EXEMPT ORGANIZATIONS - CALIFORNIA

Rollins v. Dignity Health

United States District Court, N.D. California - December 12, 2013 - F.Supp.2d - 2013 WL 6512682

Dignity Health ("Dignity") is a non-profit healthcare provider with facilities in sixteen states. From 1986 to 2012, Starla Rollins ("Rollins") was employed as a billing coordinator at a Dignity-operated hospital. Based on her employment, Rollins will be eligible for pension benefits from Dignity's benefits plan (the "Plan") when she reaches retirement age.

Rollins alleges that Dignity's Plan violates the Employee Retirement Income Security Act (ERISA). Dignity contends that its Plan need not comply with ERISA because it is a "church plan," which the statute explicitly exempts from its requirements. Rollins maintains that the Plan does not qualify as a church plan as defined by ERISA.

According to Rollins, despite the language in section U.S.C. § 1002(33)(C)(i), which permits church-associated organizations to maintain church plans, section A still demands that only a church may establish a church plan. Although Rollins also disputes whether Dignity is a church-associated organization under section C(i), the Court first addresses, and finds dispositive, her argument that Dignity is not a church, and as such cannot establish a church plan, and therefore that Dignity's Plan is not a "church plan" under the statute.

Dignity does not contend that it is a church or that its Plan was started by a church. Rather, relying primarily on section C, it argues that the ERISA statute allows a plan to qualify as a church plan regardless of what entity established the plan, so long as the plan is maintained by a tax-exempt non-profit entity "controlled by or associated with a church or a convention or association of churches." 29 U.S.C. § 1002(33)(C)(i). Because it is a tax-exempt entity associated with the Roman Catholic Church, and its Plan is maintained by a subcommittee associated with the Roman Catholic Church, Dignity argues that, as a matter of law, its Plan qualifies as a church plan.

Thus, the primary question before the Court is whether the ERISA statute requires a church plan to have been established by a church, or whether the statute merely requires that a church plan be maintained by a tax-exempt organization controlled by or associated with a church.

The Court held that notwithstanding section C, which permits a valid church plan to be maintained by some church-affiliated organizations, section A still requires that a church establish a church plan. Because the statute states that a church plan may only be established "by a church or by a convention or association of churches," only a church or a convention or association of churches may establish a church plan. 29 U.S.C. 1002(33)(A). Dignity's effort to expand the scope of the church plan exemption to any organization maintained by a church-associated organization stretches the statutory text beyond its logical ends.

"In sum, both the text and the history confirm that a church plan must still be established by a

church. Because Dignity is not a church or an association of churches, and does not argue that it is, the Court concludes that Dignity does not have the statutory authority to establish its own church plan, and is not exempt from ERISA as a matter of law. Defendants' motion to dismiss on this ground is thereby DENIED."

LIABILITY - MARYLAND

Espina v. Prince George's County

Court of Special Appeals of Maryland - December 20, 2013 - A.3 - 2013 WL 6694383

Wife of victim of fatal shooting by off-duty county police officer, as well as victim's son and victim's estate filed wrongful death suit against county and officer. The Circuit Court entered judgment on jury verdict in favor of plaintiff, after reducing verdict against county from $11,505,000 to $405,000, but leaving verdict against officer in place. All parties appealed.

The Court of Special Appeals held that:

- In a matter of first impression, damages cap set forth in Local Government Tort Claims Act (LGTCA) applied to state constitutional tort claims;
- Wrongful death claims of wife and son of victim were derivative of survival action of victim's estate;
- Claim of victim's son under Due Process Clause of State Constitution was not derivative of survival claim of victim's estate;
- Award of $5,000 in economic damages was not justified;
- Probative value of evidence of officer's involvement in violent encounters with two other individuals that occurred before officer's fatal shooting of victim outweighed danger of unfair prejudice to officer stemming from admission of the evidence;
- Sufficient evidence supported jury's finding that officer had acted with actual malice in beating and fatally shooting victim; and
- Verdict that officer did not assault or batter victim's son was reconcilable with its verdict that officer violated son's rights under Due Process Clause of State Constitution.

BALLOT INITIATIVE - MICHIGAN

Citizens Action Group of Plymouth Tp. v. Charter Tp. of Plymouth

Court of Appeals of Michigan - December 13, 2012 - Not Reported in N.W.2d - 2012 WL 6217051

On appeal, Citizen's Action Group argued that a writ of mandamus should be issued requiring Township to place on an election ballot the language stated in the petitions of the owners of more than 10 percent of the land in the Township, proposing under MCL 41.801(3) the creation of a special assessment district comprised of the entire Township, excluding tax exempt property, to raise funds for fire protection and emergency medical services. Plaintiff contended that the question submitted to voters should be framed exactly as it was in the landowner petitions, including the amount and duration of the special assessment.

However, plaintiff's counsel conceded in a hearing that the Township Board had the authority to prepare the language that appears on the ballot and that the Board could change and remedy the language stated on the landowner petitions. Plaintiff's counsel made these concessions during a

discussion of the very point in contention on appeal, i.e., whether the special assessment would be for one million or up to 10 million, when defense counsel raised this precise issue at the hearing. Accordingly, because plaintiff's counsel expressly agreed that the Township Board could change the language from the petitions and prepare the language that appears on the ballot, plaintiff cannot take a contrary position on appeal.

BONDS - MINNESOTA

Orix Public Finance, LLC v. Lake County, Minn.

United States District Court, D. Minnesota - December 5, 2013 - Slip Copy - 2013 WL 6328865

The Broadband Initiatives Program, available through the Rural Utilities Service ("RUS"), a division of the United States Department of Agriculture, assists rural communities with broadband project funding

In early 2010, Lake County submitted an RUS application for a $56,413,705 loan and a $9,955,359 grant. The application stated that the County would satisfy the local matching fund requirement by issuing $3.5 million in revenue bonds, to be repaid solely from subscription fees paid by users of the broadband network.

RUS notified Lake County that its application had been approved, subject to the County's satisfaction of RUS conditions contained in the Loan/Grant and Security Agreement between Lake County and RUS ("LGSA").

Once the County received its award letter from RUS, it began to seek funding for the requisite $3.5 million in local matching funds. Plaintiff ORIX Public Finance, LLC ("ORIX") expressed its desire to purchase the revenue bonds.

The initial drafts of the bond purchase agreement ("BPA") provided that the County would issue the revenue bonds to ORIX at 12% interest and gave ORIX a security interest and right to receive revenue from the Project pari passu with the rights held by RUS. RUS refused to approve the pari passu funding. Because it could not obtain pari passu funding and the bonds would be subordinate to RUS's payment rights, ORIX required more favorable economic terms, including a 15% interest rate and a standby letter of credit from the Project's contractor that would replenish the debt service reserve in the amount of $1.5 million if there was a draw on the debt service reserve. These changes increased the size of the bond from $3,500,000 to $5,630,000.

RUS stated that the BPA was unacceptable to RUS for many reasons including: the 15% interest rate was too high; the amount of the bond was more than the $3.5 million identified in the County's application; the amount of the bonds threatened the financial viability of the Project; the BPA would not close until after RUS funding; and the BPA called for payments through the general contractor by way of a line of credit, which RUS believed would give ORIX priority.

After RUS stated that it would deny the loan if the County proceeded with the BPA, the County decided that it could not fund the Project through revenue bonds. On February 8, 2011, the Lake County Board authorized using $3.5 million of County reserves to meet the local match requirement.

On February 23, 2011, Skala sent ORIX a letter which stated that Lake County was not in a position to perform the BPA. As of September 2012, the County and RUS had commenced the Project, and RUS has approved the first advance of the RUS loan and grant.

ORIX sued the Lake County, alleging that the BPA was an existing and enforceable contract and that Defendants anticipatorily and materially breached it by refusing to perform before performance was due. Additionally or alternatively, ORIX argued that it was entitled to a termination fee under the BPA.

The court concluded that, because RUS rejected the BPA, the frustration of purpose doctrine applied, and ORIX's claim that Lake County breached the BPA must be rejected. The fact that RUS did not formally reject the BPA, which would have required RUS to pull the award from the County altogether, is not dispositive. It is enough that, in substance, RUS rejected the BPA.

"Here, the undisputed evidence is that the entire purpose of the BPA was to provide gap financing to enable the County to qualify for the RUS loan and grant to build the Project, the proceeds of which were to be used to repay the bonds. Once RUS stated that it would not approve the loan and grant and would end the Project if the County proceeded with the BPA, there was no purpose whatsoever for the BPA for either party. From the County's point of view, it would be issuing bonds to fund nothing because there would be no Project. (And in fact, it would not be able to legally issue bonds without a public purpose.) From ORIX's point of view, it would be purchasing bonds that had no chance of repayment because repayment was going to come from the revenue raised by the Project and no Project would exist. ORIX's in-house counsel testified multiple times that if RUS pulled out of the Project, ORIX would not close on the BPA. It would be absurd and futile to enforce the BPA in the face of RUS's rejection of the BPA."

BALLOT INITIATIVE - MINNESOTA

Minnesota Voters Alliance v. Anoka Hennepin School Dist.

Court of Appeals of Minnesota - December 23, 2013 - Not Reported in N.W.2d - 2013 WL 6725847

Anoka Hennepin School District is funded in part by levies approved by voters in the district. In 2010, in recognition of the likelihood of flat or declining state funding, shifting legislative priorities, decreased revenue, and the impending expiration of an existing levy, the school district created a committee of residents and educators to recommend options to the school board. The committee delivered its final report in June 2011.

Following its review of the committee's report, the school board unanimously passed a resolution to present three levy-funding questions to voters in the election on November 8, 2011. The ballot questions asked voters whether to (1) renew an existing levy providing $1,044 per student per year for the next ten years; (2) approve a levy of $3 million each year for ten years for technology; and (3) approve a levy of $12 million per year for ten years as a stop-gap measure if the legislature fails to approve inflationary funding.

In September 2011, the school district held two public meetings to address the ballot questions. The school district also created a brochure to inform voters about the ballot questions and the effects of approving or rejecting each levy. The school district hired a company to print and mail the brochures to all addresses in the district.

The printing company completed work on the brochures on October 27, 2011. The school district posted an electronic version of the brochure on its website the same day. On October 31, 2011, the printing company mailed brochures to the 81,235 addresses in the district. In total, the school district spent $15,935.13 associated with printing and mailing the brochure.

On November 2, 2012, Minnesota Voters Alliance and Donald Huizenga filed a complaint with respondent Office of Administrative Hearings (OAH), asserting that the school district violated Minn.Stat. § 211A.02 by failing to report the expenditures associated with printing and mailing the brochure and Minn.Stat. § 211B.06 by making false statements in the brochure.

The school district moved for summary disposition, arguing that (1) the school district's brochure expenditures were not subject to the finance-reporting requirements of section 211A.02 because the brochure did not "promote" passage or defeat of any ballot question and (2) the one-year limitations period on relators' false-statement claim under section 211B.06 had run. On cross-motion for summary disposition, relators briefly argued that their complaint was timely and focused their argument on the merits of both claims.

The ALJ determined that the one-year limitations period for relators' false-statement claim and financial-reporting claim began running on October 27, 2011, the day the school district first disseminated the ballot-question brochure by posting it on its website. Based on this determination, the ALJ deemed the complaint, dated November 2, 2012, untimely. The ALJ granted the school district's motion for summary disposition and dismissed the complaint. This appeal followed.

Relators sought reversal of the summary-disposition dismissal of their financial-reporting claim under Minn.Stat. § 211A.02. They asserted, and the school district conceded, that that claim was timely. The appeals court agreed.

"The ALJ's decision was based on the determination that relators' financial-reporting claim accrued on October 27, 2011, when the school district disseminated allegedly false statements in the ballot-question brochure. But the "failure to act" that is the subject of relators' financial-reporting claim is not the dissemination of allegedly false statements but the failure to file expenditure reports outlined in section 211A.02. See Minn.Stat. § 211A.02, subd. 1 (requiring an initial report 14 days after campaign disbursements are made and several subsequent reports)."

"Assuming that the school district's brochure, in this case, is subject to section 211A.02—a question the ALJ did not reach—the limitations period on a claim that the school district failed to meet its reporting obligations would not run until reports were required to be filed. The record does not support the conclusion that those reports were due before November 2, 2011. We therefore conclude that the ALJ erred by determining that relators' financial-reporting claim was untimely and, accordingly, remand the matter for further proceedings to address the merits of that claim."

ANNEXATION - MINNESOTA

Bridgewater Tp. v. City of Dundas

Court of Appeals of Minnesota - December 23, 2013 - Not Reported in N.W.2d - 2013 WL 6725834

Bridgewater Township shares a common boundary with the City of Dundas in Rice County. On July 12, 2004, the township and the city entered into a contract known as an Orderly Annexation Agreement, providing for annexation of certain pieces of township land (the annexation area) to the city.

A dispute arose between the parties regarding which entity was granted planning and zoning authority in the annexation area. Prior to the agreement, the Dundas City Council had planning and zoning authority in the city, and the Dundas Planning Commission served in an advisory capacity to

the city council. The annexation agreement required Dundas to expand its planning commission to include three residents of Bridgewater. Bridgewater claimed the agreement also granted the newly expanded planning commission authority over all planning and zoning in the annexation area. Dundas claimed the agreement granted that authority to the Dundas City Council, with the new planning commission serving only in an advisory capacity.

The district court granted summary judgment for Dundas and entered judgment declaring that the annexation agreement unambiguously vested planning and zoning authority in the annexation area to the city. The district court concluded that Bridgewater's proposed interpretation of the agreement would lead to absurd results and fail to give effect to all of the agreement's provisions.

The Court of Appeals reversed and remanded, holding that the annexation agreement unambiguously granted planning and zoning authority in the annexation area to the planning commission.

SCHOOLS - MISSISSIPPI

Doe v. Rankin County School Dist.

Court of Appeals of Mississippi - December 10, 2013 - So.3d - 2013 WL 6438716

Ninth grade student brought action against school district, alleging negligence in failing to provide adequate safety, resulting in student being sexually assaulted by another student. The Circuit Court granted district's motion for summary judgment and denied motion for reconsideration. Student appealed.

The Court of Appeals, Ishee, J., held that:

- District's duty to oversee student conduct and school safety involved element of choice or judgment;
- District actions regarding implementation of school-safety measures and student discipline involved social and economic policy; and
- District waived affirmative defense of discretionary immunity.

IMMUNITY - MISSOURI

A.R.K. v. Storz

United States District Court, E.D. Missouri, Eastern Division - December 17, 2013 - Slip Copy - 2013 WL 6636128

Plaintiff alleged that while she was a student in the defendant school districts, she reported to school counselors that she was being sexually abused by her parents. Plaintiff alleged that the counselors failed to report the abuse to the Missouri Division of Social Services as required by state law.

The District Court found that the doctrine of sovereign immunity barred plaintiff's negligence claim as to the school districts and the individual defendants in their official capacity. The doctrine of official immunity barred plaintiff's negligence claims against the individual defendants in their individual capacity.

Plaintiff's § 1983 claims against the individual defendants also failed. The defendants' alleged failure to report the suspected abuse, as required by the Missouri state statute, did not amount to "unconstitutional misconduct" because violations of state law do not state a claim under 42 U.S.C. § 1983.

MUNICIPAL ORDINANCE - MISSOURI

Brunner v. City of Arnold

Missouri Court of Appeals, Eastern District, Division One - December 17, 2013 - S.W.3d - 2013 WL 6627959

"This is yet another challenge to the validity and constitutionality of a municipal ordinance governing what are commonly referred to as 'red light camera enforcement systems,' and we take another hike through a legal and, unfortunately, political minefield."

Motorists brought class action petition against city challenging validity of ordinance authorizing the installation and operation of an automated red light enforcement system. The Circuit Court dismissed action. Motorists appealed.

The Court of Appeals held that:

- Motorist's complaint sufficiently alleged that motorist was directly adversely affected by ordinance, as would support standing to challenge validity of ordinance;
- Fact issue existed as to whether ordinance reasonably promoted public safety, as would be required for ordinance to be validly enacted under city's police power;
- Ordinance conflicted with state statute governing reporting requirements and assessment of points for moving violations, and therefore ordinance was void and unenforceable;
- A rebuttable presumption is invalid and unconstitutional, under the due process clause of state constitution, if an ordinance is criminal in nature; and
- Ordinance at issue was criminal in nature, and therefore ordinance's rebuttable presumption that owner of a vehicle was driving vehicle at time vehicle ran red light was violation of state due process protections.

EXEMPT PROPERTIES - NEBRASKA

Harold Warp Pioneer Village Foundation v. Ewald

Supreme Court of Nebraska - December 13, 2013 - N.W.2d - 2013 WL 6512891

The Harold Warp Pioneer Village Foundation (Foundation) owns and operates the Pioneer Village Museum in Minden, Nebraska. The Foundation also owns and operates a nearby motel and campground, both of which are used primarily by museum visitors.

For many years, the museum, the motel, and the campground had all been granted property tax exemptions. When the Kearney County Board of Equalization granted the exemptions for 2011, state tax officials appealed to the Nebraska Tax Equalization and Review Commission (TERC), contending the motel and campground were not entitled to exemptions. TERC agreed, and the Foundation appealed from those determinations.

The Supreme Court of Nebraska concluded that the motel and campground are beneficial to the

museum and reasonably necessary to further its educational mission and are therefore entitled to property tax exemptions.

EMPLOYMENT - NEW HAMPSHIRE

Petition of Carrier

Supreme Court of New Hampshire - December 6, 2013 - A.3d - 2013 WL 6354607

Fire chief, who had retired from his full-time firefighter position and began receiving retirement benefits before he became full-time fire chief for another town, filed petition for writ of certiorari seeking review of ruling of board of trustees of New Hampshire Retirement System (NHRS) that he was overpaid in pension benefits and medical subsidy benefits.

Fire chief worked in Londonderry as a full-time firefighter and later as the town's fire chief. When he worked in Londonderry, he was enrolled in the NHRS. He retired from his Londonderry position in July 2007, and began receiving retirement benefits. In January 2009, he became the full-time fire chief for Hampstead. However, he did not re-enroll in the NHRS. Instead, he received both his NHRS retirement benefits and his Hampstead fire chief salary.

In February 2010, the NHRS notified fire chief that his Hampstead employment was "subject to NHRS mandatory enrollment pursuant to RSA 100–A:1, VIII." The NHRS informed him that he was "required to be restored to active, contributory service immediately" and that his monthly pension benefits would cease as of March 2010 for "as long as [he] ... occup[ied] this full-time position." Fire chief retired from his Hampstead position in May 2010.

The NHRS board determined that, because the chief collected his retirement benefits while still employed full-time by Hampstead, he was overpaid $70,892.22 in pension benefits and $9,764.56 in medical subsidy benefits. The board ordered him restored to service and required that those amounts be recouped from his future benefit payments.

The Supreme Court of New Hampshire held that:

- Fire chief was a permanent firefighter who was required to be a member of the NHRS;
- Fact that fire chief had let his fire certification lapse did not affect his status as a permanent firefighter who was required to participate in the NHRS; and
- Absent a transcript, Supreme Court had to assume that evidence supported decision of board of trustees of NHRS rejecting fire chief's request that board waive recoupment of money he was overpaid.

Statute providing that New Hampshire Retirement System (NHRS) membership is optional in case of officials appointed for fixed terms does not apply to permanent police officers and permanent firefighters, and thus, did not apply to fire chief who was a permanent firefighter.

BONDS - NEW YORK

In re Citigroup Inc. Bond Litigation

United States District Court, S.D. New York - December 19, 2013 - Slip Copy - 2013 WL 6697822

In August, this Court approved the settlement of this securities class action, which was brought on behalf of a class of purchasers of bonds issued by or on behalf of Citigroup, Inc. and raised claims pursuant to the Securities Act of 1933. Plaintiffs agreed to settle all claims in exchange for a payment of $730 million-an agreement that the Court found to be fair, reasonable, and adequate. See generally In re Citigroup Inc. Bond Litig., No. 08 Civ. 9522(SHS), 2013 WL 4427195 (S.D.N.Y. Aug. 20, 2013).

Plaintiffs' attorneys, Bernstein Litowitz Berger & Grossman LLP, sought an award of attorneys' fees and reimbursement of litigation expenses pursuant to Federal Rule of Civil Procedure 23(h), as well as reimbursement of costs and expenses incurred by class representatives pursuant to the Private Securities Litigation Reform Act of 1995 (PSLRA), 15 U.S.C. § 78u–4.

The Court reviewed the request and found that Bernstein Litowitz was entitled to both an award of reasonable attorneys' fees and reimbursement of litigation expenses. The Court also awarded reasonable costs and expenses for services rendered to the class by the lead plaintiffs.

Bernstein Litowitz requested 20% of the common fund, or $146 million, plus interest. The court found this percentage too high, given the size of the common fund, and instead awarded the firm 16% of the common fund, or $116 .8 million.

SECURITIES - NEW YORK

In re Citigroup Inc. Securities Litigation

United States District Court, S.D. New York - December 13, 2013 - F.Supp.2d - 2013 WL 6569875

Wesley Odom, a former Employee of Smith Barney Asset Management, LLC, brought suit alleging violations of Section 10(b) and Rule 10b–5 of the Securities Exchange Act of 1934 (the "Exchange Act"); common law fraud and negligent misrepresentation; and violations of the Florida Whistleblower's Act. Odom's Exchange Act and common law claims arose from alleged misrepresentations made by Citigroup during 2007 and 2008—which were the subject of multiple other lawsuits before this Court, including two securities fraud class action litigations in which settlements were approved in August 2013.

Unlike the plaintiffs in those actions, however, Odom did not allege that he purchased or sold Citigroup securities during the time period in which these misrepresentations allegedly affected the stock price. Rather, he asserted what are known as "holder" claims, alleging that he owned Citigroup stock during this period and refrained from selling it—i.e. he continued to hold the stock—due to Citigroup's misrepresentations. Odom's Whistleblower's Act claim is based upon his alleged forced resignation in retaliation for advising his clients to opt out of premium Citigroup accounts.

Odom's federal securities fraud claims were dismissed with prejudice because holder claims are not cognizable under the Exchange Act. Odom's state law fraud and negligent misrepresentation claims were also be dismissed with prejudice because they were preempted pursuant to the Securities Litigation Uniform Standards Act ("SLUSA"). Even if SLUSA did not preempt these state-law claims, however, they would fail to state a claim on the merits based upon substantially the same analysis this Court utilized in dismissing another litigation in this multidistrict litigation ("MDL"), AHW Investment Partnership v. Citigroup Inc., Nos. 09 MD 2070(SHS), 10 Civ. 9646(SHS), 2013 WL 5827643 (S.D.N.Y. Oct. 30, 2013).

Finally, because the factual allegations relevant to Odom's Florida Whistleblower's Act claim did not overlap with the facts underlying the Citigroup securities claims consolidated before this Court, the Court recommended that the Judicial Panel on Multidistrict Litigation ("JPML") remand that claim to the U.S. District Court for the Northern District of Florida, from which this action was transferred, pursuant to JPML Rule 10.1(b).

EMPLOYMENT - NEW YORK

Serdans v. New York and Presbyterian Hosp.

Supreme Court, Appellate Division, First Department, New York - December 5, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 08133

Employee was a registered nurse and nurse practitioner specializing in critical care. She suffered from a neurological disorder for which she was treated with deep brain stimulus (DBS) through electrodes permanently implanted in her brain. Employee's DBS system is sensitive to electromagnetic radiation such as that emitted by magnetic resonance imaging systems.

Employee brought action against employer, asserting claims for disability discrimination and retaliation. The Supreme Court, New York County, denied employer's motion for summary judgment. Employer appealed.

The Supreme Court, Appellate Division, held that:

- Genuine issues of material fact existed as to whether employee suffered an adverse employment action or was treated differently;
- Employee failed to point to evidence raising an inference of discriminatory animus;
- Employee's complaint about employer's alleged failure to implement agreement to accommodate her disability was a protected activity;
- Employee failed to point to evidence of a causal nexus between her complaint and alleged adverse action; and
- Existence of genuine issue of material fact precluded summary judgment on employees claims premised on employer's alleged failure to reasonably accommodate her disability.

Genuine issue of material fact existed as to whether employer failed to implement agreement to accommodate employee's disability, by frequently canceling her work assignments and ultimately ceasing to assign her work altogether, precluding summary judgment for employer on employee's claims under the New York State Human Rights Law (NYSHRL) and the New York City Human Rights Laws (NYCHRL) for disability discrimination premised on failure to reasonably accommodate her disability.

EMINENT DOMAIN - NEW YORK

Commissioner of Transp. v. Karp Associates, Inc.

Supreme Court, Appellate Term, Second Dept., 2, 11 & 13 Judicial Dist - December 9, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 23421

Commissioner of Transportation, as condemnor, brought summary proceeding to remove a condemnee occupant from property acquired for bridge project. The Civil Court of the City of New York granted summary judgment to condemnee occupant. Condemnor appealed.

Holdings: The Supreme Court, Appellate Term, held that:

- Trial court had subject matter jurisdiction;
- Commissioner had statutory standing; and
- Commissioner was not required to plead compliance with federal regulation requiring 90–day notice for evictions with respect to federally assisted real property acquisition programs.

Pleading compliance with federal regulation requiring 90–day notice for evictions with respect to federally assisted real property acquisition programs, as distinguished from proof of compliance with the regulation, was not a condition precedent to the Commissioner of Transportation, as condemnor, maintaining a summary proceeding to remove a condemnee occupant from property acquired for bridge project, as would require dismissal of Commissioner's petition.

PUBLIC WORKS - NEW YORK

Town of Oyster Bay v. Lizza Industries, Inc.

Court of Appeals of New York - December 17, 2013 - N.E.2d - 2013 N.Y. Slip Op. 08370

Town in Nassau County and two villages in Suffolk County brought actions for continuing public nuisance against contractors that, pursuant to public works contracts with counties, constructed public sewers in the '70s and '80s. Plaintiffs alleging that areas surrounding sewer lines had settled, causing damage to plaintiffs' adjacent roadways, sidewalks, and curbs.

The Court of Appeals held that:

- Six-year statute of limitations for actions for breach of contract was applicable;
- Claims accrued for limitations purposes upon completion of construction; and
- Assuming that claims could be characterized as continuing public nuisance, continuous wrong doctrine was not applicable.

Claims were subject to six-year statute of limitations for actions for breach of contract, as the gravamen of the complaints was that contractors, through their alleged faulty construction, breached their duty to town and villages, as third-party beneficiaries of public works contracts, under contracts' protection clauses requiring contractors to restore town's and villages' roadways to their usual condition after sewer construction was complete.

IMMUNITY - NEW YORK

Chamberlain v. City of White Plains

United States District Court, S.D. New York - December 10, 2013 - F.Supp.2d - 2013 WL 6477334

Estate of deceased emotionally disturbed public housing resident brought action against city, public housing authority, and police officers, alleging under § 1983 that officers' use of deadly force against resident was unconstitutional, and asserting related claims under state law. Defendants moved to dismiss for failure to state claim.

The District Court held that:

- Documents attached as exhibits to amended complaint could be considered without converting motion to one for summary judgment;
- Emergency aid doctrine authorized warrantless entry into resident's apartment;
- Sergeant was entitled to qualified immunity from excessive force claim arising from first discharge of stun gun;
- Officer was entitled to qualified immunity from excessive force claim arising from use of beanbag gun;
- Officer was not entitled to qualified immunity from excessive force claim arising from use of lethal force; and
- Estate stated municipal liability claim based on failure to train.

ZONING - NORTH CAROLINA

Blair Investments, LLC v. Roanoke Rapids City Council

Court of Appeals of North Carolina - December 17, 2013 - S.E.2d - 2013 WL 6623348

Blair Investors, LLC, (petitioner), a North Carolina limited liability corporation, leased a 100 square foot site in Roanoke Rapids to U.S. Cellular, which planned to install a cell phone tower. The property is zoned I–1 Industrial by the City of Roanoke Rapids, a zoning category that allows placement of a cellular phone tower upon granting of a special use permit.

The City Council denied the special use permit on the grounds that "more probably than not" the proposed tower would "endanger the public health or safety" and would "not be in harmony with the surrounding area." The trial court affirmed.

Petitioner appealed, contending that the trial court erred in affirming the decision of the council, on the grounds that the council's ruling was "not supported by any relevant evidence" and the Court of Appeals agreed.

"We hold that the information in the planning department's report in conjunction with the director's testimony, constituted 'competent, material, and substantial evidence tending to establish the existence of the facts and conditions which the ordinance requires for the issuance of a special use permit.' Mann Media, 356 N.C. at 12, 565 S.E.2d at 16. We agree with petitioner that it made a prima facie showing that it was entitled to a special use permit."

"Once an applicant makes a prima facie showing of entitlement to a special use permit, 'the burden of establishing that the approval of a conditional use permit would endanger the public health, safety, and welfare falls upon those who oppose the issuance of the permit. Denial of a conditional use permit must be based upon findings which are supported by competent, material, and substantial evidence appearing in the record.'"

"Moreover, a city council's denial of a conditional use permit based solely upon the generalized objections and concerns of neighboring community members is impermissible. Speculative assertions, mere expression of opinion, and generalized fears "about the possible effects of granting a permit are insufficient to support the findings of a quasi-judicial body." In other words, the denial of a conditional use permit may not be based on conclusions which are speculative, sentimental, personal, vague, or merely an excuse to prohibit the requested use."

ZONING - NORTH DAKOTA

Dahm v. Stark County Bd. of County Com'rs

Supreme Court of North Dakota - December 19, 2013 - N.W.2d - 2013 ND 241

Landowner appealed from a decision of board of county commissioners denying his application for zoning amendment to change his property designation from agricultural to residential and for approval of preliminary plat to create residential subdivision. After denying landowner's motion to submit additional evidence, the District Court affirmed. Landowner appealed.

The Supreme Court of North Dakota held that:

- County board did not act arbitrarily, capriciously, or unreasonably in denying landowner's application for zoning amendment and approval of preliminary plat to create residential subdivision;
- County board was not required to approve landowner's zoning application, despite its alleged compliance with subdivision zoning requirements, since application conflicted with county's comprehensive plan;
- County board's decision to impose appearance restriction preventing landowner from appearing before the board for six months was not arbitrary, capricious, or unreasonable; and
- District court did not abuse its discretion in denying landowner's motion to submit additional evidence.

ZONING - OHIO

Safest Neighborhood Assn. v. Athens Bd. of Zoning Appeals

Court of Appeals of Ohio, Fourth District, Athens County - December 17, 2013 - Slip Copy - 2013 -Ohio- 5610

The City of Athens Board of Zoning Appeals (BZA), the City of Athens Planning Commission (Planning Commission) and Kevin Gillespie/Integrated Services of Appalachian, Ohio, Inc. (Integrated Services) appealed the trial court's entry reversing the BZA and Planning Commission's decisions to permit Integrated Services to construct a two-story, multi-unit residential structure.

However, as neutral bodies that decided whether to grant Integrated Services' applications, the BZA and Planning Commission lacked standing to appeal the court of common pleas decision. Consequently, their appeals were dismissed. Conversely, Integrated Services unquestionably had standing to appeal as an aggrieved party who has been adversely affected by the lower court's decision.

Integrated Services argued that the lower court erred by finding that the appellees, Safest Neighborhood Association (Safest Neighborhood) and over 40 Athens residents, had standing to appeal the BZA and Planning Commission's decisions because each appellee did not show that he or she actively participated at the administrative hearing and was directly affected by the administrative decision. The Court of Appeals agreed. Because the lower court looked at the appellees collectively, rather than looking at each appellee individually, to determine if they met the requirements for standing, the court abused its discretion and its decision was reversed.

ENVIRONMENT - PENNSYLVANIA

Robinson Tp., Washington County v. Com.

Supreme Court of Pennsylvania - December 19, 2013 - A.3d - 2013 WL 6687290

Municipalities and individuals brought petition for review challenging constitutionality of act that set out statutory framework for regulation of oil and gas operations, preempted local regulation of such operations, and gave power of eminent domain to natural gas corporations. The Commonwealth Court found that the act was unconstitutional in part and enjoined application of certain provisions.

On cross-appeals, the Supreme Court of Pennsylvania held that:

- Municipalities' had standing to challenge act;
- Environmental association had standing to challenge act on behalf of members;
- Doctor had standing to challenge act;
- Provision preempting municipalities' obligation to plan for environmental concerns for oil and gas operations violated the Environmental Rights Amendment;
- Statutory requirement that municipal zoning ordinances be amended to include oil and gas operations in all zoning districts was in violation of Environmental Rights Amendment;
- Statutory well location restrictions that allowed Department of Environmental Protection (DEP) to grant waiver from setback requirements violated the Environmental Rights Amendment;
- Provision that precluded municipalities from seeking appellate review of DEP's decisions on restriction waivers violated the Environmental Rights Amendment;
- Commonwealth Court erred in failing to address individually the citizens' claims regarding the discrete provisions of act challenged as violating state constitution's provision prohibiting special laws; and
- Statute permitting public utilities commission to issue advisory opinions on proposed local ordinances did not violate separation of powers.

SUNSHINE ACT - PENNSYLVANIA

Smith v. Township of Richmond

Supreme Court of Pennsylvania - December 17, 2013 - A.3d - 2013 WL 6598713

Township resident brought action against township and township's board of supervisors, seeking declaratory and injunctive relief and alleging that defendants had violated the Sunshine Act.

The dispute concerned whether meetings between an agency and outside entities, including those involved in ongoing litigation with that agency, entailed "deliberations" – and thus, should have been open to the public – where the subject of the meetings was the same as that of the litigation, although the agency claims the meetings were held for information-gathering purposes only.

The Supreme Court of Pennsylvania concluded that closed-door gatherings did not involve deliberations and thus did not violate Sunshine Act.

Township's supervisors held four closed-door gatherings with cement company, citizens group, and adjacent municipalities that had experience dealing with quarries. These meetings did not involve "deliberations" and thus did not violate Sunshine Act, although at one gathering a brief exchange may have occurred between two supervisors concerning benefits of settlement of ongoing litigation regarding proposed expansion of cement company's limestone quarry into township. The gatherings

were held with goal of gaining information that could prove useful to township in negotiating terms of settlement regarding litigation, and purported exchange between supervisors regarding benefits of settlement appeared to have been de minimis within context of meeting as a whole.

