SCHOOLS - GEORGIA

Sherman v. Atlanta Independent School System

Supreme Court of Georgia - June 3, 2013 - S.E.2d - 2013 WL 2372192

Plaintiff brought action against school system and development authority, alleging that school taxes were diverted to development authority to fund city's tax allocation district (TAD) in violation of Educational Purpose Clause.

The Supreme Court of Georgia held that original resolutions of school board and the other local government acts approving the use of school taxes in tax allocation increments for TADs were not unconstitutional and remained effective.

Although the original resolutions of school board and the other local government acts approving the use of school taxes in tax allocation increments for city's TAD had previously been deemed unconstitutional by the Supreme Court of Georgia, that ruling was prior to constitutional amendment that allowed the General Assembly to enact a general law permitting the use of school tax funds to fund redevelopment purposes and programs, including the payment of debt service on tax allocation bonds, notwithstanding the Educational Purpose Clause or any other provision of the Constitution.

The subsequent constitutional amendment and revision of the statute governing TADs changed the applicable law, and those changes were expressly made retroactive with respect to the county, city, and local board of education approvals needed to use school taxes for redevelopment purposes.

ELECTIONS - GEORGIA

Meade v. Williamson

Supreme Court of Georgia - June 3, 2013 - S.E.2d - 2013 WL 2372260

Challenger filed petition contesting results of primary election for sheriff. The superior court declared election invalid and ordered new election. Incumbent appealed.

The Supreme Court of Georgia held that:

- Challenger had burden of proving that individuals who assisted voters were unqualified to assist voters;
- Absentee ballot was mailed in compliance with statute governing mailing of absentee ballots, even though ballot was mailed to out-of-county address;
- That absentee ballot was mailed to in-county address other than one reflected on voter registration record did not invalidate ballot;
- Statute providing that, with limited exceptions, absentee ballots can not be mailed to an address other than the permanent mailing address reflected on the applicant's voter registration record

was directory, not mandatory;

- That absentee ballot envelopes failed to designate disability that would authorize person to assist voter did not invalidate ballots; and
- Insufficient evidence supported trial court's conclusion that irregularities in election process were shown to cast doubt upon results.

In challenger's election contest, evidence was insufficient to support trial court's conclusion that irregularities in election process were shown to cast doubt upon results of primary election for sheriff. Although 14 absentee ballots appeared to have been altered, challenger presented evidence of only one illegally bought vote The remaining evidence of vote buying by incumbent's supporters was based upon hearsay and gossip, and it was purely speculative that alterations were made by anyone other than voters.

TORT CLAIMS ACT - INDIANA

City of Indianapolis v. Buschman

Supreme Court of Indiana - June 4, 2013 - N.E.2d - 2013 WL 2407481

Motorist and her husband brought action pursuant to the Indiana Tort Claims Act (ITCA) against city and police department alleging personal injuries as a result of negligence of police officer.

The Supreme Court of Indiana held that inclusion of information in tort claim notice beyond that required by ITCA did not limit or restrict scope of claim; disapproving Howard County Bd. of Com'rs v. Lukowiak, 810 N.E.2d 379.

Claimant's inclusion of information in her tort claim notice to city beyond that required by the ITCA did not operate to restrict the scope of her claim, and therefore notice that stated "no injuries" did not render claimant's notice insufficient in action against city stemming from alleged negligence of police officer, as the ITCA required no statement regarding injuries. The purpose of ITCA was to advise city of motor vehicle accident so that it could promptly investigate the surrounding circumstances, and legislature did not intend to penalize claimants for including information beyond what the ITCA required.

WORKERS' COMP - LOUISIANA

Whetstone v. Jefferson Parish School Bd.

Court of Appeal of Louisiana, Fifth Circuit - May 30, 2013 - So.3d - 12-639 (La.App. 5 Cir. 5/30/13)

Claimant appealed a determination of the Office of Workers' Compensation that denied her continued benefits for an alleged mental injury caused by post-traumatic stress related to an assault sustained within the course and scope of her employment.

Upon conclusion of a trial, the workers' compensation court ruled in favor of the school board and dismissed claimant's petition with prejudice. Specifically, the workers' compensation judge did not find claimant to be credible and did not find any merit to her claim. On appeal, claimant asked the court of appeal to reverse the credibility determinations and factual findings of the workers' compensation judge. The court of appeal found no grounds for such a reversal.

To prove entitlement to benefits for a mental injury resulting from mental stress, a claimant must prove that the mental injury was caused by “sudden, unexpected, and extraordinary stress related to employment” and must prove it by clear and convincing evidence.

INSURANCE - MASSACHUSETTS

Wheatley v. Massachusetts Insurers Insolvency Fund

Supreme Judicial Court of Massachusetts, Plymouth - May 31, 2013 - N.E.2d - 465 Mass. 297

Plaintiff brought consumers action pursuant to unfair business practices act against Insurers Insolvency Fund, alleging that Fund had engaged in various unfair claims settlement practices arising in underlying negligence action against town whose liability insurer had become insolvent.

The Supreme Judicial Court of Massachusetts held that, where a plaintiff prevails in a consumer action against Insolvency Fund under statute governing regulation of business practices for consumer protection, the Fund is liable for reasonable attorney fees.

Insurers Insolvency Fund, which is an unincorporated association, created by the legislature, for the purpose of settling unpaid claims covered by an insurance policy issued by an insurer that later becomes insolvent, is in “the business of insurance” for purposes of statute governing unfair methods of competition and unfair or deceptive acts or practices, as well as statute governing regulation of business practices for consumer protection, and therefore, Fund is in exactly the same position as a traditional for-profit insurer, that is, subject to the provisions of both statutes.

CONTRACTS - SCHOOLS - MASSACHUSETTS

Leder v. Superintendent of Schools of Concord & Concord-Carlyle Regional School Dist.

Supreme Judicial Court of Massachusetts, Middlesex - May 31, 2013 - N.E.2d - 465 Mass. 305

Musical instrument sale and rental business brought action against school district and superintendent, as well as various other district officials, seeking declaratory and injunctive relief to prevent district from endorsing other rental businesses or organizing string rental nights without business’s participation.

Plaintiff filed a complaint alleging that, by providing a competitor with their “endorsement,” the defendants had used their official positions to secure for the competitor unwarranted privileges that are of substantial value and not available to similarly situated individuals, in violation of G.L. c. 268A, § 23 (b) (2)(ii).

The Supreme Judicial Court of Massachusetts held that finding of statutory violation by State Ethics Commission and rescission request by municipal agency were prerequisites to filing of private rescission action.

LAND USE - MASSACHUSETTS

Brockton Power LLC v. City of Brockton

United States District Court, D. Massachusetts - May 30, 2013 - Slip Copy - 2013 WL 2407220

Plaintiffs were developers who wished to build an electric power generating facility on land they own in Brockton, Massachusetts. They sued the city, its planning board and city council, and seven of its present and former officials, alleging violations of 42 U.S.C. § 1983 and state law based on a conspiracy to systematically deprive plaintiffs of various constitutional rights, including the right to develop their land.

The city and the planning board answered the complaint, but the remaining eight defendants moved to dismiss it in its entirety. They challenged it on numerous grounds: (i) absolute legislative or quasi-judicial immunity; (ii) First Amendment immunity; (iii) qualified immunity; and (iv) specific attacks on the sufficiency of allegations against individual defendants with respect to each discrete claim.

According to the plaintiffs, the nature of the alleged conspiracy, the serial litigation that resulted, and the overall egregiousness of the defendants' collective actions remove this case from the realm of "run of the mill" land-use disputes that federal courts have been reluctant to entertain. It is against this backdrop, which consists of substantially more than "threadbare recitals of the elements of a cause of action," that the court considered the moving defendants' requests for dismissal. The court concluded that the moving defendants' were not entitled to dismissal on any of their asserted grounds.

ZONING - MASSACHUSETTS

Plainville Asphalt Corp. v. Town of Plainville

Appeals Court of Massachusetts, Suffolk - June 6, 2013 - N.E.2d - 2013 WL 2421029

Operator of bituminous concrete plant filed petition for determination of validity of town zoning ordinance, alleging that its nonconforming use of property was not a use prohibited by zoning bylaws, but remained a use as of right.

The appeals court held that:

- Bylaw prohibited use of property as bituminous concrete plant, and
- Use had lost its status as a preexisting nonconforming use through nonuse.

The court also noted that the right of the public to have the zoning by-law properly enforced cannot be forfeited by the action of a municipality's officers.

PROPERTY TAX BALLOT INITIATIVE - MICHIGAN

Hillsdale County Sr. Services, Inc. v. Hillsdale County

Supreme Court of Michigan - May 31, 2013 - N.W.2d - 2013 WL 2367566

Hillsdale County Senior Services, Inc. (HCSS) filed an action against Hillsdale County, seeking mandamus to enforce the terms of a property-tax ballot proposition that provided for the levy of an additional property tax in Hillsdale County to fund HCSS.

The circuit court granted plaintiffs' writ for mandamus and ordered defendant to levy the additional amount for the length of time approved by the voters.

The court of appeals, reversed the order, concluding that the circuit court lacked subject-matter jurisdiction over the case because the Tax Tribunal had exclusive and original jurisdiction over the matter. The Supreme Court of Michigan affirmed.

PUBLIC UTILITIES - MINNESOTA

Northern States Power Co. ex rel. Bd. of Directors v. Aleckson

Supreme Court of Minnesota - May 29, 2013 - N.W.2d - 2013 WL 2319588

Electric utility commenced series of condemnation actions seeking to acquire easements across various parcels of land. After landowners exercised their option under the Buy-the-Farm statute, the district court determined that landowners were entitled to awards of minimum compensation and relocation benefits. Utility appealed, and the court of appeals reversed. Landowners appealed.

The Supreme Court of Minnesota held that:

- Landowners were entitled to minimum compensation pursuant to eminent domain statute; and
- Landowners were entitled to relocation assistance.

Entitlement to minimum compensation should be determined as of the time of the taking, not the date on which the condemnor files a petition to commence condemnation proceedings. M.S.A. § 117.187.

Landowners who elected to require electric utility to acquire a fee interest in entire parcel under the Buy-the-Farm statute after utility initiated condemnation action seeking an easement for High Voltage Transmission Lines (HVTL) were owners who were required to relocate, and thus, they were entitled to minimum compensation pursuant to eminent domain statute. M.S.A. §§ 117.187, 216E.12.

Landowners who elected to require electric utility to acquire a fee interest in entire parcel under the Buy-the-Farm statute after utility initiated condemnation action seeking an easement for HVTL qualified as "displaced persons" under federal law who were entitled to relocation assistance pursuant to the Minnesota Uniform Relocation Act (MURA). Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, § 101(6)(A)(i)(I), 42 U.S.C.A. § 4601(6)(A)(i)(I); M.S.A. § 117.187.

TORT CLAIMS ACT - MISSISSIPPI

City of Jackson v. Lewis

Court of Appeals of Mississippi - May 28, 2013 - So.3d - 2013 WL 2303391

Motorists brought personal injury action against police officer and city arising from incident in which a driver, who had stolen vehicle, ran a red light and crashed into motorists' vehicle after officer began, but did not finish, pursuing him for a traffic infraction.

The court of appeals held that officer did not act in reckless disregard for the safety of the public, as would preclude governmental immunity under the Mississippi Tort Claims Act (MTCA).

Factors for determining whether a police officer acted with reckless disregard for the safety of the public during a pursuit, as would preclude governmental immunity under the MTCA are: (1) the length of the pursuit, (2) the type of neighborhood in which the pursuit took place, (3) the characteristics of the streets on which the pursuit took place, (4) the presence of vehicular or pedestrian traffic, (5) the weather conditions and visibility, (6) the seriousness of the offense for which police are pursuing the suspect, (7) whether the officer proceeded with sirens and lights, (8) whether the officer had available alternatives that would lead to the apprehension of the suspect besides pursuit, (9) the existence of a police policy that prohibits pursuit under certain circumstances, and (10) the officer's rate of speed in comparison to the posted speed limit.

Reckless disregard for the safety of the public occurs during a police pursuit, as would preclude governmental immunity under MTCA, when the conduct involved evinced not only some appreciation of the unreasonable risk involved, but also a deliberate disregard of that risk and the high probability of harm involved.

EMPLOYMENT - MISSOURI

State v. Rhoads

Missouri Court of Appeals, Western District - June 4, 2013 - S.W.3d - 2013 WL 2395982

State brought petition in quo warranto to oust mayor from office after mayor hired her son-in-law to repair a city sign.

The Missouri Court of Appeals held that mayor's hiring of son-in-law constituted an appointment to "employment," as would fall within nepotism ban of state constitution, supporting state's quo warranto petition to remove mayor from office, despite argument that son-in-law was acting as independent contractor and thus had not been appointed to employment. Work of repairing sign engaged and occupied son-in-law, even if only temporarily, and at time of adoption of constitution's nepotism ban, "employment" was not commonly understood to exclude work of independent contractors.

AUCTION RATE SECURITIES - NEVADA

Richardson v. Oppenheimer & Co. Inc.

United States District Court, D. Nevada - May 10, 2013 - Slip Copy - Fed. Sec. L. Rep. P 97, 417

Investor brought 10b-5 action against Oppenheimer following the collapse of the ARS market.

Oppenheimer moved to dismiss, arguing that plaintiff failed to plead facts with sufficient particularity to satisfy the heightened pleading standards under Fed.R.Civ.P. 9(b) and the Private Securities Litigation Reform Act (PSLRA).

The court agreed that plaintiff's allegations lack the required specificity to put defendants on notice of the particular misconduct. First, taken in context, plaintiff's allegations that Oppenheimer marketed and represented ARS as safe, secure, like cash, or liquid appear to be the conclusions plaintiff drew from specific statements, rather than the statements themselves. Further, when plaintiff alleged that investment advisor and Oppenheimer "continued to represent" that ARS were safe it is unclear whether plaintiff was referencing affirmative statements, his continued

understanding that ARS were safe based on defendants' past and current statements, the defendants' failure to correct past statements, or simply the fact that defendants continued to transact in ARS on plaintiff's behalf based on plaintiff's communicated desire for liquid investment. As specific statements are lacking, it was impossible for the court to analyze their alleged falsity. More importantly, the lack of specificity failed to meet the PSLRA's requirement to "specify each statement alleged to have been misleading."

MUNICIPAL LIABILITY - NEW JERSEY

Grijalba v. Floro

Superior Court of New Jersey, Appellate Division - June 3, 2013 - A.3d - 2013 WL 2371408

Pedestrian brought action against homeowner, who rented out a portion of her home, for injuries he sustained when he slipped and fell on sidewalk abutting property.

The Superior Court, Appellate Division held that remand was necessary for trial court to determine whether property was commercial or residential.

Remand was necessary in action against homeowner, who rented out a portion of her home, for injuries pedestrian sustained when he slipped and fell on sidewalk abutting property for findings concerning whether the property was residential or commercial. On remand trial court was to consider the nature of the ownership of the property, including whether the property was owned for investment or business purposes, the predominant use of the property, including the amount of space occupied by the owner on a steady or temporary basis, and whether the property had the capacity to generate income.

PUBLIC TRANSPORTATION - NEW YORK

Greater New York Taxi Ass'n v. State

Court of Appeals of New York - June 6, 2013 - N.E.2d - 2013 N.Y. Slip Op. 04044

Medallion taxicab owners and their representatives, association of credit union leaders and credit unions that financed medallion purchases, and city council member brought action against state and mayor, among others, challenging constitutionality of statute which permitted livery vehicles to accept street hails in outer boroughs and allowed sale of new medallions for wheelchair-accessible medallion taxicabs.

The Court of Appeals held that:

- Statute addressed matter of substantial state concern, as required for enactment of special law without home rule message;
- Statute bore reasonable relationship to state's substantial interests;
- Statute did not violate Double Enactment Clause; and
- Statute did not violate Exclusive Privileges Clause.

LABOR RELATIONS - NEW YORK

Chenango Forks Cent. School Dist. v. New York State Public Employment Relations Bd.

Court of Appeals of New York - June 6, 2013 - N.E.2d - 2013 N.Y. Slip Op. 04039

School district commenced proceeding under Article 78, seeking review of a determination of the Public Employment Relations Board (PERB) which found that it had committed an improper employer practice by failing to negotiate discontinuance of its longstanding practice of reimbursing retirees' Medicare Part B premiums.

The Court of Appeals held that:

- It was reasonable for PERB not to defer to arbitrator's finding that there was no past practice; and
- PERB determination that district had committed improper employer practice by failing to negotiate discontinuance of reimbursing Medicare premiums was supported by substantial evidence.

A "maintenance of standards" or "maintenance of benefits" clause in a labor contract requires all existing conditions of employment, except those specifically changed by the contract, to be continued during the term of a new contract. Such a clause effectively confirms past practices contractually.

Determination of the PERB that school district had committed improper employer practice by failing to negotiate discontinuance of its longstanding practice of reimbursing retirees' Medicare Part B premiums was supported by substantial evidence, where school district's knowledge of payments was shown by managerial oversight necessary to make them, as well as memorandum to faculty and staff announcing termination of practice of reimbursement, and school district's current employees had knowledge of district's reimbursement payments to retirees, and thus harbored a reasonable expectation that they would receive reimbursement of Medicare Part B premiums upon their retirement.

EMINENT DOMAIN - PENNSYLVANIA

Lower Makefield Tp. v. Lands of Chester Dalgewicz

Supreme Court of Pennsylvania - May 29, 2013 - A.3d - 2013 WL 2322471

After it was determined that the taking was for a legitimate public use, the parties proceeded to a Board of View hearing to determine valuation. The Board of View valued the property at $3,990,000. Landowners filed an appeal, and the matter proceeded to a jury trial on the issue of damages. The Court of Common Pleas entered judgment on jury verdict finding that the township owed landowners $5,850,000 as just compensation for the taking and denied township's motion for post-trial relief. Township appealed.

The Supreme Court of Pennsylvania held that:

- Testimony regarding home builder's "letter of intent" to buy property was admissible evidence of property's fair market value; and
- In a condemnation valuation trial, there is no bright-line rule prohibiting testimony of bona fide offers to buy property into evidence, especially when a contract has been signed and the offer is used to show that contract's reasonableness; abrogating, Anderson v. Dept. of Highways, 422 Pa. 1, 220 A.2d 643.

PROPERTY - RHODE ISLAND

Beauregard v. Gouin

Supreme Court of Rhode Island - May 28, 2013 - A.3d - 2013 WL 2318835

Property owner brought action against counsel who represented neighboring property owners in property dispute, alleging slander of title and intentional interference with prospective advantage.

The Supreme Court of Rhode Island held that:

- Notice of intent to dispute ownership of property did not constitute slander of title; and
- Notice did not constitute intentional interference with prospective advantage.

Slander of title action requires a plaintiff to prove: (1) that the alleged wrongdoer uttered or published a false statement about the plaintiff's ownership of real estate; (2) that the uttering or publishing was malicious; and (3) that the plaintiff suffered a pecuniary loss as a result.

Notice of intent to dispute any claim to ownership of property by property owner filed by neighboring property owners in town land records did not contain any false assertions, and therefore did not constitute slander of title, where notice unambiguously indicated that the neighboring property owners were preemptively seeking to protect their rights to the land which was of record owned by them, and in no way did the notice of intent slander or cast doubt upon property owner's title to his property.

To recover on a claim of intentional interference with prospective advantage, a plaintiff must show: (1) the existence of a business relationship or expectancy; (2) knowledge by the interferer of the relationship or expectancy; (3) an intentional and improper act of interference; (4) proof that the interference caused the harm sustained; and (5) damages to the plaintiff.

Notice of intent to dispute any claim to ownership of property by property owner filed by neighboring property owners in town land records did not constitute an improper act of interference, and therefore did not constitute intentional interference with prospective advantage, where notice unambiguously indicated that the neighboring property owners were preemptively seeking to protect their rights to the land which was of record owned by them.

CONTRACTS - SOUTH CAROLINA

Shirley's Iron Works, Inc. v. City of Union

Supreme Court of South Carolina - May 29, 2013 - S.E.2d - 2013 WL 2325263

Subcontractors who provided labor and materials on public building project brought action against city for alleged violation of Subcontractors' and Suppliers' Payment Protection Act (SPPA) and for negligence, breach of contract, quantum meruit, and related claims, after general contractor failed to pay subcontractors for amounts due.

The Supreme Court of South Carolina held that:

- SPPA created no private right of action in tort against city;
- Subcontractors' sole remedy was common law breach of contract claim;
- Law of the case doctrine did not preclude third-party beneficiary claim;

- Subcontractors sufficiently pled third-party beneficiary claim; and
- Subcontractors could not recover under theory of quantum meruit.

SPPA provision requiring city to ensure that general contractor posted payment bond did not provide for a tort cause of action against a city who allegedly failed to ensure such a bond, resulting in general contractor failing to pay subcontractor, and therefore subcontractor's action against city was barred by sovereign immunity. Pertinent sections of SPPA sounded in contract, not tort, and bonding requirement was incorporated into public works construction contracts.

