
ZONING - CALIFORNIA

Sterling Park, L.P. v. City of Palo Alto

Supreme Court of California - October 17, 2013 - P.3d - 2013 WL 5645558

Condominium developer brought action to challenge city requirement that developer set aside 10 of 96 condominium units as below market rate housing and make a substantial cash payment to a city fund.

The Supreme Court of California held that requirement was an exaction such that 180-day Mitigation Fee Act statute of limitations on exactions imposed on a development, rather than 90-day Subdivision Map Act statute of limitations regarding the validity of a condition attached to an agency or appeal board decision, disapproving Trinity Park, L.P. v. City of Sunnyvale, 193 Cal.App.4th 1014, 124 Cal.Rptr.3d 26.

Program offered developer the option of either setting aside units or paying fee. Imposition of the in-lieu fees was similar to a fee, and requirement that the developer sell units below market rate, including city's reservation of an option to purchase the below market rate units, was similar to a fee, dedication, or reservation.

ZONING - CALIFORNIA

Contasti v. City of Solana Beach

United States District Court, S.D. California - October 22, 2013 - Slip Copy - 2013 WL 5727409

Plaintiffs brought due process and equal protection claims against City of Solana Beach based upon the decision of the City Council to deny Plaintiffs' application for a development review permit for their property.

City contended that, as a matter of law, Plaintiffs were not deprived of a constitutionally protected property interest when the City Council denied their application for a development review permit, which is a special discretionary permit. Defendant contended that the denial of the discretionary development review permit based upon discretionary considerations cannot form the basis for a property interest. Because Plaintiffs cannot establish that they had a property interest in the special discretionary permit, Defendant contends that Plaintiffs cannot establish a constitutional violation.

The District Court agreed. The undisputed facts of this case establish that the decision challenged by Plaintiffs was limited to the decision to deny the development review permit. There was no facial challenge to the municipal code establishing the development review provisions or to the application of the development review permit to the property. The express provisions of the municipal code accord significant discretion to the City Council in approving certain classes of development projects.

Under California law, “no protected property interest exists when there is significant discretion accorded the agency by law, regardless of whether or to what degree that discretion is actually exercised.” In this case, the municipal code provided the City Council with significant discretion in deciding whether to grant a development review permit.

No language in the municipal code conferred a right to a permit. To the extent that the municipal code required notice and hearing, the undisputed facts of this case show that the City Council complied with all requirements of the code and rendered a decision which was not favorable to the Plaintiffs based upon criteria set forth in the code. Under the undisputed facts of this case, Plaintiffs would have a federal jury second guess the City Council’s lawful exercise of discretion. Applying the law to the undisputed facts of this case, the Court concludes that the Solana Beach Municipal Code provisions for a development review permit do not create “the sort of entitlement out of which a property interest is created.” The undisputed facts and the applicable law establish that Plaintiffs have not established a protected property interest required in order to prevail on the claim for deprivation of substantive due process.

TAX - GEORGIA

Moss v. City of Dunwoody

Supreme Court of Georgia - October 21, 2013 - S.E.2d - 2013 WL 5708063

Attorneys challenged the constitutionality of an ordinance adopted by the City of Dunwoody imposing an occupational tax on attorneys who maintained an office and practiced law in the city. Attorneys argued in the trial court that the ordinance (1) operated as an unconstitutional precondition on the practice of law, as well as an improper attempt to regulate the practice of law in violation of OCGA § 15–19–30 et seq., and (2) violated equal protection requirements because it did not apply to attorneys practicing law outside the city limits. The trial court found in favor of city. Attorneys appealed.

The Supreme Court of Georgia held that:

- Ordinance did not constitute an unconstitutional precondition on the practice of law or an improper attempt to regulate the practice of law, and
- Ordinance did not violate equal protection.

Local governments are permitted to impose and enforce occupational taxes on lawyers so long as the tax is merely a means to generate revenue and does not act as a precondition or license for engaging in the practice of law, rendering it a regulatory fee.

City ordinance requiring attorneys with offices in the city to annually register their business location with the city, obtain an occupation tax certificate, and pay the authorized tax did not constitute an unconstitutional precondition on the practice of law or an improper attempt to regulate the practice of law The ordinance did not give the city the power to suspend or revoke an attorney’s ability to practice law in the event of noncompliance, and any impediments resulting from action taken by the State Bar in response to being notified by city of an attorney’s failure to pay tax would be attributable to the proper regulating authorities and not the ordinance.

City ordinance imposing an occupational tax on attorneys who maintain offices and practice law in the city did not violate equal protection; it was reasonable for the city to require attorneys with offices inside city limits to help pay for city services from which they benefited, and all attorneys

subject to the ordinance were taxed uniformly under its provisions.

EMINENT DOMAIN - GEORGIA

Bray v. Department of Transp.

Court of Appeals of Georgia - October 23, 2013 - S.E.2d - 2013 WL 5736985

Emory H. Bray owns real property in Coweta County which was subject to a condemnation action in which part of the property was taken for public road improvements. Bray was compensated for the taking pursuant to the eminent domain provisions of the Georgia Constitution. Bray's brought a subsequent inverse condemnation action in which he sought additional compensation for consequential damages allegedly caused by the DOT's negligent construction of the road improvements for which his property was taken.

The Court of Appeals noted in its decision reversing the trial court that, because Bray sought compensation for property negligently taken or damaged by the road improvements, he stated a cause of action under the constitutional eminent domain provisions not barred by the prior condemnation award for damages resulting from proper construction of the improvements. Damage to remaining property caused by negligent or improper construction in the course of a prior eminent domain project may be recovered from the condemnor by a separate inverse condemnation proceeding, and the condemnor cannot escape the constitutional duty to compensate the property owner for the damage by claiming that the negligent party was an independent contractor rather than the condemnor's agent or employee.

PENSIONS - ILLINOIS

Prazen v. Shoop

Supreme Court of Illinois - October 18, 2013 - N.E.2d - 2013 IL 115035

Pensioner sought judicial review of decision of the Illinois Municipal Retirement Fund (IMRF) Board of Trustees finding that he violated early retirement incentive (ERI) return to work prohibitions and was required to forfeit his early retirement and repay the IMRF the portion of his annuity attributable to his early retirement incentive.

The Supreme Court of Illinois held that:

- Pensioner was not an employee of city;
- Pensioner did not enter into personal services contract with city; and
- IMRF Board lacked authority to order forfeiture on basis that corporate contract was a "guise."

Contract between corporation formed by pensioner, who had retired from his position as superintendent of the electrical department of city, and city for management and supervision of electrical department following pensioner's retirement did not constitute employment with city within meaning of Pension Code's ERI return-to-work prohibitions, where pensioner was employed by corporation, a separate legal entity, and the city hired and paid corporation, not pensioner.

TAX - MINNESOTA

Living Word Bible Camp v. County of Itasca

Minnesota Tax Court, Ninth Judicial District, Itasca County, Regular Division - October 16, 2013 - 2013 WL 5733573

Living Word Bible Camp, a tax-exempt organization owns approximately 273 acres located on Deer Lake in Itasca County. At Living Word's request, the County classified the subject property as tax-exempt from 2001 to 2007. However, the County reclassified the subject property as taxable for the January 2, 2008 and January 2, 2009 assessment dates. Living Word challenged the reclassification for both years.

On remand from the Minnesota Supreme Court, the Tax Court addressed two issues: (1) whether Living Word was an institution of purely public charity on the assessment dates; and (2) whether the caretakers' occupancy of the renovated cabin while conducting the affairs of Living Word and preparing the subject property for development makes the cabin parcel subject to property tax

After an exhaustive analysis, found that that Living Word satisfied all six North Star factors and therefore qualified as an institution of purely public charity for the time periods in question. Because Living Word was making sufficient progress towards the development of the subject property for its intended use as a bible camp, the property was exempt from property taxes payable during those period as well.

The Tax Court concluded that the caretakers' presence at the cabin to conduct Living Word's affairs—without remuneration—represents a valuable donation of their time and expertise. Their use of the cabin in connection with this donation is entirely incidental, and does not constitute a dividend of any kind. The cabin parcel was also deemed tax-exempt on the assessment dates.

TAX - MISSISSIPPI

Willow Bend Estates, LLC v. Humphreys County Bd. of Sup'rs

Supreme Court of Mississippi - October 17, 2013 - So.3d - 2013 WL 5649041

Low-income housing developments appealed county's real property tax assessments.

The instant case arouse out of a dispute regarding local ad valorem taxes on real estate developments that use federal tax credits to construct and maintain restrictive properties that rent only to lower-income households. The question was whether local governments may include the value of federal tax credits in their valuation of the properties for tax assessment purposes.

In 2005, the Mississippi Legislature enacted Mississippi Code Section 27–35–50(4)(d). The statute requires local tax assessors to determine the true value of affordable rental housing by using the appraisal method set forth in the manual of the State Tax Commission and that such procedure shall implement the "actual net operating income" methodology.

Despite the new law, Humphreys County continued to include the federal tax credits through the "cost" methodology in its valuation of low-income housing development. The different types of valuation result in extreme variations. For example, using the income method as prescribed by the statute, the development would have paid nothing in taxes for 2009, but under the county's approach, it would have owed $74,038.

The Supreme Court of Mississippi held that Mississippi Code Section 27–35–50(4)(d) prohibits local governments from including the value of federal tax credits in their valuation of the properties for

tax assessment purposes.

EMINENT DOMAIN - NEW JERSEY

Borough of Saddle River v. 66 East Allendale, LLC

Supreme Court of New Jersey - October 21, 2013 - A.3d - 2013 WL 5676872

Borough brought action to acquire property by authority of eminent domain to use as a public park. After a jury trial, the Superior Court entered judgment on verdict in favor of property owner in the amount of $5.25 million. Parties appealed and cross-appealed.

The Supreme Court of New Jersey held that:

- Trial court was required to hold a pretrial hearing to determine the admissibility of evidence regarding a zoning change affecting the property, and
- Owner's experts failed to establish foundation for opinions that zoning change was reasonably likely.

In this matter, the jury was allowed to hear evidence about the probability of a zoning change that should have been ruled on by the judge both in advance and outside of the jury's presence. Only if the court first determined that there was a reasonable probability that a zoning change would have been approved based on the standards governing such approval should the evidence have been presented to the jury for its consideration in connection with the jury's evaluation of just compensation. The evidence that the jury heard on the likelihood of the zoning change in issue here was not assessed properly in accordance with that standard, and the quality of the evidence that the jury was allowed to consider undermined the soundness of the jury's property valuation determination. The errors necessitate a new trial on the issue of just compensation

In an eminent domain condemnation action, during the jury's actual determination of a just compensation award that takes into account a premium based on the reasonable probability of a zoning change, the jury first must value the property in its current condition, considering the zoning at the time of the taking, which establishes the base value; second, the jury may consider the probability of the future zoning change or variance approval in determining the premium a buyer and seller would fix to the property, which premium is added to the base value and includes an assessment of the risk of the change occurring or being approved.

CHARITABLE IMMUNITY ACT - NEW JERSEY

Hottenstein v. City of Sea Isle City

United States District Court, D. New Jersey - October 3, 2013 - Slip Copy - 2013 WL 553278

Wrongful death/survivorship suit arose out of the untimely and tragic death of Tracy Hottenstein who, intoxicated at the time, fell off a public dock into the ocean below. Paramedics who were dispatched to the scene called a physician at the local hospital and received an official pronouncement of death.

Pursuant to the New Jersey Charitable Immunity Act, hospital and medic defendants moved to limit damages at trial for any alleged negligent acts.

To fall within the protections of the Charitable Immunity Act, a defendant must demonstrate two elements: (1) that the defendant is a charitable organization that is organized exclusively for hospital purposes, and (2) that the plaintiff was a beneficiary of its services.

It was undisputed that defendant met the first element. Plaintiffs argued that because the defendants were called to the scene in order to pronounce Tracy deceased rather than to render aid, Tracy was not a beneficiary of the Defendants' care within the statute. Nonetheless, the court concluded that the rendering of a pronouncement is sufficient to create a beneficiary status under New Jersey law.

FIRST AMENDMENT - NEW YORK

Dorsett v. County of Nassau

United States Court of Appeals, Second Circuit - October 18, 2013 - F.3d - 2013 WL 5663213

Mother of murder victim and the mother's attorney brought § 1983 action against county, alleging the county delayed approving a settlement agreement arising out of the death of the mother's daughter in retaliation for their First Amendment activities, namely her allegations that the murder was the result of inadequate police protection.

To plead a First Amendment retaliation claim a plaintiff must show: (1) he has a right protected by the First Amendment; (2) the defendant's actions were motivated or substantially caused by his exercise of that right; and (3) the defendant's actions caused him some injury.

The Court of Appeals held that county legislature's delay in approving settlement did not constitute a concrete injury sufficient to confer standing to assert a First Amendment retaliation claim against the county. Mother and attorney had no right to have the settlement approved by a particular date, as the settlement did not include a time-is-of-the-essence clause, and the legislature's agenda was subject to its absolute discretion.

HOUSING - NEW YORK

Murphy v. New York State Div. of Housing and Community Renewal

Court of Appeals of New York - October 17, 2013 - N.E.2d - 2013 N.Y. Slip Op. 06727

Son filed Article 78 petition for review of determination of New York State Division of Housing and Community Renewal (DHCR), which denied son's appeal from limited-profit housing company's rejection of his application for succession rights to his parents' rent-regulated Mitchell–Lama apartment.

The Court of Appeals held that DHCR acted arbitrarily and capriciously in denying the appeal based on failure of mother, as tenant of record, to file, in the year before son's high school graduation, an annual income affidavit listing son as co-occupant. Evidence that the apartment was son's primary residence in the two years before parents vacated the apartment was overwhelming, and there was no indication that the failure to file was related to son's status as co-occupant or income-earner.

SANCTIONS - NORTH DAKOTA

Empower the Taxpayer v. Fong

Supreme Court of North Dakota - October 22, 2013 - N.W.2d - 2013 ND 187

Supporters of constitutional measure that would have abolished property taxes brought action against numerous state and local government officials alleging violations of the Corrupt Practices Act and seeking injunctive relief. After the action was dismissed, the District Court granted sanctions against supporters for filing a frivolous action. Supporters appealed.

The Supreme Court of North Dakota held that trial court failed to adequately explain the basis for imposition of sanctions for frivolous filing.

If the district court fails to adequately explain the basis for the sanction or how the sanction was appropriately limited to what was necessary to deter future conduct, the Supreme Court is precluded from affirming the award of sanctions for a frivolous filing.

PUBLIC NUISANCE - NORTH DAKOTA

State ex rel. City of Marion v. Alber

Supreme Court of North Dakota - October 22, 2013 - N.W.2d - 2013 ND 189

City brought nuisance action against property owner, and obtained order requiring owner to remove or properly maintain abandoned vehicles on his property. Several years later, city brought contempt proceeding, alleging failure to conform to the order. The District Court found owner in contempt, ordered him to remove the nuisance vehicles, and awarded city attorney fees. Owner appealed.

The Supreme Court held that:

- Sufficient evidence that property owner could have complied with the order supported contempt finding;
- Sufficient evidence that property owner willfully failed to comply with the order supported contempt finding;
- Trial court's findings of fact and conclusions of law were sufficient; and
- Trial court's receipt of post-hearing evidence from city was not reversible error.

PUBLIC RECORDS - OHIO

State ex rel. Verhovec v. Washington Cty. Court of Common Pleas

Supreme Court of Ohio - October 15, 2013 - N.E.2d - 2013 -Ohio- 4518

Edward Verhovec made a public-records request of the city of Marietta by certified mail. When more than two months had passed and he had not received an acknowledgement or response from Marietta, he filed a public-records mandamus action under R.C. 149.43 and 2731.04. Soon thereafter, Marietta provided Edward with the requested records, and the trial court dismissed his action. Edward appealed, and the court of appeals remanded the case for consideration of Edward's motion for attorney fees.

After the remand, Marietta moved the trial court for sanctions under R.C. 2323.51 and alleged that

Edward had engaged in frivolous conduct by petitioning the trial court for a writ of mandamus. The trial court held a hearing on the motion for sanctions and indicated that a ruling would be forthcoming.

Edward filed a claim in prohibition in the Fourth District Court of Appeals before the trial court ruled on the motion for sanctions. He sought to prevent the trial court from issuing a ruling on the motion for sanctions. Marietta filed a motion to dismiss, and the Fourth District granted the motion. Edward appealed to the Supreme Court of Ohio.

The Supreme Court held that:

- Trial court in underling action had jurisdiction to rule on motion for sanctions, and
- Requesters had adequate remedy at law via appeal.

NEGLIGENCE - OHIO

Pauley v. Circleville

Supreme Court of Ohio - October 16, 2013 - N.E.2d - 2013 -Ohio- 4541

Sledder, who suffered broken neck when his sled allegedly struck object that looked like railroad tie while snow sledding down dirt pile mound at city park, and sledder's mother brought negligence action against city.

The Supreme Court of Ohio held that:

- Sledder was "recreational user" under recreational-user statute, and
- Existence of single object resembling railroad tie in park's dirt mound did not change essential character of park to something other than property that was open for recreational use.

Under recreational-user statute, the property must be viewed as a whole, and only where the essential character of the property has been altered to something other than an outdoor property on which outdoor recreational activities occur does immunity fall away.

Existence of single object resembling railroad tie in city park's dirt mound, which was being used for snow sledding, did not change essential character of park to something other than property that was open for recreational use, and thus city was immune under recreational-user statute regarding sledder's personal injuries. Park was outdoor property with trees and grass and was open to public free of charge for picnicking, sporting activities, and other recreational activities.

ZONING - PENNSYLVANIA

TKO Realty, LLC v. Zoning Hearing Bd. of City of Scranton

Commonwealth Court of Pennsylvania - October 18, 2013 - A.3d - 2013 WL 5658780

Property owner sought review of zoning hearing board decision denying owner building permit to rehabilitate structure into three-unit dwelling.

The Commonwealth Court held that:

- Use of property as three-unit dwelling was lawful nonconforming use, and

- Use was not abandoned.

Mere absence of a certificate of nonconformance from the zoning officer does not deprive landowner of his right to continue lawful nonconforming use. Use of property as three-unit dwelling was lawful nonconforming use under zoning ordinance, even though property owner did not seek certificate of nonconformance from zoning officer and failed to register in accordance with non-zoning ordinance. Prior zoning map placed property in "A" district, which permitted apartments, assessment card showed property had been assessed as three-unit dwelling, and use as three-unit dwelling became nonconforming upon passage of ordinance zoning property "R1-A," which permitted single-family or twin semi-detached homes.

FIRST AMENDMENT - PENNSYLVANIA

Barna v. Board of School Directors of Panther Valley School Dist.

United States District Court, M.D. Pennsylvania - October 15, 2013 - Slip Copy - 2013 WL 5663072

John Barna brought suit seeking damages and injunctive relief against School Board "due to his removal and banishment from meetings of the School Board in violation of his federal constitutional rights to free speech."

On April 8, 2010, Barna attended a public School Board meeting wherein he asked several questions concerning financial dealings of the School Board. Mr. Barna indicated that some of his friends similarly had concerns about financial dealings of the School Board. In response to Plaintiff's comments, Mr. Markovich, a School Board member, invited Barna to bring his friends to a subsequent School Board meeting, to which Plaintiff replied that his friends "carry guns, you wouldn't want that." Various members of the School Board responded with laughter to this quip. Markovich responded that "Aah well, I'll wear my bullet-proof vest."

Two weeks later, Barna attended another public School Board meeting. At the inception of the meeting, Markovich requested that Mr. Barna leave the meeting purportedly based upon the above-referenced comments of Mr. Barna at the April 5, 2010 School Board Meeting because his comments could have been taken as a threat. Plaintiff stated that he had been joking, but Markovich ultimately asked that Mr. Barna be removed from the meeting by a security guard. As he was leaving, Mr. Barna, in response to commentary from audience members in attendance at the April 22, 2010 School Board Meeting, jokingly stated to the audience to the effect that he might come after all of them. Mr. Barna was subsequently banned from all School Board meetings.

Barna filed suit and Defendants moved to dismiss. The Court engaged in the traditional First Amendment analysis and concluded that it was not appropriate at this stage of the case to grant Defendants' motion as Plaintiff was entitled to develop a fuller factual record in support of his claim that the School Board engaged in viewpoint-based discrimination.

In a public forum any restrictions as to time, place, and manner of speech: (1) must be unrelated to content; (2) must be narrowly tailored to serve a significant governmental interest; and (3) must allow alternative ways of communicating the same information. As to the first prong, a disturbance may very well have been the reason for removing Barna, but Barna should be given an opportunity to show that the true motive for silencing him was the content of his speech.

As to the second prong, "there is a serious and substantial question in the undersigned's mind as to

whether a permanent ban on Plaintiffs attendance at all future Panther Valley School Board meetings and Panther Valley school property was 'narrowly tailored' to serve the undoubtedly compelling government interest in assuring the safety of other citizens in attendance at School Board meetings and on school property."

AUCTION RATE SECURITIES - PENNSYLVANIA

Fulton Financial Advisors, Nat. Ass'n v. NatCity Investments, Inc.

United States District Court, E.D. Pennsylvania - October 15, 2013 - Slip Copy - 2013 WL 5635977

For a number of years prior to 2006, Fulton maintained an institutional investment account with NatCity, for which NatCity acted as Fulton's securities broker. Around 2005, NatCity allegedly recommended to Fulton that it invest in ARS, "in keeping with Fulton's desire to invest in only the highest quality and safest debt investments." An unspecified portion of these ARS were from NatCity's own inventory. Fulton currently holds $175 million in ARS. NatCity also allegedly acted as a CBD for a number of the ARS issues it recommended to Fulton, for which NatCity typically earned a yearly fee of 0.25 percent of the value of the transaction. For transactions where NatCity was not the CBD, it received a portion of the CBD's fee, a fact not disclosed to Fulton, for directing the Fulton trade to the CBD.

After the collapse of the ARS market, Fulton had been required to write down the value of its ARS by an amount in excess of $10 million. Fulton then brought the standard-issue ARS action against NatCity, making numerous allegations that state and federal regulators have determined that NatCity and the other major underwriters of ARS manipulated the ARS markets and deceived ARS investors. It also alleges that NatCity had special knowledge and expertise in the ARS auction markets that it did not possess. Because of its superior knowledge and role in the auction markets as Fulton's BD, Fulton alleges that NatCity owed it fiduciary duties, as well as duties of fairness, honesty, disclosure of material information, and undivided loyalty.

NatCity contended that Fulton had failed to plead its fraud-based claims with sufficient particularity, and that Fulton could not have reasonably relied upon NatCity's alleged misrepresentations.

The court found that Fulton had failed to allege specific facts to support the misrepresentation, scienter, and reliance elements of its fraud-based claims, and had also failed to plausibly allege the misrepresentation element of its negligent misrepresentation claim. Consequently, it granted NatCity's Motion to Dismiss the three Pennsylvania Securities Act claims, the negligent misrepresentation claim, the claim for common law fraud, and the claim for aiding and abetting fraud.

The court denied the Motion to Dismiss as to the negligence claim and the breach of fiduciary duty claim.

MUNICIPAL ORDINANCE - PENNSYLVANIA

City of Reading v. Iezzi

Commonwealth Court of Pennsylvania - October 23, 2013 - A.3d - 2013 WL 5731620

City is a third-class city organized and operating under a home rule charter. Pursuant to the

Municipal Waste Planning, Recycling, and Waste Reduction Act (Act 101) and its powers under the Charter, the City adopted an ordinance regulating the collection, transportation, storage and disposal of solid waste and recycling and imposing separate fees for these services on persons owning property located within its borders.

In December 2010, the City filed a tax claim of $1,405.17 against homeowner for delinquent recycling fees due on his property for the years 1999 through 2008.

Homeowner asserted that the Solid Waste Management Act (SWMA) and (Act 101) preempt the City from imposing recycling fees. Municipalities only have the power expressly granted to them through SWMA and Act 101. SWMA and Act 101 govern recycling and set forth a comprehensive plan for funding local recycling programs. According to homeowner these acts do not authorize a municipality to charge fees not expressly set forth in the statute. Thus, the City is not permitted to charge a fee for recycling.

The court agreed, finding that a careful review of SWMA and Act 101 reveals there is no mechanism for a municipality to charge a fee for its recycling services; rather, fees for recycling are set by the General Assembly.

LIABILITY - WASHINGTON

Washburn v. City of Federal Way

Supreme Court of Washington, En Banc - October 17, 2013 - P.3d - 2013 WL 5652733

Victim’s daughters brought wrongful death action against city arising from an act of domestic violence in which victim’s boyfriend stabbed victim to death within hours of service of protection order on him at girlfriend’s home. Following $1.1 million jury verdict solely in the estate’s favor, the Superior Court, King County granted daughter’s motion for new trial on damages. City appealed.

The Supreme Court of Washington held that:

- City preserved, for appeal, its objection to jury instruction regarding city’s duty to exercise ordinary care in service and enforcement of protection orders;
- Court of Appeals erred by holding that city failed to preserve, for purposes of appeal, the denial of its motion for judgment as a matter of law;
- Harassment statutes imposed a legal duty on police department to serve the anti-harassment order; and
- Officer, who served anti-harassment order, owed girlfriend a duty to guard against the criminal conduct of boyfriend.

City owed two different duties to girlfriend, who had obtained anti-harassment order against her boyfriend, and those were a legal duty to serve the order and a duty to act reasonably in doing so, and the latter meant taking reasonable steps to guard against the possibility that boyfriend would harm girlfriend as a result of service of the order. Officer, who served order, knew or should have known that girlfriend and boyfriend were both present and that officer’s service of the order might trigger boyfriend to act violently, and officer’s duty to act reasonably required him to take steps to guard girlfriend against boyfriend’s criminal acts.

Harassment statutes imposed a legal duty on police department to serve the anti-harassment order, and, under the legislative intent exception to public duty doctrine, if the city’s discharge of that duty constituted culpable neglect, it would bear liability in tort for death of girlfriend. While statute

imposed no duty to guarantee the safety of citizens, like girlfriend who obtained the order, it did impose on police officers a duty to serve anti-harassment orders, and legislature showed an intent to protect specific individuals in passing harassment statute.

PUBLIC UTILITIES - WASHINGTON

Cedar River Water and Sewer Dist. v. King County

Supreme Court of Washington, En Banc - October 24, 2013 - P.3d - 2013 WL 5760654

Snohomish County agreed to let King County build the Brightwater sewage treatment plant in south Snohomish County. As part of the agreement, King County agreed to provide a substantial mitigation package for the local Snohomish County community near Brightwater. The cost of the mitigation was included in the capital cost of the plant. Capital funding for the plant came mostly from the sale of bonds that were primarily secured by sewage treatment fees and capacity charges imposed on new sewage hookups. Two local utility districts that contract with King County for sewage treatment filed a suit arguing that the mitigation package was excessive.

The Supreme Court of Washington began its analysis by ruling against the districts' contention that King County has trust or fiduciary obligations as to how it used the sewage utility fund, finding that no such relationship is created unless there exists an explicit agreement to do so. Based on this ruling, it followed that the districts, rather than King County, bore the burden of proof on whether the sewage funds were properly used.

The Court affirmed the lower court's decision that the districts' challenge to the "validity, legality, or enforceability of the Settlement Agreement, including any land use aspects of that Agreement," were time barred under LUPA.

The Court also affirmed the lower court's finding that the mitigation was proper, that it was properly part of the capital cost of Brightwater's construction, and that it was properly paid for out of the Water Quality Fund. In essence, the court found a sufficient nexus between the project and its mitigation.

The Court affirmed agreed that the credit enhancement fee paid by the King County conferred a benefit on ratepayers and that it was not a hidden tax.

COLLECTIVE BARGAINING AGREEMENT - WISCONSIN

School Dist. of Kewaskum v. Kewaskum Educ. Ass'n

Court of Appeals of Wisconsin - October 23, 2013 - Slip Copy - 2013 WL 5732696

School District and School Association had a collective bargaining agreement for the 2009–10 and 2010–11 school years providing that any disputes arising under the agreement would be submitted to an arbitrator for a final, binding decision. During the course of the 2010–11 school year, the School District discharged teacher. The Association challenged the discharge, and the dispute was submitted to an arbitrator in accordance with the agreement. The arbitrator found that the School District did not have grounds under the agreement to discharge teacher and ordered her to be reinstated and paid lost wages and benefits.

The School District appealed, arguing that the arbitrator was without jurisdiction to order

reinstatement and back pay after the expiration of the parties' agreement when a new state law was in effect that barred collective bargaining by school districts over employee disciplinary matters. The School District also challenged the award on its merits.

The Court of Appeals affirmed the decision of the circuit court and rejected the School District's arguments. The change in state law had no effect on the existing collective bargaining agreement or the arbitrator's ability to order a remedy for a violation committed during the agreement's term. Additionally, the School District had not met its burden to overturn the arbitrator's award.

TAX - ARKANSAS

Hotels.com, L.P. v. Pine Bluff Advertising and Promotion Com'n

Supreme Court of Arkansas - October 10, 2013 - S.W.3d - 2013 Ark. 392

City advertising and promotion commission, county, and city brought class action against online travel companies (OTC) alleging that the OTCs had failed to collect, or collected and failed to remit, full amount of gross-receipts taxes imposed by government entities on hotel accommodations. The Circuit Court granted class certification. OTCs appealed.

The Supreme Court of Arkansas held that:

- Commission was not required to exhaust any administrative remedies;
- County and city were not required to exhaust any administrative remedies; and
- Predominance requirement for class certification was satisfied.

Common issues predominated over individual issues, and therefore the predominance requirement for class certification was satisfied in declaratory judgment action by city advertising and promotion commission, county, and city concerning the applicability of their respective gross-receipts taxes to OTCs. Although there may have been variances in the tax ordinances of the commissions, counties, and cities, each ordinance was derived from the same respective statutes permitting commissions, counties, and cities to levy such taxes. Declaratory judgment as to whether the OTCs' business transactions fell within the scope of the statutory language governing the tax was an overarching issue that could be resolved before a determination of whether the respective ordinances of each commission, county, or city contained the same language as the statutes on which they were premised.

BANKRUPTCY - CALIFORNIA

In re City of San Bernardino California

United States Bankruptcy Court, C.D. California, Riverside Division - October 16, 2013 - B.R. - 2013 WL 5645560

A major creditor of the City of San Bernardino, the California Public Employee Retirement System (CalPERS), objected to the eligibility of the City to file a petition under chapter 9 of the Bankruptcy Code on the grounds that it did not desire to effect a plan of adjustment (§109(c)(4)) and did not file the petition in good faith (§921).

The court noted that is widely endorsed that "no bright-line test exists for determining whether a debtor desires to effect a plan because of the highly subjective nature of the inquiry under

§109(c)(4).” So long as the evidence shows that the “purpose of the filing of the chapter 9 petition not simply be to buy time or evade creditors,” a bankruptcy court may properly find that the § 109(c)(4) requirement has been met.

The court concluded that the City took a number of actions of public record that objectively demonstrate that the City desired to effect a plan, including: presenting a budget report to city council; conducting open public meetings regarding the City’s financial future; voting to declare a fiscal emergency; preparing a cash flow analysis; preparing a fiscal emergency plan; and approving a pre-pendency plan. These uncontroverted facts sufficiently show that after taking steps to cut costs and raise revenue, the City – faced with a 45.9 million dollar cash deficit – had little choice but to restructure its debt.

Section 921(c) provides that a court may dismiss a chapter 9 petition if the debtor did not file the petition in good faith. Unlike the eligibility requirements of §109(c), the court’s power to dismiss a petition under §921(c) is permissive, not mandatory. As in many other considerations of good faith in the context of bankruptcy, the test is a totality of the circumstances where the Court is given the power to weigh the numerous factors in light of the circumstances as a whole in determining whether good faith is lacking. In this case, the court concluded that the City had met its burden by a preponderance of the evidence and shown that its chapter 9 petition was filed in good faith

“The purposes of chapter 9 are met by this proceeding. The integrity of the bankruptcy system is not offended by this proceeding. The City, its citizens, and its creditors deserve a chance to achieve an orderly financial future. The Court finds the City of San Bernardino eligible to proceed in its chapter 9 case.”

VOTING - CALIFORNIA

California Council of the Blind v. County of Alameda

United States District Court, N.D. California - October 16, 2013 - Not Reported in F.Supp.2d - 2013 WL 5645196

Blind voters alleged that in the last two elections, County failed to ensure that voting machines accessible to the blind and visually impaired could be activated and operated by poll workers, and therefore required these individuals to vote with the assistance of third parties in violation of Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213, § 504 of the Rehabilitation Act, 29 U.S.C. § 794, as well as California Election Code § 19227 and California Government Code § 11135.

