
SCHOOLS - LOUISIANA

Orleans Parish School Bd. v. Pastorek

Court of Appeal of Louisiana, First Circuit - August 14, 2013 - So.3d - 2012-1174 (La.App. 1 Cir. 8/14/13)

Plaintiff, Orleans Parish School Board ("OPSB"), filed a petition seeking injunctive and declaratory relief. The Louisiana Department of Education ("DOE"), the Louisiana State Board of Elementary and Secondary Education ("BESE"), and John White, in his capacity as Superintendent of Education, were all named as defendants. According to the petitions, OPSB alleged that the defendants were exceeding their constitutional authority by retaining control over non-failing OPSB schools that had been transferred from the jurisdiction of the OPSB to the BESE administered Recovery School District (the "RSD"). OPSB sought a judgment declaring that the attempts by the defendants to retain control over non-failing OPSB schools or otherwise interfere with the business affairs of the OPSB exceeded the constitutional and statutory limits of their authority. More specifically, OPSB requested that the trial court issue a permanent injunction restraining the defendants from acting in violation of their constitutional authority.

The trial court denied the OPSB's requests for injunctive relief and declaratory judgment and the appeals court affirmed.

LAND USE - NEW JERSEY

In re State Highlands Water Protection and Planning Council

Superior Court of New Jersey, Appellate Division - August 7, 2013 - Not Reported in A.3d - 2013 WL 4010274

On appeal, the court was required to decide when a municipality must comply with the regulatory framework of the Highlands Water Protection and Planning Act (Act), N.J.S.A. 13:20–1 to–35, if it has chosen to join the Highlands Region planning areas. At issue was compliance with the provision that requires a municipality to obtain prior approval of the Highlands Water Protection and Planning Council (Council) before amending its municipal land use ordinance.

Appellant Greenwich Township (Greenwich) argued that Lopatcong Township (Lopatcong) was subject to this prior approval requirement when it amended its land use ordinance to permit, as a conditional use, the siting of asphalt and concrete manufacturing facilities in Lopatcong, which borders Greenwich. Thus, Greenwich argued, the Lopatcong ordinance was invalid because Lopatcong did not seek or obtain prior approval.

However, the Council, interpreting the Act, determined that the relevant area of Lopatcong was not yet subject to the Regional Master Plan (RMP) when Lopatcong adopted its challenged land use ordinance. Therefore, prior approval was not required. Greenwich appeals the Council's decision.

Having reviewed Greenwich's arguments in light of the facts and applicable law, the appeals court affirmed.

SCHOOLS - NEW JERSEY

Borough of Seaside Park v. Commissioner of New Jersey Dept. of Educ.

Superior Court of New Jersey, Appellate Division - August 12, 2013 - A.3d - 2013 WL 4045309

Boroughs, their boards of education, and residents brought action seeking dissolution of school district, permission to withdraw from district, or alteration of district's funding formula following legislative mandate that regional school districts be funded through equalized valuation, rather than on a per-pupil basis.

The Superior Court, Appellate Division, held that:

- Failure to exhaust administrative remedies precluded relief;
- Borough failed to establish that exhaustion of remedies would have been futile;
- Circumstances did not warrant extraordinary equitable relief;
- Statutory remedies available were not illusory;
- Apportionment of cost system did not violate constitutional provision governing educational funding;
- Legislative funding mandate did not violate contracts clauses of federal and state constitutions;
- Funding mandate did not constitute an unconstitutional taking; and
- Mandate did not violate substantive due process rights of taxpayers.

Regional school district's apportionment of cost system, in which borough's taxpayers paid about the average State cost of education per pupil, did not violate state constitutional provision governing educational funding, which required a thorough and efficient education. Constitutional provision was focused primarily on the education of students, not with equality among taxpayers, there was no allegation that district's students were not receiving a thorough and efficient education, and the distribution of education costs among taxpayers was a policy decision to be made by the legislature.

TAX - PENNSYLVANIA

Reaman v. Allentown Power Center, L.P.

Commonwealth Court of Pennsylvania - August 8, 2013 - A.3d - 2013 WL 4029076

Taxpayer appealed from order of the Court of Common Pleas directing taxpayer to pay a business privilege tax in the amount of $31,469.38, including penalties and interest.

The Commonwealth Court held that:

- Taxpayer's providing of commercial leasehold space to others constituted "performance of services" within meaning of tax ordinance, and
- Commonwealth Court lacked power to abate the interest or penalties imposed against taxpayer.

Providing commercial leasehold space to others constituted the "performance of services" within meaning of business privilege tax ordinance, defining business as any activity carried on or

exercised for gain or profits in township, including, but not limited to, sale of merchandise or other tangible personalty or performance of services. Principle stated in ordinance was to establish a tax on "activities for gain or profit," leasing commercial real property was such an activity, and exemption of rental income from owner-occupied real property ordinance would have no meaning if rental income was not subject to the business privilege tax.

EMINENT DOMAIN - PENNSYLVANIA

Smucker v. Lancaster City Planning Com'n

Commonwealth Court of Pennsylvania - August 2, 2013 - A.3d - 2013 WL 3958458

Property owners appealed a city planning commission's determination that their vacant property was blighted. The Court of Common Pleas certified owners' property as blighted and authorized the city's redevelopment authority to file a declaration of taking. Owners appealed.

The Commonwealth Court held that:

- City's evidence was sufficient to prove that owners' property was vacant, and
- Common pleas court did not unduly restrict the scope of its evidentiary inquiry or capriciously disregard evidence regarding vacancy.

City's evidence was sufficient to prove that owners' property was vacant, so as to support certification of the property as blighted under Urban Redevelopment Law. Owner refused numerous requests to document occupancy with a lease and the address of an agent responsible for maintenance. Owner refused to allow city to inspect the inside of the property, and owner's uncorroborated testimony that one "Agent Josh" lived at the property and had changed the locks was rejected by trial court. 35 P.S. § 1712.1(e)(1)(i).

SCHOOL DISTRICTS - PENNSYLVANIA

In re Independent School Dist. for Property Situate in Jefferson Tp.

Commonwealth Court of Pennsylvania - August 9, 2013 - A.3d - 2013 WL 4033845

Landowners filed petition to establish independent school district for purposes of transferring their 22 contiguous parcels of property to the district. The Court of Common Pleas dismissed petition, concluding that most of those signing it were not eligible to do so. Landowners appealed.

The Commonwealth Court held that landowners were "taxable inhabitants," and thus eligible to sign petition.

At hearing for petition to establish independent school district for purposes of transferring territory to proposed district, trial court must determine four things: (1) precise boundaries of proposed independent school district; (2) that a majority of "taxable inhabitants" in "contiguous territory" have, in fact, signed petition; (3) that petitioners have listed reasons for transfer; and (4) that petition names school district into which territory is proposed to be transferred.

Under public school code provision stating that in order to establish independent school district, majority of taxable inhabitants of any contiguous territory in any school district may present petition asking that territory be established as independent district, "taxable inhabitants" are those whose

names appear on tax assessors' list as persons who can be lawfully taxed, even though not all landowners were legally domiciled in township in which property was located.

PROFESSIONAL CONDUCT - SOUTH DAKOTA

In re Discipline of Tornow

Supreme Court of South Dakota - August 7, 2013 - N.W.2d - 2013 S.D. 61

In attorney disciplinary proceedings, the Disciplinary Board found misconduct and recommended public censure.

The Supreme Court of South Dakota held that:

- Attorney's misleading statements violated rule of professional conduct;
- Attorney's attempted concealing of potential evidence constituted misconduct;
- Attorney's use of information obtained in his representation of city to assist counsel representing his daughter on city traffic charge was improper;
- Attorney's disrespectful and insulting invectives in brief to circuit court was misconduct; and
- Public censure was warranted as a sanction.

Public censure was warranted as a sanction for attorney for city who engaged in misconduct by making misleading statements in his representation of city board of ethics, by attempting to conceal potential evidence, by using information obtained in his representation of city to assist counsel representing his daughter on city traffic charge, and by including disrespectful and insulting invectives in brief to circuit court. Although attorney had practiced law for twenty-five years and had no prior substantiated disciplinary complaints, attorney's acts were intentional and numerous, attorney minimized his misconduct, and attorney's conduct was of a serious professional nature.

As a public sector lawyer and prosecutor, attorney representing city and prosecuting violations of its ordinances was a minister of justice obligated to guard the rights of the accused, enforce the rights of the public, and see that justice was done without employing improper methods.

EMPLOYMENT - UTAH

Becker v. Sunset City

Supreme Court of Utah - August 13, 2013 - P.3d - 2013 UT 51

Police officer sought administrative review of his termination for failing a portable breath test. The city appeals board upheld the termination, and officer appealed.

The Supreme Court of Utah held that:

- Substantial evidence supported finding that police officer was under the influence of alcohol, in violation of city's alcohol policy, such that termination was warranted, and
- City was exempt from the requirements imposed by statute, stating that testing or retesting for the presence of drugs or alcohol by an employer shall be carried out within the terms of a written policy.

MUNICIPAL LIABILITY - WASHINGTON

Gorman v. Pierce County

Court of Appeals of Washington, Division 2 - August 13, 2013 - P.3d - 2013 WL 4103314

Dog attack victim brought action against county alleging that county negligently failed to take appropriate action in response to complaints about dogs before the attack. The Superior Court entered judgment on a jury verdict finding county liable, but also finding that victim's actions contributed to her injuries.

On cross-appeals, the Court of Appeals held that:

- Failure to enforce exception to the public duty doctrine applied to county's failure to apply dangerous dog classification process to dogs following reports by neighbors;
- Evidence of reasons for prior complaints regarding dogs was admissible in dog attack victim's action; and
- Evidence was sufficient to support jury's finding of contributory negligence.

Under the failure to enforce exception to the public duty doctrine, a government's obligation to the general public becomes a legal duty owed to the plaintiff when: (1) government agents who are responsible for enforcing statutory requirements actually know of a statutory violation; (2) the government agents have a statutory duty to take corrective action but fail to do so; and (3) the plaintiff is within the class the statute intended to protect.

Failure to enforce exception to the public duty doctrine applied to county's failure to apply dangerous dog classification process to dogs following reports by neighbors. Under ordinance, although the county had discretion to classify or not classify any particular dog as potentially dangerous, it had a duty to at least apply the classification process to any apparently valid report of a dangerous dog.

BONDS - ALABAMA

Water Works Bd. of City of Birmingham v. AMBAC Financial Group, Inc.

United States Court of Appeals, Eleventh Circuit - August 5, 2013 - Fed.Appx. - 2013 WL 3970904

The Board created the Reserve Fund by purchasing a surety bond from Ambac, which had a AAA rating at the time. In June 2008 Ambac's rating was downgraded to AA. As a result, the Board had to put cash in the Reserve Fund. When that happened, the Board sued Ambac for breach of contract, fraud, suppression of truth, and negligence.

The Water Works Board of the City of Birmingham appealed the district court's dismissal of its claim against Ambac Financial Group, Inc. for failure to state a claim upon which relief can be granted.

In March 2007 the Board issued water and sewer revenue bonds. To do that, it was required to establish a Reserve Fund. One of the ways the Board could satisfy the requirements for the Reserve Fund was by purchasing a surety bond from an issuer that had a credit rating of AAA. If the issuer's rating fell below AAA while the bonds were still outstanding, the Board was required to deposit into the Reserve Fund the amount of all outstanding securities or replace the original surety bond with another bond from an issuer that had a AAA rating.

The Board created the Reserve Fund by purchasing a surety bond from Ambac, which had a AAA rating at the time. In June 2008 Ambac's rating was downgraded to AA. As a result, the Board had to put cash in the Reserve Fund. When that happened, the Board sued Ambac for breach of contract, fraud, suppression of truth, and negligence.

The district court dismissed the Board's breach of contract claim, reasoning that the contract between Ambac and the Board did not require that Ambac keep its AAA rating. The Board argued that the Trust Indenture, which provided the terms for the Board's issuance of the water and sewer bonds, imposed a contractual obligation on Ambac to maintain a AAA credit rating. The court found that, even if it was assumed that Ambac was bound by the Trust Indenture, the Board had not stated a viable claim for breach of contract. The Indenture did not require the bond issuer to keep a AAA rating. On the contrary, it explicitly acknowledged the possibility of the issuer's rating being downgraded and explained what the Board was required to do in that situation.

The Board alleged that Ambac's statements that it made careful investment choices were misrepresentations because they were made at a time when Ambac was lowering its underwriting standards. The appeals court agreed with the district court that Ambac's statements were merely "puffing statements" designed to make Ambac look appealing.

The Board based its claim of suppression of truth on the fact that Ambac made statements about how selective and cautious it was in investing without disclosing that it had lowered its underwriting standards and without explaining its surveillance policy. Ambac's general statements that it was "selective" or that it was engaging in "active surveillance," however, did not give rise to a duty to disclose its underwriting standards or surveillance policies

Finally, the Board argued that the court erred when it dismissed its negligence claim, arguing that even if there was no express or implied agreement that Ambac would maintain its AAA rating, Ambac had a duty not to negligently lose its AAA rating. Here, the Board argued that Ambac's negligence caused it to lose its AAA rating. As Alabama law does not impose a duty on Ambac to retain that rating, the only possible source for that duty would be in the contract between the Board and Ambac, making the Board's claim one sounding in contract law.

DESIGN IMMUNITY - CALIFORNIA

Curtis v. County of Los Angeles

Court of Appeal, Second District, Division 4, California - July 30, 2013 - Cal.Rptr.3d - 13 Cal. Daily Op. Serv. 8212

Motorist brought action against county for injuries sustained in a vehicle collision precipitated by another driver while on highway, alleging that lack of a center median space or barrier constituted a dangerous condition.

The Court of Appeal held that:

- Summary judgment evidence established that lack of median space or barrier was not a proximate cause of accident;
- Drawings and declaration established that deputy director exercised discretionary authority in rejecting median space of barrier, as required for design immunity; and
- There was no increase in highway traffic flow, speed, or accidents which supported claim that county lost design immunity through changed conditions.

In order to demonstrate entitlement to design immunity, a public entity must establish three elements: (1) a causal relationship between the plan or design and the accident, (2) discretionary approval of the plan or design prior to construction, and (3) substantial evidence supporting the reasonableness of the plan or design.

Drawings and declaration were sufficient to show that deputy director considered a median space and/or barrier for highway, but rejected those features in the exercise of his discretionary authority, as required for county to have design immunity in action arising out of motor vehicle accident on highway. Design drawings showed neither a median space nor a barrier, and deputy director stated that, in his professional engineering judgment, a center median was "not feasible due to a variety of technical reasons," and that "technical, property ownership and environmental considerations precluded any immediate installation of a center median that is 10′ in width," which was required to "even consider installing a center median barrier."

GOVERNMENTAL IMMUNITY - CONNECTICUT

Horrigan v. Town of Washington

Appellate Court of Connecticut - July 30, 2013 - A.3d - 144 Conn.App. 536

Administrators of deceased motorist's estate brought defective highway action against town after his car flipped over after sliding into an uncovered storm drain.

The Appellate Court held that evidence was sufficient to support finding that uncovered storm drain on shoulder of road did not "necessarily obstruct or hinder" use of the road, as required to be a defect.

A "defect" in a highway has been described as any object or condition in, upon, or near the traveled path which would necessarily obstruct or hinder one in the use of the road for the purpose of traveling thereon, or which, from its nature and position, would be likely to produce that result.

In this case, testimony showed that drain was placed at least three feet from the paved portion of road and that it was placed there for the purpose of making the paved portion safer by draining excess water, and two wooden posts of visible size identified the location of the drain to passersby.

The court noted that a municipality is not an insurer against accidents occurring on its highways; its duty is not to make its streets absolutely safe for the users thereof but only to exercise reasonable care to keep them in a reasonably safe condition for travel.

GOVERNMENTAL IMMUNITY - CONNECTICUT

Chirieleison v. Lucas

Appellate Court of Connecticut - July 30, 2013 - A.3d - 144 Conn.App. 430

Following fatal accident on interstate in which vehicle crossed through line of warning flares and collided with fire truck, administratrix of deceased vehicle passenger's estate brought wrongful death action against fire truck driver and town, alleging negligence against both defendants and nuisance against town.

The Appellate Court held that:

- Negligence claim against town was moot on appeal;
- Fire truck driver's actions were discretionary in nature;
- Deceased passenger did not fall within identifiable person in imminent harm exception to qualified governmental immunity; and
- Plaintiff failed to establish a prima facie case of nuisance against town.

To prevail on the identifiable person in imminent harm exception to the doctrine of qualified governmental immunity, the plaintiff must demonstrate that she was an identifiable person and was subject to imminent harm and that a public officer's conduct subjected her to that harm, despite the apparent likelihood of harm to her.

The identifiable person in imminent harm exception to the doctrine of qualified governmental immunity requires three things: (1) an imminent harm, (2) an identifiable victim, and (3) a public official to whom it is apparent that his or her conduct is likely to subject that victim to that harm. The failure to establish any one of the three prongs precludes the application of the identifiable person subject to imminent harm exception. the class of foreseeable victims to which passenger belonged, consisting of people in automobiles on the interstate, was not narrowly defined because any member of the public could have chosen to travel the interstate at the time the accident occurred, and passenger was not compelled by any municipal or state mandate to be in an automobile on the interstate at that time.

In this case, the class of foreseeable victims to which passenger belonged, consisting of people in automobiles on the interstate, was not narrowly defined because any member of the public could have chosen to travel the interstate at the time the accident occurred, and passenger was not compelled by any municipal or state mandate to be in an automobile on the interstate at that time.

SIGNAGE - ILLINOIS

CBS Outdoor, Inc. v. Village Plainfield, Ill.

United States District Court, N.D. Illinois, Eastern Division - July 30, 2013 - F.Supp.2d - 2013 WL 3975171

CBS owned a billboard on land that was subsequently annexed by the Village. The Village later conditioned a special use permit to develop the property on the removal of the billboard. This was made possible when the former owner of the property did not renew CBS' lease upon its expiration.

CBS brought an action the Village and the former property owner, alleging violations of its constitutional rights to due process, equal protection of the law, and freedom of speech.

The court found no validity to any of CBS' claims and dismissed the case.

FIRST AMENDMENT - INDIANA

Cabral v. City of Evansville, Ind.

United States District Court, S.D. Indiana, Evansville Division - July 31, 2013 - F.Supp.2d - 2013 WL 3940631

City residents brought Establishment Clause action, challenging city's approval of church's planned two-week display of numerous six-foot crosses on public riverfront property.

The District Court held that display of crosses would convey a message of city's endorsement of Christianity to the reasonable observer, and thus, would violate the Establishment Clause.

COLLECTIVE BARGAINING AGREEMENT - MASSACUSETTS

City of Boston v. Boston Police Superior Officers Federation

Supreme Judicial Court of Massachusetts, Suffolk - August 9, 2013 - N.E.2d - Mass.

City moved to vacate arbitration award finding that city violated collective bargaining agreement and awarding police officer damages and reinstatement to his original position.

The Supreme Judicial Court held that provision in collective bargaining agreement prohibiting the transfer of certain union representatives between stations or assignments impermissibly delegated police commissioner's statutory power to assign and organize officers and thus, grievance arbitrator exceeded his authority in reversing police officer's transfer.

Considerations of public safety and a disciplined police force require managerial control over matters such as staffing levels, assignments, uniforms, weapons, definition of duties, and deployment of personnel. The deployment of officer personnel to meet the tasks and responsibilities of the department is a fundamental and customary prerogative of municipal management which falls squarely within the police commissioner's authority.

Police commissioner's nondelegable managerial authority to transfer police officers could not be delegated to an arbitrator pursuant to provision of collective bargaining agreement, even if the city and the union consented to the provision.

EMPLOYMENT - MISSOURI

Schumer v. Lee

Missouri Court of Appeals, Western District - July 30, 2013 - S.W.3d - 2013 WL 3880185

Police officer sought judicial review of a decision of the Administrative Hearing Commission that found the officer subject to discipline for committing a criminal offense while on active duty, and the subsequent permanent revocation of his peace officer license by the Director of the Department of Public Safety.

The Court of Appeals held that:

- Commission's finding that officer committed a crime while on active duty did not violate officer's constitutional right of due process;
- One-year criminal statute of limitations for assault did not apply to administrative proceeding;
- Finding that police officer's act of grabbing driver by the throat during a routine traffic stop placed him in apprehension of immediate physical injury was supported by substantial evidence;
- Substantial evidence existed to support finding that police officer acted with reckless disregard for driver's safety;
- It was not inconsistent for the Director to find that police officer acted both purposefully or knowingly in assaulting driver during routine traffic stop, as one basis for finding that discipline was appropriate, and also finding that officer recklessly disregarded driver's safety, as an alternative basis for discipline;

- Director was not required to make additional findings of fact and conclusions of law to justify the permanent revocation of police officer's peace officer license; and
- Officer waived for purposes of appeal his argument that the Director erred in permitting the Deputy Director to make the decision to permanently revoke officer's peace officer license.

The constitutional protections afforded criminal defendants are not extended to a professional licensee subject to discipline, and thus, the administrative decision to permanently revoke police officer's peace officer license after finding officer committed a criminal offense while on active duty was not a violation of officer's constitutional right of due process, even though no criminal charges were brought by a public prosecutor.

SPECIAL DISTRICTS - MISSOURI

KCAF Investors, L.L.C. v. Kansas City Downtown Streetcar Transp. Development Dist.

Missouri Court of Appeals, Western District - August 7, 2013 - S.W.3d - 2013 WL 4008192

The Kansas City Downtown Streetcar Transportation Development District was formed in 2012 via a formation lawsuit and a series of elections. The construction and operation of the streetcar line was to be funded, in substantial part, by special assessments on real property located within the District, and by a sales tax, not to exceed one percent, on retail sales within the District.

Appellants – property and business owners in the district – challenged the legality of the District's formation and the imposition of the sales tax and real-property assessments.

The circuit court entered its judgment granting the Streetcar District's motion to dismiss Appellants' petition. The court held that Appellants' challenges to the real-property special assessments were "election contests" which were untimely under § 115.577, because Appellants did not bring their claims within thirty days of the certification of the results of the election approving the special assessments. The circuit court also held that Appellants were estopped from asserting any of their claims because they should have raised their challenges in the formation lawsuit, prior to the elections which authorized the District's formation and the imposition of the sales tax and real-property assessments. The appeals court affirmed.

EMINENT DOMAIN - NEW JERSEY

Norfolk Southern Ry. Co. v. Intermodal Properties, LLC

Supreme Court of New Jersey - August 6, 2013 - A.3d - 2013 WL 3984516

Railroad filed petition for authorization to acquire property adjacent to railyard for use in intermodal freight operations through exercise of power of eminent domain. The Department of Transportation (DOT) authorized railroad to commence condemnation proceedings.

The Supreme Court of New Jersey held that:

- Railroad's proposed use of property it sought to acquire through its power of eminent domain was not incompatible with the public interest;
- Property owner could not invoke the prior use doctrine in defense of railroad's attempt to exercise its power of eminent domain; and

- Railroad was not required to prove urgency, immediacy, or emergency of its need for land as a prerequisite to exercising its condemnation power.

Railroad's proposed use of property it sought to acquire through its power of eminent domain was not incompatible with the public interest, even if property owner's proposal for the use of the property might have been more in the public's interest. Statutory provision that governed the power of condemnation by a public utility, including a railroad, demanded that the focus of the proposed use be on the proposed use identified by the contemnor, and in the absence of a previously existing public use, did not permit a comparative analysis of any competing public purpose proposed by property owner.

The "prior public use doctrine" operates to deny the exercise of the power of condemnation when the proposed use will destroy an existing public use or prevent a proposed public use unless the authority to do so has been expressly given by the Legislature or must necessarily be implied. The application of the doctrine, therefore, is both specific and narrow. The prior public use doctrine does not automatically apply merely because property is already being used for a public purpose.

Railroad was not required to prove urgency, immediacy, or emergency of its need for land as a prerequisite to exercising its statutory condemnation power on the basis of the legislature's use of the phrase "as exigencies of business may demand" in statutory provision that governed a railroad's power of eminent domain. The legislature meant the phrase "exigencies of business" to be understood in the way it was used at the time when the language was chosen, which was understood to describe generally the needs of a business, rather than to allude to an emergent, urgent, immediate, or pressing need.

MUNICIPAL ORDINANCE - NEW YORK

New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City Dept. of Health and Mental Hygiene

Supreme Court, Appellate Division, First Department, New York - July 30, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 05505

Petitioners, a coalition of interest groups, brought hybrid article 78/declaratory judgment proceeding against New York City Department of Health and Mental Hygiene (DOHMH) and New York City Board of Health, challenging the constitutionality of an amendment to the New York City Health Code known as the "Sugary Drinks Portion Cap Rule" or the "Soda Ban," which prohibited New York City restaurants, movie theaters, and other food service establishments (FSEs) from serving certain sugary drinks in sizes larger than 16 ounces.

The Supreme Court, Appellate Division, held that the Board of Health exceeded the bounds of its lawfully delegated authority as an administrative agency when it promulgated the rule in question.

Although the Board was authorized to regulate matters affecting public health, Board did not act solely with a view toward public health when it adopted rule, which contained exemptions for certain drinks and FSEs not because of health-related concerns, but due to social, economic, political, and regulatory considerations. Board went beyond filling gap in existing regulatory scheme but, instead, wrote on a clean slate, especially absent evidence that soda consumption was a health hazard. Board acted in area where legislature had tried but failed to act, and Board did not bring any scientific or health expertise to bear in creating rule.

GOVERNMENTAL IMMUNITY - UTAH

Torrie v. Weber County

Supreme Court of Utah - August 6, 2013 - P.3d - 2013 UT 48

Parents of fleeing suspect, who died in car crash, filed a lawsuit against deputy and county, alleging various theories of negligence in connection with deputy's pursuit of their son.

The Supreme Court held, as matter of first impression, that statutory language exempting emergency vehicle operators from general traffic laws imposes a duty to fleeing suspects to act as a reasonably prudent emergency vehicle operator in like circumstances,

Public duty doctrine precludes the imposition of a duty on a government entity with respect to specific individuals in the absence of a specific connection between the government agency and the individuals that makes it reasonable to impose a duty, and there are at least four circumstances that may create such a special relationship: (1) by a statute intended to protect a specific class of persons of which the plaintiff is a member from a particular type of harm; (2) when a government agent undertakes specific action to protect a person or property; (3) by governmental actions that reasonably induce detrimental reliance by a member of the public; and (4) under certain circumstances, when the agency has actual custody of the plaintiff or of a third person who causes harm to the plaintiff.

BONDS - WEST VIRGINIA

Hinds County, Miss. v. Wachovia Bank N.A.

United States District Court, S.D. New York - July 30, 2013 - F.R.D. - 2013 WL 3947809

In multidistrict litigation against various financial institutions and brokerage firms, alleging conspiracy to illegally rig bids, limit competition, and fix prices in municipal securities derivatives market, the State of West Virginia sought leave to file a second amended complaint to, *inter alia*, reinstate its claims against GE Funding.

Those claims had previously been dismissed "subject to reinstatement of the claims upon a sufficient showing by West Virginia during the course of discovery of facts supporting a plausible inference that GE Funding participated in the alleged conspiracy." Since that time, three former GE Funding employees had been prosecuted for conspirational conduct related to West Virginia's claims against GE Funding.

The District Court ruled that West Virginia would be granted leave to amend, as discovery of facts supported plausible inference that GE Funding participated in alleged conspiracy.

ANNEXATION - WISCONSIN

Darboy Joint Sanitary Dist. No. 1 v. City of Kaukauna

Court of Appeals of Wisconsin - August 6, 2013 - Slip Copy - 2013 WL 3984165

City adopted an ordinance annexing certain property located within the Town and serviced by the Sanitary District. The ordinance proclaimed, pursuant to WIS. STAT. § 66.0217, that the property

was being annexed for purposes of providing municipal services.

Town and the Sanitary District filed suit against the City, alleging that the ordinance did not comport with the requirements of WIS. STAT. § 66.0217(14).

The circuit court dismissed the Town's claims, concluding that WIS. STAT. § 66.0217(11)(c) bars towns from pursuing an action to declare an annexation void for failure to comply with § 66.0217(2). The circuit court dismissed the Sanitary District's claims, concluding that the Sanitary District did not have a legal interest protected by § 66.0217 and therefore also lacked standing to bring the case. The Court of Appeals affirmed.

BONDS - ALABAMA

U.S. Bank Nat. Ass'n v. Wright

United States District Court, M.D. Alabama, Southern Division - July 24, 2013 - Slip Copy - 2013 WL 3866771

The Houston County Commission entered into a development agreement with Ronnie Gilley Properties in February 2008 to develop an entertainment facility known as Country Crossing. This development was to include, among other things, electronic bingo.

The Houston County Commission created a Cooperative District and Improvement District of Houston County—Country Crossing Project. The Cooperative District issued Series 2009 bonds to finance public improvements to 375 acres of land which comprised the Country Crossing Development. The Series 2009 Bonds were issued pursuant to Indentures. U.S. Bank acted as the Indenture Trustee of the Cooperative District.

The payment sources of the Series 2009 Bonds were assessments and fees at Country Crossing. Some of the proceeds from the sale of the Series 2009 Bonds were required to be held in a fund by the Indenture Trustee to ensure sufficient funds to make interest payment installments under the Trust Indenture. The Trust Indenture also authorized the Cooperative District to provide U.S. Bank with a Letter of Credit to serve as additional security for repayment of the revenue bonds.

As a condition of its purchase of the Series 2009 bonds, the holders required additional repayment security in the form of an Irrevocable Standby Letter of Credit naming the Indenture Trustee as beneficiary. Defendant Dr. Robert Wright, Jr. – the CEO of one of the owners of the Development – sent a Side Letter to U.S. Bank in which he stated that Wells Fargo would issue a $5 million Irrevocable Standby Letter of Credit. U.S. Bank alleged that consistent with the Side Letter, the Letter of Credit allowed U.S. Bank to draw on the Letter of Credit if given notice of non-extension of the Letter of Credit.

The electronic bingo planned for Country Crossing was determined to be illegal under Alabama law, and Country Crossing closed its doors. U.S. Bank alleged in the Complaint that collected revenues were insufficient to pay debt service on the bonds. The Cooperative District went into default.

After receiving a Notice of Non–Extension from Wells Fargo, U.S. Bank withdrew the entire $5 million under the Letter of Credit.

An attorney representing Russell Wright wrote to U.S. Bank and stated that Russell Wright had a legal interest in the Letter of Credit. In that letter, Russell Wright threatened to commence litigation and demanded the return of the $5 million.

U.S. Bank sought declaratory relief as to the validity of the Letter of Credit, the Side Letter, and the Amended Side Letter; U.S. Bank's right to draw on the Letter of Credit; the rights of the Wrights with respect to the Letter of Credit; whether Russell Wright has the legal right and standing to challenge the validity of the obligations owed; the effect of the bond validation judgment; and sought a declaration that Russell Wright is judicially estopped from asserting any positions that are inconsistent with positions he took in the Resorts Development Group II, LLC bankruptcy.

The Wrights argued that the court lacked subject matter jurisdiction over the Complaint for declaratory judgment because U.S. Bank failed to seek a declaration of its rights with respect to the Letter of Credit before drawing down the funds to zero. The Wrights said that this action sought an after-the-fact validation of the draw-down, and a legitimization of U.S. Bank's defenses to a theoretical future lawsuit by the Wrights. The Wrights argued that because U.S. Bank presented, and Wells Fargo honored, the Letter of Credit with no interference by the Wrights, U.S. Bank's harm, if any, is conjectural and not actual or imminent. In response to a brief by U.S. Bank, counsel for the Wrights further represented to the court that they have been instructed to inform the court and parties "in no uncertain terms, that they are not going to file a lawsuit against U.S. Bank regarding its drawn down of the $5,000,000 letter of credit."

