Bond Case Briefs

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Cases

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.

BONDS - ALABAMA

Lord Abbett Mun. Income Fund, Inc. v. Southern Farms, Inc.

United States District Court, M.D. Alabama, Southern Division - February 19, 2014 - Slip Copy - 2014 WL 641763

This is complex, ongoing litigation resulting from the collapse of two county districts established to finance a large, mixed-use development and the resulting failure to make payments on the bonds those districts had issued. We have previously covered earlier stages of this case.

It is impossible to accurately summarize the facts of this case. As the court noted, "The facts that set the stage for Lord Abbett's [bondholder] claims are many and complex. Extensive detail is necessary for understanding the overall context of Lord Abbett's claims and the parties' alleged rights and obligations with respect to certain property." Fortunately, the opinion sets out the facts in quite readable fashion.

The sole issue presented in this stage of the proceedings was defendant's motion to dismiss on Rule 12(b)(1) and Rule 12(b)(6) grounds – whether the bondholder's pleading alleged subject matter jurisdiction and whether its claims, if true, would entitle it to relief. Only arguments comporting with the relief available in Rule 12(b) are pertinent.

The District Court held that:

- An actual controversy existed between the parties, which grants bondholder standing to seek declaratory relief pursuant to the Declaratory Judgment Act;
- Bondholder had alleged facts suggesting that defendants' foreclosure sale was wrongful, and thus defendants' motion to dismiss for failure to state a claim was denied;
- Alabama law allows fraudulent transfer suits against wrongful transferees, and because defendants' offered no convincing arguments as to why bondholder may not sue them for fraudulent transfer, the motions to dismiss this count were denied;
- Bondholder had alleged facts substantiating a claim for tortious interference with contract; and
- Bondholder's pleading alleged sufficient facts to satisfy Rule 8(a)'s notice-pleading requirements as to defendants' attorney individually.

CEQA - CALIFORNIA

Highland Park Heritage Trust v. City of Los Angeles

Court of Appeal, Second District, Division 2, California - February 18, 2014 - Not Reported

in Cal.Rptr.3d - 2014 WL 618258

In April 2011, the State of California awarded Autry a grant of $6.6 million to fund the redesign of the interior of the Gene Autry Western Heritage Museum and for installation of new exhibits.

The City of Los Angeles Board of Recreation and Parks Commissioners Board approved the remodeling project; granted its consent thereto to Autry under the City's ground lease with Autry; and found its consent was exempt from CEQA because the project included only interior remodeling of the Autry Museum, an existing facility. The City Council rejected Petitioners' CEQA appeal and consented to the project.

Petitioners contended that approval of this project improperly furthered Autry's ultimate goal of obtaining piecemeal approval in violation of CEQA of a much more expansive project Autry appeared to have abandoned earlier. They also contend the project was not exempt from CEQA and that the project violated the Northeast Los Angeles Community Plan (NELA Community Plan) by usurping the artifacts in the Southwest Museum collection for the Autry Museum.

The Court of Appeal concluded that the City did not abuse its discretion in approving the R&P Board decision that the project did not have to comply with CEQA. The record did not support Petitioners' claim that the project is merely a component piece of a much larger project which is subject to CEQA. The Project was categorically exempt from CEQA without exception. The City did not act in a manner contrary to law in consenting to the project, which was not inconsistent with the NELA Community Plan.

GOVERNMENT CLAIMS ACT - CALIFORNIA

J.J. v. County of San Diego

Court of Appeal, Fourth District, Division 1, California - February 14, 2014 - Cal.Rptr.3d - 14 Cal. Daily Op. Serv. 1575

Former foster child, appearing through her guardian ad litem, petitioned for relief from the requirement that she timely file a written claim against county before she could maintain a personal injury action against county for money or damages based on molestation by foster father. The Superior Court denied petition. Child appealed.

The Court of Appeal held that:

- Child's claim against county accrued, at the latest, when her parents spoke at foster father's sentencing;
- Delay in child's receipt of reports did not equitably estop county from relying on Government Claims Act claim presentation time limits; and
- Government Claims Act claim presentation time limits were not tolled while child was a minor.

Government Claims Act section allowing application for leave to file late claim against public entity is remedial statute intended to provide relief from technical rules which otherwise provide trap for unwary. Remedial policy underlying statute is that wherever possible cases should be heard on their merits, and thus, denial of such relief by trial court is examined more rigorously than where relief is granted and any doubts which may exist should be resolved in favor of application.

Former foster child's personal injury claim against county for money or damages based on her molestation by foster father accrued, at the latest, when her parents both appeared and spoke at

foster father's sentencing for committing a lewd and lascivious act on child, thus triggering the one-year time limit for child to petition for relief from the requirement that she timely file a written claim under the Government Claims Act, since child's parents clearly were aware of the generic elements of wrongdoing, causation, and harm.

For the purpose of computing the time limits prescribed by the Government Claims Act, a civil cause of action for child molestation generally accrues at the time of the molestation, but that date may be postponed under the delayed discovery doctrine, which provides that a cause of action does not accrue until the plaintiff discovers, or has reason to discover, the cause of action.

PUBLIC UTILITIES - CALIFORNIA

Winding Creek Solar LLC v. California Public Utilities Commission

United States District Court, N.D. California., San Francisco Division - February 10, 2014 - F.Supp.2d - 2014 WL 558673

LLC that was owner and developer of planned solar project brought action for declaratory and injunctive relief against California Public Utilities Commission (CPUC), contending that CPUC's policies governing wholesale price of energy bought from small facilities such as that planned by LLC violated Public Utilities Regulatory Policies Act (PURPA) and thus were preempted by Federal Power Act (FPA). CPUC moved to dismiss.

The District Court held that:

- LLC failed to establish its Article III standing;
- Johnson Act did not apply to complaint;
- Eleventh Amendment immunity barred action;
- Owner-developer did not have statutory standing to bring private enforcement action under PURPA; and
- Owner-developer stated plausible claim that CPUC's process to determine rate at which electric utilities could offer to buy power from qualified small producers violated PURPA and its implementing regulations.

PURPA does not require that a state commission adopt a specific rate or rate scheme for purchases by electric utilities from qualifying small power production facility, and state commission may implement PURPA by issuing regulations, resolving disputes on a case-by-case basis, or by adopting any other means that reasonably give effect to regulations promulgated by Federal Energy Regulatory Commission (FERC). In addition, regulations promulgated by FERC pursuant to PURPA afford state commissions a wide degree of latitude in determining how to implement PURPA. As long as an implementation plan is consistent with federal law, FERC does not second-guess the state commission.

Owner-developer of planned solar project did not aver facts showing actual or imminent injury not contingent on future events, and thus failed to establish its Article III standing to sue CPUC to challenge CPUC's policies governing wholesale price of energy bought from small facilities. Owner-developer averred that its planned project had received all required approvals needed for construction, making it a fair reading of complaint that neither construction nor power production had commenced at facility, and owner-developer did not aver in complaint that it could not secure financing for facility absent long-term power purchase agreement, although it made such assertion in opposing motion to dismiss.

Owner-developer argued that CPUC's rate calculation would amount to unconstitutional taking of property without compensation as rhetorical device, and did not actually assert takings claim. Therefore Johnson Act, which barred district courts from enjoining, suspending, or restraining operation of, or compliance with, order affecting rates chargeable by public utility and made by state administrative agency or rate-making body of state political subdivision when statutory requirements were met did not apply to owner-developer's complaint.

Eleventh Amendment immunity applied to bar owner-developer's action, as underlying statutory scheme did not establish CPUC's constructive waiver of immunity, Congress did not make receipt of federal funds to implement PURPA conditional upon waiver of sovereign immunity, and complaint did not seek prospective relief only against CPUC's commissioners.

Neither its planned facility nor filing of its self-certification form satisfied requirements of provision of PURPA allowing "electric utility, qualifying cogenerator, or qualifying small power producer" to bring action to enforce regulatory scheme, and therefore owner-developer did not have statutory standing to bring private enforcement action under PURPA against CPUC.

Owner-developer alleged plausible claim that process used by CPUC to determine rate at which electric utilities could offer to buy power from qualified small producers violated PURPA and its implementing regulations by asserting that periodic market-based pricing adjustments made pursuant to CPUC's process did not reflect utilities' avoided costs. However, the court concluded that the briefing was simply too underdeveloped at this point to decide the issue. The CPUC, therefore, had not met its burden to show the complaint presented no plausible claim for relief.

PUBLIC CONTRACTS - HAWAII

Asato v. Procurement Policy Bd.

Supreme Court of Hawai'i - February 14, 2014 - P.3d - 2014 WL 594080

Taxpayer brought action against Procurement Policy Board seeking declaratory and injunctive relief, alleging that regulation providing for waiver of number of bids requirement for public contracts. The Circuit Court declared regulation invalid and awarded taxpayer attorney's fees, but declined to invalidate contracts that had been made pursuant to regulation. Board appealed and taxpayer cross-appealed.

Following discretionary transfer, the Supreme Court of Hawaii held that:

- Taxpayer constituted an interested person with standing to challenge regulation, overruling Richard v. Metcalf, 921 P.2d 169;
- Regulation conflicted with procurement code;
- Regulation exceeded Board's scope of powers;
- Determination that regulation was invalid did not require declaration that contracts issued under regulation were void ab initio; and
- Taxpayer was not entitled to award of attorney's fees and costs pursuant to private attorney general doctrine.

PENSIONS - ILLINOIS

Rosario v. Retirement Bd. of Policemen's Annuity and Ben. Fund for City of Chicago

United States Court of Appeals, Seventh Circuit - February 19, 2014 - F.3d - 2014 WL 636815

Retired city police officers brought civil rights action after the city police pension board refused to reconsider its prior denial of pension credit to police officers who retired during a 16-year period. The District Court dismissed the action, and the officers appealed.

The Court of Appeals held that:

- The 35-day period for seeking review of a decision of the Board under the Illinois Administrative Review Law (ARL) did not deprive retired police officers of procedural due process;
- Board, which by statute was made up of one-half police officers, was not impermissibly self-interested, so as to deprive pension applicants of procedural due process; and
- Board's denial of pension credit to police officers who retired during a 16-year period did not violate equal protection.

The 35–day period for seeking review under the Illinois ARL, rather than city police pension board rule permitting review or reconsideration of a police officer's pension application "at any time by majority vote of the Board for good cause shown," governed police officers' applications to reconsider the dispositions of their pension applications.

City police pension board's denial of pension credit to police officers who retired during the 16-year period after board changed its interpretation of statute governing the credit and before an appellate decision overturned that interpretation did not violate equal protection. Board's different treatment of those officers who retired before that period was rationally related to its legitimate interest in correctly calculating retiring officers' pension credits, and its different treatment of those officers who were awarded pension benefits after that period was rationally related to its legitimate interest in the finality of its judgments.

TAX - ILLINOIS

St. Clair County v. Scott Air Force Base Properties, LLC

Appellate Court of Illinois, Fifth District - February 13, 2014 - Not Reported in N.E.3d - 2014 IL App (5th) 120570-U

This case involved a series of agreements under the Military Housing Privatization Initiative (MHPI). Pursuant to those agreements, the Air Force leased a portion of Scott Air Force Base to defendant Scott Air Force Base Properties, LLC (SAFBP), and conveyed title to the improvements on that land to SAFBP by quitclaim deed. The agreements called for the defendant to renovate existing housing units, build additional units, and manage the housing units as rental property, to be leased primarily to military members assigned to Scott Air Force Base. The defendant filed property tax exemption applications based on the federal government's ownership of the underlying ground. The applications were initially denied. However, a final administrative decision by the Illinois Department of Revenue found that the property was tax-exempt.

On administrative review, that decision was reversed by the circuit court of St. Clair County. At issue in those proceedings was whether the defendant's interest in the property constituted a true leasehold or merely a license in the property. Defendant appealed, arguing that the administrative

agency correctly determined that it held only a license because the Air Force retained control over the leased property. The appellate court disagreed, affirming the decision of the circuit court reversing the decision of the Department of Revenue.

TAX - ILLINOIS

Dumas v. Pappas

Appellate Court of Illinois, First District, Sixth Division - February 7, 2014 - N.E.3d - 2014 IL App (1st) 121966

Property taxpayers filed petition for writ of mandamus and for declaratory judgment against county treasurer, county clerk, and county assessor, seeking order compelling recomputation of five years of taxpayers' property tax bills and judgment declaring that the overassessment of their real property was unlawful. The Circuit Court dismissed petition with prejudice. Taxpayers appealed.

The Appellate Court held that:

- Mandamus could not be used to compel county clerk to recompute taxes;
- Circuit Court lacked subject matter jurisdiction to grant requested relief; and
- Taxpayers were not entitled to amend their petition.

Mandamus could not be used to compel county clerk to recompute five years of taxpayers' property tax bills, although taxpayers alleged that the assessor failed in his duty to act when he refused and failed to respond to their application for certificate of error. Taxpayers were not entitled to participate in certificate of error procedure, and assessor's duty to execute a certificate of error for taxpayers' property was discretionary and thus could not form basis for writ of mandamus.

Circuit Court lacked subject matter jurisdiction to grant mandamus or declaratory judgment to taxpayers who petitioned for order compelling recomputation of five years of their property tax bills and for judgment declaring that the overassessment of their real property was unlawful. Taxpayers failed to allege that they exhausted their administrative remedies prior to filing their petition, and taxpayers did not allege that their property was tax exempt or that the real estate tax was unauthorized by law, so as to meet conditions for them to bypass administrative remedies and seek relief in the courts.

Under statute that gave right to amend where a plaintiff alleged sufficient facts but sought the wrong remedy, property taxpayers were not entitled to amend their mandamus petition, and trial court could instead dismiss the petition with prejudice. Taxpayers' reliance on statute was misplaced because trial court found that they failed to allege sufficient facts to support their right to relief.

PENSIONS - LOUISIANA

Pointe Coupee Parish School Bd. v. Louisiana School Employee's Retirement System

Court of Appeal of Louisiana, First Circuit - February 14, 2014 - So.3d - 2013-1100 (La.App. 1 Cir. 2/14/14)

Between 2005 and 2011, three Louisiana school boards privatized their bus transportation services.

This resulted in the elimination of a number of driver positions previously held by public employees who were contributing members of the Louisiana School Employees' Retirement System (LSERS).

As a result of the privatization of these positions, LSERS made demands upon the school boards for payment of a claimed portion of its unfunded accrued liability (UAL) pursuant to La. R.S. 11:1195.1 and La. R.S. 11:1195.2.1. The school boards refused to voluntarily relinquish payment, and LSERS gave notice of its intent to utilize the procedures detailed in La. R.S. 11:1202 to mandate that the state treasurer or Department of Education deduct the delinquent payments from any monies then due the school boards.

The school boards then sought declaratory and injunctive relief against LSERS to prohibit the withdrawal of funds available for their benefit from the state treasury pursuant to La. R.S. 11:1202. The trial court denied the school boards' request for declaratory and injunctive relief. The suits were dismissed with prejudice, and the school boards appealed.

On appeal, the school boards argued that the procedure for deducting funds from the state treasury pursuant to La. R.S. 11:1202 conflicts with the provisions of La. Const. Art. 3, § 16(A), Article 7, § 10(D), and Article 8, § 13(B). Alternatively, the school boards argued that the provisions of La. R.S. 11:1195.1 and La. R.S. 11:1195 .2 did not apply to employees who retire or resign without termination or whose routes are eliminated through merger or consolidation. Also, the school boards argued that the UAL attributable to the identified employees was erroneously calculated and that the UAL allegedly attributable to resigning employees would be extinguished by their withdrawal of retirement contributions. The school boards additionally argued that the doctrine of collateral estoppel barred LSERS from enforcing collection. Lastly, the school boards submit that they would sustain irreparable harm without recourse if LSERS is allowed to withdraw funds held for their benefit from the state treasury or Department of Education.

The Court of Appeal found no merit to the school boards' arguments and affirmed the judgment of the trial court.

ZONING - MASSACHUSETTS

Miles-Matthiass v. Zoning Bd. of Appeals of Seekonk

Appeals Court of Massachusetts, Bristol - February 11, 2014 - N.E.3d - 84 Mass.App.Ct. 778

Neighbors appealed decision of town zoning board, determining that property owner's proposed common driveway was permissible under town zoning bylaw. The Superior Court overturned the zoning board's decision, and owner appealed.

The Appeals Court held that:

- 30-day period for neighbors to appeal to zoning board began to run when building commissioner issued decision to approve driveway;
- Town zoning bylaw was permissive, not prohibitive;
- Trial court was required to give deference to decision of board approving driveway; and
- Driveway was a permissible accessory use under bylaw.

Town zoning bylaw was permissive, not prohibitive, for purposes of determining whether proposed common driveway was permissible accessory use under bylaw. Section of bylaw stating that more restrictive interpretation controlled in instances of multiple interpretations did not apply since bylaw did not define "accessory use," bylaw did not state that uses not expressly allowed were prohibited

but instead stated that buildings and uses were required to be in conformity with zoning regulations, and bylaw allowed legal nonconforming uses to be extended upon a finding that extension was not substantially more detrimental than existing nonconforming use.

Property owner's proposed common driveway to access residential lots over owner's and neighbors' lots was a permissible accessory use under town zoning bylaw. Although bylaw did not define "accessory use," driveway was a use that was dependent on or pertained to a main use, and zoning board found that common driveways were in existence in other parts of town and that proposed driveway was reasonable and adequate.

MUNICIPAL ORDINANCE - MICHIGAN

Rapp v. Dutcher

United States Court of Appeals, Sixth Circuit - February 18, 2014 - Fed.Appx. - 2014 WL 594064

Condominium owners brought § 1983 action against city, city officials, and condominium association, alleging a variety of constitutional violations relating to 173 citations they were issued for renting their condominium without a landlord license in violation of certain municipal ordinances. The District Court granted defendants' motions to dismiss, and owners appealed.

The Court of Appeals held that:

- Abuse of process claim under § 1983 did not exist;
- Rooker–Feldman doctrine barred owners' § 1983 claim alleging violation of the Eighth Amendment's excessive fines clause; and
- Owners failed to state class of one equal protection claim under § 1983.

An abuse of process claim under § 1983 did not exist for condominium owners, as owners did not connect the alleged abuse of process to a violation of any rights, privileges, or immunities secured by the Constitution and federal laws.

The Rooker–Feldman doctrine barred condominium owners' § 1983 claim alleging violation of the Eighth Amendment's excessive fines clause arising from the $53,300 in fines originally assessed against them for violating city ordinances by renting their condominium without a landlord license. The owners' claim challenged the fines imposed by the state trial court, which were subsequently declared unconstitutional by the state intermediate appellate court, and but-for the original $53,300 judgment, the excessive fines claim would not exist and thus, the source of injury was a state-court judgment.

Condominium owners' conclusory allegations that city acted in an arbitrary and capricious manner in enforcing against them city ordinances prohibiting them from renting their condominium without a landlord license were insufficient to state class of one equal protection claim under § 1983. Owners' complaint contained no facts showing that the city treated them differently from other individuals who violated the rental license ordinances.

MUNICIPAL ORDINANCE - NEBRASKA

Linc-Drop, Inc. v. City of Lincoln

United States District Court, D. Nebraska - February 18, 2014 - F.Supp.2d - 2014 WL 595545

For-profit corporation that owned and maintained donation drop boxes for secondhand clothing donated to non-profit charity brought action challenging constitutionality of municipal ordinance requiring permit for such boxes, limiting issuance of permits to certain non-profit organizations, and requiring that at least 80 percent of proceeds from boxes be used for charitable purposes. Plaintiff moved for preliminary injunction.

The District Court held that:

- Corporation had standing to assert First Amendment claim;
- Corporation was engaged in charitable solicitation;
- Corporation was likely to prevail on merits of its claim that 80 percent requirement violated First Amendment;
- Corporation was likely to prevail on merits of its claim that permit requirement violated First Amendment; and
- Corporation had standing to assert due process claim.

For-profit corporation that owned and maintained donation drop boxes for secondhand clothing donated to non-profit charity was likely to prevail on merits of its claim that municipal ordinance requiring that at least 80 percent of proceeds from boxes be used for charitable purposes violated its First Amendment free speech rights, and thus entry of preliminary injunction barring enforcement of ordinance was warranted. Ordinance was not narrowly tailored to prevent deception and to ensure that funds actually went to benefit charitable organizations.

For-profit corporation was likely to prevail on merits of its claim that municipal ordinance requiring permit for such boxes and limiting issuance of permits to certain non-profit organizations violated its First Amendment free speech rights, and thus entry of preliminary injunction barring enforcement of ordinance was warranted, where ordinance on its face did not purport to require when determination had to be made.

LIABILITY - NEW YORK

Benson v. City of Tonawanda

Supreme Court, Appellate Division, Fourth Department, New York - February 14, 2014 - N.Y.S.2d - 2014 N.Y. Slip Op. 01056

Pedestrian brought action against city seeking damages for injuries she sustained when her foot was caught in a gap between two wooden planks on a pedestrian bridge located within a park maintained by city. The Supreme Court, Erie County, granted summary judgment to city. Pedestrian appealed.

The Supreme Court, Appellate Division, held that triable issue of fact, precluding summary judgment, existed as to whether city affirmatively created dangerous condition.

Triable issue of fact existed as to whether city affirmatively created dangerous condition by constructing pedestrian bridge with half-inch gaps between the wooden planks instead of the quarter-inch gaps specified in the design plans for the bridge, precluding summary judgment in pedestrian's action against city seeking damages for injuries she sustained when her foot was

caught in the gap between planks on the bridge, which was located within a park maintained by city.

ZONING - NEW YORK

Exeter Bldg. Corp. v. Town of Newburgh

Supreme Court, Appellate Division, Second Department, New York - February 13, 2014 - N.Y.S.2d - 2014 N.Y. Slip Op. 00996

Developers brought hybrid proceeding pursuant to Article 78 against town, town board members, planning board, zoning board of appeals, and town code enforcement officer, seeking review of determination by board of appeals that developers had not established vested right to develop real property in accordance with prior zoning regulations and seeking declaratory judgment that they had such a vested right. The Supreme Court, Orange County, granted petition to review determination by board of appeals and granted declaratory judgment. Defendants appealed.

The Supreme Court, Appellate Division, held that:

- Board of appeals determination was neither arbitrary and capricious nor abuse of discretion, and
- Developers did not acquire vested rights to develop property in accordance with prior regulations.

The doctrine of vested rights is implicated when a property owner seeks to continue to use property, or to initiate the use of property, in a way that was permissible before enactment or amendment of a zoning ordinance but would not be permitted under a new zoning law; in those situations, the right of the property owner is to be balanced against the right of the public to enforce the zoning law.

Determination by town zoning board of appeals that developers and owners of property did not acquire vested right to develop property in accordance with prior zoning regulations was neither arbitrary and capricious nor an abuse of discretion. Even if developers could claim vested rights in reliance of an unconditional final approval of a site plan, town planning board did not grant unconditional approval of developers' site plan and developers failed to fulfill conditions precedent in resolution regarding site plan approval, such that chairperson was not authorized to sign site plan.

Reliance is an essential element of the common law doctrine of vested rights in development of property. Developers did not acquire vested rights to construct entire development project in accordance with prior zoning regulations based on their expenditures and construction in reliance on limited permits, which authorized demolition of single-family house and water tanks, erection of a sign advertising new townhouses, and regrading and clearing, since permits did not amount to town's approval of entire project.

TAX - NEW YORK

Baldwin Union Free School Dist. v. County of Nassau

Court of Appeals of New York - February 18, 2014 - N.E.3d - 2014 N.Y. Slip Op. 01103

School districts, town, and taxpayers brought related actions challenging county law that purported to repeal county charter and administrative code amendment by New York State Legislature that made county, rather than its component municipalities, liable for all real property tax refunds due to erroneous assessments. The Supreme Court, Nassau County, entered judgment for county, and

plaintiffs appealed. The Supreme Court, Appellate Division reversed. County sought leave to appeal.

The Court of Appeals held that:

- County law could not stand in absence of state's express delegation to county of such power to pass law, and
- Legislature had not delegated such power to county.

County law was exercise of constitutional "power of taxation," which could not stand unless state expressly delegated to county such power to pass that law. By requiring taxing districts within county to pay real property tax refunds to taxpayers, thereby relieving county government of that tax refund burden, and specifying that taxing districts would be served with notice of tax certiorari proceedings, county law directly altered assignment of tax burdens and administration of tax system with respect to tax review proceedings.

PUBLIC RECORDS - OHIO

State ex rel. DiFranco v. S. Euclid

Supreme Court of Ohio - February 19, 2014 - N.E.3d - 2014 -Ohio- 538

Records requester brought action seeking writ of mandamus requiring city to produce public records, and seeking damages and attorney fees. The city produced the documents, rendering the writ moot.

The remaining issue was whether requester was entitled to statutory damages and attorney fees, given that (i) the city delayed two months in providing any response to the request at all and (ii) the original production of documents was incomplete—only after requester presented an expert affidavit indicating that there were additional records to be produced did the city complete its production of the requested records.

After city produced the records, the Court of Appeals, entered summary judgment in favor of city and denied requester's claims for damages and fees. Requester appealed.

The Supreme Court of Ohio held that:

- Requester was entitled to damages, but
- Requester was not entitled to attorney fees.

Requester was entitled to mandatory award of damages under Public Records Act, as a result of city's two-month failure to respond to request and city's eight-month failure to make compete production, without any requirement that requester make a showing of public benefit. Absence of any response over two-month period was a failure to respond within a reasonable amount of time and a violation of requirement that records be promptly prepared and made available, and section of Act governing mandatory damages did not require a showing of public benefit.

Records requester was not entitled to award of attorney fees under Public Records Act, as a result of city's two-month failure to respond to request and city's eight-month failure to make compete production, since no court issued a judgment ordering city to comply with Act. Even though court had issued an interlocutory order requiring production of any responsive documents that had not yet been produced, city made its production prior to that order, and final judgment in case disposed of the complaint on grounds of mootness.

IMMUNITY - TEXAS

Midtown Edge, L.P. v. City of Houston

Court of Appeals of Texas, Houston (1st Dist.) - February 13, 2014 - Not Reported in S.W.3d - 2014 WL 586232

Condo developer ("Edge") began construction of a condominium development project in the Midtown area of Houston. After Edge applied to the City for use of its wastewater line, the City responded by letter, stating that a new wastewater line would need to be constructed. In its letter, the City listed various methods of financing the new line, noting that it could pay for all or some of the costs of design and construction, or Edge could choose to pay the costs on its own.

Edge responded via letter, stating that it was not requesting cost sharing participation. Subsequently, the City issued a construction permit, and Edge constructed the new line at a cost of $224,991.02. Upon completion, Edge dedicated the new line to the City for its ownership and maintenance.

Edge later sued the City for, inter alia, breach of contract when after the City declined to reimburse it for a pro rata portion of its pipeline construction costs after a new developer requested access to the pipeline. Edge alleged that the City's letter concerning financing of the new line constituted "a letter agreement," a "valid, enforceable agreement" between the City and Edge and that the Texas Legislature had waived the City's governmental immunity for purposes of such a breach-of-contract claim.

The City argued that the letter was not a contract, was immune from suit, and filed a plea to the jurisdiction.

The Court of Appeals agreed with the City, concluding that the requirements of section 271.151 were not met and the waiver of governmental immunity under section 271.152 did not apply. Accordingly, it held that the trial court did not err in granting the City's plea to the jurisdiction on Edge's claim for breach of contract.

UNIFORM DECLARATORY JUDGMENT ACT - TEXAS

City of San Antonio v. Rogers Shavano Ranch, Ltd.

Court of Appeals of Texas, San Antonio - February 19, 2014 - Not Reported in S.W.3d - 2014 WL 631484

Developers sued the City of San Antonio seeking declaratory relief to enforce their vested rights under Chapter 245. The developers sought declarations that either a water contract or a development sewer report constituted an "original application for permit," thereby vesting their rights against the application of subsequently adopted ordinances and regulations. In addition, the developers sought attorney's fees under the Uniform Declaratory Judgments Act (UDJA).

The City filed a plea to the jurisdiction, asserting its immunity was not waived with regard to the developers' claim for attorney's fees. After a hearing, the trial court denied the City's plea, and the City appealed.

The sole issue presented on appeal was whether a trial court has jurisdiction to award attorney's fees under the Uniform Declaratory Judgments Act in a lawsuit filed against a city by developers

seeking to enforce their vested rights under Chapter 245 of the Texas Local Government Code.

The Court of Appeals held that the recovery of attorney's fees from the city under the UDJA was incidental to and redundant of the relief provided by Chapter 245, and thus reversed the trial court's order and dismissed the developers' claim against the city for attorney's fees.

BONDS - WEST VIRGINIA

Keyser House Bonds, LLC v. Keyserhouse Associates, LTD Partnership

Supreme Court of Appeals of West Virginia - February 14, 2014 - Not Reported in S.E.2d - 2014 WL 620480

Keyser House Bonds, LLC, ("Bondholder") moved to foreclose on housing project ("Keyserhouse" securing $650,000 of municipal bonds it held that matured on April 24, 2012 and for which it had not received payment.

Keyserhouse Associates, LTD Partnership ("Partnership") and the City of Keyser ("City") obtained an order from the circuit court enjoining Bondholder from taking any action to collect its debt on the bonds, including foreclosing on the encumbered property, because of its finding that Bondholder failed to offer any evidence or proof that it complied with the pre-foreclosure notice and right to cure procedures contained in the trust indenture.