County argued that plaintiffs failed to state a claim under Title II of the ADA or § 504 of the Rehabilitation Act and filed a motion to dismiss. Defendants contended that nothing in the ADA or the Rehabilitation Act creates a right to vote privately and independently, and because Plaintiffs allege that they were able to vote with the assistance of a third party, they fail to state a claim under the ADA or the Rehabilitation Act as a matter of law.

Defendants argued that, with the assistance of a third party, plaintiffs were provided an equal opportunity to vote. However, the court agreed with plaintiffs that requiring blind and visually impaired individuals to vote with the assistance of a third party, if they are to vote at all, at best provides these individuals with an inferior voting experience “not equal to that afforded others.”

Accordingly, the Court found that Plaintiffs had sufficiently stated a claim under the ADA and Rehabilitation Act and denied County’s motion to dismiss.

The court found no merit in plaintiffs' state law claims, dismissing both.

INVERSE CONDEMNATION - CALIFORNIA

Nisevic v. City of Los Angeles

Court of Appeal, Second District, Division 5, California - October 16, 2013 - Not Reported in Cal.Rptr.3d - 2013 WL 5636483

City of Los Angeles appealed from the judgment of $5,053,548 entered in favor of plaintiff for inverse condemnation based on damage caused when sewage backed up into his home.

The City argued the ruling of the trial court on liability was not supported by substantial evidence. According to the City, there is no evidence the City's sewer system was designed or constructed in the manner described at trial or that the City, or any of its contractors, damaged or removed a portion of the sewer system. Also, there was no evidence that the City's maintenance program of the sewer system contributed to the conditions on the date of the injury to the property. The City therefore contended that plaintiff did not prove causation, an essential element of inverse condemnation.

The Court of Appeal disagreed, affirming the judgment. "Contrary to suggestions in the City's brief that the trial court's ruling was based on imagination, hunch, and a guesstimate, the record demonstrates the court was fully engaged in the fact finding process, questioning witnesses for both parties in an effort to resolve disputed factual issues, and reached a thoughtful conclusion amply supported by the evidence."

EMPLOYMENT - CALIFORNIA

Enriquez v. City of Sierra Madre

Court of Appeal, Second District, Division 7, California - October 16, 2013 - Not Reported in Cal.Rptr.3d - 2013 WL 5635950

Plaintiff was a volunteer firefighter for the City of Sierra Madre. The City hires and fires volunteer firefighters, sets the rules and regulations for their work, requires them to work specific shifts and to arrive on time, and requires them to report to supervisors and to work within the framework of the Sierra Madre Fire Department (SMFD). Volunteer firefighters also receive training and are covered by workers' compensation. The City keeps records of the volunteer firefighters' service. It pays volunteer firefighters a stipend of $1 per day, paid every 90 days. It also pays voluntary firefighters approximately $33 per day when "hired out" with a SMFD strike team of firefighters sent to assist other agencies in fighting non-local large-scale fires.

Plaintiff filed a complaint with the U.S. Equal Employment Opportunity Commission (EEOC) alleging employment discrimination. The EEOC dismissed the complaint on the ground that there was no employer-employee relationship and notified plaintiff of her right to sue.

Plaintiff sued the City. As to the employment-related causes of action, the City argued that plaintiff did not receive "significant remuneration" for her services and therefore was not an employee and could not state causes of action for employment discrimination. The Court of Appeal agreed with the City, stating that a municipality's decision to provide volunteers with workers' compensation coverage is not sufficient to confer employment status.

ZONING - CONNECTICUT

Cockerham v. Zoning Bd. of Appeals of Town of Montville

Appellate Court of Connecticut - October 8, 2013 - A.3d - 146 Conn.App. 355

Homeowners appealed from decision of zoning board of appeals, which upheld zoning enforcement officer's grant of permit to neighbor to build single-family residence on his lot, which had been previously owned by homeowners' predecessor together with homeowners' lot.

The Appellate Court held that board's interpretation of term "separately owned," in regulations providing that nonconforming lots, which could be used for single-family residences, were lots that were separately owned prior to enactment of town's zoning regulations, was supported by substantial evidence.

TAX - IDAHO

Ashton Urban Renewal Agency v. Ashton Memorial, Inc.

Supreme Court of Idaho - October 11, 2013 - P.3d - 2013 WL 5587820

Ashton Urban Renewal Agency (AURA) petitioned for judicial review of Board of Tax Appeals' (BTA) order dismissing agency's appeals from board of equalization's (BOE) approval of tax exemptions for property owners located within agency's revenue allocation area, ruling that agency lacked standing.

The district court ruled that AURA had standing to challenge the exemption. Property owners appealed.

The Supreme Court of Idaho took up the question of whether AURA is a "person aggrieved" under I.C. § 63–511, and therefore, may appeal the grant of the exemption to the Idaho Board of Tax Appeals (BTA).

Person is "aggrieved" by an order, such that person has standing to appeal, when order affects his or her present personal, pecuniary, or property interest. Effect on the person's interest must be more than a possible or remote consequence of the order. Allocation of taxes actually levied on property owners to agency in absence of grant of exemption was hardly speculative or remote, but rather grant of exemption created real and concrete loss to agency's revenue stream.

The Supreme Court of Idaho held that:

- As a matter of first impression, agency had pecuniary interest in BOE's decision, such that it had standing to appeal as aggrieved person, and
- Property owners failed to preserve issue of notice for appeal.

LIABILITY - ILLINOIS

Smart v. City of Chicago

Appellate Court of Illinois, First District, Third Division - October 9, 2013 - N.E.2d - 2013 IL App (1st) 120901

Bicyclist brought negligence action against city, alleging that city had left a street in an unsafe condition during a resurfacing project, and that as a result bicyclist had fallen and suffered injuries. After a jury trial, the Circuit Court entered judgment in favor of bicyclist, and city appealed.

The Appellate Court held that:

- City's special interrogatory on contributory negligence did not ask a single direct question, and
- Bicyclist was entitled to pursue a general negligence claim and was not required to prove elements of a premises liability claim.

City's special interrogatory on contributory negligence, asking whether bicyclist's contributory negligence was greater than 50% of the proximate cause of his injuries, did not ask a single, direct question, as required for city to be entitled to submission of special interrogatory to jury. Special interrogatory was impermissibly compound because it would have required the jury to consider multiple questions relating to the cause of bicyclist's injuries.

Bicyclist was entitled to pursue a general negligence claim, and was not required to prove elements of a premises liability claim, including that city knew or should have known of both a dangerous condition and the risk posed by the condition since bicyclist's claim arose from city's activities on its property. Even if city employees were not actively working on resurfacing project at time of accident, resurfacing project was ongoing at the time of the accident and city was directly responsible for completing and overseeing the resurfacing activities.

TORT CLAIMS ACT - IOWA

Thomas v. Gavin

Supreme Court of Iowa - October 11, 2013 - N.W.2d - 2013 WL 5583524

Arrestee sued city and county law enforcement officers, as well as city and county sheriff's office, alleging he was wrongfully assaulted and arrested by the officers, asserting claims for assault, battery, false imprisonment, and malicious prosecution. The District Court granted summary judgment to defendants on the basis of immunity under the Iowa Tort Claims Act (ITCA). Arrestee appealed.

The Supreme Court of Iowa held that officials' enforcement of state law was not enough to bring them within the scope of the ITCA and its immunities.

Any immunity conferred by the ITCA with respect to claims against state employees for assault, battery, false arrest, and malicious prosecution did not protect county sheriff's office and municipal law enforcement officials from being sued by arrestee under the Iowa Municipal Tort Claims Act (IMTCA) for these same claims, even to extent the officers were enforcing state law, as the mere act of enforcing state law was not enough to bring these local officials within the scope of the ITCA and its immunities.

PUBLIC UTILITIES - MARYLAND

Dominion Transmission, Inc. v. Town of Myersville Town Council

United States District Court, D. Maryland - October 7, 2013 - Not Reported in F.Supp.2d - 2013 WL 5550888

Dominion Transmission brought an action seeking a declaratory judgment and injunctive relief against the Town of Myersville. Specifically, Dominion sought a declaration that the Town's local laws and zoning code are preempted by the Natural Gas Act, 15 U.S.C. § 717 et seq., and an injunction to prevent the application of those laws to its plan to construct a natural gas compressor station in the Town.

The Court recognized the broad preemptive effect of the NGA, but limited Dominion's remedy so as to afford the Maryland Department of the Environment the opportunity to address compliance with the Clean Air Act.

The Court did issue a declaratory judgment to the effect that those portions of the Town Code directly affecting the siting, construction, or operation of the natural gas compressor station are null and void as applied to Dominion. The Court declined to grant injunctive relief.

NEGLIGENCE - MONTANA

Gourneau ex rel. Gourneau v. Hamill

Supreme Court of Montana - October 15, 2013 - P.3d - 2013 MT 300

Mother, individually and on behalf of student, her deceased son, filed a negligence complaint against school board after student committed suicide the day he was suspended from the high school wrestling team. The District Court granted school board summary judgment. Mother appealed.

The Supreme Court of Montana held that school board did not have a duty to prevent student from committing suicide after he was suspended from the school wrestling team.

Whether a party owes a legal duty depends largely on whether the allegedly negligent act was foreseeable. As it relates to the existence of a legal duty, foreseeability is measured on a scale of reasonableness dependent upon the foreseeability of the risk involved with the conduct alleged to be negligent.

In this case, the school board did not have a duty to prevent student from committing suicide, as the suicide was unforeseeable. Student had a history of disciplinary problems at school and he had never harmed himself or exhibited dangerous tendencies following the imposition of prior discipline. Student had no history of mental health problems or treatment, and there was no special relationship between school board and student.

BONDS - NORTH CAROLINA

U.S. v. Murphy

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

Defendant was charged with participating in a bid-rigging scheme to control and manipulate the bidding process for municipal bond proceeds. In addition, the Indictment alleged that defendant and his co-conspirators agreed to make false entries in bank records by falsifying marketing profits on trade tickets.

Defendant moved to dismiss the indictment on the grounds that the charges were barred by the

applicable statutes of limitations.

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

Defendant's principal argument was that exposure to risk of litigation expenses and settlement agreements did not constitute "affected," for purposes of § 3293(2). According to defendant, wire fraud affected a financial institution only if the institution itself were victimized by the fraud. The court disagreed with defendant's interpretation and agreed with the government that the indictment successfully alleged that a financial institution was "affected" as contemplated by § 3293(2).

EMINENT DOMAIN - NORTH CAROLINA

City of Asheville v. Resurgence Development Co., LLC

Court of Appeals of North Carolina - October 15, 2013 - S.E.2d - 2013 WL 5621631

City eminent domain action to condemn a permanent easement of 435 square feet and a temporary construction easement of 474 square feet to connect its parcel to sewer pump station located on adjoining property. City stated that once it acquired the easement and constructed the sewer line, it would be transferred to the local sewer district and operated in conjunction with the existing sewer system. Defendant answered, contending that City's intended condemnation was not for a public purpose. City then moved for a determination of all issues other than damages under N.C. Gen.Stat. § 40A–47.

The trial court determined that the City's proposed condemnation of an easement over defendant's land was for a public purpose and the Court of Appeals affirmed, finding both a public use and a public benefit.

SCHOOLS - PENNSYLVANIA

Roquet v. Kelly

United States District Court, M.D. Pennsylvania - October 9, 2013 - Slip Copy - 2013 WL 5570269

Student was rendered a paraplegic as a result of a vicious assault by a classmate. Mother sued the school and the attacker's mother, citing a lengthy, documented, pattern of bullying. As the court noted, "Regardless of the legal merits of her claims, Roquet is rightfully aggrieved by the calamity that has befallen her son, Sam, at the hands of Sam's classmate at the middle school, James."

This case is notable in that it represents the most extreme case of bullying imaginable, and a very sympathetic court, yet resulted in a finding of not liability on the part of the school.

The mother's allegations show that the school district defendants "might have done more" to protect Sam from James, not that they "created or increased the risk itself." Accordingly, the mother's claim pursuant to the state-created danger theory of liability must be dismissed.

TAX - SOUTH DAKOTA

Rushmore Shadows, LLC v. Pennington County Bd. of Equalization

Supreme Court of South Dakota - October 9, 2013 - N.W.2d - 2013 S.D. 73

Taxpayer that rented out recreational park trailers as cabins on campground that it operated appealed from county's assessment of the cabins as real property for purposes of ad valorem taxation.

The Supreme Court of South Dakota held that recreational park trailers were constructively affixed to the real estate and, therefore, constituted an "improvement to land" so as to be subject to ad valorem taxation as real property.

Factors relevant to determining whether property is a fixture, so as to constitute an improvement to land subject to ad valorem taxation as real property, and whether property is a realty improvement subject to the contractor's excise tax, include: (1) annexation to the realty, either actual or constructive; (2) property's adaptability to the use and purpose for which the realty is used; and (3) the intention of the party making the annexation.

ZONING - TENNESSEE

Citizens For Safety And Clean Air v. City Of Clinton

Court of Appeals of Tennessee - October 11, 2013 - Slip Copy - 2013 WL 5614297

Plaintiffs, a non-profit and concerned local citizens, opposed to the prospective development of a quarry and asphalt plant, challenged the heavy industrial zoning classification of a portion of the property on the basis that it was arbitrary and capricious, constituted illegal contract zoning, and, constituted illegal spot zoning.

The trial court found that Clinton had ample rational basis to render the zoning classifications of the property that it did and the appeals court affirmed. After a very interesting discussion of the issue, the appeals court determined that this was not an instance of contract zoning, or spot zoning.

TAX - WASHINGTON

Cost Management Services, Inc. v. City of Lakewood

Supreme Court of Washington, En Banc - October 10, 2013 - P.3d - 2013 WL 5570223

Natural gas purchasing agent brought action against city, seeking refund of taxes allegedly paid in error. The Superior Court entered partial summary judgment for purchasing agent and for city, granted mandamus relief requiring city to take action on refund claim, and, following a bench trial, entered judgment for purchasing agent. City appealed.

The Supreme Court of Washington held that:

- Exhaustion requirement was vitiated by city's inaction, but
- Statute of limitations for tax refund also applied to taxpayer's mandamus petition.

City's inaction in response to natural gas purchasing agent's utility tax refund request ended agent's obligation, under the doctrine of exhaustion of administrative remedies, to continue pursuing a remedy in that forum before filing a tax refund action in the Superior Court, even if city law established an appeal procedure for the refund request, and even though city sent agent a demand for payment of the utility tax attributed to a time period that was not covered by the refund request.

The three-year statute of limitations on natural gas purchasing agent's claim for utility tax refund barred agent's petition for a writ of mandamus to compel city to refund utility taxes paid outside the limitations period, since the mandamus petition in essence sought to use the administrative process to revive a claim otherwise barred by the statute of limitations, where agent filed a tax refund claim in the superior court before filing the mandamus petition.

EMPLOYMENT - WISCONSIN

Green Bay Prof. Police Ass'n v. City of Green Bay

Court of Appeals of Wisconsin - October 15, 2013 - Slip Copy - 2013 WL 5612523

Brown County and the City of Green Bay (collectively, the Municipalities) appealed an order granting a writ of mandamus to the Green Bay Professional Police Association, Ryan Meader, and the Brown County Sheriff's Department Non–Supervisory Labor Association (collectively, the Associations).

The writ directed the Municipalities to comply with the health insurance provisions of their expired collective bargaining agreements with the Associations until new agreements were reached.

The appeals court concluded that the circuit court erroneously exercised its discretion by granting the writ because the Associations failed to establish the elements necessary to obtain mandamus relief. The circuit court failed to apply the proper legal standard to the Associations' motion for mandamus relief. The court did not address any of the four elements a petitioner must prove to obtain a writ of mandamus. The court's decision to grant the Associations a writ of mandamus therefore constitutes an erroneous exercise of discretion. The appeals court reversed.

JUDICIAL SERVICES - ALABAMA

Ray v. Judicial Corrections Services

United States District Court, N.D. Alabama, Southern Division - September 26, 2013 - Slip Copy - 2013 WL 5428360

The Town of Childersburg, with the approval of its Mayor and Town Council, contracted with Judicial Corrections Services (JCS) to provide probation and fee collecting services for Childersburg's Municipal Court.

Pursuant to the agreement between Childersburg and JCS, any time a person appearing before the court is unable to pay the court costs and/or fines associated with the charges at issue, that person is automatically placed on probation using forms provided by JCS, regardless of whether a jail sentence was imposed. If an individual fails to pay a satisfactory amount, JCS then determines

whether to revoke the individual's probation (in which case the individual is jailed) or whether to impose additional fines and costs. Childersburg personnel follow JCS's recommendations regarding whether to incarcerate an individual or impose other bond requirements without conducting hearings to determine why an individual has not made payments, whether the individual may be indigent, or whether the individual is entitled to counsel. JCS takes no action to determine indigency and has denied that it has any responsibility to make that determination.

Under the agreement between Childersburg and JCS, individuals are often responsible for fines that exceed the statutory maximum of $500 that municipal courts may impose. In addition, the periods of probation imposed in order to collect fines and fees for JCS often exceed the two year statutory maximum.

Plaintiff probationers filed, on behalf of themselves and those similarly situated, multiple § 1983 claims against JCS and Childersburg. Childersburg filed a Motion to Dismiss.

The District Court held that:

- Childersburg is subject to § 1983 liability;
- The Rooker–Feldman doctrine does not preclude subject–matter jurisdiction;
- Absolute judicial immunity is inapplicable to Childersburg;
- Federalism and comity concerns do not counsel in favor of dismissal;
- O'Shea v. Littleton's bar on injunctive relief does not apply to Plaintiffs' equitable claims;
- Childersburg is entitled to contract with a private company for the provision of probationary services to the Childersburg Municipal Court.

While the court held that a municipality has the general authority to contract with a private company for the provision of probationary services, and thus declined to void the contract at this stage of the proceedings, it did indicate that this action would be more appropriately considered at the summary judgment stage when additional materials had been submitted regarding the contract with JCS.

BONDS - ARIZONA

Galassini v. Town of Fountain Hills

United States District Court, D. Arizona - September 30, 2013 - Not Reported in F.Supp.2d - 2013 WL 5445483

"Upset over the tax consequences of an upcoming bond proposal by the Town of Fountain Hills, Plaintiff Dina Galassini decided to exercise the rights of an ordinary citizen and organize a protest. Little did she realize that she was about to feel the heavy hand of government regulation in a way she never imagined. At center stage is Plaintiff's challenge to the constitutionality of a 183–word sentence defining "political committee," which raises the issue of whether a person of ordinary intelligence can understand the sentence's meaning."

Upon hearing that Plaintiff intended to protest against the bond proposal, the Town Clerk sent her a letter informing her that she would be required to register as a political committee prior to proceeding with any form of protest pursuant to Arizona Revised Statutes section 16–901(19).

Plaintiff filed a Complaint for Declaratory and Injunctive Relief against the Town of Fountain Hills, the Town Clerk of Fountain Hills, and the Town Attorney of Fountain Hills. In her Complaint, Plaintiff alleged that Arizona Revised Statutes section 16–901(19) is an unconstitutional burden on her First Amendment rights to freedom of speech and freedom of association. Thereafter, the State

of Arizona intervened. Following a preliminary injunction hearing, the Court found that Plaintiff established serious questions going to the merits of her claim. As a result, the Court granted Plaintiff's Motion for Preliminary Injunction, allowing Plaintiff to hold protests prior to the election on without first registering as a political action committee. The bond proposal was rejected by the Fountain Hills voters.

Thereafter, Plaintiff filed an Amended Complaint pursuant to 42 U .S.C. § 1983 against the Town of Fountain Hills and the State of Arizona. In her Amended Complaint, Plaintiff alleges that (1) Arizona's campaign-finance laws impose unconstitutional burdens on free speech; (2) Arizona's campaign finance scheme is overbroad in violation of the First and Fourteenth Amendments of the United States Constitution; and (3) Arizona's campaign finance scheme is impermissibly vague in violation of the Fourteenth Amendment of the United States Constitution.

The Arizona Legislature then amended the definition of "political committee" as set forth in ARS section 16–901(19). The relevant portions of the current version of Arizona's statutory scheme are set forth below. ARS section 16–901(19) was amended as follows:

"Political committee" means a candidate or any association or combination of persons that is organized, conducted or combined for the purpose of influencing the result of any election or to determine whether an individual will become a candidate for election in this state or in any county, city, town, district or precinct in this state, that engages in political activity in behalf of or against a candidate for election or retention or in support of or opposition to an initiative, referendum or recall or any other measure or proposition and that applies for a serial number and circulates petitions and, in the case of a candidate for public office except those exempt pursuant to § 16–903, that receives contributions or makes expenditures of more than two hundred fifty dollars in connection therewith, notwithstanding that the association or combination of persons may be part of a larger association, combination of persons or sponsoring organization not primarily organized, conducted or combined for the purpose of influencing the result of any election in this state or in any county, city, town or precinct in this state. Political committee includes the following types of committees:

Plaintiff, the Town of Fountain Hills, and the State of Arizona then moved for summary judgment on all of Plaintiff's claims.

After concluding that Plaintiff had standing, the court next evaluated her claim that the term "political committee" was unconstitutionally vague. They concluded that it was. The court also found that the definition of "political committee" in Arizona Revised Statutes section 16–901(19) was overbroad because it swept in a substantial amount of protected speech that the State did not have an important interest in regulating.

"Accordingly, the Court is prepared to issue an injunction that is consistent with its holdings in this case. Namely, this Court is prepared to issue an injunction that enjoins the enforcement of any statutes in Title 16, Chapter 6 of the Arizona Revised Statutes to the extent those statutes depend on the definition of political committee as set forth in Arizona Revised Statutes section 16–902.01(19)."

EMINENT DOMAIN - ARKANSAS

Cooper v. Circuit Court of Faulkner County

Supreme Court of Arkansas - October 3, 2013 - S.W.3d - 2013 Ark. 365

City initiated condemnation action against property owners. The circuit court granted owners' motion for continuance of trial, but ordered owners to pay, within five days, city's attorney fees and costs incurred in preparing for trial and court clerk's expenses in summoning jurors for jury selection, and prohibited owners from filing additional pleadings until such fees and costs were paid. Owners then petitioned for writ of prohibition or in alternative for writ of certiorari requiring Circuit Court to rescind order.

The Supreme Court of Arkansas held that:

- Writ of prohibition was not permissible remedy for rescission of order already issued, and
- Writ of certiorari would issue to require circuit court to rescind order that was clear, gross abuse of its discretion, in violation of owners' right of access to courts.

Although continuance was appealable, owners had no other remedy to challenge circuit court's jurisdiction to issue those conditions of continuance and prohibition against filing additional pleadings. Circuit court exceeded its jurisdiction and committed gross abuse by requiring payment of fees and costs as condition of filing additional pleadings, in violation of owners' constitutional right of access to courts.

TAX - CALIFORNIA

Owens v. County of Los Angeles

Court of Appeal, Second District, Division 3, California - October 2, 2013 - Cal.Rptr.3d - 13 Cal. Daily Op. Serv. 11, 015 - 2013 Daily Journal D.A.R. 13, 287

Taxpayers brought class action against county to challenge validity of Utility User Tax Ordinance. County settled with taxpayers by agreeing to submit a ballot measure to the voters in the next election. The Superior Court approved the settlement agreement, awarded attorney fees to class counsel, and denied a "motion to enforce the settlement" in which taxpayer argued that the election was not held "pursuant to applicable law." The taxpayer appealed.

Two other taxpayers brought a putative class action challenging the legality of the ballot measure that had been agreed upon in the prior settlement, and moved to invalidate the measure. The Superior Court denied the motion. The taxpayers appealed. The cases were consolidated for disposition in one opinion.

The Court of Appeal held that:

- Settlement agreement waived taxpayer's challenge to election adopting tax ordinance;
- Settlement agreement judicially estopped taxpayer's challenge to election adopting tax ordinance;
- Ballot materials were not so misleading as to violate due process;
- Ballot materials did not violate "free election" provision of state constitution; and
- New tax ordinance was not a "special tax" requiring a two-thirds vote for approval.

IMMUNITY - DISTRICT OF COLUMBIA

Dukore v. District of Columbia

United States District Court, District of Columbia - September 19, 2013 - F.Supp.2d - 2013 WL 5278353

Occupy D.C. protesters filed § 1983 action alleging that District of Columbia police officers falsely arrested and imprisoned them, violated their due process rights, engaged in civil conspiracy, and converted their tent.

The District Court held that:

- Municipal regulation prohibiting use of tents as temporary place of abodes was not so grossly and flagrantly unconstitutional as to preclude officers from asserting qualified immunity;
- It was not unreasonable for officers to believe that probable cause existed to arrest protestors for violating ordinance;
- Seizure of protestors' tent did not violate First Amendment;
- It was not unreasonable for officers to believe that tent was evidence that they had violated ordinance;
- Officers did not violate protestors' right to procedural due process; and
- Protestors stated conversion claim.

ATTORNEYS' FEES - FLORIDA

Board of Trustees of Jacksonville Police & Fire Fund v. Kicklighter

District Court of Appeal of Florida, First District - October 7, 2013 - So.3d - 2013 WL 5509113

Disabled firefighter brought breach of contract action against city police and fire pension fund seeking increased pension benefits. Following a bench trial, the Circuit Court entered judgment for firefighter. The Circuit Court awarded appellate attorney fees. Board of trustees filed motion for review.

The District Court of Appeal held that the trial court did not abuse its discretion by applying to the appellate attorney fees awarded to law firm that represented firefighter the same 1.5 fee multiplier it previously applied to the trial level attorney fees awarded to law firm, even though special appellate counsel was retained. Law firm provided approximately 75% of the legal services performed on appeal, and multiplier was not applied to the fees awarded to special appellate counsel.

BONDS - GEORGIA

In re Municipal Corrections, LLC

United States Bankruptcy Court, N.D. Georgia, Atlanta Division - September 30, 2013 - Slip Copy - 2013 WL 5534237

In an unrecorded trust indenture agreement for the issuance of tax-exempt bonds, Municipal Corrections, LLC ("Debtor"), the Chapter 11 debtor in possession in this case, "pledged and assigned" its interest in its real property to secure its obligation to pay the bonds. The indenture trustee for the bondholders is the defendant UMB, N.A. (together with Bank of Oklahoma, N.A., the original trustee, the "Bond Trustee"). The Bond Trustee is the legal holder of the security interest on behalf of the bondholders.

The Debtor sought a determination of the nature, extent, and validity of the Bond Trustee's lien on the real property, contending that it has no such lien. In addition, they sought the avoidance of any

lien the Bond Trustee has on the real property under 11 U.S.C. § 544(a)(3) on the ground that it is unenforceable against a hypothetical bona fide purchaser under Georgia law.

The dispute presented two questions arising under Georgia real estate law. The first is whether the "pledged and assigned" language in the indenture agreement created a mortgage in favor of the Bond Trustee. If so, the second question is whether other recorded documents and an order of the Superior Court validating the bonds provide constructive notice of the unrecorded interest or give rise to a duty of inquiry such that the unrecorded interest is nevertheless enforceable against a purchaser. If they do not, any interest of the Bond Trustee is avoidable under 11 U.S.C. § 544(a)(3), which permits a bankruptcy trustee (or a Chapter 11 debtor in possession with the powers of a trustee under 11 U.S.C. § 1107(a)) to avoid an interest in real property that a hypothetical bona fide purchaser could avoid under applicable state law.

The Court concluded as matters of law that the Indenture gave the Bond Trustee a mortgage on the real property and that it is enforceable against a bona fide purchaser under principles of constructive and inquiry notice that apply under Georgia law.

The good folks at Baker Donelson were kind enough to make available the entire Order Granting Indenture's MSJ, which is available here:

https://docs.google.com/a/bondcasebriefs.com/viewer?a=v&pid=gmail&attid=0.1&thid=14179deee27d90f3&mt=application/pdf&url=https://mail.google.com/mail/u/0/?ui%3D2%26ik%3D22f94432e8%26view%3Datt%26th%3D14179deee27d90f3%26attid%3D0.1%26disp%3Dsafe%26zw&sig=AHIEtbRU-DBubdX0PuJ2SeCi1P_1Gwa89g

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EMPLOYMENT - GEORGIA

King v. Worth County Bd. of Educ.

Court of Appeals of Georgia - October 9, 2013 - S.E.2d - 2013 WL 5543400

Tenured teacher whose contract was not renewed by the local school board, on grounds of insubordination, incompetency, and willful neglect of duties, appealed to the State Board of Education. The State Board reversed. Local board appealed. The Superior Court, Worth County, reversed the State Board and affirmed local board's non-renewal of teacher's contract. Teacher's application for discretionary appeal was granted.

The Court of Appeals held that:

- Local school board did not improperly rely on evidence of teacher's conduct from prior contract terms in reaching its decision not to renew his contract; and
- Letter provided to teacher by local board provided sufficient notice of the grounds for non-renewal of his contract under the Fair Dismissal Act.

TAX - GEORGIA

Turner County v. City of Ashburn

Supreme Court of Georgia - October 7, 2013 - S.E.2d - 2013 WL 5508558

Special taxing district municipalities filed petition under Local Option Sales Tax (LOST) Act, seeking

resolution of impasse in negotiations with county for renewing LOST certificate authorizing municipalities to collect and distribute the tax. The Superior Court entered orders denying county's motion to dismiss, upholding constitutionality of the LOST Act, and adopting the final and best offer of the municipalities in resolving the dispute. County applied for discretionary appeal.

The Supreme Court of Georgia held that the section of the LOST Act allowing superior court to determine distribution of tax proceeds in special taxing district violated separation of powers. Issues relating to how tax revenues should be allocated were to be left solely to legislative discretion and were not matters for determination by the courts, absent any manifest abuse of power or failure to abide by constitutional or legislative directives regarding the purposes for which the revenues could be spent.

HOUSING - ILLINOIS

Thorncreek Apartments III, LLC v. Village of Park Forest

United States District Court, N.D. Illinois, Eastern Division - September 30, 2013 - Not Reported in F.Supp.2d - 2013 WL 5432348

The Thorncreek apartment complex brought claims against the Village of Park Forest under 42 U.S.C. §§ 1981, 1983, 1985, and 1986, and Illinois law, arising from the Village's denial of Thorncreek's requests for licenses to operate a multifamily dwelling, denial of certificates of occupancy required to house new tenants, promulgation and allegedly discriminatory enforcement of an electricity ordinance, and denial of a conditional use permit for Thorncreek's leasing office. Put simply, Thorncreek alleged that the Village targeted it because the vast majority of its tenants were African–American.

Thorncreek's federal and state equal protection claims, conspiracy claims under 42 U.S.C. §§ 1985 and 1986, and ICRA claim survived the Village's summary judgment motion and will proceed to trial.

Particularly charming, was an email from the Village Manager to the Village Police Chief regarding search warrants executed at Thorncreek, in which the Village Manager stated that, "I enjoy shoving it up their ass in a firm but diplomatic and professional manner." Firm but fair.

EMPLOYMENT - LOUISIANA

Stokes v. Code Enforcement & Hearing Bureau

Court of Appeal of Louisiana, Fourth Circuit - October 2, 2013 - So.3d - 2013-0203 (La.App. 4 Cir. 10/2/13)

City Code Enforcement and Hearing Bureau appealed a decision of the City Civil Service Commission of New Orleans granting a bureau employee's appeal from the 10–day suspension imposed by her supervisors for alleged dereliction in her duties.

The Court of Appeal held that Commission's determination that bureau failed to establish good or lawful cause for disciplining employee was not manifestly erroneous.

On appeal to the City Civil Service Commission from a public employer's disciplinary action against an employee who has gained permanent status in the classified city civil service, the appointing authority has the burden of proving impairment of the efficiency of the public service in which the

employee in engaged by a preponderance of the evidence and must also prove the actions complained of bear a real and substantial relationship to the efficient operation of the public service. While these facts must be clearly established, they need not be established beyond a reasonable doubt.

IMMUNITY - LOUISIANA

Goudeau v. East Baton Rouge Parish School Bd.

United States Court of Appeals, Fifth Circuit - October 7, 2013 - Fed.Appx. - 2013 WL 5514548

Teacher brought §1983 action against parish school board, board's former superintendent, and principal for violation of First Amendment right to free speech, alleging that she suffered retaliation for speaking out against principal's directive to raise students' grades. The District Court for the denied defendants' motion for summary judgment on the basis of qualified immunity. Defendants appealed.

The Court of Appeals held that:

- Principal's alleged retaliatory transfer of teacher to another school was cognizable as an adverse employment action;
- Teacher's complaints about principal's directive addressed a matter of public concern;
- Teacher failed to present evidence to defeat superintendent's entitlement to qualified immunity; and
- Teacher failed to establish municipal liability on her § 1983 claim.

