
PUBLIC NUISANCE - MINNESOTA

Jerome v. City of St. Paul

Court of Appeals of Minnesota - April 28, 2014 - Not Reported in N.W.2d - 2014 WL 1660629

Alex Jerome and Ameena Samatar purchased a vacant building that the City of St. Paul previously had declared to be a nuisance. After their purchase, the city suspended its nuisance-abatement process to give them an opportunity to rehabilitate the building. But after several months and multiple hearings, Jerome and Samatar failed to satisfy the city's requirements for a further suspension of the nuisance-abatement process. After several extensions of time, the city council eventually adopted a resolution that ordered the building to be either repaired or removed within 30 days.

The court concluded that the city council's decision was not arbitrary, capricious, oppressive, or unreasonable, and was supported by substantial evidence; that the city's procedures were not unlawful, irregular, or contrary to city ordinance; and that the city did not violate Jerome's and Samatar's rights to due process.

PUBLIC WORKS - NEVADA

Laborers' Intern. Union of North America, Local Union No. 169 v. Truckee Carson Irr. Dist.

Supreme Court of Nevada - April 23, 2014 - Slip Copy - 2014 WL 1677653

In October 2011, Truckee Carson Irrigation District (TCID) solicited bids from qualified contractors for a public works project on the Truckee Canal. Out of six bidders, A & K Earthmover submitted the prevailing bid and was awarded the contract. Although one bidder, K.G. Walters, informally questioned whether A & K Earthmovers had properly complied with the subcontractor listing requirements of NRS 338.141, neither it nor any other bidder submitted a formal notice of protest under NRS 338.142. Nevertheless, Laborers' International Union of North America, Local Union No. 169, party to a collective bargaining agreement with K.G. Walters, and Joseph R. Maciel, a Union member, petitioned the district court for a writ of mandamus or prohibition, asserting that all bids besides that of K.G. Walters violated NRS 338.141 and seeking to compel rejection of those bids. TCID filed a motion to dismiss the writ petition, which the district court granted upon determining that the Union and Maciel lacked standing and that the bid was properly awarded to A & K Earthmover.

The Union and Maciel appealed, contending that they have standing because Union employees,

including Maciel, would likely have been employed on the project if noncompliant bids were rejected and the only responsive bidder, with whom the Union has a collective bargaining agreement, were chosen instead. The Union and Maciel also pointed out that the public works statutes are intended to promote the public's interest in securing competition, preserving public funds, and protecting against corruption. They argued that, as citizens and taxpayers who would likely have benefitted from K.G. Walters' selection as the responsive bidder, they should be allowed to pursue the public's interest in ensuring that the public works statutes are strictly complied with here.

TCID disagreed, noting that the project had been completed and arguing that neither the Union nor Maciel would be directly benefitted by the issuance of the writ, and that they are not proper parties to pursue any remedy on the public's behalf.

The Supreme Court of Nevada agreed with TCID, concluding that the district court did not err. The court noted that standing to obtain relief on behalf of the public is available only in limited circumstances.

TAX - NEW YORK

Board of Managers of French Oaks Condominium v. Town of Amherst

Court of Appeals of New York - May 1, 2014 - N.E.3d - 2014 N.Y. Slip Op. 02971

Condominium's board of managers petitioned for certiorari review of town's real property tax assessments. The Supreme Court, Erie County determined the value of the condominium after a hearing before a referee. Town appealed. The Supreme Court, Appellate Division affirmed. Town appealed as of right, based on existence of two-Justice dissent in Appellate Division's decision.

The Court of Appeals held that appraisal offered by condominium's board did not rebut the presumption of validity for town's assessment.

In a tax certiorari proceeding relating to real property taxes, a rebuttable presumption of validity attaches to the valuation of property made by the taxing authority, and consequently, a taxpayer challenging the accuracy of an assessment bears the initial burden of coming forward with substantial evidence that the property was overvalued by the assessor.

Appraisal offered by condominium's board of managers did not rebut the presumption of validity for town's assessment, where the appraiser, who used an income capitalization method, did not support the appraisal's proposed capitalization rate with objective data necessary to substantiate the component calculations.

ZONING - NEW YORK

Gabrielli v. Town of New Paltz

Supreme Court, Appellate Division, Third Department, New York - April 24, 2014 - N.Y.S.2d - 2014 N.Y. Slip Op. 02826

Owners of property within town petitioned for Article 78 review and brought action for declaratory judgment, seeking annulment of local law enacted to prevent despoliation and destruction of wetlands, waterbodies, and watercourses. The Supreme Court, Ulster County, entered judgment in

favor of owners. Town appealed.

The Supreme Court, Appellate Division held that:

- Town's planning board took requisite hard look before deciding that no environmental impact statement (EIS) was required;
- Board's identification of regulated area was sufficiently specific;
- Law was not unconstitutionally vague;
- Law did not improperly regulate activities exempt from permit requirements of state's Department of Environmental Conservation (DEC);
- Conservation fee established by law did not constitute ultra vires tax;
- Law did not improperly empower board to make quasi-judicial determinations as to when taking occurred; and
- Law was not preempted by Mined Land Reclamation Law or other state law.

LIABILITY - NEW YORK

Perez v. City of New York

Pedestrian allegedly injured when he fell upon stepping onto a sunken portion of a roadway brought personal injury action against city. The Supreme Court, Kings County, Ash, J., granted city's motion for summary judgment, and pedestrian appealed.

The Supreme Court, Appellate Division, held that:

- City established its prima facie entitlement to summary judgment, and
- Affidavit of pedestrian's expert engineer did not raise triable issue of fact as to whether city created the alleged defective condition.

City established its prima facie entitlement to summary judgment, in personal injury action alleging that pedestrian was injured when he stepped into a sunken portion of a roadway, by demonstrating that it did not have the required prior written notice of the alleged defective condition and that it did not affirmatively create the alleged defective condition.

Summary judgment evidence in personal injury action alleging that pedestrian was injured when he stepped into a sunken portion of a roadway, consisting principally of the affidavit of pedestrian's expert engineer, did not raise triable issue of fact as to whether city created the alleged defective condition. Conclusions set forth by expert were not supported by empirical data or any relevant construction practices or industry standards, and his affidavit failed to explain how he reached the conclusion that the alleged defective condition was created by work performed by city.

INVERSE CONDEMNATION - TEXAS

City of Keller v. Hall

Court of Appeals of Texas, Fort Worth - May 1, 2014 - S.W.3d - 2014 WL 1712163

Landowners sued City for inverse condemnation, alleging that various actions by the City caused repeated flooding of their property.

The City alleged that the trial court did not have jurisdiction because (1) the evidence established as a matter of law that the City did not know and was not substantially certain that damage to the Property was going to occur when it took the actions complained of, (2) the evidence established as a matter of law that none of the actions of the City proximately caused the flood damages, and (3) the landowners failed to comply with the notice provision of the City's charter.

The appeals court upheld the trial court's denial of the City's plea to the jurisdiction, finding that the City was aware that its actions proximately caused the flooding.

EMPLOYMENT - VERMONT

Stone v. Town of Irasburg

Supreme Court of Vermont - April 25, 2014 - A.3d - 2014 VT 43

Linda Stone sued the Town of Irasburg alleging that the selectboard had acted unlawfully in ordering her, as town treasurer, to raise her bond to $1,000,000. Following plaintiff's inability to obtain the bond and her removal from office by the selectboard, she claimed the Town improperly raised her bond and prevented her from obtaining the bond. She sought monetary damages based on common law defamation, tortious interference with office, violation of the Vermont Constitution, and deprivation of due process.

The trial court granted summary judgment in favor of the Town and treasurer appealed.

The Supreme Court of Vermont held that:

- Treasurer did not have a property interest in her elected position and therefore could not state a claim for relief under § 1983 for deprivation of a liberty interest;
- The intent of 24 V.S.A. § 901(b) is not to provide attorney's fees to municipal employees who have disputes with a municipality regarding the termination of their employment;
- Treasurer had waived her right to argue that, by raising her bond and then removing her from office, the selectboard unlawfully invalidated the Town vote, which elected plaintiff as treasurer;
- Treasurer was entitled to remand on her claim for defamation; and
- Treasurer failed to meet the requisite elements of tortious interference with office.

PUBLIC MEETINGS - WASHINGTON

Citizens Alliance for Property Rights Legal Fund v. San Juan County

Court of Appeals of Washington, Division 1 - April 28, 2014 - Not Reported in P.3d - 2014 WL 1711768

Citizens Alliance for Property Rights (CAPR) alleged that members of the San Juan County Council violated the Open Public Meetings Act (OPMA) by attending a series of closed meetings as part of a working group known as the San Juan County Critical Area Ordinance/Shoreline Master Program Implementation Committee (CAO Team).

Under Washington case law, a gathering that includes less than a majority of the governing body does not violate OPMA. At all times relevant to this case, the Council had six members. Therefore, a gathering that includes three councilmembers does not constitute a "meeting" of the Council for OPMA purposes, regardless of whether "action" is taken.

CAPR contended that on November 14, 2011, four of six councilmembers held a "meeting" in violation of OPMA by participating in an email and telephone exchange in which they discussed CAO Team matters. The trial court properly rejected this argument. "The OPMA does not require the contemporaneous physical presence of members of the governing body in order to constitute a meeting." An exchange of emails can constitute a "meeting" for OPMA purposes. However, "the mere use or passive receipt of e-mail does not automatically constitute a 'meeting.'" Viewed in the light most favorable to CAPR, the record shows that at most three councilmembers participated in the active discussion of issues by phone or email. The fourth councilmember received a copy of the email, but there was no evidence that she responded or actively participated in the discussion.

The court denied CAPR's request that it should create a new rule and hold that a "meeting" occurs for the purposes of OPMA when the number of members present is sufficient to block action when the matter discussed comes up for a vote before the governing body, thereby constituting a "negative quorum."
Finally, CAPR argued that it does not matter if a majority of the Council was not present at CAO Team meetings, because the CAO Team itself was a "governing body" subject to OPMA requirements. The court disagreed, holding that a committee "acts on behalf of" a governing body when it exercises actual or de facto decision making authority. Because CAPR submitted no evidence that a majority of the Council attended CAO Team gatherings or that the CAO Team exercised actual or de facto decision making authority, no "meeting" occurred for OPMA purposes.

LIABILITY - ALASKA

Mattox v. State, Dept. of Corrections

Supreme Court of Alaska - April 18, 2014 - P.3d - 2014 WL 1512475

Former inmate brought negligence action against Department of Corrections, alleging that Department negligently failed to protect him after he reported being threatened and that he was subsequently assaulted and seriously injured while in prison. The Superior Court granted Department summary judgment. Inmate appealed.

The Supreme Court of Alaska held that:

- As a matter of first impression, Department had duty to protect inmate from all reasonably foreseeable harm, including assaults from other inmates, despite contention that prison officials were only required to act when report of threat communicated immediate, identifiable, and specific danger.;
- Fact issue as to foreseeability precluded summary judgment; and

- Fact issue as to whether Department was on notice of risk of attack precluded summary judgment.

PUBLIC UTILITIES - CALIFORNIA

Perkin v. San Diego Gas & Electric Company

Court of Appeal, Fourth District, Division 1, California - April 11, 2014 - Cal.Rptr.3d - 14 Cal. Daily Op. Serv. 3928 - 2014 Daily Journal D.A.R. 4539

Owners of home damaged by wildfire brought action against electrical utility, which, through its power lines, allegedly had a role in the fire, alleging inverse condemnation, trespass, nuisance, and statutory violations. Utility, which had been the defendant in a master class action regarding the fires, demurred based on the statute of limitations. The Superior Court sustained the demurrer without leave to amend, and homeowners appealed.

The Court of Appeal held that:

- Court could not use fire boundary map from class action complaint against utility to determine whether statute of limitations was tolled;
- Prior class action lawsuits did not place utility on notice of homeowners' potential claim; and
- Tolling would not protect the "class action device."

Court could not use fire boundary map from class action complaint against electrical utility, which allegedly had a role in the fires, to determine whether statute of limitations on homeowners' separate action against utility was tolled while the class action was pending. Map, which was used in the class action to help define the term "geographic area" in the complaint, was not proposed in the class action to narrow the class definition or otherwise intended to define the class beyond the actual words of the complaint, and utility did not rely on the map in challenging the class allegations or otherwise use the map beyond its demurrer to homeowners' complaint.

Two prior class action lawsuits against electrical utility following wildfires did not place utility, whose power lines allegedly contributed to the fires, on notice of homeowners' potential claim as required to toll statute of limitations on homeowners' claims for inverse condemnation, trespass, and nuisance. First class action lawsuit concerned a different fire than the one which damaged homeowners' residence, and plaintiffs in second class action were not limited to a set number from a specific, clearly defined area who claimed a certain type of damage, but rather could be found anywhere in California claiming that their properties were damaged in some way by the fire.

Equities did not favor tolling statute of limitations on homeowners' claim against electrical utility arising out of wildfire damage to their home on basis that separate class action lawsuit against utility provided notice of potential claims. Homeowners had 16 months after the court denied class certification in which to file suit, but failed to do so, and homeowners clearly knew that they suffered damage shortly after the fire, which required them to clean up soot and ash as well as restore and re-stain stained glass windows damaged by the fire.

Tolling of homeowners' claims against electrical utility, which allegedly had role in wildfire which damaged home, on basis of prior class action lawsuit against utility by other residents which purportedly gave utility notice of the claim would not protect the "class action device," such that court would decline to apply the doctrine of class action tolling. Prior court denied class certification because it found insufficient commonality and the class action was not superior to

individual litigation, and more than 1,400 plaintiffs filed individual suits against utility prior to the denial of class certification.

EMINENT DOMAIN - DELAWARE

Lawson v. State

Supreme Court of Delaware - April 23, 2014 - A.3d - 2014 WL 1622687

Property owners filed motion for litigation expenses and costs for successfully defending against State's condemnation proceeding. The Superior Court the denied motion. Owners appealed.

The Supreme Court of Delaware held that:

- Order dismissing without prejudice State's condemnation proceeding was a "final judgment" that entitled property owners to litigation expenses;
- State did not initiate proceedings in bad faith as was necessary to warrant award of litigation expenses and costs under bad faith exception to the American Rule; and
- Remand was necessary for trial court to make explicit determination as to owners' entitlement to statutory costs.

IMMUNITY - KENTUCKY

Marson v. Thomason

Supreme Court of Kentucky - April 17, 2014 - S.W.3d - 2014 WL 1499498

Parents, individually and on behalf of legally blind middle school student injured in a fall from bleachers brought negligence action against two school principals and a teacher. The Circuit Court, Floyd County, denied defendants' motion for summary judgment, and they appealed. The Court of Appeals affirmed in part and vacated in part. Defendants sought further review.

The Supreme Court of Kentucky held that:

- Middle school principal was entitled to qualified immunity for student's injuries;
- High school principal was entitled to qualified immunity for student's injuries; but
- Teacher did not have qualified immunity for student's injuries.

High school principal's general duty was to look out for the safety of students, and thus, principal was entitled to qualified immunity for injuries sustained by legally blind middle school student who fell from improperly extended bleacher in school gymnasium. Principal had only a general supervisor duty of the high school's use of the gym, which it shared with middle school, and did not participate in the morning routine of the middle-school students.

Teacher's duty to supervise students as they entered gymnasium was ministerial, even though it

might have permitted some decision-making during the process, and thus, teacher did not have qualified immunity for the injuries sustained by legally blind middle school student who fell from improperly extended bleacher after being directed to enter gym and to proceed to the section of bleachers assigned to his class. Teacher was given a specific task to do bus duty, which included looking out for safety issues and taking the routine steps that were the established practice for bus duty at school, including directing students to gym, acts that were not discretionary in nature.

EMPLOYMENT - MARYLAND

Ellsworth v. Baltimore Police Dept.

Court of Appeals of Maryland - April 24, 2014 - A.3d - 2014 WL 1632763

Police officer sought judicial review of decision of city police department trial board, determining that officer had violated department rules. The Circuit Court reversed and remanded. Department appealed. The Court of Special Appeals reversed and remanded. Officer sought certiorari review.

The Court of Appeals held that:

- *Brady* protections, requiring State disclosure of exculpatory evidence to the defense in criminal cases, do not extend to the administrative processes of the Law Enforcement Officers' Bill of Rights (LEOBR), and
- LEOBR does not require disclosure of information regarding pending investigations unrelated to the officer and his or her specific charges.

LEOBR does not require state and federal agencies to provide information regarding pending investigations unrelated to the officer and his or her specific charges in officer disciplinary proceedings. The Legislature only intended to disclose information related to the officer and the charges specified, rather than the disclosure of information regarding an alleged extraneous investigation of a witness, which did not relate to the officer and his or her specific charges involved in the hearing.

MUNICIPAL ORDINANCE - MICHIGAN

Bonner v. City of Brighton

Supreme Court of Michigan - April 24, 2014 - N.W.2d - 2014 WL 1640602

Landowners challenged the constitutionality of § 18–59 of the Brighton Code of Ordinances (BCO), which created a rebuttable presumption that an unsafe structure may be demolished as a public nuisance if it is determined that the cost to repair the structure would exceed 100 percent of the structure's true cash value as reflected in assessment tax rolls before the structure became unsafe.

Specifically, the issue was whether the unreasonable-to-repair presumption violated substantive and

procedural due process protections by permitting demolition without affording the owner of the structure an option to repair as a matter of right.

The Supreme Court of Michigan held that BCO § 18–59 did not constitute an unconstitutional deprivation of substantive due process because the ordinance's unreasonable-to-repair presumption was reasonably related to the city of Brighton's legitimate interest in promoting the health, safety, and welfare of its citizens. Furthermore, the ordinance was not an arbitrary and unreasonable restriction on a property owner's use of his or her property because there were circumstances under which the presumption could be overcome and repairs permitted.

The court also held that the city of Brighton's existing demolition procedures provided property owners with procedural due process. Contrary to plaintiffs' argument, the prescribed procedures were not faulty for failing to include an automatic repair option. It is sufficient that aggrieved parties are provided the right to appeal an adverse decision to the city council as well as the right to subsequent judicial review. For the facial challenge to succeed, plaintiffs must show that no aggrieved property owners can meaningfully exercise their right to review or that such review is not conducted impartially. Because they have not done so, plaintiffs have failed to establish that BCO § 18–59, on its face, violates their procedural due process rights.

SPECIAL ASSESSMENTS - NEBRASKA

Johnson v. City of Fremont

Supreme Court of Nebraska - April 18, 2014 - N.W.2d - 2014 WL 1509782

A city relied upon Nebraska's "gap and extend" law to pave one block of a street and assess the paving costs against abutting property owners. At one end, the new paving adjoined a paved intersection of two paved streets. At the other end, there was no connecting paved street.

Property owner alleged that the levy of special assessments was invalid, claimed that the street improvement did not fill an unpaved gap between paved streets, but, rather, merely extended the paving on Donna Street.

The Supreme Court of Nebraska held that the paving was authorized under the second sentence of § 18–2001, which permitted the city to "pave any unpaved street … which intersects a paved street for a distance of not to exceed one block on either side of such paved street."

PUBLIC UTILITIES - NEW JERSEY

Borough of Upper Saddle River, N.J. v. Rockland County Sewer Dist. No. 1

United States District Court, S.D. New York - April 22, 2014 - Slip Copy - 2014 WL 1621292

Borough of Upper Saddle River and citizens brought suit under the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1376 (2006) and state common law, alleging that, in the course of operating a sewage treatment facility, Rockland County Sewer District # 1 had polluted-and will likely continue to pollute-the Saddle River. Plaintiffs brought four causes of action: continuing violations under section 301 of the Clean Water Act; and private nuisance, public nuisance and trespass claims under state common law. Plaintiffs sought civil penalties, injunctive and declaratory relief.

Both sides moved for summary judgment. "The issue now before the Court is to what extent Defendant can be held liable for its sewage spills through a citizen suit brought under the Clean Water Act and state common law."

The District Court held that:

- Plaintiffs had adduced sufficient evidence of injury-in-fact to defeat summary judgment;
- Plaintiffs had Article III standing;
- Plaintiffs had demonstrated "on-going" violations;
- Plaintiffs may pursue relief for violations *not* covered by the 2006 Consent Order;
- The 2006 Consent Order did not render plaintiffs' claims moot;
- Defendant was strictly liable for the sewage spills that they had not contested reached the Saddle River, as well as for sewage spills into the Saddle River that their own internal reports confirm;
- The record was insufficiently established with respect to key factors bearing on the appropriateness of civil penalties;
- Plaintiffs were not subject to injunctive relief, given the uncertainty concerning current and future spills;
- Genuine issues of material fact precluded summary judgment for either party on private nuisance claim;
- Genuine issues of material fact precluded summary judgment for either party on public nuisance claim; and
- Individual plaintiffs had failed to establish trespass claim.

(MIS)GOVERNANCE - NEW JERSEY

U.S. v. Bencivengo

United States Court of Appeals, Third Circuit - April 23, 2014 - F.3d - 2014 WL 1613315

Former mayor was convicted in the United States District Court of violating Hobbs Act and Travel Act for accepting money from insurance broker in exchange for agreeing to influence members of township school board to refrain from putting school district's insurance contract up for competitive bidding, and he appealed.

The Court of Appeals held that:

- Mayor acted under "color of official right" when he accepted money from broker;
- District court did not commit plain error in accepting government's unopposed jury instructions;
- Mayor was "performing a governmental function," within meaning of New Jersey's bribery statute, when he accepted bribes;
- Defendant's convictions did not violate Double Jeopardy Clause; and
- District judge's conduct did not constitute reversible error.

Mayor acted under "color of official right," as required to support his conviction under Hobbs Act, when he accepted money from insurance broker in exchange for agreeing to influence members of township school board to refrain from putting school district's insurance contract up for competitive

bidding, even though mayor had no official power over award of school board insurance contracts, where broker reasonably believed that mayor's position gave him influence, and not effective power, over school board's decision.

In sustaining mayor's bribery conviction, Court of Appeals holds that where public official has, and agrees to wield, influence over governmental decision in exchange for financial gain, or where official's position could permit such influence, and victim of extortion scheme reasonably believes that public official wields such influence, that is sufficient to sustain conviction under Hobbs Act, regardless of whether official holds any de jure or de facto power over decision.

INVERSE CONDEMNATION - NEW MEXICO

Moongate Water Co., Inc. v. City of Las Cruces

Court of Appeals of New Mexico - April 17, 2014 - P.3d - 2014 WL 1600574

Moongate Water Company, Inc. appealed the district court's order awarding costs to the City of Las Cruces as the prevailing party in an inverse condemnation action brought by Moongate.

The sole question on appeal was whether the Eminent Domain Code NMSA 1978, § 42A–1–1 to –33 permitted costs to be taxed against a property owner who exercises the constitutional or statutory right to seek just compensation for a taking of private property.

The court concluded that, "We see nothing unique or particularly novel in awarding costs to a prevailing party in an inverse condemnation proceeding, and we read Section 42A–1–29 of the Code as expressly providing for such an award. Accordingly, the district court correctly ruled that Rule 1–054(D) authorizes an award of costs to the City as a prevailing party in this case."

LIABILITY - NEW YORK

Selmani v. City of New York

Supreme Court, Appellate Division, Second Department, New York - April 23, 2014 - N.Y.S.2d - 2014 N.Y. Slip Op. 02764

Restaurant patrons brought action against city, city fire department, and two individual firefighters, seeking to recover damages for personal injuries sustained when firefighters allegedly assaulted them. The Supreme Court, Kings County, granted summary judgment in favor of city and city fire department. Patrons appealed.

The Supreme Court, Appellate Division, held that:

- City and fire department established their prima facie entitlement to judgment as matter of law on issue of vicarious liability for alleged assault, but
- City and fire department failed to establish prima facie entitlement to judgment as matter of law on claims for negligent hiring, supervision, training, and retention.

City and city fire department established their prima facie entitlement to judgment as matter of law on issue of vicarious liability for two firefighters' alleged assault of restaurant patrons by demonstrating that alleged tortious conduct of two firefighters was not within scope of their employment.

City and city fire department, moving for summary judgment on restaurant patrons' claims for negligent hiring, supervision, training, and retention based on two firefighters' alleged assault of patrons, failed to establish prima facie entitlement to judgment as matter of law, since city and fire department failed to submit evidence that they did not know or have reason to know of firefighters' alleged propensity for assaultive conduct, or that any such negligence on part of city or fire department was proximate cause of patrons' injuries.

EMPLOYMENT - VIRGINIA

Lewis v. City of Alexandria

Supreme Court of Virginia - April 17, 2014 - S.E.2d - 2014 WL 1499621

Former city employee filed suit for wrongful termination under Virginia Fraud Against Taxpayers Act (VFATA), seeking back pay as liquidated damages, reinstatement, and special damages, including reinstatement, front pay, and lost pension benefits. Following jury trial, the Circuit Court entered judgment on jury's award $104,096 in back pay, which was doubled for total of $208,192, and attorney fees, but then denied employee's subsequent motion for reinstatement, front pay, and lost pension benefits, and then denied reconsideration. Employee appealed.

As matter of first impression, the Supreme Court of Virginia held that:

- Denial of former city employee's request for front pay in amount of $57,178 was not abuse of discretion, and
- Denial of employee's request for lost pension compensation was not abuse of discretion.

PUBLIC UTILITIES - OHIO

Kamal v. City of Toledo, Dept. of Public Utilities

United States District Court, N.D. Ohio, Western Division - April 14, 2014 - Slip Copy - 2014 WL 1493136

Landowner alleged he was deprived of Constitutional due process rights when the City terminated water service to several properties. The key issue was whether Plaintiff had a property interest under the Fourteenth Amendment in water services provided by the City.

The court found that Plaintiff had not identified a state or local statute which creates a property interest in the receipt of water services by making water available for all users and prohibiting services from being terminated at will and requiring just cause. Therefore, Plaintiffs had no legitimate claim of entitlement to water service under Ohio or municipal law. In addition, the court found no implied contract between Plaintiff and the City for water services.

ZONING - OHIO

Tree of Life Christian Schools v. City of Upper Arlington

United States District Court, S.D. Ohio, Eastern Division - April 18, 2014 - Slip Copy - 2014 WL 1576873

When Upper Arlington officials became aware that church was considering purchasing a commercial office building for use as a school, they met with the listing agent and advised him that schools were not a permitted use for that building. The church subsequently contracted to purchase the building, contingent upon zoning to allow a school. Upon learning of the buyer, officials advised the church's school superintendent directly that schools were not a permitted use.

The church was denied a conditional use permit and was informed that it would need to submit a rezoning application if it planned to pursue a private school at that location.

The church filed a complaint alleging violations of its rights to free speech, free exercise of religion, peaceable assembly, equal protection, due process, and the establishment clause under the First and Fourteenth Amendments to the United States Constitution and Article I, Section 7 of the Ohio Constitution, as well as a violation of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).

The District Court held that the city's Uniform Development Ordinance (UDO) did not violate RLUIPA's "equal terms" provision, which states that, "No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." As the UDO prohibited public schools as well, the prohibition of private schools did not constitute differential treatments.

"As set forth above, RLUIPA requires 'equal treatment, not special treatment.' To interpret RLUIPA to require Upper Arlington to allow Plaintiff to operate a religious school in the ORC Office and Research District, would effectively require Upper Arlington to treat Plaintiff more favorably than secular schools, which are prohibited from operating in that district. Stated differently, while RLUIPA operates as a shield to protect religious assemblies or institutions from unequal treatment, Plaintiff attempts to use the equal terms provision as a sword to receive preferential treatment."

ANNEXATION - TENNESSEE

Rich v. City of Chattanooga

Court of Appeals of Tennessee - April 17, 2014 - Slip Copy - 2014 WL 1513349

The City of Chattanooga proposed to deannex thirty-six residential lots, pursuant to Tennessee Code Annotated § 6–51–201(b).

At issue in this case was whether citizens who reside on real property that is proposed for deannexation by a municipal ordinance may, pursuant to Tennessee Code Annotated § 6–51–201 (2011), properly bring a *quo warranto* or declaratory judgment action against the municipality to

challenge adoption of the deannexation ordinance.

The Court of Appeals held that q*uo warranto* relief is not available in cases where referendum elections serve as the check on the governmental exercise of deannexation power via ordinance.

BENEFITS - TENNESSEE

Gertsch v. City of Martin, Tenn.

United States District Court, W.D. Tennessee, Eastern Division - April 17, 2014 - Slip Copy - 2014 WL 1572786

Former city firefighters initiated an action against the City of Martin, Tennessee, alleging deprivation of their property rights without due process of law in violation of 42 U.S.C. § 1983 as well as common-law breach of contract. Plaintiffs were eligible for retirement benefits through, and had properly enrolled in, the Tennessee Consolidated Retirement System (TCRS).

The City recognizes an employee's unused, accumulated sick leave as creditable service and reports the unused sick leave to TCRS when an employee applies for retirement benefits. City firefighters worked twenty-four hour shifts.

The TCRS requires participating municipal employers, such as the City, to report the unused sick leave of certain types of employees, including firefighters, in days rather than in hours, but, as far as the TCRS is concerned, there is no standard formula for municipalities to convert unused sick hours to days. In reporting Plaintiffs' respective days of unused, accumulated sick leave to TCRS, the City converted every twenty-four hours of unused sick leave into one day. Plaintiffs argued that the City should have converted every twelve hours of unused sick leave into one day.

The court dismissed Plaintiffs' breach of contract claim, finding that the personnel policy upon which they relied was not a contract.

The court also found that the entitlement Plaintiffs claimed—to a specific formula for counting their unused, accumulated sick leave toward creditable service—was to a *process,* rather than substance, and was therefore not a property interest protected by the Fourteenth Amendment.

WATER LAW - VIRGINIA

Ferguson v. Stokes

Supreme Court of Virginia - April 17, 2014 - S.E.2d - 2014 WL 1499599

Owner of property adjacent to island and causeway and who acquired riparian rights appurtenant to shoreline filed ejectment action against occupier of island, alleging that his oyster house on island was located within riparian zone. Occupier filed plea in bar of statute of limitations. The Circuit Court dismissed plea as barred by prior settlement agreement between owner and occupier, and

entered order stating that occupier did not own any shoreline property, that he had no riparian rights, and that bottomlands under island and causeway belonged to Commonwealth. Occupier appealed.

The Supreme Court of Virginia held that:

- Occupier's plea in bar of statute of limitations as defense to property owner's ejectment action was equivalent of claim for adverse possession that fell within scope of prior settlement agreement with owner;
- Owner's riparian rights appurtenant to shoreline that were vested in owner by court order could not be divested by subsequent enactment of statute governing title to lands that were once state-owned bottomlands acquired by good-faith purchasers; and
- Occupier's oyster house was fixture attached to realty, not personalty.

IMMUNITY - OHIO

Lewis v. Toledo

Court of Appeals of Ohio, Sixth District, Lucas County - April 18, 2014 - Slip Copy - 2014 - Ohio- 1672

Suspect filed suit against police officer for assault, battery, recklessness, and gross negligence, stemming from incident in which officer hit suspect with her police cruiser while assisting with his apprehension. The Court of Common Pleas denied officer summary judgment. She appealed.