In addition, the circuit court ruled that (1) Partnership could enter into an agreement with their proposed management company to take over the day-to-day operation of Keyserhouse; (2) Partnership and City could immediately enter into negotiations to sell Keyserhouse to a prospective buyer; (3) it would not consider Bondholder's motion for an injunction to take over control and management of the Keyserhouse; and (4) Partnership was to pay Bondholder $5,000 per month to be applied to the $650,000 outstanding debt owed to Bondholder. Regarding the monthly payment, the circuit court stated that "I'm just going to pull a number out of the air that seems reasonable."

The court of appeals reversed, holding that the plain language of the trust indenture gave Bondholder the unconditional right to enforce payment once the bonds reached maturity, including the right to foreclose on the property if payment was not received. Although the indenture did contain various cure provisions, those were trumped by the provision that read:

"Nothing in the Indenture contained shall, however, affect or impair the right of the holders of the Bonds to enforce the payment of the principal of and interest on the Bonds at and after maturity thereof or the obligation of the Issuer to pay the principal of an interest of the Bonds to the holders thereof at the time, place, from the source and in the manner in the Bonds expressed."

The court concluded that, "Plaintiff Bondholder is entitled to seek payment on the bonds through [any] means, including foreclosure, set forth in the Indenture of Trust."

TAX - WISCONSIN

Sausen v. Town of Black Creek Bd. of Review

Supreme Court of Wisconsin - February 19, 2014 - N.W.2d - 2014 WI 9

Taxpayer sought certiorari review of the town board of review's assessment of his property for

taxation purposes, arguing that his property should have been classified as “undeveloped land,” rather than “productive forest land.” The Circuit Court affirmed. Taxpayer appealed. The Court of Appeals summarily affirmed. Taxpayer appealed.

The Supreme Court of Wisconsin held that:

- A taxpayer who objects to an assessment of his property on basis of classification of property has the burden of proving that the classification is erroneous, and
- Evidence supported assessor’s classification of taxpayer’s property as “productive forest land.”

Evidence supported assessor’s classification of taxpayer’s property as “productive forest land,” which is assessed at full value, rather than “undeveloped land,” which is assessed at 50 percent of its full value. Taxpayer relied entirely on two maps to show that property was “undeveloped land,” but neither map supported this assertion, and taxpayer failed to submit evidence that the property was not capable of producing commercial forest products or that the property failed to qualify as low-grade woods.

AFFORDABLE HOUSING - CALIFORNIA

Tuthill v. City of San Buenaventura

Court of Appeal, Second District, Division 6, California - February 10, 2014 - Cal.Rptr.3d - 14 Cal. Daily Op. Serv. 1437

Purchasers of low-income townhomes brought action against vendor and city, seeking declaratory relief and alleging negligence and negligence per se/violation of statutory duty based on developer’s and city’s failure to inform them that townhomes were subject to low income sales restrictions and that they overpaid for the units based on the restrictions. Following vendor’s default, the Superior Court denied city’s motion for judgment on the pleading, entered declaratory judgment, and awarded damages. City appealed.

The Court of Appeal held that:

- Court could not apply “equitable principles” to create an exception to public entity immunity;
- Statute requiring “the cooperation of all levels of government” to provide affordable housing for low- and moderate-income households was a general statement of public policy which did not impose any mandatory duty on city;
- City’s amended affordable housing program, did not create a mandatory legal duty on city to prevent sales to ineligible households;
- Development agreement for townhome complex was not an “enactment” which could give rise to a mandatory duty on the part of city;
- Development agreement did not establish a mandatory duty on the part of city to protect ineligible buyers from purchasing income and price restricted properties;
- Public policy statement, affordable housing plan, and development agreement were not intended to protect purchasers from overpaying for low-income townhomes; and
- Purchasers did not vindicate an important right in their action against city and thus were not entitled to attorneys’ fees based on the private attorney general doctrine.

PUBLIC UTILITIES - CALIFORNIA

Utility Reform Network v. Public Utilities Commission

Court of Appeal, First District, Division 5, California - February 5, 2014 - Cal.Rptr.3d - 2014 WL 526411

In 2012, Pacific Gas and Electric Company (PG&E) filed an application with the California Public Utilities Commission (the Commission) seeking approval of an agreement by which PG&E would acquire a new gas-fired power plant in Oakley California (the Oakley Project). A principal issue in the application proceedings was whether there was a need for the Oakley Project. The need was said to arise in part from California's efforts to obtain a greater percentage of its energy from renewable sources, thus requiring additional conventional electrical generating capacity to cope with fluctuations in supply due to the intermittent nature of wind and solar power.

The Court of Appeal concluded the Commission's finding of need was unsupported by substantial evidence, because it relies on uncorroborated hearsay materials the truth of which was disputed and which did not come within any exception to the hearsay rule. Under established California law, such uncorroborated hearsay evidence does not constitute substantial evidence to support an administrative agency's finding of fact. "Because the remaining evidence in the record fails to support the Commission's finding of need, the decisions must be annulled."

LIABILITY - CONNECTICUT

Nikides v. Town of Wethersfield

Appellate Court of Connecticut - February 11, 2014 - A.3d - 2014 WL 411298

Pedestrian sued town for damages stemming from injuries suffered as a result of trip and fall on broken piece of sidewalk. Following jury trial, the Superior Court found in favor of plaintiff and denied town's motion for directed verdict. Town appealed.

The Appellate Court held that evidence raised jury question as to whether pedestrian suffered injury while using due care and skill.

Evidence in pedestrian's action for damages under municipal defective highway statute stemming from injuries she allegedly received when she tripped and fell on broken piece of sidewalk raised jury question as to whether pedestrian suffered injury while using due care and skill, as required for recovery under statute. Plaintiff testified that as she approached defective portion of sidewalk, she was paying attention and perceived crack to be only defect, that she made mental note to step over crack, and that she did not perceive additional defect of downward slope on broken piece of sidewalk.

CONDEMNATION - GEORGIA

ADC Investments, LLC v. Department of Transp.

Court of Appeals of Georgia - February 6, 2014 - S.E.2d - 2014 WL 464379

Department of Transportation brought condemnation action involving property on which a static billboard was located. The trial court awarded partial summary judgment to DOT, barring lessee of the property from presenting evidence as to its anticipated future income stream from a digital billboard on the property. Lessee appealed.

The Court of Appeals held that triable issues existed as to whether city would have amended sign ordinances to allow digital billboards, whether sublessee would have converted billboard to digital, and whether these changes would have affected present value of the leasehold.

COURTS - IDAHO

Ada County v. City of Garden City ex rel. Garden City Council

Supreme Court of Idaho, Boise, January 2014 Term - February 7, 2014 - P.3d - 2014 WL 497439

In 1994, an en banc panel of the district judges ordered Garden City and Meridian (the Cities) to provide suitable and adequate quarters for the magistrate's division of the Fourth Judicial District (1994 Order). In addition to providing quarters, the Cities were ordered to provide for the equipment, staff, supplies, and other expenses necessary for the quarters to function properly. The Cities never complied with the order. In 2010, Ada County brought a declaratory action asking the district judges to find that the 1994 Order was still valid and to require the Cities to comply with it. The Cities responded by filing a motion to vacate the 1994 Order, claiming that the order was invalid because it was entered on an ex parte basis.

The Supreme Court of Idaho held that:

- Challenge to procedural due process owed prior to entry of prior order did not present justiciable controversy, and
- County was not entitled to award of appellate attorney fees.

Prior order that required cities to provide suitable and adequate quarters for magistrate's division of District Court had not harmed cities, and therefore cities' request to have order declared invalid due to violation of procedural due process rights did not present a "justiciable controversy," where, although the prior order required the cities to provide quarters and facilities for the magistrate's division and the county had sought payment for their use of the county courthouse, in the almost 20 years since the entry of the order, the cities had not been required to pay one penny or to provide any quarters or facilities for a magistrate's division, and there was no plan, proposal, or schedule from any interested party regarding what the cities were required to do to comply with the order.

SCHOOLS - FLORIDA

Mech v. School Bd. of Palm Beach County

United States District Court, S.D. Florida - February 7, 2014 - Slip Copy - 2014 WL 505163

David Benoit Mech provides a math tutoring service to students in the sixth grade and older under the fictitious bushiness name "The Happy/Fun Math Tutor." Mech had contracts with several middle school and a high school to place banners on the schools' fences to advertise The Happy/Fun Math Tutor.

HOWEVER, Mech has several other separate businesses, including Dave Pounder Productions LLC (DPP). In the past, DPP had produced explicit adult media. The School Board of Palm Beach County removed the banners and Mech sued on the grounds that the School Board breached the advertising contracts with him by removing the banners. The School Board went way out on a limb and argued that Mech's affiliation with DPP made it inappropriate for The Happy/Fun Math Tutor to advertise at

the schools, and that these advertisements violated School Board Policy.

In response to the School Board's motion to dismiss, the district court found that Mech had indeed stated a claim for breach of contract, but dismissed his claims for declaratory and injunctive relief.

SCHOOLS - FLORIDA

Duval County School Bd. v. Buchanan ex rel. Cox

District Court of Appeal of Florida, First District - February 7, 2014 - So.3d - 2014 WL 482231

Middle school student who was attacked by another student brought negligence action against county school board. The Circuit Court entered judgment on a jury verdict in favor of student. School board appealed.

The District Court of Appeal held that any error in allowing jury to find school board negligent for failing to place student who committed the attack in in-school suspension on the day of the attack, where she was scheduled to be due to a prior disciplinary infraction, was not fundamental error in action brought by the student who was attacked, where school board failed to challenge jury's alternative finding that school board was negligent in its supervision of student who committed the attack immediately before the attack.

MUNICIPAL ORDINANCE - INDIANA

Paul Stieler Enterprises, Inc. v. City of Evansville

Supreme Court of Indiana - February 11, 2014 - N.E.3d - 2014 WL 545433

Bars and private clubs brought actions against city alleging that smoking ban ordinance violated equal privileges and immunities clause of the Indiana Constitution. The Superior Court upheld the constitutionality of ordinance. Bars and clubs appealed, and the Court of Appeals affirmed. Transfer was granted.

The Supreme Court of Indiana held that:

- City's amended smoking ban ordinance violated equal privileges and immunities clause of Indiana Constitution by exempting riverboat casinos, and
- Unconstitutional provision of ordinance was not severable.

City's amended smoking ban ordinance, which exempted riverboat casinos, violated the equal privileges and immunities clause of the Indiana Constitution. The disparate treatment, exempting floating casinos with riverboat statutory gambling authorization but not land-based bars and clubs, including those with gambling authorization from other statutory sources, was not reasonably related to the inherent differences between the divergently-treated classes.

LIABILITY - KANSAS

Sleeth v. Sedan City Hosp.

Supreme Court of Kansas - February 7, 2014 - P.3d - 2014 WL 517801

Patient's parents brought wrongful death action against municipal hospital, alleging hospital employee punctured patient's bowel while inserting feeding tube, causing patient's death. The District Court dismissed action. Parents appealed. The Court of Appeals reversed and remanded. Hospital petitioned for review.

After grant of review, the Supreme Court of Kansas held that:

- Letter sent to hospital administrator by attorney for patient's parents, threatening wrongful death suit if settlement could not be reached regarding patient's death, did not substantially comply with statutory notice requirements for bringing a claim against a municipality, and
- Statutory provision for a municipality to have a 120-day review period for any claim against municipality, after receiving notice of that claim, cannot be waived.

Letter sent to municipal hospital administrator by attorney for patient's parents, threatening wrongful death suit if settlement could not be reached regarding patient's death, did not substantially comply with statutory notice requirements for bringing a claim against a municipality, where letter lacked any statement of monetary damages.

Assuming patient's parents' multiple writings could, in combination, suffice to comply with statutory notice requirements for bringing a claim against a municipality, 120-day time period for municipal hospital's review of parents' wrongful death claim ran from date of writing which, unlike prior writing, contained statement of monetary damages. Statutory provision for a municipality to have a 120-day review period for any claim against municipality, after receiving notice of that claim, cannot be waived; review period is a condition precedent to filing suit that implicates a court's subject matter jurisdiction.

ZONING - MASSACHUSETTS

Miles-Matthiass v. Zoning Bd. of Appeals of Seekonk

Appeals Court of Massachusetts, Bristol - February 11, 2014 - N.E.3d - 84 Mass.App.Ct. 778

Neighbors appealed decision of town zoning board, determining that property owner's proposed common driveway was permissible under town zoning bylaw. The Superior Court overturned the zoning board's decision, and owner appealed.

The Appeals Court held that:

- 30-day period for neighbors to appeal to zoning board began to run when building commissioner issued decision to approve driveway;
- Town zoning bylaw was permissive, not prohibitive;
- Trial court was required to give deference to decision of board approving driveway; and
- Driveway was a permissible accessory use under bylaw.

Thirty-day period for neighbors to file appeal with town zoning board from building commissioner's approval of property owner's proposed common driveway began to run when commissioner issued the decision, not when neighbors learned of the decision and requested a written copy, since neighbors had constructive notice of decision and failed to satisfy their duty of inquiry to learn of decision. Neighbors had been aware that owner was seeking commissioner's approval of driveway,

neighbors had initially kept in close contact with commissioner, but neighbors failed to contact commissioner regarding decision for approximately two weeks prior to decision and two weeks after decision.

ZONING - MICHIGAN

Grand/Sakwa of Northfield, LLC v. Township of Northfield

Court of Appeals of Michigan - February 4, 2014 - N.W.2d - 2014 WL 436736

The Lelands own four parcels of land totaling approximately 220 acres (the property) in Northfield Township. Before the events that gave rise to the present dispute, the property had been zoned AR Agricultural (AR), and had been farmed for over 100 years.

In January 2002, Grand/Sakwa executed an agreement to purchase the property from the Lelands. On June 30, 2003, plaintiffs applied to rezone the property from AR to SR–1 single-family residential (SR–1) in 2003. SR–1 zoning allows up to four dwellings per acre with sewer service, or one per acre without sewer service. On November 18, 2003, the township board approved the rezoning, limited to 450 homes. Following that approval, township residents organized a successful referendum, held May 18, 2004, which overruled the board's decision, thereby leaving the property zoned AR. After the referendum, the Northfield Township Zoning Board of Appeals denied plaintiffs' requests for use or dimensional zoning variances.

Plaintiffs filed suit on October 22, 2004. They alleged that any zoning classification more restrictive than SR–1 constituted a regulatory taking. Shortly after the lawsuit was filed, a new township board took office. A majority of the new board's members were organizers or supporters of the referendum that overruled the board's 2003 rezoning of the property to SR–1. The new board fired its planner and took action to amend the zoning ordinances, rezoning the property from AR to LR low-density residential (LR). The LR classification itself was amended to allow only one home per two acres, instead of the previously-allowed one home per acre.

At the time of the bench trial, therefore, the property was zoned LR. Plaintiffs argued that whether or not a regulatory taking existed should be determined by evaluating the AR zoning that existed at the time the lawsuit was filed. The township argued that whether or not a taking existed should be determined based upon the LR zoning that existed at the time the trial court heard the proofs and rendered a decision. Thus, before determining whether the zoning constituted a regulatory taking, the trial court had to determine which zoning ordinance was to be tested. The trial court ruled that the relevant zoning ordinance was the one then in place, i.e., LR zoning. After the full trial, the court held in the township's favor on all of plaintiffs' claims, finding no constitutional violation.

Plaintiffs appealed and the court of appeals affirmed.

ZONING - MICHIGAN

International Outdoor, Inc. v. City of Southgate

United States Court of Appeals, Sixth Circuit - February 10, 2014 - Fed.Appx. - 2014 WL 521173

International Outdoor, Inc. challenged the City of Southgate's denial of its applications for permission to erect eight billboards in the city.

Southgate asserted that International Outdoor had no standing to challenge the billboard ban because, even if the billboard ban in question were ruled unconstitutional, International Outdoor would still be prevented from building its proposed billboards because they would violate the height and size limitations imposed on all "free-standing signs" by another provision in the Southgate sign ordinance, § 1298.18(g). Therefore, the company's injuries would not be redressable by a favorable decision of the court. The district court agreed, dismissing the case for lack of standing. International Outdoor appealed.

The district court found no error and affirmed the district court's dismissal of the case on standing grounds.

ZONING - NEW HAMPSHIRE

Town of Newbury v. Landrigan

Supreme Court of New Hampshire - February 6, 2014 - 75 A.3d 1091

Town petitioned for injunctive relief and imposition of $2,000 fine against property owners for unlawful subdivision of lot without planning board approval. The Superior Court granted relief, and property owners appealed.

The Supreme Court of New Hampshire held that:

- Merger of contiguous, non-conforming lots, independent of town ordinance, was possible based on conduct of landowners in abandoning or abolishing individual lot lines, and
- Evidence supported trial court's finding that landowners, and their predecessors in interest, by their conduct, abandoned lot line that divided two lots, resulting in merger of lots into single lot.

Evidence supported trial court's finding that landowners, and their predecessors in interest, by their conduct, abandoned lot line that divided two lots, resulting in merger into single lot, and therefore, that subsequent subdivision of lots without approval of planning board was unlawful. Town had originally deeded two contiguous lots to owners' predecessor, who recorded plan that did not separate two lots. Property was subsequently transferred by deed three times, and ultimately to owners. Each deed did not contain internal boundary lines between two lots, owners understood they were buying single lot, and owners recorded survey plat, which showed lots separated by dotted line, which, according to town's expert, meant that lot lines had been abandoned as to the property being separate parcels.

ZONING - NEW YORK

Restuccio v. City of Oswego

Supreme Court, Appellate Division, Fourth Department, New York - February 7, 2014 - N.Y.S.2d - 2014 N.Y. Slip Op. 00829

Plaintiffs brought declaratory judgment action against city, common council, mayor, and developers, challenging rezoning of property to accommodate construction of a hotel. The Supreme Court, Oswego County, granted summary judgment in defendants' favor, and plaintiffs appealed.

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

- Rezoning was consistent with city's comprehensive plan, and
- Rezoning was reasonably related to legitimate governmental interest.

Rezoning of property to accommodate construction of a hotel was consistent with city's comprehensive plan. New zoning classification for property more closely conformed to the comprehensive plan than its existing designation and hotel would be an appropriate use in proposed zone, which was designated as "highway commercial."

City's rezoning of property to accommodate construction of a hotel was reasonably related to legitimate governmental purpose of furthering city's planned development.

EMPLOYMENT - NEW YORK

Schultz v. Town of Wheatfield

Supreme Court, Appellate Division, Fourth Department, New York - February 7, 2014 - N.Y.S.2d - 2014 N.Y. Slip Op. 00827

Town employee who was allegedly demoted after his unsuccessful bid for public office brought action against town and chief constable, asserting claims for defamation, constructive discharge, and violation of his due process and First Amendment rights. The Supreme Court, Niagara County, granted in part and denied in part defendants' motion for partial summary judgment, and both parties appealed.

The Supreme Court, Appellate Division held that:

- Defendants had burden of eliminating fact issues as to whether they retaliated against employee, and
- Employee could not maintain First Amendment claim, absent viable common law defamation claim.

Even assuming, arguendo, that town and chief constable, in moving for summary judgment on town employee's claims for violation of due process and constructive discharge, established that employee was not demoted from the rank of sergeant after his unsuccessful bid for public office because no such position ever existed, they had burden of eliminating fact issues as to whether they retaliated against employee because of his political activities by eliminating his assignments and failing to schedule him for work, all without notice or a hearing.

Town employee who ran unsuccessful campaign for public office could not maintain First Amendment claim against town and chief constable based on chief constable's letter published during his campaign, which employee alleged was defamatory in nature and had chilling effect on his First Amendment right to engage in political activity, absent a viable common law defamation claim.

LIABILITY - NEW YORK

Hume v. Town of Jerusalem

Supreme Court, Appellate Division, Fourth Department, New York - February 7, 2014 - N.Y.S.2d - 2014 N.Y. Slip Op. 00756

Pedestrian brought personal injury action against town, after the gravel along the edge of the road

where she was walking allegedly gave way and caused her to slide down the road into a hole. The Supreme Court, Yates County, denied the town's motion for summary judgment. The town appealed.

The Supreme Court, Appellate Division, held that the town's failure to receive prior written notice of the allegedly dangerous condition precluded the pedestrian's personal injury action, even if the town had actual notice of the dangerous condition, where written notice was required by the town's local law.

PUBLIC UTILITIES - OHIO

In re Application of Columbus S. Power Co.

Supreme Court of Ohio - February 13, 2014 - N.E.3d - 2014 -Ohio- 462

Office of the Ohio Consumers' Counsel (OCC) and association of large industrial energy consumers appealed decision of Public Utilities Commission (PUC) authorizing new generation rates for two utilities in utilities' electric security plan (ESP). Operating company of the utilities intervened in support of PUC. The Supreme Court of Ohio affirmed in part, reversed in part, and remanded. On remand, the PUC determined that the environmental-investment carrying costs were lawful, but directed utility to deduct actual provider-of-last-resort (POLR) costs from tariff schedules, and rejected a request to recover the amounts of the POLR charge and carrying costs that utility had collected during remand period. OCC and association appealed.

The Supreme Court of Ohio held that:

- Utility was not required by statute to prove that carrying charges were necessary in order to recover them;
- Record supported authorization of carrying charges on the basis that they would have the effect of providing certainty to both utility and its customers regarding retail electric generation service;
- Subsection of statute did not require an economic basis for utility to recover environmental-investment carrying costs; and
- Consumers could not recover previously-collected provider-of-last-resort (POLR) charges.

Electric utility was not required, under statute that stated that electric security plan could provide terms, conditions, or charges relating to carrying costs as would have the effect of stabilizing or providing certainty regarding retail electric service, to prove that carrying charges were necessary in order to recover them. Statute did not expressly impose a "necessary" requirement, and when read as a whole, statute did not require the utility to prove that the provision of retail electric service would be less probable, or certain, in order to recover costs under the statute. R.C. 4928.143(B)(1)(d), 4928.143(B)(2)(d).

Record supported authorization of carrying charges on the basis that they would have the effect of providing certainty to both electric utility and its customers regarding retail electric generation service, where utility's witness testified that environmental-investment carrying costs allowed utility to continue to provide low-cost generation power, which had the effect of lowering the price of retail electric service, where witness testified that the environmental-investment carrying charges were important to utility's ability to provide generation power at a cost that was below the market rate for purchased power at that time, which in turn had the effect of lowering or stabilizing the price of retail electric service. R.C. 4928.143(B)(2)(d).

CODE ENFORCEMENT - PENNSYLVANIA

Mayor, Town Council of Borough of Chambersburg v. Keeler

Commonwealth Court of Pennsylvania - February 10, 2014 - A.3d - 2014 WL 523748

Borough filed a municipal claim against property owner for unpaid municipal services. The Court of Common Pleas granted borough's motion for judgment on the pleadings, and entered judgment against property owner in the amount of $1,152.44 plus interest and attorney fees. Property owner appealed.

The Commonwealth Court held that the 21-day period for property owner to file his concise statement of errors complained of on appeal began to run on the date of the order's entry on the docket for the filing and service of the statement.

CONTRACTS - TEXAS

City of Willow Park v. E.S.

Court of Appeals of Texas, Fort Worth - February 6, 2014 - S.W.3d - 2014 WL 468878

Engineering firm that had entered into consulting services contract with city for preparation of an engineering feasibility report brought action for breach of contract and quantum meruit based upon city's alleged failure to pay amount due under contract. City filed plea to the jurisdiction, asserting governmental immunity. The District Court denied plea. City appealed.

The Court of Appeals held that:

- Section of parties' consulting services contract purportedly providing that city did not waive its governmental immunity by entering into contract was void as against public policy, such that firm could maintain breach of contract claim against city;
- City was immune from suit on engineering firm's attorney fees claim; and
- City was immune from suit on engineering firm's quantum meruit claim.

Legislature, in enacting section of Local Government Code providing that a local governmental entity that enters into a contract waives sovereign immunity to suit for the purpose of adjudicating a claim for breach of such contract, clearly expressed public policy of ensuring that contractors who completed a project pursuant to a contract with a governmental entity have opportunity for redress if the entity refused to pay, and parties could not override legislative policy or contract around statutory waiver of immunity through terms of their contract.

PUBLIC UTILITIES - TEXAS

West Texas Mun. Power Agency v. Republic Power Partners, L.P.

Court of Appeals of Texas, Amarillo - February 5, 2014 - S.W.3d - 2014 WL 486287

In 1983 the cities of Brownfield, Floydada, Lubbock and Tulia formed West Texas Municipal Power Agency (WTMPA) for the purpose of obtaining a reliable and adequate source of electric energy for its citizens. WTMPA is a municipal power agency created pursuant to subchapter C of chapter 163 of the Texas Utilities Code.

WTMPA negotiated and executed a Development Agreement with Republic Power, a private business entity, for the purpose of forming a partnership to develop, finance and operate future electric energy generation and transmission facilities.

The Development Agreement required WTMPA to form a local government corporation to own and operate any electric energy generation or transmission facility to be built and to issue bonds to finance their construction. WTMPA formed High Plains Diversified Energy Corporation for this purpose.

Over the next three years, Republic Power raised millions in capital and expended considerable sums completing feasibility studies and arranging for financing of the project. The Development Agreement provided for issuance of first mortgage revenue bonds by the local government corporation, ultimately High Plains, for the purpose of obtaining the balance of the funds necessary to complete the project. In furtherance of that financing obligation, a bond validation hearing was ultimately scheduled in a Lubbock County district court to approve issuance of the revenue bonds.

Prior to that hearing, at a regularly scheduled meeting of the board of High Plains, a dispute arose as to the allocation of any surplus revenue generated by the project. Due to its greater usage of the electric energy to be generated, the City of Lubbock believed it should receive a greater percentage of any surplus revenue. The Board of Directors disagreed and ultimately, at the bond validation hearing, the City of Lubbock objected to issuance of the revenue bonds by arguing High Plains was not a valid local government corporation and WTMPA did not have the authority to create it. The district court agreed with the City of Lubbock and dismissed the bond validation proceeding with prejudice. As a result, no revenue bonds were ever issued.

Republic Power sued WTMPA and Lubbock – under a joint enterprise theory – for breach of contract and breach of warranties. The District Court granted Lubbock's plea to the jurisdiction but denied WTMPA's plea. WTMPA appealed. WTMPA argued that the trial court erred in denying its plea to the jurisdiction because it is an entity entitled to governmental immunity under the facts of the case.

The Amarillo Court of Appeals held that:

- The proprietary/governmental distinction employed in the Texas Tort Claims Act does not apply to contract disputes, and
- WTMPA's contract with Republic Power was within statutory waiver of governmental immunity.

WTMPA's contract with Republic Power to develop new sources of electricity for the agency was a contract for "goods or services" to a "local governmental entity," and thus was within the coverage of the statute providing for a waiver of governmental immunity from suit in the context of a breach of contract claim, even if the agency assigned its rights and duties under the contract to a local government corporation – High Plains – where the contract required the power company to perform services such as obtaining necessary feasibility studies and securing private investment capital.

PUBLIC UTILITIES - TEXAS

Republic Power Partners, L.P. v. City of Lubbock

Court of Appeals of Texas, Amarillo - February 5, 2014 - S.W.3d - 2014 WL 486411

Private business entity that had a development agreement with municipal power agency to form a partnership to develop, finance, and operate future electric energy generation and transmission facility brought action against city, which was member of municipal power agency, and the agency

for breach of development agreement. The District Court granted city's plea to the jurisdiction and denied agency's plea to the jurisdiction. Private business entity appealed.

The Court of Appeals held that:

- City had sovereign immunity from liability from action, and
- City was not a party to the development agreement, and, thus, did not waive sovereign immunity by the fact that agency entered into agreement.

The legislature could have incorporated the proprietary/governmental distinction into the statutory waiver scheme for contract claims, however, it chose not to do so, and legislature specifically sought to waive immunity to suit for certain claims arising under written contracts with governmental entities when the action fell within the category of contracts for which immunity was waived.

City was not a party to development agreement between municipal power agency and private business entity under which entity was required to form a partnership to develop, finance, and operate future electric energy generation and transmission facility, and, thus, city did not waive immunity from suit by entity for breach of development agreement by the fact that agency entered into agreement. Although city was a member of the agency and was named in the opening paragraph of the agreement, none of the documents were executed on behalf of any of the cities, and there was no intent that the city was a party or even a third-party beneficiary to the agreement, and, to the contrary, the agreement specified that the provisions of the agreement were for the exclusive benefit of the entity and agency.

EMPLOYMENT - UTAH

Perez v. South Jordan City

Court of Appeals of Utah - February 6, 2014 - P.3d - 753 Utah Adv. Rep. 35 - 2014 UT App 31

Police officer sought review of decision of city appeal board upholding termination of his employment based on his involvement in high-speed chase and other actions that had previously resulted in formal discipline. The Court of Appeals dismissed appeal as untimely. Upon grant of certiorari, the Supreme Court of Utah reversed.

On remand, the Court of Appeals held that:

- Board of appeal did not abuse its discretion in determining that police officer was engaged in vehicle "pursuit," as opposed to "normal patrolling activities," such that officer violated state law and departmental policy by failing to activate his camera, lights, and siren during chase;
- Fact that city police department's "pursuit review committee" did not describe officer's conduct as pursuit did not preclude board of appeal from finding that officer was involved in pursuit;
- Officer's testimony that he was trained that "pursuit" referred only to driving directly behind a vehicle that is trying to flee did not preclude city board of appeal from finding that officer, who drove parallel to fleeing vehicle on another street, was involved in pursuit;
- Officer failed to demonstrate that termination of his employment was disproportionate or inconsistent with sanctions imposed against similarly situated employees; and
- Board of appeal did not improperly consider evidence that had been purged from officer's disciplinary history in upholding officer's termination.