In order to establish the School Board's liability based on an adverse employment decision in response to her protected speech, Teacher needed to demonstrate a policy or custom targeting the right that was violated (i.e., the right to engage in protected speech free from retaliation), rather than a policy concerning conduct about which she spoke (i.e., the changing of students' grades).

JURISDICTION - MASSACHUSETTS

Federal Home Loan Bank of Boston v. Ally Financial, Inc.

United States District Court, D. Massachusetts - September 30, 2013 - Slip Copy - 2013 WL 5466523

Bank purchased $5.7 billion in Private Label Mortgage–Backed Securities and later brought suit against The Bank alleges that the rating agency defendants – Moody's and S&P – knowingly engaged in practices that caused the AAA ratings assigned to PLMBS purchased by the Bank to vastly understate their risk and overstate their creditworthiness. The Bank asserted claims of fraud, negligent misrepresentation, and violation of Massachusetts General Laws Chapter 93A, Section 11.

The defendants moved to dismiss for lack of personal jurisdiction, pursuant to Federal Rule of Civil Procedure 12(b)(2). The Bank contended that the exercise of general jurisdiction is proper because of these defendants' contacts with Massachusetts.

For our purposes, the interesting aspect of this case was that the court relied, in part, on the fact that both ratings agencies had rated 12,000 municipal bond issuances in the state to establish that

Moody's and S&P had benefitted from significant systematic and continuous contacts with Massachusetts, thus establishing general jurisdiction.

ZONING - MASSACHUSETTS

Alford v. Boston Zoning Com'n

Appeals Court of Massachusetts, Suffolk - October 9, 2013 - N.E.2d - 84 Mass.App.Ct. 359

Abutting neighbors of Boston College brought action against Boston zoning commission and Boston Redevelopment Authority (BRA), seeking injunctive relief to prohibit implementation of institutional master plan (IMP) for major expansion of college facilities, and alleging a violation of state constitution. College was allowed to intervene. The Superior Court entered summary judgment in favor of zoning commission, BRA, and college. Neighbors appealed.

The Appeals Court held that:

- State constitutional right to independent judges did not apply to IMP approval process because zoning commission and BRA did not engage in an adjudicatory or quasi-adjudicatory function in proceedings to consider IMP, and
- Approval of IMP was not arbitrary or capricious as the decision was made through a process that required communication and input from multiple sectors of state and local government and private parties in an effort to ensure that the amendment comports to the standards of the Boston zoning code, and approval of IMP by BRA did not bind zoning commission, which had authority to adopt, reject, or adopt in substantial accord the BRA recommendation.

SPECIAL ASSESSMENTS - MINNESOTA

DRB No. 24, LLC v. City of Minneapolis

DRB No. 24, LLC v. City of Minneapolis

In 2001 Minneapolis established a Vacant Building Registration ("VBR") program. Through the program, owners of vacant properties are required to register the vacant property with the City and pay an annual fee. If a property owner fails to pay the fee, the City may levy and collect the fee as a special assessment against the property under the City's provision for special assessments for nuisance conditions. This arrangement is authorized by a Minnesota statute, which permits cities to collect vacant building registration fees as a special assessment against the property. Minn.Stat. § 429.101, subd. 1(a)(12).

Such fees were assessed against DRB, LLC, which failed to appeal the assessments to the district court within the deadline in accordance with Minn.Stat. § 429.081. The Magistrate Judge issued an R&R, recommending that the Court grant summary judgment for the City on all counts.

DRB objected to the R & R, raising three issues for the District Court: (1) whether the City's Notices of its intent to assess the fees were deficient, (2) if the Notices were deficient, whether the appeal deadline properly applies, and (3) whether the appeal deadline applies to claims DRB characterizes as "non-special assessment causes of action," such as fraud, unjust enrichment, and negligent misrepresentation.

The District Court concluded that the R&R was well-supported and reached the appropriate legal

conclusions in these circumstances. Accordingly, the Court overruled DRB's objections and adopted the R&R.

LIABILITY - MISSOURI

Walton v. City of Seneca

Missouri Court of Appeals, Southern District, Division Two - October 7, 2013 - S.W.3d - 2013 WL 5524828

Plaintiff appealed the judgment entered in accordance with a jury verdict in favor of City of Seneca on Plaintiffs personal injury suit for damages she alleged she suffered when she stepped into a City "water meter hole" that was located in a restaurant parking lot. Plaintiff claimed the "hole," a water meter vault, was City's property and that it constituted a dangerous condition, thereby qualifying as a statutory exception to the general rule that all money damages claims against municipalities are barred by sovereign immunity.

Plaintiff's contended the trial court erred in giving the affirmative converse jury instruction because its definition of property was that over which City "had exclusive control, possession, authority and the ability to oversee, monitor and to exclude unauthorized persons."

The Court of Appeals held that:

- Patron's trial objection to affirmative converse jury instruction was not vague or different from objection on appeal;
- Patron was not required to offer substitute jury instruction;
- Patron made submissible case on theory of liability;
- Accurate definition of property would include property actually owned by city; and
- Substantial showing of prejudice existed as a result of instruction.

"Because we agree that the affirmative converse instruction misdirected the jury and there is a substantial indication that it resulted in prejudice to Plaintiff, we must reverse the judgment and remand the case for a new trial."

ZONING - OHIO

Apple Group Ltd. v. Granger Twp. Bd. of Zoning Appeals

Court of Appeals of Ohio, Ninth District, Medina County - September 30, 2013 - Slip Copy - 2013 -Ohio- 4259

Landowner argued that Township's zoning resolution was invalid because it was not adopted in accordance with a comprehensive plan, as required under Revised Code Section 519.02. Landowner argued that, under Section 519.02, "a comprehensive plan" covers more than just zoning. Rather, it is a township's chief policy instrument which sets forth goals, policies, and objectives regarding zoning, streets, public facilities, public programs, and public lands. Apple argues that, because the Township does not have a comprehensive plan that is separate from its zoning resolution, the resolution is invalid.

Contrary to Landowner's argument, this Court had previously held that a township's failure to have a comprehensive plan "which is separate and distinct from a zoning ordinance does not render

unconstitutional a zoning ordinance." Reese v. Copley Twp. Bd. of Trustees, 129 Ohio App.3d 9, 15 (9th Dist.1998); BGC Props. v. Bath Twp., 9th Dist. Summit No. 14252, 1990 WL 31789 *4 (Mar. 21, 1990).

Landowner next argued that the Township's zoning ordinance did not meet the requirements of a comprehensive plan and, therefore, it was not made "in accordance with a comprehensive plan" under Section 519.02.

The Court stated that a zoning resolution itself can satisfy the comprehensive plan requirement. Under the majority view, "the term 'comprehensive" has three meanings: (1) comprehensive in terms of addressing an entire geographic area; (2) comprehensive in terms of having an "all-encompassing" scope; and (3) comprehensive as in a separate long-term planning document, as opposed to a temporary duration.

Upon review of the zoning resolution, the Court concluded that there was some competent credible evidence in the record from which the trial court could have found that it is "a comprehensive plan" under Section 519.02.

PUBLIC UTILITIES - OHIO

Northeast Ohio Regional Sewer Dist. v. Bath Twp.

Court of Appeals of Ohio, Eighth District, Cuyahoga County - September 26, 2013 - Slip Copy - 2013 -Ohio- 4186

Regional sewer district brought action against member communities, seeking declaratory judgment that district had authority to implement particular regional stormwater management (RSM) program. Property owners intervened. The Court of Common Pleas denied motion to dismiss, granted partial summary judgment to sewer district and, after bench trial, entered judgment in favor of district. Communities and property owners appealed.

The Court of Appeals held that:

- Statutes governing district did not grant district authority to promulgate regional stormwater management(RSM) program;
- Stormwater charge on property owners proposed by district to fund RSM program was unrelated to any use or services afforded to a property owner by a "water resource project" and thus was not authorized by statute; and
- RSM program was not authorized by district charter.

Sewer district's RSM program was not authorized by sewer district charter defining purpose and scope of authority of district. Expansive scope of the "regional stormwater system" as defined by district went far beyond scope of sewage treatment and waste water handling facilities under charter to encompass entire system of watercourses and stormwater conveyance structures, and district did not go through charter amendment process.

PUBLIC UTILITIES - PENNSYLVANIA

Norfolk Southern Ry. Co. v. Public Utility Com'n

Supreme Court of Pennsylvania - October 2, 2013 - A.3d - 2013 WL 5468263

Norfolk sought review of an order of the Public Utility Commission (PUC) that allocated to railroad 15% of the cost for the removal of a rail-crossing bridge. Norfolk contended that any allocation to it would be unjust and unreasonable, since the company owned no property or facilities at the crossing site. Norfolk also cited City of Chester v. PUC, 798 A.2d 288, for the proposition that the PUC lacked authority to allocate costs to a transportation utility which had no ownership interest associated with a rail-highway crossing.

The Supreme Court of Pennsylvania held that:

- Statutory provision that governed compensation for damages occasioned by the construction, relocation, or abolition of a railroad crossing invested the Public Utility Commission (PUC) with discretion to determine the proper proportions of costs to be allocated to concerned parties or the Commonwealth, but not to select parties who would be subject to the allocation on a discretionary basis, but
- In a matter of first impression, non-owner railroad was a concerned party for purposes of the PUC's cost-allocation jurisdiction and authority, at least to the extent that it conducted regular operations at the crossing and could enforce an easement-based right of way, abrogating City of Chester v. Public Utility Com'n, 773 A.2d 1280.

TAKINGS - TEXAS

Mira Mar Development Corp. v. City of Coppell, Texas

Court of Appeals of Texas, Dallas - October 7, 2013 - S.W.3d - 2013 WL 5524860

Developer purchased property to develop a residential subdivision. Developer then sold the lots to a home builder.

Developer sued City based on delays and changes to the development plan that increased its costs and reduced the sale price of the lots.

Developer argued it was entitled to compensation as a matter of law because the City failed to prove certain imposed exactions were roughly proportional to the projected impact of the development.

The appeals court stated that, "To resolve these issues, we must first determine whether each requirement was an exaction and, if so, whether the City established (1) an essential nexus to the substantial advancement of a legitimate government interest and (2) the rough proportionality to the projected impact of the development. Stafford Estates, 135 S.W.3d at 634." The court then engaged in a remarkably thorough analysis of each of the disputed exactions.

Based on this analysis, the court reversed certain of the lower court's rulings on the exactions and sustained others. The net result was an increase in the amount awarded to Developer, from $40,00 to $96,000, plus attorneys' fees, although the Developer had sought $800,000.

ZONING - ALABAMA

Lee v. Houser

Supreme Court of Alabama - September 27, 2013 - So.3d - 2013 WL 5394529

Developer and developer's agent brought action against town and town's planning commission

following years of obstruction and delays in developer's application for preliminary plat approval.

The Supreme Court of Alabama held that:

- Issue of whether town and town's planning commission acted negligently by failing to properly consider or grant the developer's application for preliminary plat approval was for jury;
- Issue was for jury in developer's action against town and town planning commission as to whether commission tortiously acquired jurisdiction over developer's property;
- Municipal immunity did not apply to town that sought extraterritorial jurisdiction over the private property of developer so that the municipality could prevent development of that property;
- Personal-injury cap did not apply to action by developer against town for damages associated with town's refusal to approve subdivision plat;
- Developer's agent's untimely complaint against town did not relate back to developer's complaint so as to remedy agent's violation of the municipal notice-of-claim statute; and
- Evidence was sufficient to support jury's award of lost profits.

NEGLIGENCE - ALABAMA

Chavers v. City of Mobile

Supreme Court of Alabama - September 27, 2013 - So.3d - 2013 WL 5394333

Property owner brought action against city seeking damages based on claims of negligent maintenance, continuing trespass, continuing nuisance, and inverse condemnation, all related to that part of the city's storm-water-drainage system that abutted her property.

The Supreme Court of Alabama held that:

- Genuine issue of material fact existed as to whether deteriorated condition of drainage ditch caused several large sinkholes on property owner's land, precluding summary judgment;
- Genuine issue of material fact existed as to whether property owner suffered damage from continuous migration of water and soil into the drainage ditch during six months preceding the filing of notice of claim, precluding summary judgment under municipal nonclaim statute; and
- Genuine issue of material fact existed as to whether problems with ditch had been brought to city's attention, precluding summary judgment.

SCHOOLS - ALABAMA

KB v. Daleville City Bd. of Educ.

United States Court of Appeals, Eleventh Circuit - September 30, 2013 - Fed.Appx. - 2013 WL 5422685

Parent brought Title IX action against city board of education, alleging that her daughter was sexually harassed by grade school custodian. The United States District Court for the Middle District of Alabama, granted summary judgment in favor of board. Plaintiff appealed.

The Court of Appeals held that:

- School's principal and superintendent did not act with "deliberate indifference" to actual notice of possibility that custodian might sexually harass student;
- Students' and teachers' complaints that custodian was continuously "undressing them with his

eyes" did not give principal "actual notice" of possibility that custodian might sexually harass student; and
- Board of education did not act with "deliberate indifference" to actual notice of custodian's alleged inappropriate touching of student's buttocks and his violation of command to avoid contact with student.

A Title IX sexual harassment plaintiff must identify a school district official with the authority to take corrective measures in response to "actual notice" of sexual harassment. The actual notice must be sufficient to alert that official to the possibility of the plaintiff's sexual harassment, and that official must respond with deliberate indifference in order for Title IX liability to arise.

BANKRUPTCY - CALIFORNIA

In re Mendocino Coast Recreation and Park District

United States District Court, N.D. California - September 27, 2013 - Not Reported in F.Supp.2d - 2013 WL 5423788

Creditor Westamerica Bank (the "Bank") appealed the Order of the United States Bankruptcy overruling the Bank's objection regarding Debtor Mendocino Coastal Recreation and Park District's (the "District") Chapter 9 eligibility. At issue was whether the Bankruptcy Court erred in concluding that the District complied with 11 U.S.C. § 1 09(c)(5)(B)'s requirements for eligibility as a municipal debtor under Chapter 9.

The District Court affirmed the Bankruptcy Court's order determining Chapter 9 eligibility.

In 2008, the District entered into a lease related to a parkland property with a third party that subsequently assigned all of its rights to Bank, entitling the Bank to the lease payments.

In 2011, the District's Counsel sent a "settlement outline and proposal" (the "Workout Proposal") to the Bank's Counsel, describing the District's insolvent financial situation and notifying the Bank that if it could not work out a satisfactory alternative it would file a Chapter 9 bankruptcy petition. The Workout Proposal concluded by proposing three resolutions: (1) transferring the leased property to the Bank in full satisfaction of the lease obligation, (2) paying the Bank $1.1 million in full satisfaction of the lease obligation, or (3) entering into a forbearance agreement. The Bank declined to accept, or even discuss, the Workout Proposal.

The District subsequently filed its Chapter 9 voluntary petition (the "Petition"). The Bank objected to the Petition on the ground that the District failed to meet the Chapter 9 eligibility requirements in Section 109(c)(5)(B) of the Bankruptcy Code, 11 U.S.C. § 109(c)(5)(B). The Bankruptcy Court overruled the Bank's objection, holding that the Workout Proposal satisfied Section 109(c)(5)(B).

Section 109(c) of the Bankruptcy Code provides that "[a] n entity may be a debtor under Chapter 9 of this title if and only if such entity—" (1) is a municipality; (2) is specifically authorized to be a debtor; (3) is insolvent; (4) desires to effect a plan to adjust such debts; and

(5) (a) has obtained the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter;

(b) has negotiated in good faith with creditors and has failed to obtain the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter;

(c) is unable to negotiate with creditors because such negotiation is impracticable; or

(d) reasonably believes that a creditor may attempt to obtain a transfer that is avoidable under section 547 of this title.

The Bank and the District disagreed about whether the District "negotiated in good faith." The question on appeal was whether Section 109(c)(5)(B) requires more than what the District did. The District Court concluded that Section 109(c)(5)(B) requires municipalities not just to negotiate generally in good faith with their creditors, but also to negotiate in good faith with creditors over a proposed plan, at least in concept, for bankruptcy under Chapter 9.

"From this body of law, the Court draws two conclusions. First, courts may consider, based on the unique circumstances of each case and applying their best judgment, whether a debtor has satisfied an obligation to have "negotiated in good faith." Second, while the Bankruptcy Code places the overwhelming weight of its burdens on petitioners, the provisions that call for negotiation contemplate that at least some very minimal burden of reciprocity be placed on parties with whom a debtor must negotiate.

In this case, the negotiation contemplated in Section 109(c)(5)(B) never happened, and the fault for that lay primarily with the Bank. Had the Bank responded with even the slightest indication of a willingness to negotiate, or even merely requested more time to consider the District's proposal, the door might well be open for it to claim that the District did not negotiate in good faith

This case did not present the issue of what must occur in a negotiation that satisfies 109(c)(5)(B). It presented the issue of what information, if missing from the debtor's first attempt to negotiate, bars a municipality from filing from Chapter 9 even if a creditor rejects the overture and declines to negotiate. In answering that question, one bright-line rule suggests itself. The possibility of imminent bankruptcy proceeding must be disclosed in the first effort to communicate, in order to ensure that, as the Bankruptcy Court put it in the Order Below, the municipality does not "blind-side a creditor by failing to mention that a Chapter 9 filing is contemplated."

Beyond that, the Court declined to prescribe any rigid per se rule for what qualifies as a good-faith effort to begin negotiations. That determination will depend on several factors, of which the Court here considered only three.

First, the greater the disclosure about the proposed bankruptcy plan, the stronger the debtor's claim to have attempted to negotiate in good faith. A creditor might be justified in rejecting the overture of a debtor proposing a frivolous or unclearly described adjustment plan, but a creditor is less justified in ignoring a substantive proposal.

Second, the municipality's need to immediately disclose classes of creditors and their treatment in the first communication will depend upon how material that information would be to the creditor's decision about whether to negotiate.

Third, the creditor's response, and the amount of time the creditor has had to respond, may also be factors. If a creditor has had a relatively short time to respond to the municipality's offer to negotiate, a lack of detail in the opening communication might weigh against a municipality rushing to file. On the other hand, where a creditor has been apprised of the possibility of a debt adjustment and declined to respond after a reasonable period of time, or where the creditor has explicitly responded with a refusal to negotiate, its position as an objector is significantly weakened.

ENVIRONMENTAL - CALIFORNIA

California Clean Energy Committee v. City of San Jose

Court of Appeal, Sixth District, California - September 30, 2013 - Not Reported in Cal.Rptr.3d - 2013 WL 5434129

California Clean Energy Committee (CCEC) appealed from a trial court's judgment in favor of respondent City of San Jose (City). CCEC filed a petition for writ of mandate challenging City's certification and approval of an environmental impact report (EIR) analyzing the potential environmental effects of a proposed update to City's general plan, titled "Envision San Jose 2040 General Plan" prepared pursuant to the California Environmental Quality Act (CEQA). The trial court granted summary judgment in City's favor, after finding that CCEC failed to exhaust its administrative remedies, as no administrative appeal was filed from City's planning commission's certification of the final EIR.

The Court of Appeal concluded that the EIR was not properly certified by the planning commission, as the planning commission could not be delegated the duty to certify a final EIR given that it is not a decisionmaking body with respect to the Envision San Jose project. As the EIR was not lawfully certified by the planning commission, no administrative appeal need be taken to exhaust administrative remedies.

TAKINGS - CONNECTICUT

Wellswood Columbia, LLC v. Town of Hebron

United States District Court, D. Connecticut - September 30, 2013 - Not Reported in F.Supp.2d - 2013 WL 5435532

Plaintiff brought an action against the Town of Hebron in recompense for injuries allegedly sustained as a result of Hebron's closure of a public road that provided the only access to real property owned by Plaintiff.

The court initially concluded that the Plaintiff's takings claims (counts one and three) under the Fifth Amendment were not ripe for adjudication in this pursuant to the U.S. Supreme Court's decision in Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985). The parties agreed that Williamson County precluded the court from considering count three, alleging a violation of the just compensation requirement of the Fifth Amendment.

Plaintiff argued, though, that it had brought two distinct takings claims under the Fifth Amendment, of which count one must remain within this court's jurisdiction. Specifically, Plaintiff stated that count three sought just compensation for the temporary taking of plaintiff's property (a so-called "uncompensated taking" claim), and is thus not ripe in federal court, but that count one asserted that the Town's ultra vires temporary taking of plaintiff's property for an improper purpose violated the Fifth Amendment's public use dictate (a so-called "bad faith taking" claim)," which is not proscribed by Williamson County.

Thus, a plaintiff alleging a bad faith exercise of a municipality's eminent domain power pursuant to the public use requirement of the Fifth Amendment need not exhaust Williamson County's ripeness requirements. The District Court agreed, retaining jurisdiction.

PUBLIC UTILITIES - GEORGIA

T-Mobile South, LLC v. City of Roswell, Ga.

United States Court of Appeals, Eleventh Circuit - October 1, 2013 - F.3d - 2013 WL 5434710

Telecommunications service provider brought action against city, challenging the city's denial of its cell tower application as in violation of the Telecommunications Act, and seeking an injunction compelling the city to grant it the requested permit. The United States District Court for the Northern District of Georgia granted summary judgment in favor of provider and issued an injunction requiring the city to issue the permit. City appealed.

The Court of Appeals held that city's denial of telecommunications service provider's request for a permit to build a cell tower satisfied the requirement of the Telecommunications Act that a state or local government's denial of a request for a permit to erect a cell tower be "in writing." City provided provider with a written letter clearly stating the city council had denied the request, that same letter informed the provider that the minutes from the hearing in which the city council denied the request could be obtained from the city clerk, and the minutes recounted all of the reasons for the action on the provider's application along with the relevant discussion. Moreover, the provider received, or at least could have received, an even more detailed written account of the city council's decision from the transcript of the hearing.

FIRST AMENDMENT - ILLINOIS

Brown v. Chicago Board of Educ.

United States District Court, N.D. Illinois, Eastern Division - September 25, 2013 - F.Supp.2d - 2013 WL 5376570

A middle-school teacher brought action against school board and principal under § 1983 for violation of his right to free speech under the First Amendment after he was suspended without pay for five days for leading a classroom discussion on the word "nigger." Defendants moved to dismiss.

The District Court held that:

- Teacher stated a First Amendment claim against school board;
- Teacher's right to lead the discussion was not clearly established; and
- Teacher's free speech claim precluded a substantive due process claim.

Under the First Amendment, the government is entitled to restrict employee speech that addresses a matter of public concern if it can prove that the interest of the employee as a citizen in commenting on the matter is outweighed by the interest of the government employer in promoting effective and efficient public service.

Under the First Amendment, in evaluating the balance of interests between an employee's speech as a citizen and of the government employer in promoting effective and efficient public service, courts examine any relevant facts, like whether the speech disrupted relationships with co-workers; whether the speech got in the way of the employee-speaker's performance of job duties; and the time, place, and manner of the speech.

Allegations by middle-school teacher that he was suspended without pay for five days for leading a

classroom discussion of the word “nigger,” stated a claim under § 1983 against school board for violating his right to free speech under the First Amendment. There was no indication that board had a set policy prohibiting such a discussion, or that the discussion was “abusive,” or a disruption to “orderly” classroom education such that it would have violated existing policy.

ANNEXATION - ILLINOIS

Village of Freeburg v. Helms

Appellate Court of Illinois, Fifth District - September 25, 2013 - Not Reported in N.E.2d - 2013 IL App (5th) 120288-U

Landowner and Village entered into an annexation agreement and permanent utility easement providing for the annexation of a 145–acre tract of land owned by Landowner in exchange for the Village constructing sewer lines and a lift station on a 9–acre tract of land owned by Landowner. The annexation agreement and utility easement also provided for a $300–per–day fee if the construction was not completed within a certain time frame.

Landowner sued for breach of the agreements. The Village argued that the contract was void because it had not made a prior appropriation of funds for this project, as required under section 8–1–7 of the Municipal Code.

Although the record did indicate that the agreements were approved by the corporate authorities and were properly recorded, the court concluded that any contract made in violation of section 8–1–7 of the Municipal Code is null and void. The requirements of section 8–1–7 are mandatory. Therefore, the annexation agreement and the permanent utility easement were unenforceable against the Village.

BONDS - ILLINOIS

Wells Fargo Bank, National Association v. Leafs Hockey Club, Inc.

United States District Court, N.D. Illinois, Eastern Division - September 30, 2013 - Not Reported in F.Supp.2d - 2013 WL 5433789

Court declines to dismiss suit brought by trustee against guarantor in bond default, finding diversity of citizenship and no cause to stay and dismiss under the *Colorado River* abstention doctrine.

Wells Fargo alleged that it was the successor trustee (the “Trustee”) to the Amalgamated Bank of Chicago (the “Prior Trustee”) under the Trust Indenture between the Illinois Finance Authority and the Prior Trustee dated as of February 1, 2007 (the “Trust Indenture”).

Wells Fargo alleged that the Illinois Finance Authority raised $20 million through issuing and selling a series of revenue bonds. The Illinois Finance Authority issued the bonds under the Trust Indenture and loaned the proceeds to LHC, LLC (“LHC”), an Illinois non-profit limited liability company, for the construction and operation of a hockey arena located in West Dundee, Illinois.

Pursuant to the February 1, 2007 Loan Agreement (“Loan Agreement”) and Guaranty Agreement (“Guaranty Agreement”), LHC was the borrower and Defendant Leafs Hockey was the guarantor. Wells Fargo contended that LHC had failed to make the required payments, and thus is in default. Also, Wells Fargo alleged that Leafs Hockey, as guarantor, had failed to pay its obligations under the

February 1, 2007 Guaranty Agreement. Accordingly, Wells Fargo brought breach of contract and contractual indemnity claim against Leafs Hockey.

Leafs Hockey moved to dismiss the lawsuit pursuant to Rule 12(b)(1) arguing that diversity of citizenship did not exist, and thus, the Court lacks subject matter jurisdiction. In particular, Leafs Hockey, a citizen of Illinois for diversity jurisdiction purposes, argued that Wells Fargo was only a nominal party and the true party-in-interest is either the Illinois Finance Authority, a citizen of Illinois, or the unidentified bond holders, who may or may not be citizens of Illinois. The court concluded that Leafs Hockey's argument was unavailing because, as Successor Trustee, Wells Fargo, a citizen of South Dakota, can enforce the Loan Agreement under the parties' February 1, 2007 agreements.

The court also held that Wells Fargo's state court foreclosure action against LHC and the present breach of contract action were not parallel under the circumstances. Because the federal and state court actions were not parallel, the Colorado River abstention doctrine does not apply.

LIABILITY - ILLINOIS

Berz v. City of Evanston

Appellate Court of Illinois, First District, Sixth Division - September 27, 2013 - N.E.2d - 2013 IL App (1st) 123763

Bicyclist filed complaint against city alleging negligence, stemming from injury-causing incident in which bicyclist struck pothole while riding in alleyway.

Bicyclist contended the circuit court erred in dismissing his third amended complaint where section 3–102(a) of the Tort Immunity Act did not immunize defendant from liability for his injury because he was an intended user of the alleyway.

The Appellate Court held that:

- City did not reasonably exercise its police power in arbitrarily eliminating bicyclist's cause of action;
- Subsequent amendment to municipal code did not demonstrate bicyclists were intended users at time of incident;
- Bicyclist was permitted user, rather than intended user; and
- Bicycle was not vehicle for purposes of determining city's liability.

In conclusion, because plaintiff was not an intended user of the alley in which he sustained injuries, defendant is immunized from liability pursuant to section 3–102(a) of the Tort Immunity Act.

PUBLIC UTILITIES - INDIANA

Indiana-American Water Co., Inc. v. Town of Mooresville

United States District Court, S.D. Indiana, Indianapolis Division - September 25, 2013 - Slip Copy - 2013 WL 5352879

Since 2000, Indiana–American Water Company (IAWC) has owned and operated the water utility that provides service in and around the Town of Mooresville. On July 23, 2012, Mooresville provided

notice to IAWC and the public that it would hold a public hearing to receive public comment on a proposed ordinance "declaring that the public convenience and necessity require the establishment of a municipally owned water utility and for the construction or acquisition of water utility assets and facilities."

On December 24, 2012, Mooresville adopted a second ordinance that authorized the acquisition of the IAWC operation by eminent domain, if necessary. This occurred after Mooresville's offer to buy IAWC's interest was rejected by IAWC. On December 27, 2012, Mooresville initiated an eminent domain lawsuit in state court.

IAWC filed this action seeking declaratory relief and damages against Mooresville, alleging that Mooresville violated due process and Indiana Access to Public Records Act in their quest to create a new municipal utility.

In this action the District Court dismissed IAWC's federal due process and Fourth Amendment claims. Having disposed of IAWC's federal claims, the District Court declined to retain supplemental jurisdiction over its claims under state law. "Here, it is clear that supplemental jurisdiction should be relinquished. As discussed earlier, this case includes substantial and unclear questions of state law. Under such circumstances, remand to the original state court to resolve the remaining state law claims is appropriate."

IMMUNITY - KENTUCKY

Transit Authority of River City v. Bibelhauser

Court of Appeals of Kentucky - September 27, 2013 - S.W.3d - 2013 WL 5423061

Pedestrian filed suit against transit authority, alleging that transit authority was negligent in the hiring, training, supervision, and retention of bus driver who collided with pedestrian in crosswalk while operating transit authority bus.

The Court of Appeals held that:

- Transit authority would not be afforded sovereign immunity, and
- Transit authority was not entitled to governmental immunity.

Transit authority was more corporate than governmental, and thus would not be afforded sovereign immunity. Statute addressing transit authority's creation provided that transit authority was "a public body corporate," with power "to sue and be sued," and "to have and exercise, generally, all of the powers of private corporations."

Transit authority did not carry out function integral to state government, but rather engaged in quintessentially local proprietary venture of providing transportation services, and thus was not entitled to government immunity for claims asserted against it. Transit authority did not provide transportation infrastructure, facilitate state-wide transit, legislate, administrate, or otherwise predominately serve state-level concerns.

AUCTION RATE SECURITIES - MASSACHUSETTS

Tutor Perini Corp. v. Banc of America Securities LLC

United States District Court, D. Massachusetts - September 24, 2013 - Slip Copy - 2013 WL 5376023

This action, like many similar actions that have been filed throughout the country, was triggered by the collapse of the auction rate securities ("ARS") market in February 2008. In this case, the plaintiff, Tutor Perini Corp. ("Tutor Perini") brought claims against its broker and investment advisor, Banc of America Securities LLC, now known as Merrill Lynch, Pierce, Fenner & Smith, Incorporated ("BAS"), and BAS's affiliate, Bank of America, N.A. ("BANA").

Tutor Perini alleged that during the time period from September 2007 through February 2008, BAS, with the knowledge and acquiescence of BANA, invested hundreds of millions of dollars of Tutor Perini's money in toxic ARS, including ARS that BAS had been holding in its own inventory, without disclosing the increasingly severe risk of illiquidity associated with such investments or the fact that BAS was engaged in a strategy to reduce its own inventory of ARS by foisting them onto its clients.

Tutor Perini claimed that the very risks which the defendants concealed from it materialized in February 2008, when the ARS market collapsed and ARS investors such as the plaintiff were unable to liquidate their holdings. Tutor Perini contended that as a result of the defendants' conduct, it continues to hold nearly $100 million worth of ARS, which remain frozen in its account at BAS and will not mature for decades.

Tutor Perini asserted that the defendants committed securities fraud, in violation of section 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b–5 promulgated thereunder, by making material misrepresentations and omissions regarding the risks of investing in ARS, and by selling it securities that were unsuitable in light of Tutor Perini's investment objectives (Count I). In addition, Tutor Perini asserted nine separate state law claims against the defendants, which include claims for intentional misrepresentation (Count II), fraudulent concealment (Count III), negligent misrepresentation (Count IV), violation of Mass. Gen. Laws ch. 93A (Count V), civil conspiracy (Counts VI–VII), violation of Mass. Gen. Laws ch. 110A, § 410(a)(2) (Count VIII), breach of contract (Count IX), and conversion (Count X).

Defendants contended that Tutor Perini's Exchange Act claims must be dismissed because the plaintiff has failed to comply with the heightened pleading standards of Fed.R.Civ.P. 9(b) and the Private Securities Litigation Reform Act, 15 U.S.C. §§ 78u–4(b), and has otherwise failed to allege facts sufficient to plead the elements of its claims. Similarly, they contended that each of Tutor Perini's state law claims must be dismissed because the allegations supporting them are inadequate to comply with the pleading requirements of either Fed.R.Civ.P. 9(b) or Fed.R.Civ.P. 8, and because Counts V and IX fail as a matter of law.

