Bond Case Briefs

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Cases

EMINENT DOMAIN - NEW YORK

Board of Managers of Lido Beach Towers Condominium v. City of Long Beach

Supreme Court, Appellate Division, Second Department, New York - January 24, 2024 - 223 A.D.3d 774 - 204 N.Y.S.3d 145 - 2024 N.Y. Slip Op. 00290

Board of managers for condominium brought action against city, inter alia, to recover damages for inverse condemnation, arising from city's alleged failure to timely seek permanent easement over condominium property via condemnation.

The Supreme Court, Nassau County, denied city's motion to dismiss claim as time-barred, and city appealed.

The Supreme Court, Appellate Division, held that three-year statute of limitations for damages to property applied to claim.

Three-year statute of limitations for damages to property, rather than one-year-and-ninety-day statute of limitations for damages claims against political subdivisions, applied to inverse condemnation claim by board of managers for condominium against city, since inverse condemnation claims did not sound in tort.

EMINENT DOMAIN - NEW YORK

Brinkmann v. Town of Southold, New York

United States Court of Appeals, Second Circuit - March 13, 2024 - F.4th - 2024 WL 1080032

Property owners filed § 1983 action alleging that town violated Takings Clause by exercising eminent domain to take their property for creation of park as pretext for defeating their commercial use.

The United States District Court for the Eastern District of New York denied owners' motion for preliminary injunction and dismissed complaint. Owners appealed.

The Court of Appeals held that town's exercise of eminent domain to take property for creation of park did not violate Takings Clause.

Town's exercise of eminent domain to take property for creation of park did not violate Takings Clause, even if town took land to prevent owners' commercial use; public park was public use, town paid fair compensation, and there was no indication that town meant to confer any private benefit or intended to use property for anything other than public park.

EMINENT DOMAIN - OHIO

State ex rel. AWMS Water Solutions, L.L.C. v. Mertz

Supreme Court of Ohio - January 24, 2024 - N.E.3d - 2024 WL 251182 - 2024-Ohio-200

Operator of saltwater-injection wells associated with oil and gas production filed petition for writ of mandamus to compel state to commence proceedings for property appropriation, alleging that state's suspension order with respect to one of its two wells effected a governmental taking of operator's property, requiring the state to pay it just compensation.

The Eleventh District Court of Appeals granted the state's motion for summary judgment. Operator appealed. The Supreme Court reversed and remanded. On remand, the Court of Appeals denied operator's petition for writ of mandamus. Operator appealed.

The Supreme Court held that:

- Court of Appeals ventured beyond scope of Supreme Court's remand order by determining that operator lacked cognizable property interest, and
- Court of Appeals' determination that operator lacked cognizable property interest for operator's takings claim violated doctrine of the law of the case.

Court of Appeals ventured beyond scope of Supreme Court's remand order by determining that operator of saltwater-injection wells lacked cognizable property interest, and, thus, erred in denying writ of mandamus to compel state to commence proceedings for property appropriation; Supreme Court specified that, on remand, Court of Appeals was required to weigh parties' evidence related to operator's takings claim and to weigh parties' evidence in accordance with Supreme Court's opinion and to balance all Penn Central factors to determine whether operator suffered partial taking, and, instead, Court of Appeals sua sponte ordered parties to file supplemental briefs as to whether operator had cognizable property interest under Takings Clause and denied writ without weighing parties' evidence.

Court of Appeals' determination that operator of saltwater-injection wells lacked cognizable property interest for operator's takings claim violated doctrine of the law of the case, in mandamus proceedings to compel state to commence proceedings for property appropriation; Supreme Court recognized that operator's leasehold was a property interest that triggered takings analysis, and, on remand, Court of Appeals determined that Supreme Court had not deemed that interest to be property interest for purposes of Takings Clause, that question of whether operator had cognizable property interest had not been at issue before Supreme Court, and that Supreme Court noted only that operator was prima facie entitled to invoke constitutional right to just compensation.

SCHOOLS - VIRGINIA

Ibanez v. Albemarle County School Board

Court of Appeals of Virginia, Richmond - February 20, 2024 - 80 Va.App. 169 - 897 S.E.2d 300

Parents, on behalf of themselves and their children, brought action alleging that county school board's anti-racism policy violated their rights under Virginia Constitution and Virginia statute.

The Circuit Court dismissed complaint, and parents appealed.

The Court of Appeals held that:

- Virginia Constitution's due process, equal protection, and free speech provisions were self-executing;
- Statute providing parents with fundamental right to make decisions concerning upbringing, education, and care of their children was not self-executing;
- Parents lacked standing to bring action seeking declaratory judgment that policy violated Virginia Constitution's guarantee of freedom from government discrimination;
- Policy did not compel speech, in violation of Virginia Constitution's free speech provision;
- Policy did not amount to viewpoint discrimination under free speech provision;
- Policy was not unconstitutionally vague; and
- Policy did not violate parents' due process right to direct upbringing, education, and control of their children.

GOVERNMENT CONTRACTS - LOUISIANA

Ramelli Janitorial Service, Inc. v. H&O Investments, LLC

Court of Appeal of Louisiana, Fifth Circuit - September 21, 2022 - 350 So.3d 191 - 22-265 (La.App. 5 Cir. 9/21/22)

Unsuccessful bidder for grass-cutting contract with parish brought action against parish and successful bidder, seeking declaratory and injunctive relief on ground that contract violated public bid law and seeking damages from successful bidder for unfair trade practices and from parish for detrimental reliance.

The District Court denied successful bidder's peremptory exceptions of prescription, no cause of action, and no right of action. Successful bidder filed application for supervisory writ.

The Court of Appeal held that contract was service contract, not public works contract, and thus public bid law's section providing for injunctive relief regarding public works contracts that were contrary to provisions of public bid law's part governing letting of contracts did not apply.

Grass-cutting contract with parish was "service contract," not "public works contract," and thus public bid law's section providing for injunctive relief regarding public works contracts that were contrary to provisions of public bid law's part governing letting of contracts did not apply; contract did not concern erection, construction, alteration, improvement, or repair of any public facility or immovable property.

PUBLIC MEETINGS - MAINE

McBreairty v. Miller

United States Court of Appeals, First Circuit - February 21, 2024 - F.4th - 2024 WL 702383

Plaintiff brought action against local school board and board chair, alleging that board's speech restrictions, which had been applied to plaintiff and had resulted in his removal by the police from two board meetings, violated the First Amendment and the Maine Constitution's free-speech and petition protections and seeking damages and injunctive relief.

The United States District Court for the District of Maine denied plaintiff's emergency motion for a

temporary restraining order (TRO) and preliminary injunction. Plaintiff appealed.

The Court of Appeals held that plaintiff lacked Article III standing to seek injunctive relief because he failed to allege that he intended in the future to engage in conduct that would violate the challenged speech restrictions.

Plaintiff failed to allege in his complaint that he intended in the future to engage in conduct that would violate school board's restrictions on speech at board meetings, and plaintiff thus lacked standing under Article III to seek injunctive relief in action challenging board's restrictions under the First Amendment; present-tense allegations about the restrictions at issue merely alleged that the restrictions were in continued operation, plaintiff's allegation that he "reasonably fears imminent injury" was a mere legal conclusion, and the fact that plaintiff requested injunctive relief was insufficient to establish his future intention to engage in conduct that would result in board's application to plaintiff of the restrictions at issue.

ANTI-SLAPP - MASSACHUSETTS

Bristol Asphalt, Co., Inc. v. Rochester Bituminous Products, Inc.

Supreme Judicial Court of Massachusetts, Plymouth - February 29, 2024 - N.E.3d - 2024 WL 849711

Asphalt companies brought action against competitors, alleging competitors' underlying judicial and regulatory challenges to town's approval of asphalt companies' proposed asphalt plant constituted unfair or deceptive acts or practices in the conduct of trade or commerce, conspiracy in restraint of trade or commerce, and abuse of process.

Competitors filed special motion to dismiss under anti-SLAPP (strategic litigation against public participation) statute or, alternatively, motion to dismiss for failure to state a claim. The Superior Court Department denied special motion to dismiss, finding that competitors' petitioning activities were a sham, but granted motion to dismiss claim for abuse of process. Competitors filed interlocutory appeal. The Appeals Court affirmed. Competitors' application for further appellate review was allowed.

The Supreme Judicial Court held that:

- At first stage of resolving anti-SLAPP motion, movant must show the challenged claim lacks substantial basis in conduct other than or in addition to movant's petitioning activity, abrogating *Blanchard v. Steward Carney Hospital, Inc.*, 75 N.E.3d 21, *Blanchard v. Steward Carney Hospital, Inc.*, 130 N.E.3d 1242, and *Reichenbach v. Haydock,* 90 N.E.3d 791;
- Appellate review of both stages of anti-SLAPP inquiry is de novo, abrogating *Baker v. Parsons,* 434 Mass. 543, 750 N.E.2d 953, and *McLarnon v. Jokisch*, 431 Mass. 343, 727 N.E.2d 813;
- Companies' claims were based solely on competitors' petitioning activity;
- Competitors' underlying argument that asphalt plan was not use permitted as of right in town's industrial district lacked reasonable factual support or arguable legal basis;
- Competitors' underlying arguments regarding noise and traffic problems lacked reasonable factual support or arguable legal basis;
- Competitors' underlying challenges to extension of order of conditions lacked reasonable factual support or arguable legal basis; and
- Competitors' fail-safe petitions for review under Massachusetts Environmental Protection Act (MEPA) did not constitute legitimate petitioning activity.

ZONING & PLANNING - NEW HAMPSHIRE

Harvey v. Town of Barrington

Supreme Court of New Hampshire - February 27, 2024 - A.3d - 2024 N.H. 10 - 2024 WL 791539

Property owner sought judicial review of decision by town's planning board that affirmed the zoning board of adjustment's (ZBA) grant of a variance allowing adjoining lot to be subdivided into two residential lots, each with access via an easement over property owner's lot.

The Superior Court affirmed planning board.

The Supreme Court held that:

- Town's ZBA lacked the authority to modify limited easement over property owner's lot to allow access to two residential lots, and
- Town planning board was precluded from approving the subdivision of single lot into two residential lots absent legal street access to the lots.

EMINENT DOMAIN - NEW YORK

Bowers Development, LLC v. Oneida County Industrial Development Agency

Supreme Court, Appellate Division, Fourth Department, New York - February 2, 2024 - N.Y.S.3d - 2024 WL 395766 - 2024 N.Y. Slip Op. 00523

Owners of certain real property that had been condemned by county industrial-development agency for use as a surface parking lot associated with a private medical facility petitioned to annul the agency's condemnation determination.

The Supreme Court, Appellate Division granted owners' petition. Agency appealed. The Court of Appeals reversed.

Upon remittitur, the Supreme Court, Appellate Division, held that:

- Proper procedural vehicle for owners' contention that agency's financial assistance to construction project violated statutory anti-pirating provisions was proceeding pursuant to article 78;
- Agency's determination to exercise eminent domain power to acquire property for use as parking lot was rationally related to public purpose; and
- Agency did not improperly segment its environmental review.

County industrial-development agency's determination to exercise its eminent domain power to acquire owners' property for use as a surface parking lot was rationally related to a conceivable public purpose, notwithstanding the fact that the need for the parking lot was due in part to the construction of a private medical facility; agency's acquisition of the property would serve the public use of mitigating parking and traffic congestion.

MUNICIPAL GOVERNANCE - OHIO

State ex rel. Peterson v. Licking County Board of Elections

Supreme Court of Ohio - February 21, 2024 - N.E.3d - 2024 WL 699836 - 2024-Ohio-646

Village mayor filed action against two county boards of elections, their members, village, and village's council president for writs of mandamus and prohibition to prevent boards and village from setting date for recall election, from conducting recall election to recall mayor, and to order boards to remove recall election from ballot.

The Supreme Court held that:

- Conflict of interest was not present with village solicitor's representation of village and village council president, and, thus, disqualification of village solicitor was not warranted;
- Village solicitor's alleged disclosure of information protected by attorney-client privilege at public village council meeting did not warrant disqualification of village solicitor on ground of conflict of interest;
- Village solicitor was, in fact, village solicitor, and, thus, disqualification of village solicitor on ground that village solicitor was no longer village solicitor was not warranted;
- County boards of elections did not exercise quasi-judicial authority in matter, and, thus, village mayor was not entitled to writ of prohibition to prevent boards from holding recall election;
- Village and its counsel did not exercise quasi-judicial authority in matter, and, thus, village mayor was not entitled to writ of prohibition to prevent village and council from setting day for holding recall election; and
- Village mayor was not entitled to writ of mandamus to order county boards of elections to remove special recall election from ballot.

ZONING & PLANNING - VERMONT

Town of Pawlet v. Banyai

Supreme Court of Vermont - March 1, 2024 - A.3d - 2024 WL 877863 - 2024 VT 13

Town filed a motion for contempt against landowner for his alleged noncompliance with court orders requiring that he remove structures constructed as part of a "firearms training facility" that violated town's zoning ordinances.

The Superior Court, Environmental Division, found landowner in contempt and imposed sanctions, denied landowner's motion for reconsideration, granted in part landowner's request for an extension of deadlines, and, after deadlines had expired, granted town's motion to enforce the sanctions. Landowner appealed the enforcement order.

The Supreme Court held that landowner's failure to appeal contempt order foreclosed him from collaterally attacking the sanctions imposed for violations of town's zoning ordinances.

Landowner was foreclosed from collaterally attacking any determinations made final in trial court's contempt order, including whether the sanctions imposed by the order for his violations of town's zoning ordinances violated the Excessive Fines Clause, where landowner never challenged the contempt order or trial court's denial of his motion to reconsider, but instead sought to challenge the trial court's determinations in contempt order on appeal from an order enforcing the sanctions.

TELECOM - CALIFORNIA

City of Lancaster v. Netflix, Inc.

Court of Appeal, Second District, Division 3, California - February 22, 2024 - Cal.Rptr.3d - 2024 WL 725166

City brought putative class action on behalf of itself and other local governments against video streaming services seeking unpaid past franchise fees for video services under the Digital Infrastructure and Video Competition Act and declaratory relief compelling providers to obtain state franchises and pay franchise fees going forward.

The Superior Court sustained providers' demurrer to the complaint without leave to amend, and entered judgment. City appealed.

The Court of Appeal held that:

- Act did not expressly create a private right of action for local governments against non-franchise holders;
- Act did not contain an implied private right of action for local governments against non-franchise holders; and
- Trial court appropriately preserved Public Utilities Commission's jurisdiction.

Private right of action created by the Digital Infrastructure and Video Competition Act, which required video service providers to obtain a franchise from the Public Utilities Commission and pay franchise fees to local governments in exchange for use of public rights-of-way to operate video service networks, did not expressly create a private right of action for city and local government entities against streaming services that were non-franchise holders for unpaid video service provider fees; Act made clear that fees to be collected from video service providers operating within local government's jurisdiction were franchise fees, and that only "holders" of a state franchise were obligated to pay the required fees.

Digital Infrastructure and Video Competition Act, which required video service providers to obtain a franchise from the Public Utilities Commission and pay franchise fees to local governments in exchange for use of public rights-of-way to operate video service networks, did not contain an implied private right of action for local governments against non-franchise holders for collection of video service provider fees; structure of the Act indicated it was legislative intent for Commission, not local governments, to be responsible for enforcement issues relating to state franchise requirement, as it provided for Commission to bring suit on its own against video service providers that failed to obtain state franchise, while the Act's legislative history made no mention of private right of action against non-franchise holders.

Trial court appropriately preserved Public Utilities Commission's jurisdiction by sustaining demurrer to city's declaratory relief claim against video streaming services seeking judicial declaration that services must obtain state-issued franchises through the Commission, where claim was wholly derivative of city's claim asserting private cause of action under the Digital Infrastructure and Video Competition Act seeking past due video service provider fees allegedly owed by providers, which was meritless because the Act granted enforcement authority to Commission and not local governments, and further, city's claim was essentially a thinly veiled request that court order the Commission to issue franchises to providers or to institute enforcement action against them.

IMMUNITY - COLORADO

Hice v. Giron

Supreme Court of Colorado - February 20, 2024 - P.3d - 2024 WL 677222 - 2024 CO 9

Following chase that police officer began before activating his vehicle's emergency lights, and which ended with vehicle colliding into van, fatally injuring van's driver and passenger, relatives and estate representatives of driver and passenger brought wrongful death action against officer and town.

Defendants asserted immunity defense under the Colorado Governmental Immunity Act (CGIA). The District Court dismissed on the basis of immunity. Relatives and estate representatives appealed. The Court of Appeals reversed, finding that defendants were not entitled to immunity because officer did not activate his lights and siren for the entire time he exceeded speed limit. The Supreme Court granted certiorari review.

The Supreme Court held that:

- To waive immunity under the CGIA, a minimal causal connection was required between fatal injuries and officer's failure to use lights and siren;
- Officer did not violate traffic code without privilege so as to waive immunity under the CGIA;
- Statute providing CGIA immunity "only when" making use of audible or visual signals did not require officer to use lights or sirens as soon as he began speeding; and
- Any statutory discretion afforded police officer not to use lights and siren did not mandate that officer waived immunity under the CGIA.

EMINENT DOMAIN. - DISTRICT OF COLUMBIA

Gordon v. District of Columbia

District of Columbia Court of Appeals - February 15, 2024 - A.3d - 2024 WL 630165

Property owners who sought to sell their family home filed action against the District of Columbia and several District employees, asserting constitutional and common-law claims related to the designation of the home as a historic property.

The Superior Court granted in part and denied in part the District's motion to dismiss and granted the District's motion for summary judgment on the remainder of the claims. Property owners appealed.

The Court of Appeals held that:

- Historic Preservation Office (HPO) employee was entitled to qualified immunity from property owners' Fourth Amendment claim;
- Property owners' allegations were insufficient to establish District's liability under § 1983 for HPO employee's unauthorized entry into property owners' home under a "single instance" theory;
- Property owners' allegations were insufficient to support failure-to-train claim against employee's supervisor;
- Remand was necessary on the issue of whether HPO employee was entitled to absolute official immunity from property owners' common law trespass claim;
- District's designation of property owners' home as a historic landmark was not a regulatory taking under the Fifth Amendment; and

- Historic Preservation Review Board (HPRB) hearing regarding the proposed historic designation of home did not deprive property owners of procedural due process.

IMMUNITY - OKLAHOMA

Jackson County Emergency Medical Service District v. Kirkland

Supreme Court of Oklahoma - February 13, 2024 - P.3d - 2024 WL 564543 - 2024 OK 4

Toll worker who was injured when ambulance collided with a turnpike tollbooth filed a negligence action against ambulance driver and county emergency medical services (EMS) district.

The District Court denied defendants' motions for summary judgment and to substitute parties. EMS district filed an application to assume original jurisdiction and a petition for writ of prohibition.

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

- Board of trustees, as the EMS district's governing body, should have been substituted as a party;
- EMS district, vis-a-vis the board of trustees, was subject to immunity from liability to the same extent as municipalities and counties within the state enjoyed such immunity; and
- EMS district, vis-a-vis the board of trustees, was immunity from liability in negligence action brought by toll worker who had received workers' compensation benefits.

Board of trustees for county emergency medical services (EMS) district should have been substituted for the EMS district in negligence action brought by highway toll worker injured in ambulance collision with toll booth; EMS district and its board of trustees were not distinctly created entities which could be separated from each other, and EMS district's board of trustees was the expressed entity to be sued as EMS district's sole governing body.

County's emergency medical services (EMS) district, vis-a-vis the board of trustees, was subject to immunity from liability in negligence action brought by toll worker injured in an ambulance collision to the same extent as municipalities and counties within the state enjoyed such immunity under the Oklahoma Governmental Tort Claims Act (GTCA).

County's emergency medical services (EMS) district, vis-a-vis the board of trustees, was immune from liability in negligence action brought by toll worker injured in an ambulance collision under the Oklahoma Governmental Tort Claims Act (GTCA), where the GTCA precluded liability if the injury was covered by workers' compensation, and it was undisputed that workers' compensation benefits had been paid to toll worker as a result of the accident.

LIABILITY - PENNSYLVANIA

Donahue v. Borough of Collingdale

United States District Court, E.D. Pennsylvania - February 1, 2024 - F.Supp.3d - 2024 WL 387455

Bystander injured and administratrix of estate of bystander killed when vehicle of which bystanders were occupants was struck by vehicle being chased by police in high speed pursuit, as well as decedent bystander's sister, brought action against individual police officers and boroughs, asserting claims under § 1983 for due process violations and municipal liability and under state law.

Officers and boroughs moved for summary judgment.

The District Court held that:

- Individual officers were not liable on substantive due process claim under state-created danger theory;
- Fact issues existed as to whether boroughs' allegedly defective customs and training related to pursuits were moving force of constitutional violations, precluding summary judgment on claims for municipal liability; and
- Bifurcation of § 1983 claims and state law claims was appropriate.

MUNICIPAL ORDINANCE - PENNSYLVANIA

Barris v. Stroud Township

Supreme Court of Pennsylvania - February 21, 2024 - A.3d - 2024 WL 696822

Landowner filed complaint seeking declaratory judgment that township ordinance prohibiting discharging of firearms within township, alongside zoning ordinances limiting shooting ranges to two non-residential districts in township, violated Second Amendment on its face.

The Court of Common Pleas entered summary judgment in township's favor, and landowner appealed. The Commonwealth Court reversed. Leave to appeal was granted.

The Supreme Court held that:

- Owner's conduct in discharging firearms on his own property in order to gain proficiency in their use was covered by Second Amendment, but
- Ordinance did not violate Second Amendment on its face.

Property owner's conduct in discharging firearms on his own property in order to gain proficiency in their use was covered by Second Amendment's plain text, where owner faced confiscation of his lawfully-owned firearms pursuant to township ordinance for doing so.

Township ordinance prohibiting discharging of firearms within township except in shooting ranges within non-residential districts was fully consistent with Nation's historical tradition of firearm regulation, and thus did not violate Second Amendment on its face; colonial, founding, and antebellum generations recognized states' longstanding power to regulate when and where firearms could be used for non-self-defense purposes, number of firearm discharge regulations proliferated after Second Amendment's ratification, number of regulations during this time were aimed specifically at shooting ranges and target practice, and township adopted ordinance for protection of public health and safety and general welfare of residents and visitors.

PREVAILING WAGE ACT - PENNSYLVANIA

Ursinus College v. Prevailing Wage Appeals Board

Supreme Court of Pennsylvania - February 21, 2024 - A.3d - 2024 WL 696765

Private, non-profit college sought review of decision by Pennsylvania Prevailing Wage Appeals Board which reversed the decision of the Department of Labor and Industry, Bureau of Labor Law Compliance, concluding that construction project undertaken by college and financed by bonds

issued by public authority was “public work” covered by the Pennsylvania Prevailing Wage Act (PWA), entitling members of labor union to prevailing minimum wages for project work already completed.

The Commonwealth Court reversed. Discretionary review was granted.

The Supreme Court held that the project was not paid for in whole or in part with public funds and, thus, did not constitute a “public work” within meaning of the PWA.

As shown by relevant dictionary definitions, plain reading of phrase “paid for in whole or in part out of the funds of a public body,” as used in provision of the Pennsylvania Prevailing Wage Act (PWA) defining “public work” to mean construction, reconstruction, demolition, alteration, and/or repair work other than maintenance work, done under contract and paid for in whole or in part out of the funds of a public body where estimated cost of total project is in excess of $25,000, requires the work to be marked by the receipt of payment, in whole or in part, from available pecuniary resources from or possessed by the Commonwealth of Pennsylvania, any of its political subdivisions, any authority created by the General Assembly of the Commonwealth of Pennsylvania, and any instrumentality or agency of the Commonwealth of Pennsylvania.

Construction project undertaken by private, non-profit college and financed by bonds issued by public authority was not paid for in whole or in part with public funds, and so was not a “public work” covered by Prevailing Wage Act (PWA); in providing conduit financing for project, a private endeavor, authority assigned loan agreement to trustee and then sold bonds to private underwriter, which paid purchase price with private monies directly to trustee, which deposited monies into project fund and then disbursed monies to college or others designated by it for project costs, college alone repaid bond debt from its own revenue, again directly to trustee, which deposited funds into bond fund from which bondholders were paid, at no time did relevant monies flow through authority’s coffers, and neither authority nor taxpayers bore any risk or liability relative to the bonds.

For a construction project to be a “public work” covered by the Pennsylvania Prevailing Wage Act (PWA), the statute’s clear requirement that the project be “paid for in whole or in part out of the funds of a public body” cannot be satisfied by either the mere involvement of a public body in the transaction or a “but for” test pursuant to which “but for” the public body’s involvement in the transaction the project could not have occurred; allowing a “but for” test or mere involvement of the public body to suffice would require court to impermissibly add to or otherwise modify statutory language to expand the PWA’s coverage beyond its plain terms.

EMINENT DOMAIN - SOUTH CAROLINA

Applied Building Sciences, Inc. v. South Carolina Department of Commerce, Division of Public Railways

Supreme Court of South Carolina - January 17, 2024 - S.E.2d - 2024 WL 174157

Engineering firm that was tenant in building condemned for public use asserted an inverse condemnation claim against Division of Public Railways, as condemnor, seeking reimbursement of reestablishment expenses.

The Circuit Court granted Division’s motion for summary judgment. Firm appealed, and case was certified for review.

The Supreme Court held that:

- Reestablishment expenses related to the moving of small businesses, farms, and non-profit organizations are separate from constitutional just compensation, and
- The $50,000 statutory limit on reimbursement of reestablishment expenses does not violate the federal and state takings clauses.

Reestablishment expenses related to the moving of small businesses, farms, and non-profit organizations due to a condemnation for public use are separate from constitutional just compensation in an eminent domain action.

The $50,000 statutory limit on reimbursement of reestablishment expenses related to the moving of small businesses, farms, and non-profit organizations due to a condemnation for public use does not violate the takings clauses of the Federal and State Constitutions.

EMINENT DOMAIN - CALIFORNIA

Mojave Pistachios, LLC v. Superior Court of Orange County

Court of Appeal, Fourth District, Division 3, California - February 8, 2024 - Cal.Rptr.3d - 2024 WL 489446

Limited liability company (LLC) that operated a pistachio orchard in the desert filed an action against local water agency, alleging that agency violated LLC's common law and constitutional rights to water by granting groundwater pumping allotments to other users but not to LLC, and that agency's actions amounted to a taking.

The Superior Court sustained agency's demurrer. LLC petitioned for a writ of mandate.

The Court of Appeal held that:

- As a matter of first impression, a person challenging a groundwater fee imposed under the Sustainable Groundwater Management Act (SGMA) must first pay the fee before bringing an action for a refund;
- LLC was required to first pay the assessed groundwater replenishment fee before bringing any cause of action challenging the fee;
- LLC was required to pay the groundwater basin replenishment fee before it could challenge the local water agency's exempted pumping allotments; and
- LLC's challenge to agency's implementation actions other than the replenishment fee did not support a cause of action for a taking.

EMINENT DOMAIN - NEBRASKA

Sanitary and Improvement District No. 596 of Douglas County v. THG Development, L.L.C.

Supreme Court of Nebraska - February 16, 2024 - N.W.3d - 315 Neb. 926 - 2024 WL 649268

County sanitary and improvement district (SID) filed petition in county court seeking condemnation of portion of landowner's property that was outside SID boundaries.

After landowner was awarded $56,390 for the taking, landowner appealed.

The District Court entered judgment upon jury verdict and denied landowner's motion for new trial. In second case, SID sought to levy a special assessment, and landowner counterclaimed for declaratory relief. The District Court granted landowner's motion for summary judgment in part and denied motion for attorney fees. Landowner appealed in first case, SID appealed and landowner cross-appealed in second case, and appeals were consolidated.

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

- Landowner did not strictly comply with statute governing notice of constitutional questions;
- As matter of first impression, SID does not have statutory authority to levy a special assessment on property outside its boundaries;
- Any error in admission of special benefits evidence in condemnation case was not reversible error;
- Trial court acted within its discretion in admitting expert testimony about value of remaining property in condemnation case;
- Mistrial of condemnation case was not warranted based on closing comment of SID counsel;
- Special assessment case did not involve frivolous or bad faith claims warranting attorney fees against SID; and
- Eminent domain statutes did not authorize attorney fees for special assessment case; disapproving *Simon v. City of Omaha,* 267 Neb. 718, 677 N.W.2d 129.

ZONING & PLANNING - OHIO

State ex rel. Thomas v. Wood County Board of Elections

Supreme Court of Ohio - February 2, 2024 - N.E.3d - 2024 WL 396636 - 2024-Ohio-379

Property owner, who sought to amend zoning for property to commercial sought writs of mandamus and prohibition to order county board of elections to remove zoning amendment referendum from primary-election ballot.

The Supreme Court held that:

- Property owner lacked adequate remedy in the ordinary course of the law, as required to obtain writs of mandamus or prohibition;
- County board of elections did not act in clear disregard of applicable law in determining that eight percent statutory signature requirement for referendum petition controlled number of signatures required for referendum;
- Summary of zoning amendment in referendum petition satisfied statutory requirements;
- County board of elections did not abuse its discretion or disregard applicable law in certifying zoning amendment referendum for placement on primary-election ballot;
- Notice for board meeting at which referendum petition was considered met statutory notice requirements, and, thus, certification of petition for placement on primary-election ballot was valid; and
- Notice for board meeting did not violate property owner's procedural due-process rights.

EMINENT DOMAIN - TEXAS

Rhone v. City of Texas City, Texas

United States Court of Appeals, Fifth Circuit - February 14, 2024 - F.4th - 2024 WL 617246

Owner of three apartment buildings in city brought appeal, in state district court, from order of nuisance abatement issued by a Municipal Court of Record, asserting claims under § 1983 for inverse condemnation, denial of procedural due process, and unconstitutional seizure, and seeking declaratory judgment.

After removal by city, the United States District Court granted summary judgment to city on due process claim, and later granted summary judgment to city on remaining claims. Owner appealed and filed motion to restrain and enjoin damage to or demotion of buildings. The Court of Appeals denied the motion without prejudice, and buildings were demolished by city during pendency of appeal.

The Court of Appeals held that:

- Owner satisfied requirement for exception to mootness, for issues capable of repetition yet evading review, that duration of challenges, to Municipal Court of Record's nuisance finding and court's constitutionality, was too short for complete judicial review and sufficient relief;
- Theoretical possibility of future procedural due process and seizure violations did not support exception to mootness;
- Appeal was not moot as to takings claim; and
- City's imposition of compliance costs for repairing conditions at apartment buildings did not violate doctrine of unconstitutional conditions.

ZONING & PLANNING - VIRGINIA

Hartley v. Board of Supervisors of Brunswick County

Court of Appeals of Virginia, Richmond - February 13, 2024 - S.E.2d - 2024 WL 558069

Opponents sought judicial review of county zoning board's upzoning decision which rezoned a property from agricultural to business use to allow development of a retail store.

The Brunswick Circuit Court partially sustained board's demurrer, and then granted board's motion for summary judgment, denied opponents' motion for continuance, and issued final order. Opponents appealed.

The Court of Appeals held that:

- Board's deviation from comprehensive plan did not render its decision unreasonable as a matter of law;
- Board's failure to consider statutory factors did not render its decision arbitrary and capricious;
- Board met its burden to put forward evidence of reasonableness sufficient to make question fairly debatable;
- Timing of summary judgment was not an abuse of discretion;
- Board's failure to follow Virginia Department of Transportation (VDOT) guidelines did not render decision unreasonable as a matter of law;
- Board's alleged violation of county subdivision ordinance did not render its decision unreasonable as a matter of law; and
- Board's alleged violation of its own zoning ordinance did not render its decision unreasonable as a matter of law.

ENVIRONMENTAL LAW - WASHINGTON

SkyCorp Ltd v. King County

Court of Appeals of Washington, Division 2 - February 13, 2024 - P.3d - 2024 WL 562169

Company that had been fined by county for disposing of mixed and nonrecyclable construction and demolition waste in an out-of-county facility that was licensed but that county had not designated for the disposal of such waste brought action against county, alleging that county regulation requiring disposal of such waste generated within the county at a designated facility violated both the Washington Constitution's privileges and immunities clause and its provision granting police powers to local governments by regulating conduct outside the county and infringing company's right to dispose of its property.

The Superior Court granted summary judgment to county. Company appealed.

The Court of Appeals held that:

- Regulation had only incidental effects on out-of-county activities and thus had not been shown beyond a reasonable doubt to violate constitutional provision granting police powers to local governments;
- Regulation did not directly and irreconcilably conflict with statute barring the disposal of solid waste except at a disposal site with a valid permit or as otherwise provided in the statute, and regulation thus was not shown to violate constitutional provision granting police powers to local governments by conflicting with state law;
- Regulation was not so unreasonable, arbitrary, or capricious that it exceeded county's authority under constitutional provision granting police powers to local governments;
- The right to dispose of solid waste was not a fundamental right, so regulation did not violate company's rights under the privileges and immunities clause;
- Trial court did not abuse its discretion in declining to strike declaration filed by county; and
- Any error committed by trial court in declining to strike declaration filed by county was harmless.

PUBLIC CONTRACTS - ARIZONA

Neptune Swimming Foundation v. City of Scottsdale

Supreme Court of Arizona - February 6, 2024 - P.3d - 2024 WL 440990

Private swim club filed complaint seeking a writ of mandamus compelling city to award club operating license to operate youth competitive swimming program in city's facilities under request-for-proposal (RFP) process and alleging violation of the "gift clause" of State Constitution and claiming license issued to club's competitor was not supported by adequate consideration, given club's bid for higher rate per lane hour.

The Superior Court, Maricopa County, granted summary judgment to city, and club appealed. The Court of Appeals affirmed. Club filed petition for review.

The Supreme Court held that:

- Operating license for party to operate youth competitive swimming program in city's facilities under RFP process satisfied first prong of inquiry under "gift clause" in State Constitution;

- Consideration prong of State Constitution's "gift clause" applied to club's claim;
- Club's failed competitive proposal was relevant to determining objective fair market value, but club's willingness to pay higher fees for operating license than competitor did not conclusively establish fair market value;
- Club's failed bid for operating license was not sufficient to prove that what city gave in operating license to competitor far exceeded what it received in return, and thus, there was no violation of gift clause;
- City did not have ministerial duty to award operating license to private swim club after city determined that club had scored the most points under RFP process;
- Whether city engaged in favoritism by canceling RFP after club submitted more advantageous proposal than its competitor precluded grant of summary judgment to city on club's claim that city violated its own procurement process; and
- Private swim club was not entitled to attorney fees under the private attorney general doctrine.

MUNICIPAL ORDINANCE - CALIFORNIA

City of Norwalk v. City of Cerritos

Court of Appeal, Second District, Division 2, California - February 1, 2024 - Cal.Rptr.3d - 2024 WL 376168

Neighboring city brought public nuisance action against city, alleging that city ordinance limiting commercial and heavy truck traffic through the city to certain major arteries caused extra traffic to travel through neighboring city and resulted in adverse consequences.

The Superior Court, Los Angeles County, sustained city's demurrer without leave to amend, and neighboring city appealed.

The Court of Appeal held that:

- Courts assessing whether an alleged nuisance is a "necessary implication" of a statute's express authorization, and thus whether statutory public nuisance immunity applies, should ask whether the alleged nuisance is an inexorable and inescapable consequence that necessarily flows from the statutorily authorized act;
- City had statutory immunity from neighboring city's public nuisance claims;
- Ordinance restricting traffic was not so unreasonable as to make void the delegation of regulatory authority to the city to enact such restrictions; and
- Ordinance was not invalid due to its failure to specifically exclude state and federal highways.

City had statutory immunity from neighboring city's public nuisance claims stemming from adverse effects of heavy truck traffic diverted into neighboring city by virtue of city municipal ordinance limiting heavy truck traffic to certain streets in city; statutes delegated to city the authority to prohibit the use of a street by any commercial vehicle or by any vehicle exceeding a maximum gross weight limit and to prohibit the use of particular highways by certain vehicles, and adverse effects to neighboring city inexorably and inescapably flowed from those statutorily authorized actions.

REVENUE BONDS - CALIFORNIA

Planning and Conservation League v. Department of Water Resources

Court of Appeal, Third District, California - January 5, 2024 - 98 Cal.App.5th 726 - 317

Cal.Rptr.3d 53 - 23 Cal. Daily Op. Serv. 359

Department of Water Resources filed action to validate amendments to long-term contracts with local government contractors receiving water through State Water Project, extending contract terms, expanding facilities listed as eligible for revenue bond financing, and making other changes to contracts' financial provisions.

Conservation groups and public agencies answered, some asserting affirmative defenses and contesting validation and others supporting validation. Conservation groups and other entities filed two separate actions for writs of mandate and for declaratory and injunctive relief challenging approval of amendments under California Environmental Quality Act (CEQA), Sacramento-San Joaquin Delta Reform Act, and public trust doctrine. Contractors intervened.

In coordinated proceeding, the Superior Court, Sacramento County, entered judgment in Department's favor in all three cases. Parties opposing validation appealed. Appeals were consolidated.

The Court of Appeal held that:

- Baseline for evaluation of environmental effects of proposed contract amendments was environmental setting under current contract conditions;
- Amendments were not part of larger project, such that they were properly studied in their own environmental impact report (EIR);
- CEQA did not require Department to consider environmental impacts of all potential projects which could be funded using revenue bonds issued under amendments;
- EIR adequately examined range of reasonable project alternatives;
  Amendments did not constitute "covered action" under Delta Reform Act;
- Sufficient evidence supported conclusion that amendments would not impact public trust resources; and
- Department complied with statute requiring it to present amendments to legislative committees.

Where a project involves ongoing operations or a continuation of past activity, the established levels of a particular use and the physical impacts thereof are considered to be part of the existing environmental baseline, for purposes of determining whether a project is likely to have significant environmental effects under the California Environmental Quality Act (CEQA); this rule applies to renewal of a permit or other approval for an existing facility even though the facility and its operations have not been previously reviewed under CEQA.

Baseline for evaluation by Department of Water Resources of whether proposed amendments to long-term contracts with local government agencies that received water through State Water Project would have significant environmental effects under California Environmental Quality Act (CEQA) was environmental setting under current contract conditions, not hypothetical environmental setting if contracts were not in place.

Proposed amendments to long-term contracts between Department of Water Resources and local government agencies receiving water through State Water Project were not part of larger project to build new water conveyance for Sacramento-San Joaquin Delta, and thus, Department's environmental review of proposed contract amendments alone did not constitute improper piecemealing of single project in violation of California Environmental Quality Act (CEQA), even though legislative oversight materials indicated relationship between contract amendments and financing of proposed conveyance project; amendments served independent purpose from conveyance, namely fixing financing problems with State Water Project, and amendment was only

small step towards conveyance, which faced significant other hurdles.

On appeal from judgment in favor of Department of Water Resources in California Environmental Quality Act (CEQA) action, conservation groups forfeited their argument that addendum to coordinated operations agreement between Department of Water Resources and United States Bureau of Reclamation, which Department allegedly negotiated at same time it was reviewing proposed amendments to long-term contracts with local government agencies receiving water through State Water Project, indicated amendments and addendum were part of same project, such that CEQA would have required environmental impact report (EIR) for amendments to consider addendum's impact; groups presented inadequate analysis and evidence indicating addendum was reasonably foreseeable consequence of amendments.

Existing State Water Project operations were part of baseline for environmental review of proposed amendments extending terms of and changing financing for long-term contracts with local government agencies that received water through Project, and thus, in environmental impact report (EIR) for proposed contract amendments, Department of Water Resources was not required to consider environmental impacts of extended period of existing operations; amendments would continue existing operations without change.

Links between proposed amendments to duration and financing provisions of long-term contracts with local government agencies receiving water through State Water Project and potential future projects involving existing State Water Project facilities, such as possible use of revenue bonds issued under amendments to repair aqueduct and reinforce dam, were too attenuated for California Environmental Quality Act (CEQA) to require Department of Water Resources, when assessing environmental impacts of proposed contract amendments, to forecast impacts of all such potential projects; amendments did not commit Department to, authorize revenue bonds for, or cause potential projects, and government funding mechanisms with no commitment to specific projects were specifically excluded from CEQA review.

In environmental impact report (EIR) regarding proposed amendments to terms and financial provisions of long-term contracts with local government agencies receiving water through State Water Project, project alternative of excluding amendment to revenue bond provisions was substantially similar to alternatives that Department of Water Resources, as lead agency, discussed in detail, and thus, California Environmental Quality Act (CEQA) Guideline governing discussion of range of reasonable alternatives did not require Department to discuss exclusion of revenue bond amendment in detail, where exclusion of revenue bond amendment could be understood from specifics of no-project alternative and alternative that only extended terms of contracts.

Decision of Department of Water Resources, in environmental impact report (EIR) for proposed amendments to terms and financing provisions of long-term contracts with local government agencies receiving water through State Water Project, to reject project alternatives to reduce water amounts that agencies would receive under contracts and to implement new water conservation management provisions did not constitute failure to analyze range of reasonable project alternatives, as required by California Environmental Quality Act (CEQA); EIR for proposed contract amendments had limited objective of addressing financial issues with existing contracts, and Department would have needed to add objectives to EIR to develop alternatives regarding water reductions or conservation measures.

In environmental impact report (EIR) issued by Department of Water Resources for proposed amendments extending terms and changing financial provisions of long-term contracts with local government agencies receiving water through State Water Project, no-project alternative was based on plausible, fact-based forecast that agencies would each elect to extend their existing contracts

pursuant to evergreen clause, rather than prediction that some or all agencies would fail to extend contracts, and thus, EIR satisfied California Environmental Quality Act (CEQA) requirement of analyzing no-project alternative; State Water Project had long history and played critical role in distributing water to many residents and much farmland, making it unlikely that agencies would terminate contracts.

Proposed amendments to long-term contracts with local government agencies receiving water through State Water Project, which extended terms of existing contracts and expanded ability of Department of Water Resources to use revenue bonds to finance betterments for State Water Project facilities and build new facilities, did not occur in Sacramento-San Joaquin Delta or change developed uses of State Water Project, and thus, amendments did not constitute "covered action" subject to certification requirements of Sacramento-San Joaquin Delta Reform Act; facilities were not located in Delta, term extensions did not expand State Water Project's existing operations, and financing amendments were not equivalent to future projects that would use revenue bond funds raised as result of amendments.

Sufficient evidence supported conclusion of Department of Water Resources that no public trust resource would be impacted by proposed amendments extending terms and changing financial provisions of long-term contracts with local government agencies receiving water through State Water Project, such that Department's approval of contract amendments did not violate public trust doctrine; State Water Resources Control Board or its predecessor had granted water rights to Department for State Water Project decades previously and amended such rights several times, contracts at issue were executed decades prior and allowed local agencies to extend their contractual interests indefinitely, and any use of preexisting financing mechanism that amendments broadened was speculative.

Public trust doctrine did not impose general duty of ongoing supervision on Department of Water Resources as to water rights with which it operated State Water Project, and thus, Department had no duty to weigh public trust interests or consider additional protections to those interests when considering proposed amendments extending terms and changing financing provisions of long-term contracts with local government agencies receiving water through State Water Project, where amendments had no impact on public trust uses, as they merely extended longstanding arrangements under State Water Project and bore only attenuated relationships to any projects that might be funded in future using revenue raised under amendments.

The statute requiring the Department of Water Resources to make a presentation to certain legislative committees at an informational hearing at least 60 days before the approval of a renewal or extension of a long-term water supply contract does not contemplate that the contract is in its final form when it is presented to the committees; the goal of the statute is to provide high-level oversight into the renewal or extension of State Water Project long-term contracts, but not to insert such oversight into the details of finalizing the renewal or extension by requiring an additional hearing as to any changes made following the committee hearing.

Failure by Department of Water Resources, at informational hearing before legislative committee regarding proposed amendments to long-term contracts with local government agencies receiving water through State Water Project, to mention that it had received but not yet responded to public comments on draft environmental impact report (EIR) for contract amendments did not violate statute requiring Department to make legislative presentations at least 60 days before approving renewal or extension of long-term water supply contract under State Water Project; statute did not require presentation to include details about EIR, and Department stated when seeking hearing that draft EIR had been prepared and final EIR would be completed in future.

Granting request by Department of Water Resources for validation of proposed amendments to long-term contracts with local government agencies receiving water through State Water Project would not confer absolute power on Department to assume unbounded contracts; validation action was statutorily limited to contracts in the nature of, or directly relating to, revenue bonds issued by Department under State Water Project, and Department acted within its general contracting authority under State Water Project in approving and executing amendments.