Thus, there were two issues presented before the court; namely, whether the court had subject matter jurisdiction at the time the Complaint was filed, see Household Bank v. JFS Group, 320 F.3d 1249, 1259 (11th Cir.2003) (stating, in a case in which declaratory judgment defendants had informed the district court that they did not intend to file a suit, that the court must look to the facts as they existed at the time the action was filed), and, if so, whether the court now lacks jurisdiction because the case has become moot.

The court concluded that, before ruling on the mootness issue, the court would give the Wrights additional time in which to formally state their intentions. If the parties could come to an agreement and file a joint document, the court would consider it in ruling on mootness. If the parties cannot come to an agreement, the court will consider their positions and rule on mootness, and decide whether the court should abstain from exercising jurisdiction.

EMPLOYMENT - ALABAMA

Hollis v. Town of Mount Vernon

United States District Court, S.D. Alabama, Southern Division - July 26, 2013 - Slip Copy - 2013 WL 3878947

Plaintiff Francie Michelle Hollis was hired as a dispatcher for the Town of Mount Vernon in 2007. Hollis, Mount Vernon's only full-time dispatcher, also served as the supervisor for approximately ten part-time dispatchers. During the time period relevant to Hollis' claims, defendant Joseph Cassidy, a police lieutenant, was acting police chief. Defendant Jerry Lundy was the Town's mayor during the relevant time period. William Cannon was a part-time dispatcher for the Town who worked the midnight to 8:00 a.m. shift.

Some time around early November 2009, Mr. Cannon took a shine to Hollis, as well as to a fellow dispatcher, Tina Dillard. Sadly, his love was unrequited. Nevertheless, Mr. Cannon continued to pursue both women. His endearing pursuit included activities such as:

- Going to the police station on nights when he was not working and watching Ms. Dillard through the windows;

- Sending Ms. Dillard, who is African American, an email "saying that he didn't know that he could love chocolate so much";
- Telling Hollis that he was just trying to be sure that Dillard was safe because the inmates are not locked down and walk around at night, but he promising not to do it any more;
- "Coming in there. No underwear, wearing these little bitty shorts, with his legs open";
- Obtaining an official ruling that visitors were allowed in the dispatch room for eight minutes at a time;
- Writing poetry to Hollis, his "muse," and writing in her journal; and
- Following Hollis to a chemotherapy appointment.

What girl wouldn't be flattered?

When Hollis informed Lt. Cassidy, who was acting police chief, about the peeping tom incidents, Cassidy responded "That man is crazy. I don't know what to say about that man. You all better watch him." Really, what authority could the police chief possibly exercise over one of his employees?

When Hollis informed Mayor Lundy that Cannon was following her around, Lundy responded, "I don't blame him baby. I'd like to follow you around, too. Look at you. Why wouldn't he want you?"

What followed was a pretty standard-issue sexual harassment lawsuit.

PUBLIC UTILITIES - CALIFORNIA

Koponen v. Pacific Gas & Electric Company

Court of Appeal, First District, Division 1, California - July 30, 2013 - Not Reported in Cal.Rptr.3d - 2013 WL 3946341

Plaintiffs sued on behalf of themselves and a putative class of others similarly situated, defendant Pacific Gas & Electric Company (PG&E), a public utility. Plaintiffs own properties on which PG&E has utility easements creating rights of way. Plaintiffs allege PG&E, without their consent, trespassed on their properties by installing fiber-optic lines along its utility easements and leasing or licensing rights in the fiber-optic lines to telecommunications and Internet companies. Plaintiffs sought certification of their suit as a class action.

The trial court denied the motion to certify. The court based its denial on three separate grounds: (1) the easements must be interpreted on an individual basis to determine their scope and other issues regarding liability; (2) trespass damages must be determined on an individual, property-specific basis; and (3) plaintiffs had failed to show the superiority of class adjudication.

INTERNET TAX FREEDOM ACT - CALIFORNIA

j2 Global Communications, Inc. v. City of Los Angeles

Court of Appeal, Second District, Division 4, California - July 26, 2013 - Cal.Rptr.3d - 13 Cal. Daily Op. Serv. 8040

Taxpayer ran a service which converted customers' incoming faxes to e-mails and their outgoing e-mails to faxes. Taxpayer filed claim against city for unlawful collection of Internet access tax under Internet Tax Freedom Act provision imposing a moratorium on the collection of taxes by state and local governments on purchases of telecommunications by providers of "Internet access."

The Court of Appeal held that:

- Taxpayer's service did not allow customers to "connect to the Internet" under Internet Tax Freedom Act;
- Taxpayer's service did not provide a "homepage" or "electronic mail" under Internet Tax Freedom Act; and
- Taxpayer's purchase of Direct Inward Dial (DID) telephone numbers was not a purchase of "Internet access."

COUNTY ORDINANCES - CALIFORNIA

Calguns Foundation, Inc. v. County of San Mateo

Court of Appeal, First District, Division 2, California - July 15, 2013 - Not Reported in Cal.Rptr.3d - 2013 WL 3729575

Calguns Foundation, Inc. filed an injunctive and declaratory relief action seeking a judgment declaring that a San Mateo County ordinance which precludes the possession and use of guns in the county's parks and recreational areas was preempted by state law, and hence enjoining enforcement of that ordinance. The trial court sustained the County's demurrer to the complaint and entered a judgment of dismissal. The court of appeal affirmed.

ZONING - CONNECTICUT

Schulhof v. Zoning Bd. of Appeals of City of Norwalk

Appellate Court of Connecticut - July 30, 2013 - A.3d - 144 Conn.App. 446

Residents of area adjacent to a certain island appealed zoning board's grant of island owner's application seeking setback variance to replace an existing nonconforming structure with a boathouse on the island. The Superior Court found that the board properly granted the application and that the variance did not substantially affect city's comprehensive zoning plan. Residents appealed.

The Appellate Court held that:

- Hardship existed for island owner, and
- Setback variance substantially conformed with the comprehensive zoning plan.

Setback variance sought by island owner to replace an existing nonconforming structure with a boathouse on the island substantially conformed with the comprehensive zoning plan: 1) boathouses were a use permitted in the conservation zone where the island was located; 2) the variance did not constitute an enlargement of a nonconforming structure; 3) area residents who opposed the owner's setback variance application did not present any substantive analysis or law to demonstrate that construction of the boathouse would be adverse to the environment or how it was not in the public interest; 4) the island was too small to conform to the two acre lot minimum of the conservation zone; and 5) and the setbacks from the mean high water mark overlapped, which, if enforced, prevented any structure from being built on the island.

Topographic conditions on the property involved in an application for a zoning variance may be the basis for granting a variance, as long as other properties in the area do not have the same problem.

CRIMINAL - FLORIDA

State v. Flansbaum-Talabisco

District Court of Appeal of Florida, Fourth District - July 24, 2013 - So.3d - 2013 WL 3811759

Defendant, a city mayor who had been charged with unlawful compensation, bribery, official misconduct, and conspiracy to commit unlawful compensation, filed motion to dismiss the charges against her. The Circuit Court granted motion. State appealed.

The District Court of Appeal held that:

- Allegations in information were sufficient to establish, if proved, the element of the receipt of a benefit for each of the charged offenses, and
- An explicit quid pro quo is necessary for a conviction under corruption-related statutes when a government representative accepts a campaign contribution.

Defendant has the initial burden to demonstrate in her motion to dismiss that the undisputed facts do not establish a prima facie case of guilt, after which the burden then shifts to the state to demonstrate either that material facts are actually in dispute or that the undisputed facts amount to a prima facie case of guilt.

Information alleged that major committed the offenses by corruptly requesting, soliciting, accepting, or agreeing to accept money from real estate developers who sought approval of their controversial development project to pay for a poll and an electioneering communications organization in exchange for the mayor voting favorably for their development project, and statutory definition of the term "benefit" as a "gain" or "advantage" was broad enough to encompass mayor's alleged receipt of assistance in her election effort.

It did not follow from fact that election campaign contributions were authorized by law that financial campaign assistance could not constitute crimes of bribery or unlawful compensation, and, thus, it was for factfinder to determine whether mayor's receipt of financial assistance in her election campaign from real estate developers, allegedly in exchange for her favorable vote to approve a highly controversial development project after the election, constituted crimes of bribery or unlawful compensation.

ELECTIONS - FLORIDA

Spence-Jones v. Dunn

District Court of Appeal of Florida, Third District - July 24, 2013 - So.3d - 2013 WL 3814957

Individual who was appointed to fill vacancy on city commission during the temporary suspension of city commissioner brought action seeking a declaration that commissioner was ineligible for reelection to a third consecutive term. The Circuit Court entered declaratory judgment finding that city charter provision rendering a city commissioner "elected and qualified for two consecutive full terms" ineligible for reelection precluded commissioner from seeking reelection. Commissioner appealed.

The District Court of Appeal held that commissioner remained "qualified" during her suspension and

thus precluded from seeking reelection.

LIABILITY - LOUISIANA

Stirgus v. St. John the Baptist Parish School Bd.

Court of Appeal of Louisiana, Fifth Circuit - July 30, 2013 - So.3d - 13-15 (La.App. 5 Cir. 7/30/13)

Following an incident in which a student broke his hip at football practice, suit was brought against the school and the coaches alleging that they had failed to provide proper supervision and had allowed an unreasonable risk of injury to develop during the indoor practice. The parties stipulated to medical expenses of $21,626.57. After a bench trial, the trial judge awarded Mr. Stirgus $50,000 in past pain and suffering, and also awarded medical expenses of $71,871.71, which was $50,245.14 more than the stipulated amount.

School appealed as to the monetary award and to the finding that it was liable for failure to supervise.

The appeals court amended the judgment to reduce the award for all past medical expenses to the stipulated amount of $21,626.57.

To establish a claim against a school board for failure to adequately supervise the safety of its students, a plaintiff must prove: (1) negligence on the part of the school board, its agents, or teachers in providing supervision; (2) a causal connection between the lack of supervision and the accident; and (3) that the risk of unreasonable injury was foreseeable, constructively or actually known, and preventable if a requisite degree of supervision had been exercised. The appeals court concluded that it did not have sufficient grounds to reverse the trial court's judgment as to liability for failure to supervise.

The final issue concerned the $50,000 award for general damages, which plaintiff contended is too low and which erroneously did not include an award for future pain and suffering.

Considering all of the evidence, the appeals court was unable to articulate any reasons why an award of $50,000 for past pain and suffering, and no award for future pain and suffering, constituted an abuse of the trial judge's vast discretion in fixing damages. The award was confirmed.

EMPLOYMENT - MASSACHUSETTS

McLaughlin v. City of Lowell

Appeals Court of Massachusetts, Middlesex - July 25, 2013 - N.E.2d - 84 Mass.App.Ct. 45

Firefighter brought action against city, seeking declaratory and injunctive relief, alleging that city had wrongfully refused to reinstate him under statute governing reinstatement of public employees who had retired for disability, and alleging that city had engaged in handicap-based employment discrimination and interference with firefighter's protected rights under antidiscrimination statute.

The Appeals Court held that:

- Firefighter was collaterally estopped from challenging finding of Contributory Retirement Appeal

Board (CRAB) that city prohibited use of inhalers at a fire scene;
- Firefighter was not a "qualified handicapped person"; and
- City could not be liable for interfering with firefighter's protected rights in the absence of unlawful discrimination.

Firefighter on disability retirement failed to appeal decision of CRAB finding that city fire department prohibited use of inhalers at a fire scene and ordering medical panel to clarify opinion as to whether firefighter was able to perform his job duties in light of that finding, and thus firefighter was collaterally estopped from disputing whether city rule barred use of inhalers at fire scene, in subsequent action against city seeking reinstatement under statute governing reinstatement of public employees who had retired for disability.

ZONING - MINNESOTA

Centra Homes, LLC v. City of Norwood Young America

Court of Appeals of Minnesota - July 29, 2013 - N.W.2d - 2013 WL 3868153

In a dispute over building permit fees, the city argued that (1) because each of respondents' claims addressed the application and interpretation of the state building code, and an administrative process is available to address these matters, the district court erred in ruling that respondents did not need to exhaust administrative remedies before seeking judicial review; and (2) the municipal planning act did not apply to this case. The appeals court agreed.

TAX - MISSISSIPPI

Alfonso v. Diamondhead Fire Protection Dist.

Supreme Court of Mississippi - August 1, 2013 - So.3d - 2013 WL 3945913

Property owners within fire protection district brought action against district and members of its board of commissioners challenging the monthly fire protection fee charged by the district as an illegal tax. The Circuit Court determined that the fee was a permissible fee for "services rendered." Property owners appealed.

The Supreme Court of Mississippi held that as matter of first impression, district's monthly fee was based on "services rendered" and, thus, was a permissible fee.

Fire protection district's monthly fee for fire protection services was based on "services rendered," within meaning of statute authorizing such districts to assess fees for services rendered as a funding mechanism, and, thus, was a permissible fee, rather than an impermissible tax. District provided a valuable service to property owners in the district by having fire and other emergency services available to respond to an emergency.

MUNICIPAL ORDINANCE - NEW JERSEY

Roseff v. Byram Tp.

Superior Court of New Jersey, Appellate Division - July 10, 2013 - A.3d - 2013 WL 3849886

Residents brought action against township seeking an order directing the township to accept their referendum petition and either repeal budget ordinance or hold a referendum in accordance with the Faulkner Act.

The Superior Court, Appellate Division held that budget ordinance was not subject to a referendum under the Faulkner Act.

Township had the burden of proving that the Legislature intended to carve out from Faulkner Act ordinances adopted pursuant to statute allowing municipality to increase its budget by as much as, but no more than, 3.5% in any year in which the cost-of-living adjustment was equal to or less than 2.5%. Township satisfied that burden.

EMINENT DOMAIN - NORTH DAKOTA

Alliance Pipeline L.P. v. Smith

Supreme Court of North Dakota - July 18, 2013 - N.W.2d - 2013 ND 117

Natural gas provider petitioned to enter property owner's property for examinations and surveys related to construction of natural gas pipeline. The District Court granted petition. Property owners appealed.

The Supreme Court of North Dakota held that:

- Provider's inclusion of matters outside the record did not warrant striking appellate brief;
- Motion to alter or amend was not served and filed within 28 days of notice of judgment;
- Motion for reconsideration was made within a reasonable time;
- Trial court had subject matter jurisdiction;
- Challenge to scope of order was moot; and
- Property owners were not entitled to award of attorney fees.

District court had subject matter jurisdiction to resolve natural gas provider's petition seeking access to property owners' property for examinations and surveys related to proposed natural gas pipeline, where statute authorized an entity in charge of a public use to enter upon another's land and make examinations and surveys in contemplation of condemnation for a public use, but statute did not describe a procedure to enforce that statutory right if the landowner objected to entry upon the land. District court had statutorily-prescribed subject-matter jurisdiction to hear and determine all civil proceedings and all powers necessary to the full and complete jurisdiction of the causes and the parties and full and complete administration of justice.

Property owners' challenge to the scope of trial court's order authorizing natural gas provider to access property owners' property to conduct examinations and surveys related to proposed natural gas pipeline was rendered moot by provider's completion of the examinations and surveys.

SCHOOLS - OHIO

Brookwood Presbyterian Church v. Ohio Dept. of Edn.

Court of Appeals of Ohio, Tenth District, Franklin County - July 25, 2013 - Slip Copy - 2013 -Ohio- 3260

Brookwood Presbyterian Church submitted an application to the Ohio Department of Education requesting approval as a sponsor of community schools in Ohio pursuant to R.C. 3314.02(C)(1)(f), which allows "education-oriented," tax-exempt entities under Section 501(c)(3) of the Internal Revenue Code to sponsor community schools. The DOE subsequently determined Brookwood was not an "education-oriented" entity as required by R.C. 3314.02(C)(1)(f) and denied Brookwood eligibility to sponsor community schools. After much litigation, the Court of Appeals affirmed.

PUBLIC UTILITIES - PENNSYLVANIA

Popowsky v. Pennsylvania Public Utility Com'n

Commonwealth Court of Pennsylvania - July 26, 2013 - A.3d - 2013 WL 3865275

Consumer advocate sought review of approval of electric distribution company's default services plan by state Public Utilities Commission (PUC).

The Commonwealth Court held that:

- Evidence was sufficient to support PUC finding that customer costs would likely be higher if distribution company were forced to hedge its costs with short-term contract, and
- Statutory requirement of a "prudent mix" of services for electricity procured for default service plan did not require electric distribution company to include more than one source of electricity in default services plan, supporting approval by PUC of plan proposing to obtain all electricity for certain customers from purchases on spot market.

Evidence was sufficient to support finding of PUC that customer costs would likely be higher if distribution company were forced to hedge its costs with short-term contract, in approving electric distribution company's default services plan which proposed to obtain all electricity for customers who had not chosen another electricity generation provider from purchases on the spot market, where the price varies day to day, according to market forces. Witness testified that distribution company would have to pay a premium for a hedge contract due to the small size of any such contract, necessitated by company's small default service requirement.

ELECTIONS - TEXAS

In re Rodriguez

Court of Appeals of Texas, Beaumont - August 1, 2013 - S.W.3d - 2013 WL 3945990

Potential candidates and school board were embroiled in fairly complex litigation in both state and federal court concerning redistricting, cancelled/rescheduled elections, and pre-clearance complexities when – yep, you guessed it – the Supreme Court declared unconstitutional section 4(b) of the Voting Rights Act.

Plaintiffs insisted that the court enforce its earlier decision requiring that a school board election originally scheduled for May be held in November. School board and plaintiffs then proposed competing redistricting plans in light of the Supreme Court's *Shelby County* decision.

The court said, "Hold your proverbial horses." "The parties ask this Court to make decisions in this proceeding about a potential November 2013 election, but requests and challenges to a November 2013 election are pending in federal and state district courts, and the parties cannot predict when

those cases will be resolved. Relators' issues relate to an election on some future date, not a past May 2013 date. As the parties' claims remain subject to on-going litigation in both federal and state courts, we refrain from exercising any mandamus authority and do not address the merits of the parties' claims at this time. Accordingly we deny the motion and dismiss the mandamus petition without prejudice."

CONTINGENCY FEES - TEXAS

International Paper Co. v. Harris County

Court of Appeals of Texas, Houston (1st Dist.) - July 25, 2013 - S.W.3d - 2013 WL 3864317

County brought environmental enforcement action against industrial companies. After county obtained authorization to retain private attorneys on contingent-fee basis, companies sought temporary injunction to prevent county's use of private attorneys on contingent-fee basis.

On appeal, defendants contended that the trial court erred in denying their request for temporary injunctive relief because (1) the County did not comply with the statutory provisions that control when a governmental entity can hire attorneys on a contingent-fee basis; (2) the County violated the state constitution's separation-of-powers doctrine by agreeing to payment of the private attorneys' contingent fee from funds to which the state may be entitled; and (3) the federal constitution's due-process guarantee prohibits private attorneys from prosecuting a quasi-criminal action on a governmental entity's behalf for a contingent fee.

The Court of Appeals held that:

- No live controversy existed regarding statutory compliance of county's retainer of outside counsel through particular contingent-fee agreement, and thus issue was moot;
- Companies' argument that county's use of contingent-fee counsel violated companies' due process rights was not moot;
- Companies did not have probable right to relief on due process claim; and
- Balance of equities did not weigh in favor of granting temporary injunction.

Industrial companies did not have probable right to relief on claim that county's use of private attorneys on contingent-fee basis to prosecute civil environmental enforcement action against companies violated due process, as could support temporary injunction to prevent county's use of such attorneys. Due process clause did not establish blanket prohibition against a governmental entity's engagement of private counsel on contingent-fee basis to pursue civil litigation in which only remedy sought was civil penalties, caselaw did not support companies' labeling of action as quasi-criminal, and county had disclaimed any intention to pursue criminal charges against companies.

Balance of equities did not weigh in favor of granting temporary injunction to prevent county's use of private attorneys on contingent-fee basis to prosecute civil environmental enforcement action against industrial companies, despite companies' argument that this violated companies' due process rights. There was public benefit to contingent-fee agreements in some circumstances, and any interest of attorney retained on contingent-fee basis to pursue maximum penalties could have existed for other advocates.

EMPLOYMENT - UTAH

Phillips v. South Jordan City

Court of Appeals of Utah - July 26, 2013 - P.3d - 2013 UT App 183

Former police officer sought review of city appeal board's decision to affirm police chief's termination of officer's employment.

The Court of Appeals held that:

- Officer's conduct in responding to a dispatch in excess of 100 mph, through six intersections, failed to demonstrate "due regard for the safety of all persons" as required by police department general order;
- Officer's conduct violated applicable emergency vehicle operation (EVO) policies;
- Termination of employment was not disproportionate discipline; and
- Officer failed to establish that his discipline was improperly inconsistent with sanctions imposed on other officers.

Evidence supported finding that police officer, responding to a dispatch involving a request to assist with a possible fugitive, violated police department general order by his conduct in driving through six intersections at speeds over 100 mph, reaching a top speed of 121 mph, and in shutting down his emergency equipment before passing a vehicle on the right. Officer failed to limit his speed with regard to reaction time, stopping distance, vehicle capabilities, and the possibility of unknown and unforeseen circumstances, thus failing to conduct himself with "due regard for the safety of all persons" as required.

TAX - WASHINGTON

Confederated Tribes of Chehalis Reservation v. Thurston County Bd. of Equalization

United States Court of Appeals, Ninth Circuit - July 30, 2013 - F.3d - 2013 WL 3888429

Tribe and lessee brought action against county, challenging assessment of property taxes on leased property. The District Court awarded summary judgment to county, finding that state and local governments were not prohibited from taxing permanent improvements, like resort on leased property, that were owned by non-Indians. Tribe and lessee appealed.

The Court of Appeals held that land and permanent improvements on land were exempt from state and local taxation. Land where lessee operated resort was held in trust for use of tribe, and thus land and permanent improvements on land were exempt from state and local taxation.

FEHA - CALIFORNIA

Estrada v. City of Los Angeles

Court of Appeal, Second District, Division 3, California - July 24, 2013 - Cal.Rptr.3d - 2013 WL 3831352

Plaintiff Frank Estrada (Estrada) appealed a judgment following a court trial in an action against the City of Los Angeles (the City) for disability discrimination under the California Fair Employment and Housing Act (FEHA).

The essential issue was whether the trial court properly held that Estrada, formerly a volunteer Police Reserve Officer for the City, was not an employee for purposes of the FEHA.

Although Police Reserve Officers are volunteers who serve gratuitously, the City deems these individuals to be "employees" for the limited purpose of extending them workers' compensation benefits. Such benefits are not remuneration; rather, they help to make the volunteers whole, in the event they are injured while performing their duties.

The appeals court held that the City's policy decision to extend workers' compensation benefits to these individuals, who voluntarily put themselves in harm's way on behalf of the community, does not transform the volunteers' status to that of "employee" for purposes of FEHA. Accordingly, the trial court properly concluded Estrada was not an employee and therefore could not maintain a cause of action against the City for disability discrimination.

VOTING - CALIFORNIA

Pelfrey v. San Luis Obispo County Board of Supervisors

Court of Appeal, Second District, Division 6, California - July 24, 2013 - Not Reported in Cal.Rptr.3d - 2013 WL 3834331

Resident appealed from an order denying his petition for writ of administrative mandate that would direct the County of San Luis Obispo to rescind ordinance adopted by the San Luis Obispo County Board of Supervisors redistricting supervisorial districts following the 2010 census on the ground that it did not equally divide the population between districts and unnecessarily divides the unincorporated community of Templeton and the City of San Luis Obispo, thereby diluting the rural vote.

The Court of Appeal concluded that the Board proceeded in the manner required by Elections Code section 21500 when it adopted Ordinance No. 3218, amending chapter 2.60 of the County Code, and the deviation from equality of population was within the limits of the discretion given to the Board.

ZONING - CALIFORNIA

Cacerf Norco, LLC. v. City Of Norco

Court of Appeal, Fourth District, Division 2, California - July 24, 2013 - Not Reported in Cal.Rptr.3d - 2013 WL 3836233

Plaintiff CACERF Norco, LLC (CACERF) is the owner of 428 acres in the City of Norco. It filed a declaratory relief/inverse condemnation action against the City and the City Council, contending that changes in the City's general plan and zoning ordinances resulted in a taking of CACERFs property under the Fifth and Fourteenth Amendments. CACERF plead that the City's rezoning resulted in an unconstitutional taking of the property because it deprived CACERF of all beneficial and productive use of the property.

The court stated that CACERFs facial challenge must fail. "In looking at the text of both the general plan amendment and the implementing zoning ordinance, CACERF is not denied economically viable uses of its land. There is nothing on the face of the general plan amendment or ordinance which denies CACERF an economically beneficial or productive use of its land. Here, the preservation and development zone allows for planned mixed use commercial/office park projects, planned

recreational projects, and planned resort projects. On its face, CACERF is not deprived of economically viable uses of its land. The fact that the uses may not be those that CACERF desires, or uses from which it can maximize its investment, is beside the point. The general plan amendment and zone change simply do not facially result in a taking of CACERFs land under the Fifth Amendment."

ZONING - CONNECTICUT

Lowney v. Zoning Bd. of Appeals of Black Point Beach Club Ass'n

Appellate Court of Connecticut - July 16, 2013 - A.3d - 144 Conn.App. 224

Applicant sought review of zoning board decision denying application for a permit to operate a dog grooming business in her garage.

The Appellate Court held that dog grooming business was not a permitted "home occupation" within meaning of regulation.

Even if applicant groomed only three dogs per day, the line between permitted and prohibited uses under regulation was not intended to be drawn only with respect to potential traffic congestion, and zoning board could determine that the dog grooming business was more similar to prohibited uses such as barber shops and beauty parlors than to permitted uses such as a lawyer's office or photographer's studio.

Generally, it is the function of a zoning board or commission to decide within prescribed limits and consistent with the exercise of its legal discretion, whether a particular section of the zoning regulations applies to a given situation and the manner in which it does apply. In applying the law to the facts of a particular case, a zoning board is endowed with a liberal discretion, and its decision will not be disturbed unless it is found to be unreasonable, arbitrary or illegal.

NEGLIGENCE - ILLINOIS

Trigsted v. Chicago Transit Authority

Appellate Court of Illinois, First District, Sixth Division - July 19, 2013 - N.E.2d - 2013 IL App (1st) 122468

Bus passenger, individually, and on behalf of her daughter, brought suit against municipal transit authority to recover for injuries they suffered when they were attacked by third parties while riding a transit authority bus.

The Appellate Court held that authority's conduct in overcrowding its buses was not a proximate cause of plaintiffs' injuries.

Proximate cause requires the plaintiff to show that the defendant's negligence was (1) the actual cause or the cause in fact of his injury, i.e., but for the defendant's conduct, the accident would not have occurred; and (2) the legal cause of his injury, i.e., the defendant's conduct was so closely tied to the plaintiff's injury that he should be held legally responsible for it.

Municipal transit authority's conduct in permitting bus to become overcrowded was not a cause in fact of deliberate physical attack of passenger by third parties as required to support negligence

action against authority. Passenger's injuries were not connected with any altercation over finding a seat or inadvertent pushes or contact, as might be expected from overcrowding, but instead, her injuries appeared to have been purely result of racial and ethnic hostility.

Municipal transit authority's conduct in permitting bus to become overcrowded was not a legal cause of deliberate physical attack of passenger by third parties exhibiting racial and ethnic hostility, as required to support negligence action against authority. Although authority was arguably aware that some of its passengers harbored inflammatory biases and prejudices, authority's possession of such knowledge did not make it foreseeable that the type of injury that occurred to passenger could occur from bus overcrowding.

BONDS - BANKRUPTCY - ILLINOIS

In re LHC, LLC

United States Bankruptcy Court, N.D. Illinois, Eastern Division - July 16, 2013 - Slip Copy - 2013 WL 3760109

Debtor is a not-for-profit enterprise that owns and operates an ice-skating rink. The Rink sells ice time to various skating organizations in Illinois as well as to the general public. The sole member of the Debtor and largest customer of the Rink is the Leafs Hockey Club (the "Club"), an amateur hockey organization. Although the Debtor is a taxable limited liability company, its income is passed through to the Club. The Club does not pay tax on the income received from the Debtor because the Debtor is a non-profit company. The Debtor owes $20 million to bondholders represented by Wells Fargo, the indenture trustee for the bondholders. The Club has guaranteed repayment of that debt.

When the owner of a Chapter 11 debtor is also the chief customer of that debtor, does the owner's dual role automatically constitute "cause" for appointing a Chapter 11 trustee under 11 U.S.C. § 1104(a)(1)?

Wells Fargo argues that under § 1104(a)(1) the Court is required as a matter of law to appoint a Chapter 11 trustee where the Club is both owner and customer of the Debtor, because it must be presumed as a matter of law that the Club will always elevate its interests as customer over its interests as owner of the Debtor.

The court concluded, based on the totality of the evidence, that Wells Fargo had not demonstrated by clear and convincing evidence that a Chapter 11 trustee should be appointed under § 1104(a)(1) or (a)(2). Wells Fargo has not demonstrated evidence of "cause" including fraud, gross mismanagement, or dishonesty on the part of the Debtor, or that it would be in the interests of creditors, equity security holders, and other interests of the estate to appoint a trustee.

GOVERNMENTAL IMMUNITY - ILLINOIS

Zameer v. City of Chicago

Appellate Court of Illinois, First District, Fifth Division - July 19, 2013 - N.E.2d - 2013 IL App (1st) 120198

Pedestrian brought suit against city for injuries she sustained when she tripped on defect in public sidewalk.

The Appellate Court held that:

- City did not have actual notice of defect, and
- City did not have constructive notice of defect, as required to be liable for injury under Tort Immunity Act.

Evidence that city received multiple prior complaints of defects in broader section of sidewalk was not relevant to establish that city had constructive notice of defect in portion of sidewalk on which pedestrian tripped and fell, as required to defeat motion for summary judgment based on governmental immunity under Tort Immunity Act.

Speculative theory that because section of sidewalk remained free of defects for two years, it could be inferred that the raised sidewalk on which pedestrian tripped and fell would have also remained in substantially the same condition over the same period, could not create fact question as to whether city had constructive notice of the defect, such that it could be liable for injury under Tort Immunity Act, so as to defeat motion for summary judgment.

PUBLIC TRANSPORTATION - KENTUCKY

Coalition for Advancement of Regional Transp. v. Federal Highway Admin.

United States District Court, W.D. Kentucky, at Louisville - July 17, 2013 - Slip Copy - 2013 WL 3776492

Over the course of a decade, Defendants – a variety of state and federal agencies – investigated cross-river traffic issues and the possibility of alleviating problems by building a fourth bridge in East Louisville and reconstructing the existing transportation infrastructure. This culminated in the Project, which is a roughly $2.6 billion construction and transportation management program designed to improve mobility across the Ohio River between Louisville and Southern Indiana.

Plaintiff, Coalition for the Advancement of Regional Transportation ("CART"), maintained twenty separate claims against Defendants. CART is a volunteer-member, tax exempt § 501(c)(3) organization that promotes modern transit planning, especially encouraging the introduction of light rail to urban transit systems. Though CART asserts a number of claims arguing that Defendants failed to comply with federal statutory mandates, and otherwise abused their discretion in the planning and implementation of the Project, its general contention is more normative. It believes that vehicular traffic will decline in future years, making the Project both unnecessary and in all likelihood, unable to obtain adequate funding to service construction loans taken out to finance the Project. CART maintains that other alternatives, even abandoning the Project altogether, would better serve the community.

CART advanced twenty claims against Defendants that can be generally grouped into four categories: the Project (1) violates the procedural mandates of NEPA; (2) violates various FAHA funding regulations, including the statute's prohibition of federal participation in certain tolled facilities; (3) threatens the water and air quality of the region in violation of NEPA, the CWA and the CAA; and (4) intentionally discriminates against racial minorities in violation of Title VI.

