SCHOOL FUNDING - FEDERAL

Carson as next friend of O. C. v. Makin

Supreme Court of the United States - June 21, 2022 - S.Ct. - 2022 WL 2203333

Parents of secondary school students filed § 1983 action against Commissioner of Maine Department of Education, alleging the "nonsectarian" requirement of Maine's tuition assistance program for private secondary schools violated the Free Exercise Clause and the Establishment Clause of the First Amendment, as well as the Equal Protection Clause of the Fourteenth Amendment, and seeking declaratory and injunctive relief against enforcement of the requirement.

The United States District Court for the District of Maine granted the Commissioner's motion for judgment on a stipulated record. Parents appealed. The United States Court of Appeals for the First Circuit affirmed. Certiorari was granted.

The Supreme Court held that:

- Program's "nonsectarian" requirement conditioned benefits solely due to a school's religious character, and thus was subject to strictest scrutiny;
- Program's "nonsectarian" requirement violated the Free Exercise Clause of the First Amendment; and
- Program's "nonsectarian" requirement could not be justified on ground it imposed a use-based, and not a status-based, restriction on state funds.

Maine law, which required that any private secondary school receiving state funds from its otherwise generally available tuition assistance program be "nonsectarian," conditioned the availability of benefits solely due to a school's religious character, and thus, the law was subject to the strictest scrutiny, on § 1983 claim brought by parents of secondary school students, who alleged the law violated the Free Exercise Clause of the First Amendment; the program effectively penalized the free exercise of religion by disqualifying some private schools from a generally available benefit for families whose school district did not provide a public secondary school solely because the schools were religious.

Maine's requirement, that any private secondary school receiving state funds from its otherwise generally available tuition assistance program be "nonsectarian," violated the Free Exercise Clause of the First Amendment; regardless of how the benefit and restriction were described, the program was not neutral, as it operated to identify and exclude otherwise eligible schools on the basis of their religious exercise, the exclusion of religious schools from the program promoted stricter separation of church and state than the Federal Constitution required, and under the program a private school did not have to offer an education that was equivalent to that available in Maine public schools in order to be eligible for state funds.

Maine law requiring that any private secondary school receiving state funds from tuition assistance program be "nonsectarian" could not be justified, under the First Amendment's Free Exercise

Clause, on the ground the law imposed a use-based restriction on state funds, and not a restriction based on religious status; any attempt to give effect to such a distinction by scrutinizing whether and how a religious school pursued its educational mission would raise serious concerns about state entanglement with religion and denominational favoritism, and Maine conceded that it barely engaged in any such scrutiny when enforcing the "nonsectarian" requirement.

PUBLIC UTILITIES - RHODE ISLAND

Borgo v. Narragansett Electric Company

Supreme Court of Rhode Island - June 6, 2022 - A.3d - 2022 WL 1919030

Admitted trespasser brought negligence action against utility company seeking damages for injuries she sustained in an accident at an active electrical substation.

The Superior Court entered summary judgment for utility company. Trespasser appealed.

The Supreme Court held that:

- Utility company did not owe a duty of care absent actual discovery of trespasser in position of peril, and
- Public Utilities Commission (PUC) safety regulations did not create a duty owed to trespasser.

Evidence of frequent trespassers at active electrical substation, including ladder inside the building that was not placed there by utility company, did not give rise to a duty of care owed by utility company to admitted trespasser, absent actual discovery of trespasser in position of peril by utility company, thus precluding trespasser's negligence claim seeking damages for injuries, including an amputated hand, incurred as result of accident at substation, which she entered by crawling under a closed fence.

It could not be discerned from Public Utilities Commission (PUC) safety regulations that PUC intended to protect members of the general public harmed at an electrical facility, and thus, the regulations did not create duty owed by utility company to admitted trespasser who was injured at an electrical substation; there was no language in the regulations that gave any indication that the imposition of safety standards on public utilities was designed to protect members of the general public, nor was there any mention of a purpose or concern for safety of the general public.

SPECIAL SERVICE DISTRICTS - UTAH

Cove at Little Valley Homeowners Association v. Traverse Ridge Special Service District

Supreme Court of Utah - June 16, 2022 - P.3d - 2022 WL 2165344 - 2022 UT 23

Homeowners association brought action against special service district, alleging that it paid assessments for street plowing services but did not receive any such services, and seeking an order requiring district to provide services to all areas and a refund of payments made.

The Third District Court granted district's motion to dismiss for failure to state a claim, and association appealed.

The Supreme Court held that:

- Association failed to preserve for appeal claim that code provision conflicted with state law;
- Argument that district lacked "standing" to enforce development agreement did not implicate court's subject matter jurisdiction;
- Court's failure to realize that city code conflicted with the Utah Special Service Act was not plain error, assuming that plain error could apply; and
- Court could not rely on prior case law to determine that assessments were a "tax" which had to be challenged under the Utah Tax Act.

Sentences in homeowners association's complaint that referenced city code provision stating that private streets shall be maintained by the subdivider or other private entity was not sufficient to preserve for appeal claim that code provision conflicted with state law and thus did not control whether city special service district was required to provide snow plowing services to subdivision; association did not even mention the sentences in the opposition to city special service district's motion to dismiss, let alone build an argument around them, and there was no indication that district court understood that the association believed that the city code did not control because it conflicted with state law.

Argument that services district lacked "standing" to enforce development agreement which provided that private subdivision streets had to be privately maintained did not implicate the court's subject matter jurisdiction and thus could be raised by homeowners association for the first time on appeal in action seeking to require district to provide snow plowing services to subdivision; even if court could not enforce the development agreement, court would not lose subject matter jurisdiction to adjudicate the claims the association brought against the district seeking to compel the district to provide snow plowing services and seeking a refund of assessments paid to the district.

District court's failure to realize that city code, which stated that private streets shall be maintained by the subdivider or other private entity, conflicted with the Utah Special Service Act was not plain error, assuming that plain error could apply to unpreserved issues in civil cases; association in fact failed to meet its burden of even demonstrating the correctness of the legal conclusion embedded in that argument.

District court could not rely on prior case law to determine that assessments which homeowners paid to city special service district for purposes of the provision of street services, including snow removal, street lighting services, repairing and maintaining roads, and sweeping and disposal services, were a "tax" which had to be challenged under the Utah Tax Act, as, in prior action, statement that assessments were a "tax" was dicta; issue of whether the assessment was a tax or fee was not necessary to the outcome of the case, and the court in the prior case had not questioned the way the parties had characterized the levy.

ZONING & PLANNING - VIRGINIA

Anders Larsen Trust v. Board of Supervisors of Fairfax County

Supreme Court of Virginia - May 26, 2022 - 872 S.E.2d 449

Neighbors filed petition for certiorari, seeking to challenge opening of proposed residential treatment center for teenage girls.

The Fairfax Circuit Court dismissed the action for lack of standing, and neighbors appealed.

The Supreme Court held that neighbors had standing to seek judicial review of zoning approval of residential treatment center.

Neighbors had standing to seek judicial review of zoning approval of residential treatment center for teenage girls, where neighbors lived immediately adjacent to the center, neighbors alleged that their property values would be diminished by the operation of the facility in the otherwise entirely residential neighborhood, and neighbors alleged that their enjoyment of their property would be diminished by the fact that there would be three shifts of staff coming and going, and residents and visitors likewise driving to and from the property.

REAL PROPERTY CONVEYANCE - FLORIDA

1000 Brickell, Ltd. v. City of Miami

District Court of Appeal of Florida, Third District - June 8, 2022 - So.3d - 2022 WL 2062512

Grantor, a company through which real property owner deeded property to city, brought action against city, alleging that, because city allowed property to be used by a restaurant rather than as a park, property reverted back to grantor under automatic-reverter clause in deed conveying the property.

The Circuit Court granted city's motion for summary judgment. Grantor appealed.

The District Court of Appeal held that conveyance-to-government statutory exception from statute voiding reverter provisions in deeds conveying real estate after 21 years applied.

Conveyance-to-government statutory exception from statute voiding reverter provisions in deeds conveying real estate after 21 years, as opposed to statute imposing time restriction on challenges of dedications of land to municipalities of 30 years after recordation, applied in action asserting that property that was deeded to city reverted back to grantor under automatic-reverter clause stating that property would revert if it was used for any purpose other than public-park purposes; deed conveying the property was a fee simple determinable estate subject to the automatic-reverter clause, not a dedication.

IMMUNITY - MAINE

Bean v. City of Bangor

Supreme Judicial Court of Maine - May 31, 2022 - A.3d - 2022 WL 1744191 - 2022 ME 30

Pedestrian's estate brought action against city, alleging negligence, wrongful death, and loss of consortium after pedestrian died following fall.

The Superior Court denied city's motion for summary judgment based on immunity under the Maine Tort Claims Act (MTCA). City appealed.

The Supreme Judicial Court held that:

- City had burden of proof as to its affirmative defense of immunity under MTCA, and
- Interlocutory appeal of denial of city's summary-judgment motion was not available under the "immunity" exception to final judgment rule.

City had burden of proof as to its affirmative defense of immunity under the Maine Tort Claims Act (MTCA), including the burden to establish lack of insurance coverage, in pedestrian's estate's negligence action against city arising from pedestrian's death following fall.

Interlocutory appeal of denial of city's summary-judgment motion was not available under the "immunity" exception to final judgment rule, which allowed immediate review of denial of a dispositive motion asserting immunity from suit, in pedestrian's estate's negligence action against city, even though city's motion for summary judgment was based on assertion of immunity pursuant to Maine Tort Claims Act (MTCA), where the summary judgment record left unresolved the question of the applicability of insurance to indemnify city for the claims presented in the case, as would determine applicability of immunity under MTCA.

PUBLIC UTILITIES - MASSACHUSETTS

Tracer Lane II Realty, LLC v. City of Waltham

Supreme Judicial Court of Massachusetts, Suffolk - June 2, 2022 - 489 Mass. 775 - 187 N.E.3d 1007

Developer of proposed large-scale solar energy system brought action against city seeking declaration that city could not prohibit developer from building a road on its property in residential zone to access system, which was to be located in commercial zone of neighboring town.

The Land Court Department granted summary judgment for developer. City appealed.

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

- Statutory protections afforded to solar energy systems against local zoning regulations applied to access road, and
- City's arguably allowing solar energy systems in industrial zones did not preclude developer from laying road.

Proposed road on developer's property in city's residential zone, to be used to access a planned large-scale solar energy system that was to be located in commercial zone of neighboring town, was part of the solar energy system, and thus the road had statutory protections afforded to such systems against local zoning regulation except when necessary to protect the public health, safety, or welfare, where the road would facilitate the primary system's construction, maintenance, and connection to electrical grid.

Statutory protections for solar energy systems against local zoning regulation except when necessary to protect the public health, safety, or welfare allowed developer to lay a road on its property in city's residential zone to access its planned large-scale solar energy system in commercial zone in neighboring town, even if city's zoning code allowed solar energy systems in industrial zones, where industrial zones encompassed only one to two percent of city's total land area, and code's ban on systems in all but one to two percent of city restricted rather than promoted the legislative goal of promoting solar energy.

INVERSE CONDEMNATION - MISSISSIPPI

Hardin v. Town of Leakesville

Supreme Court of Mississippi - June 9, 2022 - So.3d - 2022 WL 2070950

Homeowner brought action against town alleging that town negligently failed to maintain its drainage ditches around her home resulting in structural damage caused by water seeping up from ground into crawlspace during heavy rains.

The Circuit Court granted summary judgment for town. Homeowner appealed.

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

- Homeowner's claim required specialized knowledge of an expert to establish proximate cause, and
- Homeowner's summary judgment evidence was too speculative to create factual issue on proximate cause.

Homeowner's claim that town negligently failed to maintain its drainage ditches around her home, resulting in structural damage caused by water seeping up from ground into crawlspace during heavy rains, required specialized knowledge of an expert to establish proximate cause, where neither homeowner nor her witnesses observed water seep or flow into crawlspace underneath home.

Home inspection reports of town's expert, who was a summary judgment affiant, did not contain contradictions or a statement against interest that would corroborate homeowner's speculative summary judgment deposition testimony to create a triable issue of fact on proximate cause sufficient to defeat summary judgment on homeowner's claim that town negligently failed to maintain its drainage ditches around her home resulting in structural damage caused by water seeping up from ground into crawlspace during heavy rains, where expert's second report reaffirmed his conclusions and opinions in first report, and neither report corroborated homeowner's testimony.

BALLOT INITIATIVE - OREGON

Salsgiver v. Rosenblum

Supreme Court of Oregon, En Banc - May 27, 2022 - P.3d - 369 Or. 724 - 2022 WL 1701721

Electors filed petitions challenging ballot title that attorney general certified for initiative petition to amend state constitution to prohibit highway fees and tolls without voter approval.

The Supreme Court held that:

- Ballot title failed to adequately inform voters about measure's temporal limitation, and
- Ballot title summary inaccurately suggested that measure would require all existing tollways to stop collecting tolls until they obtained voter approval.

Ballot title for initiative petition to amend state constitution to prohibit highway fees and tolls without voter approval "after certain date" failed to adequately inform voters about measure's temporal limitation; measure would operate to invalidate any toll that was not in operation by end of 2017, even if toll already had been approved by public body—unless and until such toll was placed before voters in relevant counties and they gave their approval, but title would likely be understood by voters as referring to date sometime in future.

Ballot title summary for initiative petition to amend state constitution to prohibit highway fees and tolls without voter approval, which stated that measure applied to "tolls collected after December 31, 2017, including forthcoming I-205 and I-5 tolls," inaccurately suggested that measure would require all existing tollways to stop collecting tolls until they obtained approval of voters in nearby counties; measure expressly excepted tolls that were "in operation before January 1, 2018," from its prohibition on "assess[ing]" tolls without voter approval, regardless of whether toll was "collected after December 31, 2017."

ZONING & PLANNING - TEXAS

Schroeder v. Escalera Ranch Owners' Association, Inc.

Supreme Court of Texas - June 3, 2022 - S.W.3d - 2022 WL 1815042 - 65 Tex. Sup. Ct. J. 1318

Homeowners association brought action against city zoning and planning commission commissioners, in their official capacities, after commission approved proposed subdivision, seeking mandamus relief directing commissioners to rescind approval of plat.

After the District Court granted the commission's plea to the jurisdiction, the Court of Appeals reversed. Commission members petitioned for review.

The Supreme Court held that:

- Commission did not clearly abuse discretion in approving plat, and
- Supreme Court would not grant association opportunity to replead claim to allege that commissioners utilized improper considerations.

City zoning and planning commission did not clearly abuse its discretion in approving plat for proposed subdivision, and thus commission was protected by governmental immunity and writ of mandamus to compel commission members to rescind approval was not permitted in action brought by homeowners' association against commissioners, challenging approval; only restriction that city's unified development code placed on commission's discretion to determine whether preliminary plat conformed to requirements was that it needed to consider plat application, director's report, state law, and compliance with code, and commission members, after concluding that conformance to applicable standards had been demonstrated, approved plat, as required by statute.

Supreme Court would not grant homeowners association opportunity to replead claim, in action brought against city zoning and planning commission, challenging commission's approval of plat for proposed subdivision, to allege that commissioners utilized improper considerations in determining that plat conformed with applicable law; record established that commission considered director's report, which determined that all requirements of city's unified development code were met, recognized ministerial duty under state law to approve conforming plat, and addressed specific compliance concerns raised by association.

EMINENT DOMAIN - VIRGINIA

Board of Supervisors of County of Albemarle v. Route 29, LLC

Supreme Court of Virginia - June 2, 2022 - S.E.2d - 2022 WL 1787517

Shopping center owner filed complaint and petition for review of alleged zoning violation in which county sought to enforce transit payments which were condition of rezoning approval.

The Circuit Court overruled county's demurrer and denied plea in bar, denied county's motion to strike the evidence, and, following trial, denied county's renewed motion to strike and entered judgment for owner. County appealed.

The Supreme Court held that:

- Unconstitutional conditions doctrine applied, and
- Commuter bus route did not bear a nexus to, nor was proportional to, the impact of shopping center on traffic, and thus conditional proffer to contribute to a public transportation service was an unconstitutional taking.

Unconstitutional conditions doctrine applied to shopping center developer's voluntary conditional proffer to contribute cash to a public transportation service provided to the shopping center project; proffer was a conditional proffer which was agreed to for the purpose of receiving a land-use permit, which required the amendment of a zoning ordinance, and shopping center owner claimed that proffer could not be enforced if the payments demanded did not have a nexus to the projected impacts resulting from the rezoned development.

Commuter bus route did not bear a nexus to, nor was proportional to, the impact of shopping center on traffic, and thus shopping center developer's voluntary conditional proffer to contribute cash to a public transportation service, as condition for zoning change, was an unconstitutional taking, where bus commuter route at the center actually brought additional vehicular traffic to the center, route did not run during the times at which traffic to the center was greatest, there was little-to-no discussion at county meeting concerning the identification or mitigation of traffic impacts resulting from the transportation project, and board members openly stated that ridership on the route would increase as the population grew in commuter communities.

EMINENT DOMAIN - LOUISIANA

Lafaye v. City of New Orleans

United States Court of Appeals, Fifth Circuit - June 1, 2022 - F.4th - 2022 WL 1764044

Motorists who had paid fines for traffic violations captured by city's automated traffic enforcement system (ATES) brought action alleging that city's failure to comply with state court order to refund fines constituted unlawful taking.

The United States District Court denied city's motion to dismiss, and city filed interlocutory appeal.

The Court of Appeals held that city's retention of fines did not constitute "taking."

City's retention of fines it had collected for traffic violations based on its use of automated traffic enforcement system (ATES) that was subsequently held to be unlawful did not constitute "taking" under Fifth Amendment, even though motorists who had paid fines had obtained state court judgment ordering city to refund fines; city acquired motorists' money not through eminent domain nor through any other lawful power, but rather through ultra vires implementation of ATES.

EMINENT DOMAIN - MASSACHUSETTS

FBT Everett Realty, LLC v. Massachusetts Gaming Commission

Supreme Judicial Court of Massachusetts, Middlesex - May 23, 2022 - 489 Mass. 702 - 187 N.E.3d 373

Vendor, which bought land before legalization of casino gaming and then after legalization entered into agreement for option to purchase contingent on purchaser securing license to operate casino on the land, filed action against state gaming commission, asserting claims for intentional interference with contract and regulatory taking, alleging that commission's concerns about hidden criminal ownership interests in vendor resulted in its refusal to approve purchaser's application for license to operate casino on land unless purchase price was lowered so that value of casino-use premium on sale of land was transferred from vendor to purchaser.

The Superior Court Department granted commission's motion to dismiss intentional interference claim and granted commission's motion for summary judgment on regulatory taking claim. Vendor applied for direct appellate review, and the Supreme Judicial Court granted the application.

The Supreme Judicial Court held that:

- Trial court was required to consider all three *Penn Central* factors before deciding whether to grant commission's motion for summary judgment on vendor's regulatory taking claim;
- Genuine issues of material fact existed as to whether commission directed a compelled transfer of property or merely accepted it as cure to its concerns about undisclosed criminal ownership interest in vendor, precluding summary judgment on vendor's regulatory taking claim; and
- Commission was "public employer" immune from liability for intentional interference with contractual relations under Massachusetts Tort Claims Act (MTCA).

Trial court was required to consider all three Penn Central factors, including economic impact, interference with investment-backed expectations, and character of government action, before deciding whether to grant state gaming commission's summary judgment motion on vendor's regulatory taking claim, alleging that commission's concerns about hidden criminal ownership interests in vendor resulted in its refusal to approve purchaser's application for license to operate casino on land unless purchase price was lowered so that value of casino-use premium was transferred to purchaser; investment-backed expectations was only one factor that courts had to consider, and other factors were important, given the significant diminution in value and unusual and disputed character of government action.

Genuine issues of material fact existed as to whether state gaming commission directed a compelled transfer of property or merely accepted it as cure to its concerns about undisclosed criminal ownership interest in vendor, precluding summary judgment on vendor's regulatory taking claim against commission based on commission's purported refusal to approve purchaser's application for license to operate casino on land unless purchase price was lowered so that value of casino-use premium on sale of land was transferred from vendor to purchaser.

Factor of reasonable investment-backed expectations weighed heavily against finding a regulatory taking, in vendor's action alleging that state gaming commission's concerns about hidden criminal ownership interests in vendor resulted in its refusal to approve purchaser's application for license to operate casino on land unless purchase price was lowered so that value of casino-use premium on sale of land was transferred from vendor to purchaser; vendor bought land two years before gaming was legalized and could not have reasonably expected to sell property as site for development of

casino, and vendor's investments in the land after gaming was legalized remained subject to commission's discretionary decision of whether to award gaming license for development of casino on the property.

Substantial economic impact weighed in favor of finding regulatory taking, in vendor's action alleging that state gaming commission's concerns about hidden criminal ownership interests in vendor resulted in its refusal to approve purchaser's application for license to operate casino on land unless purchase price was lowered so that value of casino-use premium on sale of land was transferred from vendor to purchaser; vendor had negotiated agreement that purchaser would pay $100,000 per month for the right to buy the land for $75 million if purchaser were awarded license, and commission's purported actions intended to deprive vendor of any casino-use premium and reduced purchase price to $35 million causing $40 million reduction in value of the land.

Factor of character of government action weighed in favor of finding regulatory taking, in vendor's action alleging that state gaming commission's concerns about hidden criminal ownership interests in vendor resulted in its refusal to approve purchaser's application for license to operate casino on land unless purchase price was lowered so that value of casino-use premium on sale of land was transferred from vendor to purchaser; character of action was highly unusual as commission did not continue to investigate until it could determine whether there was in fact some undisclosed criminal ownership interest but instead purportedly compelled transfer of property for $40 million less than agreed upon price.

State gaming commission was "public employer" immune from liability under Massachusetts Tort Claims Act (MTCA) for vendor's claim alleging that commission intentionally interfered with contract for option to purchase land by purportedly refusing to approve purchaser's application for license to operate casino on land unless purchase price was lowered so that value of casino-use premium on sale of land was transferred from vendor to purchaser; legislature's rejection of express proposal to fully waive gaming regulation and enforcement agency's tort immunity suggested that legislature did not intend for commission to be liable, and commission enjoyed substantially less political independence and financial independence than port authority.

PUBLIC EMPLOYMENT - TEXAS

City of Fort Worth v. Pridgen

Supreme Court of Texas - May 27, 2022 - S.W.3d - 2022 WL 1696036 - 65 Tex. Sup. Ct. J. 1245

Supervisors of city police department's internal affairs and special investigations units brought action against city under Texas Whistleblower Act alleging that they were unlawfully disciplined for making good faith report of violation of law.

The District Court denied city's motion for summary judgment, and it appealed. The Court of Appeals affirmed, and city petitioned for review.

The Supreme Court held that supervisors' statements regarding consequences they believed that officer should have faced for misconduct did not constitute "reports" protected by Whistleblower Act.

Statements by supervisors of city police department's internal affairs and special investigations units to police chief regarding department's internal policies and consequences they believed that officer

should have faced for misconduct did not constitute "reports" protected by Whistleblower Act; supervisors did not supply chief with new information about officer's conduct or corroborate facts that were unverified or subject to dispute, and their objective was not to unearth or prove unlawful conduct, but to persuade chief to classify officer's known actions as criminal conduct and to terminate his employment.

EMINENT DOMAIN - UTAH

Cardiff Wales, LLC v. Washington County School District

Supreme Court of Utah - May 26, 2022 - P.3d - 2022 WL 1672215 - 2022 UT 19

Former landowner brought action against school district and developer for declaratory relief and to set aside school district's sale of landowner's former property to developer after school district decided not to build high school on property, alleging violation of statutory right of first refusal for property acquired under threat of condemnation.

The District Court dismissed. Former landowner appealed, and the Court of Appeals affirmed. Landowner petitioned for writ of certiorari, which was granted.

The Supreme Court held that:

- Property is acquired under "threat of condemnation" when government entity has specifically authorized the use of eminent domain to acquire the real property;
- Person claiming a right of first refusal to reacquire property must plead and prove that the entity to which she sold her property had, in some way, specifically authorized the use of eminent domain to take it; and
- Former landowner sufficiently alleged that school district took some sort of action that transformed its general eminent domain power into a specific threat to take landowner's parcel by eminent domain.

Property is acquired under "threat of condemnation," for purposes of requirement that seller have a right of first refusal if the acquired property is subsequently conveyed, when an official body of the state or a subdivision of the state, having the power of eminent domain, has specifically authorized the use of eminent domain to acquire the real property, rather than when there is a threat to authorize the use of eminent domain.

A landowner alleging a right of first refusal to reacquire property taken by threat of eminent domain cannot simply claim she sold her land to the government because of a general fear that the government might have taken it had she not sold; instead, to meet her statutory burden of showing a threat of condemnation, a landowner must plead and prove some government action that indicates the government has authorized the use of its eminent domain authority in a way that bespeaks a specific intent to condemn the landowner's property.

Former landowner sufficiently alleged that school district took some sort of action that transformed its general eminent domain power into a specific threat to take landowner's parcel by eminent domain, as required for landowner to have the right of first refusal to reacquire the parcel after school district decided the parcel was unnecessary for its plans; although landowner did not use the words "specifically authorize" in its complaint, it alleged that school district stated it wanted to buy the property for a new high school and "intended to acquire the Parcel through condemnation if necessary," landowner explained that it ultimately sold the parcel "in order to avoid an eminent

domain lawsuit," and letter from school district stated that, if agreeable terms could not be reached, the district "would be forced to use eminent domain powers."

ECONOMIC DEVELOPMENT - WEST VIRGINIA

Jefferson County Foundation, Inc. v. West Virginia Economic Development Authority

Supreme Court of Appeals of West Virginia - June 8, 2022 - S.E.2d - 2022 WL 2063006

Nonprofit organization that advocated for effective and accountable government brought action against West Virginia Economic Development Authority (WVEDA) and insulation manufacturer seeking declaration that WVEDA lacked statutory authority to enter into transactions to finance construction of manufacturing plant using a sale-leaseback arrangement and that transactions were a de facto tax abatement in violation of state constitutional guarantee of equal and uniform taxation.

The Circuit Court dismissed. Organization appealed.

The Supreme Court of Appeals held that:

- Organization had representative standing;
- Controversy did not present a nonjusticiable political question;
- Sale-leaseback arrangement was not a de facto tax exemption;
- WVEDA had statutory authority to enter into the sale-leaseback;
- No conflict existed in statutory tax exemption provisions; and
- Sale-leaseback did not violate constitutional guarantee of equal and uniform taxation.

Nonprofit organization that advocated for effective and accountable government had representative standing for its action against West Virginia Economic Development Authority (WVEDA) and insulation manufacturer seeking declaration that WVEDA lacked statutory authority to enter into transactions to finance construction of manufacturing plant using a sale-leaseback arrangement and that transactions amounted to a de facto tax abatement in violation of state constitutional guarantee of equal and uniform taxation, where organization sought a declaration regarding impact that a public contract would have on its members' interests that arguably fell within state constitutional protections.

Controversy about proposed transactions between a public entity, the West Virginia Economic Development Authority (WVEDA), and a private manufacturer to finance construction of manufacturing plant using a sale-leaseback arrangement did not present a nonjusticiable political question, where objector sought declaration that WVEDA lacked statutory authority to enter into proposed transactions and that transactions amounted to a de facto tax abatement in violation of state constitutional guarantee of equal and uniform taxation, and the court had duties to apply and enforce a statute unless statute was clearly unconstitutional.

Sale-leaseback arrangement involving West Virginia Economic Development Authority (WVEDA) and insulation manufacturer to finance construction of manufacturing plant was not a de facto tax exemption, and thus the West Virginia Economic Development Authority Act, as source of WVEDA's powers, did not need to be strictly construed in action seeking declaration WVEDA lacked statutory power for its actions and that the sale-leaseback violated state constitutional guarantee of equal and uniform taxation, where sale-leaseback was a series of transactions resulting in two, distinct interests of a fee interest and a leasehold, and WVEDA's resolution to enter into sale-leaseback did

not declare that the leasehold interest produced by sale-leaseback would be exempt from taxation.

West Virginia Economic Development Authority (WVEDA) had authority, under West Virginia Economic Development Authority Act, to adopt resolution to enter into a sale-leaseback agreement with insulation manufacturer to finance construction of manufacturing plant, where Act authorized WVEDA to engage in the specific transactions set forth in resolution, including issuing revenue bonds, exchanging bonds with manufacturer for property, purchasing fee interest in property from manufacturer, leasing property to manufacturer, and selling property to manufacturer at end of lease term.

Statute exempting property acquired or used by West Virginia Economic Development Authority (WVEDA) from taxation did not conflict with statute identifying types of property exempt from taxation, as applied to sale-leaseback arrangement involving WVEDA and insulation manufacturer to finance construction of manufacturing plant, where the sale-leaseback was a series of legislatively-authorized transactions and not a tax exemption, and statute identifying property tax exemptions was not, by its plain terms, an exhaustive list of types of property the Legislature exempted from taxation.

Sale-leaseback arrangement involving West Virginia Economic Development Authority (WVEDA) and insulation manufacturer to finance construction of manufacturing plant did not violate state constitutional guarantee of equal and uniform taxation, despite argument that the sale-leaseback was a sham structure hiding a huge property tax break for manufacturer, where sale-leaseback was a series of transactions resulting in two, distinct interests of a fee interest and a leasehold, WVEDA's resolution to enter into sale-leaseback did not declare that the leasehold interest produced by sale-leaseback would be exempt from taxation, and leasehold interest was subject to general rules of valuation of a leasehold.

Objector's due process challenge, including a claim of vagueness, to statute providing tax-exempt status to property acquired or used by West Virginia Economic Development Authority (WVEDA) was moot on appeal in declaratory judgment action raising statutory and constitutional challenges to sale-leaseback arrangement involving WVEDA and insulation manufacturer to finance construction of manufacturing plant, where the sale-leaseback was comprised of a series of transactions to be affected by WVEDA pursuant to its statutory authority, and WVEDA's resolution to enter into sale-leaseback did not claim to extend the disputed tax exemption to the leasehold produced by the sale-leaseback.

PUBLIC CONTRACTS - CALIFORNIA

San Luis Obispo Local Agency Formation Commission v. Central Coast Development Company

Court of Appeal, Second District, Division 6, California - May 5, 2022 - Cal.Rptr.3d - 78 Cal.App.5th 363 - 2022 WL 1419943

After property developer seeking to construct housing units on property, as well as city that approved permit, refused to pay more than $400,000 in attorney fees and costs to county's local agency formation commission, which prevailed in company and city's lawsuit against it for its denial of company and city's annexation application, commission brought action against developer and city, seeking attorney fees and costs.

The Superior Court granted developer and city's judgment on pleadings. Commission appealed.

While that appeal was pending, developer and city moved for attorney fees. The Superior Court granted the motion, awarding $428,864 to developer and $172,850 to city. Commission appealed.

On rehearing, the Court of Appeal held that:

- Indemnity agreement contained in annexation application being void for illegality meant that commission was not subject to liability for attorney fees based on statute governing award of attorney fees in contract actions, and
- Doctrine of in pari delicto did not apply to allow enforcement of indemnity agreement.

Indemnity agreement contained in property developer and city's property-annexation application that they submitted to county's local agency formation commission was void for illegality, and therefore commission was not subject to liability for attorney fees based on statute governing award of attorney fees in contract actions, in action arising from commission's denial of application to annex property for construction of housing units; commission was not authorized by statute to make indemnity agreement.

A public agency that was not authorized to make the agreement, resulting in that contract being void and the public agency not being able to enforce nor be liable on the contract, is not liable for attorney fees pursuant to statute governing award of attorney fees in a contract action.

Indemnity agreement contained in property developer and city's property-annexation application that they submitted to county's local agency formation commission was void for illegality, and therefore commission was not subject to liability for attorney fees based on statute governing fees and charges incurred in the processing of an application with the commission, in action arising from commission's denial of application to annex property for construction of housing units; commission was not authorized by statute to make indemnity agreement.

Doctrine of in pari delicto did not apply to allow enforcement of indemnity agreement, which was void for illegality, contained in property developer and city's property-annexation application that they submitted to county's local agency formation commission, and therefore commission was not subject to liability for attorney fees based on statute governing award of attorney fees in contract actions, in action arising from commission's denial of application to annex property for construction of housing units; commission was public entity for which there was overriding public interest in limiting its contractual obligations.

WATER LAW - CALIFORNIA

City of San Buenaventura v. United Water Conservation District

Court of Appeal, Second District, Division 6, California - May 26, 2022 - Cal.Rptr.3d - 2022 WL 1679400

City petitioned for writ of mandate and filed complaint for determination of invalidity and declaratory relief asserting that groundwater extraction charge adopted by water conservation district for non-agricultural users that was three times the charge for agricultural users was a tax that required voter approval, and alleging that statute that required at least a three-to-one ratio between charges was facially unconstitutional.

The Superior Court entered judgment declaring charge invalid and finding statute unconstitutional. District appealed.

The Court of Appeal held that:

- City's claim challenging validity of charge was subject to independent, not rational basis, review;
- Charge was tax that required voter approval; and
- Statute requiring minimum of three-to-one ratio between charges was facially unconstitutional.

City's claim challenging validity of groundwater extraction charge adopted by water conservation district for non-agricultural users that was three times charge for agricultural users on basis that charge was unconstitutional tax without voter approval was subject to independent, not rational basis, review of administrative record; validity of charges presented constitutional question, and one purpose of constitutional provision that broadened definition of taxes that required voter approval was to curtail deference that had been traditionally accorded legislative enactments on fees, assessments, and charges.

Groundwater extraction charge adopted by water conservation district for non-agricultural users that was three times charge for agricultural users did not bear reasonable relationship to burdens or benefits of district's conservation activities, and thus, was not excepted from constitutional requirement of voter approval of any levy, charge, or exaction of any kind imposed by local governments, even if agricultural land had greater natural recharge of water than non-agricultural land, since agricultural land's relatively high recharge rate per acre-foot was swamped by its total pumpage, which accounted for 77% of net extractions.

Statute requiring a water conservation district to adopt a groundwater extraction charge for non-agricultural users that was at least three times more than charge for agricultural users facially violated constitutional requirement of voter approval of any levy, charge, or exaction of any kind imposed by local governments unless that charge bore reasonable relationship to payor's burdens on, or benefits received from, the governmental activity, even if there might be circumstances in which three-to-one ratio was justified, since such justification would have nothing to do with requirements under statute.

PUBLIC DUTY DOCTRINE - IOWA

Estate of Farrell by Farrell v. State

Supreme Court of Iowa - May 13, 2022 - N.W.2d - 2022 WL 1509713

Estates of motor vehicle occupants who died as result of head-on collision with another vehicle traveling the wrong way on state highway brought action against state and two municipalities, alleging the defendants negligently designed, constructed, and operated a confusing interchange used by the errant driver.

The District Court denied defendants' motion for judgment on the pleadings. Defendants filed interlocutory appeal. The Court of Appeals reversed and remanded. Application for review was granted.

The Supreme Court held that public-duty doctrine did not bar action.

Public-duty doctrine did not bar claims against state and municipalities brought by estates of motor vehicle occupants who died as result of head-on collision with another vehicle traveling the wrong way on state highway, alleging that states and municipalities negligently designed, constructed, and operated a confusing highway interchange, with inadequate lighting and signage, used by the errant driver, which induced the driver mistakenly to drive into oncoming traffic; defendants' alleged

affirmative negligence created a dangerous condition on their own property that was allegedly a cause of the fatal accident.

EMINENT DOMAIN - KENTUCKY

Commonwealth v. Louisville Gas and Electric Company

Court of Appeals of Kentucky - April 22, 2022 - S.W.3d - 2022 WL 1194180

Public utility initiated condemnation proceedings to take property upon which the Kentucky Heritage Land Conservation Fund Board owned a conservation easement for construction of underground natural gas pipeline.

The Circuit Court denied Board's motion to dismiss on issue of sovereign immunity. Board filed interlocutory appeal.

The Court of Appeals held that:

- Condemnation proceedings to take conservation easement impacted Commonwealth's property rights; and
- Board was competent to defend Commonwealth's interests by asserting defense of sovereign immunity; but
- As matter of first impression, statutory mandate that eminent domain powers are exercisable as if conservation easements do not exist constitutes waiver of sovereign immunity; and
- Doctrine of prior public use did not bar utility from taking property.

Condemnation proceedings against property upon which Kentucky Heritage Land Conservation Fund Board owned a conservation easement impacted the property rights of the Commonwealth itself, and thus doctrine of sovereign immunity applied to entitle the Board to immunity in the absence of waiver by the legislature; Board used state funds to acquire the easement, and the easement was granted in the name of the "Commonwealth of Kentucky, by and through the Finance and Administration Cabinet, for the use and benefit of the Kentucky Heritage Land Conservation."

Attorney General was not required to formally decline to participate in condemnation proceedings impacting Commonwealth's rights to property upon which Kentucky Heritage Land Conservation Fund Board owned conservation easement, and thus Board was competent to defend Commonwealth's interests by asserting defense of sovereign immunity; suit did not challenge constitutionality of a statute.

Statute prohibiting a conservation easement from operating to impair or restrict any right or power of eminent domain created by statute and mandating that such rights and powers shall be exercisable as if the conservation easement does not exist constitutes a waiver of sovereign immunity where a governmental interest in a conservation easement is asserted as a defense to condemnation proceedings initiated by a party with a statutory right of eminent domain.

Statute mandating that eminent domain powers were exercisable as if conservation easements did not exist operated to prevent doctrine of prior public use from barring public utility's action to take property upon which Kentucky Heritage Land Conservation Fund Board owned a conservation easement; assuming, pursuant to statute, that Board's easement did not exist, then there was no prior public use to impede exercise of utility's right of eminent domain.

The doctrine of prior public use, which provides that land devoted to one public use cannot be taken

for another public use in the absence of express legislative authority for the taking, operates to resolve competing claims to property under a right of eminent domain.

EMINENT DOMAIN - MICHIGAN

Barber v. Charter Township of Springfield, Michigan

United States Court of Appeals, Sixth Circuit - April 11, 2022 - 31 F.4th 382

Property owner filed state court action against township, county, and their parks and recreation departments alleging that their proposed removal of dam near her property amounted to unconstitutional taking and trespass.

Following removal, the United States District Court entered judgment on pleadings in defendants' favor, and owner appealed.

The Court of Appeals held that:

- Owner's claim for injunctive relief was ripe for adjudication, and
- Owner faced sufficiently concrete, particularized, and imminent injury-in-fact to establish her standing.

Property owner's claim for injunctive relief was ripe for adjudication in her action against county and township alleging that their proposed removal of dam near her property amounted to unconstitutional taking and trespass, even though dam had not yet been removed, where county and township had reached final decision to remove dam.

Property owner faced sufficiently concrete, particularized, and imminent injury-in-fact to establish her standing to assert claim that proposed removal of dam near her property by county and township amounted to unconstitutional taking and trespass, even though removal had not commenced; county and township had made final decision to remove dam and invested at least $600,000 into dam removal and restoration project, owner claimed that removing dam would change flow of water on her property and likely alter its configuration, and harms she faced were particular to her property.