IMMUNITY - COLORADO

County of Jefferson v. Stickle

Supreme Court of Colorado - February 5, 2024 - P.3d - 2024 WL 413484 - 2024 CO 7

Pedestrian brought premises liability action against county arising out of injuries she sustained when she fell in a public parking structure maintained by the county. County filed motion to dismiss for lack of subject matter jurisdiction, alleging immunity under the Colorado Governmental Immunity Act (CGIA).

Following an evidentiary hearing, the District Court denied the county's motion to dismiss. County appealed, and the Court of Appeals affirmed. County petitioned for certiorari review, which was granted.

The Supreme Court held that:

- As a matter of first impression, parking structure where pedestrian fell was a "building" under the CGIA, and
- Optical illusion created by parking structure's surface coloring resulted at least in part from maintenance of the facility, and thus CGIA waived immunity.

Parking structure where pedestrian fell was a "building" within waiver provision of the Colorado Governmental Immunity Act (CGIA), where structure was a permanent two-level structure made of concrete and masonry materials, lower level was not entirely enclosed but had a knee-high wall surrounding it with support columns at regular intervals, and while building did not have heating, ventilation, or air conditioning, it had electricity, lighting, and a fire suppression system.

Optical illusion created by parking structure's surface coloring resulted at least in part from maintenance of the facility and was not solely a design decision, and thus Colorado Governmental Immunity Act (CGIA) waived immunity for accident in which pedestrian fell in garage allegedly due to illusion that caused walkway and parking surface to appear as a single flat surface; even if resurfacing both walkway and parking surface with the same materials was a design decision, the decision was part of a broader maintenance process.

COUNTIES - GEORGIA

First Center, Inc. v. Cobb County

Supreme Court of Georgia - February 6, 2024 - S.E.2d - 2024 WL 422804

Plaintiffs brought action against county, county commissioner, and county zoning division manager seeking declaratory, injunctive, and mandamus relief relating to a dispute about rules dictating the height of a wall surrounding a subdivision.

The Superior Court denied mandamus relief and dismissed other claims for failure to state a claim. Plaintiffs applied for discretionary review, which was granted after transfer.

The Supreme Court held that suit was not brought exclusively against and in the name of the county, as required for constitutional waiver of sovereign immunity.

Suit against county seeking declaratory, injunctive, and mandamus relief relating to a dispute about rules dictating the height of a wall surrounding a subdivision did not comply with state constitutional provision waiving sovereign immunity only for claims brought exclusively against and in the name of the state or local government, and therefore the entirety of the case was due to be dismissed, where plaintiffs sued the county but also named as defendants a county commissioner and the county zoning division manager.

IMMUNITY - MARYLAND

Mayor of Baltimore v. Wallace

Appellate Court of Maryland - February 1, 2024 - A.3d - 2024 WL 378084

Bicyclist, who was ejected from her bicycle when wheel of her bicycle became stuck in a gap between the granite bulkhead and brick pavers in public pedestrian walkway and shared use bicycle path, brought negligence action against city, alleging that city breached its duties to her by negligently causing, allowing to remain, and failing to warn her of a dangerous and defective condition on the premises, of which city had actual and/or constructive knowledge.

The Circuit Court entered judgment on jury verdict for bicyclist, and city appealed.

The Appellate Court held that:

- Pedestrian walkway and shared use bicycle path did not serve as a property, park or land that was made available for recreational purposes for purposes of determining if Maryland Recreational Use Statute (MRUS) applied, and
- MRUS did not apply, and thus, it did not override city's common law duty of care.

MUNICIPAL CORPORATIONS - SOUTH DAKOTA

Bohn v. Bueno

Supreme Court of South Dakota - February 7, 2024 - N.W.3d - 2024 WL 483676 - 2024 S.D. 6

Citizens applied for writ of mandamus against city officials after city finance officer declined to certify their petition to hold election to remove position of city manager from city's government.

The Circuit Court granted summary judgment for city. Citizens appealed.

The Supreme Court held that:

- Citizens' petition was in the required form under State Election Board regulation;
- Finance officer lacked authority to inquire into the petition's subject matter;
- Finance officer had a clear duty to certify petition and present it to city council;
- Petition was authorized under statute governing petitions for employment of a city manager;

- Petition's citation to incorrect statute did not preclude election pursuant to correct authorizing statute;
- Citizens were not entitled to statutory appellate attorney fees;
- Citizens were not entitled to attorney fees for frivolous or malicious defense; and
- Citizens were prevailing parties entitled to costs.

WATER LAW - WASHINGTON

West Terrace Golf LLC v. City of Spokane

Court of Appeals of Washington, Division 3 - February 6, 2024 - P.3d - 2024 WL 440584

Water users, who resided outside city and purchased water from city, brought action against city for, among other things, declaratory ruling that city's higher water rates for nonresident users violated statutes in title governing water companies.

City brought separate action for declaratory ruling that statute governing municipal utilities applied to a municipality's setting of its water rates.

The Superior Court, Spokane County entered order in city's favor, holding that statute governing municipal utilities and city's municipal code, not title governing water companies, governed city's authority to establish water rates at issue, and certified its order for interlocutory review. Water users sought direct review in Supreme Court, which denied direct review and transferred consolidated action to Court of Appeals, which accepted discretionary review.

The Court of Appeals held that:

- As a matter of apparent first impression, when classifying customers and service for rate-setting purposes, a municipal water supplier may only consider reasonable grounds for distinction;
- Statute requiring water rates to be "just, fair, reasonable and sufficient" was not repealed by implication as applied to municipal water suppliers; and
- As a matter of apparent first impression, a municipal water supplier must charge a uniform, just, fair, reasonable, and sufficient rate for a given class of customers or service.

The statute listing factors that a municipal water "may in its discretion consider" in "classifying customers served or service furnished" for rate-setting purposes, in which the last enumerated factor is "any other matters which present a reasonable difference as a ground for distinction," only allows cities and towns to base a rate classification on a factor, including the enumerated factor of the "location of the various customers within and without the city or town," if the factor is in fact a reasonable ground for distinction; the last factor, an omnibus clause, marks the common attribute that connects the specific items listed, and this interpretation is consistent with other statutes prohibiting unreasonable rate preferences and rate discrimination.

Because the statute authorizing cities and towns to construct water works and classify services and water users for rate-setting purposes concerns only rate classifications, it does not preclude the statute requiring gas, electricity, and water rates in general to be "just, fair, reasonable and sufficient" from applying to particular rates set by municipal water suppliers.

Legislature's repeal of statutory language requiring rates set by a municipal water supplier to be "just and reasonable" did not repeal by implication the earlier statute requiring water rates set by utilities in general to be "just, fair, reasonable and sufficient" to the extent such statute applied to municipal water suppliers; statute governing municipal water suppliers did not, by itself, cover

entire field of municipal water rates, legislature did not signal intent to recede from "just, fair, reasonable and sufficient" standard for municipal water suppliers but not for other classes of public or private utilities, and requirement of reasonableness in utility rates was longstanding.

Under the statute authorizing municipal water works, a municipal water supplier must charge a uniform rate for a given, statutorily permissible classification of customers or service, and under the statute governing water rates set by utilities in general, the rate must be just, fair, reasonable, and sufficient.

A municipal water supplier has reasonable discretion to fix rates, its rates are presumptively reasonable, and those challenging the rates bear the burden of proof to show the rates are excessive and disproportionate to the service rendered.

The inquiry into whether the rates charged by a municipal water supplier are excessive and disproportionate to the service rendered is governed by two controlling considerations: the value of the services to the public and fair compensation for the supplier.

ZONING & PLANNING - CALIFORNIA

Riddick v. City of Malibu

Court of Appeal, Second District, Division 5, California - February 1, 2024 - Cal.Rptr.3d - 2024 WL 376305

Landowner filed complaint against city after city denied their application for a permit to add an accessory dwelling unit (ADU) to their residence, alleging administrative and traditional mandate as well as a violation of the Housing Accountability Act.

The Superior Court granted claim for traditional mandate. City appealed, and landowners cross-appealed.

The Court of Appeal held that:

- City's interpretation of ordinance was not entitled to deference on appeal;
- Under city ordinance, attached accessory dwelling units were in the class of improvements to existing single-family residences that were exempt from coastal development permit requirements; and
- Whether landowners were entitled to a permit within 60 days of their completed application for an attached accessory dwelling unit was not properly before the Court of Appeal.

City's interpretation of provision of local coastal program ordinance providing for exemptions from coastal development permits for improvements to existing single-family residences was not entitled to deference on appeal in action stemming from city's denial landowner's application for a permit to add an accessory dwelling unit to their residence; neither the language of the ordinance nor its legislative history were ambiguous, any ambiguity was not of a technical or obscure nature which required specialized expertise, city's interpretation was not the result of careful consideration by senior agency officials or a consistent position maintained over a long period of time, and ordinance language was not crafted by city planning officials but rather was based, almost verbatim, on an implementing regulation promulgated by the Coastal Commission.

Under city ordinance, attached accessory dwelling units (ADUs) were in the class of improvements to existing single-family residences that were exempt from coastal development permit

requirements; ordinance noted that improvements to existing single-family residences were exempt as a class "except those noted below," improvements were defined as all structures directly attached to the residence as well as other structures normally associated with a single-family residence, which created two apparent classes of attached and detached structures, and while ordinance specified guest houses and accessory self-contained residential units was excluded from the list of other structures, that exclusion only applied to apparent class of detached structures.

Issue of whether landowners were entitled to a permit within 60 days of their completed application for an attached accessory dwelling unit was not properly before the Court of Appeal on landowners' cross appeal from determination that they were entitled to a writ of traditional mandate requiring city to consider their application as compliant with the relevant ordinance, as arguments on cross-appeal appeared to arise from matters that occurred following the final ruling on which the judgment was based.

PUBLIC UTILITIES - MAINE

Office of the Public Advocate v. Public Utilities Commission

Supreme Judicial Court of Maine - January 30, 2024 - A.3d - 2024 WL 339770 - 2024 ME 11

Office of the Public Advocate (OPA) sought judicial review of order of the Public Utilities Commission extending a waiver of the standard depreciation rate for the Maine Water Company (MWC).

The Supreme Judicial Court held that:

- Its review of Commission's decision was highly deferential;
- Plain language of Commission's rule did not authorize Commission to change or refrain from enforcing rule, and instead, provided a standard and alternative depreciation rate formula; and
- Commission did not abuse its discretion.

Plain language of Public Utilities Commission's rule providing that Commission may grant a request for a substantive deviation or waiver upon a finding of good cause or that compliance would be unduly burdensome and a finding that the deviation or waiver is not inconsistent with the purposes of the chapter or applicable statute from which the deviation or waiver is sought did not authorize Commission to change or refrain from enforcing rule, and instead, provided a standard and alternative depreciation rate formula, and therefore in the absence of a waiver provision specific to the standard and alternative approaches, the general waiver rule applied when determining whether to grant waiver as to depreciation rate for water utilities.

Public Utilities Commission did not abuse its discretion in setting water utility rates for Maine Water Company (MWC) by extending waiver of standard depreciation rate in anticipation of a gradual movement toward removal of cap on depreciation expenses that would otherwise have been charged to ratepayers and to use a phased-in approach when returning to a full charge of those expenses; by extending the cap temporarily and anticipating a gradual movement toward reduction of cap after MWC investigated impact of movement on customers, Commission's decision comported with statutory rate-setting goal and avoided rate shock.

Office of the Public Advocate (OPA) waived for Supreme Judicial Court review claims that Public Utilities Commission failed to create an evidentiary record in water utility rate setting proceeding, and that extending waiver of standard depreciation rate for Maine Water Company (MWC) was therefore unsupported by evidence in the record, by failing to raise issue with Commission; OPA

knew that hearing examiners' report relied on parties' filings and MWC's data responses to OPA, but OPA made no challenge to recommendation and did not assert that this reliance was improper in its exceptions to the examiner's report.

ZONING & PLANNING - MARYLAND

Heard v. County Council of Prince George's County

Appellate Court of Maryland - February 2, 2024 - A.3d - 2024 WL 389025

Neighbor brought petition for judicial review of county council's enactment of zoning ordinance which amended single-family detached residential zone to allow for the adaptive reuse of an abandoned public-school building by nonprofit human services organization.

The Circuit Court dismissed the petition for lack of standing, and neighbor appealed.

The Appellate Court held that:

- Neighbor was specially aggrieved by and thus had standing to contest the ordinance;
- Maryland-Washington Regional District Act (RDA) superseded county charter's zoning provisions with respect to the subject property;
- Adaptive reuse was consistent with county's comprehensive plan, for purpose of whether alleged spot zoning was improper; and
- Reuse yielded an overall public benefit such that, even if amendment constituted spot zoning, it was not improper.

EMINENT DOMAIN - MINNESOTA

Fletcher Properties, Inc. v. City of Minneapolis

Court of Appeals of Minnesota - January 16, 2024 - N.W.3d - 2024 WL 157770

Landlords brought action challenging city ordinance aimed at preventing housing discrimination based on public assistance, alleging that ordinance violated the Takings Clause of the state's constitution and was preempted by state law.

The District Court granted summary judgment to landlord, and entered permanent injunction against enforcement of the ordinance, 2018 WL 9364046. City appealed. The Court of Appeals reversed and remanded, and the Supreme Court affirmed. On remand, the District Court dissolved the permanent injunction, granted city's motion for summary judgment, denied landlord's motion for summary judgment, and granted motions for leave to submit amici briefs. Landlord appealed.

The Court of Appeals held that:

- Ordinance did not constitute a per se physical taking in all applications;
- Ordinance did not constitute a regulatory taking;
- Ordinance was not barred by conflict preemption;
- Ordinance was not barred by field preemption; and
- Trial court did not abuse its discretion by granting amici leave to participate.

On its face, city ordinance addressing housing discrimination based on public assistance did not appropriate private property or a landlord's right to exclude others from private property, and

therefore did not constitute a per se physical taking in all applications; instead, ordinance imposed restrictions on how landlords, having chosen to let their premises, may do so.

Housing-quality-standards inspections imposed on landlords for each lease renewal under city ordinance aimed at preventing housing discrimination based on public assistance was not, on its face, type of property appropriation giving rise to per se physical taking in every application in violation of Takings Clause in state's constitution; it was lawful for government to require property owners to cede right of access as condition of receiving certain benefits without causing a taking.

Record did not establish that in every instance a negative impact would occur and thus, landlord did not carry its burden for establishing that city ordinance that made it unlawful to discriminate based on tenant's receipt of public assistance constituted a regulatory taking under state constitution's Takings Clause, where ordinance included an procedure by which a landlord could be excepted from letting to a tenant for economic reasons and assert an undue-hardship defense to a discrimination claim, and two impact studies concluded that degree of impact that ordinance would have on operating expenses would vary depending on the specific property.

City ordinance aimed at housing discrimination based on public assistance, which required landlords to participate in federal housing choice voucher program, did not interfere with landlord's investment-backed expectations as would satisfy element of landlord's regulatory takings claim under the state constitution; although landlords were not required to participate in voucher program before enactment of the ordinance, the ordinance did not alter the ability to rent property, which was primary expectation regarding the property.

Requirement of city ordinance which made it unlawful for landlords to discriminate based on a tenant's receipt of public assistance, that Minnesota Public Housing Authority (MPHA) had to consent to sale of landlord's property subject to housing-assistance payment (HAP) contract between MPHA and landlord, did not necessarily amount to interference with investment-backed expectations as would satisfy element of landlord's regulatory takings claim under state constitution; although landlord argued that the requirement imposed burdens on its ability to dispose of its property, landlord cited no authority concluding that such burden established a regulatory taking in all applications, since HAP contract also limited circumstances in which MPHA may reject a proposed sale.

City ordinance that made it unlawful for landlords to discriminate based on a tenant's receipt of public assistance, including federal housing assistance vouchers, did not forbid what state's anti-discrimination statute expressly permitted as would render ordinance subject to conflict preemption; although anti-discrimination statute did not require participation in housing voucher program, it did not grant right not to participate in the program, and so there was no irreconcilable conflict by requiring landlords to accept housing vouchers and state law based on implied statutory permission.

City ordinance addressing housing discrimination based on public assistance, by permitting tenants to make claims of unlawful discrimination based on a landlord's refusal to let to them because of tenants' participation in federal housing assistance voucher program, did not permit action that was forbidden by state's anti-discrimination statute as would render ordinance subject to conflict preemption; while express purpose of state statute included protecting all persons from wholly unfounded charges of discrimination, a claim that a landlord was motivated not to rent to a person based on requirements of a public-assistance program was not necessarily a wholly unfounded claim of discrimination under anti-discrimination statute.

City ordinance addressing housing discrimination based on public assistance, by allegedly expanding list of prohibited reasons for refusing to rent property set forth in state's anti-discrimination statute,

did not frustrate purposes of state law as would render it subject to conflict preemption; ordinance was merely complementary to the anti-discrimination statute and provided landlords with an affirmative defense for undue hardship.

RECEIVERSHIP - PENNSYLVANIA

Siger v. City of Chester

Supreme Court of Pennsylvania - January 29, 2024 - A.3d - 2024 WL 316333

Receiver was appointed over financially distressed city, and the Commonwealth Court approved recovery plan. The Commonwealth Court granted receiver's petition for writ of mandamus that, among other things, required city councilman who was also head of city's department of finance and human resources to share information with receiver.

Receiver sought approval of modifications to city's recovery plan, proposing various initiatives relating to administrative duties and professional management within city government, core internal administrative functions and ethics, and economic development. After evidentiary hearing, the Commonwealth Court struck several initiatives and confirmed plan modification for other initiatives. City requested review, and the Supreme Court assumed King's Bench jurisdiction.

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

- A recovery plan does not "change the form of government" of a distressed municipality;
- Suspension of administrative duties of city's department heads did not violate constitutional provision on removal of elected and appointed officials;
- Municipalities Financial Recovery Act authorized such suspension;
- Sufficient evidence supported finding that allowing department heads to continue exercising their authority would interfere with receiver's powers or goals of recovery plan;
- Act authorized modification of recovery plan to allow receiver to direct city council's removal of items from legislative agenda;
- Receiver was not judicial officer; and
- Requiring city solicitor to disclose city officials' and employees' noncompliance with confirmed plan or court order did not conflict with rule of professional conduct governing representation-related disclosures.

The provision of the Municipalities Financial Recovery Act stating that the confirmation of a recovery plan for a financially distressed municipality, or any modification thereto, "shall not be construed to…change the form of government of the distressed municipality" is an unambiguous instruction to those who might "construe" a recovery plan, such as reviewing courts, that they should not view a recovery plan as "changing the form of government" of a distressed municipality, as changes to governmental operations that may be needed in the interest of financial recovery during a temporary receivership do not permanently alter the municipal government; this provision is not a limitation upon recovery plans.

Mayor and other elected officials did not have any prerogative to interfere with receiver appointed over financially distressed city pursuant to Municipalities Financial Recovery Act, and thus, receiver's proposed amendment of recovery plan so as to prohibit mayor and other elected officials from interfering with directives of chief of staff and receiver did not violate any such prerogative; Act expressly empowered receiver to issue orders to elected or appointed officials to implement any provision of recovery plan and "refrain from taking any action that would interfere with the powers

granted to receiver or the goals of the recovery plan" and stated confirmation of recovery plan imposed "mandatory duty" on city's officials to "undertake the acts set forth in the recovery plan."

Receiver's proposed modification to financially distressed city's recovery plan so as to suspend administrative duties of officials who served as heads of city's various departments did not violate constitutional provision stating that impeachment process was necessary to remove elected officials' administrative duties, even though officials were also elected city council members; receiver only sought to suspend officials' duties with respect to their appointed offices, not their duties in their legislative roles as city council members.

Receiver's proposed modification to financially distressed city's recovery plan so as to suspend administrative duties of officials who served as heads of city's various departments did not violate constitutional provision stating that appointed officers "may be removed at the pleasure of the power by which they shall have been appointed," even though officials were appointed as department heads by mayor, who opposed receiver's plan modification; receiver did not seek to remove officials from their offices, only to suspend their administrative duties until expiration of receivership.

Receiver's proposed modification to financially distressed city's recovery plan so as to suspend administrative duties of officials who served as heads of city's various departments, pursuant to provision of Municipalities Financial Recovery Act stating that confirmation of a recovery plan modification had effect of "suspending the authority of the elected and appointed officials" to the extent such authority conflicted with plan's goals, did not violate Act provision stating legislature generally intended to leave principal responsibility for city's affairs to elected officials, even though officials at issue were also elected city council members; receiver contended officials refused to cooperate with plan, and legislature intended to prioritize plan over local officials' prerogatives.

The Municipalities Financial Recovery Act cannot be read to suggest the authority of local officials must be preserved at all costs, in the face of their dereliction of official duty and notwithstanding conduct on their part that causes a breakdown in the function of municipal government, constitutes a failure to uphold their paramount public duty to safeguard the health, safety, and welfare of their citizens, and poses a threat to the fiscal stability of neighboring communities; indeed, the purpose and the expressly-stated intent of the Act is precisely to remedy such dereliction.

Receiver's proposed modification to financially distressed city's recovery plan so as to suspend administrative duties of officials who served as heads of city's various departments, on basis that officials refused to cooperate with receiver, did not violate provision of Municipalities Financial Recovery Act stating that during fiscal emergency, officials "shall continue to carry out [their] duties…except that no decision or action shall conflict with an emergency action plan, order or exercise of power by the Governor"; receivership operated under other chapter of Act, which authorized receiver to order officials to implement recovery plan and refrain from interference, specific receivership provisions controlled over general provision, and recovery plan superseded emergency action plan.

The section of the Municipalities Financial Recovery Act providing that a receiver's recovery plan has the effect of "suspending the authority of the elected and appointed officials of the distressed municipality…to exercise power on behalf of the distressed municipality" to the extent the officials' authority "would interfere with the powers granted to the receiver or the goals of the recovery plan" is not limited to situations where the local officials' actions contradict some specific and already extant provision of the recovery plan; rather, the officials' authority may be suspended where its exercise conflicts with, among other things, the goals of the recovery plan.

Sufficient evidence supported Commonwealth Court's conclusion that allowing city's appointed department heads to continue exercising their administrative authority would interfere with receiver's powers or goals of recovery plan, supporting approval of receiver's proposed plan modification to suspend administrative authority of department heads in order to effectuate recovery plan and remedy city's condition; receiver presented evidence that, among other things, official who was head of finance and human resources departments withheld information about his waste of $400,000 in city funds despite writ of mandamus ordering him to share financial information with receiver, and officials stymied receiver's investigations and countermanded receiver's orders to city employees.

A receiver's complete suspension of municipal officials' duties, pursuant to the Municipalities Financial Recovery Act provision authorizing such suspension to the extent the officials' authority "would interfere with the powers granted to the receiver or the goals of the recovery plan," is an extraordinary measure, one that will be warranted only very rarely; if, for example, a receiver sought to take this step immediately upon appointment, with no evidence that the local officials' conduct posed an obstacle to the municipality's financial recovery, it would be entirely appropriate for the Commonwealth Court to reject such an initiative as arbitrary or capricious under its prescribed standard of review of proposed recovery plans and modifications to plans.

Provision of Municipalities Financial Recovery Act authorizing receiver to suspend "authority of the elected and appointed officials of [a] distressed municipality…to exercise power on behalf of the distressed municipality" pursuant to city's charter to the extent that officials' authority would interfere with receiver's powers or recovery plan's goals authorized receiver's proposed modification of recovery plan so as to allow receiver to direct city council to remove items from its legislative agenda, where receiver asserted that city council members had history of adding agenda items that could impact city's financial health without providing adequate advance notice to receiver, impacting receiver's ability to provide for city's financial recovery.

A receiver appointed for a municipality under the Municipalities Financial Recovery Act is not a "judicial officer"; a receiver's power is granted by statute, not by an act of the judiciary, the receiver is selected by executive branch officials, whereas the Commonwealth Court's role in a receiver's appointment is limited to confirming the executive branch officials' choice of receiver upon demonstration of the statutory prerequisites for receivership, and the Commonwealth Court exercises no control over a receiver's day-to-day activities and is not authorized to direct a receiver to take any particular action.

Receiver's proposed initiative that would empower him to waive residency requirement for employees of financially distressed city, whose home rule charter gave city council discretion to employ qualified non-residents if no qualified city residents were available for a particular position, was proposed amendment to city's recovery plan, not city charter, and thus, did not violate constitutional requirement that amendment of a home rule charter be by referendum; initiative, which quoted charter provision and stated "this initiative substitutes 'the Receiver' for 'Council,' " sought to vest power in receiver that would otherwise be committed to city council, but did not seek to amend charter itself.

Receiver's proposed modification of financially distressed city's recovery plan so as to require city solicitor to inform receiver if solicitor became aware that any city official or employee was not complying with Commonwealth Court's orders or with recovery plan or plan modification confirmed by court order would not require solicitor to violate rule of professional conduct generally prohibiting lawyers from revealing information relating to representation of client without informed consent; rule provision contained exception allowing a lawyer to reveal such information to extent lawyer reasonably believed necessary to comply with law or court order, such that disclosure of

noncompliance with court orders and court-confirmed recovery plan was consistent with rule.

Receiver appointed over financially distressed city was not required to seek narrower relief in form of writ of mandamus before requesting Commonwealth Court's confirmation of modifications to recovery plan, but rather, had express authority under Municipalities Financial Recovery Act to seek confirmation of proposed modifications based on receiver's determination that such measures, including suspension of administrative duties of appointed department heads, were necessary to achieve financial stability in city.

Under the Municipalities Financial Recovery Act, a receiver's authority is not limited to requiring, directing, and ordering a distressed municipality's officials to take actions to implement a recovery plan, even though a provision of the Act authorizes the receiver to "issue an order to an elected or appointed official of the distressed municipality"; elsewhere, the Act expressly empowers the receiver to "require the distressed municipality" itself, not its officials, to take actions necessary to implement the plan and negotiate intergovernmental cooperations and to "direct the distressed municipality" to take any other actions to implement the plan, thereby treating the municipality as an entity distinct from its officials.

INSURANCE - PENNSYLVANIA

In re Senior Health Insurance Company of Pennsylvania

Supreme Court of Pennsylvania - January 29, 2024 - A.3d - 2024 WL 359474

Insurance Commissioner, in her capacity as statutory rehabilitator of insolvent long-term care insurer, filed second amended application for approval of her plan to correct the conditions that caused insurer's hazardous financial condition, and various states' regulators intervened.

Following a hearing, Commissioner moved for directed verdict on a certain option under the plan, which the trial court granted. Regulators filed motion for reconsideration. The Commonwealth Court approved the plan. Regulators appealed.

The Supreme Court held that:

- Regulators lacked standing to assert policyholders' interests;
- They had standing to assert that plan superseded authority of insurance regulators in other states and violated Full Faith and Credit Clause;
- Plan did not unlawfully displace regulatory authority of other states; and
- It did not violate Full Faith and Credit Clause.

Insurance regulators challenging plan to rehabilitate long-term care insurer did not assert harm to direct interest that could be avoided through judicial resolution and thus lacked standing to assert on appeal that plan was not reasonably likely to succeed in restoring insurer to solvency, plan disregarded best financial interest of policyholders and statutory guaranty association system, failed to place policyholders in at least as good a position as liquidation, and treated policyholders in different states unequally; regulators asserted detrimental impacts on financial and personal interests of policyholders, not regulators themselves, but had disavowed acting in either a parens patriae or a representative capacity for individual policyholders.

Insurance regulators challenging plan to rehabilitate long-term care insurer had standing to assert on appeal that plan sought to set rates in states other than Pennsylvania, superseded authority of insurance regulators in other states, and violated Full Faith and Credit Clause and that provision

allowing states to opt out did not cure the problems; regulators' challenges were based on their assertions that plan affected their statutory functions, duties, and responsibilities regarding setting of insurance rates within their states.

Rehabilitation plan for long-term care insurer did not unlawfully displace regulatory authority of other states by restructuring benefits and premiums to address gap between premium revenues and benefits paid, raising premiums for policyholders to preserve current coverage, or allowing policyholders to reduce their current level of coverage to avoid, or reduce, the amount of increased premiums; plan's reformation of existing contracts was legitimately designed to ameliorate financial hazard for good of all involved, regulators could elect to opt out of the plan altogether, and rehabilitator could not automatically and unilaterally raise rates within state that opted out, but was obligated to file an application with regulators.

Rehabilitation plan for long-term care insurer did not violate Full Faith and Credit Clause by restructuring benefits and premiums to address gap between premium revenues and benefits paid; regulators could elect to opt out of plan altogether, it carefully followed contours of Commonwealth's statutes governing rehabilitation of insolvent insurer and sensitively applied principles of comity with healthy regard for sovereign status of sister states, and plan provisions to ensure that assets would not be unduly depleted by payment of benefits both disproportionate to premiums paid, as well as discriminatory with respect to other policyholders, was consistent with framework and undergirding purposes of statutes of regulators' states.

IMMUNITY - WYOMING

City of Laramie v. University of Wyoming

Supreme Court of Wyoming - January 31, 2024 - P.3d - 2024 WL 356461 - 2024 WY 13

City brought declaratory judgment action against state university pertaining to university's drilling and operation of two wells for watering university's landscaping including golf course, and university filed counterclaims challenging city's attempted regulation of university.

The District Court dismissed in part and granted summary judgment for university on remaining claims and counterclaims. City appealed.

The Supreme Court held that:

- University had common-law sovereign immunity from city's attempt to enforce restrictive deed covenant against water wells;
- University was not similarly situated to other entities for purposes of equal protection challenge to statute governing university's water system;
- Statute governing university's water system was not an unconstitutional special law;
- Statute governing university's water system did not unconstitutionally delegate municipal power; and
- City was statutorily barred from enforcing ordinance requiring city approval of nonmunicipal water drilling or systems within city.

ATTORNEYS' FEES - DELAWARE

In re Delaware Public Schools Litigation

Supreme Court of Delaware - January 30, 2024 - A.3d - 2024 WL 332738

Non-profit organizations brought actions for declaratory and injunctive relief against county officials responsible for property tax collection, seeking increased funding for state's public schools.

After trial on the merits, the Court of Chancery concluded that officials used methodologies in preparing property tax assessments that violated state's True Value Statute and state Constitution's Uniformity Clause, and at remedial phase, parties reached settlement, pursuant to which a general property tax reassessment would be conducted.

Organizations moved for award of attorneys' fees and expenses. The Court of Chancery determined that organizations were entitled to attorneys' fees under common benefit doctrine, as exception to American Rule that litigants bear their own cost of being represented by counsel, and later awarded organizations $1,476,001.88 in attorneys' fees and $73,470.02 in uncontested expenses. County officials appealed.

The Supreme Court held that:

- Benefit from county officials being compelled to perform properly was insufficient to warrant attorneys' fee award under common benefit doctrine;
- Speculative benefit from school districts choosing to increase taxes did not support fee award under common benefit doctrine;
- Benefit from updated property tax reassessments did not support fee award under common benefit doctrine;
- Benefit from achieving "vertical equity" in "regressive" tax system did not support fee award under common benefit doctrine;
- Precedent rejecting private attorney general doctrine, as exception to American Rule, would not be revisited;
- Organizations lacked taxpayer standing, for purposes of taxpayer-suit theory for common benefit doctrine; and
- Organizations failed to meet taxpayer-suit theory's requirement of quantifiable, non-speculative monetary benefit for all taxpayers.

SCHOOLS - FLORIDDA

PEN American Center, Inc. v. Escambia County School Board

United States District Court, N.D. Florida, Pensacola Division - January 12, 2024 - F.Supp.3d - 2024 WL 133213

Parents, authors, publisher, and literary organization brought action against county school board, alleging violations of First and Fourteenth Amendments arising from board's decision to remove or restrict certain books from its school libraries.

Board moved to dismiss.

The District Court held that:

- Complaint was not an impermissible shotgun pleading;
- Parents sufficiently alleged an injury that would support standing;
- Action was not rendered unripe or moot due to existence of state statute creating a special

magistrate process available to parents when a local school board denied an objection to a book being made available in a school library;
- Fact issue existed as to whether content of county's school libraries was "government speech," as would be exempt from First Amendment constraints;
- Allegations of complaint were sufficient to state claim for violation of First Amendment rights to receive information and to be free from viewpoint discrimination; and
- Allegations of complaint were insufficient to state equal protection claim based on theory of disparate impact.

MUNICIPAL ORDINANCE - MISSOURI

State v. Nowicki

Supreme Court of Missouri, en banc - January 30, 2024 - S.W.3d - 2024 WL 341017

Following plea of guilty to failure to drive on right half of roadway and operating a motor vehicle without maintaining financial responsibility, defendant was convicted in the Circuit Court of driving while intoxicated for which he was sentenced as a chronic offender. Defendant appealed.

On transfer from Court of Appeals, the Supreme Court held that:

- Plain error review did not apply;
- Statute rendering Missouri uniform law enforcement system (MULES) records admissible evidence to show a defendant's status as a chronic offender did not create a rebuttable presumption that any conviction listed in such record qualified as intoxication-related traffic offense (IRTO);
- Proof of defendant's prior convictions for driving while intoxicated with nothing more were insufficient to prove that defendant's conduct underlying the convictions involved him actually physically driving a vehicle while intoxicated;
- Records showing that defendant was previously arrested for a "local BAC offense" and convicted of the charged offense did not establish that the conviction was for driving while intoxicated;
- Records showing defendant was convicted of stop sign violation on same day he was convicted of "local BAC offense" did not permit inference that defendant was actually physically driving while intoxicated;
- Records showing that defendant was previously arrested for "Dwi-Alcohol" and pled guilty to "excessive blood alcohol" did not establish the prior conviction was for actually physically driving a vehicle; and
- Records showing that defendant was previously arrested for "Dwi-Alcohol" and was convicted of "stop sign violation" on same day he pled guilty to "excessive blood alcohol" did not establish the "excessive blood alcohol" conviction was for actually physically driving a vehicle.

BONDS - MISSOURI

Krupka v. Stifel Nicolaus & Co., Inc.

United States District Court, E.D. Missouri, Eastern Division - January 30, 2024 - Slip Copy - 2024 WL 340739

California Plaintiffs brought a putative class action, alleging that Stifel negligently underwrote municipal bonds issued by the Illinois Finance Authority (IFA) to finance low-income housing projects in Chicago.

Specifically, the Offering Statement asserted that the operator of the projects, the Better Housing Foundation (BHF), would issue a certificate to bondholders representing that no litigation or other proceedings were pending or threatened against it. In fact, BHF had actually received 27 notices of ordinance violations regarding the management and conditions of several of the projects that were not disclosed in the Statement. BHF subsequently defaulted and Plaintiffs sued.

Stifel responded, arguing that Plaintiffs' claims were barred by Missouri's borrowing statute and California's two-year statute of limitations for professional negligence and negligent misrepresentation claims.

The District Court began its analysis by noting that a federal court exercising diversity jurisdiction applies the law of the forum when ruling on statutes of limitations.

Missouri had adopted a borrowing statute providing that "[w]henever a cause of action has been fully barred by the laws of the state, territory or country in which it originated, said bar shall be a complete defense to any action thereon, brought in any of the courts of this state." Mo. Rev. Stat. § 516.190. Thus, if a cause of action is time-barred by the statute of limitations of the state in which it originated, it is barred in Missouri as well.

Stifel also argued that Plaintiffs' claims originated in California on April 17, 2019, when Plaintiffs received notice of BHF's defaults and violations of the loan agreement. Because they did not file their complaint until November 2022, Stifel argued that their claims are barred by California's two-year statute of limitations for professional negligence and negligent misrepresentation claims.

Plaintiffs agreed that their claims accrued on April 17, 2019. But they argued that their claims originated either in Missouri or Illinois, the states in which the acts giving rise to their claims purportedly took place, and that they timely filed their complaint under the five-year statutes of limitations of those states.

The District Court held that:

- Missouri's borrowing statute holds that plaintiffs are financially damaged where they are located;
- Plaintiffs were financially damaged in California.
- Because there existed no genuine dispute that Plaintiffs' claims originated in California, their claims are subject to California's statute of limitations. If California law bars Plaintiffs' claims, Missouri's borrowing statute does so as well.
- In California, professional negligence and negligent misrepresentation claims are governed by the two-year statute of limitations set forth in section 339 of the California Code of Civil Procedure.
- Plaintiffs' claims are barred by California's statute of limitations. Missouri's borrowing statute therefore provides a complete defense to Plaintiffs' claims.

IMMUNITY - NEVADA

Abbott v. City of Henderson

Supreme Court of Nevada - January 25, 2024 - P.3d - 2024 WL 313432 - 140 Nev. Adv. Op. 3

Parents filed negligence and loss of consortium action against city after mother slipped while assisting youngest child on residential playground at park.

The District Court granted city's motion for summary judgment on grounds of recreational use immunity. Parents appealed, and the Court of Appeals reversed and remanded. City petitioned for review, which was granted.

The Supreme Court held that:

- Playground fell within protections of the recreational use statute;
- Mother was engaged in a recreational activity, within meaning of recreational use statute; and
- City did not willfully or maliciously fail to guard against the dangerous condition of park's playground surface.

EMINENT DOMAIN - NORTH DAKOTA

Sargent County Water Resource District v. Beck

Supreme Court of North Dakota - December 15, 2023 - 999 N.W.2d 175 - 2023 ND 230

County water resource district brought eminent domain action seeking to condemn landowners' property for a drainage project.

Following a bench trial, the District Court condemned property, denied landowners' motion for a new trial, but concluded that landowners' arguments were not foreclosed for failure to appeal water district's "Resolution of Necessity" or barred by res judicata or collateral estoppel.

Landowners appealed, and water district cross-appealed.

The Supreme Court held that:

- Applying doctrine of res judicata to bar any further review would have been unjust;
- Landowners' arguments against eminent domain were not barred by collateral estoppel;
- Water district's board obligated costs for drainage project beyond maximum maintenance levy and authorized accumulation of a fund exceeding six-year maximum levy without landowner approval, in violation of statute governing maintenance of drainage projects; and
- Project did not satisfy additional cost limitations for public use under statute authorizing eminent domain for certain public uses.

EMINENT DOMAIN - OHIO

State ex rel. AWMS Water Solutions, L.L.C. v. Mertz

Supreme Court of Ohio - January 24, 2024 - N.E.3d - 2024 WL 25118 - 22024-Ohio-200

Operator of saltwater-injection wells associated with oil and gas production filed petition for writ of mandamus to compel state to commence proceedings for property appropriation, alleging that state's suspension order with respect to one of its two wells effected a governmental taking of operator's property, requiring the state to pay it just compensation.

The Eleventh District Court of Appeals granted the state's motion for summary judgment. Operator appealed. The Supreme Court reversed and remanded. On remand, the Court of Appeals denied operator's petition for writ of mandamus. Operator appealed.

The Supreme Court held that:

- Court of Appeals ventured beyond scope of Supreme Court's remand order by determining that operator lacked cognizable property interest, and
- Court of Appeals' determination that operator lacked cognizable property interest for operator's takings claim violated doctrine of the law of the case.

Court of Appeals ventured beyond scope of Supreme Court's remand order by determining that operator of saltwater-injection wells lacked cognizable property interest, and, thus, erred in denying writ of mandamus to compel state to commence proceedings for property appropriation; Supreme Court specified that, on remand, Court of Appeals was required to weigh parties' evidence related to operator's takings claim and to weigh parties' evidence in accordance with Supreme Court's opinion and to balance all Penn Central factors to determine whether operator suffered partial taking, and, instead, Court of Appeals sua sponte ordered parties to file supplemental briefs as to whether operator had cognizable property interest under Takings Clause and denied writ without weighing parties' evidence.

Court of Appeals' determination that operator of saltwater-injection wells lacked cognizable property interest for operator's takings claim violated doctrine of the law of the case, in mandamus proceedings to compel state to commence proceedings for property appropriation; Supreme Court recognized that operator's leasehold was a property interest that triggered takings analysis, and, on remand, Court of Appeals determined that Supreme Court had not deemed that interest to be property interest for purposes of Takings Clause, that question of whether operator had cognizable property interest had not been at issue before Supreme Court, and that Supreme Court noted only that operator was prima facie entitled to invoke constitutional right to just compensation.

EMINENT DOMAIN - TEXAS

Capps v. City of Bryan

Court of Appeals of Texas, Waco - January 11, 2024 - S.W.3d - 2024 WL 118470

Landowner brought action against city for inverse condemnation, alleging that city committed a new taking when it constructed a new electric transmission line outside of the areas of right-of-way easement previously granted to city and across landowner's property in which he owned full interest at the time and that city abandoned original easement when old transmission line was removed.

The 361st District Court granted city's plea to the jurisdiction in part. Landowner filed interlocutory appeal.

The Court of Appeals held that landowner had standing to bring action.

Landowner had standing to bring inverse-condemnation action against city regarding city's construction of a new electric transmission line to replace prior transmission line, which was built within original easement on land, including standing for merits determination of whether city abandoned original easement and, if not, whether current use of new transmission line exceeded scope of permitted use under original easement, although landowner did not own land when original easement was granted; landowner alleged that taking occurred when city constructed new transmission line, entirety of dispute was about scope and damages to land for taking arising from new transmission line, and landowner owned land when new transmission line was built.

EMINENT DOMAIN - TEXAS

JRJ Pusok Holdings, LLC v. State

Court of Appeals of Texas, Houston (14th Dist.) - December 28, 2023 - S.W.3d - 2023 WL 8939318

Successor-in-interest of landowners brought action against the State and the Department of Transportation's Director of Right of Way in his official capacity, asserting violations of its statutory right to repurchase, inverse condemnation, ultra vires, and sought mandamus and declaratory relief.

The County Civil Court granted defendants' plea to the jurisdiction. Successor-in-interest appealed.

The Court of Appeals held that:

- Successor-in-interest alleged a valid waiver of State's sovereign immunity;
- Successor-in-interest's right to repurchase was not vested; and
- Ultra vires exception to sovereign immunity did not apply.

Landowners' successor-in-interest alleged a valid waiver of State's sovereign immunity based on violations of its statutory right to repurchase if the property subsequently becomes unnecessary for public use, in successor-in-interest's action against the State, alleging that the State acquired a portion of landowners' property though eminent domain for the development of a highway improvement project when landowners entered into a settlement with the State; State took landowners' property for the project and compensated them for the taking, and any language in landowners' settlement or deed executed pursuant to the settlement did not change the manner of acquisition, which was fundamentally involuntary and in the manner of eminent domain.

Landowners' successor-in-interest's statutory right to repurchase if the property acquired through eminent domain subsequently becomes unnecessary for public use was not vested, and thus successor-in-interest failed to plead a valid inverse condemnation claim, in successor-in-interest's action against the State, alleging that the State acquired a portion of landowners' property though eminent domain for the development of a highway improvement project when landowners entered into a settlement with the State; although successor suggested that it retained a statutory reversionary interest, that interest could be changed or abolished at any time, and deed executed pursuant to the settlement contained no reversionary or future interest, it merely contained a reservation for oil, gas, and sulfur.

Ultra vires exception to sovereign immunity did not apply, in landowners' successor-in-interests' action for mandamus and declaratory relief against the Department of Transportation's Director of Right of Way in his official capacity, asserting violations of its statutory right to repurchase if the property acquired through eminent domain subsequently becomes unnecessary for public use, which was based on Director's alleged failure to comply with statutory notice and offer requirements; Director had authority to determine whether successor-in-interest was entitled to repurchase the property.

MUNICIPAL GOVERNANCE - VIRGINIA

Fauber v. Town of Cape Charles

Court of Appeals of Virginia, Norfolk - January 30, 2024 - S.E.2d - 2024 WL 330737

Former town employee who had worked as the director of public works and utilities brought wrongful-termination action against town and mayor, alleging that mayor's exercise of powers of town manager during temporary vacancy in office of town manager pursuant to town's charter by firing director violated Virginia Constitution section providing that a person elected to the governing body of a locality is ineligible, during the term of office for which he was elected or appointed, to hold any office filled by the governing body.

The Northampton Circuit Court granted defendants' summary judgment motion. Former director appealed.

The Court of Appeals held that:

- Plain language of town charter empowered mayor to exercise town manager's powers and duties until a successor town manager was appointed, including to remove town employees like director;
- Former director failed to rebut presumption of constitutionality of town charter provision permitting mayor to simultaneously exercise duties and powers of town manager during vacancy in town manager position until successor was appointed;
- Mayor's inability to unilaterally eliminate director position did not prevent mayor from firing director during vacancy of town manager position;
- Question whether mayor could have unilaterally amended town ordinance that created director position was not material; and
- Mayor's summary-judgment deposition testimony answered in a way that suggested he was the town manager did not create a material fact issue.