The court stated, wearily, that "The discussion and debate over the Project, and specifically building a new bridge, has extended for several decades. Various interested parties have expressed every conceivable alternative, from doing nothing to demolishing and completely rebuilding our highway system."

"The Court, and anyone associated with the Project, will concede that interested persons could reach different conclusions concerning the region's transportation needs and their appropriate resolution. Again, the Court's only role is to determine whether Defendants followed the applicable regulatory framework and reached conclusions that the Administrative Record supports. After closely examining the record and arguments, and based on the foregoing analysis, the Court finds that Defendants have met their burdens in that respect. As such, the Court concludes that Defendants reasonably exercised their discretion in making decisions about the Project's scope, design and financing. Moreover, Defendants' actions during the planning process and the final decisions do not suggest any actionable discriminatory intent."

ZONING - MARYLAND

Dominion Transmission, Inc. v. Summers

United States Court of Appeals, District of Columbia Circuit - July 19, 2013 - F.3d - 2013 WL 3762937

Natural gas storage company petitioned for review of an order of the Maryland Department of the Environment, which twice refused to process company's application for an air quality permit necessary to proceed with construction of natural gas compressor station.

The Court of Appeals held that:

- Court of Appeals had jurisdiction under the Natural Gas Act;
- Department did not have Eleventh Amendment immunity;
- Natural Gas Act did not preempt Maryland stature requiring a demonstration that the proposed natural gas compressor station be in compliance with local laws; and
- Department was required to determine which local laws were applicable and whether company had complied with such laws.

Where Maryland Department of the Environment had refused to issue, condition, or deny an air quality permit, necessary to proceed with construction of natural gas compressor station, Court of Appeals had jurisdiction under the Natural Gas Act to consider whether the Department's decision was lawful.

Under Ex Parte Young, Maryland Department of the Environment did not have Eleventh Amendment immunity from natural gas storage company's action seeking review of the Department's reasons for refusing to process its application for air quality permit necessary to proceed with construction of natural gas compressor station, where action was seeking prospective relief only.

Natural Gas Act did not preempt Maryland stature requiring a demonstration that the proposed natural gas compressor station be in compliance with local laws; Congress expressly saved states' Clean Air Act powers from preemption, and Maryland provision was part of Maryland's state implementation plan.

Maryland Department of the Environment was required to determine whether local zoning and land use requirements were preempted by Federal Energy Regulation Commission certificate, which approved construction of natural gas compressor station, and whether company seeking to build compressor had complied with any applicable zoning or land use requirements. Department could not simply refuse to act on company's application for air quality permit. Natural Gas Act.

ZONING - MASSACHUSETTS

Bellis Circle, Inc. v. City of Cambridge

Massachusetts Land Court., Department of the Trial Court, Middlesex County - July 15, 2013 - Not Reported in N.E.2d - 2013 WL 3777029

The City of Cambridge implemented a Zoning Ordinance that rezoned plaintiff's property – a vacant parking lot – from the C1–A zone to Residential C (the "Amendment"). In a Land Court Action, plaintiff sought to annul the Amendment on the grounds (a) that it was arbitrary and capricious and constituted an abuse of discretion which exceeded the authority of the City Council, and (b) that it was illegal reverse spot zoning. Plaintiff claimed that by subjecting the property to reverse spot zoning, the City infringed upon its right to equal protection guaranteed by the Fourteenth Amendment to the United States Constitution, in violation of 42 U.S.C. § 1983.

At issue was whether the City Council's adoption of the Amendment "was a valid exercise of local zoning power." Plaintiff claimed that the Amendment was not a valid exercise of the City's zoning power because it constituted reverse spot zoning. Reverse spot zoning occurs when a zoning change singles out one lot or a small area for more restrictive treatment than that imposed on other parcels in the same zoning district.

Whether the Amendment constituted spot zoning and thereby denied Plaintiff its right to equal protection under the law "turned not on what parcel has been singled out, or even on the effect on the parcel, but rather on whether the change can fairly be said to be in furtherance of the purposes of the Zoning Act."

In essence, Plaintiff's claim was that the Amendment was poor land use planning, enacted with insufficient study. But given the broad authority of municipalities to legislate zoning changes and the deference to which such legislative decisions are entitled, poor planning is not the same as spot zoning. This case comes to down to a difference of opinion as to the appropriate zoning classification for the Property. Although reasonable minds may differ, the Amendment had not been shown to be substantially unrelated to the public health, safety, or general welfare, nor arbitrary or unreasonable. Rather, the enactment of the Amendment constituted a valid exercise of the City's police power.

Because the City Council's enactment of the Amendment was valid, it was not spot zoning. Summary judgment must be entered for the City, dismissing Plaintiff's claims of spot zoning in the Land Court Action.

ATTORNEYS' FEES - MICHIGAN

Hescott v. City of Saginaw

United States District Court, E.D. Michigan, Northern Division - July 23, 2013 - Slip Copy - 2013 WL 3817347

The Hescotts brought a complaint against the City after a residence they owned—an investment property—was demolished and the resulting debris was carried away without notice to them and without a court order authorizing the City's conduct.

One month before trial, the City mad an offer of judgment pursuant to Federal Rule of Civil Procedure 68 amounting to $15,000. The Hescotts rejected the offer. They sought $324,750 to settle

the case. When that suggested settlement was declined, the Hescotts opted to go to trial.

The Hescotts were awarded $5,000 by a jury because the City carried away the debris of their demolished residential property without notifying them first. The award resulted from the jury's conclusion that the Hescotts' Fourth Amendment right against unreasonable seizures had been violated when the city re-entered the property without the Hescotts' consent or a court order. The jury rejected, however, the Hescotts' inverse condemnation claim that the demolition of the residence was improper—they concluded that the house constituted a public safety risk which justified emergency demolition.

The precise question faced was this: may the City recover its attorney's fees—as a part of its costs—after the Hescotts' eventual jury award fell below the City's previous offer of judgment? The Court concludes that the Hescotts were not entitled to an award of attorney's fees.

"The question of who is responsible for the legal expense of litigating this case is an interesting one because the unique facts implicate both the Civil Rights Attorney's Fees Award Act of 1976 (42 U.S.C. § 1988) and Federal Rule of Civil Procedure 68. Commonly referred to as simply § 1988, the Attorney's Fees Award Act was largely intended to encourage the enforcement of civil rights laws 'through the use of plaintiffs as private attorneys general.' Rule 68, on the other hand, was designed 'to promote settlement, rather than litigation.' That is, 'Rule 68 is designed to provide a disincentive for plaintiffs from continuing to litigate a case after being presented with a reasonable offer.'"

ZONING - NEW JERSEY

TSI East Brunswick, LLC v. Zoning Bd. of Adjustment of Tp. of East Brunswick

Supreme Court of New Jersey - July 23, 2013 - A.3d - 2013 WL 3802499

Objector brought action in lieu of prerogative writs, challenging township zoning board's decision to grant conditional use variance allowing property owner to convert existing building into a for-profit health club.

The Supreme Court of New Jersey held that:

- Property owner was not required to demonstrate absence of negative criteria with enhanced quality of proofs, and
- Township could grant variance.

Property owner seeking conditional use variance was not required to demonstrate absence of negative criteria with enhanced quality of proofs, such as would be required for obtaining variance for prohibited use. Analyses of use variances and conditional use variances were fundamentally different, since a use variance would proceed in the context of a use that the governing body had prohibited, whereas the conditional use variance proceeded in the context of a use that, if it complied with certain conditions, was permitted.

In determining whether a property owner is entitled to a conditional use variance, the question is whether, in light of the failure to meet one of the conditions fixed by the zoning ordinance, the use is reconcilable with the municipality's legislative determination that the condition should be imposed on all conditional uses in that zoning district.

In determining whether a property owner is entitled to a conditional use variance, the weighing is entirely different from that demanded for a use variance because the governing body has not

declared that the use is prohibited but, instead, has elected to permit the use in accordance with certain expressed conditions; accordingly, the focus of the analysis is on the effect of non-compliance with one of the conditions as it relates to the overall zone plan.

EMINENT DOMAIN - NORTH CAROLINA

Sansotta v. Town of Nags Head

United States Court of Appeals, Fourth Circuit - July 25, 2013 - F.3d - 2013 WL 3827471

Owners of oceanfront cottages brought § 1983 action in state court against town, alleging that, in declaring cottages nuisances, town violated owners' constitutional rights. Town removed action to federal court. The United States District Court for the Eastern District of North Carolina granted summary judgment to town on owners' procedural due process and equal protection claims and dismissed owners' takings claim as unripe. Owners appealed.

The Court of Appeals held that:

- Town did not deprive owners of their procedural due process rights;
- Town did not violate owners' equal protection rights; and
- By removing action, town waived requirement that a plaintiff must seek compensation from the state before bringing a takings claim in federal court.

Town did not deprive oceanfront cottage owners of their property interest with respect to their right to use and enjoy cottages as part fee simple ownership, in connection with town declaring cottages to be nuisances, and town thus did not violate owners' procedural due process rights on such basis, since town's regulatory actions represented limitations on use of property that inhered in title itself. Although town ultimately lacked authority to declare cottages to be nuisances based on public trust doctrine, town's actions to abate nuisance were reasonable uses of its police power that did nothing to deprive owners of any property right.

Owners of oceanfront cottages had property interest, protected by due process clause, in money that would be used to pay any fines imposed by town upon declaring cottages nuisances. Owners of oceanfront cottages had property interest, protected by due process clause, in money that would be used to pay any fines imposed by town upon declaring cottages nuisances.

COUNTIES - NORTH DAKOTA

Brown v. Burleigh County Housing Authority

Supreme Court of North Dakota – July 18, 2013 - N.W.2d - 2013 ND 120

After county housing authority terminated tenant's housing assistance benefits, she appealed.

The Supreme Court held that the trial court lacked jurisdiction to review county housing authority's decision to terminate tenant's housing assistance benefits.

County housing authority was an agency of the state, but it was a public corporation and not a department or other administrative unit of the executive branch of state government, and thus the Administrative Agencies Practices Act (AAPA) did not provide for judicial review, and the housing authority was not operating the housing assistance program at the direction and supervision of a

state executive agency.

GOVERNMENTAL IMMUNITY - OHIO

Vacha v. N. Ridgeville

Supreme Court of Ohio - July 17, 2013 - N.E.2d - 2013 -Ohio- 3020

City employee, who was raped by co-worker, brought action against city, alleging vicarious liability, negligent and reckless hiring and supervision, and employer intentional tort.

The Supreme Court of Ohio held that city failed to establish as matter of law that it was entitled to political–subdivision-tort immunity regarding employee's intentional-tort claim.

To survive summary judgment, a plaintiff who alleges that her claim falls within Political Subdivision Tort Liability Act's section providing exception to political–subdivision-tort immunity need only establish a genuine issue of material fact as to whether the plaintiff's claims are causally related or causally connected to the plaintiff's employment relationship with the political subdivision.

TAX - OKLAHOMA

Board of County Com'rs of Kay County, Okla. v. Federal Housing Finance Agency

United States District Court, District of Columbia - July 26, 2013 - F.Supp.2d - 2013 WL 3841503

The Board of County Commissioners of Kay County, Oklahoma brought suit against the Federal Housing Finance Agency, as conservator for Federal National Mortgage Association (Fannie Mae) and Federal Home Loan Mortgage Corporation (Freddie Mac), as well as against Fannie Mae and Freddie Mac (collectively, Defendants). Kay County sought to compel Defendants to pay a documentary stamp tax, i.e., a transfer tax, upon the sale of real estate located in Oklahoma.

Pursuant to certain federal exemption statutes, 12 U.S.C. §§ 1452(e), 1723a(c)(2), 4617(j)(1)-(2), the Defendants are exempt from all taxation, including the excise tax at issue here. Accordingly, Defendants' motion to dismiss was be granted.

SCHOOLS - PENNSYLVANIA

Munir v. Pottsville Area School Dist.

United States Court of Appeals, Third Circuit - July 25, 2013 - F.3d - 2013 WL 3821614

Student's parent filed complaint pursuant to the Individuals with Disabilities Education Act (IDEA), challenging denial of claim for reimbursement of costs of student's placement in therapeutic residential treatment program following multiple suicide attempts.

The Court of Appeals held that:

- Student's placement in therapeutic residential treatment program was primarily for treatment of his mental health needs and thus was not appropriate for reimbursement under the IDEA, and

- Individualized education program (IEP) offered by school district satisfied its obligations under the IDEA.

Parents who change their disabled child's placement from school district they believe is not providing a free appropriate public education (FAPE), without the consent of state or local officials, do so at their own financial risk. A court may grant the family tuition reimbursement under the IDEA only if it finds that the school district failed to provide a FAPE and that the alternative private placement was appropriate.

If a school district would not have been required to provide a child with residential treatment before the child was withdrawn from public school, it does not become financially responsible under the IDEA for that placement when parents make the unilateral decision to enroll their child at a residential facility, even if the school district may have failed in some other respect to provide the child with a FAPE.

Student's placement in therapeutic residential treatment program, which provided full school day, was primarily for treatment of his mental health needs, and any educational benefit that he received was incidental, and thus placement was not "appropriate" under the IDEA, so as to entitle parents to reimbursement of costs of placement; student's placement in program was prompted by an emergency medical treatment following his suicide attempt, parents enrolled student in program in order to prevent him from harming himself, and student's performance had been above-average in public school.School districts are not financially responsible under the IDEA for the residential placement of students who need 24-hour supervision for medical, social, or emotional reasons, and receive only an incidental educational benefit from that placement.

TAX - RHODE ISLAND

City of Providence v. Federal Nat. Mortg. Ass'n

United States District Court, D. Rhode Island - July 24, 2013 - F.Supp.2d - 2013 WL 3816429

Plaintiffs were the Cities of Providence and Cranston, as well as the Cities' mayors, treasurers and tax collectors in their official capacities. Plaintiffs brought these lawsuits to compel defendants to pay past and future real estate transfer taxes, customarily due from the seller of real property at the time that a deed is recorded by the municipalities.

Defendants refused to pay those taxes, and moved for the dismissal of the lawsuits, based on tax exemptions they allege were enacted by the United States Congress.

The Court held that defendants are indeed exempt from these taxes, and granted the motions to dismiss both lawsuits in their entirety.

FIRST AMENDMENT - TENNESSEE

Jones v. Hamilton County Government, Tenn.

United States Court of Appeals, Sixth Circuit - July 19, 2013 - Fed.Appx. - 2013 WL 3766656

At issue here was whether the Hamilton County Commission's formal written policy of commencing meetings with a prayer invocation led by a private citizen violates the First Amendment's

Establishment Clause.

The Supreme Court in *Marsh* permitted legislative prayer as long as "there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. " Unless there is an indication that the prayer opportunity has been exploited to advance one faith or belief over another, the Supreme Court cautioned that courts should not "embark on a sensitive evaluation or … parse the content of a particular prayer."

When applying the Marsh standard to the facts here, the court deemed it evident that the Commission's Policy is facially constitutional. The Policy allows for three different types of invocations: (1) a reflective moment of silence; (2) a short solemnizing message; or (3) a prayer. The County's procedures for selecting potential invocation speakers are not discriminatory and allow any bonafide religious organization to participate. The Policy calls for a list of religious assemblies in the County to be compiled on a yearly basis, and, if a specific religious assembly in the County is not on the list, it can write to the County to be included. Further, the Policy allows religious assemblies from outside the County to give the opening invocation if a resident of the County requests their inclusion. The Policy expressly states that it is "intended to acknowledge and express the Commission's respect for the diversity of religious denominations and faiths represented and practiced among the citizens of Hamilton County."

In addition, the Policy states that invocation speakers will be notified: "To maintain a spirit of respect for all, the Commission requests only that the opportunity not be exploited as an effort to convert others to the particular faith of the invocation speaker, nor to disparage any faith or belief different than that of the invocation speaker." On its face, the Policy is tailored to comply with Marsh and it does not advance any one faith or belief over another.

SECURITIES - WISCONSIN

S.E.C. v. Bauer

United States Court of Appeals, Seventh Circuit - July 22, 2013 - F.3d - 2013 WL 3779906

Securities and Exchange Commission (SEC) brought action against investment adviser's senior vice president, charging her with insider trading in connection with a mutual fund redemption.

The Court of Appeals held that:

- Fact issue precluded summary judgment on issue of materiality, and
- Fact issue precluded summary judgment on issue of scienter.

Genuine issue of material fact existed as to whether nonpublic information investment adviser's senior vice president possessed regarding a mutual fund's risk of insolvency due to net redemptions and an inability to generate liquidity was material in light of public information concerning fund's troubles, precluding summary judgment for SEC in its action against vice president for insider trading.

Genuine issue of material fact existed as to whether investment adviser's senior vice president acted with scienter when she redeemed her shares in a mutual fund managed by her company based on nonpublic information regarding its price volatility, precluding summary judgment for SEC in its action against vice president for insider trading.

GOVERNMENTAL IMMUNITY - WISCONSIN

Showers Appraisals, LLC v. Musson Bros.

Supreme Court of Wisconsin - July 18, 2013 - N.W.2d - 2013 WI 79

Owner of store that was flooded brought action against independent contractor who had been retained by State to replace storm sewer in front of owner's building. The Circuit Court entered summary judgment in favor of contractor upon finding that he had been acting as an agent of the State and was thus entitled to government immunity.

The Supreme Court of Wisconsin held that:

- Government contractor seeking immunity must show both that it was agent and that injurious conduct was caused by implementation of decision for which immunity was available for government;
- Contractor failed to demonstrate that it was an agent entitled to governmental contractor immunity; and
- Contractor did not have governmental immunity for performance of its construction duties

Analyzing whether the conduct of a government contractor was undertaken as a statutory agent within the scope of governmental immunity statute solely by reference to three-part test, which is used to determine whether the relationship between contractor and the governmental entity was such that the contractor should be immune from liability for design defects, may lead a court to err. Rather, an equally dispositive question is whether the relevant decision of the governmental entity that the contractor implements is, itself, entitled to immunity because it was made through the exercise of a legislative, quasi-legislative, judicial or quasi-judicial function of the governmental entity.

MUNICIPAL ORDINANCE - DISTRICT OF COLUMBIA

In re D.F.

District of Columbia Court of Appeals - July 11, 2013 - A.3d - 2013 WL 3466365

Juvenile was found after a bench proceeding in the Superior Court to have violated a municipal regulation by possessing a BB gun outside a building.

Juvenile appealed, arguing that the court should imply a requirement that a BB gun be operable to support a conviction under the regulation.

The Court of Appeals held that carrying or possessing a BB gun outside a building in the District of Columbia violates a municipal regulation without regard to whether the BB gun was operable.

INVERSE CONDEMNATION - FLORIDA

Judkins v. Walton County

District Court of Appeal of Florida, First District - July 15, 2013 - So.3d - 2013 WL 3491163

Property owner filed inverse condemnation action against county, alleging that a road improvement project caused flooding to her property and rendered it unusable. The Circuit Court awarded

summary judgment to county on the basis of the statute of limitations. Owner appealed.

The District Court of Appeal held that stabilization doctrine did not toll the four-year statute of limitations even if county promised to remediate the flooding. The extent of owner's injury was known, and cause of action therefore accrued, right away.

Property owner waived any claim that county was equitably estopped from asserting the four-year statute of limitations as a defense to her inverse condemnation claim due to its promise to remedy the flooding of owner's property allegedly caused by a road improvement project and its subsequent abandonment of that remediation effort, where owner never raised the issue in the trial court.

HIGHWAYS - GEORGIA

Scarborough v. Hunter

Supreme Court of Georgia - July 11, 2013 - S.E.2d - 13 FCDR 2180

Following notice issued by county Board of Commissioners of intent to hold public hearing regarding proposed abandonment of county road, owners of property that abutted road and others filed complaint for writ of mandamus to compel county to repair and maintain road, and for temporary restraining order to prevent Board from conducting hearing.

The Superior Court entered TRO against Board. Board's application for interlocutory appeal was granted. The Supreme Court reversed. Board thereafter filed answer and counterclaims, then conducted public hearing, after which it unanimously decided to abandon road. The Superior Court then entered judgment for plaintiffs, issued writ compelling Board to repair and maintain road, and awarded plaintiffs attorney fees. Board appealed.

The Supreme Court of Georgia held that:

- Evidence supported Board's findings that 3,000–foot–long, dead-end county road served no substantial public purpose and that its removal was in best public interest, as grounds for decision to abandon road;
- Issue before trial court was not whether abandonment would best serve public interest, but whether Board's decision to abandon road was arbitrary or capricious, and thus, abuse of discretion; and
- Plaintiffs were not prevailing party entitled to award of attorney fees.

A county's duty to maintain roads in the county system is enforceable by mandamus under both the general mandamus statute and a special mandamus statute applicable to the repair and maintenance of county roads, which may be invoked by citizens of the relevant county.

All questions necessary to be determined in order to decide whether a street shall be vacated or abandoned and the interest of the public therein released are referred to the wisdom and discretion of the lawmaking power. Economic factors, including the cost to repair a severely damaged road, are proper considerations for the county in determining whether to abandon the road. While the decision to abandon a road must be for the benefit of the public, the benefit may be in relieving the public from the charge of maintaining a street or highway that is no longer useful or convenient to the public.

Evidence supported county board of commissioners' findings that 3,000–foot–long, dead-end county road served no substantial public purpose and that its removal would in best public interest, as

grounds for decision to abandon road. Road ran along side of mountain and served no existing homes or businesses. It was not safe for public use because of construction defects that had been concealed by contractor, which flaws contributed to road's failure. Expected costs to make it safe ranged between $600,000 and $800,000, and public was not using road.

On judicial review of decision by county Board of Commissioners following public hearing to abandon county road, issue before trial court was not whether abandonment would best serve public interest, but whether Board's decision to abandon road was arbitrary or capricious, and thus, an abuse of discretion.

SCHOOLS - ILLINOIS

Doe v. Champaign Community Unit 4 School Dist.

United States District Court, C.D. Illinois - July 12, 2013 - Not Reported in F.Supp.2d - 2013 WL 3712350

At the time of the incident in question, D.M. was a 15–year old male enrolled at Academic Academy in Champaign, Illinois. On January 21, 2011, Principal Howard entered D.M.'s classroom prior to D.M. arriving at school. Principal Howard detected the odor of cannabis and then left the classroom. Later, D.M. arrived at school and took his seat in the classroom. About 30 students were present at the time. D.M. was one of only two African–American students in the classroom.

After D.M. had taken his seat, Principal Howard entered the classroom, removed D.M. from the classroom, and took D.M. to her office. There, Principal Howard searched D.M.'s coat and backpack. Principal Howard then required D.M. to remove his shirt, unbutton his pants, remove his belt, remove his shoes, and partially disrobe. The Complaint refers to this as a "strip search." Principal Howard did not find any contraband on D.M. during the search. Principal Howard did not contact D.M.'s parents prior to conducting the search.

D.M. then returned to his classroom. Principal Howard did not conduct a search of any other student in the classroom or of any other student's belongings.

According to the Complaint, Principal Howard did not have reasonable cause to conduct this "strip search" of D.M. Principal Howard's actions were taken in her official capacity as Principal, pursuant to the policies and direction and under the supervision of Superintendent Culver and the School Board.

The District Court ruled against Plaintiff, finding that he had proffered only boilerplate conclusory allegations, rather than identifying an express policy of the School Board that could have caused a constitutional deprivation of Plaintiff's rights.

Likewise, Plaintiffs failed to allege facts that permitted an inference there was a widespread practice or custom of conducting unreasonable or racially discriminatory searches of students

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PUBLIC RECORDS - ILLINOIS

City of Champaign v. Madigan

Appellate Court of Illinois, Fourth District - July 16, 2013 - N.E.2d - 2013 IL App (4th) 120662

This case arose from Patrick Wade's request pursuant to the Illinois Freedom of Information Act (FOIA) for copies of electronic communications sent and received during city council meetings from members of the Champaign city council as well as the mayor of the City of Champaign. The City partially denied Wade's request, explaining personal communications on privately owned electronic devices are not within the scope of FOIA, even when they relate to city business.

The Attorney General issued a binding opinion, finding texts and emails sent or received from a council member's personal electronic device during public meetings, concerning city council business, are by definition public records and thus subject to FOIA.

The City appealed, arguing that the requested electronic communications are not public records as defined by FOIA.

The court concluded that communications "pertaining to public business" and sent to and from individual city council member's personal electronic devices during the time city council meetings (and study sessions) were convened are subject to FOIA. "To hold otherwise would allow members of a public body, convened as the public body, to subvert the Open Meetings Act (5 ILCS 120/1 to 7.5 (West 2010)) and FOIA requirements simply by communicating about city business during a city council meeting on a personal electronic device."

SCHOOLS - INDIANA

Smith v. Board of School Trustees of Monroe County Community School Corp.

Court of Appeals of Indiana - June 27, 2013 - N.E.2d - 35 IER Cases 1773

Teacher sought review of school board's decision to terminate his teaching contract for violating rule prohibiting him from being on school property during administrative leave.

The Court of Appeals held that:

- Substantial evidence supported board's finding that an unambiguous rule prohibiting teacher from being on school property existed;
- Substantial evidence supported board's conclusion that teacher willfully disobeyed rule;
- Testimony by co-worker regarding teacher's threatening and disparaging comments at department meeting was relevant; and
- Hearsay statement by staff member that she was scared when teacher was around was admissible as excited utterance.

ZONING - MASSACHUSETTS

DelPrete v. Ruble

Massachusetts Land Court., Department of the Trial Court, Plymouth County - July 2, 2013 - Not Reported in N.E.2d - 2013 WL 3477209

Plaintiff obtained a building permit for his property despite the fact that the lot does not comply with the lot size, frontage, or lot width requirements of the zoning bylaw in the Town of Rockland. Plaintiff proceeded to construct a single-family house on the property, and obtained a certificate of occupancy. After zoning violations came to light, plaintiff sought and was denied a variance, and the Town sought to enforce its zoning bylaw. It was conceded that, absent a variance, the building is not

allowed under current zoning.

The sole issue remaining for decision is whether laches or some other equitable doctrine operates in this case to either (1) bar the Town from enforcing its own zoning bylaws, or (2) require the Board to grant a Plaintiff a variance, notwithstanding that the provisions of G.L. c. 40A, § 10 are not met. The court concluded that these arguments are legally unavailable to Plaintiff.

There is a formidable line of cases holding that laches, estoppel, or other equitable doctrines will not bar a municipality from enforcing its bylaws. This is because the zoning power exercised by a municipality for the public interest may not be forfeited by the actions of one person, even acting in his or her capacity as a municipal officer. This is true even where there has been a substantial financial investment.

ZONING - MINNESOTA

City of Lake Elmo, Appellant, v. Bernard Nass, et al., Respondents.

Court of Appeals of Minnesota - July 15, 2013 - N.W.2d - 2013 WL 3491161

Landowners petitioned to detach their properties from the City of Lake Elmo, which objected.

The chief ALJ may order detachment so long as "the requisite number of property owners have signed the petition if initiated by the property owners, … the property is rural in character and not developed for urban residential, commercial or industrial purposes, … the property is within the boundaries of the municipality and abuts a boundary, … the detachment would not unreasonably affect the symmetry of the detaching municipality, and … the land is not needed for reasonably anticipated future development." The ALJ may deny detachment "on finding that the remainder of the municipality cannot continue to carry on the functions of government without undue hardship."

Any person aggrieved by an order under section 414.06 may appeal to the district court on the following grounds: "(1) that the order was issued without jurisdiction to act; (2) that the order exceeded the [issuer's] jurisdiction; (3) that the order is arbitrary, fraudulent, capricious or oppressive or in unreasonable disregard of the best interests of the territory affected; or (4) that the order is based upon an erroneous theory of law." Minn.Stat. § 414.07, subd. 2 (2010). Section 414.07 provides the exclusive remedy in an appeal of detachment proceedings.

The ALJ's findings of fact are reviewed under the substantial evidence test, which requires an independent examination of the record. Substantial evidence is defined as "such that a reasonable mind might accept it as adequate to support a conclusion."

In conclusion, the ALJ's detachment determination is entitled to deference. And because the decision was supported by substantial evidence and reflects a reasoned decision-making process, the court declined to disturb the determination.

TAX - OHIO

Marysville Exempted Village Local School Dist. Bd. of Edn. v. Union Cty. Bd. of Revision

Supreme Court of Ohio - July 17, 2013 - N.E.2d - 2013 -Ohio- 3077

This real property tax case presents an issue of the jurisdiction of the boards of revision: Does a valuation complaint validly invoke jurisdiction when the property owner is a corporate entity and the complaint was prepared and filed by a salaried employee of the entity who is neither an officer nor a lawyer?

In this case, ten valuation complaints were filed by a salaried employee on behalf of Connolly Construction Company as the property owner. In each case, the Union County Board of Revision ("BOR") apparently ordered a decrease in value, after which the Marysville Exempted School District Board of Education appealed to the Board of Tax Appeals ("BTA"). The school board asked the BTA to order that the original complaints be dismissed in each case because the complaints were allegedly signed by a salaried employee of the corporation who is not himself a lawyer, but who nonetheless purported to act on behalf of the corporate owner, which constitutes the unauthorized practice of law.

The Supreme Court of Ohio concluded that the General Assembly had authority to authorize salaried employees, though not lawyers, to file on behalf of the corporate property owner. Although the salaried corporate employee does not necessarily have the same degree of fiduciary duty toward the corporation that an officer possesses, the relationship of a salaried employee to the corporate employer does tend to involve an ongoing relationship between the owner and the filer that allows the owner to hold the filer accountable for his or her actions. "Nor does allowing the salaried employee to file constitute any greater intrusion on our duty to regulate the practice of law than those authorizations that we have already upheld."

RIGHT TO KNOW LAW - PENNSYLVANIA

Municipality of Monroeville v. Drack

Commonwealth Court of Pennsylvania - July 16, 2013 - Not Reported in A.3d - 2013 WL 3716891

This was an appeal from the Allegheny County Court of Common Pleas' (trial court) order that denied access to speed-timing device calibration information in possession of a third-party contractor requested pursuant to the Right–to–Know Law (RTKL). The Municipality of Monroeville from whom the information was requested, asserted it did not possess the records. Rather, the information was in the possession of a private contractor, YIS/Cowden Group, Inc. (YIS). Although it reasoned the records pertained to a governmental function, the trial court held the information was not accessible under the RTKL because it did not directly relate to a governmental function. Based upon its case law, the appeals court reversed the trial court's holding in that regard.

Ultimately, Municipality is responsible for the accurate calibration of the speed timing devices it elects to use. Municipality's contract with YIS for calibration services is necessary to perform its speed law enforcement role. Therefore, this contracted function is inseparable from a governmental purpose. Consequently, the appeals court agreed with the trial court's conclusion on this prong.

The court next considered whether the records sought directly related to the performance of the governmental function. The records cannot be incidental to preparation for the contract, or to the contractor's day-to-day operations unrelated to the services performed. The records must "directly relate" to carrying out the governmental function.

Training records of how technicians are trained to calibrate the speed timing devices directly relate to the function of calibrating the devices. How the devices are calibrated is relevant to calibration

services, and training technicians to calibrate them is necessarily and directly tied to the calibration. Accordingly, the court held that the training materials, including notes, directly related to the governmental function, and are reachable under Section 506(d).

However, that did not end the inquiry. Only "public records" that are not protected by any exemption are accessible under the RTKL. During Municipality's appeal before the trial court, YIS claimed the training notes are exempt as proprietary. Municipality put the trial court on notice of this defense in its Petition for Review, and briefed it as directed by the trial court after YIS raised the exception.

In light of the foregoing, the court remanded to the fact-finder (here, the trial court) to consider the affirmative defenses preserved in the proceedings before it, specifically the proprietary exemption.

