
IMMUNITY - ALABAMA

Ex parte Space Race, LLC

Supreme Court of Alabama - December 30, 2021 - So.3d - 2021 WL 6141625

Alabama Space Science Exhibit Commission (ASSEC) sought to vacate arbitration award that had been entered against it on breach-of-contract claim asserted by producer of space- and science-themed animated shows.

The Circuit Court denied producer's motion to dismiss. Producer petitioned for a writ of mandamus.

The Supreme Court held that the issue of whether ASSEC had interstate sovereign immunity from producer's breach-of-contract claim was fully and fairly litigated in the New York trial court that heard producer's action to confirm New York arbitration award in producer's favor, and thus the Full Faith and Credit Clause of the United States Constitution and res judicata precluded ASSEC's claim to vacate the arbitration award.

Issue of whether the Alabama Space Science Exhibit Commission (ASSEC) had interstate sovereign immunity from breach-of-contract claim asserted against it by producer of space- and science-themed animated shows was fully and fairly litigated in the New York trial court that heard producer's action to confirm New York arbitration award in producer's favor, and thus the Full Faith and Credit Clause of the United States Constitution and res judicata precluded ASSEC's later claim in Alabama state court that ASSEC's alleged sovereign immunity under the Alabama Constitution warranted vacating the arbitration award; New York trial court acknowledged that whether ASSEC was an agency of Alabama for purposes of State immunity under the Alabama Constitution was relevant to the interstate-sovereign-immunity analysis, New York trial court ultimately concluded that ASSEC was not a State agency for purposes of State immunity under the Alabama Constitution, and New York law provided that a judgment confirming an arbitration award was entitled to res judicata effect.

BUSINESS IMPROVEMENT DISTRICTS - CALIFORNIA

Hill RHF Housing Partners, L.P. v. City of Los Angeles

Supreme Court of California - December 20, 2021 - P.3d - 2021 WL 5997247 - 21 Cal. Daily Op. Serv. 12,501

Landowners in proposed business improvement districts (BID) filed petition for writ of mandate and complaint for declaratory and injunctive relief against city challenging establishment of BIDs under Property and Business Improvement District Law.

The Superior Court denied relief. Landowners appealed. The Court of Appeal affirmed. Landowners petitioned for review, which was granted.

The Supreme Court held that landowners were not required to present specific objections to BIDs at public hearings for objections to later be heard on the merits in court.

Landowners in proposed business improvement districts (BID) were not required to present specific objections to BIDs at city council's public hearings in order for objections to later be heard on the merits in court via landowners' petition for writ of mandate and complaint for declaratory and injunctive relief challenging establishment of BIDs under Property and Business Improvement District Law; opportunity to comment on a proposed BID did not involve a clearly defined machinery for submission, evaluation, and resolution of complaints by aggrieved parties, constitutional and statutory scheme did not implicitly convey an expectation that exhaustion was required to occur, and policy rationales for requiring issue exhaustion were not compelling.

IMMUNITY - INDIANA

Ladra v. State

Supreme Court of Indiana - December 9, 2021 - 177 N.E.3d 412

Motorist who was injured when her vehicle hydroplaned on interstate road and collided with concrete barrier wall brought action against the State and the Department of Transportation, alleging that she suffered injury due to Department's failure to post warnings of flooded roadway and failure to maintain proper drainage.

After a hearing, the Superior Court found defendants enjoyed governmental immunity under Indiana Tort Claim Act and granted defendants' motion for summary judgment. Motorist appealed. The Court of Appeals affirmed. Motorist petitioned for transfer, which was granted.

The Supreme Court held that fact issue as to whether condition of roadway resulted from Department's failure to rectify known problem that manifested during only during inclement weather precluded summary judgment on basis of immunity.

Genuine issue of material fact existed as to whether flooding condition on interstate roadway resulted from Department of Transportation's failure to rectify known problem with clogging of drains that manifested only during inclement weather, as would preclude summary judgment on basis of immunity under Indiana Tort Claims Act, in action by motorist who was injured when her vehicle hydroplaned on road and collided with concrete barrier wall.

PUBLIC UTILITIES - OHIO

Cleveland Electric Illuminating Co. v. Cleveland

Supreme Court of Ohio - December 21, 2021 - N.E.3d - 2021 WL 6016475 - 2021-Ohio-4463

Electric utility brought action against city and city's electric distribution company asserting claims for declaratory judgment, tortious interference with contract/business relations, and unfair competition arising from city's purchase and resale of electricity to inhabitants located outside its geographic limits.

The Court of Common Pleas granted summary judgment for city. Utility appealed. The Court of Appeals reversed and remanded. Utility appealed and city cross-appealed.

The Supreme Court held that:

- Constitutional limits on a municipal utility's sale of surplus product precluded city from purchasing electricity solely to resell entire amount extraterritorially;
- Questions of material fact existed as to whether city obtained surplus electricity for sole purpose of selling it to a neighboring city; and
- Constitutional limits on sale of surplus product did not require city to purchase exact amount of electricity to satisfy current needs of territorial customers.

State constitutional provision allowing a municipality that operates a municipal utility to sell surplus product precludes a municipality from purchasing electricity solely for the purpose of reselling entire amount of purchased electricity to an entity outside municipality's geographic limits.

Genuine issues of material fact existed as to whether city, through its electric distribution company, obtained surplus electricity for sole purpose of selling it to a neighboring city, precluding summary judgment in competing electric utility's action asserting claims for declaratory judgment, tortious interference with contract/business relations, and unfair competition premised on city's alleged violation of state constitutional limits on a municipal utility's sale of surplus product.

State constitutional provision allowing a municipality that operates a municipal utility to sell surplus product does not require a municipality to buy the exact amount of electricity required by its inhabitants at any given time, and there may be other reasons justifying the purchase of electricity beyond a municipality's immediate needs.

ZONING & PLANNING - PENNSYLVANIA

Metal Green Inc. v. City of Philadelphia

Supreme Court of Pennsylvania - December 22, 2021 - A.3d - 2021 WL 6065497

Property owner sought review of city zoning board of adjustment's denial of variance to allow conversion of unused industrial building into apartment building.

The Court of Common Pleas reversed decision. Opponents of variance appealed. The Commonwealth Court reversed. Owner sought allowance of appeal, which was granted.

The Supreme Court held that:

- Application for use variance was subject to city zoning code's minimum-variance requirement, and
- Board was required to make specific findings of fact, engage in credibility determinations, and offer sufficient rationale as to why criteria for use variance were not satisfied.

Application for use variance for building designated as "blighted" under Abandoned and Blighted Property Conservatorship Act was subject to city zoning code's requirement that variance be the "minimum variance that will afford relief and will represent the least modification possible of the use or dimensional regulation at issue"; nothing in code or in Act suggested that blighted or abandoned nature of a property was a factor when assessing minimum variance requirement, and considerations of blight or abandonment were to be addressed under code's "unnecessary hardship" requirement.

In order to allow for effective review, a zoning board's variance decision must provide sufficient findings of fact, including credibility and weight-of-evidence determinations, conclusions based on

these facts, and the reasons for granting or denying the variance.

ANNEXATION - CALIFORNIA

Award Homes, Inc. v. County of San Benito

Court of Appeal, Sixth District, California - November 1, 2021 - Cal.Rptr.3d - 72 Cal.App.5th 290 - 2021 WL 5631443

Residential developer brought action against city and county seeking a declaration that developer was not obligated under development and annexation agreements with city to pay city annexation-related fees for which city was responsible under city-county tax sharing agreements concerning new single-family construction on land that city annexed from county.

After bench trials, the Superior Court entered judgment against developer. Developer appealed.

The Court of Appeal held that:

- Developer's action was timely as to whether it was required to pay fees;
- Developer had standing;
- Statute providing for property tax transfer agreements between a county and a local agency authorized fees under tax sharing agreements;
- Tax sharing agreement required city to pay fees to county; and
- Development and annexation agreements required developer to pay fees to city.

Developer's action for declaratory relief was timely as to whether development and annexation agreements compelled developer to pay a fixed fee set forth in city-county tax sharing agreements for each residential unit constructed on land that was annexed into city from county, where developer promptly sought a declaration of its rights and duties under development and annexation agreements after learning that city would attempt to collect annexation-related fees for those projects.

Developer had standing to seek a declaration of its rights and duties under development and annexation agreements as to whether developer was required to pay a fixed fee set forth in city-county tax sharing agreements for each residential unit constructed on land that was annexed into city from county, where developer was a party to development and annexation agreements.

Residential developer's action for declaratory relief against city and county, seeking to invalidate annexation-related fees under city-county tax sharing agreement as not having been legally established when agreements were signed, was untimely under even the most generous statute of limitations, that being the four-year limitations period for actions on a contract, that arguably might have governed a challenge to amount of fees, which city sought to pass on to developer pursuant to city's development and annexations agreement with developer, where first tax sharing agreement was signed more than ten years earlier and second agreement also fall outside the four-year period.

Fixed fee that city was to pay county under tax sharing agreements for each residential unit constructed on land that was annexed into city from county was within county's authority under tax statute authorizing county to develop and adopt a master property tax transfer agreement with a local agency like city; there was nothing so fatally defective in fee obligations under tax sharing agreements to render their very creation void.

City's obligation under tax sharing agreements to pay county annexation-related fees, which city

sought to impose on residential developer pursuant to development agreement, did not cease to exist merely because developer did not seek building permits until after expiration of tax sharing agreement, which was in effect at time property was annexed by city; nothing in tax sharing agreement suggested that obligations created by it would cease to exist merely because a project annexed during its effective period was not constructed until after agreement expired, and fiscal neutrality goal of agreement would not have been served by such an interpretation.

Phrase "developer's obligations" in residential development agreement included obligation on part of developer to pay city the fixed fee, for which city was responsible to pay county under city-county tax sharing agreement, for each residential unit constructed on land that was annexed into city from county, despite argument that tax sharing agreement only required city to impose capital improvement and drainage impact fees on developers; tax sharing agreement required all three fees to be imposed on new development, development agreement did not provide explicit language excluding annexation-related fees from developer's obligations, and developer agreed as a condition of tentative map approval that fees required under tax sharing agreement were to be paid with each building permit.

Failure of city-county tax sharing agreement to use explicit term "fee" in referring to fixed fee that city was required to pay county for each single family dwelling unit constructed on land that was annexed into city from county did not preclude the annexation-related fee from being treated the same as capital improvement and drainage fees under development agreement with city, to allow city to require developer to pay city the amount of annexation-related fee pursuant to terms of development agreement, where development agreement also did not use the term "fees" and instead required developer to satisfy "developer's obligations."

County's status as non-party to residential development agreement between city and developer did not absolve developer of its obligation under agreement to pay city the amount of annexation-related fees for which city was responsible under city-county tax sharing agreement concerning new single-family construction on land that city annexed from county; any lack of obligation of developer to pay fees directly to county did not absolve developer of obligation to pay fees to city.

Residential developer's annexation agreement with city, requiring developer to hold and use the property in compliance with all "applicable provisions" of city-county tax sharing agreement, included provisions of tax sharing agreement relating to annexation-related fees that city was required to pay county and not just capital improvement and drainage impact fees to be imposed on new development, and thus city could require developer to pay city the amount of annexation-related fees, where all three fees were similar, and developer promised in annexation agreement to ensure that the proposed development paid its own way and eliminated or minimized the financial burden on city.

PUBLIC UTILITIES - GEORGIA

Cazier v. Georgia Power Company

Court of Appeals of Georgia - December 1, 2021 - S.E.2d - 2021 WL 5626887

Customers brought putative class action against electric utility, alleging that utility had improperly collected certain sales taxes and fees.

The Superior Court denied utility's motion to dismiss, and utility appealed. The Court of Appeals affirmed in part and reversed in part. On remand, the Superior Court dismissed the action based on

customers' failure to exhaust administrative remedies before the Public Service Commission (PSC), and customers appealed. The Court of Appeals vacated. After issuing writ of certiorari, the Supreme Court affirmed and remanded. In turn, the Superior Court remanded to PSC for determination as to whether utility had properly charged franchise fee to customers. The Superior Court adopted PSC's determination, certified class, and granted summary judgment to utility. Customers appealed and utility cross-appealed.

The Court of Appeals held that:

- Trial court properly remanded to PSC for initial determination as to meaning of terms in PSC's ratemaking orders, and
- Sufficient evidence supported PSC's finding that its orders used terms "usage revenue" and "total revenue" interchangeably.

Trial court properly invoked primary jurisdiction of Public Service Commission (PSC) for initial determination as to whether terms "usage revenue" and "total revenue" were used synonymously in PSC ratemaking orders concerning calculation of sales tax on municipal franchise fee (MFF), rather than interpreting terms itself; PSC's use of two different terms raised question as to whether two categories described by those apparently different terms were the same, and question was best answered by PSC itself as agency that authored orders and that had specialized competence in ratemaking proceedings.

Sufficient evidence supported finding by Public Service Commission (PSC) that its orders governing calculation of sales tax on municipal franchise fee (MFF) used terms "usage revenue" and "total revenue" interchangeably, such that electric utility properly applied MFF by calculating charge based on percentage of each consumer's total charge, where utility's rates were approved by PSC to recover all "usage" from customers, PSC noted exclusion of cost recovery items from MFF calculation by treating terms differently would be unreasonable, particularly given that minimum monthly bill included certain costs even if customer had no kilowatt-hour usage, and PSC previously approved utility's compliance filings which applied MFF to total revenue from each bill, including that from cost recovery items.

POLITICAL SUBDIVISIONS - INDIANA

Lowe v. Northern Indiana Commuter Transportation District

Supreme Court of Indiana - December 16, 2021 - N.E.3d - 2021 WL 5961638

Employee of commuter transportation district, who sustained injuries to his shoulders while working on a portion of train track, sued the district under the Federal Employers' Liability Act (FELA).

Transportation district moved for summary judgment, alleging that employee failed to provide timely notice of tort claim, as required by Indiana Tort Claims Act (TCA). The Superior Court granted motion. Employee appealed. The Court of Appeals affirmed and employee petitioned to transfer decision.

The Supreme Court held that:

- The Tort Claims Act applied to FELA suits against state entities;
- As a matter of first impression, the commuter transportation district was a political subdivision, not a state agency, under the Tort Claims Act; and
- Employee who provided notice of his work place injury to attorney general 263 days after the

alleged injury did not substantially comply with Tort Claims Act.

The Tort Claims Act applied to FELA suits against state entities; Congress does not have the power to subject nonconsenting states to private suits for damages in state courts, the mere fact that FELA is a federal statute did not automatically exclude from consideration the procedural constraints of the Tort Claims Act, the Act applies to "a claim or suit in tort" against governmental entities and their employees, and FELA applies to causes of action for negligence.

The commuter transportation district was a political subdivision, not a state agency, under the Tort Claims Act, and thus employee was required to provide notice within 180-days of his injury; a political subdivision included a "separate municipal corporation," and a commuter transportation district is defined as a municipal corporation under enabling statute.

PUBLIC UTILITIES - MASSACHUSETTS

Fore River Residents Against Compressor Station v. Office of Coastal Zone Management

Appeals Court of Massachusetts, Norfolk - December 16, 2021 - N.E.3d - 2021 WL 5969793

City mayor sought judicial review of decision by Massachusetts Office of Coastal Zone Management (MCZM) that construction of natural gas compressor station would be consistent with enforceable policies of Massachusetts' coastal zone management program. Community advocacy organization intervened on plaintiff's side.

The Superior Court Department dismissed action. Organization appealed.

The Appeals Court held that:

- Determination was not subject to review under statute authorizing judicial review to a person aggrieved by a final agency decision;
- Determination was not subject to certiorari review; and
- Organization lacked standing to seek judicial review of determination by claim for declaratory judgment.

Judicial review of determination by Massachusetts Office of Coastal Zone Management (MCZM) that construction of natural gas compressor station would be consistent with enforceable policies of Massachusetts' coastal zone management program was not available under statute authorizing judicial review to a person aggrieved by a final agency decision in an adjudicatory proceeding; an adjudicatory proceeding was one in which someone had right to agency hearing, community advocacy organization did not have right to any agency hearing, and any discretion on part of MCZM to hold a hearing did not render proceeding an adjudicatory proceeding.

Proceeding before Massachusetts Office of Coastal Zone Management (MCZM) to determine whether construction of natural gas compressor station would be consistent with enforceable policies of Massachusetts' coastal zone management program was not judicial or quasi-judicial, and thus, MCZM's consistency determination was not subject to certiorari review on such basis; regulatory scheme required MCZM to provide opportunity for public participation only through public notice and comment, proceeding was not preceded by any specific charges, MCZM was not required to hold a hearing, much less hear sworn testimony, it was federal government, not MCZM, that ultimately decided whether station could be constructed, and MCZM's determination contained

no formal findings of fact.

Community advocacy organization lacked standing to seek judicial review of determination by Massachusetts Office of Coastal Zone Management (MCZM) that construction of natural gas compressor station would be consistent with enforceable policies of Massachusetts' coastal zone management program by claim for declaratory judgment invalidating determination; while an applicant had right to appeal to federal Secretary of Commerce from a determination that a project would be inconsistent with enforceable policies of a State's coastal zone management program, no similar right was given to the public under the CZMA or state statute establishing MCZM, if standing were recognized, it would have adverse effect in form of unnecessary delays, and there were other remedies available.

PUBLIC UTILITIES - MISSISSIPPI

Pearl River Valley Water Supply District v. Khalaf

Supreme Court of Mississippi - December 9, 2021 - So.3d - 2021 WL 5832307

After a sinkhole formed on lessee's leasehold, water supply district filed a complaint against lessee to recoup the costs of repairing the sinkhole and for other relief.

The Chancery Court granted lessee's motion to dismiss, and water supply district appealed.

The Supreme Court held that:

- It was proper for water supply district to attach leases to its complaint against lessee;
- It was proper for lessee, who leased land in subdivision, to attach declaration of covenants for subdivision to his motion to dismiss;
- Lessee's recorded lease was the operative document when determining if lessee was responsible for repairing sinkhole; and
- Lessee was not responsible for repairing sinkhole on leasehold pursuant to his lease of land in subdivision.

Lessee was not responsible for repairing sinkhole on leasehold pursuant to his lease of land in subdivision; lessee's lease was recorded, terms of lease were binding on lessee, lessor, and water supply district that entered into development lease with lessor, lessee's property was subject to declaration of covenants for subdivision which reserved to homeowners' association and the district blanket easements for repairing, replacing, and maintaining storm drainage on all property subject to covenants, storm drain pipe's function, as asserted by district, was not to drain surface water from lessee's property, but to drain the entire subdivision through lessee's property into reservoir, and because lessee took the leasehold subject to the covenants reserving storm drainage easements to homeowners' association and district, lessee was not responsible for repairing storm drain pipe installed by developer long before he had entered into the lease.

ZONING & PLANNING - SOUTH CAROLINA

Greenville Bistro, LLC v. Greenville County

Supreme Court of South Carolina - December 8, 2021 - S.E.2d - 2021 WL 5823888

Restaurant operator brought action against county for declaratory and injunctive relief, raising First

Amendment free speech challenge to county's attempts to enforce its sexually oriented business code to prevent restaurant from operating with scantily-clad exotic dancers.

The Circuit Court granted operator's motion for temporary injunction, after which the county appealed and the Circuit Court denied county's motion for temporary injunctive relief during pendency of appeal. County appealed.

The Supreme Court held that:

- Zoning ordinance redefining "adult cabaret" and adding "semi-nude" definition was a valid time, place, and manner regulation;
- County was not bound by order releasing restrictions obtained in prior nuisance action to which county was not a party;
- Operator was not likely to succeed on merits of claim that county inequitably adopted ordinance due to its suspect timing;
- Trial court had jurisdiction to rule on county's motion for temporary injunctive relief; and
- County was entitled to temporary injunctive relief.

IMMUNITY - CALIFORNIA

Foley Investments, L.P. v. Alisal Water Corporation

Court of Appeal, Fourth District, Division 1, California - November 16, 2021 - Cal.Rptr.3d - 2021 WL 5833275

Apartment complex owner brought action against water company, asserting inverse condemnation and tort claims of nuisance, trespass, and negligence after water main running through complex repeatedly ruptured.

Following bifurcation, the Superior Court determined that water main was not a public use and that water company had fire protection immunity from tort claims. Apartment complex owner appealed.

The Court of Appeal held that:

- Water main served a private use such that eminent domain principles did not apply, and
- As a matter of first impression, fire protection was a substantial or significant factor in water company constructing and maintaining water main such that it had fire protection immunity.

Water main running through apartment complex served a private use, and thus inverse condemnation principles did not apply in apartment complex owner's action against water company following pipe ruptures, where water company installed main pursuant to a contract with a private developer, water company constructed and maintained the main directly on the apartment property specifically to meet the flow requirements of the fire hydrants which benefited only the property, and water main did not provide service to the public at large and gate vale at the end of the main, which had not been opened in 32 years, functioned as a cap.

Fire protection was a substantial or significant factor in water company constructing and maintaining water main on apartment complex property, and thus fire protection immunity barred apartment complex owner's nuisance, trespass, and negligence claims against water company after water main ruptured multiple times; while water main provided domestic water to the apartment complex, it also supplied water to fire hydrants on the apartment property, and but for the apartment property's specific fire protection needs, including two fire hydrants, the main would not

exist, as water company would have delivered water to the property's boundary, from which point the developer of the complex would have been responsible for installing and maintaining onsite infrastructure.

PUBLIC PENSIONS - NEBRASKA

Abbott v. City of Bellevue

Supreme Court of Nebraska - December 3, 2021 - N.W.2d - 310 Neb. 496 - 2021 WL 5751275

Police officers and their union brought § 1983 action against city challenging its decision to increase amount it regularly deducted from officers' paychecks to fund their retirement plan, alleging violations of federal and state constitutions.

The District Court found that, with respect to some officers, city unconstitutionally impaired its contractual obligations, and ordered city to insert certain language into document governing retirement plan. Officers and union appealed.

The Supreme Court held that:

- District court could not address issue of how defined contribution payment should be calculated;
- Supreme Court would remove language improperly inserted by district court into agreement;
- Officers and union were "prevailing parties" for purposes of entitlement to attorney fee; and
- Supreme Court would remand for reconsideration of attorney fee entitlement.

District Court could not address issue of how defined contribution payment should be calculated, in § 1983 action brought by police officers and their union against city challenging its decision to increase amount it regularly deducted from officers' paychecks to fund their retirement plan, where district court ordered language inserted into agreement governing retirement plan, essentially entering a declaration despite no party requesting such a declaration and agreement of both parties that such a calculation would ever be necessary.

The Supreme Court would remove language improperly inserted by district court into agreement between police officers, their union, and city governing retirement plan, which addressed issue of how defined contribution payment should be calculated, in § 1983 action brought by police officers and their union against city challenging its decision to increase amount it regularly deducted from officers' paychecks to fund their retirement plan, where amount officers would be entitled to receive if they elected defined contribution payment was not at issue, and parties agreed that it was unlikely amounts in any officer's retirement account would ever exceed defined benefit payment, as required for an officer to receive defined contribution payment.

ANNEXATION - UTAH

South Utah Valley Electric Service District v. Payson City

Supreme Court of Utah - December 9, 2021 - P.3d - 2021 WL 5831400 - 2021 UT 68

Electric improvement district brought action alleging that cities failed to comply with statutory requirements for withdrawing annexed areas from district before starting to serve district's customers following annexation.

The Fourth District Court entered partial judgment in cities' favor, and district filed interlocutory appeal.

The Supreme Court held that cities had statutory authority to provide electric service to customers inside district following annexation upon payment of required reimbursements.

Cities generally have power to regulate and sell electricity within their respective boundaries, but when they annex new land, that power is limited by requirement that they either obtain consent of previous electric provider, if it falls within statutory definition of electrical corporation, or pay it reimbursement costs.

SCHOOLS - VIRGINIA

Davison v. Rose

United States Court of Appeals, Fourth Circuit - December 3, 2021 - F.4th - 2021 WL 5750449

Students' parent filed § 1983 action against school board, its members, elementary school principal, and school system's supervisor of security alleging that no-trespass letters issued to him that prohibited his presence on school property and attendance at any school-sponsored activities unless authorized violated his First and Fourteenth Amendment rights.

The United States dismissed claims against board, and entered summary judgment in defendants' favor on remaining claims. Parent appealed.

The Court of Appeals held that:

- Res judicata barred parent's claims against school board;
- Board's policy prohibiting all personal attacks at board meetings, regardless of viewpoint, did not violate First Amendment;
- No-trespass letters were not issued in retaliation for parent's public comments;
- Principal was entitled to statutory immunity for reporting parent's suspected abuse of his children;
- Officials who issued and enforced no-trespass letters were entitled to qualified immunity; and
- Officials' failure to provide parent notice prior to issuance of no-trespass letters did not violate due process.

School board's policy prohibiting all personal attacks at board meetings, regardless of viewpoint, did not violate students' parent's First Amendment rights, despite parent's contention that policy was not used in viewpoint-neutral way towards his speech; parent was interrupted and warned for talking about particular board members, discussing their children, and providing comments that were not about topic of meeting, and was allowed to speak uninterrupted, despite mentioning individual board members, when his comments focused on topic of board meeting, and other speakers who were not interrupted when they became animated did not make comments about board members.

ZONING & PLANNING - WASHINGTON

Westridge-Issaquah II LP v. City of Issaquah

Court of Appeals of Washington, Division 1 - December 6, 2021 - P.3d - 2021 WL 5768395

Property owners filed suit pursuant to Land Use Petition Act (LUPA), seeking review of city's imposition of general facility charges (GFC) for utility connections on property being developed.

The Superior Court granted property owners' petition, ordered city to refund water and stormwater GFCs, which were waived under a land development agreement, and refund the difference in the sewer GFC charged from amount set forth in development agreement. City appealed.

The Court of Appeals held that:

- GFCs imposed by city for utility connections did not invoke vesting statute;
- Building permit applications were not inextricably linked to later-filed preliminary plat application, as would invoke vested rights; but
- Even if vested rights were at issue, GFCs could not be assessed at any particular amount until developer both applied for utility connections and paid applicable fees; and
- City's GFCs were reasonable, as required to comply with authorizing statute.

Water, sewer, and stormwater general facility charges (GFC) imposed by city for utility connections on property being developed as single-family housing were not "land use control ordinances," and thus not subject to vesting statute for such ordinances, under which a proposed division of land was considered under ordinances in effect on land at time of submission of land use application; GFCs did not limit current owners' use of the properties or the development thereon, but instead were merely fees that increased developer's costs.

Single-family residential developer's building permit applications, which were filed prior to city's modification of terms of development agreement governing subject land, were not inextricably linked to its preliminary plat application, which was filed after changes were made to development agreement, such that preliminary plat application could not be approved unless the building permit application was also approved, thus, developer did not have a right to have its building permit applications vest to the land use laws in effect when it submitted its preliminary plat application.

Single-family residential developer did not have a vested right to have general facility charges (GFC) imposed for utility connections on it property assessed at any particular amount until it both applied to connect to city's utility systems and paid the applicable fees.

General facility charges (GFC) to be imposed by city upon single-family residential property developer for water, sewer, and stormwater utility connections, pursuant to city ordinance, were reasonable, as required to comply with authorizing statute; statute required only that connection charges established by ordinance be reasonable, such that property owners would bear their equitable share of the cost of the city's utility system, and there was no indication that the GFCs imposed were not generally proportionate to property's share of the utility system's cost.

BALLOT INITIATIVE - SOUTH DAKOTA

Thom v. Barnett

Supreme Court of South Dakota - November 24, 2021 - N.W.2d - 2021 WL 5501582 - 2021 S.D. 65

County sheriff and superintendent of South Dakota Highway Patrol filed statutory election contest and separate declaratory judgment action against Secretary of State, claiming amendment to South Dakota Constitution to pass laws regarding hemp as well as laws ensuring access to marijuana for medical use was presented to voters in violation of requirements for amendments to Constitution.

Proponents of amendment intervened. The Circuit Court dismissed election contest, but determined amendment was submitted to voters in violation of Constitution. All parties appealed.

The Supreme Court held that:

- Circuit Court properly dismissed election contest;
- Sheriff and superintendent did not have standing in their official capacities to bring declaratory judgment action; but
- In matter of first impression, the Governor, through issuance of executive order, ratified declaratory judgment action, thereby curing any standing defects;
- Amendment's submission to voters violated single subject and separate votes requirements of South Dakota Constitution; and
- Provisions of amendment could not be excised under doctrine of separability and, thus, amendment was void in its entirety.

Circuit Court properly dismissed election contest brought by county sheriff and superintendent of South Dakota Highway Patrol, which claimed amendment to South Dakota Constitution to pass laws regarding hemp as well as laws ensuring access to marijuana for medical use was presented to voters in violation of requirements for amendments to Constitution, absent showing of any irregularity in election process caused by violation of election law.

County sheriff and superintendent of South Dakota Highway Patrol did not have standing in their official capacities to bring declaratory judgment action, challenging amendment to South Dakota Constitution to pass laws regarding hemp as well as laws ensuring access to marijuana for medical use, where neither sheriff nor superintendent sustained any actual or threatened injury as result of amendment; they could suffer no injury by carrying out amendment's mandate, and no violation of duty could be imputed to them by reason of their compliance.

Governor, through issuance of executive order, ratified action brought by county sheriff and superintendent of South Dakota Highway Patrol, seeking declaratory judgment that amendment to South Dakota Constitution to pass laws regarding hemp as well as laws ensuring access to marijuana for medical use was presented to voters in violation of requirements for amendments to Constitution, thereby curing any standing defect in action; order made clear the Governor intended to challenge amendment, she authorized action, desired that it continue, affirmed it in all respects and intended to be bound by result of action, and proponents of amendment would not sustain any prejudice if ratification were permitted.

Amendment to South Dakota Constitution to pass laws regarding hemp, as well as laws ensuring access to marijuana for medical use contained provisions embracing at least three separate subjects each with distinct objects and purposes and, thus, submission of amendment to voters violated single subject and separate votes requirements of South Dakota Constitution; although the stated object or purpose of amendment was legalization and regulation of marijuana, including its recreational, medical and agricultural uses, the amendment included development of comprehensive plan for legalization and regulation of marijuana, a mandate that legislature adopt laws ensuring discrete group of qualifying persons have access to medical marijuana, and a mandate that legislature regulate the cultivation, processing and sale of hemp, requirements that were not dependent upon or connected with each other.

Provisions of amendment to South Dakota Constitution regarding hemp and ensuring access to marijuana for medical use could not be excised, under doctrine of separability, to retain provisions governing development of comprehensive plan for legalization and regulation of marijuana and, thus, amendment was void in its entirety due to violation of Constitution's single subject and

separate votes requirements; Constitution required proponents of amendment to prepare amendment so that different subjects could be voted on separately, and simply severing certain provisions might not reflect actual will of voters.

EMINENT DOMAIN - PENNSYLVANIA

Hughes v. UGI Storage Company

Supreme Court of Pennsylvania - November 29, 2021 - A.3d - 2021 WL 5562689

Landowners, whose property was excluded from certificate of public convenience issued by Federal Energy Regulation Commission (FERC) for buffer zone for underground natural gas storage facilities, brought inverse condemnation action against FERC-regulated interstate natural gas pipeline company alleging deprivation of right to obtain financial benefits from natural gas lying beneath their lands due to prohibition on hydraulic fracturing in buffer zone.

The Court of Common Pleas sustained company's preliminary objections and dismissed. Landowners appealed. The Commonwealth Court affirmed. Landowners appealed.

The Supreme Court held that a public or quasi-public entity need not possess a property-specific power of eminent domain in order to implicate inverse condemnation principles.

To effect actionable conduct impacting a citizen's property necessary to support an inverse condemnation claim, it is enough that the condemnor has proceeded by authority of law for a public purpose.

Where governmental power is delegated to an otherwise private corporation, that company may assume a quasi-public status in furtherance of the public interest, for purposes of a de facto condemnation.

A public or quasi-public entity need not possess a property-specific power of eminent domain in order to implicate inverse condemnation principles.

LIABILITY - OHIO

Snay v. Burr

Supreme Court of Ohio - November 24, 2021 - N.E.3d - 2021 WL 5500052 - 2021-Ohio-4113

Motorist filed action against homeowners after single-car accident in which motorist lost control of his vehicle, struck mailboxes, and overturned into ditch, alleging claims for negligence, loss of consortium, and punitive damages.

The Court of Common Pleas granted homeowners' motion for summary judgment. Motorist appealed. The Court of Appeals affirmed. Motorist appealed.

The Supreme Court held that homeowner's mailbox adjacent to public road did not interfere with usual and ordinary course of vehicle travel on road, and thus homeowner did not owe a duty of care to motorist.

Homeowner's mailbox adjacent to public road did not interfere with usual and ordinary course of

vehicle travel on road, and thus homeowner did not owe a duty of care to motorist, and was not liable to motorist in negligence action for injuries sustained when motorist hit a patch of black ice, lost control of vehicle, struck mailboxes, and overturned into ditch, even though homeowner's mailbox post was non-conforming to postal guidelines; to the extend mailbox posted a hazard, it did so only with respect to motorists who errantly left the road.

IMMUNITY - OHIO

Maternal Grandmother v. Hamilton County Department of Job and Family Services

Supreme Court of Ohio - November 23, 2021 - N.E.3d - 2021 WL 5456421 - 2021-Ohio-4096

Maternal grandmother brought wrongful death suit and related survivorship claims against child's mother, child's father, county, county commissioners, county department of job and family services, and several caseworkers, arising from death of child while she was in the custody of her parents.

County, commissioners, department, and caseworkers moved for judgment on the pleadings, alleging they were entitled to immunity. The Court of Common Pleas granted motions and dismissed the claims against all defendants except child's parents. Grandmother appealed. The Court of Appeals affirmed. Grandmother sought further review.

The Supreme Court held that:

- Notice pleading applied to claims invoking exception to immunity of government employees for wanton or reckless conduct, and
- Grandmother's allegations were sufficient to plead her claims and raise possibility that exception to immunity applied.

When a complaint invokes the exception to a government employee's immunity for wanton or reckless conduct, notice pleading suffices and the plaintiff may not be held to a heightened pleading standard or expected to plead the factual circumstances surrounding an allegation of wanton or reckless behavior with particularity.

Maternal grandmother's allegations that caseworkers performed their duties in a wanton or reckless manner with respect to child who died when she was two years old and that caseworkers ignored child's mother's history of abusing her other children, failed to properly investigate a report of neglect or abuse of child from doctors, and overlooked what were or should have been clear signs of abuse during a home visit that occurred less than a month before child's death were sufficient to put county and caseworkers on notice of wrongful death and survivorship claims against them and to raise possibility that exception to caseworkers' statutory immunity for wanton or reckless conduct applied.

EMINENT DOMAIN - FEDERAL

Mason v. United States

United States Court of Federal Claims - November 9, 2021 - Fed.Cl. - 2021 WL 5190907

Owners of real property adjacent to rail corridor brought action against United States, asserting that government's authorizing conversion of railroad rights-of-way into recreational trails pursuant to the

National Trails System Act resulted in a taking in violation of Fifth Amendment.

Owners filed motion to amend their complaint, seeking to substitute plaintiff.

The Court of Federal Claims held that proposed amendment, seeking to substitute tenants in common, care of individual with 30.1% of ownership in the tenancy in common, as owner of certain parcel would be allowed.

Proposed amendment to property owners' complaint, asserting that government's authorizing conversion of railroad rights-of-way into recreational trails resulted in a taking in violation of Fifth Amendment, seeking to substitute tenants in common, care of individual with 30.1% of ownership in the tenancy in common, as owner of certain parcel in place of current plaintiff with respect to that parcel would be allowed, since tenants in common were proper party to bring an inverse condemnation claim regarding parcel and owners nonfrivolously alleged that the tenancy in common was duly authorized to do so based on terms of agreement governing the tenancy in common.

BONDS - CALIFORNIA

Tos v. State

Court of Appeal, Third District, California - November 30, 2021 - Cal.Rptr.3d - 2021 WL 5576552

Objectors brought action for declaratory and injunctive relief alleging that statute clarifying when corridor or usable segment thereof was "suitable and ready for high-speed train operation," for purposes of funding plan required by Safe, Reliable High-Speed Train Bond Act, violated state constitution's debt limit provision.

The Superior Court denied plaintiffs' motion for judgment on pleadings and entered stipulated judgment. Objectors appealed.

The Court of Appeal held that statute was consistent with single object of Bond Act approved by voters, and thus did not violate state constitution's debt limit provision.

Statute clarifying that corridor or usable segment thereof was "suitable and ready for high-speed train operation," for purposes of funding plan required by Safe, Reliable High-Speed Train Bond Act, when bond proceeds were to be used for capital cost for project that would enable high-speed trains to operate immediately or after additional planned investments were made on corridor or useable segment thereof and passenger train service providers would benefit from project in near-term, was consistent with single object of Bond Act approved by voters, and thus did not violate state constitution's debt limit provision; statute furthered construction of high-speed rail system by funding investments in improvement of existing train systems that would be shared with high-speed train system.

MUNICIPAL CORPORATIONS - CALIFORNIA

City of Oxnard v. County of Ventura

Court of Appeal, Second District, Division 6, California - November 23, 2021 - Cal.Rptr.3d - 2021 WL 5460725 - 21 Cal. Daily Op. Serv. 11,559 - 2021 Daily Journal D.A.R. 12,037

City brought action against surrounding county seeking preliminary injunction to prevent county from providing ambulance services within city limits pursuant to joint powers agreement.