The Court of Appeals held that:

- Summary judgment evidence did not raise fact question as to whether officer lost political subdivision immunity, and
- Bystanders' statements that officer's conduct was intentional were inadmissible as opinion testimony.

Suspect's testimony and affidavits of lay witnesses offered on summary judgment did not raise fact question as to whether police officer lost political subdivision immunity against suspect's claims. Whether officer maliciously, in bad faith, wantonly, or recklessly breached any duty owed to suspect was beyond the knowledge or experience possessed by lay persons.

Statements made by bystanders in summary judgment affidavits that police officer intentionally struck fleeing suspect with her police cruiser were not admissible as opinion testimony by lay witnesses to determine non-intentional allegations in suspect's negligence action against officer, since allegations were made without personal knowledge.

LIABILITY - WASHINGTON

Jewels v. City of Bellingham

Court of Appeals of Washington, Division 1 - April 21, 2014 - P.3d - 2014 WL 1593129

Bicyclist, who was injured when he tried to bypass speed bump in public park by going through what he believed was a gap between the speed bump and the curb and, as he did this, he encountered an asphalt berm, also known as a water diverter, that caused him to lose control of bike, filed a complaint for personal injuries and damages against city. The Superior Court granted the city's motion for summary judgment, and bicyclist appealed.

The Court of Appeals held that bicyclist could not establish that city had actual knowledge that the water diverter was dangerous, and absent showing of actual knowledge, bicyclist did not establish city's liability under recreational use statute for his injuries.

PUBLIC UTILITIES - WASHINGTON

IGI Resources, Inc. v. City of Pasco

Court of Appeals of Washington, Division 3 - April 22, 2014 - P.3d - 2014 WL 1600377

Natural gas supplier brought action against city for money had and received seeking reimbursement for taxes paid on gas delivered outside the city's boundaries. The Superior Court granted supplier summary judgment. City appealed.

The Court of Appeals held that supplier was required to exhaust its administrative remedies in seeking refund of taxes paid pursuant to city ordinance that taxed natural gas sales within the city limits before filing action against city for money had and received. Superior court's jurisdiction over supplier's equity claim did not vitiate the city's administrative exhaustion requirements.

EMINENT DOMAIN - WASHINGTON

City of Bellevue v. Best Buy Stores, LP

Court of Appeals of Washington, Division 1 - April 21, 2014 - Not Reported in P.3d - 2014 WL 1600924

The City of Bellevue brought a condemnation action over two parcels of land in order to extend NE 4th Street. The proposed design called for a five-lane road. Best Buy Stores, LP (Best Buy), the lessor of one of the parcels, opposed the condemnation action, contending that the to-be-condemned property was not necessary to fulfill a public use. Specifically, Best Buy contended that a five-lane road was not necessary and that a four-lane road would suffice.

The Court of Appeals held that Best Buy failed to demonstrate that Bellevue's determination of public necessity was arbitrary and capricious such that it amounted to constructive fraud. "Because it is not our role to second-guess Bellevue's choice of road design, we affirm."

"Although the courts may well determine from the evidence whether a project is for the public

benefit, convenience or necessity, they are not trained or equipped to pick the better route, much less design and engineer the project. Thus, the rule that leaves these decisions to the administrative agencies is a sensible one consistent with the idea that the public's business be carried out with reasonable efficiency and dispatch by those possessing the superior talents to accomplish the public purposes."

ANNEXATION - WISCONSIN

Ries v. Village of Bristol

Court of Appeals of Wisconsin - April 17, 2014 - Slip Copy - 2014 WL 1499471

The Village of Bristol petitioned the circuit court for an annexation referendum on whether to annex the Town of Bristol to the Village. The circuit court granted the Village's petition for an annexation referendum, and the referendum passed. The Village enacted an ordinance annexing the Town to the Village.

Individual and his L.P. ("Ries") subsequently filed a complaint seeking a declaration that the annexation by referendum was invalid because it violated the rule of reason, a judicially created doctrine used to determine whether an annexation is valid.

Ries raised two main issues: (1) whether the annexation fails to satisfy the rule of reason because the Village abused its discretion by initiating the annexation process and because there is no reasonable present or future demonstrable need for annexation; and (2) whether the circuit court erred in excluding testimony regarding discussions by village board members about whether to initiate the annexation process.

The court found not abuse of discretion, affirming the annexation.

CIVIL SERVICE - ALABAMA

Bates v. Crane

Court of Civil Appeals of Alabama - April 11, 2014 - So.3d - 2014 WL 1407239

Complainant, the niece of a murder victim, sought judicial review of disciplinary sanction imposed upon police chief by the Civil Service Board, claiming the sanction was too lenient in light of finding that the chief had maintained inappropriate communication with the defendant during pendency of the murder prosecution in violation of Board rules. The Circuit Court dismissed appeal upon finding that complainant lacked standing to appeal the decision. Complainant appealed.

The Court of Civil Appeals held that Civil Service Board's rules afforded complainant standing to appeal Board's decision.

Civil Service Board's rules clearly contemplated that a party who files a complaint against a member of the police department is entitled to appeal from a decision of the Board if that party "feels aggrieved" and thus afforded complainant, the niece of a murder victim and a participant in the hearing before the Board, standing to appeal Board's decision to impose, what claimant considered to be, a lenient disciplinary sanction upon police chief for maintaining personal communication with

the defendant, who chief knew through his son, and allegedly involving himself in the prosecutorial decision making process.

LIABILITY - ALASKA

Regner v. North Star Volunteer Fire Dept., Inc.

Supreme Court of Alaska - April 11, 2014 - P.3d - 2014 WL 1408551

Homeowner brought negligence action against fire departments and several of their employees following fire that destroyed mobile home. The Superior Court granted summary judgment in favor departments and employees. Homeowner appealed.

The Supreme Court of Alaska held that genuine issue of material fact existed regarding whether fire departments breached duty to homeowner or caused injury to homeowner.

IMMUNITY - ALASKA

Steward v. State

Supreme Court of Alaska - April 11, 2014 - P.3d - 2014 WL 1408549

After fatal car accident, estate and surviving spouse of motorist brought negligence action against state. The Superior Court granted partial summary judgment to state and, following jury trial, entered judgment in favor of state. Estate appealed.

The Supreme Court held that:

- Discretionary function immunity applied to state's decision not to reinstall a removed guardrail;
- Trial court's exclusion of motorist's estate's expert witness on accident reconstruction from courtroom, during testimony of police officer witness for state regarding his conclusions about what occurred during accident, was error; but
- Such error was harmless error.

EMINENT DOMAIN - ARIZONA

City of Phoenix v. Garretson

Supreme Court of Arizona - April 17, 2014 - P.3d - 2014 WL 1499642

City brought eminent domain proceeding to determine the amount of just compensation due to property owner who lost access rights of ingress and egress to abutting street when city constructed light rail tracks adjacent to owner's property, but who retained access rights to his property from another street. City moved for partial summary judgment, arguing that property owner was not

entitled to compensation because he had alternate access to the property. The Superior Court granted motion. Property owner appealed. The Court of Appeals vacated and remanded, and city appealed.

The Supreme Court of Arizona held that:

- Property owner may be entitled to compensation if the government, in the exercise of its police power, eliminates the owner's established access to an abutting roadway, even if other streets provide access to the property, and
- Landowner had a claim for compensation under eminent domain provision of State Constitution when city completely eliminated landowner's preexisting access to street, leaving him with no means of ingress or egress to that street or any replacement roadway in that location.

IMMUNITY - CALIFORNIA

Martinez v. County of Ventura

Court of Appeal, Second District, Division 6, California - April 8, 2014 - Cal.Rptr.3d - 14 Cal. Daily Op. Serv. 3825

Motorcyclist brought personal injury action against county, alleging that asphalt berm constituted a dangerous condition of public property. The Superior Court entered judgment on special jury verdict for county. Motorcyclist appealed.

The Court of Appeal held that county failed to satisfy the "approval" element of county's affirmative defense of design immunity, in motorcyclist's personal injury action alleging that asphalt berm and raised "top-hat" drain constituted a dangerous condition of public property, even if county repeatedly used the drain design for 25 years, absent evidence that the drains were designed before they were built in the field, and absent evidence that county exercised its discretion to approve the drain system before the drains were installed.

TAX - CONNECTICUT

Longview Estates, LLC v. Woodin

Appellate Court of Connecticut - April 22, 2014 - A.3d - 2014 WL 1464321

Mobile park owner commenced summary process action against homeowners for alleged failure to pay rent for lot on which their mobile home was situated. Following entry of judgment of possession and order of execution in favor of park owner, park owner petitioned for finding of abandonment and for order of public sale. Town filed objection to petition based on park owner's disclosure of defenses in town's prior action to foreclose tax lien against homeowners and park owner. The Superior Court granted petition and, following sale, entered judgment of conveyance in favor of park owner, which extinguished town's tax liens. Town appealed.

The Appellate Court held that park owner did not waive its statutory right to recover costs of selling

abandoned mobile home by its disclaimer of any interest in home made in town's prior action.

The Appellate Court held that mobile park owner did not waive statutory right to recover costs of selling abandoned mobile home by filing disclosure of defenses, stating that park owner had "no legal or equitable interest" in the home, in town's later-withdrawn tax lien foreclosure action against homeowners and park owner. Park owner did not have interest in mobile home at the time of disclosure, costs of sale were not a known right at the time of the disclosure, and expression of lack of interest was not binding on park owner's summary process action.

EMPLOYMENT - DISTRICT OF COLUMBIA

District of Columbia Metropolitan Police Dept. v. District of Columbia Office of Employee Appeals

District of Columbia Court of Appeals - April 10, 2014 - A.3d - 2014 WL 1386458

Police officer, who was convicted of driving while intoxicated (DWI), appealed his termination. The Office of Employee Appeals (OEA) upheld the termination, and appeal was taken. The OEA Board reversed and remanded. On remand, the OEA reduced officer's termination to a thirty-day suspension, with ten days held in abeyance, and police department appealed. The Superior Court affirmed and police department appealed.

The Court of Appeals held that:

- Unpaid suspension of police officer was an authorized interim administrative suspension authorized pursuant to the District of Columbia Comprehensive Merit Personnel Act (CMPA), and therefore, officer's subsequent termination did not constitute double punishment, and
- OEA erred by overturning termination of police officer, which was consistent with the range of penalties permitted for such conduct, without assessing police department's analysis.

PUBLIC RECORDS - FLORIDA

Barfield v. School Bd. of Manatee County

District Court of Appeal of Florida, Second District - April 11, 2014 - So.3d - 2014 WL 1396592

Michael Barfield appealed the trial court's order denying declaratory relief and access to public records, raising two issues. First, he argued that the trial court erred in concluding that several requested items contained in a School Board litigation report were exempt under section 119.071(1)(d), Florida Statutes (2012) concerning attorney work-product. Second, Barfield argued that the School Board policy of suspending an administrative investigation while a corresponding criminal investigation is pending does not preempt the statutory presumption that an administrative investigation is presumed inactive after sixty days.

As to the first issue, the District Court reversed because the School Board failed to prove its burden of entitlement to the exemption under 119.071(1)(d) due to the fact that the cases in question had

been closed prior to the request. The court affirmed the second issue without further comment because the School Board offered uncontroverted evidence that it had a reasonable, good faith anticipation that an administrative finding would be made in the foreseeable future.

EMPLOYMENT - ILLINOIS

Houzenga v. City of Moline, Illinois

United States District Court, C.D. Illinois., Peoria Division - April 14, 2014 - Not Reported in F.Supp.2d - 2014 WL 1464408

Scott Houzenga began his employment with the Moline Fire Department on September 8, 1997. On May 17, 2004, Heather Oepping was hired as the first female firefighter on the Department. During his September 2008 annual evaluation, Houzenga commented that he felt he was subject to a hostile work environment from Oepping because he had given her poor evaluations of her work.

On June 12, 2012, Houzenga filed a Complaint in the Circuit Court for Rock Island County, Illinois alleging claims of: (1) discrimination on the basis of gender; (2) retaliation; and (3) intentional infliction of emotional distress.

Under the indirect or burden-shifting method, the plaintiff must first make a *prima facie* showing that: (1) he was a member of a protected class; (2) he was meeting legitimate employment expectations; (3) he suffered an adverse employment action; and (4) similarly situated employees outside the protected class were treated more favorably than he was. Additionally, in a reverse discrimination case such as this, the plaintiff must show background circumstances suggesting that the employer has a reason or inclination to discriminate against men.

The court noted that Houzenga was going to have just a little trouble showing that similarly situated employees outside the protected class were treated more favorably than he was due to the fact that the "outside the protected class" group consisted of just one single woman.

As to Houzenga's Intentional Infliction of Emotional Distress claim, the court stated that, "it is well-settled that indignities, threats, annoyances, petty oppressions, and other trivialities fail to qualify as outrageous conduct actionable in an IIED claim." Good to know, as the BCB workplace subsists solely on a diet of "indignities, threats, annoyances, petty oppressions, and other trivialities."

CONTRACTS - LOUISIANA

Akers v. Bernhard Mechanical Contractors, Inc.

Court of Appeal of Louisiana, Second Circuit - April 16, 2014 - So.3d - 48, 871 (La.App. 2 Cir. 4/16/14)

This breach of contract claim arose from a public works project to renovate the Shreveport Fire Maintenance Facility. The dispute stemmed from a subcontract to provide the vehicle exhaust system for removing CO gas from the building while fire trucks are being serviced.

The City of Shreveport awarded the general contract to A & R General Contractors. Bernhard Mechanical Contractors won the mechanical subcontract on the job. Bernhard awarded the exhaust system subcontract to David Akers.

The city rejected Akers's submittal for "no prior approval." Ultimately, the city installed a different exhaust system. It used a small portion of Akers' equipment, authorizing Bernhard to pay Akers $3,861 for it.

Akers filed this suit against Bernhard, A & R and the City of Shreveport. He demanded the full bid amount, 18% interest, and attorney fees under the Public Works Act, La. R.S. 38:2246.

In response, Bernhard filed a third party demand against the city, citing a Department of Revenue certificate issued by the city to Bernhard, granting sales tax exemption for the project. The third party demand asserted, "To the extent that Bernhard is found to be the agent for the City of Shreveport with regard to the materials and/or equipment furnished by [Akers] then the City of Shreveport would be obligated to pay any and all amounts awarded to [Akers]."

The court ruled in favor of Akers against Bernhard, awarding him $40,773.00, subject to a credit of $3,861.00, with 18% contractual APR.

The court also granted judgment on the third party demand in favor of Bernhard and against the City of Shreveport, for $40,773.00, subject to a credit of $3,861.00, with 18% contractual APR. This award was based upon the court's finding that the city had in fact approved Akers' submittal, followed by an abortive attempt to retract that approval.

The court rejected the argument that the tax exemption certificate made the city and Bernhard equally or jointly responsible for a breach of contract. The exemption applies to sales and use taxes for the purchase of component construction materials, taxable services and leases and rentals of tangible personal property for the project. It does not make Bernhard the city's agent for all purposes.

CORRECTIONS - NEW JERSEY

Thomas v. Cumberland County

United States Court of Appeals, Third Circuit - April 11, 2014 - F.3d - 2014 WL 1395666

Following attack by other inmates at county correctional facility, inmate brought action against county and corrections officers at facility pursuant to § 1983 and the New Jersey Civil Rights Act, alleging failure to train, failure to protect, failure to intervene, and incitement. The District Court granted summary judgment in favor of county and officer. Inmate's claims against other officer proceeded to trial, and jury found in favor of officer. Inmate appealed only District Court's grant of summary judgment in county's favor on § 1983 failure to train claim.

The Court of Appeals held that triable issue remained as to whether county exhibited deliberate indifference to the need for pre-service training for officers in conflict de-escalation and intervention and whether the lack of such training caused inmate's injuries, precluding summary judgment on inmate's § 1983 failure to train claim against county.

ZONING - NEW YORK

Albany Basketball & Sports Corp. v. City of Albany

Supreme Court, Appellate Division, Third Department, New York - April 3, 2014 - N.Y.S.2d - 2014 N.Y. Slip Op. 02370

Proprietor of auditorium petitioned for Article 78 review of a decision of a city's board of zoning appeals (BZA), which found that current use of premises was not permitted use under city code. The Supreme Court, Albany County, dismissed proprietor's application. Proprietor appealed.

The Supreme Court, Appellate Division, held that term "auditorium" did not require fixed seating.

Although a reviewing court will generally grant deference to the interpretation of an ambiguous zoning ordinance by a municipal BZA, where the issue presented is one of pure legal interpretation of the underlying zoning law or ordinance, deference is not required.

Local zoning regulations, being in derogation of the common law, must be strictly construed against the municipality which has enacted and seeks to enforce them, and any ambiguity in the language used must be resolved in favor of the property owner.

Resolving ambiguities in city's zoning ordinances in favor of auditorium proprietor, term "auditorium" was not limited to area of concert hall, theater, school, or other structure in which audience sat, but instead included building for public gatherings or meetings or large room or building where people gather to watch performances, hear speeches, or other similar activities. Thus, city's BZA unreasonably interpreted that term as requiring fixed seating, and on those grounds finding that using premises for "rave" party, nightclub, dance club, or other similar events did not constitute permitted use under ordinance applicable to commercial office zoning district in which auditorium was located.

EMPLOYMENT - NORTH CAROLINA

Blakeley v. Town of Taylortown

Court of Appeals of North Carolina - April 15, 2014 - S.E.2d - 2014 WL 1457794

Terminated Police Chief, Timothy Blakeley, brought wrongful termination action against the Town of Taylortown.

The jury was asked to answer four issues: (1) Was the plaintiff's refusal to participate in conduct which violated public policy a substantial factor in the defendant's decision to terminate him?; (2) Would defendant have terminated plaintiff if he had not refused to participate in that conduct?; (3) What amount of damages is plaintiff entitled to recover?; and (4) By what amount should the plaintiff's actual damages be reduced? The jury returned a verdict and answered the issues as: yes, no, $291,000, and $191,000, respectively.

The appeals court granted the town's motion to amend the verdict based on the jury's failure to properly offset the amount of damages by the amount of money plaintiff earned in other jobs and in unemployment benefits, remanding for the trial court to reduce the judgment by $5,886.97.

INVERSE CONDEMNATION - NORTH CAROLINA

Beroth Oil Co. v. North Carolina Dept. of Transp.

Supreme Court of North Carolina - April 11, 2014 - S.E.2d - 2014 WL 1477931

Landowners brought action against North Carolina Department of Transportation (NCDOT), alleging inverse condemnation and seeking declaratory relief after NCDOT identified transportation corridors for the construction of a highway project known as the Northern Beltway. The Superior Court denied landowners' motion for class certification. Landowners appealed. The Court of Appeals affirmed. Landowners petitioned for discretionary review.

The Supreme Court of North Carolina held that:

- As a matter of first impression, findings of fact in a class-certification order are binding on appeal if supported by competent evidence;
- As a matter of first impression, conclusions of law in a class-certification order are reviewed de novo;
- Unique nature of parcels of land combined with diversity of proposed class precluded trial court from analyzing merits of claims when determining issue of class certification; and
- Individual issues predominated over common issues, and thus certification of class was unwarranted.

Unique nature of parcels of land combined with diversity of proposed class precluded trial court from analyzing merits of landowners' inverse-condemnation claims against NCDOT when determining issue of class certification.

Individual issues predominated over common issues regarding landowners' inverse-condemnation claims against NCDOT, and thus certification of class was unwarranted. Proposed class included over 800 landowners, not all of the landowners had same property interests and expectations, and each individual parcel was uniquely affected by NCDOT's actions.

LAND USE - PENNSYLVANIA

ION Geophysical Corp. v. Hempfield Tp.

United States District Court, W.D. Pennsylvania - April 10, 2014 - Slip Copy - 2014 WL 1405397

ION Geophysical Corporation brought a Declaratory Judgment action against Hempfield Township, seeking permission to conduct seismic testing in Hempfield Township and prohibiting the Township from interfering with ION's operations in conducting seismic testing in connection with natural gas exploration and extraction.

The basic issue was whether a township can prohibit seismic testing on a township road.

The District Court granted ION's motion for a preliminary injunction, concluding that ION had shown a reasonable probability that it would succeed on the merits on its claim that the Township's conduct violates ION's substantive and procedural due process rights and ION's equal protection

rights under the United States Constitution.

"Had the Township entered into a Seismic Agreement with ION, such an action would be an implicit approval of seismic testing on Township roads. Any agreement entered into would then be the result of a reasoned and informed negotiation in which both sides' interests were taken into account and addressed. Similarly, if the Township had passed an ordinance with regard to seismic testing, then the ordinance could not be vague, arbitrary, or unreasonable. Moreover, any ordinance purporting to regulate seismic testing would have to be in compliance with the preemption provision of Pennsylvania's oil and gas law as set forth in Title 58 of the Pennsylvania Consolidated Statutes."

"We agree with ION that the Township's ban on seismic testing on its roads is an attempt to regulate seismic testing by omission, in the absence of any ordinance regulating seismic testing. By refusing to pass a relevant ordinance or otherwise engage with ION, the Township's conduct is unreasonable and arbitrary and deprives ION of any avenue to seek accommodation or review of the Township's 'regulation by inaction.'"

BONDS - TEXAS

National Public Finance Guarantee Corp. v. Harris County-Houston Sports Authority

Court of Appeals of Texas, Houston (1st Dist.) - April 15, 2014 - S.W.3d - 2014 WL 1464654

In 1997, Harris County and the City of Houston created the Sports Authority pursuant to Chapter 335 of the Local Government Code. Since its creation, the Sports Authority has issued several series of bonds pursuant to a written Indenture of Trust to finance the construction of sports venues in Harris County.

This dispute primarily concerned the Series 2001 bonds that were used to fund the construction of Reliant Stadium. The Convention Corporation is a local government entity created to serve as the landlord of Reliant Stadium.

On several occasions since the issuance of the bonds, the revenues raised by the Sports Authority were insufficient to make the minimum principal and interest payments due on the bonds. To cover these shortfalls, the Sports Authority made claims on the financial guaranty insurance policies issued by National Public Finance Guarantee Corporation and MBIA Insurance Corporation (collectively, "National") as provided for in the Reimbursement Agreements.

National contended that these claims impermissibly reduced the reserve fund provided for in the Indenture that is intended to secure the bond obligations. It also argued that, because the Sports Authority was authorized by statute to impose an admission tax up to 10% of ticket price and parking tax up to $3 per vehicle, the Sports Authority was required by the Indenture to raise admission and parking taxes at Reliant Stadium to legislative maximums in order to cover the shortfalls. The Sports Authority refused to raise these taxes on the grounds that the Funding Agreement capped these taxes at $2 per ticket and $1 per car, that any additional revenue raised by these measures was required to be rebated to the Texans and the Rodeo under the terms of the Leases and the Funding Agreement and would therefore never be available to service bond obligations, and that it was not authorized to raise these taxes without voter approval.

On January 2013, National sued the Sports Authority, claiming that it had breached the Indenture by refusing to impose admissions and parking taxes at the legislative maximum. National also asserted other breaches by the Sports Authority and a claim for reimbursement. In addition, National requested a declaratory judgment against the Sports Authority, the Convention Corporation, the Texans, and the Rodeo, that the Indenture requires the Sports Authority to impose admissions taxes and parking taxes up to their legislative maximum, and that the provisions of the Leases and the Funding Agreement should be modified and interpreted to permit the incremental revenue generated by these increases to be paid to National.

The Authority and the Convention Corporation filed pleas to the jurisdiction, asserting that they were governmental entities and, accordingly, immune from suit. In response, National asserted that both the Sports Authority and the Convention Corporation had waived their immunity to suit by entering into the agreements related to the bond issuance. The trial court granted the plea.

National contended that the trial court erred in granting the Sports Authority's plea to the jurisdiction because (1) the 2007 Act amending Government Code chapter 1371 waived the Sports Authority's immunity by ratifying the waiver of immunity in the Funding Agreement that was incorporated into the other deal documents, (2) Texas Local Government Code section 271.152 waived the Sports Authority's immunity because all of the agreements that the Sports Authority entered into related to the bonds were contracts for services, and (3) the Sports Authority was not entitled to immunity because it issued the bonds in its proprietary, rather than governmental, capacity. In its fourth issue, National contended that the trial court erred in granting the Convention Corporation's plea because Texas Local Government Code section 271.152 operates to waive the Convention Corporation's immunity in this case.

The Court of Appeals reversed the trial court's grant of the Sports Authority's plea, holding that the 2007 Act amending Chapter 1371 of the Government Code waived the Sport Authority's immunity.

The Court of Appeals affirmed the trial court's grant of the Convention Corporation's plea, holding that Texas Local Government Code section 271.152 did not waive the Convention Corporation's immunity because a section 271.152 waiver covers only breach of contract claims and National had asserted no breach of contract claims against the Convention Corporation.

ZONING - VIRGINIA

Lamar Co., LLC v. City of Richmond

Supreme Court of Virginia - April 17, 2014 - S.E.2d - 2014 WL 1499592

City brought enforcement action against property owner and property lessee seeking lowering of lessees's billboard located on property to a conforming height. Property owner and lessee sought declaratory judgment and city filed demurrers. The Circuit Court sustained the demurrers. Property owner and lessee appealed.

The Supreme Court of Virginia held that zoning statute prohibiting local governments from removing

nonconforming uses on property for which taxes had been paid for at least 15 years, based solely on a property's nonconforming status, was a restrictive statute limiting municipal power rather than a permissive enabling statute.

ZONING - VIRGINIA

Lamar Co., LLC v. City of Richmond

Supreme Court of Virginia - April 17, 2014 - S.E.2d - 2014 WL 1499584

Property owner and property lessee sought variance to allow lessee's billboard on property to remain at its existing height. The Circuit Court upheld the zoning board's denial of the variance. The lessee appealed.

The Supreme Court of Virginia held that the proper standard of review for denial of a variance is whether the board's decision was contrary to law or an abuse of discretion, rather than whether the decision was fairly debatable.

The "fairly debatable" standard is the standard of review that a court applies when a governing body acts in a legislative capacity, such as when it adopts a zoning ordinance or grants a special use permit; it is not the proper standard of review to apply when considering a board of zoning appeals' decision to deny a request for a variance.

BONDS - VIRGINIA

U.S. ex. rel. Prince v. Virginia Resources Authority

United States District Court, W.D. Virginia, Harrisonburg Division - April 15, 2014 - Slip Copy - 2014 WL 1463786

Although short on details, this case appears to be the final phase of a long-running crusade by Mr. Prince to challenge the funding of public projects by or behalf of Shenandoah County.

After filing, and losing, four state court suits against the Virginia Resources Authority (VRA) challenging the legality of certain bonds issued under the Build America Bonds (BAB) program, Prince brought this action in federal court alleging that VRA and others violated the False Claims Act (FCA) by knowingly presenting, or causing to be presented, a false or fraudulent claim for payment or approval related to federal subsidies and tax exempt status for certain bonds through the BAB program. Prince asserted that the bonds were issued in violation of Article VII of the Virginia Constitution and that the defendants falsely claimed that the bonds were legally issued in the course of participating in the BAB program.

The District Court held that the *Rooker-Feldman* doctrine was inapplicable to this case, but that the matter was governed by Virginia preclusion law. Because the critical legal issue—the legality of the bonds issued by VRA and others—had already been decided in previous litigation between Prince and VRA, Prince's claims were barred by issue preclusion, also known as collateral estoppel.

Prince had named four other defendants: the Shenandoah County Board of Supervisors, U.S. Bank National Association, Suntrust Bank, and SunTrust Equipment Finance & Leasing Corporation. None of these defendants, however, had been served.

The court took the unusual step of stopping any further actions in its tracks. "Finally, nothing but dismissal with prejudice will prevent the harm posed by re-litigating of legal issues that have already been decided. In light of the foregoing, the court finds that it is appropriate to invoke its inherent authority to dismiss with prejudice for lack of prosecution."

"In sum, Prince has had ample opportunity to litigate the legal issues underlying this case. His attempt to litigate against VRA yet again in this federal forum is barred by issue preclusion. Likewise, the court will not allow Prince yet another bit at the apple by finally serving the remaining defendants, or by filing a new a suit against them making the same claims. Prince cannot use a tactic of delayed service as a means for further re-litigation. The court will accordingly dismiss VRA as a defendant and dismiss the remainder of the case with prejudice for failure to prosecute."

ZONING - ALABAMA

Brown v. Jefferson

Court of Civil Appeals of Alabama - April 4, 2014 - So.3d - 2014 WL 1328337

Adjoining neighbor appealed from decision of municipal board of adjustment granting dance studio operator a variance that allowed a reduction in number of required parking spaces for studio's business. The Circuit Court granted the variance, subject to conditions. Studio owner appealed.

The Court of Civil Appeals held that:

- Neighbor had standing as "party aggrieved" to challenge board of adjustment's decision;
- Trial court was not without authority to attach conditions to granting variance;
- Stated condition that studio use a shuttle bus for transporting students did not constitute an impermissible injunction; and
- The condition was not unreasonable, arbitrary, or oppressive means to address traffic congestion.

EMINENT DOMAIN - ARKANSAS

GSS, LLC v. CenterPoint Energy Gas Transmission Co.

Supreme Court of Arkansas - April 3, 2014 - S.W.3d - 2014 Ark. 144

Gas pipeline company petitioned to acquire property by eminent domain to allow construction of pipeline, and property owner counterclaimed for unlawful taking, violation of the Arkansas Civil Rights Act, trespass, and outrage. The Circuit Court entered judgment for property owner in the amount of $64,000 as just compensation. Property owner appealed.

The Supreme Court of Arkansas held that:

- Circuit Court did not abuse its discretion in excluding evidence of an appraisal of a nearby tract of land for purposes of showing comparable sales;

- The ‘quick take’ state statutory procedures used by gas pipeline company to enter upon property owner’s land and proceed with pipeline construction were not preempted by the Natural Gas Act;
- Summary judgment evidence was sufficient to demonstrate that pipeline company negotiated with property owner in good faith as required by the Natural Gas Act; and
- Pipeline company did not violate property owner’s due process rights and its rights under the Arkansas Civil Rights Act.

The “quick take” state statutory procedures used by gas pipeline company to enter upon property owner’s land and proceed with pipeline construction were not preempted by the Natural Gas Act. The Natural Gas Act contained no language to indicate Congress’s intention to preempt the state statute, but instead specifically contemplated the use of state condemnation procedure in proceedings under the federal statute, and pipeline company’s petition for condemnation and a declaration of taking had already been granted after the estimated amount of just compensation had been deposited into the registry of the court.

MUNICIPAL ORDINANCE - CALIFORNIA

1300 N. Curson Investors, LLC v. Drumea

Court of Appeal, Second District, Division 8, California - April 4, 2014 - Cal.Rptr.3d - 2014 WL 1338659

Landlord brought action against tenants for declaratory relief, ejectment, and damages. The Superior Court denied summary judgment for landlord and entered stipulated judgment for tenants. Landlord appealed.