EMPLOYMENT - SOUTH DAKOTA

Huth v. Beresford School District # 61-2

Supreme Court of South Dakota - May 29, 2013 - N.W.2d - 2013 S.D. 39

Teacher appealed from decision of the board of education, which did not renew her contract for the upcoming school year as a part of a reduction-in-force.

The Supreme Court of South Dakota held that school board's decision to eliminate teacher's position was not arbitrary, capricious, or an abuse of discretion.

On appeal, the Supreme Court considers the legality, and not the propriety, of the school board's decision. Determination of legality is a two-pronged process: (1) whether the school board acted legally, and in assessing this first prong, the court considers whether the proper procedural requirements were followed; and (2) whether the school board's decision was arbitrary, capricious, or an abuse of discretion.

School board's decision was not arbitrary, capricious, or an abuse of discretion as there was no connection between teacher's grievance and the determination not to renew her contract. The issue in teacher's grievance related to her coaching position from which she had resigned. The superintendent based his staff reduction recommendations on student needs and program activities, and he stated that the other fifth-grade teachers had more teaching endorsements and were more involved in extracurricular activities than teacher.

Arbitrary or capricious decision by school board is one that is based on personal, selfish, or fraudulent motives, or on false information, and is characterized by a lack of relevant and competent evidence to support the action taken.

GOVERNMENTAL IMMUNITY - TEXAS

City of Canton v. Zanbaka, USA, LLC

Court of Appeals of Texas, Tyler - May 31, 201 - Not Reported in S.W.3d - 2013 WL 2407223

Duke's Travel Plaza (Duke) entered into an agreement with the Canton Economic Development Corporation (CEDC), a Texas nonprofit corporation, to fund a sewer line and lift station to its travel plaza located along Interstate 20 in Van Zandt County, Texas.

Before the CEDC would be required to fund the construction of the sewer line and lift station, certain conditions precedent were required. Following the fulfillment of these conditions, the city

delayed the construction of the sewer line and lift station for several months. Duke filed suit against the City alleging that it had entered into a written contract with Duke wherein Duke agreed to provide goods and services to it. By its suit, Duke sought a declaratory judgment to determine the parties' rights and obligations under Texas Local Government Code, Section 271.152.

The City filed a plea to the jurisdiction and motion to dismiss arguing it was immune from suit because Section 271.152 did not apply given the facts of the lawsuit.

Duke alleged that the trial court had jurisdiction of this suit because the Texas Legislature waived the city's immunity from suit by enactment of Texas Local Gov't Code § 271.152, which waives immunity for contracts that provide goods and services. The city argued that it had not waived its immunity from suit because the contract between Duke and the CEDC did not involve Duke's providing it goods and services as required for its waiver of immunity under Section 271.152.

Duke contended that the "goods and services" it provided to the city under its agreement with the CEDC were the annexation of its real property, its creation of new jobs, and its installation of a fire hydrant on the annexed real property. The court of appeals concluded that the true purpose of the agreement between Duke and the CEDC was to provide funding for a sewer line and lift station to Duke's real property. That was the primary purpose of the agreement. Any benefits that would flow from that primary purpose are indirect and attenuated benefits and Section 271.152 does not apply to contracts where the governmental entity receives an indirect or attenuated benefit.

"Thus, we conclude that Duke did not contract to provide any service or good directly to the City. Therefore, we conclude that the City did not waive its immunity from suit under Section 271.152. Accordingly, the trial court erred in denying the City's plea to the jurisdiction and motion to dismiss."

GOVERNMENTAL IMMUNITY - ALABAMA

Health Care Authority for Baptist Health v. Davis

Supreme Court of Alabama - May 17, 2013 - So.3d - 2013 WL 2149493

Baptist Health at one time operated certain hospitals in Montgomery. When Baptist Health encountered financial problems in conjunction with the operation of those hospitals, it sought the assistance of the University of Alabama Board of Trustees In June 2005, the Board adopted a resolution authorizing the formation of the Health Care Authority for Baptist Health, an affiliate of UAB Health System (the "Authority").

Following a successful medical malpractice judgment, the Authority appealed, arguing that it was entitled to State immunity under § 14, Ala. Const.1901 as an affiliate of UAB Health System, a governmental entity.

After an exhaustive analysis, the Supreme Court of Alabama concluded that a health-care authority organized and operating under the HCA Act is not an "immediate and strictly governmental agency of the state." The Authority does not serve as "an arm of the State." Instead, it is a "franchisee licensed for some beneficial purpose," namely to participate with other health-care providers in the state, both public and private, in rendering health-care services to citizens of the state. The Authority therefore is not entitled to state immunity under § 14 of the Alabama Constitution.

LAW ENFORCEMENT - ARIZONA

Melendres v. Arpaio

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

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

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

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

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

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

PUBLIC EMPLOYEES - ARKANSAS

Sullivan v. Coney

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

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

The Supreme Court of Arkansas held that:

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

- Position as code enforcement officer did not constitute "building official" under municipal ordinance; and
- Chief's report to city attorney was not protected under Whistle-Blower Act.

INVERSE CONDEMNATION - CALIFORNIA

Ching Lung Hsu v. Riverside County Transportation Commission

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

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

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

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

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

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

BANKRUPTCY - COLORADO

In re Fassi

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

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

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

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

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

GOVERNMENTAL IMMUNITY - CONNECTICUT

Haynes v. City of Middletown

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

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

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

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

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

The "identifiable person, imminent harm" exception to governmental immunity is three-pronged, and requires: 1) an imminent harm; 2) an identifiable victim; and 3) a public official to whom it is apparent that his or her conduct is likely to subject that victim to that harm. If the plaintiffs fail to establish any one of the three prongs, this failure will be fatal to their claim that they come within the imminent harm exception.

ARBITRATION - CALIFORNIA

Ronay Family Limited Partnership v. Tweed

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

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

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

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

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

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

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

MUNICIPAL FINANCE - GEORGIA

City of Baldwin v. Woodard & Curran, Inc.

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

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

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

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

MUNICIPAL IMMUNITY - IDAHO

Grabicki v. City of Lewiston

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

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

The Supreme Court of Idaho held that:

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

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

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

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

MUNICIPAL FINANCE - INDIANA

1st Source Bank v. Village of Stevensville

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

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

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

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

MUNICIPAL ORDINANCE - MARYLAND

Kendall v. Howard County

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

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

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

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

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

TAX - MICHIGAN

County of Oakland v. Federal Housing Finance Agency

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

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

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

INSURANCE - OHIO

Marusa v. Erie Ins. Co.

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

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

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

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

MUNICIPAL GOVERNANCE - PENNSYLVANIA

Northeast Land Development, LLC v. City of Scranton

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

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

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

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

LIENS - PENNSYLVANIA

Elizabeth Tp. Sanitary Authority v. Mignogna

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

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

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

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

FIDUCIARY DUTY - PENNSYLVANIA

In re Jerome Markowitz Trust

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

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

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

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

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

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

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

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

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

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

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

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

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

EMINENT DOMAIN - TEXAS

In re Texas Rice Land Partners, Ltd.

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

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

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

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

MUNICIPAL COURTS - UTAH

In re Christensen

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

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

The Supreme Court of Utah held that:

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

GOVERNMENT CONTRACTS - WYOMING

Western Wyoming Const. Co., Inc. v. Board of County Com'rs of Sublette County

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

The Supreme Court of Wyoming held that:

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

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

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

TAX - U.S. TAX COURT

Uniband, Inc. v. C.I.R.

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

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

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

The U.S. Tax Court held that:

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

PUBLIC UTILITIES - ALABAMA

Otwell v. Alabama Power Co.

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

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

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

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

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

ZONING - DELAWARE

New Cingular Wireless PCS v. Sussex County Bd. of Adjustment

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

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

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

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

ARBITRATION - FLORIDA

Raymond James Financial Services, Inc. v. Phillips

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

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

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

MUNICIPAL ORDINANCES - FLORIDA

City of Palm Bay v. Wells Fargo Bank, N.A.

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

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

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

concluding that the ordinance superpriority provision is invalid."

TAX - GEORGIA

Athens-Clarke County Unified Government ex rel. Denson v. Federal Housing Finance Agency

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

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

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

EMPLOYMENT - IOWA

Rivera v. Woodward Resource Center

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

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

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

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

INSURANCE - KANSAS

Brecek & Young Advisors, Inc. v. Lloyds of London Syndicate 2003

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

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

The court of appeals held that:

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

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

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

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

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

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

BONDS - LOUISIANA

Woman's Hosp. Foundation v. National Public Finance Guarantee Corp.

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

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

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

and the Trustee.

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

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

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

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

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

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

The appeals court held that:

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

ANNEXATION - MINNESOTA

Township of Midway v. City of Proctor

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

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

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

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

SCHOOLS - MISSISSIPPI

Fails v. Swan

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

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

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

The district court found no merit to these claims.

ZONING - NEW JERSEY

Northgate Condominium Ass'n, Inc. v. Borough of Hillsdale Planning Bd.

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

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

The Supreme Court of New Jersey held that:

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

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

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

EXEMPT ORGANIZATIONS - OHIO

State ex rel. Atty. Gen. v. Vela

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

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

The court of appeals held that:

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

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

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

MUNICIPAL LIABILITY - OKLAHOMA

Ibarra v. City of Tahlequah

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

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

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

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

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

The district court concluded that:

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

ZONING - PENNSYLVANIA

Korby v. Zoning Hearing Bd. of Pulaski Tp.

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

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

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

ZONING - RHODE ISLAND

Cigarrilha v. City of Providence

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

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

The Supreme Court of Rhode Island held that:

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

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

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

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

TAX - UTAH

Lee v. Utah State Tax Com'n

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

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

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

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

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

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

TAX - ALABAMA

Montgomery County Com'n v. Federal Housing Finance Agency

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

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

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

ZONING - CALIFORNIA

City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.

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

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

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

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

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

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

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

ADVERSE POSSESSION - CALIFORNIA

Hagman v. Meher Mount Corporation

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

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

The court of appeal held that:

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

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

EMINENT DOMAIN - CALIFORNIA

Lockaway Storage v. County of Alameda

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

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

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

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

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

MUNICIPAL ORDINANCE - CALIFORNIA

Acosta v. City of Costa Mesa

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

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

The court of appeals held that:

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

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

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

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

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

MUNICIPAL ORDINANCE - FLORIDA

City of West Palm Beach v. Chatman

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

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

The district court of appeal held that:

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

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

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

BONDS - GEORGIA

Sherman v. Development Authority of Fulton County

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

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

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

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

transaction does not create an unconstitutional tax exemption."

BONDS - KENTUCKY

Bluegrass Equine and Tourism Foundation; and KHPWESLUX, LLC v. Commonwealth of Kentucky

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

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

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

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

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

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

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

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

MUNICIPAL LIABILITY - LOUISIANA

Guillory v. City of Lake Charles

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

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

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

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

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

ZONING - MARYLAND

Madison Park North Apartments, L.P. v. Commissioner of Housing and Community Development

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

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

The court of special appeals held that:

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

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

MUNICIPAL LIABILITY - MARYLAND

Clark v. Prince George's County

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

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

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

The court of special appeals held that:

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

TAX - NEW YORK

Piccolo v. New York State Tax Appeals Tribunal

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

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

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

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

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

TAX - NEW YORK

Stevenson v. New York State Tax Appeals Tribunal

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

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

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

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

EMINENT DOMAIN - PENNSYLVANIA

In re PPL Elec. Utilities Corp. of Real Estate Situate in Schuylkill County

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

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

The appeals court agreed with WMPI.

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

TAX - SOUTH CAROLINA

Tourism Expenditure Review Committee v. City of Myrtle Beach

Supreme Court of South Carolina - May

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

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

GOVERNMENTAL IMMUNITY - TEXAS

Dallas County Hosp. Dist. v. Hospira Worldwide, Inc.

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

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

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

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

EMINENT DOMAIN - TEXAS

Southwestern Bell Telephone, L.P. v. Emmett

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

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

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

INVERSE CONDEMNATION - TEXAS

Carlson v. City of Houston

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

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

The court of appeals held that:

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

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

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

MUNICIPAL GOVERNANCE - WASHINGTON

City of Seattle v. Fuller

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

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

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

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

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

TAX - CALIFORNIA

McWilliams v. City of Long Beach

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

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

Supreme Court of California held that:

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

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

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

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

MUNICIPAL LIABILITY - CALIFORNIA

Montenegro v. City of Bradbury

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

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

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

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

ENVIRONMENTAL - CONNECTICUT

Sams v. Department of Environmental Protection

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

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

The Supreme Court of Connecticut held that:

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

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

SCHOOLS - ILLINOIS

Brady v. Regional Bd. of School Trustees

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

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

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

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

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

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

ZONING - IOWA

City of Okoboji v. Parks

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

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

The Supreme Court of Iowa held that:

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

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

EMPLOYMENT - LOUISIANA

State v. Petitto

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

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

The court of appeal held that:

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

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

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

LABOR - MARYLAND

Gilliland v. Board of Educ. of Charles County

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

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

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

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

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

EMINENT DOMAIN - MINNESOTA

City of Moorhead v. Red River Valley Co-op. Power Ass'n

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

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

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

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

The Supreme Court of Minnesota held that:

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

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

TAX - MARYLAND

Montgomery County, Md. v. Federal Nat. Mortg. Ass'n

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

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

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

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

PUBLIC UTILITIES - MISSOURI

Laclede Gas Co. v. St. Charles County, Mo.

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

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

On appeal, the Court of Appeals held that:

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

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

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

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

ZONING - NEW HAMPSHIRE

Hannaford Bros. Co. v. Town of Bedford

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

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

The Supreme Court of New Hampshire held that:

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

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

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

TAX - NEW YORK

Greece Town Mall, L.P. v. State

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

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

The Supreme Court, Appellate Division held that:

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

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

MUNICIPAL GOVERNANCE - PENNSYLVANIA

Lamar Advantage GP Co., LLC v. City of Pittsburgh

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

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

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

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

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

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

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

INVERSE CONDEMNATION - SOUTH CAROLINA

Chakrabarti v. City of Orangeburg

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

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

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

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

INVERSE CONDEMNATION - TEXAS

City of Grapevine and Grapevine Board of Adjustment v. CBS Outdoor, Inc.

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

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

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

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

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

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

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

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

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

The appeals court did not agree with the City's claim that the trial court lacked jurisdiction over CBS's inverse condemnation claim because: 1) CBS failed to exhaust its administrative remedies; and 2) the State condemned the sign, thereby precluding the City from being sued for inverse condemnation of the sign. CBS's failure to appeal would have had not effect on the inverse condemnation claim and the State had declared that it was satisfied by CBS's removal of the encroaching portion of the sign.

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

INVERSE CONDEMNATION - TEXAS

Cenizo Corp. v. City of Donna

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

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

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

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

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

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

ZONING - WASHINGTON

Northshore Investors LLC v. City of Tacoma

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

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

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

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

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

GOVERNMENTAL IMMUNITY - WEST VIRGINIA

Haines v. Shirley

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

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

chase.

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

The district court agreed, dismissing the official capacity claim.

EMINENT DOMAIN - CALIFORNIA

MHC Financing Ltd. Partnership v. City of San Rafael

United States Court of Appeals, Ninth Circuit - April 17, 2013 - F.3d - 13 Cal. Daily Op. Serv. 3766

City's mobile home rent ordinance did not constitute Penn Central regulatory taking, even if mobile home park would be worth much more if no regulation was in place, where park owner purchased property when prior version of ordinance was in effect, and current ordinance was only slight modification of that ordinance.

City amended its mobile home rent ordinance to remove the sliding scale for pad rent increases and instead limit increases to a flat 75% of the change in CPI. The amendments also altered rent increases related to capital improvements.

Mobile home park owner brought actions alleging that the ordinance breached terms of settlement agreement and violated its constitutional rights.

The court of appeals held that:

- Res judicata did not bar owner's takings claims;
- Ordinance did not constitute Penn Central regulatory taking;
- Ordinance did not constitute private taking;
- Ordinance did not violate owner's substantive due process rights; and
- Question of whether settlement agreement required city to repeal ordinance was for jury.

A regulatory taking may occur, and just compensation is required, when regulatory actions occur that are functionally equivalent to classic taking in which government directly appropriates private property or ousts owner, with inquiry focusing directly upon severity of burden that government imposes upon private property rights.

In this case, the city's mobile home rent ordinance did not constitute Penn Central regulatory taking, even if mobile home park would be worth much more if no regulation was in place, where park owner purchased property when prior version of ordinance was in effect, and current ordinance was only slight modification of that ordinance.

EMINENT DOMAIN - COLORADO

Rodgers v. Board of County Commissioners of Summit County

Colorado Court of Appeals, Div. IV - April 25, 2013 - P.3d - 2013 COA 61

County's enforcement of septic system regulations did not amount to a regulatory taking; before acquiring the property, owners had an approved septic system plan that conformed to county regulations, but did not follow it.

Homeowners brought action against county alleging inverse condemnation based on septic tank regulations and a § 1983 claim alleging discrimination based on their sexual orientation.

The court of appeals held that:

- Dismissal of homeowners' claim under Colorado Civil Rights Act was warranted due to homeowners' failure to exhaust their administrative remedies;
- Homeowners were precluded from bringing direct action against county for damages under the Colorado and United States Constitutions while other adequate statutory remedies existed;
- County's enforcement of septic system regulations did not amount to a regulatory taking; and
- In a matter of first impression, trial court misapplied directed verdict rule in granting a partial directed verdict in favor of county on three challenged actions within homeowners' equal protection claim.

A "per se taking" occurs when a regulation affecting private property does not substantially advance legitimate state interests, or when a regulation denies an owner economically viable use of his land. Because reasonable zoning and land use limitations are a proper exercise of police power, such restrictions will constitute a taking only if they do not substantially advance legitimate state interests or if they prevent economically viable use of the property.

Absent a per se taking, a property owner may still prove a regulatory taking under a fact-specific inquiry. Such a taking occurs if the property retains more than a de minimis value but, when its diminished economic value is considered in connection with other factors, the property effectively has been taken from its owner.

In this case, county's enforcement of septic system regulations did not amount to a regulatory taking of homeowners' property. The regulations served a legitimate purpose and the regulations did not deprive plaintiffs of all economically viable use of their property. The economic impact of the regulations was minor compared to the value of the property, and there was no adverse impact on homeowners' investment-backed expectations because, before acquiring the property, they had an approved septic system plan that conformed to county regulations, but did not follow it.

MUNICIPAL LIABILITY - CONNECTICUT

Faulkner v. Daddona

Appellate Court of Connecticut - April 23, 2013 - A.3d - 142 Conn.App. 113

Police officer's decision whether or not to enforce traffic statutes when tow truck was at scene of automobile accident was matter of discretion, and thus officer was entitled to governmental immunity in suit brought by injured motorcyclist.

Motorcycle passenger, who allegedly was injured when tow truck entered highway at scene of prior automobile accident, brought action against town, town police officer, and town police chief, asserting that defendants failed to enforce rules and regulations governing performance of town

towing services by private contractors.

The appeals court held that:

- Police officer's decision whether or not to enforce traffic statutes when tow truck was at scene of automobile accident was matter of discretion, and thus officer was entitled to governmental immunity;
- Duties imposed on officer by police department general orders involved exercise of judgment and discretion;
- Officer's decision whether to close trunk lid of his police cruiser (obscuring emergency lights) was discretionary determination; and
- Passenger failed to allege that negligence of town or police chief or both caused her injuries, as necessary to sustain negligence claims.

ZONING - CONNECTICUT

Tine v. Zoning Bd. of Appeals of Town of Lebanon

Supreme Court of Connecticut - April 23, 2013 - A.3d - 308 Conn. 300

For purposes of three-year statute of limitations to bring enforcement action regarding a building that violates a zoning regulation, court holds that deck is not a "building."

Property owners appealed decision of town zoning board of appeals that upheld cease and desist order regarding deck, which violated setback requirements.

The Supreme Court of Connecticut held that:

- For purposes of three-year statute of limitations to bring enforcement action regarding a building that violates a zoning regulation, deck was not "building"; and
- Deck was not part of house and thus was not entitled to protection under three-year statute of limitations.

For purposes of three-year statute of limitations to bring enforcement action regarding a building that violates a zoning regulation, "building" refers to an edifice designed to stand permanently, with a roof and walls.

CHARTER SCHOOLS - FLORIDA

School Bd. of Seminole County v. Renaissance Charter School, Inc.

District Court of Appeal of Florida, Fifth District - April 26, 2013 - So.3d - 2013 WL 1775527

District court strictly construes "substantially replicates" requirement in state charter school statute.

School board appealed the state board's order requiring it to permit charter school operator to open and operate a charter school in Seminole County.