IMMUNITY - OKLAHOMA

Kamphaus v. Town of Granite

Supreme Court of Oklahoma - May 17, 2022 - P.3d - 2022 WL 1550074 - 2022 OK 46

Mother of child, who was injured when headstone fell on him while visiting cemetery, brought action against town, the operator of the cemetery, for negligence.

The District Court granted summary judgment in favor of town. Mother appealed. The Court of Civil Appeals reversed. Town filed petition for certiorari.

The Supreme Court held that:

- Town had no duty to maintain headstone, and
- Town had no duty to inspect headstone.

Town had no duty to maintain headstone, which fell on child while visiting cemetery operated by town; town only provided routine maintenance to common areas of cemetery, such as roadways, fences, and shrubbery, and mowing services, and town had no property interest in headstone placed on easement belonging to purchaser of cemetery plot.

Town had no duty to inspect headstone, which fell on child while visiting cemetery operated by town, where headstone was not owned, placed, or controlled by town.

BONDS - OKLAHOMA

Matter of Oklahoma Development Finance Authority

Supreme Court of Oklahoma - May 24, 2022 - P.3d - 2022 WL 1634775 - 2022 OK 48

Oklahoma Development Finance Authority requested that Supreme Court assume original jurisdiction and approve the issuance of ratepayer-backed bonds pursuant to the February 2021 Regulated Utility Consumer Protection Act.

The Supreme Court held that ratepayer-backed bonds to secure fuel costs incurred by public utility during extreme winter weather event were constitutional.

BONDS - OKLAHOMA

Matter of Oklahoma Development Finance Authority

Supreme Court of Oklahoma - May 24, 2022 - P.3d - 2022 WL 1635165 - 2022 OK 47

Oklahoma Development Finance Authority requested that Supreme Court assume original jurisdiction and approve the issuance of ratepayer-backed bonds pursuant to the February 2021 Regulated Utility Consumer Protection Act.

The Supreme Court held that:

- Bonds were constitutional;
- Oklahoma Corporation Commission’s final financing order was not appealed and thus final; and
- Commission did not violate the Open Meetings Act when it issued final financing order regarding ratepayer-backed bonds.

Ratepayer-backed bonds issued pursuant to Regulated Utility Consumer Protection Act to cover the debt incurred by natural gas utility during winter weather event were constitutional; proposed bonds, which would allow customers to pay their utility bills at a lower amount over a longer period of time, involved traditional, self-liquidating bonds.

Oklahoma Corporation Commission’s final financing order regarding ratepayer-backed bonds issued to cover the debt incurred by natural gas utility during winter weather event was final, as no party had appealed the financing order, and thus Supreme Court considering approval of the bonds would decline to consider issues regarding the filed-rate doctrine and whether the utility’s fuel costs were prudently incurred.

Oklahoma Corporation Commission did not violate the Open Meetings Act when it issued final financing order regarding ratepayer-backed bonds issued to cover the debt incurred by natural gas

utility during winter weather event, even if Commission failed to post agenda for meeting, where Commission met five days earlier as part of regular meeting where it decided to continue that meeting, Commission properly continued that meeting by providing a public announcement for the continued meeting with the date, time, and place, and Commission only discussed matters which were on the agenda for the prior meeting.

EMINENT DOMAIN - RHODE ISLAND

Mitola v. Providence Public Buildings Authority

Supreme Court of Rhode Island - May 9, 2022 - A.3d - 2022 WL 1446737

Property owners filed petition for assessment of damages, and petition to compel purchase in fee.

The Superior Court denied petition to compel purchase in fee, and entered final judgment. Owners appealed.

The Supreme Court held that:

- On issue of first impression, obligation of public building authority to purchase property in fee simple, if property owner so requested, was time limited;
- Petition to compel purchase in fee was timely filed;
- Owners' nearly four-year delay in bringing petition to compel purchase in fee was not inexcusable;
- Authority was not significantly prejudiced by owners' delay in bringing petition to compel purchase in fee; and
- Taking in fee by public building authority had to be based on value of property at time of taking.

EMINENT DOMAIN - TEXAS

Hlavinka v. HSC Pipeline Partnership, LLC

Supreme Court of Texas - May 27, 2022 - S.W.3d - 2022 WL 1696443

Pipeline company initiated condemnation proceedings after landowners rejected its offer to purchase a pipeline easement.

The County Court granted company's motions for summary judgment and to exclude landowner's testimony, and denied landowners' plea to the jurisdiction. Landowners appealed. The Houston Court of Appeals affirmed in part, reversed in part, and remanded. Both parties petitioned for review, and both petitions were granted.

The Supreme Court held that:

- Polymer-grade propylene product that company's pipeline carried qualified as an "oil product";
- Pipeline company met public use standard for common-carrier status that was required for condemnation authority; and
- Trial court's exclusion of landowner's testimony about sales of easements to other pipelines constituted harmful error that warranted new trial as to market value.

Pipeline company established that polymer-grade propylene that it carried qualified as an "oil product," as required for company to have statutory condemnation authority to build and construct a common-carrier pipeline to transport it, because the Natural Resources Code defined oil as "crude petroleum oil," and polymer-grade propylene was a product derived from crude oil's refinement and distillation, and further, the Railroad Commission, which authorized company to operate a pipeline, defined "product" to include all liquid products or by-products derived from crude petroleum oil or gas.

Pipeline company served at least one unaffiliated customer, and accordingly, it met the public use standard for common-carrier status under statute granting condemnation authority to common-carrier pipelines that transported oil products, where company had a transportation contract with an unaffiliated customer, its pipeline connected to existing pipeline networks making the transportation network feasible, pipeline had additional capacity and terminated near other potential customers, and company publicly filed a tariff with the Railroad Commission, demonstrating that it offered and marketed the pipeline for public hire.

Trial court's exclusion of one landowner's testimony about sales of easements to other pipelines, in pipeline company's condemnation proceedings, denied landowners the opportunity to rebut presumption that land's highest and best use was purely agricultural and that there was reasonable probability the easement that was condemned would likely have been sold, and thus, the exclusion constituted harmful error that warranted a new trial as to market value; recent sales of comparable easement rights on the same property to other pipeline companies, combined with existence of pipelines running parallel and adjacent to condemning pipeline company's pipeline, provided some evidence from which a factfinder reasonably could conclude that landowners could have sold to another the easement that they were instead compelled to sell to pipeline company.

BONDS - FEDERAL

Ponsa-Rabell v. Santander Securities LLC

United States Court of Appeals, First Circuit - May 20, 2022 - F.4th - 2022 WL 1598018

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.

EMINENT DOMAIN - INDIANA

Town of Linden v. Birge

Court of Appeals of Indiana - April 18, 2022 - N.E.3d - 2022 WL 1132791

Property owners brought inverse condemnation action against town, county, and county officials after improvements to an existing regulated agricultural drain to alleviate flooding issues in town and surrounding areas caused flooding on their property.

The Circuit Court granted town's motion to dismiss. The Court of Appeals reversed and remanded. On remand, the Circuit Court entered an order finding that there had been a permanent physical invasion of owners' property and set matter for determination of damages. Defendants filed interlocutory appeal.

The Court of Appeals held that:

- Temporary but frequent flooding of landowners' property did not constitute a per se taking;
- Evidence regarding highest and best use of landowners' property was irrelevant for purposes of establishing whether a taking had occurred; and
- Sufficient evidence supported finding that flooding on landowners' property was caused by improvements to drain.

Temporary but frequent flooding of landowners' property, allegedly caused by improvements to regulated agricultural drain that ran through pre-existing drainage easement on landowners' property in order to alleviate flooding issues in town and surrounding areas, did not constitute a per se taking as a permanent physical invasion of landowners' property; instead, whether temporary but frequent flooding of landowners' property was compensable taking was required to be analyzed under expanded *Penn Central* factors.

Evidence regarding highest and best use of landowners' property was irrelevant for purposes of establishing whether a taking had occurred, and thus was inadmissible in landowners' inverse condemnation action against town, county, and county officials arising after improvements to an existing regulated agricultural drain that ran through pre-existing drainage easement on landowners' property to alleviate flooding issues in town and surrounding areas allegedly caused flooding on landowners' property.

Sufficient evidence supported finding that flooding on landowners' property was caused by improvements to regulated agricultural drain that ran through pre-existing drainage easement on

landowners' property, in inverse condemnation action against town, county, and county officials, although defendants presented evidence and expert testimony that flooding was caused by increased rainfall, topology of landowners' farmland, and failure of landowners to connect their private lateral drains to improved drain; landowners presented evidence that they had little issue with flooding prior to improvements to the drain, and landowners' expert witness testified that drain, as reconstructed, caused flooding issues on landowners' property.

In determining whether frequent flooding of landowners' property as an alleged result of improvements to regulated agricultural drain that ran through pre-existing drainage easement on landowners' property in order to alleviate flooding issues in town and surrounding areas constituted a taking, trial court was to limit its consideration to the impact of the flooding on those portions of landowners' property that were outside of pre-existing 75-foot drainage easement that was created by statute and needed to specify the land affected if a taking was determined.

EMINENT DOMAIN - KENTUCKY

Commonwealth v. Louisville Gas and Electric Company

Court of Appeals of Kentucky - April 22, 2022 - S.W.3d - 2022 WL 1194180

Public utility initiated condemnation proceedings to take property upon which the Kentucky Heritage Land Conservation Fund Board owned a conservation easement for construction of underground natural gas pipeline.

The Circuit Court denied Board's motion to dismiss on issue of sovereign immunity. Board filed interlocutory appeal.

The Court of Appeals held that:

- Condemnation proceedings to take conservation easement impacted Commonwealth's property rights; and
- Board was competent to defend Commonwealth's interests by asserting defense of sovereign immunity; but
- As matter of first impression, statutory mandate that eminent domain powers are exercisable as if conservation easements do not exist constitutes waiver of sovereign immunity; and
- Doctrine of prior public use did not bar utility from taking property.

Statute prohibiting a conservation easement from operating to impair or restrict any right or power of eminent domain created by statute and mandating that such rights and powers shall be exercisable as if the conservation easement does not exist constitutes a waiver of sovereign immunity where a governmental interest in a conservation easement is asserted as a defense to condemnation proceedings initiated by a party with a statutory right of eminent domain.

The doctrine of prior public use, which provides that land devoted to one public use cannot be taken for another public use in the absence of express legislative authority for the taking, operates to resolve competing claims to property under a right of eminent domain.

PERMITS - LOUISIANA

In re Revocation of an Alcoholic Beverage Permit for Riteway Liquor Store

Court of Appeal of Louisiana, Second Circuit - April 13, 2022 - So.3d - 2022 WL 1100505 - 54,431 (La.App. 2 Cir. 4/13/22)

Owner and operator of liquor store sought judicial review of city's revocation of its alcoholic beverage permit.

Following a de novo trial, the District Court affirmed revocation of the permit. Owner and operator of liquor store appealed.

The Court of Appeal held that:

- Notice of city council meeting to consider rescinding alcoholic beverage permit was sufficient to put permit holder on notice as to allegations against it and to prepare its defense thereto;
- Sufficient evidence supported revocation of permit; and
- Any potential error in allowing city council transcript into record had no substantial effect on outcome of case.

EMINENT DOMAIN - NORTH DAKOTA

City of West Fargo v. McAllister

Supreme Court of North Dakota - May 12, 2022 - N.W.2d - 2022 WL 1493547 - 2022 ND 94

City filed quick-take eminent domain proceeding to acquire right-of-way across landowner's property for a sewer improvement project.

The District Court entered judgment in favor of city. Landowner appealed.

The Supreme Court held that:

- Quick-take condemnation procedure applied to city's acquisition of right-of-way across landowner's property for sewer improvement project;
- City was not required to pay for a sewer improvement project with special assessments in order to use the quick-take procedure; and
- Exclusion of portion of expert testimony was warranted.

Quick-take condemnation procedure, which allowed municipality to immediately take possession of right-of-way after making an offer to purchase and depositing the amount of the offer with the clerk of court, was not limited only to a right-of-way for highway or roadway purposes, and applied to city's acquisition of right-of-way across landowner's property for sewer improvement project.

City was not required to pay for a sewer improvement project with special assessments in order to use the quick-take procedure, which allowed municipality to immediately take possession of right-o--way after making an offer to purchase and depositing the amount of the offer with the clerk of court, to acquire right-of-way across landowner's property as part of project.

PREEMPTION - OHIO

Newburgh Heights v. State

Supreme Court of Ohio - May 19, 2022 - N.E.3d - 2022 WL 1572051 - 2022-Ohio-1642

Village filed complaint seeking declaratory judgment and a motion for preliminary and permanent injunction against State, seeking to enjoin enforcement of provisions allegedly infringing on home rule authority to enact and operate photo traffic enforcement systems, including by reducing local funding, granting exclusive jurisdiction over photo enforcement actions to courts, and requiring local authorities to pay advance court deposits to cover costs.

City filed motion to intervene, complaint, and motions for injunctions on the same basis. After allowing intervention and following hearing, the Court of Common Pleas granted motions for preliminary injunction in part, but denied motions as to funding, jurisdiction, and deposits. Village and city appealed. The Court of Appeals affirmed in part, reversed in part, and remanded. The State filed a discretionary appeal.

The Supreme Court held that:

- No conflict existed between a municipality's ordinance allowing the use of traffic cameras and state law allowing a reduction of a municipality's share of the state's local-government funds based on the amount of traffic-camera fines collected, and
- No conflict existed between a municipality's ordinance allowing the use of traffic cameras and state law requiring a municipality to pay an advance deposit to cover court costs and fees when litigating a citation for a violation based on the use of traffic camera.

SCHOOL FINANCE - TENNESSEE

Metropolitan Government of Nashville and Davidson County v. Tennessee Department of Education

Supreme Court of Tennessee - May 18, 2022 - S.W.3d - 2022 WL 1561546

Municipality and county brought declaratory judgment action against Governor and Department of Education, asserting that the Education Savings Account Pilot Program (ESA Act) was unconstitutional under the Home Rule Amendment and under the due-process and education clauses.

The Chancery Court entered judgment finding ESA Act unconstitutional under Home Rule Amendment. The Court of Appeals affirmed. Governor and Department applied for permission to bring interlocutory appeal, which was granted.

The Supreme Court held that:

- Municipality and county asserted a sufficient palpable injury to support standing, but
- ESA Act was not "applicable" to municipality or county and therefore did not implicate the Home Rule Amendment.

Municipality and county asserted a sufficient palpable injury to support standing at motion-t--dismiss stage of their declaratory judgment action against Governor and Department of Education, asserting that the Education Savings Account Pilot Program (ESA Act) was unconstitutional under the Home Rule Amendment, where municipality and county asserted an injury to local control of local affairs, which the Home Rule Amendment was enacted to protect.

Education Savings Account Pilot Program (ESA Act), allowing a limited number of students to directly receive their share of state and local education funds, which would ordinarily be provided to the public-school system they attended, and use such funds to pay for a private school education, was not "applicable" to municipality or county and therefore did not implicate the Home Rule Amendment, even though municipality and county might be affected by Act; facially, Act governed only the conduct of local education agencies (LEAs), not of municipality or county, and financial connections between LEAs and municipality or county did not change fact that entities were distinct from each other.

EMINENT DOMAIN - TEXAS

City of Baytown v. Schrock

Supreme Court of Texas - May 13, 2022 - S.W.3d - 2022 WL 1510310 - 65 Tex. Sup. Ct. J. 985

Property owner brought regulatory-taking and declaratory-judgment claims against city, alleging that city denied him all economically viable use of property by refusing to provide water service to his property and seeking declaration that city's enforcement of ordinance against him resulted in inverse condemnation of his property for which no just compensation was paid.

Following rendition of summary judgment against property owner, which was overturned by the Court of Appeals the County Civil Court at Law granted city's motion for directed verdict after property owner rested his case at jury trial. Property owner appealed, and the Houston Court of Appeals affirmed in part, reversed in part, and remanded. City petitioned for review, which was granted.

The Supreme Court held that city's refusal to reconnect property owner's utility service, due to outstanding utility bills, which prohibited owner from renting out the property did not constitute a regulatory taking.

City's refusal to reconnect property owner's utility service, due to outstanding utility bills, which prohibited owner from renting out the property did not constitute a regulatory taking; ordinance did not regulate land use, but instead permitted the city to refuse to connect utility service to the property until outstanding utility bills associated with the property were satisfied, city's regulation of utility service was not a regulation of the property itself, and property owner's claim was for city's alleged wrongful enforcement of its ordinance, rather than for a taking of private property.

LICENSING FEES - TEXAS

Builder Recovery Services, LLC v. Town of Westlake

Supreme Court of Texas - May 20, 2022 - S.W.3d - 2022 WL 1591976 - 65 Tex. Sup. Ct. J. 1151

Construction waste disposal business brought declaratory-judgment action, challenging town's power to pass ordinance requiring business to obtain license to conduct its business and seeking

declaration that 15% license fee on business's gross revenue pursuant to ordinance was unlawful.

Business also sought to recover attorney fees. After bench trial, the District Court ruled in favor of business on its claim that 15% licensee fee was unlawful, awarded attorney fees in sum of $8,523, and ruled in favor of town on all other claims. Business appealed. The Court of Appeals affirmed in part, reversed in part, and remanded. Plaintiff petitioned for review, which was granted.

The Supreme Court held that:

- Claim that town lacked authority to impose license fee based on any percentage of revenue was not mooted by intervening downward adjustment to the size of fee;
- General-law municipality's express power to regulate construction trash hauling did not include implied power to charge licensing fees based on a percentage of revenue; and
- Parties' failure to address severability warranted remand.

EMINENT DOMAIN - FEDERAL

ATS Ford Drive Investment, LLC v. United States

United States Court of Federal Claims - April 1, 2022 - Fed.Cl. - 2022 WL 986300

In rails-to-trails case, owners of real property adjacent to railroad corridor filed suit against United States, claiming Fifth Amendment taking by Surface Transportation Board's (STB) issuance of notice of interim trail use (NITU) authorizing conversion of railroad line into recreational trail pursuant to National Trail Systems Act, thus acquiring owners' property by inverse condemnation.

Parties cross-moved for summary judgment.

The Court of Federal Claims held that:

- Owners adjacent to corridor along public road lacked cognizable property interest;
- Owners adjacent to corridor acquired by railroad through court decision had cognizable property interest;
- Owners adjacent to corridor acquired by railroad via lost conveyance instruments had cognizable property interest;
- Owners adjacent to corridor acquired by railroad via warranty deed lacked cognizable property interest;
- Summary judgment was precluded as to property interest of owners adjacent to corridor acquired by railroad via quitclaim deed;
- Owners adjacent to corridor acquired by railroad via releases lacked cognizable property interest;
- Owners of parcels adjacent to street running parallel to corridor had cognizable property interest up to centerline of street; but
- Owners of parcels adjacent to street lacked cognizable property interest in other half of street.

EMINENT DOMAIN - FLORIDA

Orlando Bar Group, LLC v. DeSantis

District Court of Appeal of Florida, Fifth District - April 8, 2022 - So.3d - 2022 WL 1051484 - 47 Fla. L. Weekly D827

Restaurant group which operated several bars brought suit against the governor, in his official

capacity, the Department of Business and Professional Regulations, and a county, alleging the temporary COVID-19 restrictions enacted by defendants amounted to inverse condemnation entitling the group to compensation.

The Circuit Court granted defendants' motion to dismiss with prejudice and without leave to amend. Restaurant group appealed.

The District Court of Appeal held that:

- *Penn Central* test applied to the determination of whether temporary COVID-19 restrictions on restaurant group's bars constituted a regulatory taking;
- Temporary COVID-19 restrictions did not amount to a categorical regulatory taking;
- Temporary COVID-19 restrictions did not amount to an as-applied regulatory taking; and
- Restaurant group failed to preserve for appeal issue of whether dismissal of its complaint with prejudice and without need to amend was improper.

Penn Central test applied to the determination of whether the temporary COVID-19 restrictions on restaurant group's bars, enacted by governor, Department of Business and Professional Regulations, and county, constituted a regulatory taking, in restaurant group's suit to recover damages for its alleged losses caused by the restrictions; the COVID-19 restrictions did not result in a physical appropriation and per se taking of restaurant group's property, but were merely regulations affecting restaurant group's use of their properties.

Temporary COVID-19 restrictions enacted by governor, Department of Business and Professional Regulations, and county, which prohibited restaurant group from selling alcohol completely for 17 days in its various bars, and incrementally removed these restrictions over the following six months, did not amount to a categorical regulatory taking; the COVID-19 restrictions did not result in a complete or permanent loss of restaurant group's ability to do business.

Under the *Penn Central* test, temporary COVID-19 restrictions enacted by governor, Department of Business and Professional Regulations, and county, which prohibited restaurant group from selling alcohol completely for 17 days in its various bars, and incrementally removed these restrictions over the following six months, did not amount to an as-applied regulatory taking; even though the COVID-19 restrictions economically impacted the restaurant group's various bars, the governor was empowered by the state's emergency powers statute to prohibit the sale of alcohol, and the COVID-19 restrictions were a valid use of the State's police power to protect the general welfare.

COUNTIES - MISSISSIPPI

Board of Supervisors of Jackson County v. Qualite Sports Lighting, LLC

Supreme Court of Mississippi - May 5, 2022 - So.3d - 2022 WL 1420151

Unsuccessful bidder for project involving athletic field lighting system appealed decision of county board of supervisors, which awarded contract to competing bidder.

The Circuit Court denied unsuccessful bidder's motion for entry of scheduling order to extent that it requested a discovery period, denied board's motion to quash subpoenas issued by unsuccessful bidder, and ordered supplementation of record. Board petitioned for interlocutory appeal, which was granted.

The Supreme Court held that statute providing for appeal of a decision of a county board of

supervisors, stating that the notice of appeal must designate "all matters that the appellant desires to be made part of the record," does not permit consideration of new evidence on appeal.

On appeal from a decision of a county board of supervisors, if the parties disagree as to what matters should or should not be included as part of the record for the appeal, then the differences should be settled by the circuit court; the circuit court should conduct a hearing to determine which matters are necessary to convey a fair, accurate, and complete account of the proceedings before the board.

PUBLIC PENSIONS - PUERTO RICO

In re Financial Oversight and Management Board for Puerto Rico

United States Court of Appeals, First Circuit - April 26, 2022 - 32 F.4th 67

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.

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

- Forward-going teachers' pension obligations under existing retirement regime were a contractual commitment which Commonwealth could reject;
- Notice and hearing was properly provided for rejection of teachers' pension obligations in joint plan of adjustment;
- PROMESA preempted Commonwealth laws calling for forward-going teachers' pension obligations under existing retirement regime;
- Lack of specific legislation permitting the plan to modify Commonwealth's pension obligations to public school teachers did not bar confirmation of plan; and
- New bond legislation authorized issuance of new bonds, conditioned on further accruals or cost-o--living eliminations for participants in teachers' pension plan.

In Title III debt restructuring proceedings brought pursuant to the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), forward-going teachers' pension obligations under existing retirement regime, while effected by statute, were a contractual commitment as between the Commonwealth of Puerto Rico and its covered employers, which Commonwealth could reject in 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.

In confirming 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, in Title III debt restructuring proceedings, Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA) preempted Commonwealth laws calling for forward-going teachers' pension obligations under existing retirement regime.

In Title III debt restructuring proceedings brought pursuant to the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), lack of specific legislation permitting the plan to modify Commonwealth of Puerto Rico's pension obligations to public school teachers did not bar confirmation of 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; PROMESA only required any approval necessary under applicable law and did not by its plain terms require enabling legislation for every component of the plan, and plan's adjustment of pension obligations was in fact authorized by enabling legislation.

In Title III debt restructuring proceedings brought pursuant to the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), new bond legislation authorized issuance of new bonds, conditioned on further accruals or cost-of-living eliminations for participants in teachers' pension plan, in 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.

IMMUNITY - RHODE ISLAND

Battaglia v. Lombardi

Supreme Court of Rhode Island - May 5, 2022 - A.3d - 2022 WL 1416719

Pedestrian who was injured when he fell into manhole brought negligence action against city.

After jury verdict for pedestrian, the Superior Court granted city's motion for judgment as a matter of law. Pedestrian appealed, and city cross-appealed.

The Supreme Court held that:

- Trial justice plainly erred by making factual determinations to determine the applicability of the egregious conduct exception to public duty doctrine at the "judgment as matter of law" stage of trial, and
- Whether egregious conduct exception to the public duty doctrine applied was for jury.

Trial justice plainly erred by making factual determinations to determine the applicability of the egregious conduct exception to public duty doctrine at the "judgment as matter of law" stage of trial in negligence action brought against city by pedestrian who was injured when he fell into manhole; factual determinations were impermissibly drawn by the trial justice, who also failed to consider the evidence in the light most favorable to pedestrian as nonmovant and draw all reasonable inferences that supported his position.

Whether egregious conduct exception to the public duty doctrine applied was for jury in negligence action brought against city by pedestrian who was injured when he fell into manhole, given that there were factual disputes as to whether city created circumstances that would force a reasonably prudent person into position of extreme peril, whether city had actual or constructive notice of the perilous circumstances, and whether it failed to remedy that condition after a reasonable amount of time.

PUBLIC UTILITIES - RHODE ISLAND

Freepoint Solar LLC v. Richmond Zoning Board of Review

Supreme Court of Rhode Island - May 11, 2022 - A.3d - 2022 WL 1482502

Solar company sought review of decision of town zoning board of review denying company's application a special use permit to construct a ground-mounted solar energy system in residential zoning district.

The Superior Court reversed. Town petitioned for writ of certiorari.

The Supreme Court held that special use permit requirement of system being within two miles of utility substation did not mean only a substation of specific named utility that provided electricity in area.

Term "utility substation," in town zoning ordinance allowing for ground-mounted commercial solar energy systems within an R-3 residential zoning district by special use permit if certain requirements were met including location of entire lot on which the solar energy system was placed being within two miles of a utility substation, could include an electrical substation with three transformers and did not mean only a substation of a specific named utility that provided electricity in area.

IMPACT FEES - WASHINGTON

Viking JV, LLC v. City of Puyallup

Court of Appeals of Washington, Division 2 - May 10, 2022 - P.3d - 2022 WL 1467526

Commercial builder filed Land Use Petition Act (LUPA) petition challenging city hearing examiner's decision denying builder's request to reduce park impact fee assessed by city as condition of commercial building permit for commercial warehouse.

City filed motion to dismiss, and the Superior Court denied the motion and subsequently denied builder's petition on the merits. Builder appealed, and city cross appealed.

The Court of Appeals held that:

- City's two-tiered hearing examiner review process for reviewing local project permits was not preempted by state law, and
- Builder failed to exhaust its administrative remedies and thus lacked standing to bring LUPA petition.

City's two-tiered hearing examiner review process for reviewing local project permits was not preempted by state law; city code's allowance for no more than one open record hearing and one closed record appeal was consistent with statute governing local government review of project permit applications, city's designation that each examiner's decision may be given effect of final decision of legislative body was consistent with statute governing legal effect of decisions made by examiner, and nothing in statute governing hearing examiner system expressly prohibited two-tiered internal review system.

Commercial builder failed to exhaust its administrative remedies and thus lacked standing to bring Land Use Petition Act (LUPA) petition challenging city hearing examiner's decision denying builder's request to reduce park impact fee assessed by city as condition of commercial building permit for commercial warehouse; city's appellate examiner review process was lawful, builder failed to

procure a final determination by city's officer with highest level of authority to make determination so there was no land use decision under LUPA that would permit judicial review of builder's claims, and there were no equitable exceptions to LUPA's exhaustion requirement.

IMMUNITY - ILLINOIS

Robinson v. Village of Sauk Village

Supreme Court of Illinois - April 21, 2022 - N.E.3d - 2022 IL 127236 - 2022 WL 1180112

Pedestrian brought personal injury action against police officers and villages arising from his being struck by vehicle driven by car theft suspect who engaged in police chase involving his taking off from parking lot after initial chase, switching vehicles, and then hitting pedestrian during more police chase.

The Circuit Court granted summary judgment for officers and villages under Local Government and Governmental Employees Tort Immunity Act. Pedestrian appealed. The Appellate Court reversed. Officers and villages petitioned for leave to appeal, which was allowed.

The Supreme Court held that:

- Direct restriction or control of freedom of movement is needed to show custody for purposes immunity under Act for injury inflicted by an escaped or escaping prisoner, overruling *Townsend v. Anderson*, 2019 IL App (1st) 180771, 443 Ill.Dec. 87, 161 N.E.3d 211, and
- Suspect was not an "escaped or escaping prisoner" at time he hit pedestrian.

A mere show of authority by police officers is not sufficient to establish that a person is "held in custody" under section of Local Governmental and Governmental Employees Tort Immunity Act giving local public entities and public employees absolute immunity from liability for any injury inflicted by an escaped or escaping prisoner, as defined in Act to be a person "held in custody"; rather, "custody" requires direct restriction or control of a person's freedom of movement to a particular place for at least a limited period of time; overruling *Townsend v. Anderson*, 2019 IL App (1st) 180771, 443 Ill.Dec. 87, 161 N.E.3d 211.

Car theft suspect was not in "custody" when police officers pointed their weapons at him and ordered him to show his hands in church parking lot after first part of police chase, and thus suspect was not an "escaped or escaping prisoner" under section of Local Governmental and Governmental Employees Tort Immunity Act giving local public entities and public employees absolute immunity from liability for any injury inflicted by an escaped or escaping prisoner, as defined by Act to be a person "held in custody," where suspect remained in vehicle with engine running and door closed, officers did not block suspect's path with squad cars or otherwise limit his movement, and suspect drove out of parking lot with no physical impediment a little over one minute after arriving.

DEVELOPMENT - INDIANA

Munster Steel Co., Inc. v. CPV Partners, LLC

Court of Appeals of Indiana - March 28, 2022 - N.E.3d - 2022 WL 893777

Property seller brought action against property buyers, asserting that buyers' development agreement with town, municipal development commission, and municipal redevelopment

commission triggered sale contract's subsequent-sale provision, which required buyers to pay a fee to seller if they resold the property within two years following the closing of the sale contract.

The Superior Court denied seller's motion for summary judgment and granted buyers' motion for summary judgment, determining that the development agreement constituted an equitable mortgage, not a sale. Seller appealed.

The Court of Appeals held that agreement was executed to secure a subsisting debt, and thus agreement constituted an equitable mortgage, not a sale for which property seller could collect fee under subsequent-sale provision.

Development agreement between property buyer and town was executed to secure a subsisting debt, and thus the agreement constituted an equitable mortgage, not a sale for which property seller could collect a fee from buyer under subsequent-sale provision of contract in which seller sold the property to buyer; transfer of property to town under the agreement was intended as security for the performance of buyer's obligations to complete the first segment of development project and to secure funding for second segment of the project, and agreement called for reconveyance of town's right, title, and interest in the property simultaneously with buyer's deposit of the funds for the second segment as satisfaction of a debt.

EMINENT DOMAIN - IOWA

Matter of Condemnation of Certain Rights in Land for Extension of Armar Drive Project By City of Marion

Supreme Court of Iowa - May 6, 2022 - N.W.2d - 2022 WL 1434872

Family trust that owned undeveloped land appealed determination of Compensation Commission awarding it $403,000 as just compensation for city's condemnation of part of the land.

The District Court limited testimony of trust beneficiary, who testified as property owner, regarding comparable sales and, following a jury trial, entered judgment awarding owner $82,900 in damages. Trust appealed. The Court of Appeals affirmed. Trust applied for further review, which was granted.

The Supreme Court held that:

- Beneficiary's testimony and evidence of comparable sales, which included deeds, were not inadmissible on hearsay grounds;
- Beneficiary acquired personal knowledge of comparable sales, as required for admission of lay opinion testimony; but
- As an issue of first impression, beneficiary was unqualified to testify as expert regarding specific allegedly comparable sales of developed property.

Property owner's testimony and evidence of allegedly comparable sales, including deeds for other property sales from which sale price could be calculated within $500 based on the transfer tax paid, were not inadmissible on hearsay grounds, in condemnation proceeding regarding owner's property that was subject to partial taking, under exceptions to hearsay rule for public records, for records of documents that affect interest in property, and for statements in documents that affect an interest in property, statute governing instruments affecting real estate, and rules governing authentication of records.

Property owner acquired personal knowledge of allegedly comparable sales of other properties, as

required for admission of lay opinion witness testimony as to value of owner's property in condemnation proceeding to determine just compensation for partial taking of land, even though owner was not buyer, seller, or real estate agent in the other sales transactions, where owner reviewed public real estate records and personally inspected the other sites.

Property owner of undeveloped land was unqualified to testify as expert regarding specific allegedly comparable sales of developed property, for purposes of valuing owner's property that was partially taken in condemnation proceeding, where owner was former restaurant manager with limited real estate experience.

EMINENT DOMAIN - NEW YORK

Chynn v. County of Suffolk

Supreme Court, Appellate Division, Second Department, New York - April 20, 2022 - N.Y.S.3d - 2022 WL 1160930 - 2022 N.Y. Slip Op. 02541

Claimants brought actions seeking just compensation and direct damages for loss of oceanfront properties condemned by county as part of extensive project to reconstruct beaches and restore dune network on several barrier islands that were damaged during hurricane.

Following joint bench trial, the Supreme Court, Suffolk County, entered judgments awarding first claimant $1,750,000 and second claimant $1,830,000 as just compensation for the taking of real property. County appealed.

The Supreme Court, Appellate Division, held that:

- Upward adjustment of 3% to value of claimants' homes to account for changing market conditions was not warranted;
- Downward adjustment of 2% to market value of claimants' homes based on market conditions was not warranted; and
- Upward adjustment of 5% to market value of claimants' homes to account for condemnation blight was not warranted.

Upward adjustment of 3% per year to market value of claimants' homes to account for changing market conditions between date of the common comparable sale and vesting date was not warranted in condemnation proceeding seeking just compensation for claimants' loss of oceanfront properties condemned by county as part of extensive project to reconstruct beaches and restore dune network on several barrier islands that were damaged during hurricane, although claimants' expert appraiser testified that review of market conditions in the area showed that market had been increasing during relevant period; expert also testified that he did not have any data or other evidence to support proposed market conditions adjustment.

Downward adjustment of 2% to market value of claimants' homes based on market conditions was not warranted in condemnation proceeding brought by claimants seeking just compensation for loss of oceanfront properties condemned by county as part of extensive project to reconstruct beaches and restore dune network on several barrier islands that were damaged during hurricane; county's expert appraiser based determination that downward adjustment was warranted on sales survey created by real estate company, but there was no way to determine how mean and median values reported in survey were calculated, and there was no data to support expert's theory that the housing market in relevant area was similar to that in survey during relevant period.

Upward adjustment of 5% to market value of claimants' homes to account for condemnation blight was not warranted in condemnation proceeding seeking just compensation for claimants' loss of oceanfront properties condemned by county as part of extensive project to reconstruct beaches and restore dune network on several barrier islands that were damaged during hurricane; claimants failed to establish that any affirmative conduct by county unreasonably interfered with or further depressed value of subject properties sufficient for condemnation blight theory to apply.

EMINENT DOMAIN - NORTH DAKOTA

Sauvageau v. Bailey

Supreme Court of North Dakota - April 28, 2022 - N.W.2d - 2022 WL 1260311 - 2022 ND 86

County Joint Water Resource District filed petition seeking to take landowners' property by quick take eminent domain for flood control easement.

The District Court denied landowners' motion to dismiss and landowners' motion for a preliminary injunction. Landowners filed petition for supervisory writ.

The Supreme Court held that district was acquiring more than flood control easement over landowners' property, and thus could not use quick take procedure.

County joint water resource district was acquiring more than flood control easement over landowners' property, and thus could not use quick take procedure to acquire the property interest, where district intended to close the public road, remove all structures from the property, engage in disturbance of the surface and subsurface, and inundate the property with water, and landowners would be left with only a reverter interest with no value.

EMINENT DOMAIN - TEXAS

Harris County Fresh Water Supply District No. 61 v. Magellan Pipeline Company, L.P.

Court of Appeals of Texas, Houston (1st Dist.) - April 19, 2022 - S.W.3d - 2022 WL 1144636

After administrative phase of condemnation proceeding for pipeline-installation easement resulting in award to fresh-water-supply district of $160,000 over amount pipeline companies had already paid district for the easement, district filed a plea to the jurisdiction and objections to the award, arguing that the award failed to award district adequate compensation for companies' acquisition of the easement.

The County Civil Court at Law granted companies a permanent easement, awarded the district the $160,000 additional compensation, and denied district's request for additional compensation. District appealed.

The Court of Appeals held that:

- District was not operating within governmental immunity's bounds with respect to condemnation proceeding, and thus district's governmental immunity from suit was abrogated;
- District waived its right to assert either that companies lacked condemnation authority because they were not common carriers or that condemnation was precluded by paramount-publi-

-importance doctrine; and
- Even if district could dispute companies' common-carrier status, sufficient evidence supported finding that companies qualified as common carriers.

Fresh-water-supply district was not operating within governmental immunity's bounds with respect to condemnation proceeding in which pipeline companies sought easement to install pipeline underneath district's property, and thus district's governmental immunity from suit was abrogated; proceeding was filed by companies at district's request, district entered contractual agreements with companies in which it was contractually obligated to participate in the proceeding, district initiated the judicial phase of the proceeding by filing objections to compensation award that it received at close of administrative phase, and, in the judicial phase, district affirmatively sought to oppose the condemnation and to recover damages for companies' alleged breach of the agreements.

Fresh-water-supply district waived its right to assert either that pipeline companies lacked authority to condemn an easement underneath district's property that companies sought for building a pipeline because they were not common carriers or that condemnation was precluded because district's use of the property companies sought to condemn served an issue of paramount public importance over companies' use, where district entered contract with companies in which it agreed that it would not contest companies' authority to condemn the easement and that the scope of condemnation proceeding would be limited to any additional compensation that district might be due in excess of compensation that companies paid it before initiating the proceeding.

Sufficient evidence supported finding that pipeline would be used to serve customers unaffiliated with companies that owned pipeline and, thus, supported a finding that companies qualified as common carriers, as required for companies to have authority to condemn a pipeline-installation easement underneath fresh-water-supply district's property; evidence indicated that third parties unaffiliated with the companies used pipeline to transport refined petroleum products, and eventual pipeline was being built to accommodate volume commitments from those third parties.

ZONING & PLANNING - WASHINGTON

Kanam v. Kmet

Court of Appeals of Washington, Division 2 - May 3, 2022 - P.3d - 2022 WL 1397407

County resident brought action against city seeking declaratory judgment declaring invalidity of two city zoning ordinances.

Superior Court granted city's motion to dismiss and denied resident's motion for reconsideration.

The Court of Appeals held that:

- Resident lacked standing, and
- City's joint comprehensive growth management plan with county did not confer taxpayer standing.

County resident failed to show that he was affected in any material way by ordinances of city that he did not inhabit, and thus, he lacked standing to bring action against city to obtain judgment declaring the invalidity of two city zoning ordinances which made using building he sought to purchase for storage purposes a non-conforming use that would require him to obtain a conditional use permit, where he did not allege that he was a city purchaser, did not allege he was a city resident or that he owned any real property in the city, and did not allege that his interest in the building at issue was more than speculative.