The court found that Tutor Perini had failed to state claims for civil conspiracy, breach of contract and conversion, but that its remaining claims were sufficient to comply with the applicable pleading standards and to state a claim for relief. Specifically, the court recommended that Counts VI, VII, IX and X be dismissed, but that the motion otherwise be denied.

ZONING - MASSACHUSETTS

Palermo v. Zoning Bd. of Appeals of Manchester-by-the-Sea

Appeals Court of Massachusetts - September 27, 2013 - Slip Copy - 84 Mass.App.Ct. 1112

Plaintiffs brought an action in Superior Court, seeking reversal of a decision of the Zoning Board of Appeals of Manchester–by–the–Sea that granted a special permit to landowner. The special permit authorized landowner to reconstruct a one family house upon a legally nonconforming lot. Concluding that landowner had met his burden of showing that the removal of the existing house and garage and the construction of a new single family house would not be substantially more detrimental to the neighborhood, a judge affirmed the board's decision. Plaintiffs appealed.

Under its standard of review, the Appeals Court will uphold a zoning board's decision and that of the reviewing Superior Court if a rational basis for the decision exists which is supported by the record. In this case, application of the stated standard of review lead the court to affirm the judgment.

The criteria for issuing a special permit to demolish and reconstruct a single family house, where, as here, the use is allowed by right, is set forth in § 6.1.2 of the town's zoning by-law, which follows the language of G.L. c. 40A, § 6. Pursuant to § 6.1.2, the critical question is whether the proposed changes are "substantially more detrimental or injurious to the neighborhood than the existing nonconforming structure." The record fully supported the judge's conclusion that the board correctly determined that the change at issue would result in substantial improvements.

CODE ENFORCEMENT - MINNESOTA

Nellis v. City of Coon Rapids Bd. of Adjustment and Appeals

Court of Appeals of Minnesota - September 30, 2013 - Not Reported in N.W.2d - 2013 WL 5418082

Scott Nellis owns residential property in an area of Coon Rapids designated "Low Density Residential–2" (LDR–2). The City Housing Inspector, received a call from a person known to her who reported that there was a large pile of shavings from animal cages in Nellis's back yard. The caller described a strong and foul smell emanating from the shavings. The caller further stated that during a conversation with Nellis, Nellis said that he bred snakes and possessed about 100 snakes in his house.

Based on the Inspector's investigation, the city obtained and executed an administrative search warrant As they entered Nellis's house, ammonia in the air burned their eyes and throats. One officer became physically ill after entering the house and remained ill for several days. The remaining officers wore masks for their protection during the remainder of the inspection.

During the inspection, Nellis admitted breeding, raising, and selling reptiles. He said that he owned about 100 snakes, along with other reptiles. He further stated that he raised rodents to feed the snakes. The inspection revealed roughly 300 snakes and 400 mice, along with a cat, lizards, iguanas, cockroaches, rats, and various feed insects in the maggot, pupae, or larvae stage.

Nellis challenged City's decision affirming a citation for the keeping of non-domestic animals, in violation of Coon Rapids, Minn., City Code (CRCC) § 6–503(1) (2011), and a citation for prohibited home occupation use in violation of CRCC §§ 11–703 (2011) and 11–603(5)(a) (2011).

The Court of Appeals held that:

- Probable cause existed to support the administrative search warrant;
- The execution of the search warrant was reasonable under the Fourth Amendment;
- CRCC § 11–603(5)(a) was not unconstitutionally vague;
- The board had the authority to order Nellis to "reduce the total square footage of his home

occupation in the home to be no more than 25% of the habitable square footage;
- CRCC chapter 6–500 is not unconstitutional because it does not have a grandfather clause;
- CRCC chapter 6–500 does not violate the Equal Protection Clause;
- City had a rational basis for enacting CRCC chapter 6–500; and
- The board did not act arbitrarily and capriciously in affirming the two citations against Nellis.

FIRST AMENDMENT - NEW JERSEY

Buck Foston's New Brunswick LLC v. Cahill

United States District Court, D. New Jersey - September 27, 2013 - Slip Copy - 2013 WL 5435289

Plaintiffs brought Federal and New Jersey State constitutional claims of against City. Plaintiff was a New Jersey limited liability company, was formed to own and operate a restaurant and sports bar to be named "Buck Foston's" in the City of New Brunswick. Plaintiffs claimed that City's alleged delay in the review and then denial of Buck Foston's LLC's application for a liquor license transfer: (1) were in retaliation for Plaintiffs' exercise of commercial speech protected by the First Amendment in naming their proposed restaurant "Buck Foston's"; (2) deprived Plaintiffs of the equal protection of law under the Fourteenth Amendment by treating the application differently than those of other similarly situated bars/restaurants; and (3) violated the corresponding provisions of the New Jersey State Constitution (Article I, Paragraph 6, and Article I, Paragraph 1, respectively).

The District Court ruled that there was a genuine issue of material fact sufficient to survive Defendants' Motion for Summary Judgment on Plaintiffs' First Amendment Retaliation Claim.

EMPLOYMENT - NEW YORK

Childs v. City of Little Falls

Supreme Court, Appellate Division, Fourth Department, New York - September 27, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 06162

Firefighter commenced proceeding under Article 78, seeking review of city and its fire and police board's determination terminating his disability benefits.

The Supreme Court, Appellate Division, held that determination that firefighter's disability was not causally related to his job duties was supported by substantial evidence, and, thus, fire and police board properly terminated his disability benefits. Although firefighter presented evidence to the contrary, hearing officer was entitled to weigh parties' conflicting medical evidence and to assess credibility of witnesses.

In reviewing a determination on a firefighter's claim for disability benefits, the Supreme Court, Appellate Division, may not weigh the evidence or reject the hearing officer's choice when the evidence is conflicting and room for a choice exists.

CONTRACTS - NEW YORK

Environmental Testing & Consulting, Inc. v. City of Buffalo

Supreme Court, Appellate Division, Fourth Department, New York - September 27, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 06187

Buffalo Urban Renewal Agency (BURA) and the City of Buffalo entered into a contract whereby BURA, an environmental testing and remediation company, agreed to perform various services for homeowners who participated in the City's "Rehab Program," which provided funds to qualified homeowners seeking to improve their properties. The contract documents specified the fee to which BURA would be entitled for each of the three services provided by plaintiff to the homeowners. According to BURA, the City was obligated under the contract to retain it to perform between 220 and 260 lead paint tests, and an equal number of clearance tests and risk assessments. BURA contended that City breached the contract because it retained BURA to perform only 44 lead paint tests and no clearance tests or risk assessments.

The appeals court agreed with the City that the clear and unambiguous language of the contract provided only for a "fee for services" arrangement. The fee schedule sets forth only the agreed-upon per-unit price for each of the three services to be provided by BURA to the homeowners; it did not state that City is required to hire BURA to perform any minimum number of services.

ZONING - NEW YORK

County of Herkimer v. Village of Herkimer

Supreme Court, Appellate Division, Fourth Department, New York - September 27, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 06176

In hybrid proceeding, county sought declaratory relief and Article 78 review of village's denial of sanitary sewer system in connection with proposed county correctional facility. The Supreme Court declared null and void village's amendment to zoning ordinance, denied village's motions to dismiss and strike, and reserved decision with respect to sewer and municipal services.

The Supreme Court, Appellate Division, held that:

- Record was inadequate to determine if county was immune from village's amendments;
- Declaration that amendments were preempted by state law was unwarranted; and
- Amendments did not improperly concerned with owner or occupier of land.

Record was inadequate to make determination, based upon balancing of public interests, whether county was immune, with respect to its siting of proposed correctional facility, from requirements of village's amendments to its zoning ordinances to exclude correctional facilities from zoning districts in which proposed facility was sited, thus warranting remittal to lower court for determination, based upon more complete record, regarding such immunity.

Factors to be weighed in making a determination as to whether an entity is immune from a municipality's zoning ordinances are the nature and scope of the instrumentality seeking immunity, the kind of function or land use involved, the extent of the public interest to be served thereby, the effect local land use regulation would have upon the enterprise concerned and the impact upon legitimate local interests, the applicant's legislative grant of authority, alternative locations for the facility in less restrictive zoning areas, alternative methods of providing the needed improvement, intergovernmental participation in the project development process and an opportunity to be heard.

Declaration that village's amendments to its zoning ordinances were null and void on state preemption grounds, insofar as they excluded correctional facilities from zoning districts in which proposed county facility was sited, was unwarranted in county's suit to challenge those amendments, in light of limitations of state legislative control over siting of county correctional facilities and absence of any comprehensive and detailed regulatory scheme.

Amendments to village's zoning ordinance to exclude correctional facilities from zoning districts in which proposed county facility was sited were not invalid on ground that they violated principle that zoning should be concerned with use of land, not with identity of user, because amendments were directed at land use, not at entity that owned or occupied land.

Amendments to village's zoning ordinance to exclude correctional facilities from zoning districts in which proposed county facility was sited did not constitute exclusionary zoning.

LIABILITY - NEW YORK

Panzica v. Fantauzzi

Supreme Court, Appellate Division, Fourth Department, New York - September 27, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 06127

Pedestrian brought action against business owner and village, seeking to recover damages for personal injuries allegedly sustained in slip-and-fall on icy public sidewalk adjacent to business.

The Supreme Court, Appellate Division, held that:

- No provision of village code subject owner to liability;
- Special use doctrine did not impose liability on owner; and
- Hazard on sidewalk was not created by artificial means.

Under the special use doctrine, a landowner whose property abuts a public sidewalk may be liable for injuries that are caused by a defect in the sidewalk when the municipality has given the landowner permission to interfere with a street solely for private use and convenience in no way connected with the public use and the landowner fails to maintain the sidewalk in a reasonably safe condition. Special use doctrine did not act to impose liability on business owner in relation to pedestrian's slip-and-fall on icy public sidewalk outside of business, because sidewalk was unencumbered by installation of any objects or by other variances in construction, and pedestrian submitted no evidence that sidewalk was constructed in special manner for benefit of owner.

EMINENT DOMAIN - NEW YORK

National R.R. Passenger Corp. v. McDonald

United States District Court, S.D. New York - September 26, 2013 - F.Supp.2d - 2013 WL 5434618

The question presented by this case was whether New York State has the authority to condemn property owned by National Railroad Passenger Corporation, known as Amtrak, in the face of certain federal statutes that created Amtrak and govern the use of its property.

Amtrak brought an action against the Commissioner of the New York State Department of

Transportation, asserting that the Commissioner's effort to condemn Amtrak-owned property along the Bronx River is preempted by federal law. The State had already condemned six parcels of Amtrak property, and had plans to condemn one additional parcel, as part of the "Bronx River Greenway" project – a joint New York State, New York City, and federal redevelopment project to restore the riverfront, which includes the development of parks, bike paths, and running and walking trails along the Bronx River.

Amtrak had no interest in the subject property and was willing to part with it for the same amount of money that the State has placed in escrow for that very purpose. The only live issue was whether acquisition was properly effected by eminent domain, or whether the State had to buy the property from Amtrak. "Amtrak, having chosen not to raise the preemption issue in the eminent domain proceeding, belatedly brings it before this Court."

The court concluded that Amtrak's claims with respect to the Amtrak Bronx Rail Property are barred by the Eleventh Amendment (as to the six condemned parcels) and the statute of limitations (as to Parcel 178),

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ZONING - OHIO

Nassef v. Union Twp. Bd. of Zoning Appeals

Court of Appeals of Ohio, Twelfth District, Clermont County - September 23, 2013 - Slip Copy - 2013 -Ohio- 4130

Doctor had operated a licensed medical practice since 2006. In 2011, he began prescribing patients with opioid dependency a drug called Suboxone. Soon thereafter, a citation was issued to doctor for violating the Union Township Zoning Resolution for operating a "Suboxone Treatment Center" on the property without first obtaining a change in use permit.

Doctor then applied for a change in use permit, which was denied by the Planning and Zoning Director of Union Township. The Zoning Director stated that a "Suboxone Treatment Center" is a substance abuse treatment center, which is not specifically listed as an approved function within the B–1 Business District where the property is located. The Union Township Zoning Resolution provides that uses which are not specifically permitted are prohibited, and thus the Doctor's substance abuse treatment center was not permitted under the zoning classification. The Zoning Board of Appeals ("ZBA") confirmed the decision and doctor appealed.

The Common Pleas Court found that doctor's clinic fell within the practice of medicine, vacating the ZBA's decision. Consequently, the Court found that the treatment of patients with opioid dependency, including prescribing Suboxone, is within the scope of the Union Township Zoning Resolution allowing medical clinics in the B–1 Business District where Doctor's property is located.

The Court of Appeals affirmed, holding that the Common Pleas Court decision finding that a substance abuse treatment center falls within the definition of "medical clinic" in the Union Township Zoning Resolution is supported by a preponderance of reliable, probative, and substantial evidence.

BANKRUPTCY - PENNSYLVANIA

In re T.H. Properties, LP

United States Bankruptcy Court, E.D. Pennsylvania - October 2, 2013 - B.R. - 2013 WL 5464245

The Debtors are residential real estate developers. They proposed a Chapter 11 plan wherein the equity owners would retain their interests. Because the plan did not propose to pay creditors in full, this posed absolute priority problems. The owners addressed that problem by making a "new value" contribution. This contribution was in the form of real property, three phases (Phases IV, V, and VI) of the land referred to as Northgate. The Debtors had no interest in any of the three properties. The contribution of the Northgate phases to the plan constituted the "new value" necessary to satisfy the absolute priority rule and to obtain confirmation.

The mechanics of the transfer of the real estate are of central importance. The Northgate phases were contributed under a Transfer and Development Agreement (TDA). Under the TDA, the Northgate phases were to be transferred to the Debtor on the Effective Date and then immediately transferred out, either to New Stream Real Estate, LLC, the lienholder on Northgate, or its designee. The Debtors retained an ownership interest in Northgate to the extent of any net profits from Phases IV and V. Those profits would pay creditors under the plan.

New Stream designated an entity known as GSRE 25 LLC to receive the Northgate property from the Debtor. GSRE 25 has commenced development and sale of the Northgate properties. Operating under the belief that no transfer tax applies, title companies have assisted in the sales without requiring payment of transfer tax. This prompted the Township's complaint.

The Township's motion for summary judgment was granted. Future transfers made by GSRE 25, LLC, or any other non-debtor third party grantor, to any third party purchaser/grantee of the Northgate subdivision are not exempt from applicable transfer taxes. Further, judgment was entered in favor of the Township in the amount of the uncollected local transfer tax for those properties already sold.

EMPLOYMENT - RHODE ISLAND

Kaczorowski v. Town of North Smithfield

United States District Court, D. Rhode Island - October 1, 2013 - F.Supp.2d - 2013 WL 5442220

Town Council voted to approve a budget that eliminated the funding for the position of the Department of Public Works (DPW) Director.

Director argued that he had a constitutionally protected property interest in his job as DPW Director. Director pointed both to the Charter language establishing that his employment term ran concurrently with that of the Town Council and to the Town Administrator's letter indicating that his job was permanent.

The District Court concluded that the position of DPW Director was mandated by the Town Charter and that the town council violated the Charter when they *de facto* eliminated the position.

PUBLIC UTILITIES - UTAH

Jenkins v. Jordan Valley Water Conservancy Dist.

Supreme Court of Utah - October 1, 2013 - P.3d - 2013 UT 59

Plaintiffs case sued Jordan Valley Water Conservancy District (the District) after one of its water pipelines broke and damaged their home. Following discovery, the District moved for summary judgment, asserting, among other things, that the plaintiff homeowners could not prevail on their negligence claim because they had failed to designate an expert to testify regarding the applicable standard of care. The district court granted that motion, and the homeowners appealed. The court of appeals reversed, concluding that expert testimony was unnecessary because the District itself had previously determined that the pipeline should be replaced – a determination that in the court's view sustained a standard of care calling for replacement.

The Supreme Court of Utah granted certiorari and reversed the decision of the court of appeals. The District's internal decision recommending replacement of the pipe did not establish that such a move was required by a standard of care. And because the question whether a pipeline needs to be replaced is outside the knowledge and experience of average lay persons, the homeowners had an obligation to designate an expert to establish a basis for such a duty. Their failure to do so was fatal to their negligence claim, and the district court was right to dismiss it on summary judgment.

PUBLIC UTILITIES - VIRGINIA

Columbia Gas Transmission LLC v. Ott

United States District Court, E.D. Virginia, Norfolk Division - September 27, 2013 - Slip Copy - 2013 WL 5426073

Landowner purchased property, via a warranty deed, in Chesapeake, Virginia. Pursuant to the deed, the property was purchased subject to the easements, conditions, and restrictions of record insofar as they may lawfully affect it, including two right-of-way ("ROW") agreements in favor of Columbia Gas Transmission.

Since purchasing the property, Landowner has maintained a fence, an above-ground swimming pool and shed, which are situated on the ROWs. Running across the property and below grade of the ROWs are two high-pressure natural gas transmission pipelines that are maintained and operated by Columbia.

Columbia filed suit against Landowner, claiming the above-ground swimming pool, shed, and fence are encroachments. It contended that these improvements impair its ability to maintain and operate its pipelines in a safe and effective manner, thereby posing a risk to person, property, and the uninterrupted delivery of natural gas to the Tidewater area of Virginia.

Landowner contended that the fence is not a "building" or "structure" as contemplated and expressly prohibited by the ROW.

After a lengthy analysis, the court concluded that the term "structure" as contemplated and expressly prohibited by the ROW encompasses fences.

The court was good enough to inform us that, "Columbia presents no evidence to support a contention that all objects, for example something as trifling as a garden gnome, placed on the ROWs impair its ability to maintain and operate its pipelines in a safe and effective manner, thereby necessitating that object's permanent prohibition." Good to know.

BONDS - ARIZONA

In re Allstate Life Ins. Co. Litigation

United States District Court, D. Arizona - September 13, 2013 - Not Reported in F.Supp.2d - 2013 WL 5161688

This lawsuit stems from the offer and sale of $35 million in revenue Bonds used to finance the construction of a 5,000–seat Event Center in the Town of Prescott Valley. The underlying facts of the case have been covered previously in this publication. In this stage of the ongoing litigation, the court ruled on multiple motions for summary judgment.

Although there were a great number of rulings, we will focus on those concerning the claims brought against issuer's bond counsel – Kutak Rock.

The court found that plaintiffs failed to show that Kutak's drafting of the Bond Documents resulted in a flawed lien over the NOI in favor of the Bondholders. Thus, Plaintiffs had not demonstrated a genuine issue of material fact that the OS was misleading or omitted material information on this ground and summary judgment was granted.

The court found that Kutak was entitled to summary judgment on Plaintiffs' claims that Kutak failed to ensure the Trustee would have a method of obtaining information on whether NOI would be sufficient to pay debt service, due to the inclusion in the Loan Agreement of a provision giving the Issuer and Trustee the right at all reasonable times to examine and copy the Borrower's books and records regarding the financial performance of the Event Center.

Kutak was not entitled to summary judgment on claims that the Bond Documents were defective for reasons relating to an Escrow Account, which the Development Agreement stated was to be held in the name of the Town and the Indenture stated was to be held by the Trustee. Plaintiffs submitted evidence that this inconsistency caused concrete problems for the Bondholders when the Town refused to turn over the Escrow proceeds. At a minimum, there existed a genuine issue of fact as to whether the failure of the OS to disclose this inconsistency and any subsequent problems that arose with payment of the Escrow proceeds constituted a misstatement or omission under § 44–1991(A)(2).

Kutak was entitled to summary judgment on Plaintiffs' claims that no mechanism addressed Fitch's concern that sales taxes from the Event Center be remitted directly to the Trustee from the Town with no intercept from the Borrower, as a Fitch analyst had testified that adequate legal provisions in place.

Kutak was entitled to summary judgment on Plaintiffs' claim that the TPT Revenues from the Event Center were not required to be deposited in the Revenue Account, as the Indenture requires the Trustee to immediately deposit into the Revenue Fund all TPT Revenues, as well as "any other payments or amounts required or otherwise specified."

Kutak was granted summary judgment was on Plaintiffs' claims based on Kutak's alleged failure to disclose or implement the Town's budgetary process and procedure. A major point of contention for the Plaintiffs was the fact that the Bond Documents failed to provide a mechanism by which the Trustee could ensure that the Town would pay the pledged TPT Revenues while still complying with its annual budgetary requirements. According to the Plaintiffs, the OS was misleading in this regard because it simply stated that the Town would pay any deficiencies in debt service with TPT Revenues, without disclosing that the pledge was subject to compliance with the Town's state-mandated budget requirements and procedure. Kutak asserted that, as a matter of law, it was not

required to disclose state statutes, and thus it could not be held liable for its failure to discuss the Arizona state budgetary law in drafting the Bond Documents and the court agreed.

Kutak was granted summary judgment on Plaintiffs' claims that the Bond Documents were defective because the Trustee's remedies were available only upon accelerating the Bonds, but the Indenture prohibits the Trustee from acceleration. Kutak cited to the language of the Indenture, which in fact gives the Trustee broad permission to exercise remedies in the event of a default and does not require acceleration for those remedies to be available.

Kutak's motion for summary judgment on Plaintiffs' claim that Kutak failed to create a Lockbox Account was denied. Under the Development Agreement, the Town was required to pay certain amounts into a Lockbox Account. Kutak asserted that the obligation to create a Lockbox Account was imposed by the Development Agreement, which predated Kutak's involvement in the Bond financing. In response, Plaintiffs pointed to evidence tending to show that, in fact, it was Kutak's responsibility to ensure that the Development Agreement cohered with the other Bond Documents. The court concluded that Plaintiffs had set forth sufficient evidence to create a genuine issue of material fact that it was Kutak's responsibility to ensure that the Development Agreement worked with the rest of the Bond Documents, including ensuring that a Lockbox Account was created.

Kutak contended that it did not know, and could not reasonably have known, of the misstatements or omissions in the OS regarding projections or nondisclosure of demographic facts and thus is entitled to the affirmative defense provided by A.R.S. § 44–2001(B). The court agreed, granting summary judgment on these claims.

The court found that Plaintiffs had shown a genuine issue of material fact as to whether a Fitch downgrade of the bonds was caused by risks concealed or misstated in the OS rather than by Prescott Valley's economic downturn. Consequently, Kutak's motion for summary judgment was denied on its affirmative defense argument to the extent it pertained to loss correlating to the Fitch downgrade.

Kutak contended that it was entitled to summary judgment on Plaintiffs' negligent misrepresentation because Plaintiffs failed to submit any evidence linking their loss to those misstatements in the OS regarding defects in the lien or security for the Bonds. The court agreed, granting summary judgment on these claims.

ATTORNEY-CLIENT PRIVILEGE - CALIFORNIA

Guidiville Rancheria of California v. United States

United States District Court, N.D. California - September 20, 2013 - Not Reported in F.Supp.2d - 2013 WL 5303748

LLC sought an order compelling the production of certain legal memoranda authored by the City of Richmond's in-house and outside counsel. The City argued that the legal memoranda were subject to the attorney-client privilege and thus protected from disclosure. LLC asserted that the City waived the attorney-client privilege as to the legal memoranda when a council member quoted a portion of their contents in a letter he sent to an outside third party.

City asserted that "a city council can only authorize waiver of the privilege by vote or other similar approval by the council as a whole—the unilateral, unauthorized acts of a single council member do not constitute a waiver." The court agreed, find that, "In short, the acts of a single councilmember,

acting unilaterally and without the requisite authority, cannot erode the protections of the City Council's attorney-client privilege."

ZONING - CONNECTICUT

City of Meriden v. Planning and Zoning Com'n of Town of Wallingford

Appellate Court of Connecticut - October 1, 2013 - A.3d - 2013 WL 5314349

Planning and Zoning Commission denied City's application for a special use permit to expand an existing landfill. City appealed, claiming that the Commission's decision was not supported by substantial evidence. City argued that the Commission "gave only general, nonspecific reasons as the basis of unanimous denial" and that the superior court's reliance on the defendant's finding of intensification was improper and not supported by the record.

The appeals court disagreed, affirming the judgment of the superior court.

Section 7.5.B of the Wallingford Zoning Regulations sets forth the criteria for evaluating applications for special permits. Most relevant to this appeal is § 7.5.B.1.a, which provides that the defendant should consider "the size and intensity of the proposed use or uses and its or their effect on and compatibility with the adopted Plan of Development, the specific zone and the neighborhood...." Thus, the Wallingford Zoning Regulations explicitly listed intensity of the proposed use as a factor for the Commission's consideration when deciding a special permit application. The Commission stated that intensification, e.g., an unacceptable increase in the intensity of the current use, was the basis for denying the special permit application. Thus, the appeals court concluded that the record contained substantial evidence supporting this specific reason, and, thus, the City's claim that the Commission provided only a general reason was without merit.

EMPLOYMENT - CONNECTICUT

Doody v. Town of North Branford

United States District Court, D. Connecticut - September 24, 2013 - F.Supp.2d - 2013 WL 5323308

Deputy Chief of Police was terminated when Town eliminated the position due to budget cuts.

Deputy Chief sued, claiming that the Town deprived him of his Fourteenth Amendment right to procedural due process by failing to provide him with a hearing both prior to and after eliminating his position. The Town contended that because Deputy Chief's position was eliminated as a result of budgetary issues, and not based on any charges against him, it was under no obligation to provide a pre- or post-termination hearing unless Deputy Chief specifically requested one.

For the purposes of its motion for summary judgment, the Town conceded that the officer had a constitutionally protected property interest in his position as Deputy Police Chief. The Town also conceded that it deprived Deputy Chief of that interest when the Commissioners voted to eliminate the position. However, the Town argued that this deprivation was not effected without due process, and that it did not fail to provide Deputy Chief with adequate procedural protections either before or after his termination.

The court found that, although officer failed to protest his termination before it occurred, under the

circumstances here this failure does not prevent him from claiming a violation of his due process right to a pre-termination hearing. Because the Town provided him no notice prior to the layoff becoming effective, it did not afford him an opportunity to timely object, which is a prerequisite to waiver of one's pretermination hearing rights. Therefore, Town's motion for summary judgment was denied with respect to this aspect of its claim.

However, the court found that the Deputy Chief could not satisfy the criteria to show that he was unconstitutionally deprived of a post-termination hearing. In particular, he failed to create a genuine issue of fact as to whether he requested a post-termination hearing.

EMPLOYMENT - FLORIDA

Carter v. City of Melbourne, Fla.

United States Court of Appeals, Eleventh Circuit - September 23, 2013 - F.3d - 2013 WL 5305341

Former officer with city's police department brought § 1983 action against city, police chief, and city manager, alleging that his termination constituted First Amendment retaliation based on his political speech and union activities, and that defendants caused him to be falsely arrested, imprisoned, and prosecuted.

The Court of Appeals held that:

- Municipal liability did not attach on First Amendment retaliation claims;
- Officer's speech activities did not play substantial role in disciplinary and personnel decisions; and
- Officer's false arrest, imprisonment, and malicious prosecution claims failed.

Local governments can be held liable under § 1983 for constitutional torts caused by official policies, but such municipal liability is limited to acts that are, properly speaking, acts of the municipality, that is, acts which the municipality has officially sanctioned or ordered.

In determining whether a local government's policy or action represents official municipal policy, so that the government can be held liable under § 1983 for constitutional torts resulting therefrom, the court must determine whether the decision at issue was made by those officials or governmental bodies who speak with final policymaking authority for the local governmental actor concerning the action alleged to have caused the particular constitutional or statutory violation at issue.

BALLOT INITIATIVE - FLORIDA

Let Miami Beach Decide v. City of Miami Beach

District Court of Appeal of Florida, Third District - September 20, 2013 - So.3d - 2013 WL 5289012

City brought declaratory judgment action against political committee, as the main proponent and sponsor of initiative petition, seeking a declaration that two questions being put to the voters with regard to a convention center project were in accordance with the provisions of the city charter and general laws of the state.

Committee counterclaimed, seeking a declaration that lease approval question had been improperly

placed on special election ballot. The circuit court allowed master developer to intervene, and entered judgment in favor of city and developer, and dismissed committee's counterclaims for declaratory and injunctive relief for lack of standing. Committee appealed.

The District Court of Appeal held that:

- City waived issue of whether political committee had standing to raise counterclaims;
- Master developer was precluded from challenging committee's standing;
- Voters were required to be provided with, and allowed to approve, material terms of lease pursuant to city charter provision;
- City charter provision was not intended to control the sequence of steps involved in approving lease agreement;
- Lease approval question as posed on ballot summary was insufficient to provide the voters with the information needed to intelligently cast their ballots to approve or disapprove the lease of certain property in the vicinity of convention center; and
- Ballot question violated the statutory requirement of clarity and accuracy, and had to be removed from ballot.

Voters who were empowered by city charter to approve the lease of certain property were entitled to receive the same essential information a commissioner would need to decide whether to approve such a lease. While charter provision did not require that voters be presented with every single term or provision of lease, they were required to be provided with, and allowed to approve, the material terms of the lease pursuant to the charter provision.

Lease approval question as posed on ballot summary was insufficient to provide the voters with the information needed to intelligently cast their ballots to approve or disapprove the lease of certain property. Lease approval question lacked material terms, including the amount of rent to be paid, square footage and exact location of the property to be conveyed to developer, height of any air rights to be transferred, and a statement of other additional consideration being given by the parties.

INVERSE CONDEMNATION - FLORIDA

Board of Trustees of Internal Imp. Trust Fund v. Walton County

District Court of Appeal of Florida, First District - September 23, 2013 - So.3d - 2013 WL 5302580

Not-for-profit organizations representing real property owners in two counties brought action against Board of Trustees of the Internal Improvement Trust Fund, the Department of Environmental Protection, city, and county, alleging that beach restoration project constituted a taking.

The District Court of Appeal held that:

- The Department and the Board waived their argument of improper venue, and
- The nature of plaintiffs' inverse condemnation claim did not demand that it be treated like an eminent domain proceeding, which would have required it to be litigated in the county in which the affected land was located, as it involved question of subject matter jurisdiction, rather than venue.

BONDS - GEORGIA

Sherman v. Development Authority of Fulton County

Court of Appeals of Georgia - September 26, 2013 - S.E.2d - 2013 WL 5365169

This appeal arose from a bond validation proceeding in which the State of Georgia petitioned the Fulton County Superior Court for a judgment approving the issuance of certain taxable revenue bonds by the Development Authority of Fulton County ("DAFC") and validating the bonds and various bond security documents.

After the state filed the petition validating the issuance, Sherman filed a document entitled "Notice of Becoming Party to Bond Validation Petition Proceeding," in which he gave notice that he thereby became a party to the proceedings for purposes of stating his objections to the bond validation. DAFC moved to strike Sherman's notice on the ground that Sherman was required to follow the intervention procedures of OCGA § 9–11–24(c) in order to become a party.

The trial court denied the motion to strike, finding that under the authority of Hay v. Dev. Auth. of Walton County, 239 Ga.App. 803 (521 S.E.2d 912) (1999), Sherman's notice was sufficient to authorize him to participate as a party. Eventually, the trial court entered an order validating and confirming the bonds, and Sherman filed this appeal.

After the appeal was docketed, the court decided Sherman v. Dev. Auth. of Fulton County, 321 Ga.App. 550 (739 S.E.2d 457) (2013). Overruling the contrary holding in Hay, supra, 239 Ga.App. at 804–805, the court held that a person must follow the intervention procedures of OCGA § 9–11–24 in order to become a party to a bond validation proceeding.

In this appeal, the court concluded that Sherman, 321 Ga.App. at 554–555(1), should be given retroactive application because the court did not state that its decision should be applied only prospectively and the equities favor retroactive application under the three prongs of Chevron Oil Co., 404 U.S. at 106–107(II). Thus, Sherman lacked standing and the court dismissed his appeal.

ANNEXATION - MARYLAND

Town of La Plata v. Faison-Rosewick LLC

Court of Appeals of Maryland - September 25, 2013 - A.3d - 2013 WL 5354355

Opponents of referendum regarding property annexation by town brought action against town seeking to enjoin referendum. The ultimate issue presented was what may be placed on a petition for referendum pertaining to land annexation under Maryland Code. Additionally, the parties presented questions regarding a Town Manager's authority to create procedures for the validation and verification of signatures on a referendum petition, whether the administrator in this particular case observed his own procedures, and to what extent, if any, the Election Law Article of the Maryland Code and Maryland common law should apply to municipal land annexation referenda.

The Court of Appeals held that:

- Referendum opponents could bring a common law mandamus action challenging town manager's decision to approve petition for referendum;
- Inclusion of additional resolutions to petition for referendum pertaining to land annexation, which resolutions were nonreferrable, did not invalidate the petition;

- Town manager had the implied authority to create and publish guidelines for verification of signatures on petition for referendum; and
- Town manager's publication of guidelines did not violate the general public's due process rights.