ZONING - SOUTH DAKOTA

Parris v. City of Rapid City

Supreme Court of South Dakota - July 10, 2013 - N.W.2d - 2013 S.D. 51

Property owner sought review of city's denial of rezoning request and building permits. The Zoning Board of Adjustment affirmed. Property owner brought action seeking judicial review. The Circuit Court granted summary judgment in favor of city. Property owner appealed.

The Supreme Court of South Dakota held that:

- City's enforcement of zoning ordinance that prohibited property owner from building between 100–year and 500–year floodplains did not violate city ordinances providing general definitions for the floodway zoning and flood fringe districts, and
- Ordinance that prohibited property owner from building was not arbitrary.

City ordinance that prohibited property owner from building between 100-year and 500-year floodplains was not arbitrary so as to render ordinance invalid, where, although ordinance purportedly exceeded the actual floodway and utilized straight-line zoning, city's decision to maintain portions of the flood hazard zoning district was consistent with ensuring the health, safety, and general welfare of the city's citizens, and floodway was established to ensure the community's safety and to minimize property damage in the event of future flooding.

ADA - TEXAS

Van Velzor v. City of Burleson

United States District Court, N.D. Texas, Dallas Division - July 12, 2013 - Slip Copy - 2013 WL 3579339

Disability discrimination case arising from alleged discriminatory practices of the City of Burleson, Texas, including refusing requests to accommodate disabilities and maintaining a practice of not enforcing statutes intended to protect disabled individuals.

Plaintiff, on several occasions, requested that police department enforce Texas transportation code and the ADA, which they declined to do to Plaintiff's satisfaction.

The Plaintiff alleged that, by refusing to consider his requests for accommodation, that is, refusing to enforce or change policies which will increase likelihood of enforcement of parking regulations intended to protect disabled individuals, the defendant had violated the ADA and the Rehabilitation Act.

The court noted that a core element of a claim for reasonable modification, whether under Title I, II, or III, is that the plaintiff has been denied meaningful access to public places, benefits, or services, i.e., the kind of access that would be necessary to avoid discrimination on the basis of disability.

In this case, the Plaintiff had not, in his complaint, provided the court with sufficient factual allegations to conclude that he was denied meaningful access to the "service" or "benefit that the grantee offers," i.e., police enforcement of laws, considered generally (not just police enforcement of traffic laws).

"The court wishes to clarify that it is not concluding that a qualified individual with a disability could never make a proper 'reasonable modification' claim with respect to police enforcement. There may be instances where the lack of meaningful access to police services is so extreme that a court could find a reasonable modification necessary to prevent discrimination. For example, if a police department systematically refused to respond to calls for service at an institution populated with disabled individuals, then a court might be able to find that a reasonable modification to department practice or policy would be required to prevent discrimination. But here, the non-enforcement of two statutory provisions does not rise to this level, and a conclusion from this court that modification is required to provide greater access to police enforcement would intrude too greatly on the department's enforcement discretion."

The court concluded that the Plaintiff's allegations of lack of enforcement of one provision of the Texas Transportation Code and one provision of the Texas Business & Commercial Code do not support an inference that the plaintiff has been denied "meaningful access" to police enforcement of all the laws under the Burleson police department's jurisdiction.

HOSPITALS - WASHINGTON

Skagit County Public Hosp. Dist. No. 304 v. Skagit County Public Hosp. Dist. No. 1

Supreme Court of Washington, En Banc - July 11, 2013 - P.3d - 2013 WL 3483764

Rural public hospital district brought action against another public hospital district operating clinic within plaintiff district's boundaries seeking declaratory judgment, a writ of prohibition, and injunctive relief.

The Supreme Court of Washington held that defendant hospital district acted in excess of its jurisdiction by providing medical services in plaintiff public hospital district's territory without that district's permission.

When the legislature empowers a municipal corporation to engage in a business, the corporation may exercise its business powers much in the same way as a private entity. Whether a municipal act is governmental or proprietary in nature depends largely on whether the act is for the common good or for the specific benefit or profit of the corporate entity.

Because the legislature has indicated that rural public hospital districts operate in a governmental

capacity when providing health care services, the general rule that two municipal corporations may not perform the same function in the same territory applies.

PUBLIC UTILITIES - WISCONSIN

Bostco LLC v. Milwaukee Metro. Sewage Dist.

Supreme Court of Wisconsin - July 18, 2013 - N.W.2d - 2013 WI 78

Bostco alleged that Milwaukee Metropolitan Sewerage District's (MMSD) negligent operation and maintenance of a sewerage tunnel (the Deep Tunnel) beneath Bostco's property resulted in excessive groundwater seepage into the Deep Tunnel, thereby causing significant damage to Bostco's buildings.

The court initially concluded that MMSD was not entitled to immunity. Once MMSD had notice that the private nuisance it negligently maintained was causing significant harm, immunity under Wis. Stat. § 893.80(4) was not available for MMSD. Bostco's nuisance claim was grounded in MMSD's negligent maintenance of its Deep Tunnel, which maintenance constituted a continuing private nuisance.

Because MMSD did not have immunity for its negligent maintenance of the Deep Tunnel, the court concluded that Wis. Stat. § 893.80(3)-(5) did not abrogate MMSD's duty to abate the private nuisance that MMSD caused by its negligent maintenance of the Deep Tunnel, after MMSD had notice that the nuisance was a cause of significant harm.

The court also concluded that the monetary damage cap in Wis. Stat. § 893.80(3) did not violate equal protection, either facially or as applied to Bostco. Moreover, the nature of Bostco's claim as a continuing nuisance did not render § 893.80(3)'s monetary damage cap inapplicable. Accordingly, the court affirmed the court of appeals' conclusion that the circuit court properly reduced Bostco's monetary damages to $100,000.

The court remanded for a hearing to be held to establish whether an alternate method will abate the continuing private nuisance MMSD maintains or whether lining the Deep Tunnel with concrete is required for abatement.

ZONING - CALIFORNIA

Orange Citizens for Parks and Recreation v. Superior Court

Court of Appeal, Fourth District, Division 3, California - July 10, 2013 - Cal.Rptr.3d - 13 Cal. Daily Op. Serv. 7365

The City of Orange City Council (the City Council) ultimately approved the construction of 39 homes on 51 acres of what had been a golf course (the Project). In connection therewith, the City Council adopted a resolution amending the City's general plan (General Plan Amendment). Among other things, the General Plan Amendment changed the existing designation of the Property on the general plan land use policy map (Policy Map) from "Open Space" to "Other Open Space & Low Density." In response to petitioning activity by its citizens, the City held a referendum on the General Plan Amendment. Voters defeated Measure FF, thereby nullifying the General Plan Amendment.

Plaintiffs (referred to collectively as Orange Citizens) asserted that the referendum essentially undid the City Council's approval of the Project.

Landowner, the City, and the City Council contended that the City's general plan since 1973 had always been to allow low density residential development on the Property. As repeatedly found by the City Council in connection with its approval of the Project, the City's general plan was already consistent with low-density residential units being constructed on the Property, even without the General Plan Amendment and notwithstanding the "Open Space" designation on the Policy Map. The General Plan Amendment simply corrected errors on the Policy Map (and in other documents). Regardless of whether these errors were corrected, the Project was consistent with the City's general plan. The trial court agreed with this position and the appeals court affirmed.

"In 1973, the City Council adopted the Orange Park Acres plan as part of the general plan, and in doing so designated the Property as open space or low density residential. In 1977, the City Council resolved to remove any language in the Orange Park Acres plan inaccurately suggesting it was a specific plan. In 2011, the City Council repeatedly found the Orange Park Acres plan was still part of the general plan and the Property's use designation still allowed low density residential development. The City may fix errors in the Orange Park Acres Plan and the Policy Map by reference to previously adopted resolutions of the City Council. The General Plan Amendment was nullified by the voters, but it does not matter with regard to the major points of contention."

GOVERNMENTAL IMMUNITY - CONNECTICUT

Blonski v. Metropolitan Dist. Com'n

Supreme Court of Connecticut - July 16, 2013 - A.3d - 2013 WL 3368870

Supreme Court of Connecticut considered the scope of governmental immunity that is afforded to a political subdivision of the state that has been sued for allegedly negligent conduct that is alleged to be connected to the proprietary function of operating a water supply company.

After the plaintiff was injured when she rode her bicycle into a pipe gate on property maintained by the defendant, the Metropolitan District Commission, she brought an action claiming that the defendant had negligently maintained the gate in an unsafe and dangerous condition. The jury returned a verdict for the plaintiff and the trial court rendered judgment accordingly.

The questions that the court addressed on appeal were: (1) whether the defendant was immune from liability pursuant to General Statutes § 52–557n (a)(2)(B) because the maintenance of the gate to control the recreational use of the property was a governmental function requiring the exercise of discretion or, instead, the defendant was liable under § 52–557n (a)(1)(B) because its conduct was connected to its proprietary function of operating a water supply company; and (2) if the defendant was not entitled to immunity under § 52–557n (a)(2)(B), whether it is entitled to immunity pursuant to the Recreational Land Use Act (act), General Statutes (Rev. to 2001) § 52–557f et seq.

The Supreme Court of Connecticut concluded that the defendant was liable pursuant to § 52–557n (a)(1)(B) because the maintenance of the gate was inextricably linked to a proprietary function, and that it was not entitled to immunity pursuant to the act. Accordingly, it affirmed the judgment of the trial court.

EMINENT DOMAIN - FLORIDA

Collins v. Monroe County

District Court of Appeal of Florida, Third District - July 10, 2013 - So.3d - 2013 WL 3455608

The Landowners own property in Monroe County, Florida. Pursuant to the Monroe County Year 2010 Comprehensive Plan (the "Plan"), the Landowners filed petitions for a Beneficial Use Determination ("BUD"). A BUD petition requires an applicant to demonstrate that the comprehensive plan and land development regulations in effect at the time of the BUD application deprive the applicant of all reasonable economic use of the property.

Following a lengthy set of appeals, the court held that (a) the issuance of post-BUD building permits, etc. demonstrates that the Plan had not deprived Landowners of all reasonable economic use of their properties, and (b) only that landowner who had obtained building permits prior to the BUD petition was entitled to bring an eminent domain claim.

ZONING AND DEVELOPMENT - IDAHO

Hehr v. City of Mc Call

Supreme Court of Idaho, Boise, May 2013 Term - July 11, 2013 - P.3d - 2013 WL 3466895

Developer brought action against city for inverse condemnation alleging that the conveyance of lots to city in lieu of paying the required community housing fee, which was later declared unconstitutional in a separate proceeding, and the improvements made to those lots constituted an illegal taking.

The Supreme Court of Idaho held that:

- Developer's inverse condemnation claim against city to recover the cost of constructing improvements for the nine lots conveyed to city for community housing was encompassed in its claim to recover the value of those lots;
- Developer's state law takings claim was barred due to developer's failure to present a timely notice of claim to city;
- City never reached a final decision regarding the application of the ordinance to the property at issue as required for federal takings claim;
- Developer forfeited its federal takings claim against city; and
- City was not entitled to attorney fees.

CONTRACTS - IOWA

Horsfield Materials, Inc. v. City of Dyersville

Supreme Court of Iowa - July 5, 2013 - N.W.2d - 2013 WL 3378316

Prospective supplier of materials for public construction project brought action against city, which had excluded prospective supplier from list of preapproved materials suppliers, seeking declatory judgment that preapproval process violated public bidding statute, equal protection, and due process, and seeking relief under open records law based on city's responses to a records request.

Holdings: The Supreme Court, Mansfield, J., held that:

- Prospective supplier lacked standing to seek declaratory judgment that city's list of preapproved materials suppliers violated public bidding statute;
- Prospective supplier met "injury in fact" element of standing to assert that its ongoing exclusion from city's lists of preapproved suppliers violated equal protection and due process;
- City's process of preapproving three suppliers of aggregate and three suppliers of concrete for public construction project did not violate equal protection or substantive due process;
- Prospective supplier had no liberty or property interest at stake in supplying materials for city's construction projects, such that no procedural violation occurred when city excluded prospective supplier from lists of preapproved suppliers;
- Open Records Act provision does not impose an absolute 20-day deadline on a government entity to find and produce requested public records;
- City did not substantially comply with legal obligation under Open Records Act to produce public records promptly by taking from approximately January 25 to April 6 to produce 617 pages of records requested by materials supplier; and
- City's tactical decision as defendant on Open Records Act claim to waive attorney-client privilege with respect to eight emails covered by records request did not show that city violated the act by initially withholding those emails.

City's process of preapproving three suppliers of aggregate and three suppliers of concrete for public construction project served realistically conceivable government interest in quality control, and there was a reasonable fit between the means chosen and the goal of quality control, such that process satisfied rational-basis review on equal protection and substantive due-process challenges asserted by a prospective supplier excluded from preapproved lists. City had 20 to 30 years of positive experience with each of the suppliers on the preapproved lists, and there was no indication that city excluded any suppliers that had a similar track record.

TORT CLAIMS ACT - KANSAS

Continental Western Ins. Co. v. Shultz

Supreme Court of Kansas - July 5, 2013 - P.3d - 2013 WL 3378339

Injured motorist's workers' compensation carrier filed suit against city, city police department, and police officer to recover for amounts paid as result of motorist's accident with officer, due to officer's alleged negligence.

The Supreme Court of Kansas held that:

- Carrier's pre-suit notice of claim substantially complied with statute governing same, and
- Carrier was not required to file revised notice of claim as prerequisite to amended petition that asserted nearly eleven-fold increase in damages from amount asserted in original notice and petition.

Pre-suit notice to city filed by injured motorist's workers' compensation carrier of claim under Kansas Tort Claims Act based on alleged negligence of city police officer, which notice alleged $19,590.07 in damages, substantially complied with statute governing same, despite subsequent amended petition which alleged damages of $228,088.25. Notice provided city with sufficient information to investigate and understand merits of carrier's demand, same damages were alleged in both notice and original petition, carrier's request to amend petition was governed by different

rule governing amendment to pleadings, and city did not argue that it was unaware of carrier's claims or that it did not have enough time to investigate claims before suit was brought.

BONDS - LOUISIANA

Bluebonnet Hotel Ventures, LLC v. Wachovia Bank, N.A.

United States District Court, M.D. Louisiana - July 8, 2013 - Slip Copy - 2013 WL 3423106

Bluebonnet was created in order to construct a new hotel in Baton Rouge, Louisiana. Bluebonnet sought to issue tax-exempt Gulf Opportunity Zone ("GO Zone") bonds in order to finance the hotel's construction. Bluebonnet sought a letter of credit from Wells Fargo. A term sheet was executed and signed by a Wells Fargo and Milford Wampold ("Wampold"), the real estate developer and managing member of Bluebonnet.

As Wells Fargo continued evaluating Bluebonnet's application, complications with its proposed contractors forced Bluebonnet to repeatedly delay and change plans for the hotel, which modified essential details as previously laid out in the original term sheet. Due to the change in the plans and information from Bluebonnet, Wells Fargo was not able to go through on the original term sheet. The GO Zone bonds were granted approval in September of 2007, and were issued in May of 2008. Two weeks before the issuance of the bonds in May of 2008, and 13 months after the execution of the original term sheet, Bluebonnet attempted to gain a provisional $2.5 million letter of credit from Wells Fargo in order to preserve its bond allocation. Wells Fargo informed Bluebonnet that it "could not issue a partial or dry closing in the two weeks provided. Bluebonnet closed on alternative, limited financing from Regions Bank to preserve the bond allocation.

After the original term sheet was signed, on May 1, 2007, Wampold signed a swap contract on behalf of Bluebonnet at Wells Fargo's suggestion. The purpose of the swap contract was to hedge the floating interest rates on the anticipated bonds that Bluebonnet intended to issue by adjusting Bluebonnet's "put" payments to a fixed rate. Should the interest rates rise above the fixed rate, Wells Fargo would pay the difference, and if the interest rates fell below the fixed rate, Bluebonnet would pay Wells Fargo the difference. Before Wampold signed the contract, he was made aware that it required his personal guaranty because it would be executed independently of any other financing he might receive from Wells Fargo. Wampold delayed the start date of the swap contract six times, making the effective date May 2, 2008, nearly a year later than the original August 1, 2008 start date. During this time, the interest rates on the bonds dropped significantly, so that Wampold had to pay the difference in the rates.

After securing the funding from Regions Bank to cover the bonds, Wampold returned to Wells Fargo to obtain permanent financing through a letter of credit for the hotel. Wells Fargo was unable to grant a letter of credit under the original term contract due to Wampold's late changes to the hotel design in 2009, which differed from the original 2007 hotel design. Wampold ultimately financed the project from a loan from Regions Bank.

Wampold subsequently brought this action to rescind the swap contract for failure of cause, negligence, and detrimental reliance. Wampold claimed that the principal cause of the swap agreement was the anticipated letter of credit which never materialized. Wells Fargo filed a Motion to Dismiss.

Louisiana law contemplates the possibility that changed circumstances may constitute a failure of cause when the "cause" is within the control of the party seeking to enforce the contract.

Nevertheless, the Court found that the record contradicts Bluebonnet's claim that its determined or determinable cause for the swap contract was to fix the rate on its anticipated bond issuance, contingent upon Wells Fargo's extending a line of credit. This financial instrument was intended to, in speculative—and ultimately incorrect—anticipation of rising interest rates, provide Bluebonnet with a stable and potentially cost-effective method of making payments to any bond holders wishing to exercise their "put" rights on bonds that it desired to release

Wells Fargo's motion for summary judgment was granted.

NEGLIGENCE - MARYLAND

Coleman v. Soccer Ass'n of Columbia

Court of Appeals of Maryland - July 9, 2013 - A.3d - 2013 WL 3449426

Volunteer coaching assistant brought action against local soccer association, seeking damages for injuries incurred when he jumped and grabbed the metal crossbar of an unanchored soccer goal, causing the goal to tip over and land on his face. After a jury trial at which jury found that coach's own negligence had contributed to his injuries, the Circuit Court, Howard County, entered judgment in favor of association. Coach appealed. Before briefing and argument in the Court of Special Appeals, coach petitioned for writ of certiorari.

The Court of Appeals held that it would decline to abrogate common law principle of contributory negligence in favor of some form of comparative negligence. Thus, coach was not entitled to recover for his injuries since jury found that coach's own negligence had contributed to his injuries. Failure of numerous bills in general assembly that would have abolished or modified the contributory negligence standard was a clear indication of legislative policy to retain the standard.

FIRST AMENDMENT - MARYLAND

Hassay v. Mayor

United States District Court, D. Maryland - July 3, 2013 - Not Reported in F.Supp.2d - 2013 WL 3364692

During every summer from 1995 until June 2012, plaintiff William F. Hassay, Jr., an accomplished violinist, performed as a street artist on the beachfront boardwalk in Ocean City, Maryland. On June 2012, Hassay was warned by an Ocean City police officer that the volume of his music violated an Ocean City noise ordinance enacted in February 2012, which prohibited, inter alia, the audibility of musical instruments and amplified sound at a distance of greater than thirty feet. Faced with the threat of arrest, three months' imprisonment, and a $500 fine, Hassay never returned to the boardwalk to perform.

On April 10, 2013, Hassay filed suit against the Mayor and City Council of Ocean City, Maryland claiming that the 30–Foot Audibility Restriction violated plaintiff's rights under the First Amendment. Plaintiff also filed a motion for a preliminary injunction seeking to enjoin the enforcement of the 30–Foot Audibility Restriction on the boardwalk during the pendency of the case.

After undergoing the traditional First Amendment analysis, the court found that, by restricting the audibility of music on the boardwalk to a distance of thirty feet, Ocean City had effectively banned this form of expression from the boardwalk, a traditional public forum.

Accordingly, as applied to the Ocean City boardwalk, plaintiff had established a likelihood of success on the merits with respect to a violation of the First Amendment based on the 30–Foot Audibility Restriction. A preliminary injunction against the enforcement of the 30–Foot Audibility Restriction, as to the boardwalk, in accordance with Fed.R.Civ.P. 65, was issued.

ZONING - MASSACHUSETTS

Grady v. Zoning Bd. of Appeals of Peabody

Supreme Judicial Court of Massachusetts, Suffolk - July 10, 2013 - N.E.2d - 465 Mass. 725

Neighbor brought action challenging decision of city zoning board of appeals, denying neighbor's request to revoke property owner's building permit on ground that owner had failed to record zoning variance within one year of issuance.

The Supreme Judicial Court of Massachusetts held that variance did not lapse.

Zoning variance did not lapse after property owner failed to record variance within one-year statutory period, but instead variance became effective. Owner was issued a building permit and took substantial steps, including obtaining construction loan and beginning construction operations, within the one-year period in reliance upon an otherwise valid variance. There was no apparent harm to any interested parties, other than any harm resulting from the original, uncontested grant of the variance, and the variance was recorded less than two weeks after the expiration of the one-year period.

SPECIAL ASSESSMENTS - MICHIGAN

Kane v. Township of Williamstown

Court of Appeals of Michigan - July 11, 2013 - N.W.2d - 2013 WL 3481342

The voters in Williamstown Township approved a proposal to allow for "the creation of a special assessment district under 1951 PA 33, as amended, in order to raise money by special assessment for furnishing police protection."

The Williamstown Township Board of Trustees adopted Resolution 2010–96, which provided that the special assessment on residential property would be $150, the special assessment on commercial property would be $250, and the special assessment on vacant property would be $0.

Thereafter, petitioner received a tax bill requiring payment of $150 on his residential property and $250 on his commercial property. Petitioner appealed to the Michigan Tax Tribunal, arguing that any such special assessment must be based on each property's taxable value and not a uniform fee.

At issue was whether MCL 41.801, which indisputably permits a township to assess an ad valorem (according to value) special assessment, also permits a township to assess and implement a uniform-fee special assessment. The court of appeals concluded that it does.

The salient portion of the provision requires the township supervisor "to spread the assessment levy on the taxable value of all of the lands and premises in the district that are to be especially benefited by the police and fire protection, *according to benefits received* …." (Emphasis added.) As a result of the statute's plain language requiring that any assessments be based "according to the benefits

received," if a township determines that the properties in the district are all to benefit equally, then those properties will need to be assessed equal amounts as a matter of law.

Petitioner contended that because the assessments must be levied "on the taxable value of all the lands," any such assessments must be ad valorem and not uniform. However, the court held that spreading the assessment levied on taxable value is not the same as basing the assessment on taxable value.

SPECIAL ASSESSMENTS - MICHIGAN

Ashley Ann Arbor, LLC v. Pittsfield Charter Tp.

Supreme Court of Michigan - July 3, 2013 - N.W.2d - 2013 WL 3357686

"The parties shall include among the issues to be briefed whether a public corporation's special assessment against an individual parcel of property authorized under the Drain Code, MCL 280.490(1), but implemented through the provisions governing special assessments by the public corporation contained in the Public Improvement Act, MCL 41.721, et seq., is subject to the exclusive jurisdiction of the Michigan Tax Tribunal, pursuant to MCL 205.731, in light of the amendment of 1992 PA 172, excluding the drain code from the definition of "property tax laws.'"

"The Michigan Association of Counties, the Michigan Municipal League, and the Public Corporation Law Section of the State Bar of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae."

Knock yourselves out.

STATUTE OF REPOSE - NEW JERSEY

431 Route 206, LLC v. Township of Montague

Superior Court of New Jersey, Appellate Division - July 11, 2013 - A.3d - 2013 WL 3466561

This matter involved a twenty-four-inch reinforced concrete drainage pipe (the 24–inch pipe) that an employee of defendant Township of Montague installed in the early 1970's. The property's owner alleged that the pipe's defective design and/or negligent construction caused the pipe to fail, allowing water to escape, which destroyed the septic system and damaged buildings on the property.

The Township invoked the statute of repose, the elements of which are:

- The injury sustained by plaintiff resulted from a defective and unsafe condition of an improvement to real property;
- Defendant was responsible for performing or furnishing the design, planning, surveying, supervision of construction, or construction of the improvement; and
- The injury occurred more than ten years after the performance or furnishing of the services.

The court determined that the Township had met all three elements and dismissed the case.

CITY COUNSEL - NEW JERSEY

Booker v. Rice

Superior Court of New Jersey, Appellate Division - July 5, 2013 - A.3d - 2013 WL 3357614

Mayor, city clerk, members of city council, and appointee for vacant council position filed suit against members of city council who voted against appointment and two council members who abstained from vote, seeking order to show cause why declaratory judgment should not enter confirming appointee's appointment to council or, in alternative, why mandatory injunction should not issue to compel council members to attend and vote at special council meeting. With parties' consent, the Superior Court, Law Division, Essex County, Dennis F. Carey, III, J., issued interim order compelling all council members to appear for special vote. Four council members voted yes, two voted no, and two abstained. Mayor voted to break alleged tie, in favor of appointment. The Superior Court then issued ruling that abstention was not yes or no vote, and therefore, there was not "tie" that triggered mayor's authority to vote to break tie. Plaintiffs appealed.

The Superior Court, Appellate Division, held that:

- Abstentions of two city council members on vote to fill vacant position were not "no" votes resulting in tie, so as to trigger statutory authority for mayor to vote in order to break tie;
- City council rule of procedure that council member "may abstain from voting on any matter," and that "such abstention shall not be counted as a yes or no vote but shall be recorded in the minutes," was not arbitrary, capricious, and unreasonable; and
- Abstention on vote was permissible exercise of statutory discretion to choose to have vacancy filled by election of voters.

Incidentally, Cory Booker was a law school classmate of mine. Probably should have latched on to those coattails, eh?

EMINENT DOMAIN - NEW JERSEY

Borough of Harvey Cedars v. Karan

Supreme Court of New Jersey - July 8, 2013 - A.3d - 2013 WL 3368225

Borough brought condemnation action against beachfront property owners, seeking condemnation of portion of property for purposes of constructing a dune for storm protection.

The Supreme Court of New Jersey held that calculation of just compensation was required to include benefit that homeowners obtained as a result of storm protection provided by dune.

When a public project requires the partial taking of property, just compensation to the owner must be based on a consideration of all relevant, reasonably calculable, and non-conjectural factors that either decrease or increase the value of the remaining property. When a public project requires the partial taking of property, homeowners are entitled to the fair market value of their loss, not to a windfall, not to a pay out that disregards the home's enhanced value resulting from a public project.

To calculate a homeowner's loss from a partial taking arising from a public project, a court must look to the difference between the fair market value of the property before the partial taking and after the taking.

ARTICLE 78 REVIEW - NEW YORK

Conners v. Town of Colonie

Supreme Court, Appellate Division, Third Department, New York - July 3, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 05033

Town residents petitioned for Article 78 review of town resolution authorizing town to enter into agreement for operation and management of landfill.

The Supreme Court, Appellate Division, held that agreement did not convey any real property rights, and thus was not subject to permissive referendum requirement.

There was no conveyance of real property rights pursuant to town resolution authorizing town to enter into agreement for operation and management of landfill, and thus agreement was not lease and, as such, was not subject to statutory requirement to conduct permissive referendum. The agreement contained no provisions that explicitly conveyed property rights, stated that its purpose was for town to authorize and direct contractor to manage, maintain, and operate landfill in accordance with terms of agreement, preserved town's unlimited right to enter property, imposed numerous requirements and restrictions on contractor, and reasonably characterized payments that contractor was obligated to town were in consideration for certain revenues that contractor was entitled to retain.

PUBLIC UTILITIES - NEW YORK

Crown Castle NG East Inc. v. Town of Greenburgh, N.Y.

United States District Court, S.D. New York - July 3, 2013 - Slip Copy - 2013 WL 3357169

Plaintiff – a "carrier's carrier" that designs and installs fiber-optic based networks to improve wireless coverage and capacity sought permission to install a Distributed Antenna System ("DAS") in the Town of Greenburgh, New York. The Town, after a protracted negotiation/application process, denied Plaintiff's applications.

Plaintiff sought a declaratory judgment that the Town has violated the provisions of the TCA, and further sought a mandatory injunction requiring the Town to grant such permits or other authority as is necessary to allow Plaintiff to install, operate, and maintain its facilities in the Town's public rights of way as set forth in Plaintiff's application.

After an interminable opinion, the court concluded that, "This is a paradigmatic case where remand would only further and unnecessarily delay the processing of Plaintiff's siting application. Accordingly, the appropriate remedy in equity is an order requiring the issuance of the special permits sought."

SECURITIES - NEW YORK

Louisiana Mun. Police Employees' Retirement System v. JPMorgan Chase & Co.

United States District Court, S.D. New York - July 3, 2013 - Slip Copy - 2013 WL 3357173

Louisiana Municipal Police Employees' Retirement System ("LAMPERS") brought suit against JPMorgan Chase (the "Bank") for charging undisclosed mark-ups on foreign exchange transactions that JPMorgan executed for custodial clients.

Custodial clients of the Bank, including LAMPERS, often invest in multiple securities of foreign issuers and occasionally engage in direct currency trading as well. As a result of these activities, custodial clients regularly need to convert U.S. Dollars into foreign currencies, or foreign currencies into U.S. Dollars. This conversion is accomplished through a Foreign Exchange or "FX" transaction. In an FX transaction one currency is bought or sold in exchange for another currency at a particular rate that is available in the currency market. The Bank offers FX services to its custodial clients and regularly executes FX transactions at its customers' direction. At its core, this case was based on the allegation that the Bank executed certain FX transactions at one rate, but charged the custodial clients a different rate, resulting in profit for the Bank, and that the Bank failed to disclose this practice to its custodial clients.

The crux of the case is whether the execution of FX transactions for the client was a service under the Custody Agreement and whether the rate that the Bank listed on its monthly statements for each of these FX transactions was a "fee" when that rate includes the spread on the Indirect FX transactions.

The court concluded that rates for FX transactions are not fees, and therefore the rates disclosed by the Bank to LAMPERS did not constitute "fees," as that term is used in the Custody Agreement.

Furthermore, because the spreads were evident from the AutoFX Confirmations and publicly available databases, there was nothing secret about the mark-ups.

Finding no violations of the law, the court dismissed the case.

GOVERNMENTAL IMMUNITY - NEW YORK

Middleton v. Town of Salina

Supreme Court, Appellate Division, Fourth Department, New York - July 5, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 05119

In an action against a municipality, it is the fundamental obligation of a plaintiff pursuing a negligence cause of action to prove that the putative defendant owed a duty of care. Under the public duty rule, although a municipality owes a general duty to the public at large to perform certain governmental functions, this does not create a duty of care running to a specific individual sufficient to support a negligence claim, unless the facts demonstrate that a special duty was created.

In order for plaintiffs to establish that defendant owed a special duty to them, they were required to establish that defendant voluntarily assumed a duty that generated justifiable reliance by the person who benefitted from the duty. That burden has four elements: (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking.

Here, defendant met its initial burden on the motion by submitting evidence establishing that plaintiffs' alleged reliance upon representations allegedly made by defendant's agents was not

justifiable.

However, even assuming, arguendo, that plaintiffs raised a triable issue of fact whether defendant owed a special duty to them, the court concluded that the governmental function immunity defense applied. Defendant established that it was engaged in a governmental function when it engaged in the allegedly negligent conduct, i.e., failing to install a check valve or similar anti-backflow device on plaintiffs' sewer line to prevent sewage from flowing backwards out of the sewer line and into plaintiffs' house.

UNIONS - OREGON

Eagle Point Educ. Ass'n v. Jackson County School Dist. No. 9

United States District Court, D. Oregon, Medford Division - July 1, 2013 - Slip Copy - 2013 WL 3348357

Eagle Point Education Association (the "Union") brought a civil rights action against Jackson County School District No. 9 (the "District"), and the District's board of directors and superintendent. Plaintiffs claimed that defendants infringed on their First Amendment rights to express support for a strike by Union members.

Anticipating a strike, the District's board had adopted a "Resolution on Picketing" and a "Resolution on Signs and Banners."