ZONING - PENNSYLVANIA

PPM Atlantic Renewable v. Fayette County Zoning Hearing Bd.

Supreme Court of Pennsylvania - December 16, 2013 - A.3d - 2013 WL 6592776

Objector, who had been permitted to intervene in developer's appeal from zoning board decision, filed notice of appeal from trial court decision favorable to developer. On developer's motion, the Court of Common Pleas ordered objector to post $250,000 bond as condition of continuing with appeal. The Commonwealth Court quashed objector's merits appeal due to his failure to post bond or appeal the bond order. The Supreme Court allowed further appeal.

The Supreme Court of Pennsylvania held that in a proceeding where land developer was the appellant before the common pleas court of a zoning board's decision, Municipalities Planning Code (MPC) does not authorize that court to require an objector to post bond in connection with objector's appeal to the Commonwealth Court of a final order of common pleas court.

ZONING - RHODE ISLAND

Iadevaia v. Town of Scituate Zoning Bd. of Review

Supreme Court of Rhode Island - December 23, 2013 - A.3d - 2013 WL 6795231

Landowner sought judicial review of decision of town zoning board of review, which upheld town building official's denial of landowner's application to build single family home on unimproved lot on grounds that lot lacked street frontage and denied landowner's request for dimensional variance for width and height of unimproved lot.

The Supreme Court of Rhode Island held that:

- Trial court erred in applying doctrine of judicial estoppel to deny landowner relief;
- There was no substantial evidence to support zoning board's determination that contiguous lots on landowner's property had merged; and
- Provision of town zoning ordinance setting dimensional regulations for residential properties did not impose a frontage requirement.

Provision of town zoning ordinance setting dimensional regulations for residential properties did not impose a frontage requirement, and thus, town zoning board of review erred by denying landowner's application to build single family home on unimproved lot that lacked street frontage. Provision of zoning ordinance setting dimensional requirements for residential properties did not make any reference to frontage, but "lot frontage" was explicitly defined in other provisions of town zoning ordinance and required for other types of properties, suggesting that omission of frontage requirements for residential lots was intentional.

IMMUNITY - UTAH

Kerr v. City of Salt Lake

Supreme Court of Utah - December 17, 2013 - P.3d - 2013 UT 75

Pedestrian who was injured after tripping over uneven portion of sidewalk filed negligence action against city. Following a second jury trial, the district court entered judgment for pedestrian. City appealed.

The Supreme Court of Utah held that:

- City did not qualify for discretionary-function immunity;
- Supreme Court would decline to review trial court's grant of new trial to pedestrian after directed verdict in favor of city and dismissing jury at close of pedestrian's case in chief in first trial;
- Whether city had sufficient constructive and actual notice of sidewalk defect in order to remedy it was question for jury; and
- City invited any error by trial court in excluding lay opinions that the sidewalk displacement was not dangerous.

When determining if the discretionary-function exception to a statutory waiver of governmental immunity applies to a particular case, courts ask four questions: (1) whether challenged act, omission, or decision necessarily involves a basic governmental policy, program, or objective; (2) whether act, omission, or decision is essential to realization or accomplishment of that policy, program, or objective as opposed to being one which would not change course or direction of the policy, program, or objective; (3) whether act, omission, or decision requires exercise of basic policy evaluation, judgment, and expertise on the part of governmental agency involved; and (4) whether governmental agency involved possesses requisite constitutional, statutory, or lawful authority and duty to do or make challenged act, omission, or decision.

City did not qualify for discretionary-function immunity, as city's decision not to remedy displaced sidewalk was not essential to its program of building and maintaining sidewalks. Decision of city employee not to directly remedy sidewalk defect by horizontal saw cutting, but instead to provide a sidewalk replacement estimate to adjacent business owner, was a classic operational determination that did not implicate policy-making or thrust the decision into the political process.

DECLARATORY JUDGMENT - WASHINGTON

Lewis County v. State

Court of Appeals of Washington, Division 2 - December 17, 2013 - P.3d - 2013 WL 6630911

County brought declaratory judgment action against the state, seeking declaration that state, rather than county, would bear financial liability in future civil actions against county arising out of official acts of officers and employees of judicial branch, including county Superior Court judges, commissioners, and juvenile court and detention staff.

The County alleged that from time to time, parties bring proceedings against it claiming money damages and other relief due to acts of the Judicial Branch. In the past, the County was liable for such money damages, and the County sought a declaration that all future successful similar disputes be the State's financial responsibility. The County alleged that this case presented a question of great public importance to each of Washington's counties and to all people of Washington. The State responded that the County's case did not present a justiciable claim under the UDJA and alleged that the trial court lacked jurisdiction to hear the case.

State filed motion to dismiss for lack of subject matter jurisdiction. The Superior Court granted motion. County appealed.

The Court of Appeals held that:

- County failed to demonstrate actual, present, and existing dispute with state over financial liability in civil actions against county involving judicial branch employees, as required to establish justiciable controversy;
- County failed to demonstrate direct and substantial interest in its dispute with state over financial liability in civil actions against county involving judicial branch employees, as required to establish a justiciable controversy; and
- County was not entitled to declaratory judgment under major public importance exception to prohibition against advisory opinions, as county's financial dispute with state was not matter of major public importance.

LABOR - WYOMING

International Ass'n of Firefighters Local Union No. 279 v. City of Cheyenne

Supreme Court of Wyoming - December 20, 2013 - P.3d - 2013 WY 157

Firefighters union brought declaratory judgment action against city, seeking ruling that quorum of city counsel was required to negotiate with union, that city could not unilaterally decide to conduct negotiating sessions in public, and that proposals exchanged by parties during negotiations were not public records. The District Court granted summary judgment in favor of city. Union appealed.

The Supreme Court of Wyoming held that:

- Quorum of city counsel was required to negotiate with firefighters union regarding terms of parties' collective bargaining agreement;
- Union's claim seeking declaration that collective bargaining sessions between union and city were required to be held in executive session did not present justiciable controversy under Uniform Declaratory Judgments Act (UDJA); and
- Union's claim seeking declaration that proposals exchanged by city and union during collective bargaining sessions were exempt from disclosure under Public Meetings Act did not present justiciable controversy under UDJA.

Under statute obligating the city through its "corporate authorities" to meet and confer in good faith with representatives of fire fighters' bargaining agent, quorum of city counsel was required to negotiate with firefighters union regarding terms of parties' collective bargaining agreement, and neither the mayor nor a single councilman were corporate authorities authorized to negotiate with union. To be considered corporate authorities, officials were required to be elected or appointed by inhabitants of the city and have power to establish wages, working conditions, and other conditions of employment of fire fighters, but neither mayor nor single councilman had power to establish wages, working conditions, or other conditions of firefighters' employment, so quorum of city council members was required to negotiate with union.

INVERSE CONDEMNATION - ALABAMA

Ex parte Alabama Dept. of Transp.

Supreme Court of Alabama - December 6, 2013 - So.3d - 2013 WL 6360988

Property owner alleged that the Alabama Department of Transportation (ALDOT), under the direction of its Director and as part of a groundwater remediation effort, physically pumped chemically tainted water onto its property, used its property to help in chemical cleanup, and dumped at least a portion of the remaining water into wetlands owned by property owner. In addition, property owner claimed that ALDOT and the Director had continued this course of action for a full year after property owner demanded that it cease doing so.

Property owner brought action against ALDOT and its Director asserting claims for trespass to realty and inverse condemnation and seeking injunctive relief.

The Supreme Court of Alabama held that:

- ALDOT was absolutely immune from property owner's action for trespass to realty and inverse condemnation;
- Property owner's claims against the Director for trespass to realty were absolutely barred;
- Property owner's allegations that the ALDOT pumped chemical-laden water onto his land were sufficient to allege an actual taking, and thus, stated a valid inverse-condemnation claim against the Director;
- The Circuit Court had jurisdiction to entertain property owner's amended complaint in which it modified its claim for injunctive relief by alleging that the Director acted fraudulently, in bad faith, beyond his authority, or under a mistaken interpretation of the law; and
- Property owner's allegations were sufficient to state a claim for injunctive relief based on the bad faith of the Director.

UTILITIES - CALIFORNIA

Omnipoint Communications, Inc. v. City of Huntington Beach

United States Court of Appeals, Ninth Circuit - December 11, 2013 - F.3d - 2013 WL 6486240

Cellular telephone service provider brought action seeking to enjoin city from requiring voter approval prior to construction of mobile telephone antennae. The District Court ruled that the Telecommunications Act preempted the voter approval requirement but denied the provider's request for permanent injunctive relief. Both parties appealed.

The Court of Appeals held that:

- Provision of Telecommunications Act preserving local zoning authority functions to preserve local land use authorities' legislative and adjudicative authority subject to certain substantive and procedural limitations, and
- Initiative measure limiting city's ability to lease or sell city-owned property without voter approval, by requiring provider to obtain voter approval before constructing antennae on city-owned park property, was not preempted.

TAX - CALIFORNIA

Fresno County Fire Protection District v. City of Fresno

Court of Appeal, Fifth District, California - December 5, 2013 - Not Reported in Cal.Rptr.3d - 2013 WL 6330779

In 2003, when the City of Fresno was seeking to annex certain parcels of land served by the Fresno County Fire Protection District, the two public entities entered into an agreement entitled "Transition Agreement Regarding Transfer of Certain General Ad Valorem Real Property Tax Revenue Generated by Annexations" (the "Agreement"). The Agreement provided that, for a specified period of time after each annexation, the City would pay the District a portion of the ad valorem tax revenues generated from the annexed territory based on a formula in the agreement.

After the City annexed a number of parcels and made payments to the District pursuant to the agreement, a dispute arose between the parties over how to calculate the amount that the City was required to pay. In particular, the parties disagreed about the date to be used for measuring base year revenue under the agreement. The City had applied the date articulated in the contractual provision defining the term "base year revenue," but the District believed a later date should be used, which would result in increased sums due the District.

The District filed a complaint alleging breach of contract and related causes of action, claiming it had been underpaid. The City then moved for judgment on the pleadings on the ground that under the unequivocal terms of the agreement, the City's interpretation was correct as a matter of law—thus, the District failed to state a cause of action.

The trial court agreed with the City, finding that the District's arguments were based upon unsupported supposition that the Agreement required the City to calculate base year revenue based on supplemental tax roll information as of the recording date for the annexation. The court found that the Agreement provided a very clear and specific formula for calculating base year revenue, which reflected that base year revenue was to be calculated based on tax roll information as of the initial determination date for each annexation.

The trial court granted City's motion for judgment on the pleadings without leave to amend, and entered judgment in favor of the City. The District appealed and the Court of Appeal affirmed the trial court's decision.

PUBLIC UTILITIES - CALIFORNIA

San Pablo Bay Pipeline Co. LLC v. California Public Utilities Commission

Court of Appeal, Fifth District, California - December 11, 2013 - Cal.Rptr.3d - 2013 WL 6488287

Subsidiaries of Shell Petroleum that own and operate a crude oil pipeline filed writ proceeding to challenge a decision by the California Public Utilities Commission (PUC) concerning the refund of a portion of the fees the subsidiaries collected from Chevron, Tesoro and Valero for transporting oil through the pipeline.

The issue before the court was whether the PUC erroneously included privately owned truck racks and storage tanks in the pipeline assets subject to regulation as a public utility.

The Court of Appeal concluded that the PUC properly interpreted its earlier decision holding that the Shell Petroleum subsidiaries had dedicated the pipeline to public use. That decision addressed

the pipeline as a whole and did not include dedication findings on an asset-by-asset dedication basis and did not explicitly mention the truck racks and storage tanks. Nonetheless, the PUC's interpretation that those assets were covered by its dedication decision was consistent with the broad statutory definition of "pipe line" (Pub.Util.Code, § 227) and the axiom that the "greater contains the less" (Civ.Code, § 3536).

MUNICIPAL ORDINANCES - COLORADO

McCarville v. City of Colorado Springs

Colorado Court of Appeals, Div. V. - December 5, 2013 - P.3d - 2013 COA 169

This case presented the question of whether the City of Colorado Springs may enforce its ordinances regulating the process for amending its home rule charter even though the State has also enacted a statute regulating this matter.

McCarville filed with the City clerk a letter demanding to petition the City's electors to amend its charter. He attached a draft of his charter amendment, which addressed several municipal issues, including: (1) the salaries and terms of office of City officials; (2) future election dates as to various City offices; and (3) the salary, qualifications, and number of municipal court judges.

McCarville also announced his refusal to participate in the procedures applicable to citizen initiatives outlined by the City's ordinances (e.g., attend a public meeting). He asserted, among other things, that the City's procedures apply only to initiatives to enact ordinances and not those to amend the charter. McCarville demanded that he be allowed to immediately begin collecting the signatures necessary to place his charter amendment on the ballot. Notwithstanding his demand, the clerk followed the City ordinance and scheduled his draft initiative for a public meeting with the City's Initiative Review Committee.

Rather than participate in the City's process, McCarville filed an action in the district court. He asked the court to declare that the City's ordinances related to citizen-initiated charter amendments conflict with the Colorado Constitution and related statutes. He also requested injunctive relief. The City moved for summary judgment on the ground that its process for initiated charter amendments is consistent with the applicable constitutional and statutory provisions. The district court granted the City's motion, and McCarville appealed.

McCarville contended that the City's ordinances related to charter amendments violate the Colorado Constitution because the constitution permits only the General Assembly to legislate on this matter. He argued further that the ordinances conflict with the relevant statute, section 31–2–210, C.R.S.2013. In response, the City maintained that, as a home rule municipality, it may enact ordinances addressing the charter amendment process because: (1) this is a matter of local concern or (2) this is a matter of mixed state and local concern, and its ordinances do not conflict with the statute.

The court concluded that both the State and the City may legislate on the matter of amendments to a home rule charter so long as their legislation does not conflict.

In this case, the court held that the City's ordinances pertaining to a citizen-initiated charter amendment do not conflict with the state statues because the process set forth by City ordinances precedes and complements the procedure outlined by statute.

EMPLOYMENT - FLORIDA

Arafat v. School Bd. of Broward County

United States Court of Appeals, Eleventh Circuit - December 4, 2013 - Fed.Appx. - 2013 WL 6244735

Employee of county school board brought Title VII claims against board for sexual harassment, disparate treatment on basis of race, national origin, and religion, and retaliation, as well as claims for age discrimination under Age Discrimination in Employment Act (ADEA), and for gender discrimination under Equal Pay Act. The United States District Court for the Southern District of Florida granted board's motion to dismiss for failure to state a claim. Employee appealed.

The Court of Appeals held that:

- Employee failed to allege severe or pervasive harassment;
- Employee failed to allege protected activity, as element for retaliation; and
- Allegations did not support inference of age discrimination.

Female employee's conclusory and formulaic recitation of elements of Equal Pay Act claim, i.e., her allegation that male employees who worked jobs requiring equal skill, effort, and responsibility were paid more than her during her employment with county school board, without pleading of facts comparing her skill, effort, and responsibility levels to those males who were allegedly paid more, failed to state a claim under Equal Pay Act.

TAX - KANSAS

In re Appeals of Various Applicants from a Decision of Division of Property Valuation of State for Tax Year 2009 Pursuant to K.S.A. 74-2438

Supreme Court of Kansas - December 6, 2013 - P.3d - 2013 WL 6383034

The question arose of whether natural gas stored in facilities located in Kansas under contract with interstate companies is subject to ad valorem taxation. The Kansas Constitution, Article 11, § 1 (2012 Supp.) exempts merchants' inventory from such taxation, but that exemption does not include tangible personal property owned by a public utility.

The taxpayers claimed they were entitled to the exemption. Taxpayers are 40 business entities that fall into three general categories: out-of-state natural gas marketing companies, out-of-state local distribution companies certified as public utilities in their states, and out-of-state municipalities. Each buys natural gas from producers or other marketers and then delivers it to the pipelines under contracts with the pipeline companies allowing the taxpayer to withdraw equivalent amounts of gas at a later time from out-of-state distribution points.

Taxpayers appealed appraisals and filed requests for ad valorem tax exemption. The Court of Tax Appeals consolidated appeals and, following hearing, denied taxpayers' exemption requests. Taxpayers appealed.

The Supreme Court of Kansas held that:

- Ad valorem tax did not violate the Commerce Clause;
- There were sufficient contacts between natural gas and Kansas to eliminate any due process

concerns from ad valorem taxation;
- Taxpayers who were out-of-state marketers and brokers of natural gas were not "public utilities," and, thus, their inventory was exempt from property tax; and
- Inventory of municipally-owned natural gas was exempt from ad valorem property tax.

MUNICIPAL ORDINANCE - MAINE

Town of China v. Althenn

Supreme Judicial Court of Maine - December 10, 2013 - A.3d - 2013 ME 107

Town brought action against property owner, alleging he maintained an unauthorized automobile graveyard on his property. The District Court entered judgment in favor of town, ordering property owner to remove or store three unregistered vehicles, and imposed a civil penalty and attorney fees. Property owner appealed and town cross-appealed.

The Supreme Judicial Court of Maine held that:

- Sufficient evidence existed to support finding that automobiles stored on property owner's land were not antique vehicles, and thus, that property owner was in violation of the automobile graveyard and junkyard statute;
- Sufficient evidence existed to support finding that property owner's 3/4 ton truck was not a tractor used solely for logging purposes;
- Property owner's interrogatory answer, in which he identified a truck stored on his property as an "altered vehicle," did not constitute inadmissible opinion testimony; and
- District Court did not abuse its discretion in declining to award town additional attorney fees.

BANKRUPTCY - MICHIGAN

In re City of Detroit, Mich.

United States Bankruptcy Court, E.D. Michigan, Southern Division - December 5, 2013 - B.R. - 2013 WL 6331931

Parties objected to city's eligibility to be Chapter 9 debtor, and to whether its Chapter 9 petition had been filed in "good faith."

The Bankruptcy Court held that:

- Bankruptcy court, even as non-Article-III court, had constitutional authority to finally determine all issues that were raised in context of resolving objections to city's eligibility for Chapter 9 relief, including constitutionality of state statute pursuant to which emergency manager caused city to file for Chapter 9 relief;
- Chapter 9 of the Bankruptcy Code did not violate the Tenth Amendment, either on its face or as applied;
- Michigan's emergency manager law did not, as predicted by bankruptcy judge in Michigan, violate the State's constitutional right of referendum;
- Michigan law did not, as predicted by bankruptcy judge in Michigan, violate Pension Clause of the Michigan Constitution;
- Filing of Chapter 9 petition on city's behalf deprived Michigan state court of jurisdiction to enter any order or to determine any issue pertaining to city's eligibility to be a Chapter 9 debtor;

- City was “insolvent,” as required to be eligible for Chapter 9 relief;
- City desired to effect plan to adjust its debts, as required for it to be eligible for Chapter 9 relief;
- City demonstrated the “impracticability” of engaging in prefiling negotiations with its creditors; and
- City acted in “good faith” in filing for Chapter 9 relief, and case could not be dismissed as “bad faith” filing.

TAX - MISSOURI

Blue Springs R-IV School Dist. v. School Dist. of Kansas City

Supreme Court of Missouri, En Banc - December 10, 2013 - S.W.3d - 2013 WL 6448904

Taxpayers brought action against school district alleging that requirement that district accept transfer of students who resided in unaccredited districts violated Hancock Amendment of state constitution, which prohibited unfunded mandates. The Circuit Court entered judgment in favor of taxpayers. State appealed and taxpayers cross-appealed.

The Supreme Court of Missouri held that statutory requirement that accredited districts accept transfers from unaccredited districts did not violate Hancock Amendment.

Statutory requirement that accredited school districts accept transfer of students from unaccredited districts did not impose an unfunded mandate in violation of the Hancock Amendment of the state constitution. Hancock Amendment only barred the state from mandating “a new activity or service or an increase in the level of any activity or service beyond that required by existing law.”

Statutory requirement simply addressed which school districts would educate which students, it did not impose a “new” educational activity on local districts because all districts already were required by statute and the state constitution to provide a free public education to students in grades K–12. There was no mandated “increase in the level” of those services for the purposes of the Hancock Amendment, even if the district provided such services to more students as a result of transfers from unaccredited districts, as this was simply an increase in the frequency of providing the same service.

FORUM SELECTION - NEW YORK

Goldman, Sachs & Co. v. North Carolina Mun. Power Agency No. One

United States District Court, S.D. New York - December 9, 2013 - Slip Copy - 2013 WL 6409348

This case involved a dispute over what forum is appropriate to resolve an underlying dispute concerning the issuance by Defendant North Carolina Municipal Power Agency Number One (“NCMPAI”) of $149.7 million in auction rate securities (“ARS”) in which Goldman, Sachs & Co. (“Goldman”) acted as the underwriter and broker-dealer for the issuance.

Goldman argued that the District Court had exclusive jurisdiction under an applicable forum selection clause in the broker-dealer agreements. NCMPAI argued that arbitration before the Financial Industry Regulatory Authority (“FINRA”) was the appropriate forum to settle the parties’ dispute.

On December 12, 2012, NCMPAI initiated an arbitration in North Carolina against Goldman before

FINRA to settle disputes arising from the issuance. On February 27, 2013, Goldman filed a complaint against NCMPAI in this Court seeking a declaration that the FINRA arbitration was an inappropriate forum for the dispute and an enjoinment of the arbitration.

Goldman's brought a motion for a preliminary injunction and NCMPAI moved to dismiss the complaint or, alternatively, to transfer for improper venue.

Goldman and NCMPAI signed an underwriter agreement (the "Underwriter Agreement") which did not contain an arbitration clause and provided that North Carolina law governed its validity, interpretation, and performance.

Contemporaneously, the parties also signed a broker-dealer agreement (the "Broker–Dealer Agreement") that provided that New York law would govern, waived jury trial, and specified the United States District Court in the County of New York as the appropriate forum. The Broker–Dealer Agreement also contained a merger clause.

The Court began its analysis by holding that it had the authority to enjoin the FINRA Arbitration, if Goldman established that the Forum Selection Clause waived NCMPAI's right to arbitration and that the present dispute fell within the scope of that clause.

The Court concluded that the Broker–Dealer Agreement precluded arbitration under FINRA Rule 12200 and granted Goldman's motion to enjoin arbitration.

ZONING - NEW YORK

Qing Dong v. Town of North Hempstead

United States District Court, E.D. New York - December 9, 2013 - Slip Copy - 2013 WL 6407724

On January 3, 2006, Town enacted a zoning ordinance that included a prohibition on the development of vacant corner lots that were at least 100 feet wide on each side adjacent to the street.

In September 2008, Plaintiff purchased an undeveloped corner lot in the Town. The property's dimensions measure 154 feet by 80 feet.

In October 2008, Plaintiff applied for, and was denied, a building permit by the Town's Department of Buildings because the property's dimensions did not meet the zoning ordinance requirements to allow for development. Plaintiff subsequently sought a variance from the Town Board of Zoning Appeals (BZA), but such application was also denied.

Plaintiff commenced an Article 78 proceeding in the Supreme Court of New York, Nassau County to review the BZA's decision on her application for a variance. The Supreme Court sustained the BZA's decision denying Plaintiff's application for a variance. On appeal, the Appellate Division likewise affirmed denial of a variance.

Plaintiff commenced an action alleging a Fifth Amendment takings claim and seeking an injunction to require Defendant to either issue Plaintiff a building permit or a variance.

In New York, a plaintiff may address a takings or just compensation claim either through an Article 78 proceeding or under New York's Eminent Domain Procedure Law.

Here, Plaintiff commenced an Article 78 proceeding following the BZA denial of her variance application. However, Plaintiff did not seek just compensation in that action, but rather sought a review and annulment of the BZA's decision. Consequently, the court held that Plaintiff had not satisfied the ripeness requirements set forth in Williamson, which holds that, before a federal takings claim can be asserted, compensation must first be sought from the state if it has a reasonable, certain and adequate provision for obtaining compensation.

Finally, Town argued, and the Court agreed, that Plaintiff's taking claim must be dismissed with prejudice. Although a dismissal without prejudice would typically be appropriate, Plaintiff's time to seek just compensation had passed, and therefore her claims could never be ripe. The BZA denied Plaintiff's variance application in October 2009. However, the statute of limitations to commence an Article 78 proceeding is four months.

TAX - NEVADA

Cnty. of Clark v. LB Props., Inc.

Supreme Court of Nevada - December 12, 2013 - P.3d - 129 Nev. Adv. Op. 96

Property owner sought judicial review of decision of Tax Commission upholding the county assessor's assessment of a remainder parcel for tax abatement purposes. The First Judicial District Court reversed. County and assessor appealed.

At issue was whether a regulation promulgated by the Nevada Tax Commission to value remainder parcels of real property for tax abatement purposes applied retroactively.

The Supreme Court, Pickering of Nevada held that:

- Tax Commission regulation to value remainder parcels was legislative regulation that applied prospectively only, and
- Valuation method used by county assessor was not impermissible "ad hoc standard."

Regulation promulgated by the Tax Commission to value remainder parcels of real property for tax abatement purposes constituted a "legislative regulation," rather than an "interpretive regulation," and therefore regulation did not apply retroactively, where regulation established a substantive rule for assessing and valuing remainder properties. It did not merely construe the meaning of the statute, and regulation's apportionment formula for valuing remainder parcels represented an explicit break from the approach taken by the assessor, which, in the absence of the regulation, considered generally applicable factors such as land size and shape and looked at the separate value of the individual piece.

County assessor's method used in determining valuation of remainder parcel for tax abatement purposes did not constitute an impermissible "ad hoc standard," where, in the absence of an applicable regulatory method of assessment, the assessor determined taxable value by calculating what the property would have been worth had it existed as a separate piece of land during the relevant tax year, and included consideration of factors such as size, shape, topography, and the value of comparable parcels.

BONDS - NEW YORK

U.S. v. Grimm

United States Court of Appeals, Second Circuit - December 9, 2013 - F.3d - 2013 WL 6403072

Defendants were convicted in District Court of wire fraud and conspiracy to commit wire fraud in connection with multi-year scheme to fix below-market rates on interest paid by GE to municipalities. The conspiracy between GE employees and brokers depressed the interest rate on the guaranteed investment contracts paid by unindicted co-conspirator GE.

Defendants appealed their convictions on the ground that the indictment was barred by the applicable statutes of limitations. The district court held that the statute of limitations continued to run during the period when GE paid the (depressed) interest to the municipalities, and that the interest payments could constitute overt acts.

The Court of Appeals concluded that those payments did not constitute overt acts in furtherance of the conspiracy, and thus held that the limitations period for charging defendants with conspiracy began to run on the date bids were fixed, rather than on date periodic interest payments were made by institutions to issuers.

LIABILITY - NEW YORK

Rodriguez v. Coalition for Father Duffy, LLC

Supreme Court, Appellate Division, First Department, New York - December 3, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 08007

After accident, licensee under agreement with city to operate premises as a ticket stand moved for summary judgment in action bought against it for common law negligence and under the scaffold law and workplace safety statute. The Supreme Court granted the motion, and plaintiff appealed.

The Supreme Court, Appellate Division, held that genuine issues of material fact precluded summary judgment.

Genuine issue of material fact as to whether licensee under agreement with city permitting it to operate the premises as a ticket stand was a statutory agent of city and thus could be held liable under the scaffold law regardless of whether plaintiff's employer was hired directly by the city rather than by licensee precluded summary judgment in scaffold law action.

Genuine issue of material fact as to whether defendant's employees exercised actual supervision or control over plaintiff's worksite precluded summary judgment in action alleging common law negligence and workplace safety violations, based on defendant's furnishing of allegedly inadequate ladder to plaintiff.

Genuine issue of material fact as to whether a bailment was created by defendant's loan of the allegedly defective ladder to plaintiff, so as to give rise to liability for common-law negligence if defendant provided plaintiff with dangerous equipment even if its defect was patent, precluded summary judgment on plaintiff's common-law negligence claim.

LIABILITY - NEW YORK

Encore Lake Grove Homeowners Ass'n, Inc. v. Cashin Associates, P.C.

Supreme Court, Appellate Division, Second Department, New York - November 27, 2013 - N.Y.S.2d - 111 A.D.3d 881 - 2013 N.Y. Slip Op. 07932

Village issued certificates of occupancy for condominium developments based upon engineer's inspections. After the condominium homes were purchased, the homeowners discovered certain construction defects, including the absence of fire walls in two buildings.

Two condominium communities and a joint homeowners association brought action against village engineer for breach of contract and professional malpractice in connection with engineer's inspection of condominium units.

The Supreme Court, Appellate Division, held that:

- Plaintiffs could be third party beneficiaries of contract between village and engineer authorizing the defendant to inspect the condominiums, and
- Plaintiffs did not have claim against engineer for professional malpractice based on its allegedly negligent inspection of the condominiums. Plaintiffs were seeking enforcement of the engineer's promise to properly inspect the construction of the subject homes, an thus only had claim sounding in contract.

ZONING - UTAH

Krejci v. City of Saratoga Springs

Supreme Court of Utah - December 10, 2013 - P.3d - 2013 UT 74

Capital Assets Financial Services owned twelve acres of property within the City of Saratoga Springs. In 2012, Capital Assets asked the city council to rezone its property from a low density to a medium density residential zone so that it could develop the land into seventy-seven "mansion style town homes." The city council granted the request by enacting an ordinance rezoning the twelve acres of property. In response, a group of citizens circulated a petition to reverse the ordinance. After obtaining the required signatures, the group submitted the petition to the City and requested that the issue be placed on the ballot as a referendum. The city recorder determined that the petition complied with the requirements of Utah Code section 20A–7–601 and agreed to place it on the ballot.

Capital Assets then brought declaratory judgment action against city seeking determination that site-specific zoning action was not legislative action subject to referendum. The District Court entered judgment in favor of Capital Assets. Objectors petitioned for writ of extraordinary relief.

The Supreme Court of Utah held that:

- Statute permitting voter to challenge refusal to accept referendum petition applied;
- Petition for extraordinary relief was appropriate avenue for review; and
- Site-specific rezoning was legislative action subject to referendum.

Site-specific rezoning was legislative action, rather than administrative action, subject to referendum. Site-specific zoning effectively established a new law, and did not just implement one already in existence, as rezoning required the weighing of broad, competing policy considerations and resulted in a law of general applicability.

MUNICIPAL ORDINANCE - ARKANSAS

Graves v. Greene County

Supreme Court of Arkansas - December 5, 2013 - S.W.3d - 2013 Ark. 493

Township constable filed complaint against county, county quorum court, and county judge seeking reimbursement of expenses and for writ of mandamus to compel defendants to set salary for constables. The Circuit Court issued order requiring county defendants to set salary and denied constable's claim for expenses, which had to be presented to County Court. The County Court denied constable's claims. Constable then filed complaint for judicial review of denial and sought declaratory relief based on challenge to constitutionality of county ordinance that set salary at $25 per month. The Circuit Court conducted de novo review, denied constable's claim for reimbursement of expenses and found that ordinance setting salary for constables was not unconstitutional. Constable appealed.

The Supreme Court of Arkansas held that:

- Amended version of statute governing reimbursement of expenses of county and district officials in effect at time of request governed request;
- Constable was not "district official" entitled to reimbursement of expenses; and
- Ordinance setting salary for township constables at $25 per month was not so arbitrary and unreasonable as to violate equal protection.

County ordinance setting salary for township constables at $25 per month was not so arbitrary and unreasonable as to violate equal protection based on constable's claim that statutory responsibilities of constables called for reasonable salary of $30,000 per year. Rather, quorum court had rational basis for setting salary based on duties performed by constables at county's request, and constable testified that he never had to suppress riots, fights, or unlawful assemblies within his township, and that he did not issue any traffic or misdemeanor citations, or present any summons to jury.

Graves cites Arkansas Code Annotated section 16–19–301 (Repl.1999), which outlines the responsibilities of constables. Duties of constables include suppressing all riots, affrays, fights, and unlawful assemblies; keeping the peace; and arresting offenders.

PUBLIC UTILITIES - CALIFORNIA

Amedee Geothermal Venture I v. Lassen Municipal Utility Dist.

United States District Court, E.D. California - November 27, 2013 - Slip Copy - 2013 WL 6198967

Plaintiff Amedee Geothermal is a private entity that runs a geothermal power plant in Lassen County. Defendant Lassen Municipal Utility District (LMUD) is a local government agency that procures and distributes electrical power within its service area.

The controversy in this case centers on the terms of two agreement between LMUD and Amedee Geothermal executed in 1987 and 1988. Under the terms of these agreements LMUD agreed to supply Amedee Geothermal the electricity it needed, and to transmit the electricity the geothermal power plant produced to PG&E, in exchange for a fee.

The parties dispute, however, whether the agreements required LMUD to continuously supply

Amedee Geothermal 34.5 kv electricity, and a controversy arose in 2009 when LMUD converted the electricity supply line from 34.5 kv to 12.47 kv. Naturally, Plaintiff asserts that by changing the voltage, the Utility District breached its contractual obligations under the agreement; whereas, Defendant counters the agreement did not obligate the Utility District to continuously provide electricity at the particular 34.5 kv level.

Amedee Geothermal sued in federal court, alleging that the reduction of the electricity voltage amounted to an unconstitutional deprivation and taking of property without due process in violation of the Fourteenth Amendment of the U.S. Constitution and an unconstitutional seizure of property in violation of the Fourth Amendment of the U.S. Constitution. Plaintiff also asserted several state law claims for, in essence, breach of contract, tortious interference, and negligence.

Defendant moved for summary judgment on Plaintiff's federal claims and asked that the Court decline to continue to exercise supplemental jurisdiction over this case—which, Defendant argued, is essentially a state law contract case.

The court granted Defendant's Motion for Summary Judgment as to Plaintiff's federal claims and declined to exercise supplemental jurisdiction over the remaining state law claims.

MUNICIPAL ORDINANCE - CALIFORNIA

Maral v. City of Live Oak

Court of Appeal, Third District, California - November 26, 2013 - Cal.Rptr.3d - 13 Cal. Daily Op. Serv. 12, 857

In December 2011, the City of Live Oak passed an ordinance prohibiting the cultivation of marijuana for any purpose within the City. Plaintiffs sued, contending the ordinance violated the Compassionate Use Act (CUA) (Health & Saf. Code,1 § 11362.5), the Medical Marijuana Program (MMP) (§ 11362.7 et seq.), equal protection, and due process.

The Court of Appeal held that Compassionate Use Act and Medical Marijuana Program Act do not preempt a city's police power to prohibit all marijuana cultivation.