The Superior Court denied city's motion for preliminary injunction. City appealed.

The Court of Appeal held that:

- City lacked authority under Emergency Medical Services Systems and the Prehospital Emergency Medical Care Personnel Act to resume administration of its own ambulance services;
- City's authority to provide and administer ambulance services, even if police power, was subject to limits set forth in the Act; and
- Any withdrawal by city from joint powers agreement did not provide basis for city to resume providing ambulance services absent county's consent.

City lacked authority under Emergency Medical Services Systems and the Prehospital Emergency Medical Care Personnel Act to resume administration of its own ambulance services after it had entered into joint powers agreement with surrounding county regarding ambulance services; joint powers agreement empowered county, not city, to contract for and administer ambulance services, and fact that city was indirectly contracting for such services by being signatory to joint powers agreement did not make it eligible under Act's grandfathering provision which allowed cities to continue to provide existing services until such services were integrated into larger emergency medical services system.

City's authority to provide and administer ambulance services was subject to limits set forth in the Emergency Medical Services Systems and the Prehospital Emergency Medical Care Personnel Act, even if provision of ambulance services was police power; city had power to make and enforce only those ordinances and regulations that were not in conflict with general laws, and the Act was a general law.

Any withdrawal by city from joint powers agreement with surrounding county regarding ambulance services did not provide basis for city to resume providing ambulance services absent county's consent; as of date specified in section of the Emergency Medical Services Systems and the Prehospital Emergency Medical Care Personnel Act allowing cities to continue to provide existing services until they entered into an agreement with a county to provide such services, county's authority to provide ambulance services in city limits did not come from joint powers agreement, but from Act, and under Act, city could not expand its control by excluding county from provision of ambulance services.

ZONING & PLANNING - FLORIDA

Persaud Properties FL Investments, LLC v. Town of Fort Myers Beach

District Court of Appeal of Florida, Second District - December 11, 2020 - 310 So.3d 493 - 45 Fla. L. Weekly D2772

Property owner filed suit against town for declaratory relief, alleging a taking under state law and deprivation of due process under state constitution, and seeking mandatory injunction following town's determination that property owner had abandoned nonconforming use of property which permitted alcohol sale on part of property that extended onto environmentally critical zone.

The Circuit Court granted town's motion for summary judgment on all counts. Property owner appealed.

The District Court of Appeal held that town zoning ordinance included intent element, and thus property owners did not abandon nonconforming use during period of renovations.

Town zoning ordinance which provided that nonconforming use of property in environmentally critical zone specific to sale or service for on premises consumption of alcoholic beverages "may continue until there is an abandonment of permitted location for continuous nine-month period" included an intent element, and thus property owners did not abandon nonconforming use of property during one-year period of closure while renovations and construction were ongoing, where there was no evidence property owners intended to discontinue selling alcohol in environmentally critical zone once renovations were complete.

PUBLIC EMPLOYMENT - INDIANA

Sweet v. Town of Bargersville

United States Court of Appeals, Seventh Circuit - November 17, 2021 - 18 F.4th 273 - 2021 IER Cases 440,722

Former town employee, a customer-service representative in clerk-treasurer's office, brought § 1983 action against town and clerk-treasurer alleging retaliation in violation of First Amendment right to free speech arising from employee's termination five months after she criticized clerk-treasurer for reconnecting utility service of a wealthy delinquent customer.

The United States District Court granted summary judgment for town and clerk-treasurer. Former employee appealed.

The Court of Appeals held that:

- Employee's criticism of clerk-treasurer was not protected speech;
- Gap of five months between employee's criticism and her firing was too great to support an inference of retaliatory motive; and
- Purportedly shifting explanations for the firing did not establish retaliatory motive.

Town employee's criticism of elected town clerk-treasurer for reconnecting utility service of a wealthy delinquent customer amounted to a complaint about possible misconduct in employee's official area of responsibility, and thus the criticism was not constitutionally protected speech, where employee's job duties as customer-service representative in clerk-treasurer's office included handling utility disconnections, despite argument that it was not employee's job as a low-level employee to confront a high-ranking elected official about questions of policy.

PUBLIC MEETINGS - PENNSYLVANIA

Marshall v. Amuso

United States District Court, E.D. Pennsylvania - November 17, 2021 - F.Supp.3d - 2021 WL 5359020

Attendees of school board meetings whose public comments were interrupted or terminated pursuant to board policies brought action against school district seeking preliminary injunction to prevent application of policies that restricted their speech at public meetings.

The District Court held that:

- Policies which prohibited certain comments constituted viewpoint discrimination, for purposes of as-applied challenge to policies under Free Speech Clause;
- Policies which restricted speech at public meetings were irreparably clothed in subjectivity and were thus unconstitutionally vague under First Amendment;
- Policies which restricted speech at public meetings were unconstitutionally overbroad in violation of Free Speech Clause;
- Policy which required attendees of board meetings to publicly state their home address before speaking during period for public comment was facially invalid under Free Speech Clause;
- Plaintiffs showed that they would suffer irreparable harm absent grant of preliminary injunction;
- District failed to show that they would suffer risk of irreparable harm due to preliminary injunction; and
- Balance of equities supported waiver of requirement for plaintiffs to pay injunction bond.

PUBLIC RECORDS - VERMONT

McVeigh v. Vermont School Boards Association

Supreme Court of Vermont - November 5, 2021 - A.3d - 2021 WL 5145183 - 2021 VT 86

Requester brought action against private nonprofit corporation, a membership organization made up of school boards, seeking declaration that corporation was a public agency under the Public Records Act (PRA) and therefore had to comply with its request for copies of its records.

The Superior Court entered summary judgment for nonprofit corporation. Requester appealed.

The Supreme Court held that nonprofit corporation did not qualify as a "public agency" subject to the PRA.

Private nonprofit corporation, a membership organization made up of school boards, was not an instrumentality of the state, and therefore, it did not qualify a "public agency" within meaning of the Public Records Act (PRA); although association was involved in aspects of public education and had power to appoint members to certain boards and commissions, it was not a means through which the state or its subdivisions performed a fundamentally governmental function.

ZONING & PLANNING - CALIFORNIA

People v. Venice Suites, LLC

Court of Appeal, Second District, Division 8, California - November 15, 2021 - Cal.Rptr.3d - 2021 WL 5298494

State of California brought action against apartment house owner and operator, alleging violation of Los Angeles Municipal Code (LAMC), public nuisance, unfair business practices, and false advertising.

The Superior Court granted summary adjudication in part for owner and operator, and government voluntarily dismissed remaining claims. Government appealed.

The Court of Appeal held that:

- Court of Appeal could exercise its discretion to consider government's legal argument on uncontroverted facts, raised for first time on appeal, that short-term rentals were impliedly prohibited under permissive zoning scheme;
- Residential zone not specifying length of occupancy did not implicitly prevent apartment house from being used for short-term occupancies of 30 days or less;
- Long-term occupancy requirement for apartment house could not be inferred from definition limiting transient occupancy residential structure (TORS) to occupancies of 30 days or less; and
- Zoning code expressly authorizing use of apartment house in zone for human habitation without length of occupancy restriction could not be read in conjunction with rent stabilization ordinance (RSO) or transient occupancy tax ordinance (TOT) to require long-term occupancy.

IMMUNITY - CALIFORNIA

Martinez v. City of Beverly Hills

Court of Appeal, Second District, Division 2, California - November 10, 2021 - Cal.Rptr.3d - 2021 WL 5231409 - 21 Cal. Daily Op. Serv. 11,427

Pedestrian brought action against city alleging premises liability and negligence for a trip-and-fall in alley behind law office where she worked.

City moved for summary judgment, and the Superior Court and entered judgment,. Pedestrian appealed.

The Court of Appeal held that:

- City lacked actual notice of divot on which pedestrian tripped, and
- City lacked constructive notice of divot.

City lacked actual notice of divot on which pedestrian tripped, for purposes of determining city's liability for dangerous condition in pedestrian's action against city alleging premises liability and negligence for a trip-and-fall in alley behind law office where she worked, where Court of Appeal was permitted but not required to infer that city had actual notice because city did not produce a declaration from every possible city employee who might have been in alley in past denying having seen divot, and such an inference was not reasonable, given that city had not received complaints about alley's divot in six years preceding pedestrian's accident and had not been presented with any claims or lawsuits regarding divot in preceding 15 years.

City lacked constructive notice of divot on which pedestrian tripped, which was less than two inches deep, for purposes of determining city's liability for dangerous condition in pedestrian's action against city alleging premises liability and negligence for a trip-and-fall in alley behind law office where she worked, because cost of keeping alleys as defect-free as sidewalks for foot traffic had greater cost and less benefit, given that alleys degraded faster than sidewalks due to heavy vehicle traffic while being used less than sidewalks for foot traffic, city could reasonably elect to apply less rigorous scrutiny when inspecting alleys for defects as compared with sidewalks, meaning that universe of "obvious defects" for alleys was smaller than for sidewalks.

PUBLIC PENSIONS - KENTUCKY

City of Fort Wright v. Board of Trustees of Kentucky Retirement Systems

Supreme Court of Kentucky - October 28, 2021 - S.W.3d - 2021 WL 5050126

City employers brought action alleging improper investments by the Board of Trustees of Kentucky Retirement Systems in its management of the County Employees Retirement System (CERS).

The Circuit Court entered declaratory judgment in favor of Board. City employers appealed. The Court of Appeals affirmed. Discretionary review was granted.

The Supreme Court as a matter of apparent first impression, held that standard applicable to Board in making investments for the CERS was prudent investor standard.

Standard applicable to Board of Trustees of Kentucky Retirement Systems in making investments for the County Employees Retirement System (CERS) was prudent investor standard, and Board was not restricted by statute from making investments in unregulated hedge funds and private equity funds in managing CERS assets.

CITY CHARTER AMENDMENT - MINNESOTA

Samuels v. City of Minneapolis

Supreme Court of Minnesota - November 10, 2021 - N.W.2d - 2021 WL 5227155

Petitioners sought to correct the language city council had approved for a question on the ballot for a city election.

The District Court granted the petition and enjoined city from putting the question on the ballot as then framed. City council approved revised ballot language, and petitioner moved to strike the revised question from the ballot. The District Court granted the motion. City appealed and filed a petition for accelerated review, which was granted.

The Supreme Court held that petition that proposed to amend city charter to remove language requiring a police department and to establish a new department of public safety was not so unreasonable or misleading as to preclude voters from understanding the purpose of proposed amendment, and thus proposed amendment could be placed on ballot.

Petition that proposed to amend city charter to remove language requiring a police department and to establish a new department of public safety was not so unreasonable or misleading as to preclude voters from understanding the purpose of proposed amendment, and thus proposed amendment could be placed on ballot; the essential purpose of proposed amendment was fairly communicated as it indicated the police department would be removed from city charter and a department of public safety would be established, and the ballot language was not misleading or vague as it stated the department of public safety would use a “comprehensive public health approach,” the mayor and city council would decide the “specific functions” of new department, and the new department “will not be subject to exclusive mayoral power.”

SCHOOLS - PENNSYLVANIA

In re Formation of Independent School District Consisting of Borough of Highspire, Dauphin County

Supreme Court of Pennsylvania - October 7, 2021 - 260 A.3d 925

Coalition of inhabitants of borough appealed an order of the Court of Common Pleas denying its petition for formation of an independent school district after the Secretary of Education determined the petition had no educational merit.

The Commonwealth Court reversed. Districts sought review.

The Supreme Court held that as a matter of first impression, Secretary of Education could consider financial implications of transfer upon quality of education provided in affected districts.

In considering petition to establish school district independent of existing district for sole purpose of having new district be absorbed into neighboring district, Secretary of Education could consider audit addressing educational impact of proposed transfer over objection that financial projections in audit were "conjectural," where audit was entered into evidentiary record by stipulation and opponent agreed that auditor would not be required to offer witness to testify regarding its contents.

EMINENT DOMAIN - PENNSYLVANIA

Department of Transportation v. Bentleyville Garden Inn, Inc.

Commonwealth Court of Pennsylvania - October 1, 2021 - A.3d - 2021 WL 4483462

Pennsylvania Department of Transportation (PennDOT) condemned portion of condemnee's property, which was adjacent to condemnee's remaining property put to hotel use, and petitioned for appointment of board of viewers.

PennDOT subsequently appealed as excessive board's award of $2,908,000 to condemnee. After trial on merits of PennDOT's appeal, jury awarded condemnee $355,000, and the Court of Common Pleas denied condemnee's motion for judgment notwithstanding the verdict (JNOV) or a new trial. Condemnee appealed.

The Commonwealth Court held that:

- Eminent Domain Code permitted consideration of hotel's depressed value to calculate after-taking valuation of condemnee's remaining property;
- Hotel's loss of revenue before, during, and after PennDOT's construction of highway exit was relevant to establish damages to condemnee's remaining property;
- Consideration of hotel's revenue data from more than one year after taking to determine value of condemnee's remaining property conformed with Eminent Domain Code;
- Assumption made by PennDOT's expert that building highway exit did not affect access or visibility to condemnee's remaining property was not supported by record; and
- Belief that oil and gas industry was solely responsible for hotel's revenue decline following taking was contrary to the evidence.

WATER LAW - COLORADO

Glover v. Serratoga Falls LLC

Supreme Court of Colorado - November 15, 2021 - P.3d - 2021 WL 5296927 - 2021 CO 77

Owners of water-rights easement in ditch brought action against adjacent property owner asserting multiple claims arising from adjacent owner's construction activities.

Adjacent owner brought counterclaims seeking declaration of scope of easement owners' water rights, permission to alter ditches, and declaration of parties' maintenance obligations associated with each ditch. The Water Court entered judgment on the merits for adjacent owner and awarded attorney fees to adjacent owner. Easement owners appealed.

The Supreme Court held that:

- Water court had jurisdiction over claims;
- Adjacent property owner did not trespass on water-rights easement; and
- Water court acted within its discretion in awarding attorney fees against easement owners.

Claims in which owners of easement to access certain water rights through ditch sought declaratory judgments or "adjudications" related to the scope of those water rights and easements to convey those water rights presented "water matters" within exclusive jurisdiction of water court; before resolving dispute over location and maintenance of ditch, court first had to determine exact scope of decreed water rights in ditches and reservoir, which involved court deciding numerous right-to-use issues.

Adjacent property owner did not trespass on water-rights easement in ditch when performing construction work on adjacent property, which resulted in damage to physical infrastructure of ditch; adjacent property owner did not move ditch, adjacent property owner promptly repaired any damages without moving or altering ditch, and adjacent property owner properly came to water court to propose altering easement from open-air ditch to underground pipeline.

Water court acted within its discretion in finding that owners of water-rights easement in ditch lacked substantial justification for bringing trespass claim, and thus award of attorney fees against owners was authorized; court had determined that owner of adjacent property had not engaged in unilateral movement or alteration of ditch without consent and that adjacent owner did not interfere with easement owners' rights, and adjacent owner recognized that it would need to come to water court to propose alteration to ditch easement.

Water court acted within its discretion in determining that claim of trespass to water right, which was based on right to one fill of reservoir during each irrigation season, lacked substantial justification, warranting award of attorney fees; water court concluded that there was no evidence that any groundwater that was diverted caused injury to water right, and court found that reservoir continued to fill to capacity after installation of subdrains.

IMMUNITY - MINNESOTA

Jepsen as Trustee for Dean v. County of Pope

Supreme Court of Minnesota - November 10, 2021 - N.W.2d - 2021 WL 5227159

After child died of injuries from being thrown against a wall by father's girlfriend, trustee for child's heirs and next of kin brought wrongful death action against county and county social workers, alleging negligence in performing duties under Reporting of Maltreatment of Minors Act (RMMA).

The District Court granted county and social workers' motion for summary judgment. Trustee appealed. The Court of Appeals affirmed. Review was granted.

The Supreme Court held that:

- The immunity provision of the RMMA abrogates common law official immunity for child protection workers performing specified duties under the RMMA;
- Social workers' duties under RMMA were operational-level decisions and thus unprotected by discretionary-function immunity under the Municipal Tort Claims Act (MTCA); and
- Genuine issue of material fact as to whether social workers' failure to notify local law enforcement of reports of suspected child abuse was a proximate cause of child's death precluded summary judgment on claim that social workers violated RMMA.

LIABILITY - WASHINGTON

Fite v. Mudd

Court of Appeals of Washington, Division 2 - November 9, 2021 - P.3d - 2021 WL 5190918

Pedestrian brought action against motorist and municipality, alleging negligence after he was struck by vehicle while in crosswalk.

The Superior Court granting summary judgment regarding pedestrian's duty of care and intoxication affirmative defense, and granted judgment for pedestrian after jury verdict in his favor. Motorist appealed.

The Court of Appeals held that:

- Even without urinalysis, pedestrian's admission that he was "high," i.e., under influence of drug, during accident potentially satisfied complete defense from liability for injury;
  factual issue existed as to whether pedestrian was under influence of drug, and therefore whether motorist was entitled to affirmative defense to liability for injury;
- Trial court abused its discretion by submitting instruction to jury that improperly emphasized pedestrian's theory of case;
- Police officer's denial of knowledge of police reports of prior accidents at intersection at issue, on cross-examination by pedestrian's attorney, did not open the door so they could be admitted; and
- Although pedestrian was required to look before entering crosswalk, he was not required to specifically look to left and right before entering crosswalk; and
- Witness who testified at trial that she did not remember if pedestrian had looked before entering crosswalk could be impeached with her prior inconsistent statement that pedestrian did not look before entering crosswalk.

PUBLIC LANDS - WASHINGTON

Michel v. City of Seattle

Court of Appeals of Washington, Division 1 - November 8, 2021 - P.3d - 2021 WL 5176658

Homeowners brought amended claims for adverse possession, quiet title, prescriptive easement, trespass, and conversion relating to disputed property previously deeded to railway company and eventually conveyed to city.

City brought its own claims for adverse possession. On cross-motions for summary judgment, the Superior Court granted summary judgment in favor of homeowners, allowing homeowners to take disputed property by adverse possession and granting prescriptive easements for access. Following denial of its motion for reconsideration, city appealed.

The Court of Appeals held that:

- City established their actual and exclusive possession of disputed property, acquiring title by adverse possession more than 50 years prior;
- Land actually used or planned for use in a way that benefits the public as shown by the benefits flowing from governmental ownership is immune from claims of adverse possession; and
- Homeowners were barred by statute immunizing government-held property from adverse possession from taking possession of property.

City established their actual and exclusive possession of disputed property, acquiring title by adverse possession more than 50 years prior to action by homeowners claiming adverse possession of portions of property; city maintained a continuous presence on property for more than 60 years by using it for electrical distribution with power poles, city did not share possession of property with homeowners and their heirs or ensigns, city consented to the use of the property by third parties by allowing access to roadway, parks, recreation, and trails, city actively managed property, and city granted permits to portions of property to prior homeowners while requiring that it be allowed to access property at all reasonable times to ensure compliance with permitted use.

Because the legislature intended to broadly shield government-held land, the prohibition on adverse possession of public lands can apply to adverse possession claims brought against a government entity under the statute governing adverse possession claims based on payment of taxes, the statute governing adverse possession claims based on the disputed property being vacant or unoccupied, or the statute governing adverse possession claims brought within ten years of possession.

In the context of the statute immunizing certain government-held property from adverse possession, the statutory phrase “lands held for any public purpose” means land actually used or planned for use in a way that benefits the public as shown by the benefits flowing directly or indirectly from governmental ownership of the particular property

Homeowners were barred by statute immunizing certain government-held property from adverse possession from taking possession of city-owned public property; property was used continuously for recreation from the time of the city’s possession for more than 60 years, including for fishing, swimming, and as a public park and an inter-urban trail, and property was further used continuously to supply public utility service since the city’s possession, including for electrical distribution and water infrastructure.

PUBLIC EMPLOYMENT - WASHINGTON

Bradley v. City of Olympia

Court of Appeals of Washington, Division 2 - November 9, 2021 - P.3d - 2021 WL 5190924

Claimant, a former firefighter, sought judicial review of decision of Board of Industrial Insurance

Appeals affirming Department of Labor and Industries' (DLI's) denial of workers' compensation benefits related to claimant's bladder cancer allegedly caused by firefighting activities.

The Superior Court granted claimant's summary judgment motion. City appealed.

The Court of Appeals held that:

- City's evidence showing that firefighting in general does not cause bladder cancer was insufficient to create a question of fact as to whether statutory presumption of compensability was rebutted;
- City failed to prove nonoccupational factors caused claimant's bladder cancer; and
- Claimant was entitled to attorney fees.

ZONING & PLANNING - CALIFORNIA

Chase v. Wizmann

Court of Appeal, Second District, Division 2, California - November 1, 2021 - Cal.Rptr.3d - 2021 WL 5045754

Property owners filed suit against neighbors and related defendants for private nuisance and other causes of action related to neighbors' air conditioning and pool equipment, and property owners sought preliminary injunction.

The Superior Court granted preliminary injunction ordering neighbors to move pool and air conditioning equipment. Neighbors appealed and the injunction was stayed.

The Court of Appeal held that:

- Municipal ordinance did not preclude nuisance actions for equipment noise that did not violate ordinance;
- Property owners showed likelihood of prevailing on merits of private nuisance claim; and
- Balance of hardships favored grant of preliminary injunction.

Municipal ordinance prohibiting operation of air conditioning, refrigeration, or heating equipment for structures, or operation of any pumping, filtering, or heating equipment for pools, above certain decibel levels did not preclude nuisance actions for equipment noise that did not violate ordinance, and thus, irrespective of an ordinance violation, plaintiff could claim the existence of a nuisance; ordinance did not expressly immunize all equipment noise below decibel level proscribed in ordinance or preclude nuisance liability for otherwise excessive or inappropriate equipment noise below that level, and ordinances contained "catchall" for "any" loud noise, indicating possibility of unreasonable noise violations on case-by-case basis, irrespective of decibel level.

Property owners seeking preliminary injunction requiring neighbor to relocate air conditioning and pool equipment from below their bedroom window to other side of property showed likelihood of prevailing on merits of private nuisance claim at trial, though neighbors asserted that property owners' noise concerns were not credible; record indicated near-constant equipment noise invading property at all hours, mostly at decibel levels in violation of municipal ordinance, reasonable persons of normal sensibilities would find that to be unreasonable amount and duration of noise near bedroom window and in their yard, noise deprived property owners from comfortable enjoyment of property, and property owners made several attempts to address noise concerns before seeking injunction.

Balance of hardships favored preliminary injunction requiring neighbor to relocate air conditioning and pool equipment from below property owners' bedroom to other side of neighbors' property, in property owners' action raising private nuisance claim, though neighbor asserted that any noise violation was minor and controllable and that there were less burdensome alternatives than relocation; record indicated that equipment frequently operated all at the same time, at all hours of day and night, at decibel levels in violation of municipal noise ordinance, there was no guarantee that noise would be adequately controlled if equipment remained in place, and neighbor had already been ordered to comply with noise ordinance and had not done so.

IMMUNITY - GEORGIA

Smith v. City of Roswell

Court of Appeals of Georgia - October 18, 2021 - S.E.2d - 2021 WL 4840802

Survivors and administrators of estates of driver and passenger who died after vehicle left the road and collided with two mailboxes brought wrongful death actions against, inter alia, city and mailbox owners, asserting that mailboxes proximately caused the deaths and city negligently failed to remove the mailboxes.

The Superior Court granted city's motions to dismiss, and denied surviving daughter's motion to consolidate wrongful death and estate claims. Plaintiffs appealed.

On consolidated appeal, the Court of Appeals held that:

- Trial court's alleged error in refusing to allow decedent's surviving daughter to bring wrongful death claim when her mother declined to file the claim as surviving spouse was rendered moot when mother passed away;
- Trial court did not abuse its discretion in refusing to order consolidation of wrongful death and estate claims;
- Plaintiffs forfeited right to establish that city waived its municipal immunity by purchasing insurance; and
- Plaintiffs failed to establish that city had ministerial duty to remove mailboxes that were not in or on road.

DEVELOPMENT IMPACT FEES - NORTH CAROLINA

Plantation Building of Wilmington, Inc. v. Town of Leland

Supreme Court of North Carolina - October 29, 2021 - S.E.2d - 2021-NCSC-122 - 2021 WL 5024501

Builder brought action against town seeking refund of all impact fees and capacity fees collected by town as mandatory condition precedent to town issuing building permit.

The Superior Court granted builder's motion for class certification, which had been filed after summary judgment had been granted in builder's favor on issue of liability, and denied town's motion to dismiss for lack of subject matter jurisdiction and two other motions filed by town. Town appealed.

The Supreme Court held that town waived any objection that it may have had to trial court granting

builder's motion for class certification after granting builder's motion for summary judgment on issue of liability.

Town waived on appeal any objection that it may have had to trial court granting builder's motion for class certification after granting builder's motion for summary judgment on issue of liability, in builder's action seeking refund of all impact fees and capacity fees collected by town as mandatory condition precedent to town issuing building permit, where motion for continuance filed by builder identified that issue of class certification would be resolved after addressing cross-motions for summary judgment, and expressly stated that both parties to action "join in and consent to this motion," and parties followed that sequence.

PUBLIC UTILITIES - OHIO

In re Application of Suburban Natural Gas Company

Supreme Court of Ohio - September 21, 2021 - N.E.3d - 2021 WL 4269964 - 2021-Ohi--3224

Public gas utility filed application with the Public Utilities Commission of Ohio (PUCO) for a rate increase to cover costs of a pipeline extension. PUCO approved the rate increase and denied consumers' application for a rehearing. Consumers appealed.

The Supreme Court held that:

- As a matter of first impression, assessing whether property is "useful" for purposes of determining a public utility's rate base requires finding that the property be beneficial in rendering service for the convenience of the public as of the date certain, and
- PUCO misapplied the used-and-useful test when it looked beyond the date certain and determined that utility's investment in the pipeline extension was prudent rather than useful, as justification for rate increase.

Whether something is used and useful, for purposes of determining a public utility's rate base, must be measured as of the date certain, not at some speculative unspecified point in time; thus, a public utility is not entitled to include in the rate-base valuation property not actually used or useful in providing its public service, no matter how useful the property may have been in the past or may yet be in the future.

The Public Utilities Commission of Ohio (PUCO) misapplied the used-and-useful test for determining public gas utility's rate base when it looked beyond the date certain and determined that utility's investment in a pipeline extension was prudent rather than useful, such that there would be a rate increase so that utility customers would have to pay for it; used-and-useful test required measurement of the usefulness of the pipeline as of a the date certain, but the PUCO speculated about the pipeline extension's potential for saving time and money in the long run and looked beyond the date certain to find the extension useful.

MUNICIPAL ORDINANCE - PENNSYLVANIA

Apartment Association of Metropolitan Pittsburgh, Inc. v. City of Pittsburgh

Supreme Court of Pennsylvania - October 21, 2021 - A.3d - 2021 WL 4901913

Landlord association brought action against city, a home rule municipality and city of the second class, for injunctive relief and declaratory judgment that city lacked authority to enact ordinance generally prohibiting denial of access to housing based on a tenant's source of income.

City filed motion for judgment on the pleadings, and association filed motion for summary judgment. The Court of Common Pleas denied city's motion, granted association's motion, and declared ordinance invalid and unenforceable under Home Rule Law. City appealed. The Commonwealth Court affirmed. Supreme Court granted city's petition for allowance of appeal, vacated order of Commonwealth Court, and remanded for reconsideration with instructions. On remand the Commonwealth Court affirmed.

The Supreme Court held that:

- General police powers provision of Second Class City Code (SCCC) did not expressly authorize home rule municipality to enact ordinance prohibiting residential landlords from discriminating against tenants based on source of income, and
- Provision of Pennsylvania Human Relations Act (PHRA) authorizing municipalities to establish their own human relations commissions to combat discriminatory practices did not explicitly authorize home rule municipality to enact ordinance prohibiting residential landlords from discriminating based on tenants' source of income.

ZONING & PLANNING - VERMONT

In re 15-17 Weston Street NOV

Supreme Court of Vermont - October 29, 2021 - A.3d - 2021 WL 5023586 - 2021 VT 85

Landlord sought review of city development review board's decision upholding a notice of zoning violation of occupancy restriction prohibiting more than four unrelated adults from occupying a rental unit in a residential low density zoning district.

The Superior Court granted summary judgment for city. Landlord appealed.

The Supreme Court held that:

- Ordinance limiting safe harbor provided by 15-year statute of limitations for zoning enforcement actions was valid exercise of city's authority, and
- Claim preclusion did not apply to bar enforcement action after prior permitting proceedings.

Ordinance limiting safe harbor provided by 15-year statute of limitations for zoning enforcement actions, with respect to unlawful uses that were resumed after discontinuance for more than 60 days, was a valid exercise of city's authority to regulate zoning, where legislature conferred broad authority on municipalities to regulate land development, legislature expressly authorized municipalities to regulate and prohibit expansion and undue perpetuation of lawful preexisting nonconformities, nothing in statutory provision relating to discontinuances of preexisting nonconforming uses compelled a uniform temporal definition of discontinuance, and ordinance was consistent with and promoted the goals of zoning.

Claim preclusion did not apply to bar city from enforcing occupancy restrictions on rental property in residential low density zoning district, specifically the prohibition on more than four unrelated adults occupying a rental unit, after two permitting proceedings involving the property, where permitting proceedings involved the number of dwelling units that could exist on property rather

than occupancy of any particular unit, and there was no record evidence or clear agreement among the parties that occupancy of the specific unit that was subject of enforcement action was at issue, or substantially identical, to a claim that was at issue in prior permitting proceedings.

IMMUNITY - MASSACHUSETTS

Berry v. Commerce Insurance Company

Supreme Judicial Court of Massachusetts, Bristol - October 25, 2021 - N.E.3d - 2021 WL 4944557

Police officer, who sustained severe injuries to his leg when it was pinned between picnic table and personal vehicle of fellow police officer, who was firearms training instructor, during paid lunch break from firearms certification training at firing range on town-owned property, brought action against instructor's automobile insurer seeking declaratory judgment that immunity provision of Tort Claims Act provided no defense to coverage.

On cross-motions for summary judgment, the Superior Court Department entered judgment in favor of police officer. Insurer appealed, and the Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

The Supreme Judicial Court held that instructor was not acting within scope of his employment as police officer when his personal vehicle pinned leg of fellow police officer.

Firearms training instructor was not acting within scope of his employment as police officer when his personal vehicle pinned leg of fellow police officer against picnic table during lunch break from all-day firearms certification training at firing range, and thus, instructor's automobile insurer could not deny coverage for injured officer's damages on ground that instructor was immune from liability under Tort Claims Act, although instructor conducted training as part of his position with police department, lunch break was paid, and range was on town-owned property; instructor's unsafe driving, including approaching range too fast and proceeding towards picnic tables while spinning tires, braking, and causing vehicle to slide, was not motivated by any purpose to serve police department.

SCHOOLS - ALABAMA

Sumter County Board of Education v. University of West Alabama

Supreme Court of Alabama - September 17, 2021 - So.3d - 2021 WL 4236438

County Board of Education brought action against public university and university's president and former president in their individual and official capacities, asserting claims of reformation of a deed, breach of contract, and fraud and also seeking declaratory and injunctive relief, which claims arose from university's allowance of a charter school to open on a school campus that the board of education had closed and sold to the university with the restrictive covenant that campus not be used as a K-12 school.

The Circuit Court dismissed action. Board of education appealed.

The Supreme Court held that the restrictive covenant was against public policy.

Restrictive covenant prohibiting a charter school to open on school campus that was closed and sold by county board of education was against public policy pursuant to the School Choice and Student Opportunity Act, and thus covenant was void, even though Act was enacted after covenant's execution; covenant contradicted Act's stated policy of making a closed or unused public school facility available to a qualified charter-school organization, and it thwarted Act's overall purpose of fostering competition in public education by encouraging the establishment and proliferation of charter schools.

SCHOOL FINANCE - CALIFORNIA

Mt. Diablo Unified School District v. Clayton Valley Charter High School

Court of Appeal, First District, Division 4, California - October 1, 2021 - 69 Cal.App.5th 1004 - 284 Cal.Rptr.3d 850 - 21 Cal. Daily Op. Serv. 10,330 - 2021 Daily Journal D.A.R. 10,488

School district and charter school filed suits against each other, seeking determination of amounts due for facilities costs that regulations authorized district to charge charter school.

The Superior Court tentatively granted district's motion for judgment on pleadings on cross-petition for writ of mandate and complaint for declaratory relief. Charter school appealed.

The Court of Appeal held that:

- Pro rata share of facilities costs for charter school that paid for its own operations and maintenance excluded districtwide plant maintenance and operations costs, and
- Facilities costs excluded any contributions that district made to its ongoing and major maintenance (OMM) account that were ultimately disbursed to pay costs of type paid by charter school.

School district's calculation of pro rata share to be paid by charter school, that paid for its own operations and maintenance, was required to exclude districtwide plant maintenance and operations costs from "facilities costs," defined by regulation as not including any costs paid by charter school, including, but not limited to, costs associated with ongoing operations and maintenance and costs of any tangible items adjusted in keeping with customary depreciation schedule for each item, since regulation required district to exclude from districtwide facilities costs, of which charter school was required to pay pro rata share, any category of costs paid by charter school, not merely any specific costs that charter school paid.

The state board added plant maintenance and operations costs to the regulatory definition of facilities costs to enable a school district to obtain compensation for such services by way of a charter school's pro rata share in those cases in which the district provides such services to the school, but the concurrently added exclusion paragraph requires a district to exclude its districtwide plant maintenance and operations costs from its facilities costs when calculating the pro rata share of a school that pays for such services itself; otherwise, the school will pay for the services twice, and the district will receive reimbursement for services it did not provide.

School district's contributions to its ongoing and major maintenance (OMM) account that were ultimately disbursed to pay costs of type paid by charter school were required to be excluded from "facilities costs," within meaning of regulation authorizing district to charge charter school pro rata share of facilities costs, but excluding from districtwide facilities costs any category of costs paid by charter school; exclusion paragraph applied to all listed costs, with no basis to differentiate between

expenditures from OMM account for operations and those for maintenance.

ZONING & PLANNING - CONNECTICUT

Tillman v. Planning and Zoning Commission of City of Shelton

Supreme Court of Connecticut - October 20, 2021 - A.3d - 2021 WL 4898440

Landowners sought review of city planning and zoning commission's approval of application for planned development district (PDD) for an adjoining 121-acre parcel in city's light industrial park zone.

The Superior Court dismissed. Landowners appealed.

The Supreme Court held that:

- A municipal zoning authority that derives zoning power from statute governing zoning regulations may create a PDD;
- Approval of PDD was not impermissible spot zoning;
- Proposed PDD did not violate uniformity requirement of zoning statute; and
- Approval of PDD did not result in an unlawful subdivision.

Grant of zoning authority contained in statute governing zoning regulations permits a municipal zoning authority to create a planned development district (PDD) when the authority acts in a legislative capacity.

City planning and zoning commission's approval of application for planned development district (PDD) for a parcel in city's light industrial park zone was not impermissible spot zoning, where proposed PDD consisted of approximately 121 acres, majority of parcel had been located in industrial zone for more than 50 years, and regulations identified the area around a major road that partially bounded parcel as an appropriate location for PDDs.

Proposed planned development district (PDD) for 121-acre parcel in city's light industrial park zone did not violate uniformity requirement of statute governing zoning regulations within a municipality, notwithstanding the contemplated mixture of residential, commercial, and professional uses; even a traditional approach to zoning did not mandate a complete monoculture of uses within a particular zone.

City planning and zoning commission's approval of application for planned development district (PDD) for 121-acre parcel in city's light industrial park zone did not result in an unlawful subdivision, even though various development areas were occasionally referred to as "parcels," where there was no indication that the approval of PDD actually caused alteration of any previously existing property line, and the statement of uses and standards ultimately approved by commission expressly noted that any subdivision of the subject parcel would require separate approval.

BOND VALIDATION - GEORGIA

Bene v. State

Court of Appeals of Georgia - October 27, 2021 - S.E.2d - 2021 WL 4987582

State brought bond validation petitions seeking judgment confirming and validating county development authority's issuance of proposed taxable revenue bonds and related security intended to finance four development projects.

"The transactions share a common structure, and this structure is relevant to the issues on appeal. Specifically, the petitions sought to create a bond transaction leasehold estate, where, in consideration for the issuance of the bonds, the Companies agree to transfer fee simple title in the projects to the Authority, and the Authority and the Companies agree to execute a lease agreement under which the Companies would have the right to possession of the respective projects for a term of ten years. During the term of the lease, the Authority's interest in the projects will be exempt from ad valorem taxation; only the Companies' leasehold interest is subject to taxation. In connection with the transactions, the Authority and the Companies executed "Memoranda of Agreement" ("MOA") establishing the valuation methodology to be used in assessing ad valorem taxes on the leasehold estates. The percentage of value for each year for taxation purposes is set forth in the MOAs, starting at 50 percent of the fair market value in the first year after completion of the construction and ramping up to 95 percent of the fair market value in the tenth year following construction. At the conclusion of the lease term, the Companies would have the right to purchase the projects for nominal consideration of $10 pursuant to the terms of the lease agreement."

County resident intervened and filed objections. The Superior Court entered orders validating and confirming the bonds and bond security. Resident appealed.