SPECIAL ASSESSMENTS - MICHIGAN

Huron Development, L.L.C. v. City of Lansing

Court of Appeals of Michigan - September 19, 2013 - Not Reported in N.W.2d - 2013 WL 5288896

Property owner challenged special assessments that city levied against its property for curb, gutter, and storm sewer improvements to an adjoining road.

Property owner appealed the Tax Tribunal's order upholding the special assessments. Citing the strong presumption that special assessments are valid, the appeals court held that the Tribunal did not commit an error of law or adopt a wrong legal principle, its factual findings were supported by competent, material, and substantial evidence, and the Tribunal's lengthy delay in issuing its opinion did not deny petitioner its right to procedural due process.

ZONING - MINNESOTA

500, LLC v. City of Minneapolis

Supreme Court of Minnesota - September 25, 2013 - N.W.2d - 2013 WL 5348308

Applicant brought declaratory judgment action seeking determination that application to heritage-preservation commission for a certificate of appropriateness was a written request related to zoning, such that city had only 60 days to approve or deny application.

The Supreme Court of Minnesota held that:

- Trial court had subject matter jurisdiction;
- Written request relating to zoning referred to written request that had a connection, association, or logical relationship to the regulation of building development or the uses of property; and
- Application to heritage-preservation commission for certificate of appropriateness was written request relating to zoning.

A written request relating to zoning under statute governing time deadlines for agency action, requiring agency to approve or deny request within 60 days, referred to a written request that had a connection, association, or logical relationship to the regulation of building development or the uses of property, rather than referring only to those requests that were explicitly authorized by an applicable zoning ordinance or statute. The phrase "relating to" had been interpreted to encompass any connection, association, or logical relationship to the noun modified by the phrase, and statute said nothing about zoning statutes or ordinances.

Application to a heritage-preservation commission for a certificate of appropriateness was a "written request relating to zoning" under statute governing time deadlines for agency action, and therefore city had 60 days to approve or deny application, where a certificate of appropriateness involved a particular property and affected specific property rights, state's historic-preservation-enabling laws recognized a connection, association, or logical relationship between heritage preservation and

zoning, and city's heritage-preservation ordinances identified a connection, association, or logical relationship between an application for a certificate of appropriateness and zoning. Heritage-preservation proceedings are akin to hearings on a conditional use permit directed at a specific property and related to specific property rights.

TAX - NEW JERSEY

Advance Housing, Inc. v. Township of Teaneck

Supreme Court of New Jersey - September 25, 2013 - A.3d - 2013 WL 5338036

Non-profit corporation and its subsidiary filed tax appeals from municipalities' refusals to exempt property owned by corporation under statute exempting properties actually and exclusively used in furtherance of a taxpayer's charitable purpose.

The Tax Court denied non-profit's appeal, finding an insufficient nexus between the housing provided and the services offered by non-profit to justify a charitable property tax exemption.

The Appellate Division reversed and remanded for a judgment granting non-profit the charitable property tax exemption. It determined that non-profit had fully integrated its housing and support services and satisfied the test set forth in Presbyterian Homes of the Synod of N.J. v. Division of Tax Appeals. More specifically, the Appellate Division held that non-profit used the property for the charitable purpose of deinstitutionalizing the mentally disabled, thus relieving the government of having to provide for their housing and care.

The Supreme Court of New Jersey held that, as a matter of first impression, corporation and its subsidiary qualified for tax-exempt status.

Non-profit corporation and its subsidiary, which provided supportive housing and services for mentally disabled individuals, actually used their residences for the charitable purpose of promoting and providing permanent, normalized community living arrangements for psychiatrically disabled individuals, and, thus, they qualified for tax-exempt status. Their charitable work spared the government an expense that it ultimately would have bore, the property was used in a manner to further the charitable purpose, they received substantial sums of money from federal and state agencies to purchase housing and deliver supportive services to the psychiatrically disabled, and they were addressing an important and legitimate governmental concern, namely the provision of both housing and substantial supportive services that fostered the prospect of independent and productive living in the community for the mentally disabled, and homeless, and they were not engaged in a seemingly commercial enterprise.

AFFORDABLE HOUSING - NEW JERSEY

In the Matter of Adoption of N.J.A.C. 5:96

Supreme Court of New Jersey - September 26, 2013 - A.3d - 2013 WL 5356807

In this matter, the Supreme Court of New Jersey reviewed the Appellate Division's invalidation of the most recent iteration of Council on Affordable Housing (COAH) regulations applicable to the third round of municipal affordable housing obligations (Third Round Rules). In the Third Round Rules, COAH proposed a new approach—a "growth share" methodology—for assessing prospective need in the allocation of a municipality's fair share of the region's need for affordable housing.

In invalidating the Third Round Rules, the Appellate Division expressed doubt about whether any growth share methodology adopted by COAH could be compatible with the Mount Laurel II remedy that "appears to militate against the use of" a growth share approach for determining a municipality's affordable housing obligation.

The Supreme Court of New Jersey concluded that, unless the Legislature amends the Fair Housing Act (FHA), which tracks the judicial remedy in its operative provisions, the present regulations premised on a growth share methodology cannot be sustained. The changes in the Third Round Rules are beyond the purview of the rulemaking authority delegated to COAH because they conflict with the FHA, rendering the regulations ultra vires.

"Moreover, due to COAH's failure to enact lawful regulations to govern municipalities' ongoing obligations to create affordable housing under the FHA, we have no choice but to endorse the remedy imposed by the Appellate Division in order to fill the void created by COAH. COAH shall adopt regulations, as directed by the Appellate Division, without delay. As modified by this opinion, we thus affirm the Appellate Division's judgment with respect to the invalidity of the Third Round Rules under the FHA."

HOUSING - NEW YORK

Endrich Realty Corp. v. Rhea

Supreme Court, Appellate Division, First Department, New York - September 24, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 05968

Landlord brought action seeking to compel New York City Housing Authority to reinstate Section 8 subsidy payments.

The Supreme Court, Appellate Division, held that the cause of action accrued, and four-month statute of limitations began to run, when landlord did not receive all of the rent owed.

BONDS - OKLAHOMA

In re Oklahoma Development Finance Authority for Approval of Oklahoma State System of Higher Educ. Master Real Property Lease Revenue Refunding Bonds, Series 2013A, 2013F

Supreme Court of Oklahoma - September 24, 2013 - P.3d - 2013 OK 74

The Supreme Court of Oklahoma took up a challenge to several projects concerning the "Master Lease Program" of the Oklahoma State Regents for Higher Education authorized by 70 O.S.2011 §§ 3206.6–3206.6b. This Act enables the Oklahoma State Regents for Higher Education to provide lease financing for colleges and universities which are part of the Oklahoma State System for Higher Education. The Oklahoma Development Finance Authority (ODFA) sought the approval of the bonds which would be used to build various projects.

The court held that bonds issued by the Regents do not violate the balanced budget provisions because the Legislature has no authority to direct the entity's spending decisions. Because these bonds are payable only by the Regents, they cannot become debts of the state as a matter of law. The Regents have the sole constitutional authority to disburse funds appropriated to them in a lump sum by the Legislature. The Legislature cannot be forced to appropriate funds to repay the bonds

because it has no authority to dictate such a specific expenditure to the Regents.

EMPLOYMENT - OKLAHOMA

King v. Berryhill Fire Protection Dist.

Supreme Court of Oklahoma - September 24, 2013 - P.3d - 2013 OK 76

Employee brought action against fire protection district alleging that he was wrongfully terminated for attempted to stop a training exercise.

The Supreme Court of Oklahoma held that evidence was sufficient to support finding that employee was terminated in retaliation for opposition to unlawful and unsafe training exercise.

Plaintiff King was a paid firefighter for the Berryhill Fire Protection District and worked under the supervision of Fire Chief Downing. Chief Downing wanted to remove structures from real property he owned and had received an estimate for the demolition of structures on his property in the amount of $10,000. Rather than paying to have the structures demolished, Chief Downing began planning a live burn training exercise on the property even though gasoline tank batteries were located on nearby property on three sides of his property, trains operated on tracks on the immediate east side of his property, electrical lines were near the structures, and there was a large tree that could have caught fire. Further, there was no water immediately available at the proposed burn site. At trial, witnesses for both parties testified that the property was not an appropriate site for such a drill.

LIABILITY - TEXAS

City of Houston v. Owens

Court of Appeals of Texas, Houston (14th Dist.) - September 24, 2013 - S.W.3d - 2013 WL 5324015

Driver sued police officer and city, alleging that officer in unmarked police vehicle hit her vehicle.

The City moved to dismiss the employee under section 101.106(e) of the Civil Practice and Remedies Code, which provides: “If a suit is filed under this chapter against both a governmental unit and any of its employees, the employees shall immediately be dismissed on the filing of a motion by the governmental unit.” Tex. Civ. Prac. & Rem.Code Ann. § 101.106(e) (West 2012). The trial court granted the motion and dismissed the employee.

The City then filed a plea to the jurisdiction seeking its own dismissal pursuant to section 101.106(b), which provides: “The filing of a suit against any employee of a governmental unit constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit or recovery by the plaintiff against the governmental unit regarding the same subject matter unless the governmental unit consents.” Id. § 101.106(b). The City argued that by suing the employee as well as the City, Driver had irrevocably elected to sue only the employee.

The appeals court concluded that although 101.106(b) may “immediately and forever bar any suit against the governmental unit,” this bar does not apply if “the governmental unit consents.” “Consent” as used in 101.106(b) includes the express waiver of municipal immunity in section 101.021 of the Civil Practice and Remedies Code. Under that section, a governmental unit is liable

for certain damages arising from the operation or use of a motor-driven vehicle.

ZONING - ALABAMA

City of Prattville v. S & M Concrete, LLC

Court of Civil Appeals of Alabama - September 13, 2013 - So.3d - 2013 WL 4873473

Property owner submitted a variance request. The Board of Zoning Appeals denied the variance request. Property owner appealed. The Circuit Court entered judgment in favor of property owner and rezoned the property. City appealed.

The Court of Civil Appeals held that:

- Property owner did not have a right to continue the nonconforming use of property, and
- The city's denial of property owner's request to change the zoning classification of property from residential to business was not arbitrary or capricious.

Property owner did not have a right to continue the nonconforming use of property, even though predecessor in title had previously used the property zoned residential for a business. The property had previously been used by owner's father as a gravel pit. When owners' parents divorced, owner's mother acquired title to the property. There was no evidence that the property continued to be used as a gravel pit after owner's mother acquired title to the property, and thus the nonconforming use of the property had been discontinued for more than one year.

BONDS - ARIZONA

In re Allstate Life Ins. Co. Litigation

United States District Court, D. Arizona - September 13, 2013 - Not Reported in F.Supp.2d - 2013 WL 5161130

This suit involves the offering and sale of $35 million in revenue bonds (the "Bonds") used to finance the construction of a 5,000–seat Event Center in the Town of Prescott Valley, Arizona. The details of the case have been previously reported herein.

The claims subject to this particular Motion in the ongoing litigation were those of a number of individual Bondholders whose interests are represented by the Indenture Trustee of the Bonds, Wells Fargo. The Defendants in this case are numerous. They include 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.

- Defendants' Motion for Summary Judgment was granted as to the claims of the 53 Bondholders who failed to return questionnaires.
- Wells Fargo was prohibited from bringing claims on behalf of any Bondholders not identified by the June 15, 2012 deadline.
- Defendants' Motion for Summary Judgment on the Arizona Securities Act (ASA) claims was granted as to the secondary market purchasers who did not purchase their Bonds from Defendants, however, Defendant's Motion for Summary Judgment was denied as to the ASA claims of all other Bondholders.
- Defendants' Motion for Summary Judgment on the negligent misrepresentation claims was denied

as to those Bondholders who claimed to have relied on the Fitch Rating or the Official Statements (OS), however, Defendants' Motion for Summary Judgment on the negligent misrepresentation claims was granted as to those Bondholders who relied only on their brokers or only received the OS without any indication that they relied on it.

BONDS - CALIFORNIA

Independent Training and Apprenticeship Program v. California Dept. of Indus. Relations

United States Court of Appeals, Ninth Circuit - September 18, 2013 - F.3d - 13 Cal. Daily Op. Serv. 10, 439

Apprenticeship program and employers filed action against California agencies and officials seeking declaratory and injunctive relief, principally on ground that actions of California Department of Industrial Relations (CDIR) were inconsistent with federal regulations and hence preempted.

The Court of Appeals held that:

- Federal subject-matter jurisdiction existed over preemption claim;
- On issue of first impression, phrase, "Federal purposes," under federal apprenticeship regulations referred to federal laws or actions that in some way addressed apprenticeship or made conformity with federal apprenticeship standards a condition of eligibility for the federal assistance at issue;
- Court did not owe Auer deference to interpretation of apprenticeship regulation by Department of Labor (DOL);
- Interpretation of apprenticeship regulation by DOL was entitled to Skidmore deference;
- CDIR could require contractors on projects funded by Build America Bonds and tax-exempt municipal bonds to comply with California's apprenticeship standards;
- California "needs test" for approval of new apprenticeship programs in building and construction trades did not violate dormant Commerce Clause;
- "needs test" did not violate equal protection; and
- "needs test" did not violate substantive due process.

CDIR could require contractors on projects funded by Build America Bonds and tax-exempt municipal bonds to comply with California's apprenticeship standards, since those bonds did not condition federal assistance provided on compliance with federal apprenticeship standards.

BONDS - CALIFORNIA

Nuveen Mun. High Income Opportunity Fund v. City of Alameda, Cal.

United States Court of Appeals, Ninth Circuit - September 19, 2013 - F.3d - 13 Cal. Daily Op. Serv. 10, 525

The City of Alameda offered of municipal bonds to finance the development of a cable and Internet system. Several Nuveen entities purchased about twenty million dollars worth of the bonds and then lost money on the bonds when the City sold the system several years later. Nuveen brought federal and state securities claims against the City, alleging that the City misrepresented the risks to investors.

The Court of Appeals Nuveen held that Nuveen had not shown a triable issue of fact on the issue of

loss causation. For its federal claims under Section 10b–5 and Section 20(a) of the Securities Exchange Act of 1934, Nuveen's theory that it would not have purchased the securities but for the City's alleged misrepresentation of the risks went only to show reliance, or transaction causation. Missing was the necessary link between the claimed misrepresentations and the economic loss Nuveen suffered.

Although Nuveen pitched its appeal as novel because the notes were traded on an inefficient market, rather than a more familiar efficient market like one of the stock exchanges, this wrinkle did not change the result. Federal securities law requires proof of both transaction and loss causation.

The City had statutory immunity from suit on Nuveen's state claims. California courts have applied § 818.8 of California's Government Claims Act to immunize public entities from liability for misrepresentations sanctioned by those entities. The California Corporate Securities Act did not override that immunity.

MUNICIPAL ORDINANCE - CALIFORNIA

Pacific Shores Properties, LLC v. City of Newport Beach

United States Court of Appeals, Ninth Circuit - September 20, 2013 - F.3d - 13 Cal. Daily Op. Serv. 10, 591

Group homes for recovering alcoholics and drug users, a group home owner, and group home residents brought lawsuits against city challenging the enactment of a city ordinance having the practical effect of prohibiting new group homes from opening in most residential zones, alleging discrimination under the federal Fair Housing Act (FHA), the Americans with Disabilities Act (ADA), and the Equal Protection Clause.

The United States District Court granted summary judgment in favor of the city. Plaintiffs appealed.

The Court of Appeals held that:

- Fact issues precluded summary judgment on plaintiffs' disparate treatment claims;
- Fact issues precluded summary judgment on group homes' damages claim under the FHA; and
- Fact issue precluded summary judgment on one resident's claim for emotional distress damages under the FHA.

Genuine issues of material fact existed as to whether city ordinance was enacted with the discriminatory purpose of harming group homes and, therefore limiting the housing options available to disabled individuals recovering from addiction, and whether the ordinance had an adverse effect on group homes and group home residents, precluding summary judgment on disparate treatment claims.

EMPLOYMENT - FLORIDA

McAlpin v. Criminal Justice Standards and Training Com'n

District Court of Appeal of Florida, First District - September 13, 2013 - So.3d - 2013 WL 4873489

Police chief appealed a final order of the Criminal Justice Standards and Training Commission

suspending his law enforcement certification for 18 months, to be followed by two years' probationary reinstatement.

The District Court of Appeal held that dual roles played by attorney as staff counsel and prosecutor deprived police chief of an impartial hearing.

Dual roles played by attorney as staff counsel, in which capacity he offered advice and recommendations to Criminal Justice Standards and Training Commission, and as prosecutor, in which capacity he advocated case against police chief and pursued the maximum administrative penalty, deprived police chief of an impartial hearing and required reversal of suspension order. While the heightened staff penalty recommendation was not ultimately implemented, it was clear from the record that the prosecution was given enhanced access to the decision-making body, which undermined the Commission's function as an unbiased, critical reviewer of the facts.

EMPLOYMENT - FLORIDA

City of Miami v. Martinez-Esteve

District Court of Appeal of Florida, Third District - September 18, 2013 - So.3d - 2013 WL 5226097

Employee filed a complaint for declaratory judgment, injunctive relief, and monetary damages against the city, which had treated his project manager position as if it was unclassified and had never created an eligibility list for the position.

The District Court of Appeal held that, because city charter did not list the position of project manager as an unclassified position, it was a classified position, and having failed to amend city charter to include project manager position in the list of unclassified positions, city could not refuse to afford employee, who was project manager, the benefits of the classified position because of the city's lapses. Thus, city was estopped from claiming any advantage based on its own acts and omissions.

EMPLOYMENT - KENTUCKY

Reeves v. City of Georgetown, Ky.

United States Court of Appeals, Sixth Circuit - September 12, 2013 - Fed.Appx. - 2013 WL 4859654

Police chief of the City of Georgetown in Kentucky was removed from his position by the mayor. The chief alleged that he was terminated in violation of a City of Georgetown ordinance that stated that he could be terminated only for cause, and only by the city council.

The police chief contended that the local ordinance was preempted by the Home Rule Statutes, which provide that the mayor "shall be the appointing authority with power to appoint and remove all city employees, including police officers, except as tenure and terms of employment are protected by statute, ordinance or contract and except for employees of the council."

The court of appeals found no conflict between the two regulations. The Home Rule Statutes give the mayor authority to appoint and remove all city employees, although the statute does not state that such power is solely left to the mayor. The Home Rule Statutes does not strip the mayor of his

or her authority to appoint and remove the chief of police; rather, a plain reading of the local ordinance indicates that the city ordinance simply sets forth another option for a valid termination of the chief of police by the city council for cause. The local ordinance does not state that the mayor is stripped of his or her removal authority, nor that the city council has the sole authority to terminate the police chief. Because the police chief was terminated by the mayor, which is authorized, his claims were properly dismissed.

MUNICIPAL ORDINANCE - LOUISIANA

DMK Acquisitions & Properties, L.L.C. v. City of New Orleans

Court of Appeal of Louisiana, Fourth Circuit - September 18, 2013 - So.3d - 2013-0405 (La.App. 4 Cir. 9/18/13)

As a result of Hurricane Katrina, the Property, which was the former location of the Lake Terrace Shopping Center (a strip mall), sustained extensive damage. DMK purchased the Property for $1.35 million. At the time of the purchase, the hurricane damage to the Property had not been repaired. The City awarded DMK an Economic Development Fund grant totaling $250,000, which was intended to help bring the Property back into commerce.

The City commenced a code enforcement proceeding against DMK. The City alleged that DMK was in violation of its municipal ordinances prohibiting public nuisance and blighted property. The City's administrative hearing officer (HO) found DMK guilty of the charged violations and imposed various fines.

DMK appealed, alleging procedural, statutory, and constitutional contentions relating to the administrative hearing, essentially: (i) witnesses not being required to testify under oath at the administrative hearing, and (ii) hearsay evidence being accepted and the inability to cross-examine witnesses.

The appeals court found no violations of DMK's rights, upholding the judgment against it.

SCHOOLS - LOUISIANA

London v. East Baton Rouge Parish School Bd.

Court of Appeal of Louisiana, First Circuit - September 13, 2013 - So.3d - 2013-0034 (La.App. 1 Cir. 9/13/13)

Wheelchair-bound school visitor who was injured when his wheelchair tipped while rolling over a speed bump in high school parking lot brought action against parish school board for negligence and violation of the ADA. The Nineteenth Judicial District Court awarded summary judgment to school board on the ADA claim, and designated its judgment as final for purposes of appeal. Visitor appealed.

The Court of Appeal held that school board did not intentionally discriminate against visitor, as necessary to support compensatory damages under the ADA.

Even if placement of the speed bumps violated an ADA guideline, nothing suggested that school board was aware of any such violation, there had been no prior accidents similar to that suffered by visitor, and school board set about removing the speed bumps after visitor's accident.

EMINENT DOMAIN - MISSOURI

St. Louis County v. River Bend Estates Homeowners' Ass'n

Supreme Court of Missouri, En Banc - September 10, 2013 - S.W.3d - 2013 WL 4824030

County filed condemnation petition, and court-appointed condemnation commissioners awarded damages to property owners. Owners filed exceptions to award and requested jury trial. After jury assessed damages for owners of $1.3 million, the Circuit Court added $650,000 for heritage value to jury's verdict. County appealed.

Holdings: The Supreme Court of Missouri held that:

- Parties' stipulation to the substance of nine unrecorded bench conferences eliminated any prejudice to county, and inaudible parts of trial transcript were not prejudicial to county;
- Heritage value statute was irrelevant to jury's task of determining fair market value of subject property, and, therefore, exclusion of evidence of heritage value statute from jury's consideration was proper;
- Purported statement by owner during hearing before condemnation commissioner, about amount for which he would have settled during negotiations with county, was not admissible at jury trial as a prior inconsistent statement or an admission against interest;
- Evidence regarding price that an owner of adjacent property received when, years after selling some of that property to real estate developer, he sold the portion of the property he had retained for his residence was inadmissible;
- Proposed opinion testimony by two city employees regarding effect that challenges to the development of subject property would have on its value was subject to the discovery rule regarding disclosure of expert testimony regarding facts known and opinions developed in anticipation of litigation;
- Substantial evidence supported jury's award of $1.3 million as the fair market value of subject property; and
- Heritage value statute, requiring additional compensation of 50 percent of fair market value of property that has been owned by a family for 50 or more years, does not violate state constitution.

Heritage value statute did not violate constitutional prohibition against using public funds for a private benefit. Primary object of the expenditure in the statute was to compensate a class of persons whose property was acquired through eminent domain for the benefit of the public, and, therefore the compensation authorized by that statute was legal, notwithstanding that it also involved as, an incident, an expense that, standing alone, would not be lawful.

ZONING - NEW YORK

Nickart Realty Corp. v. Southold Town Planning Bd.

Supreme Court, Appellate Division, Second Department, New York - September 18, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 05909

Property owner brought declaratory action against town planning board challenging the imposition of an additional requirement, after the conditional preliminary approval of the subdivision plan, that owner submit proof of compliance with provision limiting transfer of sanitary flow credits or of a variance by county department of health services that was not based on the credit transfer. The Supreme Court found imposition of the additional requirement arbitrary and capricious. Board appealed.

The Supreme Court, Appellate Division, held that board could not impose additional requirement after granting conditional preliminary approval.

TAX - NEW YORK

Trump Village Section 3, Inc. v. City of New York

Supreme Court, Appellate Division, Second Department, New York - September 18, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 05894

On appeal, the court was asked to determine whether a taxable transfer occurs under Tax Law § 1201(b) and Administrative Code of the City of New York § 11–2102(a) when a residential housing cooperative corporation amends its certificate of incorporation as a part of its voluntary dissolution, reconstitution, and termination of participation in the Mitchell–Lama housing program (see Private Housing Finance Law § 10 et seq.).

The court concluded that, that because there is no transfer or conveyance of any real property or an interest in real property under those circumstances, no taxable event occurs.

LIABILITY - NEW YORK

Velez v. City of New York

United States Court of Appeals, Second Circuit - September 18, 2013 - F.3d - 2013 WL 5225784

Mother, representing estate of her son who was murdered for providing confidential tip, brought action alleging that municipality and police officers were liable for her son's death.

The Court of Appeals held that:

- Issue of whether municipality and police officers had special relationship with informant properly was submitted to the jury and
- Municipality did not acquire knowledge that inaction could lead to harm to informant.

To establish a special relationship beyond the duty that is owed to the public generally, in the context of a negligence claim under New York law against a municipality or its employees acting in a governmental capacity, four elements must be present: (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.

Municipality did not acquire knowledge that inaction could lead to harm to informant, and thus informant's estate could not establish a special relationship beyond duty that was owed to public generally on negligence claim under New York law against municipality acting in governmental capacity, where police officers who dealt with informant did not know that he was in danger.

ELECTIONS - NEW YORK

Hayon v. Greenfield

Supreme Court, Appellate Division, Second Department, New York - September 18, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 05905

Political candidate commenced proceeding to validate petition designating him as candidate in primary election for party's nomination for office as member of city council, and to invalidate designating petition of opponent. The Supreme Court entered final order validating candidate's petition and declining to invalidate opponent's petition. City's board of elections and candidate appealed and cross-appealed.

The Supreme Court, Appellate Division, held that:

- Candidate's petition substantially complied with statutory and regulatory requirements, and
- Opponent's petition also satisfied statutory requirements.

Amended cover sheet of candidate's petition substantially complied with statutory and regulatory requirements, despite candidate listing two volumes on his amended cover sheet which were not filed as part of his designating petition. In any event, candidate was not actually notified of, and given opportunity to cure, purported "extra volumes" defect, as required by rules of city's board of elections.

Designating petition submitted by candidate for position as member of city council complied with statutory requirements by indicating each signer's respective street address and county within in which each signatory resided.

LIABILITY - NEW YORK

Begley v. City of New York

Supreme Court, Appellate Division, Second Department, New York - September 18, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 05867

Parents of developmentally disabled student who died after suffering anaphylactic reaction to blueberries at private school, individually and as administrators of student's estate, brought action against city and its department of education, school, and registered nurse, alleging that defendants negligently permitted student to become exposed to blueberries, breached their duty to monitor, supervise, and control student, failed to exercise reasonable care in protecting student from injury, and failed to properly diagnose, manage, and treat student's allergic reaction.

The Supreme Court, Appellate Division, held that:

- Mandate to provide free and appropriate public education (FAPE) did not expand department's duty of care;
- Department was not vicariously liable for acts of student's private nurse;
- School provided adequate supervision of student;
- Deficiencies in school's supervision of student was not proximate cause of his death;
- School responded reasonably to student's anaphylactic reaction;
- Even if school's nurse owed duty of care to student, she did not depart from good and accepted practice; and
- Private nurse did not depart from good and accepted practice.

ZONING - NEW YORK

Huszar v. Bayview Park Properties, LLC

Supreme Court, Appellate Division, Second Department, New York - September 18, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 05906

Petitioners commenced proceeding under Article 78, seeking review of two determinations of town's board of zoning appeals granting applications for certain area variances submitted by member on behalf of limited liability company (LLC) property owner. The Supreme Court granted the petition and annulled the determinations. Appeal was taken.

The Supreme Court, Appellate Division, held that:

- Board had jurisdiction over the applications, and
- Board's determination had a rational basis and was not arbitrary and capricious.

Town's board of zoning appeals had jurisdiction over applications for area variances submitted by member of LLC property owner, where: 1) board was clearly aware that LLC was owner of the property, and that member was acting on LLC's behalf; and 2) each application was accompanied by an owner's affirmation form which reflected that LLC was owner of the property, and that member was its agent.

Determination of town's board of zoning appeals granting applications for certain area variances submitted by member on behalf of LLC property owner had a rational basis and was not arbitrary and capricious, where the board properly balanced the requisite statutory factors, and it found that benefit to the LLC outweighed detriment to the health, safety, and welfare of the neighborhood or community.

MUNICIPAL FINANCE - VERMONT

Citibank N.A. v. City of Burlington

United States District Court, D. Vermont - September 13, 2013 - Not Reported in F.Supp.2d - 2013 WL 4958645

The City of Burlington entered into a Master State and Municipal Lease/Purchase Agreement (the "MLA") under which it secured funds for the lease-to-purchase of telecom equipment and for the construction and operation of a city-wide fiber optic network. The City has used the network to provide voice, data, and cable television services through an entity known as Burlington Telecom ("BT"). After Burlington stopped appropriating funds to make payments under the MLA, Citibank N.A. filed a fifteen-count complaint raising a variety of claims against Burlington and McNeil, Leddy & Sheahan, P.C. ("McNeil"), which served as counsel to the City.

Burlington alleges that prior to entering the MLA, the City expressed concern that the MLA might prevent it from seeking financing from other lenders in the event that it required additional funds for BT's expansion within the City and to surrounding areas. According to Burlington, it was provided assurances that CitiCapital would provide such financing in the event it was required. According to Burlington, CitiCapital in effect promised to proceed in good faith and work together with Burlington when the additional financing became necessary.

In February 2008, Burlington sought additional funding from CitiCapital. At around the same time,

though, Citibank entered negotiations to sell CitiCapital's municipal leasing portfolio. In advance of the prospective sale, CitiCapital instituted a moratorium on new business and, according to Burlington, simply refused to negotiate new financing terms. Burlington did not obtain additional funds from CitiCapital, and after the credit market collapsed in the fall of 2008, no other financing options materialized. Thereafter, Burlington stopped making payments under the MLA and this lawsuit ensued.

At the motions stage of the proceeds, the court analyzed whether a promise to negotiate in good faith is illusory or enforceable. The court ultimately concluded that such promises may in theory be enforceable, but not under these circumstances due to the absence of anything other than the vaguest of assurances.

The court did indicate, however, that Burlington might succeed under a theory of promissory estoppel.

The court also ruled on a number of additional motions to dismiss and affirmative defenses and remanded for further proceedings.

EMINENT DOMAIN - VIRGINIA

PKO Ventures, LLC v. Norfolk Redevelopment and Housing Authority

Supreme Court of Virginia - September 12, 2013 - S.E.2d - 2013 WL 4854363

City redevelopment and housing authority filed petition to condemn nonblighted property within approved redevelopment project. Owner of subject property filed answer and grounds of defense to condemnation. The Circuit Court granted redevelopment and housing authority's motion to strike owner's objections and affirmative defenses, and authorized taking of property by eminent domain. Owner appealed.

The Supreme Court of Virginia held that:

- Redevelopment and housing authority did not have statutory authority, after July 1, 2010, to acquire by eminent domain nonblighted property within redevelopment project by merely filing petition for condemnation prior to July 1, 2010, and
- Application of statute limiting exercise of eminent domain to eliminate blight to property that was itself blighted did not deprive redevelopment and housing authority of any vested right in nonblighted property.

PUBLIC RECORDS ACT - ALASKA

Griswold v. Homer City Council

Supreme Court of Alaska - September 13, 2013 - P.3d - 2013 WL 5020659

In February 2008, the Homer City Council approved a bond proposition and issued an election brochure entitled "Questions & Answers about Homer Town Square and the New City Hall." Homer resident Frank Griswold filed a complaint with the Alaska Public Offices Commission, alleging that the brochure constituted the use of municipal funds to influence the outcome of a ballot measure without an appropriation ordinance in violation of AS 15.13.145.1 The commission agreed with Griswold and fined the City $400.

Griswold filed a public records request with City Manager requesting any documents relating to the brochure. The City of Homer eventually produced all of the emails requested, except for privileged emails and deleted emails that could not be recovered without expensive software. Griswold sought review of city manager's response to his public records request. The Superior Court affirmed city council's determination that manager had made good faith effort to comply with request. Griswold appealed.

The Supreme Court of Alaska held that:

- City manager made good faith effort to locate requested records;
- City did not destroy records in violation of Public Records Act;
- Trial court did not violate requestor's right to a hearing;
- Trial judge did not indicate an appearance of partiality; and
- Award of attorney's fees to city was reasonable.

City manager made a good faith and reasonable effort to locate records identified in requestor's public records request for emails related to public bond proposition so as to comply with city code provision related to records requests. City's computer system manager explained that he spent 40-50 hours searching for the email records that were requested by requestor, he stated that he searched the backup system and computer hard drives, and he explained that he used state-of-t-e-art retrieval software. The search did not obtain all responsive records, but the procedures necessary to obtain the remaining records would have required five to ten thousand dollars of additional forensic software and several additional weeks of work.

ZONING - GEORGIA

City of Statesboro v. Dickens

Supreme Court of Georgia - September 9, 2013 - S.E.2d - 2013 WL 4779204

After city's Zoning Board of Appeals affirmed city's denial of property owners' application for building permit to finish construction on partially constructed job that exceeded scope of previously issued permit, owners filed petition for writ of mandamus to compel city to issue permit.