City's joint comprehensive growth management plan with county did not make county resident a city taxpayer so as to confer taxpayer standing to bring action against city he did not inhabit to obtain declaratory judgment to declare invalidity of two city ordinances which made using building he sought to purchase for storage purposes a non-conforming use that would require him to obtain a conditional use permit; prospective purchaser did not show that city ordinances were connected in any way to the joint plan, as nothing in the plan universally adopted or even cited the ordinances, nor did he show that county could jointly enforce the city ordinances.

ANNEXATION - ILLINOIS

Village of Kirkland v. Kirkland Properties Holdings Company, LLC I

Appellate Court of Illinois, Second District - April 21, 2022 - N.E.3d - 2022 IL App (2d) 200780 - 2022 WL 1183531

Village brought action against successor owners of original landowner, alleging they breached a recorded annexation agreement, and sought damages or, in the alternative, injunctive relief in form of specific performance.

The Circuit Court granted successor owners' motion to dismiss for failure to state a claim and awarded attorney's fees in their favor. Village appealed.

The Appellate Court held that:

- Annexation agreement was a covenant that rant with land to bind successor owners, and
- Village sufficiently pled a claim that successor owners that purchased portion of subject property were bound to terms of annexation agreement.

Annexation agreement between village and original landowner was a covenant that ran with the land that bound successor owners to its terms and obligations, where agreement expressly stated that it was "binding upon heirs, executors, administrators, successors, and assigns," and on parties to agreement, very purpose of agreement was for village to annex property to develop it, and agreement clearly provided privity of estate between village and successor owners as it provided that it was binding on successors, and thus, village and each successor owner had a legally recognized interest in the development of the property.

Village sufficiently pled a claim that successor owners that only purchased a portion of the subject property were bound to terms of an annexation agreement between village and original landowner, which required successors to extend credit to village proportionate to amount of lots they owned in a subdivision in order for village to construct roads; although agreement neither expressly provided for nor expressly precluded application of terms of the agreement when a subsequent owner purchased less than entire property, terms clearly contemplated possibility that the subject property would be subdivided and developed in stages and phases, which was entirely consistent with proportionally burdening successor owners with obligations.

PUBLIC UTILITIES - CALIFORNIA

California Public Utilities Commission v. Federal Energy Regulatory Commission

United States Court of Appeals, Ninth Circuit - March 17, 2022 - 29 F.4th 454 - 22 Cal.

Daily Op. Serv. 2913 - 2022 Daily Journal D.A.R. 2667

California Public Utilities Commission (CPUC) and other state agencies petitioned for review of Federal Energy Regulatory Commission's (FERC) decisions, awarding to three California-based public utilities upward adjustments, or "incentive adders," to their rate of return on equity, over CPUC's objection that utilities should not receive awards as their participation in California independent system operator (CAISO) was involuntary and mandated by state law, so adder could not induce utilities to remain members of CAISO.

The United States Court of Appeals for the Ninth Circuit granted petitions and remanded. On remand, FERC determined that utilities' membership in CAISO was voluntary under California law, so incentive adders were warranted. CPUC and other California agencies petitioned for review of remand orders.

The Court of Appeals held that:

- FERC's remand orders did not violate mandate rule;
- *Erie* doctrine did not apply to require FERC to defer to California's interpretation of California law; and
- FERC reasonably interpreted California law as allowing utilities to voluntarily leave CAISO.

Federal Energy Regulatory Commission (FERC) did not violate mandate rule, in remand orders reaffirming award of incentive adders to public utilities' rate of return on equity because their participation in California independent system operator (CAISO) was voluntary and not mandated by California law; on remand FERC did not decide issue that Court of Appeals had already decided, as court did not definitively hold that California law prevented utilities from leaving CAISO without approval, or deviate from court's mandate that remanded case for further proceedings and instructed FERC to inquire into utility's specific circumstances as to whether it could unilaterally leave CAISO and, thus, whether incentive adder could induce utility to remain in CAISO.

Federal Energy Regulatory Commission's (FERC) conclusion, in remand orders reaffirming award of incentive adders to public utilities' rate of return on equity because their participation in California independent system operator (CAISO) was voluntary and not mandated by California law, that Erie doctrine did not apply, was not arbitrary, capricious, or contrary to law, since incentive adder and requirement that utility be voluntary member of CAISO to qualify for adder arose from federal law, and federal law as source of right sued upon did not change merely because California law dictated whether membership in CAISO was voluntary.

Court of Appeals would apply de novo review, rather than according deference, to Federal Energy Regulatory Commission's (FERC) interpretation of California law, in remand orders reaffirming award of incentive adders to public utilities' rate of return on equity because their participation in California independent system operator (CAISO) was voluntary and not mandated by California law, since FERC was not interpreting its own electricity regulations and instead was interpreting California law and public policy, in which FERC lacked specific expertise, and Congress had not assigned FERC task of interpreting state statutes.

Under California law, as predicted by Court of Appeals, Federal Energy Regulatory Commission's (FERC) interpretation, in remand orders reaffirming award of incentive adders to public utilities' rate of return on equity, that utilities' participation in California independent system operator (CAISO) was voluntary and not mandated by California law, was not arbitrary, capricious, or contrary to law, under Administrative Procedure Act (APA); California failed to identify any California Code provision mandating CAISO membership, statutory provisions that California relied

on merely directed creation of CAISO and encouraged utilities to join, and California courts would not defer to prior administrative decision suggesting the contrary, as it was inconsistent with relevant California statute.

IMMUNITY - ILLINOIS

Schultz v. St. Clair County

Supreme Court of Illinois - April 21, 2022 - N.E.3d - 2022 IL 126856 - 2022 WL 1180973

Husband, as special administrator of wife's estate, brought wrongful death and survival action against county, county 911 agency, county emergency telephone system board, and unidentified 911 dispatchers, alleging that defendants engaged in willful and wanton conduct by refusing to dispatch 911 services, which resulted in wife's death.

Defendants moved to dismiss, arguing that they were entitled to absolute immunity under the Local Governmental and Governmental Employees Tort Immunity Act and that wife's conduct was sole proximate cause of her injuries and death.

The Circuit Court granted motion. Husband appealed. The Appellate Court affirmed. Husband petitioned for leave to appeal and petition was allowed.

The Supreme Court held that:

- As matter of apparent first impression, husband's allegations implicated limited immunity provided by Emergency Telephone System (ETS) Act, rather than absolute immunity provided by Tort Immunity Act, but
- Dispatcher's refusal to dispatch police to convenience store to prevent wife from driving under the influence of alcohol was not proximate cause of wife's death.

Husband's allegations that public safety answering point (PSAP) employee's intentional or reckless refusal to dispatch vital emergency services resulted in wife's death implicated limited immunity provided by Emergency Telephone System (ETS) Act, rather than absolute immunity provided by Local Governmental and Governmental Employees Tort Immunity Act; ETS Act's limited immunity provision, by its plain language, governed scope of liability relating to PSAP employee's "performance…or provision of 9-1-1 service[,]" and, further, ETS Act, which provided comprehensive rules and regulations applicable to 911 dispatchers in relation to answering, receiving, or dispatching emergency services, was both more specific and more recent than Tort Immunity Act, indicating that legislature intended it to govern.

Emergency dispatcher's refusal to dispatch police to convenience store to prevent motorist from driving under the influence of alcohol was not proximate cause of motorist's death, which occurred when motorist drove her vehicle off the road while driving away from convenience store, where dispatcher did not furnish motorist with vehicle or alcohol or facilitate her decision to get into her vehicle and drive while intoxicated, and, at most, dispatcher's alleged conduct furnished condition by which motorist's injury was made possible, and thus it could not be established that injury to motorist would not have occurred absent dispatcher's alleged refusal to dispatch police.

BONDS - OKLAHOMA

Matter of Oklahoma Development Finance Authority for Approval of Not to Exceed $800,000,000 Ratepayer-Backed Bonds

Supreme Court of Oklahoma - May 3, 2022 - P.3d - 2022 WL 1312957 - 2022 OK 41

Oklahoma Development Finance Authority (ODFA) filed application for approval of issuance of ratepayer-backed bonds pursuant to February 2021 Regulated Utility Consumer Protection Act to finance recovery of natural gas costs incurred by public utility during two-week period of record cold temperatures.

Ratepayers filed protests challenging bonds.

On assumption of original jurisdiction, the Supreme Court held that:

- ODFA followed correct statutory process for authorization to issue bonds, and
- Bonds did not violate constitutional debt-limitation provisions.

Oklahoma Development Finance Authority (ODFA) followed correct statutory process pursuant to February 2021 Regulated Utility Consumer Protection Act for authorization to issue ratepayer-backed bonds to finance recovery of natural gas costs incurred by public utility during two-week period of record cold temperatures; ODFA gave proper notice of its application and required hearing, and final financing order set out parameters of bonds' issuance, terms, conditions, requirements, and interest.

Ratepayer-backed bonds issued by Oklahoma Development Finance Authority (ODFA) pursuant to February 2021 Regulated Utility Consumer Protection Act to finance recovery of natural gas costs incurred by public utility during two-week period of record cold temperatures did not violate constitutional debt-limitation provisions; bonds would be repaid through a charge on each ratepayer's monthly bill, such charge was secure revenue source, and money to directly pay bonds was reliable, predictable fees from outside sources, rather than from one state entity to another.

PUBLIC RECORDS - OREGON

City of Portland v. Bartlett

Supreme Court of Oregon - April 28, 2022 - P.3d - 369 Or. 606 - 2022 WL 1260316

City sought declaratory judgment that public records sought by requester, and ordered produced by district attorney, were exempt from disclosure as attorney-client privileged material.

Requester filed counterclaim seeking declaratory judgment that records must be disclosed. The Circuit Court granted city's motion for summary judgment and denied requester's motion for summary judgment. Requester appealed. The Court of Appeals reversed and remanded. City obtained leave to appeal.

The Supreme Court held that:

- Communications between city attorney and city officials that were over 25 years old were not exempt from disclosure under public records law on ground that they were subject to attorney-client privilege, and

- Public records law prevailed over any inconsistent city law.

Communications between city attorney and city officials that were over 25 years old were not exempt from disclosure under public records law on ground that they were subject to attorney-client privilege; although documents were exempt from disclosure at time they were prepared, 25-year sunset provision applied to all public records.

Application of public records law for disclosure of communications between city attorney and city officials that were over 25 years old did not interfere with "structure and procedures" of city's government, and therefore home rule under Oregon Constitution, but instead was application of general law addressed primarily to substantive social, economic, or other regulatory objectives of the state, and therefore public records law prevailed over any inconsistent city law; even legislature's disclosure requirement and that provision's related effect on evidentiary privilege, as applied to city's attorney-client communications, were somehow inconsistent with provisions of city code that made reference to that privilege, city would have to comply.

MUNICIPAL ORDINANCE - WASHINGTON

Bass v. City of Edmonds

Supreme Court of Washington - April 21, 2022 - P.3d - 2022 WL 1178491

Individual gun owners brought action against city under the Uniform Declaratory Judgment Act challenging city ordinance that made it a civil infraction to allow a minor, at-risk person, or prohibited person access to a firearm that was not secured by a locking device, or to store unlocked firearm.

The Superior Court granted gun owners' motion for summary judgment in part and concluded that the ordinance provision that made it a civil infraction if a minor, at-risk person, or prohibited person obtained a firearm from an owner's premises that was not secured by a locking device was preempted by state law. City appealed. The Court of Appeals affirmed in part and reversed in part by concluding that the entire ordinance was preempted by state law. Supreme Court granted review.

The Supreme Court held that:

- Individual gun owners had standing to challenge unauthorized access provision of city ordinance that made it civil infraction to knowingly or reasonably allow minor, at-risk person, or prohibited person access to firearm and that person obtains firearm, and
- City ordinance that made it a civil infraction to allow minor, at-risk person, or prohibited person access to firearm that was not secured by locking device or to store unlocked firearms was preempted by state statute that preempted entire field of firearms regulation.

INSURANCE - FLORIDA

White v. Ascendant Commercial Insurance, Inc.

District Court of Appeal of Florida, Third District - March 30, 2022 - So.3d - 2022 WL 945497 - 47 Fla. L. Weekly D774

Passenger, who was injured in automobile accident with school board's bus while riding in his employer's work vehicle, brought action against school board and his employer's liability insurer.

After passenger settled with school board for $175,000 and school board was dismissed with prejudice, passenger sought to recover uninsured motorist (UM) benefits from his employer's insurer. The Circuit Court granted insurer's motion for summary judgment. Passenger appealed.

The District Court of Appeal held that:

- School board was not self-insured government entity, for purposes of being classified as uninsured or underinsured;
- Passenger did not exhaust school board's liability insurance policy limits, and, thus, UM coverage under employer's insurance policy was not triggered; and
- Trial court could make determination that school board was not underinsured without jury first determining passenger's total damages.

School board was not self-insured government entity, for purposes of being classified as uninsured or underinsured under uninsured motorist (UM) statute, with regard to accident involving school board bus; school board regularly paid premiums to insurance company for liability coverage, school board's $200,000 retained limit did not render it a self-insurer, and insurance policy plainly indicated that school board was not self-insured.

Passenger, who was injured in automobile accident with school board's bus while riding in his employer's work vehicle, did not exhaust school board's liability insurance policy limits, and, thus, uninsured motorist (UM) coverage under employer's insurance policy was not triggered; school board's insurance policy provided limit of $200,000, passenger settled with school board for $175,000, and UM coverage under employer's policy was only triggered when tortfeasor's insurance coverage was exhausted through payment of judgments or settlements.

Trial court could make determination that school board was not underinsured, with regard to incident in which passenger was injured in automobile accident with school board's bus while riding in his employer's work vehicle, based on amount of passenger's settlement agreement with school board, without needing jury to first determine passenger's total damages, in passenger's action against his employer's insurer to recover uninsured motorist (UM) coverage; it was trial court's proper function to make the initial determination of law as to whether UM coverage was available.

MUNICIPAL CORPORATIONS - LOUISIANA

In re City of St. Martinville

Court of Appeal of Louisiana, Third Circuit - March 23, 2022 - So.3d - 2022 WL 853866 - 2021-700 (La.App. 3 Cir. 3/23/22)

After mayor vetoed ordinance passed by city council amending its special legislative charter to convert mayoral position from full-time to part-time, city filed petition for declaratory judgment, seeking judgment declaring that mayor was precluded from vetoing actions taken by city council.

Following hearing, the District Court, the Judicial District granted declaratory judgment in favor of city. Mayor appealed.

The Court of Appeal held that:

- Mayor had power to veto actions of city council, and
- City, rather than mayor, was responsible for costs associated with action.

Mayor of city that had adopted special legislative charter had power to veto actions of city council as provided in statute specifying that Lawrason Act applied if city charter of municipality governed by special legislative charter was silent on a matter; while Act previously only applied to municipalities not governed by special legislative charter, change to existing law made it clear that distinction existed between a charter being silent on an issue versus conflicting with Act by specifying the Act applied when charter was silent, and city's special legislative charter was silent on the issue of veto.

City that had adopted special legislative charter, rather than mayor, was responsible for costs associated with declaratory judgment action filed by city seeking judgment declaring that mayor was precluded from vetoing actions taken by city council; city instituted litigation and named mayor as a person of interest, and mayor responded to suit in her capacity as mayor for the city.

PUBLIC UTILITIES - NORTH CAROLINA

Daedalus, LLC v. City of Charlotte

Court of Appeals of North Carolina - April 5, 2022 - S.E.2d - 2022-NCCOA-203 - 2022 WL 1009836

Developer brought action against city, alleging that city's collection of sewage and water capacity fees as mandatory precondition of connecting developer's existing water and sewer infrastructure to city's water and sewer systems constituted an unlawful ultra vires action.

The Superior Court partially granted developer's summary judgment motion, ruling that city's collection of capacity fees were ultra vires, granted developer's motion to amend order to correct clerical error, and granted city's motion for certification of judgment by issuing a second amended order stating that the order was certified for appeal.
City appealed.

The Court of Appeals held that:

- Trial court did not properly certify interlocutory order for appeal;
- Interlocutory order did not compel immediate payment of a significant amount of money;
- Court of Appeals would exercise its discretion to grant city's petition for writ of certiorari to reach merits of city's appeal of interlocutory order; and
- City's collection of fees was ultra vires.

Sewage and water capacity fees charged to developer by city were charged for future discretionary spending and not for contemporaneous use of system or for services furnished, as required by version of statute in effect at time, and thus city's collection of fees was ultra vires, although city collected fees at time user requested service and not at time property owner sought building approval and fees were used to reserve specific capacity space; fees were charged to pay for capacity costs associated with serving new growth, fees were paid at time of application for new service, service connection fees consisted of tapping fee and capacity fee, and funds from collected fees were deposited into city's general water and sewer fund that carried over time to fund future operations.

DEVELOPMENT FEES - NORTH CAROLINA

TAC Stafford, LLC v. Town of Mooresville

Court of Appeals of North Carolina - April 5, 2022 - S.E.2d - 2022-NCCOA-217 - 2022 WL 1009481

Real estate developer brought action against town alleging inverse condemnation, refund of illegally exacted fees, and breach of contract, and further seeking declaratory, injunctive, and mandamus relief in connection with town's requirement that developer make off-site improvements as condition of development approval.

The Superior Court granted developer's motion for summary judgment and petition for writ of mandamus, denied town's motion for summary judgment, and reserved determination of financial issues. Town appealed and moved to stay or enjoin execution or enforcement of the order and writ of mandamus. The same Court subsequently granted developer's motion for attorney fees and costs, granted in part developer's motion for reimbursement of expenditures, and dismissed developer's remaining claims. Town and developer appealed.

The Court of Appeals held that:

- Town lacked statutory authority to withhold issuance of certificates of occupancy or other development approvals for subdivision or to condition such approvals on completion of off-site improvements;
- Real estate developer was entitled to award of mandatory attorney fees;
- As matter of apparent first impression, funds paid by developer to entities other than town were not "exactions" under statute requiring municipalities to return illegally exacted funds with interest;
- Remand was required for trial court to conduct additional proceedings to determine how much developer was entitled to recover from town; and
- Issuance of writ of mandamus rendered moot all other claims by developer against town.

IMMUNITY - WASHINGTON

Ghodsee v. City of Kent

Court of Appeals of Washington, Division 1 - April 18, 2022 - P.3d - 2022 WL 1133772

Detainee, who had been shot by county police officer and detained pursuant to Involuntary Treatment Act, and detainee's mother brought negligence action against city and county.

The Superior Court granted summary judgment in favor of city and county. Detainee appealed.

The Court of Appeals held that:

- Issue of whether county owed duty to detainee pursuant to special relationship exception to public duty doctrine was properly before court;
- Designated mental health professionals (DMHP) did not have definite, established, and continued relationship with detainee;
- Language of non-emergency detention (NED) order did not create "take charge" duty;
- Police officers did not owe detainee duty to detain him more swiftly; and
- City and county were entitled to statutory immunity.

City and county were entitled to statutory immunity for actions with regard to decision to detain detainee pursuant to Involuntary Treatment Act, in negligence action brought by detainee and

mother against city and county; statute plainly provided immunity for actions, as well as decision-making, taken related to decision regarding whether to detain person for evaluation and treatment, and detainee did not demonstrate that either city or county owed him individualized duty of care as matter of law, as necessary to establish gross negligence.

REFUNDING BONDS - KANSAS

Snodgrass v. City of Wichita

Court of Appeals of Kansas - April 1, 2022 - Slip Copy - 2022 WL 982008

After accepting a developer's petition to finance street, sewer, and water improvements for a housing development under, the City of Wichita levied special assessments against Appellants and other property owners in 2004.

The City issued bonds to pay for the improvements, then in 2011 issued refunding bonds to benefit from lower interest rates. But the City did not refund to property owners any of the money it saved by doing so. Appellants sued the City, asserting an entitlement to money based on the difference between the interest rate on the original bonds in 2004 and the interest rate of refunding bonds issued in 2011.

The City responded and moved for summary judgment, arguing that it was not legally required to reduce any assessments after issuing the refunding bonds. The City also asked the district court to dismiss Appellants' motion based on the statute of limitations, lack of notice, and immunity.

Appellants argued that their claims were unrelated to the City's original assessment, so they need not comply with the 30-day statute of limitations in K.S.A. 12-6a11 — theirs was not a "suit to set aside the said assessments or otherwise question the validity of the proceedings." Instead, Appellants argued that they sued soon after learning the City had issued refunding bonds for their property.

The Court of Appeals found – viewing the pleading and the facts in the light most favorable to Appellants – that the City failed to show that Appellants' suit questioned the validity of the assessment proceedings, and thus the City failed to show that the 30-day statute of limitations under K.S.A. 12-6a11 applied.

However, Appellants failed to show that the three-year statute of limitations applicable to implied contracts under K.S.A. 60-512 was tolled. Thus, their implied contract claims were barred by that statute.

As to the takings claim, the court held that Appellants did not sue until seven years after the City published notice of the refunding bonds, and thus their takings claim under § 1983 was barred by the two-year statute of limitations in K.S.A. 60-513(a)(4).

Appellants also argued that a property owner cannot be assessed any more than the special benefit incurred because that would constitute a taking of private property for public use without compensation, regardless of the amount. But the Court noted that precedent limited takings claims to those that show a "substantial excess" of cost over benefit.

In this instance, the Court focused on the $300 purportedly lost by the Appellants – as opposed to the $60 million saved by the City – and held that Appellants thus failed to show the City exacted "the cost of a public improvement in substantial excess of the special benefits accrued."

EMINENT DOMAIN - MICHIGAN

Gym 24/7 Fitness, LLC v. State

Court of Appeals of Michigan - March 31, 2022 - N.W.2d - 2022 WL 982050

Gym owner filed suit against the State, alleging an unconstitutional taking of its business property by operation of the governor's executive orders issued during the COVID-19 pandemic.

The Court of Claims denied State's motion for summary disposition. Appeals were taken.

The Court of Appeals held that:

- Executive orders did not involve a physical taking;
- Executive orders did not deprive gym owner of all economically productive or beneficial use of its private property; and
- Executive orders did not constitute a regulatory taking under Penn Central.

Governor's executive orders that temporarily closed and imposed restrictions on gym owner's business during the COVID-19 pandemic did not involve a physical taking of its property, as required for gym owner to be entitled to reasonable compensation, where there was no allegation or evidence that the State physically acquired, took possession of, occupied, or appropriated the gym owner's private property.

Governor's executive orders that temporarily closed and imposed restrictions on gym owner's business during the COVID-19 pandemic did not deprive gym owner of all economically productive or beneficial use of its property, and thus, there was no regulatory taking for gym owner to be entitled to reasonable compensation; closure of fitness centers for six months was temporary and considerably short in duration, there was no allegation or evidence that gym owner suffered a total loss or the complete elimination or obliteration of value by operation of the executive orders, property clearly still had value, even if no revenue or profit was generated during the closure, and any lost value relative to real and personal property likely recovered as soon as temporary closure was lifted.

Governor's executive orders that temporarily closed and imposed restrictions on gym owner's business during the COVID-19 pandemic did not constitute a regulatory taking under Penn Central, as required for gym owner to be entitled to reasonable compensation; character of government's action of temporarily closing gym owner's business was compelling in that the aim of executive orders was to stop the spread of the COVID-19, gym owner accepted that governor's executive orders were issued solely for a public purpose, and it did not contest the prudence of the governor's actions or her authority to issue the executive orders.

EMINENT DOMAIN - MICHIGAN

Barber v. Charter Township of Springfield, Michigan

United States Court of Appeals, Sixth Circuit - April 11, 2022 - F.4th - 2022 WL 1077308

Property owner filed state court action against township, county, and their parks and recreation departments alleging that their proposed removal of dam near her property amounted to unconstitutional taking and trespass.

Following removal, the United States District Court entered judgment on pleadings in defendants' favor, and owner appealed.

The Court of Appeals held that:

- Owner's claim for injunctive relief was ripe for adjudication, and
- Owner faced sufficiently concrete, particularized, and imminent injury-in-fact to establish her standing.

Property owner's claim for injunctive relief was ripe for adjudication in her action against county and township alleging that their proposed removal of dam near her property amounted to unconstitutional taking and trespass, even though dam had not yet been removed, where county and township had reached final decision to remove dam.

Property owner faced sufficiently concrete, particularized, and imminent injury-in-fact to establish her standing to assert claim that proposed removal of dam near her property by county and township amounted to unconstitutional taking and trespass, even though removal had not commenced; county and township had made final decision to remove dam and invested at least $600,000 into dam removal and restoration project, owner claimed that removing dam would change flow of water on her property and likely alter its configuration, and harms she faced were particular to her property.

ZONING & PLANNING - NORTH CAROLINA

Town of Midland v. Harrell

Court of Appeals of North Carolina - March 15, 2022 - S.E.2d - 2022-NCCOA-167 - 2022 WL 775040

Town filed action against developers, seeking order of abatement, a permanent mandatory injunction, and collection of civil penalties, costs, and attorney's fees after developers failed to maintain subdivision roads.

Town and developers filed cross-motions for summary judgment. The Superior Court granted summary judgment in favor of town, and denied developers' motion for relief from judgment. Developers appealed.

The Court of Appeals held that:

- Town had standing to pursue action against developers;
- Developers failed to establish they had a right to appeal civil penalties imposed;
- Remand of trial court's permanent injunction and abatement order was required; and
- Developers were entitled to an award of attorney's fees.

Town had standing to pursue action against developers after they allegedly failed to maintain subdivision roads as part of their development project, where town sought to exercise its powers granted to it under state law to seek fines, a mandatory injunction, and an order of abatement against developers, town also sought to exercise its power to enforce its own zoning ordinances, and based on town's own ordinances, town council was not required to adopt a resolution to authorize town to file its complaint against developers.

Civil penalties imposed by zoning administrator did not constitute a "final and binding order,

requirement or determination made in writing" under statute governing quasi-judicial zoning decisions, and thus, developers did not establish that they had right to appeal them, where civil penalties imposed simply enforced judgment that found developers committed zoning violations, which they previously and unsuccessfully appealed town's zoning and subdivision administrator's issuance of notice of violation, and pursuant to town's ordinances, there was no other avenue available to challenge enforcement of that judgment in form of civil penalties.

Remand of trial court's mandatory permanent injunction and order of abatement was required for trial court to make further findings of fact of whether developers failed to meet specific Department of Transportation (DOT) standards and what was required for compliance after developers allegedly failed to maintain subdivision roads, where trial court failed to resolve dispute between town and developers as to exactly how to bring development roads into compliance with DOT standards, and as written, developers could not know from terms of trial court's injunction and abatement order what they had to do to bring roads into compliance.

Developers were entitled to award of attorney's fees for fees incurred contesting over 200 civil penalties assessed against them during pendency of earlier appeal of their lawsuit against town board of adjustment after its zoning and subdivision administrator issued a notice of violation for developers' alleged failure to maintain subdivision roads, where town was not authorized to impose penalties while developers' first lawsuit was on appeal, and attorney's fees statute provided that fees would be awarded when a city violated a state or case law setting forth unambiguous limits on its authority.

ZONING & PLANNING - OHIO

Rice v. Village of Johnstown, Ohio

United States Court of Appeals, Sixth Circuit - April 8, 2022 - F.4th - 2022 WL 1055496

Property owners filed § 1983 action alleging that village had unlawfully delegated legislative authority to its planning and zoning commission, violating its due process rights under United States and Ohio Constitutions.

The United States District Court entered summary judgment in village's favor, and owners appealed.

The Court of Appeals held that:

- Village's purportedly unconstitutional delegation of its legislative authority constituted procedural injury sufficient to support owners' standing, and
- Owners satisfied causation requirement for standing.

Village's purportedly unconstitutional delegation of its legislative authority to its planning and zoning commission in deciding whether to approve property owners' proposed annexation and rezoning proposal for residential development constituted procedural injury sufficient to support owners' standing to assert due process claim against village, even though property in question was in neighboring township, and property's zoning status had not changed; owners' procedural injury was tied to their economic interest in developing its property, their development plans could not proceed without commission's approval, and annexation by village was not prerequisite to entering zoning process.

Property owners' procedural injury arising from village's purportedly unconstitutional delegation of its legislative authority to its planning and zoning commission in deciding whether to approve their

proposed annexation and rezoning proposal for residential development was fairly traceable to village's allegedly unconstitutional process, as required to satisfy causation requirement for standing in their action alleging denial of procedural due process, despite village's contention that owners' injury also arose from denial of annexation, and owners had not challenged denial of annexation, where village permitted petition for annexation to lapse after commission denied preliminary zoning application.

EMINENT DOMAIN - PENNSYLVANIA

Trinidad v. Department of Transportation

Commonwealth Court of Pennsylvania - March 30, 2022 - A.3d - 2022 WL 945548

Department of Transportation (DOT) brought condemnation action against landowners, seeking to quiet title and issuance of a writ of possession of commercial property after landowners failed to vacate the premises.

The Court of Common Pleas dismissed DOT's motion for writ of possession. DOT appealed.

The Commonwealth Court held that:

- Issue of whether DOT was entitled to possession of condemned property was separate from ongoing litigation;
- Issue of whether DOT was entitled to possession of condemned property was an important issue to the public;
- Denial of DOT's appeal would have resulted in an irreparable loss; and
- DOT was entitled to writ of possession.

Issue of whether Department of Transportation (DOT) was entitled to possession of landowners' condemned commercial property was separate from ongoing litigation, as required for trial court's denial of DOT's motion for writ of possession to be a final appealable order under collateral order doctrine; there was no dispute that amount of just compensation, as estimated by DOT, had been paid to landowners, thus, issue of right to possession remained, and that issue was significantly different from questions underlying the issue of landowners' entitlement for full compensation from condemnation of its commercial property.

Issue of whether Department of Transportation (DOT) was entitled to possession of landowners' condemned commercial property was an important issue that went beyond the present litigation, as required for trial court's denial of DOT's motion for writ of possession to constitute a final appealable order under collateral order doctrine; landowners' right to just compensation from DOT's taking and their subsequent divestment of all interests in the property, in addition to DOT's right to make use of property for public use to which it had established a legal right to possession, involved rights that were deeply rooted and involved important public policy considerations.

Denial of Department of Transportation's (DOT) appeal would have resulted in an irreparable loss, as required for trial court's order that denied DOT's motion for writ of possession to constitute a final appealable order under collateral order doctrine, where if order was not immediately appealable, DOT would been required to wait until Board of Viewers issued its decision on landowners' claim for full compensation, which would have caused DOT and the public to suffer losses, and substantial costs that DOT would incur due to delays and violations of contracts with third parties if it was forced to litigate its appeal from Board's decision prior to taking possession

would not have been adequately vindicable and, effectively, could not be undone.

Department of Transportation (DOT) was entitled to a writ of possession for commercial property that was part of DOT's condemnation action against landowners, where landowners did not file preliminary objections to DOT's declaration of taking, DOT paid, and landowners accepted, initial and subsequent estimated amounts of compensation for its taking of landowners' commercial property, and Federal Residential Eviction Halt did not apply to DOT's condemnation action because it only pertained to residential evictions.

BANKRUPTCY - TEXAS

In re Jack County Hospital District

United States Bankruptcy Court, N.D. Texas, Fort Worth Division - March 18, 2022 - Slip Copy - 2022 WL 829172

Jack County Hospital District commenced a municipal debt adjustment case by filing a voluntary petition for relief under chapter 9 of Title 11 of the United States Code in the United States Bankruptcy Court for the Northern District of Texas on June 11, 2020.

The Bankruptcy Court entered its Findings of Fact, Conclusions of Law, and Order Confirming the Second Amended Plan of Adjustment on March 18, 2022.

PUBLIC FINANCE - ARIZONA

State v. Arizona Board of Regents

Supreme Court of Arizona - April 5, 2022 - P.3d - 67 Arizona Cases Digest 34 - 2022 WL 1011795

Attorney General brought action against Arizona Board of Regents (ABOR) and vice president of state university, seeking injunctive relief and relief under quo warranto statute related to an agreement between ABOR and operator of hotels to build and operate hotel and conference center on ABOR's property, and alleging that agreement violated state constitution's gift clause and constituted illegal payment of public money.

The Superior Court granted ABOR's motion for summary judgment on claim under gift clause, granted ABOR's motions to dismiss remaining counts, entered judgment for ABOR and vice president, and awarded ABOR and vice president attorney fees and costs. Attorney General appealed. The Court of Appeals affirmed. Attorney General filed petition for review, which was granted.

The Supreme Court held that:

- Attorney General lacked authority to bring claim that ABOR abused its tax-exempt status and improperly diverted property tax revenues;
- Attorney General lacked authority to bring quo warranto action based on claim that ABOR made conveyance to operator in order to evade taxes;
- Attorney General had authority to bring quo warranto action based on claim that ABOR violated statute and non-delegation doctrine in lease provision of agreement with operator;
- Five-year, rather than one-year, statute of limitations applied to claim that ABOR violated "Gift

Clause" of state constitution; and
- Amended complaint related back to original complaint, for limitations purposes.

Property held by Arizona Board of Regents (ABOR), which was a state agency, was tax-exempt state property, and thus Attorney General lacked authority under statute authorizing it to enforce payment of taxes to bring claim that ABOR abused its tax-exempt status and improperly diverted property tax revenues by entering into agreement with operator of hotels to build and operate hotel and conference center on ABOR's land.

Attorney General lacked authority under quo warranto statute to bring action against Arizona Board of Regents (ABOR) based on claim that ABOR unlawfully exercised its authority by making conveyance to evade taxes in agreement with operator of hotels to build and operate hotel and conference center on ABOR's land; property held by ABOR was tax-exempt state property, such that there was no applicable tax to evade.

Attorney General had authority to bring quo warranto action against Arizona Board of Regents (ABOR) alleging that portion of agreement between ABOR and operator of hotels to build and operate hotel and conference center on ABOR's property that allowed operator to lease the hotel and conference center property from ABOR for 60 years, and to purchase property from ABOR at end of lease term for a nominal fee, was not for benefit of state, as required by statute governing ABOR's authority, but rather for the benefit and use of operator, and that lease violated non-delegation doctrine, where claim was based on allegation that ABOR unlawfully exercised its franchise.

Five-year statute of limitations under statute governing actions brought by Attorney General to recover state monies illegally paid, rather than one-year statute of limitations applicable to actions to enjoin illegal payments against any public entity or public employee, applied to Attorney General's claim alleging that money Arizona Board of Regents (ABOR) agreed to contribute towards construction of conference center in agreement with operator of hotels to build and operate hotel and conference center on ABOR's property violated "Gift Clause" of state constitution; five-year statute of limitations created exception for public-monies claims brought by Attorney General that supplanted the one-year statute of limitations, and exempted such claims from entirety of one-year statute of limitations.

Amended complaint's count alleging violation of state constitution's "Gift Clause" and illegal payment of public money related back to filing of original complaint, for limitations purposes, in action brought by Attorney General against Arizona Board of Regents (ABOR) challenging ABOR's agreement with operator of hotels to build and operate hotel and conference center on ABOR's land, even if the operative facts supporting the added claim differed from those supporting the original claims; claims in amended complaint and claims in original complaint all arose from the agreement between ABO and operator and, thus, arose from the same transaction.

ZONING & PLANNING - CALIFORNIA

Keen v. City of Manhattan Beach

Court of Appeal, Second District, Division 8, California - April 6, 2022 - Cal.Rptr.3d - 2022

WL 1021928

Owner of property rented on short-term basis petitioned for writ of mandate to enjoin city from enforcing zoning ordinances prohibiting short-term rentals.

The Superior Court enjoined ban on short-term rentals pending approval of zoning ordinances by Coastal Commission. City appealed.

The Court of Appeal held that:

- City's residential zoning ordinances always permitted short- and long-term rentals, and thus ban on short-term rentals was amendment to local coastal program requiring approval by Coastal Commission;
- Short-term residential rentals did not fall within definition of "hotels, motels, and time-share facilities"; and
- Court of Appeal would not take judicial notice of decades-old definition of "hotel."

ZONING & PLANNING - CONNECTICUT

McLoughlin v. Planning and Zoning Commission of Town of Bethel

Supreme Court of Connecticut - April 5, 2022 - A.3d - 342 Conn. 737 - 2022 WL 1002241

Applicants sought review of town planning and zoning commission's denial of application for special permit to construct and operate a crematory in business park in industrial zone.

The Superior Court dismissed. The Appellate Court affirmed. Applicants appealed.

The Supreme Court held that:

- Objections based on general standards in zoning regulations may serve as a basis to deny a special permit application; but
- Substantial evidence did not support commission's determination as adverse environmental effects from emissions;
- Substantial evidence did not support determination as to detrimental effect on neighbors or development;
- Substantial evidence did not support determination as to harmonious and orderly development; and
- Substantial evidence did not support determination as to suitability of design elements on other properties' value.

PUBLIC LAWSUITS - INDIANA

Williamson v. Razer

Court of Appeals of Indiana - March 31, 2022 - N.E.3d - 2022 WL 965211

County residents brought actions against county council and county redevelopment commission for violations of Open Door Law, and seeking declaratory judgment voiding ordinances and resolution related to project to construct zinc oxide manufacturing plant and other public improvements.

Actions were consolidated, and county filed motion for residents to post bond under Public Lawsuit

Statute, which the Superior Court denied. County filed interlocutory appeal.

The Court of Appeals held that:

- Action was "public lawsuit" within meaning of Public Lawsuit Statute, and
- Claims sought to vindicate public, rather than private interests, as required to warrant bond under Public Lawsuit Statute.

Consolidated lawsuit alleging violations of Open Door Law and seeking to void county ordinances and resolution related to project to construct zinc oxide manufacturing plant and other public improvements was a "public lawsuit," within meaning of provision of Public Lawsuit Statute requiring plaintiffs to post a bond, in action brought by county residents against county council and county redevelopment commission; alleged Open Door Law violations directly challenged the validity of the financing of the project, which would prevent the funding and construction of the project.

County residents' claims alleging violations of Open Door Law and seeking to void county ordinances and resolution related to project to construct zinc oxide manufacturing plant and other public improvements sought to vindicate public, rather than private interests, thus warranting requirement that residents post bond under Public Lawsuit Statute, where complaint alleged that county created a secret committee that negotiated with the manufacturing plant certain financial and environmental terms for the construction of the project, that the negotiated terms were incorporated into the resolution, and that the public was not granted proper access to the meeting in which the ordinances required for the construction of the project were passed.

PUBLIC UTILITIES - MAINE

General Marine Construction Corporation v. Public Utilities Commission

Supreme Judicial Court of Maine - March 31, 2022 - A.3d - 2022 WL 964164 - 2022 ME 20

Water utility customer sought review of Public Utilities Commission's (PUC) order declining to open a formal investigation into a water billing dispute after the Consumer Assistance and Safety Division (CASD) of PUC conducted a summary investigation of customer's complaint.

The Supreme Judicial Court held that:

- CASD process for resolving utility billing disputes is a voluntary, informal dispute resolution alternative to formal civil litigation, and
- PUC's declining to open formal investigation was not a final decision of PUC from which an appeal could be taken.