LABOR - WISCONSIN

Marinette County Professional Employees Union, Local 1752-A, AFSCME, AFL-CIO v. Marinette County

Court of Appeals of Wisconsin - February 11, 2014 - Slip Copy - 2014 WL 519215

In 2009, Marinette County entered into a collective bargaining agreement with the Marinette County Professional Employees Local 1752–A, AFSCME, AFL–CIO union. Article 31.01 of the agreement stated: "This agreement shall be effective January 1, 2009 through December 31, 2011[sic] shall continue in full force and effect from year to year unless either party gives written notice to the other requesting changes prior to June 1, 2011."

After a budget repair bill was introduced in February 2011, the Union approached the County about negotiating a new agreement. The County responded that it was not interested, and no negotiations occurred. 2011 Wis. Act 10 became law on June 29, 2011, thereby extinguishing most collective bargaining privileges for general municipal employees, commencing "on the day [an existing] agreement expires or is terminated, extended, modified, or renewed, whichever occurs first." Act 10, §§ 245, 9332.

In July 2011, the Union claimed the parties' existing agreement had automatically extended for an additional year because neither party had given notice before June 1. The County disputed this assertion, and the Union filed a grievance seeking a one-year extension. The County denied the grievance and the matter proceeded to arbitration.

Following a hearing and submission of briefs, the arbitrator ruled in favor of the Union, explaining: "The parties' failure to act by the June 1 date extended the labor agreement and since this occurred in advance of the Act 10 effective date, I conclude that the 2009–11 collective bargaining agreement was automatically extended through December 31, 2012." The circuit court subsequently granted the Union's motion to confirm the arbitration award. The County appealed.

The Court of Appeals affirmed, finding:

- The arbitrator had not exceeded its powers by not applying WIS. STAT. § 111.70(3)(a)4. (2009–10), which limited collective bargaining agreements to a maximum of three years, as the county waived this argument by not presenting it to the arbitrator;
- The arbitrator had not exceeded its powers when it found that the one-year automatic extension of the arbitration agreement did not violate 2011 Wis. Act 10, as the extension occurred automatically and prior to the effective date of the Act.

"We find it patently absurd to argue an arbitrator's award could be overturned for failing to consider arguments or authority that were never presented to the arbitrator. Not surprisingly, the County cites no authority for this proposition."

PENSIONS - CALIFORNIA

Chaidez v. Board of Administration of California Public Employees' Retirement System

Court of Appeal, Third District, California - February 3, 2014 - Cal.Rptr.3d - 14 Cal. Daily Op. Serv. 1222

City and former city council member filed petitions for writ of administrative mandamus and writ of mandate challenging the Public Employees' Retirement System (PERS) Board of Administration's calculation of former council member's retirement benefit. The Superior Court denied petitions. City and former council member appealed.

The Court of Appeal held that PERS's constitutional fiduciary duty to provide information to member did not preclude bifurcated calculation of benefits as city employee and elected official, and thus calculating his benefits accruing while he was a city council member based on his highest salary as a city council member rather than his highest salary as a city administrator, even if PERS failed to timely inform member of the bifurcated calculations.

TAX - CALIFORNIA

Reynolds v. City of Calistoga

Court of Appeal, First District, Division 5, California - February 3, 2014 - Cal.Rptr.3d - 2014 WL 374143

Assignee of downstream riparian rights brought action against city for breach of fiduciary duty and declaratory judgment that city had misused sales tax funds reserved exclusively for flood protection and watershed improvement. The Superior Court, Napa County, sustained demurrer without leave to amend. Assignee appealed.

The Court of Appeal held that:

- Paying sales tax while making retail purchases did not confer taxpayer standing on assignee;
- Possession of lien on land within county did not confer taxpayer standing on assignee; and
- Assignee did not have public interest standing.

Assignee of downstream riparian rights did not have taxpayer standing, under the statute creating a citizen's remedy against illegal expenditures of city funds, to bring an action against city for breach of fiduciary duty and declaratory judgment that city had misused sales tax funds reserved exclusively for flood protection and watershed improvement, as a consumer who paid sales tax when buying retail products in the city, since sales tax was imposed on the retailers rather than on assignee.

Assignee of downstream riparian rights did not have taxpayer standing, under the statute creating a citizen's remedy against illegal expenditures of city funds, to bring an action against city for breach of fiduciary duty and declaratory judgment that city had misused sales tax funds reserved exclusively for flood protection and watershed improvement, as the holder of a lien on land surrounding a creek near the city, since the lien was not evidence that he paid any taxes on the land.

Even assuming the public interest exception to the usual requirement of a beneficial interest could properly be extended to provide standing to an assignee of downstream riparian rights to bring an action against city for breach of fiduciary duty and declaratory judgment that city had misused sales tax funds reserved exclusively for flood protection and watershed improvement, trial court acted within its discretion in denying such standing to assignee, since the judgments required of local officials in allocation of public funds for public purposes were already subject to challenge by county taxpayers, including the retailers who bore the sales tax.

ZONING - FLORIDA

Archstone Palmetto Park, LLC v. Kennedy

District Court of Appeal of Florida, Fourth District - January 29, 2014 - So.3d - 2014 WL 305086

City brought declaratory judgment action against voters who had sought a citywide referendum to determine whether city ordinance should be repealed, seeking a declaration that development orders were not statutorily subject to referendum. The Circuit Court entered judgment in favor of voters, and city and intervening property owner appealed.

The District Court of Appeal held that:

- Voters' right to referendum was effectively tied to amendment that permitted local governments to retain and implement certain charter provisions, and provided for an initiative or referendum process in regard to development orders, and
- Legislature did not intend to radically expand the referendum process, but rather intended to bar referendum for development orders unless exempted by specific charter provisions in place as of June 1, 2011.

IMMUNITY - INDIANA

Veolia Water Indianapolis, LLC v. National Trust Ins. Co.

Supreme Court of Indiana - February 6, 2014 - N.E.3d - 2014 WL 486181

Insurers of restaurant brought action against city, city's waterworks department, and for-profit water company that city contracted with after frozen fire hydrants caused delay in fighting fire at restaurant. The Superior Court denied city's motion to dismiss and company's motion for judgment on the pleadings. City and company appealed. The Court of Appeals reversed.

On petition to transfer, the Supreme Court of Indiana held that:

- City's decision to hire water company to provide water for fire protection services did not constitute a discretionary function for which city would be entitled to statutory immunity; but
- City was entitled to common law sovereign immunity on insurers' claim that city failed to provide an adequate supply of water from which to fight fire, and
- For-profit, private company was not entitled to common law sovereign immunity on insurers' claims that company failed to provide an adequate supply of water from which to fight fire.

City's decision to hire water company to provide water for fire protection services did not constitute a discretionary function for which city would be entitled to statutory immunity under the Tort Claims Act for damages that resulted from a fire that destroyed a restaurant when firefighters' efforts were delayed due to frozen fire hydrants. City made no deliberate policy decision to fail to require company to follow the terms of a management agreement by properly maintaining fire hydrants' water supply, or make a conscious decision about policy formation which involved assessment of competing priorities and a weighing of budgetary considerations or the allocation of scarce resources.

The provision of adequate fire protection constituted an essential service, and thus, city's failure to provide adequate fire protection constituted an exception to governmental tort liability under

Campbell v. State, and city was entitled to common law sovereign immunity on insurers' claim that city failed to provide an adequate supply of water from which to fight fire.

For-profit, private company that contracted with city to provide a governmental service was not entitled to common law sovereign immunity on insurers' claims that company failed to provide an adequate supply of water from which to fight fire; as an autonomous entity, company had the independent authority to make internal decisions, such as insuring itself against negligence.

BENEFITS - INDIANA

Fishburn v. Indiana Public Retirement System

Court of Appeals of Indiana - February 4, 2014 - N.E.3d - 2014 WL 421329

City police officer who was injured in the line of duty, so as to entitle him to receive a monthly base disability benefit under 1977 Police Officers' and Firefighters' Pension and Disability Fund, sought review of a final order of the Indiana Public Retirement System (INPRS) affirming the order of the administrative law judge (ALJ), which determined police officer was entitled to "additional" monthly benefit amount of 34.85% of the monthly salary of a first class patrol officer, as calculated pursuant to INPRS's formula, as opposed to 45% of the monthly salary of a first class patrol officer, as calculated pursuant to officer's proposed formula. The Superior Court affirmed. Police officer appealed.

The Court of Appeals held that:

- INPRS's interpretation of statute governing additional monthly disability benefit amount to which police officer was entitled was reasonable interpretation of ambiguous statute, entitled to judicial deference, and
- Doctrine of legislative acquiescence supported INPRS's interpretation of statute governing additional monthly disability benefit amount to which police officer was entitled.

Pursuant to statute granting INPRS the power to establish rules for the administration and regulation of the Public Employees' Retirement Fund and INPRS's affairs, and to effectuate the powers and purposes of the agency, without undertaking a formal rulemaking action under the Administrative Rules and Procedures Act, Board had authority to establish a uniform manner or method of calculating the "additional monthly benefit" amount of disability benefits to which certain members of 1977 Police Officers' and Firefighters' Pension and Disability Fund were statutorily entitled without engaging in formal rulemaking.

INPRS' interpretation of statute providing that a member of the 1977 Police Officers' and Firefighters' Pension and Disability Fund who receives a monthly base disability benefit is also entitled to receive an "additional monthly amount" of between 10% and 45% of the monthly salary of a first class patrol officer, to be determined by the INPRS medical authority based on the fund member's degree of impairment, and INPRS's decision to use formula based upon mathematical method of linear interpolation to calculate fund members' additional monthly benefit amounts, was reasonable interpretation of an ambiguous statute. Thus, Court of Appeals would defer to INPRS's interpretation. INPRS was administrative agency charged with implementing statute, and formula-driven approach used by INPRS ensured that fund members who received disability base benefits received additional benefits proportionate with their respective degrees of impairment.

LIABILITY - LOUISIANA

Soileau v. Smith True Value and Rental

Court of Appeal of Louisiana, Third Circuit - January 30, 2014 - So.3d - 2011-1594 (La.App. 3 Cir. 1/30/14)

City worker brought action against city, tractor lessor, and lessor's insurer, seeking to recover for injuries sustained when front-end loader detached from tractor and crushed worker's legs at worksite for city project.

The District Court denied insurer's exception of no right of action and entered judgment on jury verdict in favor of worker. Insurer and worker appealed. The Court of Appeal reversed. Worker filed application for a writ of certiorari, which was granted. The Supreme Court of Louisiana reversed and remanded.

On remand, the Court of Appeal held that:

- Jury award of $7.5 million in general damages to injured worker was not excessive and did not constitute an abuse of discretion;
- Evidence was sufficient to support jury award of $750,000 in future medical damages to injured worker;
- Jury award of $7.5 million in general damages to injured worker was not impermissibly tainted by an improper appeal to jury's prejudice against insurance companies; and
- Jury did not manifestly err in allocating fault for accident in amount of 15% to tractor lessor, 15% to city, and 70% of fault to manufacturer of front-end loader and tractor, with which worker had entered into settlement agreement.

Despite conflicting testimony about cause of accident, mechanical engineer qualified as an expert in area of heavy equipment testified that manufacturer bore majority of fault for accident based on design defect in front-end loader. and that product recalls which did not fully address defect. Tractor lessor bore some fault for accident based on improper repair work to tractor and front-end loader. City worker testified that city employees did not lower the bucket of the front-end loader before attempting to remove tractor from worksite, and that lowering bucket would have been a "good idea" that would have reduced risk that front-loader would have detached and fallen off the tractor.

PENSIONS - MICHIGAN

Welch v. Brown

United States Court of Appeals, Sixth Circuit - January 3, 2014 - Fed.Appx. - 198 L.R.R.M. (BNA) 2071

Retired municipal workers brought §1983 action against city emergency manager and others, alleging that alteration of their lifetime health insurance benefits violated Contract Clause, Bankruptcy Clause, and Due Process Clause. Workers moved for preliminary injunction barring defendants from modifying contracts or ordinances governing workers' health-care benefits. The District Court granted motion and denied motion to stay injunction pending appeal. Defendants appealed.

The Court of Appeals held that:

- Emergency manager's orders were exercise of legislative power;
- District court did not abuse its discretion in finding that defendants violated Contract Clause because modifications impaired provisions of their contracts and collective bargaining agreements (CBAs) had a likelihood of success on the merits;
- District court's finding that workers would suffer irreparable harm in absence of preliminary injunction was not clearly incorrect; and
- District court did not abuse its discretion by issuing preliminary injunction, even though factors of harm to others and public interest were split.

City emergency manager's orders which modified existing contracts and CBAs with respect to health care benefits of municipal retirees were exercise of legislative powers. Local Government and School District Fiscal Accountability Act, which appointed emergency manager, gave him the ability to adopt or amend ordinances and exercise any power relating to the operation of the local government and provided the emergency manager with expansive authority to act in place of local officials, specifically the mayor and city council.

District court did not abuse its discretion in finding that retired municipal workers' argument in their § 1983 action that city emergency manager and others violated Contract Clause because modifications to their lifetime health insurance benefits impaired provisions of their contracts and CBAs had a likelihood of success on the merits, as required to support preliminary injunction barring enforcement of alterations. There was a substantial impairment, as modifications would impose severe strain on workers by requiring them to pay significant amounts for Medicare and health-care premiums, and while taking action to remedy fiscal emergency was legitimate public purpose, workers provided evidence that emergency manager's proposed reduction in contractual benefits was not "reasonably necessary and appropriate" to meet stated public purposes of avoiding bankruptcy and balancing city budget.

District court's finding that retired municipal workers would suffer irreparable harm in absence of preliminary injunction barring modification of contracts and CBAs governing their health-care benefits was not clearly incorrect as record showed their access to medical care might be compromised. Workers submitted three affidavits describing how modifications would affect their finances and ability to access specific medical treatments.

District court did not abuse its discretion by issuing preliminary injunction barring modification of contracts and CBAs governing retired municipal workers' health-care benefits, even though factors of whether granting preliminary injunctive relief would cause substantial harm to others and whether injunction was in the public interest were split in favor of workers and city. District court determined that public interest weighed in favor of ensuring continuing health care to members of the public, but city claimed that without cuts in those benefits they would have to make other budget cuts that would negatively affect city's public safety.

TAX - MINNESOTA

Hennepin County v. Federal Nat. Mortg. Ass'n

United States Court of Appeals, Eighth Circuit - February 5, 2014 - F.3d - 2014 WL 443983

Minnesota county, on behalf of itself and all similarly-situated Minnesota counties, brought putative class action for declaratory and injunctive relief and unjust enrichment against Federal National Mortgage Association (Fannie Mae), Federal Home Loan Mortgage Corporation (Freddie Mac), and Federal Housing Finance Agency (FHFA) as conservator for Fannie Mae and Freddie Mac, alleging

that defendants violated state law by failing to pay deed transfer taxes when conveying real property in the state. The United States District Court for the District of Minnesota granted defendants' motion to dismiss for failure to state a claim. County appealed.

The Court of Appeals held that:

- Defendants were exempted, under their federal agency charters, from paying Minnesota's deed transfer tax when conveying real property in Minnesota, and
- Despite the privatization of Fannie Mae and Freddie Mac, they were governmental instrumentalities which Congress had the authority to protect by exempting them from state taxation.

CODE ENFORCEMENT - MISSISSIPPI

Baymeadows, LLC v. City of Ridgeland

Supreme Court of Mississippi - February 6, 2014 - So.3d - 2014 WL 465698

Property owner appealed decision of city's board of aldermen that denied property owner's proposed repair plans to correct code violations regarding its apartment complex. The Circuit Court affirmed. Property owner appealed.

The Supreme Court of Mississippi held that:

- City could not use criminal pretrial diversion agreement (PDA) as basis to deny property owner's right to make repairs to its property;
- That property owner failed to submit camera inspection and repair plan for sewer lines was not basis on which board could deny approval of repair plans; and
- Board's failure to provide any explanation in its minutes as to what made safety plan, erosion-control plan, and interior remodeling plan inadequate warranted remand.

City could not use criminal PDA, which was entered into with property owner in prosecution arising from failure to correct property and maintenance code violations, as basis to deny property owner's right to make repairs to its property. Compliance with PDA and property owner's ability to submit repair plans for approval under city ordinances were two distinct issues.

STANDING - MISSOURI

Lebeau v. Commissioners of Franklin County, Missouri

Supreme Court of Missouri, En Banc - February 4, 2014 - S.W.3d - 2014 WL 440227

Residents and taxpayers brought declaratory judgment action against commissioners of county after commissioner entered a county order establishing a municipal court, alleging that bill establishing court violated original purpose provision and single subject provision of state constitution. The Circuit Court dismissed action due to lack of standing. Resident and taxpayers appealed.

The Supreme Court of Missouri held that:

- Taxpayers had standing to bring declaratory judgment action, and
- Declaratory judgment action was ripe for review.

Resident taxpayers had standing to bring declaratory judgment action challenging county commissioners' establishment of a municipal court as violative of the original purpose provision and single subject provision of the state constitution, where plaintiffs were taxpayers and citizens of the county. Petition also alleged that the legislature violated the state constitution's original purpose provision and single subject provision in enacting the bill establishing the court. Plaintiffs alleged that, as originally introduced, bill related only to proceedings in juvenile and family divisions. Plaintiffs also alleged that, at some point prior to its passage, the legislature amended bill to include a section authorizing the creation of a county municipal court in counties within a certain population range and that the addition of this section violated the original purpose and single subject provisions. Plaintiffs alleged that the county commissioners established a municipal court by commission order pursuant to bill, and the creation and operation of a municipal court would have required the expenditure of funds generated through taxation.

FINANCINGS - NEW JERSEY

Juster Acquisition Co., LLC v. North Hudson Sewerage Authority

United States District Court, D. New Jersey - January 23, 2014 - Slip Copy - 2014 WL 268652

Juster Acquisition Co., LLC entered into an agreement with the North Hudson Sewerage Authority to restructure and refinance the Authority's 2003 leveraged lease debt. The agreement contained an 18-month exclusivity period.

In 2012 – six months into Juster's eighteen-month exclusivity period – the Authority closed on a COPs transaction with NW Financial, restructuring and refinancing the same debt at issue in the exclusivity provision. Juster had previously proposed, among other options, a COPs transaction, which the Authority rejected.

Juster sued, asserting four causes of action: (1) breach of contract, (2) breach of the implied covenant of good faith and fair dealing, (3) restitution and unjust enrichment, and (4) quantum meruit.

The Authority responded that: a) the Exclusivity Provision did not apply to the COPs transaction that it ultimately entered into with NW Financial, due to the fact that the initial RFQ referred to an "equity investment," while the COPs transaction did not feature an equity investor, and b) the agreement at issue (containing the Exclusivity Provision) is, in any event, unenforceable because, inter alia, it violated public policy.

The District Court rejected the Authority's argument that the COPs transaction was somehow outside the scope of its agreement with Juster, finding no provision in the Term Sheet, or, in particular, in the binding Exclusivity Provision contained therein, limiting the restructuring and refinancing of the Authority's debt under the 2003 Leveraged Lease to a private equity deal.

The Court also found that enforcement of the Exclusivity Provision would not violate public policy because: (1) the Authority voluntarily agreed to be legally bound to the discrete terms of the Exclusivity Provision; (2) said provision did not require the Authority to accept any particular proposal, deal or rate increase by Juster; it merely required the Authority to work exclusively with Juster in refinancing and restructuring its already existing debt for a period of eighteen months; (3) after the expiration of the agreed-upon eighteen month exclusivity period, the Authority was free to refinance its 2003 leveraged lease debt in any manner (and with any entity) that it deemed fit; (4)

there is no indication that enforcement of said provision would have the direct effect of violating any existing law; and (5) enforcement of said provision encouraged the performance of the contract between the parties, promoted efficiency in the sense that it sought to refinance the Authority's already existing debt, and was consistent with fair and honorable dealing between two sophisticated parties and their respective financial and legal advisors. Thus, the court declined to hold the Exclusivity Provision void as against public policy.

The matter was set for trial solely as to: (1) the issue of damages as to the breach of contract claim, and (2) breach of the implied covenant of good faith and fair dealing in its entirety.

SECURITIES - NEW YORK

Swatch Group Management Services Ltd. v. Bloomberg L.P.

United States Court of Appeals, Second Circuit - January 27, 2014 - F.3d - 2014 WL 274407

Watch manufacturer that hosted international conference call with group of securities analysts brought action against news service, alleging that news service infringed copyright in audio recording of earnings call by recording it without authorization, and making transcript of call available to its paid subscribers. States District Court for the Southern District of New York granted summary judgment to defendant. Parties appealed.

The Court of Appeals held that:

- Lack of additional commentary or analysis did not preclude finding that "purpose and character" of use of original work favored fair use;
- Nature of copyrighted work favored finding of fair use;
- Manifestly factual character of manufacturer's earnings call favored finding of fair use;
- Statutory fair use factor regarding "amount and substantiality of the portion used in relation to the copyrighted work as a whole" did not favor manufacturer;
- Statutory fair use factor that considered "effect of the use upon the potential market for or value of the copyrighted work" favored finding of fair use;
- Use of earnings call was in accordance with fair use defense;
- Service was not entitled to cross-appeal issue of whether manufacturer's recording was validly copyrightable; and
- Prior notice of cross-appeal reasonably could not be read to contemplate review of district court's subsequent order dismissing copyright invalidity counterclaims of news service as moot.

IMMUNITY - NORTH CAROLINA

Hinson v. City of Greensboro

Court of Appeals of North Carolina - February 4, 2014 - S.E.2d - 2014 WL 424216

African-American police officer brought action against city, chief of police, and deputy chief of police alleging that defendants had subjected him to discrimination on the basis of race, conspired to discriminate on the basis of race, and conspired to injure him in his reputation and profession. The Superior Court denied defendants' motion to dismiss except as to claim for punitive damages against city. Defendants appealed.

The Court of Appeals held that city did not waive its governmental immunity through its purchase of

a $5 million excess liability policy.

City did not waive its governmental immunity, which immunity was shared with chief of police and deputy chief of police, as to police officer's State claims of discrimination on the basis of race, conspiracy to discriminate on the basis of race, and conspiracy to injure officer in his reputation and profession through its purchase of a $5 million excess liability policy. Under the terms of the policy, the city was responsible for paying $3,000,000 before there was any potential coverage under the policy, and the language of the insurance policy stated that the policy was not intended by the city to waive its governmental immunity.

IMMUNITY - OKLAHOMA

Lenz v. Town of Carney, Okla.

United States District Court, W.D. Oklahoma - February 3, 2014 - Slip Copy - 2014 WL 359210

Town Police Chief resigned and returned all Town property to the Police Department. Police officers then fraudulently obtained a search warrant to search the Chief's home for the purpose of recovering Town property they knew had been returned.

The Chief sued, alleging a variety of Fourth Amendment and state tort law claims. The officers argued that they were entitled to qualified immunity from Plaintiff's § 1983 claim. The District Court found that the Chief had stated a claim that was plausible on its face and thus those claims would survive the officers' motion to dismiss.

The Chief also alleged that the Town was liable because it failed to properly supervise, train, and discipline the officers and those failures led to the constitutional violation. The Chief also alleged that the actions of officers in securing the search warrant were part of a policy or custom. The Court found that the Chief had failed to establish either of these claims and dismissed his §1983 claims against the Town.

EASEMENTS - OREGON

Howe v. Greenleaf

Court of Appeals of Oregon - January 29, 2014 - P.3d - 2014 WL 324562

Landowner brought quiet title action against adjoining landowener, seeking title to the centerline of a vacated roadway that lay between landowner and adjoining owner's platted subdivision. The Circuit Court found for adjoining landowner in a bench trial. Landowner appealed.

The Court of Appeals held that:

- Each landowner was entitled to an extension of their property boundaries to the centerline of vacated road;
- Recital of ownership of land under easement was not material to a mutual easement agreement; and
- Adjoining landowner's statements did not constitute a probable or threatened irreparable harm.

The statutory presumption that the rights of the grantor to the middle of the road, or the thread of

the stream when used as the boundary, are included in the conveyance is a strong one that is rebutted only by an express provision in the conveyance excluding the abutting road, or by the grantor's clear intention to exclude the abutting road from the conveyance as discerned from the circumstances of the transaction.

A generally recognized exception to the common-law presumption that a vacated road reverts to the abutting landowners is where the dedicated road runs between two tracts of land under different ownership and the road was wholly dedicated from only one of the owners' tracts, then the entire width of the road transfers with the abutting property from which it was wholly dedicated.

ZONING - SOUTH CAROLINA

Kinard v. Richardson

Court of Appeals of South Carolina - January 29, 2014 - S.E.2d - 2014 WL 309476

Property owner brought action against neighbors seeking to enforce restrictive covenant to prevent leasing of neighbors' property to a third party for the purpose of horse grazing. The Circuit Court found in favor of neighbors. Owner appealed.

The Court of Appeals held that:

- Neighbors' lot was subject to the covenants;
- Owner of property that was subject to restrictive covenants preventing commercial activity had standing to bring action against neighbors;
- Amendment to restrictions on property was not lawfully executed; and
- Neighbors violated restrictive covenant when they leased tract of open land adjacent to their residence to the operators of equestrian center for the purpose of using tract as a horse pasture.

TAX - SOUTH CAROLINA

City of Myrtle Beach v. Tourism Expenditure Review Committee

Supreme Court of South Carolina - February 5, 2014 - S.E.2d - 2014 WL 464070

City appealed a determination of the Tourism Expenditure Review Committee (TERC) certifying City's grant of local accommodation tax (A-tax) funds to outside agencies as noncompliant with the Accommodations Tax Act (Act). The Administrative Law Court reversed TERC's noncompliance certification. TERC appealed.

The Supreme Court of South Carolina held that City's award of local A-tax funds, which were part of 65 percent of remaining A-tax funds allocated to a separate fund pursuant to the Accommodations Tax Act to be used for special purpose of promoting and accommodating tourism, to outside agencies as tourism-related expenditures, violated the Act.

City characterized the funds it awarded to the outside agencies as "general funds," but city's internal documents unmistakably revealed that it decided to sweep A-tax funds to its general fund to cover tourism-related public services, and Act did not permit this, but required oversight of A-tax funds by TERC.

INVERSE CONDEMNATION - TEXAS

City of San Antonio v. Kopplow Development, Inc.

Court of Appeals of Texas, San Antonio - February 5, 2014 - S.W.3d - 2014 WL 462294

Landowner brought inverse condemnation action against city alleging that city's storm water detention facility, which was built adjacent to landowner's property and across a portion of owner's easement, would subject owner's land to flooding in the event of a 100-year-flood. City filed counterclaim for statutory condemnation. Following jury trial, the District Court entered judgment in favor of landowner for $694,600, representing value of part taken and remainder damages. Both parties appealed.

The Court of Appeals affirmed in part on statutory takings claim, but reversed award of remainder damages. Petition for review was granted. The Supreme Court of Texas reversed and remanded, holding that landowner could recover remainder damages.

On remand, the Court of Appeals held that:

- Trial court erred in excluding evidence of landowner's claimed damages for the violation of his vested rights, and
- Trial court's erroneous exclusion of evidence regarding violation of landowner's vested rights required reversal and remand for new trial on issue of remainder damages, as evidence landowner sought to admit on issue of vested rights could have entitled him to greater award of remainder damages.

Landowner preserved for appellate review, in inverse condemnation action against city, its argument that city's construction of flood water detention facility adjacent to owner's property and across portion of owner's easement, and city's decision to raise minimum flood plain elevation requirements, violated landowner's vested rights. Although trial court issued an interlocutory order resolving vested rights issue in favor of city, such order was subsumed into the trial court's final judgment, such that landowner was not entitled to take an interlocutory appeal from the order addressing issue of vested rights, and landowner objected to the exclusion of vested rights evidence and made an offer of proof as to damages before the trial court, which was sufficient to preserve error.

Statutory exemption providing that floodplain regulations established by a federal flood control program apply retroactively, even against vested rights holders under the Local Government Code, did not bar recognition of landowner's vested rights, as affected by city's decision to amend city ordinance to raise minimum flood plain elevation requirements, and thus, trial court erred in excluding evidence of landowner's claimed damages for the violation of his vested rights at trial. New ordinance raising minimum floodplain elevation requirements was not established by a "federal flood control program," but rather was established by city, and city's floodplain regulations were more stringent than those adopted by Federal Emergency Management Agency (FEMA).

Where landowner claimed damages to his vested rights arising out of city's construction of flood water detention facility across a portion of landowner's easement and decision to raise minimum flood plain elevation requirements, which thereby caused landowner to incur additional costs to fill property by two feet to meet new floodplain elevation requirements, trial court's erroneous exclusion of evidence regarding landowner's claimed damages for city's violation of his vested rights was harmful, thus requiring reversal of jury's award of remainder damages to landowner in inverse condemnation action against city and remand for new trial on issue of remainder damages.

Although jury awarded landowner portion of requested remainder damages, landowner provided expert testimony of engineer and appraiser regarding cost to fill property by two feet to meet city's amended floodplain elevation requirements, which was relevant to issue of remainder damages and which could have entitled landowner to greater damages award.

CONDEMNATION - UTAH

Utah Dept. of Transp. v. Walker Development Partnership

Court of Appeals of Utah - February 6, 2014 - P.3d - 2014 UT App 30

In 1992, the Utah Department of Transportation (UDOT) condemned property belonging to Walker Development Partnership. After nearly twenty years of litigation between UDOT and Walker, UDOT moved to exclude evidence that it took property not identified in the 1992 Condemnation Resolution. The district court granted UDOT's motion to exclude and Walker appealed.

UDOT argued that the taking of property not described in the Condemnation Resolution or the pleadings was simply not relevant to the issues before the Court. UDOT contended that if it took additional property, that taking constituted "a separate and unrelated wrongful act." Thus, while Walker's claim that UDOT took more property than it condemned might be the substance of a trespass or inverse condemnation claim, Walker failed to bring those claims in its answer and the statute of limitations on an inverse condemnation claim had run.