EMPLOYMENT - DELAWARE

Murphy v. City of Lewes

United States District Court, D. Delaware - November 26, 2013 - Not Reported in F.Supp.2d - 2013 WL 6185437

Plaintiff was employed as secretary by the City from June 12, 1988 until August 15, 2012. On June 21, 2009, the City Manaher issued the City's updated Personnel Policy, which became applicable to all city employees on June 23, 2009. The Personnel Policy contained a "substance abuse policy," which provides that persons with a "verified first time positive result" of random drug testing would be placed on unpaid leave, and after 30 days, if they completed counseling and treatment could return to work.

On August 3, 2012, plaintiff was involuntarily taken to a laboratory for a monitored drug test. As a result of the test results, plaintiff was placed on administrative leave at the direction of Eckrich. Plaintiff allegedly was not afforded an opportunity to present facts while disciplinary measures were

being considered. Plaintiff was suspended, which lead to her termination. No other City employee had been similarly treated by failing to follow the procedures outlined in the Personnel Policy.

Plaintiff sued, claiming a constitutionally protected property right in an employment policy. She also claimed that she was forced, without just cause, to undergo a drug test, in violation of her Fourth, Fifth, and Fourteenth Amendment rights under the Constitution.

Defendants countered that plaintiff's complaint failed to plead the existence of a constitutionally protected property right in her employment. More specifically, defendants argued plaintiff did not plead the existence of a contract, implied or otherwise, that provides for anything more than at-will employment. Defendants further asserted the procedures provided under the Personnel Policy did not create a property interest in plaintiff's job because procedural protection alone, without substantive protection under state law, does not create a property interest in employment.

The court disagreed, finding that the complaint set forth sufficient facts to indicate plaintiff had a property interest in her employment with the City. The City modified plaintiff's employment by establishing the substance abuse policies. The City's policies created an implied contract requiring due process for termination, and therefore, created a constitutionally protected property interest in her employment.

ADR - DISTRICT OF COLUMBIA

Bank of America, N.A. v. District of Columbia

District of Columbia Court of Appeals - November 27, 2013 - A.3d - 2013 WL 6228165

District of Columbia brought action against bank, bank employees, and district employees, alleging conspiracy to process fraudulent tax refund checks. The Superior Court denied bank's motions to compel arbitration under the Federal Arbitration Act (FAA) and for stay. Bank appealed.

The Court of Appeals, Wagner held that:

- Trial court's denial of motion to compel arbitration was immediately appealable;
- Threshold question of whether District, through authorized agents, ever agreed to be bound by arbitration provision of contract with bank was for court rather than for arbitrator;
- Under the Procurement Practices Act of 1985 (PPA), District employees in the Office of the Chief Financial Officer (OCFO) lacked authority to agree to arbitrate contract and fraud claims; and
- Evidence was sufficient to support finding that contract between bank and District was completely integrated and thus rendered ineffective any prior authorizations or agreements for arbitration.

ANNEXATION - ILLINOIS

People ex rel. R and D Olson Ltd. Partnership v. Village of Glendale Heights

Appellate Court of Illinois, Second District - November 27, 2013 - Not Reported in N.E.2d - 2013 IL App (2d) 13-0472-U

In this quo warranto case, owners of property in unincorporated Du Page County, challenged the authority of the Village of Glendale Heights, to annex the subject territory.

The trial court granted summary judgment in favor of plaintiffs but the appeals court reversed,

finding that the Village had met its burden of demonstrating that it properly exercised valid authority to annex the subject territory.

After the Village gave notice on August 22, 2012, but before it passed its annexation ordinance on September 6, 2012, plaintiffs filed section 7–1–8 petitions in Bloomingdale, a neighboring jurisdiction. The Village passed its annexation ordinance after plaintiffs filed their petitions in Bloomingdale, but within the 60–day period during which section 7–1–13(c) prohibited Bloomingdale from annexing the subject territory.

Notwithstanding the Village's statutory compliance, plaintiffs contend that the Village lost authority to proceed with its annexation when plaintiffs filed their section 7–1–8 petitions in Bloomingdale. According to plaintiffs, their filing of the petitions gave Bloomingdale priority over the Village's proceeding.

"We disagree with the parties' characterization of the issue as one of priority. Even assuming arguendo that plaintiffs are correct that Bloomingdale obtained priority when plaintiffs initiated that proceeding by filing their petitions, it would have had no legal effect in the factual scenario presented here. Priority becomes relevant only when two entities have annexed the same territory; here, there was only one completed annexation—the Village's. Plaintiffs' petitions constituted a request that Bloomingdale annex the territory. Plaintiffs themselves cannot annex their property to Bloomingdale; they have no right to be annexed; and they enjoy no right of priority in themselves. Plaintiffs' quo warranto action was simply a challenge to the Village's authority to annex the subject territory, calling for an adjudication of whether the Village acted within its statutory authority. Bloomingdale was not a party; therefore, any rights that Bloomingdale might have had simply were not at issue."

INVERSE CONDEMNATION - KENTUCKY

Stewart v. City of Franklin

United States District Court, W.D. Kentucky, Bowling Green Division - December 2, 2013 - Slip Copy - 2013 WL 6230497

This case arises out of the fire at Plaintiff's residence on August 1, 2012 and the subsequent demolition of the property on August 3, 2012. Following the fire, the City of Franklin condemned the property and razed the building.

The Plaintiff alleged that Defendants violated constitutional rights and federal laws by not compensating him and not providing him an opportunity to contest the actions of the government prior to the demolition of his property. Defendants contended that Plaintiff must exhaust state remedies, specifically an inverse condemnation action, before asserting these claims in federal court. As such, Defendants argued that Plaintiff's claims are not ripe, and thus, the Court does not have subject matter jurisdiction.

Plaintiff contended that he does not need to file an action for an inverse condemnation because this taking solely related to private use, not public use. The Court rejected Plaintiff's argument concerning the condemnation of his property falling into the category of a private taking. Plaintiff correctly states that a taking for a purely private use constitutes a constitutional violation. Montgomery v. Carter Cnty., 226 F.3d 758, 765 (6th Cir.2000). However, to succeed on such a claim, Plaintiff must show that the "taking had no rational connection to a minimally plausible conception of the public interest." Id. at 768. Here, the facts alleged by Plaintiff demonstrate that his

property was demolished in connection with obtaining a local development grant. This fact alone is enough to meet the extremely low threshold of showing a connection to a public use.

TAX - LOUISIANA

Gulf Coast Housing Partnership, Inc. v. Bureau of Treasury of City of New Orleans

Court of Appeal of Louisiana, Fourth Circuit - November 27, 2013 - So.3d - 2013-0556 (La.App. 4 Cir. 11/27/13)

Gulf Coast Housing Partnership, Inc. (GCHP), is a Delaware nonprofit corporation licensed to business in Louisiana. It owns and is the sole member and manager of the three Louisiana limited liability companies (LLCs). Each of these three limited liability companies owns immovable property in Orleans Parish that they assert will be used for housing of the poor.

The Orleans Parish assessor assessed the LLCs' immovable property for ad valorem property taxes for calendar year 2010. GCHP paid the 2010 property taxes for the LLCs as assessed under protest and commenced this suit against the assessor, the City of New Orleans, and the Louisiana Tax Commission for a refund of the taxes paid.

The core issue was whether La. Const. art. VII, § 21(B)(1)(a)(i) allows Louisiana immovable property to be exempt from ad valorem property tax when the property is titled and/or owned directly by a limited liability company that is not directly a 26 U.S.C.A. § 501(c)(3) tax-exempt entity and thus income tax-exempt by United States and Louisiana law when the sole member (owner) of the limited liability company is a 26 U.S.C.A. § 501(c)(3) tax-exempt nonprofit corporation, and because the activities of the tax-exempt corporation are not commercial in nature but compliant with law for income tax-exempt purposes.

The court concluded that only if the immovable property was undeveloped and held by the tax-exempt corporation in its own name as an investment would the immovable be exempt from ad valorem tax. Here, the LLCs acquired the immovable properties for commercial purposes, albeit charitable in nature, to-wit: for "affordable and supportive rental housing for low-income individuals with disabilities and for low-income workers."

In addition, the court found no evidence that GCHP or the LLCs had entered into any agreement with any municipal or parish industrial development board to bring them within the purview of La. R.S. 51:1151, et seq., and thus potentially exempt from ad valorem taxation of their immovable property.

ZONING - MAINE

Duffy v. Town of Berwick

Supreme Judicial Court of Maine - December 5, 2013 - A.3d - 2013 ME 105

Landowners whose property abutted that of an automobile recycler sought review of planning board decision approving conditional use permit to install and operate a metal shredder for vehicles. The Superior Court vacated. Recycler appealed and landowners cross-appealed.

The Supreme Judicial Court of Maine held that:

- Planning coordinator's e-mail to attorney for applicant did not taint decision by planning board to approve the permit;
- Board's finding that application met the ordinance standards was supported by the record; and
- Record supported board's determination that metal shredder would meet the 60-decibel standard as measured at the neighboring property.

ZONING - MINNESOTA

White v. City of Elk River

Supreme Court of Minnesota - December 4, 2013 - N.W.2d - 2013 WL 6252431

Property owner brought declaratory judgment action against city seeking declaration that campground operated on property was a legal nonconforming use and that city had wrongfully revoked conditional use permits to operate campground, and seeking damages for alleged intentional interference with business relations.

The Supreme Court of Minnesota held that:

- On an issue of first impression, application for and receipt of conditional-use permit did not automatically waive nonconforming use status;
- Property owner did not waive nonconforming use status;
- Municipality lacked authority to terminate nonconforming use by revocation of conditional-use permit; and
- City properly required interim-use permit for replacement of destroyed accessory building.

Property's owner's application for and receipt of conditional-use permit for property did not constitute a surrender of the right to continue nonconforming use of the property as a campground unless the property owner validly waived that right. Nonconforming uses were constitutionally protected property rights, and a property owner's voluntary compliance with a later-enacted zoning ordinance did not automatically waive the right to operate under nonconforming use status in the future.

Property owner who had applied for and received a conditional-use permit did not "waive" its right to continue nonconforming use of property as a campground, where, although property owner knew of its nonconforming-use rights as a campground when it applied for the conditional-use permit, there was nothing in the record to evince an intent that, by applying for and accepting the conditional-use permit, property owner subordinated its rights to the city's zoning regime.

EMINENT DOMAIN - MINNESOTA

County of Dakota v. Cameron

Supreme Court of Minnesota - November 27, 2013 - N.W.2d - 2013 WL 6189021

County commenced condemnation action to acquire various properties to provide a right-of-way for road construction. The District Court awarded compensation to commercial property owner and awarded attorney fees and other costs. Property owner appealed.

The legal questions presented by this case relate to the operation of Minnesota's minimum-compensation statute, Minn.Stat. § 117.187 (2012), which provides a mechanism for compensating

property owners who “must relocate” following the condemnation of their real property. Appellant, who had his commercial property taken by respondent County of Dakota, argued that the district court erred when it failed to award him sufficient damages under the minimum-compensation statute to purchase a “comparable property in the community.”

The Supreme Court of Minnesota held that:

- Condemned property’s city was the relevant community for purposes of determining award under minimum-compensation statute;
- Another liquor store in city was a “comparable property” under minimum-compensation statute, even though such other property was not available for sale;
- The lodestar approach governs the determination of the reasonableness of an award of attorney fees in an eminent-domain proceeding; and
- Trial court acted within its discretion in reducing award of attorney fees to account for property owner’s limited success.

EMPLOYMENT - MISSISSIPPI

Strickland v. South Panola School Dist.

Court of Appeals of Mississippi - December 3, 2013 - So.3d - 2013 WL 6233912

Strickland, a teacher employed with the school district, was arrested for enticing a child pursuant to Mississippi Code Annotated section 97–5–33(7) (Supp.2013). On October 26, 2012, while Strickland was in jail, the superintendent of the school district, hand-delivered a letter to Strickland which informed him that the board had decided to terminate his employment as a result of his arrest. The letter further stated that Strickland had five days from the date of the delivery of the letter to request a hearing. Strickland did not request a hearing until November 4, 2012. Shaffer notified Strickland’s attorney on November 5, 2012, that the board would not grant Strickland’s request for a hearing because the request was not made within five days of Strickland receiving notice.

Strickland argued that he was “practically unable” to request a hearing within five days because he was incarcerated. He insists that as soon as he was able to meet with his attorney, he had a written request for a hearing delivered to the board. “It is clear here that Strickland failed to comply with section 37–9–59, as he requested a hearing outside of the five-day period mandated by the statute. Therefore, he waived his right to request a hearing, and his termination became effective on November 1, 2012.”

Despite his failure to comply with section 37–9–59, Strickland argued that the doctrine of equitable tolling applied, suspending the five days mandated by section 37–9–59. He contends that extraordinary circumstances forced him to make his request outside of the time period. The court concluded that the doctrine of equitable tolling does not apply here because the five-day requirement in section 37–9–59 has never been interpreted as a statute of limitations, and because Strickland was requesting a hearing with the school district, not filing a complaint in court. Additionally, Stickland cited no specific, extraordinary circumstances that kept him from contacting his attorney or the board while incarcerated and cites no authority to support his argument that the timeline set forth in section 37–9–59 may be extended pursuant to the doctrine of equitable tolling.

ETHICS - NEVADA

Carrigan v. Commission on Ethics of State

Supreme Court of Nevada - November 27, 2013 - P.3d - 129 Nev. Adv. Op. 95

After Nevada Commission on Ethics censured city council member based on his failure to recuse himself, pursuant to the Nevada Ethics in Government Law, from voting on a matter due to potential conflict of interest, council member petitioned for judicial review. The District Court denied the petition, and council member appealed. The Nevada Supreme Court reversed. Certiorari was granted, and the United States Supreme Court reversed and remanded.

On remand, the Nevada Supreme Court held that:

- Ethics in Government Law's recusal provision was not void for vagueness;
- Application of Law's recusal provision for conflicts of interest to city council member did not violate member's due process rights; and
- Conflict of interest recusal provisions did not violate city council member's right of association.

CBA - NEW YORK

In re Bd. of Educ. of Valhalla Union Free School Dist. v. Valhalla Teachers Ass'n

Supreme Court, Appellate Division, Second Department, New York - December 4, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 08076

The Board of Education of the Valhalla Union Free School District entered into a collective bargaining agreement with the Valhalla Teachers Association (VTA). The CBA required, inter alia, that, where a teacher's position has been "excessed" and another position becomes available, the Board must appoint the teacher whose position was excessed to the available position, if the teacher is certified in the teaching area in the available position. At some point at the end of the 2010/2011 school year, a Spanish language teacher retired, and her position became available. On June 28, 2011, the position was filled. In a July 12, 2011, meeting, the Board "excessed" the position of Lisa Petek, a teacher of English as a second language.

The VTA filed a grievance on behalf of Petek, claiming that Petek, who was certified to teach Spanish and had experience teaching the subject in another school district, should have been appointed to the vacant position. The Superintendent of Schools denied the grievance, which was appealed to the Board. The VTA waived its right to a hearing and demanded arbitration pursuant to the CBA's grievance procedures. The Board then filed a petition to permanently stay arbitration, asserting that the CBA provision at issue conflicted with public policy and the mandates of the Education Law. The Supreme Court denied the petition.

The Appellate Division found that the Supreme Court erred in concluding that this dispute was subject to arbitration. The CBA provision at issue mandates that the Board appoint a "certified" teacher, whose position has been "excessed," to a vacant position in the teacher's area of certification. While certification may be a central qualification, the Board has the discretion, under the Education Law, to prescribe additional qualifications (see Education Law § 2573[9]). The CBA, in effect, divests the Board of its discretion by mandating automatic appointment of certified teachers without inquiry into any additional qualifications the Board may have prescribed. This discretion may not be bargained away. Accordingly, the Board's petition for a permanent stay of arbitration should have been granted.

LIABILITY - NEW YORK

Antonetti v. City of New York

Supreme Court, Appellate Division, First Department, New York - November 26, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 07836

Plaintiff brought action against city and city board of education, seeking to recover damages for injuries she allegedly sustained on board's premises. The Supreme Court dismissed complaint with respect to board, granted summary judgment in favor of defendants, and denied plaintiff's motion to renew and reargue. Plaintiff appealed.

The Supreme Court, Appellate Division, held that:

- City could not be held liable for torts committed by board;
- Trial court's order denying defendants' motion for leave to amend their answer to deny that board operated premises on which plaintiff's injury occurred became law of the case; and
- Defendants were equitably estopped from seeking dismissal on ground that board did not owe plaintiff special duty.

CBA - NEW YORK

Town of Babylon v. Carson

Supreme Court, Appellate Division, Second Department, New York - November 27, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 07980

Town commenced proceeding to vacate arbitration award which reduced penalty it had imposed upon an employee Union and employee cross-petitioned to confirm the award.

The Supreme Court, Appellate Division, held that arbitrator lacked authority to reduce penalty.

Collective bargaining agreement (CBA) only empowered arbitrator to provide employee with remedy upon finding that imposition of discipline was not founded on just cause, and thus, arbitrator lacked authority to reduce penalty after finding just cause. Moreover, stipulation that arbitrator would determine whether hearing officer had considered progressive discipline in course of imposing initial penalty did not confer upon arbitrator independent power to reduce penalty imposed.

ZONING - PENNSYLVANIA

McConville v. City of Philadelphia

Commonwealth Court of Pennsylvania - November 27, 2013 - A.3d - 2013 WL 6190143

City residents brought action against city challenging legality of consent agreement between city and billboard companies and seeking declaratory and injunctive relief. The Court of Common Pleas sustained city's preliminary objections and dismissed residents' complaint. Residents appealed.

The Commonwealth Court held that:

- Resident who actively pursued billboard owner's alleged ordinance violations before Zoning Board of Adjustment (ZBA) had standing to challenge agreement, and

- Another resident who failed to pursue available administrative remedy for alleged violations lacked standing to challenge agreement.

City resident who complained to city about reconstruction of purportedly non-conforming billboard and actively pursued billboard owner's alleged ordinance violations before ZBA had standing to challenge legality of consent agreement between city and billboard companies, where billboard owner withdrew from further participation in ZBA proceedings and used consent agreement to move billboard dispute to alternative, non-public venue in which resident could not participate.

City resident who repeatedly complained to city about reconstruction of purportedly non-conforming billboard but failed to pursue available administrative remedy for billboard owner's alleged ordinance violations lacked standing to challenge legality of consent agreement between city and billboard companies. Although resident claimed that she "lost faith in the system" when city referred to consent agreement in response to resident's final complaint, it was resident's failure to pursue administrative remedy, and not consent agreement itself, that prevented resident from effectively challenging owner's reconstruction of billboard.

GOVERNMENT RECORDS - TEXAS

Fox v. State

Court of Appeals of Texas, Texarkana - December 4, 2013 - S.W.3d - 2013 WL 6244662

After repeated arrests, Robert James Fox resolved to sue the City of Jacksonville under the Texas Tort Claims Act. To this end, Fox created a document captioned, "CLAIM: NOTICE TO CURE/NOTICE OF INTENT TO SUE AS PRESENTED BY AFFIDAVIT OF Robert James Fox." The claim asserted, among other things, that the Jacksonville Police Department commenced a "series of attacks by force of arms" on three separate occasions. Fox further claimed his December 3 arrest and the events leading up to it were the result of retaliation, discrimination, religious persecution, and included torture.

Fox filed his notice among the miscellaneous documents in the County Clerk's Office of Smith County on January 6, 2009. Once filed, a copy of the document became a part of the records of the County Clerk of Smith County. After filing the notice in Smith County, Fox delivered the notice to Betty Thompson, the City Secretary for Jacksonville. After stamping the notice as "received" by the City of Jacksonville, Thompson delivered the notice to the city manager, the city attorney, and the human resources director for the City of Jacksonville. The city manager delivered the notice to Daniel.

On January 23, 2009, Fox was arrested for tampering with a governmental document. The indictment alleged that Fox presented or used a governmental record, i.e., the notice filed with the County Clerk of Smith County, by presenting the notice to the City of Jacksonville, with the intent to harm or defraud the City, with knowledge of its falsity as the document purported "to be a complaint, summons, or other Court Process and/or claiming retaliation and/or discrimination and/or religious persecution and/or torture."

After a jury trial at which Fox represented himself with standby counsel available, Fox was found guilty of tampering with a governmental record and was sentenced to one year of incarceration and fine of $10,000. Fox appealed, claiming, among other things, that the evidence was insufficient to support his conviction. The court of appeals agreed.

The Court of Appeals held that:

- Defendant's delivery of notice of claim to city secretary transformed such notice into governmental record;
- Evidence countering claims in notice of claim did not establish that defendant knew such claims were false when they were made;
- Evidence that defendant knew that allegations of discrimination, religious persecution, retaliation, and torture were false when made was insufficient to support conviction; and
- Evidence that defendant presented notice of claim to city with intent that it be taken as genuine governmental record by presenting or using document filed with county clerk was insufficient to support conviction.

"At most, the foregoing testimony supports the proposition that these witnesses disagree with Fox's allegations. This testimony does not, however, get at the root of the issue—Fox's knowledge that the claims were false. Stated differently, the State was required to prove not only that the specific allegations of discrimination, retaliation, religious persecution, and torture were false, but that Fox was aware that they were false. In this task, the State failed."

"The foregoing evidence is insufficient to prove Fox knew the allegations of discrimination, religious persecution, retaliation, and torture were false. Fox's allegations are merely that—allegations—to be accepted or rejected in a civil proceeding."

INVERSE CONDEMNATION - CALIFORNIA

Smith v. County of Santa Cruz

United States District Court, N.D. California., San Jose Division - November 26, 2013 - Not Reported in F.Supp.2d - 2013 WL 6185238

Plaintiff brought Fifth Amendment regulatory takings claim for eminent domain through inverse condemnation. Specifically, his allegations suggested that Defendants improperly tagged Plaintiff's property for violating local housing code. However, as Plaintiff failed to pursue inverse condemnation remedies in state court, he failed to allege the second element of an as-applied takings claim under the Fifth Amendment.

The remarkable part of this case is the following deadpan statement by the court, "Plaintiff appears to allege that these incidents led to the deprivation of his constitutional rights, which caused physical and emotional injuries, but other parts of the complaint suggest that Plaintiff may be dead."

Plaintiff was granted leave to amend, with the stipulation that, "Any amendment should clear up the ambiguity in the current complaint with regard to whether Plaintiff is alive."

LIABILITY - COLORADO

Rieger v. Wat Buddhawararam of Denver, Inc.

Colorado Court of Appeals, Div. A - November 21, 2013 - P.3d - 2013 COA 156

Tree trimmer brought action against temple premises owner after he was struck and injured by falling tree limb. After temple designated lead volunteer as a nonparty at fault, tree trimmer filed amended complaint naming lead volunteer as a defendant, voluntarily dismissing lead volunteer

from the action on immunity grounds, and seeking to hold temple vicariously liable for lead volunteer's negligence. The District Court granted temple's motion for summary judgment, and tree trimmer appealed.

The Court of Appeals held that:

- Tree trimmer was a "volunteer";
- Tree trimmer was a "licensee"; and
- As a matter of first impression, temple was not vicariously liable under the Colorado Premises Liability Act for lead volunteer's negligence.

Volunteer Service Act provision stating that nothing in the Act "shall be construed to bar any cause of action against a nonprofit organization" or "change the liability otherwise provided by law of a nonprofit organization" arising out of an act or omission of a volunteer exempt from liability under the Act does not create a new cause of action that does not otherwise exist under the law, nor does it expand landowner liability beyond that recognized in the Colorado Premises Liability Act.

Temple premises owner was not vicariously liable under the Colorado Premises Liability Act for lead volunteer's negligence in allowing tree limb to fall on volunteer tree trimmer while conducting tree trimming on temple property, as tree trimmer was a licensee rather than an invitee, and temple did not create any danger, nor did it provide any supervision or control over the project or the volunteers.

LIABILITY - CONNECTICUT

Stroud v. Mid-Town Tire and Supply, Inc.

Appellate Court of Connecticut - December 3, 2013 - A.3d - 2013 WL 6173860

On March 24, 2008, the Middletown Board of Education (Board) hired Mid–Town to move a storage container located on the premises of Middletown High School. Mid-Town positioned a tow truck on the east side of Huntinghill Avenue and stretched a winch cable from the tow truck, across the width of Huntinghill Avenue, to the storage container positioned near the western side of the road. You see where this is headed, right?

Plaintiff police officer, unaware that the winch cable was running across his lane of travel, violently collided with the cable. Plaintiff brought a negligence claim against Mid-Town and the Board.

Defendant filed a motion to dismiss the third count of the plaintiff's complaint on the ground that the allegations set forth therein amounted to "a cause of action against a municipality or its employees for injuries attributable to a defective roadway…." The defendant argued that pursuant to General Statutes § 52–557n, the plaintiff's exclusive remedy was to bring a claim pursuant to the municipal highway defect statute, General Statutes § 13a–149. The defendant asserted that insofar as the plaintiff did not satisfy the notice requirements of § 13a–149,3 he did not properly bring a claim pursuant to that statute and, thus, his claim should be dismissed for lack of subject matter jurisdiction.

Plaintiff asserted that his cause of action sounded in negligence. He argued that the action could not properly have been brought pursuant to § 13a–149 because he brought the action against the defendant, an employee of the board, which was not responsible for the maintenance of the roadways in the city, rather than against the city itself. Additionally, the plaintiff asserted that "there is and will be a factual dispute that at the time of the accident, Huntinghill Avenue was

closed." On this ground, the plaintiff argued, Huntinghill Avenue was not a roadway within the purview of § 13a–149.

The trial court granted the defendant's motion to dismiss, agreeing with the defendant that the plaintiff failed to bring his claim pursuant to §13a149, his exclusive remedy. The court concluded that the condition at issue in the plaintiff's complaint, namely, a winch cable stretched across the travel lanes of Huntinghill Avenue, clearly brought the claim within the purview of the municipal highway defect statute. Further, the court concluded that, pursuant to § 7–465(a), the defendant was an employee of the city and that, if the count were to proceed, the city ultimately would be liable for his negligent acts. The appeals court affirmed.

LIABILITY - GEORGIA

Stevenson v. City of Doraville

Supreme Court of Georgia - November 25, 2013 - S.E.2d - 2013 WL 6188123

Motorist who stepped out of his disabled vehicle on interstate and was struck by another vehicle filed negligence action against city, alleging that police officer in nearby police vehicle was actively negligent by creating hazards that diverted traffic towards motorist's disabled vehicle. The State Court granted summary judgment to city. Motorist appealed. The Court of Appeals affirmed. Motorist sought writ of certiorari.

After granting writ, the Supreme Court of Georgia held that:

- Public duty doctrine did not preclude motorist's claims against city based on misfeasance; but
- There was no evidence that actions of police officer contributed to motorist being hit by oncoming traffic; and
- Officer did not have special duty to motorist, as would remove motorist's claims of nonfeasance from preclusion of public duty doctrine.

LIABILITY - GEORGIA

Atkinson v. City of Atlanta

Court of Appeals of Georgia - November 21, 2013 - S.E.2d - 2013 WL 6097941

Homeowner whose yard, trees, shrubs, driveway, and fence were damaged by flooding caused by broken water main near his property brought nuisance action against city. The trial court granted summary judgment in favor of city. Plaintiff appealed.

The Court of Appeals held that:

- City could not be held liable in nuisance for failing to act within reasonable time to repair broken water main, absent evidence establishing how long it took the city to begin the repair work;
- Single isolated incident of flooding on plaintiff's property caused by broken water main was not continuous, repetitious, or of sufficient duration to support nuisance claim against city; and
- City did not have a duty to repair damage to plaintiff's property caused by flooding from water main break, as required to support nuisance claim against city for failure to timely repair the property.

To be held liable for maintenance of nuisance, a municipality must be chargeable with performing continuous or regularly repetitious acts, or creating continuous or regularly repetitious condition, which causes hurt, inconvenience or injury. Municipality must have knowledge or be chargeable with notice of the dangerous condition; and, if the municipality did not perform an act creating the dangerous conditions, the failure of the municipality to rectify the dangerous condition must be in violation of a duty to act.

To hold a municipality liable for creating or maintaining a nuisance, the defect or degree of misfeasance must exceed mere negligence (as distinguished from a single act). The act complained of must be of some duration and the maintenance of the act or defect must be continuous or regularly repetitious and there must be a failure of municipal action within a reasonable time after knowledge of the defect or dangerous condition.

TAX - ILLINOIS

Hartney Fuel Oil Co. v. Hamer

Supreme Court of Illinois - November 21, 2013 - N.E.2d - 2013 IL 115130

This case concerned the proper situs for tax liability under retail occupation taxes arising under three Illinois statutes: the Home Rule County Retailers' Occupation Tax Law, the Home Rule Municipal Retailers' Occupation Tax Act, and the Regional Transportation Authority Act (collectively, the "local ROT Acts").

The Illinois Department of Revenue (DOR) determined through audit that Hartney Fuel Oil Company's sales at retail were attributable to the company's Forest View office, rather than the Village of Mark location reported by the company. The change in location made Hartney subject to retail occupation taxes imposed by the Village of Forest View, Cook County, and the Regional Transportation Authority. The Department issued a notice of tax liability, which Hartney paid under protest. Hartney then filed for relief in the circuit court.

The circuit court ruled in favor of Hartney, concluding that it had accepted both its long-term sales and daily order sales in the Village of Mark, and that the regulations relevant to each section established a bright-line test for situs of sale: where purchase orders are accepted, tax liability is incurred. The appellate court affirmed.

The circuit court and appellate court both found the regulations to establish a bright-line test: "If the purchase order is accepted at the seller's place of business within the county, municipality and/or metropolitan region, ROT liability is fixed in that respective county, municipality and/or metropolitan region." The DOR and Local Governments argued that the regulations instead presented a fact-intensive inquiry, looking to the totality of the circumstances. They argued that only a totality-of-t-e-circumstances view accords with the legislative intent of the local ROT Acts and the Supreme Court's prior interpretation of the "business of selling" under the local ROT Acts.

The Supreme Court of Illinois concluded that the "Jurisdictional Questions" regulations embodied in 86 Ill. Adm.Code 220.115, 270.115, and 320.115 which define situs for ROT where purchase order acceptance occurs, with sale at retail and the purchaser taking delivery within the state impermissibly narrowed the local ROT Acts, contrary to legislature's intention to allow local governments to collect taxes from retailers in their jurisdictions, and, thus, the regulations were invalid.

The regulations did not amply prescribe the fact-intensive inquiry contemplated by the Supreme Court, and by allowing for only one, potentially minor step in the business of selling to conclusively govern tax situs, the regulations impermissibly constricted the scope of intended taxation.

The court went on to note that, "We do not disturb the findings by the trial and appellate courts that, under the regulations, Hartney accepted its purchase orders and long-term contracts in Mark. Because of the Department's erroneous regulations, the Department has a duty under the Taxpayers' Bill of Rights Act to abate Hartney's penalties and retail occupation tax liability of Forest View, Cook County, and the Regional Transportation Authority for the audit period."

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LIABILITY - ILLINOIS

Harden v. City of Chicago

Appellate Court of Illinois, First District, Fifth Division - November 22, 2013 - N.E.2d - 2013 IL App (1st) 120846

Pedestrian who, while attempting to cross city street, broke bones in her leg and ankle after her foot became stuck in hole in six foot by four foot metal plate located on street, adjacent to crosswalk, brought negligence action against city. The Circuit Court granted summary judgment in favor of city. Pedestrian appealed.

The Appellate Court held that:

- Pedestrian was not “intended and permitted” user of street, such that city did not owe pedestrian a duty to maintain street in reasonably safe condition for use by pedestrian, and
- Even assuming that presence of snow had obscured visibility of marked crosswalk, city did not owe pedestrian a duty of reasonable care to maintain street and metal plate in reasonably safe condition, absent evidence that location of pedestrian’s fall was within boundaries of unmarked crosswalk.

Pedestrian who was injured while attempting to cross city street after her foot became stuck in hole in six foot by four foot metal plate located on street, adjacent to crosswalk, was not an “intended and permitted user” of the street, and thus, city did not owe injured pedestrian a duty of reasonable care to maintain street in reasonably safe condition for use by pedestrian under Local Governmental and Governmental Employees Tort Immunity Act. Pedestrian, instead of using the marked crosswalk that the city had provided for pedestrian traffic to cross street, chose to walk across metal plate located approximate three feet outside marked crosswalk.

IMMUNITY - INDIANA

F.D. v. Indiana Dept. of Child Services

Supreme Court of Indiana - November 26, 2013 - N.E.2d - 2013 WL 6182967

Parents, individually and on behalf of their children, brought action against Department of Child Services (DCS) and city police department, alleging mishandling of child abuse reports. The Superior Court granted summary judgment in favor of defendants on grounds of immunity. Parents appealed.

On transfer, the Supreme Court held that:

- Indiana Tort Claims Act (ITCA) provision of immunity for initiation of a judicial or an administrative proceeding did not apply to claim against DCS;
- Police had no duty to notify parents of juvenile’s admission to molesting parent’s daughter;

- Police department was entitled to law enforcement immunity upon claim that it was negligent in failing to pursue charges against juvenile; and
- Immunity provision of the child abuse reporting statute did not apply to claim against DCS.

INVERSE CONDEMNATION - LOUISIANA

Welborn v. St. Bernard Parish Government

United States District Court, E.D. Louisiana - November 25, 2013 - Slip Copy - 2013 WL 6184983

Plaintiff's home in St. Bernard Parish had been damaged in Hurricane Katrina and subsequently demolished by the defendant. Plaintiff sought damages for the alleged denial of his due process under the Fifth and Fourteenth Amendment and for the wrongful taking of property.

Defendant argued that the federal claim for wrongful taking under the Fifth Amendment was not ripe because the plaintiff has not used available state procedures for inverse condemnation and had not been denied just compensation. In opposition to the motion to dismiss, the plaintiff argued that the defense argument is "generally correct," but that the state remedies are insufficient because any judgment by a state court "may not be paid for many years or even decades."

"The plaintiff here admits that he did not use the state procedures for redress and has not been denied compensation as a result of that process. Instead, he argues futility in opposition to this motion based on the anticipated delay in being paid on any judgment against the defendant. Assuming that this fact is accurate, the Court finds that it is insufficient to constitute the required futility as a matter of law."