The Association went on strike. Two instances of enforcement of the signage and picketing resolutions occurred during the strike.

The strike was settled after eight days.

Plaintiffs asked the Court to declare that the School District's policies limiting their presence and strike activities on District property violated plaintiffs' First Amendment right to speech. The Court found that plaintiffs' allegation that their constitutional rights were infringed by defendants, and their accompanying claim for nominal damages, was sufficient to defeat defendant's claim of mootness.

Plaintiffs also asked the Court to enjoin defendants from promulgating or enforcing directives similar to those complained of, now or in the future. The Court found that the Union had pled sufficient facts to invoke the "capable of repetition, yet evading review" exception to the mootness doctrine.

For the reasons stated above, defendants' motion to dismiss plaintiffs' federal law claims and their motion to dismiss plaintiffs' state law claims for injunctive relief were denied.

TAKINGS - TENNESSEE

Phillips v. Montgomery County

Court of Appeals of Tennessee - June 28, 2013 - Slip Copy - 2013 WL 3378952

Landowners wanted to build a subdivision on their property and submitted a preliminary subdivision plat to the Planning Commission in accordance with the applicable zoning resolution and subdivision

regulations. The Planning Commission denied the proposed plan because the property lies in the path of a planned future extension of State Highway 374.1 Landowners filed a complaint against Montgomery County and Clarksville Montgomery County Regional Planning Commission in the circuit court, asserting claims for a regulatory taking under the Tennessee Constitution and for inverse condemnation pursuant to Tenn.Code Ann. § 29–16–123.2

The Court of Appeals stated that it had not yet held that a regulatory takings claim can be asserted under Article I, Section 21 of the Tennessee Constitution (as opposed to the U.S. Constitution). Currently, it recognized only two types of takings claims—physical occupation takings claims and nuisance-type takings claims. Since the Supreme Court of Tennessee had declined to hold that a regulatory takings claim can be asserted based upon the Taking Clause of the Tennessee Constitution, The Court of Appeals also declined to do so.

The court denied the County's motion to dismiss Landowners' inverse condemnation claim, remanding for further proceedings.

INVERSE CONDEMNATION - WASHINGTON

Jackass Mt. Ranch, Inc. v. South Columbia Basin Irr. Dist.

Court of Appeals of Washington, Division 3 - July 9, 2013 - P.3d - 2013 WL 3422678

Owners of cherry orchard damaged by landslide resulting from seepage from irrigation wasteway brought claims of inverse condemnation, negligence, res ipsa loquitur, and trespass against irrigation district that operated wasteway.

The Court of Appeals held that:

- There was no evidence that landslide was caused by district's operation of wasteway, as opposed to design and construction of wasteway by United States Bureau of Reclamation (USBR), and, therefore, irrigation district could not be held liable on an inverse condemnation claim;
- There was no evidence that district breached applicable standard of care in its operation of wasteway, as necessary for district to be liable in negligence;
- Doctrine of res ipsa loquitur did not apply so as to relieve owners from proving specific acts of negligence; and
- There was no evidence to support intent element of a trespass claim.

TAX - CALIFORNIA

Los Angeles Unified School District v. County of Los Angeles

Court of Appeal, Second District, Division 4, California - June 26, 2013 - Cal.Rptr.3d - 13 Cal. Daily Op. Serv. 6811

School district petitioned for writ of mandate to compel county, city, and several community redevelopment and other local agencies to increase school district's allocation of passthrough payments from property tax increment from redevelopment.

The Superior Court denied the petition. District appealed, and the Court of Appeal reversed. On remand, the Superior Court required county to include Educational Revenue Augmentation Funds (ERAF) revenue that was actually received by school district in the calculation of district's property

tax allocation base, but rejected district's contention that its property tax allocation base should also include its share of the property tax revenue that was diverted from the ERAFs by virtue of the Triple Flip and Vehicle Licensing Fee (VLF) Swap legislation as ERAF revenue. School district appealed.

The Court of Appeal held that share of district's property tax revenue diverted from ERAF by Triple Flip or VLF Swap legislation was counted toward district's property tax base.

Diversion of revenue from an ERAF neither increases the recipient entity's property tax revenue base, nor decreases the donor ERAF's property tax revenue base. Cal. Health & Safety Code § 33607.

The share of school district's property tax revenue that was diverted from the ERAF by virtue of the VLF Swap legislation was counted as ERAF revenue in calculating district's property tax allocation base, thus avoiding either a decrease in the school district's passthrough payment allocation or an increase in a city or county's passthrough payment allocation. Cal. Health & Safety Code § 33607.5; Cal. Rev. & Tax. Code §§ 97.68(e).

INVERSE CONDEMNATION - GEORGIA

Walleye, LLC v. City of Forest Park

Court of Appeals of Georgia - July 1, 2013 - S.E.2d - 2013 WL 3286399

Walleye, LLC, owned property in the City of Forest Park at which tenant operated the Crazy Horse Saloon, a nude dancing business with private rooms and on-site alcohol service.

In March 2009, the City enacted a new ordinance, which repealed the previous sexually-oriented businesses code and enacted a revised code, banning the sale of alcohol and the use of private booths at nude dancing establishments.

The Crazy Horse closed and the property owner filed a lawsuit alleging an inverse condemnation claim because (1) there was no viable uses of the property other than that previously operated; and (2) the City had deprived the property owner of all viable economic use of the property.

The City filed a motion for summary judgment, which the trial court granted, finding that the property owner did not have vested property rights in renewed adult business or alcohol licenses, and therefore, they failed to establish a regulatory taking by the City.

The court of appeals affirmed, finding that property owner failed to state a claim for which it could recover because not only did it fail to present any evidence that their property could not be converted to a use other than an adult business, but because the zoning for the particular parcels allows for adult business. The property owner also failed to show that it could not continue leasing its buildings to other businesses in the same category that would not have violated the City's licensing rules and could operate legally within the City.

TORT CLAIMS ACT - GEORGIA

Georgia Dept. of Transp. v. Griggs

Court of Appeals of Georgia - June 28, 2013 - S.E.2d - 2013 WL 3242531

Motorist stopped her car in the emergency lane of I–285 to help a friend who had been in an automobile accident. As she walked from her friend's car back to her car, she went to the passenger's side door because it was away from the traffic lanes. As she opened the door, she stepped back onto a plywood board that was covering a manhole. The plywood gave way and she fell into the manhole, fracturing her elbow and knee, receiving cuts and bruises, and hurting her lower back. Apparently, the grate that was supposed to cover the manhole had been removed by thieves who had then placed a thin plywood board over the hole. There were no warning cones around the hole and trash from the roadway partially obscured the plywood cover.

Motorist filed a personal injury complaint against the Department of Transportation (DOT). The DOT filed a motion to dismiss. The trial court denied the motion. The DOT appealed.

Strict compliance with the notice provisions is a prerequisite to filing suit under the Georgia Tort Claims Act (GTCA), and substantial compliance therewith is insufficient.

The court found that motorist adequately complied with ante litem notice requirements. Motorist identified the portion of interstate on which she fell though a piece of plywood covering a manhole or storm drain on the shoulder of interstate, and after the notice was filed the Department of Transportation conducted an investigation and made motorist an offer of settlement.

MUNICIPAL FINANCE - ILLINOIS

Village of Sugar Grove v. F.D.I.C.

United States District Court, N.D. Illinois, Eastern Division - June 27, 2013 - Slip Copy - 2013 WL 3274583

Benchmark Bank issued a Letter of Credit ("LOC") in favor of the Village of Sugar Grove in the amount of $2,454,807.00 and a second LOC in favor of the Village in the amount of $4,538,634.00. The two LOC's secured the obligation of Hannaford Farm, LLC ("Hannaford"), the bank's customer, to construct certain property improvements. The LOC's obligated Benchmark to pay the Village upon demand certifying that Hannaford had defaulted in the manner described in the LOC's.

The Village, citing defaults by Hannaford, presented sight drafts to Benchmark demanding payment pursuant to the LOC's. Benchmark did not honor the Village's drafts, prompting the Village to file a lawsuit for wrongful dishonor in state court. The Illinois Department of Financial and Professional Regulation subsequently closed Benchmark and the FDIC was appointed as its receiver. The FDIC, as receiver for Benchmark ("FDIC–R"), removed the case to this court after it was substituted for Benchmark as the defendant.

Meanwhile, the Village submitted a proof of claim to the FDIC–R predicated on Benchmark's failure to honor the Village's drafts. The FDIC–R allowed the Village's claim in the full face amount of the LOC's as a "Tier 3" general creditor claim. The Village disputed that categorization, arguing that it should instead be treated as a depositor.

The FDIC denied the Village's deposit-insurance claim, reasoning that the LOC's were not "deposits" as that term is defined by 12 U.S.C. § 1813.

The court concluded that there was nothing arbitrary or capricious about the FDIC's reasonable conclusion that the notes backing the LOC's were "contingent," and thus not deposits.

The FDIC also stated that tax-exempt bonds backed by unfunded LOC's would become taxable if

those LOC's were deemed "deposits," as bonds are not eligible for tax exemption if they are federally guaranteed). This could, the FDIC reasoned, negatively impact the market for municipal bonds, which are often backed by unfunded letters of credit.

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PUBLIC UTILITIES - KANSAS

Rural Water Dist. No. 4, Douglas County, Kan. v. City of Eudora, Kan.

United States Court of Appeals, Tenth Circuit - July 1, 2013 - F.3d - 2013 WL 3288083

Rural water district filed § 1983 action, alleging that city violated its exclusive right to provide water service to properties within its service area after city annexed certain properties within that area. City filed counterclaims for tortious interference with business advantage, fraud, abuse of process, and declaratory relief.

The Court of Appeals held that:

- Amendment to Kansas statute governing district's powers did not apply retroactively;
- Court had discretion to take up summary judgment denial on appeal; and
- District failed to demonstrate that loans were absolutely necessary or necessary to completing project.

Rural water district may only obtain federal statutory protection from poaching while repaying a

loan from the United States Department of Agriculture (USDA) if state law authorizes it to do so. Agricultural Act of 1961, § 306(b), 7 U.S.C.A. § 1926(b).

Amendment to Kansas statute governing powers of rural water districts, which eliminated requirement that districts demonstrate necessity of obtaining USDA loan guarantees in order to show entitlement to federal protection from poaching while repaying such loans, constituted substantive amendment that did not apply retroactively, and thus district was required, in its § 1983 suit against city for alleged poaching of its customers, to show such necessity. Prior to the amendment, the city had the right to take district's customers if district's USDA-backed loans were unnecessary, and retroactive application of statute would strip city of that right. 42 U.S.C.A. § 1983; Agricultural Act of 1961, § 306(b), 7 U.S.C.A. § 1926(b); K.S.A. 82a–619(g).

DISABILITY PAYMENTS - LOUISIANA

Paul v. Jefferson Parish Public School System

Court of Appeal of Louisiana, Fifth Circuit - July 3, 2013 - So.3d - 13-132 (La.App. 5 Cir. 7/3/13)

Claimant, Ms. Paul, was employed by the Jefferson Parish School Board as a custodial worker. On March 6, 2009, she injured her neck and left shoulder during the course and scope of her employment. She reported this injury to the School Board and began receiving temporary total disability benefits.

Ms. Paul was paid temporary total disability benefits covering the period from her injury in March of 2009 until July 2, 2009. She prevailed in a disputed claim for compensation filed on December 1, 2010, alleging that her benefits had been wrongfully terminated. A February 13, 2012 Consent Judgment awarded Ms. Paul supplemental earnings benefits from the date of her injury until January 31, 2012, at which time supplemental earnings benefits payments were continued until Ms. Paul was "placed in a job that has been approved by her treating physician."

The only issue Ms. Paul presented for review was whether under La. R.S. 23:1209, the School Board's payment of supplemental earnings benefits to her interrupted prescription as to her claim for temporary total disability benefits.

The Court of Appeal found that Ms. Paul continuously received indemnity benefits (first temporary total disability benefits, followed by supplemental earnings benefits) for the injury that the School Board deemed compensable from the date of her initial injury on March 6, 2009 until April 12, 2012, when she underwent surgery for a condition related to the initial injury. She was unable to work after the surgery. Because of her total disability status following the surgery, the School Board terminated her supplemental earnings benefits. On July 11, 2012, within one year of termination of her supplemental earnings benefits, Ms. Paul filed a disputed claim for compensation, seeking temporary total disability benefits.

Applying the rules of statutory interpretation to the particular facts of this case, the court found that the workers' compensation court judge erred in finding that Ms. Paul's claim for temporary total disability benefits had prescribed. It also found that it would go against the legislatively-declared policy and intent of the Louisiana Workers' Compensation Laws, including La. R.S. 23:1209(A)(1) and (2), to find that Ms. Paul's claim for temporary total disability benefits had prescribed when she became temporarily totally disabled as a result of surgery for a condition related to her initial injury that the employer deemed compensable, in light of the fact that she had been receiving indemnity

benefits (first temporary total disability benefits, followed by supplemental earnings benefits) continuously from the date of her initial injury until the date of the surgery.

FIRST AMENDMENT - MARYLAND

Greater Baltimore Center for Pregnancy Concerns, Inc. v. Mayor and City Council of Baltimore

United States Court of Appeals, Fourth Circuit - July 3, 2013 - F.3d - 2013 WL 3336884

In suit challenging facial validity of ordinance requiring limited-service pregnancy centers to post disclaimers that they did not provide or make referrals for abortions or certain birth-control services, the District Court dismissed claims of church and archbishop for lack of standing, and granted summary judgment in favor of co-plaintiffs, permanently enjoining enforcement of ordinance on ground that it was invalid under the Free Speech Clause, and parties cross-appealed.

In an en banc opinion, the Court of Appeals held that district court erred by entering a permanent injunction without allowing city defendants discovery or adhering to the applicable summary judgment standard.

As a general proposition, summary judgment is appropriate only after adequate time for discovery; discovery is usually essential in a contested proceeding prior to summary judgment because a party asserting that a fact is genuinely disputed must support the assertion by, inter alia, citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations, admissions, interrogatory answers, or other materials.

Even if strict scrutiny proved to be the applicable First Amendment standard, city was entitled to opportunity to develop evidence relevant to the compelling governmental interest and narrow tailoring issues, including, inter alia, evidence substantiating the efficacy of the ordinance in promoting public health, as well as evidence disproving the effectiveness of purported less restrictive alternatives to the ordinance's disclaimer.

Disclosure requirements aimed at misleading commercial speech need only survive rational basis scrutiny under First Amendment, by being reasonably related to the state's interest in preventing deception of consumers. Absence of the speaker's economic motivation does not preclude classification of the speech as commercial for purposes of First Amendment analysis.

Genuine issues of material fact existed as to whether limited-service pregnancy center's advertising constituted commercial speech for purposes of First Amendment analysis, precluding summary judgment in favor of pregnancy center on its claim challenging validity of ordinance requiring limited-service pregnancy centers to post disclaimers that they did not provide or make referrals for abortions or certain birth-control services.

ZONING - MARYLAND

Pringle v. Montgomery County Planning Bd. M-NCPPC

Court of Special Appeals of Maryland - June 27, 2013 - A.3d - 2013 WL 3233337

Challenger of town's employment area sector plan sought judicial review of a decision of the county

planning board adopting resolutions relating to a development project to revitalize town's central employment corridor.

The Court of Special Appeals held that substantial evidence supported board's finding that locating "big box" retailer on internal network of streets relatively near proposed transit station, rather than on certain streets specified in town's employment area sector plan, was consistent with the sector plan.

While sector plan specified that big box retailers, if proposed, "should" have active storefronts with multiple entrances and small retail uses facing certain specified streets, this provision was aspirational, rather than mandatory. Planning board found that natural drain location of site where sector plan called for retail frontage, and the grades of that intersection made locating the retail uses on these streets unfeasible, and that, due to this constraint, an internal network of streets relatively near the proposed transit station was consistent with the sector plan.

ZONING - MINNESOTA

Douglas A. Ruhland, Appellant, v. City of Eden Valley, Respondent.

Court of Appeals of Minnesota - July 1, 2013 - N.W.2d - 2013 WL 3285019

On appeal from the district court's summary-judgment order confirming city's decision to rezone certain property from "single and two-family residential" to "commercial reserve," neighbor who objected to the zoning change argued that the city (1) failed to follow its comprehensive plan; (2) failed to comply with its zoning ordinance; (3) did not make sufficient findings of fact to support its decision and the record does not support the findings that it did make; (4) made a decision that constitutes impermissible spot zoning; and (5) made a decision that was improperly impacted by conflicts of interest.

In conclusion, the court of appeals observed that a city is required to provide reasons for a zoning decision or risk not having its decision sustained. See *Honn*, 313 N.W.2d at 416 ("The municipal body need not necessarily prepare formal findings of fact, but it must, at a minimum, have the reasons for its decision recorded or reduced to writing and in more than just a conclusory fashion. By failing to do so, it runs the risk of not having its decision sustained."). "We also observe that the reasons for the city's decision in this case are minimal and that greater explanation would have been desirable. However, given our deferential standard of review, we are satisfied that the city's zoning decision was not unreasonable, arbitrary, or capricious. We therefore affirm."

EMPLOYMENT - NEW JERSEY

Ruroede v. Borough of Hasbrouck Heights

Supreme Court of New Jersey - July 1, 2013 - A.3d - 2013 WL 3284218

Non-civil service borough police officer sought judicial review of a decision of a hearing officer recommending his termination based on officer's engaging in conduct unbecoming a police officer and public employee, disorderly conduct, willful violations of departmental rules and regulations, dishonesty, untruthfulness, and withholding information. The Borough affirmed hearing officer's recommendation. Officer appealed. The Superior Court, Law Division, Bergen County, reinstated officer on basis that his due process rights had been violated at disciplinary hearing.

The Supreme Court of New Jersey held that:

- Trial court was required to conduct an independent, de novo review of the quantum and quality of evidence presented at disciplinary hearing;
- Failure to call eyewitnesses to altercation to testify at disciplinary hearing, and relying instead on witness statements, did not violate officer's due process rights;
- Appropriate remedy to account for trial court's failure to conduct an independent, de novo review of the quantum and quality of the evidence presented at disciplinary hearing was for Supreme Court to exercise its original jurisdiction over the matter; and
- There was sufficient, competent evidence to support conclusion that officer engaged in misconduct.

OPEN MEETINGS ACT - NEW MEXICO

Palenick v. City of Rio Rancho

Supreme Court of New Mexico - June 27, 2013 - P.3d - 2013 WL 3226758

City manager brought action against city alleging his termination was in violation of the Open Meetings Act (OMA) and seeking payment pursuant to employment agreement.

The Supreme Court of New Mexico held that:

- Whether city manager waived right to pursue breach of contract claim under OMA was a question of law subject to de novo review, and
- Demand and acceptance of severance payment constituted waiver of breach of contract claim under OMA.

City manager's demand and acceptance of severance package from the city constituted a waiver of city manager's right to pursue breach of contract action against city based on alleged violation of OMA stemming from termination of manager's employment, where manager's demand and acceptance of a severance payment was inconsistent with his assertion that he was still an employee at the time of the alleged OMA violation, and manager failed to comply with statutory requirement to alert city council of alleged OMA violation.

ELECTIONS - OHIO

Krummen v. City of North College Hill, Ohio

United States District Court, S.D. Ohio, Western Division - June 26, 2013 - Slip Copy - 2013 WL 3270372

This lawsuit concerned the constitutionality of a recently passed Charter Amendment creating term limits for all elected officials in the City of North College Hill, Ohio. In addition to setting term limits for future elected officials, Section 13.09 explicitly imposed term limits retroactively on all current and past officials for years they had already served.

The District Court struck down the retroactive application of term limits to city council members holding office prior to the effective date of the amendment on the basis that such provision violated the Ohio Constitution. In addition, the retroactivity provision would also constitute an undue burden on plaintiffs' First and Fourteenth Amendment rights under the United States Constitution.

EMPLOYMENT - OHIO

Brockmeier v. Greater Dayton Regional Transit Authority

United States District Court, S.D. Ohio, Western Division - July 2, 2013 - Slip Copy - 2013 WL 3337403

Bus driver claimed that his employer, Greater Dayton Regional Transit Authority ("GDRTA"), violated the Americans with Disabilities Act ("ADA") and the corollary provision of Ohio law, when GDRTA did not allow him to drive a bus for almost two years after it received a physician's report-stating that he did not meet Department of Transportation ("DOT") medical certification guidelines for operation of a commercial vehicle due to symptoms associated with his multiple sclerosis ("MS").

This was an unusual ADA claim in that Plaintiff did not seek an accommodation or challenge the reasonableness of the accommodation his employer offered him; rather, Plaintiff claimed he should have been permitted to continue driving a bus, despite the fact that he failed a medical exam. To that end, the Court noted that this a highly regulated area of the law—likely on account of the significant safety concerns involved with public bus drivers and their transportation of citizens of the community. Quite likely indeed.

Plaintiff alleged that he submitted to GDRTA a number of physicians' certificates determining that he was able to return to work during his unpaid leave, but was not allowed to return to work. Notably, however, Plaintiff did not allege that any of these reports specifically opined whether or not he met the DOT Medical Certification guidelines for operating a commercial motor vehicle. Further, Plaintiff did not allege that he attempted to resolve the conflicting opinions through the established administrative procedure.

The court dismissed the case, noting that in order to determine whether Plaintiff was qualified for his position, the court would have to resolve the disagreement between the divergent medical opinions and this was not the appropriate forum in which to do so.

LIABILITY - RHODE ISLAND

Lombardi v. City of Providence

Supreme Court of Rhode Island - July 2, 2013 - A.3d - 2013 WL 3337000

Plaintiff tripped over a portion of a sidewalk adjacent to 180 South Main Street, Providence, Rhode Island. After serving notice upon the Providence City Council, plaintiff filed suit against the city, alleging that it negligently failed to maintain or repair the portion of the sidewalk where she fell and that she had suffered serious injuries as a result. The plaintiff later amended her complaint to add the state as a defendant.

The state answered plaintiff's complaint but, significantly, did not assert a cross-claim for contribution or indemnification against the city.

The city moved for summary judgment, arguing that it did not owe a duty to plaintiff because the state, and not the city, was responsible for the maintenance and repair of the sidewalk. The city contended that the state may assume full legal responsibility for designated roadways within a municipality and had done just that with respect to the sidewalks on South Main Street by virtue of P.L.1985, ch. 364, §§ 1–2.4.

Final judgment on plaintiff's claim was entered in favor of the city. The state filed a motion for reconsideration of the grant of summary judgment in favor of the city. The Supreme Court of Rhode Island held that the state was not entitled to this motion, as it was not a "party aggrieved by" the final judgment under G.L.1956 § 9–24–1, having chosen not to file a cross-claim against the city.

EMPLOYMENT - TEXAS

City of Houston v. Bates

Supreme Court of Texas - June 28, 2013 - S.W.3d - 2013 WL 3240206

Retired city firefighters brought action against city, alleging that city had made unauthorized deductions from their termination pay upon retirement.

The Supreme Court of Texas held that:

- Statute governing calculation of overtime required that only paid leave, and not unpaid leave, be included in calculation of hours, but
- Statute governing calculation of termination pay preempted city ordinances excluding premium pay from definition of "salary" for purposes of termination pay calculation.

Sections of local government code entitling city firefighters to a lump-sum payment for accumulated but unused vacation and sick leave upon retirement, requiring accumulated vacation and sick leave to be valued at the firefighter's "salary" at the time firefighters accumulated the leave, preempted city ordinances excluding certain types of premium pay from definition of salary for purposes of calculating accumulated benefit leave for termination pay due to firefighters upon retirement.

Statute requiring that time spent on "authorized leave" be included in calculating the number of hours city firefighter worked during a work cycle for purposes of overtime compensation, required that only paid leave, and not unpaid leave, be included in calculation of hours. The phrase "any other authorized leave" was preceded in statute by six categories of paid leave, sick time, vacation time, meal time, holidays, compensatory time, death in the family leave, indicating that legislature intended term to have the limited meaning of encompassing only other forms of paid leave.

ZONING - ALABAMA

Birmingham Derby Club, Inc. v. City of Birmingham

Court of Civil Appeals of Alabama - June 21, 2013 - So.3d - 2013 WL 3155025

Applicant for lounge liquor license and dance permits pertaining to planned adult-entertainment establishment sought judicial review of city council's denial of applications.

The Court of Civil Appeals held that:

- Applicant failed to timely seek judicial review of denial of liquor license application, and
- City properly denied application for dance permit.

City properly denied applicant's application for dance permit pertaining to planned adult-entertainment establishment involving semi-nude dancing, where, at hearing, city council heard statements from owners of residences located within 750 feet of the proposed adult establishment

who noted the adverse effects on traffic and parking that had resulted during the two-year operation of the former adult establishment on the subject premises and their concerns that similar problems would result if application was to be granted. Subject property had been zoned for light industrial use and had been sold for the purpose of being used as a tire store, and 449 signatures had been affixed to petitions seeking denial of the application.

PUBLIC UTILITIES - ALABAMA

Hilgers v. Jefferson County

Court of Civil Appeals of Alabama - June 21, 2013 - So.3d - 2013 WL 3155015

County brought five separate actions to enforce liens for unpaid sewer-service charges against five separate parcels owned by property owners.

The Court of Civil Appeals held that:

- County's power to set sewer-service charges, to collect sewer-service charges, and to impose a lien against a parcel of property serviced by the sewer system for unpaid sewer-service charges was not limited to only that portion of those charges that arose from the repayment of the bonds issued pursuant to the Amendment to State constitution that provided county could incur bonded indebtedness exceeding the then three and one half percent debt limit in order to finance improvements to its sewer system or that arose from the reasonable expenses of extending, improving, operating, and maintaining the sewer system;
- State Act that provided county commission with the right to set sewer-service charges, state that unpaid sewer-service charges were a lien upon the real property to which sewer services were provided, and granted county commission the power to enforce such liens, provided a basis for county to impose a lien for unpaid sewer-service charges on properties provided sewer services;
- Liens for unpaid sewer-service charges against five separate parcels owned by property owners, including any portion that might have been intended to repay Kelly Act indebtedness, were properly imposed under the power provided to county under the Amendment and State Act; and
- Circuit Court was not required to rule on property owners' motion to compel before entering summary judgment in favor of County.

The Supreme Court made it clear in *Lunsford v. Jefferson County* that even after bonds issued under the amendment had been paid, county could continue to level and collect sewer-service charges to cover expenses of needed improvements and extensions and maintenance and operation of sewers and sewerage treatment and disposal plants.

MUNICIPAL CONTRACTS - ARIZONA

Alpha, LLC v. Dartt

Court of Appeals of Arizona, Division 1, Department D - June 27, 2013 - P.3d - 2013 WL 3242220

Rather than undertaking a competitive bidding process, police department established a list of towing companies that would be contacted on a rotating basis for service calls. The towing regulations permitted any business satisfying the stated criteria to appear on the rotation list.

After customer complaints were filed, plaintiff was removed from the rotation list. Plaintiff then filed

suit, alleging that the town had violated its constitutional due process and equal protection rights.

The appeals court ruled that the towing company did not have a property interest in remaining on a towing rotation list created and administered by the municipal police agency. Because there was no underlying legislative enactment, and the regulations governing the list were modifiable at the administrator's discretion, no constitutionally protected property interest exists.

ATTORNEYS' FEES - ARKANSAS

Collins v. City of Bryant

Court of Appeals of Arkansas - June 19, 2013 - S.W.3d - 2013 Ark. App. 409

Landowners brought action against city to enforce alleged easement agreement with city engineer for construction of drainage on landowners' property. Following a jury trial, the Saline County Circuit Court entered judgment for landowners in the amount of $70,000, and in a separate judgment, awarded landowners attorney fees and costs. City appealed first judgment. The Court of Appeals reversed. Following reversal, the city moved to set aside judgment for attorney fees and costs, and to enter judgment in its favor. The Circuit Court granted city's motion to set aside attorney fee and costs award, but denied motion to enter judgment in city's favor. Landowners appealed and city cross appealed.

The Court of Appeals held that:

- 90-day period for Circuit Court to vacate attorney fee and costs award began to run on the date of the entry of the order, and
- City was not entitled to have a judgment entered in its favor.

PUBLIC UTILITIES - CALIFORNIA

Southern California Edison Company v. City of Victorville

Court of Appeal, Fourth District, Division 2, California - June 17, 2013 - Cal.Rptr.3d - 13 Cal. Daily Op. Serv. 6241

After automobile accident, passenger brought action against city, county, and electric utility for allegedly placing utility pole in unsafe location. Electric utility cross-complained against city for equitable indemnity.

The Court of Appeal held that:

- Superior court had jurisdiction over automobile passenger's claim against electric utility, but
- Utility's failure to comply with claims presentation requirements barred its cross-complaint against city.

If the Public Utilities Commission (1) has the authority to regulate or otherwise establish policy in a given area, and (2) has exercised that authority by regulation or policy, then the superior court may do nothing that hampers or interferes with that exercise of jurisdiction, including awarding damages in a private action. Cal. Pub.Util.Code §§ 1759, 2106.

The statute providing that a superior court may not interfere with the PUC in the performance of its official duties did not deprive the superior court of jurisdiction over automobile passenger's action

against electric utility for allegedly placing utility pole in unsafe location, even though PUC had approved a tariff applicable to the utility which contained a release of liability as to actions taken in compliance with the tariff, absent evidence of any specific PUC policy, regulation, decision or study which indicated that it had exercised authority over the siting of street lights. Cal. Pub.Util.Code §§ 1759, 2106, 2902.

Electric utility was required to comply with claims presentation requirements of the Government Claims Act before filing cross-complaint against city for equitable indemnity, since utility's cross-complaint was not solely defensive in nature, even if city's cross-complaint naming "Moe" cross-defendants could be construed as a cross-complaint against utility, where utility's cross-complaint went beyond the set of facts upon which the city defended passenger's complaint and upon which the city's cross-complaint was premised. Cal. Gov. Code §§ 905, 911.2(a).

PROPERTY TAX - CONNECTICUT

Kasica v. Town of Columbia

Supreme Court of Connecticut - June 25, 2013 - A.3d - 2013 WL 3071943

In separate actions, taxpayer appealed decisions of town Board of Assessment Appeals upholding town assessor's interim valuations of property for two tax years based on partially completed construction.

The Supreme Court of Connecticut held that:

- Town assessor had statutory authority to conduct interim assessment of real property and to assign value based on partially completed construction, and
- Statute governing assessment of property with newly completed construction, for purposes of taxation, did not apply to preclude assessment of value of real property with partially completed construction.

LAND USE - IDAHO

Telford Lands LLC v. Cain

Supreme Court of Idaho, Pocatello, May 2013 Term - June 20, 2013 - P.3d - 2013 WL 3064935

Purported dominant estate owners brought action against purported servient estate owner seeking to enforce alleged oral agreement permitted them to construct irrigation pipeline.

The Supreme Court of Idaho held that:

- Reasonable necessity existed for condemnation;
- Fact that dominant estate owners were currently under irrigation did not preclude condemnation;
- Dominant estate owners were required to make good faith effort at purchase only prior to lawsuit;
- Lessee of dominant estate had standing to maintain condemnation action;
- Judgment failed to limit length of lessee's easement;
- Servient estate owners did not abandon counterclaim for trespass;
- Statute governing costs in eminent domain proceedings provided for award of court costs, not attorney fees; overruling State ex rel. Winder v. Canyon Vista Family Ltd. Partnership, 228 P.3d

985; and

- Servient estate owners were not entitled to award of attorney fees as prevailing parties.

Reasonable necessity existed so as to permit dominant estate owners to condemn easement over servient estate for construction of irrigation pipeline, where dominant estate owner suffered conveyance losses of 35% to 40% by using a nearby canal rather than using irrigation pipeline, and public policy of state was to secure maximum use and benefit, and least wasteful use, of its water resources. Article I, § 14, of the Idaho Constitution.

