

## **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."

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## **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.

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## **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.

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## **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.

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## **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.

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## **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.

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## **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."

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## **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.

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## **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.

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## **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.

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## **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 declaratory 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.

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## **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.

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## **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.

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## **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.

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## **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.

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## **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.

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## **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.

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#### **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.

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#### **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.

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## **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?

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## **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.

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## **ARTICLE 78 REVIEW - NEW YORK**

### **[Connors 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.

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## **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.”

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## **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.

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## **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.

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## **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.

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## **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.

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## **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.

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## **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).

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## **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.

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## **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 through 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.

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## **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).

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## **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.

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## **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.

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## 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.

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## 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."

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## 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.

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## **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.

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## **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.

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## **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.

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## **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.

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## **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.

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## **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.

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## **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.

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## **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.

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## **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.

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## **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).

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## **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.

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## **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.

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## **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.

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## **ZONING - MASSACHUSETTS**

### **[Drummev 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.

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## **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.

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## **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.

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## **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.
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## **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.

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## **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.

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## **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.

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## **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.

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## **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.

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**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.

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**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."

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**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.

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## **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.

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## **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.

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## **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.

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## **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.

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## **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.

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## **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.

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## **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.

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## **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.

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## **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.

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## **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.



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## **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.

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## **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."

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## **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.

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## **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.

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## **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.

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## **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.

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## **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.

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## **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.

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## **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.

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## 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.

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## 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.”

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## **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 a 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.

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## **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.

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## **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.

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## **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.

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## **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.

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## **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.

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## **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.

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## **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.

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## **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.

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## **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.

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## **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.

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#### **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.

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#### **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.

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#### **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.’”

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## **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.

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## **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. Oops.

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.

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## **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.

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## **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.

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## **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.

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## **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.

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## **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.

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## **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."

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## **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.

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## **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.

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## **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.

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## **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.

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## 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.

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## 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.

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## 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.

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## **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.

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## **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.

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## **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.

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## **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.”

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## **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.

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## **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.

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## **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.

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## **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.

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**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.

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**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.

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## **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.

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## **GOVERNMENTAL IMMUNITY - TEXAS**

### **[City of Canton v. Zanbaka, USA, LLC](#)**

**Court of Appeals of Texas, Tyler - May 31, 2011 - 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."

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## **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.

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## **LAW ENFORCEMENT - ARIZONA**

### **[Melendres v. Arpaio](#)**

**United States District Court, D. Arizona - May 24, 2013 - Not Reported in F.Supp.2d - 2013 WL 2297173**

At issue in this lawsuit were: 1) the current policies and practices of the Maricopa County Sheriff's Office ("MCSO") by which it investigates and/or detains persons whom it cannot charge with a state crime but whom it believes to be in the country without authorization; and 2) the operations the MCSO claims a right to use in enforcing immigration-related state criminal and civil laws, such as the Arizona Human Smuggling Statute, Ariz.Rev.Stat. ("A.R.S.") § 13-2319 (Supp.2010), and the Arizona Employer Sanctions Law, A.R.S. § 23-211 et seq. (Supp.2010).

According to the position of the MCSO at trial, it claims the right to use the same type of saturation patrols to enforce state laws that it used during the time that it had authority delegated from the federal government to enforce civil violations of federal immigration law.

The MCSO asserts that ICE's termination of its 287(g) authority does not affect its ability to conduct such operations because a person's immigration status is relevant to determining whether the Arizona state crime of human smuggling—or possibly the violation of other state laws related to immigration—are occurring.

The district court held that the knowledge that a person is in the country without authorization does not, without more, provide sufficient reasonable suspicion that a person has violated Arizona criminal laws relating to immigration, such as the Arizona Human Smuggling Act, to justify a Terry stop for purposes of investigative detention. To the extent the MCSO is authorized to investigate violations of the Arizona Employer Sanctions law, that law does not provide criminal sanctions against either employers or employees. A statute that provides only civil sanctions is not a sufficient basis on which the MCSO can arrest or conduct Terry stops of either employers or employees.

The court concluded that plaintiffs were entitled to injunctive relief to protect them from usurpation of rights guaranteed under the United States Constitution. Therefore, in the absence of further facts that would give rise to reasonable suspicion or probable cause that a violation of either federal criminal law or applicable state law is occurring, the MCSO was enjoined from: 1) enforcing its LEAR policy; 2) using Hispanic ancestry or race as any factor in making law enforcement decisions pertaining to whether a person is authorized to be in the country; and 3) unconstitutionally lengthening stops.

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## **PUBLIC EMPLOYEES - ARKANSAS**

### **[Sullivan v. Coney](#)**

**Supreme Court of Arkansas - May 23, 2013 - S.W.3d - 2013 Ark. 222**

Police chief brought action against mayor and aldermen alleging various claims stemming from termination of employment.

The Supreme Court of Arkansas held that:

- Mayor was entitled to qualified immunity;
- Police chief was at-will employee;

- Position as code enforcement officer did not constitute “building official” under municipal ordinance; and
  - Chief’s report to city attorney was not protected under Whistle-Blower Act.
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## **INVERSE CONDEMNATION - CALIFORNIA**

### **[Ching Lung Hsu v. Riverside County Transportation Commission](#)**

**Court of Appeal, Fourth District, Division 2, California - May 22, 2013 - Not Reported in Cal.Rptr.3d**

Plaintiffs brought inverse condemnation action to recover additional severance damages for their property.

Defendant Riverside County Transportation Commission (RCTC) filed a motion for summary judgment. It alleged that plaintiffs’ action was barred by res judicata and collateral estoppel because plaintiffs had already received severance damages for the same property in an earlier eminent domain action.

Although plaintiffs argued that there were many factual issues to be tried, the trial court granted the motion for summary judgment. It found that the drainage and flooding issues were considered in the eminent domain action and that the severance damages awarded in the eminent domain action compensated plaintiffs for all reasonably foreseeable damage to their property caused by the proposed improvements.

Plaintiffs appealed, contending that the trial court erred because the issue of flooding was not raised in the prior action, there are material factual issues, and the flooding was not a reasonably foreseeable result of the proposed project.

Finding at least three material factual issues, the appeals court reversed the trial court’s granting of the summary judgment motion.

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## **BANKRUPTCY - COLORADO**

### **[In re Fassi](#)**

**United States Bankruptcy Court, D. Colorado - May 21, 2013 - Slip Copy - 2013 WL 2190158**

In this bankruptcy action, the bankruptcy court analyzed whether the Stockbroker Exception (Section 109(e) to Chapter 13 eligibility applies to debtors who operated as financial advisors and who were registered as “brokers” through FINRA.

In order to establish that the debtors are not subject to the stockbroker exception to eligibility under Chapter 13, the debtors must show either they do not have “customers,” as defined by § 741(2), or they are not “engaged in the business of effecting transactions in securities.” Here, it was undisputed the debtors were engaged in the business of effecting transactions in securities. Therefore, the issue of whether the debtors are “stockbrokers” turned on whether the debtors could establish by a preponderance of the evidence they did not have customers under § 741(2).

Debtors’ Independent Contractor’s Agreements indicated that the brokerage accounts were

managed by the debtors, not deposited or held by the debtors. Client money reached the brokerage for use in actual securities transactions, and the debtors functioned as mere vessels to transport checks from the client's hands to the brokerage. Clients did not entrust money to the debtors with the expectation the debtors would purchase stock or trade securities. Thus, the court concluded that debtors' clients were not "customers" under the terms of § 741(2)(B)(ii), and thus, that debtors were not "stockbrokers."

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## **GOVERNMENTAL IMMUNITY - CONNECTICUT**

### **[Haynes v. City of Middletown](#)**

**Appellate Court of Connecticut - May 21, 2013 - A.3d - 142 Conn.App. 720**

Student's mother, on her own behalf and as student's parent and next friend, brought action against city, seeking damages for injuries student had allegedly sustained when classmate at high school pushed him into broken locker. After jury returned verdict in favor of plaintiffs, the superior court, granted city's motion to set aside verdict and rendered judgment in favor of city on governmental immunity grounds. Plaintiffs appealed.

On remand from the Supreme Court of Connecticut, the Appellate Court held that:

- City did not waive special defense of governmental immunity by failing to request a jury instruction on the special defense;
- Student was a member of a class of foreseeable victims for purposes of the "identifiable person, imminent harm" exception to governmental immunity; and
- Evidence of imminent harm was insufficient for student and mother to prevail on the exception to governmental immunity for discretionary acts.

There are three exceptions to discretionary act governmental immunity: 1) liability may be imposed for a discretionary act when the alleged conduct involves malice, wantonness or intent to injure; 2) liability may be imposed for a discretionary act when a statute provides for a cause of action against a municipality or municipal official for failure to enforce certain laws; and 3) liability may be imposed when the circumstances make it apparent to the public officer that his or her failure to act would be likely to subject an identifiable person to imminent harm.

The "identifiable person, imminent harm" exception to governmental immunity is three-pronged, and requires: 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. If the plaintiffs fail to establish any one of the three prongs, this failure will be fatal to their claim that they come within the imminent harm exception.

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## **ARBITRATION - CALIFORNIA**

### **[Ronay Family Limited Partnership v. Tweed](#)**

**Court of Appeal, Fourth District, Division 1, California - May 23, 2013 - Cal.Rptr.3d - 13 Cal. Daily Op. Serv. 5224**

Tweed was a financial adviser and the president of TFI, a financial and estate planning firm. Neither Tweed nor TFI had ever been a member of FINRA. Tweed, however, had at all relevant times been registered with FINRA as an associated person of a securities broker-dealer.



Tweed opened an investment account for Ronay with CapWest, which at the time was a securities broker, investment adviser, and registered member of FINRA through which Tweed and TFI offered investments. To open the account, Ronay's general partner and Tweed, as CapWest's registered representative, filled out a new account form and signed an account agreement and disclosure statement. The agreement contained an arbitration clause.

Ronay sued Tweed, TFI, CapWest, and 13 other entities that participated in investments in tenancy-in-common interests. Ronay sought to recover damages and other relief on various theories, including breach of fiduciary duty, negligence, misrepresentation, and statutory unfair competition. The gist of Ronay's complaint was that Tweed and the other defendants misled Ronay about the risks of the tenancy-in-common investments and induced Ronay to make unacceptably risky investments, which ultimately failed.

Tweed and TFI filed a petition to compel arbitration in which they set forth the arbitration clause, alleged the existence of a controversy within the scope of the clause and Ronay's refusal to submit the controversy to arbitration, and requested an order directing Ronay to arbitrate the controversy before FINRA.

Ronay opposed the petition and motion on the ground that the arbitration agreement was unenforceable because CapWest was defunct and FINRA had cancelled its membership.

The court held that Tweed and TFI could enforce the arbitration clause of the account agreement between Ronay and CapWest as agents of CapWest and as third party beneficiaries of the agreement. It further held that even though CapWest became defunct and under FINRA Rule 12202 lost its right to enforce the arbitration clause, Tweed and TFI nevertheless retained their rights to do so.

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## **MUNICIPAL FINANCE - GEORGIA**

### **[City of Baldwin v. Woodard & Curran, Inc.](#)**

**Supreme Court of Georgia - May 20, 2013 - S.E.2d - 13 FCDR 1551**

Company that provided services to city for its wastewater treatment plant brought action against city seeking money owed under a contract.

The Supreme Court of Georgia held that the company could not recover under equitable doctrine such as quantum meruit or estoppel; overruling *Walston & Assoc. v. City of Atlanta*, 224 Ga.App. 484, 480 S.E.2d 917, *City of Dallas v. White*, 182 Ga.App. 482, 357 S.E.2d 125, and *City of St. Marys v. Stottler Stagg & Assoc.*, 163 Ga.App. 45, 292 S.E.2d 868.

Company that provided services to city for its wastewater treatment plant was statutorily required to take notice of mayor's powers and, thus, could not recover under equitable doctrine such as quantum meruit or estoppel in action against city for money allegedly owed under contract that was ultra vires and void because it was signed by mayor, who had no unilateral authority under city Charter to approve contracts that would bind the city.

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## **MUNICIPAL IMMUNITY - IDAHO**

## **Grabicki v. City of Lewiston**

**Supreme Court of Idaho, Coeur D'Alene, April 2013 Term - May 23, 2013 - P.3d - 2013 WL 2249259**

Property owner brought action against city, alleging city negligently designed and installed a storm-water drain system on a city street adjacent to owner's property, which caused storm water runoff to flow onto owner's property and damage it. The Second Judicial District Court entered summary judgment in favor of city. Owner appealed.