In the appeal, the district court found one issue dispositive. It agreed with the school board that the operator's proposed charter school's educational program did not "substantially replicate" that of

the high-performing charter school being replicated and that the order granting the operator's application must therefore be reversed. Under the state charter school statute, high-performing charter schools are allowed to apply to open new schools that "substantially replicate" an existing school.

In this case, the district court found that the requirement had not been met because the application submitted by the operator sought to open a school for grades K through 8, while the school being replicated served only students in grades 6 through 8.

The state board had apparently rejected this conclusion, accepting the operator's argument that a new charter school does not have to "exactly match" the high-performing school upon which it is modeled and the school in this case met the "substantially replicates" requirement, as the schools shared a substantially similar instruction model and the very same organizations, i.e., the very same governing board and ESP.

The district court disagreed and reversed.

In addition, the district court articulated what it deemed to be serious deficiencies in the underlying charter school statute, particularly with regard to procedural issues.

ATTORNEYS' FEES - IDAHO

In re Old Cutters, Inc.

United States Bankruptcy Court, D. Idaho - April 18, 2013 - Slip Copy - 2013 WL 1686676

Property owner, but not third-party beneficiary bank, entitled to attorneys' fees pursuant to the terms of an annexation agreement between property owner and city as the prevailing party in litigation.

Property owner and commercial bank brought action to recover attorneys' fees as the prevailing parties in an annexation dispute with city.

The bankruptcy court ruled that the property owner was entitled to attorney's fees pursuant to the terms of the annexation agreement.

The bankruptcy court held that the bank, in its action to recover amounts owed by property owner under the annexation agreement, was not entitled to attorneys' fees, as it was not a party to the annexation agreement, and thus there existed no "commercial transaction" between bank and city, a requirement for the recovery of attorneys' fees under Idaho statute.

MUNICIPAL ORDINANCE - ILLINOIS

Palm v. 2800 Lake Shore Drive Condominium Ass'n

Supreme Court of Illinois - April 25, 2013 - N.E.2d - 2013 IL 110505

Ordinance requiring that condominium unit owners be allowed, without having to state a proper purpose, to inspect financial books and records of condominium association within three business days of receipt of written request, was valid exercise of home-rule authority despite conflicts with state statutes.

Condominium unit owner brought suit against condominium association seeking production of financial records pursuant to city ordinance. City was permitted to intervene to assert validity of ordinance.

The Supreme Court of Illinois held that:

- Ordinance requiring that condominium unit owners be allowed, without having to state a proper purpose, to inspect financial books and records of condominium association within three business days of receipt of written request was valid exercise of home-rule authority despite conflicts with state statutes;
- City ordinance allowing a prevailing plaintiff to recover "reasonable attorney fees" in an action to enforce an ordinance allowed recovery based on the prevailing market rate for the attorney's services and did not limit recoverable fees to those actually incurred or paid by the plaintiff in the litigation; and
- Award of attorney fees at rate of $300 an hour was an award of "reasonable attorney fees," though unit owner's fee agreement with attorney provided a reduced hourly rate of $200.

EMINENT DOMAIN - MARYLAND

A & E North, LLC v. Mayor & City Council of Baltimore

Court of Appeals of Maryland - April 23, 2013 - A.3d - 2013 WL 1729497

Clean up your own damn mess; court rules that property owner is not entitled to relocation funds in order to spruce up property prior to jury visit for the purpose of determining fair market value.

City brought condemnation action to acquire property, a theater that had been used to store automobile parts and junk. Property owner contested action and filed pretrial motion to require city to pay relocation expenses to remove the junk from the theater before jury viewed the theater for purposes of determining fair market value.

The circuit court denied the motion, and after a jury trial, entered judgment on verdict determining fair market value of property.

The court of appeals held that owner was not entitled to pretrial relocation funds.

The purpose for which owner sought relocation funds was not to facilitate its move but rather to increase amount of its award by making property more attractive during viewing by jury. Owner could not be a "displaced person" entitled to relocation funds while challenging city's right to acquire the property.

MUNICIPAL GOVERNANCE - MINNESOTA

Linn v. City of Newport

Court of Appeals of Minnesota - April 22, 2013 - Not Reported in N.W.2d - 2013 WL 1707682

Denial of liquor license, premised solely on proximity to existing liquor store, within city council's discretion.

Plaintiffs challenged city council's denial of its application for a liquor license. They argued that the

city council abused its discretion and violated their right to equal protection.

During the meeting, council members were troubled by the fact that plaintiff wished to open his liquor store next to an existing liquor store. The two stores would be located along a highway leading into the city, and council members were concerned about the image that adjacent liquor stores might create.

Plaintiffs maintained that this reason for denying the application was insufficient when the city had not adopted specific regulations or standards regarding its preferred mix of businesses or how far apart liquor stores should be. Plaintiffs argued that specific regulations or standards on the placement of liquor stores within the city are required.

But the court held that a city council has broad discretion to deny a liquor license "when, in the judgment of the council, the welfare of the city suggests such action."

The editor of this publication strongly disagrees with the court's finding that there exists no fundamental constitutional right to a liquor store.

EXEMPT ORGANIZATIONS - MINNESOTA

Living Word Bible Camp v. County of Itasca

Supreme Court of Minnesota - April 24, 2013 - N.W.2d - 2013 WL 1748616

Supreme Court of Minnesota holds that property acquired by a tax-exempt entity is exempt from taxation for a reasonable time while the property is being adapted and fitted for the proposed use.

Taxpayer, owner of property for which it sought to obtain necessary governmental approvals for use as a summer bible camp and retreat center, challenged reclassification of its property as taxable for certain assessment years.

The Supreme Court of Minnesota held that:

- Tax court was required to consider whether taxpayer's conduct demonstrated reasonable diligence toward implementing its proposed tax-exempt use of its property as institution of purely public charity; and
- Tax court was required to consider whether taxpayer's current activities demonstrated that proposed future use of property supported continued exemption.

Property acquired by a tax-exempt entity is exempt from taxation for a reasonable time while the property is being adapted and fitted for the proposed use. Taxpayer presented evidence of steps it had taken to obtain necessary governmental approvals, while the lower court focused only on taxpayer's failure to attain success in legal proceedings to obtain necessary government approvals.

GOVERNMENTAL IMMUNITY - NEW JERSEY

Turner v. Township of Irvington

Superior Court of New Jersey, Appellate Division - April 23, 2013 - A.3d - 2013 WL 1729241

Appeals court holds that immunity statute and provision of Tort Claims Act operate in combination

to immunize township from liability for conduct of its 911 operators.

Residents, who placed calls to 911 based on conduct of resident's former boyfriend (who subsequently kidnapped and killed her), brought action against township and dispatchers, alleging negligence predicated on vicarious liability.

The court held that the statute immunizing 911 operators for conduct that is not wanton and willful, and general Tort Claims Act (TCA) provision which immunizes public entities for the wanton and willful conduct of their employees, operated in combination to immunize township from civil liability for conduct of its 911 operators, whether simply negligent or willful and wanton. Both statutory schemes shared common goal of expanding limitations on liability for public entities.

SCHOOLS - NEW YORK

Adami v. Warwick Valley Cent. School Dist.

Supreme Court, Appellate Division, Second Department, New York - April 24, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 02703

School board granted summary judgment in student's personal injury claim arising from track & field accident.

Defendant school district was granted summary judgment in personal injury action by showing that plaintiff:

- Voluntarily engaged in the sport of track and field, including the discus event;
- Was aware of the possibility of being hit with a discus while participating in that activity;
- Understood the rules and procedures of the discus event, including those related to safety; and
- Understood the inherent risks associated with the sport.

Sadly, the court did not see fit to provide us with the undoubtedly hilarious details of the accident.

SCHOOLS - NEW YORK

Philippou v. Baldwin Union Free School Dist.

Supreme Court, Appellate Division, Second Department, New York - April 17, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 02556

School districts failed to establish, prima facie, that injured student assumed risk of being injured in wrestling match when mats that had been taped together came apart during the match.

Student and his mother brought personal injury action against two school districts involved in wrestling match, seeking damages for injuries allegedly sustained when two wrestling mats which had been taped together came apart during a match.

The Supreme Court, Appellate Division, held that school districts failed to establish, prima facie, that injured student assumed risk of being injured in wrestling match.

If the playing surface is as safe as it appears to be, and the condition in question is not concealed such that it unreasonably increases risk assumed by the players, the doctrine of assumption of risk

applies. However, a board of education, its employees, agents and organized athletic councils must exercise ordinary reasonable care to protect student athletes voluntarily involved in extracurricular sports from unassumed, concealed or unreasonably increased risks.

The districts' moving papers failed to demonstrate, prima facie, that allegedly dangerous condition caused by improperly taped or secured mats did not unreasonably increase risk of injury inherent in sport of wrestling.

SCHOOLS - PENNSYLVANIA

Dallas School Dist. v. Northeast Pennsylvania School Districts (Health) Trust

Commonwealth Court of Pennsylvania - April 17, 2013 - A.3d - 2013 WL 1641341

Individual school districts not entitled to disgorgement of funds after withdrawing from health trust.

Two school districts brought civil action against health trust to compel an accounting and a disgorgement of funds from the trust following their withdrawal from the trust. The withdrawal occurred after the school districts became dissatisfied with the manner by which the trustees administered the trust.

The trial court sided with the school districts. The appeals court reversed.

The appeals court held that the members of the trust, including the school districts, delegated to the trust's board of trustees broad authority over the management of the affairs of the trust, including determining the amounts that member school districts would contribute to the trust fund and how any assets of the trust fund would be used or distributed. The appeals court found no abuse of the board's discretion and no grounds for the creation of separate, segregated trust accounts.

MUNICIPAL GOVERNANCE - PENNSYLVANIA

Parker Ave., L.P. v. City of Philadelphia

United States District Court, E.D. Pennsylvania - April 23, 2013 - Slip Copy - 2013 WL 1742498

City council's failure to pass ordinance to pave portion of street needed for property development does not constitute due process, nor equal protection, violation.

Plaintiff had, over the past seven years, been seeking to develop his property with numerous residential units. While zoning was not an impediment and various necessary approvals from the city and the commonwealth had been obtained, the city council, despite the repeated requests of plaintiff, has never passed an ordinance to pave that part of the city street needed to access the property

Plaintiff sued the City of Philadelphia and the Philadelphia City Council under 42 U.S.C. § 1983 for violation of the Equal Protection Clause and the Due Process Clause of the Constitution.

As a result of the allegedly unconstitutional conduct of defendants, plaintiff asserts it has been prohibited "from reasonably using, developing and enjoying a tract of land it owns in the City" and has lost a substantial amount of money as a result. In addition to damages, it sought a writ of

mandamus compelling the city and city council to authorize the paving of the street.

The defendants moved to dismiss on the ground that plaintiff has not stated a claim upon which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

The district court found no due process or equal protection violations and ruled in favor of the city.

ARBITRATION - TENNESSEE

Webb v. First Tennessee Brokerage, Inc.

Court of Appeals of Tennessee - April 23, 2013 - Slip Copy - 2013 WL 1737202

Purchaser of Lehman Brothers bonds not required to arbitrate dispute with broker; ensure that brokerage firm clients utilize enforceable arbitration agreements.

Account holder at First Tennessee Bank ("FTB") was induced by a financial advisor of FTB's brokerage subsidiary ("FTCB") to invest her entire savings in Lehman Brothers bonds. We all know how that movie ended.

Account holder sued and FTCB moved to stay the proceedings and compel arbitration.

The court of appeals affirmed the trial court's ruling that the account holder was not obligated to arbitrate for the following reasons:

- Unlike other brokerage firms, the agreement between investor and FTCB did not require arbitration in disputes between a customer and an investment advisor employed by the brokerage;
- The agreement was not arbitratable under Tennessee law as an unconscionable contract of adhesion;
- Claims of fraud in the inducement are not arbitratable; and
- The arbitration agreement relied upon by FTCB appears to have been inserted into the file at some later date and thus the plaintiff had not consented to arbitration.

NUISANCE ABATEMENT - TEXAS

RBIII, L.P. v. City of San Antonio

United States Court of Appeals, Fifth Circuit - April 23, 2013 - F.3d - 2013 WL 1748056

State's determination that it is faced with an emergency requiring a summary abatement is entitled to deference on the property owner's procedural due process challenge; relevant inquiry is not whether an emergency actually existed, but whether the state acted arbitrarily or otherwise abused its discretion in concluding that there was an emergency requiring summary action.

Property owner brought action against city, asserting Fourteenth Amendment procedural due process claim and Fourth Amendment unreasonable search and seizure claim arising from city's demolition of building on its property without prior notice to owner.

The court of appeals held that:

- District court abused its discretion when instructing jury on due process claim, and
- Erroneous jury instruction on due process claim also constituted abuse of discretion with respect

to Fourth Amendment claim.

Government's abatement of nuisance by summary demolition of building, when carried out in accordance with procedural due process, is a reasonable seizure under the Fourth Amendment in the absence of any factors that outweigh governmental interests, and factors favoring the property owner will generally not outweigh the government's interest when it effects a procedurally adequate summary deprivation.

Fourth Amendment reasonableness of city's seizure and demolition of nuisance property will ordinarily be established when the substantive and procedural safeguards inherent in state and municipal property standards ordinances have been fulfilled.

If the State acts pursuant to a valid summary-action ordinance in effecting a pre-notice deprivation of property, the State's determination that it was faced with an emergency requiring a summary abatement is entitled to deference on the property owner's procedural due process challenge. In such cases, the relevant inquiry is not whether an emergency actually existed, but whether the State acted arbitrarily or otherwise abused its discretion in concluding that there was an emergency requiring summary action.

But the district court abused its discretion, when instructing jury on property owner's procedural due process challenge to city's demolition of building without prior notice, by instructing jury that city was excused from providing notice to owner only if there was "immediate danger to the public" and making no mention of city's compliance with valid summary-demolition ordinance. The instruction improperly cast central factual dispute as whether or not building posed immediate danger to public, when issue should have been whether city acted arbitrarily or abused its discretion in determining that the building presented immediate danger.

Reversed and remanded.

BONDS - ARKANSAS

First Arkansas Bank & Trust, Trustee v. Gill Elrod Ragon Owen & Sherman, P.A.

Supreme Court of Arkansas - April 18, 2013 - S.W.3d - 2013 Ark. 159

Supreme Court of Arkansas discusses the liability of issuer's counsel to purchasers in bond offering, finding: 1) no liability under state securities act; 2) no relationship giving rise to a duty under contract, negligence, or breach of a fiduciary duty; but 3) existence of a question of material fact as to whether liability could flow to the law firm under the fraud exception to privity set out under the attorney-malpractice statute.

Developer acquired property and filed a petition with the city of Fayetteville to form a municipal property owners' district, which was approved. The district intended to issue tax-free municipal bonds in order to finance public works.

The district issued Series A and Series B bonds. Only Series B bonds are at issue in this case. Pursuant to the POS, the Series B bonds were "limited obligations of the District, to which the District has pledged the Capital Improvement Use Fee Revenues and a mortgage of the land located with[in] the District that is owned by the Developer." The Series B bonds were to be paid by collection of the Capital Improvement Use Fees.

Developer defaulted on payment of the Capital Improvement Use Fees on the Series B bonds. Subsequently, developer defaulted on the original mortgage securing the purchase of the development property, and the property was sold. Appellants sued the law firm that drafted the POS, alleging that the loss of security had compromised their Series B bonds and alleging violations of the Arkansas Securities Act, attorney malpractice, and other causes of action arising from a failure to disclose in the bond offering that the purchase mortgage was superior to the lien created by the Capital Improvement Use Fees obligation.

At issue in this lawsuit were causes of action alleged to arise from representations, lack of representations, or misrepresentations made at the time of the negotiation and purchase of unrated municipal-improvement bonds. The purchasers allege that the law firm had a duty to inform them of the mortgage on the real property and that it failed to inform them. Purchasers further allege that had they been informed of a mortgage on the real property to which improvements were to be made with bond proceeds, and that the Series B bonds were not secured by a first lien on the real property, they would not have purchased the bonds.

The Supreme Court of Arkansas held that:

- There exists no liability under the Arkansas Securities Act because "an attorney acting as the attorney for the issuer of securities is not liable to the ultimate purchasers and does not act as a seller, a control person, an agent, or anyone who materially aids in the sale of the securities;"
- There exists a question of material fact as to whether liability could flow to the law firm under the fraud exception to privity set out under the attorney-malpractice statute; and
- There was no relationship giving rise to a duty under contract, negligence, or breach of a fiduciary duty.

EMPLOYMENT - CALIFORNIA

Sabey v. City of Pomona

Court of Appeal, Second District, Division 2, California - April 16, 2013 - Cal.Rptr.3d - 3 Cal. Daily Op. Serv. 3799

Court of appeal holds that when a partner in a law firm represents a city at a personnel arbitration, due process prohibits city from being advised on its review of the matter by a different partner from the same firm.

Police officer petitioned for writ of mandate challenging his termination.

The court of appeal held that when a partner in a law firm represents a city at a personnel arbitration, due process prohibits city from being advised on its review of the matter by a different partner from the same firm.

When a partner in a law firm represents a department within a city at an advisory arbitration regarding a personnel matter, and when the city's decisionmaking body later reviews that arbitrator's award for confirmation or rejection, the principles of due process prohibit the decision maker from being advised on the matter by a different partner from the same law firm, since there is a clear appearance of unfairness and bias rendering the risk of actual bias too high to be constitutionally tolerable.

The attorney that advised the city council owed fiduciary duties of loyalty and care both to the firm and to the attorney that represented the department at the arbitration, and the attorney that advised

the city council could have couched his advice in many different ways because the city council was vested with discretion about whether to accept the arbitration decision.

An attorney cannot act as both an advocate for an administrative agency and then as an advisor to the decision maker who reviews the result that the advocate achieved, but performance of both roles by government lawyers from the same law office is appropriate if there are assurances that the adviser for the decision maker is screened from any inappropriate contact with the advocate.

EMINENT DOMAIN - FLORIDA

Hillcrest Property, LLP v. Pasco County

United States District Court, M.D. Florida, Tampa Division - April 12, 2013 - F.Supp.2d - 2013 WL 1502627

Court strikes down novel eminent domain work-around in which the county would deny development permits to landowners that did not "voluntarily" convey – in fee simple and without compensation – that portion of their land that encroached into the development corridor.

Before 2025 Pasco County must build more and larger roads to accommodate the inevitable increase in automobile traffic. Preferring to avoid the payment of "just compensation" after acquiring the necessary land by eminent domain, Pasco County hatched a novel and effective, but constitutionally problematic idea, a very novel regulatory regime that is created by Pasco County's "Right of Way Preservation Ordinance."

The remarkable part of the regime, and the constitutional mischief, appear in the instance of a landowner whose land is encroached by the new transportation corridor but who plans to develop the remaining land, which adjoins the encroachment. The Ordinance requires Pasco County to deny the landowner's development permit and to forbid development of the land adjoining the new transportation corridor unless the landowner "dedicates" (conveys in fee simple) to Pasco County – for free – the land within the new transportation corridor.

If constitutional, the Ordinance undoubtedly would become quickly fashionable, as counties seize a singular opportunity to procure land for public use by the thrifty expedient of coerced conveyance rather than by the historically and constitutionally prescribed mechanism of eminent domain.

Alas, the court found the Ordinance "both coercive and confiscatory in nature and constitutionally offensive in both content and operation" and enjoined implementation.

BONDS - ILLINOIS

Barrett v. Henry

Appellate Court of Illinois, Second District - April 17, 2013 - N.E.2d - 2013 IL App (2d) 120829

Appeals court upholds the financing system in which bond proceeds are deposited into a working cash fund to enable the district to finance operations during the period before the property taxes levied for that purpose have been collected; legitimate alternative to the issuance of tax anticipation warrants.

Taxpayers filed tax objection complaints against county, seeking refunds for portions of their 2009 and 2010 property taxes that were collected to make payments on bonds issued by the school district. Taxpayers argued that the district abused its discretion in issuing the bonds.

Taxpayers objected to the deposit of bond proceeds into the school district's working cash fund, arguing that the district must first demonstrate that there has been a need for tax anticipation warrants in the most recent past or that there will be a continual need for tax anticipation warrants into the foreseeable future prior to 1) establishing a working cash fund and 2) increasing a working cash fund.

The court noted that the working cash arrangement is designed to enable the district to finance operations during the period before the property taxes levied for that purpose have been collected and serves as an alternative to the issuance of tax anticipation warrants.

The appeals court quoted from a prior Illinois Supreme Court case, stating that, "the working cash fund constitutes a revolving fund from which money may be transferred to other funds in anticipation of taxes to be collected for the purposes of such other funds, to be re-paid later out of the taxes levied for such other funds when collected, and a method is provided enabling the municipality to do business on a cash basis by transferring money from the working cash fund to other funds during the time between the levy of taxes for such other funds and the collection of the taxes so levied."