The Court of Appeal held that landlord properly imposed cumulative rent increases on tenant for years when tenant was resident manager.

Under rent stabilization ordinance providing that if a “resident manager was already a tenant in the unit before being appointed resident manager, the rent charged to the resident manager upon termination of managerial services shall not exceed the rent the tenant had already been paying plus annual adjustments,” a landlord was authorized to charge a former manager tenant with all of the annual adjustments authorized under the ordinance for the years when tenant lived in her apartment rent-free in exchange for acting as resident manager, even though the building’s former landlords did not serve tenant with annual registration statements and notices of rent increases during the time that tenant did not pay rent, and notwithstanding ordinance providing that a landlord may not “demand or accept rent” without first giving each tenant a copy of the annual registration statements and notices of rent increases.

Under rent stabilization ordinance providing that when a resident manager pays partial rent “only the partial rent payments shall be subject to the annual adjustments authorized,” it logically follows from the requirement that the landlord must give notice of increases in partial rent payments that the landlord has no obligation to give notice of what the increase would have been if the manager were paying the full rental value of the unit.

TAX - CALIFORNIA

Sipple v. City of Hayward

Court of Appeal, Second District, Division 2, California - April 8, 2014 - Cal.Rptr.3d - 2014 WL 1371796

For a number of years, individuals throughout California were improperly charged taxes for internet access by their internet service provider, New Cingular Wireless PCS LLC (New Cingular), prompting various customers to file putative class action lawsuits. The lawsuits eventually settled, with New Cingular agreeing to seek refunds of the taxes from the cities and counties to which the taxes were remitted. After refund claims were denied, New Cingular brought this action against the cities and counties. The Superior Court sustained demurrer without leave to amend. Provider appealed.

The Court of Appeal held that:

- Local "refund first" ordinances were preempted by Government Claims Act;
- Provider had standing to present claims to cities and counties for tax refunds on behalf of provider's customers; and
- Provider had standing to file suit for tax refunds on behalf of provider's customers.

To the extent that local "refund first" ordinances prohibiting service suppliers from filing tax refund claims on behalf of their customers without first refunding disputed taxes from their own funds to the customers established a precondition to filing a claim, the ordinances were preempted by the Government Claims Act.

ZONING - CONNECTICUT

Reardon v. Zoning Bd. of Appeals of Town of Darien

Supreme Court of Connecticut - April 8, 2014 - A.3d - 311 Conn. 356

Landowner sent letter to town zoning enforcement officer, challenging the legality of zoning and building permits previously issued to neighboring landowner, and, when officer failed to respond, landowner filed an application for appeal to the town zoning board of appeals. The board dismissed landowner's application to appeal on grounds of untimeliness and for lack of a "decision" from which an appeal could lie. Landowner sought judicial review. The Superior Court dismissed appeal. Landowner appealed.

The Supreme Court of Connecticut held that:

- Landowner's letter to town zoning enforcement officer challenging the legality of zoning and building permits previously issued to neighboring landowner, and zoning enforcement officer's lack of response to such letter, did not give rise to a "decision" from which landowner had a right of appeal to the town zoning board of appeals, and
- Town zoning regulation prohibiting zoning agencies or officials from approving permits for

construction or land use that would violate any law, and deeming any permits so issued to be null and void, did not impose a duty upon town zoning enforcement official to respond to landowner's letter.

SCHOOLS - IDAHO

Sanders v. Board of Trustees of Mountain Home School Dist. No. 193

Supreme Court of Idaho, Boise, February 2014 Term - April 7, 2014 - P.3d - 2014 WL 1349418

Employee brought action against board of trustees of school district alleging that board breached its contract with employee by hiring a candidate less qualified than her for a teaching position. The District Court entered judgment on jury verdict in favor of board, but denied board's request for award of attorney fees. Board appealed.

The Supreme Court of Idaho held that:

- Statute governing attorney fee award in action concerning state agency or political subdivision was not exclusive, and
- On issue of first impression, board was not entitled to award of statutory discretionary arbitration costs.

Statute governing award of attorney fees in certain instances in actions involving state agency or political subdivision was not the exclusive source of attorney fees when a prevailing party also requested fees pursuant to statute governing award of attorney fees in action to recover on contract. Phrase in statute governing fees in action involving agency or political subdivision "unless otherwise provided by statute" meant that if another statute expressly provided for the awarding of attorney fees against a state agency or a political subdivision, attorney fees could be awarded under that statute also, and statute governing award in contract actions expressly applied to state agencies and political subdivisions.

Arbitration was non-binding, prior to civil suit, and costs of arbitration were limited to pre-litigation under the contract at issue, and therefore board of trustees of school district was not entitled to statutory discretionary award of arbitration costs in breach of contract action by employee related to employment contract. Statute governing award of costs gave courts authority to award costs "in a civil trial or procedure."

ANNEXATION - IDAHO

In re Old Cutters, Inc.

United States District Court, D. Idaho - March 31, 2014 - Not Reported in F.Supp.2d - 2014 WL 1319854

The City of Hailey appealed the Memorandum Decision, Order and Judgment entered by the United States Bankruptcy Court for the District of Idaho. Hailey argued that the Bankruptcy Court erred

when it invalidated the annexation fees and community housing provisions imposed by Hailey in connection with the annexation of property owned by the chapter 11 debtor, Old Cutters.

Mountain West Bank, Old Cutters' principal creditor, agreed with the Bankruptcy Court's ruling with respect to the annexation fees and community housing provisions, but appealed the Court's finding that the description of the real property in the relevant annexation agreement satisfied the requirements of the Idaho statute of frauds.

The Court concluded that the description of "Market Rate Lots" was sufficient in the Annexation Agreement and exhibits referenced in the agreement to satisfy the statute of frauds. The Court accordingly affirms the Bankruptcy Court's finding that Hailey's lien on the Property was valid under the Idaho statutes. However, because the Court also affirmed the Bankruptcy Court's holding that Hailey does not hold an enforceable claim to collect any further amounts from Old Cutters under the Annexation Agreement, Hailey's lien is ultimately unenforceable.

LIABILITY - KENTUCKY

Jessie v. Dixon

United States District Court, W.D. Kentucky, at Bowling Green - March 31, 2014 - 2014 WL 1320002

Plaintiff was a convicted prisoner incarcerated at the Hart County Detention Center (HCDC). He sued HCDC Officers Shelby Dixon and James Gossett in their individual and official capacities. Plaintiff alleged that on several occasions Defendants Dixon and Gossett had threatened him with mace and taser guns if he did not stop asking to go to church. He also alleged that he had been denied the right to go to church or have a Bible, although other prisoners are allowed. He stated that Defendant Dixon had called him a "honky and cracker and spit into my food."

The court held that, as nothing in the complaint demonstrated any purported wrongdoing occurring as a result of a policy or custom implemented or endorsed by Hart County, the complaint failed to establish a basis of liability against the municipality, thus it failed to state a cognizable § 1983 official-capacity claim.

However, the First Amendment retaliation and free-exercise claims and the Eighth Amendment safety/protection claims were allowed to proceed against Defendants Dixon and Gossett in their individual capacities for damages and injunctive relief.

LIABILITY - KENTUCKY

Derksen v. Causey

United States District Court, W.D. Kentucky, at Bowling Green - April 2, 2014 - 2014 WL 1330193

William M. Derksen, a prisoner, brought an action against Melissa Causey, Chief Deputy, Warren County Regional Jail in both her individual and official capacities.

“Plaintiff represents that on or about November 16, 2013, Defendant housed him in a ‘one men cell segregation due to [his] sexual orientation.’ Plaintiff states that he informed Defendant that his ‘Constitutional Rights [had] been violated due to discrimination.’ In response, according to Plaintiff, Defendant stated, ‘I HATE FAGGOTS I HOPE YALL ROT IN HELL I HAVE SOMETHING FOR YOUR A* *.’ Plaintiff states that 30 minutes later, Defendant opened his cell door, stated ‘Good Lucky,’ and housed a registered sex offender in the cell with him. According to Plaintiff, soon after Defendant secured the cell door, Plaintiff’s new cellmate covered Plaintiff’s mouth with a pillowcase to keep him ‘from getting unwanted attention’ and proceeded to sexually assault Plaintiff.

The court held that, as nothing in the complaint demonstrated any purported wrongdoing occurring as a result of a policy or custom implemented or endorsed by Warren County, the complaint failed to establish a basis of liability against the municipality, thus it failed to state a cognizable § 1983 official-capacity claim.

However, the court did allow the failure-to-protect claim against Ms. Causey in her individual capacity to proceed.

PUBLIC UTILITIES - MAINE

Central Maine Power Co. v. Public Utilities Com'n

Supreme Judicial Court of Maine - April 8, 2014 - A.3d - 2014 ME 56

Power company appealed from decision of Public Utilities Commission (PUC) that company had misapplied nearly $2.6 million in customer deposits to account balances for transmission-an--distribution (T&C) services that should have been applied to account balances for standard-offer service.

The Supreme Judicial Court of Maine held that:

- PUC reasonably interpreted applicable statutes and regulations referring to “a deposit” by an electricity customer as containing two components, one for T&C service and one for standard-offer service, which must be allocated to oldest debt first;
- Prospective financial impact on power company did not alone render the ordered accounting adjustment penal so as to merit application of the fair notice doctrine; and
- PUC’s decision did not run afoul of prohibition against retroactive rulemaking.

EMPLOYMENT - MASSACHUSETTS

Plourde v. Police Dept. of Lawrence

Appeals Court of Massachusetts, Essex - April 9, 2014 - N.E.3d - 85 Mass.App.Ct. 178

Retired city police officer brought action against city police department, alleging that department had violated Wage Act by failing to pay him for compensatory time that he had earned and accrued prior to being injured on duty. The Superior Court Department entered summary judgment in favor of department, and officer appealed.

The Appeals Court held that Lawrence Act, establishing financial conditions to ensure the fiscal stability of city, did not allow city to avoid its obligations under Wage Act.

Lawrence Act, a special act that established financial conditions to ensure the fiscal stability of city of Lawrence, and which provided that no personnel expenses earned or accrued within any department shall be charged to or paid from any allotment of a subsequent period without the written approval of the mayor, did not allow city to avoid its obligations under Wage Act, and thus city was required to pay retired police officer for compensatory time that he had earned and accrued prior to being injured on duty. Lawrence Act did not contain any provisions expressing a legislative intent to override Wage Act, and interpreting Lawrence Act to shield city from its obligations would lead to absurd and inconsistent results.

PUBLIC CONTRACTS - MINNESOTA

Rochester City Lines, Co. v. City of Rochester

Court of Appeals of Minnesota - April 7, 2014 - N.W.2d - 2014 WL 1344320

Rochester City Lines (RCL) operated a fixed-route transit service in respondent City of Rochester since 1966. In 1975, RCL began receiving subsidies from the city. In 1977, the city began receiving federal transit financial assistance. In 2010, however, the Federal Transit Administration (FTA) determined that the contract between RCL and the city needed to be competitively bid to comply with federal transit aid requirements.

The city received responsive bids from four companies, including RCL. After reviewing the proposals, the city determined that First Transit's proposal represented the "best-value" for the city and awarded it the contract.

The Court of Appeals held that:

- The city did not take RCL's property without just compensation;
- The bidding process was not unfair, prejudicially biased, and infected with organizational conflicts of interest;
- The bidding process did not violate RCL's due-process rights; and
- RCL had not been defamed by a city council member.

JURISDICTION - MISSOURI

Cromeans v. Morgan Keegan & Co., Inc.

United States District Court, W.D. Missouri, Central Division - April 8, 2014 - Slip Copy - 2014 WL 1375038

The City of Moberly, Missouri approved the issuance of $39 million in municipal bonds by its Industrial Development Authority for a manufacturing facility ("Mamtek").

The facility failed and the bondholders sued the underwriter, Morgan Keegan, alleging that the offering statement contained material misrepresentations and omissions. Underwriter subsequently filed a third–party complaint for contribution and indemnity against Perkins Coie, Mamtek's

intellectual property counsel during the relevant period.

Perkins Coie moved to dismiss, arguing that the Court lacked personal jurisdiction. Morgan Keegan maintained that Perkins Coie was subject to both specific and general personal jurisdiction.

The District Court held that:

- Neither Missouri's long-arm statute nor the Due Process Clause permit the exercise of personal jurisdiction based on Perkins Coie's alleged transaction of business in Missouri, as there was no evidence that Perkins Coie entered into any kind of business transaction in Missouri or with any resident of Missouri, and
- Perkins Coie was not subject to general jurisdiction, as it had not developed continuous and systematic general business contacts within the state.

"In sum, the type of attenuated and passive involvement in a client's business dealings evidenced here cannot suffice to subject a law firm to personal jurisdiction in whichever state the client, at some point, chooses to conduct business. Although Mamtek apparently elected to use the bond proceeds to pay for some or all of Perkins Coie's services, there is no evidence that Perkins Coie contracted to be paid, or was even aware that it was paid, from the bond proceeds. Accordingly, Mamtek's unilateral decision to use the bond proceeds to make repayments on prior debt of Mamtek International, which included payments to Perkins Coie for services rendered before the Moberly project had even become a concept, does not show that Perkins Coie transacted business in Missouri."

With regard to general jurisdiction, the court noted that Perkins Coie did not have an office in Missouri, had two partners with active Missouri bar licenses, and derived seven-tenths of one percent of its annual gross revenue from Missouri clients.

MUNICIPAL ORDINANCE - NEW JERSEY

State v. Frye

Superior Court of New Jersey, Appellate Division - April 9, 2014 - Not Reported in A.3d - 2014 WL 1375587

Defendant challenged the establishment of the factual basis upon which he entered a conditional guilty plea for violating Municipal Ordinance 230–92(a)(3) for continuing "the use of [a] temporary trailer without [an] issued construction permit," after the revocation of the Certificate of Occupancy (CO) by the Zoning officer.

The appeals court agreed, finding that the record clearly demonstrated that defendant did not understand how he could be guilty of having a trailer in the property "after revocation of a certificate of occupancy." In order to have established a factual basis, defendant must have admitted to guilt of all the essential elements of the offense. "In our view, defendant did not do so here."

ZONING - NORTH CAROLINA

PBK Holdings, LLC v. County of Rockingham

Court of Appeals of North Carolina - April 1, 2014 - S.E.2d - 2014 WL 1366198

County adopted an ordinance defining and regulating "high impact uses."
PBK Holdings, LLC, filed a complaint against the county challenging the ordinance. RBK alleged that it had a special use permit application pending in the county to develop a landfill. RBK stated that the proposed landfill would fall within the "Regional Solid Waste Management Facilities/Landfills–Privately Owned" category. Therefore, RBK argued that it had a "specific and legal personal legal interest in the Rockingham County zoning ordinances that impact its plans to develop a landfill."
The Court of Appeals concluded that the ordinance did not violate the Equal Protection and Commerce Clauses of the North Carolina and United States Constitutions and also rejected PBK's arguments that certain provisions of the ordinance were preempted by state and federal law.

ZONING - NORTH CAROLINA

Patmore v. Town of Chapel Hill North Carolina

Court of Appeals of North Carolina - April 1, 2014 - S.E.2d - 2014 WL 1365987

Where defendant enforced a zoning amendment by citing the owners of rental properties rather than their tenants because it was a more effective method of enforcement, their enforcement against property owners was rationally related to the purpose of the zoning restriction and did not violate plaintiffs' right to substantive due process.

N.C. Gen.Stat. § 160A–301 governs a municipality's authority to regulate parking in public vehicular areas, while the zoning amendment was a land use restriction intended to curb over-occupancy of rental properties by limiting the number of cars parked on a rental property. Because the zoning amendment and N.C. Gen.Stat. § 160A–301 did not address the same subject, the principle of *expressio unius est exclusio alterius* did not apply.

PUBLIC UTILITIES - OREGON

Rogue Valley Sewer Services v. City of Phoenix

Court of Appeals of Oregon - April 9, 2014 - P.3d - 2014 WL 1387318

At issue in this case was the validity of a City of Phoenix ordinance that imposed on Rogue Valley Sewer Services (RVS) a five percent fee on gross receipts that RVS collects from residents of the city for sewer services.

RVS contended that the city was not authorized to charge the fee and seeks to enjoin the city from enforcing the ordinance. The trial court decided the issue on summary judgment and concluded that the city's ordinance was a valid exercise of the city's authority. RVS appealed and the Court of Appeals affirmed.

EMPLOYMENT - OREGON

Bova v. City of Medford

Court of Appeals of Oregon - April 2, 2014 - P.3d - 2014 WL 1316267

Retired city employee brought action against city, seeking declaratory and injunctive relief to require city to make health insurance coverage available to him, and alleging that city's failure to provide coverage was age discrimination. The Circuit Court entered summary judgment in favor of employee on his claims for declaratory and injunctive relief, and, following a bench trial, entered judgment in favor of employee on the age discrimination claim. City appealed.

The Court of Appeals held that:

- Fact issue precluded summary judgment, and
- Disparate impact theory on discrimination claim was different from pleaded theory and thus could not be tried in absence of consent of parties.

Fact issue, as to whether the costs of providing retired employees with health insurance coverage made it unduly burdensome for city to provide that coverage, precluded summary judgment on retired city employee who sought declaratory and injunctive relief that city was required to provide him with health care coverage, under statute requiring a local government "insofar as and to the extent possible," make health insurance coverage available for retired employees to the same extent as coverage was available to non-retired employees.

Disparate impact theory for retired city employee's age discrimination claim, on which theory claim was tried, was different from employee's pleaded theory of disparate treatment, and thus trial court could not allow employee to try claim on disparate impact theory in absence of express or implied consent of parties. A disparate impact case required a showing that a facially neutral policy or criterion had a disproportionately negative impact on a protected class, while disparate treatment required a showing of intentional discrimination.

LIABILITY - PENNSYLVANIA

Nagle v. Trueblue, Inc.

Commonwealth Court of Pennsylvania - April 2, 2014 - Not Reported in A.3d - 2014 WL 1327611

After dude falls off the back of a garbage truck and dies (awkward eulogy alert), executor brought negligence action in Dauphin County against the Township and the Employment Agency.

The complaint also alleged that venue was proper in Dauphin County because the cause of action against the Employment Agency arose in Dauphin County and because transactions or occurrences took place in Dauphin County, out of which the cause of action against the Township arose.

The Township argued that the only viable cause of action that Executor may raise against it in this case could arise from the purported negligent operation of the Township-owned truck pursuant to the vehicle exception to governmental immunity under Section 8542(b)(1) of the Judicial Code, 42 Pa.C.S. § 8542(b)(1). Because the purportedly negligent operation of the truck only occurred in Perry County, the Township claimed that venue is only proper in that county under Pa. R.C.P. No. 2103(b) and Section 333 of the JARA Continuation Act, and that the trial court erred in overruling its preliminary objection to venue. The appeals court agreed, reverse/remanding.

IMMUNITY - TEXAS

City of Houston v. Downstream Environmental, L.L.C.

Court of Appeals of Texas, Houston (1st Dist.) - April 3, 2014 - S.W.3d - 2014 WL 1327936

Downstream Environmental, L.L.C. sued the City of Houston for damages that allegedly arose when the discharge line between Downstream's liquid waste disposal facility and the City's sewer system was temporarily closed. The lawsuit also implicated rate increases and a billing dispute that occurred after the temporary closure of the discharge valve. In addition to seeking damages, Downstream sought equitable and injunctive relief pursuant to its claims under the Texas Bill of Rights.

The City filed a plea to the jurisdiction based on governmental immunity. Downstream challenged the City's assertion of immunity primarily on the basis that the City was engaged in a proprietary—not governmental—function. Downstream also alleged that the City had waived governmental immunity by its actions in several respects. The trial court denied the jurisdictional plea in its entirety, and the City timely appealed.

The appeals court reversed the trial court's order in part, holding that the City was immune from Downstream's claims for money damages arising from breach of contract, negligence, and alleged constitutional violations. The court also found no applicable waiver of the City's immunity as to Downstream's contract and negligence claims for monetary damages. It remanded the case to the trial court to allow the remaining requests for injunctive relief based on constitutional claims to proceed.

The court concluded that the City's action in closing Downstream's discharge sewer line was necessary to protect the sewer system from non-conforming waste and to allow the system to reach proper operational status. This leaves little room for doubt that the services the City provided to Downstream were sanitary sewer services – which is statutorily defined as a governmental function – to the extent that all the wastewater went through the same sanitary sewer lines to the City's publicly owned treatment works.

MUNICIPAL ORDINANCE - WEST VIRGINIA

Barber v. City of Charleston

Supreme Court of Appeals of West Virginia - April 4, 2014 - Not Reported in S.E.2d - 2014 WL 1345491

Lawyer pulled into a no-parking zone, activated his blinkers, left the car idling and left the vehicle to

drop off a prescription to another attorney. Dude got a parking ticket. Lawyer argued that he was not "parking."

The Circuit Court held, after bench trial, that defendant was guilty of parking in a no parking zone in violation of the municipal code. Of course he appealed.

The Supreme Court of Appeals held that circuit court did not abuse its discretion in finding defendant guilty of parking in a no parking zone in violation of the city's municipal code and fining him $25.

Pursuant to municipal code, the term "park," when prohibited, included the standing of a vehicle, municipal code provided that a person could park temporarily for the purpose of and while actually engaged in loading or unloading. Defendant left the vehicle's motor running, activated the blinkers, and exited it briefly to deliver a prescription to another attorney, and defendant was not "loading or unloading" merely because he was bringing a prescription to a colleague.

BONDS - TEXAS

Alejos v. State

Court of Appeals of Texas, Austin - April 2, 2014 - S.W.3d - 2014 WL 1349018

This case was an expedited appeal under chapter 1205 of the Government Code, which creates a special proceeding whereby "issuers" of "public securities" can obtain a declaratory judgment—also expedited—as to the legality or validity of such securities and related official acts.

George Alejos sought to appeal a final judgment validating the issuance of approximately $33 million in sales tax revenue-backed bonds by VIA Metropolitan Transit Advanced Transportation District (the District). Mr. Alejos also appeals a subsequent order conditioning his continued participation in the litigation on his posting of a $3.6 million bond, the amount the district court found to

Alejos's asserted procedural irregularities – that the district court did not afford him the opportunity for notice and a hearing that subchapter E requires. This was a product of confusion regarding Alejos's "party" status. Having concluded that Alejos was a "party" entitled to appeal and who was subject to subchapter E's bond requirements to the same extent as "named parties," the court was compelled to agree with Alejos that he was entitled to the notice and hearing procedures that subchapter E requires before setting a bond. As such, the Order Setting Bond was reversed was reversed and remanded for a new bond hearing.

"The District does not seriously dispute that the Order Setting Bond was, in these respects, procedurally flawed, but urges us to proceed to the merits of Alejos's Judgment Appeal nonetheless and affirm the final judgment. We conclude we should not do so, as the Legislature has conditioned our jurisdiction to reach those merits on Alejos's compliance with subchapter E's bond requirement, and that issue has yet to be resolved. Unless and until our jurisdiction over the Judgment Appeal is firmly established, we should not "jump ahead" to the merits of that appeal—especially where the merits involve quite significant and complex questions regarding the District's legal authority relative to its taxpayers—lest we exceed our proper role within the constitutional separation of powers."

MUNICIPAL ORDINANCE - ALASKA

Municipality of Anchorage v. Holleman

Supreme Court of Alaska - March 28, 2014 - P.3d - 2014 WL 1266787

Citizen-sponsors brought declaratory judgment action seeking to repeal municipal ordinance by referendum. The Superior Court granted summary judgment in favor of citizen-sponsors, and ordered that referendum application be accepted. Municipality appealed.

The Supreme Court of Alaska held that:

- Referendum application was not preempted by the Public Employment Relations Act (PERA);
- Referendum application was not preempted by municipal charter;
- Municipality's home-rule status to enact labor ordinances was not exclusive of the citizens' correlative right of direct legislation;
- Referendum sought by citizen-sponsors did not violate the Constitution's prohibition against application of a referendum to dedications of revenue or appropriations, or municipal charter's corresponding prohibitions against use of a referendum for establishing budgets or appropriating funds; and
- Municipal ordinance, and therefore the referendum seeking to repeal it, were legislative rather than administrative.

IMMUNITY - ARIZONA

Ponce v. Parker Fire Dist.

Court of Appeals of Arizona, Division 1 - March 27, 2014 - P.3d - 2014 WL 1257140

Homeowner whose house was almost completely destroyed by fire sued neighbor, in whose home the fire apparently began, and filed amended complaint adding claim of negligence against fire department for failing to fully extinguish fire. Fire department moved for summary judgment. The Superior Court granted motion. Homeowner appealed.

The Court of Appeals held that:

- Fire department waived its notice of claim defense by actively litigating the merits and failing to seek prompt judicial resolution of the defense, and
- Genuine issue of material fact existed as to fire department standards in the use of thermal imaging equipment, precluding summary judgment.

Genuine issues of material fact existed as to fire department standards in the use of thermal imaging equipment, and whether department breached standard of care, precluding summary judgment in homeowner's action alleging that fire department negligently failed to detect ember that had settled

in attic insulation following earlier fire that had damaged garage.

SCHOOLS - COLORADO

Lawrence v. School Dist. No. 1

United States Court of Appeals, Tenth Circuit - March 28, 2014 - Fed.Appx. - 2014 WL 1259588

African-American woman who had worked as a social worker in the Denver public school system brought action against school district and board, alleging, inter alia, that she was terminated in retaliation for her decision to file a racial discrimination complaint with the Equal Employment Opportunity Commission (EEOC). The District Court granted defendants' motion for summary judgment, and plaintiff appealed.

The Court of Appeals held that:

- Plaintiff failed to establish that her protected activity was the cause of her former employer's materially adverse action in assigning her to split her time at four different locations;
- Even assuming that plaintiff's suspensions qualified as materially adverse actions, neither the school district nor the school board was liable for plaintiff's supervisor's decision to suspend her; and
- Even assuming that a "cat's paw" claim could be brought here, plaintiff failed to establish that her supervisor's alleged bias proximately caused her termination.

EASEMENTS - GEORGIA

Fulton County v. City of Sandy Springs

Supreme Court of Georgia - March 28, 2014 - S.E.2d - 2014 WL 1266247

City and two individual homeowners brought action against county, county board of commissioners, and county director of public works, asserting that county retained ownership of and responsibility for two drainage retention ponds and a dam located within the city, and seeking declaratory judgment, mandamus, and injunctive relief. The Fulton County Superior Court entered judgment in favor of city. County appealed.

The Supreme Court of Georgia held that:

- County that was granted easement to construct, maintain, and use dam and detention pond was responsible for maintaining the easements as long as it held them;
- Constitutional provision stating that a county may not provide storm water and sewage collections and disposal systems inside the boundaries of another municipality except by contract with the affected municipality did not prohibit county from maintaining easements;
- Easements granted on portion of unincorporated county property did not automatically terminate when city was subsequently created in that location; and

- County's responsibility to maintain easements would continue only until easements were legally transferred, terminated, or prospectively abandoned.

IMMUNITY - ILLINOIS

Suchy v. City of Geneva

Appellate Court of Illinois, Second District - March 28, 2014 - N.E.3d - 2014 IL App (2d) 130367

Independent administrator of decedent's estate brought personal injury and wrongful death action against city, park district, and county arising from decedent's death from injuries sustained when he jumped into river downstream from dam to save child. City, park district, and county moved to dismiss. The Circuit Court granted motions. Independent administrator appealed.

The Appellate Court held that the city, park district, and county did not owe decedent duty to warn of or protect against open and obvious risks presented by river and dam.

City, park district, and county did not owe duty to bystander who died after he jumped into river downstream from dam to save child. The water and dam were open and obvious conditions, making the likelihood of injury low, it was not foreseeable that a person in bystander's position would conclude that advantages of jumping into water to save child's life would outweigh risk of drowning himself or sustaining injuries that subsequently took his life, and installation of fences and other measures, in addition to existing warning signs, would impose significant burden.

Deliberate encounter exception to the open-and-obvious doctrine, providing that harm may be foreseeable when landowner has reason to expect that invitee would proceed to encounter the obvious danger because doing so would outweigh the apparent risk, did not apply to analysis of whether city, park district, and county owed duty to bystander who died after he jumped into river downstream from dam to save child. The exception required the presence of compulsion or impetus, and there was no legal or economic compulsion to rescue.

CHURCHES - LOUISIANA

Parents of Minor Child v. Charlet

Supreme Court of Louisiana - April 4, 2014 - So.3d - 2013-2879 (La. 4/4/14)

Parents of child sexual abuse complainant brought action against priest and church, alleging priest, as a mandatory reporter, had failed to report complainant's abuse allegations against another parishioner and that church was vicariously liable for the priest's failure to act. The District Court denied defendants' motion to exclude evidence of complainant's confession with priest. The Court of Appeal reversed order denying motion to exclude evidence and, on its own motion, entered peremptory exception of no cause of action. Parents petitioned for certiorari review.
The Supreme Court of Louisiana held that:

- Priest could not assert priest-penitent privilege on his own behalf, and
- Factual dispute as to whether priest violated mandatory reporting requirements precluded entry of peremptory exception of no cause of action.

The priest-penitent privilege belonged exclusively to child sexual abuse complainant, as the penitent-

communicant who had reported alleged sexual abuse to priest during a confession, not to the priest, and thus, priest could not assert the privilege to protect himself in a civil action in which complainant's parents petitioned for damages based on allegation that priest, as a mandatory reporter, had a duty to report complainant's allegations of abuse. Evidence of the confession was admissible in its entirety, as complainant was free to testify and introduce evidence as to her own confession.

Genuine issue of material fact existed as to whether communications between child sexual abuse complainant and priest were confessions per se and whether the priest obtained knowledge outside the confessional that would trigger his duty, as a mandatory reporter, to report complainant's allegations against an adult parishioner, thus precluding entry of peremptory exception of no cause of action.

SCHOOLS - LOUISIANA

Sinclair v. School Bd. of Allen Parish

United States Court of Appeals, Fifth Circuit - March 31, 2014 - Fed.Appx. - 2014 WL 1273843

Teacher commenced civil rights action against school board and school officials, alleging that she had been deprived of right without due process to be returned to "same position" following sabbatical leave. The District Court granted judgment for defendants after jury trial in their favor. Teacher appealed.

The Court of Appeals held that term "position," in Louisiana statute providing for sabbatical leaves for teachers and for their return to same position, meant that of teacher.

HOUSING - MASSACHUSETTS

Loring Towers Associates ex rel. NHPMN Management, LLC v. Furtick

Appeals Court of Massachusetts, Essex - March 27, 2014 - N.E.3d - 85 Mass.App.Ct. 142

Landlord brought summary process action in District Court Department, Salem Division, against tenant, after Boston Housing Authority (BHA) terminated tenant's section 8 housing assistance benefits and stopped paying subsidized portion of tenant's rent. Tenant filed third-party complaint against BHA, seeking reinstatement of benefits. BHA moved to dismiss third-party complaint. Following transfer, the Housing Court Department denied the motion to dismiss and instead ordered BHA to reinstatement benefits retroactive to date of termination. BHA appealed.

