EMINENT DOMAIN - WASHINGTON

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

Supreme Court of Washington - August 3, 2023 - 533 P.3d 400

Landowners brought action against public utility district, alleging district's operation of dam entitled landowners to damages based on inverse condemnation, trespass, nuisance, and negligence.

District counterclaimed for declaration of prescriptive easement. On summary judgment, the Superior Court declared a prescriptive easement in favor of utility district and dismissed landowners' claims. Landowners appealed. The Court of Appeals affirmed in part, reversed in part, and remanded. Review was granted.

The Supreme Court held that:

- As a matter of apparent first impression, the "subsequent purchaser rule," prohibiting landowners from suing, through an inverse condemnation action, for property damage caused by governmental conduct that occurred prior to their ownership, is a doctrine of standing rather than an affirmative defense;
- Landowners were subsequent purchasers as to taking that occurred when dam was built, supporting finding that they were precluded from bringing an inverse condemnation claim;
- There was no evidence that alleged increase in flooding on property was attributable to district, as could render increased flooding a new taking that would allow inverse condemnation claim; and
- Landowners were precluded from asserting a nuisance claim against district based on same flooding as "backup" for inverse condemnation claim.

The "subsequent purchaser rule," prohibiting landowners from suing, through an inverse condemnation action, for property damage caused by governmental conduct that occurred prior to their ownership, is a doctrine of standing rather than an affirmative defense.

Implicit in the subsequent-purchaser rule, prohibiting landowners from suing, through an inverse condemnation action, for property damage caused by governmental conduct that occurred prior to their ownership, is the principle that the purchase price of land subject to a governmental taking reflects the diminution of value.

Landowners were "subsequent purchasers" as to taking that occurred when dam was built and thus were precluded from bringing an inverse condemnation claim arising from public utility district's dam operations that had flooded landowners' property, where landowners bought property at a purchase price that represented known seasonal flooding from dam operations.

There was no evidence that alleged increase in flooding on landowners' property was attributable to public utility district, as could render increased flooding a new taking that would allow inverse condemnation claim by landowners, as subsequent purchasers whose purchase of property was at a price that reflected known flooding from district's dam operations.

Landowners were precluded from asserting a nuisance claim against public utility district, based on flooding of landowners' property from district's dam operations, as "backup" for landowners' inverse condemnation claim, which was barred by subsequent-purchaser rule given that landowners had purchased property at a price that accounted for known flooding due to dam operations, where parties did not dispute that a taking occurred.

PUBLIC UTILITIES - CALIFORNIA

Kerman Telephone Co. v. Public Utilities Commission

Court of Appeal, Fifth District, California - August 7, 2023 - Cal.Rptr.3d - 2023 WL 5445535 - 2023 Daily Journal D.A.R. 8823

Rural telephone companies filed petition for writ of review challenging Public Utilities Commission's decision penalizing companies for allegedly violating Commission rule prohibiting misleading filings by not disclosing full amount of rural telephone bank (RTB) stock redemption proceeds to determine ratemaking treatment of gain on redemption, and denying rehearing.

The Court of Appeal held that companies did not have fair notice under due process clause that disclosure of full amount of RTB stock redemption proceeds was required.

Public Utilities Commission's rate case resolutions, requiring rural telephone companies to file application with Commission when companies redeemed any rural telephone bank (RTB) stock to determine the ratemaking treatment of gain on redemption, did not give companies fair notice that companies were required to disclose full amount of RTB stock redemption proceeds, and therefore Commission's decision penalizing companies for violating Commission rule prohibiting misleading filings by not disclosing the full amount of redemption proceeds violated due process, where resolutions did not expressly require companies to disclose the full amount of redemption proceeds in the application.

Public Utilities Commission's decision on gains on sale that Commission issued about a year before rural telephone companies filed application with Commission, pursuant to Commission's rate case resolutions, upon companies' redemption of rural telephone bank (RTB) stock, did not give companies a basis to infer that they had an obligation to disclose the full amount of RTB stock redemption proceeds, and therefore Commission's decision penalizing companies for violating Commission rule prohibiting misleading filings by not disclosing the full amount of redemption proceeds violated due process, where Commission determined in its gains-on-sale decision that all gains and losses from the sale of public utility property that was never in rate base, which included RTB stock in issue, should accrue to the shareholders.

BALLOT INITIATIVES - IDAHO

Idahoans for Open Primaries v. Labrador

Supreme Court of Idaho - August 16, 2023 - P.3d - 2023 WL 5274562

Petitioners filed action requesting writs of certiorari and mandamus, asserting that the Idaho Attorney General's short and general ballot titles for the Idaho Open Primaries Act initiative measure failed to comply with statutory requirements.

The Supreme Court, Zahn, J., held that:

- Supreme Court would exercise its original jurisdiction to consider petitioners' requests for writ relief;
- Coalition had standing to bring action;
- As a matter of first impression, Supreme Court applies the substantial compliance standard when reviewing ballot titles;
- Term "nonparty blanket primary" did not describe the initiative as commonly referred to or spoken of;
- Term "ranked-choice voting" was distinctive and accurately described the vote tabulation method described in the initiative;
- Description of the tabulation process in general title was likely to prejudice the initiative; and
- Supreme Court would retain jurisdiction and order Attorney General to provide new ballot titles for review, rather than adopt petitioners' proposed ballot titles.

PUBLIC RECORDS - MARYLAND

Baltimore Police Department v. Open Justice Baltimore

Supreme Court of Maryland - August 31, 2023 - A.3d - 2023 WL 5616318

Organization interested in investigating and publicizing reports of police misconduct sought judicial review of police department's denial of organization's request under Maryland Public Information Act (MPIA) to waive estimated fees of approximately $245,000 to produce records relating to incidents involving uses of force.

The Circuit Court upheld police department's denial of fee waiver. Organization appealed. The Court of Special Appeals reversed. Police department and police commissioner filed petition for writ of certiorari, and petition was granted.

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

- Organization's challenge to denial of request for fee waiver was in the nature of an administrative mandamus action, such that circuit court had jurisdiction to review the challenge;
- MPIA vests the custodian with discretion to determine which factors are relevant to the public interest determination for a request for waiver of fees;
- Custodians have discretion to determine whether the waiver would be in the public interest after considering all relevant factors;
- Courts determine whether the custodian's exercise of discretion in deciding a fee waiver request was arbitrary and capricious;
- Police department's denial of organization's request for public interest waiver of fees was arbitrary and capricious; and
- Remand to police department for reconsideration of public interest determination was appropriate remedy.

MUNICIPAL GOVERNANCE - MASSACHUSETTS

Satanic Temple, Inc. v. City of Boston

United States District Court, D. Massachusetts - July 31, 2023 - F.Supp.3d - 2023 WL 4868944

Nontheistic religious organization brought action against city, alleging that city council violated

organization's rights under Establishment Clause and free exercise rights under Massachusetts constitution when city councilors did not invite organization or allow its request to give invocation before start of weekly meeting. Parties cross-moved for summary judgment.

The District Court held that:

- Organization could not prevail on its claim against city for violation of Establishment Clause;
- Council's practice of legislative prayer did not violate Establishment Clause; and
- Organization could not prevail on its claim against city for violation of its free exercise rights under Massachusetts constitution.

BONDS - NEW YORK

Long v. Town of Caroga

Supreme Court, Appellate Division, Third Department, New York - August 17, 2023 - N.Y.S.3d - 2023 WL 5284765 - 2023 N.Y. Slip Op. 04352

Petitioner brought special proceeding petition pursuant to Election Law to validate three petitions seeking permissive referendum on three bond resolutions passed by town board.

The Supreme Court dismissed the petition. Petitioner appealed.

The Supreme Court, Appellate Division, held that:

- Town board's rescission of underlying bond resolution mooted appeal as to dismissal of petition challenging town clerk's rejection of referendum challenging that resolution, and
- Referendum petitions satisfied statutory requirements.

Appeal of trial court's dismissal of petitioner's special proceeding petition pursuant to Election Law, challenging town clerk's determination rejecting permissive referendum petition pertaining to town board resolution authorizing issuance of serial general obligation bonds for construction of town salt/sand storage building, was rendered moot by town board's subsequent rescission of underlying resolution.

Any attempt to prevent a permissive referendum should be viewed with utmost circumspection since the right to petition the government is deeply rooted in democracy.

A town clerk has a statutory duty to accept and file all papers required by law to be filed in his or her office, which includes the authority to perform a ministerial examination of a referendum petition and to reject its filing if said petition is insufficient on its face.

The distinction between "ministerial acts" and "judicial acts," in context of Town Law statute governing powers and duties of town clerks, is that where the law prescribes the rule to be followed so as to leave nothing to the exercise of judgment or discretion, the act is a ministerial act, but where the act involves the exercise of judgment or discretion in determining whether the duty exists, the act is judicial.

Referendum petitions satisfied statutory requirements for permissive referendum on town bond resolutions, and thus town was required to fulfill its statutory duty to hold elections on referendums; although town clerk rejected petitions as invalid and later issued determinations that petitions were facially defective for failing to satisfy certain statutory requirements, petitions were legally received

and accepted for filing within 30-day statutory deadline after passage of resolutions, clerk's subsequent determination for rejecting petitions was issued after five-day statutory deadline to file objections to petitions, and no person challenged referendum petitions within five days of their filing by submitting written objections to town clerk and by filing verified petition with trial court.

PUBLIC EMPLOYMENT - OHIO

State ex rel. Youngstown Civil Service Commission v. Sweeney

Supreme Court of Ohio - August 30, 2023 - N.E.3d - 2023 WL 5596058 - 2023-Ohio-3006

City, mayor, and city civil service commission filed petition for writ of prohibition to prevent Court of Common Pleas from exercising jurisdiction over administrative appeal commenced by police sergeant detective challenging mayor's appointment to city civil service commission.

The Supreme Court granted Court's and detective's motions to dismiss, denied judge's motion to dismiss, granted alternative writ, and issued briefing schedule.

The Supreme Court held that:

- Fact that city civil service commission did not serve detective with its final order under commission's rules did not toll 30-day period for detective to file administrative appeal, and
- City, mayor, and city civil service commission were not entitled to writ of prohibition to prevent judge from exercising jurisdiction over detective's administrative appeal.

Fact that city civil service commission did not serve police sergeant detective with its final order under commission's rules did not toll 30-day period for detective to file administrative appeal, in city and commission's action for writ of prohibition alleging that court of common pleas did not have jurisdiction over detective's administrative appeal; commission's failure to comply with its rule regarding service of its order on detective did not affect timeliness of detective's appeal, detective sought extraordinary writ to compel commission to serve him with written notice of order, and Supreme Court found that writ would not have benefited detective, because time for filing timely administrative appeal had expired.

City, mayor, and city civil service commission were not entitled to writ of prohibition to prevent judge from exercising jurisdiction over police sergeant detective's administrative appeal challenging mayor's appointment to commission; city, mayor, and commission had adequate remedy by way of appeal from any error in judge's treatment of detective's appeal as being from older decision from which he did not timely appeal.

BANKRUPTCY - PUERTO RICO

In re Financial Oversight and Management Board for Puerto Rico

United States Court of Appeals, First Circuit - August 22, 2023 - F.4th - 2023 WL 5365926

In Title III debt restructuring proceedings brought pursuant to Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), Financial Oversight and Management Board (FOMB) moved for confirmation of modified eighth amended plan of adjustment for group of dairy producer claimants entitled to receive 50% of their claims in full consideration of any allowed claims and for separate group of claimants seeking just compensation for pre-petition takings for which they were

entitled to receive payment of 100% of allowed claims.

The United States District Court for the District of Puerto Rico confirmed plan. Dairy producer appealed.

The Court of Appeals held that:

- Plan properly classified producer's claim as non-takings due to prior settlement;
- Adjudication of FOMB's objection to producer's claim did not violate due process;
- Plan did not unfairly discriminate against producer; and
- Plan did not contain third-party release.

EMINENT DOMAIN. - TEXAS

St. Maron Properties, L.L.C. v. City of Houston

United States Court of Appeals, Fifth Circuit - August 21, 202. - F.4th - 2023 WL 5346633

Property owners brought § 1983 and state-law claims against city in state court, alleging violations of the takings clause, the due process clause, and the equal protection clause arising from alleged damage to properties through dumping of construction materials and subsequent remediation efforts.

Case was removed. The United States District Court for the Southern District of Texas granted city's motion to dismiss. Owners appealed.

The Court of Appeals held that:

- Owners sufficiently alleged an official government policy, as required to state claim for municipal liability under § 1983;
- Owners sufficiently alleged an official policymaker, as required to state claim for municipal liability under § 1983; and
- Owners sufficiently alleged a direct causal link between municipal policy and alleged constitutional deprivation, as required to state claim for municipal liability under § 1983; but
- Under Texas law, property owners' claims against city for negligence, trespass, nuisance, conversion, conspiracy, and violation of the Texas Theft Liability Act arose from sanitary and storm sewers, and thus, pursuant to Texas Tort Claims Act, city had sovereign immunity from claims unless such immunity was otherwise waived.

SCHOOL FINANCE - WASHINGTON

Wahkiakum School District No. 200 v. State

Supreme Court of Washington, En Banc - September 7, 2023 - P.3d - 2023 WL 5762673

Public school district brought action against the State, alleging the State violated its constitutional duty to amply fund education of all resident children by failing to provide ample funds for school-related capital construction costs, and seeking declaratory, injunctive, and monetary relief.

The Superior Court granted the State's motion to dismiss. School district appealed.

As a matter of first impression, the Supreme Court held that constitutionally required "education"

for which the state alone must provide ample funding does not include school capital construction costs.

Constitutionally required "education" for which the state alone must provide ample funding does not include school capital construction costs; instead, such costs are a shared responsibility between the State and local school districts.

EMINENT DOMAIN - WISCONSIN

Erickson v. Village of Yorkville

United States District Court, E.D. Wisconsin - July 11, 2023 - F.Supp.3d - 2023 WL 4489512

Property owners brought § 1983 action against village and one of its board members alleging violations of their rights under the Takings, Due Process, and Equal Protection Clauses of the Constitution by denying them full and fair use of their property through a failure to consider a conditional use permit for property owners to implement development plans.

Property owners also alleged that, because board member acted maliciously toward them, they should be awarded punitive damages under Wisconsin law. Defendants moved for summary judgment.

The District Court held that:

- Statement of town clerk upon which owners premised regulatory taking claim was inadmissible hearsay;
- Regulatory taking claim was not ripe;
- Equal protection claim was not ripe;
- Equal protection claim failed on merits;
- Due process claim was not ripe; and
- Board member did not display personal animus against property owners for purposes of entitlement to punitive damages.

EMINENT DOMAIN - ALABAMA

Ex parte Cooper

Supreme Court of Alabama - August 25, 2023 - So.3d - 2023 WL 5492465

Toll bridge operator, which was a private company, brought action against Director of the Alabama Department of Transportation (ALDOT), in his official capacity, and company that ALDOT had hired to build a nearby bridge.

In the action, toll bridge operator asserted a bad-faith claim for an injunction to the nearby bridge's construction and an inverse-condemnation claim for compensation from the State for the value of the toll bridge.

The Circuit Court entered order compelling Director to respond to certain discovery requests, entered preliminary injunction to halt bridge's construction, and dismissed as a defendant the company hired to build the nearby bridge. Director appealed as to the injunction and sought mandamus relief from the discovery order. Company hired to build the nearby bridge filed its own

appeal.

The Supreme Court held that:

- State immunity barred the bad-faith claim;
- Director's recovery under the preliminary-injunction bond would be limited to the $100,000 bond amount; and
- Company hired to build the nearby bridge would not be entitled recover its damages for being wrongfully enjoined.

State immunity barred bad-faith claim that toll bridge operator had asserted against Director of the Alabama Department of Transportation (ALDOT) in his official capacity, which claim was the basis for operator's request for a preliminary injunction halting the construction of a nearby bridge; the claim sought to directly affect a State contract right by sinking the State's contract for the construction of the nearby bridge.

Toll bridge operator's inverse-condemnation claim for compensation from the State for the value of the toll bridge, which claim stemmed from State having another company build a nearby bridge, was ripe; despite argument that operator was not in immediate danger of sustaining a legally cognizable injury, such an argument was a challenge to the claim's merits, and toll bridge operator's allegation that it faced an imminent injury, i.e., the total loss of the value of its property, caused by a government action that was redressable by the payment of compensation for the value of that property was sufficient to assert a ripe claim.

Following appellate determination that circuit court, due to the existence of State immunity, lacked subject-matter jurisdiction to enter a preliminary injunction against Director of the Alabama Department of Transportation (ALDOT), in his official capacity, to halt the construction of a bridge in the vicinity of a toll bridge operated by a private company, Director's recovery under the preliminary-injunction bond would be limited to the $100,000 bond amount, absent a finding by the trial court that toll bridge operator sought the injunction in bad faith.

Despite appellate determination that circuit court, due to the existence of State immunity, lacked subject-matter jurisdiction to enter a preliminary injunction against Director of the Alabama Department of Transportation (ALDOT), in his official capacity, to halt the construction of a bridge in the vicinity of a toll bridge operated by a private company, the company that the State hired to build the bridge would not be entitled recover its damages for being wrongfully enjoined; the preliminary-injunction bond bound toll bridge operator only unto Director, and altering the bond's terms to allow the bridge construction company to recover under the bond would effectively increase toll bridge operator's exposure beyond what it agreed to when the injunction was entered.

PUBLIC HEALTH - CALIFORNIA

Grant Park Neighborhood Association Advocates v. Department of Public Health

Court of Appeal, Third District, California - August 14, 2023 - Cal.Rptr.3d - 2023 WL 5198632

Objectors, who were neighborhood association and individuals, filed petition for writ of mandate challenging Department of Public Health's approval of entity's application to operate needle and syringe distribution program in county.

The Superior Court denied petition. Objectors appealed.

The Court of Appeal held that:

- Department violated statutory requirement of "consultation" with local law enforcement;
- Department's violation of consultation requirement was prejudicial, and thus, not harmless error;
- Objectors' claims regarding failure to consult with law enforcement were not rendered moot by expiration of approval of program, in light of its reauthorization;
- Department violated written-notice requirement of public-comment provision;
- Department was required to provide 90-day comment period, rather than 45-day period;
- Department's violations of notice and comment-period requirements were collectively prejudicial, and thus, were not harmless error; and
- Department's violation of comment-period requirement was not rendered moot by amendment of regulation.

REFERENDA - COLORADO

Ward v. State by and through Polis

Supreme Court of Colorado - August 21, 2023 - P.3d - 2023 WL 5340376 - 2023 CO 45

Residents, local officials, and other plaintiffs brought action against Governor and Secretary of State, in their official capacities, to invalidate legislative bill and its embedded referred measure about limiting property taxes and providing other funding for local government, contending that both violated the Colorado Constitution's single-subject requirement and that the referred measure's title violated the Colorado Constitution's clear-expression requirement.

The District Court concluded that it lacked subject-matter jurisdiction to consider the single-subject claims and denied the requested relief on the clear-expression claims. Plaintiffs appealed.

The Supreme Court held that:

- Unless and until Colorado voters approved referred measure, courts lacked subject-matter jurisdiction to review either the measure or the legislative bill in which it was embedded to determine compliance with the Colorado Constitution's single-subject requirement;
- Failure of referred measure's title to provide detail on the rate or amount of proposed property tax reductions was not a basis to find that the title violated the Colorado Constitution's clear-expression requirement;
- Failure of referred measure's title to mention that measure would authorize an appropriation for rental assistance was not a basis to find that measure's title violated the Colorado Constitution's clear-expression requirement;
- Failure of referred measure's title to refer to separate legislation that concerned refunds under the Taxpayer's Bill of Rights (TABOR) and that would take effect only if the voters approved the referred measure was not a basis to find that measure's title violated the Colorado Constitution's clear-expression requirement;
- That referred measure's title used allegedly confusing and obfuscating language in connection with its modifications to certain provisions in the Taxpayer's Bill of Rights (TABOR) was not a basis to find that measure's title violated the Colorado Constitution's clear-expression requirement; and
- Failure of referred measure's title to mention the new funding for the State Education Fund was not a basis to find that measure's title violated the Colorado Constitution's clear-expression requirement.

Unless and until Colorado voters approved referred measure about limiting property taxes and providing other funding for local government, courts lacked subject-matter jurisdiction to review either the measure or the legislative bill in which it was embedded to determine compliance with the Colorado Constitution's single-subject requirement; despite argument that statute providing for election contests arising out of a ballot issue or ballot question election concerning the order on the ballot or the form or content of any ballot title conferred subject-matter jurisdiction, a single-subject violation, which, by its nature, could not be remedied by judicial reformation, was not the type of challenge contemplated by that statute.

That the title for referred measure did not provide detail on the rate or amount of proposed property tax reductions was not a basis to find that the title violated the Colorado Constitution's clear-expression requirement; such an alleged failure was nothing more than an assertion that the title could be more specific and expansive, the title did alert voters to the general object to be accomplished, and a title did not have to express all of the act's provisions or the details by which the act's objects were to be accomplished.

Failure of title of referred measure, which concerned limitations on property taxes, to mention that measure would authorize an appropriation for rental assistance was not a basis to find that measure's title violated the Colorado Constitution's clear-expression requirement; such an argument was simply an assertion that the title could provide more detail, but the lack of that level of detail did not render the title unclear.

Failure of title of referred measure, which concerned limitations on property taxes, to refer to separate legislation that concerned refunds under the Taxpayer's Bill of Rights (TABOR) and that would take effect only if the voters approved the referred measure, was not a basis to find that measure's title violated the Colorado Constitution's clear-expression requirement; the referred measure did not concern itself with that separate legislation, and challengers to the referred measure's validity pointed to no authority supporting their contention that a ballot title had to disclose the impact that it may have on the implementation of separate legislation.

That the title of referred measure, which concerned limitations on property taxes, used allegedly confusing and obfuscating language in connection with its modifications to certain provisions in the Taxpayer's Bill of Rights (TABOR) was not a basis to find that measure's title violated the Colorado Constitution's clear-expression requirement; such an argument amounted to nothing more than a quibble with the language of the title, and there was nothing unclear or misleading in the language that the General Assembly chose to employ.

Failure of title of referred measure, which concerned limitations on property taxes, to mention the new funding for the State Education Fund was not a basis to find that measure's title violated the Colorado Constitution's clear-expression requirement; lack of such a mention simply concerned a contention that the title should contain more specificity as to how it will compensate for lost property tax revenues, but such detail was neither necessary nor necessarily desirable.

EMINENT DOMAIN - FLORIDA

Sabal Trail Transmission, LLC v. 3.921 Acres of Land in Lake County Florida

United States Court of Appeals, Eleventh Circuit - July 25, 2023 - 74 F.4th 1346 - 29 Fla. L. Weekly Fed. C 2791

Natural gas company brought action pursuant to Natural Gas Act to condemn property for pipeline

easement.

The United States District Court for the Middle District of Florida, adopting report and recommendation of a magistrate judge, awarded prejudgment interest to property owner under Florida law and, adopting report and recommendation of a magistrate judge, awarded attorney fees and costs to owner under Florida law. Company appealed.

The Court of Appeals held that state law applied in determining the measure of compensation in a condemnation proceeding under the Natural Gas Act.

Condemnation proceedings under the Natural Gas Act section authorizing private entities who have received a certificate of public convenience and necessity to acquire property by the exercise of the right of eminent domain must look to state law to determine the measure of compensation.

MUNICIPAL CORPORATIONS - GEORGIA

Hospital Authority of Wayne County v. AmerisourceBergen Drug Corporation

Supreme Court of Georgia - August 21, 2023 - S.E.2d - 2023 WL 5337867

County hospital authority brought actions against pharmaceutical companies, seeking to recover unreimbursed amounts it purportedly expended in treating opioid-dependent patients.

Actions were consolidated into multidistrict litigation (MDL). After seven of companies moved to dismiss, the United States District Court for the Northern District of Ohio certified questions.

The Supreme Court held that authority did not have legal authority to challenge Settlement Act's preemption provision on grounds that it violated Georgia Constitution's bar against retroactive laws.

County hospital authority did not have legal authority to challenge Settlement Act's preemption provision, which barred past, present or future claims on behalf of governmental entity seeking to recover against any business or person that was released entity under terms of settlement between State of Georgia and certain pharmaceutical companies, on grounds that it violated Georgia Constitution's bar against retroactive laws; General Assembly's passage of Act and its preemption provision took away any general statutory power the authority might otherwise have had to pursue such claims.

ZONING & PLANNING - MARYLAND

Prince George's County Council v. Concerned Citizens of Prince George's County

Supreme Court of Maryland - August 22, 2023 - A.3d - 2023 WL 5358452

Citizens of county filed petition for review of county district council's decision to enact bill amending zoning ordinance so as to exempt site of private airport, under certain conditions, from housing and development density restrictions generally applicable to properties in residential-agricultural (R-A) zone.

The Circuit Court, affirmed council's decision. Citizens appealed. The Court of Special Appeals reversed, finding that council bill violated requirement of uniformity in zoning laws. Airport's owners

and council petitioned for writ of certiorari, and after writ was granted, council withdrew as party. Citizens moved to dismiss on ground of mootness in light of new council bill.

The Supreme Court held that:

- Council had authority to act legislatively to exempt airport site from development restrictions of R-A zone;
- Amendment served valid public purpose, namely encouraging redevelopment of land currently used for nonconforming and dangerous airport;
- Citizens failed to establish that developers' conduct evinced favoritism on the part of council;
- State's authority to regulate airports did not preclude county from amending zoning ordinance based on public safety concerns;
- Ordinance's facial neutrality was not dispositive of uniformity violation;
- Any intent or belief on council's part that amendment would only affect airport site was not dispositive of uniformity violation; and
- Amendment did not discriminate between similarly-situated properties.

EMINENT DOMAIN - MICHIGAN

Bruneau v. County of Midland

United States District Court, E.D. Michigan, Northern Division - July 26, 2023 - F.Supp.3d - 2023 WL 4765562

Property owners, whose properties were flooded after dam collapsed after several days of rain due to static liquefaction, brought putative class action against counties in which dam was located, alleging gross negligence and violations of both Fifth Amendment's Takings Clause under § 1983 and Takings Clause of Michigan's constitution.

Counties moved for summary judgment.

The District Court held that:

- Counties' conduct in setting lake levels to attempt to protect property values of nearby properties was not "taking" under Takings Clause of Fifth Amendment;
- There was no evidence that counties flooded nearby properties to achieve some public benefit, as would be required for owners o support their claim that counties' actions were taking under Michigan's Takings Clause; and
- Counties were entitled to governmental immunity from claims of gross negligence.

Even if counties in which dam was located knew that they had set lake levels at dangerously high levels that would increase risk of dam failure, counties' conduct in setting lake levels to attempt to protect property values of nearby properties was not "taking" under Takings Clause of Fifth Amendment, in putative class action against counties by owners of properties, whose properties were flooded after dam collapsed after several days of rain due to static liquefaction, where counties did not flood properties to achieve any benefit for any third party.

There was no evidence that counties, in which dam was located, flooded nearby properties to achieve some public benefit, as would be required for owners of properties to support their claim that counties' actions in setting lake levels to attempt to protect property values of nearby properties were taking under Michigan's Takings Clause, in putative class action by owners after dam collapsed following several days of rain due to static liquefaction.

Counties in which dam was located were entitled to governmental immunity from claims of gross negligence brought by property owners, whose properties were flooded after dam collapsed after several days of rain due to static liquefaction, where owners only named counties themselves as parties, rather than naming any individual employees of counties.

LIABILITY - MONTANA

White v. Flathead County

United States District Court, D. Montana, Missoula Division - July 5, 2023 - F.Supp.3d - 2023 WL 4347648

Arrestee brought § 1983 action against arresting officer, several other unnamed county sheriff's deputies, and county, alleging that arresting officer and other county sheriff's deputies used excessive force when they arrested him, that county was liable under Monell, that defendants violated arrestee's right to privacy under the Montana constitution, that defendants were negligent, and that arresting officer's conduct qualified as assault and battery under Montana law.

Defendants moved for summary judgment on Monell claim, and filed motion in limine seeking to exclude evidence and testimony of ongoing medical damages that purportedly resulted from the alleged constitutional violations.

The District Court held that:

- Arrestee failed to show failure to train as basis for § 1983 *Monell* liability;
- Arrestee failed to show that county ratified arresting officer's alleged constitutional violation by not disciplining him or commenting on his kick to arrestee's head;
- County could not be held liability under § 1983 based on *Monell* via Montana law's imposition of tort liability on governmental entities; and
- Court would decline to exclude expert testimony of arrestee's treating physicians.

ZONING & PLANNING - NEW HAMPSHIRE

Weiss v. Town of Sunapee

Supreme Court of New Hampshire - August 23, 2023 - A.3d - 2023 WL 5418884

Property owners, who sought variance for setback for residence, appealed after town zoning board of adjustment denied variance application, both initially and on rehearing.

The Superior Court dismissed action. Property owners appealed.

The Supreme Court held that:

- Superior Court had subject matter jurisdiction to review board's findings that there was insufficient evidence of unnecessary hardship and that variance would not be in keeping with spirit of zoning ordinance, and
- Remand for determination of whether owners had good cause for specifying grounds for appeal in addition to those set forth in rehearing application was warranted.

EMINENT DOMAIN - OHIO

State ex rel. Balunek v. Marchbanks

Supreme Court of Ohio - July 25, 2023 - N.E.3d - 2023 WL 4711688 - 2023-Ohio-2517

Land owner sought a writ of mandamus ordering the Department of Transportation (DOT) to begin appropriation proceedings for the taking of real property owned by land owner.

The Supreme Court held that:

- DOT committed a taking of land owner's property;
- Land owner was entitled to a writ of mandamus compelling the DOT to institute appropriation proceedings; and
- Attorney fees were not available in mandamus actions to compel appropriation proceedings.

The Department of Transportation (DOT) committed a taking of land owner's property, for the purpose of land owner's mandamus action seeking to compel the DOT to begin appropriation proceedings; prior to DOT's construction project, the property had access to abutting roads through driveways and an easement, during the project the DOT destroyed the property's driveways that connected it to East 93rd Street and did not replace those driveways or provide alternative curb-cut access, and the project also eliminated the property's easement access to Woodland Avenue, rendering the property currently inaccessible to lawful vehicular traffic.

The fact that land owner would "likely" be granted street-opening permit to rebuild driveways to access property and that such a permit "would effectively negate the underlying loss-of-access basis" of his eminent domain claim did not negate owner's entitlement to writ of mandamus ordering Department of Transportation (DOT) to begin appropriation proceedings, after DOT project destroyed property's two driveways and eliminated property's easement across neighboring property to access road; street-opening permit would be granted only if property met city's ordinances and standards, no evidence indicated if property met those standards, to obtain permit owner would have to pay fee and submit performance bond of up to $250,000, and permit process could not compel DOT to begin appropriation proceedings, and thus was not adequate remedy.

Land owner was entitled to a writ of mandamus compelling the Department of Transportation (DOT) to institute appropriation proceedings for the taking of owner's property, where DOT project eliminated access to the property by lawful vehicular traffic, and DOT's action constituted a taking for which it owed compensation.

EMPLOYMENT - OHIO

State ex rel. International Association of Fire Fighters, Local 1536, AFL-CIO v. Sakacs

Supreme Court of Ohio - August 29, 2023 - N.E.3d - 2023 WL 5535189 - 2023-Ohio-2976

Firefighters' union brought action against city, mayor, and city civil service commission, seeking a declaration that the fire chief's position, which was filled one day after the incumbent fire chief's retirement when the mayor rehired fire chief who had just retired, was subject to a competitive promotional-examination process, a permanent injunction prohibiting non-competitive means for filling vacancies within the city's fire department, and a writ of mandamus ordering the mayor to declare a vacancy in the fire chief's position, administer an examination, and make an appointment

to fill the vacancy.

After allowing fire chief to intervene, the Court of Common Pleas granted the city's and mayor's motions for partial judgment on the pleadings as to punitive damages and attorney fees and denied the union's motion for summary judgment and granted summary judgment to defendants on the union's remaining claims. Union appealed. The Eleventh District Court of Appeals affirmed. Appeal was allowed.

The Supreme Court held that:

- Fire chief position became vacant when incumbent chief retired and thus had to be filled through statutory competitive promotional-examination process, and
- City's charter did not authorize city's mayor to appoint the incumbent fire chief to that position one day after he had retired as fire chief.

Fire chief position in city's fire department became vacant when the incumbent chief retired, and thus, the position had to be filled through the statutory competitive promotional-examination process, despite the fact the mayor purported to rehire the incumbent fire chief for the fire chief's position on the day after the incumbent retired, and notwithstanding that the incumbent fire chief did not intend to permanently relinquish the position when he retired; the incumbent could not have been rehired for a position that was not vacant.

City, its mayor, and its civil service commission forfeited their argument on appeal before the Supreme Court that city's charter authorized the mayor to appoint incumbent fire chief to that position one day after he had retired from the position because the charter was in direct conflict with statute requiring vacancies in positions above the rank of regular fire fighter to be filled using the competitive promotional-examination process and, therefore, the charter controlled, where this argument was neither raised in the trial court nor the court of appeals in suit brought by firefighter's union alleging the failure to fill vacancy in fire chief position through the competitive promotional-examination process upon incumbent chief's retirement violated civil-service laws.

EMINENT DOMAIN - IDAHO

Day v. Idaho Transportation Department

Supreme Court of Idaho, Boise, April 2023 Term - August 14, 2023 - P.3d - 2023 WL 5185613

Property owners brought action against Idaho Transportation Department (ITD) asserting claims for inverse condemnation and breach of contract concerning ITD's alleged failure to provide alternative access to their property near a freeway interchange.

The Fourth Judicial District Court entered summary judgment in favor of Department. Owners appealed. The Supreme Court affirmed in part, and reversed and remanded district court's decision on ITD's statute of limitations defense. On remand, the Fourth Judicial District Court held a bench trial, and after conclusion of owners' case-in-chief, granted ITD's motion for involuntary dismissal, finding there was no breach of contract and that the inverse condemnation claim was untimely. ITD moved for attorney fees, and the District Court denied the motion. Owners appealed, and ITD cross-appealed. Both parties moved for attorney fees on appeal.

The Supreme Court held that:

- Owners' quasi-estoppel argument was preserved for appeal;
- District court's findings did not support conclusion that ITD took inconsistent positions on the statute of limitations defense;
- Facts found by the district court supported finding that ITD did not create an unconscionable disadvantage by asserting statute of limitations defense;
- Owners' conduct did not demonstrate that they relied on ITD's purported waiver of the limitations period;
- It was reasonable for ITD to believe agreement had been reached so as to cease tolling of limitations;
- ITD was not entitled to prevailing party attorney fees; and
- Owners were not entitled to attorney fees related to their appeal.

EMINENT DOMAIN - ILLINOIS

Luster v. Village of Ashmore

United States Court of Appeals, Seventh Circuit - August 2, 2023 - F.4th - 2023 WL 4921532

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.

EMINENT DOMAIN - KANSAS

Kansas Fire and Safety Equipment v. City of Topeka

Supreme Court of Kansas - June 30, 2023 - 317 Kan. 418 - 531 P.3d 504

Multiple month-to-month tenants sued city for relocation benefits under Eminent Domain Procedure Act (EDPA) after they were forced to move once city bought property where they operated their businesses.

City filed motion for summary judgment. Tenants appealed. The District Court granted summary judgment to city. Tenants appealed. The Court of Appeals reversed and remanded. Tenants petitioned for review, which was granted. The Supreme Court affirmed decision of the Court of Appeals. On remand, city again sought summary judgment. The District Court granted summary judgment to city. Tenants appealed and city cross-appealed, and the Court of Appeals reversed and remanded with directions. The Supreme Court granted petitions for review.

The Supreme Court held that:

- Eminent Domain Procedure Act (EDPA) does not provide a private right of action;
- EDPA did not provide the district court with jurisdiction over tenants' claims for relocation expenses;
- Tenants' failure to pursue administrative remedy within the Kansas Relocation Assistance for Persons Displaced by Acquisition of Real Property Act (KRA) deprived the district court of subject matter jurisdiction; and
- Statute generally authorizing the court to review final judgments and orders of a political or taxing subdivision when it exercises judicial and quasi-judicial functions did not apply.

Kansas Eminent Domain Procedure Act (EDPA) does not provide a private right of action to displaced persons to recover relocation costs following condemnation; instead, the Kansas Relocation Assistance for Persons Displaced by Acquisition of Real Property Act (KRA) provides a single, comprehensive administrative remedy to vindicate the statutory right to relocation benefits and assistance.

EMINENT DOMAIN - LOUISIANA

3000-3032 St. Claude Avenue, LLC v. City of New Orleans

Court of Appeal of Louisiana, Fourth Circuit - June 22, 2023 - So.3d - 2023 WL 4117342 - 2022-0813 (La.App. 4 Cir. 6/22/23)

Owner of split-zoned lots filed a petition for judicial review of city council's denial of owner's request to rezone rear portions of lots, which were zoned commercial in front and residential in back, to apply a single commercial zoning designation to enable construction of hotel project.

The District Court remanded the matter back to city council for further review and to clarify basis for its decision. City filed a motion for suspensive appeal, which the District Court granted. After city filed appeal, the Court of Appeal converted the appeal to an application for supervisory writs, and the Court of Appeal issued writ opinion denying relief and remanding to city council. After city council again denied zoning amendment, lot owner filed amended petition for judicial review. The District Court granted the amended petition, and city timely filed a motion for suspensive appeal.

The Court of Appeal held that:

- Trial court improperly shifted burden from landowners to city council to demonstrate why its denial of rezoning request was in fact not arbitrary and capricious;
- As a matter of first impression, split-zoning is not per se invalid; and
- Denial of rezoning request was not arbitrary and capricious, or characterized by an abuse of

discretion, and thus did not constitute a taking.

IMMUNITY - MARYLAND

Williams v. Morgan State University

Supreme Court of Maryland - August 14, 2023 - A.3d - 2023 WL 5198267

Former university employee brought action in state court against university and former supervisor, alleging claims of wrongful termination in violation of Maryland public policy, defamation, and retaliation in violation of the National Defense Authorization Act (NDAA) and the American Recovery and Reinvestment Act (ARRA).

Defendants removed to federal court and the United States District Court for the District of Maryland granted defendants' motion to dismiss for failure to state a claim. Former employee appealed. The Court of Appeals affirmed in part, vacated in part, and remanded. On remand, the District Court granted defendants renewed motion to dismiss on the ground that the Maryland Tort Claims Act (MTCA) does not waive the state's sovereign immunity with respect to federal whistleblower claims. Former employee appealed. The Court of Appeals certified question of law to the Supreme Court, which the Supreme Court accepted.

The Supreme Court held that as a matter of first impression, MTCA's limited waiver of state's sovereign immunity for a "tort action," does not expressly or by necessary implication encompass federal statutory claims.

Based on the plain language of the Maryland Tort Claims Act (MTCA) and its statutory context, purpose, and legislative history, MTCA's limited waiver of state's sovereign immunity for a "tort action," does not expressly or by necessary implication encompass federal statutory claims; when the General Assembly has intended to waive state's sovereign immunity for purposes of a state statutory claim, it generally has done so directly within specific statutory scheme at issue, General Assembly has demonstrated that it knows how to waive sovereign immunity to federal claims when that is its intent, and extending scope of the waiver provision to federal statutory claims is inconsistent with both the key, neighboring provisions concerning interplay between state and state employee's immunity in certain suits, as well as MTCA's role as a gap-filler scheme.

IMMUNITY - MICHIGAN

Linden v. City of Southfield, Michigan

United States Court of Appeals, Sixth Circuit - July 26, 2023 - F.4th - 2023 WL 4758817

Personal representative of patient's estate filed § 1983 action against city and emergency medical responders alleging deliberate indifference to patient's serious medical needs and violation of substantive due process after responders pronounced her dead and discontinued treatment while she was still alive.

The United States District Court for the Eastern District of Michigan dismissed complaint and affirmed order denying plaintiff's motion of leave to file third amended complaint. Plaintiff appealed.

The Court of Appeals held that:

- Responders were entitled to qualified immunity;
- City was not subject to municipal liability under § 1983; and
- District court did not abuse its discretion in denying plaintiff's motion for leave to file third amended complaint.

It was not clearly established in August 2020 that government officials' failure to treat patient based on their mistaken belief that patient was dead violated patient's substantive due process rights under state-created danger doctrine, and thus city emergency medical responders were entitled to qualified immunity from liability in § 1983 action alleging violation of substantive due process after they pronounced patient dead and discontinued treatment while she was still alive, even if their mistake increased risk that funeral home employee would begin processing her presumed-dead body for funeral proceedings; patient was not in state custody, and responders did not prohibit any private party from seeking or rendering aid.

CONTRACTS - MISSISSIPPI

Teeuwissen v. Hinds County , Mississippi, by and through its Board of Supervisors

United States Court of Appeals, Fifth Circuit - August 14, 2023 - F.4th - 2023 WL 5200322

Law firm and attorney brought § 1983 action against county and members of county board of supervisors who voted to terminate contracts entered into by predecessor board retaining law firm as special counsel for county and attorney as board attorney for one year, alleging contracts required county to pay fixed sum for entire year, even if county no longer wanted the contracted legal services after election flipped board's composition, asserting federal due process and state-law claims, and seeking declaratory and injunctive relief.

The United States District Court granted county's motion to dismiss federal causes of action for failure to state a claim, and declined to exercise supplemental jurisdiction over state-law claims. Plaintiffs appealed.

The Court of Appeals held that attorney and law firm had due-process-protected property interests in money that they were entitled to under early-termination provisions in contracts.

Attorney and law firm had due-process-protected property interests in money that they were entitled to under early-termination provisions in contracts entered into by predecessor county board of supervisors retaining law firm as special counsel for county and attorney as board attorney for one year, since Mississippi statute granting power to county board of supervisors, in its discretion, to employ counsel by the year at an annual salary at an amount that it deemed proper rendered contracts binding on successor board that had voted to terminate contracts after election had flipped board's composition.

IMMUNITY - NEW JERSEY

Conforti v. County of Ocean

Supreme Court of New Jersey - August 10, 2023 - A.3d - 2023 WL 5112899

Wife of deceased county jail inmate, individually and as administratrix ad prosequendum of inmate's estate, and as parent natural guardian and guardian ad litem of their minor child, brought action

against county, county Board of Chosen Freeholders, county Department of Corrections, retired warden, and corporal, alleging negligence and violation of New Jersey Civil Rights Act (NJCRA) in connection with inmate's suicide.

The Superior Court denied defendants' summary judgment motion on negligence claims, and granted defendants' summary judgment motion as to NJCRA claims. Following a jury's finding that defendants were negligent and award of damages to plaintiff, the Superior Court, 2018 WL 4676882, denied defendants' motions for judgment notwithstanding the verdict (JNOV), or, in the alternative, for a new trial and remittitur, and entered judgment for plaintiff. Defendants appealed. The Superior Court, Appellate Division affirmed. The Supreme Court granted defendants' petition for certification.

The Supreme Court held that whether defendants were negligent as to conduct unrelated to any failure to examine, failure to diagnose or treat, or failure to confine a person for a mental health condition or drug dependence, were material fact issues.

LIABILITY - NEW YORK

Methal v. Village of Ardsley

Supreme Court, Appellate Division, Second Department, New York - July 12, 2023 - 192 N.Y.S.3d 545 - 2023 N.Y. Slip Op. 03775

Property owners brought action against village, company that constructed retaining wall, and engineer of retaining wall alleging that village's storm drain system broke and caused damage to property and that retaining wall contributed to system's deterioration.

Company and engineer asserted cross-claims against village. The Supreme Court, Westchester County, granted in part village's motion for summary judgment on certain cross-claims and denied it in part with respect to owners' negligent design claim and with respect to complaint and engineer's cross-claim to extent they sought damages, contribution, or indemnification for injures to property that occurred 90 days prior to service of second notice of claim. Village appealed and company and engineer cross-appealed.

The Supreme Court, Appellate Division, held that:

- Limitations period for owners' negligent design claim began to run when system was designed and installed;
- Village failed to establish prima facie entitlement to judgment as a matter of law that trespass and negligent maintenance claims were untimely; and
- Owners' notice of claim to village sufficiently complied with statutory requirements.

EMINENT DOMAIN - NEW YORK

Niagara Falls Redevelopment, LLC v. City of Niagara Falls

Supreme Court, Appellate Division, Fourth Department, New York - July 28, 2023 - N.Y.S.3d ----2023 WL 4837104 - 2023 N.Y. Slip Op. 04050

Property owners commenced proceeding seeking to annul city's determination authorizing the condemnation of their property for the development of a park and associated recreational facilities.

The Supreme Court, Appellate Division, held that:

- Condemnation determination was rationally related to a conceivable public purpose, supporting confirmation of the determination;
- Contention that condemnation determination should have been annulled for city's failure to establish how it planned to pay for project and failure to conduct market study fell outside of scope of judicial statutory review;
  Annulment of condemnation determination on basis of alleged failure to comply with city's comprehensive plan was not warranted;
- Annulment of condemnation determination on ground that it was excessive was not warranted;
  City's identification of tax parcel numbers and street addresses of property it was condemning was sufficient to comply with statutory condemnation-notice requirements; and
- Property owners were not prejudiced by untimeliness of publication of synopsis of condemnation determination and city's findings, and thus untimeliness did not support the annulment of condemnation determination.