The Supreme Court of Georgia held that:

- Exclusive remedy for obtaining judicial review of decision of Zoning Board of Appeals was by writ of certiorari, not writ of mandamus, and
- Owners had 30 days from date city Zoning Board of Appeals rendered decision affirming city's denial of building permit to obtain judicial review of decision.

ANNEXATION - ILLINOIS

Board of Educ. of Community High School Dist., No. 99, Du Page County v. Regional Bd. of School Trustees of Du Page County

Appellate Court of Illinois, Second District - September 4, 2013 - Not Reported in N.E.2d - 2013 IL App (2d) 121422

Families formed a committee pursuant to sections 7–1 and 7–6 of the School Code (105 ILCS 5/7–1, 7–6 (West 2010)), and filed a petition with the Regional Board of School Trustees seeking to detach

16 parcels within their subdivision (Territory) from the boundaries of Districts 58 and 99 and annex the Territory into the boundaries of Districts 53 and 86.

After an exhaustive analysis, the appeals court held that:

"In light of the evidence of the Territory's connection to the Oak Brook community; the preference of Territory residents to attend the annexing schools; the closer distance of the annexing district's elementary schools; the fraction of the detaching schools' budget that would be affected by a boundary change; and the lack of effect the detachment would have on the ability of the districts to meet State standards of recognition, the Board's conclusion that the overall benefit to the Territory and annexing districts from granting the petition clearly outweighs the resulting detriment to Districts 58 and 99 and the surrounding community is not against the manifest weight of the evidence. Therefore, we affirm the judgment of the Du Page County circuit court affirming the Board's decision to grant the petition to detach the Territory from the boundaries of Districts 58 and 99 and annex the Territory into the boundaries of Districts 53 and 86."

EMPLOYMENT - INDIANA

Peru City Police Dept. v. Martin

Court of Appeals of Indiana - September 3, 2013 - N.E.2d - 2013 WL 4714275

Former police officer sought review of decision of city public safety board terminating his employment for alleged excessive force and conduct unbecoming an officer.

The Court of Appeals held that city public safety board's decision to terminate officer for use of excessive force and conduct unbecoming an officer was supported by substantial evidence.

In review of a municipal safety board's decision, an appellate court does not conduct a de novo trial, but defers to the fact-finding of the agency, so long as the findings are supported by substantial evidence. "Substantial evidence" means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Neither the trial court nor the appellate court is permitted to reweigh the evidence or reassess witness credibility.

An aggrieved party who is attacking the evidentiary support for the agency's findings bears the burden of demonstrating that the agency's conclusions are clearly erroneous. An arbitrary and capricious decision is one which is patently unreasonable and made without consideration of the facts and in total disregard of the circumstances and lacks any basis which might lead a reasonable person to the same conclusion.

Officers were dispatched to nursing home after nurse called 911 and requested assistance to transport a combative patient to a hospital. After ordering the staff to stay away, the officers entered the room of a sixty-four-year-old Alzheimer's patient. They found patient sitting in a chair and staring straight ahead. He was naked except for his socks. The officers commanded patient to get on a gurney but he did not comply. Rather, he began "shuffling" toward officer.

Officer applied stun gun to patient five times with a total deployment time of 31 seconds, although patient was handcuffed after third stun gun application.

FIRST AMENDMENT - MAINE

Callaghan v. City of South Portland

Supreme Judicial Court of Maine - September 10, 2013 - A.3d - 2013 ME 78

Two part-time city employees filed § 1983 civil rights action against city, seeking declaratory and injunctive relief with regard to provisions of city's personnel policy prohibiting a city employee from seeking election to or serving on city school board, and from engaging on their own time in certain political activity in regard to school board elections

The Supreme Judicial Court of Maine held that, as applied to the two employees, city's personnel policy violated First Amendment protections of free speech. Running for election to school board was speech involving a matter of public concern, and city failed to demonstrate an actual impact on municipal government operations that would outweigh employees' First Amendment interest. City could lawfully prohibit certain employees, including city manager, from running for the board, and it was best left to city officials than to Supreme Judicial Court to draw dividing line separating those employees who could lawfully be barred from running from those who could not.

TORT CLAIMS ACT - MARYLAND

Rounds v. Maryland Nat. Capital Park and Planning Com'n

Court of Special Appeals of Maryland - September 9, 2013 - A.3d - 2013 WL 4788171

Property owners brought action against Maryland National Capital Park and Planning Commission, alleging that Commission had wrongfully refused to issue addresses to homeowners, and against owners and developers of neighboring property, alleging that owners and developers had wrongfully attempted to prevent plaintiffs' access and use of their properties, and seeing declaratory judgment that plaintiffs had an easement to use a road to access their properties.

The Court of Special Appeals held that:

- 180-day notice requirement of Local Government Tort Claims Act (LGTCA) applied to state constitutional action against Commission;
- Plaintiffs failed to show good cause to excuse notice requirement;
- Plaintiffs failed to join necessary parties, warranting dismissal of action.

A plaintiff in an action against a state agency has shown good cause to excuse compliance with the LGTCA notice requirement where the plaintiff: (1) prosecuted his or her claim with that degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances, or (2) delayed because government representatives made misleading representations to the plaintiff.

VOTING - MINNESOTA

Minnesota Voters Alliance v. Ritchie

United States Court of Appeals, Eighth Circuit - August 2, 2013 - 720 F.3d 1029

Persons eligible to vote in Minnesota, and organizations representing such persons, brought action against various Minnesota state and county officials challenging the process by which the officials confirmed the eligibility of election day registrants (EDRs), and a provision of the Minnesota Constitution denying the right of persons under guardianship to vote, as well as the sufficiency of

notice afforded to such persons under certain Minnesota statutes.

The Court of Appeals held that:

- Plaintiffs failed to state a § 1983 claim challenging the Minnesota election procedure;
- Plaintiffs lacked standing to challenge provision of Minnesota Constitution denying the right of persons under guardianship to vote; and
- Plaintiffs lacked standing to challenge the adequacy of notice afforded by Minnesota's statutory procedures for adjudicating wards' voting rights.

SCHOOLS - MISSISSIPPI

Swindle v. Neshoba County School Dist.

Court of Appeals of Mississippi - September 10, 2013 - So.3d - 2013 WL 4799046

Father of student filed action against school district pursuant to Mississippi Tort Claims Act (MTCA), stemming from incident in which his son was injured during altercation following school-sponsored football practice.

The Court of Appeals held that:

- School district had ministerial duty to supervise students when returning to locker room, and
- Fact issue as to whether school district breached duty precluded summary judgment.

School district had ministerial duty under statute prescribing responsibilities of school personnel and under school's handbook to supervise students returning to locker room after football practice, and did not possess discretion to exercise judgment regarding how to supervise students. Statute required district to maintain discipline, and handbook defined affirmative duty imposed on school personnel to supervise students at all times during extracurricular activities, stating that personnel was responsible for conduct and control of students, for which there was no exclusion for teachers or coaches of football team.

SPECIAL ASSESSMENTS - MISSOURI

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

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

The Kansas City Downtown Streetcar Transportation Development District was formed in 2012 pursuant to the Missouri Transportation Development District Act, §§ 238.200 to 238.280.2 The Streetcar District was formed for the purpose of constructing and operating a streetcar line to run for approximately two miles along Main Street in downtown Kansas City. The construction and operation of the streetcar line is to be funded, in substantial part, by special assessments on real property located within the District, and by a sales tax, not to exceed one percent, on retail sales within the District.

Property owners within the District sued, claiming that the real-property assessments and sales taxes imposed within the District are unlawful.

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

MUNICIPAL ORDINANCE - MISSOURI

Unverferth v. City of Florissant

Missouri Court of Appeals, Eastern District, Division I - September 10, 2013 - S.W.3d - 2013 WL 4813851

Appellants received red light camera tickets from city stating that they had committed a "Violation of Public Safety (Failure to Stop at a Red Light)" in violation of a city municipal ordinance (the "Ordinance"). Appellants challenged the validity of the Ordinance in a six-count petition. Appellants alleged the Ordinance violated their due process rights and the privilege against self-incrimination, sought declaratory judgment regarding the validity and constitutionality of the Ordinance and its enforcement, and asserted a claim of civil conspiracy against city and American Traffic Solutions ("ATS"). Claims of unjust enrichment were also asserted against city and ATS.

The appeals court reversed and remanded that portion of the trial court's judgment declaring the Ordinance valid and dismissing because it was enacted with proper authority and is consistent with state law. Appellants pleaded that city exceeded its authority under its police power to enact the Ordinance because the purpose of the Ordinance was to raise municipal revenue and not to regulate traffic or promote safety. Whether the Ordinance is a revenue-generating scheme advanced under the guise of city's police power is a factual question not appropriate for resolution on city's motions to dismiss.

In addition, Appellants adequately pleaded, and the appeals court held, that the Ordinance conflicts with Missouri law because it regulates moving violations without requiring the municipal court to report the violation to the Director of Revenue as required by Missouri statute. The appeals court reversed the judgment of the trial court dismissing Appellants' claim for declaratory judgment because the Ordinance conflicts with state statutes regulating moving violations.

With regard to Appellants' claims relating to procedural due process, Appellants adequately pleaded that the Ordinance denied them notice, a fair hearing and adequate procedural protections as required under Missouri Supreme Court Rules and Article I, Section 10 of the Missouri Constitution. Whether the Ordinance, as enacted or applied, violated Appellants' procedural due process rights is a factual question that is not appropriate for resolution on city's motions to dismiss. Appellants are entitled to pursue discovery and present facts in support of their properly pleaded allegations. Accordingly, the appeals court reversed that portion of the trial court's judgment dismissing the allegations contained in Counts I and IV relating to the denial of adequate procedural protections, notice, and fair hearing, and remand those issues to the trial court for proceedings consistent with this opinion.

OPEN MEETINGS LAW - MONTANA

Zunski v. Frenchtown Rural Fire Dept. Bd. of Trustees

Supreme Court of Montana - September 10, 2013 - P.3d - 2013 MT 258

Requestor brought action against board of trustees of rural fire district alleging violations of open meeting law and rights to know and participate stemming from hiring of trustee as interim fire chief.

The Supreme Court of Montana held that:

- Challenge to illegal meeting was moot;
- Capable of repetition yet evading review exception to mootness doctrine did not apply;
- Voluntary cessation exception to mootness doctrine did not apply; and
- Board complied with records request in a reasonable and timely manner.

Pursuant to the open meetings law, a governing body can remedy the illegality of the meeting without judicial involvement by making a new decision that is not based on anything from the illegal meeting. Rural fire district board of trustees' subsequent legal meeting rendered moot challenge to legality of previous meeting pursuant to the open meetings law, where the subsequent meeting's compliance with the open meeting and public participation laws remedied any earlier violations of those laws.

ZONING - NEW MEXICO

State, City of Albuquerque v. Pangaea Cinema LLC

Supreme Court of New Mexico - September 12, 2013 - P.3d - 2013 WL 4857693

Art-house movie theater appealed decision of the Metropolitan Court finding theater guilty of criminal zoning violation after it showed one or more erotic or pornographic films during weekend-long "Pornotopia" film festival.

The District Court held that theater had committed zoning violation, rejected theater's argument that zoning ordinances were unconstitutional as applied to it, and imposed criminal fine of $500.

The Supreme Court of New Mexico held that theater was not an "adult amusement establishment" within the meaning of zoning ordinance prohibiting adult amusement establishments in zone in which theater operated.

Although films shown during "Pornotopia" festival qualified as adult "amusement or entertainment" under ordinance, theater was not an "adult amusement establishment" in the ordinary meaning of the term. The presumed intent of ordinance was to regulate businesses of a clearly adult nature to avoid or quarantine negative secondary effects of adult businesses, and ordinance contained no indication that it was applicable to venues that only occasionally showed pornographic films.

EMPLOYMENT - NEW YORK

Board of Educ. of Hauppauge Union Free School Dist. v. Hogan

Supreme Court, Appellate Division, Second Department, New York - September 11, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 05816

Michael P. Hogan submitted an application to the Hauppauge Union Free School District seeking

employment as a physical education teacher. In his application, which he certified to be true and complete, Hogan failed to disclose that he had previously held a probationary teaching position with another school district. The District claims that Hogan resigned from this previous position after allegations were made that he used corporal punishment and he was told that he would not receive tenure.

The District preferred three disciplinary charges against Hogan pursuant to Education Law § 3020–a. Charge No. 1 alleged that Hogan was guilty of misconduct because he had presented an employment application to the District which was false because he knowingly omitted the fact that he had been a probationary teacher at another school district, and that Hogan presented the employment application with the knowledge or belief that it would be filed with the District. Charge No. 1 further alleged that this conduct was in violation of Penal Law § 175.30, which defines the crime of offering a false instrument for filing in the second degree.

Hogan subsequently moved to dismiss Charge No. 1, contending that it was time-barred by Education Law § 3020–a, which provides that no disciplinary charge may be brought more than three years after the occurrence of the alleged incompetency or misconduct, "except when the charge is of misconduct constituting a crime when committed" (Education Law § 3020–a[1]). The hearing officer designated as arbitrator granted Hogan's motion, concluding that the District had failed to plead sufficient facts to establish that Hogan committed a violation of Penal Law § 175.30 by knowingly omitting his prior position as a probationary teacher from his employment application, and that the District could therefore not invoke the exception to the three-year limitations period that applies when the charged misconduct constitutes a crime. The District thereafter commenced this proceeding pursuant to CPLR article 75 and Education Law § 3020–a seeking to vacate the award dismissing Charge No. 1 on the ground that it was arbitrary and capricious, and lacked a rational basis. The Supreme Court granted the District's petition and reinstated Charge No. 1.

The Supreme Court, Appellate Division, held that:

- Arbitration award dismissing one of three charges against applicant was a final determination subject to judicial review, and
- Arbitrator's determination was arbitrary and capricious.

Arbitrator's determination was arbitrary and capricious, where the charge contained allegations that applicant presented an employment application to school district which was false because he knowingly omitted fact that he had been a probationary teacher at another school district, and that he presented the employment application with knowledge or belief that it would be filed with the district.

EMPLOYMENT - NEW YORK

Chisholm v. Hochman

Supreme Court, Appellate Division, Second Department, New York - September 11, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 05818

Teacher commenced proceeding under Article 78, seeking review of school district's determination terminating his employment.

The Supreme Court, Appellate Division, held that teacher did not acquire a tenured position by estoppel.

Tenure may be acquired by estoppel when a school board accepts the continued services of a teacher or administrator, but fails to take the action required by law to either grant or deny tenure prior to the expiration of the teacher's probationary term. In this case, teacher did not acquire a tenured position by estoppel, where he had agreed to extend his probationary period for an additional year and that additional probationary period had not expired when school district terminated his employment.

BONDS - OHIO

Kozel v. Andrews

Court of Appeals of Ohio, Fifth District, Tuscarawas County - September 5, 2013 - Slip Copy - 2013 -Ohio- 3887

Twin City Hospital is a small rural acute care hospital located in Dennison, Tuscarawas County, Ohio. Twin City has served the community for over one hundred years.

On October 13, 2010, Twin City filed Chapter 11 Bankruptcy. The creditors of Twin City duly elected Appellant as Trustee, replacing the originally appointed Trustee. The proceeding under Chapter 11 was subsequently converted to a Chapter 7 proceeding.

Appellant subsequently filed a complaint in the U.S. Bankruptcy Court against Appellees – former board members of Twin City. Appellant asserted Appellees acted improperly by issuing approximately $17.3 million in tax exempt revenue bonds to fund new construction and renovations to Twin City and to refinance the hospital's outstanding long term obligations while its finances were in poor condition.

The case was moved to the state court, which granted summary judgment in favor of Appellees. The trial court found Appellant had failed to establish by clear and convincing evidence any Appellee "was conscious that Board approval of the bond transaction would, in all probability, result in the failure of Twin City Hospital."

Appellant appealed, contending that the trial court incorrectly held him to a "willful" – rather than "reckless" – standard of care, thereby requiring a higher threshold showing to overcome summary judgment. The appeals court agreed, reversing and remanding.

DEVELOPER IMPACT FEES - SOUTH CAROLINA

Home Builders Ass'n of South Carolina v. School Dist. No. 2 of Dorchester County

Supreme Court of South Carolina - September 11, 2013 - S.E.2d - 2013 WL 4835458

2009 Act No. 99 permits school district to impose an impact fee to be paid by developers on "new residential dwelling units constructed within the school district." The Board of Trustees of Dorchester School adopted the impact fee by resolution effective June 23, 2009. An organization of home builders, brought a declaratory judgment suit seeking injunctive relief against the school district challenging the constitutionality of the Act under provisions of the state constitution requiring statewide uniformity (S.C. Const. art. VIII, § 14(6))1 and limiting special legislation (S.C. Const. art. III, § 34).

This case was an appeal from an order granting respondents' motion for a judgment on the pleadings under Rule 12(c), SCRCP, and dismissing appellants' complaint. The Supreme Court found issues of fact raised by the complaint that must be resolved before the constitutionality of 2009 Act No. 99 could be determined, it reversed and remanded for further proceedings.

ZONING - WASHINGTON

International Longshore and Warehouse Union, Local 19 v. City of Seattle

Court of Appeals of Washington, Division 1 - September 9, 2013 - P.3d - 2013 WL 4788953

Chris Hansen, a private investor, acquired land on which he proposed to develop and operate a new sports arena south of downtown Seattle. Hansen approached the city of Seattle and King County proposing that they participate in the development and ownership of the arena on his property. Last December, King County and the city signed a "Memorandum of Understanding" that contemplates the use of public funds for an arena on Hansen's proposed site. The memorandum lays out the particulars of how the venture will be financed and operated if King County and Seattle ultimately decide to participate in it. Environmental review of the proposal as required by the State Environmental Protection Act (SEPA), chapter 43.21C RCW, is currently underway.

In this lawsuit, the International Longshore and Warehouse Union, Local 19 (ILWU), contended that by signing the memorandum before analyzing the environmental consequences of the project, the city and county had illegally stacked the deck in favor of the south Seattle location.

The trial court dismissed the suit on summary judgment and the appeals court affirmed. The memorandum did not predetermine where an arena will be built or even that an arena will be built at all. Whether the city and county will agree to Hansen's proposal is a decision expressly reserved until after environmental review is complete. Because there has not yet been a government "action" as that term is defined by SEPA, the courts are not a forum for the union's opposition to Hansen's proposal.

ZONING - CONNECTICUT

Musco Propane, LLP v. Town of Wolcott Planning and Zoning Com'n

United States Court of Appeals, Second Circuit - September 3, 2013 - Fed.Appx. - 2013 WL 4711633

Propane distributor brought suit against town, claiming that its rights under the First Amendment and the Equal Protection and Due Process Clauses of the Fourteenth Amendment were violated when the town denied it certain zoning permits and issued a Cease and Desist Order requiring it to halt its wholesaling of propane.

The court concluded that propane distributor had failed to adduce sufficient evidence from which a rational juror could conclude that the actions of the defendants amounted to a violations of its rights under the Constitution of the United States.

UTILITIES - GEORGIA

T-Mobile South, LLC v. City of Milton, Ga

United States Court of Appeals, Eleventh Circuit - September 5, 2013 - F.3d - 2013 WL 4750549

Mobile phone service provider brought action claiming that city's denial of its cell phone tower use permit applications violated the writing requirement of the Telecommunications Act (TCA). The United States District Court for the Northern District of Georgia ruled that the city violated the TCA and permanently enjoined it from denying phone service provider's applications. City appealed.

The Court of Appeals held that:

- TCA provision requiring cell phone tower construction permit application denials to be in writing does not require decision to be in a separate writing, and
- City council hearing transcripts, letters, and hearing minutes pertaining to denial of mobile phone service provider's cell phone tower use permit applications satisfied TCA writing requirement for application denials.

Under TCA provision requiring state or local government's denial of cell phone tower construction permit application to be in writing and supported by substantial evidence, there must be reasons for the denial that can be gleaned from the denial itself or from the written record. Provision neither expresses nor implies any requirement that the reasons for denial must be stated in the letter or some other document that announces the decision, if there is a separate document doing that, or prohibit having the reasons stated only in the hearing transcript or minutes.

TCA provision requiring state or local government's denial of cell phone tower construction permit application to be in writing and supported by substantial evidence does not require decision to be in a separate writing, a writing separate from the transcript of the hearing and the minutes of the meeting in which the hearing was held, or a single writing that itself contains all of the grounds and explanations for the decision. To the extent that the decision must contain grounds or reasons or explanations, it is sufficient if those are contained in a different written document or documents that the applicant can access, and all of the written documents should be considered collectively in deciding if the decision is in writing.

Planning commission and city council hearing transcripts, and city council letters and hearing minutes, pertaining to city's denial of mobile phone service provider's cell phone tower use permit applications, were sufficient to satisfy TCA requirement that application denials be in writing, even though denial was not announced or explained in a separate document. Hearing transcripts included recommendations and reasons for decisions, letters notified service provider of decisions on applications, hearing minutes recounted all of the reasons for decisions, and service provider had access to all of the documents before its deadline for filing its lawsuit.

ANNEXATION - ILLINOIS

Board of Educ. of Du Page High School Dist. 88 v. Pollastrini

Appellate Court of Illinois, Second District - August 29, 2013 - N.E.2d - 2013 IL App (2d) 120460

Pursuant to the Illinois School Code (School Code) (105 ILCS 5/1–1 et seq.), parents filed a petition with the Regional Board of School Trustees of Du Page County (the Board) for detachment. The petitioners sought to detach the Timber Trails area from Districts 48 and 88 and have the area

annexed into Butler School District 53 (District 53) and Hinsdale Central High School District 86 (District 86).

A dispute ensued regarding the validity of the signatures gathered in support of the annexation.

The appeals court set out the requirement for valid signatures, stating:

"We therefore turn to a consideration of the signatures that the petitioners submitted in support of their detachment petition. We note that there is a dearth of Illinois law on the subject of how such signatures should be analyzed. However, in considering existing Illinois law as well as foreign authorities, certain standards emerge. Substantial compliance will be found if the signature transposes the first name and middle initial (*Board of Education of Wapella Community Unit School District No. 5 v. Regional Board of School Trustees*, 247 Ill.App.3d 555, 560 (1993)), if the middle initial is omitted (*People ex rel. Owen v. Dunn*, 247 Ill. 410, 413 (1910)), if a suffix, such as Junior, is omitted (*Morton v. State Officers Electoral Board*, 311 Ill.App.3d 982, 985 (2000)), or if a common shortened version of a first name (such as Ray) is used instead of the full first name (such as Raymond) (*Bonardo v. People*, 182 Ill. 411, 424 (1899); *In re Nomination Petition of Gales*, 54 A.3d 855, 859 (Pa.2012)). Substantial compliance will not be found if one uses an initial for a first or last name. *In re Nomination Petition of Flahery*, 770 A.2d 327, 332 (Pa.2001). Similarly, if using an initial instead of a full first name is not substantial compliance, then omitting a first or last name completely is not substantial compliance. See id. Further, substantial compliance will not be found if the signature is printed rather than in cursive as it appears on the corresponding registration form. *State ex rel. Rogers v. Taft*, 594 N.E.2d 576, 579 (Ohio 1992)."

OPENS RECORD ACT - KENTUCKY

City of Fort Thomas v. Cincinnati Enquirer

Supreme Court of Kentucky - August 29, 2013 - S.W.3d - 2013 WL 4609021

Following unsuccessful appeal to Attorney General, newspaper brought action against city under Open Records Act (ORA), challenging city's denial of newspaper's request to inspect and copy entire police file generated during homicide investigation.

The Supreme Court of Kentucky held that:

- Law-enforcement exemption under ORA is appropriately invoked only when the agency can articulate a factual basis for applying it, only, that is, when, because of the record's content, its release poses a concrete risk of harm to the agency in the prospective enforcement action; and
- Mere fact that a law-enforcement action remains prospective is not enough to establish that disclosure of anything from a law enforcement file constitutes "harm" under law-enforcement exemption, overruling *Skaggs v. Redford*, 844 S.W.2d 389; but
- Trial court did not abuse its discretion in denying newspaper's request for attorney fees and costs.

Even if an agency, in response to an ORA, adopts the approach of identifying the generic kinds of documents for which the law-enforcement exemption is claimed, and the generic risks posed by disclosure of these categories of documents, agency must identify and review its responsive records, release any that are not exempt, and assign the remainder to meaningful categories. A category is meaningful if it allows the court to trace a rational link between the nature of the document and the alleged likely harm to the agency.

An agency asserting the law-enforcement exemption in an action under ORA should provide the

requesting party and the court with sufficient information about the nature of the withheld record, or the categories of withheld records, and the harm that would result from release of record to permit the requester to dispute the claim and the court to assess it. If disclosure even to that limited extent would defeat the exemption, then in camera inspection may be necessary, but those cases should be the exception.

EMPLOYMENT - MARYLAND

Cross v. Baltimore City Police Dept.

Court of Special Appeals of Maryland - September 3, 2013 - A.3d - 2013 WL 4719089

Former city police officer appealed decision of city police commissioner, terminating her employment after officer married a convicted murderer and prison gang member. The Circuit Court upheld officer's termination, and officer appealed.

The Court of Special Appeals held that:

- Rational basis scrutiny applied to officer's First Amendment challenge to regulation prohibiting officers from associating with persons of questionable character;
- Regulation was rationally related to legitimate city interest; and
- Substantial evidence showed that officer violated regulation.

INVERSE CONDEMNATION - MONTANA

Weaver v. State

Supreme Court of Montana - September 3, 2013 - P.3d - 2013 MT 247

Real property owners filed claims of negligence and inverse condemnation against state to recover for damage to their property allegedly resulting from procedures used by state to contain wildland fire. The District Court entered judgment on jury verdict awarding owners $730,000 in damages on negligence claim and denied owners' posttrial motion for discovery sanctions. Both sides appealed.

The Supreme Court of Montana held that:

- Statement in owners' trial brief, that it was a reasonable and necessary decision for state to let wildland fire move across owners' property to flatter, more defensible space, did not constitute a judicial admission with respect to negligence claim;
- District court did not abuse its discretion in striking a defense under public duty doctrine that state first raised in its trial brief, filed three weeks before trial; and
- Trial court did not abuse its discretion in denying owners' posttrial motion for sanctions.

BONDS - NEW YORK

Oppenheimer AMT-Free Municipals v. ACA Financial Guar. Corp.

Supreme Court, Appellate Division, First Department, New York - September 3, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 05768

A public benefit corporation (Issuer) issued and sold $200,177,680 in municipal bonds to finance the

extension of a toll road in Greenville, South Carolina (original bonds). Under the trust agreement if the issuer files a voluntary petition in bankruptcy, it is an event of default which entitles a bond holder to pursue all its legal remedies.

Defendant, a financial guaranty insurance company, issued a number of secondary market insurance policies to guaranty the issuer's timely payment of obligations under certain of the original bonds. The individual policies were evidenced by certificates of bond insurance (CBIs) which "wrapped" the particular bond defendant was insuring.

The CBIs were "noncancellable except in the event the holder or the Owner surrenders its interest in the Certificate of Bond Insurance or in the position … and waives its rights to receive payment from the Insurer under this policy pursuant to Sections 3.03(f)1 and 4.06(b) of the Custody Agreement."

The toll revenues received by the issuer were substantially less than projected and, on January 1, 2010, the issuer defaulted in making payments on certain of the outstanding original bonds, none of which were owned by plaintiffs. On June 24, 2010, however, the issuer filed for Chapter 9 bankruptcy protection, which allows insolvent municipalities to reorganize their debts. Defendant was listed in the petition as one of the creditors holding twenty (20) of the largest unsecured debts. It was a "special notice" party and filed a proof of claim on its own behalf.

The bankruptcy filing had the effect of accelerating the claims on the original bonds. The CBIs, however, had no parallel acceleration requirement, except at the sole option of defendant, which it did not exercise.

As part of the bankruptcy, the issuer's bond offering was restructured. The restructuring plan called for a mandatory exchange of the original bonds for new bonds and the consequent cancellation of the original bonds.

Defendant acknowledged that it would have been contractually obligated to pay for any loss suffered by plaintiffs under the original bonds when they matured, in the event of the issuer's bankruptcy, but it claims that as a result of the restructuring plan that was adopted, the original bonds were cancelled, completely relieving it of any obligation to pay under the CBIs.

Bond holders brought action against insurer, seeking declaration that insurer was still obligated to pay in the event that issuer defaulted. The appeals court agreed, finding insurer's position inconsistent with the terms of the policies and contrary to law.

LIABILITY - NEW YORK

Cebron v. Tuncoglu

Supreme Court, Appellate Division, Second Department, New York - August 28, 2013 - N.Y.S.2d -109 A.D.3d 631 - 2013 N.Y. Slip Op. 05729

In two related actions, school bus driver and monitor on that bus brought action against town, driver and owner of colliding vehicle, and owners of property that was alleged source of icy road conditions, seeking to recover damages for personal injuries allegedly sustained in motor vehicle accident.

The Supreme Court, Appellate Division, held that:

- Fact issue existed as to whether water from property owners' land contributed to icy condition;

- Driver and owner of colliding vehicle established prima facie entitlement to judgment as matter of law; and
- Fact issues existed as to whether town contributed to icy condition.

Private landowner may be liable for injuries sustained in a car accident that is proximately caused by an ice condition occurring on an abutting public roadway, where that ice condition was caused and created by the artificial diversion of naturally flowing water from the private landowner's property onto the public roadway.

Driver and owner of colliding vehicle, moving for summary judgment in personal injury suit of school bus monitor, seeking to recover damages for personal injuries allegedly sustained in motor vehicle accident, established prima facie entitlement to judgment as matter of law by providing competent medical evidence that monitor's alleged lumbar injuries did not constitute serious injury within meaning of no-fault automobile insurance law and pointing to monitor's own testimony that accident caused her to lose only about one week of work.

Genuine issues of material fact existed as to whether town affirmatively created icy road condition through its own negligence, and whether town's negligence at time road was repaired immediately resulted in existence of the hazardous condition, precluding summary judgment in school bus driver's and monitor's suit against town.

EMINENT DOMAIN - NORTH CAROLINA

Town of Midland v. Wayne

Court of Appeals of North Carolina - September 3, 2013 - S.E.2d - 2013 WL 4714329

The Town of Midland condemned a portion of a planned subdivision for an easement in which to construct a natural gas pipeline and a fiber optic line.

A contractor employed by the Town drove vehicles and equipment and maintained construction staging areas on portions of the subdivision outside of the easement for a period of time during construction.

Defendant filed a counterclaim for inverse condemnation, claiming that: a) the contractor's actions constituted a temporary taking of portions of the subdivision; and b) the Town had inversely condemned its entire tract by adversely impacting its rights to develop it in accordance with the previously-approved subdivision plan.

The appeals court held that: a) the trial court did not err in ruling there was an inverse taking with regard the parking of construction vehicles and the temporary construction of a road on the property outside of the assessment condemned by the Town's contractor; and b) the trial court erred in concluding that there was a regulatory taking of the property in its entirety.

IDEA - PENNSYLVANIA

S.H. ex rel. Durrell v. Lower Merion School Dist.

United States Court of Appeals, Third Circuit - September 5, 2013 - F.3d - 2013 WL 4752015

Student and her mother brought action against school district, alleging violations of the Individuals with Disabilities Education Act (IDEA), the Rehabilitation Act (RA), and the Americans with Disabilities Act (ADA), contending that the school district misdiagnosed student as disabled for several years.

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

- IDEA did not create a cause of action for children misidentified as being disabled;
- Claims for compensatory damages under the RA and the ADA required a finding of intentional discrimination;
- Showing of deliberate indifference could satisfy the intentional discrimination element of a claim for compensatory damages under the RA and the ADA; and
- Plaintiffs failed to establish school district's deliberate indifference to student being misidentified as having a learning disability.

MUNICIPAL ORDINANCE - TEXAS

City of Houston v. BCCA Appeal Group, Inc.

Court of Appeals of Texas, Houston (1st Dist.) - August 29, 2013 - Not Reported in S.W.3d - 2013 WL 4680224

This case concerned the constitutionality of a home-rule city's ordinance which purported to regulate air pollution within that city's borders. The BCCA Appeal Group, Inc. (the Group), a non-profit organization whose members own and operate industrial facilities in the Houston area, brought suit to enjoin enforcement of two air pollution control ordinances enacted by the City of Houston (the City)—City of Houston Ordinance Nos.2007–208 and 2008–414 (collectively, the Ordinance).

