
EMINENT DOMAIN - INDIANA

Lake Ridge School Corporation v. Holcomb

Court of Appeals of Indiana - November 9, 2022 - N.E.3d - 2022 WL 16827671

School corporations sued the Governor, Attorney General, State Board of Education, and Department of Education, alleging that statutes requiring school corporations to sell or lease unused properties to charter schools or state educational institutions for $1 violated taking clauses of Fifth Amendment and state constitution and seeking declaratory and injunctive relief.

The Superior Court granted defendants' motion for summary judgment. School corporations appealed.

The Court of Appeals held that school corporations could not assert takings claims against State.

School corporations could not sue Governor, Attorney General, State Board of Education, and Department of Education under takings clauses of Fifth Amendment and state constitution regarding statutes requiring school corporations to sell or lease unused properties to charter schools or state educational institutions for $1, since school corporations were political subdivisions of the State.

PREVAILING WAGE ACT - MISSOURI

Brockington v. New Horizons Enterprises, LLC

Supreme Court of Missouri, en banc - November 22, 2022 - S.W.3d - 2022 WL 17128824

Labor union brought putative class action against employer, a construction contractor, for violations of Missouri Prevailing Wage Act, alleging employer failed to pay employees prevailing wage for properties performed in construction of public works.

Individual employee was substituted for union as class representative. Employee and employer filed cross-motions for summary judgment. The Circuit Court sustained employer's motion and overruled employee's. Employee appealed, and the Court of Appeals affirmed. The Supreme Court granted employee's application for transfer. Employee moved for attorney fees.

The Supreme Court held that triable issues existed as to whether employee was employed on behalf of public body engaged in construction as part of blight remediation project.

Genuine issues of material fact as to whether employees of employer, an asbestos abatement and window work contractor, were employed on behalf of public body, namely city or its industrial expansion authority, engaged in construction as part of area blight remediation and redevelopment project precluded summary judgment on employees' putative class claims against employer for failure to pay prevailing wage as required by Missouri Prevailing Wage Act.

NEGLIGENCE - NEW YORK

Annitto v. Smithtown Central School District

Supreme Court, Appellate Division, Second Department, New York - November 2, 2022 - N.Y.S.3d ----2022 WL 16626086 - 2022 N.Y. Slip Op. 06098

Mother, on behalf of high school football player, brought personal injury action against school district, alleging that district was negligent in supervising football player during off-season weight-training test, during which he lost control of bar weighing 295 pounds, causing one of his fingers to be crushed.

The Supreme Court, Suffolk County, granted district's motion for summary judgment. Mother appealed.

The Supreme Court, Appellate Division, held that:

- Doctrine of primary assumption of risk did not negate district's duty to safeguard football player from risks that led to incident, and
- Genuine issues of material fact precluded summary judgment.

Doctrine of primary assumption of risk did not negate school district's duty to safeguard high school football player from risks that led to incident during off-season weight-training test, in which football player lost control of bar weighing 295 pounds, causing one of his fingers to be crushed, although weight test was related to the football player's conditioning and was occasioned by his membership on football team; the only risks football player assumed were those that were inherent in the sport of football, and the risk that football coach would fail to provide adequate supervision during the weight test, causing the football player's finger to be crushed, was not a risk assumed when football player chose to join the football team.

Genuine issues of material fact existed as to whether student assistant inadequately spotted high school football player during weight-training test, whether assistant had sufficient time to render assistance but negligently failed to perceive the difficulty encountered by the football player or react appropriately, or whether football coach negligently entrusted that task to assistant, precluding summary judgment in personal injury action against school district, alleging that during test, football player lost control of bar weighing 295 pounds, causing one of his fingers to be crushed between the bar and the support rack.

TELECOM - OHIO

Maple Heights v. Netflix, Inc.

Supreme Court of Ohio - November 30, 2022 - N.E.3d - 2022 WL 17331374 - 2022-Ohi--4174

City filed class action in federal court against video-streaming services, seeking judgment declaring that services were in violation of the Fair Competition in Cable Operations Act by providing video services without authorization from the director of commerce and without paying the requisite fees to city.

The United States District Court certified questions to the Supreme Court.

The Supreme Court held that:

- Services were not "video-service providers" within meaning of the Fair Competition in Cable Operations Act; and
- City did not have implied right of action under the Act to sue services.

Video-streaming services were not "video-service providers" within meaning of the Fair Competition in Cable Operations Act, and therefore, they were not required to obtain a video-service authorization from Director of the Department of Commerce, because services used the public internet to provide content and as such, they did not place their own wires or equipment in public rights-of-way to provide their subscribers with their programing, and equipment used to access their services belonged to their customers, not them.

City did not have implied private right of action under the Fair Competition in Cable Operations to sue video-streaming services to enforce Act's video-service authorization requirement and pay video-service provider fee to city; city was not within class meant to benefit from Act, and Act granted Director of the Department of Commerce with sole authority to issue authorizations and investigate allegations that a video-service provider was violating or failing to comply with Act's authorization and service fee requirements, so as to centralize authority and eliminate local governments' authority.

BANKRUPTCY - PUERTO RICO

In re Financial Oversight and Management Board for Puerto Rico

United States Court of Appeals, First Circuit - November 23, 2022 - F.4th - 2022 WL 17175263

State-chartered credit unions that were part of a financial cooperative system that provided banking and financial services to communities in the Commonwealth of Puerto Rico filed second amended adversary complaint against the Commonwealth, the Financial Oversight and Management Board for Puerto Rico (FOMB) and its individual members, and other governmental entities, asserting claims under, inter alia, Puerto Rico contract and tort law, Puerto Rico's Act Against Organized Crime and Money Laundering (PR-RICO), and provisions of the Commonwealth and United States constitutions, alleging that defendants engaged in a fraudulent scheme to coerce plaintiffs into buying government bonds knowing that the bonds were unsustainable and would diminish in value.

Plaintiffs also sought an order excepting their claims from discharge in certain defendants' debt adjustment proceedings under Title III of the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA) as well as additional declaratory relief, injunctive relief, and compensatory damages.

Defendants moved to dismiss for lack of subject matter jurisdiction and failure to state a claim. The United States District Court granted the motions and dismissed the claims. Credit unions appealed.

The Court of Appeals held that:

- Credit unions failed to allege fraud with the requisite particularity;

- Under Puerto Rico law, the statute of limitations for credit unions' negligence-based claims was not equitably tolled; and
- Credit unions failed to plausibly plead coercion as the manner in which the government and related entities deprived them of any property interest in the bonds, as required to establish their takings claims under the Commonwealth's and United States' Constitutions.

State-chartered credit unions failed to meet heightened pleading standard for claims of fraud against Commonwealth of Puerto Rico, Corporación Pública para la Supervisión y Seguro de Cooperativas de Puerto Rico (COSSEC), and Government Development Bank (GDB), arising from defendants' alleged participation in fraudulent scheme to coerce credit unions into buying government bonds while knowing that bonds were unsustainable and would diminish in value; while providing some factual allegations beyond "based-on-information-and-belief" assertions, credit unions did not plausibly plead even the first element of fraud, false representations by defendants, with complaint failing to provide requisite level of particularity and instead outlining a broad and vague scheme involving COSSEC's issuance of circular letters, purported threats, and unspecified meetings between individuals over four-year period, and mere speculation about defendants' knowledge of falsity of any allegedly false statements.

Under Puerto Rico law, the statute of limitations for credit unions' negligence-based claims against the Commonwealth of Puerto Rico, the Financial Oversight and Management Board for Puerto Rico (FOMB) and its individual members, and other governmental entities arising from credit unions' purchase of government bonds was not equitably tolled; even taking as true credit unions' allegations of actual loss on the bonds at specified time and of their efforts to work with the government at that time to mitigate that loss, the one-year statute of limitations for their negligence-based claims expired prior to Hurricane Maria's passage through Puerto Rico.

State-chartered credit unions that were part of financial cooperative system failed to allege facts showing that regulatory actions of Commonwealth of Puerto Rico and related governmental entities coerced them to purchase allegedly unsustainable government bonds, as required to support their takings claims under the Commonwealth's and United States' Constitutions; although government-issued "circular letters" authorized and enticed credit unions to purchase bonds in an amount representing up to 30% of their liquid assets, letters' use of permissive language belied claim that credit unions had no choice but to purchase the bonds offered, and allegations about so-called mandatory nature of circular letters in general and the general authority of the Corporación Pública para la Supervisión y Seguro de Cooperativas de Puerto Rico (COSSEC) to force compliance with regulations did not lead to the inference that defendants actually forced or compelled credit unions to purchase the bonds.

TELECOM - TENNESSEE

City of Knoxville v. Netflix, Inc.

Supreme Court of Tennessee - November 22, 2022 - S.W.3d - 2022 WL 17099921

City brought action in federal court against video streaming services seeking judgment declaring that services were "video service providers" within meaning of Competitive Cable Video Services Act and accordingly were required to apply for a franchise and pay franchise fees to city and other localities.

The United States District Court for the Eastern District of Tennessee certified question to the Supreme Court.

The Supreme Court held that video streaming services did not provide a “video service” within meaning of the Competitive Cable Video Services Act and thus they were not required to apply for a franchise and pay franchise fees to city and other localities.

Video streaming services did not provide a “video service” within meaning of the Competitive Cable Video Services Act, and thus, they were not subject to Act’s requirement that video service providers obtain a franchise and pay franchise fees to localities, because services did not physically occupy public rights-of-way and used another entity’s wireline facilities to deliver video programming.

COURTS - CALIFORNIA

Dedication and Everlasting Love to Animals, Inc. v. City of El Monte

Court of Appeal, Second District, Division 8, California - November 8, 2022 - Cal.Rptr.3d - 2022 WL 16757286 - 2022 Daily Journal D.A.R. 11,509

Property owner brought action, designated as a limited civil case, challenging administrative hearing officer’s decision upholding citations for property owner’s violations of municipal code based on accumulated trash on property owner’s vacant lot.

The Superior Court summarily affirmed, and property owner filed a notice of appeal to the Appellate Division of the Superior Court. The Appellate Division rejected the filing, and property owner appealed to the Court of Appeal.

The Court of Appeal held that:

- Property owner’s appeal was a limited civil case;
- The Appellate Division of the Superior Court, not the Court of Appeal, had jurisdiction over property owner’s appeal; and
- The Court of Appeal had authority to transfer property owner’s appeal to the Appellate Division of the Superior Court.

Property owner’s action challenging the decision in an administrative hearing in which the amount in controversy was less than $25,000, an action that had been designated a limited civil matter from the outset, was a limited civil case.

Appellate Division of the Superior Court, not the Court of Appeal, had jurisdiction over property owner’s appeal from the Superior Court’s affirmance, in an action that had been designated a limited civil matter from the outset, of an administrative decision in which the amount in controversy was less than $25,000, because the appeal was in a limited civil case.

The inherent authority of the Court of Appeal, together with the statute governing appeals taken to the incorrect court, empowered the Court of Appeal to transfer to the Appellate Division of the Superior Court property owner’s appeal from the Superior Court’s affirmance, in a limited civil case, of an administrative decision upholding citations for property owner’s violations of municipal code.

SCHOOLS - COLORADO

Education ReEnvisioned BOCES v. Colorado Literacy and Learning Center

Colorado Court of Appeals, Division VII - November 3, 2022 - P.3d - 2022 WL 16641819 -

2022 COA 128

School district cooperative brought declaratory-judgment action against nonmember school district, seeking to continue to operate a school within school district's boundaries without school district's permission.

School district filed counterclaim and third-party claim against contractor that operated school for cooperative, seeking an opposite declaratory judgment. The District Court denied school district's motion for partial summary judgment and granted cooperative and contractor's motion for summary judgment. School district appealed.

The Court of Appeals held that for purposes of statute allowing school district cooperative to lease sites and buildings to provide facilities necessary for operation of cooperative service program at any appropriate location, "any appropriate location" means any location in the geographic bounds of a participating member school district.

MUNICIPAL ORDINANCE - GEORGIA

City of Atlanta v. Girls Galore, Inc.

Court of Appeals of Georgia - November 14, 2022 - S.E.2d - 2022 WL 16935999

Nightclub operator petitioned for certiorari review in the superior court of mayor's sanction of operator for violating provisions of city's alcoholic beverages ordinance.

The Superior Court reversed the mayor's decision. City applied for discretionary appeal, and the Court of Appeals granted the application.

The Court of Appeals held that evidence was insufficient to support mayor's decision to sanction nightclub operator for violating provisions of city's alcoholic beverages ordinance.

Evidence was insufficient to support mayor's decision to sanction nightclub operator for violating provisions of city's alcoholic beverages ordinance, in proceeding following operator's petition for certiorari review of mayor's sanction, though city argued evidence supported mayor's decision because operator violated provisions listed in due cause letter; it was mayor's written decision to sanction operator and the reasons stated in that written decision that were under review rather than the recommendation of the license review board or the allegations in the due cause letter, and city did not argue that record supported mayor's finding of violations of provisions cited in her letter.

SCHOOL FINANCE - IOWA

Save Our Stadiums v. Des Moines Independent Community School District

Supreme Court of Iowa - November 18, 2022 - N.W.2d - 2022 WL 17072350

Citizens filed action for declaratory judgment, seeking an adjudication that their referendum petition included enough signatures to trigger a public referendum on the financing of a school district's proposed athletic stadium.

The District Court granted summary judgment for school district, and citizens appealed.

The Supreme Court held that:

- Total number of voters at the election, rather than total number of votes cast in at-large school board election race, was number to be counted when determining the statutory threshold to trigger public referendum;
- Citizens were not prejudiced by school district's failure to return referendum petition;
- District's failure to return referendum petition did not constitute a de facto acceptance; and
- Denial of referendum petition did not amount to a denial of citizens' due process rights.

Total number of voters at the election, rather than total number of votes cast in at-large school board election race, was number to be counted when multiplying by 30% to determine the statutory threshold to trigger public referendum on school district's proposed athletic stadium and financing plan; statute required count of "voters at" the election, which included multiple races for city council seats and school board positions, and did not refer to the number of "votes in" the last election of school officials.

School district's statutory duty to return referendum petition, on athletic facility financing, which lacked requisite number of voter signatures was directory, rather than mandatory, although the statute stated that the petition "shall" be returned, as statute directed whom to do what and when: the school board was to return the petition after it determined that the petition lacked sufficient signatures.

Citizens were not prejudiced by school district's failure to return referendum petition on athletic facilities financing after school board determined that the petition lacked the requisite number of voter signatures; even if the district had returned the petition immediately, citizens only had 30 minutes to collect another 381 signatures, and citizens knew the district would require more signatures based on the superintendent's email setting forth the number of signatures required.

School district's failure to return referendum petition on athletic facilities financing, after school board determined that the petition lacked the requisite number of voter signatures, did not constitute a de facto acceptance of the petition for filing; district never accepted the petition for filing by its action or inaction, but instead examined the petition and found the number of signatures insufficient, and, because the filing deadline expired the same day citizens submitted the petition with inadequate time to cure the deficiency, any obligation to return the petition was moot.

Denial of citizens' referendum petition on financing for school district athletic facilities did not amount to a denial of citizens' due process rights; citizens failed to submit a valid petition to trigger a statutory right to a public referendum.

School district's denial of citizens' referendum petition on financing for school district athletic facilities did not shock the conscience, and thus did not amount to a violation of citizens' substantive due process rights; referendum petition was facially invalid due to failure to obtain required number of signatures.

ZONING & PLANNING - MONTANA

Tai Tam, LLC v. Missoula County by and Through Board of County Commissioners

Supreme Court of Montana - November 15, 2022 - P.3d - 2022 WL 16946486 - 2022 MT 229

Landowner brought claim for statutory damages against county board of county commissioners, as well as § 1983 claims, after board denied landowner's subdivision proposal.

The District Court granted board's motion to dismiss, and landowner appealed.

The Supreme Court held that:

- 30 day statute of limitations did not apply;
- Landowner's status as owner of property was sufficient to state a protected property interest for § 1983 claims;
- Complaint sufficiently set forth a § 1983 claim against the board;
- Allegations were sufficient to state a § 1983 due process claim;
- Allegations were sufficient to state a § 1983 claim based on an unconstitutional taking; and
- Allegations were sufficient to state a "class of one" equal protection claim.

Thirty day statute of limitations for persons aggrieved by a decision to approve, conditionally approve, or deny an application and preliminary plat for a proposed subdivision or a final subdivision plat did not apply to landowner's action under other subsection allowing a person who has filed a subdivision application to bring an action for damages.

Landowner's status as owner of property was sufficient to state a protected property interest and allow landowner to bring § 1983 claims against board of county commissioners following their denial of landowner's subdivision proposal, even if it lacked a protected property interest in its subdivision application.

Landowner's complaint, in which it alleged the board of county commissioners violated its rights to due process and equal protection, and constituted a taking of property without just compensation, when the board "implemented policies to protect viewsheds, protect generic ecologic values, and protect adjacent property owners, despite having no such adopted regulations," and "[h]aving adopted plans acknowledging much of the prime agricultural soils in the Target Range area have been developed, the Board now requires the few remaining landowners to unfairly shoulder the burden of preserving what remains via policies and actions carried out under color of state law," sufficiently set forth a § 1983 claim against the board, although it did not set forth in detail the relevant four-part test for imposing liability on a local governmental entity under § 1983.

Landowner's assertion that board of county commissioners had implemented policies to protect viewsheds, generic ecologic values, and adjacent property owners "despite having no such adopted regulations," and that the board was both failing to implement regulations it had adopted and implementing policies which were not based on any adopted regulations at all, were sufficient to state a § 1983 due process claim that landowner, regardless of the hearings held on its actual subdivision application, had not been given an opportunity to be heard at a meaningful time and in a meaningful manner regarding the board's adoption and implementation of policies and regulations which could deprive landowner of its property interest as a landowner, and thus to survive motion to dismiss for failure to state a claim.

Landowner's allegations that board of county commissioners, which rejected landowner's subdivision application, was applying rules and regulations to the proposed development which had not been adopted with proper notice and opportunity to be heard, and that the board was unfairly requiring landowner to shoulder the burden of preserving agricultural lands and viewsheds which was not imposed on other landowners, were sufficient to state a § 1983 claim based on an unconstitutional taking.

Allegations in landowner's § 1983 complaint against board of county commissioners which denied landowner's subdivision application, including that surrounding property had been allowed to be developed in the same pattern as that desired by landowner, that landowner had been subjected to policies which county had not formally adopted and which were applied on an ad hoc basis, that landowner was being forced to preserve its property for agriculture when other landowners in the area were allowed to develop their properties, and that the board was not following the area land use element regarding the property, were sufficient to state a "class of one" equal protection claim.

LIABILITY - NEW YORK

Maldovan v. County of Erie

Court of Appeals of New York - November 22, 2022 - N.E.3d - 2022 WL 17095561 - 2022 N.Y. Slip Op. 06632

Public administrator of estate of woman with developmental disabilities, who was sexually assaulted, abused, and murdered by her brother and mother, with whom she had lived, brought actions against county and sheriff, alleging that caseworkers for county's child and adult protective services agencies, who had investigated reports the woman was being abused, as well as sheriff's deputies, were negligent in the performance of their duties, leading to the woman's death.

The Supreme Court, Erie County, denied the parties' motions for summary judgment, and they appealed. The Supreme Court, Appellate Division, reversed the order denying defendants' motion and granted summary judgment to defendants. Leave to appeal was granted.

The Court of Appeals held that:

- County did not voluntarily assume a duty beyond what was owed to the public generally;
- Sheriff's deputies took no action that could have induced reliance by the woman's other family members; and
- Special duty rule for municipal negligence is not satisfied whenever a municipality's child or adult protective services agency receives a report of abuse, opens an investigation, and has contact with the injured party; abrogating *Boland v. State*, 218 A.D.2d 235, 638 N.Y.S.2d 500.

ANNEXATION - OHIO

State ex rel. Tangeman v. Miami County Board of County Commissioners

Court of Appeals of Ohio, Second District, Miami County - October 21, 2022 - N.E.3d - 2022 WL 15948703 - 2022-Ohio-3851

After board of county commissioners denied petition for expedited type-2 annexation of township property to city on ground that city did not resolve to provide water and sewer services to territory proposed to be annexed, agent for group of township landowners who sought annexation petitioned for writ of mandamus compelling board of county commissioners to approve annexation petition.

The Court of Appeals held that annexation petition satisfied statutory requirements.

Petition for expedited type-2 annexation of township property to city complied with statutory provision requiring that municipal corporation to which annexation was proposed agree to provide services specified in its statutorily-required services resolution to territory proposed for annexation,

even though city did not resolve to provide water and sewer services to proposed territory; statute plainly permitted municipality to pick and choose services it would offer annexed territory, and board of county commissioners could not exercise veto power over substance of municipal corporation's services resolution.

PUBLIC UTILITIES - PENNSYLVANIA

Adorers of the Blood of Christ United States Province v. Transcontinental Gas Pipe Line Co LLC

United States Court of Appeals, Third Circuit - November 8, 2022 - F.4th - 2022 WL 16754137

Religious organization opposed to the extraction, transportation, and use of fossil fuels brought action for money damages, challenging the construction and operation of gas pipeline on property owned by organization as violative of its rights under the Religious Freedom Restoration Act (RFRA).

The United States District Court for the Eastern District of Pennsylvania dismissed the action. Organization appealed.

The Court of Appeals held that action was impermissible collateral attack on Federal Energy Regulatory Commission (FERC) order concerning certification of interstate gas pipeline.

Cause of action asserted by religious organization opposed to the extraction, transportation, and use of fossil fuels seeking money damages under the RFRA for the construction and operation of gas pipeline on property owned by organization was impermissible collateral attack on Federal Energy Regulatory Commission (FERC) order concerning the certification of interstate gas pipeline; organization could have and should have raised its RFRA claim before FERC, it was inescapably intertwined with pipeline's route, construction, and operation, which was authorized after extensive, public proceedings before FERC as required by the Natural Gas Act (NGA).

SCHOOLS - PENNSYLVANIA

Save Our Saltsburg Schools v. River Valley School District

Commonwealth Court of Pennsylvania - November 7, 2022 - A.3d - 2022 WL 16727334

Advocacy group representing area students, parents, community members, and business owners filed a complaint against school district and school board members, alleging that the board members improperly decided to close a high school in violation of procedural due process and in breach of their fiduciary duty to the group's members.

The Court of Common Pleas sustained defendants' preliminary objections. Advocacy group appealed.

The Commonwealth Court held that:

- Advocacy group failed to assert an established constitutional right that would support its procedural due process challenge, and
- School district's mission statement and the relationship between the community and elected members of school board did not create a fiduciary duty related to school closures.

Advocacy group failed to assert an established constitutional right that would support its procedural due process challenge to decision by school district and members of school board to close a public high school; section of the Pennsylvania School Code providing procedural rules to govern school officials in the closing of a school did not create any constitutionally-recognized procedural due process rights to participate in the school district's decision.

School district's mission statement and the relationship between the community and elected members of school board did not create a fiduciary duty related to school closures, in action by advocacy group representing area students, parents, community members, and business owners who were opposed to the closing of a high school; the Public School Code limited local school board members' fiduciary status to their capacity to expend taxpayer funds to operate the schools, and gave local school boards significant discretion to close a school after a properly-noticed public hearing regardless of community opposition.

Local school boards must hold a properly noticed public hearing at which the community may voice opposition to a proposed school closure, but regardless of that opposition, boards have significant discretion thereafter to vote for and order a closure so long as the decision is not arbitrary, capricious, or fraudulent.

IMMUNITY - WEST VIRGINIA

Jones v. Logan County Board of Education

Supreme Court of Appeals of West Virginia - November 17, 2022 - S.E.2d - 2022 WL 17038200

Former middle school student brought action against county board of education, alleging that board's employees were aware that he was severely bullied by his classmates, but took no action to stop it, and asserting various claims including negligence.

The Circuit Court granted board's motion to dismiss for failure to state a claim. Student appealed as to negligence claim.

The Supreme Court of Appeals held that:

- Board was not entitled to immunity from negligence claim under the Tort Claims Act;
- Student sufficiently alleged duty, as an element of negligence claim; and
- Student sufficiently alleged proximate cause, as an element of negligence claim.

County board of education failed to assert before circuit court that any statutory exception applied to limit its liability for injury caused by negligence of board's employees, and thus board was not entitled to immunity under the Tort Claims Act from former middle school student's negligence claim alleging that board's employees did not respond when he was severely bullied by classmates, where student's allegations were not based on employees' intentional acts and related to negligence occurring on school grounds.

Assertion of former middle school student that he had reported to principal that he had been choked with a rope by another pupil sufficiently alleged that it was foreseeable to principal that his affirmative inaction would expose student to a high risk of harm from bullies' misconduct, and thus that principal had a duty of protection or supervision, as required for student to state a negligence claim against county board of education, based on board's employees' failure to respond when student was severely bullied by his classmates, even though harm to student was a result of

intentional misconduct by a third party; choking incident was a far more serious act than student's prior alleged instances of bullying.

Former middle school student sufficiently alleged that principal's failure to respond when he was bullied was the proximate cause of his injuries, as required for student to state a negligence claim against county board of education, by alleging that principal, as board's employee, had known for almost three years that student was being bullied and had told student's mother that it would be addressed, that student told principal that another pupil had choked him with a rope with enough force to leave red welts on his neck, that principal did not notify mother of choking incident, and that student was attacked days later, at which time he was punched in the face and knocked unconscious, notwithstanding board's contention that bullies' actions were a superseding cause of student's injuries.

USER FEES - CALIFORNIA

Raja Development Co., Inc. v. Napa Sanitary District

Court of Appeal, First District, Division 4, California - November 8, 2022 - Cal.Rptr.3d - 2022 WL 16757563 - 2022 Daily Journal D.A.R. 11,512

Condominium owners brought action for declaratory and injunctive relief against sanitary district alleging that the use-fee portion of sewer service charge, which also included a capacity-fee portion, was an unlawful tax.

The Superior Court sustained sanitary district's demurrer. Owners appealed.

In a case of first impression, the Court of Appeal held that putative inseverability of ordinances authorizing sewer charge did not make a challenge to use-fee portion of charge subject to shorter limitations period for challenging capacity fees.

Putative inseverability of county ordinances authorizing sewer service charge did not make condominium owners' challenge to the use-fee component of service charge, as an illegal tax, subject to the 120-day limitations period for challenging capacity fees, which were captured in the capacity-fee component of charge; regardless of whether ordinances were severable, owners did not allege any wrongful conduct by sanitary district with respect to capacity fee, the invasion of any right or interest that owners possessed related to capacity fee, or any legal injury from capacity fee.

CONSTITUTIONAL LAW - CALIFORNIA

Lunn v. City of Los Angeles

United States District Court, C.D. California - September 20, 2022 - F.Supp.3d - 2022 WL 4357436

Property owners brought § 1983 action against city, alleging that it had violated their constitutional rights by permitting persons experiencing homelessness to camp their tents and vehicles on street across from their property, which caused owners' views of golf course to become obstructed, and by removing one owners' freight container that displayed political speech that she had placed on a public walkway in same area where persons experiencing homelessness were camping in protest of perceived selective enforcement of city code pertaining to storage of personal property in public spaces.

City moved to dismiss for lack of subject-matter jurisdiction and for failure to state a claim.

The District Court held that:

- Property owners failed to establish that purported injury of having their view of a golf course obstructed was substantially motivated by city's actions;
- Single incident in which city allegedly removed property owners' freight container was not tantamount to city policy or custom;
- Property owner failed to state a procedural due process claim;
- Property owner failed to state substantive due process claim; and
- City's removal of property owner's freight container did not violate owner's rights under equal protection clause.

LIENS - CONNECTICUT

Metropolitan District Commission v. Marriott International, Inc.

Appellate Court of Connecticut - October 25, 2022 - A.3d - 216 Conn.App. 154 - 2022 WL 13683532

Municipal water-control authority brought civil action for breach of contract and unjust enrichment against hotel and state, seeking to recoup authority's costs related to sewer improvements. Meanwhile, authority brought separate administrative proceeding in which a sewer-benefit assessment was imposed on hotel's property.

In civil action, the Superior Court granted state's motion to dismiss and granted summary judgment to hotel and, in postjudgment proceedings, denied hotel's motion to hold authority in contempt but granted hotel's application to discharge lien that authority had filed to enforce an unpaid and unchallenged sewer-benefit assessment made in the administrative proceeding. Authority appealed the order discharging the lien.

The Appellate Court, held that:

- Trial court lacked subject-matter jurisdiction over hotel's motion to discharge lien, and
- Statute allowing a party to seek discharge of a lien on real property did not provide trial court authority to discharge lien.

Trial court lacked subject-matter jurisdiction in breach-of-contract action between municipal water-control authority and hotel over hotel's motion to discharge sewer-benefit-assessment lien that authority had obtained to enforce assessment that had been imposed on hotel's property in separate administrative proceeding; hotel's exclusive remedy to challenge lien was to appeal the assessment in the administrative proceeding within the appeal period, something hotel had not done.

Statute allowing a party to seek discharge of a lien on real property did not provide trial court authority, in breach-of-contract action between municipal water-control authority and hotel, to discharge sewer-benefit-assessment lien that authority had obtained to enforce assessment that had been imposed on hotel's property in separate administrative proceeding, where court made no finding that hotel had complied with all necessary statutory notice requirements, nor did court make any finding that authority's lien was legally invalid.

MONUMENTS - GEORGIA

Sons of Confederate Veterans v. Henry County Board of Commissioners

Supreme Court of Georgia - October 25, 2022 - S.E.2d - 2022 WL 14147669

Organizations brought action for injunctive relief against first county board of commissioners, alleging that board voted to remove a Confederate monument from courthouse square in violation of statute concerning such monuments.

Board moved to dismiss. The Superior Court granted motion. Organizations appealed. Individual and organizations also brought separate actions against second county board of commissioners based on similar allegations. The Superior Court consolidated and then dismissed actions for lack of standing. Organizations and individual appealed. Appeals were consolidated and the Court of Appeals affirmed. Organizations and individual petitioned for certiorari, which was granted.

The Supreme Court held that:

- Requirement that plaintiffs have a cognizable injury is a standing requirement arising from the Georgia Constitution;
- Individual alleged cognizable injury, as required to establish standing to bring claim for injunctive relief; and
- Organizations failed to allege that they suffered cognizable injuries, and thus failed to establish independent, direct standing to bring claim for injunctive relief.

The constitutional limitations on judicial power, which require that an actual controversy must exist in order to sue, prevent the Georgia Supreme Court from rendering advisory opinions on Georgia law, but the Court does have the power to issue advisory opinions regarding the Georgia Rules of Professional Conduct, which govern lawyers, and the Georgia Code of Judicial Conduct, which governs judges; the Georgia Constitution vests in the Court as an incident of the judicial power the exclusive power to regulate the practice of law and to promulgate the Code of Judicial Conduct.

Because the Georgia Constitution vests the "judicial power" in state courts, and the nature of judicial power has long been understood as limited to resolving those controversies in which there is a cognizable injury, the requirement that plaintiffs have a cognizable injury in order to invoke the power of the courts is a standing requirement arising from the Georgia Constitution.

By alleging that she was citizen of county, individual alleged cognizable injury as result of county board of commissioners' vote to move public Confederate monument from display, as required to establish standing to bring claim for injunctive relief under statute governing preservation and protection of certain public monuments and memorials.

Organizations failed to allege that they suffered cognizable injuries as result of county boards of commissioners' decisions to move public Confederate monuments from display, and thus failed to establish independent, direct standing to bring claim for injunctive relief under statute governing preservation and protection of certain public monuments and memorials, where organizations failed to allege that they were citizens, residents, or taxpayers of counties that they sued or that they were community stakeholders, such that duty created by statute was one owed to them.

POLITICAL SUBDIVISIONS - KANSAS

Hennessey v. University of Kansas Hospital Authority

United States Court of Appeals, Tenth Circuit - November 9, 2022 - F.4th - 2022 WL 16828836

Alleging that she was sexually assaulted by hospital radiology technician, patient brought action against state university hospital authority, asserting claim for negligent supervision.

Hospital authority moved to dismiss for lack of subject matter jurisdiction and based on Eleventh Amendment sovereign immunity. Finding that authority was an arm of the state, the United States District Court for the District of Kansas granted motion to dismiss. Patient appealed.

The Court of Appeals held that:

- As matter of first impression, authority bore the burden to establish its status as an arm of the state for purposes of sovereign immunity defense;
- Authority bore the burden to establish its status as an arm of the state for purposes of diversity jurisdiction;
- Limited role of governor and legislature with respect to board governing authority supported determination that it was not an arm of the state;
- Factor of ownership and control over property favored a finding that authority was an arm of the state;
- Ability of authority to form its own contracts favored supported determination that it was not an arm of the state;
- Ability of authority to set policies supported determination that it was not an arm of the state; and
- Vacatur of dismissal and remand to receive additional evidence was warranted.

State university hospital authority bore the burden to establish its status as an arm of the state for purposes of its Eleventh Amendment sovereign immunity defense, in patient's action against authority, asserting claim for negligent supervision based on alleged sexual assault by hospital radiology technician; authority possessed the evidence relating to its status, putting the burden on authority potentially obviated the need for discovery so that authority could benefit from immunity sooner, and assigning the burden to authority was consistent with precedent under the Foreign Sovereign Immunities Act (FSIA) placing burden on foreign sovereign to make a prima facie showing of immunity, and also consistent with general rule requiring defendants to bear the burden when asserting a defense.

State university hospital authority's possession of evidence as to its status as an arm of the state for purposes of Eleventh Amendment sovereign immunity supported placing the burden on authority to establish such status, in patient's action against authority, asserting claim for negligent supervision of hospital radiology technician who sexually assaulted patient, despite authority's contention that patient could obtain evidence about authority's status through an open records request; although the text of the act creating the authority was readily available to patient, the authority was in possession of key evidence regarding its finances, day-to-day operations, and operating procedures.

State university hospital authority bore the burden to establish its status as an arm of the state for purposes of an attack on patient's prima facie showing of district court's diversity jurisdiction over patient's action against authority, asserting claim for negligent supervision based on alleged sexual assault by hospital radiology technician; authority possessed the evidence relating to its status, courts had already shifted the burden to defendant on arm-of-the-state inquiry in sovereign immunity context such that it was natural to do so for purposes of diversity of citizenship, and placing the burden on authority was analogous to placement of burdens under the Foreign Sovereign Immunities Act (FSIA).

Under Kansas act establishing state university hospital authority, factor of authority's finances favored determination that authority was not an arm of the state entitled to Eleventh Amendment sovereign immunity from patient's suit asserting claim for negligent supervision based on sexual assault by hospital radiology technician; act provided for the authority to have its own funds, managed outside of the state treasury, allowing authority to open and maintain bank accounts, fix its rates, hire collection services, borrow money, make loans, and set the salaries of employees and provide supplemental benefits, and although authority could not levy taxes, act allowed it to issue bonds that were solely its responsibility and not backed by the state.

Under Kansas law, limited role of governor and legislature with respect to board governing state university hospital authority favored a finding that authority was autonomous from the State, thus supporting determination that it was not an arm of the state entitled to Eleventh Amendment sovereign immunity from patient's suit asserting claim for negligent supervision based on sexual assault by hospital radiology technician; although 13 of 19 board members had been appointed by governor and confirmed by legislature at authority's inception, governor now had to select from candidates chosen by the board when appointing a new member, governor did not choose who led the board or who was in charge of overseeing authority's daily operations, and governor could not remove a member of the board.

Under Kansas law, classification of employees favored a finding that state university hospital authority was autonomous from the State, thus supporting determination that it was not an arm of the state entitled to Eleventh Amendment immunity from patient's suit asserting claim for negligent supervision based on sexual assault by hospital radiology technician; the act which created authority largely treated the authority like a private hospital for purposes of hiring, firing, and providing benefits for employees, in that it explicitly declared that employees of hospital and authority were not state employees, stated that it did not place any officer or employee of the authority under the civil service act, and gave authority discretion to create benefit programs and set terms of employment.

Under Kansas law, factor of ownership and control over property favored a finding that state university hospital authority was an arm of the state, and thus entitled to Eleventh Amendment sovereign immunity from patient's suit asserting claim for negligent supervision based on sexual assault by hospital radiology technician; although the act establishing authority allowed it to acquire and regulate the use of certain property and equipment, act did not transfer buildings and facilities to authority and did not allow authority to own buildings or facilities, including those constructed with funds from its revenues, and the act provided that disputes over transfer of property from university to authority would be resolved by governor.

SCHOOL FINANCE - NORTH DAKOTA

Hoke County Board of Education v. State

Supreme Court of North Carolina - November 4, 2022 - S.E.2d - 2022 WL 16703972 - 2022-NCSC-108

Proceeding was brought to review State's compliance with comprehensive remedial plan (CRP) that was developed pursuant to a consent order to achieve its obligation under the State Constitution to provide all children the opportunity to obtain a sound basic education in a public school.

The Superior Court entered order requiring transfer of state funds to fully fund the CRP. After an appeal and a grant of discretionary review, the case was remanded. The Superior Court entered

order removing transfer directives, and case returned to the Supreme Court.

The Supreme Court held that:

- Trial court acted within its inherent power in issuing order directing transfer of state funds to implement CRP;
- Budget Act did not satisfy State's constitutional obligations;
- Order for transfer of funds did not raise non-justiciable political questions; and
- Transfer order was not an impermissible constitutional determination in a friendly suit.

Trial court acted within its inherent power in issuing order directing state officials to transfer available funds to implement portions of comprehensive remedial plan that was developed pursuant to a consent order to achieve State's obligation under State Constitution to provide all children in state an opportunity to obtain a sound basic education in a public school, where court provided the executive and legislative branches time and space to fix the violation on their own terms for over 17 years, executive and legislative branches repeatedly failed to remedy an established statewide violation, court exhausted all established alternative methods before directing transfer of funds, and court sought the least intrusive remedy that would still adequately address the violation.

Budget Act did not satisfy State's constitutional obligations, as set forth in a Supreme Court opinion, to provide all children the opportunity to obtain a sound basic education in a public school, where a comprehensive remedial plan that was developed pursuant to consent order was the only remedial plan that State presented to Court, and the Act, as measured against the 18-year remedial phase of case, did not substantially comply with the constitutional mandate as measured by applicable educational standards.

Trial court's order directing state officials to transfer available funds to implement portions of comprehensive remedial plan that was developed pursuant to a consent order to achieve State's obligation under State Constitution to provide all children in state an opportunity to obtain a sound basic education in a public school did not involve non-justiciable political questions, where the court assessed the State's compliance with the State's own determination of constitutional educational adequacy, not the court's.

Trial court's order directing state officials to transfer available funds to implement portions of comprehensive remedial plan that was developed pursuant to a consent order to achieve State's obligation under State Constitution to provide all children in state an opportunity to obtain a sound basic education in a public school was not an impermissible constitutional determination in a friendly suit prior to intervention of legislative defendants, where case was hotly contested for decades, and State repeatedly asserted either that it had achieved constitutional compliance or that trial court no longer had jurisdiction over case, even if State made efforts to achieve constitutional compliance over 17 years after Supreme Court's decision finding a constitutional violation.

PREEMPTION - WASHINGTON

Rental Housing Association of Washington v. City of Federal Way

Court of Appeals of Washington, Division 1 - November 14, 2022 - P.3d - 2022 WL 16918272

Advocacy group for rental housing providers brought action against city, challenging citizens' initiative that required landlords to have good cause to terminate tenancy or refuse lease renewal

and prohibited discrimination against certain community members.

The Superior Court granted partial summary judgment in favor of city. Advocacy group appealed.

The Court of Appeals held that:

- City ordinance irreconcilably conflicted with state law;
- Initiative did not violate single subject rule;
- Initiative did not exceed scope of city's initiative power; and
- Issue of admissibility of declaration of city's expert was moot.

PUBLIC UTILITIES - WEST VIRGINIA

Mason County Public Service District v. Public Service Commission of West Virginia

Supreme Court of Appeals of West Virginia - November 10, 2022 - S.E.2d - 2022 WL 16848080

County public service district appealed Public Service Commission's decision to invalidate $50 residential water disconnection fee.

The Supreme Court of Appeals held that:

- Commission had statutory authority to investigate and ultimately invalidate disconnect fee even if resident who complained about residential water service disconnection to the Commission did not mention the fee, and
- Commission's order that disconnect fee was an unreasonable practice was consistent with the Commission's precedent and rules.

Public Service Commission had statutory authority to investigate and ultimately invalidate county public service district's practice of charging a $50 residential water service disconnect fee even if resident who complained about residential water service disconnection to the Commission did not mention the fee.

Public Service Commission's order that county public service district's $50 residential water service disconnect fee was an unreasonable practice was consistent with the Commission's precedent and rules, even if district, as a locally rate regulated utility, had plenary authority to set rates, fees, and charges; Commission's rules allowed only for a reconnect fee, and Commission historically found that disconnect fees amounted to a double-recovery because the expenses involved should be part of a utility's operation and maintenance expenses recoverable in base rates.

TELECOM - ARKANSAS

City of Ashdown, Arkansas v. Netflix, Inc.

United States Court of Appeals, Eighth Circuit - November 8, 2022 - F.4th - 2022 WL 16754392

City filed putative class action lawsuit seeking declaratory judgment that online video streaming service providers had to comply with Arkansas Video Service Act (VSA) and damages for their failure

to pay required fee.

The United States District Court for the Western District of Arkansas dismissed complaint, and city appealed.

The Court of Appeals held that VSA did not create implied right of action for city to bring suit against providers.

Under Arkansas law, Arkansas Video Service Act (VSA) did not create implied right of action for city to bring suit against online video streaming service providers for alleged failure to pay applicable franchise fees, even though city was owed fees and had other rights under VSA; VSA expressly conferred right of action onto Public Service Commission, but limited Commission to mandamus and injunction proceedings, which did not allow relief in form of compelling payment of past-due fees, and municipalities were not special class that legislature intended to protect through VSA.

IMMUNITY - CALIFORNIA

State Department of State Hospitals v. Superior Court of Napa County

Court of Appeal, First District, Division 5, California - November 2, 2022 - Cal.Rptr.3d - 2022 WL 16631117

Former ward of state brought action against State Department of Hospitals alleging she was sexually assaulted by a Department counselor when she was a minor and confined at hospital, and asserted claims of negligence, negligent supervision/training/hiring/retention, sexual battery, assault, and statutory civil rights violations.

The Superior Court sustained Department's demurrer in part, with leave to amend, and overruled it in part. Department filed petition for writ of mandate, and an order to show cause was issued.

The Court of Appeal held that:

- Complaint was barred by Department's immunity under statute providing immunity to public entities for injury to inpatient of mental institution;
- Former ward could not overcome immunity accorded to Department for injury to inpatient of mental institution by alleging Department violated generally worded regulations, overruling *Baber v. Napa State Hospital,* 257 Cal.Rptr. 55; and
- Leave to amend complaint was not warranted.

Statute providing for public entity's liability for act or omission of employee within scope of employment did not establish minimum personnel standards as would have triggered liability under statute providing for liability for failure to provide adequate or sufficient equipment, personnel or facilities, and thus complaint brought by former ward of state against State Department of Hospitals, alleging that Department employee sexually abused her when she was minor and ward of state, was barred by Department's immunity under statute providing immunity to public entities for injury to inpatient of mental institution; statute did not set any minimum standards for personnel, and immunity for injury to inpatient of mental institution was subject only to exceptions set out in statute itself.

Former ward could not overcome immunity accorded to State Department of Hospitals for injuries to inpatient of mental institution by alleging that Department violated generally worded regulations; rather, for claims to fall within statutory exception for failure to provide adequate or sufficient

equipment, personnel or facilities, as an exception to immunity, ward was required to allege Department violated specific minimum standard sufficient to put the Department on notice as to the minimum requirements with which it must comply, overruling Baber v. Napa State Hospital, 257 Cal.Rptr. 55.

EMINENT DOMAIN - FEDERAL

Hippely v. United States

United States Court of Federal Claims - October 18, 2022 - Fed.Cl. - 2022 WL 10329550

In a rails-to-trails case, owners of property subject to railroad easement filed suit seeking just compensation for alleged temporary taking by Surface Transportation Board's (STB) issuance of notice of interim trail use (NITU) subject to a National Historic Preservation Act (NHPA) historic preservation condition, authorizing the county and railroad to negotiation potential conversion of easement into public recreational trail under National Trails Systems Act Amendments, prior to eventual expiration of the NITU and abandonment of easement.

Property owners moved for summary judgment on liability; government brought cross-motion for summary judgment.

The Court of Federal Claims held that:

- Railroad intended to complete abandonment during the period in which the NITU was in effect, thus requiring compensation for a taking, and
- The NITU was a factual cause of railroad's delayed abandonment of easement, despite concurrent presence of NHPA historic preservation condition.

In rail-to-trail takings case, evidence was sufficient to support an inference that, had there been no notice of interim trail use (NITU), railroad intended to complete abandonment during the period in which the NITU was in effect, thus satisfying causation element and requiring compensation for a taking; the railroad filed an application to abandon, which indicated an affirmative intent to abandon at the time the NITU was issued, railroad never sought further extension of time to negotiate trail use, railroad consummated abandonment six months after the NITU expired, NITU authorized removal of track during its pendency, and railroad met the standard of abandonment under Ohio law.

In rails-to-trails case, the notice of interim trail use (NITU) was a factual cause of railroad's delayed abandonment of easement and the delay of property owners' reversionary interests, despite the existence of a National Historic Preservation Act (NHPA) historic preservation condition; the NITU alone would have caused the delay in abandonment.

PUBLIC UTILITIES - FEDERAL

United Power, Inc. v. Federal Energy Regulatory Commission

United States Court of Appeals, District of Columbia Circuit - September 16, 2022 - 49 F.4th 554 - Util. L. Rep. P 15,235

Utility member of generation and transmission cooperative petitioned for review of declaratory order of the Federal Energy Regulatory Commission (FERC), which determined that upon admission

of natural gas supplier to electrical cooperative, cooperative was subject to jurisdiction of FERC, and that FERC had exclusive jurisdiction over exit charges, which cooperative charged to exiting utility members of cooperative. Second utility member and Colorado Public Utilities Commission (PUC) intervened in support of utility member. Cooperative, and a third and fourth utility member intervened in support of FERC.

The Court of Appeals held that:

- Utility member failed to exhaust argument that FERC acted ultra vires or beyond agency's statutory authority, as required for Court of Appeals to exercise jurisdiction over argument;
- Utility member exhausted issue before FERC as to whether FERC's actions were arbitrary and capricious;
- FERC's issuance of declaratory order was within its broad discretion to determine when and how to hear and decide matters; and
- Cooperative's exit charge was a rate charged in connection with provision of wholesale electricity, and thus FERC had exclusive jurisdiction to determine reasonableness of exit charge.

Utility member failed to raise with specificity in application for rehearing its argument that Federal Energy Regulatory Commission (FERC) acted ultra vires or beyond statutory authority in finding generation and transmission cooperative was subject to FERC jurisdiction, such that utility member failed to exhaust argument before FERC as required for Court of Appeals to exercise jurisdiction over issue, and thus Court of Appeals was without jurisdiction to consider utility member's argument; utility member argued in footnote to introduction of its request for rehearing that FERC's action was premature and inefficient, but did not describe FERC's action as ultra vires or beyond agency's statutory authority.

Utility member's discussion in footnote of its application for rehearing before Federal Energy Regulatory Commission (FERC), which described FERC's action in asserting jurisdiction over generation and transmission cooperative as premature and inefficient and specified what FERC ought to have done, was sufficiently specific to permit finding that utility member raised argument before FERC that FERC's actions were arbitrary and capricious, and thus utility member exhausted issue before FERC as required for appellate jurisdiction under Federal Power Act (FPA); utility member's description of what FERC did and what FERC ought to have done, which was wait for state tribunal's resolution of related issue, were specific enough to make out an "arbitrary and capricious" argument without squinting.

Federal Energy Regulatory Commission's (FERC's) decision to issue declaratory order as to FERC's jurisdiction over generation and transmission cooperative to determine utility member's exit charge was within FERC's broad discretion to determine when and how to hear and decide matters, despite fact that proceeding before state agency was still pending as to whether natural gas supplier's admission to cooperative, from which FERC's jurisdiction was rendered, was proper; FERC explained it had statutory obligation to act on rate filings submitted by electrical cooperative, it did not matter that FERC might have had to revisit its determination and some later time, and providing temporary clarity to parties was useful and reasonable.