EMPLOYMENT - INDIANA

Mertz v. City of Greenwood

Court of Appeals of Indiana - April 12, 2013 - N.E.2d - 2013 WL 1497311

Court of appeals holds that city merit police commission had authority to discipline former assistant chief for conduct that occurred while demoted police officer served as assistant chief.

Police officer petitioned for judicial review of disciplinary decision by city merit police commission. Officer contended that the trial court erred when it concluded that the commission had authority to consider disciplinary action against him after he was removed as assistant chief for conduct that occurred while he was assistant chief.

The court of appeals held that city merit police commission had authority under city code and ordinance to discipline former assistant chief for conduct that occurred while police officer served as assistant chief.

Though under the code and ordinance the commission could not discipline an officer while that officer was serving as the chief or an assistant chief, officer remained a police officer subject to the same professional standards as other police officers, and the exception no longer applied after officer was demoted.

MUNICIPAL ORDINANCE - NEBRASKA

D-CO, Inc. v. City of La Vista

Supreme Court of Nebraska - April 12, 2013 - N.W.2d - 285 Neb. 676

Court upholds constitutionality of city ordinance requiring landlords to obtain a license to lease residential property and submit to periodic building code inspections, while exempting other residential property from those requirements.

Rental property owners brought action against city, seeking declaratory and injunctive relief and alleging that city ordinance establishing rental housing licensing and inspection program violated state constitution.

Under the ordinance, owners of rental property must obtain a license to lease the property to others and submit to periodic building code inspections of their rental property. The owners claimed that the ordinance's application to only rental property residences – and not to owner-occupied residences – was an arbitrary and unreasonable classification that violates Nebraska's constitutional prohibition against special legislation.

For purposes of state constitution's prohibition against special legislation, a legislative act constitutes "special legislation" if 1) it creates an arbitrary and unreasonable method of classification, or 2) it creates a permanently closed class. To be valid under state constitution's clause prohibiting special legislation, a legislative classification must be based upon some reason of public policy, some substantial difference in circumstances, that would naturally suggest the justice or expediency of diverse legislation regarding the objects to be classified.

The court concluded that the record showed that the city based its classification of rental property residences on a real distinction from other residential properties and that its distinctive treatment was reasonably related to legitimate goals. Protecting tenants' safety within the context of the landlord/tenant relationship creates a unique public policy concern that distinguishes rental properties from other residential properties.

Furthermore, because the renting of residential housing is a business, a city can reasonably require the owners of such housing to pay fees to offset the cost of regulating that business.

ZONING - NEW HAMPSHIRE

Town of Bartlett Bd. of Selectmen v. Town of Bartlett Zoning Bd. of Adjustment

Supreme Court of New Hampshire - April 12, 2013 - A.3d - 2013 WL 1497323

The Supreme Court of New Hampshire holds that the word "premises" in town zoning ordinance prohibiting off-premise signs included buildings and grounds associated with resort's general area, including ownership units and registration office, rather than a single lot of land.

Town board of selectmen appealed order of the superior court upholding a decision of town zoning board of adjustment (ZBA) finding that a sign erected by applicant, giving directions to registration office of resort, was permitted under town's zoning ordinance.

Selectboard approved landowner's application to place a sign on Route 302. The sign was erected at the westerly entrance to the resort area. At some point, an additional, smaller sign was affixed underneath the approved sign, reading "REGISTRATION .3 MILES BACK ON LEFT." The registration office to which the sign refers is the office at which patrons register for the resort. The office is located on a lot within the resort, separate from the lot on which the sign is located.

The Selectboard denied the resort's application to approve the second sign, citing the town

ordinance that prohibits the erection of an outdoor sign “on any premises other than on the premises where the activity to which the sign pertains is located,” and Section D, which prohibits off-premise signs “in all districts except as provided elsewhere in [the] Ordinance.”

The Supreme Court disagreed, ruling that the word “premises” in town zoning ordinance prohibiting off-premise signs included buildings and grounds associated with resort’s place, including ownership units and registration office, rather than a single lot of land. Although ordinance did not define “premises,” it defined “lot” as tract, parcel, or plot of land, and, had it been intent of drafters of ordinance to interpret word “premises” as a single lot of land, they could have done so by using the word “lot.”

TAX - NEW HAMPSHIRE

In re City of Nashua

Supreme Court of New Hampshire - April 12, 2013 - A.3d - 2013 WL 1499318

Supreme Court New Hampshire holds that only encumbrances on includable assets are deductable when calculating net assets for purposes of elderly exemption.

Taxpayer filed an application with the city for an elderly exemption for tax year 2011. The application listed total assets, not including the value of her residence, of $145,724.19. It also noted the existence of an equity loan secured by the taxpayer’s residence in the amount of $42,000. To qualify for the elderly exemption under the city’s ordinance, the taxpayer’s net assets could not exceed $125,000, excluding the value of the taxpayer’s residence. The city denied the exemption on the ground that the taxpayer’s net assets exceeded $125,000.

The taxpayer appealed to the BTLA. She contended that because the statutory definition of “net assets” deducts the value of “good faith encumbrances,” the amount of her equity loan should be subtracted from her total assets (excluding the value of her residence) to arrive at “net assets,” thereby bringing her “net assets” below the prescribed limit. The BTLA agreed, and the City appealed.

The Supreme Court New Hampshire held that only encumbrances on includable assets are deductable when calculating net assets for purposes of elderly exemption, reversing the BTLA’s decision.

Term “net assets” in statute providing elderly exemption from property taxes meant the value of all includable assets net of any encumbrances on those assets, rather than encumbrances on any assets of taxpayer, and therefore encumbrance on taxpayer’s residence, which, pursuant to statute, was not counted as an asset in the net asset calculation, was not deducted in the net assets calculation in determining applicability of exemption to taxpayer.

ZONING - NEW JERSEY

Mahwah Realty Associates, Inc. v. Township of Mahwah

Superior Court of New Jersey, Appellate Division - April 15, 2013 - A.3d - 2013 WL 1500362

Under statute governing notice of a hearing on an amendment to zoning ordinance proposing a change to the classification or boundaries of a zoning district, it is only when a boundary change is

proposed that the notice must identify such change by street names, etc.

Health club owner brought action against township, challenging ordinance that sought to include health and wellness centers and fitness and health clubs as principal permitted uses in general industrial and industrial park zones. Owner contended that the ordinance changed the “classification” of those zones, thereby requiring compliance with notice provisions.

The appeals court held that:

- Ordinance changed the classification of industrial zones, thus triggering statutory notice requirements; but
- Under statute governing notice of a hearing on an amendment to zoning ordinance proposing a change to the classification or boundaries of a zoning district, it is only when a boundary change is proposed that the notice must identify such change by street names, common names or other identifiable landmarks, and by reference to lot and block numbers.

ZONING - NEW HAMPSHIRE

Trefethen v. Town of Derry

Supreme Court of New Hampshire - April 12, 2013 - A.3d - 2013 WL 1497321

The Supreme Court of New Hampshire holds that, because original 30-day filing deadline fell on a Saturday, property owners could timely file their appeal with the zoning board of adjustment on the following Monday.

Property owners sought rehearing after township’s Zoning Board of Adjustment (ZBA) granted a special exception to the lessee of abutting property, permitting the property to be used as a day care facility. The ZBA denied rehearing, and property owners appealed. The superior court dismissed, ruling that the property owners did not satisfy the 30-day filing deadline.

The Supreme Court of New Hampshire held that because original 30-day filing deadline fell on a Saturday, property owners could timely file their appeal on the following Monday.

GOVERNMENTAL IMMUNITY - NEW YORK

Banigo v. Board of Educ. of Roosevelt Union Free School Dist.

Supreme Court, Nassau County, New York - April 15, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 23126

Legitimate elimination of teacher position created immunity against unlawful termination claim; filing of EEOC complaint does not satisfy notice requirement prior to initiation of lawsuit against the district.

Teacher brought action against board of education, school district, and superintendent, alleging violations of education law, age discrimination in particular.

The Supreme Court held that:

- Superintendent was entitled to governmental immunity; and
- Filing of complaint with Equal Employment Opportunity Commission (EEOC) did not satisfy notice

requirement.

The court found that superintendent was entitled to governmental immunity from teacher's claims that her termination violated various education law provisions, even if his motives were venal or malicious, where teacher had no right to continued employment once her position was eliminated and elimination was act of discretion within superintendent's powers.

Teacher's filing of complaint with Equal Employment Opportunity Commission (EEOC) did not satisfy notice requirement provision of education law, required before bringing claims regarding her termination against board of education and school district. The EEOC complaint was filed eight months after her discharge, and it was not served upon board or district.

GOVERNMENTAL IMMUNITY - VIRGINIA

Board of Sup'rs of Fluvanna County v. Davenport & Co. LLC

Supreme Court of Virginia - April 18, 2013 - S.E.2d - 2013 WL 1687514

Supreme Court of Virginia holds that county board of supervisors waived its legislative immunity in bond-related action against its financial advisor.

County board of supervisors brought action against board's financial advisor alleging breach of fiduciary duty, actual fraud, gross negligence, constructive fraud, unjust enrichment, breach of contract, and breach of the Virginia Securities Act in connection with advice rendered to the board regarding a bond issuance.

The Supreme Court, Leroy F. Millette, Jr., J., held that board waived legislative immunity in regards to issues relating to complaint against financial advisor.

The advisor argued that the court should dismiss the complaint, as it violated the separation of powers doctrine because the elements of the claims and advisor's defenses required the court to adjudicate issues not properly before the judiciary. The circuit court agreed, holding that the separation of powers doctrine prohibited the court from resolving the dispute because to do so would require inquiry into the motives of the board.

The Supreme Court of Virginia reversed, finding that County waived legislative immunity, and thus, immunity did not bar action against county's financial advisor, by: 1) declining to assert legislative immunity; 2) voluntarily filing a complaint that, due to the Board's burden of proof, involved issues protected by legislative immunity; and 3) making an unequivocal waiver of protection from inquiry into legislative motivation in the text of its complaint.

SECURITIES - CALIFORNIA

McDaniel v. Wells Fargo Investments, LLC

United States Court of Appeals, Ninth Circuit - April 9, 2013 - F.3d - 2013 WL 1405949

Federal securities laws held to preempt suits by investment advisors alleging that banks' in-house trading policies amount to forced-patronage in violation of California labor law.

Federal law requires brokerage firms to take measures reasonably designed to prevent their

employees from misusing material, nonpublic information. To meet that obligation, defendants Wells Fargo, Morgan Stanley, and Merrill Lynch adopted policies generally forbidding their financial advisors from opening self-directed trading accounts outside the firm.

Former California employees of the firms sued, contending that the firms' trading policies allowing members to open self-directed trading accounts only in house, thus force each "employee … to patronize his or her employer … in the purchase of [a] thing of value" and thus amount to forced patronage in violation of section 450(a) of the California Labor Code.

The firms raised the defense of preemption. They contended that section 450(a) is an obstacle to the accomplishment of a significant objective of federal securities law – namely, that brokerage firms use their discretion to adopt whatever trading polices they think best suited to preventing insider trading and similar abuses.

After analysis, the appeals court affirmed the district court's ruling that the Securities Exchange Act and related SRO rules preempt the employees' forced-patronage suits.

EMPLOYMENT - CALIFORNIA

Wedbush Securities, Inc. v. Stephen Kelleher

Court of Appeal, First District, Division 4, California - April 9, 2013 - Not Reported in Cal.Rptr.3d

FINRA arbitration panel finds firm's failure to compensate the head of its tax-exempt sales and trading desk "morally reprehensible."

Plaintiff is an experienced municipal bond trader who went to work for a financial services firm as the head of its tax-exempt sales and trading desk.

Several years later, plaintiff filed a "Statement of Claim" (SOC) with the Financial Industry Regulatory Authority (FINRA), the designated adjudicator of any dispute between plaintiff and the firm concerning his compensation. The SOC outlined the basic facts relating to plaintiff's claim for unpaid compensation, and sought more than $6 million against the firm.

A hearing was held before a three-person panel. The panel awarded plaintiff $3.5 million in compensation the panel found was owed because of the firm's "morally reprehensible failure and refusal to compensate" plaintiff in a timely fashion.

The firm filed suit to vacate the arbitration award, claiming: 1) error by the panel in denying the firm's request to postpone the arbitration hearing; 2) error by the panel in excluding the firm's late proffered evidence concerning the company's investigation into possible regulatory irregularities by plaintiff and/or his department; and 3) the failure by one of the arbitrators to disclose a ground for his disqualification.

The appeals court found no error and confirmed the award.

EXEMPT ORGANIZATIONS - COLORADO

Larimer County Board of Commissioners, et. al. v. Colorado Property Tax Administrator and YMCA of the Rockies

Colorado Court of Appeals, Div. V - April 11, 2013 - P.3d - 2013 COA 49

Court holds that Board of Assessment did not apply the proper legal standards when it denied a YMCA facility both religious purpose and charitable use tax exemptions.

The Young Men's Christian Association of the Rockies and the Colorado Property Tax Administrator appealed the Board of Assessment Appeals orders finding that the YMCA was not entitled to a charitable use exemption or a religious purposes exemption from property taxes, except for its chapels and religious activity center.

As to the religious purposes exemption, the court or appeals concluded that the Board did not apply the proper legal standards and, therefore, erred as a matter of law.

The majority of the Board's order identified evidence in the record related to the YMCA's application. However, in its analysis, the Board did not address the YMCA's declaration of religious purposes contained in its application, the effect of the declaration's presumed validity, or whether the presumption had been overcome. Because such declarations are presumptive with regard to the religious purposes for which property is used under section, the Board erred as a matter of law.

As to the charitable use exemption, the court of appeals again found that the Board did not apply the correct legal standards and thus erred as a matter of law.

In its order, the Board repeatedly said that it was applying a statutory presumption against exemption in this case. However, this presumption was not accurate in light of the applicable constitutional provisions and more recent supreme court authority. The Colorado Constitution provides that property that is used solely and exclusively for strictly charitable purposes shall be exempt from taxation. To that end, the court strictly construes what constitutes a charitable purpose but liberally construes the means used to achieve it.

Based on the record, the appeals court concluded that the Board did not properly consider whether the YMCA used the properties solely and exclusively for strictly charitable purposes.

The YMCA contended that remand was unnecessary because the relevant facts are undisputed, and that under the court of appeals' standard of review, it may conclude as a matter of law that the YMCA is entitled to one or both exemptions. Therefore, the YMCA asked the court to uphold the tax administrator's determinations.

Although it agreed that the Board did not apply the correct legal standards, it could not conclude that the tax administrator's findings necessarily should be reinstated. "These are complex applications that involve a significant amount of evidence and testimony." Moreover, both the religious purposes and charitable use exemptions allow for partial exemptions. Therefore, remand is necessary because the court could not make the factual findings required to review the tax administrator's determinations.

SCHOOLS - FLORIDA

Hatcher ex rel. Hatcher v. DeSoto County School Dist. Bd. of Educ.

United States District Court, M.D. Florida, Fort Myers Division - April 5, 2013 - Slip Copy -

2013 WL 1395810

Court declines to let high school principal off the hook – either officially or individually – in student's First Amendment suit.

High school student filed suit against school district and principal, asserting that they interfered with her First Amendment right to organize and participate in the National Day of Silence and have asserted again this year that she will not be allowed to participate as she proposes.

The principal sought dismissal of the complaint, arguing, *inter alia*, that: 1) the official capacity claim against her is duplicitous of the claim against the school district; 2) the individual capacity claim against her for injunctive relief is not available to plaintiff; and 3) the individual capacity claims against her are barred by qualified immunity.

The court agreed that an official capacity claim may be redundant when the entity is also a named defendant. The school board, however, was contesting any liability based on the principal's conduct, and therefore it remained plausible at this stage of the proceedings that a separate official capacity claim could be maintained against her.

As to the principal's assertion that the claim for injunctive relief must be dismissed because injunctive relief against a government official in her individual capacity is not appropriate with regard to that defendant's official duties, the court found that personal liability under 42 U.S.C. § 1983 is available when an official's allegedly unconstitutional actions are "within the official's authority and necessary to the performance of governmental functions." The Court saw no reason why such personal liability cannot be remedied by injunctive relief.

The court also found that the principal was not entitled to qualified immunity, which provides "complete protection for individual public officials performing discretionary functions insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." The complaint alleged facts showing the principal was operating in her discretionary capacity as principal of the high school. The Complaint also alleged facts showing that the principal violated plaintiff's clearly established First Amendment rights.

Although not at issue in this stage of the proceedings, the court made it abundantly clear that the school district's policy of forbidding any and all protests on school grounds would be going down in flames.

EMPLOYMENT - GEORGIA

Demaree v. Fulton County School Dist.

United States Court of Appeals, Eleventh Circuit - April 8, 2013 - Slip Copy - 2013 WL 1395791

U.S. Court of Appeals finds rational basis for elimination of all school orchestra and band positions, denying Equal Protection claim.

Entire cadre of elementary school orchestra and band teachers lost their jobs during a reduction in force ("RIF") implemented by the school district. Teachers sued, alleging that the school district violated their rights under the Equal Protection Clause of the United States and Georgia Constitutions.

The RIF described a five-step analysis considering factors of performance and tenure. The positions of elementary orchestra and band school teachers, however, were not eliminated through this five-step analysis. Instead, the school district voted to non-renew all elementary band and orchestra teachers because those positions were deemed "non-essential" functions. These positions were described as "programs/functions eliminated."

One group besides elementary orchestra and band teachers was also placed in the "programs/functions eliminated" – Grades 1 through 3 paraprofessionals. However, the 165 Grades 1 through 3 paraprofessionals were not eliminated as a group like the elementary orchestra and band teachers; rather, they were analyzed through the five-step RIF process. This resulted in some of the Grades 1 through 3 paraprofessionals' continued employment in other paraprofessional positions.

Plaintiffs alleged that they were similarly situated with the Grades 1 through 3 paraprofessionals and that the school district had no rational basis for treating the two groups differently.

"Because Plaintiffs have failed to meet their burden of negating 'every conceivable basis which might support' the RIF's classification, the district court did not err in rejecting their Equal Protection claim."

ELECTIONS - ILLINOIS

Atkinson v. Schelling

Appellate Court of Illinois, Second District - April 9, 2013 - N.E.2d - 2013 IL App (2d) 130140

Appeals court affirms electoral board's decision that mayoral candidates were entitled to rely on village clerk's miscalculated minimum signature number, citing equitable estoppel.

Two candidates timely filed nomination papers to have their names appear on the ballot for the office of mayor. One candidate's papers contained 110, the other's 105. Both candidates relied on a letter from the village clerk stating that mayoral candidates must obtain a minimum of 80 signatures.

Petitioner filed objections to the candidates' nominating papers, arguing that the papers did not contain the minimum number of signatures required by section 10–3 of the Illinois Election Code, which in this case was actually 123. All parties subsequently agreed that the village clerk had miscalculated the formula contained in section 10-3.

The Electoral Board overruled petitioner's objections and ordered the candidates' names to be included on the ballot, citing equitable estoppel. The trial court affirmed the Electoral Board's decisions, as did the appeals court.

EMPLOYMENT - ILLINOIS

Cromwell v. City of Momence

United States Court of Appeals, Seventh Circuit - April 12, 2013 - F.3d - 2013 WL 1490099

U.S. Court of Appeals holds that police department employee handbook did not give terminated

officer a constitutionally protected property interest in continued public employment.

Former city police officer brought action against city alleging that his termination was procedurally inadequate under the Due Process Clause because the police department rules and regulations, adopted by city ordinance, gave him a constitutionally protected property interest in continued public employment.

Because employment relationships in Illinois are presumed to be at will, establishing an expectation of continued employment requires a clear statement made in some substantive state-law predicate. In this case the officer argued that the presence in the city police department's rules and regulations of a few explicit grounds for disciplining nonprobationary employees created a clear promise of continued employment for nonprobationary employees in the absence of cause for termination, sufficient to give rise to a protected property interest under the Due Process Clause. In contrast, the rules and regulations provided that probationary employees could be fired at any time for any reason.

The court began its analysis by noting that the listed grounds for disciplining nonprobationary employees were extremely broad, and, more importantly, did not purport to list all permissible grounds for termination.

Under Illinois law, promises made in an employee handbook can in certain circumstances give rise to a legitimate claim of entitlement to continued employment sufficient to be protected as a property interest by due process. An employee handbook will create an enforceable due process right to a protected property interest in continued employment only if the traditional requirements for contract formation are present, the first of which is that the promise must be clear enough that an employee would reasonably believe that an offer has been made. The promise cannot be a mere procedural guarantee, but rather, substantive criteria limiting the state's discretion is required in order for a property interest to be created.

The court of appeals held that no such contract had been formed here, and thus the officer did not have a protectable property interest in continued employment.