LIABILITY - MARYLAND

Ellis v. Housing Authority of Baltimore City

Court of Appeals of Maryland - November 26, 2013 - A.3d - 2013 WL 6182545

Residents brought action against city housing authority, alleging claims for negligence and violation of the Consumer Protection Act (CPA) arising from residents' alleged exposure to lead paint at property owned and operated by housing authority. The Circuit Court entered summary judgment in favor of housing authority, and residents appealed.

The Court of Appeals held that:

- Residents failed to substantially comply with notice requirement of Local Government Tort Claims Act (LGTCA);
- Residents did not show good cause for their failure to comply with notice requirement; and
- Notice requirement did not violate residents' right of access to courts.

ZONING - MINNESOTA

Meldahl v. City of Minneapolis

Court of Appeals of Minnesota - November 25, 2013 - Not Reported in N.W.2d - 2013 WL 6152196

Steven Meldahl owns 85 rental properties located in City of Minneapolis. From approximately 2008 through 2011, the properties accrued delinquent utility (water, sewage, and solid waste) bills, and the city conducted nuisance-abatement work and sidewalk repairs to address uncorrected code violations. Additionally, the city determined that three of Meldahl's properties were subject to a vacant-building registration (VBR) fee.

Meldahl challenged the district court's grant of summary judgment to city. He argued that (1) the city's assessment appeal procedures are inadequate and the city failed to adequately review the assessments it adopted; (2) two city ordinances are unconstitutionally vague; (3) the city's VBR fee did not reflect the regulatory costs associated with his vacant buildings; (4) the district court erred in ordering reassessments for only one of eight properties for which the parties agreed reassessment was warranted; and (5) the city did not provide proper notice of sidewalk-repair assessments.

The court of appeals affirmed the district court's ruling on each of the counts.

ZONING - MISSOURI

Babb v. Missouri Public Service Com'n

Missouri Court of Appeals, Western District - November 26, 2013 - S.W.3d - 2013 WL 6170640

Homeowners brought declaratory judgment action seeking review of denial of special use permit (SUP) for installation of a solar energy system on home. The Circuit Court granted summary judgment to homeowners. City appealed.

The Court of Appeals held that:

- City ordinance requiring SUP for residential solar energy systems and setting out requirements for installation of residential solar panels were merely regulatory, not prohibitive, and thus did not conflict with state statute; but
- Homeowners were not required to seek juridical review of city's denial of SUP under statute addressing procedure for review of boards of adjustment; and
- Homeowners were not required to seek review by Public Service Commission (PSC) before bringing declaratory judgment action.

MUNICIPAL ORDINANCE - MISSOURI

Damon v. City of Kansas City

Missouri Court of Appeals, Western District - November 26, 2013 - S.W.3d - 2013 WL 6170565

Automobile owners brought class action against city and company that operated city's red-light camera enforcement system, challenging validity of city's red-light camera ordinance. The Circuit Court dismissed action. Owners appealed.

The Court of Appeals held that:

- The Court of Appeals has jurisdiction to consider the validity and constitutionality of a municipal ordinance;

- Owners who paid fine without going to court had standing to challenge ordinance;
- Owners who paid fine without going to court did not waive their right to raise constitutional challenges in a court of law;
- Owners facing prosecution did not have an adequate remedy at law as would preclude their declaratory judgment claim;
- Allegations were sufficient to survive motion to dismiss on grounds that ordinance was a proper exercise of city's police power;
- Ordinance conflicted with state law characterizing running a red light as a moving violation, and thus was void;
- Resolution of validity of ordinance's rebuttable presumption was not appropriate for review on a motion to dismiss; and
- Owners who paid fine stated claim for unjust enrichment, notwithstanding voluntary payment doctrine.

PUBLIC UTILITIES - NEW JERSEY

Borough of Lodi v. Passaic Valley Water Com'n

Superior Court of New Jersey, Appellate Division - November 22, 2013 - Not Reported in A.3d - 2013 WL 6122592

In 2008, defendant Passaic Valley Water Commission (PVWC or Commission) concluded that, for approximately one decade, it had erred in failing to raise the rates it charged to plaintiff Borough of Lodi (Lodi or Borough) pursuant to a lease provision that permitted rate increases based on increases in wholesale water costs. PVWC made "corrective rate increases" totaling 49% over two years that were designed to bring the rates charged to the level where they would have been if increases in wholesale water costs had been passed on to Lodi.

Lodi filed suit, challenging the increases. The trial court ruled that rate increases to Lodi in 2009 and 2010 were unconscionable; required it to roll back rates to 2008 levels with defined annual increases; required the refund of rates deemed excessive; and restricted future annual rate increases. PVWC appealed.

The appeals court concluded that the term "wholesale water costs" means the costs incurred in delivering water to the Lodi retail distribution system. As for rate increases based upon the increase in "wholesale water costs," PVWC was authorized to implement such increases only based upon increases in the wholesale water rates for the year preceding the rate increase. To the extent the "corrective rate increases" exceeded the increases available pursuant to this interpretation of the lease, they were not authorized by the lease. Those increases must be rescinded and any amount collected pursuant to the unauthorized increases must be credited or returned to the retail customers.

EMPLOYMENT - NEW YORK

Mowry v. DiNapoli

Supreme Court, Appellate Division, Third Department, New York - November 21, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 07794

Petitioner was hired as the attorney for the Mexico Central School District in 1974 and served in that capacity until his retirement in 2002. Similarly, petitioner served as the attorney for the Village

of Mexico during roughly that same time frame. During these periods, petitioner also served as an attorney for other public entities and maintained a private law practice. In 2010, eight years after his retirement, petitioner received a letter determination from respondent New York State and Local Retirement System informing him that, based upon a review of petitioner's relationship with both the school district and the Village, he had incorrectly been reported as an employee, rather than as an independent contractor.

Petitioner brought Article 78 proceeding challenging determination of State Comptroller denying his application for salary and service credits for his service as school district and village attorney.

The Supreme Court, Appellate Division, held that:

- Attorney was employee of the school district, not an independent contractor;
- Substantial evidence supported Comptroller's determination that attorney was an independent contractor and not an employee of the Village; and
- That determination was not barred by laches.

TAX - NEW YORK

Expedia, Inc. v. City of New York Dept. of Finance

Court of Appeals of New York - November 21, 2013 - N.E.2d - 2013 N.Y. Slip Op. 07759

Taxpayers, on-line travel intermediaries that facilitated hotel room reservations, brought suit seeking declaration that expansion of city's tax on hotel occupants to fees earned by them was unconstitutional. The Supreme Court, New York County, dismissed claim and taxpayers appealed. The Supreme Court, Appellate Division, that tax violated state constitution. City appealed.

The Court of Appeals upheld the tax expansion, finding that city properly exercised broad authority conveyed by plain language of enabling statute.

Plain language of enabling statute authorized city to impose "a tax . . . such as the Legislature has or would have the power and authority to impose on persons occupying hotel rooms in [the] city," and city properly exercised this broad authority when it enacted local law to expand city's tax on hotel occupants to fees earned by on-line travel intermediaries that facilitated hotel room reservations. By its terms, statute extended taxing power to city coextensive with that of state and permitted broad range of taxation on any "rent or charge" paid to hotel owner or "person entitled to be paid the rent or charge," and local law imposed tax within those limitations on charges paid to intermediaries.

TAX - NEW YORK

Greater Jamaica Development Corp. v. New York City Tax Com'n

Supreme Court, Appellate Division, Second Department, New York - November 27, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 07972

Greater Jamaica Development Corporation (GJDC) was organized in 1967 as a charitable, not-fo--profit corporation with a mission to promote the development of the business-commercial-retail district of Jamaica, Queens. In 1998, GJDC formed the Jamaica First Parking, LLC (hereinafter JFP), with GJDC as its sole member, in order to acquire, develop, and operate public parking facilities in the Jamaica community on a nonprofit basis. Thereafter, JFP came to own and operate five such

public parking facilities. These five parking facilities allegedly offered significantly lower rates than similar for-profit facilities so as to attract visitors, consumers, retailers, and other businesses to the area.

In a private letter ruling issued in 2001, the IRS concluded that the operation of public parking facilities by JFP would not adversely affect GJDC's federal tax exempt status, in large part because such activity was "substantially related" to GJDC's charitable tax-exempt purposes and would "lessen the burdens of government" as defined by certain tax regulations. In 2007, New York City Department of Finance (DOF) granted an exemption from real property taxes pursuant to Real Property Tax Law § 420–a on the public parking facilities owned and operated by JFP.

In February 2011, the DOF revoked the real property tax exemption, beginning with the 2011/2012 tax year, on the ground that, inter alia, the operation of parking facilities, in and of itself, was not a charitable activity as contemplated by RPTL 420–a. Subsequently, GJDC and JFP commenced a proceeding against the DOF and the New York City Tax Commission.

The appeals court found that the revocation of the tax exemption did not have a rational basis and was, therefore, arbitrary and capricious.

TAX - NEW YORK

Maetreum of Cybele, Magna Mater, Inc. v. McCoy

Supreme Court, Appellate Division, Third Department, New York - November 21, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 07788

Not-for-profit religious corporation commenced proceeding under Article 78, seeking review of town board of assessment review's denial of its applications for real property tax exemptions. Town contended that the property in question was used primarily to provide cooperative housing because, in essence, the few adherents of the religion had in effect just continued the property's former residential use.

The Supreme Court, Appellate Division, held that religious corporation had met its burden of demonstrating that the property was used primarily for religious or charitable purposes, and, thus, it was tax exempt.

To qualify for the property tax exemption for property used for religious or charitable purposes: (1) the petitioner must be organized exclusively for the purposes enumerated in the statute; (2) the property in question must be used primarily for the furtherance of such purposes; (3) no pecuniary profit, apart from reasonable compensation, may inure to the benefit of any officers, members, or employees; and (4) petitioner may not be simply used as a guise for profit-making operations.

Property uses that are merely auxiliary or incidental to the main and exempt purpose and use will not defeat the property tax exemption for property used for religious or charitable purposes.

INVERSE CONDEMNATION - NORTH CAROLINA

Department of Transp. v. Webster

Court of Appeals of North Carolina - November 19, 2013 - S.E.2d - 2013 WL 6073033

Following condemnation of private road, Department of Transportation (DOT) moved for a hearing to determine whether DOT's actions in granting a driveway access to a business 18 months after the date of taking constituted a compensable taking of the defendants' property, or whether the actions constituted a non-compensable exercise of the State's police power. The Superior Court ordered that evidence of the driveway permit and its effects should not be included as elements of damage at the trial in condemnation proceeding. Defendant property owners appealed.

The Court of Appeals held that:

- Trial court was authorized to address whether increased traffic flow was a compensable damage subject to a jury's determination in hearing under statute providing that judge may hear and determine any and all issues raised by condemnation pleadings other than damages, and
- Any effects related to increased traffic due to the driveway permit did not constitute a taking or compensable damages to adjacent properties.

BONDS - OHIO

Internatl. Bhd. of Elec. Workers Local Union No. 8 v. Bd. of Defiance Cty. Commrs.

Court of Appeals of Ohio, Third District, Defiance County - November 25, 2013 - Slip Cop - 2013 -Ohio- 5198

Union filed a R.C. 4115.16(B) interested party prevailing wage enforcement action against County, alleging violations of the Ohio prevailing wage law during a Defiance County building project at the Historic Jail Building (the "Project).

The County began planning the Project in Fall 2009. The County then advertised for bids on the Project, initially stating that Ohio prevailing wage law would apply to the Project. On December 24, 2009, the County adopted Resolution No. 09–12–848, which declared the entire area within the County as a "Recovery Zone." On February 4, 2010, the County issued County Building Improvement General Obligation Bonds, Series 2010 (Federally Taxable—Recovery Zone Economic Development Bonds) (the "Bonds") to finance the construction of the Project. The United States Treasury agreed to pay the County an amount equal to 45 percent of the interest payable on the Bonds, which triggered the application of the Davis–Bacon Act. Funding for the Treasury payments derived from the American Recovery and Reinvestment Act ("ARRA").

On January 5, 2010, the County requested that each of the lowest bidders for the Project execute an acknowledgment stating that the provisions of Ohio prevailing wage law no longer applied, and that instead, the provisions of the Davis–Bacon Act applied to the Project. Each of the bidders executed the acknowledgments, which were then attached to the original construction contracts. On February 4, 2010, the Bonds were issued by the County and sold to Fifth Third Securities, Inc. The County deposited the proceeds from the Bonds into the County's Permanent Improvement Fund, which was used to pay for the construction of the Project.

Meanwhile, the County deposited the Treasury's reimbursement payments into a Bond Retirement Fund in order to extinguish its interest and principal obligations under the Bonds. Although no money from the Bond Retirement Fund was transferred into the Permanent Improvement Fund, the funding for the Project was obtained from the Bonds that will be retired through the Bond Retirement Fund. Checks to pay Project expenses were linked to the Permanent Improvement Fund.

The Union argued that the trial court erred by finding that the County was exempted from the Ohio

prevailing wage law under R.C. 4115.04(B)(1). According to Local No. 8, the funds that were actually used to construct the Project came from the proceeds of the sale of the Bonds, which were deposited in the County's Permanent Improvement Fund and thus it was the County's Permanent Improvement Fund that paid for the "actual" construction of the Project. Thus, the federal funding, which was deposited into the Bond Retirement Fund, did not contribute to the actual construction of the Project. Like the trial court, found that this argument was "contrary to reason and common sense."

The appeals court concluded that federal funds were used in the construction of a public improvement, and therefore, the Project is exempted under Ohio prevailing wage laws under R.C. 4115.03(B). As such, it was proper for the trial court to grant summary judgment in favor of the County and to deny Local No. 8's motion for summary judgment.

SCHOOLS - PENNSYLVANIA

Moeck v. Pleasant Valley School Dist.

United States District Court, M.D. Pennsylvania - November 14, 2013 - F.Supp.2d - 2013 WL 6048131

Wrestlers, who were brother and sister, brought action against wrestling coach, school district, and school officials under § 1983 and Title IX, asserting claims based on male wrestler's alleged injuries from practice where he wrestled a teammate who outweighed him by 70 pounds, and sexual harassment claims as to female wrestler. School district and officials moved to dismiss complaint.

The District Court held that:

- Male wrestler sufficiently alleged causation based on failure to train policy, as required to state cause of action under § 1983 for vicarious liability of district;
- Issue of whether officials violated male wrestler's substantive due process rights could not be resolved at motion to dismiss stage;
- Male wrestler sufficiently alleged that coach's conduct shocked the conscience, as required to state cause of action under state-created danger theory;
- Male wrestler's right to bodily integrity was clearly established at time of his alleged injury, so officials were not qualifiedly immune from liability for any violation of such right; and
- If female wrestler told principal and vice principal about alleged sexual harassment from coach, then district would have had notice such harassment.

LIABILITY - UTAH

Dedelow v. City of Heber

United States District Court, D. Utah, Central Division - November 25, 2013 - Not Reported in F.Supp.2d - 2013 WL 6158953

Plaintiff Ryan Dedelow was cited for speeding in Heber City on April 25, 2004. His citation was additionally filed in Wasatch County. Though Mr. Dedelow paid the citation to the City within the allotted time, the City failed to notify the County that the citation had been resolved. This resulted in an active arrest warrant for Mr. Dedelow.

Mr. Dedelow was stopped for a minor traffic violation where a warrant check revealed an active,

eight-year-old arrest warrant. He was subsequently arrested and booked into jail. His pregnant wife was left at the side of the highway in Sardine Canyon and required to find her own way home. Mr. Dedelow alleges that he suffered embarrassment and humiliation as a result of being arrested, booked into jail, and having his new wife's family bail him out and pick him up from jail.

Mr. Dedelow brourght an action under 42 U.S.C. § 1983 claiming the City failed to notify Wasatch County that the citation had been appropriately resolved. He also claims the County failed to inquire into whether the citation had been resolved, keeping an arrest warrant active for eight years. Therefore, Plaintiff alleges that the City and County Defendants negligently failed to ensure their employees followed proper administrative procedures.

The court granted the City's motion to dismiss, finding that Mr. Dedelow's complaint lacked factual allegations to support a plausible claim of relief under § 1983.

"Mr. Dedelow's allegations center on the theory of inadequate training—that the municipal custom or policy itself comprised a failure to act, which was the result of a deliberate indifference to the rights of Plaintiff. However, the Complaint lacks facts supporting the allegation of deliberate indifference. Mr. Dedelow provides no factual allegations of a pattern of unconstitutional arrest and detention resulting from failure to resolve traffic citations that would put Defendants on notice. The Complaint also lacks facts supporting an allegation that Defendants failed to train their employees to follow proper procedures in recurrent situations that present an obvious potential for constitutional violations. Without more, Defendant's failure to act in this instance does not suggest a custom or policy of inadequate training as a result of deliberate indifference to the rights of Plaintiff."

PORT AUTHORITY - WASHINGTON

Lane v. Port of Seattle

Court of Appeals of Washington, Division 1 - November 25, 2013 - P.3d - 2013 WL 6169310

The Port of Seattle purchased the Eastside Rail Corridor from Burlington Northern Santa Fe Railway Company (BNSF) for $81.4 million and sold portions to King County and the city of Redmond. Taxpayer contended the Port lacked statutory authority to make the purchase because the northern part of the corridor lies outside the port district and will not be used to run cargo to or from existing port facilities.

The Court of Appeals held that:

- Purchase of portion of rail corridor fell within port's statutory powers, even though portion had no physical connection to existing port facilities and was outside of port boundaries;
- Fact that port commission failed to adopt formal resolution until after purchase did not render the purchase ultra vires;
- Port commission's finding of reasonable necessity for purchase was not arbitrary and capricious; and
- Evidence supported port commission's finding that acquisition of rail corridor property would stimulate economic development and that purchase was therefore necessary for port district's purposes.

IMMUNITY - WEST VIRGINIA

Polk v. Town of Sophia

United States District Court, S.D. West Virginia - November 27, 2013 - Slip Copy - 2013 WL 6195727

Following sexual assault on arrestee by police officer in this police car, plaintiff brought multiple claims against municipality.

The District Court found that the plaintiff had pled sufficient facts to survive the threshold 12(b)(6) inquiry. Plaintiff had alleged a custom or policy of the Town of Sophia with regard to male officers transporting female prisoners to jail without supervision, and allowing officers the ability to turn off their vehicle's camera unilaterally. Further, the Plaintiff has alleged that this policy or custom directly led to her injuries. Thus, the motion to dismiss the Plaintiff's 42 U.S.C. § 1983 claim against the Town of Sophia should not be granted.

CONTRACTS - CALIFORNIA

Mountain Cascade Inc v. City and County of San Francisco

United States District Court, N.D. California - November 18, 2013 - Not Reported in F.Supp.2d - 2013 WL 6069010

MCI, a general engineering contractor, entered into a contract with San Francisco, acting through the General Manager of the San Francisco Public Utilities Commission ("SFPUC"), for construction work known as Bay Division Pipeline No. 5 Reliability Upgrade, Contract No. WD–2542 (the "Contract"). The project involved the installation of nine miles of 60″ welded, mortar-lined and coated steel pipe (the "Project:) through East Palo Alto, Menlo Park, San Mateo County, and Redwood City. The total awarded contract amount was $52,183,400.

The contract contained a provision that MCI agreed "to perform the Work in good and workmanlike manner to the satisfaction of the GENERAL MANAGER [of SFPUC], … and to otherwise fulfill all of CONTRACTOR's obligations under the Contract Documents, as and when required under the Contract Documents to the satisfaction of the GENERAL MANAGER."

On or around January 21, 2011, San Francisco informed MCI that certain welds did not conform with the plans, specifications, and approved submittals for the Project. As of that date, San Francisco and the Project's inspectors had accepted four miles of the completed pipeline. On or around January 26, 2011, San Francisco ordered MCI to stop welding operations effective January 27, 2011, based on deficiencies in the welds. On or around May 13, 2011, San Francisco notified MCI that it rejected all interior and exterior welds on the Project placed prior to January 26, 2011 until they were inspected for compliance with Contract requirements. San Francisco had a contractual duty to inspect the welds before allowing MCI to cover and backfill them, and MCI alleges that San Francisco represented that the welds were accepted and that MCI could cover the welds and backfill the area, even though San Francisco knew that the welds were unacceptable and/or that it would require MCI to uncover the welds.

Ultimately, San Francisco required MCI to remove and replace 628 interior and 94 exterior pipe joint welds, even though MCI submitted expert opinions that repair of the welds was appropriate. MCI alleges that San Francisco's order of removal and replacement of the welds was contrary to the requirements of the specifications, the Contract, code, and applicable welding industry standards. MCI further alleges that San Francisco's acts and omissions caused substantial delay in the completion of the Project.

MCI filed its complaint in state court alleging seven causes of action. San Francisco removed the case to federal court. MCI filed an amended complaint, alleging causes of action for 1) breach of contract; 2) violation of the Equal Protection Clause of the United States Constitution; and 3) breach of the implied warranty of correctness of project plans and specifications.

San Francisco moved to dismiss MCI's Equal Protection claim on the grounds that such a claim is not cognizable as a matter of law.

MCI's second cause of action alleges a violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, based upon a class-of-one theory. MCI asserts that San Francisco treated it differently from other similarly-situated contractors on other projects and that San Francisco's actions were "arbitrary, capricious, intentional and/or reckless." Specifically, MCI claims that San Francisco used different inspection standards for MCI's work than for the work of other contractors and subcontractors; rejected MCI's welds but did not reject similar welds by other contractors on other projects on the Pipeline; required MCI to remove and replace welds, rather than repair them, while allowing other contractors to repair allegedly deficient welds; selectively enforced specifications; and materially and unilaterally changed the contract terms, scope of work, and schedules in bad faith.

San Francisco argues that a class-of-one equal protection claim by a government contractor is not cognizable as a matter of law.

The court concluded that the exercise of discretionary decision-making that Engquist and Douglas Asphalt held is immune from a constitutional challenge, applies to government-contractor relationships for the same reason that it applies to government-employee relationships. See Douglas Asphalt, 541 F.3d at 1274 ("decisions involving government contractors require broad discretion that may rest 'on a wide array of factors that are difficult to articulate and quantify.'" (quoting Engquist, 553 U.S. at 604)). Accordingly, MCI's class-of-one equal protection claim was dismissed with prejudice.

As the court granted San Francisco's motion to dismiss the sole federal claim over which it had original jurisdiction with prejudice, the court declined to exercise supplemental jurisdiction over MCI's remaining state law claims. Accordingly, the case was remanded to state court.

SCHOOLS - CALIFORNIA

Cuff v. Grossmont Union High School District

Court of Appeal, Fourth District, California., Division 1, California - November 18, 2013 - Cal.Rptr.3d - 13 Cal. Daily Op. Serv. 12, 559

Mother of two public high school students brought action against school counselor and school district for invasion of privacy after school counselor's provided a copy of her mandatory report of suspected child abuse by mother to the suspected victims' father.

The Court of Appeal held that:

- Child Abuse and Neglect Reporting Act (CANRA) did not immunize counselor's alleged act of giving child abuse report to the suspected victims' father;
- Statute authorizing release of pupil records in an emergency did not immunize counselor's alleged act of giving child abuse report to the suspected victims' father; and
- Immunity statute for public employees' exercises of discretion did not immunize counselor's

alleged act of giving child abuse report to the suspected victims' father.

FINANCE - COLORADO

Todd Creek Village Metropolitan District v. Valley Bank & Trust Company

Colorado Court of Appeals, Div. VI - November 21, 2013 - P.3d - 2013 COA 154

At issue in this appeal was whether the plaintiff, Todd Creek Village Metropolitan District (the special district), had the constitutional and statutory authority to enter into loans and security agreements with the defendant, Valley Bank & Trust Company (the bank), and to pledge the district's assets as collateral.

In 2004, the special district executed and delivered to the bank a $1.4 million line-of-credit promissory note with a one-year maturity date (the loan). The loan was secured by a deed of trust that encumbered real property owned by the special district, including two reservoirs, one well site, and four easements.

In late 2011, the parties were unable to agree to the terms of an extension. The special district filed an action seeking a declaratory judgment that the loans were invalid and did not need to be repaid because they violated the special district's service plan and the requirements of Colo. Const. art. XI, section 6. The district court agreed and granted the special district's request for declaratory judgment.

The appeals court identified two issues to be addressed: (1) whether Article XI, section 6(1) of the Colorado Constitution requires that a municipal district seeking voter approval of a general obligation debt must identify the specific collateral that will be pledged to secure the debt; and (2) the extent to which a special district's financing arrangements must be provided for in the special district's service plan.

As to the first issue, the appeals court disagreed with the special district's contention that section 6 requires the district to identify to voters the particular assets it intended to pledge to secure the loan along with the general obligation debt, and therefore, the pledges made by the special district of public assets to collateralize the loan were invalid.

As to the second issue, the appeals court agreed with the bank's contention that the district court erred in ruling that the loan to the special district was invalid based on the special district's service plan. The district court concluded that there was a conflict between the special district's statutory authority to enter into loans and the special district's service plan, which prohibited the issuance of general obligation debt. The appeals court concluded that the service plan did not prohibit the issuance of general obligation debt and that the loan by the bank did not constitute a material modification of the special district's service plan.

In summary, we conclude (1) the 1996 election approved general obligation bonds and 'other obligations' and the special district complied with the voter-approval mandate of Colo. Const. art. XI, section 6; (2) the Special District Act grants special districts the authority to 'borrow money and incur indebtedness [and] acquire, dispose of, and encumber real and personal property,' §§ 32–1–1001(1)(e)–(f); (3) the special district's service plan does not prohibit the issuance of general obligation debt; (4) the Special District Act only requires that a special district conform to a service plan 'so far as practicable,' § 32–1–207(1); (5) only material modifications to the service plan had to be approved by the board of county commissioners; (6) there was no material modification of the district's service plan, and it was therefore unnecessary for the service plan to restate that the

special district would be incurring general obligation debt. See generally Wick v. Pueblo W. Metro. Dist., 789 P.2d 457, 458 (Colo.App.1989).”

LIABILITY - GEORGIA

Dennis v. City of Atlanta

Court of Appeals of Georgia - November 13, 2013 - S.E.2d - 2013 WL 5995553

Homeowner’s guardian, who executed a release in connection with the settlement of a prior lawsuit against city arising out of sewer backups and storm water drainage problems, brought subsequent lawsuit against city arising out of the same problems. The trial court granted city’s motion to dismiss. Guardian appealed.

The Court of Appeals held that:

- Release applied to future unknown claims of the releasors involving the same issues, including those asserted in guardian’s subsequent lawsuit;
- Trial court was not required to convert city’s motion to dismiss into a motion for summary judgment; and
- Release did not violate public policy.

Plain and unequivocal language of the release released city from “any and all actions, … whatsoever, … known or unknown, foreseen or unforeseen” arising out of the allegations brought or that could have been brought in the original lawsuit.

IMMUNITY - GEORGIA

City of Atlanta v. Mitcham

Court of Appeals of Georgia - November 20, 2013 - S.E.2d - 2013 WL 6085247

Diabetic inmate in city’s custody brought negligence action against city and city’s police chief, alleging that defendants’ negligent failure to monitor and regulate inmate’s insulin levels resulted in permanent injuries. Defendants filed motion to dismiss on grounds of governmental immunity. The trial court denied motion. Defendants appealed.

The Court of Appeals held that provision of medical services to inmates confined in city’s custody was ministerial rather than governmental function, and thus, defendants were not entitled to governmental immunity.

City’s duty to furnish inmates necessary medical care and to bear the costs of such care was imposed by statute, and inmate had fundamental right to medical care, such that the provision of such care was not discretionary.

INVERSE CONDEMNATION - GEORGIA

Daniel v. Fulton County

Court of Appeals of Georgia - November 19, 2013 - S.E.2d - 2013 WL 6068498

Karen Daniel filed a complaint for damages against Fulton County, asserting a claim of inverse condemnation. The trial court dismissed the complaint on the ground that Daniel had filed for bankruptcy without disclosing the claim and was therefore precluded from pursuing it by the doctrine of judicial estoppel. Daniel appealed.

The Court of Appeals held that trial court's failure to consider whether property owner would have gained unfair advantage or imposed unfair detriment if not estopped required remand.

The crux of the trial court's order was its determination that the lack of evidence that property owner had taken steps to reopen the bankruptcy mandated application of the doctrine of judicial estoppel to bar her claim.

WHISTLEBLOWER STATUTE - GEORGIA

Colon v. Fulton County

Supreme Court of Georgia - November 18, 2013 - S.E.2d - 2013 WL 6050390

County employees brought separate actions against county under whistleblower statute, alleging that they suffered adverse employment actions after they reported to county supervisors the manner in which various county personnel were violating laws, rules, and regulations, and were fraudulently wasting and abusing county funds and public money, and that employees refused to participate in cover-up of fraud.

The Supreme Court of Georgia held that:

- Whistleblower statute set forth a specific waiver of the County's sovereign immunity and the extent of such waiver, even though the statute did not expressly state that sovereign immunity was waived, and
- Reach of whistleblower statute was not limited to causes of action for alleged retaliation only inasmuch as the employee's complaints were related to state programs.

Reach of whistleblower statute was not limited to causes of action for alleged retaliation when the employee's complaints were related to state programs or operations under the public employer's jurisdiction. There was nothing in the plain language of statute to suggest that retaliation claims were somehow limited by a public employer's ability to receive and investigate complaints or information relating to possible fraud, waste, and abuse in state programs.

LIABILITY - GEORGIA

Myers v. Board of Regents of University System of Georgia

Court of Appeals of Georgia - November 13, 2013 - S.E.2d - 2013 WL 5994928

Visitor who injured her ankle when she tripped on edge of pothole in college campus parking lot brought negligence action against the Board of Regents of the University System of Georgia, based on allegedly unsafe condition of parking lot. The trial court granted Board's motion to dismiss for lack of subject matter jurisdiction, based on plaintiff's failure to provide sufficient ante litem notice to Board. Plaintiff appealed.

The Court of Appeals reversed, holding that plaintiff sufficiently identified the "amount of loss

claimed" against Board of Regents so as to comply with requirements of ante litem notice statute.

Even though visitor did not include dollar amount of claimed loss, her notice stated that she had fractured her left ankle by stepping in pothole and that the amount of her loss was yet to be determined since she was still incurring medical bills and did not know the full extent of her injury, which provided the Board adequate notice of alleged nature, location, and cause of visitor's injuries.

PUBLIC RECORDS - MAINE

MaineToday Media, Inc. v. State

Supreme Judicial Court of Maine - November 14, 2013 - A.3d - 2013 ME 100

Newspaper petitioned for review of state's denial of request to inspect and copy Enhanced 911 call transcripts regarding altercation that resulted in homicide investigation. Following a trial de novo, the Superior Court upheld the denial. Newspaper appealed.

The Supreme Judicial Court of Maine held that as matter of first impression, state failed to establish reasonable possibility that disclosure of transcripts in question would interfere with law enforcement proceedings, as asserted basis under Criminal History Record Information Act (CHRIA) for keeping transcripts confidential in response to newspaper's FOAA request. Participant in altercation had already been subject of an initiating criminal complaint when newspaper first made request, and state did not identify any particular investigation yet to be completed in the matter or how it could be affected by availability of transcripts.

Confidentiality pursuant to the CHRIA is afforded only if the record that the government seeks to shield (1) contains intelligence or investigative information; (2) was prepared by or at the direction of, or is kept in the custody of, a criminal justice agency; and (3) would, if disclosed, create a reasonable possibility of one or more of the harms detailed in the statute.

Bureau of Consolidated Emergency Communications is not a "criminal justice agency," within meaning of provision of CHRIA placing limitations on dissemination of intelligence and investigative information in reports or records prepared at the direction of or kept in the custody of a criminal justice agency. Although the bureau's product is used for criminal justice purposes on a daily basis, the bureau manages the telecommunications necessary for the provision of emergency services.

The Court declined to adopt a blanket rule that any Enhanced 911 transcripts that related to active homicide investigations or prosecutions were exempted under CHRIA from disclosure pursuant to a FOAA request.

TAX - MARYLAND

Townsend Baltimore Garage, LLC v. Supervisor of Assessments of Baltimore City

Court of Special Appeals of Maryland - November 19, 2013 - A.3d - 2013 WL 6081708

Sublessees of land owned by state university appealed decision of Tax Court, determining that improvements constructed on the land were not exempt from real property taxes.

The Court of Special Appeals held that improvements were exempt from real estate taxation and not

subject to taxation under statute providing for taxation of property leased by state to a lessee with the privilege to use the property in connection with a business that is conducted for profit, even though university had leased the land to for-profit entities in order to obtain financing for construction of the improvements, offices, laboratory, and parking garage. Although entities were treated under the leases as owners of the improvements for certain purposes, the improvements were leased back to the university and used for university purposes.

TAX - MICHIGAN

Michigan Co-Tenancy Laboratory/Trinity Health v. Michigan Pittsfield Charter Tp.

Court of Appeals of Michigan - November 14, 2013 - Not Reported in N.W.2d - 2013 WL 6037120

The Michigan Co–Tenancy Laboratory (MCL) is a group of non-profit hospitals that entered into an arrangement whereby they each possessed, as tenants in common, an undivided interest in laboratory equipment.

Township assessed the personal property at the laboratory facility as taxable. Petitioners filed an appeal with the Michigan Tax Tribunal contending that the personal property of the laboratory was exempt from was exempt from ad valorem taxation pursuant to MCL 211.9(1)(a) (personal property of charitable institutions incorporated under the laws of this state) and MCL 211.7o (real or personal property owned and occupied by a nonprofit charitable institution).

Township moved the Tribunal for Summary Disposition on the grounds that the property was not exempt under the relevant statutes because MCL was not incorporated, and further that the property was not located on real property “owned and occupied by a nonprofit trust and used for hospital or public health purposes.”

The Tribunal concluded that petitioners had proven by a preponderance of the evidence that the subject property qualified for a property tax exemption under MCL 211.91(1)(a) and MCL 211.7o and the Court of Appeals affirmed.