ZONING & PLANNING - VIRGINIA

SAS Associates 1, LLC v. City Council for City of Chesapeake, Virginia

United States Court of Appeals, Fourth Circuit - January 24, 2024 - F.4th - 2024 WL 252812

Landowners who wanted to wanted to combine their properties to create a 90-acre development brought action against city council under § 1983 and state law alleging the city council's denial of the landowners' applications to have their properties rezoned violated their Fourteenth Amendment right to equal protection as well as their rights against unconstitutional rezoning limitations under Virginia law.

The United States District Court for the Eastern District of Virginia granted the city council's motion to dismiss, and landowners appealed.

The Court of Appeals held that:

- Council member's expressed opposition to landowner's application were not pretexts for discriminatory animus and thus did not support equal protection claim, and
- Comparator developments cited by landowners were not similarly-situated and thus did not support equal protection claim.

Council member's opinions regarding traffic congestion, drainage, and school capacity, which she expressed during public hearing in opposing landowners' revised application to have their properties rezoned in order to create a 90-acre development on their properties, were not pretexts for discriminatory animus and thus did not support landowners' § 1983 claim the city council's denial of their revised application violated their Fourteenth Amendment right to equal protection; council member discussed precisely the kinds of things local governments routinely discussed in considering

zoning matters, her concerns echoed those of the community regarding mitigating flooding, traffic, and school overcrowding, and whether those concerns were unfounded was a dispute best umpired by city council.

Ten comparator developments cited by landowners were not similarly-situated to landowners' proposed 90-acre development, and thus, city council's alleged differential treatment of comparator developments did not support landowners' § 1983 claim that council violated their equal protection rights by treating them differently from others who were similarly situated when it denied landownwers' rezoning applications; nine of ten comparator developments were constructed between 60 and ten years before landowners' applications were denied, in intervening ten years influx of more than 25,000 new residents came into city, and, unlike landowners' proposed development, comparator developments neither included a commercial component nor sought same combination of zoning classifications as landowners.

ZONING & PLANNING - CALIFORNIA

Guerrero v. City of Los Angeles

Court of Appeal, Second District, Division 5, California - January 17, 2024 - Cal.Rptr.3d - 2024 WL 177163

Opponents of real estate development project filed petition for writ of mandate alleging violations of California Environmental Quality Act (CEQA), Planning and Zoning Law, and Subdivision Map Act, seeking order requiring city to vacate project approvals and prepare environmental impact report (EIR) evaluating project's environmental impacts.

Trial court sustained developers' and city's joint demurrer as to claims under Planning and Zoning Law and Subdivision Map Act but overruled demurrer as to CEQA claims. Following trial, the Superior Court granted petition and issued peremptory writ of mandate. City and developers appealed.

The Court of Appeal held that:

- CEQA limitations period began to run on issuance of first notice of determination (NOD) adopting mitigated negative declaration (MND) and approving vesting tentative tract map, and
- City's re-adoption of MND did not restart statute of limitations.

City's issuance of notice of determination (NOD) regarding adoption of mitigated negative declaration (MND) and approval of vesting tentative tract map for proposed development project constituted "project approval," and thus, triggered 30-day limitations period for challenging MND under California Environmental Quality Act (CEQA), even though vesting tentative tract map conditioned city's approval on developers obtaining zoning change; vesting tentative tract map represented city's earliest firm commitment to approving project as it would require such approval once developer met conditions in tentative tract map, city's issuance of MND before project's first discretionary approval was consistent with legislative intent for early environmental review, and NOD put public on notice of MND.

City's re-adoption of mitigated negative declaration (MND) for proposed development project, after city had initially issued notice of determination (NOD) regarding adoption of MND and approval of vesting tentative tract map for project, did not restart 30-day limitations period for challenging adequacy of MND under California Environmental Quality Act (CEQA), and thus, objectors who

failed to challenge original MND within 30 days of NOD could not assert same challenges to subsequent NOD filed by city when adopting zone change required under tentative tract map and re-adopting MND, where no changes to project had occurred that would have required city to issue subsequent or supplemental MND, as necessary to support challenge to re-adopted MND.

EMPLOYMENT - CALIFORNIA

Visalia Unified School District v. Public Employment Relations Board

Court of Appeal, Fifth District, California - January 9, 2024 - Cal.Rptr.3d - 2024 WL 95058 - 2024 Daily Journal D.A.R. 373

Union filed an unfair practice charge with the Public Employment Relations Board (PERB), alleging that school district fired union officer in retaliation for engaging in protected activity in violation of the Educational Employment Relations Act (EERA). PERB found in officer's favor.

School district petitioned for writ of review.

The Court of Appeal held that:

- Holding of a union office fell within the activities protected by the EERA;
- Substantial evidence supported PERB's conclusions that school district terminated union officer in retaliation for her protected activity, based on temporal proximity, district's inadequate investigation, exaggerated and noncontemporary justifications, and union animosity;
- PERB's conclusions that district treated officer disparately and the sanction of termination was disproportionate were not supported by substantial evidence; and
- Record compelled a finding that district would have terminated officer for inaccurately entering student attendance even absent her protected activity.

IMMUNITY - GEORGIA

Lovell v. Raffensperger

Supreme Court of Georgia - January 17, 2024 - S.E.2d - 2024 WL 171719

Pro se plaintiffs filed separate verified complaints against Secretary of State and county boards of elections and their individual members, seeking declaratory and injunctive relief.

The Superior Court granted defendants' motions to dismiss. Plaintiffs appealed, and the cases were consolidated for appeal.

The Supreme Court held that plaintiffs' complaints failed to comply with constitutional provision waiving sovereign immunity only for claims brought exclusively against the State and in the name of the State of Georgia or exclusively against the counties and in the name of such counties.

NEGLIGENCE - IDAHO

GSN Capital, LLC v. Shoshone City & Rural Fire District

Supreme Court of Idaho, Boise - January 11, 2024 - P.3d - 2024 WL 118094

Property owner brought action against fire district, asserting a negligence claim related to destruction of a sawmill from a fire.

The Fifth Judicial District Court granted in part and denied in part fire district's motion for summary judgment. Owner appealed.

The Supreme Court held that:

- Court reviewing summary judgment motion concerning a claim arising under the Idaho Tort Claims Act (ITCA) is free to consider issues related to duty and immunity under ITCA in the order of its choosing, abrogating *Walker v. Shoshone County*, 112 Idaho 991, 739 P.2d 290;
- Fire protection district statute did not impose affirmative duty on fire district in favor of owner;
- Courts conducting special relationship inquiry must first consider whether the hallmarks of a special relationship—custody and control—are present before considering whether the relevant factors justify imposing an affirmative duty in that circumstance;
- No special relationship existed to impose affirmative duty of care on fire district;
- Fire district did not assume a duty of care; and
- Fire district would not be awarded attorney fees.

PUBLIC PENSIONS - ILLINOIS

Arlington Heights Police Pension Fund v. Pritzker

Supreme Court of Illinois - January 19, 2024 - N.E.3d - 2024 IL 129471 - 2024 WL 205490

Beneficiaries of local police and firefighter pension funds brought action against Governor who signed into law act that amended Illinois Pension Code so as to consolidate local police and firefighter pension fund assets into statewide pension investment funds, seeking declaratory, injunctive, and other relief, including a finding that amendment violated Pension Protection Clause and Takings Clause of Illinois Constitution.

The Circuit Court granted Governor's motion for summary judgment, and beneficiaries appealed. The Appellate Court affirmed. Beneficiaries' petition for leave to appeal was granted.

The Supreme Court held that:

- Beneficiaries' right to vote for local pension fund board members was not protected benefit under Pension Protection Clause;
- Amendment's requirements that local funds pay start-up and administration costs of new funds did not violate Pension Protection Clause; and
- Amendment did not take or damage private property in violation of Takings Clause.

Local police and firefighter pension fund beneficiaries' voting rights did not constitute benefits protected by Pension Protection Clause, and thus, any dilution or other impairment of such voting rights that resulted from amendment to Pension Code requiring consolidation of local police and firefighter pension fund assets into statewide pension investment funds did not violate Pension Protection Clause; amendment had no impact on beneficiaries receiving promised monetary benefits, as it did not change beneficiaries' right to elect members of local funds' boards or local boards' authority to determine amount of benefits beneficiaries were entitled to receive, and beneficiaries had no right under Pension Protection Clause relating to who invested local fund assets.

Amendment to Pension Code requiring consolidation of local police and firefighter pension fund assets into statewide pension investment funds for use in paying benefits to local funds' members and covering operating expenses did not impair or diminish local pension fund benefits, and thus, did not violate Pension Protection Clause of Illinois Constitution, even if amendment required local funds to pay start-up, administration, and operation costs for new funds plus interest on any amount borrowed from Illinois Finance Authority (IFA) to pay transition costs; amendment did not require borrowing or spending of any specific amount on startup and administrative costs of new funds, which were intended to make more money available to fund local pension benefits by eliminating unnecessary costs.

Amendment to Pension Code requiring consolidation of local police and firefighter pension fund assets into statewide pension investment funds for use in paying benefits to local funds' members and covering operating expenses did not take any private property belonging to local funds' beneficiaries, and thus, did not take or damage private property without just compensation in violation of Takings Clause of Illinois Constitution; amendment only changed how local fund assets were managed and invested without affecting ultimate use of assets to pay pension benefits, and beneficiaries had no private property right in source of funding for payments of promised benefits.

UTILITIES - ILLINOIS

City of Rock Falls v. Aims Industrial Services, LLC

Supreme Court of Illinois - January 19, 2024 - N.E.3d - 2024 IL 129164 - 2024 WL 204356

City filed petition for injunctive and other relief against owner of commercial property, seeking to require owner to abandon property's private sewage disposal system and connect to city's public sewage disposal system.

After bench trial, the Circuit Court denied petition. City appealed. The Appellate Court reversed. Owner petitioned for leave to appeal, which was allowed.

The Supreme Court held that trial court lacked discretion to balance the equities in determination of whether to grant injunctive relief, which city sought pursuant to ordinance rather than under trial court's inherent equitable authority; overruling *County of Kendall v. Rosenwinkel*, 353 Ill. App. 3d 529, 288 Ill.Dec. 737, 818 N.E.2d 425.

Trial court lacked discretion to balance the equities in determination of whether to grant injunctive relief to city in its action against owner of commercial property, seeking to require owner to abandon property's private sewage disposal system and connect to city's public sewage disposal system, where city sought injunction on basis of owner's asserted violation of sewage ordinances and under ordinance authorizing injunctive relief for continuous violations of municipal code, rather than under trial court's inherent equitable authority, and there was no suggestion that ordinances were in some manner unconstitutional or improper; overruling *County of Kendall v. Rosenwinkel*, 353 Ill. App. 3d 529, 288 Ill.Dec. 737, 818 N.E.2d 425.

EMINENT DOMAIN - SOUTH CAROLINA

Applied Building Sciences, Inc. v. South Carolina Department of Commerce, Division of Public Railways

Supreme Court of South Carolina - January 17, 2024 - S.E.2d - 2024 WL 174157

Engineering firm that was tenant in building condemned for public use asserted an inverse condemnation claim against Division of Public Railways, as condemnor, seeking reimbursement of reestablishment expenses.

The Circuit Court granted Division's motion for summary judgment. Firm appealed, and case was certified for review.

The Supreme Court held that:

- Reestablishment expenses related to the moving of small businesses, farms, and non-profit organizations are separate from constitutional just compensation, and
- The $50,000 statutory limit on reimbursement of reestablishment expenses does not violate the federal and state takings clauses.

Reestablishment expenses related to the moving of small businesses, farms, and non-profit organizations due to a condemnation for public use are separate from constitutional just compensation in an eminent domain action.

The $50,000 statutory limit on reimbursement of reestablishment expenses related to the moving of small businesses, farms, and non-profit organizations due to a condemnation for public use does not violate the takings clauses of the Federal and State Constitutions.

LIABILITY - TEXAS

HNMC, Inc. v. Chan

Supreme Court of Texas - January 19, 2024 - S.W.3d - 2024 WL 202323

Husband, sons, and estate of hospital employee who was killed when she was struck by a vehicle while crossing public roadway between parking lot and hospital brought negligence action against hospital and other defendants.

The 133rd District Court entered judgment on jury verdict finding hospital 20% responsible, employee 10% responsible, and other parties 70% responsible for negligently causing employee's death, and awarding total of $15 million to husband and sons.

Hospital appealed after its motion to set aside judgment and for new trial was overruled by operation of law.

On reconsideration en banc, the Houston Court of Appeals affirmed. Hospital petitioned for review, which was granted.

The Supreme Court held that:

- Hospital had no duty to ensure safety of employee who left hospital's property;

- Hospital did not undertake a duty to employee;
- Artificial conditions that hospital created were not on hospital's property, and thus could not support a duty under rule that an owner or occupant of premises abutting a highway has a duty to refrain from jeopardizing or endangering the safety of persons using the highway as a means of passage or travel;
- There was no evidence that conditions on hospital's property were dangerous, and thus those conditions could not support a duty to employee;
- Hospital had a duty to address any dangerous conditions in limited areas of right-of-way where hospital actually exercised control;
- Evidence was legally insufficient to support jury's finding that signs hospital had placed in public right-of-way proximately caused employee's death; and
- Remedy of take-nothing judgment was warranted.

BONDS - VIRGINIA

UMB Bank, N.A. v. New Port Community Development Authority

United States District Court, E.D. Virginia, Norfolk Division - September 26, 2023 - Slip Copy - 2023 WL 9197749

In August 2005, the City of Portsmouth ("City") created the New Port Community Development Authority ("Authority") and a special assessment district known as the "New Port Community Development Authority District" ("District").

In February, 2006, the City adopted an ordinance levying special assessments on real property in the District. The City, Authority, and the developer and owner of the lands within the development project, entered into the Special Assessment Agreement detailing the "(a) issuance of the Bonds, (b) development of the Project, and (c) the Special Assessments (including, the collection of delinquent Special Assessments.)."

Certain landowners in the District failed to pay the Special Assessments when due on the property, resulting in the City's inability to pay principal and interest on the Bonds to the Trustee. The Trustee did not receive from the City sufficient Special Assessment Revenues, resulting in default.

In January, 2023, UMB Bank, N.A., as Trustee ("Trustee"), a national banking association, in its capacity as Trustee for the Trust Estate, created by the Indenture of Trust for the New Port Community Development Authority Special Assessment Bonds, Series 2006 (the "Bonds"), filed a Complaint against the Authority, the City, and the City Treasurer (together, "Defendants").

Trustee accused Defendants of breaching their obligations under the Master Indenture Trust and Special Assessment Agreement, including to enforce collection of Delinquent Assessments and distribute proceeds from the tax sale auction of the Delinquent Property to the Trustee for purposes of paying debt service on the Bonds.

Defendants moved to dismiss, arguing that they had fulfilled their obligations under the Special Assessment Agreement as it had "timely billed and attempted to collect and enforce the collection of Special Assessment[s] in the same manner as regular property taxes."

The Court found that the elements of a direct breach of contract claim were sufficiently pleaded. "Trustee alleges it acts in the interest of the Trust Estate and the Master Indenture Trust, which conveys to the Trustee the right to enforce the Authority's rights and remedies under the Special Assessment Agreement and protect the Trustee's interest under the Master Indenture Trust.

However, the Trustee has not received Delinquent Assessments and expended substantial fees to defend its interest regarding the Pledged Revenues." Based on the allegations in the Complaint, the Court found that the Trustee alleged sufficient facts to state a direct claim for breach of contract.

The City also argued that the Trustee failed to meet the first element for declaratory judgment, claiming that there was no actual controversy between the parties regarding the allocation of foreclosure proceeds because there had not been a sale of the Delinquent Property.

The Court disagreed, finding that Trustee met the first element. The Complaint alleged an actual controversy because if Trustee does not receive the foreclosure proceeds, it would represent a loss to the Trust Estate. The fact that the City had not sold the Delinquent Property did not make the action any less ripe for review.

CHARTER SCHOOLS - CALIFORNIA

Grossmont Union High School District v. Diego Plus Education Corporation

Court of Appeal, Fourth District, Division 1, California - December 29, 2023 - Cal.Rptr.3d - 2023 WL 9014912 - 23 Cal. Daily Op. Serv. 1312024 Daily Journal D.A.R. 159

Public high school district brought action against charter school corporate entities, alleging violation of Charter Schools Act (CSA) by operating charter schools within district's geographic boundaries, and seeking a writ of mandate and declaratory and injunctive relief against charter school corporate entities and school districts that approved schools' charters.

Another school district sought to intervene, and intervention was granted. The Superior Court granted petition. The Fourth District Court of Appeal reversed and remanded. After remand, the Superior Court granted entities' motion for attorney fee award. Plaintiff and intervenor appealed.

The Court of Appeal held that:

- Trial court reasonably concluded that charter school corporate entities were successful parties;
- Charter school corporate entities enforced an important right affecting public interest;
- Charter school corporate entities succeeded in conferring significant benefit on general public or a large class of individuals;
  Private enforcement was necessary;
- Trial court abused its discretion by failing to address issue of financial burdens and incentives;
- This was not an exceptional case precluding attorney fee award; and
- Trial court did not abuse its discretion with respect to amount of attorney fees awarded.

SPECIAL ASSESSMENTS - DISTRICT OF COLUMBIA

Beatley v. District of Columbia

District of Columbia Court of Appeals - January 11, 2024 - A.3d - 2024 WL 118277

Taxpayers filed suit against District of Columbia, challenging corrected special assessment levied on their real property for costs incurred by District to perform emergency repairs to taxpayers' residence, including accrued interest and fees, and seeking refund.

The Superior Court dismissed complaint for lack of subject matter jurisdiction on ground that

taxpayers had not exhausted administrative remedies. Taxpayers appealed.

The Court of Appeals granted District's request for remand. On remand, the Superior Court again dismissed case for lack of jurisdiction, this time on ground that limitations period governing taxpayers' action had expired. Taxpayers appealed.

The Court of Appeals held that six-month limitations period governing taxpayers' action in superior court challenging corrected special assessment was not triggered by District's levy of corrected special assessment on taxpayers' property.

Six-month limitations period governing taxpayers' action in superior court challenging corrected special assessment by District of Columbia levied against taxpayers' real property in amount of $17,047.88 for costs incurred by District in paying contractor to perform emergency repairs to taxpayers' residence, including accrued interest and fees, began to run from date of final assessment determined following exhaustion of administrative remedies, not date District levied corrected special assessment; therefore, because District filed tax lien on property on basis of corrected special assessment before it provided notice of corrected assessment to taxpayers, thereby depriving taxpayers of resort to administrative process to challenge assessment before Office of Tax Revenue and Real Property Tax Appeals Commission (RPTAC), limitations period was never triggered.

PUBLIC MEETINGS - FLORIDA

McDonough v. Garcia

United States Court of Appeals, Eleventh Circuit - January 10, 2024 - F.4th - 2024 WL 106093

City resident filed § 1983 action alleging that city and police officers violated First Amendment by banning him from city council meetings, and that officers lacked probable cause to arrest him for disorderly conduct and cyberstalking.

The United States District Court for the Southern District of Florida entered summary judgment in defendants' favor, and plaintiff appealed.

The Court of Appeals held that:

- City council meeting was designated public forum, rather than limited public forum, for First Amendment purposes;
- Trespass order indefinitely banning plaintiff from city hall violated First Amendment;
- Plaintiff's conduct did not provide officer with probable cause to arrest him for disorderly conduct;
- Officers had probable cause to arrest defendant for cyberstalking;
- Officer was entitled to qualified immunity from liability on First Amendment claim; and
- Officers were not entitled to qualified immunity from liability on false arrest claim.

EMINENT DOMAIN - HAWAII

City and County of Honolulu by and through Honolulu Authority for Rapid Transportation v. Victoria Ward, Limited

Supreme Court of Hawai'i - December 29, 2023 - P.3d - 2023 WL 9017006

Transportation authority filed complaint seeking to condemn approximately two acres within master planned community in order to construct portions of fixed rail system and rail station, and developer filed answer and complaint seeking to recover just compensation and severance damages for property interests taken or damaged.

After transportation authority obtained order of possession through quick-take procedure, numerous summary judgment motions were filed, and the Circuit Court largely granted the motions, but denied in part transportation authority's motion to strike two exhibits. Developer filed nine notices of appeal, and transportation authority filed single notice regarding five orders, and, following transfer to the Supreme Court, filed motion to dismiss developer's appeals for lack of subject matter jurisdiction.

The Supreme Court held that:

- Genuine issue of material fact as to whether "locally preferred alternative" in city ordinance established definite plans to build the station within master planned community precluded summary judgment on that issue;
- Genuine issue of material fact as to whether transportation authority forced developer to enclose a stairwell due to safety concerns precluded summary judgment on developer's claim for damages due to that structural modification;
- Genuine dispute of material fact as to whether master planned community developer presented a reasonable argument for a probable future use of property as condominium tower precluded summary judgment on developer's claim that highest and best use of property was for condominium tower;
- Supreme Court lacked jurisdiction to review transportation authority's cross-appeal of order denying motion to strike affidavit;
- Damages could include the "cost to cure," including building replacement parking spots to ameliorate the effects of the taking, only if that value was less than the diminution in fair market value of the property between the "before" condition and the "after" condition;
- Genuine issue of material fact as to whether master planned community development's parcels were sufficiently united such that developer could recover severance damages for one parcel based on taking of other parcel precluded summary judgment;
- Transit-oriented development overlay plan, which allowed greater development density in master planned community, was a special offsetting benefit, as opposed to a general benefit; and
- Court properly exercised its discretion when pausing the accrual of statutory interest, on money which transportation authority had deposited, for the duration of landowner's interlocutory appeals.

BOND DOCUMENTS - ILLINOIS

UIRC-GSA Holdings, LLC v. William Blair & Company, L.L.C.

United States Court of Appeals, Seventh Circuit - January 12, 2024 - F.4th - 2024 WL 139270

Issuer of revenue bonds that retained investment bank as adviser for bond transactions brought claim for copyright infringement against another client of investment bank, relating to bond documents used in bond offerings by entity formed by other client.

After issuer and other client settled, issuer filed amended complaint asserting claims against investment bank for copyright infringement and professional negligence. Investment bank brought

third-party claims against other client and its bond-issuing entity for indemnification and contribution.

The United States District Court for the Northern District of Illinois granted summary judgment for investment bank and its motion for attorney fees. Issuer appealed.

The Court of Appeals held that:

Issuer's trivial variation to copied indenture trust was not copyrightable;

- Mixture of fragmented phrases, facts, and language dictated solely by functional considerations lacked creative expression required for copyright protection;
- Re-sequencing paragraphs from copied indenture of trust, and thereby creating different order that mattered, was not creative expression; and
- District court did not abuse its discretion in awarding attorney fees to investment bank.

Nine substitutions of "Project" for "Properties" from copied indenture of trust, change from "Borrower" to "Issuer," and new clause reading "and initial funding of reserves for the Bonds" were trivial variation by issuer of revenue bonds that were not copyrightable, for purpose of infringement claim against investment bank.

Facts, fragmented phrases, and language dictated solely by functional considerations that were added by issuer of revenue bonds to copied indenture of trust lacked creative expression required for copyright protection, for purpose of infringement claim against investment bank.

Replacing language in copied indenture of trust with "Mortgage," "Assignment of Lease," and "Collateral Assignment of Rents" in list of legal documents, and adding phrase "the Loan Agreement obligates the Borrower to (and the Issuer shall cause the Borrower to)" by issuer of revenue bonds lacked creative expression required for copyright protection, for purpose of infringement claim against investment bank.

Re-sequencing paragraphs from copied indenture of trust, though material change, was not creative expression by issuer of revenue bonds, for purpose of copyright infringement claim against investment bank; even if issuer chose its language carefully, its choices were driven by convenience and function, not creativity, because issuer did not include any expressive elaborations, but instead chose to present its idea to potential investors with formal technicality common to bond documents, which were, at their foundation, bare bones descriptions of offering and terms and conditions.

District court did not abuse its discretion in awarding attorney fees to defendant investment bank under Copyright Act, after entering summary judgment in its favor in infringement action brought by issuer of revenue bonds; although court assumed that issuer brought action with proper motive, court held that issuer failed to rebut presumption in favor of bank on frivolousness, court sided with bank on objective unreasonableness of claim on basis that issuer's decision to not be forthcoming about copied documents, either earlier in litigation or before Copyright Office, was problematic, and award would advance considerations of compensation and deterrence because of issuer's failure to disclose.

NEGLIGENCE - MISSOURI

Sender v. City of St. Louis

Supreme Court of Missouri, en banc - January 9, 2024 - S.W.3d - 2024 WL 98380

Bicyclist brought action against city, asserting claims for negligence based on premises and personal liability and seeking to recover for injuries allegedly sustained when bicyclist encountered a purported defect on public bike path.

The Circuit Court granted city's motion to dismiss on basis of improper statutory notice. Bicyclist appealed.

On transfer from the Court of Appeals held that:

- Paved public bike path fell within statutory definition of "thoroughfare" under notice of claim statute, and
- Bicyclist's failure to include the circuit court hearing in the appellate record precluded Supreme Court review.

Paved public bike path, on which bicyclist allegedly encountered defect on path and sustained injuries after wrecking bicycle, fell within statutory definition of "thoroughfare" under notice of claim statute, and thus required bicyclist to give notice to the city of her negligence claims; although the bike path itself was a closed circuit, it was intersected by streets and connector paths and persons using it could get on and off the path as they chose, and the path was thus a thoroughfare subject to statutory notice requirements.

Bicyclist's failure to include a transcript of circuit court's hearing precluded appellate review of her claim that circuit court erroneously applied the law when it dismissed her negligence claims against city for failure to provide the required statutory notice of her injury on allegedly defective bike path; absence of any record of circuit court's hearing prevented the Supreme Court from knowing the predicate facts necessary to determine whether the circuit court erroneously misapplied the law in finding bicyclist's notice insufficient.

PUBLIC PAYMENTS - TEXAS

American Precision Ammunition, L.L.C v. City of Mineral Wells

United States Court of Appeals, Fifth Circuit - January 12, 2024 - F.4th - 2024 WL 137035

Company brought action against city alleging breach of contract, violation of Texas Open Meetings Act (TOMA), denial of federal due process, and denial of due course of law under Texas Constitution.

The United States District Court for the Northern District of Texas dismissed complaint, and company appealed.

The Court of Appeals held that:

- City's contractual obligation to "gift" private company $150,000 was illegal under state constitution;
- District court's determination that agreement was illegal rendered company's TOMA claim moot; and
- Company lacked protected due process property interest in city's promise to gift it $150,000.

Under Texas law, city's contractual obligation to "gift" private company $150,000 constituted gratuitous payment of public money, and thus was illegal under state constitutional provision prohibiting gratuitous payment of public money by political subdivisions to individuals, associations, or corporations, despite company's contention that city agreed to provide it with payment in

consideration of its agreement to relocate to city; agreement did not indicate any consideration in exchange for $150,000 gift, agreement provided that tax abatements—not $150,000 gift—were return benefit that company was set to receive for relocating to city, and agreement provided no other return benefits to city for its gift.

District court's determination that city's agreement with company violated Texas constitution's prohibition against gratuitous payment of public money by political subdivisions rendered moot company's claim that city's termination of its agreement violated Texas Open Meetings Act (TOMA) because agenda notice for city council's meeting did not sufficiently apprise public that agreement would be discussed or that any action might be taken with regard to it; company wanted district court to reinstate parties' agreement, but that claim was predicated on finding that it was valid and enforceable.

Company lacked protected property interest in city's promise to gift it $150,000, and thus city's termination of contract did not violate company's right to due process under Fourteenth Amendment or its right to due course of law under Texas Constitution, despite company's contention that agreement's notice-and-cure provision created property interest in tax abatements provided by agreement; gift violated state constitution's prohibition against gratuitous payment of public money by political subdivisions, and ordinary breach of contract suit in state court could fully protect company's interest in tax abatements.

WATER LAW - CALIFORNIA

Planning and Conservation League v. Department of Water Resources

Court of Appeal, Third District, California - January 5, 2024 - Cal.Rptr.3d - 2024 WL 62607

Department of Water Resources filed action to validate amendments to long-term contracts with local government contractors receiving water through State Water Project, extending contract terms, expanding facilities listed as eligible for revenue bond financing, and making other changes to contracts' financial provisions.

Conservation groups and public agencies answered, some asserting affirmative defenses and contesting validation and others supporting validation. Conservation groups and other entities filed two separate actions for writs of mandate and for declaratory and injunctive relief challenging approval of amendments under California Environmental Quality Act (CEQA), Sacramento-San Joaquin Delta Reform Act, and public trust doctrine. Contractors intervened.

In coordinated proceeding, the Superior Court, Sacramento County, entered judgment in Department's favor in all three cases. Parties opposing validation appealed. Appeals were consolidated.

The Court of Appeal held that:

- Baseline for evaluation of environmental effects of proposed contract amendments was environmental setting under current contract conditions;
- Amendments were not part of larger project, such that they were properly studied in their own environmental impact report (EIR);
- CEQA did not require Department to consider environmental impacts of all potential projects which could be funded using revenue bonds issued under amendments;
- EIR adequately examined range of reasonable project alternatives;

- Amendments did not constitute “covered action” under Delta Reform Act;
- Sufficient evidence supported conclusion that amendments would not impact public trust resources; and
- Department complied with statute requiring it to present amendments to legislative committees.

Baseline for evaluation by Department of Water Resources of whether proposed amendments to long-term contracts with local government agencies that received water through State Water Project would have significant environmental effects under California Environmental Quality Act (CEQA) was environmental setting under current contract conditions, not hypothetical environmental setting if contracts were not in place.

Proposed amendments to long-term contracts between Department of Water Resources and local government agencies receiving water through State Water Project were not part of larger project to build new water conveyance for Sacramento-San Joaquin Delta, and thus, Department’s environmental review of proposed contract amendments alone did not constitute improper piecemealing of single project in violation of California Environmental Quality Act (CEQA), even though legislative oversight materials indicated relationship between contract amendments and financing of proposed conveyance project; amendments served independent purpose from conveyance, namely fixing financing problems with State Water Project, and amendment was only small step towards conveyance, which faced significant other hurdles.

Existing State Water Project operations were part of baseline for environmental review of proposed amendments extending terms of and changing financing for long-term contracts with local government agencies that received water through Project, and thus, in environmental impact report (EIR) for proposed contract amendments, Department of Water Resources was not required to consider environmental impacts of extended period of existing operations; amendments would continue existing operations without change.

Links between proposed amendments to duration and financing provisions of long-term contracts with local government agencies receiving water through State Water Project and potential future projects involving existing State Water Project facilities, such as possible use of revenue bonds issued under amendments to repair aqueduct and reinforce dam, were too attenuated for California Environmental Quality Act (CEQA) to require Department of Water Resources, when assessing environmental impacts of proposed contract amendments, to forecast impacts of all such potential projects; amendments did not commit Department to, authorize revenue bonds for, or cause potential projects, and government funding mechanisms with no commitment to specific projects were specifically excluded from CEQA review.

In environmental impact report (EIR) regarding proposed amendments to terms and financial provisions of long-term contracts with local government agencies receiving water through State Water Project, project alternative of excluding amendment to revenue bond provisions was substantially similar to alternatives that Department of Water Resources, as lead agency, discussed in detail, and thus, California Environmental Quality Act (CEQA) Guideline governing discussion of range of reasonable alternatives did not require Department to discuss exclusion of revenue bond amendment in detail, where exclusion of revenue bond amendment could be understood from specifics of no-project alternative and alternative that only extended terms of contracts.

Decision of Department of Water Resources, in environmental impact report (EIR) for proposed amendments to terms and financing provisions of long-term contracts with local government agencies receiving water through State Water Project, to reject project alternatives to reduce water amounts that agencies would receive under contracts and to implement new water conservation management provisions did not constitute failure to analyze range of reasonable project alternatives,

as required by California Environmental Quality Act (CEQA); EIR for proposed contract amendments had limited objective of addressing financial issues with existing contracts, and Department would have needed to add objectives to EIR to develop alternatives regarding water reductions or conservation measures.

In environmental impact report (EIR) issued by Department of Water Resources for proposed amendments extending terms and changing financial provisions of long-term contracts with local government agencies receiving water through State Water Project, no-project alternative was based on plausible, fact-based forecast that agencies would each elect to extend their existing contracts pursuant to evergreen clause, rather than prediction that some or all agencies would fail to extend contracts, and thus, EIR satisfied California Environmental Quality Act (CEQA) requirement of analyzing no-project alternative; State Water Project had long history and played critical role in distributing water to many residents and much farmland, making it unlikely that agencies would terminate contracts.

Additional analysis provided by Department of Water Resources, in final environmental impact report (EIR) for proposed amendments to long-term contracts with local government agencies receiving water through State Water Project, explaining its rejection of project alternative that would reduce amounts of water local agencies would receive under existing contracts did not constitute significant new information requiring Department to recirculate EIR for additional public comment before certifying it; additional analysis in final EIR was only meant to clarify rejection of alternative in response to public comments misunderstanding calculation and delivery of State Water Project water under existing contracts, and did not disclose new environmental impact or increase in severity of an impact.

Proposed amendments to long-term contracts with local government agencies receiving water through State Water Project, which extended terms of existing contracts and expanded ability of Department of Water Resources to use revenue bonds to finance betterments for State Water Project facilities and build new facilities, did not occur in Sacramento-San Joaquin Delta or change developed uses of State Water Project, and thus, amendments did not constitute “covered action” subject to certification requirements of Sacramento-San Joaquin Delta Reform Act; facilities were not located in Delta, term extensions did not expand State Water Project’s existing operations, and financing amendments were not equivalent to future projects that would use revenue bond funds raised as result of amendments.

Sufficient evidence supported conclusion of Department of Water Resources that no public trust resource would be impacted by proposed amendments extending terms and changing financial provisions of long-term contracts with local government agencies receiving water through State Water Project, such that Department’s approval of contract amendments did not violate public trust doctrine; State Water Resources Control Board or its predecessor had granted water rights to Department for State Water Project decades previously and amended such rights several times, contracts at issue were executed decades prior and allowed local agencies to extend their contractual interests indefinitely, and any use of preexisting financing mechanism that amendments broadened was speculative.

Public trust doctrine did not impose general duty of ongoing supervision on Department of Water Resources as to water rights with which it operated State Water Project, and thus, Department had no duty to weigh public trust interests or consider additional protections to those interests when considering proposed amendments extending terms and changing financing provisions of long-term contracts with local government agencies receiving water through State Water Project, where amendments had no impact on public trust uses, as they merely extended longstanding arrangements under State Water Project and bore only attenuated relationships to any projects that

might be funded in future using revenue raised under amendments.

The statute requiring the Department of Water Resources to make a presentation to certain legislative committees at an informational hearing at least 60 days before the approval of a renewal or extension of a long-term water supply contract does not contemplate that the contract is in its final form when it is presented to the committees; the goal of the statute is to provide high-level oversight into the renewal or extension of State Water Project long-term contracts, but not to insert such oversight into the details of finalizing the renewal or extension by requiring an additional hearing as to any changes made following the committee hearing.

Granting request by Department of Water Resources for validation of proposed amendments to long-term contracts with local government agencies receiving water through State Water Project would not confer absolute power on Department to assume unbounded contracts; validation action was statutorily limited to contracts in the nature of, or directly relating to, revenue bonds issued by Department under State Water Project, and Department acted within its general contracting authority under State Water Project in approving and executing amendments.

PUBLIC UTILITIES - CALIFORNIA

Sierra Telephone Company, Inc. v. Reynolds

United States District Court, E.D. California - November 27, 2023 - F.Supp.3d - 2023 WL 8190262

Telephone service provider that participated in subsidy program for small, rural, independent telephone companies that provided local telephone service in rural and remote areas of California, internet service provider (ISP), and their parent company, brought action against commissioners of the California Public Utilities Commission (CPUC), in their official capacities, challenging application of CPUC's broadband imputation policy, which imputed the revenues of ISPs to affiliate telephone service providers, in calculation of provider's subsidies under the program, as an unconstitutional taking, preempted by the Federal Communications Commission's (FCC) Restoring Internet Freedom Order, and in violation of the Dormant Commerce Clause.

Plaintiffs moved for a preliminary injunction and defendants moved to dismiss for failure to state a claim.

The District Court held that:

- Johnson Act did not preclude district court from exercising subject matter jurisdiction over plaintiffs' action;
- Plaintiffs failed to state a takings claim;
- Plaintiffs failed to state a per se takings claim;
- FCC's order did not preempt CPUC's ratemaking decisions;
- Claim preclusion did not bar preemption claim;
- Issue preclusion did not bar preemption claim; and
- Plaintiffs failed to state a claim for violation of the Dormant Commerce Clause.

Johnson Act, which deprived federal courts of jurisdiction over suits challenging an order affecting

rates chargeable by a public utility that were based solely on diversity of citizenship or repugnance of the order to the Federal Constitution, did not preclude district court from exercising subject matter jurisdiction over action brought by telephone service provider that participated in subsidy program for small, rural, independent telephone companies that provided local telephone service in rural and remote areas of California, internet service provider (ISP), and their parent company, challenging California Public Utilities Commission's (CPUC) imputation of ISP's revenues to telephone provider in calculation of provider's subsidies, as an unconstitutional taking, preempted by the Federal Communications Commission's (FCC) Restoring Internet Freedom Order, and in violation of the Dormant Commerce Clause; plaintiffs' preemption claim was not solely constitutional.

Telephone service provider that participated in subsidy program for small, rural, independent telephone companies that provided local telephone service in rural and remote areas of California, internet service provider (ISP), and their parent company, did not sufficiently allege that telephone service provider had a property interest in the subsidies, in support of their claim challenging California Public Utilities Commission's (CPUC) imputation of ISP's revenues to telephone service provider in calculation of provider's subsidies, pursuant to broadband imputation policy, as an unconstitutional taking; complaint did not include factual allegations that participation in the subsidy program was mandatory or that CPUC was compelling telephone service provider's participation in the program.

California Public Utilities Commission's (CPUC) ratemaking decision for telephone provider that participated in subsidy program for small, rural, independent telephone companies that provided local telephone service in rural and remote areas of California, which imputed revenues of affiliate internet service provider (ISP) to telephone provider in calculation of provider's subsidies, and concluded that telephone provider required a 5.98% rate of return on regulated investments to cover its costs of capital, was not unfair or unreasonable, and thus did not constitute an unconstitutional taking; ISP used telephone provider's infrastructure to deliver broadband services, and the CPUC rate design accounted for ISP's usage of and benefit derived from the subsidized infrastructure, balancing interests of the providers, other carriers contributing to the subsidy program, and the public.

Telephone and internet service providers, and their parent company, did not sufficiently allege that California Public Utilities Commission's (CPUC) ratemaking decision for telephone provider, which imputed revenues of internet provider to telephone provider in calculation of subsidies under government program for small, rural, independent telephone providers, pursuant to its broadband imputation policy, and concluded that telephone provider required a 5.98% rate of return on regulated investments to cover its costs of capital, was unreasonable in light of prior CPUC decision which determined that telephone provider required a 9.22% rate of return, in support of their takings claim; plaintiffs did not allege that 9.22% remained the minimal rate of return for operations or include factual allegations regarding impacts of broadband imputation policy on telephone provider's ability to achieve a sufficient rate of return to draw investment and cover costs.

Telephone and internet service providers, and their parent company, did not sufficiently allege that California Public Utilities Commission's (CPUC) ratemaking decision for telephone provider, which imputed revenues of internet provider to telephone provider in calculation of subsidies under government program for small, rural, independent telephone providers, pursuant to its broadband imputation policy, and concluded that telephone provider required a 5.98% rate of return on regulated investments to cover its costs of capital, was unreasonable because it did not allow telephone provider to earn a return on the value of property equal to the return being made in the same general part of the counties in which it operated, in support of takings claim; plaintiffs did not

allege facts that compared telephone provider's rate of return to other rates of return in the same territory.

California Public Utilities Commission (CPUC) did not compel telephone service provider that participated in subsidy program for small, rural, independent telephone companies that provided local telephone service in rural and remote areas of California to operate a loss by conflating its financials with affiliate internet service provider's (ISP) financials, in its ratemaking decision, which imputed revenues of ISP to telephone provider in calculation of provider's subsidies, and concluded that telephone provider required a 5.98% rate of return on regulated investments to cover its costs of capital, and thus CPUC's decision did not result in an unconstitutional taking; CPUC did not compel telephone provider to look to its affiliate internet provider to recover its losses or compel telephone provider to participate in the subsidy program.

Claim asserted by telephone and internet service providers, and their parent company, challenging California Public Utilities Commission's (CPUC) imputation of internet provider's revenues to affiliate telephone provider in calculation of provider's subsidies under government program for small, rural, independent telephone providers, as a unconstitutional taking, which incorporated all 65 preceding paragraphs in the complaint without distinction, was an improper shotgun pleading that did not give proper notice to either the CPUC Commissioners or the district court; if specific paragraphs supported the claim and plaintiffs intended to rely on them, those paragraphs, not the wholesale incorporation of every paragraph, should have been specifically incorporated by reference.

Telephone service provider that participated in subsidy program for small, rural, independent telephone companies that provided local telephone service in rural areas of California, internet service provider (ISP), and their parent company, did not allege that California Public Utilities Commission's (CPUC) ratemaking decision for telephone provider, which imputed ISP's revenues to telephone provider in calculation of provider's subsidies, pursuant to its broadband imputation policy, directly appropriated ISP's private property or ousted it from its domain, that CPUC required a permanent physical invasion of ISP's property, or that ISP was the owner of real property which had been called upon to leave its property economically idle, and thus failed to state a per se takings claim under one of the traditional theories.

Telephone service provider that participated in subsidy program for small, rural, independent telephone companies that provided local telephone service in rural areas of California, internet service provider (ISP), and their parent company, did not sufficiently allege that California Public Utilities Commission's (CPUC) ratemaking decision for telephone provider, which imputed ISP's revenues to telephone provider in calculation of provider's subsidies, pursuant to its broadband imputation policy, indirectly mandated a transfer of ISP's profits to telephone provider to fulfill telephone provider's revenue requirement on an annual basis, in support of their per se takings claim; plaintiffs failed to allege how imputing ISP's profits in telephone provider's rate design mandated a transfer of property.

Federal Communications Commission's (FCC) decision in its Restoring Internet Freedom Order to stop classifying broadband services as "telecommunications services" subject to regulation pursuant to Title II of Communications Act, and to instead reclassify them as "information services" not subject to regulation under Title I, did not preempt California Public Utilities Commission's (CPUC) imputation of internet service provider's (ISP) revenues to affiliate telephone service provider, in calculation of provider's subsides under statute establishing subsidy program for small, rural, independent telephone companies that provided local telephone service in rural areas of California; FCC's Order was merely a policy preference for a "light-touch" broadband regulatory approach, and CPUC's broadband imputation did not conflict with federal law or with purposes and objectives of

Congress.

Federal Communications Commission's (FCC) policy preference for a "light-touch" broadband regulatory approach, expressed in its decision to reclassify broadband services as "information services" not subject to regulation under Title I of the Communications Act, did not preempt California Public Utilities Commission's (CPUC) imputation of internet service provider's (ISP) revenues to affiliate telephone service providers, in calculation of subsides under voluntary subsidy program for small, rural, independent telephone companies that provided local telephone service in rural and remote areas of California; CPUC's broadband imputation applied only to those who desired a state subsidy and did not compel participation in the subsidy program.

Finding in prior state court action, brought by ten telephone companies that participated in program that provided subsidies to small, rural, independent providers of telephone service in rural and remote areas of California against California Public Utilities Commission (CPUC), that CPUC's broadband imputation policy, which imputed revenues of internet service providers (ISP) to affiliate telephone companies in calculation of subsidies under the program, was not facially preempted by Federal Telecommunications Act and Federal Communications Commission (FCC) order exempting broadband internet services from utility-style regulation, was not res judicata in subsequent federal court action brought by one of the telephone companies from state court action against CPUC, claiming that CPUC's use of broadband imputation in ratemaking decision for company was preempted by federal law; company's as-applied challenge in federal case included facts specific to its rate case, whereas prior case did not raise specific effect of CPUC's policy on each company.