MUNICIPAL LIABILITY - LOUISIANA

Broussard v. State ex rel. Office of State Bldgs., Under Div. of Admin.

Supreme Court of Louisiana - April 5, 2013 - So.3d - 2012-1238 (La. 4/5/13)

Supreme Court of Louisiana holds that defective condition – misaligned elevator in a state building – is more properly considered an unreasonably dangerous condition where comparative fault is applicable, rather than an open and obvious hazard where no duty is owed.

Delivery driver, who sustained back injury while pulling loaded dolly into misaligned elevator in state building, brought premises-liability action against state. A jury returned a verdict in driver's favor. The appeals court held the jury's factual determination that the elevator's defective condition presented an unreasonable risk of harm was manifestly erroneous because the defect was open and obvious, and reversed.

The supreme court granted driver's writ to further examine, under the manifest error doctrine, whether a defective condition is more properly considered an open and obvious hazard where no duty is owed, rather than an unreasonably dangerous condition where comparative fault is applicable.

The Supreme Court of Louisiana held that:

- Elevators were part of state building, for purposes of state's liability under civil code article governing damage caused by ruin of building;
- Evidence supported jury's finding that one and one-half to three inch offset between floor of elevator and floor of state building's lobby presented unreasonable risk of harm; and
- Evidence supported jury's finding that elevator's defective condition was not open and obvious to all.

The state, therefore, breached its duty of care by failing to remedy the defect or warn of its existence until the defect could be remedied.

Although the elevator served a valuable societal function, and although no prior injuries had been reported, the evidence indicated that the public did not ordinarily anticipate offsets between floors of elevators and buildings. Numerous individuals had tripped due to building's misaligned elevators and inexpensive steps could have been taken to warn employees and visitors of hazard posed by elevator.

UNIONS - MARYLAND

Mayo v. Board of Educ. of Prince George's County

United States Court of Appeals, Fourth Circuit - April 11, 2013 - F.3d - 2013 WL 1459249

Court holds that temps are not third-party beneficiaries under the CBA between school board and union, and therefore not entitled to bring a breach of contract action against the school board.

Temporary employees of board of education filed a class action complaint asserting employee-compensation claims against the school board and union. They alleged that even though the collective bargaining agreement excluded "temporary employees" from the bargaining unit, they were entitled to the benefits of an arbitration award entered as the result of an arbitration between the school board and the union, as well as benefits from the underlying CBA.

The court of appeals concluded that temps were not third-party beneficiaries under the CBA between school board and union, and therefore could not bring a breach of contract action against the school board. The CBA explicitly excluded temporary employees from coverage, and although the CBA did allow the use of substitute or temporary employees to fill "authorized positions" – which would make those employees part of the bargaining unit – it did so to protect those positions for members of the bargaining unit.

ARBITRATION AWARD - MASSACHUSETTS

Kaplan v. Shanahan

Appeals Court of Massachusetts - April 10, 2013 - Slip Copy - 83 Mass.App.Ct. 1124

Court affirms arbitration award in which prevailing party was awarded attorneys' fees, as the parties had agreed to be bound by FINRA arbitration rules, which permit such fees.

Plaintiffs claimed error in a judgment entered by a judge in the superior court confirming an arbitration award. The plaintiffs maintain that the arbitrators exceeded their authority when they

awarded the defendants their fees because no authority existed for such an award.

The defendants countered, and the arbitrators agreed, that pursuant to the underlying contract and the rules of the Financial Industry Regulatory Authority (FINRA) to which the plaintiffs agreed to be bound, the circumstances of this case permitted attorneys' fees. The judge agreed with the defendants, holding that according to the FINRA Dispute Resolution Arbitrators' Guide, attorney's fees are allowed when the contract includes a clause that provides for the fees and the all of the parties request or agree to such fees, as was the case in this matter.

The plaintiffs filed a FINRA "Arbitration Submission Agreement" stating that they would agree to abide by any award rendered. The parties filed several claims and asked for attorney's fees to be decided as part of the arbitration award. Arbitration award affirmed.

MUNICIPAL CONTRACTS - MINNESOTA

Rochon Corp. v. City of St. Paul

Court of Appeals of Minnesota - April 8, 2013 - N.W.2d - 2013 WL 1395596

A prospective contractor for a municipal project that successfully challenges a bid-submission process and recovers under the Minnesota Uniform Municipal Contract Law cannot circumvent the prohibition of attorneys' fee awards by claiming that the contract violation entitles it to attorneys' fees under Minnesota's private attorney general statute.

Bidder challenged the district court's refusal to award attorney fees and litigation costs incurred after it successfully challenged city's bidding process for a municipal-contracting project. Bidder was awarded the full costs of its bid submission as allowed under the Minnesota Uniform Municipal Contracting Law (UMCL). Because the UMCL unambiguously prohibits the award of attorney fees under these circumstances, the court declined to adopt bidder's argument that it was entitled to attorney fees and costs under Minnesota's private attorney general statute.

The Private AG statute provides private litigants the right to commence a civil action and recover damages, including attorneys' fees, if the claimed injury stems from a legal violation that would normally fall within the purview of the attorney general's investigatory powers. Such injuries include "unfair, discriminatory, and other unlawful practices in business, commerce, or trade." The statute contains a nonexhaustive list of applicable statutory sections. The UMCL is not included.

Because the bidder had already received bid-preparation costs under the UMCL, it was required to allege a viable additional claim falling within the Private AG statute to be eligible to recover under its provisions. Otherwise, the UMCL's prohibition of awarding attorney fees will govern. Bidder pointed to the city's violation of its own ordinances and instructions regarding the project. The court stated that, while these claims certainly allege unfair and unlawful practices, they fail to differentiate themselves from the governing tenets of the UMCL and its prohibition of awarding attorney fees.

MUNICIPAL ORDINANCES - MINNESOTA

State v. McElroy

Court of Appeals of Minnesota - April 8, 2013 - N.W.2d - 2013 WL 1393622

City ordinance restricting the volume of music emanating from an electronic device located within a motor vehicle that is being operated on a public street is not unconstitutionally overbroad or vague.

Local ordinance prohibits “the operation of any electronic device used for the amplification of music or other entertainment, which is located within a motor vehicle being operated on a public street or alley, or in commercial or residential parking facilities, which is audible by any person from a distance of fifty (50) feet or more from the vehicle.”

Individual challenged his conviction for violating the ordinance, arguing that: 1) the ordinance is unconstitutionally vague and overbroad; 2) the state failed to prove the element of amplification beyond a reasonable doubt; and 3) the district court erred by instructing the jury that it must reach a verdict.

The court of appeals held that the ordinance is neither vague nor overbroad, and thus constitutional. And because the evidence was sufficient to sustain appellant’s conviction, and the district court properly instructed the jury, the conviction was affirmed

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GOVERNMENTAL IMMUNITY - NEW HAMPSHIRE

Ojo v. Lorenzo

Supreme Court of New Hampshire - April 3, 2013 - A.3d - 2013 WL 1316980

Supreme Court of New Hampshire holds that grand jury’s finding of probable cause did not retroactively establish probable cause at time or arrest, declines to extend immunity to arresting officers.

Arrestee sued arresting officer and police department for false imprisonment and malicious prosecution. The superior court granted defendants’ motion to dismiss on ground of they were immune from suit because the grand jury found probable cause in the prior criminal prosecution.

On appeal, the Supreme Court of New Hampshire held that:

- Grand jury’s probable cause finding did not establish probable cause at time of arrest, so as to entitle officer to immunity;
- Indictments did not collaterally estop arrestee from establishing that probable cause did not support his arrest;
- Arrestee’s stated claims not barred by immunity;
- Finding of probable cause to bind arrestee over did not collaterally estop him from establishing that probable cause did not support his arrest;
- Police did not establish probable-cause defense to false imprisonment claims; and
- Indictments defeated malicious prosecution claim.

“In conclusion, we repeat that the ‘public simply cannot afford for those individuals charged with securing and preserving community safety to have their judgment shaded out of fear of subsequent lawsuits or to have their energies otherwise deflected by litigation, at times a lengthy and cumbersome process.’ We understand that ‘[p]olice officers are trusted with one of the most basic and necessary functions of civilized society, securing and preserving public safety.’ Nonetheless, at this stage of the proceeding, the defendants have not demonstrated that they are entitled to immunity from suit, or that probable cause supported the plaintiff’s arrest. We note that if further factual development of the record establishes the lack of any genuine issue of material fact regarding the existence of probable cause for the plaintiff’s arrest, the summary judgment

procedure remains available to the defendants to resolve this litigation short of a trial."

MUNICIPAL LIABILITY - NEW YORK

Vega v. 103 Thayer Street, LLC

Supreme Court, Appellate Division, First Department, New York - April 2, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 02169

Appeals court finds that ambiguous symbol on city DOT map raised a triable issue of fact as to whether the city had prior written notice of pedestrian hazard.

Pedestrian who allegedly tripped and fell as result of hole in pedestrian ramp brought personal injury action against city.

The city moved for summary judgment on the ground that plaintiff could not prove prior written notice to the city as required under the administrative code because the Big Apple map received by the Department of Transportation on the date of the accident did not indicate the specific marking (a circle) for a "hole or other hazardous depression" at the location of the accident.

The trial court granted the city's motion for summary judgment dismissing the complaint. Plaintiff appealed.

The appeals court reversed on the ground that the city failed to make a prima facie showing of entitlement to judgment as a matter of law because the markings on the Big Apple map it submitted were ambiguous, thus raising an issue of fact as to whether it had prior written notice of the alleged defect.

TAX - OHIO

Akron City Sch. Dist. Bd. of Edn. v. Summit Cty. Bd. of Revision

Court of Appeals of Ohio, Ninth District, Summit County - April 10, 2013 - Slip Copy - 2013 - Ohio- 1419

Standing to challenge a county's property valuation, requires that one must be the legal title holder of real property within the county and not merely the holder of an equitable interest, in this case a long-term lease with a purchase option.

A nursing facility was sold twice in one year: first, for $17,620,000, and later for $6,497,886. The county had valued the property at $3,137,460 for that year.

The Board of Education for the Akron City School District filed a complaint with the Board of Revision, seeking an increase in the property's valuation. The Board of Revision found that the property's fair market value was $3,137,460. The School Board appealed the Board of Revision's decision to the Board of Tax Appeals, which determined that the true fair market value of the property was $17,620.000 as the second sale was not a true arms-length transaction.

The court of appeals confirmed the Board of Tax Appeals' ruling that lessee of the property did not have standing to challenge the valuation, even though its lease contained a purchase option. To have standing to challenge a valuation, one must be the legal title holder of real property within the

county, and not merely the holder of an equitable interest. In the absence of standing, the challenge to the valuation was moot and the Board of Tax Appeals determination was affirmed.

UNIONS - ALASKA

[Plumbers & Pipefitters, Local 367 v. Municipality of Anchorage]

Supreme Court of Alaska - March 29, 2013 - P.3d - 2013 WL 1281791

Supreme Court of Alaska affirms superior court's holding that municipal code limited its equitable power to impose contract conditions as part of a permanent injunction in collective bargaining dispute.

Union and municipality entered into collective bargaining to renew the union's expiring contract. When negotiations broke down, the parties entered into arbitration, but the arbitrator's proposed decision failed to garner the necessary municipal assembly votes to become binding on the parties.

Under the municipality's labor ordinances, the assembly's failure to approve the arbitrator's decision resulted in an impasse, with each party given a remedy: the municipality could implement its last best offer presented at arbitration, and the union could go on strike. However, the union's statutory right to strike was limited and could be enjoined if the work stoppage threatened public health and safety.

Although the union voted to strike, it agreed to a preliminary injunction before the strike was scheduled to begin because work stoppage would threaten public health and safety almost immediately. The union then argued that the superior court should impose the arbitrator's decision as a condition of a permanent injunction to compensate for "taking away" the union's right to strike.

The superior court held that its equitable jurisdiction was constrained by the municipal code, which had no provision for imposing the arbitrator's decision, and entered an order permanently enjoining the strike and allowing the municipality to implement its last best offer. The union appealed, arguing the superior court erred as a matter of law in holding the municipal code limited its equitable power to impose contract conditions as part of a permanent injunction.

The Supreme Court of Alaska affirmed the superior court's decision.

MUNICIPAL LIABILITY - DISTRICT OF COLUMBIA

[Woods v. District of Columbia]

District of Columbia Court of Appeals - March 28, 2013 - A.3d - 2013 WL 1235465

Stroke victim's reliance on alleged misdiagnosis by District of Columbia ambulance crew did not give rise to a special relationship, as required in order to avoid the application of the public-duty doctrine.

Stroke victim brought negligent diagnosis action against the District. The superior court granted District's motion to dismiss, and stroke victim appealed.

The court of appeals held that stroke victim's reliance on alleged misdiagnosis by District ambulance crew did not give rise to a special relationship, as required in order to avoid the application of the

public-duty doctrine.

The court stated that the public-duty doctrine barred a claim that a plaintiff's situation was made worse because the plaintiff relied upon actions taken by District emergency personnel in providing the kind of on-the-scene emergency assistance that the District normally provides to the general public.

ZONING - CONNECTICUT

Keepers, Inc. v. City of Milford, Conn.

United States District Court, D. Connecticut - March 30, 2013 - F.Supp.2d - 2013 WL 1297839

Court upholds the constitutionality of city ordinances regulating sexually-oriented businesses; strikes down posting provision as unconstitutionally broad.

Operators of strip club and sex shop challenged the constitutionality of two versions of a city ordinance regulating sexually-oriented businesses.

Plaintiffs argued that the ordinance violates the First Amendment (as an impermissible prior restraint, an undue burden on protected expression, overbroad, and an impermissible impairment on the right to freely associate); the Fourth Amendment; the Takings Clause of the Fifth Amendment; the Ninth Amendment; and the Fourteenth Amendment (as vague as-applied, facially vague, and causing a deprivation of liberty interests without due process). They also contend it violates Conn. Gen.Stat. § 8–2.

The court held that the ordinances in question were not an attempt to regulate the primary effects of the expression, but rather target secondary effects of the expression, the court concluded that the ordinances are content-neutral time, place, and manner regulations, and thus subject to intermediate scrutiny.

The court found that both ordinances satisfied all four elements established in *O'Brien*. Therefore, the ordinances are valid restrictions on speech.

However, the court concludes that the scope of the posting provision was unconstitutionally broad because there is not a substantial relationship between the governmental interest and the information required to be posted. While requiring the posting of the names of the individuals who manage, operate and/or control a sexually oriented business is substantially related to enforcement of the ordinance, posting the names of individuals based merely on their status as a 30% shareholder or an officer not involved in the management, operation or control of the sexually oriented business is not substantially related to the city's interest in enforcing the ordinance.

PUBLIC UTILITIES - GEORGIA

Georgia Power Co. v. Cazier

Court of Appeals of Georgia - March 29, 2013 - S.E.2d -

Court holds that public utility customers could not bring direct action against utility for refund of sales taxes, but claim for refund of allegedly miscalculated municipal franchise fees did not

impermissibly intrude upon the Public Service Commission's exclusive rate-making authority.

Customers brought action against electric utility, alleging that utility had improperly collected certain sales taxes and fees that were allegedly not subject to sales tax. The trial court denied utility's motion to dismiss. Utility filed interlocutory appeal.

The court of appeals held that:

- Customers could not bring direct action against utility for refund of sales taxes, but
- Claim for refund of allegedly miscalculated municipal franchise fees did not impermissibly intrude upon the Public Service Commission's exclusive rate-making authority.

Statute governing procedures for claiming refund of erroneously collected taxes from Department of Revenue did not create a cause of action for customers against electric utility for refund of sales taxes utility had collected on certain fees that were allegedly not subject to sales tax. The statute allowed a person who had erroneously paid sales tax the opportunity to bypass the filing of a formal refund claim with Department by first simply requesting a refund from a dealer, while still preserving the person's right to later pursue an administrative remedy with the Department in the event the request for a dealer refund failed, but did not allow the person to bring a direct action against a dealer

Section of Uniform Sales and Use Tax Administration Act, providing time limits and notice requirements for a cause of action against dealers for over-collected sales or use taxes, did not create a direct cause of action against dealers.

Customers' claim did not impermissibly intrude upon the Public Service Commission's exclusive rate-making authority, as the claim did not challenge the validity or reasonableness of any utility rate set by the Commission, and instead simply challenged the method of calculating and collecting the fee.

BANKRUPTCY - GEORGIA

In re Montgomery

United States Bankruptcy Court, N.D. Georgia, Atlanta Division - March 28, 2013 - B.R. - 2013 WL 1342937

Court holds that school district satisfied its burden and was thus entitled to a determination that the judgment debt owed by debtor was nondischargeable under § 523(a)(2)(A).

This action involved a consulting contract between a California school district and debtor, in his capacity as a benefits specialist. The contract and other related causes of action between the parties were litigated in superior court, resulting in a judgment against debtor for $2 million.

The school district sought a determination that its judgment debt is nondischargeable. The school district also sought a determination that a portion of debtor's claimed exemptions, in the form of IRA accounts, were not property of the estate due to a constructive trust imposed upon funds as a result of the superior court order and judgment.

The court found that each of the § 523(a)(2)(A) elements had been satisfied by school district: 1) debtor made a false representation with intent to deceive; 2) reliance on the false representation; 3) the creditor's reliance was justifiable; and 4) resulting damages to the creditor. School district

satisfied its burden and was entitled to a determination that the judgment debt owed by debtor was nondischargeable under § 523(a)(2)(A).

The court also agreed with school district that certain funds in debtor's IRA accounts are not property of the estate because these funds were placed in a constructive trust for school district's benefit.

PENSIONS - MICHIGAN

Welch v. Brown

United States District Court, E.D. Michigan, Southern Division - March 29, 2013 - F.Supp.2d - 2013 WL 1292373

Court issues preliminary injunction blocking implementation of modified municipal retiree health care benefits by appointed emergency city manager.

This case involved the alteration of lifetime health insurance benefits of retired municipal workers in the City of Flint. Plaintiffs allege that through a number of collective bargaining agreements ("CBAs") they were promised lifetime health benefits identical or comparable to the plans in place when they retired.

Defendant was appointed as Emergency Manager for Flint and subsequently issued several orders that unilaterally modified the terms of the CBAs. Plaintiffs filed for a preliminary injunction enjoining the enactment of the modifications.

The court found that plaintiffs demonstrated a likelihood of success on the merits as to their Contract Clause and Due Process claims with respect to those plaintiffs who derive their health care benefits from CBAs. The court also that plaintiffs had demonstrated a likelihood of success on the merits as to their Due Process claim with respect to those plaintiffs who derive their health care benefits from city ordinance.

Plaintiffs' motion for a preliminary injunction was granted. "Defendants are hereby enjoined from modifying the contracts and/or ordinances governing Plaintiffs' health-care benefits, and to the extent that modification has already occurred, the contracts and ordinances are restored to the status quo ante."

BONDS - MICHIGAN

Wells Fargo Advantage Nat. Tax Fee Fund v. Helicon Associates, Inc.

United States Court of Appeals, Sixth Circuit - April 2, 2013 - Slip Copy - 2013 WL 1316471

Appeals court reverses summary judgment in favor of Dorsey & Whitney on securities law and negligent representation allegations in connection with bond issuance for which the firm served as underwriters' counsel.

Michael Witucki ran a corporation that sold a building to a charter school of which he was the Chief Administrative Officer. Witucki's dual roles created a conflict of interest that violated Michigan law. Dorsey & Whitney, LLP acted as underwriters' counsel for a bond issue that financed the building purchase. Dorsey allegedly drafted the Preliminary Official Statement knowing of the conflict of

interest but failed to disclose it.

As a result of the Michigan law violation and other problems with the bond issue, the chartering entity of the charter school forced the unwinding of the bond issue, which caused plaintiffs to lose several million dollars. Plaintiffs brought suit in federal district court, alleging that Dorsey & Whitney violated state and federal securities laws, and that Dorsey & Whitney was liable for common-law negligent misrepresentation.

The district court granted summary judgment to Dorsey & Whitney and the appeals court reversed, remanding the case for further proceedings

The appeals court held that plaintiffs had stated a plausible claim for relief under the Connecticut Uniform Securities Act. It was enough, at this early stage in the litigation, that Dorsey & Whitney allegedly drafted the Preliminary Official Statement and edited and revised the Official Statement knowing that the documents omitted material facts.

Under Michigan law, a third party may hold an attorney liable for negligent misrepresentation when the attorney negligently performed a contractual duty and the third party was either someone the attorney knew would rely on the information or someone the attorney should have reasonably foreseen would rely on the information. The appeals court ruled that the negligent misrepresentation claim should not have been dismissed at the summary judgment stage. Based upon the facts, a jury could determine that Dorsey & Whitney negligently performed a contractual duty when it failed to include the material conflict of interest in the Preliminary Official Statement and in the Official Statement.