PUBLIC MEETINGS - TEXAS

In Re City of Amarillo, Texas

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'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.

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.

The city council passed Ordinances approving this plan on May 24, 2022. The agenda item regarding the Ordinances read:

> 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.

Taxpayer filed a declaratory judgment action under Texas Civil Practice and Remedies Code Chapter 37 (UDJA) seeking to void the Ordinances and the anticipation notes.

Taxpayer alleged several violations of theTexas Open Meetings Act (TOMA) in his petition and

counterclaim. He requested declaratory relief under the UDJA, injunctive relief, and a direct violation of TOMA. Because of these alleged violations, taxpayer requested the trial court declare Ordinances 7985 and 7980 to be voidable.

On October 25, 2022, the court signed a final judgment which, among other things, invalidated the two ordinances and the anticipation notes. Both parties appealed.

Generally, TOMA is satisfied when written notice of the date, time, place, and subject of each meeting held by a governmental body has been posted in a place readily-accessible to the general public at least seventy-two hours before the scheduled time of the meeting. The primary disagreement in the appeal centered on whether the City substantially complied with TOMA by sufficiently describing the "subject" to be discussed in the city council meeting.

The Court of Appeals held 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.

CHARTER AMENDMENT - CALIFORNIA

Coalition of County Unions v. Los Angeles County Board of Supervisors

Court of Appeal, Second District, Division 3, California - July 28, 2023 - Cal.Rptr.3d - 2023 WL 4862020

Coalition of county employee unions and two individuals filed petition for peremptory writ of mandate prohibiting county board of supervisors and county chief executive officer (CEO) from enforcing voter-adopted county charter amendment, which required board to annually allocate at least 10% of locally generated unrestricted revenues in general fund to direct community investment and alternatives to incarceration and prohibited such funds from being allocated to any carceral system or law enforcement agency.

The Superior Court, Los Angeles County, granted petition. Respondents appealed.

The Court of Appeal held that:

- Amendment was authorized by constitutional provision allowing counties to provide for powers and duties of local officers and operation of local governments;
- Amendment comported with constitutional requirement that county charters provide for performance of statutorily mandated functions;
- Voters were authorized to approve ballot measure amending county charter;
- Amendment did not incapacitate county from performing state-delegated public functions;
- County Budget Act did not reflect legislative intent to exclusively delegate county budgeting to boards of supervisors; and
- Statutes governing Public Safety Augmentation Fund did not reflect legislative intent to preclude local referenda and initiatives on public safety budgeting.

Voter-adopted amendment to county charter which required county board of supervisors to allocate portion of general fund revenues to community investment and incarceration alternatives and

prohibited such funds' allocation to carceral and police uses defined power and duty of county's governing body, and thus, was authorized by constitutional provision allowing counties to provide for powers and duties of local officers and operation of local governments, even though amendment limited board's discretion as to budgeting duty; "power" set forth in amendment was allocation of locally generated unrestricted revenues, "duty" was directing 10% of such revenues to particular purposes, and Constitution did not preclude charter amendments from restricting or reassigning governing body's powers.

Voter-adopted amendment to county charter which required county board of supervisors to allocate portion of locally generated unrestricted revenues in general fund to direct community investment and alternatives to incarceration and prohibited such funds from being allocated to any carceral system or law enforcement agency comported with constitutional provision requiring county charters to provide for performance of functions required by statute; County Budget Act required county boards of supervisors to adopt county budgets on annual basis, and amendment guided board in such process by describing how portion of budget was to be allocated.

Constitutional provisions on local government authorized voters to approve ballot measure amending county charter to require county board of supervisors to allocate at least 10% of certain revenues in general fund to direct community investment and other specified purposes and precluding board from allocating such funds to carceral or police uses, even though Constitution did not expressly allow voters to have any role in county budgeting; Constitution required county charter to be amended only "in the same manner" as it was originally adopted, namely by majority vote of county's voters, such that voters had constitutional right to amend charter on any topic that was proper subject of county charter, which included budgeting.

Voter-adopted amendment to county charter, which required county board of supervisors to allocate 10% of locally generated unrestricted revenues in general fund to direct community investment and alternatives to incarceration and prohibited such funds' allocation for carceral or police uses, did not incapacitate county from performing public functions delegated to it by state, and thus, did not exceed scope of county's constitutionally permissible self-governance; amendment increased budgetary stability for certain expenditures that voters prioritized, board could reduce 10% set-aside in event of fiscal emergency or voters could amend charter again if amendment proved unduly constraining, and amendment, which was meant to reduce crime, did not facially impair public safety.

County Budget Act's references to "board of supervisors" as entity responsible for adopting county budget did not unambiguously indicate Legislature meant to exclusively delegate budgeting decisions to county boards of supervisors and preclude local electorates from exercising initiative and referendum powers on issues of county budgeting; Act, which applied only to counties, simply referred to boards because no other local legislative or governing body could enact county budget.

Voter-adopted ballot measure, which amended county charter to require county board of supervisors to allocate certain portion of revenue from general fund to direct community investment and other purposes and precluded such funds' allocation for carceral or police uses, did not allow electorate to exercise any powers or duties which County Budget Act granted to board and other county officials, including board's power to expend money to fund programs it deemed advisable or necessary, and thus, measure did not conflict with Act; measure did not allow voters to engage in statutory procedures for preparing recommended budget and adopting final budget or preclude board or officials from undertaking such duties, and board retained power to decide recipients and amounts of funding.

County Budget Act did not reflect legislative intent to delegate setting of budget priorities

exclusively to local governing bodies in order to fulfill Act's statewide objectives, and thus, state's general interest in county budgeting, as reflected in Act, did not weigh in favor of finding that Legislature intended to preclude voters in county from amending county charter by initiative or referendum so as to require board of supervisors to annually expend certain funds on direct community investment and incarceration alternatives and preclude board from allocating such funds to carceral and police uses; Act set forth some general, procedural parameters for county budgeting, but left substance of budget allocations entirely to individual counties.

Voter-adopted ballot measure that required county board of supervisors to allocate 10% of locally generated unrestricted revenues in general fund to incarceration alternatives and other purposes and precluded board from allocating such funds to carceral or police uses did not conflict with statutes governing Public Safety Augmentation Fund, and thus, statutes did not reflect legislative intent to preclude voters' exercise of initiative and referendum rights regarding counties' public safety budgets; statutes were not abstract declarations of interest in public safety, but rather, set up concrete framework for collection of sales tax revenues and distribution to local governments through Fund, whereas measure concerned only locally generated, unrestricted revenues, not Fund revenues.

PREEMPTION - CALIFORNIA

Chevron U.S.A. Inc. v. County of Monterey

Supreme Court of California - August 3, 2023 - P.3d - 2023 WL 4940263

Mineral rights holders brought action for declaratory and injunctive relief challenging validity of county ordinances banning land uses in support of new oil and gas wells and land uses in support of wastewater injection in unincorporated areas of county.

The Superior Court entered judgment striking down the ordinances. County appealed, the Court of Appeal affirmed. The Supreme Court granted review.

The Supreme Court held that ordinance conflicted with state statute granting state oil and gas supervisor authority to supervise drilling operations and thus was preempted.

Local law enters an area that is "fully occupied" by general law, and is thus preempted, when the Legislature has expressly manifested its intent to fully occupy the area, or when it has impliedly done so in light of one of the following indicia of intent: (1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the' locality.

County ordinance banning oil and gas wastewater injection and impoundment and the drilling of new oil and gas wells conflicted with state statute granting state oil and gas supervisor authority to supervise drilling operations and thus was preempted, as while statute mandated that the state "shall" supervise oil operation in a way that permitted well operators to "utilize all methods and practices" the state oil and gas supervisor has approved, the county ordinance provided that certain oil production methods could never be used.

IMMUNITY - CONNECTICUT

Adesokan v. Town of Bloomfield

Supreme Court of Connecticut - August 1, 2023 - A.3d - 347 Conn. 416 - 2023 WL 4915906

Motorist, individually and on behalf of her two minor children, brought action against town, police department, and police officer, alleging negligence, negligent supervision, and respondeat superior in connection with personal injuries sustained in collision when police officer's vehicle, that was traveling southbound in response to a possible abduction with emergency lights and siren activated, collided with driver's side of motorist's vehicle that was also traveling southbound, when motorist made a left turn at intersection at the same time that police officer attempted to pass motorist in northbound lane.

The Superior Court granted defendants' summary judgment motion. Motorist appealed.

Upon transfer from the Appellate Court, the Supreme Court held that defense of discretionary act qualified immunity does not apply to claims arising from the manner in which an emergency vehicle is operated under the privileges provided by the emergency-vehicle statute.

ZONING & PLANNING - MAINE

Upstream Watch v. City of Belfast

Supreme Judicial Court of Maine - August 3, 2023 - A.3d - 2023 WL 4939323 - 2023 ME 43

Environmental organization that was dedicated to restoration of mid-coast rivers and streams to their natural habitats sought review of city zoning board of appeals' (ZBA) dismissal of organization's appeal of city planning board's issuance of site plan permit, zoning permits, groundwater wells permit, and water intake/discharge pipes permit to applicant for proposed land-based salmon aquaculture project at site where highway crossed river.

The Superior Court affirmed. Organization appealed.

The Supreme Judicial Court held that:

- ZBA erred when it confined its review of organization's standing to information contained in application-to-appeal form, and
- Organization had associational standing to appeal to ZBA.

Whether city zoning board of appeals (ZBA) erred in confining its review of environmental organization's standing argument to organization's written response on its application-to-appeal form involved a legal interpretation of a land use regulation ordinance, and therefore Supreme Judicial Court would consider the issue de novo, in proceeding involving organization's challenge to city planning board's issuance of site plan permit, zoning permits, groundwater wells permit, and water intake/discharge pipes permit to applicant for proposed land-based salmon aquaculture project at site where highway crossed river.

City zoning board of appeals (ZBA) erred when it confined its review of environmental organization's standing argument to organization's written response on the application-to-appeal form for a challenge to city planning board's issuance of site plan permit, zoning permits, groundwater wells permit, and water intake/discharge pipes permit to applicant for proposed land-based salmon

aquaculture project at site where highway crossed river, where land use regulation ordinance did not contain such a restriction and ordinance mandated that, when acting in an appellate capacity, the ZBA was to consider all evidence of record submitted in the underlying hearing.

Environmental organization that was dedicated to restoration of mid-coast rivers and streams to their natural habitats had associational standing to appeal to city zoning board of appeals (ZBA) to challenge city planning board's issuance of site plan permit, zoning permits, groundwater wells permit, and water intake/discharge pipes permit to applicant for proposed land-based salmon aquaculture project at site where highway crossed river, where at least one of organization's members was an aggrieved person, either as an abutter or as a possessor of land directly affected by the project, and land use regulation ordinance did not explicitly require that a party show a particularized injury to qualify as an aggrieved party.

IMMUNITY - MISSISSIPPI

Phillips v. City of Oxford

Supreme Court of Mississippi - August 3, 2023 - So.3d - 2023 WL 4943506

Motorist, on behalf of herself and her minor child, brought action against city under Mississippi Tort Claims Act (MTCA), seeking to recover damages for injuries she and her child sustained when patrol car driven by police officer en route to emergency struck her vehicle in an intersection.

Following bench trial, the Circuit Court entered final judgment in favor of city. Motorist appealed. The Court of Appeals reversed. Writ of certiorari was granted.

The Supreme Court, en banc, held that evidence supported finding that city was entitled to police-protection immunity.

Evidence supported trial court's finding that police officer's conduct prior to automobile collision at intersection did not rise to high standard of reckless disregard, for purpose of determining city's entitlement to police-protection immunity under Mississippi Tort Claims Act (MTCA); officer exercised some measure of safety precaution by activating his lights and sirens throughout his response, he activated his horn for additional warning at intersections, he slowed as he approached intersections, and dash camera showed that all other cars at subject intersection yielded to officer except car driven by plaintiff motorist.

IMMUNITY - MISSOURI

Brandy v. City of St. Louis, Missouri

United States Court of Appeals, Eighth Circuit - July 28, 2023 - F.4th - 2023 WL 4835028

After city police officer deployed pepper spray against protestor and others in a crowd, protestor sued defendants including officer, city, and police chief, alleging various claims under federal and Missouri law, including First Amendment retaliation.

Defendants moved for summary judgment based on immunity grounds. The United States District Court denied officer's summary judgment motion in part, finding that he was not entitled to summary judgment on First Amendment retaliation claim based on qualified immunity, or on state-law claims based on official immunity, and reserved ruling on city's summary judgment motion

based on sovereign immunity. Defendants appealed.

The Court of Appeals held that:

- Protestor's right to exercise his First Amendment rights without facing retaliation from government officials was clearly established;
- The Court of Appeals lacked jurisdiction to disturb district court's conclusion that fact issue existed as to whether protestor's taunts of officer amounted to a true threat;
- The Court of Appeals lacked jurisdiction to resolve whether fact issue existed as to whether deployment of pepper spray was motivated by protected First Amendment activity;
- The Court of Appeals lacked jurisdiction to reverse determination that fact issue existed as to whether officer acted maliciously; and
- District court would be required on remand to reach the merits of city's sovereign immunity defense.

Given that city was entitled to a thorough determination of its claims of sovereign immunity, district court would be required to reach the merits of city's sovereign immunity defense against protestor's claims arising from city police officer's deployment of pepper spray against him, on remand from city's interlocutory appeal from district court's order denying summary judgment, where district court had failed to rule on city's summary judgment motion, but had instead reserved ruling until after the conclusion of trial.

REFERENDA - OHIO

State ex rel. LaChapelle v. Harkey

Supreme Court of Ohio - August 7, 2023 - N.E.3d - 2023 WL 5012040 - 2023-Ohio-2723

Member of committee that was attempting to place referendum on city ordinance related to nonowner-occupied residential property filed action seeking writ of mandamus to order city official to transmit referendum petition to county board of elections.

The Supreme Court held that:

- Committee member lacked adequate remedy in ordinary course of law as required for writ of mandamus;
- City official had mandatory, ministerial duty to transmit referendum petition to county board of elections;
- Fact that there was dispute about whether copy of ordinance was properly certified copy did not remove city official's duty to transmit petition to county board of elections; and
- Fact that city ordinance may have been administrative in nature did not remove city official's duty to transmit referendum petition to county board of elections.

Member of committee that was attempting to place referendum on city ordinance related to nonowner-occupied residential property lacked adequate remedy in ordinary course of law, for purposes of obtaining writ of mandamus to compel city official to transmit referendum petition to county board of elections, due to proximity of election.

City official had mandatory, ministerial duty to transmit referendum petition for city ordinance related to nonowner-occupied residential property to county board of elections, thus warranting mandamus relief, where petition was filed with city official within 30 days of passing of ordinance

Fact that there was dispute about whether copy of ordinance governing nonowner-occupied residential property filed prior to circulating referendum petition related to ordinance was properly certified copy did not remove city official's duty to transmit petition to county board of elections; copy of ordinance contained certification attesting that it was true and exact replica of original ordinance, and city official's duty to certify sufficiency and validity of petition did not arise until after board of elections examined petition.

Fact that city ordinance related to nonowner-occupied residential property may have been administrative in nature and thus not subject to referendum did not remove city official's duty to transmit referendum petition to county board of elections; city official did not have discretion to withhold referendum petition on ground that required her to make judicial or quasi-judicial determination.

ZONING & PLANNING - RHODE ISLAND

Green Development, LLC v. Town of Exeter

Supreme Court of Rhode Island - July 28, 2023 - A.3d - 2023 WL 4832121

Solar field project owner brought action for declaratory and injunctive relief after town paused, and subsequently amended, its zoning ordinance, preventing the development of three commercial solar field projects.

The Superior Court denied relief, and project owner appealed.

The Supreme Court held that:

- Owner's submissions were pre-applications rather than applications for development which had vested under provisions of the Zoning Enabling Act;
- Town had authority under town charter to issue moratorium;
- Statute did not preempt town's ability under town charter to adopt 60-day moratorium; and
- Vesting clause in town's emergency moratorium was not an improper modification of vesting requirements for zoning applications enacted outside ordinary notice and hearing procedures.

Solar field project owner's submissions to town planner for development of three solar field projects were pre-applications under Land Development and Subdivision Review Act, rather than applications for development which had vested under provisions of the Zoning Enabling Act, where project owner had selected the "pre-application" box on each of its three submissions and further included a letter of transmittal identifying the submissions as application materials for a pre-application plan review of its project, and town planner catalogued the submissions as "pre-applications" upon receipt.

Town had authority under town charter to issue moratorium on pending submissions for development of solar field projects; moratorium ordinance clearly characterized the emergency as a threat of an overdevelopment of solar-field projects in residential zones, and ordinance complied with the 60-day limitation for such emergency ordinances and affected only applications that had not vested under the applicable laws.

Statute authorizing a municipality to implement a "one-time moratorium, for the purpose of providing interim protection for a planned future land use or uses" for the first 12 months after a municipality adopts its local comprehensive plan was not exclusive and did not preempt town's ability, under town charter provision regarding emergency ordinances, to adopt 60-day moratorium on solar field project approvals.

Vesting clause in town's emergency moratorium ordinance prohibiting further solar field projects was not an improper modification of vesting requirements for zoning applications enacted outside ordinary notice and hearing procedures required for zoning amendments; valid and temporary emergency ordinance did not rise to the level of a de facto zoning ordinance, and town clearly provided vesting clause in an attempt to delineate which applications would proceed throughout the duration of the moratorium and which applications the town would place on hold.

EMINENT DOMAIN - WASHINGTON

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

Supreme Court of Washington - August 3, 2023 - P.3d - 2023 WL 4939152

Landowners brought action against public utility district, alleging district's operation of dam entitled landowners to damages based on inverse condemnation, trespass, nuisance, and negligence.

District counterclaimed for declaration of prescriptive easement. On summary judgment, the Superior Court declared a prescriptive easement in favor of utility district and dismissed landowners' claims. Landowners appealed. The Court of Appeals affirmed in part, reversed in part, and remanded. Review was granted.

The Supreme Court held that:

- As a matter of apparent first impression, the "subsequent purchaser rule," prohibiting landowners from suing, through an inverse condemnation action, for property damage caused by governmental conduct that occurred prior to their ownership, is a doctrine of standing rather than an affirmative defense;
- Landowners were subsequent purchasers as to taking that occurred when dam was built, supporting finding that they were precluded from bringing an inverse condemnation claim;
- There was no evidence that alleged increase in flooding on property was attributable to district, as could render increased flooding a new taking that would allow inverse condemnation claim; and
- Landowners were precluded from asserting a nuisance claim against district based on same flooding as "backup" for inverse condemnation claim.

The "subsequent purchaser rule," prohibiting landowners from suing, through an inverse condemnation action, for property damage caused by governmental conduct that occurred prior to their ownership, is a doctrine of standing rather than an affirmative defense.

Landowners were "subsequent purchasers" as to taking that occurred when dam was built and thus were precluded from bringing an inverse condemnation claim arising from public utility district's dam operations that had flooded landowners' property, where landowners bought property at a purchase price that represented known seasonal flooding from dam operations.

There was no evidence that alleged increase in flooding on landowners' property was attributable to public utility district, as could render increased flooding a new taking that would allow inverse condemnation claim by landowners, as subsequent purchasers whose purchase of property was at a price that reflected known flooding from district's dam operations.

Landowners were precluded from asserting a nuisance claim against public utility district, based on flooding of landowners' property from district's dam operations, as "backup" for landowners' inverse condemnation claim, which was barred by subsequent-purchaser rule given that landowners had purchased property at a price that accounted for known flooding due to dam operations, where

parties did not dispute that a taking occurred.

IMMUNITY - KENTUCKY

New Albany Main Street Properties v. Watco Companies, LLC

United States Court of Appeals, Sixth Circuit - July 27, 2023 - F.4th - 2023 WL 4777172

Lessee of port facility brought action against riverport authority's executive director in her official capacity, alleging state claims of tortious interference with contractual and business relationships, civil conspiracy, and defamation, and seeking damages and an injunction.

The United States District Court for the Western District of Kentucky denied director's motion to dismiss. Director filed interlocutory appeal.

The Court of Appeals held that:

- Director was not entitled to pure sovereign immunity;
- Authority performed a function integral to state government;
- Authority performed a statewide function; and
- Lessee brought action against director in her official, rather than individual, capacity.

Kentucky's rule of pure immunity does not apply to cities, which the Kentucky Supreme Court treats as municipal corporations, rather than arms of the government, and it does not apply to state or county employees sued in their individual capacities who must instead rely on the distinct doctrine of qualified immunity.

Executive director for riverport authority, a quasi-government agency, was not entitled to pure sovereign immunity under Kentucky common law, in action by lessee of port facility, alleging state-law claims against director for tortious interference with contractual and business relationships, civil conspiracy, and defamation.

The development of transportation infrastructure qualifies as a government, not a proprietary, task, for purposes of establishing that a corporate entity performs a function integral to state government for governmental sovereign immunity to apply; this transportation infrastructure includes not just the airports that planes use or the roads that cars use, but also the docks and wharves that ships use.

Riverport authority, a quasi-government agency that leased industrial property for public purpose of developing ports, performed a function integral to state government, rather than a proprietary function, as would support finding that authority's executive director was entitled to governmental sovereign immunity in lessee's action alleging state claims of tortious interference with contractual and business relationships, civil conspiracy, and defamation; authority did not act with a profit motive as it could only charge reasonable rates for use of port facility, was required to devote any surplus revenue to maintaining facility, and was eligible to rely on revenue bonds and taxpayer funds to subsidize its activities, and authority did not own the ships that hauled cargo, but rather owned transportation infrastructure of port facility that shippers used.

Riverport authority, a quasi-government agency that leased industrial property for public purpose of alleviating a statewide concern relating to developing ports, performed a statewide function, rather than a regional function, as would support finding that authority's executive director was entitled to governmental sovereign immunity in lessee's action alleging state claims of tortious interference

with contractual and business relationships, civil conspiracy, and defamation, even though authority had a limited regional jurisdiction; need to ensure that individuals living in state had adequate means to ship their cargo to the other side of the commonwealth represented a classic governmental problem that extended beyond any one region.

Port facility lessee brought action against executive director of riverport authority, a quasi-government agency, in her official, rather than individual, capacity, as would support finding that director was entitled to governmental sovereign immunity in lessee's action alleging claims including defamation, absent argument that anything in course of proceedings would have put director on notice that lessee sued her in her personal capacity; claim was ambiguous in that it merely identified director as "Executive Director of Louisville/Jefferson County Riverport Authority," and claim never alleged that it sought money damages from director in her individual capacity.

ZONING & PLANNING - SOUTH DAKOTA

Dakota Constructors, Inc. v. Hanson County Board of Adjustment

Supreme Court of South Dakota - July 26, 2023 - N.W.2d - 2023 WL 4778243 - 2023 S.D. 38

Quarry owners filed petition for writ of certiorari, contesting conditions which county board of adjustment attached to conditional use permit and arguing that quarry was a prior nonconforming use in agricultural district.

The Circuit Court denied the writ, and quarry owner appealed.

The Supreme Court held that:

- As a matter of first impression, in passing on the meaning of a zoning ordinance, the courts will consider and give weight to the construction of the ordinance by those administering the ordinance, and
- Determination that previous operation of quarry had ceased for more than one year and was thus not a prior nonconforming use was not wrong or erroneous.

In passing on the meaning of a zoning ordinance, the courts will consider and give weight to the construction of the ordinance by those administering the ordinance; however, an administrative construction is not binding on the court, which is free to overrule the construction if it is deemed to be wrong or erroneous.

County board of adjustment determination that previous operation of quarry in agricultural district had ceased for more than one year and was thus not a prior nonconforming use under zoning ordinance that could continue without a conditional use permit was not wrong or erroneous, nor was it in willful disregard of the indisputable proof; extraction of sand, gravel, or minerals was not a permitted principal use within an agricultural district under the ordinance, board differentiated between the extraction of material from the ground and the removal of previously extracted and stockpiled material from the site, and there was no evidence contradicting reports filed by quarry owner's predecessor that zero tons of gravel were removed from their natural state on the site for 17 years, but rather predecessor removed stockpiled aggregate.

IMMUNITY - MICHIGAN

Sunrise Resort Association, Inc. v. Cheboygan County Road Commission

Supreme Court of Michigan - July 24, 2023 - N.W.2d - 2023 WL 4713823

Real property owners brought action against county road commission arising from damage to their properties allegedly caused by an overflow and backup of a storm water drainage system, seeking monetary damages under the sewage-disposal-system-event exception to governmental immunity and injunctive relief to abate the ongoing trespass or nuisance.

The Circuit Court granted commission's motion for summary disposition. Owners appealed, and the Court of Appeals reversed and remanded. The Supreme Court granted leave to appeal.

The Supreme Court held that:

- Claim under the sewage-disposal-system-event exception to immunity was timely, and
- County commission had immunity from common law trespass-nuisance claim.

Sewage overflow or backup was a distinct event which occurred within three years of filing complaint, and thus property owners' complaint against county road commission under the sewage-disposal-system-event exception to immunity under the Government Tort Liability Act (GTLA) was timely, even if other overflow or backup events also had occurred more than three years before the complaint.

County road commission had immunity under the sewage-disposal-system-event (SDSE) exception to Government Tort Liability Act (GTLA) from landowners' common law trespass-nuisance claim arising from overflow or backup of a sewage disposal system, and thus landowners were prohibited from seeking injunctive relief in connection with that claim.

ZONING & PLANNING - NEW HAMPSHIRE

Raymond, Trustee of J&R Realty Trust v. Town of Plaistow

Supreme Court of New Hampshire - July 28, 2023 - A.3d - 2023 WL 4831447

Real property owner appealed decision of the zoning board of adjustment denying variance request to convert property from non-conforming residential use to commercial use to house home improvement business engaged in the sale, service, and installation of windows, siding, roofing, decks, and gutters.

The Superior Court upheld the denial, and property owner appealed. The Supreme Court remanded for articulation, and the Superior Court issue order determining that the decision was reasonable.

The Supreme Court held that proposed use of property fell with definition of a "trade business" permitted in commercial zone.

Proposed use of property fell with definition of a "trade business" permitted in commercial zone, rather than a contractor's storage yard; primary purpose of building would be to house home improvement business engaged in the sale, service, and installation of windows, siding, roofing, decks, and gutters, and allow business to operate a retail showroom to provide trade services directly to the public, ordinance expressly provided examples of a trade business that included "electricians, plumbers, and HVAC contractors," and company intended to store all materials inside a 3,400 square foot warehouse building.

REVENUE BONDS - OKLAHOMA

Matter of Oklahoma Turnpike Authority

Supreme Court of Oklahoma - August 1, 2023 - P.3d - 2023 WL 4881238 - 2023 OK 84

Oklahoma Turnpike Authority brought original proceeding seeking approval of revenue bonds to finance the construction of three turnpike projects, update and repair turnpike facilities and infrastructure, refund prior revenue bonds and notes, and pay other costs.

The Supreme Court held that:

- Authority was statutorily authorized to construct proposed southern extension of turnpike, and
- Authority was authorized by statute to issue additional bonds for the construction of two connections to finalize outer loop around city.

Oklahoma Turnpike Authority was statutorily authorized to construct proposed southern extension of turnpike, even if extension did not begin or end in exact locations specified in statute; proposed extension moved easterly from beginning point at spur and crossed river as required in statute, and ended in the vicinity of city as stated in statute, and Turnpike Authority had broad authority to determine the route, as well as the discretion to determine routes that were feasible and economically sound.

The interpretation or construction of an undefined statute by the agency charged with its administration is entitled to the highest respect from the courts, especially when the administrative construction is settled and uniformly applied for several years; in such cases, the administrative construction will not be disturbed except for very cogent reasons, provided that the construction so given was reasonable.

Oklahoma Turnpike Authority was authorized by statute to issue additional bonds for the construction of two connections to finalize outer loop around city; while statute restricted bonds for construction of any of four proposed turnpikes to one issue under one bond indenture, that provision only applied to initial bond issue to begin construction of the four proposed turnpikes, and Authority had statutory authorization to pay “all or any part of the cost of any one or more turnpike projects,” which allowed authority to later issue bonds for the two connectors.

SCHOOLS - RHODE ISLAND

Purcell v. Johnson

Supreme Court of Rhode Island - July 18, 2023 - A.3d - 2023 WL 4567587

Unelected candidate for school committee brought a petition in quo warranto against town council, its appointee to school committee, and school committee, seeking a determination that she was entitled to be appointed to fill a vacancy on school committee.

Appointee and town council also brought a petition in quo warranto for a determination that appointee had the right and title to the position on the school committee.

The Supreme Court held that:

- Town charter was inconsistent with and could not be reconciled with legislative act regarding

appointments to vacancies on regional school committee, and
- More specific town charter governed, and unelected candidate was entitled to be appointed to regional school committee.

Town's charter that specified that, in the event of a vacancy on the regional school committee, the town council "shall appoint the unelected candidate who received the greatest number of votes for that office in the most recent general or special election" was inconsistent with and could not be reconciled with legislative act authorizing towns to incorporate and form a regional school district, where act placed no limitation on whom the council could elect to fill a vacancy on the regional school committee.

Unelected candidate for regional school committee who had received the greatest number of votes for that office in the most recent election was entitled to be appointed by town council to fill vacancy on school committee, as provided by town charter, where town charter was more specific in its outline of a substantive procedure to fill a vacancy on regional school committee and was precise in who the appointee would be, and thus controlled over legislative act authorizing towns to incorporate and form a regional school district which placed no limitation on whom the council could elect to fill a vacancy.

PUBLIC CONTRACTS - GEORGIA

City of Brookhaven v. Multiplex, LLC

Court of Appeals of Georgia - July 27, 2023 - S.E.2d - 2023 WL 4779591

City brought action against contractor for breach of contract to replace park and build new elementary school, seeking attorney fees and liquidated damages under contract's delay clause. Contractor asserted counterclaims.

The Superior Court granted contractor's motion for summary judgment on city's claim for liquidated damages and denied city's cross-motion for summary judgment, finding that delay clause was unenforceable penalty. City appealed.

The Court of Appeals held that:

- Undisputed difficulty of estimating damages did not preclude summary judgment on enforceability of delay clause;
- Parties intended that delay clause create penalty; and
- At time of contracting, delay clause did not set forth reasonable estimate of damages that might result from breach.

Undisputed difficulty of estimating damages that might result from any breach of public works contract between city and contractor, which called for swift replacement of public park, did not preclude contractor from showing, on its motion for summary judgment on city's claim seeking liquidated damages for breach of contract, that liquidated damages clause was unenforceable penalty, even though contractor would have burden at trial to show that provision was penalty; at summary judgment, contractor only had to point to absence of evidence on any one of the three factors provision needed to satisfy in order to constitute enforceable liquidated damages clause rather than penalty, and difficulty in estimating damages was only one of those three factors.

City and contractor intended that delay clause in contract to demolish public park, build new park, and build new elementary school, which provided for "Liquidated Damages at the rate of $1,000.00

per calendar day" in event of delay, would deter breach, and thus, clause was unenforceable penalty; contract contained no language indicating that liquidated damages were not intended as penalty, city testified that timely construction of new park was important to minimize time that area residents would need to go without a park, and city conceded that intent of delay clause was to "disincentivize delays" by requiring contractor to pay $1,000 per day from its net profits if project were not completed on time.

At time of contracting, delay clause in contract between city and contractor for demolition of old park, swift construction of new park, and construction of elementary school, which provided for "Liquidated Damages at the rate of $1,000.00 per calendar day" of delay, was not reasonable estimate of probable loss that might result from contractor's delay in construction of park, and thus, clause constituted unenforceable penalty; city did not attempt to estimate damages that might result from late completion of construction before contract was executed, and city representative testified that $1,000-per-day number was not project-specific, but rather, was chosen because it was "standard" number for liquidated damages clauses, which city stated were very common in its construction contracts.

ZONING & PLANNING - CALIFORNIA

Lafayette Bollinger Development LLC v. Town of Moraga

Court of Appeal, First District, Division 1, California - July 19, 2023 - Cal.Rptr.3d - 2023 WL 4613300

Landowners petitioned for writ of mandate and brought other claims against town after they unsuccessfully sought to amend their property's "Study" land use designation in town's general plan in order to develop housing.

The Superior Court issued a peremptory writ of mandate requiring town to give the property a legally compliant land-use designation, but otherwise entered judgment for town, granted town's motion to strike and tax costs, and denied landowners' motion for attorney's fees. Landowners appealed, and town cross-appealed.

The Court of Appeal held that:

- Designation of landowners' property as "Study" in general plan did not substantially comply with statutory requirements;
- Town's failure to comply with general plan statute by identifying landowners' property as "Study" on general plan did not require town to approve landowners' application for housing project;
- Designation of landowners' property as "Study" on general plan was not a per se regulatory taking;
- Rejection of landowners' proposal to construct 85 houses on land designated as "Study" on general plan was not a regulatory taking;
- Delay in adopting a permanent land-use designation for landowners' property was rational in light of the property's unique aspects and thus did not violate equal protection
- Town's failure to give landowners' property a valid designation on general plan was not so outrageous as to violate substantive due process;
- Landowners were not the "prevailing party" and thus were not entitled to award of costs; and
- Attorney's fees under the private attorney general doctrine were not warranted.

EMINENT DOMAIN - FLORIDA

Sabal Trail Transmission, LLC v. 3.921 Acres of Land in Lake County Florida

United States Court of Appeals, Eleventh Circuit - July 25, 2023 - F.4th - 2023 WL 4729037

Natural gas company brought action pursuant to Natural Gas Act to condemn property for pipeline easement.

The United States District Court for the Middle District of Florida adopting report and recommendation of a magistrate judge awarded prejudgment interest to property owner under Florida law and, adopting report and recommendation of a magistrate judge, awarded attorney fees and costs to owner under Florida law. Company appealed.

The Court of Appeals held that state law applied in determining the measure of compensation in a condemnation proceeding under the Natural Gas Act.

Condemnation proceedings under the Natural Gas Act section authorizing private entities who have received a certificate of public convenience and necessity to acquire property by the exercise of the right of eminent domain must look to state law to determine the measure of compensation.

SCHOOL IMPACT FEES - NORTH CAROLINA

Zander v. Orange County, NC

Court of Appeals of North Carolina - July 5, 2023 - S.E.2d - 2023 WL 4339347

Plaintiffs appealed from a summary judgment order dismissing their class action complaint brought against Defendants Orange County (County) and the Town of Chapel Hill1 on behalf of persons: (1) who were assessed allegedly ultra vires school impact fees by the County (the "Feepayer Class"); or (2) who are allegedly entitled to a refund of some school impact fees due to a 2016 change in the fee schedule (the "Refund Class").

Plaintiffs filed a complaint alleging, inter alia, that the County failed to comply with the Enabling Act's fee-setting provisions and the fees were thus ultra vires.

TischlerBise, the County's consultant included the following costs as "capital improvements" in drafting the 2007 Studies that served as the basis of the fees: (1) construction; (2) land acquisition; (3) portable/temporary classrooms; (4) support facilities; (5) buses; and (6) TischlerBise's consulting fee.

The court held that "buses and TischlerBise's consultant fees are not 'capital improvements to … schools' because they are not themselves 'capital improvements' as the word is ordinarily understood. A bus and a consultant's report simply are not 'acqui[sitions] [of] or improve[ments] [to] a fixed asset.'"

The Court of Appeals held that:

- The County unlawfully included some costs not authorized by statute in calculating the impact fees and hold that the Feepayer Class is entitled to recoup the portion of the school impact fees that were assessed to cover those improper costs; and
- As to the Refund Class, the trial court properly granted summary judgment for the County because

the forecast of evidence demonstrated that no refunds were owed under the applicable ordinance.

EMINENT DOMAIN - OHIO

State ex rel. Balunek v. Marchbanks

Supreme Court of Ohio - July 25, 2023 - N.E.3d - 2023 WL 4711688 - 2023-Ohio-2517

Land owner sought a writ of mandamus ordering the Department of Transportation (DOT) to begin appropriation proceedings for the taking of real property owned by land owner.

The Supreme Court held that:

- DOT committed a taking of land owner's property;
- Land owner was entitled to a writ of mandamus compelling the DOT to institute appropriation proceedings; and
- Attorney fees were not available in mandamus actions to compel appropriation proceedings.

The Department of Transportation (DOT) committed a taking of land owner's property, for the purpose of land owner's mandamus action seeking to compel the DOT to begin appropriation proceedings; prior to DOT's construction project, the property had access to abutting roads through driveways and an easement, during the project the DOT destroyed the property's driveways that connected it to East 93rd Street and did not replace those driveways or provide alternative curb-cut access, and the project also eliminated the property's easement access to Woodland Avenue, rendering the property currently inaccessible to lawful vehicular traffic.

The fact that land owner would "likely" be granted street-opening permit to rebuild driveways to access property and that such a permit "would effectively negate the underlying loss-of-access basis" of his eminent domain claim did not negate owner's entitlement to writ of mandamus ordering Department of Transportation (DOT) to begin appropriation proceedings, after DOT project destroyed property's two driveways and eliminated property's easement across neighboring property to access road; street-opening permit would be granted only if property met city's ordinances and standards, no evidence indicated if property met those standards, to obtain permit owner would have to pay fee and submit performance bond of up to $250,000, and permit process could not compel DOT to begin appropriation proceedings, and thus was not adequate remedy.

Land owner was entitled to a writ of mandamus compelling the Department of Transportation (DOT) to institute appropriation proceedings for the taking of owner's property, where DOT project eliminated access to the property by lawful vehicular traffic, and DOT's action constituted a taking for which it owed compensation.

PUBLIC PENSIONS - RHODE ISLAND

Beaudry v. Rossi

Supreme Court of Rhode Island - June 9, 2023 - 295 A.3d 349

Personal representative of firefighter's estate brought action against town arising from dispute over calculation of firefighter's disability retirement benefits. The Superior Court granted town's motion for summary judgment. Personal representative appealed.

The Supreme Court held that:

- Pension plan amendment providing for administrative remedy was not validly enacted by vote of town council;
- Town council did not implicitly ratify amendment via vote on subsequent amendment; and
- Town council did not implicitly ratify amendment via periodic votes ratifying collective bargaining agreement (CBA).

Amendment to town's pension plan that gave town council, sitting as plan administrators, the exclusive right to interpret and decide matters under plan was not validly enacted at time of firefighter's disability retirement, and therefore firefighter was not required to exhaust the administrative remedy set forth in amendment before pursuing action against town arising from dispute over calculation of his disability retirement benefits, where town charter reserved the power to change town's pension plan in town council, town council did not authorize any town official to act on its behalf, and council never voted on amendment.

PUBLIC CONTRACTS - SOUTH CAROLINA

Buonaiuto v. Town of Hilton Head Island

Court of Appeals of South Carolina - June 14, 2023 - S.E.2d - 2023 WL 3985220

Protestant brought action against town, seeking declaration that town violated its procurement code because it failed to publicly bid or subject its contract with chamber of commerce to its code, rescission of town's contract, an injunction requiring town to subject any proposed contract to its code, and an award of costs and attorney's fees.

On cross-motions for summary judgment, the Court of Common Pleas entered summary judgment in favor of town. Protestant appealed.

The Court of Appeals held that town's procurement code did not govern town's contract with chamber of commerce to manage and direct expenditure of statutorily-mandated special fund for advertising and promotion of tourism.

Town's procurement code did not govern town's contract with chamber of commerce which, among other things, included managing and directing expenditure of a statutorily-mandated special fund for advertising and promotion of tourism, though contract required chamber to submit a budget of planned expenditures and subsequent accounting of expenditures, submit designated marketing organization report and marketing plan, and submit tourism metrics; town's intent in enacting procurement code was to enable bidding process for receipt of funds in exchange for services rendered to town, and town officials and chamber's president and chief operating officer stated that purpose of the contract was to ensure chamber met compliance and operating standards rather than to procure services.

DEVELOPMENT - TENNESSEE

Save Our Fairgrounds v. Metropolitan Government of Nashville and Davidson County

Court of Appeals of Tennessee - July 14, 2023 - Slip Copy - 2023 WL 4542524

In 2017, Major League Soccer announced that it had awarded a soccer franchise to Nashville. To attract a franchise, the Metropolitan Government of Nashville and Davidson County (Metro) agreed to the construction of a soccer-specific stadium and an adjacent multi-use development at the Fairgrounds. It pledged to use half of the property taxes generated by the multi-use development to create a capital fund for the Fairgrounds.

Metro Council passed a resolution giving conditional approval to the Sports Authority of the Metropolitan Government of Nashville and Davidson County to issue bonds to construct and equip the stadium and related facilities.

Save Our Fairgrounds (Plaintiff) is a nonprofit corporation dedicated to promoting and preserving the Fairgrounds. Plaintiff sued Metro alleging that the soccer development violated various provisions of the Metro Charter.

Plaintiff moved for a temporary restraining order and/or injunction to keep "Metro from taking any actions to commence any phase of redevelopment of the Fairgrounds Nashville property until a referendum is approved by the voters." They argued, for the first time, that § 11.602(d) required **both** a majority vote in Metro Council **and** a public referendum before any demolition or redevelopment could occur at the Fairgrounds.

After a hearing, the court denied the injunction request. The court ruled that § 11.602(d) unambiguously allowed demolition to occur after **either** a majority vote of Metro Council or a charter amendment.

The court concluded that the plaintiffs did not prove that the construction and operation of the soccer development were ultra vires, a breach of fiduciary duty, or a violation of the Metro Charter. Rather, Metro demonstrated that, when the new development was completed, (1) it would still be feasible to host a divisional fair on site and (2) the existing activities would be continued.

ZONING & PLANNING - TEXAS

Consolidated Towne East Holdings, LLC v. City of Laredo

Court of Appeals of Texas, San Antonio - July 12, 2023 - S.W.3d ----2023 WL 4482391

Developer brought declaratory judgment and mandamus action against city, seeking declaration that city's refusal to issue living unit equivalences unless developer voluntarily annexed its land constituted a regulatory taking and that denial of services by city officials was an ultra vires act.

City and developer filed cross-motions for summary judgment, which the 406th District Court granted in favor of city and dismissed developer's claims with prejudice. Developer appealed.

The Court of Appeals held that:

- Developer's regulatory-takings claim was not ripe;
- Developer was not entitled to mandamus relief against city officials; and
- Dismissal without prejudice, rather than with prejudice, was appropriate disposition of developer's premature claims.

Developer's regulatory-takings claim against city, alleging that city's refusal to issue living unit equivalences unless developer voluntarily annexed its land as a precondition for water and sewer services amounted to an unconstitutional exaction, was not ripe, and thus trial court lacked subject matter jurisdiction over developer's declaratory judgment action, where city and developer had not even entered into discussions regarding cost of annexation, and without an authoritative determination of annexation costs, court could not assess whether costs assessed pursuant to annexation were roughly proportional to interests that city asserted.

Dismissal without prejudice, rather than with prejudice, was appropriate disposition of developer's premature, or unripe, claims against city, seeking declarations that city's refusal to issue living unit equivalences unless developer voluntarily annexed its land constituted a regulatory taking, and that city ordinance requiring annexation before issuance of permit for a sewer connection resulted in an unconstitutional taking as well.

Developer was not entitled to mandamus relief against city officials, seeking to compel them to sell living unit equivalences to developer without imposing requirement to annex its land to city as precondition for water and sewer services and alleging their denial to sell was an ultra vires act and amounted to an unconstitutional regulatory taking; developer failed to establish there was an unconstitutional exaction, city officials' actions were not contrary to statute or city ordinance, so as to allow for prospective relief, and developer failed to argue that an exception was met to ordinances requiring annexation before city could issue sewer and plumbing permits.

EDUCATION - ARKANSAS

Arkansas Department of Education v. Jackson

Supreme Court of Arkansas - June 15, 2023 - 2023 Ark. 105 - 669 S.W.3d 1

Plaintiffs, who were individuals connected either by employment, residence, or otherwise to public school district that had been taken over by the State Board of Education due to minimum-enrollment concerns, moved for a temporary restraining order (TRO) in its lawsuit for a declaratory judgment that the LEARNS Act's emergency clause, pursuant to which the Secretary of Education, who was acting as district's school board, entered into a transformation contract with charter school management company, was ineffective.

The Circuit Court entered order granting the TRO. Defendants appealed.

The Supreme Court held that:

- Payments that district would make to management company under transformation contract could not be irreparable harm;
- Nonrenewal of employment contracts and other adverse effects related to those nonrenewals could not be irreparable harm;
- Risk of district being involuntarily consolidated, dissolved, or divided in retaliation for lawsuit could not be irreparable harm;
- Alleged lack of an opportunity of district residents to participate in and provide feedback on

transformation contract could not be irreparable harm; and
- Absence of a TRO would not impair right of ballot-question committee to pursue a citizen-initiated repeal of the LEARNS Act via referendum petition.

Payments that public school district would make to charter school management company under transformation contract could not be "irreparable harm" and thus could not support temporary restraining order (TRO) against the LEARNS Act's emergency clause, pursuant to which the Secretary of Education, who was acting as district's school board since district had been taken over by the State Board of Education due to minimum-enrollment concerns, had entered into the transformation contract; the payments were clearly monetary in nature.

Nonrenewal of employment contracts and other adverse effects related to those nonrenewals could not be "irreparable harm" and thus could not support temporary restraining order (TRO) against the LEARNS Act's emergency clause, pursuant to which the Secretary of Education, who was acting as district's school board since district had been taken over by the State Board of Education due to minimum-enrollment concerns, had entered into the transformation contract; the nonrenewals and related effects could adequately be compensated by money damages or redressed in a court of law.