The Supreme Court of Idaho held that:

- Owner stated claim for negligence against city;
- Discretionary function exception of the Idaho Tort Claims Act (ITCA) did not apply to claim that city negligently designed storm-water drain system; and
- Fact question regarding application of ITCA's design exception precluded summary judgment in favor of city.

Property owner's allegations, that city, through its employee, affirmatively acted by designing and constructing a storm water drain system, that the new system was negligently designed, and that the city's negligence was the proximate cause of damage to owner's property, stated a cause of action against city for negligence.

ITCA was enacted to provide relief to those suffering injury from the negligence of government employees. To accomplish that purpose, the ITCA is to be construed liberally, and liability is the rule and immunity is the exception.

Discretionary function exception of the ITCA may provide a governmental entity with immunity from liability for having exercised its discretion by deciding, or not deciding, to make a plan or design for the highway in question in the first place. However, once that entity has made the decision to plan and design the highway, it must comply with the ITCA's design exception in order to be immune from any suit arising out of that plan or design.

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## **MUNICIPAL FINANCE - INDIANA**

### **1st Source Bank v. Village of Stevensville**

**United States District Court, N.D. Indiana, Fort Wayne Division - May 23, 2013 - Slip Copy - 2013 WL 2285367**

Diversity action arose when the Village of Stevensville, Michigan defaulted on a series of loans made by 1<sup>st</sup> Source Bank, an Indiana corporation. The Village alleged that it lacked the authority to enter into the loan agreements, and that they were thus enforceable.

"This case turns on the resolution of two related issues. The first issue is whether the Defendants had statutory authorization to obtain a loan from the Plaintiff. Second, if the Defendants were not authorized to obtain a loan from the Plaintiff, the Court must analyze whether the Defendants are nonetheless required to repay the proceeds of that loan to the Plaintiff."

The court proceeded on the assumption that the Village did not have the statutory authority to enter into the loans. Under Indiana law, the Village was liable to the lender under the theory of quantum meruit. Under Michigan law, the Village was estopped from denying the validity of the loan agreements.

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## **MUNICIPAL ORDINANCE - MARYLAND**

### **[Kendall v. Howard County](#)**

**Court of Appeals of Maryland - May 21, 2013 - A.3d - 2013 WL 2157879**

County residents brought action for declaratory and injunctive relief against county, alleging that various county resolutions, ordinances, zoning decisions, and administrative actions relating to land use violated county charter, which required certain land use decisions to be made in the form of legislative acts passed by city council by original bill, so that the decisions could be petitioned to referendum.

The court of appeals held that residents lacked standing to bring action.

In order to demonstrate taxpayer standing to bring an action challenging a municipal ordinance, a party, as a taxpayer, may satisfy the special damage standing requirement by alleging both (1) an action by a municipal corporation or public official that is illegal or ultra vires, and (2) that the action may injuriously affect the taxpayer's property, meaning that it reasonably may result in a pecuniary loss to the taxpayer or an increase in taxes.

County residents lacked standing to bring declaratory judgment action challenging validity of various county resolutions, ordinances, zoning decisions, and administrative actions as having been made in violation of sections of county charter requiring certain land use decisions to be made in the form of legislative acts passed by city council by original bill, allegedly violating residents' right to petition the decisions for referendum and associated free speech and voting rights as the county charter did not afford an automatic right to approve the decisions at the polls, and residents alleged no specific and personal harm flowing from the denial of the opportunity to petition the decisions to referendum.

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## **TAX - MICHIGAN**

### **[County of Oakland v. Federal Housing Finance Agency](#)**

**United States Court of Appeals, Sixth Circuit - May 20, 2013 - F.3d - 2013 WL 2149964**

County and county treasurer brought action against Fannie Mae and Freddie Mac, seeking recovery of allegedly unpaid transfer taxes that were due on real estate transactions that defendants recorded with county register of deeds. The Federal Housing Finance Agency (FHFA) intervened as defendants' conservator under Housing and Economic Recovery Act (HERA), and state officials intervened as state plaintiffs.

The court of appeals held that Federal statutory exemptions from "all taxation" for Fannie Mae, Freddie Mac, and FHFA, as conservator, applied to Michigan transfer taxes on real estate transactions.

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## **INSURANCE - OHIO**

### **[Marusa v. Erie Ins. Co.](#)**

**Supreme Court of Ohio - May 21, 2013 - N.E.2d - 2013 - Ohio- 1957**

Insureds brought action against automobile insurer after insurer denied claim for uninsured motorist (UM) coverage arising out of collision with police officer.

The Supreme Court of Ohio held that insureds were not precluded from recovering UM benefits.

Automobile insurance policy, providing that an uninsured motor vehicle included a motor vehicle whose owner or operator had political subdivision tort immunity and providing that insurer would pay damages that insured was "legally entitled to recover," did not preclude insured from recovering uninsured motorist (UM) benefits arising from collision with city police officer who was immune from liability. The policy did not rely on statutory definition of "uninsured motor vehicle," but instead unambiguously provided UM coverage when an insured was injured by an owner or operator who had tort immunity, and policy did not explain potential limitation of UM coverage resulting from use of phrase "legally entitled to recover."

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## **MUNICIPAL GOVERNANCE - PENNSYLVANIA**

### **[Northeast Land Development, LLC v. City of Scranton](#)**

**United States District Court, M.D. Pennsylvania - May 21, 2013 - F.Supp.2d - 2013 WL 2237791**

The Scranton City Council tabled a resolution authorizing a development project after it had been approved by the City Planning Commission and City Engineer. Developers sued, alleging that the city and council members acted in an arbitrary, capricious and irrational manner in order to coerce the plaintiffs to perform a punch list of items for the development. By this and other conduct, plaintiff alleged that the city and the members of the city council "acted individually and in concert with each other and in an arbitrary, capricious and irrational manner and precluded the Plaintiffs rightful use of its property in profound violation of Plaintiffs procedural and substantive due process rights pursuant to the Fourteenth Amendment and 42 U.S.C. § 1983."

Though plaintiffs complained about the motivation behind the individual defendants' actions - their animosity to certain forms of development - its complaint was grounded in the action that defendants took in tabling the motion to approve the development plan. Since voting on the development plan - or choosing not to vote on that plan - is the sort of act that the Supreme Court has found "in form quintessentially legislative," the court found that the individual defendants were absolutely immune from all claims against them.

The city council's role in enacting or declining to enact a resolution authorizing the mayor of the city to enter into the development agreement in question required the exercise of the council's legislative authority and, as such, its decision to table the resolution authorizing the development agreement did not implicate the protections of procedural due process.

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## **LIENS - PENNSYLVANIA**

### **[Elizabeth Tp. Sanitary Authority v. Mignogna](#)**

**Commonwealth Court of Pennsylvania - May 21, 2013 - A.3d - 2013 WL 2178684**

Township sanitary authority filed a municipal lien, seeking to recover costs associated with the abatement of a nuisance pursuant to Municipal Claims and Tax Liens Act (MCTLA) and town ordinance.

The Commonwealth Court held that affidavits of chairman of township sanitary authority and of the nuisance abatement project manager, in support of authority's municipal lien claim against landowners seeking recovery of costs associated with nuisance abatement, were not sworn to, affirmed, or verified as required by rule, and, therefore, were required to be disregarded as incompetent hearsay evidence to which landowners objected.

Dismissal of municipal lien claim with prejudice, rather than granting the township sanitary authority leave to amend its pleadings, was warranted upon determination that the only supporting affidavits for the asserted lien were defective and would be disregarded as incompetent hearsay evidence, where authority was not seeking to amend its pleadings but merely sought a second opportunity to submit new and different evidence in support of its lien.

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## **FIDUCIARY DUTY - PENNSYLVANIA**

### **[In re Jerome Markowitz Trust](#)**

**Superior Court of Pennsylvania - May 23, 2013 - A.3d - 2013 PA Super 128**

Trustee hired Wachovia Bank to hold \$9 million of Trust funds in its Short Term Investment Management ("STIM") product while the Trust explored longterm investment strategies. Wachovia's STIM portfolio at that time included Auction Rate Securities ("ARS"). [Foreshadowing alert.]

Trustee retained Glenmede as an investment advisor for the Trust and notified Wachovia that the Trust assets would be moved to another manager.

Unbeknownst to Trustee or Glenmede, and despite having received and acknowledged notice of its removal as investment advisor, Wachovia continued to engage in purchases after that date, most significantly, on December 27, 2006, when it purchased a \$300,000 investment in Jefferson County, Alabama Sewer Revenue Warrants. [Yet more foreshadowing.]

Wachovia transferred to Glenmede the majority of Trust assets in its possession, 11 of which were ARSs, the Jefferson ARS, and the Mobile ARS among them. However, Wachovia's transfer of the ARSs failed to include the auction rights associated with each ARS. When it realized that Wachovia had failed to transfer the auction rights and/or to notify remarketing agents, Glenmede began to work to obtain the auction rights for the ARSs. Glenmede did not inform Trustee that it had not received the auction rights from Wachovia.

Glenmede was able to obtain auction rights for some, but not all, ARSs, and to successfully liquidate certain ARSs without auction rights.

After the collapse of the ARS market, the Trust sued Wachovia for its handling of the ARSs. That suit was settled. The Trust then sued Glenmede for its handling of the ARSs.

Trustee directed its new investment advisor to sell the Mobile ARS, which sold for \$234,500, which represented 67% of its \$350,000 par value. Slightly more than a month later, the ARS were redeemed at full par value. Had it not been sold by Trustee, the Trust would have realized no loss.

Also at Trustee's direction, the Jefferson ARS was sold and the Trust realized \$90,000, which represented 30% of its \$300,000 par value. However, the Jefferson ARS had not been declared in default and continued to pay all ARS holders increased interest.

The Orphans' Court concluded that Glenmede had breached its fiduciary duty to the Trust, as it was

more concerned with positioning itself favorably vis a vis responsibility for the delay in its receipt of auction rights, than passing along the relevant market information. Glenmede's conduct in this regard fell short of the scrupulous good faith and candor that are the cornerstones of a fiduciary relationship and constituted a breach of the fiduciary duty.

On appeal, the Trust argued that the surcharge levied against Glenmede for the breach of its fiduciary duty should be \$325,500 - which represents the amount lost by the Trust by the forced sale of the Jefferson and Mobile ARSs in the secondary market - rather than the surcharge of \$11,700 levied by the Orphans' Court.

Neither party produced evidence regarding the method of calculation of the \$161,549.42 fee paid to Glenmede. Thus, the appeals court stated that it was, "left to simple arithmetic and discretion." The fee paid to Glenmede (\$161,549.42) represented 1.8% of the Trust assets that it was given to invest (\$9 million). Applying that percentage to the aggregate \$650,000 carrying value of the Mobile ARS and the Jefferson ARS (which is the value at which those assets were reflected on receipt and upon transfer by Glenmede), revealed that the amount of compensation attributable to those two investments is \$11,7000.00. Accordingly, Orphans' Court was correct to impose a surcharge upon Glenmede in the amount of \$11,700.00 for breach of its fiduciary duty.

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## **EMINENT DOMAIN - TEXAS**

### **[In re Texas Rice Land Partners, Ltd.](#)**

**Court of Appeals of Texas, Beaumont - May 23, 2013 - S.W.3d - 2013 WL 2250717**

Texas Rice Land Partners ("TRL") owns property in Jefferson County, Texas, currently used for rice farming. Real party in interest, TransCanada Keystone Pipeline, L.P. is the owner and operator of the United States' portion of the Keystone Pipeline System.

After unsuccessful attempts to negotiate the purchase of a necessary easement, TransCanada filed a petition for condemnation seeking to condemn an easement across property owned by TRL in order to complete construction of the pipeline. The trial court entered an order appointing special commissioners, and a hearing was held in which the special commissioners awarded TRL \$20,808 in compensation for the easements sought by TransCanada.

TRL objected on the ground that TransCanada did not possess the power of eminent domain as it was not a common carrier. The Court of Appeals ruled that TransCanada had provided sufficient evidence to establish that the Keystone Pipeline is a common carrier line, and thus possesses the power of eminent domain.

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## **MUNICIPAL COURTS - UTAH**

### **[In re Christensen](#)**

**Supreme Court of Utah - May 21, 2013 - P.3d - 2013 UT 30**

Disciplinary proceeding was brought against judge. The Judicial Conduct Commission (JCC) issued findings of fact and conclusions of law and an order of censure requiring judge to repay excess salary.