Generation and transmission cooperative's exit charge, levied against a withdrawing member, was a rate charged in connection with the provision of wholesale electricity, and thus Federal Energy Regulatory Commission (FERC) had exclusive jurisdiction to determine reasonableness of cooperative's exit charge, although exit charge was not a rate or charge for a jurisdictional service; exit charge protected cooperative's members against rate increases caused by exit of a member while also increasing membership commitment and stability, exit charge was important part of bargain to which a firm agreed when it became part of cooperative, and if there were no obligation

to pay an equitable exit charge, cost of electricity under requirements contract would have been higher

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IMMUNITY - NORTH CAROLINA

Estate of Ladd by Ladd v. Funderburk

Court of Appeals of North Carolina - October 18, 2022 - S.E.2d - 2022 WL 10219785 - 2022-NCCOA-676

Deceased motorist's wife and estate filed suit against property owners for wrongful death, negligence, and negligent infliction of emotional distress, alleging that owners' negligence caused tree that stood in owners' front yard to fall on motorist's car during a storm, fatally injuring motorist and injuring motorist's wife, and owners cross-sued town for contribution under the Uniform Contribution Among Tortfeasors Act.

The Superior Court denied town's motion for summary judgment. Town appealed.

The Court of Appeals held that:

- Town's statutory affirmative duty to keep public streets free from unnecessary obstructions did not require preventative measures for tree that was not already obstruction;
- Town's activity in failing to exercise its authority pursuant to tree ordinance to remove tree from owners' yard was necessarily governmental in nature; and
- Town did not waive its governmental immunity by purchasing liability insurance.

A municipality's statutory affirmative duty to keep public streets open for travel and free from unnecessary obstructions does not require preventative measures for trees on private property which are not already an obstruction.

Town's activity in failing to exercise its authority pursuant to tree ordinance to remove tree from property owners' front yard was necessarily governmental in nature, and thus town was entitled to defense of governmental immunity, in action by deceased motorist's wife and estate to recover for injuries sustained when tree fell on motorist's car during storm; ordinance preserved authority to eliminate threats to public health, safety, or welfare from trees solely for town, and private party could not have, under color of ordinance, walked onto owners' property and unilaterally cut down tree.

Town did not waive its governmental immunity by purchasing liability insurance, where policy contained clause stating that it applied to tort liabilities of any insured only to extent that such liability was not subject to any defense of governmental immunity.

MUNICIPAL ORDINANCE - FLORIDA

Florida Association of Realtors v. Orange County, Florida

District Court of Appeal of Florida, Fifth District - October 27, 2022 - So.3d - 2022 WL 15234476

Real estate agents' association filed suit against county, seeking declarations that proposed rent control ordinance was unconstitutional and that ballot summary of ordinance was invalid, and

seeking injunctive relief to prevent county from enforcing ordinance and to prevent county supervisor of elections from conducting or certifying referendum election on ordinance.

The Circuit Court denied association's motion for temporary injunction, but concluded that association had a substantial likelihood of succeeding in its challenges against the ordinance and summary. Association filed interlocutory appeal and county cross-appealed.

The District Court of Appeal held that:

- Association was likely to succeed on merits of its claim that ordinance was invalid;
- Association was likely to succeed on the merits of its claim that ballot summary for ordinance would mislead voters;
- Direct conflict between ordinance and statutory requirements for rent control ordinances constituted irreparable harm;
- Association had no adequate legal remedy on its claims; and
- Public interest supported issuance of temporary injunction.

Real estate agents' association was likely to succeed on merits, as element for temporary injunction, on its claim that county rent control ordinance was invalid under state constitution because it violated statute prohibiting local governments from adopting rent control ordinances without determining that controls were necessary to eliminate existing housing emergencies that constituted serious menace to general public; ordinance's legislative findings primarily referred to historical structural issues, rather than sudden or unexpected occurrence, and findings addressing more recent circumstances cited only spiraling inflation, housing prices, and rental rates.

Real estate agents' association was likely to succeed on merits, as element for temporary injunction, on its claim that proposed county rent control ordinance was invalid under state constitution because it violated statute prohibiting local governments from adopting rent control ordinances without determining that controls were necessary to eliminate existing housing emergencies that constituted serious menace to general public, even if county could prove existence of housing emergency, where county's legislative findings were virtually devoid of findings that allegedly existing housing emergency was so grave as to constitute serious menace to general public, at most citing to low rental vacancy rate and low availability of affordable housing.

Real estate agents' association was likely to succeed on merits, as element for temporary injunction, on its claim that proposed county rent control ordinance was invalid under state constitution because it violated statute prohibiting local governments from adopting rent control ordinances without determining that controls were necessary to eliminate existing housing emergencies that constituted serious menace to general public, even if county could prove existence of housing emergency that constituted serious menace to general public, where county's legislative findings did not even suggest that ordinance would eliminate housing emergency, and consultant team that evaluated ordinance's effectiveness for county concluded that ordinance might actually hurt rental conditions in county.

Real estate agents' association was likely to succeed on the merits, as element for temporary injunction, on its claim that the ballot summary for proposed county rent control ordinance was invalid because it would mislead the voters as to the ordinance's chief purpose, where the summary only advised voters about the amount of the proposed rent control, and did not advise voters as to the frequency of allowable rent increases under the ordinance.

Direct conflict between proposed county rent control ordinance and statute setting conditions under which local governments could adopt such ordinances, which conflict rendered ordinance

unconstitutional pursuant to state constitutional prohibition against ordinances inconsistent with general law, constituted irreparable harm, in and of itself, for purposes of determining whether real estate agents' association was entitled to temporary injunction, in association's action challenging validity of ordinance and its associated ballot measure.

Real estate agents' association had no adequate legal remedy, as element for temporary injunction, on its claims that proposed county rent control ordinance was invalid under state constitution because it violated statute setting conditions under which local governments could adopt such ordinances and that ballot summary for proposed county rent control ordinance was invalid because it would mislead the voters as to the ordinance's chief purpose, even if damages suffered by association and its members were quantifiable, where county was protected by sovereign immunity, and neither association nor its members could recover damages from county for harm they had and would incur.

Public interest supported issuance of temporary injunction to prevent county from enforcing proposed rent control ordinance that did not meet facial requirements of statute setting conditions under which local governments could adopt such ordinances, and did not meet facial requirements of state constitutional prohibition against ordinances inconsistent with general law.

Public interest supported issuance of temporary injunction to prevent county supervisor of elections from conducting or certifying referendum election on ordinance using ballot summary that omitted material information regarding ordinance's purpose; there was no defensible reason to determine ballot initiative was misleading, yet still have electorate vote on it, only then informing them that measure was unenforceable opinion poll all along.

EMINENT DOMAIN - GEORGIA

Edgewater Hall Enterprises, LLC v. City of Canton

Court of Appeals of Georgia - November 1, 2022 - S.E.2d - 2022 WL 16569409

After order and judgment stating that permanent easement was condemned for city's use to construct and maintain a gravity sewer main and pedestrian trail, servient tenement owner filed petition to set aside declaration of taking, and following subsequent order and judgment stating that temporary construction easement was condemned for city's use for access across property to construct sewer main and trail, servient tenement owner filed second petition to set aside taking.

Following hearing, the Superior Court denied petitions. Servient tenement owner filed applications for interlocutory appeal challenging denial of both petitions, which were granted.

The Court of Appeals held that:

- Evidence support determination that city's actions during negotiations regarding taking for temporary construction easement did not rise to level of bad faith;
- Plat city attached to declaration of taking for temporary construction easement was sufficient under taking statute; but
- Servient tenement owner was property owner and therefore had standing to petition to set aside declaration of taking related to permanent easement.

Evidence supported trial court's determination that actions of city during negotiations regarding taking for temporary construction easement for access across property to build sewer main and pedestrian trail did not rise to the level of bad faith to justify setting aside declaration of taking, even

though city failed to recognize servient tenement owner as property owner despite conducting negotiations with it and offered lower amount than appraisal valuation; evidence showed that city stopped negotiating with servient tenement owner after city's title search led to erroneous conclusion that servient tenement owner was not the owner of property underlying easement and that amount city offered was based on comparable settlement city had reached with owner of different property.

Plat city attached to declaration of taking for temporary construction easement for access across property to build sewer main and pedestrian trail was sufficient under taking statute; even though plat did not provide any specific metes and bounds, plat set out sufficient information from which boundaries of claimed easement could be calculated exactly.

Servient tenement owner was owner of property and therefore was entitled to be named in and served with condemnation petition and had standing to petition to set aside city's declaration of taking related to permanent easement to construct and maintain a gravity sewer main and pedestrian trail; servient tenement owner paid taxes assessed by city and county and held title to the property by virtue of its deed.

MUNICIPAL ORDINANCE - NEBRASKA

REO Enterprises, LLC v. Village of Dorchester

Supreme Court of Nebraska - November 4, 2022 - N.W.2d - 312 Neb. 792 - 2022 WL 16703325

Landlord brought declaratory judgment action against village alleging that ordinance requiring landlords to guarantee payment of tenants' unpaid utility charges for services provided by village was unconstitutional special legislation and violated equal protection, the Equal Credit Opportunity Act (ECOA), and public policy.

The District Court granted landlord's motion for summary judgment on equal protection claim. Village appealed. The Supreme Court reversed and remanded. The District Court granted summary judgment for village on other claims. Landlord appealed.

The Supreme Court held that:

- Ordinance did not violate state constitutional prohibition against special legislation;
- Landlord was not an applicant for credit under ECOA;
- Ordinance was not void as against public policy; and
- Trial court did not plainly err in not entering summary judgment on issue not raised on motion for summary judgment.

Ordinance requiring landlords to guarantee payment of tenants' unpaid utility charges in order for tenants to receive utility services from village did not violate state constitutional prohibition on special legislation, even though ordinance did not require third-party guarantee for property owners applying for utility services from village; there was a substantial difference in circumstances between tenants and property owners as to time and expense that was likely necessary for village to collect unpaid utility bills.

Landlord that was required by ordinance to serve as guarantor of unpaid utility bills of its tenants in order for tenants to receive utility services from village was not an "applicant" for credit under Equal Credit Opportunity Act (ECOA), and therefore landlord could not seek equitable or declaratory

relief under ECOA as to alleged invalidity of ordinance. Consumer Credit Protection Act.

Landlord that was required by ordinance to serve as guarantor of unpaid utility bills of its tenants in order for tenants to receive utility services from village, but that did not qualify as an "applicant" for credit under Equal Credit Opportunity Act (ECOA), could not obtain declaratory relief under ECOA as to validity of ordinance by naming one of its tenants as a third-party defendant, where tenant did not make an application to district court for relief.

Ordinance requiring landlords to guarantee payment of tenants' unpaid utility charges for services provided by village was not void as against public policy, even though state law capped the amount landlords could demand as a security deposit.

ZONING & PLANNING - PENNSYLVANIA

PSIP JVI Krumsville Road, LLC v. Board of Supervisors of Greenwich Township

Commonwealth Court of Pennsylvania - October 26, 2022 - A.3d - 2022 WL 14659062

Developer appealed decision of township board of supervisors, which rejected developer's preliminary land development plan for reason that developer had conveyed land to Pennsylvania Department of Transportation (PennDOT) for a highway right-of-way without first obtaining township's subdivision approval.

The Court of Common Pleas reversed supervisors' decision and granted developer's land use appeal. Supervisors appealed.

The Commonwealth Court held that:

- Developer was not required to obtain subdivision approval from township before, or after, conveyance of land to PennDOT for public purpose, and
- Township acted in bad faith with respect to its disapproval of the plan.

Developer was not required to obtain subdivision approval from township before, or after, conveyance of land to Pennsylvania Department of Transportation (PennDOT) for required right-o--way, as this public purpose rendered township's subdivision and land development ordinance (SALVO) inapplicable; deed from developer to PennDOT recited that real estate transfer was for required highway right-of-way and limited use of the real estate to that single public purpose.

Township acted in bad faith with respect to its disapproval of developer's land development plan, and this bad faith constituted, in itself, a basis for trial court to reverse township supervisors' disapproval of the plan; faced with a final plan that fully complied with every substantive requirement in township subdivision and land development ordinance (SALDO), township devised self-serving technical violations as means to reject the plan.

EMINENT DOMAIN - TEXAS

In re Upstream Addicks and Barker (Texas) Flood-Control Reservoirs

United States Court of Federal Claims - October 28, 2022 - Fed.Cl. - 2022 WL 15805669

Property owners sued federal government, claiming Fifth Amendment taking of flowage easement from two dams designed, constructed, maintained, and operated by Army Corps of Engineers, after properties within flood-pool reservoirs were inundated with impounded flood waters during Hurricane Harvey.

Following consolidation of actions within master docket and then splitting of actions into two sub-master dockets based on whether property was upstream or downstream from dams and bifurcation of upstream cases to consider liability and damages separately, the Court of Federal Claims determined that partial taking of non-categorical, permanent flowage easement was effected on all 13 upstream bellwether test case properties. After cases moved to discovery on damages, six upstream properties were chosen for just compensation phase, and bench trial was held.

The Court of Federal Claims held that:

- Just compensation was warranted for real property taken by flowage easement;
- Just compensation was warranted for personal property taken by easement;
- Awards for certain personal property required reductions for lack of documentation;
- Just compensation was warranted for displacement costs;
- Just compensation awards would be offset by government's direct payments; and
- Interest rate of 3.62% was warranted on owners' just compensation awards.

Government's flowage easement that effected permanent physical partial taking of owners' real property upstream from dams operated by Army Corps of Engineers required just compensation in amount of difference between property's market value with and without easement plus depreciation resulting to remainder of property after Corps flooded properties with impounded water during hurricane; easement left owners fee simple interest in properties, allowing them to continue lawful use subject to risk of occasional flooding caused by dams, market was aware of flood risk even if not aware of easement, and award reflected properties' value in their damaged state subject to easement and included only repair costs incurred to restore property to pre-taking state and only for remainder of any lease.

Government's flowage easement that effected permanent physical partial taking of owners' real and personal property upstream from dams operated by Army Corps of Engineers required just compensation for personal property, fixtures, and improvements damaged or destroyed by Corps' flooding of properties with impounded water during hurricane, since owners' personal property was not merely damaged by government's taking of their real property, but rather, owners' personal property itself was taken by government, and their personal property losses were compensable even if Corps did not intend to cause such damage and did not acquire personal property for public use.

Property owners' displacement costs would be awarded as just compensation for government's flowage easement that effected permanent physical partial taking of owners' real and personal property upstream from dams operated by Army Corps of Engineers, including owners' costs of securing substitute housing actually and necessarily incurred due to Corps' flooding of properties with impounded water during hurricane, since owners' displacements extended from time their homes were rendered uninhabitable until their homes were repaired and safe to occupy once again, but dislocation awards would be reduced by half to reflect each owner's co-tenancy and would not be based on monthly rental value of properties as that would duplicate their real property awards.

Property owner's costs for displacement of tenants from his rental units would be awarded as just compensation for government's flowage easement that effected permanent physical partial taking of owners' real and personal property upstream from dams operated by Army Corps of Engineers, including owner's costs in lost income and utility payments for one unit and lost rent for another unit

due to Corps' flooding of properties with impounded water during hurricane, since owner's units were vacant because of government's taking, but award was reduced by half to reflect owner's proportional ownership of property, and costs incurred in traveling from his home in California to Texas to oversee repair of his properties and testify during liability trial were incidental and thus noncompensable.

Federal Emergency Management Agency's (FEMA) direct payments to property owners were required to be offset from owners' just compensation awards for government's flowage easement that effected permanent physical partial taking of their real and personal property upstream from dams operated by Army Corps of Engineers, due to Corps' flooding of properties with impounded water during hurricane, even though FEMA made funds available to others whose homes were flooded during hurricane but not because of government taking, since owners would receive double recovery if FEMA payments were not deducted, and government reimbursed for some losses of property once by issuing FEMA relief and should not be compelled to pay again for damage to property by same flood pursuant to just compensation award.

EMINENT DOMAIN - WYOMING

Colton v. Town of Dubois

Supreme Court of Wyoming - November 3, 2022 - P.3d - 2022 WL 16645722 - 2022 WY 138

Landowner brought declaratory judgment action against town concerning his rights under Eminent Domain Act to reclaim, for non-use by town, the portion of his property that town previously sought to condemn for airport project but ultimately acquired through a settlement agreement with landowner.

After a bench trial, the District Court granted summary judgment for town. Landowner appealed.

The Supreme Court held that:

- Settlement agreement satisfied elements for landowner's waiver of rights under Act, and
- Settlement agreement did not contravene public policy behind Act.

Landowner's settlement agreement with town waived any right he had under Eminent Domain Act to reclaim, for non-use by town, the portion of his property that town previously sought to condemn for airport project but ultimately acquired through settlement agreement, where Act's provisions were primary basis for parties' claims throughout their dispute leading to settlement agreement, waiver provisions in settlement agreement were not ambiguous, the stated purpose of settlement agreement was to resolve "any and all" future claims "related in any way" to the condemnation action, and landowner agreed to release town from "any and all" claims in multiple sections of settlement agreement.

Landowner's waiver of his right under Eminent Domain Act to reclaim, for non-use by town, the portion of his property that town previously sought to condemn for airport project but ultimately acquired through settlement agreement with landowner did not contravene public policy behind Act; landowner's waiver of statutory opportunity to reclaim property did not affect the public interest in the acquisition, possession, occupation, and enjoyment of private land by a public entity when the public interest and necessity so required, and public policy or interest was also served by recognizing an individual's right to freely contract.

ENVIRONMENTAL LAW - CALIFORNIA

G.I. Industries v. City of Thousand Oaks

Court of Appeal, Second District, Division 6, California - October 26, 2022 - Cal.Rptr.3d - 2022 WL 14750209

Competitor petitioned the trial court for a writ of mandate directing the city to vacate both its approval of solid waste hauling franchise agreement and its finding that the project was exempt from the California Environmental Quality Act (CEQA).

The Superior Court sustained city's and solid waste hauling company's demurrer without leave to amend.

The Court of Appeal held that:

- City violated the Ralph M. Brown Act by adopting CEQA exemption without having listed it as an item on its agenda for at least 72 hours, and
- Competitor's letter to city was sufficient to satisfy the Brown Act's requirements for a "cure and correct" letter.

City violated the Ralph M. Brown Act by adopting California Environmental Quality Act (CEQA) exemption for solid waste hauling franchise agreement without having listed it as an item on its agenda for at least 72 hours; CEQA exemption was not a component of the agenda item awarding the franchise agreement to waste hauling company, but rather involved a separate action or determination by the city and concerned discrete significant issues of CEQA compliance.

Competitor's letter informing city that it violated the Ralph M. Brown Act by "voting to adopt a Notice of Exemption (NOE)" prior to adopting solid waste hauling franchise agreement "and without adequate notice to the public" was sufficient to satisfy the Act's requirements for a "cure and correct" letter; regardless of whether city technically voted to "adopt" a notice of exemption or when that notice was filed, letter informed city that it violated the Act by considering California Environmental Quality Act (CEQA) exemption for the franchise agreement without describing the action in the agenda for at least 72-hours prior to the meeting.

IMMUNITY - GEORGIA

City of Roswell v. Hernandez-Flores

Court of Appeals of Georgia - October 28, 2022 - S.E.2d - 2022 WL 15654230

Pedestrian filed negligence suit against city, seeking to recover for multiple permanent injuries sustained when she was struck on the sidewalk by a fleeing suspect's vehicle after it swerved to avoid tire-deflating spikes deployed by a city police officer.

Asserting sovereign immunity, city moved for summary judgment. The trial court denied city's motion. City appealed.

The Court of Appeals held that:

- Officer was not actively using his patrol car at the time pedestrian was injured, so as to waive city's immunity;

- Officer's storage of spikes in the trunk of his patrol car was not a use of a motor vehicle that would waive city's immunity; and
- Officer was not using patrol car as a vehicle when he was positioned behind it and deploying spikes, so as to waive city's immunity.

City police officer was not actively using his patrol car at the time pedestrian was injured by fleeing suspect's vehicle after it swerved to avoid tire-deflating spikes deployed by officer, and thus officer's conduct involving a motor vehicle was insufficient to waive city's sovereign immunity from pedestrian's negligence suit, even though officer's patrol car had been involved in his monitoring of the pursuit of the suspect on his radio and his travel to intersection at which he deployed spikes; patrol car had already been parked on the side of the road when pedestrian was injured.

City police officer's storage of tire-deflating spikes in the trunk of his patrol car was not a use of a motor vehicle within the meaning of statute waiving city's sovereign immunity for losses arising out of claims for the negligent use of a vehicle, and thus did not waive city's immunity from pedestrian's negligence suit seeking to recover for injuries sustained when she was struck by a fleeing suspect's vehicle after it swerved to avoid such spikes; it was officer's actual use of spikes that allegedly led suspect's vehicle to injure pedestrian, not the location in which spikes were stored, and thus officer's allegedly tortious conduct did not originate in or flow from the storage of spikes in the patrol car, and such storage was not the direct cause of pedestrian's injuries.

City police officer was not using his parked patrol car as a vehicle when he was positioned behind it and deploying tire-deflating spikes, within the meaning of statute waiving city's sovereign immunity for losses arising out of claims for the negligent use of a vehicle, and thus statute did not apply to waive city's immunity from pedestrian's negligence suit seeking to recover for injuries sustained when she was struck by a fleeing suspect's vehicle after it swerved to avoid such spikes; patrol car was parked and analogous to a static prop, and its presence at the scene did not directly contribute to accident, in that suspect allegedly swerved to avoid spikes, not the patrol car.

Statutes that provide for a waiver of sovereign immunity, such as the provision waiving immunity of local government entities for a loss arising out of claims for the negligent use of a motor vehicle, are in derogation of the common law and thus are to be strictly construed against a finding of waiver.

POLITICAL SUBDIVISIONS - GEORGIA

City of Winder v. Barrow County

Court of Appeals of Georgia - October 28, 2022 - S.E.2d - 2022 WL 15645176

County brought action against city, challenging manner of funding road maintenance and rates assessed for water utility services.

The Superior Court denied city's motion to dismiss and for summary judgment, and granted county's motion for partial summary judgment. City appealed.

The Court of Appeals held that:

- County could charge city residents for countywide maintenance of unincorporated roads outside the city limits;
- Statute regarding viable sources of funding for countywide services did not restrict funding sources; and
- Superior Court had authority to resolve county's claim that water usage rates assessed by city

amounted to illegal tax.

Statute governing funding strategies for county services, providing that when the county and municipality jointly fund a countywide service, the costs should be shared by property owners and residents that received the service, did not preclude county from charging city residents for countywide maintenance of unincorporated roads outside the city limits; county roads, regardless of their specific geographic location, and their proper maintenance, benefited all residents of county.

Statute regarding viable sources of funding for countywide services, which listed property taxes, insurance premium taxes, assessments, and user fees, did not limit funding for countywide services to the four listed sources; sources listed were general categories that could be used for funding.

Superior Court had authority to resolve county's claim that water usage rates assessed by city amounted to an illegal tax on its unincorporated residents.

LIABILITY - KENTUCKY

City of Barbourville v. Hoskins

Supreme Court of Kentucky - October 20, 2022 - S.W.3d - 2022 WL 12196572

Visitor to water park owned by city brought action against the city under theories of premises liability, strict liability, and breach of contract to recover for burns she sustained on the bottom of her feet after visiting the park.

The Circuit Court granted summary judgment to city, and visitor appealed. The Court of Appeals affirmed in part and reversed in part. Discretionary review was granted.

The Supreme Court held that:

- Visitor was an invitee at the park, and thus, city owed her a duty to discover unreasonably dangerous conditions and either eliminate or warn of them;
- The sun-heated walkways at the water park were not an unreasonably dangerous condition, and thus, city had no duty to warn of or ameliorate the condition; and
- The burns visitor sustained from the sun-heated walkways were not foreseeable to the city, and thus it had no duty to eliminate the allegedly dangerous condition.

Visitor who sustained burns on the bottom of her feet after visiting city-owned water park was an "invitee" at the park, and thus, city owed her a duty to discover unreasonably dangerous conditions on the land and either eliminate or warn of them, for purposes of her premises liability claim, where visitor was an individual present on the premises at the explicit or implicit invitation of the city, as property owner, to do business or otherwise benefit the city.

The sun-heated walkways at city-owned water park were not an unreasonably dangerous condition, and thus, city had no duty to warn of or ameliorate the condition, precluding city's liability for burns invitee sustained on the bottom of her feet after visiting the park; there was no evidence that the walkways at the water park were negligently maintained or defectively designed, that other water parks took steps to minimize the sun-generated heat of their concrete walkways, or that the park failed to comply with industry standards or practices.

The burns invitee, who had diabetic neuropathy that caused a loss of protective sensation in her feet, sustained from walking on sun-heated walkways at city-owned water park were not foreseeable to

the city, and thus the city had no duty to eliminate the allegedly dangerous condition; there was no evidence of any feasible means the city could have undertaken to lessen the alleged risk created by heat radiating from sidewalks warmed by the summer sun, no evidence that the city acted outside of industry standard practices, and no evidence why the city would have anticipated injuries like invitee's to take place.

SHORT TERM RENTALS - LOUISIANA

Hignell-Stark v. City of New Orleans

United States Court of Appeals, Fifth Circuit - August 22, 2022 - 46 F.4th 317

Homeowners who sought to operate short term rentals and company providing services for short term rental owners brought § 1983 action against city, alleging violations of the dormant Commerce Clause, the Takings Clause of the Fifth Amendment, and the First Amendment right to free speech, based on the city's ordinance requiring licenses to operate short term rentals.

The United States District Court for the Eastern District of Louisiana granted summary judgment in favor of city, in part, and denied city's motion, in part. Parties cross-appealed.

The Court of Appeals held that:

- Homeowners had no protected property interest in the renewal of their short term rental licenses, as required to support Takings Clause claim for nonrenewals;
- Ordinance's residency requirement violated dormant Commerce Clause; and
- Court of Appeals lacked jurisdiction to review District Court's decision on the homeowners' First Amendment claim.

Homeowners who sought to operate short term rentals had no protected property interest in the renewal of their short term rental licenses, as required to support Takings Clause claim against city for nonrenewals; the original licensing ordinance stated expressly that a short term rental license was a privilege, not a right, and that the license could be revoked or not renewed for non-compliance with the ordinance, and homeowners only held prior licenses for a couple of years, so that they were not firmly established in custom and practice.

Residency requirement of city ordinance governing licenses for short term rentals, providing that no homeowner could obtain license to operate short term rental unless property was also homeowner's primary residence and owner had homestead exemption for that property, violated dormant Commerce Clause; requirement discriminated on its face against interstate commerce, as it completely prohibited out-of-state residents who owned property in city from obtaining short term rental licenses, and legitimate local purposes of requirement, including preventing nuisances and promoting affordable housing, could adequately be served by reasonable nondiscriminatory alternatives, such as enforcement efforts to address nuisances, and reducing housing regulations.

The Court of Appeals lacked jurisdiction to review District Court's determination that homeowners' First Amendment claim, alleging that city ordinance requiring homeowners to obtain licenses to operate short term rentals was a prior restraint on free speech, was viable; finding that claim was viable was not "final, appealable judgment," as determination did not resolve all of homeowners' claims for relief.

FINANCIAL REPORTING - MISSOURI

City of Foley v. Director, Missouri Department of Revenue

Missouri Court of Appeals, Western District - October 18, 2022 - S.W.3d - 2022 WL 10199680

After state Department of Revenue fined city for filing a late financial report, city filed a declaratory judgment action against state Department of Revenue and State Auditor alleging that regulation governing annual financial reports of political subdivisions was unreasonable, arbitrary, capricious, and violative of due process provisions of constitutions of state and the United States.

The Circuit Court granted defendants' motions for judgment on the pleadings. City appealed.

The Court of Appeals held that:

- City failed to prove its claim that defendants' motions for judgment on the pleadings were essentially motions to dismiss for failure to state a claim;
- Trial court properly decided merits of well-pleaded declaratory relief action by judgment of dismissal;
- There was no declaration that trial court could make with regard to regulation that would change fact that filing requirement and penalty procedures were all statutory;
- Regulation did not exceed its statutory authority; and
- Trial court necessarily could not proclaim that regulation's six-month post fiscal year deadline imposed a mandatory fine on city without due process.

ZONING & PLANNING - OHIO

State ex rel. Halstead v. Jackson

Supreme Court of Ohio - September 13, 2022 - N.E.3d - 2022 WL 4137610 - 2022-Ohi--3205

Relators sought writ of mandamus to have referendum on zoning ordinance passed as emergency legislation placed on upcoming general-election ballot.

The Supreme Court held that:

- Relators caused unreasonable delay in waiting to file action, as relevant to whether action was barred by laches;
- City and prospective purchaser of land were not prejudiced by delay, and thus action was not barred by laches;
- Relators lacked adequate remedy in ordinary course of law;
- Ordinance validly passed as emergency legislation was not subject to referendum under city charter; and
- Ordinance sufficiently stated reasons for passage as emergency legislation.

Zoning ordinance validly passed as emergency legislation was not subject to referendum under city's charter, which stated that zoning ordinances "shall be subject to the provisions of [the charter] pertaining to their enactment and matters of initiative or referendum"; natural reading of charter was that "subject to" had one object, i.e., "the provisions of [the charter]," meaning that zoning ordinances could be enacted in same way as other ordinances and that charter's referendum

provisions applied to such ordinances, and charter incorporated state law concerning referendum petitions, which law exempted from referendum power ordinances passed as emergency legislation.

Stated reasons in zoning ordinance for its passage as emergency legislation, specifically, to preserve and increase municipal income tax revenues, to protect value of previously made utility infrastructure investments in zoned area, and to protect city's influence over and ability to fund infrastructure improvements in zoned area, were sufficient to satisfy requirement that ordinance set forth reasons for passage as emergency legislation under statute providing that such ordinances go into immediate effect, and thus zoning ordinance was not subject to referendum.

PUBLC RECORDS - NEW HAMPSHIRE

Colquhoun v. City of Nashua

Supreme Court of New Hampshire - October 26, 2022 - A.3d - 2022 WL 14664688

Records requester brought action against city after city denied request for certain e-mail communications between city employees pursuant to Right-to-Know Law.

The Superior COURT entered judgment in favor of requester but denied requester's motion for attorney's fees. Requester appealed.

The Supreme Court held that:

- City should have known that denial of request on basis that records were not reasonably described violated Right-to-Know Law, as would require award of fees, and
- City also should have known that denial of request on basis that it was unduly burdensome violated Right-to-Know Law, as would require award of fees.

City should have known that denial of records request, which sought all email communications between two city employees during specified two-month period, on basis that records were not reasonably described violated Right-to-Know Law, as would require award of attorney's fees to requester after trial court found in her favor in her action against city for violation of Right-to-Know Law; although city asserted that caselaw indicated use of "all" rendered request deficient, such caselaw was distinguishable, and city's own actions in quickly finding the responsive documents after requester filed suit demonstrated that requester's description was sufficient to permit city to find documents.

City should have known that denial of records request, which sought all email communications between two city employees during specified two-month period, on basis that request was unduly burdensome violated Right-to-Know Law, as would require award of attorney's fees to requester after trial court found in her favor in her action against city for violation of Right-to-Know Law; caselaw clearly demonstrated that, even if request was unduly burdensome, city could not simply categorically deny the request in its entirety but rather was required to undertake reasonable search.

PUBLIC UTILITIES - PENNSYLVANIA

City of Lancaster v. Pennsylvania Public Utility Commission

Commonwealth Court of Pennsylvania - October 11, 2022 - A.3d - 2022 WL 6572195

Municipalities filed petition for review against Public Utility Commission (PUC) challenging constitutionality of regulation that mandated outdoor gas meter locations but permitted natural gas distribution companies (NGDC's) to consider indoor gas meter locations when meter was within building in a locally designated historical district.

The Commonwealth Court sustained PUC's preliminary objection to petition's count alleging regulation violated state constitutional provision governing natural resources, but overruled PUC's preliminary objection to count challenging regulation as unconstitutional as an improper delegation of PUC's authority to private parties. Municipalities filed application seeking summary relief as to remaining count.

The Commonwealth Court held that regulation improperly vested absolute discretion in NGDCs, and thus was an unconstitutional delegation of legislative authority.

Regulation, that generally required gas meters to be placed outside building but allowed inside meter location to be considered when building was located in historic district, improperly vested absolute discretion in natural gas distribution companies (NGDCs) as to whether to require that a gas meter be located inside or outside of historic building, such that regulation was without adequate standards to guide and restrain exercise of authority delegated from Public Utility Commission (PUC) to NGDCs, and thus regulation was unconstitutional delegation of legislative authority; regulation lacked formal procedure to challenge NGDC's decision, NGDCs were not required to give reasons for decision, and regulation contained no presumption of maintaining gas meter's current location.

BANKRUPTCY - PUERTO RICO

In re Financial Oversight and Management Board for Puerto Rico

United States District Court, D. Puerto Rico - October 12, 2022 - B.R. - 2022 WL 6949441

In Title III debt restructuring proceedings brought pursuant to the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), debtor, the Puerto Rico Highways and Transportation Authority (HTA), by and through the Financial Oversight and Management Board for Puerto Rico, sought confirmation of its modified fifth amended Title III plan of adjustment.

The District Court held that confirmation of the plan was warranted.

Good and sufficient cause supported confirmation, under Title III of the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), of the modified fifth amended Title III plan of adjustment of the Puerto Rico Highways and Transportation Authority (HTA); all objections to confirmation had been resolved, overruled, or withdrawn, the plan was consistent with the applicable HTA fiscal plan and satisfied applicable sections of PROMESA, the provisions of the plan constituted a good faith, reasonable, fair, and equitable compromise and settlement of all claims and controversies resolved pursuant to the plan, including specified bond claims, and the Financial Oversight and Management Board for Puerto Rico consented to confirmation.

BANKRUPTCY - PUERTO RICO

In re Financial Oversight and Management Board for Puerto Rico

United States Court of Appeals, First Circuit - October 27, 2022 - F.4th - 2022 WL

15254099

In Title III debt restructuring proceedings brought pursuant to the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), Financial Oversight and Management Board for Puerto Rico filed motion for confirmation of modified eighth amended proposed joint plan of adjustment for Commonwealth of Puerto Rico, Employees Retirement System of the Government of the Commonwealth of Puerto Rico and the Puerto Rico Public Buildings Authority.

Creditors objected.

The United States District Court for the District of Puerto Rico overruled objections, and confirmed plan.

Teachers' associations appealed and filed motions for stay pending appeal. The District Court denied stay motions.

Retirees then appealed confirmation order.

The Court of Appeals held that:

- Confirmation order did not incorporate by reference the stipulation and final judgment's invalidation of Acts and, thus, Court did not possess jurisdiction over retirees' action, and
- Retirees' failure to timely appeal stipulation and final judgment meant that Court lacked jurisdiction over retirees' action.

A passing reference in findings of fact, conclusions of law and confirmation order for plan of adjustment for Commonwealth of Puerto Rico, Employees Retirement System of the Government of the Commonwealth of Puerto Rico and the Puerto Rico Public Buildings Authority to a stipulation and final judgment approved by Title III court, which entered settlement in adversary proceeding between Financial Oversight and Management Board for Puerto Rico, the Commonwealth government, and Office of Management and Budget (OMB) agreeing that Acts permitting certain government employees to retire early and providing enhanced retirement benefits were invalidated pursuant to Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA) did not amount to confirmation order's incorporation by reference of stipulation and final judgment's invalidation of Acts and, thus, Court of Appeals did not possess jurisdiction over retirees' action seeking to challenge confirmation order.

Under merger doctrine, adversary proceeding's stipulation and final judgment approved by Title III court, which entered settlement between Financial Oversight and Management Board for Puerto Rico, the Commonwealth government, and Office of Management and Budget (OMB) agreeing that Acts permitting certain government employees to retire early and providing enhanced retirement benefits were invalidated pursuant to Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), could not be construed as part of main bankruptcy case's findings of fact, conclusions of law and confirmation order for plan of adjustment for Commonwealth of Puerto Rico, Employees Retirement System of the Government of the Commonwealth of Puerto Rico and the Puerto Rico Public Buildings Authority and, thus, retirees' failure to timely appeal stipulation and final judgment meant that Court of Appeals lacked jurisdiction over retirees' action, seeking to challenge confirmation order; adversary proceeding was separate from bankruptcy case and, upon entry of approval order, became final and immediately appealable.

WATER LAW - SOUTH DAKOTA

Little v. Hanson County Drainage Board, Hanson County

Supreme Court of South Dakota - October 26, 2022 - N.W.2d - 2022 WL 15115230 - 2022 S.D. 63

Objectors brought action against county drainage board, alleging that the board failed to follow approval procedures outlined in its ordinances and state statutes when granting drainage permit application to clean out pre-existing ditch located in township road's right-of-way.

The Circuit Court affirmed board's decision. Objectors appealed.

The Supreme Court held that:

- Objectors were required to directly appeal township's approval of application in order to challenge township's consent to permit;
- Board complied with procedures outlined in its ordinances for examining drainage permit application to determine whether township provided necessary written approval;
- Board complied with public notice requirements;
- Board did not violate its ordinance requiring applicant to post notice on the property at county's direction by failing to require applicant to post notice on his property;
- Board did not abuse its discretion in approving application without considering applicant's alleged prior improper removal of driveway and culvert; and
- Proffered evidence that objectors alleged would establish that township's consent to permit was invalid was not relevant in determining whether board complied with its ordinances in granting application.

BALLOT INITIATIVES - SOUTH DAKOTA

Dakotans for Health v. Noem

United States Court of Appeals, Eighth Circuit - November 1, 2022 - F.4th - 2022 WL 16559224

Ballot question committee brought action against Governor of the State of South Dakota, South Dakota Attorney General, and South Dakota Secretary of State, alleging that legislative bill amending state law regarding petition circulation process violated First Amendment.

The United States District Court for the District of South Dakota granted committee's motion for preliminary injunction, and state appealed.

The Court of Appeals holds that:

- Committee had standing to seek prospective First Amendment relief;
- Committee was likely to succeed on merits of its First Amendment claim;
- Committee faced irreparable harm in absence of preliminary injunction; and
- Balance of harms and public interest favored issuance of preliminary injunction.

Ballot question committee faced concrete, particularized, and actual injury from South Dakota law imposing new obligations on persons compensated to circulate initiative petitions, as required to establish standing to seek prospective First Amendment relief, even though challenged provisions

were directed primarily at petition circulators; requirement that paid petition circulators publicly disclose sensitive personal information would likely make it more difficult for committees to recruit paid circulators, thereby restricting committee's ability to reach its audience, and South Dakota regulated petition circulators and ballot question committees in such way that their interests were highly intertwined, if not inseparable.

Ballot question committee was likely to succeed on merits of its claim that South Dakota law requiring paid petition circulators to make sensitive personal information publicly available violated First Amendment, for purposes of evaluating committee's entitlement to preliminary injunction; state failed to show that paid petition circulators created greater risk of fraud than volunteers, public disclosure requirement was likely to chill right to circulate petitions, and requirement was not narrowly tailored to serve state's important interests.

Ballot question committee faced irreparable harm in absence of preliminary injunction barring enforcement of South Dakota law imposing restrictions on paid petition circulators that likely violated First Amendment; committee could not sue for money damages, and law affected core political speech by impacting number of persons willing to circulate petitions for committee and number of persons eligible to circulate for it, and thus its ability to reach its audience and successfully gather enough signatures to place question on ballot.

Balance of harms and public interest favored issuance of preliminary injunction barring enforcement of South Dakota law imposing restrictions on paid petition circulators that likely violated First Amendment; while South Dakota had important interests in protecting integrity of ballot initiative process, it had no interest in enforcing overbroad restrictions.

SURETY BONDS - UTAH

In re Western Insurance Company

Supreme Court of Utah - October 27, 2022 - P.3d - 2022 WL 15048431 - 2022 UT 38

County sought hearing after insurer's liquidator denied county's claims to recover on surety bonds purchased from insurer by developer which defaulted and ceased work on municipal projects.

The Third District Court entered judgment for liquidator, and county appealed.

The Supreme Court held that:

- Release and waiver was ambiguous such that extrinsic evidence was admissible to interpret the document;
- Any error by district court in admitting or excluding evidence was not harmful; and
- County failed to show that court's determination that liquidator could amend determination of insurer's liability was faulty.

Release and waiver which insurer's liquidator sent to county, which sought to recover on surety bonds purchased from insurer by developer which defaulted and ceased work on municipal projects, which provided that county's claim would be "fully compromised and settled and [ ] not in dispute" was ambiguous such that extrinsic evidence was admissible to interpret the document; while county argued that they had entered into a binding settlement agreement which required liquidator to recommend county's claims to the court, liquidator argued that the document simply affirmed the statutory rights and obligations placed on each party and that the "compromised and settled" language warned county that, if it objected, it would lose its statutory right to object to the

liquidator's determination.

County failed to establish that Insurer Receivership Act did not allow insurer's liquidator to amend determination of insurer's liability to county on surety bonds purchased by developer which defaulted and ceased work on municipal projects; while county contended that insurer's liability became fixed on the date court issued liquidation order, county provided no analysis or authority to back up its claims, and did not show why the district court's determination that the Act allowed the liquidator to amend the notice of determination, after obtaining additional information, was faulty.

Record on appeal in action regarding notice of determination for liquidated insurer did not support county's contention that the district court found that bonded projects had been substantially completed, and that such finding was error; district court concluded that the county had failed to demonstrate that it would need to expend any money to finish the projects and therefore dismissed the county's objection to the amended notice of determination because the county failed to provide sufficient evidence to demonstrate that the liquidator got it wrong when he concluded that the county had not suffered a loss.

TELECOM - ARIZONA

Vertical Bridge Development LLC v. County of Maricopa

United States District Court, D. Arizona - October 5, 2022 - F.Supp.3d - 2022 WL 5434217

Developer brought a claim against county board of supervisors, alleging that board's decision denying developer's special use permit (SUP) application to build a cellular network tower violated the Telecommunications Act (TCA).

Board moved for partial judgment on the pleadings.

The District Court held that:

- Board's denial of developer's SUP was a decision subject to the TCA, and
- Developer's allegations stated a claim for violation of TCA requirements that the basis of a denial be in writing and supported by substantial evidence.

County board of supervisors' denial of developer's special use permit (SUP) application to build a cellular network tower was a "decision" to deny a request to place personal wireless service facilities subject to the Telecommunication Act's (TCA) requirements that the basis of the denial be stated in writing and supported by substantial evidence, regardless of whether the denial was characterized as a legislative or adjudicative act; the board considered the SUP application, considered the proposed cellular tower site along with specific technical facts, design specifications, and community member opinions, and denied the application.

Developer's allegation that the county board of supervisors denied its special use permit (SUP) application to construct a cellular tower without providing a basis for the denial stated a claim for violation of the Telecommunications Act (TCA) requirement that the basis of a denial of a request to build a wireless service facility be stated in writing.

Developer's allegation that the county board of supervisors denied developer's special use permit (SUP) application to construct a cellular tower based on certain objectors' aesthetic concerns or the rural nature of the area stated a claim for violation of the Telecommunications Act (TCA) requirement that a denial of a request to build a wireless service facility be supported by substantial

evidence in a written record.

ANNEXATION - CALIFORNIA

Tracy Rural County Fire Protection District v. Local Agency Formation Commission of San Joaquin County

Court of Appeal, Third District, California - October 13, 2022 - Cal.Rptr.3d - 2022 WL 7265008

Rural county fire protection district, joined by city, filed petition for writs of ordinary and administrative mandate and complaint for declaratory relief challenging decision by county local agency formation commission (LAFCO) adopting governance model for fire services requiring that future annexations to city would detach from district.

The Superior Court denied petition. District appealed.

The Court of Appeal held that:

- LAFCO did not have authority to issue resolution under statute granting it authority to approve proposals for change of organization;
- Resolution was not authorized under statute granting LAFCO authority to make and enforce regulations for orderly and fair conduct of hearings;
- Resolution was not authorized under statutes providing LAFCO with power to review and approve proposals for changes of organization consistent with procedures;
- Resolution was not authorized under statutes providing LAFCO with power to review and approve changes of organizations consistent with policies and guidelines;
- Resolution was contrary to statute setting forth legislative findings and declarations;
- Resolution was not authorized under statutes governing standards for LAFCO to assess proposals; and
- Resolution was not authorized by statutes granting LAFCO power to review spheres of influence.

County local agency formation commission (LAFCO) was not authorized to issue resolution ordering detachment of fire protection services from rural county fire protection district in future annexations of territory by the city, but rather it was required to act on specific proposals for annexation and/or detachment, under statute granting it power to review and approve with or without amendment proposals for organization or reorganization; although resolution was issued against backdrop of two annexation proposals, LAFCO was not reviewing either of those proposals when it issued challenged resolutions, and LAFCO instead established policy requiring city to include detachment in all future annexation proposals.

Statute granting county local agency formation commission (LAFCO) authority to make and enforce regulations for the orderly and fair conduct of hearings by LAFCO did not authorize it to issue resolution ordering detachment of fire protection services from rural county fire protection district in future annexations of territory by the city; resolution had nothing to do with orderly and fair conduct of hearings by LAFCO.

Resolution adopted by county local agency formation commission (LAFCO) ordering detachment of fire protection services from rural county fire protection district in future annexations of territory by the city was not “procedure,” within meaning of statutes providing LAFCO with power to review and approve proposals for changes of organization or reorganization consistent with procedures adopted

by LAFCO, and to adopt written procedures for evaluation of proposals, and thus statutes were not basis of authority to issue resolution; resolution did not set forth any rules of procedure for bringing or presenting an annexation proposal to the LAFCO, but it instead dictated the substance of that proposal.

Resolution adopted by county local agency formation commission (LAFCO) ordering detachment of fire protection services from rural county fire protection district in future annexations of territory by city was not "policy" or "guideline," within meaning of statute providing LAFCO with power to review and approve proposals for changes of organization or reorganization consistent with policies and guidelines adopted by the LAFCO, and thus statute was not basis for authority to issue resolution; resolution was not statement of general principles, as it went beyond statement of general goals or outline of policy or conduct and specifically precluded consideration of annexation proposals that did not include detachment, and while policies could include directives, change in organization could not be one of them.

Resolution adopted by county local agency formation commission (LAFCO) ordering detachment of fire protection services from rural county fire protection district in future annexations of territory by city was contrary to statute setting forth legislative findings and declarations of Cortese-Kno--Hertzberg Local Government Reorganization Act of 2000, which made clear that dispositive issue to be decided was which agency or agencies could best provide the relevant services; preventing city from proposing what it considered to be best model for fire protection services, i.e., nondetachment from district, improperly limited LAFCO's consideration of that dispositive issue in context of specific annexation being proposed.

Resolution adopted by county local agency formation commission (LAFCO) ordering detachment of fire protection services from rural county fire protection district in future annexations of territory by city was not "standard," under statutes governing standards for assessing factors in reviewing a proposal for change of organization or for assessing evaluation of plan for providing services within affected territory, and thus statutes were not basis for LAFCO's authority to issue resolution; resolution did not set up detachment model as standard against which annexation proposal should be compared in assessing proposal or factors, but it instead required detachment in the proposal itself.

Resolution adopted by county local agency formation commission (LAFCO) ordering detachment of fire protection services from rural county fire protection district in future annexations of territory by city was not authorized by statutes granting LAFCO power to review services and spheres of influence of cities and special districts, and to enact policies to promote development of areas within the sphere; LAFCO did something entirely different from sphere of influence determination when it ordered detachment for all future annexation proposals, and resolution went beyond authorizing logical and orderly development of areas within the sphere by effectively initiating future changes of organization by requiring detachment as condition of submitting any future annexation proposal.

EMINENT DOMAIN - CALIFORNIA

Sheetz v. County of El Dorado

Court of Appeal, Third District, California - October 19, 2022 - Cal.Rptr.3d - 2022 WL 10993726

Landowner filed petition for writ of mandate and complaint for declaratory and injunctive relief to challenge $23,420 traffic impact mitigation fee imposed by county as a condition of issuing him a

building permit for the construction of a single-family residence on his property.

The Superior Court sustained county's demurrer in part and denied the petition for writ of mandate, and landowner appealed.