MUNICIPAL LIABILITY - MISSOURI

Sasnett v. Jons

Missouri Court of Appeals, Western District - April 2, 2013 - S.W.3d - 2013 WL 1296725

Jury instruction that driver owed a higher standard of care than city was not warranted following grant of directed verdict as the jury was repeatedly and correctly advised throughout trial of driver's higher standard of care.

Family of deceased motorist brought a wrongful death action against driver and city after a fatal accident at an allegedly unreasonably dangerous intersection. The circuit court affirmed jury verdict finding driver 10% at fault and city 90% at fault.

On appeal, the family contended that the circuit court failed to instruct the jury that driver owed a higher standard of care than the city owed and this error resulted in the jury allocating a low percentage fault to driver. The family also contended that the court plainly erred in admitting driver's testimony that she has three children and that she understood that the family wanted her to go to jail. The family alleged that this testimony caused the jury to allocate too little fault to driver and to award them less damages.

The court of appeals held that:

- Instruction that driver owed a higher standard of care than city was not warranted following grant of directed verdict as to driver's liability but not as to city's liability; and
- Any error in admitting driver's testimony about her family status, her inability to be a stay-at-home mom due to conditions of probation, and her belief that plaintiffs wanted her to go to jail was not

- plain error.

An instruction that driver owed a higher standard of care than city was not warranted following grant of directed verdict as to driver's liability but not as to city's liability, despite claim that without the instruction the jury could not properly compare the fault of city, which owed only ordinary care, with the fault of driver, who owed the highest degree of care. The verdict director against driver instructed the jury that driver was liable to plaintiffs as a matter of law and that the jury was required to assess a percentage of fault to driver. The verdict director against city instructed the jury to determine the city's liability under the ordinary care standard, and jury was repeatedly and correctly advised throughout trial of driver's higher standard of care.

There was a substantial amount of evidence showing that the intersection was dangerous, that the city had identified intersection as a high accident location several years before accident, that the city knew the poor visibility of the traffic signals at intersection was primarily to blame for the dangerousness of the intersection, and that city had done nothing to fix it.

ANNEXATION - NEBRASKA

U.S. Cold Storage, Inc. v. City of La Vista

Supreme Court of Nebraska - March 29, 2013 - N.W.2d - 285 Neb. 579

Court approves annexation, holding that previous annexation statute did not create a constitutionally protected vested right.

Property owner and sanitary and improvement district brought class action against city challenging validity of annexation ordinance that sought to annex district, which included industrial area.

The Supreme Court of Nebraska held that:

- City's failure to strictly comply with notice requirements for annexation did not render ordinance seeking to annex sanitary and improvement district invalid;
- City did not undertake annexation of sanitary and improvement district solely for purposes of obtaining revenue;
- Amended annexation statute permitted city to annex district regardless of industrial area's value;
- Previous annexation statute did not create a constitutionally protected vested right; and
- Statute regarding annexation of sanitary and improvement districts stayed merger of the district with city until determination on the merits of property owners' challenge to annexation.

Previous statute regarding annexation, which prevented annexation of an industrial area with a valuation of more than $286,000 absent the consent of the owners of a majority of the value of the area, did not create a contract between city and landowners in the industrial area that would preclude application of the amended statute, which allowed annexation of an industrial area regardless of actual valuation if it was located in a county with a population in excess of 100,000 persons and the city did not approve the original designation of such tract as an industrial area.

EMPLOYMENT - NEW JERSEY

Doyle v. Lakewood Tp.

Superior Court of New Jersey, Appellate Division - March 27, 2013 - Not Reported in A.3d -

2013 WL 1222679

Tax collector not entitled to employment protections that apply only to municipal chief financial officers.

Plaintiff was appointed tax collector for the township. The township served plaintiff with a preliminary notice of disciplinary action. She was suspended at the time the notice was served. Plaintiff demanded a hearing, which was held. The township's municipal manager, who had appointed plaintiff, acted as hearing officer. He sustained the charges and confirmed plaintiff's removal from the position of tax collector.

Plaintiff appealed the decision to the Civil Service Commission. The Commission declined jurisdiction because plaintiff was a non-tenured employee and was not entitled to civil service protection. She then filed an action seeking judicial review of the decision terminating her employment.

The township moved for dismissal, arguing that the Law Division lacked jurisdiction because plaintiff was an at-will employee without civil service or other statutory job protection.

Plaintiff conceded that she was not a tenured tax collector and, therefore, not entitled to the termination procedures set forth in N.J.S.A. 40A:9–145.8, which concerns the tenure rights of municipal tax collectors. Instead, she argues that she is entitled to judicial review of her termination pursuant to the procedures established by N.J.S.A. 40A:9–140.9, which she contends applies to any municipal employee. The court held that that statute applies only to municipal chief financial officers.

BONDS - NEW YORK

Municipality of Bremanger v. Citigroup Global Markets Inc.

United States District Court, S.D. New York - March 28, 2013 - Slip Copy - 2013 WL 1294615

Court declines to hold Citigroup liable for losses sustained by Norwegian municipalities that invested in a Citi fund, finding that Norwegian broker neglected to convey risk disclosures provided by Citi.

The Citi Tender Option Bond Fund ("Fund") is a hedge fund managed by Citigroup. The Fund purports to engage in a municipal bond arbitrage strategy by investing in long-term municipal bonds using funds obtained from the issuance of short-term tender option bonds. The Fund purported to capture the profit, or "positive carry," generated by the difference between long-term municipal bond rates and short-term lending rates. The Fund also entered into LIBOR interest rate swaps purportedly in an attempt to hedge the risk of its investments against adverse changes in municipal bond values as a result of interest rate movements.

A Citi affiliate and a Norwegian securities firm ("Terra") entered into a distribution agreement under which Terra was authorized to sell fund-linked notes issued by Banque AIG that provided indirect exposure to the Fund (the "Notes"). Citi's presentations and marketing materials provided to Terra contained extensive disclosures regarding risk.

Seven Norwegian municipalities, acting through Terra, invested in the Notes. In August 2007, the Fund and the Notes all dropped in value, tripping certain redemption triggers.

The Norwegian Financial Supervisory Authority subsequently launched an investigation into Terra regarding its sale of securities, including the sale of the Notes to the Municipalities. Terra admitted full responsibility for the misinformation which was presented to the Municipalities. Terra's license was revoked and it went bankrupt.

Citi then began the process of unwinding and redeeming the Notes.

The Municipalities brought suit against Citi alleging fraud and negligent misrepresentation under New York common law.

The Court granted Citi summary judgment because the Municipalities could not set forth a theory of reliance supported by any facts. The Municipalities could not demonstrate direct reliance, because Citi did not directly communicate the alleged misrepresentations to them.

The Court also found that the Municipalities failed to set forth a theory of causation supported by any facts. The Municipalities could not demonstrate that Citi's alleged misrepresentations and omissions "were the direct and proximate cause of the losses claimed." Terra's decision to remove key risk disclosures contained in the Citi presentation and to make oral representations that contradicted certain of those risk disclosures constituted an "intervening act" that was not "a normal or foreseeable consequence of the situation created" by Citi's acts.

MUNICIPAL LIABILITY - NEW YORK

Figueroa v. New York City Bd. of Educ.

Supreme Court, Appellate Division, First Department, New York - March 19, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 01793

Appeals court affirms directed verdict in favor of school board, confirming absence of liability in personal injury action as there was no evidence of a dangerous condition in the classroom.

Visitor at public school who tripped and fell over legs of blackboard easel brought personal injury action against school board.

The trial court granted school board's motion to set aside jury verdict and directed entry of judgment in favor of board. The appeals court affirmed, concluding that there was no evidence of a dangerous condition in the classroom.

SCHOOLS - NEW YORK

D.K. ex rel. Mrs. K. v. Mahopac Cent. School Dist.

Supreme Court, Putnam County, New York - March 28, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 23092

Court declines school board's request that mother be compelled to undergo forensic psychiatric examination in connection with her lawsuit against the district.

Mother brought action, in her individual capacity and on behalf of her autistic son, against school district for negligence, negligent hiring, training and retention, fraud and misrepresentation, intentional infliction of emotional harm, false imprisonment, assault and battery, and loss of

services, society and companionship arising from the alleged physical, sexual, and emotional abuse of her son by teachers. School district moved for order compelling discovery and compelling both parents to appear for psychiatric examination.

The court held that:

- School district could not compel father to appear for psychiatric examination, and
- Mother would not be compelled to undergo forensic psychiatric examination.

Various factors for consideration in motions to compel testing include: 1) whether the information sought is speculative; 2) whether it would delay proceedings by turning the fact-finding process into a series of mini-trials about what may have contributed to the findings sought to be introduced at trial; 3) whether, upon consideration of the crucial search for truth, the relief sought would create undue delay occasioned by battling experts; and 4) the burden imposed and the personal nature of the information sought.

OPEN MEETINGS ACT - RHODE ISLAND

Anolik v. Zoning Bd. of Review of City of Newport

Supreme Court of Rhode Island - April 2, 2013 - A.3d - 2013 WL 1314947

Supreme Court of Rhode Island holds that the zoning board agenda item violated Open Meeting Act's requirement that supplemental written public notice contain statement specifying nature of business to be discussed.

Zoning board received a letter from counsel for Congregation Jeshuat Israel requesting an extension of the time in which to substantially complete certain improvements to its property that had been approved by a previous zoning board decision.

The request for an extension of time was referenced in one of the items contained in the agenda that was posted with respect to the board's next meeting. That agenda item reads in its entirety as follows:

"IV. Communications:
Request for Extension from Turner Scott received 11/30/08
Re: Petition of Congregation Jeshuat Israel"

The zoning board approved the extension.

Plaintiffs brought action under Open Meetings Act against city zoning board of review and members of board, alleging that agenda item for board's meeting violated the Act.

The Supreme Court of Rhode Island held that the agenda item violated Open Meeting Act's requirement that supplemental written public notice contain statement specifying nature of business to be discussed.

Designating agenda item under rubric of "Communications" did not even remotely indicate that any action would be taken with respect to agenda item, and agenda item did not give notice that named individual's request for extension was to extend time periods then in effect for purpose of completing or substantially completing improvements that had previously been approved by board.

ZONING / PLANNING - RHODE ISLAND

Lloyd v. Zoning Bd. of Review for City of Newport

Supreme Court of Rhode Island - March 29, 2013 - A.3d - 2013 WL 1285881

Court finds special-use permit, not dimensional variance, appropriate form of relief for construction of addition to dimensionally nonconforming residence.

Adjoining landowners appealed decision of city zoning board of review that granted property owners' application for special-use permit for construction of addition to dimensionally nonconforming residence.

The Supreme Court of Rhode Island held that:

- Special-use permit, not dimensional variance, was appropriate form of relief;
- Property owners were entitled to utilize expanded lot coverage that was authorized by prior dimensional variance;
- Zoning ordinance did not contemplate calculation of building mass or three-dimensional spaces in criteria for alterations of dimensionally nonconforming structures; and
- Decision to accept testimony of property owners' expert witness was within board's discretion.

City zoning ordinance did not contemplate calculation of building mass or three-dimensional spaces in criteria for alterations of dimensionally nonconforming structures, and thus increase in three-dimensional space and building mass that would result from proposed addition to dimensionally nonconforming residence could not be considered by city zoning board of review when determining whether to grant special-use permit for construction of addition.

SOVEREIGN IMMUNITY - TEXAS

Wight Realty Interests, Ltd. v. City of Friendswood

Court of Appeals of Texas, Houston (1st Dist.) - April 4, 2013 - S.W.3d - 2013 WL 1341216

Court agrees with city on the applicability of Texas law restricting land acquisition outside county but upholds developers right to seek damages for the services that it was required to render for the city pursuant to the underlying contract.

Developer and city executed an earnest money contract providing that developer would construct and develop for the city youth recreational sports facilities on a tract of land owned by developer and two adjoining tracts, which were to be acquired by developer. Upon completion, the City was to purchase all of the land and facilities.

City terminated the contract prior to the transfer of any land or facilities from developer to the city. City refused to pay developer for the costs it incurred for constructing the recreational facilities. Developer filed suit against the city, asserting claims for breach of contract and estoppel and seeking recovery for its costs of construction and land acquisition and the contractual-termination damages.

The City asserted that it was immune from suit, arguing that a statutory provision that waives a city's immunity from suit for breach-of-contract claims involving the provision of "goods or services" did not apply because its contract with developer involved real property. In response, developer

argued that because it had provided the city with acquisition, development, and construction services, the city's immunity was waived.

In a prior proceeding, this court, concluded that the contract "plainly" required developer to provide "services" and contained "the essential terms of the parties' agreements," held that the city's immunity was waived and remanded for further proceedings.

Following remand, the city filed another summary-judgment motion and plea to the jurisdiction, arguing, in part, that the contract that it drafted and entered into was illegal and void because the city did not have the authority to acquire the pertinent tracts of land for use as a park as they were situated outside of the counties in which the city is located.

The court agreed with developer that, as a home-rule municipality the city possess "broad powers" derived from the Texas Constitution, but concluded that the legislature has with "unmistakable clarity" imposed geographical limits upon a municipality's, including a home-rule municipality, acquisition of land for parks purposes.

However, these provisions do not, given the contract at issue, deprive the trial court of jurisdiction to determine developer's claim pertaining to the services that it rendered pursuant to the contract. Nor does the applicability of these provisions demonstrate that the city is entitled to judgment as a matter of law on developer's claim. This is because developer did not bring a suit for specific performance of the contract, i.e., it is not seeking an order compelling the city to acquire land in violation of the Local Government Code. Developer was seeking damages for the services that it was required to render for the city pursuant to the contract.

The court concluded that developer was entitled to a remand on its breach-of-contract claim related to its provision of services under the contract.

EMINENT DOMAIN - TEXAS

El Dorado Land Co., L.P. v. City of McKinney

Supreme Court of Texas - March 29, 2013 - S.W.3d - 2013 WL 1276045

Supreme Court of Texas holds that reversionary interest retained by vendor in deed to city was property interest capable of being taken by condemnation under state Takings Clause.

Property owner that had sold land to city, pursuant to special warranty deed restricting city from using land for anything other than a community park, and providing owner with an option to repurchase the land in the event that city violated the restriction, brought inverse condemnation action against city, alleging that city had violated restriction and then wrongfully failed to reconvey the land to him or condemn his interest.

The Supreme Court of Texas held that reversionary interest retained by vendor in deed to city was property interest capable of being taken by condemnation under state Takings Clause, even though the interest was not a possibility of reverter, since the interest effectively functioned as a power of termination or a right of reentry, and vendor's deed conveyed a defeasible estate to the city with the vendor retaining a conditional future interest.

A "possibility of reverter" is a term of art for a future interest retained by a grantor that conveys a determinable fee; it is the grantor's right to fee ownership in the real property reverting to him if the condition terminating the determinable fee occurs. Under Texas law, the possibility of reverter and

the right of reentry are both freely assignable like other property interests.

EMPLOYMENT - WASHINGTON

In re Recall of Bolt

Supreme Court of Washington, En Banc - March 28, 2013 - P.3d - 2013 WL 1286213

Court finds charges levied against mayor in recall petition factually insufficient.

Three town council members filed recall petition against mayor and a fourth council member. The superior court found that only one charge against mayor and council member was factually and legally sufficient to support a recall election. The council members appealed.

The Supreme Court of Washington held that:

- Mayor’s failure to impose progressive discipline before discharging town employee was factually insufficient for recall;
- Bullying allegations were factually insufficient for recall;
- De minimis personal use of town vehicle was insufficient for recall;
- Alleged improper approval of construction before council member took office was not proper basis for recall;
- Mayor’s alleged clerical work for town was legally insufficient for recall;
- Supreme Court would review superior court’s finding that a charge was sufficient for recall; and
- Purchases of used equipment for town without advance authorization were legally insufficient for recall.

“Factual sufficiency” of a recall petitioner’s charges means that the charges: 1) “state the act or acts complained of in concise language” and “give a detailed description including the approximate date, location, and nature of each act complained of;” and 2) enable the public and the challenged public official to identify the acts or failure to act which without justification would constitute a prima facie showing of misfeasance, malfeasance, or a violation of the oath of office.

REDISTRICTING - TEXAS

In re Rodriguez

Court of Appeals of Texas, Beaumont - March 18, 2013 - S.W.3d - 2013 WL 1189005

Court of appeals holds that school board has a mandatory duty imposed by law to accept applications for the positions that came open as a result of census-based redistricting.

The results of the 2010 federal census required that the board redivide the district. The board apparently adopted a plan, the 5–2 plan, within the explicit deadline contained in the education code, but an objection by the Department of Justice prevented the initial redistricting. It is undisputed that the board officially recognized and acted upon the 2010 federal census. The board anticipated completing the redistricting process for the May 2013 election. The board entered into an election services agreement for a joint election with the City of Beaumont for May 2013, and set a deadline for the filing of applications to be placed on the ballot. It is also undisputed that the plaintiffs timely filed applications. The ultimate issue in this proceeding is whether the Board could properly reject those applications at a time when the Board planned to hold an election after

redistricting.

The court of appeals held that the school board had a mandatory duty imposed by law to accept the applications for the positions that were timely presented.

PLANNING / ZONING - TEXAS

Town of Bartonville Planning and Zoning Bd. of Adjustments v. Bartonville Water Supply Corp.

Court of Appeals of Texas, San Antonio - March 27, 2013 - S.W.3d - 2013 WL 1222939

Court of appeals agrees with zoning board's assertion that question of applicability of local ordinance to water supply corporation exceeds the board's authority; board possesses only the authority to enforce ordinance.

Town planning and zoning board of adjustments denied water supply corporation's application for a building permit for the construction of a water tower.

At trial, the water supply corporation argued that the board's order was illegal because the board should have determined that its own zoning ordinances do not apply to the corporation because of provisions in the Texas Water Code. The board replied that it had no authority to make any such determination. It only had the authority to enforce the ordinance.

The court of appeals held that it was not within the board's jurisdiction to make a determination concerning the applicability of the zoning ordinances, nor was it within the trial court's jurisdiction in a limited petition for writ of certiorari review. The court agreed with the board that the trial court exceeded its subject matter jurisdiction and remanded.

TAX - NORTH CAROLINA

In re Blue Ridge Housing of Bakersville LLC

Court of Appeals of North Carolina - March 19, 2013 - S.E.2d - 2013 WL 1110672

In case of first impression, court holds that nonprofit organization was the "owner" of low income housing development and thus development entitled to property tax exemption, even though nonprofit had only a 0.1% legal ownership interest in the development.

County appealed Property Tax Commission decision finding that housing development qualified for ad valorem tax exemption as a low income housing development owned by a nonprofit organization.

The court of appeals held that:

- As a matter of first impression, nonprofit organization was the "owner" of the development; and
- Decision did not violate equal protection or tax uniformity principles.

Legal title is not determinative as to the question of ownership for purposes of a property tax exemption; instead, where an entity qualifying for a tax exemption possesses a sufficient interest in the property, the property is said to belong to that entity, even where legal title to the property is held by another party.

Factors suggesting ownership of a property by an entity otherwise qualified for a tax emption may include, but are not limited to: 1) the entity's control of the venture's operations; 2) the entity's status as trustee of LLC property; 3) the possibility of future increased actual ownership interest; and 4) the intent of the participating parties.

In this case, the court found that nonprofit organization was the "owner" of low income housing development and thus development entitled to property tax exemption, even if nonprofit had only a 0.1% legal ownership interest in the development. Nonprofit was the sole manager of the development and made the operational decisions. Nonprofit was the trustee of the active trust involved with the development. Nonprofit had the right of first refusal to purchase the entire 100% legal ownership interest in the development. Nonprofit spearheaded the development of the project and only partnered with other owner to finance the project.

LAND USE - NEW YORK

Marinaccio v. Town of Clarence

Court of Appeals of New York - March 21, 2013 - N.E.2d - 2013 N.Y. Slip Op. 01868

In case of intentional flooding, court finds considerable injury and undeniably intentional tortious acts but holds that evidence is insufficient for an award of punitive damages.

Property owner brought action against town and subdivision developer asserting causes of action for trespass and private nuisance and seeking damages for flooding on his property allegedly caused by intentional flow of water onto his property.

The question in this case was whether the evidence was sufficient to find defendant liable for punitive damages. The court found that, although the injury was considerable and the tortious acts undeniably intentional, the evidence was insufficient for an award of punitive damages.

Because the standard for imposing punitive damages is a strict one and punitive damages will be awarded only in exceptional cases, the conduct justifying such an award must manifest spite or malice, or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called wilful or wanton.

In this case, developer of subdivision did not willfully and wantonly cause danger to health, safety, and welfare of public through diversion of storm water to mitigation pond. Although developer failed to ensure that town followed through with plan to obtain an easement from property owner to allow water to flow onto his property, developer complied with all federal, state, and local planning and development laws and regulations, and worked closely with Army Corps, town engineer, and town planner to secure all required permits and approvals, and hired wetlands expert, engineering expert, and soil expert to assist in those regards.