Prior state court proceeding, brought by telephone companies that participated in program that provided subsidies to small, rural, independent providers of telephone service in rural and remote areas of California against California Public Utilities Commission (CPUC), wherein statute allowing CPUC to impute broadband revenues of telephone companies' internet service provider (ISP) affiliates in determining subsidies under the program was found not to be preempted by the Federal Telecommunications Act and Federal Communications Commission (FCC) order exempting broadband internet services from utility-style regulation, did not collaterally estop one telephone company from prior case from litigating claim in federal court that CPUC's use of broadband imputation in ratemaking decision for company was preempted by FCC's determinations; prior case presented facial challenge to broadband policy, whereas federal court action disputed application of broadband imputation on behalf of one telephone company.

Telephone company that participated in program that provided subsidies to small, rural, independent providers of telephone service in rural and remote areas of California, internet service provider (ISP), and their parent company, did not sufficiently allege that California Public Utilities Commission's (CPUC) ratemaking decision for telephone company, which imputed revenues of ISP to company in calculation of subsidies under the government program, pursuant to its broadband imputation policy, burdened interstate commerce, in support of claim that CPUC's ratemaking decision violated the Dormant Commerce Clause; all burdens alleged by plaintiffs were upon ISP's internal operations.

Claim asserted in federal court action by telephone company that participated in program that provided subsidies to small, rural, independent providers of telephone service in rural and remote areas of California, internet service provider (ISP), and their parent company against California Public Utilities Commission (CPUC), that CPUC's imputation of ISP's revenues to affiliate telephone company in calculation of company's subsidies under the program violated the Dormant Commerce Clause, was not within the scope of prior state court action challenging CPUC's broadband imputation policy as facially unconstitutional, and thus was not precluded, under doctrine of res judicata; transactional nucleus of facts of prior facial challenge differed from the as-applied

challenge raised in federal court.

HOSPITAL DISTRICTS - FLORIDA

Harrison v. South Broward Hospital District

District Court of Appeal of Florida, Fourth District - November 8, 2023 - So.3d - 2023 WL 73679 - 2048 Fla. L. Weekly D2154

Former general counsel for hospital district board of commissioners brought action against board members, asserting claims for defamation, tortious interference with advantageous business relationship, outrage, and gross negligent infliction of emotional distress for their actions in holding meeting and voting to terminate her.

Members moved for summary judgment based on summary judgment. The Circuit Court entered nonfinal order denying the summary judgment motion. Members appealed that order and separately filed petition for writ of certiorari for review the denial of their summary judgment motion. Cases were consolidated for resolution.

The District Court of Appeal held that members were entitled to absolute immunity as to general counsel's claims.

Members of hospital district board of commissioners were acting within scope of their duties when they held meeting to review general counsel's performance and voted for her discharge, and thus members were entitled to absolute immunity as to general counsel's tort claims for defamation, tortious interference with advantageous business relationship, outrage, and gross negligent infliction of emotional distress, even if members were acting in bad faith and maliciously; district's bylaws gave board broad authority to employ personnel, and even if only the chief executive officer (CEO) could terminate general counsel's employment because she reported only to the CEO, the bylaws recognized board's authority to vote for her discharge and direct CEO to terminate her.

EMINENT DOMAIN - INDIANA

State v. Laughlin

Court of Appeals of Indiana - November 29, 2023 - N.E.3d - 2023 WL 8246853

Parties with property interest in billboard advertising sign and lease commenced action against state and Department of Transportation alleging inverse condemnation.

The Superior Court entered order of appropriation without resolving factual issues as to whether taking occurred. State and Department filed interlocutory appeal.

The Court of Appeals held that trial court erred in determining that taking occurred without setting matter for hearing or allowing other dispositive motions to be filed.

Trial court improperly determined that taking had occurred based upon only complaint by purported holders of property interest in billboard advertising sign, which state and Department of Transportation removed as part of highway improvement project, and state's objections and affirmative defenses, in inverse condemnation action; court was required to make factual determination as to whether taking occurred by setting matter for hearing or allowing other

dispositive motions to be filed.

IMMUNITY - KANSAS

Unruh v. City of Wichita

Supreme Court of Kansas - January 5, 2024 - P.3d - 2024 WL 57470

Arrestee brought action against city, police chief, and police officers, asserting a claim for negligence arising from allegations that officers used excessive force to arrest him.

The District Court granted summary judgment to defendants. Arrestee appealed. The Court of Appeals affirmed. Arrestee's petition for review was granted.

The Supreme Court held that:

- Special duty needed for negligence claim arising from an officer's alleged use of excessive force does not simply arise anytime there is an affirmative act by the officer causing injury, disapproving *Dauffenbach v. City of Wichita*, 233 Kan. 1028, 667 P.2d 380, and
- Substance of arrestee's claim sounded not in negligence, but in civil battery, and was thus subject to the 12-month limitations period for such claims.

PREEMPTION - NEW YORK

Town of Babylon, NY v. James

United States District Court, E.D. New York - December 19, 2023 - F.Supp.3d - 2023 WL 8734201

Incorporated towns of New York, which had sued opioid distributors and producers in state court seeking damages for financial losses suffered as a consequence of distributors' and producers' wrongdoings, brought action against Attorney General for state of New York, seeking declaratory relief that challenged statute, which created opioid settlement fund for settlements reached with certain distributors and producers and extinguished state court claims by towns and others, violated towns' rights to substantive due process, equal protection, and access to the courts under the U.S. and New York Constitutions and violated the home-rule restrictions under New York Constitution.

Attorney General moved to dismiss.

The District Court held that:

- Proprietary interest exception to capacity-to-sue rule under New York law did not apply to give towns capacity to sue Attorney General and challenge statute;
- Home rule exception to capacity-to-sue rule under New York law did not apply to give towns capacity to sue Attorney General and challenge statute;
- Court would take judicial notice of legislative materials supporting New York senate bill that was later codified into challenged statute;
- Towns lacked standing to pursue Fourteenth Amendment claims;
- Exercise of supplemental jurisdiction over towns' claims under New York Constitution would be declined; and
- Towns lacked necessary legal predicate to seek declaratory judgment.

Proprietary interest exception to capacity-to-sue rule under New York law, barring constitutional challenges by political subdivisions, did not apply to give incorporated towns capacity to sue New York Attorney General and challenge statute, which created opioid settlement fund for settlements reached with certain opioid distributors and producers and extinguished state court claims by towns and others; even though challenged statute affected towns' vested rights in continuing litigation against distributors and producers, there was no statute granting towns right to receive from any statutorily created fund based on their pre-existing lawsuits against producers and distributors, but rather, towns had only unadjudicated legal claims that may or may not have resulted in monetary recovery.

BONDS - TEXAS

Senior Care Living VI, LLC v. Preston Hollow Capital, LLC

Court of Appeals of Texas, Houston (1st Dist.) - November 30, 2023 - S.W.3d - 2023 WL 8262772

Assisted-living facility management company brought declaratory-judgment action against bank and trust company, seeking declaration that management company was not in default under bond agreements to finance construction of facility.

Bondholder intervened, and its separate action against individual guarantor of management company's debt was consolidated with declaratory-judgment action.

Bank and trust company conditionally asserted same claims as bondholder, alleging breach of contract against management company and claim against guarantor under guaranty.

The District Court entered partial summary judgment that bank and trust company were properly appointed as co-successor trustees, dismissed management company's claims for conversion, and after bench trial, entered judgment against management company and guarantor, jointly and severally, for $52.6 million.

After their motions for new trial were overruled, management company and guarantor appealed.

The Court of Appeals held that:

- Appointment of bank and trust company as successor co-trustees was effective;
- Notice to co-trustees was not a condition precedent to bondholder bringing action against management company;
- Bondholder did not qualify as guaranteed party entitled to enforce guaranty against individual guarantor;
- Notice of intent to accelerate debt incurred under bond agreements was not clear and unequivocal; and
- There was no evidence that management company owned or had possession of funds or entitlement to possession of funds under bond agreements.

Issue on appeal, in declaratory-judgment action brought by company that managed assisted-living facility against bondholders who issued bonds to finance construction of facility, raised by company, alleging bondholder was not entitled to receivership because it did not plead for that relief, was rendered moot when, during pendency of appeal, receiver moved for final accounting and sought to be discharged, and trial court granted that request and discharged receiver from all duties, responsibilities, and obligations under trial court's post-judgment receivership order.

Appointment of bank and trust company as successor co-trustees by bond trustee, who managed distribution of proceeds from sale of bonds to finance construction of assisted-living facility and loan payments from facility's management company, was effective under provision of trust indenture agreement governing appointment of co-trustees, even though management company, as obligor under agreement, did not give prior consent; bond trustee sent notice appointing bank and trust company as co-trustees, provision explicitly vested bond trustee with "power to appoint" one or more persons to act as co-trustee jointly with bond trustee, and provision gave bond trustee power to make the appointment "on its own" if obligor did not join.

Assisted-living facility management company and individual guarantor of management company's debt incurred under bond agreements to finance construction of facility, waived argument on appeal that bondholder could not recover on its breach of contract claim because copy of agreement admitted at trial indicated that it had been amended, but bondholder did not introduce amended version into evidence; no party argued in trial that agreement was inoperable or sought to introduce amended agreement, and management company did not attempt to establish in trial that agreement had been amended, and it obtained no fact findings on amendments modifying agreement.

Provision of trust indenture agreement, under which proceeds from sale of bonds were used to finance construction of assisted-living facility, regarding actions taken by bondholder representative in lieu of bond trustee, did not make written notice a prerequisite to proceeding in lieu of trustee, merely noting bondholder's election to proceed would be evidenced by written notice, and thus, notice was not a condition precedent to bondholder bringing action against facility's management company, as obligor under agreement, for breach of contract; provision contemplated that written notice would constitute contemporaneous or after-the-fact proof that an election to proceed had taken place, and provision did not have conditional language such as "if," "provided that," or "on condition that."

Even if provision of trust indenture agreement, under which proceeds from sale of bonds were used to finance construction of assisted-living facility, regarding notice of actions taken by bondholder representative in lieu of bond trustee was a condition precedent to bondholder bringing action against facility's management company, as obligor under agreement, bondholder substantially complied with such condition; bondholder's counsel emailed bank serving as co-trustee under agreement, stating that counsel intended to file a complaint against management company in federal court, including complaint as attachment, and stating that filing included input from bank's counsel and counsel for trust company serving as co-trustee.

Bondholder, as noteholder representative and majority bondholder representative under bond agreements in which proceeds from sale of bonds were used to finance construction of assisted-living facility, could pursue remedies on behalf of subordinate bondholders for breach of contract claim against assisted-living facility management company, as obligor under agreements, even if relevant provisions ensured priority of senior notes and bonds; nothing in relevant provisions of agreements provided that, when entire debt had been accelerated due to default, bondholder could pursue remedies only on behalf of senior bondholders, and could not also pursue remedies on behalf of subordinate bondholders in same proceeding.

Bondholder, as noteholder representative and majority bondholder representative under bond agreements in which proceeds from sale of bonds were used to finance construction of assisted-living facility, was not a noteholder, and thus, did not qualify as a guaranteed party entitled to enforce guaranty against individual guarantor of financing for facility; bondholder was not a registered owner of promissory notes, and was not required to be in order to be noteholder representative, and guaranteed parties under guaranty included only trustee for the benefit of noteholders.

Bondholder's status as noteholder representative and majority bondholder representative, under bond agreements in which proceeds from sale of bonds were used to finance construction of assisted-living facility, did not grant it authority to enforce guaranty against individual guarantor of financing for facility; text of guaranty itself said nothing about allowing either noteholder representative or majority bondholder representative to pursue remedies under guaranty, and instead provided only that noteholder representative could direct trustee under agreements to take action after an event of default.

Assisted-living facility management company and individual guarantor of management company's debt, incurred under bond agreements to finance construction of facility, preserved for appeal issue of whether bondholder properly accelerated debt under agreements, even if bondholder pleaded that all conditions precedent to suit had been performed, and management company and guarantor did not specifically challenge notice of intent to accelerate as condition precedent, where trial court admitted evidence of notices of default, of intent to accelerate debt, and of acceleration, and made express fact findings that debt was properly accelerated.

Trustee's notice of intent to accelerate debt incurred under bond agreements to finance construction of assisted-living facility, including parenthetical "(subject to further election and notice to you)," was not clear and unequivocal, and thus, subsequent notice of acceleration of debt was ineffective; agreements gave trustee option to accelerate payment of amounts owed by facility's management company upon occurrence of an event of default, and by including parenthetical, trustee failed to unequivocally indicate that management company's failure to cure alleged defaults would automatically result in acceleration, and instead suggested that an additional election and notice would need to be made in the future.

Court of Appeals would reverse $52.6 million award of damages in favor of bondholder and remand for a new trial on bondholder's breach of contract claim, which was reversed in part on appeal, rather than suggesting a remittitur, in declaratory-judgment action brought by company that managed assisted-living facility against bondholders who issued bonds to finance construction of facility; no party had suggested an amount for a remittitur, management company had not challenged all breaches found by the trial court, and the trial court made no findings that would identify an appropriate lesser amount of damages.

There was no evidence that assisted-living facility management company owned or had possession of funds or entitlement to possession of funds, under bond agreements in which proceeds from sale of bonds were used to finance construction of assisted-living facility, as required element of management company's conversion claim against bank and trust company, as co-trustees managing distribution of proceeds from sale of bonds and loan payments from management company, and bondholder.

There was no evidence that bank and trust company, as co-trustees under bond agreements in which proceeds from sale of bonds were used to finance construction of assisted-living facility, and bondholder held money that belonged to assisted-living facility management company, as obligor under agreements, as required element of management company's money had and received claim against bank, trust company, and bondholder.

Guaranty, under which individual guarantor of assisted-living facility management company's debt incurred under bond agreements to finance construction of facility guaranteed full and prompt payment of debt to trustee for the benefit of noteholders, could not be used to justify requiring guarantor to pay bondholder's attorney fees and expenses, in management company's declaratory-judgment action seeking declaration that it was not in default under agreements; bondholder was not a guaranteed party, i.e., noteholder, under guaranty, and could not enforce guaranty.

Bank and trust company, as co-trustees under bond agreements in which proceeds from sale of bonds were used to finance construction of assisted-living facility, were not entitled to recover attorney fees against individual guarantor of financing for facility, in declaratory-judgment action brought by management company of facility against bank, trust company, and bondholder, seeking declaration that it was not in default under agreements; bank and trust company conditionally asserted same causes of action asserted by bondholder, in the event bondholder lacked authority to bring suit, and trial court awarded damages against guarantor to bondholder only, such that condition to trigger assertion of bank and trust company's claims never occurred.

PUBLIC RECORDS - UTAH

McKitrick v. Gibson

Supreme Court of Utah - January 11, 2024 - P.3d - 2024 WL 119334 - 2024 UT 1

Former county commissioner petitioned for review of city records review board's grant of freelance journalist's request under Government Records Access and Management Act (GRAMA) for records relating to investigation into alleged official misconduct.

The Second District Court granted journalist's motion to intervene and denied her motion to dismiss for lack of standing. Journalist appealed, and the Supreme Court reversed and remanded. The Second District Court denied journalist's motion for attorneys' fees and litigation costs. Journalist appealed.

The Supreme Court held that:

- GRAMA did not limit the availability of fees and costs only to appeals initiated by the governmental entity or the requester;
- Journalist's legal filings as intervenor sufficed as a statement of position to city for purposes of GRAMA fee provision;
- Journalist could be found to have substantially prevailed under GRAMA fee provisions even if she did not prevail against city or did not prevail on the merits; and
- On remand, district court should apply GRAMA's statutory fee provisions to the facts and underlying circumstances of journalist's appeal.

District court should exercise its discretion on remand to apply the statutory fee provisions of the Government Records Access and Management Act (GRAMA) to the facts and underlying circumstances of journalist's appeal of denial of her motion to dismiss county commissioner's petition for review of decision by city records review board to grant journalist's records request, even though commissioner's petition was never addressed on the merits; trial court should look beyond the question of commissioner's standing when considering the public benefit derived from the case, the nature of journalist's interest in the records, and whether city's actions had a reasonable basis.

EMINENT DOMAIN - ARIZONA

State v. Foothills Reserve Master Owners Association, Inc.

Court of Appeals of Arizona, Division 1 - December 7, 2023 - P.3d - 2023 WL 8467518

State Department of Transportation filed condemnation action to acquire subdivision's common

areas for highway construction, and homeowners sought proximity damages for a complete taking of their positive easements to use the land and negative easements to preserve the open space.

Following cross-motions for summary judgment, the Superior Court determined homeowners were entitled to proximity damages, and a stipulated final judgment was entered. State appealed.

The Court of Appeals held that:

- Easements were not parcels of land for purposes of severance damages, and
- Homeowners did not possess any title to or ownership interest in common areas.

Negative and positive common area easements, which allowed subdivision homeowners to use common areas and required common areas to remain open space, were not parcels of land, and thus homeowners were not entitled to proximity damages for the loss of the easements after common areas were condemned and taken as part of highway construction project.

Subdivision homeowners did not possess any title to or ownership interest in common areas taken for highway construction project, and thus could not recover severance damages for the alleged "severance" of their homes from a larger parcel which included the common areas; rather, homeowners' association owned the common areas, and homeowners only possessed easements giving them a right to use or limit development of the common areas.

PUBLIC UTILITIES - CALIFORNIA

Center for Biological Diversity, Inc. v. Public Utilities Commission

Court of Appeal, First District, Division 3, California - December 20, 2023 - Cal.Rptr.3d - 2023 WL 8796605

Environmental organization and others petitioned for writ review of Public Utilities Commission's adoption of successor to net energy metering (NEM) tariff, which significantly reduced prices utilities paid for customer-generated power, contending it failed to comply with statute setting forth objectives for successor tariff.

The Court of Appeal held that:

- Commission was not required to consider costs and benefits of renewable energy generally when valuing energy generated and exported by consumers;
- Commission's decision to base price of customer-generated energy on utilities' marginal cost of energy was reasonably related to statutory goal of equity between customers;
- Petitioners failed to establish benefits of increased resiliency conferred by customer-generated energy accrued to utilities or electrical system rather than to those customers;
- Utilities' costs under regulatory category "transmission revenue requirements" did not undermine Commission's estimate of avoided transmission costs;
- Reduction in financial benefit to customers with renewable energy systems did not violate statutory directive to ensure "customer-sited renewable distributed generation continues to grow sustainably";
- Successor tariff satisfied statutory requirement of including "specific alternatives designed for growth" of customer-generated energy among disadvantaged residential communities; and
- Sufficient evidence supported finding that applying successor tariff to nonresidential customers would serve statutory requirement of balancing costs and benefits to all customers and electrical system.

OPEN MEETINGS - COLORADO

The Sentinel Colorado v. Rodriguez

Colorado Court of Appeals, Division II - December 7, 2023 - P.3d - 2023 WL 8462301 - 2023 COA 118

Newspaper filed complaint against city records custodian seeking release of recording of city council executive session about censure charges against council member, alleging council committed Colorado Open Meetings Law (OML) violations at that executive session.

The District Court held that the violations were cured by a subsequent public city council meeting and ordered custodian not to release recording. Newspaper appealed.

The Court of Appeals held that:

- Council's announcement of executive session closed to public for "Legal Advice" failed to comply with OML;
- Council adopted a position or formal action at executive session, in violation of OML;
- Council waived any attorney-client privilege that existed to protect recording of executive session from public disclosure;
- Subsequent public meeting of city council regarding censure charges did not "cure" OML violations of executive session; and
- Newspaper was not entitled to award of attorney fees under OML.

EMINENT DOMAIN - GEORGIA

Wise Business Forms Inc. v. Forsyth County

Court of Appeals of Georgia - December 22, 2023 - S.E.2d - 2023 WL 8862419

Property owner brought action against county and Georgia Department of Transportation (GDOT) asserting a claim for inverse condemnation by permanent nuisance after road expansion increased the surface and stormwater runoff flowing under its property, which created a sinkhole in its parking lot.

The Superior Court dismissed complaint, and property owner appealed. The Court of Appeals affirmed. Property owner appealed, and the Supreme Court reversed.

On remand, the Court of Appeals held that property owner's claim that drainage system resulted in an inverse condemnation by permanent nuisance was not barred as a matter of law by the applicable four-year statute of limitations.

Property owner's claim that drainage system constructed by county and Georgia Department of Transportation (GDOT) resulted in an inverse condemnation by permanent nuisance was not barred as a matter of law by the applicable four-year statute of limitations, although the construction had occurred more than four years earlier, where property owner alleged that increased stormwater runoff was a nuisance that was not immediately observable.

EMINENT DOMAIN - INDIANA

State v. Franciscan Alliance, Inc.

Court of Appeals of Indiana - November 28, 2023 - N.E.3d - 2023 WL 8226129

State brought condemnation proceeding to acquire landowner's 0.632-acres strip of undeveloped property, which was adjacent to neighbor's property used as a pharmacy, to transform a road into part of an interstate corridor.

The Superior Court entered a jury verdict that awarded landowner $680,000 and neighbor $1.5 million. State appealed.

The Court of Appeals held that:

- Landowner and neighbor were not entitled to damages for alleged inconvenience associated with traffic flow and increased travel distance;
- Neighbor was not entitled to award of attorney's fees; and
- Eminent domain statute providing for 8% prejudgment interest applied.

Landowner of 0.632-acres strip of undeveloped property and neighbor that owned adjacent property used as a pharmacy were not entitled to damages for alleged inconvenience associated with traffic flow and increased travel distance, in State's condemnation proceeding to acquire landowner's strip of property to transform a road into part of an interstate corridor; landowner and neighbor still had access to the new interstate, and though the construction project would have added approximately one to three miles of travel distance to reach their property, it was not severe enough to be considered an effective elimination of ingress and egress rights.

Neighbor that owned property used as a pharmacy, which was adjacent to landowner's 0.632-acres strip of undeveloped property, was not entitled to award of attorney's fees under statute providing that recovery of a defendant's litigation expenses, including reasonable attorney's fees was limited to when amount of damages awarded was greater than amount specified in plaintiff's last offer of settlement, in State's condemnation proceeding to acquire landowner's strip of property to transform a road into part of an interstate corridor; as only the value of landowner's strip was compensable, and it was solely owned by landowner, there were no longer any damages for neighbor to recover.

Eminent domain statute that provided for an 8% prejudgment interest, rather than general statute governing interest payments on final judgments that provided for a 6% prejudgment interest, applied in State's condemnation proceeding to acquire landowner's 0.632-acres strip of undeveloped property, which was adjacent to neighbor's property used as a pharmacy, to transform a road into part of an interstate corridor.

IMMUNITY - IOWA

Penny v. City of Winterset

Supreme Court of Iowa - December 29, 2023 - N.W.2d - 2023 WL 9008159

Motorist brought action against city and police officer alleging that officer was reckless in his conduct related to collision with motorist in an intersection, and that city was vicariously liable for the alleged recklessness.

The District Court granted city's and officer's motion for summary judgment. Motorist appealed, and the case was transferred to the Court of Appeals, which reversed and remanded. City's and officer's application for further review was granted.

The Supreme Court held that officer's conduct did not meet high bar for "recklessness" in order for liability to exist under statute providing liability protections to drivers of emergency vehicles.

Police officer's conduct in driving through an intersection without making full stop at the stop sign while responding to an emergency call did not meet high bar for "recklessness," as required for city and officer to have liability under exception to statute providing liability protections to drivers of emergency vehicles for injuries sustained by motorist with whom officer collided in the intersection, where officer had his lights running and siren blaring, he saw traffic to his left was either stopped or far enough away from the intersection not to be problem and saw a light to his right he believed to be coming from a nearby farmhouse, he slowed to speed that was reasonable before proceeding through the intersection, and he had a clear lane through which he could proceed.

PUBLIC UTILITIES - MAINE

Office of the Public Advocate v. Public Utilities Commission

Supreme Judicial Court of Maine - December 28, 2023 - A.3d - 2023 WL 8940325 - 2023 ME 77

Office of Public Advocate sought review of order of Public Utilities Commission (PUC) which approved an amended special rate contract between natural gas utility and customer.

The Supreme Judicial Court held that:

- PUC's decision to apply different standard of review to special rate contract for natural gas service than it would to a special rate contract for electric transmission and distribution, so as to require that special rate contract for electric transmission and distribution maximize revenue above marginal cost of service while not requiring the same of a special rate contract for natural gas service, was not unreasonable, unjust, or unlawful;
- Special rate contract did not result in a discount for customer that was so high as to constitute an unreasonable burden on other ratepayers served by utility and thus was not unjust, unreasonable, or discriminatory, supporting approval of such contract; and
- PUC acted within discretion in declining to require a general cost-of-service study before approving contract.

ZONING & PLANNING - MASSACHUSETTS

Carroll v. Select Board of Norwell

Supreme Judicial Court of Massachusetts, Suffolk - January 5, 2024 - N.E.3d - 2024 WL 56172

Subdivision residents brought action against town select board, seeking mandamus relief so as to compel board to transfer land abutting subdivision to conservation commission.

On cross-motions for summary judgment, the Land Court Department granted summary judgment to board. Residents appealed and board cross-appealed.

After sua sponte transfer of case from Appeals Court, the Supreme Judicial Court held that:

- Land was held by town for specific purpose of providing affordable housing rather than as general corporate inventory and therefore could not be diverted to an inconsistent use, including use for conservation, without approval of board or officer having charge of land, and
- Residents' objections to board's statement of undisputed facts were insufficient to constitute a request for more discovery prior to summary judgment ruling.

PUBLIC RECORDS - OHIO

State ex rel. WTOL Television, L.L.C. v. Cedar Fair, L.P.

Supreme Court of Ohio - December 20, 2023 - N.E.3d - 2023 WL 8790609 - 2023-Ohio-4593

Broadcast news companies sought writ of mandamus to compel amusement park operator and police department that provided security for amusement park to produce records responsive to companies' public-records requests related to incident in which guest of amusement park was injured and to alleged sexual assaults at amusement park's employee housing.

The Supreme Court held that:

- Amusement park's police department was functional equivalent of public institution, and, thus, was required to respond to companies' requests under Public Records Act;
- Companies were entitled to writ of mandamus compelling amusement park operator and amusement park's police chief to product copies of reports of alleged sexual misconduct and reports regarding alleged incident with ride that injured guest;
- Companies were not entitled to writ of mandamus compelling production of reports from emergency medical services (EMS) personnel or related to EMS services regarding alleged incident of injured guest;
- Companies were entitled to an award of their court costs;
- Award of statutory damages to companies was not warranted; and
- Award of attorney fees to companies was not warranted.

Amusement park's police department was functional equivalent of public institution, and, thus, was required to respond to broadcast news companies' requests under Public Records Act; at time of requests, police department was serving as police department for employees and guests of amusement park, it did more than just provide security for amusement park, it enforced criminal laws, and it was made up of sworn, state-certified police officers who exercised plenary police power.

BANKRUPTCY - SOUTH CAROLINA

In re Jasper Pellets, LLC

United States Bankruptcy Court, D. South Carolina - December 15, 2023 - B.R. - 2023 WL 9062959

Successful bidder on Chapter 11 debtor's assets at auction brought adversary proceeding against debtor, asserting claims for breach of contract, violation of South Carolina Unfair Trade Practices

Act, fraud, negligent misrepresentation, fraud in the inducement, breach of contract accompanied by a fraudulent act, fraudulent concealment, unjust enrichment, and declaratory judgment. Case was converted to one under Chapter 7. Later, trustee filed motion seeking approval of settlement.

Debtor's main secured creditor objected.

The Bankruptcy Court held that:

- Proposed global settlement agreement was fair, equitable, and in best interest of estate, and therefore would be approved, and
- Settlement agreement did not require creditor's consent.

Proposed global settlement agreement of $655,000 paid to trustee was fair, equitable, and in best interest of estate, and therefore would be approved by Bankruptcy Court in Chapter 7 case converted from one under Chapter 11, in adversary proceeding brought by successful bidder on debtor's assets at auction asserting claims against debtor for, inter alia, breach of contract, violation of South Carolina Unfair Trade Practices Act, fraud, unjust enrichment, and declaratory judgment; trustee identified avoidable transfers totaling approximately $566,000 and commercial torts believed to be worth in excess of $1 million, whereas bidder asserted claims of over $43 million, and if settlement agreement was not approved, trustee would have to continue litigating factually complex issues with uncertainty as to any recovery for the estate and with no funds whatsoever to do so.

Creditor's security interest did not extend to escrowed good faith deposit in connection with asset purchase agreement between debtor and successful bidder in auction of debtor's assets, which creditor claimed was part of its collateral, and thus global settlement agreement between bidder and trustee in debtor's Chapter 7 case converted from one under Chapter 11, which ascribed no value to the asset purchase agreement, did not require creditor's consent; Bankruptcy Court never entered an order approving the sale with any liens of secured creditors to attach to the proceeds, and good faith deposit remained in escrow subject to creditor's claims that it was refundable to it and thus never vested to the bankruptcy estate.

BANKRUPTCY - TEXAS

Regions Bank v. Crawford Health Facilities Development Corporation

United States District Court, W.D. Texas, Austin Division - December 5, 2023 - Slip Copy - 2023 WL 9105659

Receiver filed a Motion for Order: (I) Approving Sale Procedures; (II) Authorizing Private Sale of Substantially All Assets of the Receivership Estate; (III) Waiving Certain Requirements of 28 U.S.C. § 2001(b); (IV) Setting a Hearing Date to Confirm a Private Sale; and (V) Approving Form and Manner of Notice (the "Motion").

The court held a hearing on the Motion on December 5, 2023.

Having conducted a hearing and having reviewed the Motion and the entire case file and having noted no other responses, objections, or other filings with respect to the Motion, the court issued and adopted the Report and Recommendation.

ENVIRONMENTAL - WASHINGTON

Advocates for a Cleaner Tacoma v. Puget Sound Clean Air Agency

Court of Appeals of Washington, Division 2 - December 26, 2023 - P.3d - 2023 WL 8889864

Objector sought review of Pollution Control Hearings Board's (PCHB) dismissal of claim that regional clean air agency's approval of permit for construction of a liquefied natural gas facility was issued ultra vires.

The Superior Court affirmed. Objector appealed.

The Court of Appeals held that permit approval, via agency control officer's delegation of authority to staff to approve the permit, was not an ultra vires act.

Regional clean air agency's approval of permit for construction of a liquefied natural gas facility, under which the agency's control officer sub-delegated authority to staff members to approve the permit, was not ultra vires, where control officer complied with agency's resolution granting him authorization to delegate the issuance of orders of approval, and such delegation was appropriate based on the volume of applications that the agency received, the expertise required, and the limited duties that were expected of board members.

POLITICAL SUBDIVISIONS - CALIFORNIA

Yalung v. State

Court of Appeal, Fifth District, California - December 21, 2023 - Cal.Rptr.3d - 2023 WL 8821363

Driver who was injured in car accident in which four of driver's children were injured seriously and one of her children was injured fatally brought action on behalf of herself, her injured children, and her deceased child's estate against individual who, while working as a provider of caretaking services under state's In-Home Supportive Services (IHSS) program, allegedly rear-ended driver's car after running a stop sign and against state, county, and state and county entities involved in administering IHSS program, alleging claims for wrongful death, negligence and breach of statutory duties, and survival, and asserting that government entities were liable as provider's employer or joint employer.

The Superior Court sustained demurrers of state and county without leave to amend. Driver appealed only the order sustaining state's demurrer.

The Court of Appeal held that state was not special employer of provider, who had been hired directly by recipient under the direct-hiring method for providing services under the IHSS program, and state thus was not vicariously liable for provider's actions.

State was not the special employer of provider who was employed under the In-Home Supportive Services (IHSS) program as a caretaker for an IHSS recipient, who had directly hired caretaker in a county whose public authority for administering the IHSS program used the direct-hiring method, and state thus was not vicariously liable for injuries to driver and her four children, and for fatal injuries to one of driver's children, that they sustained in car accident allegedly caused by caretaker's negligence and breach of statutory duties; state lacked power to supervise the details of caretaker's work, state did not select provider to work for IHSS recipient, and state's agent in

administering IHSS program, the public authority, was not provider's employer for purposes of vicarious liability.

NEGLIGENCE - IDAHO

Yellowstone Log Homes, LLC v. City of Rigby

Supreme Court of Idaho - December 20, 2023 - P.3d - 2023 WL 8792973

Real property owner brought action against city for negligence and negligence per se for city's failure to mark lateral sewer line when marking utilities for construction company, which later bored through the lateral sewer line which city failed to mark, causing damage to the property.

The Seventh Judicial District Court granted city's motion for summary judgment, but denied city's motion for summary judgment. Property owner appealed, and city-cross-appealed.

The Supreme Court held that:

- Property owner had standing under the Idaho Underground Facilities Damage Prevention Act to bring negligence per se claim;
- Genuine issue of material fact as to whether city located the underground facilities with "reasonable accuracy" or used "the best information available" precluded summary judgment on negligence per se claim;
- Property owner was a member of the class of persons the Underground Facilities Damage Prevention Act was intended to protect;
- Genuine issue of material fact as to whether city's alleged violation of the Act was the proximate cause of property owner's damages precluded summary judgment on negligence per se claim;
- City had a common law duty to property owner to act as a reasonable manager of its property under the circumstances when marking underground facilities; and
- Genuine issue of material fact as to whether city breached a duty owed to property owner precluded summary judgment for city on claim it had discretionary function immunity.

IMMUNITY - ILLINOIS

Alave v. City of Chicago

Supreme Court of Illinois - December 14, 2023 - N.E.3d - 2023 IL 128602 - 2023 WL 8633536

Bicyclist brought negligence action against city arising from his accident with pothole while he was riding his privately-owned bicycle through a crosswalk on roadway near a city-authorized bicycle rental station and a large bike rental sign.

The Circuit Court granted city's motion for involuntary dismissal. Bicyclist appealed. The Appellate Court reversed and remanded. City petitioned for leave to appeal, which was allowed. Holdings:

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

- Existence of nearby bike rental station was a factor for whether bicyclist was an intended roadway user to whom city would owe a duty of care; and
- Bicyclist was not an intended roadway user at site of accident.

Existence of city-authorized bicycle rental station in plaza adjoining a sidewalk that ran parallel to roadway, approximately 100 feet from site of bicyclist's accident with pothole while he was riding his privately-owned bicycle on right side of roadway through crosswalk, was a factor for determining whether bicyclist was an intended user of roadway at site of accident, for whom city would owe a duty of care under Local Governmental and Governmental Employees Tort Immunity Act to maintain roadway in reasonably safe condition.

Bicyclist was not an intended user of roadway at site of his accident with pothole while he was riding his privately-owned bicycle on right side of roadway through a crosswalk, and thus city did not city owe bicyclist a duty of care under Local Governmental and Governmental Employees Tort Immunity Act to maintain roadway in reasonably safe condition, even though a city-authorized bicycle rental station and a large sign advertising bike rentals were nearby; rental station and sign established only that city permitted bicycling on adjacent roadway, and there were no other no other affirmative physical manifestations, such as road signs or pavement markings, indicating that city intended for bicyclists to use roadway.

ZONING & PLANNING - MICHIGAN

Sakorafos v. Charter Township of Lyon

Court of Appeals of Michigan - November 21, 2023 - N.W.2d - 2023 WL 8101316

Neighbors brought action against city and veterinary clinic for nuisance, conspiracy, and deprivation of civil rights, alleging that operation of commercial dog kennel on clinic property violated city ordinances.

The Circuit Court granted city's and clinic's motions for summary disposition, and neighbors appealed.

The Court of Appeals held that:

- Neighbors were not required to show that their damages were singular or unique in order to have standing to bring nuisance per se claim, and
- Neighbors lacked ability to obtain writ of mandamus to compel township to enforce zoning ordinance.

Neighbors were not required to show that their damages from veterinary clinic's dog kennel were singular or unique in order to have standing to bring nuisance per se claim based on alleged violation of city ordinances, as the fact that other nearby residents also may have suffered ill effects from the dog kennel did not defeat their standing; instead, neighbors were only required to demonstrate special damages different from the injury suffered by others in the community generally, which was supported by their status as an adjoining property owner.

Neighbors lacked ability to obtain writ of mandamus to compel township to enforce zoning ordinance governing commercial kennels as applied to veterinary clinic and its variance, as township had discretion in the enforcement of its ordinances, and neighbors' ability to seek abatement of the nuisance per se created by the alleged zoning violation provided an equitable remedy to achieve enforcement of the ordinance.

REFERENDA - MISSOURI

Byrd v. State

Supreme Court of Missouri, en banc - December 19, 2023 - S.W.3d - 2023 WL 8790264

Objectors brought action against State for declaratory and injunctive relief, alleging that house bill, which had been passed by House of Representatives and Senate and signed into law and which related to political subdivisions, violated the single subject, clear title, and original purpose requirements of state constitution.

The Circuit Court sustained State's motion for judgment on pleadings. Objectors appealed.

The Supreme Court held that:

- Bill's inclusion of provisions regulating expenditure of state funds for housing or homelessness violated constitution's single subject requirement, and
- Non-germane provisions were not severable, and thus entire bill was required to be struck.

House bill, which had been passed by House of Representatives and Senate and signed into law, relating to political subdivisions violated constitution's single subject requirement by including provisions regulating the expenditure of state funds for housing or homelessness, even though such provisions would apply to political subdivisions receiving those funds; connection between political subdivisions and homelessness was remote at best, and provisions included portions that did not relate to political subdivisions at all, such as subsection providing certain immunity to private campground operators.

It was not clear beyond reasonable doubt that house bill relating to political subdivisions would have been passed by General Assembly without the portions of bill that, in violation of constitution's single subject requirement, were not germane to subject of political subdivisions, namely provisions regulating the expenditure of state funds for housing or homelessness, and therefore the non-germane provisions were not severable and entire bill was required to be struck; narrative title of bill had been changed in Senate after bill was passed by house, and provision at issue was added to bill by Senate Substitute.

EMINENT DOMAIN - NEW YORK

Bowers Development, LLC v. Oneida County Industrial Development Agency

Court of Appeals of New York - December 14, 2023 - N.E.3d - 2023 WL 8629207 - 2023 N.Y. Slip Op. 06406

Owner of certain real property that had been condemned by eminent domain by county industrial-development agency for use as a surface parking lot associated with hospital and healthcare facility petitioned to annul condemnation determination.

The Supreme Court, Appellate Division, granted petition. Agency appealed.

The Court of Appeals held that agency had rational basis for concluding that use of property was for a "commercial" purpose, and so had authority to condemn property.

County industrial-development agency had rational basis for concluding that use of certain real

property as surface parking lot associated with hospital and healthcare-facility project was for a "commercial" purpose, and so had authority to condemn property by eminent domain; as a general matter parking facility used by customers of a profit-making business generally had a "commercial" purpose, proposed use of this property did not serve any healthcare-related function, but facility instead functioned simply to satisfy need for parking created by medical office building and to provide public parking at night, although some paying tenants of medical office building provided healthcare services, building itself was an office building with space leased out to paying tenants, and even assuming some of its paying tenants could have qualified as "hospitals" or "health-related facilities," that would not have negated commercial nature of office building as a whole.

EMINENT DOMAIN - NORTH DAKOTA

Sargent County Water Resource District v. Beck Revocable Living Trust

Supreme Court of North Dakota - December 15, 2023 - N.W.2d - 2023 WL 8658361 - 2023 ND 230

County water resource district brought eminent domain action seeking to condemn landowners' property for a drainage project.

Following a bench trial, the District Court condemned property, denied landowners' motion for a new trial, but concluded that landowners' arguments were not foreclosed for failure to appeal water district's "Resolution of Necessity" or barred by res judicata or collateral estoppel. Landowners appealed, and water district cross-appealed.

The Supreme Court held that:

- Applying doctrine of res judicata to bar any further review would have been unjust;
- Landowners' arguments against eminent domain were not barred by collateral estoppel;
- Water district's board obligated costs for drainage project beyond maximum maintenance levy and authorized accumulation of a fund exceeding six-year maximum levy without landowner approval, in violation of statute governing maintenance of drainage projects; and
- Project did not satisfy additional cost limitations for public use under statute authorizing eminent domain for certain public uses.

Applying doctrine of res judicata to bar any further review of matters contained in water resource district's resolution of necessity related to drainage project would have been unjust in eminent domain proceeding seeking to condemn landowners' property, even though landowners failed to timely appeal resolution of necessity which barred judicial review; district court had noted in landowners' underlying declaratory judgment action that water district, being well aware of opposition to project and a request for a vote, considered and passed resolution of necessity without including it on agenda of a regularly scheduled meeting, then erroneously told landowners at the next meeting that time to appeal decision had already expired, and statement in resolution was misleading in that water district sought permanent and temporary easements over properties without including legal description of affected properties.

Landowners' arguments against eminent domain action brought by county water resource district seeking to condemn landowners' property for drainage project were not barred by collateral estoppel, notwithstanding landowners' prior action against water district, seeking declaratory and injunctive relief; landowners did not have a fair opportunity to be heard prior to eminent domain action given that final judgment by district court dismissing declaratory judgment action for lack of

appellate subject matter jurisdiction, which dismissal was affirmed by Supreme Court, was not on the merits.

County water resource district's board obligated costs for drainage project beyond the maximum maintenance levy and authorized the accumulation of a fund exceeding six-year maximum levy without landowner approval in violation of statute governing maintenance of drainage projects.

Assuming that drainage project qualified as "maintenance" within meaning of statute governing maintenance of drainage projects, project as approved required an unlawful accumulation of funds in excess of the maximum permissible levy and unlawfully obligated county water resource district for costs beyond the maximum maintenance levy under that section, and therefore project did not satisfy additional cost limitations for public use under statute authorizing eminent domain for certain public uses.

POLITICAL SUBDIVISIONS - OHIO

Meade v. Lorain County

United States District Court, N.D. Ohio, Eastern Division - December 15, 2023 - F.Supp.3d - 2023 WL 8656902

Terminated county employee brought action against county and supervisors, alleging termination violated Family and Medical Leave Act (FMLA), Title VII, and Ohio state law. County and supervisors moved for judgment on pleadings.

The District Court held that:

- Under Ohio law, county was not an "agency of…a political subdivision of a State," as would fall within definition of a "public agency" under FLSA and therefore constitute an "employer" subject to suit under FMLA;
- Term "the government of," as used in provision of FLSA defining a "public agency," as would constitute an "employer" subject to suit under the FMLA, to include "the government of a State or political subdivision thereof" applies to both the term "State" and the term "political subdivision thereof," as opposed to only applying to the term "State," and therefore a political subdivision itself is not a public agency under that provision;
- Under Ohio law, county was not the "government of a State or political subdivision thereof," as would fall within definition of a "public agency" under FLSA and therefore constitute an "employer" subject to suit under FMLA; and
- Court would decline to grant employee leave to amend pleadings.

BANKRUPTCY - PENNSYLVANIA

In re City of Chester

United States Bankruptcy Court, E.D. Pennsylvania - November 3, 2023 - B.R. - 2023 WL 7274750

Chapter 9 debtor-city brought adversary proceeding against creditors, holders of city-issued bonds, and indenture trustee, seeking turnover of revenues received by indenture trustee and to avoid security interests in revenues due to city.

Parties cross-moved for summary judgment.

The Bankruptcy Court held that:

- Trust indenture plainly required indenture trustee to turn over prepetition excess funds to debtor-city;
- Debtor-city's claim seeking turnover of prepetition excess funds accrued at earliest when amount held in sinking fund accounts exceeded amount due;
- Revenues payable to or to be received by debtor-city and pledged as collateral constituted payment intangible or account for purposes of perfection;
- Creditors' security interests in revenues pledged as collateral, as part of trust indenture, were properly perfected;
- Ordinance authorizing debtor-city to incur debt to issue bonds and grant security interest in certain revenues did not create statutory lien;
- Pledged revenues as part of trust indenture were collateral, and not "proceeds"; and
- Revenues payable to debtor-city from horse racing facility as a slot machine license operation fee were not "taxes."

Under Pennsylvania law, trust indenture plainly required the indenture trustee to turn over prepetition excess funds to Chapter 9 debtor-city, regardless that city did not initiate a request for the excess funds prior to petition date pursuant to course of performance whereby indenture trustee would typically contact city when excess funds were available and ask city to provide a direction letter specifying the account where the excess funds should be sent; indenture trust did not make the city's entitlement to the excess funds dependent upon the city following a certain procedure for obtaining the funds.

Chapter 9 debtor-city's claim against indenture trustee seeking turnover of prepetition excess funds accrued, for purposes of applicable four-year statute of limitations under Pennsylvania law for breach of contract claims, at the earliest when amount held in sinking fund accounts established by indenture trustee exceeded the amount due to pay principal and interest for bonds issued by city.