The Court of Appeals held that:

- State did not fail to comply with statute requiring bond validation petitions to state purpose of bonds to be issued;
- Evidence supported finding that county would derive substantial benefit from bond transaction;
- Superior court did not impermissibly shift burden of proof;
- Superior court did not rule on ad valorem taxation issues without subject-matter jurisdiction;
- Superior court had jurisdiction concerning issue of valuation methodology;
- Superior court's explanation as to why it had subject-matter jurisdiction over State's petition was sufficient to satisfy statutory requirements; and
- Superior court made adequate findings of fact and conclusions of law to support conclusion that bond transactions at issue did not violate Gratuities Clause.

State bringing bond validation petitions seeking judgment confirming and validating county development authority's issuance of proposed taxable revenue bonds to finance four development projects did not fail to comply with statute requiring bond validation petitions to state purpose of bonds to be issued; each petition included their stated purpose in similarly worded language, including that bond proceeds would be "used to finance a portion of the costs of acquisition, construction, equipping and installation of land, improvements and related building fixtures and building equipment" for use as "mixed-use commercial development and an economic development project."

Evidence supported finding that county would derive substantial benefit from bond transaction wherein county development authority would issue taxable revenue bonds to companies to finance four development projects, and therefore trial court did not err in determining that the bond transactions did not result in unconstitutional gratuity; at the hearing on State's petition to validate the bonds, authority's executive director testified that the projects at issue would improve county's infrastructure, create hundreds of jobs, expand tax rolls, and bring economic development.

Superior court did not impermissibly shift burden of proof by requiring county resident, as

intervenor, to show cause as to why proposed taxable revenue bonds to finance four development projects should not be validated, and therefore trial court did not err in its assignment of burden of proof, in proceedings on State's bond validation petitions in which resident intervened and filed objections; trial court correctly assigned burdens of proof and found that State satisfied its burden of proof, while resident failed to satisfy his own burden with regard to his affirmative defenses.

In the context of bond validation proceedings, where an intervention has been filed by citizens and taxpayers of the political subdivision involved, it is the intervenors who are quasi-defendants, and the technical adversary position between the governing authority and the solicitor general, acting for the State, will not permit these two entities by admissions in pleadings to establish as proved the essential allegations of the petition for validation, but the burden is on the State, acting through its solicitor general, to prove the material facts which are requisite to obtain bond validation; and where there is a total absence of such proof, it is error for the court to render judgment validating the bonds.

Superior court's ruling in which it validated county development authority's issuance of taxable revenue bonds to finance four development projects included information regarding ad valorem taxation matters only as necessary to resolution of the validity of the bonds, rather than constituting merit-based determination, and therefore superior court did not rule on ad valorem taxation issues without subject-matter jurisdiction; in its orders, superior court simply reiterated that satisfaction of development purposes of the bond transactions justified validation and that a tax exemption was a natural by-product of that validation, as expressly provided by statute expressly exempting development authorities from taxation.

Superior court had jurisdiction to consider issue of methodology formula expressed in county development authority and companies' memoranda of agreement that established method for assessing ad valorem taxes on leasehold estates created by authority and companies' bond transaction to finance four development projects; statutory framework set out in Development Authorities Law vested superior court with exclusive jurisdiction to hear and determine all matters relevant to bond validation.

Superior court's explanation as to why it had subject-matter jurisdiction over State's petition seeking validation of county development authority's issuance of proposed taxable revenue bonds intended to finance four development projects was sufficient to satisfy requirements of statute requiring that, upon request, judgment of court include written findings of fact and conclusions of law; in its validation order, superior court correctly noted that statute governing validation of revenue bonds vested exclusive jurisdiction over bond validation matters in superior courts.

Superior court made adequate findings of fact and conclusions of law to support its conclusion that county development authority and companies' bond transactions for financing four development projects did not violate Gratuities Clause; superior court set forth evidence that projects would create new jobs and promote industry and employment opportunities for public good, and superior court then looked to relevant case law and applied it to facts of case to conclude that authority had demonstrated through substantial evidence that bonds provided substantial benefit to people of Georgia through economic development and job creation.

County board of assessors did not impermissibly cede its authority in the memoranda of agreement between county and companies that set forth the methodology to be used to value leasehold estates created by bond transactions between county and companies to finance four development projects; board's choice to execute agreement represented exercise of discretion in and of itself, rather than loss of discretion, and the agreement's ramp-up valuation formula that increased value over time was not inherently unlawful.

IMMUNITY - GEORGIA

Sharma v. City of Alpharetta

Court of Appeals of Georgia - October 28, 2021 - S.E.2d - 2021 WL 5001916

Estate of swimmer who died in city swimming pool brought action against city, alleging premises liability, negligence in lifeguards' supervision of swimmers, and negligence in city's training and supervision of lifeguards.

The State Court granted city's motion to dismiss. Estate appealed.

The Court of Appeals held that city did not waive its municipal sovereign immunity when it purchased a liability insurance policy.

City did not waive its municipal sovereign immunity when it purchased a liability insurance policy, where "Sovereign Immunity and Damages Caps" provision of the policy, which stated that "issuance of this insurance shall not be deemed a waiver of any statutory immunities by or on behalf of any insured," was clear expression of intent to preserve city's municipal sovereign immunity where possible and to prevent purchase of the policy from expanding city's liability in any way.

PUBLIC PENSIONS - KENTUCKY

City of Villa Hills v. Kentucky Retirement Systems

Supreme Court of Kentucky - August 26, 2021 - 628 S.W.3d 94

City filed petition for judicial review of order of the State Retirement Systems assessing actuarial costs against city following retirement of one of its employees.

The Circuit Court affirmed. City appealed. The Court of Appeals, 2019 WL 2896454, affirmed. City sought discretionary review.

The Supreme Court held that:

- Pension-spiking statute, which seeks to limit practice of increasing pay of public employee in years immediately leading up to retirement with effect of increasing employee's pension benefits in retirement, applies retroactively;
- Evidence supported determination that city employee's pay increase was not a result of a bona fide promotion; and
- Pension-spiking statute was constitutional.

Pension-spiking statute, which seeks to limit practice of increasing pay of public employee in years immediately leading up to retirement with effect of increasing employee's pension benefits in retirement, applies retroactively.

Evidence supported determination of State Retirement Systems that city employee's pay increase was not a result of a bona fide promotion, in action under pension-spiking statute, which seeks to limit practice of increasing pay of public employee in years immediately leading up to retirement with effect of increasing employee's pension benefits in retirement; employee's formal rank and title within police department did not change despite his additional responsibilities, and employee was doing practically the same inspection work before purported promotion.

Pension-spiking statute, which seeks to limit practice of increasing pay of public employee in years immediately leading up to retirement with effect of increasing employee's pension benefits in retirement, is not unconstitutionally overbroad; parameters of statute are reasonably tailored to purported end.

Pension-spiking statute, which seeks to limit practice of increasing pay of public employee in years immediately leading up to retirement with effect of increasing employee's pension benefits in retirement, is not an unconstitutional ex post facto law.

Decision of State Retirement Systems to assess actuarial costs to city following retirement of police officer, under pension-spiking statute, which seeks to limit practice of increasing pay of public employee in years immediately leading up to retirement with effect of increasing employee's pension benefits in retirement, did not violate Contracts Clause; relationship between city and Retirement Systems was purely one of statute, not contract, and statute did not affect any employer-employee obligations between city and employee.

EASEMENTS - ALASKA

Windel v. Matanuska-Susitna Borough

Supreme Court of Alaska - October 8, 2021 - P.3d - 2021 WL 4697717

Landowners sued borough, challenging the validity of easements that crossed their property to give access to neighboring residences.

The Superior Court dismissed most of the claims on res judicata grounds, granted borough's motions for summary judgment or judgment on the pleadings, and, following bench trial, entered judgment for borough on claim that borough violated landowners' due process rights by towing their truck from disputed roadway. Landowners appealed.

On rehearing, the Supreme Court held that:

- Privity requirement of res judicata was met;
- Borough could treat easement as one acquired by donation, rather than by dedication;
- Permit application did not establish that borough could not grant a construction permit to neighbor who was not an adjoining landowner to road;
- Borough's act in towing landowners' pickup truck from road did not violate landowners' due process rights; and
- Award of enhanced attorney's fees was an appropriate exercise of discretion.

Borough could treat easement as one acquired by donation, rather than by dedication, such that it could be acquired simply with borough manager's approval and no further procedure was necessary; acquisition by dedication and acquisition by donation were similarly described in the borough code and were not further defined, the donators' grant of a right of way in exchange for nominal consideration could be categorized as either or both, and the borough's interpretation of the undefined terms in its ordinance was a reasonable one consistent with the statutory grant of broad authority over planning and land use.

MUNICIPAL ORDINANCE - CALIFORNIA

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

Court of Appeal, Sixth District, California - October 12, 2021 - Cal.Rptr.3d - 2021 WL 4743024 - 21 Cal. Daily Op. Serv. 10,548 - 2021 Daily Journal D.A.R. 10,699

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 held that state law governing oil and gas operational methods and practices preempted county ordinances.

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 were preempted as conflicting with Public Resources Code section giving the state oil and gas supervisor authority to supervise and permit oil and gas operational methods and practices throughout state, where Code permitted and encouraged drilling of new wells and use of wastewater injection and explicitly vested in the state the authority to permit that conduct, even though ordinances did not regulate many of the technical aspects of oil drilling operations addressed by voluminous state statutes and regulations.

LIABILITY - GEORGIA

Hall v. City of Blakely

Court of Appeals of Georgia - September 14, 2021 - S.E.2d - 2021 WL 4165738

Motorist brought action against city, alleging that she suffered injuries resulting from city fire department pick-up truck hitting her vehicle.

City moved for judgment on the pleadings. The Superior Court granted motion. Motorist appealed.

The Court of Appeals held that ante litem notice filed by motorist did not provide specific amount of monetary damages sought from city.

Ante litem notice filed by motorist, who had allegedly incurred injuries resulting from city fire department pick-up truck hitting her vehicle, did not provide specific amount of monetary damages sought from city, and thus notice failed to either strictly or substantially comply with provision of statute governing demand prerequisite to suit for injury that required such specific amount and dismissal of claim brought by motorist against city was warranted; while notice indicated that motorist would make claims for injuries and damages and provided minimum and maximum monetary amount sought, and motorist argued that if city had agreed to pay amount within such range, it would have been able to enforce settlement, seeking unknown number was too indefinite to constitute binding offer of settlement.

POLITICAL SUBDIVISIONS - NORTH CAROLINA

Southern Environmental Law Center v. North Carolina Railroad Company

Supreme Court of North Carolina - August 13, 2021 - 378 N.C. 202 - 2021-NCSC-84 - 861 S.E.2d 533

Requester brought action requesting the entry of an order declaring that the North Carolina Railroad Company was an agency of the State of North Carolina for purposes of the Public Records Act, declaring that the records requested from the railroad constituted public records, and ordering the railroad to make those records available for inspection.

After the case was designated a mandatory complex business case, the Superior Court granted railroad's motion for summary judgment, and requester appealed.

The Supreme Court held that as a matter of first impression, railroad was not an agency of North Carolina government or a subdivision of such an agency.

North Carolina Railroad Company was not an agency of North Carolina government or a subdivision of such an agency as defined by the Public Records Act, although the State was the Railroad's sole shareholder and the Railroad enjoyed a number of benefits due to its relationship with the State, where both the General Assembly and other governmental entities consistently treated the Railroad as a private corporation rather than a public agency or subdivision, the State lacked a sufficient degree of control over the day-to-day operations of the Railroad, and the Railroad consistently maintained its separate corporate identity and structure and made decisions independently of any directives that it might receive from governmental officials, and owned its own property and paid taxes to counties and the State.

PUBLIC UTILITIES - OHIO

In re Application of FirstEnergy Advisors for Certification as a Competitive Retail Electric Service Power Broker and Aggregator

Supreme Court of Ohio - October 14, 2021 - N.E.3d - 2021 WL 4783198 - 2021-Ohio-3630

Public Utilities Commission of Ohio (PUCO) granted application to certify electric utility as a competitive retail electric service (CRES) provider to provide aggregator and brokerage services, and denied objectors' request for rehearing.

Objectors appealed, and the Supreme Court of Ohio granted utility's request to intervene in appeal.

The Supreme Court held that:

- PUCO's order violated statute governing certification;
- PUCO's failure to provide reasoned explanation of the basis of its decision warranted remand; and
- PUCO violated its duty to find that electric utility was fit and capable of complying with all applicable rules for CRES providers by deferring all consideration of corporate-separation issues to other proceedings after granting certification.

Order of Public Utilities Commission of Ohio (PUCO) granting application of electric utility for certification as a competitive retail electric service provider violated statute governing certification by failing to explain reasoning and factual grounds for granting application, failing to make any independent findings about utility's managerial fitness and competence to provide competitive retail electric services to Ohio consumers, and failing to identify facts in the record on which it based its decision.

Without knowing why Public Utilities Commission of Ohio (PUCO) decided to certify electric utility as a competitive retail electric service (CRES) provider, objectors faced an almost insurmountable task in showing prejudice, thus warranting remand for PUCO to make factual and legal findings

consistent with its obligations under statute governing certification.

Public Utilities Commission of Ohio (PUCO) violated its duty to find that electric utility was fit and capable of complying with all applicable rules for competitive retail electric service (CRES) providers by deferring all consideration of corporate-separation issues to audit case after granting certification; there was no examination of the shared employees or of procedures and policies utility had in place to prevent information from passing improperly between shared employees, and instead of determining whether utility had shown that it could comply with code of conduct, PUCO deferred all issues regarding corporate-separation requirements to other proceedings.

MUNICIPAL ORDINANCE - PENNSYLVANIA

Apartment Association of Metropolitan Pittsburgh, Inc. v. City of Pittsburgh

Supreme Court of Pennsylvania - October 21, 2021 - A.3d - 2021 WL 4901913

Landlord association brought action against city, a home rule municipality and city of the second class, for injunctive relief and declaratory judgment that city lacked authority to enact ordinance generally prohibiting denial of access to housing based on a tenant's source of income.

City filed motion for judgment on the pleadings, and association filed motion for summary judgment. The Court of Common Pleas denied city's motion, granted association's motion, and declared ordinance invalid and unenforceable under Home Rule Law. City appealed. The Commonwealth Court affirmed. Supreme Court granted city's petition for allowance of appeal, vacated order of Commonwealth Court, and remanded for reconsideration with instructions. On remand the Commonwealth Court affirmed.

The Supreme Court held that:

General police powers provision of Second Class City Code (SCCC) did not expressly authorize home rule municipality to enact ordinance prohibiting residential landlords from discriminating against tenants based on source of income, and
Provision of Pennsylvania Human Relations Act (PHRA) authorizing municipalities to establish their own human relations commissions to combat discriminatory practices did not explicitly authorize home rule municipality to enact ordinance prohibiting residential landlords from discriminating based on tenants' source of income.

General police powers provision of Second Class City Code (SCCC) did not expressly authorize home rule municipality to enact ordinance prohibiting residential landlords from discriminating against tenants based on source of income, including federal housing vouchers, and, thus, did not protect ordinance from Business Exclusion to municipality's broad home rule powers; police powers provision did not expressly permit city to enact legislation requiring residential landlords to affirmatively participate in otherwise voluntary federal housing subsidy program.

Provision of Pennsylvania Human Relations Act (PHRA) authorizing municipalities to establish their own human relations commissions to combat discriminatory practices, including housing discrimination, did not explicitly authorize home rule municipality to enact ordinance prohibiting residential landlords from discriminating based on tenants' source of income, including federal Section 8 housing vouchers, and, thus, ordinance was subject to Business Exclusion on home rule powers; PHRA did not identify "source of income" as protected class, and by expressly defining "source of income" to include Section 8 vouchers, ordinance required landlords to comply with

burdensome Section 8 Program regulations, which had previously been voluntary, going far beyond scope of PHRA.

City waived its appellate argument alleging that by enacting the nondiscrimination ordinance, which prohibited residential landlords from discriminating based on tenants' source of income, including federal Section 8 housing vouchers, the city was enabling the implementation of federal housing policy as evinced by the United States Housing Act of 1937 and the Fair Housing Act of 1968 (FHA) to eradicate discriminatory practices within a sector of the nation's economy, and thus Business Exclusion exception did not apply to invalidate ordinance, where the city did not raise the argument before the Commonwealth Court either of the times it briefed the case in that court.

PUBLIC UTILITIES - TEXAS

City of New Boston, Texas v. Netflix, Inc.

United States District Court, E.D. Texas, Texarkana Division - September 30, 2021 - F.Supp.3d - 2021 WL 4771537

City brought putative class action against video service providers alleging violation of Texas Utility Code franchise fee statute.

Providers filed motion to dismiss.

The District Court held that Texas Utility Code unambiguously granted authority only to Public Utility Commission (PUC) to issue state certificate of franchise for provision of cable service or video service.

Texas Utility Code unambiguously granted authority only to Public Utility Commission (PUC) to issue state certificate of franchise for provision of cable service or video service; statute did not qualify authority in any way, statute did not give court any basis upon which it could act as franchising authority, and statute did not reserve to individual municipalities any authority to declare a provider a holder of a state-issued certificate of franchise authority.

ZONING & PLANNING - VERMONT

In re Wright & Boester Conditional Use Application

Supreme Court of Vermont - October 15, 2021 - A.3d - 2021 WL 4806937 - 2021 VT 80

Applicants sought conditional use permit or variance from local development review board allowing applicants to demolish and rebuild lakeside structure on its existing footprint, adding a third level and increasing building's height by ten feet.

Board conditionally approved application, allowing rebuilding of structure to its original height of two stories. Applicants appealed to the Superior Court, Environmental Division, which granted permit based on revised application, and applicants' neighbors appealed.

The Supreme Court held that:

- Structure was a "boathouse," not an "accessory building," and
- Environmental Division should have remanded to local development review board.

Two-story lakeside structure, which was within 150 feet of lakeshore and which applicants sought to demolish and rebuild on its existing footprint while adding a third level and increasing building's height by ten feet, was a "boathouse," not an "accessory building," for purposes of local zoning ordinance limiting boathouses to 15 feet maximum height and accessory buildings to 30 feet; although structure had been used for more than storing boats, zoning ordinance's intent was to increase restrictions over time to protect lakeshore, boathouses were only new development permitted within 150 feet of lakeshore, and to conclude otherwise would allow any preexisting structure not fitting narrow definition of boathouse to be up to 30 feet high and increase burden on lakeshore.

Environmental Division should have remanded applicants' application to demolish and rebuild lakeside structure on its existing footprint, adding a third level and increasing building's height by ten feet, to local development review board, rather than granting conditional permit based on revised application, where revisions were major, implicating additional analyses the review board did not have occasion to consider, review board might have invoked comment from interested persons who had no objection to original plan, and because new proposal would shift structure much closer to existing septic system, which did not conform with local ordinances, and add a fiberglass ramp at the shoreline with the heavily regulated "shoreland buffer resource zone."

ZONING & PLANNING - CALIFORNIA

Schreiber v. City of Los Angeles

Court of Appeal, Second District, Division 6, California - September 28, 2021 - Cal.Rptr.3d - 2021 WL 4436987 - 21 Cal. Daily Op. Serv. 9989 - 2021 Daily Journal D.A.R. 10,274

Neighbors filed petition for writ of administrative mandamus to challenge city planning commission's approval of a mixed-use development project which included density bonus incentives and waivers.

The Superior Court denied the petition, and neighbors appealed.

The Court of Appeal held that:

- Developer was not required to show that the incentives granted under the density bonus law would actually result in cost reductions;
- City ordinance requiring documentation to show that the waiver or modification of any development standards are needed in order to make restricted affordable units economically feasible is therefore preempted by state law; and
- Financial feasibility study was sufficient to support any required finding by city planning commission under the density bonus law that incentives would result in cost reductions.

LIABILITY - CALIFORNIA

Cavey v. Tualla

Court of Appeal, Fifth District, California - September 24, 2021 - Cal.Rptr.3d - 2021 WL 4343719 - 2021 Daily Journal D.A.R. 10,075

Plaintiff filed personal injury action against school district and district employee for injuries sustained in a traffic accident involving a school district vehicle.

The Superior Court sustained school district's demurrer without leave to amend and entered a judgment of dismissal. Plaintiff appealed.

The Court of Appeal held that:

- As a matter of first impression, a claim is presented "by a person acting on the claimant's behalf" within the meaning of the Government Claims Act if the claimant knowingly and intentionally authorized the third person to present it or knowingly and intentionally ratified the claim after it was presented;
- As a matter of first impression, an unauthorized, unratified claim is a nullity under the Government Claims Act and has no legal effect;
- Plaintiff's timely filing of lawsuit against school district operated as a repudiation of the claim presented to district by chiropractic clinic;
- School district did not clearly and affirmatively established it was unduly prejudiced by plaintiff's repudiation of claim submitted by chiropractic clinic;
- Claim submitted by chiropractic clinic was a nullity and, therefore, was invalid with no force or effect; and
- School district's notice of rejection of claim filed by chiropractic clinic was defective and did not start six-month statute of limitations.

EMINENT DOMAIN - GEORGIA

Department of Transportation v. Mixon

Supreme Court of Georgia - October 5, 2021 - S.E.2d - 2021 WL 4528939

Landowner brought action against Georgia Department of Transportation (GDOT), alleging nuisance and inverse condemnation arising from flooding on her property following road-widening project, and seeking injunctive relief and compensation.

The Superior Court dismissed in part. Department applied for interlocutory appeal, which was granted. The Court of Appeals affirmed. Department petitioned for writ of certiorari, which was granted.

The Supreme Court held that:

- State constitutional takings provision waives sovereign immunity for two types of claims for injunctive relief, and
- Provision waived Department's sovereign immunity for landowner's inverse condemnation claim seeking injunctive relief.

Waiver of sovereign immunity effected by just compensation provision of State Constitution for claims seeking injunctive relief allows an injunction only to stop the taking or damaging until such time as the authority fulfills its legal obligations that are conditions precedent to eminent domain.

Just compensation provision of State Constitution waived Georgia Department of Transportation's (GDOT) sovereign immunity against landowner's inverse condemnation claim seeking injunctive relief arising from flooding on her private property following road-widening project, where landowner alleged that GDOT's failure to maintain its storm water drainage systems resulted in regular flooding on property, there was no suggestion that GDOT afforded landowner compensation for the alleged taking, and there was no suggestion that GDOT availed itself of legal process to exercise its eminent domain power over landowner's property. property.

PUBLIC MEETINGS - NEW HAMPSHIRE

Sivalingam v. Newton

Supreme Court of New Hampshire - October 5, 2021 - A.3d - 2021 WL 4552444

Former member of town board of selectmen brought action for injunctive relief against town and current board members, seeking current members' dismissal.

The Superior Court granted summary judgment to current members but denied board's motion to dismiss. Former member and board appealed, and current members cross-appealed.

The Supreme Court held that:

- Information disclosed during board meeting by current members was insufficient to adversely affect former member's reputation, as would be required to state claim under statute providing for dismissal of a town officer who violates oath of office through divulgence of certain information obtained by virtue of official position;
- Trial court acted within its discretion in declining to award attorney fees to current members under a "bad faith litigation" theory;
- Trial court acted within its discretion in declining to award attorney fees to current members under "substantial benefit" theory; and
- Provision of Right-to-Know Law permitting a public body to enter nonpublic session to consider matters which would likely affect adversely a person's reputation does not require that the public body provide notice of its intent to enter nonpublic session to discuss a particular person.

MUNICIPAL ORDINANCE - NEW YORK

People v. Torres

Court of Appeals of New York - October 12, 2021 - N.E.3d - 2021 WL 4732737 - 2021 N.Y. Slip Op. 05448

Defendant pled guilty in the Criminal Court of the City of New York, New York County to failure to exercise due care to avoid collision with a pedestrian and failure to yield to a pedestrian, pursuant to provision of city administrative code known as the "Right of Way Law."

Defendant appealed, and the Supreme Court affirmed. In a separate case, another defendant was convicted after a bench trial in the Criminal Court of the City of New York of violating the same administrative code provision. Defendant appealed, and the Supreme Court, Appellate Term, affirmed. Leave to appeal was granted to defendant in each case.

The Court of Appeals held that:

- Right of Way Law did not violate due process by imposing ordinary negligence as the culpable mental state;
- Mens rea standard under Right of Way Law was not void for vagueness under Due Process Clause;
- Article of Penal Law governing culpability did not preempt the Right of Way Law;
- State's Vehicle and Traffic Law did not preempt the Right of Way Law; and
- City's enactment of Right of Way Law was valid exercise of delegated police power from the State.

SCHOOL DISTRICTS - PENNSYLVANIA

In re Formation of Independent School District

Supreme Court of Pennsylvania - October 7, 2021 - A.3d - 2021 WL 4618660

Coalition of inhabitants of borough appealed an order of the Court of Common Pleas denying its petition for formation of an independent school district after the Secretary of Education determined the petition had no educational merit.

The Commonwealth Court reversed. Districts sought review.

The Supreme Court held that as a matter of first impression, Secretary of Education could consider financial implications of transfer upon quality of education provided in affected districts.

In considering petition to establish school district independent of existing district for sole purpose of having new district be absorbed into neighboring district, Secretary of Education could consider financial implications of transfer upon quality of education provided in affected districts.

In reviewing for educational merit a petition for establishment of an independent school district for transfer of territory to another district, the Secretary of Education must take a holistic approach, looking not just at the students who would be transferred, but at the students in each of the affected school districts.

In considering petition to establish school district independent of existing district for sole purpose of having new district be absorbed into neighboring district, Secretary of Education could consider audit addressing educational impact of proposed transfer over objection that financial projections in audit were "conjectural," where audit was entered into evidentiary record by stipulation and opponent agreed that auditor would not be required to offer witness to testify regarding its contents.

ZONING & PLANNING - CALIFORNIA

Muskan Food & Fuel, Inc. v. City of Fresno

Court of Appeal, Fifth District, California - September 27, 2021 - Cal.Rptr.3d - 2021 WL 4398417 - 21 Cal. Daily Op. Serv. 10,011

Owner of gas station and convenience store petitioned for writ of mandate seeking to set aside city's approval of a conditional use permit for the development of a neighborhood shopping center across the street from his store.

The Superior Court denied petition, concluding substantial evidence supported city's zoning decision. Owner appealed, and real parties in interest filed cautionary cross appeal.

The Court of Appeal held that:

- Word "petition," as used in municipal code describing the procedures for appealing city's approval of a conditional use permit, was vague; but
- Meaning of "petition" encompassed both oral and written requests;
- Informal dinner with city council member was not a "petition" to the council member to appeal city planning commission's decision approving a conditional use permit; and
- e-mail sent to mayor from the president of city's chapter of convenience store association was not a

"petition" to appeal city planning commission's decision approving a conditional use permit.

Word "petition," as used in municipal code describing the procedures for appealing city's approval of a conditional use permit, was vague, requiring court to resolve ambiguity, since it failed to provide the level of formality required to challenge permit; term "petition" could mean making a simple oral request, making a formal written request, or something in between.

Word "petition," as used in municipal code describing the procedures for appealing city's approval of a conditional use permit, encompassed both oral and written requests made to the mayor or council member, since there was no specific language in related code sections requiring it only to be in writing.

ZONING & PLANNING - FLORIDA

City of West Palm Beach, Inc. v. Haver

Supreme Court of Florida - September 30, 2021 - So.3d - 2021 WL 4467768 - 46 Fla. L. Weekly S281

City residents brought action against city, challenging city's inaction in response to residents' complaints claiming that neighbor was running a group home in violation of a city zoning ordinance, and seeking injunctive relief requiring city to investigate and, if necessary, take enforcement action against neighbor's alleged zoning violation, a declaratory judgment that city violated its ordinance by refusing to take enforcement action against neighbor, a writ of mandamus requiring city to determine whether neighbor had violated the zoning ordinance and then to take enforcement action, and a writ of certiorari to quash any quasi-judicial decisions or acts taken by city in connection with their refusal to enforce the zoning ordinance against neighbor.

The Circuit Court granted city's motion to dismiss. Residents appealed, and the Fourth District Court of Appeal affirmed dismissal of the mandamus and certiorari claims, but reversed as to the claims for injunctive and declaratory relief, and certified conflict. City petitioned for discretionary review.

The Supreme Court held that injunctive relief is not available to compel a city to enforce a zoning ordinance against a third party.

MUNICIPAL ADVISORS - ILLINOIS

Kane v. Option Care Enterprises, Inc.

Appellate Court of Illinois, First District, THIRD DIVISION - September 8, 2021 - N.E.3d - 2021 IL App (1st) 200666 - 2021 WL 4076323

Attorney James H. Kane, d/b/a Kane & Co. (Kane), brought claims of breach of contract and quantum meruit against Option Care Enterprises, Inc. (Option Care), seeking $764,762 in compensation for services he provided pursuant to a contingency fee contract to "evaluate and negotiate tax credits and other federal, state, and local level incentives" from Illinois and Wisconsin "government officials."

The trial court granted summary judgment to Kane's client after finding that the agreement was unenforceable as a matter of public policy because it provided for contingency fee lobbying in

violation of section 8 of the Lobbyist Registration Act (Act) (25 ILCS 170/8) and because enforcement of the contract was barred, recovery under the equitable theory of quantum meruit was also barred.

The appeals court affirmed, finding that the trial court was correct in concluding that Option Care was entitled to summary judgment as to Kane's breach of contract claim because Kane could not meet the threshold requirement of a valid, enforceable agreement.

POLITICAL SUBDIVISIONS - KANSAS

University of Kansas Hospital Authority v. Board of County Commissioners for Franklin County

Supreme Court of Kansas - September 10, 2021 - P.3d - 2021 WL 4127517

Hospital filed suit against city and county, seeking payment for medical expenses incurred by indigent driver of vehicle who was injured in a crash after fleeing from police.

The District Court granted summary judgment in the hospital's favor against the city and granted summary judgment in favor of county. City appealed and hospital cross-appealed, and the Court of Appeals affirmed in part, reversed in part, and remanded with directions. Hospital petitioned for review, and city cross-petitioned.

The Supreme Court held that:

- City police officers did not arrest indigent driver, and
- Officers did not otherwise have custody of indigent driver.

City police officers did not arrest indigent patient after he fled from officers in vehicle and was involved in accident, and thus did not have custody of him on that basis at the time the decision was made to obtain medical treatment for him following accident and therefore city was not liable for health care services rendered to patient; while they pursued patient, the pursuit ended without arrest after accident, officer's directive to patient to tell emergency personnel if he was on any drugs was simply a treatment-related directive, officer did not act on that information, did not handcuff the patient, did not give Miranda warning, and did not tell the patient he was under arrest, officers did not follow patient to hospital, and county placed custodial hold on patient and guarded him until his release to county's custody.

City police officers did not have custody of indigent patient at the time the decision was made to obtain medical treatment for him, and thus city was not liable for health care services rendered to patient, who was injured in accident after fleeing police in vehicle, where patient was never arrested by city police officers, and patient was not restrained by the officers pursuant to a court or magistrate order.

BALLOT INITIATIVE - OHIO

State ex rel. Rhoads v. Hamilton County Board of Elections

Supreme Court of Ohio - September 16, 2021 - N.E.3d - 2021 WL 4204309 - 2021-Ohi--3209

Relators sought writ of mandamus compelling county board of elections to change ballot language for proposed amendment to city charter.

The Supreme Court held that:

- Board properly summarized amendment language regarding approval of litigation on behalf of city and its officials;
- Board properly summarized amendment language regarding compensation of city-council members;
- Board properly summarized amendment language regarding residency requirements for mayor;
- Board would be directed to use as ballot language the actual text of amendment regarding how vacancies on city council were to be filled;
- Board properly summarized amendment language regarding notice of vacant city-council seats;
- Board properly summarized amendment language regarding personal liability of mayor and city-council members; and
- Board properly summarized amendment language regarding removal of mayor from office.

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REFERENDA - OHIO

State ex rel. T-Bill Development Company, L.L.C. v. Union County Board of Elections

Supreme Court of Ohio - October 1, 2021 - N.E.3d - 2021 WL 4487957 - 2021-Ohio-3535

Property owners and land developer brought action against county board of elections, seeking writs of prohibition and mandamus ordering board to remove zoning referendum from upcoming election ballot.

The Supreme Court held that:

- Relators lacked adequate remedy in ordinary course of the law;
- Board did not disregard requirement that referendum petition be accompanied by affected area;
- Referendum petition’s summary was not rendered inadequate for including only first page of zoning application;
- Referendum petition’s summary was not rendered inadequate by quality of attached maps; and
- Referendum petition’s summary was not rendered inadequate for referring signers to zoning-commission office for additional information.

PUBLIC UTILITIES - PENNSYLVANIA

In Re Chester Water Authority Trust

Commonwealth Court of Pennsylvania - September 16, 2021 - A.3d - 2021 WL 4200770

"The narrow issue for our consideration is whether section 5622(a) of the Municipality Authorities Act (MAA), 53 Pa.C.S. § 5622(a), authorizes (or, more appropriately, continues to authorize) a municipality to obtain the assets of a water authority that it created—a water authority that eventually expanded to provide water services outside the borders of the municipality and into other counties—in light of section 1 of Act 73 of 2012,3 which added section 5610(a.1) to the MAA, 53 Pa.C.S. § 5610(a.1.), and transformed the governance structure of such an authority."

"Upon review, we conclude that section 5610(a.1) did not abrogate, supersede, or otherwise alter a municipality's longstanding power under section 5622(a) and its statutory predecessors to unilaterally obtain an authority and/or its assets."

ZONING & PLANNING - PENNSYLVANIA

Pascal v. City of Pittsburgh Zoning Board of Adjustment

Supreme Court of Pennsylvania - September 22, 2021 - A.3d - 2021 WL 4303202

Objectors to nonprofit property owner's application for variances and special exceptions with respect to plan to maintain retail space, remodel and reopen restaurant, and build dwelling units petitioned for review of decision of zoning board of adjustment (ZBA) granting application.

The Court of Common Pleas affirmed grant of application, and objectors appealed. The Commonwealth Court affirmed. Objectors' petition for discretionary review was allowed.

The Supreme Court held that:

- Application was not deemed denied 45 days after hearing on application without decision, and
- As matter of first impression, member of ZBA that voted in favor of granting application, who held position on applicant's board of directors, was acting under conflict of interest, in violation of objectors' due process right to impartial tribunal, disapproving Borough of *Youngsville v. Zoning Hearing Bd. of Youngsville, 69 Pa.Cmwlth*. 282, 450 A.2d 1086.

IMMUNITY - TEXAS

Texas Southern University v. Pepper Lawson Horizon International Group, LLC

Court of Appeals of Texas, Houston (1st Dist.) - September 28, 2021 - S.W.3d - 2021 WL 4432525

Construction company brought action against state university, alleging breach of contract under Texas Civil Practice and Remedies Code Chapter 114 and violations of Texas Prompt Payment Act (PPA) related to university's alleged failure to grant company an extension and alleged failure to pay bills incurred pursuant to construction contract.

University filed plea to the jurisdiction, which the 157th District Court denied. University appealed.

The Court of Appeals held that:

- University's sovereign immunity was not waived by PPA, and
- Allegations in complaint did not constitute express violations of construction contract, as required to waive university's sovereign immunity from breach of contract action.

State university's sovereign immunity was not waived by Texas Prompt Payment Act (PPA), as required to establish trial court's jurisdiction over construction company's action, alleging university failed to pay company's final bills under construction contract; company did not identify a separate statutory source outside of PPA that allowed a waiver of sovereign immunity for its claim.

Allegations in construction company's complaint, that state university breached parties' contract by failing to extend construction schedule, did not constitute a violation of modification provisions of construction contract, which permitted parties to equitably adjust contract time for weather delays and other delays within university's reasonable control, as required to waive university's sovereign immunity from construction company's breach of contract action brought under Texas Civil Practice and Remedies Code; modification provisions set forth procedures for obtaining time extensions, but company did not allege that university failed to comply with such procedures, but rather, company merely disputed the results.

Allegations in construction company's complaint, that state university failed to grant company power and access to project site by a specific date, provided inaccurate design documents, and failed to refrain from performing other activities at project site during construction, did not constitute express violations of construction contract, as required to waive university's sovereign immunity from company's breach of contract action brought under Texas Civil Practice and Remedies Code; contract stated that university made no representation as to accuracy of design documents and that it was not responsible for company's interpretations of documents, and that university was not responsible for delay or hindrances to work caused by any act or omission of university.

Allegations in construction company's complaint, that state university breached parties' contract by failing to make payment of contract and change order balance, did not constitute a violation of bill pay provision of contract, which required company to promptly pay bills and allowed university to audit company's bills and withhold payments in various circumstances, as required to waive university's sovereign immunity from construction company's breach of contract action brought under Texas Civil Practice and Remedies Code; contract expressly limited circumstances in which university had a duty to pay company to when university received a complete application for payment, an updated work progress schedule, and confirmation that project documentation was kept current.

IMMUNITY - GEORGIA

DeKalb County v. Stanley

Court of Appeals of Georgia - September 24, 2021 - S.E.2d - 2021 WL 4350039

Visually impaired pedestrian brought action against county and director of its public works transportation division asserting claims for negligence, nuisance, and violation of Title II of Americans with Disabilities Act (ADA) after she tripped and fell in hole on sidewalk.

The trial court dismissed pedestrian's claims for negligence and nuisance on ground of sovereign immunity, but denied county's motion for summary judgment on ADA claim. Parties appealed.

The Court of Appeals held that:

- Pedestrian failed to establish deliberate indifference required to support her claim for compensatory damages under Title II of ADA;
- Sovereign immunity barred negligence claim; and
- Sovereign immunity barred nuisance claim.