SCHOOLS - NEW YORK

Board of Educ. of Mineola Union Free School Dist. v. Mineola Teachers Ass'n

Supreme Court, Appellate Division, Second Department, New York - March 27, 2013 - N.Y.S.2d - 2013 N.Y. Slip Op. 02070

Appeals court finds that policy granting paid days off for observance of religious holidays violates

Establishment Clause.

Collective bargaining agreement between school district and teachers association provided that members of the association could receive up to five religious holidays as paid days off.

In October 2010, the school district advised the association that it would no longer abide by the religious holidays provision because it was unconstitutional. The association filed a grievance, which was denied, and then sought to invoke its contractual right to arbitration. The school district then commenced a proceeding pursuant to permanently stay the arbitration, and the association moved to compel arbitration.

The appeals court stated that, “There is no firmer or more settled principle of Establishment Clause jurisprudence than that prohibiting the use of the State’s power to force one to profess a religious belief.” Here, the clear wording of the religious holidays provision rewarded members of the association who claimed to be religiously observant with more paid days off than those afforded to agnostics, atheists, and members who were less observant. As a result, the religious holidays provision violated the Establishment Clause.

MUNICIPAL LIABILITY - MARYLAND

Ross v. Housing Auth. of Baltimore City

Court of Appeals of Maryland - March 22, 2013 - A.3d - 2013 WL 1164525

Court finds that expert witness was not qualified to provide expert testimony as to source of lead paint exposure, however, expert testimony not sole means of establishing causation as circumstantial evidence could suffice.

Former resident of home owned by city housing authority brought action against housing authority, alleging claims for negligence and unfair trade practices under the Consumer Protection Act, and alleging that resident had been injured by being exposed to lead in home while living there as a child.

The circuit granted housing authority’s motion in limine to exclude testimony of resident’s expert on source of resident’s lead exposure, and entered summary judgment in favor of housing authority. Resident appealed.

The court of appeals held that:

- Expert testimony lacked factual basis; but
- Causation was not required to be established by expert testimony.

Pediatrician was not qualified to provide expert testimony as to source of plaintiff’s lead exposure that resulted in elevated lead levels. Pediatrician’s training and experience was to determine blood lead level and to treat patients with elevated blood lead levels, and she was not trained or experienced in quantifying lead exposure, identifying lead hazards, abating lead hazards, or in determining causality with respect to relative exposures.

However, proof of causation – the link between property owned by city housing authority and plaintiff’s exposure to lead paint and dust – was not required to be established by expert testimony, but instead could be established through circumstantial evidence. Remanded.

ANNEXATION - MARYLAND

Koste v. Town of Oxford

Court of Appeals of Maryland - March 26, 2013 - A.3d - 2013 WL 1197204

Petition seeking to bring a municipal annexation resolution to referendum could not be circulated and signed by members of the relevant electorate before final enactment of the targeted resolution.

The Town of Oxford, Maryland introduced a resolution proposing to annex a sizable number of acres of submerged lands adjacent to the Town's boundaries. Following first publication in a local newspaper of a legal notice of the pendency of the resolution and of the date and time of a public hearing, as required by the governing annexation statute, petition circulators among the voters of Oxford prepared and began circulating a petition for referendum regarding the proposed resolution.

A registered voter filed a complaint for declaratory judgment and writ of mandamus that sought a determination that referendum petition signatures could be lawfully obtained before final enactment of an annexation resolution.

The court of appeals held that a petition seeking to bring a municipal annexation resolution to referendum could not be circulated and signed by members of the relevant electorate before final enactment of the targeted resolution.

The annexation statute's 45-day period following the final enactment of the resolution for obtaining the signatures of registered voters to petition for a referendum on resolution acted as a substantial restriction on when petitions could be circulated, as only after enactment of a resolution could voters be fully informed about all pertinent information of the given resolution.

PUBLIC EMPLOYEES - LOUISIANA

West Monroe Firefighters Local 1385 v. City Of West Monroe

Supreme Court of Louisiana - March 19, 2013 - So.3d - 2012-1937 (La. 3/19/13)

Court holds that nothing in the statute governing minimum monthly salaries of firemen in certain municipalities requires the "minimum monthly salary" to independently meet the federal minimum wage laws.

Louisiana pays firefighters a state supplement of $500 per month beginning after a firefighter's first year. The legislature in 2006 amended the law to allow a municipality to pay first-year firefighters a supplemental monthly payment "in the amount equivalent to the state supplemental pay, or any portion thereof." City of West Monroe paid a city supplement in the amount of $300 to its first-year firefighters.

State law sets forth the minimum salaries to be paid to the differing ranks of firefighters, basing the pay differential on specified percentages above the "minimum monthly salary" of a first-year firefighter. The City did not include the $300 supplemental payment in its computation of the "minimum monthly salary."

City firefighters brought action against city alleging failure to comply with statute setting forth minimum salary requirements for firefighters, and failure to comply with the Louisiana Wage Act

The Supreme Court of Louisiana held that city supplemental pay of $300 per month to firefighters in their first year of employment was not included in the calculation of a first-year firefighters' "minimum monthly salary" for purposes of determining wage differentials for higher-ranking firefighters.

Nothing in the statute governing minimum monthly salaries of firemen in certain municipalities requires the "minimum monthly salary" to independently meet the federal minimum wage laws. If the legislature had intended for the base pay of firemen to be governed by the mandates of the Fair Labor Standards Act, it could have directly referenced it therein.

TAX - GEORGIA

City of Atlanta v. City of College Park

Supreme Court of Georgia - March 28, 2013 - S.E.2d - 2013 WL 1247932

Court holds that city can levy an occupation tax on Atlanta for its proprietary operations occurring within the city; municipalities not "local authorities."

The Cities of Atlanta and College Park entered into an agreement in 1969 for purposes of expanding Atlanta Hartsfield–Jackson International Airport. One of the provisions of the agreement granted Atlanta the exclusive right to collect and levy occupation taxes from businesses located at the airport that were within the city limits of College Park. In 2007, after commissioning a study for the purpose of reassessing this relationship, College Park informed Atlanta and airport businesses that it would no longer honor the 1969 Agreement and that it would now seek to collect occupation taxes from the airport businesses including Atlanta's proprietary business operations.

Atlanta filed a declaratory action seeking a judgment that the 1969 Agreement controlled the collection of occupation taxes from businesses operating at the airport within College Park.

The court of appeals affirmed the trial court's judgment invalidating the 1969 Agreement, but reversed the trial court's finding that the term "local authority" as used in the Georgia statute included municipalities. Accordingly, because Atlanta was not a "local authority" that was exempt from the imposition of occupation taxes, the court of appeals found that College Park could properly levy an occupation tax on the City of Atlanta for its proprietary operations occurring within College Park. The Supreme Court of Georgia affirmed.

TAX - GEORGIA

First Congregational Church v. Fulton County Bd. of Tax Assessors

Court of Appeals of Georgia - March 27, 2013 - S.E.2d - 2013 WL 1223852

Court finds that primary purpose of church's income-producing parking lot is commercial, not charitable, and thus taxable.

Tax-exempt church purchased a parking lot for use by its parishioners. The church subsequently entered into a lease agreement with a company that operated a commercial parking business on those days on which it was not used for church parking.

The superior court ruled in favor of the county board of tax assessors, holding that an income-

producing parking lot did not qualify for an exemption from ad valorem property taxation.

The church appealed, arguing that it had purchased the property for the purpose of creating a parking lot, and that after it converted the property into a paved parking lot, it indeed used the property for overflow parking for its parishioners and guests attending religious activities or obtaining charitable services. The church acknowledged that it derived income from the property by way of its contract with a third party, but pointed out that the income received by it (as opposed to whatever income was received by the commercial operator) was used to support its religious services and charitable pursuits. In light of these circumstances, the church maintained that the property's "primary" use was the provision of overflow parking, that income production of $90,000 yearly was an "incidental" use of its property its property was entitled to the claimed tax exemptions.

The appeals court concluded that most of the activities that took place on the church's property were patently not at the core of its religious or charitable purposes, affirming the trial court's opinion.

BONDS - GEORGIA

Sherman v. Development Authority of Fulton County

Court of Appeals of Georgia - March 22, 2013 - S.E.2d - 2013 WL 1165280

Appeals court rejects sufficiency of trial court's findings of fact and conclusions of law in bond validation proceeding.

This case arose from a bond validation proceeding in which the State of Georgia petitioned a 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.

Mr. Sherman, a taxpayer and citizen of Fulton County appealed from the order of the trial court validating and confirming the bonds and bond security. Mr. Sherman asserting that the trial court erred by failing to set forth therein findings of fact or conclusions of law sufficient to support its ultimate holdings that: 1) the method used by DAFC to value the leasehold estate was valid under the requirements of Harris and Sherman I; 2) the structure of the bond transaction did not violate OCGA § 36–62–8; 3) the Memorandum was not ultra vires, in violation of OCGA § 36–30–3(a);9 and 4) the structure of the bond transaction did not create an unconstitutional tax exemption.

The court of appeals largely agreed with Mr. Sherman regarding the insufficiency of the findings of fact or conclusions of law. The appeals court found that the trial court labeled some of its holdings as "findings of fact." Instead of being actual factual findings, however, these statements were summary conclusions that contain no hint about the evidence or analysis the court relied on to arrive at them. Similarly, the trial court's "conclusions of law" challenged by Sherman on this appeal cite no legal authority and contain no analysis that explains them. Accordingly, these findings of fact and conclusions of law fail to satisfy the requirements of OCGA § 9–11–52(a).

The appeals court vacated the trial court's order and remanded to allow the trial court to enter a new order on the Bond Validation Petition. Such order to contain specific factual findings and conclusions of law necessary to explain any ultimate holdings of the trial court that: 1) the method used by DAFC to value the leasehold estate is valid under the requirements of Harris and Sherman I;

2) the structure of the bond transaction does not violate OCGA § 36–62–8(b); 3) the execution of the Memorandum did not violate OCGA § 36–30–3(a) and therefore did not constitute an ultra vires act; and 4) the structure of the bond transaction does not create an unconstitutional tax exemption.

MUNICIPAL GOVERNANCE - FLORIDA

Atheists of Florida, Inc. v. City of Lakeland, Fla.

United States Court of Appeals, Eleventh Circuit - March 26, 2013 - F.3d - 2013 WL 1197772

Court holds that city's practice of allowing clergy to perform invocations at city commission meetings did not violate federal or state establishment clauses; validates city's new procedures for selecting invocation speakers.

Atheist organization brought §1983 action against city and mayor, alleging that practice of allowing religious ministers to perform invocations before city commission meetings violated establishment clauses of First Amendment and Florida Constitution.

The court of appeals held that:

- Defendants' new practices for selecting invocation speakers did not violate establishment clauses;
- Organization's claims related to defendants' former practices for selecting invocation speakers were moot; and
- Defendants' expenditures toward selecting invocation speakers did not violate no–aid provision of Florida's establishment clause.

City commission's selection of speakers to deliver invocation at commission's did not proselytize, advance, or disparage any one faith or belief and did not affiliate city with any discrete faith or belief, and thus did not violate establishment clauses of First Amendment and Florida Constitution. Procedures required commission to update congregations list annually, based on search of local phone books and Internet listings, potential speakers from congregations outside county were included on list if city resident who was member of that congregation requested it, and every congregation on list then received invitation to give invocation at commission meetings.

City commission's expenditure of $1,200 to $1,500 per year to arrange for speakers to give invocation before commission meetings did not advance religion, precluding Atheist organization's §1983 claim that commission violated no–aid provision in Establishment Clause of Florida Constitution. Funds merely went to mailing invitations to various religious leaders in community, and no religious group received any pecuniary benefit, either direct or indirect, from those expenditures or received financial assistance from commission for promotion and advancement of its theological views.

EMINENT DOMAIN - CALIFORNIA

Monks v. City of Rancho Palos Verdes

Court of Appeal, Second District, California - March 28, 2013 - Not Reported in Cal.Rptr.3d - 2013 WL 1248251

City not liable to landowners for decline in their property value during the pendency of a long-

running eminent domain dispute.

On remand in a long-running eminent domain dispute, city opted to allow plaintiffs to build homes on their lots. Plaintiffs asserted they were also entitled to compensation for the decline in the fair market value of their properties. The trial court disagreed, stating that the city had remedied the permanent taking by repealing the offending resolution and enacting a new resolution allowing plaintiffs to develop their properties.

The court of appeal agreed, stating that the city did not have to pay compensation to plaintiffs for the permanent taking because it provided a constitutionally acceptable alternative remedy – allowing plaintiffs to build homes on their lots.

MUNICIPAL GOVERNANCE - CALIFORNIA

Rubin v. City of Lancaster

United States Court of Appeals, Ninth Circuit - March 26, 2013 - F.3d - 13 Cal. Daily Op. Serv. 3357

Court finds preponderance of Christian prayers at city council meeting a function of demographics, rather than an unconstitutional establishment of religion.

Attendees of city council meetings brought action against city in a California state court requesting declaratory and injunctive relief from the city's policy of permitting prayers that mention Jesus, arguing that both the invocations and the policy amounted to an establishment of religion.

The court of appeals held that city council's facially neutral practice of opening its meetings with privately led prayers did not effect an unconstitutional establishment of religion in violation of First Amendment and California constitution.

Notwithstanding that the majority of city-council invocations had been Christian, city council's facially neutral practice of opening its meetings with privately led prayers did not effect an unconstitutional establishment of religion in violation of First Amendment and California constitution. The court found that the city had taken proactive measures to deliver on its promise of inclusivity, stressing, both to the public and to invited prayer-givers, the policy's nonsectarian aims. The fact that most so far had been Christian was merely a function of local demographics and the choices of the religious leaders who responded out of their own initiative to the city's invitation.

MUNICIPAL GOVERNANCE - CALIFORNIA

Harris v. Rizzo, et al.

Court of Appeal, Second District, Division 3, California - March 20, 2013 - Cal.Rptr.3d - 13 Cal. Daily Op. Serv. 3209

Court concludes that state Attorney General has standing, on behalf of city, to bring an action against allegedly corrupt individuals, to remove the city from their control, and require them to pay restitution to the city.

"When it appears that a charter city is under the control of individuals who are looting the city's coffers for their own benefit, can the Attorney General, on behalf of the city, bring an action against

the allegedly corrupt individuals, to remove the city from their control and require them to pay restitution to the city? We conclude that the Attorney General may bring such an action, and seek recovery from the corrupt individuals to the extent their acts were unauthorized."

This case concerned the city of Bell. The appeals court concluded that the Attorney General does have standing to pursue an action on behalf of the City. It further concluded that, although separation of powers and legislative immunity bar pursuit of this action with respect to acts within the discretion of City officials, these doctrines do not prevent the action from proceeding with respect to defendants' allegedly ultra vires acts.

EMPLOYMENT - ALASKA

Mills v. Hankla

Supreme Court of Alaska - March 22, 2013 - P.3d - 2013 WL 1165508

Supreme Court of Alaska finds that genuine issue of material fact exists as to whether police chief was a "supervisor" of employees during alleged acts of sexual harassment, precluding summary judgment.

In 2008, city promoted a police officer to police chief. The city's hiring determination and the officer's subsequent conduct led four police department employees to sue the police chief and the city. The employees asserted several claims including wrongful termination, sexual harassment, and negligent hiring.

The Supreme Court of Alaska held that:

- Evidence supported finding that employer did not engage in spoliation of evidence;
- Genuine issue of material fact as to whether employee was constructively discharged precluded summary judgment on wrongful termination claim;
- Genuine issue of material fact as to whether police chief was a "supervisor" of employees during alleged acts of sexual harassment precluded summary judgment on sexual harassment action;
- State Human Rights Act does not provide for individual liability of employees for hostile work environment sexual discrimination or hostile work environment sexual harassment; and
- Employer's hiring decision in hiring of police chief was discretionary, and thus official immunity applied to decision.

VOTER INITIATIVE - WASHINGTON

League of Educ. Voters v. State

Supreme Court of Washington, En Banc - February 28, 2013 - P.3d - 2013 WL 791807

Voter-enacted initiative that required any bill containing a tax increase to be passed by a two-thirds majority vote of the legislature held unconstitutional, but severable.

Voter associations, individual legislators, and individual taxpayers brought action challenging constitutionality of voter-enacted initiative requiring supermajority vote on any tax . The superior court determined that challenge to both provisions was justiciable and that both provisions violated state constitution. State appealed.

The Supreme Court of Washington held that:

- Challenge to supermajority provision was justiciable controversy;
- Challenge to referendum provision was not justiciable controversy;
- Challenge to referendum provision did not constitute matter of great public importance;
- Supermajority provision violated state constitution; and
- Supermajority provision was severable from remainder of statute.

The court concluded that the voter-enacted initiative requiring any bill containing a tax increase to be passed by a two-thirds majority vote of the legislature violated the state constitutional provision governing legislature's passage of bills. But it also found that the supermajority provision was severable from the remainder of the statute. The initiative contained a severability clause. The purpose of the initiative was to make passing tax increases more difficult and the remainder of the statute served that purpose, even without the supermajority requirement, as another provision of the legislation required a referendum for passage of a tax increase.

LITIGATION – AUCTION RATE SECURITIES - MARYLAND

Mayor and City Council of Baltimore, Md. v. Citigroup, Inc.

United States Court of Appeals, Second Circuit - March 5, 2013 - F.3d - 2013 WL 791397

City fails to establish requisite elements of an antitrust conspiracy in connection with the collapse of the ARS market.

City's mayor and council brought putative class action against banks and various financial institutions, alleging conspiracy to stop buying auction rate securities for their own proprietary accounts, in violation of the Sherman Act, which then triggered collapse of market for such securities. The United States District Court for the Southern District of New York granted defendants' motion to dismiss. Plaintiffs appealed.

The U.S. Court of Appeals held that:

- Plaintiffs pled only parallel conduct on part of defendants, with no common motive to conspire, and
- Plaintiffs failed to allege "high level" of inter–firm communications.

In the absence of "smoking gun" proving the existence of an antitrust conspiracy, the complaint may, in order to survive a motion to dismiss, present circumstantial facts supporting the inference of a conspiracy. This circumstantial evidence might include the existence of a horizontal agreement based on conscious parallelism. When such interdependent conduct is accompanied by circumstantial evidence and additional factors, including a common motive to conspire, evidence that shows that the parallel acts were against the apparent individual economic self–interest of the alleged conspirators, and evidence of a high level of inter–firm communications, will help a complaint survive a motion to dismiss.

City's mayor and council pled only parallel conduct on part of banks and various other financial institutions that had no common motive to conspire. Although defendants withdrew from the market "in a virtually simultaneous manner," plaintiffs' allegations were consistent with finding that market was already collapsing when defendants withdrew, so that defendants acted rationally and in anticipation of similar actions taken by competitors.

PARCEL TAX - CALIFORNIA

Borikas, et al. v. Alameda Unified School District

Court of Appeal, First District, Division 1, California - March 6, 2013 - Cal.Rptr.3d - 2013 WL 820593

Court finds that parcel tax's residential/commercial property classifications and differential tax burdens based on property size exceed the school district's taxing authority.

This case involves the validity of a parcel tax approved by Alameda Unified School District (District) voters as Measure H. The issue before the court was whether the tax violates Government Code section 50079, which authorizes school districts to levy "qualified special taxes." Such taxes are statutorily defined as "taxes that apply uniformly to all taxpayers or all real property within the school district, except that 'qualified special taxes' may include taxes that provide for an exemption from those taxes for taxpayers 65 years of age or older or for persons receiving Supplemental Security Income for a disability, regardless of age." Measure H provides exemptions for some senior and disabled taxpayers. It also imposes different tax rates on residential and commercial/industrial properties, as well as different rates on different sized commercial/industrial properties.

Plaintiffs contended that Measure H's property classifications, differing tax rates and conditional exemptions violated section 50079's definitional language that special taxes apply "uniformly" to all taxpayers or all real property within the district. The District contended that this statutory language reflected long-established equal protection principles which allow a governmental entity to create reasonable tax classifications, so long as all taxpayers within a classification are treated the same.

After examining the language and legislative history of section 50079, and that of the correlative enabling statutes, the court of appeal concluded that the legislature did not include this definitional language in order to acknowledge established equal protection principles. Rather, the language at issue was intended to be a constraint on the extent of the taxing authority delegated to the local governmental entities. The court therefore concluded Measure H's property classifications and differential tax burdens exceed the District's taxing authority under section 50079. The court also concluded that these provisions could be severed from the measure and that Measure H's exemptions for senior and disabled taxpayers are permissible under the statute.

EMINENT DOMAIN - TEXAS

Texas Municipal Power Agency v. Johnston

Court of Appeals of Texas, Houston (1st Dist.) - February 28, 2013 - S.W.3d - 2013 WL 744395

Landowner's petition for injunctive relief premature, as municipal power agency had initiated negotiations regarding easement but had taken no concrete steps to condemn his property.