Under Article 9 of the Uniform Commercial Code (UCC), as adopted in Pennsylvania, revenues payable to or to be received by Chapter 9 debtor-city pledged as collateral as part of trust indenture executed in connection with bonds issued by city constituted a "payment intangible" or "account" for purposes of perfection, as the trust indenture gave the bond parties a security interest in a right to payment of a monetary obligation through certain date, and if the drafters of the trust indenture only meant to capture money actually received, they would have eliminated "to be" and simply defined the pledged revenues as amounts "received."

Under Article 9 of the Uniform Commercial Code (UCC), as adopted in Pennsylvania, revenues paid or payable to Chapter 9 debtor-city in connection with entity's operation of harness racing and casino facility, pledged as collateral as part of prepetition contribution agreement with county to assist city with financing the construction of a soccer stadium, constituted a "payment intangible" or "account" for purposes of perfection; nowhere did the contribution agreement limit county's security interest to solely revenues received, but rather, financing statement specifically described county's collateral as all of city's right, title and interest in and to host community payments under Pennsylvania Race Horse and Development Gaming Act.

Creditors' security interests in revenues pledged as collateral, as part of trust indenture executed in connection with bonds issued by Chapter 9 debtor-city, were properly perfected under Pennsylvania's Local Government Unit Debt Act, where financing statements provided name of the debtor, name of the secured party, and a description of the collateral.

Under Article 9 of the Uniform Commercial Code (UCC), as adopted in Pennsylvania, filing of financing statements was sufficient to perfect creditors' security interests in revenues payable to Chapter 9 debtor-city pledged as collateral as part of trust indenture executed in connection with bonds issued by city.

Ordinance authorizing Chapter 9 debtor-city to incur debt to issue bonds and grant security interest in certain revenues payable to city for benefit of indenture trustee did not create "statutory lien" within meaning of Bankruptcy Code, but rather, created "consensual lien"; although the ordinance governed aspects of the lien, it was entirely reliant on the underlying trust indenture and would have no operative force without it, and liens held by bond parties did not arise solely under the ordinance.

County, as creditor by virtue of prepetition contribution agreement to assist Chapter 9 debtor-city with financing the construction of a soccer stadium, held "consensual lien," and not "statutory lien" within meaning of Bankruptcy Code, in horse racing facility's revenues payable to city, even though ordinance specifically provided that city agreed to make contribution to county, because the ordinance indicated that it was built upon the contribution agreement, which was voluntary and consensual in nature and inherently contrary to the form of statutory liens.

Under exception to general rule that property which bankruptcy estate acquires postpetition is not subject to liens resulting from prepetition security agreements, if security agreement entered before commencement of bankruptcy case extends to proceeds, product, offspring or profits of original collateral, then security interest continues to apply to proceeds and so on, even when they are acquired by debtor or estate after bankruptcy case begins.

Revenues payable to Chapter 9 debtor-city and pledged as part of trust indenture executed in connection with bonds issued by city were collateral, and not "proceeds" within meaning of Article 9 of the Uniform Commercial Code (UCC), as adopted in Pennsylvania, and thus, statutory "proceeds" exception to general rule against the continued postpetition effect of prepetition security interests did not apply to the pledged revenues.

Even if revenues payable to Chapter 9 debtor-city and pledged as part of trust indenture executed in connection with bonds issued by city were considered "proceeds," within meaning of Article 9 of the Uniform Commercial Code (UCC), as adopted in Pennsylvania, those proceeds would be generated by postpetition acts of a third party and thus constitute proceeds of postpetition property, rather than prepetition property, making statutory "proceeds" exception to general rule against the continued postpetition effect of prepetition security interests inapplicable to the pledged revenues.

Revenues payable to Chapter 9 debtor-city from horse racing facility pursuant to Pennsylvania Gaming Act as a slot machine license operation fee were not "taxes" exempt from general rule against the continued postpetition effect of prepetition security interests; gaming entity's license was conditioned on payment of the fee, suggesting that the slot machine license operation fee was payment in exchange for a privilege not shared by others.

Table game revenues from Pennsylvania local share assessment payable or to be received by Chapter 9 debtor-city from horse racing facility were fees, and not "taxes" exempt from general rule against the continued postpetition effect of prepetition security interests; payment of local share assessment ultimately related to individual privilege only applicable to certain individual entities of holding a certificate to operate table games, and Pennsylvania distinguished local share assessment from table game taxes.

Revenues payable to or to be received by Chapter 9 debtor-city from horse racing facility pursuant to additional consideration agreement, pledged as collateral as part of trust indenture executed in

connection with bonds issued by city, were payments due under a contract, i.e., debts, and not "taxes" exempt from general rule against the continued postpetition effect of prepetition security interests.

EMINENT DOMAIN - FEDERAL

Barlow v. United States

United States Court of Appeals, Federal Circuit - November 22, 2023 - 86 F.4th 1347

In rails-to-trails case, owners of property abutting railroad line filed suit against United States, seeking compensation for alleged Fifth Amendment taking effected by Surface Transportation Board (STB) issuing notice of interim trail use (NITU) for railroad line, pursuant to National Trails System Act, thereby allowing railroad and Illinois Department of Natural Resources (DNR) to negotiate railbanking and interim trail use agreement for railroad line.

The Court of Federal Claims granted government summary judgment. Property owners appealed.

The Court of Appeals held that:

- Right-of-way agreements conveyed easements to railroad limited to railroad purposes;
- Deeds that included words "for railroad purposes" conveyed easements to railroad;
- Railroad at most held easements on property for which deeds were lost; and
- Owners held fee simple interests to centerline of property for which deeds were lost.

FEES - ILLINOIS

Habdab, LLC v. County of Lake

Appellate Court of Illinois, Second District - November 21, 2023 - N.E.3d - 2023 IL App (2d) 230006 - 2023 WL 8054100

Developer brought declaratory judgment action against county and village, seeking declaration that it was not obligated to pay highway improvement fees under intergovernmental agreement between county and villages as a condition of annexation.

The Circuit Court granted county's motion for summary judgment and denied developer's cross-motion for summary judgment. Developer appealed.

The Appellate Court held that:

- Highway improvement fees did not fall within statutory definition of "road improvement impact fees," and
- Unconstitutional conditions doctrine did not apply to render fees an unconstitutional taking.

Highway improvement fees, which were assessed as a condition to annexation under intergovernmental agreement between county and villages, did not constitute "road improvement impact fees" within meaning of the Road Improvement Impact Fee Law, in developer's declaratory judgment action against county and village, seeking declaration that it was not obligated to pay fees as a condition of annexation; Impact Fee Law defined "road improvement impact fees" as any charge or fee levied or imposed by a unit of local government as a condition to the issuance of a building permit or a certificate of occupancy in connection with a new development, and the agreement

provided that payment of highway improvement fees was a condition of annexation into one of the villages.

Essential nexus existed between highway improvement fees, which were assessed as a condition to annexation under intergovernmental agreement between county and villages, and a legitimate state interest, in determining whether unconstitutional conditions doctrine applied to render fees as an unconstitutional taking, in developer's declaratory judgment action against county and village, seeking declaration that it was not obligated to pay fees as a condition of annexation; nexus existed between preventing further traffic congestion and providing for road improvements to ease that congestion, and agreement provided that, as property developed, residents would benefit from highway improvements that ensured traffic was efficiently transported through the area, and provided for construction funding for such improvements.

There was a rough proportionality between highway improvement fees, which were assessed as a condition to annexation under intergovernmental agreement between county and villages, and the harm the county sought to remedy through fee assessment, and thus unconstitutional conditions doctrine did not apply to render fees as an unconstitutional taking, in developer's declaratory judgment action against county and village, seeking declaration that it was not obligated to pay fees as a condition of annexation; agreement's purpose was to establish construction funding for future highway improvements, which were intended to address existing and future traffic demands, and county agreed to design and construct road improvements in exchange for a portion of construction costs being reimbursed from fees collected from developers.

EDUCATION - MONTANA

Stand Up Montana v. Missoula County Public Schools

Supreme Court of Montana - December 12, 2023 - P.3d - 2023 WL 8593762 - 2023 MT 240

Parents of public school students brought action alleging that school districts' mandatory masking policies for students, staff, and visitors to schools during COVID-19 pandemic violated substantive due process.

The District Court of the Fourth Judicial District granted school districts' motion in limine and then granted summary judgment for school districts. Parents appealed.

The Supreme Court held that:

- Rational basis review rather than strict scrutiny applied for due process claim;
- Mask policies did not violate due process; and
- Expert testimony on physical effects of face mask usage on children was irrelevant to due process analysis.

Under rational basis review, school districts' mandatory masking policies for students, staff, and visitors to public schools during COVID-19 pandemic did not need to be logically consistent in every respect to be consistent with substantive due process, and they would be upheld unless they were unreasonable or arbitrary.

School districts' mandatory masking policies for students, staff, and visitors to public schools during COVID-19 pandemic did not infringe on students' and parents' fundamental rights of privacy and individual dignity and parents' rights to control the care and custody of their children, and therefore rational basis review rather than strict scrutiny applied to parents' substantive due process

challenge to masking policies.

School districts' mandatory masking policies for students, staff, and visitors to public schools during COVID-19 pandemic did not violate substantive due process, where school districts, prior to adoption of policies, considered information and recommendations of reputable public and private health care providers and agencies, including the Centers for Disease Control (CDC), which all recommended universal masking.

Proffered expert testimony on physical effects of face mask usage on children, including tooth decay, halitosis, and speech impediments, was irrelevant in action raising a substantive due process challenge to school districts' mandatory masking policies for students, staff, and visitors to public schools during COVID-19 pandemic; testimony would not have aided a jury in determining whether mask policies were rationally related to stemming the spread of COVID-19.

INSURANCE - NEW JERSEY

City of Whittier v. Everest National Insurance Company

Court of Appeal, Second District, Division 1, California - December 6, 2023 - Cal.Rptr.3d - 2023 WL 8441663

City brought declaratory judgment action against its excess liability insurers to recover for breach of contract by denying coverage for settlement of police officers' suit alleging retaliation for refusing to participate in and/or reporting unlawful citation and arrest quota.

The Superior Court adopted referee's statement of decision granting insurers' motions for summary disposition and denying city's motion for summary adjudication. City appealed.

The Court of Appeal held, as a matter of first impression that coverage was not barred by statute providing that insurer was not liable for loss caused by wilful act of insured.

Police officers' complaint against city for retaliating against officers for refusing to participate in allegedly unlawful citation and arrest quotas alleged non-willful bases for liability under statute that prohibited retaliation against employee for refusing to participate in activity that would result in violation of law, and, thus, coverage under city's excess liability policy for settlement of officers' claims was not barred by statute providing that insurer was not liable for loss caused by wilful act of insured; alleged acts of "shift averaging" and of setting performance benchmarks by comparing officers' arrest counts were not clearly illegal such that city reasonably could not have believed otherwise.

POLITICAL SUBDIVISIONS - NEW YORK

Drake v. Village of Lima

Supreme Court, Appellate Division, Fourth Department, New York - November 17, 2023 - N.Y.S.3d - 2023 WL 7982101 - 2023 N.Y. Slip Op. 05833

Village residents brought action against village and village department of public works seeking damages and injunctive relief arising from defendants' alleged failure to properly maintain and operate sewer main, causing sewage to backflow into residents' home, asserting causes of action for, inter alia, negligence, trespass, public nuisance, private nuisance, and inverse condemnation or de

facto taking.

The Supreme Court, Livingston County, granted in part and denied in part defendants' motion to dismiss. Parties appealed.

The Supreme Court, Appellate Division, held that:

- Village and village department of public works failed to establish that department was administrative unit of village that lacked capacity to be sued;
- Residents' notice of claim included information sufficient to enable defendants to investigate claim for damages for personal injury to deceased resident;
- Residents failed to state trespass claim;
- Residents' private nuisance cause of action was duplicative of negligence claim;
- Residents failed to state claim for inverse condemnation or de facto taking;
- Residents failed to state claim for public nuisance; and
- Residents failed to state claim for injunctive relief.

IMMUNITY - NORTH DAKOTA

Dundon v. Kirchmeier

United States Court of Appeals, Eighth Circuit - November 3, 2023 - 85 F.4th 1250

Protestors, who were allegedly injured by police officers' use of force to disperse crowd while they were protesting construction of oil pipeline, brought § 1983 action alleging claims against individual officers for using excessive force in violation of their Fourth and Fourteenth Amendment rights, *Monell* claim against municipalities alleging unconstitutional policies, and claim against police chief and county sheriffs for supervisory liability based on deliberate indifference for actions of officers.

The United States District Court for the District of North Dakota granted summary judgment in favor of the defendants. Protestors appealed.

The Court of Appeals held that:

- It was not clearly established that officers' use of force designed to disperse protesters violated constitutional right under Fourth Amendment, and thus, officers were entitled to qualified immunity;
- Municipalities' use-of-force policies were facially lawful, and thus, protesters were required to show that failures to adopt adequate safeguards were product of deliberate indifference to establish *Monell* liability;
- Municipalities were not subject to *Monell* liability, given lack of clearly established right; and
- Law enforcement chiefs were not subject to supervisory liability, given lack of clearly established right.

It was not clearly established that police officers' use of force designed to disperse a crowd constituted a seizure under the Fourth Amendment, and thus officers who deployed water, tear gas, rubber bullets, and bean bags to disperse a crowd at protest over oil pipeline were entitled to qualified immunity from excessive-force claims in § 1983 action by protesters who were allegedly injured by the officers' use of force; one decision from another Court of Appeals fell short of robust consensus of authority clearly establishing use of force to disperse was seizure under Fourth Amendment, and subsequent Eighth Circuit precedent concluded that law was not clearly established on relevant point.

BALLOT INITIATIVE - OREGON

Ady v. Rosenblum

Supreme Court of Oregon - December 7, 2023 - P.3d - 371 Or. 702 - 2023 WL 8467527

Petitioners challenged ballot title including captions and summary for initiative petition to establish a program to provide state funding to certain families who incur qualified expenses for educating their children outside of the public school system.

The Supreme Court held that:

- Reference to religious schools was not impermissibly misleading;
- Funding of religious schools would have been a significant change to existing law, thus warranting reference to funding of religious schools as a major effect;
- Reference to income eligibility did not fail to adequately describe how funds from initiative petition's Education Savings Account Program would be limited to income-eligible students;
- Decision to focus on major effects did not render ballot title noncompliant with statute requiring that a caption identify all major effects to the limit of the available words;
- Statute requiring that "yes" result statement in ballot measure be a simple and understandable statement of 25 words or less that describes the result if proposed measure is approved did not require "yes" result statement to expressly make overly specific statement that funds from Education Savings Account Program were parent-directed for the student's benefit;
- Statute requiring that the "yes" result statement in a ballot measure be a simple and understandable statement of 25 words or less that describes the result if the proposed measure is approved did not require that "yes" result statement include "qualified expenses" in quotation marks; and
- Express statement that public funding of religious schools was prohibited by Oregon Constitution would have risked confusing voters.

PUBLIC UTILITIES - CALIFORNIA

Villarroel v. Recology, Inc.

Court of Appeal, First District, Division 3, California - December 1, 2023 - Cal.Rptr.3d - 2023 WL 8291665

Customers brought putative class action against refuse collection company for violations of Unfair Competition Law (UCL) and Consumers Legal Remedies Act (CLRA), intentional and negligent misrepresentation, fraudulent concealment, breach of contract, and other claims, seeking restitution, injunctive relief, and compensatory and punitive damages based on allegations that company bribed city official to facilitate approval of its application for increased refuse collection rates.

Company demurred, and trial court sustained demurrer in part and overruled it in part. Customers filed amended complaint, and company again demurred. The Superior Court sustained demurrer without leave to amend, finding claims were precluded by filed rate doctrine. Customers appealed.

The Court of Appeal held that:

- Filed rate doctrine did not preclude claims for injunctive relief;
- Concerns of nondiscrimination did not warrant applying filed rate doctrine to preclude claims for

restitution;
- Concerns of nonjusticiability did not warrant applying filed rate doctrine to preclude claims for restitution; and
- Doctrine of res judicata did not preclude customers' claims based on prior judgment in law enforcement action.

PUBLIC UTILITIES - FEDERAL

PJM Power Providers Group v. Federal Energy Regulatory Commission

United States Court of Appeals, Third Circuit - December 1, 2023 - F.4th - 2023 WL 8291307

Electricity generators, nonprofit associations representing electricity generators, Pennsylvania Public Utility Commission, and Public Utilities Commission of Ohio petitioned for review, under Federal Power Act (FPA), of Federal Energy Regulatory Commission's (FERC) order approving electricity tariff, filed by regional transmission operator (RTO), which took effect by operation of law after FERC commissioners deadlocked two-to-two and failed to issue order accepting or denying change in tariff within 60 days.

The Court of Appeals held that:

- Petitioners had associational standing to challenge FERC's order;
- FERC's constructive action by operation of law was reviewable under same deferential standards of FPA and Administrative Procedure Act (APA) as for actual action;
- Judicial review encompassed commissioners' mandatory statements explaining their reasons for approving or denying tariff; and
- FERC's rationale for approving tariff was neither arbitrary nor capricious and was supported by substantial evidence.

Electricity generators had associational standing to seek review, under FPA, of Federal Energy Regulatory Commission's (FERC) order approving regional transmission operator's (RTO) tariff that took effect by operation of law, even though generators did not articulate any injuries in their opening briefs, since joint appendix incorporated records from generators' protest before FERC that demonstrated their members suffered economic losses from new tariff that became effective by operation of law due to FERC commissioners deadlocking and failing to issue order accepting or denying change within 60 days, and affidavit attached to one generator's reply brief elaborated on those harms, so generators articulated redressable concrete and particularized injury traceable to FERC approving tariff.

Pennsylvania Public Utility Commission and Public Utilities Commission of Ohio had associational standing to seek review, under FPA, of Federal Energy Regulatory Commission's (FERC) order approving regional transmission operator's (RTO) new tariff that took effect by operation of law due to FERC commissioners deadlocking and failing to issue order accepting or denying change within 60 days, since state entities established cognizable injury by demonstrating they represented states' interests in protecting their citizens and electric ratepayers in traditional government field of utility regulation, their injury was traceable to FERC's approval of tariff by operation of law, and their injury was redressable because vacating or rescinding order would reinstate prior tariff.

Federal Energy Regulatory Commission's (FERC) order accepting electricity tariff that took effect by operation of law, after FERC commissioners deadlocked two-to-two and failed to issue order accepting or denying change in tariff within 60 days, was reviewable under same deferential

substantial evidence standards set forth in FPA and Administrative Procedure Act (APA) for FERC's orders that took effect by FERC's actual action rather than constructive action by operation of law, and thus, Court of Appeals was not required to review de novo whether new tariff was just and reasonable as predicate to deciding whether FERC's discretion to approve was properly exercised, since FPA and APA prohibited court from substituting its judgment for that of FERC.

Judicial review of Federal Energy Regulatory Commission's (FERC) order accepting electricity tariff that took effect by operation of law, under FPA, after commissioners deadlocked two-to-two and failed to issue order accepting or denying change in tariff within 60 days, encompassed entire record, including commissioners' statements explaining their reasoning; commissioner's statements did more than record each individual rationale for affirming or rejecting rate filing, as they played integral role in judicial review by collectively illuminating FERC's reasons for inaction construed as affirmative order, so thorough consideration of entire record was required to ensure commissioners who did not find tariff unlawful engaged in decisionmaking that was reasoned, principled, and based on record.

FPA's provision, stating that if Federal Energy Regulatory Commission (FERC) permitted 60-day period to expire without issuing order accepting or denying change in rates filed by public utilities because commissioners were divided two against two as to lawfulness of change or if FERC lacked quorum, then failure to issue order accepting or denying change "shall be" considered to be order issued by FERC accepting that change, did not contradict FERC's enabling statute, stating that FERC's actions "shall be" determined by majority vote of members present, since FPA provision concerned only how agency inaction should be construed for limited purposes of rehearing and review but did not illuminate what constituted agency action per se.

Even if Federal Energy Regulatory Commission's (FERC) enabling statute, stating that FERC's actions "shall be" determined by majority vote of members present, were contradicted by FPA's provision, stating that if FERC permitted 60-day period to expire without issuing order accepting or denying change in rates filed by public utilities because commissioners were divided two against two as to lawfulness of change or if FERC lacked quorum, then failure to issue order accepting or denying change "shall be" considered to be order issued by FERC accepting that change, specific FPA's terms prevailed over general terms of enabling statute, as Congress identified narrow circumstances in FPA under which to construe FERC's inaction, in particular way, for specific purpose.

Federal Energy Regulatory Commission's (FERC) rationale set forth in joint statement by two commissioners, construing FERC's deadlocked vote by articulating their reasons for approving as just and reasonable regional transmission operator's (RTO) new electricity tariff that took effect by operation of law, under FPA, was neither arbitrary nor capricious and was supported by substantial evidence, including that new tariff permissibly reflected shift away from regime embraced in prior tariff, to address concern that some market participants might have incentive to depress market clearing prices by offering supply at less than competitive level, and commissioners determined that investors' reliance on prior tariff did not tilt balance against those policy concerns.

EMINENT DOMAIN - FEDERAL

Barlow v. United States

United States Court of Appeals, Federal Circuit - November 22, 2023 - F.4th - 2023 WL 8102421

In rails-to-trails case, owners of property abutting railroad line filed suit against United States, seeking compensation for alleged Fifth Amendment taking effected by Surface Transportation Board (STB) issuing notice of interim trail use (NITU) for railroad line, pursuant to National Trails System Act, thereby allowing railroad and Illinois Department of Natural Resources (DNR) to negotiate railbanking and interim trail use agreement for railroad line.

The Court of Federal Claims granted government summary judgment. Property owners appealed.

The Court of Appeals held that:

- Right-of-way agreements conveyed easements to railroad limited to railroad purposes;
- Deeds that included words "for railroad purposes" conveyed easements to railroad;
- Railroad at most held easements on property for which deeds were lost; and
- Owners held fee simple interests to centerline of property for which deeds were lost.

Under Illinois law, right-of-way agreements conveyed easements to railroad, rather than fee simple estates, thus supporting takings claims by owners of parcels abutting railroad line converted to trail use, pursuant to National Trails System Act; right-of-way agreements rebutted statutory presumption that fee simple estate was conveyed to railroad, by expressly conveying "RIGHT OF WAY" as object of grant in granting clause, agreements were titled "RIGHT OF WAY" and granted right of way for railway "over or across" and "on or across" parcels, consistent with intent to convey easement, and agreements promised to "make all proper and necessary deeds to convey in fee simple to said Company, said RIGHT OF WAY," meaning railroad acquired a fee in the easement or right-of-way.

Under Illinois law, deeds that included words "for railroad purposes" conveyed easements to railroad, rather than fee simple estates, in property conveyed for railroad line, thus supporting takings claims by owners of parcels abutting railroad line that was converted to trail use, pursuant to National Trails System Act, since deeds rebutted statutory presumption, under Illinois Conveyances Act, that fee simple estate was conveyed to railroad, by language in granting clause of deeds that restricted right of conveyance to lesser estate, in other words, "for railroad purposes."

Under Illinois law, owners of property abutting railroad line established that written instruments conveying property to railroad for railroad line, if such instruments ever existed, were lost or destroyed, thus shifting burden to government to establish contents of those instruments in defending against owners' claims seeking just compensation for alleged taking effected by Surface Transportation Board (STB) issuing notice of interim trail use (NITU) for railroad line, pursuant to National Trails System Act, since owners produced evidence of diligent search, including valuation schedules, written requests, and subpoenas to acquire documents related to railroad's acquisition of use rights, but owners were unable to locate conveyance instruments.

Under Illinois law, government failed to demonstrate, with clear and convincing evidence, content of lost or destroyed deeds conveying property to railroad for railroad line, and thus, deeds were presumed to be void, in evaluating property owners' claims seeking just compensation for alleged taking of their property abutting railroad line effected by Surface Transportation Board (STB) issuing notice of interim trail use (NITU) for railroad line, pursuant to National Trails System Act, even though government pointed to valuation schedules in attempt to establish that specific instruments existed as to conveyance of property for railroad line, since valuation schedules did not specify interests acquired by railroad and instead merely noted type of instrument as contract or deed memo.

In Illinois, railroad could have at most obtained prescriptive easements on property conveyed to

railroad for railroad line, pursuant to Illinois Constitution, providing that fee of land taken for railroad tracks, without consent of owners, was required to remain in such owners, subject to use for which it was taken, thus supporting takings claims by owners of property abutting railroad line after Surface Transportation Board (STB) issued notice of interim trail use (NITU) for railroad line, pursuant to National Trails System Act, since there were no valid conveyance instruments expressly conveying property to railroad, as lost or destroyed deeds were presumed to be void due to government's failure to establish their contents.

Under Illinois law, owners of property abutting railroad line held fee simple interests to centerline of railroad corridor, thus supporting their claims seeking just compensation for alleged taking of their property effected by Surface Transportation Board (STB) issuing notice of interim trail use (NITU) for railroad line, pursuant to National Trails System Act, since presumption that owners had fee simple interests to centerline of railroad corridor was unrebutted because railroad could at most obtain easements, not fees, due to voided lost instruments of conveyance.

PUBLIC RECORDS - FLORIDA

City of Tallahassee v. Florida Police Benevolent Association, Inc.

Supreme Court of Florida - November 30, 2023 - So.3d - 2023 WL 8264181

Two city police officers who fatally shot suspects threatening them with deadly force brought action, along with their union, against city, seeking declaratory judgment, writ of mandamus, and injunctive relief in connection with city's intent to publicly disclose officers' identities at media's request.

Various media organizations intervened, asserting that city police department had failed to respond to their request for public records identifying the two officers.

Following a hearing, the Circuit Court denied the officers' and the union's requests for relief. Union appealed. The First District Court of Appeal reversed. City and intervenors appealed.

The Supreme Court held that:

- Victim confidentiality provision of Florida Constitution does not guarantee a generalized right of anonymity to crime victims, and
- Victim confidentiality provision of Florida Constitution did not preclude city from disclosing officers' names and identities to media.

Victim confidentiality provision of Florida Constitution does not guarantee to a crime victim the categorical right to withhold his or her name from disclosure or a generalized right of anonymity.

Victim confidentiality provision of Florida Constitution did not preclude city from disclosing to media names and identities of two city police officers who had fatally shot suspects who had threatened officers with deadly force.

MUNICIPAL GOVERNANCE - LOUISIANA

Caldwell v. City of Shreveport

Supreme Court of Louisiana - November 17, 2023 - So.3d - 2023 WL 7983824 - 2023-00182 (La. 11/17/23)

City marshal petitioned for writ of mandamus or, in alternative for damages, based on claim that city had violated its statutory obligations to fund office of marshal for more than ten years.

Following bench trial, District Court issued judgment awarding marshal $1,527,371.58. Marshal appealed, and the Court of Appeal vacated in part and rendered judgment increasing award to marshal to $4,587,572.85. City petitioned for writ of certiorari.

The Supreme Court held that:

- City marshal had no cause of action against city to retroactively recover expenses accrued by marshal's office over period of years, and
- City's statutory obligation to fund office of city marshal was limited to physical office of marshal and its maintenance and expenses, which could be defrayed under statute that created special account for city marshal funded by revenues generated by costs assessed in city court criminal matters.

EMINENT DOMAIN. - MISSISSIPPI

United States Upon Relation of Tennessee Valley Authority v. Easements and Rights-of-Way Over Land in DeSoto County, Mississippi

United States District Court, N.D. Mississippi, Oxford Division - November 9, 2023 - F.Supp.3d - 2023 WL 7412938

United States, upon relation and for use of Tennessee Valley Authority (TVA), filed condemnation action to acquire permanent easements and rights-of-way across parcels of owner's golf course property, in order for TVA to build and maintain electric power transmission line project.

Government moved to exclude testimony by owner's retained expert offering his appraisal of value of property rights in order to determine just compensation.

The District Court held that:

- Expert's methodology for determining just compensation was not reliable;
- Expert's appraisal methodology violated unit rule;
- Expert improperly determined highest and best use of easement area was residential;
- Expert improperly valued taking of easement area as fee take;
- Expert improperly opined that owner should be compensated for frustration-of-purposes damages;
- Expert's calculation of cost-to-cure damages was improper; and
- Expert's ipse dixit opinion of incurable damages to remaining property was unsupported.

MUNICIPAL GOVERNANCE - NEW YORK

Rochester Police Locust Club, Inc. v. City of Rochester

Court of Appeals of New York - November 20, 2023 - N.E.3d - 2023 WL 8007121 - 2023 N.Y. Slip Op. 05959

Police union, its president, and an individual officer commenced hybrid article 78 proceeding and declaratory-judgment action against, among others, the city, the mayor, and the city council, alleging that newly enacted local law illegally transferred virtually all authority over police discipline

to a police accountability board (PAB).

The Supreme Court determined that portions of the local law were invalid and unenforceable. City council appealed. The Supreme Court, Appellate Division, affirmed as modified.

The Court of Appeals held that:

- City's repeal of its charter's provision that granted the commissioner of public safety, among other things, cognizance, jurisdiction, supervision and control of the police bureau, including the officers and members thereof, meant that, in the absence of a collective-bargaining agreement permitting it, city could not enact a local law transferring virtually all authority over police discipline to a PAB; and
- Even if that charter provision had not been repealed, the provision would not have permitted the challenged local law.

ZONING & PLANNING - VIRGINIA

Calway v. City of Chesapeake

Court of Appeals of Virginia, Norfolk - November 28, 2023 - S.E.2d - 2023 WL 8192080

In zoning enforcement proceeding, the City of Chesapeake General District Court entered judgment in favor of property owner and dismissed action.

City appealed. The Circuit Court entered judgment in favor of city. Owner appealed.

The Court of Appeals held that:

- As a matter of first impression, notice of zoning violation was insufficient to comply with statutory requirement that such a notice, to be valid, include a statement informing recipient "that the decision shall be final and unappealable if not appealed within 30 days";
- Failure to comply with statutory notice requirements renders a zoning enforcement action voidable; and
- Defective notice was not rendered harmless by city's inclusion of a full notice of appeal rights in subsequent determination letter.

Notice of zoning violation sent to property owner arising from unpermitted car port was insufficient to comply with statutory requirement that such a notice, to be valid, include a statement informing recipient "that the decision shall be final and unappealable if not appealed within 30 days," where notice stated that zoning decision could be appealed to zoning board of appeals within 30 days, that appeal would cost $175, and that further information could be obtained on city's website, but notice did not include any explicit language about the finality of a zoning determination if it was not appealed.

City's defective notice to property owner of alleged zoning violation due to unpermitted car port, which notice failed to contain necessary information about the finality of a zoning determination if it was not appealed, was not rendered harmless by city's inclusion of a full notice of appeal rights in subsequent determination letter, where determination letter did not include required next steps, such as correcting the violation by a specified date, or the impending risk of enforcement action if the carport was not removed, but rather simply pointed back to original defective notice.

PUBLIC CONTRACTS - WASHINGTON

Alexandria Real Estate Equities, Inc. v. University of Washington

Court of Appeals of Washington, Division 2 - December 5, 2023 - P.3d - 2023 WL 8401868

Developer, as taxpayer and disappointed bidder on real estate development contract with public university, brought action against university, contending university lacked statutory authority to enter into transaction with successful bidder and that university failed to use competitive bidding procedures required under public works law.

University moved for summary judgment, and during pendency of motion, developer filed amended complaint adding claim that university's developer selection process was arbitrary and capricious.

The Superior Court granted summary judgment on first two claims, and following bench trial on third claim, entered judgment in favor of university, finding developer lacked standing and university did not act arbitrarily and capriciously. Developer appealed.

The Court of Appeals held that:

- University had statutory authority to enter into ground lease transactions for non-enumerated type of campus building;
- University was not required to competitively bid project under statute that would apply if it incurred at least $90,000 in costs;
- Developer failed to establish contracts at issue were never executed, for purposes of disappointed-bidder standing; and
- Damages developer allegedly incurred solely as disappointed bidder did not constitute special injury supporting taxpayer standing.

BALLOT INITIATIVE - WASHINGTON

Jewels Helping Hands v. Hansen

Court of Appeals of Washington, Division 3 - December 7, 2023 - P.3d - 2023 WL 8462609

Advocates for unhoused persons brought action against local voter, city, and county seeking declaratory and injunctive relief against local initiative placed on general election ballot that sought to expand city ordinance list of locations in city where camping was banned regardless of whether shelter space was available, on grounds that initiative exceeded scope of local initiative power.

The Superior Court dismissed the complaint. Advocates appealed and asked for an emergency injunction prohibiting the initiative from appearing on the ballot. After Court of Appeals commissioner granted the motion, the emergency injunction was lifted and appeal was set for accelerated review.

The Court of Appeals held that:

- Initiative did not improperly seek to exercise power reserved solely to city council;
- Initiative did not conflict with controlling state law; and
- Initiative was legislative, not administrative in character.

Scope of local initiative that sought to expand city ordinance list of locations in city where camping was banned regardless of whether shelter space was available applied only to public property, for

purposes of determining whether initiative sought to exercise powers delegated exclusively to city council or was an appropriate subject for electorate's involvement in subject matter challenge brought by advocates for unhoused persons; purpose of municipal code to which initiative would add was to regulate control and obstruction of public rights-of-way in the city, and initiative limited application to city-owned property.

Local initiative that sought to expand city ordinance list of locations in city where camping was banned regardless of whether shelter space was available sought to regulate those who used city property regularly, and not the property owner or holder, and therefore, was not a zoning ordinance, for purposes of determining whether initiative sought to exercise powers delegated exclusively to city council or was an appropriate subject for electorate's involvement in subject matter challenge brought by advocates for unhoused persons; initiative did not impose any penalties on any owner or holder of property who ran afoul of its provisions, but rather, the only people who could suffer penalties were those whom the law would characterize as guests or trespassers.

Local initiative that sought to expand city ordinance list of locations in city where camping was banned regardless of whether shelter space was available fell within city's general police powers, and as such, did not improperly seek to exercise power reserved solely to city council, for purposes of subject matter challenge brought by advocates for unhoused persons, because initiative addressed public safety concerns regarding camping and storage of personal property in public areas.

Local initiative that sought to expand city ordinance list of locations in city where camping was banned regardless of whether shelter space was available did not conflict with controlling state law on homeless response planning, as the state law did not say anything about what cities may or may not do about individuals who were currently unhoused and even if initiative overlapped with section of the state law that required each county's homeless housing task force to develop a five-year homelessness housing plan, the law did not require cities or their legislative authority to implement the county task force guidelines.

Local initiative that sought to expand city ordinance list of locations in city where camping was banned regardless of whether shelter space was available qualified as legislative, as opposed to an administrative matter falling outside scope of local initiative power, because it was permanent, not temporary, and applied generally throughout the city, not just to specific parcels of land.

PREEMPITON - WEST VIRGINIA

SWN Production Company, LLC v. City of Weirton

West Virginia Intermediate Court of Appeals - November 1, 2023 - S.E.2d - 2023 WL 7178284

Natural gas exploration and production company filed petition for writ of certiorari seeking review of city board of zoning appeals' denial of its application for conditional use permit to operate a drilling site within city, and separately filed complaint seeking declaration that West Virginia Oil and Gas Act or Natural Gas Horizontal Well Control Act preempted city zoning ordinances that regulated location of oil and gas drilling sites.

After the two matters were consolidated, the Circuit Court entered order dismissing the preemption claim. Company appealed.

The Intermediate Court of Appeals held that:

- Appeal was not rendered moot by city's repeal of ordinance;
- Ordinances were not expressly preempted;
- Repealed ordinance was subject to implied preemption; and
- Horizontal Well Act preempted city's drilling permit approval scheme under ordinance that regulated location of oil and gas drilling sites.

City's repeal of development ordinance that increased drilling site setback from 200 feet to 2,500 feet from any residential, church, or school use and removed oil and gas extraction as permitted conditional use anywhere in city except industrial-zoned districts did not moot natural gas exploration and production company's appeal of circuit court's dismissal of its claim that the ordinance and the previous development ordinance were preempted by the Oil and Gas Act or the Horizontal Well Act, even though the repealed ordinance appeared to have eliminated the primary setback requirement at issue in the case, where there were still additional steps and regulatory requirements under re-enacted previous development ordinance before company could proceed with drilling.

City zoning ordinances that regulated site location for oil and gas development were not expressly preempted by Oil and Gas Act or Horizontal Well Act, where there was no provision in Land Use Planning Act, which gave municipalities ordinances authority to enact zoning ordinances, that exempted oil and gas development from zoning laws, while it did contain express preemptions for other uses, such as group residential facilities and essential utilities and equipment.

Under repealed city zoning ordinance regulating oil and gas development, there was direct conflict with Horizontal Well Act and thus, ordinance was subject to implied preemption, where ordinance's and state statute's setback requirements could not be reconciled, as ordinance imposed setback requirement on drilling sites that was 2,500 feet, while the state statute only required setback requirement of 625 feet.

City's drilling permit approval scheme under zoning ordinance which regulated location of oil and gas drilling sites could not be reconciled with language of state's Horizontal Well Act, which vested West Virginia Department of Environmental Protection (WVDEP) with sole and exclusive authority to regulate permitting and location of horizontal gas wells, and thus, conflict preemption applied to city's zoning approval scheme, so that city could not hinder natural gas exploration and production company's ability to begin drilling after WVDEP approved a permit under state's permitting program.

BONDS - ARIZONA

UMB Bank NA v. Harvest Gold Silica Incorporated

United States District Court, D. Arizona - November 16, 2023 - Slip Copy - 2023 WL 7924178

Indenture Trustee moved for the appointment of a receiver following the default and apparent failure of a facility that remediated mine solid waste into silica-based products, which had been financed with $22M of revenue bonds.

The District Court approved Indenture Trustee's petition for appointment of a receiver, finding that the balance of harms justified the appointment.

“The sheer disparity between money received and income, coupled with the lack of any payments and reporting transparency gives rise to at least an inference of poor management.”

“The proposed receiver has stated he has no intention of liquidating the property, but instead intends to ‘assess the site, determine the highest and best use for the collateral, stop any waste, and work diligently to identify a plan to maximize the value of the collateral for the benefit of the Bondholders and Trust Estate.'”

“Thus far, UMB has been unable to obtain payments on the bonds and is unable to ascertain whether the collateral is being wasted. Appointing a receiver to oversee the use of the collateral and ensure it is put to the most valuable use will serve UMB’s interests.”

PUBLIC UTILITIES - CALIFORNIA

Gantner v. PG&E Corporation

Supreme Court of California - November 20, 2023 - P.3d - 2023 WL 8010215

Electric utility customer brought putative class action against investor-owned utility, in its chapter 11 case, seeking damages for alleged losses following series of emergency public safety power shutoffs (PSPS) to mitigate threat of wildfires, based on allegation that PSPS were necessitated by utility’s negligent maintenance of power grid and equipment.

The United States Bankruptcy Court for Northern District of California granted utility’s motion to dismiss, without leave to amend, and customer appealed. The United States District Court for the Northern District of California affirmed, and customer appealed. The Court of Appeals affirmed and certified question.

The Supreme Court held that customer’s action against utility for damages resulting from PSPS events was preempted under statute depriving superior courts of jurisdiction to review orders of Public Utilities Commission (PUC) or interfere with PUC’s supervisory and regulatory obligations.

Electric utility customer’s putative class action against utility for damages, based on allegations that series of public safety power shutoffs (PSPS) to reduce risk of wildfires were necessitated by utility’s negligence in maintaining power grid and equipment over period of decades, and that PSPS events resulted in loss of habitability of customers’ dwellings, loss of food items in refrigerators, and other losses was preempted by statute depriving superior courts of jurisdiction to review orders of Public Utilities Commission’s (PUC) or interfere with PUC’s official obligations, where PUC had promulgated formal guidelines governing utility’s authority with respect to PSPS in emergency situations, consistent with statutory requirement for annual wildfire mitigation plans, PUC had approved utility’s PSPS plan, suit would interfere with PUC’s supervisory and regulatory authority over PSPS implementation and post-hoc review of PSPS events, and alleged losses were direct result of PSPS, and not any violation of PUC guidelines.

LIABILITY - IDAHO

Hanks v. City of Boise

Supreme Court of Idaho, Boise, May 2023 Term - November 28, 2023 - P.3d - 2023 WL 8214813

Airline passenger, who was invitee at city airport, brought negligence action against city and city's parking contractor arising from passenger's slip and fall on patch of ice that allegedly was created by an unknown traveler's dump of beverage in airport's passenger unloading zone in winter.

The Fourth Judicial District Court granted summary judgment for city and contractor. Passenger appealed.

The Supreme Court held that:

- Ice patch was an isolated incident rather than a recurring condition resulting from airport's operating methods;
- There was no evidence that city and contractor had actual or constructive knowledge of ice patch; and
- Trial court did not improperly sua sponte decide issue of causation.

EMINENT DOMAIN - INDIANA

Moriarity v. State

Court of Appeals of Indiana - November 15, 2023 - N.E.3d - 2023 WL 7635638

Property owners brought inverse-condemnation action against State, Natural Resources Commission, and Department of Natural Resources (DNR), claiming DNR's order forcing them to modify or remove their illegal dam to comply with the Dam Safety Act constituted a regulatory taking that entitled them to just compensation.

The Circuit Court dismissed complaint. Property owners appealed.

The Court of Appeals held that:

- Order of DNR requiring property owners to modify or remove illegal dam did not constitute compensable per se regulatory taking, and
- DNR's order did not constitute regulatory taking under the Penn Central factors.

Order of Department of Natural Resources (DNR) requiring property owners to modify or remove their illegal dam on their property to comply with Dam Safety Act did not constitute a compensable per se regulatory taking, even if property owners lost all economic productive use of their property; property owners never possessed right to build illegal dam and, as a result, were not entitled to compensation because DNR forced them to remove or modify it.

Order of Department of Natural Resources (DNR) requiring property owners to modify or remove their illegal dam on their property to comply with Dam Safety Act did not constitute regulatory taking under Penn Central factors, and thus property owners were not entitled to compensation under takings clauses of state constitution and Fifth Amendment, even if dam's removal would cause property owners significant economic damages and even if they expected that dam would create thriving ecosystem of fish and wildlife; property owners could not have reasonably expected that they had right to build dam that violated Act, and DNR was acting to promote common good and ensure public safety from risk that potentially deficient dam would fail and flood nearby landowners.

MUNICIPAL GOVERNANCE - LOUISIANA

Caldwell v. City of Shreveport

Supreme Court of Louisiana - November 17, 2023 - So.3d - 2023 WL 7983824 - 2023-00182 (La. 11/17/23)

City marshal petitioned for writ of mandamus or, in alternative for damages, based on claim that city had violated its statutory obligations to fund office of marshal for more than ten years.

Following bench trial, District Court issued judgment awarding marshal $1,527,371.58. Marshal appealed, and the Court of Appeal vacated in part and rendered judgment increasing award to marshal to $4,587,572.85. City petitioned for writ of certiorari.

The Supreme Court held that:

- City marshal had no cause of action against city to retroactively recover expenses accrued by marshal's office over period of years, and
- City's statutory obligation to fund office of city marshal was limited to physical office of marshal and its maintenance and expenses, which could be defrayed under statute that created special account for city marshal funded by revenues generated by costs assessed in city court criminal matters.

EMINENT DOMAIN - MISSISSIPPI

United States v. Easements and Rights-of-Way Over 3.94 Acres of Land

United States District Court, N.D. Mississippi, Oxford Division - November 9, 2023 - F.Supp.3d - 2023 WL 7429670

United States, upon the relation and for the use of the Tennessee Valley Authority, brought condemnation action, seeking easements across golf course property in connection with transmission line project.

United States moved for summary judgment as to proper amount of just compensation.

The District Court held that testimony of landowner's non-expert witnesses that easements would eliminate utility of easement area and negatively affect property's security and aesthetics did not create fact issue as to appropriate amount of just compensation.

Testimony of landowner's non-expert witnesses that easements would eliminate utility of easement area and negatively affect property's security and aesthetics did not create fact issue as to appropriate amount of just compensation for taking of easements and thus did not preclude summary judgment on issue of compensation, in proceeding in which United States, upon the relation and for the use of the Tennessee Valley Authority, condemned easements across golf course property in connection with transmission line project.

PUBLIC UTILITIES - NEW HAMPSHIRE

Appeal of Liberty Utilities (EnergyNorth Natural Gas) Corp.

Supreme Court of New Hampshire - November 15, 2023 - A.3d - 2023 WL 7557658

Natural gas utility appealed from order of Public Utilities Commission denying its request to recover

development costs related to construction of proposed natural gas pipeline and tank system through temporary rate increase to utility's customers.