Risk of public school district being involuntarily consolidated, dissolved, or divided in retaliation for lawsuit challenging validity of LEARNS Act's emergency clause could not be "irreparable harm" and thus could not support temporary restraining order (TRO) against the clause, pursuant to which the Secretary of Education, who was acting as district's school board since district had been taken over by the State Board of Education due to minimum-enrollment concerns, had entered into the transformation contract; the risks were entirely speculative.

Absent authority granting public school district residents the right to an opportunity to participate in and provide feedback on transformation contract, the denial of such an opportunity could not be "irreparable harm" and thus could not support temporary restraining order (TRO) against the LEARNS Act's emergency clause, pursuant to which the Secretary of Education, who was acting as district's school board since district had been taken over by the State Board of Education due to minimum-enrollment concerns, had entered into the transformation contract.

Even if there was authority granting public school district residents the right to an opportunity to participate in and provide feedback on transformation contract, residents did have that opportunity, and thus alleged denial of such an opportunity could not be "irreparable harm" and could not support temporary restraining order (TRO) against the LEARNS Act's emergency clause, pursuant to which the Secretary of Education, who was acting as district's school board since district had been taken over by the State Board of Education due to minimum-enrollment concerns, had entered into the transformation contract; meeting where State Board of Education approved the contract was open to the public.

Absence of a temporary restraining order (TRO) would not impair ballot-question committee's right to pursue a citizen-initiated repeal of the LEARNS Act via a referendum petition, and thus alleged impairment of that right could not be "irreparable harm" and could not support temporary restraining order (TRO) against the LEARNS Act's emergency clause, pursuant to which the Secretary of Education, who was acting as public school district's school board since district had been taken over by the State Board of Education due to minimum-enrollment concerns, had entered into a transformation contract with charter school management company.

PUBLIC UTILITIES - CALIFORNIA

City of Hesperia v. Lake Arrowhead Community Services District

Court of Appeal, Fourth District, Division 1, California - July 12, 2023 - Cal.Rptr.3d - 2023 WL 4485099

City brought action against water and wastewater district and district's board of directors seeking a writ of mandate prohibiting further pursuit of solar photovoltaic project to offset energy costs associated with district's operations and facilities under state renewable energy self-generation bill credit transfer program, alleging that proposed property site was not within district's water or wastewater service area, and challenging sufficiency of evidence supporting no-feasible-alternative determination so as to qualify for exemption from city's zoning regulations, among other claims.

The Superior Court denied petition. City appealed.

The Court of Appeal held that:

- Substantial evidence supported trial court's finding that city had unreasonably delayed issue relating to eligibility for program, as would support application of laches to bar city's claim;
- Substantial evidence supported trial court's finding that city's unreasonably delay prejudiced district, as would support application of laches;
- Evidence supported finding that proposed property site was within district's geographical boundary, and therefore was eligible for use under program; and
- Sufficient evidence supported district's determination of no feasible alternative, so as to avoid application of city's zoning regulations.

Substantial evidence supported trial court's finding, on review of denial of city's petition for writ of mandate, that city had unreasonably delayed raising issue that water and wastewater service district's solar energy project site did not qualify for state renewable energy self-generation bill credit transfer program, as would support application of laches to bar city's assertion that project was ineligible for program; evidence indicated that city failed to raise eligibility issue during prior lawsuit seeking writ of mandate against district, had been aware of district's plan to utilize program for at least five years, including size, location, and reason for project, offered no explanation for delay, and was on notice of facts from which it should have been aware of district's agreement with investor-owned utility company to participate in program.

Substantial evidence supported trial court's finding, on review of denial of city's petition for writ of mandate, that city's unreasonable delay in raising issue whether water and wastewater service district's solar energy project qualified for state renewable energy self-generation bill credit transfer program prejudiced district, as would support application of laches to bar city's claim of ineligibility; district had expended money, time, and effort to demonstrate that there were no feasible alternatives project so as to be exempt from city's zoning regulations, and city induced district to pursue project through lengthy and costly litigation and technical analysis, and by placing at risk district's ability to benefit from agreement with investor-owned utility company.

The "geographical boundary of a local government," for purposes of state renewable energy self-generation bill credit transfer program, refers to an area that is subject to the governing authority of the local government at issue; interpretation is consistent with the legislature's expressed purpose and concerns regarding program, to increase the number and type of entities that can benefit from program while at the same time avoiding complications that could arise if a governmental entity attempts to obtain energy credits from one electrical corporation but apply those credits to an account serviced by a different electrical corporation.

On review of denial of city's petition for writ of mandate, evidence supported trial court's finding

that proposed property site for water and wastewater service district's solar energy project was within district's geographical boundary, and therefore was eligible for use under state renewable energy self-generation bill credit transfer program to offset energy costs associated with district's operations and facilities, even though property was not located within district's service area boundaries; evidence indicated that district governed property in relation to wastewater service function by conveying treated effluent directly from district's wastewater treatment plant into percolation ponds at facility on property, district could not complete wastewater management function without having authority over property, and property was served by electrical corporation with which district entered into agreement that was necessary for participation in program.

City failed to demonstrate that there was insufficient evidence to support trial court's denial of city's petition for writ of mandate as to city's challenge to sufficiency of evidence to support water and wastewater service district's determination of no feasible alternative to proposed property site for district's solar energy project seeking to offset energy costs associated with district's operations and facilities pursuant to state renewable energy self-generation bill credit transfer program so as to qualify for exemption from application of city's zoning regulations.

ZONING & PLANNING - GEORGIA

Hall County v. Cook Communities

Court of Appeals of Georgia - June 29, 2023 - S.E.2d - 2023 WL 4246126

Property developer filed lawsuit against county and its commissioners, in their individual capacities, challenging a rezoning decision and seeking declaratory, injunctive, and mandamus relief.

The Superior Court denied county's motion to dismiss developer's direct action, ultimately concluding that local zoning authority's decision on developer's request to rezone its property was legislative rather than quasi-judicial. County filed an application for interlocutory review, which the Court of Appeals granted.

The Court of Appeals held that county's rezoning decision was legislative, not quasi-judicial, and thus, proper method for property developer to challenge constitutionality of that decision was to file suit in Superior Court.

County's rezoning decision was legislative, not quasi-judicial, and thus, proper method for property developer to challenge constitutionality of that decision was to file suit in Superior Court, which could then conduct a de novo review, as developer was not limited to review of that decision by writ of certiorari; developer, alleging that rezoning conditions imposed an unconstitutional taking of its property and seeking declaratory, injunctive, and mandamus relief, presented a constitutional attack against conditions that county attached to approval of developer's application to rezone, which essentially amounted to a denial of its rezoning request.

ZONING & PLANNING - INDIANA

Shinall v. Board of Zoning Appeals for Town of Ogden Dunes

Court of Appeals of Indiana - June 16, 2023 - N.E.3d - 2023 WL 4038500

Homeowners petitioned for judicial review of decision of town board of zoning appeals granting neighbors a variance of residential building height restriction.

The Superior Court granted board's and neighbors' motion to dismiss for lack of standing, concluding that homeowners were not aggrieved by any perceived hindrance to their prospective lake views. Homeowners appealed.

The Court of Appeals held that homeowners clearly established that they were aggrieved for purposes of establishing standing to seek judicial review of zoning decision.

Allegations in homeowners' petition clearly established they were aggrieved by town board of zoning appeals' decision granting neighbors' proposed variance of residential building height restriction established by town zoning code, and thus homeowners had standing to seek judicial review of board's decision; homeowners alleged that they had enjoyed a waterfront view of lake over roofline of neighbors' existing home for almost two decades, that they had a marketable interest in property value associated with waterfront view, and that neighbors' proposed height variance would obstruct homeowners' view of lake and diminish values of their property and adjacent properties, indicating that homeowners had a pecuniary injury beyond that which would be suffered by the community as a whole.

MUNICIPAL GOVERNANCE - NEBRASKA

Dodge County Humane Society v. City of Fremont

Supreme Court of Nebraska - July 14, 2023 - N.W.2d - 314 Neb. 714 - 2023 WL 4536101

Humane society, a nonprofit organization, filed petition in error that named city, with which it had entered into contract for animal control services, and city council after council approved motion that authorized city mayor to send humane society letter regarding termination of contract, alleging that city had no cause to terminate and had failed to comply with contractual termination prerequisites.

The District Court denied motion to dismiss brought by city and council and ordered contract reinstated. City and council appealed.

The Supreme Court held that city council was not exercising judicial function when it voted to approve motion for mayor to send letter.

City council was not exercising judicial function when it voted to approve motion for mayor to send letter to county humane society regarding termination of animal control contract into which parties had entered, and thus trial court lacked jurisdiction to hear humane society's petition in error; while council, at meeting, opened floor for members of public to comment on agenda item concerning motion to send notice of termination, and several residents, as well as humane society's attorney, commented, such public comment was not required, and council did not receive evidence or testimony into official record or render decision in adversarial proceeding consistent with due process.

EMINENT DOMAIN - NEW MEXICO

McFarland Land and Cattle Inc. v. Caprock Solar 1, LLC

Supreme Court of New Mexico - July 13, 2023 - P.3d - 2023 WL 4523156

Property owner sought injunction against limited liability company (LLC) and county related to the use of a road on property owner's land. County intervened and sought declaratory judgment against

property owner.

Following a bench trial, the District Court concluded that LLC and county established the existence of a public prescriptive easement, permitting their use of the road. Property owner appealed, and the Court of Appeal reversed and remanded. County petitioned for writ of certiorari, which was granted.

The Supreme Court held that:

- When proving a public prescriptive easement claim, one does not need to prove a minimum number of users or frequency of use, but only need prove that use of the road in question was free and common to all who had occasion to use it as a public highway, and
- Evidence was sufficient to support finding that public used road at issue and that a public prescriptive easement existed over it at the low water crossing.

BANKRUPTCY - PUERTO RICO

In re Financial Oversight and Management Board for Puerto Rico

United States Court of Appeals, First Circuit - July 12, 2023 - F.4th - 2023 WL 4486289

Financial Oversight and Management Board for Puerto Rico moved for confirmation of proposed plan of adjustment for Puerto Rico Highways and Transportation Authority (HTA) discharging claims of current and former Puerto Rico Highways and Transportation Authority (PRHTA) employees who received extra compensation in addition to their salaries for their service as project administrators or project supervisors.

The United States District Court for the District of Puerto Rico of the Southern District of New York, sitting by designation determined that group's claims for additional compensation were dischargeable under plan. Group appealed.

The Court of Appeals held that claims were based only on PRHTA regulation that did not implement federal health or safety program, and any applicable federal regulations did not include obligation to pay group additional compensation, and therefore those claims were not exempt from discharge.

Claims of current and former Puerto Rico Highways and Transportation Authority (PRHTA) employees who received extra compensation in addition to their salaries for their service as project administrators or project supervisors were based only on PRHTA regulation that did not implement federal health or safety program, and any applicable federal regulations did not include obligation to pay group additional compensation, and therefore those claims were not exempt from discharge, even if claims were valid federal constitutional claims and PROMESA created exception to discharge.

EMPLOYMENT - RHODE ISLAND

Sosa v. City of Woonsocket

Supreme Court of Rhode Island - July 14, 2023 - A.3d - 2023 WL 4536168

Law enforcement officer who was fired after admitting before a Massachusetts court to a recitation of facts of the charged offenses of felony breaking and entering, felony assault with a dangerous

weapon, and assault on a family member filed action against city for alleged violation of the Law Enforcement Officers' Bill of Rights (LEOBR).

The Superior Court granted officer's request for an order to show cause and ordered city to comply with LEOBR. City appealed.

The Supreme Court held that officer's admission to sufficient facts in Massachusetts court did not constitute a plea of guilty or nolo contendere sufficient to dismiss officer without a hearing under LEOBR.

Law enforcement officer's admission to sufficient facts for a finding of guilt, made pursuant to Massachusetts statute providing for continuation of felony charges against officer, did not constitute a plea of guilty or nolo contendere sufficient to dismiss officer without a hearing under Law Enforcement Officers' Bill of Rights (LEOBR); an admission to sufficient facts followed by a continuance without a finding was not a conviction under Massachusetts law, officer complied with the terms and the case was dismissed without a conviction, and LEOBR required a felony conviction to terminate officer without a hearing.

IMMUNITY - SOUTH CAROLINA

Lockaby v. City of Simpsonville

Court of Appeals of South Carolina - June 21, 2023 - S.E.2d - 2023 WL 4095956

City councilmember filed suit against city, former mayor, and city council's sergeant-at-arms, alleging claims of gross negligence, false imprisonment, and § 1983 claims for violation of her First Amendment and Fourth Amendment rights in connection with her ejection from a city council meeting.

The Circuit Court granted defendants' motion for summary judgment. Councilmember appealed.

The Court of Appeals held that mayor's decision to eject councilmember from meeting was legislative act protected by legislative immunity.

Mayor's decision to eject city councilmember from city council meeting was a legislative act, and thus legislative immunity barred councilmember's suit against city, mayor, and city council's sergeant-at-arms alleging claims under § 1983 for First and Fourth Amendment violations and claims for gross negligence and false imprisonment, which claims stemmed from her ejection from the meeting.

HEALTHCARE REIMBURSEMENT - CALIFORNIA

County of Santa Clara v. Superior Court of Santa Clara

Supreme Court of California - July 10, 2023 - P.3d - 2023 WL 4414084

Non-contracting hospitals brought action against county to recover reasonable compensation for emergency medical services provided to individuals enrolled in health care service plan operated by county.

The Superior Court overruled county's demurrer. On petition for writ of mandate, the Sixth District

Court of Appeal granted petition. Review was granted.

The Supreme Court held that:

- Hospitals' compliance with Government Claims Act's claims presentation requirements did not establish that they sought money or damages covered by Act's immunity provisions, and
- Government Claims Act did not immunize county from hospitals' quantum meruit claims.

Government Claims Act's claims presentation requirements were broader in scope than Act's public entity immunity or liability provisions, and thus hospitals' compliance with Act's claims presentation requirements when seeking compensation for emergency medical services provided to individuals enrolled in county's health care service plan did not establish that they sought money or damages covered by Act's immunity provisions.

Government Claims Act did not immunize county from non-contracting hospitals' quantum meruit claims to enforce statutory duty under Knox-Keene Act to reimburse them for reasonable cost of emergency medical services and care they provided to individuals enrolled in county's health care service plan, even though that duty would result in payment of money; county was subject to Knox-Keene Act's regulatory scheme because it chose to enter health care plan market, hospitals did not seek money damages, but to compel county to comply with its mandatory duty under Knox-Keene Act, and permitting hospitals to proceed furthered Knox-Keene Act's fundamental purpose of protecting California's health care delivery system's continued financial viability.

POLITICAL SUBDIVISIONS - GEORGIA

Pass v. Athens Housing Authority

Court of Appeals of Georgia - June 27, 2023 - S.E.2d - 2023 WL 4194714

Plaintiff brought action against city housing authority, alleging that he was shot four times at close range by a resident at housing authority property, and asserting claims for premises liability, nuisance, and negligence.

The State Court granted housing authority's motion to dismiss on the basis of sovereign immunity. Plaintiff appealed.

The Court of Appeals held that city housing authority was not an instrumentality of the state and thus was not entitled to sovereign immunity.

City housing authority was not an instrumentality, department, or agency of the state and thus was not entitled to sovereign immunity from suit brought by plaintiff shot while on housing authority property; although state law enabled housing authority's creation, it was created by city, governed by local authorities with no day-to-day state control, received no funding, tax revenue, or insurance coverage from the state, was required to abide by federal housing agency rules, its employees were not covered by state benefits, and its purpose was to serve residents of the county rather than the citizens of the state.

LIABILITY - GEORGIA

Payton v. City of College Park

Court of Appeals of Georgia - June 27, 2023 - S.E.2d - 2023 WL 4193455

Survivors and estate of decedent killed by errant gunfire filed a complaint against emergency response organizations and cities, asserting claims for negligence and wrongful death related to the timeliness of defendants' response to a 911 call.

The State Court granted defendants' motion to dismiss. Plaintiffs appealed.

The Court of Appeals held that:

- Plaintiffs' ante litem notice seeking "an amount not less than $1 million" did not substantially comply with Georgia's ante litem notice requirements;
- Plaintiffs lacked standing to challenge the constitutionality of statute setting out requirements for ante litem notices to municipalities; and
- Plaintiffs' failure-to-render-aid claim did not fall within the intentional tort exception to statutory requirements for ante litem notices to municipalities.

MUNICIPAL FINANCE - IDAHO

Bradbury v. City of Lewiston

Supreme Court of Idaho - July 10, 2023 - P.3d - 2023 WL 4409927

City resident brought action against city for declaratory judgment and equitable relief, alleging that city had been collecting excessive utility fees and improperly spending municipal funds.

City moved to strike, alleging that resident's pleadings included confidential research memoranda prepared by city attorney. The Second Judicial District Court granted motion. Resident moved for reconsideration. The District Court denied motion. Parties filed cross-motions for summary judgment. The District Court granted and denied motions in part and declined to award any attorney fees or costs to either side. Resident appealed.

The Supreme Court held that:

- Research memoranda prepared by city attorney and submitted to city manager were protected by attorney-client privilege;
- City's transfers of funds from sanitation fund to golf-course fund and library fund were interdepartmental fund transfers that did not violate Idaho Constitution;
- Payments made by city to private entities were for contracted services, not donations;
- Resident's claim that street-impact fees assessed and allocated to city's water, wastewater, and sanitation funds amounted to illegal tax was brought in his individual capacity;
- Resident was not entitled to refund of street-impact fees;
- Trial court did not abuse its discretion by denying resident's request for attorney fees; and
- City was not entitled to attorney fees on appeal.

LIMITATION OF ACTIONS - MISSISSIPPI

Moton v. City of Clarksdale

Supreme Court of Mississippi - July 6, 2023 - So.3d - 2023 WL 4360567

Former city commissioner filed suit against city, executor of former mayor's estate, and police captain, asserting various tort claims and violations of state constitutional rights to free speech, due process, and equal protection, arising out of commissioner's arrests during two board of commissioners meetings.

The Circuit Court granted defendants' motion to dismiss for failure to state claim, on limitations grounds, and commissioner appealed.

The Supreme Court held that:

- Commissioner's claims for gross negligence, intentional infliction of emotional distress, negligent infliction of emotional distress, and civil conspiracy were governed by one-year limitations period for tort claims brought under Mississippi Tort Claims Act (MTCA);
- One-limitations period governing tort claims was not tolled;
- Commissioner's state constitutional claims were governed by general three-year limitations period for "[a]ll actions for which no other period of limitation is prescribed";
- Commissioner's causes of action for state constitutional violations accrued, and three-year limitations period governing claims began to run, on dates of arrests; and
- Commissioner's claim for malicious prosecution accrued, and one-year limitations period governing claim began to run, on date that charges against him were dismissed.

PUBLIC EMPLOYMENT - OHIO

State ex rel. Casey v. Brown

Supreme Court of Ohio - July 6, 2023 - N.E.3d - 2023 WL 4356527 - 2023-Ohio-2264

Captain of city fire department brought mandamus action against city officials, seeking promotion to rank of battalion chief, award of associated compensation and employment benefits, and awards of attorney fees and costs.

The Seventh District Court of Appeals dismissed captain's complaint. Captain appealed and filed motion to strike portions of officials' brief and motion for oral argument.

The Supreme Court held that:

- Documents attached to captain's complaint would not be stricken;
- Documents not attached to captain's complaint and officials' references to them would be stricken;
- Oral argument was unwarranted;
- Captain had adequate remedy by way of grievance procedure under collective bargaining agreement (CBA);
- Statutes governing promotion did not impact adequacy of remedy under CBA;
- Abandonment of captain's grievance by firefighters' union did not impact adequacy of remedy under CBA; and
- Grievance procedure under CBA was not rendered inadequate for not being complete, beneficial, or speedy.

PUBLIC EMPLOYMENT - TENNESSEE

City of Memphis v. Edwards by and Through Edwards

Supreme Court of Tennessee - July 5, 2023 - S.W.3d - 2023 WL 4414598

City filed petition for judicial review of administrative law judge's (ALJ) order concluding that city had wrongly denied firefighter's claim for benefits under city's on-the-job injury plan and its heart, hypertension, and lung program.

The Chancery Court granted motion filed by firefighter's widow, who had been substituted as party following firefighter's death during the administrative proceedings, to dismiss the petition for judicial review due to city's failure to file the administrative record. City appealed. The Court of Appeals reversed and remanded. Widow filed application for permission to appeal.

The Supreme Court held that city's inadequate brief on appeal resulted in waiver of issue of whether trial court had erred in dismissing city's petition for judicial review.

City waived on appeal the issue of whether trial court had erred in dismissing city's petition for judicial review of administrative law judge's (ALJ) order concluding that city had wrongly denied firefighter's claim for benefits under city's on-the-job injury plan and its heart, hypertension, and lung program, where such issue was not designated by city as an issue in its appellate brief, and brief did not include argument on the issue that satisfied requirements of rule governing contents of an appellant's brief.

IMMUNITY - ALABAMA

City of Orange Beach v. Boles

Supreme Court of Alabama - June 16, 2023 - So.3d - 2023 WL 4038455

Property owner who had obtained building permits for multiple-level duplexes and a single-family dwelling brought action as to the duplexes against city and city's "chief building official," asserting claims for declaratory relief, injunctive, and monetary damages stemming from city's refusal to conduct a meter-release inspection until property owner returned a completed form listing information, including financial information, about subcontractors used.

The Circuit Court entered a preliminary injunction directing the city to conduct an electrical and meter-release inspection. Subsequently, city commenced its own action as to the single-family dwelling for a judgment declaring that its "chief building official" was authorized to require a building-permit holder to provide a completed subcontractor form for a permitted project and that the city was authorized to withhold scheduling meter-release inspections and/or a certificate of occupancy until the completed subcontractor form was provided.

Property owner filed counterclaims for injunctive relief, declaratory relief, and damages. The cases were consolidated on property owner's motion despite city's objection, and property owner was then permitted to demand a jury trial on his counterclaims.

After property owner settled his claims against city's "chief building official" and withdrew any claims for punitive damages, the Circuit Court entered judgment on a jury verdict for property owner. City appealed in each case, and the appeals were consolidated.

The Supreme Court held that the city had substantive immunity from property owner's claims.

City had substantive immunity from liability to property owner, who had obtained building permits for multiple-level duplexes and a single-family dwelling, in regard to its requirement that building-permit holders submit information, including financial information, about subcontractors before it would conduct the required meter-release inspection; the meter-release inspections were aimed at promoting public safety, and any resultant duty to perform the inspections was owed to the public at large rather than to any individual property owner.

EMINENT DOMAIN - GEORGIA

Kitchens v. Lincoln County

Court of Appeals of Georgia - June 26, 2023 - S.E.2d - 2023 WL 4170459

Land owners filed an action for a temporary and permanent injunction against county after county demanded they remove a gate that impeded access to a portion of a road that had previously been condemned by the federal government.

The Superior Court granted county's motion for summary judgment on the basis of sovereign immunity. Land owners appealed.

The Court of Appeals held that county's conduct amounted to a claim of inverse condemnation that waived its sovereign immunity.

County's conduct in threatening to remove or damage a gate on land owners' property to access a road to which it allegedly had no ownership interest created a condition that amounted to a claim of inverse condemnation that waived county's sovereign immunity and allowed land owners to seek injunctive relief; the disputed property had previously been condemned by the federal government and the county had not established title by prescription.

CONTRACTS - ILLINOIS

PML Development LLC v. Village of Hawthorn Woods

Supreme Court of Illinois - June 15, 2023 - N.E.3d - 2023 IL 128770 - 2023 WL 4003826

Developer brought action against village alleging breach of development agreement under which developer was authorized to fill and grade property in exchange for donating it to village, and village counterclaimed for breach of contract.

After a bench trial, the Circuit Court entered judgment for developer. Village appealed and developer cross-appealed. The Appellate Court affirmed in part, reversed in part, and vacated in part. Developer petitioned for leave to appeal, which was granted.

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

- A non-breaching party's decision to continue performing after a material breach is a factual question reviewed under the manifest weight of the evidence standard;
- Record supported finding that developer elected to continue performing following village's material breach;

- Record supported finding that village elected to continue performing following developer's material breach;
- Village materially breached agreement via non-issuance of permit, imposition of noncontractual obligations, and interference with means and methods;
- Developer materially breached agreement via non-conveyance of property, non-funding of drawdown account, and failure to reconstruct road; and
- Each party had a viable breach of contract claim following material breaches by both parties but elections to continue.

POLITICAL SUBDIVISIONS - GEORGIA

Files v. Housing Authority of City of Douglas

Court of Appeals of Georgia - June 27, 2023 - S.E.2d - 2023 WL 4194717

Motorist filed a negligence and vicarious liability complaint against city housing authority and housing authority employee after motorist was injured in an automobile accident when his vehicle collided with city vehicle driven by employee.

The Superior Court granted housing authority summary judgment and motorist appealed.

The Court of Appeals held that city housing authority did not qualify as a State agency, department or instrumentality, and thus was not entitled to sovereign immunity.

City housing authority did not qualify as a State agency, department or instrumentality, and thus was not entitled to sovereign immunity in lawsuit filed against city housing authority and authority employee after motorist was injured when his vehicle was struck by city vehicle driven by authority employee; city housing authority was not indelibly intertwined with the State as it was created by a local entity and was governed primarily, if not wholly, by local authorities, its operation, functional purpose, and governance was to serve the citizens of city and nearby county, not the State, and there was no evidence that authority employees were connected to the State via the merit system, their retirement plans, or any other rules affecting State workers.

SCHOOL FINANCE - INDIANA

Performance Services, Inc. v. Randolph Eastern School Corporation

Supreme Court of Indiana - June 28, 2023 - N.E.3d - 2023 WL 4226265

School corporation brought declaratory judgment action seeking to void contract it entered into with wind turbine operator, and operator filed counterclaims for breach of contract and suit on account.

School corporation filed motion for summary judgment, and operator filed motion for partial summary judgment on its counterclaims. After a hearing, the Circuit Court granted school corporation's motion for summary judgment and denied operator's cross-motion for summary judgment. Operator appealed.

On petition to transfer, the Supreme Court held that contract constituted illegal investment by a school corporation under Home Rule Act and Public Investment Act and was void and unenforceable.

Contract in which school corporation agreed to make payments to wind turbine operator constituted

illegal investment by a school corporation under Home Rule Act and Public Investment Act and was void and unenforceable, though operator argued school corporation agreed to make payments in exchange for tangible benefit of access to turbine and its data for educational purposes and did not "invest" any money; school corporation committed money to operator that it would use to sell power and renewable energy credits and then convert those sales into financial benefits for school corporation, tangible benefit of access to turbine did not preclude contract from constituting investment, and school corporation committed money both in exchange for access and in hopes of obtaining financial return.

EMINENT DOMAIN - KANSAS

Kansas Fire and Safety Equipment v. City of Topeka

Supreme Court of Kansas - June 30, 2023 - P.3d - 2023 WL 4278213

Multiple month-to-month tenants sued city for relocation benefits under Eminent Domain Procedure Act (EDPA) after they were forced to move once city bought property where they operated their businesses.

City filed motion for summary judgment. Tenants appealed. The District Court granted summary judgment to city. Tenants appealed. The Court of Appeals reversed and remanded. Tenants petitioned for review, which was granted. The Supreme Court affirmed decision of the Court of Appeals. On remand, city again sought summary judgment. The District Court granted summary judgment to city. Tenants appealed and city cross-appealed, and the Court of Appeals reversed and remanded with directions. The Supreme Court granted petitions for review.

The Supreme Court held that:

- Eminent Domain Procedure Act (EDPA) does not provide a private right of action;
- EDPA did not provide the district court with jurisdiction over tenants' claims for relocation expenses;
- Tenants' failure to pursue administrative remedy within the Kansas Relocation Assistance for Persons Displaced by Acquisition of Real Property Act (KRA) deprived the district court of subject matter jurisdiction; and
- Statute generally authorizing the court to review final judgments and orders of a political or taxing subdivision when it exercises judicial and quasi-judicial functions did not apply.

POLITICAL SUBDIVISIONS - LOUISIANA

Ojomo-Bakare v. Baton Rouge Community College

Court of Appeal of Louisiana, First Circuit - June 2, 2023 - So.3d - 2023 WL 3862305 - 2022-0970 (La.App. 1 Cir. 6/2/23)

Parents, individually and on behalf of their minor child, filed a petition for damages against community college, alleging that parent, a student at college, slipped and fell on campus as a result of an unknown substance causing her injury.

The District Court sustained college's declinatory exception raising objection of insufficiency of service of process and dismissed without prejudice. Parents appealed.

The Court of Appeal held that:

- Community college was a state agency, not a political subdivision, for purpose of determining which procedural rules governed service; and
- Parents timely requested service on the Board of Supervisors of the Louisiana Community and Technical Colleges System, the proper defendant.

Community college was a "state agency," not a political subdivision, for purpose of determining which procedural rules in the Louisiana Governmental Claims Act governing sufficiency of service applied to parents' slip-and-fall case against college individually and on behalf of their minor child; although statute establishing college called it an institution, that statute also provided that college would be under control, supervision, and management of the Board of Supervisors of Community and Technical Colleges, a state agency.

Parents timely requested service on the Board of Supervisors of the Louisiana Community and Technical Colleges System, the proper defendant in their slip-and-fall case against community college individually and on behalf of their minor child; although parents named college as original defendant and only requested service on college within 90 days of filing suit, parents 11 months later filed amending and supplemental petition, at which time the Board, identified as an agency of the state, was named as a defendant, triggering 90-day time period to request service of citation, and on same day, parents requested service of citation on the Board, the Attorney General, and the Office of Risk Management.

BONDS - MISSOURI

Krupka v. Stifel Nicolaus & Co., Inc.

United States District Court, E.D. Missouri, Eastern Division - July 5, 2023 - Slip Copy - 2023 WL 4350946

California Plaintiffs filed this putative class action in Missouri state court alleging that Missouri Defendant Stifel Nicolaus made negligent misrepresentations and was negligent in its underwriting of municipal bonds issued by the Illinois Finance Authority to fund low-income housing developments in Chicago.

Defendant removed the case to this Court under the Class Action Fairness Act and filed a motion for judgment on the pleadings.

Plaintiffs then moved to remand the case, arguing that their claims fall under CAFA's jurisdictional exception for actions related to securities. 28 U.S.C. § 1332(d)(9). Noting that the Eighth Circuit had not opined on the proper application of CAFA's securities exception, this Court followed other circuit and district court precedent and accordingly denied the motion and directed Plaintiffs to respond to Defendant's motion for judgment on the pleadings.

Plaintiffs then filed a petition for permission to appeal in the Eighth Circuit, during which the Court stayed the case pending a ruling by the appellate court. The Eighth Circuit summarily denied Plaintiffs' petition, after which the Court ordered Plaintiffs to file a response to Defendants motion for judgment on the pleadings by June 26, 2023. On that date, Plaintiffs filed the present motion to stay the case again pending their petition for writ of certiorari in the Supreme Court.

"The Court agrees with Defendant that further delay is not warranted here. Defendant's motion for judgment on the pleadings, which centrally asserts that Plaintiffs' claims are time-barred, has been

pending for six months. Even accepting Plaintiffs' premise that Brady applies, in this Court's estimation their likelihood of success in the Supreme Court is tenuous. Further, the Court fails to see any material prejudice they would suffer from filing a responsive brief, particularly considering the resources they have expended seeking interlocutory appeals. In contrast, Defendant is prejudiced by the ongoing pendency of this lawsuit without a threshold ruling on its viability. Additionally, the Court finds that any further delays in this case would undermine the interests of judicial efficiency. The Court will therefore deny Plaintiffs' motion to stay the case while they await a ruling from the Supreme Court."

EMINENT DOMAIN - OKLAHOMA

Childers v. Arrowood

Supreme Court of Oklahoma - June 20, 2023 - P.3d - 2023 WL 4069005 - 2023 OK 74

Property owners filed condemnation action against neighbors, in order to obtain utility easement, under statute granting private party right of exercise of eminent domain for private ways of necessity.

The District Court granted easement, and neighbors appealed. The Court of Civil Appeals affirmed. Petition for certiorari was granted.

The Supreme Court held that:

- Property owners were not required to prove elements of common law easement by necessity in order to obtain utility easement under statute;
- Statute granting private person right to exercise of eminent domain for private ways of necessity did not require proof of public purpose for taking; and
- As matter of first impression, "private ways of necessity," within meaning of statute that granted private landowner right of exercise of eminent domain for private ways of necessity, included access to utilities.

Property owners were not required to prove elements of common law easement by necessity in order to obtain utility easement over neighbors' land, in condemnation action against neighbors under statute granting private party right of exercise of eminent domain for private ways of necessity.

"Private ways of necessity," within meaning of statute that granted private landowner right of exercise of eminent domain for private ways of necessity, was not limited in scope to roadway necessary for ingress and egress to and from landlocked property, but encompassed access to utilities for effective and beneficial use of owners' land in order to build residence on property.

Under the statute granting a private landowner the power of eminent domain for "private ways of necessity," the issue of what is necessary to the effective and beneficial use of the property depends on the nature of the property.

"Necessary" rights, for purposes of statute granting private landowner right of exercise of eminent domain for "private ways of necessity" are not limited to those essential to enjoyment of owner's property, but include those which are reasonably required to make effective use of property; what is necessary depends on nature and location of property, and may change over time.

ZONING & PLANNING - SOUTH CAROLINA

Ani Creation, Inc. v. City of Myrtle Beach Board of Zoning Appeals

Supreme Court of South Carolina - June 28, 2023 - S.E.2d - 2023 WL 4221865

Operators of smoke shops and tobacco stores petitioned for review of decision of city board of zoning appeals denying operators' constitutional challenges to zoning overlay ordinance that prohibited operation of smoke shops and tobacco stores, among others, in city's historic downtown.

The Circuit Court affirmed. Store operators appealed.

On rehearing, the Supreme Court held that:

- Two readings of ordinance were not so different that third reading was required prior to enactment of ordinance;
- As matter of first impression, creation of municipal zoning overlay district did not constitute impermissible reverse spot zoning;
- Even assuming that municipal zoning overlay district constituted spot zoning, any such spot zoning was permissible;
- Boundaries of zoning overlay district had a rational basis and thus did not violate store operators' equal protection rights;
- Ordinance did not violate store operators' due process rights due to failure to explicitly provide for a hearing for an affected vendor;
- Operators failed to establish that ordinance constituted an unconstitutional taking; and
- Ordinance was not preempted by state criminal laws.

IMMUNITY - TEXAS

City of Houston v. Green

Supreme Court of Texas - June 30, 2023 - S.W.3d - 2023 WL 4278246

Motorist brought action against city seeking to hold it vicariously liable for police officer's alleged negligence and independently liable for negligently hiring, training, and supervising officer following motor vehicle accident involving officer while he was responding to an emergency call.

The 133rd District Court, Harris County, denied city's motion for summary judgment alleging the Tort Claims Act did not waive city's governmental immunity. City appealed. The Houston Court of Appeals, Fourteenth District, affirmed. City petitioned for review, which was granted.

The Supreme Court held that officer did not act with reckless disregard when accident occurred, and thus, emergency exception to waiver of governmental immunity under Tort Claims Act applied.

Police officer did not act with reckless disregard for safety of others when he proceeded through red light into intersection while responding to emergency call and allegedly caused motor vehicle accident, and thus, emergency exception to waiver of governmental immunity under Tort Claims Act applied to city in motorist's personal injury claim; motorist provided no evidence to contradict that officer was responding to emergency call involving armed suspect, that officer activated overhead emergency lights, that officer averaged 35 to 40 miles per hour, that officer at least slowed his speed before proceeding through each intersection, that officer intermittently activated his audible siren, that other vehicles noticed officer and stopped, that those vehicles blocked officers view of the

lane motorist was in, and that motorist was traveling in the dark without headlights.

POLITICAL SUBDIVISIONS - TEXAS

CPS Energy v. Electric Reliability Council of Texas

Supreme Court of Texas - June 23, 2023 - S.W.3d - 2023 WL 4140460

Municipally owned electric utility brought action against Electric Reliability Council of Texas (ERCOT) and ERCOT's former chief executive officer, alleging breach of contract, negligence, gross negligence, negligence per se, breach of fiduciary duty, and violations of Texas Constitution.

The 285th District Court denied ERCOT's plea to the jurisdiction. ERCOT and former chief executive officer appealed, and the San Antonio Court of Appeals reversed. Utility petitioned for review, which was granted.

In second proceeding, power company brought action against ERCOT for fraud, negligent misrepresentation, and breach of fiduciary duty, alleging that ERCOT's electricity capacity, demand, and reserves reports misled power company to invest $2.2 billion in building new power plants. ERCOT filed plea to the jurisdiction.

The 15th District Court denied plea. ERCOT filed interlocutory appeal and alternatively filed petition for writ of mandamus. The Dallas Court of Appeals consolidated cases, dismissed interlocutory appeal for want of jurisdiction, and granted mandamus petition.

Power company filed petition for writ of mandamus in the Supreme Court, and ERCOT filed conditional petition for review, both challenging the Court of Appeals' decision.

The Supreme Court dismissed petitions as moot. On remand, the District Court granted ERCOT's plea to the jurisdiction based on sovereign immunity. Power company appealed, and the Court of Appeals reversed and remanded. ERCOT filed petition for review, which was granted.

The Supreme Court held that:

- ERCOT was an "organ of government" within the meaning of the definition of "governmental unit" under the Texas Tort Claims Act;
- ERCOT derived its status and authority from statute, as required to fall within the definition of "governmental unit" under the Texas Tort Claims Act;
- Utilities Code provision constituted a pervasive regulatory scheme which imparted to the Public Utilities Commission (PUC) exclusive jurisdiction over ERCOT;
- Company's contention that ERCOT failed to properly perform Public Utility Regulatory Act (PURA) requirement that it publish capacity, demand, and reserves reports (CDRs) by issuing fraudulent CDRs fell within the PUC's exclusive jurisdiction;
- Allegations ERCOT failed to properly implement protocols to ensure the integrity of its system during winter storm and failed to take reasonable precautions to meet its load projections or corrective action when projections showed insufficient capacity came with PUC's exclusive jurisdiction; and
- ERCOT has sovereign immunity as an arm of the State.

A private, non-governmental entity can qualify as a "governmental unit" under the Texas Tort Claims Act, but only if (1) it is an institution, agency, or organ of government; and (2) it derives its status and authority as such from the Texas Constitution or statutes.

An “organ of government,” which qualifies as a “governmental unit” under the Texas Tort Claims Act, is an entity that operates as part of a larger governmental system and performs a uniquely governmental function.

Electric Reliability Council of Texas (ERCOT) was an “organ of government” within the meaning of the definition of “governmental unit” under the Texas Tort Claims Act; ERCOT was part of the state’s broader electricity-regulation system under Public Utility Regulatory Act (PURA), ERCOT performed the uniquely governmental function of utilities regulation under the direct oversight of the Public Utilities Commission (PUC) and was directly responsible and accountable to the PUC, and ERCOT exercised delegated authority from the PUC to adopt and enforce rules relating to the reliability of the regional electrical network, and enforced operating standards and established and oversaw payment procedures for transactions by market participants within the electrical network.

Electric Reliability Council of Texas (ERCOT) derived its status and authority from statute, as required to fall within the definition of “governmental unit” under the Texas Tort Claims Act, even though it was a private, nonprofit corporation; ERCOT was the independent service operator (ISO) established by the Public Utilities Commission (PUC) as required under the Public Utility Regulatory Act (PURA), such that its “status” as the ISO for the Texas power region and its “authority” to act in that capacity derived directly from PURA.

Utilities Code provision constituted a pervasive regulatory scheme which imparted to the Public Utilities Commission (PUC) exclusive jurisdiction over the Electric Reliability Council of Texas (ERCOT), as the independent system operator (ISO) certified for the Texas power region; Code granted PUC extensive and ultimate authority over an ISO which was directly responsible and accountable to the PUC, the PUC had complete authority to oversee and investigate ERCOT’s finances, budget, and operations to ensure adequate performance of ERCOT’s functions and duties, PUC had authority over ERCOT’s board makeup, its bylaws and protocols, and its ability to charge fees to its members, and PUC had adjudicatory power over ERCOT as well, and had the power to take appropriate action for ERCOT’s failure to adequately perform its functions or duties.

Power company’s contention that Electric Reliability Council of Texas (ERCOT) failed to properly perform Public Utility Regulatory Act (PURA) requirement that it publish capacity, demand, and reserves reports (CDRs) by issuing fraudulent CDRs that inaccurately reported the capability of existing electric generation resources to meet projected demand in the Texas power region fell within the exclusive jurisdiction of the Public Utilities Commission (PUC), even if PUC lacked authority to determine whether ERCOT complied with the relevant common-law standards or to provide a remedy; the proper performance of ERCOT’s operations, functions, and duties was within PUC’s “complete” authority over ERCOT, and PUC was statutorily authorized to hold ERCOT accountable if ERCOT failed to properly perform.

Electric utility’s allegations that Electric Reliability Council of Texas (ERCOT) failed to properly implement protocols to ensure the integrity of its system during winter storm, failed to take reasonable precautions to meet its load projections or corrective action when projections showed insufficient capacity, and failed to correct “an acknowledged $16 billion error,” and electric utility’s requests for exemption from ERCOT’s short-pay and default-uplift procedures, came with exclusive jurisdiction of the Public Utilities Commission (PUC); issues implicated ERCOT’s operations and billing, which fell under the PUC’s “complete authority,” PUC had delegated authority to ERCOT to oversee transaction settlement payment procedures, and PUC was responsible under statute for ensuring that ERCOT “adequately performs [its] functions and duties.”

Fact that electric utility alleged an unconstitutional taking claim against Electric Reliability Council of Texas (ERCOT) based on short-pay and default-uplift procedures for charges relating to winter

storm default did not exempt claim from exhaustion of administrative remedies doctrine, as a decision from the Public Utilities Commission (PUC) on the underlying issues could moot the constitutional claims; if the PUC ordered adjustment of the alleged overcharge pricing or resettlement of ERCOT's payments to utility, it would cure the alleged violations and obviate the need to assert the constitutional claims in court, and, even if it did not, utility was not precluded from pursuing its constitutional claims after exhaustion or from seeking judicial review of any PUC rulings on issues underlying those claims.

Public Utility Regulatory Act (PURA) evinced a clear legislative intent to vest Electric Reliability Council of Texas (ERCOT) with the nature, purposes, and powers of an arm of the State government such that ERCOT had sovereign immunity; Public Utilities Commission (PUC) certified ERCOT as the independent service operator (ISO) required by PURA, and had authority over ERCOT's operations, governance, finances, and budget, ERCOT was directly responsible to the PUC, which could decertify ERCOT if ERCOT failed to adequately perform, ERCOT was subject to requirements typically reserved for state entities, including review under the Texas Sunset Act and open meetings requirements, and ERCOT's regulatory role over electric utilities was uniquely governmental.

Political, pecuniary, and pragmatic policies underlying immunity doctrines supported conclusion that Electric Reliability Council of Texas (ERCOT) had sovereign immunity; even though ERCOT was not funded with tax dollars, any damages payments would nevertheless come from the state and the public, the Public Utilities Commission (PUC) had authority over ERCOT's finances, including its ability to raise money and how it spent money, statute required ERCOT transfer its assets to a successor organization if PUC decertified ERCOT, and judicial imposition of a damages award against ERCOT would run afoul of the Legislature's determination that the PUC alone had "complete authority" over ERCOT's finances.

ZONING & PLANNING - WASHINGTON

City of Olympia v. Western Washington Growth Management Hearings Board

Court of Appeals of Washington, Division 1 - June 26, 2023 - P.3d - 2023 WL 4171044

City petitioned for review of denial by Western Washington Growth Management Hearings Board (Board) of city's motion to dismiss advocacy group's administrative appeal of hearing examiner's decision dismissing group's administrative challenge, in which group alleged that city failed to properly consider environmental impacts, to city's revisions to housing-related provisions in municipal code.

The Superior Court ruled that Board erred and that city was entitled to dismissal of group's administrative appeal and of proceeding. Advocacy group appealed.

The Court of Appeals held that:

- Amendments to statute governing city planning that precluded administrative and judicial review of certain actions taken by a city to increase its residential building capacity applied to group's administrative challenge because amendments were made before a final decision on group's challenge, and
- Those amendments barred group's administrative challenge.

BONDS - ARIZONA

Crossfirst Bank v. Vieste SPE LLC

United States District Court, D. Arizona - April 25, 2023 - Slip Copy - 2023 WL 3078656

Plaintiffs' purchased $28,935,000 of industrial development bonds on April 17, 2013. Plaintiffs subsequently brought a complaint alleging aiding and abetting fraud, negligent misrepresentation, and common law fraud.

Plaintiffs sought class certification.

The District Court held that:

- The numerosity requirement is satisfied when the putative class consists of at least 40 members; and
- Plaintiffs, while alleging a class of at least 200 members, were unable to prove by a preponderance of the evidence that the putative class exceeded 7 members.

"Plaintiffs have not proven by a preponderance of the evidence that the putative class size exceeds 7 members, much less the speculation that the putative class exceeds 200 members. Because Plaintiffs have not established numerosity, the Court need not address the other Rule 23 requirements and will deny class certification."