Process for resolving utility billing disputes, in which Consumer Assistance and Safety Division (CASD) of Public Utilities Commission (PUC) conducts a summary investigation of a customer's complaint after the customer first makes a direct attempt to settle dispute with utility, is a voluntary, informal dispute resolution alternative to formal civil litigation, and is not an adjudicatory, binding decision of PUC requiring due process akin to a formal court proceeding.

Public Utilities Commission's (PUC) order declining to open a formal investigation into a water billing dispute between water utility and its customer following informal investigation of customer's complaint by Consumer Assistance and Safety Division (CASD) of PUC was not a final decision of PUC from which an appeal could be taken; PUC's action was a decision not to proceed to a formal adjudicatory action.

UNDERWRITING - MICHIGAN

In re Flint Water Cases

United States District Court, E.D. Michigan, Southern Division - March 29, 2022 - Slip Copy - 2022 WL 957542

Plaintiffs brought suit against Defendant financial institutions – J.P. Morgan Securities LLC, Wells Fargo Bank N.A., and Stifel, Nicolaus & Company, Inc. – that acted as underwriters for approximately $300 million in municipal bonds used to fund the infrastructure behind the Karegnondi Water Authority ("KWA"). The KWA is a municipal water supply system, incorporated under Michigan law, whose formation required the installation of a water intake structure, pipelines, and multiple pumping stations to process and distribute raw water to an area in the State of Michigan including the City of Flint.

Plaintiffs alleged that Defendants conspired with various governmental officials to violate Plaintiffs' bodily integrity when Defendants underwrote the bonds that funded the KWA project. They also allege that Defendants were professionally negligent when they failed to require that the Flint Water Treatment Plant ("FWTP") be upgraded or that there exist a feasible funding mechanism to pay for the necessary upgrades.

The District Court held that:

- Plaintiffs' conspiracy claim failed because it did not allege that Defendants acted with the purpose of violating their constitutional rights, nor did Plaintiffs plead the alleged conspiracy with sufficient specificity;
- Plaintiffs did not adequately plead that Defendants acted under color of state law;
- As to its ordinary negligence claim, Plaintiffs failed to sufficiently allege a relationship between Defendants and Plaintiffs sufficient to create a duty of care; and
- Even if the Court had found that Plaintiffs had adequately pleaded that a legal duty existed to sustain a negligence claim, that claim fails on public policy grounds.

"Defendants ultimately aimed to secure a deal and sell the bonds at a favorable rate. To be sure, Defendants' conduct was one step in the causal chain that ultimately led to the violation of Plaintiffs' rights. But even as Plaintiffs tell the story, Defendants did not have the objective of violating Plaintiffs' rights. At most, Defendants acted without considering the possible harm to Plaintiffs. A section 1983 conspiracy claim requires a 'single plan' with the 'objective to deprive plaintiffs of their constitutional rights,' *Marvaso*, 971 F.3d at 606. To the extent it is possible to conspire to be careless, such a conspiracy would be legally insufficient to make out a claim under section 1983."

"Plaintiffs' allegations that a reasonable underwriter would not have funded the KWA project in light of the City's finances and the condition of the FWTP may be more properly understood as an argument that underwriters have a duty to evaluate the externalities of the municipal projects they fund before they fund them. But even if the Court were to accept this as true, which it does not, it does not follow that Defendants here conspired with state actors to violate Plaintiffs' rights."

"The issuing of a loan is therefore not an undertaking that ordinarily gives rise to a duty of due care to third parties. As Plaintiffs acknowledge, the underwriting of a municipal bond is a kind of lending. Accordingly, Plaintiffs have not shown that Defendants' underwriting of the KWA bonds gave rise to a duty of reasonable care to avoid harms to Plaintiffs."

"SIFMA persuasively argues that under Plaintiffs' theory, '[u]nderwriters would suddenly be

responsible to a municipality's residents for judgments made by elected officials as to how best to govern, manage, and operate their own city, town, or state—matters over which the underwriters have no control.'"

"KWA is a municipal entity. Those who determined whether and how to build the KWA project were elected officials and individuals appointed by elected officials. Those officials answer to the public through the political process, and in this case, some of them answer through the judicial process. Imposing a duty on Defendants could result in our nation's banks making decisions on behalf of municipalities. Banks are not accountable to the public in the voting booth. On balance, the burdens and benefits weigh against imposing a duty on Defendants in this case."

MUNICIPAL CORPORATIONS - WASHINGTON

Stevens County ex rel. Rasmussen v. Travelers Surety and Casualty Company of America

Court of Appeals of Washington, Division 3 - March 31, 2022 - P.3d - 2022 WL 965155

County prosecutor sued county commissioners and sureties on their official bonds claiming they were individually liable on their bonds for voting to approve unconstitutional gifts to homeless fund.

The Superior Court entered summary judgment in favor of prosecutor. Commissioners appealed.

The Court of Appeals held that:

- Commissioners could not be held individually liable on official bonds, and
- Constitutional requirement of strict accountability of county officers for public money coming into their possession did not apply.

County commissioners who had approved allegedly unconstitutional gift of public money to homeless fund could not be held individually liable on official bonds; commissioners acted as legislative body, bonds covered commissioners in individual capacity, and propriety of their votes could not make them liable under terms of their official bonds.

Constitutional requirement of strict accountability of county officers for public money coming into their possession did not apply to commissioners' involvement in legislatively authorizing allegedly unconstitutional appropriation for homeless fund; commissioners themselves never handled public money so as to expose themselves to absolute liability.

Mere errors of judgment or misconstruction of statutes do not meet standard for holding county commissioners individually liable on their bonds for nonministerial acts upon finding of abuse of discretion; instead, liability requires proof not only that official made error or mistake, but that error or mistake was product of corrupt or malicious motives.

PUBLIC EMPLOYMENT - ARKANSAS

Johnson v. Wright

Supreme Court of Arkansas - March 10, 2022 - 2022 Ark. 57 - 640 S.W.3d 401

Former members and employees of City Advertising and Promotion Commission (CAPC) brought action against city officials alleging, among other things, that other members' appointments to the CAPC violated the Arkansas Constitution.

The Circuit Court denied plaintiffs' motion for emergency injunction and denied their motion to reconsider. Plaintiffs brought interlocutory appeal.

The Supreme Court held that:

- CAPC at-large member met the qualifications of an elector under Arkansas constitution, and
- CAPC appointments were not barred by statute prohibiting city council members from being appointed to another municipal office while they were serving on a city council.

City Advertising and Promotion Commission (CAPC) at-large member met the qualifications of an elector under Arkansas constitution, and thus was not prohibited from appointment to CAPC, despite contention that member did not reside in the subdivision she sought to serve; there was no statute requiring member to be a city resident, and member was not seeking election to a city office, nor was she appointed to fill a vacancy in an elected office, and instead member was appointed to a commission position that was authorized not only by statute but also by city municipal ordinance.

Appointments of members to City Advertising and Promotion Commission (CAPC) were not barred by statute prohibiting city council members from being appointed to another municipal office while they were serving on a city council, even though members were city council members at time of their appointments; statute was a statute of general applicability, and specific statute relevant to the CAPC required such an appointment.

IMMUNITY - CALIFORNIA

Cleveland v. Taft Union High School District

Court of Appeal, Fifth District, California - March 25, 2022 - Cal.Rptr.3d - 2022 WL 883855 - 22 Cal. Daily Op. Serv. 3109

High school student who was shot in stomach by classmate brought action against district, superintendent, principal, and assistant principal, alleging claims for negligence, premises liability, and negligent infliction of emotional distress.

District defendants filed cross-complaint against classmate and his family members for indemnity and apportionment of fault.

After district defendants' motion in limine, seeking to exclude evidence pertaining to district employees' threat assessment of classmate, was granted, the Trial Court entered judgment upon jury verdict against district in amount of $2,052,000 based on apportioned percentage of district employees' negligence, and thereafter denied district's motion for judgment notwithstanding the verdict, in which district argued that its employees were shielded under statute providing immunity to public employees for failing to make adequate physical or mental examination. District appealed.

As a matter of first impression, the Court of Appeal held that various actions by high school employees in conducting threat assessment were not part of a "mental examination" for which

employees had statutory immunity.

Failures by district superintendent, high school principal, and assistant principal to collectively carry out threat assessment of potentially violent student, adequately communicate with student's parents, recommend counseling as intervention technique, monitor student and reassess safety plan, and include school resource officer in threat assessment team, were not part of a "mental examination" for which employees were shielded from liability under statute providing immunity to public employees for failing to conduct or failing to adequately conduct mental examination, in negligence action against district brought by classmate who was shot in stomach by student; "mental examination" was limited to process of inspecting the physical, visual, emotional, and mental state of student.

PUBLIC UTILITIES - DISTRICT OF COLUMBIA

Newman v. Federal Energy Regulatory Commission

United States Court of Appeals, District of Columbia Circuit - March 9, 2022 - 27 F.4th 690

Customers petitioned for review of orders of Federal Energy Regulatory Commission (FERC) that raised their electricity rates. Developer that sought to build proposed electric power transmission line was granted leave to intervene in support of FERC.

The Court of Appeals held that:

- Clause stating that account shall include expenditures "for the purpose of influencing the decisions of public officials" included expenditures for purpose of indirectly, as well as directly, influencing decisions of public officials;
- Regulatory text favored reading clause to include expenditures for purpose of indirectly, as well as directly, influencing decisions of public officials;
- Regulatory history of account favored reading clause to include expenditures for purpose of indirectly, as well as directly, influencing decisions of public officials;
- FERC precedent favored reading clause to include expenditures for purpose of indirectly, as well as directly, influencing decisions of public officials;
- Regulatory purpose of account favored reading clause to include expenditures for purpose of indirectly, as well as directly, influencing decisions of public officials; and
- Accounts pertaining to "outside services employed" and "general advertising expenses" were not appropriate categories for disputed expenditures.

REFERENDA - ILLINOIS

McHenry Township v. County of McHenry

Supreme Court of Illinois - March 24, 2022 - N.E.3d - 2022 IL 127258 - 2022 WL 869540

Township sought writ of mandamus compelling county and county clerk to place on township's general election ballot a referendum proposition, initiated by township's board of trustees, to dissolve township.

The Circuit Court granted defendants' motion to dismiss. Township appealed. The Appellate Court reversed and remanded. Defendants filed petition for leave to appeal, which was allowed.

The Supreme Court held that:

- Issues raised on appeal regarding whether clerk could refuse to place referendum proposition on ballot were moot;
- Public-interest exception to mootness doctrine applied; and
- Clerk was not authorized to make legal determinations about whether referendum proposition was made in accordance with general election law or was prohibited by time limitation against same proposition appearing on ballots based on comparison of proposition to referendum that appeared on recent primary election ballot.

ZONING & PLANNING - KENTUCKY

Seiller Waterman, LLC v. Bardstown Capital Corporation

Supreme Court of Kentucky - March 24, 2022 - S.W.3d - 2022 WL 883677

Property developer filed complaint against neighboring property owners who opposed one if its development and rezoning proposals and their law firm, seeking damages for wrongful use of civil proceedings in continued opposition to approved zoning changes, stating it had lost profits of $12 million and incurred legal fees totaling $73,752.33.

The Circuit Court granted law firm's motion for summary judgment and dismissed developer's claims for wrongful use of civil proceedings and abuse of process. Developer appealed. The Court of Appeals affirmed in part, reversed in part, and remanded. Property owners' and law firm's petition for discretionary review was granted.

The Supreme Court held that:

- On issue of first impression, *Noerr-Pennington* doctrine protected First Amendment petitioning of government in zoning litigation;
- Statutory appeals from zoning decisions were not limited to neighboring property owners, but could be utilized by rezoning applicants or anyone otherwise injured or aggrieved by zoning decision;
- Neighboring property owners, represented by law firm, used lawful and legislatively-prescribed means to challenge development and zoning activities on substantive grounds;
- Developer, as applicant that initiated zoning proceedings, was necessary party to appeal by neighboring homeowners protesting zoning change;
- Property owner's action was not objectively baseless, and therefore sham exception to *Noerr-Pennington* doctrine did not apply; and
- Adjoining neighboring property owners had statutory standing to bring action.

JURISDICTION - LOUISIANA

St. Tammany Parish Hospital Service District No. 2 v. Zurich American Insurance Company

United States District Court, E.D. Louisiana - March 14, 2022 - Slip Copy - 2022 WL 766318

Plaintiff St. Tammany Parish Hospital Service District alleged that, as a result of COVID-19 and governmental measures taken at both the federal and state levels, it had suffered substantial financial losses.

Plaintiff further alleges the losses it suffered and expenses it incurred are covered as "EXTRA EXPENSE" under the insurance policies provided by Defendant Zurich American Insurance Company.

Plaintiff brought this insurance coverage action for declaratory judgment and breach of contract arising from the refusal of Defendants to provide coverage to Plaintiff under a comprehensive loss policy issued by the Defendants called "The Zurich Edge Healthcare Policy": a unique policy targeting healthcare facilities with the marketing promise of "higher limits, broader coverage and greater flexibility" and which expressly provides coverage for the losses Plaintiff sustained as a result of COVID-19.

Defendants filed a Notice of Removal, invoking this Court's diversity jurisdiction under 28 U.S.C. § 1332. Plaintiff filed a motion to remand to state court, arguing complete diversity is lacking because Plaintiff is an arm of the state and that "[a]s a matter of law, an arm of the state has no citizenship and cannot be removed to federal court under 28 U.S.C. § 1332(a)." Plaintiff further argued that hospital service districts such as Plaintiff are alter egos or arms of the state "such that they are immune from suit in federal court pursuant to the Eleventh Amendment.

Defendants argued that complete diversity, and federal subject matter jurisdiction exist because Plaintiff is a citizen of the State of Louisiana and is not an arm or alter ego of the State of Louisiana.

The District Court held that:

- Louisiana's statutes and case law support the conclusion that hospital service districts such as Plaintiff are political subdivisions, and not arms of the state.
- The Court must address the question of whether Plaintiff, a political subdivision of the State of Louisiana, is a citizen of Louisiana for purposes of diversity jurisdiction.
- The Court must also determine whether Plaintiff is an arm or alter ego of the State of Louisiana.
- The Fifth Circuit takes a case-by-case approach to determining whether a state is the real party in interest in suits brought against entities which appear to be alter egos or arms of the state.
- The Fifth Circuit utilizes six factors (the "Clark Factors") to determine whether an entity is an arm of the state: (1) Whether the state statutes and case law characterize the agency as an arm of the state; (2) The source of funds for the entity; (3) The degree of local autonomy the entity enjoys; (4) Whether the entity is concerned primarily with local, as opposed to state-wide, problems; (5) Whether the entity has authority to sue and be sued in its own name; and (6) Whether the entity has the right to use and hold property.
- The Court found that each of the six Clark factors pointed inexorably to the conclusion that Plaintiff is not an arm of the State of Louisiana. As a political subdivision that is not an arm of the state, it is a citizen of the State of Louisiana. Because neither Defendant is a citizen of the State of Louisiana, complete diversity exists in this case. Accordingly, the Court concluded it has subject matter jurisdiction over this action under 28 U.S.C. § 1332.

MUNICIPAL ORDINANCE - LOUISIANA

Mellor v. Parish of Jefferson

Supreme Court of Louisiana - March 25, 2022 - So.3d - 2022 WL 884001 - 2021-0858 (La. 3/25/22)

Motor vehicle drivers who paid fines under parish ordinance for overtaking and passing a school bus with its visual signals activated brought class action against parish, seeking damages and declaration that ordinance was unconstitutional.

The District Court, Jefferson Parish, granted drivers' motion for summary judgment. Parish appealed.

The Supreme Court held that ordinance was unconstitutional for regulating parish school board.

Parish ordinance establishing civil fines against motor vehicle drivers for overtaking and passing a school bus with its visual signals activated was unconstitutional under section of Louisiana Constitution prohibiting any provision in a home rule charter affecting a school board; ordinance not only outlined a system of cameras for tracking and notifying violators, but also specifically directed parish school board to administer the system, stating that school board was "responsible for the administration of the system and for notification of the violation," and it was of no consequence that school board did not object to ordinance.

EMINENT DOMAIN - BALTIMORE

Xu v. Mayor of Baltimore

Court of Special Appeals of Maryland - March 30, 2022 - A.3d - 2022 WL 951849

City filed condemnation action regarding vacant property.

After bench trial, entered judgment as to just compensation. Landowner appealed.

The Court of Special Appeals held that:

- Landowner did not waive right to jury trial, and
- Trial court abused its discretion in precluding landowner from testifying as to property's value and as to how landowner arrived at that value.

Landowner, who was proceeding pro se, did not waive her right to jury trial of condemnation action by initially agreeing to bench trial during telephone status conference and by stating at subsequent hearing that she had not filed anything in writing with court clerk since date of status order entered one day after landowner filed written request for jury trial; landowner clearly expressed desire for jury trial and had requested one in a writing filed with court, there was no evidence of discovery violation with a resulting sanction or that landowner was trying to frustrate the efficient adjudication of court system, and there was no written election for bench trial by all parties.

Trial court abused its discretion in precluding landowner from testifying in condemnation proceeding as to her property's value and as to how she arrived at that value, based on determination that landowner had not been qualified as an expert; as owner, landowner was presumptively competent to give opinion as to value of property, and thus it followed that landowner was able to testify as to how she arrived at that opinion, and any lack of expert status went to weight of testimony rather than admissibility.

ZONING & PLANNING - MONTANA

Egan Slough Community v. Flathead County Board of County Commissioners

Supreme Court of Montana - March 22, 2022 - P.3d - 2022 WL 841994 - 2022 MT 57

Community organization brought action against county and operator of commercial water bottling

plant following expansion of a citizen-initiated agricultural zoning district through a citizen initiative, seeking mandamus relief to enforce zoning regulations and a declaratory judgment against water bottling operations.

Operator filed counterclaims alleging illegal reverse spot zoning and violations of due process, equal protection, and takings clauses. The District Court entered summary judgment orders and denied operator's motions to compel discovery and for attorney fees. Organization appealed and operator cross-appealed.

The Supreme Court held that:

- Water bottling plant was a valid nonconforming use;
- Initiative complied with statutory requirement of setting out fully the resolution to be repealed;
- Initiative did not impermissibly legislate on multiple subjects;
- Initiative did not create illegal reverse spot zoning;
- Initiative did not violate procedural due process;
- Initiative did not violate equal protection;
- A compensable regulatory taking did not occur; and
- Trial court acted within its discretion in denying attorney fees for defense of petition for writ of mandate.

STATE FINANCE - OKLAHOMA

Matter of Oklahoma Capitol Improvement Authority

Supreme Court of Oklahoma - April 5, 2022 - P.3d - 2022 WL 1011832 - 2022 OK 31

Oklahoma Capitol Improvement Authority (OCIA) filed application seeking approval to enter into federal loans, secured with Transportation Infrastructure Finance and Innovation Act (TIFIA) notes, for rural highway improvement projects.

The Supreme Court held that approval of OCIA's application was warranted.

Approval of application by Oklahoma Capitol Improvement Authority (OCIA) to enter into federal loans, secured with Transportation Infrastructure Finance and Innovation Act (TIFIA) notes, for rural highway improvement projects was warranted, where legislature authorized proposed TIFIA loans as an essential governmental function, OCIA gave valid notice of its application, and OCIA's application was uncontested.

PUBLIC UTILITIES - SOUTH DAKOTA

Ehlebracht v. Crowned Ridge Wind II, LLC

Supreme Court of South Dakota - March 23, 2022 - N.W.2d - 2022 WL 869874 - 2022 S.D. 19

Neighboring residents appealed decision of Public Utilities Commission (PUC) granting permit to construct large-scale wind energy farm.

The Circuit Court affirmed. Residents appealed.

The Supreme Court held that:

- Statute granting PUC the authority to promulgate rules regarding the permitting and construction of wind-energy facilities, in combination with statute setting out legislative finding that it was necessary to ensure that the location, construction, and operation of energy facilities would produce minimal adverse effects, did not create obligation for PUC to promulgate specific rules defining "minimal adverse effects" associated with proposed wind-energy projects;
- To extent that PUC was required to ensure that proposed project would produce minimal adverse effects, it sufficiently did so;
- Residents failed to state claim for equal-protection violation;
- PUC's issuance of permit was not the de facto grant of an easement over residents' property;
- Issuance of permit was not a per se taking of residents' property;
- Residents failed to state claim for taking based on consequential-damages theory; and
- Issuance of permit, which had effect of foreclosing any future nuisance claim by residents for permitted activity, did not constitute a compensable taking.

IMMUNITY - COLORADO

Heard v. Dulayev

United States Court of Appeals, Tenth Circuit - March 29, 2022 - F.4th - 2022 WL 905105

Suspect brought § 1983 action against police officer and city, alleging that officer used excessive force against him in violation of his Fourth Amendment rights, and that city failed to adequately train and supervise its officers with respect to the use of force.

The United States District Court for the District of Colorado denied defendants' motion for summary judgment. Suspect appealed.

The Court of Appeals held that:

- Court of Appeals had appellate jurisdiction to decide whether officer's use of a stun gun was justified;
- Officer was entitled to qualified immunity; and
- Court of Appeals would decline to exercise pendent appellate jurisdiction over § 1983 claim against city.

EMINENT DOMAIN - GEORGIA

Wise Business Forms Inc. v. Forsyth County

Court of Appeals of Georgia - March 15, 2022 - S.E.2d - 2022 WL 780001

Property owner brought action against county and Georgia Department of Transportation (GDOT) alleging per se taking and inverse condemnation in that road expansion increased surface and stormwater runoff flowing under its property, which created sinkhole in its parking lot.

The Superior Court dismissed complaint, and owner appealed.

The Court of Appeals held that:

- Owner was not required to file expert affidavit with its complaint;
- Statute of limitation began to run against owner's permanent nuisance claim when road expansion project was completed; and

- Owner's inverse condemnation claim was based on permanent, rather than abatable, nuisance.

Property owner was not required to file expert affidavit with its complaint asserting inverse condemnation by nuisance claim against county and Georgia Department of Transportation (GDOT) premised on their failure to mitigate increased runoff following road expansion, which channeled stormwater through pipe running underneath its property, thereby causing sinkhole in its parking lot, where complaint did not assert any claims of negligence.

Statute of limitation began to run against property owner's permanent nuisance claim against county and Georgia Department of Transportation (GDOT) when road expansion project was complete, rather than when owner noticed sinkhole in its parking lot 20 years later; claim was premised on county's and GDOT's failure to mitigate increased runoff following road expansion, which channeled stormwater through pipe running underneath its property, thereby causing sinkhole, and alleged dramatic increase in stormwater runoff would have been immediately observable.

Property owner's inverse condemnation claim against county and Georgia Department of Transportation (GDOT), premised on their failure to mitigate increased runoff following road expansion, which channeled stormwater through pipe running underneath its property, thereby causing sinkhole in its parking lot, was based on permanent, rather than abatable, nuisance; expansion project included design and installation of stormwater drainage system and decision not to build detention facilities to address alleged increased runoff, which constituted enduring features of construction project.

IMMUNITY - MISSOURI

KITC Homes, LLC v. City of Richmond Heights

Missouri Court of Appeals, Eastern District, DIVISION TWO - March 8, 2022 - S.W.3d - 2022 WL 677654

Developers brought action against city, raising claims of tortious interference, negligence, and impairment of contract under the Contracts Clause, after city allegedly delayed in sending developers an invoice for demolition costs on property before sale after developers had purchased the property from the city.

The Circuit Court granted city's motion to dismiss on sovereign immunity grounds and for failure to state a Contracts Clause claim. Developers appealed.

The Court of Appeals held that:

- Proprietary-function exception to sovereign immunity applied to developer's tortious interference and negligence claims, but
- Developer failed to state a Contracts Clause Claim.

Proprietary-function exception to sovereign immunity applied to developer's tortious interference and negligence claims against city, where developers alleged that city, for the purpose of receiving income to benefit itself as a corporate entity, demolished improvements on property, and delayed in submitting to developer a special assessment for the cost of the demolition until after developer purchased property.

Developer, who alleged that city delayed in issuing it a special assessment for costs that city

incurred after demolishing buildings on land before selling it to developer until after developer had purchased land, failed to state a Contracts Clause claim, where city's assessment was not a law of the state or change in state law that impaired the alleged contractual relationship between the city and developer.

MUNICIPAL ORDINANCE - OKLAHOMA

Magnum Energy, Inc. v. Board of Adjustment for City of Norman

Supreme Court of Oklahoma - March 22, 2022 - P.3d - 2022 WL 840198 - 2022 OK 26

Oil and gas operator appealed decision of city board of adjustment denying operator's application for variance from ordinance requiring oil and gas operators to maintain an umbrella insurance policy with at least $2 million in coverage.

The District Court granted operator's motion for summary judgment. Board appealed. The Court of Civil Appeals reversed. Operator filed petition for certiorari, which was granted.

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

- Municipal authority to regulate oil and gas is limited in scope to those areas reserved in statute governing municipal regulation of oil and gas activities and elsewhere in statute, and
- Ordinance exceeded scope of authority to regulate oil and gas production reserved for municipalities.

City ordinance requiring oil and gas operators to maintain an umbrella insurance policy with at least $2 million in coverage exceeded scope of authority to regulate oil and gas production reserved for municipalities; umbrella-insurance requirement did not fall within any of the categories reserved for municipal regulation under statute governing municipal regulation of oil and gas activities, and statute governing cities' jurisdiction over permit fees for drilling and operation of oil and gas wells did not apply given that satisfying umbrella-insurance requirement could not be fairly characterized as permit fee.

MUNICIPAL CORPORATIONS - PENNSYLVANIA

County of Delaware v. Delaware County Regional Water Quality Control Authority

Commonwealth Court of Pennsylvania - March 3, 2022 - A.3d - 2022 WL 619580

County filed complaint for writ of mandamus and other relief from execution by regional water quality control authority of contract to sell authority's assets to private buyer.

Authority, buyer, and others intervened and asserted counterclaims, including for injunctive relief.

Following bench trial, the Court of Common Pleas granted injunctive relief and denied mandamus relief based on findings that asset purchase agreement (APA) was valid and enforceable, that

Municipality Authorities Act (MAA) did not authorize county to dissolve or obtain authority or its assets so as to interfere with authority's contractual performance, and that county did not assume authority's contractual obligations. County appealed.

The Commonwealth Court held that:

- Ordinance was valid and enforceable under MAA provision allowing municipalities to dissolve authorities and acquire assets, and
- County's alleged inability to perform under terms of contract did not preclude county from dissolving authority and assuming its contractual obligations.

County ordinance directing termination or dissolution of regional water quality control authority and requiring authority to engage in conduct necessary to effectuate transfer of its assets to county and assumption of its liabilities and obligations by county was valid and enforceable under statute allowing municipalities to dissolve authorities' projects, acquire their assets, and assume associated obligations, even if county did not explicitly assume authority's obligations in ordinance; county could not direct transfer of any specific assets until it had verified information about such assets, and ordinance complied with statutory process of adopting ordinance to signify desire to acquire project, then completing assumption of obligations, and finally accepting conveyance of project.

Any inability on county's part to fulfill terms of contract by which regional water quality control authority agreed to sell its assets to private buyer did not impede county from exercising its power under Municipal Authorities Act (MAA) to terminate authority, assume its obligations, and obtain its assets prior to full performance under contract; if authority could simply incur contractual obligations to prevent county from terminating authority, clause in MAA allowing county to assume authority's obligations when terminating authority would be rendered nugatory, and authority had not obtained any continuing debt to be repaid on immediate or continuing basis, rendering county's ability to perform under contract irrelevant to county's power to dissolve authority.

PUBLIC UTILITIES - WASHINGTON

Walter Family Grain Growers, Inc. v. Foremost Pump & Well Services, LLC

Court of Appeals of Washington, Division 3 - March 24, 2022 - P.3d - 2022 WL 869673

Farming company brought action against electric utility, among others, asserting negligence claim based on allegations that excessive voltage destroyed newly-installed irrigation and power equipment and resulted in lost crops.

The Superior Court granted summary judgment for utility company. Farming company appealed.

The Court of Appeals held that:

- Utility owed company ordinary duty of care, and
- Genuine issue of material fact precluded summary judgment.

Electric company owed farming company ordinary duty of care, rather than heightened duty of care, for purposes of company's negligence claim against utility arising from allegations that excessive voltage service destroyed newly-installed irrigation and power equipment and resulted in lost crops, where 480-volt service provided by utility company was low voltage and of minimal danger.

Genuine issue of material fact existed as to whether electric utility breached its duty of ordinary care

owed to farming company, precluding summary judgment for utility in negligence action brought by company arising from allegations that excessive voltage service destroyed newly-installed irrigation and power equipment and resulted in lost crops.

MUNICIPAL ORDINANCE - WASHINGTON

Rental Housing Association v. City of Seattle

Court of Appeals of Washington, Division 1 - March 21, 2022 - P.3d - 2022 WL 831450

Landlords brought action against city, challenging ordinance limiting landlord's ability to evict tenant for nonpayment of rent during three winter months, ordinance prohibiting landlord from evicting tenant for nonpayment of rent for six months after end of COVID-19 civil emergency, and ordinance requiring landlord to accept installment payments of unpaid rent for certain period of time after end of civil emergency.

On cross-motions for summary judgment, the Superior Court upheld ordinances' provisions except for provision banning accrual of interest on unpaid rent during civil emergency and for one year thereafter. Landlords appealed, and city cross-appealed.

The Court of Appeals held that:

- Ordinances imposing eviction bans did not irreconcilably conflict with Residential Landlord Tenant Act (RLTA), unlawful-detainer statute, or ejectment statute and thus were not preempted;
- Ordinance requiring landlords to accept installment payments did not on its face conflict with statutory payment plan structure for renters experiencing financial hardship due to COVID-19 pandemic, and thus ordinance was not preempted;
- Prejudgment-interest statute preempted ordinance banning accrual of interest on unpaid rent during COVID-19 civil emergency and for one year thereafter;
- Neither ordinance imposing eviction ban constituted per se physical taking in violation of state constitution's takings clause;
- Landlords had property rights that were protected by right to procedural due process under state constitution;
- Ordinance prohibiting eviction for nonpayment of rent for six months after end of civil emergency violated landlords' right to procedural due process under state constitution; and
- Ordinances did not implicate fundamental rights of landlords and thus did not violate state constitution's privileges and immunities clause.

PUBLIC UTILITIES - CALIFORNIA

California Public Utilities Commission v. Federal Energy Regulatory Commission

United States Court of Appeals, Ninth Circuit - March 17, 202 - F.4th - 2022 WL 803838 - 22 Cal. Daily Op. Serv. 2913 - 2022 Daily Journal D.A.R. 2667

California Public Utilities Commission (CPUC) and other state agencies petitioned for review of Federal Energy Regulatory Commission's (FERC) decisions, awarding to three California-based public utilities upward adjustments, or "incentive adders," to their rate of return on equity, over CPUC's objection that utilities should not receive awards as their participation in California independent system operator (CAISO) was involuntary and mandated by state law, so adder could

not induce utilities to remain members of CAISO.

The United States Court of Appeals for the Ninth Circuit granted petitions and remanded. On remand, FERC determined that utilities' membership in CAISO was voluntary under California law, so incentive adders were warranted. CPUC and other California agencies petitioned for review of remand orders.

The Court of Appeals held that:

- FERC's remand orders did not violate mandate rule;
- Erie doctrine did not apply to require FERC to defer to California's interpretation of California law; and
- FERC reasonably interpreted California law as allowing utilities to voluntarily leave CAISO.

Federal Energy Regulatory Commission (FERC) did not violate mandate rule, in remand orders reaffirming award of incentive adders to public utilities' rate of return on equity because their participation in California independent system operator (CAISO) was voluntary and not mandated by California law; on remand FERC did not decide issue that Court of Appeals had already decided, as court did not definitively hold that California law prevented utilities from leaving CAISO without approval, or deviate from court's mandate that remanded case for further proceedings and instructed FERC to inquire into utility's specific circumstances as to whether it could unilaterally leave CAISO and, thus, whether incentive adder could induce utility to remain in CAISO.

Federal Energy Regulatory Commission's (FERC) conclusion, in remand orders reaffirming award of incentive adders to public utilities' rate of return on equity because their participation in California independent system operator (CAISO) was voluntary and not mandated by California law, that Erie doctrine did not apply, was not arbitrary, capricious, or contrary to law, since incentive adder and requirement that utility be voluntary member of CAISO to qualify for adder arose from federal law, and federal law as source of right sued upon did not change merely because California law dictated whether membership in CAISO was voluntary.

Court of Appeals would apply de novo review, rather than according deference, to Federal Energy Regulatory Commission's (FERC) interpretation of California law, in remand orders reaffirming award of incentive adders to public utilities' rate of return on equity because their participation in California independent system operator (CAISO) was voluntary and not mandated by California law, since FERC was not interpreting its own electricity regulations and instead was interpreting California law and public policy, in which FERC lacked specific expertise, and Congress had not assigned FERC task of interpreting state statutes.

Under California law, as predicted by Court of Appeals, Federal Energy Regulatory Commission's (FERC) interpretation, in remand orders reaffirming award of incentive adders to public utilities' rate of return on equity, that utilities' participation in California independent system operator (CAISO) was voluntary and not mandated by California law, was not arbitrary, capricious, or contrary to law, under Administrative Procedure Act (APA); California failed to identify any California Code provision mandating CAISO membership, statutory provisions that California relied on merely directed creation of CAISO and encouraged utilities to join, and California courts would not defer to prior administrative decision suggesting the contrary, as it was inconsistent with relevant California statute.

INTERGOVERNMENTAL AGREEMENTS - GEORGIA

Driskell v. Dougherty County

Court of Appeals of Georgia - March 16, 2022 - S.E.2d - 2022 WL 793864

Motorist filed suit against city, city code enforcement officer, and county for injuries sustained when officer collided with motorist's vehicle.

The State Court granted county's motion for summary judgment, and denied city's motion for summary judgment and motorist's cross-motion for summary judgment. Motorist and city appealed denial of their respective motions.

The Court of Appeals held that:

- Mutual control is essential element of joint venture between contracting government entities, disapproving *City of Eatonton v. Few*, 189 Ga. App. 687, 377 S.E.2d 504, *DeKalb County v. Lenowitz*, 218 Ga. App. 884, 463 S.E.2d 539, *Lafontaine v. Alexander*, 343 Ga. App. 672, 808 S.E.2d 50, and *Ga. Dept. of Transp. v. Delor*, 351 Ga. App. 414, 830 S.E.2d 519;
- No joint venture existed between city and county that rendered county liable for city officer's alleged negligence;
- County was not liable for officer's alleged negligence under borrowed-servant doctrine; and
- County was not liable for officer's alleged negligence under agency theory of liability.

BONDS - MISSISSIPPI

Green Hills Development Company, LLC v. Oppenheimer Funds, Inc.

United States District Court, S.D. Mississippi, Northern Division, Northern Division - February 9, 2022 - Slip Copy - 2022 WL 409948

In 2007, the Rankin County Board of Supervisors created the Stonebridge Public Improvement District to manage and finance public-improvement services for property located within the then newly established Stonebridge development.

In September 2007, Stonebridge's board issued bonds through a Trust Indenture. UMB Bank later became Successor Trustee. Under the terms of the Trust Indenture, Stonebridge was to levy special assessments on properties within the development and remit the revenues collected to the Trustee to service the debt on the bonds.

After Stonebridge failed to remit amounts necessary to service the debt, UMB Bank filed a summary judgment motion against Stonebridge alleging breach of Stonebridge's contractual obligations under the Trust Indenture. UMB Bank also asked the court to appoint a receiver. Stonebridge counter-claimed.

The United States District Court denied both motions for summary judgement, as well as the motion to appoint a receiver.

The District Court found that none of the numerous issues raised by both parties could be adjudicated due to the incomplete, inadequate arguments and pleadings by both parties. The court opted to allow the litigation process to continue in the hope that some clarity would somehow emerge.

> "Here, the Court spent considerable time studying the legal briefs, independently

> researching the arguments, and examining the record, but the factual and legal pictures remain unclear. The Court acknowledges that some of its questions may flow from its own misunderstanding of this highly complicated and voluminous record. On the other hand, the parties often offer argument snippets unsupported by relevant legal authority or supporting record evidence. They also ignore, or lightly touch, what appear to be significant arguments offered by opposing parties."
>
> "It is certainly possible that somewhere in this massive record are documents supporting some of their assertions."

These issues included:

- Statutes of limitations;
- Res judicata;
- Collateral estoppel;
- Claim preclusion;
- Choice of law;
- Service of process;
- Anticipatory breach; and
- So, so many more.

IMMUNITY - NEW YORK

Ferreira v. City of Binghamton

Court of Appeals of New York - March 22, 2022 - N.E.3d - 2022 WL 8375662022 N.Y. Slip Op. 01953

Unarmed occupant of home subject to no-knock search warrant, who was shot in stomach by police officer during execution of search warrant, brought negligence action against officer, police department, and city.

Following trial in which jury found in favor of occupant against city and awarded him $3 million in damages, but found in favor of officer, the United States District Court granted city's motion for judgment as a matter of law and set aside the damage award and denied occupant's motion to overturn the verdict in favor of officer. Occupant appealed. The Court of Appeals affirmed in part and certified question.

The Court of Appeals held that:

- Plaintiffs must establish that municipality owed them special duty when they assert negligence claim based on actions taken by municipality acting in governmental capacity, and
- Plaintiffs asserting negligence claim based on actions taken by municipality acting in governmental capacity may establish special duty when municipality, acting through its police force, plans and executes no-knock search warrant at person's home, and such duty runs to individuals within targeted premises at time warrant is executed.

POLITICAL SUBDIVISIONS - NORTH DAKOTA

Hagen v. North Dakota Insurance Reserve Fund

Supreme Court of North Dakota - March 17, 2022 - N.W.2d - 2022 WL 803334 - 2022 ND 53

Records requester brought petition for writ of mandamus against insurer, a government self-insurance pool, seeking to require disclosure of documents under open records law.

The District Court granted petition. Insurer appealed and requester cross-appealed.

The Supreme Court held that:

- Requester's amended petition related back to original petition and thus was timely;
- As a matter of apparent first impression, insurer was an "agency" of city and thus was a public entity subject to open records law;
- Past liability cannot form the basis for the "potential liability" exception to required disclosure under the open records law; and
- Trial court acted within its discretion in declining to award costs and fees to requester.

IMMUNITY - TEXAS

Hunnicutt v. City of Webster

Court of Appeals of Texas, Houston (14th Dist.) - February 17, 2022 - S.W.3d - 2022 WL 481795

Property owner and co-owner sought declaratory relief that owner's conveyance of 4.41 acres to the city was void or, alternatively, for rescission of her conveyance, as well as declaratory relief as to their ultra-vires claim against city's director of economic development for making allegedly false representations and promises in order to induce sale of the acreage.

The 190th District Court granted city's plea to the jurisdiction and rendered judgment in favor of the city and director. Owners appealed.