The Supreme Court held that pre-construction costs for cancelled project were costs associated with construction work, which utility was statutorily precluded from recovering by rate increase.

Statute prohibiting public utility rates or charges from being "based upon any costs associated with construction work if said construction work is not completed" precluded natural gas utility from recovering, through rate increase, engineering, environmental, consulting, and other pre-construction costs related to plan to construct natural gas pipeline and tank system, even though utility cancelled project before physical structure was built; costs were incurred on steps in process to construct physical structure, such that they were "associated with construction work" within meaning of statute, as confirmed by statute elsewhere treating costs of pre-construction activities like "owning" and "financing" as non-recoverable costs "associated with…construction work in progress."

MUNICIPAL GOVERNANCE - NEW YORK

Rochester Police Locust Club, Inc. v. City of Rochester

Court of Appeals of New York - November 20, 2023 - N.E.3d - 2023 WL 8007121 - 2023 N.Y. Slip Op. 05959

Police union, its president, and an individual officer commenced hybrid article 78 proceeding and declaratory-judgment action against, among others, the city, the mayor, and the city council, alleging that newly enacted local law illegally transferred virtually all authority over police discipline to a police accountability board (PAB).

The Supreme Court determined that portions of the local law were invalid and unenforceable. City council appealed. The Supreme Court, Appellate Division, affirmed as modified.

The Court of Appeals held that:

- City's repeal of its charter's provision that granted the commissioner of public safety, among other things, cognizance, jurisdiction, supervision and control of the police bureau, including the officers and members thereof, meant that, in the absence of a collective-bargaining agreement permitting it, city could not enact a local law transferring virtually all authority over police discipline to a PAB, and
- Even if that charter provision had not been repealed, the provision would not have permitted the challenged local law.

LIABILITY - NEW YORK

McCalla v. Piris-Fraser

Supreme Court, Appellate Division, Second Department, New York - November 15, 2023 - N.Y.S.3d - 2023 WL 7562158 - 2023 N.Y. Slip Op. 05722

Pedestrian filed personal injury suit against owner of premises abutting public sidewalk, seeking to recover for injuries she allegedly sustained when she tripped and fell on the sidewalk.

The Supreme Court, Kings County, denied owner's motion for summary judgment. Owner appealed.

The Supreme Court, Appellate Division, held that:

- Owner's use of premises' basement as home office did not affect residential-use exemption from liability under city code, and
- Owner was not liable to pedestrian under common-law principles.

In absence of any evidence that owner of two-family owner-occupied residence abutting sidewalk on which pedestrian fell used residence's basement, as home office for her medical practice, with regularity or that she claimed premises as her business address or as tax deduction, her use of basement as home office was merely incidental to residential use, and thus, her use of basement did not affect property's status as owner-occupied residence, under city administrative code provision exempting owners of one-, two-, and three-family owner-occupied residences from tort liability under provision's shifting of liability from city to abutting owners, for injuries arising from defective sidewalks.

Owner of property abutting public sidewalk where pedestrian tripped and fell was not liable, under common-law principles, to pedestrian for injuries pedestrian allegedly sustained in her fall, absent evidence that owner created the defective condition that allegedly caused pedestrian's fall, that owner had actual or constructive notice of the defect before pedestrian's fall, or that owner made a special use of that area of the sidewalk.

REFERENDA - OREGON

Wasson v. Fagan

Court of Appeals of Oregon - November 1, 2023 - P.3d - 328 Or.App. 813 - 2023 WL 7173557

Elector filed petition challenging the validity of a provision in the Secretary of State's "County, City, and District Initiative and Referendum Manual," which had been adopted by rule, that set forth higher signature requirements in certain areas.

The Court of Appeals held that:

- Statute authorizing the Secretary of State to enact election rules authorized the Secretary to promulgate the challenged provision;
- Rational-basis review applied to claim that the provision violated the Oregon Constitution's Equal Privileges Clause; and
- A rational basis existed for the provision, i.e., the signature requirement distinction could serve the legitimate state goal of managing the volume of initiatives or referendums by requiring higher signature percentage thresholds in districts with fewer voters.

Statute authorizing the Secretary of State to enact election rules authorized the Secretary to promulgate by rule provision in the Secretary of State's "County, City, and District Initiative and Referendum Manual" that set forth the statutorily mandated signature requirements for certain areas, despite argument that the higher signature requirements, which were based on percentages of votes cast for Governor in the most recent general election, for districts than the requirements for a particular city, particular metropolitan service districts, particular school districts, or particular mass-transit districts were neither correct or impartial.

Rational-basis review applied to claim that the Oregon Constitution's Equal Privileges Clause was violated by provision in the Secretary of State's "County, City, and District Initiative and Referendum Manual," which had been adopted by rule, that set forth higher signature requirements, which were based on percentages of votes cast for Governor in the most recent general election, in districts than in a particular city, particular metropolitan service districts, particular school districts, or particular mass-transit districts; any classes at issue were distinguished by geographical location and were not "suspect classes."

Rational basis existed for provision in the Secretary of State's "County, City, and District Initiative and Referendum Manual," which had been adopted by rule, that set forth higher signature requirements, which were based on percentages of votes cast for Governor in the most recent general election, in certain districts than in a particular city, particular metropolitan service districts, particular school districts, or particular mass-transit districts, and thus the provision did not violate the Oregon Constitution's Equal Privileges Clause; the signature requirement distinction could serve the legitimate state goal of managing the volume of initiatives or referendums by requiring higher signature percentage thresholds in districts with fewer voters.

EMINENT DOMAIN - PENNSYLVANIA

Peters Township v. Snyder

Commonwealth Court of Pennsylvania - November 8, 2023 - A.3d - 2023 WL 7370938

Property owners brought preliminary objections against township's declaration of taking to connect existing private road with new planned development.

The Court of Common Pleas dismissed owners' objections. Owners appealed.

The Commonwealth Court held that:

- Actual and genuine purpose of taking by township was for public use to improve public safety, and thus, condemnation did not violate United States Constitution or Property Rights Protection Act;
- Condemnation was not excessive, as would have require taking to be overturned;
- Condemnation was not unnecessary; and
- Res judicata did not bar township from approving ordinance to condemn property.

Actual and genuine purpose of taking by township was for public use to improve public safety, and thus, condemnation of property owners' property to connect existing private road with new planned development did not violate United States Constitution or Property Rights Protection Act; connection of road would provide quick access for emergency responses, and benefit to public was primary, while benefit to any private individual was only incidental.

ENVIRONMENTAL - CALIFORNIA

California Construction and Industrial Materials Association v. County of Ventura

Court of Appeal, Second District, Division 6, California - November 13, 2023 - Cal.Rptr.3d - 2023 WL 7478994

Opponents of project, an ordinance creating overlay zones to protect wildlife migration corridors in

rural portions of county, separately petitioned for writs of mandate to require county to vacate the ordinance.

The Superior Court denied petitions. Opponents appealed, and the appeals were consolidated.

The Court of Appeal held that:

- As a matter of first impression, county was not "permitting a use" within meaning of the Surface Mining and Reclamation Act (SMARA) when it adopted ordinance creating overlay zones to protect wildlife migration corridors;
- Substantial evidence supported county's finding that project fell within categorical exemptions from the California Environmental Quality Act (CEQA);
- Opponents failed to carry burden of showing unusual circumstances in order for exception to the categorical CEQA exemptions to apply; and
- There was no substantial evidence to support fair argument that there was reasonable possibility that project would have an adverse effect on the environment.

County was not "permitting a use" within meaning of Surface Mining and Reclamation Act (SMARA) provision requiring a lead agency to prepare statement specifying reasons for permitting proposed use and forward a copy to State Geologist for review when it adopted ordinance creating overlay zones to protect wildlife migration corridors in rural portions of the county; phrase did not include changes in permitting requirements, and while opponents of the ordinance argued that the overlay zone project permitted a "use," namely a wildlife corridor, the use was by wildlife, which could not seek permission from the county.

Opponents of project, a county adopted ordinance creating overlay zones to protect wildlife migration corridors in rural portions of the county, failed to show it was reasonably probable that they would have obtained a more favorable result in the absence of county's alleged error under the Surface Mining and Reclamation Act (SMARA) in not preparing a statement specifying its reasons for permitting proposed use and forwarding a copy thereof to the State Geologist, as required to obtain writ of mandate requiring county to vacate the ordinance; there were numerous public comments on the project, as well as State Geologist's comments that project threatened extraction of mineral resources, and even had county forwarded a formal statement of reasons, nothing in SMARA gave State Geologist power to stop or modify the project.

Substantial evidence supported county's finding that ordinance creating overlay zones to protect wildlife migration corridors in rural portions of the county fell within categorical exemptions from California Environmental Quality Act (CEQA) pertaining to actions taken by a regulatory agency to assure maintenance, restoration, or enhancement of a natural resource and procedures for protection of the environment, since wildlife was a natural resource entitled to protection, and evidence provided included studies and other documents citing need to preserve wildlife corridors and establishment of development standards compatible with wildlife movement, as well as preservations by experts.

Opponents of project, a county adopted ordinance creating overlay zones to protect wildlife migration corridors in rural portions of the county, failed to distinguish the project based on its size for purposes of establishing unusual circumstances, as required for exception to categorical exemptions from California Environmental Quality Act (CEQA) to apply; opponents claimed that project was significantly larger than other projects in its class, but they cited no such evidence, and cases they cited showed the opposite, as those projects covered entire counties or even the entire state.

Opponents of project, a county adopted ordinance creating overlay zones to protect wildlife migration corridors in rural portions of the county, failed to distinguish the project based on its location for purposes of establishing unusual circumstances, as required for exception to categorical exemptions from California Environmental Quality Act (CEQA) to apply; opponents cited no evidence that other projects in the challenged project's exempt class did not overlay similar resources, as neither mining nor ordinances that attempted to preserve wildlife were unique to the county, and exemption to which opponents compared the project was not one on which the county was relying.

There was no substantial evidence to support fair argument that there was a reasonable possibility that project, a county adopted ordinance creating overlay zones to protect wildlife migration corridors in rural portions of the county, would have an adverse effect on the environment, as was required for exception to categorical exemptions from California Environmental Quality Act (CEQA) to apply; project opponents argued that project prohibited or hampered mining or access to a permitted mine, but that was speculative, and opponents pointed to no requirements that could not also have been imposed under former requirements for a mining conditional use permit, which required applicants to show proposed development would not be detrimental to public interest, health, safety, convenience, or welfare, and that was consistent with county's plan.

LIABILITY - DISTRICT OF COLUMBIA

Colbert v. District of Columbia

District of Columbia Court of Appeals - November 16, 2023 - A.3d - 2023 WL 7807164

Employee and his spouse filed suit against District of Columbia, seeking damages for negligence, vicarious liability, and loss of consortium related to worker's fall from the back of a sanitation truck being driven by a co-worker.

The Superior Court granted District's motion to dismiss. Plaintiffs appealed.

The Court of Appeals held that employee's claims against the District as a substitute defendant under the Non-Liability Act for a co-worker's alleged negligence were precluded by the exclusivity provision of the Comprehensive Merit Personnel Act (CMPA).

Employee's claims against the District of Columbia as a substitute defendant under the Non-Liability Act for a co-worker's allegedly negligent driving of a sanitation truck were precluded by the exclusivity provision of the Comprehensive Merit Personnel Act (CMPA), which barred employee suits against the District for compensable workplace injuries; the Non-Liability Act did not create an exception to the exclusivity provision of the CMPA.

ATTORNEYS' CHARGING LIENS - FLORIDA

Miami Dade College v. Nader + Museu I, LLLP

District Court of Appeal of Florida, Third District - October 18, 2023 - So.3d - 2023 WL 6852277 - 48 Fla. L. Weekly D2012

After competing judgments were entered for bidder and for college in two separate lawsuits arising from bid protest dispute, the Circuit Court denied college's motions to offset its larger judgment against bidder's smaller judgment. College appealed.

The District Court of Appeal held that:

- Attorneys' charging liens did not have priority over college's right to offset, and
- Collateral estoppel did not bar college from filing motion to offset.

Attorneys' charging liens did not have priority over college's right to offset its larger judgment against bidder's smaller judgment, after competing judgments were entered for bidder and for college in two separate lawsuits arising from bid protest dispute; right of set-off generally prevailed so as to interfere with attorneys' lien upon debt recovered, and attorneys' charging liens attached to judgment in first lawsuit, which was entered after judgment for college in second lawsuit.

Matter was not "fully litigated" or determined in first lawsuit, and thus collateral estoppel did not bar college from filing motion in second lawsuit to offset its larger judgment against bidder's smaller judgment, after competing judgments were entered for bidder and for college in two separate lawsuits arising from bid protest dispute, although trial court in first lawsuit denied college's motion to offset filed in that lawsuit; trial court in first lawsuit did not declare rights or duties of bidder or college based on ultimate facts, but simply concluded it did not have jurisdiction over judgment in second lawsuit.

LIABILITY - GEORGIA

Berrian v. Max Grin, LLC

Court of Appeals of Georgia - October 30, 2023 - S.E.2d - 2023 WL 7122529

Patron of entertainment complex's roller skating rink filed suit against complex for negligence, arising out of injuries sustained when she fell while skating toward rink.

The Superior Court granted complex's motion for summary judgment, and patron appealed.

The Court of Appeals held that:

- Complex was "roller skating center," within meaning of Roller Skating Safety Act, and thus, patron assumed risk of injuries from fall;
- Patron, who was chaperoning students at complex was "roller skater," and not "spectator," within meaning of Act;
- Complex complied with its obligations under Act to "[p]ost the duties of roller skaters and spectators … in conspicuous places and [m]aintain the stability and legibility of all required signs, symbols, and posted notices"; and
- Complex was not subject to liability for patron's injuries based on its alleged noncompliance Act requirement that complex comply with ordinarily accepted industry safety standards and to "maintain roller skating equipment and roller skating surfaces."

MUNICIPAL ADVISORS - INDIANA

London Witte Group, LLC v. City of Marion

Court of Appeals of Indiana - October 10, 2023 - N.E.3d - 2023 WL 6562947

City brought action against advisor which provided financial advice to city regarding funding for a redevelopment project, which city financed but which developer was ultimately unable to complete,

and alleged claims for negligence, breach of fiduciary duty, and constructive fraud and unjust enrichment.

The Grant Superior Court granted in part and denied in part advisor's motion for summary judgment. City appealed and advisor cross-appealed. The Court of Appeals affirmed in part, reversed in part, and remanded with instructions. City sought transfer, and transfer was granted. The Supreme Court affirmed in part, reversed in part, and remanded. On remand, jury trial was held, and the Superior Court entered judgment in favor of city. Advisor appealed.

The Court of Appeals held that:

- Issue of whether mayor engaged in intentional wrongdoing, as could, pursuant to doctrine of adverse domination, toll limitations period for city's claims, was jury question;
- Issue of whether mayor exercised ability to supervise and control city attorney and others who could investigate mayor's own alleged wrongdoing, as could, pursuant to doctrine of adverse domination, toll limitations period for city's claims, was jury question;
- Issue of whether advisor breached standard of care was jury question;
- Issue of whether advisor breached fiduciary duty was jury question; and
- Verdict awarding damages of over $3 million, representing 95% of fault, against advisor was not excessive.

Advisor sufficiently renewed its prior motion for directed verdict at close of evidence, so as to preserve for appeal argument that trial court erred in denying motion, in case in which city, to which advisor had provided financial advice regarding construction project, asserted claims including negligence and breach of fiduciary duty against advisor, even if advisor could have been more specific in its arguments as to why trial court should enter judgment in its favor, where advisor referred to prior motion and made arguments on same grounds as those asserted in prior motion.

Issue of whether mayor engaged in intentional wrongdoing, as could, pursuant to doctrine of adverse domination, toll limitations period for city's claims, was jury question, in case in which city asserted claims for negligence and breach of fiduciary duty against advisor which provided financial advice to city regarding financing for a redevelopment project, in which city alleged that mayor had engaged in improper conduct, including receipt of improper financial benefits from developer and bond proceeds, and that this tolled limitations period for city's claims arising from advisor's alleged failure to tell city that developer lacked the money to complete the project.

Issue of whether mayor exercised ability to supervise and control city attorney and others who could investigate mayor's own alleged wrongdoing, as could, pursuant to doctrine of adverse domination, toll limitations period for city's claims, was jury question, in case in which city asserted claims for negligence and breach of fiduciary duty against advisor which provided financial advice to city regarding financing for a redevelopment project, in which city alleged that mayor had engaged in improper conduct, including receipt of improper financial benefits from developer and bond proceeds, and that this tolled limitations period for city's claims arising from advisor's alleged failure to tell city that developer lacked the money to complete the project.

Issue of whether advisor to city was complicit in mayor's alleged wrongdoing, as could, pursuant to doctrine of adverse domination, toll limitations period for city's claims against advisor, was jury question, in case in which city asserted claims for negligence and breach of fiduciary duty against advisor which provided financial advice to city regarding financing for a redevelopment project, in which city alleged that mayor had engaged in improper conduct, including receipt of improper financial benefits from developer and bond proceeds, and that this tolled limitations period for city's claims arising from advisor's alleged failure to tell city that developer lacked the money to complete

the project.

Issue of whether advisor to city breached standard of care was jury question, in city's negligence action against advisor which provided financial advice to city regarding financing for a redevelopment project for which city provided bond financing but which developer ultimately did not have the money to complete.

Issue of whether advisor breached fiduciary duty in providing financial advice to city regarding redevelopment project was jury question, in case arising from project for which city provided bond financing but which developer ultimately lacked the money to complete.

Verdict awarding damages of over $3 million, representing 95% of fault, against advisor which provided financial advice to city regarding city's financing of a redevelopment project was not excessive, in case in which city asserted negligence and breach of fiduciary duty by advisor, alleging that advisor improperly failed to tell city that developer lacked the money to complete the project, despite advisor's assertion that it had limited role in outcome given city also alleged wrongdoing by mayor and others with regard to project, including mayor's receipt of financial benefits from developer; there was evidence that advisor had played an active role or at least had been complicit in wrongdoing of others.

EMINENT DOMAIN - INDIANA

City of Carmel v. Barham Investments, LLC

Court of Appeals of Indiana - October 30, 2023 - N.E.3d - 2023 WL 7119594

Following agreed order of appropriation and appointment of appraisers in eminent domain proceeding in which city sought to convert street intersection into a roundabout interchange, city filed motion for partial summary judgment, arguing that commercial landowner was not entitled to compensation for its loss of access to road.

The Circuit Court denied the motion and, following a jury trial, entered judgment on jury verdict awarding landowner $2.4 million in damages. City appealed.

The Court of Appeals held that:

- Easement did not grant landowner any right to curb-cut access to road from commercial property;
- As a matter of first impression, city's acquisition of road in prior condemnation proceeding extinguished commercial landowner's easement rights in road to access commercial property; and
- Landowner was not entitled to compensation for city's closure of access to road.

Commercial landowner's easement "over, across and under" road "for pedestrian and vehicular traffic, sewer lines, water lines, fire protection lines and other utilities" did not grant landowner any right to curb-cut access to road from commercial property, and thus city's removal of curb-cut access as part of eminent domain proceeding did not substantially interfere with easement and was not compensable.

City's acquisition of road in prior condemnation proceeding extinguished commercial property

owner's easement rights in road to access commercial property, and thus there was no easement to take in city's current eminent domain proceeding in which city sought to convert street intersection into a roundabout interchange.

Commercial landowner was not entitled to compensation for city's closure of access to road when using eminent domain to convert road intersection into a roundabout interchange, where landowner maintained sufficient access to another road to run its business, and roundabout project did not interfere with two other access points to the property.

LAW ENFORCEMENT - NEW YORK

Police Benevolent Association of City of New York, Inc. v. City of New York

Court of Appeals of New York - November 20, 2023 - N.E.3d - 2023 WL 8007151 - 2023 N.Y. Slip Op. 05960

Law enforcement unions brought action against city for declaratory judgment that provision of city administrative code making it a criminal offense to use certain methods of restraint in manner that restricted flow of air or blood while effecting an arrest was preempted by state laws governing arrest authority of police officers, establishing defense of justification, and criminalizing strangulation-related offenses, as well as for declaration that code provision was vague in violation of New York's Due Process Clause.

City moved and unions cross-moved for summary judgment. The Supreme Court, New York County, granted unions' motion in part, ruling that code provision was unconstitutionally vague. City appealed. The Supreme Court, Appellate Division, reversed, granted city's motion, denied unions' cross-motion, and declared that code provision was constitutional. Unions appealed.

The Court of Appeals held that:

- City code provision was not within field of criminal procedure, for purposes of field preemption;
- Statute criminalizing certain conduct involving obstruction of breathing during an arrest did not reflect legislative intent to preempt field;
- Statutes relating to defense of justification did not reflect legislative intent to preempt field;
- City code provision did not conflict with statute criminalizing certain conduct involving obstruction of breathing during an arrest;
- City code provision provided fair notice of specific conduct it proscribed; and
- City code provision provided clear guidelines for enforcement.

City administrative code provision making it a criminal offense for law enforcement officers to use certain methods of restraint in manner that restricted flow of air or blood while effecting an arrest only incidentally touched upon matter of criminal procedure, and thus, New York legislature's establishment of integrated, comprehensive system of laws administering criminal procedure statewide, such as through statute governing arrest authority of police officers, did not preempt city code provision under doctrine of field preemption; city code provision defined substantive criminal offense without regulating matters of criminal procedure.

Statute making it a felony for police or peace officers to cause serious physical injury or death during an arrest by criminally obstructing breathing or using chokeholds to intentionally impede breathing did not reflect legislative intent to preempt field so as to preclude city code provision making it a criminal offense to use certain methods of restraint in manner that restricted flow of air

or blood while effecting an arrest, even though statute was motivated by legislature's belief that city police department's internal ban on use of chokeholds was ineffective; such belief suggested only that state determined departmental approach to eliminating chokeholds was insufficient, with no indication that legislature meant to preclude any local laws consistent with statute, such as city's.

Provisions of Penal Law making defense of justification available in "any prosecution for an offense," including violations of local laws or ordinances, and specifically making such defense applicable to the "use of force in making an arrest" did not reflect legislative intent to preempt field of police use of force, so as to preclude city from enacting administrative code provision making it a criminal offense to use certain methods of restraint in manner that restricted flow of air or blood while effecting an arrest; by making justification defense available in any prosecution for an offense, legislature left room for local governments to designate substantive offenses related to such conduct by police officers.

City code provision making it a criminal offense to use certain methods of restraint in manner that restricted flow of air or blood while effecting an arrest did not conflict with statute making it a felony for police or peace officers to cause serious physical injury or death during an arrest by criminally obstructing breathing or using chokeholds to intentionally impede breathing, and thus, statute did not preempt city code provision by conflict, even though city code provision proscribed conduct that statute did not cover and did not require specific intent to impede breathing or infliction of serious physical injury or death; city code provision did not expressly or directly conflict with statute, as necessary for conflict preemption to apply.

City code provision making it a criminal offense to use certain methods of restraint in manner that restricted flow of air or blood while effecting an arrest did not conflict with statutes making defense of justification available in "any prosecution for an offense," including violations of local laws or ordinances, and specifically making such defense applicable to the "use of force in making an arrest," and thus, statutes did not preempt city code provisions by conflict; justification defense remained available in prosecutions for violations of city code provision.

City code provision making it a crime to "restrain an individual in a manner that restricts the flow of air or blood by…sitting, kneeling, or standing on the chest or back in a manner that compresses the diaphragm, in the course of effecting or attempting to effect an arrest" provided fair notice of specific conduct it proscribed, and thus, any medical imprecision of phrase "compresses the diaphragm" did not render provision void for vagueness under Due Process Clause; person of ordinary intelligence would understand "compress" to have common meaning of "to press or squeeze" or "to reduce in size, quantity, or volume," and would read statute to prohibit applying pressure in specified ways impeding person's ability to breathe by interfering with commonly-understood movement of diaphragm.

City code provision making it a crime to "restrain an individual in a manner that restricts the flow of air or blood by compressing the windpipe or the carotid arteries on each side of the neck, or sitting, kneeling, or standing on the chest or back in a manner that compresses the diaphragm, in the course of effecting or attempting to effect an arrest" provided officials, judges, and juries with clear guidelines for enforcement, and thus, provision was not void for vagueness under Due Process Clause; provision sufficiently defined conduct prohibited, namely, specific physical contact with particular areas of body in manner producing certain result, such that any determination of whether violation occurred was not left to enforcers' personal, subjective ideas of right and wrong.

EMINENT DOMAIN - WASHINGTON

Haggart v. United States

United States Court of Federal Claims - October 18, 2023 - 168 Fed.Cl. 148

Landowner filed rails-to-trails class action against United States, claiming that conversion of her property into recreational trail pursuant to National Trails System Act resulted in taking without just compensation.

After parties reached settlement agreement, the Court of Federal Claims granted landowner's motion to approve settlement and entered final judgment.

Two class members objected to settlement and appealed.

The United States Court of Appeals for the Federal Circuit vacated and remanded. On remand, the Court of Federal Claims again granted landowner's motion for approval of settlement. Government appealed. The Court of Appeals affirmed.

Landowner then filed five separate motions for statutory attorney fees and costs, pursuant to Uniform Relocation Assistance and Real Property Acquisition Policies Act (URA). The Court of Federal Claims granted motions in part, and upon reconsideration, denied landowner's motion for attorney fees and costs for legal work performed by her husband, who was attorney, joint owner of subject property, and co-plaintiff. Landowner appealed.

The United States Court of Appeals for the Federal Circuit affirmed in part, vacated in part, and remanded. On remand, landowner requested entry of monetary judgment in her favor for three expenses as well as post-judgment interest on those expenses, and requested three additional categories of monetary relief that were not addressed by the Court of Appeals in its remand order.

The Court of Federal Claims held that:

- Landowner was entitled to reimbursement of filing, research, and appraisal expenses under URA;
- No-interest rule applied to bar recovery of post-judgment interest;
- Tucker Act did not allow post-judgment interest award against the government;
- Landowner was not entitled to award of compound post-judgment interest on attorney fees awarded to law firm;
  Mandate rule prohibited recovery of other URA expenses sought; and
- Changed circumstances of husband's disclaimer of his interest in the property was insufficient to avoid mandate rule's bar on landowner's recovery of attorney fee award under URA for work husband performed on appeal and on remand.

WATER - CALIFORNIA

City of Marina v. County of Monterey

Court of Appeal, Sixth District, California - November 13, 2023 - Cal.Rptr.3d - 2023 WL 7485522

City, city council, and city groundwater sustainability agency filed petition and cross-petition for writ of mandate and complaint and cross-complaint for declaratory relief challenging valley basin groundwater sustainability agency's groundwater sustainability plan, as adopted by county and posted by Department of Water Resources as operative groundwater sustainability for majority of high-priority groundwater basin, including area within city.

County filed cross-petition for writ of mandate and cross-complaint for declaratory relief requesting declaration that formation of city's groundwater sustainability agency was void and that county was exclusive groundwater sustainability agency for area within city.

Following bench trial, the Superior Court denied city's writ petition and cross-petition and granted in part county's writ petition, holding that plan adopted by county was operative groundwater sustainability plan for majority of basin, including area within city, but rejecting county's contention that formation of city's groundwater management agency was void. City appealed and county cross-appealed.

The Court of Appeal held that:

- City's and valley basin agency's failure to resolve overlap between claimed areas caused area of overlap to become unmanaged, allowing county to become exclusive groundwater management sustainability agency for such area;
- County was not precluded from becoming groundwater management sustainability agency due to its membership in valley basin agency, a joint powers authority;
- Sustainable Groundwater Management Act (SGMA) did not preclude county and valley basin agency from executing coordination agreement; and
- SGMA did not preclude county from adopting groundwater sustainability plan after statutory deadline.

Failure by city and valley basin groundwater sustainability agency to timely resolve overlap in areas for which they had submitted their respective notifications of intent to form groundwater sustainability agency caused area of overlap, which was within high-priority basin, to become unmanaged, and thus, provision of Sustainable Groundwater Management Act (SGMA) allowing county where unmanaged area in high-priority basin was located to become presumptively exclusive groundwater sustainability agency for such area authorized county where area of overlap was located to become its exclusive groundwater sustainability agency; under SGMA, neither agency's decision to become groundwater sustainability agency could be effective for area of unresolved overlap.

Under the Sustainable Groundwater Management Act (SGMA), where an overlap exists between areas of a high-priority or medium-priority basin encompassed within two local agencies' notices of intent to become a groundwater sustainability agency and the agencies do not timely resolve the conflict, neither groundwater sustainability agency has become the effective agency authorized to submit a groundwater management plan for the disputed area, and therefore that area is unmanaged.

County's membership in valley basin groundwater sustainability agency, a joint powers authority, did not preclude county from invoking its authority under Sustainable Groundwater Management Act (SGMA) to become groundwater sustainability agency for area of high-priority basin which both city and valley basin agency had claimed in their notifications of intent to form groundwater sustainability agency after city and valley basin agency failed to resolve overlap, making area unmanaged; valley basin agency, as joint powers authority, had separate, independent existence from county, as its member.

Sustainable Groundwater Management Act (SGMA) did not preclude county, which assumed role of exclusive groundwater sustainability agency for area of high-priority basin after city's and valley basin groundwater sustainability agency failed to resolve dispute over which one of those two agencies would manage such area, from entering into coordination agreement with valley basin agency whereby valley basin agency would adopt groundwater sustainability plan for area on

county's behalf and implement same plan in area and remainder of high-priority basin that valley basin agency managed; coordination agreement was consistent with legislature's intent for local government agencies to cooperate to promptly manage groundwater basins and minimize state intervention.

Deadline set forth in Sustainable Groundwater Management Act (SGMA) for a high-priority groundwater basin to be managed under a groundwater sustainability plan was permissive and directory, not mandatory, and thus, county's failure to timely submit valid groundwater sustainability plan for area of high-priority basin for which county had assumed role of groundwater sustainability agency did not preclude county from untimely approving such plan; SGMA set forth no penalty or other express consequences for failure to meet deadline, but rather, only stated that if no local agency decided to form groundwater sustainability agency and adopt groundwater sustainability plan for high- or medium-priority basin by deadline, basin "may" be designated probationary basin by state, in its discretion.

EMINENT DOMAIN - FEDEERAL

Midas Resources, Inc. v. United States

United States Court of Federal Claims - November 7, 2023 - Fed.Cl. - 2023 WL 7320594

Lessee of mineral estate filed suit against United States, seeking just compensation under Fifth Amendment for alleged physical taking of mineral estate by government's building of border wall on and adjacent to surface estate, under which lessee's mineral estate was leased, thereby allegedly interfering with, negatively affecting, negatively impacting, and denying access to lessee's mineral estate and real property interests.

Government moved to dismiss for lack of subject matter jurisdiction and for failure to state claim.

The Court of Federal Claims held that:

- Lessee failed to state physical takings claim;
- Lessee waived regulatory takings claim; and
- Any regulatory takings claim based on future government action was not ripe.

Mineral estate lessee's allegations that government's building of border wall on and adjacent to surface estate inhibited, burdened, or rendered more expensive lessee's access to mineral estate and property interests were insufficient to state physical takings claim warranting just compensation under Fifth Amendment; under Texas' accommodation doctrine, lessee's interest was to have fair chance of benefiting from its mineral estate, limited by surface estate owner's fair chance to benefit from its estate, but lessee did not allege that all access to its property was cut off by government using surface estate in such manner as to oust lessee from any fair chance of using its mineral estate or that government itself appropriated, confiscated, or destroyed minerals.

Lessee of mineral estate waived regulatory takings claim based on government's building of border wall on and adjacent to surface estate that allegedly inhibited, burdened, or rendered more expensive lessee's access to mineral estate, where lessee made strategic decision not to assert regulatory takings claim, despite having three "bites at the apple" between initial complaint and two amended versions, lessee's response to government's motion to dismiss expressly stated that it was not asserting regulatory takings claim or such theory of recovery, and lessee's counsel of record conceded that claim was pled as physical taking.

Any regulatory takings claim by lessee of mineral estate based on government planning imminent construction of gate at public road crossing border wall built on and adjacent to surface estate that would allegedly impede lessee's access to mineral estate was not ripe for adjudication, since claim depended on future government action that had not yet occurred, so lessee's access to mineral estate was not impeded, as lessee could access, via public right of way, surface estate overlying southern portion of its mineral estate.

CHARTER SCHOOLS - GEORGIA

DeKalb County School District v. DeKalb Agriculture Technology and Environment, Inc.

Court of Appeals of Georgia - November 2, 2023 - S.E.2d - 2023 WL 7210307

Charter schools brought action against school district and related parties, alleging breach of charter agreements and certain provisions of Charter Schools Act.

The trial court granted plaintiffs' summary judgment motion as to liability, and denied defendants' cross-motion for summary judgment. Defendants appealed.

The Court of Appeals held that:

- Claims sounded in contract and, thus, were not barred by sovereign immunity;
- Language in renewed charter contracts unambiguously imposed on school district a per-pupil funding floor, and thus e-mails concerning possible meaning of provision were immaterial parol evidence;
- There was no evidence suggesting that condition precedent, if any, in charter school contracts relevant to charter schools being funded at relevant per-pupil rate, was not, in fact, satisfied;
- Charter Schools Act required defendants to calculate and distribute federal allotments to charter schools;
- Defendants were only entitled to reimbursement for administrative services actually provided to charter schools;
- Defendants breached mandate in Charter Schools Act to treat charter schools no less favorably than non-charter schools; and
- Provision in Charter Schools Act applicable to newly-formed charter schools did not apply to established charter schools.

REAL PROPERTY CONVEYANCES - ILLINOIS

Village of Riverdale v. Nosmo Kings, LLC

Appellate Court of Illinois - October 5, 2023 - 2023 IL App (1st) 221380 - 2023 WL 6467934

Village brought action against purported purchasers of marina property, seeking to have marina declared abandoned and to be granted permission to demolish buildings on the property.

Purported purchaser counterclaimed and filed third-party complaint against village's former officials, as well as purported vendor's owner, seeking writ of mandamus, damages for tortious interference with prospective economic advantage and business expectancy and civil conspiracy, quiet title, and other claims.

The Circuit Court granted village and officials' motion for summary judgment. Purchasers appealed.

The Appellate Court held that provision in redevelopment agreement that prohibited transfer of marina's ownership did not void any purported conveyance of marina to purported purchasers, but was a contractual promise providing village a remedy in the event of a breach.

Provision in redevelopment agreement between village and purported vendor of marina property that prohibited transfer of marina's ownership did not void vendor's purported conveyance of marina to purported purchasers, but was a contractual promise providing village's remedy in event of a breach was to terminate agreement and pursue reimbursement of its contributions to redevelopment project; agreement did not categorically bar any sale of marina, but allowed a sale if certain conditions were met, i.e., either passage of 36 months following village's receipt of certificate of substantial completion or with village's consent, and it did not say that any attempted conveyance without satisfaction of one of two conditions was null and void, rather, it merely provided that vendor agreed to place limitations on its right to alienation.

ZONING & PLANNING - MONTANA

Hanson v. Town of Fort Peck

Supreme Court of Montana - November 7, 2023 - P.3d - 2023 WL 7320260 - 2023 MT 208

Subdivision developers filed motion seeking court enforcement of mediated memorandum of understanding (MOU) and alleged settlement agreement regarding town's obligation to accept maintenance of subdivision streets.

The District Court granted the motion, and town appealed.

The Supreme Court held that:

- Town council was not a "person" protected by the state constitution's open meetings provision from its own non-compliant conduct;
- MOU did not obligate developers to provide a geotechnical investigation of roadway section thickness and was not based on either a mutual mistake of fact or a qualifying unilateral mistake of fact made by town;
- MOU completely and accurately stated the parties' complete agreement regarding the matters expressly referenced therein;
- MOU satisfied all essential requirements for valid contract formation, even if parties did not ultimately agree on the terms of a contemplated final settlement agreement; and
- Genuine issue of material fact as to whether town council approved terms of MOU, which was a condition precedent to it being binding and enforceable, precluded summary judgment for developers.

ZONING & PLANNING - PENNSYLVANIA

East Penn Township v. Swartz

Commonwealth Court of Pennsylvania - October 20, 2023 - A.3d - 2023 WL 6933346

Township filed complaint against property owners for fines for owners' failure to cure violations of township's zoning ordinance, attorneys' fees, and costs.

Township filed motion for judgment on the pleadings, which the Court of Common Pleas granted as to underlying ordinance violations.

Following bench trial, entered judgment in favor of township. Township filed petition to hold owners in civil contempt of judgment, and owners filed motion to enforce settlement agreement. After township withdrew its petition, the trial court denied owners' motion. Owners appealed.

The Commonwealth Court held that:

- Owners did not lack standing to pursue their motion to enforce settlement agreement based on township's withdrawal of its petition to hold owners in civil contempt, but
- Evidence supported determination that township and property owners never came to meeting of the minds, as required for binding and enforceable settlement agreement.

Property owners did not lack standing to pursue their motion to enforce a settlement agreement allegedly entered with township on the basis that township withdrew its petition to hold owners in civil contempt of judgment finding owners violated township's zoning ordinance, in proceeding on township's complaint seeking fines, attorney fees, and costs for owners' violations; trial court's order imposing the judgment expressly retained jurisdiction over the matter "to ensure that the foregoing directives are strictly complied with by the [owners] and to hear any and all claims for contempt thereof," and no discontinuance was ever filed to extinguish the underlying zoning matter even though the judgment had been final for over a year.

Evidence supported trial court's determination that township and property owners never came to a meeting of the minds, as required to form a binding and enforceable settlement agreement, in proceeding on township's complaint seeking fines, attorney fees, and costs for owners' violations of township's zoning ordinance; resolution adopted by township's board of supervisors regarding the proposed settlement referenced the trial court's verdict stating that owners were to cease, desist, and cure the ordinance violations within 30 days of the verdict, but owners stated that they considered the inclusion of the verdict in the draft agreement as inessential, suggesting the parties never perceived the relationship between the violations and the potential settlement in the same way.

IMMUNITY - ALABAMA

Ex parte Herring

Supreme Court of Alabama - October 27, 2023 - So.3d - 2023 WL 7096598

Mother, as personal representative of estate of juvenile daughter who was inadvertently shot and killed by a classmate on the campus of public high school, brought wrongful-death action against high school's principal and city superintendent of schools.

The Circuit Court denied defense motion for summary judgment. Principal and superintendent petitioned for a writ of mandamus directing the trial court to enter a summary judgment in their favor on the ground of State-agent immunity.

The Supreme Court held that:

- Provision in board of education's policy manual that required each school to develop and implement evidence-based practices to prevent violence was not sufficiently detailed to qualify as a basis for applying the "beyond authority" exception to State-agent immunity;

- Principal did not violate that provision of the policy manual;
- School system's job description for principals was not sufficiently detailed to qualify as a basis for applying the "beyond authority" exception to State-agent immunity;
- Principal did not abdicate his responsibility to enforce the student code of conduct; and
- Superintendent did not violate statute providing that the superintendent was to see that the laws relating to the schools and the rules and regulations of the city board of education were carried into effect.

PUBLIC CONTRACTS - CALIFORNIA

Stronghold Engineering Incorporated v. City of Monterey

Court of Appeal, Sixth District, California - November 3, 2023 - Cal.Rptr.3d - 2023 WL 7291379

Contractor under project to renovate city's conference center and adjacent plaza brought action against city seeking declaration of its rights and duties under contract and change order for unforeseen delays.

Trial court sustained city's demurrer with leave to amend. After contractor presented claims to city relating to delays and city denied claims, contractor filed amended complaint asserting causes of action for breach of contract. The Superior Court granted city's motion for summary judgment. Contractor appealed.

The Court of Appeal held that:

- Original complaint was solely for declaratory relief, such that presentment requirement of Government Claims Act did not apply, and
- Claim for anticipated and incurred delay damages exceeded $375,000 limit for contractual dispute resolution procedure.

Contractor's complaint against city, seeking interpretation of contractor's agreement in change order for renovation project to "waive its rights to any due compensable or excusable delays in time and money for all known and unknown knowledge of the project conditions" and determination that under change order, city "must compensate" contractor "for due compensable or excusable delays in time and money for any changes" city caused to project was solely claim for declaratory relief, not damages, and thus, contractor was not statutorily required to present claim to city before filing complaint; declaratory judgment would only resolve parties' contractual duties but would not establish that any given delay was compensable, and no damages would flow solely from such relief.

Calculation of amount of contractor's breach-of-contract claim against city arising from delay in project to renovate city property, for purpose of contract's dispute resolution procedure generally applying to claims for payment of up to $375,000 in money or damages "arising from work done by or on behalf of" contractor, included both damages already accrued and reasonably anticipated future damages, and thus, such claim was for $826,569 as full amount of anticipated and incurred damages stated in contractor's proposed change order, not only for damages incurred by date of such change order, even if work was not yet done; contract required contractor to submit notice of potential claims before commencing performance and to bring disputes to city's attention at "earliest possible time."

EMINENT DOMAIN - GEORGIA

Columbia County v. Satcher

Court of Appeals of Georgia - October 23, 2023 - S.E.2d - 2023 WL 6968848

Landowners brought action against county, alleging nuisance, inverse condemnation, trespass, negligence, and adverse possession arising from allegedly defective stormwater drainage system.

Following bench trial, the Superior Court entered judgment in favor of landowners. County appealed.

The Court of Appeals held that:

- Claims for trespass, nuisance, and negligence were duplicative of landowners' inverse condemnation claim and would be analyzed as one claim under a theory of nuisance;
- Even if landowners' first observance of harm from drainage system triggered accrual of limitations period for nuisance claim, landowners experienced separate harm, triggering separate accrual of limitations, on date that parking lot on property, which was built over landowners' drainage pipe, collapsed following heavy rains and failure of the pipe;
- Landowners' presentation of ante litem notice to county allowed recovery only for claims that accrued prior to the presentation of notice rather than also for claims that accrued after presentation of notice;
- Any use of landowners' drainage pipe by county was not done under a claim of right, as would be required for county to obtain prescriptive easement in pipe; and
- Bona fide controversy existed between landowners and county, precluding award of attorney fees to landowners premised on purported stubborn litigiousness by county.

PUBLIC UTILITIES - HAWAII

City and County of Honolulu v. Sunoco LP

Supreme Court of Hawai'i - October 31, 2023 - P.3d - 2023 WL 7151875

City and county brought action against oil and gas companies alleging nuisance, trespass, strict liability failure to warn, and negligent failure to warn arising from companies' alleged deceptive marketing campaign and misleading of the public about dangers and environmental impact of using fossil fuel products.

The Circuit Court denied companies' motions to dismiss for lack of personal jurisdiction and for failure to state a claim. Companies sought leave to file an interlocutory appeal, which was granted.

The Supreme Court held that:

- Companies' in-state activity fell under long-arm statute;
- Companies had the due process minimum contacts required for specific personal jurisdiction;
- Exercising specific jurisdiction was reasonable under Due Process Clause;
- Clear notice was not a requirement in addition to due process minimum contacts;
- Federal common law governing interstate air pollution suits did not retain its preemptive effective after Clean Air Act (CAA) displaced it;
- CAA did not expressly preempt state-law tort claims;
- CAA did not preempt state claims via field preemption; and

- CAA did not preempt state claims via conflict preemption.

EMINENT DOMAIN - ILLINOIS

MB Financial Bank, N.A. v. Brophy

Supreme Court of Illinois - September 21, 2023 - N.E.3d - 2023 IL 128252 - 2023 WL 6153041

Taxpayers whose apartment-complex property had been taken by city in condemnation action brought declaratory judgment action against county treasurer seeking refund of property taxes paid between the date the city filed its condemnation complaint and the date it acquired taxpayers' property.

The Circuit Court dismissed action. Taxpayers appealed. The Appellate Court affirmed in part and reversed in part. Treasurer petitioned for leave to appeal, which was granted, and taxpayers sought cross-relief.

The Supreme Court held that city's title to property did not vest retroactively to date of filing of condemnation petition and thus did not relieve taxpayers from property tax liability for period between date of filing on condemnation complaint and date of payment of compensation; overruling *City of Chicago v. McCausland*, 379 Ill. 602, 41 N.E.2d 745.

Title to apartment-complex property acquired by city in condemnation proceeding did not vest retroactively to date of filing of condemnation petition and thus did not relieve property owner from property tax liability for period between date of filing on condemnation complaint and date of payment of compensation; owner was not deprived of right to control property or enjoy its benefits, including through collection of profits generated by rental, while condemnation action was being litigated; overruling *City of Chicago v. McCausland*, 379 Ill. 602, 41 N.E.2d 745

PUBLIC UTILITIES - TENNESSEE

City of Memphis v. Horn Lake Creek Basin Interceptor Sewer District

United States District Court, W.D. Tennessee, Western Division - September 22, 2023 - Slip Copy - 2023 WL 6200074

In the 1970s, the City of Memphis entered into an agreement to treat wastewater collected by a Sewer District in Mississippi in exchange for fee payments based on the volume of wastewater delivered.