ZONING & PLANNING - CALIFORNIA

Lucas v. City of Pomona

Court of Appeal, Second District, Division 8, California - June 13, 2023 - Cal.Rptr.3d - 2023 WL 3962513

Property owner filed a petition for writ of mandate to overturn city's creation of overlay district designating areas for permissible commercial cannabis activities, alleging that the city made the decision improperly by failing to conduct a new environmental impact review (EIR).

Following a hearing, the Superior Court denied the petition and entered judgment in favor of the city. Property owner appealed.

The Court of Appeal held that:

- Substantial evidence standard rather than a fair evidence standard applied;
- Substantial evidence supported city's determination that the proposed commercial cannabis activities were exempt from CEQA as consistent with existing land uses and density covered by previous EIR;
- Substantial evidence supported city's determination that overlay district had no project-specific effects requiring a new EIR; and
- Substantial evidence supported city's determination that overlay district would not create environmental impacts beyond those identified in previous EIR.

IMMUNITY - CALIFORNIA

Leon v. County of Riverside

Supreme Court of California - June 22, 2023 - P.3d - 2023 WL 4112144

Widow of victim who was fatally shot by his neighbor brought action against county, alleging negligent infliction of emotional distress based on failure of county sheriff's deputies to promptly cover victim's body, with genitals exposed, or remove the body from the scene while deputies investigated the shooting and searched for the shooter.

The Superior Court granted summary judgment in favor of county. Widow appealed. The Court of Appeal affirmed and widow appealed.

The Supreme Court of California holds that:

- Provision of Government Claims Act immunizing public employees from claims of injury caused by wrongful prosecution expands the scope of immunity to include any claim of injury caused by wrongful prosecution, even if prosecution is merely negligent;
- Provision of Government Claims Act protects public employees from liability only for initiation or prosecution of official proceeding; disapproving *Amylou R. v. County of Riverside*, 28 Cal.App.4th 1205, 34 Cal.Rptr.2d 319; *Citizens Capital Corp. v. Spohn*, 133 Cal.App.3d 887, 184 Cal.Rptr. 269; *Jenkins v. County of Orange,* 212 Cal.App.3d 278, 260 Cal.Rptr. 645; *Baughman v. State of California*, 38 Cal.App.4th 182, 45 Cal.Rptr.2d 82; *Strong v. State of California*, 201 Cal.App.4th 1439, 137 Cal.Rptr.3d 249; *Doe v. State of California*, 8 Cal.App.5th 832, 214 Cal.Rptr.3d 391; *County of Los Angeles v. Superior Court*, 181 Cal.App.4th 218, 104 Cal.Rptr.3d 230; *Richardson-Tunnell v. Schools Ins. Program for Employees (SIPE)*, 157 Cal.App.4th 1056, 69 Cal.Rptr.3d 176; *Gillan v. City of San Marino*, 147 Cal.App.4th 1033, 55 Cal.Rptr.3d 158; *Ingram v. Flippo*, 74 Cal.App.4th 1280, 89 Cal.Rptr.2d 60; *Paterson v. City of Los Angeles*, 174 Cal.App.4th 1393, 95 Cal.Rptr.3d 333; *Javor v. Taggart*, 98 Cal.App.4th 795, 120 Cal.Rptr.2d 174; and
- Provision of Government Claims Act did not apply and, thus, did not immunize county from widow's negligent infliction of emotional distress claim.

EMINENT DOMAIN - FEDERAL

Ideker Farms, Inc. v. United States

United States Court of Appeals, Federal Circuit - June 16, 2023 - F.4th - 2023 WL 4035816

Farmers, landowners, and business owners brought takings action against United States, claiming their land was taken without just compensation based on actions by the Army Corps of Engineers to restore the Missouri River to a more natural state, which resulted in flooding of the plaintiffs' properties.

Following first phase of trial on liability, the Court of Federal Claims issued ruling for plaintiffs in part and for government in part. Both parties moved for reconsideration, and the motions were denied. Following a second phase of trial regarding three representative individual properties, the Court found that a taking of a permanent flowage easement had occurred and awarded damages. The Government appealed, and the plaintiffs cross-appealed.

The Court of Appeals held that:

- Stabilization doctrine applied;
- Takings claims did not accrue at time of initial flooding;
- Date which court selected as date on which takings claims accrued was not arbitrary on grounds it

was not related to any physical event;
- Permanent recurring physical occupation by floodwaters constituted a per se taking;
- Baseline for determining whether changes to River caused flooding was to be measured from the time of the changes returning the river to its more natural state, rather than from earlier changes intended to reduce River flooding;
- Relative benefits doctrine did not apply; and
- Crops and other personal property destroyed by flooding were compensable.

Stabilization doctrine applied to determination of when farmers', landowners', and business owners' takings claims accrued following actions by the Army Corps of Engineers on the Missouri River which resulted in periodic flooding, as plaintiffs did not bring a tort claim for a single flood, but rather the events fixing the Government's liability were recurring floodings over several years that rose to a taking of a permanent flowage easement.

Farmers', landowners', and business owners' takings claims, following actions by the Army Corps of Engineers on the Missouri River which resulted in periodic flooding, did not stabilize, and thus statute of limitations did not begin to accrue, at time of first flooding of their properties after Corps made initial changes to River, where Corps continued to make changes for an additional seven years, and modifications to the River's water flow and its effects were ongoing, dynamic, and complex.

Farmers, landowners, and business owners did not know nor reasonably should have known from initial flooding that changes to the Missouri River by the Army Corps of Engineers resulted in a taking of a permanent flowage easement on their properties, and thus takings claim did not accrue at time of initial flooding; single flood did not indicate any pattern of new and recurring flooding that would result in a permanent taking, the cause and effects of the recurring flooding were difficult to ascertain given the complex nature of the hydrology of the River, and some plaintiffs did not even experience the initial flooding.

Date which court selected as date on which farmers', landowners', and business owners' takings claims accrued following actions by the Army Corps of Engineers on the Missouri River which resulted in periodic flooding was not arbitrary on grounds it was not related to any physical event; plaintiffs did not learn of the full scope of the River and system changes and their effects on flooding until several years of recurring flooding, at that point plaintiffs consulted experts to confirm their suspicions about the cause of the flooding and filed suit within a few months of confirmation from those experts, and such causation and damages knowledge derived from expert opinions based on analysis of recurrent flooding during the prior seven year period.

Permanent recurring physical occupation of farmers', landowners', and business owners' land by floodwaters due to changes to the Missouri River by the Army Corps of Engineers constituted a per se taking; fact that the floodwaters might come and go during the year and were intermittent did not negate the existence of a taking, but bore only on the amount of compensation.

Baseline for determining whether changes to Missouri River by Army Corps of Engineers, in order to restore River to a more natural state, caused flooding was to be measured from the time of the changes returning the river to its more natural state, rather than from earlier changes under the Flood Control Act (FCA) which were intended to reduce River flooding; a reasonable property owner, at the time the Government took a permanent flowage easement, would have understood the later changes to not have been contemplated as part of the flood-control projects completed pursuant to the FCA, and such later changes, which increased the risk of flooding, were antithetical to the original FCA priorities of decreasing such risk.

Relative benefits doctrine did not apply in takings action by farmers, landowners, and business owners after the Army Corps of Engineers made changes to the Missouri River in order to return the river to a more natural state, which resulted in permanent recurring flooding of the plaintiffs' properties, even if original flood control projects being undone by the Corps had provided a benefit to the plaintiffs; original flood control project and later changes were different projects under different programs spread out over decades and directed to different purposes, and plaintiffs did not in any benefit from the recent changes, which were directed to mitigating environmental and wildlife degradation.

Crops and other personal property destroyed by flooding after Army Corps of Engineers made changes to the Missouri River in order to restore it to a more natural state ware not merely an indirect result of the taking of a flowage easement, but rather were compensable under the Fifth Amendment, as government-induced periodic flooding directly took a permanent flowage easement on plaintiffs' land and also destroyed their crops and personal property.

Court of Appeals would remand takings action for district court to reconsider whether heavy flooding of Missouri River in one particular year was the result of changes made by the Army Corps of Engineers to return the river to a more natural state; even if decision that year to release water was not part of the single purpose of protecting endangered species, changes made by the Corps could have impacted the severity of the flood damage, and the court also failed to consider, despite the record rainfall, whether the Corps' actions increased the severity or duration of the flooding compared to what was attributable to record rainfall.

ANNEXATION - GEORGIA

City of Tucker v. City of Clarkston

Court of Appeals of Georgia - June 15, 2023 - S.E.2d - 2023 WL 4009762

City brought a petition for declaratory judgment and injunctive relief against a neighboring city, county, county housing authority, and a developer, alleging that defendants had illegally annexed a 14-acre parcel, ownership of which was acquired by developer, which included four acres of land that was incorporated into the plaintiff city.

The trial court granted defendants' motion to dismiss, and plaintiff city appealed.

The Court of Appeals held that action was mooted when neighboring city de-annexed the contested four acres and developer delivered written request asking plaintiff city to annex that parcel.

City's petition for declaratory judgment and injunctive relief against neighboring city, county, county housing authority, and a developer, for allegedly illegally annexing a 14-acre parcel, ownership of which was acquired by developer, which included four acres of land that was incorporated into the petitioning city, was moot after neighboring city divided the 14-acre parcel into two parts and de-annexed the contested four acres, and developer delivered written request asking petitioning city to annex the four-acre parcel; neighboring city and developer took all necessary steps to return the four acres of incorporated land to petitioning city, and even if entire annexation was unlawful, petitioning city could only obtain relief over the four acres that fell within its borders.

ZONING & PLANNING - IDAHO

Reese v. City of Blackfoot

Supreme Court of Idaho, Boise, February 2023 Term - June 13, 2023 - P.3d - 2023 WL 3959031

Neighbors filed petition for judicial review of city council's approval of landowners' application for planned unit development in "residential ranchette" zoning district.

The Seventh Judicial District Court dismissed petition, and neighbors appealed.

The Supreme Court held that neighbors failed to establish that city council's approval of application for planned unit development prejudiced a substantial right, even if city had violated its own code by approving the development.

Neighbors failed to establish that city council's approval of application for planned unit development prejudiced a substantial right, and thus court would affirm city council's decision even if city had violated its own code by approving the development; neighbors relied on minutes from hearing which described testimony focused on traffic, density of homes, parking availability, and other concerns, but such conclusory statements of harm did not establish prejudice in light of other factors limiting the potential harm, and neighbors failed to establish how an increase in the number of houses would negatively impact the property values in an already residential area.

Neighbors' appeal of city council's decision approving planned unit development, although unsuccessful, was not frivolous, unreasonable, or without foundation, and thus did not warrant award of attorney's fees; while city had violated its own code by approving the development, neighbors failed to show prejudice.

EMINENT DOMAIN - ILLINOIS

Pardilla v. Village of Hoffman Estates

Appellate Court of Illinois, First District, Fourth Division - May 25, 2023 - N.E.3d - 2023 IL App (1st) 211580 - 2023 WL 3636671

Landowners brought action against village, asserting claims for inverse condemnation, ejectment, and trespass and sought a temporary restraining order and preliminary injunction to order village to remove from their property fencing and materials used to rebuild a sanitary lift station.

After preliminary injunction was granted, owners filed petition for rule to show cause, alleging village continued to perform construction work in violation of the injunction.

The Circuit Court issued a rule to show cause, and following a hearing, found village in indirect civil contempt of the injunction, ordered village to pay fines for any future violations of the injunction, and awarded attorney's fees to landowners. Village appealed.

The Appellate Court held that:

- Term in preliminary injunction was not definite, clear, nor precise, and thus was unenforceable, and
- Landowners' offer of proof was not sufficient to satisfy landowners' burden of making prima facie showing that village violated preliminary injunction.

Orders relating to preliminary injunction prohibiting village from interfering with landowners' use of

their property, finding that village was in contempt for violating injunction, and award of attorney's fees to landowners in connection with contempt proceedings were appealable, and thus, Appellate Court had jurisdiction to review orders, though injunction was moot as village completed what it was ordered to do and no longer sought to do what injunction prohibited; injunction was reviewable since village was found in contempt for violating injunction and it appealed contempt finding, and award of attorney's fees was a penalty imposed because of contempt finding, making contempt order reviewable.

Term in preliminary injunction prohibiting village from interfering with landowners' use of their property while also providing that village could appropriately exercise its easement rights over landowners' property to rebuild a sanitary lift station on adjoining property was not definite, clear, nor precise, and thus term of the injunction was unenforceable; order gave little more direction than a general command to obey the law, it failed to specify what village could or could not do, and it laid a foundation for inevitable future disputes.

Landowners' offer of proof, in which their attorney presented photographs and stated landowner would testify that village was doing construction work on his property, was not sufficient to satisfy landowners' burden of making prima facie showing that village violated previously issued preliminary injunction requiring village to remove fencing and materials from landowners' property and prohibiting village from interfering with their property rights, and thus burden of proof did not shift to village in proceedings brought by landowners to hold village in contempt for violating the preliminary injunction; offer of proof was not called for when parties appeared on petition for rule to show cause since court had not excluded any evidence, rather, court essentially permitted attorney to make oral presentation of landowners' verified petition.

REAL PROPERTY CONVEYANCE - MARYLAND

Board of County Commissioners of St. Mary's County v. Aiken

Supreme Court of Maryland - June 20, 2023 - A.3d - 2023 WL 4072671

Landowners brought action against board of county commissioners for declaratory judgment, alleging that they owned disputed property lying to the east of their parcels.

County counterclaimed for declaratory judgment that it owned disputed property in fee simple, alleging that grantor, who was landowners' predecessor in interest, conveyed land to State Roads Commission and that Commission conveyed land to county.

Southern neighbors intervened, asserting claims for declaratory judgment, injunctive relief, and interference with easement against landowners and county, as well as claim to quiet title against landowners and inverse-condemnation claim against county. Parties all moved for summary judgment.

The Circuit Court granted county's motion, granted landowners' motion as to neighbors' claims for injunctive relief interference with easement, and otherwise denied motions. Landowners appealed, and neighbors cross appealed. The Court of Special Appeals affirmed in part, vacated in part, and remanded. County filed petition for writ of certiorari, which was granted.

The Supreme Court held that:

- Deed from landowners' predecessor to the State conveyed the entire interest in the disputed property in fee simple absolute;

- Deed and referenced plat were sufficient to establish predecessor's offer to dedicate road to public use;State accepted offer to dedicate property to public use by accepting the conveyance and recording the deed;
- Deed from the State to the county conveyed property as a public road; and
- County's adoption of ordinance closing road both effectively confirmed an acceptance of the State's offer to dedicate and effectively served as public notice of road closure, and was effective to close the road.

MUNICIPAL CORPORATIONS - MINNESOTA

Zimmer v. Pine Lake Township

Court of Appeals of Minnesota - May 22, 2023 - N.W.2d - 2023 WL 3574229

Property owners brought action against township for declaration that road abutting property was owned and maintained by township and for writ of mandamus requiring township to repair and maintain road as public roadway.

Township filed motion to dismiss, which the District Court granted. On appeal, the Court of Appeals reversed and remanded. On remand, owners filed amended complaint, and the trial court denied owners' motion for summary judgment, and granted township's motion for summary judgment. Owners appealed.

The Court of Appeals held that township was not obligated to open and maintain road.

Township was not obligated to open and maintain the road abutting property owners' property, in property owners' action against township for declaration that the road was owned and maintained by township and for writ of mandamus requiring township to repair and maintain the road, alleging that the road had been used by the public and been "constructively dedicated" as a public road by a deed executed by the fee owners of the road.

PUBLIC RECORDS - NEW JERSEY

Gannett Satellite Information Network, LLC v. Township of Neptune

Supreme Court of New Jersey - June 20, 2023 - A.3d - 2023 WL 4066414

Newspaper publisher, which had requested copies of internal affairs file of former township police sergeant pursuant to both common law and Open Public Records Act (OPRA), brought action against township after it denied request, seeking to compel township to disclose records.

The Superior Court determined that records were exempt from disclosure under OPRA, but that publisher was entitled to a redacted version of the records under common law, and awarded publisher attorney's fees. Township appealed and publisher cross-appealed. The Superior Court, Appellate Division, affirmed in part and reversed in part. The Supreme Court granted publisher's petition for certification, limited to question of attorneys' fees.

The Supreme Court held that trial court was not authorized to award publisher attorney fees for prevailing on its common law right to access records claim.

Following its determination that newspaper publisher had a common law right of access to internal

affairs file of former township police sergeant convicted of manslaughter, and that township should not have withheld the file, trial court was not authorized to award publisher attorney fees under any exception to American Rule, which provided that each party pay their own fees, even if Open Public Records Act (OPRA) authorized fees for violations of its provisions; Act did not extend to allow fees for common law claims, no other statute or rule provided for fees, the parties did not have a contract providing for fees, and case did not involve fiduciary malfeasance.

POLITICAL SUBDIVISIONS - WEST VIRGINIA

Edward S. v. Raleigh County Housing Authority

Supreme Court of Appeals of West Virginia - June 8, 2023 - S.E.2d - 2023 WL 3881268

Tenant whose rent was subsidized with a Section 8 housing voucher obtained through county housing authority, as administrator of children's estates, next friend and guardian to injured child, and on his own behalf, brought action against authority and putative owners of rental house for wrongful deaths of his children and negligence after house caught fire.

The Circuit Court granted summary judgment in favor of authority on qualified immunity grounds. Tenant appealed.

The Supreme Court of Appeals held that county housing authority was "political subdivision," as defined in Tort Claims Act.

County housing authority was a "political subdivision," as defined in Tort Claims Act, although state created housing authority in county with the passage of the Housing Act; housing authority could not transact any business or exercise its powers until or unless county, by proper resolution, determined that there was need for an authority, and, when county commission passed such resolution, authority became established and authorized to transact business and exercise its powers under the Housing Act, rendering authority a public corporation established by county commission under the Housing Act and a "political subdivision," as that term was defined in Tort Claims Act.

MUNICIPAL GOVERNANCE - CALIFORNIA

San Bernardino County Board of Supervisors v. Monell

Court of Appeal, Fourth District, Division 2, California - May 25, 2023 - Cal.Rptr.3d - 2023 WL 3643245 - 2023 Daily Journal D.A.R. 4954

County board of supervisors filed a combined complaint and writ petition in which board sought a declaration that voter-approved initiative that amended county charter to limit a supervisor to a single four-year term and to limit a supervisor's compensation to $5,000 a month was invalid and an injunction and writ of mandate preventing initiative's enforcement.

After a trial as a writ petition, the Superior Court entered a ruling that granted the mandate petition and struck down the initiative in its entirety. Proponent of initiative appealed, and board cross-appealed.

The Court of Appeal held that:

- Passage of a superseding measure did not render the appeal and cross-appeal moot;

- Regulatory interests justified the term limit, which was not a severe restriction on rights under the First and Fourteenth Amendments;
- On its face, the compensation cap did not violate federal and state minimum-wage laws;
- Any conflict between the compensation cap and county ordinance that required elected county officials to be provided with certain benefits was not a basis to find that the compensation cap was invalid;
- The terms of the newly elected supervisors began on the date provided by the county charter, i.e., the first Monday in December following the election;
- Pursuant to state statute, initiative went info effect ten days after the vote was declared by the board;
- Term limit did not kick out of office those supervisors who were already serving a term beyond their first time, but it would bar them from serving another term later; and
- Compensation cap could not apply to supervisors elected at the same election that approved the initiative.

WATER LAW - CALIFORNIA

Los Angeles Waterkeeper v. State Water Resources Control Board

Court of Appeal, Second District, Division 1, California - June 2, 2023 - Cal.Rptr.3d - 2023 WL 3774587

Environmental-advocacy organization filed petitions for writs of mandate against state water resources control board and regional water quality control board, alleging that boards violated duty under California Constitution and Water Code by permitting four publicly owned treatment works (POTWs) to discharge treated wastewater without evaluating whether quantities discharged were reasonable or whether treated wastewater could be recycled or otherwise put to better use, and that regional board issued permits without making findings required under California Environmental Quality Act (CEQA).

Boards demurred. The Superior Court sustained demurrer as to regional board but overruled demurrer as to state board. Following bench trial, the Superior Court entered judgment for organization, issued, writs of mandate, and awarded organization attorney fees. State board appealed and organization cross-appealed.

The Court of Appeal held that:

- Regional board had no duty to prevent purportedly unreasonable discharge of treated wastewater;
- Assuming state board had duty to prevent waste and unreasonable use of water, organization failed to allege that state board acted in derogation of duty and thus failed to state claim for mandamus; and
- CEQA did not require regional board to make findings regarding environmental impacts of wastewater discharge permits and whether there were feasible alternatives or mitigation measures.

Regional water quality control board had no duty, under section of California Constitution concerning conservation of water, to prevent purportedly unreasonable discharge of treated wastewater from four publicly owned treatment works (POTWs); regional board’s role in state water law was to regulate water quality, and although Water Code broadly delegated to state water resources control board “the adjudicatory and regulatory functions of the state in the field of water resources” and power to “take all appropriate proceedings or actions…to prevent waste [and]

unreasonable use" of water, nothing in Water Code granted regional board equivalent powers or suggested that regional board's role in regulating water quality included regulation of wasteful or unreasonable use of water.

CHARTER SCHOOLS - WEST VIRGINIA

Blair v. Brunett

Supreme Court of Appeals of West Virginia - June 8, 2023 - S.E.2d - 2023 WL 3881272

Public school teachers filed a lawsuit against Governor of West Virginia, alleging that allowing the West Virginia Professional Charter School Board (PCSB) to create public charter schools without a majority vote of the citizens where the schools would be located violated the West Virginia Constitution, and seeking a writ of mandamus and declaratory relief or, in the alternative, injunctive relief.

The Circuit Court granted teachers' motion for a preliminary injunction and denied Governor's motion to dismiss. Governor brought an interlocutory appeal.

The Supreme Court of Appeals held that:

- Teachers' alleged injury of being deprived of their constitutional right to vote was not causally connected to Governor's actions, as required for standing;
- Teachers' alleged injury was not redressable through injunctive relief against Governor, as required for standing; and
- Preliminary injunction issued against Governor by trial court did not bind the PCSB.

Public school teachers' alleged injury of being deprived of their constitutional right to vote by law allowing the West Virginia Professional Charter School Board (PCSB) to create public charter schools without a majority vote of residents was not causally connected to Governor's actions, and thus teachers lacked standing to seek injunctive relief against Governor; Governor's only role in relation to the law was signing it after its passage and appointing PCSB members, Governor had no veto authority over actions of PCSB, and Governor's alleged knowledge of the law's unconstitutionality when he signed it did not establish causation given that PCSB, a nonparty, exercised its own independent statutory authority to approve or reject charter school applications.

Public school teachers' alleged injury of being deprived of their constitutional right to vote by law allowing the West Virginia Professional Charter School Board (PCSB) to create public charter schools without a majority vote of residents was not redressable through injunctive relief against Governor, as required for standing; Governor did not control nonparty PCSB's ability to approve or reject charter school applications and thus could not be required to order PCSB to cease its activities.

Preliminary injunction issued against Governor by trial court in action brought by school teachers challenging the constitutionality of law allowing the West Virginia Professional Charter School Board (PCSB) to create public charter schools without a majority vote of residents did not bind the PCSB, where the PCSB was not a party to the action, was created by statute, and acted pursuant to its statutory authority and not on behalf of the Governor, and Governor could not direct or veto the PCSB's decision to approve a charter school application.

IMMUNITY - IOWA

Nahas v. Polk County

Supreme Court of Iowa - June 9, 2023 - N.W.2d - 2023 WL 3906488

Former county employee brought action against county and members of county board of supervisors asserting claims for libel per se, wrongful termination in violation of public policy, extortion, civil conspiracy, intentional infliction of emotional distress, and violations of open meetings and confidential records laws.

The District Court denied defendants' motion to dismiss, and they appealed.

The Supreme Court held that:

- Qualified immunity defenses were not available to members of board of supervisors;
- Employee's complaint had to comply with particularity and plausibility components of new heightened pleading standard for claims under the Iowa Municipal Tort Claims Act (IMTCA);
- Requiring compliance with "clearly established" component of new heightened pleading standard would be an impermissible retrospective application;
- Libel per se claim satisfied the particularity and plausibility pleading standards;
- Extortion claim failed the particularity and plausibility pleading standards;
- Civil conspiracy claim satisfied the particularity and plausibility pleading standards; and
- Open meetings violation claim failed the particularity and plausibility pleading standards.

PUBLIC MEETINGS - LOUISIANA

Livingston Parish School Board v. Kellett

Court of Appeal of Louisiana, First Circuit - May 18, 2023 - So.3d - 2023 WL 3556635 - 2022-1240 (La.App. 1 Cir. 5/18/23)

Parish school board sued elementary school student's mother seeking injunctive relief to stop her from publicly discussing school board, special education program, and other individuals after she allegedly made social media posts that defamed and slandered the reputations of school board and school staff, based on communications recorded by electronic devices in her child's clothing.

After school board obtained a temporary restraining order (TRO) and then a preliminary injunction prohibiting mother from using electronic devices and from making or publishing any defamatory, slanderous, libelous, frivolous, and/or fraudulent claims concerning school board and its employees, mother filed motion for dissolution of the preliminary injunction. The District Court granted the motion in part with respect to the prohibition on use of the electronic device and denied the motion in all other respects. Mother appealed. Court of Appeal issued and then recalled show cause order.

The Court of Appeal held that:

- Preliminary injunction against mother making defamatory statements was an unconstitutional prior restraint on speech, and
- Dissolution of portion of preliminary injunction prohibiting mother from engaging in any form of written or verbal disparagement was warranted.

Preliminary injunction enjoining elementary school student's mother from making certain public

statements about school board and its employees that were purportedly defamatory, including allegations of criminal conduct, constituted an unconstitutional prior restraint on speech protected by the First Amendment, where there had been no judicial determination that words allegedly spoken by mother and accusations purportedly made by her were defamatory or defamatory per se, nor did the trial court, in considering school board's motion for preliminary injunctive relief, determine that mother in fact made the challenged statements and was liable for defamation.

EMINENT DOMAIN - FLORIDA

D'Arcy v. Florida Gaming Control Commission

District Court of Appeal of Florida, First District - May 24, 2023 - So.3d - 2023 WL 3608904

Owner of kennel business and business brought action against state Gaming Control Commission, alleging amendment to state Constitution forbidding racing of domesticated dogs for money violated takings clauses of state and federal Constitutions.

Commission filed motion for summary judgment, which the Circuit Court granted. Owner and business appealed.

The District Court of Appeal held that:

- Plaintiffs lacked reasonable expectation that their investment in dog racing could not be severely impacted by regulation, as would support takings claim, and
- Amendment was valid exercise of police power, rather than eminent domain, as would support takings claim.

Owner of kennel business and business lacked a reasonable expectation that their investment in dog racing could not be severely impacted by regulation, as would support owner and business's claim alleging the amendment to the state Constitution forbidding the racing of domesticated dogs in connection with a wager for money or other item of value violated the takings clauses of the state and federal Constitutions; amendment did not forbid dog racing per se, and it was not reasonable that owner had no expectation of future governmental interference with his and business's property investments, as pari-mutuel gambling had long been heavily regulated in the state.

Amendment to state Constitution forbidding the racing of domesticated dogs in connection with a wager for money or other item of value was a valid exercise of police power, rather than eminent domain, as would support claim brought by owner of kennel business and business, alleging that amendment violated the takings clauses of the state and federal Constitutions; amendment prevented a public harm.

MUNICIPAL ORDINANCE - IOWA

Livingood v. City of Des Moines

Supreme Court of Iowa - June 9, 2023 - N.W.2d - 2023 WL 3906367

Vehicle owners brought suit to challenge city's use of state income offset program to collect automated traffic citation penalties not reduced to judgment in municipal infraction proceedings.

The District Court denied owners' motion for summary judgment and granted city's motion for

summary judgment. Owners appealed.

The Supreme Court held that:

- City's use of state income tax refunds to offset automated traffic citation penalties did not constitute "taking";
- Statute governing municipal infractions did not preempt ordinances allowing city to use state's income offset program to collect automated traffic citation penalties not reduced to judgment in municipal infraction proceeding;
- Damages were not available for vehicle owners "claim" of preemption;
- Two owners were not entitled to declaratory and injunctive relief;
- City's attempts to enforce civil penalties for automated traffic citations did not violate vehicle owners' due process rights; and
- Penalties that city assessed and referred to income offset program were not legally enforceable.

City's use of state income tax refunds to offset automated traffic citation penalties did not constitute "taking"; city was not taking property for public use, but was instead collecting penalties allegedly owed for violation of its laws.

Statute governing municipal infractions did not preempt ordinances allowing city to use state's income offset program to collect automated traffic citation penalties not reduced to judgment in municipal infraction proceeding; ordinance provided that recipient of notice of violation could voluntarily pay penalty, ordinance provided that recipient of notice could request that city proceed with municipal infraction proceeding, and ordinance stated that city would file municipal infraction if recipient of notice did not pay citation and did not request that city file municipal infraction.

Statute governing municipal infractions preempted city ordinance providing that if vehicle owner did not request administrative hearing or municipal infraction proceeding following issuance of automated traffic citation, notice of violation would be deemed a debt subject to placement in city's debt offset program; ordinance's declaration that civil penalty was a debt due, owing, and payable without municipal infraction judgment was directly contrary to and irreconcilable with statute.

Vehicle owner was entitled to declaratory and injunctive relief following successful claim that statute governing municipal infractions preempted city ordinance deeming a notice of violation a debt subject to placement in city's offset program following issuance of automated traffic citation; owner would be entitled to assert preemption defense as to any claim of offset.

City's attempts to enforce civil penalties for automated traffic citations did not violate vehicle owners' due process rights, where owners were provided with notices of violation and afforded opportunity to request hearing, owners were provided notice of city's intent to transfer matter to income offset program and opportunity to challenge transfer, owners were provided with notices of intent to offset, and owners failed to seek hearings in response to each of those notices.

Penalties that city assessed for automated traffic citations and referred to income offset program were not legally enforceable, where city failed to file municipal infraction proceeding as required by its own ordinance and instead proceeded to extrajudicial collection efforts.

Remand of vehicle owners' claims against city for unjust enrichment, arising from city's attempts to enforce civil penalties for automated traffic citations, was warranted for consideration of whether there were any defenses to claim of unjust enrichment and whether there were any disputed issues of material fact necessitating trial on that claim.

LIABILITY - IOWA

Martin v. Tovar

Supreme Court of Iowa - June 9, 2023 - N.W.2d - 2023 WL 3906432

After city police officer sexually assaulted intoxicated victim to whom he had provided courtesy ride, victim brought action against city and police officer, alleging causes of action for sexual assault, battery, intentional infliction of emotional distress (IIED), false imprisonment, and invasion of privacy.

The District Court granted city's motion for summary judgment. Victim appealed.

The Supreme Court held that:

- Sexual assault fell outside the scope of officer's employment;
- There was no evidence that sexual assault by officer was expected, foreseeable, or sanctioned by the city;
- Officer's poor performance evaluations were insufficient to create genuine issue of material fact regarding foreseeability of sexual assault;
- Accusation that officer had assaulted another victim did not create genuine issue of material fact regarding foreseeability of sexual assault; and
- The Supreme Court would decline to extend aided-by-agency theory to hold city vicariously liable for sexual assault.

CREDIT DEFAULT SWAPS - NEW MEXICO

In re Credit Default Swaps Auctions Litigation

United States District Court, D. New Mexico - June 5, 2023 - Slip Copy - 2023 WL 3821337

Plaintiffs – quasi-state funds that manage state and state-employee asset funds and retirement accounts – alleged that Defendants – *inter alia*, Investment Banks – impermissibly colluded and conspired to manipulate — or "fix" or "rig" — Credit Default Swap auctions in an anticompetitive manner, and that this conduct constituted: 1) a conspiracy to restrain trade in violation of the Sherman Act and the Clayton Act, 2) violations of the Commodity Exchange Act, and 3) unjust enrichment by civil conspiracy in violation of New Mexico law.

Defendants moved to dismiss.

The U.S. District Court held that:

- Plaintiffs adequately pled sufficient factual matter to invoke the fraudulent concealment doctrine, and concluded that the fraudulent concealment doctrine operates to equitably toll the applicable statutes of limitations, rendering Plaintiffs' claims timely;
- Plaintiffs plausibly alleged that a conspiracy existed and that several domestic Defendants' overt acts in furtherance of the conspiracy were committed in the United States and are sufficient to subject co-conspirators to jurisdiction in the United States;
- These are not "umbrella" claims in that Plaintiffs do not allege they were injured by non-conspirators who independently decided to charge artificial prices to keep pace with Defendants;
- Plaintiffs clearly alleged a common motive, conduct against self-interest, inter-firm communications, and suspicious auction rules as context for the conspiracy sufficient to adequately

allege an antitrust conspiracy;
- Plaintiffs alleged sufficient facts to state a claim under the Commodity Exchange Act (CEA) against Defendants; and
- Plaintiffs adequately stated a claim for unjust enrichment and may proceed with that claim as an alternative theory to the federal antitrust and CEA claims.

ANNEXATION - OHIO

Board of Township Trustees for Eaton Township v. KNG, Ltd.

Court of Appeals of Ohio, Ninth District, Lorain County - May 15, 2023 - N.E.3d - 2023 WL 3450412 - 2023-Ohio-1621

Township board brought action challenging decision of county board of commissioners to grant developer's petition to annex certain township land into neighboring village.

The Court of Common Pleas affirmed commissioners' decision. Township appealed.

The Court of Appeals held that developer and village failed to satisfy road maintenance requirements of annexation statute, as condition to annexation.

Developer and village failed to satisfy the road maintenance requirements of annexation statute, which precluded annexation if a road would be divided by the annexation unless the municipal corporation agreed to assume maintenance of the road as a condition of the annexation, in township's action challenging county board of commissioners' decision to grant developer's annexation petition, which would divide a road between township and village; board's resolution merely stated that village and county "desire to enter into a shared maintenance agreement whereupon each will share equally (1/2) the cost of maintenance" of the road, which was not the same as the "municipal corporation, as a condition of annexation, will assume the maintenance."

EMINENT DOMAIN - PUERTO RICO

Dinh v. United States

United States Court of Federal Claims - June 5, 2023 - Fed.Cl. - 2023 WL 3815051

Bondholders filed putative class action against United States, seeking just compensation under Fifth Amendment for alleged taking of their private property as owners of first subordinated secured bonds issued by instrumentality of Commonwealth of Puerto Rico, as alleged direct and intended result of Congress's enactment of Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), allowing Puerto Rico and its instrumentalities to adjust their debts in bankruptcy, that resulted in loss of significant portion of principal and interest on holder's bonds and their security interests and liens on revenues.

Government moved to dismiss for lack of subject matter jurisdiction or, alternatively, for failure to state claim.

The Court of Federal Claims held that:

- Subject matter jurisdiction could be exercised over claim;
- PROMESA did not displace jurisdiction over claim;

- Exercising jurisdiction was not impermissible collateral attack;
- Claims added in amended complaints related back to original timely complaint;
- Bondholders adequately alleged cognizable property interests;
- Collateral estoppel did not bar litigation of issue of PROMESA's enactment effecting taking; but
- Enactment of PROMESA did not constitute regulatory taking.

Bondholders' sufficiently alleged Fifth Amendment taking effected by Congress's enactment of Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA) that resulted in loss of significant portion of their principal and interest on bonds by allowing Puerto Rico to adjust its debts in bankruptcy, as required for exercise of Tucker Act jurisdiction over claim, since bondholders' complaint unambiguously alleged that federal action took their property without just compensation.

Tucker Act jurisdiction over bondholders' Fifth Amendment taking claims allegedly effected by Congress's enactment of Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA) that resulted in loss of significant portion of their bonds' principal and interest by allowing Puerto Rico to adjust its debts in bankruptcy, was not displaced by PROMESA, stating that any action against Oversight Board for Puerto Rico, and any action otherwise arising out of PROMESA, in whole or in part, "shall" be brought in United States district court for covered territory, since PROMESA did not reflect Congress's unambiguous intent to displace Tucker Act jurisdiction, given that PROMESA did not waive sovereign immunity for monetary relief claims against United States, unlike Tucker Act.

Bondholders' claim for Fifth Amendment taking allegedly effected by Congress's enactment of Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), that resulted in loss of significant portion of bonds' principal and interest by allowing Puerto Rico to adjust its debts in bankruptcy, was not impermissible collateral attack on decision by district court confirming plan of debt adjustment under Title III of PROMESA, since district court's confirmation of plan simply described part of process that resulted in taking of bondholders' property to which they did not attribute any legal error, and their takings claim did not require Court of Federal Claims to scrutinize Title III court's reasoning or result in confirming plan.

Proposed amendment to bondholders' class action complaint to allege Fifth Amendment taking by additional bondholders related back, for purposes of six-year statute of limitations for claims before Court of Federal Claims, to original complaint claiming that taking was allegedly effected by Congress's enactment of Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA) that resulted in loss of significant portion of bonds' principal and interest by allowing Puerto Rico to adjust its debts in bankruptcy.

Bondholders sufficiently alleged property interest cognizable under Fifth Amendment Takings Clause, as required to state claim that taking was effected by Congress's enactment of Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA) allowing Puerto Rico and its instrumentalities to adjust their debts in bankruptcy, since bondholders alleged that enactment of PROMESA resulted in loss of significant portion of principal and interest on their bonds as well as their lien on revenues that could be enforced in event of default on their contractual right to repayment of principal and interest.

Prior proceeding in which district court assigned under Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA) determined that plan of debt adjustment for Puerto Rico and its instrumentalities and settlement agreement did not take bondholders' property without just compensation did not collaterally estop bondholders from litigating issue of whether United States was liable for taking based on Congress's enactment of PROMESA.

Congress's enactment of Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), allowing Puerto Rico and its instrumentalities to adjust their debts in bankruptcy, did not constitute Fifth Amendment regulatory taking of bondholders' property interests in their contractual right to repayment of principal and interest on bonds and liens against revenue, since bondholders' property interests were impaired only after Oversight Board for Puerto Rico, which was non-federal entity, took series of discretionary actions resulting in restructuring of debts under PROMESA, and taking involving third-party non-federal entities was insufficient to warrant just compensation, as Board did not act as agent of United States and was not coerced to file petition for adjustment under PROMESA.

BOND ISSUANCE - TEXAS

In re Gaskill

Court of Appeals of Texas, Beaumont - June 8, 2023 - Not Reported in S.W. Rptr - 2023 WL 3876506

Voters dissatisfied with the results of an election approving the Magnolia ISD's authority to issue $228,000,000 in school bonds, filed a writ of mandamus almost six months after the election seeking to compel the Magnolia Independent School District's Board President to "take such actions as necessary to conduct" a recount for the 2022 Magnolia ISD Bond.

"The relators say they are not seeking to contest the election's results, but that they instead want information about the machines used in the election so they will know in upcoming elections how accurate the machines are in counting votes, including an election that will occur in May 2023."

The relators say they are not seeking to contest the election's results, but that they instead want information about the machines used in the election so they will know in upcoming elections how accurate the machines are in counting votes, including an election that will occur in May 2023.

"By waiting 171 days after the election to challenge Adcox's decision rejecting the petitions Relators submitted for a recount of the vote on a school bond measure approved by voters, the relators allowed the results of the election to become final and Adcox's duty to order a recount of the results to expire. We hold that we lack jurisdiction over this original proceeding. Accordingly, the Relator's petition for writ of mandamus is dismissed."

PUBLIC UTILITIES - CALIFORNIA

Campana v. East Bay Municipal Utility District

Court of Appeal, First District, Division 4, California - May 23, 2023 - Cal.Rptr.3d - 2023 WL 3596189 - 2023 Daily Journal D.A.R. 4803

Water utility customers brought putative class action against municipal utility district alleging that the tiered-rate water structure used by the utility to determine the cost of residential and commercial water service in two counties violated Proposition 218's procedural and substantive limitations on a local agency's ability to extend, impose, or increase property-related fees for services.

The Superior Court sustained utility's demurrer without leave to amend. Customers appealed.

The Court of Appeal held that:

- The complaint sought to invalidate utility's rate structure, and did not merely seek refund of excess fees, and thus was subject to 120-day limitations period;
- The limitations period did not run anew when, each month, the utility collected the allegedly illegal tax; and
- The Government Claims Act did not extend the 120-day statute of limitations applicable to customers' claims.

Water utility customers forfeited any claim that the tiered-rate water structure used by municipal utility district to determine cost of residential and commercial water service violated Proposition 218, which imposed procedural and substantive limitations on a local agency's ability to extend, impose, or increase property-related fees for services, by misusing revenues for a purpose other than providing service, where customers' complaint set forth no factual allegations specific to the alleged section misuse of funds claim, and they failed to develop any pertinent arguments in their briefing on appeal of superior court's decision to sustain utility's demurrer, including any explanation for their position that an inverse validation was inapplicable.

Water utility customers putative class action complaint, which alleged the tiered-rate structure used by municipal utility district determine cost of residential and commercial water service in two counties violated Proposition 218's limitations on local agency's ability to extend, impose, or increase property-related fees for services, sought to attack, review, set aside, void, or annul utility's rate structure, and did not merely seek refund of excess fees, and thus, customers' claims were subject to 120-day limitations period; complaint framed the claims as an attack on tiered-rate pricing, alleging the constitutional infirmities of this structure gave rise to partial refund claims, and effect of customers' allegations, if true, would be to invalidate the tiered-rate fee structure.

Provision of Proposition 218 stating that all fees or charges shall comply with the section imposing procedural and substantive limitations on a local agency's ability to extend, impose, or increase property-related fees for services, does not authorize a new challenge, subject to a new statute of limitations, with the assessment and collection of fees each month; the provision merely requires that all fees, existing at the time Proposition 218 was approved, be brought into line with the substantive requirements of the section.

The 120-day limitations period applicable to water utility customers' putative class action complaint alleging the tiered-rate structure used by municipal utility district to determine cost of residential and commercial water service in two counties violated Proposition 218's limitations on local agency's ability to extend, impose, or increase property-related fees for services, did not run anew when, each month, the utility collected the allegedly illegal tax; the complaint challenged the validity of the utility's resolution adopting service fees, and there was no ongoing statutory obligation the district had to fulfill after it adoption the resolution.

Assuming notice was required under the Government Claims Act for water utility customers' claims alleging the tiered-rate structure used by municipal utility district to determine cost of residential and commercial water service in two counties violated Proposition 218's limitations on local agency's ability to extend, impose, or increase property-related fees for services, any time requirements imposed by the Claims Act did not extend the 120-day statute of limitations applicable to customers' claims, because the gravamen of their complaint was a challenge to the tiered-rate structure adopted by the utility through resolutions.

WATER DISTRICTS - CALIFORNIA

Barajas v. Sativa L.A. County Water District

Court of Appeal, Second District, Division 2, California - May 25, 2023 - Cal.Rptr.3d - 2023 WL 3641453

Residents brought putative class action against local water district and fictitiously-named defendant for breach of contract, nuisance, and negligence based on district's alleged failure to provide potable drinking water.

After county's local agency formation commission (LAFCO) dissolved district, residents substituted county in lieu of fictitiously-named defendant, then voluntarily dismissed county.

Trial court certified class, then decertified class as to nuisance claim. The Superior Court, Los Angeles granted district's motion to dismiss, which it construed as motion for judgment on the pleadings, denied residents' motion for leave to amend complaint to name district as defendant "by and through" county, and denied residents' motion to vacate order that had granted their motion for voluntary dismissal of county as defendant. Residents appealed.

The Court of Appeal held that district was no longer valid defendant upon its dissolution because successor agency was appointed to wind up district's affairs.

County local agency formation commission (LAFCO) did not task water district with winding up its own affairs when dissolving district pursuant to Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000, and, thus, upon district's dissolution, district had no further function to carry out and was no longer valid defendant in residents' action for breach of contract, nuisance, and negligence; Act authorized LAFCO to name successor agency instead of permitting district to wind up its own affairs by default, which LAFCO did by designating county as successor, transferring district's assets to county, and explicitly tasking county with winding up district's affairs, and it would be absurd for district to retain winding-up power when county owned and controlled its assets.

The provisions of the Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000 stating that a local agency's dissolution terminates its powers except those necessary to wind up its affairs, although they might suggest that a district always continues to exist notwithstanding its dissolution for purposes of winding up its affairs, these provisions merely set up default terms and conditions for dissolution; the Act elsewhere provides that a local agency formation commission (LAFCO) has the power to specify the terms and conditions that apply upon dissolution in a specific case, and those specific terms control over the Act's general provisions governing dissolution.

When authorizing dissolution of specific water district and appointment of county as administrator and successor agency, legislature did not intend to preserve pending claims against district arising from its provision of water, and, thus, construing provisions of Cortese-Knox-Hertzberg Local Government Reorganization Act governing dissolution powers to preclude residents' action against district, or against county as successor responsible for winding up district's affairs, for negligence and other claims did not contravene legislature's intent; statute specifically addressing district explicitly granted immunity to county for claims arising from district's provision of water, so that county had incentive to assume stewardship despite district's water quality violations.

LIABILITY - CALIFORNIA

Los Angeles Unified School District v. Superior Court of Los Angeles County

Supreme Court of California - June 1, 2023 - P.3d - 2023 WL 3745196

Public high school student brought tort action against school district, alleging that district employee sexually assaulted her.