The court of appeals agreed with UDOT, affirming the district court's grant of UDOT's motion to exclude.

ZONING - WASHINGTON

Ellensburg Cement Products, Inc. v. Kittitas County

Supreme Court of Washington, En Banc - February 6, 2014 - P.3d - 2014 WL 465643

Cement producer sought review of county's determination of nonsignificance (DNS) under State Environmental Policy Act (SEPA) and grant of conditional use permit (CUP) to landowner to conduct rock crushing and other gravel and cement production related activities on his agricultural-zoned property. The Superior Court affirmed. Producer appealed. The Court of Appeals reversed. Landowner and county petitioned for review.

The Supreme Court of Washington held that:

- County's SEPA appeal procedure violated state law;
- No deference was due to county's interpretation of agricultural-use zoning ordinance; and
- Rock crushing was not permitted use on agricultural-zoned property.

County's SEPA appeal procedure that considered SEPA appeal in closed record hearing prior to conducting open record hearing on underlying grant of CUP to landowner violated state law. Statutory scheme governing SEPA appeals required county to provide single simultaneous open record hearing on both SEPA determination and underlying grant of CUP, followed by optional single closed record appeal.

County's failure to follow record-creating procedure mandated by state law for appeals of SEPA

determinations was not harmless. During deliberations, board member stated, “I’m just trying to take in all this stuff[,] [m]akes it tough when you can’t ask questions,” to which another board member replied, “[w]ell, we need to move this along,” and immediately thereafter, board voted to deny SEPA appeal.

No deference was due to county’s interpretation of agricultural-use zoning ordinance that allowed for rock crushing on agricultural-zoned property, since county’s decision was based on erroneous interpretation of law. Interpretation was by-product of litigation regarding landowner’s application for CUP to conduct rock crushing on his property and there was no preexisting policy supporting county’s interpretation.

Rock crushing was not permitted use on agriculturally-zoned land, since use was not listed as conditional use under agricultural zoning ordinances, as it was elsewhere in zoning code, and use category “processing of products produced on premises” appeared only in agricultural zones, which strongly suggested that “products produced” referred only to agricultural products.

EXEMPT ORGANIZATIONS - WASHINGTON

Ockletree v. Franciscan Health System

Supreme Court of Washington, En Banc - February 6, 2014 - P.3d - 2014 WL 465423

Former employee of nonprofit religious organization brought action against it for illegal discrimination on the basis of race and disability. The District Court certified questions.

The certified questions in this case required the court to decide whether, the exemption of nonprofit religious organizations from the definition of “employer” under Washington’s Law Against Discrimination (WLAD) violated the Washington Constitution.

Larry Ockietree brought suit in state court against Franciscan Health System (FHS), challenging the termination of his employment following a stroke. Ockletree, who is African–American, claimed that his termination was the result of illegal discrimination on the basis of race and disability. FHS removed the suit to federal court and moved to dismiss Ockletree’s claims. FHS argued that it was exempt from WLAD as a nonprofit religious organization. Ockletree challenged the validity of the religious employer exemption under the state and federal constitutions.

The Supreme Court of Washington held that:

- Definition of “employer” in Law Against Discrimination (LAD) did not grant a privilege or immunity to religious nonprofits at the expense of other organizations that were subject to LAD;
- Legislature had a reasonable ground for distinction between religious nonprofits and other nonprofits; and
- Definition did not violate Establishment Clause of state constitution.

ZONING - ALABAMA

City of Alabaster v. Shelby Land Partners, LLC

Supreme Court of Alabama - January 24, 2014 - So.3d - 2014 WL 272334

Property owners brought action seeking relief from city’s denial of request to rezone property to

allow for development of apartment complex. The Circuit Court granted owners summary judgment. City appealed.

The Supreme Court of Alabama held that:

- Zoning ordinance, which placed property within a community business district that permitted only commercial uses, was reasonable and substantially related to the general welfare of the community, and
- City's decision to deny the property owner's application to rezone a portion of the city's largest commercial area for multifamily residential use was not arbitrary or capricious.

Zoning ordinance, which was adopted as part of redevelopment plan and placed property within a community business district that permitted only commercial uses, was reasonable and substantially related to the general welfare of the community. Plan approved by city provided that a purpose of the redevelopment project was to increase employment opportunities, promote a diversified economy and expand the city's tax base, and as such, it was determined that the entire project area was best suited for general business district development.

ENVIRONMENTAL - CALIFORNIA

Protect Agricultural Land v. Stanislaus County Local Agency Formation Commission

Court of Appeal, Fifth District, California - January 28, 2014 - Cal.Rptr.3d - 2014 WL 308137

Objector filed petition for writ of mandate challenging county local agency formation commission's (LAFCO) compliance with California Environmental Quality Act (CEQA) and Reorganization Act in approving city's application for modifications to city's sphere of influence and annexation of 960 acres. The Superior Court, Stanislaus County, granted judgment on pleadings for LAFCO and city without leave to amend. Objectors appealed.

The Court of Appeal held that:

- Evidence supported finding that no good cause existed for objector's failure to comply with summons and publication requirements, and
- Summons and publication requirements applied to objector's CEQA claim.

A LAFCO annexation determination is quasi-legislative and, before the annexation is completed, i.e., final, may be challenged by a petition for a writ of ordinary mandamus.

Once a county LAFCO annexation determination is completed, its validity may be challenged only by an in rem proceeding under the validating statutes or by a quo warranto proceeding filed by the Attorney General.

Trial court's finding that no "good cause" existed for objector's failure to comply with the summons and publication requirements applicable to a reverse validation action in filing a petition for writ of mandate challenging was supported by substantial evidence, including evidence that the information that challenges to certain LAFCO decisions must be pursued as reverse validation actions appeared in the guide to the Reorganization Act produced by the California LAFCO and in many treatises about California land use litigation.

ZONING - CALIFORNIA

Hagopian v. State

Court of Appeal, Second District, Division 1, California - January 24, 2014 - Cal.Rptr.3d - 2014 WL 265517

Developers of coastal property who had commenced construction without first obtaining a coastal development permit brought action against Coastal Commission for declaratory, injunctive, and writ relief challenging Commission's issuance of cease and desist and restoration orders. The Superior Court denied developers' claims. Developers appealed.

On appeal, developers argued that: (1) the County of Los Angeles is the proper permitting body for the coastal zone in which their property is located; (2) the county should be ordered to assume this permitting authority; (3) the Commission should be ordered to compel the county to fulfill this obligation; (4) the Commission violated petitioners' due process rights and denied them a fair hearing; and (5) the Commission's findings were unsupported by substantial evidence.

The Court of Appeal held that:

- Coastal Commission was not required to transfer permitting authority before county apprised Commission of permitting procedures;
- Coastal Commission hearing was not improperly biased against developers;
- Commission was not required to adopt regulations that would ensure county would actually adopt and certify local coastal programs; and
- County's choice whether to seek interim permitting authority under Coastal Act was discretionary.

Under the Coastal Act provision stating that the authority for issuance of coastal development permits shall be delegated to local governments, the Coastal Commission's duty to cede permitting authority to local governments is conditioned on the local government first establishing permitting procedures, adopting ordinances prescribing them, and informing the Commission.

The Coastal Act provision stating that the authority for issuance of coastal development permits shall be delegated to local governments did not require the Coastal Commission to transfer permitting authority over a geographic unit to a county, where the county had neither apprised the Commission of any permitting procedures it intended to implement for that geographic unit nor adopted an ordinance prescribing them.

ZONING - CALIFORNIA

Tejon Real Estate, LLC v. City of Los Angeles

Court of Appeal, Second District, Division 4, California - January 22, 2014 - Cal.Rptr.3d - 2014 WL 232598

Owner of vacant lot engaged in discussions with city representatives concerning the conditions under which it could obtain an extension of water service to its lot, and whether installation of a fire hydrant would be required prior to building a residence. Having obtained informal opinions from city and fire department representatives concerning the cost of the water extension and the necessity of the hydrant, appellant initiated an action for declaratory relief, seeking interpretation of the Department of Water and Power Rules Governing Water and Electric Service (DWP Rules) and the Fire Code.

The Superior Court sustained city's demurrer without leave to amend, and lot owner appealed.

The Court of Appeal held that:

- Any administrative decisions based on regulations could not be challenged by declaratory judgment, and
- Lot owner was required to exhaust administrative remedies and obtain a final administrative decision from city before bringing action.

While owner was provided preliminary opinions and cost estimates from city personnel, owner never applied for any building permit, did not receive a final determination from the City, and could not say with certainty what charges would be imposed or conditions enforced once the City rendered a final decision based on specific plans for construction.

ELECTIONS - COLORADO

Jones v. Samora

Supreme Court of Colorado - January 27, 2014 - P.3d - 2014 CO 4

Recalled town trustee and citizens group brought election contest, asserting that numbered stubs were left on absentee ballots during initial stages of counting and thus violated voters' right to cast secret ballots. Following a bench trial, the District Court entered judgment setting aside results of recall election. Election judge, town, and newly elected mayor and trustees petitioned for review.

The Supreme Court of Colorado held that election judges' failure to remove numbered stubs from absentee ballots prior to counting ballots did not violate state constitution's section governing secrecy of ballots and prohibiting marked ballots. Ballot was secret when both in-person and absentee voters voted, and there was no indication that secrecy or integrity of entire election was put in jeopardy by election judges' error.

VOTER INITIATIVE - FLORIDA

In re Advisory Opinion to Attorney General re Use of Marijuana for Certain Medical Conditions

Supreme Court of Florida - January 27, 2014 - So.3d - 2014 WL 289984

Attorney general filed petition for advisory opinion as to validity of proposed citizen medical marijuana initiative amendment to Florida Constitution and corresponding financial impact statement.

The Justices of the Supreme Court held that:

- Proposed amendment satisfied single-subject requirement of state constitution;
- Title and summary of proposed amendment complied with statutory requirement that they fairly inform voters of chief purpose of amendment and not mislead voters; and
- Financial impact statement satisfied statutory requirements.

For purposes of single-subject analysis of a proposed citizen initiative amendment to the state constitution, "logrolling" is a practice wherein several separate issues are rolled into a single

initiative in order to aggregate votes or secure approval of an otherwise unpopular issue.

Proposed amendment to state constitution legalizing medical use of marijuana did not violate "log-rolling" aspect of constitutional single-subject requirement for citizen initiative petitions by providing for specific role of Department of Health in overseeing and licensing medical use of marijuana, as such provision was directly connected with question of whether state residents wanted provision in state constitution authorizing medical use of marijuana, as determined by licensed Florida physician, under Florida law.

Proposed constitutional amendment based on citizen initiative petition legalizing medical use of marijuana did not substantially alter or perform functions of multiple aspects of government, in violation of single-subject requirement of state constitution; amendment calling for Department of Health or its successor agency to register and oversee providers, issue identification cards, and determine treatment amounts to ensure safe use of medical marijuana by qualifying patients did not substantially affect or alter Department's functions, and amendment did not empower Department to make primary policy decisions in usurpation of legislative power.

Title and summary of proposed constitutional amendment based on citizen initiative petition legalizing medical use of marijuana complied with statutory requirement that they fairly inform voters of chief purpose of amendment and not mislead voters. Neither title, "Use of Marijuana for Certain Medical Conditions[,]" nor summary hid true scope of proposed amendment, title and summary were not affirmatively misleading for omitting issue of physician criminal or civil liability, and title and summary were not required to inform voters as to current state of federal law with respect to possession and use of marijuana.

EMINENT DOMAIN - GEORGIA

Darling Intern., Inc. v. Carter

Supreme Court of Georgia - January 27, 2014 - S.E.2d - 2014 WL 273897

Heirs of property owner whose property was condemned through eminent domain and subsequently sold to private developer brought ejectment and quiet title action against developer. The trial court entered judgment in favor of heirs along with a decree that title to the property vested in heirs and was superior to developer's claim of title. Developer appealed.

The Supreme Court of Georgia held that:

- Property that was conveyed via a properly executed deed did not constitute a void conveyance that would not pass title to a subsequent bona fide purchaser for value without notice of a defect in the chain of title;
- Subsequent purchaser's failure to inquire into whether or not county complied with requirement that it enter an order in its minutes authorizing disposal of real property did not defeat purchaser's status as a bona fide purchaser without notice;
- A mere misnomer of purchaser's corporate name in the conveyance of title of real property from developer to subsequent purchaser did not prevent passage of title;
- Even if county's failure to comply with requirement that it enter an order authorizing disposal of real property was sufficient to invalidate its quit claim deed or to defeat subsequent purchaser's status as a bona fide purchaser without notice of a defect in the chain of title, it would not have served to invalidate city's conveyance of its one-half interest in the property;
- County was not required to reformulate a new development plan for an alternative use of

condemned property once its original use was abandoned;
- The Urban Redevelopment Law that governed the original taking of property by eminent domain did not apply to county's conveyance of its interest in real property that had been acquired by eminent domain 30-years earlier; and
- County's conveyance of its interest in real property did not constitute a one-to-one transfer of property interests for a private and not a public purpose in violation of the Fifth Amendment.

STATUTE OF LIMITATIONS - ILLINOIS

Gillespie Community Unit School Dist. No. 7, Macoupin County v. Wight & Co.

Supreme Court of Illinois - January 24, 2014 - 2014 IL 115330

School district filed claims including fraudulent misrepresentation by concealment of material fact against architect following subsidence of coal mine beneath school building.

Architect moved for summary judgment in its favor on all counts, arguing that the School District's claims for professional negligence and for breach of implied warranty were barred by the four-year statute of limitations in section 13–214(a) of the Code of Civil Procedure (the Code) (735 ILCS 5/13–214(a) (West 2010)) and that the claim for fraudulent misrepresentation was barred by the five-year statute of limitations in section 13–205 (735 ILCS 5/13–205 (West 2010)) of the Code. The circuit court agreed and granted architect's motion for summary judgment.

The Supreme Court of Illinois held that fraudulent misrepresentation claim was subject to five-year limitations period.

School district's fraudulent misrepresentation claim against an architect, involving the alleged failure to disclose a high risk of subsidence at site of school building due to past mining activity, was subject to a five-year statute of limitations applicable to "all civil actions not otherwise provided for," as opposed to no limitations period at all. Exclusion of fraudulent misrepresentation claims from Illinois' four-year limitations period for construction-based actions did not mean that no limitations period applied.

ANNEXATION - LOUISIANA

Chesapeake Operating, Inc. v. City of Shreveport

Court of Appeal of Louisiana, Second Circuit - January 29, 2014 - So.3d - 48, 608 (La.App. 2 Cir. 1/29/14)

Gas well operator filed four concursus actions, naming city and parish commission as defendants, seeking a determination of whether city or parish was entitled to receive royalties from mineral production from operator's gas wells, which were located on land underlying public roads, for which both city and parish had executed mineral leases in favor of well operator.

Concursus actions were consolidated and assignee of well operator's interest in city's mineral lease was permitted to intervene. City and assignee, whose interests were aligned with city's, filed separate motions for summary judgment, and parish and well operator filed cross-motion for summary judgment. The District Court determined that parish was entitled to receive proceeds of mineral production attributable to disputed properties, and granted summary judgment in favor of parish and well operator. City and assignee appealed.

The Court of Appeal held that, as matter of first impression, city's annexation of public roads owned by parish transferred ownership of such roads to city, and thus, city had authority over mineral rights in the land underlying disputed roads and right to receive proceeds of mineral production therefrom.

EMPLOYMENT - MARYLAND

Roberts v. Montgomery County

Court of Appeals of Maryland - January 28, 2014 - A.3d - 2014 WL 294317

County firefighter sought judicial review of decision of the Workers' Compensation Commission denying request for workers' compensation benefits after he was injured in a car accident on trip from training session back to the fire station. The Circuit Court granted summary judgment in favor of employer. Firefighter appealed. The Court of Special Appeals affirmed. Firefighter petitioned for writ of certiorari, which was granted.

The Court of Appeals held that:

- Injuries sustained in car accident on way from training session to fire station were compensable, and
- Going and coming rule did not preclude recovery of benefits.

Under the "positional-risk test" for determining whether an injury is compensable under the Workers' Compensation Act, the inquiry is whether the injury would have been sustained, "but for" the fact that the conditions and obligations of employment placed the employee where the injury occurred

Injury occurred in a place the employee would not have been "but for" his employment and while engaged in an activity incident to his employment, and therefore county firefighter's injuries sustained in an accident that occurred when he was leaving a physical training session on his motorcycle and on his way to fire station constituted a compensable injury under the Workers' Compensation Act pursuant to the "positional-risk test," where firefighter, at time of the accident, was already on duty, being paid, and traveling between his employer-encouraged physical training session and the firehouse where he worked.

The "going and coming rule" provides that injuries sustained by employees commuting to and from a fixed site of employment are generally not considered to arise out of and in the course of employment and are, therefore, not compensable under the Act.

BONDS - MINNESOTA

Lakes Area Business Ass'n v. City of Forest Lake

Court of Appeals of Minnesota - January 27, 2014 - N.W.2d - 2014 WL 274049

Business association and city residents brought action against city and city development authority alleging that authority's issuing of bonds to finance construction of new city hall and public safety building without a referendum violated state law. The County District Court entered judgment in favor of defendants. The business association and residents appealed.

The Court of Appeals held that:

- Statute governing capital improvement bonds did not apply to authority, and
- Statute governing revenue bonds permitted authority to issue bonds without a referendum.

Statute governing capital improvement bonds used to finance the construction of public facilities applied only to municipalities and their issuance of bonds, and thus any of the provisions of the statute allegedly requiring that a vote take place before the issuance of the bonds did not apply to city development authority's issuance of bonds to finance construction of a new city hall and public safety building. Minnesota Statutes section 475.521.

Statute governing the authority of economic development authorities to issue revenue bonds to finance the construction of projects did not require that a referendum be held before the issuance of such bonds, and thus municipal economic development authority could issue $22.5 million in revenue bonds to finance construction of a new city hall and public safety building without holding a referendum. Minnesota Statutes section 469.103.

EMINENT DOMAIN - MISSISSIPPI

Harrison County Utility Authority v. Helen Peterson Walker

Court of Appeals of Mississippi - January 14, 2014 - So.3d - 2014 WL 114529

County utility authority brought quick-take condemnation action against landowner to acquire easement over property to bring water and waste-water to new wastewater treatment facility. Landowner filed motion to dismiss, asserting county utility authority failed to join her husband and son as necessary parties who had interest in land by virtue of warranty deed. The Special Court of Eminent Domain dismissed condemnation action. County utility authority appealed.

The Court of Appeals held that:

- Appeal was not moot;
- Warranty deed filed in wrong judicial district was void as to county utility authority; and
- Landowner's husband and son, who had interest in property by virtue of misfiled warranty deed, were not necessary parties to condemnation action.

EMINENT DOMAIN - MISSOURI

City of North Kansas City v. K.C. Beaton Holding Co., LLC

Missouri Court of Appeals, Western District - January 14, 2014 - S.W.3d - 2014 WL 114657

Third class, non-charter city brought condemnation action against property owner and operator of fast food restaurant located on property, seeking to acquire the property as part of larger project to redevelop blighted area. Property owner and restaurant operator filed motion to dismiss. The Circuit Court granted motion, on grounds that city lacked statutory authority to condemn the property for the purpose of eliminating blight. Cross-appeals were taken.

The Court of Appeals held that:

- City lacked statutory authority to condemn property upon which fast food restaurant was operated for purpose of eliminating blight, and

- Landowner and restaurant operator were not aggrieved by trial court's order granting their motion to dismiss condemnation action, and thus, were not entitled to file cross-appeal.

Eliminating of blight did not qualify as "public purpose" within meaning of statute governing condemnation of private property by third class cities. Although statute generally conferred upon third class cities power to condemn private property for any necessary public purpose, elimination of blight was only recognized to be a public purpose, through constitutional amendment and case law, subsequent to statute's enactment, and plain language of statute did not confer upon third class cities the authority to condemn private property to eliminate blight, either expressly or by implication.

BALLOT INITIATIVE - MISSOURI

State ex rel. Dienoff v. Galkowski

Missouri Court of Appeals, Eastern District, Division Four - January 27, 2014 - S.W.3d - 2014 WL 280372

County resident petitioned for mandamus and injunctive relief, challenging the language of ballot initiative proposing a tax increase for the benefit of ambulance district. Following a hearing, the Circuit Court and rewrote ballot initiative, which, as modified, was defeated at a municipal election. Ambulance district appealed.

The Court of Appeals held that:

- Public interest exception to mootness doctrine would be invoked to review trial court's authority to rename and rewrite ballot initiative;
- Trial court lacked required statutory authority to do so; and
- Comprehensive Emergency Medical Services Systems Act allowed ambulance district's board of directors discretion in drafting ballot language proposing general tax increases.

Appellate court would invoke public interest exception to mootness doctrine to address underling issue of whether, in absence of statutory guidance, trial court had authority to re-word a ballot question, later defeated at an election, proposing a tax increase for ambulance district. Issue was of general public interest and importance, the controversy was likely to recur, and issue of trial court's authority to rewrite a ballot question approved by ambulance district's board of director's and submitted to county election authority could evade appellate review if appellate court did not exercise its discretion to review the issue in present case.

Trial court lacked the required statutory authority, on county resident's petition for injunctive relief, to rename and rewrite municipal ballot initiative for a tax increase to benefit ambulance district on basis that the title and ballot language were "impermissibly biased."

Exclusion of specific guidance in the Comprehensive Emergency Medical Services Systems Act with respect to ballot questions proposing tax increases, especially in light of legislature's specific instructions with respect to other tax-related ballot questions, was an intentional act by the legislature to allow ambulance district's board of directors discretion in drafting ballot language proposing general tax increases.

MUNICIPAL ORDINANCE - MISSOURI

City of Moline Acres v. Brennan

Missouri Court of Appeals, Eastern District, Division Four - January 28, 2014 - S.W.3d - 2014 WL 295050

Owner of motor vehicle who received ticket for violating city's speed camera traffic ordinance contested violation and moved to dismiss the "prosecution" against him, alleging that ordinance was invalid. The Circuit Court declared city's speed camera traffic ordinance invalid and dismissed city's action against vehicle owner. City appealed.

The Court of Appeals held that city's speed camera traffic ordinance, which imposed strict liability upon motor vehicle owners who allowed their vehicles to be operated at a rate of speed in excess of the posted speed limit for violations captured by a speed camera, conflicted with state statutory scheme imposing liability solely upon drivers of motor vehicles who operate vehicles in excess of the posted speed limit, so as to render city's speed camera traffic ordinance void. City's ordinance permitted what state law prohibited, by allowing prosecution of the owner of a vehicle without regard to whether the owner was operating the vehicle at the time of the speeding infraction.

TAX - NEW JERSEY

Waterside Villas Holdings, LLC v. Monroe Tp.

Superior Court of New Jersey, Appellate Division - January 24, 2014 - A.3d - 2014 WL 258849

Property owner filed a complaint against township, contesting an assessment of property tax. The Tax Court dismissed the complaint for its failure to respond to a municipal request for income and expense information as required by N.J.S.A. 54:4–34, often referred to as "Chapter 91."

Owner appealed.

The Superior Court, Appellate Division, held that:

- Owner could not assert a claim on appeal that it had good cause for failing to respond to a request for income and expense information, and
- Omission of "may" from a copy of the statute governing such requests that was sent to owner by tax assessor did not entitle owner to any equitable relief from the statute's requirements.

Property owner could not assert a claim, on appeal from an assessment of property tax, that it had good cause for failing to respond to a request for income and expense information that was sent by tax assessor, even though owner, which had constructed an apartment complex on the property, argued that the request was not clear and unequivocal. The notice was sent to owner by certified mail, an accompanying letter expressly requested owner's "operational cost" for the "recent twelve months," specifically January 1 through December 31 of a certain year, and such clear and explicit language was not equivocal or confusing in any respect.

Omission of "may" from a copy of the statute governing municipal requests for income and expense information that was sent to property owner by tax assessor did not entitle owner to any equitable relief from the statute's requirements, including a requirement that an owner respond to a such a request within 45 days of the request or be barred from appealing an assessment. Omission of

"may" from a phrase relating to examinations on oath was minor and inadvertent, did not alter the substance of the statute, and did not prejudice owner.

Where a tax assessor, who has a mandatory duty to provide property owners with a copy of the statute governing municipal requests for income and expense information when tendering such a request, provides property owners with a copy of the statute that omits critical and substantive statutory provisions, principles of fair dealing preclude the assessor from seeking relief under the statute if a property owner fails to respond to a request. Where, however, the omission is minor and inadvertent, does not alter the substance of the statute, and does not prejudice the property owner, the municipality is still entitled to a dismissal pursuant to the statute.

BENEFITS - NEW YORK

McKay v. Village of Endicott

Supreme Court, Appellate Division, Third Department, New York - January 23, 2014 - N.Y.S.2d - 2014 N.Y. Slip Op. 00408

Firefighter who injured his back while working brought article 78 proceeding to annul a determination of the village denying his request for supplemental disability benefits. The Supreme Court partially granted firefighter's application. Village appealed.

The Supreme Court, Appellate Division, held that firefighter was entitled to due process before his disability payments were terminated.

TAX - NEW YORK

Board of Educ. of Poughkeepsie City School Dist. v. City of Poughkeepsie

Supreme Court, Appellate Division, Second Department, New York - January 29, 2014 - N.Y.S.2d - 2014 N.Y. Slip Op. 00472

Board of education for city's school district brought action against city, seeking declaration that city was required to pay school taxes on real property it had acquired through tax deeds. The Supreme Court, Dutchess County, upon an order of same court denied board's motion for summary judgment and granted city's cross-motion for summary judgment. Board appealed.

The Supreme Court, Appellate Division, held that:

- City code provisions clearly and unambiguously exempted city from obligation to pay school taxes, and
- Statutory provisions did not supersede those city code provisions.

Provisions of city's administrative code clearly and unambiguously exempted city from any obligation to pay school taxes on real property it had acquired through tax deeds. Although subject property was not held for public use, provisions contained broad language stating that "[a]ll property belonging to the city shall be exempt from taxation for any purpose, except as provided in the charter or this administrative code," and there was no express requirement that such property be held for public use.

Statutory provisions exempting, to some extent, municipal property held for public use from

payment of special ad valorem levies and special assessments, and specifically stating that municipal property acquired by tax deed "shall be deemed to be held by it for a public use" and exempt only from "taxation and special ad valorem levies," but not from "taxes for school purposes and special assessments," did not supersede provisions of city's administrative code that exempted city from any obligation to pay school taxes on real property it had acquired through tax deeds. Statutory provisions were not to be "deemed to repeal or otherwise affect the provisions of any special or local law or ordinance," barring amendment or repeal, and city had neither amended nor repealed its exemption.

MUNICIPAL ORDINANCE - OHIO

Jodka v. Cleveland

Court of Appeals of Ohio, Eighth District, Cuyahoga County - January 23, 2014 - 2014 WL 265797 - 2014 -Ohio- 208

Vehicle owner, who received citation under city ordinance adopting civil enforcement system for red light and speeding offenders, filed complaint against city and company tasked with issuing citations, alleging unjust enrichment and that ordinance violated state constitution. The Court of Common Pleas granted defendants' motions to dismiss and for summary judgment. Plaintiff appealed.

The Court of Appeals held that:

- Ordinance's procedure for contesting citations violated constitutional provision vesting judicial power in courts, and
- Owner did not have standing to present claim of unjust enrichment.

Procedure set forth in municipal ordinance adopting civil enforcement system for contesting automated camera traffic citations violated constitutional provision that vested judicial power in courts as established by law, since municipal courts alone had power to adjudicate civil violations of moving traffic laws. Violation of ordinance did not fall within parking violation exception to statute providing that municipal courts' jurisdiction extended to violation of "any ordinance," and creation of tribunal under ordinance for adjudicating citation contests did not constitute proper exercise of concurrent police power authorized by statute, nor was it otherwise a power of local self-government.

TAX - PENNSYLVANIA

Albright Care Services v. Union County Bd. of Assessment

Commonwealth Court of Pennsylvania - January 29, 2014 - Not Reported in A.3d - 2014 WL 316588

Albright Care Services operates a continuing care retirement community (CCRC) in the County and requested a real estate tax exemption. The Union County Board of Assessment concluded that none of Albright's properties were entitled to tax exemption, but the trial court reversed on appeal. The Board appealed.

The appeals court was asked to consider whether: (1) the trial court properly found that Albright is an Institutions of Purely Public Charity (IPPC); and (2) which, if any, of Albright's tax parcels located in the County is exempt from real estate taxes.

The appeals court affirmed the trial court's ruling to the extent that it found that Albright is an Institution of Purely Public Charity. The matter was for a determination as to the exemption status of individual Albright tax parcels.

ZONING - PENNSYLVANIA

Penn Street, L.P. v. East Lampeter Tp. Zoning Hearing Bd.

Commonwealth Court of Pennsylvania - January 29, 2014 - A.3d - 2014 WL 309448

Property owner sought review of decision of township zoning hearing board, rejecting substantive validity challenges to zoning ordinance and zoning map, as well as accompanying request for site-specific relief. The Court of Common Pleas, affirmed. Property owner appealed.

The Commonwealth Court held that:

- Property owner failed to establish improper reverse spot zoning;
- Ordinance limiting development to only one lot per 25 acres on any tract containing more than 10 acres was a proper use of police power to further agricultural property; and
- Property owner failed to establish denial of a fair hearing.

ZONING - PENNSYLVANIA

Rubino v. Millcreek Tp. Bd. of Sup'rs

Commonwealth Court of Pennsylvania - January 22, 2014 - A.3d - 2014 WL 223559

Landowners sought review of township's denial of their subdivision application to divide existing residential property into two lots. The Court of Common Pleas affirmed. Landowners appealed.