The Group asserted that the Ordinance was preempted because it claimed for the City several powers the Legislature granted exclusively to the Texas Commission on Environmental Quality (TCEQ) in the Texas Clean Air Act (TCAA) and the provisions of the Texas Water Code (TWC) that govern enforcement of the TCAA. According to the Group, the Ordinance conflicted with the TCAA, TWC, and Article XI, Section 5 of the Texas Constitution which bars home-rule cities from enacting any ordinance that is "inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State."

The Ordinance requires facilities to register with the City by filing an application and paying the applicable registration fee. It is unlawful to operate a facility within the City's boundaries that is not registered with the City. The Group argues that these sections are not only inconsistent with state law, but also make unlawful a condition or act approved or authorized under state law.

The Group argued that a facility's lawful operation pursuant to TCEQ's rules and orders would nonetheless be unlawful under the Ordinance, if that facility failed to register with the City or pay a registration fee. Thus, according to the Group, the entire registration program created by the ordinance is preempted. If the Group is correct, then any concurrent regulatory scheme or permitting process by a municipality would be preempted. This does not appear to be the prevailing law in Texas.

In this case, the City was not attempting to hold an affected industry to a higher, more onerous standard than the one set forth by the state. On the contrary, the Ordinance was the City's attempt to create a concurrent regulatory scheme or permitting process through which it will enforce the

state's existing rules and regulations. In fact, the City acknowledged that its decision to regulate and enforce the TCAA and TCEQ rules and regulations on its own in this case—rather than in cooperation with TCEQ—is due to what it perceives to be TCEQ's lax enforcement efforts. According to the City, the Group is only challenging the constitutionality of the Ordinance because the industry "currently enjoys what it perceives to be a permissive regulatory approach from the TCEQ" and it fears regulation by "a vigilant watch dog" (i.e., the City).

The court concluded that the Group failed to show that the Legislature intended to preempt the Ordinance with "unmistakable clarity," and thus, failed to meet its extraordinary burden to establish that the ordinance is invalid.

MUNICIPAL ORDINANCE - TEXAS

Levy v. City of El Paso

United States District Court, W.D. Texas, El Paso Division - August 30, 2013 - Slip Copy - 2013 WL 4677923

Appearing pro se, Plaintiffs filed a complaint raising several constitutional claims and several state law claims relating to city's enforcement of certain municipal ordinances governing property maintenance. In particular, Plaintiffs alleged that the city ordered discontinuation of electrical service at a home owned by Plaintiffs in violation of substantive and procedural due process, and that the city's adoption of the Vacant Building Ordinance gives the city "arbitrary and discriminatory power to limit a property owner's use of his or her property." Plaintiffs also alleged that criminal proceedings initiated by the city against Plaintiffs pursuant to the same municipal ordinances constituted the torts of malicious prosecution and abuse of process, and that city's actions against Plaintiffs constituted both intentional infliction of emotional distress and civil conspiracy.

The court disagreed, granting city's motion to dismiss.

GOVERNMENTAL IMMUNITY - TEXAS

Texas Adjutant General's Office v. Ngakoue

Supreme Court of Texas - August 30, 2013 - S.W.3d - 2013 WL 4608867

Motorist filed negligence action against employee of Texas Adjutant General's Office (TAGO), seeking recovery for injuries sustained in collision with vehicle driven by employee. Employee filed motion to dismiss under election-of-remedies provision of Texas Tort Claims Act (TTCA), and motorist filed amended petition adding TAGO as a defendant.

The Supreme Court of Texas held that:

- Consent of a governmental unit to suit, under provision of Texas Tort Claims Act (TTCA) stating that the filing of a suit against any employee of a governmental unit constitutes an irrevocable election and immediately and forever bars any suit by plaintiff against governmental unit regarding same subject matter unless governmental unit consents, is not limited to statutory waivers of immunity found outside the TTCA itself, abrogating City of Houston v. Esparza, 369 S.W.3d 238;
- A suit against governmental employee in his official capacity does not trigger the bar contained in election-of-remedies provision to subsequent suits against governmental unit regarding same subject matter; and

- Motorist, in filing amended petition adding TAGO as defendant in response to TAGO employee's motion to dismiss, was not required to also dismiss employee before proceeding against TAGO as sole defendant.

GOVERNMENTAL IMMUNITY - TEXAS

Port of Houston Authority v. Aaron

Court of Appeals of Texas, Houston (1st Dist.) - September 5, 2013 - S.W.3d - 2013 WL 4760963

More than ninety property owners filed a lawsuit against the Port of Houston Authority, alleging that its negligent operation of a container terminal along the Bayport Ship Channel constituted a nuisance that interfered with the use and enjoyment of their property and violated a municipal noise-control ordinance.

The Port Authority filed a plea to the jurisdiction, seeking dismissal based on governmental immunity.

The court of appeals held that the property owners' claims did not fall within the scope of the limited waiver of governmental immunity stated in the Texas Tort Claims Act, and rendered judgment dismissing the property owners' claims.

INVERSE CONDEMNATION - TEXAS

City of Lorena v. BMTP Holdings, L.P.

Supreme Court of Texas - August 30, 2013 - S.W.3d - 2013 WL 4730647

Residential subdivision developer brought claims against city for declaratory judgment and inverse condemnation, relating to city's moratorium on permits for sewer connections.

The Supreme Court of Texas held that:

- Developer was not required to submit sewer connection application before filing lawsuit;
- Property approved for subdivision is exempt from any development moratorium based on shortages of public facilities; and
- Fact issue precluded summary judgment on inverse condemnation claim.

City ordinance providing that applications for new sewer connections are not to be accepted for filing and are to be returned to the applicant as unfiled does not impose a requirement that a landowner aggrieved by the ordinance file an application to administratively exhaust the landowner's claim. Rather, it is a process by which the City will return any applications to the owner as unfiled.

Under city ordinance providing that applications for new sewer connections were not to be accepted for filing and were to be returned to the applicant as unfiled, developer was not required to submit a sewer connection application before filing its inverse condemnation and declaratory judgment action based on state law prohibiting municipalities from enforcing moratoria against approved development, since such attempted filing would be futile.

Because state law prohibiting municipalities from enforcing development moratoria resulting from

shortages of essential public facilities against approved development defines “development” as subdivision or construction, such a moratorium may not affect property approved for subdivision or construction. A property need not be approved for both the subdivision and construction aspects of development to be insulated from such moratoria.

Genuine issue of material fact existed as to the extent of city’s intrusion on subdivision developer’s use and enjoyment of its property with a sewer connection moratorium which violated state law prohibiting municipalities from enforcing moratoria against approved development, thus precluding summary judgment for city on developer’s inverse condemnation claim.

VOTING - UTAH

Burr v. City of Orem

Supreme Court of Utah - August 30, 2013 - P.3d - 2013 UT 57

City residents brought action challenging proposed language for referendum ballot title, asserting three challenges to the language: (1) the language failed to give a true and impartial statement of the purpose of the measure by failing to mention UTOPIA, a city-owned telecommunications network, (2) the title created an argument for the measure by minimizing the perceived burden on businesses, and (3) the wording was otherwise “unsatisfactory” in that it sought to hide from the voters the causal connection between the UTOPIA bond obligation and the requested tax rate increase.

The Supreme Court of Utah held that:

- Supreme Court’s review of a referendum ballot title encompasses requirements that the ballot title gives a true and impartial statement of the purpose of the measure, that the ballot title not exceed 100 words in length, and that the ballot title be submitted by the stated deadline; abrogating *Walker v. Weber County*, 973 P.2d 927, and
- Content of title satisfied requirement to present a true and impartial statement of purpose of resolution.

SPECIAL ASSESSMENT DISTRICTS - ALASKA

L Street Investments v. Municipality of Anchorage

Supreme Court of Alaska - August 23, 2013 - P.3d - 2013 WL 4500329

The former Anchorage Municipal Code provided for the creation of special assessment districts for public capital improvements. In 1996, the Anchorage Municipal Assembly (Assembly) enacted Anchorage Ordinance 96–77(S–I) to broaden “special assessment districts” to include the provision of services and to authorize business improvement districts. In 1997 the Assembly passed Anchorage Ordinance 97–51, which created the Downtown Improvement District (District) for a period of three years.

When passing this ordinance, the Assembly amended the boundaries of the proposed District to exclude some properties on K and L Streets. The building at 420 L Street, the property owned by appellant L Street Investments, was in the original proposal but subsequently carved out by the Assembly.

In 2000 the Assembly extended the life of the District for ten years. Beginning in 2009, the Anchorage Downtown Partnership canvassed businesses hoping to extend the life of the District again and expand the District to include businesses between I and L Street.

After the majority of business owners in the proposed District approved the extension and expansion, the Assembly extended the life of the District and expanded it to include businesses between I and L Streets, including the building at 420 L Street.

L Street Investments filed a complaint arguing: (1) Section 9.02(a) of the Municipality of Anchorage's Charter does not authorize the Municipality to finance services within the District by an assessment—rather, the Municipality can finance services only by a tax levy; and (2) the District is a "service area," and AS 29 .35.450(c) prohibits the expansion of a service area unless a majority of voters in the area to be added vote in favor of expanding the service area. The Anchorage Downtown Partnership intervened, and all parties filed cross-motions for summary judgment.

The Supreme Court of Alaska concluded that Section 9.02(a) does not preclude the Municipality from levying an assessment for services because the language in Section 9.02(a) is permissive rather than mandatory, and does not expressly prohibit the Municipality from using an assessment to finance services. The Municipality, as a unified home rule municipality, enjoys broad authority to exercise all legislative powers not prohibited by law or Charter.22 The use of assessments to finance services is not prohibited by law or Charter and is therefore a valid exercise of the Municipality's authority.

As the superior court stated, the legislative history of AS 29.35 .450 shows that the legislature was focused on specific types of service areas. It does not suggest that the legislature either contemplated or intended to impose the voting requirements of AS 29.35.450(c) on a business improvement district that does not primarily provide road, fire, or park and recreation services, but may provide some services in those areas. Neither the plain language nor the legislative history of AS 29.35.450 indicates that the District is a service area subject to its terms. Accordingly, the Supreme Court of Alaska held that the District was not a service area subject to the voting requirements of AS 29.35.450.

MUNICIPAL ORDINANCE - ILLINOIS

Village of Roxana, Ill. v. Shell Oil Co.

United States District Court, S.D. Illinois - August 26, 2013 - Slip Copy - 2013 WL 4510164

Roxana is a small village in Madison County, Illinois that was formed around a petroleum refinery operated by Shell. Roxana was for many years a company town so that the city park is named "Shell Park" and the high school athletic teams are known as the Roxana "Shells." The Illinois Environmental Protection Agency (IEPA) forced Shell to take measures to remediate the pollution coming from its refinery that threaten surrounding soil and groundwater.

Roxana then brough an action to enforce its own municipal nuisance ordinance against Shell. Roxana started this action by filing 230 separate cases in state court. The complaint in each case described a separate property located within Roxana that was alleged to be contaminated by pollutants from the Shell refinery. Shell removed all 230 cases based on diversity of citizenship once they were consolidated. Roxana's claims are based on an ordinance adopted in 1932 which makes it unlawful "to place, deposit, throw, leave or permit to remain, or to cause or permit to flow, any liquid, slops, animal or vegetable matter, filth, dirt or rubbish, or substance of any kind likely to

become rotten, foul, nauseous, putrid or offensive" on any property or water in Roxana.

Shell argued that the ordinance did not cover petroleum byproducts that are "valuable commodities that its owner takes precautions to safeguard." This is a question of law that the parties agree is to be decided by Illinois rules of construction, as if the ordinance were a statute. The court disagreed with Shell, finding that the ordinance applied to the facts as alleged.

Roxana is a non-home rule municipality and as such may only exercise those powers enumerated in the Illinois Constitution or by implication conferred by a state statute. If a non-home rule municipality enacts an ordinance conflicts "with the spirit and purpose of a state statute," that ordinance is preempted by the statute. So, if Roxana's ordinance conflicted with an IEPA permit or consent order entered pursuant to the Act, it must give way as preempted. The narrow question here was whether the Roxana ordinance conflicted with a 1989 IEPA permit that was renewed in 2010 or with a 1998 consent order. The court concluded that there existed no conflict.

Shell's motion for summary judgment was denied.

TORT CLAIMS ACT - INDIANA

Schoettmer v. Wright

Supreme Court of Indiana - August 27, 2013 - N.E.2d - 2013 WL 4519807

After he was injured in an automobile accident, plaintiff cooperated with the other driver's insurer in hopes of settling his claim. Nearly a year later, when settlement proved elusive, he hired a lawyer and filed suit. Only then did he learn that the other driver was employed by a political subdivision subject to the Indiana Tort Claims Act. Plaintiff cited several reasons to excuse his failure to comply with the notice requirements of that Act, including waiver, substantial compliance, agency, and estoppel. The court found the first three unavailing, but concluded he should be permitted to present proof of estoppel to the trial court, and the court reversed and remanded on that basis.

In addition, the Supreme Court of Indiana held that:

- Agency's amendment of responsive pleading did not prejudice motorist;
- Notice to agency's insurer did not constitute substantial compliance with notice requirement of Indiana Tort Claims Act (ITCA);
- Liability insurer of agency was not agent for purposes of notice requirement; but
- Genuine issue of material fact existed regarding whether agency should have been estopped from asserting notice requirement as defense.

The crucial consideration when determining whether there has been substantial compliance with statutory notice requirement of the ITCA is whether the notice supplied by the claimant of his intent to take legal action contains sufficient information for the city to ascertain the full nature of the claim against it so that it can determine its liability and prepare a defense.

Genuine issue of material fact existed regarding whether designated community action agency should have been equitably estopped from asserting defense of motorist's failure to comply with notice requirement of ITCA in personal injury action against agency, and therefore summary judgment in favor of agency based upon failure to comply with notice requirement was precluded. Motorist presented evidence that he was not aware that agency was a statutorily designated community action program and thus a political subdivision, neither agency not its insurer ever mentioned the ITCA or the notice requirement to motorist, and there was evidence that insurer's

agent told motorist it was in his best interest to wait until completion of medical treatment before asserting claim.

ANNEXATION - KANSAS

Bunge Milling, Inc. v. City of Atchison

Court of Appeals of Kansas - August 23, 2013 - P.3d - 2013 WL 4499120

The City of Atchison (City) appealed the district court's decision setting aside its ordinance establishing the annexation of Bunge Milling, Inc.'s (Bunge) property under K.S.A. 12–520(a)(1). The City argued that Midland Surveying (Midland) acted as Bunge's agent when Midland filed a boundary survey of Bunge's property with the register of deeds. As the City would only have had the authority to annex Bunge's property if the *owners* had filed the survey under K.S.A. 12–519(e), the filing of a boundary survey by Bunge's agent would meet this requirement. Bunge argued its property was not subject to annexation because Midland was not its agent for the purpose of filing the survey.

The appeals court agreed with the district court that Midland was not acting as Bunge's agent when it filed a boundary survey of Bunge's property with the register of deeds, meaning that the survey had not been filed by the "owner" of such tract.

ZONING - KANSAS

Friends of Bethany Place, Inc. v. City of Topeka

Supreme Court of Kansas - August 23, 2013 - P.3d - 2013 WL 4499116

Historic preservation group appealed city's decision to approve church's application to build parking lot on registered historic site owned by church. The District Court set aside the city's decision as arbitrary, capricious, and unreasonable. Church and city appealed. The Court of Appeals reversed district court's judgment and remanded case with directions. Preservation group petitioned for review.

The Supreme Court of Kansas held that:

- Individual owners of property located within 500 feet of historic site were "persons aggrieved" by city's issuance of permit, and, therefore, had standing under Historic Preservation Act to seek judicial review;
- Historic preservation group met traditional test for associational standing to seek judicial review of city's decision to issue permit;
- City council failed to take "hard look" at all relevant factors in regard to possible alternatives, as required under caselaw interpreting Historic Preservation Act, before issuing permit; and
- As matter of first impression, governing body is required, before issuing permit for a project which will encroach upon, damage or destroy historic property, to establish that no feasible and prudent alternatives exist and that all possible planning has been done to minimize harm to the historic property; overruling Allen Realty, Inc. v. City of Lawrence, 14 Kan.App.2d 361, 790 P.2d 948.

ZONING - MONTANA

Williams v. Board of County Com'rs of Missoula County

Supreme Court of Montana - August 28, 2013 - P.3d - 2013 MT 243

Challenger to constitutionality of a statutory protest provision, under which group of property owners barred board of county commissioners from establishing special zoning district in which gravel mining and asphalt operations would be prohibited, filed complaint against board for declaratory and injunctive relief. Landowners intervened. The District Court denied landowners' motion to dismiss and granted summary judgment to challenger and to board, which agreed with challenger that statute was unconstitutional. Landowners appealed.

The Supreme Court of Montana held that:

- Property owners were necessary parties to declaratory judgment action, but challenger's failure to name them as parties was remedied by their timely intervention;
- Protest provision, which allowed property owners representing 50 percent of the agricultural and forest land in a zoning district to block zoning proposals, was an unconstitutional delegation of legislative power that violated due process guarantees in federal and state constitutions; and
- Invalid protest provision was severable from remainder of statute setting forth procedures to be followed by board of county commissioners in adopting zoning regulations.

Provision in zoning statute that allowed property owners representing 50 percent of the agricultural and forest land in a zoning district to block zoning proposals, and to prevent county commissioners from even proposing an alternative zoning resolution for a period of one year, was an unconstitutional delegation of legislative power that violated due process guarantees in federal and state constitutions. Protest provision provided no standards or guidelines to inform the exercise of the delegated power, and it contained no legislative bypass providing for review by a legislative body with the power to consider exceptional cases.

ZONING - NEW JERSEY

Thomas Griepenburg and Carol Griepenburg v. Township of Ocean, State of New Jersey Department of Environmental Protection and State of New Jersey Department of Community Affairs

Superior Court of New Jersey, Appellate Division - August 29, 2013 - A.3d - 2013 WL 4554621

Plaintiffs were the owners of 31 acres of land in the Township of Ocean. Plaintiffs challenged the enactment of Township ordinances that rezoned the subject property from residential (R–2) and highway commercial (C–3) to an EC Environmental Conservation District (EC Zone).

The appeals court concluded that these ordinances were invalid as applied to plaintiffs' property because the downzoning was not required to serve the stated purposes of the ordinances and did not reflect reasonable consideration of existing development in the areas where the subject property was located.

OPEN RECORDS - NEW JERSEY

Paff v. Atlantic City Alliance, Inc.

Superior Court of New Jersey, Appellate Division - August 27, 2013 - Not Reported in A.3d - 2013 WL 4515915

Plaintiff appealed from a decision of the Law Division that dismissed his claim that defendant Atlantic City Alliance, Inc. (ACA) is a "public agency" subject to the provisions of the Open Public Records Act (OPRA), N.J.S.A. 47:1A–1 to –13 and the common law right of access to public records.

In 2011, the Legislature enacted, and the Governor signed, L. 2011, c. 18, now codified as N.J.S.A. 5:12–218 to –233. The purpose of the legislation was to revive and enhance Atlantic City's tourism and gaming industries through the creation of the Atlantic City Tourism District. N.J.S.A. 5:12–219a(1). The District would be managed by the Casino Reinvestment Development Authority (CRDA). N.J.S.A. 5:12–219b.

After the legislation was enacted, five casinos formed ACA as a private, not-for-profit corporation. On November 2, 2011, ACA and CRDA entered into a "Public–Private Agreement for Marketing Atlantic City" (the Agreement) as envisioned by N.J.S.A. 5:12–221a.

Plaintiff sent a letter to ACA's president requesting that ACA produce certain "government records in accordance with [OPRA] and the common law right of access." Among other things, he asked for copies of the contracts between ACA and certain of its employees, e-mails exchanged between these individuals, ACA's by-laws, and its certificate of incorporation. ACA's president advised plaintiff that ACA was not a "public agency" under OPRA and, therefore, ACA would not produce any of its records in response to plaintiff's request.

Plaintiff sued. After reviewing the provision in light of the Legislature's intent, the court concluded that the ACA is not "public agency" subject to OPRA or the common law right of access to public records. The appeals court affirmed.

LIABILITY - NEW YORK

Weisbecker v. West Islip Union Free School Dist.

Supreme Court, Appellate Division, Second Department, New York - August 28, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 05743

Father of high school student who was attacked by another student on an athletic field owned by school district brought action to recover damages for personal injuries, alleging district's failure to provide adequate security and to lock access gates constituted negligence.

The Supreme Court, Appellate Division, held that:

- School district did not have duty to protect student who was attacked on athletic field after school hours, and
- School district's failure to lock gates to athletic field was not the proximate cause of student's injuries.

School district did not have duty to protect student who was on athletic field at night, and thus was not liable for injuries student incurred when he was attacked by another student; district did not make direct assurances regarding security to student and student did not rely on the provision of security in deciding to congregate with others on the field.

School district's failure to lock gates accessing athletic field upon which student was attacked was not the proximate cause of the student's injuries, as required to support a claim of negligence against school district based on acts performed in a proprietary capacity, since the assault was not a foreseeable act of failing to lock the gates.

ARS - NEW YORK

People ex rel. Cuomo v. Charles Schwab & Co., Inc.

Supreme Court, Appellate Division, First Department, New York - August 27, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 05722

Attorney General brought enforcement action against registered securities broker-dealer, alleging broker-dealer engaged in fraudulent and deceptive conduct in the sale of auction rate securities (ARS) to the investing public. Broker-dealer moved to dismiss for failure to state a claim. The Supreme Court granted motion. Attorney General appealed.

The Supreme Court, Appellate Division, held that:

- Attorney General sufficiently stated a claim under Martin Act, and
- Attorney General sufficiently pled a nexus with New York, as required to state claims under Martin Act.

Attorney General's allegation, in enforcement action, that brokers, employees and managers of registered securities broker-dealer misled customers by variously representing ARS as "safe, low risk, highly liquid investments, or cash management alternatives, or similar to money market funds" without disclosing that the liquidity of these instruments was dependent on the successful operation of the Dutch auctions, was sufficient to state claims under Martin Act.

Attorney General's allegation, in enforcement action, that ARS sold by registered securities broker-dealer to its customers were underwritten and/or managed by New York-based financial institutions, that broker-dealer transmitted its customers' buy, sell and hold orders to the trading desks of financial institutions located in New York and that the substantial majority of the auctions of the ARS were held in New York, sufficiently pled a nexus with New York, as required to state claims under the Martin Act, regardless of some of the customers were not residents of New York.

TAX - NEW YORK

Matteawan On Main, Inc. v. City of Beacon

Supreme Court, Appellate Division, Second Department, New York - August 21, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 05680

Nonhomestead property owner sued city to obtain refund of tax overpayments, alleging claims for money had and received, unjust enrichment, for declaratory relief, and for imposition of a constructive trust upon the overpayments. The Supreme Court granted city's motion to dismiss for failure to serve a timely notice of claim. Owner appealed.

The Supreme Court, Appellate Division, held that:

- Dismissal was not warranted on basis that owner's cause of action was barred by applicable

statute of limitations, and
- Owner was not required to allege that it paid disputed taxes under protest to obtain a refund.

Generally, there can be no recovery of taxes paid unless the payments were made involuntarily, that is, under protest or duress. However, nonhomestead property owner was not required to allege that it paid disputed taxes under protest, to obtain refund of alleged tax overpayments from city, where owner alleged that it made the tax payments under a mistake of fact because it was unaware that city had miscalculated tax rates applied to homestead and nonhomestead properties and without knowledge that the miscalculation resulted in an incorrect apportionment between homestead and nonhomestead properties and excessive taxes for a number of years.

LIABILITY - NEW YORK

Grasso v. Nassau County

Supreme Court, Appellate Division, Second Department, New York - August 21, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 05674

In plaintiffs' medical malpractice and wrongful death action against fire department, the Supreme Court granted department's motion to dismiss for failing to serve timely notice of claim. Plaintiffs appealed.

The Supreme Court, Appellate Division, held that the Supreme Court providently exercised its discretion in denying plaintiffs' application for leave to serve a late notice of claim.

No proposed notice of claim was submitted with plaintiffs' cross motion for leave to serve a late notice of claim. Plaintiffs' unsubstantiated claim of law office failure by their former attorney was not a reasonable excuse for their failure to serve a timely notice of claim. Fire department's presence at the accident did not establish department was aware of facts constituting the plaintiffs' claims. Plaintiffs failed to demonstrate that the more-than-one-year delay would not substantially prejudice department.

MUNICIPAL ORDINANCE - NORTH CAROLINA

Town of Nags Head v. Toloczko

United States Court of Appeals, Fourth Circuit - August 27, 2013 - F.3d - 2013 WL 4517074

Town brought action in state court against owners of oceanfront cottage, seeking to enforce land-use ordinances and seeking an order of abatement and civil penalties. Action was removed to federal court, and owners filed multiple counterclaims. Town moved to dismiss, owners moved for partial summary judgment, and town moved for leave to file motion for summary judgment. The United States District Court for the Eastern District of North Carolina, James C. Dever III, Chief District Judge, 863 F.Supp.2d 516, abstained from deciding case and declined federal jurisdiction. Owners appealed.

The Court of Appeals held that:

- Federal court was not required to abstain under Burford doctrine from resolving owners' claims for declaratory relief concerning town's authority to ratify and enforce ordinance;
- District court was not required to abstain from deciding cottage owners' claim against town under

§ 1983 alleging due process and equal protection violations; and
- Court of Appeals would suspend state-litigation requirement for owners' takings claim in interest of fairness and judicial economy.

Because North Carolina has no mechanism for the federal courts to certify questions of state law to its Supreme Court, the federal courts must follow the decision of an intermediate state appellate court unless there is persuasive data that the highest court would decide differently.

District court was not required to abstain under Burford doctrine from deciding cottage owners' claim against town under § 1983 alleging due process and equal protection violations. Although constitutional claim intersected with town's land use and zoning laws, court was not required to define geographical reach of public trust doctrine to resolve constitutional claim.

SCHOOLS - OHIO

Miami Trace Local School Dist. v. Washington C.H. City School Dist.

Court of Appeals of Ohio, Twelfth District, Fayette County - August 19, 2013 - Slip Copy - 2013 -Ohio- 3578

Washington Court House School District (WCH) and Miami Trace School District (Miami Trace) reached an agreement regarding land transfer requests from persons who owned property within Miami Trace and wished to have it annexed into WCH. Miami Trace agreed to transfer properties to WCH in exchange for WCH's agreeing to pay Miami Trace 30 percent of the "net tax gain generated by the transfers." Four properties were transferred.

At the time the parties entered their transfer agreements, WCH only had an operating levy; it did not have a permanent improvement levy and had not passed a bond issue. After the last of the four agreements between the parties was reached in September 2001, WCH passed its first permanent improvement levy in 2002 and its first bond issue in 2005. WCH never made a payment to Miami Trace under any of the four agreements.

In 2010, Miami Trace, while working on an unrelated land transfer request, reviewed the four land transfer agreements with WCH and concluded that WCH owed a substantial amount of money under the terms of those agreements. Miami Trace arrived at this conclusion by interpreting the parties' agreements to mean that the 30–percent–payment provision in the parties' four agreements applies to the funds WCH receives from its permanent levy and bond issue, as well as its operating levy. However, when Miami Trace sought payment from WCH for these amounts, WCH refused on the ground that the 30–percent–payment provision applies only to the funds it receives from its operating levy.

In 2012, the trial court found that Miami Trace was entitled to prevail, and awarded $94,213.36, because "[t]he clear and unambiguous language of all four agreements is that 'gross amount of taxes collected' includes operating levies, permanent levies and bond issues."

The appeals court reversed. "The spirit of these agreements is to compensate Miami Trace for any 'lost tax revenue' generated by the transfers. The parties' four agreements expressly limit the term 'net tax gain' to those that are 'generated by the transfers' in question. However, Miami Trace could not have any 'lost tax revenue' 'generated by the transfers' from taxes that did not exist at the time of the agreements. WCH's permanent improvement levy and bond issue do not fall within the term 'gross amount of taxes collected' because the permanent improvement levy and bond issue did not

exist when these agreements were executed. The four land transfers in question were completed in 1993, 1996 and two more in 2001. WCH's permanent improvement levy was not passed until 2002 and its bond issue was not passed until 2005."

The court concluded that the trial court erred in determining that the 30–percent–payment provision applied to WCH's subsequently enacted permanent improvement levy and bond issue. It therefore modify the trial court's judgment by reducing the award granted to Miami Trace from $94,213.36 to $5,839.42.

PUBLIC UTILITIES - OHIO

In re Complaint of Cameron Creek Apts. v. Columbia Gas of Ohio, Inc.

Supreme Court of Ohio - August 29, 2013 - N.E.2d - 2013 -Ohio- 3705

Natural gas customer filed complaint with Public Utilities Commission against gas utility, alleging that utility had demanded major structural retrofitting of the ventilation system to gas appliances in customer's 240-unit apartment complex, and requesting that utility be prohibited from terminating service. The Public Utilities Commission entered order in favor of customer, and utility appealed.

The Supreme Court of Ohio held that:

- Evidence supported finding that customer's current appliances were safe;
- Commission provided sufficiently clear guidance to utility; and
- Order did impose undue burden on utility.

Public Utilities Commission could prohibit natural gas utility from threatening to shut off gas service to customer's 240-unit apartment complex to compel customer to retrofit each apartment to conform to current fuel gas standards of national trade association, since evidence supported finding that customer's current appliances were safe under Ohio Building Code, Ohio Mechanical Code, and local building codes; customer's experts testified that state and local codes allowed for the type of ventilation installed at complex and that the gas appliances received a sufficient supply of air for combustion, ventilation, and dilution of gases.

Public Utilities Commission, in order prohibiting natural gas utility from threatening to shut off gas service to customer's 240-unit complex to compel customer to retrofit each apartment to conform to current fuel gas standards of national trade association, provided sufficiently clear guidance as to how utility could apply trade association standards in other existing residential structures. Commission determined that strict adherence to the standards was not required that compliance cannot be compelled if it was economically or practically unreasonable, and that utility could not force extensive retrofitting of dwellings based solely on a violation of the standards.

Public Utilities Commission, in order prohibiting natural gas utility from threatening to shut off gas service to customer's 240-unit complex to compel customer to retrofit each apartment to conform to current fuel gas standards of national trade association, did not impose undue burden on utility. Claim that ruling would create a backlog of customers contesting the enforceability of the standards was speculative, and claim that order would impose significant recordkeeping requirements and require changes to utility's computer system was not supported by evidence.

EMINENT DOMAIN - TEXAS

Crawford Family Farm Partnership v. TransCanada Keystone Pipeline, L.P.

Court of Appeals of Texas, Texarkana - August 27, 2013 - S.W.3d - 2013 WL 4519769

The Crawford Family Farm Partnership (Crawford) contenced that that the pipeline planned by TransCanada Keystone Pipeline, L.P. (TransCanada) failed to sufficiently fall within the specifications made by the Legislature to authorize TransCanada to exercise the power of eminent domain to compel the grant of a pipeline right-of-way over Crawford lands.

Crawford responded to TransCanada's motion for summary judgment by raising a new argument—that because TransCanada is an interstate pipeline which contemplates the transmission of crude oil, it is not a common carrier under Section 111.002(1) and (6) of the Texas Natural Resources Code.

The Court of Appeals concluded that TransCanada was a common carrier with the power of eminent domain.

TAKINGS - TEXAS

Edwards Aquifer Authority v. Bragg

Court of Appeals of Texas, San Antonio - August 28, 2013 - S.W.3d - 2013 WL 4535935

This appeal presented numerous issues regarding the regulation and permitting of the limited water resources within the Edwards Aquifer region of South Texas. Appellants Glenn and JoLynn Bragg are commercial pecan growers who were denied a water permit for one of their pecan orchards and granted a limited permit for another of their pecan orchards. The Braggs successfully sued Edwards Aquifer Authority (the "Authority") and Roland Ruiz in his official capacity as General Manager of the Authority for an alleged taking of their property and obtained a judgment awarding them damages.

The Authority and Ruiz then appealed asserting: (1) the Braggs sued the wrong party because the State's mandate of the Authority's actions precludes a takings claim against the Authority; (2) the Braggs' claims are barred by the statute of limitations; (3) no compensation is owed for any taking of the Braggs' Home Place Orchard; (4) the trial court incorrectly determined the amount of compensation owed for any taking of the Braggs' D'Hanis Orchard; (5) the Authority's permitting decision did not cause a taking of the Home Place Orchard or the D'Hanis Orchard; and (6) if it prevails, it is entitled to attorney's fees. In their cross-appeal, the Braggs contend the trial court erred (1) in calculating the compensation owed to them on both takings claims and (2) by concluding the Authority's denial of their permit applications did not amount to per se or categorical taking.

The Court of Appeals concluded that the trial court properly determined the implementation of the Edwards Aquifer Act resulted in a takings of the Braggs' property. However, because the trial court erred in quantifying the compensation owed to the Braggs, it reversed and remanded.