The Superior Court denied district's motion to strike student's request for statutory enhanced damages based on the assault resulting from district allegedly covering up employee's sexual assault of another student. District petitioned for writ of mandate. The Court of Appeal granted a writ. Review was granted.

The Supreme Court held that:

- Government Claims Act's prohibition of public entity being held liable in tort for damages imposed primarily for sake of example and by way of punishing defendant applies not only to damages that are simply and solely punitive but also to damages that would function, in essence, as award of punitive or exemplary damages; overruling *People ex rel. Younger v. Superior Court*, 16 Cal.3d 30, 39, 127 Cal.Rptr. 122, 544 P.2d 1322; *San Francisco Civil Service Assn. v. Superior Court*, 16 Cal.3d 46, 127 Cal.Rptr. 131, 544 P.2d 1331; *Kizer v. County of San Mateo*, 53 Cal.3d 139, 279 Cal.Rptr. 318, 806 P.2d 1353; and
- Government Claims Act shields public entities from liability for statutory award of enhanced damages, not exceeding treble damages, when childhood sexual assault was result of cover up.

EMINENT DOMAIN - GEORGIA

Kudzu Capital, LLC v. City of Decatur

Court of Appeals of Georgia - June 7, 2023 - S.E.2d - 2023 WL 3859348

City brought condemnation action against subdivision property owner seeking to condemn the property and requested appointment of special master.

Following a hearing, the special master awarded property owner $2,180,000. Both property owner and city appealed the award and requested a jury trial. In jury trial, the Superior Court incorporated the jury's verdict into a final judgment and awarded property owner $1,400,000. Property owner appealed.

The Court of Appeals held that:

- Price owner paid for the property and the corresponding tax certificate were relevant in determining the fair market value of the property;
- Evidence of property owner's alleged right to require city to open right-of-way for vehicular use for roadway that abutted the property was inadmissible;
- Property owner was permitted by trial court to present evidence pertaining to its representative's dealings with city prior to the condemnation proceeding;
- Property owner's request to charge jury were adequately covered by the other general instructions given by the trial court; and
- Trial court did not err by charging jury that a county or municipality had no obligation to "open" an undeveloped road.

ZONING & PLANNING - MAINE

Tominsky v. Ogunquit

Supreme Judicial Court of Maine - May 23, 2023 - A.3d - 2023 WL 3590162 - 2023 ME 30

Property owner filed two appeals in the Superior Court, the first challenging code enforcement officer's issuance of building permits for six dwelling units on abutting property, and the second challenging the issuance of a certificate of occupancy for one of the dwelling units. Permittee filed appeal challenging town board of appeals' granting of good cause exception to owner for his untimely administrative appeal of the building permits.

The Superior Court denied owner's first appeal, dismissed owner's second appeal, and denied permittee's appeal. Owner and permittee appealed the decisions, and the appeals were consolidated for review.

The Supreme Judicial Court held that:

- As a matter of first impression, party that has obtained municipal approval need not and should not file its own appeal or cross-appeal to challenge the application of good cause exception to deadline for filing administrative appeal;
- Permittee lacked standing to file appeal town board of appeals' decision denying owner's appeal on the merits;
- Owner's mistaken belief of law was not an extraordinary circumstance that would result in flagrant miscarriage of justice that could excuse his delay in filing appeal to town board of appeals; and
- Issuance of certificate of occupancy was not an appealable event.

ZONING & PLANNING - MASSACHUSETTS

Hume Lake Christian Camps, Inc. v. Planning Board of Monterey

Supreme Judicial Court of Massachusetts, Suffolk - June 7, 2023 - N.E.3d - 2023 WL 3855265

Nonprofit Christian organization appealed planning board's denial of its application to build a recreational vehicle (RV) campground on its property, contending the proposed campground fell within Dover Amendment's limits on the ability of municipalities to "regulate or restrict the use of land or structures for religious purposes."

The Land Court Department entered judgment in part for organization. Board appealed, and organization cross-appealed. The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

The Supreme Judicial Court held that:

- Primary or dominant purpose of housing families at proposed RV campground would be to serve organization's religious mission;
- Primary or dominant purpose of housing volunteers and seasonal staff at RV campground would be to facilitate the operation, maintenance, and improvement of organization's religious family camp; and
- Primary or dominant purpose of religious family camp was to serve organization's evangelical mission, rather than recreation.

Primary or dominant purpose of religious family camp was to serve nonprofit Christian organization's evangelical mission, rather than recreation, and thus recreational vehicle (RV) campground for camp fell within Dover Amendment's limits on the ability of municipalities to "regulate or restrict the use of land or structures for religious purposes"; camp attendees were required to participate in two chapel sessions each day and to receive religious instruction, camp's guest retreats were available only to organizations that agree to abide by a schedule that included religious components, nonbelievers were allow to attend camp programs in the service of proselytization, and recreational activities boosted interest in the camp's religious offerings.

ZONING & PLANNING - MISSISSIPPI

City of Ocean Springs v. Illanne

Supreme Court of Mississippi - April 27, 2023 - So.3d - 2023 WL 3113383

Neighbors appealed three separate zoning decisions of the city board of aldermen regarding subdivision application for townhouse development.

The Circuit Court consolidated the appeals, reversed the decisions in two of the appeals, and on motion to alter or amend, altered its ruling in part, and remanded to the city board. City appealed.

The Supreme Court held that remand was required for a factual determination as to whether subdivision applicant was acting as a "petitioner" entitled to notice as a necessary party.

Remand of zoning appeals was required for a factual determination as to whether subdivision applicant was acting as a "petitioner" before the board of aldermen or whether he was acting in a representative capacity on behalf of the petitioner, and thus whether neighbors who appealed zoning decision were required to name and give notice to applicant as a necessary party; in addition, Supreme Court would direct the trial court to determine all issues of fact that may arise out of any appeal submitted to the trial court for a determination and that may be necessary for disposition of cases on appeal.

APPROPRIATIONS - NEW YORK

Schulz v. State

Supreme Court, Appellate Division, Third Department, New York - May 11, 2023 - N.Y.S.3d - 2023 WL 3355650 - 2023 N.Y. Slip Op. 02575

Taxpayers brought hybrid Article 78 proceeding and declaratory judgment action, alleging that appropriations in Governor's budget bill, relating to agreement between State, county, and National Football League (NFL) franchise in which State would appropriate $600 million in funds to urban development corporation for services and expenses related to development of proposed football stadium in county, violated provisions of State Constitution prohibiting State and local governments from appropriating public funds in aid of private undertakings.

Government defendants filed motion to dismiss for failure to state cause of action. The Supreme Court dismissed taxpayers' petition and denied petitioners' motion to file surreply. Taxpayers filed separate appeals.

The Supreme Court, Appellate Division, held that:

- State's appropriations did not violate State Constitution, even though appropriations would aid private undertaking;
- Any funds provided by county would not violate State Constitution; and
- Declaratory judgment, rather than dismissal of petition, was appropriate remedy.

Appropriation of State funds, relating to agreement between State, county, and National Football League (NFL) franchise in which State would appropriate $600 million in funds to public development corporation for services and expenses pertaining to development of proposed sports stadium, did not violate State Constitution's prohibition on appropriations of public funds for private undertakings, even though appropriations would aid private undertaking; private benefit was merely incidental, appropriations for stadium rebuild were expressly authorized by statute, and Legislature recognized public purpose of sports stadiums in creating and retaining jobs, attracting business investment, and enhancing State's reputation.

Any funds appropriated by county, relating to development of sports stadium located in county, would not violate State Constitution's prohibition on appropriation of funds by local governments for private undertakings; if county appropriated funds to private benefit corporation, those funds would not be subject to constitutional prohibition on gifting money to private entities, and if county appropriated money directly to private parties for stadium project, appropriations would not be barred by constitutional prohibition given predominantly public purpose of stadium.

Issuance of declaratory judgment, rather than dismissal of petition, was proper remedy in taxpayers' hybrid Article 78 proceeding and declaratory judgment action challenging appropriations of State funds related to development of sports stadium, upon determination that appropriations by State and county would not violate State Constitution's prohibitions on appropriations of public funds for private undertakings, since there were no questions of fact.

OPEN MEETINGS - OKLAHOMA

Hirschfeld v. Oklahoma Turnpike Authority

Supreme Court of Oklahoma - May 31, 2023, - P.3d - 2023 WL 3735825 - 2023 OK 59

Landowners petitioned for declaratory judgment and injunctive relief, claiming that Oklahoma Turnpike Authority (OTA) violated Open Meeting Act (OMA) by not providing sufficient notice of proposed new turnpikes in OTA's meeting agendas.

The District Court granted summary judgment for landowners. OTA appealed.

The Supreme Court held that:

- Agenda items about short-term financing for "certain turnpike projects" were sufficient;
- Agenda item about consideration of a consulting engineering services contract was sufficient;
- Agenda items about contracts for bond and capital program for turnpike program were sufficient;
- Governor's mere announcement of turnpike program during meeting did not violate OMA notice requirement; and
- Supreme Court had exclusive jurisdiction to consider landowners' request for declaratory relief.

Agenda items in Oklahoma Turnpike Authority's (OTA) notice of regular board meeting, stating that a resolution authorizing short-term financing for "certain turnpike projects" would be considered and acted upon at the meeting, complied with Open Meeting Act (OMA) section governing notice of public meetings, even though the notice did not specify whether the financing was for one of three

proposed new turnpikes that were part of turnpike improvement program, where "turnpike project" was a statutorily-defined term, OTA included with the agenda a copy of the resolution which referred to interim financing for "turnpike projects," and board considered and approved resolution without any modifications, additions, or amendments.

Agenda item in Oklahoma Turnpike Authority's (OTA) notice of regular board meeting, stating that the engineering division would submit a consulting engineering services contract for board's consideration and action, complied with Open Meeting Act (OMA) section governing notice of public meetings, even if notice lacked specificity about which turnpikes were involved in a long-range turnpike improvement and expansion program that OTA announced at a subsequent meeting, where contract was for program management services, which was what was specified in agenda item, rather than for construction of a specific component of any turnpike project, and board considered and took action only on the contract expressly stated in the agenda without any modifications, additions, or amendments.

Agenda items in Oklahoma Turnpike Authority's (OTA) notice of regular board meeting, stating that the board was to consider various design, right of way, and utility management contracts for the bond and capital program for turnpike construction and improvement program, complied with Open Meeting Act (OMA) section governing notice of public meetings, even if notice lacked specificity as to whether contracts involved the construction of one of three proposed new turnpikes, where board considered and took action only on the contract expressly stated in the agenda, board's approval of agenda items did not include a contract for a specific component of any turnpike project, and items of business dealt with several turnpike projects on a larger scale than the possible construction or proposed route of one turnpike.

Governor's announcement of a turnpike construction and improvement program during the director's report section of Oklahoma Turnpike Authority's (OTA) regular board meeting, without prior notice in an agenda item in OTA's notice of public meeting, did not violate notice requirements of Open Meeting Act (OMA), where announcement was for informational purposes only, and board did not take any action at meeting regarding the program.

Supreme Court had exclusive jurisdiction to consider landowners' request for declaratory relief to prevent Oklahoma Turnpike Authority (OTA) from exercising its eminent domain power to construct proposed new turnpike, upon OTA's filing of application to validate proposed bonds to construct and operate turnpike.

IMMUNITY - TEXAS

City of Austin v. Quinlan

Supreme Court of Texas - June 2, 2023 - S.W.3d - 2023 WL 3767092

Restaurant patron brought premises liability action against city and restaurant that operated sidewalk café, arising out of ankle injury sustained when patron fell more than one foot from sidewalk to street.

The 98th District Court denied city's plea to jurisdiction, and city appealed. The Austin Court of Appeals affirmed in part and reversed in part. Petition for review was granted.

The Supreme Court held that:

- Sidewalk café maintenance agreement between restaurant and city did not impose

nondiscretionary duty on city, and thus, claims against city did not fall outside "discretionary function" exception to waiver of immunity, under Texas Tort Claims Act;
- City's alleged control over sidewalk café, under agreement, had no bearing on issue whether "discretionary function" exception to city's waiver of governmental immunity applied;
- Statutes governing municipality's authority to issue permit for use of municipal street or sidewalk for public convenience or private use did not impose nondelegable, nondiscretionary duty on city, for which alleged breach fell outside "discretionary function" exception to waiver of immunity; and
- Dismissal of complaint, rather than remand to allow patron opportunity to amend, was appropriate.

IMMUNITY - TEXAS

City of League City v. Jimmy Changas, Inc.

Supreme Court of Texas - June 9, 2023 - S.W.3d - 2023 WL 3909986

Restaurant developer sued city for breach of contract for nonpayment of reimbursements for certain expenditures made in connection with construction and operation of a restaurant within city limits.

The District Court denied city's plea to the jurisdiction. City brought interlocutory appeal. The Houston Court of Appeals affirmed. City petitioned for review, which was granted.

The Supreme Court held that:

- Activity was not included in statutory list of governmental functions; disapproving *CHW-Lattas Creek, L.P. v. City of Alice*, 565 S.W.3d 779;
- Activity was discretionary, weighing in favor of concluding that city engaged in a proprietary function;
- Activity was primarily for benefit of those within corporate limits of municipality, weighing in favor of concluding that city engaged in a proprietary function;
- Terms and requirements of agreement did not indicate in any way that city entered into agreement on state's behalf, weighing towards a proprietary function; and
- City's discretionary decision to enter into agreement with restaurant developer was not essential to any governmental function, weighing in favor of holding that city engaged in a proprietary function.

City's activity of entering into agreement with restaurant developer as an economic-development activity and not as a community-development or urban-renewal activity was not included in statutory list of governmental functions protected by sovereign immunity under Tort Claims Act, for purposes of deciding city's plea to the jurisdiction in developer's breach of contract action against city for nonpayment of reimbursement of expenditures in constructing and operating restaurant in city; purpose of agreement was to stimulate business and commercial activity, create local jobs, and increase state sales tax revenue, not to undertake urban renewal activities; disapproving *CHW-Lattas Creek, L.P. v. City of Alice*, 565 S.W.3d 779.

ZONING & PLANNING - WISCONSIN

Miller v. Zoning Board of Appeals of Village of Lyndon Station

Supreme Court of Wisconsin - June 6, 2023 - N.W.2d - 2023 WI 46 - 2023 WL 3829573

Objecting property owner sought certiorari review of village zoning board of appeals' upholding of

village board's decision to grant neighboring property owners' application to rezone residential property for commercial use.

After neighboring property owners intervened, the Circuit Court reversed. Neighboring property owners appealed. The Court of Appeals reversed. Objecting property owner sought statutory certiorari review.

The Supreme Court held that village board's vote to rezone property was a "legislative act," and thus board member's alleged partiality from being the mother of one of the neighboring property owners who applied for the rezoning did not violate the procedural due process rights of the objecting property owner.

Village board's vote to amend zoning ordinance and rezone applicants' property from residential use to commercial use was "legislative act" rather than "adjudicative act," and thus board member's alleged partiality from being mother of one applicant did not violate procedural due process rights of objecting neighboring property owner; although vote only occurred in response to rezoning application, board made prospective change by enacting, repealing, or amending existing generally applicable law, and when legislative actions were at issue in dispute about procedural due process, those affected by legislation were not entitled to any process beyond that provided by legislative process.

REDEVELOPMENT AGENCIES - CALIFORNIA

City of Chula Vista v. Stephenshaw

Court of Appeal, Third District, California - April 14, 2023 - Cal.Rptr.3d - 2023 WL 3336400

City and successor redevelopment agency filed petition for writ of mandate and complaint for declaratory and injunctive relief seeking a writ to compel Department of Finance to recognize reimbursement agreements as enforceable obligations and approve use of property tax revenues for such items on all current and futures recognized obligation payment schedules (ROPS).

The Superior Court denied petition. Plaintiffs appealed.

The Court of Appeal held that:

- Reimbursement agreements qualified as enforceable obligations;
- Department did not abuse its discretion in denying reimbursement of lease payments made in connection with debt instruments that were unenforceable obligations; and
- Department was not estopped from denying ROPS.

Under "tax increment financing method," tax revenues available for local redevelopment agencies from land within a redevelopment area are frozen as of the date a redevelopment plan is adopted, and any tax revenues generated by an increase in property values after adoption of the plan, the tax increment, are paid to the redevelopment agency for use in financing the redevelopment project.

A primary purpose of legislation to dissolve redevelopment agencies and create a process for wind down of their affairs was to eliminate tax increment financing, and redirect, to the maximum extent possible, the revenues and assets of the former redevelopment agencies to local governments to help fund core governmental services; as part of the wind down process, the law established successor agencies and empowered them to continue to make payments due for enforceable obligations.

To obtain funds to make payments required by enforceable obligations, a successor redevelopment agency must periodically prepare recognized obligation payment schedules (ROPS) setting forth the minimum payment amounts for each enforceable obligation and identify one or more sources of payment, and submit the ROPS to the oversight board for approval; the Department of Finance makes its determination of the enforceable obligations and the amounts and funding sources of the enforceable obligations.

Reimbursement agreements between city and former redevelopment agency qualified as enforceable obligations under statutory exception for contemporaneous written agreements between city or county and former redevelopment agency at time of issuance of indebtedness obligations solely for purpose of securing or repaying those indebtedness obligations for purposes of recognized obligation payment schedules (ROPS), and thus Department abused its discretion in determining that agreements were not enforceable obligations; agreements were written agreements entered into at time indebtedness was incurred for purpose of securing or repaying that debt, parties expressly agreed that city would be entitled to exercise any and all remedies available pursuant to law if tax increment revenues were available but unpaid to city, and implied covenant of good faith and fair dealing required tax increment revenues be pledged to repayment of indebtedness honestly and in good faith.

There was no reimbursement agreement or amendment to an existing reimbursement agreement executed contemporaneously with debt instruments, and thus Department of Finance did not abuse its discretion in denying reimbursement of lease payments made in connection with those debt instruments as unenforceable obligations that were not required to be reimbursed to successor redevelopment agency or city for purposes of recognized obligation payment schedules (ROPS), although timing of reimbursement obligation was contingent on unpledged tax increment revenues being available; legislature did not make explicit any attempt to exclude agreements containing contingent repayment obligations, and Department failed to explain why contingency rendered repayment obligation illusory.

Department of Finance was not estopped from denying recognized obligation payment schedules (ROPS) for former redevelopment agency due to its approval of those items in prior ROPS; city and successor redevelopment agency could not show that they reasonably relied on Department's past ROPS approvals because the relevant transactions occurred years before Department's ROPS determinations, Department's ROPS determination letters expressly warned that past approval of an item would not prevent Department from revisiting that item on future ROPS, and estoppel would have nullified a strong rule of public policy.

PUBLIC UTILITIES - CALIFORNIA

TruConnect Communications, Inc. v. Maximus, Inc.

Court of Appeal, First District, Division 1, California - May 11, 2023 - 308 Cal.Rptr.3d 365

Provider of telephone services to lower-income residents of state under a program administered by the California Public Utilities Commission (CPUC) filed first amended complaint against administrator, hired by CPUC to manage program enrollment, and its subcontractor, for negligence, intentional and negligent interference with prospective economic relations, violations of the Unfair Competition Law, quantum meruit, unjust enrichment, and related claims, claiming that they botched the rollout of a new software platform used to enroll people in the program, causing provider to lose millions of dollars.

The Superior Court sustained companies' demurrers. Provider appealed.

The Court of Appeal held that:

- Trial court's jurisdiction over provider's action was not statutorily barred on basis that a decision by trial court in the action would be inconsistent with a CPUC order or decision;
- Trial court's jurisdiction over provider's action was not statutorily barred on basis that recovery in action would enjoin, restrain, or interfere with CPUC in the performance of its official duties; and
- Remand to trial court was warranted so that it could consider whether CPUC was an indispensable party to the action.

A trial court decision in action brought by provider of telephone services to lower-income residents of state, under a program administered by the California Public Utilities Commission (CPUC), against two companies, hired by CPUC to manage program enrollment, claiming that they botched the rollout of new software used for program enrollment, causing provider to lose millions of dollars, would not be inconsistent with any CPUC order or decision, and thus trial court retained jurisdiction over case; CPUC's determination that provider was not eligible for reimbursement from CPUC's program's fund did not affect whether provider was potentially entitled to damages from companies under tort and related theories, and provider would not have to establish that CPUC erred in making its determination in order to prevail in its action against companies.

Recovery in trial court action brought by provider of telephone services to lower-income residents of state, under a program administered by the California Public Utilities Commission (CPUC), against two companies, hired by CPUC to manage program enrollment, claiming that they botched the rollout of new software used for program enrollment, causing provider to lose millions of dollars, would not enjoin, restrain, or interfere with CPUC in the performance of its official duties, and thus trial court retained jurisdiction over case; crux of provider's action was to recover damages, not to constrain any of CPUC's findings or to interfere with CPUC's oversight of the program, and CPUC did not authorize or direct companies to injure third parties with software malfunctions and errors, thereby immunizing them from claims by those parties.

Remand to trial court was warranted so that it could consider whether the California Public Utilities Commission (CPUC) was an indispensable party to action brought by provider of telephone services to lower-income residents of state, under a program administered by CPUC, against two companies, hired by CPUC to manage program enrollment, claiming that they botched the rollout of new software used for program enrollment, since the trial court never reached the indispensable-party issue when sustaining companies' demurrers, and therefore never weighed the relevant factors or made any findings.

BALLOT INITIATIVE - CALIFORNIA

Travis v. Brand

Court of Appeal, Second District, Division 8, California - May 19, 2023 - Cal.Rptr.3d - 2023 WL 3558102

City residents brought action for injunctive relief against city mayor, city councilmember, political action committee (PAC) created to support ballot measure limiting waterfront development, and other supporters of measure, alleging that defendants violated Political Reform Act by failing to designate PAC as primarily formed and as candidate-controlled, then failing to follow naming and disclosure requirements for primarily formed and candidate-controlled committees.

Following bench trial, the Superior Court entered judgment in defendants' favor and awarded statutory attorney fees. Plaintiffs appealed and appeals were consolidated. The Second District Court of Appeal affirmed in part and reversed in part. Plaintiffs' petition for review was granted. The Supreme Court reversed and remanded for determination of whether residents brought or maintained suit without foundation, as necessary to support award of attorney fees to defendants under Act.

On remand, the Court of Appeal held that:

- Findings that residents had improper motive and outside funding did not establish their claims lacked foundation;
- Factual foundation existed for claim that PAC was misdesignated as general purpose committee;
- Factual foundation existed for claim that PAC was controlled by candidates;
- Claims had legal foundation;
- Defendants did not advance important rights affecting public interest, as necessary for private attorney general fee award; and
- Defendants did not confer benefit upon general public or large class.

EMINENT DOMAIN - FEDERAL

Etchegoinberry v. United States

United States Court of Federal Claims - May 19, 2023 - Fed.Cl. - 2023 WL 3574352

Landowners filed class action against United States, claiming that failure of Bureau of Reclamation, Department of Interior (DOI), to comply with statutory obligation, under San Luis Act, to provide irrigation drainage for owners' farmlands in water district resulted in gradual physical taking of property without just compensation.

Government moved to dismiss for failure to state claim.

The Court of Federal Claims held that takings claims were time barred.

Landowners' takings claims for just compensation, based on Bureau of Reclamation's failure to provide drainage for water district and owners' irrigated and drainage-impaired farmland within district, accrued, under six-year statute of limitations for claims against United States under Tucker Act, when landowners should have been aware that their claims had stabilized given numerous actions and decisions by government and extensive litigation history over several decades regarding government's failure to provide solution to drainage problem that should have alerted owners as to permanency of alleged taking and ended any justifiable uncertainty they had about accrual of their claims.

NEGLIGENCE - GEORGIA

Mercy Housing Georgia III, L.P. v. Kaapa

Court of Appeals of Georgia - May 30, 2023 - S.E.2d - 2023 WL 3710032

Son of elderly tenant in section 8 housing filed a wrongful death, negligence, and negligence per se action against owners and managers of apartment complex after complex failed to provide tenant with an emergency call device, in compliance with the Department of Housing and Urban

Development (HUD) regulations, resulting in tenant being unable to call for assistance after he had a stroke, causing a delay in tenant obtaining treatment and tenant's eventual death.

Son filed a motion for summary judgment on issue of negligence per se, and defendants moved for summary judgment on the issues of causation, punitive damages, and owner's status as a defendant. The State Court granted son partial summary judgment and denied defendants' motions for summary judgment. Defendants appealed.

The Court of Appeals held that:

- Trial court's admission of expert testimony from property manager was not an abuse of discretion;
- Owners and managers of apartment complex failed to provide tenant with an emergency call device, in compliance with HUD regulations, and thus were negligent per se; and
- Genuine issue of material fact existed as to whether the lack of an emergency call system actually delayed elder tenant's rescue and treatment following a stroke.

BALLOT INITIATIVE - MAINE

Jortner v. Secretary of State

Supreme Judicial Court of Maine - April 10, 2023 - A.3d - 2023 WL 2856124 - 2023 ME 25

Citizens filed petition for judicial review of decision of the Secretary of State that determined the wording of a ballot question for citizen-initiated legislation that would create a non-profit electric utility, challenging use of the term "quasi-governmental power company" to describe the proposed utility and requesting substitution with the term "consumer-owned transmission and distribution utility."

The Superior Court vacated Secretary's decision and remanded matter to Secretary to revise the wording of the ballot question. Secretary appealed.

The Supreme Judicial Court held that use of term "quasi-governmental" in describing the proposed utility resulted in the question being not understandable to a reasonable voter reading the question for the first time, and thus ballot question did not satisfy statutory standard.

Use of term "quasi-governmental" in describing proposed non-profit electric utility as a "quasi-governmental power company," in ballot question for citizen-initiated legislation that would create a non-profit electric utility, resulted in the question being not understandable to a reasonable voter reading the question for the first time, and thus ballot question did not satisfy statutory standard, although some features of the new utility would be governmental in nature; term "quasi-governmental" did not appear in the proposed legislation and did not have a clear dictionary definition, the prefix "quasi-" had multiple meanings, and there was no existing statutory definition of the term.

BALLOT INITIATIVE - MINNESOTA

Kranz v. City of Bloomington

Supreme Court of Minnesota - May 24, 2023 - N.W.2d - 2023 WL 3606470

Residents of home-rule charter city whose proposed city-charter amendment to repeal the use of

ranked-choice voting to elect candidates to municipal office was rejected by city council because one of its four sections was manifestly unconstitutional filed petition in the district court for correction of ballot error, seeking declaratory and injunctive relief to, inter alia, require city to sever the section deemed unconstitutional and to submit remainder of amendment to the voters.

The District Court denied the petition. Residents appealed, and their petition for accelerated review was granted.

The Supreme Court held that assuming without deciding that courts have the power under the Minnesota constitution to sever unlawful portions of a proposed city-charter amendment, the proposed amendment in the present case failed to satisfy the high bar required to establish that severance was appropriate.

Assuming without deciding that, under state constitution, Minnesota courts may sever unlawful portions of a proposed city-charter amendment pre-enactment, that is, after signature collection but before presentation to voters, unconstitutional provision of residents' proposed amendment to repeal use of ranked-choice voting, which required a supermajority of voters to approve such voting in future elections, did not satisfy the high bar required for severance; although other parts of amendment would effectively repeal ranked-choice voting even without the unconstitutional provision, amendment's purpose was twofold, both to repeal ranked-choice voting and, through the unconstitutional provision, to prevent its future reinstatement, so the subject provision provided a substantial portion of the efficacy or strength of the proposal, and it could not be ascertained whether signers of petition would have wanted remainder of amendment to proceed without the unconstitutional portion.

BOND VALIDATION - OKLAHOMA

Pike Off OTA, Inc. v. Oklahoma Turnpike Authority

Supreme Court of Oklahoma - May 23, 2023 - P.3d - 2023 WL 3592641 - 2023 OK 57

Plaintiffs brought action against the Oklahoma Turnpike Authority (OTA) for injunctive and/or mandamus relief, challenging the OTA's authority to construct three proposed turnpikes.

The District Court granted the OTA's motion to dismiss. Plaintiffs appealed, and the Supreme Court retained the case.

The Supreme Court held that:

- Oklahoma Constitution permitted Legislature to enact statute conferring exclusive original jurisdiction upon Supreme Court to hear and determine application for bond validation to construct and operate turnpikes;
- Plaintiffs' claims fell within the Supreme Court's exclusive jurisdiction; and
- Plaintiffs not have a clear legal right to the mandatory injunctive and/or mandamus relief they sought.

The Oklahoma Constitution permitted the Legislature to enact statute conferring exclusive original jurisdiction upon the Supreme Court to hear and determine an application for bond validation to construct and operate turnpikes, and thus, the statute was constitutional, notwithstanding provision of the Constitution that gave all district courts unlimited original jurisdiction, since the district courts' jurisdiction was limited where otherwise provided in the Constitution, and the Constitution expressly empowered the Supreme Court to exercise jurisdiction conferred by statute, including the

jurisdiction conferred upon it in the turnpike statute.

Claims brought in action for injunctive and/or mandamus relief, which alleged the Oklahoma Turnpike Authority (OTA) did not have statutory authorization to construct proposed turnpikes and that OTA exceeded its statutory authorization by seeking an additional bond issue to complete a turnpike, fell within the Supreme Court's exclusive jurisdiction, and the Court gained exclusive jurisdiction to consider the questions raised by the action when the OTA filed its own application with the Court to validate the proposed bonds for these turnpikes.

Plaintiffs who brought action challenging Oklahoma Turnpike Authority's (OTA) authority to construct three proposed turnpikes did not have a clear legal right to the mandatory injunctive and/or mandamus relief they sought compelling OTA to perform, comply with, and abide by all legal duties, obligations, and due process rights of plaintiffs and other Oklahoma citizens; plaintiffs failed to specify any legal duty or obligation that OTA would violate at some point in the future, and their claim demanding OTA comply with some undefined laws or statutory duties was contingent upon whether Supreme Court approved OTA's proposed bond issue for these turnpikes, and so the claim was dependent upon the Court exercising its exclusive jurisdiction in OTA's separate bond validation proceeding.

EMINENT DOMAIN - TEXAS

City of Webster v. Moto Kobayashi Trust

Court of Appeals of Texas, Houston (1st Dist.) - May 9, 2023 - S.W.3d - 2023 WL 3311470

Owners of unoccupied, commercial buildings in city brought inverse condemnation action against city, alleging that city ordinance requiring the removal or demolition of their properties as a public nuisance abatement measure was an unconstitutional taking.

The 152nd District Court, Harris County, denied city's plea to the jurisdiction, and city appealed.

The Court of Appeals held that district court in Harris County lacked jurisdiction over inverse condemnation claims.

District court in Harris County lacked jurisdiction over inverse condemnation claims brought against city by owners of unoccupied, commercial buildings, alleging that city ordinance requiring the removal or demolition of their properties as a public nuisance abatement measure was an unconstitutional taking; legislature had mandated that inverse condemnation claims in Harris County be brought in the civil courts at law.

EMINENT DOMAIN - CALIFORNIA

Shenson v. County of Contra Costa

Court of Appeal, First District, Division 2, California - March 30, 2023 - 89 Cal.App.5th 1144 - 306 Cal.Rptr.3d 584 - 2023 Daily Journal D.A.R. 2797

Owners of creekside properties sued county and flood control district for inverse condemnation and parallel tort causes of action after drainage improvements failed and their properties were damaged by erosion and subsidence.

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

The Court of Appeal held that:

- County's requirement that developer make drainage-related improvements and offer to dedicate an easement as conditions of subdivision approval did not convert spillway into a public drainage system;
- Fees collected by flood control district did not establish that subdivision's drainage improvements were incorporated into a public drainage system;
- Failure of defendants to require mitigation by upstream property owners did not establish that subdivision's drainage improvements were a public work; and
- Any error in trial court's exclusion of expert's statement regarding county's custom and practice was harmless.

County's requirement that private developer make drainage-related improvements and offer to dedicate an easement as conditions of approval of subdivision did not convert spillway constructed by developer into a public drainage system, as alleged in inverse condemnation action brought by subdivision property owners, where county never expressly accepted the easement offer and never maintained or repaired the spillway or installed any improvements.

The fact that drainage improvements required for county approval of subdivision served some off-subdivision needs did not convert the improvements into public works in inverse condemnation action brought by subdivision property owners; county ordinance requiring easements for off-subdivision drainage merely recognized that waters from landlocked properties must at times be conveyed through drainage improvements on other properties to reach a natural watercourse.

County's failure to act on developer's offer of dedication of subdivision's drainage improvements did not convert the improvements into public works in inverse condemnation action brought by subdivision property owners; the county's acceptance of the offer only for the purpose of recording the deed was not an equivocal acceptance of the offer for the purpose it was offered, i.e., to access the improvements, and county made no effort to maintain or repair the improvements.

County's requirement that subdivision developer install drainage improvements and county's acceptance "for recording only" of offer of dedication of the improvements did not create an implied acceptance of the drainage easements as public works in inverse condemnation action brought by subdivision property owners; county was not involved in the construction of the improvements and did not perform maintenance or repair work on them.

Fees collected from subdivision property owners by flood control district were not evidence that subdivision's drainage improvements were incorporated into a public drainage system in inverse condemnation action brought by owners against district and county; fees were collected pursuant to a drainage fee ordinance to be placed in a fund intended to cover a local match to a proposed federal flood-control project that was never built.

ATTORNEYS' FEES - CALIFORNIA

Kennedy Commission v. City of Huntington Beach

Court of Appeal, Fourth District, Division 2, California - May 11, 2023 - Cal.Rptr.3d - 2023 WL 3372378

Objector filed petition for alternative writ of mandate and complaint for declaratory and injunctive

relief against city and city council, alleging that amended housing plan was inconsistent with city's housing element, which identified sufficient sites to accommodate city's regional housing needs allocation (RHNA) of low-income housing.

Action was transferred from the Superior Court, Orange County. The Superior Court, Los Angeles County granted petition for writ of mandate and, later, the Superior Court awarded attorney fees to objector. City and city council appealed each decision. The Court of Appeal reversed, granting of petition for writ of mandate and reversed attorney fees award. On remand, objector filed first amended petition for writ of mandate and declaratory relief. After parties stipulated to dismissal of first amended petition, objector filed motion for attorney fees. The Superior Court granted attorney fees in amount of $3,531,201.10. City and city council appealed.

The Court of Appeal held that:

- Objector satisfied causation element to recover attorney fees under catalyst theory pursuant to statute allowing award of fees in action resulting in enforcement of important right affecting public interest;
- Action was not frivolous, as supported award of attorney fees;
- Trial court acted within its discretion in finding that objector reasonably attempted to settle its case before suing;
- Objector satisfied prong requiring enforcement of important right;
- Action conferred a significant benefit on public;
- Sufficient evidence supported trial court's finding that 4,165.7 hours spent litigating case was reasonable; and
- Trial court acted within its discretion when it applied multiplier of 1.4 to lodestar amount.

Objector's persistence in requiring city to meet city's regional housing needs allocation (RHNA) of low-income housing was substantial factor in city's adoption of second housing element, which complied with RHNA, and thus objector satisfied causation element to recover attorney fees under catalyst theory pursuant to statute allowing award of fees in action resulting in enforcement of important right affecting public interest, in action seeking writ of mandate and declaratory relief regarding amended housing plan; objector's litigation caused Legislature to change law to require consistency by charter cities and prompted Department of Housing and Community Development (HCD) to file suit against city, and objector achieved its primary objective of city complying with RHNA.

ANNEXATION - ILLINOIS

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

Supreme Court of Illinois - May 18, 2023 - N.E.3d - 2023 IL 1286122023 WL 3516672

Village brought action against purported successor owners of original landowner, alleging they breached recorded annexation agreement for 114-acre residential subdivision by refusing its request for a letter of credit, in amount proportionate to the number of their lots, to secure completion of roads in the subdivision, and sought damages or, in the alternative, injunctive relief in form of specific performance.

The Circuit Court granted defendants' motion to dismiss on the pleadings and awarded attorney fees in their favor. Village appealed. The Appellate Court reversed in part, vacated in part, and remanded. Defendants' petition for leave to appeal was allowed.

The Supreme Court held that:

- Village's notice of appeal was sufficient to confer appellate jurisdiction over its challenge to the circuit court's award of attorney fees and the circuit court's dismissal of village's third amended complaint, on which the circuit court based its award of attorney fees;
- Defendants were "successor owners of record of the land" subject to the annexation agreement, even though they owned only a portion of the original configuration;
- The annexation agreement was binding on defendants; and
- Because the Municipal Code expressly authorized specific performance as a remedy, village's requests for specific performance remained viable despite the availability of other avenues of relief.

LIABILITY - IOWA

Sutton v. Council Bluffs Water Works

Supreme Court of Iowa - May 19, 2023 - N.W.2d - 2023 WL 3555502

Homeowners brought action against city for strict liability and negligence, alleging that underground water main broke and that this water caused their house to settle, resulting in damage to its foundation, interior walls, garage floors, and doors.

The District Court denied city's motion to dismiss the strict liability claim, and city sought interlocutory appeal.

The Supreme Court held that:

- Municipal Tort Claims Act did not bar homeowners' strict liability claim against city, and
- Municipal Tort Claims Act's language defining "tort" as every civil wrong which results in wrongful death or injury embraces strict liability claims.

Municipal Tort Claims Act did not bar homeowners' strict liability claim against city for damages allegedly caused when underground water main broke and the water caused their house to settle, resulting in damage to its foundation, interior walls, garage floors, and doors; strict liability claims were "torts" for which parties could pursue claims under the Act, and sections of Act granting immunity to municipalities for tort claims based on claims of negligent design and construction of public facilities or failure to upgrade public facilities were not applicable since homeowners alleged no negligence in design and made no allegation of any failure by city to upgrade, improve, or alter any part of water distribution system to a new, changed, or altered design standard.

Municipal Tort Claims Act section granting immunity to municipalities for tort claims based on claims of failure to upgrade public improvements or facilities is not limited to negligence, and it bars claims based on an alleged failure to upgrade existing public facilities when a new-and-improved design standard emerges.

EMINENT DOMAIN - MASSACHUSETTS

Smiley First, LLC v. Department of Transportation

Supreme Judicial Court of Massachusetts, Suffolk - May 23, 2023 - N.E.3d - 2023 WL 3589087

Landowner brought action against Massachusetts Department of Transportation (MassDOT), seeking declaratory and equitable relief as to MassDOT's contention that its purported taking of landowner's property merely confirmed rights that MassDOT already held under previous taking.

On cross-motions for summary judgment, the Superior Court granted summary judgment to MassDOT. Landowner appealed to Appeals Court, and the Supreme Judicial Court transferred case on Supreme Judicial Court's own motion.

The Supreme Judicial Court held that:

- Whether easement has been established by eminent domain or granted privately, as general rule, doubts as to extent of restriction in easement should be resolved in favor of freedom of land from servitude, and
- Easement condemned by MassDOT's predecessor-in-interest for relocating railroad facilities displaced by road construction project did not encompass project for construction of test track and 6,000 square foot building for storage of railway vehicles on burdened land, and thus such project constituted an additional taking for which compensation was required.

Whether easement has been established by eminent domain or granted privately, as general rule, doubts as to extent of restriction in easement should be resolved in favor of freedom of land from servitude.

Easement condemned by Department of Public Works, the predecessor-in-interest to Massachusetts Department of Transportation (MassDOT), for relocating railroad facilities displaced by road construction project did not encompass project for construction of test track and 6,000 square foot building for storage of railway vehicles on burdened land, and thus such project constituted an additional taking for which compensation was required; easement was limited in space and time by air rights reserved to fee holder, providing for railroad to relocate a single track to property and thereafter fixing scope of easement to the right of way occupied by track and vertical dimension above it, and overall purpose set out in easement was to relocate the facilities being displaced.

License agreement entered into between Commonwealth and Department of Public Works, the predecessor-in-interest to Massachusetts Department of Transportation (MassDOT), which permitted easement condemned by Department for relocating railroad facilities displaced by road construction project to be used by railroad for ancillary activities that constituted railroad purposes, could not unilaterally expand scope of permissible use of the burdened land beyond what was stated in the taking.

Where a right of way, or other easement, is granted by deed without fixed and defined limits, the practical location and use of such way or easement by the grantee under the deed, acquiesced in by the grantor at the time of the grant and for a long time subsequent thereto, operate as an assignment of the right, and are deemed to be that which was intended to be conveyed by the deed, and are the same, in legal effect, as if it had been fully described by the terms of the grant.

Easement condemned by Department of Public Works, the predecessor-in-interest to Massachusetts Department of Transportation (MassDOT), for relocating railroad facilities displaced by road construction project, providing for railroad to relocate a single track to property and thereafter fixing scope of easement to the right of way occupied by track and vertical dimension above it, did not give railroad a right to occupy the entire parcel of burdened land in perpetuity; rather, railroad only possessed a right to place its tracks and facilities in the place of its choosing on the burdened land.

EMINENT DOMAIN - PENNSYLVANIA

In re General Municipal Authority of City of Nanticoke

Commonwealth Court of Pennsylvania - March 27, 2023 - A.3d - 2023 WL 2637071

Condemnees brought separate preliminary objections to amended declarations of taking of their respective properties by city's general municipal authority, which declarations were for construction of multi-use building.

The Court of Common Pleas overruled condemnees' objections and, after condemnees filed notices of appeal, directed condemnees to file concise statements of errors. After trial judge's retirement, Tina Polachek Gartley, J., issued supporting opinion.

The Commonwealth Court held that:

- Provisions of the Municipality Authorities Act (MAA) allowing takings for partial public uses, uses not exclusively designated as public or non-public, and uses for industrial development did not facially violate federal or state constitutional protections;
- Trial court allowed amendment of declarations after condemnees brought preliminary objections, and thus, amended declarations were not improperly filed;
- Absent any prejudice resulting from listing of incorrect location for examination of minutes of meeting by authority authorizing declarations, declarations were validly authorized;
- Any inadequacy in description of condemnee's property in original declaration was rectified by amended declaration; but
- Remand was required for trial court to hold de novo hearing and to make findings of fact and conclusions of law.

OPEN MEETINGS - VIRGINIA

Gloss v. Wheeler

Supreme Court of Virginia - May 18, 2023 - S.E.2d - 2023 WL 3513381

County residents filed a petition for mandamus and injunction against members of the county board of supervisors, alleging violation of the Virginia Freedom of Information Act (VFOIA).

The Prince William Circuit Court granted defendants' motion to strike made at the conclusion of residents' evidence at trial, and denied residents' motion for reconsideration. Residents appealed.

The Supreme Court held that meeting of county's citizens advisory board and a majority of supervisors was subject to the open meeting provisions of VFOIA and did not fall within an exception to the definition of "meeting."

In action brought by county residents against members of the county board of supervisors for alleged violation of the Virginia Freedom of Information Act (VFOIA), meeting of county's citizens advisory board and a majority of supervisors did not fall outside the VFOIA definition of "meeting" based on participants' failure to discuss public business, where the meeting was called specifically to discuss matters of county policy related to riots occurring in the county and police response to those riots, such discussions occurred as planned, the same issues were placed on county board's agenda for a subsequent emergency meeting, and sufficient evidence supported a conclusion that county business was transacted regarding the contents of a requested law enforcement report about

the riots.

MUNICIPAL CORPORATIONS - WASHINGTON

Messersmith v. Town of Rockford

Court of Appeals of Washington, Division 3 - May 18, 2023 - P.3d - 2023 WL 3514210

Property owners brought action against town, seeking to quiet title to strips of land that fell within platted roads and alleyway.

The Superior Court granted property owners' motion for summary judgment. Town appealed.

The Court of Appeals held that platted roads and alleyway were not subject to the nonuser statute and thus did not revert to property owners.

Platted roads and alleyway which were never developed were not subject to the nonuser statute and thus did not revert to property owners in quiet title action against town, where the plain language of the nonuser statute as it existed at relevant times limited its application to "county" roads and ceased to apply to the roads on property owners' land when the property was annexed into and became part of the town one year after having been platted.

EMINENT DOMAIN - FEDERAL

Angelly v. United States

United States Court of Federal Claims - May 11, 2023 - Fed.Cl. - 2023 WL 3398155

Owners of land and other property along two rivers filed suit against United States, seeking just compensation for alleged physical taking of flowage easements by Army Corps of Engineers' construction of river training structures designed to deepen and provide better alignment for rivers' navigational channels thereby causing atypical and unseasonal flooding on their land. Government moved to dismiss for lack of subject matter jurisdiction and for failure to state claim.

Holdings:

- Takings claims were not time barred, and
- Landowners' complaint sufficiently stated takings claims.

Landowners' allegations of atypical and unseasonal flooding of their property, which would not have occurred absent Corps of Engineers' construction of river training structures for navigational channels, would be accepted as true on government's motion to dismiss takings claims for lack of subject matter jurisdiction, so Court of Federal Claims would presume owners rarely experienced flooding outside of typical flooding season until specified years; government failed to controvert owners' allegations and instead provided evidentiary support for assertion that flooding occurred regularly for many years, but nowhere in its motion or attached exhibits presented evidence calling jurisdictional facts into question contrary to owners' allegations of new atypical flooding during growing season.

When the government decides to forego the opportunity to define precisely when a Fifth Amendment taking occurs, and instead leaves the taking to physical events, it is thereby putting on the owner the

onus of determining the decisive moment when the fact of the taking could no longer be in controversy; these circumstances would allow the government to place an unfair burden on the property owner, so strict application of accrual principles is discouraged in cases where the taking is the result of a gradual process.