The Supreme Court of Utah held that:

- Censure and repayment of excess salary was warranted for judge who violated salary cap statute for judges who were employed by more than one municipality, and
- Statute that provided that justice court judge's salary could not be diminished during his term was not violated when municipality honored judge's request to have his salary reduced to comply with salary cap.

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## **GOVERNMENT CONTRACTS - WYOMING**

### **[Western Wyoming Const. Co., Inc. v. Board of County Com'rs of Sublette County](#)**

**Supreme Court of Wyoming - May 21, 2013 - P.3d - 2013 WY 63**

The Supreme Court of Wyoming held that:

- Statute providing for a resident contractor preference does not preempt field of residential preferences, overruling *Green River v. DeBernardi*, 816 P.2d 1287; and
- Court could not determine that award of contract was proper absent evidence showing where the money came from to pay for the project.

Public contracts statute providing for a resident contractor preference with reference to lowest bid or qualified response does not preempt the field of residential preferences in the context of bidders who are both Wyoming residents. Rather, the statute has no application in that context, and applies only in the context of competing bids from a resident and a non-resident contractor, overruling *Green River v. DeBernardi*, 816 P.2d 1287.

A county, in a situation where advertisement for bids on a public contract is not required, is required by statute to award the bid to a Wyoming resident. When advertisement for bids is required, the bid must be awarded to the lowest resident bidder unless his bid is more than five percent higher than that of the lowest responsible nonresident bidder.

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## **TAX - U.S. TAX COURT**

### **[Uniband, Inc. v. C.I.R.](#)**

**United States Tax Court - May 22, 2013 - 140 T.C. No. 13**

P is a Delaware corporation, wholly owned by T, an Indian tribe. For the years at issue P attempted to file consolidated returns with C, another corporation wholly owned by T. P contended that T is the common parent corporation of P and C and that together they constitute an affiliated group eligible to file a consolidated return. On the returns filed, P did not claim Indian employment credits under I.R.C. sec. 45A even though P was entitled to them. Instead, P deducted the entirety of its employee expenses.

R determined that the consolidated returns that P joined in filing were invalid and that P was required to claim a credit under I.R.C. sec. 45A and reduce its wage deduction by the entire credit amount (without regard to credit limitations for particular tax years). P now contends that it is not subject to corporate income tax because it is an integral part of T, which because it is an Indian tribe is exempt from income tax.

The U.S. Tax Court held that:

- P, as a State-chartered corporation, is a separate and distinct entity from T and is not exempt from the corporate income tax;
- The consolidated returns filed for the years in issue were invalid because T, as an Indian tribe, was not eligible to join in the filing of a consolidated return, and P and C alone did not constitute an affiliated group; and
- The Indian employment credits under I.R.C. sec. 45A are not elective, and as a result, P's employee expense deductions for the years at issue must be reduced by the amount of the credit as determined under I.R.C. sec. 45A without regard to limitations on the allowable amount of the credit.

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## **PUBLIC UTILITIES - ALABAMA**

### **[Otwell v. Alabama Power Co.](#)**

**United States District Court, N.D. Alabama, Jasper Division - May 9, 2013 - F.Supp.2d - 2013 WL 1966115**

Owners of land adjacent to Smith Lake sought declaratory and injunctive relief due to Alabama Power's alleged misuse of waters and property surrounding the Lewis Smith development at Smith Lake. Plaintiffs alleged generally that they have riparian rights in the waters of Smith Lake and that these rights are violated, and other torts result, when Alabama Power "unreasonably releases large flows of water from Smith Lake to cool the Gorgas discharge," resulting in a water level too far below the 510 msl shoreline contour. Plaintiffs also alleged that Alabama Power is unreasonably lowering lake levels in order to avoid building cooling towers at a downstream power plant.

The court deemed it unnecessary to issue an abstract ruling on whether plaintiffs have riparian rights in Smith Lake because such a ruling will not resolve the dispute that was squarely before the court on Alabama Power's motion for summary judgment; i.e., whether Alabama Power's operation of Smith Dam under its 1957 and 2010 FERC Licenses and the Corps Manual is a reasonable use of its own riparian rights such that Plaintiffs' state-law tort causes of action cannot be maintained.

Alabama Power argues that all of Plaintiffs' claims fail because this lawsuit is an impermissible collateral attack on the FERC License, which was issued to Alabama Power after the FERC considered and rejected the same substantive arguments Plaintiffs made to the Court. In sum, Alabama Power's motion for summary judgment is due to be granted because Plaintiffs' claims constitute an impermissible attack on a FERC licensing decision and thus belong only in a federal court of appeals.

All of Plaintiffs' claims nonetheless fail for an entirely independent reason as well. Alabama Power argued that Plaintiffs' riparian rights, assuming they have them, are subject to the right of reasonable use of the waters by other riparian owners, including Alabama Power, and the use of riparian rights on a FERC-licensed project is considered "reasonable" as a matter of law when the FERC licensee is acting in compliance with its FERC license. The district court agreed, granting summary judgment to Alabama Power.

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## **ZONING - DELAWARE**

### **[New Cingular Wireless PCS v. Sussex County Bd. of Adjustment](#)**

**Supreme Court of Delaware - May 9, 2013 - A.3d - 2013 WL 1943987**



Telecommunications company sought judicial review of decision of county board of adjustment denying application for special use exception to construct a 100-foot telecommunications monopole on a commercially-zoned property.

Pursuant to county code, special use exceptions were to be granted unless the county adjustment board found the exception would “substantially affect adversely the uses of adjacent and neighboring property.”

The Supreme Court of Delaware held that the company was required only to show that use would not substantially adversely affect neighboring properties, rather than that use would have no adverse affect.

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## **ARBITRATION - FLORIDA**

### **[Raymond James Financial Services, Inc. v. Phillips](#)**

**Supreme Court of Florida - May 16, 2013 - So.3d - 2013 WL 2096252**

Raymond James Financial Services required its clients to sign an agreement to arbitrate all disputes arising out of the handling of their investments. The issue in this case was not the validity of the arbitration agreement, but rather whether Florida’s statute of limitations that is applicable to a “civil action or proceeding” applies to arbitration proceedings. The investors assert that the statute of limitations applies only to judicial actions and thus did not limit the time in which to bring their arbitration claims.

The Supreme Court of Florida held that the term “proceeding” as used in statutory provision that barred any proceeding unless begun within the applicable statute of limitations, was a broad term that encompassed arbitration proceedings.

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## **MUNICIPAL ORDINANCES - FLORIDA**

### **[City of Palm Bay v. Wells Fargo Bank, N.A.](#)**

**Supreme Court of Florida - May 16, 2013 - So.3d - 2013 WL 2096257**

This case considered whether a municipal ordinance may validly establish superpriority status for municipal code enforcement liens. The appeals court concluded that such an ordinance superpriority provision is invalid because it conflicts with a state statute and that the city’s lien accordingly did not have priority over the lien of Wells Fargo’s mortgage that was recorded before the city’s lien was recorded.

The Supreme Court of Florida stated, “Here, it is undisputed that the Palm Bay ordinance provision establishes a priority that is inconsistent with the priority established by the pertinent provisions of chapter 695. In those statutory provisions, the Legislature has created a general scheme for priority of rights with respect to interest in real property. Giving effect to the ordinance superpriority provision would allow a municipality to displace the policy judgment reflected in the Legislature’s enactment of the statutory provisions. And it would allow the municipality to destroy rights that the Legislature established by state law. A more direct conflict with a statute is hard to imagine. Nothing in the constitutional or statutory provisions relating to municipal home rule or in the Local Government Code Enforcement Boards Act provides any basis for such a municipal abrogation of a state statute. The conflict between the Palm Bay ordinance and state law is a sufficient ground for

concluding that the ordinance superpriority provision is invalid.”

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## **TAX - GEORGIA**

### **[Athens-Clarke County Unified Government ex rel. Denson v. Federal Housing Finance Agency](#)**

**United States District Court, M.D. Georgia, Macon Division - May 14, 2013 - Slip Copy - 2013 WL 2102922**

“This is a putative class-action lawsuit against the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation, federally chartered private corporations known more commonly by their nicknames Fannie Mae and Freddie Mac. The Plaintiffs are local governments that wish to represent a class of all 159 Georgia counties. They contend the Defendants’ nonpayment of Georgia’s Real Estate Transfer Tax (“transfer tax”) has unlawfully deprived them of revenue. Fannie Mae and Freddie Mac argue that federal law exempts them from paying the tax.”

“These are not new accusations. Over the past two years, local government plaintiffs in several states have brought versions of this lawsuit in their respective federal jurisdictions, including in the Eastern and Western Districts of Michigan, the District of Columbia, the Middle District of Florida, the Northern District of Illinois, and the Northern and Southern Districts of Georgia. So far, the Defendants have moved to dismiss the plaintiffs’ complaints in eleven of those cases. Ten of their motions have been granted. The Defendants have now moved to dismiss this case. Their motion is GRANTED.”

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## **EMPLOYMENT - IOWA**

### **[Rivera v. Woodward Resource Center](#)**

**Supreme Court of Iowa - May 10, 2013 - N.W.2d - 2013 WL 1922860**

Former employee terminated from her employment as a residential treatment worker at state resource center brought action against resource center, alleging wrongful discharge in violation of public policy.

The Supreme Court of Iowa held that timely filing of initial suit dismissed for failure to exhaust administrative remedies triggered savings clause of Iowa Tort Claims Act, so as to render subsequent action allowable under the statute of limitations.

Although employee failed to comply with administrative procedure provided by ITCA prior to initiation of first lawsuit, a “claim” in the context of the savings clause did not require a distinction between administrative claims and court claims, as in the statute of limitations, because the procedures within the ITCA for a claimant to abrogate immunity had not yet come into play when a state agency or court had only determined the ITCA provided the exclusive remedy for the claim.

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## **INSURANCE - KANSAS**

### **[Brecek & Young Advisors, Inc. v. Lloyds of London Syndicate 2003](#)**

**United States Court of Appeals, Tenth Circuit - May 13, 2013 - F.3d - 2013 WL 1943338**

Insured filed action in diversity, seeking declaratory relief and damages for insurer's failure to defend and pay sufficient indemnity under professional liability insurance policy with regard to claims brought in arbitration before National Association of Securities Dealers alleging that agents of insured mismanaged and unlawfully "churned" investment accounts of its clients. The district court granted summary judgment for insured. Insurer appealed.

The court of appeals held that:

- Arbitrations were connected by common facts, circumstances, decisions, and policies, and thus claims in subsequent arbitration related back under "interrelated wrongful acts" provision; and
- Insured had been prejudiced by actions that insurer took in course of receiving underlying claim.

Under New York law, an insurer bears the burden to establish a claim falls within the scope of a policy exclusion. To negate coverage, exclusions must be stated in clear and unmistakable language, subject to no other reasonable interpretation, and applicable in the particular case.

The insurance policy contained two provisions indicating insurer was not responsible for indemnifying or defending insured for claims made during the policy period which are interrelated with claims made prior to the policy period.

After settling multiple claims, insured sued insurer. Specifically, the parties disputed whether the twenty-six claims constituted interrelated wrongful acts under the insurance policy. Insured argued the claims were logically interrelated by a common factual nexus. Insurer argued there was not a sufficient factual nexus between the claims, emphasizing differences in the investors, investment products, issuers, representatives, and recoveries sought in each claim. At issue was whether or not insured was responsible for a \$50k retention for one case, or all twenty-six.

Insurer also suggested an alternative position, that if each of the twenty-six claims were found to have arisen from interrelated wrongful acts, then all of the those claims would relate back to claims made in prior arbitrations. Because those earlier arbitrations occurred outside of the policy period, insurer argued, no coverage for any of the claims would exist. The district court found a sufficient factual nexus between each of the cases and sided with insurer in its related-back defense.

However, under New York law, where an insurer defends an action on behalf of an insured, with knowledge of a defense to the coverage of the policy, it thereafter is estopped from asserting that the policy does not cover the claim. Insured argued that, regardless of the how the policy is interpreted, insurer is precluded from denying coverage due to the actions it took in the course of receiving the twenty-six arbitrations. Specifically, insured argued that insurer had either waived its right to assert the relation-back defense or should be estopped from denying coverage under New York law. The district court sided with insured on this issue.