The Court of Appeal held that:

- Fee was not subject to the heightened scrutiny of the Nollan/Dolan test;
- County was not required by the Mitigation Fee Act to evaluate the specific traffic impacts attributable to landowner's development before imposing fee; and
- Fee was reasonably related to the burden imposed by the development.

The requirements of *Nollan v. California Coastal Comm'n*, 483 U.S. 825, and Dolan v. City of Tigard, 512 U.S. 374, do not extend to development fees that are generally applicable to a broad class of property owners through legislative action; legislatively prescribed monetary fees, as distinguished from a monetary condition imposed on an individual permit application on an ad hoc basis that are imposed as a condition of development are not subject to the Nollan/Dolan test for an unconstitutional monetary exaction.

Traffic impact mitigation fee $23,420 which county imposed on landowner as a condition of issuing a building permit for the construction of a single-family residence on his property was not subject to the heightened scrutiny of the *Nollan/Dolan* test for assessing takings claims in the context of land-use exactions; fee was not an "ad hoc exaction" imposed on a property owner on an individual and discretionary basis, but was a development impact fee imposed pursuant to a legislatively authorized fee program that generally applied to all new development projects within the county, and fee was calculated using a formula that considered various factors.

Landowner could not maintain claim for declaratory relief that county's policy of requiring new development to pay the full cost of constructing new roads and widening of existing roads without regard to the cost specifically attributable to the particular project on which the fee is imposed resulted in an unlawful exaction of $23,420, which was required as condition for landowner to obtain permit to construct single-family residence, as landowner's sole remedy was administrative mandamus, not declaratory relief.

Traffic impact mitigation fee of $23,420, which county imposed as a condition for issuing a building permit for the construction of a single-family residence, was reasonably related to the burden imposed by the development, and thus was valid under the Mitigation Fee Act, where county considered the information contained in a technical report prepared by the Department of Transportation (DOT) and studies analyzing the impacts of contemplated future development on existing public roadways and the need for new and improved roads as a result of new development, and amended fee rates were adopted after DOT prepared a detailed memorandum explaining the purpose of the fee, the use to which the fee was to be put, and the methodology used to calculate the fee rate for each type of new development.

EMINENT DOMAIN - FLORIDA

Gulf Coast Transportation, Inc. v. Hillsborough County

District Court of Appeal of Florida, Second District - October 7, 2022 - So.3d - 2022 WL 5265431

Taxicab companies, which operated in county pursuant to medallions issued by commission created

by special legislation, brought inverse condemnation against the State and county, alleging the two entities had taken their taxi medallions without compensation when the legislature dissolved the commission and repealed the special legislation, and the county did not compensate the companies for or offer to purchase their old medallions, but instead required them to purchase new ones.

The Circuit Court denied the State's motion to dismiss, but granted summary judgment to the county. The State and the companies appealed, and the appeals were consolidated.

The District Court of Appeal held that:

- District Court of Appeal had jurisdiction to review Circuit Court's order denying the State's motion to dismiss, and
- The companies did not have a property interest in the medallions that was cognizable under the Takings Clause.

District Court of Appeal had jurisdiction to review Circuit Court's order denying the State's motion to dismiss, for failure to state a claim, taxicab companies' claim the State had taken their private property without compensation by negating their taxicab medallions when the legislature dissolved the commission that had issued the medallions and repealed the special legislation governing the commission, since the Circuit Court's ruling on that motion was directly related to an aspect of its appealable final summary judgment in favor of county in the same inverse condemnation proceeding, namely, whether a taking occurred within the meaning of the Florida Constitution.

Taxicab companies that held medallions issued by commission created by special legislation did not have a property interest in the medallions that was cognizable under the Takings Clause of the Florida Constitution, and thus, the State did not take compensable property from the companies when the legislature dissolved the commission and repealed the special legislation governing it, even though the legislature had declared that the medallions were the private property of medallion holders and had granted them the ability to transfer their medallions; the legislature always retained the power to change or abolish the regulatory framework that created the medallions, and any interest the companies had in their medallions was a unilateral expectation in the persistence of that framework.

TELECOM - ILLINOIS

City of East St. Louis v. Netflix, Inc.

United States District Court, S.D. Illinois - September 23, 2022 - F.Supp.3d - 2022 WL 4448868

City brought putative class action in diversity against video streaming platforms, alleging ongoing violations of the Illinois Cable and Video Competition Law (CVCL), and also asserting claims for trespass and violation of city ordinance requiring city's and operating franchise company's prior written consent and approval to resell cable communication signals or service within the city.

Platforms moved to dismiss.

The District Court held that:

- As a matter of first impression, CVCL did not provide an express private right of action;
- City did not have right of action based on home rule authority;
- CVCL did not imply a private right of action;

- City failed to state a claim for trespass;
- City ordinance did not provide an express right of action;
- City did not plausibly allege that platforms were violating the ordinance at issue; and
- Implying a private right of action was not warranted since ordinance provided an adequate remedy.

Illinois' Cable and Video Competition Law (CVCL), which required video service providers to obtain authorization from the state to provide services and pay service provider fees to local units of government, did not provide an express private right of action to city to bring lawsuit and collect service fees from video streaming platforms; CVCL clearly provided an express right of action to the state's Attorney General to institute a lawsuit for violations of CVCL and did not state that local units of government could do the same, nor did it affirmatively delegate any sort of power to local units of government when it came to enforcing its provisions.

City failed to establish that it had right of action based on home rule authority to bring lawsuit against video streaming platforms under the Illinois Cable and Video Competition Law (CVCL) to collect requisite provider fees, where CVCL only authorized the state's Attorney General to bring suit and city did not show that home rule authority operated to allow it to step into the Attorney General's shoes and file the lawsuit, and further, CVCL limited ability of local governments to act because it explicitly stated that its provisions were a limitation of home rule powers under the state constitution.

Illinois' Cable and Video Competition Law (CVCL), which required video service providers to obtain authorization from the state to provide services and pay service provider fees to local units of government, did not imply a private right of action for city to bring lawsuit and collect service fees from video streaming platforms, where CVCL provided an adequate remedy through enforcement framework which granted authority to the state's Attorney General to investigate, penalize, and remedy violations of the statute, and implying a private right of action for local governments was not consistent with statute's underlying purpose, which was to implement a state authorization process and uniform standards and procedures for cable franchising.

Content provided through the internet by video streaming platforms did not cause a physical intrusion or interfere with city's possessory rights in its property, and thus, the alleged unlawful entry of platforms' content on city's property, delivered to subscribers via wireline facilities located at least partially in public rights-of-way without compensating city for use of the public rights-o--way, did not give rise to an actionable trespass claim under Illinois law; video content transmitted through the internet did not take up physical space that could conceivably interfere with city's exclusive possession of public rights-of-way or subtract from city's use of the rights-of-way, and any actual physical intrusion was by the internet wirelines, which platforms did not install, operator, or maintain.

Section of municipal code requiring city's and operating franchise company's prior written consent and approval to resell cable communication signals or service within the city, did not provide an express private right of action under Illinois law to remedy a violation, in city's lawsuit against video streaming platforms alleging that platforms owed it a service fee for using its public rights-of-way to transmit content to subscribers; instead, the municipal code provided for administrative enforcement and punishment for violations as a misdemeanor with a fine and imprisonment.

Implying a private right of action under section of municipal code requiring city's and operating franchise company's prior written consent and approval to resell cable communication signals or service within the city was not warranted under Illinois law, in city's lawsuit against video streaming platforms alleging that platforms owed it a service fee for using its public rights-of-way to transmit

content to subscribers, where city's allegations regarding platforms' peering agreements with internet service provides did not lead to plausible conclusion that platforms were even reselling cable in violation of the ordinance.

Municipal code provided adequate remedy for section requiring city's and operating franchise company's prior written consent and approval to resell cable communication signals or service within the city, and thus, implying a private right of action was not warranted under Illinois law, in city's lawsuit against video streaming platforms alleging that platforms owed it a service fee for using its public rights-of-way to transmit content to subscribers; municipal code established a framework for administrative enforcement and remediation of ordinance violations, which city did not argue was inadequate to deter violations.

MUNICIPAL CORPORATIONS - MISSISSIPPI

Longo v. City of Waveland

Supreme Court of Mississippi - October 20, 2022 - So.3d - 2022 WL 11581158

Individual objector filed a notice of appeal of decision of city's board of aldermen to approve application for conditional use and preliminary plat approval. After the ten-day period for taking an appeal had run, objector then amended the notice of appeal to name applicant as appellee.

In a different action, an objector, which was a neighboring property owner, filed a notice of appeal of city's decision to grant preliminary plat approval for the development of a subdivision, and that notice of appeal did not name the applicant as a party.

The Circuit Court entered separate judgments dismissing the appeals in both actions. Both objectors appealed, and the two actions were consolidated.

As a matter of first impression, the Supreme Court held that under the statute governing appeals of decisions of local governing authorities, which requires that a petitioner before a local governing authority be made a party to the appeal, a notice of appeal that is filed on time but that erroneously omits a petitioner's name does not defeat the circuit court's jurisdiction.

Under the statute governing appeals of decisions of local governing authorities, which requires that a petitioner before a local governing authority be made a party to the appeal, a notice of appeal that is filed on time but that erroneously omits a petitioner's name does not defeat the circuit court's jurisdiction, and the omission may be corrected; naming all petitioners as appellees in a notice of appeal is a procedural requirement and is not jurisdictional.

TELECOM - NEVADA

City of Reno v. Netflix, Inc.

United States Court of Appeals, Ninth Circuit - October 28, 2022 - F.4th - 2022 WL 15579803

City brought action against digital content service providers, alleging providers failed to pay franchise fees under Nevada's Video Service Law (VSL) and seeking declaration pursuant to federal Declaratory Judgment Act.

The United States District Court for the District of Nevada dismissed action. City appealed.

The Court of Appeals held that:

- Under Nevada law as predicated by the Court of Appeals, the Video Service Law (VSL), permitting local governments to impose franchise fees that do not exceed five percent of a video service provider's gross annual revenue from subscribers within the local government's jurisdiction, does not impliedly create a private right of action for cities to sue for unpaid franchise fees;
- The Declaratory Judgment Act does not provide a cause of action when a party lacks a cause of action under a separate statute and seeks to use the Act to obtain affirmative relief; and
- City's action was offensive, not defensive, and thus city could not obtain relief pursuant to Declaratory Judgment Act in absence of an independent cause of action against providers.

Court of Appeals would exercise its discretion to forgive city's forfeiture of issue of whether Declaratory Judgment Act provided an independent right of action, on city's appeal of dismissal, for failure to state claim, of its action against digital content service providers alleging providers failed to pay franchise fees under Nevada's Video Service Law (VSL) and seeking declaration pursuant to federal Declaratory Judgment Act; issue was pure question of law, and because Court of Appeals would ultimately affirm district court's dismissal, there was no risk that providers would suffer prejudice.

Under Nevada law as predicated by the Court of Appeals, the Video Service Law (VSL), permitting local governments to impose franchise fees that do not exceed five percent of a video service provider's gross annual revenue from subscribers within the local government's jurisdiction, does not impliedly create a private right of action for cities to sue for unpaid franchise fees.

City's action against digital content service providers, alleging providers failed to pay franchise fees under Nevada's Video Service Law (VSL), was offensive, not defensive, and thus city could not obtain relief pursuant to Declaratory Judgment Act in absence of an independent cause of action against providers.

NEGLIGENCE - NEW YORK

Schneider v. Hanasab

Supreme Court, Appellate Division, Second Department, New York - October 5, 2022 - N.Y.S.3d - 2022 WL 5065968 - 2022 N.Y. Slip Op. 05552

Executrix of motorized-scooter rider's estate brought personal injury and wrongful death action against driver and town, alleging that as a result of defendants' negligence, rider was struck by driver's vehicle at an intersection in town.

After jury found that both driver and the town were negligent, apportioned liability 70% to the town and 30% to driver, and awarded plaintiff damages in the principal sums of $2,000,000 for the decedent's conscious pain and suffering and $125,000 for loss of services, the Supreme Court, Nassau County, denied driver's motion to set aside the jury verdict and for new trial and denied town's motion to set aside the jury verdict and for judgment as a matter of law or a new trial. Defendants separately appealed.

The Supreme Court, Appellate Division, held that:

- Jury finding that town was 70% at fault was not contrary to the weight of the evidence;

- Jury's award of principal sum of $2,000,000 for rider's conscious pain and suffering was not contrary to the weight of the evidence; but
- Jury's award of damages for loss of services in the sum of $125,000 was contrary to the weight of the evidence.

Jury verdict finding town 70% at fault was not contrary to the weight of the evidence in personal injury and wrongful death action brought by executrix of motorized-scooter rider's estate against driver and town, alleging that as result of defendants' negligence, rider was struck by driver's vehicle at an intersection in town, where there was valid line of reasoning and permissible inferences that could lead rational persons to jury's conclusion that town was negligent with respect to placement of stop line at intersection where rider was struck and that such negligence was proximate cause of accident, and jury's apportionment of fault was supported by fair interpretation of the evidence.

Jury verdict awarding executrix of motorized-scooter rider's estate principal sum of $2,000,000 for rider's conscious pain and suffering was not contrary to the weight of the evidence in personal injury and wrongful death action brought by executrix against driver and town, alleging that as result of defendants' negligence, rider was struck by driver's vehicle at an intersection in town, where opinion of executrix's medical expert regarding pain rider experienced between time of accident and his death four days later, together with executrix's testimony regarding her observations of rider during his hospitalization, sufficiently demonstrated degree of rider's consciousness and severity of pain he suffered, and award did not deviate materially from what would be reasonable compensation.

Jury's award of damages for loss of services in the sum of $125,000 was contrary to the weight of the evidence in personal injury and wrongful death action brought by executrix of motorized-scooter rider's estate against driver and town, alleging that as result of defendants' negligence, rider was struck by driver's vehicle at an intersection in town, where loss of services for four days was not supported by showing of cost of replacing the rider's household services.

DEEDED PROPERTY - OHIO

Cleveland Botanical Garden v. Worthington Drewien

Supreme Court of Ohio - October 20, 2022 - N.E.3d - 2022 WL 11391874 - 2022-Ohio-3706

Sublessee of city park filed declaratory judgment action against heirs of grantor who conveyed land to city for creation and operation of park, seeking judicial determination that sublessee's use, operation, and maintenance of deeded property was consistent with deed restrictions.

Heirs sought injunction to prevent sublessee from charging for admission and parking. Parties brought cross-motions for partial summary judgment, and the Court of Common Pleas entered declaratory judgment in favor of sublessee. Heirs appealed. The Court of Appeals affirmed in part, reversed in part, and remanded. Heirs appealed and sublessee cross-appealed.

The Supreme Court held that:

- Sublessee's operation of facilities, building, gardens, and parking garage in park, along with charging of fees to maintain those operations, was consistent with terms of deed granting property to city;
- Deed of gift conveying property to city for purpose of maintaining a park therein "for the benefit of

all the people" did not create a trust; and
- Reversionary interest held by heirs was original to root of title and thus could not be extinguished under Marketable Title Act (MTA).

City park sublessee's operation of facilities, buildings, gardens, and a parking garage, and its charging of fees to maintain those operations, on property granted to city for purpose of "improving and maintaining a beautiful and attractive Public Park therein" was consistent with terms of deed granting property to city, which required city to maintain property "in such repair and condition as to make it an attractive and desirable place of resort" and required park "to be open at all times to the public"; to interpret deed as requiring city to permit any person to freely access all parts of park at all times would nearly suspend the practical realities of operating park.

Deed of gift conveying property to city for purpose of maintaining a park therein "for the benefit of all the people" did not create a trust, even though grantor might have intended for city to act symbolically as trustee for park, where deed used language of transfer, including that grantor did "freely give, grant, and convey" property, and deed contained reversionary clause.

Reversionary interest held by grantor's heirs in property donated to city for use as park was original to root of title and thus could not be extinguished under the Marketable Title Act (MTA), in case in which grantor's deed provided that, if property or any part thereof was diverted from specified use, property would revert to grantor or heirs.

PUBLIC RECORDS - VIRGINIA

Hawkins v. Town of South Hill

Supreme Court of Virginia - October 20, 2022 - S.E.2d - 2022 WL 11420016

Requester petitioned for writ of mandamus to compel town to produce documents requested under Virginia Freedom of Information Act (VFOIA) relating to employment disputes involving town manager.

The Mecklenburg Circuit Court granted petition in part. Requester appealed.

In a case of first impression, the Supreme Court held that:

- "Personnel information" under VFOIA exemption means private data, facts, or statements within a public record relating to a specific government employee, and
- Data, facts, and statements are "private" if disclosure would be an unwarranted invasion of personal privacy to a reasonable person.

The terms of the personnel information exemption of Virginia Freedom of Information Act (VFOIA) are to be narrowly construed to provide open access to public records.

Term "personnel," under the personnel information exemption of Virginia Freedom of Information Act (VFOIA), means a body of persons employed in some service or government employees; the definition is narrowly limited to those employed by the government and does not encompass any individual whose information merely happens to appear in a public record.

For purposes of the personnel information exemption of Virginia Freedom of Information Act (VFOIA), the term "content," as included in VFOIA's definition of "information" as "the content within a public record that references a specifically identified subject matter," means data, facts, or

statements.

Term “personnel information,” for purposes of the personnel information exemption of Virginia Freedom of Information Act (VFOIA), means data, facts, or statements within a public record relating to a specific government employee, which are in the possession of the entity solely because of the individual’s employment relationship with the entity, and are private, but for the individual’s employment with the entity.

GOVERNMENTAL FUNCTIONS - ALABAMA

Barnes v. Town Council of Perdido Beach

Supreme Court of Alabama - October 21, 2022 - So.3d - 2022 WL 12240411

Objectors sought an injunction to prevent town council from constructing a public boat launch and pier at the end of a public street and establishing a public park in the surrounding area.

After the case was removed to federal court and then remanded, the Circuit Court held a bench trial and then entered a judgment for town council. Objectors appealed.

The Supreme Court held that:

- Construction of the boat launch and pier did not violate the street’s public dedication;
- As a matter of apparent first impression, the construction of the boat launch and pier was a governmental function, not a proprietary one, and thus the wetland-setback provisions of city zoning ordinances and subdivision regulations did not preclude the construction project even though it would take place near a creek; and
- That certain amendments to zoning ordinances made it easier for town council to go through with the project did not make the amendments arbitrary.

Town council’s construction of a public boat launch and pier at the end of a public street did not violate the street’s public dedication; boat launch and pier would be placed where the street ended at the edge of a creek and would not destroy or inhibit the use of the street as a public road.

Town council’s construction of a public boat launch and pier near a creek was a “governmental function,” not a “proprietary one,” and thus the wetland-setback provisions of city zoning ordinances and subdivision regulations did not preclude the construction project; municipalities had delegated authority to provide recreational facilities for the well-being of their citizens, and the town’s master plan contained several references to providing public water access and boat launches to the community.

That certain amendments to zoning ordinances made it easier for town council to construct a public boat launch and pier did not make the amendments “arbitrary”; the adoption of the amendments raised questions upon which reasonable differences could exist in view of all the circumstances, and the wisdom of the amendments was fairly debatable.

OPEN MEETINGS - ILLINOIS

Scatchell v. Board of Fire and Police Commisioners for Village of Melrose

Park

Appellate Court of Illinois - September 30, 2022 - N.E.3d - 2022 IL App (1st) 201361 - 2022 WL 4590759

Former police officer appealed decision of village board of fire and police commissioners, which terminated officer after finding that he had violated departmental policies.

The Circuit Court upheld the board's decision. Officer appealed.

The Appellate Court held that:

- Seven of eight factual findings that officer violated departmental policies were not against the manifest weight of the evidence;
- Decision to terminate officer was neither unreasonable nor arbitrary, and was appropriate considering nature and scope of his misconduct;
- Police department not violate its own policies, collective bargaining agreement with officer's union, or any other procedural challenges while investigating officer;
- Officer failed to establish that board violated the Open Meetings Act; and
- Trial court did not abuse its discretion in denying officer leave to amend his complaint.

MUNICIPAL CORPORATIONS - GEORGIA

City of College Park v. Martin

Court of Appeals of Georgia - October 18, 2022 - S.E.2d - 2022 WL 10225601

Former city firefighter brought action against city and city officials challenging city's termination of her employment, alleging, among other things, that city violated Open Meetings Act (OMA) in appointing interim city manager without a public vote and that city manager thus was not authorized to uphold firefighter's termination.

The Superior Court initially granted summary judgment to defendants. On firefighter's appeal, the Court of Appeals, affirmed in part and reversed in part, but the Supreme Court granted certiorari to defendants, affirmed in part and reversed in part, and remanded for further consideration of key issue for firefighter's OMA claim, namely whether city charter required a public vote on appointment of an interim city manager. On remand, the Superior Court granted summary judgment to firefighter, holding that interim city manager's appointment without a public vote was improper. Defendants appealed.

The Court of Appeals held that:

- Provision in city charter providing for appointment of an interim city manager did not require that a public vote be taken on the appointment, and
- Interim city manager was not improperly appointed and was authorized to uphold city's termination of firefighter's employment.

Provision in city charter providing that the mayor and the city council "shall have full powers to make a temporary appointment" to the office of city manager in the event of a vacancy does not require that a vote be taken on appointment of an interim city manager.

City did not violate the Open Meetings Act by failing to vote on the appointment of an interim city manager in an open meeting, and interim city manager was thus not improperly appointed and was

authorized to uphold city's termination of firefighter's employment; city charter permitted mayor and council to appoint an interim city manager without a public vote.

SCHOOL FINANCE - MISSISSIPPI

Jones County School District v. Covington County School District

Supreme Court of Mississippi - October 13, 2022 - So.3d - 2022 WL 7278319

Noncustodial school district brought action against custodial school district for accounting, declaratory judgment, money had and received, breach of fiduciary duties, and preliminary injunction, alleging that custodial district failed to share sixteenth-section income as required by statute for period of 18 years or more.

Custodial district asserted counterclaim seeking declaratory judgment regarding application of statute controlling sixteenth-section fund allocation. Noncustodial district moved for accounting and for partial summary judgment. Custodial district filed cross-motion for partial summary judgment. The Chancery Court granted motion for accounting in part. Noncustodial district filed interlocutory appeal.

The Supreme Court held that:

- Statutes establishing one-year limitations period for noncustodial school district to make a claim with custodial school district for pro rata share of sixteenth-section income were not statutes of limitation and were not in conflict with section of Mississippi Constitution providing that statutes of limitation did not run against political subdivisions, and
- Term "available," as used in statutes governing investment and pro rata distribution of sixteenth-section revenue, means only those funds which are capable of being utilized.

Statute establishing one-year limitations period for noncustodial school district to make a claim with custodial school district for pro rata share of sixteenth-section income and statute providing that "[a]ny school district failing to timely provide the list [of enrolled children] to the…custodial school district shall forfeit its right to such funds" were not statutes of limitation and were not in conflict with section of Mississippi Constitution providing that statutes of limitation did not run against political subdivisions; one-year period did not place time limit on litigation, but rather placed time limit on when noncustodial district could make claim with a custodial district, and thus was not statute of limitations.

Term "available," as used in the statute requiring custodial school district to invest revenues from sixteenth-section lands in principal fund and the statute describing payment of pro rata shares of available funds to noncustodial school districts, cannot mean all funds derived from sixteenth-section lands, and thus must mean only those funds which are capable of being utilized, i.e., expendable funds.

EMINENT DOMAIN - NEW YORK

Savo v. City of New York

Supreme Court, Appellate Division, Second Department, New York - September 28, 2022 - N.Y.S.3d - 2022 WL 4489340 - 2022 N.Y. Slip Op. 05343

Owners of three nonadjacent lots located in park preserve brought action against city seeking to recover damages for inverse condemnation.

The Supreme Court, Richmond County, denied city's motion for summary judgment. City appealed.

The Supreme Court, Appellate Division, held that:

- Owners' inverse condemnation cause of action accrued when city's parks department acquired their properties;
- Doctrine of equitable estoppel did not apply bar city's affirmative defense claiming that the statute of limitations on landowners' claim had expired;
- City's motion for summary judgment was not premature; and
- Owners' request for leave to amend their complaint was improperly raised for the first time on appeal.

LIABILITY - NEW YORK

McDaniel v. City of New York

Supreme Court, Appellate Division, First Department, New York - October 4, 2022 - N.Y.S.3d - 2022 WL 4830527 - 2022 N.Y. Slip Op. 05501

Pedestrian who allegedly tripped and fell while walking in an uneven and cracked portion of crosswalk at intersection brought personal injury action against city, road-milling contractor that had performed work in the area a little over a year before pedestrian's alleged accident, and contractor that had installed electrical conduits in the area five years before the alleged accident.

The Supreme Court, Bronx County, denied city's and road-milling contractor's motions for summary judgment and denied the electrical-conduit contractor's motion for summary judgment. City and contractors appealed.

The Supreme Court, Appellate Division, held that:

- Genuine issue of material fact as to whether map of purported defects in city's sidewalks and streets satisfied prior written notice requirement under city's administrative code precluded summary judgment in favor of city;
- Road-milling contractor was not liable for pedestrian's injuries; and
- Electrical-conduit contractor was not liable for pedestrian's injuries.

Genuine issue of material fact existed as to whether defect identified on map of purported defects in city's sidewalks and streets, which city acknowledged receiving, was the uneven and cracked portion of crosswalk that pedestrian claimed caused her to trip and fall, so as to satisfy prior written notice requirement under city's administrative code, precluding summary judgment in favor of city in pedestrian's personal injury action.

COUNTIES - OHIO

Estate of Fleenor v. Ottawa County

Supreme Court of Ohio - October 11, 2022 - N.E.3d - 2022 WL 6572090 - 2022-Ohio-3581

Estate of deceased nursing home resident filed action for negligence and other causes of action

against county, which owned and ran nursing home.

The Court of Common Pleas granted summary judgment in favor of county. Estate appealed. The Sixth District Court of Appeals reversed. County appealed, and the Supreme Court accepted jurisdiction.

The Supreme Court held that unchartered county was not sui juris, and therefore county was required to be sued in name of board of commissioners.

Unchartered county was not sui juris, and therefore it was required to be sued in the name of its board of commissioners; although county that adopted charter or alternative form of government was transformed into body politic and corporate, so as to be capable of suing and being sued, different rule applied to unchartered counties, and it was board of commissioners that could sue and be sued.

CHARTER SCHOOLS - PENNSYLVANIA

Bell v. Wilkinsburg School District

Supreme Court of Pennsylvania - September 29, 2022 - A.3d - 2022 WL 4541536

Operator of public charter schools, and grandmother of two charter school students, jointly filed lawsuit against school district seeking declarative and injunctive relief challenging district's decision changing mode of transportation for charter school students from school buses to public transportation through issuance of free passes.

The Court of Common Pleas dismissed complaint following nonjury trial. The Commonwealth Court reversed and remanded for entry in favor of charter school operator. Allowance of appeal was granted.

The Supreme Court held that:

- Regulation governing Department of Education's approval of school district's transportation plan was ambiguous, and
- Regulation did not obligate school district to obtain Department of Education's approval of transportation plan prior to implementing plan.

Department of Education regulation, which provided that a school district's means of student transportation to and from school "shall be subject to approval by the Department," was ambiguous since regulation did not unambiguously resolve question of when Department was required to approve a change in a school district's transportation plan in suit by charter school operator and grandparent of charter school students challenging district's decision to change charter school student's mode of transportation from bussing to public transportation; charter school operator contended plan must be approved before implementation, district contended Department approved plans after implementation Department decision on whether to reimburse district, and both constructions were reasonable.

Regulation governing approval of school district student transportation plans by Department of Education does not impose a requirement of prior approval, rather, the Department's remedy, if it concludes a transportation plan does not comport with the requirements of the School Code or applicable regulations, is limited to withholding financial reimbursement from the school district for the costs it incurred in implementing the transportation plan.

Regulation did not obligate school district to first obtain approval from Department of Education as to its transportation plan prior to implementing the plan, which changed mode of transportation for charter school students from school buses to public transportation through issuance of free passes; evidence showed that Department, historically, had not required school districts to seek approval prior to implementing a transportation plan, Department repealed previous regulation requiring prior approval, no other sections in same title required prior Department approval of transportation plans, and matters regarding the perceived safety advantages of transporting students by school bus over common carrier involved policy judgments reserved for General Assembly.

IMMUNITY - TEXAS

Varner v. City of Andrews

Court of Appeals of Texas, El Paso - September 28, 2022 - S.W.3d - 2022 WL 4538877

Pedestrian brought personal injury action against city, alleging that city was liable for injuries incurred when she was attacked by a pack of dogs while walking in city. The District Court granted city's plea to the jurisdiction. Pedestrian appealed.

The Court of Appeals held that pedestrian's complaints about city's animal control policies and procedures to mayor and police chief were insufficient to put city on notice, for purposes of Texas Tort Claims Act's notice requirement, of her claim.

Pedestrian's complaints about city's animal control policies and procedures to mayor and police chief were insufficient to put city on notice, for purposes of Texas Tort Claims Act's notice requirement, of claim in her personal injury action against city, that city was liable for injuries incurred when she was attacked by pack of dogs; there was no evidence that either mayor or police chief came away from meeting having subjective awareness of possible claim that city's conduct caused pedestrian's injuries, dogs had escaped from owner's private property moments before attack and owner was present at the scene shortly after the attack, and in statement to city, pedestrian described the event, but made no reference to city's animal control procedures being a causal factor.

EMINENT DOMAIN - CALIFORNIA

Today's IV, Inc. v. Los Angeles County Metropolitan Transportation Authority

Court of Appeal, Second District, Division 8, California - October 5, 2022 - Cal.Rptr.3d - 2022 WL 5107251

Hotel owner brought action for nuisance and inverse condemnation against county transportation authority and general contractor, alleging that defendants' construction of underground subway line interfered with operation of hotel.

General contractor moved to strike portions of complaint. The Superior Court granted motion. Authority filed demurrer concerning claim for inverse condemnation. The Superior Court granted motion. Defendants then filed motion for judgment on the pleadings as to nuisance claim. The Superior Court granted motion. General contractor thereafter moved for summary adjudication as to nuisance claim. The Superior Court granted motion. Owner appealed.

The Court of Appeal held that:

- Owner failed to allege that traffic detours set up by authority caused its property to suffer from intangible intrusion burdening property in way that was direct, substantial, and peculiar to property itself, and thus failed to state claim for inverse condemnation under intangible-intrusion theory;
- Owner failed to allege that intrusion of noise and dust was unique, special or peculiar in comparison with other stakeholders in area, and thus failed to state claim against authority for inverse condemnation under intangible-intrusion theory;
- Owner alleged that invasion of, or interference with, use and enjoyment of its property caused by construction project was substantial, as required to state claim for private nuisance;
- Owner failed to allege that gravity of harm to owner's use and enjoyment of its property outweighed social utility of construction project, and thus failed to state claim for private nuisance;
- Statute providing that "[n]othing which is done or maintained under the express authority of a statute can be deemed a nuisance" provided defendants with immunity from liability for owner's nuisance claim;
- Whether or not general contractor's method of construction was reasonable did not hinge on whether general contractor possibly breached term of its contract with authority, in connection with its subcontractor's classification of noise limits, and thus did not create triable issue of material fact precluding summary adjudication on nuisance claim; and
- Testimony of hotel's former managing director that defendants conspired to harm hotel was speculative and did not create triable issue of material fact precluding summary adjudication on nuisance claim.

MUNICIPAL ORDINANCE - CALIFORNIA

Kirk v. City of Morgan Hill

Court of Appeal, Sixth District, California - September 30, 2022 - Cal.Rptr.3d - 2022 WL 4592168

City residents and firearms interest group brought action for declaratory relief to challenge city ordinance requiring that the theft or loss of a gun be reported within 48 hours, alleging ordinance was preempted by a state law requiring that missing guns be reported within five days.

The Superior Court granted summary judgment for the city, and residents and interest group appealed.

The Court of Appeal held that:

- Ordinance was not duplicative of state statute;
- Ordinance did not contradict state statute;
- Statute did not expressly occupy the field; and
- Statute did not preempt ordinance by implication.

City ordinance requiring that the theft or loss of a gun be reported within 48 hours was not duplicative of state statute requiring that missing guns be reported within five days, and thus was not preempted on that ground; ordinance imposed a more stringent requirement, and thus was not coextensive with state law.

City ordinance requiring that the theft or loss of a gun be reported within 48 hours did not obstruct application of state statute requiring that missing guns be reported within five days, and thus ordinance was not preempted on grounds it contradicted state law; statute set a minimum standard and merely established the outer limit for when a report must be made, it was also permissible

under the statute to notify law enforcement before the five days had elapsed, and purpose of the statute to ensure prompt reporting of missing firearms was furthered by and was consistent with the ordinance.

State statute requiring that missing guns be reported within five days did not contain language precluding municipalities from issuing their own requirements for reporting missing guns, and thus did not expressly occupy the field or preempt, on that ground, city ordinance requiring that the theft or loss of a gun be reported within 48 hours.

State statute requiring that missing guns be reported within five days did not preempt by implication city ordinance requiring that the theft or loss of a gun be reported within 48 hours; state concern reflected by the statute was that local law enforcement authorities be promptly notified of a lost or stolen gun, statute was entirely tolerant of local regulation furthering its purpose by requiring even earlier notification, and local interest at stake justified any burden on transient citizens.

SECURITIES REGS - FEDERAL

U.S. Securities & Exchange Commission v. Murphy

United States Court of Appeals, Ninth Circuit - October 4, 2022 - F.4th - 2022 WL 4866712

Securities and Exchange Commission (SEC) brought enforcement action against three investors, alleging violations of the Securities Exchange Act of 1934 section prohibiting unregistered brokers from effecting transactions in securities, § 10(b), and Rule 10b-5.

The United States District Court for the Southern District of California granted summary judgment in favor of SEC, and imposed civil penalties and injunctive relief. Investors appealed.

The Court of Appeals held that:

- Investors traded securities "for the account of others" and thus violated provision barring unregistered "broker" from trading securities;
- Provision barring any unregistered "broker" from trading securities was not unconstitutionally vague;
- Investor's knowing provision of false zip codes to municipal bond underwriters were "material misrepresentations" in violation of § 10(b) and Rule 10b-5;
- District court acted within its discretion in using number of months investor traded as unregistered broker to calculate total violations for purposes of determining amount of civil penalty;
- Civil monetary penalties did not violate Excessive Fines Clause;
- Injunction was warranted under the circumstances; and
- Injunction ordering defendant to comply with the Act was not insufficiently specific.

Investors who purchased municipal bonds at direction of owner of prime brokerage, with his capital, and shared portion of trading risk with him, traded securities "for the account of others," and thus were "brokers," within meaning of Securities Exchange Act of 1934, such that they violated the Act by failing to register with the Securities and Exchange Commission (SEC); investors put owner's capital at risk on every trade they made, contrary to investors' arguments, fact that they bore risk did not remove then from ambit of statute, and investors acted as owner's agents.

Provision of the Securities Exchange Act of 1934 barring any "broker" from trading securities without registering with the Securities and Exchange Commission (SEC) was not unconstitutionally vague, though unregistered broker asserted that neither statute nor SEC regulation provided fair

notice that his trading arrangement, in which he bought municipal bonds as agent of owner of prime brokerage, with owner's capital, and shared a portion of the trading risk, required him to register as a broker; broker's conduct fell within text of the statute, and if he had concerns about the legality of his business arrangement, he could have requested clarification from the SEC in the form of a "No-Action Letter."

Investor's knowing provision of false zip codes to municipal bond underwriters to obtain highest retail priority for purchase of municipal bonds were "material misrepresentations" in violation of § 10(b) and Rule 10b-5, though investor asserted that underwriters had actual knowledge of her real zip code provided on her account registration forms and that there was no evidence underwriters submitted false zip codes to issuers; issuers mainly relied on zip codes to determined retail priority order, any underwriters that examined forms would be left with two zip codes and no basis to discern truth from fraud, and misrepresentations were material even if not communicated to issuers.

Record supported district court's finding at remedies stage that investor committed 21 § 10(b) violations, based on the number of times she provided false zip codes to municipal bond underwriters to obtain highest retail priority for purchase of municipal bonds, in Securities and Exchange Commission (SEC) enforcement proceeding, though her liability turned on only three fraudulent transactions; at remedies stage, district court could consider more evidence to assess full extent of investor's misconduct so long as new evidence did not conflict with its liability findings, SEC submitted evidence of 21 conversations in which investor provided underwriters with false zip codes, and investor admitted to communicating 21 false zip codes.

District court acted within its discretion in using number of months investor traded as unregistered broker to calculate his total violations of provision of the Securities Exchange Act of 1934 barring any "broker" from trading securities without registering with the Securities and Exchange Commission (SEC) to determine amount of civil penalty in civil enforcement action brought by SEC; decision was especially reasonable, and favorable to investor, as district court could have found thousands of violations if it had relied on number of transactions he made as unregistered broker.

Record supported district court's finding that investor traded as unregistered broker for 46 months, in calculating his total violations of provision of the Securities Exchange Act of 1934 barring any "broker" from trading securities without registering with the Securities and Exchange Commission (SEC), to determine amount of civil penalty in civil enforcement action brought by SEC, though investor asserted that record contained just 12 months of trading data, where investor's trading logs, which were submitted to district court, confirmed 46 months of trading activity.

District court acted within its discretion in declining to consider civil penalties imposed on other defendants when imposing penalties on investors for violations of Securities Exchange Act of 1934 section prohibiting unregistered brokers from effecting transactions in securities, § 10(b), and Rule 10b-5, in enforcement action brought by Securities and Exchange Commission (SEC); comparison to settling defendants in same action who entered into consent decrees with SEC would be inapt because penalties resulted from bargained-for exchange, particularly since those defendants admitted wrongdoing, and comparison to defendants in separate actions would be inappropriate because circumstances varied so widely, and district could needed to perform individualized inquiry.

Civil monetary penalties of $414,090.40, $308,512.80, and $1,761,920, imposed against three investors, did not violate Excessive Fines Clause, in Securities and Exchange Commission (SEC) enforcement action in which investors were found to have violated Securities Exchange Act of 1934 section prohibiting unregistered brokers from effecting transactions in securities and one investor was found to have violated § 10(b) and Rule 10b-5; penalties were well within statutory maximum, investors made thousands of trades, which could have led to multimillion-dollar penalties, district

court exercised its discretion in manner that led to substantially lower penalties, and, although there was no direct harm to individuals, violations caused systemic harm and were serious enough to warrant penalties imposed.

Injunction was warranted requiring defendants to disclose for five years a copy of complaint and final judgment in Securities and Exchange Commission (SEC) enforcement proceeding to any brokerage firm that they opened or maintained an account with, and permanently enjoining one defendant from future violations of Securities Exchange Act of 1934 section prohibiting unregistered brokers from effecting transactions in securities and the other from violating that section as well as § 10(b) and Rule 10b-5; defendants' current compliance with law did not render injunctive relief unavailable, defendants remained engaged in securities industry, and district court found they had failed to fully appreciate wrongfulness of their conduct.

Injunction, which ordered defendant to comply with Securities Exchange Act of 1934 section prohibiting unregistered brokers from effecting transactions in securities, was not insufficiently specific on the ground that it merely directed defendant to comply with the law, in Securities and Exchange Commission (SEC) enforcement proceeding; the statutory terms were not impermissibly vague, and the injunction also referenced the district court's summary judgment decision finding liability, which provided defendant, a sophisticated actor, with additional guidance for his future conduct.

PUBLIC MEETINGS - FLORIDA

Gundy v. City of Jacksonville Florida

United States Court of Appeals, Eleventh Circuit - September 30, 2022 - F.4th - 2022 WL 4591231

Pastor brought § 1983 action against city and city council president, alleging that his rights of free speech and free exercise of religion were violated when city council president turned off pastor's microphone during prayer invocation at city council meeting, subsequently posted a critical social media message about pastor, and proposed new guidance on future invocations.

The United States District Court for the Middle District of Florida granted summary judgment in favor of defendants. Pastor appealed.

As a matter of first impression, the Court of Appeals held that pastor's invocation was government speech, which was not protected by Free Speech or Free Exercise Clauses.

Pastor's prayer invocation at city council meeting was "government speech," rather than "private speech," and thus invocation's contents, which included political criticism of council and incumbent mayor, were not protected by Free Speech or Free Exercise Clauses, in § 1983 claim challenging city council president's conduct of turning off pastor's microphone during invocation; legislative invocations were part of history and tradition of United States, council memorandum stated that invocations were part of council's tradition and were for benefit and blessing of council's proceedings, and placed restraints on invocations, such as prohibiting speakers from disparaging other faiths or beliefs, and invocation speaker was chosen and invited by active council member.

ZONING & PLANNING - ILLINOIS

Station Place Townhouse Condominium Association v. Village of Glenview

Appellate Court of Illinois, First District, Third Division - September 28, 2022 - N.E.3d - 2022 IL App (1st) 211131 - 2022 WL 4492999

Condominium associations and individual unit owners filed a complaint for declaratory judgment against village, challenging village's approval of application to develop a mixed-use building on nearby property and village's purchase and sale agreement with developer.

The Circuit Court dismissed the complaint in its entirety for failure to state a claim and for lack of standing. Plaintiffs appealed.

The Appellate Court held that:

- Purchase and sale agreement was not invalid, as village acted within its home rule powers;
- Plaintiffs were not deprived of their procedural due process rights during rezoning process;
- Plaintiffs' claim of violation of their substantive due process rights failed to state a cause of action; and
- Relief requested by plaintiffs alleging violations of the Open Meetings Act was unavailable, as meetings at issue were not "closed" meetings.

Village's purchase and sale agreement with developer was not invalid, though village did not comply with section of Illinois Municipal Code governing sale of surplus real estate, as village acted within its home rule powers in entering into the agreement, so was not required to comply with Illinois Municipal Code; entirety of property at issue was located within boundaries of village, and sale of municipal real property was considered a function pertaining to village's government and affairs, as village had a longstanding interest in revitalizing its downtown area and sale of village-owned parcel of property located in downtown area to developer seeking to build a mixed-use development implicated local concerns.

EMINENT DOMAIN - MONTANA

Hamlin Construction and Development Company Inc. v. Montana Department of Transportation

Supreme Court of Montana - October 4, 2022 - P.3d - 2022 WL 4917982 - 2022 MT 190

Developer brought action against the Montana Department of Transportation (MDT), raising claims for inverse condemnation, unjust enrichment, negligence, and nuisance, arising from MDT's alleged role in causing developer to be required to accommodate floodplain development permit requirements in order to construct a subdivision on its property. Developer brought separate action against the county, raising similar claims.

The District Court dismissed the unjust enrichment claim, entered summary judgment for MDT on inverse condemnation and nuisance claims, and denied developer's motion to consolidate case with the parallel case against the county. Developer appealed.

The Supreme Court held that:

- Developer failed to satisfy the causation element of inverse condemnation claim;
- Developer failed to show it conferred a benefit on MDT as required for unjust enrichment;
- Statute immunizing government agencies from liability for damages caused by an obstruction for

which a flood plain permit had been granted survived rational basis review for constitutionality; and
- District court was not precluded from considering lack of causal connection as justification to grant summary judgment on the nuisance claim.

Developer failed to show that but for Montana Department of Transportation's (MDT) public project in reconstructing a road adjacent to site of its proposed subdivision it would not have suffered the damage for which it sought compensation, the inability to obtain a county development permit to construct a subdivision without construction of a large floodwater detention pond, and thus, developer failed to satisfy the causation element of claim for inverse condemnation under the Fifth Amendment and the Montana Constitution; developer did not assert that MDT's project created or worsened flood concerns on its property, as the property had preexisting flooding concerns and MDT's project, if anything, reduced those preexisting concerns.

Developer failed to plausibly allege that it had conferred a benefit on the Montana Department of Transportation (MDT) in form of county permit requirement that developer construct a large floodwater detention pond where it had planned to put houses in its planned subdivision project, which it alleged was to accommodate for defects and deficiencies in new culverts which were part of MDT's reconstruction project on an adjacent public road, for which MDT had alleged duty to repair, and thus, developer failed to satisfy an essential element for an actionable unjust enrichment claim; developer did not plausibly allege there were any problems associated with MDT's new culverts beyond those associated with developer's plans to its subdivision construction project or that MDT would have had to replace the culverts absent the detention pond.

To extent that statute immunizing government agencies from liability for damages caused by an obstruction for which a flood plain permit had been granted barred developer's claims for a damages remedy for permitted obstructions but did not bar just compensation for a constitutional taking or damaging under the Montana Constitution or Fifth Amendment, the challenged statutory section did not impinge upon developer's rights of acquiring, possessing, and protecting property to degree sufficient to warrant constitutional review under the strict scrutiny, and thus, the rational basis review standard applied, in developer's action alleging negligence by the Montana Department of Transportation (MDT) in replacing culverts on a public road, which caused flooding issues on developer's adjacent property.

Statute immunizing government agencies from liability for damages caused by an obstruction for which a flood plain permit had been granted was rationally related to legitimate government interest in shielding such entities from threat of costly damages litigation associated with water-flow obstructions resulting from development or maintenance of public works, so long as that government entity went through valid permit process intended to mitigate significant risks of flood damage to the travelling public and private property, and thus, developer failed to show statute violated substantive due process rights under the Fifth and Fourteenth Amendments and Montana Constitution, in action alleging negligence by the Montana Department of Transportation (MDT) in replacing culverts on public road that caused flooding to its adjacent property.

Issue of lack of causal connection between Montana Department of Transportation's (MDT) actions in replacing culverts on public road in reconstruction project and flooding issues on developer's adjacent property was before the court, and thus, district court was not precluded from using the lack of causal connection as justification to dismiss, on summary judgment, developer's nuisance claims due to MDT's failure to raise the argument until its reply brief on its motion for summary judgment, where developer had addressed the issue during the summary judgment hearing, and it was not clear that the district court even relied on arguments made in MDT's reply brief in reaching its determination.

MUNICIPAL ORDINANCE - NEW YORK

West 49th Street, LLC v. O'Neill

Civil Court, City of New York, New York County - September 23, 2022 - N.Y.S.3d - 2022 WL 4392993 - 2022 N.Y. Slip Op. 22296

After tenant's death and expiration of his lease to rent-stabilized premises, landlord brought holdover licensee proceeding against respondent, tenant's purported successor, who had shared apartment with deceased tenant and who had not vacated premises after having received a notice to quit.

Respondent asserted, among other defenses, that he had a right as a nontraditional family member to a renewal lease in his own name. The parties cross-moved for summary judgment, respondent moved for discovery, and landlord moved for use and occupancy pendente lite.

The Civil Court of the City of New York held that:

- Genuine issues of material fact about nature of deceased tenant's relationship with respondent and with third party, who had not lived with tenant but had been a purported life partner of tenant, precluded summary judgment;
- As a matter of first impression, fact that a deceased tenant may have had a nontraditional family relationship not just with a purported successor but also with another person does not automatically preclude the purported successor from establishing a succession claim as a nontraditional family member under city's rent-stabilization ordinance;
- Respondent was not entitled to discovery into bank records of joint bank account between deceased tenant and purported life partner who had not lived with tenant; and
- Landlord was entitled to use and occupancy pendente lite from date of court's order.

PUBLIC NUISANCE - ALABAMA

State v. Epic Tech, LLC

Supreme Court of Alabama - September 30, 2022 - So.3d - 2022 WL 4588777

State brought actions for declaratory and injunctive relief against companies that allegedly had created a public nuisance due to their operation of illegal slot machines and gambling devices.

In addition, State named a town council as a defendant in one of the actions.

The Circuit Court dismissed actions. State appealed, and the appeals were consolidated. The Supreme Court reversed and remanded in both actions. On remand, the Circuit Court denied State's request for injunctive relief and dismissed counterclaims asserted by a company and the town council, and the Circuit Court denied State's request for injunctive relief. State appealed, the company and the town council cross-appealed the dismissal of their counterclaims, and the appeals were consolidated.

The Supreme Court held that:

- State established that the machines at issue did not constitute the otherwise legal game of bingo;
- The potential existence of another remedy, namely criminal prosecution, did not prevent the issuance of preliminary or permanent injunctive relief;

- Even if the potential existence of another remedy could preclude injunctive relief, State demonstrated the lack of an alternate remedy;
- State demonstrated that it would be irreparably harmed in the absence of injunctive relief; and
- Company and town council waived on appeal any argument concerning the dismissal of their counterclaims.