Under the "stabilization doctrine," the statute of limitations does not bar an action under the Tucker Act for a Fifth Amendment taking by flooding when it is uncertain at what stage in the flooding operation the land has become appropriated for public use; rather, stabilization occurs when it becomes clear that the gradual process set into motion by the government has effected a permanent taking, not when the process has ceased or when the entire extent of the damage is determined.

During the time when it is uncertain whether the gradual process will result in a permanent taking, under the Fifth Amendment, the plaintiff need not sue the government; however, once it is clear that the process has resulted in a permanent taking and the extent of the damage is reasonably foreseeable, the claim accrues and the statute of limitations begins to run.

Under stabilization doctrine, landowners' claims seeking just compensation under Tucker Act, for atypical and unseasonal flooding of their property due to Army Corps of Engineers' construction of river training structures for navigational channels, accrued under six-year statute of limitations for takings claims, on date that flooding stabilized when it became clearly apparent by passage of time that such atypical and unseasonable intermittent flooding was of permanent nature.

Landowners claiming that Army Corps of Engineers effected taking of their property, by atypical and unseasonal flooding due to construction of river training structures for navigational channels, were not required to pinpoint precise action constituting conduct that government could not engage in without paying just compensation, in order to state Fifth Amendment takings claim, since pinpointing requirement for regulatory taking claim did not apply to landowners' physical takings case, and even if pinpointing requirement applied, owners sufficiently alleged their claims with enough specificity to pinpoint what government actions allegedly led to taking of their properties.

Landowners claiming that Army Corps of Engineers effected taking of their property, by atypical and unseasonal flooding due to construction of river training structures for navigational channels, were not required to affirmatively and literally plead that alleged flooding fell outside of United States' navigational servitude, in order to state Fifth Amendment takings claim, since owners' properties did not sit in riverbed, and it was not location of river training other structures that was relevant, but rather, location and permanence of effect of government action causing flooding.

Court of Federal Claims conducts a two-part test to distinguish torts from takings: (1) a property loss compensable as a taking only results when the government intends to invade a protected property interest or the asserted invasion is the direct, natural, or probable result of an authorized activity and not the incidental or consequential injury inflicted by the action, and (2) the nature and magnitude of the government action must be considered.

Landowners seeking just compensation for atypical and unseasonal flooding of their properties due to Army Corps of Engineers' construction of river training structures for navigational channels stated claim for Fifth Amendment taking, not claim sounding in tort, since owners alleged they could establish their takings claims by proving that flooding allegedly invading their properties was direct, natural, and probable result of Corps' actions to maintain navigable river channel.

n analyzing whether the invasion of owners' property was the direct, natural, or probable result of the government action, as required to state a Fifth Amendment takings claim, Court of Federal Claims must look at whether the result was predictable; in other words, the injury must be the

foreseeable result of the action.

SECURITIES - CALIFORNIA

Quinn v. LPL Financial LLC

Court of Appeal, Second District, Division 8, California - May 10, 2023 - Cal.Rptr.3d - 2023 WL 3334992

Registered securities broker-dealers and investment advisers brought action alleging that brokerage firm misclassified them as independent contractors, rather than employees, and failed to reimburse for business expenses and made unlawful wage deductions.

The Superior Court granted firm's motion for summary adjudication. Plaintiffs appealed.

The Court of Appeal held that:

- Statute creating different test for determining whether broker-dealers and advisors were employees did not violate their equal protection rights, and
- Retroactive application of the statute did not violate due process.

Statute stating that *Borello*, 48 Cal.3d 341, 256 Cal.Rptr. 543, 769 P.2d 399, rather than *Dynamex*, 4 Cal.5th 903, 232 Cal.Rptr.3d 1, 416 P.3d 1, test for determining status as employee or independent contractor applied to registered securities broker-dealers and investment advisers had rational basis and did not violate equal protection rights of advisors and broker-dealers, even if the exemption resulted from lobbying efforts; legislature rationally could believe such professionals, who asked people to trust them with wealth and finances, had more skill and bargaining power than the average worker and therefore were less vulnerable to exploitation by misclassification as independent contractors.

Registered securities broker-dealers and investment advisers had no vested right in a particular test for determining whether they were employees or independent contractors, and, thus, retroactive application of statute stating that *Borello*, 48 Cal.3d 341, 256 Cal.Rptr. 543, 769 P.2d 399, rather than *Dynamex*, 4 Cal.5th 903, 232 Cal.Rptr.3d 1, 416 P.3d 1, test for determining status as employee or independent contractor applied to registered securities broker-dealers and investment advisers did not violate due process.

MUNICIPAL GOVERANCE - CALIFORNIA

Childhelp, Inc. v. City of Los Angeles

Court of Appeal, Second District, Division 7, California - April 17, 2023 - Cal.Rptr.3d - 2023 WL 3274645

Nonprofit tenant brought action against city landlord for declaratory relief, writ of mandate, and promissory estoppel after city declined to transfer property to tenant in exchange for tenant's agreement to continue using the property to provide services for victims of child abuse.

City filed unlawful detainer action, and actions were consolidated. The Superior Court granted city's motions for summary adjudication on promissory estoppel cause of action, sustained city's demurrer without leave to amend to tenant's causes of action for declaratory relief and writ of mandate, and granted summary judgment to city on unlawful detainer complaint. Tenant appealed.

The Court of Appeal held that:

- City council resolution directing various city departments and officials to prepare and execute the necessary approvals and agreements was not an ordinance or contract which required city to transfer the property;
- Tasks described in city council resolution were discretionary rather than ministerial; and
- City could not be promissorily estopped from entering into any contract which violated city charter.

City council resolution directing various city departments and officials to prepare and execute the necessary approvals and agreements to convey property to nonprofit tenant, in exchange for tenant's agreement to continue using the property to provide services for victims of child abuse, was not an ordinance or contract which required city to transfer the property; city did not comply with the requirements in the city charter and administrative code for contracting and selling real property, and there was no ordinance prescribing the terms and conditions of the sale or a written contract signed by the mayor or other authorized personnel and approved by the city attorney.

Tasks described in city council resolution directing various city departments and officials to prepare and execute the necessary approvals and agreements to convey property to nonprofit tenant, in exchange for tenant's agreement to continue using the property to provide services for victims of child abuse, were discretionary rather than ministerial, and thus tenant was not entitled to writ of mandate compelling city to transfer the property; although the resolution directed certain City officers and departments to take certain actions, it did not specify how these actions should be carried out, and there was no contract, or even agreement on key terms, at the time the resolution was passed.

City could not be promissorily estopped from entering into any contract to convey premises to nonprofit tenant, in exchange for tenant's agreement to continue using the property to provide services for victims of child abuse, which violated city charter, even if city council had passed resolution directing various city departments and officials to prepare and execute the necessary approvals and agreements and had induced tenant not to look for other, affordable properties; the reasonable value of the property exceeded $5,000, city attorney had not approved the form of any agreement to sell the property, and city had not passed an ordinance or entered into a written contract to sell the property to tenant.

LIABILITY - IOWA

White v. Harkrider

Supreme Court of Iowa - May 12, 2023 - N.W.2d - 2023 WL 3395946

Arrestee's spouse brought action against city, county, police officer, and deputy sheriff, alleging state constitutional tort claims, as well as claims for intentional infliction of emotional distress, trespass, and assault, arising out of warrantless arrest which occurred at their residence.

The District Court granted in part and denied in part defendants' motion to dismiss for failure to

state claim. Application of spouse and cross-application of defendants for interlocutory appeal was granted.

The Supreme Court held that:

- Defendants' alleged conduct in effecting warrantless arrest was not outrageous, precluding claim for intentional infliction of emotional distress;
- Officers did not commit trespass when they entered spouse's property; but
- Spouse sufficiently stated claim for assault.

BONDS - MISSOURI

Krupka v. Stifel Nicolaus & Co., Inc.

United States District Court, E.D. Missouri, Eastern Division - May 11, 2023 - Slip Copy - 2023 WL 3376356

California Plaintiffs filed a putative class action in Missouri state court alleging that Missouri Defendant Stifel Nicolaus made negligent misrepresentations and was negligent in its underwriting of municipal bonds issued by the Illinois Finance Authority (IFA) to fund low-income housing developments in Chicago.

In January 2023, Defendant removed the case to the District Court of Missouri under the Class Action Fairness Act (CAFA). Plaintiffs moved to remand the case, arguing that their claims fell under CAFA's jurisdictional exception for actions related to securities.

The District Court held that:

- CAFA confers original federal jurisdiction when the putative class has over 100 members, the amount in controversy exceeds $5 million, and the parties are minimally diverse in citizenship;
- CAFA does not apply to "any class action that solely involves a claim that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security;"
- The party seeking remand bears the burden of proving a CAFA exception, and any doubt is resolved against remand;
- In cases where remand was granted, the plaintiffs sued in their capacity as holders alleging breach of fiduciary duties owed by the defendant trustees or corporate board members and related claims predicated on the breach;
- By contrast, in cases where plaintiffs have sued as purchasers alleging misrepresentation in the sale of securities, courts have denied remand; and
- Remand was not warranted under the CAFA securities exception.

"Here, Plaintiffs have not sued the trustee and do not plead the existence of a fiduciary relationship on which their claims depend. Rather, they allege injury from Stifel's negligent due diligence and resulting misrepresentations in the offering memorandum provided to potential investors as purchasers. Applying the foregoing caselaw to this set of facts, the Court concludes that remand is not warranted under the CAFA securities exception."

"The Court acknowledges Plaintiffs' argument that a straightforward reading of the statute could be construed to encompass their claims, given its broad ;related to' language. But while the Eighth Circuit has yet to opine on this issue, the Circuit has instructed in a similar context that courts are to interpret CAFA jurisdiction broadly and exceptions narrowly, with any doubt resolved against

remand."

"Mindful of this directive and guided by the reasoning of other Circuit and district courts, the Court declines to extend the securities exception to cover claims involving the performance of non-fiduciary functions vis-à-vis potential investors based on an alleged duty of care not grounded in the securities themselves. Rather, this case appears to present the type of 'interstate class action of national importance' that Congress intended to place in federal court."

ZONING & PLANNING - NEW HAMPSHIRE

Anthony v. Town of Plaistow

Supreme Court of New Hampshire - May 16, 2023 - A.3d - 2023 WL 3471177

Landowners sought review of town planning board's granting of site-plan approval for the development and consolidation of two neighboring lots in town's commercial zoning district.

The Superior Court affirmed. Landowners appealed.

The Supreme Court held that:

- Landowners could not raise argument that board erred when it determined that use of lots complied with zoning ordinance;
- Board adequately considered the potential for regional impact; and
- Board acted reasonably and lawfully in approving site plan.

To the extent that landowners were seeking appellate review of trial court's judgment affirming zoning board of appeal's (ZBA) decision that it lacked jurisdiction to consider landowners' challenge to decision that a neighboring landowner's proposed use of lots complied with zoning ordinance, that issue was not properly before the Supreme Court; landowners did not appeal trial court's judgment before it became final, which meant that any appeal was deemed waived.

When appealing from superior court's affirmance of town planning board's granting of site-plan approval for the development and consolidation of two lots in town's commercial zoning district, neighboring landowners could not raise argument that board erred when it determined that use of lots complied with zoning ordinance; neighboring landowners had already appealed to have zoning board of appeals (ZBA) review the compliance determination, but the ZBA had dismissed that appeal.

Planning board adequately considered the potential for regional impact when approving site plan for the development and consolidation of two lots in town's commercial zoning district; at the public hearing, town's planning director discussed regional impact issues and testified that in his 16 years of experience, he had never worked on a commercial development that had caused any regional impact, and board was also aware that the project would not impact ground or surface water, that the site was located in the center of the town, and that the project would minimally affect traffic in the area.

Town's planning board acted reasonably and lawfully in approving site plan for the development and consolidation of two lots in town's commercial zoning district; board subjected application to a rigorous review process, including numerous public hearings and a site visit, and at each stage of

the process, abutters' concerns about water quality, wetlands preservation, pollution, noise, and buffering were addressed by applicant or board.

EMINENT DOMAIN - SOUTH CAROLINA

Braden's Folly, LLC v. City of Folly Beach

Supreme Court of South Carolina - April 5, 2023 - S.E.2d - 2023 WL 2778717

Owner of two small, contiguous, developed coastal lots brought action for regulatory taking against city, alleging that city amended ordinance to require certain contiguous properties under common ownership, including owner's properties, to be merged into a single, larger property, and that merger ordinance interfered with owner's investment-backed expectation.

Parties filed cross-motions for summary judgment. The Circuit Court granted owner's motion. City appealed.

The Supreme Court held that:

- Treatment-of-the-land factor weighed in favor of identifying relevant parcel as both lots combined;
- Physical-characteristics factor weighed in favor of identifying relevant parcel as both lots combined;
- Value-of-the-property factor weighed in favor of identifying relevant parcel as both lots combined;
- Economic impact of ordinance weighed heavily in favor of finding that ordinance did not amount to regulatory taking;
- Extent to which ordinance interfered with owner's investment-backed expectations did not weigh in favor of either party; and
- Character of ordinance weighed in favor of finding that ordinance did not amount to regulatory taking.

Treatment-of-the-land factor for defining relevant parcel for purposes of regulatory-taking claim brought by owner of two contiguous, beachfront lots, who challenged city ordinance requiring lots to be merged, weighed in favor of identifying relevant parcel as both lots combined, where lots were currently merged under state and local law, there were no physical or topographical boundaries that would have limited joint treatment or development of lots, lots had always been owned and sold as single unit and were even redeveloped by owner at same time, and due to city's zoning ordinances and dune-management ordinances, owner was prohibited from selling lots separately or from building separate homes on each should one of the existing homes be more than 50% destroyed.

Physical-characteristics factor for defining relevant parcel for purposes of regulatory-taking claim brought by owner of two contiguous lots, who challenged city ordinance requiring lots to be merged, weighed in favor of identifying relevant parcel as both lots combined, where lots were located on beach, which was quintessential example of area that was heavily regulated and likely to become subject to additional environmental regulations.

Value-of-the-property factor for defining relevant parcel for purposes of regulatory-taking claim brought by owner of two contiguous lots, who challenged city ordinance requiring lots to be merged, weighed in favor of identifying relevant parcel as both lots combined; any economic impact resulting from merger ordinance was mitigated by benefits of using property as integrated whole since, regardless of merger ordinance, one lot contained beachfront property that was restricted by city's dune-management ordinances, which prevented any redevelopment on lot if existing house was

destroyed by 50% or more, and thus merger of lots would allow owner to maintain beach house on other lot while simultaneously enjoying beach access from beachfront lot.

Economic impact of city ordinance requiring merger of property owner's two contiguous, beachfront lots weighed heavily in favor of finding that ordinance did not amount to regulatory taking, although owner claimed that if lots were sold separately, they were worth $508,000 more than if they were sold as single, merged lot, where $508,000 difference amounted to 23% reduction in value, which, while not insignificant, was far less than other reductions in value found constitutional by United States Supreme Court, owner remained able to rent out houses on each lot separately, with average gross receipts amounting to approximately $117,000 per year, and during pendency of lawsuit, buyer offered owner its full asking price of $2.55 million for both lots.

Extent to which city ordinance requiring merger of property owner's two contiguous, beachfront lots interfered with owner's investment-backed expectations did not weigh in favor of either party, for purposes of owner's regulatory-takings claim, although ordinance was enacted after owner redeveloped house on first lot and built new house on second lot, with plans to sell lots separately, where owner used lots for family vacations and as rental properties for several decades, owner delayed selling lots after redevelopment and made little to no effort to actually sell once lots were placed on market, lots were located in coastal area with dynamic, fragile environment, and size, shape, and orientation of lots provided objective indicia that owner's expectation of selling second lot was unreasonable.

Character of city ordinance requiring merger of property owner's two contiguous, beachfront lots weighed in favor of finding that ordinance did not amount to regulatory taking, where ordinance did not unfairly single out owner's lots, ordinance was reasonable land-use regulation enacted as part of coordinated effort to protect beach and surrounding land by preserving federal funding for beach renourishment, and although owner was slightly burdened by ordinance, it in turn would benefit greatly from the restrictions that were placed on others.

EMINENT DOMAIN - TEXAS

Hidalgo County Water Improvement District No. 3 v. Hidalgo County Irrigation District No. 1

Supreme Court of Texas - May 19, 2023 - S.W.3d - 2023 WL 3556685

Water improvement district brought action against county irrigation district for the condemnation of property to extend an underground irrigation pipeline.

Special commissioners were appointed and assessed damages to irrigation district. Irrigation district then filed plea to the jurisdiction, arguing it had governmental immunity from condemnation suit. The County Court at Law granted irrigation district's plea to the jurisdiction and dismissed for want of subject matter jurisdiction based on governmental immunity.

Water improvement district appealed. The Corpus Christi affirmed. Water improvement district petitioned for review.

The Supreme Court held that irrigation district did not have governmental immunity from condemnation suit.

Irrigation district did not have governmental immunity from water improvement district's eminent

domain proceeding for the condemnation of property to extend underground irrigation pipeline, considering the purpose that governmental immunity served, its nature, and development of immunity and eminent domain precedent; condemnation proceeding, being in rem in nature, did not threaten the public treasury, separation-of-powers underlying immunity were not threatened, recognizing immunity in condemnation proceedings would be contrary to legislative scheme that preferred pre-taking adjudication and would require the taking to occur first and consequences be sorted out later, and wholly immunizing irrigation district would undermine condemnation power the Legislature chose to grant condemnors to fulfill an identified public need.

IMMUNITY - CALIFORNIA

Stack v. City of Lemoore

Court of Appeal, Fifth District, California - May 3, 2023 - Cal.Rptr.3d - 2023 WL 3220918

After breaking his wrist when he tripped and fell on defect caused by uneven sidewalk, jogger sued city for general negligence and under the Government Claims Act for maintaining a dangerous condition of public property.

Following judgment of nonsuit on negligence cause of action, and denial of city's motions for a nonsuit and for a directed verdict on the cause of action for maintaining a dangerous condition, the Superior Court entered judgment on jury verdict in favor of jogger, awarding $90,000 in damages. City appealed.

The Court of Appeal held that:

- Height differential between slabs of sidewalk weighed heavily against finding that defect was trivial as a matter of law;
- Factor of the nature of the defective condition weighed against ruling that defect was trivial as a matter of law;
- Factor of the quality of the defect weighed against ruling that defect was trivial as a matter of law;
- Factor of obstruction of the defect weighed against ruling that defect was trivial as a matter of law; and
- Factors of weather and lighting conditions weighed in favor of ruling that defect was trivial as a matter of law.

IMMUNITY - IDAHO

Mattson v. Idaho Department of Health and Welfare

Supreme Court of Idaho, Boise - January 2023 Term - May 4, 2023 - P.3d - 2023 WL 3236922

Patient and her husband brought action against Idaho Department of Health and Welfare and certified physician assistant, alleging medical malpractice and failure to obtain informed consent.

The First Judicial District Court granted summary judgment in favor of defendants. Patient and husband appealed.

The Supreme Court held that:

- Idaho Tort Claims Act provided immunity for claims arising out of injuries to person receiving services from state mental health center, hospital, or similar facility;
- Provision of Idaho Tort Claims Act providing immunity for claims arising out of injury to "person receiving services from a mental health center, hospital or similar facility" included noncustodial outpatient services provided by state; and
- Fact issue existed as to whether defendants' alleged negligence amounted to "reckless, willful and wanton conduct."

TELECOM - LOUISIANA

City of Kenner v. Netflix, Inc.

Court of Appeal of Louisiana, Fifth Circuit - May 3, 2023 - So.3d - 2023 WL 3216197 - 22-466 (La.App. 5 Cir. 5/3/23)

City brought putative class action on behalf of itself and all of Louisiana's political subdivisions similarly situated against video streaming platforms seeking to collect franchise fees under Consumer Choice for Television Act (CCTA).

The District Court sustained platforms' exceptions of no cause of action and no right of action, and dismissed city's claims against platforms with prejudice. City appealed.

The Court of Appeal held that:

- City had no right of action to enforce CCTA provisions against platforms that did not hold franchise certificates, and
- Video streaming platforms were not "video service providers" within meaning of the CCTA, and thus platforms were not required to obtain certificates of franchise from Secretary of State, so that city had no cause of action against platforms.

City had no right of action to enforce provisions of Consumer Choice for Television Act (CCTA) requiring franchise certificate holders to pay franchise fees against video streaming platforms that did not hold franchise certificates; CCTA did not grant local governmental subdivisions right to enforce its provisions by filing suit against non-holders of certificates.

Video streaming platforms were not "video service providers" within the meaning of the Consumer Choice for Television Act (CCTA), in that the platforms did not operate or maintain their own wire line facilities in the public right of way, and thus platforms were not required to obtain certificates of franchise from Secretary of State under CCTA, so that city had no cause of action to seek franchise fees from platforms under CCTA; platforms' customers accessed video services through customers' own devices via an internet connection provided by a third-party internet service provider (ISP), and platforms were not ISPs.

MUNICIPAL ORDINANCE - NEW HAMPSHIRE

Town of Conway v. Kudrick

Supreme Court of New Hampshire - May 2, 2023 - A.3d - 2023 WL 3185072

Town brought action against property owner seeking judgment declaring that zoning ordinance prohibited short-term rentals in residential districts that were not owner-occupied.

Parties filed cross-motions for judgment on the pleadings. The Superior Court granted owner's motion and denied town's motion. Town appealed.

The Supreme Court held that non-occupying owner's use of property as a short-term rental was permitted under town's zoning ordinance.

Non-occupying owner's sole use of a property as a short-term rental satisfied definition of a "residential/dwelling unit" as required to be permitted in a residential zone under town zoning ordinance, notwithstanding town's contentions that ordinance was not intended to permit transient stays; ordinance applied to occupants living as a household, which required that the property be used for residential purposes regardless of duration, and the occupants of the short-term rental property exclusively engaged in residential activities.

BANKRUPTCY - PUERTO RICO

In re Financial Oversight and Management Board for Puerto Rico

United States District Court, D. Puerto Rico - May 3, 2023 - B.R. - 2023 WL 3213960

Financial Oversight and Management Board for Puerto Rico brought adversary proceeding to disallow bondholders' proofs of claim for amounts due pursuant to trust agreement with Puerto Rico Electric Power Authority (PREPA).

Bondholders counterclaimed for declaratory judgment. Numerous entities were allowed to intervene. Parties moved for summary judgment, and the United States District Court for the District of Puerto Rico granted the motions in part and denied in part.

Bondholders and official committee of unsecured creditors filed motions requesting certification of the court court's summary judgment order for immediate appeal.

The District Court held that:

- Immediate appeal of summary judgment order would not materially advance the progress of the case or proceeding;
- Summary judgment order did not involve a question of law as to which there was no controlling decision; and
- Summary judgment order did not involve a matter of public importance.

Immediate appeal of Bankruptcy Court's order granting in part and denying in part summary judgment motions would not materially advance the progress of the case or proceeding, as may warrant appeal of interlocutory orders under Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), in adversary proceeding brought by Financial Oversight and Management Board for Puerto Rico seeking to disallow bondholders' proofs of claim for amounts due pursuant to trust agreement with Puerto Rico Electric Power Authority (PREPA); appeals would most efficiently be handled comprehensively, based upon final orders, and simultaneously, rather than piecemeal.

Bankruptcy Court's order granting in part and denying in part summary judgment motions did not involve a question of law as to which there was no controlling decision, as may warrant immediate appeal of interlocutory orders under Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), in adversary proceeding brought by Financial Oversight and Management Board for Puerto Rico seeking to disallow bondholders' proofs of claim for amounts due pursuant to trust agreement with Puerto Rico Electric Power Authority (PREPA); holdings from summary judgment

order that parties sought to challenge were predominantly the application of settled law to interpretation of the trust agreement.

Bankruptcy Court's order granting in part and denying in part summary judgment motions did not involve a matter of public importance, as may warrant immediate appeal of interlocutory orders under Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), in adversary proceeding brought by Financial Oversight and Management Board for Puerto Rico seeking to disallow bondholders' proofs of claim for amounts due pursuant to trust agreement with Puerto Rico Electric Power Authority (PREPA); parties requesting certification of summary judgment order for immediate appeal did not support their conclusory assertions of public importance with respect to the advancement of jurisprudence, nor did they support their assertion that the decision would affect a large number of jobs or other vital interests in a community.

POLITICAL SUBDIVISIONS - VIRGINIA

Oreze Healthcare LLC v. Eastern Shore Community Services Board

Supreme Court of Virginia - May 4, 2023 - S.E.2d - 2023 WL 3237365

Operator of assisted living facility brought breach of lease action against Eastern Shore Community Services Board, a political subdivision of the Virginia Department of Behavioral Health and Developmental Services which had leased facility buildings and agreed to maintain them, alleging Board acted or failed to act with regard to the buildings , which had flooded.

After operator conveyed the property by general warranty deed to a third party, Board filed motion for summary judgment, alleging that deed had conveyed breach of lease claims. The Portsmouth Circuit Court granted the motion, and operator appealed.

The Supreme Court held that:

- Lease did not merge into warranty deed, and
- Breach of lease claim was a chose in action "owned" by operator that did not transfer simply by execution of warranty deed to third party.

Lease between operator of assisted living facility and Eastern Shore Community Services Board, which had leased facility buildings and agreed to maintain them, did not merge into warranty deed which operator conveyed to third-party; Board was neither grantor nor grantee, lease was not a collateral agreement made in connection with the sale, and lease terminated before the deed was executed.

Assisted living facility operator's breach of contract claim against Eastern Shore Community Services Board, which had leased facility buildings and agreed to maintain them, was a chose in action "owned" by operator that did not transfer simply by execution of warranty deed to third party; while operator could have assigned its right to the breach of contract claim to the third party, the deed conveying the property was silent as to that claim.

BALLOT INITIATIVE - VIRGINIA

Williams v. Legere

Court of Appeals of Virginia, Norfolk - May 2, 2023 - S.E.2d - 2023 WL 3183162

City resident who circulated petition for referendum on question of whether school board members were to be elected directly by city voters filed motion for emergency declaratory judgment, a temporary injunction, and writ of mandamus, seeking to enjoin city registrar and officials on city election board from enforcing statutory residency requirement for circulator and witnesses of referendum petition and challenging the constitutionality of the witness-circulator residency requirement.

The Circuit Court granted city's motion to intervene and dismiss, granted election board's demurrer, and denied resident's motions. Resident filed petition for review with the Supreme Court as to the denial of injunction, which was denied. Resident appealed the denials of the other requested relief to the Court of Appeals.

The Court of Appeals held that:

- As a matter of first impression, witness-circulator residency requirement significantly burdened resident's right to political speech secured by First Amendment, and thus strict scrutiny, rather than rational basis review, applied to resident's constitutional challenge to the requirement, and
- Exception to mootness doctrine for disputes capable of repetition, yet evading review applied to the proceeding.

Statute imposing locality residency requirement on witnesses and circulators of referendum petitions constituted a restriction on political speech that was a clear deprivation of a right guaranteed in the First Amendment, and thus strict scrutiny, rather than rational basis review, applied to city resident's constitutional challenge to the validity of the witness-circulator residency requirement; requirement limited the number of registered voters that resident, as proponent of referendum petition, could reach and decreased the likelihood that she would be able to get her initiative on the ballot, and the requirement substantially restricted resident's ability to engage in core political speech.

Exception to mootness doctrine for disputes capable of repetition, yet evading review applied to proceeding brought by city resident, as proponent of referendum petition, for declaratory judgment and writ of mandamus, challenging constitutionality under First Amendment of statutory residency requirement for witnesses and circulators of referendum petitions; although deadline to get resident's referendum on ballot had long since passed, resident expressed an intent to file future referendum petitions and had reasonable expectation that city would enforce the residency requirement in the future.

POLITICAL SUBDIVISIONS - WEST VIRGINIA

City of Wheeling v. Public Service Commission of West Virginia

Supreme Court of Appeals of West Virginia - April 24, 2023 - S.E.2d - 2023 WL 3051738

City appealed from decision of Public Service Commission (PSC) which re-calculated rate for sewer treatment services sold by city to other city, and from decision of PSC, which denied city's petition for reconsideration and motion for stay.

On rehearing, the Supreme Court of Appeals held that 120-day dispute resolution period set forth in statute governing PSC's jurisdiction over certain political subdivisions providing separate or combined water or sewer services commenced on date request for investigation was filed with PSC pursuant to that statute.

The 120-day dispute resolution period set forth in the statute governing the Public Service Commission's (PSC) jurisdiction over certain political subdivisions providing separate or combined water or sewer services commences on the date a request for investigation is filed with the PSC pursuant to that statute.

ZONING & PLANNING - WASHINGTON

Kenmore MHP LLC v. City of Kenmore

Supreme Court of Washington, En Banc - May 4, 2023 - P.3d - 2023 WL 3238559

Property owner sought judicial review of decision of Growth Management Hearings Board that granted city's motion for summary judgment and dismissed property owner's petition for review challenging city land-use ordinance, based on determination that property owner did not substantially comply with service requirements.

The Superior Court reversed and remanded to Board. City appealed. The Court of Appeals reversed the Superior Court and upheld the Board's decision. Property owner filed petition for review, which was granted.

The Supreme Court held that:

- Property owner substantially complied with service requirements, and
- Board's failure to correctly apply test for substantial compliance and failure to consider prejudice as a factor was arbitrary and capricious in violation of Washington's Administrative Procedure Act (APA).

Petitioner substantially complied with service requirements under regulation governing petitions for review before the Growth Management Hearings Board relating to whether or not an adopted comprehensive plan was in compliance with the goals of the Growth Management Act, even though petitioner was not in actual compliance when it served city after the date it filed petition with Board; city was in the same position it would have been had petitioner actually complied with the order of service, and city did not claim that it was prejudiced.

Growth Management Hearings Board's dismissal of petition for review based on petitioner's alleged failure to substantially comply with regulatory service requirements by serving city after filing petition with Board was arbitrary and capricious in violation of Washington's Administrative Procedure Act (APA); Board failed to correctly apply test for substantial compliance with service requirement when it did not consider prejudice to city as a factor.

VARIABLE RATE DEMAND OBLIGATIONS - CALIFORNIA

State ex rel. Edelweiss Fund, LLC v. JPMorgan Chase & Company

Court of Appeal, First District, Division 4, California - April 27, 2023 - Cal.Rptr.3d - 2023 WL 3115668

Relator filed seventh amended qui tam complaint under the California False Claims Act (CFCA) against financial institutions and subsidiaries that served as remarketing agents for State that managed variable rate demand obligations (VRDO), alleging that they engaged and conspired to engage in "robo-resetting" scheme, in which they mechanically set interest rates for the VRDO en masse, without consideration of individual characteristics of the bonds, associated market conditions, or investor demand, which resulted in artificially high interest rates, in violation of contractual obligation to reset each VRDO's interest rate at the lowest possible level to enable them to sell the series at face value.

The Superior Court sustained defendants' demurrer without leave to amend. Relator appealed.

The Court of Appeal held that:

- Relator's allegations that comparison of defendants' average interest rates with average commercial paper rate showed artificial inflation were insufficient to support CFCA claim;
- Relator's allegations about forensic analysis and study that it performed to evaluate interest rate resetting by defendants were sufficient to support CFCA claim;
- Relator's allegations that seven former employees of defendants stated and corroborated that defendants engaged in "robo-resetting" scheme were sufficient to support CFCA claim;
- Relator stated claim against defendants for conspiracy to violate CFCA;
- Commercial paper comparison information on websites providing business and market news could not support application of CFCA's public disclosure bar;
- Interest rate reset information on website that published information on all municipal bonds was not a "report" of the state, as required for public disclosure bar to apply; and
- Interest rate reset information on website that published information on all municipal bonds did not constitute a public disclosure in "news media," as required for public disclosure bar to apply.

Relator alleged an implied certification claim under the California False Claims Act (CFCA) against remarketing agents for State that managed variable rate demand obligations (VRDO), but not a "literal false or fraudulent" claim for payment, under the federal False Claims Act (FCA); relator alleged that agents impliedly certified compliance with their contractual obligations reset each VRDO's interest rate at the lowest possible level to enable them to sell the series at face value by submitting claim for payment for remarketing services, and that implied certification was false because agents knew those services had not been performed, but relator did not allege any other express false statements in agents' claims for payment.

Compliance by remarketing agents for State that managed variable rate demand obligations (VRDO), with express contractual obligation to reset each VRDO's interest rate at the lowest possible level to enable them to sell the series at face value, was material government's payment decision, such that agents' false implied certification of compliance with that contractual term could support qui tam action against agents under California False Claims Act (CFCA); although the remarketing agreements did not mandate a specific process that agents had to use to reset the interest rate levels, it followed from the rate-resetting obligation that agents had to employ some methodology that was capable of allowing them to set the rates at the lowest possible level.

Relator's seventh amended complaint satisfied heightened pleading requirements for maintaining qui tam action under California False Claims Act (CFCA) against remarketing agents that managed variable rate demand obligations (VRDO), by alleging that during specific time frame, agents submitted claims for payment, impliedly certifying that they complied with contractual obligation to reset each VRDO's interest rate at the lowest possible level to enable them to sell the series at face value, and that those claims were false because agents mechanically set interest rates for VRDO en masse, without any consideration of individual characteristics of the bonds, associated market

conditions, or investor demand, which resulted in artificially high interest rates.

Qui tam relator's allegations that comparison of State remarketing agents' average interest rates for variable rate demand obligations (VRDO) with average commercial paper rate showed that agents artificially inflated their interest rates for the VRDO by mechanically setting them en masse were insufficient to support claim, under California False Claims Act (CFCA), arising from false implied certification of compliance with express contractual obligation to reset each VRDO's interest rate at the lowest possible level to enable them to sell the series at face value; relator's complaint also contained allegations that agents' mechanical rate setting practices were the same both when the average VRDO rate was lower than the average commercial paper rate and when it was higher.

Qui tam relator's allegations about forensic analysis and study that it performed to evaluate interest rate resetting for variable rate demand obligations (VRDO) by remarketing agents were sufficient to support relator's claims, under California False Claims Act (CFCA), for false implied certification of compliance with contractual obligation to reset each VRDO's interest rate at the lowest possible level; relator alleged that forensic analysis revealed that agents grouped collections of VRDOs into "buckets" and applied to each "bucket" an identical pricing spread which moved the interest rate of each bond in the bucket up or down in lock-step fashion, and that study provided dozens of specific instances in which interest rate of a VRDO was set at a level higher than it should have been.

Qui tam relator's allegations that seven former employees of remarketing agents stated and corroborated that agents shirked their contractual and regulatory obligations to reset interest rates for variable rate demand obligations (VRDO) at the lowest possible level to enable them to sell the series at face value, by engaging in rate-setting misconduct that relator's forensic analyses revealed, were sufficient to support relator's false implied certification claim, under California False Claims Act (CFCA); taken together, employees' statements added support for inference from rate-setting data that agents did not evaluate factors such as credit quality, revenue source, economic sector, and size, for each VRDO, and that their failure to do so resulted in rates that were too high.

Qui tam relator stated a claim against State remarketing agents that managed variable rate demand obligations (VRDO), for conspiracy to violate California False Claims Act (CFCA), arising from collusion to inflate VRDO interest rates; complaint alleged "cross-bank bucketing" of VRDO interest rate resets, that agents agreed to ignore a downgrade to short-term credit rating of one defendant, which would have lowered interest rates on VRDO, and to continue coordinated pricing, that agents used indexing services to exchange information about future VRDO rate-setting, and facts showing agents had the opportunity and incentive to inflate VRDO rates.

Seventh amended qui tam complaint against State remarketing agents that managed variable rate demand obligations (VRDO), rather than original complaint, was the operative pleading for purposes of determining whether California False Claims Act's (CFCA) public disclosure bar foreclosed CFCA claims based on allegations that agents set artificially high interest rates on VRDO, in violation of contractual obligation to reset each VRDO's interest rate at the lowest possible level to enable them to sell the series at face value.

Commercial paper comparison information available on website providing business and market news and on the Federal Reserve Economic Data (FRED) website were not material to relator's claims against State remarketing agents that managed variable rate demand obligations (VRDO), under California False Claims Act (CFCA), for false implied certification of compliance with express contractual obligation to reset each VRDO's interest rate at the lowest possible level to enable them to sell the series at face value, and thus could not support application of CFCA's public disclosure bar; relator's allegations that comparison of agents' average interest rates for VRDO with commercial paper rates showed that agents' rates were artificially inflated were insufficient to

support his CFCA claim.

Interest rate reset information on website that published information on all municipal bonds was not a "report" of the state, as required for California False Claims Act's (CFCA) public disclosure bar to apply, in relator's qui tam action against State remarketing agents that managed variable rate demand obligations (VRDO) for false implied certification of compliance with express contractual obligation to reset each VRDO's interest rate at the lowest possible level to enable them to sell the series at face value; the information on the website was provided by remarketing agents and made available by the Municipal Securities Rulemaking Board (MSRB), a non-governmental self-regulatory organization.

Interest rate reset information on website that published information on all municipal bonds did not constitute a public disclosure in "news media," as required for California False Claims Act's (CFCA) public disclosure bar to apply, in relator's qui tam action against State remarketing agents that managed variable rate demand obligations (VRDO) for false implied certification of compliance with contractual obligation to reset each VRDO's interest rate at the lowest possible level to enable them to sell the series at face value; an online repository containing agents' daily or weekly submission of interest rate reset data was not generally newsworthy, and if interest rate data were considered a disclosure by "news media" simply because it was on a publicly available website, it would effectively swallow fora limitations in CFCA.

IMMUNITY - CALIFORNIA

Tansavatdi v. City of Rancho Palos Verdes

Supreme Court of California - April 27, 2023 - P.3d - 2023 WL 3107312

Mother of bicyclist who was killed when his bicycle collided with a turning truck on city street brought action against city, alleging that city created a dangerous condition by removing a bicycle lane from the area of the accident, and had failed to warn of that dangerous condition, leading to accident and bicyclist's death.

The Superior Court entered summary judgment for city. Mother appealed, and the Court of Appeal affirmed in part, vacated in part, and remanded. City filed petition for review, which was granted.

The Supreme Court held that design immunity under the Government Claims Act does not categorically preclude failure to warn claims that involve a discretionarily approved element of a roadway; disapproving *Weinstein v. Department of Transportation*, 139 Cal.App.4th 52, and *Compton v. City of Santee*, 12 Cal.App.4th 591.

IMMUNITY - CALIFORNIA

Hernandez v. City of Stockton

Court of Appeal, Third District, California - April 28, 2023 - Cal.Rptr.3d - 2023 WL 3142328

Plaintiff filed a personal injury action after the city rejected his government claim for damages sustained in a fall caused by an allegedly defective public sidewalk.

The Superior Court granted the city's motion for summary judgment. Plaintiff appealed.

The Court of Appeal held that:

- Plaintiff's failure to comply with Government Claims Act precluded him from bringing a civil action for injuries allegedly caused by a defective public sidewalk;
- Plaintiff did not substantially comply with the claims presentation requirement of the Act; and
- Plaintiff was not excused from compliance with the Act even in the face of city's actual knowledge.

Plaintiff's failure to comply with the claim presentation requirement of the Government Claims Act precluded him from bringing a civil action against city for injuries sustained in a fall allegedly caused by a defective public sidewalk, where plaintiff's government claim specifically and solely identified an "uplifted sidewalk" as the dangerous condition that caused his injuries, but his civil action, liability was premised on a different dangerous condition, i.e. a hole created by an empty tree well.

Plaintiff who brought a civil action against city for injuries sustained in a fall allegedly caused by a defective public sidewalk did not substantially comply with the claims presentation requirement of the Government Claims Act, where he specifically identified the dangerous condition as an "uplifted sidewalk" in his government claim, but identified the defect in his civil action as hole caused by an empty tree well, which was not a further description or clarification of his allegation of an uplifted sidewalk, but was an entirely different description.

City engineer's deposition testimony that, after reviewing plaintiff's deposition transcript, he knew plaintiff's claim against city was based on plaintiff tripping in a hole created by an empty tree well did not require reversal of trial court's grant of summary judgment for city based on plaintiff's failure to comply with notice requirements of the Government Claims Act, where plaintiff was not excused from compliance with the Act even in the face of city's actual knowledge, and there was nothing in the record showing that the city was aware of the actual cause of plaintiff's fall prior to the rejection of his government claim.

BOND VALIDATION - GEORGIA

Joint Development Authority of Jasper County v. McKenzie

Court of Appeals of Georgia - April 28, 2023 - S.E.2d - 2023 WL 3142214

State filed petition for order validating taxable revenue bonds and other aspects of project to develop and construct electric vehicle manufacturing facility pursuant to agreements between manufacturer, State, and multi-county joint development authority (JDA).

County citizens intervened in opposition to petition. Following evidentiary hearing, the Superior Court denied petition, finding project and bonds were not sound, feasible, and reasonable, that JDA failed to demonstrate project would promote welfare of local communities, and that rental agreement created taxable estate for years and did not create bailment for hire. JDA and State appealed, and proceedings on appeal were consolidated.

The Court of Appeals held that:

- State and JDA made out prima facie case that bonds and project were sound, feasible, and reasonable;
- Citizens failed to rebut prima facie showing that bonds and project were sound, feasible, and reasonable;
- Trial court could not deny petition on basis that it was not sound, feasible, or reasonable to exempt

project from public audits;
- Citizens failed to rebut prima facie showing that bonds and project would promote local community's general welfare;
- Rental agreement did not give manufacturer bailment for hire as to personal property; and
- Rental agreement gave manufacturer usufruct in real property.

State and multi-county joint development authority (JDA) made out prima facie case, in State's petition to validate revenue bonds for car manufacturing facility project, that bonds and project were sound, feasible, and reasonable; petitioners showed that manufacturer had over $21 billion in assets and $16.4 billion in cash, bonds would be privately funded and would not subject State to pecuniary liability, manufacturer promised to create 7,500 new jobs with average salary of $56,000, witnesses with background in development deals testified about benefits to local communities from jobs, tax revenue, and relocation of suppliers, and State committed to providing subsidies to defray project's costs.

In its petition to validate revenue bonds associated with project to develop and construct electric car manufacturing facility, State was not required to establish economic feasibility of bonds and project as part of its prima facie burden to show bonds and project were sound, feasible, and reasonable.

Citizens who opposed State's petition to validate revenue bonds for electric car manufacturing facility project failed to rebut State's prima facie showing that bonds and project were sound, feasible, and reasonable; citizens only presented Securities and Exchange Commission (SEC) filings containing cautionary language about manufacturer and presented evidence that manufacturer had spent a lot of the capital it initially raised, but State's witnesses testified that SEC filings did not alarm them, and no evidence supported inference that manufacturer's financial condition would render project unsound, unfeasible, or unreasonable.

Trial court could not deny State's petition to validate revenue bonds for project to construct electric car manufacturing facility on basis that it was not sound, feasible, or reasonable to exempt project from public audits, where multi-county joint development authority (JDA), as bond issuer, complied with statutory procedure for waiving audit requirement, namely by providing public notice soliciting public preapproval of bond issue language that expressly indicated no associated performance audit or performance review would be conducted.

Citizens who opposed State's petition to validate revenue bonds for project to construct electric car manufacturing facility failed to rebut State's prima facie showing that bonds and project would promote local community's general welfare, and, thus, trial court could not deny petition based on finding that project would not benefit local community; citizens only cross-examined State's witnesses about lack of information regarding cost community would bear in supporting project but provided no affirmative evidence about such cost, and absent such evidence, trial court was required to defer to finding by multi-county joint development authority.

Rental agreement between manufacturer and multi-county joint development authority (JDA) for equipment and other property involved with project to develop car manufacturing facility did not give manufacturer bailment for hire as to equipment, even though agreement stated parties intended to create such bailment; agreement granted manufacturer rights that were greater than mere use of property and inconsistent with lack of ownership, such as right to dispose of equipment owned by JDA at manufacturer's discretion without transfer of title and without need to notify or compensate JDA up to specified cumulative value of non-replaced equipment, and allowed manufacturer to demand that JDA quitclaim its title to manufacturer.

A usufruct is created when the owner of real estate grants to another person the right simply to

possess and enjoy the use of such real estate either for a fixed time or at the will of the grantor; in such a case, no estate passes out of the landlord and the usufruct may not be conveyed except by the landlord's consent, nor is it subject to levy and sale.

A lease of real estate for a period of less than five years is presumed to be a non-taxable usufruct, and there is a rebuttable presumption that a lease for five years or more is a taxable estate for years.

Express description of manufacturer's rights to land in rental agreement between manufacturer and multi-county joint development authority (JDA), which concerned land to be used in car manufacturing facility project, weighed in favor of finding that agreement merely granted usufruct to manufacturer, not taxable estate for years, where agreement specifically provided it granted only a usufruct, that manufacturer did not have a right to use project land in as absolute a manner as it could if it were owner or lessee with estate for years, and that agreement "does not grant and shall not be construed as a grant of title or leasehold estate" to manufacturer.

In agreement between manufacturer and multi-county joint development authority (JDA) concerning land for car manufacturing facility project, provisions discussing liability for ad valorem taxes weighed in favor of finding that parties intended to grant manufacturer a usufruct rather than an estate for years; agreement stated it created usufruct, which was not "taxable interest for purposes of ad valorem taxation," and stated that, while JDA could not guarantee "any particular ad valorem tax treatment," it would help manufacturer contest any ad valorem taxes that were levied and would credit any payments of such taxes against manufacturer's obligations to make payment in lieu of taxes (PILOT).