PROPERTY - LOUISIANA

Davis v. Brent

Court of Appeal of Louisiana, Second Circuit - June 19, 2013 - So.3d - 48, 088 (La.App. 2 Cir. 6/19/13)

Landowner filed a petition for declaratory judgment against neighbors, alleging that neighbors had a right-of-way over, and did not possess fee ownership of, a strip of land used as driveway.

The Court of Appeal held that deed granted a servitude of passage and did not grant fee ownership of the driveway.

Deed conveying tract of land and granting a “fifty foot driveway” in a certain location across land adjacent to tract granted a servitude of passage, and did not grant fee ownership of the driveway. Deed language referring to driveway did not refer to a “parcel” or “strip,” did not specifically describe where driveway ended, and required reference to the description of adjacent land to determine where the driveway began.

In deciding whether a fee simple title to land has been conveyed or a servitude thereupon has been granted by a deed, the intention of the parties must be determined from the stipulations in the entire instrument, giving effect to all of the provisions therein contained.

The general rule is that if an instrument is so ambiguous as to leave doubt about the parties’ intent, the court may resort to extrinsic evidence as an aid in construction.

ZONING - MASSACHUSETTS

Drummey v. Town of Falmouth Zoning Bd. of Appeals

Superior Court of Massachusetts, Barnstable County - June 18, 2013 - Not Reported in N.E.2d - 2013 WL 3205142

The Town of Falmouth constructed a wind turbine, known as Wind I, at the waste water treatment facility which it owns and operates. The building permit for Wind I was issued by the town’s building commissioner on June 30, 2009 after he determined that a special permit was unnecessary. Wind I became operational in March of 2010. Thereafter, on October 4, 2010, the plaintiffs appealed to the Falmouth Zoning Board of Appeals (ZBA) which, on March 3, 2011, affirmed the issuance of a building permit for Wind I without a special permit.

Plaintiffs appealed the ZBA’s decision, seeking an order that the Town cease operation of Wind I until a special permit was applied for and issued.

The court found that it was not irrational for the Town to conclude that in most cases a windmill is a use with such potential to impact neighbors so as to require special permission, but in the case of a municipal windmill, the benefits of the use justify allowance as of right. Accordingly, the Court could not conclude that the Building Commissioner erred in issuing a building permit under § 240–30B without a special permit.

The plaintiffs also contended that the Town was required to obtain a special permit under § 240–33G(5) of the Bylaw, which requires a special permit for enumerated accessory uses in a Public Use District, including windmills. However, the Court agreed with the Town that where a municipal purpose use is allowed as of a right in a particular district, it is permitted regardless of whether it is a primary or accessory use. It would make little sense to authorize the Town to construct a windmill as the primary use on the site as of right while requiring it to obtain a special permit for a windmill constructed as a less intensive accessory use.

CODE ENFORCEMENT - MISSISSIPPI

Vazzana v. City of Greenville

Court of Appeals of Mississippi - June 25, 2013 - So.3d - 2013 WL 3185891

Property owner appealed the Washington County Circuit Court's order affirming the decision of the City Council of Greenville, Mississippi, which found that several properties owned by him were a menace. He argued that (1) he received insufficient notice of the hearing; and (2) the city council's actions were arbitrary and capricious.

The Court of Appeals found no error and affirmed.

STATUTE OF LIMITATIONS - NEW JERSEY

Town of Kearny v. Brandt

Supreme Court of New Jersey - June 20, 2013 - A.3d - 2013 WL 3064600

After structural failures, town brought action against engineers and architects, asserting claims of negligence and breach of contract concerning design and construction of public safety facility.

The Supreme Court of New Jersey held that:

- Issuance of temporary certificate of occupancy triggered running of statute of repose, and
- As a matter of first impression, Comparative Negligence Act and Joint Tortfeasors Contribution Law authorized allocation of fault to engineers, who obtained summary judgment on ground of statute of repose.

RENT CONTROL - NEW JERSEY

Heyert v. Taddese

Superior Court of New Jersey, Appellate Division - June 25, 2013 - A.3d - 2013 WL 3184626

Tenants claimed that landlords violated the New Jersey Consumer Fraud Act (CFA), N.J.S.A. 56:8–1 to –195, by charging rent in excess of that allowed by local rent control ordinances, and that the

municipality erred in granting the landlords a hardship rent increase. The landlords claimed that the municipality's rent control ordinance is unconstitutional and that the legal base rent calculated under the ordinance was arbitrary, capricious and unreasonable.

The appeals court held that:

- The CFA applied to the landlords;
- The landlords committed an affirmative act of unlawful conduct by charging the tenants rent in excess of that allowed by the City's rent control ordinance;
- The landlords violated the CFA;
- The tenants were not required to seek reimbursement prior to filing suit; and
- The City's rent control ordinance is not unconstitutionally vague.

ZONING - NEW JERSEY

Kane Properties, LLC v. City of Hoboken

Supreme Court of New Jersey - June 26, 2013 - A.3d - 2013 WL 3197164

Property owner brought action in lieu of prerogative writs, challenging city's disapproval of variances for owner to build a multiple unit residential building in an area zoned for industrial use.

The Supreme Court of New Jersey held that:

- Appearance of impropriety standard applied to review of attorney's actions in advising city council;
- Incomplete recusal irretrievably tainted city council's actions; and
- Appropriate remedy was de novo review of zoning board's decision by trial court.

Incomplete recusal of city's conflicted corporation counsel, who had previously represented principal objector to grant of variances in same proceeding, irretrievably tainted, due to the appearance of impropriety, city council's adjudication in matter concerning property owner's appeal from zoning board's denial of request for zoning variances, where attorney sent initial letter to counsel for property owner involved in the appeal, attorney prepared a generic memorandum that his substitute counsel forwarded, along with his own, to the governing body, and attorney appeared at meeting concerning the appeal, in his capacity as corporation counsel, during which he answered questions about voting procedures and then signed the resolution on the line designating him as having approved the city council's action.

ZONING - NEW JERSEY

Price v. Himeji, LLC

Supreme Court of New Jersey - June 25, 2013 - A.3d - 2013 WL 3184784

Landowner filed complaint against developer to bring action in lieu of prerogative writs to set aside zoning board's approval of variances for developer's multi-unit residential building.

The Supreme Court of New Jersey held that:

- Application for variance required evaluation of whether use would promote the general welfare, not that there was no other potential location for the use;
- Appellate division properly exercised original jurisdiction; and

- Zoning board demonstrated compliance with negative criteria for developer's application.

The Municipal Land Use Law exhibits a preference for municipal land use planning by ordinance rather than by variance, which is accomplished through the statute's requirements that use variances be supported by special reasons and proof of the negative criteria.

Proof of the negative criteria requires the applicant for use variance to demonstrate, in accordance with the enhanced quality of proof, both that the variance can be granted without substantial detriment to the public good and that it will not substantially impair the intent and the purpose of the zone plan and zoning ordinance.

LABOR - NEW YORK

Cordero v. New York Institute of Technology

United States District Court, E.D. New York - June 20, 2013 - Slip Copy - 2013 WL 3189189

Current and former employees of the New York Institute of Technology (NYIT) initiated an action on behalf of themselves and a purported class of others similarly situated, alleging that NYIT violated the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201, et seq., and the New York Labor Law (NYLL), N.Y. Lab. Law §§ 190, et seq., by: (1) failing to pay plaintiffs one and one half (1.5) times their hourly rate for all hours worked in excess of forty (40) hours per week; (2) retaining charges to customers purporting to be gratuities for plaintiffs; and (3) failing to reimburse plaintiffs for the costs of purchasing and maintaining their uniforms.

The District Court declined NYIT's motion to dismiss, finding that a not-for-profit educational corporations are not exempt from the Hospitality Wage Order.

GOVERNMENTAL IMMUNITY - NEW YORK

Applewhite v. Accuhealth, Inc.

Court of Appeals of New York - June 25, 2013 - N.E.2d - 2013 N.Y. Slip Op. 04727

Patient who suffered anaphylactic shock caused by allergic reaction to prescribed medication brought action for personal injuries sustained as result of allegedly negligent treatment rendered by city's emergency medical technicians (EMTs).

The Court of Appeals held that:

- Provision of 911 referrals and emergency medical service responses was governmental function, and
- Fact issues regarding existence of special duty precluded summary judgment on patient's negligence claim against city.

For purposes of a negligence claim against a municipality, a government entity performs a purely proprietary role when its activities essentially substitute for or supplement traditionally private enterprises; in contrast, a municipality will be deemed to have been engaged in a governmental function when its acts are undertaken for the protection and safety of the public pursuant to the general police powers. For purposes of a negligence claim against a municipality, the distinction between governmental functions and private, proprietary conduct is that the government will be

subject to ordinary tort liability if it negligently provides services that traditionally have been supplied by the private sector.

Provision of 911 referrals and emergency medical service responses were within traditional responsibilities of municipal government, and thus were governmental, rather than proprietary, function. Services existed for protection and safety of public and not as substitute for private enterprises. Purportedly negligent EMTs were employees of city's fire department using city resources in an effort to fulfill city's obligation to answer emergency 911 dispatch and attempt to save patient's life. EMTs employed by city fire department and deployed via 911 system received training in basic life support techniques and their range of approved emergency services was limited by law.

ANNEXATION - TENNESSEE

State ex rel. Allen v. City of Newport

Court of Appeals of Tennessee - June 18, 2013 - Slip Copy - 2013 WL 3148260

The City of Newport sought to annex certain properties in Cocke County, Tennessee. A number of affected parties objected to the annexation and filed a complaint against the City. The trial court allowed the plaintiffs to amend their complaint to allege that the City was barred from annexing their properties because it had defaulted on a prior plan of services from an earlier annexation.

The following issues were raised on appeal:

- Whether a municipality, after the enactment of Tennessee Code Annotated section 6–51–102(b)(5), may annex "any new territory" if it is in default on "any plan of services?"
- Whether the appellants were entitled to a jury trial to determine any material facts at issue in this declaratory judgment action?

The court found that the 1998 provisions do include compliance with the City's earlier plans of service and concluded that the trial court erred in dismissing the appellants' declaratory judgment claim on the basis of improper retroactive application of Tennessee Code Annotated section 6–51–102(b)(5). Thus, it reversed the judgment and remanded to the trial court. "We express no opinion as to the eventual result of this litigation after further proceedings."

The court also found that a jury was authorized.

PROPERTY - WISCONSIN

Blanc v. City of Janesville

Court of Appeals of Wisconsin - June 27, 2013 - Slip Copy - 2013 WL 3213297

This case involved a claim for relocation assistance and related benefits after the City of Janesville considered purchasing, but did not ultimately acquire, a property owned by Marc Blanc and rented by Schulz Automotive Machine, Ltd. Blanc and Schulz Automotive appealed an order granting summary judgment in favor of the City, which effectively denied Schulz Automotive's claim for relocation assistance and Blanc's claims for rental losses and legal expenses.

On appeal, Schulz Automotive argued that it met the definition of a "displaced person" and thus was

entitled to relocation assistance. Blanc argued that he was entitled to recovery of rental losses and legal expenses under constitutional and estoppel theories.

The appeals court concluded that Schulz Automotive did not move from the property as a direct result of any circumstances set forth in WIS. ADMIN. CODE § ADM 92.01(14)(a) (Dec.2011) and thus is not a "displaced person" under the Wisconsin statutes and administrative code. It also concluded that Blanc was not entitled to rental losses or legal expenses under any of the theories on which he relied.

FIRST AMENDMENT - SUPREME COURT OF THE UNITED STATES

Agency for Intern. Development v. Alliance for Open Society Intern., Inc.

Supreme Court of the United States - June 20, 2013 - S.Ct. - 13 Cal. Daily Op. Serv. 6326

Domestic organizations that received funding under United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act brought action against United States, seeking declaration that Act's provision requiring organizations that receive funding under Act to have policy expressly opposing prostitution violated their First Amendment rights.

The Supreme Court held that requirement that organizations receiving funding under the Act have a policy expressly opposing prostitution, by compelling as a condition of federal funding the affirmation of a belief that by its nature could not be confined within the scope of the Government program, violated First Amendment free speech protections.

"If there is a fixed star in the constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

EMINENT DOMAIN - SUPREME COURT OF THE UNITED STATES

Koontz v. St. Johns River Water Management Dist.

Supreme Court of the United States - June 25, 2013 - S.Ct. - 13 Cal. Daily Op. Serv. 6557

Landowner brought action in Florida state court against water management district, alleging that district's denial of land use permits unless he funded offsite mitigation projects on public lands amounted to a taking without just compensation.

The Supreme Court held that:

- District could not evade limitations of the unconstitutional conditions doctrine by conditioning approval of a land use permit on landowner's funding of offsite mitigation projects on public lands, and
- "Monetary exactions" as a condition of a land use permit must satisfy requirements that government's mitigation demand have an essential nexus and rough proportionality to the impacts of a proposed development, abrogating McClung v. Sumner, 548 F.3d 1219.

Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation. As in other unconstitutional conditions cases in which

someone refuses to cede a constitutional right in the face of coercive pressure, the impermissible denial of a governmental benefit is a constitutionally cognizable injury.

Water management district's request that landowner spend money to fund offsite mitigation projects on public lands, rather than give up an easement on his land, as a condition of a land use permit was subject to requirement that government's mitigation demand have an essential nexus and rough proportionality to the impacts of a proposed development.

UNIONS - CALIFORNIA

City of Los Angeles v. Superior Court

Supreme Court of California - June 20, 2013 - P.3d - 2013 WL 3064811

Union petitioned to compel arbitration of over 400 employee grievances arising out of city's plan to furlough its employees. The Superior Court, Los Angeles County, granted the petition. City petitioned for writ of mandate. The Court of Appeal granted petition. City petitioned for review. The Supreme Court granted review, superseding the opinion of the Court of Appeal.

The Supreme Court of California held that:

- Arbitration under memorandum of understanding (MOU) would not involve improper delegation of city's power to set salaries or fix budget;
- Employees' grievances were within arbitration clause of MOU;
- MOU provision authorizing grievances about "practical consequences" of exercises of management rights did not preclude arbitration of grievances about furlough; and
- Ordinance limiting grievance process to disputes "concerning the interpretation or application" of an MOU did not preclude arbitration of grievances about furlough.

Under Myers-Milias-Brown Act (MMBA), once a local government approves an MOU, it becomes a binding and enforceable contract that neither side may change unilaterally.

Arbitration of employee grievances arising out of charter city's plan to furlough its employees, pursuant to arbitration provision of MOU stating that employees "shall be compensated for 40 hours per week at the regular hourly rate for their class and pay grade" would not involve an improper surrender or delegation by the city of its discretionary powers under the charter to set salaries and fix the budget, since the arbitrator's role would be limited to interpreting the MOUs for the purpose of determining whether the furlough program violated the terms of those MOUs.

The existence of an annual budget process does not prohibit a governmental entity from entering into multiyear financial commitments, nor does it provide a justification for avoiding or repudiating such commitments.

Where a collective bargaining agreement provides for arbitration of all disputes pertaining to the meaning, interpretation, and application of the collective bargaining agreement and its provisions, any dispute as to the meaning, interpretation and application of any specific matter covered by the collective bargaining agreement is a matter for arbitration.

TAKINGS - CALIFORNIA

Valerio v. City of San Diego

United States District Court, S.D. California - June 17, 2013 - Slip Copy - 2013 WL 3049126

The principal planner in San Diego's Development Services Department ("DSD") historical resources section approved plaintiff's application to advertise on the side of a building. Plaintiff then entered into a lease agreement with the owner of the building.

DSD subsequently notified plaintiff that DSD was revoking the advertising permit, thereby nullifying Plaintiffs' authorization to proceed with the signage.

Plaintiffs sued the city and others, alleging: (1) violation of Fifth and Fourteenth Amendment right to procedural due process; (2) unlawful taking without just compensation; (3) violation of Fifth and Fourteenth Amendment right to substantive due process; (4) intentional misrepresentation; (5) violation of California Civil Code § 52.1, and requesting injunctive relief.

The district court:

- Denied defendants' motion for judgment with respect to qualified immunity;
- Denied defendants' motion for judgment with respect to plaintiffs' takings claim;
- Denied defendants' motion for judgment with respect to plaintiffs' Fourteenth Amendment due process;
- Denied defendants' motion for judgment with respect to plaintiffs' Fourteenth Amendment substantive due process rights;
- Granted defendants' motion for judgment for immunity from intentional misrepresentation as to the city;
- Denied defendants' motion for immunity from intentional misrepresentation as to DSD planner;
- Denied defendants' motion for judgment with respect to plaintiffs' request for injunctive relief; and
- Granted defendants' motion for judgment with respect to California Civil Code § 52.1.

ZONING - CONNECTICUT

DelGobbo v. Town of Watertown

Appellate Court of Connecticut - June 25, 2013 - A.3d – 2013 WL 2993891

This action, commenced as a petition for a writ of mandamus, arose out of the widening of Guernseytown Road in Watertown, an event that necessitated the reconstruction of the plaintiffs' driveway by the town. The plaintiffs argued that the defendants violated the town zoning regulations in the reconstruction of their driveway and that they are entitled to have those regulations enforced. They sought an order requiring the town to enforce its zoning regulations, essentially against itself, so that their driveway will be reconstructed in such a fashion as to bring it into compliance with existing zoning regulations. The plaintiffs also requested that the court order the zoning enforcement officer to inspect and determine whether the existing driveway is in violation of the zoning ordinances, in contrast to an order that the town reconstruct the driveway so as to bring it into compliance with the current zoning regulations.

Essentially, the plaintiffs were arguing that, although the method employed or the decisions made by the zoning enforcement officer in performing her duties may be discretionary, it is not discretionary that she perform her job; the duty to perform her job is a ministerial one. For that argument to withstand scrutiny, however, the plaintiffs needed to establish that the zoning enforcement officer had a mandatory duty to inspect the plaintiffs' driveway, even in the absence of any prior request

from them, to ensure that it complied with the zoning regulations.

Although the plaintiffs argued that the lower court erred in concluding that the actions or inactions of the zoning enforcement officer were discretionary and further erred in concluding that the case was controlled by *Greenfield*, the plaintiffs failed to set forth any law that supports their argument that the zoning enforcement officer had a mandatory duty to inspect and to opine on whether the driveway was in compliance with the zoning regulations. Additionally, the plaintiffs admitted that they requested a writ of mandamus without first having asked the zoning enforcement officer to inspect the driveway.

The appeals court concluded that the plaintiffs failed to demonstrate that the lower court abused its discretion in denying their request for a writ of mandamus. The judgment of the trial court was affirmed.

TORT CLAIMS ACT - DELAWARE

Hanson v. Morton

Supreme Court of Delaware - June 11, 2013 - A.3d - 2013 WL 2480248

Attorney, who was appointed by court to represent indigent parents in guardianship proceeding, sought to withdraw from representation due to lack of professional malpractice insurance coverage.

The Supreme Court of Delaware held that:

- Tort Claims Act provides qualified immunity to attorneys appointed by the Family Court to represent an indigent parent in a child dependency and neglect proceeding, and
- For purposes of rule of professional conduct providing that court-appointed attorney may only withdraw from appointment for good cause, lack of malpractice insurance is not “good cause” to withdraw from court-appointed representation of indigent parent in a child dependency and neglect proceeding.

ZONING and DEVELOPMENT - FLORIDA

Hillcrest Property, LLP v. Pasco County

United States District Court, M.D. Florida, Tampa Division - April 12, 2013 - F.Supp.2d - 24 Fla. L. Weekly Fed. D 33

Property owner filed § 1983 action challenging constitutionality of county’s regulatory regime, which required dedication of property within transportation corridor as precondition for development permit.

The District Court held that:

- Owner’s claim was ripe;
- Owner’s claim was timely;
- Ordinance violated owner’s substantive due process rights;
- Ordinance did not violate owner’s equal protection rights;
- Ordinance did not violate owner’s right of access to courts; and
- Ordinance did not violate owner’s right to trial by jury.

County's regulatory regime, which required dedication of property within transportation corridor as precondition for development permit, improperly used police power and was not rationally related to legitimate governmental purpose, and thus violated property owner's substantive due process rights, even though inverse condemnation remedy existed for each landowner subjected to ordinance. Ordinance required county to prove nothing and empowered it to determine just compensation, if any, it would pay, ordinance did not require county to return any unused property to owner, and ordinance discriminated based on economic aspiration.

"Pasco County has enacted an ordinance that effects what, in more plain-spoken times, an informed observer would call a 'land grab,' the manifest purpose of which is to evade the constitutional requirement for 'just compensation,' that is, to grab land for free. Viewed more microscopically, Pasco County's Ordinance designs to accost a citizen as the citizen approaches the government to apply for a development permit, designs to withhold from a citizen the development permit unless the citizen yields to an extortionate demand to relinquish the constitutional right of 'just compensation,' and designs first and foremost to accumulate—for free—land for which a citizen would otherwise receive just compensation.

SECURITY OF COMMUNICATIONS ACT - FLORIDA

Nunn v. State

District Court of Appeal of Florida, Fourth District - June 12, 2013 - So.3d - 2013 WL 2494161

Defendant was convicted of sexual battery on a child under twelve, six counts of lewd and lascivious molestation of a child under twelve, and lewd and lascivious exhibition in the presence of a child under sixteen. Defendant appealed.

The District Court of Appeal held that officer's recording of controlled telephone call was not rendered unlawful under Florida Security of Communications Act when it was discovered that the crimes occurred beyond officer's jurisdiction, as officer had a good faith belief that she was investigating a crime that occurred within her jurisdiction when the call was made.

BONDS - GEORGIA

Sherman v. City of Atlanta

Supreme Court of Georgia - June 17, 2013 - S.E.2d - 2013 WL 2927578

State petitioned for confirmation and validation of issuance of city bond. Objectors sought to intervene, appearing via counsel at the bond validation hearing. Objectors were not personally present at the hearing and no documentary evidence was introduced regarding their residency, as required under Georgia's Revenue Bond Law. The superior court declined to rule on the issue of standing, instead finding no merit to objectors' claims. After a hearing, the superior court entered judgment confirming and validating the bond issuance. Objectors appealed.

The Supreme Court of Georgia held that:

- Trial court was required to determine objectors' standing before addressing merits of objections;
- Evidence was insufficient to establish objectors' standing;
- Objectors lacked standing to appeal.

Courts are not required to take judicial notice of facts establishing a party's standing to participate in a judicial proceeding.

City was not judicially estopped from protesting whether objectors were citizens of state and residents of city, as required to establish objectors' standing to participate in proceedings on petition to validate proposed city bond. Although city had argued in prior non-bond validation case that objector should not be allowed to file emergency motion seeking to prevent the commencement of bond validation proceeding because objector's ability to intervene in bond validation proceeding was an adequate remedy at law, such statement did not require application of judicial estoppel, since objector could intervene in bond proceeding, provided objector properly established his standing.

GOVERNMENTAL IMMUNITY - GEORGIA

Peach County School Dist. v. Austin

Court of Appeals of Georgia - June 20, 2013 - S.E.2d - 2013 WL 3067579

Spectator filed a complaint against school district, superintendent, assistant superintendent, principal of high school, and the Director of Maintenance of schools, seeking recovery for personal injuries allegedly sustained when she fell on a sidewalk as she was leaving a graduation ceremony at high school.

The Court of Appeals held that:

- School district did not waive its sovereign immunity by purchasing liability insurance, and
- Alleged duties of school officials to inspect, maintain and repair school district property were discretionary, and thus, individual school officials were entitled to qualified immunity.

EMINENT DOMAIN - IDAHO

Alpine Village Co. v. City of McCall

Supreme Court of Idaho, Boise - May 2013 Term - June 14, 2013 - P.3d - 2013 WL 2663852

Property owner brought action against city alleging that city's enforcement of ordinance that had been found to be unconstitutional in a separate proceeding effectuated an unlawful taking of property in violation of federal and state constitutions.

The Supreme Court of Idaho held that:

- Notice provision of Idaho Tort Claims Act (ITCA) applied;
- Notice provision of ITCA was not complied with;
- Notice provision of ITCA was procedural, rather than jurisdictional, bar;
- Application of notice provision of ITCA did not violate equal protection;
- Doctrine of quasi-estoppel did not preclude assertion of notice provision of ITCA as defense;
- City's enforcement of ordinance did not constitute a final decision;
- Property owner did not seek compensation for alleged taking through available state procedures; and
- City was entitled to award of appellate attorney fees.

BONDS - ILLINOIS

Land of Lincoln Goodwill Industries, Inc. v. PNC Financial Services Group

United States District Court, C.D. Illinois - June 5, 2013 - Not Reported in F.Supp.2d - 2013 WL 2446375

Under the terms of a Loan Agreement, County issued $2 million in tax exempt economic development revenue bonds and loaned the proceeds to Goodwill to finance a development project for Goodwill. The loan was evidenced by a promissory note executed by Goodwill.

PNC (as a successor entity) funded the transaction by purchasing the Bonds and accepting the assignment of the County's rights under the Loan Agreement and Note.

Goodwill notified PNC that it intended to prepay the indebtedness in full. PNC notified Goodwill that it would have to pay a prepayment charge in excess of $300,000.00 if it chose to prepay the indebtedness.

Goodwill filed an action to seek a declaratory judgment that the prepayment charge provision of the Loan Agreement – § 9.1(b) – did not apply. Goodwill argued that, pursuant to § 9.1(b), the prepayment penalty can only be assessed only against a note that bears interest at a fixed rate, while this was an adjustable rate loan.

For the first ten years of this loan, the principal was to bear interest at the Initial Rate of 4.79% per annum, and for the last ten years, the principal was to bear interest at the Adjusted Rate determined on October 5, 2017. During each of these ten year periods, the principal bears interest at a fixed rate. The court thus concluded that this was indeed a fixed-rate loan.

In addition, the plain meaning of the documents, viewed as a whole, manifested a general intent that Goodwill could prepay at any time subject to a Prepayment Charge.

The court was also not persuaded by the reference to the "Variable" rate on the Form 8038. According to IRS definitions, a variable yield bond issue is any bond issue that is not a fixed yield issue. A fixed yield bond issue is a bond issue whose yield is fixed and determinable on the issue date. This Bond issue did not have a fixed and determinable yield on the issue date because the parties intended that the rate would be subject to change to a percentage to be determined on October 5, 2017, ten years after the issue date. The County, thus, properly indicated on Form 8038 that the yield was variable. The fact that the yield on the Bond issue was variable for IRS purposes, however, did not affect the applicability of § 9.1(b). The "fixed rate" language in § 9.1(b) did not relate to the overall yield of the Bond issue.

EMINENT DOMAIN - IOWA

Hawkeye Land Co. v. City of Coralville

Court of Appeals of Iowa - June 12, 2013 - Slip Copy - 2013 WL 2637411

The city of Coralville's decided to extend an avenue over railroad tracks in order to provide street access to a developing subdivision.

Prior to beginning construction on the street extension, Coralville did not initiate eminent domain proceedings. Instead, the city engaged in negotiations with Heartland Rail Corporation (Heartland)

under the belief that Heartland held the rights necessary to approve the street extension over the railroad tracks. An agreement was reached between Coralville and Heartland.

Hawkeye Land Company then filed an application for a permanent injunction to prevent the city Coralville from constructing the street extension over railroad tracks, claiming that it alone had the right to grant certain easements.

Ownership of various rights with respect to the railroad tracks was the point of contention between the parties. Hawkeye and Heartland both claimed to have received ownership rights from the railroad's original owner, Chicago Pacific Corporation (CPC). Heartland claims to have purchased rights from CPC and then granted the rights to operate the rail line to Iowa Interstate while retaining the right to grant certain types of easements, including easements necessary to construct a street over the tracks. Coralville argues it has purchased such an easement. Hawkeye argues it purchased certain rights from CPC, including the right to grant easements for "transportation and transmission systems" by "whatever means," which it argued includes streets. The dispute is: which entity actually possesses the right to grant easements necessary to extend Coral Ridge Avenue over the tracks and whether that entity has been properly compensated. If Hawkeye possesses the necessary rights, the street extension could constitute a taking under the Iowa Constitution requiring eminent domain proceedings and payment to Hawkeye. If Heartland owns the right to grant easements, eminent domain proceedings are not necessary because Coralville has compensated Heartland.

Regardless, the district court denied Hawkeye's application for a permanent injunction, finding that Hawkeye had failed to show it will suffer irreparable harm and has no adequate remedy at law. The district court further found that Hawkeye's rights, if any, can be determined in an action for money damages, as money damages would be the result regardless of what type of action was brought.

PUBLIC HOUSING - LOUISIANA

Housing Authority of New Orleans v. King

Court of Appeal of Louisiana, Fourth Circuit - June 12, 2013 - So.3d - 2012-1372 (La.App. 4 Cir. 6/12/13)

City housing authority filed rule for possession of premises, seeking to evict public housing tenant for violation of lease agreement's "one strike" provision, which authorized termination of the lease for criminal activity.

The Court of Appeal held that housing authority failed to establish by a preponderance of the evidence that tenant violated lease agreement. The housing authority did not attempt to introduce the lease agreement or the police report of the incident that led to tenant's arrest into evidence at the hearing on housing authority's rule for possession of premises, and housing authority introduced no other testimony or documentary evidence. Housing authority offered argument of counsel only. "Argument of counsel, no matter how artful, is not evidence."

EMPLOYMENT - MASSACHUSETTS

Sheriff of Suffolk County v. Jail Officers and Employees of Suffolk County

Supreme Judicial Court of Massachusetts, Suffolk - June 14, 2013 - N.E.2d - 465 Mass. 584

Union filed grievance, alleging that termination, by county sheriff, of employment of county jail officer violated just cause provisions of collective bargaining agreement. Arbitrator found just cause for discipline, but revoked the discharge and ordered six-month suspension without pay, benefits, or accumulation of seniority.

The Supreme Judicial Court ruled that arbitrator's award would not be vacated. Union filed a complaint for contempt, asking that county sheriff be held in contempt for failing to pay back pay pursuant to trial court's judgment confirming arbitrator's award.

Supreme Judicial Court held that:

- It was irrelevant to the issue of mitigation of damages that officer might have been able to further offset his lost earnings by working on a more permanent basis as a restaurant employee, carpenter, or bouncer, and
- County sheriff would not be assessed postjudgment interest.

When one is under contract for personal service, and is discharged, it becomes his duty to dispose of his time in a reasonable way, so as to obtain as large compensation as possible, and to use honest, earnest and intelligent efforts to this end. He cannot voluntarily remain idle and expect to recover the compensation stipulated in the contract from the other party.

General principle of mitigation of damages is applicable to public employees who are reinstated after having been unlawfully discharged.

When an arbitrator's award of reinstatement and repayment for loss of earnings to a terminated employee is silent on the duty to mitigate damages, court should take into consideration whether the issue of mitigation of damages was explicitly raised before the arbitrator or whether any challenge to the award was waived by a failure to raise the issue of mitigation before the arbitrator or, in a timely fashion, to challenge the award as having exceeded the arbitrator's authority.

LAW ENFORCEMENT - MICHIGAN

Amerson v. Township of Waterford

United States District Court, E.D. Michigan, Southern Division - June 13, 2013 - Slip Copy - 2013 WL 2898222

Plaintiff sued the Township of Waterford, Michigan and several officers within its Department of Police, asserting that he sustained a variety of severe head and bodily injuries following his arrest by the individually identified law enforcement officers.

In their motion for summary judgment, the Defendants argued that (1) plaintiff's allegations of municipal liability were not supported by any evidence; and (2) the individual police officers were entitled to a summary judgment.

The court found that, even if the evidence was sufficient to support plaintiff's inadequate training argument, he had failed to present any other competent evidence with regard to the remaining elements of his failure to train or supervise claim, namely, the municipality's deliberate indifference and a causal connection between the municipality's failure to train or supervise and the alleged constitutional violation. Therefore, Waterford Township was entitled to the entry of a summary judgment.

