initiative on the ballot were unconstitutional. The District Court found the amendments did not violate any constitutional provisions, and the proponents appealed.

The Supreme Court of Utah held that:

- Statutory amendment that required local initiative proponents to collect signatures equal to ten percent of the votes cast in the most recent presidential election, rather than ten percent of the votes cast in the prior gubernatorial election, did not amount to a per se unreasonable restriction on the right to initiative;
- Amendment did not unduly burden the right to initiative under State Constitution;
- Amendment served a legitimate governmental purpose;
- Amendment did not violate the uniform operation of laws provision of the State Constitution; and
- Amendment did not improperly hinder initiative proponents' First Amendment right to express their political message by means of a ballot initiative.