In agreement between manufacturer, State, and multi-county joint development authority (JDA) concerning land for car manufacturing facility project, provisions discussing dominion or control over property weighed overall in favor of finding that agreement created usufruct, even though agreement let manufacturer engage in construction and alterations costing less than $15 million without JDA's consent, which indicated estate for years; State fully owned buildings on property, manufacturer could only use property for specified purposes, JDA could inspect property, and manufacturer was bound by specified zoning and environmental provisions, restrictions on billboards and signage, and health, environmental, safety, and anti-discrimination laws, which JDA could enforce.

In agreement between manufacturer and multi-county joint development authority (JDA) concerning land for car manufacturing facility project, provisions discussing duties to keep and maintain premises and appurtenances of property weighed in favor of finding that agreement created usufruct; agreement stated that manufacturer was required to maintain, repair, and insure project and keep conditions safe, that JDA had no obligation to do so, that manufacturer would spend at least $5 million or sum equivalent to revenue bonds in developing and improving project despite State's retention of title to buildings, improvements, and fixtures, and that JDA had certain rights and control regarding insurance.

In rental agreement between manufacturer and multi-county joint development authority (JDA) concerning land for car manufacturing facility project, provisions discussing manufacturer's ability to sublet or assign its rights weighed in favor of finding that agreement created usufruct; agreement did not allow manufacturer to create lien or encumbrance on property, convey any rights, interests, or duties in agreement, or sublet property to non-affiliate unless JDA first consented, and even with consent to subletting, which JDA could withhold unreasonably as to any subtenant other than manufacturer's suppliers, property could still be used solely for activities related to vehicle manufacturing.

State's decision not to present its own evidence at hearing on its petition to validate revenue bonds and other aspects of project to develop car manufacturing facility, instead deferring to multi-county joint development authority (JDA) to present evidence supporting petition, did not deprive State of standing to appeal from petition's denial; State retained standing to appeal as party to petition.

ZONING & PLANNING - MISSISSIPPI

City of Ocean Springs v. Illanne

Supreme Court of Mississippi - April 27, 2023 - So.3d - 2023 WL 3113383

Neighbors appealed three separate zoning decisions of the city board of aldermen regarding subdivision application for townhouse development.

The Circuit Court consolidated the appeals, reversed the decisions in two of the appeals, and on motion to alter or amend, altered its ruling in part, and remanded to the city board. City appealed.

The Supreme Court held that remand was required for a factual determination as to whether subdivision applicant was acting as a "petitioner" entitled to notice as a necessary party.

Remand of zoning appeals was required for a factual determination as to whether subdivision applicant was acting as a "petitioner" before the board of aldermen or whether he was acting in a representative capacity on behalf of the petitioner, and thus whether neighbors who appealed zoning decision were required to name and give notice to applicant as a necessary party; in addition, Supreme Court would direct the trial court to determine all issues of fact that may arise out of any appeal submitted to the trial court for a determination and that may be necessary for disposition of cases on appeal.

ANNEXATION - NEW YORK

Wagschal v. Szegedin

Supreme Court, Appellate Division, Second Department, New York - April 12, 2023 - N.Y.S.3d - 2023 WL 2904405 - 2023 N.Y. Slip Op. 01899

Petitioners brought article 78 proceeding against town and existing village to prohibit town from exercising jurisdiction over certain proposals for annexation of certain territories of existing village.

The Supreme Court, Orange County, denied existing village's motion to dismiss, granted portion of petition prohibiting town officials from exercising jurisdiction over annexation proposals until town considered proposed village's incorporation petition, and dismissed petition to extent it sought to permanently prohibit town from considering annexation proposals. Town and existing village appealed.

The Supreme Court, Appellate Division, held that:

- Order was ripe for appellate review, and
- Prior jurisdiction rule required town to determine proposed village's petition of incorporation before considering proposals to annex certain territories of existing village.

Trial court's order in article 78 proceedings denying village's motion to dismiss petition of

prohibition to prohibit town and its officials to annex certain territories of village was ripe for appellate review, where village sought determination of whether town and its officials were about to proceed without or in excess of jurisdiction.

Prior jurisdiction rule required town to determine proposed village's petition of incorporation before considering proposals to annex certain territories of existing village, where incorporation petition was filed before existing village filed any complete and formal annexation petition for same land, and incorporation petition superseded prior petitions filed for incorporation of proposed village.

OPEN MEETINGS - VIRGINIA

Suffolk City School Board v. Wahlstrom

Supreme Court of Virginia - April 27, 2023 - S.E.2d - 2023 WL 3103622

Resident brought action against city school board and two board members individually and in their official capacities, alleging board and members violated the Virginia Freedom of Information Act (FOIA) by denying her free entry to a public meeting of the board.

Following bench trial, the Suffolk Circuit Court entered judgment awarding relief against board and sustaining demurrer as to members' individual liability. Defendants appealed and resident cross-appealed.

The Supreme Court held that:

- Board violated VFOIA by denying resident "free entry" to meeting;
- Board's VFOIA violation warranted injunctive relief;
- There is no requirement that a trial court making finding, express or implied, of a willful and knowing violation of VFOIA before it may issue a VFOIA injunction, overruling *Hale v. Washington Cnty. Sch. Bd.*, 241 Va. 76, 81, 400 S.E.2d 175;
- Resident "substantially prevailed," as required for attorney fee award;
- Board did not present "special circumstances" sufficient to make attorney fee award unjust;
- Trial court erred in concluding that VFOIA did not permit civil penalties to be assessed against members in their individual capacities; and
- Members' violations of VFOIA were not "knowingly made," as required for imposition of civil penalties.

SCHOOL FINANCE - CALIFORNIA

Davis v. Fresno Unified School District

Supreme Court of California - April 27, 2023 - P.3d - 2023 WL 3107288

Taxpayer brought action against school district and contractor alleging that a lease-leaseback agreement for construction of new middle school, which was financed through bond proceeds, violated competitive bidding requirements, rules governing conflicts of interest, and education statutes.

The Superior Court sustained defendants' demurrer and the Court of Appeal reversed in part. On remand, the Superior Court granted defendants' motion for judgment on the pleadings. Taxpayer appealed. The Court of Appeal reversed. Defendants petitioned for review, which was granted.

The Supreme Court held that lease-leaseback arrangement was not a local agency "contract" subject to statutory validation as being inextricably bound to government indebtedness or debt financing; disapproving *McGee v. Balfour Beatty Construction, LLC*, 247 Cal.App.4th 235, 202 Cal.Rptr.3d 251.

A local agency contract is subject to validation under statute providing for an action to determine the validity of a local agency's bonds, warrants, contracts, obligations, or evidences of indebtedness if the contract is inextricably bound up with government indebtedness or with debt financing guaranteed by the agency, and to satisfy this standard, the contract must be one on which the debt financing of the project directly depends.

A lease-leaseback arrangement between school district and contractor for construction of new middle school was not a local agency "contract" subject to statutory validation as being inextricably bound up with government indebtedness or debt financing guaranteed by the agency, where underlying project was fully funded by district's prior sale of general obligation bonds, payment of debt service on bonds was from ad valorem property taxes, nothing in documents that were connected to approval and sale of bonds suggested any link to or dependence upon validity of lease-leaseback arrangement, and nothing in lease-leaseback documentation was concerned with project financing; disapproving *McGee v. Balfour Beatty Construction*, LLC, 247 Cal.App.4th 235, 202 Cal.Rptr.3d 251.

IMMUNITY - GEORGIA

Thomas v. Henry County Water Authority

Court of Appeals of Georgia - April 18, 2023 - S.E.2d - 2023 WL 2983097

Motorist brought personal-injury action against public water authority, which operated and maintained water system within county, and its employee, alleging that motorist suffered catastrophic injuries when authority's truck, which was being driven by employee, collided with motorist's automobile.

The Superior Court granted defendants' motion to dismiss. Motorist appealed.

The Court of Appeals held that:

- Limited waiver of sovereign immunity for automobile injury claims that are brought against counties and other local government entities is not conditioned on presentment of an ante litem notice of claim;
- Water authority was not entitled to be treated as a county for purposes of ante-litem-notice requirement;
- County is not immune from suit when a claimant fails to timely present ante litem notice of claim, as the suit is nonexistent; and
- Motorist's allegation that employee acted outside scope of employment precluded granting dismissal based on immunity for local governmental employee who committed tort involving use of motor vehicle while in performance of official duties.

ZONING & PLANNING - KENTUCKY

Friends of Louisville Public Art, LLC v. Louisville/Jefferson County Metro

Historic Landmarks and Preservation Districts Commission

Supreme Court of Kentucky - April 27, 2023 - S.W.3d - 2023 WL 3113325

Organizations and individuals who opposed the city's attempt to move a statute from an historic preservation district sought judicial review of city landmark commission's reversal of the district architectural review committee's denial of the city's request to move the statute.

The Circuit Court affirmed the commission's decision. Plaintiffs appealed, and the Court of Appeals affirmed. Plaintiffs moved for discretionary review.

The Supreme Court held that:

- Votes of three city employees as members of landmark commission to reverse architectural review committee's decision denying the city's request to move a statute was a violation of due process, and
- Landmarks commission was without authority to review decision of the architectural review committee absent written findings.

The votes of three city employees as members of the city landmark commission to reverse the historic preservation district architectural review committee's decision denying the city's request to move a statute was a denial of procedural due process for those opposed to moving the statute and rendered the commission's reversal inherently arbitrary, where the employees had a patent conflict of interest in being decisionmakers in a dispute involving their employer.

Under city ordinances, city's landmarks commission was without authority to review the decision of the historic preservation district architectural review committee denying city's request to move a statute, where the architectural review committee failed to make the required written findings of fact to support its decision.

MUNICIPAL ORDINANCE - KENTUCKY

City of Pikeville v. Kentucky Concealed Carry Coalition, Inc.

Supreme Court of Kentucky - April 27, 2023 - S.W.3d - 2023 WL 3113397

Nonprofit corporation with members seeking to protect Second Amendment rights from over-regulation brought action against city, mayor, city manager, and city board of commissioners alleging city's prohibition on firearms within city properties violated statute generally prohibiting local regulation of firearms, and seeking declaratory relief, injunctive relief, and attorney fees.

The Circuit Court granted summary judgment in favor of defendants and awarded prevailing party attorney fees. Nonprofit corporation appealed. The Court of Appeals reversed and remanded. Discretionary review was granted.

The Supreme Court held that nonprofit corporation did not have associational standing.

Quantum of proof necessary to establish associational standing depends on stage of proceeding: at pleading stage, less specificity is required, and association may speak generally of injuries to some of its members, for presumption is that general allegations embrace those specific facts that are necessary to support claim; by summary judgment stage, however, more particulars regarding association's membership must be introduced or referenced; finally, before favorable judgment can be attained, association's general allegations of injury must clarify into concrete proof that one or

more of its members has been injured.

Nonprofit corporation with members seeking to protect Second Amendment rights from over-regulation did not have associational standing to bring claims alleging city unlawfully prohibited firearms within city properties; desire of unidentified members to access various city-owned sites without fear their rights to carry firearms would be denied was too speculative, unsupported allegation concerning actual denial of entry to unidentified members lacked sufficient specificity, and any existence of statutory standing did not equate to constitutional standing.

PUBLIC EMPLOYMENT - LOUISIANA

Marvin v. Berry

Supreme Court of Louisiana - April 25, 2023 - So.3d - 2023 WL 3073565 - 2023-00214 (La. 4/25/23)

District attorney petitioned for declaratory judgment as to whether the Dual Officeholding and Dual Employment Law prohibited member of board of commissioners for recreation and water-conservation district from also serving as the district's executive director.

The District Court denied Attorney General's petition to intervene on state's behalf and granted summary judgment to district and board member. Attorney General appealed. The Court of Appeal affirmed the denial of Attorney General's petition to intervene and did not address the merits of summary judgment. Attorney General sought a writ of certiorari. The Supreme Court granted the writ and remanded for consideration of Attorney General's assignments of error about summary judgment. On remand, the Court of Appeal affirmed. Attorney General sought a writ of certiorari.

The Supreme Court held that the Dual Officeholding and Dual Employment Law prohibited district's board member from also serving as district's executive director.

The Dual Officeholding and Dual Employment Law prohibits the same person from holding two public offices or jobs if the incumbent of one, alone or in conjunction with others, has the power to appoint or remove the incumbent of the other.

Dual Officeholding and Dual Employment Law prohibited member of board of commissioners for recreation and water-conservation district from also serving as the district's executive director; board of commissioners had the power to appoint and remove the executive director, and despite argument that the particular commissioner abstained from the board's selection and oversight of the executive director, his authority over the executive-director position could not be divested by a majority vote of the board.

BONDS - MINNESOTA

Rochester MSA Building Company v. UMB Bank, N.A.

United States District Court, D. Minnesota - April 17, 2023 - Slip Copy - 2023 WL 2976057

The Plaintiffs in this case – Minnesota nonprofit corporations that own and operate two public charter schools —borrowed more than $15 million in bond proceeds from the City of Rochester, Minnesota, to finance the improvement and expansion of the schools' facilities.

After Plaintiffs defaulted on promises to maintain minimum levels of cash-on-hand and income available for debt service, they entered a Forbearance Agreement with Defendant UMB Bank, the indenture trustee of the bonds. In that agreement, Plaintiffs accepted new obligations. These new obligations included replacing a financial vendor, retaining and giving some additional authority to an interim business manager, and paying certain fees and expenses UMB incurred in connection with the default.

Plaintiffs brought this case to challenge the reasonableness of fees UMB charged under the Forbearance Agreement. UMB counterclaimed, alleging that Plaintiffs defaulted on their obligations under the Forbearance Agreement and the underlying bond agreements.

The District Court held that:

- The Forbearance Agreement was ambiguous regarding the scope of the authority held by the interim business manager appointed pursuant to the Forbearance Agreement;
- UMB Bank failed to provide Plaintiffs with documentation establishing the reasonableness of its invoiced legal fees;
- Whether a Forbearance Termination Event resulted because of Plaintiffs' nonpayment of the invoiced legal fees remained an open question due to UMB Bank's withdrawal of the charged amount from Plaintiffs' debt service reserve fund (which occurred only 17 days after the invoices were received);
- Summary judgment was not appropriate with respect to the attorneys' fees issue, meaning that the Parties' competing claims on that issue were trial-worthy;
- Plaintiffs' failure to replace its existing financial vendor constituted a Forbearance Termination Event;
- UMB's request that a Rule 54(b) judgment be entered against Plaintiffs for the outstanding principal and interest due under the Bond Documents, as well as an order directing that it was entitled to foreclose on the collateral, would be denied; and
- Entry of judgment under Rule 54(b) was not appropriate due to the fact that Plaintiffs' fee-related claims could result in a setoff against the judgment sought to be made final and the risk of a piecemeal appeals process.

ZONING & PLANNING - SOUTH DAKOTA

Kirwan v. City of Deadwood

Supreme Court of South Dakota - April 26, 2023 - N.W.2d - 2023 WL 3111176 - 2023 S.D. 20

Building owner appealed city historic district commission's denial of certificate of appropriateness to conduct renovations on saloon building.

The Circuit Court affirmed, and building owner appealed.

The Supreme Court held that:

- As a matter of first impression, clearly erroneous standard of review applies to appeals from the decision of a historic district commission;
- Commission considered the relevant factors as required by ordinance when denying building owner's application;

- Commission placed upon the record the reasons for its denial, as required by statute;
- Letter from historic preservation officer denying certificate of appropriateness satisfied statutory requirement that commission furnish the applicant a copy of its reasons for the decision;
- Commission's failure to provide building owner with an "attested copy" of the reasons for its denial did not require reversal; and
- Record supported commission's denial of building owner's application.

CHARTER AMENDMENTS - TEXAS

Hotze v. Turner

Supreme Court of Texas - April 21, 2023 - S.W.3d - 2023 WL 3027869

Citizen who had helped to initiate city charter amendment to govern limitations in increases in city revenues, which amendment was approved by voters in the same election in which they approved a council-proposed amendment on the same topic, brought action against city for a declaratory judgment that both the citizen-initiated and the council-proposed amendment were in effect, which was a dispute that stemmed from associated election ordinance's "primacy clause" that stated that the council-proposed amendment would prevail over the citizen-initiated amendment if the voters approved the council-proposed amendment by more votes than the citizen-initiated one, which is what occurred.

The 333rd District Court denied city's plea to the jurisdiction. The Houston Court of Appeals affirmed. The 333rd District Court entered partial summary judgment that "primacy clause" rendered citizen-initiated ordinance ineffective and, after a bench trial, entered judgment that city had fully complied with council-proposed ordinance.

Citizen appealed the summary-judgment order, and city cross-appealed. The Houston Court of Appeals affirmed the summary judgment. Voter petitioned for review.

The Supreme Court held that:

- An election challenge was not the exclusive remedy for citizen seeking to challenge the council-proposed amendment;
- Council-proposed amendment's "primacy clause" violated state statute that required a municipality to adopt a charter amendment that was approved by voters at an election;
- As a matter of apparent first impression understate statute governing adoption of amendments to municipal charters, the amendments became effective when the city declared them to have been adopted; and
- State statute governing adoption of amendments to municipal charters does not require a municipality to achieve the impossible by giving effect to two conflicting charter amendments adopted at the same election.

An election challenge was not the exclusive remedy for citizen seeking to challenge the effectiveness of voter-approved city charter amendment that been proposed by city council, which challenge stemmed from associated election ordinance's "primacy clause" that stated that the council-proposed amendment would prevail over the citizen-initiated amendment if the voters approved the council-proposed amendment by more votes than the citizen-initiated one, which is what occurred, and thus citizen could bring challenge as a declaratory-judgment action; citizen's challenge concerned the city's decision not to enforce parts of its charter as it existed after the election.

Election ordinance's "primacy clause" that stated that if a city council-proposed amendment to city

charter received more votes at the election than a citizen-initiated amendment, then the council-proposed amendment would take effect, even if voters approved both amendments, violated state statute that required a municipality to adopt a charter amendment that was approved by voters at an election, and thus the "primacy clause" was void for conflicting with state law.

Pursuant to state statute that provided that a city charter or an amendment did not take effect until the governing body of the municipality entered an order in the records of the municipality declaring that the charter or amendment was adopted, voter-approved amendment to home rule city's charter became effective when city declared amendment to have been adopted, despite argument that the effective date was a matter for the city's discretion; the proposition that an adopted amendment could be added to the city charter without ever becoming effective absent further city approval was incompatible with the statute.

Statute governing adoption of amendments to a municipality's charter does not require a municipality to achieve the impossible by giving effect to two conflicting charter amendments adopted at the same election.

ZONING & PLANNING - CALIFORNIA

Martinez v. City of Clovis

Court of Appeal, Fifth District, California - April 7, 2023 - Cal.Rptr.3d - 2023 WL 2820092

Resident brought action against city, its manager, and city council for declaratory and injunctive relief and petitioned for writ of mandate claiming violations of Housing Element Law. She also alleged discrimination against lower income housing, violations of Fair Housing Act (FHA), California's Fair Employment and Housing Act (FEHA), and duty to affirmatively further fair housing.

The Superior Court overruled demurrer in part and sustained it in part, granted petition for writ of mandate in part, and entered judgment in favor of resident. City appealed, and resident filed cross-appeal.

The Court of Appeal held that:

- As a matter of first impression, overlapping densities in zoning did not comply with Housing Element Law;
- Resident stated claim of disparate impact in violation of FHA;
- Resident stated claim of disparate impact in violation of FEHA;
- Disparate income claims are cognizable for discrimination against development intended for lower income persons;
- As a matter of first impression, statute requiring public agency to affirmatively further fair housing does more than simply prohibit public agencies from discriminating in housing programs and zoning;
- As a matter of first impression, violations of Housing Element Law compelled finding that city violated statutory duty to affirmatively further fair housing;
- As a matter of first impression, practice with a discriminatory effect on persons of color or housing intended to be occupied by lower income households violates public agency's affirmative duty; and
- As a matter of first impression, the affirmative duty is enforceable in court by writ of mandate.

Overlapping density provisions after city attempted to bring its housing element into compliance by

allowing approval of multi-family housing at density of 35 to 43 units per acre, but did not change base zoning that permitted development at densities below 20 units per acre, did not substantially comply with statute stating property "shall be" zoned with minimum density of 20 units per acre; base zoning allowed for development at a lower density, term "minimum density and development standards" required zoning with at least a density of 20 units per acre, and the statute imposed minimum density requirement when jurisdiction as required to rezone sites to accommodate a shortfall for current planning period or carryover from prior planning period.

Resident's allegations about city's violations of Housing Element Law to accommodate need for lower income housing identified with sufficient particularity the practice element of cause of action alleging disparate impact in violation of Fair Housing Act (FHA); resident alleged in detail that city failed to accommodate and to provide opportunities to develop lower income housing, and resident alleged a continuing failure to implement program by its deadline resulting in the Department of Housing and Community Development's (HCD) written findings that the 2015-2023 housing element did not substantially comply with the Housing Element Law.

Resident's allegations detailing city's failure to comply with Housing Element Law to accommodate need for lower income housing adequately alleged that city's practice lacked a sufficient justification in action alleging disparate impact in violation of Fair Housing Act (FHA); city's violation of the Housing Element Law was not a valid government policy and thus could not be regarded at the pleading stage as necessary for achieving legitimate objectives.

Resident's causation allegations contained enough particularity to adequately allege that city's practice of noncompliance with Housing Element Law to accommodate need for lower income housing predictably resulted in a disparate impact on persons of color in violation of Fair Housing Act (FHA); in addition to allegations of discriminatory intent, resident alleged statistical facts about income and housing burden within city and county and facts about the city's persistent failure to comply with the Housing Element Law during planning cycles.

Resident's allegations that city's violations of Housing Element Law to accommodate need for lower income housing had adverse and disparate impact on people of color and the disparate impacts were predictable, statistically significant, and did not occur by chance satisfied requirement to plead disparate impact on a group of persons because of a protected characteristic in violation of Fair Housing Act (FHA); existence of a disparate impact, which was intertwined with the causation element, was supported by allegations of statistics about the racial and economic composition of city and county.

Resident's allegations of statistics about the racially and economic composition of city and county from a historical perspective were sufficient to adequately allege that city's practice of noncompliance with the Housing Element Law to accommodate need for lower income housing during planning periods perpetuated segregated housing patterns and, thus, stated a segregative effect claim under Fair Housing Act (FHA); even though fifth cause of action for violation of the FHA did not use the words "perpetuate," "segregation," or variants of those terms, seventh cause of action alleged the city's acts and omissions created barriers to overcoming patterns of segregation, rather than fostering inclusive communities free from barriers.

City resident adequately alleged disparate impact and a segregative effect of city's violations of Housing Element Law in suit under Fair Employment and Housing Act (FEHA); resident claimed that city's violations of Housing Element Law had adverse and disparate impact on people of color and the disparate impacts were predictable, statistically significant, and did not occur by chance, and she alleged statistics about the racially and economic composition of city and county from a historical perspective.

Word “discriminate” in Planning and Zoning Law making it illegal for city to discriminate against any residential development in the enactment or administration of ordinances encompasses practices with a discriminatory effect, which includes a disparate impact, and, thus, disparate income claims are cognizable for discrimination against development intended for lower income persons; legislature declared that discriminatory practices inhibiting the development of housing for persons and families of very low, low, moderate, and middle incomes, or emergency shelters for the homeless were a matter of statewide concern.

Statute requiring public agency to affirmatively further fair housing does more than simply prohibit public agencies from discriminating in housing programs and zoning.

City’s violations of Housing Element Law with regard to lack of zoning for regional housing needs allocation carryover for lower income housing compelled finding that city violated statutory duty to affirmatively further fair housing; city’s acts and omissions related to amended housing element after effective date of statutory duty qualified as administration of “programs and activities relating to housing and community development” for purposes of duty to administer programs and activities relating to housing and community development in a manner to affirmatively further fair housing, and one purpose of Housing Element Law and its requirement for zoning of sufficient sites to accommodate regional housing needs allocation is to further affordable housing for lower income households.

Practice with a discriminatory effect on persons of color or housing intended to be occupied by lower income households violates public agency’s duty to administer its programs and activities relating to housing and community development in a manner to affirmatively further fair housing.

Public agency’s duty to affirmatively further fair housing is enforceable in court, and an ordinary writ of mandate is an appropriate mechanism for enforcing that duty.

MUNICIPAL GOVERNANCE - ILLINOIS

Uetricht v. Chicago Parking Meters, LLC

United States Court of Appeals, Seventh Circuit - April 7, 2023 - F.4th - 2023 WL 2818008

Drivers living in city brought putative class action against private entity that had been granted a 75-year concession over city’s parking meters, alleging claims under the Sherman Act and the Illinois Consumer Fraud and Deceptive Business Practices Act (ICFA).

The United States District Court dismissed drivers’ Sherman Act claim for failure to state a claim based on the state-action immunity doctrine and relinquished jurisdiction over drivers’ ICFA claim. Drivers appealed.

The Court of Appeal held that:

- City had authority under Illinois law, pursuant to a clearly articulated and affirmatively expressed state policy, to regulate parking on city streets, and city was thus entitled to state-action immunity under the Sherman Act for its decisions with respect to parking spaces and meters, and
- Under contract granting concession to entity, city had sufficient control, amounting to active state supervision, over entity’s administration of parking meters such that state-action immunity precluded drivers’ Sherman Act claim against entity.

IMMUNITY - NEBRASKA

Angel v. Nebraska Department of Natural Resources

Supreme Court of Nebraska - April 14, 2023 - N.W.2d - 314 Neb. 1 - 2023 WL 2939979

Following failure of dam, which resulted in one death and property damage, special administrator of decedent's estate and owners of property, including administrator and corporation, sued defendants including the Department of Natural Resources, asserting claims for negligence and nuisance.

The Department asserted immunity as an affirmative defense. The District Court granted the Department's motion for summary judgment based on immunity provision of the Safety of Dams and Reservoirs Act. Administrator and owners appealed, and petition to bypass review by the Court of Appeals was granted.

The Supreme Court held that:

- The Department's immunity included immunity for conduct prior to the effective date of the Act;
- Duties of the Department to inspect dam and determine its hazard potential classification fell within the Act's immunity provision;
- The Department was immune under the Act from claim that it was negligent in approving revised plans to reconstruct dam;
- The Department was immune under the Act from claim that it was negligent in conducting inspections of the dam;
- The Department was immune under the Act from claims alleging negligence based on dam's classification and lack of emergency plan;
- The Department was immune under the Act from negligence claim based on failure to train and supervise its agents or employees; and
- The Department's allegedly negligent inspections and adjudications of dam's hazard potential did not come within emergency exception to immunity for negligent acts .

Department of Natural Resources did not assume control of failed dam during an "emergency," and thus Department's allegedly negligent inspections of dam and adjudications of its hazard potential did not come within emergency exception to the Department's immunity for negligent acts under the Safety of Dams and Reservoirs Act, so as to make Department liable on claims brought by owners of damaged property and administrator of estate of individual who died as result of dam failure; the Department was not aware of the dam's failure or of the conditions leading to failure until after dam had been breached, and allegations against the Department were not based on any acts or omissions during an emergency.

IMMUNITY - NEW YORK

Anderson v. Commack Fire District

Court of Appeals of New York - April 20, 2023 - N.E.3d - 2023 WL 3010345 - 2023 N.Y. Slip Op. 02028

Driver commenced action against fire district and volunteer firefighter to recover damages for personal injuries that she sustained when the vehicle she was driving collided with a fire truck that volunteer firefighter, with lights and sirens on, was driving through an intersection on a red light.

The Supreme Court, Suffolk County, granted defendants' motion for summary judgment as to

firefighter but denied the motion as to fire district. Fire district appealed. The Supreme Court, Appellate Division, affirmed and granted district leave to appeal.

The Court of Appeals held that the "reckless disregard" standard applicable to privileged actions that the Vehicle and Traffic Law allows emergency vehicles to take applies when a fire district is alleged to be vicariously liable for conduct that is privileged under that provision.

The "reckless disregard" standard applicable to privileged actions that the Vehicle and Traffic Law allows emergency vehicles to take, such as proceeding past red lights when involved in emergency operations, demands more than a showing of a lack of due care under the circumstances—the showing typically associated with ordinary negligence claims; rather, there must be evidence that the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow and has done so with conscious indifference to the outcome.

The "reckless disregard" standard applicable to privileged actions that the Vehicle and Traffic Law allows emergency vehicles to take, such as proceeding past red lights when involved in emergency operations, applies when a fire district is alleged to be vicariously liable for conduct that is privileged under that provision.

ZONING & PLANNING - OHIO

State ex rel. Pinkston v. Delaware County Board of Elections

Supreme Court of Ohio - March 30, 2023 - N.E.3d - 2023 WL 2706811 - 2023-Ohio-1060

Township-zoning referendum proponent filed petition for writ of mandamus compelling county board of elections to place referendum on the ballot for the general primary election or ballot for the general election after board had sustained a protest to the referendum petition.

The Supreme Court held that:

- Laches did not apply;
- Proponent lacked adequate remedy at law as required for mandamus relief;
- Petition summary did not borrow text from a zoning resolution;
- Petition summary met basic statutory requirements;
- Petition summary was not deficient for failing to indicate number of homes being proposed in residential development; and
- County elections board abused its discretion by finding that the summary improperly omitted description of developer's earlier rezoning applications.

Township-zoning referendum proponent did not have actual or constructive knowledge that his delay in filing complaint for mandamus compelling county elections board to place referendum on primary election ballot after board sustained a protest to referendum petition would cause harm to the board, as required for laches to apply, where there was no evidence that proponent actually knew that a two-week delay in filing his lawsuit would cause board not to prepare to hold a primary election, nor was there any evidence justifying the imputation of such knowledge to proponent.

Township-zoning referendum proponent lacked an adequate remedy at law, as required to obtain writ of mandamus compelling county elections board to place referendum on primary election ballot after board sustained a protest to referendum petition, given the proximity of the board's decision in late February and the primary election in May.

Township-zoning referendum petition's summary did not borrow text from a zoning resolution but rather, borrowed language from minutes of township board of trustees' meeting approving developer's final application for rezoning property to a planned residential district, and thus, proponent did not show that using the borrowed language satisfied statutory requirements for the summary; zoning amendment at issue was proposed by developer's application, not be resolution of the board of trustees.

Township-zoning referendum petition's summary met basic statutory requirements that it identify location of the property at issue, its current zoning status, and nature of the requested change, where summary provided parcel numbers and an address for the property, along with its current zoning, planned institutional district, and proposed zoning, planned residential district, and nature of proposed development, single-family homes.

Township-zoning referendum petition's summary was not deficient for failing to indicate number of homes being proposed in residential development, because the summary unambiguously apprised readers of the specific use the proposal would permit, namely, the development of single-family homes, and as such, it was not ambiguous or misleading.

Proponent of township-zoning referendum was not required to describe developer's earlier rezoning applications in petition's summary of zoning amendment, and thus, county elections board abused its discretion and acted contrary to law in finding that the summary improperly omitted that information; developer, which filed protest to the petition, argued that because petition summary did not include information about modifications, it conveyed the false impression that rezoning as approved was same as rezoning as initially proposed, but it was the zoning amendment as adopted by the township that had to be summarized in the petition.

ZONING & PLANNING - SOUTH CAROLINA

Ani Creation, Inc. v. City of Myrtle Beach Board of Zoning Appeals

Supreme Court of South Carolina - April 19, 2023 - S.E.2d - 2023 WL 2996979

Store operators appealed decision of city's board of zoning appeals which denied their challenges to municipal zoning overlay district which prohibited the operation of smoke shops and tobacco stores, among others, in the city's downtown.

The Circuit Court affirmed, and store operators appealed.

The Supreme Court held that:

- Two readings of ordinance were not so different that third reading was required prior to enactment of ordinance;
- As a matter of first impression, creation of municipal zoning overlay district did not constitute impermissible reverse spot zoning;
- Even assuming that municipal zoning overlay district constituted spot zoning, any such spot zoning was permissible;
- Boundaries of municipal overlay district had a rational basis and thus did not violate store operators' equal protection rights;
- Ordinance did not violate store operators' due process rights due to failure to explicitly provide for a hearing for an affected vendor; and
- Operators failed to establish that municipal zoning ordinance constituted an unconstitutional

taking.

Creation of municipal zoning overlay district which prohibited the operation of smoke shops and tobacco stores, among others, in the city's downtown did not constitute impermissible reverse spot zoning; prohibited retail uses in the overlay district were not the result of a zoning "island" that developed as the surrounding area was rezoned while the district was left behind, but instead the prohibition was created by an affirmative legislative act by the city.

IMMUNITY - CALIFORNIA

Hacala v. Bird Rides, Inc.

Court of Appeal, Second District, Division 3, California - April 10, 2023 - Cal.Rptr.3d - 2023 WL 2851729

Pedestrian and her family members brought action against city and operator of electric motorized scooter rental business alleging negligence, negligent infliction of emotional distress, loss of consortium, and public nuisance arising from pedestrian's trip and fall on a dockless rental scooter that an unknown third party left partially sticking out from behind a trash can on sidewalk.

The Superior Court, Los Angeles County, sustained defendants' demurrer without leave to amend. Pedestrian appealed.

The Court of Appeal held that:

- City had immunity under Government Claims Act;
- City's alleged failure to remove improperly parked scooters was not a physical deficiency in public property;
- City's failure to create sidewalk markings for scooter parking did not increase danger from third-party negligence;
- Requisite special relationship for imposing a duty for harm relating to third-party conduct did not apply;
- Operator had a general duty to use ordinary care or skill in management of its property;
- Public policy did not support an exception to general duty of care; and
- Pedestrian alleged sufficient facts to assert a private action for public nuisance.

City had discretion, but was not under a mandatory duty, to remove improperly parked electric rental scooters or to revoke scooter rental company's permit for noncompliance, and therefore city was immune from liability under the Government Claims Act in pedestrian's negligence action arising from her alleged trip and fall on dockless rental scooter that an unknown third party left partially sticking out from behind a trash can on sidewalk, where permit reserved in city the right to amend, modify, or change the terms and conditions of the dockless scooter pilot program at its discretion, and permit did not specify ministerial steps for removing scooters and imposing fees for such removals.

CIVIL RIGHTS - COLORADO

Irizarry v. City and County of Denver

United States District Court, D. Colorado - March 15, 2023 - F.Supp.3d - 2023 WL 2528782

Protestors brought § 1983 action against city, transit authority, and police officer, alleging that officer arrested both of them after they shouted “fuck the police” while protesting police brutality in public plaza and that officer later arrested one of them after protestor returned to plaza to protest previous arrest.

Defendants moved to dismiss for failure to state a claim.

The District Court held that:

- Arrestees stated Fourth Amendment unlawful arrest claim;
- Officer was not entitled to qualified immunity from arrestees’ unlawful arrest claim;
- Arrestee stated Fourth Amendment unlawful arrest claim;
- Arrestee stated retaliatory arrest claim;
- Officer was not entitled to qualified immunity from retaliatory arrest claim;
- Arrestee stated First Amendment violation claim; and
- City was not liable for § 1983 claims.

ZONING & PLANNING - FLORIDA

Gay v. Jupiter Island Compound, LLC

District Court of Appeal of Florida, Fourth District - April 12, 2023 - So.3d - 2023 WL 2904054

Landowners brought action against member/chairperson of town’s impact review committee, alleging tortious interference with business relationships.

The Circuit Court issued nonfinal order summarily denying member/chairperson’s motion to dismiss based on common-law absolute immunity and statutory immunity. Member/chairperson petitioned for certiorari review as to common-law absolute immunity and appealed as to statutory immunity.

The District Court of Appeal held that:

- Member/chairperson was entitled common-law absolute immunity, but
- Landowners’ complaint sufficiently alleged member/chairperson acted in bad faith or with malicious purpose, as exception to statutory immunity.

Alleged conduct of member/chairperson of town’s impact review committee occurred within scope of duties as public official, and thus, member/chairperson was entitled to common-law absolute immunity from liability for tortious interference with business relations; while landowners alleged that member/chairperson made false representations about ex parte communications that were intended to delay and ultimately deny landowners’ construction applications, member/chairperson had authority in those roles to address landowners’ constructions applications, regardless of whether she made false statements.

Landowners’ complaint for tortious interference with business relations sufficiently alleged that member/chairperson of town’s impact review committee acted in bad faith or with malicious purpose, as exception to a public official’s statutory immunity from tort liability for acts or omissions in scope of employment or function; landowners alleged that member/chairperson embarked upon series of acts with three co-conspirators to delay landowners’ construction applications and interfered with their relationships with their retained professionals, and that she failed to disclose, and instead falsely stated, that she had not had any ex parte communications regarding landowners’

applications.

POLITICAL SUBDIVISIONS - IOWA

Sand v. An Unnamed Local Government Risk Pool

Supreme Court of Iowa - April 7, 2023 - N.W.2d - 2023 WL 2817479

State Auditor filed application to enforce subpoena for financial records of local government risk pool.

The District Court denied application. Auditor appealed.

The Supreme Court held that pool was not a "governmental subdivision" over which Auditor had statutory authority.

Local government risk pool organized as an unincorporated nonprofit association was not an entity organized under chapter 28E on joint exercise of governmental powers and was thus not a "governmental subdivision" over which the State Auditor had statutory authority.

Government entities have statutory authority to establish, join, and pay funds into a local government risk pool; the repeated statutory authorizations to establish, join, and pay into a local government risk pool implicitly confer the authority to create a local government risk pool outside of chapter 28E on joint exercise of governmental powers.

PUBLIC UTILITIES - IOWA

LS Power Midcontinent, LLC v. State

Supreme Court of Iowa - March 24, 2023 - N.W.2d - 2023 WL 2618192

Competitor electric transmission companies brought action against Iowa Utilities Board (IUB), IUB's chair, director of Legislative Services Agency, and the State's code editor, seeking declaratory judgment that statute granting incumbent electric transmission owners a right of first refusal to construct and maintain lines to be connected to existing facility violated the single-subject, title, and equal protection provisions of the Iowa Constitution and seeking temporary injunction prohibiting enforcement of the statute.

The District Court dismissed for lack of standing. Companies appealed. The Court of Appeals affirmed. Companies applied for further review, and application was granted.

The Supreme Court held that:

- Companies had standing to pursue action challenging constitutionality of statute;
- Briefing and existing record were adequate for Supreme Court to decide whether to issue temporary injunction staying enforcement of statute, and, thus, Supreme Court would exercise its discretion to decide injunction issue;
- Companies were likely to succeed on merits of claim that title of appropriations bill granting right of first refusal violated constitutional title requirement, as required to obtain temporary injunction;
- Title "legal and regulatory responsibilities" as catchall for disparate subjects does not meet constitutional requirement that the title of an act express the subject matter of the act; abrogating

Rush v. Reynolds, 2020 WL 825953;

- Companies were likely to succeed on merits of claim that title of appropriations bill violated single-subject requirement of constitution, as required to obtain temporary injunction;
- Companies would likely suffer irreparable harm in absence of temporary injunction; and
- Public interest supported temporary injunction.

Competitor electric transmission companies had particularized injury distinct from general population, as required for standing to pursue action against Iowa Utilities Board (IUB) and state officials seeking declaratory judgment that statute granting incumbent electric transmission owners a right of first refusal to construct and maintain lines connected to existing facility violated state constitution's single-subject, title, and equal protection provisions; unlike members of general public, companies were approved to complete transmission projects in the state, and statute injured companies by precluding them from bidding on new projects unless incumbent failed to exercise its right of first refusal.

Competitor electric transmission companies suffered competitive injury at time of enactment of statute granting incumbent electric transmission owners a right of first refusal to construct and maintain lines connected to existing facility, and did not need to identify specific project lost to incumbent to have standing to pursue action against Iowa Utilities Board (IUB) and state officials seeking declaratory judgment that statute violated state constitution's single-subject, title, and equal protection provisions; companies were qualified and competent to supply transmission lines for in-state projects, but statute effectively blocked companies from competing unless incumbent declined to exercise its right of first refusal.

Competitor electric transmission companies' competitive injury was traceable to state's actions, as required for standing to pursue action against Iowa Utilities Board (IUB) and state officials seeking declaratory judgment that statute granting incumbent electric transmission owners a right of first refusal to construct and maintain lines connected to existing facility violated state constitution's single-subject, title, and equal protection provisions; state's grant of right of first refusal to incumbent caused harm to companies by blocking companies from competing unless incumbent declined to exercise its right of first refusal.

Favorable decision would redress competitor electric transmission companies' competitive injury, as required for standing to pursue action against Iowa Utilities Board (IUB) and state officials seeking declaratory judgment that statute granting incumbent electric transmission owners a right of first refusal to construct and maintain lines connected to existing facility violated state constitution's single-subject, title, and equal protection provisions; blocking enforcement of right of first refusal would allow companies to supply transmission lines for in-state projects.

Competitor electric transmission companies' injury in the form of lost future profits was sufficiently imminent for standing to pursue action against Iowa Utilities Board (IUB) and state officials seeking declaratory judgment that statute granting incumbent electric transmission owners a right of first refusal to construct and maintain lines connected to existing facility violated state constitution's single-subject, title, and equal protection provisions; companies alleged that regional transmission organizations would approve $30 billion in new electric transmission projects over the next ten years and that organizations had begun studying ways to expand transmission grid in midwest, including in the state, and companies would lose profits when incumbents received new projects.

Briefing and existing record were adequate for Supreme Court to decide whether to issue temporary injunction staying enforcement of statute granting incumbent electric transmission owners a right of first refusal to construct lines connected to existing facility, pending resolution of constitutional claims, and, thus, Supreme Court would exercise its discretion to decide injunction issue, instead of

remanding issue to district court, following its decision that competitor electric transmission companies had standing to pursue action challenging statute; appellate briefing squarely addressed injunction issue, companies briefed merits of constitutional claims on appeal, all parties briefed merits of claims below, and claims turned on question of law that did not require further record development.

Competitor electric transmission companies were likely to succeed on merits of claim that title of appropriations bill granting incumbent electric transmission owners a right of first refusal to construct lines connected to existing facility violated constitutional title requirement, as required for temporary injunction staying enforcement of statutory right of first refusal pending resolution of constitutional claims; title, "An Act relating to state and local finances by making appropriations, providing for legal and regulatory responsibilities, providing for other properly related matters, and including effective date and retroactive applicability provisions" did not give notice of right of first refusal provision, and title failed to clearly communicate subject matter of bill.

Competitor electric transmission companies were likely to succeed on merits of claim that title of appropriations bill granting incumbent electric transmission owners a right of first refusal to construct lines connected to existing facility violated single-subject requirement of state constitution, as required for temporary injunction staying enforcement of statutory right of first refusal pending resolution of constitutional claims; bill contained medley of appropriations provisions and granted substantive rights, and right of first refusal failed to garner sufficient votes for enactment as standalone bill.

Competitor electric transmission companies would likely suffer irreparable harm through loss of opportunity to land multi-million-dollar electric transmission projects in the state in absence of temporary injunction against Iowa Utilities Board (IUB) and state officials staying enforcement of statute granting incumbent electric transmission owners a right of first refusal to construct lines connected to existing facility, pending resolution of claims challenging constitutionality of statute.

Balance of harms favored temporary injunction against Iowa Utilities Board (IUB) and state officials staying enforcement of statute granting incumbent electric transmission owners a right of first refusal to construct lines connected to existing facility, pending resolution of constitutional challenges to statute brought by competitor electric transmission companies; companies were harmed by loss of opportunity to compete for new projects, intervenors, who were shielded from competition by statute, argued that new projects were years away and faced no harm while case was pending, and companies were likely to succeed on claims, thereby diminishing any harm resulting from state not being allowed to enforce statute.

Public interest supported temporary injunction against Iowa Utilities Board (IUB) and state officials staying enforcement of statute, granting incumbent electric transmission owners a right of first refusal to construct lines connected to existing facility, pending resolution of constitutional challenges to statute brought by competitor electric transmission companies; public had interest in reliable electric service at reasonable rates, and statute would decrease competition and increase cost of electricity.

BALLOT INITIATIVE - MAINE

Jortner v. Secretary of State

Supreme Judicial Court of Maine - April 10, 2023 - A.3d - 2023 WL 2856124 - 2023 ME 25

Citizens filed petition for judicial review of decision of the Secretary of State that determined the wording of a ballot question for citizen-initiated legislation that would create a non-profit electric utility, challenging use of the term "quasi-governmental power company" to describe the proposed utility and requesting substitution with the term "consumer-owned transmission and distribution utility."

The Superior Court vacated Secretary's decision and remanded matter to Secretary to revise the wording of the ballot question. Secretary appealed.

The Supreme Judicial Court held that use of term "quasi-governmental" in describing the proposed utility resulted in the question being not understandable to a reasonable voter reading the question for the first time, and thus ballot question did not satisfy statutory standard.

Use of term "quasi-governmental" in describing proposed non-profit electric utility as a "quasi-governmental power company," in ballot question for citizen-initiated legislation that would create a non-profit electric utility, resulted in the question being not understandable to a reasonable voter reading the question for the first time, and thus ballot question did not satisfy statutory standard, although some features of the new utility would be governmental in nature; term "quasi-governmental" did not appear in the proposed legislation and did not have a clear dictionary definition, the prefix "quasi-" had multiple meanings, and there was no existing statutory definition of the term.