The Appeals Court held that:

- Tenant could be allowed to file third-party complaint against BHA, and
- BHA violated due process in terminating tenant's benefits.

In landlord's summary process action, tenant could be allowed to file third-party complaint against BHA seeking reinstatement of Section 8 housing assistance benefits, under rule permitting a defendant to bring in a third party who is or may be liable to him for all or part of the plaintiff's claim against him, since BHA was potentially liable for contribution for a portion of tenant's rent arrearage; nothing in summary process statute prohibited tenant from filing third-party complaint.

BHA violated tenant's due process rights in terminating his Section 8 housing assistance benefits under the Federal Housing Choice Voucher Program. Termination notice incorrectly stated that decision was final and that there was no further right to appeal, and BHA grievances and appeals administrator denied tenant's request for a late hearing and upheld the termination decision without any hearing officer having made a compelling circumstances evaluation.

EMINENT DOMAIN - MINNESOTA

Great River Energy v. Swedzinski

Court of Appeals of Minnesota - March 31, 2014 - Not Reported in N.W.2d - 2014 WL 1272381

Appellants are public utilities engaged in the business of generating and transmitting electric power throughout Minnesota, North Dakota, South Dakota, and Wisconsin. Under the name "CapX2020," appellants have undertaken to construct a 345 kilovolt high voltage transmission line from Brookings, S.D. to Hampton, MN. The Minnesota Public Utilities Commission (MPUC) issued appellants the required certificate of need and route permit for the power line, thereby authorizing appellants to exercise their eminent-domain powers to acquire the right-of-way for the project.

In August 2012, appellants initiated a condemnation action, seeking to acquire easements for the power-line project. In October 2012, respondent landowners notified appellants of their "buy-th--farm" election under Minn.Stat. § 216E.12, subd. 4 (2012), requiring appellants to acquire fee title to their 218.85 acres of land instead of taking only the 8.86 acre easement needed for the project.

The District Court granted landowner's buy-the-farm election. Appellants appealed the election, arguing that the District Court failed to consider the law's reasonableness requirement, given that the total amount of respondents' land was so much greater than the actual amount of land needed for the power line easement. The Court of Appeals affirmed the election, finding that it fell within the provisions of the statute.

ZONING - NEBRASKA

Rodehorst Brothers v. City of Norfolk Board of Adjustment

Supreme Court of Nebraska - March 28, 2014 - N.W.2d - 287 Neb. 779

Partnership owned a fourplex apartment building in Norfolk, Nebraska. The building's use as a fourplex (to house up to four families), in an area zoned R–2 for one- and two-family use, was a legal, nonconforming use.

Neb.Rev.Stat. § 19–904.01 (Reissue 2012), as well as the applicable zoning ordinance, both provide

that the right to continue such a use is lost if it has been discontinued for 1 year.

The partnership argued that although some of the apartments in the building were unoccupied for several years, the building's use as a fourplex never changed, primarily because it had all the trappings of a fourplex and the units were available for use.

The Supreme Court of Nebraska affirmed the City of Norfolk Board of Adjustment's ruling that the partnership had forfeited its right to continue the use due to the fact that two of the four apartment units had been unoccupied for more than one year. Relevant to this conclusion was the fact that the owners had not attempted to find new tenants for the unoccupied apartments.

The court also held that the City of Norfolk Board of Adjustment lacked authority under Neb.Rev.Stat. § 19–910 (Reissue 2012) to grant a "use" variance to otherwise allow the use to continue and that there was no "taking" of the property.

BONDS - NEVADA

Goldman, Sachs & Co. v. City of Reno

United States Court of Appeals, Ninth Circuit - March 31, 2014 - F.3d - 14 Cal. Daily Op. Serv. 3511

Underwriter and broker-dealer commenced action against municipality to enjoin arbitration that municipality had initiated before Financial Industry Regulatory Authority (FINRA) to resolve its claims against underwriter arising out of their contractual relationship. The District Court denied underwriter's motion for injunctive relief and entered final judgment in favor of municipality. Underwriter appealed.

The Court of Appeals held that:

- FINRA Rule 12200 that described certain circumstances under which FINRA Director could deny access to FINRA arbitration forum did not require FINRA members to consent to FINRA determination of issue of arbitrability;
- Municipality qualified as "customer" of underwriter; and
- Forum selection clause superseded default obligation of underwriter Rule 12200 to arbitrate.

Municipality qualified as "customer" of underwriter and broker-dealer, and thus FINRA rule required it to arbitrate at request of municipality unless municipality disclaimed its right to arbitrate through contract, where municipality issued approximately $211 million in auction rate securities (ARS) to finance series of city projects, underwriter and broker-dealer provided services in course of its securities business activities, and municipality compensated it in form of underwriter's discounts and annual broker-dealer fees.

Forum selection clause superseded default obligation of underwriter and broker-dealer under FINRA rule to arbitrate, where parties agreed to bring claims that arose out of their contractual relationship in District of Nevada. Presumption in favor of arbitrability did not apply, express waiver

of arbitration was not required, requirement to bring “all actions and proceedings” in District of Nevada included arbitration, and waiver of “all right to trial by jury” merely stated the obvious as to arbitration.

PUBLIC UTILITIES - NEW YORK

Borough of Upper Saddle River, N.J. v. Rockland County Sewer Dist. No. 1

United States District Court, S.D. New York - March 31, 2014 - Slip Copy - 2014 WL 1311770

Citizens’ brought suit under the Clean Water Act and state common law, alleging that, in the course of operating a sewage treatment facility, Rockland County Sewer District # 1 has polluted-and will likely continue to pollute-the Saddle River. Plaintiffs brought four causes of action: continuing violations under section 301 of the Clean Water Act; private nuisance, public nuisance and trespass claims under state common law.

Both parties moved for summary judgment. The issue was to what extent Defendant could be held liable for its sewage spills through a citizen suit brought under the Clean Water Act and state common law.

The District Court:

- Denied Defendant’s motion for summary judgment with respect to Article III standing;
- Denied Defendant’s motion for summary judgment to the extent that it was based on an argument that Plaintiffs failed to demonstrate “ongoing violations”;
- Denied Defendant’s motion to the extent that it is based on the argument that this action was duplicative of a 2006 Consent Order;
- Found that Plaintiffs had produced sufficient evidence that, notwithstanding the 2006 Consent Order, there remained a “realistic probability” that Defendant would continue to violate the Act;
- Denied Plaintiffs’ request for injunctive relief, without prejudice, awaiting submission of further evidence on the issue;
- Granted Defendants’ motion for summary judgment on Plaintiffs’ private nuisance claims.

NONPROFITS - NEW JERSEY

Kaplan v. Saint Peter's Healthcare System

United States District Court, D. New Jersey - March 31, 2014 - Slip Copy - 2014 WL 1284854

Plaintiff class action on behalf of participants and beneficiaries of the Saint Peter’s Healthcare System Retirement Plan (the “Plan”), alleging that the Plan was being improperly maintained by

SPHS as a "church plan" under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*

The question posed was whether a non-profit healthcare corporation may establish and maintain a church plan if it is controlled by or associated with a church. If answered in the affirmative, the Court must then determine whether this interpretation of the church plan definition violates the Establishment Clause of the United States Constitution.

The Court concluded, as a matter of law, SPHS's employee pension Plan was not a church plan because it had not been established by a church, notwithstanding the fact that the IRS had issued a private letter ruling to the contrary.

STANDING - NEW YORK

Association for a Better Long Island, Inc. v. New York State Dept. of Environmental Conservation

Court of Appeals of New York - April 1, 2014 - N.E.3d - 2014 N.Y. Slip Op. 02216

Association dedicated to economic growth of region, land-owning limited liability company (LLC) and its managing partner, and town and its community development agency (CDA) commenced hybrid Article 78 petition/declaratory judgment action challenging regulatory amendments, made by Department of Environmental Conservation's (DEC) Division of Fish, Wildlife and Marine Resources, establishing a formal process through which individuals could obtain permits to allow for incidental taking of endangered or threatened species. The Supreme Court, Albany County, granted Department's motion to dismiss. Petitioners appealed. The Supreme Court, Appellate Division, affirmed. Leave to appeal was granted to town and its community development agency.

The Court of Appeals held that:

- Town and CDA sufficiently alleged an injury in fact, as required for standing to challenge Department's procedures for adopting the amended regulations;
- Town and CDA satisfied "zone of interests" requirement for standing to challenge Department's procedures for adopting the amended regulations; but
- Alleged economic injuries did not support standing to bring claim asserting that Department issued negative declaration without taking a hard look; and
- Substantive challenges to amended regulations were not ripe.

ZONING - NEW YORK

Christian Airmen, Inc. v. Town of Newstead Zoning Bd. of Appeals

Supreme Court, Appellate Division, Fourth Department, New York - March 28, 2014 - N.Y.S.2d - 2014 N.Y. Slip Op. 02171

Airport operator petitioned for Article 78 review of a decision of town's zoning board of appeals (ZBA), which denied the operator's request for a use variance to authorize the paving of an existing

turf runway at the airport. In a special proceeding under Article 78, the Supreme Court, Erie County, vacated and annulled ZBA's decision, and granted operator's request. ZBA appealed.

The Supreme Court, Appellate Division, held that substantial evidence supported finding of town's ZBA that airport operator failed to demonstrate unnecessary hardship, and thus supported ZBA's decision to deny operator's request for use variance to authorize paving of existing turf runway at airport. Nothing in record supported operator's contention that runway predated enactment of town's first zoning ordinance, precluding any finding of prior nonconforming use, operator failed to establish that, in absence of variance, it would not realize reasonable return on property, and, because deeds proffered by ZBA demonstrated that operator did not acquire portions of subject property until nearly ten years after enactment of ordinance, any alleged hardship was self-created.

TAX - OHIO

Laborde v. City of Gahanna

United States Court of Appeals, Sixth Circuit - April 1, 2014 - Fed.Appx. - 2014 WL 1282546

Taxpayers brought putative class action in state court against city, city official, and Ohio Regional Income Tax Agency, alleging city used a tax form that resulted in the overpayment of municipal income taxes, and asserting takings claims under the United States and Ohio Constitutions, as well as unjust enrichment. Following removal to federal court, the District Court granted defendants' motions for judgment on the pleadings, and taxpayers appealed.

The Court of Appeals held that:

- Alleged overpayment and city's retention of taxes was not a taking under the Fifth Amendment;
- Tax Injunction Act (TIA) applied; and
- TIA barred prosecution of takings claim in federal court.

Taxpayers' alleged overpayment of municipal taxes, allegedly caused by city's use of tax form that understated the amount of tax credit taxpayers were entitled to receive for income taxes paid to other municipalities, was not a taking of private property under the Fifth Amendment. Tax credits were part and parcel of the municipal income tax system, and Fifth Amendment takings clause was not implicated by the collection of taxes.

Tax Injunction Act (TIA) applied in taxpayers' action alleging that city used tax form that allegedly resulted in the overpayment of municipal income taxes by understating the amount of tax credit taxpayers were entitled to receive for income taxes paid to other municipalities, which allegedly amounted to a taking under the Fifth Amendment. Tax credit impacted taxpayers' tax liability and was a credit for taxes already paid to another municipality, and taxpayers' takings claims implicated the correct interpretation of the city code and sought relief that would have the effect of limiting their tax liability.

Taxpayers had a plain, speedy, and efficient remedy under Ohio statute, which allowed any person to obtain a declaration of their rights under, inter alia, municipal ordinances, and thus Tax Injunction Act (TIA) barred prosecution of taxpayers' Fifth Amendment takings claims, based on city's use of tax form that allegedly resulted in the overpayment of municipal income taxes by allegedly understating the amount of tax credit taxpayers were entitled to receive for income taxes paid to other municipalities, in federal court.

BALLOT INITIATIVE - OKLAHOMA

In re Initiative Petition No. 397, State Question No. 767

Supreme Court of Oklahoma - April 1, 2014 - P.3d - 2014 OK 23

Proponents of initiative to amend state constitution appealed ballot title prepared by the Attorney General regarding proposal to fund storm shelters and campus security for local school districts and career technology districts.

The Supreme Court of Oklahoma held that:

- Proponents were required to file or submit a copy of the petition and a copy of the ballot title to the Attorney General when filing them with the Secretary of State;
- Attorney General had five business days to file response to ballot title after filing with Secretary of State;
- Attorney General's late response was statutorily effective;
- Proponents bore burden to show that the title was clearly contrary to either statutory law or the Oklahoma Constitution;
- Attorney General's ballot title complied with statutory requirements of impartiality and correctness;
- Ninety-day period of time to collect signatures commences when the ballot title appeal is final.

Petitioners' initially proposed ballot title, now the substitute ballot title offered on appeal, states as follows:

> This measure amends the Oklahoma Constitution. It adds a new section 44 to Article 10. Bonds could be sold. Up to Five Hundred Million Dollars ($500,000,000.00) could be available. Bond money would be used for school districts and career technology districts. Bond money would be used for storm shelters or secure areas. State franchise taxes would repay these bonds. If money from franchise tax was not enough, the Legislature could use the General Revenue Fund to repay the bonds. State bond money could be used by school districts or career technology districts to reduce local debt or eliminate local debt incurred for storm shelters or secure areas. If enough money from franchise tax remains after state bonds are paid for, the balance of franchise tax could be used for grants for storm shelters for people and businesses. When state bonds are paid off, additional bonds could be sold to keep the programs funded. Laws would be written for details about using bond money. State agencies could make rules about state bond money. These rules would have the effect of law. The Oklahoma State Constitution is being amended to allow state bond money to pay for shelters and secure areas in schools.
>
> The current ballot title for the initiative, the ballot title prepared by the Attorney

General, states as follows:

This measure adds Article 10, Section 44 to the Oklahoma Constitution. The new section authorizes the issuance of up to 500 million dollars in State bonds. The bond money would be used by local school districts and career technology districts for storm shelters and campus security.
The measure does not provide for new State revenues to pay for the bonds. Under the measure the State franchise tax revenues would no longer go into the General Revenue Fund, which is the primary fund used to pay for State Government. Rather, franchise taxes revenues would be used for annual bond payments (principal and interest).
In any year in which the franchise tax revenues are not sufficient to make annual payments, the Legislature, at its discretion, could use General Revenue Fund monies to make the annual bond payment.
In years in which not all the franchise tax revenues are needed to make payments, the remaining franchise tax revenues—with Legislative approval—could be used for storm shelter grants to individuals and businesses.

In authorizing these bond and grant programs, the measure creates exceptions to the Constitution's prohibitions on gifts and the use of the state's credit.

TORT CLAIMS ACT - OKLAHOMA

Hall v. GEO Group, Inc.

Supreme Court of Oklahoma - April 1, 2014 - P.3d - 2014 OK 22

Inmate brought negligence action against private prison facility after inmate was injured while being transported to a medical appointment. The District Court granted summary judgment in favor of facility. Inmate appealed.

The Supreme Court of Oklahoma held that:

- Compliance with notice provisions of Governmental Tort Claims Act (GTCA) was required to bring tort action against private prison facility;
- Application of notice provisions of GTCA to actions against private prisons did not violate equal protection; and
- Application of notice provisions of GTCA to private prisons did not constitute unconstitutional special law.

IMMUNITY - PENNSYLVANIA

Boyden v. Township of Upper Darby

United States District Court, E.D. Pennsylvania - March 24, 2014 - F.Supp.2d - 2014 WL 1152149

Arrestee brought action against township and police officer, who used stun gun during arrest, pursuant to § 1983 and state tort law, alleging officer used excessive force in violation of the Fourth Amendment and committed assault and battery under state law and asserting a claim for municipal liability against township. Defendants moved to dismiss for failure to state a claim and on qualified immunity grounds.

The District Court held that:

- Arrestee stated a claim for excessive force;
- Officer was not entitled to qualified immunity; and
- Arrestee stated a claim for municipal liability against township.

Arrestee's allegations that he was already in custody and restrained by handcuffs, showing no attempt to resist, when arresting officer used stun gun on him were sufficient to state a claim against officer for use of excessive force in violation of the Fourth Amendment.

Arresting officer was not entitled to qualified immunity in arrestee's § 1983 action alleging officer used excessive force in violation of the Fourth Amendment by using stun gun on him. A reasonable law enforcement officer should know that excessive uses of stun guns to effectuate an arrest would constitute a Fourth Amendment violation.

Arrestee's allegations that two township police officers were fired for use of excessive force and were then reinstated, that there were two cases in which officers were sued for use of excessive force, and that arresting officer participated in the beating of another individual, during which he allegedly used his stun gun repeatedly, were sufficient to allege that township officers acted pursuant to a municipal custom condoning the use of excessive force during arrests, as required to state a claim for municipal liability under § 1983 against township based on arresting officer's use of stun gun on arrestee.

ASSESSMENTS - RHODE ISLAND

Commerce Park Associates 1, LLC v. Houle

Supreme Court of Rhode Island - March 31, 2014 - A.3d - 2014 WL 1281862

Property owners brought declaratory judgment action challenging the legality of sewer assessments, naming as defendants town tax collector, finance director, town, and sewer authority. The Superior Court granted town's motion to dismiss, but denied its request for sanctions. Property owners appealed, and town cross appealed.

The Supreme Court of Rhode Island held that:

- The appeals process set forth in statute governing petitions for relief from any assessment of taxes did not apply to any sewer assessments or charges levied by the town pursuant to its authority under its enabling act, and
- Superior Court did not abuse its discretion in denying property owners' request for sanctions.

Sewer assessments and charges did not constitute “taxes” for appeal purposes, and thus, the appeals process set forth in statute governing petitions for relief from any assessment of taxes did not apply to any sewer assessments or charges levied by the town pursuant to its authority under town’s enabling act. Town enabling act referred to the means of raising funds in order to cover the cost and maintenance of sewer system as assessments and annual charges, and specifically distinguished between that portion of the cost and construction of the sewer works that would be paid for by the town through its general taxation and the portion to be paid for by assessments and annual charges against individual parcels of property.

MUNICIPAL ORDINANCE - VIRGINIA

Amin v. County of Henrico

Court of Appeals of Virginia, Richmond - April 1, 2014 - S.E.2d - 2014 WL 1281726

Defendant was convicted in the Circuit Court of carrying concealed weapon in violation of county ordinance. Defendant appealed. The Court of Appeals affirmed. Defendant appealed. The Supreme Court reversed and remanded.

On remand, the Court of Appeals held that:

- County ordinance, criminalizing as a violation of county law all conduct that would be criminal under certain provisions of the Virginia Code, could not have validly incorporated statute proscribing the act of carrying a concealed weapon, and
- Because trial court convicted defendant of violating a county ordinance that could not punish the conduct alleged in the final order, a violation of the ordinance was a legally insufficient basis for a criminal conviction, such that defendant’s conviction was void ab initio.

TAX - WASHINGTON

APL Ltd. v. Washington State Dept. of Revenue

Court of Appeals of Washington, Division 1 - March 31, 2014 - Not Reported in P.3d - 2014 WL 1289567

At issue in this retail sales tax refund action was whether five 800–ton cranes leased by plaintiff from the Port of Seattle constitute personalty, which is subject to retail sales tax, or fixtures, which is not.

Because the record failed to show one of the three essential elements to prove a fixture—the Port’s intent—the appeals court affirmed the trial court’s judgment denying a refund of taxes that APL paid.

MUNICIPAL ORDINANCE - WASHINGTON

Cannabis Action Coalition v. City of Kent

Court of Appeals of Washington, Division 1 - March 31, 2014 - P.3d - 2014 WL 1284870

Interest group brought declaratory judgment action challenging validity of city zoning ordinance prohibiting medical marijuana "collective gardens." The Superior Court dismissed claims. Plaintiffs appealed.

The Court of Appeal held that:

- Amendments to Medical Use of Cannabis Act (MUCA) did not legalize medical marijuana or collective gardens;
- Governor's veto message was the sole source of relevant legislative history to be considered in interpreting amendments that were enacted following sectional veto;
- Cities were authorized to enact zoning requirements to regulate or exclude collective gardens; and
- Ordinance did not conflict with state law.

INVERSE CONDEMNATION - WISCONSIN

Fromm v. Village of Lake Delton

Court of Appeals of Wisconsin - April 3, 2014 - Slip Copy - 2014 WL 1316607

Homeowner brought a takings claim under the inverse condemnation statute, WIS. STAT. § 32.10 (2009–10), and the takings clause of the Wisconsin Constitution, against Village after sustaining the destruction of his home due to severe flooding and resulting erosion in June 2008. Homeowner alleged that the Village unconstitutionally took his property without providing just compensation.

Homeowner made two arguments on appeal as to why the circuit court erred in dismissing his complaint on summary judgment. First, he argued that actions of the Village caused the flooding event and, thus, the Village must compensate him under the takings clause of the Wisconsin Constitution and the inverse condemnation statute. Second, he argued in the alternative that, whether or not he can point to proof of specific Village action, this court "should find a per se taking under the facts of this case." Essentially, homeowner contended that the court should apply the following as a per se rule: any time a governmental unit controls a dam and there is a loss of private property due to flooding associated with the dam's operation, the governmental unit is liable for a taking.

The court concluded that the Village did not act in a manner that unconstitutionally took homeowner's property, and also rejected his request that the court apply or create a per se rule.

ZONING - GEORGIA

Noble Parking, Inc. v. Centergy One Associates, LLC

Court of Appeals of Georgia - March 21, 2014 - S.E.2d - 2014 WL 1097955

Adjacent property owners brought action against operator of a park-for-hire business seeking to enjoin operation of business. City intervened and also sought injunctive relief. The trial court granted property owners and city summary judgment. Business operator appealed.

The Court of Appeals held that:

- Operator was not required to exhaust administrative remedies with city in order to defend action brought against it by neighboring property owners, and
- Operator's use of parking lot property for an outdoor horse show did not act to supersede its nonconforming use of property for park-for-hire business.

Operator of park-for-hire business was not required to exhaust administrative remedies with the city in order to defend action brought against it by neighboring property owners seeking to enjoin operation of business based on city code violation. Although city intervened in the action, operator was not seeking to circumvent the review process by instituting a collateral attack on the city's decision that its nonconforming use of property for a park-for-hire business had been superseded, but rather operator chose to resume its parking business after the city informed it of the decision regarding nonconforming use, thereby assuming the risk of the city would pursue a penalty for violation of the city code.

Park-for-hire business operator's use of parking lot property for an outdoor horse show did not act to supersede its nonconforming use of property for park-for-hire business pursuant to city code provision that allowed for a nonconforming use to be superseded by a permitted use. Use of property for outdoor show was a use that was only permitted or allowed by a special administrative permit, and because no such permit was issued, operator's use could not act to supersede the nonconforming use.

LIABILITY - GEORGIA

Battlefield Investments, Inc. v. City of Lafayette

Court of Appeals of Georgia - March 20, 2014 - S.E.2d - 2014 WL 1061491

Property owner whose building was damaged when sewer system backed up and overflowed brought negligence action against city. The trial court awarded summary judgment to city. Owner appealed.

The Court of Appeals held that:

- Doctrine of res ipsa loquitur did not apply, and
- Owner's motion to recuse trial judge was untimely.

Doctrine of res ipsa loquitur did not apply to incident in which sewer system at property owner's building backed up and overflowed and, thus, could not be used to establish city's negligent operation of the sewer system. There was evidence that the injury was produced by the intermediary cause of a flooding event of historic proportions, and property owner could have prevented the backflow incident by installing a valve on its property.

MUNICIPAL ORDINANCE - ILLINOIS

Henderson Square Condominium Ass'n v. LAB Townhomes, L.L.C.

Appellate Court of Illinois, First District, Fifth Division - March 21, 2014 - N.E.3d - 2014 IL App (1st) 130764

Condominium association and its board of managers brought action against developers, alleging breach of the implied warranty of habitability, fraud, negligence, breach of city prohibition against misrepresenting material facts in the course of marketing and selling real estate, and breach of a fiduciary duty. The Circuit Court dismissed claims. Plaintiffs appealed.

The Appellate Court held that:

- Limitations periods provided for real estate construction claims, rather than statute of limitations applicable to unwritten contracts, governed action;
- Plaintiffs' allegations triggered fraud exception to the running of limitations period;
- City ordinance created a separate cause of action that could be based on representations made prior to completion of construction; and
- Plaintiffs sufficiently pleaded cause of action for breach of fiduciary duty.

City ordinance prohibiting the misrepresenting of material facts in the course of marketing and selling real estate created a cause of action separate from common law fraud, which was not limited to preexisting facts, but could be based on representations made prior to completion of construction.

IMMUNITY - ILLINOIS

American Islamic Center v. City of Des Plaines

United States District Court, N.D. Illinois, Eastern Division - March 24, 2014 - Not Reported in F.Supp.2d - 2014 WL 1243870

American Islamic Center (AIC) is a religious institution incorporated under the Illinois Not–For–Profit Corporation Act. On February 6, 2013, AIC contracted to buy certain property on the condition that Des Plaines would adopt a zoning map amendment that would allow AIC to use the property for religious and educational activities. On July 15, 2013, the five city council members named as defendants voted against the amendment, outvoting three other city council members who voted in favor of the amendment.

In this decision, the Court considered defendants' remaining arguments, namely that: 1) the city council members are entitled to absolute legislative immunity, 2) the Tort Immunity Act bars recovery under Count 6 (IRFRA), and 3) the Illinois statute that AIC cites in its state-law claim seeking review of the zoning decision, 65 ILCS 5/11–13–25, does not provide an independent basis for a cause of action.

The Court concluded that: 1) the city council members are entitled to absolute legislative immunity,

2) the Tort Immunity Act does not bar recovery under the Illinois Religious Freedom Restoration Act (IRFRA), and 3) AIC may challenge the city's zoning ordinance under Illinois law even if section 11–13–25 does not provide an independent cause of action.

EMINENT DOMAIN - KANSAS

In re Eminent Domain

Supreme Court of Kansas - March 21, 2014 - P.3d - 2014 WL 1133418

School district filed eminent domain petition. The District Court entered judgment on jury verdict of $249,000 for landowners, and they appealed.

The Supreme Court of Kansas held that:

- Trial judge properly allowed landowner, who did not have appraisal expertise, to express a valuation opinion in eminent domain action, but appropriately excluded testimony that was not relevant to the jury's determination, and
- Given landowner's admission that he did not have appraisal expertise, landowner was not qualified to perform a cost appraisal, and therefore, trial judge did not abuse his discretion in excluding this evidence in eminent domain proceeding.

ANNEXATION - KENTUCKY

City of Lebanon v. Goodin

Supreme Court of Kentucky - March 20, 2014 - S.W.3d - 2014 WL 1101471

Property owners brought action challenging annexation by city. The Circuit Court granted summary judgment in favor of property owners. City appealed. The Court of Appeals affirmed. City petitioned for discretionary review.

The Supreme Court of Kentucky held that:

- As a matter of first impression, state annexation statute allows a city to annex territory that is either touching the boundary of the city or nearby;
- As a matter of first impression, territory was suitable for annexation under annexation statute; and
- Annexation did not violate property owners' rights under state constitution's provision barring governmental entities from exercising absolute and arbitrary power over lives, liberty, and property.

In interpreting terms "adjacent" and "contiguous" in annexation statute, which allowed extension of city to areas that were adjacent or contiguous to city's boundaries, application of commonly understood meaning of terms was appropriate, where General Assembly did not define terms, language used by General Assembly was clear and unambiguous, no absurdity would arise in giving terms their plain and commonly understood meanings, and apparent intent of General Assembly

would, at the very least, not be frustrated in any way.

Territory was suitable for annexation by city under annexation statute, although territory was irregular in shape; northern boundary of territory touched city's current municipal border for 4,780.5 feet, territory was sought by city as location of new store, and territory included city-owned industrial park.

City's annexation of territory did not violate non-consenting property owners' rights under state constitution's provision barring governmental entities from exercising absolute and arbitrary power over lives, liberty, and property. City's decision to annex territory was rationally connected to its power to act, annexing territory would potentially increase commercial development or revenue, and city fully complied with statute governing selection of territory for annexation.

TAX - MARYLAND

Victoria Falls Committee for Truth in Taxation, LLC v. Prince George's County

Court of Appeals of Maryland - March 21, 2014 - A.3d - 2014 WL 1128391

Taxpayers in special taxing district challenged resolution enacted by county creating the tax district. The Tax Court denied claims. On appeal, the Circuit Court affirmed. Taxpayers appealed, and the Court of Special Appeals affirmed. Taxpayers were granted writ of certiorari.

The Court of Appeals held that:

- County did not have to determine whether any change in land ownership occurring after application for district might have affected requirement that a super-majority of landowners in proposed district request creation of district, and
- County's approval of request to create district that did not include 25 of the 609 lots within community was lawful under act's requirement that district be used to finance infrastructure improvements in any defined geographic region.

Plain language of state enabling act allowing for the creation of special taxing districts did not require that county determine whether any change in land ownership occurring after the time of application for creation of the district might have affected the requirement that a super-majority of landowners in the proposed district request creation of district. Act only required a super-majority at the time the application was made.

County's approval of the request to create a special taxing district that did not include 25 of the 609 lots within the planned community was lawful under the state enabling act's requirement that the district be used to finance infrastructure improvements in any defined geographic region within the county, even though the 25 excluded lots were located throughout non-contiguous parts of the planned community. The act did not require the special taxing district to have a particular shape or include particular properties, nor did it contain any reference to contiguity or a specific subdivision.

ZONING - MARYLAND

Dugan v. Prince George's County

Court of Special Appeals of Maryland - March 27, 2014 - A.3d - 2014 WL 1258135

Homeowners sought review of county's approval of application for water and sewer amendment by religious congregation which sought to build a church and school on neighboring property. The Circuit Court affirmed. Homeowners appealed.

The Court of Special Appeals held that:

- Appropriate vehicle for appealing the council's resolutions was administrative mandamus;
- Council's resolutions articulated the basis of the council's decision at a level sufficient for judicial review of the legality of the decision;
- Substantial evidence supported county council's decision to amend water and sewer plans; and
- Maryland–National Capital Park and Planning Commission's review of proposed amendment to county's water and sewer plan substituted fully for the two step review and certification process for adopting such amendments.

County council acted in a quasijudicial capacity when it approved amendments to water and sewer plan to allow religious congregation to build church and school on property, and thus, the appropriate vehicle for appealing the council's resolutions was administrative mandamus rather than a declaratory judgment action. Although the general process of considering water and sewer category change requests in county was a legislative amendment process, the consideration of religious congregation's application was unique in that the application was not combined with any other water and sewer category change requests, but was reviewed separately, and the approval was not based on the overall community planning, but rather a specific federal court opinion and order concerning discrimination against congregation's application.