BONDS - CALIFORNIA

Bates v. Poway Unified School District

Court of Appeal, Fourth District, Division 3, California - September 29, 2022 - Cal.Rptr.3d - 2022 WL 4545805

Property owners who had paid special tax bonds for construction of new elementary school in school district filed a petition for a writ of mandate and a complaint for declaratory and injunctive relief challenging school district's failure to allocate state funds to retire local bonds or toward uses permitted by local bonds.

The Superior Court denied petition. Property owners appealed.

The Court of Appeal held that:

- Clear and unambiguous language of regulation limited a school district's use of state reimbursement funds by imposing a savings requirement to reward school districts by allowing them to retain any savings achieved during school construction for any future high priority capital outlay expenditures;
- Informal correspondence in e-mails between school district and employees of Office of Public School Construction (OPSC) was not relevant to interpretation of regulation;
- Opinions offered by OPSC program analyst were entitled to full weight;
- Informal correspondence between school district and OPSC employees regarding interpretation of regulation was not entitled to presumptive deference;
- Executive order (EO) report was relevant;
- EO report did not clarify whether SAB imposed a savings requirement in regulation; and
- Extrinsic evidence of voter-approved bond initiative was not relevant to interpretation of regulation.

Clear and unambiguous language of regulation promulgated under the Leroy F. Greene School Facilities Act limited a school district's use of post-construction state reimbursement funds by imposing a savings requirement to reward school districts by allowing them to retain any savings achieved during school construction for any future high priority capital outlay expenditures, such that only school districts that reported a savings after completing the approved project could retain state funds for other construction projects, and therefore if a school district failed to realize any savings during construction, it was required to use all of state's money toward uses permitted by the local bond or completely retire the local bonds funding the project.

Informal correspondence in e-mails between school district and employees of Office of Public School Construction (OPSC), an arm of the California Department of General Services, was not relevant to consideration of State Allocation Board's (SAB) intent in drafting regulation supporting Leroy F. Greene School Facilities Act, or purpose of regulation, with respect to question whether savings on construction was required for school district's use of post-construction state reimbursement funds; communications did not directly answer question, but rather were focused on theoretical possible uses of funds.

Opinions offered by program analyst for Office of Public School Construction (OPSC), an arm of the California Department of General Services, that when there were no project savings with respect to construction of a school, the school district was limited to using post-construction state reimbursement funds for local bond uses or paying off debt on project, were entitled to full weight when determining State Allocation Board's (SAB) intent in drafting regulation supporting Leroy F. Greene School Facilities Act, or purpose of regulation, even though program analyst had told school district she would refer matter to audit team member because she was not as familiar with expenditure reporting; lack of expertise on how to report expenditures to SAB did not mean program analyst lacked understanding of regulation's requirements and restrictions.

Informal correspondence between school district and employees of Office of Public School Construction (OPSC), an arm of the California Department of General Services, regarding interpretation of regulation supporting Leroy F. Greene School Facilities Act was not entitled to presumptive deference that would ordinarily be due to an administrative agency on a statutory construction issue, when deciding legislative intent with respect to school district's use of post-construction state reimbursement funds; employees did not claim to have any expertise with respect to legal or regulatory issues, and did not suggest State Allocation Board (SAB) previously interpreted the regulation in any particular way.

Executive order (EO) report prepared for a State Allocation Board (SAB) meeting at which SAB agreed to enact regulation supporting Leroy F. Greene School Facilities Act clarified appropriate uses of state bond funds used to reimburse local funding, clearly reflected SAB's intention that school districts use the grant money to reimburse original source of funding, and contradicted school district's claim that funding was unencumbered, and thus report was directly relevant so as to be admissible for court's evaluation of regulation's purpose, when deciding whether school district's use of post-construction state reimbursement funds was limited to local bond uses or paying off debt on school construction project; report stated that goal was to make sure school districts could not misuse state bond funds used to reimburse local funding, and agency understood it needed regulation to address how to best safeguard intent of local and state bond funds.

Executive order (EO) report prepared for a State Allocation Board (SAB) meeting at which SAB agreed to enact regulation supporting Leroy F. Greene School Facilities Act did not clarify whether SAB imposed a savings requirement in regulation to reward school districts by allowing them to retain any savings achieved during school construction for any future high priority capital outlay expenditures; report did not mention any specific part of proposed regulation or suggest any preference for new capital outlay expenditures, and the only suggested preferences stated in report was to make sure the money was used to reimburse local funding, avoid violating intent of local and state bond funds, and ensure bonds maintained a certain tax-exemption status.

Extrinsic evidence of voter-approved bond initiative was not relevant to supply insight into statutory purpose of Leroy F. Greene School Facilities Act enacted 17 years prior, or supporting regulation enacted 12 years prior, with respect to question whether school was required to use all post-construction state reimbursement funds toward uses permitted by the local bond or completely retire local bonds funding project, absent savings during construction; initiative did nothing to alter Act's express restrictions on expenditures beyond approved construction of new school, voters were aware limited exception to rule applied only in cases where school district achieved a savings, and if creators of initiative wished to make sure specific bond funds were available for new capital expenditures, beyond those mandated by Act, they needed to have explicitly stated so in the proposed legislation.

ZONING & PLANNING - DELAWARE

Ocean Bay Mart, Inc. v. City of Rehoboth Beach Delaware

Supreme Court of Delaware - September 30, 2022 - A.3d - 2022 WL 4587490

Owner of city real estate brought action against city, alleging that it had a vested right to approval of site plan proposing to develop property into 63 residential condominium units as a single, undivided parcel, substantially in the form submitted without going through major subdivision approval, since owner had begun the approval process before zoning code amendments were enacted, seeking a declaratory judgment, and alleging that city was equitably estopped from enforcing against owner zoning code amendments that were adopted after site plan had been submitted.

The Court of Chancery found in favor of city. Owner appealed.

The Supreme Court held that:

- Substantial question existed as to whether plan complied with city's existing zoning law;
- Court of Chancery did not abuse its discretion in concluding that property owner could not reasonably have relied on vague and indirect interaction between owner's real estate agent and building inspector;
- Court of Chancery did not abuse its discretion in finding that owner did not reasonably rely on conversation in which owner's attorney confirmed with city solicitor that a condominium was not a subdivision;
- Court of Chancery did not abuse its discretion in determining that approval of other condominium projects did not support claim of reliance to establish vested right in development plan;
- Owner could not have reasonably relied on decision of Board of Adjustment overruling building inspector's decision that condominium development could not be approved as a single, undivided parcel;
- There was no evidence that owner relied upon rule of statutory construction that ambiguity in a statute will be resolved in favor of owner;
- Amended zoning ordinances unambiguously applied to owner's pending site plan application; and
- Court of Chancery did not abuse its discretion in finding that city was not equitably estopped from applying amended zoning ordinances to pending site plan application.

CONTRACTS - INDIANA

Performance Services, Inc. v. Randolph Eastern School Corporation

Court of Appeals of Indiana - September 19, 2022 - N.E.3d - 2022 WL 4295425

School corporation brought action seeking declaratory judgment that contact with wind turbine company for construction and operation of wind turbine facility was void, and company asserted counterclaims for breach of contract, suit on account, and equitable entitlement to the reasonable value of services provided, after school failed to pay access fees.

Parties filed cross-motions for summary judgment, and the Circuit Court granted the school's motion. Company appealed.

The Court of Appeals held that:

- Court of Appeals owed no deference to written opinions of State Board of Accounts on legality of contract;
- Contract did not reflect illegal investment by political subdivision;
- Contract was not subject to leasing procedures set forth in Public Leasing Act;
- Public Works Act did not apply to contract; and
- Contract was not void for indefiniteness.

On appeal from grant of summary judgment in favor of school corporation on its action seeking declaratory judgment that school's contract with wind turbine company was void, Court of Appeals owed no deference to written opinions of State Board of Accounts, stating that contract between school and company reflected an illegal investment; Board was in no better position than Court of Appeals to read contract at issue and discern its meaning, and Board's opinions did not state binding legal conclusions on meaning of contract, which spoke for itself.

School corporation's contract with wind turbine company for construction and operation of wind turbine facility never amounted to more than school owing payments for services rendered by company, and thus did not reflect an illegal investment by a political subdivision in a wind turbine, in violation of limited statutory authority of schools to invest money, where school agreed to make semiannual payments to company in exchange for certain access to facility and data, and school had option after five years of such payments to purchase facility by paying off company's construction debt and any capital improvements, which school did not do.

School corporation's contract with wind turbine company for construction and operation of wind turbine facility was not a lease, and thus leasing procedures set forth in Public Leasing Act were not applicable to contract, even though school had unvested option to purchase facility; contract did not create property right of school in facility, which was in all respects owned, managed, and controlled by company, but rather contract right, whereby school was granted access to facility and data in exchange for payments, that company could have revoked based on school's nonperformance.

Public Works Act did not apply to school corporation's contract with wind turbine company for construction and operation of wind turbine facility, where contract was neither a lease nor paid for out of a public fund or special assessment, but was rather funded by bond agreement between company and bank.

School corporation's contract with wind turbine company for construction and operation of wind turbine facility was not void for indefiniteness because it called for an indefinite number of semiannual payments from school to company; parties were presumed to have had a reasonable time for payments in mind, and at no point did the school seek to terminate contract, which was a contract at will.

Contract containing no specific termination date is terminable at will, and where the parties fix no time for the performance or discharge of obligations created by the contract they are assumed to have had in mind a reasonable time.

PUBLIC CONTRACTS - MISSISSIPPI

Broadband Voice, LLC v. Jefferson County

Supreme Court of Mississippi - September 29, 2022 - So.3d - 2022 WL 4543841

Telephone and internet services company, which had entered into three-year contracts with prior

county board of supervisors, brought breach of contract action against county and moved for judgment on the pleadings after county terminated contracts before end of terms.

The Circuit Court denied motion and dismissed complaint with prejudice. Company appealed.

The Supreme Court held that:

- Law on successor boards prevented company from enforcing early-termination clauses, and
- Supreme Court would decline to review unjust enrichment and quantum meruit claims.

Law on successor boards, which generally prohibited predecessor boards of supervisors from binding successor boards by contract, prevented telephone and internet services company from enforcing early-termination clauses of three-year contracts into which it had entered with county board of supervisors, after successor board terminated contracts before end of terms, even though company argued that early-termination fee was due before contract was voided, given that termination notice sent by county, 13 days before termination date, made fee due immediately; plain language of contract indicated that, if customer terminated prior to expiration of term, company would charge remaining service fees due immediately, and termination fee would not be effective until termination.

Supreme Court would decline to review unjust enrichment and quantum meruit claims raised by telephone and internet services company, in breach of contract action brought against county, arising from county's failure to pay early-termination fees for contracts into which it had entered with company; company did not raise unjust enrichment and quantum meruit issues at any time prior to appeal, and reversing trial court's judgment based on claims that were not part of pleadings would have chilling effect of depriving trial court of opportunity to first rule on issue, and then depriving Supreme Court of opportunity to perform appellate review by utilizing appropriate standard of review of trial court's ruling.

BONDS - PUERTO RICO

Ponsa-Rabell v. Santander Securities LLC

United States Court of Appeals, First Circuit - May 20, 2022 - 35 F.4th 26 - Fed. Sec. L. Rep. P 101,405

Customers who had purchased municipal bonds from broker brought securities fraud class action against brokerage firm asserting it made material omissions when making the sales, in violation of Securities Exchange Act and Puerto Rico law.

The United States District Court for the District of Puerto Rico adopted report and recommendation of United States Magistrate Judge and dismissed. Customers appealed.

The Court of Appeals held that:

- Brokerage firm was under no duty to repeat information already known or readily accessible to investors, and
- There was no evidence of a special relationship between broker and its customers, as would impose duty on firm to disclose omitted information.

Brokerage firm selling municipal bonds to its customers was under no duty to repeat information already known or readily accessible to the investors to avoid later claim for securities fraud based on

the omission; although customers asserted that firm should have disclosed to them in fund prospectus information regarding the deteriorating market conditions for Puerto Rico bonds, it was commonly known to public at the time of the purchase that Puerto Rico was experiencing an economic recession and that its debts might become unpayable.

There was no evidence of a special relationship between brokerage firm and customers who purchased municipal bonds from the firm, as would impose duty on the firm, under securities law, to disclose to customers that, at time of sale, it was actively trying to rid itself of its inventory of municipal bonds because of its concern of risk exposure, given the direction of the market; there was no indication that firm made any special promises to its customers to outline the risks of their investment, or to inform them that any projected risks were materializing.

MUNICIPAL ORDINANCE - TEXAS

City of Port Arthur v. Thomas

Court of Appeals of Texas, Beaumont - August 31, 2022 - S.W.3d - 2022 WL 3868106

After city and city's public works director attempted to enforce ordinances regulating use of heavy vehicles on city street adjacent to owner's property where he operated landfarm for disposing used drilling mud from oil and gas operations, owner filed suit against city and director for tortious interference, violations of Equal Protection Clause and alternatively, inverse condemnation and regulatory taking, declaratory relief against both defendants, ultra vires actions against director, and sought to enjoin city's enforcement of ordinances.

Defendants filed plea to the jurisdiction. The District Court denied defendants' plea to the jurisdiction. Defendants appealed.

The Court of Appeals held that:

- Owner pled ultra vires claim sufficient to invoke trial court's jurisdiction;
- Owner failed to allege that director acted ultra vires in enforcing city roadway ordinances;
- Fact issues existed as to whether owner was "reasonably prudent operator" and whether director enforced road use ordinances in "commercially reasonable manner";
- City did not waive its sovereign immunity under Uniform Declaratory Judgments Act (UDJA);
- Fact issues as to whether director acted ultra vires in enforcing ordinance warranted denial of director's plea to the jurisdiction on owner's UDJA claim;
- Owner failed to demonstrate that defendants' actions in enforcing ordinance were not rationally related to legitimate government objectives; and
- Owner failed to allege viable inverse condemnation or regulatory takings claim to establish waiver of city's immunity.

Property owner who operated landfarm for disposing used drilling mud from oil and gas operations pled ultra vires claim sufficient to invoke trial court's jurisdiction, in his action against city's public works director asserting that director enforced road use ordinances in manner that was pre-empted by state law and/or violated owner's right to Equal Protection under Texas Constitution; owner complained that director's enforcement of statute by requiring him and his customers to obtain permit or agreement when director had not made others do so constituted ultra vires act, specifically pleading that director acted without reference to or in conflict with constraints placed on his discretion by local law authorizing him to act.

Property owner who operated landfarm for disposing used drilling mud from oil and gas operations failed to allege that city's public works director acted ultra vires in enforcing city roadway ordinances requiring applications to operate excess loads on roadways, for purposes of whether governmental immunity barred suit against director for enforcing ordinances in manner that was pre-empted by state law and/or violated owner's right to Equal Protection under Texas Constitution; ordinances vested director with authority to determine heavy truck routes and empowered him to take applications and to determine, based on information provided, whether to designate roadways capable of sustaining excess load and duration, and fact that owner was first person city required to complete application did not mean that director acted outside his authority.

Fact issues existed as to whether property owner who operated landfarm for disposing used drilling mud from oil and gas operations was "reasonably prudent operator" and whether city's public works director enforced road use ordinances in "commercially reasonable manner," warranting denial of city and director's plea to the jurisdiction in owner's claim that city and director enforced road use ordinances in manner that was pre-empted by state law.

City did not waive its sovereign immunity under Uniform Declaratory Judgments Act (UDJA) in declaratory judgment action brought by property owner, who operated landfarm for disposing used drilling mud from oil and gas operations, seeking to prevent city from enforcing its road use ordinances requiring him to apply and obtain permit to operate excess loads on roadways; although city's sovereign immunity could be waived if owner challenged validity of ordinances, owner did not challenge validity of ordinances but, rather, challenged enforcement of ordinances, and such a challenge did not fall within scope of UDJA's express waivers of sovereign immunity.

Fact issues existed as to whether city's public works director's enforcement of road use ordinances constituted ultra vires action, warranting denial of director's plea to the jurisdiction as to property owner's Uniform Declaratory Judgments Act (UDJA) claim against director seeking to prevent him from enforcing road use ordinances requiring owner to apply and obtain permit to operate excess loads on roadways with respect to his operation of landfarm for disposing used drilling mud from oil and gas operations.

Property owner who operated landfarm for disposing used drilling mud from oil and gas operations failed to demonstrate that city and its public works director's actions in enforcing ordinance requiring owner to file permit application to operate excess loads on roadways were not rationally related to legitimate government objective of responding to specific citizen complaints regarding owner's operation and damage to city streets, and therefore owner failed to allege facially valid claim that city and director's enforcement of ordinance violated Equal Protection Clause; city provided evidence that owner's operation created more wear and tear on streets compared to purportedly similar trucks, and, although owner was first person city required to apply for permit under ordinance, city offered evidence it intended to use such permit applications going forward.

Property owner who operated landfarm for disposing used drilling mud from oil and gas operations, but was required to file permit application to operate excess loads on roadways pursuant to city ordinance, failed to allege viable inverse condemnation or regulatory takings claim to establish waiver of city's immunity; ordinances dealt with regulating road use and specifically, heavy traffic on roads, which was not a regulation of owner's property, and true nature of owner's claim was based on city's alleged wrongful enforcement of its ordinance, rather than an intentional taking or damage of his property for public use.

Whether state law preempted city ordinances requiring filing of permit application to operate excess loads on certain roadways necessarily depended upon whether city's actions in enforcing it were "commercially reasonable" and whether property owner acted as "reasonably prudent operator"

under civil statute expressly preempting municipal regulation of oil and gas operations with exception for municipality's ability to enact or enforce ordinance regulating traffic or noise, and therefore, because essence of owner's case against city and public works director was substantively more civil than criminal, trial court did not lack jurisdiction to enjoin enforcement of ordinance for violation of constitution and certain statutory provisions.

ZONING & PLANNING - WASHINGTON

Homeward Bound v. Central Puget Sound Growth Management Hearings Board

Court of Appeals of Washington, Division 2 - September 27, 2022 - P.3d - 2022 WL 4477915

Operator of drop-in center filed petitions for review of two orders of growth management hearings board, which found that city's regulations restricting the siting of day use centers and overnight shelters serving people experiencing homelessness complied with city's comprehensive growth management plan, and the Growth Management Act (GMA).

The Superior Court consolidated the two petitions and affirmed both the initial order and compliance order. Operator appealed.

The Court of Appeals held that:

- Determination of whether centers and shelters serving people experiencing homelessness were essential public facilities was a matter of local discretion;
- Prior to requesting that board declare center and shelters as essential public facilities under GMA, operator was required to request that city designate centers and shelters as essential public facilities under its local discretion;
- City's regulation violate GMA provision prohibiting the preclusion of siting of essential public facilities;
- Substantial evidence supported board's decision that city's regulation complied with its comprehensive plan, as required under GMA;
- Substantial evidence supported board's decision that regulation complied with policy in comprehensive plan that encouraged range of housing types and densities to meet needs of all economic sectors;
- City's regulation complied with city's policies addressing access to transit and pedestrian safety; and
- Centers and shelters were not "commercial uses," and thus policy in city's comprehensive plan regarding commercial uses in industrial areas did not apply to centers and shelters.

LIABILITY - ILLINOIS

Quiroz v. Chicago Transit Authority

Supreme Court of Illinois - September 22, 2022 - N.E.3d - 2022 IL 127603 - 2022 WL 4372898

Estate of pedestrian who died from being struck by a rapid transit train brought wrongful death action against city transit authority, alleging that transit authority's negligence caused pedestrian's death.

The Circuit Court dismissed the action. Estate appealed. The Appellate Court reversed and remanded. Transit authority's petition for leave to appeal was granted.

The Supreme Court held that:

- Exception to rule regarding open and obvious conditions that imposed duty to warn trespassers about artificial conditions highly dangerous to known trespassers did not apply;
- Transit authority did not owe duty to rescue; and
- Estate did not allege any conduct that would impose liability under willful and wanton conduct theory.

Exception to rule regarding open and obvious conditions that imposed duty to warn trespassers about artificial conditions highly dangerous to known trespassers did not apply so as to impose duty upon city transit authority to warn pedestrian of moving rapid transit train, in action brought by pedestrian's estate arising from pedestrian's death from being struck by train after he allegedly trespassed inside underground subway tunnel, fell from a recessed catwalk authorized for transit authority personnel onto ground near the tracks, and injured himself so that he could not get away, since transit authority had no reason to believe a trespasser would not appreciate the danger posed by a moving rapid transit train, and moreover, estate did not allege a failure to warn.

City transit authority did not owe pedestrian a duty to rescue him from rapid transit train, after he allegedly trespassed inside an underground subway tunnel, fell from a recessed catwalk authorized for transit authority personnel onto the ground near the tracks, and injured himself so that he could not avoid being struck by oncoming train, despite transit authority's awareness of pedestrian's presence, where there was no special relationship between transit authority and pedestrian, transit authority did not put him in a position of peril, as his injury from falling in an unauthorized area not open to the public into open and obvious path of the train was personal to him through no fault of transit authority, and transit authority was not an insurer of a trespasser's safety.

Pedestrian's estate did not allege any conduct by city transit authority that would impose liability for pedestrian's death from being struck by a rapid transit train, after he trespassed into area of subway tunnel authorized for transit authority personnel and fell and injured himself so that he could not avoid the oncoming train, under theory of willful or wanton conduct; while estate alleged that train operators failed to keep a lookout for objects and persons who might be in a subway tunnel and failed to monitor the security cameras in the tunnel in real time to determine if people in those areas were endangered, transit authority did not owe legal duty to trespassers to either keep a lookout or to monitor its security cameras to keep a lookout for trespassers in real time.

IMMUNITY - MASSACHUSETTS

Harrison v. Massachusetts Bay Transportation Authority

Appeals Court of Massachusetts, Suffolk - September 13, 2022 - N.E.3d - 101 Mass.App.Ct. 659 - 2022 WL 4137192

Workers, who had been hired by staffing agencies to perform information technology (IT) services for transportation authority, brought action against authority, with both alleging violation of independent contractor statute and one alleging retaliation.

The Superior Court Department dismissed claims on sovereign immunity grounds. Workers appealed.

The Appeals Court held that:

- Provision of authority's enabling statute that concerned authority's liability did not waive authority's sovereign immunity;
- Provision that granted authority power to sue or be sued did not waive authority's sovereign immunity;
- Statutes that prohibited employers from penalizing employees as result of action to seek rights and that governed classifying individuals as employees did not waive authority's sovereign immunity; and
- Public policy did not support waiving authority's sovereign immunity.

EMINENT DOMAIN - MICHIGAN

Miner v. Ogemaw County Road Commission

United States District Court, E.D. Michigan, Northern Division - September 2, 2022 - F.Supp.3d - 2022 WL 4017281

Landowner brought state court action against county road commission and commission's managing director, alleging violation of the federal Takings Clause, violation of the Michigan takings clause, violation of due process, conspiracy to interfere with civil rights under § 1983, and state law claims of trespass, malicious prosecution, abuse of process, and unlawful arrest.

Commission and director removed. Owner moved for summary judgment and commission and director cross-moved for summary judgment.

The District Court held that:

- Commission failed to establish prescriptive easement for culvert that could defeat landowner's takings claims;
- Natural-flow doctrine under Michigan law did not impair landowner's takings claims;
- Landowner established commission's inverse condemnation of his land under Michigan law;
- Genuine issue of material fact existed as to whether purpose of drainage culvert was for private use or public use, precluding summary judgment on claim for substantive due process violation;
- Genuine issue of material fact as to whether county had policy or custom that would render it liable under *Monell* for conduct of commission employees, precluding summary judgment on claim for substantive due process violation;
- Neither commission nor director was entitled to immunity, under Michigan Governmental Tort Liability Act, from landowner's trespass claim under Michigan law; and
- Director was subject to money damages on landowner's trespass claim under Michigan law.

County road commission failed to establish prescriptive easement for water culvert under Michigan law, which diverted water from neighboring property onto landowner's property, that could defeat landowner's takings claims under federal and Michigan constitutions, where neighboring property owner had only owned his parcel for four years, such that he could not have prescriptive drainage easement unless by succession from parcel's former owner, county failed to establish that there was previous owner of parcel that owned it for 15 continuous years, and nothing indicated that county had prescriptive easement.

Natural-flow doctrine under Michigan law did not impair landowner's takings claims under federal and Michigan constitutions, arising from culvert that diverted water from neighboring property onto landowner's property, which caused flooding, and thus landowner was entitled to compensation from

county road commission and its managing director for culvert's diversion of water onto his land, where landowner's takings claims involved flow of water caused by county highway and man-made culvert, and nothing indicated that water from neighboring property naturally "washed" over county highway onto landowner's property while culvert was blocked by concrete, but instead that water traveled down side of ditch further west while culvert was blocked.

Landowner's takings claims under federal and Michigan constitutions did not begin to run, and six-year limitations period did not accrue, until eight months after landowner filed action in state court under "continuing violation" doctrine, where county road commission's wrongful conduct was physical trespass of culvert onto land after they unblocked it—not its initial installation or intermittent flooding that culvert allegedly caused, such trespass newly accrued each day that culvert trespassed onto landowner's land, and culvert continued to trespass onto land following initiation of suit even though culvert was trimmed so that it only trespassed onto land by .33 feet rather than six feet.

Landowner's entitlement to damages for any harm to property that trespassing culvert proximately caused would not be limited by six-year statute of limitations for inverse-condemnation cases under Michigan law and would date back to landowner's purchase of property through date that takings claims, under federal and Michigan constitutions, in state court; damages seemingly began to run when county road commission admittedly removed blockage from culvert for first time, which was approximately five months prior to landowner's purchase of property, and then persisted under "continuing violation" doctrine.

Landowner established county road commission's inverse condemnation of his land without actual physical occupation, acquisition, or appropriation, through presence of culvert on his land, which diverted water onto his land from neighboring property, and thus landowner was entitled to just compensation for commission's unconstitutional taking of land under Michigan law, where commission abused its legitimate power by entering land without warrant under guise of easement, commission affirmatively acted and caused damage to property by cutting and unblocking culvert, which flooded property, and trespassing culvert caused diminution in value of property since flood waters froze nearly all land surrounding landowner's house, rendering use and enjoyment of property practically scant.

County road commission committed unconstitutional taking of landowner's real property under Fifth Amendment through physically trespassing drain culvert on his land, which diverted water onto his land from neighboring property and cause flood damage, and thus landowner was entitled to just compensation for such taking, where physical trespass and flooding of property occurred from time that landowner purchased parcel until he filed action in state court.

Genuine issue of material fact existed as to whether purpose of drainage culvert, which diverted water onto landowner's property from neighboring property causing flooding, was for private use or public use, precluding summary judgment on landowner's claim for violation of his substantive due process rights to his property.

Genuine issue of material fact as to whether county had policy or custom with regard to upkeep and maintenance of drainage culvert, which diverted water onto landowner's property from neighboring property and caused flooding, that would render it liable under *Monell* for conduct of county road commission employees who entered onto landowner's land without permission to cut and unblocked culvert, precluding summary judgment on landowner's claim for violation of his substantive due process rights to his property.

County road commission's managing director was not entitled to qualified immunity from

landowner's claim for violation of his substantive due process rights to his property, where commission and director violated landowner's constitutional right to be free from unconstitutional governmental takings by its physically trespassing culvert that diverted water onto landowner's property from neighboring property and caused flooding, it was clearly established that permanent occupations of land by installations constituted takings even if such installation occupied only relatively insubstantial amounts of space and did not seriously interfere with landowner's use of rest of his land, and drain culvert constituted such installation.

County road commission's managing director was subject to money damages on landowner's trespass claim under Michigan law for damages caused by drain culvert, which divert water onto landowner's property from neighboring property and caused flooding, even though commission could not be held liable for money damages under Act, where Act removed qualified immunity for agency employees for intentional torts, which included trespass.

TELECOM - OHIO

Tarpon Towers II, LLC v. City of Sylvania

United States District Court, N.D. Ohio, Western Division - September 1, 2022 - F.Supp.3d - 2022 WL 3998799

Communications companies sought judicial review of decision by city council which denied companies' application for special-use permit to construct cell-phone tower.

Both parties moved for summary judgment.

The District Court held that:

- City council failed to set forth contemporaneous written reasons which were stated clearly enough to enable judicial review, as required by the Telecommunications Act (TCA);
- Substantial evidence did not support denial based on local height restrictions;
- Substantial evidence did not support denial based on alleged negative impact on property values;
- Companies demonstrated that denial of application would result in significant gap in personal wireless service coverage;
- Companies demonstrated that they inquired into feasibility of alternative site locations; and
- Order requiring city council to approve application was warranted.

REFERENDA - OHIO

State ex rel. Sanduskians for Sandusky v. Sandusky

Supreme Court of Ohio - September 23, 2022 - N.E.3d - 2022 WL 4395899 - 2022-Ohi--3362

Taxpayer and others sought a writ of mandamus ordering city, city law director, and city commission members to certify a charter-amendment petition for a vote by city electors at general election, and requested attorney fees.

The Supreme Court held that:

- Estoppel did not apply to preclude taxpayer and others from arguing that statute, which listed

what had to be included in any initiative or referendum petition, did not apply to their charter-amendment petition;
- Statute requiring an initiative petition to contain a full and correct copy of the title and text of the proposed ordinance, and a full and correct copy of the ordinance to be referred, did not apply to taxpayer and others' petition to amend city charter; abrogating *State ex rel. Hackworth v. Hughes,* 97 Ohio St.3d 110, 776 N.E.2d 1050; *Morris v. City Council of the City of Macedonia*, 71 Ohio St.3d 52, 641 N.E.2d 1075; *State ex rel. Becker v. Eastlake*, 93 Ohio St.3d 502, 756 N.E.2d 1228; and
- Taxpayer was not entitled to mandamus relief on claim seeking to have city and board of elections take the necessary steps to place proposed charter amendment on the next general election ballot.

Estoppel did not apply to preclude taxpayer and others from arguing that statute, which listed what had to be included in any initiative or referendum petition, did not apply to their charter-amendment petition; even if taxpayer and others took the position in their communications with city that the general municipal initiative and referendum statutes applied to their petition, they did not raise the argument in a court proceeding, and thus estoppel did not apply.

Statute requiring an initiative petition to contain a full and correct copy of the title and text of the proposed ordinance, and a full and correct copy of the ordinance to be referred, did not apply to taxpayer and others' petition to amend city charter; statute applied only to initiative and referendum petitions, and thus was inapplicable to a municipal charter-amendment petition, unless something in the municipal charter incorporated the statute into the charter-amendment process, as a charter amendment was not an "initiative"; abrogating *State ex rel. Hackworth v. Hughes*, 97 Ohio St.3d 110, 776 N.E.2d 1050; *Morris v. City Council of the City of Macedonia*, 71 Ohio St.3d 52, 641 N.E.2d 1075; *State ex rel. Becker v. Eastlake*, 93 Ohio St.3d 502, 756 N.E.2d 1228.

Taxpayer was not entitled to mandamus relief on claim seeking to have city and board of elections take the necessary steps to place proposed charter amendment on the next general election ballot; city charter called for a proposed amendment to be submitted to the electors "at the next regular municipal election" occurring between 60 and 120 days from the city commission's passage of an ordinance providing for the submission, and "regular municipal election" was defined as an election occurring in November of an odd numbered year.

Taxpayer was not entitled to an award of attorney fees in mandamus action seeking to compel city, city law director, and city commission members to certify a charter-amendment petition for a vote by city electors at general election, pursuant to statute that allowed a court to award attorney fees to a successful taxpayer instituted a lawsuit after a city law director failed, upon request of a taxpayer, to apply for a writ of mandamus to enforce any duty enjoined by law or ordinance; an award of fees was generally warranted only when a respondent's actions were not reasonably supported by law, and city respondents position that charter-amendment petition was deficient as it failed to contain a full and correct copy of the title and text of the proposed ordinance was supported by caselaw.

EMINENT DOMAIN - TEXAS

Baker v. City of McKinney, Texas

United States District Court, E.D. Texas, Sherman Division - August 26, 2022 - F.Supp.3d - 2022 WL 3704302

Homeowner brought action against city seeking compensation for damages to her home caused by standoff with armed fugitive, alleging violation of the Takings Clauses of the federal and state constitutions.

Following jury trial, the District Court entered judgment in favor of homeowner and awarded $44,555.76 in just compensation for the cost of repairs to her real property, and $15,100.83 in just compensation for the loss in market value to her personal property. City moved for new trial.

The District Court held that:

- City was liable for unconstitutional taking based on destruction of property during standoff;
- Homeowner's daughter did not consent to taking;
- Governmental immunity did not shield city from liability under Takings Clause of Texas Constitution;
- Jury instruction on relevance of police officers' actions did not constitute plain error; and
- Damages award of $15,100 for loss of personal property was not against the weight of the evidence.

City was liable on homeowner's claim for unconstitutional taking in violation of the Fifth Amendment based on destruction of property during standoff and after officers forcefully entered home by breaking down both front and garage door and running over backyard fence, even though law enforcement could lawfully enter homeowner's property pursuant to the public interest in order to draw armed fugitive out of home, where law enforcement could not lawfully destroy homeowner's property.

Homeowner's daughter did not consent to taking, as would preclude city's liability for unconstitutional taking under the Texas Constitution, although daughter consented to law enforcement's entry onto the property in order to draw out armed fugitive in home, where daughter did not consent to destruction of property.

Governmental immunity did not shield city from liability under Takings Clause of Texas Constitution for damage to homeowner's property caused by police officers' apprehension of dangerous fugitive in home; claim under state constitution for taking, damaging, or destruction of property for public use constituted waiver of governmental liability, and officers destroyed homeowner's property for public use.

Exclusion of evidence of donations of items, money, and insurance proceeds that reduced out-o--pocket expenses homeowner incurred in repairing home after it was damaged by police officers pursuing armed fugitive did not prejudice city by forcing it to compensate homeowner twice for same injury, as would warrant new trial in action alleging unconstitutional taking in violation of the Fifth Amendment, where benefits were entirely voluntary and from private third-party payments or services, benefits were in no way funded or paid for by city, nor had homeowner ever been compensated by city for her losses, and allowing city to completely forego paying just compensation by taking private property then waiting for third party to cover owner's losses would have resulted in injustice to homeowner.

Jury instruction, in homeowner's § 1983 action against city alleging unconstitutional taking based on damages caused to her home by police officers' standoff with armed fugitive, stating that any actions taken by police department were not relevant to consideration of whether city violated homeowner's rights by taking her property without just compensation did not constitute plain error, as would warrant new trial, where homeowner's § 1983 claim was not premised on officers' actions in destroying her property, but on city's refusal to provide her with just compensation.

Verdict awarding homeowner $15,100 for loss of personal property was not against the weight of the evidence, and thus did not warrant new trial in homeowner's action against city alleging unconstitutional taking under the Fifth Amendment and Texas Constitution arising from police

officers' standoff with armed fugitive, where homeowner testified that tear gas had permeated the walls and floors of her home, and that, by the time she was permitted to enter her home after tear gas had been remediated, city had removed everything that was in it and no pictures of her damaged personal property had been taken, and homeowner's testimony detailed personal property that had been destroyed, including pre-destruction photographs of each item she discussed.

ZONING & PLANNING - WASHINGTON

Futurewise v. Spokane County

Court of Appeals of Washington, Division 3 - September 22, 2022 - P.3d - 2022 WL 4373952

Petitioners filed petition for judicial review of a final decision of the Growth management Hearings board which upheld county's comprehensive plan.

By agreement of the parties, the Superior Court certified the case for direct review, and appeal was transferred.

The Court of Appeals held that:

- A "capital facility," as contemplated by comprehensive plan requirements of the Growth Management Act (GMA), is a fixed, physical facility that has been built, constructed, or installed to perform a service relevant to the considerations at issue in the GMA, such as public services;
- Transportation facilities need be addressed only in the transportation element of a comprehensive plan, not both the transportation and capital facilities elements;
- GMA requirement that the capital facilities plan element of a comprehensive plan include the proposed locations and capacities of expanded or new capital facilities applies only to facilities owned and operated by the city or county preparing the plan; and
- Capital facilities element of county's comprehensive plan did not have to include a detailed itemization of the amounts of money to be derived from identified public sources.

IMMUNITY - WYOMING

Casey v. Teton County Hospital District

Supreme Court of Wyoming - September 16, 2022 - P.3d - 2022 WL 4284714 - 2022 WY 112

Surgical patient brought action against county hospital and others, alleging that she received negligent medical treatment during her hospital stay.

The District Court granted summary judgment in favor of hospital. Patient appealed.

In matters of apparent first impression, the Supreme Court held that:

- Patient's untimely presentment to county hospital of her notice of claim required dismissal of suit against hospital, and
- Party could not satisfy two-year requirement for presenting notice of claim against governmental entity by substantial compliance.

Surgical patient's untimely presentment to county hospital of her notice of claim more than two years after the accrual of her claim for negligent medical treatment during her hospital stay failed to strictly comply with the Wyoming Governmental Claims Act (WGCA), requiring the dismissal of the

negligence suit against the hospital.

IMMUNITY - CALIFORNIA

Flores v. City of San Diego

Court of Appeal, Fourth District, Division 1, California - September 15, 2022 - Cal.Rptr.3d - 2022 WL 4244284 - 2022 Daily Journal D.A.R. 9981

Mother and girlfriend of motorcyclist, who died during police vehicle pursuit when his motorcycle crashed, brought actions against city for wrongful death and negligence. Actions were consolidated.

The Superior Court granted city's motion for summary judgment based on statutory immunity. Mother and girlfriend appealed.

The Court of Appeal held that:

- Commission on Peace Officer Standards and Training (POST) regulation specifying minimum standards for legislatively-mandated training courses applied to annual trainings;
- Vehicular pursuit training requirements specified in immunity statute were "legislatively mandated" within meaning of POST regulation;
- Term "guidelines" in immunity statute referred to "standards" in vehicle pursuit training statute;
- POST regulation setting forth standard of one year of annual vehicular pursuit training did not exceed statutory authority; and
- Triable issue existed as to whether city provided at least one hour in annual vehicular pursuit training.

PUBLIC UTILITIES - COLORADO

United Power, Inc. v. Federal Energy Regulatory Commission

United States Court of Appeals, District of Columbia Circuit - September 16, 2022 - F.4th - 2022 WL 4281979

Utility member of generation and transmission cooperative petitioned for review of declaratory order of the Federal Energy Regulatory Commission (FERC), which determined that upon admission of natural gas supplier to electrical cooperative, cooperative was subject to jurisdiction of FERC, and that FERC had exclusive jurisdiction over exit charges, which cooperative charged to exiting utility members of cooperative.

Second utility member and Colorado Public Utilities Commission (PUC) intervened in support of utility member. Cooperative, and a third and fourth utility member intervened in support of FERC.

The Court of Appeals held that:

- Utility member failed to exhaust argument that FERC acted ultra vires or beyond agency's statutory authority, as required for Court of Appeals to exercise jurisdiction over argument;
- Utility member exhausted issue before FERC as to whether FERC's actions were arbitrary and capricious;
- FERC's issuance of declaratory order was within its broad discretion to determine when and how to hear and decide matters; and

- Cooperative's exit charge was a rate charged in connection with provision of wholesale electricity, and thus FERC had exclusive jurisdiction to determine reasonableness of exit charge.

Utility member failed to raise with specificity in application for rehearing its argument that Federal Energy Regulatory Commission (FERC) acted ultra vires or beyond statutory authority in finding generation and transmission cooperative was subject to FERC jurisdiction, such that utility member failed to exhaust argument before FERC as required for Court of Appeals to exercise jurisdiction over issue, and thus Court of Appeals was without jurisdiction to consider utility member's argument; utility member argued in footnote to introduction of its request for rehearing that FERC's action was premature and inefficient, but did not describe FERC's action as ultra vires or beyond agency's statutory authority.

Utility member's discussion in footnote of its application for rehearing before Federal Energy Regulatory Commission (FERC), which described FERC's action in asserting jurisdiction over generation and transmission cooperative as premature and inefficient and specified what FERC ought to have done, was sufficiently specific to permit finding that utility member raised argument before FERC that FERC's actions were arbitrary and capricious, and thus utility member exhausted issue before FERC as required for appellate jurisdiction under Federal Power Act (FPA); utility member's description of what FERC did and what FERC ought to have done, which was wait for state tribunal's resolution of related issue, were specific enough to make out an "arbitrary and capricious" argument without squinting.

Federal Energy Regulatory Commission's (FERC's) decision to issue declaratory order as to FERC's jurisdiction over generation and transmission cooperative to determine utility member's exit charge was within FERC's broad discretion to determine when and how to hear and decide matters, despite fact that proceeding before state agency was still pending as to whether natural gas supplier's admission to cooperative, from which FERC's jurisdiction was rendered, was proper; FERC explained it had statutory obligation to act on rate filings submitted by electrical cooperative, it did not matter that FERC might have had to revisit its determination and some later time, and providing temporary clarity to parties was useful and reasonable.

Generation and transmission cooperative's exit charge, levied against a withdrawing member, was a rate charged in connection with the provision of wholesale electricity, and thus Federal Energy Regulatory Commission (FERC) had exclusive jurisdiction to determine reasonableness of cooperative's exit charge, although exit charge was not a rate or charge for a jurisdictional service; exit charge protected cooperative's members against rate increases caused by exit of a member while also increasing membership commitment and stability, exit charge was important part of bargain to which a firm agreed when it became part of cooperative, and if there were no obligation to pay an equitable exit charge, cost of electricity under requirements contract would have been higher.

PUBLIC MEETINGS - CONNECTICUT

Priore v. Haig

Supreme Court of Connecticut - September 7, 2022 - A.3d - 344 Conn. 636 - 2022 WL 4099434

Special permit applicant filed suit against neighbor for libel per se, libel per quod, slander per quod, and defamation, alleging neighbor's comments at planning and zoning commission meeting caused reputational damage to his standing in community and profession and falsely accused him of

criminal misconduct and being untrustworthy.

The Superior Court granted neighbor's motion to dismiss on grounds that court lacked subject matter jurisdiction and denied applicant's motion to reargue. Applicant appealed, and the Appellate Court affirmed. Applicant petitioned for certification to appeal, which was granted.

The Supreme Court held that public hearing on special permit application was not "quasi-judicial," and thus statements neighbor made during hearing about permit applicant were not protected by an absolute privilege from applicant's defamation claim.

A proceeding may be "quasi-judicial," for purposes of absolute defamation privilege, when the body or entity conducting the proceeding has the discretion to apply the law to the facts, while additional factors that could assist in determining whether a proceeding is quasi-judicial in nature include whether the body has the power to exercise judgment and discretion, hear and determine or to ascertain facts and decide, make binding orders and judgments, affect the personal or property rights of private persons, examine witnesses and hear the litigation of the issues on a hearing, and enforce decisions or impose penalties; these factors are not exclusive, nor must all factors militate in favor of a determination that a proceeding is quasi-judicial in nature for a court to conclude that the proceeding is quasi-judicial.

Public hearing on special permit application before town planning and zoning commission was not "quasi-judicial," and thus statements neighbor made during hearing about permit applicant were not protected by an absolute privilege from applicant's defamation claim; while commission had discretion to apply the law to the facts of the application before it, and was empowered to make binding orders or judgments affecting the rights of private persons, the hearing lacked procedural safeguards, the commission had limited authority to reject evidence or otherwise limit what information was brought before it to ensure the reliability of the proceeding, and there was a lack of a public policy rationale for extending absolute immunity.

SCHOOLS - FLORIDA

Chabad Chayil, Inc. v. School Board of Miami-Dade County, Florida

United States Court of Appeals, Eleventh Circuit - September 8, 2022 - F.4th - 2022 WL 4100687

Operator of Jewish oriented afterschool program brought § 1983 action against school district and county's Office of Inspector General (OIG), alleging violations of its First Amendment right to freely exercise religion, violation of equal protection rights, and violation of due process under the Fourteenth Amendment.

United States District Court for the Southern District of Florida dismissed the claims with prejudice and without leave to amend. Operator appealed.

The Court of Appeals sitting by designation, held that:

- School district did not have *Monell* liability;
- OIG did not have § 1983 liability for alleged violations of operator's First Amendment right to freely exercise its religion;
- Operator failed to establish a "class of one" equal protection claim;
- Operator's alleged agreement with school district did not support its due process claim;
- Operator did not have a due process protected right to have school district consider its application

for use of school facilities; and
- OIG did not have § 1983 liability for the alleged due process violation.

School superintendent's alleged actions in making decision to prevent operator of Jewish oriented afterschool program from using school district's facilities for the program were subject to meaningful administrative review and therefore lacked the final policymaking authority required for school district to have *Monell* liability for alleged violations of operator's religious freedom rights under the First Amendment, and equal protection and procedural due process rights under the Fourteenth Amendment, where state statutory scheme as a whole made clear that the school district retained ultimate authority to review and reverse any of the superintendent's decisions that it disapproved.

Allegations by operator of Jewish oriented afterschool program, that county's Office of Inspector General (OIG), in investigating operator for failing to reveal it collected monies in application for free access to school district facilities, exhibited bias against operator based on its teaching of religion and that OIG investigators pressured interviewees to say that teaching religious topics violated some policy, despite having no basis to believe that religious orientation of the program violated any school district policy, were insufficient to plausibly allege an official policy or custom of OIG that would render it liable for violating operator's right to freely exercise its religion; allegations did not demonstrate a custom so longstanding and widespread that it was deemed authorized by policymaking officials.

Operator of Jewish oriented afterschool program failed to demonstrate that its comparators were similarly situated in all relevant respects and thus failed to establish a "class of one" equal protection claim against county's Office of Inspector General (OIG) arising from allegations that OIG singled it out for investigation for failing to disclose it collected monies in order to get facility use fee waivers from the school district when numerous other organizations received fee waivers while charging fees, where OIG's investigation into operator was instigated by an anonymous complaint alleging that operator was improperly receiving fee waivers, and operator did not allege that any of the proposed comparators were also the subject of such a complaint.

Purported informal agreement between operator of Jewish oriented afterschool program and school district, allowing operator to use school facilities for program until conclusion of county Office of Inspector General (OIG) investigation into operator's alleged misrepresentations in order to gain free use of school facilities and circumvention of process for having an afterschool program at a school district facility, was not a stigma plus legal entitlement, and thus, operator failed to establish a valid § 1983 due process claim for deprivation of a liberty interest based on reputational harm against OIG for making allegedly false and defamatory statements in its investigation report, where operator did not have a signed, written agreement to use school district facilities for the school year.

Right to have applications for use of school facilities be considered by school district was not a property right recognized under state law, and thus, operator of Jewish oriented afterschool program did not have a stigma plus legal entitlement supporting a valid § 1983 due process claim for deprivation of a liberty interest based on reputational harm against county Office of Inspector General (OIG), arising from OIG's investigation into operator's alleged misrepresentations in order to gain free use of school facilities and circumvention of process for having an afterschool program at a school district facility; operator did not point to any legal authority providing that it had a right to have a local school district consider its applications.

Even if county's Office of Inspector General (OIG) acted in accordance with some official policy or custom, that policy or custom did not cause harm suffered by operator of Jewish oriented afterschool program from school district's action in barring operator from continuing to use school facilities

following OIG's investigation into operator's alleged misrepresentations in effort to obtain free use of school facilities, and thus, OIG did not have § 1983 liability for operator's due process claim for deprivation of a liberty interest based on reputational harm arising from OIG's alleged defamatory statements in its investigation report; OIG's role was to conduct investigations and issue reports, and it did not have authority to refuse any group permission to use school district property.

MARKETABLE TITLE ACT - MINNESOTA

Lundstrom v. Township of Florence

Court of Appeals of Minnesota - September 6, 2022 - N.W.2d - 2022 WL 4074769

Landowners brought declaratory-judgment action against township, claiming that township's interest in unopened streets abutting their property was extinguished by Marketable Title Act (MTA).

The District Court denied landowners' summary judgment motion and granted township's summary judgment motion in which they sought a declaration that the disputed streets were platted, public, unopened roads. Landowners appealed.

The Court of Appeals held that:

- Landowners established a "source of title" for purposes of their claim under MTA, and
- Township neither timely recorded notice of its easement interest nor identified evidence that satisfied possession exception notice requirement of MTA.