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## **BONDS - LOUISIANA**

### **[Woman's Hosp. Foundation v. National Public Finance Guarantee Corp.](#)**

**United States Court of Appeals, Fifth Circuit - May 14, 2013 - Slip Copy - 2013 WL 1955884**

WHF operates a hospital in Baton Rouge, Louisiana. In 2005, WHF issued \$39.7 million of tax-exempt bonds (the "Series 2005 Bonds").

WHF executed a trusteeship agreement with the Bank of New York Trust Company (the "Trustee"). This trusteeship was memorialized and organized by a Master Trust Indenture, executed by WHF

and the Trustee.

WHF also contracted with Financial Guaranty Insurance Co. ("FGIC") to insure the payments of principal and interest due to the holders of the Series 2005 Bonds (the "Insurance Contract"). The Insurance Contract contained a number of restrictions on the ability of WHF to issue further debt during the term of the Series 2005 Bonds. In particular, Section 2.2(f) of the Insurance Contract provided that WHF would not incur any new indebtedness unless the debt met certain "stress-test" conditions, and Section 2.6 provided that WHF could not amend or supplement the Master Trust Indenture without FGIC's consent.

In 2008, WHF decided to build an entirely new hospital. To achieve this goal, WHF planned to issue \$350 million in new bonds (the "Series 2010 Bonds"). It intended that these bonds would be secured under the terms of the Master Trust Indenture. In December 2009, pursuant to Section 2.6 of the Insurance Contract, WHF asked FGIC's successor-in-interest, National Public Finance Guarantee Corp. ("National"), for its consent to supplement and amend the Master Trust Indenture to cover this new bond issue.

The issuance of the Series 2010 Bonds was a time-sensitive matter. WHF believed that the first quarter of 2010 was its ideal window for marketing the bonds. Despite the Series 2010 Bonds meeting the stress-test conditions of Section 2.2(f) of the Insurance Contract, National refused to give its consent immediately. It requested that WHF schedule a site visit and otherwise sought to condition its consent on further concessions on the part of WHF.

Realizing that it would not be able to issue the Series 2010 Bonds in January as planned if it continued to try to obtain National's consent, WHF instead defeased the Series 2005 Bonds in their entirety, incurring prepayment penalties in excess of \$2.5 million. WHF believed National's withholding of consent was a deliberate ploy to force exactly this course of action, which had the effect of relieving National of its responsibilities under the Insurance Contract far earlier than would otherwise have been the case. WHF also believed that National's withholding of consent was without authority under the Insurance Contract - it interpreted the Insurance Contract to require National's consent under Section 2.6 for supplements and amendments covering new debt issues so long as the new debt would meet the stress-test requirements of Section 2.2(f).

In December 2010, WHF brought an action against National in Louisiana state court, alleging breach of contract, breach of the duty of good faith, abuse of rights based on improper motives, and detrimental reliance.

National argued that the insurance contract provided it with an unqualified right of consent to proposed supplements and amendments to the Master Trust Indenture and that as a result it had not breached its contract with WHF. National further contended that it withheld consent for economic reasons that, as a matter of law, cannot constitute bad faith or an abuse of rights. Finally, National argued that the WHF's pleadings by their own terms defeated any claim of detrimental reliance.

The appeals court held that:

- The district court correctly stated that National's right of consent was without "qualifications or exceptions" with respect to the Series 2010 Bonds;
- That the district court did not err in concluding that National was within its rights to withhold its consent as a matter of law, notwithstanding the fact that the Series 2010 Bonds met the stress-test conditions of Section 2.2(f) of the Insurance Contract; and
- That the district court correctly dismissed WHF's claims.

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## **ANNEXATION - MINNESOTA**

### **[Township of Midway v. City of Proctor](#)**

**Court of Appeals of Minnesota - May 13, 2013 - Not Reported in N.W.2d - 2013 WL 1943010**

In this dispute concerning annexation of real property, the Township of Midway challenged the district court's grant of summary judgment for the City of Proctor.

Midway contended that, because the petition for annexation contained an erroneous legal description of the property, the petition was legally deficient and the resulting ordinance annexing the property is invalid.

The court of appeals affirmed, finding that Minn.Stat. § 414.033, subd. 2(3) (2012) does not require an annexation petition to include a legal description, and because the statutory requirements were met.

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## **SCHOOLS - MISSISSIPPI**

### **[Fails v. Swan](#)**

**United States District Court, S.D. Mississippi, Hattiesburg Division - May 10, 2013 - Slip Copy - 2013 WL 1962041**

Student brought a Section 1983 case arising from a school board's revocation of its permission for student to transfer to another school district.

Plaintiff asserted two claims under 42 U.S.C. § 1983. First, plaintiff claimed that defendant's actions deprived her of substantive due process rights protected by the Fourteenth Amendment's Due Process Clause. Second, plaintiff claimed that defendant's actions deprived her of procedural due process rights protected by the Fourteenth Amendment's Due Process Clause.

The district court found no merit to these claims.

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## **ZONING - NEW JERSEY**

### **[Northgate Condominium Ass'n, Inc. v. Borough of Hillsdale Planning Bd.](#)**

**Supreme Court of New Jersey - May 13, 2013 - A.3d - 2013 WL 1943204**

Corporation that managed and operated a previously-existing condominium community filed complaint in lieu of prerogative writs in which it challenged planning board's granted conditional use permit to developer and owner of adjacent parcel.

The Supreme Court of New Jersey held that:

- Conditional use approval notice that contained erroneous tax lot designation complied with MLUL requirements, but
- Board was not permitted to round down dwelling units per acre calculation when determining RSIS compliance.

Despite containing an erroneous tax lot designation, conditional use approval published by developer complied with section of Municipal Land Use Law (MLUL) that set forth requirements governing the manner in which the property to be developed was required to be identified. The notice, although utilizing lot numbers that were not included on the official tax map, did not thereby misidentify the lot to be developed, as the block number used in the notice was correct. Developer only used lot numbers that it included in notice in reliance on previous directions from tax assessor. Notice identified property by using commonly-known name for parcel, and there was no confusion about location for proposed development.

Planning board was not permitted to round down dwelling units per acre calculation when determining whether developer's project design for age-restricted housing development complied with requirements of Residential Site Improvement Standards (RSIS) for internal roadway widths and improvement so as to warrant grant of conditional use permit. Regulation relating to intensity of roadways made it plain that the drafters did not intend that "rounding" techniques could be utilized to alter its standards. On the contrary, the regulation defined a low intensity development as one that contained "less than or equal to 4" dwelling units per gross acre.

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## **EXEMPT ORGANIZATIONS - OHIO**

### **[State ex rel. Atty. Gen. v. Vela](#)**

**Court of Appeals of Ohio, Fifth District, Licking County - March 15, 2013 - N.E.2d - 2013 - Ohio- 1049**

The State filed action against incorporator and directors of non-profit foster home placement agency for disregard and exploitation of the agency.

The court of appeals held that:

- Non-profit foster home placement agency was a charitable trust;
- Audit report prepared by Auditor of State was admissible under the business records exception to the hearsay rule;
- Evidence was sufficient to establish that incorporator and director breached their fiduciary duties; and
- Evidence was sufficient to establish that incorporator and directors were unjustly enriched by using agency funds for personal interests.

In order to prove the existence of a charitable trust, a party must establish three elements: (1) a fiduciary relationship with respect to property arising under the law of the State or of another jurisdiction; (2) as the result of a manifestation of intention to create the trust; (3) which subjects an individual by whom the property is held to fiduciary duties to deal with this property within the State for any charitable, religious, or educational purpose.

In this case, the agency's articles of incorporation contemplated a fiduciary relationship between the agency and the children and families for whom the agency was created to serve, the agency was established as a non-profit organization under the Internal Revenue Code, and the agency's articles expressly prohibited the agency's incorporator and directors from using funds from the agency for any purpose other than charitable and educational purposes.

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## **MUNICIPAL LIABILITY - OKLAHOMA**

### **[Ibarra v. City of Tahlequah](#)**

**United States District Court, E.D. Oklahoma - May 13, 2013 - Slip Copy - 2013 WL 1991546**

This case arose when plaintiff was struck in the head by a police officer, causing him to fall to the ground, where, even after being restrained, plaintiff claims officers continued to strike him and yell racially charged epithets.

Plaintiff filed a complaint with the police chief, who later testified that he did not investigate the incident after the complaint, because plaintiff was “hard to understand” and “wasn’t being specific on what was going on.” However, the chief did understand that plaintiff “had been arrested and ... there was some police brutality or something to that effect.” Charming.

In order to prevail on his claim for racial harassment in violation of the Equal Protection Clause, Plaintiff must prove both that: 1) the defendant officers engaged in harassing behavior or violated one of plaintiff’s established rights; and 2) the defendant officers’ actions were racially motivated.

Municipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question. A municipality cannot be held liable for the acts of its employees on a theory of respondeat superior. Thus, a city cannot be made vicariously liable for acts of the individual officers under 42 U.S.C. § 1983. Rather, a plaintiff must establish both: 1) a municipal policy or custom; and 2) a direct causal link between the policy or custom and the alleged injury.

The district court concluded that:

- The police chief was the final policymaker with regard to department policies and procedures;
- There existed sufficient evidence support a finding of deliberate indifference to the need for additional training on civil rights matters;
- There existed sufficient evidence to find that the failure to correct the alleged deficient training on issues of civil rights was the driving force behind plaintiff’s injuries;
- A reasonable jury could certainly find the complaints the police chief allegedly received were sufficient to establish a continuing, widespread, and persistent pattern of misconduct by department officers resulting in plaintiff’s injuries;
- There existed sufficient to establish a custom or practice of disregarding the rights of Hispanic residents of the city; and
- There existed no evidence to support plaintiff’s allegations of negligent hiring.

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## **ZONING - PENNSYLVANIA**

### **[Korby v. Zoning Hearing Bd. of Pulaski Tp.](#)**

**Commonwealth Court of Pennsylvania - May 14, 2013 - A.3d - 2013 WL 1955676**

Landowner sought review of decision of zoning hearing board finding him in violation of zoning ordinance.

The Commonwealth Court of Pennsylvania held that attorney's failure to present evidence at hearing, submit appeal brief, or appear at oral argument did not amount to extraordinary cause to open board's judgment, even if his actions constituted legal malpractice.

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## **ZONING - RHODE ISLAND**

### **[Cigarrilha v. City of Providence](#)**

**Supreme Court of Rhode Island - May 15, 2013 - A.3d - 2013 WL 2016639**

Owner of three-family dwelling brought action seeking declaratory and injunctive relief from city's enforcement of zoning law restricting property to single- or double-family use, claiming the property qualified for legal nonconforming use exception.

The Supreme Court of Rhode Island held that:

- Property was not in use as a three-family residence before the enactment of zoning ordinance and thus did not qualify for legal nonconforming use exception;
- City's assessment of property taxes upon property based on its use as a three-family residence did not preclude enforcement of zoning laws by operation of equitable estoppel; and
- City's assessment of property taxes upon property based on its use as a three-family residence did not preclude enforcement of zoning laws by operation of laches.

The property did not qualify for a legal nonconforming use exception as the record on appeal was silent as to the use of the property in 1923, and it was property owner's burden to prove that the property was used as a three-family residence before enactment of the zoning law in 1923.

City's assessment of property taxes upon property based on its use as a three-family residence did not, by operation of equitable estoppel, preclude enforcement of single- and double-family residence zoning restrictions, absent evidence showing that city had made any representation which induced property owners to maintain the property as a three-family residence. Property owner benefited from additional rental income, thus negating the injury requirement of equitable estoppel.

City's assessment of property taxes upon property based on its use as a three-family residence did not, by operation of defense of laches, preclude city from enforcing zoning laws that restricted properties to single- or double-family residences. City's imposition of taxes based upon property's actual use did not evince negligent delay in the enforcement of zoning laws, and city promptly enforced its codes once it learned of the property's violations.

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## **TAX - UTAH**

### **[Lee v. Utah State Tax Com'n](#)**

**Supreme Court of Utah - May 14, 2013 - P.3d - 2013 UT 29**

Taxpayers established a qualified plan under Internal Revenue Code section 401. Employer contributions to profit-sharing plans are tax-deductible to the employer at the time of contribution. Plan funds grow tax-free until they are distributed, at which time distributions are taxable to the employee as ordinary income. Here, taxpayer's sole proprietorship contributed funds to the plan. These funds were invested entirely in U.S. government obligations, the interest on which is tax-exempt under 31 U.S.C. section 3124(a).