County's lack of sidewalk inspection procedure and its failure to repair hole in sidewalk until eight months after it received actual knowledge of its existence did not demonstrate deliberate indifference required to support visually impaired pedestrian's claim for compensatory damages under Title II of Americans with Disabilities Act (ADA) after she tripped and when she fell into hole, absent evidence that county eschewed sidewalk repair policy in order to discriminate against persons with disabilities, that it received numerous and repeated complaints about problems with its sidewalks to which it did not respond or intentionally ignored, or that county official with substantial supervisory authority had actual knowledge of hole prior to accident.

Sovereign immunity barred negligence claim brought against county by visually impaired pedestrian who was injured after she tripped and fell into hole in sidewalk, even if proper maintenance of sidewalk was ministerial duty, rather than governmental function.

Sovereign immunity barred nuisance claim brought against county by visually impaired pedestrian who was injured after she tripped and fell into hole in sidewalk.

BONDS - ILLINOIS

UIRC-GSA Holding, Inc. v. William Blair & Company, LLC.

United States District Court, N.D. Illinois, Eastern Division - September 29, 2021 - Slip Copy - 2021 WL 4459530

UIRC-GSA Holding (Plaintiff) acquires and operates properties leased to the U.S. General Services Administration (GSA) to be financed by the sale of bonds through its subsidiaries. William Blair & Company (Defendant or Blair) was Plaintiff's investment banker and placement agent for certain bond offerings, the proceeds of which were used to acquire a portfolio of real estate properties.

Between 2012 and the close of discovery, Plaintiff executed a total of six bond offerings. To market the bond offerings, Plaintiff created and used a Private Placement Memorandum (PPM) and an Indenture of Trust. Plaintiff registered copyrights in the PPM for the transactions, as well as the preliminary and final versions of the PPM and the Indenture of Trust. "Plaintiff could not copyright the entire document, and the Copyright Office required Plaintiff to disclaim 'standard legal language.' At issue, then, are several paragraphs within these documents."

Defendants noted that Plaintiff's documents appeared to be revised versions of offering documents from an earlier deal involving third parties unrelated to Plaintiff, namely the Idaho Housing and Finance Association. Plaintiff concedes that its attorneys provided the Idaho deal documents as a template, but claims that its top executives "spent about six months painstakingly writing and re-writing the critical sections of the [PPM]," and "did almost all of the work themselves." Defendant contests this assertion, noting that Plaintiff's documents have substantial overlap with the Idaho deal documents, such that they are verbatim or near verbatim. It is undisputed that Plaintiff did not receive permission to use the Idaho deal documents. It is also undisputed that Defendant played no meaningful role in the drafting process for Plaintiff's documents.

At some point in late 2014, a competitor of Plaintiffs, Rainier, completed a bond offering very similar

to Plaintiff's. Blair acted as the investment banker and placement agent for Rainier. Plaintiff asserts that Blair approached Rainier and helped Rainier "mimic" Plaintiff's successful bond offerings, using Plaintiff's copyrighted documents. "Rainier's confidential placement memorandum and indenture of trust appears to have striking similarities to Plaintiff's PPM." Plaintiff further claimed that this overlap was intentional, and that Defendant actively encouraged and personally directed Blair's employees and Blair's outside counsel to use the infringing materials to solicit other clients, including Rainier.

Defendants dispute Plaintiff's characterization, arguing that only 5% of the Rainer confidential placement memorandum is alleged to be copied from Plaintiff's documents, and even less for Rainier's indenture of trust. Defendants also note that they did not draft Rainier's documents, rather the law firm Mayer Brown did.

Blair moved for summary judgment, arguing that Plaintiff's documents are not entitled to copyright protection because they are unauthorized derivative works and lack originality.

Defendants argued that the copyrighted portions of Plaintiff's documents lack the requisite modicum of creativity and originality, are unauthorized derivative works based on the Idaho deal documents, and are largely unprotectable facts, ideas, or fragmented or functional phrases, such as definitions of terms. Plaintiff responded that their executives painstakingly rewrote their documents such that they are unique and original. Plaintiff further argued that the works cannot be derivative unless the underlying work is also subject to copyright protection, and there is no indication that the Idaho documents were copyrighted.

The District Court concluded that Plaintiff's documents lacked originality and were not sufficiently creative to warrant copyright protection.

ZONING & PLANNING - MISSISSIPPI

American Tower Asset Sub, LLC v. Marshall County

Supreme Court of Mississippi - September 2, 2021 - So.3d - 2021 WL 3926009

Objector appealed decision of the county board of supervisors to approve applicant's request for special exception to build 290-foot tower on a plot designated an agricultural zone.

The Circuit Court granted motion to dismiss brought by county. Objector appealed.

The Supreme Court held, as matter of first impression, that objector's failure to deliver copy of notice of appeal to president of the board of supervisors was procedural defect that could be remedied.

Objector's failure to deliver copy of notice of appeal of decision of the county board of supervisors to approve applicant's request for special exception to build tower on plot designated agricultural zone to president of the board of supervisors was procedural defect that could be remedied; despite statutory requirement that copy of notice of appeal be delivered to president, statute did not specify exact method of service or delivery that was required, notice of appeal initiated the appeal, and filing of the notice established appellate jurisdiction in circuit court.

PUBLIC UTILITIES - OHIO

In re Application of Duke Energy Ohio, Inc.

Supreme Court of Ohio - September 22, 2021 - N.E.3d - 2021 WL 4301266 - 2021-Ohi--3301

Electric power and natural gas company applied for a certificate of environmental compatibility and public need to construct a natural gas pipeline.

The Power Siting Board granted company a certificate for the construction, operation, and maintenance of the pipeline along an alternative route. City and other intervenors appealed.

The Supreme Court held that:

- Even if company's alternate-route proposal was not "fully developed information" at the time of submission of application, city was not harmed by the power citing board's failure to deny the application based on the error;
- Board's determination that natural gas pipeline would begin to address system supply balance and mitigate electric power and natural gas company's dependence upon Kentucky station was not erroneous;
- Board adequately considered the nature of the probable environmental impact of company's proposed gas pipeline in relation to planned sewer project;
- Evidence supported board's finding that company thoroughly addressed safety concerns relating to its application for a certificate of environmental compatibility and public need to construct a natural gas pipeline; and
- Record supported power siting board's evaluation of gas pipeline's estimated tax benefits.

Even if electric power and natural gas company's alternate-route proposal in its application for a certificate of environmental compatibility and public need to allow construction of a natural gas pipeline was not "fully developed information" at the time of submission of application, in violation of administrative code filing requirements, city was not harmed by the power siting board's failure to deny the application based on the error; company provided supplemental information, power citing board determined that company eventually provided all information required by statute, staff received the information necessary to conduct its investigation, and intervenors had access to the information through discovery.

Power siting board's determination, in granting certificate for the construction, operation, and maintenance of natural gas pipeline, that natural gas pipeline would begin to address system supply balance and mitigate electric power and natural gas company's dependence upon Kentucky station as it would reduce company's substantial dependence upon Kentucky station with the station serving approximately 45 to 50 percent of peak day load after construction of natural gas pipeline, rather than 55 percent, was not erroneous; there was no qualitative standard for determining the sufficiency of an improvement, and report indicated that company's dependence upon Kentucky station posed a "significant exposure to reliability" and threatened "far reaching" consequences should a supply disruption occur.

Evidence supported finding that power siting board adequately considered the nature of the probable environmental impact of electric power and natural gas company's proposed gas pipeline in relation to planned sewer project before granting company a certificate for the construction, operation, and maintenance of the pipeline, even if company did not address its pipeline's potential conflict with the planned sewer project; board addressed the potential conflict in its order, and

adjustments to avoid a conflict with sewer project were filed with the board in a separate case.

Evidence supported power siting board's finding that electric power and natural gas company thoroughly addressed safety concerns relating to its application for a certificate of environmental compatibility and public need to construct a natural gas pipeline; company made commitments to apply enhanced design, construction, operation and assessment criteria to the installation and maintenance of pipeline, including having a wall thickness of more than twice that required for transmission lines, using remote control valves, and installing the pipeline at a depth of 48 inches of cover, which was twice that required for distribution lines and a foot deeper than that required for transmission lines, as well as complying with federal gas pipeline safety requirements.

The record supported power siting board's evaluation of gas pipeline's estimated tax benefits, in granting certificate for the construction, operation, and maintenance of gas pipeline; electric power and natural gas company estimate in its amended application that the alternate route for pipeline would generate approximately $2.2 million in tax benefits under 2016 tax rates, with $617,000 going to city, and company later supplemented the information, estimating that the alternate route would generate nearly $2.9 million in tax benefits under 2018 tax rates, with a little more than $1 million going to city.

IMMUNITY - PENNSYLVANIA

Brooks v. Ewing Cole, Inc.

Supreme Court of Pennsylvania - September 22, 2021 - A.3d - 2021 WL 4301270

Courthouse visitor brought personal injury action against Family Court and others after she was allegedly injured while walking into unmarked glass wall at Family Court building.

The Court of Common Pleas denied summary judgment on sovereign immunity grounds. Family Court appealed. The Commonwealth Court quashed notice of appeal. Family Court filed petition for allowance of appeal.

The Supreme Court held that order denying Family Court's motion for summary judgment on its defense of sovereign immunity was an appealable collateral order.

Order denying Family Court's motion for summary judgment on its defense of sovereign immunity in personal injury action was an appealable collateral order; issue was a purely legal question that did not require examination of merits of claim, right to sovereign immunity defense was too important to evade review before final judgment, and defense would be irreparably lost if appellate review of adverse decision on sovereign immunity were postponed until final judgment.

BONDS - WISCONSIN

In re Atrium of Racine, Inc.

Court of Appeals of Wisconsin - July 30, 2021 - Slip Copy - 2021 WL 3235321 (Table) - 2021 WI App 63

When the Atrium, a seventy-six-unit senior housing facility, went into receivership in May 2017, it owed its residents $7,487,000 for entrance fees, deposit fees and trust funds that the residents had paid at the inception of their residency at the Atrium (the Residents). It also owed $6,097,000 to

some 800 individual bondholders who had invested in the Atrium by purchasing bonds (the Bondholders).

The circuit court concluded that the Bondholders had priority over the rights of the Residents to the remaining assets of the Atrium.

Residents appealed.

The Court of Appeals reversed and remanded, holding that the Residents' entrance fees and security deposits had priority over the interests of the Bondholders.

The Bondholders were advised via the Prospectus and Project Contract that the entrance fees were "refundable resident deposits" that qualified as "Permitted Liens." The definition of entrance fees was contained in both the Project Contract and the Prospectus, which defined them as: "The fees, other than monthly service charges, paid by residents of a Facility to the [Obligor/Corporation] for the purpose of obtaining the right to reside in a Facility, including any refundable resident deposits described in any lease or similar residency agreements …."

"We need not create a constructive trust in this action as neither party has been unjustly enriched. The sole question before us is whether the Residents or the Bondholders have the superior right to the assets being held in the receivership. We conclude the entrance fees and security deposits paid by the Residents in this case are superior in priority to the Bondholders' claims. The Bondholders were aware from the Prospectus and Project Contract that the entrance fees constituted permitted liens and had priority over their claims when they purchased their bonds. It would be disingenuous to now assert that these provisions indicating that the entrance fees were permitted liens are meaningless. Thus, the rights of the Residents to their entrance fees and security deposits are superior to the Bondholders' rights to the Atrium's assets, and as such, the circuit court erred as a matter of law in its order that the Bondholders have priority over the entrance fees and security deposits owned by the Residents."

"We hold that (1) the Residents and the Atrium contracted as landlord and tenant, (2) their contracts were rental agreements within the meaning of the law, (3) the entrance fees (and security deposits) were security deposits within the meaning of the law, and (4) the circuit court erred in giving the Bondholders a priority security interest over the Residents' entrance fees and security deposits."

QUIET TITLE - ALABAMA

City of Birmingham v. Metropolitan Management of Alabama, LLC

Supreme Court of Alabama - September 17, 2021 - So.3d - 2021 WL 4235435

City moved to vacate default judgment quieting title to real property in which city claimed a recorded-assessment interest, which plaintiff in the quiet-title action averred it had not discovered until after entry of the default judgment.

The Circuit Court denied motion. City appealed.

The Supreme Court held that plaintiff had constructive knowledge of city's interest in real property as well as its "residence," i.e., city hall, and thus plaintiff was required to serve city by some other method before serving notice by publication.

Plaintiff in quiet-title action had constructive knowledge of city's interest in real property as well as

its “residence,” i.e., city hall, and thus plaintiff was required to serve city by some other method before serving notice by publication; city’s deed, which specified that it was prepared by a person whose location was city hall, was recorded about ten years before tax-sale purchaser conveyed the real property to plaintiff, and Rules of Civil Procedure provided that a municipality could be served with process by serving its chief executive officer or clerk, whose offices would ordinarily be at city hall.

ZONING & PLANNING - CALIFORNIA

Los Angeles Department of Water and Power v. County of Inyo

Court of Appeal, Fifth District, California - August 17, 2021 - 67 Cal.App.5th 1018 - 283 Cal.Rptr.3d 119 - 21 Cal. Daily Op. Serv. 8480

City department of water and power filed petition for writ of mandate, alleging that county, which sought to acquire city department’s landfill sites in county by eminent domain, failed to properly identify the true nature and scope of its “project” under the California Environmental Quality Act (CEQA).

Following transfer, the Superior Court entered judgment and issued writ, and county appealed.

The Court of Appeal held that:

- County did not provide adequate notice that CEQA exemptions would be considered at public meeting, and
- Categorical CEQA exemption for existing “facilities” does not include unlined landfills.

County did not provide adequate notice that California Environmental Quality Act (CEQA) exemptions would be considered at public meeting regarding proposed condemnation of landfills, and thus CEQA’s issue exhaustion requirement did not apply to landowner’s CEQA challenges to county’s reliance on CEQA exemptions; agenda request form for the hearing of county’s board of supervisors did not mention CEQA or any exemption, and first disclosure or notice occurred just before the close of the public portion of the hearing when a county staff member stated that county believed the proposed condemnation was exempt from CEQA under the existing facilities exemption and the commonsense exemption.

Categorical California Environmental Quality Act (CEQA) exemption for existing “facilities” does not include unlined landfills; some landfills pose a threat to groundwater, air quality and public health.

POLITICAL SUBDIVISIONS - GEORGIA

McClain v. Carrollton Police Department

Court of Appeals of Georgia - September 2, 2021 - S.E.2d - 2021 WL 3926001

Pro se plaintiff brought action against city police department for defamation, malpractice, and illegal procession.

The Superior Court granted department’s motion to dismiss. Plaintiff appealed.

The Court of Appeals held that as a matter of first impression, a municipal police department is not a

separate legal entity subject to suit.

Municipal police departments are not separate legal entities subject to suit because they are merely agents or instrumentalities of the municipality.

PUBLIC UTILITIES - OHIO

In re Application of Suburban Natural Gas Company

Supreme Court of Ohio - September 21, 2021 - N.E.3d - 2021 WL 4269964 - 2021-Ohi--3224

Public gas utility filed application with the Public Utilities Commission of Ohio (PUCO) for a rate increase to cover costs of a pipeline extension. PUCO approved the rate increase and denied consumers' application for a rehearing.

Consumers appealed.

The Supreme Court held that:

- As a matter of first impression, assessing whether property is "useful" for purposes of determining a public utility's rate base requires finding that the property be beneficial in rendering service for the convenience of the public as of the date certain, and
- PUCO misapplied the used-and-useful test when it looked beyond the date certain and determined that utility's investment in the pipeline extension was prudent rather than useful, as justification for rate increase.

LOCAL GOVERNANCE - OHIO

State ex rel. Grumbles v. Delaware County Board of Elections

Supreme Court of Ohio - September 13, 2021 - N.E.3d - 2021 WL 4145145 - 2021-Ohi--3132

Incumbent township trustee filed petition for writ of mandamus ordering county board of elections to certify his name for placement on ballot as candidate for different seat on same board of township trustees.

The Supreme Court held that:

- Trustee lacked adequate remedy in ordinary course of the law, as would support mandamus relief;
- Trustee was eligible to run as candidate for different seat on same board; but
- Trustee did not establish bad faith by board and, thus, was not entitled to attorneys fees as prevailing party.

Incumbent township trustee was eligible to run as candidate for different seat with different term on same board of township trustees, though board of elections asserted that there would be inherent conflict of interest in trustee's involvement in appointing his successor to trustee position he would vacate; statute governing township board of trustees provided for three distinct seats on board, there was nothing in statutory scheme governing township trustees or elections generally that prohibited incumbent trustee from seeking to be elected to seat with different term than one he was currently serving, concern about conflict was policy consideration not set forth in relevant statutes,

and when General Assembly had prohibited candidacies, it had done so expressly.

PUBLIC RECORDS - VERMONT

Human Rights Defense Center v. Correct Care Solutions, LLC

Supreme Court of Vermont - September 3, 2021 - A.3d - 2021 WL 4032925 - 2021 VT 63

Nonprofit advocacy group brought action against government contractor that provided medical care to incarcerated individuals, seeking to compel disclosure under the Public Records Act (PRA) of claims, lawsuits, or settlements arising from contractor's provision of services under its contract.

The Superior Court entered summary judgment for contractor. Advocacy group appealed.

The Supreme Court held that:

- Defendant was a "public agency" as that term was defined by the PRA, and
- As a matter of first impression, where the state contracts with a private entity to discharge the entirety of a fundamental and uniquely governmental obligation owed to its citizens, that entity acts as an instrumentality of the state, and therefore, the private entity constitutes a "public agency" within meaning of the PRA.

OPEN MEETINGS - ARIZONA

Welch v. Cochise County Board of Supervisors

Supreme Court of Arizona - September 2, 2021 - P.3d - 2021 WL 3924147

County resident brought action against county board of supervisors, and its individual members, alleging violations of open-meeting laws and conflict-of-interest statute in connection with board's appointment of board member as a justice of the peace, and seeking relief including, inter alia, an order declaring member's appointment null and void, an injunction requiring the board to open position to public applications, various writs of mandamus, including to remove board members, and penalties against individual board members.

The Superior Court granted board's motions to dismiss for lack of standing and failure to state a claim. Resident appealed. The Court of Appeals reversed and remanded. Petition for review was granted.

The Supreme Court held that:

- Open-meeting and conflict-of-interest laws broadly confer standing based upon party's interest in preserving the values of transparency and accountability that the laws enshrine;
- County resident had standing to challenge alleged violation of open-meeting law by county board;
- Resident had standing to challenge alleged violation of conflict-of-interest law by board;
- Board's ratification of appointment did not moot open-meeting claim.

EMINENT DOMAIN - CALIFORNIA

City of Escondido v. Pacific Harmony Grove Development, LLC

Court of Appeal, Fourth District, Division 1, California - August 26, 2021 - Cal.Rptr.3d - 68 Cal.App.5th 213 - 2021 WL 3783247 - 21 Cal. Daily Op. Serv. 8775

City brought eminent domain action against land owners, which sought to acquire strip of owners' land by condemnation.

Following bench trial on bifurcated issue of valuation of land, the Superior Court entered judgment in favor of city. Owners appealed.

The Court of Appeal held that:

- Dedication requirement was constitutional;
- It was reasonably probable that city would impose dedication requirement in exchange for permit to further develop land;
- Dedication requirement arose four years prior to date of probable inclusion; and
- Condemnation action was not unreasonably delayed for purpose of precondemnation damages.

City's dedication requirement for strip of owners' property to build industrial road prior to further development of property was constitutional, as was required for Porterville doctrine, 195 Cal.App.3d 1260, for valuing property in condemnation proceeding to apply, despite contention that road across property was unnecessary because existing frontage road could have been widened, where dedication in exchange for development approval was logically related to public interest in mitigating traffic caused by development, consideration of most favorable comparison for owners—that is, using higher alleged valuation for strip—showed that dedication was not disproportionate, and frontage road was overburdened such that further development would violate general development plan's policy goal.

It was reasonably probable that city would impose constitutional dedication requirement on property owners for strip of property in exchange for permit to further develop land, and thus Porterville doctrine, 195 Cal.App.3d 1260, for valuing property in condemnation proceedings applied to determine value of owners' property, where owners acknowledged that development of property would likely have required some sort of dedication to mitigate any resulting adverse impact, and city's long-term development planning, in place for more than 10 years, contemplated connecting parkway across property via condemned strip.

City' dedication requirement for strip of owners' property to build road prior to further development of property arose four years prior to date of probable inclusion of property in city's public project, and thus project effect rule did not apply when determining value of property in condemnation proceeding, despite contention that dedication requirement did not arise until year in which city amended general redevelopment plan to restrict access to owners' property, where dedication requirement as to strip arose four years prior to date of probable inclusion when plan fixed location of road extension across property, and, at time of purchase years after plan was put in place, owners should have reasonably expected that any development approval would be conditioned on dedication of strip.

City's condemnation action for strip of owners' property was not unreasonably delayed, and thus owners were not entitled to precondemnation damages, despite contention that city's formal announcement of necessity to condemn property occurred 10 years prior to adoption of resolution of necessity to condemn when city entered into agreement to permit construction of hospital, where action was filed two days after resolution was adopted, city lacked authority to approve any development of property until city annexed property from county approximately one year prior to

resolution, and owners never sought city approval to develop property in any other manner other than tentative map proposal that owners ultimately withdrew.

PUBLIC UTILITIES - CONNECTICUT

Raspberry Junction Holding, LLC v. Southeastern Connecticut Water Authority

Supreme Court of Connecticut - August 18, 2021 - A.3d - 2021 WL 3671081

Operator of hotel brought negligence action against municipal water authority seeking to recover loss of revenue in connection with water supply outage which lasted several days.

The Superior Court granted defendant's summary judgment motion. Plaintiff appealed. The Supreme Court reversed and remanded. On remand, the Superior Court again granted defendant's summary judgment motion. Plaintiff appealed.

Upon transfer from the Appellate Court, the Supreme Court held that:

- It was reasonably foreseeable that water service outage at hotel lasting several days would cause economic losses;
- Normal expectations of parties militated against finding a legal duty;
- Imposition of a duty of care would have encouraged future plaintiffs to initiate actions of their own in the event of a prolonged interruption in water service without a corresponding increase in public safety;
- Vast majority of jurisdictions barred recovery of economic losses in a negligence action;
- Exception to general rule that law of negligence does not cover purely economic losses did not apply.

IMMUNITY - MARYLAND

Bailey v. City of Annapolis

Court of Special Appeals of Maryland - September 1, 2021 - A.3d - 2021 WL 3909625

Arrestee brought action against city, police officer, and police department employees to recover for malicious prosecution, gross negligence, and negligence in connection with second wrongful arrest based on warrant for arrest of suspect with same name and birth date.

The Circuit Court dismissed malicious prosecution and gross negligence claims and entered summary judgment for officer and employees on negligence claim. Arrestee appealed.

The Court of Special Appeals held that:

- As a matter of first impression, mistaken arrest based on a warrant for someone else with the same name and date of birth was not the institution of criminal proceedings as required for malicious prosecution claim;
- Police officer did not act with gross negligence;
- Police records specialist, her supervisor, and another police department employee did not act with gross negligence;
- Some actions by police officer were discretionary and protected by public official immunity, but

some were unprotected ministerial actions;
- Factual questions precluded summary judgment in arrestee's negligence action against officer; and
- Records specialist and her supervisor owed no duty to arrestee.

ZONING & PLANNING - MASSACHUSETTS

West Street Associates LLC v. Planning Board of Mansfield

Supreme Judicial Court of Massachusetts, Bristol - August 30, 2021 - N.E.3d - 488 Mass. 319 - 2021 WL 3852207

Abutting landowner of proposed location for medical marijuana dispensary operated by recently converted for-profit organization brought action against town planning board challenging the issuance of a special permit to construct a medical marijuana dispensary.

The Superior Court Department found no error in board's decision to grant for-profit organization a special permit and concluded town bylaw that required medical marijuana dispensaries to be operated by nonprofit entities was preempted. Landowner appealed.

The Supreme Judicial Court held that town bylaw was preempted by state law to the extent it required all medical marijuana dispensaries to be nonprofit organizations.

Town bylaw was preempted by state law to the extent it required all medical marijuana dispensaries to be nonprofit organizations, and thus special permit issued by town planning board to recently converted for-profit organization to construct a medical marijuana dispensary could not be revoked; Legislature disavowed statutory and regulatory provisions regarding nonprofit organizations when it repealed and replaced the act and expressly allowed medical marijuana establishments to be for-profit, and town's bylaws frustrated one of the purposes of the amended act which was to allow for-profit entities to distribute medical marijuana.

REFERENDA - OHIO

State ex rel. Pennington v. Bivens

Supreme Court of Ohio - September 13, 2021 - N.E.3d - 2021 WL 4145035 - 2021-Ohi--3134

Petitioners filed petition for writ of mandamus seeking to compel city attorney or city council to certify sufficiency of zoning-amendment referendum petition and to compel city council to submit referendum petition to electors at the general election.

The Supreme Court held that:

- Statutory precirculation requirement did not apply to referendum petition;
- Laches did not bar petitioners from obtaining relief, in absence of actual, material prejudice to respondents from delay; but
- Award of attorney fees to petitioners as successful party in taxpayer suit was not warranted under the circumstances.

Petitioners were not required to comply with statute requiring submission of certified copy of zoning ordinance to city auditor before circulating zoning-amendment referendum petition, under terms of

city charter; statutory procedures for circulating referendum petition did not apply to municipality, such as city, that had adopted its own charter containing referendum provision for its own ordinances and other legislative measures, city charter incorporated only those general laws that were applicable to the municipality and that did not conflict with charter's provisions, city charter allowed circulation without submission to auditor, which statute prohibited, such that there was conflict and charter controlled, and charter left no room for statutes to overlay additional procedures.

Laches did not bar petitioners from obtaining writ of mandamus to compel city attorney to certify sufficiency of zoning-amendment referendum petition so that city council could refer zoning amendment to electors at general election, though city attorney and city council asserted that petitioners' unreasonable delay in filing action caused matter to become expedited election matter and resulted in Supreme Court issuing separate scheduling order requiring them to submit their answer even earlier than date in default expedited briefing schedule; matter was fully briefed well in advance of deadline for preparing absentee ballots, case presented relatively straightforward issues, none of which required extensive discovery, and respondents were able to file answer three days early.

Award of attorney fees was not warranted to petitioners, as successful party on petition for writ of mandamus to compel city attorney to certify sufficiency of zoning-amendment referendum petition so that city council could refer zoning amendment to electors at general election, under statutes governing fee awards in taxpayer suits, where precedent lent support to city attorney's position that petitions were not sufficient because petitioners failed to comply with statutory requirement to file certified ordinance with city auditor before circulating the petitions.

SCHOOLS - SOUTH CAROLINA

Wilson ex rel. State v. City of Columbia

Supreme Court of South Carolina - September 2, 2021 - S.E.2d - 2021 WL 3928992

State's Attorney General brought declaratory judgment action against city, seeking declaration that city ordinances mandating use of facemasks in all K-12 public schools within the city due to COVID-19 pandemic violated state legislature's appropriations act and were void.

The Supreme Court held that:

- State legislature's policy determination to leave to parents the decision as to whether students should wear facemasks in schools was within the broad parameters of legislature's constitutional boundaries;
- Provision of appropriations act that prohibited school districts from using appropriated funds to require students and/or employees to wear facemasks at any of school district's education facilities did not violate one-subject rule of the State Constitution; and
- The challenged ordinances were preempted by the appropriations act.

State legislature's policy determination to leave to parents the decision as to whether students should wear facemasks in K-12 public schools was within the broad parameters of legislature's constitutional boundaries, and thus Supreme Court did not have power to impose its own policy judgment on state legislature or city, in state Attorney General's action for declaration that city ordinances requiring use of facemasks in city's public schools during COVID-19 pandemic violated state legislature's appropriations act, which prohibited school districts from using any appropriated

funds to require students and/or employees to wear facemasks at education facilities.

Provision of state legislature's appropriations act that prohibited school districts from using state-appropriated funds to require students and/or employees to wear facemasks at any of school district's education facilities did not violate one-subject rule of the State Constitution; provision was reasonably and inherently related to the spending of tax money, provision was included as part of Department of Education's budget, and provision had legitimate and natural association with title of the appropriations act, which included language indicating that the act was "to regulate the expenditure of" appropriated funds.

City ordinances imposing mandate for students and school employees to wear facemasks in K-12 public schools in the city due to COVID-19 pandemic, and requiring school personnel to enforce the mask mandate or face monetary and other legal sanctions, violated provision of state legislature's appropriations act which prohibited school districts from using any state-appropriated funds to require students and/or employees to wear facemasks at education facilities, although city claimed that the city itself would fund and enforce the mandate without the use of any state-appropriated funds; ordinances forced school personnel, who had connection to state-appropriated funds, to choose between violating the appropriations act or city law.

City ordinances imposing mandate for students and school employees to wear facemasks in K-12 public schools in the city due to COVID-19 pandemic, and requiring school personnel to enforce the mask mandate or face monetary and other legal sanctions, were preempted by state legislature's appropriations act which prohibited school districts from using any state-appropriated funds to require students and/or employees to wear facemasks at education facilities; ordinances expressly conflicted with the appropriations act, such that compliance with both was not possible, and ordinances frustrated the purposes of the relevant provision of the appropriations act.

BALLOT INITIATIVE - TEXAS

In re Petricek

Supreme Court of Texas - September 1, 2021 - S.W.3d - 2021 WL 3909908 - 64 Tex. Sup. Ct. J. 1769

Voter, who signed petition to city council for proposed ordinance that, according to petition, would establish minimum standards for city police department to enhance public safety and police oversight, transparency, and accountability, petitioned for writ of mandamus, challenging city council's chosen ballot language, after city council chose to place proposed ordinance before the voters for approval, using its own description of the ordinance to be used on the ballot, rather than using the caption set forth in the petition as the ballot language.

The Supreme Court held that:

- City charter required city to place caption for petition-initiated ordinance on ballot verbatim if caption complied with applicable law, including the common-law standard for ballot language, but if petitioned caption fell short of that standard, city had limited discretion to revise the caption to the extent necessary to bring it into compliance;
- City charter was a law that otherwise prescribed the wording required to appear on ballot for a petition-initiated ordinance, for purposes of provision of the Election Code requiring the authority ordering an election to prescribe the wording of a proposition that is to appear on the ballot, unless "otherwise provided by law";

- Cost to city of ordinance was a chief feature that reflected ordinance's character and purpose, and thus, ballot language was required to mention cost impact of ordinance; and
- Caption for ordinance was not misleading for failure to mention certain details of ordinance, such as minimum police staffing levels, minimum levels of community engagement, or training mandates required by proposed ordinance, and thus, under city charter, city council had no discretion to adopt its own ballot language to address such details.

City charter was a law that otherwise prescribed the wording required to appear on ballot for a petition-initiated ordinance, for purposes of provision of the Election Code requiring the authority ordering an election to prescribe the wording of a proposition that is to appear on the ballot, unless "otherwise provided by law"; Election Code defined "law" to mean "a constitution, statute, city charter, or city ordinance," city charter article governing petition-initiated ordinances stated that the ballot "shall state the caption of the ordinance," and although Election Code did not define "caption," city acknowledged that the caption was the proposition briefly laying out the measure or initiated ordinance.

ZONING & PLANNING - VERMONT

In re Snowstone, LLC Act 250 Jurisdictional Opinion

Supreme Court of Vermont - September 3, 2021 - A.3d - 2021 WL 4025651 - 2021 VT 72

Prospective purchaser of proposed stone quarry sought review of jurisdictional opinion of state land use district coordinator that purchaser needed a permit under state's land use and development law for quarry, which was on less than an acre of land within a larger unimproved parcel in a municipality without permanent zoning and subdivision bylaws.

The Superior Court, Environmental Division, determined that quarry did not need state permit. Objectors appealed.

The Supreme Court held that:

- Quarry was not a "development" needing a state permit, and
- Objectors did not timely seek additional hearing to present evidence regarding project footprint in light of stormwater permit conditions.

Under permitting requirements of state's land use and development law, a "development" on more than one acre of land, needing a permit in a "one-acre town" that has not adopted permanent zoning and subdivision bylaws, refers to the land actually used for the construction of improvements, rather than the size of the parcel on which the construction of improvements will be located.

Proposed stone quarry on less than an acre of land within a larger unimproved parcel was not a "development" in a municipality that had not adopted permanent zoning and subdivision bylaws, and therefore the quarry did not require a permit under state's land use and development law.

Failure of proposed stone quarry operator to inform objectors of a stormwater permit decision for quarry within ten days of obtaining permit did not excuse objectors' failure to abide by Environmental Division's order giving objectors 30 days from stormwater permit determination to request further hearing in appeal of jurisdictional opinion of state land use district coordinator regarding need for a permit under state's land use and development law, where objectors participated in stormwater permitting proceedings and had notice that stormwater permit was issued before deadline for seeking further hearing in appeal of jurisdictional opinion in order to

present evidence regarding project footprint in light of stormwater permit conditions.

IMMUNITY - ARIZONA

Dinsmoor v. City of Phoenix

Supreme Court of Arizona - August 6, 2021 - 50 Arizona Cases Digest 17 - 492 P.3d 313

Mother brought action against school district, city, and school officials, alleging negligence-based claims arising from female student's death after being shot by ex-boyfriend while the two were at a friend's house after school.

The Superior Court entered summary judgment for all defendants. Mother appealed. The Court of Appeals affirmed in part, reversed in part, and remanded. District and officials petitioned for review, and the petition was granted.

The Supreme Court held that:

- A primary or secondary school's duty to protect students exists only while the school is fulfilling its roles as custodian, land possessor, and quasi-parental figure, and once students safely leave the school's control, the special relationship ends, and students are simultaneously released to their parents' or guardians' full custodial care, then the school is relieved of any duty to affirmatively protect students from any hazards they encounter, disapproving *Hill v. Safford Unified Sch. Dist.*, 191 Ariz. 110, 952 P.2d 754, and
- School did not owe duty to protect student from her ex-boyfriend.

UTILITIES - CALIFORNIA

Alameda County Waste Management Authority v. Waste Connections US, Inc.

Court of Appeal, First District, Division 2, California - August 18, 2021 - Cal.Rptr.3d - 2021 WL 3661201 - 21 Cal. Daily Op. Serv. 8550 - 2021 Daily Journal D.A.R. 8624

County waste management authority sued three out-of-county landfills that disposed of waste originating in the county, petitioning for injunctive or declaratory relief to enforce its authority to inspect specified records kept by the landfills.

The Superior Court granted county authority's motion for judgment on the pleadings and compelled landfills to allow inspection. Landfills appealed.

The Court of Appeal held that:

- The Integrated Waste Management Act authorized county authority to inspect and copy the records it sought without precondition, and
- County authority was entitled to judgment on the pleadings.

The language "as necessary to enforce the collection of local fees" in subsection of the Integrated Waste Management Act which governed local governments' rights to inspect and copy specified records related to waste originating in their jurisdiction did not impose as a precondition any factual showing of necessity; that language stated just one purpose for which local government entities could use the records, the mechanism provided for government entities to enforce their authority to inspect indicated inspection was a power or a right, "as necessary" did not inevitably mean

"essential," and read in the context of the entire section and its legislative history, that language meant that local agencies with fee ordinances were entitled to inspect and copy the records without precondition.

County waste management authority was entitled to judgment on the pleadings in case in which county authority sued landfills to enforce its statutory authority to inspect and copy specified records kept by the landfills related to waste originating in the county, where the only issue where there was a real dispute was a legal one, regarding the interpretation of a subsection of the Integrated Waste Management Act which governed local governments' rights to inspect and copy such records, and the statute required no showing of factual necessity for county authority to be authorized to inspect and copy the records.

ELECTIONS - ILLINOIS

Walker v. Agpawa

Supreme Court of Illinois - August 26, 2021 - N.E.3d - 2021 IL 127206 - 2021 WL 3776296

Objectors sought review of decision of municipal officers electoral board finding that mayoral candidate was duly qualified candidate for office despite federal felony conviction for mail fraud.

The Circuit Court affirmed. Objectors appealed. The Appellate Court reversed. Candidate petitioned for leave to appeal, which was allowed.

The Supreme Court held that:

- Governor's certificate to restore rights restored right to hold municipal office;
- Statutory amendment concerning restoration of rights as to public office following conviction was not void for vagueness;
- Statutory amendment did not violate First Amendment rights to object to a candidacy; and
- Statutory amendment did not violate separation of powers principles.

STATUTE OF LIMITATIONS - INDIANA

City of Marion v. London Witte Group, LLC

Supreme Court of Indiana - June 17, 2021 - 169 N.E.3d 382

City brought action against company that provided financial advice to city regarding financing for a construction project and alleged claims for negligence, breach of fiduciary duty, and constructive fraud and unjust enrichment.

The Superior Court granted in part and denied in part financial advisor's motion for summary judgment. City appealed and financial advisor cross-appealed. The Court of Appeals affirmed in part, reversed in part, and remanded with instructions. City sought transfer, and transfer was granted.

The Supreme Court held that:

- As a matter of first impression, the Supreme Court would adopt the equitable tolling doctrine of adverse domination;
- The adverse domination doctrine applied to both private and municipal corporations; and
- Genuine issues of material fact existed as to whether mayor adversely dominated the city, and

whether company that provided financial advice to city contributed to it, precluding summary judgment.

The Supreme Court would adopt the equitable tolling doctrine of adverse domination, which was an equitable doctrine that tolled statutes of limitations for claims by corporations against its officers, directors, lawyers and accountants for so long as corporation was controlled by those acting against its interests, as a logical corollary of its discovery rule.