Landowner sought temporary and permanent injunctive relief against the Texas Municipal Power Agency (TMPA) to prohibit TMPA from entering onto his property to conduct surveys and inspections and attempting to condemn a portion of his property. TMPA contended that landowner's petition was premature and did not present a justiciable controversy.

TMPA is a municipal power agency created pursuant to Texas Utilities Code and is a political subdivision of the State. As a political subdivision, TMPA thus possesses eminent domain powers,

but before TMPA can initiate condemnation proceedings, it must first authorize the initiation of such proceedings at a public meeting by a record vote.

Although TMPA had indicated its desire to use its eminent domain powers to obtain an easement on a portion of landowner's property, the board had not yet authorized the initiation of a condemnation proceeding. Until it authorized such a proceeding, TMPA could not file a petition initiating condemnation. Thus, until the Board authorized the condemnation of landowner's property and TMPA actually filed a condemnation proceeding, the landowner had not suffered a concrete injury. The court concluded that landowner's claim for injunctive relief, at that point, presented an "abstract, hypothetical, and remote dispute" that was not ripe for adjudication.

TAX INCREMENT FINANCING - COLORADO

Northglenn Urban Renewal Authority v. Gil Reyes, in His Official Capacity As Adams County Assessor; and Board of County Commissioners of the County of Adams

Colorado Court of Appeals, Div. V - February 28, 2013 - P.3d - 2013 WL 781920

Appeals court rejects county assessor's TIF calculation that included property in the base value while removing that same property from the newly assessed value.

City council approved an urban renewal plan created by for the redevelopment of blighted areas. The plan included tax increment financing (TIF). "TIF is a form of public funding that allows for the sale of municipal bonds to raise money for public improvements pursuant to the Colorado Urban Renewal Law."

The city council subsequently passed a resolution that substantially amended the urban renewal plan, adding several tracts of new property to the Urban Renewal Area. No significant redevelopment activity occurred, however, on much of the newly added property. Therefore, the city council passed another resolution to suspend TIF for those properties within the renewal area without active urban renewal projects.

The county assessor later calculated the TIF revenue by removing the suspended property from the total assessed value but including the suspended property in the base value. The Assessor also concluded that the TIF period for all properties, including the later added properties, would expire in 2017, a date twenty-five years after the effective date of the original 1992 renewal plan.

The urban renewal authority filed a complaint alleging that, a) the assessor improperly calculated the base value of the property in the urban renewal area, and b) the assessor improperly shortened the duration of the applicable TIF period for the additional properties.

The court of appeals agreed, concluding that a calculation that creates an imbalance in an authority's TIF by including property in the base value while removing the same property from the new assessed value impedes the goals of addressing and financing renewal of blighted areas.

ANNEXATION - LOUISIANA

Little Capitol of Louisiana, Inc. v. Town of Henderson

Court of Appeal of Louisiana, Third Circuit - March 6, 2013 - So.3d - 2012-1089 (La.App. 3

Cir. 3/6/13)

Reasonableness of annexation is a fact-driven inquiry that requires a weighing of evidence and is thus not suited to summary judgment proceedings.

Opponents objected to town's annexation of land, filing a Petition in Opposition to Annexation and Extension of the Corporate Limits of the Town. Plaintiffs asserted that the annexation was solely for the purpose of providing revenue to the town, that the town could not provide any services to the area to be annexed, and that, as a result, the annexation was unreasonable.

The trial court granted plaintiff's motion for summary judgment, stating that, "Plaintiffs have sustained their burden of proof that the annexation is unreasonable by an abundance of the evidence."

The court of appeal reversed, stating, "In an annexation contest, what is reasonable or unreasonable depends largely upon the particular facts in any given situation. Such a fact-driven inquiry necessarily involves a weighing of evidence. Consideration of the weight of the evidence is improper on a motion for summary judgment, and it is not the function of the trial court on a motion for summary judgment to determine or even inquire into the merits of the issues raised."

"After reviewing the 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits submitted,' this court cannot, without weighing the evidence, assess the reasonableness of the annexation. Therefore, we find that a grant of summary judgment is not appropriate. Accordingly, the judgment of the trial court is reversed, and the matter is remanded to the trial court for further proceedings."

LITIGATION - ARIZONA

In re Allstate Life Ins. Co. Litigation

United States District Court, D. Arizona - March 1, 2013 - Not Reported in F.Supp.2d - 2013 WL 789106

Court finds that genuine issue of material fact exists as to defendant's control person status in ongoing bond issuance litigation.

At issue in this lawsuit was the offering and sale of $35 million in revenue bonds used to finance the construction of a 5,000 seat event center. Plaintiffs are entities and individuals who purchased in the bond offering.

The relevant Defendants for the purposes of this portion of the ongoing litigation were Prescott Valley Event Center LLC ("PVEC–LLC"), Global Entertainment Corporation ("Global"), and Treliving. PVEC–LLC is the entity that received the proceeds of the bond sale and was responsible for managing the construction and financing of the Event Center. Global was the majority shareholder of PVEC–LLC, owning between 50% of PVEC–LLC's stock during the times relevant to this suit. In turn, the majority shareholder of Global was a holding company named Western Professional Hockey League ("WPHL"). Treliving is the chairman and a minority shareholder of both Global and WPHL.

This suit was based on a number of misstatements purportedly made by the defendants. These misstatements were allegedly made in the Preliminary Official Statement and the Official Statement. Plaintiffs alleged that Defendants Global and PVEC–LLC contributed to the allegedly misleading statements in the OS. They asserted claims against Treliving as a control person of Global and thus

PVEC–LLC under Section 20(a) of the Exchange Act, A.R.S. § 44–1999(B) of the Arizona Securities Act, and 815 ILCS § 5/13 of the Illinois Securities Law. Plaintiffs also asserted a claim against Treliving for negligent misrepresentation. Treliving moved for summary judgment on all claims.

The court concluded that the plaintiffs had shown that a genuine issue of material fact exists as to whether Treliving was a control person of Global under both Section 20(a) of the Exchange Act and § 44–1991 of the Arizona Securities Act. However, Plaintiffs had failed to establish any fact issue as to Treliving's liability under the Illinois Securities Law or Arizona's common-law negligent misrepresentation claim. Thus, Treliving's Motion for summary judgment was denied as to the Section 20(a) and § 44–1991 claims, but granted as to the Illinois Securities Law and negligent misrepresentation claims.

ZONING - MAINE

Summerwind Cottage, LLC v. Town of Scarborough

Supreme Judicial Court of Maine - March 5, 2013 - A.3d - 2013 ME 26

Town's shoreland zoning map entitled to deference by the zoning board of appeal and the court even though ordinance stated that map was "merely illustrative" of boundary locations.

Neighbors appealed decision of town zoning board of appeals to grant a setback variance to landowners.

The Supreme Judicial Court of Maine held that:

- Shoreland zoning map was entitled to deference;
- Lot was not required to meet minimum lot width requirement or obtain a variance from width requirement in order to obtain setback variance;
- Evidence was sufficient to support finding that lot required variance from setback requirement due to the unique circumstances of the property; and
- Evidence was sufficient to support finding that variance was required in order to allow a reasonable return.

Town's shoreland zoning map was part of shoreland zoning ordinance such that it was the result of the legislative process by the town council and was entitled to deference by the zoning board of appeals and the court, even though ordinance stated that map was "merely illustrative" of boundary locations.

In the interest of judicial economy the Supreme Judicial Court agreed to consider neighbors' challenge to the validity of town's shoreland zoning map, although the proper method of challenging the map's validity was through a declaratory judgment action. By hearing the challenge, the Supreme Judicial Court could avoid remand to the Superior Court to amend the complaint and to address an issue that the court had already heard.

ZONING - ARIZONA

Stagecoach Trails MHC, L.L.C. v. City of Benson

Supreme Court of Arizona, En Banc - March 5, 2013 - P.3d - 2013 WL 792825

Court holds that mobile home park operator was not required to appeal again to the city's board of adjustment after the zoning administrator reaffirmed his earlier denial of a permit; remanded on issue of nonconforming use.

Mobile home park operator brought action seeking judicial review of city zoning administrator's denial of a permit to install a new mobile home, and to challenge zoning ordinance.

The Supreme Court of Arizona held that:

- Park operator was not required to appeal again to the city's board of adjustment after the zoning administrator reaffirmed his earlier denial of a permit, and
- Park operator was not entitled mandamus relief or attorney fees.

The park operator argued that the entire park is the nonconforming use and replacing individual manufactured homes within the park is merely a continuation of the existing use that does not alter the park's nonconforming status. In contrast, the city argued that, because the individual space is the nonconforming use, placing a new home on the space is a different use that must satisfy current zoning requirements. The City did not argue, however, that if the park is the nonconforming use, replacing an individual home would alter the use and subject the park, and each space, to current zoning regulations. The court remanded to a lower court to decide these issues.

TAX - NEW JERSEY

Borough of Paramus v. County of Bergen

Tax Court of New Jersey - February 22, 2013 - 2013 WL 706315

Tax court holds that leasing tax-exempt hospital property to a third-party on a for-profit basis does not affect the exempt status of the property since the hospital continues to serve the public purpose set forth by the tax statute.

Property at issue is a public hospital exempt from local property taxes based on a provision of the New Jersey code which provides an exemption for county owned property put to public use. In 1997 the county elected to transition the management of the hospital to a for-profit third party health care management firm.

The property continued to be designated as exempt on the tax rolls. In 2001, the manager entered into contracts to lease space within the hospital to service providers. The borough assessor placed a partial assessment on the property in 2005 meant to tax those spaces within the hospital buildings leased by the manager to for-profit service providers. The Borough filed a tax appeal in 2008, and for later years, challenging the exempt status of the hospital and seeking to increase both the non-taxed assessment on the exempt portion of the property and the taxed assessment on the hospital's leased spaces.

The tax court found that the act of leasing the property to a third-party on a for-profit basis does not affect the exempt status of the property since the hospital continues to serve the public purpose set forth by the statute. Because the exemption statutes at issue require that the property be used for a public purpose, the tax exemption code provision has no application to these facts. In addition, the nature and use of the leased spaces remain to be determined at trial, the outcome of which will either render the property wholly exempt or wholly taxable.

SCHOOL BOARD - KENTUCKY

Banks v. Breathitt County Bd. of Educ.

United States District Court, E.D. Kentucky, Central Division, at Lexington - February 28, 2013 - F.Supp.2d - 2013 WL 716315

While school board employees may be sued for constitutional violations in two capacities – official and individual, suing government employee in his or her official capacity is simply another way of pleading action against entity of which employee is an agent.

County school system employee filed suit asserting violation of his substantive due process rights under Fourteenth Amendment, wrongful abridgement of his rights under First Amendment, discrimination in violation of Kentucky statute prohibiting teachers and school board employees from being discriminated against because of their political opinions, violation of Kentucky statute prohibiting employers from subjecting public employees to reprisal for reporting information relating to employer's violation of the law, alleged fraud, or abuse, and intentional infliction of emotional distress.

The district court held that:

- 1983 claims against individual school board members in their official capacities were redundant of claim against school board itself;
- Board of education was not entitled to immunity from claims based on Kentucky statute prohibiting teachers and school board employees from being discriminated against because of their political opinions;
- Kentucky statute prohibiting employers from subjecting public employees to reprisal for reporting information relating to employer's violation of the law, alleged fraud, or abuse waived any government immunity to which school board might otherwise be entitled;
- School board was not entitled to governmental immunity on claim for intentional infliction of emotional distress;
- Official capacity state law claims against individual school board members were redundant of claims against school board itself; and
- Complaint sufficiently stated claims against interim superintendent and two school board members at time of alleged discriminatory events.

SCHOOL BOARDS – TAX - MISSISSIPPI

Jones County School Dist. v. Mississippi Dept. of Revenue

Supreme Court of Mississippi - March 7, 2013 - So.3d - 2013 WL 829010

Supreme Court of Mississippi holds that school districts are not liable for oil and gas severance taxes on sixteenth-section royalty interests.

This case concerned three main issues: 1) whether a school district is liable for oil and gas severance taxes on its royalty interests derived from oil and gas production on sixteenth-section land; 2) whether the statute of limitations restricts the time period in which a school district can seek a refund of severance taxes that it had paid erroneously; and 3) whether a school district is liable for administrative expense taxes on its royalty interests derived from oil and gas production on sixteenth-section land.

The Supreme Court of Mississippi found that:

- School districts are not liable for oil and gas severance taxes on sixteenth-section royalty interests, as political subdivisions of the state are not included within the definition of "persons" made subject to these taxes.
- Pursuant to Article 4, Section 104 of the Mississippi Constitution, statutes of limitation in civil causes do not run against the state or its subdivisions.
- School districts are liable for administrative expense taxes on sixteenth-section royalty interests. These assessments are "fees," not "taxes"; the legislature has expressly made the state and its subdivisions subject to these fees; and no constitutional provision or other law is violated by requiring school districts to pay them.

EMPLOYMENT - OREGON

Webber v. First Student, Inc.

United States District Court, D. Oregon., Medford Division - February 26, 2013 - F.Supp.2d - 2013 WL 773732

Bus driver fails to establish sufficient nexus between his private contractor employer and school district to sustain civil rights action; Confederate flags frowned upon.

Employee was terminated by his employer, First Student, Inc., for insubordination after he refused to remove a 3–by–5 foot Confederate flag from his pickup truck while the truck was parked on school district property. First Student is a private contractor that provides transportation services to the school district. Employee claimed the termination violated his First Amendment rights and that First Student and the district acted together to deprive him of his right to freedom of speech and expression.

To state a claim for violation of his First Amendment rights under § 1983, employee must first show that First Student acted under color of state law. The court begins with the presumption that conduct by private actors is not taken under color of state law. Thus, the plaintiff bears the burden of establishing that a nominally private entity was a state actor. The basic question under the color of state law inquiry is whether the necessary "close nexus" between the state, the private entity, and the challenged conduct exists.

The Supreme Court has articulated four tests for determining whether a private entity's actions amount to state action: 1) public function; 2) compulsion; 3) joint action; and 4) governmental nexus. The district court's analysis revealed that the employee failed to meet any of these tests.

INVERSE CONDEMNATION - GEORGIA

Barngrover v. City of Columbus

Supreme Court of Georgia - March 4, 2013 - S.E.2d - 2013 WL 776731

Equitable relief granted to homeowner in inverse condemnation action against city entitled the city to raze and rebuild homeowner's house.

Property owner filed suit seeking monetary and equitable relief for inverse condemnation and a continuing nuisance and trespass on his property resulting in sinkholes and the presence of fecal

coliform bacteria allegedly caused by leakage from the City's network of storm water and sewage pipes running under his property. A special master was appointed, issued a report, the superior court adopted the special master's recommendation as to equitable relief, and ordered that the structures on the property be razed and rebuilt. Property owner appealed.

The Supreme Court of Georgia held that:

- The trial court had the discretion to enter an order requiring house to be razed and rebuilt, and
- The trial court's failure to remove special master was not an abuse of discretion.

The Supreme Court found that the jury's equitable remediation verdict effectively revoked the city's existing pipeline easements through homeowner's property and re-directed said pipelines and easements through another portion of his property. This was not an illegal exercise of the power of eminent domain, was not an illegal seizure of his property, and was not a violation of his right to equal protection of the laws.

ANNEXATION - TEXAS

City of Harlingen v. Lee

Court of Appeals of Texas, Corpus Christi–Edinburg - February 28, 2013 - S.W.3d - 2013 WL 772661

Texas appeals court declines to recognize re-annexation as a power separate and distinct from annexation.

A Texas home-rule municipality purported to enact three separate ordinances: (1) Ordinance Number 08–65, annexing two tracts of land; (2) Ordinance Number 11–44, disannexing the area in question; and (3) Ordinance Number 12–1, repealing and rescinding Ordinance Number 11–44.

Local resident challenged the validity of these ordinances. The court found that the resident had standing to sue for disannexation because he alleged a distinct injury, traceable to the municipality's conduct, which is likely to be redressed by the requested relief.

The court of appeals found that the municipality had not offered any authority to establish that, in addition to its power to annex and power to disannex, it has a third power to re-annex. The court reviewed the relevant provisions of the Texas Local Government Code and the case law interpreting and applying those provisions and found no authority to establish that the city has a third and distinct power to re-annex. Accordingly, the court declined to recognize re-annexation as a power separate and distinct from annexation.

The court also held that the resident lacked standing to prosecute refund claims on behalf of third parties.

ZONING - NEW JERSEY

Motley v. Borough of Seaside Park Zoning Bd. of Adjustment

Superior Court of New Jersey, Appellate Division - March 4, 2013 - A.3d - 2013 WL 776544

Total destruction of a non-conforming structure, whether by the owner's design or by accident,

terminates a nonconforming use and terminates the owner's right to continue that use.

Property owner, who sought to restore nonconforming house after pipes burst and caused significant water damage, filed action in lieu of prerogative writs seeking to overturn decision of borough zoning board of adjustment denying owner's application to lift stop work order.

The superior court held that:

- Owner, by removing every part of structure except foundation and footings, effected a total destruction of property, and
- "Stop work" order was justified by owner's improper conduct in exceeding limitations of zoning permit.

Given the statutory objective to eradicate nonconforming uses over time, local governing bodies may not adopt ordinances that authorize the restoration or replacement of all nonconforming structures, even on the condition that the cubic size of the replacement structure does not exceed the size of the existing structure. A nonconforming use or structure may be restored or repaired in the event of partial destruction thereof; by contrast, total destruction of such a structure, whether by the owner's design or by accident, terminates a nonconforming use and the owner's right to continue that use likewise ceases.

MUNICIPAL GOVERNANCE - NEW JERSEY

In re Advisory Letter No. 7-11 of Supreme Court Advisory Committee on Extrajudicial Activities

Supreme Court of New Jersey - March 6, 2013 - A.3d - 2013 WL 811863

Judge allowed to serve in the same municipality where his son had been sworn in as police officer, but with significant limitations.

Chief municipal court judge petitioned for review of opinion issued by Advisory Committee on Extrajudicial Activities that judge could no longer serve as judge in same municipality where judge's son had been sworn in as police officer.

The Supreme Court of New Jersey held that chief municipal court judge could serve, but was disqualified from presiding over any case in which his son or any fellow police officers or coworkers were party or witness in any case in municipal court, and was disqualified from acting in any supervisory capacity over other municipal court judges.

FORECLOSURE - MAINE

Stoops v. Nelson

Supreme Judicial Court of Maine - March 5, 2013 - A.3d - 2013 ME 27

Court upholds town's foreclosure of property for unpaid taxes and subsequent conveyance via municipal quitclaim deed.

Town foreclosed on property for unpaid taxes and subsequently conveyed the property via municipal quitclaim. Original owners brought action to quiet title against subsequent purchaser and town,

alleging violations of their due process rights.

The Supreme Judicial Court of Maine held that:

- Town complied with statutory notice requirements for imposition of tax lien, as prerequisite to automatic foreclosure;
- Provision of tax lien foreclosure statute that municipality “shall notify” record property owner of automatic foreclosure did not require that taxpayers received actual notice of pending foreclosure; and
- Automatic foreclosure on tax lien did not violate due process.

MUNICIPAL GOVERNANCE - TEXAS

In re Lee

Court of Appeals of Texas, Austin - February 28, 2013 - S.W.3d

City Secretary does not have the authority to determine the legal sufficiency of the allegations contained in a recall petition.

Citizens completed a petition to recall town mayor. Upon completion, the recall petition was filed with the City Secretary, who reviews the petition to determine if it is sufficient or insufficient. In this case, the City Secretary deemed the petition insufficient. The next day, at its next regular session, the city council approved the City Secretary’s certification of insufficiency and refused to order a mayoral recall election. Citizens brought a motion to compel.

The city did not contend that the recall petition lacked the required number of valid signatures. Rather, it contended that the City Charter authorized the City Secretary to review the factual allegations supporting the recall and to determine, in his or her discretion, if the allegations are sufficient to give rise to a claim “for reason of incompetence, noncompliance with this Charter, misconduct or malfeasance in office.”

The court roundly rejected this contention, finding that a review of the sufficiency of the allegations supporting recall would, in essence, amount to a non-judicial determination by the City Secretary and the City Council of whether the facts as alleged give rise to a legal basis for recall under the City Charter.

“The Charter for the City of Brady creates a ministerial duty for the City Secretary to certify a recall petition upon determining that it contains the requisite number of signatures. Likewise, the City Charter creates a ministerial duty for the City Council to order a recall election if the official whose removal is sought refuses to resign. Here, there is no dispute that the recall petition included the correct number of signatures. Further, there is no explicit discretionary duty relied upon by the City Secretary for refusing to certify the recall petition as sufficient or by the City Council for refusing to order a recall election. Under these facts, we conclude that mandamus relief is warranted.”

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