County council's resolutions granting religious congregation's water and sewer category change requests so that congregation could build church and school on property articulated the basis of the council's decision at a level sufficient for judicial review of the legality of the decision. While the council's resolutions did not include a discussion of how a category change conformed to each of the requirements of the county's water and sewer plan, the council incorporated the reasoning of federal court opinion that found that county's original denial of request constituted religious discrimination, and the federal court reviewed the record, made detailed findings, and applied the law, making it unnecessary for the council to repeat the same findings and legal analysis.

Substantial evidence supported county council's decision to amend water and sewer plans to allow religious congregation to build church and school on property. County's department of environmental resources (DER) analyzed how the application complied with the standards necessary for approval and found that the application was generally consistent with the criteria established in the water and sewer plan, civil engineer testified that the proposed development protected existing wetlands buffer, and federal court opinion in congregation's religious discrimination action against county, which findings were incorporated into council's decision, determined that county failed to produce any evidence showing a negative environmental impact from development.

Maryland–National Capital Park and Planning Commission's review of proposed amendment to county's water and sewer plan substituted fully for the two step review and certification process for adopting such amendments. Statute stated that Maryland–National Capital Park and Planning Commission's review constituted full compliance with the review process, and thus, county council had legal authority to consider application for water and sewer amendment.

EMPLOYMENT - MARYLAND

Baltimore County v. Thiergartner

Court of Special Appeals of Maryland - March 26, 2014 - A.3d - 2014 WL 1245031

County sought judicial review of decision of Workers' Compensation Commission awarding permanent partial disability benefits to claimant, who was retired county firefighter and who had coronary artery disease. The Circuit Court denied county's motion for summary judgment and granted claimant's cross-motion for summary judgment. County appealed.

As matters of first impression, the Court of Special Appeals held that:

- Statute providing that workers' compensation benefits received by retired firefighter regarding occupational disease will be adjusted so that total of those benefits and retirement benefits does not exceed weekly salary during active employment only applies to weekly retirement and workers' compensation benefits that are due concurrently, and
- Lump-sum payment that claimant received from county's deferred retirement option program could not be used to offset workers' compensation benefits.

DEVELOPMENT - MARYLAND

State Center, LLC v. Lexington Charles Ltd. Partnership

Court of Appeals of Maryland - March 27, 2014 - A.3d - 2014 WL 1258366

Business owners brought action against state agencies and developer, involved in multi-phase redevelopment project intended to replace aged and obsolete State office buildings with new facilities for State use, seeking a declaratory judgment that the formative contracts for the project were void and an injunction to halt the project. The Circuit Court, Baltimore City, voided formative contracts of the project on the grounds that they violated the State Procurement Law. Defendants petitioned for writ of certiorari.

The Court of Appeals held that:

- Business owners were not "bidders or offerors" or "prospective bidders or offerors," required to exhaust administrative remedies before the State Board of Contract Appeals;
- Business owners' properties in city business district were insufficiently proximate to project property to support property owner standing;
- Business owners established taxpayer standing to bring action; but
- Business owners' filing of action in a case involving time-sensitive procurement issues was unreasonably delayed, such that claims were barred by laches.

"After climbing the foothills to this point and with the mountain almost in sight, Appellees' surviving claims on the merits shall stumble and fall to a figurative death in the crevasse that is the equitable doctrine of laches."

STATUTE OF LIMITATIONS - MASSACHUSETTS

Genovesi v. Nelson

Appeals Court of Massachusetts, Norfolk - March 5, 2014 - N.E.3d - 85 Mass.App.Ct. 43

Investor brought action against financial advisors, alleging claims of fraud, fraudulent inducement, negligent misrepresentation, breach of fiduciary duty, deceptive business practices, and violation of Massachusetts Uniform Securities Act (MUSA), arising from advisors' allegedly misleading investor into believing that he had placed $1 million in funds into a low-risk investment, with resulting loss of investor's entire investment. The Superior Court Department dismissed the complaint on limitations grounds, and investor appealed.

The Appeals Court held that statutes of limitations were tolled until time that investor learned he had lost his investment.

Three- and four-year statutes of limitations were tolled, pursuant to discovery rule, on claims against financial advisors by investor alleging fraud, fraudulent inducement, negligent misrepresentation, breach of fiduciary duty, deceptive business practices, and violation of MUSA, from time that investor placed $1 million in funds into an investment based on advisors' alleged misrepresentations that investment was low-risk until time that investor learned he had lost his entire investment. Investor first knew that he had been misled in when the investment fund announced that it would not pay interest or return any principal for investor's shares.

IMMUNITY - MICHIGAN

Nash v. Duncan Park Com'n

Court of Appeals of Michigan - March 20, 2014 - N.W.2d - 2014 WL 1097444

This wrongful death case arose from a sledding accident that took the life of 11–year–old Chance Nash. The accident occurred at Duncan Park in Grand Haven. The questions presented on appeals centered on the ownership of Duncan Park and whether the governmental tort liability act (GTLA), MCL 691.1401 *et seq.*, barred plaintiff's claim.

To answer these questions was required to interpret a document drafted 100 years ago. The circuit court ruled that this instrument transferred the park property from Martha Duncan to the city of Grand Haven. However, the district court concluded that the document created a trust which conveyed legal ownership of the land to three trustees rather than to the City.

The more difficult issue was whether the Duncan Park Commission, which was established pursuant to Martha Duncan's trust, constituted a "political subdivision" of the city of Grand Haven. Political subdivision status would cloak the trustees and the Commission with governmental immunity.

The court concluded that, because the Commission was a private organization empowered by the trust to manage the park without any governmental oversight, it could not invoke governmental immunity to avoid liability for Chance's death.

BONDS - NEW JERSEY

Morris County Imp. Authority v. Power Partners Mastec, LLC

Superior Court of New Jersey, Appellate Division - March 24, 2014 - Not Reported in A.3d - 2014 WL 1125378

In 2011, Power Partners Mastec, LLC (Mastec) and SunLight General Capital, LLC (SunLight) responded to RFPs issued by Morris County Improvement Authority and Somerset County Improvement Authority, and were awarded the contract to design and construct approximately seventy solar energy generating systems on properties owned by governmental entities across Morris, Somerset, and Sussex Counties. Mastec's and SunLight's business relationship did not endure. The two entities are currently embroiled in arbitration to determine which one of them is liable for cost overruns and construction delays that have affected their ability to perform under the contract entered into with plaintiffs.

Before these arbitration proceedings began, Mastec filed notices to assert liens under the Municipal Mechanics' Lien Law on approximately $50,000,000 in project financing funds plaintiffs received from the sale of government-secured, taxable municipal bonds. These funds are intended to cover the cost of the solar energy program and are held in a trust managed by the U.S. Bank.

Acting on plaintiffs' order to show cause and verified complaint, the Law Division discharged any restrictions on the disbursement of these funds by U.S. Bank as trustee that were created by Mastec's notice under the Municipal Mechanics' Lien Law. The court found Mastec was not a "subcontractor" under the statute and thus not entitled to the protections afforded by the Municipal Mechanics' Lien Law. After this ruling, Mastec filed notices of lien under the Construction Lien Law. On plaintiffs' challenge, the trial court limited the scope of these liens, by permitting them to attach only to interests in real property held by SunLight, arguably rendering the liens powerless to affect the disbursement of the municipal bond funds managed by U.S. Bank. The court denied Mastec's motion for reconsideration of this ruling.

Mastec now appeals arguing the trial court erred when it discharged the municipal mechanics' liens based on having found Mastec was not a subcontractor as defined under *N.J.S.A.* 2A:44–126. Mastec also argues it is entitled to have construction liens attach to SunLight's entire leasehold interest in properties, including any revenue generated by leases that are derived from the municipal bond funds. If we were to reject these arguments, Mastec urges us to remand the matter for the parties to engage in discovery and, if necessary, for the trial court to conduct a plenary hearing. According to Mastec, the limited record developed before the trial court thus far is not sufficient to support a final determination of the issues raised here.

The appellate court found that the trial court erred in not finding Mastec to be a subcontractor under *N.J.S.A.* 2A:44–126, but nevertheless affirmed the court's ultimate judgment denying Mastec the protections available under the Municipal Mechanics' Lien Law because the County Improvement Authorities Law, *N.J.S.A.* 40:37A–44 to –135, specifically exempts the property of a county improvement authority from "judicial process." *N.J.S.A.* 40:37A–127. As plaintiffs correctly argued, because a municipal mechanics' lien can only be enforced through judicial process, the liens are unenforceable as a matter of law.

MUNICIPAL ORDINANCE - NEW MEXICO

Town of Silver City v. Ferranti

Supreme Court of New Mexico - March 20, 2014 - Not Reported in P.3d - 2014 WL 1153775

Accused appealed assessment of fines related to determination of guilt for violation of criminal city ordinances for consumption of alcohol and marijuana in public park. After de novo bench trial, the District Court dismissed charges against accused and found that fines were grossly disproportionate to gravity of offenses. City appealed.

The Supreme Court of New Mexico held that:

- Ordinance giving police authority to issue citations for violations of criminal ordinances in lieu of arrest was not unconstitutionally vague, and
- Fines were not excessive and did not constitute cruel and unusual punishment.

City ordinance allowing police officers authority to issue citations for violations of criminal ordinances in lieu of arrest was not unconstitutionally vague, even though ordinance lacked express guidance regarding exercise of officers' authority. Express standards were not required before officer could exercise his discretion to either arrest or issue citation.

Fines imposed on accused for violations of city ordinances prohibiting accused's consumption of alcohol and marijuana in public park were not excessive and did not constitute cruel and unusual punishment. Fine for possession of marijuana was within amount specified under ordinance, and fine for drinking in public place was less than amounts prescribed by ordinance.

ARBITRATION - NEW YORK

Citigroup Global Markets Inc. v. All Children's Hosp., Inc.

United States District Court, S.D. New York - March 20, 2014 - F.Supp.2d - 2014 WL 1133401

Citigroup sought declaratory judgment and injunctive relief against All Children's Hopsital, Inc. ("ACH") to enjoin ACH from pursuing an arbitration brought by ACH in Florida. That arbitration was initiated by a Statement of Claim filed by ACH on September 30, 2013 before the FINRA. The arbitration asserted claims arising from the market failure of more than $90 million in auction rate securities issued under a Broker–Dealer Agreement executed by the parties on September 1, 2007.

ACH offered three principal arguments: (1) that the phrase "actions and proceedings" is narrow and does not encompass arbitrations at all, such that the Agreement and FINRA rule can be read to complement each other; (2) that the subject of the arbitration does not "aris[e] out of" the Agreement; and (3) that this Court lacks authority to grant the injunction sought by Citigroup. The District Court found no merit in any of these arguments.

"ACH's first argument raises the linguistic question of whether an arbitration falls under the umbrella of 'all actions and proceedings.' These are capacious words. In Black's Law Dictionary, the many entries under 'action' span nine columns across five pages and those for 'proceeding' take an entire page. *See Black's Law Dictionary* 32–36, 1324 (9th ed.2009). When conjoined together and modified by 'all'—*i.e.,* 'all actions and proceedings'—the words appear maximally all-inclusive."

The court permanently enjoined ACH from further pursuing its arbitration before FINRA directed it to discontinue that arbitration forthwith.

IMMUNITY - NEW YORK

Bower v. City of Lockport

Supreme Court, Appellate Division, Fourth Department, New York - March 21, 2014 - N.Y.S.2d - 2014 N.Y. Slip Op. 01868

A homeowner's guest brought negligence, battery, and § 1983 excessive force claims against a municipality and police officers, claiming that the officers pushed or failed to prevent him from falling down a flight of stairs. The Supreme Court, Niagara County, denied the defendants' motion for summary judgment. The defendants appealed.

The Supreme Court, Appellate Division, held that:

- The officers did not voluntary assume a duty of care over the guest;
- The officers were protected by governmental function immunity; and
- There was no evidence that the officers pushed the guest down the stairs.

OPEN RECORDS - NEW YORK

Crawford v. New York City Dept. of Information Technology and Telecommunications.

Supreme Court, New York County, New York - March 20, 2014 - N.Y.S.2d - 2014 N.Y. Slip Op. 24072

Requester brought proceeding pursuant to Article 78 and the Freedom of Information Law (FOIL) against the New York City Department of Information Technology and Telecommunications seeking information regarding location of conduits used for high-speed internet. Agency moved for order directing that papers be filed under seal.

The Supreme Court, New York County, held that:

- Information regarding location of conduits used for high-speed internet was exempt from disclosure under FOIL exemption for information technology, and
- Good cause existed to seal papers related to denial of FOIL request.

Disclosure of information in map form regarding location of conduits used for high-speed internet would jeopardize security of city's information technology assets, therefore, such maps were exempt

from disclosure under FOIL exemption for information technology, in requester's FOIL request for such information from New York City Department of Information Technology and Telecommunications. Release of precise location of conduits would pose substantial threat and make fiber optic network more susceptible to terrorist or other attack.

SCHOOLS - NEW YORK

Candino v. Starpoint Central School Dist.

Supreme Court, Appellate Division, Fourth Department, New York - March 21, 2014 - N.Y.S.2d - 2014 N.Y. Slip Op. 01852

Former student brought action against two school districts and their boards of education, and two high schools, alleging that student was exposed to highly contagious virus when he participated in wrestling tournament. The Supreme Court, Erie County, granted student's application for leave to serve late notice of claim. Defendants appealed.

The Supreme Court, Appellate Division, held that granting leave to serve late notice of claim was unwarranted.

Where a claimant does not offer a reasonable excuse for failing to serve a timely notice of claim, a court may grant leave to serve a late notice of claim only if the respondent has actual knowledge of the essential facts underlying the claim, there is no compelling showing of prejudice to the respondent, and the claim does not patently lack merit.

High school student was not entitled to leave to serve late notice of claim against two school districts and their boards of education, and two high schools, alleging that he was exposed to highly contagious virus when he participated in wrestling tournament; even assuming that respondents suffered no prejudice from delay, and that proposed claim against them did not patently lack merit, respondents asserted that, until student made application for leave, they had no knowledge that he had contracted herpes or otherwise had been injured at tournament, and notice of claim filed by another wrestler only provided respondents with constructive knowledge of student's claim, since nothing in that notice established that student was infected at tournament.

TAX - NEW YORK

Keyspan Gas East Corp. v. Supervisor of Town of Oyster Bay

Supreme Court, Appellate Division, Second Department, New York - March 19, 2014 - N.Y.S.2d - 2014 N.Y. Slip Op. 01719

A natural gas company brought action against town, its supervisor, and special municipal districts, challenging the imposition of special ad valorem taxes for garbage and refuse collection services on the company's mass property. Two special districts brought third-party and second-party claims against the county. The Supreme Court, Nassau County, denied the county's motion to dismiss the third-party and second-party claims. The county appealed.

The Supreme Court, Appellate Division, held that the county could not charge back the cost of refunding proceeds from invalid ad valorem taxes to the special municipal districts.

A county's liability to refund proceeds from a special ad valorem taxes for garbage and refuse collection services that was found to be invalid as applied to certain mass property was not an assessment for benefit of special municipal districts, and thus could not be charged back to the special districts during the following tax year.

TAX - NEW YORK

New York Telephone Co. v. Supervisor of Town of Hempstead

Supreme Court, Appellate Division, Second Department, New York - March 19, 2014 - N.Y.S.2d - 2014 N.Y. Slip Op. 01726

A phone company brought an action against a town supervisor, various municipal bodies and special districts within a county, challenging the imposition of special ad valorem taxes for garbage and refuse collection services on the company's mass property. The Supreme Court, Nassau County, found the taxes invalid. The defendants appealed. The Supreme Court, Appellate Division, affirmed. On remand, the Supreme Court, Nassau County, ordered the defendants to refund the improperly assessed taxes. The defendants appealed.

The Supreme Court, Appellate Division, held that the town and other municipal bodies and districts were liable for refunds of the improper tax payments.

Phone company's "mass property," on which a county sought to impose special ad valorem taxes for garbage and refuse collection services, refers to equipment such as lines, wires, cables, poles, supports, and enclosures for electrical conductors, which constitute a type of real property that is not amenable to human occupation and has been erected on public and private real property owned by persons or entities other than the utility.

A county administrative provision, in which the county assumed liability for tax refunds, did not relieve a town supervisor, various municipal bodies, and special districts within a county of their liability to refund tax payments in connection with special ad valorem taxes for garbage and refuse collection services that were found to be invalid, where the town played a role in determining what properties were subject to the taxes, and the town, and other municipal bodies and districts could seek indemnification from the county.

SPECIAL ASSESSMENTS - NORTH DAKOTA

Hector v. City of Fargo

Supreme Court of North Dakota - March 20, 2014 - N.W.2d - 2014 ND 53

Owner of property located in improvement district brought action against city, challenging special assessments, alleging claims for statutory and equitable reassessment of project benefits, fraud and

deceit, violation of fiduciary duties, and denial of federal civil rights. The District Court entered summary judgment in favor city, and owner appealed.

The Supreme Court of North Dakota held that owner was precluded, pursuant to doctrine of res judicata, from litigating issues that had been or could have been raised in prior appeal of city commissioners' approval of the assessments.

Property owner's prior appeal of decision of city commissioners approving special assessments against property located in improvement district, precluded, pursuant to doctrine of res judicata, litigation of issues that had been raised or could have been raised in owner's subsequent original action in district court challenging same special assessments, including issues contesting city's claimed construction costs, whether city committed fraud in its statement of costs, whether city improperly applied federal highway funds for project, and whether city violated due process in approving the assessments.

IMMUNITY - WASHINGTON

Fabre v. Town of Ruston

Court of Appeals of Washington, Division 2 - March 19, 2014 - P.3d - 2014 WL 1064804

Casino and its owner filed suit against town, mayor, and members of town council for negligence, negligent misrepresentation, and tortious interference with business expectancy, arising out of town council's enactment of ordinances, later declared void and/or repealed, which replaced graduated tax on social card games with flat 20% tax and banned house-banked social card games. The Superior Court entered summary judgment for defendants on all claims and dismissed complaint. Plaintiffs appealed.

The Court of Appeals held that:

- Town was not performing proprietary function when they enacted ordinances, as required to come within "proprietary function" exception to public duty doctrine on claims negligence and negligent misrepresentation;
- Negligence claims did not come within "special relationship" exception to public duty doctrine; and
- Town was immune from suit for tortious interference with business expectancy.

Town was performing government function, and not propriety function, when it enacted ordinances replacing graduated tax on casino's revenues on social card games with flat 20 percent tax and banning house-banked social card games, and thus, casino's claims for negligence and negligent misrepresentation arising out of enactment of such ordinances, both of which were subsequently repealed, did not come within proprietary function exception to public duty doctrine.

Casino could not have justifiably relied on representations of former mayor that casino would always be allowed to operate, and thus, casino did not have "special relationship" with town, as required for casino's claims for negligence and negligent misrepresentation arising out of council's enactment of ordinances replacing graduated tax on social card games with flat 20% tax and banning house-banked social card games to come within "special relationship" exception to public duty doctrine,

where mayor did not have independent authority to establish tax or prohibit or allow social card games, mayor could not represent to casino how future town councils would vote and legislate, and mayor had no authority to bind future members of council to such promise.

Town was engaged in purely legislative acts when it enacted ordinances replacing graduated tax on social card games with flat 20% tax and banning house-banked social card games, and thus, town was immune from suit for tortious interference with business expectancy, in action brought by casino, regardless of whether ordinances were subsequently declared void and/or repealed.

LABOR - WASHINGTON

City of Vancouver v. State Public Employment Relations Com'n

Court of Appeals of Washington, Division 2 - March 25, 2014 - P.3d - 2014 WL 1226499

City sought review of Public Employment Relations Commission decision finding that city committed an unfair labor practice by discriminating against police officers' guild president out of animus over his union activities. The Clark Superior Court certified the appeal.

The Court of Appeals held that:

- Commission was authorized by statute to impose liability on individuals for unfair labor practices;
- Commission did not impose individual liability on police chief for unfair labor practices;
- Commission's error in applying an improper burden of proof in determining the city's liability was harmless;
- Fact that police chief did not have notice of assistant police chief's antiunion animus in making recommendations for officers for motorcycle unit did not preclude a finding of unfair labor practices;
- Officer's loss of benefits conferred by selection to the motorcycle unit constituted an adverse employment action for purposes of claim of unfair labor practices;
- Commission did not engage in rule making with its order finding city liable for unfair labor practice;
- Substantial evidence supported examiner's finding that assistant police chief's statement that he wanted someone for motorcycle unit position who shared police chief's "vision" betrayed his animus towards police officer; and
- Substantial evidence supported examiner's finding that police chief relied on a tainted recommendation from assistant police chief.

TAX - NEW YORK

In re Foreclosure of Tax Liens by City of Troy

Supreme Court, Appellate Division, Third Department, New York - March 13, 2014 - N.Y.S.2d - 2014 N.Y. Slip Op. 01657

In proceedings for foreclosure of tax liens by city, the County Court denied motion of mortgagee's assignee, seeking to be relieved from amended judgment of foreclosure and to have mortgage lien reinstated. Assignee appealed.

The Supreme Court, Appellate Division, held that assignee's challenge to amended judgment was not timely, notwithstanding any jurisdictional defect resulting from purported violation of bankruptcy stay.

Where an entity with a purported interest in real property that was subject to a tax sale neglects to challenge the sale in any fashion for two years, a conclusive presumption arises regarding the procedural regularity of all proceedings regarding the sale.

Notwithstanding any jurisdictional defect resulting from purported violation of bankruptcy stay, two-year period for mortgagee's assignee to seek relief from amended judgment of foreclosure and tax deed transfer, or otherwise challenge judgment, began to run when judgment was entered.

Tax Increment Financing - North Dakota

Haugland v. City of Bismarck

Supreme Court of North Dakota - March 14, 2014 - N.W.2d - 2014 ND 51

Objector brought declaratory judgment action seeking declaration that city's adoption and modifications of its urban renewal plan and use of tax increment financing to fund renewal projects in its renewal area violated the Urban Renewal Law and various provisions of the state and federal constitution. The District Court granted summary judgment in favor of city. Objector appealed and city cross-appealed. The Supreme Court of North Dakota affirmed in part, reversed in part, and remanded. On remand, the District Court granted summary judgment in favor of city. Objector appealed.

The Supreme Court of North Dakota held that:

- Genuine issue of material fact existed regarding whether city complied with statutory requirements for substantially modifying its urban renewal plan, and
- Pending authorized renewal projects existed within the renewal area to support continued diversion of property taxes from normal property tax recipients to city's tax increment financing fund.

Genuine issue of material fact existed regarding whether city complied with statutory requirements for substantially modifying its urban renewal plan, and therefore summary judgment in favor of city was precluded in objector's declaratory judgment action challenging city's modification of urban renewal plan. City was unable to locate and present documentation related to passage of resolution that modified urban renewal plan.

Pending authorized renewal projects existed within the renewal area to support continued diversion of property taxes from normal property tax recipients to city's tax increment financing fund, so as to comply with requirements of Urban Renewal Law for tax increment financing, where a quiet rail zone, a parking ramp, and an incentive program were authorized projects under the city's modified renewal plan, which had not been terminated and which authorized ongoing diversion of tax increment funds on an area wide approach.

ASSESSMENTS - WASHINGTON

Hasit LLC v. City of Edgewood (Local Improvement Dist. #1)

Court of Appeals of Washington, Division 2 - March 13, 2014 - P.3d - 2014 WL 982355

Owners of local improvement district (LID) parcels sought review of city council decision to pass ordinance subjecting owners' property to assessment for installation of sewers, alleging substantive defects in appraiser's assessment and flaws in council's protest procedures. The Superior Court remanded matter for revised and de novo hearing and evidentiary process. City appealed and owner cross-appealed.

The Court of Appeals held that:

- Apparent violation of procedural rules in vote to confirm assessment did not render resulting ordinance invalid;
- Requiring owners to bear entire costs of sewer installation did not proceed on fundamentally wrong basis;
- Assessment was improperly based on costs that resulted in benefit only to future users not assessed under LID;
- Council's denial of owners' protests based on failure to produce expert testimony was arbitrary and capricious;
- Council's requirement that owners present expert appraisal evidence was arbitrary and capricious;
- City failed to provide owners with constitutionally adequate notice of hearing; and
- Even if due process violation amounted to jurisdictional defect, owners that did not protest assessment waived claim.

Assessment imposed on property owners of specially-benefited parcels in LID to pay for installation of sewers were improperly based on costs that resulted in benefit only to future users not assessed under LID, requiring annulment of assessments as to those owners that protested imposition of assessments. Assessments included costs for oversizing sewer pipes, which would benefit only future owners and presented situation different from incidental general benefits that sewer improvements confer on community at large.

INVERSE CONDEMNATION - TEXAS

City of El Paso v. Ramirez

Court of Appeals of Texas, El Paso - March 14, 2014 - S.W.3d - 2014 WL 996368

The City has owned and operated the Clint Landfill, a solid waste disposal site, since the early 1980's. Appellees own land within one mile of the landfill's southwestern boundary. In July 2006, after a series of rainstorms, the City and surrounding areas experienced extensive flooding. As a result of the heavy rainfall, the retention ponds at the Clint Landfill overflowed and caused significant damage to Appellees' property.

In June 2007, Appellees sued the City asserting claims for inverse condemnation, nuisance, trespass, Texas Water Code violations, and requesting a permanent injunction. The Court of Appeals

dismissed, but granted Appellees leave to amend. They did so, the trial court denied the City's plea to the jurisdiction, and the City appealed that denial.

The City argued that the trial court erred by denying its plea to the jurisdiction because Appellees' pleadings failed to demonstrate the intent and public use elements of an inverse condemnation claim. The City also contended Appellees' pleadings failed to establish causation. The City maintains that because Appellees did not plead a valid takings claim those claims are barred by sovereign immunity. The City further argued that Appellees' nuisance and trespass claims which were asserted under Article I, Section 17 of the Texas Constitution are also barred by the City's governmental immunity. Appellees respond that they have pleaded sufficient facts to support their claims. The Court of Appeals agreed with Appellees, affirming the denial of City's plea to the jurisdiction.

ANNEXATION - TENNESSEE

Tigrett v. Cooper

United States District Court, W.D. Tennessee, Western Division - March 17, 2014 - Slip Copy - 2014 WL 1025639

Tenn.Code Ann. § 7–2–106(b)–(d) provides that any metropolitan charter cannot be adopted unless it is approved by both a majority of the qualified voters residing in the principal city in the county and a majority of the qualified voters residing outside the principal city in the county. This is referred to as the dual-majority voting requirement.

A referendum was held regarding the formation of a metropolitan government comprised of the consolidated governments of the City of Memphis and Shelby County. A majority of the residents of Shelby County voted against the proposal and a majority of the residents of Memphis voted to approve the proposal.

After the failure of the referendum, plaintiffs filed a complaint alleging that Tennessee's dual-majority vote requirement violated the Fourteenth Amendment, the Fifteenth Amendment, and section two of the Voting Rights Act of 1965. Plaintiffs alleged that the dual-majority voting requirement violates the Fourteenth Amendment in two ways: by diluting the vote of minority voters in the City of Memphis and by diluting the vote of residents of the City of Memphis as a whole.

The District Court dismissed, finding no civil rights violation.

TAX - PENNSYLVANIA

Delaware County, Pa. v. Federal Housing Finance Agency

United States Court of Appeals, Third Circuit - March 18, 2014 - F.3d - 2014 WL 1012961

Appeals court holds that Fannie Mae and Freddie Mac are exempt from paying state and local real

estate transfer taxes.

PUBLIC OFFICE - OHIO

Calvaruso v. Brown

Supreme Court of Ohio - March 19, 2014 - N.E.3d - 2014 -Ohio- 1018

Six of the nine Akron Police Department captains, who claimed that they were each qualified to hold the positions of deputy police chief and acting police chief, brought action seeking writ of quo warranto to oust assistant to city mayor from his alleged assignments as acting chief of police and de facto deputy chief.

In this quo warranto case, relators are six of the nine Akron Police Department captains, who claim that they are each qualified to hold the positions of deputy police chief and acting police chief. They seek to oust Charles Brown, an assistant to the mayor of Akron, from the positions of de facto deputy chief and acting chief of police.

The Supreme Court of Ohio held that:

- Acting chief of police was not a public office, and
- Assistant did not hold office of deputy chief.

Acting chief of city police department was not a "public office" to which anyone had a right, but instead was a temporary assignment filled only when city police chief was briefly absent, and thus city police captains were not entitled to writ of quo warranto to oust assistant to city mayor who held assignment. "Acting chief of police" was not an official appointment to an office for the remainder of the term or until the next election, it was an assignment to act in the chief's stead while he was away from the office for a few days.

Assistant to city mayor did not hold office of de facto deputy chief of police, and thus police captains were not entitled to writ of quo warranto to oust assistant. Although assistant was performing some duties that were normally performed by deputy chief, and although assistant had assumed the title of "assistant chief of police," a position that did not exist in either the police division manual or the city charter, assistant did not claim to hold office of deputy chief, and to the extent captains were challenging the legality of assistant's exercise of deputy chief's duties, quo warranto did not lie.

TAX - OHIO

Panther II Transp., Inc. v. Seville Bd. of Income Tax Rev.

Supreme Court of Ohio - March 19, 2014 - N.E.3d - 2014 -Ohio- 1011

Village board of income tax review sought review of decision of Board of Tax Appeals (BTA) determining that state law preempted village tax on net profits of for-hire motor carrier. The Court of Appeals affirmed. Board appealed.

The Supreme Court of Ohio held that village tax was superseded by statute.

Village tax on net profits of for-hire motor carrier was preempted by former statute providing that governing taxes paid by for-hire motor carriers, providing that all fees, license fees, annual payments, license taxes, or taxes or other money exactions, except the general property tax, charged by local authorities were illegal and superseded by state law. Statute's expansive terms showed the General Assembly's intent to impose the broadest possible preemption of local taxing power.

IMMUNITY - NEW YORK

Metropolitan Taxicab Bd. of Trade v. New York City Taxi & Limousine Com'n

Supreme Court, Appellate Division, First Department, New York - March 18, 2014 - N.Y.S.2d - 2014 N.Y. Slip Op. 01683

Taxi owners who leased their taxis to drivers, and their trade association, commenced hybrid Article 78 proceeding challenging Taxi and Limousine Commission's (TLC) rule prohibiting taxi lessors from collecting sales tax in addition to standard lease cap, and action for a declaratory judgment. The Supreme Court, New York County dismissed the complaint. Plaintiffs appealed. The Supreme Court, Appellate Division affirmed, and leave to appeal was granted. The Court of Appeals reversed. On remand, the Supreme Court, New York County denied plaintiffs' motion for incidental damages. Plaintiffs appealed.

The Supreme Court, Appellate Division, held that:

- Plaintiffs were not entitled to an award of incidental damages, and
- Doctrine of governmental immunity shielded TLC from liability for incidental damages.

Taxi owners were not entitled to an award of incidental damages, although Court of Appeals determined that TLC's effective reduction of taxi lease cap had no rational basis, where TLC never collected any funds it was obligated to reimburse to owners, or kept any funds it should have paid to owners.