The adverse domination doctrine, which tolled the statute of limitations as long as the corporate plaintiff was controlled by alleged wrongdoers, applied to both private and municipal corporations.

Genuine issues of material fact existed as to whether mayor adversely dominated the city, and whether company that provided financial advice to city contributed to it, precluding summary judgment based on the adverse domination doctrine on company's statute of limitations defense in negligence, breach of fiduciary duty, and constructive fraud action.

BUILD AMERICA BONDS - INDIANA

Indiana Municipal Power Agency v. United States

United States Court of Federal Claims - July 23, 2021 - Fed.Cl. - 2021 WL 3123777 - 128 A.F.T.R.2d 2021-5316

Public-sector power providers filed suit against United States, claiming violation of statutory duty, under American Recovery and Reinvestment Act (ARRA), and breach of contract by IRS failing to refund 35% of interest payable under their Direct Payment Build America Bonds (BABs) that they had issued under authority of ARRA.

Government moved to dismiss for failure to state claim.

The Court of Federal Claims held that:

- Claims were within Tucker Act jurisdiction;
- Refunds of interest under BABs were subject to sequestration;
- Issuers' characterizations of payments could not prevent sequestration;
- Sequestration reduced amount of refunds owed to issuers; and
- Government contract was not formed for refund payments.

Issuers of Direct Payment Build America Bonds (BABs), under American Recovery and Reinvestment Act (ARRA), asserted claims against United States that were within Tucker Act jurisdiction, for alleged violation of statutory duty under ARRA and breach of contract by failing to refund 35% of interest payable under BABs, since ARRA was separate money-mandating statute that created payment obligation on government, and issuers alleged nonfrivolous claim of contract with United States.

Statute providing funding for tax refunds to pay issuers of Direct Payment Build America Bonds (BABs), under American Recovery and Reinvestment Act (ARRA), did not constitute "appropriation Act," but rather authorized "direct spending," and thus, issuers' refunds of 35% of interest payable for their BABs were subject to sequestration, under Budget Control Act and American Taxpayer Relief Act, that permanently canceled budgetary resources, including direct spending, defined as budget authority provided by law other than appropriation Acts, since BABs were not statutorily listed as program exempted from sequestration.

Issuers of Direct Payment Build America Bonds (BABs), under American Recovery and Reinvestment Act (ARRA), could not preserve from sequestration full payment of tax refunds of 35% of interest under their BABs, by characterizing payments as "overpayment" of taxes or as "obligated funds," since payments to bond issuers were funded through statute that was subject to sequestration with respect to tax refunds to issuers of BABs, and government did not obligate funds for life of BABs, as obligation arising from BABs arose not when they were issued but only after IRS timely received and processed government form from issuers, so government's payment obligation did not extend beyond year processed.

Government was statutorily required to reduce its payment obligations for tax refund of 35% of interest payable to issuers of Direct Payment Build America Bonds (BABs), under American Recovery and Reinvestment Act (ARRA), due to subsequent enactment of Taxpayer Relief Act, imposing sequestration that permanently canceled budgetary resources, including direct spending such as funding for tax refunds to pay issuers of BABs, since spending cuts implemented by later-enacted Taxpayer Relief Act and Budget Control Act were irreconcilable with ARRA's 35% payment rate and reduced government's payment obligation by sequestration.

Government did not intend to create contract to be bound to pay tax refund of 35% of interest payable to issuers of Direct Payment Build America Bonds (BABs), under American Recovery and Reinvestment Act (ARRA), that did not frame authorized payments under BABs as contractual obligation, but rather, merely set forth payment program for issuers of qualifying BABs.

Issuers of Direct Payment Build America Bonds (BABs) waived any argument based on additional documents to establish existence of contract with United States, where issuers did not plead contract based on those documents in their amended complaint, they did not raise that argument in opposition to government's motion to dismiss, and they disclaimed that argument at oral argument.

POLITICAL SUBDIVISIONS - NORTH CAROLINA

Southern Environmental Law Center v. North Carolina Railroad Company

Supreme Court of North Carolina - August 13, 2021 - S.E.2d - 2021-NCSC-84 - 2021 WL 3575673

Requester brought action requesting the entry of an order declaring that the North Carolina Railroad Company was an agency of the State of North Carolina for purposes of the Public Records Act, declaring that the records requested from the railroad constituted public records, and ordering the railroad to make those records available for inspection.

After the case was designated a mandatory complex business case, the Superior Court granted railroad's motion for summary judgment, and requester appealed.

The Supreme Court held that Railroad was not an agency of North Carolina government or a subdivision of such an agency.

North Carolina Railroad Company was not an agency of North Carolina government or a subdivision of such an agency as defined by the Public Records Act, although the State was the Railroad's sole shareholder and the Railroad enjoyed a number of benefits due to its relationship with the State, where both the General Assembly and other governmental entities consistently treated the Railroad as a private corporation rather than a public agency or subdivision, the State lacked a sufficient degree of control over the day-to-day operations of the Railroad, and the Railroad consistently

maintained its separate corporate identity and structure and made decisions independently of any directives that it might receive from governmental officials, and owned its own property and paid taxes to counties and the State.

ZONING & PLANNING - OHIO

State ex rel. Donaldson v. Delaware County Board of Elections

Supreme Court of Ohio - August 26, 2021 - N.E.3d - 2021 WL 3821901 - 2021-Ohio-2943

Relator filed petition for writ of mandamus, seeking to require county board of elections to include referendum on zoning amendment on ballot.

The Supreme Court held that:

- Referendum petition's summary of zoning amendment failed to present issue fairly and accurately, rendering petition invalid, and
- Petition's reliance on public-hearing notices and zoning-commission language did not render summary sufficient.

Relator lacked adequate remedy in ordinary course of the law, as required for relator to obtain writ of mandamus ordering county board of elections to place referendum relating to zoning amendment on ballot, due to proximity of election, which was approximately two months away.

Referendum petition's summary of township zoning amendment relating to planned overlay district, which described amendment in general terms and stated that zoning amendment would include sections detailing permitted uses, open spaces, and prohibited uses, and that zoning resolution and map would be amended to designate the planned overlay district area, failed to present issue fairly and accurately to those being asked to sign petition, and thus petition was rendered invalid; summary did not identify location of land being rezoned, and it did not describe proposed zoning changes by indicating current use of property or uses that zoning amendment would permit.

Referendum petition's reliance on language from township zoning commission's public-hearing notices and zoning commission's resolution recommending denial of proposed zoning amendment regarding planned overlay district did not satisfy requirement that zoning amendment, as adopted by township, be fairly and accurately described in petition; notices did not summarize zoning amendment passed by township, but instead informed public of hearings that were scheduled to take place on proposed amendment prior to its enactment, notices were not required to contain summary of proposed zoning amendment, zoning commission's resolution was recommendation to township, not summary of amendment, and resolution related to previous version of planned overlay district.

BANKRUPTCY - PUERTO RICO

In re Financial Oversight and Management Board for Puerto Rico.

United States Court of Appeals, First Circuit - August 12, 2021 - 7 F.4th 31

In the jointly administered restructuring cases of the Commonwealth of Puerto Rico and various governmental instrumentalities pursuant to Title III of the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), the Puerto Rico Electric Power Authority (PREPA), PREPA's fiscal agent, and the Financial Oversight and Management Board for Puerto Rico (FOMB) moved for

entry of order allowing administrative expense claim for the costs of certain "front-end transition services" that private consortium with which PREPA had contracted to assume control over PREPA's power transmission and distribution system (T&D system) had agreed to perform.

Creditors objected. The United States District Court for the District of Puerto Rico granted motion in part and denied it in part. Creditors appealed.

The Court of Appeals held that:

- Addressing an issue of apparent first impression for the court, the subsection of the Bankruptcy Code providing administrative expense priority for the actual, necessary costs and expenses of preserving the estate applies in Title III cases;
- The Title III court did not abuse its discretion in finding that the front-end transition services satisfied the requirements for administrative expense treatment; and
- The Title III court correctly determined that it was not authorized to review challenges to FOMB's decision to certify a fiscal plan and budget for PREPA that included the front-end transition service fee.

Subsection of the Bankruptcy Code providing administrative expense priority for the actual, necessary costs and expenses of preserving the estate applies in cases under Title III of the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA); Congress incorporated the entirety of the Code's administrative expense section into PROMESA, such that each provision of that section must be given effect, and though there is no "estate" to preserve in Title III proceedings, reading "estate" in the context of the administrative expense provision to mean "property of the debtor" is sensible in light of the text and structure of Title III and the Code.

In case under Title III of the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), the Title III court did not abuse its discretion in finding that "front-end transition services" which private consortium with which the Puerto Rico Electric Power Authority (PREPA) had contracted to assume control over PREPA's power transmission and distribution system (T&D system) had agreed to perform satisfied the requirements for administrative expense treatment; the court correctly recognized that burden was on movants to show that payments at issue qualified to administrative expense priority, the court permissibly credited declaration submitted by movants indicating that services in question were necessary prerequisites to private consortium assuming control over the T&D system and so were beneficial to PREPA, and objectors did not provide any contrary factual evidence that services did not benefit PREPA.

In case under Title III of the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), the Title III court correctly determined that it was not authorized to review challenges to decision of the Financial Oversight and Management Board for Puerto Rico (FOMB) to certify a fiscal plan and budget for the Puerto Rico Electric Power Authority (PREPA) that included fees for certain "front-end transition services" that private consortium with which PREPA had contracted to assume control over PREPA's power transmission and distribution system (T&D system) had agreed to perform; PROMESA insulated FOMB's certification determinations from judicial review in the federal courts.

In case under Title III of the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), appellants' argument that the Title III court's interpretation of the PROMESA provision insulating decisions of the Financial Oversight and Management Board for Puerto Rico (FOMB) from judicial review violates the nondelegation doctrine was waived where appellants never raised the issue before the Title III court, and no exceptional circumstances warranted consideration of the argument for the first time on appeal.

IMMUNITY - CONNECTICUT

Doe v. Town of Madison

Supreme Court of Connecticut - July 30, 2021 - A.3d - 2021 WL 3281024

Three public high school students who were sexually abused by high school teacher brought separate action against town, town school board, police officer assigned as school resource officer, and high school principal.

Actions were consolidated. The Superior Court granted summary judgment in favor of defendants. Students appealed.

The Supreme Court held that:

- High school personnel lacked reasonable suspicion to believe that teacher was sexually abusing students or exposing them to risk of sexual abuse, as would trigger duty to report under mandatory reporting statute;
- School athletic director's testimony did not create ministerial duty of professionalism; and
- Defendants had no ministerial duty to monitor security camera video footage at high school.

INSURANCE - ILLINOIS

Netherlands Insurance Company v. Macomb Community Unit School District No. 185

United States Court of Appeals, Seventh Circuit - August 6, 2021 - F.4th - 2021 WL 3464356

Insurers brought action seeking declaration of their rights and obligations under school district's general commercial liability insurance policy after district settled female students' action alleging that it had failed to prevent and inappropriately responded to sexual misconduct by male student.

The United States District Court for the Central District of Illinois entered judgment on pleadings in district's favor, and insurers appealed.

The Court of Appeals held that student's sexual misconduct fell within scope of policy provision excluding coverage for "[a]ny sexual misconduct" of "any person."

Under Illinois law, male student's sexual misconduct towards female students unambiguously fell within scope of provision of school district's general commercial liability insurance policy excluding coverage for "[a]ny sexual misconduct" of "any person," despite district's contention that it excluded coverage only for sexual misconduct by school employee.

PUBLIC PENSIONS - MARYLAND

Cherry v. Mayor and City Council of Baltimore City

Court of Appeals of Maryland - August 16, 2021 - A.3d - 2021 WL 3611768

Police officers and firefighters filed class action lawsuit against Mayor and City Council of Baltimore, alleging claims for declaratory relief and breach of contract.

The Circuit Court certified class of plaintiffs and three sub-classes and ruled that city did not breach its contract with sub-class of active employees, but it did breach its contract with retired and retirement-eligible sub-classes and awarded more than $30 million in damages to them.

Police officers' and firefighters' petition for writ of certiorari was granted.

The Court of Appeals held that:

- City did not breach its contract with pension plan members by underfunding plan;
- City breached its contract with retired police officers and firefighters and retirement-eligible police officers and firefighters;
- City had authority to make reasonable prospective modifications to pension plan, provided they were reasonable and necessary;
- Ordinance was reasonable and necessary, as required to be enforceable; and
- Circuit court correctly declined to order specific performance and calculated damages.

City did not breach its contract with pension plan members by underfunding plan, since plan did not require city to "fully fund" retiree reserves and provision governing calculation of city's annual contribution to fund contemplated possibility of either underfunding or overfunding of plan.

City, by way of ordinance that retrospectively divested benefits belonging to those pension plan members by replacing market-driven post-retirement cost-of-living adjustment feature with tiered cost-of-living adjustment, breached its contract with retired police officers and firefighters and retirement-eligible police officers and firefighters by unlawfully withdrawing or removing previously earned and accrued benefit entitlements.

City had authority to make reasonable prospective modifications to pension plan, provided they were reasonable and necessary, notwithstanding provision that contractual relationship existed between plan members and city and benefits provided under plan thereafter could not be diminished or impaired in any way, since benefits set forth in plan did not vest until members reached service retirement eligibility and provision did not eviscerate city's reserved power to make such reasonable and necessary prospective changes to plan.

Ordinance retrospectively divesting benefits belonging to public pension plan members by replacing market-driven post-retirement cost-of-living adjustment feature with tiered cost-of-living adjustment was reasonable and necessary, and therefore it did not violate Contract Clause, since ordinance was reasonably intended to preserve integrity of plan, changes to plan, as they affected active members, were reasonable changes promoting paramount interest of city without serious detriment to employee, active member employees received substantially plan for which they bargained, and to extent any benefits were lessened or other terms became more onerous, those changes were balanced by combination of overwhelming public welfare considerations and new benefits or qualifying conditions.

Circuit court correctly declined to order specific performance, i.e., reinstitution of variable benefit for retired and retirement-eligible police officers and firefighters, and calculated damages owed to retired and retirement-eligible police officers and firefighters from ordinance retrospectively divesting benefits belonging to public pension plan members by replacing market-driven post-retirement cost-of-living adjustment feature with tiered cost-of-living adjustment (COLA) by assessing how retired and retirement-eligible members would have fared if, hypothetically, city had retained variable benefit for them but made prospective changes to plan for members whose rights to benefits had not yet vested, since retired and retirement eligible were "closed" from changes but city was permitted to apply new COLA to active members.

VARIABLE RATE BONDS - MASSACHUSETTS

Rosenberg v. JPMorgan Chase & Co.

Supreme Judicial Court of Massachusetts - May 11, 2021 - 487 Mass. 403 - 169 N.E.3d 445

Relator filed complaint under Massachusetts False Claims Act (MFCA) against financial institutions that served as remarketing agents for Commonwealth on long-term tax-exempt variable rate bonds that financed long-term public projects or infrastructure, based on allegations that agents fraudulently inflated interest rates on bonds, in breach of agents' obligations in remarketing agreements determine lowest interest rate that would permit sale of bonds on any given rate determination date.

The Superior Court Department granted agents' motion to dismiss and relator appealed.

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

- Information relating to agents' misrepresentations to Commonwealth was in public domain, for purposes of "public disclosure" bar to qui tam action;
- Purportedly true state of agents' fraud was in public domain;
- Remarketing agreements constituted "reports," and thus were statutory source of previously disclosed information, for purposes of "public disclosure" bar to qui tam action;
- Internet website that published information on all municipal bonds constituted "news media," and thus, was statutory source of previously disclosed information;
- Relator's assertions in complaint were substantially same as misrepresentations and true state of facts that were previously disclosed to public, for purposes of "public disclosure" bar to qui tam suit;
- Relator did not have knowledge independent of that information previously disclosed to public, as would bring relator's complaint within "original source" exception to "public disclosure" bar to suit; and
- Relator's information did not materially add to previously disclosed fraudulent scheme, as would bring relator's complaint within "original source" exception to "public disclosure" bar to suit.

Remarketing agents alleged misrepresentations that they would comply with their obligations to Commonwealth to determine applicable rate of interest on long-term, tax-exempt, variable rate bonds that financed long-term public projects and infrastructure that, in their judgment, was lowest rate that would permit sale of bonds bearing interest at applicable interest rate at par plus accrued interest as of applicable rate determination date, was in public domain, for purposes of "public disclosure" bar to qui tam action against agents under Massachusetts False Claims Act (MFCA), where representations were set forth in agreements with Commonwealth, in Municipal Securities Rulemaking Board (MSRB) rules that addressed agents' duties to bond issuers, and in Securities Industry Financial Markets Association (SIFMA) model disclosures.

Purportedly true state of remarketing agents' fraud in setting artificially high interest rates on long-term tax-exempt variable rate bonds to finance long-term public projects or infrastructure, when they represented to Commonwealth that they would comply with their obligations as remarketing agents to determine lowest interest rate that would permit sale of bonds on given rate determination date, were in public domain, for purposes "public disclosure" bar to qui tam action against agents under Massachusetts False Claims Act (MFCA); relator's assertion that agents were not obtaining lowest rates was available to public on Internet, specifically, website that publishes information on all municipal bonds, and relator used same data from website on Internet to conclude that agents were not setting lowest rates on bonds.

Remarketing agreements with Commonwealth, in which remarketing agents purportedly misrepresented state of facts that they would comply with their obligations to Commonwealth to determine applicable rate of interest on long-term, tax-exempt, variable rate bonds that financed long-term public projects and infrastructure that, in their judgment, was lowest rate that would permit sale of bonds bearing interest at applicable interest rate at par plus accrued interest as of applicable rate determination date, constituted "reports," and thus were statutory source of previously disclosed information, for purposes of "public disclosure" bar to qui tam action against agents, under Massachusetts False Claims Act (MFCA).

Internet website that published information on all municipal bonds constituted "news media," and thus, was statutory source of prior disclosure of purportedly true state of remarketing agents' alleged fraud in setting artificially high interest rates on long-term tax-exempt variable rate bonds that financed long-term public projects or infrastructure, when agents represented to Commonwealth in remarketing agreements that they would comply with their obligations to determine lowest interest rate that would permit sale of bonds on given rate determination date, for purposes of public disclosure bar to qui tam action under Massachusetts False Claims Act (MFCA).

Relator's allegations in qui tam complaint against remarketing agents, relating to agents' purportedly fraudulent scheme to artificially inflate interest rates on long-term tax-exempt variable rate bonds that financed long-term public projects or infrastructure, when agents represented to Commonwealth in remarketing agreements that they would comply with their obligations to determine lowest interest rate that would permit sale of bonds on any given rate determination date, were substantially same as misrepresentations and true state of facts that were previously disclosed to public, such that publicly disclosed information put Commonwealth on trail of alleged fraud without relator's assistance, and thus, relator's complaint fell within "public disclosure" bar to qui tam suit under Massachusetts False Claims Act (MFCA).

Relator did not have knowledge independent of that information previously disclosed to public regarding scheme by remarketing agents to artificially inflate interest rates on long-term tax-exempt variable rate bonds that financed long-term public projects or infrastructure, despite agents' obligations in remarketing agreements with Commonwealth to determine lowest interest rate that would permit sale of bonds on any given rate determination date, and thus, relator was not original source of information, as would bring relator's complaint under "original source" exception to "public disclosure" bar to suit under Massachusetts False Claims Act (MFCA); Internet website that published information about municipal bonds publicly reported same data upon which relator relied, and relator's analysis depended entirely on interest rate data, which were available on website.

Relator did not materially add to previously disclosed fraudulent scheme by remarketing agents to artificially inflate interest rates on long-term tax-exempt variable rate bonds that financed long-term public projects or infrastructure, in breach of agents' obligations in remarketing agreements with Commonwealth to determine lowest interest rate that would permit sale of bonds on any given rate determination date, and thus, relator was not "original source" of information, as would bring his qui tam complaint within "original source" exception to "public disclosure" bar to suit under Massachusetts False Claims Act (MFCA), despite relator's claim that his investigation revealed robo-resetting scheme for resetting interest rates; salient information was that agents promised they would reset rates individually and failed to do so, and manner in which they conducted the fraud — purportedly in order to discourage holders of bonds from selling those bonds — was detail that would not influence behavior of someone already armed with knowledge of salient elements of fraud.

Relator's assertion of collusion between remarketing agents to artificially inflate interest rates on long-term tax-exempt variable rate bonds that financed long-term public projects or infrastructure, in breach of agents' obligations in remarketing agreements with Commonwealth to determine lowest

interest rate that would permit sale of bonds on any given rate determination date, did not materially add to information previously publicly disclosed, and thus, relator was not "original source" of knowledge of scheme, as required for relator's complaint to come within "original source" exception to "public disclosure" bar to qui tam suit under Massachusetts False Claims Act (MFCA); complaint simply alleged that agents must have colluded in order for interest rates to have changed as they did, and only additional information beyond this deduction from data contained on website that published information regarding municipal bonds, obtained during single interview, was not relevant to purported fraud, but merely confirmed what relator had already had discerned from data.

POLITICAL SUBDIVISIONS - NEW JERSEY

Ocean County Board of Commissioners v. Attorney General of State of New Jersey

United States Court of Appeals, Third Circuit - August 9, 2021 - F.4th - 2021 WL 3482908

Counties and county agencies filed suits against Attorney General for State of New Jersey, Office of Attorney General, and State of New Jersey, seeking declaration that law enforcement directive, also known as Immigrant Trust Directive, issued by Attorney General to limit ability of counties and local law enforcement to cooperate with federal immigration authorities violated United States Constitution and New Jersey law and was preempted by federal statutes.

Following consolidation of cases, the United States District Court for the District of New Jersey granted defendants' motion to dismiss for lack of subject matter jurisdiction and for failure to state claim. Counties and county agencies appealed.

The Court of Appeals held that:

- In matter of first impression, political subdivision may sue its creator state in federal court under Supremacy Clause; and
- Immigrant Trust Directive was not preempted by federal law.

Immigrant Trust Directive, issued by Attorney General for State of New Jersey, limiting ability of counties and local law enforcement to cooperate with federal immigration authorities, was not preempted by federal statutes, barring state entity or official from prohibiting, or in any way restricting, any government entity or official from sharing immigration information with federal authorities, and also providing that no state or local government entity could be prohibited, or in any way restricted, from communicating immigration information to federal government, since statutes regulated state actors, not private actors.

MUNICIPAL ORDINANCE - NORTH DAKOTA

City of Fargo v. Roehrich

Supreme Court of North Dakota - August 5, 2021 - N.W.2d - 2021 WL 3411833 - 2021 ND 145

Defendant was convicted in the District Court of harassment in violation of city ordinance. Defendant appealed.

The Supreme Court held that:

- Ordinance criminalizing telephone calls with "no purpose of legitimate communication" was not unconstitutionally vague in violation of due process;
- Ordinance was not unconstitutionally vague as applied to defendant; and
- First Amendment did not protect defendant's conduct.

City harassment ordinance criminalizing telephone calls with "no purpose of legitimate communication" was not unconstitutionally vague in violation of due process, although term was not defined by statute; ordinance required the defendant to have the intent to frighten or harass to be found guilty, and the combination of the specific intent element with the required conduct of repeated phone calls or other electronic communication with no legitimate purpose created minimum guidelines for the reasonable police officer, judge, or jury and limited the dangers of arbitrary and discriminatory application, and provided a reasonable person with adequate and fair warning of the prohibited conduct.

City harassment ordinance criminalizing telephone calls with "no purpose of legitimate communication" was not unconstitutionally vague in violation of due process as applied to defendant; while defendant may have initially called city police officers with the purpose of legitimate communication regarding his son's car accident, he made hundreds of telephone calls to three officers over a period of two years, and many of the calls had no purpose of legitimate communication, and calls were repetitive and included name calling and profanity, allegations the officers were liars or corrupt and did not know how to do their jobs, and other similar statements.

First Amendment did not protect defendant's conduct in making harassing phone calls to city police officers and did not prevent conviction for violating city harassment ordinance criminalizing telephone calls with "no purpose of legitimate communication," where defendant made hundreds of telephone calls to three officers, he was told to stop calling numerous times, he was sent a cease and desist letter, and he continued to call the officers after being told to stop, and defendant stated in multiple voicemail messages that he would continue to call the officers until he was charged with harassment.

ZONING & PLANNING - PENNSYLVANIA

Drummond v. Robinson Township

United States Court of Appeals, Third Circuit - August 17, 2021 - F.4th - 2021 WL 3627106

Gun rights organization, gun club, and would-be operator of gun club filed § 1983 action against township and township zoning officer, alleging violation of plaintiffs' Second Amendment rights by stalling club operator's zoning application to allegedly zone gun club out of existence, among other claims.

The United States District Court for the Western District of Pennsylvania granted defendants' motion to dismiss and denied plaintiffs' motion for preliminary injunction as moot. Plaintiffs appealed. The Court of Appeals affirmed in part, vacated in part, and remanded. On remand, the United States District Court for the Western District of Pennsylvania granted defendants' motion to dismiss for failure to state a claim. Plaintiffs appealed.
Holdings: The Court of Appeals held that:

- As a matter of first impression, zoning restrictions lacked historical foundations, as would support

heightened scrutiny;
- Intermediate scrutiny, rather than strict scrutiny, applied;
- Defendants failed to establish a close fit between challenged rules and actual public benefits they served; and
- Reassignment to another district judge was unwarranted.

Township's zoning restrictions barring training with common weapons in areas where firearms practice was otherwise permitted and preventing businesses in certain areas from selling guns or range time at a profit lacked historical foundations, as would support heightened scrutiny on facial Second Amendment challenge pursuant to § 1983, even though ordinance shared some features with traditional antecedents of dividing township into districts, excluding firearms purchase and practice from residential areas, and designating certain areas for center-fire practice and commercial ranges.

Township's zoning ordinance prohibiting commercially-operated gun clubs and forbidding center-fire cartridges, did not ban firearms purchase and practice in township, but rather preserved avenues for citizens to acquire weapons and maintain proficiency in their use, thus implicating intermediate scrutiny, rather than strict scrutiny, on Second Amendment facial challenge pursuant to § 1983; ordinance allowed non-profit gun clubs, allowed citizens to train with forms of ammunition other than center-fire cartridges, and opened two districts to commercial ranges and center-fire rifle training.

Township failed to establish a close fit between challenged zoning ordinance prohibiting commercially-operated gun clubs and forbidding center-fire cartridges and actual public benefits they served of preventing use of powerful ammunition, reducing noise, increasing safety, and moderating intensity of use, and thus township failed to establish that ordinance withstood intermediate scrutiny on § 1983 Second Amendment facial challenge at the motion to dismiss for failure to state a claim stage; there were no parallels for the challenged rules whether in history or in contemporary practice, there was no evidence tying challenged rules to asserted interest, and township neglected to explain why it eschewed more targeted alternatives.

Reassignment to another district judge was unwarranted for § 1983 Second Amendment case challenging township's zoning ordinance prohibiting commercially-operated gun clubs and forbidding center-fire cartridges; district court did not disregard Court of Appeals' prior order which directed district court to follow two-step framework for Second Amendment challenges, and which did not direct district court to reach a particular result at either step.

ZONING & PLANNING - UTAH

Croft v. Morgan County

Supreme Court of Utah - August 12, 2021 - P.3d - 2021 WL 3557629 - 2021 UT 46

Residents brought action to challenge county's rejection of their application to submit an ordinance approving the development of a ski resort community to a referendum.

The Second District Court dismissed the challenge for lack of jurisdiction, and residents appealed.

The Supreme Court held that, as a matter of first impression, residents could not have obtained an extraordinary writ in the Supreme Court, and thus were not required to file a petition for extraordinary writ and properly filed their challenge in the district court.

Residents who sought to challenge county's rejection of their application to submit an ordinance

approving the development of a ski resort community to a referendum could not have obtained an extraordinary writ in the Supreme Court, and thus were not required to file a petition for extraordinary writ and properly filed their challenge in the district court, where construction of the ski resort was not imminent, referendum did not need to be immediately placed on the ballot to avoid the ski resort's construction, referendum application was not tied to any specific election or other deadline, and, while 18 months had passed since the referendum application was rejected, their alleged injury could still be redressed through a referendum.

PUBLIC RECORDS - WASHINGTON

Bogen v. City of Bremerton

Court of Appeals of Washington, Division 2 - August 10, 2021 - P.3d - 2021 WL 3504603

Citizen brought action against city alleging violation of Public Records Act (PRA).

The Superior Court granted city's motion to dismiss. Citizen appealed.

The Court of Appeals held that:

- One-year statute of limitations on citizen's PRA claim began to run on day after city's final action on citizen's records request, and
- Court would defer to superior court to award attorney fees.

One-year statute of limitations on citizen's Public Records Act (PRA) claim against city began to run on day after city's final action on citizen's public records request, rather than on day of city's final action; "within one year of" language in statute established period of time allowed for judicial review of agency actions, not how to compute that period of time, and "within one year of" time period in statute did not include day of triggering event.

Court of Appeals would defer to Superior Court to award attorney fees in citizen's action against city alleging violation of Public Records Act (PRA); though citizen prevailed on his appeal of grant of motion to dismiss for failure to state a claim, citizen's PRA claims had not yet been decided on merits

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BROWN ACT - CALIFORNIA

Daly v. San Bernardino County Board of Supervisors

Supreme Court of California - August 9, 2021 - P.3d - 2021 WL 3482924 - 21 Cal. Daily Op. Serv. 8047

Disappointed applicant for seat on Board of Supervisors and civic organization filed petition for writ of mandate, naming county Board of Supervisors and members who had participated in appointment of Board member, with appointed member as real party in interest, seeking judicial determination that initial nomination process violated Brown Act.

The Superior Court granted mandate petition. Board and appointed member appealed. The Court of Appeal denied writ of supersedeas effectuating such automatic stay of enforcement pending Board and appointed member's appeal on the merits. Board and appointed member filed joint petition for review asking whether superior court's order should have been automatically stayed as mandatory

injunction. Petition for review by Board and appointed member was granted, and judgment and further proceedings below were stayed pending further order.

The Supreme Court held that:

- Superior court order was subject to automatic stay of enforcement pending Board and appointee's appeal on merits, and Board and appointee were entitled to writ of supersedeas effectuating such stay, and
- Quo warranto was available remedy for appointed member of county Board of Supervisors to be immediately excluded from office on claim that nomination process violated Brown Act.

On petition for writ of mandate seeking judicial determination that initial process to nominate applicant for county Board of supervisors position violated Brown Act, superior court order requiring Board to rescind its appointment of applicant as supervisor and instead to seat appointee named by Governor was subject to automatic stay of enforcement pending Board and appointee's appeal on merits, and Board and appointee were entitled to writ of supersedeas effectuating such stay, since requirement to remove appointee from supervisor position and seat Governor's replacement plausibly could not be described as merely incidental to other aspects of order.

Quo warranto was available remedy for appointed member of county Board of Supervisors to be immediately excluded from office on claim that nomination process violated Brown Act

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BALLOT INITIATIVE - MAINE

Caiazzo v. Secretary of State

Supreme Judicial Court of Maine - July 29, 2021 - A.3d - 2021 WL 3197177 - 2021 ME 42

Voter brought action to challenge Secretary of State's decision to draft a single ballot question for direct initiative regarding transmission lines.

The Superior Court affirmed, and voter appealed.

The Supreme Judicial Court held that Secretary of State appropriately exercised her discretion when deciding to draft single ballot question.

Supreme Judicial Court of Maine holds that Secretary of State appropriately exercised her discretion when deciding to draft single ballot question for direct initiative proposing "An Act To Require Legislative Approval of Certain Transmission Lines, Require Legislative Approval of Certain Transmission Lines and Facilities and Other Projects on Public Reserved Lands and Prohibit the Construction of Certain Transmission Lines in the Upper Kennebec Region," as initiated bill presented a set of amendments aimed at a stated, but compound, purpose.

MUNICIPAL CONTRACTS - MARYLAND

Town of Riverdale Park v. Ashkar

Court of Appeals of Maryland - July 15, 2021 - A.3d - 2021 WL 2965001

Palestinian-American principal of towing company brought action against municipality and its personnel, claiming malicious prosecution and intentional discrimination on basis of national origin

after he was denied municipal towing contract.

The Circuit Court granted judgment for municipality. Principal appealed. The Court of Special Appeals affirmed in part and reversed in part. Municipality's petition for writ of certiorari was granted.

The Court of Appeals held that:

- Argument that had not been advanced in motion for judgment could not be considered on review judgment notwithstanding verdict;
- All that Palestinian-American had to show, as member of protected class, to establish prima facie case of discrimination was that he was qualified, but despite those qualifications, his application for tow contract was rejected, and given to somebody else;
- Membership on tow list provided legally sufficient and nondiscriminatory reason for why other towing company may have been preferred over towing company owned by Palestinian-American that had lapsed membership;
- Palestinian-American presented sufficient evidence that discrimination against his national origin motivated employment decision by municipality;
- National origin discrimination from police department officers reasonably could be imputed to municipality;
- Evidence was sufficient for jury to find that municipality's use of law enforcement list of member towing companies as nondiscriminatory reason for decision to not select Palestinian-American's towing company for towing contract was not worthy of credence; and
- Circuit court's failure to decide whether to grant motion for new trial if judgment was later reversed on appeal required remand.

Palestinian-American presented sufficient evidence that discrimination against his national origin motivated employment decision by municipality to choose other towing company over his towing company for towing contract, where, among other things, claimant was called "camel jockey" by lieutenant colonel on two separate occasions, at least two more indications of discriminatory animus by police department were directed against claimant based on his national origin, police department, and specifically lieutenant colonel, was most important voice in denying claimant's bid for employment, contract was given to other towing company on basis that it was on law enforcement towing list but list was never mentioned as necessary qualification prior to granting contract, and municipality passed resolution preferring local vendors, claimant's company was local vendor, and other towing company was not.

MUNICIPAL CORPORATIONS - NEVADA

Endo Health Solutions, Inc. v. Second Judicial District Court of State in and for County of Washoe

Supreme Court of Nevada - July 29, 2021 - P.3d - 2021 WL 3266732 - 137 Nev. Adv. Op. 39

City brought tort action against manufacturers and distributors of prescription opioid medications to recover damages as a result of the opioid epidemic allegedly caused by defendants, and alleging public nuisance, common law public nuisance, negligence, and unjust enrichment.

The District Court denied in part defendants' motion to dismiss. Defendants petitioned for writ of mandamus.

The Supreme Court held that District Court's failure to strictly apply statutory definition of "matter of local concern" as set forth in modified Dillon's Rule warranted writ of mandamus.

IMMUNITY - NEW JERSEY

Gonzalez by Gonzalez v. City of Jersey City

Supreme Court of New Jersey - August 4, 2021 - A.3d - 2021 WL 3376907

Estate brought negligence action against police officers, city, and police department, arising out of motorist's death from being struck by a car on a highway bridge where officers allegedly left him after responding to his one-vehicle accident that left his vehicle inoperable.

The Superior CourT granted summary judgment in favor of defendants. Estate appealed. The Superior Court reversed. Defendants' petition for certification was granted.

The Supreme Court held that:

- Officers' actions did not implicate the Good Samaritan Act;
- Immunity for acting under statute requiring removal of an incapacitated person from public place to a treatment center did not apply;
- Fact issues precluded summary judgment; and
- Neither immunity for failure to enforce a law nor immunity for good-faith enforcement of a law applied.

PUBLIC INTEREST PRIVILEGE - NEW YORK

Comptroller of City of New York v. City of New York

Supreme Court, Appellate Division, First Department, New York - August 12, 2021 - N.Y.S.3d - 2021 WL 3555807 - 2021 N.Y. Slip Op. 04685

Comptroller brought proceeding against city for an order compelling city to fully comply with subpoena comptroller issued after city failed to produce documents requested by comptroller in investigation under city charter regarding city's preparation, planning, and response to the COVID-19 pandemic.

City filed cross petition seeking an order dismissing proceeding and quashing, modifying, or fixing conditions on city's compliance with subpoena. The Supreme Court, New York County, granted in part and denied in part the petition and cross petition, ordering city to comply with the request for documents but quashing the request for documents relating to communications involving mayor or first deputy mayor, and denying city's request in cross petition to quash testimonial subpoenas.

The Supreme Court, Appellate Division, held that:

- Comptroller's investigation did not exceed his authority under city charter, and
- Public interest in protecting mayor's and first deputy mayor's predecisional and deliberative communications outweighed public interest in allowing comptroller to review and possibly publish those communications as part of his investigation, and thus, public interest privilege applied to such communications.

Comptroller's investigation into city's preparation, planning, and response to the COVID-19

pandemic did not exceed his authority under city charter; charter gave comptroller power to audit and investigate all matters relating to or affecting the finances of the city and to issue subpoenas, and although investigation into city's pandemic response was not strictly targeted to finding out how the response affected city finances, charter provided comptroller with broad investigative authority of matters that affected city finances and did not strictly limit investigations to only fiscal matters, and investigation addressed the impact of the city's response to the pandemic on the city's finances.

The public interest in protecting the mayor's and first deputy mayor's predecisional and deliberative communications outweighed the public interest in allowing comptroller to review and possibly publish those communications as part of his investigation into city's response to COVID-19 pandemic, and thus, public interest privilege applied to such communications; given the ongoing threat of the pandemic, mayor and leadership team needed access to information and advice from all sources, which required that the sources had some assurance that their advice would remain confidential and free from fear of reprisal, and public disclosure of confidential communications could chill future deliberations about pressing matters, potentially to the public's harm.