In 2018, the City informed the District that it would no longer extend wastewater treatment services to the District. The City requested that the District develop and submit a "detailed plan of action for the removal of its users from the City's sanitary sewer system along with a proposed schedule within the next six (6) months.

Complex litigation ensued, after which the U.S. District Court held that:

- "The City of Memphis shall continue treating the wastewater from the Horn Lake Creek Basin Interceptor Sewer District of DeSoto County, Mississippi until such time as the District is able to complete all necessary construction to begin operations and route wastewater to an alternative

treatment facility."

- "The District shall have eight (8) years from October 1, 2023, in which to complete construction or expansion of an alternative wastewater treatment facility. On or before December 29, 2023, the District shall file on the docket its estimated construction schedule based on this time period. Thereafter, until the District disconnects from the City's system, the District shall file reports every six months29 that include detailed descriptions and explanations of: (1) its progress toward meeting the deadlines set forth in its construction schedule, and (2) any issues or circumstances that have caused delays, including the impact on the construction schedule."
- "On or before December 29, 2023, the District shall file a construction schedule for the remaining work needed to complete its peak flow storage facility. Thereafter, until the peak flow storage facility begins operating, the District shall file reports every six months that include detailed descriptions and explanations of: (1) its progress toward meeting the deadlines set forth in its construction schedule, and (2) any issues or circumstances that have caused delays, including the impact on the anticipated schedule."
- "Until the District disconnects from the City's system, it shall pay to the City a volumetric rate for treatment of its wastewater, Beginning September 23, 2023, the District's volumetric rate shall be calculated using the following formula: District's Rate = Agreements Rate + ((Ordinance Rate – Agreements Rate) x Applicable Percentage). The "Applicable Percentage" will increase each year according to the following schedule…"

MUNICIPAL ORDINANCE - ALABAMA

Dixon v. City of Auburn

Supreme Court of Alabama - October 27, 2023 - So.3d - 2023 WL 7096600

Owner of residential property brought action against city's mayor, in his official capacity, and city council member who served as mayor pro tempore, also in her official capacity, and asserted claim that city's zoning ordinance that expressly regulated short-term rentals of residential property and that, due to the neighborhood-conservation zoning district where owner's property was located, prohibited owner from renting out the property on a short-term basis, violated his right to due process and also violated his right to equal protection as guaranteed by the Alabama Constitution.

The Circuit Court entered summary judgment for defendants. Property owner appealed.

The Supreme Court held that:

- Owner did not have a pre-existing, lawfully established right to the nonconforming use of home's basement for short-term rentals;
- In the absence of more than the conclusory and generalized arguments made by owner, ordinance did not violate whatever equal-protection rights owner had under the Alabama Constitution; and
- City was not equitably estopped from enforcing ordinance against owner.

Homeowner did not have a pre-existing, lawfully established right to the nonconforming use of home's basement for short-term rentals, and thus city's zoning ordinance that expressly regulated short-term rentals of residential property and that, due to the neighborhood-conservation zoning district where owner's property was located, prohibited owner from renting out the property on a short-term basis, did not violate owner's due-process rights under the Alabama Constitution; the plain language of the city's zoning ordinance had, at all relevant times, presumptively prohibited

those uses not specifically enumerated as permitted in neighborhood-conservation districts, and short-term rentals had never been listed as a permitted use in such districts.

In the absence of more than the conclusory and generalized arguments made by owner of residential property, city's zoning ordinance that expressly regulated short-term rentals of residential property and that, due to the neighborhood-conservation zoning district where owner's property was located, prohibited owner from renting out the property on a short-term basis, did not violate whatever equal-protection rights owner had under the Alabama Constitution.

City was not equitably estopped from enforcing against residential property owner its ordinance that expressly regulated short-term rentals of residential property and that, due to the neighborhood-conservation zoning district where owner's property was located, prohibited owner from renting out the property on a short-term basis; despite arguments that city did not enforce its previous zoning ordinance against owner's short-term rentals and that city had been collecting lodging taxes on short-term rentals pursuant to an agreement that city had with online marketplace used by owner, equitable estoppel was not a bar to the correction of a mistake of law, and the agreement provided that it did not constitute a waiver by city of any other provisions of law to a particular short-term rental operator.

ZONING & PLANNING - CALIFORNIA

Snowball West Investments L.P. v. City of Los Angeles

Court of Appeal, Second District, Division 4, California - October 26, 2023 - Cal.Rptr.3d - 2023 WL 7034030

Developer filed a petition for writ of mandate against city, challenging city's refusal to clear the map conditions necessary to approve housing development, grant developer's request for zoning changes, or allow rezoning exemptions.

The Superior Court denied the petition. Developer appealed.

The Court of Appeal held that:

- Developer's project was not entitled to a rezoning exemption under the Housing Accountability Act (HAA);
- Site's zoning designation which limited density to something below the maximum permitted in city's community plan did not render the zoning "inconsistent" with the plan;
- City was not required to make written findings to support its denial of proposed development; and
- City council relied on substantial evidence, as required by its municipal code, when adopting report from its planning and land use management committee recommending that developer's requested zoning change be denied.

CONTRACTS - GEORGIA

Fowler Office Park, LLC v. Greenprints Alliance, Inc.

Court of Appeals of Georgia - October 20, 2023 - S.E.2d - 2023 WL 6936392

High bidder for real estate brought action against Department of Transportation (DOT) for breach of sales contract and against corporation, city, city employee, and city's economic development director who was also member of corporation's board to recover for tortious interference with business relations.

The Superior Court entered summary judgment in favor of city, employee, corporation, and board member. Bidder appealed.

The Court of Appeals held that:

- Bidder's actions after contract was formed did not constitute a counter-offer showing the lack of a meeting of the minds;
- Factual issue as to whether DOT had abandoned sale after sending revised quitclaim deed to bidder precluded summary judgment; and
- Corporation did not engage in tortious interference with business relations.

High bidder's actions in sending a revised copy of unsigned quitclaim deed back to Department of Transportation (DOT) after bidder had received written notice of bid acceptance and binding contract was already in existence did not constitute a counter-offer showing the lack of a meeting of the minds.

Genuine issues of material fact as to whether Department of Transportation (DOT) had abandoned sale of land after sending revised quitclaim deed to high bidder precluded summary judgment in bidder's suit alleging breach of contract and tortious interference with business relations by corporation, city, city employee, and city's economic development director who was also member of corporation's board.

Corporation did not engage in tortious interference with business relations between Department of Transportation (DOT) and high bidder for real property when board member communicated with DOT and others about possibility of canceling the bid or altering terms of quitclaim deed; member acted solely in official capacity as city's economic development director, did not take any action on behalf of or at direction of corporation regarding the property or bidder's attempt to purchase it, and did not contact anyone at DOT about sale on behalf of corporation, and corporation never authorized or directed member to communicate with anyone about the property or to take any action to interfere with the sale of it.

ZONING & PLANNING - GEORGIA

Morgan County Hospital Authority v. City of Madison

Court of Appeals of Georgia - October 27, 2023 - S.E.2d - 2023 WL 7101211

County hospital authority brought action against city for declaratory judgment that it could sell acute care hospital for operation of acute drug and alcohol treatment facility without purchaser obtaining a conditional use permit (CUP).

The Superior Court ruled in favor of city. Hospital authority appealed.

The Court of Appeals held that:

- Justiciable controversy existed for declaratory judgment action;
- The planned treatment facility was “hospital” within meaning of city zoning ordinance permitting hospitals; and
- Hospital authority did not abandon facility.

City’s change in ordinance so that purchaser of property from county hospital authority needed conditional use permit (CUP) to operate acute drug and alcohol treatment facility created a sufficient justiciable controversy necessary for hospital’s declaratory judgment action; hospital marketed the property to prospective purchasers for a number of years, reaching at least two asking-price offers, and it has been prevented from closing by city’s insistence that purchaser obtain a CUP.

Acute drug and alcohol treatment facility to be operated by purchaser after sale by county hospital authority was “hospital” within meaning of city zoning ordinance permitting hospitals; the treatment facility would provide medical and psychological care to patients, and hospital authority had conducted a wide array of services at the facility, including treatment of individuals with drug and alcohol addiction.

County hospital authority did not abandon facility that it was trying to sell for operation of acute drug and alcohol treatment facility, and, thus, requirement that purchaser obtain conditional use permit (CUP) did not apply, where hospital authority continued to house some hospital operations at the property even though full variety of hospital services did not currently occur at that location, and it had spent over $100,000 a year maintaining the facilities and could restart full operations in a matter of days if necessary.

IMMUNITY - GEORGIA

McCloud v. Lowndes County Board of Commissioners

Court of Appeals of Georgia - October 30, 2023 - S.E.2d - 2023 WL 7122543

Motorist whose vehicle was struck by a tractor-trailer at a road construction area brought personal injury action against county employee who was directing traffic at the site.

The Superior Court granted employee’s motion to dismiss. Motorist sought interlocutory review.

The Court of Appeals held that trial court’s order would be vacated and remanded for clarification of trial court’s reasoning for granting county employee’s motion to dismiss motorist’s claim.

Trial court order dismissing motorist’s personal injury claim against county employee who was directing traffic at the road construction area where motorist’s vehicle was struck by a tractor-trailer would be vacated and remanded for clarification, where trial court’s reasoning for granting employee’s motion to dismiss motorist’s claim was unclear from its order, and the record contained no evidence that could potentially shed some analytical light on whether trial court applied the standard for a motion to dismiss for lack of subject-matter jurisdiction, or a motion to dismiss for failure to state a claim.

EMINENT DOMAIN - NEW YORK

Penney Property Sub Holdings LLC v. Town of Amherst

Supreme Court, Appellate Division, Fourth Department, New York - October 6, 2023 - N.Y.S.3d - 2023 WL 6528859 - 2023 N.Y. Slip Op. 05058

Property owner sought judicial review of town's decision to authorize condemnation of property that included owner's land, which was leased and operating as a fully-functional department store.

The Supreme Court, Appellate Division, held that:

- Notice to property owner satisfied procedural due process;
- Town's decision was rationally related to a conceivable public purpose;
- Evidence supported town's decision regardless of whether owner's property was blighted; and
- Possibility that condemned land would be sold to private developer did not render town's decision unconstitutional.

Notice to property owner of town hearing on condemnation of land satisfied requirements of procedural due process, even though owner did not actually receive notice until after hearing, absent evidence that town was, or should have been, aware that mailed notice had not reached owner on time.

Town's decision to exercise eminent domain power to condemn around two acres of commercial land on which there was a fully-functional department store was rationally related to a conceivable public purpose, where condemnation would foster redevelopment to eliminate urban blight by allowing town to hold complete title to the entire 62 acre area.

Evidence supported town's decision to condemn property owner's commercial land as part of redevelopment plan to combat urban blight, regardless or whether owner's particular property was blighted, where record showed that overall area was economically underdeveloped and stagnant and that condemnation and subsequent improvement would be of benefit.

Possibility that town would sell property owner's land to a private developer after condemning it did not render town's decision to authorize condemnation constitutionally infirm under the Fifth Amendment.

REFERENDA - OHIO

State ex rel. King v. Cuyahoga County Board of Elections

Supreme Court of Ohio - November 1, 2023 - N.E.3d - 2023 WL 7179059 - 2023-Ohio-3959

Mayor filed petition seeking extraordinary relief ordering county board of elections and its individual members to remove proposed city charter amendment from general election ballot and refrain from going forward with special mayoral recall election.

The Supreme Court held that:

- Board had no statutory obligation to hold hearing on mayor's protest against proposed city charter amendment, and
- Board had no statutory obligation to hold hearing on mayor's protest against validity of signatures on mayoral recall petition.

Statute requiring boards of elections to conduct hearings on written protests against petitions or

candidacies applies only to declarations of candidacy, nominating petitions, or other petitions presented to boards of elections for purpose of becoming candidate for any nomination or office or for holding of election on any issue.

County board of elections had no statutory obligation to hold hearing on mayor's protest against proposed city charter amendment, and thus issuance of writ of mandamus ordering board to remove issue from general election ballot was not warranted; amendment did not involve written protest against petition or candidate, and board placed amendment on ballot after it received city council's resolution proposing amendment under city charter.

County board of elections had no statutory obligation to hold hearing on mayor's protest against validity of signatures on mayoral recall petition, and thus issuance of writ of mandamus ordering board to remove mayoral recall issue from special election ballot was not warranted; city charter required clerk of council to certify whether at least 25 percent of voters who voted in last regular municipal election of officers signed petition, and gave board no discretion in reviewing petition's validity.

Board of elections does not abuse its discretion by declining to hold protest hearing when protestor has no statutory right to hearing.

EMPLOYMENT - TEXAS

El Paso County Water Improvement District No. 1 v. Trevizo

Court of Appeals of Texas, El Paso - October 27, 2023 - S.W.3d - 2023 WL 7109919

Employee who worked as an equipment manager for water district brought action against district, alleging that district discriminated against him on basis of his age and disability, denied him reasonable accommodation, and retaliated against him, resulting in a hostile work environment.

The District Court denied district's plea to the jurisdiction and motion for summary judgment based on sovereign immunity. District appealed.

On rehearing, the Court of Appeals held that:

- Manager's comment to employee was a stray remark that did not constitute competent direct evidence to support age discrimination claim;
- Employee did not provide sufficient evidence he was treated less favorably than similarly situated younger employees;
- Employee failed to establish a prima facie case of disability discrimination;
- Employee's statements that he was "tired of sweating" and "getting dizzy" were insufficient to constitute a request for reasonable accommodation;
- Employee failed to establish causal-link requirement for retaliation claim;
- Employee's request to not drive trucks without air conditioning, as purported accommodation for his disability, was not a protected activity sufficient to invoke anti-retaliation provisions of employment discrimination statute; and
- Alleged harassing actions against employee were not severe or pervasive enough to create an objectively hostile or abusive work environment.

PUBLIC SCHOOLS - COLORADO

Colorado State Board of Education v. Adams County School District 14

Supreme Court of Colorado - October 16, 2023 - P.3d - 2023 WL 68031852023 CO 52

School district sued Colorado State Board of Education, challenging decision to remove district's accreditation and order its reorganization, and asserting violations of procedural due process, equal protection on behalf of its students, local control provisions, and the Administrative Procedures Act (APA).

The District Court granted State Board's motion to dismiss. School district appealed, and State Board petitioned for certiorari review.

The Supreme Court held that:

- Subordinate state agencies, political subdivisions, and officials raising claims challenging a government entity's decision are not subject to any specialized standing test; abrogating *Martin v. District Court*, 550 P.2d 864;
- State Board did not violate the constitutional provision giving local boards of education control of instruction in public schools;
- School district lacked standing under either the Education Accountability Act or APA to bring a procedural due process challenge to the process followed by the State Board when it removed school district's accreditation and order its reorganization; and
- School district did not have standing to bring an equal protection claim on behalf of its majority-minority students against State Board for the use of cut scores to measure district performance.

EMINENT DOMAIN - MISSISSIPPI

Board of Supervisors of Issaquena County, Mississippi v. United States

United States Court of Appeals, Federal Circuit - October 19, 2023 - F.4th - 2023 WL 6886791

County board of supervisors brought takings action against the United States, alleging that actions or inactions by the United States when extending levee project led to flooding that damaged county property, destroyed private property, and reduced economic activity, thereby depriving the county of tax revenue.

The Court of Federal Claims granted the government's motion to dismiss for failure to state a claim, and county appealed.

The Court of Appeals held that:

- Failure of the United States to build pumps in backwater project area or to construct an alternative drainage system did not constitute a taking;
- Original projects to shore up river levee system did not support takings claim;
- Complaint failed to allege that flooding of property enclosed by levees was greater than would have taken place if the levee project had not been built; and
- Based on arguments on appeal, Court of Appeals would allow county to ask Claims Court to consider an amended takings complaint.

Failure of the United States government to build pumps in backwater project area after levee system was built up, or to construct an alternative drainage system, did not constitute a taking of county property, which flooded after heavy rain, as there was no affirmative government act.

Original United States government projects to shore up river levee system did not support county's takings claim stemming from flooding of backwater area following later extension of levees, even if original projects were expected to increase flood heights on the river and require additional flood protection for the flooded county backwater area, as county's complaint made no claim based on a theory involving the flood control measures on the river stemming from the original projects, which were undertaken almost a century earlier, but instead its claim for relief rested entirely on the government's actions vis-à-vis the backwater levee extension project's construction and operation.

Based on arguments on appeal, Court of Appeals would allow county to ask Claims Court to consider an amended takings complaint against the United States that would explain how the construction and operation of levee extension project led to increased flooding, even though county did not seek leave from the Claims Court to file an amended complaint and did not expressly ask for a remand for that purpose; while complaint was dismissed for failure to state a claim, and complaint did not allege but-for causation, county had argued on appeal that the United States was systematically increasing flood risk by preventing area enclosed by levee from draining when river was not flooding, but had failed to specifically allege in complaint that the levee project made things worse by blocking water from draining during non-flood periods.

County's complaint against the United States, based on flood control project which extended levees, failed to allege that flooding of property enclosed by levees was greater than would have taken place if the levee project had not been built, and thus failed to allege causation necessary to state a takings claim; complaint appeared to concede that absent the project, backwater flooding from river would have entered the area and there was no allegation that project made backwater river flooding worse, complaint did not plausibly explain how the construction of the levee project could have led to worse rainwater flooding than would have occurred in its absence.

IMMUNITY - NEBRASKA

Brown v. State

Supreme Court of Nebraska - October 13, 2023 - N.W.2d - 315 Neb. 336 - 2023 WL 6780043

Visitor at state recreational area brought negligence action against State under State Tort Claims Act (STCA), alleging he was injured at the recreational area when a riding lawnmower struck picnic table at which he was sitting.

The District Court dismissed. Visitor appealed. The Supreme Court reversed and remanded. The District Court granted summary judgment for State. Visitor appealed.

The Supreme Court held that:

- A riding lawnmower is not a "motor vehicle" as exception to weather conditions exemption to waiver of sovereign immunity under STCA, and
- Weather conditions exemption to waiver of sovereign immunity applied.

A riding lawnmower is not a "motor vehicle" for purposes of the State Tort Claims Act (STCA) provision setting forth a motor vehicle exception to the weather conditions exemption to waiver of sovereign immunity.

Negligence claim of visitor at state recreational area arose out of wet grass in recreation area, and therefore State had immunity from suit under the weather conditions exemption to waiver of

sovereign immunity in State Tort Claims Act (STCA), for action arising from a riding lawnmower's collision with picnic table at which visitor was sitting, where mower slipped on wet grass from rain the prior day while being operated by a state employee, mower slid down slope, and mower then collided with picnic table that was at bottom of slope.

ZONING & PLANNING - NEW YORK

Nemeth v. K–Tooling

Court of Appeals of New York - October 24, 2023 - N.E.3d - 2023 WL 6976445 - 2023 N.Y. Slip Op. 05349

Property owners filed article 78 petition against businesses being operated on neighbor's land and zoning board of appeals to annul grant of neighbor's second request for use variance, and then amended petition to add neighbor as respondent and moved for judgment.

The Supreme Court granted respondents' cross-motions to dismiss amended pleading on limitations grounds and for lack of necessary party, and owners appealed. The Supreme Court, Appellate Division, affirmed. Owners petitioned for and were granted leave to appeal.

The Court of Appeals held that:

- If petition was amended to add new party, relation-back doctrine was not limited to cases where amending party's omission in failing to name party in original petition resulted from doubts regarding omitted party's identity or status, abrogating *Matter of Sullivan v Planning Bd. of the Town of Mamakating*, 151 A.D.3d 1518, 58 N.Y.S.3d 692, *Branch v Community Coll. of the County of Sullivan,* 148 A.D.3d 1410, 48 N.Y.S.3d 861, and *Matter of Ayuda Re Funding, LLC v Town of Liberty*, 121 A.D.3d 1474, 996 N.Y.S.2d 379;
- Neighbor knew or should have known that, but for owners' mistaken omission, she would have been named in owners' article 78 petition to annul variance, as required for amended petition adding neighbor as respondent to relate back to original, timely filed petition;
- Better course was for Court of Appeals to determine whether neighbor shared unity of interest with businesses named as respondents in original petition, as required for amended petition to relate back to originally filed petition, rather than remittal of case; and
- Neighbor shared unity of interest with businesses named in original petition, as required for amended petition to relate back to original, timely filed petition.

MUNICIPAL CORPORATIONS - NORTH CAROLINA

Town of Midland v. Harrell

Supreme Court of North Carolina - October 20, 2023 - S.E.2d - 2023 WL 6933512

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, and the Court of Appeals affirmed in part and reversed in part. Developers

appealed based on dissenting opinion.

The Supreme Court held that ordinance authorized town to file suit against subdivision developers for failure to maintain subdivision streets without first obtaining approval of the town council.

Town development ordinance regarding developer maintenance of subdivisions streets not accepted by dedication, which provided that, if a penalty is not paid or settlement not reached "the matter shall be referred to legal counsel," authorized town to file suit against subdivision developers for failure to maintain subdivision streets without first obtaining approval of the town council.

LIABILITY - OKLAHOMA

Ullman v. Oklahoma Highway Patrol

Supreme Court of Oklahoma - October 17, 2023 - P.3d - 2023 WL 6818220 - 2023 OK 100

Personal watercraft riders who were injured when a boat operated by a trooper with the Oklahoma Highway Patrol (OHP) collided with them brought action against OHP for negligence and respondeat superior.

The District Court granted OHP's motion to dismiss and denied riders' motion for a new trial. Riders appealed.

The Supreme Court held that letter asking OHP to preserve evidence relating the accident did not substantially comply with notice of claim requirements in the Governmental Tort Claims Act, and thus did not trigger time limits for filing suit under the Act.

Letter sent by attorney asking Oklahoma Highway Patrol (OHP) to preserve any evidence relating to accident that occurred when boat operated by OHP officer collided with personal watercraft, injuring riders, did not substantially comply with notice provisions of the Governmental Tort Claims Act, and thus did not trigger Act's time limits for filing suit against OHP for negligence and respondeat superior; letter was not addressed or sent to Oklahoma Office of Management & Enterprise Services (OMES) and stated that a claim might be made, but that evidence must be preserved to make such an evaluation, and letter did not state the name of the officer who allegedly caused the accident, or provide details about healthcare providers or injuries sustained, other than to generally list some of them.

PUBLIC UTILITIES - TEXAS

North Collin Special Utility District v. City of Princeton, Texas

United States District Court, E.D. Texas, Sherman Division - September 29, 2023 - F.Supp.3d - 2023 WL 6387368

Special utility district brought action against city, under § 1983 and provision of Consolidated Farm and Rural Development Act protecting utilities from curtailment and encroachment by municipalities and other public bodies, alleging that city was unlawfully providing water service to customers in competition with district and within district's service area.

City moved to dismiss, to transfer, and for a more definite statement.

The District Court adopted report and recommendation of United States Magistrate Judge, and held that:

- City's argument on motion to dismiss for lack of subject matter jurisdiction was properly considered on a motion to dismiss for failure to state a claim;
- First-to-file rule did not apply based on case district filed in another court;
- Stay pending resolution of district's case filed in another court was warranted;
- District could not state a § 1983 claim;
- District's allegations were insufficient to state claim for protection under provision protecting utilities from encroachment by municipalities with regard to district's entire certificate of convenience and necessity (CCN);
- District's request for declaration of rights concerning effect of city's annexation of land within district's territory, actual and threatened water service by city, and city's interference with potential district water customers failed to state a claim for declaratory judgment; and
- Claim that provision protecting utilities from curtailment and encroachment by municipalities preempted applicable state laws was insufficient to establish federal question jurisdiction.

ENVIRONMENTAL - COLORADO

Weld County Colorado Board of County Commissioners v. Ryan

Supreme Court of Colorado - October 16, 2023 - P.3d - 2023 WL 6799975 - 2023 CO 54

County brought action challenging rules adopted by Air Quality Control Commission to minimize emissions of certain pollutants from oil and gas wells.

The District Court dismissed action for lack of standing. County appealed. The Court of Appeals affirmed. County filed petition for certiorari.

The Supreme Court held that:

- County's claims were "legally protected," but
- County did not establish injury in fact.

County's claims were "legally protected," as required for standing, in county's action challenging rules adopted by Air Quality Control Commission to minimize emissions of certain pollutants from oil and gas wells; Air Pollution Prevention and Control Act contained provision permitting judicial review, which was intended for parties, including counties, to be able to bring Administrative Procedure Act (APA) challenge to any final order or determination by Commission.

Supreme Court, on review of Court of Appeals' affirmation of trial court's dismissal for lack of standing of county's action challenging rules adopted by Air Quality Control Commission to minimize emissions of certain pollutants from oil and gas wells, would decline to consider county's theory that it suffered injury in fact because it was landowner with rights impacted by revisions at issue, where county did not plead such theory in its complaint or otherwise raise such theory in trial court.

Supreme Court, on review of Court of Appeals' affirmation of trial court's dismissal for lack of standing of county's action challenging rules adopted by Air Quality Control Commission to minimize emissions of certain pollutants from oil and gas wells, would decline to consider county's theory that it suffered injury in fact because it had associational standing on behalf of small well operators within county, although county's complaint contained allegation that Air Pollution Prevention and Control Act generally granted counties unique standing to represent interests of their constituents,

where complaint contained no other factual allegations that supported associational standing, and county did not raise associational-standing theory before trial court.

County's allegation that rules would significantly increase costs of regulatory compliance for oil and gas operators within county, resulting in large percentage of county's wells being shut-in and thereby reducing county's tax revenue streams did not establish injury in fact required for standing, in county's action challenging rules adopted by Air Quality Control Commission to minimize emissions of certain pollutants from oil and gas wells; supposed harm to county's tax base flowed from speculation about future business decisions that third-party oil and gas operators might make in response to increased regulatory burden.

County's allegation that Air Quality Control Commission failed to give adequate priority to county's concerns as local government raising questions about economic impact of proposed rules as required by statute did not establish injury in fact required for standing, in county's action challenging rules adopted by Commission to minimize emissions of certain pollutants from oil and gas wells, although county alleged that it was given only ten minutes to testify during rulemaking hearing and that Commission ultimately adopted rules which were contrary to county's arguments; county's complaint lacked any factual allegation that its evidence was excluded from rulemaking hearing or that its arguments were otherwise ignored.

County's allegation that Air Quality Control Commission's methodology was flawed and that it permitted one party to file proposal after deadline for submitting proposals had passed and without sufficient time for other parties to react, in violation of Commission's procedural rules and therefore of Administrative Procedure Act (APA), did not establish injury in fact required for standing, in county's action challenging rules adopted by Commission to minimize emissions of certain pollutants from oil and gas wells; county's complaint contained little more than contention that Commission acted improperly, and did not state how Commission's allegedly unlawful action injured county beyond reducing time it had to respond to proposal.

County's allegation that rules infringed on its land use authority did not establish injury in fact required for standing, in county's action challenging rules adopted by Air Quality Control Commission to minimize emissions of certain pollutants from oil and gas wells; rules at issue had no bearing on use of land, as oil and gas producers could still operate anywhere under rules, but those operations were merely subject to increased inspections and emissions requirements.

IMMUNITY - GEORGIA

McBrayer v. Scarbrough

Supreme Court of Georgia - October 11, 2023 - S.E.2d - 2023 WL 6611019

Arrestee's wife brought wrongful death action against county sheriff, alleging negligence by sheriff's deputies arising from arrestee's death while he was restrained in back seat of a patrol car.

The Superior Court granted sheriff's motion for judgment on the pleadings. Wife appealed. The Court of Appeals affirmed. Wife petitioned for writ of certiorari to the Court of Appeals, and the Supreme Court granted her petition.

The Supreme Court held that:

- Word "use" in statute waiving sovereign immunity for injuries arising from negligent use of a covered motor vehicle does not exclude any use beyond active transportation, but instead, may

include other acts depending on the circumstances of the case, overruling *City of Roswell v. Hernandez-Flores*, 365 Ga. App. 849, 880 S.E.2d 340; *Wingler v. White*, 344 Ga. App. 94, 808 S.E.2d 901; *Columbus Consolidated Govt. v. Woody*, 342 Ga. App. 233, 802 S.E.2d 717; *Bd. of Commrs. of Putnam County v. Barefoot*, 313 Ga. App. 406, 721 S.E.2d 612; *Gish v. Thomas,* 302 Ga. App. 854, 691 S.E.2d 900; and *Williams v. Whitfield County*, 289 Ga. App. 301, 656 S.E.2d 584, and

- Arrestee's death arose from deputies' alleged negligent "use" of a covered motor vehicle, as required for waiver of sovereign immunity.

Arrestee's death when county sheriff's deputies detained him and left him prone across back seat of the patrol car, restrained by cobble strap affixed to patrol car door, arose from deputies' alleged negligent "use" of a covered motor vehicle, as required for waiver of sovereign immunity in wrongful death action brought against sheriff by arrestee's wife, since patrol cars were designed to detain people, and loading arrestee into the back of the patrol car was inherently part of the detention process because he could not have been detained inside the patrol car without having been loaded inside it by deputies.

EMINENT DOMAIN - ILLINOIS

Willow Way, LLC v. Village of Lyons, Illinois

United States Court of Appeals, Seventh Circuit - October 5, 2023 - F.4th - 2023 WL 6474407

Former landowner brought § 1983 action against village alleging federal due process and takings claims, and a state-law inverse condemnation claim, arising from village's demolition of the property's dilapidated and empty house that was a public nuisance.

The United States District Court for the Northern District of Illinois granted summary judgment for village on federal claims and relinquished supplemental jurisdiction. Former landowner appealed.

The Court of Appeals held that:

- Demolition due to public nuisance did not violate substantive due process and was not a taking requiring just compensation;
- No procedural due process violation occurred; and
- The $75,000 jurisdictional minimum for diversity jurisdiction over state-law claim was not satisfied.

Village's demolition of a dilapidated and empty house that was a public nuisance did not violate landowner's substantive due process rights and did not require just compensation under takings clause.

No procedural due process violation occurred in connection with village's demolition of a dilapidated and empty house that was a public nuisance, where village published notice, posted notices on house, and mailed notice to landowner of the impending demolition, and landowner did not request a hearing or file suit in state court pursuant to statutory procedure to block demolition until a judge could decide whether house met statutory criteria for being razed.

The $86,000 difference in price that landowner paid to acquire property and the sales price for property at auction approximately five years later to satisfy village's lien for demolition expenses did

not satisfy the $75,000 jurisdictional minimum for diversity jurisdiction for district court to exercise supplemental jurisdiction over landowner's state-law inverse condemnation claim after grant of summary judgment for village on landowner's federal takings and due process claims arising from village's demolition of the property's dilapidated and empty house, as a public nuisance, approximately four years after landowner acquired property; change in price over five years differed from injury caused by demolition of house, and value of property immediately before and after demolition was unknown.

PRISON FINANCE - OKLAHOMA

Oklahoma Department of Corrections v. Byrd

Supreme Court of Oklahoma - October 10, 2023 - P.3d - 2023 WL 6564666 - 2023 OK 97

Oklahoma Department of Corrections petitioned for review from decision of State Auditor as to "actual daily cost" for which county was entitled to reimbursement from Department for housing state prisoners.

The District Court granted county's and State Auditor's motion for summary judgment based on determination that it lacked subject matter jurisdiction to adjudicate any claim that would it to decide "actual daily cost" reimbursement.

Department filed petition in error. The Court of Civil Appeals reversed and remanded. Department's and State Auditor's petitions for certiorari review were granted.

The Supreme Court held that:

- Doctrine of issue preclusion did not apply to bar relitigation of whether "actual daily cost" included county jail's fixed costs, based on order granting summary judgment in prior suit by county against Department;
- Whether "actual daily cost" included county's fixed costs or was limited to consumable costs presented matter of statutory interpretation that did not implicate separation of powers, overruling *Board of County Commissioners of County of Seminole v. Oklahoma Department of Corrections,* 499 P.3d 33; and
- "Actual daily cost" meant any cost incurred by county that directly attributable to housing prisoner, including consumable costs and any portion of county jail's operating expenses that would not otherwise have been incurred but for presence of prisoner.

Trial court's order on summary judgment in prior suit by county against Department of Corrections that "actual daily cost" that county was entitled to reimbursement from Department for housing prison inmates was limited to consumables, i.e., actual costs of feeding, housing, clothing, and providing medical treatment to prisoners and did not include fixed costs, for purposes of Department's statutory obligation to reimburse county for costs of housing inmates, did not have preclusive effect, and thus, doctrine of issue preclusion did not apply in Department's subsequent petition for review of State Auditor's determination that "actual daily cost" included county's fixed costs, where State Auditor was not party to prior suit, and therefore did not have full and fair opportunity to litigate issue of meaning of "actual daily cost," and prior order was non-final, interlocutory order.

Trial court's determination of whether "actual daily cost" included county's fixed costs or was limited to consumable costs, under statute governing Department of Corrections' obligation to

reimburse county for actual daily cost of housing state prisoner, presented matter of statutory interpretation that did not implicate separation of powers, and thus, trial court did not lack subject matter jurisdiction to interpret meaning of "actual daily cost," on Department's petition for review of Auditor's calculation of county's actual daily cost for which it was entitled to reimbursement, despite State Auditor's assertion that statute conferred upon her office discretionary executive duty to determine "actual daily cost"; rather, State Auditor's statutory duties and discretion she had in performing those duties were predicated upon interpretation of statute, and by interpreting "actual daily cost," court was not interfering with State Auditor's performance of her executive duty.

"Actual daily cost," within meaning of statute governing Department of Corrections' obligation to reimburse county for costs of housing state prisoner, meant any cost directly attributable to housing prisoner, including consumable costs such as food, clothing, and medical care, and any portion of county jail's operating expenses that would not otherwise have been incurred but for presence of prisoner.

EMINENT DOMAIN - SOUTH CAROLINA

Marlowe v. South Carolina Department of Transportation

Court of Appeals of South Carolina - September 27, 2023 - S.E.2d - 2023 WL 6280433

Landowners brought action against the Department of Transportation (DOT), alleging inverse condemnation, conversion, due process, and negligence for flood damage to their property purportedly caused by DOT's construction project for a new culvert and elevated highway following a cataclysmic flood and hurricane.

The Circuit Court granted DOT's motion for summary judgment. Landowners appealed.

The Court of Appeals held that:

- DOT was not liable for any damages to landowners' property which occurred during or before its construction process;
- Adoption and execution of construction project was a quasi-judicial function subject to governmental immunity;
- Triable issue of fact existed as to whether DOT's conduct amounted to an affirmative, positive, aggressive act; and
- Provision of Stormwater Act did not provide for unchecked immunity to governmental entities once a permit had been obtained.

Department of Transportation (DOT) had no notice of alleged defects or condition of existing culvert for highway near landowners' property, and thus was not liable for any damages which occurred during or before its construction process under provision of Tort Claims Act (TCA) providing that governmental entities were not liable for design of highways and other public ways, in landowners' action against DOT for flood damage to their property purportedly caused by DOT's construction project for a new culvert and elevated highway following a cataclysmic flood and hurricane; before construction began, DOT's hydraulic design study found no functional deficiencies with existing culvert, and once construction began, project was under design and not subject to maintenance.

Department of Transportation's (DOT) adoption and execution of construction project for a new culvert and elevated highway near landowners' property was quasi-judicial function subject to governmental immunity under Tort Claims Act (TCA), in landowners' action against DOT for flood

damage to their property purportedly caused by DOT's construction project for a new culvert and elevated highway following a cataclysmic flood and hurricane; though process of altering highway elevation near a property increased risk of flooding to the surrounding areas, DOT had plans to install new culvert during construction process, however, new culvert was not installed until after the two major weather events occurred.

Genuine issue of material fact existed as to whether Department of Transportation's (DOT) conduct in its construction project for a new culvert and elevated highway near landowners' property amounted to an affirmative, positive, aggressive act, precluding summary judgment in landowners' action against DOT for flood damage to their property purportedly caused by DOT's construction project for a new culvert and elevated highway following a cataclysmic flood and hurricane.

Landowners were not required to demonstrate that affirmative, positive, aggressive act on part of the Department of Transportation (DOT) occurred because its installation of culverts and construction to public roadways were legitimate government actions, as would support a claim for regulatory inverse condemnation, in landowners' action against the DOT for inverse condemnation for flood damage to their property purportedly caused by DOT's construction project for a new culvert and elevated highway following a cataclysmic flood and hurricane; landowners were seeking recovery for flooding damage under a theory of physical inverse condemnation.

Provision of Stormwater Act providing that no action or failure to act under the Act could be construed to impose any liability on the State, department, districts, local governments, or other agencies, officers, or employees for recovery of damages caused by such action or failure to act was not a catch-all provision that provided unchecked immunity to governmental entities once a permit had been obtained, in landowners' action against Department of Transportation (DOT) for flood damage to their property purportedly caused by DOT's construction project for a new culvert and elevated highway following a cataclysmic flood and hurricane; provision neither imposed nor relieved liability for actions or failures to act.

PUBLIC UTILITIES - CALIFORNIA

Boyd v. Central Coast Community Energy

Court of Appeal, Sixth District, California - October 4, 2023 - Cal.Rptr.3d - 2023 WL 6457319

Residential customer petitioned for writ of mandate claiming that electricity rates charged by a regional governmental entity, which was a community choice aggregator, were invalid under State Constitution as taxes that voters had not approved.

The Superior Court denied petition. Customer appealed.

The Court of Appeal held that:

- Electricity rates were "taxes" under general definition of taxes, but
- Rates fell within exception for rates not exceeding reasonable costs of providing service.

Electricity rates that regional governmental entity, a community choice aggregator, charged to residential customers under an "investor owned utility-minus" model and then under a cost-o--service model were charges imposed by a local government and therefore the rates were "taxes" under general definition of taxes in state constitutional provision requiring local and regional governmental entities to secure voter approval for new or increased taxes, where entity was a joint

powers authority formed of cities, towns, and counties, and rates were established by entity's board of directors under authority granted by the joint powers agreement forming the entity.

Electricity rates that regional governmental entity, a community choice aggregator, charged to residential customers under an "investor owned utility-minus" model and then under a cost-o--services model were "taxes" under general definition of taxes in state constitutional provision requiring local and regional governmental entities to secure voter approval for new or increased taxes, even though customers had the choice of opting out of the rates and receiving electricity from a privately owned utility instead; any requirement of no alternative way for customers to obtain electricity services in order to deem the rates "taxes" would have impermissibly engrafted an unstated, extratextual restriction onto the constitutional provision.

Electricity rates that regional governmental entity, a community choice aggregator, charged to residential customers under an "investor owned utility-minus" model and then under a cost-o--services model were "taxes" under general definition of taxes in state constitutional provision requiring local and regional governmental entities to secure voter approval for new or increased taxes, despite argument that treating entity's rates as taxes would undermine its ability to function due to the difficulty of obtaining voter approval for rate increases in each jurisdiction in which entity functioned, where entity could avoid having to obtain approval from all jurisdictions within its service area by making sure that its charges did not exceed its reasonable costs as an exception to definition of taxes.

Substantial evidence supported trial court's finding that electricity rates that regional governmental entity, a community choice aggregator, initially charged residential customers under an "investor owned utility-minus" model did not exceed entity's reasonable costs, and therefore rates fell within the reasonable costs exception to general definition of "taxes" requiring voter approval under the State Constitution, where entity presented evidence about how it calculated rates using rates charged by incumbent privately-owned electric utility that served most of entity's operating area as the starting point, and entity also presented testimony that the rates of privately-owned electric utilities were based on their costs of service and that community choice aggregators had higher costs because they faced risks that privately-owned utilities did not.

Substantial evidence supported trial court's finding that electricity rates that regional governmental entity, a community choice aggregator, charged residential customer under a cost-of-service model did not exceed entity's reasonable costs, and therefore rates fell within the reasonable costs exception to general definition of "taxes" requiring voter approval under the State Constitution, even though entity had a surplus of nearly $18.5 million at time it adopted model and set new rates based on model, where surplus was from a mid-year treasurer's report, which took a snapshot of entity's position at time of report, and other evidence showed that by end of the year, entity's net position had declined $7.8 million, far from running a surplus.

BONDS - INDIANA

London Witte Group, LLC v. City of Marion

Court of Appeals of Indiana - October 10, 2023 - N.E.3d - 2023 WL 6562947

A few years before 2008 or 2009, the YMCA in Marion moved into a new space, leaving the old YMCA building in downtown Marion vacant. In 2008 or 2009, the City began discussions with Michael An, a developer from California. An proposed a redevelopment of the old YMCA building into a combination of hotel, restaurant, retail, and commercial spaces ("the YMCA project"). He

estimated that the project would cost around $5.5 million. The City was willing to provide bond financing in the amount of $2.5 million, meaning that An had to come up with $3 million from other sources.

The bonds would be funded from a tax-increment financing (TIF) district, with London Witte Group's (LWG) role being to determine "how much room is in the TIF district to do this project." Essentially, LWG's primary job was to ensure that the City could pay back the bonds.

First Farmers Bank emerged as the prospective bond buyer. The Bank and the City each expected that An would provide proof that he had attained the additional $3 million in financing. The Bank and the City subsequently accepted An's assurances that he had secured the additional financing.

LWG's assurances satisfied the Bank, because the bonds were issued on December 16, 2009. At some point, construction began, but it was never completed. The City refinanced the bonds in 2011, after which An continued to work on the project and to look for investors.

The City sued An's estate. The primary allegation from which the City's claims against LWG stemed is that LWG "not only failed to tell the City that An lacked the money to complete the project, it prevented the Bank from learning it—a fact which would have stopped, or at least substantially changed, the bond issue."

During the discovery process, the City allegedly first became aware that bond proceeds were used to provide personal benefits to Mayor Seybold, including payment of the premium on a life insurance policy, cash payments to Mayor Seybold's wife, and contributions to Mayor Seybold's political campaigns. Moreover, An was allegedly told that the City would invest in his project only if he hired the Mayor's brother, Chad.

The trial court entered an order granting LWG's motion with respect to the claims for negligence and breach of fiduciary duty and denying it with respect to the claim for constructive fraud/unjust enrichment. The trial court found that the negligence and breach of fiduciary duty Counts are based on the two-year statute of limitations. However, the Court denied the relief requested in the summary judgment motion as to the constructive fraud/unjust enrichment claim. That claim is based on the six-year statute of limitations, which did not begin to run until LWG's work on the 2011 Refinancing was completed.

The Supreme Court of Indiana reversed as to the statute of limitations claims. The Indiana Supreme Court adopted the doctrine of adverse domination as a potential avenue for tolling a statute of limitation in Indiana.

The case proceeded to trial and the jury entered a verdict against LWG in the amount of $3,121,624.00. LWG appealed and the Court of Appeals affirmed. LWG filed a motion fo a directed verdict, which was denied.

LWG challenged the trial court's determination that the City presented sufficient evidence of both intentional wrongdoing and domination by the Mayor to survive its directed verdict motions.

The trial court determined that a directed verdict was improper because there was sufficient evidence to support a reasonable inference of wrongdoing, or at least that would allow reasonable persons to differ as to the result. Upon review, the Court of Appeals reached the same conclusion as the trial court.

The Court of Appeals also found that the evidence supported the reasonable inference that Mayor Seybold exerted control over the investigation such that any wrongdoing on his behalf would not be

discovered. The Court of Appeals concluded that the trial court did not abuse its discretion in denying LWG's motion for a directed verdict on the City's claim of adverse domination.

IMMUNITY - MASSACHUSETTS

Paradis v. Frost

Appeals Court of Massachusetts, Middlesex - September 22, 2023 - N.E.3d - 2023 WL 6166492

After student died by suicide, student's mother brought action against school district and licensed independent clinical social worker, who had a contract with the school district, claiming negligence and wrongful death.

The Superior Court Department granted district's motion to dismiss, and mother appealed.