Landowners established a "source of title" for purposes of their claim under Marketable Title Act (MTA) in declaratory-judgment action against township regarding their respective interests in portions of two platted, unopened streets that abutted landowners' lots; fee simple title to real estate was "source of title" for MTA purposes, landowners owned fee simple interests in their lots, lots abutted streets dedicated by plat, neither street had been vacated, and landowners had fee simple interest to center of street.

Township neither timely recorded notice of its easement interest in unopened streets abutting landowners' property nor identified evidence that satisfied possession exception notice requirement of Marketable Title Act (MTA), and thus township was conclusively presumed to have abandoned its interest in unopened streets to which landowners had asserted interest, although township had purported interest through execution and recording of land by plat dedication in 1857 and claimed that public used street to access river abutting landowners' property; recording of plat did not satisfy township's duty to file notice of claim under MTA, township did not show that public used streets to access riverfront, and abandonment of platted public street did not require affirmative act.

REFERENDA - NEW JERSEY

Kumar v. Piscataway Township Council

Superior Court of New Jersey, Appellate Division - August 23, 2022 - A.3d - 2022 WL 3589079

Voters sought review of a decision from township council, which approved resolutions to place non-binding public opinion questions on general election ballot regarding proposed ordinances to

establish emergency medical services department and to required township to record, broadcast, or stream township's public meetings.

The Superior Court found township's resolutions were void and enjoined township from placing non-binding public opinion questions on the ballot, but denied voters' motion for attorney's fees. Appeals were taken.

The Superior Court, Appellate Division, held that:

- Township council was not authorized to place non-binding public opinion questions on general election ballot under the Faulkner Act, but
- Voters were entitled to award of attorney's fees under Civil Rights Act.

Township council was not authorized to place non-binding public opinion questions concerning identical binding questions proposed by voters on the same general election ballot under the Faulkner Act; voters had already asked township council to consider and place binding questions regarding creation of an emergency medical services department and recording or broadcasting of township meetings under statutory procedure governing initiatives for proposed ordinances, and inclusion of both binding and non-binding questions would have caused voter confusion and could have resulted in contradictory results.

Voters' right to petition initiatives for proposed township ordinances constituted a "substantive right" protected by the Civil Rights Act (CRA), such that a deprivation of the right entitled voters to an award of attorney fees as the prevailing party under the CRA; township, through its council, violated the Act and prevented voters from having their petitions fully and fairly considered, and court's order enjoining township from placing non-binding questions on the ballot altered legal relationship between the parties in favor of voters.

EMINENT DOMAIN - NEW YORK

20 Rewe Street, Ltd. v. State

Supreme Court, Appellate Division, Second Department, New York - September 14, 2022 - N.Y.S.3d - 2022 WL 4230493 - 2022 N.Y. Slip Op. 05145

Landowner brought action against State for damages from partial taking of real property. Following nonjury trial, the Court of Claims rendered judgment in favor of landowner, and awarded landowner $3,310,500 in damages. Landowner appealed.

The Supreme Court, Appellate Division, held that record supported trial court's pre-taking value of real property based on State's appraisal.

Record supported trial court's $4,389,000 pre-taking value of landowner's real property based on State's appraisal, in action to recover damages arising from a partial taking of real property; comparable sales proffered by State's expert were sufficiently similar to serve as a guide to the market value of the property, notwithstanding differences between the comparables and the property, and State's appraiser sufficiently and credibly explained the basis for his selection of comparable properties and relevant adjustments made to the valuation of the properties, and evidence supported trial court's rejection of certain adjustments made by landowner's appraiser.

BONDS - OHIO

Vandercar, LLC v. Port of Greater Cincinnati Development Authority

Court of Appeals of Ohio, First District, Hamilton County - September 9, 2022 - N.E.3d - 2022 WL 4112705 - 2022-Ohio-3148

In 2019, Developer entered into a $36 million purchase contract for the purchase of the Millennium Hotel in downtown Cincinnati in order to facilitate the redevelopment of the hotel. Developer later assigned its interest in the contract to the Port of Greater Cincinnati Development Authority under an Agreement Regarding Assignment ("the Agreement") in exchange for two potential fees totaling $7.5 million.

Under the purchase and sale agreement, the Port was obligated to pay Developer a $2.5 million "Developer Fee" upon the closing of the transaction. In the event that the Port issued the "Redevelopment Bonds" within one year of the closing of the sale, it was obligated to pay Developer an additional $5 million.

On February 13, 2020, the Port issued revenue bonds in the amount of $52 million. On February 14, 2020, the Port closed on its acquisition of the real property and paid Developer its $2.5 million Development Fee.

Developer subsequently submitted an invoice for the remaining $5 million, Developer asserted that the revenue bonds were issued for purposes other than simply property acquisition and were thus Redevelopment Bonds issued within one year of closing, which triggered the Port's obligation to pay the Redevelopment Fee. Developer claimed that the $52 million of revenue bonds consisted of both Property Acquisition Bonds and Redevelopment Bonds.

The Port argued that the revenue bonds consisted only of Property Acquisition Bonds, and that it was not obligated to pay the Redevelopment Fee because it did not issue Redevelopment Bonds to construct a new hotel.

The Agreement did not define "acquisition" or "redevelopment," and defined "Property Acquisition Bonds" only as bonds issued to acquire the Real Property and "Redevelopment Bonds" as those issued for redevelopment of the Real Property.

The Court of Appeals held that:

- The $52 million issuance of revenue bonds constituted both Property Acquisition Bonds and Redevelopment Bonds, triggering the Port's obligation to pay Developer's $5 million Redevelopment Fee.
- Remand was necessary to determine if the Port acted in bad faith, as the basis for an award of attorneys' fees as costs.
- Developer was not entitled to the payment of prejudgment interest, as the Port was an arm or instrumentality of the state.

ZONING & PLANNING - OHIO

State ex rel. Halstead v. Jackson

Supreme Court of Ohio - September 13, 2022 - N.E.3d - 2022 WL 4137610 - 2022-Ohi--3205

Relators sought writ of mandamus to have referendum on zoning ordinance passed as emergency legislation placed on upcoming general-election ballot.

The Supreme Court held that:

- Relators caused unreasonable delay in waiting to file action, as relevant to whether action was barred by laches;
- City and prospective purchaser of land were not prejudiced by delay, and thus action was not barred by laches;
- Relators lacked adequate remedy in ordinary course of law;
- Ordinance validly passed as emergency legislation was not subject to referendum under city charter; and
- Ordinance sufficiently stated reasons for passage as emergency legislation.

Zoning ordinance validly passed as emergency legislation was not subject to referendum under city's charter, which stated that zoning ordinances "shall be subject to the provisions of [the charter] pertaining to their enactment and matters of initiative or referendum"; natural reading of charter was that "subject to" had one object, i.e., "the provisions of [the charter]," meaning that zoning ordinances could be enacted in same way as other ordinances and that charter's referendum provisions applied to such ordinances, and charter incorporated state law concerning referendum petitions, which law exempted from referendum power ordinances passed as emergency legislation.

Stated reasons in zoning ordinance for its passage as emergency legislation, specifically, to preserve and increase municipal income tax revenues, to protect value of previously made utility infrastructure investments in zoned area, and to protect city's influence over and ability to fund infrastructure improvements in zoned area, were sufficient to satisfy requirement that ordinance set forth reasons for passage as emergency legislation under statute providing that such ordinances go into immediate effect, and thus zoning ordinance was not subject to referendum.

MUNICIPAL CORPORATIONS - OHIO

State ex rel. Village of Moscow v. Clermont County Board of Elections

Supreme Court of Ohio - September 8, 2022 - N.E.3d - 2022 WL 4100752 - 2022-Ohio-3138

Protestors, a village and its mayor, sought writ of prohibition to reverse Board of Elections' denial of protest to keep petition to surrender the corporate powers of village off the ballot as it had not been submitted to village's legislative authority prior to its submission to the Board of Elections and had not been filed with township Board of Trustees, and to reverse Board of Elections' certification of petition to the ballot, and sought a writ of mandamus compelling Board of Elections to remove the measure from the ballot.

The Supreme Court held that:

- Board of Elections failed to follow applicable legal provisions by placing surrender petition on ballot despite fact that petition had not been submitted to village's legislative authority prior to its submission to Board of Elections, as would support writ of prohibition to reverse certification of

surrender petition to ballot, abrogating *Pringle v. Clermont Cy. Bd. of Elections*, 12th Dist. Clermont No. CA2019-10-078, 2019-Ohio-4528, 2019 WL 5692285; and
- Grant of writ of prohibition mooted request for a writ of mandamus.

SCHOOLS - OKLAHOMA

Ritter v. State

Supreme Court of Oklahoma - September 20, 2022 - P.3d - 2022 WL 4359959 - 2022 OK 73

Parents of public school students brought a declaratory judgment action challenging the constitutional validity of statutes prohibiting a public school district from requiring a vaccination or proof of a vaccination against COVID-19 for a student to attend in-person school and from mandating masks for unvaccinated students unless the Governor declared a state of emergency in the jurisdiction in which the school board was located.

The District Court granted a temporary injunction. State appealed and parents filed a counter-appeal.

The Supreme Court held that:

- Statutes were an unconstitutional delegation of legislative authority to the extent they required Governor to declare an emergency, and
- Unconstitutional provision could be severed from the remainder of statutes.

Principles of sovereign immunity did not preclude plaintiffs from pursuing a declaratory judgment action against the State challenging the validity of statutes relating to vaccination restrictions and COVID-19 mask mandates in public schools as violative of various constitutional provisions including provision on delegation of legislative authority; a declaratory judgment could be sought to determine the validity of any statute, and a suit for declaratory judgment was neither strictly legal nor equitable, but assumed the nature of the controversy at issue.

Statutes prohibiting school boards for public school districts from requiring a vaccination or proof of a vaccination against COVID-19 for a student to attend in-person school and from mandating masks for unvaccinated students unless the Governor declared a state of emergency in the jurisdiction in which the school board was located were an unconstitutional delegation of legislative authority, to the extent the statutes required the Governor to declare an emergency before school boards could make decisions regarding local health matters; statutes removed the school boards' authority to act independently and exercise the authority granted to school boards and statutes granted that authority to Governor, who had neither constitutional nor statutory authority over operation of schools.

Unconstitutional provision in statutes relating to vaccination restrictions and COVID-19 mask mandates in public schools, which impermissibly delegated legislative authority to the Governor to declare an emergency before local school districts could make decisions regarding local health matters, could be severed from the valid provisions, which remained enforceable; valid provisions were separable, or were capable of being executed in accordance with the legislative intent of the statutes as enacted.

IMMUNITY - CONNECTICUT

Daley v. Kashmanian

Supreme Court of Connecticut - August 30, 2022280 A.3d - 344 Conn. 464 - 2022 WL 3692856

Motorcyclist brought action against police officer and city, alleging that officer had negligently and recklessly caused motorcyclist to be ejected from his motorcycle.

Following close of evidence at jury trial, the Superior Court granted officer's motion for directed verdict as to recklessness charge, and subsequently, following jury verdict in motorcyclist's favor on negligence charge, granted officer's and city's motions to set aside the jury verdict. Motorcyclist appealed. The Appellate Court affirmed in part, reversed in part, and remanded. Motorcyclist filed petition for certification.

The Supreme Court held that:

- Operation of a motor vehicle is a "ministerial act" for which a municipal employee lacks qualified immunity;
- Officer's operation of unmarked police car was not itself a discretionary activity, but officer's decision to use unmarked police car to surveil motorcyclist was discretionary for purposes of governmental immunity; and
- Officer and city were not entitled to discretionary act immunity for officer's negligent operation of the police car.

Operation of a motor vehicle is a "ministerial act" for which a municipal employee lacks qualified immunity; terms of the relevant motor vehicle laws establish a ministerial duty, insofar as they contain mandatory statutory language that itself limits discretion in the performance of the mandatory act.

City police officer's operation of unmarked police car was not itself a discretionary activity during the surveillance operation that led to the collision that injured motorcyclist since operation of a motor vehicle was a highly regulated activity that constituted a ministerial function, but officer's decision to use unmarked police car to surveil motorcyclist was discretionary one for purposes of governmental immunity.

City police officer's operation of unmarked police car, including following the statutory rules of the road, was a ministerial function, and thus, officer and city were not entitled to discretionary act immunity for officer's negligent operation of the police car, while surveilling motorcyclist, which resulted in motorcyclist's being ejected from his motorcycle; motor vehicle statutes providing the rules of the road imposed numerous ministerial duties that officer violated in his operation of unmarked police car.

IMMUNITY - DISTRICT OF COLUMBIA

Thurman v. District of Columbia

District of Columbia Court of Appeals - September 15, 2022 - A.3d - 2022 WL 4241684

Juvenile brought action against District of Columbia and police officers alleging negligence and excessive force arising from his being bitten by police dog that officers released into house without a canine warning to search for potentially armed juvenile suspects during a burglary call.

The Superior Court granted summary judgment for District of Columbia and officers. Juvenile

appealed.

The Court of Appeals held that:

- Juvenile could use defense expert's affidavit on standard of care about deploying police dogs on juvenile suspects at summary judgment stage;
- Factual issues on any deviation from standard of care and causation precluded summary judgment on negligence claims against officers;
- Sovereign immunity barred claims of negligent hiring, training, and supervision against District of Columbia;
- Officers had qualified immunity from excessive force claims; and
- District of Columbia did not have *Monell* liability on excessive force claims.

ZONING & PLANNING - KANSAS

Pretty Prairie Wind LLC v. Reno County

Court of Appeals of Kansas - August 26, 2022 - P.3d - 2022 WL 3693052

Company that was denied conditional-use permit from county to build wind farm brought action against county challenging denial, alleging that protest petitions submitted by county residents were invalid, and that decision to deny permit was unreasonable.

The District Court denied company's motion for partial summary judgment, denied company's subsequent request to file interlocutory appeal, and, at company's request, dismissed outstanding claim and entered final judgment. Company appealed.

The Court of Appeals held that statutes governing requirements for election petitions did not apply to zoning protest petitions for conditional-use permit to build wind farm.

Statute requiring three-fourths majority of board of county commissioners to overrule planning commission's recommendation when the owners of at least 20% of the land within 1,000 feet of the property at issue sign and file protest petitions within 14 days after the end of the public hearings, rather than statutes governing requirements for election petitions, applied to zoning protest petitions for conditional-use permit for company that sought to build wind farm; language of statutes concerned elections and signature requirements for electors, zoning protest petitions did not trigger public involvement, unlike election petitions, signing requirement for zoning petitions required land ownership, not ability to vote as in election petitions, and zoning petitions were filed with city or county clerk, not election officer.

EMINENT DOMAIN - LOUISIANA

City Bar, Inc. v. Edwards

Court of Appeal of Louisiana, First Circuit - August 30, 2022 - So.3d - 2022 WL 3754747 - 2021-1437 (La.App. 1 Cir. 8/30/22)

Bar owners filed class action lawsuit against Governor in his official capacity, alleging that they were uniquely singled out by series of executive orders that closed and restricted the operation of bars statewide for the purpose of slowing the spread of COVID-19, and seeking just compensation for the alleged taking of their property, permits, business operations, and income.

The District Court granted the Governor's peremptory exception of no cause of action. Owners appealed.

The Court of Appeal held that owners plausibly alleged that executive orders closing and restricting operation of bars statewide for purpose of slowing spread of COVID-19 was regulatory taking under State Constitution.

Bar owners plausibly alleged that Governor's conduct, in issuing series of executive orders closing and restricting operation of bars statewide for purpose of slowing spread of COVID-19, constituted taking of their property under Louisiana Constitution, where owners alleged that they had constitutionally protected property rights in lawfully issued alcohol permits and income derived from their business enterprises, owners alleged that their rights were taken and damaged by Governor for express purpose of removing or reducing risk to public health or safety, and owners alleged that orders constituted regulatory takings that damaged their property rights.

PUBLIC RECORDS - OHIO

State ex rel. Stevenson v. King

Supreme Court of Ohio - September 7, 2022 - N.E.3d - 2022 WL 4086758 - 2022-Ohio-3093

City council president filed a mandamus action seeking to compel city mayor and finance director to produce records related to certain public expenditures.

The Eighth District Court of Appeals granted the writ in part and denied the writ in part. Mayor and finance director appealed.

The Supreme Court held that:

- President of city council was entitled to mandamus relief on her claim seeking the production of public records from mayor and finance director, and
- Evidence was insufficient to establish an attorney-client relationship between city council or city council president and law firm.

President of city council was entitled to mandamus relief on her claim seeking the production of public records from city mayor and finance director related to funds received and spent by the city under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), where mayor and finance director failed to respond to the request, they failed to present sufficient evidence to support their claim that no written records existed pertaining to the application for and award of CARES Act grant money, and they failed to authenticate evidence submitted in support of their claim that records pertaining to the appropriation and expenditure of CARES Act money had already been shared with the city council through regular financial reports.

Evidence was insufficient to establish an attorney-client relationship between city council or city council president and law firm, and thus city council president was entitled to an award of attorney fees based on city mayor and finance director's failure to comply with public records request; city council passed resolution to hire law firm, mayor vetoed the resolution, council president did not allege that city council overrode the veto, and there was no evidence that president retained law firm in her personal capacity.

BOND ELECTION - TEXAS

Rawls v. Woodville ISD

Court of Appeals of Texas, Beaumont - August 31, 2022 - Not Reported in S.W. Rptr. - 2022 WL 3908530

Charles Rawls filed Plaintiff's/Contestant's Original Election Contest against Woodville ISD (WISD), Lisa Meysembourg, in her official capacity as Superintendent of WISD, and Donece Gregory, in her official capacity as County Clerk of Tyler, County (collectively, the Appellees) concerning WISD's $47.85 million school bonds for 2022 on the May 7, 2022 election ballot.

Rawls alleged a variety of election irregularities in the bond election process. Rawls sought a declaration from the trial court stating that the administration, conduct, and manner of the early voting and election day voting for the Proposition was illegal and invalid as a matter of law.

The trial court granted Appellees' Pleas to the Jurisdiction and Rawls appealed.

The Court of Appeals affirmed, holding that:

- WISD's Board of Trustees ordered the bond election and WISD's Board of Trustees was the canvassing authority for the bond election.
- Because Rawls's suit named WISD, Meysembourg, and Gregory as contestees instead of the presiding officer of the authority that ordered the contested election or the presiding officer of the final canvassing authority for the contested election (namely, the President of WISD's Board of Trustees), Rawls failed to comply with the statutory prerequisite to filing an election contest suit.

POLITICAL SUBDIVISIONS - VIRGINIA

Fines v. Rappahannock Area Community Services Board

Supreme Court of Virginia - September 8, 2022 - 876 S.E.2d - 2022 WL 4099848

Patient brought action against community services board for negligent retention, negligent supervision, negligence, and vicarious liability, alleging that patient received psychological therapy through board at its facilities when he was between six and eight years old, that therapist employed by board molested him multiple times during individual counseling sessions, and that patient suffered significant mental and emotional injuries as result of the repeated sexual assaults.

Board demurred and filed plea in bar asserting sovereign immunity. The King George Circuit Court granted plea in bar. Patient appealed.

The Supreme Court held that:

- Board was not "arm" of Commonwealth entitled to sovereign immunity;
- Board was not specifically created as body corporate and politic and as political subdivision of Commonwealth, for purposes of determining whether board was municipal corporation immune from tort liability;
- Board was created to fulfill public purpose, for purposes of determining whether board was municipal corporation;
- Board only partially satisfied third factor pertinent to determination of whether board was municipal corporation, i.e., whether board had power to have common seal, to sue and be sued, to

enter into contracts, to acquire, hold and dispose of its revenues, personal and real property;
- Board only partially satisfied fifth factor pertinent to determination of whether board was municipal corporation, i.e., whether board had power to borrow money and issue tax-exempt bonds;
- Question whether board was immune from tort liability involved matter of substantive law, for purposes of determining whether board was municipal corporation; and
- Board was not municipal corporation immune from tort liability.

PRISONS - VIRGINIA

Clayton v. Commonwealth

Court of Appeals of Virginia, Lexington - September 13, 2022 - S.E.2d - 2022 WL 4135504

After bench trial, prisoner was convicted in the Danville Circuit Court of possession of an unlawful chemical compound by a prisoner, and he appealed.

The Court of Appeals held that:

- Statute providing that it is unlawful for prisoner to procure, sell, secrete or have in his possession any chemical compound which he has not lawfully received is a strict liability offense, and
- Commonwealth was not required to prove that prisoner had knowing possession of the chemical compound.

PUBLIC PENSIONS - CALIFORNIA

Hale v. California Public Employees' Retirement System

Court of Appeal, First District, Division 3, California - August 29, 2022 - Cal.Rptr.3d - 2022 WL 3713449

Retired firefighters with California's Department of Forestry and Fire Protection who had served as executive officers for union sought judicial review of ALJ's proposed decision that was adopted by California Public Employees' Retirement System board (CalPERS), concluding that cash-outs or buy-downs of holiday leave credits were not compensation earnable and therefore should not be included in final compensation for purposes of calculating monthly retirement allowances.

Union officers petitioned for writ of administrative mandamus. The Superior Court denied petition. Union officers appealed.

The Court of Appeal held that:

- Rule defining special compensation items for members employed by contracting agency and school employers that must be reported to CalPERS did not control whether holiday cash-outs were special compensation that were required to be included in calculating pensions;
- Cash-outs met the statutory definition of special compensation, and thus were required to be included in income when calculating pension benefits;
- Characterization of group or class was the union bargaining unit, rather than class-of-two consisting of union officers alone;
- Cash-outs were not required to be available to all members of bargaining unit, regardless whether they were similarly situated, to be considered special compensation; and

- Court would take judicial notice of decision indicating that CalPERS had taken inconsistent positions on whether state members were subject to rule.

EMINENT DOMAIN - INDIANA

624 Broadway, LLC v. Gary Housing Authority

Supreme Court of Indiana - August 29, 2022 - N.E.3d - 2022 WL 3714283

Condemnee brought action against municipal housing authority, seeking injunctive relief and damages based on allegations that authority unlawfully exercised eminent domain over condemnee's commercial real property and violated condemnee's constitutional and statutory procedural rights.

The Superior Court granted authority's motion for summary judgment and denied condemnee's motion for summary judgment. Condemnee appealed. The Court of Appeals affirmed in part, reversed in part, and remanded with instructions. Petition to transfer was granted.

The Supreme Court held that:

- Notice of condemnation proceedings by publication violated due process;
- Inadequate notice in violation of due process was not harmless; and
- Proper remedy for due process violation was new hearing on just compensation.

Municipal housing authority's use of notice by publication to provide condemnee with notice of hearing regarding authority's exercise of eminent domain on condemnee's property and the valuation of the property, rather than providing actual notice to condemnee's registered agent, violated due process; housing authority knew identity and name of registered agent from condemnee's articles of organization filed with Secretary of State.

Municipal housing authority's due process violation in providing condemnee notice by publication of hearing regarding authority's exercise of eminent domain on condemnee's property and the valuation of the property, rather than providing actual notice to condemnee's registered agent, was not harmless; if condemnee had been given sufficient notice, it could have timely presented its appraisal of the property before the final valuation hearing, and condemnee's appraisal in the amount of $325,000 was significantly higher than the authority's $24,000 appraisal and significantly higher that the final award of $75,000.

Proper remedy for municipal housing authority's due process violation in providing condemnee inadequate notice by publication of hearing regarding authority's exercise of eminent domain on condemnee's property and valuation of the property was new hearing on damages to determine just compensation for taking; authority strictly followed statutory procedures for administrative taking of the property, the taking was not subterfuge to convey private property to another individual for private use, there was no showing that authority acted arbitrarily and capriciously, and adequate legal remedy could be provided through just compensation.

PUBLIC UTILITIES - MAINE

NECEC Transmission LLC v. Bureau of Parks and Lands

Supreme Judicial Court of Maine - August 30, 2022 - A.3d - 2022 WL 3723172 - 2022 ME 48

Owner of renewable energy project, which involved construction of high-voltage direct current (HVDC) transmission line from Canada to New England, brought declaratory judgment action seeking to permanently block retroactive application of ballot initiative that imposed a geographic ban on construction of high-impact electric transmission lines in the state and that required a two-thirds approval from legislature for any similar project on public lands.

The Business and Consumer Court denied owner's motion for preliminary injunction and reported the interlocutory ruling for review.

The Supreme Judicial Court held that retroactive application of ballot initiative could violate due process thus warranting a preliminary injunction.

Retroactive application of ballot initiative that imposed a geographic ban on construction of high-impact electric transmission lines in the state, and that required a two-thirds approval from legislature for any similar project on public lands, would violate due process clause of the State Constitution if owner of renewable energy project undertook substantial construction consistent with and in good-faith reliance on its previously-issued public convenience and necessity (CPCN) for the project, which involved the construction of high-voltage direct current (HVDC) transmission line from Canada into New England, and thus owner was entitled to a preliminary injunction in its declaratory judgment action seeking to permanently block retroactive application of ballot initiative.

REFERENDA - NEBRASKA

Eggers v. Evnen

United States Court of Appeals, Eighth Circuit - August 31, 2022 - F.4th - 2022 WL 3905817

Ballot campaign committee and ballot sponsor brought action alleging that provision of Nebraska constitution establishing signature distribution requirement for ballot initiatives violated Equal Protection Clause.

The United States District Court for the District of Nebraska granted plaintiffs' motion for preliminary injunction, and state appealed.

The Court of Appeals held that:

- Claim that requirement violated Equal Protection Clause was subject to rational basis review;
- Plaintiffs failed to establish likelihood of success on merits; and
- Balance of equities and public interest did not favor issuance of preliminary injunction.

Provision of Nebraska constitution establishing signature distribution requirement for ballot initiatives did not restrict fundamental right, and thus claim that requirement violated Equal Protection Clause was subject to rational basis review.

Ballot campaign committee and ballot sponsor failed to establish likelihood of success on merits of their claim that provision of Nebraska constitution establishing signature distribution requirement for ballot initiatives violated Equal Protection Clause by devaluing signatures of voters in populous counties relative to signatures of citizens in less populous counties, and thus were not entitled to preliminary injunction; state had legitimate interest in limiting ballot initiatives to those with reasonable chance of success in order to avoid overcrowded ballot, and lawmaker could rationally conclude that signature distribution requirement furthered that interest by weeding out initiatives

with small but concentrated support base.

Balance of equities and public interest did not favor issuance of preliminary injunction barring application of Nebraska constitution's signature distribution requirement for ballot initiatives in evaluating petition to place proposals to legalize marijuana for medical and recreational purposes on ballot, in light of state's interest in lawfully managing its elections, and fact that signature distribution requirement appeared not to violate ballot campaign committee's equal protection rights.

SHORT TERM RENTALS - NEW JERSEY

Nekrilov v. City of Jersey City

United States Court of Appeals, Third Circuit - August 16, 2022 - 45 F.4th - 2022 WL 3366430

Individuals who invested in and operated short-term rentals filed § 1983 action alleging that city ordinance limiting short-term rentals violated their rights under Takings, Contracts, and Due Process Clauses.

The United States District Court dismissed complaint, and plaintiffs appealed.

The Court of Appeals held that:

- Plaintiffs' forward-looking right to pursue their short-term rental businesses was not property right cognizable under Takings Clause;
- Ordinance did not result in total taking or taking per se;
- Ordinance did not effect partial taking;
- Ordinance did not violate Contracts Clause; and
- Ordinance did not violate plaintiffs' substantive due process rights.

City ordinance limiting short-term rentals did not deprive properties formerly used as short-term rentals of all economically viable use, and thus did not result in total taking or taking per se, even though individuals who invested in and operated short-term rentals could not expect same profits from long-term leases as from short-term rentals; ordinance did not entirely ban short-term rentals, and investors could still make economically viable use of properties by occupying properties or sub-leasing them on long-term basis.

City's enactment of ordinance limiting short-term rentals did not effect partial taking, even though owners and lessees of properties previously used as short-term rentals may have lost between 50% and 66% of their potential revenue, and city officials had encouraged them to invest in short-term rentals; ordinance was general zoning regulation restricting permissible uses of residential housing with goals of protecting residential housing market and promoting public safety, values of underlying properties or leases had not decreased, lost-profit claims failed to account for other potential uses of properties, prior ordinance placed qualifications on operation of short-term rentals, and amended ordinance permitted lessees to use properties for short term rentals for majority of lease term.

City had substantial public purpose in passing ordinance limiting short-term rentals, and thus ordinance did not violate Contracts Clause, even if it substantially impaired long-term leases that investors had entered into for purpose of offering short-term rentals, and mayor was subjectively motivated by his dissatisfaction with online short-term rental platform over campaign donations; city

was not party to long-term leases, and ordinance articulated multiple public purposes, including desire to protect residential character of neighborhoods and reduce nuisance activity associated with short-term rentals.

City ordinance limiting short-term rentals did not violate substantive due process rights of individuals who invested in and operated short-term rentals, even if mayor was subjectively motivated by his dissatisfaction with online short-term rental platform over campaign donations; ordinance articulated several legitimate state interests furthered by change in regulation, including protecting long-term housing supply, reducing deleterious effects on neighborhoods caused by short-term rentals, and protecting residential character and density of neighborhoods.

POLITICAL SUBDIVISIONS - OHIO

State ex rel. Ohio-Kentucky-Indiana Regional Council of Governments v. Bureau of Workers' Compensation

Supreme Court of Ohio - September 6, 2022 - N.E.3d - 2022 WL 4074772 - 2022-Ohio-3058

Council of regional governments, which provided coordinated planning services to federal, state and local governments, their political subdivisions, agencies, departments, instrumentalities, special districts and private agencies or entities relating to regional transportation and development plan within region, sought writ of mandamus ordering state Bureau of Workers' Compensation (BWC) to change council's Ohio State Workmen's Compensation Insurance Fund Manual classification as a "special public authority," a type of public-employer taxing district, which resulted in a much higher premium, and to reassign classifications previously in effect which were applicable to private employers.

Magistrate issued decision recommending issuance of writ. The Tenth District Court of Appeals denied writ. Council appealed.

The Supreme Court held that:

- Council was not a public employer;
- Manual classification that applies to public employers that are taxing districts did not apply to council; and
- BWC's failure to explain why reclassification to "special public authorities" most closely described council's degree of hazard warranted grant of limited writ of mandamus.

Council of regional governments, which provided coordinated planning services to federal, state and local governments, their political subdivisions, agencies, departments, instrumentalities, special districts and private agencies or entities relating to regional transportation and development plan within region, was not a "public employer" for classification of council with respect to risk of hazard for purposes of determining workers' compensation premium rates, even though council received some of its funding from public sources and designated itself a public body in its articles of agreement, apparently for purposes of receiving federal transportation funds; council did not fit into any of the categories of public employers, which were delineated with great specificity.

Council of regional governments, which provided coordinated planning services to federal, state and local governments, their political subdivisions, agencies, departments, instrumentalities, special districts and private agencies or entities relating to regional transportation and development plan within region, was not a "taxing district," and thus classification in Ohio State Workmen's

Compensation Insurance Fund Manual that applies to public employers that are taxing districts, for purposes of determining rate of an employer's workers' compensation premiums, did not apply to council, which was not a territorial division of government throughout which a tax may be levied, and council had no taxing authority.

Bureau of Workers' Compensation's (BWC) failure to explain why reclassification under Ohio State Workmen's Compensation Insurance Fund Manual from classifications for private employers to "special public authorities" most closely described degree of hazard for Council of regional governments, which provided coordinated planning services to federal, state and local governments, their political subdivisions, agencies, departments, instrumentalities, special districts and private agencies or entities relating to regional transportation and development plan within region, warranted grant of limited writ of mandamus ordering BWC to evaluate degree of hazard in council's business and to explain any conclusion as to why classification best described council's business with respect to the degree of hazard; council did not meet the definition of a classification.

MANDAMUS - OHIO

State ex rel. Clark v. Twinsburg

Supreme Court of Ohio - September 2, 2022 - N.E.3d - 2022 WL 4005808 - 2022-Ohio-3089

Relator sought a writ of mandamus ordering city, city Clerk of Council, and law director to transmit petition to county Board of Elections concerning a referendum seeking to replace resolution, which stated that the planning commission approved project's final site plan with condition that project's building height not exceed 35 feet.

The Supreme Court held that:

- Laches did not bar action;
- Jurisdictional-priority rule did not apply to bar action;
- Relator lacked an adequate remedy in the ordinary course of law due to the proximity of election; and
- Clerk of Council had a mandatory, ministerial duty to transmit referendum petition to Board of Elections for its signature verification after ten days had elapsed from filing of petition.

Laches did not bar action in which petitioner sought writ of mandamus to compel city, city Clerk of Council, and law director to transmit referendum petition to county Board of Elections seeking to replace resolution, which stated that planning commission approved project's final site plan with condition that project's building height not exceed 35 feet, even though case would not have been automatically expedited had petitioner filed sooner than 21 days, absent showing of material prejudice by delay; proximity to election of approximately two months made it likely that even if petitioner had filed at the earliest possible time after the case ripened, court would have ordered case to be expedited.

Jurisdictional-priority rule, providing that as between state courts of concurrent jurisdiction, tribunal whose power is first invoked acquires exclusive jurisdiction to adjudicate the whole issue and settle rights of parties, did not apply to bar action in which petitioner sought writ of mandamus to compel city, city Clerk of Council, and law director to transmit to county Board of Elections referendum petition to allow for a public vote on referendum seeking to replace resolution, which stated that planning commission approved project's final site plan with condition that project's building height not exceed 35 feet, even though petitioner had filed an administrative appeal in common pleas court

before filing mandamus action, since administrative appeal, which could overturn resolution as improper, would not have provided remedy sought of a public vote on referendum.

Petitioner lacked an adequate remedy in the ordinary course of law due to the proximity of election, which was approximately two months away, as would support petition for writ of mandamus to compel city, city Clerk of Council, and law director to transmit to Board of Elections referendum petition seeking to replace resolution, which stated that planning commission approved project's final site plan with condition that project's building height not exceed 35 feet, since an administrative appeal would not have accomplished what petitioner sought of placing referendum on ballot.

City Clerk of Council had a mandatory, ministerial duty to transmit to Board of Elections for its signature verification after ten days had elapsed from filing date of referendum petition seeking to replace resolution, which stated that planning commission approved project's final site plan with condition that project's building height not exceed 35 feet, as would support issuance of limited writ of mandamus directing Clerk to transmit referendum petition and a certified copy of resolution to county Board of Elections, regardless of law director's judicial or quasi-judicial determination that resolution was administrative, rather than legislative, and therefore not subject to referendum.

EMINENT DOMAIN - PENNSYLVANIA

Frein v. Pennsylvania State Police

United States Court of Appeals, Third Circuit - August 30, 2022 - F.4th - 2022 WL 3724097

Parents of defendant who was convicted in connection with fatal shooting brought action against Pennsylvania State Police, district attorney, and prosecutors under § 1983, alleging that the failure to return gun seized from parents during investigation of shooting, which gun was never used at trial or on appeal, constituted a violation of Fifth Amendment's takings clause and of Second Amendment.

The United States District Court granted motion to dismiss for failure to state a claim. Parents appealed.

The Court of Appeals held that:

- Gun was pressed into public use, as could support takings claim;
- Unfavorable decision by state court on parents' motion seeking return of gun did not result in claim-preclusion bar to takings claim;
- Police and district attorney did not lawfully acquire gun using police powers, as would obviate requirement for compensation of parents pursuant to takings clause; and
- Fact that a citizen can retain or acquire another firearm does not prevent seizure of a firearm from burdening Second Amendment rights; but
- Pprocedure afforded to parents by state court, on parents' motion for return of gun under state criminal procedure rule, was sufficient to comply with due process.

MUNICIPAL ORDINANCE - ALABAMA

City of Center Point v. Atlas Rental Property, LLC

Supreme Court of Alabama - August 26, 2022 - So.3d - 2022 WL 3700376

Landlords sought preliminary and permanent injunctive relief from city ordinance requiring certificates of occupancy for rental-housing units.

The Circuit Court entered preliminary injunction enjoining ordinance's enforcement. City appealed.

The Supreme Court held that:

- The Alabama Uniform Residential Landlord and Tenant Act (AURLTA) expressly preempted the ordinance;
- Landlords demonstrated that they would suffer irreparable harm in the absence of a preliminary injunction; and
- Balance of harms favored entering a preliminary injunction.

Alabama Uniform Residential Landlord and Tenant Act (AURLTA) expressly preempted city ordinance requiring certificates of occupancy for rental-housing units; despite argument that the AURLTA governed only the landlord-tenant relationship, the AURLTA expressly prohibited ordinances relative to residential landlords, rental housing codes, or the rights and obligations governing residential landlord and tenant relationships.

Landlords alleging that the Alabama Uniform Residential Landlord and Tenant Act (AURLTA) preempted city ordinance requiring certificates of occupancy for rental-housing units demonstrated that they would suffer irreparable harm in the absence of a preliminary injunction, despite argument that landlord's alleged harm could remedied through an award of monetary damages; it was evident from the nature of the requirements of the ordinance, as well as the nature of the penalties for compliance with the ordinance, that it would be difficult, if not impossible, to accurately calculate the future damages that the landlords might suffer if the ordinance were allowed to stand, notwithstanding its determination that the ordinance was preempted by the AURLTA.

Balance of harms favored entering a preliminary injunction enjoining enforcement of city ordinance requiring certificates of occupancy for rental-housing units; city was attempting to regulate an area of the law that the legislature intended the Alabama Uniform Residential Landlord and Tenant Act (AURLTA) to exclusively occupy, and city had other avenues to protect the health and safety of its citizens, such as building regulations that governed the conditions and maintenance of all property, buildings, and structures within the city, not just rental-housing units.

BREACH OF CONTRACT - CALIFORNIA

CAM-Carson, LLC v. Carson Reclamation Authority

Court of Appeal, Second District, Division 8, California - August 23, 2022 - Cal.Rptr.3d - 2022 WL 3593158 - 2022 Daily Journal D.A.R. 8974

Commercial real estate developer brought action against city and city reclamation authority for breach of contract and breach of the covenant of good faith and fair dealing, alleging that developer entered contracts with defendants to develop 40-acre site after defendants remediated soil and groundwater contamination, installed infrastructure, and built roads, that defendants engaged in gross mismanagement and malfeasance that created massive funding deficit which derailed project, causing damages to developer of over $80 million, and that city was alter ego of reclamation authority.

City demurred to the complaint. The Superior Court sustained demurrer. Developer appealed.

The Court of Appeal held that:

- The alter ego doctrine may be applied to a government entity in a case where the facts justify an equitable finding of liability;
- Developer alleged that city and reclamation authority were operated with integrated resources in pursuit of single business purpose, that city dominated reclamation authority such that reclamation authority had no separate mind, will or existence of its own, and that inequitable result would follow if acts in question were treated as those of reclamation authority alone, as required to state claim against city under alter ego theory for breach of contract; and
- Developer alleged that city and reclamation authority were alter egos and that developer and city were also parties to development agreement, as required to state claim against city for breach of implied covenant of good faith and fair dealing.

ANTI-TRUST - FLORIDA

Town of Indian River Shores v. City of Vero Beach

United States District Court, S.D. Florida - August 23, 2022 - F.Supp.3d - 2022 WL 3593152

Town brought action against city, alleging antitrust violations of the Sherman Act arising from a service territory agreement between city and county that foreclosed town from obtaining essential water services from county in the future.

City moved to dismiss.

The District Court held that:

- Legal interests were sufficiently adverse to establish a substantial, ripe controversy;
- Town made sufficient showing of hardship for ripeness;
- Town plausibly alleged existence of a "horizontal market allocation" in violation of the Sherman Act;
- "Clear articulation" requirement for state-action immunity was not satisfied; and
- County was not a required party that had to be joined in the action.

Parties' legal interests in town's action against city, alleging anticompetitive harm under the Sherman Act arising from a service territory agreement between city and county that foreclosed town from obtaining essential water services from county in the future, were sufficiently adverse to establish a substantial, ripe controversy that was fit for judicial decision, irrespective of whether city ultimately decided to withhold its approval for services contract between town and county; town alleged existence of veto right implicating antitrust liability, as city allegedly engaged in ongoing monopolistic abuse of town by reducing competition for essential water services, and fact that parties had exhausted extensive dispute resolution procedures demonstrated parties' enduring disagreement.

Town made sufficient showing of hardship, as an element of ripeness analysis, in action against city, alleging anticompetitive harm under the Sherman Act arising from a service territory agreement between city and county that foreclosed town from obtaining essential water services from county in the future, where town showed that putting the case on hold pending future action by the city, exercising its alleged right under the agreement to refuse to allow tow to obtain essential water services from county, could force it to choose either between continuing to receive essential water services from city or potentially leaving residents without service.

Town plausibly alleged existence of a "horizontal market allocation" in violation of the Sherman Act related to a service territory agreement between city and county that allegedly foreclosed town from obtaining essential water services from county in the future, where town alleged that the agreement provided that county "shall not provide water or sewer service" within city service area without city's written approval, and that city construed the agreement as creating a permanent territorial allocation for water services that foreclosed city's existing customers, including town, from ever obtaining competing essential water services from county without city's consent, which was supported by a city letter to county asserting city's rights under the agreement.

City's alleged anticompetitive conduct, based on a service territory agreement between city and county, was not clearly authorized by the state so as to pass the "clear articulation" requirement for state-action immunity from federal antitrust law, in town's action alleging anticompetitive harm under the Sherman Act due to its being foreclosed by the agreement from obtaining essential water services from county in the future; while the Florida legislature authorized municipalities to develop public utilities for water services, it did not contemplate the alleged anticompetitive conduct that effectively granted one municipality exclusive market control over services of another incorporated municipality when same statute limited exercise of municipal corporate powers within corporate limits of another municipality.

County was not so situated that its absence in town's case against city, alleging anticompetitive harm under the Sherman Act from service territory agreement between city and county that allegedly foreclosed town from obtaining essential water services from county in the future, and thus, county was not a "required party" within meaning of the joinder rule; while county was party to the agreement that was at issue of the litigation, county had specifically disclaimed any interest in the litigation, and neither party had identified any other reason that would require presence of county in the litigation.

LIABILITY - INDIANA

Bohanon v. City of Indianapolis

United States Court of Appeals, Seventh Circuit - August 22, 2022 - F.4th - 2022 WL 3585003

Bar patron filed § 1983 against city alleging that off-duty police officers had used excessive force, in violation of his Fourth Amendment rights.

After jury entered verdict in patron's favor, the United States District Court granted city's motion for judgment as matter of law. Patron appealed.

The Court of Appeals held that city was not subject to municipal liability under § 1983 based on off-duty police officers' use of excessive force against bar patron.

City was not subject to municipal liability under § 1983 based on off-duty police officers' use of excessive force against bar patron, even though city's general order prohibiting officers under influence of alcohol from performing any law enforcement functions contained exception for extreme emergency situations; it was not obvious that policy prohibiting police action while drinking, subject to narrow and specific exception to protect life and limb, would lead off-duty officers to use excessive force, no similar incident—let alone pattern of similar incidents—had occurred since general order was enacted, officers violated city policy regarding use of force, and their actions did not fall within general order's narrow exception.

MANDAMUS - MINNESOTA

Spann v. Minneapolis City Council

Supreme Court of Minnesota - August 24, 2022 - N.W.2d - 2022 WL 3640919

City residents filed a petition for a writ of mandamus, seeking to compel city council and mayor to hire more police officers.

The District Court granted petition by issuing alternative writ requiring the mayor and city council to show cause why they have not employed and funded at least 731 sworn police officers, the equivalent of 0.0017 officers per resident based on the most current census data. City council and mayor appealed. The Court of Appeals reversed. Residents petitioned for further review, which was granted.

The Supreme Court held that:

- City council was obligated under city charter to fund a police force of at least 731 officers and provide for those employees' compensation;
- Mayor had a clear legal duty under city charter to employ 731 officers based on the most recent census data;
- City council did not violate its clear legal duty to provide funding to fund at least 731 officers;
- Residents were not entitled to supplement the record with later-created materials;
- Alternative writ of mandamus did not impermissibly instruct mayor how to exercise hiring discretion; and
- City council was meeting its uncontested clear legal duty under city charter to fund at least 731 sworn police officers, thus precluding issuance of alternative writ of mandamus requiring city council to fund at least 731 officers.

IMMUNITY - MISSOURI

Poke v. Independence School District

Supreme Court of Missouri, en banc.July 12, 2022647 S.W.3d 18

School-district employee brought action against district, asserting violation of state statute through alleged retaliation for filing workers' compensation claim.

The Circuit Court granted summary judgment to district. Employee appealed.

On transfer from the Court of Appeals, the Supreme Court held that statute creating private right of action for employees who are discharged, or discriminated against, by employer for exercising workers' compensation rights, read in conjunction with statute defining an "employer" for purposes of Workers' Compensation Law to include governmental entities, waived any sovereign immunity that school district had to employee's action; overruling *Krasney v. Curators of University of Missouri,* 765 S.W.2d 646; and *King v. Probate Division, Circuit Court of County of St. Louis,* 21st Judicial Circuit, 958 S.W.2d 92.

EMINENT DOMAIN - NEW YORK

Rag Herkimer, LLC v. Herkimer County

Supreme Court, Appellate Division, Fourth Department, New York - August 4, 2022 - N.Y.S.3d - 2022 WL 3097542 - 2022 N.Y. Slip Op. 04854

Former property owner brought action against county, seeking just compensation for property that county acquired through eminent domain.

Following bench trial, the Supreme Court, Herkimer County, entered judgment, determining the fair market value of the property was $575,600. Former owner appealed.

The Supreme Court, Appellate Division, held that the Supreme Court did not abuse its discretion in accepting comparable sales of county's expert.

Trial court did not abuse its discretion in accepting comparable sales of county's expert rather than comparable sales of former property owner's expert in determining fair market value of owner's property and amount of just compensation award for property that county acquired through eminent domain; even if comparable sales of county's expert left "much to be desired," trial court found that remote comparable sales of owner's expert were derived from strikingly different markets, and trial court could accept sales of county's expert as best basis for evaluating the property and utilize such sales with proper adjustment for differences from owner's property.

EMINENT DOMAIN - NORTH CAROLINA

Anderson Creek Partners, L.P. v. County of Harnett

Supreme Court of North Carolina - August 19, 2022 - 876 S.E.2d - 2022 WL 3570917 - 2022-NCSC-93

Developers brought consolidated actions against county seeking refunds for one-time fees paid to county for water and sewer services to be furnished to their future real estate developments, which county imposed as precondition for its concurrence in developers' applications to North Carolina Department of Environmental Quality (DEQ) for water and sewer permits, as well as seeking declaratory judgment that fee ordinance was invalid.

The Superior Court granted county's motion for judgment on the pleadings, and developers appealed. The Court of Appeals affirmed. The Supreme Court granted discretionary review.

The Supreme Court held that:

- Water and sewer fees were impact fees, not user fees;
- As a matter of first impression, water and sewer fees constituted exactions;
- "unconstitutional conditions" doctrine required water and sewer fees to have essential nexus and rough proportionality with county's costs of expanding water and sewer infrastructure into developments;
- Developers adequately alleged that county coerced them to pay fees in order to obtain land use permits;
- Developers' admission precluded any argument that fees lacked essential nexus to costs of infrastructure expansion;
- Issue of whether fees were roughly proportional to costs of infrastructure expansion could not be resolved on motion for judgment on the pleadings; and
- New fee ordinance pursuant to new statute did not render action moot.

One-time fees that county charged developers for water and sewer services constituted impact fees, not user fees, for purpose of determining whether fees were takings without just compensation under "unconstitutional conditions" doctrine, even though county called fees "capacity use" fees; such fees were intended to cover cost of expanding water and sewer infrastructure to accommodate new development, rather than being paid by customers at fixed rate in accordance with their monthly water and sewer usage for purpose of paying for services they used at time of actual use.

Impact fees that county required developers to pay for water and sewer services as condition of county's concurrence in water and sewer permit approval constituted exactions, for purpose of determining whether fees constituted takings without just compensation under "unconstitutional conditions" doctrine; fees were imposed on developers based on their respective prorated shares of cost of expanding utility services to developments, and term "exaction" included monetary exactions, not only a requirement that a developer dedicate land.