Doctrine of governmental immunity shielded Taxi and Limousine Commission from liability for incidental damages in hybrid Article 78 proceeding and declaratory judgment action challenging TLC's rule prohibiting taxi lessors from collecting sales tax in addition to standard lease cap, where TLC's determination, however unjustified it may have been, was an exercise of discretion, in that TLC considered issue of imposing the tax rule and decided to impose it.

EMPLOYMENT - NEW YORK

Klubenspies v. Town of Clarkstown

Supreme Court, Appellate Division, Second Department, New York - March 19, 2014 - N.Y.S.2d - 2014 N.Y. Slip Op. 01722

Taxpayers sued town under statute providing for action against town officers to prevent illegal official acts. The Supreme Court, Rockland County dismissed claim. Taxpayers appealed.

Taxpayers failed to state cause of action against town under statute providing for action against town officers to prevent illegal official acts, based on alleged hiring practices and employment policies of town and town supervisor, where complaint did not allege how hiring practices and employment policies were fraudulent, or waste of public property in the sense that they represented a use of public property or funds for entirely illegal purposes.

ZONING - MASSACHUSETTS

Doherty v. Planning Bd. of Scituate

Supreme Judicial Court of Massachusetts, Suffolk - March 21, 2014 - N.E.3d - Mass.

Property brought action seeking judicial review of decision of town planning board, denying owner's application for special permits to construct residential dwellings on two adjacent unimproved lots on a barrier beach peninsula. After a bench trial, the Land Court Department affirmed the board's decision, and owner appealed. The Appeals Court reversed. Board applied for further appellate review.

The Supreme Judicial Court of Massachusetts held that in determining whether lots were "subject to flooding," board could consider lots' overlap with Federal Emergency Management Agency's (FEMA) flood zones and testimony of witnesses.

EMPLOYMENT - LOUISIANA

Gaspard v. City of Abbeville

Supreme Court of Louisiana - March 14, 2014 - So.3d - 2013-2817 (La. 3/14/14)

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.

Officer asserted that a statement made by the Abbeville Police Department taser training officer was not provided to her upon request, violating her rights as a police officer and rendering her termination an absolute nullity.

The 15th Judicial District Court dismissed officer's appeal. Officer appealed. The Court of Appeal reversed, and certiorari was granted.

The Supreme Court held that officer was only entitled to request a copy of her own statement.

Pursuant to statute providing that police employee or law enforcement officer shall not be prohibited from obtaining a copy of recording or transcript of recording of his statements upon his written request, police officer, who was being investigated for not following departmental policies while using taser, resulting in injury to middle school student, was only entitled to request a copy of her own statement and, as this was a personal right, question of whether sergeant's statement was actually recorded was of no consequence. Nothing in statute suggested that officer was entitled to a copy of all statements made during the investigation.

BONDS - ILLINOIS

Wells Fargo Bank v. Leafs Hockey Club, Inc.

United States District Court, N.D. Illinois, Eastern Division - March 14, 2014 - Not Reported in F.Supp.2d - 2014 WL 1017211

Wells Fargo is the successor trustee under the Trust Indenture between the Illinois Finance Authority and the Prior Trustee dated February 1, 2007. The Illinois Finance Authority issued $20 million in revenue bonds under the Trust Indenture and loaned the proceeds to LHC, an Illinois non-profit limited liability company, for the construction and operation of a hockey arena located in West Dundee, Illinois. Pursuant to the February 1, 2007 Loan Agreement and Guaranty Agreement, LHC was the borrower and Defendant Leafs Hockey was the guarantor.

Wells Fargo alleged that LHC has failed to make the required payments, and thus was in default, and that Leafs Hockey, as guarantor, has failed to pay its obligations under the Guaranty Agreement.

Leafs Hockey filed a three-count Counterclaim against Wells Fargo alleging a breach of contract claim, a claim for an equitable accounting, and a conspiracy to defraud claim. The essence of the counterclaim was that the trustee had failed to adequately monitor disbursements and to keep accurate and thorough records regarding the money advanced for the construction of the hockey arena, and thus the Trustee breached the terms of the Loan Agreement and the Trust Indenture.

The District Court dismissed the Counterclaim, finding that Leafs Hockey had failed to meet the pleading requirements for each of its three causes of action.

LIABILITY - ILLINOIS

Davis v. City of Chicago

Appellate Court of Illinois, First District, Third Division - March 12, 2014 - N.E.3d - 2014 IL App (1st) 122427

Mother of suspect who was killed after being shot by police officer brought wrongful death action against officer and city. Following jury trial and verdict for defense, the Circuit Court granted new trial. City and officer appealed.

The Appellate Court held that:

- Mother waived any objection to opening statement by defense which referred to suspect's pending gun possession charge;
- Such opening statement remarks were not misconduct or made in bad faith, as could support grant of new trial; and
- Such opening statement remarks did not cause substantial prejudice, as could support grant of new trial.

Mother intentionally waived any objection to defendant city and officer's opening statement reference to son's pending gun possession charge, in case in which city and officer sought to introduce evidence of pending charge to support theory that son pointed gun at officer during incident, where mother specifically acknowledged that statement hurt her case but that she would "live with it" and that she recognized that opening statements were not evidence, and at no time did mother ever indicate a change in her position to object to statement.

Opening statement remarks were not deliberate misconduct or in bad faith, as could support grant of new trial following defense verdict in wrongful death action against city and officer, even though court later ruled evidence of pending charge inadmissible. At time remarks were made, court had ruled that evidence of the pending charge would be admissible, and once court made ruling to exclude the evidence, no mention of evidence was made again.

Opening statement remarks did not cause substantial prejudice as could support grant of new trial, even though court later ruled evidence of pending charge inadmissible. There was no other mention of evidence during rest of trial or closing arguments, two-week trial focused on other issues, jury did not send out any questions regarding mention of pending charge, and court instructed jury that opening statements were not evidence.

TAX - IDAHO

In re Certified Question of Law

Supreme Court of Idaho, Boise, January 2014 Term - March 18, 2014 - P.3d - 2014 WL 1032449

In taxpayers' action for refund of allegedly illegal county tax, the District Court certified question.

The Supreme Court of Idaho held that the limitations period for statutory remedies made available under Idaho law to obtain a refund of an illegal county tax commences upon payment of the tax.

Person wishing to challenge an allegedly illegal tax must either pay the tax under protest and then bring a cause of action in court within sixty days or file a claim with the board of county commissioners within a year.

IMMUNITY - GEORGIA

Ratliff v. McDonald

Court of Appeals of Georgia - March 18, 2014 - S.E.2d - 2014 WL 1013746

Visitor to county detention facility who was assaulted by another visitor brought personal injury action against, among others, county sheriff and several of his deputies arising out of deputies' failure to protect her from the assault. The trial court awarded summary judgment to sheriff and deputies. Visitor appealed.

The Court of Appeals held that:

- Respondeat superior claim against sheriff was barred by sovereign immunity;
- Any claims asserted against deputies in their official capacities were barred by sovereign immunity; and
- Visitor failed to establish that the assault was reasonably foreseeable, and that deputies had superior knowledge of the danger, as necessary to support her premises liability claim.

EMPLOYMENT - GEORGIA

Kautz v. Powell

Court of Appeals of Georgia - March 19, 2014 - S.E.2d - 2014 WL 1043882

Mayor brought declaratory judgment action, seeking a declaration that she had sole authority to terminate the employment of the city attorney. The trial court entered judgment finding that authority to terminate city attorney was vested in the city council. Mayor appealed.

The Court of Appeals held that city charter did not implicitly give mayor the sole authority to terminate the employment of the city attorney, even though it expressly authorized mayor to hire the city attorney. Charter did not expressly give mayor or any other officer the sole authority to terminate the employment of any appointed city officer, and charter expressly reserved to the city council all powers of government not otherwise delegated, leaving no gap from which an implied power could arise.

CONTRACTS - FLORIDA

School Bd. of Broward County v. Pierce Goodwin Alexander & Linville

District Court of Appeal of Florida, Fourth District - March 19, 2014 - So.3d - 2014 WL 1031461

School board contracted with an architectural firm to perform design services for the renovation of a high school. After construction was completed, the school board sued the architect, contending that numerous "change order items" (COIs) were a breach of the contract to provide design services. The COIs were generated due to changes in the initial design plans to meet building code requirements after construction commenced.

The thrust of the school board's suit was that the architect did not provide initial design plans for bidding by contractors that were code-compliant. One of the issues raised pretrial was the standard of care applicable to the contract between the parties. The school board contended that the standard of care was whether the initial plans were code-compliant as required by the contract (breach of

contract standard). The architect contended that the standard of care was whether it performed its duties with ordinary and reasonable skill (negligence standard). The circuit court agreed with the architect.

The appeals court agreed with the school board that the circuit court's erroneous interpretation of the contract resulted in the jury being instructed on an erroneous standard of care, and the circuit court improperly limiting expert testimony to a negligence standard of care. It thus reversed for a new trial as to the largest of the COIs.

As to certain of the COIs to which the architect admitted liability, the appeals court held that damages collected by the school board for the COIs should not include costs for construction that the school board would have incurred if the initial design plans matched the final design plans. This was referred to by the parties as"first cost."

MUNICIPAL ORDINANCE - FLORIDA

Bell v. City of Winter Park, Fla.

United States Court of Appeals, Eleventh Circuit - March 20, 2014 - F.3d - 2014 WL 1088346

Plaintiffs brought action against municipality, alleging that ordinances concerning picketing or protesting near dwelling units violated their free speech rights, and seeking injunctive relief as well as damages. The United States District Court for the Middle District of Florida denied plaintiffs' motion for preliminary injunction and granted municipality's motion to dismiss. Plaintiffs appealed.

The Court of Appeals held that:

- Ordinance prohibiting picketing or protesting within 50 feet of any dwelling unit did not on its face violate free speech rights, but
- Ordinance allowing person residing in a dwelling unit to post "no loitering" sign and allowing city officer to enforce such prohibition on its face violated free speech rights.

Municipal ordinance, prohibiting picketing or protesting within 50 feet of any dwelling unit, and prohibiting picketing or protesting in any park, public street, public right-of-way, or sidewalk where such activity impeded or interfered with rights of others to travel in safe manner, did not on its face violate free speech rights, since ordinance did not regulate speech on basis of content or viewpoint and thus was content-neutral, and ordinance withstood intermediate scrutiny in that it served government interest in protecting well-being, tranquility, and privacy of the home, and in protecting the unwilling listener, it was narrowly tailored to achieve those ends, and it left open alternative channels of communication.

Municipal ordinance, allowing person residing in a dwelling unit to post "no loitering" sign and allowing city officer to enforce such prohibition against loitering within 50 feet of dwelling, on its face violated free speech rights, in that ordinance permitted private citizens to have municipality regulate speech on traditional public fora for any reason, and it provided no standards for enforcement, leaving officers free to enforce prohibition on basis of content or viewpoint of an individual's speech

TAX - FLORIDA

Accardo v. Brown

Supreme Court of Florida - March 20, 2014 - So.3d - 2014 WL 1057291

Lessees of land pursuant to long-term leases from county brought action against county property appraiser and county tax collector seeking declaratory judgment and injunction against the assessment of ad valorem taxes against the land and improvements. The Circuit Court, Santa Rosa County awarded summary judgment to appraiser and tax collector. Lessees appealed. The District Court of Appeal affirmed and certified question of great public importance.

The Supreme Court of Florida held that doctrine of equitable ownership applied to land which was subject to perpetually renewable leases from county, as well as to improvements thereon, subjecting both land and improvements to ad valorem taxation.

For purposes of ad valorem taxation, existence of equitable ownership under a leasehold was not dependent upon lessee's ultimate right to acquire legal title. Lessee's interest under perpetually renewable lease was not materially different from that of lessee under lease for term of years with right to obtain title for nominal consideration upon termination of lease.

Payment of rent and other obligations imposed on lessees of real property by their leases were insufficient to defeat conclusion that lessees held virtually all benefits and burdens of ownership of both improvements and land, such that both improvements and land were subject to ad valorem taxation. Payment of rent and bearing of other obligations were typically incident to leaseholds under which tenant had equitable ownership, and many of lessees' obligations were similar to those typically imposed on owners under declaration of condominium or restrictive covenants in subdivision.

Statutory provision regarding taxation of property "originally leased for 100 years or more, exclusive of renewal options" did not apply to exempt from ad valorem taxation land and improvements held pursuant to perpetually renewable leases, where county from which land was leased was not "owner" thereof for purposes of ad valorem taxation.

IMMUNITY - CONNECTICUT

Edgerton v. Town of Clinton

Supreme Court of Connecticut - March 18, 2014 - A.3d - 2014 WL 928696

Estate of passenger injured in collision with tree while driver was fleeing the scene of another accident in which driver collided with a automobile driven by a volunteer firefighter brought action against town, alleging town's emergency dispatcher's failure to act to stop pursuit by volunteer firefighter was a proximate cause of passenger's injuries. Following a jury trial, estate was awarded $12,713,612.97 in damages. Town appealed.

The Supreme Court of Connecticut held that:

- No possible basis existed from which to conclude that it would have been apparent to town's emergency dispatcher that her actions in responding to volunteer firefighter's emergency call

would have subjected a passenger in a vehicle being pursued by firefighter to imminent harm, as required to apply the identifiable person-imminent harm exception to governmental immunity for dispatcher's discretionary acts or omissions;
- Dispatcher's knowledge of the town's geography and the layout of its roads was not, in and of itself, probative of whether it would have been apparent to dispatcher that volunteer firefighter was engaged in a high speed pursuit of another vehicle, and that dispatcher's conduct in failing to advise firefighter to abandon his pursuit was likely to subject a passenger in the vehicle being pursued to harm;
- Dispatcher's knowledge of the location of volunteer firefighter's vehicle and the vehicle he was pursuing was not probative of whether it would have been apparent to dispatcher that firefighter was engaged in a high speed pursuit, and that dispatcher's conduct in failing to advise firefighter to abandon his pursuit was likely to subject a passenger in the vehicle being pursued to harm; and
- Dispatcher's acknowledgment to firefighter that there was no further value in his keeping hit and run vehicle in sight was insufficient to satisfy the apparentness requirement of the exception to governmental immunity with regard to passenger injured when vehicle being pursued hit a tree.

LIABILITY - ALABAMA

Morrow v. Caldwell

Supreme Court of Alabama - March 14, 2014 - So.3d - 2014 WL 982969

Mother of minor, who was electrocuted when he came in contact with tenant's chain-link fence, brought wrongful-death action against tenant and city's electrical inspector in his individual capacity for negligence in inspecting tenant's premises. The Circuit Court denied inspector's motion for judgment declaring that $100,000 cap on damages against a municipality applied to him. Inspector sought certification and review by the Supreme Court.

The Supreme Court held that as a matter of first impression, cap on damages for claims against a municipality did not limit the recovery on a claim against a municipal employee in his or her individual capacity.

MUNICIPAL ORDINANCE - ALASKA

Szabo v. Municipality of Anchorage

Supreme Court of Alaska - March 7, 2014 - P.3d - 2014 WL 895197

After property owners were ordered to pay $311,000 in unpaid fines assessed by city for failing to remove junk stored on their property, property owners filed motion for relief from judgment. The Superior Court denied motion. Property owners appealed.
The Supreme Court of Alaska held that:

- Motion for relief based on mistake, inadvertence, surprise, or excusable neglect was time barred;
- Property owners received adequate notice of evidentiary hearing prior to entry of judgment;
- No change of circumstances existed to support grant of motion for relief from prospective application of judgment; and
- Claim that fines were unconstitutionally excessive did not warrant grant of motion for relief from judgment.

Claim that fines were unconstitutionally excessive did not support entitlement to grant of property owners' motion for relief from judgment following judgment ordering property owners to pay $311,000 in unpaid fines assessed by city for failure to clean up junk on property in violation of zoning code; rule permitting relief from judgment was not intended to allow a party to raise legal claims that it failed to bring on direct appeal, and property had the opportunity to challenge the constitutionality of the fines on direct appeal after the trial court issued its order and final judgment, but failed to do so.

JURISDICTION - ARIZONA

Town of Florence v. Florence Copper, Inc.

United States District Court, D. Arizona - March 10, 2014 - Not Reported in F.Supp.2d - 2014 WL 923026

The focal point of thIS case is a 1,187 acre parcel of real property located within the boundaries of the Town of Florence (the "Property"). The Property became subject to a PreAnnexation Development Agreement in 2003 which incorporated a Planned Unit Development by reference (the "PADA"). In 2007 the Property's zoning was changed from Light Industrial to Residential. Florence Copper, Inc. is the present owner of the Property.

Town filed an action against Copper and Pinal County in state court. Town's complaint advanced two claims for relief. The first was for a declaration of the parties' rights under various documents that apply to the Property. The second was a claim to acquire all nonconforming uses and structures on the Property through exercise of the Town's power of eminent domain.

Copper removed the litigation from state court pursuant to 28 U.S .C. § 1441(a) . The Notice of Removal indicated that there was diversity of citizenship jurisdiction under 28 U.S.C. § 1332(a)(3) and that Pinal County had no interest in the Property which could support its inclusion as a defendant.

Town moved to remand to state court. Town's first argument in support of its motion to remand was that the presence of Pinal County as a defendant defeats diversity jurisdiction. However, Copper contended that Pinal County had been fraudulently joined. Copper argued that Pinal County was merely a "nominal party" and therefore should be disregarded citing *Navarro Savings Ass'n v. Lee.*

Copper went on to argue that Pinal County's only interest in the Property arose from the fact that the Property was subject to Pinal County tax levies so that a tax lien in its favor is imposed by state statute. This it submits is an insufficient interest, because "any tax lien held by the County will remain in place regardless of which side prevails in this case." The court concluded that this did not alter the fact that Pinal County has a continuing interest in the Property, even if its interest appeared to be well secured.

"This court is guided by Ninth Circuit jurisprudence which instructs that so long as there is a possibility that a state court would find that a complaint advances a cause of action against a resident defendant, the federal court must remand the case. Here, there is no doubt that a state court would consider Pinal County a proper defendant in the eminent domain action, because of its continuing statutory right to a tax lien on the Property. In light of the appellate court's instruction, this case must be remanded."

EMINENT DOMAIN - CALIFORNIA

Property Reserve, Inc. v. Superior Court

Court of Appeal, Third District, California - March 13, 2014 - Cal.Rptr.3d - 2014 WL 978309

The State of California intends to build a tunnel to transport water from the north to the south. Before condemning the land needed for the project, it wants to study the environmental and geological suitability of hundreds of properties on which the tunnel may be constructed. "The difficulty here is that those precondemnation activities may themselves be a taking."

Pursuant to a statutory procedure that purports to authorize these precondemnation activities, the State petitioned the trial court for orders to enter the affected private properties and conduct the studies. For the geological studies, the State requested authority to enter the properties and conduct borings and drillings in the ground that would leave permanent columns of cement in the bored holes up to depths of 200 feet. The court denied the State's petition for the geological activities.

It ruled these activities constituted a taking, and they could be authorized only in a direct condemnation action, not by the precondemnation procedure.The trial court, however, granted the State's petition to enter the affected properties to conduct environmental studies. It effectively granted the State a blanket temporary easement for one year, during which the State may enter the properties and conduct its studies for up to 66 days during the year with up to eight personnel each entry. The court concluded such access and the environmental activities to be performed did not work a taking. As required by the statutory procedure, the court conditioned the environmental entries on the State depositing an amount of money the court determined to be the probable amount necessary to compensate the landowners for actual damage to, or substantial interference with their possession or use of, their properties, which the State's activities may cause.

On appeal the Court of Appeal concluded that both the geological activities and the environmental activities as authorized will work a taking. The geological activities will intentionally result in a permanent physical occupation of private property, defined constitutionally as a taking per se. The environmental activities will work a taking because they intentionally acquire a temporary property interest of sufficient character and duration to require being compensated."We also conclude the statutory precondemnation procedure cannot be used to accomplish these intentional takings. If an entity with the power of eminent domain intentionally seeks to take property or perform activities that will result in a taking, the California Constitution requires that entity to directly condemn the affected property interest in an authorized condemnation suit it brings and in which a landowner receives all of his constitutional protections against eminent domain. The statutory precondemnation procedure does not provide such a suit, as it fails to authorize the determination of the value of the property interest intentionally sought to be taken and to do so in a noticed hearing, and it fails to provide for a jury determination of just compensation in that hearing."

PUBLIC UTILITIES - CALIFORNIA

Mata v. Pacific Gas and Electric Company

Court of Appeal, First District, Division 3, California - February 28, 2014 - Cal.Rptr.3d - 14 Cal. Daily Op. Serv. 2234

Heirs of decedent electrocuted by overhead power line while trimming redwood tree brought

negligence and premises liability action against electrical utility and vegetation contractor, alleging they failed to exercise due care in maintaining vegetation clearance near the power line. The Superior Court dismissed the claims based on lack of subject matter jurisdiction, and heirs appealed.

The Court of Appeal held that court had subject matter jurisdiction even if clearance met minimum standard determined by Public Utilities Commission rules.

Commission rules and orders clearly provided that while a utility normally must maintain specified minimum clearances between its overhead electric lines and adjacent trees, the Commission left to the determination of the utility whether greater clearances were necessary at particular locations in order to ensure public safety, and permitting court action for failure to use due care in making such a determination complimented, rather than hindered, the Commission's jurisdiction.

An electrical utility has a duty to make overhead wires safe under all the exigencies created by the surrounding circumstances. A failure to satisfy that duty subjects the utility to liability in judicial proceedings for damages to those harmed by its negligence. Compliance with the general orders of the Public Utilities Commission does not establish as a matter of law due care by the power company, but merely relieves it of the charge of negligence per se. It does not affect the question of negligence due to the acts or omissions of the company as related to the particular circumstances of the case.

The Public Utilities Commission cannot evaluate and rectify individual claims for damages resulting from a utility's failure to exercise reasonable care in making the determination at a particular location as to whether clearance between vegetation and power lines beyond the minimum required by rule is necessary or advisable. A superior court action for damages based on a utility's failure to use due care is in aid of, rather than in derogation of, the Public Utilities Commission's jurisdiction.

LIABILITY - CONNECTICUT

Walker v. Housing Authority of City of Bridgeport

Appellate Court of Connecticut - March 11, 2014 - A.3d - 148 Conn.App. 591

Injured plaintiff brought suit against municipal housing authority for injuries she allegedly sustained while on housing authority property. Housing authority moved for summary judgment. The Superior Court granted motion. Plaintiff appealed.

The Appellate Court held that:

- Attorney's affidavit regarding mailing of notice of claim to authority did not create genuine issue of material fact;
- Statement in affidavit from authority's employee was not hearsay;
- Inability of deceased authority chairman to testify as to whether she had received notice did not create genuine issue of material fact;
- Attorney's letter to municipal housing authority regarding plaintiff's injuries did not meet statutory notice requirements; and
- Authority could not delegate authority to receive claim notices to its chief of security.

SCHOOLS - FLORIDA

Carver Middle School Gay-Straight Alliance v. School Bd. of Lake County, Fla.

United States District Court, M.D. Florida, Ocala Division - March 6, 2014 - F.Supp.2d - 2014 WL 897072

The Carver Middle School Gay–Straight Alliance asked to be recognized by the Lake County School Board at Carver Middle School in order to receive certain benefits that would accompany that recognition. The School Board declined to grant the Alliance such status. The Alliance sued, alleging violations of the Equal Access Act and the First Amendment right to free speech and association.

The District Court held that:

- The Equal Access Act likely does not apply to schools below the high school level;
- Alliance had standing
- Alliance had not demonstrated a substantial likelihood of prevailing on the merits of their claim under the Equal Access Act;
- The rejection of the Alliance application was a prior restraint predicated upon the content of the speech or associational rights intended to be exercised by the Alliance;
- *Hazelwood School District,* rather than *Tinker* governs this case, and thus the reasonably related standard applies;
- The curtailment of the Alliance speech by the School Board's failure to recognize it as a sponsored club was reasonably related to legitimate pedagogical concerns.

TAX - GEORGIA

Newton Timber Co., L.L.L.P. v. Monroe County Bd. of Tax Assessors

Supreme Court of Georgia - March 10, 2014 - S.E.2d - 14 FCDR 442

Taxpayers petitioned for a writ of mandamus against county board of tax assessors, seeking an order requiring the board to approve or deny Conservation Use Value Assessment (CUVA) applications, and to certify taxpayers' appeals to the Superior Court. The Superior Court denied all of taxpayers' requests for relief, and they appealed.

The Supreme Court of Georgia held that:

- County board of tax assessors was not required to certify taxpayers' property tax evaluation tax appeals until such time as the Superior Court clerk received taxpayers' filing fees, overruling *Fayette County Bd. of Tax Assessors v. Oddo,* 261 Ga.App. 707, 583 S.E.2d 537, and
- Taxpayers' were not entitled to extraordinary remedy of mandamus to order county board of tax assessors to either approve or deny their CUVA applications.

IMMUNITY - GEORGIA

City of Atlanta v. Shavers

Court of Appeals of Georgia - March 11, 2014 - S.E.2d - 2014 WL 929183

Gas station patron filed suit against police officer, stating claims of false imprisonment and malicious prosecution, stemming from incident in which officer charged patron with felony larceny and transported him to jail for allegedly taking money orders from gas station. The trial court denied officer summary judgment. He appealed.

The Court of Appeals held that:

- Officer's appeal did not fall within collateral order doctrine, and
- Officer deliberately intended to do wrongful act, such that he was not immune from suit.

Police officer's appeal from trial court's denial of his summary judgment motion filed on basis of official immunity did not fall within collateral order doctrine, and thus was immediately appealable, since question of fact existed as to whether officer acted with actual malice, such that issue of official immunity was no longer purely legal question nor a conclusive determination that officer was not immune from suit.

Police officer deliberately intended to do wrongful act by arresting gas station patron for allegedly stealing from gas station, charging him with felony larceny, and transporting him to jail, such that officer acted with actual malice and thus would not qualify for official immunity from patron's suit for false imprisonment and malicious prosecution. Officer knew that patron did not steal any property from gas station prior to time that officer decided to arrest him.

ZONING - HAWAII

Kauai Springs, Inc. v. Planning Com'n of County of Kaua"i

Supreme Court of Hawai'i - February 28, 2014 - P.3d - 2014 WL 812683

Water bottling company sought review of county planning commission's denial of combined application for a use permit, zoning permit, and special permit to continue operating a spring water bottling facility. The Circuit Court reversed in part and vacated in part. Planning commission appealed. The Intermediate Court of Appeals vacated and remanded. Bottling company petitioned for writ of certiorari, which was granted.

The Supreme Court of Hawaii held that:

- Ordinances permitting assent to delay in ruling on application did not conflict with statute;
- Bottling company assented to delay in ruling on application; and
- Planning commission properly denied application pursuant to public trust doctrine.

County planning commission properly denied, pursuant to the public trust doctrine of the state constitution, water bottling company's combined application for a user permit, zoning permit, and special permit related to operation of spring water bottling facility, where there was no evidence that bottling company or its commercial water supplier had legal standing to extract or sell the water on a commercial basis, thus, bottling company's operation of bottling facility would not have been in compliance with Water Commission and Public Utilities Commission requirements.

LIABILITY - ILLINOIS

Ellwood v. City of Chicago

United States District Court, N.D. Illinois, Eastern Division - March 6, 2014 - Not Reported in F.Supp.2d - 2014 WL 883553

On April 25, 2008, Chicago police officers arrested Steven M. Dick following an investigation into a series of disturbing letters that the police had received threatening an imminent shooting at a local elementary school. The letters threatened retribution for the police's shooting of a wild cougar, which had taken place in Mr. Dick's backyard. The police suspected that Mr. Dick was the author of the threatening letters and arrested him the day before the school shooting was supposed to take place. The police did not charge Mr. Dick with any offenses related to the threatening letters, however, and instead charged him with possessing unregistered weapons and with assault. These charges against Mr. Dick were eventually dropped, and, six years later, another man pleaded guilty to sending the letters.

Mr. Dick sued the City of Chicago and the police officers involved in his arrest, alleging false arrest, involuntary commitment, illegal search, a failure to train, and conspiracy under 42 U.S.C. § 1983, as well as various state-law claims. Mr. Dick has since passed away, and his sister, Lauren Ellwood had taken over this litigation as the special administrator of Mr. Dick's estate. Defendants moved for summary judgment on all claims.

The District Court held that:

- The police acted reasonably in arresting Mr. Dick and taking him to the hospital after he bonded out of police custody, and thus defendants were entitled to summary judgment on the false arrest and involuntary commitment claims;
- Defendants were entitled to summary judgment on Plaintiff's illegal search, failure-to-train, and conspiracy claims;
- There was no probable cause to support the offenses with which Mr. Dick was charged, and thus the court denied summary judgment as to the state-law malicious prosecution claim.

EMPLOYMENT - ILLINOIS

Scepurek v. Board of Trustees of Northbrook Firefighters' Pension Fund

Appellate Court of Illinois, First District, Second Division - March 4, 2014 - N.E.3d - 2014 IL App (1st) 131066

Firefighter brought action against board of trustees of village firefighters' pension fund, alleging that board had wrongfully denied his application for a duty disability pension. The Circuit Court affirmed the board decision, and firefighter appealed.

The Appellate Court held that board decision was against manifest weight of evidence.

No evidence supported board's conclusion that firefighter's disability had been solely caused by a preexisting back condition and that work-related injury did not contribute at all to the disability. All medical evidence, including reports made by the board's own independent medical evaluators, concluded that the work-related injury contributed at least in part to firefighter's permanent

disability.

TAX - INDIANA

Gupta v. Busan

Court of Appeals of Indiana - March 6, 2014 - N.E.3d - 2014 WL 880697

Following issuance of a tax deed to purchaser of real property, putative property owner filed suit to quiet title arguing non-compliance with certified mail notice requirements. The Circuit Court granted summary judgment for putative owner. Purchaser appealed.

The Court of Appeals held that tax purchaser's notice to former owner, sent by certified mail, complied with statutory requirements for obtaining tax deed, even though purchaser did not request return receipt, and former owner asserted he did not receive notice; purchaser was not required to provide actual proof of tracking and delivery to show compliance.

To comply with due process, a purchaser of tax deed must give notice that is reasonably calculated to inform interested parties of the pending action in order to afford them an opportunity to present objections. If the notice of a tax deed purchase is reasonably calculated to inform under all of the circumstances of the particular case, the constitutional requirements are satisfied and the issuance of the tax deed will be upheld.

Purchaser provided notice reasonably calculated to inform mortgagee of the tax sale and issuance of tax deed, in compliance with due process, by sending letters regarding the sale and redemption period by certified and first class mail, and also posting notice on the property.

Former owner, moving for relief from tax sale more than 60 days after issuance of deed, failed to make requisite allegation of constitutionally inadequate notice, and instead alleged only that purchaser failed to follow statutory requirements for certified mail.