LIABILITY - NEW JERSEY

Marshall v. Keansburg Borough

United States District Court, D. New Jersey - November 20, 2013 - Slip Copy - 2013 WL 6095475

Plaintiff Richard Marshall Jr. brought an action against Defendants Keansburg Borough, Detective Bryan King, Sergeant Wayne Davis, Detective Jillian Kohler, Chief of Police Raymond O’Hare, and Deputy Chief of Police Michael Pigott. Plaintiff alleges various 42 U.S.C. § 1983 violations and a violation of the New Jersey Civil Rights Act stemming from an altercation between Defendants King, Davis, and Koehler and Plaintiff wherein the Defendant Officers used allegedly excessive force against Plaintiff. He also alleges common law claims for assault and battery, intentional infliction of emotional distress, and negligence.

On December 18, 2010, Plaintiff Richard Marshall Jr. was standing on the sidewalk on Beachway Avenue in Keansburg, New Jersey, when he was approached by three uniformed Keansburg Borough

Police Officers, Defendants King, Davis, and Kohler (together, the "Defendant Officers:). As the Defendant Officers approached, Plaintiff's cellular phone started to ring. Defendant King told Plaintiff not to "fucking answer that phone." Plaintiff proceeded to answer the phone, at which point Plaintiff alleges that Defendants King and Davis grabbed Plaintiff from both sides of his arm and threw him face first against their unmarked police vehicle. As Defendant King grabbed Plaintiff, he screamed, "I fucking told you not to answer your phone." Defendants King and David allegedly proceeded to kick out Plaintiff's legs, tackle him to the ground, and knee Plaintiff in his ribs and back. Defendant King then allegedly used his forearm to choke Plaintiff, at which point Plaintiff stated, "I can't breathe; why are you doing this?" Defendant Kohler, who had observed the entire incident, then sprayed Plaintiff in the face with OC spray, while Plaintiff was handcuffed and on the ground.

As a result of this incident, Plaintiff was charged with resisting arrest in violation of N.J.S.A. 2C:29–2(a)(1) as to all three police officers. On February 2, 2012, Plaintiff appeared before the Honorable Michael Pugliese, J.M.C., relative to the charges brought against him. As a result of this proceeding, Plaintiff pled guilty to a violation of Keansburg Municipal Ordinance 3–17.4 for "disorderly conduct" and paid fines. Accordingly, the charges for resisting arrest were dismissed.

On December 13, 2012, Plaintiff commenced this action. He alleges: (1) Defendants King, Davis, and Kohler used excessive force against him in violation of § 1983; (2) Defendants King, David, and Kohler failed to intervene in the unjustified assault and arrest of Plaintiff in violation of § 1983; (3) Defendant Davis is liable as a supervisor under § 1983; (4) Defendants Borough of Keansburg Police Department, O'Hare, and Pigott are liable to him under § 1983 because an official policy, practice, or custom caused Plaintiff's injuries; (5) prospective injunctive relief against the Defendants is warranted; (6) Defendants King, Davis, and Kohler used excessive force against Plaintiff in violation of N.J.S.A. 10:6–1 ("The New Jersey Civil Rights Act" or "NJCRA"); (7) Defendants King, Davis, and Kohler committed an assault and battery on Plaintiff; (8) Defendants King, Davis, and Kohler acted in such a way that Plaintiff sustained severe emotional distress; and (9) Defendants King, Davis, and Kohler acted negligently towards the Plaintiff.

The Defendants moved to dismiss Plaintiff's Complaint in its entirety. Defendants argue that Count One should be dismissed because Plaintiff's § 1983 claim for excessive force is barred by Heck v. Humphrey, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994). Alternatively, they argue that Count One should be dismissed Defendants King, Davis, and Kohler are entitled to qualified immunity and are therefore barred from liability. Finally, they argue that Plaintiff is estopped from asserting a § 1983 excessive force claim in Count One because of the guilty plea he entered in the underlying criminal lawsuit. Defendants contend that because Count One is deficient and must be dismissed, Plaintiff's remaining § 1983 claims (Counts Two through Five) must fail as well. Defendants allege that Count Six of the Complaint, the alleged violation of the New Jersey Civil Rights Act, should be dismissed for the same reasons as Plaintiff's § 1983 claims. Defendants contend that the additional state law claims (Counts Seven through Nine) should be dismissed because, like Counts Two through Five, they are predicated on the use of excessive force against the Plaintiff.

Defendants further allege that any claims against Defendants O'Hare and Pigott must fail because Plaintiff's claims against them are based upon a theory of respondeat superior. Defendants also argue any claims against Defendant O'Hare should be dismissed because he was not the Chief of Police on the date of the incident. Defendants further contend that any claims against Defendants O'Hare and Pigott are barred because they were not identified on a Notice of Tort Claim by the Plaintiff. Finally, Defendants allege that there can be no claim for punitive damages against Keansburg Borough under either § 1983 or under the New Jersey Civil Rights Act.

The court concluded that Plaintiff had sufficiently stated a claim as to virtually each of his allegations and declined to dismiss. Time to settle, fellas.

PUBLIC RECORDS - NEW JERSEY

Paff v. Community Education Centers, Inc.

Superior Court of New Jersey, Appellate Division - November 21, 2013 - A.3d - 2013 WL 6096513

Education and Health Centers of America, Inc. (EHCA) is a non-profit entity that contracts with state and local governments to provide substance abuse treatment and education services to inmates preparing for release from incarceration. CEC is a privately held for-profit entity that provides treatment and education services aimed at changing addictive and criminal behaviors. In 1996, CEC entered into an agreement with EHCA to provide services and staff for EHCA's contracts in New Jersey.

Plaintiff submitted a request to EHCA and CEC seeking access to certain records pursuant to the Open Public Records Act (OPRA). Plaintiff asserted that EHCA and CEC are "public agencies" under OPRA and are therefore subject to its requirements.

CEC denied plaintiff's requests. CEC informed plaintiff that it was not a "public entity" under OPRA and not subject to OPRA's requirements.

Plaintiff filed a complaint against CEC in the Law Division, claiming that CEC is a "public agency" under OPRA. Plaintiff sought an order requiring CEC to appoint a custodian of records, adopt an OPRA document-request form, and grant access to the attorney billing and personnel records he had requested.

The trial court determined that CEC did not qualify as a "public agency" under OPRA. CEC is an independent corporation that provides services in New Jersey pursuant to its contract with EHCA. CEC was not created, nor is it controlled, by any governmental entity. The appeals court affirmed.

TAX - NEW YORK

Village of Lowville v. County of Lewis

Supreme Court, Appellate Division, Fourth Department, New York - November 15, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 07581

Village brought action against county requesting specific performance of a tax exemption agreement.

The Supreme Court dismissed the complaint. Village appealed.

The Supreme Court, Appellate Division, held that county board's adoption of resolution phasing out all tax exemptions for municipal water and sewage treatment facilities constituted a "legislative change" within meaning of agreement, which provided that "legislative change" would modify obligations of the parties to comply with such change. County board was legislative body that exercised county's power through local law or resolution duly adopted by board.

LIABILITY - NEW YORK

Ferreira v. Cellco Partnership

Supreme Court, Appellate Division, Second Department, New York - November 20, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 07706

Owners of homes located near a commercial facility brought action against village and facility owner, seeking to recover damages for injuries allegedly sustained by exposure to noise, smoke, and odor emanating from the facility, and alleging that village was negligent in failing to enforce building codes.

The Supreme Court, Appellate Division, held that:

- Village did not have special relationship with owners giving rise to a duty to exercise care for their benefit;
- Village did not voluntarily assume a duty to protect owners; and
- Owners did not detrimentally rely on village's alleged promise to address the situation.

In the absence of some special relationship creating a duty to exercise care for the benefit of particular individuals, liability may not be imposed on a municipality for failure to enforce a statute or regulation.

A special relationship creating a duty on the part of a municipality to exercise care for the benefit of particular individuals can be formed in three ways: (1) when the municipality violates a statutory duty enacted for the benefit of a particular class of persons; (2) when the municipality voluntarily assumes a duty that generates justifiable reliance by the person who benefits from the duty; or (3) when the municipality assumes positive direction and control in the face of a known blatant and dangerous safety violation.

LIABILITY - NEW YORK

Freeman v. City of New York

Supreme Court, Appellate Division, Second Department, New York - November 20, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 07707

Daughter of woman who died during snowstorm after ambulance services failed to arrive brought wrongful death action against city, alleging negligent failure to provide emergency services and negligence failure to prepare and respond to snowstorm.

The Supreme Court, Appellate Division, held that:

- Allegations were insufficient to establish existence of a "special relationship" between decedent and city, as required to state negligence claims against city, and
- Trial court should have denied motion for leave to amend pleadings.

As a general rule, a municipality may not be held liable to a person injured by the breach of a duty owed to the general public, such as a duty to provide police protection, fire protection or ambulance services, unless there is a "special relationship" between the municipality and the claimant.

To establish the existence of a "special relationship" between a municipality and a claimant, as

would impose a specific duty upon the municipality to act on behalf of the claimant, the claimant must establish the following factors: (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking.

LICENSING - NEW YORK

Marsala v. City of Long Beach

Supreme Court, Appellate Division, Second Department, New York - November 20, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 07737

Taxi license applicants commenced hybrid proceeding under Article 78, seeking review of city's determinations denying their applications to renew their licenses, and action to recover damages for violation of their constitutional rights under color of state law.

The Supreme Court, Appellate Division, held that city's denial of applications to renew applicants' municipal taxi licenses did not implicate a protected property interest, as would support applicants' claim that city violated their due process rights, since city retained discretion to grant or deny the applications.

LIABILITY - NEW YORK

Duffina v. County of Essex

Supreme Court, Appellate Division, Third Department, New York - November 14, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 07531

Truck driver employed by subcontractor brought action against county, seeking to recover damages for injuries he sustained while delivering asphalt to county roadway project. County commenced third-party action seeking contractual indemnification from asphalt supplier. The Supreme Court denied county's motion for summary judgment on complaint, and granted supplier summary judgment on county's indemnification claim. County appealed.

The Supreme Court, Appellate Division, held that:

- Driver's notice of claim sufficiently apprised county of his claims;
- County was not negligent with respect to manner in which it conducted road paving operations; but
- Fact issue existed as to whether alleged negligence of county in permitting public traffic on road, while construction was ongoing, was substantial factor in causing or exacerbating driver's injuries;
- Industrial Code provision governing brakes could be basis for county liability under Labor Law; and
- County was entitled to contractual indemnification from supplier.

LIABILITY - NEW YORK

Alladice v. City of New York

Supreme Court, Appellate Division, First Department, New York - November 14, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 07557

Plaintiff filed motion for leave to file an untimely notice of claim against city and city transit authority, relating to plaintiff's alleged fall at subway platform. The Supreme Court denied the motion. Plaintiff appealed.

The Supreme Court, Appellate Division, held that:

- City, as out-of-possession landlord, did not have responsibility for allegedly hazardous condition, and
- Plaintiff did not show city transit authority's actual knowledge of essential facts.

LIABILITY - NEW YORK

Denermark v. 2857 West 8th Street Associates

Supreme Court, Appellate Division, Second Department, New York - November 13, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 07444

Pedestrian brought action against building owner and lessee to recover for injuries sustained when she overstepped single step, causing her to trip and fall onto adjacent sidewalk. The Supreme Court, Kings County, Ash, J., entered summary judgment in defendants' favor, and pedestrian appealed.

The Supreme Court, Appellate Division, held that:

- Pedestrian adequately identified condition that caused accident;
- Fact issues remained as to whether door leaf violated city administrative code, and whether there was causal connection between violation and pedestrian's fall;
- Fact issues remained as to whether owner retained sufficient control over premises to impose liability; and
- Owner's retention of right to repair did not relieve tenant of its obligation to keep premises reasonably safe.

BONDS - LITIGATION - NORTH CAROLINA

U.S. v. Murphy

United States District Court, W.D. North Carolina, Charlotte Division - October 16, 2013 - Slip Copy - 2013 WL 5636710

Defendant was charged with participating in a bid-rigging scheme to control and manipulate the bidding process for municipal bond proceeds.

A three count bill of indictment was entered charging defendant with 1) conspiracy to commit wire fraud and to defraud the United States in violation of 18 U.S.C. § 371; 2) a substantive wire fraud charge in violation of 18 U.S.C. § 1343; and 3) conspiracy to make false entries in bank records in violation of 18 U.S.C. § 371.

Before the indictment was entered, the government and defendant entered into two separate tolling

agreements. Under these agreements, the period covered by the tolling agreements would be excluded from calculating time "for the purpose of any statute of limitation" for certain charges. The parties agree that these agreements together tolled the statutes for a total of two years and eleven days.

Defendant then moved to dismiss the indictment on the grounds that the charges were time-barred.

With respect to Counts I and II, the wire fraud charges, the issue was whether the applicable statute of limitations is the ten year period by 18 U.S.C. § 3293(2). This provision extends the statute of limitations from five years to ten "if the offense affects a financial institution." The indictment alleged that a financial institution was affected in that Bank of America, one of the co-conspirators and defendant's employer from 1998 to 2002, was made "susceptible to substantial risk of loss" as a result of the scheme and, in fact, the bank agreed to pay federal and state agencies over $137 million in settlements "as compensation for the losses incurred by those agencies and victims." Defendant contended that this allegation is insufficient to bring the charges under the ten year statute and requested that the court dismiss these charges as time barred. The court agreed with the government's interpretation and denied defendant's motion as to Counts I and II.

Defendant contended that Count III of the Indictment was time barred because the charges contained in this count were not included in the two tolling agreements. The court agreed with the government that the tolling agreements did apply to Count III.

FIRST AMENDMENT - OHIO

Freshwater v. Mt. Vernon City School Dist. Bd. of Edn.

Supreme Court of Ohio - November 19, 2013 - N.E.2d - 2013 -Ohio- 5000

Public school teacher sought review of the city school board's decision to terminate him after he refused to obey school district's order that he stop displaying the Bible on his desk.

The Supreme Court of Ohio held that:

- "good and just cause" supporting termination of a public teacher's contract includes "insubordination";
- Teacher's religiously-motivated display of his personal Bible on his desk did not violate the Establishment Clause;
- School district's order that teacher remove his Bible from display on his desk infringed on teacher's rights under the Free Exercise Clause;
- Teacher's disobedience of school district's invalid order did not constitute "insubordination" supporting termination; but
- Teacher's disobedience of orders requiring removal of religious materials displayed by teacher in classroom for reasons other than the exercise of his religion constituted "insubordination" supporting termination.

Teachers do not abandon their First Amendment rights, including the right to freely exercise their religion, when they enter their classrooms.

Public school teacher's religiously-motivated display of his personal Bible on his desk did not violate the Establishment Clause of the First Amendment. Teacher did not use the Bible while teaching, Bible's inconspicuous presence on teacher's desk did not convey a message that the school district endorsed or promoted Christianity, teachers' desks were considered personal space at school and

teachers often kept private items there, teacher did not prominently stage or draw attention to his Bible, and school district had the power to correct any misperceptions that it was endorsing teacher's beliefs.

City school district's order, that teacher remove from classroom conspicuously-displayed Bible, Christian-themed book, and poster depicting governmental officials in prayer, did not violate teacher's rights under the Free Exercise Clause, but rather constituted a valid order, willful disobedience of which constituted "insubordination" supporting teacher's termination. Unlike the presence of a personal Bible on teacher's desk, teacher's display of additional items was not a part of his exercise of his religion, but rather, was undertaken to make a point once a controversy had erupted regarding the presence of the Bible and the teacher's teaching of creationism and intelligent design in science class.

TAX - OHIO

Gesler v. Worthington Income Tax Bd. of Appeals

Supreme Court of Ohio - November 19, 2013 - N.E.2d - 2013 WL 6067978

Taxpayers appealed decision of city, denying request for refund of municipal income tax. The Board of Tax Appeals (BTA) affirmed the city decision, and taxpayers appealed.

The Supreme Court of Ohio held that state statute containing definition of net profit for purposes of municipal income tax did not invalidate city ordinance excluding federal Schedule C income from net profit subject to municipal tax.

Under home rule amendment and provision of state constitution allowing General Assembly to limit the power of municipalities to levy taxes, General Assembly could limit city's power to tax but could not command city to impose a tax. Thus, statute containing definition of net profit for purposes of municipal income tax did not invalidate city ordinance defining net profit, for purposes of municipal income tax, as excluding amounts required to be reported on Schedule C of federal income tax return, even though statute defined net profit as including Schedule C income.

TAX - PENNSYLVANIA

Roethlein v. Portnoff Law Associates, Ltd.

Supreme Court of Pennsylvania - November 20, 2013 - A.3d - 2013 WL 6096757

Delinquent taxpayer brought class action against law firm and attorney, who acted as private tax collector for various municipalities and school districts, for unjust enrichment and violation of Pennsylvania Loan Interest and Protection Law (Act 6). The Court of Common Pleas entered judgment in favor of taxpayers for approximately $1.06 million, and attorney fees for approximately $1.27 million. Defendants appealed, and ordered an accounting.

The Supreme Court held that:

- Act 6 did not provide taxpayers with a cause of action to challenge costs imposed for collection of delinquent taxes, and
- Administrative cost fees of $35 incurred by the municipalities in their effort to collect delinquent taxes were recoverable from taxpayers.

Loan Interest and Protection Law, which was also known as Act 6, applied only to claims involving the loan or use of money, and, thus, did not provide taxpayers with a cause of action to challenge costs imposed for the collection of delinquent taxes or to seek damages and attorney fees for improperly-imposed costs. Legislature intended law to apply only to claims involving the loan or use of money, and title and the language of preamble clearly contemplated an act applying to claims arising from the loan or use of money.

Administrative cost fees of $35 incurred by municipalities in their effort to collect delinquent taxes were recoverable from taxpayers pursuant to statute that stated that municipality could recover charges, expenses, and fees incurred in the collection of delinquent taxes, including, under certain circumstances, charges, expenses, and fees of third-party tax collectors retained by the municipality.

MUNICIPAL WASTE DISPOSAL - PENNSYLVANIA

Pennsylvania Waste Industries Ass'n v. Monroe County Municipal Waste Management Authority

Commonwealth Court of Pennsylvania - November 21, 2013 - A.3d - 2013 WL 6116099

"In this appeal of interest to counties and municipal authorities statewide, we are asked whether a municipal authority tasked with planning and implementing municipal waste disposal for Monroe County may set the "tipping fees" at private landfills. These fees cover disposal costs in the landfills as well as administrative costs and costs of other aspects of the county-wide waste disposal plan."

The Pennsylvania Waste Industries Association (Appellant) is a trade association of private landfill owners and operators and waste haulers doing business in Pennsylvania. In August 2012, Appellant commenced an action for declaratory judgment against the Monroe County Municipal Waste Management Authority. It challenged the Authority's power to set the "tipping fee" for waste disposal at privately owned facilities and to include in the "tipping fee" the costs of its Integrated Waste Management System and debt service. It argued setting the "tipping fee and including a non-disposal component was ultra vires the Authority and related solid waste laws. Appellant also challenged the Authority's current administrative fee on the same grounds.

Appellant raised two principle arguments. First, it contended that the Authority's "tipping fee," as proposed in the RFP, was ultra vires the Authority's enabling legislation. In other words, the Authority was not empowered under either the Authorities Act or Act 101 to set "tipping fees" at facilities it does not own or operate.

Second, Appellant asserted that the Authority's "tipping fee," as proposed in the RFP, was preempted by Act 101 and related solid waste laws. Allowing municipalities to impose their own local fees undermines a uniform system of standardized fees, applications and grants.

After a lengthy analysis, the court held that the Authority was not authorized by the first clause of Section 5607(d)(9) of the Authorities Act to set the "tipping fee" at landfills in which it does not have a meaningful ownership or operational interest. However, the Authority was authorized by the second clause of Section 5607(d)(9) of the Authorities Act to charge for its administrative services, including debt service.

Further, Act 101 preempts local fees covering recycling programs. However, Act 101 does not preempt other local fees which are otherwise permitted by statute and which are not inconsistent with Act 101's provisions and purposes.

IMMUNITY - TEXAS

Pegasus School of Liberal Arts & Sciences v. Ball-Lowder

Court of Appeals of Texas, Dallas - November 18, 2013 - Not Reported in S.W.3d - 2013 WL 6063834

Pegasus is a private nonprofit corporation that operates an open-enrollment charter school in Dallas under a charter contract with the State of Texas. Teacher at Pegasus was fired after she complained about allegedly illegal activity there, first to school officials, and then to the State Auditor's Office, the Dallas Fire Department, the Texas Charter School Association, the Dallas County District Attorney, and the Texas Education Agency. She brought suit for wrongful discharge under the Texas Whistleblower Protection Act, alleging in her petition that she was "terminated in retaliation for reporting a violation of law to an appropriate law enforcement authority."

Pegasus filed a plea to the jurisdiction, asserting that teacher's claims must be dismissed because the Whistleblower Protection Act is not applicable to a Texas open-enrollment charter school. Ball–Lowder contended in her response to the plea to the jurisdiction that Ohnesorge was wrongly decided and was overruled by the supreme court's decision in C2 Construction II. She argued that under C2 Construction II, open-enrollment charter schools are subject to the Whistleblower Protection Act.

The Court of Appeals concluded that its reasoning in Ohnesorge was not consistent with C2 Construction II or III, and that the Whistleblower Protection Act applies to an open-enrollment charter school. Therefore, it affirmed the trial court's order denying the plea to the jurisdiction of Pegasus.

CODE ENFORCEMENT - TEXAS

State v. Cooper

Court of Criminal Appeals of Texas - November 20, 2013 - S.W.3d - 2013 WL 6081452

Defendant was found guilty, in the Plano Municipal Court, of two violations of city's property maintenance code, and was fined $300 and $200, respectively. Defendant appealed.

After grant of review, the Court of Criminal Appeals, held that charging instrument was insufficient to state offense against defendant for alleged violation of maintenance code.

Municipal code of ordinances contained requirement that persons be given notice that they are in violation of the code before such persons can be charged, and charging instrument failed to allege that defendant was given notice before being charged.

EMINENT DOMAIN - ARKANSAS

Giles v. Ozark Mountain Regional Public Water Authority

Court of Appeals of Arkansas - November 6, 2013 - Not Reported in S.W.3d - 2013 Ark. App. 639

Ozark Mountain Regional Public Water Authority (Ozark) filed a complaint for condemnation and

declaration of taking in which it sought to take property owned by appellants for the construction of a water-treatment and intake facility together with all necessary roadways, water transmission lines, and a water tower. An appraisal determined the fair market value of the property to be $66,986, which amount was deposited by Ozark in favor of appellants. Following a trial, the jury fixed the compensation for the property at $341,500.

Appellants filed a motion for attorney's fees. Ozark opposed the motion, arguing that it exercised its taking power under the procedures of a subsection of the Arkansas Code that does not allow for attorney's fees. The circuit court denied appellants' motion for attorney's fees. Appellants appealed. That's how appellants are made.

Appellants argued that the circuit court erred by determining that the waterworks attorney's fee statute is not applicable in this case.

Ozark is a public-water authority, an entity sanctioned by the enactment of Act 15 of 2001, which is codified at Arkansas Code Annotated sections 4–35–201 et seq. None of those code sections contain any authority for an award of attorney's fees. A public-water authority has the power to exercise eminent domain in accordance with the procedures prescribed by Arkansas Code Annotated sections 18–15–301 et seq. Ark.Code Ann. § 4–35–210 None of the statutes in subchapter 3 allow for an award of attorney's fees.

Arkansas Code Annotated sections 18–15–601 et seq. set out the eminent-domain authority and procedure for water and water-generated electric municipal corporations. Subchapter 6 does allow for an award of attorney's fees if the amount awarded by the jury exceeds the amount deposited by the corporation or water association in an amount that is more than twenty percent of the sum deposited. Ark.Code Ann. § 18–15–605(b) (Repl.2003). Appellants argue that section 18–15–605(b) applies in this case.

The court concluded that an analysis of the procedure for the exercise of eminent domain by a public-water authority is restricted to subchapter 3, which contains no provision for an award of attorney's fees. The circuit court, therefore, did not have authority to award any fees, and its decision to deny the motion for fees was correct.

EMINENT DOMAIN - CALIFORNIA

Bank of New York Mellon v. City of Richmond

United States District Court, N.D. California - November 6, 2013 - Not Reported in F.Supp.2d - 2013 WL 5955699

After the Court dismissed a nearly identical case filed by Wells Fargo, the City of Richmond and its "advisor," a private company named Mortgage Resolution Partners LLC (collectively, "Defendants"), moved to dismiss this action on the same grounds, arguing that the issue was not yet ripe for determination for constitutional and prudential purposes. Here, Bank of New York Mellon and Wilmington Trust Company (collectively, "Plaintiffs") challenge the Court's prior determination regarding ripeness, and argue that this case presents unique issues—particularly related to the effect of its request for declaratory judgment—that the Court had not yet considered.

Defendants here are considering purchasing underwater mortgages from Richmond homeowners and refinancing the mortgages so that the homeowners would have lower payments and protection from foreclosure.

Plaintiffs filed suit for injunctive and declaratory relief, arguing that Defendants' eminent domain plan is both unconstitutional and sufficiently imminent such that the case is ripe for determination. Plaintiffs argued that the Court should deny this motion, emphasizing that the case is ripe for determination and that the Court had not explicitly ruled on ripeness related to actions for declaratory judgment.

The Court once again found that the case is not yet ripe for determination and granted Defendants' motion to dismiss without prejudice.

"To intervene before the Richmond City Council adopts an eminent domain program would stretch the role of the judiciary beyond what is contemplated by Article III and what is reasonable to maintain judicial efficiency. If the courts were expected to intervene in every legislative proposal that had potential constitutional ramifications, their dockets would be filled with prospective litigation. This is exactly the purpose of the ripeness doctrine; where, as here, factual contingencies could arise that would make litigation unnecessary, it is not reasonable to expect the courts to devote their resources to resolve undefined and potentially non-existent constitutional conflicts."

PUBLIC CONTRACTS - INDIANA

Kitchell v. Franklin

Supreme Court of Indiana - November 13, 2013 - N.E.2d - 2013 WL 6009720

Resident filed petition against city seeking declaration that ordinance authorizing mayor to negotiate public-private agreement was invalid.

The Supreme Court of Indiana held that the Public-Private Agreement Act does not require a political subdivision to adopt the Act before it may issue a request for proposals or begin contract negotiations consistent with Act.

ZONING - IOWA

Residential and Agricultural Advisory Committee, LLC v. Dyersville City Council

Court of Appeals of Iowa - November 6, 2013 - Slip Copy - 2013 WL 5951191

Residential and Agricultural Advisory Committee, L.L.C., filed a petition for writ of certiorari and request for stay and injunction against the Dyersville City Council, the mayor of Dyersville, and the individual city council members. The plaintiffs alleged the city council had acted (1) in violation of Iowa law, (2) in violation of Dyersville city ordinances, (3) in excess of its authority, (4) arbitrarily and capriciously, and (5) in contravention of public safety, health, morals, and the general welfare by passing Resolution Number 38–12, which rezoned certain property from A–1 Agricultural to C–2 Commercial. The property in question included that known as the "Field of Dreams."

At the initial hearing, the District Court denied plaintiffs' petition for writ of certiorari.

Plaintiffs appealed, asserting that under Iowa Rule of Civil Procedure 1.1406 the issues before the court at the initial hearing were limited to the sufficiency of the petition for writ of certiorari, whether an injunction should have been issued, and whether a bond would be required. They contend the district court improperly considered the merits of the case before they had an

opportunity to conduct discovery.

The Court of Appeals agreed, concluding that the district court improperly decided the merits of the petition for writ of certiorari after the initial hearing, rather than confine its decision to whether the writ should be issued.

EMPLOYMENT - LOUISIANA

O'Hern v. New Orleans Police Dept.

Supreme Court of Louisiana - November 8, 2013 - So.3d - 2013-1416 (La. 11/8/13)

Police officer, who pleaded nolo contendere to illegal use of weapons, appealed his termination of employment alleging that it was unlawful because of failure to timely complete the investigation.

The Supreme Court of Louisiana held that disciplinary investigation of police officer's conduct in drinking alcohol, taking drugs, and shooting his gun multiple times in his personal vehicle while on a police shift was completed within 60 days, as required by statute. Preliminary investigation was a criminal investigation that was not governed by 60-day rule, and subsequent administrative investigation was completed within 60 days. A criminal investigation into actions of a police officer tolls time limit for the administrative investigation.

"The investigation in question stems from the following incident. While on duty on December 12, 2009, Mr. O'Hern left his patrol assignment and went to his private vehicle. He drove to the top floor of a downtown parking garage, consumed a bottle of whiskey and ingested nearly a dozen Clonazepam (anti-anxiety) tablets. He then tasered himself and discharged his firearm over twenty times, shooting through the windshield and roof of the vehicle. Responding officers found Mr. O'Hern incapacitated and took him to a medical facility where he informed personnel that he attempted to commit suicide. His blood alcohol content was 0.105%."

BANKRUPTCY - MICHIGAN

In re City of Detroit, Mich.

United States Bankruptcy Court, E.D. Michigan, Southern Division - November 6, 2013 - B.R. - 2013 WL 5963141

Plaintiffs who had commenced actions challenging the constitutionality of state statute pursuant to which emergency manager was appointed for bankrupt municipality sought determination that automatic stay arising upon commencement of municipality's Chapter 9 case did not apply to their lawsuits or, in alternative, relief from automatic stay.

The Bankruptcy Court held that:

- Automatic stay, as extended to protect employees, agents and representatives of municipality that had filed for Chapter 9 relief, applied to federal lawsuit filed by residents of city challenging the constitutionality of statute pursuant to which emergency manager was appointed;
- Stay did not apply to federal lawsuit brought, not only by residents and officials of bankrupt municipality, but by residents and officials of other municipalities in Michigan for which emergency managers had been appointed, challenging the constitutionality of state statute pursuant to which these appointments were made; and

- “Cause” did not exist to modify automatic stay to allow residents and officials of bankrupt municipality to proceed with federal lawsuit.

IMMUNITY - MISSISSIPPI

Harris ex rel. Harris v. Board of Trustees of Clinton Public School Dist.

Court of Appeals of Mississippi - November 12, 2013 - So.3d - 2013 WL 5976624

High school student filed tort-claims action against public school district, stemming from incident in which teachers refused to allow student to use restroom during administration of state standardized test.

The Court of Appeal held that:

- Teachers’ refusal to allow student to use restroom was discretionary function subject to immunity, and
- Teachers’ decision to deny restroom request was for public-policy purpose.

Public school teachers’ refusal to allow high school student to use restroom during administration of state standardized test was discretionary function subject to immunity under Mississippi Tort Claims Act (MTCA), since element of choice or judgment was involved in decision to allow restroom use in case of emergency. While school district was required to establish student-testing plan, testing-security procedures of plan were left to discretion of district employees, particularly assigned test administrators, as there was no automatic requirement under plan that administrators allow students to use restroom.

Public school district teachers’ decision to grant or deny high school student’s restroom request during administration of state standardized test was for public-policy purpose of maintaining integrity and security of test and testing environment, grounded in maintenance of student discipline, safety, and order, as required for immunity from suit under MTCA. Purpose was crucial for administering test in way that gave fair and accurate results as means of measuring student performance, and paramount to ability of protecting integrity and security of test was ability of administrator to have discretion to conduct test and to control classes.

PUBLIC UTILITIES - MISSOURI

In re Union Elec. Co.

Missouri Court of Appeals, Western District - October 15, 2013 - S.W.3d - 2013 WL 5614208

Customers appealed from order of Public Service Commission (PSC) allowing electric utility to pass Regional Transmission Organization (RTO) electricity transmission charges onto customers through Fuel and Purchased Power Adjustment Clause (FAC).

The Court of Appeals held that:

- “Transportation,” as used in statute that allowed electric utilities to apply to PSC for interim energy charges or periodic rate adjustments to reflect increases in transportation costs, included transmission charges, and

- PSC's order was reasonable.

Fact that type of transmission charges passed onto customers of electric utility did not exist at time of enactment of statute, which allowed electric utilities to apply to PSC for interim energy charges or periodic rate adjustments to reflect increases in transportation costs, did not preclude PSC's determination that transmission charges by RTO to utility were eligible to be passed onto customers through FAC. The statute did not expressly describe or limit charges eligible to be recovered, except that such charges be "prudently incurred."

PUBLIC RECORDS - MONTANA

Billings Gazette v. City of Billings

Supreme Court of Montana - November 8, 2013 - P.3d - 2013 MT 334

Newspaper brought action against city seeking disclosure of documents related to discipline of city employees due to inappropriate computer usage. The District Court ruled that city was required to disclose unredacted documents. City appealed.

The Supreme Court of Montana held that:

- Employees had actual expectation of privacy in identities related to disciplinary investigation;
- Expectation was one society was willing to accept as reasonable; and
- Demand for individual privacy clearly exceeded the merits of public disclosure.

An examination of a request under the public right to know provision of the Montana Constitution requires a three-step process: (1) whether the provision applies to the particular political subdivision against whom enforcement is sought; (2) whether the documents in question are documents of public bodies subject to public inspection; and (3) if the first two requirements are satisfied, whether a privacy interest is present, and if so, whether the demand of individual privacy clearly exceeds the merits of public disclosure.

City employees had actual expectation of privacy in their identities in relation to internal disciplinary proceedings, and therefore demands of individual privacy clearly exceeded the merits of public disclosure so as to support preclusion of disclosure of records regarding internal disciplinary proceedings stemming from employees' purported use of work computers to view pornography, where city's internet use policy for employees addressed only the city's knowledge of the employee's internet use, not the identities of the employees involved in internal disciplinary proceedings.

City employees' expectation of privacy in their identities in relation to internal disciplinary proceedings was an expectation of privacy that society was willing to accept as reasonable, so as to support preclusion of disclosure of identities of employees involved in disciplinary proceeding stemming from purported use of work computers to view pornography, where employees were not elected officials, department heads, or high management, internet usage was not related to employees' public duties, employees received only a five-day suspension and were not discharged or forced to resign, no criminal charges had been filed or were contemplated against employees, and there was no allegation of violation of any specific duty related to performance of a public trust function.