Under "unconstitutional conditions" doctrine, one-time impact fees that county charged developers as monetary exactions for water and sewer services, as precondition for county's concurrence in developers' water and sewer permit applications, were required to have essential nexus and rough proportionality with costs that proposed developments imposed on county's water and sewer infrastructure in order for fees not to constitute takings, even though fees were not discretionary, administrative, or imposed in lieu of any dedication of land; each fee was linked to specific parcel of land proposed for development, and allowing county to increase fees or use fee proceeds for non-development-related purposes would enable county to pressure developers to give up property without just compensation.

Developers adequately alleged that county's imposition of one-time sewer and water fees, which constituted impact fees and exactions, had effect of coercing developers into paying fees in order to obtain land use permits, supporting their claim against county for takings without just compensation under "unconstitutional conditions" doctrine, where developers alleged that county conditioned its concurrence in developers' applications for sewer and water permits on developers' payment of impact fees, that payment of fees was not merely necessary to permit developers to connect to water and sewer system, and that requiring fees before county would support developers' applications for water and sewer permits necessary to record subdivision plots precluded development of properties as planned.

In developers' action against county for violations of Takings Clause based on county's imposition of impact fees for expansion of water and sewer system into planned developments, which developers alleged constituted unconstitutional condition on county's consent to water and sewer permits, county, not developers, bore burden of showing that fees had essential nexus to and were roughly proportional to developments' impact on county's water and sewer infrastructure.

Developers' admission, in their complaint against county for imposing monetary exaction in form of water and sewer impact fees as condition of county's consent to water and sewer permits in violation of Takings Clause, that water and sewer impact fees were collected by county to pay for costs of future improvements to county's water and sewer system precluded developers from arguing that fees lacked essential nexus to county's objective of funding expansion of its water and sewer system capacity to serve proposed developments, as requirement for fees to be permissible under "unconstitutional condition" doctrine.

Issue of whether water and sewer impact fees that county imposed on developers as condition of its consent to developers' water and sewer permit applications were roughly proportional to costs of expansion of water and sewer system to serve proposed developments, as necessary for fees to be permissible under "unconstitutional conditions" doctrine, could not be resolved on county's motion

for judgment on the pleadings with respect to developers' complaint against county for violation of Takings Clause based on contention that fees constituted unconstitutional conditions on permits; county had not demonstrated that its estimates of water and sewer capacity expansion costs, upon which fees were estimated, were roughly proportional to actual cost of expanding water and sewer system to accommodate proposed developments.

ZONING & PLANNING - NORTH CAROLINA

Visible Properties, LLC v. Village of Clemmons

Court of Appeals of North Carolina - August 2, 2022 - S.E.2d - 2022-NCCOA-529 - 2022 WL 3031723

Outdoor advertising sign company petitioned for writ of certiorari after city zoning board of adjustment rejected company's application for zoning permit to construct billboard with digital technology on property bordering city highway.

The Superior Court granted petition and affirmed board's decision. Company appealed.

The Court of Appeals held that:

- City zoning ordinances allowed construction of company's proposed sign;
- Company's proposed sign, which periodically changed static digital images, was not "moving and flashing sign" prohibited by city zoning ordinances; and
- Company's proposed sign was not "electronic message board" prohibited by city zoning ordinances.

Provisions for off-premises signs contained in sign regulations portion of city zoning ordinances, which allowed off-premises signs on property near city highway, superseded two other more general ordinances governing property, which did not allow off-premises signs, and thus city zoning ordinances allowed outdoor advertising sign company to construct proposed billboard with digital technology on property; sign-specific rules directly applied to use at issue, and sign-specific rules stated that other zoning restrictions did not apply if proposed use was regulated by specific regulations of that section.

Outdoor advertising sign company's proposed digital billboard, which periodically changed static images, was not "moving and flashing sign" within meaning of city zoning ordinance prohibiting moving and flashing signs near city highway; ordinary usage of ambiguous terms "moving" and "flashing" did not squarely describe digital billboard, which was not capable of movement and had no sudden or transient display of lights, excluding billboards that changed static images did not render superfluous ordinance's exclusion of electronic time, temperature, and message signs, and specific examples of prohibited signs, including pennants, banners, and spotlights, were capable of either physically moving or shining light in sudden or intermittent manner.

Outdoor advertising sign company's proposed digital billboard, which periodically changed static images, was not "electronic message board" within meaning of city zoning ordinance prohibiting electronic message boards near city highway; reading ordinances to prohibit any electronic sign displaying any form of message would render "electronic message board" term superfluous, ordinary meaning of ambiguous term electronic message board referred to narrower category of sign, such as mobile electronic signs seen near road construction, or digital message boards often affixed beneath business's name or logo and listing business hours or product offerings, which would not be

described as billboards like company's proposed sign.

DEDICATION - PENNSYLVANIA

In re Township of Jackson

Commonwealth Court of Pennsylvania - August 1, 2022 - A.3d - 2022 WL 3021688

Township petitioned for leave of court under the Donated or Dedicated Property Act to sell land dedicated for use as a public park, alleging that, due to the topography of the land as well as the cost to maintain the lot, it was not practicable to develop the lot as a public park.

After evidentiary hearings, the Court of Common Pleas denied the petition. Township appealed.

The Commonwealth Court held that:

- Procedural requirement that defense of equitable estoppel to be raised in responsive pleading did not apply to Donated or Dedicated Property Act proceedings;
- Evidence supported trial court's conclusion that township actively facilitated residents' belief that land would remain as open space;
- Township did not establish that retaining recreational use for which land was dedicated was no longer physically or financially practicable; and
- Evidence supported conclusion that maintaining land as pocket park continued to serve interest of the public.

Procedural requirement that defense of equitable estoppel be raised in responsive pleading did not apply to proceedings conducted under Donated or Dedicated Property Act, and thus testimony of township residents, as parties-in-interest under Act, could raise issue of whether township was equitably estopped from selling park land, in proceedings on township's petition for leave of court to sell land dedicated for use as public park; while no opponent of sale filed responsive pleading or expressly raised defense of equitable estoppel, Pennsylvania Rules of Civil Procedure had not been incorporated into proceedings conducted under Act, and local rules had not been adopted to cover such proceedings.

Substantial evidence supported trial court's conclusion that township actively facilitated residents' belief that land dedicated for use as public park would remain as open space, as grounds for application of doctrine of equitable estoppel in proceedings on township's Donated or Dedicated Property Act petition for leave to sell park; township approved land development plan designating land as proposed public park, township accepted donation of land and dedicated land to public park use, and township never advised public that it might use land for any other purpose.

Township did not establish, in proceedings on its Donated or Dedicated Property Act petition for leave to sell land dedicated for use as public park, that retaining recreational use for which land was dedicated was no longer physically or financially practicable, as requirement for grant of judicial relief under Act; township's supervisor acknowledged that township could keep land as open space in its unimproved state, which involved minimum maintenance, and township's consulting engineer testified that land could be developed with walking trail and basketball court.

Substantial evidence supported trial court's conclusion that maintaining land dedicated for recreational public use as a pocket park continued to serve the interest of the public, as grounds for denial of township's Donated or Dedicated Property Act petition for leave to sell the park, where a number of people representing a significant proportion of the development in which the park was

located signed a petition seeking to save the park.

ZONING & PLANNING - CALIFORNIA

CV Amalgamated LLC v. City of Chula Vista

Court of Appeal, Fourth District, Division 1, California - August 12, 2022 - Cal.Rptr.3d - 2022 WL 3354984

Business petitioned for writ of mandate challenging city's denial of its application for a license to operate a retail cannabis store in the city.

The Superior Court denied the petition. Business appealed.

The Court of Appeal held that:

- City had ministerial duty to follow mandatory procedures for issuing the license;
- City acted in an arbitrary and capricious manner in rescoring business's application;
- Business did not have adequate remedy for city's failure to follow its procedures; and
- No parties needed to be joined prior to granting the relief sought.

City had ministerial duty to follow mandatory procedures for issuing license to operate a retail cannabis store in the city, so that its failure to follow those procedures when it rejected business's license application in first phase of two-phase licensing process for business's failure to score high enough in merit-based evaluation conducted by the city provided basis for issuance of writ of mandate, where neither the relevant cannabis ordinance nor the cannabis regulations permitted the city to disqualify an applicant during the first phase of the process for not scoring high enough, but rather, both the ordinance and the regulations required that city deem an applicant to be qualified if it met the stated minimum requirements, which did not include any merit-based scoring requirement.

City acted in an arbitrary and capricious manner in rescoring business's application for license to operate a retail cannabis store, following business's appeal alleging that initial scoring was unfair, by limiting its efforts to only one of four relevant categories in the discretionary merit-based evaluation due to alleged formatting and organization errors, thus providing a basis for issuance of writ of mandate requiring city to carry out discretionary duty to rescore all four categories of business's application, where reason provided for so limiting the rescoring, that only one category was impacted by the errors, was contradicted by evaluator's testimony that all four categories were impacted by the errors, which compelled conclusion that rescoring each of the four categories was warranted.

Business's claim for promissory estoppel against city, seeking recovery of expenses for application for license to operate a retail cannabis store that were lost when city allegedly wrongly rejected its application in breach of a purported promise, did not provide adequate legal remedy for city's failure to follow mandatory procedures for issuing licenses for cannabis retail businesses as would provide the court with discretion to deny business's petition for mandamus relief, because the remedy for promissory estoppel would not give business the relief it sought through traditional mandamus, namely, a chance to compete for and be awarded a license.

Other applicants for license to operate a retail cannabis store who scored higher than business on city's merit-based evaluation and advanced to second phase of two-phase licensing process were not indispensable parties that business had to join in proceedings on its petition for writ of mandate as

relief for city's alleged improper denial of its application, since other applicants would not be prejudiced by any writ issued as relief to business, as relief that business sought did not include an order invalidating any licenses city may have issued to the other applicants.

ZONING & PLANNING - DISTRICT OF COLUMBIA

Lumen Eight Media Group, LLC v. District of Columbia

District of Columbia Court of Appeals - August 11, 2022 - A.3d - 2022 WL 3270077

District of Columbia brought action seeking injunctive relief against sign company and building owners alleging that defendants violated regulations that purportedly required defendants to obtain permits before erecting signs on private property that were located under building overhangs.

The Superior Court granted District's motion for summary judgment. Defendants appealed.

The Court of Appeals held that:

- Defendants did not forfeit their right to rely on Sign Regulation Act;
- Sign Regulation Act provision pertaining to mayor's ability to issue and amend regulations applied to dispute;
- Sign Regulation Act provision pertaining to mayor's ability to issue and amend regulations applied to rulemaking; and
- Emergency rule promulgated by mayor, by which mayor amended regulations pertaining to sign permitting requirements, was invalid.

Sign company and business owners did not forfeit their right to rely on Sign Regulation Act provision pertaining to mayor's ability to issue and amend regulations pertaining to displaying signs on public and private property, even though Court of Appeals raised issue sua sponte and parties based their arguments in trial court on a different statute; Court invited, and received, supplemental briefs from parties so that it was not procedurally unfair, question was too important to overlook as determining which provision applied was antecedent to and ultimately dispositive of whether trial court's judgment was able to stand, and it would have thwarted intent of legislature to rely on statute that did not apply simply because parties failed to identify correct one.

Sign Regulation Act provision pertaining to mayor's ability to issue and amend regulations pertaining to displaying signs on public and private property, and not Construction Code provision pertaining to mayor's ability to issue and amend regulations pertaining to Code, applied to dispute on whether sign company and businesses were required by regulations to obtain permits before erecting signs on private property under building overhangs and whether mayor was able to amend such regulations by promulgating emergency rule, despite contention provision of Act did not apply to interior signs and was titled "Outdoor Signs"; language of Act indicated that it applied to private property within public view, and emergency rule at issue was designed to clarify that provision.

Sign Regulation Act provision pertaining to mayor's ability to issue and amend regulations pertaining to display on signs of public and private property, and not Construction Code provision pertaining to mayor's ability to issue and amend regulations pertaining to Construction Code, applied to rulemaking by which mayor allegedly amended regulations governing permitting requirements for signs by promulgating emergency rule, for purposes of dispute on whether sign company and businesses were required to obtain permits before erecting signs on private property under building overhangs; while scope of Code included placing and maintenance of interior signs,

Code provision pertaining to rule amendment said nothing specific about signs, and Act provision was enacted over 25 years after Code provision.

Emergency rule promulgated by mayor, by which mayor amended regulations pertaining to permitting requirements for display of signs on public and private property, did not receive the affirmative approval of the Council of the District of Columbia, and thus rule was invalid, for purposes of dispute on whether sign company and businesses were required to obtain permits before erecting signs on private property under building overhangs.

MUNICIPAL ORDINANCE - FLORIDA

Club Madonna Inc. v. City of Miami Beach

United States Court of Appeals, Eleventh Circuit - August 1, 2022 - 42 F.4th 1231

Fully-nude strip club filed § 1983 action against city raising First and Fourth Amendment challenges, along with preemption challenges, to city ordinance requiring nude strip clubs to follow a record-keeping and identification-checking regime to ensure that each performer was at least 18 years old.

The United States District Court for the Southern District of Florida granted city's motion to dismiss. Club appealed. The Court of Appeals affirmed in part, reversed in part, and remanded. The District Court granted renewed motion to dismiss in part, after which the District Court adopted in part a report and recommendation of Jonathan Goodman, United States Magistrate Judge and granted summary judgment in part. Club appealed and city cross-appealed.

In a case of first impression, the Court of Appeals held that:

- Ordinance was a valid time, place, and manner restriction complying with First Amendment free speech guarantee;
- Ordinance's warrantless-search provision satisfied administrative-search exception to warrant requirement for closely-regulated industries;
- Immigration Reform and Control Act (IRCA) preempted ordinance section concerning verification of an individual's employment authorization;
- Ordinance's penalty scheme was not preempted by Florida statute setting forth penalties for criminal and noncriminal violations; and
- Ordinance's unlawful section on verification of an individual's employment authorization was severable.

City ordinance requiring nude strip clubs to follow a record-keeping and identification-checking regime to ensure that each performer was at least 18 years old was a valid time, place, and manner restriction complying with the First Amendment free speech guarantee; although the ordinance's requirements, including log in/log out procedure for workers and performers requiring two forms of identification, were significant and time-consuming, they were not substantially broader than necessary to achieve the ordinance's aim of preventing minors and victims of human trafficking from dancing nude on a public stage, and the paperwork process still left club with plenty of hours in the day and night for its dancers to perform.

ZONING & PLANNING - IDAHO

City of Ririe v. Gilgen

Supreme Court of Idaho, Boise, February 2022 Term - August 9, 2022 - P.3d - 2022 WL 3206113

City petitioned for judicial review of decision of county board of commissioners to grant applicant a conditional use permit that allowed her to place mobile home on her property located in city's area of impact and sought declaratory relief.

After county filed notice of non-objection, the Seventh Judicial District Court granted petition, remanded the matter, and denied applicant's motions for reconsideration. Applicant appealed, and city cross-appealed.

The Supreme Court held that:

- City was required to file separate declaratory judgment action in order to obtain declaratory relief;
- City was not "affected person" allowed to seek judicial review under Local Land Use Planning Act (LLUPA) of board's decision;
- Appropriate remedy for city to enforce county's compliance with area of impact agreement adopted pursuant to LLUPA was to file original civil action; and
- City acted without reasonable basis in fact or law, such that applicant, as prevailing party on appeal, would be awarded appellate attorney fees.

In order to obtain declaratory relief, city was required to file separate declaratory judgment action, instead of attempting to request such declaratory relief in its petition for judicial review of decision of county board of commissioners to grant applicant a conditional use permit that allowed her to place mobile home on her property located in city's area of impact; civil actions and administrative appeals were processed differently by the courts and governed by different standards.

Counties and city governments are considered "local governing bodies" rather than "agencies" for purposes of the Administrative Procedure Act (APA), which is intended to govern judicial review of decisions made by agencies, not local governing bodies.

City was not "affected person" allowed to seek judicial review under Local Land Use Planning Act (LLUPA) of decision of county board of commissioners to grant applicant a conditional use permit that allowed her to place mobile home on her property located within city's area of impact; city did not have bona fide interest in real property outside city limits as it had no jurisdiction over such property.

Appropriate remedy for city to enforce county's compliance with area of impact agreement adopted pursuant to Local Land Use Planning Act (LLUPA) was to file original civil action, not to file petition for judicial review of decision of county board of commissioners to grant applicant a conditional use permit that allowed her to place mobile home on her property located within city's area of impact; LLUPA did not allow city to petition for judicial review as city did not have bona fide interest in real property outside city limits, but LLUPA allowed governing board, defined as city council or board of county commissioners, to institute civil action to enforce compliance with any ordinance enacted pursuant to LLUPA.

City acted without reasonable basis in fact or law in petitioning for judicial review of decision of county board of commissioners to grant applicant a conditional use permit that allowed her to place mobile home on her property located in city's area of impact and in requesting declaratory relief in same petition, such that applicant, as prevailing party on appeal, would be awarded appellate attorney fees, although city defended position that was accepted by district court judge; Local Land

Use Planning Act (LLUPA) did not authorize city to bring action as "affected person" for judicial review, and it was settled law that action for declaratory relief could not be combined with action for judicial review.

EMINENT DOMAIN - INDIANA

Duke Energy Indiana, LLC v. Bellwether Properties, LLC

Court of Appeals of Indiana - August 3, 2022 - N.E.3d - 2022 WL 3050699

Landowner brought action against electrical utility, asserting claim for inverse condemnation based on increase of required clearance around electrical lines, which increase extended clearance requirement beyond size of utility's easement to maintain such lines on landowner's property.

Utility filed motion to dismiss, asserting that landowner's claim was barred by six-year statute of limitations. The Circuit Court, Monroe County, Michael Hoff, J., granted utility's motion. Landowner appealed. The Court of Appeals reversed and remanded. Utility sought transfer, which was granted. The Supreme Court reversed. On remand, the Circuit Court denied electrical utility's motion for summary judgment. Electrical utility filed an interlocutory appeal.

The Court of Appeals held that:

- Electrical utility's alleged taking was regulatory, not physical, and
- Electrical utility's enforcement of horizontal clearance regulations did not constitute as a compensable regulatory taking.

Electrical utility's alleged taking, if valid, was regulatory in nature, rather than physical, after utility told landowner that it either had to redesign or move a proposed warehouse on its property based on utility's enforcement of horizontal clearance regulations, which increased extended clearance requirement beyond size of utility's easement to maintain electrical lines on landowner's property; utility's predecessor was the entity that installed transmission lines on landowner's property, and enactment of clearance requirement did not result in utility to physically intrude or require landowner to allow another entity to access property, but rather, placed limits on landowners' power to build on small portion of its land.

Electrical utility's enforcement of horizontal clearance regulations, which increased utility's clearance requirements and went beyond size of utility's easement to maintain electrical lines on landowner's property, did not constitute as a compensable regulatory taking after utility notified landowner that it either had redesign or move its proposed warehouse to comply with clearance regulations; impact of utility's enforcement of clearance regulations was minimal, enforcement did not interfere with landowner's reasonable investment-backed expectations of the land, and landowner could have reasonably avoided dispute by discovering clearance requirements prior to purchasing the land or when its architect designed its proposed warehouse.

LIABILITY - MARYLAND

Hancock v. Mayor and City Council of Baltimore

Court of Appeals of Maryland - August 15, 2022 - A.3d - 2022 WL 3350854

Estate of laborer who was employed by independent contractor and was buried alive while working at an excavation site filed a survivorship and wrongful death action against city which hired independent contractor to perform the excavation work and against subcontractor.

The Circuit Court granted city's and subcontractor's motions to dismiss, and estate appealed. The Court of Special Appeals affirmed. Estate filed a petition for writ of certiorari which was granted.

The Court of Appeals held that:

- As matter of first impression, one who hires independent contractor is not liable to an employee of that contractor for injuries caused by contractor's negligence in performing the work for which it was hired;
- As matter of first impression, city which hired independent contractor to perform excavation work did not owe laborer, who was independent contractor's employee, a duty in tort with respect to city's retention of independent contractor;
- As matter of first impression, subcontractor did not owe laborer a duty in tort to warn him of danger that subcontractor allegedly perceived; and
- As matter of first impression, duty of contractor or subcontractor on construction job to exercise due care to provide for protection and safety of the employees of other contractors or subcontractors is owed with respect to conditions that contractor or subcontractor creates or over which it exercises control.

BONDS - MINNESOTA

Thompson v. St. Anthony Leased Housing Associates II, LP

Supreme Court of Minnesota - August 24, 2022 - N.W.2d - 2022 WL 3640466

Tenant brought putative class action against landlords for breach of contract, breach of implied covenant of good faith and fair dealing, unjust enrichment, and violations of Uniform Deceptive Trade Practices Act and Consumer Fraud Act, alleging that landlords charged rent to rent-restricted tenants in apartment complex in excess of rate limits imposed by Minnesota Bond Allocation Act, which applied to privately-developed housing projects funded by municipal bond proceeds.

The District Court granted landlords' motion to dismiss for failure to state a claim. Tenant appealed. The Court of Appeals affirmed. The Supreme Court granted tenant's petition for further review.

The Supreme Court held that:

- Tenant had standing to bring claim against landlord for breach of contract based on rent increases in excess of amounts allowed by Bond Allocation Act, and
- Term "area fair market rent" in Bond Allocation Act meant fair market rent set for area by federal Department of Housing and Urban Development (HUD).

The Minnesota Bond Allocation Act does not provide a private cause of action to enforce its rent restrictions, and bond issuers have the sole enforcement authority.

Residential tenant's allegations that landlord charged her rent in excess of limits established by Minnesota Bond Allocation Act were sufficient to plead injury-in-fact, as necessary for standing to

bring claim against landlord for breach of contract, even though Act did not provide tenant with private right of action to enforce its rent limits; tenant alleged that landlord promised in lease that any rent increases would be made in compliance with state and local laws, and that landlord's rent increases in excess of caused her economic injury.

Remedy provided by Minnesota Bond Allocation Act for developer's charging of excessive rent for tenants in housing project funded by municipal bond proceeds, namely statutory penalty payable to issuer, was not exclusive remedy for other parties that contracted with developer, and, thus, did not preclude tenant's claim against developer, as landlord, for violation of contractual promise not to increase rent beyond amounts permitted by Act.

Alleged failure by city, as issuer of municipal bond that funded development of housing project where tenant lived, to find that developer failed to comply with rent restrictions of Minnesota Bond Allocation Act and to assess statutory penalty did not preclude tenant's claim against developer, as landlord, for breach of contractual agreement not to increase rent beyond amounts authorized by Act; city's inaction did not govern whether developer violated lease by charging rent that exceeded statutory limit or whether tenant had standing to bring such claim against landlord.

Term "area fair market rent," as used in provision of Minnesota Bond Allocation Act requiring parties that received municipal bond proceeds for housing construction to offer at least 20% of units at rental rate that did not exceed "area fair market rent…as established by the federal Department of Housing and Urban Development" (HUD) had technical meaning of fair market rent figure set for area by HUD, not payment standard amount set by local public housing agency; Act's linking of rent restriction to rent figures set by HUD and mentioning of federal assistance programs indicated term had special meaning supplied by federal housing assistance law, payment standard was based on but did not equate to fair market rent, and HUD did not "establish," meaning generate, payment standards itself.

IMMUNITY - NORTH CAROLINA

Providence Volunteer Fire Department, Inc. v. Town of Weddington

Supreme Court of North Carolina - August 19, 2022 - S.E.2d - 2022 WL 3570915 - 2022-NCSC-100

Volunteer fire department brought action against town, its mayor, and rival fire department alleging breach of contract, fraud in inducement and actual fraud, deprivation of property and liberty without due process, and tortious interference with contract.

The Superior Court denied town's and mayor's motions to dismiss fraud-related claims, and they appealed. The Court of Appeals reversed and remanded. Fire department's request for discretionary review was granted.

The Supreme Court held that:

- Town was entitled to governmental immunity from liability for alleged fraud in connection with its sale and lease-back agreement involving fire station;
- As matter of first impression, legislative immunity is recognized bar to claims against North Carolina public officials; and
- Mayor was entitled to legislative immunity from liability for fraud-related claims arising from contracts' termination.

Activities in which town was engaged in course of its dealings with volunteer fire department were governmental, rather than proprietary, in nature, and thus town was entitled to governmental immunity from liability for alleged fraud in connection with its sale and lease-back agreement involving fire station, despite fire department's contention that transaction was proprietary in nature; fire protection services were traditionally provided by government—either directly or through contract with private entities—for purpose of protecting safety and well-being of its residents, town did not charge fee to its residents for fire protection services and did not make profit in connection with provision of such services, and agreement set out manner in which fire station would be provided.

Legislative immunity is recognized bar to claims against North Carolina public officials.

Local officials are entitled to legislative immunity from suit if (1) they were acting in legislative capacity at time of alleged incident; and (2) their acts were not illegal acts.

Mayor's actions in calling and setting agenda for town council meeting to vote to terminate town's contracts with volunteer fire department constituted legislative actions for which he was entitled to legislative immunity from liability for fraud-related claims arising from contracts' termination.

BANKRUPTCY - NORTH CAROLINA

York County v. Appaloosa Management, LP

United States District Court, D. South Carolina, Rock Hill Division - August 17, 2022 - B.R. - 2022 WL 3572450

County filed complaint in state court alleging that related entities directed the misappropriation of $21,000,000 of statutorily restricted public funds for expanding road to five lanes and instead utilized the funds on football franchise's headquarters and practice facility, in connection with mixed-use development that included sports and entertainment venues.

Entities removed the case to federal district court, seeking ultimate reference to bankruptcy court, based on developer's Chapter 11 filing in the United States Bankruptcy Court for the District of Delaware. County moved to remand.

The District Court held that:

- County's removed action was "related to" developer's Chapter 11 case, but
- Court lacked "arising in" jurisdiction over county's action.

County's removed action alleging that related entities directed the misappropriation of $21,000,000 of statutorily restricted public funds for expanding road to five lanes and instead utilized the funds on football franchise's headquarters and practice facility, in connection with mixed-use development that included sports and entertainment venues, was "related to" developer's Chapter 11 case, for purposes of bankruptcy jurisdiction, because recovery by county against related entities could affect the claim that county asserted in developer's bankruptcy case for the same amount, existence of debtor's indemnification clause could conceivably have an effect on the administration of the bankruptcy estate, and debtor's adversary proceeding against county overlapped significantly with county's claims.

District Court lacked "arising in" jurisdiction over county's removed action alleging that related entities directed the misappropriation of $21,000,000 payment to Chapter 11 debtor-developer

consisting of statutorily restricted public funds for expanding road to five lanes and instead utilized the funds on football franchise's headquarters and practice facility, in connection with mixed-use development that included sports and entertainment venues, because all of county's claims for civil conspiracy, negligence and negligence per se, interference with contractual relations, and negligent misrepresentation existed antecedent to debtor's bankruptcy filing, and a claim that pre-dated Chapter 11 filing could not be said to have arisen within that case.

PUBLIC WORKS - PENNSYLVANIA

Ursinus College v. Prevailing Wage Appeals Board

Commonwealth Court of Pennsylvania - August 4, 2022 - A.3d - 2022 WL 3093121

Private, non-profit college sought review of decision by Pennsylvania Prevailing Wage Appeals Board which reversed the decision of the Department of Labor and Industry, Bureau of Labor Law Compliance, concluding that construction project undertaken by college and financed by bonds issued by public authority was "public work" under the Pennsylvania Prevailing Wage Act, entitling members of labor union to prevailing wages for project work already completed.

The Commonwealth Court held that project was not "public work" under Pennsylvania Prevailing Wage Act.

Construction project undertaken by private, non-profit college and financed by bonds issued by public authority was not "public work" under Pennsylvania Prevailing Wage Act, although authority issued bonds and loaned funds to college under loan agreement, where authority was obligated to transfer funds to trustee, transfer took place before college received any funds for project, authority did not hold such funds, funds college used to pay for project were disbursed by trustee, rather than authority, college purchased bonds with private funds, college bore risk for repaying bonds, and Act required work be paid for out of funds of public body, rather than considering if college would have received funds "but for" acts of authority.

EMINENT DOMAIN - TEXAS

State v. LBJ/Brookhaven Investors, L.P.

Court of Appeals of Texas, Dallas - August 2, 2022 - S.W.3d - 2022 WL 3053893

Former owners of commercial property filed suit against State, Department of Transportation, Transportation Commission, Department's Executive Director, and Commission's Chairman, seeking to enforce their right of repurchase as to parcel of land along freeway that owners contended were taken in eminent domain proceedings and were no longer necessary to the project or public use.

The 134th District Court denied the State's plea to the jurisdiction. State appealed.

The Court of Appeals held that:

- State's failure to formally amend its condemnation petition to specifically reference parcel of land bordering its right of way did not deprive trial court of jurisdiction to render agreed judgment affecting parcel;
- State acquired parcel by eminent domain, for purposes of eminent domain right of repurchase statute; and

- Eminent domain statutes allow State to be sued in cases involving claims for property acquired by eminent domain, including issues involving right of repurchase statute.

State's failure to formally amend its condemnation petition to specifically reference parcel of land bordering State's right of way that was not included in State's original condemnation petition did not deprive trial court of jurisdiction to render agreed judgment in condemnation proceedings, and thus judgment was not void as to parcel; both sides were not only aware of the specific property that was being condemned, but they reached an agreement as to that property.

Agreed judgment entered in condemnation proceedings regarding state highway project unambiguously reflected that State acquired parcel of land bordering its right of way that were not included in its original condemnation proceedings by eminent domain, rather than by later-filed special warranty deed, for purposes of determining whether eminent domain right of repurchase statute applied to parcel; judgment provided that State was "condemning and acquiring" property described in exhibits that included parcel, decreed that State recover fee simple title to property described in exhibits, ordered State to pay property owners full compensation for condemnation, and, upon payment, released and discharged State of obligation to pay compensation for taking of property.

Statute setting district court's authority in eminent domain proceedings allows State to be sued in cases involving claims for property acquired by eminent domain, and gives district court authority over "all issues," not just condemnation and damages; these issues include those involving right of repurchase statute, which itself provides that district court may determine all issues in any suit regarding repurchase of real property interest acquired through eminent domain by former property owner or owner's heirs, successors, or assigns.

STATE MANDATES - CALIFORNIA

Coast Community College District v. Commission on State Mandates

Supreme Court of California - August 15, 2022 - P.3d - 2022 WL 3349232

Community college districts petitioned for writ of mandate challenging decision of Commission on State Mandates that funding entitlement regulations did not impose a state mandate under state constitutional provision requiring the State to reimburse local governments for state-mandated new programs or higher level of service.

The Superior Court denied petition and entered judgment. Districts appealed. The Court of Appeal reversed in part. Commissioner petitioned for review.

The Supreme Court held that funding entitlement regulations did not impose a state mandate under a legal compulsion theory.

Regulations specifying various conditions that community college districts were required to satisfy to avoid the possibility of having state aid reduced or withheld did not legally compel districts to comply, and thus regulations did not impose a state mandate under a legal compulsion theory for purposes of a local government's constitutional right to reimbursement for a state-mandated new program or higher level of service; fact that the standards set forth in regulations, including matriculation, hiring of faculty, and selecting curriculum, related to districts' core functions did not in itself establish that districts had a mandatory legal obligation to adopt those standards, and California Community Colleges Chancellor had discretion to pursue remedial measures for any

noncompliance.

PUBLIC UTILITIES - FEDERAL

Consolidated Edison Company of New York, Inc. v. Federal Energy Regulatory Commission

United States Court of Appeals, District of Columbia Circuit - August 9, 2022 - F.4th - 2022 WL 3205886

Protesting entities separately petitioned for review of the Federal Energy Regulatory Commission's (FERC) orders that approved regional transmission organization's cost allocations for upgrades to transmission owner's facilities.

After consolidation, the Court of Appeals held that:

- The FERC failed to reasonably explain why a "flow-based" method called the "solution-based distribution-factor analysis" (DFAX), which assigned costs based on how much each utility used a facility over time, was permissible to be used to allocate the costs of the upgrades;
- The "de minimis" threshold used in the DFAX violated the Federal Power Act's cost-causation principle and caused undue discrimination;
- The FERC reasonably explained its decision that netting the flows to each delivery point in a zone to calculate total flow in a zone did not violate the Federal Power Act's cost-causation principle and did not cause undue discrimination;
- It was reasonable to use a model of the flow of electricity that assumed that each zone was at peak demand;
- The FERC reasonably read the tariff as requiring an appropriate substitute proxy for the DFAX method;
- Responsibility of public utility outside of transmission organization's region to pay costs associated with the upgrades ended upon termination of its power exchange transmission service, or "wheeling," agreement with transmission owner; and
- The FERC reasonably came to and adequately explained conclusion that the overall cost allocation for entities outside the transmission organization's region was not unjust or unreasonable.

When approving regional transmission organization's cost allocations for upgrades to transmission owner's facilities, which upgrades were "non-flow-based" projects, the Federal Energy Regulatory Commission (FERC) failed to reasonably explain why a "flow-based" method called the "solution-based distribution-factor analysis" (DFAX), which assigned costs based on how much each utility used a facility over time, was permissible to be used to allocate the costs of the upgrades; when evaluating a separate project that also conferred non-flow-based benefits, the FERC had determined that using DFAX was not warranted, and although the FERC claimed that the upgrade projects involved resolving short-circuit issues in a way that made those projects like flow-based projects, the FERC conceded that, like the stability issue with the separate project, short-circuit problems were not directly caused by flow overloads on a facility.

When reviewing the Federal Energy Regulatory Commission's (FERC) orders that approved regional transmission organization's cost allocations for upgrades to transmission owner's facilities, the Court of Appeals had jurisdiction to consider argument that the FERC acted arbitrarily in treating the upgrade projects differently from a separate project when determining the appropriateness of the method used to assign costs; even though the protesting utilities failed to raise the argument when applying for rehearing of an initial FERC order, the FERC did not change its position as to the

separate project until after the application for rehearing of the initial order, so the protesting utilities had a reasonable ground for failing to raise the argument.

The "de minimis" threshold used in the "flow-based" method called the "solution-based distribution-factor analysis" (DFAX) to allocate costs for upgrades to transmission owner's facilities violated the Federal Power Act's cost-causation principle and caused undue discrimination; under the threshold, if the "distribution factor," which was computed by dividing a zone's use of a facility by the zone's total load, was below 1%, then the zone would be assigned no costs, but such a threshold operated as a too-big-to-pay rule that bordered on the absurd.

Federal Energy Regulatory Commission (FERC) reasonably explained its decision that netting the flows to each delivery point in a zone to calculate total flow in a zone, which was a calculation process done as part of the "flow-based" method called the "solution-based distribution-factor analysis" (DFAX) to allocate costs for upgrades to transmission owner's facilities, did not violate the Federal Power Act's cost-causation principle and did not cause undue discrimination; under "netting," receipt of electricity in a negative direction offset the receipt of electricity in a positive direction, but since counterflows increased capacity, it was reasonable to treat them as benefits that the zones could confer on the facilities.

When deciding on protesting entities' petitions for review of the Federal Energy Regulatory Commission's (FERC) orders that approved regional transmission organization's cost allocations for upgrades to transmission owner's facilities, the Court of Appeals lacked jurisdiction to consider certain arguments as to why netting the flows to each delivery point in a zone to calculate total flow in a zone violate the Federal Power Act's cost-causation principle and caused undue discrimination; protesting utilities did not raise such argument in their applications for rehearing.

When deciding whether to approve regional transmission organization's cost allocations for upgrades to transmission owner's facilities, it was reasonable for the Federal Energy Regulatory Commission's (FERC) to use a model of the flow of electricity that assumed that each zone was at peak demand; despite argument that the assumption overestimated the merchant transmission facilities' use of the transmission facilities, the assumption was reasonable since transmission owner had to be able to meet peak load to guarantee system reliability.

When deciding whether to approve regional transmission organization's cost allocations for upgrades to transmission owner's facilities, the Federal Energy Regulatory Commission (FERC) reasonably read the tariff as requiring an appropriate substitute proxy for the "solution-based distribution-factor analysis" (DFAX) method to allocate costs of upgrades to transmission owner's facilities only when the modeled flows were not consistent with the normal expected flow results that an engineer would expect to see; despite argument that the tariff required a departure from the DFAX method if it violated the Federal Power Act's cost-causation principle, such an approach did not comport with requirement of FERC that costs be assigned ex ante.

Public utility's responsibility to pay costs associated with upgrades to transmission owner's facilities ended upon termination of its power exchange transmission service, or "wheeling," agreement with transmission owner, and thus transmission organization for region that did not include utility could not allocate such costs to utility after the termination; post-wheeling-agreement settlement that clarified the parties' rights and obligations made clear that utility had no liability for transmission enhancement charges after termination of term of service.

When reviewing Federal Energy Regulatory Commission's (FERC) orders that approved regional transmission organization's cost allocations for upgrades to transmission owner's facilities, the Court of Appeals lacked jurisdiction to consider intervenor's argument that the FERC's decision to

allow merchant transmission facility to avoid cost allocations for one of the upgrade projects was arbitrary; such an argument appeared nowhere in intervenor's requests for rehearing before the FERC, which generally challenged the FERC's handling of cost allocation.

When deciding whether to approve regional transmission organization's cost allocations for upgrades to transmission owner's facilities, the Federal Energy Regulatory Commission (FERC) reasonably came to and adequately explained conclusion that the overall cost allocation for entities outside the transmission organization's region was not unjust or unreasonable; the FERC recognized that transmission organization was upgrade project's planner, and the FERC relied on transmission organization's statement that the project would still be needed in region even if there were no flows on the transmission facilities interconnecting the two regions at issue.

CONTRACTS - ILLINOIS

PML Development LLC v. Village of Hawthorn Woods

Appellate Court of Illinois, Second District - June 29, 2022 - N.E.3d - 2022 IL App (2d) 200779 - 2022 WL 2336455

Developer brought breach-of-contract action against village, alleging that village did not comply with agreement under which developer was authorized to fill and grade property in exchange for donating it, after filling and grading, to village. Village counterclaimed, alleging that developer breached agreement by failing to pay taxes on property.

Following a bench trial, the Circuit Court found that both parties had breached, but that village had breached first, and awarded developer much, but not all, of the damages it sought. Village appealed, and developer cross-appealed the damages award.

The Appellate Court held that:

- Trial court's finding that village had materially breached contract was not against the manifest weight of the evidence;
- Village violated its contractual obligation to act in good faith;
- Developer's decision to proceed under contract after village's breach meant that developer was not excused from its contractual obligations by village's breach;
- Village did not prevent developer from performing its contractual obligation to convey property to village;
- Developer's failure to pay taxes on property was misconduct that rendered developer's hands unclean and precluded developer from recovering under doctrine of unjust enrichment; and
- Developer's own material breach of contract, through its failure to pay property taxes, precluded developer's breach-of-contract claim against village.

EMINENT DOMAIN - INDIANA

Nordin v. Town of Syracuse

Court of Appeals of Indiana - July 14, 2022 - N.E.3d - 2022 WL 2721041

Property owners brought action against town for negligence, based on flooding of their cottage when a town worker accidentally turned on a water valve.

The Circuit Court granted summary judgment in favor of town. Property owners appealed.

The Court of Appeals held that:

- The Circuit Court erred in measuring damages based on difference between cottage's pre-flooding and post-flooding market value;
- Evidence supported the Circuit Court's determination as to cottage's pre-flooding market value;
- Genuine issue of material fact existed as to what repairs were necessary to restore cottage; and
- There was no evidence that costs associated with repairing cottage would have exceeded half of cottage's fair market value.

Trial court erred in measuring damages for flooding of a cottage based on difference between cottage's fair market value prior to flooding and after flooding, rather than simply cottage's pre-flooding market value, in property owners' negligence action against town which accidentally caused flooding; cottage could not be repaired and was rendered useless.

Evidence supported trial court's determination as to fair market value of cottage prior to flooding accidentally caused by town, for purposes of ruling on damages in property owners' negligence action; owners contended that town failed to show that pre-flooding property-tax assessment of cottage bore any resemblance to market value, but they cited no authority saying that tax assessment could not be evidence of market value, owners failed to explain how estimated costs of repairing cottage were reflective of pre-flooding market value, and it was undisputed that restored or rebuilt cottage would be significantly nicer and more valuable than old, unoccupied, and deteriorating structure which owner's purchased.

Genuine issue of material fact existed as to what repairs were necessary to restore cottage which was damaged when town accidentally caused flooding, precluding grant of town's motion for summary judgment on issue of loss of use in property owners' negligence action.

There was no evidence that costs associated with repairing a flooded cottage would have exceeded half of cottage's fair market value, precluding grant of town's motion for summary judgment on issue of loss of use in property owners' negligence action.

MUNICIPAL ORDINANCE - KANSAS

City of Wichita v. Trotter

Supreme Court of Kansas - August 12, 2022 - P.3d - 2022 WL 3330383

City charged defendant with violating municipal ordinances by operating an unlicensed after-hours establishment and operating an unlicensed entertainment establishment.

The Wichita Municipal Court found defendant guilty and ordered defendant to pay $200 fine and serve 12 months on nonreporting probation for after-hours violation, with underlying 90-day jail sentence, and ordered defendant to pay $200 fine for entertainment-licensing violation. Defendant appealed. On de novo review, the District Court dismissed the charges. City appealed. The Court of Appeals reversed and remanded with directions. Defendant petitioned for review, which was granted.

The Supreme Court held that:

- Defendant had standing to assert a First Amendment challenge;

- Defendant lacked standing to assert a Fourth Amendment challenge; and
- Licensing ordinances were overbroad in violation of First Amendment.

City ordinances requiring licenses for operation of after-hours establishments and criminalizing the operation of such establishments without a license were overbroad in violation of First Amendment right of assembly; although city had legitimate government interest in regulating late-night commercial activity, plain language of ordinances intruded into non-commercial gatherings during the hours from midnight until 6 a.m., including the right of assembly inside and around private homes.

ZONING & PLANNING - NORTH CAROLINA

Schooldev East, LLC v. Town of Wake Forest

Court of Appeals of North Carolina - July 19, 2022 - S.E.2d - 2022-NCCOA-494 - 2022 WL 2812335

After town planning board denied applicant's applications for major site plan and major subdivision approval to build a charter school, applicant filed a petition for writ of certiorari.

The Superior Court granted writ and affirmed the board's decision, and applicant appealed.

The Court of Appeals held that:

- Applicant's appeal from superior court's decision was not moot;
- Superior court erroneously exercised the whole record test in determining the preliminary legal question concerning the sufficiency of applicant's evidence;
- Term "street improvements" did not include sidewalk improvements, as that term was used in statute providing that city could only require "street improvements" related to schools that were required for safe ingress and egress to municipal street system;
- Statute providing that city could only require street improvements related to schools that were required for safe ingress and egress to the municipal street system did not prohibit towns from regulating pedestrian and bicycle connectivity; and
- Applicant failed to meet its burden of production to show that it satisfied town ordinance so as to establish prima facie case for entitlement to permits.

Court of Appeals had jurisdiction to address applicant's appeal from superior court's order entered upon review of a quasi-judicial decision by a municipality; town planning board denied applicant's applications for major site plan and major subdivision approval to build a charter school, and after certiorari was granted, superior court affirmed board's decision.

Applicant's appeal from trial court's decision affirming town planning board's denial of applications for major site plan and major subdivision approval to build charter school was not moot, even though applicant had allegedly renounced its legal right to "operate" charter school after filing its notice of appeal; applicant applied only for development permits under town's unified development ordinance (UDO), and it was a separate entity, namely charter school, that sought charter applications which would allow it to "operate" school, the questions originally in controversy between applicant and town were not moot, and decision on the existing controversy would have practical effect on applicant's ability to obtain the required development permits.

Superior court properly applied de novo standard of review in interpreting statute governing limitation on city requirements for street improvements related to schools and in reaching its

decision that statute did not prohibit municipalities from regulating pedestrian and bicycle connectivity in relation to proposed new schools.

When reviewing town planning board's denial of applications for major site plan and major subdivision approval to build a charter school, superior court erroneously exercised the whole record test in determining the preliminary legal question concerning the sufficiency of applicant's evidence; instead, superior court should have applied de novo review to determine the initial legal issue of whether applicant had presented competent, material, and substantial evidence in support of its applications.

On review of town zoning board's decision, it was not prejudicial error when superior court erroneously exercised the whole record test, as opposed to de novo review, in determining the preliminary legal question concerning the sufficiency of applicant's evidence in support of its applications for major site plan and major subdivision approval to build a charter school, given that applicant failed to meet its burden of production to show it was entitled to the requested permits.

The Court of Appeals would review de novo whether statute governing limitation on city requirements for street improvements related to schools was properly interpreted in context of applicant's zoning applications for major site plan and major subdivision approval to build a charter school.

Term "street improvements" did not include sidewalk improvements, as that term was used in statute providing that city could only require "street improvements" related to schools that were required for safe ingress and egress to the municipal street system and that were physically connected to a driveway on the school site.

Statute providing that city could only require "street improvements" related to schools that were required for safe ingress and egress to the municipal street system and that were physically connected to a driveway on the school site did not prohibit towns from regulating pedestrian and bicycle connectivity in relation to proposed new schools; statutory term "street improvements" did not include sidewalk improvements.

Statute providing that charter school's specific location would not be prescribed or limited by a local board or other authority except a zoning authority did not prevent town from considering community plan policies with respect to schools and corresponding regulations, as town zoning board was acting as a zoning authority when denying applications for major site plan and major subdivision approval to build a charter school.

Town's community plan policy stating that public school locations should serve to reinforce desirable growth patterns rather than promoting sprawl was solely advisory, and thus, it was irrelevant to applications for major site plan and major subdivision approval to build a charter school and was not a proper basis for town zoning board to deny applicant's site plan application; community plan policy was a policy statement applicable to the planning of a new school location, and policy was not implemented by a zoning regulation.

Town's community plan policy providing that school campuses should be designed to allow safe pedestrian access from adjacent neighborhoods was a policy of the town's comprehensive plan to be implemented by a zoning regulation and could be changed at any time, and standing by itself, community plan policy was only advisory and did not have the force of law; however, the policy was implemented by town's unified development ordinance (UDO) requiring applicant for school to demonstrate how its plan would achieve walking and bicycle accessibility by schoolchildren to schools.

Applicant's failure to satisfy town's unified development ordinance (UDO), requiring applicant for school to demonstrate how its plan would achieve walking and bicycle accessibility by schoolchildren to schools, was a proper basis on which town denied applications for major site plan and major subdivision approval to build charter school.

Town's unified development ordinance (UDO) that was intended to regulate the development of land to be used for educational uses and required the provision of off-premise sidewalks and multi-use trails or paths to allow for accessibility by students to schools was a subdivision ordinance because it concerned a component of essential infrastructure for an elementary and secondary school within town's planning jurisdiction, and thus, superior court properly considered the ordinance in denying applicant's subdivision plan application in connection with charter school.

Applicant failed to show that it was not required to comply with town's unified development ordinance (UDO) that was intended to regulate the development of land to be used for educational uses in order to satisfy conditions for approval of its applications for major site plan and major subdivision approval to build a charter school.

Town zoning board made ultimate decision as to whether applicant presented competent, material, and substantial evidence in support of its applications for major site plan and major subdivision approval to build a charter school and whether applicant met requirements of town unified ordinance that was intended to regulate the development of land to be used for educational uses.

Applicant failed to meet its burden of production to show that it met town unified development ordinance (UDO) requiring the provision of off-premise sidewalks and multi-use trails or paths to allow for accessibility by students to schools in order to establish a prima facie case for entitlement to permits for major site plan and major subdivision approval to build a charter school; applicant demonstrated that it would provide pedestrian connectivity to only one residential neighborhood through park located to the south of the proposed school.

Town's local zoning ordinances requiring pedestrian connectivity and accessibility for schoolchildren to school were not preempted by statute providing that city could only require street improvements related to schools that were required for safe ingress and egress to the municipal street system and that were physically connected to a driveway on the school site.

EMINENT DOMAIN - NORTH DAKOTA

Northwest Landowners Association v. State

Supreme Court of North Dakota - August 4, 2022 - N.W.2d - 2022 WL 3096724 - 2022 ND 150

Landowners association brought action against State seeking a declaration that senate bill relating to subsurface pore space violated the state and federal takings clauses, and oil and gas company intervened as a defendant.

The District Court granted summary judgment for association. State and company appealed.