MUNICIPAL ORDINANCE - WASHINGTON

City of Seattle v. Long

Supreme Court of Washington - August 12, 2021 - P.3d - 2021 WL 3556950

Truck owner sought review of municipal court order requiring him to reimburse city $547.12 for impoundment costs via payment plan of $50 per month, for truck that served as owner's home and that was impounded for violation of city's 72-hour parking ordinance.

The Superior Court affirmed in part and reversed part. City petitioned for discretionary review, and owner cross-petitioned. The Court of Appeals affirmed in part and reversed in part. Parties sought further review.

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

- Truck automatically qualified as a homestead;
- Homestead claim was premature;
- Impoundment did not violate state constitutional provision protecting against unwarranted government intrusions into private affairs;
- Impoundment and associated costs were partially punitive and thus constituted fines;
- A court considering whether a fine is constitutionally excessive should consider a person's ability to pay; and
- Payment plan as imposed violated excessive fines clause.

Truck that served as owner's home and that was impounded by city for parking infraction automatically qualified as a homestead without need for owner to file a declaration.

Truck owner's homestead claim seeking shield against attachment, execution, or forced sale of his truck that served as his home and that was impounded by city for parking infraction was premature, where city did not seek to collect on owner's debt in the form of impoundment costs for which magistrate set up payment plan to reimburse city.

City's impoundment of truck for parking infraction and $547.12 payment plan of $50 per month for impoundment costs were unconstitutionally excessive for truck owner who used truck as residence, where nature of offense was a civil parking infraction that carried a $44 fine, city suspended

enforcement of the 72-hour parking violation during COVID-19 pandemic signaling that city viewed violation as a relatively minor offense, there was no evidence that the infraction was related to any other criminal activity, truck was not parked in residential area or area of hot demand for city vehicles, owner made at most $700 per month, owner was attempting to save for apartment to move himself out of homelessness, and owner could not access his tools for work as general tradesman during impoundment.

Impoundment of truck for parking infraction after city posted notice of violation of 72-hour parking ordinance did not violate state constitutional provision protecting against unwarranted government intrusions into private affairs, where truck owner told officers his truck was in need of repairs and could not be driven, even though owner used truck as his home and did not have access to it for 21 days.

Impoundment and associated costs for truck that had a parking infraction were partially punitive and thus constituted fines under excessive fines clause, even though owner retrieved truck and costs were intended to reimburse city for towing and storage fees, where costs were imposed only as a result of the impoundment, which city code characterized as a penalty.

EASEMENTS - CALIFORNIA

Pear v. City and County of San Francisco

Court of Appeal, Sixth District, California - July 28, 2021 - Cal.Rptr.3d - 2021 WL 3186556 - 21 Cal. Daily Op. Serv. 7667

Grantors' successors brought action regarding their uses of surface of strip of property deeded to city and county for use for underground water pipes, alleging claims for quiet title, an irrevocable license, declaratory relief, and injunctive relief.

The Superior Court granted summary judgment for city and county. Successors appealed, and the Sixth District Court of Appeal reversed and remanded. Following a court trial, the Superior Court entered judgment for successors on claims to quiet title and for declaratory and injunctive relief, and city and county appealed.

The Court of Appeal held that:

- Deed reservation allowed grantors' successors to plant grass on the property;
- Deed reservation allowed grantors' successors to place ornamental landscaping on the property;
- Deed reservation permitted roads and streets for both residential and commercial use;
- Deed reservation allowed access to commercial property's service bays which were perpendicular to the pipeline property; and
- Deed reservation did not permit parking lot use of the property as part of general access to neighboring automotive service center.

PUBLIC FINANCE - MICHIGAN

Taxpayers for Michigan Constitutional Government v. Department of Technology , Management and Budget

Supreme Court of Michigan - July 28, 2021 - N.W.2d - 2021 WL 3179659

Taxpayer organization brought action against state and state authorities to enforce state constitutional amendment requiring certain percentage of state spending to be apportioned to local government.

The Court of Appeals granted mandamus relief for organization, and the matter then came before the Court of Appeals again on motion for reconsideration. The Court of Appeals granted summary judgment in part and denied it in part for both parties. Parties' applications for leave to appeal were granted.

The Supreme Court held that:

- "Proposal A" payments should be counted as part of total state spending paid to units of local government for purposes of Headlee Amendment;
- Public school academies (PSAs) were not "school districts" as that term was used in Headlee Amendment; and
- State funding provided to units of local government had to be counted for purposes of "total state spending paid to all units of Local Government" under Headlee Amendment.

Under the Headlee Amendment requiring certain percentage of state spending to be apportioned to local government, neither specific individual units of local government nor classes of units of local government are entitled to the same proportion of the allotment for units of local government as they received in 1978–1979.

"Proposal A" payments from state sales and use tax that state directed to school districts, and state spending for state-mandated local services and activities, had to be counted as part of total state spending paid to units of local government for purposes of Headlee Amendment requiring certain percentage of state spending to be apportioned to local government.

Public school academies (PSAs) were not "school districts" as that term was used in Headlee Amendment which requires certain percentage of state spending to be apportioned to local government; although legislature authorized creation of PSAs and treated them as school districts for specific purpose of receiving aid from State School Aid Fund, PSAs were organized as nonprofit corporations by person or other entity, PSAs were not limited to defined local geographic area, governing body of PSA was made up of board of directors comprised of privately selected members, board of directors of PSA could enter into contract with education-management corporation to manage or operate PSA or to provide PSA with instructional or other services, and PSA was funded solely by state and may not levy taxes.

State funding provided to units of local government had to be counted for purposes of "total state spending paid to all units of Local Government" under Headlee Amendment which required certain percentage of state spending to be apportioned to local government to honor voters' intent neither to freeze legislative discretion to enact necessary and desirable legislation in response to changing times and conditions nor to permit state government unrestricted discretion in its allocation of support for mandated activities and services; state funding to unit of local government was state funding to unit of local government, whether that funding was tied to state mandate or was unrestricted aid for discretionary spending.

STANDING - NEW HAMPSHIRE

Carrigan v. New Hampshire Department of Health and Human Services

Supreme Court of New Hampshire - July 20, 2021 - A.3d - 2021 WL 3044342

Taxpayer-resident brought declaratory judgment action against Department of Health and Human Services and its Commissioner, alleging that they were failing to meet their statutory and constitutional duties with respect to abused and neglected children as a result of their "irresponsible" spending decisions.

The Superior Court dismissed for lack of standing. Taxpayer-resident appealed.

The Supreme Court held that taxpayer-resident lacked standing under state constitutional provision allowing declaratory judgment actions challenging unlawful spending of public funds.

State constitutional provision allowing declaratory judgment actions by taxpayer-residents challenging governmental action involving unlawful spending of public funds does not provide the judiciary with the authority to decide whether the State or a local government has invested sufficient resources to address alleged shortcomings or has properly funded the agencies with responsibility for abiding by the legal requirements enacted by the legislature at levels that facilitate legal functioning.

Taxpayer-resident lacked standing, under state constitutional provision allowing declaratory judgment actions by taxpayer-residents challenging governmental action involving unlawful spending of public funds, against Department of Health and Human Services and its Commissioner alleging that they were failing to meet their statutory and constitutional duties with respect to abused and neglected children as a result of their "irresponsible" spending policies involving poor allocation of resources, where taxpayer-resident failed to challenge any specific spending action or spending approval by Department.

MUNICIPAL ORDINANCE - NORTH DAKOTA

Smith v. Isakson

Supreme Court of North Dakota - July 22, 2021 - N.W.2d - 2021 WL 3083472 - 2021 ND 131

Defendant convicted, following bench trial, of violating city ordinance prohibiting the sale of merchandise on public grounds without a permit filed a pro se petition for writ of supervision, alleging violation of his right to jury trial.

The Supreme Court held that:

- Defendant was not entitled to jury trial under Sixth Amendment, but
- He was entitled to jury trial under North Dakota constitution.

Defendant charged with violating city ordinance prohibiting the sale of merchandise on public grounds without permit was not entitled to jury trial under the Sixth Amendment, since the offense was characterized as infraction, and carried a maximum potential fine of $1000, without any possible prison term.

Defendant charged with violating city ordinance prohibiting the sale of merchandise on public grounds without permit was entitled to jury trial under North Dakota constitution; when North Dakota constitution was adopted in 1889, laws permitted cities to comprehensively regulate sales in public places, and jury trial was guaranteed for violation of such laws because potential penalties

included incarceration for up to three months and fines of up to $100, and constitution extended right to jury trial to all crimes for which the right was preserved when constitution was adopted.

IMMUNITY - OREGON

Sherman v. State by and through Department of Human Services

Supreme Court of Oregon, En Banc - July 29, 2021 - P.3d - 368 Or. 403 - 2021 WL 3204726

Former foster child brought action against Department of Human Services, alleging that the Department failed to protect her from abuse while she was a child in foster care by negligently certifying her foster parents and failing to appropriately investigate and respond to alleged abuse, and also alleging violation of the Vulnerable Person Act.

The Circuit Court granted Department's motion to dismiss, ruling that claims were time-barred by the statute of ultimate repose. Former foster child appealed. The Court of Appeals reversed and remanded, and Department appealed.

The Supreme Court, en banc, held that:

- Statutory two year limitations period for Oregon Tort Claims Act (OTCA) claims does not render statute, exempting child abuse claims from the statute of ultimate repose, completely ineffective;
- Statute, exempting child abuse claims from the statute of ultimate repose, applies to all child abuse claims, including claims for child abuse brought against public bodies; and
- Child abuse claims brought against Department should not have been dismissed.

EMINENT DOMAIN - SOUTH CAROLINA

Ray v. City of Rock Hill

Supreme Court of South Carolina - August 4, 2021 - S.E.2d - 2021 WL 3378945

Landowner brought action against city for trespass and inverse condemnation arising from city's piping stormwater under her house.

The Circuit Court granted summary for city on inverse condemnation claim, after which the Circuit Court directed a verdict for city on trespass claim. Landowner appealed. The Court of Appeals affirmed in part, reversed in part, and remanded. City petitioned for writ of certiorari, which was granted.

The Supreme Court held that:

- Factual issues about city's reconnection of city pipes to stormwater catch basin precluded summary judgment on inverse condemnation claim, but
- Statute of limitations barred recovery for damage caused by flow of water before city reconnected pipes.

Genuine issues of material fact existed as to whether city's reconnection of three city pipes to stormwater catch basin, which allowed water to resume flowing through pipe under landowner's house, was an affirmative, positive, aggressive act by city resulting in damage to landowner's property, precluding summary judgment on landowner's inverse condemnation claim.

Landowner's right of action against city for inverse condemnation was limited to three years from date she discovered, or by exercise of reasonable diligence should have discovered, she might have had a claim against city for city's piping stormwater under her house.

PUBLIC UTILITIES - TEXAS

Quadvest, L.P. v. San Jacinto River Authority

United States Court of Appeals, Fifth Circuit - August 3, 2021 - F.4th - 2021 WL 3362470

Investor-owned water utilities brought action against San Jacinto River Authority (SJRA), state entity, alleging that SJRA violated Sherman Act when it entered into and enforced contracts relating to purchase of wholesale water in Montgomery County, Texas.

The United States District Court for the Southern District of Texas denied SJRA's motion to dismiss based upon state-action immunity. SJRA filed interlocutory appeal.

The Court of Appeals held that:

- SJRA invoked state-action immunity as state entity, and therefore interlocutory appeal of denial SJRA's motion to dismiss based upon state-action immunity was proper, and
- SJRA was not entitled to state-action immunity at pleading stage.

San Jacinto River Authority (SJRA) invoked state-action immunity as state entity, in action brought by investor-owned water utilities alleging that SJRA violated Sherman Act when it entered into and enforced contracts relating to purchase of wholesale water in Montgomery County, Texas, and therefore interlocutory appeal of denial SJRA's motion to dismiss based upon state-action immunity was proper, since SJRA was active participant in market over which it purportedly exerted anticompetitive control.

Texas Legislature did not authorize entry of San Jacinto River Authority (SJRA), as state entity, into, and enforcement of, challenged provisions of groundwater reduction plan (GRP) contract with intent to displace competition in market for wholesale raw water in Montgomery County, Texas, and therefore SJRA was not entitled to state-action immunity at pleading stage of action brought by investor-owned water utilities alleging that SJRA violated Sherman Act, since statutory authority to sell surface water would not inherently, logically, or ordinarily result in displacement of competition in market for allegedly cheaper, plentiful groundwater.

EMINENT DOMAIN - COLORADO

North Mill Street, LLC v. City of Aspen

United States Court of Appeals, Tenth Circuit - July 27, 2021 - F.4th - 2021 WL 3163952

Property owner, whose property was located within area of city zoned for industrial use, brought action against city after council adopted ordinance that removed free-market residential units as permitted conditional use within such zoning district and refused to rezone property to mixed use zoning district, seeking declaratory judgment that ordinance was invalid and unenforceable and injunction against enforcing ordinance, and alleging, inter alia, a § 1983 regulatory takings claim under the Fifth Amendment.

The United States District Court granted defendants' motion to dismiss. Property owner appealed.

The Court of Appeals held that:

- Finality rule, under which a regulatory takings claim is not ripe until plaintiff has received final decision, is prudential, and not jurisdictional;
- Owner's claims were constitutionally ripe for review;
- City retained discretion to approve free-market residential unit development, supporting determination that city's decision was not final, and thus claims were not prudentially ripe for review; and
- It was not reasonably certain that city would deny application for variance, supporting determination that city's decision was not final, and thus claims were not prudentially ripe for review.

Finality rule, under which a regulatory takings claim is not ripe until the plaintiff has received a final decision regarding the application of the challenged regulations to the property at issue from the government entity charged with implementing the regulations, is prudential, and not jurisdictional.

Property owner, whose property was located within industrial zone, adequately alleged that it suffered economic injury that was fairly traceable to city's adoption of ordinance that removed free-market residential (FMR) units as permitted conditional use within property's zoning district and denial of owner's rezoning application, so as to satisfy injury-in-fact requirement for Article III standing, and thus owner's claims were constitutionally ripe for review, for purposes of claims against city alleging, inter alia, § 1983 regulatory takings claim under the Fifth Amendment; owner alleged that ordinance made it more difficult to find suitable tenants, and that it was not able to build FMR units unless it pursued planned development application for a variance.

City retained discretion to approve free-market residential unit (FMR) development on property owner's property, which was zoned for industrial use, through the planned development application process, supporting determination that city's decision was not final, so as for claims to not be prudentially ripe for review, for purposes of claims against city alleging, inter alia, § 1983 regulatory takings claim under the Fifth Amendment; city retained discretion to approve a use variation from the zoning regulations through the planned development application process, and city was merely required to consider earlier findings made in course of rezoning application in considering such a variance.

It was not reasonably certain that city would deny property owner's application for variance from zoning regulations through the planned development application process, in order to permit free-market residential unit (FMR) development on property zoned for industrial use, supporting determination that city's decision was not final, and thus claims were not prudentially ripe for review, for purposes of claims against city alleging, inter alia, § 1983 regulatory takings claim under the Fifth Amendment; relevant zoning ordinance did not definitively determine type of development permitted on property specifically, and owner had only submitted an application for re-zoning as opposed to variance.

ZONING & PLANNING - MAINE

Hill v. Town of Wells

Supreme Judicial Court of Maine - July 13, 2021 - A.3d - 2021 WL 2932349 - 2021 ME 38

Property owner sought judicial review of the decision of town's zoning board of appeals (ZBA) denying his request for setback variances.

The Superior Court rejected ZBA's denial of the variances. Abutting landowner, as intervenor, appealed.

The Supreme Judicial Court held that:

- In considering whether the essential character of the locality within which property owner sought a setback variance would be altered if variance was granted, "locality" included a wildlife sanctuary and the abutting undeveloped Refuge and wetlands, and
- Property owner failed to show that his proposed residence with the variances would conform to the "essential character of the locality," and would not degrade the significant value of surrounding environmental resources, thus, supporting denial of owner's variance request.

BALLOT INITIATIVES - OHIO

State ex rel. Schmitt v. Bridgeport

Supreme Court of Ohio - August 3, 2021 - N.E.3d - 2021 WL 3376105 - 2021-Ohio-2664

Initiative proponent sought a writ of mandamus to compel village clerk to certify to the elections board the sufficiency and validity of an initiative petition, or to compel the elections board to place the initiative on the November ballot.

The Supreme Court held that initiative proponent failed to comply with the requirement that he file a signed initiative petition with the village clerk.

Initiative proponent failed to comply with the requirement that he file a signed initiative petition with the village clerk, and thus he was not entitled to mandamus relief compelling village clerk to certify to the elections board the sufficiency and validity of the initiative petition, or compelling the elections board to place the initiative on the November ballot; proponent attempted to file the petition with mayor and unpaid volunteer clerk in the mayor's office, however statute required proponent to file the initiative petition with the village clerk, whose duties had been consolidated with the village treasurer into an appointed position called "fiscal officer," and proponent never attempted to file initiative petition with fiscal officer.

PUBLIC MEETINGS - OHIO

Ison v. Madison Local School District Board of Education

United States Court of Appeals, Sixth Circuit - July 7, 2021 - 3 F.4th 887

Four attendees of school board meetings, who were interrupted or prevented from speaking for failing to comply with board's public participation policy, filed § 1983 action asserting that board's policy violated First Amendment facially and as applied to them, and they sought compensatory damages, declaratory relief, and an injunction.

The United States District Court for the Southern District of Ohio granted summary judgment in favor of board. Attendees appealed.

The Court of Appeals held that:

- Policy constituted impermissible viewpoint discrimination in violation of the First Amendment;
- Policy violated First Amendment as applied to attendee who was interrupted and removed from meeting;
- Board had significant governmental interest supporting policy's in-person preregistration requirement, as necessary for requirement to be valid time, place, or manner restriction;
- Preregistration requirement was narrowly tailored to that significant governmental interest, as necessary for it to be valid time, place, or manner restriction;
- Individuals who could not comply with preregistration requirement had ample alternative channels to communicate with board, and thus requirement was valid time, place, or manner restriction;
- Preregistration requirement did not violate First Amendment as applied to three attendees who were prevented from speaking; and
- Policy was not void for vagueness under the First Amendment.

PROCUREMENT - PENNSYLVANIA

U.S. Venture, Inc. v. Commonwealth

Supreme Court of Pennsylvania - July 21, 2021 - A.3d - 2021 WL 3073379

Distributor of fuel products petitioned for review of Board of Claims' order, No. 4180, dismissing distributor's contractual claims arising out of Commonwealth's nonpayment of two alternative and clean energy (ACE) grants that distributor obtained to add compressed natural gas fuel pumps to existing fuel stations.

The Commonwealth Court affirmed. Distributor petitioned for allowance of appeal, which was granted.

The Supreme Court held that ACE grants were "grants" that were not subject to limited waiver of sovereign immunity under Procurement Code.

Commonwealth's award of Alternative and Clean Energy (ACE) grants to fuel products distributor to support distributor's plans to add compressed natural gas fuel pumps to two existing fuel stations were "grants" that were not subject to limited waiver of sovereign immunity under Procurement Code, and thus Board of Claims did not have jurisdiction to resolve distributor's contractual claims arising from nonpayment of grants, despite argument that grants were awarded with a primary purpose to procure construction, where Commonwealth had no ownership, control of, or interest in the privately-owned fuel pumps located on privately-owned property, and Commonwealth received nothing from the deals other than advancement of its desire to promote ACE program and reduce harmful emissions.

LIABILITY - WASHINGTON

Norg v. City of Seattle

Court of Appeals of Washington, Division 1 - July 19, 2021 - P.3d - 2021 WL 3030524

Husband and wife filed suit against city, alleging that city was negligent in responding to wife's 911 call while husband was having heart attack.

City filed motion for summary judgment, and husband and wife filed motion for partial summary judgment. The Superior Court granted husband and wife's motion and struck city's public duty

doctrine defense. City appealed.

The Court of Appeals held that public duty doctrine did not apply to bar husband and wife's claim.

City's duty to respond to 911 call was not public duty owed to general public at large but was instead common law duty to exercise reasonable care in providing emergency medical services, and therefore public duty doctrine did not apply to bar claims brought by husband and wife alleging that city was negligent in responding to wife's 911 call while husband was having heart attack.

PUBLIC UTILITIES - CALIFORNIA

BullsEye Telecom, Inc. v. California Public Utilities Commission

Court of Appeal, First District, Division 5, California - July 6, 2021 - Cal.Rptr.3d - 66 Cal.App.5th 301 - 2021 WL 2801926 - 21 Cal. Daily Op. Serv. 6845

Local carriers filed petitions for writ review of decisions by Public Utilities Commission (PUC), first, finding that local carriers discriminated against long-distance carrier with respect to rates charged for switched access services and, second, denying local carriers' request for rehearing but modifying earlier decision.

Petitions were consolidated and writ of review was issued.

The Court of Appeal held that:

- PUC was not required to conduct new evidentiary hearing when granting request for rehearing;
- PUC's determination that switched access was monopoly bottleneck service was not novel;
- PUC's determination that switched access was monopoly bottleneck service allowed it to revisit prior holdings that disparity in rates was justified;
- PUC did not shift burden of proving unlawful discrimination to local carriers;
- Any deviations from scoping memorandum did not prejudice local carriers; and
- Statutes prohibiting discriminatory reparations and refunds of rates on file with PUC did not preclude PUC from ordering refund as reparation for rate discrimination.

When granting request for rehearing, statute governing orders of modification did not require Public Utilities Commission (PUC) to follow procedural aspects of regular hearings, including new evidentiary hearing, before modifying and superseding its prior decision that local carriers set discriminatory rates against long-distance carrier; statutes governing proceedings before PUC did not define "rehearing" as equivalent to regular hearing, but, rather, only specified that evidentiary proceedings were required in certain situations, such as on rehearing in expedited complaint procedure for small claims, and local carriers did not demonstrate they were denied opportunity to present evidence in original evidentiary proceeding or that new factual developments required new evidentiary hearing.

Determination by Public Utilities Commission (PUC) that switched access was monopoly bottleneck service, supporting PUC's conclusion that local carriers imposed discriminatory rates against long-distance carrier, did not constitute novel determination, and, thus, did not violate PUC procedural rules prohibiting retroactive applications of novel regulatory determinations, where PUC had previously recognized, in context of incumbent local exchange carriers prior to adoption of Telecommunications Act of 1996, that switched access was monopoly bottleneck service, and given that PUC's pre-Act determination turned on nature of services, PUC was not required to state expressly that same analysis would apply to post-Act competitive local carriers before applying that

analysis in case at hand.

Determination by Public Utilities Commission (PUC) that switched access service constituted monopoly bottleneck service allowed PUC, on rehearing of long-distance carrier's claims that local carriers engaged in rate discrimination, to revisit and reject its prior determinations that long-distance carrier was not willing and able to accept terms and conditions of local carriers' lower-rate contracts with its competitors and that rational basis supported rate difference; PUC's determination on rehearing, finding that carrier was willing and able to accept terms and conditions of competitors' contracts and that no rational basis supported rate difference, indicated PUC did not intend reasoning for its prior findings to the contrary to extend to monopoly bottleneck services.

In finding that local carriers failed to submit evidence of any rational basis for discriminating against long-distance carrier with respect to rates for local exchange services, Public Utility Commission (PUC) did not impermissibly shift burden of proving unlawful discrimination to local carriers rather than long-distance carrier, where long-distance carrier had already established that there was no difference in the cost of providing services, such that PUC properly required local carriers to offer other justification for rate differential.

By deviating from scoping memorandum, which gave local carriers reason to believe long-distance carrier's discrimination claim would fail if long-distance carrier were not willing and able to accept all terms of lower-rate agreements offered to its competitors, Public Utilities Commission (PUC), which held that long-distance carrier's willingness and ability to accept terms related to switched access services were sufficient, did not prejudice local carriers, where PUC considered all issues described in scoping memorandum and acknowledged that while long-distance carrier was only willing and able to meet terms related to switched access services, such willingness and ability were legally sufficient in context of monopoly bottleneck service.

Holding by Public Utilities Commission (PUC) that costs of service did not constitute rational basis for differential rates set by local carriers for long-distance carrier versus competitors, and that certain other factors were irrelevant to rational-basis analysis, was not contrary to scoping memorandum, even though scoping memorandum gave local carriers reason to believe long-distance carrier's discrimination claim would fail if there were non-cost-related considerations that supported different treatment, where PUC considered all issues described in scoping memorandum, which did not specify any particular factors that would be considered in rational-basis analysis.

Holding of Public Utilities Commission (PUC) that factors other than cost of services were irrelevant to analysis of whether rational basis existed for local carriers' setting of higher rates for switched access services with respect to long-distance carrier versus its competitors, in contrast with scoping memorandum that listed non-cost factors as possible rational bases for different rates, did not prejudice local carriers, where local carriers did not identify any evidence they would have presented had they been aware PUC would conclude factors listed in memorandum did not constitute rational bases in light of record, and memorandum did not discourage or prevent local carriers, which did not assert different costs of service supported different rates, from presenting any such evidence.

Statutes prohibiting public utilities from refunding any portion of rates on file with Public Utilities Commission (PUC) and prohibiting discriminatory reparations for discriminatory rates did not preclude PUC from ordering refund to long-distance carrier as reparation for local carriers' discriminatory offering and provision of off-tariff discounts to certain of long-distance carrier's competitors; local carriers did not establish that other long-distance customers with similar claims did not have opportunity to file complaint with PUC, as would render reparations discriminatory, refund statute did not prohibit all awards permitted by reparations statute, and refund statute

allowed “just and reasonable” refunds as reparations for rate discrimination when justified by special circumstances.

BALLOT INITIATIVE - COLORADO

Matter of Title , Ballot Title and Submission Clause for 2021-2022 #16

Supreme Court of Colorado - June 21, 2021 - P.3d - 2021 WL 2645511 - 2021 CO 55

Initiative opponents petitioned for review of Ballot Title Setting Board decisions in setting title, ballot title, and submission clause for initiative proposing to amend Colorado’s criminal animal cruelty statutes by ending certain exemptions for livestock, creating a safe harbor for the slaughter of livestock with various conditions, and expanding the definition of “sexual act with an animal,” a type of animal cruelty, alleging that initiative spanned multiple subjects in violation of single subject requirement.

The Supreme Court held that:

- Central theme of ballot initiative was to extend animal cruelty statutes to livestock;
- Initiative’s safe harbor for slaughter of livestock did not violate single subject rule;
- Initiative’s expansion of definition of “sexual act with an animal” violated single subject rule.

In determining whether ballot initiative violated single subject rule, central theme of initiative was to extend criminal animal cruelty statutes to livestock; initiative would remove animal cruelty statutes’ exception for accepted animal husbandry practices utilized by any person in the care of companion or livestock animals, end exemption to certain sentencing provisions for treatment of livestock and other animals used in farm or ranch production of food, fiber, or other agricultural products when the treatment is in accordance with accepted agricultural animal husbandry practices, enact a safe harbor for slaughter of livestock from animal cruelty statutes, and expand definition of sexual act with an animal, a type of animal cruelty.

Initiative’s safe harbor amendment to criminal animal cruelty statutes for slaughter of livestock, clarifying that slaughtering livestock would not count as animal cruelty if animals had lived a minimum number of years and they were killed in accordance with accepted animal husbandry practices that did not cause needless suffering, did not violate single subject rule; policy preventing killing of young livestock addressed treatment of living animals, rather than livestock death, risk of logrolling was low because creating safe harbor pointed in the same direction of increasing welfare of livestock and would not have surprised voters, and proposal was not particularly lengthy or complex.

Initiative’s amendment to Colorado’s criminal animal cruelty statutes by expansion of definition of “sexual act with an animal,” a type of animal cruelty, violated single subject rule; provision would have modified standard of care for all animals by criminalizing new conduct, regardless of whether that conduct was directed at livestock or other animals, served at least two distinct and separate purposes, was not necessarily and properly connected to measure’s central focus of incorporating livestock into animal cruelty statutes, and ran risk of surprising voters with a surreptitious change.

IMMUNITY - MISSOURI

Davis v. Buchanan County, Missouri

United States Court of Appeals, Eighth Circuit - July 20, 2021 - F.4th - 2021 WL 3042232

Mother of former inmate at county jail brought wrongful death action against county, member of sheriff's department, former county jail administrator, and former county sheriff, alleging that defendants had failed during three-day incarceration period to provide appropriate medical care for inmate's endocrine disorders.

The United States District Court for the Western District of Missouri denied county's motion to dismiss on immunity grounds and its subsequent motion for reconsideration, on theory that county had waived its sovereign immunity by "purchasing" insurance. County appealed.

The Court of Appeals held that, under Missouri law as predicted, county that entered into an inmate-health-services contract that required third party provider to "procure and maintain" various liability insurance policies and "to name the county as an additional insured," thereby "purchased" liability insurance.

Under Missouri law as predicted by the Eighth Circuit Court of Appeals, county that entered into an inmate-health-services contract with third party that was to supply health care to inmates at county correctional facility, a contract that, in addition to providing for such health care services, also required the third party to "procure and maintain" various liability insurance policies and "to name the county as an additional insured," thereby "purchased" liability insurance and waived its sovereign immunity for tort claims covered by that insurance; while county did not make direct payment to liability insurer, its payment of roughly $300,000 per year to third party for services that included the acquisition of liability insurance was in nature of a "purchase" of insurance, as that term was used in Missouri waiver-of-immunity provision.

SPECIAL ASSESSMENTS - NEBRASKA

Main St Properties LLC v. City of Bellevue

Supreme Court of Nebraska - July 16, 2021 - N.W.2d - 309 Neb. 738 - 2021 WL 3008959

Property owner filed petition to appeal city board of equalization decision to place liens on the property in order to collect costs that had been assessed for the demolition and removal of a structure on the property.

The District Court dismissed the petition based on lack of jurisdiction, and property owner appealed.

The Supreme Court held that district court had jurisdiction to consider property owner's petition.

A "special assessment," within meaning of statute providing that property owner may appeal "any special assessment" to the district court where the subject property is located includes and applies to a "special assessment" levied under authority of statute providing that a city or village may levy the cost for demolishing or repairing a nuisance as a special assessment.

District court had jurisdiction to consider property owner's petition challenging special assessment which city levied to recover costs associated with demolishing a nuisance building on the property.

TORT CLAIMS - NEW JERSEY

H.C. Equities, LP v. County of Union

Supreme Court of New Jersey - July 19, 2021 - A.3d - 2021 WL 3027207

Commercial landlord brought action against county and county improvement authority, asserting claims for trade libel, defamation, and conspiracy, related to a report that contained allegedly false statements about condition of buildings it rented to the county, which allegedly thwarted landlord's settlement with county for a dispute concerning the lease.

The Superior Court dismissed the action. Landlord appealed. The Superior Court, Appellate Division, reversed and remanded with directions. County and authority petitioned for certification, and petition was granted.

The Supreme Court held that:

- Landlord's claims accrued and triggered the 90-day notice requirement under the Tort Claims Act on date of letter in which it identified county and authority as being liable for its injuries, and
- Landlord's series of letters did not establish substantial compliance with Tort Claims Act's notice requirement.

Commercial landlord's claims for trade libel and defamation against county improvement authority, and for conspiracy against authority and the county, related to report of the condition of buildings leased to the county which allegedly contained false statements about the properties and allegedly thwarted landlord's settlement agreement with the county for dispute concerning the lease, accrued, and therefore triggered the notice requirement under the Tort Claims Act, on date on date of landlord's letter, directed to counsel for the authority, in which landlord stated that it viewed county and authority to be liable for its injuries, and landlord was thereby required to present its claims to the county and authority no later than 90 days from date of the letter.

Commercial landlord's three letters, sent at different times to different recipients, did not establish substantial compliance with notice requirements of the Tort Claims Act, so as to allow claims for trade libel, defamation, and conspiracy against county and county improvement authority arising from allegedly false statements in report on condition of buildings leased to the county, since the Act clearly required one identifiable date on which the public entity received notice, the letters did not contain sufficient information to alert county and authority of claims landlord would assert, to give them time to investigate and to settle, even if letters were considered together, which would result in prejudice, and landlord provided no reasonable explanation why there was not strict compliance with the Act.

EMINENT DOMAIN - NEW YORK

Gabe Realty Corp. v. City of White Plains Urban Renewal Agency

Supreme Court, Appellate Division, Second Department, New York - June 30, 2021 - N.Y.S.3d - 195 A.D.3d 1020 - 2021 WL 2672758 - 2021 N.Y. Slip Op. 04134

Owners of some parcels of real property within an area to be condemned commenced proceeding seeking judicial review of urban renewal agency's determination to acquire their properties by eminent domain.

The Supreme Court, Appellate Division, held that authority's bare pleading of substandard conditions did not satisfy its obligation to provide an adequate basis for eminent domain condemnation of the subject properties.

Urban renewal authority's bare pleading of substandard conditions did not satisfy its obligation to provide an adequate basis for its conclusion that remediation of urban blight was a sufficient public benefit to support eminent domain condemnation of the subject properties, although the remediation of substandard or insanitary conditions was a proper basis for the exercise of the power of eminent domain, and agency completed a full environmental assessment form pursuant to the State Environmental Quality Review Act; agency relied only on conclusory assertions of blight based on a 25-year-old urban renewal plan that in itself lacked detail or documentation, and the environmental assessment failed to identify relevant areas of environmental concern.

EMINENT DOMAIN - NORTH DAKOTA

City of West Fargo v. McAllister

Supreme Court of North Dakota - July 22, 2021 - N.W.2d - 2021 WL 3083466 - 2021 ND 136

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

The District Court entered a condemnation judgment and certified judgment as final. Landowner appealed.

The Supreme Court held that trial court abused its discretion by certifying judgment as final without any analysis.

Trial court abused its discretion by certifying condemnation judgment in quick-take eminent domain proceeding as final, where court provided no analysis of factors for a request for certification, and none of the parties, nor the court, demonstrated how the case was not a standard interlocutory appeal, even though both parties argued that the only issue left to be decided was condemnee's costs and disbursements.

LEGAL SERVICES - ALABAMA

Fuston, Petway & French, LLP v. Water Works Board of City of Birmingham

Supreme Court of Alabama - June 30, 2021 - So.3d - 2021 WL 2678325

Law firm brought action against client, which was a city water works board, and asserted claims of breach of contract and breach of the covenant of good faith and fair dealing, which arose from board's vote to terminate contract pursuant to which law firm represented board.

The Circuit Court dismissed the claim of breach of the covenant of good faith and fair dealing and later entered summary judgment for the board on the claim of breach of contract. Law firm appealed.

The Supreme Court held that:

- Contractual provision requiring that there be a supermajority in order for board to terminate the

contract was against public policy and therefore invalid, and
- The contract was for legal services as opposed to nonlegal services.

Contractual provision requiring that there be a supermajority in order for city water works board to terminate the three-year contract, pursuant to which a law firm provided legal services to board, was against public policy and therefore invalid.

Contract between law firm and city water works board was for legal services as opposed to nonlegal services, as was relevant to determining if contractual provision requiring that there be a supermajority in order for board to terminate the contract before the end of its three-year duration was against public policy; despite argument that agreement provided that law firm administer board's purported contract-compliance program, which allegedly would have been a nonlegal service so as to allow law firm to maintain breach-of-contract claim against board for terminating the contract as to the contract-compliance program's administration, nothing in the record showed that board adopted such a program.

PUBLIC UTILITIES - CALIFORNIA

Save Lafayette Trees v. East Bay Regional Park District

Court of Appeal, First District, Division 3, California - June 30, 2021 - Cal.Rptr.3d - 2021 WL 2677595 - 21 Cal. Daily Op. Serv. 6705

Neighbors and interest group filed an amended petition/complaint seeking to vacate regional park district's approval of a memorandum of understanding with natural gas utility allowing for the removal of 245 trees from park district land.

The Superior Court sustained defendants' demurrers without leave to amend and dismissed the lawsuit, and neighbors and interest group appealed.

The Court of Appeal held that:

- Tolling agreement with regional park district regarding California Environmental Quality Act (CEQA) challenge was not binding on utility;
- Date on which CEQA's 180-day statute of limitations was triggered was date of public hearing;
- Statutory exception prohibiting a regional park district from interfering with public property that is either "owned or controlled" by city did not require park district to comply with municipal tree protection ordinance;
- Park district's board was not bound by district ordinance providing rules and regulations for the general public's use of district land; and
- District's actions were all quasi-legislative actions to which constitutional due process rights of notice and hearing were inapplicable.

Tolling agreement between petitioners and regional park district regarding petitioners' California Environmental Quality Act (CEQA) challenge to district's approval of a memorandum of understanding with natural gas utility regarding removal of trees on park land was not binding on utility; utility was both a necessary party and an indispensable party without whom the CEQA cause of action could not proceed, and utility, as a named party, was entitled to either assert or waive the statute of limitations defense to the amended petition/complaint.

Date on which 180-day statute of limitations under the California Environmental Quality Act (CEQA) was triggered for petitioners' challenge to park district's agreement to allow gas utility to remove

245 trees from park land was date of public hearing at which park district committed to a definite course of action by issuing a resolution authorizing the acceptance of funding from utility for the cost of the tree replacement and maintenance, even if meeting agenda and description of the resolution did not indicate that trees would be removed; memorandum of understanding, executed over the following two days, was consistent with the resolution and the project as outlined in the staff report submitted to the park district's board of directors.