BONDS - NEVADA

Washoe-Mill Apartments v. U.S. Bank Nat. Ass'n

United States District Court, D. Nevada - September 30, 2013 - Slip Copy - 2013 WL 5493301

Washoe–Mill Apartments (WMA) is a Nevada General Partnership. WMA entered into a partnership agreement in order to construct and operate a HUD subsidized facility for seniors and disabled citizens, the Washoe–Mill Apartments. In 1993, Bank of America Nevada (BOAN) and the Washoe Housing Finance Corporation (WHFC) entered into a Trust Indenture Agreement (the "Agreement") regarding bonds used to refinance WMA's mortgage loans for the WMA facility. The Agreement was executed pursuant to HUD's tax-exempt bond financing program regulations. Under the Agreement, BOAN was the trustee of the bond proceeds and was charged with making payment to bondholders. HUD states that these bonds were tax-exempt, the mortgage was insured by HUD, and WMA received rental subsidies from HUD.

The WMA facility was sold on January 21, 2011, and the payoff amount for the mortgage loan was remitted as full settlement of the mortgage. A year later, in January 2012, a trust officer for U.S. Bank informed WMA that it had conducted an audit that revealed the existence of $229,160.81 remaining in the trust account. U.S. Bank conducted an investigation to determine who the funds belonged to but was unable to reach a conclusion.

WMA brought a claim for the full amount remaining in the trust. HUD counterclaimed and moved for summary judgment on the grounds that the contractual language of the Agreement is clear that the interpleaded funds belong to HUD.

The Agreement was entered into pursuant to Section 11(b) of the United States Housing Act of 1937. HUD explained that Section 11(b) was originally designed to finance the acquisition, construction, or rehabilitation of low income housing. After interest rates dropped in the late 1980s, however, Section 11(b) was used exclusively to pay off existing bonds by issuing new bonds at a lower interest rate. In addition to insuring the mortgage through these tax-exempt bonds, HUD also provides rent subsidies. In exchange for these benefits, "[u]pon full payment of the principle and interest on the obligations (including that portion of the obligations attributable to the funding of the debt service reserve), any funds remaining in the debt service reserve shall be remitted to HUD." 24 C.F.R. § 811.108(a)(3).

HUD asserted that Section 413 of the Agreement incorporates this statutory requirement. Section 413 states that, "[u]pon final payment of all principal of, premium, if any, and interest on the Bonds, and upon satisfaction of all claims against the Issuer and the Trustee hereunder … any moneys remaining in all Funds shall be paid at the written direction of the Issuer to HUD." The court agreed, granting HUD's motion for summary judgment.

NEGLIGENCE - NEW YORK

Koerner v. City of New York

Supreme Court, Appellate Division, First Department, New York - November 12, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 07410

Worker brought action against city and its board of education, seeking to recover damages for injuries he allegedly sustained while working at school, as result of presence at school of fungal

pathogen that caused his eye infection.

The Supreme Court, Appellate Division, held that:

- There was insufficient evidence that board was on notice of dangerous condition alleged, and
- There was no evidence that board exercised supervision and control over work performed by worker.

A general awareness that a dangerous condition may be present is legally insufficient to charge a defendant with constructive notice.

Awareness of unsanitary conditions at school was insufficient evidence that city's board of education was on notice of presence of fungal pathogen that allegedly caused worker's eye infection, as would support worker's statutory and common law negligence claims against board, absent any evidence that the fungus existed at the school at all, other than speculation based on worker's unusual infection.

There was no evidence that city board of education exercised supervision and control over work being performed by worker who allegedly sustained injury while working at school, as result of presence at school of fungal pathogen that caused his eye infection, so as to impart liability pursuant to statute imposing general duty to protect the health and safety of employees.

LIABILITY - NEW YORK

Williams v. City of New York

Supreme Court, Appellate Division, First Department, New York - November 7, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 07268

In personal injury suit against city and its transit authority, the Supreme Court granted authority's motion to correct rate of interest on judgment from nine-percent to three-percent. Plaintiff appealed.

The Supreme Court, Appellate Division, held that by statute, proper interest rate was three-percent.

By statute, rate of interest against authority could not exceed three-percent and both authority and city were found to be jointly and severally liable for 100% of judgment, and authority was obligated to indemnify city pursuant to lease of subject property.

EMPLOYMENT - NEW YORK

Fiducia v. DiNapoli

Supreme Court, Appellate Division, Third Department, New York - November 7, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 07245

Police officer commenced Article 78 proceedings, seeking review of determination denying his application for accidental disability retirement benefits.

The Supreme Court, Appellate Division, held that officer slipping and falling while descending stairway in abandoned building was not an accident. An incident at issue in application for accidental disability retirement benefits does not qualify as an accident where the injury results

from an expected or foreseeable event arising during the performance of routine employment duties. Rather, the precipitating event must emanate from a risk that is not an inherent element of the petitioner's regular employment duties.

CBA - NEW YORK

Buffalo Niagara Airport Firefighters Ass'n v. DiNapoli

Supreme Court, Appellate Division, Third Department, New York - November 7, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 07227

Firefighters union brought article 78 proceeding to review a State Comptroller's finding that newly hired firefighters were not eligible to participate in a noncontributing special retirement plan. The Supreme Court, Albany County, dismissed the proceeding, and union appealed.

The Supreme Court, Appellate Division, held that:

- Triborough Amendment to the tier 5 retirement legislation did not entitle newly hired firefighters to participate in noncontributory special retirement plan provided for in expired collective bargaining agreement (CBA), and
- Union and transportation authority were prohibited from agreeing to a noncontributory retirement plan, and could not bind third parties, such as State Comptroller, to such a plan.

CBA providing for a noncontributory plan, executed seven months after the effective date, could not be considered to be retroactively "in effect" on that date.

SCHOOLS - PENNSYLVANIA

In re Petition to Realign Regional Election Districts in Pennsbury School Dist.

Commonwealth Court of Pennsylvania - November 8, 2013 - A.3d - 2013 WL 5962796

The Bucks County Court of Common Pleas issued an order approving a school district reapportionment petition filed by the Pennsbury School District Board of School Directors pursuant to Section 303 of the Public School Code of 1949.

An unincorporated association, Concerned Residents of Pennsbury (CROP), which had developed a competing plan for the School District, appealed.

CROP asserted three arguments: 1) that the approved plan did not satisfy the "one person, one vote" requirement of the Equal Protection Clause of the United States Constitution; 2) that the approved plan did not satisfy the requirement of Section 303(b)(3) of the Public School Code that the population of voting regions in school board elections be "as nearly equal as possible;" and 3) that the trial court abused its discretion in approving the plan over its plan.

The appeals court concluded that none of these contentions was valid. Contrary to CROP's assertions, the trial court judge, in her well-reasoned opinion, correctly applied the law and acted well within her discretion.

IMMUNITY - PENNSYLVANIA

Oliver v. Tropiano Transp., Inc.

Commonwealth Court of Pennsylvania - November 8, 2013 - A.3d - 2013 WL 5962809

Parking garage customer filed complaint against parking authority, alleging that its negligence caused passenger to sustain foot fractures while exiting parking shuttle. The Court of Common Pleas found authority liable. Authority appealed.

The Commonwealth Court held that:

- Parking authority was local authority, rather than Commonwealth agency;
- Customer was barred from recovering damages for pain and suffering; and
- Customer's claim did not fall under real property exception to governmental immunity.

To maintain negligence claim under the real property exception to governmental immunity, plaintiff must prove that his or her injury resulted from a dangerous condition arising from local agency's care, custody, or control of real property.

Parking garage customer's negligence claim against parking authority, as local agency, did not fall under real property exception to governmental immunity, as the ramp itself was not defective, but rather purported negligence of shuttle operator in leaving customer on ramp was cause of customer's injuries.

INVERSE CONDEMNATION - TEXAS

Edwards Aquifer Authority v. Bragg

Court of Appeals of Texas, San Antonio - November 13, 2013 - S.W.3d - 2013 WL 5989430

Commercial pecan growers filed action against Edwards Aquifer Authority (EAA) for an alleged taking of growers' property, and for alleged violations of growers' federal civil rights, as result of decisions denying one water permit application and partially denying another. Lawsuit was removed to federal court, which dismissed civil rights claims and remanded takings claims back to state court. The district court granted partial summary judgment on liability for takings claim and, following bench trial, awarded compensation. Both parties appealed.

On denial of motion for rehearing, the Court of Appeals held that:

- As a matter of apparent first impression, EAA is a proper party to a takings lawsuit instituted under the Edwards Aquifer Authority Act (EAAA), even though actions of EAA giving rise to suit may not have been discretionary, and even if the state might be a proper party;
- EAA was not judicially estopped, based on successful arguments in federal court regarding accrual of growers' § 1983 claims, from subsequently arguing an earlier accrual date for growers' takings claim;
- Ten-year statute of limitations for an adverse possession claim applies where a regulatory taking results from an unreasonable interference with the landowner's right to use and enjoy the property;
- Growers' regulatory-takings claims did not accrue for limitations purposes until EAA made its final decisions regarding application of EAAA to growers' permit applications;
- Permitting system under EAAA that dictated the decisions on growers' applications resulted in

compensable “regulatory taking” of two orchards;
- Proper time for determining the value of groundwater rights subjected to regulatory taking was the time at which time at which the statutory provisions that dictated those decisions were applied to the properties in question; and
- Just compensation would be determined by reference to the best and highest use of the two properties at issue, i.e., as commercial pecan orchards, and by valuing the orchards immediately before and immediately after the EAAA was applied to the orchards.

“Based on our discussion above, we conclude the trial court erred in calculating the compensation owed for the takings of the two orchards. Therefore, we remand this cause for the trial court to calculate the compensation owed on the Home Place Orchard as the difference between the value of the land as a commercial-grade pecan orchard with unlimited access to Edwards Aquifer water immediately before implementation of the Act in 2005 and the value of the land as a commercial-grade pecan orchard with access to Edwards Aquifer water limited to 120.2 acre-feet of water immediately after implementation of the Act in 2005. We also remand this cause for the trial court to calculate the compensation owed on the D’Hanis Orchard as the difference between the value of the land as a commercial-grade pecan orchard with unlimited access to Edwards Aquifer water immediately before implementation of the Act in 2004 and the value of the land as a commercial-grade pecan orchard with no access to Edwards Aquifer water immediately after implementation of the Act in 2004.”

EMINENT DOMAIN - TEXAS

State v. Moore Outdoor Properties, L.P.

Court of Appeals of Texas, El Paso - November 13, 2013 - S.W.3d - 2013 WL 6002035

State filed a petition for condemnation of a parcel of land located along Interstate 30 in Fort Worth for a highway construction project. Moore Outdoor Properties, L.P., owned the land. A large billboard structure was located on the property. Arrington purchased the billboard structure, permit, and leasehold rights from Moore at a price of $1,268,454.3 Moore retained ownership of the land underneath the billboard structure and Arrington leased the land for 99 years with an option to extend the lease for four 50 year periods.

Following a hearing, the Special Commissioners awarded $334,194 jointly to Moore and Arrington for the total condemnation. Arrington counterclaimed for inverse condemnation for the State’s taking of its leasehold property interests and sought to recover compensation.

The State responded that it is not required to compensate Arrington for the billboard structure because it is personal property, not real property, and that a sign permit does not create a property right, and therefore, it is not required to compensate Arrington for this interest.

Arlington argued that its interests in the sign permit, billboard structure, and leasehold form an intertwined property interest or aggregate asset which would be sold together in the market. It reasons that the combined “leasehold property interests” are compensable in a condemnation proceeding.

The jury found that the fair market value of Arrington’s property interests on the date of the taking was $969,243, which it awarded, and the appeals court affirmed.

EMINENT DOMAIN - TEXAS

City of College Station, Tex. v. Star Ins. Co.

United States Court of Appeals, Fifth Circuit - November 14, 2013 - F.3d - 2013 WL 6028315

City brought action against its general commercial liability insurer, seeking to recover defense costs, indemnification, and statutory penalty interest, after insurer refused to defend or indemnify the city in an underlying lawsuit.

In the underlying lawsuit, a real-estate investment trust alleged that city's zoning decisions were discriminatory and driven by an irrational animus, depriving the trust of its right to equal protection, that the city's zoning decisions were arbitrary, and therefore violated trust's right to substantive due process, and that city council members conspired with third-party landowners to poach the trust's prospective tenants, thereby tortiously interfering with trust's contracts and business expectancies.

The Court of Appeals held that allegations in underlying complaint against city did not fall within the scope of policy's "inverse condemnation" exclusion. The policy excluded liability "arising out of (3)27 any principle of eminent domain, condemnation proceeding, [or] inverse condemnation," and that language could not reasonably be read to extend to liability arising out of all zoning decisions.

IMMUNITY - WYOMING

DiFelici v. City of Lander

Supreme Court of Wyoming - November 12, 2013 - P.3d - 2013 WY 141

Pedestrian who was injured when she fell after stepping into a hole drilled in the gutter of a street brought action against city, alleging negligence and claiming entitlement to recovery under specific statute rendering cities and towns liable for injuries resulting from excavations or obstructions which make streets or sidewalks unsafe.

The Supreme Court of Wyoming held that:

- Hole was result of street maintenance that was excluded from waiver of immunity otherwise provided under Claims Act;
- Collection or diversion of storm water runoff on a city street did not constitute liquid waste collection or disposal as contemplated by waiver provisions; and
- Pedestrian was not entitled to recover under specific statute rendering cities and towns liable for injuries resulting from excavations or obstructions which make streets or sidewalks unsafe.

Collection or diversion of storm water runoff on a city street did not constitute liquid waste collection or disposal, thus depriving pedestrian of an exception to the immunity conferred on city by the Governmental Claims Act, in negligence action brought by pedestrian who was injured when she fell after stepping into a hole drilled in the gutter of a street for purposes of draining storm water. Claims Act was not designed to prevent cities from returning surface water to natural watercourses and aquifers, and the liability which would have resulted from claims that a surface water drainage system did not operate properly would have been overwhelming.

ZONING - ALABAMA

KTK Min. of Virginia, LLC v. City of Selma, Ala.

United States District Court, S.D. Alabama, Northern Division - October 31, 2013 - Slip Copy - 2013 WL 5883836

The Confederate Memorial Circle is a one-acre tract of land located in the City's Old Live Oak Cemetery. The Circle was established in 1877 by a resolution of the Selma City Counsel granting a petition by members of the Ladies of the Confederate Memorial Association requesting a donation of one acre of ground located in that area upon which to erect a monument to the Confederate dead. In addition to hosting a Confederate memorial, the Circle serves as a burial place for 195 Confederate dead and is the site of a World War I memorial. A monument to Confederate General Nathan Bedford Forrest was added to the Circle in 2001 after the Selma City Council ordered that it be moved there from another location, where it had been erected in 2000 by an organization known as the Friends of Forrest (FOF).

On August 2, 2012, KTK Mining of Virginia, LLC (KTK) entered into a contract with Selma Chapter 53 of the United Daughters of the Confederacy (UDC), for the sum of $1.00 and other consideration, to perform construction work on the Circle for the purpose of making improvements. The UDC, along with the City, has taken part in the maintenance of the Circle for over 100 years. KTK estimated that, when completed, the work it planned to perform for the UDC would have a value of $163,200. KTK agreed to perform this work on a non-profit basis, with all costs and expenses to be either borne by KTK or reimbursed by private contributions. On August 6, 2012, KTK entered into a contract with FOF to make improvements to the Circle and to relocate and secure the Forrest monument within the Circle. KTK estimated that, when completed, the work it planned to perform for FOF would have a value of $56,300. KTK also agreed to perform this work on a non-profit basis and to bear most costs and expenses, other than those which FOF members might wish to cover voluntarily.

On August 3, 2012, pursuant to City Ordinance No. 01–9091, the Selma Historic Development Commission issued UDC and FOF a Certificate of Appropriateness for the Circle refurbishing project. That same day, the required Certificate of Appropriateness having been first obtained (due to the fact that the planned work was taking place in a historic district), KTK was issued a building permit from the City's Department of the Building Inspector to proceed with the project. KTK then began its work on the Circle.

Protesters subsequently entered the construction site and caused a series of disruptions. KTK, the protestors, the City mayor, and the City Attorney agreed to cease all activity, including work and protests, in the Circle until after municipal elections were held on August 28, 2012.

The evening of August 28, 2012, after the polls had closed, KTK employees returned to the Circle to resume work but were prevented from doing so by Chief Riley, who threatened arrest if they did so.

On August 29, 2012, a meeting was held at Selma City Hall involving KTK, City officials, and a representative for the protestors, at which KTK agreed not to return to the Circle to perform work for a period of one week, to give time for the City Council to meet and resolve issues related to the project.

The City Council held a meeting on September 25, 2012. At this meeting, protestors and other City citizens were permitted to address the City Council regarding the UDC's purported license to use the Circle, asking that the Council revoke that license. At some point, one council member made a

motion to stop the Permit of building the Nathan Bedford Forrest Monument, and revoke the building permit until a court could rule on the matter.

No item regarding KTK's building permit was included on the meeting agenda, and there is no evidence that KTK was given notice that such an action might take place at the meeting. The City's building inspector never revoked the building permit or issued a stop-work order against KTK.

KTK brought a motion for summary judgment, arguing there was no genuine issue of material fact that the City violated its procedural due process rights by depriving it of a constitutionally-protected property interest when it suspended/revoked the building permit issued to KTK for the Circle refurbishing project without giving KTK a chance to be heard prior to the decision and without providing a means to challenge it

KTK's motion was granted. In order to satisfy due process, the City was required to provided KTK notice and the opportunity to be heard prior to the City Council's suspension/revocation of its permit and it was in fact provided neither.

PUBLIC UTILITIES - CALIFORNIA

Water Replenishment District of Southern California v. City of Cerritos

Court of Appeal, Second District, Division 1, California - October 30, 2013 - Cal.Rptr.3d - 13 Cal. Daily Op. Serv. 12, 037

Trial court made a non-final interim order that the provisions of article XIII D of the California Constitution invalidated a replenishment assessment imposed on the City of Cerritos by the Water Replenishment District of Southern California. Subsequent to the interim order, the City stopped paying the assessment but continued to produce groundwater.

Water district brought action against City for declaratory, injunctive, and writ relief challenging City's production of groundwater while failing to pay replenishment assessment.

The Court of Appeal held that:

- "Pay first, litigate later" principle required city to pay assessment until a final judgment invalidated it, and
- Trial court was required to grant preliminary injunction against city's production of water without paying assessment.

EMINENT DOMAIN - FLORIDA

Beyer v. City of Marathon

District Court of Appeal of Florida, Third District - November 6, 2013 - So.3d - 2013 WL 5927690

Property owners brought inverse condemnation action against city and state arising out of a comprehensive plan that barred any development on their property.

The District Court of Appeal held that:

- Owners failed to present any evidence of reasonable investment-backed expectations for

development of the property;
- Inverse condemnation claim was not barred by the doctrine of laches; and
- Owners were not deprived of all economically beneficial use of their property.

A subjective expectation that land can be developed is no more than an expectancy and does not translate into a vested right to develop the property, so as to support an inverse condemnation claim.

MUNICIPAL ORDINANCE - FLORIDA

Ripps v. City of Coconut Creek

District Court of Appeal of Florida, Fourth District - November 6, 2013 - So.3d - 2013 WL 5925093

City residents sought certiorari review of city ordinances approving Indian tribe's proposed construction of a hotel and parking garages, arguing that further review was necessary under the development of regional impact (DRI) statute. The Circuit Court denied relief, finding that the DRI statute did not apply. Residents filed petition for second-tier certiorari review.

The District Court of Appeal held that any failure by circuit court to properly apply the DRI statute did not result in a miscarriage of justice, as necessary to warrant second-tier certiorari review where DRI statute was amended after adoption of the zoning ordinances to remove hotel development from its scope, such that tribe could withdraw and resubmit its rezoning application without triggering application of the statute.

EMPLOYMENT - GEORGIA

City of St. Marys v. Brinko

Court of Appeals of Georgia - October 30, 2013 - S.E.2d - 2013 WL 5813674

Former city employee brought action against city, and various city employees, alleging due process and wrongful termination claims. The trial court granted summary judgment in favor of defendants on employee's tort claims, but against defendants on employee's due process claim. Defendants appealed, and employee cross-appealed.

According to employee, she and the city had an oral employment agreement for a term of 50 years. A very common arrangement.

The Court of Appeals held that former employee did not have a protected property interest in her employment subject to procedural due process.

Employee, whose employment was terminable at will, and who did not have a valid contract of employment with city, did not have a protected property interest in her employment that was subject to procedural due process, absent a showing that any official city document, ordinance, or statute altered her status as an at-will employee and provided that she could only be fired for cause.

ZONING - GEORGIA

City of Tybee Island, Georgia v. Live Oak Group, LLC

Court of Appeals of Georgia - November 5, 2013 - S.E.2d - 2013 WL 5912115

Property owner filed zoning appeal and petition for mandamus, asserting a variety of claims arising out of city's denial of its application for a zoning amendment. The trial court awarded summary judgment to property owner on its inverse condemnation claim, and awarded summary judgment to city on owner's remaining claims, including owner's federal takings claim, which it explained was being denied solely because owner succeeded on the inverse condemnation claim. City appealed, and property owner appealed the denial of its federal takings claim in the event the judgment on the inverse condemnation claim was reversed.

The Court of Appeals held that denial of property owner's application for a zoning amendment did not amount to inverse condemnation.

City's denial of property owner's application for a zoning amendment did not amount to inverse condemnation under the eminent domain provision of state constitution. There was no affirmative act by city for a public purpose causing a nuisance or trespass on owner's property resulting in diminished utility and functionality of the property.

MUNICIPAL ORDINANCE - GEORGIA

Rehman v. Belisle

Supreme Court of Georgia - November 4, 2013 - S.E.2d - 2013 WL 5878287

Citizen brought action against mayor and councilmen of city seeking declaration that ordinance prohibiting possession of marijuana was invalid.

The Supreme Court of Georgia held that:

- Failure to perfect service warranted dismissal, and
- Citizen who had never been charged, or even threatened, with violating ordinance lacked standing to challenge its constitutionality.

IMMUNITY - GEORGIA

City of Atlanta v. Durham

Court of Appeals of Georgia - November 7, 2013 - S.E.2d - 2013 WL 5943411

After decedent was killed during the demolition of an abandoned house owned by the city, administratrix of decedent's estate and decedent's son brought action against city, asserting claims for negligence, negligent hiring, negligent supervision, breach of contract, and nuisance. City filed motion to dismiss for failure to state a claim on grounds of governmental immunity. The trial court denied motion. City appealed.

The Court of Appeals held that city performed governmental function when it elected to demolish abandoned house and selected contractor to perform demolition, and thus, city was entitled to governmental immunity on plaintiffs' negligence claims.

EMPLOYMENT - ILLINOIS

Brumfield v. City of Chicago

United States Court of Appeals, Seventh Circuit - November 6, 2013 - F.3d - 2013 WL 5928187

Police officer commenced action against municipality, alleging claims under the Rehabilitation Act and Title II of the ADA.

The Court of Appeals held that:

- On question of first impression, Title II of the ADA does not cover disability discrimination in public employment;
- Officer waived issue on appeal of whether res judicata barred her claim under Title I of the ADA;
- Officer did not actually state that municipality had terminated her employment by reason of her alleged disability; and
- Officer's "psychological problems" did not prevent her from performing essential function of her job.

An employer may fire an employee for engaging in unacceptable workplace behavior without violating the ADA or the Rehabilitation Act, even if the behavior was precipitated by a mental illness.

EMPLOYMENT - LOUISIANA

Gaspard v. City of Abbeville

Court of Appeal of Louisiana, Third Circuit - November 6, 2013 - So.3d - 2013-519 (La.App. 3 Cir. 11/6/13)

Police officer sought review of civil service board's decision upholding city council's termination of officer's employment, stemming from incident in which officer allegedly injured middle school student when she improperly used and deployed stun gun in school classroom.

The Court of Appeal held that:

- All recordings of interviews from police employees and officers were required, and
- Evidence was insufficient to support trial court's finding that investigating officer's interview was recorded.

In order for termination of police officer under investigation for injury to student based on alleged improper use and deployment of stun gun in middle school classroom not to be rendered absolute nullity, full recordings of interviews from all police employees and officers were required, rather than only from officer under investigation, despite contention that officer under investigation did not have right to obtain recorded statement from investigating officer's interview with police internal affairs board. No exception was applicable to board's interview with investigating officer.

PUBLIC UTILITIES - MARYLAND

PPL Energyplus, LLC v. Nazarian

United States District Court, D. Maryland - September 30, 2013 - F.Supp.2d - 2013 WL 5432346

Utility companies filed action against Commissioner of Maryland Public Service Commission (PSC), alleging that order directing Maryland utilities to enter into Contract for Differences with generator involving construction of new generation facility violated Supremacy Clause, Commerce Clause, and § 1983.

The District Court held that:

- PSC order was preempted by Federal Power Act (FPA) and void under Supremacy Clause;
- Order did not fall within the market participant exception to dormant Commerce Clause; and
- Locational requirement in order was not facially discriminatory.

MUNICIPAL ORDINANCE - MISSOURI

Edwards v. City of Ellisville

Missouri Court of Appeals, Eastern District, Division Three - November 5, 2013 - S.W.3d - 2013 WL 5913628

Drivers received violation notices from the City of Ellisville alleging that they had violated Ellisville's red light camera ordinance (the "Ordinance") and challenged the Ordinance in an eight-count purported class action petition. The petition sought declaratory judgment regarding the Ordinance's constitutionality, validity, and conformity with state law, as well as Ellisville's authority to enact the Ordinance. Drivers also asserted that the Ordinance violated procedural due process and the privilege against self-incrimination, and they alleged claims of unjust enrichment, money had and received, and civil conspiracy against Ellisville and American Traffic Solutions, Inc. ("ATS").

Ellisville and ATS each filed separate motions to dismiss as well as a joint motion to dismiss, all of which were granted by the trial court. Drivers appealed.

The appeals court held that the Ordinance was properly enacted pursuant to Ellisville's police power for regulating public safety. However the court concluded that the Ordinance conflicted with Missouri law on the same subject in violation of Section 304.120.3. Specifically, the Ordinance conflicts with Sections 304.281, the state statute governing traffic signal violations, and 302.225, and 302.302, the provision of state law relating to the assessment of points for moving violations.

Accordingly, the Ordinance is void and unenforceable as a matter of law.

EMINENT DOMAIN - NEW JERSEY

100 Paterson Realty, LLC v. City of Hoboken

Superior Court of New Jersey, Appellate Division - November 6, 2013 - Not Reported in A.3d - 2013 WL 5925711

City engaged in a pattern of conduct that made it clear that it desired to purchase developer's property for use as parkland. This conduct included a number of property designations, negotiations, and reports which occasioned considerable uncertainty and delay, but none of which

resulted in an actual rezoning of the property.

Developer finally concluded that the city's commitment to creating new parkland and the council's prior actions, evidenced to him the city's hostility to the plaintiff's development application, and therefore rendered fruitless any continued attempt to develop the property.

Developer sued, alleging that the city's actions deprived him of the property's beneficial use, thus resulting in an inverse condemnation for which just compensation must be paid. Alternatively, he sought just compensation for deprivation of beneficial use on the theory of a temporary taking.

The court found that, while the city's actions may have resulted in the plaintiff's inability to develop the projects he was proposing, they did not otherwise deprive him of the beneficial use of the property, as tenants continued to occupy the building.

The judge further determined that plaintiff was not deprived of the beneficial use of its property such that a de facto taking had occurred. With respect to plaintiff's argument that it should be compensated for temporary taking of the Property as a result of its application being tabled, the judge concluded that plaintiff had not been deprived of all of the beneficial use of the property, reasoning that the six or seven months involved were not significant.

MUNICIPAL ORDINANCE - NEW JERSEY

Fullbrook v. Mayor, Members of City Council of City of Camden

Superior Court of New Jersey, Appellate Division - November 7, 2013 - Not Reported in A.3d - 2013 WL 5942128

7–Eleven and others brought an application to set aside a city ordinance adopted by the City of Camden. The ordinance regulated the hours of operation of certain businesses located within 200 feet of a residential zone.

Plaintiff challenged the ordinance as an arbitrary and unreasonable exercise of the City's police powers. Plaintiffs claimed the ordinance bore no "reasonable and substantial relationship to the public interest to be advanced thereunder."

Following a bench trial, the trial court found the Ordinance represented a valid exercise of the City's police power and dismissed the action. The appeals court agreed and affirmed.

ZONING - NEW JERSEY

Advance at Branchburg II, LLC v. Branchburg Tp. Bd. of Adjustment

Superior Court of New Jersey, Appellate Division - November 1, 2013 - A.3d - 2013 WL 5851864

Property owner sought review of decision by township's board of adjustment denying request for a variance for construction of a multi-family residential development on property located in industrial zone.

The Superior Court, Appellate Division, held that inclusion of affordable housing units in development did not transform project into an inherently beneficial use for purposes of granting

variance.

BONDS - NEW YORK

O'Brien v. New York State Com'r of Educ.

Supreme Court, Appellate Division, Third Department, New York - November 7, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 07223

In 2010, School District's Board of Education approved a district-wide plan to reorganize and upgrade the School District's facilities at an expected cost of $9.9 million. The Board contemporaneously approved a resolution which, subject to voter approval, authorized the issuance of bonds to finance the facilities project and voted to hold a special election to obtain voter approval thereof.

Petitioner filed a petition with Commissioner of Education challenging the School District's approval of the bond resolution.

Petitioner's primary contention was that the facilities project and bond resolution violated the School District's constitutional and statutory debt limit, an argument that turns on how to calculate or classify indebtedness for debt limit purposes. That is, the issue is whether the authorization for bonds to be issued in the future to finance the facilities project are—for purposes of the debt limit calculation—included in the School District's indebtedness at the time they are authorized, as petitioner argued, or when the bonds are actually issued, as respondents contended.

The appeals court concluded that indebtedness is not incurred for purposes of the School District's debt limit until the authorized bonds are actually sold, i.e., issued.

FIRST AMENDMENT - NEW YORK

Jones v. Schneiderman

United States District Court, S.D. New York - September 30, 2013 - F.Supp.2d - 2013 WL 5452758

Organizers of professional mixed martial arts events, as well as professional mixed martial arts athletes, brought action against New York state attorney general and New York county district attorney alleging that statutory ban on combative sports violated their rights under the First and Fourteenth Amendments.

The District Court held that:

- Live-performance mixed martial arts were not expressive conduct;
- Statute provision prohibiting profiting form combative sports was not overbroad;
- Organizers and athletes stated a claim for vagueness as applied to competitors;
- Statute was not vague as applied to bar owners and gym owners;
- Statute was not facially vague; and
- Statute did not violate dormant Commerce Clause.

Live-performance, professional mixed martial arts were not expressive conduct protected under the First Amendment such that a statewide combative sport ban did not violate the right of mixed

martial arts athletes to engage in expressive conduct, even though the sport communicated a particular message including the fighters' thoughts and feelings as to beauty, creativity, courage, skill and excellence in relation to the sport, as well as the fighters' personal stories, where the particularized message was not likely to be understood by its viewers since it was typically viewed as a competitive sport rather than a public performance, and it was not an inherently expressive activity.

Allegations that New York statute banning combative sports was inconsistently enforced, that some events produced by exempted organizations were allowed while others were not, and that state officials were unclear as to whether the statute amounted to a total ban, were sufficient to state a claim that the statute was unconstitutionally vague in violation of the Due Process Clause of the Fourteenth Amendment as applied to professional mixed martial arts events sanctioned by exempt organizations.

ZONING - NEW YORK

Perlbinder Holdings, LLC v. Srinivasan

Supreme Court, Appellate Division, First Department, New York - October 29, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 06980

Petitioner sought review of the decision of the Board of Standards and Appeals of the City of New York (BSA), which upheld the New York City Department of Buildings' (DOB) revocation of petitioner's permits for an outdoor advertising sign.

The Supreme Court, Appellate Division, held that the BSA was required to hear evidence that petitioner constructed the sign in good-faith reliance on a prior determination of the Manhattan Borough Building Commissioner that the sign was a permissible replacement for a similar sign that was removed when a building on the property was demolished.

TAX - NEW YORK

Hempstead Country Club v. Board of Assessors

Supreme Court, Appellate Division, Second Department, New York - November 6, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 07178

Country club that owned property on which a private, not-for-profit golf course was operated brought tax certiorari proceedings challenging property tax assessments. After a bench trial, the Supreme Court adopted the income capitalization approach utilized by country club's appraiser, awarded a reduction in tax assessments, and directed that the assessment rolls be corrected and any tax overpayments be refunded, with interest. County appealed.

The Supreme Court, Appellate Division, held that country club's valuation approach was acceptable and yielded a fair market value, and did not result in improper "double counting."

LIABILITY - RHODE ISLAND

Wyso v. Full Moon Tide, LLC

Supreme Court of Rhode Island - November 1, 2013 - A.3d - 2013 WL 5864457

Pedestrian, who tripped and fell on a public sidewalk that was uneven and replete with cracks, brought action against owner of property abutting the sidewalk and property owner's commercial tenant. The trial court granted summary judgment to property owner and its tenant, and pedestrian appealed.

The Supreme Court of Rhode Island held that neither property owner nor its tenant owed pedestrian a duty to maintain the sidewalk abutting its premises.

Pedestrian's injuries occurred on a public sidewalk that was not within the control or possession of property owner or its tenant, and any duty created by town ordinance, addressing maintenance and repair of sidewalks, inured to the benefit of the municipality and not to individuals.

IMMUNITY - TEXAS

Lund v. Giauque

Court of Appeals of Texas, Fort Worth - October 31, 2013 - S.W.3d - 2013 WL 5834398

Parents, whose biological children were subjected to "sexually reactive behaviors" by potentially adoptable children placed in their home, sued adoption workers for Department of Family and Protective Services (DFPS), in their individual capacity, alleging negligence and gross negligence. Workers filed motion to dismiss, asserting defense of governmental immunity. The District Court denied workers' motions, and they appealed.

The Court of Appeals held that the statutory extension of governmental immunity to acts of individual government employees acting within scope of their employment did not violate Open Courts provision of the Texas Constitution.

Texas Tort Claims Act extends governmental immunity to acts of individual governmental employees acting within the scope of their employment.

Open Courts provision in Texas Constitution prohibits arbitrary or unreasonable legislative action that abrogates well-established, common-law remedies. It ensures that citizens bringing common-law causes of action will not unreasonably be denied the right to redress in the courts.

To establish that legislation violates a litigant's rights under the Open Courts provision, the litigant must show that (1) the statute restricts a well-recognized, common-law cause of action (the well-recognized prong) and (2) the restriction is unreasonable or arbitrary when balanced against the Act's purpose (the balance prong).