The distributions that taxpayer received from his qualified plan are taxable as ordinary income, just as any distribution from a retirement or pension plan. At issue here, however, was whether distributions from the plan are tax-exempt because the plan funds were invested in U.S. government obligations.

The court agreed with taxpayer that income received as interest on U.S. government obligations is exempt from state taxation, but the income taxpayer claimed to be exempt was not received as interest on U.S. obligations, but rather as distributions from a qualified Section 401 plan. Thus, the distributions qualify for a tax exemption only if the plan acted as a conduit, allowing the funds to retain their tax-exempt character after distribution.

Taxpayer argued that the tax-exempt character of the interest received by the plan is passed through to them, rendering a portion of their distributions tax-exempt. The Tax Commission argued that the interest loses its tax-exempt nature when the funds are distributed to the beneficiary.

The court concluded that, despite plan funds being invested in U.S. government obligations, distributions from a Section 401 qualified plan are fully taxable. The funds in taxpayer's profit-sharing plan, invested in U.S. government obligations, were exempt from income tax while in the plan. But upon distribution, those funds became plan distributions and could no longer be treated as interest on tax-exempt securities. The distributions from the plan were simply income from a qualified plan, subject to taxation under the Internal Revenue Code and Utah law.

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## **TAX - ALABAMA**

### **[Montgomery County Com'n v. Federal Housing Finance Agency](#)**

**United States District Court, M.D. Alabama, Northern Division - May 6, 2013 - Slip Copy - 2013 WL 1896256**

Alabama county brought suit, claiming that Fannie Mae and Freddie Mac had unlawfully refused to pay recordation tax on property transfers within the state. The defendants moved to dismiss, claiming that, under federal law, Fannie Mae and Freddie Mac are immune from paying the Alabama tax.

The district court concluded that Alabama's recordation tax falls within the ambit of the statutory immunity but does not fall within the exception to the immunity.

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## **ZONING - CALIFORNIA**

### **[City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.](#)**

**Supreme Court of California - May 6, 2013 - P.3d - 13 Cal. Daily Op. Serv. 4517**

City brought action against medical marijuana dispensary (MMD) operators for public nuisance, seeking injunctive relief.

The Supreme Court of California held that Compassionate Use Act (CUA) and Medical Marijuana Program Act (MMPA) do not preempt local bans on MMDs.

Inherent local police power recognized by the state constitution includes broad authority to determine, for purposes of the public health, safety, and welfare, the appropriate uses of land within

a local jurisdiction's borders, and preemption by state law is not lightly presumed. When local government regulates in an area over which it traditionally has exercised control, such as the location of particular land uses, California courts will presume, absent a clear indication of preemptive intent from the Legislature, that such regulation is not preempted by state statute

Unless exercised in clear conflict with general law, a city's or county's inherent, constitutionally recognized power to determine the appropriate use of land within its borders allows it to define nuisances for local purposes, and to seek abatement of such nuisances. A local jurisdiction may prohibit collective or cooperative medical marijuana activities within its own borders by declaring such conduct on local land to be a nuisance, and by providing means for its abatement.

MMPA does not grant a "right" of convenient access to marijuana for medicinal use.

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## **ADVERSE POSSESSION - CALIFORNIA**

### **[Hagman v. Meher Mount Corporation](#)**

**Court of Appeal, Second District, Division 6, California - April 3, 2013 - 215 Cal.App.4th 82 - 155 Cal.Rptr.3d 192**

Neighbor sued nonprofit religious organization to quiet title to disputed property on the theory that he had acquired title by adversely possessing that property.

The court of appeal held that:

- Religious organization was not a "public entity" immune from adverse possession; and
- Religious organization's welfare exemption from property taxes excused neighbor from the requirement to pay taxes on the disputed property.

Nonprofit religious organization's neighbor was excused from the usual requirement that neighbor pay taxes on religious organization's land for five years to accomplish adverse possession of the land. Even though the land was subject to a Mosquito Control and Vector Borne Disease Prevention Assessment which was paid by the religious organization, no taxes were "levied and assessed" on the property due to the religious organization's welfare exemption from property taxes.

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## **EMINENT DOMAIN - CALIFORNIA**

### **[Lockaway Storage v. County of Alameda](#)**

**Court of Appeal, First District, Division 3, California - May 9, 2013 - Cal.Rptr.3d - 2013 WL 1910878**

County determined that an amendment to its General Plan, adopted by voters as Measure D, prohibited Lockaway Storage from completing a project to develop a self-storage facility in the County. Lockaway sued for inverse condemnation and civil rights violations. After issuing a writ of mandate that authorized the project to proceed, the superior court conducted a nonjury trial which resulted in a judgment holding the County liable for a temporary regulatory taking and awarding Lockaway damages of \$989,640.96. Pursuant to a separate order, the court awarded Lockaway attorney fees totaling \$728,015.50.

The County appealed both the judgment and the attorney fee order. It contended the judgment must

be reversed because: 1) Lockaway's development plan violated Measure D; and 2) even if the court correctly allowed Lockaway to proceed with the project, the County's conduct did not effect a regulatory taking. The County also contended that if the judgment was affirmed, the trial court erred by awarding Lockaway attorney fees for work that was irrelevant or unnecessary to its inverse condemnation claim.

The appeals court concluded that the trial court was correct to rule that Lockaway's project was unaffected by the passage of Measure D. The County's change of position, almost two years after Measure D was implemented, was an unreasonable and unjust interpretation of the measure that effectuated a regulatory taking. The basis for the award of attorney fees was easily discerned from the record and was reasonably within the scope of the trial court's discretion.

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## **MUNICIPAL ORDINANCE - CALIFORNIA**

### **[Acosta v. City of Costa Mesa](#)**

**United States Court of Appeals, Ninth Circuit - May 3, 2013 - F.3d - 13 Cal. Daily Op. Serv. 4481**

Speaker at city council meeting brought action against the mayor, the chief of police, the city, and certain individual police officers, challenging city ordinance making it a misdemeanor for members of the public who speak at city council meetings to engage in disorderly, insolent, or disruptive behavior, and alleging he was unreasonably and unlawfully seized after speaking at a meeting.

The court of appeals held that:

- City ordinance was facially overbroad in violation of the First Amendment;
- Unconstitutional portions of the ordinance were not severable;
- Officers were entitled to qualified immunity on speaker's First Amendment claims;
- Officers were entitled to qualified immunity on speaker's unlawful seizure and arrest claims;
- Officers did not use excessive force against speaker;
- Any error in the district court's evidentiary rulings did not prejudice speaker; and
- Substantial evidence supported jury's verdict that the mayor neutrally and constitutionally applied the ordinance to speaker.

City ordinance provision prohibiting the making of "personal, impertinent, profane, insolent or slanderous remarks" at city council meetings was an unconstitutional prohibition on speech, absent a readily susceptible narrowing construction.

An ordinance that governs the decorum of a city council meeting is not facially overbroad under the First Amendment if it only permits a presiding officer to eject an attendee for actually disturbing or impeding a meeting. However, actually disturbing or impeding a meeting means actual disruption of the meeting, as a municipality cannot merely define disturbance in any way it chooses, e.g., it may not deem any violation of its rules of decorum to be a disturbance.

Under California law, city ordinance making it a misdemeanor for members of the public who speak at city council meetings to engage in disorderly, insolent, or disruptive behavior allowed the city to prohibit non-disruptive speech that was subjectively "impertinent," "insolent," or essentially offensive, and therefore the ordinance was facially overbroad in violation of the First Amendment; only the words "disorderly" and "disruptive" were qualifiers that referred to actual disruption of the city proceedings, and the third qualifier merely prohibited "insolent" behavior, and that type of

expressive activity could, and often likely would, fall well below the level of behavior that actually disturbed or impeded a city council meeting.

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## **MUNICIPAL ORDINANCE - FLORIDA**

### **[City of West Palm Beach v. Chatman](#)**

**District Court of Appeal of Florida, Fourth District - May 8, 2013 - So.3d - 2013 WL 1890698**

Defendant was charged with violating city ordinance that criminalized loitering with intent to commit prostitution.

The district court of appeal held that:

- Ordinance was unconstitutionally overbroad, and
- Ordinance was unconstitutionally vague.

Ordinance was overbroad because its language did not require that the conduct proscribed be with specific intent, but rather restricted conduct that “demonstrates” a specific intent, and ordinance could therefore infringe on activities protected by the First Amendment, like waving at passersby or sauntering down a street, that were interpreted by a law enforcement officer as evincing a specific intent to entice or solicit another to commit an act of prostitution.

Ordinance was unconstitutionally vague, in violation of due process. Even though it required a violator’s conduct to be activity that “demonstrates” a specific intent to entice or solicit another to commit an act of prostitution, the ordinance still allowed for arbitrary enforcement by law enforcement, as it allowed an individual officer to determine subjectively if waving at passersby or strolling down the street “demonstrates” the requisite specific intent.

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## **BONDS - GEORGIA**

### **[Sherman v. Development Authority of Fulton County](#)**

**Court of Appeals of Georgia - March 22, 2013 - S.E.2d - 13 FCDR 935**

State petitioned for a judgment validating the creation of a bond transaction leasehold estate. Following hearings, the county superior court validated the bond issuance, and taxpayer appealed.

The court of appeals held that trial court failed to make adequate findings of fact and conclusions of law, as required by statute when taxpayer requested findings and conclusions. The appeals court held that the trial court’s “findings of fact” were summary conclusions that contained no hint about the evidence or the trial court’s analysis, and trial court’s “conclusions of law” cited no legal authority and contained no analysis.

The case was remanded to allow the trial court to enter a new order on the Bond Validation Petition. “Such order shall contain specific factual findings and conclusions of law necessary to explain any ultimate holdings of the trial court that: (i) the method used by DAFC to value the leasehold estate is valid under the requirements of Harris and Sherman I; (ii) the structure of the bond transaction does not violate OCGA § 36-62-8(b); (iii) the execution of the Memorandum did not violate OCGA § 36-30-3(a) and therefore did not constitute an ultra vires act; and (iv) the structure of the bond

transaction does not create an unconstitutional tax exemption.”

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## **BONDS - KENTUCKY**

### **[Bluegrass Equine and Tourism Foundation; and KHPWESLUX, LLC v. Commonwealth of Kentucky](#)**

**Court of Appeals of Kentucky - May 10, 2013 - S.W.3d - 2013 WL 1919567**

Developers entered into a series of agreements with state entities to develop a luxury hotel at a Kentucky horse park. The project was to be financed by tax-exempt bonds.

As a result of developer's inability to market the bonds, the state terminated the agreement. Developer filed a complaint against the state for breach of contract, seeking monetary damages and alleging that months of efforts and millions of dollars had been expended toward the project.

The court of appeals identified three issues: 1) Whether a “contract for construction services” existed as that term is contemplated by the RFP; 2) If so, whether developers diligently advanced work on the project under the contract; and 3) What form of notice of termination and opportunity to cure the state was required to provide, and whether or not it effectively complied.

The court first determined that a “contract for construction services” was formed. Consequently, the agreement between the parties clearly indicated that the failure to diligently advance work under the contract was an event default. The court concluded that the developer's failure to obtain financing was indeed an act of default. The court also found that the state had provided developers with proper notice of termination and an opportunity to cure.

Pursuant to the underlying agreement, the developers had a contractual obligation to reimburse the state for its costs in relocation of public utilities. However, the court concluded that a mistake occurred in this instance. “As our law makes clear, mutual mistake occurs when both parties participate in the transaction and each labors under the same conception of the alleged agreement.”

Both parties were mistaken as to the availability of bond financing, and the state's belief that financing would be available was the primary reason it completed the utility projects prior to the completion of financing. The state did so with clear and full knowledge that financing had not yet been obtained and, thus, assumed the risk that the project could still fail for lack of financing. Moreover, the improvements made by the state still inure to the benefit of the commonwealth, and will facilitate any future efforts to develop the site.

The appeals court concluded that principles of equity dictate that the state should have to assume the costs of the improvements, particularly in light of the fact that it will continue to realize the economic benefits of same. The state cannot simultaneously recover from a breach of contract, and at the same time, recover for initiating a utility project at a time when it now argues it was clear that financing for the project would ultimately not be obtained.

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## **MUNICIPAL LIABILITY - LOUISIANA**

### **[Guillory v. City of Lake Charles](#)**

**Court of Appeal of Louisiana, Third Circuit - May 8, 2013 - So.3d - 2013-9 (La.App. 3 Cir. 5/8/13)**

Bus drivers brought action against city to recover for injuries allegedly sustained as a result of driving defective buses. The district court awarded summary judgment to city pursuant to the exclusivity provisions of the Workers' Compensation Act. Drivers appealed.