Statutory exception prohibiting a regional park district from interfering with public property that is either "owned or controlled" by city did not require park district to comply with municipal tree protection ordinance before entering into memorandum of understanding with gas utility to allow gas utility to remove 245 trees from park land within city; rather, exception merely prohibited district from taking control of city parks and recreational facilities, such as a municipal golf course.

Regional park district's board was not bound by district ordinance providing rules and regulations for the general public's use of district land, and thus ordinance did not apply to memorandum of understanding between park district and gas utility allowing utility to remove 245 trees from park district land; park district's administration of district land was subject to separate "Operating Guidelines."

Actions of regional park district's board of directors in holding a public hearing, issuing a resolution, and entering into a memorandum of understanding with gas utility allowing utility to remove 245 trees from park district land were all quasi-legislative actions, not quasi-adjudicatory ones, to which constitutional due process rights of notice and hearing were inapplicable; decisions were not limited to a consideration of the interests of nearby property owners, but, rather, board was tasked with considering utility's request in the context of how the proposed tree removal and replacement and future maintenance operations would impact the park district's mission, and decision required the board to assess a broad spectrum of community costs and benefits not limited to facts peculiar to the individual case.

IMMUNITY - FLORIDA

Khoury v. Miami-Dade County School Board

United States Court of Appeals, Eleventh Circuit - July 7, 2021 - F.4th - 2021 WL 2817612

Detainee brought § 1983 action against public school board and public school police officers, asserting claims for municipal liability against board and claims against officers for false arrest, excessive force, and First Amendment retaliation.

The United States District Court for the Southern District of Florida entered summary judgment for board and officer. Detainee appealed.

The Court of Appeals held that:

- Officer was not entitled to qualified immunity for false arrest claim;
- Fact issues precluded summary judgment on First Amendment retaliation claim; and
- Board did not have municipal liability under § 1983.

Public school police officer had no arguable probable cause to conclude that detainee was a danger to herself or others as required to involuntarily commit her for a mental health examination under Florida's Baker Act and thus, he was not entitled to qualified immunity from detainee's § 1983 false arrest claim, where although detainee had been acting strangely while filming vehicles she believed

to be parked illegally and acted irrationally by screaming she was being attacked by the officer, she was not violating the law or harming anyone by filming, nor was she a threat to any of the witnesses.

Genuine issue of material fact as to whether there was a causal connection between public school police officer's retaliatory actions in involuntarily committing detainee and forcing her to undergo a mental health examination under Florida's Baker Act in connection with incident related to detainee's filming of what she believed to be illegally parked cars on school property and the adverse effect on speech precluded summary judgment on detainee's First Amendment retaliation claim against officer.

Detainee failed to provide sufficient evidence that public school board had a custom or practice of committing people who did not qualify for an involuntary mental health examination pursuant to Florida's Baker Act and thus, board did not have § 1983 municipal liability for alleged violation of her First and Fourth Amendment rights for public school police officer's actions in committing her for a mental health examination under the Baker Act in relation to an incident that occurred while she was filming cars she believed to be illegally parked on school property; despite detainee's allegations of other incidents involving the Baker Act detentions, those incidents were either too remote in time or did not show a constitutional violation.

PUBLIC UTILITIES - HAWAII

Matter of Hawai'ian Electric Company, Inc.

Supreme Court of Hawai'i - June 29, 2021 - P.3d - 2021 WL 2660470

Environmental organization sought review of Public Utilities Commission's (PUC) decision to not re-open its order approving power purchase agreement (PPA) in which electric utility agreed to purchase wind energy generated on proposed wind farm.

The Supreme Court held that:

- Court had jurisdiction to rule on jurisdictional issue;
- Organization's request to re-open via relief from judgment rule was not a collateral attack on order;
- Organization was a "person aggrieved" with standing to appeal;
- Relief from judgment rule was not available to re-open order to address impact of project on greenhouse gas emissions;
- Alleged lack of a timely incidental take license over Hawai'ian hoary bat did not void PPA as a basis to re-open order; and
- Blog article from popular science magazine about decreased wind energy prices did not warrant re-opening of order.

Supreme Court possessed jurisdiction, at a minimum, to rule on jurisdictional issue raised in environmental organization's appeal of Public Utilities Commission's (PUC) decision to not re-open its unappealed order approving power purchase agreement (PPA) between electric utility and wind energy generator following contested case proceeding in which organization was granted participant status, where objector asked Court to consider whether rule governing motions for relief from judgment or order provided authority to re-open PUC's order due to substantially changed circumstances.

Environmental organization's request, made via the relief from judgment rule, to re-open Public

Utilities Commission's (PUC) order approving power purchase agreement (PPA) between electric utility and wind energy generator following contested case proceeding in which organization was granted participant status was not an impermissible collateral attack on order, where motion was submitted in same proceeding that generated the order.

Environmental organization was a "person aggrieved" with standing to appeal Public Utilities Commission's (PUC) decision to not re-open PUC's unappealed order approving power purchase agreement (PPA) between electric utility and wind energy generator following contested case proceeding in which organization was granted participant status, where organization's motion for relief from the order was brought within the same proceeding.

Public Utilities Commission (PUC) properly declined to use the relief from judgment rule, which was asserted by environmental organization that had participant status, as a basis to re-open PUC's order approving power purchase agreement (PPA) between electric utility and wind energy generator in order to address impact of project on greenhouse gas (GHG) emissions, where absence of a GHG emissions analysis was readily apparent in order when it was filed, organization could have timely moved for rehearing or reconsideration of order, and organization also could have timely appealed order.

Any failure of electric utility or wind energy generator to timely obtain an incidental take license (ITL) over Hawai'ian hoary bat did not void their power purchase agreement (PPA) and Public Utilities Commission's (PUC) order approving PPA within meaning of the relief from judgment rule, and therefore PUC was not required to re-open its order, via that rule, pursuant to request of environmental organization that had participant status in contested case proceeding; the "voiding" of PPA and PUC's order that organization sought to prove did not involve defects in jurisdiction or a due process violation.

Blog article from popular science magazine summarizing Department of Energy's (DOE) report that wind energy prices nationwide had fallen did not provide extraordinary circumstances necessary to re-open Public Utilities Commission's (PUC) order approving power purchase agreement (PPA) between electric utility and wind energy generator on the basis, under the relief from judgment rule, that it was no longer equitable for order approving higher wind energy prices to have prospective application, where Hawai'i was excluded from DOE's report due to unique issues facing wind development in state.

VOTER INITIATIVES - MAINE

Portland Regional Chamber of Commerce v. City of Portland

Supreme Judicial Court of Maine - July 6, 2021 - A.3d - 2021 WL 2795844 - 2021 ME 34

Regional chamber of commerce brought action against city alleging that voter-initiated legislation establishing emergency minimum wage in city violated direct initiative provisions of State Constitution and city's direct initiative ordinance.

The Superior Court granted summary judgment against chamber. Chamber appealed and intervenors cross-appealed.

The Supreme Judicial Court held that:

- Emergency minimum wage provision did not violate direct initiative power under State Constitution;

- Provision did not violate direct initiative ordinance; and
- Effective date of provision was date that new minimum wage rate came into effect.

Voter-initiated legislation establishing emergency minimum wage in city related to municipal affairs, and therefore it did not violate direct initiative provisions of State Constitution; local minimum wage was among the issues encompassed by municipal legislative authority.

Voter-initiated legislation establishing emergency minimum wage in city related to municipal affairs, and therefore it did not violate city's direct initiative ordinance; local minimum wage was among the issues encompassed by municipal legislative authority, and direct initiative ordinance was a predominantly procedural provision that merely facilitated the substantive law and that could evolve separate and apart from the procedure.

Effective date of voter-initiated legislation establishing emergency minimum wage in city was date that new minimum wage rate came into effect, where legislation did not explicitly state an effective date for emergency minimum wage provision and emergency provision cross-referenced another section to establish the effective minimum wage rate for purposes of computing emergency minimum wage.

CIVIL ASSESSMENTS - MARYLAND

Angel Enterprises Limited Partnership v. Talbot County

Court of Appeals of Maryland - July 9, 2021 - A.3d - 2021 WL 2885857

Following administrative proceeding arising from imposition of civil penalty on landowners for their violations of county code, county filed petition for judicial review of decision of county board of appeals, which determined that daily accrual of fines was stayed during pendency of administrative appeal.

The Circuit Court reversed in part. Landowners appealed. The Court of Special Appeals affirmed in part and vacated in part. Landowners filed petition for writ of certiorari.

The Court of Appeals held that:

- The jurisdiction conferred upon a local board of appeals by Express Powers Act does not include original jurisdiction or administrative adjudicatory review of civil fines or penalties or other civil assessments, and
- Civil assessments issued by county compliance officer were not "adjudicatory orders" over which county, a charter county, could confer jurisdiction upon its board of appeals pursuant to Express Power Act.

The jurisdiction conferred upon a local board of appeals by Express Powers Act does not include original jurisdiction or administrative adjudicatory review of civil fines or penalties or other civil assessments.

Civil assessments issued by county compliance officer on landowners for violations of county code associated with clearing of trees and building of driveway were not "adjudicatory orders" over which county, a charter county, could confer jurisdiction upon its board of appeals pursuant to Express Power Act; assessments did not command landowners to take a specific action but rather purported to enforce abatement orders by imposing daily civil penalty until such time as landowners complied with separately-issued orders.

MUNICIPAL ORDINANCE - MISSOURI

Langford v. City of St. Louis, Missouri

United States Court of Appeals, Eighth Circuit - July 6, 2021 - F.4th - 2021 WL 2793564

Protestor brought action against city, seeking injunctive and declaratory relief and alleging that ordinance prohibiting obstructing or delaying movement of pedestrian or vehicular traffic violated her free speech rights, was overbroad as applied to her and facially, and was void for vagueness in violation of the Due Process Clause of the Fourteenth Amendment.

Both sides moved for summary judgment. The United States District Court for the Eastern District of Missouri granted protestor's motion and denied the city's cross-motion, and the city appealed.

The Court of Appeals held that:

- Municipal ordinance that prohibited any person from "position[ing]" himself or herself "in such a manner as to obstruct the reasonable movement of vehicular or pedestrian traffic" was not, on its face, unconstitutionally overbroad in violation the First Amendment;
- Ordinance was not, on its face, unconstitutionally vague; and
- Police officers did not invidiously discriminate against protestor based on her speech, in alleged violation of her First Amendment rights, in arresting her for violating a traffic ordinance.

Municipal ordinance that prohibited any person from "position[ing]" himself or herself "in such a manner as to obstruct the reasonable movement of vehicular or pedestrian traffic" was not, on its face, unconstitutionally overbroad in violation the free speech rights of protestor who, upon returning from public march down the same street over which she had previously traveled, refused to obey the directions of police officers who were attempting to clear the street after the conclusion of the march, who had directed her to move from the street to the sidewalk; ordinance was not addressed to speech, but to conduct, and furthered the city's legitimate interest in ensuring the free and orderly flow of traffic on its streets and sidewalks.

Municipal ordinance that prohibited any person from "position[ing]" himself or herself "in such a manner as to obstruct the reasonable movement of vehicular or pedestrian traffic" was not, on its face, unconstitutionally vague in violation the due process rights of protestor who, upon returning from public march down the same street over which she had previously traveled, refused to obey the directions of police officers who were attempting to clear the street, and who had directed her to move from the street to the sidewalk; ordinance used terms that were widely used and well understood, and the mere fact that officers would need to use some degree of judgment in determining whether a person had positioned herself in a manner that obstructed the reasonable flow of traffic did not render the ordinance unconstitutional.

Police officers did not invidiously discriminate against protestor based on her speech, in alleged violation of her First Amendment rights, in arresting her for violating a traffic ordinance that prohibited any person from "position[ing]" himself or herself "in such a manner as to obstruct the reasonable movement of vehicular or pedestrian traffic"; protestor was the only one in group of protestors who, upon returning from public march down the same street that she had previously traveled, ignored the commands of police officers who were attempting to clear the street by moving from the street to the sidewalk.

OPEN MEETINGS - OHIO

State ex rel. Ames v. Portage County Board of Commissioners

Supreme Court of Ohio - July 14, 2021 - N.E.3d - 2021 WL 2944137 - 2021-Ohio-2374

Petitioner filed a mandamus action against county board of commissioners and county solid waste management district (SWMD) commissioners alleging the board violated the Open Meetings Act and the Public Records Act.

The parties filed cross-motions for summary judgment. The Court of Appeals granted the board's motion and denied petitioner's motion. Petitioner appealed.

The Supreme Court held that:

- Evidence established that SWMD was a valid entity created by statute, and thus board of county commissioners did not violate the Open Meetings Act by separately conducting SWMD business during recesses of the board's regular meetings;
- A genuine issue of material fact existed as to whether the use of a consent agenda during SWMD meetings violated the Open Meetings Act; and
- Petitioner was entitled to mandamus relief on his claim that the county board of commissioners violated the Open Meetings Act by failing to produce full and accurate minutes from SWMD meeting in response to petitioner's public-records request.

Evidence established that solid waste management district (SWMD) was a valid entity created by statute, and thus board of county commissioners did not violate the Open Meetings Act by separately conducting SWMD business during recesses of the board's regular meetings; statutes expressly authorized a board of county commissioners to create a SWMD, when a board of county commissioners established a SWMD it also served as the district's board of directors, and the General Assembly defined a SWMD as a political subdivision unto itself, separate from a county, though governed by the board of county commissioners that created it.

A genuine issue of material fact existed as to whether the use of a consent agenda during solid waste management district (SWMD) meetings violated the Open Meetings Act, as the use of a consent effectively closed the SWMD meetings because it prevented members of the public in attendance at the meetings from knowing which resolutions were being approved and hearing any deliberations on those resolutions, precluding summary judgment in mandamus action seeking to compel county board of commissioners to prepare, file, and maintain accurate minutes for SWMD meetings.

Petitioner was entitled to mandamus relief on his claim that the county board of commissioners violated the Open Meetings Act by failing to produce full and accurate minutes from solid waste management district (SWMD) meeting in response to petitioner's public-records request; the meeting minutes stated a list of expenditures totaling $1,794.42 was "attached hereto as Exhibit 'A' and incorporated herein by reference," and it was undisputed that Exhibit A was not attached to the official minutes prepared by the board's clerk or included with the documents produced to petitioner in response to his public-records request.

EMINENT DOMAIN - TEXAS

Hidalgo County Water Improvement District No. 3 v. Hidalgo County Water

Irrigation District No. 1

Court of Appeals of Texas, Corpus Christi-Edinburg - May 27, 2021 - S.W.3d - 2021 WL 2149828

Water improvement district filed condemnation proceeding against water irrigation district to obtain permanent subterranean easement to install water pipeline through irrigation district's property.

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. Improvement district appealed.

The Court of Appeals held that:

- As matter of first impression, governmental immunity applied in condemnation proceeding, and
- Legislature did not waive irrigation district's immunity by granting power to improvement district to condemn "any land."

Condemnation proceeding's status as quasi in rem action did not deprive water irrigation district of governmental immunity from suit in water improvement district's action seeking permanent subterranean easement to install water pipeline on irrigation district's property, even though governmental immunity did not apply to in rem actions under Expedited Declaratory Judgment Act (EDJA); condemnation proceeding, unlike an EDJA action, involved forced transfer of property interest, allowing suit would threaten separation-of-powers principles that underlie immunity by giving trial court control over irrigation district's choice not to allow improvement district to build pipeline, and governmental entities were immune from a "suit for land," a class of suits that included condemnation actions.

Statute that granted power to water improvement district to acquire "any land" by condemnation did not clearly and unambiguously waive governmental immunity of irrigation district that owned land over which the improvement district sought, through condemnation action, to obtain permanent subterranean easement to install water pipeline; reference to acquiring "any land" was at most ambiguous, as it could be interpreted, with respect to public land, as general grant of power to condemn such land in the event that a specific waiver of governmental immunity existed, rather than as being a waiver of governmental immunity, statute made sense without finding waiver, and all ambiguities had to be resolved in favor of retaining immunity.

EMINENT DOMAIN - ALABAMA

South Grande View Development Company, Inc. v. City of Alabaster, Alabama

United States Court of Appeals, Eleventh Circuit - June 21, 2021 - F.4th - 2021 WL 2525190

Real estate developer brought § 1983 action alleging that city's rezoning of parcel owned by developer constituted regulatory taking without just compensation in violation of Fifth Amendment.

Following decisions on motions in limine to exclude certain evidence, the United States District Court for the Northern District of Alabama entered judgment, upon a jury verdict, in favor of developer in the amount of approximately $3.5 million. City appealed.

The Court of Appeals held that:

- Action was ripe for adjudication, notwithstanding that developer did not seek variance from city ordinance;

- Testimony about city's motivation for ordinance that rezoned parcel owned by real estate developer was not relevant;
- Admission of irrelevant evidence about city's motivation was harmless error;
- City's challenge to certain valuation evidence was not preserved on appeal; and
- Foreclosure evidence was not relevant.

LIABILITY - GEORGIA

Metropolitan Atlanta Rapid Transit Authority v. Ingram

Court of Appeals of Georgia - June 25, 2021 - S.E.2d - 2021 WL 2621448

Passenger in vehicle that collided with metropolitan transit authority bus brought negligence action against transit authority and bus driver.

Transit authority and bus driver moved to dismiss or, in the alternative, to transfer venue pursuant to Metropolitan Atlanta Rapid Transit Authority (MARTA) Act. The State Court denied motion. Court of Appeals granted motion for interlocutory review brought by transit authority and bus driver.

The Court of Appeals held that transit authority and bus driver were joint tortfeasors.

Metropolitan transit authority and driver of transit authority bus were "joint tortfeasors," and thus provision of Georgia Constitution that indicated that suits against joint tortfeasors residing in different counties could be tried in either county, and not provision of Metropolitan Atlanta Transit Authority Act (MARTA) that required that any action to enforce suit against transit authority be brought in particular county, applied in action brought by passenger of vehicle that collided with bus against transit authority and bus driver; driver was employee of transit authority acting within scope of employment at time of collision.

SCHOOLS - OHIO

Gabbard v. Madison Local School District Board of Education

Supreme Court of Ohio - June 23, 2021 - N.E.3d - 2021 WL 2557315 - 2021-Ohio-2067

Parents of students filed action against school board and related defendants, seeking permanent injunction precluding school district from implementing resolution allowing authorization of several district employees to carry concealed firearms into school safety zones and seeking declaratory judgment that resolution was unlawful.

The Court of Common Pleas granted school board's motion for summary judgment. Parents appealed. The Twelfth District Court of Appeals affirmed in part, reversed in part, and remanded. School board filed discretionary appeal, which the Supreme Court accepted.

The Supreme Court held that:

- Training-or-experience requirement for school personnel to be armed while on duty applied to school employees, including teachers, administrators, and other staff members, and
- Exception to statute criminalizing possession of deadly weapon in school safety zone for those authorized by board of education did not permit board to circumvent training-or-experience requirement.

Training-or-experience requirement in statute prohibiting a school from employing a person as a special police officer, security guard, or other position in which such person was armed while on duty unless the person had satisfactorily completed basic peace-officer training or had 20 years of experience as a peace officer applied to school employees, including teachers, administrators, or other staff members, who went armed while on the job, and not only to employees who served in safety or security positions that inherently required employee to be armed; statute did not tie application of training-or-experience requirement to duties of employee's position, and General Assembly could have expressly limited statute to those employed in police capacity but did not.

Statute criminalizing possession of deadly weapon in school safety zone except by certain categories of people, including persons who acted in accordance with written authorization from board of education, did not permit school board to circumvent statute prohibiting a school from permitting an employee to be armed while on duty unless the person had satisfactorily completed basic peace-officer training or had 20 years of experience as a peace officer; criminal statute addressed only effect of school board's prior authorization on armed person's exposure to criminal liability and not circumstances of appropriate authorization, and had General Assembly perceived any conflict in criminal and training-or-experience statutes, it could have addressed it in statutory language.

PUBLIC UTILITIES - OHIO

In re Complaint of Allied Erecting & Dismantling Company, Inc. v. Ohio Edison Company

Supreme Court of Ohio - July 8, 2021 - N.E.3d - 2021 WL 2828917 - 2021-Ohio-2300

After electric company discovered it had failed to read one of the six electric meters at corporation's facility for three years, and sent corporation a bill for the three year period, corporation filed a complaint.

The Public Utilities Commission ordered corporation to pay the back bill. Corporation appealed.

The Supreme Court held that:

- Public Utilities Commission's alleged failure to enforce tariff or statute did not render the Commission's order adopting electric company's back bill, which was not based on initial load reading after unbilled period, unreasonable, and
- Tariff provision did not preclude electric company from using estimates to create a back bill.

PUBLIC CONTRACTS - WASHINGTON

Conway Construction Company v. City of Puyallup

Supreme Court of Washington - July 8, 2021 - P.3d - 2021 WL 2835360

Construction company brought action against city seeking a declaration that city's termination for default of parties' road construction contract was improper and should be converted to a termination for convenience.

The Superior Court found that city's termination was for convenience and awarded construction company damages, including attorney's fees. The Court of Appeals affirmed in part and reversed in part. Construction company and city both sought discretionary review, which was granted.

The Supreme Court held that:

- City was not entitled to terminate parties' contract based on defective work;
- City acted unreasonably or in bad faith when it withheld satisfaction with construction company's proposed remedy for defective work;
- City's termination of contract was not properly for default, and thus would be converted to a termination for convenience;
- As a matter of first impression, city was not entitled to an offset for defective work discovered after termination;
- Construction company was not entitled to statutory attorney's fees; and
- Construction company was entitled to contractual attorney's fees.

EMINENT DOMAIN - FEDERAL

PennEast Pipeline Company, LLC v. New Jersey

Supreme Court of the United States - June 29, 2021 - 141 S.Ct. 2244 - 21 Cal. Daily Op. Serv. 6471

Natural gas company filed actions under Natural Gas Act (NGA) to condemn properties owned by State of New Jersey for construction of interstate gas pipeline.

The United States District Court for the District of New Jersey denied State's motion to dismiss and granted company's requests for orders of condemnation and preliminary injunctive relief for immediate access to the properties. State appealed. The United States Court of Appeals for the Third Circuit vacated and remanded. Certiorari was granted.

The Supreme Court held that:

- Court of Appeals below had jurisdiction over State's appeal, and
- Actions brought by natural gas companies pursuant to the NGA to condemn rights-of-way in which a State has an interest do not offend state sovereignty.

State of New Jersey's appeal of district court's grant of natural gas company's requests for orders condemning state-owned land, pursuant to Natural Gas Act (NGA), to construct interstate gas pipeline was not collateral attack on certificates of public convenience and necessity issued to company by Federal Energy Regulatory Commission (FERC) to build the pipeline, and thus, State's appeal did not have to be filed in Court of Appeals hearing challenges to FERC's certificate order, which had exclusive jurisdiction to affirm, modify, or set aside that order; State's argument on appeal that NGA did not delegate the right to file condemnation actions against nonconsenting States did not seek to modify FERC's order, but instead asserted a defense against company's condemnation proceedings.

Natural Gas Act (NGA) provision authorizing natural gas companies that hold certificates of public convenience and necessity from Federal Energy Regulatory Commission (FERC) to acquire, through eminent domain, any right-of-way needed to build natural gas pipeline was passed specifically to solve the problem of States impeding interstate pipeline development by withholding access to their own eminent domain procedures.

Condemnation actions brought under the Natural Gas Act (NGA) provision authorizing natural gas companies, which hold certificates of public convenience and necessity from the Federal Energy Regulatory Commission (FERC) to build an interstate pipeline, to condemn all necessary rights-o-

-way, including land in which a State holds an interest, do not offend state sovereignty, because the States consented at the founding to the exercise of the federal eminent domain power, whether by public officials or private delegatees.

IMMUNITY - GEORGIA

Beasley v. Georgia Department of Corrections

Court of Appeals of Georgia - June 22, 2021 - S.E.2d - 2021 WL 2548838

Citizen and his wife brought action against Georgia Department of Corrections (GDOC), which arose from an incident in which two inmates killed the two corrections officers who were transporting them, confronted citizen, who had stopped his vehicle behind halted prison bus, at gunpoint, and stole his vehicle, alleging that officers created a public nuisance by failing to abide by certain departmental policies in transporting inmates and seeking damages for emotional distress under the Georgia Tort Claims Act (GTCA).

The trial court granted GDOC's motion to dismiss on sovereign-immunity grounds. Plaintiffs appealed.

The Court of Appeals held that:

- Citizen's asserted damages were solely caused by assault and battery perpetrated by inmates, and thus action fell under assault-and-battery exception to GTCA's waiver of sovereign immunity, entitling GDOC to sovereign immunity;
- Citizen's asserted damages were personal injuries, as opposed to a taking of personal property via a public nuisance for which GDOC could be held liable, thus supporting GDOC's entitlement to sovereign immunity; and
- GDOC was entitled to sovereign immunity for its alleged creation of a public nuisance.

ZONING & PLANNING - MISSISSIPPI

Board of Supervisors of Hancock County v. Razz Halili Trust

Supreme Court of Mississippi - June 24, 2021 - So.3d - 2021 WL 2587103

Trust brought action challenging decision by county zoning board to deny trust's application to use its property as a marina.

The Circuit Court reversed. Board appealed.

The Supreme Court held that:

- Board's denial of trust's application was arbitrary and capricious, and
- Board's denial of trust's application was not supported by substantial evidence.

Zoning board's denial of trust's application to use its property as a marina was arbitrary and capricious, despite board's assertion that trust's proposed use of property to load and unload shipments of oysters was prohibited based on definition of a "seafood processor" under state licensing statute; marina was allowed as a matter of right in zone where property was located, whether trust's proposed use of property would classify it as a seafood processor under licensing statute was irrelevant to whether trust was engaged in seafood processing prohibited under local

zoning ordinance, and there was no evidence that definition of a marina or prohibited use of seafood processing precluded unloading and loading oysters.

Zoning board's denial of trust's application to use its property as a marina was not supported by substantial evidence, despite board's assertion that trust intended to use property to process seafood, which was a prohibited use in zone where property was located; all evidence presented to board in trust's application and board meetings indicated that trust was applying to operate a marina as defined by local zoning ordinance, specifically that trust intended to use property to receive shipments of oysters, to unload oysters, to load them into refrigerated trucks, and to ship them out of state, and board was presented with no evidence that trust's intended use of property constituted a prohibited processing use under ordinance.

EMINENT DOMAIN - NEBRASKA

Sanitary and Improvement District No. 67 of Sarpy County v. Department of Roads

Supreme Court of Nebraska - June 25, 2021 - N.W.2d - 309 Neb. 600 - 2021 WL 2603414

County sanitary and improvement district brought inverse condemnation action against state arising from re-routing of highway.

The District Court dismissed on the pleadings. Sanitary and improvement district appealed.

The Supreme Court held that sanitary and improvement district, a state political subdivision, lacked standing to bring inverse condemnation action against state.

County sanitary and improvement district was not a person having private property, and thus it was not the real party in interest and lacked standing to bring inverse condemnation action against state arising from re-routing of highway.

LAND USE & DEVELOPMENT - OKLAHOMA

Immel v. Tulsa Public Facilities, Authority

Supreme Court of Oklahoma - June 22, 2021 - P.3d - 2021 WL 2548600 - 2021 OK 39

Taxpayers brought action seeking declaratory judgment that city's public facilities authority and city could not sell 8.8 acres of park land to a prospective private developer for the construction of a commercial shopping center because the land was held in a public trust expressly as a park for the people.

The District Court granted authority's and city's motions for summary judgment. Taxpayers appealed.

The Supreme Court held that:

- Taxpayers had standing to bring action in equity, rather than qui tam, seeking declaratory judgment against authority and city;
- Authority and city were prohibited from selling tract of park to developer, unless the public use had been abandoned or the park had become unsuited for continued use;

- Factual issue existed as to whether tract of park had been lawfully abandoned, and as such relinquished, by authority and/or city, as would have authorized its sale without special legislative authority, thus, precluding summary judgment in taxpayers' action; and
- Factual issue existed as to whether the expenditure of public funds by authority and city, namely, sale of tract of park and allocation of tax funds for infrastructure development to same developer met the constitutional public purpose requirement for investment of public funds in private enterprises, thus, precluding summary judgment in taxpayers' action.

Taxpayers had standing to bring action in equity, rather than qui tam, seeking declaratory judgment that city's public facilities authority and city could not sell 8.8 acres of park land to a private developer for the construction of a commercial shopping center because the land was held in a public trust expressly as a park for the people; taxpayers asserted that the $570,000 in city funds to be paid to prospective private developer would have been an illegal expenditure.

City's public facilities authority and city were prohibited from selling tract park to prospective private developer, unless the public use had been abandoned or the park had become unsuited for continued use, despite the fact that legal title had been transferred via a quit claim deed from city to a public trust; the park land was held by authority, a public trust, for the use and benefit of the citizens as a public park, the park land was held in a governmental capacity for use by the public, such that it could not be sold without special legislative authority, and it was undisputed that there was no special legislative authorization empowering authority and city to sell that tract of the park to a private developer for commercial use.

Genuine issue of material fact existed as to whether tract of park which city's public facilities authority and city was attempting to sell to private developer for construction of a commercial shopping center, had been lawfully abandoned, and as such relinquished, by authority and/or city, as would have authorized its sale without special legislative authority, thus, precluding summary judgment in taxpayers' action seeking declaratory judgment that authority and city could not sell that tract to prospective private developer.

Genuine issue of material fact existed as to whether the expenditure of public funds by city public facilities authority and city, namely, sale of tract of park for 20% of its market value to private developer and allocation of a half million dollars in tax funds for infrastructure development to same developer met the constitutional public purpose requirement for investment of public funds in private enterprises, thus, precluding summary judgment in taxpayers' action seeking declaratory judgment that authority and city could not sell that tract to prospective private developer.

IMMUNITY - PENNSYLVANIA

Degliomini v. ESM Productions, Inc.

Supreme Court of Pennsylvania - June 22, 2021 - A.3d - 2021 WL 2546382

Bicyclist who was injured when he rode into unmarked and un-barricaded sinkhole on city street during charity bike ride brought negligence action against city, among other parties.

Following jury verdict in favor of bicyclist, the Court of Common Pleas denied city's motion for post-trial relief and granted bicyclist's motion for delay damages. City appealed. The Commonwealth Court reversed. Bicyclist petitioned for discretionary review.

The Supreme Court held that pre-injury exculpatory release granting city immunity from duty to

maintain city streets violated public policy, and was thus invalid.

Enforcement of pre-injury exculpatory release to grant city immunity in negligence action by bicyclist who was injured when he rode into unmarked and un-barricaded sinkhole during charity bike ride would have jeopardized health, safety, and welfare of public at large by removing any incentive for city to exercise minimal standards of care due to maintain public streets in reasonably safe condition for reasonably foreseeable uses, thus rendering release invalid as it violated public policy principles definitively stated in Political Subdivision Tort Claims Act; city's duty to exercise reasonable care in discharging its independently-derived and essential function of street repair arose long before event, when city had actual notice or could reasonably have been charged with notice of existence of sinkhole.

ZONING & PLANNING - SOUTH CAROLINA

Croft as Trustee of James A. Croft Trust v. Town of Summerville

Supreme Court of South Carolina - June 16, 2021 - S.E.2d - 2021 WL 2448236

Residents and public interest groups sought judicial review of decision by town board of architectural review approving construction of proposed development project.

The Court of Common Pleas affirmed. Residents and public interest groups appealed. The Court of Appeals affirmed. Residents and public interest groups filed petition for writ of certiorari, which was granted.

The Supreme Court held that:

- Appeal from decision affirming board's approval of project was moot;
- Exception to mootness doctrine for issues capable of repetition, yet evading review, did not apply; and
- Public interest exception to mootness doctrine did not apply.

Appeal from decision affirming decision by town board of architectural review approving construction of proposed development project was moot; issue was whether developer could build the project as approved by the board, controversy ended when developer decided not to build project while appeal was pending, and decision rendered for either party would not provide any practical relief and would be a purely academic exercise by appellate court.

Exception to mootness doctrine permitting appellate court to decide merits of moot appeal for issues capable of repetition, yet evading review, did not apply to appeal filed by residents and public interest groups challenging decision affirming approval of proposed development project by town board of architectural review on grounds of purported Freedom of Information Act (FOIA) and town ordinance violations, which was rendered moot when developer decided not to build project while appeal was pending; although issues related to purported FOIA and ordinance violations were capable of repetition, they did not evade review, since appeal did not become moot because there was insufficient time to challenge board's approval before controversy ended.

Public interest exception to mootness doctrine did not apply to permit appellate court to decide merits of appeal filed by residents and public interest groups challenging decision affirming approval of proposed development project by town board of architectural review on grounds of purported Freedom of Information Act (FOIA) and town ordinance violations, which was rendered moot when developer decided not to build project while appeal was pending; while it was important

that citizens had the ability to stay informed of the activities of public bodies, there was no imperative or manifest urgency requiring appellate court to issue opinion on application of FOIA and town ordinances to board's activity.

EMINENT DOMAIN - CALIFORNIA

Pakdel v. City and County of San Francisco, California

Supreme Court of the United States - June 28, 2021 - S.Ct. - 2021 WL 2637819 - 21 Cal. Daily Op. Serv. 6305

Partial owners of a multi-unit residential building organized as a tenancy-in-common brought § 1983 action against city, its board of supervisors, and its department of public works, alleging a city ordinance effected an unconstitutional regulatory taking by conditioning the conversion of the building to a condominium arrangement on the partial owners offering the tenant in their unit a lifetime lease.

The United States District Court for the Northern District of California granted defendants' motions to dismiss for lack of subject matter jurisdiction and for failure to state a claim. Owners appealed. The United States Court of Appeals for the Ninth Circuit affirmed, and denied rehearing en banc.

Upon granting certiorari, the Supreme Court held that owners did not have to comply with administrative procedures for seeking relief, in order to satisfy finality requirement for bringing regulatory taking claim.

Partial owners of a multi-unit residential building organized as a tenancy-in-common did not have to comply with city's administrative procedures for seeking relief, in order to satisfy finality requirement for bringing their § 1983 action alleging city ordinance effected an unconstitutional regulatory taking by conditioning the conversion of the building to a condominium arrangement on the owners offering the tenant in their unit a lifetime lease; having denied the owners' requests for an exemption from the ordinance, there was no question about the city's position, as the owners either had to execute the lifetime lease or face an enforcement action.

IMMUNITY - GEORGIA

Young v. Johnson

Court of Appeals of Georgia - June 14, 2021 - S.E.2d - 2021 WL 2410699

Driver of vehicle that was hit by city vehicle being driven by motorist, a city employee, brought negligence action against city and motorist.

The trial court granted city's and motorist's motion to dismiss based on sovereign immunity. Injured driver appealed.

The Court of Appeals held that driver's failure to explicitly plead a waiver of city's sovereign immunity barred her from bringing negligence action against city and motorist.

Failure of driver of vehicle that was hit by city vehicle being driven by motorist, a city employee, to explicitly plead a waiver of city's sovereign immunity, barred her from bringing negligence action against city and motorist; driver did not explicitly plead a waiver of city's sovereign immunity in her

complaint, she failed to amend her complaint to allege such a waiver, she did not raise sovereign immunity in any of her filings in the court below, she failed to respond to city's motion to dismiss based on sovereign immunity, and she did not otherwise contest the motion to dismiss.

CRIMINAL LAW - IOWA

State v. Wright

Supreme Court of Iowa - June 18, 2021 - N.W.2d - 2021 WL 2483567

Following denial of his motion to suppress, defendant was convicted in the District Court of possession of controlled substances, and he appealed. The Court of Appeals affirmed, and defendant appealed.

The Supreme Court held that:

- Officer "seized" garbage bags and papers and effects contained therein;
- Officer engaged in "search" when he opened garbage bags he had seized;
- Garbage bags and their contents were "papers" and "effects" protected by state constitution's prohibition against unreasonable searches and seizures;
- Defendant did not abandon all right, title, and interest in property he put in garbage bags; and
- Officer's warrantless seizure of bags and examination of their contents violated state constitution's prohibition against unreasonable seizures and searches.

POLITICAL SUBDIVISIONS - MAINE

Fair Elections Portland, Inc. v. City of Portland

Supreme Judicial Court of Maine - June 17, 2021 - A.3d - 2021 WL 2460648 - 2021 ME 32

Voters group sought judicial review of city council's decision not place a citizen-initiated ballot question on the ballot as a proposed charter amendment and asserted independent claims seeking declaratory judgment and injunctive relief, as well as violations of state and federal law pursuant to § 1983.

The Superior Court affirmed city council's decision. Voters group appealed.

The Supreme Judicial Court held that:

- As a matter of first impression, the Home Rule Act authorizes municipal officers to review a proposed charter modification to determine whether it constitutes a revision rather than an amendment;
- As a matter of first impression, distinction between a charter amendment and a charter revision for purpose of the Home Rule Act is in terms of breadth and in terms of depth; and
- City council's failure to make findings of fact to explain its decision precluded meaningful judicial review.

The Home Rule Act authorizes municipal officers to review a proposed charter modification to determine whether it constitutes a revision rather than an amendment, even where the petition presenting the proposed modification does not include the statute's optional language regarding requests for revision of the charter.

For purposes of the Home Rule Act, the distinction between a charter amendment and a charter revision is one of scope, in terms of breadth of what would be affected and depth of what would be altered, in that a proposed amendment would not, if enacted, materially affect the municipality's implementation, in the course of its operations, of major charter provisions that are not mentioned in the proposed amendment, and in terms of depth, an amendment would not, if enacted, make a profound and fundamental alteration in the essential character or core operations of municipal government; if a petition proposes a change to the charter that is either so broad or so profound, or both, as to justify a revisitation of the entire charter by a charter commission, the proposal is for a revision.