Balance prong considers whether the legislature's action was arbitrary or unreasonable by deciding (1) whether a substitute remedy was provided or (2) whether the legislative action was a reasonable exercise of the legislature's police power in the interest of the general welfare.

Statutory extension of governmental immunity to acts of individual government employees acting within the scope of their employment was not arbitrary or capricious and, thus, did not violate Open Courts provision, even though the governmental entity's liability was not expanded under the Act. Legislation was a reasonable exercise of the legislature's police power to achieve the societal goal of limiting claims against individual governmental employees.

EASEMENTS - VIRGINIA

Old Dominion Boat Club v. Alexandria City Council

Supreme Court of Virginia - October 31, 2013 - S.E.2d - 2013 WL 5833271

Owner of alleged dominant estate brought action against city, city council, and owners of alleged servient estate, seeking declaratory judgment stating that it had vested easement over 30-foot right-of-way and seeking permanent injunction prohibiting erection of obstructions.

The Circuit Court decreed that owner of alleged dominant estate had vested easement and permanently enjoined owners of alleged servient estate from erecting any obstruction. Owners of alleged servient estate, city, and city council appealed. The Supreme Court of Virginia reversed and remanded. On remand, the Circuit Court entered judgment in favor of city and alleged servient estate owner. Alleged dominant estate owner appealed.

The Supreme Court of Virginia held that:

- City's acquisition of right-of-way did not extinguish easement, and
- Easement was not extinguished by fulfillment of its purpose.

Easement over right-of-way was not extinguished by fulfillment of its purpose when city acquired the right-of-way and converted it to a public street, since purpose of easement continued. Deed stated that purpose of easement was to provide more easy communication with the public main streets, changing right-of-way did not result in a cessation of the purpose of the easement, but merely facilitated the easement in continuing to fulfill its ongoing purpose.

Cessation of purpose is essential to a finding of extinguishment of an easement by fulfillment of its original purpose; without cessation of the purpose for which the easement was created, an express easement does not end when its purpose is simply fulfilled or when it is no longer necessary unless its express terms so state.

PUBLIC – PRIVATE PARTNERSHIPS - VIRGINIA

Elizabeth River Crossings OpCo, LLC v. Meeks

Supreme Court of Virginia - October 31, 2013 - S.E.2d - 2013 WL 5833279

City residents and users of tunnel that crossed river between that city and another city filed complaint against private entity and Virginia Department of Transportation (VDOT), challenging constitutionality of a comprehensive agreement between the defendants regarding construction and operation of a new tunnel and other facilities.

The Supreme Court of Virginia held that:

- Tolls to be imposed pursuant to comprehensive agreement were not "taxes," but, rather, "user fees," for purposes of claim that General Assembly had unconstitutionally delegated its legislative power by enacting Public–Private Transportation Act (PPTA);
- State Corporation Commission (SCC) does not hold regulatory authority over toll rate setting in projects authorized by the PPTA;
- General Assembly could constitutionally delegate to VDOT, under PPTA, the legislative power to impose and set the rates of user fees;

- General Assembly could constitutionally empower private entity to assist VDOT in exercising legislative power to impose and set rates of user fees;
- Private entity's involvement in imposing and setting rates of user fees was not an unconstitutional delegation of legislative power by VDOT;
- PPTA satisfied constitutional requirement of providing specific policies and definite standards to guide an administrative agency to which legislative power is delegated; and
- Commonwealth's police power was not unconstitutionally abridged by VDOT's entering into comprehensive agreement or by terms of agreement.

LICENSES - WISCONSIN

Nowell v. City of Wausau

Supreme Court of Wisconsin - November 6, 2013 - N.W.2d - 2013 WI 88

Bar sought judicial review of a decision by the city not to renew its combined intoxicating liquor and fermented malt beverage license. The Circuit Court concluded that certiorari review was appropriate, and, applying this standard, affirmed the city's decision. Bar appealed. The Court of Appeals reversed and remanded. City sought review which was granted.

The Supreme Court of Wisconsin held that:

- Certiorari review, rather than de novo review, was appropriate, and
- City acted within its jurisdiction and followed statute in deciding not to renew bar's license.

Statutory certiorari review accords a presumption of correctness and validity to the prior decision; thus, the scope of certiorari review is limited to whether: (1) municipality kept within its jurisdiction, (2) municipality acted according to law, (3) municipality's action was arbitrary, oppressive, or unreasonable, and represented its will, and not its judgment, and (4) the evidence was such that it might reasonably make the order or determination in question.

Certiorari review of city's decision not to renew bar's combined intoxicating liquor and fermented malt beverage license, rather than de novo review, was appropriate. Lack of restriction on municipality decisions to grant or deny licenses was consistent with the historic view that the granting of a liquor license is a legislative function, certiorari review served to keep alcohol licensing decisions within the control of the municipality by according deference to its decisions, and permitting a circuit court to determine de novo whether a liquor license should be granted would, in essence, improperly transfer that legislative function from the municipality to the court.

IMMUNITY - ALABAMA

In re Coleman

Supreme Court of Alabama - October 25, 2013 - So.3d - 2013 WL 5763273

Driver of large commercial truck, which struck fire engine that was following police squad car responding to an emergency call filed negligence suit against police officer who was driving squad car and city. Officer and city filed motion for summary judgment. The Circuit Court denied the motion. Officer and city filed petition for writ of mandamus.

The Supreme Court of Alabama held that officer was entitled to statutory and state agent immunity.

Officer was a peace officer who, at time of accident, was performing a function, i.e., responding to an emergency call, that entitled him to statutory immunity, and while officer did not make continuous use of siren in his squad car, but caused it only to "yelp" while continuously making use of his emergency lights, this constituted making use of an audible signal and visual requirements set forth in statute.

ZONING - CALIFORNIA

Community Youth Athletic Center v. City of National City

Court of Appeal, Fourth District, Division 1, California - October 30, 2013 - Cal.Rptr.3d - 2013 WL 5823767

In 2007, the City of National City and its Community Development Commission (together, the City), approved an amendment to its 1995 redevelopment plan, ordinance No.2007–2295 (Amendment), that extended the time period authorized by the plan for the use of eminent domain powers within a 300–acre area, based on certain designations of physical and economic blight. (Health & Saf.Code, § 33000 et seq., the Community Redevelopment Law (CRL).

When their opposition to the City's approval of the Amendment was unsuccessful, Community Youth Athletic Center (CYAC) brought reverse validation action in superior court to seek declaratory and injunctive relief and damages under several statutory and constitutional theories.

After a bench trial, the superior court issued a statement of decision and judgment in favor of CYAC, interested parties and the interested public. In the reverse validation proceedings, the trial court examined the administrative record and set aside the Amendment to the redevelopment plan, by issuing declaratory relief based on its findings of several violations of the CRL:

- 1) Contrary to the provisions of section 33457.1, the City failed to include in its mandated report, prior to the hearing on such Amendment, the maps required by section 33352, subdivision (b) that documented the physical and economic conditions of blight that existed within the project area,
- 2) The administrative record did not contain substantial evidence supporting the physical blight findings underlying the Amendment, and
- 3) Neither the City nor its retained private consultant had produced, on request by CYAC, two types of underlying raw data relied upon in consultant's "Report to Council" (RTC) (i.e., consultant's field surveys of blight conditions, or the City's police department's property-b--property crime data). The City had relied on those field surveys and crime data to support the enactment of the Amendment which extended the eminent domain redevelopment power, as they led to the RTC's conclusions that physical and economic blight existed within the project area, but the record did not support that reliance.

Upon review the Court of Appeal affirmed the judgment, but reversed the grant of declaratory relief on the due process theory.

ZONING - CALIFORNIA

City of Irvine v. County of Orange

Court of Appeal, Fourth District, Division 3, California - October 28, 2013 - Not Reported in Cal.Rptr.3d - 2013 WL 5798554

City of Irvine sued to compel County of Orange and the County of Orange Sheriff–Coroner (collectively, County) to set aside their decision to approve and submit an application for state funding to expand one of the County's jail facilities. Irvine alleged the County's application constituted a project approval under the California Environmental Quality Act (CEQA) and therefore required the County to prepare an environmental impact report (EIR) analyzing the County's plans to expand its jail facilities before approving and submitting the application. The trial court disagreed and denied Irvine's petition for writ of mandate.

The Court of Appeal affirmed. The County's application did not constitute a project approval under CEQA because it did not commit the County to a definite course of action regarding the expansion of its jail facilities. The application was merely a preliminary step in the state process for counties to seek funding for jail expansion. Indeed, the state's process did not require the County to initiate a CEQA review of its expansion plans until after the County submitted its application and received conditional approval to fund the project.

MUNICIPAL ORDINANCE - ILLINOIS

Bockweg v. Konopiots

Appellate Court of Illinois, First District - September 27, 2013 - N.E.2d - 2013 IL App (1st) 121122

Property owner brought action against excavation company seeking monetary damages, but not an injunction, caused by excavation of adjacent property. The Circuit Court entered judgment on a jury verdict in favor of owner, but denied request for attorney fees. Owner appealed.

The Appellate Court held that once property owner established that excavator violated excavation ordinance and she was awarded damages for the violation, there was no doubt that she successfully enforced the ordinance and was entitled to an award of attorney fees and costs pursuant to statute.

BONDS - MISSOURI

Compass Bank v. Eager Road Associates, LLC

United States District Court, E.D. Missouri, Eastern Division - October 28, 2013 - Slip Copy - 2013 WL 5786634

Banks sought damages for the breach of a Settlement Agreement between the parties arising out of an underlying lawsuit. The dispute underlying the prior lawsuit arose out of a complex financial transaction involving the development of commercial and retail property known as The Meridian at Brentwood (the Meridian Project). The Banks alleged that the City of Brentwood issued tax increment revenue bonds (the Bonds) to finance certain public improvements associated with the Meridian Project and to reimburse Defendant Eager Road Associates (ERA) for certain costs incurred by ERA in constructing such improvements. In September 2011, the parties entered into a Settlement Agreement.

The Banks alleged that at issue were two provisions of the Settlement Agreement and Mutual Release, whereby Defendants were required to (1) tender to Plaintiffs $4.15 million to purchase a portion of the Bonds (the Developer Settlement Payment), and (2) provide a $1.35 million letter of credit (Developer Letter of Credit), payable in three years.

The Banks further alleged that the Settlement Agreement provided for Bond Refinancing, which involved either remarketing of Series 2007B Bonds or refunding both Series 2007A and Series 2007B Bonds and that, under the terms of the Settlement Agreement, delivery of the Developer Settlement Agreement and Developer Letter of Credit were conditions precedent to the Bond Refinancing. According to the Banks, they have performed their obligations under the Settlement Agreement, but ERA has failed to meet its obligations as designated by the Settlement Agreement, including making the Developer Settlement Payment, delivering the Developer Letter of Credit, and completing the Bond Refinancing.

For purposes of this lawsuit, ERA disclosed Eugene Norber as a non-retained expert witness. ERA's expert witness disclosure states that the subject matter of Mr. Norber's testimony will be "payments made from trust accounts maintained" by Defendant UMB Bank. N.A., relating to the Series 2007B Bonds, "including, but not limited to, interest payments to bondholders from said accounts and payments for legal fees made from said accounts."

The Banks sought to exclude Mr. Norber's testimony on the grounds that (1) ERA incorrectly designated him as a non-retained expert rather than as a retained expert; (2) even if Mr. Norber was properly designated a non-retained expert, ERA's expert disclosure does not properly comply with the requirements for non-retained experts under Rule 26(a)(2)(C); and (3) given the subject of Mr. Norber's testimony, ERA failed to disclose any unique knowledge or expertise Mr. Norber has regarding trust accounts or payments made from trust accounts.

A retained or specialty expert is "an expert who without prior knowledge of the facts giving rise to litigation is recruited to provide expert opinion testimony. A non-retained expert is one whose testimony arises from his or her involvement in events giving rise to the litigation.

"The Court finds that Mr. Norber was properly designated a non-retained expert. He was contacted and consulted to address an ongoing issue for which he has specialized expertise, and he was actively involved in financial matters related to the funding and development of Meridian Project. Because Mr. Norber was properly designated a non-retained expert by ERA, the Court finds that ERA's expert witness disclosure regarding Mr. Norber was sufficient as it provided a 'summary of the facts and opinions' about which he is expected to testify, including payments made from trust accounts maintained by UMB relating to the Series 2007B Bonds."

Consequently, the Banks' Motion to Exclude Purported Expert Testimony of Eugene Norber was denied.

MUNICIPAL ORDINANCE - MISSOURI

Ballard v. City of Creve Coeur

Missouri Court of Appeals, Eastern District, Division Four - October 1, 2013 - S.W.3d - 2013 WL 5458971

Vehicle owners, who received citations under the red light camera ordinance, brought class action against city and red light camera system operator seeking declaratory judgment regarding the ordinance's constitutionality and conformity with state law, as well as city's authority to enact the ordinance, and also claimed the ordinance violated procedural due process and the privilege against self-incrimination, and alleged claims of unjust enrichment and civil conspiracy by city and operator.

The Court of Appeals held that:

- Vehicle owners who received citations for violating city's red light camera ordinance had an adequate remedy at law in their municipal court proceedings, precluding equitable relief;
- Genuine issue of material fact existed as to whether city enacted red light camera ordinance as a revenue generating tax measure, precluding summary judgment on action challenging validity of ordinance; and
- Owner's payment of fine issued for violation of red light camera ordinance precluded owner from bringing unjust enrichment claim.

Vehicle owners who received citations for violating city's red light camera ordinance had an adequate remedy at law in their municipal court proceedings, and thus, trial court lacked authority to issue equitable relief by declaring ordinance invalid or enjoining enforcement of ordinance. Owners could assert the invalidity of the ordinance as a defense to the proceedings against them in municipal court.

Genuine issue of material fact existed as to whether city enacted red light camera ordinance as a revenue generating tax measure so that it fell outside of its police power, precluding summary judgment on vehicle owner's action challenging validity of ordinance.

INVERSE CONDEMNATION - NEW JERSEY

Petrozzi, et. al. v. City of Ocean City

Superior Court of New Jersey, Appellate Division - October 28, 2013 - A.3d - 2013 WL 5777349

As the appeals court noted in its opinion, this case involved "recurrent issues facing shore communities and their residents." "We are asked, primarily, to determine whether a municipality's failure to perform its part of easement agreements with owners of beachfront properties is due to reasonably unforeseen circumstances beyond its control so as to be relieved of its contractual duty, and, if so, whether these homeowners are nevertheless left without a remedy."

In 1989, Ocean City participated in a beach replenishment and dunes restoration program. In order to procure the requisite easements from oceanfront homeowners, the City proposed easements containing a restriction that the municipality would construct and maintain the dune system with a height limitation of no greater than three feet above the average elevation of the bulkhead.

Accretion caused areas of the dunes to grow in height and width, and the affected property owners began requesting that Ocean City comply with the dune maintenance provision in their easement agreements. By this time, however, Ocean City was required to apply for a CAFRA permit prior to performing dune maintenance to alter the size or height of any dunes within the municipality. The DEP denied the permit.

Landowners subsequently filed claims against the City alleging breach of the easement agreements and inverse condemnation.

The appeals court agreed with Ocean City that it was entitled to the defense of impossibility. "Not only were the CAFRA amendments and DEP's subsequent disapproval of Ocean City's permit application beyond the municipality's control, they were also not reasonably foreseeable events."

However, the court found that although Ocean City did not breach the contract, it did not automatically follow that the landowners were not entitled to monetary relief.

"Here, the parties agreed upon an exchange of performances and because of events not reasonably foreseen, Ocean City's part of the exchange cannot now take place. Yet the fact remains plaintiffs surrendered their right to compensation in reliance on Ocean City's promise to protect their ocean views. Absent that reliance, Ocean City would have had to pay plaintiffs for depriving them of their views. If Ocean City may retain the benefit of this bargain despite its failure to perform its promise — even if performance was impracticable — without consequence, the municipality would reap a windfall at plaintiffs' expense and plaintiffs would have given something for nothing. Equity, however, demands some relief for plaintiffs and, therefore, a hearing to determine a fair and just restitutionary amount is warranted."

"The question remains how to measure damages for restitution in this case. Obviously, the fixing of an appropriate restitutionary amount must consider the value of that which plaintiffs have been deprived, including loss of, or interference with, their ocean views due to the accretive effects. But offset against the burdens suffered by plaintiffs are the potential gains conferred by the partial consideration performed by Ocean City to date, namely the non-speculative, reasonably calculable benefits arising from the municipality's dune project. These may include the added wave/storm surge protection afforded by the accretive effect of the dunes. We emphasize that the remedy we grant is an equitable one, and not a substitute for eminent domain, for which a jury trial is not appropriate.

The court concluded that the landowners are entitled on remand to a hearing to determine a fair and just restitutionary amount for performing their part of the bargain with Ocean City.

BALLOT INITIATIVE - NEW JERSEY

Redd v. Bowman

Superior Court of New Jersey, Appellate Division - October 29, 2013 - A.3d - 2013 WL 5786989

This appeal involved an initiative petition and proposed ordinance filed with the Camden city clerk, defendant by a Committee of Petitioners (the Committee). The ordinance was proposed in response to Camden's decision to disband its municipal police department and join a newly-formed county police force. Plaintiffs – the Mayor and City Council president – filed a complaint seeking to declare the petition-initiated ordinance invalid before it was submitted to the City Council or placed on any ballot.

The Law Division judge determined that the proposed ordinance did not "unduly restrict" Camden's "statutory authority" under N.J .S.A. 40A:14–118, which grants every municipality the right to "create and establish" a police force. However, the judge entered restraints prohibiting the city clerk from accepting the petition and proposed ordinance for filing because the proposed ordinance created an undue restraint on the future exercise of municipal legislative power, was invalid, and could not be placed on the ballot for voters to act upon. The judge specifically refrained from considering whether the proposed ordinance was pre-empted by the Municipal Rehabilitation and Economic Recovery Act, N.J.S.A. 52:27BBB–1 to –75 (MRERA), and the Special Municipal Aid Act, N.J.S.A. 52:27D–118.24 to –118.31 (SMAA). The Committee filed an appeal.

The Committee claimed that the proposed ordinance was a valid exercise of the initiative powers granted by the Faulkner Act, and the judge erred by concluding the proposed ordinance impermissibly restrained future municipal legislation. The Committee also asserted that the initiative ordinance was not prohibited by N.J.S.A. 40A:14–118, nor preempted by the statutory

regimes impacting local finance and budgeting in Camden.

Paragraph B of the initiative ordinance prohibited the city from disbanding the police force and joining any County police force, requiring that Camden "shall instead continue to maintain its own police department." The appeals court concluded that such general language certainly does not violate the expressed or implied terms of the Faulkner Act. It therefore reverse those provisions of the Law Division's order that declared the proposed ordinance to be "invalid" and restrained its further consideration by the Council or the voters because it improperly restricted future municipal legislative action.

As to preemption by MRERA and SMAA – statutory regimes impacting local finance and budgeting – the appeals court remanded to the Law Division for further consideration of whether the various statutory schemes at issue preempted consideration by the voters of the proposed initiative ordinance in this case.

ZONING - NEW YORK

Saratoga Springs Preservation Foundation v. Boff

Supreme Court, Appellate Division, Third Department, New York - October 24, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 06924

Historic preservation organization brought article 78 proceeding challenging decision of city's design review commission to permit demolition of historic building. The Supreme Court denied the application, and organization appealed.

The Supreme Court, Appellate Division held that:

- Commission's determination that owner's demolition application satisfied city code's requirement that such application include postdemolition development plans was not arbitrary or capricious;
- Commission did not impermissibly segment its State Environmental Quality Review Act (SEQRA) review;
- Commission's determination that structure was unsafe and could not be preserved was not arbitrary or capricious; and
- Commission member was not disqualified from reviewing owner's application because of alleged conflict of interest.

EMPLOYMENT - NEW YORK

Quartucio v. DiNapoli

Supreme Court, Appellate Division, Third Department, New York - October 24, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 06928

Police officer who sustained bilateral knee injuries commenced article 78 proceeding to review determination of State Comptroller which denied officer's application for accidental disability retirement benefits under Policemen's and Firemen's Retirement System.

The Supreme Court, Appellate Division held that:

- Officer bore burden of demonstrating his entitlement to benefits;

- Alleged incident in which officer responded to citizen complaint regarding drug activity and thereafter sustained injury while attempting to apprehend and subdue one of the suspects in question was not "accident;"
- Incident in which officer tripped over basket that was part of large commercial shredder was not "accident;"
- Incident in which officer tripped over wooden frame securing simulated telephone pole to ground was not "accident;" and
- Incident in which police officer slipped and fell while exiting his vehicle at fuel dock of local highway garage was not "accident."

Incident is not "accident," for purposes of accidental disability retirement benefits under Policemen's and Firemen's Retirement System, where underlying injuries result from expected or foreseeable event arising during performance of routine employment duties, arise from the injured employee's own misstep or inattention, or occur during course of training program constituting ordinary part of employee's job duties and normal risks arising therefrom.

ANNEXATION - NEW YORK

Town of Monroe v. Village of Woodbury

Supreme Court, Appellate Division, Second Department, New York - October 30, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 07050

Zigmond Brach and the Village of Kiryas Joel (hereinafter Kiryas Joel) are owners of certain real property located in the Town and Village of Woodbury. In 2012, Brach and Kiryas Joel submitted a petition to the Board of Trustees of the Village of Woodbury and the Town Board of the Town of Woodbury and the Town Board of the Town of Monroe, seeking to annex their property from the Town and Village of Woodbury into the Town of Monroe.

After a public hearing, the Town of Woodbury issued a determination denying the petition for annexation, determining that the petition failed to comply with the requirements of article 17 of the General Municipal Law, that annexation would violate General Municipal Law § 716(1) because it would affect state senate and assembly districts, and that the proposed annexation was not in the overall public interest. Shortly thereafter, the Village of Woodbury issued a determination denying the petition for annexation on nearly identical grounds.

In response to these determinations, the Town of Monroe, which had found the proposed annexation to be in the overall public interest, commenced the instant proceeding in this Court pursuant to General Municipal Law § 712 for adjudication and determination of the issue of whether the proposed annexation is in the overall public interest.

The Town of Woodbury and the Village of Woodbury moved to dismiss this proceeding. The appeals court granted the motions to dismiss, without prejudice to the filing of a new petition for the same proposed annexation.

LIABILITY - NEW YORK

Hannibal v. Incorporated Village of Hempstead

Supreme Court, Appellate Division, Second Department, New York - October 23, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 06836

Plaintiff brought action against, inter alia, county, seeking to recover damages for personal injuries allegedly sustained when he tripped and fell on water cap protruding from sidewalk outside county courthouse.

Where a locality has enacted a prior written notice statute, it may not be subjected to liability for injuries caused by an improperly maintained street or sidewalk unless it has received written notice of the defect, or an exception to the written notice requirement applies.

Recognized exceptions to a prior written notice requirement exist where the municipality created the defect or hazard through an affirmative act of negligence, or where a special use confers a special benefit upon it.

In this case, the court found that a genuine issue of material fact existed as to whether "special use" exception to statutory rule requiring prior written notice applied, precluding summary judgment in plaintiff's personal injury suit against county, seeking to recover damages for personal injuries allegedly sustained when he tripped and fell on water cap protruding from sidewalk outside county courthouse.

ZONING - NEW YORK

Hart Family, LLC v. Town of Lake George

Supreme Court, Appellate Division, Third Department, New York - October 24, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 06904

Owner of lakefront property filed article 78 proceeding, challenging the town planning board's denial of owner's request for site plan approval.

The appeals court held that town planning board lacked authority to grant or deny application submitted by the owner of lakefront property for site plan approval to construct a new pier and sundeck, where state owned the land under the lake, and state had not delegated its authority to review owner's proposed construction to town, and thus, state had exclusive authority to grant or deny owner's proposed construction.

When the state owns land under navigable waters in its sovereign capacity, its exclusive authority preempts local land use laws and extends beyond the regulation of navigation to every form of regulation in the public interest. Absent delegations by the state allowing local municipalities to regulate the manner of construction and location of structures in waters owned by the state in its sovereign capacity, municipalities bordering or encompassing such waters have no authority to issue such regulations.

EMPLOYMENT - NORTH CAROLINA

Hunter v. Town of Mocksville, N.C.

United States District Court, M.D. North Carolina - October 21, 2013 - F.Supp.2d - 2013 WL 5726316

Town police officers discharged after contacting the Governor's office about corruption and misconduct by the police chief and others in the department brought action against town, town police chief, and town manager, alleging under § 1983 that defendants retaliated against them, in

violation of their First Amendment rights, and asserting claim under state law for wrongful discharge.

The District Court held that:

- Fact issues precluded summary judgment as to First Amendment retaliation claims;
- Chief and manager were entitled to qualified immunity from First Amendment retaliation claims;
- Chief and manager did not have final policymaking authority; but
- Fact issue precluded summary judgment as to wrongful discharge claim.

To balance interests of public employee and government, for purposes of First Amendment retaliation claim, district courts undertake three-step inquiry: (1) whether employee was speaking as citizen upon matter of public concern or as an employee about matter of personal interest, (2) whether employee's interest in speaking upon matter of public concern outweighed government's interest in providing effective and efficient services to public, and (3) whether employee's speech was substantial factor in employee's adverse employment decision.

"The plaintiffs have offered sufficient evidence to support a jury finding that the Town fired them for reporting to the Governor's office that the Mocksville Police Department was experiencing corruption and other issues. While the Town has offered evidence that the plaintiffs were fired for performance issues, that evidence does not entitle them to summary judgment. It merely creates a disputed question of material fact which a jury must decide."

TAX - PENNSYLVANIA

City of Philadelphia v. Cumberland County Bd. of Assessment Appeals

Supreme Court of Pennsylvania - October 30, 2013 - A.3d - 2013 WL 5827023

County board of assessment appeals sought review of order of the Court of Common Pleas granting summary judgment to city, as trustee under decedent's will, acting by board of directors of city trusts, finding that certain investment property owned by trust was immune and exempt from taxation by county and its subdivisions.

The Commonwealth Court reversed. Board of directors of city trusts petitioned for discretionary review, which was granted.

The Supreme Court of Pennsylvania held that property owned by city as trustee for city trust was immune from local real estate taxation.

Property owned by city as trustee of city trust, which had been established by private party, and leased by the board of directors of city trusts to Office of Attorney General was immune from local real estate taxation pursuant to sovereign immunity, where legislature created board in order to establish in instrumentality of the Commonwealth to oversee the charitable assets of the trust that were bequeathed to the city and Commonwealth, and property had long been controlled by the Commonwealth on behalf of the city.

EMINENT DOMAIN - PENNSYLVANIA

Columbia Gas Transmission, LLC v. 1.01 Acres, More or Less in Penn Tp., York County, Pa.

United States District Court, M.D. Pennsylvania - October 24, 2013 - Slip Copy - 2013 WL 5773414

Columbia Gas is an interstate natural gas company subject to the jurisdiction of the Federal Energy Regulatory Commission (FERC). Columbia Gas currently operates a natural gas pipeline that runs in and around York County, Pennsylvania. The pipeline has been designated "Line 1655."

Columbia Gas wanted to replace and reroute a portion of Line 1655 away from the Line's current location, which has become heavily populated. Columbia Gas envisions a new and improved Line 1655 that, at the widest point, diverts approximately a quarter-mile from the old one. This diversion in effect takes Line 1655 out from under the land where Columbia Gas currently has pipeline easements, and removes it some distance yonder to plots where Columbia Gas does not possess such easements.

Columbia Gas negotiated with distant landowners to obtain the easements necessary to construct the replacement Line 1655, but no satisfactory arrangement could be struck with respect to the property of at least four landowning couples (the "landowners"). Columbia Gas filed suit in this Court, naming the land of the four couples and the couples themselves as defendants and asserting the right to take the easements by power of eminent domain.

Eager to commence and complete construction of the replacement pipeline, Columbia Gas filed a motion for partial summary judgment and for immediate possession of the necessary easements.

However, the Court disagreed with Columbia Gas's position that replacement Line 1655 can be relocated approximately a quarter-mile away from the old Line 1655 to circumvent a population center and still be considered a "replacement" of an "eligible facility" pursuant to 18 C.F.R. §§ 157.202(b)(2)(i) & 157.208(a).

"For that reason alone, Columbia Gas's motion for partial summary judgment must be denied, and because Columbia Gas has not established the right to condemn the necessary easements at this time, its motion for immediate possession must also be denied."

INVERSE CONDEMNATION - SOUTH CAROLINA

Frampton v. South Carolina Dept. of Transp.

Court of Appeals of South Carolina - October 30, 2013 - S.E.2d - 2013 WL 5819543

Property owner brought action against Department of Transportation claiming inverse condemnation and constitutional torts. Following a jury trial, the Circuit Court entered judgment for property owner in the amount of $36,527, and the Department appealed.

The Court of Appeals held that:

- Evidence was sufficient to support a finding that Department's exercise of its power of eminent domain constituted a physical taking that extended for a period of 16 months;
- The Circuit Court was within its authority to allow property owner's expert to testify as to his opinion of the interest rate property owner could expect to recover on an investment in rental property; and

- The more specific statute that expressed a landowner's ability to receive attorney fees in an inverse condemnation action applied to property owner's claim.

Evidence was sufficient to support a finding that bridge construction and related activities that blocked property owner's easement for access to public road constituted an exercise of the Department of Transportation's eminent domain powers, rather than a separate and distinct police power, and thus, constituted a "physical taking" that existed for a period of 16 months. Property owner testified and provided pictures of constant disturbance and blockage across the access point to public road, further testified that when contractors were asked to move their equipment, other contractors would almost immediately move different equipment in the easement for access, and that his tenant left prior the termination of his lease because of the Department's taking.

The more specific statute that expressly addressed a landowner's ability to receive attorney's fees and costs as a result of prevailing in an inverse condemnation case, rather than the general statute that addressed the award of attorney fees to a prevailing landowner in a condemnation action, applied to property owner. By applying the prevailing party language of the condemnation statute to an inverse condemnation case would have placed a heavier burden on property owner, a result not intended by the legislature.

EMINENT DOMAIN - TEXAS

City of Laredo v. Montano

Supreme Court of Texas - October 25, 2013 - S.W.3d - 2013 WL 5763179

In this eminent-domain case, a jury determined that the City of Laredo's condemnation was not for an authorized public use and awarded attorney's fees and expenses to the property owner under Texas Property Code § 21.019(c). This fee-shifting statute authorizes the trial court to "make an allowance to the property owner for reasonable and necessary fees" and expenses to the judgment date, when condemnation is denied.

Of the lawyers who represented the Montanos, Richard Gonzalez was awarded $339,000 and Adriana Benavides-Maddox was awarded $37,000.

The City appealed the award, complaining about deficiencies in the property owner's attorney's fees proof under the fee-shifting statute.

As to Gonzalez, the Supreme Court of Texas determined that his testimony regarding his hours was devoid of substance and, thus, insufficient to support lodestar determination of attorney fees. He testified that he had reasonably accumulated about 1,356 hours in the case. He came to this number by multiplying his 226 weeks of active employment by a factor of six, representing his estimate of average number of hours per week he worked case, although the record provided no clue as to how he came to conclude that six hours a week was a "conservative" estimate of his time in case, he did not appear to have known how much he was owed for his services until the calculations at trial, he conceded that, had he been billing his client, he would have itemized his work and provided this information, and similar effort should be made when adversary is asked to pay instead of client. As the Supreme Court noted, "Our puzzlement deepens when we consider Gonzalez's testimony that he did not make any record of his time in the case or prepare any bills or invoices for the Montanos." The court remanded for further consideration, leaving open the possibility that Mr. Gonzalez would receive nothing more than the $35,000 he had previously been paid by the Montanos.

Although Ms. Benavides-Maddox appears to have kept no billing records either, the Supreme Court found that her testimony about her unbilled trial work was at least some evidence on which to base an award of attorney fees in because it concerned contemporaneous or immediately completed work for which she had not had time to bill, or presumably even record, in her billing system. Billing inquiry involved contemporaneous events and discrete tasks—the trial and associated preparation for each succeeding day, it was a task the opponent witnessed at least in part, having also participated in the trial, and attorney's charges relating to the trial were not questioned on cross-examination.

ASSESSMENTS - WASHINGTON

Fury v. City of North Bend

Court of Appeals of Washington, Division 1 - October 21, 2013 - Not Reported in P.3d - 2013 WL 5743644

After receiving a petition for a sewer system improvement from property owners, the City passed an ordinance for construction of a vacuum system, specifying the cost would be approximately $11.7 million. When the City then expanded the improvement district to accommodate more parcels, the City determined the increased size of the district required construction of a gravity sewer system, which would cost approximately $19 million. The City did not pass a new ordinance specifying the material change in design and cost of the improvement; rather, it proceeded with construction and approved construction contracts by resolution.

Under RCW 35.43.100, the passage of the ordinance creating an improvement district triggers a 30–day window in which the affected property owners may file suit to challenge the improvement district.

Because the City did not pass a new ordinance after determining it would build a gravity system, the property owners did not have the opportunity to protest the substantially increased cost of the improvement under RCW 35.43.100. Rather, the appealing property owners had the opportunity to challenge the construction of the gravity system only after the assessments were imposed.

The appeals court annulled the assessments of the five parcels at issue, allowing the City to pursue a reassessment.

TAX - VERMONT

Brownington Center Church of Brownington, Vermont, Inc. v. Town of Irasburg

Supreme Court of Vermont - October 25, 2013 - A.3d - 2012 VT 99

Church appealed Board of Civil Authority's property tax assessment on its Christian summer camp property, arguing that the entire property was tax exempt because the buildings on the camp were either a church edifice, or a building used as a convent, school or home as defined in 32 V.S.A. §§ 3802(4) and 3832(2). The trial court found that no structure of the sort existed on the property for the purposes of tax exemption and that "the land surrounding these buildings is the exact opposite of an 'edifice.'" Church appealed.