The Court of Appeals held that:

- Co-owner did not have an individual, justiciable interest in the case and therefore lacked standing;
- City was performing a governmental function when it solicited, designed, and constructed the roads on the conveyed property;
- Owner did not establish any waiver of governmental immunity;
- Owner did not articulate a viable claim against the city and thus could not substantiate a claim for remedy of rescission; and
- The allegedly false representations and promises made by director did not support an ultra-vires claim.

EASEMENTS - WASHINGTON

Maslonka v. Public Utility District No. 1 of Pend Oreille County

Court of Appeals of Washington, Division 3 - March 3, 2022 - P.3d - 2022 WL 619944

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.

IMMUNITY - IDAHO

Williamson v. Ada County

Supreme Court of Idaho, Boise, November 2021 Term - February 25, 2022 - P.3d - 2022 WL 575967

Inmate of county jail brought action against county and sheriff, alleging negligence arising from incident in which inmate suffered head injury during request that he stand for roll call.

The District Court dismissed action. Inmate appealed.

The Supreme Court held that:

- County's decision to use ladderless bunk beds in county jail was discretionary function for which county had discretionary-function immunity under the Idaho Tort Claims Act (ITCA);
- Fact issue as to whether county's decision to require county jail inmate to descend from top bunk bed for roll call was a discretionary function, for which discretionary-function exception to liability under ITCA could apply, precluded grant of county's motion to dismiss; and
- County was not a prevailing party that could recover attorney fees on appeal.

IMMUNITY - NEBRASKA

Clark v. Sargent Irrigation District

Supreme Court of Nebraska - March 11, 2022 - N.W.2d - 311 Neb. 123 - 2022 WL 727360

Landowners brought negligence action against irrigation district alleging that irrigation district's employee negligently mixed and over-applied an off-label herbicide mixture on trees near canal

causing damage to landowners' corn crops.

The District Court denied irrigation district's motion for summary judgment. Irrigation district filed interlocutory appeal.

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

- Denial of summary judgment motion challenging compliance with presuit procedures of tort claims acts is not a final appealable order involving assertion of sovereign immunity, disapproving Great Northern Ins. Co. v. Transit Auth. of Omaha, 305 Neb. 609, 941 N.W.2d 497; Great Northern Ins. Co. v. Transit Auth. of Omaha, 308 Neb. 916, 958 N.W.2d 378;
  Denial of summary judgment motion asserting discretionary function exemption of Political Subdivisions Tort Claims Act (PSTCA) was a final appealable order; and
- Discretionary function exemption of PSTCA did not apply to bar landowners' claim.

When the State or a political subdivision moves for summary judgment asserting the plaintiff's failure to comply with presuit claim presentment procedures of State Tort Claims Act (STCA) or Political Subdivisions Tort Claims Act (PSTCA), the motion is not based on the assertion of sovereign immunity, within meaning of statute providing that a final order, which may be appealed, includes an order denying a motion for summary judgment when such motion is based on the assertion of sovereign immunity; disapproving Great Northern Ins. Co. v. Transit Auth. of Omaha, 305 Neb. 609, 941 N.W.2d 497; Great Northern Ins. Co. v. Transit Auth. of Omaha, 308 Neb. 916, 958 N.W.2d 378. Neb. Rev. Stat. §§ 13-905, 25-1902(1)(d), 81-8,212.

Irrigation district's summary judgment motion alleging discretionary function exemption of Political Subdivisions Tort Claims Act (PSTCA) as a bar to landowners' negligence claim against district arising from application of herbicide along canal near crops was based on the assertion of sovereign immunity, and thus the denial of motion was a final appealable order.

Discretionary function exemption to waiver of sovereign immunity under Political Subdivisions Tort Claims Act (PSTCA) did not apply to bar landowners' negligence claim against irrigation district alleging that irrigation district's employee negligently mixed and over-applied an off-label herbicide mixture on trees near canal causing damage to landowners' corn crops, where Pesticide Act specifically prescribed course of conduct that holders of noncommercial applicator licenses, like employee, were required to follow when mixing and applying herbicides, and as a result employee and had no choice but to adhere to that course of conduct.

INVERSE CONDEMNATION - NEW MEXICO

van Buskirk v. City of Raton

Court of Appeals of New Mexico - February 11, 2022 - P.3d - 2022 WL 441568

Landowners filed complaint alleging negligence by city for failing to properly cover trash in landfill that was adjacent to property, filed amended complaint alleging inverse condemnation, and filed third complaint instead pleading a cause of action for quintuple damages for inverse condemnation.

Following grant of summary judgment to city on third complaint, landowners filed fourth complaint seeking quintuple damages for inverse condemnation, claiming they had standing based upon previous sale of a 64.77-acre tract to city. The District Court granted summary judgment in favor of city. Landowners appealed.

The Court of Appeals held that landowners' previous grant to city of parcel, which was not landfill that landowners alleged caused damage to their adjacent property, could not serve as basis for inverse condemnation claim for quintuple damages.

Landowners' previous grant to city of parcel, which was not the landfill that landowners alleged caused damage to their adjacent property, could not serve as basis for inverse condemnation claim seeking quintuple damages, in which landowners sought quintuple damages for damage to their 214-acre grazing land caused by trash blowing from landfill; landowners were not the grantors from whom city purchased the landfill that caused the damage alleged, and there was no evidence of subsequent damage resulting from the original transaction the landowners relied upon in their inverse condemnation claim seeking quintuple damages.

EMINENT DOMAIN - OKLAHOMA

Barnett v. Okay Public Works Authority

Supreme Court of Oklahoma - March 8, 2022 - P.3d - 2022 WL 680380 - 2022 OK 24

Mobile home community owner brought inverse condemnation action against city public works authority arising out of installation of wastewater sewer lines on the premises.

The District Court entered judgment on jury verdict for landowner and granted public works authority an easement. Public works authority appealed, and the Court of Civil Appeals reversed. The Supreme Court granted certiorari.

The Supreme Court held that:

- Public works authority's statutory power of eminent domain included power to construct and install pipelines to transport and deliver wastewater to its plant for treatment, and
- Installation of wastewater sewer lines on mobile home community premises as part of sanitary system project was for public use.

City public works authority's statutory power of eminent domain to undertake "projects for the transportation, delivery, treatment or furnishing of water for domestic purposes" included power to construct and install pipelines to transport and deliver wastewater to its plant for treatment.

City public works authority's installation of wastewater sewer lines on mobile home community premises as part of sanitary system project was for public use of improving the system that transports, delivers, treats, and furnishes water for city, as required for mobile home community owner to maintain inverse condemnation action; project was not confined to mobile home community premises, but rather connected to adjoining subdivision on one side and convenience store on other side, sanitary collection system received wastewater both from mobile home community and from other properties in city, and authority's facility treated all of that wastewater.

ZONING & PLANNING - RHODE ISLAND

Nerney v. Town of Smithfield

Supreme Court of Rhode Island - March 4, 2022 - A.3d - 2022 WL 627817

Citizen brought action against town seeking writ of mandamus ordering town to remove several

trees and plants that were planted on town's property by neighboring landowners who had a permit for plantings to prevent soil erosion on their property.

The Superior Court granted town's motion to dismiss for failure to state a claim. Citizen appealed.

The Supreme Court held that town's decision as to how to deal with the trees was within town's discretionary authority, and thus, could not serve as basis for issuance of writ of mandamus.

Town's decision as to how to deal with several trees planted on its property by neighboring landowners, who had a permit for plantings to prevent soil erosion on their property, was within town's discretionary authority, and thus, decision could not serve as basis for issuance of writ of mandamus to require town to remove trees; decision was part of town's executive function to enforce the laws and to require neighboring landowners to comply with express terms of their permit.

IMMUNITY - GEORGIA

Williams v. City of Tybee Island

Court of Appeals of Georgia - February 24, 2022 - S.E.2d - 2022 WL 555653

Parents of beach patron filed suit against city for wrongful death after patron drowned while attempting to rescue swimmers who were in distress, after they were caught in ocean current. The trial court granted city's motion for summary judgment, and parents appealed.

The Court of Appeals held that:

- Patron voluntarily exposed himself to risk of drowning while attempting to assist other swimmer struggling against ocean current as tide was rising in sandbar, as required for city to establish assumption of risk as affirmative defense to claims for wrongful death;
- City was not liable for patron's death under rescuer doctrine;
- Under "public duty" doctrine, city was not subject to liability for patron's drowning death.

PUBLIC UTILITIES - HAWAII

Matter of Maui Electric Company, Limited

Supreme Court of Hawai'i - March 2, 2022 - P.3d - 2022 WL 612072

Community group sought review of the Public Utilities Commission's (PUC) approval of power purchase agreement (PPA) to purchase solar energy, 2020 WL 6018521, and denial of group's motion for reconsideration.

The Supreme Court held that:

- Statutes governing PUC's PPA review reflect core state constitutional public trust principles;
- PUC discharged its statutory duty to assess the public interest and consider potential anticompetitive issues; and
- PUC complied with its statutory obligation to consider the need to reduce state's reliance on fossil fuels.

Statutes governing the Public Utilities Commission's (PUC) power purchase agreement (PPA) review

reflect core state constitutional public trust principles, in that the state and its agencies must protect and promote the justified use of Hawai'i's natural beauty and natural resources; thus, when there is no reasonable threat to a trust resource, satisfying those statutory provisions fulfills the PUC's obligations as trustee.

Public Utilities Commission (PUC) discharged its statutory duty to assess the public interest and consider potential anticompetitive issues in approving power purchase agreement (PPA) for purchase of solar energy, despite contention that after bid selection all finalists hired same legal counsel to negotiate non-price PPA terms and some of those terms were similar or identical across projects; PUC did not dodge concerns about shared counsel and investigated and made specific findings, approval order reflected that PUC considered vetting mechanisms built into procurement process and concluded it had sufficient assurance that PPA was negotiated in good faith and without collusion, and PUC determined that solar company's choice of counsel did not have any adverse impact on pricing and terms.

Public Utilities Commission (PUC) complied with its statutory obligation to consider the need to reduce state's reliance on fossil fuels through energy efficiency and increased renewable energy generation when approving power purchase agreement (PPA) for purchase of solar energy; PUC reviewed electric company's greenhouse gas analysis, methodology, and data and found that project would result insignificant reduction in emissions, PUC evaluated state's energy policy and project's anticipated financial savings, PUC considered benefits of having dispatchable renewable energy, PUC identified permits that solar company would have to obtain, impact studies related to those permits, and agency review, and PUC considered solar company's efforts to explore an alternative site.

PUBLIC UTILITIES - IDAHO

Groveland Water and Sewer, District v. City of Blackfoot

Supreme Court of Idaho, Boise, January 2022 Term - March 3, 2022 - P.3d - 2022 WL 620634

Sewer district brought action against city, alleging that it violated sewer district's jurisdictional sovereignty by requiring individuals and entities located outside city limits but within sewer district to sign a "consent to annex" form in order for city to agree to connect them to sewer services, and seeking declaratory and injunctive relief as well as a finding of anticipatory breach of contract.

The Seventh Judicial District Court granted sewer district's request for preliminary injunction, entered summary judgment for sewer district on its anticipatory breach of contract claim, and denied city's motion to dismiss. City appealed.

The Supreme Court held that:

- City failed to provide adequate record for the Court to consider merits of its claims on appeal;
- Sewer district demonstrated an injury in fact sufficient to have standing to bring declaratory judgment claim;
- Sewer district established privity for standing to bring anticipatory breach claim;
- Sewer district was entitled to attorney fees and costs under terms of its contract with city; and
- Sewer district was entitled to statutory award of attorney fees for being the prevailing party on an appeal that was brought frivolously, unreasonably, or without foundation.

IMMUNITY - KANSAS

Schreiner v. Hodge

Supreme Court of Kansas - February 18, 2022 - P.3d - 2022 WL 497348

Petitioner filed pro se action against police officer and police sergeant alleging causes of action for assault, battery, false arrest, and false imprisonment after he was detained by police during an investigation concerning a suspicious vehicle.

Defendants removed case to federal court, and petitioner moved to remand. The United States District Court for the District of Kansas granted motion, and remanded to state court. The District Court granted officer and sergeant summary judgment based on discretionary function immunity under Kansas Tort Claims Act (KTCA). Petitioner appealed. The Court of Appeals affirmed. Petition for review was granted.

The Supreme Court held that:

- Officers did not have reasonable suspicion of criminal activity required to detain petitioner, and
- Officers were entitled to discretionary function immunity under the KTCA.

Police officers did not have reasonable suspicion of criminal activity required to detain petitioner, who had parked his vehicle in a residential area and entered a nearby wooded area from which he emerged three hours later, although petitioner's vehicle was parked in an area where officers were aware other crimes had taken place, and petitioner refused to reply when officer asked if he owned the vehicle; petitioner's vehicle was parked legally, officers did not have reasonable suspicion to believe that petitioner had committed, was committing, or was about to commit a crime, and his refusal to answer questions and attempt to leave could not be basis of such suspicion.

Although police officers did not have reasonable suspicion of criminal activity required to detain petitioner, who had parked his vehicle in a residential area and refused to answer officer's questions when he emerged three hours later, they were entitled to discretionary function immunity under the Kansas Tort Claims Act (KTCA) from petitioner's tort claims; their investigation of petitioner, along with their reasonable suspicion determination, were discretionary functions implicating matters of policy.

ZONING & PLANNING - MAINE

Zappia v. Town of Old Orchard Beach

Supreme Judicial Court of Maine - March 1, 2022 - A.3d - 2022 WL 599183 - 2022 ME 15

Property owner sought judicial review of decision of town's Zoning Board of Appeals upholding town's Code Enforcement Officer's (CEO) denial of owner's application to build a greenhouse in the front yard of her residential property.

The Superior Court affirmed. Plaintiff appealed.

The Supreme Judicial Court held that:

- Zoning ordinance provided for the Board to conduct de novo review, and therefore, the operative decision for purposes of Supreme Judicial Court review was that of the Board, and

- Phrase “required front yard” in town’s zoning ordinance relating to accessory buildings referred to the portion of the front yard that was required to be free of accessory structures under the applicable space and bulk regulations for the zoning district within which the property was located.

PUBLIC UTILITIES - NEVADA

Southwest Gas Corporation v. Public Utilities Commission of Nevada

Supreme Court of Nevada - February 17, 2022 - P.3d - 2022 WL 495029 - 138 Nev. Adv. Op. 5

Natural gas provider petitioned for judicial review of decision of Public Utilities Commission (PUC) in rate setting case to deny provider’s request for reimbursement for costs related to software upgrade projects and pension expenses and to set return on equity lower than what the provider requested.

The District Court denied petition. Provider appealed.

The Supreme Court held that:

- Public utilities do not enjoy a presumption of prudence with respect to the expenses they incur;
- Constitutional-fact doctrine does not apply to Supreme Court’s review of decisions of PUC;
- Provider had notice and opportunity to present its case on issue of normalizing pension expenses, as required for PUC’s rate-setting procedures to conform with procedural due process;
- PUC’s decision to adopt three-year normalization of pension expenses was not arbitrary or capricious;
- PUC’s selection of 9.25% return on equity was not unconstitutional confiscatory taking;
- PUC’s decision to disallow provider to recover its costs related to software upgrade projects was supported by substantial evidence; and
- PUC’s decision to disallow provider to recover its pension expenses was supported by substantial evidence.

Natural gas provider was not entitled to rebuttable presumption of prudence with respect to expenses for pension and software upgrade projects that provider sought to recover by filing general rate application with Public Utilities Commission (PUC) seeking to increase service rates charged to customers; provider was best positioned to prove the prudence of the expenses it incurred and could petition the courts for review if PUC rejected expenditures in arbitrary and capricious manner, and regulations required utilities to ensure material relied upon would serve as its complete case.

Public Utilities Commission’s (PUC) rate-setting procedures to conform with procedural due process in proceeding in which provider sought to raise its service rates to recover adjusted pension expenses; normalization issue was raised in prefiled direct testimony, but provider did not address it in direct testimony or in rebuttal at the hearing.

Public Utilities Commission (PUC) did not deprive natural gas provider of opportunity to explain its proposal to reduce discount rate used to calculate amount it needed to set aside to fund future pension obligations in proceeding in which provider sought to raise its service rates to recover adjusted pension expenses, and thus did not violate procedural due process requirements; regulatory professional for provider was asked at hearing how discount rate was determined and she merely stated that decision was made in conjunction with actuary, that she could not provide any further information, and that provider had no other witnesses who could do so.

Public Utilities Commission's (PUC) decision to adopt three-year normalization of pension expenses was not arbitrary or capricious in proceeding in which natural gas provider sought to raise its service rates to recover adjusted pension expenses and costs related to software upgrade projects; adopting normalization procedure for the first time in response to significant fluctuation made sense as the nature of averaging meant that provider would be somewhat undercompensated in high-cost years but overcompensated in low-cost years.

Public Utilities Commission's (PUC) selection of zone of reasonableness for return on equity between 9.10% to 9.70% was not arbitrary or capricious but was supported by substantial evidence in proceeding in which natural gas provider sought to raise its service rates to recover adjusted pension expenses, costs related to software upgrade projects, and return on equity; PUC considered expert testimony and provider's circumstances, such as its capital structure and risk profile, and PUC was free to fix any return on equity within range of reasonableness and permissibly settled on rate of 9.25% after balancing interests of ratepayers and shareholders.

Public Utilities Commission's (PUC) selection of 9.25% return on equity, in proceeding in which natural gas provider sought to raise its service rates to recover adjusted pension expenses, costs related to software upgrade projects, and return on equity, was not unconstitutional confiscatory taking; 9.25% return on equity was commensurate with other utilities with corresponding risks and maintained provider's ability to attract capital.

Public Utilities Commission's (PUC) decision to disallow natural gas provider to recover its costs related to software upgrade projects was supported by substantial evidence in proceeding in which provider sought to raise its service rates; provider submitted scant evidence substantiating projects' work order expenses, provider presented no witnesses who were directly involved in execution of projects or who could explain basis for incurring costs, and PUC's skepticism of expenses was warranted in light of provider's earlier attempt to obtain reimbursement for number of questionable expenses, including biweekly massages and home theater system.

Public Utilities Commission's (PUC) decision to disallow natural gas provider to recover its pension expenses was supported by substantial evidence in proceeding in which provider sought to raise its service rates; provider did not provide evidence to support its proposal to reduce discount rate used to calculate amount it needed to set aside to fund future pension obligations as witness was unable to explain how provider made decision to significantly reduce the discount rate.

EDUCATION - CALIFORNIA

Srouy v. San Diego Unified School District

Court of Appeal, Fourth District, Division 1, California - February 24, 2022 - Cal.Rptr.3d - 2022 WL 557183 - 2022 Daily Journal D.A.R. 1868

Former high school student brought action against public school district seeking declaration that school district was obligated to indemnify student for his defense costs in underlying personal injury action that referee brought against student, following graduation, for injuries referee received during an "away" varsity football game in which student might have made a late hit on another athlete.

The Superior Court granted school district's demurrer without leave to amend and dismissed. Student appealed.

The Court of Appeal held that:

- Free school guarantee of State Constitution did not impose a mandatory duty on school district to provide student a free legal defense;
- School district's refusal to defend student did not result in student's incurring a statutorily-prohibited charge for an extracurricular activity;
- School district did not have mandatory duty to defend based on Education Code section governing liability for activities off school grounds; and
- Student did not have a viable equal protection claim.

IMMUNITY - COLORADO

Maphis v. City of Boulder

Supreme Court of Colorado - February 22, 2022 - P.3d - 2022 WL 521907 - 2022 CO 10

Pedestrian brought personal injury action against city after tripping over a deviation in a city sidewalk.

The District Court denied city's motion to dismiss for lack of subject matter jurisdiction. City appealed, and the Court of Appeals reversed. The Supreme Court granted certiorari review.

The Supreme Court held that:

- To prove "dangerous condition" element of governmental immunity waiver under the Colorado Governmental Immunity Act (CGIA), a plaintiff must show that the condition created a chance of injury, damage, or loss which exceeded the bounds of reason, and
- Sidewalk deviation did not create a chance of injury, damage, or loss which exceeded the bounds of reason.

EMINENT DOMAIN - INDIANA

624 Broadway, LLC v. Gary Housing Authority

Court of Appeals of Indiana - December 27, 2021 - N.E.3d - 2021 WL 6110010

Condemnee brought action against municipal housing authority, seeking injunctive relief and damages based on allegations that authority unlawfully exercised eminent domain over condemnee's 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 held that:

- Indiana's statutory membership and quorum requirements for local housing authorities are preempted by federal law governing administrators appointed by United States Department of Housing and Urban Development (HUD) over local housing authorities in substantial default of agreements with HUD;
- Indiana's statutory requirement that local housing authority obtain approval from local fiscal body before exercising eminent domain is preempted by federal law governing HUD administrators;
- Uniform Relocation Assistance and Real Property Acquisition Policies Act creates no right in a

condemnee to judicial review of an agency's property-acquisition practices;
- Authority's use of notice by publication for hearing regarding exercise of eminent domain, rather than providing actual notice to condemnee's agent whose name and address were known to authority, violated condemnee's right to due process; and
- Fact that agent eventually learned of and attended hearings did not render harmless authority's failure to attempt service method likely to give condemnee actual notice of the meetings.

ZONING & PLANNING - MARYLAND

City of Hyattsville v. Prince George's County Council

Court of Special Appeals of Maryland - February 23, 2022 - A.3d - 2022 WL 533996

City and residents petitioned for judicial review of decision of county council, sitting as district council, to rezone part of property located within city from "open space" zone to "one-family detached residential" zone and to amend list of allowed uses to permit townhouses to be constructed on the property.

The Circuit Court affirmed decision. City and residents appealed.

The Court of Special Appeals held that:

- County zoning ordinances, which treated district council as primary and final decision maker on request to change underlying zone or allowed uses for property in development district overlay zone, did not violate division of authority established by Maryland-Washington Regional District Act (RDA);
- District council's decision to approve application to rezone part of property and to amend list of allowed uses was, in substance, a decision to approve zoning map amendment that RDA required council to make;
- District council's decision to establish approval criteria for changes to underlying zone without any reference to change-mistake requirement was appropriate exercise of council's zoning powers;
- Substantial evidence supported district council's conclusion that rezoning and amending list of allowed uses conformed with purposes and recommendations for development district overlay zone, as stated in sector plan, and did not substantially impair implementation of sector plan;
- Footnote attached to top line of table of standards for development district overlay zone did not operate to prohibit changes to list of allowed uses, and, thus, district council was authorized under county zoning ordinances to change list of allowed uses for property, provided that council found proposal met criteria in ordinances for approving zoning request; but
- District council was required under county zoning ordinances to approve maximum densities in terms of dwelling units per net acre of net lot or tract area, instead of dwelling units per acre.

EMINENT DOMAIN - OKLAHOMA

Rocket Properties, LLC v. LaFortune

Supreme Court of Oklahoma - January 18, 2022 - 502 P.3d 1112 - 2022 OK 5

In city's action for eminent domain, property owner asserted claim for inverse condemnation.

The District Court granted city summary judgment and dismissed property owner's claim on grounds that it was governed by the Oklahoma Governmental Tort Claims Act (GTCA). Property owner filed

petition for writ of prohibition.

The Supreme Court held that action for inverse condemnation was not a "tort" governed by GTCA.

A cause of action grounded on inverse condemnation is not a tort governed by Governmental Tort Claims Act (GTCA); rather, it is a special statutory proceeding for the purpose of ascertaining the compensation to be paid for appropriated or damaged property.

EMINENT DOMAIN - TEXAS

Preston Hollow Capital, L.L.C. v. Cottonwood Development Corporation

United States Court of Appeals, Fifth Circuit - January 14, 2022 - 23 F.4th 550

Lender, which made loan to city in connection with development project, brought § 1983 action against city, alleging city violated Takings Clause when it failed to return loaned funds.

The United States District Court adopted magistrate's report and recommendation and dismissed action. Lender appealed.

The Court of Appeals held that:

- Lender's pre-existing title to its own money did not allow lender to bring takings claim, as opposed to breach of contract claim, against city, and
- Neither city's statements asserting belief that loan agreement was void or voidable nor its adoption of resolution stating that transaction with lender was "legally defective" were sovereign acts, and therefore such acts could not support takings claim.

Lender's pre-existing title to its own money did not allow lender to bring takings claim, as opposed to breach of contract claim, against city based on city's failure to return funds lent to city by lender pursuant to parties' loan agreement; lender exchanged its pre-existing title for various rights laid out in loan agreement, such as a promissory note, and thus rights at issue in takings action were not independent of parties' contract.

Neither municipal borrower's statements asserting belief that loan agreement was void or voidable nor its adoption of resolution stating that transaction with lender was "legally defective" were sovereign acts, and therefore such acts could not support takings claim by lender after borrower failed to return loaned funds; borrower did not act pursuant to statute, ordinance, or regulation.

IMMUNITY - UTAH

Cunningham v. Weber County

Supreme Court of Utah - February 17, 2022 - P.3d - 2022 WL 480901 - 2022 UT 8

Special weapons and tactics training (SWAT) class participant and his wife brought action against county, the class provider, alleging claims for negligence and loss of consortium arising from injuries that participant sustained when an explosive by which he was instructed to stand exploded.

The Second District Court entered summary judgment for county. Participant and wife appealed.

The Supreme Court held that:

- Preinjury release of liability was not enforceable;
- As a matter of first impression, Government Immunity Act (GIA) waives immunity for both simple and gross negligence; and
- As a matter of first impression, GIA waives immunity for loss of consortium claims related to injuries for which immunity is waived.

Preinjury release of liability for negligence that special weapons and tactics (SWAT) training class participant signed was not clear and unmistakable, and thus, it was unenforceable, in participant's action against class provider arising out of injuries he sustained after he was instructed to stand a few feet away from an explosive set on a door latch and the explosive detonated, where the release used broad, general language that did not specifically nor unequivocally evince an intent to hold the provider, as the released party, blameless for its own negligent conduct.

The Government Immunity Act (GIA) waives immunity for both simple and gross negligence claims against a governmental entity.

The Governmental Immunity Act (GIA) waives immunity for loss of consortium claims related to injuries for which immunity is waived.

MUNICIPAL FINES - WASHINGTON

Williams v. City of Spokane

Supreme Court of Washington - March 3, 2022 - P.3d - 2022 WL 619690

Motorist brought putative class action against city and traffic control company asserting claims for declaratory and injunctive relief and claims for damages on theories of due process and unjust enrichment, seeking refund of his uncontested traffic infraction fine for speeding in school zone.

The Superior Court denied defendants' summary judgment motion. Defendants moved for discretionary review, which was granted. The Court of Appeals reversed. Motorist petitioned for review, which was granted.

The Supreme Court held that:

- Exclusive means for motorist to obtain a refund of traffic infraction fine was to move to vacate judgment in municipal court;
- Court of Appeals properly exercised its discretion to reach standing issue for first time on appeal; and
- Motorist lacked standing to seek declaratory and injunctive relief.

MUNICIPAL ORDINANCE - ALABAMA

Glass v. City of Montgomery

Supreme Court of Alabama - February 11, 2022 - So.3d - 2022 WL 414392

Motorist disputing civil citation for allegedly running a red light challenged the constitutionality of

municipal ordinance and a corresponding local act that authorized automated photographic enforcement of traffic-light violations within municipality's corporate limits.

The Circuit Court determined that ordinance and local act were constitutional. Motorist appealed.

The Supreme Court held that:

- Local act did not violate Alabama Constitution's prohibition on local law in any case that was provided for by a general law;
- Local act did not violate Alabama Constitution's prohibition on the legislature authorizing any municipal corporation to pass any laws inconsistent with the general laws of the State; and
- Local act did not violate Alabama Constitution's prohibition on local laws fixing the punishment of a crime.

Local act that authorized automated photographic enforcement of traffic-light violations within municipality's corporate limits did not violate Alabama Constitution's prohibition on local law in any case that was provided for by a general law; although the local law did address a case that was provided for by a general law, the local law passed constitutional muster under the "demonstrated local need" exception to the constitutional provision, given the city's need to protect the safety of the traveling public.

Local act that authorized automated photographic enforcement of traffic-light violations within municipality's corporate limits did not violate Alabama Constitution's prohibition on the legislature authorizing any municipal corporation to pass any laws inconsistent with the general laws of the State; despite argument that act and corresponding municipal ordinance effectively decriminalized the criminal offense of running a red light by making the offense a civil violation, act and ordinance provided that no civil penalty could be imposed if the vehicle operator was cited for a criminal violation of the traffic code, and the Alabama Constitution empowered the legislature to create both a criminal violation and a civil violation for the same act.

Local act that authorized automated photographic enforcement of traffic-light violations within municipality's corporate limits did not violate Alabama Constitution's prohibition on local laws fixing the punishment of a crime; Act exclusively provided for civil violations and civil penalties.

EMINENT DOMAIN - CALIFORNIA

Ballinger v. City of Oakland

United States Court of Appeals, Ninth Circuit - February 1, 2022 - 24 F.4th 1287 - 22 Cal. Daily Op. Serv. 1444 - 2022 Daily Journal D.A.R. 1189

Landlords filed § 1983 action alleging that city's requirement that they pay relocation fee to their tenant before they could move back into their own home upon expiration of lease constituted unlawful physical taking.

The United States District Court for the Northern District of California dismissed complaint, and landlords appealed.

The Court of Appeals held that:

- Relocation fee was not unconstitutional physical taking;
- Ordinance did not effect "physical taking" under Takings Clause;

- Ordinance did not place unconstitutional exaction on landlords' preferred use of their home; and
- Landlords' payment of relocation fees did not constitute "seizure" for Fourth Amendment purposes.

Relocation fee that city ordinance required landlords to pay their tenant after terminating lease for cause was not unconstitutional physical taking; ordinance merely regulated landlords' use of their land by regulating relationship between landlord and tenant.

City ordinance requiring landlords to pay tenant relocation fee upon termination of lease for cause merely imposed obligation to pay money on happening of contingency, which happened to be related to real property interest, but did not seize sum of money from specific fund, and thus did not effect "physical taking" under Takings Clause; relocation fee was monetary obligation triggered by landlords' actions with respect to use of their property, not burden on their interest in property.

City ordinance requiring landlords to pay tenant relocation fee before they could move back into their own home upon expiration of lease did not conditionally grant or regulate grant of government benefit, such as permit, and thus did not place unconstitutional exaction on their preferred use of their home, in violation of Takings Clause.

Landlords' payment of relocation fees to tenants pursuant to city ordinance did not constitute state action, and thus did not constitute "seizure" for Fourth Amendment purposes; city did not participate in monetary exchange, exercise coercive power over tenants, or actively encourage, endorse, or participate in any wrongful interference by tenants with landlords' money.

INSURANCE - GEORGIA

Atlantic Specialty Insurance Company v. City of College Park

Supreme Court of Georgia - February 15, 2022 - S.E.2d - 2022 WL 451879

Automobile accident victims' relatives brought wrongful death action against city to recover for fatal collision with unknown driver during police pursuit.

City's automobile insurer intervened for limited purpose of litigating policy limits.

The State Court entered partial summary judgment that limits available were $5 million. Insurer appealed. The Court of Appeals affirmed. Insurer's petition for certiorari was granted.

The Supreme Court held that:

- Immunity endorsements to city's policy did not contravene public policy, and
- Policy provided no coverage for liability above $700,000 waiver of sovereign immunity.

Statute increasing waiver of sovereign immunity to extent that the local government entity purchases commercial liability insurance in an amount in excess of $700,000 statutory waiver of immunity does not mean that the purchase of liability insurance in excess of the statutorily prescribed limit waives sovereign immunity to policy limit for any sort of claim.

Immunity endorsements to city's automobile liability policy did not contravene public policy by stating that insurer had no duty to pay damages on city's behalf unless defenses of sovereign and governmental immunity were inapplicable and that policy and coverages were not a waiver of sovereign immunity.

City's automobile policy with immunity endorsements provided no coverage for liability above $700,000 waiver of sovereign immunity and thus provided no coverage above $700,000 for fatal accident caused by stolen vehicle during police chase, where endorsements stated that insurer had no duty to pay damages on city's behalf unless defenses of sovereign and governmental immunity were inapplicable and that policy and coverages were not a waiver of sovereign immunity.

MUNICIPAL CORPORATIONS - MASSACHUSETTS

City Council of Springfield v. Mayor of Springfield

Supreme Judicial Court of Massachusetts, Hampden - February 22, 2022 - N.E.3d - 2022 WL 519479

City council brought action seeking declaratory relief, injunction, and mandamus to require mayor to comply with ordinance reorganizing police department to be headed by five-person board of police commissioners rather than single commissioner.

The Superior Court Department entered summary judgment in city council's favor, and mayor appealed. Parties' joint application for direct appellate review was granted.

The Supreme Judicial Court held that:

- Ordinance fell within city council's statutory authority;
- Ordinance did not violate mayor's statutory power to appoint and remove "all heads of departments and members of municipal boards";
- Ordinance did not impermissibly interfere with mayor's statutory authority to enter into employment contract with police chief; and
- Ordinance did not usurp mayor's right to decide that police force would be better administered with single, professional commissioner.

ELECTIONS - MISSOURI

City of Maryland Heights v. State

Supreme Court of Missouri, en banc - February 15, 2022 - S.W.3d - 2022 WL 464268

Officials of political subdivisions within county brought action against State, seeking declaration that statute prohibiting officials from directly using public funds to advocate, support, or oppose a ballot measure or candidate for public office violated the First and Fourteenth Amendments of the federal constitution.

The Circuit Court entered judgment in favor of officials. State appealed.

The Supreme Court held that:

- Statute did not constitute a regulation of officials' speech and thus did not violate free speech clause of First Amendment;
- Term "ballot measure," as used in statute, was not impermissibly vague under due process clause; and
- Statute's terms "public funds" and "directly" were also not impermissibly vague under due process clause.

Supreme Court of Missouri holds that statute prohibiting political-subdivision officials from directly using public funds to advocate, support, or oppose a ballot measure or candidate for public office did not constitute a regulation of officials' speech and thus did not violate free speech clause of First Amendment, where statute did not in any way prohibit the use of private or personal funds to subsidize officials' speech.

Term "ballot measure," as used in statute prohibiting political-subdivision officials from directly using public funds to advocate, support, or oppose a ballot measure or candidate for public office, was not impermissibly vague under due process clause, even though statute did not define term; another statute, though not strictly applicable to statute at issue, defined term as a proposal intended to be submitted to voters, and whether a proposal was intended to be submitted to the voters would be clear in most circumstances, especially when the process for getting it on the ballot has begun.

Terms "public funds" and "directly," as used in statute prohibiting political-subdivision officials from directly using public funds to advocate, support, or oppose a ballot measure or candidate for public office, were not impermissibly vague under due process clause, even if a variety of hypothetical situations might pose close call under statute; speculation about hypothetical situations was insufficient to support facial attack when language understandable to ordinary person conveyed what was prohibited in the vast majority of intended applications.

BOND ELECTION - TEXAS

Launius v. Flores

Court of Appeals of Texas, Dallas - February 1, 2022 - S.W.3d - 2022 WL 292265

A bond election for Dallas College that was held on May 4, 2019. The bond measure proposed the issuance of $1,102,000,000 in bonds and notes for the purpose of constructing, improving, renovating, and equipping school buildings for Dallas College. The measure passed.

Kirk Launius opposed the bond measure and was a poll watcher. In the underlying election contest, Launius alleged that election officers or persons officially involved in the administration and tabulation of the election counted illegal votes, failed to count legal votes, and "made mistakes and/or engaged in illegal conduct." [Sound familiar?]

After a bench trial, the trial court sustained the election results and rendered judgment for Dallas College. The trial court signed its final judgment on December 30, 2020. Launius filed a request for findings of fact and conclusions of law on January 19, 2021, and a notice of past due findings on February 18, 2021. The trial court issued findings of fact and conclusions of law on March 17, 2021. Launius filed his notice of appeal on March 29, 2021, which is eighty-nine days after the trial court signed the judgment.

The Court of Appeals held that appeals required by statute to be accelerated ***or expedited*** are accelerated appeals. TEX. R. APP. P. 28.1(a) . In an accelerated appeal, the notice of appeal must be filed within 20 days after the judgment or order is signed. TEX. R. APP. P. 26.1(b).

Dallas College argued in its motion to dismiss that Launius's notice of appeal was untimely because this is an accelerated appeal pursuant to Rule 28.1(a) with accelerated deadlines governed by Rule 26.1(b). Dallas College relied on section 231.009 of the election code, which provides that "[a]n election contest has precedence in the appellate courts and shall be disposed of ***as expeditiously*** as

practicable." TEX. ELEC. CODE § 231.009. Dallas College contends that the plain language of section 231.009 requires appeals of judgments in an election contest on a measure to be expedited and, as such, they are accelerated appeals under Rule 28.1(a) and subject to the deadlines imposed by Rule 26.1(b).

Launius, in contrast, relied on section 232.015 of the election code to support his contention that the Rule 26.1(b) deadlines did not apply here and, as such, his appeal was timely filed within ninety days after the judgment was signed as required by Rule 26.1(a)(4). Section 232.015 provides that "[t]he trial or appellate court ***may accelerate*** the appeal in a contest of a general or special election in a manner consistent with the procedures prescribed by Section 232.014." TEX. ELEC. CODE § 232.015. Launius maintains that the election at issue was a special election and, as such, falls under section 232.015. He further argues that section 232.015 does not require appeals to be accelerated; rather, the statute gives an appellate court discretion to consider the appeal on an accelerated basis.

The Court of Appeal found that Launius's reliance on section 232.015 was misplaced because the election at issue was not subject to Chapter 232 of the election code. Chapter 232 applies only to "a contest of an election for nomination or election to a public office or an office of a political party." TEX. ELEC. CODE § 232.001. The election at issue here was a bond election, not an election for nomination or election to office. A bond election is an "election on a measure" that is subject to Chapter 233 of the election code and is part of Title 14, Subchapter B of the election code. See id. § 233.001 ("This chapter applies to a contest of an election on a measure."); see also id. § 1.005(12) ("'Measure' means a question or proposal submitted in an election for an expression of the voters' will.").

"We conclude section 231.009 controls our determination of the motion to dismiss. We must, therefore, decide if disposing of an appeal in an election contest 'as expeditiously as practicable' means the appeal must 'be accelerated or expedited' as an accelerated appeal under Rule 28.1(a). Compare id. § 231.009 ('An election contest has precedence in the appellate courts and shall be disposed of as expeditiously as practicable.') with TEX. R. APP. P. 28.1(a) ('Appeals required by statute to be accelerated **or expedited**, … are accelerated appeals.')."

"No Texas court has addressed this question. Similar language in the Texas Citizens Participation Act (TCPA), however, is consistently construed as requiring an appeal to be accelerated under the appellate rules of procedure."

"Here, the requirement found in section 231.009 requiring appeals to 'be disposed of ***as expeditiously*** as practicable' constitutes a requirement that appeals be expedited under section 231.009." "Because section 231.009 creates an appeal that is statutorily-required to be expedited, such an appeal is accelerated under Rule 28.1(a) and subject to the accelerated appellate timetable of Rule 26.1(b). As such, the notice of appeal was due within twenty days after the date the judgment or order was signed or within thirty-five days if a motion to extend time was filed."