The Supreme Court held that:

- Portions of senate bill were a facially unconstitutional per se taking based on physical invasion of property;
- Unconstitutional portions of senate bill were severable from the remainder;

- Trial court acted within its discretion in denying further discovery as to value of pore space before ruling on summary judgment motion; and
- Association was entitled to attorney's fees as prevailing party pursuant to § 1988.

Portions of senate bill relating to subsurface pore space, allowing a third-party oil and gas operator to use subsurface pore space, eliminating the right to compensation for "use of or lost value" to a surface owner's pore space, and stating that injection or migration of substances into pore space for disposal operations, by itself, did not constitute trespass, nuisance, or other tort, constituted a per se taking that facially violated state and federal takings clauses based on physical invasion of property; those portions allowed oil and gas operators to physically invade a landowner's property by injecting substances into the landowner's pore space, restricted landowners from having any control over the timing, extent, or nature of the invasion, and prohibited the right to compensation for use of pore space.

The dominant mineral estate principle, arising from a severance of mineral rights from the surface creating an implied easement in favor of a mineral owner to use the surface estate as reasonably necessary to find and develop minerals, did not save portions of senate bill relating to subsurface pore space from facially violating state and federal takings clauses as a per se taking via physical invasion of property, where portions authorized subsurface disposal of waste by third-party oil and gas operators beyond scope of any implied easement and also barred surface owners from bringing a tort action for a trespass from disposal operations that were beyond scope of any implied easement.

Portions of senate bill relating to subsurface pore space, granting a broad authorization to third-party oil and gas operators to physically occupy landowners' pore space and barring demands for compensation or tort actions to secure rights, was an exercise of the State's police power which was limited by the state and federal takings clauses as a physical invasion of property, despite argument that landowners took title to pore space with an expectation that their title was limited by police power; landowners' takings claims were not premised on a regulation of what they could do with their property, and they did not take title subject to possibility that their property could be actually occupied or taken away without just compensation.

Facially unconstitutional provisions of senate bill relating to subsurface pore space, granting a broad authorization to third-party oil and gas operators to physically occupy landowners' pore space and barring demands for compensation or tort actions to secure rights in violation of state and federal takings clauses, were severable from remaining provisions, which included sections designating use of carbon dioxide as acceptable for enhanced recovery of oil, gas, and other minerals, granting North Dakota Industrial Commission (NDIC) authority to adopt and enforce rules and orders, and limiting application of certain other provisions in the context of existing contracts; remaining provisions were sufficiently distinct to operate independently from the unconstitutional provisions.

Landowners association's failure to expressly plead §§ 1983 and 1988 in its complaint seeking a declaration that a state senate bill relating to subsurface pore space was facially unconstitutional did not preclude an award of attorney fees to association as a prevailing party pursuant to § 1988 upon trial court's determination that the senate bill was a facially unconstitutional taking; attorney's fees could be awarded under § 1988 even if complaint did not expressly plead §§ 1983 and 1988, and complaint alleged a deprivation of a property right in violation of the Fifth and Fourteenth Amendments.

Landowners association that prevailed on its challenge to state senate bill relating to subsurface pore space as being a facially unconstitutional taking was entitled to attorney's fee pursuant to § 1988, despite argument that association lacked standing to assert its members' rights under § 1983; all that was required under § 1988 to award fees was that association prevail on a claim within scope

of § 1983.

PUBLIC UTILITIES - OHIO

In re Application of Icebreaker Windpower, Inc.

Supreme Court of Ohio - August 10, 2022 - N.E.3d - 2022 WL 3220040 - 2022-Ohio-2742

Residents sought judicial review of decision of Ohio Power Siting Board granting certificate of environmental compatibility and public need for six-turbine wind-powered electric-generation facility to be built on submerged land in Lake Erie.

The Supreme Court held that:

- Evidence supported Board's determinations as to probable environmental impact on migrating birds and bats and steps for reducing such impact;
- Board properly determined that conditions on its grant of certificate were sufficient to protect birds and bats and ensure that facility represented minimum adverse environmental impact; and
- Board lacked jurisdiction to consider contention that proposed construction of facility violated public-trust doctrine.

Evidence supported Ohio Power Siting Board's determinations as to probable environmental impact with respect to migrating birds and bats and steps for reducing such impact, as relevant to request for certificate of environmental compatibility and public need for six-turbine wind-powered electric-generation facility to be built on submerged land in Lake Erie; Board cited studies that monitored birds and bats flying in vicinity of project site, Board cited evidence showing that small scale of project and location between eight and ten miles offshore severely reduced impact that facility would have on birds and bats, and Board cited radar studies showing that most migrating birds were expected to fly above rotor-swept zone of turbines.

Ohio Power Siting Board properly determined that conditions on its grant of certificate of environmental compatibility and public need for six-turbine wind-powered electric-generation facility to be built on submerged land in Lake Erie were sufficient to protect birds and bats and ensure that facility represented minimum adverse environmental impact; Board found that moving facility farther from shore and small scale of project minimized several potential adverse environmental impacts on wildlife, Board required certificate applicant to submit radar-monitoring plan prior to construction, and Board required applicant to install fully functioning collision-monitoring technology prior to operation.

Ohio Power Siting Board lacked jurisdiction to consider residents' contention that proposed construction of six-turbine wind-powered electric-generation facility to be built on submerged land in Lake Erie violated public-trust doctrine and, therefore, that project would not serve public interest, convenience, and necessity, so as to preclude certificate of environmental compatibility and public need; statutory provision setting forth condition that facility serve public interest, convenience, and necessity did not include language giving Board authority to make public-trust determinations concerning Lake Erie, nor did provision make mention of any obligation of state to hold waters and submerged land of Lake Erie in trust for people of Ohio.

ZONING & PLANNING - PENNSYLVANIA

In re Charlestown Outdoor, LLC

Supreme Court of Pennsylvania - August 16, 2022 - A.3d - 2022 WL 3364248

Property owner appealed decision of township zoning board, which denied property owner's challenge to validity of township's zoning ordinance that permitted construction of billboards in zoning district.

The Court of Common Pleas affirmed the zoning board's decision finding that the ordinance was not de facto exclusionary. Property owner appealed. The Commonwealth Court affirmed. Property owner's petition for allowance of appeal was granted.

The Supreme Court held that:

- Zoning ordinance was not the source of the exclusion, and thus ordinance was not de facto exclusionary, and
- Municipalities have no duty to review and revise zoning ordinances or to rezone for a particular use where a property owner's use is limited by third parties, including through governmental regulations beyond the municipality's control.

Ordinance that permitted billboards in zoning district did not impose conditions that rendered use impossible, rather, following construction of turnpike ramp subsequent to enactment of ordinance, it was Department of Transportation (PennDOT) regulation that precluded billboards in zoning district, and thus because zoning ordinance was not the source of the exclusion, ordinance was not de facto exclusionary in property owner's challenge to ordinance; ordinance permitted use on land that was rendered unusable for that purpose by intervening actions of a third party, other than setback provision, nothing in ordinance restricted placement of billboards in zoning district, and neither severing ordinance restrictions nor allowing property owner to erect a billboard were available as remedies.

Municipalities have no duty to review and revise their zoning ordinances or to rezone for a particular use where a property owner's use is limited by third parties, including through governmental regulations beyond the municipality's control.

To the extent that a de facto exclusion challenger to a zoning ordinance is successful, that success is limited to obtaining the opportunity to acquire and develop property in the zone where the use is permitted; if the defect asserted cannot be cured by severing restrictive provisions of ordinance, then the case stands in the same posture as one involving de jure exclusion, and the sole remedy is to allow use somewhere, and a successful litigant must receive that benefit in form of at least partial approval of a proposal.

SPECIAL ASSESSMENTS - CALIFORNIA

Broad Beach Geologic Hazard Abatement District v. 31506 Victoria Point LLC

Court of Appeal, Second District, Division 4, California - August 2, 2022 - Cal.Rptr.3d - 2022 WL 3053306

Property owners, including trust, filed petition for writ of mandate, seeking to set aside special assessment to fund shoreline fortification project as violative of state constitutional limitations on assessments.

The Superior Court entered judgment invalidating assessment, but subsequently denied property

owners' motions for attorney fees under private attorney general statute. District appealed from judgment and property owners appealed from order denying attorney fees.

The Court of Appeal held that:

- Project would create general benefit of improved public beach;
- State agency's requirement that city district ensure public access to beach did not render beach cost of project rather than general benefit;
- District was required to apportion special benefits that revetment would confer on parcels behind it;
- District was required to assess county-owned parcels specially benefited by project;
- Possibility of new assessment in future did not render financial benefits from litigation so uncertain as to warrant attorney fees;
- Trial court properly considered litigation benefits to property owners who joined litigation after petition was first filed in considering attorney fee award; and
- Trust had adequate financial motivation to participate in litigation absent award of attorney fees.

Shore fortification project would create wider, sandy beach that would benefit public in general, and, thus, constitutional provision governing assessments required city district to separate project's special benefits to certain parcels from general benefit, including beach, and include only portion of cost of project representing special benefits in special assessment used to fund project, even if general benefits did not impose additional costs and district did not subjectively intend to widen beach for recreational purposes; allowing any special benefit that also provided general benefits to support assessment for entire cost of project would be inconsistent with constitutional separation and quantification requirements, which depended on real-world effects rather than agency intent.

Coastal Commission's requirement that city district ensure public access to beach that would be enlarged and enhanced as a result of shore fortification project did not render enhanced public beach a cost of such project rather than general benefit, and, thus, did not exempt district from constitutional requirement of separating such general benefit from project's special benefit of protecting particular properties and include only costs attributable to special benefit when imposing special assessment on those properties; provision of wide, sandy beach was central to revetment project, not mere condition for approval or required consideration by agency, and Commission's action to ensure project would not cut off public's beach access did not transform project's general benefits into costs.

Revetment was integral part of city district's proposed shoreline fortification project, and, thus, constitutional article governing assessments required district, when imposing assessment to fund project, to apportion special benefits that revetment would confer by providing additional protection to parcels behind it so that assessment would be proportional to those parcels' relative special benefits, even though property owners constructed existing, temporary revetment and agreed to fund its relocation; State Lands Commission required district to pay for existing revetment's unauthorized use of state lands, district persuaded Coastal Commission to keep revetment, and Coastal Commission's conditions of approval required district to relocate revetment and mitigate its environmental impact.

Shoreline fortification project would provide special benefit of protection to county-owned parcels that contained stairs providing public access to beach, and, thus, constitutional article governing special assessments required city district to impose project-funding assessment against such parcels, even if project would not change stairs' function; project would protect shoreline, including stairs and parcels, by adding sand and maintaining revetment, each parcel encompassed large area, and constitution did not permit district to treat county parcels more favorably than it did privately-

owned parcels that also received special benefit from project, such as by exempting county parcels from assessment or funding benefits to county parcels through in-kind contributions from homeowners.

LIABILITY - CALIFORNIA

Nunez v. City of Redondo Beach

Court of Appeal, Second District, Division 3, California - July 27, 2022 - Cal.Rptr.3d - 2022 WL 2965453 - 2022 Daily Journal D.A.R. 8078

Pedestrian filed a negligence lawsuit against city after she tripped on an elevated sidewalk slab and injured her left knee and right arm.

The Superior Court granted city summary judgment and pedestrian appealed.

The Court of Appeal held that city's policy to repair sidewalk tripping hazards greater than a half-inch did not create a triable issue of fact as to the triviality of sidewalk offset.

City's policy to repair sidewalk tripping hazards greater than a half-inch did not create a triable issue of fact as to the triviality of sidewalk offset, in pedestrian's negligence lawsuit against city after she tripped on an elevated sidewalk slab; minor defects to the alignment of city's sidewalk inevitably occur, and the continued existence of such nonalignments without warning or repair was not unreasonable and did not preclude the trial court from finding the sidewalk defect was trivial.

SCHOOL FINANCE - MISSISSIPPI

Wayne County School District v. Quitman School District

Supreme Court of Mississippi - July 28, 2022 - So.3d - 2022 WL 2980866

School district filed suit against neighboring school district seeking to recover pro rata distribution of funds arising from their shared trust property.

The Chancery Court entered judgment for plaintiff school district. Both sides appealed.

The Supreme Court, en banc, held that statute governing schools' division of revenue collected from shared townships was a condition precedent, not a statute of limitations.

Statute governing the manner in which revenue from shared townships was to be administered to school districts, which stated that "any school district failing to timely provide the list to the superintendent of the custodial school district shall forfeit its right to such funds" was not a statute of limitations that established a time limit for bringing a lawsuit; rather, it was a condition precedent school districts were required to fulfill.

EMINENT DOMAIN - NORTH CAROLINA

County of Moore v. Acres

Court of Appeals of North Carolina - July 5, 2022 - S.E.2d - 2022-NCCOA-446 - 2022 WL 2432952

County brought action against landowners, alleging that landowners had encroached on county's purported easement to access sewer and water mains on property by constructing fence and planting trees in easement area, and seeking injunctive and declaratory relief.

The Superior Court granted landowners' motion for summary judgment, and denied county's cross-motion for partial summary judgment on the issue of the county's ownership of the lines and easement. County appealed.

The Court of Appeals held that:

- Any inverse condemnation claim by landowners was untimely, and
- County held title to an easement along the surface of the property.

County held title to sewer and water mains under landowners' property, and thus held title to an easement along the surface of the property to service, maintain, and repair the utility mains, where county took possession of the lines more than two decades earlier and had continuously used and operated the lines for a public purpose.

PUBLIC UTILITIES - SOUTH DAKOTA

Matter of Ehlebracht

Supreme Court of South Dakota - August 3, 2022 - N.W.2d - 2022 WL 3097464 - 2022 S.D. 46

Intervenors impacted by potential wind energy farm appealed Public Utilities Commission's (PUC) approval of siting permit for wind energy farm.

The Circuit Court affirmed, and intervenors appealed.

The Supreme Court held that:

- PUC correctly applied legal standard requiring an applicant to comply with all applicable laws and rules;
- Application adequately complied with requirement that it include a "forecast" of the impact that the facility would have on solid waste management facilities;
- Adoption of noise levels set forth in amended county ordinance did not pose any danger to the health, safety, or welfare of the inhabitants living near the project;
- Applicant's failure to commission a field study to measure the ambient sound that existed naturally in area of proposed wind energy farm prior to construction did not indicate that applicant failed to meet its burden to show that the facility would not substantially impair the health, safety or welfare of the inhabitants;
- Applicant met its burden to show that the facility would not substantially impair the health, safety or welfare of the inhabitants as it related to the topic of infrasound; and
- Applicant was not required to submit an air quality study.

CHARTER SCHOOLS - TEXAS

KIPP Texas, Inc. v. Doe #1

Court of Appeals of Texas, Houston (1st Dist.) - June 30, 2022 - S.W.3d - 2022 WL 2347906

Parents of students sexually abused by counselor at charter school brought action against school's corporate operator, alleging claims for assault and negligence.

The District Court denied operator's plea to the jurisdiction, which asserted immunity from suit and liability. Operator appealed.

The Court of Appeals held that:

- Operator had governmental immunity from parents' suit;
- Open-courts provision of the State Constitution did not apply to preclude operator's governmental immunity; and
- Uncontroverted affidavit established operator's status as an open-enrollment charter school.

Operator of open-enrollment charter school had governmental immunity from claims for assault and negligence brought by parents of students sexually abused by a counselor employed by operator at school, since a public school district would be immune from such claims.

Open-enrollment charter school had governmental immunity as a matter of common-law interpretation, rather than on the basis of statute, and thus open-courts provision of the State Constitution did not apply to preclude such immunity, so as to confer subject-matter jurisdiction over action against operator of open-enrollment charter school, brought by parents of children sexually abused by counselor, and asserting claims for assault and negligence; although the legislature enacted a statute granting governmental immunity to open-enrollment charter schools, the Supreme Court as a whole did not defer to such enactment in holding that open-enrollment charter schools have immunity.

Uncontroverted affidavit established operator of school as an open-enrollment charter school, as required for school's governmental immunity from suit brought by parents of students sexually abused by school counselor, where parents did not object to the affidavit, did not file any evidence controverting the school's status as an open-enrollment charter school, and sought a declaration that a certain statutory provision applicable only to open-enrollment charter schools violated the open-courts provision of the Texas Constitution, which was tantamount to a judicial admission of the school's status as an open-enrollment charter school.

EMINENT DOMAIN - WASHINNGTON

Maslonka v. Public Utility District No. 1 of Pend Oreille County

Court of Appeals of Washington, Division 3 - August 2, 2022 - P.3d - 2022 WL 3037184

Landowners brought action against county public utility district, an operator of river dam that caused occasional flooding, seeking injunctive relief and asserting claims of inverse condemnation, trespass, nuisance, and negligence arising from flooding of their agricultural property.

Utility district counterclaimed for declaration of prescriptive easement to flood at water levels above those set forth in express easement.

On summary judgment, the Superior Court declared a prescriptive easement in favor of utility district and dismissed landowners' claims. Landowners appealed.

The Court of Appeals held that:

- Continuous and uninterrupted use, as element of prescriptive easement, can be decided on summary judgment;
- As matter of first impression, a party asserting a prescriptive easement must prove each element by clear and convincing evidence;
- Factual issues precluded summary judgment on prescriptive easement claim;
- Factual issue as to applicability of subsequent purchaser rule precluded summary judgment on inverse condemnation claims as to riverfront parcel;
- Trespass and nuisance claims for riverfront parcel were not subsumed by inverse condemnation claims; and
- Utility district did not cause injury to inland agricultural parcel that allegedly flooded due to defect in diking improvements.

ADR - CALIFORNIA

People v. Maplebear Inc.

Court of Appeal, Fourth District, Division 1, California - July 28, 2022 - Cal.Rptr.3d - 2022 WL 2981169

City attorney brought an enforcement action under the Unfair Competition Law (UCL), on behalf of People, against operator of website and smart-phone application used to facilitate same-day, on-demand grocery shopping and delivery services, alleging that operator unlawfully misclassified its employees as independent contractors in order to deny them worker protections, harming its alleged employees and the public at large through a loss of significant payroll tax revenue, and giving operator unfair advantage against its competitors.

Operator moved to compel arbitration concerning city attorney's requests for injunctive relief and restitution. The Superior Court denied motion. Operator appealed.

The Court of Appeal held that city attorney was not bound by arbitration provisions of agreements between operator and its employees.

City, which brought action for restitution and injunctive relief under Unfair Competition Law (UCL) against operator of grocery-shopping and delivery smart-phone application, alleging that operator unlawfully misclassified its employees as independent contractors, was not bound by arbitration provisions of agreements between operator and its employees, where city was acting in its own law-enforcement capacity to seek civil penalties for labor violations traditionally prosecuted by state, city was indisputably not party to any arbitration agreement with operator, no individual employee had control over litigation and city did not need any individual employee's consent to bring action, and city's claims sought to vindicate public harms.

An action under the Unfair Competition Law (UCL) seeking injunctive relief and civil penalties filed by a public prosecutor on behalf of the People is not primarily concerned with restoring property or benefiting private parties; it is fundamentally a law-enforcement action with a public, penal objective.

Under the Broughton-Cruz rule, 988 P.2d 67, 66 P.3d 1157, agreements to arbitrate claims for public injunctive relief under the Consumers Legal Remedies Act (CLRA), the Unfair Competition Law, or the false advertising law are not enforceable in California; the central premise of the rule is that the judicial forum has significant institutional advantages over arbitration in administering a public injunctive remedy, which as a consequence will likely lead to the diminution or frustration of the public benefit if the remedy is entrusted to arbitrators.

EMINENT DOMAIN - INDIANA

701 Niles, LLC v. AEP Indiana Michigan Transmission Company, Inc.

Court of Appeals of Indiana - July 7, 2022 - N.E.3d - 2022 WL 2517441

Publicly-regulated utility company brought condemnation action against limited-liability corporation (LLC), seeking to obtain easements by eminent domain for an underground electric-transmission line.

The Circuit Court denied LLC's motion for preliminary injunction seeking to enjoin utility company from using the land for placement of a separate private transmission line for third-party private university. LLC filed interlocutory appeal.

The Court of Appeals held that:

- LLC did not knowingly waive any objections to use of the land for a wholly private purpose by third-party;
- Third-party could not be allowed to obtain easements for private use through utility company's condemnation action against LLC; and
- Placement of third-party's private electric-transmission line constituted a constitutionally-impermissible taking of a separate property right from LLC and therefore warranted injunctive relief.

Limited-liability corporation (LLC), which had been negotiating with publicly-regulated utility company regarding easements for an underground electric-transmission line across LLC's land, did not knowingly waive any objections to use of the land for a wholly private purpose by third-party university, in utility company's condemnation action against LLC, since utility company's condemnation complaint did not put LLC on notice of any intended use of the land by a private party, utility company only asserted a public use to which LLC had no objection, and utility company concealed its memorandum of understanding with university to allow the university to concurrently occupy the underground duct bank with the placement of a separate private transmission line.

Private university, as third-party, could not obtain easements for private use through publicly-regulated utility company's condemnation action against limited liability corporation (LLC), which sought to obtain easements on LLC's land by eminent domain for public use of underground electric-transmission line; private and public uses would not have been concurrent, separate line would have been installed and would separately need to be maintained for the university's sole private use, utility company acknowledged that arrangement with university to install separate line did not in any way further mission of transferring electric services to customers, and university's private line required extra construction materials and installation of additional manholes.

Placement of private electric-transmission line for sole use by private university, as third-party, on or through land owned by limited-liability corporation (LLC), which had negotiated with publicly-regulated utility company regarding placement of a transmission line intended only for public use, constituted a constitutionally-impermissible taking of a separate property right from LLC and therefore warranted injunctive relief enjoining utility company from installing the university's line to the duct bank without LLC's express consent, in utility company's condemnation action against LLC seeking to obtain easements by eminent domain, since the university's private line was separate and distinct from the line for public use sought by utility company.

ZONING & PLANNING - MARYLAND

Town of Upper Marlboro v. Prince George's County Council

Court of Appeals of Maryland - August 1, 2022 - A.3d - 2022 WL 3025099

Town filed petition for review of county council's adoption of minor amendment to remove schoolhouses from county historic sites and districts plan.

The Circuit Court denied petition, and town appealed. The Court of Special Appeals affirmed. Certiorari was granted.

The Court of Appeals held that:

- Council's initiating resolution was not final agency action subject to judicial review;
- Council's adoption of minor amendment was judicially reviewable final agency action;
- Town could challenge council's passage of minor amendment by alleging procedural deficiencies in initiating resolution;
- Council's decision to adopt minor amendment was legislative action;
- County code provision stating that minor amendment process "may" be utilized for two specific purposes did not require minor amendment to fulfill either purpose;
- Council's initiating resolution adequately set forth minor amendment's purpose; and
- Initiating resolution adequately set forth minor amendment's scope.

HOSPITALS - MISSISSIPPI

SRHS Ambulatory Services, Inc. v. Pinehaven Group, LLC

Supreme Court of Mississippi - July 21, 2022 - So.3d - 2022 WL 2841696

Nonprofit corporation formed by county-owned community hospital, which entered into purchase agreement for property, filed action against vendor and title insurer, seeking declaration that the purchase of the property was void for lack of ratification by county board of supervisors, benefits under title insurance policy, and damages for title insurer's negligence.

Vendor counterclaimed for declaration of parties' rights under disputed purchase contract. The Circuit Court denied nonprofit's motion for summary judgment and granted vendor's motion for declaratory judgment. Nonprofit appealed.

The Supreme Court held that purchase was valid without ratification by county board of supervisors.

Purchase of property by nonprofit corporation formed by county-owned community hospital was valid without ratification by county board of trustees under statute governing operations of boards of trustee of community hospitals, which mandated owners' approval of real estate transactions when board acquired property; hospital board of trustees was not acquiring the property, hospital's board approved and financed nonprofit's acquisition of the property, nonprofit's board of directors voted to enter into contract with vendor for purchase, hospital board agreed in its meeting minutes to provide financial services to corporation, and hospital board approved in its resolutions the initial price needed to secure the property and the final price to complete the purchase.

EMINENT DOMAIN - TEXAS

State by and Through Texas Transportation Commission v. Suleiman

Court of Appeals of Texas, Houston (14th Dist.) - June 30, 2022 - S.W.3d - 2022 WL 2350048

Landowner and its registered agent brought action against State seeking declaration that prior settlement between registered agent, who owned adjacent parcel, and State precluded State from condemning landowner's property, and seeking injunction prohibiting State from taking landowner's property.

The District Court denied the State's motion to dismiss for lack of jurisdiction, and motion to abate the case. State brought interlocutory appeal challenging denial of motion to dismiss, and petitioned for writ of mandamus challenging denial of motion to abate.

The Court of Appeals held that county court had exclusive jurisdiction to determine issues raised in objections to condemnation award, and thus district court lacked subject matter jurisdiction over proceeding.

Landowner's filing of objections to special commissioners' award provided county court with exclusive jurisdiction to determine issues raised in objections, including landowner's contention that condemnation violated settlement agreement between State and landowner's registered agent concerning State's condemnation of adjoining parcel owned by agent, and thus district court lacked subject matter jurisdiction over proceeding brought by landowner and registered agent to enjoin State from condemning landowner's property based upon alleged violation of settlement agreement; request to enjoin state from violating settlement was not materially different from asking district court to enjoin condemnation proceeding, over which county court had exclusive jurisdiction.

LIABILITY - TEXAS

Doe v. Beaumont Independent School District

United States District Court, E.D. Texas, Beaumont Division - July 14, 2022 - F.Supp.3d - 2022 WL 2783047

Female public middle school students brought § 1983 action against school district and male former teacher, alleging violation of the Due Process Clause, for the deprivation of their rights of personal safety, security, and bodily integrity, and violations of the Equal Protection Clause in connection with relationship between former teacher and students and allegations of sexually abusive contact, and seeking damages and declaratory relief under Title IX.

School district moved to dismiss, and plaintiffs moved for protective and sealing orders.

The District Court held that:

- Student stated claim for the denial of substantive due process right to bodily integrity;
- Plaintiffs sufficiently alleged that school district's "pass the trash" policy created a breeding ground for sexual predators to exploit vulnerable schoolchildren so as to constitute a deprivation of the right to equal protection;
- Plaintiffs sufficiently alleged that school district's policy uniquely affected minor female students;
- Plaintiffs' irreparable injures had been caused as a result of policy so as to constitute a deprivation

of the right to equal protection;
- Students sufficiently alleged existence widespread practice so as to state § 1983 *Monell* claim;
- Plaintiffs sufficiently alleged causal link between policy, *Monell's* scienter requirement, and students' injuries so as to establish deliberate indifference for purposes of "moving force" element of § 1983 *Monell* claim; and
- Plaintiffs sufficiently pled actual notice to an appropriate person of employee-on-student sexual harassment and abuse to state Title IX claim.

BOND VALIDATION - VERMONT

Soares v. Barnet Fire District #2

Supreme Court of Vermont - July 22, 2022 - A.3d - 2022 WL 2898896 - 2022 VT 34

Plaintiff brought action against fire district and municipal bond bank, challenging approval of municipal bond for loan to acquire fire district's private water system and secure state funding for its rehabilitation.

The Superior Court ruled on partial summary judgment and, following two-day trial, entered declaratory judgment for plaintiff but denied request to invalidate the bond vote, denied motion for reconsideration, and denied motion for attorney's fees. Plaintiff appealed.

The Supreme Court held that:

- Defects in bond approval procedure were subsequently cured by the committee's validation resolution;
- Open Meeting Law provision allowing attorney's fees did not apply retroactively; and
- Committee had authority to charge curb-stop fee.

Defects in procedure which fire district used to obtain approval for municipal bond for loan to acquire fire district's private water system and secure state funding for its rehabilitation, including failing to properly adopt a necessity resolution at a meeting before the bond vote and adopting warning and proposal for a bond vote at a districtwide meeting rather than at a prudential committee meeting, were the result of oversight, inadvertence, and mistake which were subsequently cured by the committee's validation resolution; committee consistently attempted to promote the interests underlying the Open Meeting Law and it acted in a transparent way throughout the process, and validation statute did not contain any exception for Open Meeting Law violations.

Plaintiff failed to establish on appeal that trial court, in action challenging approval of municipal bond, erred by failing to explicitly address his request for a new trial, in which he sought admit into evidence an exhibit and related testimony that was offered at trial as proof of the harm caused to him and the fire district community by violations of the Open Meeting Law; while plaintiff referenced evidence and testimony that the trial court apparently excluded at trial, he provided no transcript of the proceedings below and the Supreme Court had no record on which to evaluate his claim that the trial court should have admitted such evidence.

Open Meeting Law provision allowing attorney's fees did not apply retroactively to fire district committee's violation of the Law while approving municipal bond; provision was not solely remedial or procedural, but created a substantive change in the law by setting forth a process by which municipalities could become obligated to pay attorney's fees for violations of the Open Meeting Law where they had no such exposure before, and including a process by which municipalities could

avoid such obligations, and it would be unfair to apply it to support an award of attorney's fees when committee had no ability to take the steps to avoid liability under the statute.

Fire district's prudential committee had authority, when approving municipal bond for loan to acquire fire district's private water system and secure state funding for its rehabilitation, to charge curb-stop fee; statutory authority to require existing customers to remain connected to the municipal water system necessarily encompassed the power to charge a fee to those who seek to leave that system.

PUBLIC RECORDS - CALIFORNIA

Essick v. County of Sonoma

Court of Appeal, First District, Division 4, California - June 29, 2022 - Cal.Rptr.3d - 80 Cal.App.5th 562 - 2022 WL 2339453

Elected county sheriff, against whom harassment complaint had been filed with county, moved for preliminary injunction to bar county's release of complaint, as well as report and related documents prepared by independent investigator, after local newspaper requested such release pursuant to California Public Records Act (CPRA).

The Superior Court denied motion. Sheriff appealed.

The Court of Appeal held that:

- County was not sheriff's employing agency;
- County did not take on role of sheriff's employer; and
- County's agreement that investigation would comply with Public Safety Officers Procedural Bill of Rights Act (POBRA) did not estop county from disclosing complaint, report, and related documents.

County, with which harassment complaint had been filed regarding county sheriff, was not sheriff's "employing agency," and thus complaint, as well as report and documents prepared by investigator, were not personnel records, as used in statute that protected as confidential information obtained from peace officers' personnel records, or confidential files related to investigation of complaint by member of public, for purposes of provision of California Public Records Act (CPRA) that protected from disclosure records the disclosure of which was prohibited by law, even though county paid sheriff; sheriff was public official elected by county voters, county board of supervisors, which had oversight responsibility over sheriff, lacked power to hire, fire, or discipline him, and complaint, report, and documents had no consequence for sheriff's duties or compensation.

County, by commissioning investigatory report after member of public filed harassment complaint against elected county sheriff, did not take on role of county sheriff's employer, for purposes of statutes that protected as confidential information obtained from peace officers' personnel records and confidential files related to investigation of complaint by member of public, and thus provision of California Public Records Act (CPRA) that protected from disclosure records the disclosure of which was prohibited by law did not apply.

County's agreement that investigation into harassment complaint filed against elected county sheriff would comply with Public Safety Officers Procedural Bill of Rights Act (POBRA) did not estop county from disclosing complaint, or subsequent investigatory report and related documents, pursuant to California Public Records Act (CPRA), even though sheriff argued such agreement created enforceable legal promise that records would be confidential; nothing in POBRA statutory scheme

explicitly granted or mentioned confidentiality from CPRA requests, such that there was no misrepresentation or concealment of material facts, and if report and findings were to be treated as confidential, only protection came outside of POBRA, from penal code provisions related to disclosure of documents.

EMINENT DOMAIN - FLORIDA

Lemon Bay Cove, LLC v. United States

United States Court of Federal Claims - July 15, 2022 - Fed.Cl. - 2022 WL 2793949

Owner of wetlands comprised of submerged land and mangroves filed suit against United States, claiming that Army Corps of Engineers effected taking by denying owner Clean Water Act (CWA) permit to fill property in order to build 12-unit residential development on property.

Bench trial was held.

The Court of Federal Claims held that:

- Corps' denial of permit did not effect categorical taking, and
- Corps' denial of permit did not effect regulatory taking under *Penn Central*.

Army Corps of Engineers' denial of Clean Water Act (CWA) permit to fill 2.08 acres and to build 12-unit residential project on owner's wetlands comprised of submerged land and mangroves did not constitute categorical taking requiring just compensation, under Fifth Amendment; Corps' denial of permit did not deprive property of all economic value, as owner's persistence in pursuing development of 12-unit footprint for its own financial reasons, rather than considering smaller footprint, prevented Corps' consideration of any other economically viable uses of property.

Owner of wetlands comprised of submerged land and mangroves lacked reasonable investment-backed expectations sufficient to satisfy *Penn Central* regulatory taking requirements, based on Army Corps of Engineers' denial of Clean Water Act (CWA) permit for owner to fill 2.08 acres of property and build 12-unit residential project, where owner was aware at time of purchase that Corps' requirement of obtaining permit was longstanding regulatory restraint impacting potential development of owner's property.

MUNICIPAL ORDINANCE - INDIANA

City of Gary v. Nicholson

Supreme Court of Indiana - July 21, 2022 - N.E.3d - 2022 WL 2841364

State residents filed action seeking declaratory judgment that city's "welcoming ordinance" establishing commitment to protecting rights of immigrants violated state law and injunction preventing city from enforcing it.

Parties filed cross-motions for summary judgment, and the State intervened. The Superior Court entered summary judgment in favor of residents and entered injunction. City appealed. The Court of Appeals affirmed in part, reversed in part, and remanded with instructions.

On petition to transfer, the Supreme Court held that:

- Statute providing private right of action to compel enforcement with immigration laws did not confer standing;
- Residents lacked standing under public-standing doctrine; and
- State's intervention did not preclude dismissal based on residents' lack of standing.

Statute providing that, if a governmental body violates laws relating to citizen and immigration status information and enforcement of federal immigration laws, a person lawfully domiciled in Indiana may bring an action to compel the governmental body to comply with the laws, creates a private right of action, but it does not confer standing to bring such an action because it lacks an injury requirement; thus, a person lawfully domiciled in Indiana may have a statutory cause of action, but that does not mean the person has necessarily sustained an injury essential to obtaining judicial relief.

Indiana residents lacked standing under public-standing doctrine to bring action seeking declaratory judgment that city's "welcoming ordinance" establishing commitment to protecting rights of immigrants violated state law and injunction preventing city from enforcing it, in absence of allegations that they were injured.

State's intervention in action by Indiana residents seeking declaratory judgment that city's "welcoming ordinance" establishing commitment to protecting rights of immigrants violated state law and injunction preventing city from enforcing it did not preclude dismissal based on residents' lack of standing, where state did not file separate complaint, sought no relief from city, intervened only to offer its view of the meaning of the relevant statutory provisions, and conceded that dismissal would be appropriate if residents lacked standing.

ZONING & PLANNING - MASSACHUSETTS

City of Boston v. Conservation Commission of Quincy

Supreme Judicial Court of Massachusetts, Suffolk - July 25, 2022 - N.E.3d - 2022 WL 2911830

City sought certiorari review of local conservation commission's denial of city's application for permission to build a bridge that would impact wetlands, pursuant to Wetlands Protection Act and local wetlands ordinance.

The Superior Court Department allowed city's motion for partial judgment on the pleadings, after which the Superior Court Department entered a final judgment. Commission appealed.

The Supreme Judicial Court held that Department of Environmental Protection's (DEP) superseding order of conditions preempted the commission's denial of city's application.

Department of Environmental Protection's (DEP) superseding order of conditions pursuant to Wetlands Protection Act preempted local conservation commission's denial of city's application for permission to build a bridge to the extent that commission's decision was premised on impacts related to access road, where commission stated that it was unable to assess cumulative wetlands impacts under local wetlands ordinance, the impacts with which commission's consultants and commission were concerned were within DEP's purview, and differing analyses for any consideration by commission of impacts other than those that the DEP found meaningful were not due to local ordinance being more stringent than Act.

ZONING & PLANNING - MICHIGAN

Saugatuck Dunes Coastal Alliance v. Saugatuck Township

Supreme Court of Michigan - July 22, 2022 - N.W.2d - 2022 WL 2903871

Environmental organization with local residents as members brought action in which it sought review of township zoning board of appeals' separate decisions that organization lacked standing to appeal the grant of conditional, preliminary approval and the later grant of final approval to proposed residential site condominium project that included a marina and boat basin with boat slips.

The Circuit Court affirmed the board's determination that organization lacked standing to appeal the conditional, preliminary approval, the Circuit Court, affirmed the board's determination that organization lacked standing to appeal the final approval. Organization appealed both circuit court decisions. After consolidating the actions, the Court of Appeals affirmed in part and remanded. Organization applied for leave to appeal.

On the application for leave to appeal, the Supreme Court held that to be a "party aggrieved" by a zoning board of appeals decision, an appellant must have participated in the challenged proceedings by taking a position on the contested proposal or decision, must claim some protected interest or protected personal, pecuniary, or property right that will be or is likely to be affected by the challenged decision, and must provide some evidence of special damages arising from the challenged decision; overruling to a limited extent *Joseph v Grand Blanc Twp*, 5 Mich App 566, 147 N.W.2d 458; *Olsen v Chikaming Twp*, 325 Mich App 170, 924 N.W.2d 889; and other cases.

DISCIPLINE - NEW YORK

Matter of Genova

Supreme Court, Appellate Division, Second Department, New York - July 13, 2022 - N.Y.S.3d - 2022 WL 2709358 - 2022 N.Y. Slip Op. 04548

As part of attorney disciplinary proceeding, the Attorney Grievance Committee (AGC) moved to confirm special referee's report sustaining charges of professional misconduct against attorney, who was deputy town supervisor, and to impose discipline.

The Supreme Court, Appellate Division, held that disbarment was warranted for attorney's misconduct involving dishonesty, fraud, deceit, or misrepresentation.

Disbarment was warranted for misconduct of attorney, who was deputy town supervisor, in helping bidder on municipal contracts in acquiring unfair advantage, orchestrating loan guarantees by town for bidder, accepting bribes from bidder in form of car rides, meals, and discounts, and failing to disclose that town was guarantor for bidder on various financial documents; in aggravation, attorney engaged in corruptive practices as public official for personal and professional benefit, jeopardized financial well-being of town, received thousands of dollars in benefits from bribes, and damaged public's trust.

IMMUNITY - NORTH DAKOTA

Lovro v. City of Finley

Supreme Court of North Dakota - July 21, 2022 - N.W.2d - 2022 WL 2840065 - 2022 ND 145

Property owner brought action against city alleging negligence, gross negligence, and breach of contract seeking damages after city's water line broke and caused damage to owner's driveway and basement.

The District Court granted city's motion for summary judgment. Property owner appealed.

The Supreme Court held that:

- District court did not abuse its discretion in refusing to allow additional time for owner to conduct discovery before deciding city's motion for summary judgment;
- Owner failed to establish that city could or did waive its governmental immunity, and thus, owner's claims were barred by governmental immunity; and
- Owner waived issue for appellate review that district court erred in granting summary judgment dismissing his breach of contract claim.

Property owner failed to establish that city could or did waive its governmental immunity, and thus, owner's claims were barred by governmental immunity in action seeking damages against city alleging negligence and gross negligence after city's water line broke and caused damage to owner's driveway and basement; owner failed to cite any case law which provided that the discretionary function exception could be waived, and owner alleged the damages were caused by city's failure to property operate, maintain, repair, and inspect their water system.

BANKRUPTCY - PUERTO RICO

In re Financial Oversight and Management Board

United States Court of Appeals, First Circuit - July 18, 2022 - F.4th - 2022 WL 2800724

In Title III debt restructuring proceedings brought pursuant to the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), Financial Oversight and Management Board for Puerto Rico filed motion for confirmation of modified eighth amended proposed joint plan of adjustment for Commonwealth of Puerto Rico, Employees Retirement System of the Government of the Commonwealth of Puerto Rico and the Puerto Rico Public Buildings Authority.

Creditors objected. The United States District Court for the District of Puerto Rico overruled objections, and confirmed plan. Teachers' associations appealed and filed motions for stay pending appeal. The District Court denied stay motions. Board appealed to challenge ruling of Title III court that Fifth Amendment precluded plan from impairing prepetition claims for just compensation that arose under Takings Clause.

The Court of Appeals held that:

- Confirmation order under Title III of PROMESA could not be considered as categorically exempting takings claims from discharge as exercise of discretion;
- On issue of first impression, Fifth Amendment precluded impairment or discharge of prepetition claims for just compensation in bankruptcy under Title III of PROMESA; and

- Fifth Amendment did not permit impairment of prepetition claims for just compensation simply because claimants no longer possessed rights in taken property postpetition.

Live controversy existed over issue of otherwise valid Fifth Amendment takings claims arising prepetition could be discharged in bankruptcy proceedings under Title III of the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA) without payment of just compensation; although confirmed plan of adjustment provided for full payment of takings claims, plan expressly provided for such full payment only if Title III court's ruling on takings claims was upheld on appeal.

Confirmation order under Title III of Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA) could not be considered as categorically exempting takings claims from discharge as exercise of discretion, since Title III court necessarily determined that discharging valid, prepetition takings claims for less than just compensation would violate Fifth Amendment and render plan providing for such discharge unconfirmable under PROMESA, Title III court never purported to exercise any discretionary authority in exempting takings claims from discharge, and Title III court would have to had reason for exercising its discretion in that manner and only possible reason could be that Fifth Amendment required exempting takings claims from discharge.

Fifth Amendment precluded impairment or discharge of prepetition claims for just compensation in bankruptcy under Title III of the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA).

Fifth Amendment did not permit impairment of prepetition claims for just compensation simply because claimants no longer possess rights in taken property after governmental obligor has sought bankruptcy relief.

EMINENT DOMAIN - RHODE ISLAND

Johnston Equities Associates, LP v. Town of Johnston

Supreme Court of Rhode Island - July 1, 2022 - A.3d - 2022 WL 2378319

Owner of federally subsidized affordable-housing apartment complex brought continuing trespass action against town, town finance director, and town director of public works, alleging that they allowed sewage from town's sewer pipelines to be discharged into apartment complex's private sewer line.

The Superior Court entered judgment on jury verdict for complex owner but reduced $1.2 million award to $100,000 based on statutory cap on damages. Complex owner appealed, and town cross-appealed.

The Supreme Court held that:

- Complex's general contractor, who was a partner in complex's owner, did not have apparent authority to enter into agreement with town to transfer ownership of private sewer line to town;
- Evidence was insufficient to show that town's use of apartment complex's private sewer line was open and notorious, and thus town did not have a prescriptive easement;
- Town's continuing trespass was a "proprietary function" to which the statutory cap on tort damages did not apply;
  Public duty doctrine did not apply;
- Complex owner could recover prejudgment interest beginning from date on which it submitted

presentment letter to the town council seeking damages;
- Evidence was sufficient to support finding of causation; and
- Bills, invoices, and general ledgers were supported by testimony of parties who performed the work that was the subject of those documents, and thus were admissible.

Town's continuing trespass through connection of town sewer line to apartment complex's private sewer line was not part of the design and construction of the system, and thus was not a "governmental function" but instead was a "proprietary function" to which the statutory cap on tort damages did not apply; town was unaware of the connection until shortly before the trespass action was filed, plans and maps did not show any plan for the town to tie into the private line, and claim was that town, by allowing its sewage to flow into the private line, wrongfully operated the town's sewage system.

LIABILITY - TEXAS

Vess v. City of Dallas

United States District Court, N.D. Texas, Dallas Division - June 23, 2022 - F.Supp.3d - 2022 WL 2277504

City resident experiencing homelessness brought action against city and city fire-rescue department employee, asserting claims under § 1983 for excessive force and municipal liability arising from incident in which employee assaulted resident when employee responded to grass fire. Employee moved for judgment on the pleadings, city moved to dismiss.

The District Court held that:

- Resident was seized when employee kicked him in the head;
- Resident failed to state claim for municipal liability based on alleged custom or practice of inaction and attitude of indifference towards providing medical treatment for persons with mental health conditions and persons experiencing homelessness;
- Resident sufficiently alleged that city had practice or custom of protecting previously-disciplined and unfit fire department employees, as element of § 1983 claim for municipal liability;
- Resident sufficiently alleged that city's practice or custom of protecting previously-disciplined and unfit fire department employees was moving force behind department employee's actions; but
- Resident failed to sufficiently allege that city was deliberately indifferent in providing inadequate training regarding how to detain and treat persons with mental health conditions and persons experiencing homelessness.

IMMUNITY - VIRGINIA

Patterson v. City of Danville

Supreme Court of Virginia - July 7, 2022 - S.E.2d - 2022 WL 2517205

Inmate's estate brought action against city jail physician, alleging that physician committed medical malpractice by failing to provide appropriate care to inmate, who died a few months after suffering from cardiac arrest in jail.

Danville Circuit Court granted physician's plea in bar to estate's negligence claim and granted physician's demurrer to estate's gross negligence claim. Estate appealed.

The Supreme Court held that:

- Physician was entitled to derivative sovereign immunity, and
- Physician's conduct did not rise to level of gross negligence.

Provision of constitutionally and statutorily required medical care to inmates at city jail involved exercise of powers and duties of a government conferred by law on the municipality, so as to qualify as a governmental function subjecting the city to sovereign immunity from tort liability arising therefrom, for purposes of determining jail physician's derivative sovereign immunity, as a municipal employee, from medical negligence claim alleging that physician failed to provide appropriate care to inmate who died a few months after suffering from cardiac arrest in the jail.

City jail physician was entitled to derivative sovereign immunity from inmate's estate's medical negligence claim arising from allegations that inmate died after suffering from cardiac arrest at jail, for which physician failed to provide appropriate care; physician's city employer had constitutional and statutory duty to provide medical care to incarcerated patients and chose physician as its agent to fulfill that duty, all of the allegations in the complaint involved discretionary, not ministerial, medical decisions made by physician, and city had great measure of control over physician, as he had no control over patients he was obligated to treat, he did not bill inmates for his services, he was required to treat inmates at the jail using city-owned equipment and supplies, and he was subject to supervision of jail director.

Inmate's estate's allegations of jail physician's medical malpractice concentrated on physician's inadequacy in treating inmate, who died a few months after suffering from cardiac arrest in jail, not a heedless and palpable violation of legal duty by a physician who refused to show even slight diligence or scant care, and thus, the allegations did not rise to level of gross negligence that would pierce physician's derivative sovereign immunity defense; complaint provided long list of medical tests and treatments that inmate received and alleged that physician misdiagnosed inmate, but physician's multiple efforts to treat inmate, whether or not negligently performed, demonstrated that physician was exercising some degree of care in his capacity as a physician.

EMINENT DOMAIN - FEDERAL

Graves v. United States

United States Court of Federal Claims - July 7, 2022 - Fed.Cl. - 2022 WL 2525366

Landowners brought action against United States, alleging physical taking, and land use exaction, of private right-of-way interest in United States Forest Service forest road offshoot that granted them exclusive use without just compensation, in violation of Fifth Amendment, and seeking declaratory and injunctive relief. United States moved to dismiss for lack of subject matter jurisdiction.

The Court of Federal Claims held that:

- Landowners objectively should have known of United States' alleged physical taking of private right-of-way interest when they signed Federal Land Policy and Management Act (FLPMA) easement;
- Landowners failed to establish alleged taking was inherently unknowable; and
- Landowners failed to establish United States concealed alleged taking.

Landowners objectively should have known of United States' alleged physical taking of private right-of-way interest in United States Forest Service (USFS) road offshoot, and thus takings claim accrued

and six-year statute of limitations began to run, when they signed Federal Land Policy and Management Act (FLPMA) easement, even though owners argued claim accrued five years later, when they were first told that USFS was claiming ownership of road; takings claim was that USFS' requirement that owner maintain easement, pay fees, obtain special use permit, and allow other landowners to use easement constituted taking, and such requirements were all included in easement owners signed, and owners had previously signed easement that placed upon them exact limitations and restrictions they disputed in instant proceeding.

Landowners failed to establish that United States' alleged physical taking of private right-of-way interest in United States Forest Service (USFS) road offshoot was inherently unknowable as of accrual date of takings claim, as would have suspended accrual of six-year statute of limitations for bringing such claim in Court of Federal Claims, pursuant to accrual suspension rule; all of the United States' actions that landowners alleged constituted takings claim, including that United States Forest Service (USFS) required them to pay fees, maintain permit, and allow others to use road, were requirements found in easements landowners had previously signed.