As to the individual claims, the court found that plaintiff had not established that the officers observed the alleged mistreatment and could have prevented the harm from occurring, and therefore had not established that the officers were involved in the alleged constitutional violations. Therefore, the officers were entitled to summary judgment on this claim.

GOVERNMENTAL IMMUNITY - MICHIGAN

Bilan v. Murchie

Court of Appeals of Michigan - June 13, 2013 - Not Reported in N.W.2d - 2013 WL 2662460

In this claim for damages allegedly arising from the negligent operation of an automobile, defendant Monroe Public School District and the School District's employee appealed the trial court's order denying their motion for summary disposition under MCR 2.116(C)(7) and MCR 2.116(C)(10).

In their motion, the School District and employee argued that they were entitled to the dismissal of plaintiff's claims because his claims were barred by governmental immunity.

The appeals court agreed that the trial court erred when it denied employee's motion because no reasonable jury could find that his driving amounted to gross negligence given the undisputed facts.

However, in response to the School District's motion, plaintiff presented evidence that established a question of fact as to whether his injuries resulted from the accident at issue. Accordingly, the trial court did not err when it denied the School District's motion for summary disposition on the ground that plaintiff failed to establish that his injuries resulted from employee's negligent operation of the pickup truck.

SCHOOLS - MISSISSIPPI

Acadia Ins. Co. v. Hinds County School Dist.

United States District Court, S.D. Mississippi, Jackson Division - June 13, 2013 - Slip Copy - 2013 WL 2897931

Parents brought suit against school district, alleging that a teacher had physically abused their daughter.

The court dismissed all of the parents' claims except their 42 U.S.C. § 1983 claim alleging a violation of their substantive due process right to bodily integrity.

The school district's insurer brought a summary judgment motion, asserting that it did not have a duty to defend under the terms of its insurance policy.

Insurer contended that its policy does not cover the abuse at issue, primarily because there is an exclusion for damages based upon bodily injury. The school district disagreed, pointing to language covering "Mental Distress arising out of a Wrongful Employment Practice," which includes a "violation of an individual's civil rights" relating to "negligent evaluation." It argued that because the student's claims that the superintendent and principal's negligent evaluation of her teacher allowed that teacher to abuse her, thereby violating her civil rights and causing mental distress, that the insurer had a duty to defend it in this litigation.

The court sided with the insurer, as the student had not brought a claim for negligent evaluation. Her complaint alleged claims for negligent supervision, assignment, hiring, and retention, but did not mention her teacher's evaluations.

TAX - NEW YORK

Wagner & Stoll, LLC v. City of Schenectady

Supreme Court, Appellate Division, Third Department, New York - June 13, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 04413

Plaintiff entered into a payment in lieu of taxes (PILOT) agreement with the City of Schenectady Industrial Development Agency with respect to certain real property that was exempt from real property taxes. Under the PILOT agreement, plaintiff was obligated to make annual payments to various taxing entities, including the Schenectady City School District, and the amount of those payments was based upon the assessment of the property as determined by the assessor of the City of Schenectady. Plaintiff later commenced two RPTL article 7 proceedings, alleging that the assessment was excessive and unequal. Plaintiff provided notice of both petitions to the school district. The school district did not move to intervene or otherwise appear in the proceedings at that time.

The Supreme Court subsequently issued an order memorializing a stipulation between the City and plaintiff to reduce the assessed value of the property. The order further required the City and various other taxing entities, including the school district, to refund to plaintiff "excess taxes" paid. The City thereafter refunded to plaintiff the excess amount that it was paid pursuant to the PILOT agreement The school district, however, refused to make any refund to petitioner asserting, among other things, that "excess taxes" did not include payments made pursuant to the PILOT agreement.

Plaintiff sought an order to direct the school district to refund the excess payments made by plaintiff under the PILOT agreement. The court granted plaintiff's motion and directed the school district to refund to petitioner excess payments made under the PILOT agreement.

UTILITIES - OKLAHOMA

Rural Water Dist. No. 5 Wagoner County, Okla. v. City of Coweta

United States District Court, N.D. Oklahoma - June 11, 2013 - F.Supp.2d - 2013 WL 2557607

Plaintiff, Rural Water District No. 5 of Wagoner County, Oklahoma ("Wagoner–5"), filed suit, claiming that, as a debtor association under 7 U.S.C. § 1926(b), it had the exclusive right to provide water service to all customers within its service area. Wagoner–5 alleged that it acquired a loan from the USDA and that Wagoner–5 therefore has the exclusive right to serve four customers whose service is at issue in this action: Koweta Indian Clinic; Timber Ridge Crossing Subdivision; Celebration at the Woods Subdivision; and Cedar Creek Village (the "disputed customers"). The City of Coweta was providing water service to the disputed customers, and Wagoner–5 alleged that the City's service to those customers violated § 1926(b).

The court disagreed with the City's argument that the boundaries of Wagoner–5 were diminished by City's annexation of the disputed customers, finding it inconsistent with the law construing § 1926(b) to prohibit municipalities from using their annexation of territory within a rural water district as a

springboard for providing water service to residents within the district or to limit the water district's services to the annexed area.

The Tenth Circuit previously had held that a rural water district may maintain claims against a municipality for curtailment after the district becomes indebted, even where the municipality began providing service to disputed properties prior to the district's indebtedness.

GOVERNMENTAL IMMUNITY - SOUTH CAROLINA

Health Promotion Specialists, LLC v. South Carolina Bd. of Dentistry

Supreme Court of South Carolina - June 12, 2013 - S.E.2d - 2013 WL 2631075

Company, which provided preventative dental care to children in schools and which employed dental hygienists who contracted with supervising dentists, brought action against Board of Dentistry, seeking damages resulting from Board's regulation imposing restrictions on hygienists' work in schools.

The Supreme Court of South Carolina held that:

- Company was not entitled to amend complaint to add claim for conspiracy to violate South Carolina Unfair Trade Practices Act (SCUTPA);
- Under Tort Claims Act (TCA), Board was immune from company's tort claims; and
- For purposes of SCUTPA, Board's promulgation of emergency regulation did not constitute "trade or commerce."

Under TCA, Board of Dentistry was immune from tort claims that were asserted by company employing dental hygienists and that arose from Board's emergency regulation requiring clinical examination of patient by supervising dentist within 45 days before hygienist could perform preventative dental care for patient in school setting. Board's promulgation of emergency regulation constituted legislative or quasi-legislative act that was protected from liability under TCA.

For purposes of SCUTPA, Board of Dentistry's promulgation of emergency regulation concerning restrictions on dental hygienists' provision of preventative dental care to children in school setting did not constitute "trade or commerce," and thus Board did not violate SCUTPA. Promulgation of regulation did not involve advertisement, sale, or distribution of services or property within business context.

ZONING - TEXAS

Riner v. City of Hunters Creek

Court of Appeals of Texas, Houston (14th Dist.) - June 20, 2013 - S.W.3d - 2013 WL 3087061

Landowners sought to subdivide their property. The local planning and zoning commission disapproved their preliminary plat. Landowners sought declaratory judgment and a writ of mandamus from the district court.

Landowners sought to subdivide their lot into three lots, and to that end, they filed an application for replat with the City's planning and zoning commission (the "Commission). The application included a

preliminary plat of the proposed subdivision. The Commission disapproved Landowners' application, and at Landowners' request, issued an order certifying the reasons for its decision. The Landowners did not appeal the decision to the board of adjustment, but instead filed suit against the Commission in a Harris County district court. According to the Landowners, the Commission disapproved the plat primarily because the Commission misconstrued an ordinance specifying the minimum lot size of residential properties and erroneously excluded the area beneath a public-street easement. Landowners asked the trial court to render a declaratory judgment construing the ordinance and stating that all of the Commission's 14 reasons for disapproving the plat were invalid. In the alternative, the Landowners asked the trial court to issue a writ of mandamus compelling the Commission to approve the plat or to conditionally approve it subject to modification.

The Commission specially excepted to the Landowners' live pleadings on the ground that their allegations failed to establish the trial court's subject-matter jurisdiction over the Landowners claims. The trial court sustained the special exceptions and ordered the Landowners to amend their pleadings within fifteen days to show that (a) they have the right to judicial review of the Commission's denial of their application for approval of the preliminary plat, and (b) their claims are ripe for review.

The Landowners did not further amend their pleadings, and after the Commission moved for entry of judgment, the trial court dismissed the Landowners' suit for lack of subject-matter jurisdiction. The appeals court affirmed.

BANKRUPTCY - CALIFORNIA

In re City of Stockton, Cal.

United States Bankruptcy Court, E.D. California - June 12, 2013 - B.R. - 2013 WL 2629129

"Chapter 9 is unique among voluntary Bankruptcy Code cases in that a municipality must litigate its way to the order for relief before restructuring its debt. Capital markets creditors of the City of Stockton have required the City to prove its eligibility for chapter 9 relief under 11 U.S.C. §§ 109(c) and 921(c). Such a proceeding is like a qualifying round in a competition; success leads only to the main event—the process of achieving a viable plan of adjustment. Without a confirmed plan, a municipality lacks constitutional authority to compel impairment of contracts."

"This opinion addresses chapter 9 eligibility issues that arose during the three-day trial on the question whether to order relief and the post-trial motion to alter or amend the findings regarding the strategy adopted by certain creditors. The focus is on pre-filing obligations of the municipality in dealing with creditors and stakeholders. Concluding that the City carried its burden to establish the elements required for an order for relief and concluding that the objectors inappropriately used an issue relating to plan confirmation, but that is irrelevant to eligibility, as a pretext to decline to negotiate in good faith and to force a trial that should not have been necessary, relief will be ordered."

BONDS - ARIZONA

In re Allstate Life Ins. Co. Litigation

United States District Court, D. Arizona - June 10, 2013 - Not Reported in F.Supp.2d - 2013 WL 2474508

At issue in this lawsuit was the offering and sale of $35 million in revenue bonds (the "Bonds") used to finance the construction of an Event Center in the Town of Prescott Valley, Arizona. Plaintiffs in this case were entities and individuals who purchased in the Bond offering in November 2005 (the "Bondholders"). They include Allstate Life Insurance Company and a number of individual plaintiffs whose interests were represented by the Indenture Trustee of the Bonds, Wells Fargo.

The defendants in this case were numerous. They included the underwriters for the bonds, attorneys for the underwriters, and the various entities that received the proceeds for the bonds and built the Event Center. For the purposes of this motion, the relevant defendant was the law firm Stinson Morrison Hecker's ("Stinson"), who served as underwriters' counsel for the offering. Stinson initially represented only the underwriter Stern, but later represented all the underwriters participating in the offering.

This action was based on a number of misstatements purportedly made by all defendants. These misstatements were allegedly made in the Preliminary Official Statement and the Official Statement. The OS provided two sources for paying debt service on the Bonds: (1) the net operating income from the Event Center and (2) Transaction Privilege Tax Revenues ("TPT Revenues"), allegedly pledged by the Town of Prescott Valley, consisting of sales taxes generated by the Event Center and certain areas near the Event Center. The alleged misstatements pertained to: (1) the annual attendance and profitability of the Event Center; and (2) the existence of a lien or other security device on the TPT Revenues for the benefit of the Bondholders.

Plaintiffs alleged that the defendants failed to disclose the existence of two feasibility reports, and that the OS stated that no feasibility reports had been prepared on its projections at all. Since its opening, the Event Center failed to recognize profit at the level of the projections set forth in the OS.

Plaintiffs also asserted claims based on alleged drafting errors in the bond documents. Plaintiffs claimed that the OS falsely stated that the debt service on the Bonds would be "secured" by a first lien on the TPT Revenues. They allege that due to defective drafting in certain Bond documents, no such lien exists. Plaintiffs allege that, because of these drafting errors, the Town of Prescott Valley has refused to deliver TPT Revenues for debt servicing on the Bonds, thus harming the Bondholders.

Stinson brought a Motion for Summary Judgment. The burden thus fell on Plaintiffs to raise a material issue of fact that Stinson made the misleading statements or was so involved in drafting the OS that it had actual knowledge of misleading facts, giving rise to a duty to disclose.

The court concluded that reasonable juror could find, based on the above evidence, that Stinson substantially participated in the drafting, preparing, and reviewing of the POS, which was part of the OS containing the misleading statements alleged by Plaintiffs to constitute an unlawful sale of securities under A.R.S. § 44–1991. Moreover, a finder of fact could determine, based on the evidence set forth by Plaintiffs, that Stinson spent enough time reviewing and editing the POS that it had actual knowledge of the misstatements contained in the POS, thus giving rise to a duty to disclose, given their substantial role in the transaction. Stinson's Motion for Summary Judgment was therefore denied on Plaintiffs' § 44–1991 claim.

Plaintiffs provided evidence of Stinson's substantial assistance in reviewing and proposing changes to the POS and issuing a clean 10b–5 opinion that was a condition precedent to the underwriters' purchase of the bonds. These were all steps along the process which culminated in the fraudulent sale of the bonds to Plaintiffs, the primary violation. Based on this evidence, a reasonable fact-finder could conclude that Stinson's actions, in the aggregate, constitute "more than a little aid." Wells Fargo, 38 P.3d at 26. Stinson's Motion for Summary Judgment on the aiding and abetting claim was therefore denied.

However, Plaintiffs have to overcome Stinson's showing that there was no material issue of fact that Stinson did not supply any information to the Plaintiffs. As such, Stinson's Motion for Summary Judgment was granted on Plaintiffs' claim of negligent misrepresentation.

ZONING - DELAWARE

Murray v. Town of Dewey Beach

Supreme Court of Delaware - June 10, 2013 - A.3d - 2013 WL 2474684

Property owners brought action challenging town's authority to enter into settlement agreement with a commercial developer.

The Supreme Court of Delaware held that action challenging town's settlement agreement with commercial developer permitting violations of zoning restrictions was subject to limitation period in statute governing zoning challenges, where the effect of the settlement agreement was to amend zoning restrictions to allow construction of a commercial development. 10 Del.C. § 8126.

FIRST AMENDMENT - FLORIDA

City of Fort Lauderdale v. Chuanwen Wang

District Court of Appeal of Florida, Fourth District - June 12, 2013 - So.3d - 2013 WL 2493972

Artist who sold his art on sidewalks sought declaratory judgment that three content-neutral city ordinances that operated to bar him from selling his artwork on sidewalks in beach area violated his First Amendment rights.

The district court of appeal held that zoning map submitted by artist did not establish that ordinances violated First Amendment by purportedly failing to provide alternative channels of communication.

In a public forum, a governing entity may establish time, place, or manner restrictions upon an activity which is otherwise fully protected by the First Amendment if the restrictions (1) are content-neutral, (2) are narrowly tailored to serve a significant government interest, and (3) leave open ample alternative channels of communication; the government holds the burden of demonstrating each prong of this test.

Zoning map did not establish that three content-neutral city ordinances that operated to bar artist from selling his artwork on sidewalks in beach area violated artist's First Amendment rights by purportedly failing to provide alternative channels of communication. The map itself did not demonstrate how much tourist activity was in any particular zoning district.

SCHOOLS - FLORIDA

Gabriele v. School Bd. of Manatee County

District Court of Appeal of Florida, Second District - June 7, 2013 - So.3d - 2013 WL 2451349

Teacher sought review of final order of county school board, suspending her employment for fifteen days without pay and returning her from a professional service contract to an annual contract.

The district court of appeal, held that Florida K–20 Education Code does not grant school boards the authority to return an employee under a professional service contract to an annual contract.

A professional service contract under the Florida K–20 Education Code is a continuous contract which renews automatically, and can only be terminated for just cause or based upon uncorrected performance deficiencies.

NEGLIGENCE - GEORGIA

Clark v. City of Atlanta

Court of Appeals of Georgia - June 7, 2013 - S.E.2d - 2013 WL 2450871

Pedestrian filed suit against city and other defendants for injuries sustained when she tripped and fell on uneven sidewalk pavers.

The court of appeals held that fact issue remained whether city had constructive notice of uneven sidewalk pavers, thus precluding summary judgment.

Constructive notice of a defect in the public roads or sidewalks, as a prerequisite to imposing liability on the city for any injuries resulting therefrom, may be imputed through the knowledge of the city's employees or agents, or may be shown by testimony as to how long the defect existed prior to the injury, objective evidence that the defect existed over time, or evidence that others were injured as a result of the same condition over a period of years.

The question of the city's constructive notice of a defect in a sidewalk or public road ordinarily is for the jury, except in the absence of any evidence of constructive notice that could create a fact question, and in such an instance, the issue of negligence is a matter of law.

The length of time a defect in a public road or sidewalk must exist in order for an inference of constructive notice of the defect to arise, as a prerequisite to holding the city liable for any injuries resulting therefrom, is ordinarily a jury question.

OPEN MEETINGS ACT - IOWA

City of Postville v. Upper Explorerland Regional Planning Com'n

Supreme Court of Iowa - June 7, 2013 - N.W.2d - 2013 WL 2450154

City and resident-taxpayer brought action against state regional planning commission and its members, alleging violation of the Open Meetings Act, and sought damages.

The Supreme Court of Iowa held that:

- Volunteer members of commission could not be held personally liable for Open Meetings Act violation;
- Issue of fact existed as to whether commission violated reasonable notice requirements for government meetings pursuant to Open Meetings Act;

- Commission complied with statute requiring publication in newspaper of general circulation of names and gross salaries of members regularly employed.

There was no evidence that volunteer members of State regional planning commission engaged in intentional misconduct or a knowing violation of Open Meetings Act in taking secret ballot vote approving contract to purchase property, as required to hold members personally liable for Open Meetings Act violations.

For purposes of provision in statute granting any volunteer serving on any council of governments immunity from claim based upon an act or omission of the person performed in discharge of the person's duties, except for acts or omissions which involve intentional misconduct or knowing violation of the law, "intentional misconduct" requires more than a reckless disregard for the law, and a "knowing violation" requires a deliberate or conscious act.

Genuine issue of material fact, as to whether public had reasonable access to bulletin board in hallway of State regional planning commission's office, when commission posted public notice of its meeting, precluded summary judgment in action against commission asserting that it violated reasonable notice requirements for government meetings pursuant to Open Meetings Act.

TORT CLAIMS ACT - MASSACHUSETTS

Moore v. Town of Billerica

Appeals Court of Massachusetts - June 7, 2013 - N.E.2d - 83 Mass.App.Ct. 729

Mother of child hit by baseball in town park brought action against town under Massachusetts Tort Claims Act (MCTA).

The appeals court held that:

- Town had governmental immunity, and
- Town had immunity under recreational use statute.

Town's failure to erect signs or barriers between park and baseball field to prevent injury to users of park was not "negligent maintenance," and thus town had tort immunity, under section of MCTA providing immunity for a governmental unit's failure to prevent or diminish the harmful consequences of a condition not originally caused by governmental unit.

PUBLIC UTILITIES - MINNESOTA

In re Xcel Energy's Application for a Route Permit for CapX 2020 Hampton-Rochester-La Crosse High Voltage Transmission Line

Court of Appeals of Minnesota - June 10, 2013 - Not Reported in N.W.2d - 2013 WL 2460343

Consolidated certiorari appeals challenged a high-voltage-transmission-line (HVTL) route permit issued by Minnesota Public Utilities Commission (MPUC) to Northern States Power Company, doing business as Xcel Energy (Xcel).

The appeal of a church and landowners concerned the first segment of the permitted route. The

church and landowners argued that the MPUC erred by designating Xcel's preferred route for that segment because: (1) Xcel improperly modified its proposed route late in the application process, which violated statutory notice and environmental-review requirements; (2) the route violated Minnesota's nonproliferation policy; and (3) the MPUC relied on extrarecord information in designating the route.

On certiorari review, the court of appeals will affirm the MPUC's decision to issue an HVTL route permit unless the decision is arbitrary or capricious, exceeds the agency's jurisdiction or statutory authority, is made upon unlawful procedure, reflects an error of law, or is unsupported by substantial evidence in view of the entire record. The court concluded that none of these elements existed, affirming the MPUC's decision.

EMINENT DOMAIN - MISSOURI

State ex rel. Jackson v. Dolan

Supreme Court of Missouri, En Banc - May 28, 2013 - S.W.3d - 2013 WL 2459994

Landowners petitioned for writ of prohibition, contending that order condemning their land at request of port authority was unauthorized.

The Supreme Court of Missouri held that:

- Condemnation by port authority of landowner's land through eminent domain satisfied the public use requirement, but
- Taking violated statute that prohibited port authority from acquiring private property through eminent domain for solely economic development purposes.

"Economic development" is defined in statute that prohibits condemning authority from acquiring private property through the process of eminent domain for solely economic development purposes as an increase in all four of the factors listed in the definition, that is, an increase in the tax base, tax revenues, employment, and general economic health.

Port authority's taking of landowner's land was solely for economic development purposes and, thus, violated statute that prohibited port authority from acquiring private property through eminent domain for solely economic development purposes. Although taking would have facilitated construction of a loop track to handle trains and improved river commerce, taking was included in the port authority's economic development plan, and the only manner in which the taking would have improved river commerce was by drawing more economic development into the area, as opposed to making such commerce easier to conduct.

SCHOOLS - MISSOURI

Breitenfeld v. School Dist. of Clayton

Supreme Court of Missouri, En Banc - June 11, 2013 - S.W.3d - 2013 WL 2631061

Parents of students enrolled in accredited public school district brought action against that district and the transitional school district in which students resided, which had lost accreditation, for declaratory judgment that transitional district was required under "Unaccredited District Tuition Statute" to pay for students' tuition in accredited district. The circuit court granted summary

judgment to districts. Parents appealed. The Supreme Court of Missouri reversed and remanded.

On remand, taxpayers from districts were allowed to intervene to argue that statute violated constitutional amendment's prohibition against unfunded mandates, and taxpayers named state as a defendant. The circuit court determined that statute was unconstitutional as applied to defendant districts and entered judgment in favor of accredited district on its counterclaim against one parent for tuition owed. That parent and the state appealed. The Supreme Court, on its own motion, transferred case from the court of appeals.

The Supreme Court of Missouri held that:

- An increased cost of performing an existing activity or service cannot itself result in an unfunded mandate in violation of constitutional amendment, abrogating School District of Kansas City v. State, 317 S.W.3d 599;
- Tuition-payment provision of statute at issue did not impose a "new" or "increased" activity or service on either unaccredited district or accredited district, as necessary to create an unfunded mandate;
- Tuition-payment provision did not shift a state tax burden to a local entity so as to create unfunded mandate;
- Record did not support a finding that provision imposing new mandate on an unaccredited district to provide transportation to resident pupils who attended an accredited school in another district increased costs to taxpayers of unaccredited district, as necessary to constitute an unfunded mandate;
- Defense of impossibility did not apply with respect to one parent's claim seeking payment of tuition for two students; and
- Trial court did not abuse its discretion in permitting taxpayers to intervene on remand.

OPEN PUBLIC RECORDS ACT - NEW JERSEY

Paff v. New Jersey State Firemen's Ass'n

Superior Court of New Jersey, Appellate Division - June 13, 2013 - A.3d - 2013 WL 2629978

Member of State Firemen's Association brought action against Association alleging violations of the Open Public Records Act (OPRA).

The appeals court held that Association, as an independent State instrumentality, was a public agency whose records were subject to inspection under the OPRA.

Association's financial activities implicated OPRA's aim to shed light on the fiscal affairs of government, and to combat waste, misconduct and corruption. The Association was the direct recipient of substantial revenues generated from specific taxes imposed on insurance premiums, it was delegated authority to assure those funds were spent in accord with statutory strictures, and it disbursed funds directly in the form of burial benefits, and both regulated and oversaw the disbursement of relief benefits by local associations to which it distributed funds.

MUNICIPAL ORDINANCE - NEW JERSEY

Mile Square Towing, LLC v. City of Hoboken

Superior Court of New Jersey, Appellate Division - June 13, 2013 - Not Reported in A.3d -

2013 WL 2631202

Mile Square Towing, LLC appealed the denial of its challenges to the validity of an ordinance adopted by the City of Hoboken. The ordinance – City of Hoboken's Ordinance No. Z-131, codified as Chapter 184 of the General Code of the City of Hoboken – provides for licensing and regulation of businesses that remove and store motor vehicles.

Because the ordinance does not exceed Hoboken's authorization to license and regulate towing services provided in N.J.S.A. 40:48–2.49, or impermissibly delegate authority to the director of Hoboken's Department of Parking and Transportation to administer and enforce Chapter 184, the court affirmed.

EMINENT DOMAIN - NEW YORK

Commissioner of Transp. v. Sunny Lumber Supply NY, Inc.

Civil Court, City of New York, Kings County - May 30, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 23177

Commissioner of Transportation, as condemnor, commenced holdover proceeding to evict occupant, as condemnee, and seeking judgment of possession of property taken for public bridge project, under Eminent Domain Law.

The Civil Court, City of New York, held that:

- Subject matter jurisdiction was not lacking over eviction proceeding, and
- Condemnor satisfied requirements of Eminent Domain Law.

Condemnor's holdover proceeding to evict condemnee and seeking judgment of possession of property taken for public bridge project, pursuant to Eminent Domain Law, was within jurisdiction of civil court, under Real Property Actions and Proceedings Law, authorizing court of civil jurisdiction to hold special proceeding to recover real property.

AGE DISCRIMINATION IN EMPLOYMENT ACT - NEW YORK

Abramson v. Board of Educ. of Middle Country School Dist. No. 11

United States Court of Appeals, Second Circuit - June 7, 2013 - Fed.Appx. - 2013 WL 2450579

"These cases are controlled by Auerbach v. Board of Education of the Harborfields Central School District, 136 F.3d 104, 107 (2d Cir.1998), which interpreted the Age Discrimination in Employment Act's ("ADEA's") safe harbor provision for retirement incentives. The Court held that a retirement incentive plan is consistent with the ADEA if it '(1) is truly voluntary, (2) is made available for a reasonable period of time, and (3) does not arbitrarily discriminate on the basis of age.'"

"The School District's retirement incentive plan is almost identical to the one at issue in Auerbach, and easily passes its three-part test. The incentive was plainly voluntary; all three of the employees here independently chose not to accept. It was available for a reasonable amount of time; the employees had until February 1 in their final year of service to make their retirement election—a full month more than the teachers had in Auerbach. Finally, the provision does not enable arbitrary

discrimination. Every employee who had worked the minimum number of years required under the plan was given the opportunity to accept the incentive, and employees who chose to decline (like the plaintiffs) were able to 'continue to work as valued employees in the School District without any corresponding loss of benefits or job status.'"

ZONING - PENNSYLVANIA

Bernotas v. Zoning Hearing Bd. of City of Bethlehem

Commonwealth Court of Pennsylvania.June 7, 2013 - A.3d - 2013 WL 2450160

Adjacent landowners sought review of decision of zoning hearing board granting variances to applicant to expand grocery store, a nonconforming use of property.

The Commonwealth Court upheld the granting of the variances, finding that:

- Dimensional variance standard, rather than nonconforming use standard, applied to application for variances;
- Substantial evidence supported finding that hardship resulted from unique physical conditions of property;
- Substantial evidence supported finding that requested expansion was necessary for reasonable use of the property;
- Substantial evidence supported finding that proposed expansion would not adversely impact neighborhood; and
- Applicant was required to obtain a variance, not special exception.

In general, an applicant can establish unnecessary hardship required for a variance by demonstrating either that physical characteristics of the property are such that the property cannot be used for the permitted purpose or can only be conformed to such purpose at a prohibitive expense, or that the property has either no value or only a distress value for any permitted purpose.

In considering a dimensional variance request, multiple factors may be considered, including the economic detriment to the applicant if the variance was denied, the financial hardship created by any work necessary to bring the building into strict compliance with the zoning requirements and the characteristics of the surrounding neighborhood.

Dimensional variance standard, rather than nonconforming use standard, applied to application for variances to add loading dock, ramp, and warehouse for grocery store, a nonconforming use of the property; additions would increase nonconforming use without creating a new use on the lot, and proposed new structures were incidental and secondary to principle nonconforming use of the property and would improve and modernize existing structures devoted to nonconforming use.

WORKERS' COMP - TEXAS

City of Bellaire v. Johnson

Supreme Court of Texas - June 7, 2013 - S.W.3d - 2013 WL 2450151

Contract worker brought negligence action against city and city garbage truck driver for injuries sustained when he fell into garbage truck hopper. Ooops.

The Supreme Court of Texas held that worker's claim was subject to workers' compensation's exclusive remedy bar.

An employee cannot avoid the workers' compensation exclusive remedy bar by arguing that he was not covered under the specific terms of his employer's workers' compensation insurance policy. Rather, the employee is covered as a matter of law, and any dispute by the carrier over whether it agreed to provide such coverage under the policy's terms is with the employer.

Contract worker furnished to city by staffing services company was city's employee, rather than an independent contractor, where city controlled the details of worker's work, notwithstanding worker's claims that he was not a "paid employee" of the city within the meaning of self-insured city's interlocal agreement, and was not paid by the city or by the hour. The city provided worker with workers' compensation coverage as a matter of law, and worker was paid by the city through staffing company and on the basis of the hours he reported to the city.

SOVEREIGN IMMUNITY - ALABAMA

Weaver v. Madison City Bd. of Educ.

United States District Court, N.D. Alabama, Northeastern Division - May 29, 2013 - F.Supp.2d - 2013 WL 2350181

Plaintiff filed a lawsuit against the Madison City Board of Education Board under the Uniform Services Employment and Reemployment Rights Act ("USERRA"). In its motion to dismiss, the Board argued that is immune from suit under USERRA as an "arm of the state" for Eleventh Amendment purposes.

At § 4323 of the Act, the United States district courts are given jurisdiction over causes of action brought under USERRA "against a private employer by a person." When an action is brought by a private litigant against a State as an employer, however, "the action may be brought in a State court of competent jurisdiction in accordance with the laws of the state." To complicate matters further, 38 U.S.C. § 4323(i) defines the term "private employer" to include the "political subdivision[s] of a State."

The Board in this action contended that it is not a mere "political subdivision" of the State of Alabama, but a full-fledged "arm of the State" itself. Although the term "arm of the State" does not appear in the jurisdictional or definitional provisions of the statute, the Board argues that because it is not a mere political subdivision of the State of Alabama, § 4323(i) does not apply and that it is an "arm of the state," immune from suit in the United States district court under the Eleventh Amendment to the United States Constitution. Plaintiff counters that the Board is not an "arm of the state," but a "political subdivision" within the meaning of § 4323(i) and, even if the Board is an "arm of the state," the Eleventh Amendment does not bar a private suit against the State under USERRA because it was enacted pursuant to Congress's constitutional War Powers, not the Commerce Clause.

The court analyzed the status of a city school board, when performing an employment function, under the four-factor Manders analysis for assessing whether an entity is an "arm of the State" for Eleventh Amendment purpose, concluding that a local city school board is a political subdivision – comparable to counties and municipalities – not an arm of the State.

STATUTE OF LIMITATIONS - ARIZONA

Cook v. Town of Pinetop-Lakeside

Court of Appeals of Arizona, Division 1, Department D - May 28, 2013 - P.3d - 2013 WL 2363132

In 2001, Cook asked the Town to abandon to him part of a public right-of-way adjacent to his property. The Town council agreed and passed a resolution that abandoned the property to Cook.

In 2007, Cook's neighbor, Cletis Heffel, filed a notice of claim and complaint against the Town. Heffel asserted that the 2001 abandonment had caused his property to become landlocked. The Town council held two public meetings to discuss how to resolve the property dispute. Cook was present and spoke at both meetings. At the second meeting, the Town council voted to rescind the 2001 abandonment.

In February 2009, Cook brought a quiet title action against the Town and Heffel. The Town answered and filed a counter-claim seeking a declaratory judgment. The court granted the Town summary judgment, finding that because Cook was present when the Town council rescinded the abandonment, he had actual knowledge of the Town's actions. The court concluded, therefore, that the litigation against the Town is time barred by A.R.S. 12–821.