The court of appeal held that city's alleged failure to follow up on requested repairs to buses did not rise to the level of an intentional tort, and thus intentional act exception to workers' compensation exclusivity did not apply.

The Workers' Compensation Act shields employers from civil liability stemming from employees who are injured in the course and scope of their employment. The Act provides the exclusive remedy to such employees. The exclusivity provisions of the Workers' Compensation Act do not apply if the employee's injury resulted from an intentional act.

An "intentional act" in the context of the exception to workers' compensation exclusivity has the same meaning as an intentional tort; that is, the person who acts either (1) consciously desires the physical result of his act, or (2) knows that the result is substantially certain to follow from his conduct, whatever his desire may be as to that result.

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## **ZONING - MARYLAND**

### **[Madison Park North Apartments, L.P. v. Commissioner of Housing and Community Development](#)**

**Court of Special Appeals of Maryland - May 3, 2013 - A.3d - 2013 WL 1859040**

Owner of residential development filed petition for writ of administrative mandamus and seeking judicial review of decision of city commissioner of housing and community development, revoking owner's multiple family dwelling license. The circuit court denied the petition, and owner appealed.

The court of special appeals held that:

- Regulation requiring owner to prevent crime was not void for vagueness;
- Owner's due process rights were not violated; and
- Evidence supported revocation of license.

City regulation, allowing revocation of a multiple family dwelling license upon a finding that the owner has either "allowed" the property to be used for "prostitution, drug trafficking, or other criminal activity that creates or constitutes a nuisance" or "knew or should have known that the premises were being used for one of these purposes and failed to prevent them from being so used," was not void for vagueness. The regulation enumerated types of prohibited activities and created two avenues that permit revocation, if the owner allowed the prohibited activities, which required affirmative action by the owner, or if the owner failed to act to prevent such use of which it had actual or constructive knowledge.

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## **MUNICIPAL LIABILITY - MARYLAND**

### **[Clark v. Prince George's County](#)**

**Court of Special Appeals of Maryland - May 2, 2013 - A.3d - 2013 WL 1843380**

Furniture delivery person who had been shot and injured while making delivery inside county police

officer's home, and relatives of second delivery person who had been shot and killed in same incident, brought action against county, alleging numerous tort claims and seeking damages for personal injuries and wrongful death.

The court of special appeals held that:

- County was entitled to governmental immunity from direct tort claims;
- Officer was not acting within scope of employment in shooting delivery persons; and
- Evidence officer's health history and prior violent acts was not admissible.

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## **TAX - NEW YORK**

### **[Piccolo v. New York State Tax Appeals Tribunal](#)**

**Supreme Court, Appellate Division, Third Department, New York - May 2, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 03137**

Taxpayer owned property in a Qualified Empire Zone Enterprise and claimed QEZE credits for a downtown improvement tax it paid.

Taxing authorities acknowledged that taxpayer was entitled to claim QEZE credits for "eligible real property taxes" but did not agree with taxpayer that the downtown improvement tax falls within the definition of that phrase. To resolve the issue, the court set out to determine whether the quoted phrase includes special ad valorem levies and special assessments in addition to traditional taxes and, if not, whether the downtown improvement tax is actually a tax as opposed to an ad valorem levy or special assessment.

The court began its analysis by stating that statutes creating exemptions must be strictly construed against the taxpayer and, if ambiguity arises, against the exemption. Under this standard, taxpayer had not met its burden of establishing that the term "eligible real property taxes" in Tax Law § 15(e) includes an exemption from ad valorem levies or special assessments. Under the same standard, taxpayer had not met its burden of proving that the tax exemption under Tax Law § 15(e) applied to the downtown improvement tax.

The court concluded that, despite its label as such, the downtown improvement tax was not actually a tax. It was irrelevant whether that charge was actually a special assessment or ad valorem levy, as both are excluded from the definition of tax. Taxpayer failed to meet its burden of proving its entitlement to the QEZE credit for the downtown improvement tax.

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## **TAX - NEW YORK**

### **[Stevenson v. New York State Tax Appeals Tribunal](#)**

**Supreme Court, Appellate Division, Third Department, New York - May 2, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 03137**

The parties here agreed that taxpayer is entitled to claim QEZE credits for "eligible real property taxes" (Tax Law § 15[a], [e] ), but disagreed as to whether Sanitary District charges fell within the definition of that phrase. For the reasons stated in the decision in *Matter of Piccolo v. New York State* [briefed herein] the term "eligible real property taxes" in Tax Law former § 15(e) does not include special ad valorem levies and special assessments. The appeals court agreed with the

tribunal's determination that the charges at issue are ad valorem levies, not taxes.

Although the parties disputed whether the charges at issue are imposed in proportion to the benefit received or in the same manner as taxes for municipal purposes, they qualify as either ad valorem levies or special assessments. As neither of those categories falls within the definition of tax, the tribunal rationally determined that the charges at issue were not taxes, and taxpayer failed to meet her burden of proving that such charges could be claimed as the basis for a QEZE credit under Tax Law § 15(e).

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## **EMINENT DOMAIN - PENNSYLVANIA**

### **[In re PPL Elec. Utilities Corp. of Real Estate Situate in Schuylkill County](#)**

**Commonwealth Court of Pennsylvania - May 8, 2013 - A.3d - 2013 WL 1891399**

Landowner (WMPI) asserted that PPL Electric Utilities Corporation (PPL) was required to comply with the procedural requirements set forth in Section 1511 of the Associations Code by seeking approval from the Public Utility Commission (PUC) prior to condemning WMPI's land for a perpetual easement and right-of-way.

The appeals court agreed with WMPI.

"Because we must strictly construe eminent domain statutes pursuant to Township of Millcreek, 25 A.3d at 1292, and Olson, 595 A.2d at 708, and because the Declaration authorizes actions by PPL that appear to be encompassed within Section 1511(c), we are constrained to conclude that PPL must comply with Section 1511(c) before condemning WMPI's land for a perpetual easement and right-of-way."

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## **TAX - SOUTH CAROLINA**

### **[Tourism Expenditure Review Committee v. City of Myrtle Beach](#)**

**Supreme Court of South Carolina - May**

Tourism Expenditure Review Committee (TERC) brought declaratory judgment action seeking determination of meaning of provision of Accommodations Tax Act that provided for expenditure of A-Tax funds generally referred to as "65% Funds." The circuit court adopted city's view of provision. TERC appealed.

The Supreme Court of South Carolina held that exclusive statutory procedure for challenging expenditure of A-Tax funds deprived trial court of subject matter jurisdiction.

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## **GOVERNMENTAL IMMUNITY - TEXAS**

### **[Dallas County Hosp. Dist. v. Hospira Worldwide, Inc.](#)**

**Court of Appeals of Texas, Dallas - April 30, 2013 - S.W.3d - 2013 WL 1803572**

Hospital District entered into a written lease and purchase contract with Hospira for certain medical equipment and supplies. During the term of the lease, Hospira did not invoice the District for the full amount of the monthly lease. Several months after the end of the lease term, Hospira invoiced the



District for the remaining amounts due under the lease. After Hospira's attempts to recover the shortfall from the District were unsuccessful, Hospira sued the District asserting the District's immunity from suit had been waived by section 271.152 of the local government code. The District filed a plea to the jurisdiction contending Hospira's suit was barred by sovereign immunity. Among other things, the District argued that its immunity from suit had not been waived under section 271.152 because it was not a local government entity as defined in section 271.151.

"We must decide whether the legislature intended to waive the District's immunity from suit from Hospira's claims by enacting sections 271.151.160 of the local government code, which waives immunity from suit for contract claims against most local governmental entities in certain circumstances. Because the language defining a local governmental entity in section 271.151 clearly and unambiguously encompasses county hospital districts, we conclude the District's immunity from suit for Hospira's breach of contract claim has been waived by section 271.152. We further conclude, however, that the waiver of immunity afforded under section 271.151 does not extend to Hospira's alternative claim for quantum meruit."

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## **EMINENT DOMAIN - TEXAS**

### **[Southwestern Bell Telephone, L.P. v. Emmett](#)**

**Court of Appeals of Texas, Houston (14th Dist.) - May 9, 2013 - S.W.3d - 2013 WL 1909543**

This dispute arose over who must bear the cost of relocating AT&T's telecommunications equipment located in a public right-of-way and attached to Forest Hill Street Bridge in Houston, which spans Brays Bayou near the Ship Channel. The issue arose in connection with a plan to demolish the existing City-owned bridge and replace it with a longer, wider one as part of a project to widen Brays Bayou.

Following an extremely complex analysis, the court of appeals concluded that the relocation costs at issue were "not clearly within the ... purview" of section 49.223 - the provision of the Water Code that requires payment for utility relocations. Because AT&T failed to establish its entitlement to payment under section 49.223 for the relocation costs at issue, the trial court properly granted summary judgment in favor of the County Commissioners and the City and properly granted summary judgment against AT&T.

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## **INVERSE CONDEMNATION - TEXAS**

### **[Carlson v. City of Houston](#)**

**Court of Appeals of Texas, Houston (14th Dist.) - May 2, 2013 - S.W.3d - 2013 WL 1844219**

Condominium unit owners brought inverse condemnation action against city under the Texas Constitution alleging a "taking" based upon the loss of use of their homes after being forced to vacate without being afforded procedural due process. Homeowners further alleged that, because the city ordered the homes vacated as a matter of public health and safety, the taking was for an alleged public use.

The court of appeals held that:

- City could not evict owners without procedural due process for failure to have certificates of occupancy, and

- City's order to vacate was a taking for a public use.

The court of appeals did not agree with the city's argument that the homeowners never possessed vested property rights because certificates of occupancy had not been obtained.

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## **MUNICIPAL GOVERNANCE - WASHINGTON**

### **[City of Seattle v. Fuller](#)**

**Supreme Court of Washington, En Banc - May 2, 2013 - P.3d - 2013 WL 1843342**

Defendant was convicted in the municipal court of obstructing a law enforcement officer, was sentenced to jail and ordered to pay restitution. Defendant appealed to the superior court, arguing that the municipal court lacked the authority to order restitution and that restitution may only be imposed in lieu of a fine.

The Supreme Court of Washington held that the 1996 statutory amendments to the criminal statutes governing suspended sentences and conditions of probation did not divest municipal courts of the power to impose restitution.

Even though the amendments inserted "superior" preceding court through both statutes, amended statutes did not limited the superior courts to imposing restitution only in felony cases and municipal courts had concurrent jurisdiction with superior courts over misdemeanors

The municipal court, when sentencing defendant convicted of obstructing a law enforcement officer, was not barred from imposing both restitution and a fine, as the statute provided that an individual convicted of a felony or misdemeanor "shall" be punished by imprisonment, a fine, or both.

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## **TAX - CALIFORNIA**

### **[McWilliams v. City of Long Beach](#)**

**Supreme Court of California - April 25, 2013 - P.3d - 13 Cal. Daily Op. Serv. 4090**

Taxpayer brought class action against city for tax refund, and for declaratory, injunctive, and writ relief challenging the City of Long Beach's telephone users tax (TUT) and seeking refund of the taxes paid. Taxpayer asserted that Long Beach Municipal Code section 3.68.50, subdivision (d) exempted from the TUT all amounts that "are exempt from or not subject to" the federal excise tax on telephone service and that the City has for some time mischaracterized the charges subject to the federal excise tax.

Supreme Court of California held that:

- Local charters or ordinances do not preclude Government Claims Act tax refund class actions;
- Government Claims Act does not violate home rule taxing power of charter cities; and
- Government Claims Act provides the necessary legislative authorization for class claims of taxpayer refunds against local governmental entities.

Code of Civil Procedure section 313 provides that the "general procedure" for the presentation of claims for money or damages against a local government entity is prescribed by the Government Claims Act. The California Supreme Court had previously held that the Government Claims Act

permits a class action claim by taxpayers against a local government entity for the refund of an unlawful tax “in the absence of a specific tax refund procedure set forth in an applicable governing claims statute.” In this case, the defendant local government entity asserts that its municipal code contains an “applicable governing claims statute” barring class action claims for a tax refund. The Supreme Court concluded that a local ordinance is not a “statute” within the meaning of the Government Claims Act and therefore affirmed the Court of Appeal.