IMMUNITY - MISSISSIPPI

Moton v. City of Clarksdale

Supreme Court of Mississippi - April 6, 2023 - So.3d - 2023 WL 2804785

Following his arrests at two city commissioners meetings, former city commissioner brought action against defendants including city, police captain, and executor of former mayor's estate, alleging violations of his rights under the Mississippi Constitution to free speech, due process, and equal protection, and also asserting claims for malicious prosecution, civil conspiracy, and intentional and negligent infliction of emotional distress.

Finding commissioner's claims time-barred, the Circuit Court granted defendants' motion to dismiss for failure to state a claim.

The Supreme Court held that:

- Commissioner's filing of suit did not toll one-year limitations period applicable to common law claims under the Mississippi Tort Claims Act;
- Three-year general statute of limitations applied to commissioner's constitutional claims; and
- Commissioner's claim for malicious prosecution accrued when charges against him were dismissed for failure to prosecute.

Former city commissioner's filing of suit against city, police captain, and former mayor's estate did not toll the one-year limitations period applicable to his common law claims against such defendants brought under the Mississippi Tort Claims Act, where the time providing for presuit notice and for filing suit had already run at the time the suit was filed, and commissioner had undisputedly not complied with the procedural requirements of the Act.

Mississippi's three-year general statute of limitations, rather than one-year limitations period under

the Mississippi Tort Claims Act, applied to former city commissioner's constitutional claims against city, police captain, and former mayor's estate, alleging violations of his rights under the Mississippi Constitution to free speech, substantive due process, and equal protection, stemming from his arrests at city commissioners meetings.

Former city commissioner's claim for malicious prosecution accrued, and one-year limitations period began to run, when charges against commissioner were dismissed for failure to prosecute, for purposes of commissioner's suit against city, police captain, and former mayor's estate, stemming from his arrests at city commissioners meetings.

BANKRUPTCY - PENNSYLVANIA

In re City of Chester

United States Bankruptcy Court, E.D. Pennsylvania - March 14, 2023 - B.R. - 2023 WL 2504708

City, through receiver appointed under Pennsylvania's Municipalities Financial Recovery Act, filed Chapter 9 petition. Certain elected city officials and holder of city-issued bond objected.

The Bankruptcy Court held that:

- City was specifically authorized to file its voluntary petition by a governmental officer empowered by Pennsylvania state law, as required to be eligible for Chapter 9 relief;
- City was insolvent, as required to be eligible for Chapter 9 relief;
- City desired to effect a plan to adjust its debts, as required to be eligible for Chapter 9 relief;
- City negotiated in good faith with those of its major creditor constituencies with which it was practical to negotiate, as required to be eligible for Chapter 9 relief; and
- City filed its voluntary petition in good faith.

City was a "political subdivision" of Pennsylvania and, thus, a "municipality" within the meaning of the Bankruptcy Code, for purposes of determining its eligibility for relief under Chapter 9; the oldest city in the state, city maintained a fire department with approximately 61 sworn personnel and a police department with approximately 83 sworn officers, and had the ability to tax its residents.

Under Pennsylvania law, city, through receiver appointed under Pennsylvania's Municipalities Financial Recovery Act, was specifically authorized to file its voluntary bankruptcy petition, as required to be eligible for Chapter 9 relief; Secretary of Pennsylvania Department of Community and Economic Development (DCED) authorized receiver to commence a municipal debt adjustment action in writing, and receiver subsequently consulted with Municipal Financial Recovery Advisory Committee (MFRAC) regarding city's financial problems, such that receiver followed all procedural requirements of Act for initiating a municipal debt adjustment action.

Elected city officials did not have standing to object to city's eligibility to be a debtor under Chapter 9 of the Bankruptcy Code; officials did not have "personal stake" in outcome of controversy and were not creditors of city or able to assert an equitable claim against the bankruptcy estate.

City was insolvent, as required to be eligible for Chapter 9 relief, where city had current and long-term inability to pay its debt obligations as they came due; city's prolonged financial distress satisfied both "generally not paying its debts as they become due" and "is unable to pay its debts as they become due" prongs of the Bankruptcy Code's definition of "insolvent," as city was currently unable to fund, and historically had been unable to fun, its substantial obligations under pension

funds established for city employees, which were unconditionally owed and presently enforceable, over $100 million remained due and owing under the pension plans, which city lacked resources to pay, in addition to other substantial debt obligations, city's baseline general fund projections showed deficits of $46.5 million to $16.3 million over upcoming five-year period, and city was in state of "bona fide financial distress" unlikely to be resolved absent bankruptcy.

City desired to effect a plan of adjustment, as required to be eligible for Chapter 9 relief; there was no evidence that city filed its bankruptcy petition with ulterior motive such as evading creditors, city, through receiver appointed under Pennsylvania's Municipalities Financial Recovery Act, attempted to resolve claims with its creditors for months prior to filing petition, but to no avail, city submitted a memorandum of law in support of its eligibility to be a debtor with its voluntary petition which stated that city was "presently developing a plan of adjustment[ ] and [was] seeking mediation with its major constituencies to expedite and mediate a path towards such a plan," city requested mandatory mediation at outset of case, further confirming its desire to expeditiously effect a plan of adjustment, and receiver made pre- and postpetition efforts to implement city's recovery plans.

City negotiated in good faith with those of its major creditor constituencies with which it was practical to negotiate, as required to be eligible for Chapter 9 relief; city engaged in well-documented meetings with its unions and made numerous attempts at follow-up communication prior to filing its petition, city had a constructive meeting and attempted to follow up with one group of bondholders, city made multiple unsuccessful attempts to negotiate with second bondholder and negotiated in good faith even though the parties ultimately could not reach consensual resolution outside of bankruptcy, and it was impracticable for city to negotiate with its approximately 268 retirees, given the volume of potential retiree claims and their lack of centralized representation prepetition.

In context of determining whether a municipality negotiated with creditors in good faith for purposes of Chapter 9 eligibility, the creditor's response, and the amount of time the creditor has to respond, may be factors; if creditor has had a relatively short time to respond to municipality's offer to negotiate, lack of detail in the opening communication might weigh against municipality rushing to file, while on the other hand, where creditor has been apprised of the possibility of a debt adjustment and declined to respond after a reasonable period of time, or where creditor has explicitly responded with a refusal to negotiate, its position as an objector is significantly weakened.

In context of determining whether a municipality negotiated with creditors in good faith for purposes of Chapter 9 eligibility, it is impossible to negotiate with a "stonewall," that is, a creditor whose position has remained virtually unchanged over a period of time, and a municipality is not required to wait until it has reached an impasse after extensive prepetition negotiations to invoke the subject provision of the Bankruptcy Code.

City filed its voluntary Chapter 9 petition in good faith; financial problems that city had faced for decades were of type contemplated by, and meant to be addressed in, a Chapter 9 filing, city's decision to file voluntary petition and its pursuit of plan of recovery in the face of "crippling liabilities" and insufficient revenue to meet current and future liabilities was consistent with Chapter 9's objective of providing protection to a financially distressed municipality from creditors while it develops a plan to adjust its debts, city had been and remained insolvent despite its receiver's efforts to cut expenses and find sources of funding, city's prepetition negotiations with creditors to avoid bankruptcy had not been fruitful and Chapter 9 appeared to be the only viable option, and city's residents, who were burdened by high taxes while facing diminishing essential services, would be prejudiced by denial of Chapter 9 relief.

EMINENT DOMAIN - SOUTH CAROLINA

Braden's Folly, LLC v. City of Folly Beach

Supreme Court of South Carolina - April 5, 2023 - S.E.2d - 2023 WL 2778717

Owner of two small, contiguous, developed coastal lots brought action for regulatory taking against city, alleging that city amended ordinance to require certain contiguous properties under common ownership, including owner's properties, to be merged into a single, larger property, and that merger ordinance interfered with owner's investment-backed expectation.

Parties filed cross-motions for summary judgment. The Circuit Court, Charleston County, Roger M. Young, J., granted owner's motion. City appealed.

The Supreme Court held that:

- Treatment-of-the-land factor weighed in favor of identifying relevant parcel as both lots combined;
- Physical-characteristics factor weighed in favor of identifying relevant parcel as both lots combined;
- Value-of-the-property factor weighed in favor of identifying relevant parcel as both lots combined;
- Economic impact of ordinance weighed heavily in favor of finding that ordinance did not amount to regulatory taking;
- Extent to which ordinance interfered with owner's investment-backed expectations did not weigh in favor of either party; and
- Character of ordinance weighed in favor of finding that ordinance did not amount to regulatory taking.

Treatment-of-the-land factor for defining relevant parcel for purposes of regulatory-taking claim brought by owner of two contiguous, beachfront lots, who challenged city ordinance requiring lots to be merged, weighed in favor of identifying relevant parcel as both lots combined, where lots were currently merged under state and local law, there were no physical or topographical boundaries that would have limited joint treatment or development of lots, lots had always been owned and sold as single unit and were even redeveloped by owner at same time, and due to city's zoning ordinances and dune-management ordinances, owner was prohibited from selling lots separately or from building separate homes on each should one of the existing homes be more than 50% destroyed.

Physical-characteristics factor for defining relevant parcel for purposes of regulatory-taking claim brought by owner of two contiguous lots, who challenged city ordinance requiring lots to be merged, weighed in favor of identifying relevant parcel as both lots combined, where lots were located on beach, which was quintessential example of area that was heavily regulated and likely to become subject to additional environmental regulations.

Value-of-the-property factor for defining relevant parcel for purposes of regulatory-taking claim brought by owner of two contiguous lots, who challenged city ordinance requiring lots to be merged, weighed in favor of identifying relevant parcel as both lots combined; any economic impact resulting from merger ordinance was mitigated by benefits of using property as integrated whole since, regardless of merger ordinance, one lot contained beachfront property that was restricted by city's dune-management ordinances, which prevented any redevelopment on lot if existing house was destroyed by 50% or more, and thus merger of lots would allow owner to maintain beach house on other lot while simultaneously enjoying beach access from beachfront lot.

Economic impact of city ordinance requiring merger of property owner's two contiguous, beachfront

lots weighed heavily in favor of finding that ordinance did not amount to regulatory taking, although owner claimed that if lots were sold separately, they were worth $508,000 more than if they were sold as single, merged lot, where $508,000 difference amounted to 23% reduction in value, which, while not insignificant, was far less than other reductions in value found constitutional by United States Supreme Court, owner remained able to rent out houses on each lot separately, with average gross receipts amounting to approximately $117,000 per year, and during pendency of lawsuit, buyer offered owner its full asking price of $2.55 million for both lots.

Extent to which city ordinance requiring merger of property owner's two contiguous, beachfront lots interfered with owner's investment-backed expectations did not weigh in favor of either party, for purposes of owner's regulatory-takings claim, although ordinance was enacted after owner redeveloped house on first lot and built new house on second lot, with plans to sell lots separately, where owner used lots for family vacations and as rental properties for several decades, owner delayed selling lots after redevelopment and made little to no effort to actually sell once lots were placed on market, lots were located in coastal area with dynamic, fragile environment, and size, shape, and orientation of lots provided objective indicia that owner's expectation of selling second lot was unreasonable.

Character of city ordinance requiring merger of property owner's two contiguous, beachfront lots weighed in favor of finding that ordinance did not amount to regulatory taking, where ordinance did not unfairly single out owner's lots, ordinance was reasonable land-use regulation enacted as part of coordinated effort to protect beach and surrounding land by preserving federal funding for beach renourishment, and although owner was slightly burdened by ordinance, it in turn would benefit greatly from the restrictions that were placed on others.

IMMUNITY - TEXAS

Bonin v. Sabine River Authority

United States Court of Appeals, Fifth Circuit - April 14, 2023 - F.4th - 2023 WL 2943004

Property owners brought action alleging that river authority took, damaged, or destroyed their property by causing or contributing to a flood when they opened spillway gates into the river.

The United States District Court for the Eastern District of Texas denied river authority's motion to dismiss complaint for lack of subject matter jurisdiction and later denied river authority's motion to dismiss amended complaint for lack of subject matter jurisdiction. River authority appealed.

The Court of Appeals held that:

- Characterization of river authority under Louisiana law weighed in favor of finding that it was entitled to Eleventh Amendment immunity, but only modestly;
- Source of river authority's funding weighed against finding that it was entitled to Eleventh Amendment immunity;
- River authority's autonomy weighed minimally against finding that it was entitled to Eleventh Amendment immunity;
- River authority was concerned primarily with local, as opposed to statewide, problems, which weighed against finding that it was entitled to Eleventh Amendment immunity;
- River authority's statutorily conferred right to sue in its own name weighed against finding that it was entitled to Eleventh Amendment immunity; and
- River authority's right to hold and use property weighed against finding that it was entitled to

Eleventh Amendment immunity.

Characterization of river authority under Louisiana law weighed in favor of finding that authority was an "arm of the state" entitled to Eleventh Amendment immunity, but only modestly, in property owners' action alleging that authority took, damaged, or destroyed their property by causing or contributing to a flood when they opened spillway gates into the river; language in state statutes describing authority as "an agency and instrumentality of the state" was inconsistent, as it also described authority as a "corporation and body politic and corporate" invested with "all powers, privileges, rights, and immunities conferred by law upon other corporations of like character," and belated placement of authority in executive branch was partly undercut by authority's retention of significant operational autonomy.

Source of river authority's funding weighed against finding that authority was an "arm of the state" of Louisiana entitled to Eleventh Amendment immunity, in property owners' action alleging that authority took, damaged, or destroyed their property by causing or contributing to a flood when they opened spillway gates into the river; while the Louisiana legislature had discretion to appropriate state funds to the authority, authority generated its own revenues, could incur debts and borrow money, and was obligated to pay its debts out of its funds, without drawing on state resources.

River authority's autonomy weighed minimally against finding that authority was an "arm of the state" of Louisiana entitled to Eleventh Amendment immunity, in property owners' action alleging that authority took, damaged, or destroyed their property by causing or contributing to a flood when they opened spillway gates into the river; while entire board of commissioners who governed authority were appointed by and served at the pleasure of the Louisiana governor, authority had significant independent management autonomy given to it by the state, including the power to acquire property, enter into contracts, incur debts and borrow money, and even establish and maintain a law enforcement division within the authority.

River authority was concerned primarily with local, as opposed to statewide, problems, which weighed against finding that authority was an "arm of the state" of Louisiana entitled to Eleventh Amendment immunity, in property owners' action alleging that authority took, damaged, or destroyed their property by causing or contributing to a flood when they opened spillway gates into the river; although authority generated some statewide benefits, its activities were localized, and it had a territorial jurisdiction.

River authority's statutorily conferred right to sue and be sued in its own name weighed against finding that authority was an "arm of the state" of Louisiana entitled to Eleventh Amendment immunity, in property owners' action alleging that authority took, damaged, or destroyed their property by causing or contributing to a flood when they opened spillway gates into the river.

River authority's right to hold and use property weighed against finding that authority was an "arm of the state" of Louisiana entitled to Eleventh Amendment immunity, in property owners' action alleging that authority took, damaged, or destroyed their property by causing or contributing to a flood when they opened spillway gates into the river; although Louisiana statute describing authority's powers stated that authority held property as an instrumentality of the state, the same statute also said that title to all property acquired by the authority was taken in its corporate name.

MANDAMUS - ALABAMA

Ex parte City of Muscle Shoals

Supreme Court of Alabama - March 31, 2023 - So.3d - 2023 WL 2721348

Residents of subdivision filed a complaint against city seeking an injunction directing city to enact a comprehensive stormwater-management plan or to enforce its existing stormwater-management ordinances to prevent retention pond from overflowing.

City moved to dismiss arguing it was entitled to substantive immunity. The Circuit Court denied the motion to dismiss. City petitioned for a writ of mandamus directing the circuit court to dismiss residents' claim based on its entitlement to substantive immunity.

The Supreme Court held that city was entitled to substantive immunity from residents' claim for injunctive relief.

City was entitled to substantive immunity from residents' claim for injunctive relief, which sought an injunction directing city to enact a comprehensive stormwater-management plan or to enforce its existing stormwater-management ordinances to prevent retention pond from overflowing; city's decisions about its enactment of a plan or its enforcement of existing ordinances concerning its drainage systems were public-policy decisions made in connection with the city's responsibility to provide for the public's safety, health, and general welfare and were so laden with the public interest as to outweigh the incidental duty to individual citizens, and thus fell into the category of actions excepted from the general rule of liability.

EMINENT DOMAIN - CALIFORNIA

Shenson v. County of Contra Costa

Court of Appeal, First District, Division 2, California - March 30, 2023 - Cal.Rptr.3d - 2023 WL 2706499

Owners of creekside properties sued county and flood control district for inverse condemnation and parallel tort causes of action after drainage improvements failed and their properties were damaged by erosion and subsidence.

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

The Court of Appeal held that:

- County's requirement that developer make drainage-related improvements and offer to dedicate an easement as conditions of subdivision approval did not convert spillway into a public drainage system;
- Fees collected by flood control district did not establish that subdivision's drainage improvements were incorporated into a public drainage system;
- Failure of defendants to require mitigation by upstream property owners did not establish that subdivision's drainage improvements were a public work; and
- Any error in trial court's exclusion of expert's statement regarding county's custom and practice was harmless.

County's requirement that private developer make drainage-related improvements and offer to dedicate an easement as conditions of approval of subdivision did not convert spillway constructed by developer into a public drainage system, as alleged in inverse condemnation action brought by subdivision property owners, where county never expressly accepted the easement offer and never

maintained or repaired the spillway or installed any improvements.

Fees collected from subdivision property owners by flood control district were not evidence that subdivision's drainage improvements were incorporated into a public drainage system in inverse condemnation action brought by owners against district and county; fees were collected pursuant to a drainage fee ordinance to be placed in a fund intended to cover a local match to a proposed federal flood-control project that was never built.

Failure of the county or flood control district to require upstream property owners to install mitigation measures to offset the downstream runoff through subdivision was not an affirmative act that demonstrated public control or dominion over subdivision's drainage improvements in inverse condemnation action brought by subdivision property owners.

Trial court's error, if any, in excluding expert's statement about county's custom and practice regarding assumption of responsibility for maintaining privately-constructed drainage improvements was harmless in inverse condemnation action brought by subdivision homeowners; evidence of custom and practice could not establish that county created a contract by accepting subdivision developer's offer of dedication and thereby undertook to maintain the improvements, and the terms implied by expert conflicted with express terms of the agreement between county and developer.

LIABILITY - LOUISIANA

Green v. East Carroll Parish School District/Board

Court of Appeal of Louisiana, Second Circuit - March 1, 2023 - So.3d - 2023 WL 2289434 - 54,910 (La.App. 2 Cir. 3/1/23)

Mother of a child with a disability filed petition for damages against school board, individually and on behalf of child, alleging that school board was negligent for failing to provide required transportation and services to her wheelchair-using son, and that this failure caused her to fall and be injured on day when she elected to transport him herself since special services school bus equipped with a wheelchair lift was not functioning properly.

The District Court granted school board's motion for summary judgment, finding that the only reason for mother's fall was her own haste and negligence. Mother appealed.

The Court of Appeal held that:

- School board's motion for summary judgment was timely served;
- School board did not owe a duty to mother to prevent her from sustaining an injury while transporting her children;
- Mother's injury was too attenuated from school board's duty to provide safe transportation for child; and
- Trial court properly dismissed child's claims for personal injury against school board.

School board did not owe a duty to mother of student with a disability to prevent her from sustaining an injury while transporting her children, and thus, mother could not prevail on her negligence claim against school board, though she was injured while transporting her disabled student to school on morning special services bus equipped with a wheelchair lift was not working; board owed a duty of care to student pursuant to his individualized education program, but that duty did not extend to student while he was being voluntarily transported in his mother's vehicle, and mother had multiple options when required special services transportation was not available, but did not seek any of

them and instead elected to drive her student to school.

Mother's injury, which she sustained while transporting her student with a disability to school, was too attenuated from school board's duty to provide safe transportation for student, pursuant to his individualized education program, to establish school board's liability for negligence, though she elected to transport student to school on morning special services bus equipped with a wheelchair lift was not working; risk of mother falling was not in scope of school board's duty to provide transportation to student.

SPECIAL ASSESSMENTS - NORTH DAKOTA

Senske Rentals, LLC v. City of Grand Forks

Supreme Court of North Dakota - March 31, 2023 - N.W.2d - 2023 WL 2718043 - 2023 ND 55

Property owner appealed after city council upheld decision of city special assessment commission to specially assess property for street improvements. The District Court upheld commission's decision. Property owner appealed.

The Supreme Court held that:

- Judicial notice would not be taken of city's published documents relating to special assessment amount;
- Record was inadequate for property owner to meet burden to demonstrate that city or commission acted arbitrarily, capriciously, or unreasonably in determining benefit of project; and
- Commission's assessment method did not violate statutory requirements.

Supreme Court would decline to take judicial notice of city's published documents relating to special assessment amount of street-improvement project when reviewing district court's order upholding decision of city special assessment commission; documents related to information gathered nearly two years after determination of special-assessment amount, and documents were not in the record given that they were not presented to district court, city council, which upheld commission's decision, or commission.

Record in property owner's appeal of special assessment was inadequate for property owner to meet burden to demonstrate that city or city special assessment commission acted arbitrarily, capriciously, or unreasonably in determining benefit of street-improvement project, where record did not reflect that property owner made a specific argument on method that commission used to determine benefit.

City special assessment commission's assessment method, under which commission calculated assessment amount for street-improvement project by taking cost of construction and dividing it by square footage of the property and assessing it according to lot frontage, did not violate requirements of statute governing determination of special assessments by commission, despite contention that complex nature of project was not comparable to other projects that had lent themselves to a simple form of calculation.

Supreme Court would decline to consider property owner's claim that constitutional taking occurred because special assessments imposed by city special assessment commission regarding street-improvement project were as much as improved value of the parcels when Court reviewed district court's affirmance of commission's decision, where property owner did not raise claim in district

court.

EMINENT DOMAIN - OHIO

State ex rel. US Bank Trust, National Association v. Cuyahoga County

Supreme Court of Ohio - April 4, 2023 - N.E.3d - 2023 WL 2762497 - 2023-Ohio-1063

Relator sought mandamus relief compelling counties to begin appropriation proceedings regarding properties foreclosed upon through expedited tax foreclosure proceedings for abandoned land.

The Eighth District Court of Appeals, the Sixth District Court of Appeals, and the Ninth District Court of Appeals dismissed. Relator appealed.

The Supreme Court held that:

- Relator had standing with respect to one property as owner of mortgage at time of foreclosure;
- Relator lacked standing with respect to another property as non-owner of mortgage at time of foreclosure; and
- Relator had adequate remedy in ordinary course of law, precluding mandamus relief.

Relator had standing to seek mandamus relief compelling county to begin appropriation proceedings regarding property that was foreclosed upon through expedited tax foreclosure proceeding for abandoned land, even though the mortgage assignment to relator was recorded almost a month after adjudication of foreclosure, where mortgage assignment was executed a month before adjudication.

Relator lacked standing to seek mandamus relief compelling county to begin appropriation proceedings regarding property that was foreclosed upon through expedited tax foreclosure proceeding for abandoned land, where relator did not own mortgage on the property at time of alleged taking, and relator made no showing that takings claim was assigned to it when it acquired the mortgage.

Relator had adequate remedy in ordinary course of law regarding two properties foreclosed upon through expedited tax foreclosure proceeding for abandoned land, and thus relator was not entitled to mandamus relief compelling county to begin appropriation proceedings; relator could have redeemed properties by paying what was due on tax liens, relator could have sought transfers of foreclosure actions from boards of revision to common pleas courts, and relator could have appealed boards' adjudications of foreclosure to common pleas courts.

PUBLIC EMPLOYMENT - TENNESSEE

Moss v. Shelby County Civil Service Merit Board

Supreme Court of Tennessee - March 21, 2023 - S.W.3d - 2023 WL 2579880

Firefighter filed writ of certiorari seeking review of decision of county civil service merit board upholding firefighter's termination.

The Chancery Court affirmed. Firefighter appealed. The Court of Appeals reversed. Board applied for permission to appeal, which was granted. The Supreme Court reversed and remanded. On remand, the Court of Appeals affirmed in part, vacated in part, and remanded. Board filed

application for permission to appeal, which was granted.

The Supreme Court held that board's decision at termination hearing to disallow firefighter's questions about more lenient discipline imposed on other employees was not clear error in judgment.

Firefighter's disparate discipline evidence, pertaining to discipline imposed on other fire department employees, was irrelevant to whether there was just cause to terminate firefighter's employment, and thus, county civil service merit board's decision at termination hearing to disallow firefighter's questions about more lenient discipline imposed on other employees was not clear error in judgment that rendered board's decision arbitrary or capricious; essential facts of consequence to board's decision involved firefighter's conduct, and evidence about discipline that might have been imposed on other employees in other situations did not tend to make the facts about firefighter's conduct more or less probable, and he did not claim equal protection violation based on membership in protected class.

PUBLIC EMPLOYMENT - ALABAMA

City of Houston v. Houston Professional Fire Fighters' Association, Local 341

Supreme Court of Texas - March 31, 2023 - S.W.3d - 2023 WL 2719477 - 66 Tex. Sup. Ct. J. 561

City firefighters' union filed suit against city over claim that city violated the Fire and Police Employee Relations Act by failing to provide firefighters with substantially equal compensation and conditions of employment that prevailed in comparable private sector employment. Union also requested a declaration of compensation and conditions of employment for one year pursuant to the Act.

The 234th District Court denied city's jurisdictional plea, denied city's motion for summary judgment on claim that Act's judicial-enforcement provisions were unconstitutional, entered partial summary judgment for union, and permitted city to file an interlocutory appeal. City took an appeal as of right concerning the denial of its jurisdictional pea and tool an interlocutory appeal of the rejection of its constitutional claim. The Houston Court of Appeals affirmed. In a separate action, city police officers' union brought action for a declaration that Act preempted city charter amendment that would require city to set firefighter compensation commensurate with police officer compensation at similar ranks, which was a claim that the city joined. The 157th District Court entered summary judgment that the amendment was preempted by the Act. Firefighters' union and individual firefighters who had intervened appealed. The Houston Court of Appeals reversed and remanded. Review was granted in both actions.

The Supreme Court held that:

- Act's judicial-enforcement provision was not an unconstitutional abdication of legislative authority under the Texas Constitution;
- Act's compensation standards were not so vague as to render their judicial application unconstitutional under the Texas Constitution; abrogating *International Ass'n of Firefighters, Local Union No. 2390 v. City of Kingsville*, 568 S.W.2d 391;
- Firefighters' union was not required to propose particular private-sector standards during collective bargaining in order to be entitled to have the courts establish compensation under the Act; and

- Act preempted the city charter amendment.

Fire and Police Employee Relations Act's judicial-enforcement provision, which required courts to establish compensation in the event of an impasse in collective bargaining, was not unconstitutional abdication of legislative authority under the Texas Constitution, despite argument that the provision required courts to establish compensation in the first instance; the Act, which required local governments to provide firefighters with substantially equal compensation and conditions of employment that prevailed in comparable private sector employment, provided a legislatively defined standard by which to assess compensation structure and linked judicial enforcement of that standard to an evaluation of existing compensation.

Compensation standards laid out in the Fire and Police Employee Relations Act, which required local governments to provide firefighters with substantially equal compensation and conditions of employment that prevailed in comparable private sector employment, were not so vague as to render their judicial application invalid as result of unconstitutional delegation of legislative authority; the Act expressed the Legislature's policy judgment that firefighters' employment conditions should mirror the private sector; abrogating *International Ass'n of Firefighters, Local Union No. 2390 v. City of Kingsville*, 568 S.W.2d 391.

City firefighters' union was not required to propose particular private-sector standards during collective bargaining in order to be entitled to have the courts establish compensation under the Fire and Police Employee Relations Act, which, in a waiver of governmental immunity, allowed courts to do so in the event of an impasse and which required local governments to provide firefighters with substantially equal compensation and conditions of employment that prevailed in comparable private sector employment; Act's good-faith provision did not require either party to negotiate based on a particular standard or agree to particular terms.

Fire and Police Employee Relations Act's provision that required local governments to provide firefighters and police officers with substantially equal compensation and conditions of employment that prevailed in comparable private sector employment preempted city charter amendment that would require city to set firefighter compensation commensurate with police officer compensation at similar ranks; Act expressed an overarching state policy with respect to collective-bargaining compensation, Act provided that fire and police departments had to bargain independently with their public employer unless they voluntarily joined together, and Act provided a specific compensation standard for claims for judicial enforcement, i.e., private-sector employment, which conflicted with the amendment.

Fire and Police Employee Relations Act's provision that required local governments to provide firefighters with substantially equal compensation and conditions of employment that prevailed in comparable private sector employment establishes the standard for judicial enforcement of firefighter compensation to the exclusion of local law.

UTILITY FEES - ARKANSAS

City of Fort Smith v. Merriott

Supreme Court of Arkansas - March 16, 2023 - S.W.3d - 2023 Ark. 51 - 2023 WL 2530753

Class of city citizens and taxpayers brought action against city after discovering that it was dumping recycling in landfill, contending that collection of monthly sanitation charges, which purportedly included fees for recycling, was an illegal exaction and that city had been unjustly enriched.

Following certification of class and denial of city's motion for summary judgment, the Circuit Court denied city's motion to compel class notice on grounds city had waived notice. City appealed, and the Supreme Court reversed and remanded. Following a bench trial on remand, the Circuit Court entered judgment for class and awarded damages. City appealed.

The Supreme Court held that:

- Single sanitation fee which city charged for curbside pickup of trash, recyclables, and yard waste bore a reasonable relationship to the benefits conferred thus was not an illegal exaction, and
- Evidence of the cost of city's fake recycling program was insufficient to show the value of the benefit which city received, and thus did not support claim for restitution.

Single sanitation fee which city charged for curbside pickup of trash, recyclables, and yard waste bore a reasonable relationship to the benefits conferred on those receiving the services and thus was not an illegal exaction, even though city dumped collected recycling while continuing to run a separate curbside-recycling program and gave warning stickers to residents that failed to properly separate their trash; city ordinance set a single fee for the cost of residential collection and disposal of solid waste, recycling, and yard waste, city spent the funds on the collection and disposal of solid waste, recycling, and yard waste, charges were maintained in the sanitation enterprise fund, and residents were never charged a separate fee specifically designated for recycling.

Evidence of the cost of city's fake recycling program was insufficient to show the value of the benefit which city received from class of city citizens who paid a single sanitation fee for sanitation services that included recycling, and thus citizens could not recover that cost as restitution for unjust enrichment; there was no evidence that city, which collected recycling separate from garbage but dumped them both together, gained anything from its deception or profited or otherwise benefited from its actions.

PUBLIC UTILITIES - HAWAI'I

Matter of Hawai'i Electric Light Company, Inc.

Supreme Court of Hawai'i - March 13, 2023 - P.3d - 2023 WL 2471890

After Supreme Court vacated Public Utilities Commission (PUC) decision approving electric utility's proposed purchase of electricity from power company's proposed biomass power plant, energy company appealed PUC's decision on remand reconsidering its earlier grant of waiver to utility, and denying waiver from competitive bidding process for acquisition of new renewable energy generation sources, and it also appealed from PUC's decision denying its motion for reconsideration.

The Supreme Court vacated and remanded. Following new contested case hearing, the PUC declined to approve amended power purchase agreement, and power company appealed.

The Supreme Court held that:

- PUC had duty to consider energy prices when considering electric utility's proposed purchase of electricity from power company's proposed biomass power plant;
- PUC was not restricted to comparing biomass power plant to fossil-fuel plants when considering

potentially harmful climate change due to the release of harmful greenhouse gases; and
- PUC could apply carbon neutrality standard when evaluating proposed biomass power plant.

Public Utilities Commission (PUC) on remand, had duty to consider energy prices when considering electric utility's proposed purchase of electricity from power company's proposed biomass power plant; mandate on remand from Supreme Court expressly required consideration of whether the cost of energy under the Amended power purchase agreement was reasonable and whether the terms of the agreement were prudent and in the public interest, and PUC had a duty to act in the public interest.

Public Utilities Commission (PUC), when considering whether costs of proposed biomass power plant were reasonable as part of proposed power purchase agreement, was not restricted to comparing biomass power plant to fossil-fuel plants when considering potentially harmful climate change due to the release of harmful greenhouse gases.

Public Utilities Commission (PUC) findings, when declining to approve power purchase agreement for purchase of power from proposed biomass power plant project, did not indicate that PUC improperly tried to become its own "expert," where PUC merely compiled data provided by power company's expert into a table and calculated that project would reach cumulative carbon neutrality 12 years after it reached annual carbon neutrality, and two years after the statutory cutoff for full carbon neutrality.

Public Utilities Commission's (PUC) critical evaluation of the evidence power company presented when seeking approval of power purchase agreement for electric utility to purchase energy from power company's proposed biomass power plant did not equate to improper application of a higher evidentiary standard, even if power company and electric utility were the only ones to introduce expert evidence; PUC simply did not find power company persuasive.

Public Utilities Commission (PUC) could apply carbon neutrality standard when evaluating power purchase agreement for electric utility to purchase electricity from power company's proposed biomass power plant; power company had pledged to be carbon negative, carbon neutrality went directly to the reasonability of its costs in light of its greenhouse gas emissions, and PUC was not convinced by power company's argument that increased emissions would be offset by tree planting.

PUBLIC UTILITIES - IOWA

LS Power Midcontinent, LLC v. State

Supreme Court of Iowa - March 24, 2023 - N.W.2d - 2023 WL 2618192

Competitor electric transmission companies brought action against Iowa Utilities Board (IUB), IUB's chair, director of Legislative Services Agency, and the State's code editor, seeking declaratory judgment that statute granting incumbent electric transmission owners a right of first refusal to construct and maintain lines to be connected to existing facility violated the single-subject, title, and equal protection provisions of the Iowa Constitution and seeking temporary injunction prohibiting enforcement of the statute.

The District Court dismissed for lack of standing. Companies appealed. The Court of Appeals affirmed. Companies applied for further review, and application was granted.

The Supreme Court held that:

- Companies had standing to pursue action challenging constitutionality of statute;
- Briefing and existing record were adequate for Supreme Court to decide whether to issue temporary injunction staying enforcement of statute, and, thus, Supreme Court would exercise its discretion to decide injunction issue;
- Companies were likely to succeed on merits of claim that title of appropriations bill granting right of first refusal violated constitutional title requirement, as required to obtain temporary injunction;
- Title "legal and regulatory responsibilities" as catchall for disparate subjects does not meet constitutional requirement that the title of an act express the subject matter of the act; abrogating *Rush v. Reynolds*, 2020 WL 825953;
- Companies were likely to succeed on merits of claim that title of appropriations bill violated single-subject requirement of constitution, as required to obtain temporary injunction;
- Companies would likely suffer irreparable harm in absence of temporary injunction; and
- Public interest supported temporary injunction.

Competitor electric transmission companies had particularized injury distinct from general population, as required for standing to pursue action against Iowa Utilities Board (IUB) and state officials seeking declaratory judgment that statute granting incumbent electric transmission owners a right of first refusal to construct and maintain lines connected to existing facility violated state constitution's single-subject, title, and equal protection provisions; unlike members of general public, companies were approved to complete transmission projects in the state, and statute injured companies by precluding them from bidding on new projects unless incumbent failed to exercise its right of first refusal.

Competitor electric transmission companies suffered competitive injury at time of enactment of statute granting incumbent electric transmission owners a right of first refusal to construct and maintain lines connected to existing facility, and did not need to identify specific project lost to incumbent to have standing to pursue action against Iowa Utilities Board (IUB) and state officials seeking declaratory judgment that statute violated state constitution's single-subject, title, and equal protection provisions; companies were qualified and competent to supply transmission lines for in-state projects, but statute effectively blocked companies from competing unless incumbent declined to exercise its right of first refusal.

Competitor electric transmission companies' competitive injury was traceable to state's actions, as required for standing to pursue action against Iowa Utilities Board (IUB) and state officials seeking declaratory judgment that statute granting incumbent electric transmission owners a right of first refusal to construct and maintain lines connected to existing facility violated state constitution's single-subject, title, and equal protection provisions; state's grant of right of first refusal to incumbent caused harm to companies by blocking companies from competing unless incumbent declined to exercise its right of first refusal.

Favorable decision would redress competitor electric transmission companies' competitive injury, as required for standing to pursue action against Iowa Utilities Board (IUB) and state officials seeking declaratory judgment that statute granting incumbent electric transmission owners a right of first refusal to construct and maintain lines connected to existing facility violated state constitution's single-subject, title, and equal protection provisions; blocking enforcement of right of first refusal would allow companies to supply transmission lines for in-state projects.

Competitor electric transmission companies' injury in the form of lost future profits was sufficiently imminent for standing to pursue action against Iowa Utilities Board (IUB) and state officials seeking declaratory judgment that statute granting incumbent electric transmission owners a right of first refusal to construct and maintain lines connected to existing facility violated state constitution's single-subject, title, and equal protection provisions; companies alleged that regional transmission

organizations would approve $30 billion in new electric transmission projects over the next ten years and that organizations had begun studying ways to expand transmission grid in midwest, including in the state, and companies would lose profits when incumbents received new projects.

Briefing and existing record were adequate for Supreme Court to decide whether to issue temporary injunction staying enforcement of statute granting incumbent electric transmission owners a right of first refusal to construct lines connected to existing facility, pending resolution of constitutional claims, and, thus, Supreme Court would exercise its discretion to decide injunction issue, instead of remanding issue to district court, following its decision that competitor electric transmission companies had standing to pursue action challenging statute; appellate briefing squarely addressed injunction issue, companies briefed merits of constitutional claims on appeal, all parties briefed merits of claims below, and claims turned on question of law that did not require further record development.

Competitor electric transmission companies were likely to succeed on merits of claim that title of appropriations bill granting incumbent electric transmission owners a right of first refusal to construct lines connected to existing facility violated constitutional title requirement, as required for temporary injunction staying enforcement of statutory right of first refusal pending resolution of constitutional claims; title, “An Act relating to state and local finances by making appropriations, providing for legal and regulatory responsibilities, providing for other properly related matters, and including effective date and retroactive applicability provisions” did not give notice of right of first refusal provision, and title failed to clearly communicate subject matter of bill.

Competitor electric transmission companies were likely to succeed on merits of claim that title of appropriations bill granting incumbent electric transmission owners a right of first refusal to construct lines connected to existing facility violated single-subject requirement of state constitution, as required for temporary injunction staying enforcement of statutory right of first refusal pending resolution of constitutional claims; bill contained medley of appropriations provisions and granted substantive rights, and right of first refusal failed to garner sufficient votes for enactment as standalone bill.

Competitor electric transmission companies would likely suffer irreparable harm through loss of opportunity to land multi-million-dollar electric transmission projects in the state in absence of temporary injunction against Iowa Utilities Board (IUB) and state officials staying enforcement of statute granting incumbent electric transmission owners a right of first refusal to construct lines connected to existing facility, pending resolution of claims challenging constitutionality of statute.

Balance of harms favored temporary injunction against Iowa Utilities Board (IUB) and state officials staying enforcement of statute granting incumbent electric transmission owners a right of first refusal to construct lines connected to existing facility, pending resolution of constitutional challenges to statute brought by competitor electric transmission companies; companies were harmed by loss of opportunity to compete for new projects, intervenors, who were shielded from competition by statute, argued that new projects were years away and faced no harm while case was pending, and companies were likely to succeed on claims, thereby diminishing any harm resulting from state not being allowed to enforce statute.

Public interest supported temporary injunction against Iowa Utilities Board (IUB) and state officials staying enforcement of statute, granting incumbent electric transmission owners a right of first refusal to construct lines connected to existing facility, pending resolution of constitutional challenges to statute brought by competitor electric transmission companies; public had interest in reliable electric service at reasonable rates, and statute would decrease competition and increase cost of electricity.

ZONING & PLANNING - MASSACHUSETTS

Reilly v. Town of Hopedale

Appeals Court of Massachusetts, Worcester - March 7, 2023 - N.E.3d - 2023 WL 2375559

Citizens brought action against town and railroad, seeking a declaration that town's waiver of its statutory option to purchase forest lands, entered into as part of settlement agreement with railroad, was invalid and unenforceable.

The Superior Court Department granted railroad's motion for judgment on the pleadings. In consolidated case, the Land Court Department denied citizens' motion for expedited treatment of their motion to intervene and their motion to intervene in suit brought by town against railroad. Citizens appealed.

The Appeals Court held that:

- Citizens lacked standing to seek declaratory relief under statute allowing for taxpayers to petition to restrain illegal appropriations;
- Citizens lacked standing to bring a claim under statute creating tax incentives for preserving and maintaining forest lands;
- Citizens lacked standing to pursue a mandamus action under statute allowing town to assign its option to purchase classified forest lands;
- Citizens' motion to intervene in Land Court action was not moot and would be remanded; and
- Citizens' post-judgment motion to intervene in Land Court action was not untimely.

ANNEXATION - MISSISSIPPI

City of Jackson v. City of Pearl

Supreme Court of Mississippi - March 16, 2023 - So.3d - 2023 WL 2532971

Cities and county sought review of a third city's ordinance incorporating undeveloped land that was located in county, which was not city's county, and that surrounded an airport that city had previously incorporated.

The Circuit Court entered order voiding the ordinance. City appealed.

The Supreme Court held that city needed approval from county board of supervisors for its attempted annexation to enlarge existing airport.

Statute governing municipal incorporation of property in another county, relating to statutory process for municipalities of more than 100,000 people to incorporate noncontiguous airport property, required city to obtain approval from county board of supervisors for city ordinance that incorporated undeveloped land that was located in county, which was not city's county, and that surrounded an airport that city had previously incorporated; city could not use statute as a jumping off point for future annexations into county to enlarge existing airport after receiving a one-time pass, via the statute, from the requirements of general annexation law.

ANNEXATION - NEBRASKA

Darling Ingredients Inc. v. City of Bellevue

Supreme Court of Nebraska - March 24, 2023 - N.W.2d - 313 Neb. 853 - 2023 WL 2618705

Landowner brought action against city challenging validity of annexation ordinance, seeking declaratory and injunctive relief.

The District Court entered judgment for landowner on two bases for relief without addressing third basis. City appealed. The Supreme Court reversed and remanded. On remand, the District Court entered judgment for city. Landowner appealed.

The Supreme Court held that:

- Trial court acted within scope of remand by deciding case without receiving additional evidence as to third basis to challenge ordinance, and
- Annexation ordinance was not for an improper purpose of solely seeking to increase tax revenue.

Trial court acted within scope of Supreme Court's remand to consider landowner's "improper purpose" challenge to city's annexation ordinance when trial court decided case on remand without receiving additional evidence, on remand following reversal of judgment declaring ordinance invalid on two of three bases raised by landowner, where proof on all three of landowner's bases for relief was fully presented at trial, trial court found for landowner on the first two bases for relief at close of the evidence but did not address the third basis for relief which was whether ordinance was enacted for an improper purpose, Supreme Court observed that trial court did not render any decision as to the "improper purpose" challenge, and landowner did not seek leave to amend pleadings, seek additional discovery, or offer new evidence at a subsequent trial.

City's annexation ordinance that included rural area which was not contiguous or adjacent to city was not for an improper purpose of solely seeking to increase tax revenue, where city was motivated to annex area in question, at least in part, to foster natural growth and development of city.

ELECTIONS - OHIO

State ex rel. Richardson v. Gowdy

Supreme Court of Ohio - March 24, 2023 - N.E.3d - 2023 WL 2624185 - 2023-Ohio-976

City elector filed action against city council president and county board of elections for writ of mandamus to president to appoint clerk of council to complete recall-petition process related to removal of three members of city council, in time to place recall elections on primary-election ballot, or, in the alternative, to compel board of elections to certify number of valid signatures on submitted petitions, and seeking attorney fees and costs.

The Supreme Court held that:

- City elector's claim for writ of mandamus to compel city council president to appoint clerk of council was moot;
- Elector was not entitled to writ of mandamus to compel city council president to certify number of signatures;
- Elector was not entitled to writ of mandamus to compel county board of elections to certify number of valid signatures for each recall petition submitted to board;
- Elector was not entitled to attorney fees; but
- City elector was entitled to costs.

City elector’s claim for writ of mandamus to compel city council president to appoint clerk of council to perform ministerial task of certifying number of valid signatures on recall petitions for removal of members of city council was moot, where city council president had already performed action that elector sought to compel.

City elector was not entitled to writ of mandamus to compel city council president to certify number of signatures on recall petitions for removal of members of city council; city council president had no legal duty to certify number of signatures, and clerk of council, who did have duty to certify number of signatures, was not party to case.

City elector was not entitled to writ of mandamus to compel county board of elections to comply with city charter and statute governing recall petitions for members of city council to complete ministerial task of certifying number of valid signatures for each recall petition submitted to board; statute governing recall petitions was not adopted as part of city charter.

City elector was not entitled to attorney fees in her action for writ of mandamus to compel city council president to appoint clerk of council to certify valid signatures on recall petitions for removal of city council members, on basis of council president’s bad faith actions and city law director declining to bring mandamus action, where judgment was not being ordered in elector’s favor.

City elector was entitled to costs in her action for writ of mandamus to compel city council president to appoint clerk of council to certify valid signatures on recall petitions for removal of city council members, where elector had good cause to believe that her claim was well founded.

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