The Court of Appeals held that the notice of appeal was untimely, and the request for findings of fact and conclusions of law did not extend the time to perfect the appeal.

ZONING & PLANNING - WASHINGTON

Kenmore MHP LLC v. City of Kenmore

Court of Appeals of Washington, Division 2 - February 8, 2022 - P.3d - 2022 WL 365736

Petitioner filed petition for judicial review of decision of Growth Management Hearings Board, determining that petitioner's service of its petition for review of a city ordinance on city after filing petition with the Board deprived Board of jurisdiction and did not substantially comply with service requirements, and summarily denying petitioner's request to amend its petition to add legal authorities.

The Superior Court reversed and remanded to the board. City appealed.

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

- Court of Appeals would defer to Board's interpretation of "substantially comply" in service requirement of regulation governing petitions for review;
- Petitioner did not substantially comply with service requirement of regulation governing petitions for review, under the Board's interpretation of substantial compliance;
- Board's dismissal of petition did not conflict with regulation providing that Board would rarely entertain a motion for summary judgment except in a case of failure to act by a statutory deadline; and
- Board's dismissal of petition was not arbitrary and capricious.

Court of Appeals would defer to Growth Management Hearings Board's interpretation of "substantially comply" in service requirement of regulation governing petitions for review, i.e., that for a party to substantially comply with a service rule, (a) the party that had to be served personally received actual notice, (b) the defendant would suffer no prejudice from the defect in service, (c) there is a justifiable excuse for the failure to serve properly, and (d) the plaintiff would be severely prejudiced if his complaint were dismissed, which it adopted from test used under the federal rules of civil procedure; term was ambiguous, and definition was plausible, related to a service rule, was consistent with statutory language of the Growth Management Act, and had not been overturned.

Petitioner had no justifiable excuse for serving its petition for review of a city ordinance on city after filing petition with the Growth Management Hearings Board, and thus, it did not "substantially comply" with service requirement of regulation governing petitions for review, under the Board's interpretation of substantial compliance; petitioner gave petition to a messenger on the Friday afternoon before the statutory deadline and the messenger was unable to reach the City for service that day.

Growth Management Hearings Board's dismissal of petition for review of a city ordinance due to petitioner's service of petition on city after filing petition with the Board, even though petitioner complied with statute of limitations, did not conflict with regulation providing that Board would rarely entertain a motion for summary judgment except in a case of failure to act by a statutory deadline; regulation did not place any mandate on Board, as "rarely" did not mean "never."

Growth Management Hearings Board's dismissal of petition for review of a city ordinance due to petitioner's service of petition on city after filing petition with the Board was not arbitrary and capricious, in violation of the state Administrative Procedure Act (APA); Board examined the record and applied a legal test it adopted from the federal courts for determining substantial compliance with a service requirement, and applying that test to the facts, Board determined that petitioner did not substantially comply with its service requirement because it failed one element of the test: a justifiable excuse.

IMMUNITY - WYOMING

Cornella v. City of Lander

Supreme Court of Wyoming - January 18, 2022 - 502 P.3d 381 - 2022 WY 9

Homeowners brought negligence action against city under Wyoming Governmental Claims Act (WGCA) arising from an officer's removal of bat from home but losing bat in transport before it could be tested for rabies.

The District Court granted summary judgment for city. Homeowners appealed.

The Supreme Court held that:

- Trial court could not grant summary judgment on an immunity issue not raised by parties without giving notice and time to respond;
- WGCA immunity provision for appointed special municipal officers did not apply; and
- Officer and police chief owed a common law duty to homeowners to act as reasonable peace officers.

Trial court could not grant summary judgment to city on grounds not raised by parties without giving notice and time to respond in homeowners' negligence action under Wyoming Governmental Claims Act (WGCA) arising from officer's removal of bat from home but losing bat before it could be tested for rabies; court sua sponte changed the dispositive summary judgment issue from existence of duty to whether governmental immunity was waived.

Officer who removed bat from home and city's police chief were certified peace officers, and therefore immunity provision of Wyoming Governmental Claims Act (WGCA) for appointed special municipal officers like animal control officers did not apply to give city immunity from homeowners' negligence claim under WGCA arising from officer's losing bat in transport before it could be tested for rabies, where officer's job description labeled him a certified police officer, officer's job qualifications required successful completion of law enforcement academy basic peace officer course and stated that he was required to be a certified reserve police officer, and chief's job qualifications required him to be a certified professional police officer.

Officer who worked as animal control officer for city police department, along with police chief, owed a common law duty to homeowners to act as reasonable peace officers under the circumstances, which involved officer's removal of bat from home after which bat escaped during transport before being tested for rabies, where officer and police chief were peace officers acting within the scope of their duties.

PUBLIC UTILITIES - CALIFORNIA

Plata v. City of San Jose

Court of Appeal, Fourth District, Division 3, California - February 2, 2022 - Cal.Rptr.3d - 2022 WL 305902 - 22 Cal. Daily Op. Serv. 1612 - 2022 Daily Journal D.A.R. 1284

Ratepayers who were customers of city water system brought class action lawsuit against city, alleging that city violated Right to Vote on Taxes Act by collecting money from customers and illegally transferring it to the city's own general fund and seeking declaratory and injunctive relief against the city, as well as recovery of the amounts overpaid.

After bench trial, the Superior Court found the tiered rate structure did not comply with Act, but did not award ratepayers any relief and granted city's motion to decertify class. Ratepayers appealed, and the city cross-appealed.

The Court of Appeal held that:

- Under Right to Vote on Taxes Act, late penalty charges do not burden landowners as "landowners," but rather landowners as "delinquent bill payers;"
- City water system could not identify in advance which property owners would become delinquent on their bills, and thus, it was unable to calculate a per-parcel charge and notify those property owners of a public hearing as it would be required to do under Act;
- City water system's late penalty charges were not "fees" as contemplated in the constitutional definition set forth in Act; and
- Trial court abused its discretion in permitting ratepayers to assert not merely a new theory, but liability on an entirely different state of facts against city water system than that set forth in ratepayers' claim presented to city pursuant to Government Claims Act (GCA).

Under Right to Vote on Taxes Act which provides the procedures and criteria by which a local government can lawfully impose or increase any fee or charge as incidents of property ownership, late penalty charges do not burden landowners as "landowners," but rather landowners as "delinquent bill payers;" landowner will not incur a late penalty charge merely through ownership and normal use of property, but rather through an additional act or omission, such as failing to pay his bill by the due date.

City water system could not identify in advance which property owners would become delinquent on their bills, and thus, it was unable to calculate a per-parcel charge and notify those property owners of a public hearing as it would be required to do under Right to Vote on Taxes Act which provided the procedures and criteria by which local government could lawfully impose or increase any fee or charge as incidents of property ownership; late penalty charges were not charges for water delivery, and instead, they were charges for failure to pay water bill, and late penalty charges were not "fees" as contemplated in the Act.

City water system's late penalty charges had nothing to do with water usage, and thus, they were not "fees" as contemplated in the constitutional definition set forth in Right to Vote on Taxes Act which provided the procedures and criteria by which local government could lawfully impose or increase any fee or charge as incidents of property ownership; late penalty charges were charges for failure to pay water bill.

Trial court abused its discretion in permitting ratepayers to assert not merely a new theory, but liability on an entirely different state of facts against city water system than that set forth in ratepayers' claim presented to the city pursuant to Government Claims Act (GCA); claim presented to city provided the city with notice that its water rates and the bases for them were being questioned, but claim was not enough to put the city on notice that its tiered rate structure was being attacked under Right to Vote on Taxes Act, and thus, ratepayers' complaint against city's water system challenging tiered rate system was not fairly reflected in the claim presented to the city, ratepayers themselves seemingly never understood the tier structure to be at issue as they never used the words "tiered rate" in their pleadings, charge of inflated rates alone did not necessarily implicate a tier structure, and ratepayers' tiered rates challenge represented a whole new litigation frontier.

EMINENT DOMAIN - IDAHO

Munden v. Bannock County

Supreme Court of Idaho, Boise, September 2021 Term - February 9, 2022 - P.3d - 2022 WL 386057

Landowners brought action against county asserting claims for declaratory relief and inverse condemnation concerning purported public road that landowners used as a private agricultural road, arising from county's enactment of ordinance restricting winter usage of road to snowmobile use only.

The Sixth Judicial District Court entered ex parte temporary restraining order (TRO) prohibiting enforcement of ordinance, but later dissolved TRO, dismissed complaint, and awarded county attorney fees and costs. Landowners appealed.

The Supreme Court held that:

- Trial court acted within its discretion in dissolving TRO;
- County was entitled to attorney fees and costs incurred in seeking dissolution of TRO;
- A rebuttable presumption exists that amount of bond posted by a plaintiff seeking an ex parte TRO is adequate;
- A petition for initiation of validation or abandonment proceedings with county was required before landowners could file suit concerning status of road;
- Dismissal without, rather than with, prejudice was required; and
- Landowners did not invite error in trial court's award of attorney fees to county for defending motions to clarify multiple non-final judgments;
- Trial court prematurely issued writ of execution for county's attorney fees before there was a final appealable judgment.

ZONING & PLANNING - MICHIGAN

Township of Fraser v. Haney

Supreme Court of Michigan - February 8, 2022 - N.W.2d - 2022 WL 388013

Township brought nuisance-abatement action against landowners, alleging violation of zoning ordinances stemming from landowners' keeping of hogs on property.

The Circuit Court denied landowners' motion for summary disposition on limitations grounds. Landowners appealed. The Court of Appeals reversed and remanded. Township sought leave to appeal, and, in lieu of granting leave, Supreme Court vacated and remanded. On remand, the Court of Appeals again reversed and remanded. Township sought leave to appeal, which was granted.

The Supreme Court held that action accrued from each date that landowners kept hogs on property, rather than solely from first date on which landowners had hogs on property.

Township's nuisance-abatement action against landowners pursuant to Zoning Enabling Act, alleging violation of zoning ordinances stemming from landowners' keeping of hogs on property, accrued from each date that landowners kept hogs on their property, rather than solely from first date on which landowners had hogs on property; it was the presence of the hogs that constituted the wrong asserted by township.

ANNEXATION - NEW JERSEY

Seaview Harbor Realignment Committee, LLC v. Township Committee of Egg Harbor Township

Superior Court of New Jersey, Appellate Division - December 29, 2021 - A.3d - 2021 WL 6129555

Property owners' sought review of township committee's decision, adopting recommendation of Planning Board to deny property owners; deannexation petition, seeking to annex their small community to a neighboring borough.

The Superior Court granted property owners' motion for summary judgment in part, and denied the motion in part. Property owners appealed.

The Superior Court, Appellate Division, held that:

- Evidence was sufficient to support trial court's determination that deannexation would result in social detriment;
- Evidence was sufficient to support trial court's determination that deannexation would result in economic injury;
- Trial court acted in its discretion when it determined that the harm to property owners from being a part of the township did not outweigh the harm to the township if the petition was granted;
- Trial court did not act arbitrarily or unreasonably in denying property owners' petition; and
- Trial court acted within its discretion in denying property owners' motion to supplement the record with emails and invoices that showed township administrator's communications with Board's attorney and professional planner.

MUNICIPAL ORDINANCE - NEW YORK

Hunters for Deer, Inc. v. Town of Smithtown

Court of Appeals of New York - February 10, 2022 - N.E.3d - 2022 WL 397864 - 2022 N.Y. Slip Op. 00907

Not-for-profit corporation, which advocated for rights of deer hunters, and licensed hunter who served as the corporation's president brought action against town, seeking declaration that town ordinance that imposed restrictions on discharge of firearms in the town was invalid as applied to the discharge setback of a bow and arrow.

The Supreme Court, Suffolk County, granted town's motion for summary judgment. Not-for-profit corporation and licensed hunter appealed. The Supreme Court, Appellate Division, reversed and remitted. Town filed motion for leave to appeal, which was granted.

The Court of Appeals held that a bow was not a "firearm" within meaning of statute authorizing certain towns to regulate discharge of firearms, and thus statute did not authorize town to regulate discharge of bows.

Term "firearm," as used in statute authorizing certain towns to prohibit discharge of firearms through ordinances that could be more restrictive than other laws where such discharge could be hazardous to the general public, did not include a bow, and thus statute did not authorize town to regulate the discharge of bows.

EMINENT DOMAIN - OHIO

State ex rel. Duncan v. American Transmission Systems, Inc.

Supreme Court of Ohio - February 9, 2022 - N.E.3d - 2022 WL 385590 - 2022-Ohio-323

Owner of property adjacent to right-of-way on which power lines were to be constructed filed complaint against company that installed transmission towers, electric utility, city, and mayor, seeking declaration that power lines were public and private nuisance resulting in taking of his property, preliminary and permanent injunction halting project's construction, writ of mandamus requiring respondents to commence appropriation proceedings, and compensatory relief.

The Eleventh District Court of Appeals granted respondents' motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim. Property owner appealed.

The Supreme Court held that:

- Court of Appeals lacked jurisdiction over claims for declaratory judgment and compensatory relief;
- Court of Appeals lacked jurisdiction over claims for injunctive relief;
- Alleged risks of harm were not actionable taking;
- Construction project was not compensable taking based on denial of access to land;
- Owner failed to state claim for regulatory taking;
- Alleged damages to owner's property were not peculiar to his property, and thus, did not constitute compensable taking on that ground; and
- Consequential damages were not recoverable for alleged injury to owner's property.

ZONING & PLANNING - PENNSYLVANIA

Altoona First Savings Bank v. Township of Logan

Commonwealth Court of Pennsylvania - December 22, 2021 - A.3d - 2021 WL 6057874

Bank brought declaratory judgment action against township and developer, arising from bank's purchase of foreclosed properties previously owned by developer, and seeking declarations that the bank was not a "developer" or "applicant" under the Municipalities Planning Code, that the bank was neither a party to nor bound by agreement between developer and township, that township's failure to file a claim against the developer's performance bond made township liable for the costs of completing infrastructure in development, and that developers were liable for the infrastructure costs.

The Court of Common Pleas granted partial summary judgment in favor of bank. Township filed interlocutory appeal.

The Commonwealth Court held that:

- Genuine issue of material fact precluded summary judgment on issue of whether bank was the successor to developer;
- Agreement between developer and township was not a covenant that ran with the land in development; and
- Genuine issues of material fact precluded summary judgment on issue of whether agreement was binding on bank.

Genuine issue of material fact existed regarding whether bank assumed the proprietary interest of developer by purchasing foreclosed properties previously owned by developer, precluding summary judgment on issue of whether bank was the successor to the developer who made application for development and, therefore, the successor applicant under the Municipalities Planning Code responsible for all required infrastructure for the completion of the development.

Developers agreement between developer and township was not a covenant that ran with the land in development project, although agreement was recorded; one clear purpose of the agreement was to assure that developers, not the individual lot purchasers, would be primarily responsible to provide the requisite infrastructure for the development, and agreement therefore could not constitute a covenant running with the land, in that it could not and did not impose infrastructure obligations on the individual lot purchasers.

Genuine issues of material fact existed regarding the meaning of "successor" in developers agreement between developer and township and whether the bank that bought foreclosed properties previously owned by developer was a successor under the agreement, precluding summary judgment on issue of whether agreement was binding on bank.

UNFUNDED MANDATES - WASHINGTON

Washington State Association of Counties v. State

Supreme Court of Washington - January 27, 2022 - P.3d - 2022 WL 244109

Counties and Washington State Association of Counties (WSAC) filed suit against State of Washington, seeking declaratory judgment that counties were entitled to reimbursement in full from State for costs incurred to comply with statute requiring State auditors to install minimum of one ballot box per 15,000 registered voters and minimum of one ballot drop box in each city, and damages.

The Superior Court granted partial summary judgment to counties and WSAC, and ordered State to fully reimburse counties for funds expended in order to comply ballot-box statute. State petitioned for direct review.

The Supreme Court held that:

- Specific statute entitling counties to reimbursement from State proportional share of election-related costs controlled over general unfunded-mandate statute that required State to fully reimburse political subdivisions for newly imposed or increased responsibility;
- Amendment did not violate state constitutional prohibition against amendment or revision of existing statute by mere reference to its title; and
- Amendment's retroactivity provision did not deprive counties of vested right without due process of law.

PUBLIC UTILITIES - DISTRICT OF COLUMBIA

City and County of San Francisco v. Federal Energy Regulatory Commission

United States Court of Appeals, District of Columbia Circuit - January 25, 2022 - F.4th - 2022 WL 211363

City petitioned for review of multiple orders by the Federal Energy Regulatory Commission (FERC) denying its complaints against utility, and denying city's requests for rehearing regarding delivery of electricity to end users, challenging utility's refusal to offer secondary-voltage service and provide service to certain delivery points under terms of open-access tariff.

The Court of Appeals held that:

- Petitions were not moot;
- FERC's decisions were arbitrary and capricious;
- FERC's decision that utility did not unduly discriminate was not based on reasoned decision-making; and
- FERC's decision that utility complied with grandfathering provision was arbitrary and capricious.

City's petitions for review of decisions by the Federal Energy Regulatory Commission (FERC) denying city's complaints against electrical utility, alleging that utility violated distribution agreement by refusing to offer secondary-voltage service to some end-users within the city, were not rendered "moot" by utility's proposed revised changes to the distribution agreement, which were accepted by FERC, where retrospective relief for prior violations was still available to city.

Federal Energy Regulatory Commission (FERC) decision, finding that electrical utility retained discretion to determine what level of service was most appropriate for customers, and denying city's complaint challenging utility's refusal to offer secondary-voltage service to city, was arbitrary and capricious, in violation of the Federal Power Act (FPA); FERC's decision was conclusory and vague, it made only passing reference to relevant factors, such as safety, reliability, and engineering challenges, and it failed to identify specific risks and challenges arising from providing secondary-voltage service to city.

Federal Energy Regulatory Commission (FERC) decision, finding that electrical utility did not unduly discriminate against city by providing service to retail customers at higher voltages than it provided to city, did not amount to reasoned decision-making, as required by the Federal Power Act (FPA), absent specific explanation as to how utility's retail customers were not similarly-situated to city.

Federal Energy Regulatory Commission (FERC) decision, that electrical utility's refusal to provide city with new interconnections for secondary-voltage distribution services unless the total electricity demand was less than 75 kilowatts did not violate terms of secondary-voltage tariff, was arbitrary and capricious in violation of Federal Power Act (FPA); FERC failed to explain specific justifications for the 75-kilowatt numerical guidepost, which was not set forth in the tariff itself.

Decision of the Federal Energy Regulatory Commission (FERC), finding that electrical utility complied with grandfathering provision of Federal Power Act (FPA) by providing secondary-voltage service to limited number of delivery points, was arbitrary and capricious; FERC departed from its own interpretation of its precedent, without providing reasoned analysis indicating how and why its prior policies and standards were being changed.

BALLOT INITIATIVE - CALIFORNIA

Starr v. Chaparro

Court of Appeal, Second District, Division 6, California - January 18, 2022 - Cal.Rptr.3d - 73 Cal.App.5th 1094 - 2022 WL 152088

Initiative proponent requested writ of mandate to compel the city to place initiative on the ballot,

which would amend city ordinance to extend mayor's term to four years and to establish a combined two-term limit for mayor and council member.

The Superior Court denied petition. Proponent appealed.

On rehearing, the Court of Appeal held that city was required by the Election Code to place proponent's initiative on the ballot.

City was required by the Election Code to place on the ballot proponent's initiative, which would amend city ordinance to extend the mayor's term to four years and to establish a combined two-term limit for mayor and council member, rather than adopt the initiative as an ordinance without alteration, where ordinance amended by the initiative had been adopted by the voters after the city, acting pursuant to its authority under the Government Code to submit questions to electors, had placed the ordinance on the ballot, and the majority of voters then voted to have an elected mayor with a two-year term of office.

PUBLIC UTILITIES - CALIFORNIA

County of San Bernardino v. West Valley Water District

Court of Appeal, Fourth District, Division 2, California - February 1, 2022 - Cal.Rptr.3d - 2022 WL 292704 - 2022 Daily Journal D.A.R. 1250

County filed petition for writ of mandate and complaint for declaratory relief against water district, seeking emergency relief to order district to change its election date to statewide general election.

The Superior Court entered stipulated judgment, ordering that district conduct its elections on statewide general election date. District appealed.

The Court of Appeal held that:

- District waived argument that county lacked standing to bring petition, and
- District was required to conduct its election on statewide general election date in even-numbered years.

Water district waived argument that county lacked standing to bring petition for writ of mandate and complaint for declaratory relief, seeking emergency relief to order district to change its election date to statewide general election under Voter Participation Rights Act (VPRA), despite fact that district raised issue in its demurrer, as parties' stipulated judgment, ordering district to conduct its elections on statewide general election date, did not address standing.

Under Voter Participation Rights Act (VPRA), water district was required to conduct its election on statewide general election date in even-numbered years, rather than statewide primary election date, where turnout for district's elections was just 10 percent, and statewide general election date brought in over 60 percent of voters from political subdivision, thereby exceeding VPRA's 25 percent threshold to change district's election date.

FEES - FLORIDA

Pincus v. American Traffic Solutions, Inc.

Supreme Court of Florida - February 3, 2022 - So.3d - 2022 WL 324706

Motorist brought putative class action against company that was exclusive vendor for city's red light photo-enforcement program, alleging that the "convenience fee" that he was charged for paying his traffic ticket online with a credit card was an illegal commission or a prohibited surcharge, and that vendor operated as an unlicensed money transmitter, all of which, he contended, supported a claim for unjust enrichment under Florida law.

Vendor moved to dismiss.

The United States District Court for the Southern District of Florida granted motion. Motorist appealed. The Court of Appeals certified question.

The Supreme Court held that motorist failed to establish vendor's acceptance and retention of five percent convenience fee as required to state a claim for unjust enrichment.

Motorist failed to establish vendor's acceptance and retention of five percent convenience fee, which was charged due to motorist paying traffic ticket with credit card electronically, was inequitable, as required to state a claim for unjust enrichment, in putative class action against company that was exclusive vendor for city's red light photo-enforcement program, challenging the propriety of "convenience fee" motorist was charged for paying traffic ticket electronically; even if convenience fee was prohibited by Florida statutes such as those addressing licensure requirements for money transmitters or surcharge prohibitions, vendor's retention of fee was not inequitable as it provided value in exchange because motorist could pay balance over time, and received immediate confirmation.

TRANSPORTATION FEES - LOUISIANA

Winmill Tire, LLC v. Colt, Inc.

Supreme Court of Louisiana - January 28, 2022 - So.3d - 2022 WL 263004 - 2020-01446 (La. 1/28/22)

Generators of waste tires brought action against waste-tire processors, seeking damages and declaration that transportation fee imposed by processors was unlawful.

The District Court granted generators' motion for partial summary judgment, denied processors' motions for summary judgment on fee legality, and granted generators' subsequent motion to correct the judgment. Processors appealed. The Court of Appeal dismissed the appeals due to lack of decretal language in the judgment. The District Court thereafter amended the judgment, and processors appealed. The Court of Appeal affirmed.

After grant of certiorari, the Supreme Court held that:

- Provision of Administrative Code imposing waste-tire fee on tires sold in state, "to be collected from the purchaser by the tire dealer or motor vehicle dealer at the time of retail sale," pursuant to Waste Tire Program administered by Louisiana
- Department of Environmental Quality (LDEQ), did not preclude transportation fee;
- Statute providing that LDEQ waste-tire fee could not exceed specified maximum amounts also did not preclude transportation fee; and
- Provision of Administrative Code stating that the LDEQ waste-tire fee "shall not include any

additional fees" also did not preclude transportation fee.

BONDS - MINNESOTA

Rochester MSA Building Company v. UMB Bank, N.A.

United States District Court, D. Minnesota - January 12, 2022 - Slip Copy - 2022 WL 110295

Plaintiffs own and operate two public charter schools and were loaned more than $15 million in bond proceeds by the City of Rochester, Minnesota, to finance the improvement and expansion of their facilities.

After Plaintiffs defaulted on promises to maintain minimum levels of cash on hand and income available for debt service, they entered a forbearance agreement with Defendant UMB Bank, the indenture trustee of the bonds. In that agreement, Plaintiffs took on new obligations, like more frequent financial reporting, implementing the recommendations of a business consultant, and retaining an independent business manager. Plaintiffs also agreed to pay certain fees and expenses UMB incurred.

Plaintiffs filed this lawsuit over the reasonableness of fees that UMB has tried to collect under the forbearance agreement.

UMB asserted counterclaims, alleging that Plaintiffs defaulted on their obligations under the forbearance agreement and underlying bond agreements. UMB moved to appoint a general receiver.

The District Court held that:

- Although the parties' inclusion of a receivership remedy in their agreements is a factor that will be afforded some weight, the equitable factors announced in *Aviation Supply Corp.* still apply, and the burden will remain with UMB to show its entitlement on balance of those factors;
- Plaintiffs did not consent to receivership outright. At most, they agreed to "not oppose, contest, or challenge" appointment "upon the occurrence of a Forbearance Termination Event;"
- The parties conditioned the availability of receivership on some event of default. Plaintiffs do not concede that a receivership-triggering default event occurred, and, at this early stage, there are legitimate disputes over each type of default event that UMB asserts;
- Against the weight given to the parties' contemplation of receivership as a contractual remedy, the remaining factors establish that UMB has not made the extraordinary showing required for appointment;
- For many of the reasons it has not shown an imminent danger of loss, UMB also has not shown that it lacks adequate legal remedies or the absence of a less drastic equitable remedy;
- The denial of the motion will be without prejudice to UMB filing a renewed motion for receivership on a more developed record or upon a material change in the schools' financial circumstances. UMB also has less-drastic forms of injunctive relief at its disposal, such as a financial accounting or limited receivership; and
- The balance of harms weighs against receivership. A receiver offers added expense and diminished returns to the schools, which continue paying for an interim business manager with "exclusive authority" over their financial operations. Receivership also risks a decrease in student enrollment for the schools—meaning reduced state funding—due to confusion or misconception in the community over the schools' financial well-being.

ZONING & PLANNING - MISSISSIPPI

Wheelan v. City of Gautier

Supreme Court of Mississippi - February 3, 2022 - So.3d - 2022 WL 325207

Following city council's order authorizing property owner to build 1,410-square-foot workshop on property, neighbor filed suit against owner, city, and individual members of city council, alleging city council's order was unlawful because city council did not provide notice to neighbors of hearing on owner's building permit. Neighbor also alleged owner's workshop created nuisance.

Following trial, the Chancery Court dismissed suit. Neighbor appealed. The Court of Appeals affirmed. Neighbor filed petition for writ of certiorari.

The en banc Supreme Court held that:

- The pure questions of law presented in the interpretation of zoning ordinances are to be reviewed de novo, overruling *Hatfield v. Board of Supervisors of Madison County*, 235 So. 3d 18, and
- In city zoning ordinance providing that accessory structures could not exceed 50% of "main building area," term "main building area" could not be read to mean "entire lot."

In city zoning ordinance providing that accessory structures could not exceed 50% of "main building area," term "main building area" could not be read to mean "entire lot"; immediately preceding sentence in ordinance limited principal structure and all accessory structures combined to only 25% of lot area and stated that accessory structures could not exceed 20% of "rear lot area."

WORKER'S COMPENSATION - NEW JERSEY

Lapsley v. Township of Sparta

Supreme Court of New Jersey - January 18, 2022 - A.3d - 2022 WL 151632

Workers' compensation claimant, a township library employee, sought review of Division of Workers' Compensation's order concluding that her injury from a snowplow accident in township-owned parking lot adjacent to library, after she clocked out from work, was compensable.

The Superior Court, Appellate Division, reversed, finding that the injuries did not arise out of and in the course of claimant's employment.

The Supreme Court held that township's exercise of control over the parking lot rendered claimant's injuries compensable under the Worker's Compensation Act.

Township exercised its "control" over parking lot adjacent to township library, such that injuries sustained by claimant, a library employee, in accident with snowplow after she stepped off a library curb directly into the parking lot where her husband was parked, arose out of and in the course of her employment, so as to be compensable under the Workers' Compensation Act, since township owned the lot and had right to control it, was maintaining it by plowing it of snow when the accident occurred, and would have been aware that a library employee would park in the lot directly abutting the library.

PUBLIC CONTRACTS - NORTH CAROLINA

Southern Power Company v. Cleveland County

United States Court of Appeals, Fourth Circuit - January 14, 2022 - F.4th - 2022 WL 128488

Power company brought action seeking a declaration that its agreement with a North Carolina county constituted an enforceable contract.

The United States District Court adopted report and recommendation of United States Magistrate Judge and granted county's motion to dismiss for lack of jurisdiction. Plaintiff appealed.

The Court of Appeals held that:

- Agreement was not a binding contract when signed by parties;
- Contract formation occurred after passage of law mandating that municipal contracts with private entities include a recapture provision allowing a municipality to recover cash incentives already paid if the private entity breaches the agreement;
- Agreement violated law and thus was not a valid contract, such that there was no contractual waiver of governmental immunity;
- County acted in a governmental, rather than proprietary, capacity, such that county was entitled to governmental immunity; and
- Plaintiff was precluded from using equitable estoppel to enforce contract that violated law.

Unilateral agreement providing that county would make substantial cash payments to power company if company built and operated natural gas plant, a decision left to company's sole discretion, was not a binding contract under North Carolina law when the parties signed the agreement, but rather was only an offer by county when signed; agreement required nothing from power company, county could have withdrawn offer at any time before it was accepted by performance, and both power company and county could have torn up agreement the day after they signed it without any repercussions.

Under North Carolina law, contract formation occurred upon power company's performance and acceptance of unilateral contract providing that county would make substantial cash payments to power company if company built and operated natural gas plant, a decision left to company's sole discretion, such that formation occurred after passage of law mandating that municipal contracts with private entities include a recapture provision allowing a municipality to recover cash incentives already paid if the private entity breaches the agreement, even though parties signed contract weeks before legislature enacted statute.

Agreement between county and power company for construction and operation of a natural gas plant called upon county to do things that only a governmental entity could do, such as expediting processing of all applications for permits required by county and waiving fees for permitting, inspection, development or other fees normally charged by county for development and/or industrial projects, and therefore county acted in a governmental, rather than proprietary, capacity, such that county was entitled to governmental immunity from power company's equitable estoppel claim.

Under North Carolina law, power company was precluded from using equitable estoppel to enforce contract providing that county would make substantial cash payments to power company if company built and operated natural gas plant, and thus county was entitled to governmental immunity from suit, since contract violated statute mandating that municipal contracts with private entities include a recapture provision allowing a municipality to recover cash incentives already paid if the private

entity breaches the agreement.

IMMUNITY - CALIFORNIA

Williamson v. City of National City

United States Court of Appeals, Ninth Circuit - January 24, 2022 - F.4th - 2022 WL 201071 - 22 Cal. Daily Op. Serv. 1133 - 2022 Daily Journal D.A.R. 842

Protester brought § 1983 action against police officers alleging Fourth Amendment excessive force claims, along with claims under California's Tom Bane Civil Rights Act, arising from her removal, in handcuffs, from city council meeting at which she and other protesters performed a "die-in" demonstration with red-painted hands and chanting following death of a suspect in custody.

The United States District Court for the Southern District of California denied officers' motion for summary judgment based on qualified immunity. Officers appealed.

The Court of Appeals, Forrest held that:

- Type and amount of force used in pulling protester backward out of meeting by her arms and wrists after she went limp was minimal;
- City's interests in forcibly removing protester from meeting were low but not nonexistent;
- Gravity of intrusion on protester and weight of city's interests in removing her were aligned; and
- Bane Act claim failed for lack of proof of underlying constitutional violation.

ZONING & PLANNING - CALIFORNIA

Tran v. County of Los Angeles

Court of Appeal, Second District, Division 2, California - January 21, 2022 - Cal.Rptr.3d - 2022 WL 189918 - 22 Cal. Daily Op. Serv. 1025

Liquor store owner petitioned for writ of administrative mandate seeking to overturn county board of supervisors' determination approving modified conditional use permit for alcohol sales.

The Superior Court denied petition. Owner appealed.

The Court of Appeal held that:

- County code's 30-day time limit for board to render decision after hearing is mandatory;
- Board's indication of intent to approve modified permit at hearing was not a rendering of decision under 30-day time limit; and
- Board's error was not harmless.

County board of supervisors' error in failing to comply with 30-day time period for rendering a decision after a hearing was not harmless with respect board's approval of a modified conditional use permit for alcohol sales, where, once the 30 days passed, the more favorable decision of regional planning commission, which board reviewed, should have been affirmed via the self-executing "failure to act" provision, and the grant of the permit would have become effective as of that date.

MUNICIPAL CORPORATIONS - CALIFORNIA

Starr v. Chaparro

Court of Appeal, Second District, Division 6, California - January 18, 2022 - Cal.Rptr.3d - 2022 WL 152088 - 22 Cal. Daily Op. Serv. 853 - 2022 Daily Journal D.A.R. 656

Initiative proponent requested writ of mandate to compel the city to place initiative on the ballot, which would amend city ordinance to extend mayor's term to four years and to establish a combined two-term limit for mayor and council member.

The Superior Court denied petition. Proponent appealed.

On rehearing, the Court of Appeal held that city was required by the Election Code to place proponent's initiative on the ballot.

City was required by the Election Code to place on the ballot proponent's initiative, which would amend city ordinance to extend the mayor's term to four years and to establish a combined two-term limit for mayor and council member, rather than adopt the initiative as an ordinance without alteration, where ordinance amended by the initiative had been adopted by the voters after the city, acting pursuant to its authority under the Government Code to submit questions to electors, had placed the ordinance on the ballot, and the majority of voters then voted to have an elected mayor with a two-year term of office.

EMINENT DOMAIN - FEDERAL

Hardy v. United States

United States Court of Federal Claims - December 17, 2021 - Fed.Cl. - 2021 WL 5997272

In rails-to-trails action in which United States' conversion of owners' property from railroad rights-of-way to recreational trails constituted taking as to 145 of 173 parcels, owners filed motion for attorneys' fees and cost under Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (URA).

The Court of Federal Claims held that:

- Owners provided sufficient evidence that requested rates were reasonable under URA;
- Owners' unsuccessful claims were distinguishable from their successful claims;
- Hours that owners' counsel spent working on claims spreadsheets constituted administrative work and was, thus, not compensable under URA;
- Reduction in owners' claimed billed hours would be appropriate due to block billing;
- Owners' counsel's 13 trips to conduct trail inspections and in-person meetings with landowners were reasonable;
- Reduction in claimed travel fees would be warranted; and
- Owners' counsel's time entries for billing were not excessive, duplicative, or unnecessary.

ANNEXATION - TEXAS

Lampasas Independent School District v. Morath

Court of Appeals of Texas, Austin - January 21, 2022 - S.W.3d - 2022 WL 193198

Independent school district sought judicial review of the Commissioner of Education's decision to allow land developer to detach its land from that school district and annex it to another.

The 53rd District Court upheld the Commissioner's decision. School District appealed.

On rehearing and as a matter of first impression, the Court of Appeals held that Commissioner lacked jurisdiction over developer's petition for review absent a decision denying detachment petition.

Commissioner of Education lacked jurisdiction over developer's petition for review seeking detachment and annexation of school territory, pursuant to statutory provision allowing parties aggrieved by school districts' split decisions regarding such petitions to appeal to the Commissioner, absent a decision by one school district's board of trustees denying the petition; while one school district's board of trustees failed to act on the petition, board's failure to act was not a denial of the petition.

IMMUNITY - MISSOURI

Allen v. 32nd Judicial Circuit

Supreme Court of Missouri, en banc - January 11, 2022 - S.W.3d - 2022 WL 105130

Title insurance company employee brought personal injury action against city, state, and county to recover damages for personal injuries arising from injuries sustained when she fell on stairway leading to courthouse basement.

Following a jury verdict, the Circuit Court entered judgment for employee against the state, for the city and county, denied state's motion for judgment notwithstanding the verdict (JNOV), and denied employee's conditional motion for new trial as to liability by the city and county. State appealed and employee cross-appealed.

On transfer from the Court of Appeals, the Supreme Court held that:

- Employee provided sufficient evidence to find physical defects and deficiencies tantamount to a "dangerous condition";
- Evidence suggested that state had actual notice that stairway could be hazardous;
- State had constructive notice of stairway's defective condition;
- Jury instruction contained an inaccurate statement of the law under the "dangerous condition" waiver of sovereign immunity;
- Prejudice to state from inaccurate jury instruction warranted further proceedings to consider state's liability;
- Employee showed that city was a legal owner of courthouse as required for liability under "dangerous condition" waiver of sovereign immunity; and
- A plaintiff need not demonstrate that a public entity possesses exclusive possession and control of the property to satisfy the "public entity's property" element of the "dangerous condition" waiver of sovereign immunity if the public entity is the legal owner of the property, abrogating *Ford v. Cedar County*, 216 S.W.3d 167.

EMINENT DOMAIN - NEW YORK

Yu v. Incorporated Village of Oyster Bay Cove

United States District Court, E.D. New York - January 12, 2022 - F.Supp.3d - 2022 WL 130557

Property owners filed § 1983 action village, its code enforcement officer, and building inspector alleging violations of substantive due process rights and Takings Clause arising out of village's enforcement of its village code concerning construction, conservation, nuisance, and animal control.

Defendants moved to dismiss.

The District Court held that:

- Statute of limitations commenced when village planning board denied owners' site plan for construction permit
- *Rooker-Feldman* did not bar court from maintaining jurisdiction over owners' claims;
- Denial of permits did not violate owners' substantive due process rights;
- Fines assessed by village did not violate owners' substantive due process rights; and
- Rejection of owners' site plan did not effect regulatory taking.

Village's rejection of property owners' plan to permit alterations to existing building, expand existing driveway, construct new piers and gate, and maintain existing deck did not effect regulatory taking, even if denial resulted in property devaluation; village did not effectively deprive owners of any economic use of property, which could still be used as residence, and there was no allegation that village code—which was intended to protect wetlands and promote public safety—interfered with any investment-backed expectations.

PUBLIC RECORDS - OHIO

State ex rel. Horton v. Kilbane

Supreme Court of Ohio - February 1, 2022 - N.E.3d - 2022 WL 287443 - 2022-Ohio-205

Petitioner sought a writ of mandamus ordering police chief and city to produce documents related to city's implementation of a traffic-ticket quota, as well as statutory damages, attorney fees, and costs.

The Supreme Court held that:

- Petitioner was not entitled to mandamus relief on her request seeking a copy of reprimand issued to police officer for failing to write enough traffic citations;
- City's 13-month delay in responding to petitioner's public records request was unreasonable and warranted an award of statutory damages; and
- Petitioner failed to establish that she was entitled to an award of attorney fees.

EMINENT DOMAIN - TEXAS

Anderson v. United States

United States Court of Appeals, Federal Circuit - January 20, 2022 - F.4th - 2022 WL 175725

Owners of lands adjacent to railroad corridor filed rails-to-trials case against United States, seeking

just compensation for alleged Fifth Amendment taking by Surface Transportation Board's (STB) issuance of notice of interim trail use (NITU) to convert corridor into recreational trail pursuant to National Trail Systems Act.