The Commonwealth Court held that in applying township's subdivision and land development ordinance, it was the recorded subdivision plan that created landowners' lot that determined average lot sizes, rather than the larger residential subdivision listed in landowners' deed.

Although developer of residential subdivision numbered each subdivision plan sequentially and titled each a "section," each application proposed a separate subdivision plan that was considered on its own merits in applying the ordinance, and notations in subdivision plan filings about future streets, development or turn-arounds in the subdivision did not collapse the six subdivision plan filings into a single subdivision plan for purposes of determining average lot size.

PUBLIC UTILITIES - TEXAS

City of Dallas v. Public Utility Com'n of Texas

Court of Appeals of Texas, Austin - January 9, 2014 - Not Reported in S.W.3d - 2014 WL 108363

The City of Dallas filed an application to be certified as a retail electric provider. After reviewing the application, the Public Utility Commission denied the request. Essentially, the Commission determined that municipal corporations are not eligible for certification under the Commission's rule. Subsequent to the Commission's ruling, the City sought judicial review. Ultimately, the district

court affirmed the Commission's ruling, and the City appeals that determination. The court of appeal affirmed the district court's order.

The Utilities Code sets out the process for certification and requires the Commission to issue a certificate "to a person" who demonstrates that he has "the financial and technical resources" needed, has the requisite "managerial and technical ability," has "the resources needed," and has "ownership or lease of an office within this state for the purpose of providing customer service, accepting service of process, and making available … books and records sufficient to demonstrate [his] compliance with the requirements" of the Utilities Code. Tex. Util.Code § 39.352(b). Alternatively, a person can be certified by showing that he meets the last requirement and by filing an affidavit from all of the retail customers that he "has contracted to provide one megawatt or more of capacity stating that" he satisfies the remaining three requirements listed above. Id. § 39.352(d). The City elected to seek its certification using the alternative method.

As outlined above, the Utilities Code authorizes the Commission to issue a certificate to a "person." Id. § 39.352. The dispute in this case pertained to whether the City is a "person" as contemplated by the Utilities Code. See Oncor Elec. Delivery Co. LLC v. Public Util. Comm'n, 406 S.W.3d 253, 260 (Tex.App.-Austin 2013, no pet.) (explaining that statutory construction is question reviewed de novo with primary goal of giving effect to legislature's intent, which is generally discerned from statute's plain language). As support for the idea that it qualifies as a person, the City points to the definition of "person" found in another chapter of the Utilities Code. That definition states that the term "person" "includes an individual, a partnership of two or more persons having a joint or common interest, a mutual or cooperative association, and a corporation, but does not include an electric cooperative." Tex. Util.Code § 11.003(14).

The court then undertook a lengthy, exhaustive, and fairly interesting analysis. Although it found that the City's position was reasonable, it concluded that the Commission's interpretation of the various statutes was also reasonable and not inconsistent with the governing framework, and thus it was forced to conclude that the district court did not err when it upheld the Commission's determination that the City was not eligible to be certified as a retail electric provider and the Commission's decision to dismiss the City's application for certification.

WHISTLEBLOWER ACT - TEXAS

College of the Mainland v. Meneke

Court of Appeals of Texas, Houston (14th Dist.) - January 23, 2014 - S.W.3d - 2014 WL 257882

Former employee of public junior college, who worked as information security officer, brought retaliatory discharge claim against college under the Texas Whistleblower Act, alleging that he was fired in retaliation for reporting to auditors that another college employee had inappropriate access to college's computer systems. College filed plea to the jurisdiction, asserting governmental immunity. The District Court denied plea. College appealed.

The Court of Appeals held that:

- College's internal policies regarding computer usage were not "law" within meaning of Whistleblower Act, and thus, report of alleged violation of such policies was not a report of a violation of "law" entitled to protection under Act, and
- Complained-of conduct, namely other employee's inappropriate access to college's computer

systems, did not constitute violation of law prohibiting tampering with government records, and thus, report of such conduct was not a report of a "violation" of law entitled to protection under Whistleblower Act.

EMPLOYMENT - VIRGINIA

Brickey v. Hall

United States District Court, W.D. Virginia, Abingdon Division - January 23, 2014 - Slip Copy - 2014 WL 268449

The plaintiff, Mr. Randall Brickey, served as a police officer in Saltville, Virginia from December 1, 2006 until May 21, 2012, when he was terminated. In early 2012, Brickey decided to run for an elected position on the Town Council. Defendant Hall, the Chief of Police, advised Brickey that "there would be no problem" with his running for office. Hall subsequently became angry with Brickey over statements he made during the course of his campaign and terminated Brickey on the basis that the he violated the code of conduct requirements applicable to all Saltville Police Department employees.

Ha, ha, Brickey won a seat on the Town Council. The police department was unamused. Brickey up and sued.

Brickey asserted various constitutional violations of his procedural due process rights and his first amendment rights to liberty and free speech in connection with his termination.

The court dismissed plaintiff's procedural and substantive due process claims will, along with all claims for punitive damages, but denied defendants' motion to dismiss on the claim of retaliatory discharge under the First Amendment.

LIABILITY - WASHINGTON

Nguyen v. City of Seattle

Court of Appeals of Washington, Division 1 - January 27, 2014 - P.3d - 2014 WL 294298

Truck driver brought action against city seeking to recover for personal injuries and damages sustained when top corner of cargo box of truck struck portion of tree on planting strip adjacent to city street. The Superior Court entered judgment for city and driver appealed.

The Court of Appeals held that:

- City did not breach duties under city ordinances to keep trees along street from creating hazardous condition and to ensure that trees be kept trimmed to height of eight feet above sidewalk and 14 feet above roadway;
- Ordinances did not impose duty on city to inspect trees;
- City was not liable to driver under theory of premises liability; and
- Doctrine of res ipsa loquitur did not apply.

City did not breach duties under city ordinances to keep trees along street from creating hazardous condition and to ensure that trees be kept trimmed to height of eight feet above sidewalk and 14 feet above roadway, and thus, driver of truck that was 11 feet high could not recover for personal

injuries arising out of upper corner of cargo box striking branch of tree where it connected to trunk, where there was no evidence that branch was hanging lower than 14 feet from street, right corner of truck hit tree where large branch connected to trunk, trunk did not extend over roadway, photograph of street and tree taken in year before accident did not show any damage to tree, and there were no complaints by other citizens or motorists regarding that tree.

IMMUNITY - WASHINGTON

Camicia v. Howard S. Wright Const. Co.

Supreme Court of Washington, En Banc - January 30, 2014 - P.3d - 2014 WL 333159

Bicyclist brought negligence action against city after bicyclist was thrown from her bicycle after colliding with a wooden post on portion of bicycle trail located in city. The Superior Court granted summary judgment in favor of city. Bicyclist appealed. The Court of Appeals reversed. City sought further review, which was granted.

The Supreme Court of Washington held that genuine issue of material fact existed regarding whether bicycle trail served a recreational purpose or a transportation purpose, and therefore summary judgment was precluded in favor of city on the basis of recreational use immunity in negligence action by bicyclist who was injured while riding on trail in city, where it was disputed whether city had authority to close the trail to public transportation, and bicycling was not necessarily a recreational activity.

To be immune under the recreational use immunity statute, a landowner must establish that the land in question: (1) was open to members of the public; (2) for recreational purposes; and that (3) no fee of any kind was charged.

For purposes of recreational use immunity, a landowner has "lawful possession and control" over land if it holds continuing authority to determine whether the land should be open to the public.

In order to be entitled to recreational use immunity, a landowner must have authority to close the land to the recreating public because extending recreational immunity to landowners who lack authority to close the land to the public would not further the purpose behind the act, namely to encourage landowners to open land that would not otherwise be open.

Where the land at issue is shown to be recreational, recreational use immunity does not depend on whether the plaintiff was actually engaged in recreation at the time of injury.

BENEFITS - WISCONSIN

Hussey v. Milwaukee County

United States Court of Appeals, Seventh Circuit - January 29, 2014 - F.3d - 2014 WL 308413

Esther Hussey, on behalf of herself and all others similarly situated, sued Milwaukee County in state court alleging that its failure to provide cost-free health insurance to retirees constituted a taking of property without due process of law in violation of the United States and Wisconsin constitutions.

In 2012, the County again amended its health insurance plans, which further increased the

deductibles, co-payments, and co-insurance charges that Hussey would have to bear. These amendments also modified the plan's coordination of benefits with Medicare for retirees over the age of 65. Prior to the 2012 amendments, the County's plan had employed the "come-out-whole" method of benefits coordination, under which any expenditures not covered by Medicare was paid in full by the County. Starting in 2012, the County began to utilize the "non-duplication" method, which designated Medicare as the primary health coverage provider and reduced the benefits to be paid under the County's plan by the amount of benefits paid by Medicare. Among other things, this change ensured that retirees over the age of 65 would pay the same deductibles, co-payments, and co-insurance charges as other retirees and active employees.

In response to Hussey's suit, the County contended that it only promised retirees the ability to participate in the same health insurance plan as active employees on a "premium-free" basis. The magistrate judge reviewed the language of the ordinances and agreed with the County, granting its motion for summary judgment and denying Hussey's cross-motion. Hussey appealed and the Court of Appeal affirmed.

SCHOOLS - WYOMING

Powers v. State

Supreme Court of Wyoming - January 28, 2014 - P.3d - 2014 WY 15

State superintendent of public instruction, individually and as superintendent, and two voters, individually and on behalf of Wyoming citizens, filed an action seeking a declaratory judgment and preliminary injunction that would prevent Senate Enrolled Act 0001, which among other things created a new position of director of the Wyoming Department of Education and assigned to the director nearly all of the duties that were previously the superintendent's responsibility, from taking effect. The action was filed on the day that the act was signed into law.

The District Court denied the motion for a preliminary injunction and certified four questions of law to the Supreme Court.

As a matter of first impression, the Supreme Court of Wyoming held that the legislative act unconstitutionally deprives the state superintendent of the power of "general supervision of the public schools" entrusted to the state superintendent by the Wyoming Constitution.

Under the act, which made the director the administrative head and chief executive offer of the department of education, the state superintendent no longer has any supervisory role in the department and is relegated to the role of general observer with limited and discrete powers and duties.

PENSIONS - CALIFORNIA

Meyers v. Retirement Fund of Fed. City Employees

Court of Appeal, Sixth District, California - January 22, 2014 - Not Reported in Cal.Rptr.3d - 2014 WL 228689

Former City of San Jose employee, petitioned under Probate Code sections 15642 and 172001 for an order removing certain trustees of defendant The Retirement Fund of the Federated City Employees ("Retirement Fund"), the retirement system for the City of San Jose.

The superior court dismissed the petition on the grounds the Retirement Fund is expressly excluded from the definition of a "trust" under section 82, and thus a petition to remove trustees under the Probate Code may not be maintained against it.

On appeal, employee argued that the judgment must be reversed, despite the exclusionary language of section 82, because: (1) the California Constitution mandates that "[t]he assets of a public pension or retirement system are trust funds" (Cal. Const., art. XVI, § 17, subd. (a) (section 17)); and (2) section 15003, subdivision (c) (section 15003(c)) specifically allows for the application of trust law to public pension funds.

The Court of Appeal disagreed, affirming the superior court's ruling.

COUNTY FEES - CALIFORNIA

City of Clovis v. County of Fresno

Court of Appeal, Fifth District, California - January 16, 2014 - Cal.Rptr.3d - 2014 WL 172397

Cities petitioned for writ of mandate challenging county's calculation of vehicle license fee (VLF), Swap and Triple Flip service fee. The Superior Court ordered the county to apply the methodology advocated by the cities and to issue refunds to the cities, and also ordered the county to pay prejudgment and postjudgment interest. County appealed.

The Court of Appeal held that:

- Prejudgment interest was applicable;
- Seven percent was the correct rate of postjudgment interest under prior law; and
- Statute reducing prejudgment and postjudgment interest applied only prospectively from its effective date.

Trial court acted correctly in awarding prejudgment interest against county on cities' successful mandamus claims for recalculation of county's VLF, Swap and Triple Flip service fees, since the money the county was ordered to pay was "damages" for purposes of prejudgment interest. Where the money the county was ordered to pay could be made certain by calculation, the cities were entitled to recover the money on a particular day, and the county caused the overcharges by using an erroneous method of calculating the property tax administration fee.

STUDENT HOUSING - COLORADO

Auraria Student Housing at the Regency, LLC v. Campus Village Apartments, LLC

United States District Court, D. Colorado - January 22, 2014 - Not Reported in F.Supp.2d - 2014 WL 235519

Auraria Student Housing at the Regency, LLC leases and operates an apartment complex in Denver under the trade name The Regency—Auraria's Student Housing Community, LLC (the "Regency.") The Regency is dedicated to providing off-campus housing for students attending classes on the campus of the Auraria Higher Education Center campus ("Auraria Campus") in Denver. The Regency is located a few miles away from the Auraria Campus.

In response to a 2004 study that found that the Auraria Campus had a housing demand, the University of Colorado Denver ("UCD") approached University of Colorado Real Estate Foundation ("CUREF") to construct student housing on land adjacent to campus. CUREF formed Campus Village Apartments, LLC ("CVA") in order to construct the Campus Village Apartments.

In 2004, UCD and CUREF entered into an agreement (the "2004 Agreement") whereby UCD agreed to: (1) assist in marketing the Campus Village Apartments; (2) institute a residency requirement for most full-time domestic freshmen and international students (the "New Students") to live at off-campus housing; (3) "exclusively refer" the New Students to the Campus Village Apartments; and (4) not participate in the development of another student housing project.

In 2005, CUREF assigned the 2004 Agreement to CVA, and CVA issued $50.365 million in revenue bonds (the "2005 Bonds") through the Colorado Educational and Cultural Facilities Authority ("CECFA") to fund the construction of the Campus Village Apartments.

In May 2008, UCD, CUREF, and Defendant entered into an operating agreement regarding the Campus Village Apartments (the "2008 Agreement"). Pursuant to the 2008 Agreement, UCD agreed to continue enforcing the Residency Requirement. In return, CVA gave UCD students placement priority at the Campus Village Apartments with a specific number of beds dedicated each year for UCD students.

In July 2008, CVA borrowed proceeds from the sale of $54.055 million in bonds issued through CECFA to refinance the 2005 Bonds.

During the 2012–2013 academic year, the rental cost for New Students living at the Campus Village Apartments was $7,390 per academic year, without parking or a meal plan. During the 2011–2012 academic year, the lowest rental cost for the Regency was $4,750 per academic year, which included parking but not a meal plan. Plaintiff alleges that it has lost business from New Students who would have chosen to live at the Regency if not for the Residency Requirement.

On these facts, Regency filed action against CVA alleging four claims for relief: (1) conspiracy to monopolize, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2; (2) civil conspiracy; (3) interference with prospective business relations; and (4) interference with existing contractual relations.

The parties provided mutually exclusive versions of CVA's motivations and purposes for entering into the 2004 and 2008 Agreements, neither of which were implausible on its face. The District Court concluded that questions of fact existed as to whether CVA had the specific intent to monopolize, as required under the Sherman Act, and thus denied Regency's motion for partial summary judgment.

LIABILITY - CONNECTICUT

Pellecchia v. Connecticut Light and Power Co.

Appellate Court of Connecticut - January 21, 2014 - A.3d - 147 Conn.App. 650

On July 28, 2006, the assistant highway superintendent for the Town of Killingly observed live, downed power lines on a section of Mashentuck Road. Mashentuck Road is a public highway located in the town, and the highway is maintained and controlled by the town. The assistant notified the town's highway superintendent of the downed power lines, and the two placed orange cones on the highway where Mashentuck Road intersected with the two nearest crossroads. They then left the area. Thereafter, Anthony E. Pellecchia was electrocuted and died when the motorcycle he was

driving came into contact with the downed, energized power lines. Cannot be a fun way to go.

In June, 2008, the administrator of the decedent's estate commenced a wrongful death action alleging, inter alia, that QVEC, which was notified of the downed power lines, was negligent in failing to provide timely notice of the downed lines to the utility defendants. In August, 2011, QVEC filed a third party complaint seeking indemnification from the town defendants. QVEC alleged in the third party complaint that any negligence attributable to QVEC due to its alleged failure to timely notify the utility defendants of the downed power lines was passive in nature and that the direct and immediate cause of the decedent's electrocution was the active negligence of the town defendants in failing to close properly that section of Mashentuck Road over which the power lines had fallen to vehicular traffic.

The town defendants filed a motion to strike the third party complaint. The town defendants argued, inter alia, that the third party complaint should be stricken because a claim for indemnification could not be brought against a municipality or its employees for what constituted a defective highway claim under § 13a149. QVEC filed a memorandum of law in opposition to the motion to strike the third party complaint, arguing that the allegations in the third party complaint properly set forth a claim for common-law indemnification on an active/passive negligence theory.

The trial court granted the town defendants' motion to strike based on the court's determination that the factual allegations of the third party complaint invoked the municipal highway defect statute, General Statutes § 13a–149. On the basis of that determination, the court ultimately concluded that QVEC could not state a proper cause of action because QVEC had failed to allege that it complied with the notice requirement of § 13a–149, QVEC had not alleged that it was a "traveler" as required under § 13a–149, and indemnification is not appropriate when the allegations of third party negligence invoke § 13a–149. The appeals court agreed that QVEC could not, as a matter of law, state a claim for indemnification on the facts alleged and, accordingly, it affirmed the judgment of the court.

MUNICIPAL ORDINANCE - GEORGIA

Polo Golf and Country Club Homeowners' Ass'n, Inc. v. Rymer

Supreme Court of Georgia - January 21, 2014 - S.E.2d - 2014 WL 211267

Homeowners who experienced flooding in their home brought action against subdivision homeowner's association following its alleged refusal to repair the subdivision's stormwater system. The homeowner's association counterclaimed against homeowners and sought a declaratory judgment against county. The county moved for summary judgment. The Superior Court granted the motion. The homeowner's association appealed.

The Supreme Court of Georgia held that:

- Fact issue existed as to whether association was estopped from enforcing maintenance provisions in covenant against homeowners, but
- Addendum in county ordinance did not apply to existing developments.

A genuine issue of material fact existed as to whether subdivision homeowner's association was equitably estopped from enforcing maintenance provision of covenant against subdivision homeowners, precluding summary judgment in homeowners' action against the association for its alleged failure to repair the subdivision's stormwater system.

Addendum to county ordinance requiring certain real estate developments to maintain and repair their own stormwater systems applied only to new developments or re-developments, and thus did not require existing subdivision to pay to maintain stormwater system.

ZONING - HAWAII

Kellberg v. Yuen

Supreme Court of Hawai'i - January 22, 2014 - P.3d - 2014 WL 235461

Subdivision neighbor brought action against numerous county defendants, alleging they mistakenly approved seven-lot subdivision even though property consisted of only six lots. The Circuit Court denied county defendants' motions to dismiss and granted neighbor's motion for partial summary judgment and remanded to the county Board of Appeals to consider neighbor's petition for appeal of planning director's decision. After the Board of Appeals dismissed the petition and affirmed, the Circuit Court denied neighbor's motion for an injunction and granted county defendants' motion for summary judgment. Neighbor appealed, and the Intermediate Court of Appeals determined that subject matter jurisdiction was lacking, vacated the Circuit Court judgment, and remanded for order of dismissal. Neighbor applied for certiorari review.

The Supreme Court of Hawaii held that:

- Planning Director's subdivision approval was the Director's final, appealable decision;
- Director's letter to neighbor in which he acknowledged mistake in subdivision approval did not constitute a separately appealable final decision;
- Doctrine of exhaustion of administrative remedies did not apply to failure to timely appeal the final decision; and
- Neighbor's failure to appeal Board's decision on remand did not constitute a failure to exhaust administrative remedies.

ANNEXATION - INDIANA

American Cold Storage v. City of Boonville

Supreme Court of Indiana - January 21, 2014 - 2014 WL 218392

Landowners who owned property in annexed territory brought declaratory judgment action and written remonstrance, asserting that city's annexation should not take place. The Superior Court entered partial judgment in favor of city on city's motion to dismiss and determined landowners had standing to pursue declaratory judgment action. City brought interlocutory appeal. The Court of Appeals affirmed in part, reversed in part, and remanded. On remand, the Superior Court dismissed the complaint and, following appeal and remand, denied landowners' motion to correct error. Landowners appealed. The Court of Appeals reversed and remanded.

On city's petition to transfer, the Supreme Court of Indiana held that land which comprised any portion of state highway that was included in annexed territory should have been considered and counted as a single parcel for purposes of determining whether remonstrance protesting annexation was signed by at least 65% of the owners of the annexed territory.

LIABILITY - LOUISIANA

Fuselier v. City of Oakdale

Court of Appeal of Louisiana, Third Circuit - January 15, 2014 - So.3d - 2013-640 (La.App. 3 Cir. 1/15/14)

Motorist brought action against city, seeking to recover for personal injuries allegedly sustained in one-car accident when she ran off roadway into a ditch. The District Court entered judgment for city after a bench trial. Motorist appealed.

The Court of Appeal held that condition of road where motorist swerved into ditch was not an unreasonable risk of harm.

A finding of the existence of a defect alone is not a sufficient analysis to establish liability for a city for damages caused by a building or thing; in order for there to be liability, the defect must create an unreasonably dangerous risk. The standard for public entities in maintaining roads under risk-utility test is not perfection but rather that roads be kept reasonably safe for persons exercising ordinary care and reasonable prudence. The duty to maintain roads and rights of way does not require bringing old highways up to modern standards unless a new construction or a major reconstruction of the highway has taken place.

Condition of road where motorist swerved into ditch, allegedly to avoid driver that took wide turn into her lane, was not an unreasonable risk of harm, as required for motorist's action seeking to recover for personal injuries allegedly sustained in the one-car accident. Road was two-lane and paved, it provided access to medical facilities, ditch provided drainage to prevent flooding, there were no prior accidents or complaints regarding condition of road, conditions of road were open and obvious, cost to city would be high to improve road, and gravity of harm suffered by motorist was questionable due to motorist having gaps in treatment, failing to follow through with treatment, not reporting accidents, and having positive drug tests, among other things.

PENSIONS - MICHIGAN

AFT Michigan v. State

Court of Appeals of Michigan - January 14, 2014 - N.W.2d - 2014 WL 128086

Representative organizations of public school employees, appealed the Court of Claims' orders dismissing their challenges to provisions of 2012 PA 300, which amended the Public School Employees Retirement Act (PSERA) and altered future healthcare and retirement benefit plans available to public school employees for services performed after December 1, 2012.

Plaintiffs took issue with four separate provisions of 2012 PA 300:

- MCL 38.1343e, requiring a 3% contribution towards retiree healthcare.
- MCL 38.1343g, requiring a 4% contribution to pension to remain in the Basic Plan.
- MCL 38. 1384b, providing a "sanction" of reduced multiplier in calculating pension benefits for those individuals who opt-out of § 43g.
- MCL 38.1391a(8), providing the mechanism for refunding contributions to individuals who opted into the retiree healthcare plan but who ultimately fail to qualify to receive such benefits.

The Court of Appeals concluded that:

- 2012 PA 300 did not unconstitutionally impair existing contractual obligations to pension and retiree healthcare benefits in violation of both the federal and state constitutions.
- Various pamphlets, handbooks and informative brochures published by the state did not evidence a contract between the state and the members, whereby the state specifically indicated that a 1.5% multiplier would be used to calculate pension benefits, nor did there exist an "implied in law" contract.
- The argument that 1980 PA 300 created a contract between the state and public school employees under which every public school employee was given a clear promise that the retirement multiplier used to calculate pension benefits would be 1.5% was specifically rejected by the Michigan Supreme Court in Studier v. Michigan Pub School Employees' Retirement Bd, 472 Mich. 642; 698 NW2d 350 (2005).
- Const 1963, art 9, § 24 protects only those pension benefits that have already accrued, not future benefits.

PUBLIC EASEMENT - MONTANA

Public Lands Access Ass'n v. Board of County Com'rs of Madison County

Supreme Court of Montana - January 15, 2014 - P.3d - 2014 MT 10

Public lands access group filed complaint against county, alleging that landowners adjacent to bridges had erected fences along county roads preventing public from using rights-of-way to access river. Landowner intervened as defendant. The District Court granted group summary judgment on issue of public access to river from bridge abutting landowner's property, and following bench trial, denied public access to river at county road. Group appealed and landowner cross-appealed. Appeals were consolidated.

The Supreme Court of Montana held that:

- County did not have secondary easement that was separate from public road right-of-way;
- Remand was necessary to determine width of right-of-way;
- As a matter of first impression, use of right-of-way to access river was permitted; and
- Public access to river via landowner's property did not constitute unconstitutional taking.

County did not have secondary easement over county road right-of-way for purposes of construction, maintenance, and repair that was separate from public road right-of-way established by prescriptive use; areas necessary to support maintenance of road, as well as land needed to make road safe and convenient for public use were included in public right-of-way. Courts do not separate general public's use of public prescriptive road easement and land needed for construction, repairs, and maintenance to create two distinct interests, public road for travel and a secondary easement for maintenance, but rather, courts recognize one public road right-of-way.

Minimum statutory 60-foot road width does not apply to roads established by prescriptive use. Rather, width of roadway acquired by prescription is determined as a question of fact by character and extent of its use and may be more or less than width of highways established by statute.

Use of public road right-of-way established through prescriptive use to access river over which right-of-way crossed was permitted, even if use was not established adversely during prescriptive period, since scope of right-of-way was not strictly limited to adverse usage through which easement was acquired, but rather scope included public uses that were reasonably foreseeable and were reasonably incidental to uses through which easement was acquired. Access to river was reasonably foreseeable use of right-of-way.

Public access to river via right-of-way county purchased from landowner did not constitute unconstitutional taking of landowner's property, despite contention that right-of-way was never intended to be used for access to river for recreational purposes. Landowner's predecessor in interest expressly granted public right-of-way for road, bridge, and land and water underlying it without limiting its uses, and surface waters that traversed riverbed were publicly owned, such that landowner had no compensable priority interest in property he claimed had been taken from him.

LIABILITY - NEW YORK

Williams v. Gonzalez

Supreme Court, Appellate Division, Second Department, New York - January 22, 2014 - N.Y.S.2d - 2014 N.Y. Slip Op. 00345

Student, by his parents, and his parents derivatively, brought action against town and school district, seeking to recover damages for personal injuries student allegedly sustained when he was struck by motor vehicle while crossing public road on his way to school. The Supreme Court, Westchester County, granted student's motion for leave to serve amended notice of claim on district, denied district's cross-motion for summary judgment or to dismiss, and granted student's motion for leave to serve late notice of claim on town. District and town appealed.

The Supreme Court, Appellate Division, held that:

- Granting leave to file late notice of claim on town was warranted, and
- District established prima facie entitlement to judgment as matter of law.

Granting student leave to serve late notice of claim on town was warranted in personal injury suit arising from incident in which student was struck by motor vehicle while crossing public road on his way to school, as town failed to demonstrate that student's underlying claim was patently without merit. While the merits of a claim ordinarily are not considered on a motion for leave to serve a late notice of claim, leave should be denied where the proposed claim is patently without merit.

School district, moving for summary judgment in student's personal injury suit arising from incident in which student was struck by motor vehicle while crossing public road on his way to school, established its prima facie entitlement to judgment as matter of law by demonstrating that it had no duty to supervise student at time of accident, as he was not within district's custody and control, and that district neither created allegedly dangerous condition on public road, nor had any duty to warn of condition, nor had authority to place traffic signs or markers on any highways.

SECURITIES - NEW YORK

Butler v. U.S.

United States District Court, E.D. New York - January 17, 2014 - F.Supp.2d - 2014 WL 216476

Defendant was convicted of securities fraud and conspiracy to commit securities and wire fraud. Defendant moved to vacate his conviction and sentence.

The District Court held that:

- Defendant procedurally defaulted his claims regarding alleged Brady violations and extraterritorial application of securities- and wire-fraud statutes;
- Even if defendant had not defaulted claims, prosecution's alleged nondisclosures did not undermine confidence in outcome of defendant's trial, as required to establish Brady violation; and
- Defendant's securities-fraud scheme involved domestic securities transactions subject to § 10(b), although ARS were not listed on United States exchange.

Prosecution's nondisclosure that defendant interacted with clients who were interested in both government-guaranteed student-loan-backed ARS and non-student-loan-backed ARS did not undermine confidence in outcome of defendant's securities-fraud trial, as required to establish Brady violation on motion to vacate conviction and sentence. Prosecution never asserted that defendant defrauded all of his customers, but instead focused on six victims, each of whom were always clear about their desire to purchase only government-guaranteed student-loan-backed ARS.

Criminal defendant's securities-fraud scheme involved domestic securities transactions, although ARS at issue were not listed on United States exchange, and thus transactions were subject to § 10(b). Scheme involved purchase or sale of ARS in United States, although defendant's clients were abroad, because he maintained office in New York from which he pressed clients to invest, and ARS trading was conducted between defendant in New York and United States banks pursuant to clients' instructions to defendant, who thereby created irrevocable liability in United States as clients' American agent.

LIABILITY - NEW YORK

Austin v. Town of Southampton

Supreme Court, Appellate Division, Second Department, New York - January 22, 2014 - N.Y.S.2d - 2014 N.Y. Slip Op. 00315

Operator of street paving truck brought action against town and homeowners' association, seeking damages for injuries he sustained when low-hanging tree branch struck his head. Defendants moved for summary judgment. The Supreme Court, Suffolk County, granted motions. Operator appealed.

The Supreme Court, Appellate Division, held that:

- Genuine issue of material fact existed as to whether town had actual or constructive notice of low-hanging tree branches, and
- Homeowners' association did not have actual or constructive notice of defect, and thus was not liable.