The court of appeals reversed, holding that the statute of limitations does not run against a plaintiff in possession who brings a quiet title action purely to remove a cloud on the title to his property. Because Cook's claim against the Town for quiet title did not accrue for statute of limitations purposes, his claim is not barred by the one-year limitation period established by A.R.S. § 12–821.

EMPLOYMENT - ARKANSAS

Proctor v. Cabot School Dist.

Court of Appeals of Arkansas - May 29, 2013 - Not Reported in S.W.3d - 2013 Ark. App. 366

School principal appealed the circuit court's decision to affirm the termination of her employment, citing the Teacher Fair Dismissal Act.

The Teacher Fair Dismissal Act requires just and reasonable cause that is not arbitrary or capricious in support of a teacher's termination. The Act provides that a teacher's termination by a school district shall be void unless the school district substantially complies with the provisions of the Act and the school district's applicable personnel policies. The decision to terminate a teacher pursuant to the TFDA is a matter within the discretion of the school board, and the reviewing court cannot substitute its opinion for that of the school board in the absence of an abuse of that discretion.

The circuit court used, as a rational basis for support of appellant's termination, facts gathered from testimony that appellant (1) was in fact absent, (2) knew there would be no administrator in the building on two of the three days she would be absent due to her having previously granted permission to the assistant principal to be absent on those days, (3) had formerly complied with the prior-approval requirement, and (4) knew the policy existed. Therefore, the appeals court could not find the circuit court's decision to be clearly erroneous and affirmed.

GOVERNMENTAL IMMUNITY - CALIFORNIA

Freeny v. City of San Buenaventura

Court of Appeal, Second District, Division 6, California - June 4, 2013 - Cal.Rptr.3d - 2013 WL 2421601

The California Tort Claims Act (Act) confers immunity from tort liability on public employees when they make "basic policy decisions" in a legislative capacity. (Gov.Code, §§ 820.2, 821, 821.2.)

In this case, the court of appeal held that public employees' tort immunity for legislative decision-making applies even when that decision-making is also alleged to involve the making of misrepresentations motivated by "actual fraud, corruption or actual malice." (§ 822.2)

Reading section 822.2's exception for misrepresentations motivated by actual fraud, corruption or actual malice as not qualifying the tort immunity that otherwise attaches to legislators' policy making decisions best harmonizes the legislative intent behind all of these provisions. It effectuates the intent behind sections 820.2, 821 and 821.2 by eliminating the danger of harassment and chilling that springs from susceptibility to tort lawsuits while preserving oversight by criminal prosecution and by the electorate.

SOVEREIGN IMMUNITY - CONNECTICUT

Town of Rocky Hill v. SecureCare Realty, LLC

Superior Court of Connecticut, Judicial District of Hartford - April 23, 2013 - Not Reported in A.3d - 2013 WL 2132067

The town of Rocky Hill brought suit to prevent the defendants from proceeding with their plan to operate a nursing home for individuals transitioning from a correctional facility or receiving services from the Department of Mental Health and Addiction Services.

In 2011, the Connecticut state legislature adopted Public Act. 11–44, which was codified as General Statutes § 17b–372a. That statute provides for the development of residential nursing facilities for individuals in the department of correction's custody or receiving services from the department of mental health and addiction services. The supposed rationale behind the legislation is that the costs associated with those individuals would be covered by the federal Medicaid program.

Defendant formed two entities, one to own the facility property and one to serve as the licensed nursing home operator and tenant on the property. These entities subsequently entered into a contract with the state department of mental health and addiction services. The contract referenced an agreement whereby the state would reimburse the entities for certain expenses. The contract also identifies that the entities were created solely for the contract with the state, and that such entities would be "financially dependent on the State due to the fact that the State shall be the sole referral source and primary payment source for the Facility."

The town sought a declaratory judgment and injunction that the defendants were prohibited from opening and operating the proposed § 17b–372a facility at the facility property because it conflicts with the town's zoning regulations.

Defendants filed a motion to dismiss, based upon the assertion that the defendants are "arms of the state" and are entitled to sovereign immunity. The court agreed, granting the motion to dismiss.

In addition, a municipality could not through its zoning regulations prevent the establishment of a facility created pursuant to state statute. In this case, the state's action in § 17b–372a has preempted the plaintiff's zoning authority in relation to the facility property.

MUNICIPAL GOVERNANCE - CONNECTICUT

Candlewood Hills Tax Dist. v. Medina

Appellate Court of Connecticut - June 11, 2013 - A.3d - 2013 WL 2397078

Certain residents of the Candlewood Hills Tax District joined the district's board and effected a reduction in the size of the district that removed their property, and the properties of others, from the district.

The lower court invalidated the reduction and the residents appealed, contending that, (1) the court improperly declared the boundary reduction invalid despite finding compliance with the statutory procedure, and (2) the court erroneously found that the defendants owed fiduciary duties to the district and breached these duties by calling the referendum on the boundary reduction. The appeals court agreed and reversed.

"On appeal, the question we must answer is whether a special taxing district's reduction of its boundaries that followed the applicable statutory procedure, is nevertheless invalid because the district's board members owed a fiduciary duty to the residents of the district and breached this duty by voting for a referendum when it was opposed by the majority of the district's residents."

"Accordingly, in light of the court's finding that the defendants followed the statutory requirements for reducing the district's boundaries, a finding that has ample support in the record, and a record that reflects that the defendants' actions did not constitute fraud, corruption or other misconduct, we conclude that the court improperly declared the boundary reduction invalid."

"The defendants next claim that the court improperly held that they owed fiduciary duties to the district and breached these duties by calling the referendum on the boundary reduction while they were burdened by a conflict of interest. Specifically, the defendants argue that a municipal officer's duties cannot be correctly characterized as fiduciary, which is a status typically reserved for more direct and intimate relationships than that enjoyed by a public office holder. We agree with the defendants."

"It would be extremely illogical and unworkable to hold that the only requirement for holding a position on the board of the taxing district, residence within the district, is the same requirement that would disqualify a board member from making legislative decisions simply because those decisions would affect him or her in the same manner that all residents of the district would be impacted. Here, the defendants advocated on behalf of not only themselves as residents, but on behalf of the owners of thirty-one other properties in the district that were also removed from the district by reason of the district vote on the resolutions. As we discussed previously, the fact that the residents of the taxing district who were not from the affected areas were unhappy with the board's process does not establish that the defendants acted under a conflict of interest, or against the public interest."

SCHOOLS - GEORGIA

Sherman v. Atlanta Independent School System

Supreme Court of Georgia - June 3, 2013 - S.E.2d - 2013 WL 2372192

Plaintiff brought action against school system and development authority, alleging that school taxes were diverted to development authority to fund city's tax allocation district (TAD) in violation of Educational Purpose Clause.

The Supreme Court of Georgia held that original resolutions of school board and the other local government acts approving the use of school taxes in tax allocation increments for TADs were not unconstitutional and remained effective.

Although the original resolutions of school board and the other local government acts approving the use of school taxes in tax allocation increments for city's TAD had previously been deemed unconstitutional by the Supreme Court of Georgia, that ruling was prior to constitutional amendment that allowed the General Assembly to enact a general law permitting the use of school tax funds to fund redevelopment purposes and programs, including the payment of debt service on tax allocation bonds, notwithstanding the Educational Purpose Clause or any other provision of the Constitution.

The subsequent constitutional amendment and revision of the statute governing TADs changed the applicable law, and those changes were expressly made retroactive with respect to the county, city, and local board of education approvals needed to use school taxes for redevelopment purposes.

ELECTIONS - GEORGIA

Meade v. Williamson

Supreme Court of Georgia - June 3, 2013 - S.E.2d - 2013 WL 2372260

Challenger filed petition contesting results of primary election for sheriff. The superior court declared election invalid and ordered new election. Incumbent appealed.

The Supreme Court of Georgia held that:

- Challenger had burden of proving that individuals who assisted voters were unqualified to assist voters;
- Absentee ballot was mailed in compliance with statute governing mailing of absentee ballots, even though ballot was mailed to out-of-county address;
- That absentee ballot was mailed to in-county address other than one reflected on voter registration record did not invalidate ballot;
- Statute providing that, with limited exceptions, absentee ballots can not be mailed to an address other than the permanent mailing address reflected on the applicant's voter registration record was directory, not mandatory;
- That absentee ballot envelopes failed to designate disability that would authorize person to assist voter did not invalidate ballots; and
- Insufficient evidence supported trial court's conclusion that irregularities in election process were shown to cast doubt upon results.

In challenger's election contest, evidence was insufficient to support trial court's conclusion that irregularities in election process were shown to cast doubt upon results of primary election for sheriff. Although 14 absentee ballots appeared to have been altered, challenger presented evidence

of only one illegally bought vote The remaining evidence of vote buying by incumbent's supporters was based upon hearsay and gossip, and it was purely speculative that alterations were made by anyone other than voters.

TORT CLAIMS ACT - INDIANA

City of Indianapolis v. Buschman

Supreme Court of Indiana - June 4, 2013 - N.E.2d - 2013 WL 2407481

Motorist and her husband brought action pursuant to the Indiana Tort Claims Act (ITCA) against city and police department alleging personal injuries as a result of negligence of police officer.

The Supreme Court of Indiana held that inclusion of information in tort claim notice beyond that required by ITCA did not limit or restrict scope of claim; disapproving Howard County Bd. of Com'rs v. Lukowiak, 810 N.E.2d 379.

Claimant's inclusion of information in her tort claim notice to city beyond that required by the ITCA did not operate to restrict the scope of her claim, and therefore notice that stated "no injuries" did not render claimant's notice insufficient in action against city stemming from alleged negligence of police officer, as the ITCA required no statement regarding injuries. The purpose of ITCA was to advise city of motor vehicle accident so that it could promptly investigate the surrounding circumstances, and legislature did not intend to penalize claimants for including information beyond what the ITCA required.

WORKERS' COMP - LOUISIANA

Whetstone v. Jefferson Parish School Bd.

Court of Appeal of Louisiana, Fifth Circuit - May 30, 2013 - So.3d - 12-639 (La.App. 5 Cir. 5/30/13)

Claimant appealed a determination of the Office of Workers' Compensation that denied her continued benefits for an alleged mental injury caused by post-traumatic stress related to an assault sustained within the course and scope of her employment.

Upon conclusion of a trial, the workers' compensation court ruled in favor of the school board and dismissed claimant's petition with prejudice. Specifically, the workers' compensation judge did not find claimant to be credible and did not find any merit to her claim. On appeal, claimant asked the court of appeal to reverse the credibility determinations and factual findings of the workers' compensation judge. The court of appeal found no grounds for such a reversal.

To prove entitlement to benefits for a mental injury resulting from mental stress, a claimant must prove that the mental injury was caused by "sudden, unexpected, and extraordinary stress related to employment" and must prove it by clear and convincing evidence.

INSURANCE - MASSACHUSETTS

Wheatley v. Massachusetts Insurers Insolvency Fund

Supreme Judicial Court of Massachusetts, Plymouth - May 31, 2013 - N.E.2d - 465 Mass. 297

Plaintiff brought consumers action pursuant to unfair business practices act against Insurers Insolvency Fund, alleging that Fund had engaged in various unfair claims settlement practices arising in underlying negligence action against town whose liability insurer had become insolvent.

The Supreme Judicial Court of Massachusetts held that, where a plaintiff prevails in a consumer action against Insolvency Fund under statute governing regulation of business practices for consumer protection, the Fund is liable for reasonable attorney fees.

Insurers Insolvency Fund, which is an unincorporated association, created by the legislature, for the purpose of settling unpaid claims covered by an insurance policy issued by an insurer that later becomes insolvent, is in "the business of insurance" for purposes of statute governing unfair methods of competition and unfair or deceptive acts or practices, as well as statute governing regulation of business practices for consumer protection, and therefore, Fund is in exactly the same position as a traditional for-profit insurer, that is, subject to the provisions of both statutes.

CONTRACTS - SCHOOLS - MASSACHUSETTS

Leder v. Superintendent of Schools of Concord & Concord-Carlyle Regional School Dist.

Supreme Judicial Court of Massachusetts, Middlesex - May 31, 2013 - N.E.2d - 465 Mass. 305

Musical instrument sale and rental business brought action against school district and superintendent, as well as various other district officials, seeking declaratory and injunctive relief to prevent district from endorsing other rental businesses or organizing string rental nights without business's participation.

Plaintiff filed a complaint alleging that, by providing a competitor with their "endorsement," the defendants had used their official positions to secure for the competitor unwarranted privileges that are of substantial value and not available to similarly situated individuals, in violation of G.L. c. 268A, § 23 (b) (2)(ii).

The Supreme Judicial Court of Massachusetts held that finding of statutory violation by State Ethics Commission and rescission request by municipal agency were prerequisites to filing of private rescission action.

LAND USE - MASSACHUSETTS

Brockton Power LLC v. City of Brockton

United States District Court, D. Massachusetts - May 30, 2013 - Slip Copy - 2013 WL 2407220

Plaintiffs were developers who wished to build an electric power generating facility on land they own in Brockton, Massachusetts. They sued the city, its planning board and city council, and seven of its present and former officials, alleging violations of 42 U.S.C. § 1983 and state law based on a

conspiracy to systematically deprive plaintiffs of various constitutional rights, including the right to develop their land.

The city and the planning board answered the complaint, but the remaining eight defendants moved to dismiss it in its entirety. They challenged it on numerous grounds: (i) absolute legislative or quasi-judicial immunity; (ii) First Amendment immunity; (iii) qualified immunity; and (iv) specific attacks on the sufficiency of allegations against individual defendants with respect to each discrete claim.

According to the plaintiffs, the nature of the alleged conspiracy, the serial litigation that resulted, and the overall egregiousness of the defendants' collective actions remove this case from the realm of "run of the mill" land-use disputes that federal courts have been reluctant to entertain. It is against this backdrop, which consists of substantially more than "threadbare recitals of the elements of a cause of action," that the court considered the moving defendants' requests for dismissal. The court concluded that the moving defendants' were not entitled to dismissal on any of their asserted grounds.

ZONING - MASSACHUSETTS

Plainville Asphalt Corp. v. Town of Plainville

Appeals Court of Massachusetts, Suffolk - June 6, 2013 - N.E.2d - 2013 WL 2421029

Operator of bituminous concrete plant filed petition for determination of validity of town zoning ordinance, alleging that its nonconforming use of property was not a use prohibited by zoning bylaws, but remained a use as of right.

The appeals court held that:

- Bylaw prohibited use of property as bituminous concrete plant, and
- Use had lost its status as a preexisting nonconforming use through nonuse.

The court also noted that the right of the public to have the zoning by-law properly enforced cannot be forfeited by the action of a municipality's officers.

PROPERTY TAX BALLOT INITIATIVE - MICHIGAN

Hillsdale County Sr. Services, Inc. v. Hillsdale County

Supreme Court of Michigan - May 31, 2013 - N.W.2d - 2013 WL 2367566

Hillsdale County Senior Services, Inc. (HCSS) filed an action against Hillsdale County, seeking mandamus to enforce the terms of a property-tax ballot proposition that provided for the levy of an additional property tax in Hillsdale County to fund HCSS.

The circuit court granted plaintiffs' writ for mandamus and ordered defendant to levy the additional amount for the length of time approved by the voters.

The court of appeals, reversed the order, concluding that the circuit court lacked subject-matter jurisdiction over the case because the Tax Tribunal had exclusive and original jurisdiction over the matter. The Supreme Court of Michigan affirmed.

PUBLIC UTILITIES - MINNESOTA

Northern States Power Co. ex rel. Bd. of Directors v. Aleckson

Supreme Court of Minnesota - May 29, 2013 - N.W.2d - 2013 WL 2319588

Electric utility commenced series of condemnation actions seeking to acquire easements across various parcels of land. After landowners exercised their option under the Buy-the-Farm statute, the district court determined that landowners were entitled to awards of minimum compensation and relocation benefits. Utility appealed, and the court of appeals reversed. Landowners appealed.

The Supreme Court of Minnesota held that:

- Landowners were entitled to minimum compensation pursuant to eminent domain statute; and
- Landowners were entitled to relocation assistance.

Entitlement to minimum compensation should be determined as of the time of the taking, not the date on which the condemnor files a petition to commence condemnation proceedings. M.S.A. § 117.187.

Landowners who elected to require electric utility to acquire a fee interest in entire parcel under the Buy-the-Farm statute after utility initiated condemnation action seeking an easement for High Voltage Transmission Lines (HVTL) were owners who were required to relocate, and thus, they were entitled to minimum compensation pursuant to eminent domain statute. M.S.A. §§ 117.187, 216E.12.

Landowners who elected to require electric utility to acquire a fee interest in entire parcel under the Buy-the-Farm statute after utility initiated condemnation action seeking an easement for HVTL qualified as “displaced persons” under federal law who were entitled to relocation assistance pursuant to the Minnesota Uniform Relocation Act (MURA). Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, § 101(6)(A)(i)(I), 42 U.S.C.A. § 4601(6)(A)(i)(I); M.S.A. § 117.187.

TORT CLAIMS ACT - MISSISSIPPI

City of Jackson v. Lewis

Court of Appeals of Mississippi - May 28, 2013 - So.3d - 2013 WL 2303391

Motorists brought personal injury action against police officer and city arising from incident in which a driver, who had stolen vehicle, ran a red light and crashed into motorists’ vehicle after officer began, but did not finish, pursuing him for a traffic infraction.

The court of appeals held that officer did not act in reckless disregard for the safety of the public, as would preclude governmental immunity under the Mississippi Tort Claims Act (MTCA).

Factors for determining whether a police officer acted with reckless disregard for the safety of the public during a pursuit, as would preclude governmental immunity under the MTCA are: (1) the length of the pursuit, (2) the type of neighborhood in which the pursuit took place, (3) the characteristics of the streets on which the pursuit took place, (4) the presence of vehicular or pedestrian traffic, (5) the weather conditions and visibility, (6) the seriousness of the offense for which police are pursuing the suspect, (7) whether the officer proceeded with sirens and lights, (8) whether the officer had available alternatives that would lead to the apprehension of the suspect

besides pursuit, (9) the existence of a police policy that prohibits pursuit under certain circumstances, and (10) the officer's rate of speed in comparison to the posted speed limit.

Reckless disregard for the safety of the public occurs during a police pursuit, as would preclude governmental immunity under MTCA, when the conduct involved evinced not only some appreciation of the unreasonable risk involved, but also a deliberate disregard of that risk and the high probability of harm involved.

EMPLOYMENT - MISSOURI

State v. Rhoads

Missouri Court of Appeals, Western District - June 4, 2013 - S.W.3d - 2013 WL 2395982

State brought petition in quo warranto to oust mayor from office after mayor hired her son-in-law to repair a city sign.

The Missouri Court of Appeals held that mayor's hiring of son-in-law constituted an appointment to "employment," as would fall within nepotism ban of state constitution, supporting state's quo warranto petition to remove mayor from office, despite argument that son-in-law was acting as independent contractor and thus had not been appointed to employment. Work of repairing sign engaged and occupied son-in-law, even if only temporarily, and at time of adoption of constitution's nepotism ban, "employment" was not commonly understood to exclude work of independent contractors.

AUCTION RATE SECURITIES - NEVADA

Richardson v. Oppenheimer & Co. Inc.

United States District Court, D. Nevada - May 10, 2013 - Slip Copy - Fed. Sec. L. Rep. P 97, 417

Investor brought 10b-5 action against Oppenheimer following the collapse of the ARS market.

Oppenheimer moved to dismiss, arguing that plaintiff failed to plead facts with sufficient particularity to satisfy the heightened pleading standards under Fed.R.Civ.P. 9(b) and the Private Securities Litigation Reform Act (PSLRA).

The court agreed that plaintiff's allegations lack the required specificity to put defendants on notice of the particular misconduct. First, taken in context, plaintiff's allegations that Oppenheimer marketed and represented ARS as safe, secure, like cash, or liquid appear to be the conclusions plaintiff drew from specific statements, rather than the statements themselves. Further, when plaintiff alleged that investment advisor and Oppenheimer "continued to represent" that ARS were safe it is unclear whether plaintiff was referencing affirmative statements, his continued understanding that ARS were safe based on defendants' past and current statements, the defendants' failure to correct past statements, or simply the fact that defendants continued to transact in ARS on plaintiff's behalf based on plaintiff's communicated desire for liquid investment. As specific statements are lacking, it was impossible for the court to analyze their alleged falsity. More importantly, the lack of specificity failed to meet the PSLRA's requirement to "specify each statement alleged to have been misleading."

MUNICIPAL LIABILITY - NEW JERSEY

Grijalba v. Floro

Superior Court of New Jersey, Appellate Division - June 3, 2013 - A.3d - 2013 WL 2371408

Pedestrian brought action against homeowner, who rented out a portion of her home, for injuries he sustained when he slipped and fell on sidewalk abutting property.

The Superior Court, Appellate Division held that remand was necessary for trial court to determine whether property was commercial or residential.

Remand was necessary in action against homeowner, who rented out a portion of her home, for injuries pedestrian sustained when he slipped and fell on sidewalk abutting property for findings concerning whether the property was residential or commercial. On remand trial court was to consider the nature of the ownership of the property, including whether the property was owned for investment or business purposes, the predominant use of the property, including the amount of space occupied by the owner on a steady or temporary basis, and whether the property had the capacity to generate income.

PUBLIC TRANSPORTATION - NEW YORK

Greater New York Taxi Ass'n v. State

Court of Appeals of New York - June 6, 2013 - N.E.2d - 2013 N.Y. Slip Op. 04044

Medallion taxicab owners and their representatives, association of credit union leaders and credit unions that financed medallion purchases, and city council member brought action against state and mayor, among others, challenging constitutionality of statute which permitted livery vehicles to accept street hails in outer boroughs and allowed sale of new medallions for wheelchair-accessible medallion taxicabs.

The Court of Appeals held that:

- Statute addressed matter of substantial state concern, as required for enactment of special law without home rule message;
- Statute bore reasonable relationship to state's substantial interests;
- Statute did not violate Double Enactment Clause; and
- Statute did not violate Exclusive Privileges Clause.

LABOR RELATIONS - NEW YORK

Chenango Forks Cent. School Dist. v. New York State Public Employment Relations Bd.

Court of Appeals of New York - June 6, 2013 - N.E.2d - 2013 N.Y. Slip Op. 04039

School district commenced proceeding under Article 78, seeking review of a determination of the Public Employment Relations Board (PERB) which found that it had committed an improper employer practice by failing to negotiate discontinuance of its longstanding practice of reimbursing retirees' Medicare Part B premiums.

The Court of Appeals held that:

- It was reasonable for PERB not to defer to arbitrator's finding that there was no past practice; and
- PERB determination that district had committed improper employer practice by failing to negotiate discontinuance of reimbursing Medicare premiums was supported by substantial evidence.

A "maintenance of standards" or "maintenance of benefits" clause in a labor contract requires all existing conditions of employment, except those specifically changed by the contract, to be continued during the term of a new contract. Such a clause effectively confirms past practices contractually.

Determination of the PERB that school district had committed improper employer practice by failing to negotiate discontinuance of its longstanding practice of reimbursing retirees' Medicare Part B premiums was supported by substantial evidence, where school district's knowledge of payments was shown by managerial oversight necessary to make them, as well as memorandum to faculty and staff announcing termination of practice of reimbursement, and school district's current employees had knowledge of district's reimbursement payments to retirees, and thus harbored a reasonable expectation that they would receive reimbursement of Medicare Part B premiums upon their retirement.

EMINENT DOMAIN - PENNSYLVANIA

Lower Makefield Tp. v. Lands of Chester Dalgewicz

Supreme Court of Pennsylvania - May 29, 2013 - A.3d - 2013 WL 2322471

After it was determined that the taking was for a legitimate public use, the parties proceeded to a Board of View hearing to determine valuation. The Board of View valued the property at $3,990,000. Landowners filed an appeal, and the matter proceeded to a jury trial on the issue of damages. The Court of Common Pleas entered judgment on jury verdict finding that the township owed landowners $5,850,000 as just compensation for the taking and denied township's motion for post-trial relief. Township appealed.

The Supreme Court of Pennsylvania held that:

- Testimony regarding home builder's "letter of intent" to buy property was admissible evidence of property's fair market value; and
- In a condemnation valuation trial, there is no bright-line rule prohibiting testimony of bona fide offers to buy property into evidence, especially when a contract has been signed and the offer is used to show that contract's reasonableness; abrogating, Anderson v. Dept. of Highways, 422 Pa. 1, 220 A.2d 643.

PROPERTY - RHODE ISLAND

Beauregard v. Gouin

Supreme Court of Rhode Island - May 28, 2013 - A.3d - 2013 WL 2318835

Property owner brought action against counsel who represented neighboring property owners in property dispute, alleging slander of title and intentional interference with prospective advantage.

The Supreme Court of Rhode Island held that:

- Notice of intent to dispute ownership of property did not constitute slander of title; and
- Notice did not constitute intentional interference with prospective advantage.

Slander of title action requires a plaintiff to prove: (1) that the alleged wrongdoer uttered or published a false statement about the plaintiff's ownership of real estate; (2) that the uttering or publishing was malicious; and (3) that the plaintiff suffered a pecuniary loss as a result.

Notice of intent to dispute any claim to ownership of property by property owner filed by neighboring property owners in town land records did not contain any false assertions, and therefore did not constitute slander of title, where notice unambiguously indicated that the neighboring property owners were preemptively seeking to protect their rights to the land which was of record owned by them, and in no way did the notice of intent slander or cast doubt upon property owner's title to his property.

To recover on a claim of intentional interference with prospective advantage, a plaintiff must show: (1) the existence of a business relationship or expectancy; (2) knowledge by the interferer of the relationship or expectancy; (3) an intentional and improper act of interference; (4) proof that the interference caused the harm sustained; and (5) damages to the plaintiff.

Notice of intent to dispute any claim to ownership of property by property owner filed by neighboring property owners in town land records did not constitute an improper act of interference, and therefore did not constitute intentional interference with prospective advantage, where notice unambiguously indicated that the neighboring property owners were preemptively seeking to protect their rights to the land which was of record owned by them.

CONTRACTS - SOUTH CAROLINA

Shirley's Iron Works, Inc. v. City of Union

Supreme Court of South Carolina - May 29, 2013 - S.E.2d - 2013 WL 2325263

Subcontractors who provided labor and materials on public building project brought action against city for alleged violation of Subcontractors' and Suppliers' Payment Protection Act (SPPA) and for negligence, breach of contract, quantum meruit, and related claims, after general contractor failed to pay subcontractors for amounts due.

The Supreme Court of South Carolina held that:

- SPPA created no private right of action in tort against city;
- Subcontractors' sole remedy was common law breach of contract claim;
- Law of the case doctrine did not preclude third-party beneficiary claim;
- Subcontractors sufficiently pled third-party beneficiary claim; and
- Subcontractors could not recover under theory of quantum meruit.

SPPA provision requiring city to ensure that general contractor posted payment bond did not provide for a tort cause of action against a city who allegedly failed to ensure such a bond, resulting in general contractor failing to pay subcontractor, and therefore subcontractor's action against city was barred by sovereign immunity. Pertinent sections of SPPA sounded in contract, not tort, and bonding requirement was incorporated into public works construction contracts.

EMPLOYMENT - SOUTH DAKOTA

Huth v. Beresford School District # 61-2

Supreme Court of South Dakota - May 29, 2013 - N.W.2d - 2013 S.D. 39

Teacher appealed from decision of the board of education, which did not renew her contract for the upcoming school year as a part of a reduction-in-force.

The Supreme Court of South Dakota held that school board's decision to eliminate teacher's position was not arbitrary, capricious, or an abuse of discretion.

On appeal, the Supreme Court considers the legality, and not the propriety, of the school board's decision. Determination of legality is a two-pronged process: (1) whether the school board acted legally, and in assessing this first prong, the court considers whether the proper procedural requirements were followed; and (2) whether the school board's decision was arbitrary, capricious, or an abuse of discretion.

School board's decision was not arbitrary, capricious, or an abuse of discretion as there was no connection between teacher's grievance and the determination not to renew her contract. The issue in teacher's grievance related to her coaching position from which she had resigned. The superintendent based his staff reduction recommendations on student needs and program activities, and he stated that the other fifth-grade teachers had more teaching endorsements and were more involved in extracurricular activities than teacher.

Arbitrary or capricious decision by school board is one that is based on personal, selfish, or fraudulent motives, or on false information, and is characterized by a lack of relevant and competent evidence to support the action taken.

GOVERNMENTAL IMMUNITY - TEXAS

City of Canton v. Zanbaka, USA, LLC

Court of Appeals of Texas, Tyler - May 31, 201 - Not Reported in S.W.3d - 2013 WL 2407223

Duke's Travel Plaza (Duke) entered into an agreement with the Canton Economic Development Corporation (CEDC), a Texas nonprofit corporation, to fund a sewer line and lift station to its travel plaza located along Interstate 20 in Van Zandt County, Texas.

Before the CEDC would be required to fund the construction of the sewer line and lift station, certain conditions precedent were required. Following the fulfillment of these conditions, the city delayed the construction of the sewer line and lift station for several months. Duke filed suit against the City alleging that it had entered into a written contract with Duke wherein Duke agreed to provide goods and services to it. By its suit, Duke sought a declaratory judgment to determine the parties' rights and obligations under Texas Local Government Code, Section 271.152.

The City filed a plea to the jurisdiction and motion to dismiss arguing it was immune from suit because Section 271.152 did not apply given the facts of the lawsuit.

Duke alleged that the trial court had jurisdiction of this suit because the Texas Legislature waived the city's immunity from suit by enactment of Texas Local Gov't Code § 271.152, which waives

immunity for contracts that provide goods and services. The city argued that it had not waived its immunity from suit because the contract between Duke and the CEDC did not involve Duke's providing it goods and services as required for its waiver of immunity under Section 271.152.

Duke contended that the "goods and services" it provided to the city under its agreement with the CEDC were the annexation of its real property, its creation of new jobs, and its installation of a fire hydrant on the annexed real property. The court of appeals concluded that the true purpose of the agreement between Duke and the CEDC was to provide funding for a sewer line and lift station to Duke's real property. That was the primary purpose of the agreement. Any benefits that would flow from that primary purpose are indirect and attenuated benefits and Section 271.152 does not apply to contracts where the governmental entity receives an indirect or attenuated benefit.

"Thus, we conclude that Duke did not contract to provide any service or good directly to the City. Therefore, we conclude that the City did not waive its immunity from suit under Section 271.152. Accordingly, the trial court erred in denying the City's plea to the jurisdiction and motion to dismiss."

GOVERNMENTAL IMMUNITY - ALABAMA

Health Care Authority for Baptist Health v. Davis

Supreme Court of Alabama - May 17, 2013 - So.3d - 2013 WL 2149493

Baptist Health at one time operated certain hospitals in Montgomery. When Baptist Health encountered financial problems in conjunction with the operation of those hospitals, it sought the assistance of the University of Alabama Board of Trustees In June 2005, the Board adopted a resolution authorizing the formation of the Health Care Authority for Baptist Health, an affiliate of UAB Health System (the "Authority").

Following a successful medical malpractice judgment, the Authority appealed, arguing that it was entitled to State immunity under § 14, Ala. Const.1901 as an affiliate of UAB Health System, a governmental entity.

After an exhaustive analysis, the Supreme Court of Alabama concluded that a health-care authority organized and operating under the HCA Act is not an "immediate and strictly governmental agency of the state." The Authority does not serve as "an arm of the State." Instead, it is a "franchisee licensed for some beneficial purpose," namely to participate with other health-care providers in the state, both public and private, in rendering health-care services to citizens of the state. The Authority therefore is not entitled to state immunity under § 14 of the Alabama Constitution.