EMINENT DOMAIN - MISSISSIPPI

Carthan v. Patterson

Court of Appeals of Mississippi - March 11, 2014 - So.3d - 2014 WL 930791

Property owner filed suit alleging that municipality's demolition of his warehouse as a nuisance was an unconstitutional taking. Municipality filed motion for summary judgment. The Circuit Court granted motion. Property owner appealed.

The Court of Appeals held that property owner's letter appealing municipality's demolition of his warehouse failed to comply with requirements for bill of exceptions, and thus property owner failed to perfect his appeal of municipality's act and trial court did not have jurisdiction over owner's subsequent unconstitutional taking action, where letter failed to embody the facts and proceedings below.

MUNICIPAL ORDINANCE - NEBRASKA

City of Beatrice v. Meints

Court of Appeals of Nebraska - March 11, 2014 - N.W.2d - 21 Neb.App. 805

Meints was charged on June 21, 2011, with 12 separate counts of violating Beatrice City Code § 16–623 (2002), which prohibits the storage of junked or unregistered vehicles for more than 21 days and labels any vehicle so stored as a nuisance.

Meints alleged the city code was invalid because it criminalizes conduct which is not criminal under the Nebraska Revised Statutes. He argues that the time limit in the state statute regulating unregistered vehicles is 30 days, that the limit in the Beatrice City Code regulating the same is 21 days, and that there is therefore an irreconcilable conflict which makes the city ordinance unenforceable.

All ordinances are presumed to be valid. However, the power of a municipality to enact and enforce any ordinance must be authorized by state statute. Where there is a direct conflict between a municipal ordinance and a state statute, the statute is the superior law. However, if the ordinance and statute in question are not contradictory and can coexist, then both are valid.

The Court of Appeals disagreed, finding that a city is authorized by Neb.Rev.Stat. § 18–1720 (Reissue 2012) to "define, regulate, suppress and prevent nuisances, and to declare what shall constitute a nuisance, and to abate and remove the same." The Nebraska statutes do not address or regulate the placement or open storage of unlicensed, unregistered, or junk motor vehicles upon private property. This falls within the discretion of the city, as authorized by § 18–1720. In addition, the district court also noted that a similar ordinance regulating and prohibiting junked vehicles was upheld by the Nebraska Supreme Court in *Village of Brady v. Melcher,* 243 Neb. 728, 502 N.W.2d 458 (1993). The general rule is that courts should give great deference to a city's determination of which laws should be enacted for the welfare of the people. See *Giger v. City of Omaha,* 232 Neb. 676, 442 N.W.2d 182 (1989).

"For the reasons stated above, we find that this assignment of error is without merit."

EMINENT DOMAIN - NEBRASKA

SourceGas Distribution LLC v. City of Hastings

Supreme Court of Nebraska - March 7, 2014 - N.W.2d - 287 Neb. 595

The City of Hastings, Nebraska filed a petition in the county court seeking to initiate condemnation proceedings against property owned by SourceGas Distribution LLC that was located in an area that had been annexed by Hastings. Hastings brought its petition under the general condemnation procedures found at Neb.Rev.Stat. §§ 76–701 through 76–726 (Reissue 2009 & Cum.Supp.2012) (chapter 76). In an effort to enjoin the county court proceedings, SourceGas filed a complaint for temporary and permanent injunction, primarily alleging that Hastings must utilize Nebraska's Municipal Gas System Condemnation Act, Neb.Rev.Stat. §§ 19–4624 through 19–4645 (Reissue 2012) (Gas System Condemnation Act), rather than the procedures in chapter 76.

The district court concluded that § 19–4626(2) exempted Hastings from being required to proceed under the Gas System Condemnation Act and that Hastings could utilize the general condemnation procedures set forth in chapter 76. The Supreme Court of Nebraska affirmed.

Section 19–4626(2), provides: “Nothing in the act shall be construed to govern or affect the manner in which a city which owns and operates its own gas system condemns the property of a utility when such property is brought within the corporate boundaries of the city by annexation.” Therefore, § 19–4626(2) provides that the Gas System Condemnation Act does not apply when a city owns and operates its own gas system and the property that is being condemned is within the corporate boundaries of the city by annexation.

Supreme Court of Nebraska holds that Gas System Condemnation Act does not apply when a city owns and operates its own gas system and the property that is being condemned is within the corporate boundaries of the city by annexation and thus city could utilize general condemnation procedures.

ENTERPRISE ZONES - NEW YORK

Hudson River Valley, LLC v. Empire Zone Designation Bd.

Supreme Court, Appellate Division, Third Department, New York - March 5, 2014 - N.Y.S.2d - 2014 N.Y. Slip Op. 01490

Real estate holding company brought combined proceeding pursuant to Article 78 and action for declaratory judgment against Empire Zone Designation Board, seeking annulment of the revocation of its certification as empire zone business enterprise. The Supreme Court, Albany County partially granted Board’s motion to dismiss, and company appealed.

The Supreme Court, Appellate Division, held that:

- Board’s decision was not arbitrary and capricious;
- Question of whether company and related entity were a single enterprise invoked factual, rather than purely legal, questions, and thus company was not excused from exhaustion requirement; and
- Company failed to show administrative challenge would have been futile, so as to excuse exhaustion.

Empire Zone Designation Board’s decision upholding revocation of real estate holding company’s certification as empire zone business enterprise, based on its failure to meet the statutory requirements, namely, the shirt-changer test and 1:1 benefit-cost test, without considering company’s annual business reports in combination with those of its related entity and its claims that they were a single enterprise for purpose of determining whether it met 1:1 benefit-cost test was not arbitrary and capricious or contrary to law, where company did not advance argument to the Board in support of its administrative appeal or present any evidence to substantiate it.

Question of whether real estate holding company and a related entity constituted a single enterprise, for the purpose of determining whether company met the 1:1 benefit-cost test, as required to qualify for Empire Zones Program, invoked resolution of factual, not purely legal, issues, and thus company was not excused from exhaustion requirement for bringing Article 78 proceeding.

Real estate holding company, which sought to develop a traumatic brain injury center with a related entity, failed to show that an administrative challenge to the revocation of its certification as an empire zone business enterprise based on the 1:1 benefit-cost test would have been futile, so as to excuse the exhaustion requirement for bringing an Article 78 proceeding, especially given that the related entity was recertified following an administrative appeal of its own decertification.

LIABILITY - NEW YORK

In re Paula D.

Supreme Court, Appellate Division, First Department, New York - March 6, 2014 - N.Y.S.2d - 2014 N.Y. Slip Op. 01523

Infant plaintiff who was injured after being struck by vehicle brought personal injury action against city, construction companies, and others, alleging construction enclosure on city's property blocked her view of intersection. Defendants moved for summary judgment. The Supreme Court, Bronx County, granted motions in part and denied motions in part. Parties cross-appealed.

The Supreme Court, Appellate Division, held that:

- Triable issue of fact existed as to whether plaintiff's failure to observe the vehicle that struck her was a foreseeable consequence of construction enclosure;
- Triable issue of fact existed as to whether contractor responsible for designing and creating a construction enclosure unleashed a force of harm, such that it was not entitled to rely upon municipally approved plans or its status as an independent contractor;
- Triable issue of fact as to whether construction enclosure followed approved plans, and whether it should have been recognized it as unsafe; and
- City did not owe plaintiff a special duty.

City's nondelegable duty, as owner of property upon which construction enclosure that allegedly blocked infant plaintiff's view of vehicle that struck her at intersection was located, was not triggered, where defect was in the construction structure, not the roadway or sidewalk.

MUNICIPAL ORDINANCE - NEW YORK

30 Clinton Place Owners Inc. v. City of New Rochelle

United States District Court, S.D. New York - February 27, 2014 - Slip Copy - 2014 WL 890482

The City of New Rochelle charges residential property owners an annual "residential refuse fee" to offset the cost of removing garbage and recyclables from their properties. The $223 per-dwellin--unit fee applies equally to single-family homes and individual apartments, regardless of how much it costs to remove garbage from each type of dwelling unit.

Plaintiffs alleged that people living in multi-dwelling-unit housing pay more for garbage removal than people living in single-family homes. Plaintiffs further alleged racial minorities disproportionately occupy the multi-dwelling unit housing in the City. In sum, plaintiffs alleged the City knew the residential refuse fee would have a disparate impact on racial minorities.

The District Court dismissed the claim, finding no Equal Protection, 42 U.S.C. §§ 1981 and 1982, FHA Section 3604(b), or state law violations.

ZONING - OHIO

Artz v. Elizabeth Twp.

Court of Appeals of Ohio, Second District, Miami County - March 7, 2014 - Slip Copy - 2014 -Ohio- 854

Property owner filed action for declaratory judgment with respect to his entitlement under township zoning code to erect and operate animal crematorium. The Court of Common dismissed complaint with prejudice. Property owner appealed.

The Court of Appeals held that:

- Definition of agricultural use in township zoning resolutions did not encompass use of subject property for operation of animal crematorium as permitted principal use, and
- Operation of animal crematorium was not permitted accessory use incidental to permitted operation of dog kennel.

ZONING - PENNSYLVANIA

THW Group, LLC v. Zoning Bd. of Adjustment

Commonwealth Court of Pennsylvania - March 6, 2014 - A.3d - 2014 WL 880324

Applicant sought review of order of city zoning board of adjustment (ZBA) denying applicant a zoning use permit to operate a methadone clinic in a commercial district. The Court of Common Pleas reversed. Objectors appealed.

The Commonwealth Court held that:

- Methadone clinic was a permitted use even though clinic was not a specifically mentioned in city zoning code;
- Non-existence of methadone clinics at time of writing of zoning code did not preclude the proposed clinic from qualifying as a permitted use;
- Applicant’s proposal did not create an additional or new principal structure on a lot in violation of zoning code;
- Trial court did not err in choosing not to rely on objectors’ expert’s testimony to make a legal determination as to what constituted a medical office under zoning code; and
- Trial court did not exceed its authority by using a dictionary to define term “clinic” that was not defined in zoning code.

MUNICIPAL ORDINANCE - SOUTH CAROLINA

Pallares v. Seinar

Supreme Court of South Carolina - March 12, 2014 - S.E.2d - 2014 WL 949618

Homeowner brought civil suit against neighbors for malicious prosecution and abuse of process after neighbors sued homeowner for various animal and building code violations. The Circuit Court granted neighbors summary judgment. Homeowner appealed and the Supreme Court certified case for review.

The Supreme Court of South Carolina held that:

- Summary judgment evidence supported determination that neighbors honestly believed that they had probable cause to lodge complaints against homeowner, but
- Fact issue precluded summary judgment as to abuse of process claim.

Summary judgment evidence supported trial court's determination, in granting neighbors summary judgment on homeowner's malicious prosecution claim, that neighbors honestly believed that they had probable cause to lodge complaints against homeowner for nuisance animals and various housing and building code violations. Incident reports documenting complaints about dogs barking stated that reporting officer observed dog on homeowner's property "constantly barking [and] causing [a] disturbance in the neighborhood," and city inspections department issued homeowner warnings and notices of violation of city ordinance.

One who uses legal process, whether criminal or civil, against another primarily to accomplish purpose for which it is not designed, is subject to liability for harm caused by the abuse of process. Collateral objective must be sole or paramount reason for acting.

Tort of abuse of process centers on events occurring outside the process; improper purpose, as element of abuse of process, usually takes form of coercion to obtain collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as threat or club. Willful act element of abuse of process consists of three components: (1) willful or overt act; (2) in the use of the process; (3) that is improper because it is either unauthorized or aimed at illegitimate collateral objective.

Genuine issue of material fact existed as to whether neighbors had ulterior motive in filing various complaints against homeowner and in seeking her mental commitment and whether there was willful act by neighbors aimed at alleged illegitimate collateral objective of ejecting homeowner from her home and neighborhood, precluding summary judgment on claim for abuse of process.

IMMUNITY - TEXAS

Abbott v. City of Paris, Texas

Court of Appeals of Texas, Texarkana - March 7, 2014 - S.W.3d - 2014 WL 895195

Owner of trailer park, an approved, non-conforming use, was denied approval to expand the park unless the property was rezoned.

Owner alleged causes of action against the City for (1) regulatory taking, (2) denial of due process of law, and (3) denial of equal protection under the law. In response, the City filed a plea to the jurisdiction alleging that owner failed to present any statute or recognized theory of law that would satisfy a valid waiver of governmental immunity and further claiming that Abbott failed to exhaust

his administrative remedies. The trial court granted the City's plea to the jurisdiction.

The Court of Appeals affirmed the City's plea to the jurisdiction, finding that owner, once again, failed to exhaust all available administrative remedies.

VIRGINIA - IMMUNITY

U.S. ex rel. Oberg v. Pennsylvania Higher Educ. Assistance Agency

United States Court of Appeals, Fourth Circuit - March 13, 2014 - F.3d - 2014 WL 961560

Relator, on behalf of United States, brought qui tam action under False Claims Act (FCA) alleging that various state-created corporate entities intended to facilitate issuance of student loans defrauded United States Department of Education. Parties consented to final disposition by magistrate judge. The United States District Court for the Eastern District of Virginia dismissed action. Relator appealed. The Court of Appeals vacated and remanded, 681 F.3d 575. On remand, the United States District Court for the Eastern District of Virginia again dismissed action. Relator appealed.

The Court of Appeals held that:

- Remand was required to permit limited discovery as to question of whether Pennsylvania Higher Education Assistance Agency (PHEAA) was proper defendant under FCA;
- Remand was required to permit limited discovery as to question of whether Virginia Student Assistance Corporation (VSAC) was proper defendant under FCA; and
- Arkansas Student Loan Authority (ASLA) was an arm of the State, and was thus not a "person" subject to liability under FCA.

EASEMENTS - GEORGIA

Donald Azar, Inc. v. Muche

Court of Appeals of Georgia - March 7, 2014 - S.E.2d - 2014 WL 888885

Landowner brought action against company that provided surface parking services on company's adjacent property, seeking to enjoin company's obstruction of a private way and asking for damages. Company answered and filed counterclaim for judgment declaring that it owned alley abutting both its own property and landowner's property and that landowner did not have any easement in alley. The trial court referred action to special master, who held evidentiary hearing and prepared proposed order in favor of company. The trial court adopted special master's report and proposed order. Landowner appealed.

The Court of Appeals held that:

- Special master was authorized to find that landowner abandoned any implied easement that it may once have had in alley, and

- Special master was authorized to reject landowner's contention that it had parol license to use alley.

Evidence showed that alley was neither maintained nor used by city for approximately 20 years before company first improved areas in alley and blocked its open use, that landowner consented to company's improvements in alley and supported re-zoning plan advanced by company that included fencing and other encroachments in alley, and that landowner failed to voice any objection to company's use of or improvements to alley until approximately 20 years after company's use of and improvements to alley began.

MUNICIPAL ORDINANCE - ALABAMA

K & D Automotive, Inc. v. City of Montgomery

Supreme Court of Alabama - February 28, 2014 - So.3d - 2014 WL 803375

Automobile repair business and its owner filed suit against city, city employees, and registered nuisance abatement agent, alleging numerous claims, including interference with business activities and defamation, and also challenged the constitutionality of the city nuisance ordinance, pursuant to which city declared numerous vehicles on business's premises were "junk" in violation of the ordinance and had the vehicles towed from the premises. Defendants filed motions for summary judgment. The Montgomery Circuit Court granted the motion in part, and following a bench trial, finding that city was not liable for alleged damage to vehicles that were towed, but ordering abatement agent to pay plaintiffs $520 in damages. Plaintiffs appealed.

The Supreme Court of Alabama held that:

- Fact issues existed as to whether definition of term "junk" in nuisance ordinance was arbitrary, unreasonable and overly broad, in violation of due process, and
- Lists or properties that were alleged to be hosting nuisances, prepared by employees of city housing code department, were themselves evidence sufficient to shift burden of proof to business and owner to show that they were not hosting nuisances.

FIRST AMENDMENT - CALIFORNIA

American Humanist Ass'n v. City of Lake Elsinore

United States District Court, C.D. California - February 25, 2014 - Not Reported in F.Supp.2d - 2014 WL 791800

Plaintiffs challenged a veterans-memorial design approved by the Lake Elsinore City Council as violative of the First Amendment's Establishment Clause of the United States Constitution and the Establishment, No Preference and No Aid to Religion Clauses of Articles I and XVI of the California Constitution.

The District Court concluded that the Lake Elsinore memorial, which prominently featured a cross, violated both the U.S. Constitution's Establishment Clause and the Establishment and No Preference Clauses of the California Constitution.

“The public comments show that for a majority of the five-person Lake Elsinore City Council, the purpose for including the cross on the memorial was to symbolize their religion and the Country’s status as a Christian nation. Such comments reflect an abandonment of government neutrality in adopting the cross design, and an ‘intent of promoting a particular point of view in religious matters.'”

PENSIONS - CALIFORNIA

City of Oakland v. Oakland Police and Fire Retirement System

Court of Appeal, First District, Division 4, California - February 28, 2014 - Cal.Rptr.3d - 2014 WL 800988

The City of Oakland successfully argued at trial that the Oakland Police and Fire Retirement Board (Board) had impermissibly included certain holiday premium pay and shift differential pay in the calculation of Oakland Police and Fire Retirement System (PFRS) retirement benefits. The Board was ordered to correct its calculations for all future payments and to implement a plan for recovering past overpayments made to retirees.

The City claimed that the Board was overcompensating PFRS retirees in four specific ways: (1) by paying retirees at an excessive rate for holidays; (2) by paying retirees for too many holidays; (3) by including shift differential pay in the calculation of retiree benefits; and (4) by paying retirees who retired above the rank of Captain at an excessive rate for holidays.

The Retired Oakland Police Officers Association, along with several PFRS’s members and beneficiaries (collectively, the “Association”), appealed.

The Court of Appeal held that:

- The City was barred by the doctrine of res judicata from re-litigating the issue of holiday premium pay;
- The development of essential facts by the trial court with respect to shift differential pay was not error;
- The City and the Board were estopped from requiring PFRS retirees to repay any retirement benefits based on the improper inclusion of shift differential pay as “compensation attached to rank;” and
- The Board was not barred by theories of equitable estoppel or laches from recouping the benefits improperly paid to PFRS retirees based on an inflated number of pensionable holidays for fiscal years 2009, 2010, and 2011.

ZONING - CALIFORNIA

Tower Lane Properties v. City of Los Angeles

Court of Appeal, Second District, Division 1, California - February 28, 2014 - Cal.Rptr.3d - 2014 WL 794334

Builder filed petition for writ of mandate seeking to compel city to set aside grading permit condition, which stated no grading permit shall be issued for a hillside site larger than 60,000 square feet unless a “tentative tract map” has been approved by a city planner, on grounds that it did not propose to subdivide the land and thus no tentative tract map was required. The Superior

Court granted the writ, and city appealed.

The Court of Appeal held that:

- Ordinance only applied to subdivisions, and
- Deference to city's interpretation was unwarranted.

City ordinance stating that no grading permit shall be issued for a hillside site larger than 60,000 square feet "unless a tentative tract map has been approved therefor by the advisory agency" only applied to subdivisions and thus did not apply to builder's request for grading permit for single hillside building site. Term "tract map" was a subdivision-specific term, purpose of the ordinance was to ensure that city could control grading work as part of subdivision approvals, and other ordinances extensively addressed hillside grading requirements and protected the integrity of hillsides and hillside communities.

The level of deference accorded to an agency's interpretation of an ordinance turns on whether the agency has a comparative interpretive advantage over the courts, and also whether its interpretation is likely to be correct. Factors to consider in determining if an agency has a comparative advantage include whether the legal text to be interpreted is technical, obscure, complex, open-ended, or entwined with issues of fact, policy, and discretion.

CIVIL SERVICE - CONNECTICUT

Shevlin v. Civil Services Com'n of City of Bridgeport

Appellate Court of Connecticut - February 25, 2014 - A.3d - 2014 WL 631143

Firefighter lieutenants, qualified for promotion to captain, sought a judicial determination of the eligibility date to take captain examination. The Superior Court ruled for firefighters. Civil service commission appealed.

The Appellate Court held that demotion of firefighter from captain to lieutenant was not "layoff," for purpose of determining eligibility date for captain promotion examination, since firefighter's position was not discontinued due to lack of work or lack of funds. Rather, eligibility date for examination should have been calculated based on another captain's retirement, which created vacancy at captain class with no active promotion list.

ARS - DELAWARE

RBC Capital Markets, LLC v. Education Loan Trust IV

Supreme Court of Delaware - March 5, 2014 - A.3d - 2014 WL 868668

After the Court of Chancery dismissed action filed by noteholder that alleged educational loan trust had paid excessive fees to issuer of notes in violation of trust indenture, under which noteholder was issued auction rate securities collateralized by student loans owned by trust, noteholder sued trust and issuer for breach on contract and breach of implied covenant of good faith and fair dealing, claiming defendants breached indenture by failing to pay interest lawfully owed to plaintiff. The Superior Court dismissed action for failure to state a claim and as barred by res judicata. Plaintiff appealed.

The Supreme Court of Delaware held that:

- Complaint adequately alleged that interest was actually due and owing to plaintiff, which defendants failed to pay;
- Indenture's no-action clause did not bar plaintiff's breach of contract claim;
- Order issued by Court of Chancery was final decree;
- Record was insufficient to determine whether plaintiff knew, or could have known, of its claim for unpaid interest at time complaint was filed in Court of Chancery; and
- Res judicata did not bar breaches that occurred after complaint in Court of Chancery was filed.

Noteholder's amended breach of contract complaint adequately alleged that interest was actually due and owing to noteholder under indenture of trust, which issuer of notes and educational loan trust failed to pay, as required for noteholder's claim for breach of indenture, under which noteholder was issued auction rate securities collateralized by student loans owned by trust. Complaint alleged interest amount noteholder was due under terms of indenture.

Only where predicate to recovery of unpaid interest or principal is proving breach of legal obligations under trust indenture other than those directly addressing payment of principal and interest will noteholder's claim for principal or interest be subject to indenture's no-action clause.

No-action clause of noteholder's indenture of trust did not bar noteholder's breach of contract claim stemming from unpaid interest under terms of indenture, despite contention that noteholder did not specify precisely how it calculated interest and that documents it used contradicted position that claim was only for interest due. Indenture explicitly allowed noteholder to bring action to recover unpaid principal or interest without first complying with no-action clause, and it was not necessary for noteholder to prove breach of legal obligations under indenture, other than those that directly addressed payment of interest, as predicate to recovery.

Res judicata did not bar portion of noteholder's claim for unpaid interest under indenture of trust that was allegedly due after prior complaint was filed, even if noteholder knew or could have known of its claim for unpaid interest when it filed prior action. Facts underlying claims for unpaid interest had not materialized at time prior action was filed, as indenture and supplemental indenture created separate, recurring obligations for interest payments.

MUNICIPAL ORDINANCE - GEORGIA

Sweeney v. Lowe

Court of Appeals of Georgia - March 3, 2014 - S.E.2d - 2014 WL 804051

Alleged dog bite victim brought action against dog owner. The owner moved for summary judgment. The trial court granted the motion. Dog bite victim appealed.

The Court of Appeals held that victim failed to properly plead and prove the ordinance.

In order for a superior court or the Court of Appeals to consider city or county ordinances they must be alleged and proved, and the proper method of proving a city or county ordinance is by production of the original or of a properly certified copy.

Court could not hear alleged dog bite victim's challenge to trial court's grant of summary judgment in favor of dog owner, where victim failed to provide the relevant county statute of which he alleged a violation, or a certified copy of it, and there was no indication of an agreement between victim and

dog owner that the county statute was the one at issue.

ZONING - GEORGIA

Burke County v. Askin

Supreme Court of Georgia - March 4, 2014 - S.E.2d - 2014 WL 818937

Landowner sought writ of mandamus to compel county to repair and maintain five roads abutting his property in subdivision. The Superior Court granted writ as to three roads. County appealed, and landowner cross-appealed. The Supreme Court of Georgia vacated and remanded. On remand, the Superior Court again issued a writ of mandamus granting the relief requested, and county appealed.

The Supreme Court of Georgia held that:

- County was precluded from relitigating the issue of whether the Superior Court erred in granting landowner mandamus relief by compelling county to construct and maintain a previously unopened segment of roadway on the basis that mandamus relief is limited to requests regarding existing public roads;
- Superior Court's grant of mandamus relief to landowner did not constitute a manifest abuse of discretion, and
- County's refusal to complete unfinished segment of subdivision road was arbitrary, capricious, unreasonable and a gross abuse of discretion.

MUNICIPAL ORDINANCE - ILLINOIS

Village of Roxana v. Shell Oil Company

United States District Court, S.D. Illinois - March 5, 2014 - Not Reported in F.Supp.2d - 2014 WL 860157

In response to petroleum byproduct pollution from adjacent Shell refinery, the Village of Roxana filed 230 separate complaints, each complaint representing a different Village property allegedly contaminated by Shell's pollutants in an effort to enforce Roxana Municipal Code § 8.16.010, which prohibits "leaving garbage, dirt or rubbish in public way or watercourse."

Shell asked the District Court to certify the following issues for interlocutory appeal: (1) Whether the Village of Roxana's Municipal Ordinance § 8.16.010 violation claims were preempted under Illinois law?; and (2) Whether the plain meaning of section 8.16.010, as a matter of law, encompassed Roxana's Municipal Ordinance violation claims?

As to preemption, the court concluded that the question of whether Illinois state law preempts Roxana's alleged ordinance violation was not a question of law within the meaning of section 1292(b), and thus the court denied Shell's motion for certification of order for interlocutory appeal in that respect.

The court then considered the rules of statutory construction to determine whether it was contestable that petroleum byproducts were within the scope of Roxana's ordinance. The court concluded that it was contestable that section 8.16.010 encompassed the leaking of petroleum byproducts, including benzene, into the ground. Because Shell had established that this issue was a question of law, controlling, contestable, and likely to speed up the litigation, the court will granted

Shell's motion in that respect and certified the following question for interlocutory appeal: Whether the release of petroleum byproducts are "an offensive substance" within the meaning of Roxana's Municipal Code § 8.16.010?

PUBLIC UTILITIES - MAINE

Houlton Water Co. v. Public Utilities Com'n

Supreme Judicial Court of Maine - March 4, 2014 - A.3d - 2014 ME 38

Intervenors sought judicial review of Public Utilities Commission's approval of the reorganization of two regulated electrical utilities.

The reorganization involves changes in the corporate ownership of specific entities that transmit and distribute electricity in Maine such that they will be held in common ownership with generators of electricity in Maine, primarily generators of electricity from wind power. The intervenor argued that the Electric Industry Restructuring Act, 35–A M.R.S. §§ 3201–3217 (2013), prohibits, as a matter of law, the proposed union under a single ownership of transmission-and-distribution utilities and electricity generators. Alternatively, the intervenors argue that the specific affiliations and financial relationships proposed here contravene the goals of the Act, the Commission erred in its legal analysis and its factual findings, and the Commission abused its discretion in approving and setting conditions on the reorganization.

The Supreme Judicial Court of Maine held that:

- Electric Industry Restructuring Act's prohibition on financial relationships did not impose a blanket prohibition against Maine transmission and distribution (T&D) utilities sharing an affiliate with Maine generation and generation-related assets, and
- T&D utility was not required to have control of generation assets in order for it to have impermissible financial interest.

Electric Industry Restructuring Act's prohibition on financial relationships did not impose a blanket prohibition against Maine T&D utilities sharing an affiliate with Maine generation and generation-related assets. Act did not explicitly prohibit all affiliation, as defined by the Act, between a T&D utility's corporate owner and entities that owned generation or generation-related assets, rather, whether any specific proposed affiliation ran afoul of the prohibition against a T&D utility having ownership of, a financial interest in, or otherwise exercising control over a generator was required to be addressed individually.

T&D utility was not required to have control of generation assets or generation-related assets for it to have a "financial interest" in generation utility within meaning of Electric Industry Restructuring Act's prohibition on financial relationships. Rather, a T&D utility had a prohibited "financial interest" in generation assets or generation-related assets if there existed a sufficient financial interest in the assets of a generator that the interest was likely to produce incentives for favoritism that would have undermined the purpose of the Act.

IMMUNITY - MISSISSIPPI

Watkins ex rel. Watkins v. Mississippi Dept. of Human Services

Supreme Court of Mississippi - February 27, 2014 - So.3d - 2014 WL 793639

Biological mother brought wrongful-death action against the Department of Human Services (DHS) in connection with child's death from starvation after child was removed from mother's home, DHS was awarded custody of child, and DHS placed child in the home of his paternal grandmother, to whom durable legal custody was later awarded. The Circuit Court granted summary judgment in favor of DHS, on grounds that DHS was entitled to sovereign immunity from liability for acts alleged in mother's complaint. Mother appealed.

Genuine issue of material fact existed as to whether DHS received "report" from treating physicians or social workers that child was being abused or neglected, related to child's admission to and treatment at hospital for symptoms of malnourishment, so as to trigger DHS's ministerial duty to investigate such report, thus precluding summary judgment for DHS on issue of its entitlement to discretionary-function immunity under the Mississippi Tort Claims Act.

BONDS - MISSOURI

Cromeans v. Morgan Keegan & Co., Inc.

United States District Court, W.D. Missouri, Central Division - February 24, 2014 - F.Supp.2d - 2014 WL 818638

Municipal bond purchasers brought putative class action against underwriter, alleging that underwriter made material misrepresentations and omissions in offering statement. Underwriter filed third-party complaint against municipality, seeking indemnification and contribution to extent it might be liable to bond purchasers. Municipality moved to dismiss third-party complaint based on sovereign immunity.

The District Court held that:

- Missouri legislature did not expressly waive sovereign immunity for municipalities in enacting the Missouri Securities Act, and
- Issuance of municipal bonds was governmental, rather than proprietary, function.

Missouri legislature did not expressly waive sovereign immunity for municipalities in enacting the Missouri Securities Act, although provision of act stated that "a person" could be liable for making misrepresentation in connection with sale of securities, and general definition of "person" in act included government entities. However, definitions section of act had qualifying language, which provided that definitions applied "unless context otherwise requires" and act never mentioned sovereign immunity, term "person" was used in sections of act other than civil liability section, and enactment of act was not motivated by any particular concern with municipal liability.

Under Missouri law, issuance of municipal bonds was governmental, rather than proprietary, function, and thus municipality was entitled to sovereign immunity in underwriter's action against municipality for indemnity and contribution to extent underwriter might be liable to any bond purchaser based on alleged misrepresentations and omissions contained in offering statement.

The court did not agree with underwriter's argument that municipality was not entitled to sovereign immunity because it engaged in for-profit, and therefore proprietary, functions in connection with the issue of the bonds. Although the only benefit that municipality's residents might have received from facility was some degree of economic stimulation, that still qualified as an essential governmental purpose.

BONDS - MISSOURI

Wells Fargo Bank, N.A. v. Derrick Thomas Academy Charter School, Inc.