A municipality has a duty to maintain its roadways in a reasonably safe condition, and this duty extends to trees adjacent to the road which could pose a danger to travelers. However, the municipality will not be held liable unless it had actual or constructive notice of the dangerous condition.

TAX - OHIO

Mason City School Dist. Bd. of Edn. v. Warren Cty. Bd. of Revision

Supreme Court of Ohio - January 21, 2014 - 2014 WL 241950 - 2014 -Ohio- 104

County school board appealed decision of county board of revision, determining that $3.3 million was the tax value of real property for a specific tax year. The Board of Tax Appeals (BTA) issued a decision determining that the tax value of the property was $5.3 million. Appeal was filed by property owner that had acquired the property after the BTA hearing but before BTA issued its decision. School board filed motion to dismiss appeal.

The Supreme Court of Ohio held that:

- Failure of new owner to serve former owner with notice of appeal was not a jurisdictional defect;
- BTA was not required by statute or regulation to continue hearing or give notice of hearing to new owner; but
- BTA was required to evaluate determination by board of revision that previous sale of property had not been recent.

Failure of new owner of real property to serve former owner notice of appeal of decision of BTA, determining tax value of property, was not a jurisdictional defect warranting dismissal of appeal, since requirement that new owner serve former owner did not run to the core of procedural efficiency. New owner, not former owner, had primary and substantial interest in valuation of property, potential deprivation of property through foreclosure of tax lien directly affected new owner, not former owner who had transferred the property.

On appeal of county board of revision decision determining tax value of real property for a certain year, BTA had a sufficient evidentiary basis to determine date and price of previous sale of property, for purposes of determining whether sale could be used as basis for valuation of property. Although taxing authority failed to present evidence of sale, property record card contained a notation referring to date and price of the sale, county auditor had recited date and price of sale at hearing before county board of revision, and owner and taxing authority did not contest the facts of the sale but instead presented arguments as if the sale was factual.

BTA had authority to determine tax value of real property in appeal of decision of county board of revision, unrestricted by values claimed by owner or taxing authority, and thus fact that taxing authority did not rely on previous sale of property as basis for valuing property did not preclude BTA from using prior sale as value of property.

BTA was required to evaluate determination of county board of revision that previous sale of real property was not recent, for purposes of determining tax value of property, and could not rely on mere temporal proximity between previous sale and tax lien date in determining that sale had been recent, where board of revision had made an explicit finding that presumption of recency of the sale had been rebutted by facts that 57% of tenants in commercial retail property had vacated in the 13 months after sale.

PUBLIC UTILITIES - OHIO

Cleveland v. State

Supreme Court of Ohio - January 21, 2014 - 2014 WL 241956 - 2014 -Ohio- 86

City brought action against state, seeking declaration that statute, granting Public Utilities Commission of Ohio (PUCO) authority to regulate towing companies as for-hire motor carriers, violated home rule amendment of state constitution. The Court of Common Pleas entered summary judgment in favor of state, and city appealed. The Court of Appeals reversed. State filed

discretionary appeal.

The Supreme Court of Ohio held that:

- Statute was a general law;
- Portion of statute providing that towing companies were not subject to local ordinances violated home rule amendment; but
- Invalid portion of statute could be severed from remaining portion.

A state statute takes precedence over a local ordinance, such that the ordinance will be determined to exceed a municipality's powers under the home rule amendment to state constitution, when: (1) the ordinance is an exercise of the police power, rather than of local self-government, (2) the statute is a general law, and (3) the ordinance is in conflict with the statute.

To constitute a general law for purposes of home rule analysis under the state constitution, a statute must: (1) be part of a statewide and comprehensive legislative enactment, (2) apply to all parts of the state alike and operate uniformly throughout the state, (3) set forth police, sanitary, or similar regulations, rather than purport only to grant or limit legislative power of a municipal corporation to set forth police, sanitary, or similar regulations, and (4) prescribe a rule of conduct upon citizens generally.

Portion of statute granting PUCO authority to regulate towing companies as for-hire motor carriers, providing that towing entities were not subject to any ordinance, rule, or resolution of any local unit of government, violated home rule amendment of state constitution. Statute could not limit municipalities' right to enact ordinances that did not conflict with the general law.

OPEN RECORDS - PENNSYLVANIA

In re Right to Know Law Request Served on Venango County's Tourism Promotion Agency, Lead Economic Development Agency

Commonwealth Court of Pennsylvania - January 3, 2014 - A.3d - 2014 WL 28676

Requestor sought review of determination of the Office of Open Records (OOR) that regional alliance of businesses, industry, and tourism was not a local agency subject to the Right-to-Know-Law (RTKL). The Court of Common Pleas affirmed. Requestor appealed.

The Commonwealth Court held that:

- Trial court's error in applying deferential standard of review was harmless error;
- Status of alliance as an industrial development agency did not render alliance a local agency for purposes of the RTKL; and
- Alliance did not meet definition of a local agency as a "similar governmental entity" to a local agency.

Status of regional business and tourism alliance as an industrial development agency under the Industrial Development Authority Act did not render alliance a local agency which would be subject to the RTKL. Functions of an industrial development agency, including assisting economic development and stimulating the local economy, though laudable, were not essentially governmental in nature.

Regional business and tourism alliance did not meet definition of a local agency, as would be subject

to the RTKL, as a “similar governmental entity” to a local agency, despite argument that alliance received public funds. Most of alliance’s board members were representatives from the private sector and thus there was no evidence of government control, primary functions of alliance, including economic development and community stewardship, did not fulfill a core purpose of a government agency, and government financing of alliance was small compared to private contributions.

STANDING - SOUTH CAROLINA

Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n

Supreme Court of South Carolina - January 22, 2014 - S.E.2d - 2014 WL 229894

Objectors brought action against cruise ship operator alleging nuisance and zoning claims and seeking an injunction. State Ports Authority and city intervened as defendants. Defendants petitioned the Supreme Court to take the case in its original jurisdiction. The Supreme Court granted the petition and transferred the case to itself.

The Supreme Court of South Carolina held that:

- Objectors lacked standing to bring nuisance and zoning claims against cruise ship operator, and
- Supreme Court would not apply the public importance exception to the requirement of standing.

Associations of neighbors and conservationists lacked standing to bring nuisance and zoning claims against cruise ship operator for allegedly violating city’s zoning, noise, height, and signage ordinances in the operation of a cruise ship at a pier terminal, since neither the associations nor their members suffered a concrete, particularized harm to a legally protected interest, even if the operator’s alleged violations caused the neighborhood to suffer traffic congestion, pollution, noises, and obstructed views.

PUBLIC UTILITIES - TEXAS

Texas Coast Utilities Coalition v. Railroad Com'n of Texas

Supreme Court of Texas - January 17, 2014 - S.W.3d - 2014 WL 185030

Coalition of nine cities that formed utilities coalition and state agencies that were gas utility’s customers sought judicial review of Railroad Commission’s order approving a new rate schedule. The Judicial District Court reversed order. Commission and utility appealed. The Austin Court of Appeals reversed and remanded. Coalition and agencies sought review which was granted.

The Supreme Court of Texas held that:

- Cost of service adjustment (COSA) was a rate, and, thus, Gas Utility Regulation Act (GURA) expressly authorized the Commission to include COSA clauses in rate schedules;
- COSA complied with GURA mandate that utility seeking increased rate be required to timely file a statement of intent; and
- COSA complied with GURA clause giving municipalities exclusive jurisdiction to establish rates within their borders.

COSA was a rate, and, thus, GURA expressly authorized the Railroad Commission to include COSA

clauses in rate schedules. Rate schedule established utility's charges and compensation, the COSA clause provided that the charges and compensation would adjust annually to account for differences between utility's estimated and recorded expenses, and by including the COSA clause in the rate schedule, the Commission established a practice that affected utility's charges and compensation.

COSA complied with GURA mandate that utility seeking to increase its rate be required to timely file a statement of intent, although the rate did not have to be re-approved each time it was applied, and COSA clause could change the basis by which the amount of a customer's bill was determined, and that change could result in an increase in the amount of the customer's bill. COSA rate changes only needed to be approved once, Railroad Commission's rate-making authority included the authority to establish practices that affected the basis by which the amount of a customer's bill was determined, and it was not possible for such a practice to affect the basis without changing it in some way.

COSA complied with GURA clause giving municipalities exclusive jurisdiction to establish rates within their borders, although COSA clause allowed Railroad Commission to adjust rate each year based on data regarding costs incurred in successive years. COSA clause did not have to provide for a full GURA rate case prior to an annual adjustment in gas utility's rate because the COSA clause and the adjustment were the product of a full rate case, in which the municipalities were afforded all of the jurisdiction, powers, and duties that GURA granted to them, and utilities retained the authority to deny an annual adjustment, just as it could deny a proposed rate increase, and to participate in any appeal of that decision to the Commission.

TAX - VIRGINIA

Corr v. Metropolitan Washington Airports Authority

United States Court of Appeals, Fourth Circuit - January 21, 2014 - F.3d - 2014 WL 211884

Motorists who used toll road brought action against airport authority for illegal exaction of tax, in violation of Due Process Clause and guarantee of republican form of government, and for violation of Virginia Constitution. The District Court dismissed the action. The Court of Appeals transferred motorists' appeal.

The Court of Appeals held that:

- Motorists had standing, and
- Tolls were user fees and not taxes prohibited by Virginia constitution.

Motorists paid tolls in exchange for particularized benefit of expanding rail system and for use of that road, motorists voluntarily chose to use toll road, motorist who objected to toll could take another route, and tolls were collected solely to fund the rail project.

SCHOOLS - WYOMING

Wadsworth v. Board of Trustees of Lincoln County School Dist. Number Two

Supreme Court of Wyoming - January 16, 2014 - P.3d - 2014 WY 7

High school teacher petitioned for review of decision of board of trustees of county school district that terminated his teaching contract. The District Court affirmed. Teacher appealed.

The Supreme Court of Wyoming held that:

- A school board is not statutorily required to independently review the entire evidentiary record received by a hearing officer before accepting a recommended decision to terminate, suspend or dismiss a continuing contract teacher; and
- Due process did not require that school board independently review entire evidentiary record before accepting hearing officer's recommendation to terminate teacher's contract.

A school board is not required, under the provision of Wyoming's Administrative Procedure Act (APA) applying to contested cases generally and a Wyoming statute applying specifically to contested cases before a school board, to independently review the entire evidentiary record received by a hearing officer before accepting a recommended decision to terminate, suspend, or dismiss a continuing contract teacher. Rather, those statutes, read together require only that a school board review a hearing officer's findings of fact and conclusions of law, and any objections or exceptions thereto, before accepting a recommended decision.

Due process did not require that school board independently review entire evidentiary record before hearing officer before accepting hearing officer's recommendation to terminate continuing contract high school teacher for insubordination. While teacher's private interest was substantial, procedures used by board adequately safeguarded that interest, as teacher received notice of basis for contract termination and had an opportunity to be heard before neutral hearing officer and ultimately before the board, and voting members of the board reviewed hearing officer's findings, conclusions, and recommended decision.

INCORPORATION - ALABAMA

In re Incorporation of Caritas Village, Ala. v. Fuhrmeister

Supreme Court of Alabama - January 10, 2014 - So.3d - 2014 WL 92630

A petition was filed to incorporate village. The Probate Court denied the petition. Appeal was filed.

The Supreme Court of Alabama held that affidavits, which included declarations of intent to reside in village, did not satisfy the population requirement for petitioning to incorporate a village.

The declarants' statements of intent to declare residency in village did not meet the purpose of incorporating small municipalities as it did not indicate a body of inhabitants who shared with the proposed municipality a community of interest grounded in their place of residency.

LAW ENFORCEMENT - CALIFORNIA

Quezada v. City of Los Angeles

Court of Appeal, Second District, Division 1, California - January 8, 2014 - Cal.Rptr.3d - 2014 WL 60330

Police officers brought action against city and police chief for civil rights violations under the Bane Act and violations of the Public Safety Officers Bill of Rights Act (POBRA) based upon their treatment during a departmental investigation into the discharge of one of the officer's weapons while the three officers were off duty and had been drinking at a bar near the police station.

The Superior Court granted summary judgment for city and chief, and officers appealed.

The Court of Appeal held that:

- Officers did not have any right under POBRA to postpone interrogation in light of the seriousness of the investigation;
- Interrogation did not violate POBRA provision allowing interrogated officers to attend to personal physical necessities;
- City did not violate POBRA when it forced officers to provide multiple public safety statements;
- Failure to wait until chosen attorney was available did not violate officers' representation rights under POBRA;
- Search of off-duty officers' personal vehicles did not violate officer's Fourth Amendment rights;
- Department did not violate Tom Bane Civil Rights Act; and
- POBRA did not prevent police captain from reassigning officer while investigation was pending.

MUNICIPAL ORDINANCE - CALIFORNIA

People v. Nguyen

Court of Appeal, Fourth District, Division 3, California - January 10, 2014 - Cal.Rptr.3d - 14 Cal. Daily Op. Serv. 317

Defendant was charged with being a sex offender in a city park or recreational facility without written permission from the city's police chief. The Superior Court sustained defendant's demurrer. The People appealed. The Appellate Division of the Superior Court certified the appeal for immediate transfer to the Court of Appeal.

The Court of Appeal held that:

- City ordinance requiring sex offenders to obtain permission from police chief to enter parks or recreational facilities was subject to field preemption by state laws regulating daily life of sex offenders, and
- Court of Appeal could not sever preempted portion of ordinance by replacing it with a ban on entering such facilities.

The state impliedly preempts a field when (1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the locality.

City ordinance prohibiting sex offenders whose victims were minors from entering parks and recreational facilities without permission from police chief was subject to field preemption by the Penal Code sections regulating daily life of sex offenders to reduce the risk the offender will commit another offense, since those sections were all closely related and established a patterned approach, the subject area of sex offenders was historically dominated by state regulation, and the requirement to seek permission from the police chief was a de facto registration requirement that went beyond the Penal Code's standardized registration requirements for sex offenders.

Replacing preempted city ordinance prohibiting sex offenders whose victims were minors from

entering parks and recreational facilities without permission from police chief with an outright ban on such offenders entering parks and recreational facilities would not be a proper exercise of the Court of Appeal's power to sever the preempted portion of an ordinance, since it was not "volitionally separable," absent evidence that the city intended to adopt a complete ban on sex offenders entering a city park or recreational facility.

EMINENT DOMAIN - CALIFORNIA

Powell v. County of Humboldt

Court of Appeal, First District, Division 1, California - January 16, 2014 - Cal.Rptr.3d - 2014 WL 171483

Scott and Lynn Powell challenged the constitutionality of a county general plan requirement that they provide an aircraft overflight easement as a condition for obtaining a building permit to make minor alterations to their residence. The Powells contended that the easement requirement constituted a taking of their property without payment of just compensation.

The Court of Appeal affirmed the trial court's grant to summary judgment to the County, finding that the Nollan essential nexus standard is a special application of the doctrine of unconstitutional conditions. It does not apply unless the government requires a person as a condition for receiving a discretionary government benefit to give up the constitutional right to just compensation for a taking of their property, or compels the person to pay a monetary fee equivalent to such a taking.

The overflight easement in this case did not as a matter of law effect a taking of the Powells' private property or airspace under Fifth Amendment jurisprudence or California law, and the Powells failed to come forward with evidence sufficient to either establish the practical effect of the easement was to bring about such a taking, or to demonstrate there were triable issues of material fact with respect to that question. The trial court therefore properly granted summary judgment to the County.

HOUSING - CONNECTICUT

Fairchild Heights Residents Ass'n, Inc. v. Fairchild Heights, Inc.

Supreme Court of Connecticut - January 21, 2014 - A.3d - 2014 WL 116440

Association of mobile home residents brought action against owner-operator of mobile home park, asserting per se negligence and Connecticut Unfair Trade Practices Act (CUTPA) claims and seeking declaratory and injunctive relief, punitive damages, attorney fees, and costs. After bench trial, the Superior Court entered judgment in favor of owner-operator. Association appealed. The Appellate Court reversed and remanded with direction to dismiss action for lack of subject-matter jurisdiction.

On certification, the Supreme Court of Connecticut held that:

- Association failed to exhaust its administrative remedies before asserting per se negligence claims;
- Association was required to seek declaratory ruling from Department of Consumer Protection before asserting per se negligence claims;
- Use of informal compliance procedure by Department of Consumer Protection did not excuse association from seeking declaratory ruling;
- Association was not required to exhaust administrative remedies before asserting CUTPA claim;

- Association had standing to pursue CUTPA claim on behalf of its members; and
- Association was entitled to new trial on CUTPA claim.

TAX - GEORGIA

Porche v. Noriega

Court of Appeals of Georgia - January 15, 2014 - S.E.2d - 2014 WL 128668

City tax commissioner filed petitions against the owners of two adjoining townhomes seeking in rem ad valorem tax foreclosure of abatement liens against the townhomes. The trial court denied the petitions. Tax commissioner appealed.

The Court of Appeals held that the petitions did not comply with statutes governing in rem tax foreclosure of delinquent ad valorem taxes because they were against the owners rather than the properties.

EMINENT DOMAIN - ILLINOIS

Wilson v. Robinson Tp.

Appellate Court of Illinois, Fifth District - January 15, 2014 - Not Reported in N.E.2d - 2014 IL App (5th) 130134-U

Landowners argued that the taking of land by Robinson Township through eminent domain, for the purpose of altering a road, was void ab initio because the township had failed to comply with the provisions of the Eminent Domain Act (735 ILCS 30/1–1–1 to 99–5–5 (West 2012)) and the Illinois Highway Code (605 ILCS 5/6–101 to 6–329 (West 2008)). Landowners argued that at the time of the filing of the eminent domain action, no formal resolution or ordinance had been adopted by Robinson Township authorizing the taking of the property. Landowners argued that, because Robinson Township failed to initiate formal proceedings at the township level prior to initiating eminent domain proceedings, in violation of the Eminent Domain Act, the taking is void ab initio.

The appeals court conceded that the township may have exceeded its authority in bringing the eminent domain action without first having taken the appropriate formal action but that this did not equate to the circuit court's having exceeded its authority by entering the eminent domain judgment. The circuit court had jurisdiction over the eminent domain proceeding and the parties thereto. Accordingly, the eminent domain judgment may have been voidable in a direct attack against it, but it is not void and may not be collaterally attacked in the administrative review proceeding.

Accordingly, the appeals court rejected the appellants' argument on appeal and affirmed the decision of the circuit court.

SCHOOLS - ILLINOIS

Pioli v. North Chicago Community Unit School Dist. No. 187

Appellate Court of Illinois, Second District - January 13, 2014 - Not Reported in N.E.2d - 2014 IL App (2d) 130512-U

Teachers filed suit against North Chicago Community Unit School District No. 187, after plaintiffs were laid off from their tenured teaching positions in spring 2012 and were not rehired for open positions in fall 2012. Plaintiffs argued that defendant's actions violated section 24–12 of the School Code (105 ILCS 5/24–12 (West 2012)). The parties filed cross-motions for summary judgment, and the trial court granted summary judgment in defendant's favor. The appeals court affirmed.

On March 23, 2012, defendant sent notices to each plaintiff informing them that the school board had resolved to honorably dismiss them at the end of the 2011–12 school term because of the board's decision to decrease the number of teachers employed in the school district. It was common practice for Illinois school boards to issue such notices during the spring term because of statutory notice requirements and the uncertainty of the funding available for teacher employment for the fall term. Under the practice, the dismissals were not made effective in the fall term if sufficient funding became available. Here, funding became available in the fall term, and defendant did not decrease the number of teachers during that term, but instead hired new teachers to replace plaintiffs. In doing so, defendant deprived plaintiffs of their tenure rights to continued employment.

The appeals court pointed to the fact that the School Code had been amended in June 2011, allowing schools to factor in performance evaluations into hiring decisions, where previously only tenure and seniority applied.

"While we understand plaintiffs' contention that their layoffs and lack of recall rights demonstrate a decline in tenure protections, that result is due to a clear decision by the legislature to prioritize teacher evaluations. The statutory amendments do not completely erode tenure protections in layoff situations, as teachers within the same groups and with the same evaluation ratings are dismissed based on seniority considerations. 105 ILCS 5/24–12 (West 2012). Tenured teachers with 'unsatisfactory' ratings also receive substantial classroom remediation (105 ILCS 5/24A–5(i) (West 2012)), presumably to help them achieve success (as embodied by a higher rating) in the classroom. However, the tenure benefits during layoffs that plaintiffs currently seek, largely embodied in the prior law, may only be achieved through legislative action."

ZONING - INDIANA

Floyd County v. City of New Albany

Court of Appeals of Indiana - January 16, 2014 - N.E.2d - 2014 WL 172546

City brought declaratory judgment action against county, seeking declaratory judgment as to whether city had zoning jurisdiction over an unincorporated area outside city limits. The Circuit Court granted summary judgment to city. County appealed and city cross-appealed.

The Court of Appeals held that:

- Statutory procedure for a municipality to exercise territorial jurisdiction over an area within two miles of municipal boundary in a county with a population of less than 95,000 and a comprehensive plan, rather than procedure for same that was generally applicable in a county that has a comprehensive plan, applied to determination of whether city located in county of less than 95,000 could exercise zoning jurisdiction over particular area, and
- City's provision of sanitary sewer services and building code inspection and enforcement services to area constituted provision of "municipal services," as would support city's exercise of zoning jurisdiction over area.

SCHOOLS - MINNESOTA

Lifespan of Minnesota, Inc. v. Minneapolis Public Schools Independent School Dist. No. 1

Court of Appeals of Minnesota - January 13, 2014 - N.W.2d - 2014 WL 103450

Lifespan of Minnesota, Inc., sued public schools for breach of contract based on the school districts' alleged failure to pay for educational services that Lifespan provided to student-attendees of its day treatment program.

The district court dismissed Lifespan's claims with prejudice, holding that the court lacked subject-matter jurisdiction over the breach-of-contract claims and that the statutory claims lacked merit.

The court of appeals held that Lifespan's claims based on the districts' breach of their obligation to pay for education services provided before the contracts' specified termination dates would not require the district court to scrutinize the school districts' reasoning or second-guess their policy decisions. The district court therefore had subject-matter jurisdiction over those ordinary contract nonpayment claims and the court remanded the case so that those claims could be litigated.

To the extent that the contract claims also alleged that the school districts were bound to continue the relationship and to pay for services beyond the periods specified by contract, however, the district court correctly decided that it lacked subject-matter jurisdiction. The district court did not err by dismissing Lifespan's statutory claims.

TAX - MISSOURI

Gateway Hotel Partners, LLC v. C.I.R.

United States Tax Court - January 9, 2014 - T.C. Memo. 2014-5

Limited liability company (LLC), which was taxed as partnership, petitioned for review of final partnership administrative adjustment (FPAA), which determined that LLC was required to recognize income from transfers of state tax credits, that LLC was required to include in income the return of funds it had previously contributed in connection with hotel redevelopment project, and that LLC was liable for accuracy-related penalty.

The Tax Court held that:

- LLC's transfer of certain state tax credits was nontaxable partnership distribution in redemption of member's preferred equity rights;
- LLC's transfer of certain other state tax credits was sale of full amount credits;
- All proceeds from LLC's sale of state tax credits were includible in LLC's income under assignment-of-income doctrine;
- Return to LLC of payment it made into deferred developer fees fund was nontaxable return of principal; and
- LLC was liable for accuracy-related penalty.

Owner of LLC's managing member, not LLC, was bridge loan borrower in form and substance, and thus lender's transfer of loan proceeds directly to LLC constituted deemed capital contribution by owner to member and then by member to LLC, and LLC's transfer of state tax credits to owner as member's assignee was nontaxable partnership distribution in redemption of member's preferred

equity rights. Loan agreement indicated owner acted on its own behalf as borrower, not as LLC's agent, and owner was both legally obligated to repay loan and party to which lender looked for repayment.

Under Missouri law, member's waiver of rights under LLC operating agreement did not surrender member's discretion to prohibit LLC from distributing LLC's state tax credits to manager in satisfaction of manager's right to preferred return of capital. Member waived only rights that gave rise to payment obligation when it waived interest in "such rights…due and owing" to manager under section of operating agreement providing for manager's preferred return of capital upon issuance of credits to LLC, and member's discretionary right to prevent transfer of credits did not give rise to payment obligation.

Under Missouri law, LLC's financing statement, which listed LLC as debtor and lender as secured party, did not grant security interest in LLC's state tax credits to lender, which provided loan to owner of LLC's manager; financing statement merely described covered collateral, and it did not identify the obligation to be secured by the covered collateral.

LLC's transfer of state tax credits to managing member's assignee was not taxable sale under step transaction doctrine, but rather was distribution made pursuant to managing member's preferred-equity rights, which flowed from managing member's capital contribution. Capital contribution was not a meaningless or unnecessary step in the transaction, and step satisfying the resulting preferred-equity rights was also legitimate.

All proceeds from LLC's sale of state tax credits were includible in LLC's income under assignment-of-income doctrine. Although LLC chose to divert some proceeds of sale to satisfy loan liability of manager's owner, LLC had the right to receive all of proceeds itself.

OPEN MEETINGS - NEW JERSEY

Bozzi v. City of Atlantic City

Superior Court of New Jersey, Appellate Division - January 7, 2014 - A.3d - 2014 WL 43991

Requestor brought suit alleging that city violated Open Public Records Act (OPRA) by charging excessive $25 fee for copying requested bid specifications. The Superior Court, Law Division, Atlantic County, found that bid specifications were government records subject to OPRA, and that city violated OPRA. County appealed.

The Superior Court, Appellate Division, held that:

- Requester's failure to submit written OPRA request was fatal to relief, and
- Bid specifications were government records subject to OPRA.

Bid specifications for proposed contract to provide maintenance services for public safety building did not require specialized and skilled services, eligible to be obtained through competitive contracting proposals in lieu of public bidding under Local Public Contracts Law (LPCL), and thus request for copy of such specifications was not subject to LPCL provision governing fees for providing documentation for such proposals.

Bid specifications for proposed contract to provide maintenance services to county were not protected by deliberative process privilege under Open Public Records Act (OPRA). Although inter-departmental input was necessary for creation of the specifications, requested document was

neither pre-decisional nor deliberative, rather, specifications were intended to be distributed.

LIABILITY - NEW YORK

Quintero v. City of New York

Supreme Court, Appellate Division, First Department, New York - January 7, 2014 - N.Y.S.2d - 2014 N.Y. Slip Op. 00077

Police officer brought action to recover for personal injuries she sustained in motor vehicle accident while she was passenger in unmarked police car. The Supreme Court denied city's motion for summary judgment, and it appealed.

The Supreme Court, Appellate Division, held that city was not protected from civil liability for officer's injuries.

Police officers who had double-parked unmarked police vehicle in order to observe two suspects were not engaged in "emergency operation," and thus city was not protected from civil liability for injuries to officer when vehicle was struck from behind by minivan, where officers were sitting at accident location approximately 15 to 20 minutes before accident.

TAX - NEW YORK

Vanderhoef v. Silver

Supreme Court, Appellate Division, Third Department, New York - December 19, 2013 - N.Y.S.2d -112 A.D.3d 1174 - 2013 N.Y. Slip Op. 08486

County and county executive brought action against State, state entities and officials, and metropolitan transit authority (MTA) which served 12-county metropolitan commuter transportation district that included plaintiff county, challenging metropolitan commuter transportation mobility tax, a payroll tax imposed upon employers and self-employed individuals doing business within district. The Supreme Court granted summary judgment to defendants. County appealed.

The Supreme Court, Appellate Division, held that the metropolitan commuter transportation mobility tax was constitutional.

Even if funding provided to MTA by plaintiff county was disproportionately high when compared to transit services received by plaintiff county in return, MTA undoubtedly provided services to plaintiff county and its residents.

EMINENT DOMAIN - NEW YORK

Malba Cove Properties, Inc. v. Tax Appeals Tribunal of State

Supreme Court, Appellate Division, Third Department, New York - January 9, 2014 - N.Y.S.2d - 2014 N.Y. Slip Op. 00145

Former property owner commenced Article 78 proceeding to review determination by Tax Appeals Tribunal which sustained imposition of real property transfer gains tax assessment after property was taken by eminent domain.

The Supreme Court, Appellate Division, held that transfer of owner's property to city as part of eminent domain taking occurred after repeal of statute imposing tax.

Transfer of owner's property to city as part of eminent domain taking occurred after repeal of statute imposing tax of 10% of gains derived from certain real property transfers, and therefore, owner did not owe the tax, despite city filing condemnation order and acquisition map prior to statute's repeal. City asserted it owned the property at time it commenced condemnation proceedings, but named owner as party with possible interest, it was unclear whether transfer involving owner would occur until city lost title issue, and title was not cleared until after statute was repealed.

SCHOOLS - NEW YORK

Guga v. Watertown Bd. of Educ.

Supreme Court, Appellate Division, Fourth Department, New York - January 3, 2014 - N.Y.S.2d - 2014 N.Y. Slip Op. 00030

Parent of injured student filed application for leave to serve a late notice of claim against school board, school district, and school for daughter's injuries. The Supreme Court granted application. School defendants appealed.

The Supreme Court, Appellate Division, held that leave to file late notice of claim was warranted.

Parent alleged that school assumed affirmative duty of ensuring that daughter would be placed on school bus after school and transported home in order to avoid potential confrontation with students who had threatened older child, and that school breached duty by failing to instruct daughter to take bus home or even to make her aware of potential danger, as a result of which she walked home and was assaulted by two students off school property.

Parent established reasonable excuse for delay, she was unaware of serious nature of injury and its permanency during 90–day period and submitted medical records demonstrating progressive and worsening nature of injury. Six-month period between assault and application was comparatively short period of delay, school had notice of essential facts constituting claim, and late service would not substantially prejudice school in maintaining defense on merits.