The Court of Federal Claims granted in part government's motion for summary judgment. Owners appealed.

The Court of Appeals held that, under Texas law, unambiguous granting clauses of deeds to railroad granted fee simple interests rather than easements, with respect to strips of land for railroad corridor.

Under Texas law, unambiguous granting clause, of deed for strip of land for railroad corridor, was controlling despite language in deed's description of land referring to the conveyance as a right of way, and thus, deed conveyed to railroad fee simple interest rather than easement, so that Surface Transportation Board's (STB) issuance of notice of interim trail use (NITU), to convert corridor into recreational trail pursuant to National Trail Systems Act, did not constitute a taking of grantor's property without just compensation; granting clause stated that deed conveyed "all that piece or parcel of land," though description following granting clause stated that deed was made "for a right of way" for construction and operation of railroad, and also "granted" right to take and use all stone earth and other material existing or that might be found within right of way.

IMMUNITY - ALASKA

Barton v. City of Valdez

Supreme Court of Alaska - January 21, 2022 - P.3d - 2022 WL 189008

Resident brought negligence action against city, seeking to recover damages for injuries she sustained when a tire swing overhanging a cliff in an undeveloped area of a city park bumped into her while she was standing at the edge of a bluff, causing her to fall over the bluff and leaving her partially paralyzed and in a wheelchair.

The Superior Court entered summary judgment for city. Resident appealed.

The Supreme Court held that city was not protected by discretionary function immunity.

City's decision whether to remove tire swing overhanging a cliff in an undeveloped area of a city park, was not a planning type decision that entailed balancing policy considerations and thus city was not protected by discretionary function immunity in negligence action arising from incident in which the swing bumped into resident who was standing at edge of a bluff and caused her to fall over the bluff, leaving her partially paralyzed and in a wheelchair, where the swing was an unauthorized, human-made hazard that was known, easily accessible, and simple to remove, and the city identified no conceivable reasons for declining to remove it.

ZONING & PLANNING - CALIFORNIA

Old East Davis Neighborhood Association v. City of Davis

Court of Appeal, Third District, California - December 20, 2021 - Cal.Rptr.3d - 2021 WL 64260822 - 2 Cal. Daily Op. Serv. 789 - 2022 Daily Journal D.A.R. 446

Neighborhood association filed petition for writ of mandate challenging city council's approval of proposal for mixed-use building project.

The Superior Court granted petition. City, city council, and developer appealed, and association filed cross-appeal.

The Court of Appeal held that:

- Substantial evidence supported city's approval of project;
- City's downtown and traditional residential neighborhoods design guidelines did not preclude approval of project; and
- City council did not abuse its discretion in determining that project complied with guidelines.

Substantial evidence supported city's approval of proposed four-story mixed use building on land zoned mixed-use in transition area between downtown core and residential neighborhood, even though building would exceed height of mixed-use buildings inside downtown core, and buildings in core area were generally one or two stories; general plan required that new buildings "maintain scale transition" and provide "architectural 'fit'," and that there be "scale transition between intensified land uses and adjoining lower intensity land uses," building featured greater architectural relief and setbacks than case study image demonstrated and did not exceed height permitted in core area, and residential neighborhood contained number of large, monolithic structures.

Provision of city's downtown and traditional residential neighborhoods design guidelines (DTRN) stating that "building shall appear to be in scale with traditional single-family houses along the street front" was not mandatory, and thus did not preclude city council's approval of proposed four-story mixed use building on land zoned mixed-use in transition area between downtown core and residential neighborhood; guideline was subjective and not sort of unequivocal and quantifiable language that might be seen to set minimum acceptable limits.

City council did not abuse its discretion in determining that proposed four-story mixed use building in transition area between downtown core and residential neighborhood complied with provision of city's downtown and traditional residential neighborhoods design guidelines (DTRN) stating that "building shall appear to be in scale with traditional single-family houses along the street front"; building's design was predominantly two and three stories on alley side, with third level set back, and mass pushed toward train tracks.

EMINENT DOMAIN - FLORIDA

Tidewater Preserve Master Association, Inc. v. Department of Transportation

District Court of Appeal of Florida, Second District - December 17, 2021 - So.3d - 2021 WL 5980701 - 46 Fla. L. Weekly D2674

Department of Transportation (DOT) filed petition for an order of taking of landowner's property as part of the construction of a new interstate bridge.

The Circuit Court granted Department's petition. Landowner appealed.

The District Court of Appeal held that DOT made a good faith effort to estimate the value of landowner's property.

Department of Transportation (DOT) made a good faith effort to determine the value of landowner's property, as required for the trial court to grant DOT's petition for an order of taking in a "quick take" proceeding to construct a new interstate bridge on landowner's property; testimony from DOT's appraiser, a state-certified real estate appraiser with 30-plus years of experience, regarding his appraisal methodology was accepted without objection, and landowner's expert, who had not yet appraised the property or even actually set foot on the property, disagreed with DOT's expert's assessment on three of its factors, which merely casted doubt on the accuracy of DOT's appraiser, but not the validity of his assessment.

PUBLIC EMPLOYMENT - ILLINOIS

International Association of Fire Fighters, Local 50 v. City of Peoria

Supreme Court of Illinois - January 21, 2022 - N.E.3d - 2022 IL 127040 - 2022 WL 186577

Firefighters' labor union brought declaratory-judgment action against city, asserting that definitions in city ordinance regarding firefighters' line-of-duty benefits were inconsistent with section of Public Safety Employee Benefits Act requiring city to pay entire premium of health insurance plans of firefighters catastrophically injured in the line of duty and their families.

The Circuit Court granted union's motion for summary judgment and denied city's motion for summary judgment. City appealed. The Appellate Court affirmed. City filed petition for leave to appeal, which was allowed.

The Supreme Court held that:

- Requiring city to follow Supreme Court's decision that defined "catastrophic injury" when city was enacting ordinance did not violate separation-of-powers principles;
- Act's section limiting exercise of concurrent authority by home rule units was sufficiently specific to prohibit city from enacting ordinance that contained definitions that were inconsistent with Act;
- Definition of "catastrophic injury" in ordinance was inconsistent with Act and thus was preempted; and
- Definition of "injury" in ordinance was inconsistent with Act and thus was preempted.

Requiring city, a home rule unit, to follow Supreme Court's decision that defined "catastrophic injury," for purposes of section of Public Safety Employee Benefits Act requiring city to pay entire premium of health insurance plans of firefighters catastrophically injured in the line of duty and their families, when city was enacting ordinance regarding firefighters' line-of-duty disabilities did not violate separation-of-powers principles; Supreme Court was not lawmaking or legislating but rather was determining legislative intent, and General Assembly had not amended Act to supersede decision.

Public Safety Employee Benefits Act's section limiting exercise of concurrent authority by home rule units was sufficiently specific to prohibit city from enacting ordinance that contained definitions that were inconsistent with Act's requirement that city pay entire premium of health insurance plans of firefighters catastrophically injured in the line of duty and their families, though section did not state that home rule units were not allowed to independently define terms "catastrophic injury" and "injury"; General Assembly was not required to anticipate every way that home rule unit may attempt to circumvent Act's requirement via ordinance, and section required that concurrent exercise of home rule units' authority be consistent with respective statutory schemes.

MUNICIPAL ORDINANCE - NEBRASKA

State v. Grant

Supreme Court of Nebraska - January 14, 2022 - N.W.2d - 310 Neb. 700 - 2022 WL 128128

Defendant was convicted, following bench trial, in the County Court of disturbing the peace and of assault or menacing threats, both in violation of city ordinances.

The District Court, sitting as an intermediate court of appellate review, affirmed the convictions. Defendant appealed.

The Supreme Court held that:

- Defendant's conviction for making threats in a menacing manner did not violate his right to free speech under the federal and state Constitutions;
- Sufficient evidence existed to support defendant's conviction for assault or menacing threats; and
- Record provided a sound basis for defendant's sentences.

ZONING & PLANNING - NEW HAMPSHIRE

Town of Lincoln v. Chenard

Supreme Court of New Hampshire - January 19, 2022 - A.3d - 2022 WL 166066

Town brought action against property owner, seeking injunctive relief stemming from owner's alleged operation of junk yard.

The Superior Court entered judgment in favor of town in part but denied town's request for costs and attorney's fees. Owner appealed and town cross-appealed.

The Supreme Court held that:

- A "place," under provision of junk-yard statute defining a junk yard, as would require license, as a place used for "storing and keeping" or "storing and selling" or "otherwise transferring" the items enumerated in the statute, need not be a place of business but rather may be any place used for purposes enumerated in statute;
- Evidence was sufficient to support finding that property owner's four properties were collectively a "place" that could constitute a junk yard pursuant to statute; and
- Properties did not constitute a "junk yard" under ordinance.

Property owner's use of his four neighboring properties to store personal belongings did not render properties a "junk yard" pursuant to town ordinance, which did not define term; ordinance regulated junk yards as an industrial use, which plainly did not include storage of personal belongings.

EMINENT DOMAIN - OKLAHOMA

Rocket Properties, LLC v. LaFortune

Supreme Court of Oklahoma - January 18, 2022 - P.3d - 2022 WL 153188 - 2022 OK 5

In city's action for eminent domain, property owner asserted claim for inverse condemnation.

The District Court granted city summary judgment and dismissed property owner's claim on grounds that it was governed by the Oklahoma Governmental Tort Claims Act (GTCA). Property owner filed petition for writ of prohibition.

The Supreme Court held that action for inverse condemnation was not a "tort" governed by GTCA.

A cause of action grounded on inverse condemnation is not a tort governed by Governmental Tort Claims Act (GTCA); rather, it is a special statutory proceeding for the purpose of ascertaining the compensation to be paid for appropriated or damaged property.

BALLOT INITIATIVE - CALIFORNIA

Jobs & Housing Coalition v. City of Oakland

Court of Appeal, First District, Division 1, California - December 30, 2021 - Cal.Rptr.3d - 2021 WL 6142680 - 22 Cal. Daily Op. Serv. 339 - 2022 Daily Journal D.A.R. 147

Coalition of stakeholders brought postelection reverse-validation action against city seeking to invalidate enacted measure on ballot initiated by citizens that proposed special parcel tax after city council enacted the measure after measure received majority of vote, despite ballot materials stating it needed two-thirds of the vote to pass.

The Superior Court granted coalition's motion for judgment on the pleadings, finding measure failed because it needed, but failed, to secure two-thirds of the vote, and found the enactment would amount to a fraud on the voters. City appealed.

The Court of Appeal held that:

- Measure on ballot that proposed special parcel tax was not invalidated under due process on the basis that the ballot materials were inaccurate, and
- Measure on ballot that proposed special parcel tax was not invalidated as a fraud on the voters.

City council's enacted measure on ballot initiated by citizens that proposed special parcel tax was not invalidated under due process on the basis that the ballot materials were inaccurate, despite ballot incorrectly stating measure needed two-thirds vote to pass, rather than just majority in postelection, reverse-validation action brought by coalition of stakeholders against city seeking to invalidate the enactment; other than voting-threshold statements measure's ballot materials it was undisputed that voters were given true and impartial information about the substance of the proposed tax and how and where the proceeds would be distributed, and voting-threshold statements were made when there was legal uncertainty about the applicable voting threshold for citizen's initiatives for special parcel taxes.

City council's enacted measure on ballot initiated by citizens that proposed special parcel tax was not invalidated as a fraud on the voters, despite ballot incorrectly stating measure needed two-thirds vote to pass, rather than just majority in postelection, reverse-validation action brought by coalition of stakeholders against city seeking to invalidate the enactment; the voting-threshold statements in measure's ballot materials had to be viewed in a context of an evolving legal landscape surrounding citizens' initiatives for special parcel taxes, and while the city attorney and auditor were incorrect in stating in the ballot materials that measure required two-thirds of the vote, coalition did not allege that these officials acted with a fraudulent intent.

ZONING & PLANNING - CALIFORNIA

Protect Our Neighborhoods v. City of Palm Springs

Court of Appeal, Fourth District, Division 2, California - January 7, 2022 - Cal.Rptr.3d - 2022 WL 72039 - 22 Cal. Daily Op. Serv. 479 - 2022 Daily Journal D.A.R. 333

Homeowner membership organization that opposed short-term rentals brought action against city and brought second action against individual homeowners who were issued vacation rental registration certificates from the city, seeking writ of mandate as well as injunctive and declaratory relief for alleged violations of the city's municipal code and the California Environmental Quality Act (CEQA) arising from city vacation rental ordinance that authorized short-term rentals of single-family residences.

The cases were consolidated, and the Superior Court entered judgment for city and the individual homeowners. Organization appealed.

The Court of Appeal held that:

- Short-term rentals were "customarily incident to" permitted uses of a dwelling under the zoning code;
- City was not required by the zoning code to make a finding that short-term rentals were similar to listed uses and not more obnoxious or detrimental to other permitted uses before enacting new permitted use for them;
- Allowing short-term rentals was a legislative judgment for the city that was entitled to deference; and
- Zoning code did not require discretionary permits for short-term rentals.

PUBLIC EMPLOYMENT - CALIFORNIA

Lozano v. City of Los Angeles

Court of Appeal, Second District, Division 3, California - January 7, 2022 - Cal.Rptr.3d - 2022 WL 71705 - 22 Cal. Daily Op. Serv. 493 - 2022 Daily Journal D.A.R. 324

Former police officers filed petition for writ of administrative mandate challenging city's decision to terminate their employment.

The Superior Court denied petition, and officers appealed.

The Court of Appeal held that:

- Board of Police Commissioner's special order regarding use of digital in-car video system (DICVS) did not preclude city from taking disciplinary action against officers;
- Penal Code provision prohibiting intentional eavesdropping without parties' consent did not preclude use of DICVS recording;
- Notice published by city professional standards bureau regarding use of recordings of personal communications in disciplinary proceedings did not bar use of DICVS records; and
- Substantial evidence supported trial court's finding that officers did not have right to representation during meeting with their commanding officer.

EMINENT DOMAIN - IDAHO

Munden v. Bannock County

Supreme Court of Idaho, Boise, September 2021 Term - December 15, 2021 - P.3d - 2021 WL 5912332

Landowners brought action against county asserting claims for declaratory relief and inverse condemnation concerning purported public road that landowners used as a private agricultural road, arising from county's enactment of ordinance restricting winter usage of road to snowmobile use only.

The Sixth Judicial District Court entered ex parte temporary restraining order (TRO) prohibiting enforcement of ordinance, but later dissolved TRO, dismissed complaint, and awarded county attorney fees and costs. Landowners appealed.

The Supreme Court held that:

- Trial court acted within its discretion in dissolving TRO;
- County was entitled to attorney fees and costs incurred in seeking dissolution of TRO;
- A rebuttable presumption exists that amount of bond posted by a plaintiff seeking an ex parte TRO is adequate;
- A petition for initiation of validation or abandonment proceedings with county was required before landowners could file suit concerning status of road;
- Dismissal without, rather than with, prejudice was required; and
- Landowners did not invite error in trial court's award of attorney fees to county for defending motions to clarify multiple non-final judgments;
- Trial court prematurely issued writ of execution for county's attorney fees before there was a final appealable judgment.

EMINENT DOMAIN - INDIANA

State v. Koorsen

Court of Appeals of Indiana - December 1, 2021 - N.E.3d - 2021 WL 5626362

Landowners filed inverse condemnation action against State, seeking just compensation for taking resulting from State's construction of a detention pond to provide drainage for highway.

The Superior Court found that parties' negotiations resulted in an accepted offer of $45,000 as just compensation for the taking and that landowners were entitled to an additional $171,640.56 in litigation expenses. State appealed.

The Court of Appeals held that:

- State's $45,000 settlement offer did not inherently include litigation expenses, and
- Landowners' response to the $45,000 settlement offer was a counteroffer, not an acceptance, as there was no mutual assent.

State's offer to settle inverse condemnation action for $45,000 did not inherently include litigation expenses; state eminent domain settlement statute's plain language did not contemplate the inclusion of litigation expenses, and if litigation expenses were inherently included in settlement

offer, eminent domain statutory scheme reserving issue of litigation expenses as an incentive for parties to settle would be unworkable, as government's final settlement offer could not later be compared to factfinder's damage award to determine if a low-ball settlement offer triggered landowner's entitlement to litigation expenses.

Landowners' response to State's inverse condemnation settlement offer was not an acceptance, as there was no mutual assent; State's objective intent was for landowners to forego litigation expenses in the interest of settlement, but landowners responded with a counteroffer requesting that they be awarded litigation expenses in addition to the offered settlement sum, so landowners' objective intent was not to forego litigation expenses in the interest of settlement, and their response did not correspond with State's offer in every respect.

EMINENT DOMAIN - TEXAS

City of Grapevine v. Muns

Court of Appeals of Texas, Fort Worth - December 23, 2021 - S.W.3d - 2021 WL 6068952

Homeowners brought action requesting declaration that city's municipal ordinance that banned short-term rentals violated their substantive due course of law rights, was preempted, and was unconstitutionally retroactive.

The 17th District Court denied city's motion for summary judgment and plea to the jurisdiction. City filed interlocutory appeal.

On rehearing, the Court of Appeals held that:

- Homeowners were not required to exhaust all administrative remedies before they brought action;
- Homeowners had vested property right sufficient to allege regulatory-takings claim;
- Passage of ordinance was cause in fact of alleged taking;
- Homeowners presented sufficient evidence that ordinance had economic impact on value of their property;
- Homeowners presented sufficient evidence that ordinance interfered with their distinct investment-backed expectations;
- Homeowners had vested right to lease their properties; and
- City did not have immunity from request for injunctive relief.

Homeowners were not required to exhaust all administrative remedies before they brought action challenging municipal ordinance that banned short-term rentals; action challenged ordinance's constitutionality and would not have been mooted by an administrative decision, and adjustment board lacked power to declare whether zoning ordinance or ordinance banning short term-rentals violated state constitution.

Term "single-family detached dwelling" as defined in zoning ordinance did not prohibit short-term rentals in zoning districts in which homeowners' properties were located, so long as renters met zoning ordinance's definition of "family"; zoning ordinance did not have any occupancy-duration requirements, and "single-family detached dwelling" did not address leasing, whether short- or long-term.

Homeowners' failure to expressly challenge zoning ordinance did not render their action seeking declaration that ordinance banning short-term rentals was unconstitutional a request for advisory opinion; homeowners' retroactivity, due-course-of-law, and takings claims turned on whether

existing zoning ordinance allowed short term rentals, and existing zoning ordinance did allow short-term rentals.

Homeowners had vested property right sufficient to allege regulatory-takings claim against city following ordinance that banned short-term rentals; homeowners had vested property interest in properties themselves, and homeowners' claimed that city had unreasonably interfered with their rights to use and enjoy their properties.

City's passage of ordinance that banned short-term rentals was cause in fact of alleged taking of homeowners' properties; existing zoning ordinance allowed leasing unrestricted by duration.

Homeowners presented sufficient evidence that municipal ordinance banning short-term rentals in zoning districts in which homeowners' properties were located had economic impact on value of their property, as required to show probable right of recovery on regulatory taking claim; homeowners were earning rental income from their short-term rentals, short-term rentals generated higher revenues than long-term leasing did, and over ten-year period, combined potential gross-rental differential between typical market rents for long-term versus short-terms leases for homeowners' properties exceeded $4.2 million.

Homeowners presented sufficient evidence that municipal ordinance banning short-term rentals in zoning districts in which homeowners' properties were located interfered with homeowners' distinct investment-backed expectations, as required to show probable right of recovery on regulatory taking claim; homeowners had reasonable investment-backed expectations in purchasing and improving their properties for use as short-term rentals based on existing zoning ordinance and on city employees' representations that short-term rentals were allowed under zoning ordinance.

Homeowners failed to plead viable claim that municipal ordinance banning short-term rentals in zoning districts in which homeowners' properties were located was impliedly preempted by tax code or property code, and thus city was entitled to grant of its amended plea to the jurisdiction as to preemption claim; homeowners did not point to any provision in either tax code or property code that implied that legislature meant to limit or forbid local regulations banning short-term rentals.

Homeowners pleaded facially valid claim that municipal ordinance banning short-term rentals in zoning districts in which homeowners' properties were located was unconstitutionally retroactive; homeowners pleaded that ordinance impaired their settled property rights under common law and under existing zoning ordinance to lease their properties on short-term basis.

Homeowners had vested right to lease their properties, as supported claim that municipal ordinance banning short-term rentals violated their substantive-due-course-of-law rights, although homeowners did not have vested right under existing ordinance to use their properties as short-term rentals, where private property ownership was fundamental right, and property ownership included right to lease to others.

City did not have immunity from homeowners' request for injunctive relief against city, in which they asked trial court to enjoining city from enforcing municipal ordinance banning short-term rentals in zoning districts in which homeowners' properties were located; homeowners pleaded valid claims challenging constitutionality of ordinance, homeowners did not alleged that any city officials were violating the law or exceeding their powers under the law, and homeowners' claims were not substantively ultra vires claims.

FINANCE - TEXAS

Preston Hollow Capital, L.L.C. v. Cottonwood Development Corporation

United States Court of Appeals, Fifth Circuit - January 14, 2022 - F.4th - 2022 WL 131110

Lender, which made loan to city in connection with development project, brought § 1983 action against city, alleging city violated Takings Clause when it failed to return loaned funds.

The United States District Court adopted magistrate's report and recommendation and dismissed action. Lender appealed.

The Court of Appeals held that:

- Lender's pre-existing title to its own money did not allow lender to bring takings claim, as opposed to breach of contract claim, against city, and
- Neither city's statements asserting belief that loan agreement was void or voidable nor its adoption of resolution stating that transaction with lender was "legally defective" were sovereign acts, and therefore such acts could not support takings claim.

Lender's pre-existing title to its own money did not allow lender to bring takings claim, as opposed to breach of contract claim, against city based on city's failure to return funds lent to city by lender pursuant to parties' loan agreement; lender exchanged its pre-existing title for various rights laid out in loan agreement, such as a promissory note, and thus rights at issue in takings action were not independent of parties' contract.

Neither municipal borrower's statements asserting belief that loan agreement was void or voidable nor its adoption of resolution stating that transaction with lender was "legally defective" were sovereign acts, and therefore such acts could not support takings claim by lender after borrower failed to return loaned funds; borrower did not act pursuant to statute, ordinance, or regulation.

REAL PROPERTY - ALASKA

Gavora, Inc. v. City of Fairbanks

Supreme Court of Alaska - December 30, 2021 - P.3d - 2021 WL 6141628

Purchaser of property with contaminated groundwater brought action against vendor, a city, for misrepresentation, fraud, breach of contract, breach of implied covenant of good faith and fair dealing, breach of implied warranty of fitness for public use, implied indemnity, and negligence based on allegations that vendor misrepresented the property's environmental status during purchase negotiations.

The Superior Court ruled in vendor's favor. Purchaser appealed.

The Supreme Court held that:

- Fiduciary duty or similar relation of trust did not exist between vendor and purchaser, such that vendor had no duty to disclose contamination;

- Vendor had no reason to know purchaser did not know about contamination, such that vendor had no duty to disclose contamination;
- Superior court's finding that vendor and vendor's primary negotiator did not actively deceive purchaser, as used to support conclusion that vendor was not liable for failing to disclose dangerous condition known to it, was not clearly erroneous;
- Purchaser had reason to know about groundwater contamination on the property, such that vendor was not liable for failing to disclose dangerous condition known to it; and
- Superior court's finding that there was no physical harm after purchase of property, as used to support conclusion that vendor was not liable for failing to disclose dangerous condition known to it, was not clearly erroneous.

REFERENDA - ARIZONA

Arizona School Boards Association, Inc. v. State

Supreme Court of Arizona - January 6, 2022 - P.3d - 2022 WL 57291

School board association and others brought action seeking declaration that sections of four legislative budget reconciliation bills violated constitutional title requirement or single subject rule.

The Superior Court ruled that challenged sections violated title requirement and that one bill violated single subject rule. State appealed, and appeal was transferred.

The Supreme Court held that:

- Plaintiffs had standing under Uniform Declaratory Judgments Act (DJA);
- Bill titles did not satisfy title requirement;
- One bill violated single subject rule;
- An act that violates the single subject rule is void in its entirety, abrogating *Clean Elections Institute, Inc. v. Brewer*, 209 Ariz. 241, 99 P.3d 570; and
- Holding that bill violated single subject rule would be applied retroactively.

PUBLIC UTILITIES - CALIFORNIA

Cannara v. Nemeth

United States Court of Appeals, Ninth Circuit - December 30, 2021 - F.4th - 2021 WL 6141690 - 22 Cal. Daily Op. Serv. 109 - 2022 Daily Journal D.A.R. 4

Public utility ratepayers brought action for declaratory and injunctive relief against California Public Utilities Commission (CPUC), its members, and various state government entities, alleging that California bill which established wildfire fund to help cover utility liabilities resulting from wildfires and the related surcharge proceeding initiated by CPUC violated their right to procedural due process and qualified as an unlawful taking under Fifth Amendment.

The United States District Court for the Northern District of California granted defendants' motion to dismiss for lack of subject matter jurisdiction. Ratepayers appealed.

The Court of Appeals held that:

- Ratepayers' action challenged state utility rate-making within meaning of Johnson Act, which barred federal courts from exercising jurisdiction over suits affecting state-approved utility rates,

and
- CPUC's surcharge proceedings provided reasonable notice and hearing within meaning of Johnson Act, such that Act barred federal courts from exercising jurisdiction over the action as one affecting state-approved rates.

Public utility ratepayers' claims against California Public Utilities Commission (CPUC), its members, and state government entities for declaratory and injunctive relief, alleging that California bill which established wildfire fund to help cover utility liabilities resulting from wildfires and related surcharge proceeding initiated by CPUC violated their right to procedural due process and qualified as an unlawful taking, challenged state utility rate-making within meaning of Johnson Act, and thus the Act barred federal courts from exercising jurisdiction over the suit; ratepayers asked court to find unconstitutional and enjoin sections of bill which created the fund and process by which a utility could seek assistance from fund, and this relief would necessarily affect utility rates.

Surcharge proceedings initiated by California Public Utilities Commission (CPUC), which resulted in imposition of ratepayer surcharge to support wildfire fund that was created to cover utility liabilities resulting from wildfires, provided "reasonable notice and hearing" under Johnson Act, and thus Act barred federal courts from exercising jurisdiction over ratepayers' action against CPUC challenging constitutionality of surcharge and legislation that created fund, although there was no evidentiary hearing, where CPUC allowed anyone interested to become party to proceedings, circulated notice of hearing in newsletter, allowed parties to present opinions at multiple stages, allowed oral argument, accepted comments on proposed decision, and responded to those comments in final decision.

Compliance with state-law procedures in public utility rate-making proceedings is relevant in assessing whether a rate-making order was entered following "reasonable notice and hearing" within meaning of Johnson Act, for purposes of determining whether the Act bars federal court from exercising jurisdiction over suit affecting state-approved utility rate, but it is not itself determinative because state law could provide fewer procedural protections than the Johnson Act's basic standard requires.

PUBLIC RECORDS - MARYLAND

Baltimore Action Legal Team v. Office of State's Attorney of Baltimore City

Court of Special Appeals of Maryland - December 17, 2021 - A.3d - 2021 WL 5990784

Requester brought action against the Office of the State's Attorney, alleging violations of the Maryland Public Information Act (MPIA).

The Circuit Court granted the Office of the State's Attorney's motion for summary judgment. Requester appealed.

The Court of Special Appeals held that:

- "Do not call" list did not qualify for the personnel records exemption under MPIA;
- That the Office of the State's used internal affairs records to create the "do not call" list did not support its blanket denial under the personnel records exemption;
- Office of the State's Attorney could not invoke investigatory records exemption to support blanket denial of the request;
- "Do not call" list was not created in anticipation of litigation as required for work-product

exemption;
- That the records could constitute Brady material did not transform them into work-product protected from disclosure;
- Denial of MPIA fee waiver request made in conjunction with request for full investigatory files into alleged criminal activity of any police officer was arbitrary and capricious; and
- Denial of MPIA fee waiver request made in conjunction with request for investigatory files of a specific police officer was arbitrary and capricious.

ZONING & PLANNING - NEBRASKA

Main St Properties LLC v. City of Bellevue

Supreme Court of Nebraska - January 7, 2022 - N.W.2d - 310 Neb. 669 - 2022 WL 68163

Property owner brought action against city, seeking declaratory and injunctive relief arising from city's adoption of a rezoning ordinance that prohibited owner from parking its rental business moving vans, trucks, and trailers on the south side of its building as it had been doing pursuant to an agreement with the city.

City moved to dismiss based on lack of subject matter jurisdiction. The District Court granted the motion. Owner appealed.

The Supreme Court held that city exercised a legislative power rather than a judicial function subject to the petition-in-error process when it adopted the rezoning ordinance.

Property owner's complaint, allegations, and exhibits properly embraced within the complaint showed that when city adopted a rezoning ordinance that prohibited owner from parking or storing its rental business's moving vans, trucks, and trailers south of the north face of the building, it was exercising a legislative power subject to a collateral attack of the ordinance, rather than a judicial function for which the sole means of challenging the ordinance was to file a petition in error; owner's allegations showed that city adopted a rezoning ordinance based on the recommendation of the planning commission, not that the city council decided a dispute of adjudicative fact, and further, the city council was not statutorily required to act in a judicial manner.

EMINENT DOMAIN - TEXAS

United States v. 4.620 Acres of Land, more or less, in Hidalgo County, Texas

United States District Court, S.D. Texas, McAllen Division - December 20, 2021 - F.Supp.3d - 2021 WL 5999388

United States brought eminent domain action to take 4.620-acre tract of land in fee simple with certain reservations.

United States moved to exclude testimony of expert, and property owner moved for summary judgment.

The District Court held that:

- Reliability of expert's appraisal was not affected by discrepancy of week to month between date of taking and expert's effective date;

- Expert opinion and report were unreliable to extent expert did not consider all elements that contributed to value of property and all elements that detracted from it to arrive at unitary market value for single piece of property acquired;
- Whether expert's questionable damage model and 40% diminution calculation were credible based on disputed sale evidence and damage modeling was issue for jury;
- Rebuttal report did not have to be stricken on basis of post-deadline supplement of one additional piece of data to timely original report;
- Court had jurisdiction over issue of whether landowner was entitled to some measure of just compensation for bollard fence improvement that United States previously had wrongfully placed upon land at issue;
- Tucker Act did not jurisdictionally bar compensating landowner for bollard fence improvement; and
- Landowner was not entitled to value of bollard wall that United States previously had placed on that property.

ATTORNEYS' FEES - WASHINGTON

Koler/Land Use & Property Law, PLLC v. City of Black Diamond

Court of Appeals of Washington, Division 1 - December 27, 2021 - P.3d - 2021 WL 6112336

Attorneys filed lawsuit against city seeking injunctive and declaratory relief as well as monetary damages for city's breach of their contracts for legal services.

The Superior Court granted summary judgment to city. Attorneys appealed.

The Court of Appeals held that:

- Mayor lacked exclusive authority to determine who would act as city attorney, and
- City counsel had authority to contract for legal services to challenge mayor's conduct in rejecting council's resolutions discharging purported city attorneys.

Mayor of noncharter code city lacked exclusive authority to determine who would act as city attorney, where city had not passed ordinance making city attorney an appointive officer, legal service agreements for purported city attorneys were terminable at will either on 30 or 60 days' notice despite city code provision requiring appointive officers to receive salary and setting maximum term of one year for such officers, and agreements were more consistent with alternative method of obtaining legal advice through reasonable contractual arrangement for such professional services.

City counsel for noncharter code city had authority to contract for legal services to challenge mayor's conduct in rejecting council's resolutions discharging purported city attorneys, even though lawsuit initiated on behalf of council was dismissed with prejudice without ruling in council's favor, where there were clear disputes between mayor and council regarding legality of mayor's conduct and council would have prevailed in lawsuit had it proceeded to final resolution.

PUBLIC UTILITIES - CALIFORNIA

California Public Utilities Commission v. Federal Energy Regulatory

Commission

United States Court of Appeals, District of Columbia Circuit - December 17, 2021 - F.4th - 2021 WL 5979312

California Public Utilities Commission (CPUC) filed petition to review Federal Energy Regulatory Commission's (FERC) approval of California Independent System Operator Corporation's (CAISO) proposed revision to compensation structure for its Capacity Procurement Mechanism (CPM), as voluntary program designed to provide electric capacity necessary to maintain grid reliability within CAISO's network.

The Court of Appeals held that:

- FERC did not engage in reasoned decision-making when it approved CAISO's proposed revision to compensation structure for its CPM, and
- Substantial evidence did not support FERC's approval of CAISO's proposed revision to compensation structure for its CPM.

Federal Energy Regulatory Commission (FERC) did not engage in reasoned decision-making when it approved proposed revision by California Independent System Operator Corporation (CAISO) to compensation structure for its Capacity Procurement Mechanism (CPM), as voluntary program designed to provide electric capacity necessary to maintain grid reliability within CAISO's network, which resulted in variable, resource-specific and uncapped maximum rate intended to compensate particular resources, by relying on prior order approving soft-offer cap, which included 20% adder, that produced fixed, resource-agnostic maximum rate meant to facilitate competitive bidding process among many resource classes, and therefore approval was arbitrary and capricious in violation of Administrative Procedure Act (APA), since FERC did not discuss their material differences, and, instead, invoked sort of "consistency" rationale, and left it at that.

Substantial evidence did not support Federal Energy Regulatory Commission's (FERC) approval of California Independent System Operator Corporation's (CAISO) proposed revision to compensation structure for its Capacity Procurement Mechanism (CPM), as voluntary program designed to provide electric capacity necessary to maintain grid reliability within CAISO's network, and therefore approval was arbitrary and capricious in violation of Administrative Procedure Act (APA), since neither CAISO nor FERC relied on findings supporting conclusion that 20% adder for above-cap resources would be just and reasonable mechanism to provide opportunity for sufficient recovery of fixed costs plus return on capital to facilitate incremental upgrades and improvement by resources.

PUBLIC UTILITIES - DISTRICT OF COLUMBIA

Newman v. Federal Energy Regulatory Commission

United States Court of Appeals, District of Columbia Circuit - December 28, 2021 - F.4th - 2021 WL 6122669

Customers petitioned for review of orders of Federal Energy Regulatory Commission (FERC) that raised their electricity rates.

Developer that sought to build proposed electric power transmission line was granted leave to intervene in support of FERC.

The Court of Appeals held that:

- Clause stating that account shall include expenditures "for the purpose of influencing the decisions of public officials" included expenditures for purpose of indirectly, as well as directly, influencing decisions of public officials;
- Regulatory text favored reading clause to include expenditures for purpose of indirectly, as well as directly, influencing decisions of public officials;
- Regulatory history of account favored reading clause to include expenditures for purpose of indirectly, as well as directly, influencing decisions of public officials;
- FERC precedent favored reading clause to include expenditures for purpose of indirectly, as well as directly, influencing decisions of public officials;
- Regulatory purpose of account favored reading clause to include expenditures for purpose of indirectly, as well as directly, influencing decisions of public officials; and
- Accounts pertaining to "outside services employed" and "general advertising expenses" were not appropriate categories for disputed expenditures.

EMINENT DOMAIN - GEORGIA

Ansley Walk Condominium Association, Inc. v. Atlanta Development Authority

Court of Appeals of Georgia - December 30, 2021 - S.E.2d - 2021 WL 6141606

Landowners filed putative class action against city development authority, implementation agent for multi-use trail, and city for inverse condemnation and trespass, alleging that city failed to compensate property owners for unauthorized use and taking of their property to develop portion of multi-use trail on former railroad corridor.

After the superior court denied defendants' motion to dismiss and the Court of Appeals affirmed, plaintiffs moved for class certification. The Superior Court denied motion, and plaintiffs appealed.

The Court of Appeals held that predominance requirement for class certification was not met.

Predominance requirement for class certification was not met, in landowners' action against city development authority, implementation agent for multi-use trail, and city for inverse condemnation and trespass arising from development of trail on former railroad corridor; each claim required determination that class members owned property adjoining corridor and that their rights extended to center-line of corridor, which required analysis of each deed, approximately 60 property rights agreements needed to be reviewed to determine impact on claims and ownership as well as possible defenses, determination of purpose of original easement given to railroad required analysis of 13 individual handwritten conveyance instruments, and damages were individualized as properties had wide variety of uses.

POLITICAL SUBDIVISIONS - INDIANA

Lowe v. Northern Indiana Commuter Transportation District

Supreme Court of Indiana - December 16, 2021 - 177 N.E.3d 796

Employee of commuter transportation district, who sustained injuries to his shoulders while working on a portion of train track, sued the district under the Federal Employers' Liability Act (FELA).

Transportation district moved for summary judgment, alleging that employee failed to provide timely notice of tort claim, as required by Indiana Tort Claims Act (TCA). The Superior Court granted

motion. Employee appealed. The Court of Appeals affirmed and employee petitioned to transfer decision.

The Supreme Court held that:

- Tort Claims Act applies to FELA suits against state entities;
- As a matter of first impression, the commuter transportation district was a political subdivision, not a state agency, under the Tort Claims Act; and
- Employee who provided notice of his work place injury to attorney general 263 days after the alleged injury did not substantially comply with Tort Claims Act.

Tort Claims Act applies to Federal Employers' Liability Act (FELA) suits against state entities; Congress does not have power under Article I of the United States Constitution to subject nonconsenting states to private suits for damages in state courts, the mere fact that FELA is a federal statute does not automatically exclude from consideration the procedural constraints of the Act, the Act applies to "a claim or suit in tort" against governmental entities and their employees, and FELA applies to causes of action for negligence.

The commuter transportation district was a political subdivision, not a state agency, under the Tort Claims Act, and thus employee was required to provide notice within 180-days of his injury; a political subdivision included a "separate municipal corporation," and a commuter transportation district is defined as a municipal corporation under enabling statute.

Employee who provided notice of his work place injury to attorney general 263 days after the alleged injury did not substantially comply with Tort Claims Act requirement that employee provide notice to the governing body of commuter transportation district political within 180-days of his injury; employee conceded at the summary judgment hearing that substantial compliance concerned the notice's content, not its timing.

INSURANCE - MICHIGAN

County of Ingham v. Michigan County Road Commission Self-Insurance Pool

Supreme Court of Michigan - December 21, 2021 - N.W.2d - 2021 WL 6062290

Counties brought action against intergovernmental road commission self-insurance pool for refund of unused portions of prior membership contributions to the pool, following counties' purported withdrawal of their road commissions from intergovernmental agreement and transfer of county road commissions' powers to counties' boards of commissioners.

The Circuit Court granted summary disposition in favor of pool and denied counties' motion for summary judgment. Counties appealed. The Court of Appeals reversed on the ground that counties were eligible for refunds as successors in interest to their dissolved road commissions. Pool applied for leave to appeal. The Supreme Court remanded to Court of Appeals for determination of whether governing documents of pool permitted it to decline to issue refunds of surplus premiums from prior-year contributions. On remand, the Court of Appeals reversed and remanded. Pool applied for leave to appeal.