A local charter provision or municipal ordinance governing claims for tax refunds does not preclude a Government Claims Act class action claim by taxpayers against a local government entity for the refund of an unlawful tax, since a charter provision or municipal ordinance does not qualify as a “statute prescribing procedures for the refund of any tax”; disapproving *Pasadena Hotel Development Venture v. City of Pasadena*, 119 Cal.App.3d 412, 174 Cal.Rptr. 52, and *Batt v. City and County of San Francisco*, 155 Cal.App.4th 65, 65 Cal.Rptr.3d 716.

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## **MUNICIPAL LIABILITY - CALIFORNIA**

### **[Montenegro v. City of Bradbury](#)**

**Court of Appeal, Second District, Division 4, California - April 25, 2013 - Cal.Rptr.3d - 3 Cal. Daily Op. Serv. 4206**

Pedestrian who tripped over protruding tree trunk while walking on pathway brought action against city, alleging negligence, willful failure to warn of a dangerous condition, and dangerous condition of public property.

The Court of Appeal held that pathway was a “recreational trail” such that city had immunity.

A governmental entity is absolutely immune from liability for injuries caused by a physical defect of a recreational trail. Pathway on which pedestrian was injured was a “recreational trail” such that city had statutory immunity from liability for pedestrian’s injuries. Even if pedestrian was not engaged in recreation but only was acting as an ordinary pedestrian seeking to avoid traffic by using the pathway, where pathway was designed to be used by the public for multiple recreational purposes, including jogging, hiking, bicycling, and horseback riding, pathway was landscaped to simulate a natural area to encourage such activity, and pathway was in fact used for numerous recreational purposes, including horseback riding and hiking.

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## **ENVIRONMENTAL - CONNECTICUT**

### **[Sams v. Department of Environmental Protection](#)**

**Supreme Court of Connecticut - April 30, 2013 - A.3d - 308 Conn. 359**

Property owners appealed from order of state Department of Environmental Protection (DEP) directing them to remove a gabion seawall that they had constructed on their property along shoreline of Connecticut River within coastal boundary.

The Supreme Court of Connecticut held that:

- On-site observations by DEP of water coming into contact with seawall were sufficient to support a finding that a portion of seawall was located waterward of high tide line, so as to require a permit from DEP for construction or maintenance of that structure;

- If DEP properly exercises jurisdiction over a structure under both the statutory provision relating to structures located waterward of high tide line and the Coastal Management Act (CMA) provisions relating to coastal site plans, the exact location of the high tide line does not need to be established;
- DEP did not engage in rule making subject to requirements of Uniform Administrative Procedure Act (UAPA) when it used one year frequency tidal flood elevation data from Army Corps of Engineers as factor in determining high tide line;
- DEP's use of one year frequency tidal flood elevation data from Army Corps of Engineers as factor in determining high tide line was consistent with statute setting forth means for making that determination;
- Authority of DEP to exercise enforcement remedies under CMA is not predicated on a formal decision by coastal municipality as to whether site plan approval is required for the activity at issue;
- DEP was not bound by finding of a trial court in action by town to enforce an unappealed cease-and-desist order with respect to same seawall that the seawall was not a "shoreline flood and erosion control structure" subject to the CMA;
- Property owners, who failed to appeal the town's cease-and-desist order to zoning board of appeals, could not challenge the merits of that order in town's action to enforce the order, abrogating *Costa v. Sams*, 2008 WL 4044332;
- Evidence supported DEP's finding that seawall was located on a "coastal bluff or escarpment" within meaning of CMA;
- Seawall would not have been exempt from requirement under CMA of submitting a coastal site plan, even if ultimately it was determined by town that the seawall did not adversely impact a coastal resource; and
- DEP, in ordering removal of seawall, properly exercised jurisdiction over entire seawall, including portions located landward of high tide line.

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## **SCHOOLS - ILLINOIS**

### **[Brady v. Regional Bd. of School Trustees](#)**

**Appellate Court of Illinois, Third District - April 29, 2013 - Not Reported in N.E.2d - 2013 IL App (3d) 120463-U**

Parents filed a detachment petition to detach their property from the Newark Community High School and annex it to Morris Community High School District. The sole basis for the petition was the absence of a football program at Newark.

The Board of Education of Newark opposed the detachment petition because it believed it has a sound educational program and that boundary lines should be upheld.

A detachment petition hearing was held and the Regional Board denied the petition. The trial court reversed but the appeals court upheld the Regional Board's denial.

"Reasonable minds may differ as to the application of the 'whole child' and 'community interest' factors when it comes to the educational welfare of the children in the detachment area. What does remain clear, however, is that it is not the function of this court to act as a "super school board" and impose our judgment over that of the Regional Board. It is apparent from the record before us that the Regional Board carefully considered the facts, weighed the evidence, and made a determination to deny the petition after applying the requisite statutory factors. There was substantial evidence to support such a finding . Having found that Newark and Morris were substantially similar and that

any differences were negligible, the Regional Board determined that aside from being able to participate in high school football, there was no cognizable benefit to the educational welfare of the children in the detachment area, and therefore denied the Bradys' petition."

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## **ZONING - IOWA**

### **[City of Okoboji v. Parks](#)**

**Supreme Court of Iowa - April 26, 2013 - N.W.2d - 2013 WL 1785992**

City brought declaratory judgment action seeking determination that property owner's attempt to add lounge to marina violated city's zoning regulations.

The Supreme Court of Iowa held that:

- Operation of bar on pontoon adjacent to marina constituted impermissible extension on nonconforming use;
- City was entitled to injunction; and
- Injunction was not overly broad.

Property owner's operation of a bar on floating pontoon structure that was located above state-owned lake bed and outside the geographic boundaries of the city constituted an impermissible extension of use of nonconforming marina in residential area, as the bar utilized upland marina property for ingress, egress, parking, and restroom facilities. The preexisting nonconforming use of the property owned was limited to marina operations, and use of property for ingress and egress to the bar, to provide parking for patrons of the bar, and to provide restroom facilities for patrons of the bar was inconsistent with the preexisting nonconforming use.

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## **EMPLOYMENT - LOUISIANA**

### **[State v. Petitto](#)**

**Court of Appeal of Louisiana, First Circuit - April 26, 2013 - So.3d - 2012-1670 (La.App. 1 Cir. 4/26/13)**

Defendant was convicted of two counts of malfeasance in office. Defendant appealed.

The court of appeal held that:

- Evidence was sufficient to permit trial court to infer defendant's knowledge of his brother's interest in transaction which was subject of parish council resolution;
- Evidence that defendant violated statutory duty to refrain from engaging in economic transactions involving his governmental entity and immediate family member having economic interest in transaction was sufficient to support conviction;
- Evidence that defendant violated statutory duty to refrain from receiving something of economic value in exchange for assisting another person in transaction with his public agency was sufficient to support conviction;
- Charges were not duplicitous; and
- Convictions on both counts did not violate double jeopardy protections.

Circumstantial evidence was sufficient to support trial court's conclusion that defendant, a parish council member, was aware "from day one" of his brother's financial interest in real property which was subject of parish council resolution supporting developer's application for development tax credits, introduced and voted on by defendant.

Evidence that parish council member intentionally and unlawfully violated his statutory duty to refrain from engaging in economic transactions involving parish and immediate family member having economic interest in transaction was sufficient to support conviction of malfeasance in office. Defendant introduced and voted for resolution supporting development tax credits because that action affected land in which defendant's brother held substantial economic interest, with actual knowledge of existence of such economic interest.

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## **LABOR - MARYLAND**

### **[Gilliland v. Board of Educ. of Charles County](#)**

**United States Court of Appeals, Fourth Circuit - April 26, 2013 - Slip Copy - 2013 WL 1777507**

Bus drivers and bus attendants, who were jointly employed by the Board and certain bus contractors, brought suit against school board seeking to recover unpaid wages, including overtime wages, primarily on the basis of the FLSA. Drivers alleged that they were not paid for all of the hours that they worked. They also allege that they were required to work more than 40 hours per week during their joint employment and that they have not been paid overtime for the hours they worked in excess of 40 per week.

The district court ruled that Maryland waived the board's Eleventh Amendment immunity against a claim brought under the FLSA for up to \$100,000 in damages.

The board appealed, arguing that the district court erred in ruling that they are not entitled to Eleventh Amendment immunity against FLSA claims for damages of \$100,000 or less. The appeals court agreed and reversed.

The appeals court found that the decisions of the Maryland appellate courts made clear that § 5-518's applicability turns on the type of claim asserted. The statute applies only to tort claims, such as personal injury actions, and tort-related claims, such as discrimination actions. The FLSA claim in this case does not fit that description. Unlike discrimination claims, which the Maryland courts have concluded are in the nature of personal-injury claims, FLSA claims "are contractual in their nature." That is so because the FLSA's overtime provisions "are read into and become a part of every employment contract that is subject to" the FLSA's terms, and thus the liability of the employer in an action under the FLSA for unpaid overtime is for the wages due under working agreements which the federal statute compels employer and employee to make." In light of the contractual nature of the FLSA claim, the court concluded that Maryland courts would not consider it to be an "employment law" claim in this context.

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## **EMINENT DOMAIN - MINNESOTA**

### **[City of Moorhead v. Red River Valley Co-op. Power Ass'n](#)**

**Supreme Court of Minnesota - May 1, 2013 - N.W.2d - 2013 WL 1810589**

City annexed a residential subdivision with 65 metered electric service accounts. The City then filed a condemnation petition to begin municipal electric service to residents of the subdivision under Minn.Stat. § 216B.47 (2012).

The City's valuation report calculated damages using a traditional fair market value approach in which it calculated the total value of the subdivision's business enterprise before and after the taking, with the difference constituting the compensation due.

The subdivision's report declined to use or consider a fair market value approach, instead limiting its analysis to the four statutory factors set forth in Minn.Stat. § 216B.47: 1) original cost of the facilities less depreciation; 2) loss of revenue to the utility; 3) expenses resulting from integration of facilities; and 4) other appropriate factors. Minn.Stat.

The Supreme Court of Minnesota held that:

- Damages assessment required consideration of statutory factors, rather than merely fair market value, and
- Untimely submission of revised expert report warranted exclusion of portions of report.

Use of only fair market value analysis was contrary to the plain language of eminent domain statute, which stated that the "damages to be paid in eminent domain proceedings must include the original cost of the property less depreciation, loss of revenue to the utility, expenses resulting from integration of facilities, and other appropriate factors," and statutory factors differed from fair market value as, while fair market value calculations generally consider the replacement cost of property, the statute specified that damages were to include the original cost less depreciation.

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## **TAX - MARYLAND**

### **[Montgomery County, Md. v. Federal Nat. Mortg. Ass'n](#)**

**United States District Court, D. Maryland - April 30, 2013 - Not Reported in F.Supp.2d - 2013 WL 1832370**

Maryland imposes recordation and transfer taxes when parties transfer title to real property. The state also permits its counties to impose their own transfer taxes, subject to certain conditions. Pursuant to this authority, Montgomery County imposes transfer taxes.

Montgomery County filed a class action complaint, alleging that Fannie Mae and Freddie Mac have participated in thousands of real estate transactions in Montgomery County and elsewhere in Maryland involving the transfer of title to real property, but have refused to pay both the transfer taxes and the agricultural land transfer taxes imposed by Washington County.

The district court held that, because Fannie Mae's and Freddie Mac's charters exempt them from the state and local taxes at issue in this case, dismissing Montgomery County's statutory claim seeking payment of such taxes and entering a declaratory judgment in favor of defendants.

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## **PUBLIC UTILITIES - MISSOURI**

### **[Laclede Gas Co. v. St. Charles County, Mo.](#)**

**United States Court of Appeals, Eighth Circuit - April 25, 2013 - F.3d - 2013 WL 1760303**

Public gas utility sought injunction against county to prevent county from ordering it to move its gas lines without compensation. The district court granted the injunction.

On appeal, the Court of Appeals held that:

- Utility gave county required 60 day notice before amending complaint to include Pipeline Safety Act (PSA) claim;
- District court was not required to abstain from hearing injunction action; and
- Utility was likely to succeed on the merits of its claim.

The district court had jurisdiction to hear public gas utility's action against county seeking a preliminary injunction barring county from moving or otherwise tampering with utility's gas lines in violation of the Pipeline Safety Act (PSA). The alleged imminent threat of physical damage to the gas lines and concomitant endangerment of the public gave the court jurisdiction under provisions of the PSA allowing preliminary injunction actions by private entities to prevent knowing or willful damage to regulated pipelines.