It is well settled that key factors for the court to consider in determining an application for leave to serve a late notice of claim are whether the claimant has demonstrated a reasonable excuse for the delay, whether the respondents acquired actual knowledge of the essential facts constituting the claim within 90 days of its accrual or within a reasonable time thereafter, and whether the delay would substantially prejudice the respondents in maintaining a defense on the merits.

TAX - OREGON

New Beginnings Christian Center, Inc. v. Multnomah County Assessor

Oregon Tax Court, Magistrate Division - January 13, 2014 - 2014 WL 108731

Church appealed County Assessor's notice, dated March 29, 2013, disqualifying Church's property from tax exemption for tax years 2007–08 through 2012–13.

The subject property is one of two adjacent properties owned by the Church. The subject property is an approximately two-acre, grass-covered lot without any buildings. In one corner of the subject property is a large, lighted sign with an electronic reader board that displays church announcements. Church's church building is located on the adjacent parcel. Plaintiff applied for and obtained exemption from property tax for the subject property in March 2006.

Assessor agreed to reinstate the subject property's tax exemption and cancel its assessment for the years at issue if Church paid a late filing fee, pursuant to ORS 307.162, of $3,637.98.

The issue before the court was whether Church must pay a late filing fee to reinstate the subject property's tax exemption.

The court concluded that Church's addition of the subject property to the tax roll was in error because the subject property qualified for tax exemption for all years at issue and granted Church's motion for reinstatement without payment of a late filing fee.

SCHOOLS - PENNSYLVANIA

Beattie v. Line Mountain School Dist.

United States District Court, M.D. Pennsylvania - January 13, 2014 - F.Supp.2d - 2014 WL 131637

Parents, on behalf of female student, brought action against school district, alleging that district policy prohibiting female students from participating in all-male wrestling teams was discrimination on basis of sex in violation of Equal Protection Clause of Fourteenth Amendment and Equal Rights Amendment to Pennsylvania Constitution. Parents moved for preliminary injunction enjoining district from enforcing policy.

The District Court held that:

- Parents showed likelihood of success on merits of equal protection claim, as required to support preliminary injunction;
- Balance of equities favored preliminary injunction; and
- Public interest would not be harmed by granting injunction.

MUNICIPAL ORDINANCE - PENNSYLVANIA

Dillon v. City of Erie

Commonwealth Court of Pennsylvania - January 7, 2014 - A.3d - 2014 WL 37840

Firearm owner, who obtained permit for pro-firearms rally in city park, filed action for declaratory judgment and injunctive relief, seeking preliminary and permanent injunction enjoining enforcement of city ordinances, which prohibited hunting and the use or possession of firearms in city parks and required reporting of stolen firearms. The Court of Common Pleas denied preliminary injunction. Firearm owner appealed.

The Commonwealth Court held that:

- City ordinance that prohibited firearms in city parks was preempted by Uniform Firearms Act;
- Firearm owner was entitled to preliminary injunction enjoining enforcement of city ordinance that

prohibited firearms in city parks;
- Firearm owner's appeal of denial of preliminary injunction was not moot; and
- Firearm owner did not have standing to challenge and obtain injunctive relief against enforcement of city ordinance that required stolen handguns to be reported by handgun owners to authorities.

City ordinance that prohibited hunting and the use or possession of firearms in city parks was preempted by Uniform Firearms Act, which provided in pertinent part that no county, municipality or township could in any manner regulate the lawful ownership, possession, transfer or transportation of firearms when carried or transported for purposes not prohibited by the laws of the Commonwealth. Act preempted city ordinance by its own terms and by decisional law and precluded city from regulating lawful possession of firearms.

IMMUNITY - VIRGINIA

Robertson v. Western Virginia Water Authority

Supreme Court of Virginia - January 10, 2014 - S.E.2d - 2014 WL 92244

Property owner filed suit against regional water authority for negligence arising out of collapse of ten-foot retaining wall caused by burst sewer line. The Circuit Court entered summary judgment in water authority's favor, and owner appealed.

The Supreme Court of Virginia held that water authority was not entitled to sovereign immunity from suit water authority's obligation to maintain and keep sewers in good repair was "proprietary function."

ZONING - VIRGINIA

Board of Sup'rs of James City County v. Windmill Meadows, LLC

Supreme Court of Virginia - January 10, 2014 - S.E.2d - 2014 WL 92090

County, on behalf of its board of supervisors and acting zoning administrator, brought declaratory judgment action against developers who sought to establish residential communities within county and non-profit corporation developing a life-care community within county, seeking declaration that statute regulating county's ability to accept conditional zoning cash proffers had no retroactive effect, such that statute would not affect county's collection of any cash proffers agreed to by developers and non-profit corporation prior to the statute's effective date.

Non-profit corporation filed answer in which it requested attorney fees and costs. Developers brought counterclaim seeking refund of cash proffers collected by county after statute's effective date as well as attorney fees and costs. The Circuit Court granted summary judgment in favor of defendants and awarded defendants attorney fees and costs. County appealed.

The Supreme Court of Virginia held that:

- Statute regulating locality's ability to collect conditional zoning cash proffers applies to any and all cash payments owed to a locality under a zoning proffer, regardless of whether terms of such proffer was agreed to prior to or after statute's effective date;
- Non-profit corporation did not successfully challenge an ordinance, administrative or other action of county, and thus was not entitled to award of attorney fees under conditional zoning cash

proffer statute; but
- Developers who prevailed on counterclaim against county successfully challenged an action of the county, and thus were entitled to award of attorney fees under conditional zoning cash proffer statute.

EMPLOYMENT - WASHINGTON

Brownfield v. City of Yakima

Court of Appeals of Washington, Division 3 - January 14, 2014 - P.3d - 2014 WL 123438

Former city police officer brought action against city, alleging retaliation for whistleblowing activities, wrongful discharge, negligent hiring, supervision, and retention of city police chief, and violation of Washington Law Against Discrimination (WLAD). The Superior Court granted summary judgment in favor of city. Officer appealed.

The Court of Appeals held that:

- City maintained its own whistleblower policy and was therefore exempt from suit under Local Government Whistleblower Protection Act;
- Federal court's ruling that former officer was not terminated based on his whistleblowing activities or free speech rights collaterally estopped officer from relitigating issue of cause of his termination, as element of state law claim for wrongful discharge;
- Federal court's ruling that former officer's refusal to comply with city's legitimate order to undergo fitness for duty evaluation constituted insubordination collaterally estopped officer from relitigating issue of validity of city's order to submit to fitness examination, as relevant to state law claim for wrongful discharge;
- Federal court's ruling that city's termination of officer did not violate Americans with Disabilities Act's (ADA) prohibition on disability discrimination did not collaterally estop officer from litigating issue of whether city violated WLAD by terminating him on account of his disability;
- Officer failed to demonstrate that city's stated reason for his termination was pretext for disability discrimination, as necessary to support disability discrimination claim under WLAD; and
- Officer could not maintain claim against city for negligent hiring and supervision of police chief and city manager.

Federal court's judgment finding that city did not terminate allegedly disabled former police officer on account of his disability, such that city's termination of officer did not violate ADA did not collaterally estop former officer from litigating issue of whether city violated WLAD by terminating him on account of his disability. Legal issues were not identical, as ADA and WLAD imposed different burdens of proof upon plaintiff alleging disability discrimination, in that ADA required plaintiff to prove that, "but for" the illicit motive of disability, he would not have been subject to adverse employment action, while WLAD required plaintiff to prove that disability was a "substantial factor" causing the adverse employment action.

BONDS - CALIFORNIA

Harris Const. Co., Inc. v. Tulare Local Healthcare Dist.

United States District Court, E.D. California - December 13, 2013 - Slip Copy - 2013 WL 6576034

Plaintiff Harris Construction Co., Inc. was the general contractor for the Tower 1 Expansion Project for Tulare Regional Medical Center ("TRMC").

Harris sought an injunctive order to stop or suspend its continuing construction on the project and to stop draws on the general obligation bond funds for the project. Harris contended that TRMC was insolvent, wrongfully withheld $9,666,430 owed to Harris and its subcontractors, and compelled Harris to perform significant project work without compensation, all of which warranted the requested injunctive relief.

The District Court concluded that Harris sought unworkable injunctive relief.

"In essence, Harris seeks this Court's order to preclude its continuing work on the project. Harris does not need this Court's order or permission to refrain from working on the project. Harris may seek to enforce its contract and other rights without this Court's order to stop project construction. If this Court were to order construction stoppage, it would effectively find that defendants committed contract breaches and that, by stopping work, Harris would not be in breach. In addition, Harris' requested relief would preclude removal of further bond funds without this Court's approval. This Court is unable to monitor constantly project construction and financing as Harris seeks. This Court is not, and cannot be, an account manager for the project."

EMINENT DOMAIN - GEORGIA

Emery v. Chattooga County

Court of Appeals of Georgia - January 6, 2014 - S.E.2d - 14 FCDR 27

The property subject the taking was a 60 foot ingress and egress easement across an unpaved road that runs through landowner's property and provides access to approximately 20 residents living along Hairs Lake Road. Pursuant to OCGA § 32–3–1, the County filed a declaration of taking to acquire landowner's interest in the easement after the other property owners adjoining the road approached the County and agreed to convey their interest in the easement to the County for the purpose of the road being made part of the county road system, meaning, in this case, that it would be paved and maintained by the County.

Landowner sought to set aside County's declaration of taking. The Superior Court denied petition. Landowner appealed.

The Court of Appeals held that county did not act in bad faith, did not abuse or misuse its discretion, and did not exceed its authority when it acted to condemn unpaved road.

Although road primarily would be used for ingress and egress by approximately 20 area residents, and although decision to condemn property was not made until surrounding landowners requested that county acquire road, there was no indication that general public would not have right to use road, paving and maintaining road would benefit emergency responders, and county had policy to acquire, improve, and maintain roads as parts of county were developed and residents requested that county do so.

Condemnor is not authorized to exercise the power of eminent domain to acquire property to be used by private individuals for private use and private gain, but the amount of usage of the property by the general public is not controlling when determining whether a condemnor is authorized to exercise the power of eminent domain.

IMMUNITY - ILLINOIS

Richter v. College of Du Page

Appellate Court of Illinois, Second District - December 31, 2013 - N.E.2d - 2013 IL App (2d) 130095

Pedestrian student brought negligence action against college after she allegedly tripped and fell on an uneven sidewalk. College moved for summary judgment. The Circuit Court, granted the motion. Pedestrian appealed.

The Appellate Court held that:

- Decision to repair sidewalk was made pursuant to a policy such that college was entitled to immunity, and
- Decision to repair sidewalk was discretionary such that college was entitled to immunity.

College's decision not to repair sidewalk was made pursuant to a policy, such that it was entitled to immunity in pedestrian student's slip and fall action to recover for injuries sustained after she tripped on a deviation between two sidewalk slabs. College had "wait-and-see" approach to repairing slabs and made each decision on a case-by-case basis given uncertainties of freeze-thaw cycles.

Repair of uneven sidewalk was a discretionary, rather than ministerial function, such that college was entitled to immunity in pedestrian student's slip and fall action after she tripped on a deviation between two sidewalk slabs. College's building and grounds manager alone made determination of whether to repair a sidewalk slab, and there was no set of rules or regulations that he was bound to follow.

OPEN MEETINGS - MONTANA

Monitor v. Jefferson High School Dist. No. 1

Supreme Court of Montana - January 9, 2014 - P.3d - 2014 MT 5

Newspaper brought action against school district, seeking declaratory and injunctive relief and asserting that school district violated open meeting and public participation requirements. The District Court granted newspaper's motion for summary judgment. School district appealed.

The Supreme Court of Montana held that:

- Genuine issue of material fact as to whether meeting of school board's budget subcommittee was meeting of quorum of school board and as to whether board took action to eliminate candidates for vacant principal position precluded summary judgment, and
- Mere presence of fourth member of school board in room to observe budget subcommittee did not transform meeting into meeting of full school board.

Open-meeting statutes do not prohibit a member of a public body from observing a meeting of a sub-quorum subcommittee or even asking questions during the meeting, and doing so does not constitute the convening of a quorum.

ELECTIONS - NEW JERSEY

Finkel v. Township Committee of Township of Hopewell

Superior Court of New Jersey, Appellate Division - December 30, 2013 - A.3d - 2013 WL 6839489

Residents who supported municipality's proposed acquisition of roadway from county brought action for declaratory and injunctive relief, seeking to challenge referendum that submitted the issue to voters, claiming municipality's failure to submit proposed question on non-binding local referendum to county clerk within 81 days before election rendered the referendum untimely and thus invalid.

The Superior Court denied the requested relief. In response to residents' emergent application just days prior to election, a two-judge panel of the Superior Court, Appellate Division, issued order denying residents' request for injunctive relief. After the election in which voters rejected municipality's acquisition of roadway, a three-judge panel denied residents' subsequent request for injunctive relief. Residents appealed.

The Superior Court, Appellate Division held that:

- Appellate Division would review otherwise moot issue as one capable of repetition yet evading review, and
- Submission of question on non-binding referendum was subject to strict enforcement of two deadlines set forth in two election statutes.

Proposed question on non-binding local referendum could not be placed on ballot when municipality had failed to submit proposal to county clerk within 81 days before election as required by election statute, even though municipality had submitted proposal within 65–day deadline separately set forth in another conflicting election statute, and municipality's failure to comply with both statutes rendered the referendum untimely and thus invalid. Although the two election statutes were in conflict, providing two separate submission deadlines, the longer 81–day deadline served its own purpose of protecting the citizenry and promoted the opportunity for voters to respond effectively to a proposed referendum.

EMINENT DOMAIN - NEW YORK

GM Components Holdings, LLC v. Town of Lockport Indus. Development Agency

Supreme Court, Appellate Division, Fourth Department, New York - December 27, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 08739

Company petitioned for review of town agency's determination, authorizing condemnation of vacant land owned by company.

The Supreme Court, Appellate Division, held that:

- Agency's determination to exercise eminent domain power was rationally related to conceivable public purpose, and
- Agency's determination complied with statutory procedures.

On review of a condemnation determination, the Appellate Division must either confirm or reject the

condemnor's determination and findings, and its review is confined to whether (1) the proceeding was constitutionally sound; (2) the condemnor had the requisite authority; (3) its determination complied with statutory procedures; and (4) the acquisition will serve a public use.

Town agency's determination to exercise eminent domain power was rationally related to conceivable public purpose, as required to support agency's decision to condemn 91 acres of company's vacant property for purpose of expanding industrial park. Agency found that since creation of park it had assisted 30 businesses, accounting for investments totaling nearly 400 million dollars and employment of 491 area residents. Agency found that there were only 33 acres of vacant land in park suitable for sale and development and that it had already sold 42 acres to a buyer, and agency also found that company's property was in proximity to park and was zoned for industrial use.

Town agency's determination complied with statutory procedures, as required to support agency's decision to condemn 91 acres of company's vacant property for purpose of expanding industrial park. Agency identified relevant areas of environmental concern, took hard look at them, and made reasoned elaboration of basis for its determination that there would be no negative impact on environment as a result of the acquisition of property.

EMINENT DOMAIN - NEW YORK

Sicoli v. Town of Lewiston

Supreme Court, Appellate Division, Fourth Department, New York - December 27, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 08729

Property owners brought action to annul a determination of town to condemn certain real property by eminent domain for the purpose of completing the dedication of a public road.

The Supreme Court, Appellate Division, held that:

- Town did not abuse its discretion in determining that public use, benefit, or purposes would be served by acquisition of owner's property, and
- There was no evidence property owners were treated differently from others similarly situated.

LIABILITY - NEW YORK

Stevens v. Kellar

Supreme Court, Appellate Division, Third Department, New York - December 19, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 08499

Plaintiff brought action against police officer and town, seeking to recover damages for personal injuries sustained in altercation between plaintiff and off-duty officer. The Supreme Court granted town's motion for summary judgment as to claims against it. Plaintiff appealed.

The Supreme Court, Appellate Division held that:

- Officer was not acting within scope of his employment, precluding plaintiff's vicarious liability claim against town, and
- Officer's prior assault conviction was insufficient to put town on notice of officer's alleged

inclination to violent conduct.

Municipality cannot be held vicariously liable for acts perpetrated by a member of its police force in the course of engaging in a personal dispute, without any genuine official purpose, whether or not the police officer characterizes such conduct as an arrest or incident to an arrest.

Police officer was not acting within scope of his employment at time of his altercation with plaintiff, precluding plaintiff's vicarious liability claim against town, in suit seeking damages for personal injuries sustained in that altercation. Officer was not on duty when he went to pub in his girlfriend's personal vehicle after hearing about plaintiff "hitting on" girlfriend, and he was not in uniform, was not carrying his police radio, did not identify himself as police officer, did not report alleged assault upon Allen to his dispatcher or another law enforcement agency, did not at any time attempt to take plaintiff into custody, and was not carrying his weapon.

Police officer's prior conviction for assault was insufficient to put town on notice that he was inclined toward violent conduct, precluding plaintiff's claims that town negligently hired, trained, and/or supervised officer. Town was aware of officer's prior conviction and had discussed it with officer prior to hiring him, and town never received any complaints regarding officer's behavior.

MEDICAL MALPRACTICE - NEW YORK

Flores-Vasquez v. New York City Health & Hospitals Corp.

Supreme Court, Appellate Division, First Department, New York - December 24, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 08543

Patients brought action against city hospital, seeking to recover for alleged medical malpractice. The Supreme Court, Bronx County granted patients' motion for leave to file a late notice of claim. City appealed.

The Supreme Court, Appellate Division, held that trial court was within its discretion in granting patients leave to file late notice of claim.

In determining if leave to file a late notice of claim should be granted, the court must consider whether the movant demonstrated a reasonable excuse for the failure to serve the notice of claim within the statutory time frame, whether the municipality acquired actual notice of the essential facts of the claim within 90 days after the claim arose or a reasonable time thereafter, and whether the delay would substantially prejudice the municipality in its defense.

Trial court was within its discretion in granting patients leave to file late notice of medical malpractice claim against city hospital. Although patients failed to proffer a reasonable excuse for the delay, patients submitted expert affidavits showing that city had actual knowledge of facts underlying their theory of a departure from accepted standard of pediatric care with regard to diagnosis and treatment of infant patient's fetal distress and existence of a causally related injury, and their opinions were not refuted by city's pediatric defense expert.

EMPLOYMENT - NEW YORK

Botsford v. Bertoni

Supreme Court, Appellate Division, Third Department, New York - December 26, 2013 -

N.Y.S.2d - 198 L.R.R.M. (BNA) 2007 - 2013 N.Y. Slip Op. 08575

Former fire inspector, who was also president of village's firefighters union, petitioned for Article 78 review of determination of village's mayor to terminate his employment.

The Supreme Court, Appellate Division held that:

- Inspector was not deprived of his rights under Civil Service Law, and
- Mayor should have been disqualified from reviewing hearing officer's recommendation.

Determination annulled and remitted.

Former fire inspector, who was also president of village's firefighters union, was not penalized for exercising his statutory right to hearing on underlying disciplinary charges, but rather for giving false testimony at that hearing, and thus he was not deprived of his rights under Civil Service Law. Village was entitled to take adverse action against inspector because he made false statements in response to underlying charge of misconduct, precluding argument that to permit initiation of perjury charges under such circumstances would coerce inspector into admitting misconduct, regardless of veracity of charges, in order to avoid more severe penalty.

In second disciplinary proceeding, village's mayor should have been disqualified from reviewing hearing officer's recommendation to terminate fire inspector. Mayor's decision in first disciplinary proceeding not only agreed with officer's report, but also stated his own opinion that "I do not believe [inspector's] account of what was said," and he later averred, in affidavit submitted in inspector's Article 78 proceeding, that he found inspector's version of events "incredible," and, while falsity of inspector's account was not at issue in second proceeding, central issue in second proceeding was whether inspector's false testimony was given knowingly and willingly, so that mayor was in position of determining inextricably intertwined question of whether inspector's statements were made knowingly and willfully.

LIABILITY - NEW YORK

Pulver v. City of Fulton Dept. of Public Works

Supreme Court, Appellate Division, Fourth Department, New York - January 3, 2014 - N.Y.S.2d - 2014 N.Y. Slip Op. 00004

Plaintiff brought personal injury action against city, seeking damages for injuries incurred when she tripped and fell in hole in grassy area between curb and paved portion of sidewalk.

The Supreme Court, Appellate Division, held that:

- Grassy area between curb and paved portion of sidewalk where pedestrian allegedly tripped and fell in hole was part of sidewalk, and thus city's prior written notice requirement applied, and
- Affirmative negligence exception to city's prior written notice requirement did not apply.

Evidence that plaintiff had submitted a preaccident "work order" to the city relating to hole in grassy area between curb and paved portion of sidewalk was insufficient to establish that affirmative negligence exception to city's written notice requirement applied, where, in response to the "work order," city dispatched an employee who testified that he inspected the area, found nothing wrong with it, and performed no work, and there was no evidence that city placed plywood, on which pedestrian tripped, over hole.

LICENSES - NEW YORK

Battaglia Demolition, Inc. v. City of Buffalo

Supreme Court, Appellate Division, Fourth Department, New York - December 27, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 08751

Demolition company brought Article 78 action for review of city council's determination to deny its application for a transfer station license, and of decision of city's director of permit and inspection services which denied its application for a collector license. The Supreme Court dismissed, and company appealed.

The Supreme Court, Appellate Division, held that:

- Determinations were neither affected by an error of law nor arbitrary and capricious, and
- Company's argument that its possession of other licenses and permits obviated need for a transfer station license was not properly brought in Article 78 proceeding.

ZONING - NEW YORK

S & R Development Estates, LLC v. Feiner

Supreme Court, Appellate Division, Second Department, New York - December 26, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 08641

Property owner brought article 78 proceeding to challenge the determination of zoning board of appeals (ZBA) that owner's property was located in a one-family residence zoning district instead of a multihousing district. The Supreme Court annulled ZBA's determination. Town appealed.

The Supreme Court, Appellate Division, held that ZBA's determination was arbitrary and capricious and affected by an error of law.

Determination of the ZBA that the depiction of owner's property in town's official zoning map as located in a multihousing district was a result of a scrivener's error, was arbitrary and capricious and affected by an error of law, where the official zoning map of the town was the final authority as to the current zoning classification of any land located within, and there was no other zoning map or evidence to support finding a scrivener's error.

EMPLOYMENT - PENNSYLVANIA

Neshaminy School Dist. v. Neshaminy Federation of Teachers

Commonwealth Court of Pennsylvania - January 9, 2014 - A.3d - 2014 WL 67963

The Neshaminy School District appeals an order of the Court of Common Pleas of Bucks County denying its petition to vacate a grievance arbitration award that reinstated a discharged teacher to her former position.

In doing so, the trial court held that the teacher had not waived her right to grieve her dismissal under the collective bargaining agreement between the School District and the Neshaminy Federation of Teachers (Union) even though she appeared at a hearing before the Board of School Directors. The trial court found that the teacher attended the Board hearing because she had been

misled by the School District's notice stating that she would "lose" all her contractual and constitutional rights if she did not request a hearing from the School Board.

The trial court accepted the Union's explanation that the teacher had always intended to pursue a grievance before an arbitrator as the way to challenge her dismissal. The School District contended that the teacher's attendance at the School Board hearing, regardless of her reasons, deprived the arbitrator of jurisdiction. The appeals court agreed, reversing the trial court.

SCHOOLS - PENNSYLVANIA

Watts v. Manheim Tp. School Dist.

Commonwealth Court of Pennsylvania - January 7, 2014 - A.3d - 2014 WL 37878

Father, who had joint and equal child custody, filed a complaint against school district seeking injunctive relief after district stopped providing transportation for his child from his residence located in district to public school child attended in the same district. The Court of Common Pleas granted a permanent injunction and directed the district to resume bussing services for the child to and from father's residence. School District appealed.

The Commonwealth Court held that:

- As a matter of first impression, school district's obligation to provide free transportation services extended to providing transportation to and from child's two different residences within same district, and
- Father had clear legal right to relief, warranting the permanent injunction.

Where a child has two residences within a school district, the school district must provide transportation services accommodating both residences. The school district cannot fulfill its transportation obligation by merely designating one parent's residence as the sole bus stop without any consideration of the child's other residence.

ZONING - PENNSYLVANIA

Tri-County Landfill, Inc. v. Pine Tp. Zoning Hearing Bd.

Commonwealth Court of Pennsylvania - January 9, 2014 - A.3d - 2014 WL 68798

Property owner sought review of decision of township zoning hearing board denying zoning approval for its proposed landfill. The Court of Common Pleas, affirmed. Property owner appealed.

The Commonwealth Court held that:

- Objectors were precluded from raising issues beyond those raised by property owner in its appeal;
- Proposed landfill unambiguously constituted a "structure" under zoning ordinance, thus rendering landfill subject to ordinance's 40–foot height restriction;
- Application of 40–foot height restriction did not result in an unconstitutional de facto exclusion of landfill use;
- Property owner failed to establish hardship warranting dimensional variance; and
- Property owner was not entitled to variance by estoppel or laches.

TAX - TEXAS

Palaniappan v. Harris County Appraisal Dist.

Court of Appeals of Texas, Houston (1st Dist.) - December 31, 2013 - S.W.3d - 2013 WL 6857983

Property owner sought judicial review of decision of county appraisal district that appraised the value of his property for certain tax year. The 11th District Court, Harris County granted appraisal district's motion to dismiss for lack of subject matter jurisdiction, based on property owner's failure to substantially comply with Tax Code's prepayment requirement. Property owner appealed.

On rehearing, the Court of Appeals held that:

- Property owner's oath of inability to pay was timely;
- Property owner failed to demonstrate that he was financially unable to pay property taxes on the due date and, thus, was not excused from substantially complying with prepayment requirement by virtue of inability to pay; and
- Sufficient evidence supported trial court's finding that property owner did not pay the undisputed amount of ad valorem taxes due prior to the delinquency date.

IMMUNITY - WYOMING

Campbell County Memorial Hosp. v. Pfeifle

Supreme Court of Wyoming - January 7, 2014 - P.3d - 2014 WY 3

Patient filed suit against county hospital, anesthesia services provider that had contract with hospital, and nurse anesthetist employed by provider, based on anesthetist's alleged negligence in administration of epidural injections to patient. The District Court denied hospital's motion for partial summary judgment on basis of immunity and hospital appealed.

The Supreme Court of Wyoming held that:

- Hospital's motion for judgment on pleadings was properly converted to one for summary judgment, for purposes of standard of review on appeal from denial of motion;
- Order denying hospital's motion was appealable interlocutory order;
- Anesthetist was not "public employee," within meaning of Wyoming Governmental Claims Act; and
- Wyoming Supreme Court's holding in *Sharsmith v. Hill* did not amount to implicit waiver of county hospital's sovereign immunity from suit.

Nurse anesthetist employed by anesthesia services provider that had contract with county hospital was not "public employee," within meaning of Wyoming Governmental Claims Act, for purposes of determining whether hospital had waived its sovereign immunity from vicarious liability for alleged negligence of anesthetist, in patient's medical malpractice action, where nurse was not employee of governmental entity, and she was not acting in course of providing contract services for state institution, insofar as county hospital was not listed as one of state institutions enumerated therein.

Wyoming Supreme Court's holding in *Sharsmith v. Hill* that hospital could be vicariously liable for alleged negligence of non-employees or independent contractors under theory of ostensible agency did not amount to implicit waiver of county hospital's sovereign immunity from suit, based on theory of vicarious liability, for alleged medical negligence of nurse anesthetist employed by anesthesiology

services provider that had contract with hospital. Rather, decision regarding whether or not hospital had waived its immunity from suit was matter for legislature, not courts, to decide.

ZONING - ALABAMA

Lee v. Houser

Supreme Court of Alabama - December 20, 2013 - So.3d - 2013 WL 6703454

Developer and developer's agent brought action against town and town planning commission, alleging negligent and wanton failure to consider or to approve developer's subdivision-plat application. The Circuit Court denied defendants' motion for judgment as a matter of law and entered judgment on a jury verdict in favor of plaintiffs. Town and commission appealed.

On application for rehearing, the Supreme Court of Alabama held that:

- Issue of whether town and town's planning commission acted negligently by failing to properly consider or grant the developer's application for preliminary plat approval was for jury;
- Issue of whether town planning commission tortiously acquired jurisdiction over developer's property was for jury;
- Municipal immunity did not apply to town and planning commission;
- Personal-injury cap did not apply to developer's claim for damages associated with town's refusal to approve subdivision plat;
- Developer's agent's untimely complaint against town did not relate back to developer's complaint so as to remedy agent's violation of the municipal notice-of-claim statute; and
- Evidence was sufficient to support jury's award of lost profits.

Municipal immunity did not apply to town that sought extraterritorial jurisdiction over the private property of developer so that the municipality could prevent development of that property. There was evidence that actions of town and its planning commission were negligent beyond wrongful decision making, and public welfare exception to general rule of no immunity did not apply, given that town seemingly lacked a public interest reason for delaying the consideration of developer's plat application.

Personal-injury cap did not apply to action by developers against town for damages associated with town's refusal to approve subdivision plat since the personal-injury cap only applied to bodily injury or death, neither of which were asserted in the case.