EMPLOYMENT - UTAH

Nelson v. City of Orem

Supreme Court of Utah - August 19, 2013 - P.3d - 2013 UT 53

Police officer was terminated from his position with the Orem City Police Department after using excessive force during a booking at Orem City Jail. Both the Orem City Employee Appeals Board and the court of appeals upheld Officer Nelson's termination. Police officer sought review of decision of the city employee appeals board that upheld city's decision to terminate his employment.

The Supreme Court of Utah held that:

- Abuse of discretion was appropriate standard for appellate court to review Appeals Board's determination that officer's termination was not inconsistent with prior sanctions under police department's excessive force policy;
- Appeals Board did not abuse its discretion when it found that police officer's termination for use of excessive force was not inconsistent with prior sanctions under police department's excessive force policy; and
- Any error in Appeals Board's relying on police department's expert, to whom police officer had allegedly revealed confidential information, was harmless.

ZONING - WASHINGTON

Prosser Hill Coalition v. County of Spokane

Court of Appeals of Washington, Division 3 - August 22, 2013 - P.3d - 2013 WL 4478227

Coalition of neighbors filed a Land Use Petition Act (LUPA) petition for review of approval of a conditional use permit for a private airstrip. The Spokane Superior Court remanded for a new hearing. County and permit applicants appealed, and neighbors cross-appealed.

The Court of Appeals held that:

- Failure to include property owners' names in caption in petition did not divest superior court of jurisdiction;
- Land Use Petition Act did not require that a summons accompany filing of LUPA petition;
- Notice of application for conditional use permit for airstrip was insufficient; and
- Neighbors were not entitled to costs.

Notice of application for conditional use permit for airstrip was insufficient, where county code stated that notice had to be posted along the most heavily traveled street, proposed airstrip was not adjacent to a road, two nearest roads were a dirt road leading to a private residence and a paved thoroughfare in the area, applicant only posted notice on the dirt road leading to the private residence, and notice gave an erroneous description of where the airstrip site would be located.

One purpose of specific statutory requirements for public notice of an impending land use decision is to ensure that decision makers receive enough information from those who may be affected by the action to make an intelligent decision.

EMPLOYMENT - ALASKA

Kennedy v. Municipality of Anchorage

Supreme Court of Alaska - August 16, 2013 - P.3d - 2013 WL 4399118

Former police officers brought action against municipality for racial discrimination, alleging a hostile work environment. The Superior Court granted motion to compel officers' compliance with discovery requests. Officers petitioned for review, which was granted. Officers appealed.

The Supreme Court of Alaska held that:

- On an issue of first impression, garden-variety mental anguish claims did not waive physician and psychotherapist privilege, and
- Officers' mental anguish claims were garden-variety.

"Garden-variety claims" of mental anguish refer to claims for compensation for nothing more than the distress that any healthy, well-adjusted person would likely feel as a result of being so victimized.

Police officers' garden-variety mental anguish claims in employment discrimination action against municipality did not waive physician and psychotherapist privilege. Garden-variety claims were sufficiently limited in scope to alleviate defendants' concerns regarding fairness to defendants, wide-ranging inquiry into an individual's medical and psychiatric history could have deterred legitimate discrimination claims, and litigants should not have been forced to choose between disclosing highly personal medical information and asserting claims for distress that any healthy individual would have likely suffered as a result of discrimination.

Former police officers' assertion of mental anguish claims in employment discrimination action against municipality were "garden-variety claims" that did not put their mental state at issue so as to waive physician and psychotherapist privilege for purposes of discovery of officers' medical records, where mental anguish claims did not allege a specific, diagnosed psychological condition, but rather merely that officers had suffered general mental distress, officers alleged that they did not receive mental health treatment for emotional distress, and officers asserted that their claims could be established by lay testimony.

EMINENT DOMAIN - CALIFORNIA

City of Perris v. Stamper

Court of Appeal, Fourth District, Division 2, California - August 9, 2013 - Cal.Rptr.3d - 13 Cal. Daily Op. Serv. 8814 - 2013 Daily Journal D.A.R. 10, 711

City filed eminent domain action to acquire land for truck route though light industrial land, and appraised the take as undevelopable agricultural land on theory that it would not approve any development unless landowners gave or dedicated truck route land to the city.

After bifurcation and court trial on legal issues, the Superior Court entered judgment for city regarding dedication issue. Following stipulated judgment as to appraisal, landowners appealed.

The Court of Appeal held that:

- Landowners had right to jury trial on issues of fact bearing on fair market value;
- Court could not consider city's promises of future concessions and assurances when considering whether taken area was roughly proportionate to parcel's potential traffic impacts;

- Dedication requirement was a free-standing requirement which was not attributable to the road construction project for purposes of statute prohibiting evidence of increase or decrease in value attributable to the project; and
- Testimony by city manager and engineer was expert testimony.

When condemned property would have to be dedicated as a condition of developing the larger parcel of which the condemned property is a part, the condemned property must be valued at its current use because it could never be used for any other purpose.

Owners of light industrial land had a right to a jury trial on certain factual issues bearing on the fair market value of their land which city took to establish truck route, including whether it was reasonably probable that city would require the take to be dedicated as a condition of developing the entire parcel, and whether the extent of the take was roughly proportionate to the entire parcel's impacts on traffic in the event the entire parcel was developed for light industrial uses.

ZONING - CALIFORNIA

Friends of Oroville v. City of Oroville

Court of Appeal, Third District, California - August 19, 2013 - Cal.Rptr.3d - 13 Cal. Daily Op. Serv. 9041 - 2013 Daily Journal D.A.R. 11, 024

The Friends of Oroville brought action under the California Environmental Quality Act (CEQA), challenging the City of Oroville's approval of an environmental impact report (EIR) for the project at issue—a relocated and expanded Wal–Mart Supercenter to replace an existing Wal–Mart of traditional dimension and retail offerings (the Project).

On appeal, plaintiffs contended the City's EIR (1) improperly found it was infeasible for the Project to contribute its fair share mitigation for "Year 2030" cumulative traffic impacts along eight intersections of Oroville Dam Boulevard, (2) inadequately analyzed the Project's hydrological impacts, (3) inadequately analyzed the Project's greenhouse gas emissions, and (4) violated CEQA's notice requirements.

The appeals court found that the City properly adopted Assembly Bill 32's reduction targets for GHG emissions as the threshold-of-significance standard in determining whether the Project's GHG emissions constituted a significant environmental impact. The problem was that the City improperly applied this proper standard in concluding that the Project's environmental impacts from GHG emissions were less than significant. Citizens, again, exemplifies the model, showing us a proper way to apply the Assembly Bill 32 threshold-of-significance standard.

The appeals court concluded that the City misapplied the Assembly Bill 32 threshold-of-significance standard in two related ways: (1) by applying a meaningless, relative number to determine insignificant impact; and (2) by failing to ascertain the existing Wal–Mart's GHG emissions, and the impact on GHG emissions from the Project's mitigation measures.

NEGLIGENCE - CALIFORNIA

Hayes v. County of San Diego

Supreme Court of California - August 19, 2013 - P.3d - 13 Cal. Daily Op. Serv. 9028 - 2013 Daily Journal D.A.R. 10, 999

Minor daughter of suspect fatally shot by sheriff's deputies brought action against deputies and county, alleging state and federal claims stemming from shooting.

The Supreme Court of California held that tactical conduct and decisions preceding an officer's use of deadly force were relevant considerations in determining whether the use of deadly force gives rise to negligence liability; disapproving Munoz v. City of Union City, 120 Cal.App.4th 1077, 16 Cal.Rptr.3d 521.

LAND USE - CONNECTICUT

Emerick v. Town of Glastonbury

Appellate Court of Connecticut - August 20, 2013 - A.3d - 145 Conn.App. 122

Landowner brought action against town, seeking writ of mandamus and injunctive and declaratory relief, to restore and preserve a mill located on town property that abutted landowner's property.

The Appellate Court held that:

- Landowner lacked standing to challenge city's mill demolition by virtue of his status as abutting landowner;
- Landowner lacked voter standing to challenge the demolition; and
- Landowner lacked taxpayer standing to challenge the demolition.

Abutting landowners are statutorily aggrieved in zoning cases. However, landowner lacked standing to challenge town's demolition of a mill located on town property by virtue of his ownership of property abutting the mill. Landowner's action was not an administrative appeal from the decision of a zoning agency or conservation commission, and landowner failed to allege specific, personal, and legal interest in the mill demolition arising from his status as abutting landowner that was any different from the general interest that all members of the community shared.

A plaintiff's status as a taxpayer does not automatically give him standing to challenge alleged improprieties in the conduct of the defendant town; plaintiff must also allege and demonstrate that the allegedly improper municipal conduct caused him to suffer some pecuniary or other great injury.

To establish taxpayer standing, it is not enough for a plaintiff to show that his tax dollars have contributed to the challenged municipal project. Plaintiff must prove that the project has directly or indirectly increased his taxes or, in some other fashion, caused him irreparable injury in his capacity as a taxpayer.

ZONING - FLORIDA

Angelo's Aggregate Materials, Ltd. v. Pasco County

District Court of Appeal of Florida, Second District - August 14, 2013 - So.3d - 2013 WL 4081010

Property owner brought declaratory judgment action against county and its zoning administrator seeking declaration of its vested rights under prior land use regulation and declaration that certain portion of county's land development code (LDC) were unconstitutional.

The District Court of Appeal held that:

- Action presented a justiciable controversy appropriate for declaratory judgment, and
- Ordinance's exhaustion of administrative remedies requirement did not apply to declaratory judgment actions.

Action in which property owner sought declaration of its vested rights under prior land use regulation and declaration that portions of county's land development code (LDC) was unconstitutional concerned a justiciable controversy appropriate for declaratory relief. Property owner had a dispute with the county over which legal framework applied to its permit for a landfill. Property owner sought determination whether it had a vested right to proceed merely with a conditional use permit or whether the subsequent changes to the LDC, requiring a comprehensive plan land use amendment, applied. Without such a determination, property owner risked having made a significant investment in seeking the conditional use permit only to learn the expense was wasted by the need for a comprehensive plan amendment.

TAX - KANSAS

In re Equalization Appeal of Coffeyville Resources Nitrogen Fertilizers, L.L.C.

Court of Appeals of Kansas - August 9, 2013 - Slip Copy - 2013 WL 4046403

This was a judicial review action arising out of Montgomery County's classification, valuation, and assessment of certain assets owned by Coffeyville Resources Nitrogen Fertilizers, L.L.C. The Montgomery County appraiser classified, valued, and assessed the 699 assets in dispute—which are used by Coffeyville Resources at a nitrogen fertilizer plant—as real property. The Kansas Court of Tax Appeals (COTA) found in a 2–1 decision that the assets in dispute were properly classified as real property and that the fair market value of the real property was $303,066,836.

The appeal raised three issues. First, whether COTA utilized the appropriate test in classifying the disputed assets as real property. Second, whether COTA erred in concluding that Coffeyville Resources failed to establish a violation of its constitutional right to uniform and equal tax treatment. Third, if COTA erred in relying on Montgomery County's appraisal of the disputed assets.

As to the first issue, the appeals court found that the lower court's failure to make findings of fact and conclusions of law regarding the individual assets—or groups of similar assets—in dispute made it difficult—if not impossible—for the court to meaningfully review whether COTA appropriately applied the Total Petroleum factors in this case. It therefore remanded this matter to COTA to make specific findings and conclusions, based on the Total Petroleum factors, as to whether each asset—or group of assets—should be classified as real property or personal property.

ZONING - MASSACHUSETTS

Timperio v. Zoning Bd. of Appeals of Weston

Appeals Court of Massachusetts. Suffolk - August 16, 2013 - N.E.2d - 84 Mass.App.Ct. 151

Property owner appealed decision of town zoning board of appeals, denying owner's application for variance and special permit for a parcel comprised of two lots.

The Appeals Court held that:

- Decision of board, that one lot had retained its separate character, did not preclude lots from merging for zoning purposes, and
- Owner's lots were not protected from merger under statute exempting certain lots from increased zoning restrictions.

Under the common-law merger doctrine, when adjacent nonconforming lots come into common ownership, they are normally merged and treated as a single lot for zoning purposes.

Owner's three adjoining lots were not protected from merger for zoning purposes under statute exempting certain lots from increased zoning restrictions, even though town zoning board had previously determined that one lot retained its separate character, where town subsequently enacted zoning ordinance increasing lot frontage requirements in district where lots were located. Town's prior finding that one lot retained its "separate status as a preexisting nonconforming lot," did not equate to a finding that the lot was separately owned from the other two lots, thereby somehow qualifying first lot for "perpetual" protection under the statute.

LAND USE - MINNESOTA

Abrahamson v. City of Le Sueur

Court of Appeals of Minnesota - August 19, 2013 - Not Reported in N.W.2d - 2013 WL 4404719

Plaintiffs were residents of the City of Le Sueur who opposed the development of a proposed energy power plant. The proposed bioenergy-electric-generating power plant was known as the Hometown Bio Energy Project.

The Minnesota Municipal Power Agency (MMPA) proposed to develop the project on a site of approximately 35 acres just outside of the city. The city council accepted a petition for annexation from the owner of the proposed project site and completed annexation of the site in December 2011.

The city is a Home Rule Charter city, as authorized by Minnesota Statutes Chapter 410. The city's charter reserves to the voters the right to petition the city council for adoption of ordinances. Concerned about the possible nuisance impact of the project, appellants proposed an ordinance amending Ordinance No. 517 of the city's Code of Ordinances relating to public nuisances.

The district court determined that the proposed ordinance amendment conflicted with state nuisance law and was a land-use regulation preempted by the Municipal Planning Act (MPA). The appeals court affirmed.

PUBLIC UTILITIES - MISSISSIPPI

Sturdivant v. Moore Bayou Water Ass'n Inc.

Court of Appeals of Mississippi - August 13, 2013 - So.3d - 2013 WL 4055136

Property owner brought action against water association, county, and the Department of Transportation (DOT), alleging claims for negligence and breach of contract against water association, and inverse condemnation against county and the DOT related to the destruction of a water line during a highway expansion project.

The Court of Appeals held that:

- Property owner lacked standing to bring breach of contract claim against water association;
- Summary judgment evidence was sufficient to demonstrate that association's contractual relationship with member ended long before water line that serviced member was damaged;
- Association's failure to replace damaged water line did not constitute negligence;
- The 120-day period for property owner to serve her inverse condemnation complaint on county began to run on the date she filed her complaint; and
- Circuit Court's determination that no good cause was shown for property owner's intentional delay in serving process on county did not constitute an abuse of discretion.

SCHOOLS - MISSISSIPPI

Hester v. Lowndes County School Dist.

Court of Appeals of Mississippi - August 20, 2013 - So.3d - 2013 WL 4419336

Baseball coach and principal sought review of decision by school district to terminate them. The Chancery Court affirmed coach's termination, but ordered principal reinstated and awarded him lost wages. Coach and school district appealed.

The Court of Appeals held that:

- Baseball coach was terminated for good cause, and
- Principal was terminated for good cause.

Baseball coach was terminated for good cause; by using the school's name to finance the purchase of a fairway mower, coach wrongfully exposing the district to potential liability for a $15,000 mower. School district's renewal of baseball coach's contract did not amount to ratification of his prior actions in securing credit for the purchase of a fairway mower by using the school's name, where coach's misconduct was not discovered until after the contract renewal.

School board had good cause to terminate principal. He admitted he knew the school could not buy the fairway mower, yet he executed a document purporting to give baseball coach the authority to make such a purchase on the school's behalf. While the principal claimed he did not know what he was signing, his signature on the incumbency certificate was sufficient evidence for the school board to conclude he had read and understood the document. A person is under an obligation to read a contract before signing it, and will not as a general rule be heard to complain of an oral misrepresentation the error of which would have been disclosed by reading the contract.

ELECTIONS - NEW YORK

Hoerger v. Spota

Supreme Court, Appellate Division, Second Department, New York - August 16, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 05661

Plaintiffs brought action seeking to invalidate petitions designating incumbent as candidate for district attorney for county, based on county term limit law.

The Supreme Court, Appellate Division, held that:

- County lacked authority to restrict the number of consecutive years that a person could serve as district attorney for the county, and
- County government's ability to place term limits on office of district attorney for county is preempted by state law.

ELECTIONS - NEW YORK

Hall v. Dussault

Supreme Court, Appellate Division, Third Department, New York - August 15, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 05651

Appeal was taken from order of the Supreme Court granting applications to invalidate designating petitions for two candidates for town office in upcoming primary election.

The Supreme Court, Appellate Division, held that:

- Failure of subscribing witnesses to inform signers that, by signing the petition, they affirmed the truth of the matter to which they subscribed rendered the signatures invalid;
- Subscribing witness' mistaken execution of the statement intended for a notary public or commissioner of deeds rather than that meant for party members on nominating petition rendered signatures on the petition invalid, but
- Such mistakes were technical irregularities that did not preclude giving voters an opportunity to ballot.

MUNICIPAL ORDINANCE - OREGON

State v. Christian

Supreme Court of Oregon - August 15, 2013 - P.3d - 2013 WL 4185310

Defendant was convicted in the Circuit Court of several state law offenses and violation of city ordinance against carrying a firearm in a public place having recklessly failed to unload it.

The Supreme Court of Oregon held that:

- Supreme Court would not address defendant's overbreadth challenge to city ordinance;
- Ordinance was facially constitutional under state constitutional article governing right to bear arms; and
- Ordinance did not violate the Second Amendment; overruling State v. Blocker, 630 P.2d 824, and State v. Hirsch/Friend, 114 P.3d 1104.

City ordinance, prohibiting a person from knowingly possessing or carrying a firearm in a public place, recklessly having failed to remove all ammunition from firearm, does not prohibit the mere possession of firearms in public places, but specifically regulates only the manner of possession, namely, knowingly possessing or carrying a loaded firearm in public and recklessly failing to remove all of the ammunition.

Justification for recognizing overbreadth challenges in cases involving freedom of expression and peaceable assembly under First Amendment does not apply in the context of state constitutional article governing the right to bear arms. Unlike protected speech and assembly, recognizing overbreadth challenges in "right to bear arms" cases is not necessary because the enforcement of an

overbroad restriction on the right to bear arms does not tend to similarly deter or "chill" conduct that that provision protects.

Overbreadth challenges are not cognizable in challenges under state constitutional article governing right to bear arms, and as such, the justification for recognizing overbreadth challenges in First Amendment freedom of expression and assembly cases does not apply in the context of "right to bear arms" cases; overruling State v. Blocker, 630 P.2d 824, and State v. Hirsch/Friend, 114 P.3d 1104.

Intermediate scrutiny, as opposed to strict scrutiny, was appropriate standard to review constitutionality of city ordinance, prohibiting a person from knowingly possessing or carrying a firearm in a public place, recklessly having failed to remove all ammunition from firearm, under Second Amendment. Ordinance did not absolutely restrict the individual right to bear arms in public for the purpose of self-defense, and it also made additional exceptions to the prohibition of possession or carrying loaded firearms in public places, some of which lessened the burden of the ordinance on Second Amendment rights.

SCHOOLS - PENNSYLVANIA

Solomon v. School Dist. of Philadelphia

United States Court of Appeals, Third Circuit - August 12, 2013 - Fed.Appx. - 2013 WL 4047199

Former teacher brought action claiming that school district violated Americans with Disabilities Act (ADA) and other federal and state laws by refusing to grant her reasonable accommodations after she suffered herniated disks and related back problems.

The Court of Appeals held that:

- Ample evidence supported finding that school district's offer of elevator access to teacher after reassigning her to upstairs classroom was a reasonable accommodation under ADA, and
- School district offer of elevator access to teacher fulfilled its duty under the ADA, and it was not obligated to offer her another teaching or administrative position.

TAX - PENNSYLVANIA

Norwegian Tp. v. Schuylkill County Bd. of Assessment Appeals

Commonwealth Court of Pennsylvania - August 12, 2013 - A.3d - 2013 WL 4046669

Bank transferred Property to Township, which intended to convert it into a playground. Funds were not immediately available for this conversion, so the Property was used as open space while the Township pursued the playground project.

County sent a notice to the Township notifying the Township of municipal/county and school district tax liability for the Property. The Township appealed to the Board, which affirmed its tax assessment of the Property based on fair market value. The Township appealed the tax assessment of the Board to the trial court challenging the Property's tax-exempt status.

On appeal, the Board argued that the trial court erred in determining that the Board bore the

burden of proving that the Township was not using the Property for a public purpose and therefore the Property was taxable. The Board asserted that the trial court erred in concluding that the Property was tax-exempt because: (1) the Township was not actively and currently using the Property for public purposes; (2) the Township merely "intended" to use the Property as a public park and/or playground and had not begun construction or expended significant sums of money towards this development; (3) the Township did not have the necessary funds to develop the Property for public purposes; and (4) the Township had failed to install improvements to the Property or notify its residents that the Property was available for public use as a park and/or playground.

The appeals court began its analysis by stating that a progeny of cases had held that municipal authorities, including townships, are extensions of the Commonwealth, and, thus, property owned by these entities is presumptively non-taxable.

The appeals court concluded by stating that, "Because property owned by a governmental body (i.e., a township) is presumed to be immune from taxation unless there is evidence presented that the property is being used for a non-governmental purpose, see Granville, the trial court correctly placed the burden on the taxing authority to prove the Township's tax liability. With the sole evidence by the Board being the tax assessment record card and a photograph of the Property establishing that it is vacant, the record supports the trial court's finding that there was no evidence in the record to suggest that the Property has been used for a non-public purpose and, moreover, supports the findings that the Property is available to the public for recreational activities and was used for the public's benefit. Though not required for a property to be tax-immune/exempt, the trial court also found that the Township made a good-faith effort to develop the Property (as established by the Township's testimony that it had continued to apply for grants, clear trees and debris, and maintain the Property as part of its regular maintenance program for playgrounds/parks). The evidence supports the trial court's findings, and it is insufficient to rebut the presumption—itself supported by a century of case law—that the Property is exempt from taxation. The trial court properly concluded that, '[u]nder these circumstances, taxation of the [P]roperty is neither compelled nor intended by the Pennsylvania Constitution or the County Assessment Law.'"

LIABILITY - SOUTH DAKOTA

Patitucci v. City of Hill City

Supreme Court of South Dakota - August 14, 2013 - N.W.2d - 2013 S.D. 62

Pedestrian brought negligence action against city and landowner, whose land abutted public sidewalk, after pedestrian was injured while walking on sidewalk.

The Supreme Court, Zinter of South Dakota held that:

- City had sufficient control over sidewalk within city boundary, so as to have duty of care for designing, constructing, maintaining, and repairing sidewalk, but
- There was no evidence that landowner made special use of sidewalk, as would create duty on part of landowner to maintain sidewalk in reasonably safe condition for pedestrian.

Under common law, landowners abutting public sidewalks generally do not owe a duty to keep them in a reasonably safe condition, but an exception exists when the abutting owner creates or maintains an excavation or other artificial condition on the sidewalk.

Under the "special use doctrine," if an abutting landowner makes special use of the sidewalk, he or she owes a duty to maintain it in a reasonably safe condition for pedestrians lawfully using it, and must exercise reasonable care to guard the public from injury. If the abutter does not, he or she becomes liable to any persons injured as a proximate result of his or her negligence.

ZONING - TENNESSEE

Shore v. Maple Lane Farms, LLC

Supreme Court of Tennessee, at Knoxville - August 19, 2013 - S.W.3d - 2013 WL 4428904

After County Zoning Board of Appeals issued order permitting farmer to hold one amplified outdoor music concert per year, farmer's neighbor filed suit against farmer, asserting claim for nuisance and violation of Board's order limiting concerts to one per year.

The Supreme Court of Tennessee held that:

- Marketing of farm by holding amplified outdoor music concerts was not connected with production of farm products, within meaning of Right to Farm Act;
- Evidence was sufficient to establish prima facie case of nuisance;
- Music concerts were not "recreational activities on land used for commercial production of farm products," within statutory definition of "agriculture," and thus, were not exempt from compliance with zoning resolution.

PUBLIC UTILITIES - CALIFORNIA

BNSF Railway Company v. Public Utilities Commission

Court of Appeal, Third District, California - August 5, 2013 - Cal.Rptr.3d - 13 Cal. Daily Op. Serv. 8455

Railroads petitioned for writ of review challenging Public Utilities Commission's (PUC) determination that it had the authority to order railroads to stop using locomotive-mounted horns at certain pedestrian rail crossings.

The Court of Appeal held that PUC lacks authority to order railroads to stop using locomotive-mounted horns at rail crossings outside federal quiet zones.

The Federal Railroad Administration regulations making the sounding of a locomotive-mounted audible warning device at public highway-rail grade crossings a requirement of federal law leave the sounding of locomotive horns at pedestrian crossings entirely to the states to regulate.

Under the state statute mandating that "a bell, siren, horn, whistle, or similar audible warning device shall be sounded," in accordance with a federal regulation requiring that such devices be mounted on a locomotive, at any public crossing or any other rail crossing except a crossing in a federal quiet zone, the PUC lacks authority to order railroads to stop using locomotive-mounted horns at pedestrian rail crossings outside federal quiet zones.

FIRST AMENDMENT - CALIFORNIA

Dowd v. City of Los Angeles

United States District Court, C.D. California - August 7, 2013 - Not Reported in F.Supp.2d - 2013 WL 4039043

Plaintiffs – performers who make their living on the Venice Beach Boardwalk – filed a lawsuit raising facial and as-applied challenges to the 2006 and 2008 versions of LAMC § 42.15 and its implementing Public Expression Permit Program Rules, which govern the use of the Boardwalk.

Plaintiffs argued that the regulations violate the First and Fourteenth Amendments. The facial challenges to the 2008 ordinance at issue were threefold: First, Plaintiffs argued that the permitting and designated performance space system was not a reasonable time, place and manner restriction and granted unbridled discretion to licensing authorities. Second, Plaintiffs asserted that the ordinance's use of the phrase "inextricably intertwined" rendered it unconstitutionally vague. Third, Plaintiffs claimed that the amplified sound ban was not a reasonable time, place, and manner restriction.

The District Court:

- Granted summary judgment in favor of City on the 2006 Ordinance;
- Granted summary judgment in favor of City on the Permit and Lottery system, the height restriction, the rotation requirement, and the sunset requirement;
- Granted summary judgment in favor of Plaintiffs on the amplified sound ban; and
- Granted summary judgment in favor of City on the facial constitutionality of the Rules of Decorum under the United States Constitution, but granted summary judgment in favor of Plaintiffs on their as-applied challenge to the Rules of Decorum under the United States Constitution and the California constitution.
- The court declined to issue a preliminary injunction but found that the provisions of the Rules of Decorum at issue here are constitutional only when there is an actual disruption beyond a per se breach of the Rules.

ZONING - DISTRICT OF COLUMBIA

D.C. Library Renaissance Project/West End Library Advisory Group v. District of Columbia Zoning Com'n

District of Columbia Court of Appeals - August 8, 2013 - A.3d - 2013 WL 4016278

Association organized to protect neighborhood library, which was to be demolished and replaced as part of planned unit development (PUD), filed petition for judicial review of Zoning Commission's decision to approve public contractor's PUD application.

The Court of Appeals held that:

- Association had constitutional standing to seek judicial review of Commission's approval of PUD application;
- Association had prudential standing to seek judicial review of Commission's approval of PUD application;
- Commission acted reasonably in concluding that it was not required under "adverse effects" zoning regulation to consider value of land rights being transferred to public contractor in determining whether to approve PUD;
- Evidence supported conclusion of commission that PUD would not generate adequate revenue

without relief from inclusionary zoning (IZ) requirements; and
- Evidence supported commission's determination that approval of PUD would not be inconsistent with District's comprehensive plan as a whole.

An organization or association has standing to bring suit on behalf of its members when: (1) its members would otherwise have standing to sue in their own right, (2) the interests it seeks to protect are germane to the organization's purpose, and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Injury in fact asserted by association organized to protect neighborhood library, which was to be demolished and replaced as part of planned unit development (PUD), i.e., that implementation of PUD would cause its members to lose the use and enjoyment of the current library and that the replacement library would be inadequate, was traceable to zoning commission's order approving PUD, and the injury was capable of being redressed by a favorable decision of the Court of Appeals, such that association had constitutional standing to seek judicial review of commission's order.

ZONING - FLORIDA

Foley v. Orange County

United States District Court, M.D. Florida - August 13, 2013 - Slip Copy - 2013 WL 4110414

Plaintiffs were residents of Orange County, Florida, who own and raise toucans. They brought several claims against Orange County based on their efforts to operate a commercial aviary out of their residence, which is located in a residential-only zoned area of the county, and another parcel of property that is located in rural-use zoned area of the county.

Plaintiffs contended that portions of Orange County's land use ordinances, which prohibit the operation of a commercial aviary at the residence altogether and at the second property absent a special use permit, conflict with a provision of the Florida Constitution that provides the Florida Fish and Wildlife Commission with all of the "regulatory and executive powers of the state with respect to wild animal life and fresh water aquatic life." Art. IV, § 9, Fla. Const. Plaintiffs had been issued a permit to possess and sell the birds from their residence by the commission.

The court found that Florida law provided that the state legislative power over captive wildlife was transferred to the Florida Fish and Wildlife Conservation Commission. Art. IV, § 9, Fla. Const. The effect of the transfer of that portion of the state's legislative power was to divest the state legislature of authority to regulate the possession and sale of captive wildlife and vest that power in the commission. The commission therefore assumed the regulatory authority that the legislature had prior to the transfer. As such, the rules adopted by the commission are tantamount to legislative acts and become the governing law of the state. Any and all laws in conflict with the commission's rules are consequently void.

Applying these principles, the court concluded that Orange County cannot use its land use ordinances to regulate the possession or sale of captive wildlife.

TAX - INDIANA

In re Carroll County 2012 Tax Sale

Court of Appeals of Indiana - August 8, 2013 - N.E.2d - 2013 WL 4020307

The primary issue in this case was whether the trial court erred in interpreting Indiana Code section 13–26–14–4, which prohibits real property from being sold at a tax sale when the only lien against the property was for unpaid sewer bills. The appellees-petitioners successfully petitioned the trial court to have their respective properties removed from the county tax sale list when it was determined that unpaid sewage bills were the only liens on the parcels.

Twin Lakes Regional Sewer District (TLRSD), appealed that determination, alleging that the trial court misinterpreted the provisions of Indiana Code section 13–26–14–4 regarding the removal of the properties from the tax sale list.

The appeals court concluded that the trial court properly determined that the statute prohibits foreclosure on the property at a tax sale when an unpaid sewer bill is the only lien that exists on the property.

MUNICIPAL ORDINANCE - KANSAS

City of Lawrence v. Gilmore

Court of Appeals of Kansas - August 2, 2013 - Slip Copy 2013 - WL 3970195

The Lawrence Police Department arrested some dude three times for violation of Lawrence, Kansas, Municipal Ordinance 16–803(4), which states in pertinent part:

"It shall be unlawful to …

….

(4) Continue to obstruct traffic on any street, sidewalk, or other right-of-way of this City after having been ordered by a police officer to end such obstruction.

"For the purposes of this section, 'obstruct traffic' means to walk, stand, sit, lie, or place an object in a manner as to: block lawful passage by another person or vehicle, or to require another person or driver to take evasive action to avoid physical contact, or to block the entrance of any private or public building or establishment from any public street or sidewalk."

Apparently, dude had something going on with the Weaver's store, located at the intersection of Massachusetts and Ninth Street in Lawrence, as each arrest occurred at that location.

Dude argued that ordinance 16–803(4) was unconstitutionally vague on its face. He also argued that the lack of a scienter and mens rea requirement in the ordinance gave rise to vagueness concerning his First Amendment rights. Furthermore, it did not sufficiently define "evasive action."

The void-for-vagueness doctrine requires that an ordinance define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.

"Here, the conduct prohibited by the ordinance is clear. An ordinary person can understand what conduct is prohibited because the term 'evasive action' is unambiguous based on its plain meaning and the term 'obstruct traffic' is clearly defined in the ordinance. Moreover, the term 'evasive action" does not lend itself to the same subjective interpretation as the term 'annoying' in the cases relied on by [the dude]. The clear and objective nature of the term 'evasive action' and the clearly defined term 'obstruct traffic' do not encourage arbitrary and discriminatory enforcement. All

doubts must be resolved in favor of the ordinance's validity, and it is our duty to uphold the ordinance rather than defeat it. This ordinance can be construed in a reasonable way that makes it constitutionally valid; therefore, the ordinance is upheld."

SCHOOLS - LOUISIANA

Orleans Parish School Bd. v. Pastorek

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

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

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