Landowners failed to establish that United States concealed its alleged physical taking of private right-of-way interest in United States Forest Service (USFS) road offshoot with result that they were unaware of acts' existence, as would have suspended accrual of six-year statute of limitations for bringing such claim in Court of Federal Claims, pursuant to accrual suspension rule, even though their complaint referenced conversation with United States Forest Service (USFS) official who landowners alleged put them on notice and landowners' counsel indicated at oral argument that there was outside agreement; landowners did not allege USFS prevented them from understanding easement into which they entered with United States or otherwise fraudulently concealed material facts to prevent them from learning of alleged taking.

INTERLOCAL AGREEMENTS - KANSAS

Delaware Township v. City of Lansing

Supreme Court of Kansas - July 8, 2022 - P.3d - 2022 WL 2661879

Municipalities petitioned for declaratory judgment to stop city's dissolution or alteration of fire district that was created by Board of County Commissioners under the Fire Protection Act and disposition of fire district property, and city counterclaimed seeking declaratory judgment that interlocal cooperation agreement governing joint operation and management of fire district was enforceable in its entirety, including agreement's termination and asset division provisions.

The District Court determined that city could not unilaterally alter or disorganize fire district and could not force a disposition of property as a matter of public policy. City appealed. The Court of Appeals affirmed. City petitioned for review, which was granted.

The Supreme Court held that:

- Agreement was enforceable on its own terms without placing fire district itself in any jeopardy of being unlawfully dissolved;
- Termination provision was not void as against public policy; and
- No party was prejudiced by unfair surprise.

Interlocal cooperation agreement governing joint operation and management of fire district, including termination and asset division provisions, was enforceable on its own terms without

placing fire district itself in any jeopardy of being unlawfully dissolved; agreement acknowledged that there was a functional distinction between terminating the fire district and the agreement, and the power of any party to terminate agreement was clearly bargained for.

Termination provision of interlocal cooperation agreement governing joint operation and management of fire district was not void as against public policy; there was no reason to believe that individual party ownership of fire district assets was an inherent threat to public safety, municipalities had retained title to their own assets when they initially entered into agreement, there was no reason to believe any citizen would be left without adequate fire protection as assets would be fairly distributed and liabilities would be relatively allocated across all parties, leaving no party with disproportionate access to resources or stuck with disproportionate liabilities, and agreement required arbitration by a third party if parties could not agree on fairness.

No party was prejudiced by unfair surprise in connection with termination of interlocal cooperation agreement governing joint operation and management of fire district, and thus city's notice of termination of agreement was effective, such that municipalities were required to allocate assets and liabilities per agreement's terms; notice of 18 months was required for termination and that term was surely bargained for to allow the parties to make appropriate arrangements.

COUNTIES - MARYLAND

Prince George's County v. Thurston

Court of Appeals of Maryland - July 13, 2022 - A.3d - 2022 WL 2709752

82Petitioners sought a temporary restraining order and preliminary injunction to enjoin the use of Council Resolution, an alternative redistricting plan proposed by county council.

The Circuit Court declared the resolution was ineffective and determined the county redistricting commission's redistricting plan had become law. County petitioned for writ of certiorari, which was granted.

The Court of Appeals held that county council was required to use a bill and pass a law, and could not rely upon a resolution to enact an alternative redistricting plan.

County council was required to use a bill and pass a law, and could not rely upon a resolution to enact an alternative redistricting plan, when it elected not to adopt the plan of the redistricting commission following receipt of federal decennial census data, and council's failure to do so resulted in adoption of the commission's redistricting plan on the last day of November, pursuant to county charter.

Express Powers Act did not allow county council to enact an alternative redistricting plan different from the plan proposed by appointed redistricting commission by resolution, as argued by county, rather than by bill; while local government article provided that "[a] county may create and revise election districts and precincts," county charter, which was ratified by county voters, included redistricting provisions that expressly addressed creating and revising election districts.

State legislative districting process in state constitution did not allow county council to enact an alternative redistricting plan different from the plan proposed by appointed redistrict commission by resolution, as argued by county; statewide legislative districting was governed by the Constitution of Maryland and councilmanic redistricting was governed by the county charter, state and county have separate and distinct redistricting procedures, and the terms "joint resolution" and "resolution," and

used by the general assembly and in county charter differed.

TRANSPORTATION IMPACT FEE CREDITS - MARYLAND

Anne Arundel County v. 808 Bestgate Realty, LLC

Court of Appeals of Maryland - July 7, 2022 - A.3d - 2022 WL 2526948

Developer petitioned for judicial review of decision of county board of appeals denying developer's request for transportation impact fee credits in connection with certain road improvements that it made to county road as part of redevelopment project.

The Circuit Court reversed board's decision. County appealed. The Court of Special Appeals affirmed in part and reversed in part. Developer and county filed petition for writ of certiorari, which the Court of Appeals granted.

The Court of Appeals held that:

- County code required county to award transportation impact fee credits to developer for improvements that exceeded road provisions and were approved by county's engineer administrator, and
- Remand for county board of appeals to address issue of whether developer's improvements were "site-related" improvements for which transportation impact fee credits could not be given was unnecessary.

County code provision stating that transportation impact fee credits "shall" be allowed for improvements providing capacity over provisions for adequate road facilities required county to award transportation impact fee credits to developer for improvements to county road that exceeded road provisions and were approved by county's engineer administrator, although developer satisfied road provisions without need for mitigation plan; the word "shall" was mandatory, not discretionary, nothing in code conditioned entitlement to credits on necessity of mitigation plan, and county had approved requests for credits where no mitigation was necessary to satisfy road provisions.

Remand for county board of appeals to address issue raised sua sponte by Court of Special Appeals of whether developer's improvements to county road as part of redevelopment project were "site-related" improvements for which transportation impact fee credits could not be given was not necessary or desirable to avoid the expense and delay of another appeal, given stipulation by county and developer in briefs and oral arguments before Court of Appeals that improvements were not "site-related."

IMMUNITY - MISSOURI

Torres v. City of St. Louis

United States Court of Appeals, Eighth Circuit - July 1, 2022 - F.4th - 2022 WL 2374560

Surviving family members of suspect who was shot and killed during the execution of a search warrant at his grandfather's home brought action against police officers and city, alleging unlawful seizure, use of excessive force, and conspiracy under § 1983 in violation of the Fourth Amendment, and alleging state-law claims for wrongful death and infliction of emotional distress. Additionally, grandfather filed action, alleging unlawful seizure.

The United States District Court denied officers' motion for summary judgment. Officers filed interlocutory appeal.

The Court of Appeals held that:

- Two officers could not be liable for use of excessive force;
- Court of Appeals lacked jurisdiction to consider whether officers were entitled to qualified immunity;
- Grandfather was not unlawfully seized in violation of Fourth Amendment; and
- Court of Appeals lacked jurisdiction to determine whether officers were entitled to official immunity.

Court of Appeals lacked jurisdiction to decide whether police officers who shot and killed suspect were entitled to qualified immunity, in § 1983 Fourth Amendment excessive force claim brought by surviving family members of suspect, where District Court denied qualified immunity based on genuine factual disputes as to whether suspect fired semi-automatic weapon at police and was armed when he was shot.

Suspect was not "seized" by police officers, within meaning of Fourth Amendment, although officers entered suspect's home and allegedly shot their firearms, where suspect did not acquiesce to officers' show of authority and his freedom of movement was not restrained.

Court of Appeals lacked jurisdiction to decide whether police officers who shot and killed suspect were entitled to official immunity, under Missouri law, from liability, in claims for wrongful death and negligent infliction of emotional distress brought by surviving family members of suspect, where District Court denied official immunity based on genuine factual disputes as to whether suspect fired semi-automatic weapon at police and was armed when he was shot.

PUBLIC EMPLOYMENT - MISSOURI

Poke v. Independence School District

Supreme Court of Missouri, en banc - July 12, 2022 - S.W.3d - 2022 WL 2707806

School-district employee brought action against district, asserting violation of state statute through alleged retaliation for filing workers' compensation claim.

The Circuit Court granted summary judgment to district. Employee appealed.

On transfer from the Court of Appeals, the Supreme Court held that statute creating private right of action for employees who are discharged, or discriminated against, by employer for exercising workers' compensation rights, read in conjunction with statute defining an "employer" for purposes of Workers' Compensation Law to include governmental entities, waived any sovereign immunity that school district had to employee's action; overruling *Krasney v. Curators of University of Missouri*, 765 S.W.2d 646; and *King v. Probate Division*, Circuit Court of County of St. Louis, 21st Judicial Circuit, 958 S.W.2d 92.

BONDS - NEW JERSEY

Goodman v. UBS Financial Services, Inc.

United States District Court, D. New Jersey - June 30, 2022 - Slip Copy - 2022 WL 2358403

Richard Goodman ("Bondholder") purchased – at a premium – a significant number of taxable municipal bonds, which he held in a brokerage account controlled by UBS Financial Services, Inc. ("UBS"). Bondholder alleged that for the tax years between 2015 and 2018, UBS incorrectly reported the amount of the amortized bond premiums on his 1099 Tax Form, causing him to significantly overpay his federal taxes.

Bondholder alleged that instead of following the policy set out in the UBS Form 1099 Guide, the Form 1099s that UBS provided to him, included only the amount of interest, without including the amortizable bond premium, either as a gross amount or as part of a net calculation.

Bondholder brought contract and tort claims on behalf of himself and similarly situated individuals and UBS moved to dismiss.

The United States District Court held that:

- Bondholder plausibly alleged that UBS violated two interrelated implied terms of the Client Relationship Agreement ("CRA"). The Court found that it is implied in the CRA that UBS would provide accurate tax forms and that UBS would follow its stated policies in providing tax forms;
- Bondholder failed to state a claim for the violation of the implied covenant of good faith and fair dealing;
- Bondholder had not plausibly alleged that there was a fiduciary relationship between him and UBS related to tax information reporting, and thus could not state a claim for breach of fiduciary duty;
- Bondholder failed to plausibly allege a duty of care that sufficed to state a claim for negligent misrepresentation; and
- Bondholder stated a claim for negligence. Factual issues precluded dismissal at this stage and the economic loss rule did not bar his claim.

IMMUNITY - VIRGINIA

Patterson v. City of Danville

Supreme Court of Virginia - July 7, 2022 - S.E.2d - 2022 WL 2517205

Inmate's estate brought action against city jail physician, alleging that physician committed medical malpractice by failing to provide appropriate care to inmate, who died a few months after suffering from cardiac arrest in jail.

Danville Circuit Court granted physician's plea in bar to estate's negligence claim and granted physician's demurrer to estate's gross negligence claim. Estate appealed.

The Supreme Court held that:

- Physician was entitled to derivative sovereign immunity, and
- Physician's conduct did not rise to level of gross negligence.

City jail physician was entitled to derivative sovereign immunity from inmate's estate's medical negligence claim arising from allegations that inmate died after suffering from cardiac arrest at jail, for which physician failed to provide appropriate care; physician's city employer had constitutional and statutory duty to provide medical care to incarcerated patients and chose physician as its agent to fulfill that duty, all of the allegations in the complaint involved discretionary, not ministerial, medical decisions made by physician, and city had great measure of control over physician, as he had no control over patients he was obligated to treat, he did not bill inmates for his services, he was required to treat inmates at the jail using city-owned equipment and supplies, and he was subject to supervision of jail director.

Inmate's estate's allegations of jail physician's medical malpractice concentrated on physician's inadequacy in treating inmate, who died a few months after suffering from cardiac arrest in jail, not a heedless and palpable violation of legal duty by a physician who refused to show even slight diligence or scant care, and thus, the allegations did not rise to level of gross negligence that would pierce physician's derivative sovereign immunity defense; complaint provided long list of medical tests and treatments that inmate received and alleged that physician misdiagnosed inmate, but physician's multiple efforts to treat inmate, whether or not negligently performed, demonstrated that physician was exercising some degree of care in his capacity as a physician.

PUBLIC UTILITIES - COLORADO

Danks v. Colorado Public Utilities Commission

Supreme Court of Colorado - June 13, 2022 - P.3d - 2022 WL 2112965 - 2022 CO 26

Owner of property near proposed pipelines for gas-gathering system, which collected and delivered raw gas from wells on private property to processing facilities, sought review of decision of Public Utilities Commission (PUC) denying in part owner's exceptions to administrative law judge's (ALJ) decision and determining that, with respect to operations upstream from processing facility, gas-gathering system was not "public utility" subject to regulation by PUC or statutory requirement that utility obtain certificate of public convenience and necessity (CPCN) before constructing new facility.

The District Court affirmed. Owner appealed.

The Supreme Court held that:

- PUC regularly pursued its authority;
- PUC reached just and reasonable decision;
- Substantial evidence supported PUC's decision; and
- PUC reasonably determined that no evidentiary hearing was necessary.

District court's order affirming decision of Public Utilities Commission (PUC) that, with respect to operations upstream from processing facility, gas-gathering system delivering raw gas from private wells to processing facilities was not "public utility" requiring certificate of public convenience and necessity (CPCN) was "final judgment" reviewable by Supreme Court, although PUC's decision purported to dismiss some allegations of owner of property near system's proposed pipelines without prejudice; PUC addressed owner's substantive claims, concluded that system was not public utility, and made clear that if PUC would find issue with downstream operations, then owner would be free to pursue claims relating to distinct operations in future proceedings, and district court affirmed rulings.

Public Utilities Commission (PUC) regularly pursued its authority in deciding that, with respect to operations upstream from processing facility, gas-gathering system delivering raw gas from private wells to facility using pipelines was not "public utility" subject to regulation by PUC or statutory requirement that utility obtain certificate of public convenience and necessity (CPCN) before constructing new facility; PUC looked to text of statute providing definition of "public utility," noted that Supreme Court had previously emphasized the phrase "for the purpose of supplying the public" when analyzing whether entity was public utility, and concluded that system did not meet definition as operator did not market raw gas that it gathered in its system.

Substantial evidence supported Public Utilities Commission's (PUC) decision that, with respect to operations upstream from processing facility, gas-gathering system delivering raw gas from private wells to facility using pipelines was not operated for purposes of supplying the public, such that it was not "public utility" subject to regulation by PUC or statutory requirement that utility obtain certificate of public convenience and necessity (CPCN) before constructing new facility; property owner who commenced administrative proceeding alleged in complaint that system's operator did not market the raw gas it owned, and ALJ found that operator did not market or sell any of the raw gas in its gathering system.

Public Utilities Commission (PUC) reasonably determined that no evidentiary hearing was necessary before deciding jurisdictional issues and dismissing property owner's complaint on the basis that, with respect to operations upstream from processing facility, gas-gathering system delivering raw gas from private wells to facility using pipelines was not "public utility" subject to regulation by PUC or statutory requirement that utility obtain certificate of public convenience and necessity (CPCN) before constructing new facility; PUC looked to civil procedure rules for guidance, under civil procedure rules, PUC could determine jurisdictional issues without evidentiary hearing if it accepted all complaint's assertions of fact as true, and PUC accepted owner's factual allegations as true.

EMINENT DOMAIN - FEDERAL

Haggart v. United States

United States Court of Appeals, Federal Circuit - June 22, 2022 - F.4th - 2022 WL 2231886

Landowners filed rails-to-trails class action against United States, claiming that conversion of their properties into recreational trail pursuant to National Trails System Act resulted in taking without just compensation.

After parties reached settlement agreement, the Court of Federal Claims granted landowners' motion to approve settlement and entered final judgment. Two class members objected to settlement and appealed. The United States Court of Appeals for the Federal Circuit vacated and remanded. On remand, the Court of Federal Claims again granted landowners' motion for approval of settlement. Government appealed. The Court of Appeals affirmed. Landowners then filed five separate motions for statutory attorney fees and costs, pursuant to Uniform Relocation Assistance and Real Property Acquisition Policies Act (URA). The Court of Federal Claims granted motions in part, and upon reconsideration denied landowner's motion for attorney fees and costs for legal work performed by her husband, who was attorney, joint owner of subject property, and co-plaintiff. Landowner appealed.

The Court of Appeals held that:

- Landowner was not entitled under URA to attorney fees, but

- Landowner's lack of entitlement to attorney fees did not preclude her from seeking recovery of certain expenses.

Landowner was not entitled under Uniform Relocation Assistance and Real Property Acquisition Policies Act (URA) to attorney fees for legal work performed by her husband, who was an attorney, following settlement of rails-to-trails class action alleging that conversion of properties into recreational trail resulted in taking without just compensation; there was absence of attorney-client relationship, even if there was attorney-client relationship, underlying claim was about taking of a property interest that was owned jointly by landowner and her husband as community property, and they pursued essentially unitary claim jointly, as co-plaintiffs, such that legal work amounted to pro se representation.

Landowner's lack of entitlement to attorney fees under Uniform Relocation Assistance and Real Property Acquisition Policies Act (URA) for legal work performed by her husband, who was an attorney, joint owner of subject property, and co-plaintiff, did not preclude her from seeking recovery of certain expenses under the URA, following settlement of rails-to-trails class action alleging that conversion of properties into recreational trail resulted in taking without just compensation, even if such expenses were related to legal work, since URA treated attorney fees and expenses separately.

PUBLIC UTILITIES - FEDERAL

Belmont Municipal Light Department v. Federal Energy Regulatory Commission

United States Court of Appeals, District of Columbia Circuit - June 17, 2022 - F.4th - 2022 WL 2182810

Municipal electric utilities, state entities, and environmental groups petitioned for review of orders of Federal Energy Regulatory Commission (FERC) accepting tariff revisions by Independent System Operator for New England (ISO-NE), under Federal Power Act (FPA), to compensate generators for maintaining inventory of energy during upcoming winter months, and approving Inventoried Energy Program (IEP), under which ISO-NE would provide additional payments to generators to maintain up to three days' worth of fuel on-site and convert it into electricity and denying rehearing.

The Court of Appeals held that:

- Municipal electric utilities group had standing;
- State entities had standing;
- FERC's approval of portion of IEP that included coal, nuclear, biomass, and hydroelectric generators was arbitrary and capricious; and
- Portion of IEP that included coal, nuclear, biomass, and hydroelectric generators was severable and warranted vacatur.

Group of municipally-owned electric utilities had standing, under Article III and FPA, to challenge order of Federal Energy Regulatory Commission (FERC), approving Inventoried Energy Program (IEP), under which Independent System Operator for New England (ISO-NE) would provide additional payments to generators to maintain up to three days' worth of fuel on-site and convert it into electricity; group established imminent injury-in-fact by representing electrical utilities that would be expected to pay ISO-NE's designated rates under IEP, group's injuries were traceable to FERC's approval of IEP, and granting group's petition, vacating FERC's approval of ISO-NE's tariff

provisions implementing IEP, and remanding to FERC would redress those injuries.

New Hampshire Office of Consumer Advocate, New Hampshire Public Utilities Commission (PUC), and Massachusetts Attorney General had standing, under Article III and FPA, to challenge order of Federal Energy Regulatory Commission (FERC), approving Inventoried Energy Program (IEP), providing additional payments to generators to maintain up to three days' worth of fuel on-site and convert it into electricity; state entities established imminent injury-in-fact by representing interests of states in protecting their citizens and electric ratepayers in traditional government field of utility regulation, injuries were traceable to FERC's approval of IEP, and granting state entities' petition, vacating FERC's approval of tariffs implementing IEP, and remanding to FERC would redress those injuries.

Federal Energy Regulatory Commission's (FERC) order, approving Inventoried Energy Program (IEP), under which Independent System Operator for New England (ISO-NE) would provide additional payments to generators to maintain up to three days' worth of fuel on-site and convert it into electricity, lacked adequate reasoning as to challenge that IEP added $40 million per year in new payments to nuclear, coal, biomass, and hydroelectric resources that were unlikely to change their behavior; FERC summarily accepted ISO-NE's contention that IEP's broad eligibility appropriately provided similar compensation for similar service, which completely disregarded challengers' argument, that IEP was overly inclusive and would give windfall payments to those resources, and ignored FERC's past precedents.

Federal Energy Regulatory Commission's (FERC) order, approving Inventoried Energy Program (IEP) under which Independent System Operator for New England (ISO-NE) would provide additional payments to generators to maintain up to three days' worth of fuel on-site and convert it into electricity, was severable and would be vacated as to arbitrary and capricious approval of IEP provisions concerning coal, nuclear, biomass, and hydroelectric generators that would not change their behavior in response to incentives thereby resulting in windfall payments to those resources; there was no substantial doubt that FERC would have adopted IEP without inclusion of nuclear, coal, biomass, and hydroelectric generators on its own, and remaining IEP provisions functioned sensibly without vacated portion.

INSURANCE - FLORIDA

Public Risk Management of Florida v. Munich Reinsurance America, Inc.

United States Court of Appeals, Eleventh Circuit - June 29, 2022 - F.4th - 2022 WL 2338572

Reinsured, a self-insured risk-management program that insured various local government entities in Florida, brought action against reinsurer, alleging breach of contract and seeking declaratory relief that reinsured was obligated to reimburse reinsurer for defense and coverage it provided to reinsured in underlying § 1983 and inverse condemnation action.

Reinsured brought counterclaims, seeking declaratory judgment that it had no duty to reimburse reinsured. The United States District Court for the Middle District of Florida adopted Report and Recommendation of United States Magistrate Judge and entered summary judgment for reinsurer. Reinsured appealed.

The Court of Appeals held that:

- Reinsured did not have duty to defend insured city, under public officials errors and omissions

(E&O) policy, in underlying action;
- Reinsured, a self-insured risk-management program, did not have duty to indemnify insured city for settlement of § 1983 claim in underlying action; and
- Reinsurer did not have duty to reimburse reinsured, a self-insured risk-management program, for its defense and indemnification of city in underlying action.

Under Florida law, insurer, a self-insured risk-management program, did not have duty to defend insured city, under public officials errors and omissions (E&O) policy, in underlying § 1983 and inverse condemnation proceeding, as plaintiffs' alleged Fourth Amendment violations occurred prior to relevant coverage period under policy, and every alleged infringement by city of plaintiffs' possessory interest in their property was part of a series of related wrongful acts and, thus, a single "occurrence" under policy.

Under Florida law, reinsurer did not have duty to reimburse reinsured, a self-insured risk-management program, for its defense and indemnification of city in underlying § 1983 and inverse condemnation action, despite contention that "follow the fortunes" doctrine, which generally bound reinsurers to reinsured's decision to pay claim and required reinsurers to refrain from second guessing a good faith decision to do so, required reinsurer to reimburse reinsured; reinsurance agreement expressly required reinsured to submit to reinsurer proof it paid insured city as well as proof that agreement provided coverage for such payment, but underlying plaintiffs' alleged claims occurred prior to relevant coverage period under governing errors and omissions (E&O) policy.

Under Florida law, as predicted by the District Court, "follow the fortunes" doctrine, which generally bound reinsurers to reinsured's decision to pay claim and required reinsurers to refrain from second guessing a good faith decision to do so, would not be inferred to require reinsurer to reimburse reinsured, a self-insured risk-management program, for its defense and indemnification of city in underlying § 1983 and inverse condemnation proceeding; parties' reinsurance agreement contained terms that were plainly and unambiguously inconsistent with the doctrine, as it expressly required reinsured to submit to reinsurer proof it paid insured city, as well as proof the agreement provided coverage for such payment.

COUNTIES - IOWA

Landowners v. South Central Regional Airport Agency

Supreme Court of Iowa - June 24, 2022 - N.W.2d - 2022 WL 2277119

After two cities and county entered into joint powers agreement to create regional airport agency that would build and operate a new regional airport, cities filed suit to enforce county's obligations under the agreement, and landowners filed separate suit against cities and county, seeking judgment declaring that agreement was illegal and an injunction against agency to prevent it from acquiring land for airport via eminent domain.

The District Court granted summary judgment in favor of cities and against the county and landowners. County and landowners appealed, and appeals were consolidated.

The Supreme Court held that:

- Provisions of Iowa Code regarding county home rule authority did not preclude county from participating in regional airport agency formed pursuant to joint powers agreement, rather than mechanisms described in statutes;

- Statute providing that political subdivisions could establish joint airport commission was not exclusive mechanism for county's participation in regional airport agency;
- Statute providing mechanism for local governments to jointly create an airport authority did not preclude county's participation in agency;
- Agreement unconstitutionally bound future county board of supervisors in its exercise of legislative powers; and
- Agreement unlawfully restricted county's ability to end its delegation of powers to agency.

Provisions of Iowa Code regarding county home rule authority did not preclude county from participating in regional airport agency formed pursuant to joint powers agreement, rather than mechanisms described in statutes providing for establishment and creation of joint airport commission or airport authority; statutory provisions describing county's specific home rule powers related to airports listed specific powers county could exercise, but allowed county to exercise these or similar powers under its home rule powers or other provisions of law, unambiguously indicating that home rule powers related to airports were nonexclusive.

Statute providing that political subdivisions could establish joint airport commission was not exclusive mechanism for county's participation in regional airport agency, and thus did not preclude county from participating in agency formed pursuant to joint powers agreement; language stating that political subdivisions "may provide for the creation and establishment of a joint airport commission which, when so created or established, shall function in accordance with the provisions" of statute meant only that if county chose to create a joint airport commission, then it must comply with the provisions of statute, but did not suggest that a joint airport commission was only mechanism for joint creation of airport by a county.

Statute providing mechanism for local governments to jointly create an airport authority did not preclude county from participating in regional airport agency formed pursuant to joint powers agreement, rather than mechanisms described in statute, where statute provided that it was intended to provide alternative and complete method for exercise of the powers to establish a joint airport authority, not that it was exclusive mechanism for doing so.

County's home rule authority allowed it to exercise power jointly with cities pursuant to joint powers agreement creating regional airport agency that would build and operate new regional airport, rather than in manner described in statutes providing for establishment and creation of joint airport commission or airport authority; statute authorizing joint exercise of governmental powers allowed for the joint exercise of powers "already vested" in cooperating entities, and county already possessed power to establish airports under its home rule authority.

Provision of joint powers agreement between county and cities creating regional airport agency that would build and operate new regional airport, prohibiting amendment or termination of agreement without unanimous consent of all parties, unconstitutionally bound future county board of supervisors in its exercise of legislative powers; provision inextricably bound county to agency, provision bound county to exercise its legislative functions, such as its powers over zoning, road relocations, eminent domain, and issuing building permits, for an indefinite period, even if a new slate of supervisors was elected, and since county could not amend or terminate agreement without consent of cities, it was functionally bound to adhere to cession of core legislative functions for an indefinite period.

Joint powers agreement between county and cities, creating regional airport agency that would build and operate new regional airport, unlawfully restricted county's ability to end its delegation of powers to agency; county entered agreement delegating to agency several governmental powers, including those over zoning, road relocations, eminent domain, and issuing building permits, and

agreed to participate in agency after majority vote of its board of supervisors, but process for terminating agreement and withdrawing from agency was much more onerous, requiring consent of cities that were party to agreement.

ANNEXATION - KANSAS

City of Olathe v. City of Spring Hill

Supreme Court of Kansas - July 1, 2022 - P.3d - 2022 WL 2377171

First city brought action against second city, alleging breach of agreement not to annex certain property and seeking declaratory relief, preliminary and permanent injunctive relief, and temporary restraining order (TRO).

The District Court issued TRO, entered judgment that agreement was unenforceable as a governmental action that could not bind subsequent city councils, denied request for injunctive relief, and dismissed action. First city appealed and second city cross-appealed, and the District Court entered an order staying its ruling pending appeal. Second city filed motion to stay, modify, or vacate the stay, and the Court of Appeals denied motion, issued its own stay and injunction pending appeal, and granted first city's motion to transfer case to the Supreme Court.

The Supreme Court held that agreement was governmental in nature, and thus did not bind subsequent city councils.

Agreement between first city and second city not to annex certain land was governmental, and thus did not bind subsequent elected city councils; agreement addressed development, introduction, or improvement of services, which were quintessential policy considerations, and agreement had no hallmarks of contract for provision of services and did not call for any specific services to be provided.

IMMUNITY - MICHIGAN

Champine v. Department of Transportation

Supreme Court of Michigan - July 6, 2022 - N.W.2d - 2022 WL 2525392

Motorist brought action against state department of transportation alleging negligence and asserting the "highway exception" to the governmental tort liability act (GTLA), arising from injuries motorist allegedly sustained when a chunk of concrete from road struck his vehicle.

The Court of Claims granted department's motion for summary judgment, which was affirmed on appeal. Motorist appealed.

The Supreme Court held that motorist's complaint served as "notice" under the GTLA.

Motorist's complaint against state department of transportation served as "notice" of the occurrence of the injury and the defect, as required for application of the highway exception to governmental immunity under the governmental tort liability act (GTLA) in order to allow motorist to bring negligence claim, arising from injuries motorist allegedly sustained when a chunk of concrete from road struck his vehicle; complaint was brought within 120 days of the occurrence as specified by the GTLA, and text of GTLA did not indicate that there needed to be some temporal gap between the

filing of a notice and the initiation of a lawsuit.

Nothing in the text pertaining to the notice requirements in order to assert an exception under the governmental tort liability act (GTLA) suggests that notice cannot be provided through the filing of a plaintiff's complaint within the statutory notice period.

A complaint filed within the statutory notice period, listing the factual circumstances and legal theories relevant to the cause of action, gives sufficient warning or legal notification of the occurrence of the injury and the defect, in order to meet the notice requirement in order to assert an exception under the governmental tort liability act (GTLA).

SCHOOLS - NORTH CAROLINA

Peltier v. Charter Day School, Inc.

United States Court of Appeals, Fourth Circuit - June 14, 2022 - 37 F.4th 104

Female students, through their parents, brought action against private nonprofit corporation that operated charter school, members of corporation's board, and for-profit corporation that managed school's day-to-day operation alleging that charter school's dress code, which required only female students to wear skirts, violated their rights under Equal Protection Clause, Title IX, and state law.

The United States District Court entered summary judgment in students' favor on equal protection claim and in defendants' favor on Title IX claim. Parties filed cross-appeals. The Court of Appeals reversed and remanded.

The Court of Appeals, on rehearing en banc, held that:

- Operator of charter school performed "state action" in implementing school's dress code, as required to support operator's liability, in § 1983 equal protection challenge;
- For-profit corporation did not perform "state action" in implementing school's dress code, as required for § 1983 liability;
- Charter school's dress code violated the Equal Protection Clause;
- For-profit corporation that managed school's day-to-day operations was "recipient" of federal financial assistance subject to Title IX; and
- Title IX applied to sex-based dress codes.

Private operator of charter school designated as public, under North Carolina law, performed "state action" in implementing school's dress code, which required only female students to wear skirts, as required to support operator's liability, in § 1983 equal protection challenge to dress code; under North Carolina's charter school system, state delegated to charter school operators part of state's traditional constitutional duty to provide free, universal elementary and secondary education to students, and school's dress code was central component of school's educational philosophy of providing a traditional educational environment with traditional manners.

For-profit corporation that contracted with private operator of charter school designated as public, under North Carolina law, to manage charter school's day-to-day operations did not perform "state action" in implementing school's dress code, which required only female students to wear skirts, as required to support for-profit corporation's liability, in § 1983 equal protection challenge to dress code; corporation had no direct relationship with state and was not party to the charter agreement between North Carolina and charter school operator, North Carolina did not otherwise delegate its constitutional duty to provide free, universal elementary and secondary education to for-profit

management corporation, and the corporation contracted only with operator to provide management services.

Public charter school's dress code, which required only female students to wear skirts, violated the Equal Protection Clause; the skirts requirement was gender-based, it promoted impermissible gender stereotypes, including that girls were "fragile" and required protection by boys, and it did not serve any important governmental objective.

For-profit corporation that managed public charter school's day-to-day operations was "recipient" of federal financial assistance through an intermediary, and thus, was subject to Title IX; it was undisputed that corporation received 90% of its funding from operator of charter school that it contracted with, and operator, in turn, received nearly all of its funding from public sources, including the federal government.

Title IX applied to sex-based dress codes promulgated by covered educational entities.

AIRPORT FEES - CALIFORNIA

Turo Inc. v. Superior Court of City and County of San Francisco

Court of Appeal, First District, Division 2, California - June 28, 2022 - Cal.Rptr.3d - 2022 WL 2314801

Operator of online platform that allowed car owners to rent their cars to other platform users petitioned for writ of mandate directing Superior Court to vacate order granting state's and city's motion for summary adjudication of his cause of action for declaratory judgment that it was not in the business of renting vehicles to the public for purposes of statute authorizing municipal airports to require rental companies to collect a fee from customers on behalf of the airports.

The Court of Appeal held that operator was neither a "renal car company" nor a "rental company" subject to the airport permit and fee collection requirements.

Operator of online platform that allowed car owners to rent their cars to other platform users was neither a "rental car company" nor a "rental company" within meaning of state law, and thus, it was not required to comply with statute authorizing the municipal airport to require a rental car company permit and the collection of fees from rental customers on behalf of the airport, since operator itself did not own, possess, or control the vehicles listed on its platform; under relevant statutes, the act of renting a vehicle required ownership or control of the vehicle.

INVERSE CONDEMNATION - MONTANA

Wittman v. City of Billings

Supreme Court of Montana. - July 5, 2022 - P.3d - 2022 WL 2437885 - 2022 MT 129

Homeowners brought inverse condemnation action against city arising from a single-event backup of raw sewage into their basement caused by a grease clog in city's sewer main.

The District Court granted summary judgment for city. Homeowners appealed.

The Supreme Court held that sewage backup was not a constitutional damaging of homeowners'

property for public use.

A single-event backup of raw sewage into homeowners' basement caused by grease clog in city's sewer main was not a constitutional damaging of homeowners' property for public use under the law of inverse condemnation, where city did not deliberately plan and build its sewer system in such a way that made damaging homeowners' property foreseeable, and backup was caused by misuse of system by people discharging grease into system.

Statistical possibility that homeowners could sustain damage from a backup of raw sewage into their basement from city's sewer system could not be used to establish an inverse condemnation claim against city arising from such a backup arising from a grease clog in the sewer main; fact that 0.04687 percent of sewer users across city experienced some form of a sanitary sewer overflow in a given year, from all causes, did not render homeowners' single-event backup foreseeable, and damage sustained from backup was properly considered an incidental or inadvertent consequence of operation of system.

EMINENT DOMAIN - OKLAHOMA

Snow v. Town of Calumet

Supreme Court of Oklahoma - June 21, 2022 - P.3d - 2022 WL 2204860 - 2022 OK 63

Landowners brought action against town for trespass and inverse condemnation, alleging that after expiration of two temporary easements that had been granted by their predecessors in interest, for town's installation and maintenance of two municipal sewer lines across the property, town continued to maintain the sewer lines, and town counterclaimed to quiet title based on easements by prescription.

The District Court granted summary judgment to town on owners' claims and granted summary judgment to owners on town's counterclaim. Owners appealed as to inverse condemnation claim, and the Supreme Court retained the appeal.

The Supreme Court held that inverse condemnation claim did not accrue until temporary easements expired, and thus, landowners had standing to sue.

Inverse condemnation claim did not accrue until two temporary easements granted by prior owners of land, for town's installation and maintenance of two municipal sewer lines across the property, expired, which expiration occurred after prior owners had sold the property to current owners, and thus, current owners had standing to bring inverse condemnation action against town, alleging town's maintenance of the sewer lines after expiration of the temporary easements.

EMINENT DOMAIN - TEXAS

Miles v. Texas Central Railroad & Infrastructure, Inc.

Supreme Court of Texas - June 24, 2022 - S.W.3d - 2022 WL 2282641 - 65 Tex. Sup. Ct. J. 1599

Owner of real property along proposed high-speed rail route brought action that sought, among other things, a declaratory judgment that the corporations that wished to survey the property lacked eminent-domain authority.

The District Court entered summary judgment in favor of property owner, awarded him attorney fees, and dismissed corporations' counterclaims with prejudice. Corporations appealed. The Corpus Christi-Edinburg Court of Appeals reversed, rendered judgment, and remanded. Property owner petitioned for review.

The Supreme Court held that the corporations qualified as "interurban electric railway companies" under the Transportation Code.

Corporations conducting surveys for a high-speed rail route qualified as "interurban electric railway companies" under the Transportation Code's provision granting eminent-domain powers to corporations chartered for the purpose of constructing, acquiring, maintaining, or operating lines of electric railway between municipalities in Texas for the transportation of freight, passengers, or both, and thus corporations had eminent-domain powers under that statute; even though high-speed rail was unimaginable when the statute was enacted, rail project was an electric railway between municipalities in Texas, corporations were actually chartered for the statutorily authorized purpose of constructing, acquiring, maintaining, or operating lines of electric railway between municipalities in Texas for the transportation of freight, passengers, or both, and corporations were engaged in activities in furtherance of that purpose.

That corporation's proposed railway would connect to the interstate rail system, and thus be subject to the Surface Transportation Board's jurisdiction, did not mean that the railway could not be an "interurban railway," as relevant to determining if corporation had eminent-domain powers under the Transportation Code for being an interurban electric railway company.

Corporations conducting surveys for high-speed rail route did not have to show that there was a reasonable probability of completing the route in order for them to have eminent-domain powers under Transportation Code's provision that granted such powers to corporations chartered for the purpose of constructing, acquiring, maintaining, or operating lines of electric railway between municipalities in Texas for the transportation of freight, passengers, or both.

Statute that required companies with eminent-domain powers to submit by a certain date a letter to the comptroller containing information about such powers did not apply to corporation that qualified as an interurban electric railway company such that it had eminent-domain powers under the Transportation Code, and thus corporation's failure to send such a letter did not extinguish its eminent-domain powers; it was not until after the deadline listed in that statute that corporation amended its charter to state that corporation's purpose was to operate an interurban electric railway company, which was a necessary component of its acquisition of eminent-domain authority under the Transportation Code provision at issue.

EMINENT DOMAIN - TEXAS

In re Breviloba, LLC

Supreme Court of Texas - June 24, 2022 - S.W.3d - 2022 WL 2282598 - 65 Tex. Sup. Ct. J. 1679

Following proceeding in which landowner filed petition for writ of mandamus seeking to compel the County Court at Law to set aside order denying landowner's plea to the jurisdiction and motion to transfer proceedings to district court in action in which pipeline builder sought to condemn portion of landowner's property and landowner asserted counterclaims, in which the Waco Court of Appeals granted the petition, pipeline builder petitioned for writ of mandamus in which it argued county

court at law had jurisdiction over counterclaims and therefore entire case.
Holding:

The Supreme Court held that county court at law had jurisdiction over pipeline builder's action seeking to condemn portion of landowner's property and landowner's asserted counterclaims.

County court at law had jurisdiction over pipeline builder's action seeking to condemn portion of landowner's property and landowner's asserted counterclaims totaling over $13 million, though counterclaims exceeded court's statutory jurisdictional limit; counterclaims were part of eminent domain case as gravamen of landowner's counterclaims was challenge to pipeline builder's eminent domain authority, and concurrent jurisdiction statute granted court jurisdiction over eminent domain cases which was not subject to an amount-in-controversy limitation.

ZONING & PLANNING - UTAH

Salt Lake City Corporation v. Utah Inland Port Authority

Supreme Court of Utah - June 29, 2022 - P.3d - 2022 WL 2337654 - 2022 UT 27

City brought action to challenge Utah Inland Port Authority Act, which required that certain municipalities adopt specific zoning regulations and permissions favorable to developing an inland port and directed certain taxes to the project.

The District Court granted Utah Inland Port Authority's motions for summary judgment, and city appealed.

The Supreme Court held that:

- Act's disparate treatment of three cities was rationally related to a legitimate legislative purpose and thus did not violate the Uniform Operation of Laws Clause of the Utah Constitution;
- Court would decline to reach merits of issue of whether the Act violated the Uniform Operation of Laws Clause by redirecting property taxes, as legislature had amended the Act;
- Act's requirement that three cities "allow an inland port," and prohibition against them outlawing the "transporting, unloading, loading, transfer, or temporary storage of natural resources" on authority jurisdictional land, did not violate the Utah Constitution; and
- Court would decline to reach merits of issue of whether the Act violated the Utah Constitution through the redirection of tax revenue to an outside group or entity.

Utah Inland Port Authority Act's disparate treatment of three cities, by requiring them to have certain zoning regulations permitting port area and prohibiting certain regulations of port area activity, was rationally related to a legitimate legislative purpose and thus did not violate the Uniform Operation of Laws Clause of the Utah Constitution; Act's statewide public purpose was to maximize the long-term economic and other benefit for the state, studies projected that an inland port could create thousands of jobs, develop natural resource extraction industries, and make Utah a bigger player in the global economy, and classification cleared the way for the port by requiring the three cities to "allow an inland port" and preventing them from prohibiting activities necessary to operate it.

Utah Inland Port Authority Act's requirement that three cities "allow an inland port," and prohibition against them outlawing the "transporting, unloading, loading, transfer, or temporary storage of natural resources" on authority jurisdictional land, did not violate the Ripper Clause of the Utah Constitution, which prohibited delegation of authority to an outside group or entity; rather, Act's

legislative mandates were aimed at certain municipalities.

Supreme Court would decline to reach merits of issue of whether Utah Inland Port Authority Act violated the Ripper Clause of the Utah Constitution through the redirection of tax revenue to an outside group or entity, as legislature had amended the Act to make substantive changes to the funding provisions; instead, Court would order the parties to submit supplemental briefing on whether the tax challenges to the Act were moot and should be dismissed.

IMMUNITY - WASHINGTON

Estate of McCartney by and through McCartney v. Pierce County

Court of Appeals of Washington, Division 2 - June 28, 2022 - P.3d - 2022 WL 2311855

Estate of deceased sheriff's deputy, by and through its personal representative, and members of deputy's family filed wrongful death action against county, alleging that county's failure to properly staff and train sheriff's department resulted in deputy's death in the line of duty, and sought a writ of mandamus ordering county to provide department with sufficient staffing.

The Superior Court granted county's motion for judgment on the pleadings. Plaintiffs appealed.

The Court of Appeals held that:

- Trial court could take judicial notice of county records regarding county's decisions on sheriff's department funding;
- Governmental discretionary immunity applied to county's decisions on funding for staffing of sheriff's department and sheriff's deputy allocation;
- Professional rescuer doctrine barred recovery by estate and family; and
- Workplace safety laws did not prescribe and define county's duty regarding sheriff's department staffing with such precision as to leave nothing to the exercise of discretion or judgment.

PUBLIC RECORDS - WISCONSIN

Friends of Frame Park, U.A. v. City of Waukesha

Supreme Court of Wisconsin - July 6, 2022 - N.W.2d - 2022 WL 2444511 - 2022 WI 57

Requester of a draft contract between city and private entity concerning terms under which entity's baseball team would play in stadium to be constructed in city park brought mandamus action seeking access to the contract.

After releasing the requested record, city moved for summary judgment. The Circuit Court entered summary judgment for city, denied requester's motion for attorney fees, and dismissed action in its entirety. Requester appealed. The Court of Appeals reversed and remanded with directions. City petitioned for review.

The Supreme Court held that:

- As a matter of apparent first impression, to "prevail in whole or in substantial part," as that phrase is used in statute allowing requester of public records to recover attorney fees if requester prevails in whole or part in action for release of records, means requester must obtain judicially sanctioned change in parties' legal relationship; abrogating *Racine Education Ass'n v. Board of Education for*

Racine Unified School District, 129 Wis.2d 319, 385 N.W.2d 510; State ex rel. Vaughan v. Faust, 143 Wis.2d 868, 422 N.W.2d 898; *Merco Distrib. Corp. v. Com. Police Alarm Co.*, 84 Wis.2d 455, 267 N.W.2d 652; and *WTMJ, Inc. v. Sullivan*, 204 Wis.2d 452, 555 N.W.2d 140, and

- Public interest warranted city's withholding of draft contract until consultation with common council.

IMMUNITY - ALABAMA

Ex parte City of Warrior

Supreme Court of Alabama - June 24, 2022 - So.3d - 2022 WL 2286244

Personal representative of estate of motorist killed in collision with vehicle going the wrong way while its driver was attempting to flee police brought negligence action against fictitiously named defendants, who, personal representative claimed, were yet-to-be-named police officers or individuals who were in pursuit of the wrong-way vehicle's driver.

Personal representative later amended the complaint to substitute the names of police officers for the fictitiously named defendants. The Circuit Court denied police officers' motion for summary judgment. Officers petitioned for mandamus relief. The Supreme Court granted the petition and issued the writ. City and town filed motions for summary judgment. The Circuit Court denied city and town's motions for summary judgment. City and town filed a petition for a writ of mandamus directing the Circuit Court to vacate its order denying their motions for summary judgment in tort action.

The Supreme Court held that city and town were entitled to immunity.

City and town were entitled to immunity in estate of motorist's action alleging city and town were vicariously liable under doctrine of respondeat superior for the purported wrongful conduct of their police officers, who engaged in a high speed pursuit of defendant driver, during which driver drove the wrong way on interstate and caused a head-on collision with motorist, resulting in the death of motorist; police officers were performing discretionary law enforcement functions in pursuing defendant driver's vehicle in an attempt to place him under arrest for evading a lawful traffic stop, and thus officers were entitled to State-agent immunity from liability on claims filed by estate of motorist.

ATTORNEYS' FEES - CALIFORNIA

City of Los Angeles Department of Airports v. U.S. Specialty Insurance Company

Court of Appeal, First District, Division 5, California - June 15, 2022 - Cal.Rptr.3d - 2022 WL 2156119

City department of airports brought action against manufacturer of airport firefighting trucks and surety on performance bond alleging that manufacturer breached build contract and seeking enforcement of performance bond.

Manufacturer brought separate contract action against department and actions were consolidated.

The Superior Court entered judgment upon jury verdict in favor of city on all claims, awarded

department $1 in nominal damages, and denied motions by department and surety for contractual attorney fees. Department and surety appealed. The Court of Appeal reversed and remanded. On remand, the Superior Court denied applications by department and surety for contractual attorney fees as a prevailing party. Surety appealed.

The Court of Appeal held that trial court did not abuse its discretion in determining that surety was not prevailing party entitled to contractual attorney fees.

Trial court did not abuse its discretion in determining that surety on performance bond with manufacturer who agreed to build airport firefighting trucks for city department of airports was not "prevailing party" entitled to contractual attorney fees, in consolidated contract actions by department and manufacturer, even though surety asserted no affirmative claims for damages against department and department was limited to nominal damages, since surety and manufacturer were represented by same counsel at trial, submitted joint trial brief, and agreed to joint jury instructions rendering surety liable if manufacturer was found liable, such that success on contract claims was important objective, not just limiting damages, and jury found in favor of department on all contract claims.

EMINENT DOMAIN - LOUISIANA

City of Baton Rouge v. Mucciacciaro

Court of Appeal of Louisiana, First Circuit - May 25, 2022 - So.3d - 2022 WL 1658374 - 2021-0656 (La.App. 1 Cir. 5/25/22)

City filed petition for expropriation seeking to acquire for the expansion of a roadway three separate parcels of land owned by landowner that contained restaurant, office, and rental property.

The District Court entered an order of expropriation, expropriating the three parcels, ordered city to deposit the sum of $1,515,278 into the registry of the court, and ordered landowner to surrender the properties.

Following landowner's answer and reconventional demand seeking additional compensation, in a bench trial the District Court awarded landowner $3,669,143 as just compensation in addition to the earlier deposit, twenty-five percent attorney fees, and all court costs. City appealed.

The Court of Appeal held that:

- Trial court abused its discretion by limiting testimony of city's real estate appraisal expert regarding valuation of restaurant property in not permitting expert to expound on her calculated just compensation and refusing to allow city to fully question her concerning whether property was unique or indispensable;
- Restaurant property was not considered unique and indispensable and thus landowner was not entitled to replacement cost without depreciation as just compensation for partial expropriation;
- Landowner failed to prove by preponderance of the evidence his entitlement to higher value of just compensation than the $1,325,238 deposited for expropriated portion of restaurant property;
- Remainder of restaurant property not subject to expropriation did not constitute uneconomic remainder but did result in parcel to have more limited utility and thus landowner was entitled to severance damages of $262,495;
- Trial court manifestly erred in finding landowner met burden of proving another highest and best use for his office property and thus just compensation of $71,500 was appropriate;

- Trial court did not manifestly err in finding landowner met burden of proving that city did not justly compensate him for taking of portion of rental property; and
- Trial court did not manifestly err in finding landowner was entitled to lost rental profits of $8,000 for rental property.