The Supreme Court held that:

- Withdrawing counties had no right to share in any distribution of surplus equity;
- County which had dissolved its road commission and transferred commission's powers and duties

to county's board of commissioners without executing an agreement to withdraw from pool was not eligible for membership; and
- Public policy did not require pool to include former members when distributing surplus equity.

Counties that had withdrawn from intergovernmental road commission self-insurance pool before effective date of resolutions dissolving road commissions had no right to share in any distribution of pool's surplus equity, even if permissive language in pool's declaration of trust on distribution of excess monies imposed affirmative obligation; declaration of trust, by-laws, and inter-local agreements did not mandate terms of any such distribution, declaration allowed pool to treat withdrawing members differently and less favorably than other members, agreements stated that trust, by-laws, rules, and regulations stated responsibility for disposing of surplus funds, and memorandum provided for forfeiture of withdrawing member's right to receive future distributions.

County which had dissolved its road commission and transferred commission's powers and duties to county's board of commissioners without executing an agreement to withdraw from intergovernmental road commission self-insurance pool was not a "county road commission" within meaning of by-laws limiting membership to county road commissions, and, thus, dissolution of road commission did not transfer road commission's membership to county itself; when by-laws were drafted and last revised, County Road Law required every county with a county road system to have a board of county road commissioners, and pool's members rejected resolution that would have allowed membership.

Public policy did not require intergovernmental road commission self-insurance pool to include former members when distributing surplus equity and thus did not require pool to include counties that had dissolved road commissions, even if counties expected amendment of pool's by-laws or change in withdrawal policy to their benefit; excluding the counties from surplus distributions did not deny them insurance coverage, pool's withdrawal policy was not a penalty since pool treated counties as any other former member, and statutory restriction on self-insurance group conditioning a refund of surplus equity on a member's continued participation in the group only applied in the context of worker's compensation insurance.

PUBLIC RECORDS - NEVADA

Las Vegas Review-Journal v. City of Henderson

Supreme Court of Nevada - December 23, 2021 - P.3d - 2021 WL 6102332 - 137 Nev. Adv. Op. 81

Newspaper filed suit against city to compel production of documents under the Nevada Public Records Act (NPRA), and it moved for attorney fees after records were produced.

The District Court granted in part newspaper's motion. City appealed, and newspaper cross-appealed. The Supreme Court reversed. Newspaper filed amended request for attorney fees based on intervening caselaw. The District Court denied the motion. Newspaper appealed.

The Supreme Court held that:

- Newspaper did not make reasonable attempt to settle dispute with city, as factor weighing against determination that newspaper was prevailing party under catalyst theory;
- District court adequately considered factor of when city voluntarily released records;
- Trial court was required to review merits of claim that documents were protected by deliberative-

process privilege, in considering factor of whether newspaper was entitled to receive documents at earlier time; and
- District court clearly erred in determining that newspaper's suit against city was not frivolous based on Supreme Court's silence in prior appeals.

PUBLIC EMPLOYMENT - NEW JERSEY

Meade v. Township of Livingston

Supreme Court of New Jersey - December 30, 2021 - A.3d - 2021 WL 6139336

Female former employee brought action against employer, a township, alleging gender discrimination under Law Against Discrimination (LAD) after she was fired from her job as township manager and replaced with male township manager to whom the male police chief, who allegedly had gender bias against women as his superiors, would report.

The Superior Court granted summary judgment for employer. Employee appealed. The Superior Court, Appellate Division, affirmed. Employee appealed.

The Supreme Court held that:

- Employee established prima facie case of gender discrimination;
- Factual issues existed as to whether employee was fired because employer believed she was unable to control chief as a result of her gender; and
- Cat's paw theory of liability did not apply.

Female former employee, a township manager, established a prima facie case of gender discrimination under the Law Against Discrimination (LAD), where employee was a member of a protected group, she performed her job for 11 years, and she was fired and replaced with a male township manager.

Genuine issues of material fact existed as to whether township fired female township manager to replace her with a male manager because township believed she was unable to control male police chief as a result of her gender and as to whether township impeded female manager's efforts to terminate chief's employment, precluding summary judgment in gender discrimination action under the Law Against Discrimination (LAD).

Cat's paw theory of liability did not apply to female former township employee's action against township employer for gender discrimination under the Law Against Discrimination (LAD) arising from her firing from job as township manager and replacement with male manager who would supervise male police chief who allegedly had a discriminatory attitude towards women as his superiors, where employee did not allege that a subordinate influenced employer to fire her, but rather alleged that employer's decision to fire her was influenced by the chief's own discriminatory views.

IMMUNITY - ALABAMA

Ex parte Space Race, LLC

Supreme Court of Alabama - December 30, 2021 - So.3d - 2021 WL 6141625

Alabama Space Science Exhibit Commission (ASSEC) sought to vacate arbitration award that had been entered against it on breach-of-contract claim asserted by producer of space- and science-themed animated shows.

The Circuit Court denied producer's motion to dismiss. Producer petitioned for a writ of mandamus.

The Supreme Court held that the issue of whether ASSEC had interstate sovereign immunity from producer's breach-of-contract claim was fully and fairly litigated in the New York trial court that heard producer's action to confirm New York arbitration award in producer's favor, and thus the Full Faith and Credit Clause of the United States Constitution and res judicata precluded ASSEC's claim to vacate the arbitration award.

Issue of whether the Alabama Space Science Exhibit Commission (ASSEC) had interstate sovereign immunity from breach-of-contract claim asserted against it by producer of space- and science-themed animated shows was fully and fairly litigated in the New York trial court that heard producer's action to confirm New York arbitration award in producer's favor, and thus the Full Faith and Credit Clause of the United States Constitution and res judicata precluded ASSEC's later claim in Alabama state court that ASSEC's alleged sovereign immunity under the Alabama Constitution warranted vacating the arbitration award; New York trial court acknowledged that whether ASSEC was an agency of Alabama for purposes of State immunity under the Alabama Constitution was relevant to the interstate-sovereign-immunity analysis, New York trial court ultimately concluded that ASSEC was not a State agency for purposes of State immunity under the Alabama Constitution, and New York law provided that a judgment confirming an arbitration award was entitled to res judicata effect.

BUSINESS IMPROVEMENT DISTRICTS - CALIFORNIA

Hill RHF Housing Partners, L.P. v. City of Los Angeles

Supreme Court of California - December 20, 2021 - P.3d - 2021 WL 5997247 - 21 Cal. Daily Op. Serv. 12,501

Landowners in proposed business improvement districts (BID) filed petition for writ of mandate and complaint for declaratory and injunctive relief against city challenging establishment of BIDs under Property and Business Improvement District Law.

The Superior Court denied relief. Landowners appealed. The Court of Appeal affirmed. Landowners petitioned for review, which was granted.

The Supreme Court held that landowners were not required to present specific objections to BIDs at public hearings for objections to later be heard on the merits in court.

Landowners in proposed business improvement districts (BID) were not required to present specific objections to BIDs at city council's public hearings in order for objections to later be heard on the merits in court via landowners' petition for writ of mandate and complaint for declaratory and injunctive relief challenging establishment of BIDs under Property and Business Improvement District Law; opportunity to comment on a proposed BID did not involve a clearly defined machinery for submission, evaluation, and resolution of complaints by aggrieved parties, constitutional and statutory scheme did not implicitly convey an expectation that exhaustion was required to occur, and policy rationales for requiring issue exhaustion were not compelling.

IMMUNITY - INDIANA

Ladra v. State

Supreme Court of Indiana - December 9, 2021 - 177 N.E.3d 412

Motorist who was injured when her vehicle hydroplaned on interstate road and collided with concrete barrier wall brought action against the State and the Department of Transportation, alleging that she suffered injury due to Department's failure to post warnings of flooded roadway and failure to maintain proper drainage.

After a hearing, the Superior Court found defendants enjoyed governmental immunity under Indiana Tort Claim Act and granted defendants' motion for summary judgment. Motorist appealed. The Court of Appeals affirmed. Motorist petitioned for transfer, which was granted.

The Supreme Court held that fact issue as to whether condition of roadway resulted from Department's failure to rectify known problem that manifested during only during inclement weather precluded summary judgment on basis of immunity.

Genuine issue of material fact existed as to whether flooding condition on interstate roadway resulted from Department of Transportation's failure to rectify known problem with clogging of drains that manifested only during inclement weather, as would preclude summary judgment on basis of immunity under Indiana Tort Claims Act, in action by motorist who was injured when her vehicle hydroplaned on road and collided with concrete barrier wall.

PUBLIC UTILITIES - OHIO

Cleveland Electric Illuminating Co. v. Cleveland

Supreme Court of Ohio - December 21, 2021 - N.E.3d - 2021 WL 6016475 - 2021-Ohio-4463

Electric utility brought action against city and city's electric distribution company asserting claims for declaratory judgment, tortious interference with contract/business relations, and unfair competition arising from city's purchase and resale of electricity to inhabitants located outside its geographic limits.

The Court of Common Pleas granted summary judgment for city. Utility appealed. The Court of Appeals reversed and remanded. Utility appealed and city cross-appealed.

The Supreme Court held that:

- Constitutional limits on a municipal utility's sale of surplus product precluded city from purchasing electricity solely to resell entire amount extraterritorially;
- Questions of material fact existed as to whether city obtained surplus electricity for sole purpose of selling it to a neighboring city; and
- Constitutional limits on sale of surplus product did not require city to purchase exact amount of electricity to satisfy current needs of territorial customers.

State constitutional provision allowing a municipality that operates a municipal utility to sell surplus product precludes a municipality from purchasing electricity solely for the purpose of reselling entire amount of purchased electricity to an entity outside municipality's geographic limits.

Genuine issues of material fact existed as to whether city, through its electric distribution company, obtained surplus electricity for sole purpose of selling it to a neighboring city, precluding summary judgment in competing electric utility's action asserting claims for declaratory judgment, tortious interference with contract/business relations, and unfair competition premised on city's alleged violation of state constitutional limits on a municipal utility's sale of surplus product.

State constitutional provision allowing a municipality that operates a municipal utility to sell surplus product does not require a municipality to buy the exact amount of electricity required by its inhabitants at any given time, and there may be other reasons justifying the purchase of electricity beyond a municipality's immediate needs.

ZONING & PLANNING - PENNSYLVANIA

Metal Green Inc. v. City of Philadelphia

Supreme Court of Pennsylvania - December 22, 2021 - A.3d - 2021 WL 6065497

Property owner sought review of city zoning board of adjustment's denial of variance to allow conversion of unused industrial building into apartment building.

The Court of Common Pleas reversed decision. Opponents of variance appealed. The Commonwealth Court reversed. Owner sought allowance of appeal, which was granted.

The Supreme Court held that:

- Application for use variance was subject to city zoning code's minimum-variance requirement, and
- Board was required to make specific findings of fact, engage in credibility determinations, and offer sufficient rationale as to why criteria for use variance were not satisfied.

Application for use variance for building designated as "blighted" under Abandoned and Blighted Property Conservatorship Act was subject to city zoning code's requirement that variance be the "minimum variance that will afford relief and will represent the least modification possible of the use or dimensional regulation at issue"; nothing in code or in Act suggested that blighted or abandoned nature of a property was a factor when assessing minimum variance requirement, and considerations of blight or abandonment were to be addressed under code's "unnecessary hardship" requirement.

In order to allow for effective review, a zoning board's variance decision must provide sufficient findings of fact, including credibility and weight-of-evidence determinations, conclusions based on these facts, and the reasons for granting or denying the variance.

ANNEXATION - CALIFORNIA

Award Homes, Inc. v. County of San Benito

Court of Appeal, Sixth District, California - November 1, 2021 - Cal.Rptr.3d - 72 Cal.App.5th 290 - 2021 WL 5631443

Residential developer brought action against city and county seeking a declaration that developer was not obligated under development and annexation agreements with city to pay city annexation-related fees for which city was responsible under city-county tax sharing agreements concerning

new single-family construction on land that city annexed from county.

After bench trials, the Superior Court entered judgment against developer. Developer appealed.

The Court of Appeal held that:

- Developer's action was timely as to whether it was required to pay fees;
- Developer had standing;
- Statute providing for property tax transfer agreements between a county and a local agency authorized fees under tax sharing agreements;
- Tax sharing agreement required city to pay fees to county; and
- Development and annexation agreements required developer to pay fees to city.

Developer's action for declaratory relief was timely as to whether development and annexation agreements compelled developer to pay a fixed fee set forth in city-county tax sharing agreements for each residential unit constructed on land that was annexed into city from county, where developer promptly sought a declaration of its rights and duties under development and annexation agreements after learning that city would attempt to collect annexation-related fees for those projects.

Developer had standing to seek a declaration of its rights and duties under development and annexation agreements as to whether developer was required to pay a fixed fee set forth in city-county tax sharing agreements for each residential unit constructed on land that was annexed into city from county, where developer was a party to development and annexation agreements.

Residential developer's action for declaratory relief against city and county, seeking to invalidate annexation-related fees under city-county tax sharing agreement as not having been legally established when agreements were signed, was untimely under even the most generous statute of limitations, that being the four-year limitations period for actions on a contract, that arguably might have governed a challenge to amount of fees, which city sought to pass on to developer pursuant to city's development and annexations agreement with developer, where first tax sharing agreement was signed more than ten years earlier and second agreement also fall outside the four-year period.

Fixed fee that city was to pay county under tax sharing agreements for each residential unit constructed on land that was annexed into city from county was within county's authority under tax statute authorizing county to develop and adopt a master property tax transfer agreement with a local agency like city; there was nothing so fatally defective in fee obligations under tax sharing agreements to render their very creation void.

City's obligation under tax sharing agreements to pay county annexation-related fees, which city sought to impose on residential developer pursuant to development agreement, did not cease to exist merely because developer did not seek building permits until after expiration of tax sharing agreement, which was in effect at time property was annexed by city; nothing in tax sharing agreement suggested that obligations created by it would cease to exist merely because a project annexed during its effective period was not constructed until after agreement expired, and fiscal neutrality goal of agreement would not have been served by such an interpretation.

Phrase "developer's obligations" in residential development agreement included obligation on part of developer to pay city the fixed fee, for which city was responsible to pay county under city-county tax sharing agreement, for each residential unit constructed on land that was annexed into city from county, despite argument that tax sharing agreement only required city to impose capital improvement and drainage impact fees on developers; tax sharing agreement required all three fees

to be imposed on new development, development agreement did not provide explicit language excluding annexation-related fees from developer's obligations, and developer agreed as a condition of tentative map approval that fees required under tax sharing agreement were to be paid with each building permit.

Failure of city-county tax sharing agreement to use explicit term "fee" in referring to fixed fee that city was required to pay county for each single family dwelling unit constructed on land that was annexed into city from county did not preclude the annexation-related fee from being treated the same as capital improvement and drainage fees under development agreement with city, to allow city to require developer to pay city the amount of annexation-related fee pursuant to terms of development agreement, where development agreement also did not use the term "fees" and instead required developer to satisfy "developer's obligations."

County's status as non-party to residential development agreement between city and developer did not absolve developer of its obligation under agreement to pay city the amount of annexation-related fees for which city was responsible under city-county tax sharing agreement concerning new single-family construction on land that city annexed from county; any lack of obligation of developer to pay fees directly to county did not absolve developer of obligation to pay fees to city.

Residential developer's annexation agreement with city, requiring developer to hold and use the property in compliance with all "applicable provisions" of city-county tax sharing agreement, included provisions of tax sharing agreement relating to annexation-related fees that city was required to pay county and not just capital improvement and drainage impact fees to be imposed on new development, and thus city could require developer to pay city the amount of annexation-related fees, where all three fees were similar, and developer promised in annexation agreement to ensure that the proposed development paid its own way and eliminated or minimized the financial burden on city.

PUBLIC UTILITIES - GEORGIA

Cazier v. Georgia Power Company

Court of Appeals of Georgia - December 1, 2021 - S.E.2d - 2021 WL 5626887

Customers brought putative class action against electric utility, alleging that utility had improperly collected certain sales taxes and fees.

The Superior Court denied utility's motion to dismiss, and utility appealed. The Court of Appeals affirmed in part and reversed in part. On remand, the Superior Court dismissed the action based on customers' failure to exhaust administrative remedies before the Public Service Commission (PSC), and customers appealed. The Court of Appeals vacated. After issuing writ of certiorari, the Supreme Court affirmed and remanded. In turn, the Superior Court remanded to PSC for determination as to whether utility had properly charged franchise fee to customers. The Superior Court adopted PSC's determination, certified class, and granted summary judgment to utility. Customers appealed and utility cross-appealed.

The Court of Appeals held that:

- Trial court properly remanded to PSC for initial determination as to meaning of terms in PSC's ratemaking orders, and
- Sufficient evidence supported PSC's finding that its orders used terms "usage revenue" and "total

revenue" interchangeably.

Trial court properly invoked primary jurisdiction of Public Service Commission (PSC) for initial determination as to whether terms "usage revenue" and "total revenue" were used synonymously in PSC ratemaking orders concerning calculation of sales tax on municipal franchise fee (MFF), rather than interpreting terms itself; PSC's use of two different terms raised question as to whether two categories described by those apparently different terms were the same, and question was best answered by PSC itself as agency that authored orders and that had specialized competence in ratemaking proceedings.

Sufficient evidence supported finding by Public Service Commission (PSC) that its orders governing calculation of sales tax on municipal franchise fee (MFF) used terms "usage revenue" and "total revenue" interchangeably, such that electric utility properly applied MFF by calculating charge based on percentage of each consumer's total charge, where utility's rates were approved by PSC to recover all "usage" from customers, PSC noted exclusion of cost recovery items from MFF calculation by treating terms differently would be unreasonable, particularly given that minimum monthly bill included certain costs even if customer had no kilowatt-hour usage, and PSC previously approved utility's compliance filings which applied MFF to total revenue from each bill, including that from cost recovery items.

POLITICAL SUBDIVISIONS - INDIANA

Lowe v. Northern Indiana Commuter Transportation District

Supreme Court of Indiana - December 16, 2021 - N.E.3d - 2021 WL 5961638

Employee of commuter transportation district, who sustained injuries to his shoulders while working on a portion of train track, sued the district under the Federal Employers' Liability Act (FELA).

Transportation district moved for summary judgment, alleging that employee failed to provide timely notice of tort claim, as required by Indiana Tort Claims Act (TCA). The Superior Court granted motion. Employee appealed. The Court of Appeals affirmed and employee petitioned to transfer decision.

The Supreme Court held that:

- The Tort Claims Act applied to FELA suits against state entities;
- As a matter of first impression, the commuter transportation district was a political subdivision, not a state agency, under the Tort Claims Act; and
- Employee who provided notice of his work place injury to attorney general 263 days after the alleged injury did not substantially comply with Tort Claims Act.

The Tort Claims Act applied to FELA suits against state entities; Congress does not have the power to subject nonconsenting states to private suits for damages in state courts, the mere fact that FELA is a federal statute did not automatically exclude from consideration the procedural constraints of the Tort Claims Act, the Act applies to "a claim or suit in tort" against governmental entities and their employees, and FELA applies to causes of action for negligence.

The commuter transportation district was a political subdivision, not a state agency, under the Tort Claims Act, and thus employee was required to provide notice within 180-days of his injury; a political subdivision included a "separate municipal corporation," and a commuter transportation district is defined as a municipal corporation under enabling statute.

PUBLIC UTILITIES - MASSACHUSETTS

Fore River Residents Against Compressor Station v. Office of Coastal Zone Management

Appeals Court of Massachusetts, Norfolk - December 16, 2021 - N.E.3d - 2021 WL 5969793

City mayor sought judicial review of decision by Massachusetts Office of Coastal Zone Management (MCZM) that construction of natural gas compressor station would be consistent with enforceable policies of Massachusetts' coastal zone management program. Community advocacy organization intervened on plaintiff's side.

The Superior Court Department dismissed action. Organization appealed.

The Appeals Court held that:

- Determination was not subject to review under statute authorizing judicial review to a person aggrieved by a final agency decision;
- Determination was not subject to certiorari review; and
- Organization lacked standing to seek judicial review of determination by claim for declaratory judgment.

Judicial review of determination by Massachusetts Office of Coastal Zone Management (MCZM) that construction of natural gas compressor station would be consistent with enforceable policies of Massachusetts' coastal zone management program was not available under statute authorizing judicial review to a person aggrieved by a final agency decision in an adjudicatory proceeding; an adjudicatory proceeding was one in which someone had right to agency hearing, community advocacy organization did not have right to any agency hearing, and any discretion on part of MCZM to hold a hearing did not render proceeding an adjudicatory proceeding.

Proceeding before Massachusetts Office of Coastal Zone Management (MCZM) to determine whether construction of natural gas compressor station would be consistent with enforceable policies of Massachusetts' coastal zone management program was not judicial or quasi-judicial, and thus, MCZM's consistency determination was not subject to certiorari review on such basis; regulatory scheme required MCZM to provide opportunity for public participation only through public notice and comment, proceeding was not preceded by any specific charges, MCZM was not required to hold a hearing, much less hear sworn testimony, it was federal government, not MCZM, that ultimately decided whether station could be constructed, and MCZM's determination contained no formal findings of fact.

Community advocacy organization lacked standing to seek judicial review of determination by Massachusetts Office of Coastal Zone Management (MCZM) that construction of natural gas compressor station would be consistent with enforceable policies of Massachusetts' coastal zone management program by claim for declaratory judgment invalidating determination; while an applicant had right to appeal to federal Secretary of Commerce from a determination that a project would be inconsistent with enforceable policies of a State's coastal zone management program, no similar right was given to the public under the CZMA or state statute establishing MCZM, if standing were recognized, it would have adverse effect in form of unnecessary delays, and there were other remedies available.

PUBLIC UTILITIES - MISSISSIPPI

Pearl River Valley Water Supply District v. Khalaf

Supreme Court of Mississippi - December 9, 2021 - So.3d - 2021 WL 5832307

After a sinkhole formed on lessee's leasehold, water supply district filed a complaint against lessee to recoup the costs of repairing the sinkhole and for other relief.

The Chancery Court granted lessee's motion to dismiss, and water supply district appealed.

The Supreme Court held that:

- It was proper for water supply district to attach leases to its complaint against lessee;
- It was proper for lessee, who leased land in subdivision, to attach declaration of covenants for subdivision to his motion to dismiss;
- Lessee's recorded lease was the operative document when determining if lessee was responsible for repairing sinkhole; and
- Lessee was not responsible for repairing sinkhole on leasehold pursuant to his lease of land in subdivision.

Lessee was not responsible for repairing sinkhole on leasehold pursuant to his lease of land in subdivision; lessee's lease was recorded, terms of lease were binding on lessee, lessor, and water supply district that entered into development lease with lessor, lessee's property was subject to declaration of covenants for subdivision which reserved to homeowners' association and the district blanket easements for repairing, replacing, and maintaining storm drainage on all property subject to covenants, storm drain pipe's function, as asserted by district, was not to drain surface water from lessee's property, but to drain the entire subdivision through lessee's property into reservoir, and because lessee took the leasehold subject to the covenants reserving storm drainage easements to homeowners' association and district, lessee was not responsible for repairing storm drain pipe installed by developer long before he had entered into the lease.

ZONING & PLANNING - SOUTH CAROLINA

Greenville Bistro, LLC v. Greenville County

Supreme Court of South Carolina - December 8, 2021 - S.E.2d - 2021 WL 5823888

Restaurant operator brought action against county for declaratory and injunctive relief, raising First Amendment free speech challenge to county's attempts to enforce its sexually oriented business code to prevent restaurant from operating with scantily-clad exotic dancers.

The Circuit Court granted operator's motion for temporary injunction, after which the county appealed and the Circuit Court denied county's motion for temporary injunctive relief during pendency of appeal. County appealed.

The Supreme Court held that:

- Zoning ordinance redefining "adult cabaret" and adding "semi-nude" definition was a valid time, place, and manner regulation;
- County was not bound by order releasing restrictions obtained in prior nuisance action to which county was not a party;

- Operator was not likely to succeed on merits of claim that county inequitably adopted ordinance due to its suspect timing;
- Trial court had jurisdiction to rule on county's motion for temporary injunctive relief; and
- County was entitled to temporary injunctive relief.

IMMUNITY - CALIFORNIA

Foley Investments, L.P. v. Alisal Water Corporation

Court of Appeal, Fourth District, Division 1, California - November 16, 2021 - Cal.Rptr.3d - 2021 WL 5833275

Apartment complex owner brought action against water company, asserting inverse condemnation and tort claims of nuisance, trespass, and negligence after water main running through complex repeatedly ruptured.

Following bifurcation, the Superior Court determined that water main was not a public use and that water company had fire protection immunity from tort claims. Apartment complex owner appealed.

The Court of Appeal held that:

- Water main served a private use such that eminent domain principles did not apply, and
- As a matter of first impression, fire protection was a substantial or significant factor in water company constructing and maintaining water main such that it had fire protection immunity.

Water main running through apartment complex served a private use, and thus inverse condemnation principles did not apply in apartment complex owner's action against water company following pipe ruptures, where water company installed main pursuant to a contract with a private developer, water company constructed and maintained the main directly on the apartment property specifically to meet the flow requirements of the fire hydrants which benefited only the property, and water main did not provide service to the public at large and gate vale at the end of the main, which had not been opened in 32 years, functioned as a cap.

Fire protection was a substantial or significant factor in water company constructing and maintaining water main on apartment complex property, and thus fire protection immunity barred apartment complex owner's nuisance, trespass, and negligence claims against water company after water main ruptured multiple times; while water main provided domestic water to the apartment complex, it also supplied water to fire hydrants on the apartment property, and but for the apartment property's specific fire protection needs, including two fire hydrants, the main would not exist, as water company would have delivered water to the property's boundary, from which point the developer of the complex would have been responsible for installing and maintaining onsite infrastructure.

PUBLIC PENSIONS - NEBRASKA

Abbott v. City of Bellevue

Supreme Court of Nebraska - December 3, 2021 - N.W.2d - 310 Neb. 496 - 2021 WL 5751275

Police officers and their union brought § 1983 action against city challenging its decision to increase

amount it regularly deducted from officers' paychecks to fund their retirement plan, alleging violations of federal and state constitutions.

The District Court found that, with respect to some officers, city unconstitutionally impaired its contractual obligations, and ordered city to insert certain language into document governing retirement plan. Officers and union appealed.

The Supreme Court held that:

- District court could not address issue of how defined contribution payment should be calculated;
- Supreme Court would remove language improperly inserted by district court into agreement;
- Officers and union were "prevailing parties" for purposes of entitlement to attorney fee; and
- Supreme Court would remand for reconsideration of attorney fee entitlement.

District Court could not address issue of how defined contribution payment should be calculated, in § 1983 action brought by police officers and their union against city challenging its decision to increase amount it regularly deducted from officers' paychecks to fund their retirement plan, where district court ordered language inserted into agreement governing retirement plan, essentially entering a declaration despite no party requesting such a declaration and agreement of both parties that such a calculation would ever be necessary.

The Supreme Court would remove language improperly inserted by district court into agreement between police officers, their union, and city governing retirement plan, which addressed issue of how defined contribution payment should be calculated, in § 1983 action brought by police officers and their union against city challenging its decision to increase amount it regularly deducted from officers' paychecks to fund their retirement plan, where amount officers would be entitled to receive if they elected defined contribution payment was not at issue, and parties agreed that it was unlikely amounts in any officer's retirement account would ever exceed defined benefit payment, as required for an officer to receive defined contribution payment.

ANNEXATION - UTAH

South Utah Valley Electric Service District v. Payson City

Supreme Court of Utah - December 9, 2021 - P.3d - 2021 WL 5831400 - 2021 UT 68

Electric improvement district brought action alleging that cities failed to comply with statutory requirements for withdrawing annexed areas from district before starting to serve district's customers following annexation.

The Fourth District Court entered partial judgment in cities' favor, and district filed interlocutory appeal.

The Supreme Court held that cities had statutory authority to provide electric service to customers inside district following annexation upon payment of required reimbursements.

Cities generally have power to regulate and sell electricity within their respective boundaries, but when they annex new land, that power is limited by requirement that they either obtain consent of previous electric provider, if it falls within statutory definition of electrical corporation, or pay it reimbursement costs.

SCHOOLS - VIRGINIA

Davison v. Rose

United States Court of Appeals, Fourth Circuit - December 3, 2021 - F.4th - 2021 WL 5750449

Students' parent filed § 1983 action against school board, its members, elementary school principal, and school system's supervisor of security alleging that no-trespass letters issued to him that prohibited his presence on school property and attendance at any school-sponsored activities unless authorized violated his First and Fourteenth Amendment rights.

The United States dismissed claims against board, and entered summary judgment in defendants' favor on remaining claims. Parent appealed.

The Court of Appeals held that:

- Res judicata barred parent's claims against school board;
- Board's policy prohibiting all personal attacks at board meetings, regardless of viewpoint, did not violate First Amendment;
- No-trespass letters were not issued in retaliation for parent's public comments;
- Principal was entitled to statutory immunity for reporting parent's suspected abuse of his children;
- Officials who issued and enforced no-trespass letters were entitled to qualified immunity; and
- Officials' failure to provide parent notice prior to issuance of no-trespass letters did not violate due process.

School board's policy prohibiting all personal attacks at board meetings, regardless of viewpoint, did not violate students' parent's First Amendment rights, despite parent's contention that policy was not used in viewpoint-neutral way towards his speech; parent was interrupted and warned for talking about particular board members, discussing their children, and providing comments that were not about topic of meeting, and was allowed to speak uninterrupted, despite mentioning individual board members, when his comments focused on topic of board meeting, and other speakers who were not interrupted when they became animated did not make comments about board members.

ZONING & PLANNING - WASHINGTON

Westridge-Issaquah II LP v. City of Issaquah

Court of Appeals of Washington, Division 1 - December 6, 2021 - P.3d - 2021 WL 5768395

Property owners filed suit pursuant to Land Use Petition Act (LUPA), seeking review of city's imposition of general facility charges (GFC) for utility connections on property being developed.

The Superior Court granted property owners' petition, ordered city to refund water and stormwater GFCs, which were waived under a land development agreement, and refund the difference in the sewer GFC charged from amount set forth in development agreement. City appealed.

The Court of Appeals held that:

- GFCs imposed by city for utility connections did not invoke vesting statute;
- Building permit applications were not inextricably linked to later-filed preliminary plat application,

as would invoke vested rights; but
- Even if vested rights were at issue, GFCs could not be assessed at any particular amount until developer both applied for utility connections and paid applicable fees; and
- City's GFCs were reasonable, as required to comply with authorizing statute.

Water, sewer, and stormwater general facility charges (GFC) imposed by city for utility connections on property being developed as single-family housing were not "land use control ordinances," and thus not subject to vesting statute for such ordinances, under which a proposed division of land was considered under ordinances in effect on land at time of submission of land use application; GFCs did not limit current owners' use of the properties or the development thereon, but instead were merely fees that increased developer's costs.

Single-family residential developer's building permit applications, which were filed prior to city's modification of terms of development agreement governing subject land, were not inextricably linked to its preliminary plat application, which was filed after changes were made to development agreement, such that preliminary plat application could not be approved unless the building permit application was also approved, thus, developer did not have a right to have its building permit applications vest to the land use laws in effect when it submitted its preliminary plat application.

Single-family residential developer did not have a vested right to have general facility charges (GFC) imposed for utility connections on it property assessed at any particular amount until it both applied to connect to city's utility systems and paid the applicable fees.

General facility charges (GFC) to be imposed by city upon single-family residential property developer for water, sewer, and stormwater utility connections, pursuant to city ordinance, were reasonable, as required to comply with authorizing statute; statute required only that connection charges established by ordinance be reasonable, such that property owners would bear their equitable share of the cost of the city's utility system, and there was no indication that the GFCs imposed were not generally proportionate to property's share of the utility system's cost.

BALLOT INITIATIVE - SOUTH DAKOTA

Thom v. Barnett

Supreme Court of South Dakota - November 24, 2021 - N.W.2d - 2021 WL 5501582 - 2021 S.D. 65

County sheriff and superintendent of South Dakota Highway Patrol filed statutory election contest and separate declaratory judgment action against Secretary of State, claiming amendment to South Dakota Constitution to pass laws regarding hemp as well as laws ensuring access to marijuana for medical use was presented to voters in violation of requirements for amendments to Constitution.

Proponents of amendment intervened. The Circuit Court dismissed election contest, but determined amendment was submitted to voters in violation of Constitution. All parties appealed.

The Supreme Court held that:

- Circuit Court properly dismissed election contest;
- Sheriff and superintendent did not have standing in their official capacities to bring declaratory judgment action; but
- In matter of first impression, the Governor, through issuance of executive order, ratified declaratory judgment action, thereby curing any standing defects;

- Amendment's submission to voters violated single subject and separate votes requirements of South Dakota Constitution; and
- Provisions of amendment could not be excised under doctrine of separability and, thus, amendment was void in its entirety.

Circuit Court properly dismissed election contest brought by county sheriff and superintendent of South Dakota Highway Patrol, which claimed amendment to South Dakota Constitution to pass laws regarding hemp as well as laws ensuring access to marijuana for medical use was presented to voters in violation of requirements for amendments to Constitution, absent showing of any irregularity in election process caused by violation of election law.

County sheriff and superintendent of South Dakota Highway Patrol did not have standing in their official capacities to bring declaratory judgment action, challenging amendment to South Dakota Constitution to pass laws regarding hemp as well as laws ensuring access to marijuana for medical use, where neither sheriff nor superintendent sustained any actual or threatened injury as result of amendment; they could suffer no injury by carrying out amendment's mandate, and no violation of duty could be imputed to them by reason of their compliance.

Governor, through issuance of executive order, ratified action brought by county sheriff and superintendent of South Dakota Highway Patrol, seeking declaratory judgment that amendment to South Dakota Constitution to pass laws regarding hemp as well as laws ensuring access to marijuana for medical use was presented to voters in violation of requirements for amendments to Constitution, thereby curing any standing defect in action; order made clear the Governor intended to challenge amendment, she authorized action, desired that it continue, affirmed it in all respects and intended to be bound by result of action, and proponents of amendment would not sustain any prejudice if ratification were permitted.

Amendment to South Dakota Constitution to pass laws regarding hemp, as well as laws ensuring access to marijuana for medical use contained provisions embracing at least three separate subjects each with distinct objects and purposes and, thus, submission of amendment to voters violated single subject and separate votes requirements of South Dakota Constitution; although the stated object or purpose of amendment was legalization and regulation of marijuana, including its recreational, medical and agricultural uses, the amendment included development of comprehensive plan for legalization and regulation of marijuana, a mandate that legislature adopt laws ensuring discrete group of qualifying persons have access to medical marijuana, and a mandate that legislature regulate the cultivation, processing and sale of hemp, requirements that were not dependent upon or connected with each other.

Provisions of amendment to South Dakota Constitution regarding hemp and ensuring access to marijuana for medical use could not be excised, under doctrine of separability, to retain provisions governing development of comprehensive plan for legalization and regulation of marijuana and, thus, amendment was void in its entirety due to violation of Constitution's single subject and separate votes requirements; Constitution required proponents of amendment to prepare amendment so that different subjects could be voted on separately, and simply severing certain provisions might not reflect actual will of voters.

EMINENT DOMAIN - PENNSYLVANIA

Hughes v. UGI Storage Company

Supreme Court of Pennsylvania - November 29, 2021 - A.3d - 2021 WL 5562689

Landowners, whose property was excluded from certificate of public convenience issued by Federal Energy Regulation Commission (FERC) for buffer zone for underground natural gas storage facilities, brought inverse condemnation action against FERC-regulated interstate natural gas pipeline company alleging deprivation of right to obtain financial benefits from natural gas lying beneath their lands due to prohibition on hydraulic fracturing in buffer zone.

The Court of Common Pleas sustained company's preliminary objections and dismissed. Landowners appealed. The Commonwealth Court affirmed. Landowners appealed.

The Supreme Court held that a public or quasi-public entity need not possess a property-specific power of eminent domain in order to implicate inverse condemnation principles.

To effect actionable conduct impacting a citizen's property necessary to support an inverse condemnation claim, it is enough that the condemnor has proceeded by authority of law for a public purpose.

Where governmental power is delegated to an otherwise private corporation, that company may assume a quasi-public status in furtherance of the public interest, for purposes of a de facto condemnation.

A public or quasi-public entity need not possess a property-specific power of eminent domain in order to implicate inverse condemnation principles.

LIABILITY - OHIO

Snay v. Burr

Supreme Court of Ohio - November 24, 2021 - N.E.3d - 2021 WL 5500052 - 2021-Ohio-4113

Motorist filed action against homeowners after single-car accident in which motorist lost control of his vehicle, struck mailboxes, and overturned into ditch, alleging claims for negligence, loss of consortium, and punitive damages.

The Court of Common Pleas granted homeowners' motion for summary judgment. Motorist appealed. The Court of Appeals affirmed. Motorist appealed.

The Supreme Court held that homeowner's mailbox adjacent to public road did not interfere with usual and ordinary course of vehicle travel on road, and thus homeowner did not owe a duty of care to motorist.

Homeowner's mailbox adjacent to public road did not interfere with usual and ordinary course of vehicle travel on road, and thus homeowner did not owe a duty of care to motorist, and was not liable to motorist in negligence action for injuries sustained when motorist hit a patch of black ice, lost control of vehicle, struck mailboxes, and overturned into ditch, even though homeowner's mailbox post was non-conforming to postal guidelines; to the extend mailbox posted a hazard, it did so only with respect to motorists who errantly left the road.

IMMUNITY - OHIO

Maternal Grandmother v. Hamilton County Department of Job and Family Services

Supreme Court of Ohio - November 23, 2021 - N.E.3d - 2021 WL 5456421 - 2021-Ohio-4096

Maternal grandmother brought wrongful death suit and related survivorship claims against child's mother, child's father, county, county commissioners, county department of job and family services, and several caseworkers, arising from death of child while she was in the custody of her parents.

County, commissioners, department, and caseworkers moved for judgment on the pleadings, alleging they were entitled to immunity. The Court of Common Pleas granted motions and dismissed the claims against all defendants except child's parents. Grandmother appealed. The Court of Appeals affirmed. Grandmother sought further review.

The Supreme Court held that:

- Notice pleading applied to claims invoking exception to immunity of government employees for wanton or reckless conduct, and
- Grandmother's allegations were sufficient to plead her claims and raise possibility that exception to immunity applied.

When a complaint invokes the exception to a government employee's immunity for wanton or reckless conduct, notice pleading suffices and the plaintiff may not be held to a heightened pleading standard or expected to plead the factual circumstances surrounding an allegation of wanton or reckless behavior with particularity.

Maternal grandmother's allegations that caseworkers performed their duties in a wanton or reckless manner with respect to child who died when she was two years old and that caseworkers ignored child's mother's history of abusing her other children, failed to properly investigate a report of neglect or abuse of child from doctors, and overlooked what were or should have been clear signs of abuse during a home visit that occurred less than a month before child's death were sufficient to put county and caseworkers on notice of wrongful death and survivorship claims against them and to raise possibility that exception to caseworkers' statutory immunity for wanton or reckless conduct applied.