Public gas utility had substantial likelihood of success on the merits of its claim that it could not be made to move its gas line located along an easement. The Missouri supreme court had already issued an opinion favorable to the utility concerning a gas line on an easement with language similar to the easement at issue in utility's present action, and a Missouri state court had issued an opinion favorable to utility regarding the easement at issue in the present action.

Public interest supported grant of preliminary injunction where lines served numerous customers, a 200 foot retaining wall and several feet of fill were located over one of the gas line easements, and county's plan to remove the lines without assistance from the utility increased the risk of an explosion or leak that would endanger public safety.

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## **ZONING - NEW HAMPSHIRE**

### **[Hannaford Bros. Co. v. Town of Bedford](#)**

**Supreme Court of New Hampshire - April 25, 2013 - A.3d - 2013 WL 1769794**

Supermarket sought review of the decision of the town zoning board of adjustment (ZBA) which granted a variance to an ordinance restricting the size of any single building in the commercial district to a competing supermarket developer.

The Supreme Court of New Hampshire held that:

- The distance of supermarket to developer did not support standing;
- The substantial nature of the variance supported standing;
- Supermarket's participation in administrative hearings supported standing;
- ZBA's consideration of the spirit of the ordinance did not convey standing on supermarket;
- Supermarket's claim that it suffered a direct injury from unfair or illegal competition did not support standing;
- Weeks factors did not support finding that supermarket had standing;
- Supermarket's equal protection claim did not convey standing; and
- Supermarket failed to identify any direct interest in outcome of the ZBA's decision sufficient to convey standing.

The court concluded that the supermarket failed to identify any direct interest in the outcome of the



ZBA's grant of a variance to an ordinance restricting the size of any single building in the commercial district to a competing supermarket developer sufficient to convey standing, even if the ZBA acted in a quasi-judicial capacity when it granted variance.

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## **TAX - NEW YORK**

### **[Greece Town Mall, L.P. v. State](#)**

**Supreme Court, Appellate Division, Third Department, New York - April 25, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 02807**

Shopping mall owner commenced combined proceeding, pursuant to Article 78 and action for declaratory judgment, to review Empire Zone Designation Board's revocation of its certification as empire zone business enterprise.

The Supreme Court, Appellate Division held that:

- Revocation of mall owner's certification did not violate state constitution's delegation of authority to tax to legislature;
- Revocation could not be made retroactive; and
- Board could not be estopped from revoking certification.

Commissioner of Economic Development's revocation of mall owner's certification as empire zone business enterprise did not violate state constitution's delegation of authority to tax to legislature, where Department of Economic Development did not impose any tax, but merely determined, pursuant to legislative mandate, whether businesses were entitled to credit against legislatively-imposed taxes.

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## **MUNICIPAL GOVERNANCE - PENNSYLVANIA**

### **[Lamar Advantage GP Co., LLC v. City of Pittsburgh](#)**

**Commonwealth Court of Pennsylvania - April 30, 2013 - A.3d - 2013 WL 1800050**

The Pittsburgh City Council enacted a signage ordinance. Certain changes were made between the original version of the ordinance and the final version.

Plaintiff challenged the ordinance, claiming that the enacted ordinance was substantially changed from its original version and thus it was a new bill requiring the City Council to refer it to the Planning Commission for its report and recommendation and to conduct another public hearing.

In denying plaintiff's appeal, the trial court held that the bill was validly enacted because "the overall policy and purpose of the Bill was not disturbed and therefore, the changes are not significant and another hearing was not required."

The appeals court noted that amendments to legislation after a public hearing or after review by a body such as a Planning Commission are envisioned because, otherwise, input from the public hearing would be meaningless. However, amendments that go far beyond the proposed legislation cannot be made without re-advertisement and a new hearing.

In this case, the appeals court agree with the trial court's conclusion that the changes made

between the introduced and final versions were not substantial enough to warrant re-advertisement and rehearing, as the changes were either: 1) more stringent than initially proposed; 2) not substantial enough to warrant a new hearing; or 3) not substantial in relation to the legislation as a whole because those modifications do not demonstrate any appreciable change in the overall policy of the bill.

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## **INVERSE CONDEMNATION - SOUTH CAROLINA**

### **[Chakrabarti v. City of Orangeburg](#)**

**Court of Appeals of South Carolina - May 1, 2013 - S.E.2d - 2013 WL 1830951**

Plaintiffs purchased a fire-damaged house located in Orangeburg, South Carolina. Ultimately, Orangeburg determined the house to be a nuisance and condemned it under the International Property Maintenance Code (IPMC), which Orangeburg adopted as its building maintenance code. Orangeburg demolished the house and plaintiffs filed a complaint against Orangeburg, alleging negligence in condemning the house as a nuisance and demolishing it and seeking actual damages.

Section 110 of the IPMC addresses demolition. IPMC Section 110.1 provides a city may demolish an unsafe house as a nuisance if one of three requirements are met: (1) the city deems it impossible to save (unreasonable to repair) and ordered its demolition; (2) the owner and the city both agree to demolish it; or (3) in cases where repairs have been undertaken, any substantial construction had ceased for two years. Orangeburg asserts the evidence provides compelling proof that there was "cessation of normal construction" of more than two years on plaintiffs' property.

Plaintiffs argued Orangeburg was grossly negligent in demolishing their house without waiting the requisite time, the cessation of normal construction for a period of more than two years after work began, as required by section 110.1 of the IPMC. The court found Orangeburg issued a second building permit to the plaintiffs six months prior to demolishing their house, and Orangeburg produced no evidence of a date when substantial construction on the property had ceased for any significant period, much less the required two years. Therefore, the court determined Orangeburg did not follow the proper procedure in demolishing plaintiffs' house. Further, evidence was presented that the Chakrabartis' contractor was doing work on the house until Orangeburg demolished it.

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## **INVERSE CONDEMNATION - TEXAS**

### **[City of Grapevine and Grapevine Board of Adjustment v. CBS Outdoor, Inc.](#)**

**Court of Appeals of Texas, Waco - May 2, 2013 - S.W.3d - 2013 WL 1830375**

CBS operated an off-premise, nonconforming advertising billboard sign located adjacent to State Highway 114 in the City of Grapevine. As part of a project to expand State Highway 114, the State of Texas filed a petition for condemnation against several landowners to acquire real property near the highway. Although the pole supporting CBS's sign was not located on the real property sought to be condemned by the State, the sign aerially encroached over part of the property to be condemned by approximately four feet. The State therefore included CBS as a defendant in its suit and alleged that it was entitled to condemn not only fee title to the real property, but also title to the sign.

CBS sent a letter to the City, explaining that "as a result of the overhang, the State must either acquire the entire Sign structure, or CBS must conduct maintenance to the Sign so that the face no

longer encroaches on the easement.” Acknowledging that the City’s “regulations prohibit the construction, erection, remodeling, alteration, relocation, or expansion of a sign unless a zoning permit has been obtained in accordance with Section 60 of the Zoning Ordinance,” CBS requested permission to shift the face of the sign—one of the actions authorized by TxDOT’s regulations—to eliminate the aerial encroachment.

In response to CBS’s letter, the Assistant City Attorney notified CBS that the advertising sign was “currently nonconforming under the applicable City codes” and could not “be moved, altered, or adjusted under the current conditions.” The City denied CBS’s request to shift the face of the sign.

The State’s project manager notified CBS that the aerial encroachment had to be removed. CBS eliminated the overhang by simply removing the four foot panel on the end of the sign face overhanging the right of way.

The City then informed CBS that the sign had been “illegally modified” in violation of the City’s zoning ordinances and ordered CBS to remove the sign. CBS filed an appeal of the letter with the Grapevine Board of Adjustment and, alternatively, sought a variance. After a hearing, the Board denied CBS’s appeal and request for a variance.

CBS later sued the City and the Board for judicial review of the Board’s decision, injunctive relief, inverse condemnation in violation of the state and federal constitutions, violations of due process, declaratory relief, and attorneys’ fees. The City filed a plea to the jurisdiction challenging each of CBS’s claims, and the trial court denied the plea in its entirety.

The appeals court agreed with the city that the trial court lacked jurisdiction over CBS’s claim for judicial review because CBS failed to exhaust its administrative remedies by not appealing the City’s decision advising CBS that the advertising sign could not be “moved, altered, or adjusted.”

The appeals court did not agree with the City’s claim that the trial court lacked jurisdiction over CBS’s inverse condemnation claim because: 1) CBS failed to exhaust its administrative remedies; and 2) the State condemned the sign, thereby precluding the City from being sued for inverse condemnation of the sign. CBS’s failure to appeal would have had no effect on the inverse condemnation claim and the State had declared that it was satisfied by CBS’s removal of the encroaching portion of the sign.

The appeals court reversed that portion of the trial court’s order denying the City’s plea to the jurisdiction as to CBS’s claims for judicial review, injunctive relief, due process, declaratory relief, and attorneys’ fees and render judgment that CBS take nothing on those claims. It affirmed that portion of the trial court’s order denying the City’s plea as to CBS’s inverse condemnation claim.

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## **INVERSE CONDEMNATION - TEXAS**

### **[Cenizo Corp. v. City of Donna](#)**

**Court of Appeals of Texas, Corpus Christi-Edinburg - April 25, 2013 - Not Reported in S.W.3d - 2013 WL 1800270**

Commercial farm sued city for plugging drainage pipes directing water away from the farm’s soybean crop, alleging that the city’s actions constituted an unconstitutional taking under the Texas Constitution.

The trial court granted summary judgment to the city and the farm appealed, challenging the

sufficiency of the evidence supporting the trial court's findings of fact regarding the intent element of its inverse condemnation claim.

To establish the intent element, farm was required to establish that the city: 1) knew that a specific act - plugging the drainage pipes - was causing identifiable harm; or 2) knew that the specific property damage - the reduction in the yield of the soybean crop - was substantially certain to result from its plugging of the drainage pipes.

The city's testimony established that it knew that the soybean crop would be damaged if it was under water for an extended period of time, but that he did not know, at the time the city blocked the drains, how long the field would be under water or whether any damage would result. The appeals court concluded that the evidence did not conclusively establish as a matter of law that the city knew that its blocking the drain pipes caused identifiable harm or that it knew damage to the soybean crop was substantially certain to result from its actions. Summary judgment affirmed.

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## **ZONING - WASHINGTON**

### **[Northshore Investors LLC v. City of Tacoma](#)**

**Court of Appeals of Washington, Division 2 - April 30, 2013 - P.3d - 2013 WL 1831458**

Developer submitted an application to the city for permits to redevelop a golf course. In the application, developer requested approval of the development's preliminary plat, approval of a rezone modification, site plan approval, multiple variances and reductions to development standards, and wetland/stream approvals or exemptions. The city council denied the application.

Developer then filed a Land Use Petition Act (LUPA) petition and appealed the city examiner's recommendation on the rezone modification application to the council. The parties agreed that developer could file and serve an amended LUPA petition within 21 days of the council's decision in order to address that decision. The council denied developer's rezone modification request at a hearing. Developer then filed an amended LUPA petition and, 23 days after the council's hearing, served the city with that petition. The city filed a motion to dismiss the amended LUPA petition for untimely service, but the superior court denied the motions.

The city appealed the superior court's denial of their motions to dismiss. The city argued that developer failed to meet the statutory requirement to serve it within 21 days of the date the council issued its final land use decision, thus depriving the superior court of jurisdiction to hear the petition.

The court of appeals agreed, holding that the 21-day period began to run on the date of the council's oral vote because this vote, not the subsequent notice of appeal results the city clerk mailed, was the final decision and was entered into the public record in several formats.

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## **GOVERNMENTAL IMMUNITY - WEST VIRGINIA**

### **[Haines v. Shirley](#)**

**United States District Court, N.D. West Virginia, Martinsburg - April 16, 2013 - Slip Copy - 2013 WL 1636580**

County sheriff Robert "Bobby" Shirley savagely beat a handcuffed suspect following a high-speed

chase.

The sheriff brought a motion to dismiss plaintiff's official capacity claim, arguing that the plaintiff had failed to identify any municipal policy or custom of the Jefferson County Commission which violated plaintiff's rights under §1983. Additionally, defendants argued that the plaintiff had presented the court with no evidence that would causally link any act or omission on the part of the Jefferson County Commission with any alleged deprivation of plaintiff's rights under §1983.

The district court agreed, dismissing the official capacity claim.

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