"The parties do not dispute that the River of Life property is dedicated for pious use and that it is

owned and operated by the Church as a nonprofit organization. The issue, then, is whether the property is excluded from the pious-use exemption of § 3802(4) by the language in § 3832(2). The Church argues that the camp property qualifies for exemption, primarily because everything that occurs on the property facilitates its religious ministry and that worship and service of the Believer in Christ takes place everywhere on the premises. 'The entire property is dedicated and used for the religious mission of the Church,' such that the use of the structures and the property is 'exclusively religious.' Under this belief, the Church maintains that the steel equipment building, the cabins, kitchen and the tent, are all church edifices. It defines 'church edifice' to be a 'structure or facility that is used exclusively or primarily to propagate a religious message to persons who receive that message for a worshipful purpose.' It posits that an overnight summer camp for religious purposes transforms the entire property into a place of worship and education. We disagree."

The types and intended uses of properties that are eligible for the pious-use exemption under § 3832(2) are identified with specificity and includes convents, schools, orphanages, and hospitals. Id. § 3832(2). The list does not include church camps per se – meaning church camps are not exempt.

The Church tried to avoid the significance of the exclusion of church camps from the list of exempt properties by arguing that this church camp consists of a "church edifice" or collection of "church edifices."

"With this, we emphasize the limited scope of our holding. We do not decide as a matter of law what structures can or cannot be a house of worship—be it a cabin, a tent, or a Quonset hut. Rather, our decision today rests solely on the fact that church camps are not among the real estate owned by a religious society that the Legislature has made expressly eligible for the pious-use exemption, and, in our view, describing a church camp as a 'church edifice' stretches the statutory term far beyond its ordinary meaning. Accordingly, we hold that neither the storage building nor the cabins that house campers nor the kitchen where meals are prepared nor the surrounding lands fit within the exemptions listed in § 3832(2), based on either the type of or primary use of these structures. When all is said and done, this property is a camp—a summer camp owned by a church. It is neither a listed structure nor does it encompass a listed use enumerated in § 3832(2) and therefore it is not entitled to property tax exemption."

BONDS - WISCONSIN

Stifel, Nicolaus & Co., Inc. v. Lac du Flambeau Band of Lake Superior Chippewa Indians

United States District Court, W.D. Wisconsin - October 29, 2013 - Slip Copy - 2013 WL 5803778

Lake of the Torches Economic Development Corporation is a corporation established under tribal law and wholly owned by the Lac du Flambeau Band of Lake Superior Chippewa Indians, a federally-recognized Indian tribe organized under Section 16 of the Indian Reorganization Act of 1934 (25 U.S.C. §§ 461 et seq.). In January 2008, Lake of the Torches issued $50 million in bonds and sold them to a brokerage firm, Stifel, Nicolaus & Company, Inc. In turn, Stifel Nicolaus sold the bonds to plaintiff LDF Acquisition, LLC, a special purpose vehicle created by Saybrook Tax Exempt Investors, LLC, predecessor in interest to Saybrook Fund Investors, LLC. Godfrey & Kahn, S.C., a law firm, advised the parties on this complex transaction.

The Transaction involved multiple written contracts. Among other contracts, these included the terms of the bonds themselves, a bond purchase agreement and a Trust Indenture Agreement, the

latter of which provided a description of the means by which Lake of the Torches would repay its debt. The Trust Indenture Agreement designated plaintiff Wells Fargo Bank as the trustee. The Tribe and Wells Fargo also executed a Tribal Agreement, in which the Tribe guaranteed payment of the obligations of Lake of the Torches for payment of both principal and interest on the bonds.

Unfortunately, the various contracts included slightly differing versions of the Tribe's waiver of sovereign immunity, as well as consent to the jurisdiction of the District Court for the Western District of Wisconsin and, should the district court fail to exercise jurisdiction, of Wisconsin state courts.

When Lake of the Torches allegedly repudiated the bonds in 2009, Wells Fargo brought suit against it in the Western District of Wisconsin for breach of the Indenture. In answering, Lake of the Torches alleged sovereign immunity as an affirmative defense, arguing that the Trust Indenture Agreement in which it had allegedly waived its sovereign immunity was void as an unapproved "management contract" that violated the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701–2721 (IGRA), and the corresponding regulations. The District Court agreed, finding the Indenture void, although the opinion does not discuss what constitutes an unapproved "management contract."

Although Wells Fargo voluntarily dismissed its suit, Saybrook and LDF took up the fight in Wells Fargo's stead, filing a 24–count complaint in Waukesha County Circuit Court that asserted a breach of bond claim against Lake of the Torches and various alternative claims for misrepresentation, securities fraud, malpractice and equitable recission.

What followed was an incredibly complex jurisdictional puzzle involving the state, federal, and tribal courts.

In this particular action, brought in District Court, plaintiffs sought (1) a declaration that a Tribal Court for the Lac du Flambeau Band of Lake Superior Chippewa Indians lacked subject-matter jurisdiction over them and (2) an injunction preventing any further action by the Tribe and the Lake of the Torches Economic Development Corporation in a recently-filed matter against plaintiffs in that forum.

Defendants moved to dismiss for lack of subject-matter jurisdiction under Fed.R.Civ.P. 12(b)(1). Following a lengthy analysis, the court denied defendants' motion because (1) the arguments defendants advanced went directly to the merits of the underlying disputes; and (2) neither logic nor law supported resolving the merits under the guise of a jurisdictional challenge.

The District Court concluded that it had jurisdiction, at least for the purpose of determining jurisdiction, and scheduled a preliminary injunction hearing for November 26, 2013, during which the parties could offer additional argument and stand on their paper submissions or offer additional evidence as they deem fit regarding the issue of the Tribal Court's jurisdiction.

IMMUNITY - ALABAMA

Ex parte City of Bessemer

Supreme Court of Alabama - October 18, 2013 - So.3d - 2013 WL 5663871

City and city councilors petitioned for a writ of mandamus directing the Jefferson Circuit Court, to dismiss a claim alleging bad-faith failure to pay legal bills and costs stemming from a complaint filed by former city councilor and law firm that represented councilor and to dismiss a racial discrimination claim brought by councilor. Former city councilor's claim against city for bad-faith

failure to pay legal expenses was associated with criminal action alleging ethics law violations, of which councilor was ultimately acquitted.

The Supreme Court held that:

- Former city councilor's claim against city for bad-faith failure to pay legal expenses was precluded by local-governmental immunity, and
- City councilors were not protected by legislative immunity from racial discrimination claim.

EMPLOYMENT - ARKANSAS

Hudlow v. City of Rogers, Ark.

United States District Court, W.D. Arkansas, Fayetteville Division - October 21, 2013 - Slip Copy - 2013 WL 5707785

City Treasurer was summarily fired by the Mayor without notice or cause. Treasurer brought action alleging that Mayor and City violated 42 U.S.C. § 1983 and Ark.Code Ann. § 16–123–105 (deprivation of rights) and Ark.Code Ann. § 21–1–601 et seq. (Arkansas Whistleblower Act) when they terminated him from his position. Specifically, he argued that he had a constitutionally protected property interest in his continued employment as City Treasurer, of which the defendants deprived him without due process.

The District Court noted that the essential question was whether, as a matter of law, Rogers Code § 2–234 – which requires cause and a 2/3 vote of the city council – provided the sole procedure for properly terminating a person in the position of City Treasurer. If so, Treasurer could only be terminated for cause, and thus, he had a constitutionally protected property interest in continued employment.

To answer this question, the Court looked first to the Arkansas Code. Arkansas law allows a city of the first class with a mayor-council form of government (like the City of Rogers) to provide, by ordinance, for the election or appointment of its City Treasurer. Ark.Code Ann. § 14–43–405(2). It further allows the council of any such city to provide, by ordinance, for the removal of any appointive officer upon a majority vote of the council. Ark.Code Ann. § 14–42–109(a)(2).

Pursuant to these statutes, the City of Rogers enacted Rogers Code §§ 2–227 and 2–234. Section 2–227 states that the City Treasurer shall be appointed by the mayor and confirmed by a vote of two-thirds of the City Council. Section 2–234 states that the City Treasurer may be removed from office for cause upon a two-thirds vote of the City Council. These sections are found within Article III, Division 5 of the Rogers Code of Ordinances, which sets out all sections specifically relevant to the position of City Treasurer.

By stating that removal pursuant to § 2–234 must be "for cause," it appears the City of Rogers has created a property interest in employment for the position of City Treasurer, which can only be deprived after due process. However, the defendants argue that § 2–234 was not intended to be the only vehicle for removing a City Treasurer. They contend that Ark.Code Ann. § 14–42–110 provides an alternate manner of removing a City Treasurer, without cause.

Arkansas Code Annotated § 14–42–110(a)(1) provides that a mayor of a city of the first class may appoint and remove all department heads, unless the city council votes, by a two-thirds majority, to override the mayor's action. That this section (titled "Removal and appointment power") is separate from the aforementioned § 14–42–109 (titled "Removal of officers") suggests that the two sections

are intended to apply to two different types of positions: officers and department heads.

The defendants argue that Treasurer was a department head and, as such, was subject to the removal provision in § 14–42–110. However, the Rogers Code itself contradicts that assertion.

Rogers Code § 2–228 requires a City Treasurer to take an oath of office. The ordinance references Ark. Const. art. 19, § 20—which requires all public officers to take an oath of affirmation before entering the duties of their respective offices-and Ark. Code Ann. § 14–42–106—which provides, in part, that all municipal officers, whether elected or appointed, must take the oath proscribed for officers by the Arkansas Constitution. Likewise, Rogers Code § 2–229 requires a City Treasurer to give a good and sufficient surety bond to the city before entering the discharge of his duties. That section also references § 14–42–106, which further provides that a city council may require its officers to post such a bond. Ark.Code Ann. § 14–42–106(c). Clearly, the drafters of the Rogers Code perceived the City Treasurer as an officer.

Based on the foregoing, the Court found that the Treasurer for the City of Rogers is an officer. The Court further finds that, since the removal of officers and department heads are treated differently under Arkansas law, the removal provisions for a department head in § 14–42–110 are inapplicable to the removal of the Rogers City Treasurer. Therefore, the City Treasurer can only be removed for cause pursuant to Rogers Code § 2–234.

As the City Treasurer, Treasurer could only be removed from office for cause, and only upon a two-thirds vote of the City Council. Thus, he had a legitimate expectation of continued employment, of which he could not be deprived without due process. Treasurer was not afforded a hearing prior to his termination. Therefore, the Court found that he was deprived—without due process—of a property interest in continued employment.

ZONING - CALIFORNIA

Sterling Park, L.P. v. City of Palo Alto

Supreme Court of California - October 17, 2013 - P.3d - 2013 WL 5645558

Condominium developer brought action to challenge city requirement that developer set aside 10 of 96 condominium units as below market rate housing and make a substantial cash payment to a city fund.

The Supreme Court of California held that requirement was an exaction such that 180-day Mitigation Fee Act statute of limitations on exactions imposed on a development, rather than 90-day Subdivision Map Act statute of limitations regarding the validity of a condition attached to an agency or appeal board decision, disapproving Trinity Park, L.P. v. City of Sunnyvale, 193 Cal.App.4th 1014, 124 Cal.Rptr.3d 26.

Program offered developer the option of either setting aside units or paying fee. Imposition of the in-lieu fees was similar to a fee, and requirement that the developer sell units below market rate, including city's reservation of an option to purchase the below market rate units, was similar to a fee, dedication, or reservation.

ZONING - CALIFORNIA

Contasti v. City of Solana Beach

United States District Court, S.D. California - October 22, 2013 - Slip Copy - 2013 WL 5727409

Plaintiffs brought due process and equal protection claims against City of Solana Beach based upon the decision of the City Council to deny Plaintiffs' application for a development review permit for their property.

City contended that, as a matter of law, Plaintiffs were not deprived of a constitutionally protected property interest when the City Council denied their application for a development review permit, which is a special discretionary permit. Defendant contended that the denial of the discretionary development review permit based upon discretionary considerations cannot form the basis for a property interest. Because Plaintiffs cannot establish that they had a property interest in the special discretionary permit, Defendant contends that Plaintiffs cannot establish a constitutional violation.

The District Court agreed. The undisputed facts of this case establish that the decision challenged by Plaintiffs was limited to the decision to deny the development review permit. There was no facial challenge to the municipal code establishing the development review provisions or to the application of the development review permit to the property. The express provisions of the municipal code accord significant discretion to the City Council in approving certain classes of development projects.

Under California law, "no protected property interest exists when there is significant discretion accorded the agency by law, regardless of whether or to what degree that discretion is actually exercised." In this case, the municipal code provided the City Council with significant discretion in deciding whether to grant a development review permit.

No language in the municipal code conferred a right to a permit. To the extent that the municipal code required notice and hearing, the undisputed facts of this case show that the City Council complied with all requirements of the code and rendered a decision which was not favorable to the Plaintiffs based upon criteria set forth in the code. Under the undisputed facts of this case, Plaintiffs would have a federal jury second guess the City Council's lawful exercise of discretion. Applying the law to the undisputed facts of this case, the Court concludes that the Solana Beach Municipal Code provisions for a development review permit do not create "the sort of entitlement out of which a property interest is created." The undisputed facts and the applicable law establish that Plaintiffs have not established a protected property interest required in order to prevail on the claim for deprivation of substantive due process.

TAX - GEORGIA

Moss v. City of Dunwoody

Supreme Court of Georgia - October 21, 2013 - S.E.2d - 2013 WL 5708063

Attorneys challenged the constitutionality of an ordinance adopted by the City of Dunwoody imposing an occupational tax on attorneys who maintained an office and practiced law in the city. Attorneys argued in the trial court that the ordinance (1) operated as an unconstitutional precondition on the practice of law, as well as an improper attempt to regulate the practice of law in violation of OCGA § 15–19–30 et seq., and (2) violated equal protection requirements because it did not apply to attorneys practicing law outside the city limits. The trial court found in favor of city. Attorneys appealed.

The Supreme Court of Georgia held that:

- Ordinance did not constitute an unconstitutional precondition on the practice of law or an improper attempt to regulate the practice of law, and
- Ordinance did not violate equal protection.

Local governments are permitted to impose and enforce occupational taxes on lawyers so long as the tax is merely a means to generate revenue and does not act as a precondition or license for engaging in the practice of law, rendering it a regulatory fee.

City ordinance requiring attorneys with offices in the city to annually register their business location with the city, obtain an occupation tax certificate, and pay the authorized tax did not constitute an unconstitutional precondition on the practice of law or an improper attempt to regulate the practice of law The ordinance did not give the city the power to suspend or revoke an attorney's ability to practice law in the event of noncompliance, and any impediments resulting from action taken by the State Bar in response to being notified by city of an attorney's failure to pay tax would be attributable to the proper regulating authorities and not the ordinance.

City ordinance imposing an occupational tax on attorneys who maintain offices and practice law in the city did not violate equal protection; it was reasonable for the city to require attorneys with offices inside city limits to help pay for city services from which they benefited, and all attorneys subject to the ordinance were taxed uniformly under its provisions.

EMINENT DOMAIN - GEORGIA

Bray v. Department of Transp.

Court of Appeals of Georgia - October 23, 2013 - S.E.2d - 2013 WL 5736985

Emory H. Bray owns real property in Coweta County which was subject to a condemnation action in which part of the property was taken for public road improvements. Bray was compensated for the taking pursuant to the eminent domain provisions of the Georgia Constitution. Bray's brought a subsequent inverse condemnation action in which he sought additional compensation for consequential damages allegedly caused by the DOT's negligent construction of the road improvements for which his property was taken.

The Court of Appeals noted in its decision reversing the trial court that, because Bray sought compensation for property negligently taken or damaged by the road improvements, he stated a cause of action under the constitutional eminent domain provisions not barred by the prior condemnation award for damages resulting from proper construction of the improvements. Damage to remaining property caused by negligent or improper construction in the course of a prior eminent domain project may be recovered from the condemnor by a separate inverse condemnation proceeding, and the condemnor cannot escape the constitutional duty to compensate the property owner for the damage by claiming that the negligent party was an independent contractor rather than the condemnor's agent or employee.

PENSIONS - ILLINOIS

Prazen v. Shoop

Supreme Court of Illinois - October 18, 2013 - N.E.2d - 2013 IL 115035

Pensioner sought judicial review of decision of the Illinois Municipal Retirement Fund (IMRF) Board of Trustees finding that he violated early retirement incentive (ERI) return to work prohibitions and was required to forfeit his early retirement and repay the IMRF the portion of his annuity attributable to his early retirement incentive.

The Supreme Court of Illinois held that:

- Pensioner was not an employee of city;
- Pensioner did not enter into personal services contract with city; and
- IMRF Board lacked authority to order forfeiture on basis that corporate contract was a "guise."

Contract between corporation formed by pensioner, who had retired from his position as superintendent of the electrical department of city, and city for management and supervision of electrical department following pensioner's retirement did not constitute employment with city within meaning of Pension Code's ERI return-to-work prohibitions, where pensioner was employed by corporation, a separate legal entity, and the city hired and paid corporation, not pensioner.

TAX - MINNESOTA

Living Word Bible Camp v. County of Itasca

Minnesota Tax Court, Ninth Judicial District, Itasca County, Regular Division - October 16, 2013 - 2013 WL 5733573

Living Word Bible Camp, a tax-exempt organization owns approximately 273 acres located on Deer Lake in Itasca County. At Living Word's request, the County classified the subject property as tax-exempt from 2001 to 2007. However, the County reclassified the subject property as taxable for the January 2, 2008 and January 2, 2009 assessment dates. Living Word challenged the reclassification for both years.

On remand from the Minnesota Supreme Court, the Tax Court addressed two issues: (1) whether Living Word was an institution of purely public charity on the assessment dates; and (2) whether the caretakers' occupancy of the renovated cabin while conducting the affairs of Living Word and preparing the subject property for development makes the cabin parcel subject to property tax

After an exhaustive analysis, found that that Living Word satisfied all six North Star factors and therefore qualified as an institution of purely public charity for the time periods in question. Because Living Word was making sufficient progress towards the development of the subject property for its intended use as a bible camp, the property was exempt from property taxes payable during those period as well.

The Tax Court concluded that the caretakers' presence at the cabin to conduct Living Word's affairs—without remuneration—represents a valuable donation of their time and expertise. Their use of the cabin in connection with this donation is entirely incidental, and does not constitute a dividend of any kind. The cabin parcel was also deemed tax-exempt on the assessment dates.

TAX - MISSISSIPPI

Willow Bend Estates, LLC v. Humphreys County Bd. of Sup'rs

Supreme Court of Mississippi - October 17, 2013 - So.3d - 2013 WL 5649041

Low-income housing developments appealed county's real property tax assessments.

The instant case arouse out of a dispute regarding local ad valorem taxes on real estate developments that use federal tax credits to construct and maintain restrictive properties that rent only to lower-income households. The question was whether local governments may include the value of federal tax credits in their valuation of the properties for tax assessment purposes.

In 2005, the Mississippi Legislature enacted Mississippi Code Section 27–35–50(4)(d). The statute requires local tax assessors to determine the true value of affordable rental housing by using the appraisal method set forth in the manual of the State Tax Commission and that such procedure shall implement the "actual net operating income" methodology.

Despite the new law, Humphreys County continued to include the federal tax credits through the "cost" methodology in its valuation of low-income housing development. The different types of valuation result in extreme variations. For example, using the income method as prescribed by the statute, the development would have paid nothing in taxes for 2009, but under the county's approach, it would have owed $74,038.

The Supreme Court of Mississippi held that Mississippi Code Section 27–35–50(4)(d) prohibits local governments from including the value of federal tax credits in their valuation of the properties for tax assessment purposes.

EMINENT DOMAIN - NEW JERSEY

Borough of Saddle River v. 66 East Allendale, LLC

Supreme Court of New Jersey - October 21, 2013 - A.3d - 2013 WL 5676872

Borough brought action to acquire property by authority of eminent domain to use as a public park. After a jury trial, the Superior Court entered judgment on verdict in favor of property owner in the amount of $5.25 million. Parties appealed and cross-appealed.

The Supreme Court of New Jersey held that:

- Trial court was required to hold a pretrial hearing to determine the admissibility of evidence regarding a zoning change affecting the property, and
- Owner's experts failed to establish foundation for opinions that zoning change was reasonably likely.

In this matter, the jury was allowed to hear evidence about the probability of a zoning change that should have been ruled on by the judge both in advance and outside of the jury's presence. Only if the court first determined that there was a reasonable probability that a zoning change would have been approved based on the standards governing such approval should the evidence have been presented to the jury for its consideration in connection with the jury's evaluation of just compensation. The evidence that the jury heard on the likelihood of the zoning change in issue here was not assessed properly in accordance with that standard, and the quality of the evidence that the jury was allowed to consider undermined the soundness of the jury's property valuation determination. The errors necessitate a new trial on the issue of just compensation

In an eminent domain condemnation action, during the jury's actual determination of a just compensation award that takes into account a premium based on the reasonable probability of a zoning change, the jury first must value the property in its current condition, considering the zoning

at the time of the taking, which establishes the base value; second, the jury may consider the probability of the future zoning change or variance approval in determining the premium a buyer and seller would fix to the property, which premium is added to the base value and includes an assessment of the risk of the change occurring or being approved.

CHARITABLE IMMUNITY ACT - NEW JERSEY

Hottenstein v. City of Sea Isle City

United States District Court, D. New Jersey - October 3, 2013 - Slip Copy - 2013 WL 553278

Wrongful death/survivorship suit arose out of the untimely and tragic death of Tracy Hottenstein who, intoxicated at the time, fell off a public dock into the ocean below. Paramedics who were dispatched to the scene called a physician at the local hospital and received an official pronouncement of death.

Pursuant to the New Jersey Charitable Immunity Act, hospital and medic defendants moved to limit damages at trial for any alleged negligent acts.

To fall within the protections of the Charitable Immunity Act, a defendant must demonstrate two elements: (1) that the defendant is a charitable organization that is organized exclusively for hospital purposes, and (2) that the plaintiff was a beneficiary of its services.

It was undisputed that defendant met the first element. Plaintiffs argued that because the defendants were called to the scene in order to pronounce Tracy deceased rather than to render aid, Tracy was not a beneficiary of the Defendants' care within the statute. Nonetheless, the court concluded that the rendering of a pronouncement is sufficient to create a beneficiary status under New Jersey law.

FIRST AMENDMENT - NEW YORK

Dorsett v. County of Nassau

United States Court of Appeals, Second Circuit - October 18, 2013 - F.3d - 2013 WL 5663213

Mother of murder victim and the mother's attorney brought § 1983 action against county, alleging the county delayed approving a settlement agreement arising out of the death of the mother's daughter in retaliation for their First Amendment activities, namely her allegations that the murder was the result of inadequate police protection.

To plead a First Amendment retaliation claim a plaintiff must show: (1) he has a right protected by the First Amendment; (2) the defendant's actions were motivated or substantially caused by his exercise of that right; and (3) the defendant's actions caused him some injury.

The Court of Appeals held that county legislature's delay in approving settlement did not constitute a concrete injury sufficient to confer standing to assert a First Amendment retaliation claim against the county. Mother and attorney had no right to have the settlement approved by a particular date, as the settlement did not include a time-is-of-the-essence clause, and the legislature's agenda was subject to its absolute discretion.

HOUSING - NEW YORK

Murphy v. New York State Div. of Housing and Community Renewal

Court of Appeals of New York - October 17, 2013 - N.E.2d - 2013 N.Y. Slip Op. 06727

Son filed Article 78 petition for review of determination of New York State Division of Housing and Community Renewal (DHCR), which denied son's appeal from limited-profit housing company's rejection of his application for succession rights to his parents' rent-regulated Mitchell–Lama apartment.

The Court of Appeals held that DHCR acted arbitrarily and capriciously in denying the appeal based on failure of mother, as tenant of record, to file, in the year before son's high school graduation, an annual income affidavit listing son as co-occupant. Evidence that the apartment was son's primary residence in the two years before parents vacated the apartment was overwhelming, and there was no indication that the failure to file was related to son's status as co-occupant or income-earner.

SANCTIONS - NORTH DAKOTA

Empower the Taxpayer v. Fong

Supreme Court of North Dakota - October 22, 2013 - N.W.2d - 2013 ND 187

Supporters of constitutional measure that would have abolished property taxes brought action against numerous state and local government officials alleging violations of the Corrupt Practices Act and seeking injunctive relief. After the action was dismissed, the District Court granted sanctions against supporters for filing a frivolous action. Supporters appealed.

The Supreme Court of North Dakota held that trial court failed to adequately explain the basis for imposition of sanctions for frivolous filing.

If the district court fails to adequately explain the basis for the sanction or how the sanction was appropriately limited to what was necessary to deter future conduct, the Supreme Court is precluded from affirming the award of sanctions for a frivolous filing.

PUBLIC NUISANCE - NORTH DAKOTA

State ex rel. City of Marion v. Alber

Supreme Court of North Dakota - October 22, 2013 - N.W.2d - 2013 ND 189

City brought nuisance action against property owner, and obtained order requiring owner to remove or properly maintain abandoned vehicles on his property. Several years later, city brought contempt proceeding, alleging failure to conform to the order. The District Court found owner in contempt, ordered him to remove the nuisance vehicles, and awarded city attorney fees. Owner appealed.

The Supreme Court held that:

- Sufficient evidence that property owner could have complied with the order supported contempt finding;
- Sufficient evidence that property owner willfully failed to comply with the order supported contempt finding;

- Trial court's findings of fact and conclusions of law were sufficient; and
- Trial court's receipt of post-hearing evidence from city was not reversible error.

PUBLIC RECORDS - OHIO

State ex rel. Verhovec v. Washington Cty. Court of Common Pleas

Supreme Court of Ohio - October 15, 2013 - N.E.2d - 2013 -Ohio- 4518

Edward Verhovec made a public-records request of the city of Marietta by certified mail. When more than two months had passed and he had not received an acknowledgement or response from Marietta, he filed a public-records mandamus action under R.C. 149.43 and 2731.04. Soon thereafter, Marietta provided Edward with the requested records, and the trial court dismissed his action. Edward appealed, and the court of appeals remanded the case for consideration of Edward's motion for attorney fees.

After the remand, Marietta moved the trial court for sanctions under R.C. 2323.51 and alleged that Edward had engaged in frivolous conduct by petitioning the trial court for a writ of mandamus. The trial court held a hearing on the motion for sanctions and indicated that a ruling would be forthcoming.

Edward filed a claim in prohibition in the Fourth District Court of Appeals before the trial court ruled on the motion for sanctions. He sought to prevent the trial court from issuing a ruling on the motion for sanctions. Marietta filed a motion to dismiss, and the Fourth District granted the motion. Edward appealed to the Supreme Court of Ohio.

The Supreme Court held that:

- Trial court in underling action had jurisdiction to rule on motion for sanctions, and
- Requesters had adequate remedy at law via appeal.

NEGLIGENCE - OHIO

Pauley v. Circleville

Supreme Court of Ohio - October 16, 2013 - N.E.2d - 2013 -Ohio- 4541

Sledder, who suffered broken neck when his sled allegedly struck object that looked like railroad tie while snow sledding down dirt pile mound at city park, and sledder's mother brought negligence action against city.

The Supreme Court of Ohio held that:

- Sledder was "recreational user" under recreational-user statute, and
- Existence of single object resembling railroad tie in park's dirt mound did not change essential character of park to something other than property that was open for recreational use.

Under recreational-user statute, the property must be viewed as a whole, and only where the essential character of the property has been altered to something other than an outdoor property on which outdoor recreational activities occur does immunity fall away.

Existence of single object resembling railroad tie in city park's dirt mound, which was being used for

snow sledding, did not change essential character of park to something other than property that was open for recreational use, and thus city was immune under recreational-user statute regarding sledder's personal injuries. Park was outdoor property with trees and grass and was open to public free of charge for picnicking, sporting activities, and other recreational activities.

ZONING - PENNSYLVANIA

TKO Realty, LLC v. Zoning Hearing Bd. of City of Scranton

Commonwealth Court of Pennsylvania - October 18, 2013 - A.3d - 2013 WL 5658780

Property owner sought review of zoning hearing board decision denying owner building permit to rehabilitate structure into three-unit dwelling.

The Commonwealth Court held that:

- Use of property as three-unit dwelling was lawful nonconforming use, and
- Use was not abandoned.

Mere absence of a certificate of nonconformance from the zoning officer does not deprive landowner of his right to continue lawful nonconforming use. Use of property as three-unit dwelling was lawful nonconforming use under zoning ordinance, even though property owner did not seek certificate of nonconformance from zoning officer and failed to register in accordance with non-zoning ordinance. Prior zoning map placed property in "A" district, which permitted apartments, assessment card showed property had been assessed as three-unit dwelling, and use as three-unit dwelling became nonconforming upon passage of ordinance zoning property "R1-A," which permitted single-family or twin semi-detached homes.

FIRST AMENDMENT - PENNSYLVANIA

Barna v. Board of School Directors of Panther Valley School Dist.

United States District Court, M.D. Pennsylvania - October 15, 2013 - Slip Copy - 2013 WL 5663072

John Barna brought suit seeking damages and injunctive relief against School Board "due to his removal and banishment from meetings of the School Board in violation of his federal constitutional rights to free speech."

On April 8, 2010, Barna attended a public School Board meeting wherein he asked several questions concerning financial dealings of the School Board. Mr. Barna indicated that some of his friends similarly had concerns about financial dealings of the School Board. In response to Plaintiff's comments, Mr. Markovich, a School Board member, invited Barna to bring his friends to a subsequent School Board meeting, to which Plaintiff replied that his friends "carry guns, you wouldn't want that." Various members of the School Board responded with laughter to this quip. Markovich responded that "Aah well, I'll wear my bullet-proof vest."

Two weeks later, Barna attended another public School Board meeting. At the inception of the meeting, Markovich requested that Mr. Barna leave the meeting purportedly based upon the above-referenced comments of Mr. Barna at the April 5, 2010 School Board Meeting because his comments could have been taken as a threat. Plaintiff stated that he had been joking, but Markovich ultimately

asked that Mr. Barna be removed from the meeting by a security guard. As he was leaving, Mr. Barna, in response to commentary from audience members in attendance at the April 22, 2010 School Board Meeting, jokingly stated to the audience to the effect that he might come after all of them. Mr. Barna was subsequently banned from all School Board meetings.

Barna filed suit and Defendants moved to dismiss. The Court engaged in the traditional First Amendment analysis and concluded that it was not appropriate at this stage of the case to grant Defendants' motion as Plaintiff was entitled to develop a fuller factual record in support of his claim that the School Board engaged in viewpoint-based discrimination.

In a public forum any restrictions as to time, place, and manner of speech: (1) must be unrelated to content; (2) must be narrowly tailored to serve a significant governmental interest; and (3) must allow alternative ways of communicating the same information. As to the first prong, a disturbance may very well have been the reason for removing Barna, but Barna should be given an opportunity to show that the true motive for silencing him was the content of his speech.

As to the second prong, "there is a serious and substantial question in the undersigned's mind as to whether a permanent ban on Plaintiffs attendance at all future Panther Valley School Board meetings and Panther Valley school property was 'narrowly tailored' to serve the undoubtedly compelling government interest in assuring the safety of other citizens in attendance at School Board meetings and on school property."

AUCTION RATE SECURITIES - PENNSYLVANIA

Fulton Financial Advisors, Nat. Ass'n v. NatCity Investments, Inc.

United States District Court, E.D. Pennsylvania - October 15, 2013 - Slip Copy - 2013 WL 5635977

For a number of years prior to 2006, Fulton maintained an institutional investment account with NatCity, for which NatCity acted as Fulton's securities broker. Around 2005, NatCity allegedly recommended to Fulton that it invest in ARS, "in keeping with Fulton's desire to invest in only the highest quality and safest debt investments." An unspecified portion of these ARS were from NatCity's own inventory. Fulton currently holds $175 million in ARS. NatCity also allegedly acted as a CBD for a number of the ARS issues it recommended to Fulton, for which NatCity typically earned a yearly fee of 0.25 percent of the value of the transaction. For transactions where NatCity was not the CBD, it received a portion of the CBD's fee, a fact not disclosed to Fulton, for directing the Fulton trade to the CBD.

After the collapse of the ARS market, Fulton had been required to write down the value of its ARS by an amount in excess of $10 million. Fulton then brought the standard-issue ARS action against NatCity, making numerous allegations that state and federal regulators have determined that NatCity and the other major underwriters of ARS manipulated the ARS markets and deceived ARS investors. It also alleges that NatCity had special knowledge and expertise in the ARS auction markets that it did not possess. Because of its superior knowledge and role in the auction markets as Fulton's BD, Fulton alleges that NatCity owed it fiduciary duties, as well as duties of fairness, honesty, disclosure of material information, and undivided loyalty.

NatCity contended that Fulton had failed to plead its fraud-based claims with sufficient particularity, and that Fulton could not have reasonably relied upon NatCity's alleged misrepresentations.

The court found that Fulton had failed to allege specific facts to support the misrepresentation, scienter, and reliance elements of its fraud-based claims, and had also failed to plausibly allege the misrepresentation element of its negligent misrepresentation claim. Consequently, it granted NatCity's Motion to Dismiss the three Pennsylvania Securities Act claims, the negligent misrepresentation claim, the claim for common law fraud, and the claim for aiding and abetting fraud.

The court denied the Motion to Dismiss as to the negligence claim and the breach of fiduciary duty claim.

MUNICIPAL ORDINANCE - PENNSYLVANIA

City of Reading v. Iezzi

Commonwealth Court of Pennsylvania - October 23, 2013 - A.3d - 2013 WL 5731620

City is a third-class city organized and operating under a home rule charter. Pursuant to the Municipal Waste Planning, Recycling, and Waste Reduction Act (Act 101) and its powers under the Charter, the City adopted an ordinance regulating the collection, transportation, storage and disposal of solid waste and recycling and imposing separate fees for these services on persons owning property located within its borders.

In December 2010, the City filed a tax claim of $1,405.17 against homeowner for delinquent recycling fees due on his property for the years 1999 through 2008.

Homeowner asserted that the Solid Waste Management Act (SWMA) and (Act 101) preempt the City from imposing recycling fees. Municipalities only have the power expressly granted to them through SWMA and Act 101. SWMA and Act 101 govern recycling and set forth a comprehensive plan for funding local recycling programs. According to homeowner these acts do not authorize a municipality to charge fees not expressly set forth in the statute. Thus, the City is not permitted to charge a fee for recycling.

The court agreed, finding that a careful review of SWMA and Act 101 reveals there is no mechanism for a municipality to charge a fee for its recycling services; rather, fees for recycling are set by the General Assembly.