United States District Court, W.D. Missouri, Western Division - March 4, 2014 - Slip Copy - 2014 WL 835891

EdisonLearning, Inc. (Edison) is a for-profit business engaged in the operation and management of charter schools. Edison partnered with a private foundation to open Derrick Thomas Academy Charter School, Inc. (DTA). DTA was a nonprofit corporation.

The Missouri Chartered Schools Act (MCSA) required DTA to have a charter sponsor and management company. DTA's charter sponsor was the University of Missouri–Kansas City (UMKC), and DTA's management company was Edison. UMKC, as a charter sponsor, had the ability to revoke DTA's charter if DTA failed to comply with the MCSA or the requirements imposed by the Missouri Department of Education and Secondary Education (DESE).

By 2007, DTA was indebted $8.2 million for building, equipment, and construction-related expenses and owed $2.5 million to Edison. Due to this indebtedness, the Industrial Development Authority of Kansas City (Authority) issued over $10 million in Revenue Bonds (Bonds) to assist DTA in refinancing its debt pursuant to a Loan Agreement between DTA and the Authority. Under the Loan Agreement, the Bonds were secured by DTA's future revenues and all funds and investments held by DTA. DTA's main source of revenue was state aid from DESE.

Wells Fargo Bank, N.A. was the successor Indenture Trustee for the Bonds and administered the distribution of Bond proceeds and the payment of principal and interest on the Bonds to the Bondholders.

On November 20, 2012, UMKC refused to renew DTA's charter, causing DTA to close. As a result, DTA no longer received state aid payments from DESE. Without state aid payments as revenue for DTA, DTA could not pay its obligations under the Loan Agreement, DTA went into default and the Bondholders were not fully repaid. Wells Fargo sued, alleging it was DTA's negligent mismanagement that caused Wells Fargo to incur, and continue to incur, damages. Wells Fargo also claimed that DTA had liability insurance that covered the claims contained within Wells Fargo's complaint.

DTA moved to dismiss, citing sovereign immunity and failure to state a claim.

"Whether a charter school and its board members are entitled to sovereign immunity is a case of first impression in Missouri. However, there will be no need to decide such an unprecedented issue if Plaintiff fails to allege a duty under Missouri law. Accordingly, the Court will first address whether Plaintiff sufficiently alleges a duty under Missouri law."

"Plaintiff serves as the Successor Indenture Trustee on behalf of the Bondholders, who are creditors of DTA because DTA owed Bond repayments to them. It may be the case under Missouri law that Defendants could be liable to DTA for fiscally irresponsible decisions made that resulted in DTA closing and being unable to make Bond repayments. However, Defendants owed no duty or allegiance to the Bondholders or Plaintiff acting as Successor Indenture Trustee of the Bondholders. Accordingly, without any such recognized duty, Plaintiff fails to state a claim for negligence under Missouri law."

IMMUNITY - NEW YORK

Martinez v. County of Suffolk

United States District Court, E.D. New York - February 27, 2014 - F.Supp.2d - 2014 WL 775058

Plaintiff brought action against county, police department, and individual officers asserting claims under § 1983, § 1985, and state law arising from an allegedly unlawful motor vehicle stop and search of plaintiff's person and vehicle. Defendants moved for summary judgment.

The District Court held that:

- Plaintiff's § 1983 and state-law claims against police department could not go forward;
- Plaintiff had no constitutionally protected right to have supervisory officers investigate his complaints about the stop;
- Plaintiff failed to state § 1985 claim for conspiracy to deprive him of the equal protection of the laws;
- Intracorporate conspiracy doctrine barred plaintiff's § 1985 claims;
- Supervisory officers could not be held liable under state law for failing to investigate plaintiff's complaints of battery; and
- Plaintiff could not bring a negligent hiring cause of action against county.

TAX - NEW YORK

In re Foreclosure of Tax Liens by City of Hudson

Supreme Court, Appellate Division, Third Department, New York - February 27, 2014 - N.Y.S.2d - 2014 N.Y. Slip Op. 01361

Religious corporation petitioned to set aside judgment of property tax foreclosure and transfer of title to city concerning real property that religious corporation purportedly had transferred to its then-minister. The Supreme Court, Columbia County, dismissed petition. Religious corporation appealed.

The Supreme Court, Appellate Division, held that:

- Petition was timely under two-year statute of limitations, and
- City reasonably provided notice to ascertainable interested parties.

Unlike a motion to vacate a default judgment in a tax foreclosure proceeding, which may not be brought later than one month after entry of the judgment, a person or entity challenging the validity of a deed transferred in connection with a tax foreclosure proceeding faces a two-year statute of limitations.

Religious corporation's petition to set aside underlying judgment of property tax foreclosure and transfer of title to city was subject to two-year statute of limitations, since religious corporation was not party to foreclosure proceeding, and it sought to set aside judgment on basis that city failed to provide notice to religious corporation, which claimed to be rightful owner of property.

City reasonably provided notice to ascertainable interested parties, as required by law. Even though religious corporation did not receive personal notice, city sent notice, by ordinary and certified mail,

to minister, who was listed on tax rolls as owner of property. Despite questions raised by religious corporation as to validity of its transfer, public record, on its face, did not disclose that religious corporation had any interest in property, and religious corporation failed to take any action to regain title after discovering noncompliance with statutory requirement of court approval for transfers from religious corporations.

SCHOOLS - TEXAS

Estate of Lance v. Lewisville Independent School Dist.

United States Court of Appeals, Fifth Circuit - February 28, 2014 - F.3d - 2014 WL 805452

Estate and parents of special-needs fourth-grade student, who locked himself inside school nurse's bathroom and took his own life, filed § 1983 action against school district, claiming violation of student's constitutional rights and disability discrimination under Rehabilitation Act. The United States District Court for the Eastern District of Texas granted district summary judgment. Appeal was taken.

The Court of Appeals held that:

- District provided free appropriate public education (FAPE) required under Rehabilitation Act;
- District was not deliberately indifferent to peer harassment in violation of Rehabilitation Act;
- § 1983 claim under special relationship theory was not actionable; and
- § 1983 claim under state-created danger theory was not actionable.

School district's reasonable response to reported incidents of student-on-student harassment of special-needs student, who ultimately locked himself in school nurse's bathroom and hanged himself, was not deliberately indifferent to harassment, as required to support parents' claim under Rehabilitation Act. District investigated two documented altercations involving student and punished all students involved, district had pattern of responding to other incidents involving student and promoting his relationship with other students, district's anti-bullying policies were appropriate and up to national standards, and district provided employee training presentation on bullying and harassment.

WHISTLEBLOWER LAW - TEXAS

City of Fritch v. Coker

Court of Appeals of Texas, Amarillo - February 27, 2014 - Not Reported in S.W.3d - 2014 WL 812915

Kirk Coker was the Chief of Police for the City of Fritch, Texas. Alana Gariepy was a resident of Fritch. The City viewed the Gariepy property as a nuisance and the City Council voted to abate the Gariepy property.

After abatement procedures had begun, Coker concluded that the proper procedures to abate the Gariepy property had not been followed meaning that Coker and his crew were not legally permitted to be on the Gariepy property. Coker then advised the Fritch City Manager that he was vacating the Gariepy property.

On April 4, 2012, Coker contacted the Texas Rangers, the Hutchinson County District Attorney's

Office, the Texas Attorney General's Office, and the Texas Department of Public Safety for the purpose of filing a "good faith" report of what Coker believed to be a violation of the law by the City. Coker contended that the City violated the law by criminally trespassing on Gariepy's property and violating Gariepy's civil rights. The City terminated Coker on April 9, 2012.

The trial court denied the City's plea to the jurisdiction in the whistleblower action filed by Coker and the City appealed.

The appeals court concluded that, based upon his conclusory statements to the trial court, Coker could not have formed a good faith belief that the City was, by his action of being on the Gariepy property, violating the law, specifically, committing a trespass on the Gariepy property. Inasmuch as Coker did not make a good faith report of a violation of the law by his employer, the City of Fritch, the trial court erred when it denied the City's plea to the jurisdiction.

EASEMENTS - VIRGINIA

Beach v. Turim

Supreme Court of Virginia - February 27, 2014 - S.E.2d - 2014 WL 782824

Neighbors brought action against owner of subdivision lot, asserting claim for private nuisance and seeking injunctive relief regarding alleged express easement. The Circuit Court granted neighbors' motion for partial summary judgment and, following bench trial, issued injunction precluding lot owner from blocking use of easement and requiring lot owner to restore steps in easement. Lot owner appealed.

The Supreme Court of Virginia held that deed and incorporated plat did not create express easement in favor of neighbors. Deed did not state to whom easement was granted, purpose of easement was ambiguous at best, and plat merely described location of easement.

RIPARIAN RIGHTS - WASHINGTON

Richert v. Tacoma Power Utility

Court of Appeals of Washington, Division 2 - March 4, 2014 - P.3d - 2014 WL 839962

Landowners of property below a dam whose riparian rights had been condemned in prior litigation brought class action against city for property damage caused by increased water flow. The city filed a motion for summary judgment based on res judicata. The Superior Court entered judgment in favor of class members. The city appealed.

The Court of Appeals held that:

- Landowners' claims did not have concurrence of identity with prior litigation, and
- Landowners could not have brought current claims in prior litigation.

Landowners' class action against city for water damage caused by increased flow of river from dam did not have a concurrence of identity with prior litigation that led to condemnation of their riparian rights, and thus res judicata doctrine did not bar their claims, where their claims were for water damage to property from an increased water flow that led to flooding and a high water table, rather than for a violation of riparian rights.

Landowners whose riparian rights were condemned by city in prior litigation could not have brought their more recent class action claims against city for property damage due to increased water flow from a dam in the prior litigation, and thus res judicata did not bar their claims, where their claims were based, in part, on aggradation in the river bed that occurred only after the condemnation of their riparian rights, the increased water flow from the dam did not occur until several decades after the initial condemnation, and the court that heard the prior litigation explicitly stated that the condemnation was occurring due to a diminishment of the river's flow, rather than an increase.

TAX - WISCONSIN

CED Properties, LLC v. City of Oshkosh

Supreme Court of Wisconsin - March 6, 2014 - N.W.2d - 2014 WI 10

Property owner sought judicial review of special assessments levied by city against owner's corner lot. The Circuit Court granted partial summary judgment in favor of city. Property owner appealed. The Court of Appeals affirmed. Owner sought review.

The Supreme Court of Wisconsin held that owner's complaint was sufficient to put city on notice that owner was seeking review of entire amount of assessments, even though complaint mentioned only $19,000 levied as to first street that lot faced and failed to mention another $19,000 levied as to cross-street. The complaint included lot's parcel number, which was the only parcel number assigned to the lot, and also included reference to names of both street and cross-street.

EASEMENTS - CALIFORNIA

Schmidt v. Bank of America, N.A.

Court of Appeal, Fourth District, Division 1, California - February 21, 2014 - Cal.Rptr.3d - 14 Cal. Daily Op. Serv. 1893

Servient tenement owner brought action against dominant tenement owner and homeowners' association (HOA) for trespass, nuisance, and injunctive and declaratory relief. The Superior Court granted summary judgment for dominant tenement owner and HOA. Servient tenement owner appealed.

The Court of Appeal held that:

- Easement passed under deed that failed to mention easement;
- Easement "for public road purposes" did not create public right-of-way; and
- Fact issue existed as to whether structures and improvements fell within scope of easement.

Under reserved easement granting "the right of ingress and egress for public road purposes," the phrase "for public road purposes" meant "in order to reach a public road," and thus it did not create a public right-of-way over the easement, even though in a later deed the dominant tenement owner described the easement as one "for public road purposes, and incidental purposes."

VOTING - CALIFORNIA

Vargas v. Balz

Court of Appeal, Fourth District, Division 3, California - February 21, 2014 - Cal.Rptr.3d - 14 Cal. Daily Op. Serv. 1903

City resident filed a petition for a writ of mandate to compel the city clerk and the registrar to print ballot arguments submitted by two councilmembers as having been submitted by them and not by the city council. The Superior Court denied petition in part. Resident appealed.

The Court of Appeal held that:

- Omission of city council's name from signature form required city clerk to deem councilmembers to have submitted arguments as individuals;
- Clerk had no authority to modify the signature form to make it fulfill the requirements of an argument submitted by an organization; and
- Clerk violated Elections Code by failing to make publicly available the same material that was sent to the registrar.

Under the Elections Code, when two city council members submitted arguments in opposition to ballot measures without the council's name on the signature form, city clerk was duty bound to accept the signature form as an argument submitted by individuals, not by an organization, even if city clerk was aware of the intention of the city council to authorize the members to submit the arguments against the measures on behalf of the city council. City clerk had no authority, and certainly no duty, to modify the signature form to make it fulfill the requirements of an argument submitted by an organization.

City clerk violated the Elections Code by failing to make publicly available the same material that was sent to the registrar for inclusion in the sample ballot, where city clerk made a change in the signature block, and the information on the city's website and otherwise made publicly available was different from the information submitted to the registrar for inclusion in the sample ballot.

MUNICIPAL ORDINANCE - GEORGIA

Wilbros, LLC v. State

Supreme Court of Georgia - February 24, 2014 - S.E.2d - 2014 WL 695212

State charged LLC that operated a solid waste, recycling, composting, and waste water processing facility with violating county nuisance ordinance based on ongoing odor nuisance after the state and LLC had entered into a consent order regarding similar state law claims. The LLC filed a plea in bar of prosecution. The trial court denied the plea. LLC appealed.

Upon transfer, the Supreme Court of Georgia held that:

- In a matter of apparent first impression, double jeopardy was an available, potential defense to LLC;
- Sanctions imposed on LLC via consent order with the state for violating Comprehensive Solid Waste Management Act were civil in nature, such that charge against LLC for violating county nuisance ordinance was not barred by double jeopardy;
- County nuisance ordinance fell within constitutional exception to preemption; and

- County nuisance ordinance was not impermissibly vague, in violation of due process.

Double jeopardy was an available, potential defense under both the Federal and State Constitution, as Double Jeopardy Clause of the Fifth Amendment applied to the states through the Fourteenth Amendment, and a corporation was entitled to double jeopardy protection afforded by the State Constitution.

However, state sanctions imposed on LLC were civil in nature, and, thus, criminal action against LLC concerning the same nuisance conduct, in violation of county nuisance ordinance, was not barred by double jeopardy.

County nuisance ordinance fell within constitutional exception to preemption, as the ordinance was, by its terms, aimed at abating certain nuisances, and it did not set forth regulations that were in conflict with the Comprehensive Solid Waste Management Act.

County nuisance ordinance was not impermissibly vague, in violation of due process, as the ordinance did not give unfettered discretion to a health official to determine what constitutes a violation, but required the opinion of a health officer that the prohibited pollution was sufficient to be disagreeable or discomforting to a person of ordinary sensibilities or detrimental to health or well-being.

IMMUNITY - IOWA

Star Equipment, Ltd. v. State, Iowa Dept. of Transp.

Supreme Court of Iowa - January 31, 2014 - N.W.2d - 2014 WL 346521

Subcontractors of "targeted small business" (TSB) filed suit against TSB, Department of Transportation (DOT), and other subcontractors, seeking to recover from DOT the unpaid balances the TSB owed subcontractors for work they had done on public construction contracts governing improvements to rest areas along interstate highway. TSB defaulted. DOT filed motion to dismiss or strike the subcontractors' claims against it for amounts that exceeded the retainage. The District Court granted motion to extent they exceeded retained funds, and granted summary judgment against TSB. Subcontractors appealed.

The Supreme Court of Iowa held that:

- In a matter of first impression, statute providing that if bond requirement for a TSB is waived, an entity having a contract with the TSB is entitled to any remedy provided under statute governing labor and material on public improvements to collect funds owed on contract constituted a waiver of sovereign immunity that allowed subcontractors to recover from DOT the unpaid balances TSB owed to subcontractors;
- In a matter of first impression, statute providing that if bond requirement for a TSB is waived, an entity having a contract with the TSB is entitled to any remedy provided under statute governing labor and material on public improvements to collect funds owed on contract did not violate provision of State Constitution prohibiting the state's credit to be given or loaned to, or in aid of, any individual, association, or corporation; and
- Subcontractors, as prevailing parties, were entitled to reasonable attorney fees.

SCHOOLS - LOUISIANA

Moore v. Louisiana Bd. of Elementary and Secondary Educ.

United States Court of Appeals, Fifth Circuit - February 24, 2014 - F.3d - 2014 WL 718423

Plaintiffs in longstanding pending school desegregation action filed suit pursuant to All Writs Act to enjoin school board and state agencies and official from implementing statutes they alleged would violate consent decree.

The action sought an injunction prohibiting the implementation of two acts passed in the 2012 Regular Session of the Louisiana Legislature. Act 1 of the 2012 legislature adjusted the standards for evaluating and discharging ineffective teachers. Act 2 permitted Minimum Foundation Program (MFP) funds to be allocated to individual students as vouchers to attend private schools or pay for supplemental courses from various other education providers. The District Court granted injunctive relief, and state defendants appealed.

After granting state defendants' emergency motion for stay pending appeal, the Court of Appeals held that:

- Challenge to statute permitting diversion of MFP funds was moot, where state supreme court invalidated provision in question, holding that state constitution required all MFP funds to be allocated to public schools and not be diverted elsewhere;
- Eleventh Amendment barred court from exercising jurisdiction over state agencies; and
- Official could not be enjoined from implementing and enforcing legislation adjusting standards for evaluating and discharging ineffective teachers, where there was no evidence that superintendent had taken any action pursuant to legislation that violated federal law, nor that his implementation of legislation would result in direct violation of federal law.

EMPLOYMENT - LOUISIANA

Winn v. Department of Police

Court of Appeal of Louisiana, Fourth Circuit - February 21, 2014 - So.3d - 2013-0199 (La.App. 4 Cir. 2/21/14)

After the City Civil Service Commission (CSC) terminated police officer for neglect of duty by not timely reporting misconduct by a subordinate officer. Officer, he appealed.

The Court of Appeal held that evidence supported the CSC's determination that police officer committed neglect of duty by not timely reporting misconduct by a subordinate officer.

Officer ordered vehicle with a dead body to be relocated, officer knew that the burned vehicle behind police station contained a dead body and was the vehicle he had previously ordered to be relocated, officer learned subordinate officer was involved in burning the car, officer consulted an attorney and, based on attorney's advice, invoke his Fifth Amendment privilege against self-incrimination and not report second officer's involvement.

Police officer's Fifth Amendment privilege against self-incrimination did not excuse him of his ongoing duty to report the misconduct of other police officers. The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself," and when officer learned subordinate officer was involving in burning a vehicle that contained a dead body he had not been compelled in any criminal case to be a witness against himself or to report misconduct of his own.

ZONING - LOUISIANA

Spilsbury v. City of New Orleans

Court of Appeal of Louisiana, Fourth Circuit - February 19, 2014 - So.3d - 2013-1258 (La.App. 4 Cir. 2/19/14)

Landowners sought review of zoning board decision upholding city's denial of landowners' permit application to repair their duplex, which was a non-conforming use in single-family zoning district. The Civil District Court affirmed. Landowners appealed.

The Court of Appeal held that:

- Zoning ordinance for single-family residential district, which provided five-year deadline for owners of two-family dwellings applying for permits "regarding demolition and building" applied only to owners of two-family dwellings who desired to demolish and rebuild the dwelling from hurricane damage, not to owners applying for permits to renovate two-family dwellings which were not going to be demolished, and
- Denial of new permit or extension of prior permit was arbitrary and capricious.

Decision of Board of Zoning Appeals to deny landowners either a new permit or an extension of their prior permit for renovating duplex, which was a non-conforming use in single-family residential district, following hurricane damage was arbitrary and capricious; hurricane was a unique situation which resulted in extreme delays, and landowners had continued to take necessary steps to complete renovation project.

LIABILITY - MASSACHUSETTS

Filepp v. Boston Gas Company, Inc.

Appeals Court of Massachusetts - February 27, 2014 - N.E.3d - Mass.App.Ct.

Bicyclist filed suit against gas company, seeking to recover damages for injuries he sustained when he fell from bicycle while riding on street, allegedly caused by two-inch wide "rut" in pavement that had been created by gas company. Company filed motion for summary judgment. The Superior Court granted motion. Bicyclist appealed.

The Appeals Court held that Bicyclist's failure to send notice to gas company of his claim within 30 days of injuries precluded his suit against company to recover damages for injuries he sustained, as statutory entitlement to notice extended to both private and public entities.

MUNICIPAL ORDINANCE - MINNESOTA

Dean v. City of Winona

Court of Appeals of Minnesota - February 24, 2014 - N.W.2d - 2014 WL 684689

Residential property owners brought action to challenge municipal ordinance which limited to 30% the number of lots on a block eligible to obtain certification as a rental property. The District Court granted summary judgment for city, and property owners appealed.

The Court of Appeals held that:

- Ordinance was a valid exercise of police power;
- Ordinance was not unconstitutional on its face;
- Ordinance was not unconstitutional as applied;
- Ordinance did not violate any substantive due process right to rent property; and
- Ordinance did not improperly delegate legislative power.

EMINENT DOMAIN - NEBRASKA

Village of Memphis v. Frahm

Supreme Court of Nebraska - February 14, 2014 - N.W.2d - 287 Neb. 427

Landowners brought action against village for inverse condemnation after discovering that buried power line and water line were outside easement area. After county judge ordered village to pay compensation, village appealed. The District Court, Saunders granted village's motion for partial summary judgment, and, following settlement which required village to pay compensation, denied landowners' motion for attorney's fees. Landowners appealed, and the Supreme Court moved the case to its own docket.

The Supreme Court of Nebraska held that:

- Settlement agreement resulted in landowners' waiver of any claims concerning utility easement and the court's entry of partial summary judgment;
- Release waived claim for attorney fees under statute allowing such fees as part of reimbursement for costs incurred; and
- Village's failure to engage in good faith negotiations prior to filing of inverse condemnation claim did not entitle landowners to attorney's fees.

Village's failure to engage in good faith negotiations prior to landowners' filing of an inverse condemnation claim with county court judge did not entitle landowners to attorney's fees, where after filing appeal from county court determination, village engaged in good faith negotiations.

ELECTIONS - NEVADA

Lorton v. Jones

Supreme Court of Nevada - February 20, 2014 - P.3d - 130 Nev. Adv. Op. 8

Mayoral candidate petitioned for a writ of mandamus or prohibition challenging the eligibility of former city council members in mayoral election. At issue was a constitutional interpretation of whether years of service as a council member counted against the number of years that a council member could serve as mayor,

The Supreme Court of Nevada held that in a matter of first impression, Nevada constitutional provision on term limits precluded council members who had served 12 years from being elected mayor.

The drafters of Nevada constitutional provision that prohibits an individual from being elected to any state office or local governing body if he or she has served in that office, or at the expiration of his or her current term he or she will have served, 12 years or more intended to preclude reelection to the local governing body as a whole when a member has served on that body for 12 years or more in any

capacity.

Nevada constitutional provision prohibiting an individual from being elected to any state office or local governing body if he or she had served in that office, or at the expiration of his or her current term he or she would have served, 12 years or more prevented city council members who had served for 12 years from being elected mayor. Under the city charter, city council was the city's governing body, and the mayor was a member of the city council for all purposes.

ZONING - NEW YORK

Union Square Park Community Coalition, Inc. v. New York City Dept. of Parks and Recreation

Court of Appeals of New York - February 20, 2014 - N.E.3d - 2014 N.Y. Slip Op. 01207

Plaintiffs brought action against New York City Department of Parks and Recreation, its Commissioner, the City, and restaurant operator, challenging an agreement by the Department to allow the operation of a restaurant in a city park. The Supreme Court, New York County, granted plaintiffs' request for a preliminary injunction and denied the City's cross motion to dismiss. The Supreme Court, Appellate Division, reversed, denied the motion for a preliminary injunction and granted dismissal of the complaint, and the plaintiffs appealed.

The Court of Appeals of New York held that:

- The agreement did not violate the public trust doctrine, and
- The agreement constituted a license agreement, rather than a lease of parkland requiring legislative approval.

Under the public trust doctrine, dedicated parkland cannot be converted to a non-park purpose for an extended period of time absent the approval of the State Legislature. City Department of Parks and Recreation did not violate the public trust doctrine by entering into a licensing agreement with a restaurant operator that allowed the operator to operate a seasonal restaurant in the pavilion of a city park, without the approval of the State Legislature, absent showing that the type and location of the restaurant were unlawful.

City Department of Parks and Recreation's agreement with restaurant operator, permitting operation of restaurant in city park pavilion, constituted a license agreement, rather than a lease of parkland requiring legislative approval. Although agreement had 15-year term, Department retained significant control over restaurant's operations, including months and hours of operation, staffing plan, and menu prices, operator's use of premises was only seasonal and was not exclusive even in summer, as outdoor seating was required to be available to general public and operator had to open pavilion for weekly community events, agreement contained environmental and community-based provisions, and it broadly allowed Department to terminate license at will so long as termination was not arbitrary and capricious.

EMINENT DOMAIN - NEW YORK

Village of Haverstraw v. AAA Electricians, Inc.

Supreme Court, Appellate Division, Second Department, New York - February 26, 2014 - N.Y.S.2d - 2014 N.Y. Slip Op. 01332

Village brought condemnation proceeding. The Supreme Court, Rockland County, after nonjury trial, awarded condemnee $6,500,000 as just compensation for taking of its property. Condemnor appealed, and condemnee cross-appealed on ground of inadequacy.

The Supreme Court, Appellate Division, held that:

- Trial court was justified in concluding that subject property's highest and best use was for multi-family residential development, and
- Trial court did not err in valuing subject property on per-acre basis rather than on basis of how many units could be developed thereon.

In a case involving the taking of property, the measure of damages must reflect the fair market value of the property in its highest and best use on the date of the taking, regardless of whether the property is being put to such use at the time.

In a condemnation proceeding, where an increment is added to the value of vacant land to reflect its development potential, the specific increment which is selected and applied must be based on sufficient evidence and be satisfactorily explained. Moreover, it is necessary to show that there is a reasonable possibility that the property's highest and best asserted use could or would have been made within the reasonably near future, and a use which is no more than a speculative or hypothetical arrangement may not be accepted as the basis for a condemnation award.

A condemnee may not receive an enhanced value for its property where the enhancement is due to the property's inclusion within a redevelopment plan. Thus, for example, property zoned for industrial use should be valued in accordance with the industrial zoning designation which would apply if the redevelopment plan did not exist, for a condemnee is only entitled to compensation for what it has lost, not for what the condemnor has gained.

In condemnation proceeding, trial court was justified in concluding that subject property's highest and best use was for multi-family residential development and awarding condemnee $6,500,000. Condemnee's appraiser sufficiently and credibly explained basis for his selection of comparable properties and relevant adjustments made to valuation of those properties, trial court did not improperly incorporate enhancement to subject property's value based on village's urban redevelopment plan, and trial court adequately explained its reasons for making changes to results presented in condemnee's appraisal.

In condemnation proceeding, trial court did not err in valuing subject property on per-acre basis rather than on basis of how many units could be developed thereon.

LIABILITY - NEW YORK

Abad ex rel. Morales v. New York City Health and Hospitals Corp.

Supreme Court, Appellate Division, First Department, New York - February 20, 2014 - N.Y.S.2d - 2014 N.Y. Slip Op. 01254

Infant patient, by his mother and natural guardian, brought medical malpractice against city health corporation which operated hospital where patient was allegedly injured. The Supreme Court, Bronx County denied patient's motion seeking leave to file late notice of claim and dismissed action, and patient appealed.

The Supreme Court, Appellate Division held that denial of leave to file late notice of claim more than

seven years after claim accrued was not abuse of discretion.

Seven-year delay prejudiced corporation, given that neither hospital records nor subsequent events served as notice of the facts constituting the patient's claim, and patient did not offer a good reason for the delay.

ZONING - OREGON

Barkers Five, LLC v. Land Conservation and Development Com'n

Court of Appeals of Oregon - February 20, 2014 - P.3d - 2014 WL 662329

Petitioners sought review of order of the Land Conservation and Development Commission (LCDC), acknowledging metropolitan service district's and counties' designation of urban and rural reserves.

The Court of Appeals held that:

- Legal premises undergirding and informing LCDC's review of the consideration and application of the reserve factors were individually and collectively valid;
- Legal premises informing LCDC's review of the "best achieves" standard were individually and collectively valid;
- First county misapplied rural reserve factors through its use of substituted pseudo-factors;
- Petitioners failed to establish error in second county's application of "safe harbor provision";
- Third county failed to adequately "consider" rural reserve factors in designating all of the land in a certain denominated "area" as rural reserve; and
- Order was unlawful for failing to meaningfully explain why urban reserve designation was supported by substantial evidence when evidence showed that transportation facilities serving the area would be failing.

Evidence that transportation facilities serving a certain area would be failing within the reserve period was "so at odds" with determination of the LCDC that the designation of the area as urban reserves was supported by substantial evidence that it gave rise to an inference that LCDC misunderstood its standard of review, and thus LCDC's order was unlawful in substance. Provision of adequate transportation facilities is critical to the development of urban areas, and LCDC failed to provide a meaningful explanation as to why, even in light of that conflicting evidence, the designation was supported by substantial evidence.

PENSIONS - UTAH

Ramsay v. Kane County Human Resource Special Service Dist.

Supreme Court of Utah - February 25, 2014 - P.3d - 2014 UT 5

County hospital employees, individually and as representatives of class of similarly situated individuals, filed suit against the county human resource special service district, retirement plan administrator, and the plan's insurance and investment agents, arising out of hospital's alleged failure to fund plan as required by law. The Third District Court dismissed complaint for lack of subject matter jurisdiction, and employees appealed. The Court of Appeals affirmed in part, reversed in part, and remanded. Defendants petitioned for a writ of certiorari.

The Supreme Court of Utah held that:

- All of employees' claims fell within exhaustion of administrative remedies requirement of State Retirement and Insurance Benefit Act (the "Act);
- Employees were not relieved from exhaustion requirement on basis that administrative remedies were inadequate; and
- Employees were not relieved from exhaustion requirement on basis that exhaustion would cause them irreparable harm by allowing statute of limitations to run.

County hospital employees' breach of contract, breach of fiduciary duty, negligence, and declaratory and injunctive relief claims for hospital's alleged failure to provide its employees with the appropriate amount of benefits required by the Act were all covered by the Act, and thus court lacked subject matter jurisdiction over any of the claims due to employees' failure to exhaust administrative remedies under the Act.

County hospital employees were not relieved from the requirement of exhaustion of administrative remedies under the State Retirement and Insurance Benefit Act on the basis that administrative remedies were inadequate for their claims even if the Retirement Board was unlikely to grant employees' request for consequential damages, absent evidence that the employees could not proceed as a class in the administrative action or that they could not pursue their claims against third parties in an administrative action.

County hospital employees were not relieved from the requirement of exhaustion of administrative remedies under the Act on the basis that exhaustion would cause them irreparable harm by allowing the statute of limitations to run on their claims since the requirement to exhaust administrative remedies would have no bearing on timing for the purpose of the statute of limitations.