INDEMNIFICATION - CALIFORNIA

Lexin v. City of San Diego

Court of Appeal, Fourth District, Division 1, California - December 23, 2013 - Cal.Rptr.3d - 13 Cal. Daily Op. Serv. 13, 824

"This is the latest appeal arising from the City of San Diego's (the City) infamous underfunding of its employment retirement system." In 2002 the Board of Directors (board) of the San Diego City Employees' Retirement System (SDCERS) approved the City's proposal to modify the funding plan to delete the potential of a balloon payment if the underfunded ratio fell to a certain level, in exchange for the City's resolution to indemnify the board members from liability for "any claim or lawsuit" arising from the approval. In Torres, supra, 154 Cal.App.4th at pp. 224–226, 64 Cal.Rptr.3d 495,

this court held the resolution required the City to pay attorney fees the board members incurred in enforcing their right to costs of defense in two civil actions brought against them by the then city attorney arising from their approval of the modification.

In this appeal, the issue is whether the City's resolution also requires it to pay the board members' criminal defense costs in Lexin, supra, 47 Cal.4th 1050, 103 Cal.Rptr.3d 767, 222 P.3d 214, an action the San Diego County District Attorney brought against them for felony violation of the states' conflict of interest statute, Government Code section 1090.2 The City appeals a summary judgment for the board members in their declaratory relief action, contending (1) the resolution does not apply to criminal proceedings and (2) section 995.8 precludes an award of defense costs because, after commencement of the criminal action, the city council did not hold a formal hearing to determine the provision of a defense would be in the City's best interests and the board members "acted … in good faith, without actual malice and in the apparent interests of the public entity" when it approved the modification. (§ 995.8, subd. (b).) The City asserts that despite its indemnity agreement, it had the right to arbitrarily deny a defense.

The Court of Appeal affirmed the judgment. "The plain language of the City's resolution requires it to pay criminal defense costs and there is no statutory impediment."

BENEFITS - CALIFORNIA

Dailey v. City of San Diego

Court of Appeal, Fourth District, Division 1, California - December 26, 2013 - Not Reported in Cal.Rptr.3d - 2013 WL 6804639

Denise Dailey alleged that the City improperly capped her retiree health benefit at $8,880, which she alleges is approximately $600 less than the cost of her actual premiums. She alleged that because the retiree health benefit is a benefit under the City's retirement system, an affirmative vote by all members of the City's pension system was required to implement that change.

The Court of Appeal concluded that the retiree health benefit is not a benefit under the City's retirement system, and therefore an affirmative vote by all members of the pension system was not required to implement the cap on employees' health benefit.

OPEN MEETINGS - CALIFORNIA

Citizens for Open and Public Participation v. City of Montebello

Court of Appeal, Second District, Division 5, California - December 23, 2013 - Not Reported in Cal.Rptr.3d - 2013 WL 6786709

Citizens for Open and Public Participation (COPP) sought a writ of mandate and declaratory and injunctive relief against City of Montebello (City) and Montebello City Council (City Council), and sought declaratory and injunctive relief against Nick Pacheco (Pacheco).

COPP alleged that defendants failed to comply with various provisions of the Ralph M. Brown Act (Gov.Code, § 54950 et seq.1) (Brown Act) in connection with a November 16, 2009, special meeting of the City Council (Special Meeting) and closed session during which the City Council approved Agreement No. 2585, a "Professional Services Agreement" pursuant to which Pacheco was hired as a consultant to serve as Interim City Administrator. COPP further sought a declaration that

Pacheco's agreement with the City violated section 1090, and thus was void ab initio and should be deemed rescinded because Pacheco made or drafted the agreement while acting as the City's Interim Assistant City Administrator and had a financial interest in the agreement.

The trial court first found certain violations of the Brown Act but denied COPP writ relief, and then, in a separate proceeding, denied COPP declaratory and injunctive relief and COPP's request for attorney fees. COPP appeals from the denial of declaratory and injunctive relief and the denial of its request for attorney fees. The Court of Appeal affirmed.

SCHOOLS - FLORIDA

Sherrod v. School Bd. of Palm Beach County

United States Court of Appeals, Eleventh Circuit - December 23, 2013 - Fed.Appx. - 2013 WL 6727565

Following settlement of his First Amendment retaliation claim against school board, black school board employee brought action alleging the board violated his rights under § 1981 by entering into a more favorable settlement agreement with a white male who had also sued the board alleging First Amendment violations. The District Court denied employee's motion for recusal and granted board's motion to dismiss. Employee appealed.

The Court of Appeals held that:

- Settlement agreement barred employee's § 1981 claim;
- Employee's argument that the board breached the agreement was not properly before Court of Appeals;
- Agreement was not void ad initio because white board employee allegedly received more favorable settlement; and
- District court did not abuse his discretion in deciding not to recuse.

SECURITIES LAW - FLORIDA

S.E.C. v. City of Miami, Fla.

United States District Court, S.D. Florida, Miami Division - December 27, 2013 - F.Supp.2d - 2013 WL 6842072

Alleging multiple violations of federal securities laws in connection with fraudulent accounting and the resulting inflation of its bond ratings, the SEC filed suit against the City of Miami, seeking: 1) a declaration that Defendants have violated the federal securities laws; 2) an order directing the City to comply with the prior Commission order; 3) a permanent injunction enjoining Defendants from violating Section 17(a) of the Securities Act, 15 U.S.C. § 77q(a) and Section 10(b) and Rule 10b–5 of the Exchange Act, 15 U.S.C. § 78j(b); and 4) an order directing Defendants to pay civil money penalties pursuant to Section 20(d) of the Securities Act, 15 U.S.C. § 77t(d), and Section 21(d) of the Exchange Act, 15 U.S.C. § 78u(d).

The City filed a motion to dismiss. The court declined to dismiss on any of the City's stated grounds.

Although the court conceded that the City had made a strong argument regarding materiality, it concluded that, "Viewing the allegations concerning materiality in the light most favorable to the

SEC, the Court concludes materiality is minimally satisfied."

IMMUNITY - GEORGIA

City of Milledgeville v. Primus

Court of Appeals of Georgia - December 19, 2013 - S.E.2d - 2013 WL 6670761

Corrections officer, who allegedly was injured in accident after brake line on city transport bus that he was driving ruptured, sued city for negligence. The Superior Court denied city's motion for summary judgment on ground of sovereign immunity. City sought interlocutory appeal, which was granted.

The Court of Appeals held that decision whether to replace brake line on bus was discretionary act falling within city's sovereign immunity.

There was no standard replacement schedule for brake line, which was lifelong vehicle part that was not typically replaced, such that mechanics would replace brake line only if, in the exercise of their judgment, they saw some reason to do so. City did not fail to follow specific rule, procedure, or law or otherwise deviate from clear standard for performing its inspection of bus.

PUBLIC UTILITIES - HAWAII

Pacific Lightnet, Inc. v. Time Warner Telecom, Inc.

Supreme Court of Hawai'i - December 18, 2013 - P.3d - 2013 WL 6669334

Telecom carrier brought action against provider of call termination services, alleging that it was billed for services that were never provided.

The Supreme Court of Hawaii held that:

- Powers that were statutorily enumerated to Public Utilities Commission (PUC) did not deprive circuit court of jurisdiction in areas where jurisdiction could overlap;
- Statutes that established PUC's general supervisory power over utilities and their rates and authority over certain billing disputes did not give primary jurisdiction to PUC;
- Application of primary jurisdiction doctrine would have been unfair to carrier;
- Time-period of 120 days in tariff for carrier to object to provider's bill or charges was not a statute of limitations and, thus, could not have been waived as an untimely affirmative defense; and
- Remand was required for the jury to consider 120–day time limitation.

Powers that were statutorily enumerated to PUC did not deprive circuit court of jurisdiction in areas where jurisdiction could overlap. Rather, claims brought in the courts could be subject to the primary jurisdiction doctrine and the filed-rate doctrine, which served to limit the ability of a plaintiff to bring claims in the courts, rather than with the PUC, and those doctrines did not erect barriers to original jurisdiction.

EMINENT DOMAIN - IDAHO

Alliance for Property Rights and Fiscal Responsibility v. City of Idaho Falls

United States Court of Appeals, Ninth Circuit - December 31, 2013 - F.3d - 2013 WL 6851450

Property owners filed state court action alleging that city's use of its eminent domain power to condemn land outside of city for purpose of building electric transmission lines for municipal electrical utility violated their due process rights. After removal, the United States District Court entered summary judgment in owners' favor, and city appealed.

The Court of Appeals held that:

- City lacked power of extraterritorial eminent domain for purpose of constructing electric transmission lines, and
- Certification of issue to Idaho supreme court was not warranted.

TAX - ILLINOIS

DeKalb County v. Federal Housing Finance Agency

United States Court of Appeals, Seventh Circuit - December 23, 2013 - F.3d - 2013 WL 6727323

Illinois counties and State of Illinois commenced action to impose real estate transfer tax on sales by government–sponsored enterprises such as Federal National Mortgage Association (Fannie Mae) and Federal Home Loan Mortgage Corporation (Freddie Mac) of foreclosed property to home buyers notwithstanding their statutory exemption from state taxation.

The Court of Appeals held that:

- Enterprises were exempt from real estate transfer taxes levied by state or local government;
- Real estate transfer tax was not property tax and therefore was not excluded from tax exemption to government–sponsored enterprises;
- Conversion of Federal National Mortgage Association and Federal Home Loan Mortgage Corporation to government–sponsored enterprises did not strip them of their implied constitutional tax exemption; and
- Suit to prevent state's tax collector from imposing real estate transfer tax on sales of foreclosed property by Federal National Mortgage Association and Federal Home Loan Mortgage Corporation was not subject to Tax Injunction Act.

FERAL CATS - ILLINOIS

County of Cook v. Village of Bridgeview

Appellate Court of Illinois, First District, Sixth Division - December 27, 2013 - Not Reported in N.E.2d - 2013 IL App (1st) 122164-U

This case involved two apparently conflicting ordinances that regulate feral cat colonies within Cook County. One of the ordinances was adopted by the County. The other ordinance was adopted by the Village of Bridgeview, a municipality located within Cook County.

The Village of Bridgeview is a home-rule municipality located within Cook County. On April 1, 2009,

Bridgeview adopted Ordinance No. 09–04. This ordinance prohibits Bridgeview residents from operating feral cat colonies within Bridgeview's corporate limits and imposes fines on those who fail to comply.

The County filed a lawsuit alleging that the Bridgeview ordinance infringed upon its statutory authority to control and prevent the spread of rabies and control feral cats within Cook County. The County sought a declaration that Bridgeview lacked the statutory and home rule authority to enact its ordinance. The County also sought an injunction prohibiting Bridgeview from enforcing its ordinance. The Appellate Court sided with the County.

LABOR - INDIANA

Local 1963 of United Auto., Aerospace, Agricultural Implement Workers of America, UAW v. Madison County

Court of Appeals of Indiana - December 18, 2013 - N.E.2d - 2013 WL 6657355

On January 1, 2009, the County, through the Commissioners and Council, entered into a Collective Bargaining Agreement (CBA) with UAW.

In November of 2010, the voters of Madison County elected a new Assessor and a new Recorder (the "Officials"), both of whom fired a number of their deputies who were UAW members covered by the CBA.

On June 27, 2011, UAW filed a complaint, alleging the County had breached the CBA. UAW sought an injunction for the reinstatement of two deputy assessors and further sought recognition from the County that UAW is the exclusive bargaining representative for the Officials' deputies.

On April 16, 2012, the officials moved for summary judgment, contending the Commissioners and Council lacked the "authority to unilaterally bind non-consenting, independently elected officials" to the CBA, which "restricted the elected officials in their appointment, removal and supervision of deputies and employees."

The trial court entered summary judgment in favor of the County and the UAW appealed.

The Court of Appeals concluded that the trial court properly issued summary judgment for the County because, as a matter of law, the Commissioners and Council had no authority to execute a CBA interfering with the independence of the Officials in appointing and discharging their deputies and employees.

PUBLIC UTILITIES - INDIANA

Town of Newburgh v. Town of Chandler

Court of Appeals of Indiana - December 23, 2013 - N.E.2d - 2013 WL 6795027

Acting under Indiana Code sections 36–9–2–16, –17, and –18 (1980), the towns of Newburgh and Chandler in Warrick County have for decades been providing sewer services in the four-mile rings outside their boundaries. Their four-mile rings somewhat overlap.

In 2007, both towns adopted ordinances that purported to exercise an exclusive license to furnish

sewer service within the overlapping area between Newburgh and Chandler and explicitly prohibiting the other town from providing service.

Ruksam Development, LLC, approached both Newburgh and Chandler about the feasibility and cost of providing sewer services to a subdivision it planned to develop in the overlapping area. Newburgh's estimate was a good deal higher than Chandler's, so Ruksam opted to request sewer services from Chandler. Shortly thereafter, Newburgh sued Ruksam in Vanderburgh Circuit Court for violating the Newburgh ordinance. Chandler then sued Newburgh in Warrick Superior Court, seeking a declaratory judgment that Newburgh's ordinance could not prohibit Chandler from providing new sewer services in the overlapping area.

Newburgh adopted its ordinance asserting exclusive license to provide, and prohibiting others from providing, new sewer services to customers in the overlapping area in April 2007. As Chandler adopted its ordinance six weeks later, Newburgh argued that its ordinance prevails because it was adopted first. The Court of Appeals noted that, "This state's courts have long used a first-in-time rule, in the absence of other legislative direction, to resolve disputes when two municipalities possess concurrent and complete jurisdiction of a subject matter." After a very interesting analysis, the Court of Appeals applied the first-in-time rule, granting summary judgment to Newburgh.

EMINENT DOMAIN - KANSAS

Kickapoo Tribe of Indians of Kickapoo Reservation in Kansas v. Black

United States District Court, D. Kansas - December 20, 2013 - Not Reported in F.Supp.2d - 2013 WL 6796423

The Kickapoo Indian Reservation lies almost entirely within the boundaries of the Nemaha Brown Watershed Joint District No. 7. The Tribe and the District entered into the Watershed Plan and Environmental Impact Statement for the Upper Delaware and Tributaries Watershed (the "Agreement") in 1994 to serve as co-sponsors of a project aimed to carry out works of improvement for soil conservation and for other purposes, including flood prevention.

The Agreement included plans for a multipurpose dam with recreational facilities, otherwise known as the "Plum Creek Project." On multiple occasions, the Tribe asked the District to exercise its power of eminent domain to condemn non-Indian-owned land for the Plum Creek Project that the Tribe had been unable to acquire on its own. The District declined the Tribe's request each time. The Tribe filed a water rights action on June 14, 2006, seeking declaratory relief, injunctive relief, compensatory damages, and specific performance. In essence, the Tribe claims that the Agreement is a binding contract that obligates the District to condemn 1,200 acres of land on the Tribe's behalf to build the Plum Creek Project.

The District Court found that the Agreement was unambiguous, and did not require the District to condemn land on the Tribe's behalf. The District was entitled to summary judgment on this issue.

TAX - LOUISIANA

Graugnard v. Capital Area Transit System

Court of Appeal of Louisiana, First Circuit - December 20, 2013 - So.3d - 2012-2025 (La.App. 1 Cir. 12/20/13)

Capital Area Transit System (CATS) is authorized to impose a tax on any subject of taxation within the territorial area of East Baton Rouge Parish or any local governmental subdivision or subdivisions located wholly within any of the municipalities located wholly within the boundaries of East Baton Rouge Parish for any transit-related purpose whatsoever, provided that the proposed tax is approved by a majority of voters voting on the proposition within the affected local governmental subdivisions at an election held in accordance with the Louisiana Election Code. Accordingly, CATS is authorized to call a tax election parish wide or within the limits of any municipality that is wholly located within the boundaries of East Baton Rouge Parish.

On April 21, 2012, CATS exercised its statutory authority and held special elections in the cities of Baton Rouge, Baker, and Zachary to levy an ad valorem tax (the Tax) within those cities. At that time, it is undisputed that CATS provided transit services within these three cities as well as in the unincorporated areas of East Baton Rouge Parish. However, because CATS did not call a parish-wide election, the registered voters that reside within the unincorporated areas of East Baton Rouge Parish were unable to participate in the April 21, 2012 election. The cities of Baton Rouge and Baker passed the Tax.

Graugnard and Smith filed suit challenging the validity of the Tax on equal protection grounds under both the federal and state constitutions. According to the allegations of their petition, Graugnard lives within the municipal boundaries of Baton Rouge. Smith, who lives in the unincorporated area of East Baton Rouge Parish, owns taxable property within the city of Baton Rouge. The gist of plaintiffs' assertions is that individuals who reside outside of the cities of Baton Rouge and Baker, but own property inside those cities, were denied the right to vote in the Tax elections. Additionally, they maintain that individuals who pay the ad valorem taxes on property owned inside those cities suffer an equal protection violation because the proceeds of the Tax will be spent outside of the municipal limits for the benefit of individuals and businesses that do not have to pay the Tax. They aver their claim's' also set forth a cause of action under the 28 U.S.C. § 1983, which provides an enforcement action for federal constitutional and statutory rights. Plaintiffs requested a declaration that the Tax is invalid as a violation of their federal and state constitutional equal protection rights.

CATS filed several exceptions, including peremptory exceptions urging objections of prescription, peremption, no cause of action and no right of action. CATS claimed that because the parties stipulated that plaintiffs had not filed their suit within sixty days, CATS was entitled to a dismissal of the suit under La. R.S. 18:1294.

The fundamental question raised in this case is what period of limitation applies to a § 1983 federal constitutional equal protection claim challenging the validity of a state ad valorem tax and tax election brought in a Louisiana district court. The Court of Appeal concluded that the sixty-day period required by La. R.S. 18:1294 applied, dismissing plaintiff's suit.

EMINENT DOMAIN - MARYLAND

Montgomery County v. Soleimanzadeh

Court of Appeals of Maryland - December 23, 2013 - A.3d - 2013 WL 6761978

County brought condemnation action against landowners. Earlier in the proceedings, the Circuit Court imposed discovery violation sanctions precluding landowners from introducing any evidence as to the fair market value of the taken properties. Because of these sanctions, the landowners were unable to generate through affirmative evidence a genuine dispute of material fact concerning the County's appraisal valuations of the taken properties in either case. Thus, the Circuit Court granted

the County's Motions for Summary Judgment on the issue of just compensation.

The Court of Special Appeals reversed and remanded. County petitioned for certiorari.

The Court of Appeals held that:

- Summary judgment was available in condemnation proceeding, and
- County expert's appraisal was sufficient to support award of just compensation.

PENSIONS - MICHIGAN

Welch v. Brown

United States Court of Appeals, Sixth Circuit - January 3, 2014 - Fed.Appx. - 2014 WL 25641

To stave off municipal insolvency and balance the City of Flint's budget, the Governor of Michigan appointed an Emergency Manager to address the financial crisis. Plaintiffs challenged several orders the Emergency Manager issued, which modified existing contracts and collective bargaining agreements with respect to health-care benefits of municipal retirees.

Plaintiffs and the class they represent are individual retired municipal workers, their eligible spouses, dependents, and the United Retired Governmental Employees (URGE), an organization that represents the interests of municipal retirees. Seeking injunctive relief and damages under 42 U.S.C. § 1983, Plaintiffs filed a Class Action Complaint against the City of Flint, its current and former Emergency Managers, its Retirement Officer Manager, and its Finance Director (collectively, "Defendants").

According to Plaintiffs, Defendants violated the Contract and Bankruptcy Clauses of the United States Constitution and deprived them of a property interest without due process or just compensation. Plaintiffs requested a preliminary injunction to enjoin Defendants from modifying the contracts and ordinances governing their health-care benefits and to restore any already modified agreements to the status quo ante. Although Defendants argued that reducing retiree benefits is a "necessary change" to avoid bankruptcy, the district court was not persuaded based on the evidence and argument presented. Finding no abuse of discretion, the court of appeals affirmed the district court's order granting preliminary injunctive relief.

PUBLIC UTILITIES - NEW JERSEY

Penpac, Inc. v. County of Passaic

Superior Court of New Jersey, Appellate Division - December 27, 2013 - Not Reported in A.3d - 2013 WL 6817644

This appeal concerned the liability of Passaic County for one particular debt of the Passaic County Utilities Authority (PCUA or the Authority). Plaintiff Penpac, Inc., a waste management company, held a judgment against the PCUA for services rendered. Penpac appealed from an October 25, 2012 order granting summary judgment to Passaic County and dismissing Penpac's complaint seeking that the County pay the PCUA's debt of between one and two million dollars. Passaic County agreed to financially assist the Authority in a number of agreements, but refused to pay the PCUA's debt owed to Penpac.

Penpac made five arguments in opposition to the grant of summary judgment to the County. First, Penpac argued that defendant Passaic County has de facto dissolved the PCUA, and because the Municipal and County Utilities Authority Law (MCUA), N.J.S.A. 40:14B–1 to –69, requires that an authority's debts be paid upon dissolution, the County was now liable for all of the PCUA's debts. Second, Penpac argued that the County has assumed all of the PCUA's liabilities by operating the authority as a shell corporation. Third, Penpac maintained that the County had waived any statutory protection from the debts. Fourth, Penpac posited that the County had de facto merged with the PCUA. Finally, Penpac argued that the PCUA's corporate veil should be pierced. "The motion judge rejected these arguments and we affirm."

EMINENT DOMAIN - NORTH CAROLINA

In re NCVAMD, Inc.

United States Bankruptcy Court, E.D. North Carolina., Raleigh Division - December 31, 2013 - Slip Copy - 2013 WL 6860816

On April 19, 2010, NCVAMD, Inc., filed a petition under chapter 7 of the Bankruptcy Code and Gregory B. Crampton was appointed as chapter 7 trustee on April 20, 2010. At the time of filing bankruptcy, the debtor owned a 25% remainder interest in a .59 acre tract of land, with all improvements thereon, located off of Roberta Road in Concord, North Carolina (the "Property").

After the filing of the petition, the trustee and representatives of the NCDOT engaged in discussions regarding the possibility of the NCDOT purchasing the Property in its entirety, including the interest owned by the bankruptcy estate. The two sides could not reach an agreement on the fair market value of the Property. However, as a result of these negotiations the NCDOT gained express and actual knowledge of the bankruptcy filing and the trustee's appointment. Despite this actual knowledge, the NCDOT filed a Complaint and Notice of Taking in the Superior Court seeking to condemn a portion of the Property. The NCDOT then demolished a 1,138 square foot commercial building on the Property as part of the condemnation project. The filing of the Condemnation Action, the recordation of the Memorandum of Action, and destruction of the building all took place after the NCDOT had actual knowledge of debtor's bankruptcy case, and most importantly, before any attempt by the NCDOT to obtain stay relief.

On September 24, 2013, almost one year after filing the Condemnation Action, the NCDOT filed a motion for relief from the automatic stay under 11 U.S.C. § 362. The motion expressly disclaimed any knowledge of the bankruptcy prior to filing the Condemnation Action, despite the fact that the chapter 7 trustee is named as a party defendant in the Condemnation Action complaint. Email communications between the NCDOT and the trustee, dated in May of 2012, undisputedly show that the NCDOT clearly had actual and specific knowledge of the bankruptcy prior to filing the Condemnation Action.

The Bankruptcy Court was not amused, awarding the trustee attorneys' fees, actual damages, and punitive damages.

WATER LAW - NORTH DAKOTA

Reep v. State

Supreme Court of North Dakota - December 26, 2013 - N.W.2d - 2013 ND 253

Owners of property next to navigable waters brought action against State, seeking declaration regarding ownership of mineral interests under shore zone of the navigable waters. In a separate action, well operator sued several upland owners in an interpleader action to determine adverse claims to proceeds from mineral interests under the shore zone of navigable waters. Following consolidation of actions, the District Court entered summary judgment, determining that the State owned the mineral interests under the land in the shore zone. Appeals were consolidated.

The Supreme Court of North Dakota held that statute governing interests of grantees in shore zones between high and low watermarks on a navigable lake or stream does not convey State's equal footing interest in minerals under the shore zone to upland landowners.

PUBLIC UTILITIES - OHIO

In re Application of Black Fork Wind Energy, L.L.C.

Supreme Court of Ohio - December 18, 2013 - N.E.2d - 2013 -Ohio- 5478

Objectors appealed order of state Power Siting Board, issuing certificate approving construction of wind-powered electric generation facility, or wind farm.

The Supreme Court of Ohio held that Board did not prevent objectors from cross-examining witnesses or presenting evidence, such as would have violated objectors' due process rights by failing to call as witnesses seven of eight staff members who had prepared a report on the proposed facility. Although all eight Board staff members had prefiled their written testimony, there was no indication that ALJ improperly considered the prefiled testimony of staff members who did not testify, and objectors failed to compel attendance of the seven non-testifying staff members. Because appellants had not established that the Board's order was unlawful or unreasonable, the board's order was affirmed.

MUNICIPAL ORDINANCE - OHIO

Lima v. Stepleton

Court of Appeals of Ohio, Third District, Allen County - December 23, 2013 - N.E.2d - 2013 -Ohio- 5655

On November 19, 2012, a criminal complaint was filed in Lima Municipal Court charging Stepleton with one count of failure to confine a vicious dog in violation of Lima City Ordinance ("LCO") 618.125(D), a minor misdemeanor. Stapleton entered a plea of no contest and appealed.

In his third and fifth assignments of error, Stepleton essentially argued that his conviction should be reversed because LCO 618.125(D) is unconstitutional under the Home Rule Amendment to the Ohio Constitution. Specifically, Stepleton asserted that LCO 618.125(D) conflicts with certain provisions of R.C. Chapter 955. As such, he claims that the trial court erred in applying LCO 618.125(D).

The Court of Appeals agreed with Stapleton, reversing his conviction.

MUNICIPAL ORDINANCE - OHIO

State v. Bielski

Court of Appeals of Ohio, Seventh District, Mahoning County - December 19, 2013 - Slip Copy - 2013 -Ohio- 5771

John Bielski was convicted in municipal court of a city property maintenance code violation after being cited for an accumulation of rubbish on his property. The citation stated that Appellant had violated section 307.1 of the Youngstown Property Maintenance Code, a third-degree misdemeanor criminal offense.

Bielski argued on appeal that the Youngstown Property Maintenance Code section he was charged with was so vague that a person of ordinary intelligence would not be put on notice as to the behavior that is proscribed and the Court of Appeals agreed.

Bielski also argued that the offense with which he was charged was a strict liability criminal offense that contained no guidelines defining its parameters or preventing its arbitrary enforcement. International Property Maintenance Code Section 307.1 prohibits the "accumulation of rubbish or garbage" in both the interior and exterior of every structure. The deputies who issued the citation could not explain what "accumulation of rubbish" meant. The section of the actual Youngstown Property Maintenance Code cited on appeal made no reference to whether it is the owner or tenant's responsibility to keep the premises free from garbage. There was no definition as to how long the rubbish must be present to be treated as an "accumulation." There were no guidelines explaining when a person should receive a warning, an administrative citation, or a criminal citation. The Appeals Court therefore concluded that International Property Maintenance Code Section 307.1, whether enforced directly or purportedly through Youngstown Ord. Chapter 546, was unconstitutionally vague on its face. Bielski's conviction was reversed and the charge dismissed.

OPEN MEETINGS - WASHINGTON

Amalgamated Transit Union Local No. 1576 v. Snohomish County Public Transp. Ben. Area

Court of Appeals of Washington, Division 1 - December 23, 2013 - P.3d - 2013 WL 6761984

Unions representing transit employees and nonvoting member of community transit agency board of directors who had been selected by unions brought declaratory judgment action against community transit agency, seeking declaration that provision of transit agency's bylaws, prohibiting nonvoting board member from attending any board executive session held to discuss personnel matters, was void. Parties filed cross-motions for summary judgment. The Superior Court granted summary judgment in favor of transit agency. Plaintiffs appealed.

The Court of Appeals held that:

- Plaintiffs had standing to bring action under Uniform Declaratory Judgments Act (UDJA) seeking invalidation of contested provision of transit agency's bylaws;
- Provision of transit agency's bylaws prohibiting nonvoting transit agency board member from attending any executive session of board pertaining to personnel matters conflicted with state statute and was therefore void; and
- Provision of state statute granting chair of board of directors of transit agency discretion to exclude nonvoting board member from attending executive sessions of board did not violate equal protection clause.

Provision of community transit agency's bylaws prohibiting nonvoting member of transit agency board of directors, who was selected by transit employees union, from participating in any closed executive session of transit agency board pertaining to personnel matters irreconcilably conflicted with provision of state statute granting chair of transit agency board the discretion to exclude the nonvoting board member from any closed executive session not pertaining to labor negotiations, thus rendering the bylaw invalid. State law granted chair of transit agency board the authority and discretion to exclude nonvoting board member from attending executive sessions held for purpose of discussing personnel matters, but challenged bylaw eliminated any such exercise of authority by the chair.

PENSIONS - ALABAMA

City of Gadsden v. Harbin

Supreme Court of Alabama - December 13, 2013 - So.3d - 2013 WL 6516387

Harbin started working as a police officer for the City in 1972. It is undisputed that he did not have a written employment contract with the City. In 1972, Harbin also started mandatory participation in the Policemen's and Firemen's Retirement Fund of the City of Gadsden ("PFRF"). At that time, the PFRF provided, in part, that, after 20 or more years of service, a participant would receive "[a] retirement benefit equal to 50 percentum of the current salary being paid to persons holding the same rank as such retirement member held at the time of his retirement."

In 1975, the PFRF was modified and the above-quoted "sliding scale provision" was eliminated. The PFRF was again modified in 1980. Finally, in 2002, all the funds in the PFRF were transferred to the Employees Retirement System of Alabama ("ERS"), which then administered the retirement program for the City's police officers. Harbin retired in 2012 and currently receives pension payments under the ERS.

On January 11, 2007, Harbin sued the City, alleging breach of contract and seeking equitable relief.

The Supreme Court of Alabama held that:

- Where officer had not retired and was not eligible to retire before effective date of amendment to PFRF, his rights under the PFRF had not vested and were subject to modification, and
- Officer failed to establish claim, absent a showing that a contract actually existed between him and city.