The Appeals Court held that:

- Social worker's failure to inform student's parents about student's girlfriend's concerns about him was not "original cause" of death of student who died by suicide, and thus, school district was entitled to immunity under Tort Claims Act;
- As matter of first impression, "specific assurance" exception to immunity under Tort Claims Act did not apply since student's girlfriend was not member of his household;
- As matter of first impression, term "household" means group of people who dwell under same roof, as term is used in Tort Claims Act providing that immunity does not apply to any claim based upon explicit and specific assurances of safety or assistance made to victim or member of his family or "household" by public employee;
- Social worker's failure to inform student's family about girlfriend's suspicions were negligent omissions, and not "acts of intervention," for purposes of "affirmative acts of intervention" exception to immunity under Tort Claims Act; and
- Section of Tort Claims Act which limited immunity for any claim by or on behalf of a patient for negligent medical or other therapeutic treatment received by patient from public employee did not apply.

EMINENT DOMAIN - MINNESOTA

State by Commissioner of Transportation v. Schaffer

Court of Appeals of Minnesota - August 7, 2023 - 995 N.W.2d 177

After owner of condemned land rejected state's offer of the $43,000 at which state had valued the land, state, by the Commissioner of Transportation (MnDOT), brought eminent-domain condemnation proceeding.

Following a hearing, court-appointed commissioners valued the taking at $92,000. After MnDOT had tendered payment in full with interest, the District Court granted owner's motion for an award of statutory attorney fees and costs and, following a hearing, awarded owner reasonable attorney fees

of $63,228, in excess of the $16,333.33 owner owed attorney under their contingency-fee agreement. MnDOT appealed.

As a matter of first impression, the Court of Appeals held that an award of statutory attorney fees in an eminent-domain proceeding is not limited to the amount specified in the landowner's attorney-fee agreement.

An award of statutory attorney fees in an eminent-domain proceeding, under statute providing for the award of reasonable attorney fees to a landowner if the final judgment or damages award in the proceeding is more than 40 percent greater than the condemning authority's last written offer, is not limited to the amount specified in the landowner's attorney-fee agreement.

ANNEXATION - NEW YORK

Town of Union Vale v. Town of Beekman

Supreme Court, Appellate Division, Second Department, - New York.September 20, 2023 - N.Y.S.3d - 2023 WL 6134177 - 2023 N.Y. Slip Op. 04670

Town commenced proceeding for annexation of real property lying within other municipality and that comprised of part of a public park, and referees were designated to hear and report their findings of fact and conclusions of law.

Following hearing referees, issued report finding that annexation was not in the overall public interest and recommended denial of annexation. Town filed motion to disaffirm report and other municipality filed motion to confirm report.

The Supreme Court, Appellate Division, held that:

- Annexation of property was not in the overall public interest, and
- Annexation proceeding was not proper former for resolution of zoning dispute regarding proposed site of cellular phone tower.

Annexation of real property lying within other municipality, which comprised part of a public park, was not in the overall public interest, precluding grant of town's request for annexation; there was no indication that unified government of park encompassing subject property would benefit the public or provide significant public safety benefits or that annexation was necessary to resolve a taxation dispute.

Annexation proceeding was not the proper forum for resolution of zoning dispute between town and other municipality regarding proposed site of cellular phone tower located within real property composed of largely vacant land and making up part of a public park; dispute was the subject of a related article 78 proceeding and appeal.

REFERENDA - OHIO

State ex rel. Miller v. Union County Board of Elections

Supreme Court of Ohio - October 7, 2023 - N.E.3d - 2023 WL 6543199 - 2023-Ohio-3664

Committee which sought to hold referendum on annexation ordinance filed complaint for writ of

mandamus ordering county board of elections to place referendum on general-election ballot. Committee also sought award of attorney's fees.

The Supreme Court held that:

- Committee lacked adequate remedy in the ordinary course of law, as required for writ of mandamus;
- Laches did not bar committee's action for writ of mandamus;
- Secretary of State was not necessary and indispensable party to action for writ of mandamus;
- Removal of referendum from general-election ballot was not appropriate, based on alleged misrepresentations about contents of referendum by committee;
- Removal of referendum from general-election ballot was not appropriate, based on alleged misrepresentations regarding aerial-photo map of area subject to referendum by committee; and
- Committee was not entitled to attorney's fees.

REFERENDA - OHIO

State ex rel. Hildreth v. LaRose

Supreme Court of Ohio - October 8, 2023 - N.E.3d - 2023 WL 6542737 - 2023-Ohio-3667

Relators sought writ of mandamus compelling Ohio Secretary of State and county board of elections to sustain a protest and remove an initiative from general-election ballot.

The Supreme Court held that:

- Relators lacked an adequate remedy in the ordinary course of the law;
- Petition did not violate election law providing that no alterations, corrections, or additions may be made to a petition after it is filed in a public office;
- Petition violated election law requiring that part-petitions that electors sign are the same ones that are later filed with city auditor; and
- Petition did not comply with election law requiring the title of a proposed ordinance to be included on each part-petition presented to electors.

Relators lacked an adequate remedy in the ordinary course of the law, as would support writ of mandamus to compel Ohio Secretary of State and county board of elections to sustain a protest and remove an initiative from general-election ballot, given proximity of election of approximately one month.

There was no evidence that anyone altered initiative petition after it was filed with city auditor, and thus petition did not violate election law providing that no alterations, corrections, or additions may be made to a petition after it is filed in a public office, such that relators were not entitled to writ of mandamus to compel Ohio Secretary of State and county board of elections to sustain protest and remove initiative from general-election ballot on basis of violation of such election law, even though petitioners had previously filed a certified copy of proposed ordinance with city auditor which differed from petition.

Initiative petition filed with city auditor violated election law prescribing a city auditor's duties after receiving a petition that has been signed by the required number of electors, and which inherently requires that part-petitions that electors sign are the same ones that are later filed with city auditor, by replacing the first page of part-petitions after obtaining signatures, as would support writ of mandamus to compel Ohio Secretary of State and county board of elections to sustain protest and

remove initiative from general-election ballot; part-petitions as filed with city auditor were not signed by any electors.

Initiative petition filed with city auditor did not comply with election law requiring that each part-petition presented to electors contain a full and correct copy of the title and text of the proposed ordinance and requiring the title of a proposed ordinance to be included on each part-petition presented to electors, as would support writ of mandamus to compel Ohio Secretary of State and county board of elections to sustain protest and remove initiative from general-election ballot, since each filed part-petition included a title that was not presented to the electors who signed it, and new language conveyed material information about the nature of the proposed ordinance.

REFERENDA - OHIO

State ex rel. Ohioans United for Reproductive Rights v. Ohio Ballot Board

Supreme Court of Ohio - September 19, 2023 - N.E.3d - 2023 WL 6120070 - 2023-Ohi--3325

Committee, which proposed initiative petition for constitutional amendment regarding right to reproductive freedom, contended that ballot language for amendment was misleading and sought writ of mandamus to compel Ohio Secretary of State to reconvene Ohio Ballot Board to either adopt proposed amendment as ballot language or to prescribe lawful ballot language.

The Supreme Court held that:

- Term "medical treatment" in ballot language was not misleading;
- Phrase "citizens of the State of Ohio" in ballot language was misleading to average voter;
- Ballot language was not misleading regarding woman's right to continue pregnancy against medical advice;
- Ballot language was not misleading by suggesting that physician had unfettered authority to determine fetal viability;
- Ballot language was not misleading about circumstances in which State could regulate reproductive decision-making;
- Use of term "unborn child" instead of "fetus" did not make ballot language improperly argumentative; and
- Limited writ of mandamus was warranted to correct misleading ballot language.

REFERENDA - OHIO

State ex rel. Hildreth v. LaRose

Supreme Court of Ohio - October 8, 2023 - N.E.3d - 2023 WL 6542737 - 2023-Ohio-3667

Relators sought writ of mandamus compelling Ohio Secretary of State and county Board of Elections to sustain a protest and remove an initiative from general-election ballot.

The Supreme Court held that:

- Relators lacked an adequate remedy in the ordinary course of the law;
- Petition did not violate election law providing that no alterations, corrections, or additions may be made to a petition after it is filed in a public office;

- Petition violated election law requiring that part-petitions that electors sign are the same ones that are later filed with city auditor; and
- Petition did not comply with election law requiring the title of a proposed ordinance to be included on each part-petition presented to electors.

STATUTE OF LIMITATION - MINNESOTA

Ringsred v. City of Duluth

Supreme Court of Minnesota - September 13, 2023 - N.W.2d - 2023 WL 5944262

Plaintiff, an individual who had once owned certain real property in city and who had been involved in litigation with city related to that property, brought action against city, newspaper, and other defendants, alleging, among other claims, a § 1983 claim against city for allegedly interfering with plaintiff's First Amendment free-speech rights by making false statements and taking other retaliatory action against him because of his prior lawsuits and public opposition to city's actions.

The District Court dismissed certain claims for failure to state a claim, specifically holding that plaintiff's First Amendment retaliation claim against city was time-barred, granted summary judgment to defendants on other claims, and denied leave to amend. On plaintiff's appeal, the Court of Appeals affirmed on some issues but reversed as to dismissal of plaintiff's First Amendment retaliation claim against city, holding that the statute of limitations was tolled under the continuing-violation doctrine. City petitioned for further review only on the timeliness of plaintiff's First Amendment retaliation claim.

The Supreme Court held that the continuing-violation doctrine, assuming it could apply, did not render timely plaintiff's claims alleging that, outside the six-year limitations period, city wrongly retaliated against him for exercising his First Amendment free-speech rights, because each alleged act of retaliation was a discrete act that was actionable when it was committed.

Even if the continuing-violation doctrine could apply under Minnesota law for purposes of determining the timeliness of a § 1983 claim for First Amendment retaliation, the doctrine did not apply to render timely plaintiff's claims alleging that, outside the six-year limitations period, city interfered with his First Amendment free-speech rights by making false statements and taking other retaliatory action against him because of his prior lawsuits and public opposition to city's actions related to certain property in city, because each alleged act of retaliation, such as city's alleged interference with his ability to buy the property as retaliation for his prior speech, was a discrete act that was actionable when it was committed.

BONDS - MINNESOTA

In the Matter of the Issuance of $24,035,000 in Industrial Development Authority Revenue Bonds

Court of Appeals of Minnesota - October 9, 2023 - Not Reported in N.W. Rptr. - 2023 WL 6543580

Volusia County, Florida, issued three series of bonds to finance the acquisition and renovation of a senior-living facility. After the onset of the COVID-19 pandemic, the facility did not generate enough revenue to make the agreed-upon regular payments to bondholders. The facility was sold for a loss. The district court determined that the proceeds of the sale must be distributed to first-tier

bondholders before second-tier bondholders and to second-tier bondholders before third-tier bondholders.

On appeal, a third-tier bondholder argued that the district court should have distributed the sale proceeds to all bondholders on a pro rata basis.

The Court of Appeals affirmed, holding that the district court properly interpreted the governing agreements by giving first-tier bondholders priority over second-tier bondholders and second-tier bondholders priority over third-tier bondholders.

IMMUNITY - GEORGIA

Collins v. Schantz

Court of Appeals of Georgia - September 26, 2023 - S.E.2d - 2023 WL 6223235

Motorcyclist, who had led police on high-speed chase, brought action against estate of county sheriff, who had shot buckshot at him, alleging battery, negligence, and violations of Georgia constitution.

The Superior Court denied estate's summary judgment motion. Estate applied for interlocutory appeal, which was granted.

The Court of Appeals held that:

- Genuine issue of material fact regarding whether sheriff was entitled to official immunity precluded summary judgment on battery and negligence claims, but
- Motorcyclist had no viable private cause of action against estate for alleged constitutional violations.

Genuine issue of material fact regarding whether county sheriff, who had shot motorcyclist with buckshot as motorcyclist led police on high-speed chase, intended to shoot motorcyclist intentionally and without justification, such that he acted solely with tortious intent to cause injury, or whether he shot motorcyclist in self-defense, and thus whether sheriff was entitled to official immunity, precluded summary judgment in action brought by motorcyclist against sheriff's estate, alleging battery and negligence.

Motorcyclist, who had been shot by county sheriff as motorcyclist led police on high-speed chase, had no viable private cause of action against sheriff's estate for violation of Georgia constitution's ban on unreasonable seizures and on abuse of person in being arrested, even assuming his assertions concerning sheriff's alleged violations of constitutional rights had merit; Georgia law contained no equivalent to § 1983, which gave claim against state officer individually for certain unconstitutional acts.

EMINENT DOMAIN - CALIFORNIA

Pacific Gas and Electric Company v. Superior Court of San Joaquin County

Court of Appeal, Third District, California - September 21, 2023 - Cal.Rptr.3d - 2023 WL 6156238

Irrigation district brought eminent domain action to acquire a portion of electric utility's electric distribution system that was within district's service territory in order to provide its own retail electric service.

The Superior Court confirmed an earlier order of the Superior Court concerning standard of proof to be applied at trial. Utility petitioned for writ of mandate.

The Court of Appeal held that:

- Utility could raise objection to the taking on grounds that were separate from validity of district's resolution of necessity, and
- Separation of powers doctrine did not require judicial deference to district's resolution of necessity.

Extraordinary circumstances existed for mandamus review of the substance of two superior court orders regarding standard of proof to be applied at trial on irrigation district's right to take a portion of electric utility's electric distribution system under Eminent Domain Law, even though the first order was filed six years earlier, where a timely petition for writ of mandate was previously filed with respect to first order, that petition was only dismissed because it was then moot, current writ petition was timely as to second order, and, to the extent the second order was erroneous, it was erroneous because it attempted to incorporate an erroneous and incompatible earlier ruling.

Electric utility did not have to show that irrigation district grossly abused its discretion or that the findings in district's resolution of necessity were not supported by substantial evidence in order to challenge district's right to take a portion of utility's electric distribution system that was within district's service territory for purposes of providing its own retail electric service; utility simply was required to prove that one of the public necessity elements or the "more necessary public use" element was not true by the preponderance of the evidence.

Question of necessity of the taking of a public utility's property was made a judicial question by statute, and therefore the separation of powers doctrine did not require judicial deference to irrigation district's resolution of necessity when court was resolving electric utility's challenge to the public necessity elements or the "more necessary public use" element for district's proposed taking of a portion of utility's electric distribution system that was within district's service territory for purposes of providing its own retail electric service.

IMMUNITY - CALIFORNIA

Brinsmead v. Elk Grove Unified School District

Court of Appeal, Third District, California - September 18, 2023 - Cal.Rptr.3d - 2023 WL 6058526

Parents of deceased 16-year-old high school student brought wrongful death action against school district, seeking to hold district liable for student's death in car crash after getting picked up from the bus stop by a friend when her bus had not arrived for 40 minutes after the scheduled time.

THE Superior Court sustained demurrer without leave to amend and entered judgment of dismissal.

Parents appealed.

The Court of Appeal held that:

- Parents sufficiently alleged that district had "undertaken to provide transportation" within meaning of exception to immunity statute;
- Parents adequately alleged that student should have been under district's supervision by time she decided to find other transportation for purposes of the exception to the immunity statute; and
- Parents sufficiently alleged that district failed to exercise reasonable care in performance of its duty to provide transportation to student.

Parents of 16-year-old high school student who died in a car crash when she took a ride from a friend after waiting for school bus that never came sufficiently alleged that school district had "undertaken to provide transportation" within meaning of exception to statute providing school districts immunity from liability for conduct or safety of any public school pupil when pupil is not on school property by alleging that district accepted responsibility of providing student stable and reliable transportation to school when it enrolled her in district's school bus program; district chose to provide bus transportation to students and its duty to transport included students gaining access to the transportation vehicle.

Parents of 16-year-old high school student who died in a car crash when she took a ride from a friend after waiting for school bus that never came adequately alleged that student should have been under school district's supervision by time she decided to find other transportation and at time she was fatally injured, as required for exception to statute providing school districts immunity from liability for conduct or safety of any public school pupil when pupil is not on school property to apply in parents' wrongful death action; parents alleged that district undertook to provide student's transportation to school by accepting her enrollment in school bus program, under which bus had duty to arrive at the designated stop and take student to school, but the bus did not arrive for at least 40 minutes after scheduled arrival time.

Parents of 16-year-old high school student who died in a car crash when she took a ride from a friend after waiting for school bus that never came sufficiently alleged that district failed to exercise reasonable care in performance of its duty to provide transportation to student, so as to withstand district's demurrer to their wrongful death complaint, by alleging that school bus did not timely pick student up and district did not notify her or them of school bus delays or how to react during those delays.

COURTS - GEORGIA

400 Edgewood, LLC v. City of Atlanta

Court of Appeals of Georgia - September 20, 2023 - S.E.2d - 2023 WL 6138228

City filed complaint in rem against owner of gas station and convenience store property, at or near which numerous criminal incidents occurred, seeking to abate alleged public nuisance at property.

The Municipal Court determined evidence supported finding that operation of business at property was nuisance and ordered owner to install additional security cameras, hire competent security, and reduce hours of operation for one year, and the Superior Court affirmed. Owner moved for discretionary appeal, which was granted.

The Court of Appeals held that Municipal Court exceeded its authority by ordering injunctive relief.

Municipal Court, which required owner of convenience store and gas station property, at or near which multiple criminal incidents occurred, to install additional security cameras, hire "competent" security, and reduce hours of operation for one year following determination that evidence supported finding that operation of business at property was nuisance, ordered injunctive relief, and thus exceeded its authority, in action brought by city against owner; court imposed affirmative duty on owner to both perform, by enhancing security measures, and refrain from performing, by limiting business' hours of operation, specific acts.

ZONING & PLANNING - IDAHO

North West Neighborhood Association v. City of Boise

Supreme Court of Idaho, Boise, November 2022 Term - September 7, 2023 - P.3d - 2023 WL 5761372

Neighborhood association filed petition for judicial review of city council's approval of three interrelated land use applications.

The Fourth Judicial District Court affirmed, and association appealed.

The Supreme Court held that:

- City council's rezoning decision did not address project's failure to address fire service requirements of comprehensive plan or whether project was in the best interests of the public's general welfare;
- City council's failure to provide a reasoned statement explaining its decision when approving application for planned unit development required remand;
- Any errors by city council in failing to confine its review of planned unit development to evidence presented to the planning and zoning commission and in deferring its hearing to give the project applicants the opportunity to submit a revised application did not prejudice neighborhood association; and
- Neighborhood association, although the prevailing party on appeal, was not entitled to an award of attorney's fees.

EMINENT DOMAIN - ILLINOIS

Luster v. Village of Ashmore

United States Court of Appeals, Seventh Circuit - August 2, 2023 - 76 F.4th 535

Putative purchaser of residential property, who was buying property on contract, brought § 1983 action against village, alleging village violated purchaser's due process rights when it acquired the property for a municipal park and required purchaser to vacate home.

The United States District Court for the Central District of Illinois dismissed action. Purchaser appealed.

The Court of Appeals held that:

- Alleged availability of adequate post-deprivation remedies did not preclude purchaser's due process claim, and

- Damages were a permissible remedy for claim.

Alleged availability of adequate post-deprivation remedies did not preclude putative purchaser's § 1983 claim against village for procedural due process violation based on village acquiring home, which purchaser was buying on contract, for a municipal park and requiring purchaser to vacate home, where purchaser did not allege that he was deprived of his property interest by the random, unauthorized acts of any village employee but rather that village, as part of its plan to establish a municipal park, deliberately deprived purchaser of his property interest and attempted to remove him without prior notice and an opportunity to be heard.

Damages were a permissible remedy for putative purchaser's § 1983 claim against village for procedural due process violation based on village acquiring home, which purchaser was buying on contract, for a municipal park and requiring purchaser to vacate home; given that house was gone, damages were purchaser's only possible remedy.

MUNICIPAL ORDINANCE - INDIANA

Noblesville, Indiana Board of Zoning Appeals v. FMG Indianapolis, LLC

Supreme Court of Indiana - September 25, 2023 - N.E.3d - 2023 WL 6209522

Pole sign owner appealed decision of the city board of zoning appeals which affirmed a stop work order and notice of violation issued by city which addressed work performed on the sign after it was damaged by a storm.

The Superior Court reversed, and board appealed. The Superior Court reversed, and city board appealed. The Court of Appeals reversed with directions, and owner petitioned to transfer decision.

The Supreme Court held that ordinance governing nonconforming signs was ambiguous as to the meaning of the term "relocate," and thus the term was to be construed in favor of pole sign owner.

Ordinances regulating signs, which indicated such signs lost their legal nonconforming status if they were "relocated," was ambiguous as to the meaning of the term "relocate," and thus the term was to be construed in favor of pole sign owner and owner's movement of sign posts 18 to 36 inches behind their original location, after original posts were damaged by a storm, did not constitute a "relocation" that would cause signs to lose their legal nonconforming status.

Pole sign owner was entitled to award of costs in action challenging city board of zoning appeals order finding that owner had relocated billboard sign by replacing sign posts, which had been damaged in storm, with posts installed 18 to 36 inches away from original posts, causing sign to lose is nonconforming legal status; in addition to judicial review of board's decision, pole sign owner sought prospective declaratory relief and costs, which would ensure sign would retain its legal nonconforming status and allow owner to complete maintenance to sign, which been halted due to stop work order issued by city, outside of the six-month deadline for sign repairs stated in ordinance.

REFERENDA - MONTANA

Monforton v. Knudsen

Supreme Court of Montana - September 26, 2023 - P.3d - 2023 WL 6224973 - 2023 MT 179

Proponent filed petition to challenge the Attorney General's determination that proposed ballot initiative to establish an acquisition-based system of taxation for real property, to limit property tax increases, and to cap property tax at 1% of the property's value was legally insufficient.

The Supreme Court held that:

- Attorney General had authority to determine that proposed ballot initiative violated Montana Constitution's separate-vote requirement, and
- Initiative proposed multiple, unrelated changes to Montana's Constitution, and thus violated Montana Constitution's separate-vote provision.

Attorney General determination that proposed ballot initiative violated Montana Constitution's separate-vote requirement was properly within his authority to address as a constitutional requirement governing submission of the proposed issue to the electors; Attorney General determined that initiative, despite being submitted as a single constitutional amendment to establish an acquisition-based system of taxation for real property and to limit property tax increases, had proposed multiple, unrelated changes to Montana's Constitution.

Ballot initiative to establish an acquisition-based system of taxation for real property, to limit property tax increases, and to cap property tax at 1% of the property's value, proposed multiple, unrelated changes to Montana's Constitution, and thus violated Montana Constitution's separate-vote provision; voters could not express support for limiting increase in annual property valuations, while also opposing an overall cap on the level of taxes levied against a property.

NEGLIGENCE - NEW YORK

A. R. v. Bay Shore Union Free School District

Supreme Court, Appellate Division, Second Department, New York - August 23, 2023 - 219 A.D.3d 850 - 195 N.Y.S.3d 124 - 2023 N.Y. Slip Op. 04389

Student who was allegedly injured during a gym class golfing activity brought personal injury action against school district, alleging that it was negligent in its supervision of student.

The Supreme Court denied school district's motion for summary judgment. School district appealed.

The Supreme Court, Appellate Division, held that school district failed to establish, prima facie, that student was adequately supervised and instructed.

On motion for summary judgment in student's negligent supervision action, school district failed to establish, prima facie, that student was adequately supervised and instructed as to safe use of golfing equipment and proper positioning on field prior to injury which occurred when her partner struck her in mouth during back-swing; gym class teacher was unable to testify at deposition as to specifics of lesson plan or safety instructions he provided, and did not recall if students who had received their clubs were properly positioned.

EMINENT DOMAIN - OHIO

State ex rel. Duncan v. Mentor

Supreme Court of Ohio - September 7, 2023 - N.E.3d - 2023 WL 5760701 - 2023-Ohio-3115

Property owner sought a writ of mandamus to compel city to commence appropriation proceedings for an alleged taking of his property.

The Eleventh District Court of Appeals granted city's motion to dismiss, and property owner appealed.

The Supreme Court held that property owner was not entitled to mandamus relief compelling city to commence appropriation proceedings for an alleged taking of his property.

Property owner was not entitled to mandamus relief compelling city to commence appropriation proceedings for an alleged taking of his property, where owner had an adequate remedy in the ordinary course of law as he could have appealed the zoning board's decision denying him a permit to place a houseboat on his property, which constituted the alleged taking of owner's property, and if the court of common pleas had reversed the denial of the permit, no taking would have occurred.

EMPLOYMENT - VIRGINIA

Amazon Logistics, Inc. v. Virginia Employment Commission

Court of Appeals of Virginia, Richmond - September 26, 2023 - S.E.2d - 2023 WL 6217816

Company appealed from decision of the Employment Commission finding that company owed unemployment insurance taxes for claimant, who was flex delivery driver, and for all similarly misclassified flex delivery drivers.

The Richmond Circuit Court affirmed the Commission's decision, and company appealed.

The Court of Appeals held that:

- As matter of first impression, once Commission proves that services are performed for remuneration, burden shifts to the putative employer to prove that the subject individual is not employee for unemployment insurance taxation purposes;
- Evidence supported Commission's determination that flex delivery driver for company was "employee," not independent contractor, for unemployment insurance tax purposes; and
- Commission did not err when it generalized claimant's experiences as flex delivery driver to all of company's flex delivery drivers.

Once the Employment Commission proves that services are performed for remuneration, the burden shifts to the putative employer to prove, by a preponderance of the evidence, that the subject individual is not an employee for unemployment insurance taxation purposes.

Evidence supported Employment Commission's determination that flex delivery driver for company was "employee," not independent contractor, for unemployment insurance tax purposes; evidence showed that company required flex drivers to comply with specific instructions on when, where and how delivery blocks were to be completed, that flex drivers had little control over when they worked, and that services performed by flex drivers were essential to and integrated into company's business

model.

Employment Commission did not err when it generalized claimant's experiences as flex delivery driver to all of company's flex delivery drivers for purposes of determining if flex delivery drivers were employees, as opposed to independent contractors, for unemployment insurance tax purposes; evidence established a nexus between claimant's experiences and "terms of services" agreement governing company's relationship with flex drivers sufficient to support the Commission's determination that, because terms and conditions of the agreement applied equally to all flex drivers, company misclassified all such flex drivers, including claimant, for unemployment tax purposes.

EMINENT DOMAIN - GEORGIA

Wise Business Forms, Inc. v. Forsyth County

Supreme Court of Georgia - September 19, 2023 - S.E.2d - 2023 WL 6065278

Property owner brought action against county and Georgia Department of Transportation (GDOT) asserting a claim for inverse condemnation by permanent nuisance after road expansion increased the surface and stormwater runoff flowing under its property, which created a sinkhole in its parking lot.

The Superior Court dismissed complaint, and property owner appealed. The Court of Appeals, Reese affirmed. Property owner appealed

.

The Supreme Court held that property owner's claim for past and future damages caused by increased runoff was not barred by the four-year nuisance statute of limitations.

ZONING & PLANNING - IDAHO

Bracken v. City of Ketchum

Supreme Court of Idaho, Boise - November 2022 Term - September 15, 2023 - P.3d - 2023 WL 5988150

Applicant for conditional use permit brought action against city, mayor, and city administrators arising from denial of permit for applicant's proposed gas station off main street in city, alleging intentional interference with economic expectancy and § 1983 claims of due process violations.

The Fifth Judicial District Court granted summary judgment for defendants and denied applicant's motion for reconsideration. Applicant appealed.

The Supreme Court held that:

- Applicant's right to have application evaluated under then-existing ordinance vested when he filed second application;
- Applicant was excused from exhausting administrative remedies under Local Land Use Planning Act (LLUPA);
- Applicant did not have a due process property right in procedures governing application for conditional use permit;
- Trial court acted within its discretion in denying motions for rulings on issues of law while

summary judgment motions were pending;
- Defendants were not entitled to attorney fees for a frivolous appeal; and
- Defendants were not entitled to § 1988 attorney fees as prevailing parties on appeal.

ZONING & PLANNING - MONTANA

Whitefish 57 Commercial, LLC v. City of Whitefish

Supreme Court of Montana - September 20, 2023 - P.3d - 2023 WL 6134935 - 2023 MT 176

Landowner and developer sought review of city's denial of conditional use permit to build 85-room hotel in secondary business zone.

The District Court granted summary judgment for city. Landowner and developer appealed.

The Supreme Court held that:

- Council acted within its discretion in denying permit based on hotel's nonconformance with city's growth policy, and
- Council acted within its discretion in denying permit based on traffic concerns.

City council acted within its discretion in denying conditional use permit to build 85-room hotel in secondary business zone based, in part, on hotel's nonconformance to city's growth policy, despite argument that city's economy was largely based on tourism, where growth policy stated that citizens valued the scale, character, and small town feel of the community, and community members provided written comments expressing disappointment over addition of another hotel in city instead of something more culturally enriching, stating that the number of hotels and condos in city was "mind numbing," pleading with council to consider climate burdens of more development before approving another generic project, and questioning whether "this was the right time for a hotel."

City council acted within its discretion in denying conditional use permit to build 85-room hotel in secondary business zone based, in part, on the increased traffic expected to result from hotel, even though Montana Department of Transportation (MDT) concluded that the traffic impact of hotel would be so insignificant it did not warrant a traffic impact study; council was not bound by MDT's traffic report, and council used its own observations of intersection in issue and the average daily trips generated by an engineer's traffic report to conclude that a hotel in area could exacerbate traffic.

IMMUNITY - NEW YORK

Jourdain v. Metropolitan Transportation Authority

Supreme Court, Appellate Division, Second Department, New York - August 30, 2023 - N.Y.S.3d - 219 A.D.3d 876 - 2023 WL 5598571 - 2023 N.Y. Slip Op. 04421

Driver brought personal injury action against town and transportation authority, alleging that she sustained injuries when a tree on an embankment owned by the authority fell onto her vehicle while driving.

The Supreme Court, Rockland County, granted town's motion for summary judgment and denied authority's motion for summary judgment. Driver appealed and authority cross-appealed.

The Supreme Court, Appellate Division, held that:

- Town's duty to maintain road extended to tree adjacent to road, and
- Authority was not entitled to governmental immunity.

A municipality's duty to maintain its roadways in a reasonably safe condition encompasses those trees, adjacent to the roads, which could reasonably be expected to pose a danger to travelers; however, liability will not attach unless the municipality had actual or constructive notice of the dangerous condition and subsequently failed to take reasonable measures to correct the condition.

Town's duty to maintain road extended to tree adjacent to road, for purposes of driver's personal injury action against town, alleging that she sustained injuries when a tree on an embankment fell onto her vehicle while driving, although tree was not located on the town's property, where town owned and maintained the road where driver's vehicle was struck by the tree.

Transportation authority was not entitled to governmental immunity, in driver's personal injury action against authority, alleging that she sustained injuries when a tree on an embankment owned by authority fell onto her vehicle while driving; driver's claim arose out of the authority's duties as a landowner, which was a proprietary function.

EMINENT DOMAIN - NORTH CAROLINA

Agapion v. United States

United States Court of Federal Claims - September 5, 2023 - Fed.Cl. - 2023 WL 5735895

Landowners filed rails-to-trails takings cases, under Fifth Amendment, claiming federal government's rail banking program, pursuant to National Trails System Act, effected taking of their property abutting and underlying portions of abandoned railroad line following Surface Transportation Board's (STB) issuance of notice of interim trail use (NITU) to facilitate railroad's sale of its interest in easement to city as recreational trail sponsor through non-warranty deed for 3.1 mile stretch of railroad corridor.

After parties stipulated to landowners' fee ownership of encumbered property, three-day valuation bench trial was held on their request for $7,357,492.00 in damages plus interest, and landowners filed post-trial brief and motion for partial summary judgment as to applicable interest rate.

The Court of Federal Claims held that:

- Survey attached to non-warranty deed governed dimensions of city's new easement;
- Landowners were deprived of full use of property burdened by city's new easement;
- Expert's valuation methodology overcompensated landowners;
- Expert's appraisal review was not facially unreliable;
- Landowners were entitled to just compensation of $6,394,457.00; and
- Landowners were entitled to interest payments compounded annually.

Landowners' loss of their reversionary right to unencumbered fee ownership of property underlying railroad corridor easement fully deprived them of right to exclusive use of their property including right to maintain structures in easement that city obtained from railroad, facilitated by Surface Transportation Board's (STB) issuance of notice of interim trail use (NITU) under National Trails System Act, and thus, owners' expert correctly based his valuation findings for just compensation for taking on owners' complete loss of legal rights to use property encumbered by city's new easement,

since city had exclusive authority to dictate use of entire corridor for recreational trail, and STB had exclusive authority to dictate use of entire corridor for potential rail-line reactivation.

Landowners were entitled to just compensation of $6,394,457, rather than $7,357,492 that they requested, for taking effected by Surface Transportation Board's (STB) issuance of notice of interim trail use (NITU) to facilitate railroad's transfer of abandoned railroad easement to city for recreational trail, under National Trails System Act, since owners' expert included cost to construct privacy wall into compensable damages total for each property, in order to ostensibly cure reduction in property's value attributable to loss in privacy from presence of easement, but inclusion of cost to cure would have overcompensated owners.

Landowners were entitled to interest payments compounded annually on their just compensation of $6,394,457 for taking effected by Surface Transportation Board's (STB) issuance of notice of interim trail use (NITU) to facilitate railroad's transfer of abandoned railroad easement to city for recreational trail, under National Trails System Act, since interest would account for delay between time of taking and payment for taking.

BONDS - TEXAS

In re City of Amarillo

Court of Appeals of Texas, Amarillo - August 16, 2023 - Not Reported in S.W. Rptr - 2023 WL 5279473

In November 2020, more than 60% of the City of Amarillo's voters defeated a proposition for issuance of $275 million in general obligation bonds payable from ad valorem taxes to fund improvement and expansion of the City's civic center complex. Per statute, this meant the City could not issue certificates of obligation to fund the proposed civic center project for three years.

Some city officials remained insistent that the City needed to improve the civic center, but they wanted to avoid returning to the voters. So, after conferring with legal counsel, two officials and city staff put into place a three-step plan. First, they proposed the city council pass Ordinance 7980 to designate the existing civic center and another building as part of the City's Tax Increment Reinvestment Zone (TIRZ #1) project plan. Second, they met behind-the-scenes with lenders and legal counsel to pre-negotiate a $260.525 million financing deal and language for proposed Ordinance 7985 wherein the City would issue tax anticipation notes. This method of funding requires no voter approval, but also carries a short repayment schedule: seven years. So, to try to avoid risk of an enormous tax increase this project would pose, they planned a third step: future issuance of 30-year refunding bonds to refinance the debt authorized under Ordinance 7985. If executed successfully, this plan would presumably allow the City to obtain what voters had already rejected: a civic center construction project funded by long-term bond financing.

On May 20, 2022, the City posted public notice of a city council meeting for May 24, 2022. Attached to the six-page agenda were 197 pages of related documents.

When the agenda discussed the final item for consideration – Nonconsent Item L–citizens were not given many specifics about proposed Ordinance 7985. The agenda entry reads in full as follows:

> This item is the discussion and consideration of an ordinance authorizing the issuance of the City of Amarillo, Texas Combination Tax and Revenue Notes, Series 2022A resolving other matters incident and related thereto including the approval of a paying

agent/registrar agreement and a purchase contract.

The city council passed Ordinances 7980 and 7985 on May 24, 2022. Three days later, Fairly filed a declaratory judgment action under Texas Civil Practice and Remedies Code Chapter 37 (UDJA) seeking to void Ordinances 7980, 7985, and the anticipation notes. Thereafter, the City filed an action for expedited declaratory relief under Texas Government Code Chapter 1205 and sought declarations that the ordinances and anticipation notes were valid. On the City's motion, the two actions were consolidated.

The case was tried to the bench. On October 25, 2022, the court signed a final judgment which, among other things, invalidated the two ordinances and the anticipation notes.6 The judgment also awarded Fairly attorney's fees of $351,613.82 through trial, with additional fees conditioned on his successful defense of the judgment on appeal.

Both parties appealed.

The Court of Appeals affirmed, holding that:

- The City's notice regarding Ordinance 7985 failed to substantially comply with TOMA because it failed to give the reader adequate notice of the action the City sought to take
- City's failure to disclose an intent to finance more than a quarter-billion-dollars of public funds prevented the public from determining the consequences on its own; and
- Nonconsent item L's nebulous expressions of intent were further confounded because of statements that were patently incorrect, in that the executed ordinance and financing documents differ from what the notice tells the public regarding the funds securing the debt: ad valorem taxes, not taxes and revenues.

IMMUNITY - CALIFORNIA

Carr v. City of Newport Beach

Court of Appeal, Fourth District, Division 3, California - August 29, 2023 - Cal.Rptr.3d - 2023 WL 5596339 - 2023 Daily Journal D.A.R. 8998

Swimmer, who sustained injuries after diving headfirst into shallow waters, from a 20-inch-wide seawall, called a groin, at city beach, brought action against city for creating or maintaining a dangerous condition of public property and failure to warn.

The Superior Court granted city's motion for summary judgment. Swimmer appealed.

The Court of Appeal held that:

- Swimmer engaged in a "hazardous recreational activity" triggering city's statutory immunity from liability;
- Gross negligence exception to city's statutory immunity did not apply;

- Dangerous condition exception to city's statutory immunity did not apply; and
- City was immune from liability for swimmer's injuries to the extent that they were caused by lifeguard's failure to warn him that diving from the groin was prohibited.

ZONING & PLANNING - IDAHO

North West Neighborhood Association v. City of Boise

Supreme Court of Idaho, Boise - November 2022 Term - September 7, 2023 - P.3d - 2023 WL 5761372

Neighborhood association filed petition for judicial review of city council's approval of three interrelated land use applications.

The Fourth Judicial District Court affirmed, and association appealed.

The Supreme Court held that:

- City council's rezoning decision did not address project's failure to address fire service requirements of comprehensive plan or whether project was in the best interests of the public's general welfare;
- City council's failure to provide a reasoned statement explaining its decision when approving application for planned unit development required remand;
- Any errors by city council in failing to confine its review of planned unit development to evidence presented to the planning and zoning commission and in deferring its hearing to give the project applicants the opportunity to submit a revised application did not prejudice neighborhood association; and
- Neighborhood association, although the prevailing party on appeal, was not entitled to an award of attorney's fees.
  Affirmed in part, reversed in part, and remanded with instructions.

PUBLIC UTILITIES - OHIO

Steelhead Farms, LLC v. Northeast Ohio Natural Gas Corp.

Court of Appeals of Ohio, Eleventh District, Lake County - July 31, 2023 - N.E.3d - 2023 WL 4863153 - 2023-Ohio-2649

Limited liability company (LLC) filed amended complaint against natural gas company for trespass, ejectment, and quiet title, and company counterclaimed for declaratory judgment that it may continue lawful operation of pipeline on LLC's property.

The Court of Common Pleas denied LLC's motion for partial summary judgment, and granted company's motion for summary judgment. LLC appealed.

The Court of Appeals held that:

- Statement by natural gas company's employee was not admissible under hearsay exception for statements made within scope of employment;
- Pipeline company maintained irrevocable license to operate pipeline that was transferable to natural gas company;
- LLC could not collaterally attack receiver's authority to sell pipeline; and

- Receivership court's ruling did not create quit claim sale or prevent protections for natural gas company.

Pipeline company maintained an irrevocable license over property owned by Limited Liability Company (LLC) that was transferable to natural gas company, which purchased the pipeline that pipeline company constructed on the property, in LLC's action against gas company for trespass, ejectment, and quiet title; even though pipeline company did not own the property, it was given permission to permanently utilize a portion of the property for operation of the pipeline from LLC's owner, who owned the property at the time the pipeline was constructed, and pipeline company operated the pipeline continuously for over a decade and a half while the property was under the ownership of several different companies, owned by owner, which allowed the pipeline to operate.

POLITICAL SUBDIVISIONS - SOUTH CAROLINA

Davis v. South Carolina Educational Credit for Exceptional Needs Children Fund

Court of Appeals of South Carolina - August 9, 2023 - S.E.2d - 2023 WL 5062401

Records requester brought Freedom of Information Act (FOIA) action against nonprofit organization that provided funding for "exceptional needs children" to attend private schools, seeking to obtain certain records from organization.

The Circuit Court granted summary judgment for organization. Requester appealed.

The Court of Appeals held that organization was not "public body" subject to FOIA.

Nonprofit organization that provided funding for "exceptional needs children" to attend private schools was not "public body" subject to Freedom of Information Act (FOIA), although organization's major purpose was deciding who received scholarships indirectly supported by state and organization appeared to be acting as proxy for state; support that organization received in form of likely fleeting assistance from state officials and use of state fundraising platform was de minimis, rather than diversion of block of public funds en masse or management of expenditure of public funds, legislation that created organization included reporting and accountability mechanism, and organization was technically independent of state.

Records requester abandoned argument that circuit court erred in using later legislation to interpret General Assembly's original intent in budget proviso that created nonprofit organization providing funding for "exceptional needs children" to attend private schools, for purposes of requester's appeal from circuit court's grant of summary judgment for organization in requester's Freedom of Information Act (FOIA) action seeking to obtain certain records from organization, where requester cited no legal authority for such argument.

EMINENT DOMAIN - OHIO

State ex rel. Duncan v. Mentor

Supreme Court of Ohio - September 7, 2023 - N.E.3d - 2023 WL 5760701 - 2023-Ohio-3115

Property owner sought a writ of mandamus to compel city to commence appropriation proceedings for an alleged taking of his property.

The Eleventh District Court of Appeals granted city's motion to dismiss, and property owner appealed.

The Supreme Court held that property owner was not entitled to mandamus relief compelling city to commence appropriation proceedings for an alleged taking of his property.

Property owner was not entitled to mandamus relief compelling city to commence appropriation proceedings for an alleged taking of his property, where owner had an adequate remedy in the ordinary course of law as he could have appealed the zoning board's decision denying him a permit to place a houseboat on his property, which constituted the alleged taking of owner's property, and if the court of common pleas had reversed the denial of the permit, no taking would have occurred.

EMINENT DOMAIN - PENNSYLVANIA

Chernomusa N-Jie v. Department of Transportation

Commonwealth Court of Pennsylvania - August 7, 2023 - A.3d - 2023 WL 5006238

Landowner filed petition for appointment of board of viewers pursuant to the Eminent Domain Code, alleging that removal of landowner's pedestrian bridge by the Department of Transportation (DOT) constituted de facto taking. DOT filed preliminary objections, alleging that bridge was unpermitted encroachment upon highway right-of-way and encroached on adjacent property.

The Court of Common Pleas overruled DOT's preliminary objections and granted landowner's petition. DOT appealed.

The Commonwealth Court held that:

- Substantial evidence supported finding that DOT's actions were unreasonable and prolonged, as would support landowner's claim for de facto taking, and
- Remand was not warranted to determine precise date and nature of taking.

Substantial evidence supported trial court's finding that the Department of Transportation's (DOT) removal of landowner's pedestrian bridge during DOT's project to replace a retaining wall on its right-of-way was unreasonable and prolonged, as would support landowner's claim that DOT's actions constituted a de facto condemnation; bridge was landowner's only access to his property, causing him to use a ladder to climb in and out of a streambed to access the property, and DOT installed a new guardrail, further blocking landowner's access.

Remand was not warranted to determine the precise date of the Department of Transportation's (DOT) condemnation of landowner's property, and the precise nature of the property interest condemned, in proceeding on landowner's petition for appointment of a board of viewers under the Eminent Domain Code, alleging that DOT's removal of landowner's pedestrian bridge during DOT's project to replace a retaining wall on its right-of-way constituted a de facto taking; the trial court found that landowner's interest in the pedestrian bridge and its supporting pillars had been condemned, and that the condemnation "occurred during the summer of 2020," which was sufficient to allow the board of viewers to assess damages for the taking.

PUBLIC UTILITIES - SOUTH CAROLINA

Daufuskie Island Utility Company, Inc. v. South Carolina Office of Regulatory Staff

Supreme Court of South Carolina - August 30, 2023 - S.E.2d - 2023 WL 5597905

Water and wastewater utility sought review of Public Service Commission's (PSC) order that granted utility 39% of the additional revenue that it requested in its application.

The Supreme Court reversed. On remand, the PSC disallowed certain rate case expenses. Utility appealed. The Supreme Court reversed and remanded. On remand, the PSC rejected request for reparations surcharge. Utility appealed.

The Supreme Court held that PSC lacked authority to grant reparations surcharge.

Public Service Commission (PSC) lacked authority to grant reparations surcharge to water and wastewater utility for period between prior orders during which no bond by utility was in effect before parties reached settlement agreement entitling utility to its rate increase; utility's sole remedy was statute permitting utility to put requested rates into effect under bond during appeal, utility wishing to protect itself against ills of regulatory lag was limited to statutory remedies which did not include a reparations surcharge, and allowing utility to collect reparations surcharge following successful appeal would entirely obviate need for utility to ever secure appellate bond or make other arrangements, thus placing all risk on ratepayers and none on the utility.

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