City council's failure to make findings of fact to explain its decision not place a citizen-initiated ballot question on the ballot as a proposed charter amendment precluded meaningful judicial review; given that whether a particular charter proposal would be an amendment or a revision focused on the proposal's effect on the current municipal charter and operations, city council's adjudication of that question was highly fact-specific, but the record contained no statement of city council's basis in law and fact for whether or not it deemed the petition to propose a revision rather than an amendment of the charter, and without that, the court could not determine whether the rejection of the petition involved legal error, abuse of discretion, or findings not supported by substantial evidence.

ZONING & PLANNING - NORTH CAROLINA

Cheryl Lloyd Humphrey Land Investment Company, LLC v. Resco Products, Inc.

Supreme Court of North Carolina - June 11, 2021 - S.E.2d - 2021-NCSC-56 - 2021 WL 2387933

Vendor of undeveloped land brought action for tortious interference with prospective economic advantage against owners of open-quarry mine that was adjacent to a portion of the land, asserting mine owners made misrepresentations during town's rezoning hearings concerning dangers posed by mining operations, inducing purchaser to exclude from purchase the portion of property that was adjacent to the mine.

The Superior Court granted mine owners' motion to dismiss for failure to state a claim. The Court of Appeals reversed. Mine owners appealed.

The Supreme Court held that alleged misrepresentations made by mine owners during town's rezoning hearings constituted protected petitioning activity.

Alleged misrepresentations made by owners of open-quarry mine that was adjacent to a portion of undeveloped land during town's rezoning hearings concerning dangers posed by mining operations, which statements allegedly induced land purchaser to exclude from purchase agreement with vendor the portion of property that was adjacent to the mine, constituted petitioning activity protected by the First Amendment to the United States Constitution and the North Carolina Constitution.

ZONING & PLANNING - RHODE ISLAND

Middle Creek Farm, LLC v. Portsmouth Water & Fire District

Supreme Court of Rhode Island - June 16, 2021 - A.3d - 2021 WL 2447820

Subdivision developer brought action against town water and fire district for declaratory and injunctive relief, contending that district was required to provide water services to subdivision lots which were partially in town and partially in neighboring town.

District filed motion to dismiss for failure to join indispensable parties. The Superior Court denied district's motion and granted developer's motion for summary judgment. District appealed.

The Supreme Court held that:

- Term "inhabitants" in district's charter meant anyone who owned real estate and paid taxes to the district, and
- Owners of other 53 properties partially located in town and partially located in neighboring town were not indispensable parties.

Term "inhabitants" in town water and fire district's charter, authorizing distribution of water to the inhabitants of the district, meant anyone who owned real estate and paid taxes to the district, rather than simply to parcels with residences within town boundaries; charter references not only a "house" but also a "building, tenement or estate," charter also gave district the power and authority to mandate that "any estate" connect to an abutting main, and it would be absurd to allow district to tax businesses such as golf courses or farms which lacked residential components or buildings while not providing water to such businesses.

Owners of other 53 properties partially located in town and partially located in neighboring town were not indispensable parties to subdivision developer's declaratory judgment action against town water and fire district seeking extension of water to subdivision lots partially located in town and partially located in neighboring town; none of the other owners had a direct claim upon the subject of the action such that joinder of that party would cause it to lose anything by operation of the judgment rendered, nor did they have an actual, present, adverse, and antagonistic interest in the judgment, and any risk that district would have to litigate the underlying issue every time a property straddling the borderline filed an application for water service was purely speculative.

INSURANCE - SOUTH CAROLINA

Reeves v. South Carolina Municipal Insurance and Risk Financing Fund

Supreme Court of South Carolina - June 16, 2021 - S.E.2d - 2021 WL 2448359

Personal representative of decedent's estate brought declaratory judgment action against municipal insurer seeking interpretation of extent of coverage for municipality and municipal police officers, following settlement entered for wrongful shooting death.

The Circuit Court granted personal representative's motion for summary judgment in part and denied it in part, and granted insurer's motion for summary judgment in part and denied it in part. Both parties appealed. The Court of Appeals affirmed in part and reversed in part. Insurer's petition for writ of certiorari was granted.

The Supreme Court held that:

- Municipality's negligent acts of hiring, retaining, and supervising police officer, and officer's use of

deadly force, were separate occurrences;
- No duplication clause did not apply to municipality's negligent acts of hiring, retaining, and supervising police officer, and officer's use of deadly force;
- Undefined term "Coverage Limit" had to be construed against insurer as synonymous with "liability limit"; and
- "Limit of Liability" portion of policy did not limit claims.

Municipality's negligent acts of hiring, retaining, and supervising police officer, and officer's use of deadly force, were separate occurrences under terms of law enforcement liability indemnity coverage that defined "occurrence" as wrongful act that resulted in bodily injury, resulting in separate claims for separate damages.

No duplication clause in insurance policy that limited law enforcement liability indemnity coverage for any claim applicable to more than one section of contract did not apply to municipality's negligent acts of hiring, retaining, and supervising police officer, and officer's use of deadly force, since claims involved only law enforcement liability.

No duplication clause in insurance policy that limited law enforcement liability indemnity coverage for all claims or suits involving substantially same injury or damage, or progressive injury or damage, did not apply to municipality's negligent acts of hiring, retaining, and supervising police officer, and officer's use of deadly force.

Undefined term "Coverage Limit" in insurance policy providing law enforcement liability indemnity coverage had to be construed against insurer as synonymous with "liability limit," which was defined as "$1,000,000" "Per Occurrence."

"Limit of Liability" portion of insurance policy providing law enforcement liability indemnity coverage stating "Only a single limit or Annual Aggregate will apply, regardless of the number of persons or organizations injured or making claims, or the number of Covered Persons who allegedly caused them, or whether the damage or injuries at issue were continuing or repeated over the course of more than one Coverage Period" did not limit claims that municipality was negligent in hiring, retaining, and supervising police officer and officer wrongfully used deadly force, since that section did not contain "Annual Aggregate" and undefined "single limit" term provided it was "Liability Limit" of "$1,000,000" "Per Occurrence."

"Limit of Liability" portion of insurance policy providing law enforcement liability indemnity coverage stating "liability for any one occurrence/wrongful act will be limited to $1,000,000 per Member regardless of the number of Covered Persons, number of claimants or claims made" did not limit claims that municipality was negligent in hiring, retaining, and supervising police officer and officer wrongfully used deadly force, since there were multiple occurrences-wrongful acts.

EMINENT DOMAIN - TEXAS

Jim Olive Photography v. University of Houston System

Supreme Court of Texas - June 18, 2021 - S.W.3d - 2021 WL 2483766 - 64 Tex. Sup. Ct. J. 1411

Professional photographer brought action against public university, alleging unlawful taking based on university's unauthorized use of copyrighted aerial photograph of city on university's webpages.

The District Court denied university's plea to the jurisdiction. University filed interlocutory appeal.

The Houston Court of Appeals vacated and dismissed. Photographer petitioned for review, which was granted.

The Supreme Court held that university's alleged copyright infringement was not a per se taking.

Alleged copyright infringement by public university, via unauthorized use of copyrighted aerial photograph of city on university's webpages, was not a "per se taking," despite argument that university deprived photographer of the most important stick in his bundle of rights, that being his exclusive right to control his work; university did not take possession or control of copyright, photographer retained key legal rights that constituted property, university did not assume physical control of copyright, photographer could seek injunctive relief to prevent or restrain infringement of a copyright, and university's infringement did not deprive photographer of right to dispose of copyrighted work.

ZONING & PLANNING - CONNECTICUT

Farmington-Girard, LLC v. Planning and Zoning Commission of City of Hartford

Supreme Court of Connecticut - June 7, 2021 - A.3d - 2021 WL 2324251

Special permit applicant filed appeals challenging text amendments to city zoning regulations and zoning map changes made by city planning and zoning commission precluding special permit to construct fast-food restaurant.

After consolidation of appeals, the Superior Court dismissed. Applicant appealed. The Appellate Court affirmed. Applicant petitioned for certification to appeal, which was granted.

The Supreme Court held that:

- Zoning regulations did not confer authority on city zoning administrator to void application on ground that it was incomplete;
- Zoning administrator's letter purportedly voiding application was not appealable to zoning board of appeals or superior court; and
- Applicant's failure to pursue administrative remedy as to letter did not moot appeals of regulatory amendments and map changes.

ZONING & PLANNING - FLORIDA

Burns v. Town of Palm Beach

United States Court of Appeals, Eleventh Circuit - June 8, 2021 - F.3d - 2021 WL 2325300

Property owner brought § 1983 action against town, alleging that denial of approval, by town's architectural review commission, of building permit for replacement of traditional beachfront mansion with larger mansion using midcentury modern design violated his rights to due process, equal protection, and freedom of expression.

The United States District Court for the Southern District of Florida adopted the report and recommendation of a magistrate judge and granted summary judgment to town. Owner appealed.

The Court of Appeals held that:

- Owner failed to specifically demonstrate why he needed additional discovery before a ruling on town's summary judgment motion;
- A reasonable viewer would not infer some sort of message from the new mansion, as would be required for First Amendment protection of expressive conduct, because landscaping features would prevent viewers from seeing the mansion;
- Town's criteria for demolition and construction were not unconstitutionally vague under due process principles; and
- Owner offered no evidence for similarly-situated requirement for class-of-one equal protection claim.

CONTRACTS - GEORGIA

Renee Group, Inc. v. City of Atlanta

Court of Appeals of Georgia - June 11, 2021 - S.E.2d - 2021 WL 2389138

Sewer cleaning corporation, who was invited by city to submitted bid for Department of Watershed Management sewer cleaning and pipeline assessment annual contract, brought action against city alleging breach of contract and promissory estoppel.

The trial court granted city's motion to dismiss breach-of-contract claim and granted city's motion for summary judgment, asserting that corporation could not meet its burden in showing promissory estoppel. Sewer cleaning corporation appealed.

The Court of Appeals held that corporation was precluded from bringing promissory estoppel claim against city.

Sewer cleaning corporation, who was invited by city to submitted bid for Department of Watershed Management sewer cleaning and pipeline assessment annual contract, was precluded from bringing promissory estoppel claim against city, although city council approved resolution authorizing mayor to enter into proposed agreement with corporation; there also needed to be approval by city attorney, execution by mayor, and attestation to by municipal clerk, and none of those requirements were met.

LIABILITY - MICHIGAN

Buhl v. City of Oak Park

Supreme Court of Michigan - June 9, 2021 - N.W.2d - 2021 WL 2350031

Pedestrian, who fractured her ankle when she fell attempting to avoid a crack in sidewalk, brought action against city under the sidewalk exception to governmental immunity.

The Circuit Court granted summary disposition in favor of city, based on statutory amendment that allowed municipality to assert open and obvious danger doctrine as a defense. Pedestrian appealed, and the Court of Appeals affirmed. Pedestrian appealed.

The Supreme Court held that amended statute granting municipalities right to raise open and obvious danger doctrine as defense in premises-liability cases, could not be applied retroactively to

pedestrian's claim.

Nothing in the plain language of amended statute granting municipalities the right to raise the open and obvious danger doctrine as a defense in premises-liability cases suggested that it was intended to apply retroactively, and thus, factor asking whether there is specific language in the statute that indicates whether it should be applied retroactively did not support retroactive application of amended statute to pedestrian's claim seeking to recover from city for injuries sustained when she fell trying to avoid a crack in sidewalk prior to amendment; amendment was given immediate effect without further elaboration, and amendment made no mention of whether it applied to a cause of action that had already accrued before its effective date.

Factor asking whether retroactive application of statute or amendment would create new obligations, impose new duties, or attach new disabilities with respect to transactions already past, did not favor retroactive application of amended statute granting municipalities right to raise open and obvious danger doctrine as defense in premises-liability cases, to pedestrian's claim seeking to recover from city for injuries sustained when she fell trying to avoid a crack in sidewalk prior to amendment; although application of amended statute would not automatically extinguish pedestrian's claim, subsequent application of open and obvious danger doctrine would result in dismissal of her lawsuit because retroactive application would relieve city of legal duty it owed to her when injury occurred.

Factor favoring retroactive application of statutes that are merely remedial or procedural did not favor retroactive application of amended statute granting municipalities right to raise open and obvious danger doctrine as defense in premises-liability cases, to pedestrian's claim seeking to recover from city for injuries sustained when she fell trying to avoid a crack in sidewalk prior to amendment; retroactive application of amendment would relieve city of duty it owed to maintain its sidewalk in reasonable repair.

Amended statute granting municipalities right to raise open and obvious danger doctrine as defense in premises-liability cases, could not be applied retroactively to pedestrian's claim seeking to recover from city for injuries sustained when she fell trying to avoid a crack in sidewalk prior to amendment, and thus, city could not avail itself of the open and obvious danger doctrine as a defense to pedestrian's negligence claim; nothing in the plain language of amended statute suggested that it was intended to apply retroactively, and retroactive application would relieve city of a legal duty it owed to pedestrian when injury happened.

BONDS - NEW YORK

Monterey Bay Military Housing, LLC v. Ambac Assurance Corporation

United States District Court, S.D. New York - March 31, 2021 - F.Supp.3d - 2021 WL 1226984

Military base housing projects brought action in Northern District of California against loan originator, bond insurer, their managing directors, and others for conspiracy and substantive violations of Racketeer Influenced and Corrupt Organizations Act (RICO), as well as state-law claims including breach of fiduciary duty and aiding and abetting breach of fiduciary duty.

After originally denying insurer's motion to transfer venue, the United States District Court for the Northern District of California denied defendants' motions to dismiss second amended complaint for failure to state a claim, but sua sponte reconsidered its prior denial of transfer motion and

transferred action to Southern District of New York for lack of personal jurisdiction over all but one defendant. Defendants moved for reconsideration.

The District Court held that:

- Transferor court's determination that it lacked personal jurisdiction over most defendants precluded it from denying those defendants' motions to dismiss for failure to state a claim;
- Projects adequately alleged special circumstances giving rise to fiduciary relationship between them and loan originator under New York law;
- Projects did not have inquiry notice triggering application of four-year statute of limitations under RICO;
- Allegations of scheme to defraud projects through issuance of bonds would not support securities fraud enforcement action;
- Projects' allegations satisfied horizontal and vertical relatedness requirements for RICO enterprise claims;
- Projects adequately alleged bond insurer knowingly and intentionally participated in mail and wire fraud; and
- Projects adequately alleged that purchaser of loan originator and purchaser's affiliated entities entered into RICO conspiracy.

District court's determination that it lacked personal jurisdiction over all but one defendant in developers' action under Racketeer Influenced and Corrupt Organizations Act (RICO) precluded district court from denying defendants' motions to dismiss for failure to state a claim; personal jurisdiction over defendants was necessary before district court could adjudicate arguments presented by those defendants in motions to dismiss for failure to state a claim, at least to extent that district court ruled against such defendants.

Military housing projects' allegations that bond insurer, loan originator, their managing directors, and others engaged in mail and wire fraud as predicates for Racketeer Influenced and Corrupt Organizations Act (RICO) enterprise and conspiracy claims were premised on each defendant's knowing or intentional participation in scheme to defraud, and, thus, projects were not required to plead defendants had fiduciary duty giving rise to obligation to disclose any omitted facts, where projects alleged that originator, insurer, and their directors made affirmative representations to private developers and to consultant regarding financing of housing projects, including that insurer would act in projects' best interests to obtain highest possible rating from rating agencies.

Housing projects adequately alleged special circumstances giving rise to fiduciary relationship between loan originator and its managing director on the one hand and projects on the other, as necessary to support projects' claims against originator and director for breach of fiduciary duty under New York law, even though loan agreements did not purport to create fiduciary relationship, where projects alleged that originator and its director promised to provide fiduciary services beyond typical lender role in connection with financing projects, including by serving as financial advisor and as projects' agent in negotiating term loans and surety bonds, and that projects relied on representations in agreeing to work with originator rather than other lenders.

Allegations that bond insurer, through its managing director, told private developers and consultant for housing projects on military bases that insurer would act in projects' best interest to obtain highest possible rating from ratings agencies and would operate as projects' "fiduciary and agent" were insufficient, under New York law, to plausibly allege fiduciary relationship between insurer or its managing director and projects, as necessary to support projects' claims against insurer and managing director for breach of fiduciary duty, in the absence of specific allegations regarding nature of relationship between insurer and projects.

Clause in agreements that mortgage company entered into in connection with financing for housing projects on military bases, in which mortgage company disclaimed "financial advisor or fiduciary relationship role" in relation to developers, applied solely to mortgage company, not to entities affiliated with mortgage company, and, thus, under New York law, disclaimer clause did not preclude developers' action for breach of fiduciary duty against affiliated entities, where clause only specified that mortgage company would not be agent or fiduciary of developers or assume advisory or fiduciary responsibility in favor of developers.

Clause in agreements that mortgage company entered into in connection with financing for housing projects on military bases, in which mortgage company disclaimed "financial advisor or fiduciary relationship role" in relation to developers, did not preclude developers' claims against company under New York law for breach of fiduciary duty, where developers alleged that financial advisor who engaged in tortious conduct in breach of his fiduciary obligations was acting as agent of company and within scope of his employment with entity affiliated with company, such that company and entity were allegedly vicariously liable for financial advisor's conduct, as well as that company and financial advisor procured developers' agreement to disclaimer clause by fraud.

In considering whether, based on allegations of second amended complaint, military base housing projects had inquiry notice of allegedly fraudulent conduct on the part of loan originator, insurer, and others that would trigger four-year statute of limitations on projects' claims under Racketeer Influenced and Corrupt Organizations Act (RICO), trial court was not required to consider allegation contained only in first amended complaint that development consultant had noticed originator's preference for using insurer on projects; statement in first amended complaint did not directly contradict allegations of second amended complaint.

Allegations in housing projects' complaint against loan originator, insurer, and others for mail and wire fraud under Racketeer Influenced and Corrupt Organizations Act (RICO) were sufficient to establish that projects engaged in reasonably diligent inquiry, such that four-year limitations period on RICO claims did not begin to run based on inquiry notice, even if consultant's observation that originator seemed partial to using insurer for credit enhancement triggered projects' duty to inquire, where consultant allegedly insisted that originator competitively bid out credit enhancement, indicating some inquiry had occurred, and insurer and originator responded by concealing insurer's role in development project financing, such that further inquiry would not have discovered alleged fraud.

Consultant's observation that loan originator was partial to using insurer for credit enhancement in connection with military base housing project financing was insufficient to show that a reasonable plaintiff with such knowledge would have been aware of existence of fraud, and, thus, did not put projects, which brought civil claim under Racketeer Influenced and Corrupt Organizations Act (RICO) against originator and insurer based on mail and wire fraud, on inquiry notice that would trigger four-year limitations period for civil RICO claims; originator's pattern of business dealings with same insurer, in and of itself, did not indicate alleged schemes to inflate credit spread and manipulate insurer ratings.

Military base housing projects' questioning of managing director of loan originator about funding structure did not establish that projects were on notice of director's alleged fraud in obtaining financing, and, thus, did not preclude doctrine of fraudulent concealment from delaying application of four-year statute of limitations on projects' civil Racketeer Influenced and Corrupt Organizations Act (RICO) claims against director, originator, and others, in the absence of allegations about circumstances that prompted projects to ask such questions.

Consultations between housing project developers and managing director of loan originator about

effect on projects of downgrade in insurer's rating did not suggest that developers were aware of alleged fraudulent scheme for insurer to secretly participate in certain projects, and, thus, did not preclude doctrine of fraudulent concealment from delaying limitations period on developers' claims against director, originator, insurer, and others under Racketeer Influenced and Corrupt Organizations Act (RICO); it would have been reasonable for developers to have concerns about insurer's downgrade in connection with projects for which insurer openly provided credit enhancement, as opposed to projects for which developers were allegedly unaware of insurer's involvement.

Military housing projects' allegations that loan originator, bond insurer, and others engaged in scheme to defraud projects, as bond issuers, by falsely representing bonds' interest rates would be set at market, allowing originator to keep undisclosed profits from sales at above-market rates, would not have supported a securities fraud enforcement action brought by Securities and Exchange Commission (SEC), and, thus, securities-fraud bar to actions under Racketeer Influenced and Corrupt Organizations Act (RICO) did not preclude projects from basing RICO claims on alleged scheme; projects alleged that participants made misrepresentations and caused harm to them as bond issuers, which did not implicate SEC's authority to protect securities market or securities investors such as bond holders.

Military housing projects' allegations that loan originator, bond insurer, and originator's managing director, among others, engaged in scheme of mail and wire fraud in connection with project financing satisfied horizontal relatedness requirement for Racketeer Influenced and Corrupt Organizations Act (RICO) enterprise claim, where various alleged acts of fraud had same or similar purposes and results, namely, obtaining undisclosed and unlawful profits in connection with providing financing through projects, alleged scheme shared same participants as well as many same victims, including Army and its consultant, and predicate acts shared methods of commission, including director's role as financial advisor and misrepresentations regarding nature and structure of financial transactions.

Alleged misrepresentations that loan originator, its managing director, bond insurer, and others made to military housing projects, Army, and its consultant regarding nature of transactions undertaken to finance projects related to activities of alleged Racketeer Influenced and Corrupt Organizations Act (RICO) enterprise, as necessary to satisfy requirement of vertical relatedness for RICO enterprise claim, where misrepresentations allegedly benefited originator, director, and other participants in alleged scheme of mail and wire fraud by allowing them to reap undisclosed profits at projects' expense, such as through issuance of high-interest bonds, or to prevent projects from uncovering enterprise's scheme, such as through concealing insurer's involvement.

Military base housing projects adequately alleged that bond insurer knowingly and intentionally participated in mail and wire fraud scheme to obtain credit enhancement fees from projects without projects' knowledge that insurer was participating in financing, as necessary to plead insurer's mail and wire fraud as predicate acts under Racketeer Influenced and Corrupt Organizations Act (RICO), even though insurer did not make any misrepresentations or omissions to projects, where projects alleged that originator, director, and insurer intentionally concealed that insurer was providing credit enhancement in exchange for high fees, despite representations that project loans would not have credit enhancement and despite providing project with certain documents omitting insurer's role.

Military housing projects adequately alleged that purchaser of loan originator and purchaser's affiliated entities entered into conspiracy with originator, originator's managing director, and bond insurer to defraud projects in securing financing, as necessary to support Racketeer Influenced and Corrupt Organizations Act (RICO) conspiracy claim, where projects alleged that during due diligence

process preceding acquisition of originator's business, purchaser and affiliates learned that originator and others engaged in enterprise to reap profits through making misrepresentations to projects regarding bond insurance rates and credit enhancement services, and purchaser proceeded with acquisition and hired managing director, then made their own financing-related misrepresentations to projects.

Military housing projects' complaint against loan originator, purchaser of originator, purchaser's affiliated entities, and others for Racketeer Influenced and Corrupt Organizations Act (RICO) enterprise and conspiracy adequately explained specific role of purchaser and each of its affiliates in alleged scheme to defraud projects in connection with financing, as necessary to satisfy requirement of pleading fraud with particularity as to each defendant, where complaint alleged each entity's role in financing of projects, alerted each entity to theory of liability against it, including theory of purchaser's successor liability, and alleged that entities had intertwined operations making it difficult to tell which entity took which actions.

ZONING & PLANNING - OHIO

Benalcazar v. Genoa Township, Ohio

United States Court of Appeals, Sixth Circuit - June 10, 2021 - F.3d - 2021 WL 2374260

Property owners filed § 1983 action alleging that township violated their rights under Due Process and Equal Protection Clauses when it denied their rezoning request. After township signed consent decree permitting owners to develop their property, township residents intervened and moved to dismiss.

The United States District Court for the Southern District of Ohio approved consent decree, and intervenors appealed.

The Court of Appeals held that district court had authority to enter consent decree without first ruling on intervenors' motion to dismiss.

District court had subject matter jurisdiction over property owners' non-frivolous claim that township violated their rights under Due Process and Equal Protection Clauses when it denied their rezoning request, and thus had authority to enter consent decree without first ruling on intervening township residents' motion to dismiss based on zoning referendum reversing township's approval of rezoning application.

OPEN MEETINGS - WASHINGTON

Zink v. City of Mesa

Court of Appeals of Washington, Division 3 - June 1, 2021 - P.3d - 2021 WL 2197995

City council meeting attendee brought action against city, mayor, city council members, county, sheriff's offices, sheriff, and deputies, alleging violations of the Open Public Meetings Act (OPMA) in connection with arrest for video recording city council meeting, among other claims.

Following a jury verdict in favor of defendants, the Superior Court set aside jury's verdict and found city violated OPMA by prohibiting attendee from video recording meeting, and awarded $5,000 in attorney fees. Attendee appealed.

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

- City council proceedings constituted a "meeting" within meaning of OPMA;
- City's decision to eject attendee who was video recording meeting was not reasonable;
- Attendee stated a claim that city's governing body established an invalid condition precedent on attendance at a public meeting in violation of OPMA;
- Individual elected officials were not subject to personal individual liability; and
- Trial court's brief analysis with respect to $5,000 attorney fee award was an abuse of discretion.

ANNEXATION - WISCONSIN

City of Mayville v. Department of Administration

Supreme Court of Wisconsin - June 11, 2021 - N.W.2d - 2021 WL 2385542 - 2021 WI 57

First village filed petition for judicial review of decision of Department of Administration, which approved cooperative plan between second village and town whereby second village and town would be consolidated. Department and second village moved to dismiss for lack of standing.

The Circuit Court denied motion. The Circuit Court thereafter determined that first village was required to be party to plan and reversed Department's decision. Department and second village appealed. The Court of Appeals affirmed as modified. The Supreme Court granted review.

The Supreme Court held that:

- Department's decision affected substantial interests of first village, and thus first village had standing to seek judicial review of decision, and
- Cooperative plan physically altered or made difference in first village's boundary line, and thus before such change could be effective, first village was required to be party to plan.

Department of Administration's decision approving cooperative plan to consolidate first village and town adversely affected substantial interests of second village, and thus second village had standing to seek judicial review of decision, where both villages were completely surrounded by town, which was unincorporated, upon approval of plan land surrounding second village would become incorporated village, prior to plan second village had statutory extraterritorial zoning rights and extraterritorial plat approval rights within town and was statutorily permitted to annex areas of town contiguous to it, and plan extinguished those statutorily granted rights.

Cooperative plan to consolidate first village and town physically altered or made difference in second village's boundary line, and thus before such change could be effective, second village was required to be party to plan, although plan did not, in and of itself, effect change in second village's boundary line, where plan set conditions that had to be met if second village's boundary lines were to change, and, further, territory surrounding second village would become incorporated territory and, due to that change, second village would no longer will possess statutory right to annex that territory.

IMMUNITY - CALIFORNIA

Sales v. City of Tustin

Court of Appeal, Fourth District, Division 3, California - June 8, 2021 - Cal.Rptr.3d - 2021

WL 2327869 - 21 Cal. Daily Op. Serv. 5489

Mother brought action in federal court against city asserting federal civil rights claims and state wrongful death and civil rights claims arising from death of her son who was struck by vehicle while being pursued by police officers on foot.

The United States District Court for the Central District of California entered judgment against her on her federal claims and withdrew supplemental jurisdiction over her state-law claims. After the United States Court of Appeals for the Ninth Circuit affirmed, mother brought action asserting her state-law claims in state court. The Superior Court granted summary judgment in favor of city based on statute of limitations, and denied mother's motion for reconsideration. Mother appealed.

The Court of Appeal held that six-month limitations period under California's Tort Claims Act was tolled for 30 days from date United States Court of Appeals issued its mandate, not from date United States District Court dismissed mother's pendent state-law claims.

Six-month limitations period under California's Tort Claims Act for mother's wrongful death and civil rights claims against city in connection with death of her son, who was struck by vehicle while being pursued by police officers on foot, was tolled for 30 days pursuant to federal supplemental jurisdiction statute from date United States Court of Appeals issued its mandate on mother's appeal as of right in her previous federal action, rather than from date United States District Court dismissed mother's pendent state-law claims or from date United States Court of Appeals filed its panel decision.

PUBLIC UTILITIES - COLORADO

San Isabel Electric Association, Inc. v. Public Utilities Commission

Supreme Court of Colorado - June 1, 2021 - P.3d - 2021 WL 2197981 - 2021 CO 36

Rural cooperative electric association sought review of Public Utilities Commission's (PUC) order, determining that association's certificates of public convenience and necessity (CPCN) did not give association the right to provide station power to another electric utility's wind farms that were located in association's certificated service territory.

The District Court affirmed. Association appealed.

The Supreme Court, en banc, held that:

- Association's CPCNs did not preclude utility from self-supplying station power to wind farm, and
- Association did not have a due process right to provide station power thus precluding any right to hearing on purported deletion of service area.

Rural cooperative electric association did not have a right under its certificates of public convenience and necessity (CPCN) to provide station power to another electric utility's wind farms that were located in association's certificated service territory, and other utility, as a vertically integrated utility, could continue to self-supply such power using its own interconnected transmission network and electric generation resources; self-supply of station power did not involve a sale, prohibiting self-supply of power would have resulted in inefficient duplication, and allowing self-supply of power promoted state's renewable energy policy.

Rural cooperative electric association did not have a due process property right under its certificates

of public convenience and necessity (CPCN) to provide station power to winds farms of a vertically-integrated electric utility that were located in association's certificated service territory, and therefore lack of a PUC hearing on whether association was unwilling or unable to serve its certificated territory, relating to the purported deletion of portion of territory, did not violate due process.

STATUTE OF LIMITATIONS - INDIANA

City of Marion v. London Witte Group, LLC

Supreme Court of Indiana - June 17, 2021 - N.E.3d - 2021 WL 2466180

City brought action against company that provided financial advice to city regarding financing for a construction project and alleged claims for negligence, breach of fiduciary duty, and constructive fraud and unjust enrichment.

The Superior Court granted in part and denied in part financial advisor's motion for summary judgment. City appealed and financial advisor cross-appealed. The Court of Appeals affirmed in part, reversed in part, and remanded with instructions. City sought transfer, and transfer was granted.

The Supreme Court held that:

- As a matter of first impression, the Supreme Court would adopt the equitable tolling doctrine of adverse domination;
- The adverse domination doctrine applied to both private and municipal corporations; and
- Genuine issues of material fact existed as to whether mayor adversely dominated the city, and whether company that provided financial advice to city contributed to it, precluding summary judgment.

The Supreme Court would adopt the equitable tolling doctrine of adverse domination, which was an equitable doctrine that tolled statutes of limitations for claims by corporations against its officers, directors, lawyers and accountants for so long as corporation was controlled by those acting against its interests, as a logical corollary of its discovery rule.

The adverse domination doctrine, which tolled the statute of limitations as long as the corporate plaintiff was controlled by alleged wrongdoers, applied to both private and municipal corporations.

Genuine issues of material fact existed as to whether mayor adversely dominated the city, and whether company that provided financial advice to city contributed to it, precluding summary judgment based on the adverse domination doctrine on company's statute of limitations defense in negligence, breach of fiduciary duty, and constructive fraud action.

ZONING & PLANNING - MASSACHUSETTS

Styller v. Zoning Board of Appeals of Lynnfield

Supreme Judicial Court of Massachusetts, Suffolk - June 7, 2021 - N.E.3d - 487 Mass. 588 - 2021 WL 2308296

Property owner brought action challenging town zoning board's decision that short-term rentals of owner's single-family residence constituted an unauthorized additional use of the property as a

“tourist home” or “lodging house” that was prohibited before town adopted new zoning bylaw that expressly barred such short-term rentals in single-residence zoning districts.

After owner sold the residence affirmed the board’s decision. Owner appealed, and case was transferred from the Appeals Court.

The Supreme Judicial Court held that:

- Property owner had standing to continue action, even after sale of residence;
- Action was not rendered moot by sale of residence; and
- Short-term rentals did not qualify as prior nonconforming use that was exempt from new bylaw barring such rentals.

ANNEXATION - NEBRASKA

County of Sarpy v. City of Gretna

Supreme Court of Nebraska - May 28, 2021 - N.W.2d - 309 Neb. 320 - 2021 WL 2171772

County brought action for declaratory and injunctive relief against city, challenging validity of city’s annexation ordinances and a zoning extension ordinance for annexation of area that was in close proximity to rapidly developing areas and that was planned for development, but that was presently undeveloped and being used for agricultural purposes.

The District Court granted county’s motion for summary judgment. City appealed.

The Supreme Court held that annexed area was urban thus precluding statutory ban on annexation of agricultural lands that were rural in character by a city of the second class.

Annexed area that was in close proximity to rapidly developing areas and that was planned for development, but that was presently undeveloped and used for agricultural purposes, was “urban” and not “rural” in character, and thus city’s annexation ordinances and zoning extension ordinance for annexation of area did not violate statute prohibiting a city of the second class from annexing of agricultural lands that were rural in character; city’s comprehensive plan designated area to include planned interstate interchange which was designated as community entrance and special character area, city expected to develop area into city’s future growth area, and city, county, state, and other governmental agencies all had plans to develop area, which was fastest growing area in the state.

INDUSTRIAL DEVELOPMENT BONDS - PENNSYLVANIA

Katzen & Boyer v. Clearfield County Industrial Development Authority, et. al.

United States District Court, W.D. Pennsylvania - June 11, 2021 - Slip Copy2021 WL 2402005

Holder of industrial development bonds (Bonds) brought action alleging that Developers engaged in a scheme to deprive the Bondholders of additional contingent rental interest by fraudulently concealing and diverting rental revenue to a straw party, and by failing to accurately report the revenue generated by the Project Facility. Bondholders also alleged that Developer was suppressing the amount of additional contingent appreciation interest due to the Bondholders by refusing to provide information by which Paying Agent’s appraiser could make an accurate appraisal of the

Project Facility.

Bondholders alleged claims for: breach of contract; tortious interference with contract; unjust enrichment; and, conspiracy.

Developers and related parties moved for summary judgment.

The District Court held that:

- Bondholders stated a plausible claim for the tort of intentional interference with a contract against Developers;
- Bondholders stated a plausible claim of unjust enrichment against Developers;
- Bondholders stated a plausible claim of civil conspiracy against Developers;
- Developers were not entitled to dismissal of the claim for punitive damages at this stage of the proceedings;
- Bondholders stated plausible claims for tortious interference, unjust enrichment against the parties alleged to have engaged in the scheme to deprive Bondholders of additional contingent rental interest by fraudulently concealing and diverting rental revenue;
- Bondholders allegations are sufficient to plausibly state the fiduciary relationship element of a breach of fiduciary duty claim under Pennsylvania law, whether that relationship is classified as trustee/beneficiary or principal/agent;

The gist of the action doctrine did not apply because the gravamen of the tort claim was not the alleged violation of Developers' contractual obligations to the Bondholders as third-party beneficiaries under the Mortgage Loan Agreement, but instead was his intentional interference with the contractual obligations of the Industrial Development Authority and M&T Bank as Paying Agent under the Debt Resolution and the Bonds. Developers were not a party to either the Debt Resolution or the Bonds, and neither the Debt Resolution nor the Bonds created any direct contractual relationship between the Bondholders and Developers. Rather, it was the contractual obligations of the IDA and M&T Bank under the Debt Resolution and the Bonds with which Bondholders alleged Developers tortiously interfered.

The relationship between Developers and the Bondholders at the heart of the unjust enrichment claim was not founded on a direct contract between those two parties. Rather, the contract at issue is the Mortgage Loan Agreement between Developers and M&T Bank, as the agent of the IDA, to which the Bondholders are third party beneficiaries. And a third-party beneficiary to a contract, like the Bondholders, may bring an unjust enrichment claim when the defendant has "received and retained a benefit" from the plaintiff "which would be unjust to retain" without some payment to the plaintiff.

Because the question of whether punitive damages are proper often turns on the defendant's state of mind, this question frequently cannot be resolved on the pleadings alone, but must await the development of a full factual record at trial.

Bondholders' allegations that they are in a fiduciary relationship with M&T Bank which imposes common law duties to "protect, manage and preserve" the rights of the Bondholders related to the revenue generated by the Project Facility beyond the duties owed under the terms of the transaction documents, if believed, are sufficient to plausibly meet the first element of a breach of fiduciary duty claim under Pennsylvania law.

"Here, Plaintiffs allege that their breach of fiduciary duty claim is predicated on M&T Bank's violation of a broader duty imposed by common law that arises from the fiduciary relationship

existing between the Bondholders and the Bank, and that this duty exists regardless of any other obligations of the Bank imposed under the Mortgage Loan Agreement and Bonds. While there may be some overlap between the Bondholders' breach of contract and breach of fiduciary duty claims against M&T Bank, the Court is satisfied that the Bondholders' breach of fiduciary duty claim states enough distinct facts to give it a legal basis separate and apart from the contractual relationship between the parties. Accordingly, the Court concludes that Plaintiffs' breach of fiduciary claim as pled against M&T Bank is not precluded as a legal matter by the gist of the action doctrine."

BANKRUPTCY - PUERTO RICO

In re Financial Oversight and Management Board for Puerto Rico

United States District Court, D. Puerto Rico - May 21, 2021 - F.Supp.3d - 2021 WL 2071094

In matter arising within Commonwealth of Puerto Rico's debt adjustment proceeding under Title III of the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), union and individuals who were employees of Puerto Rico Electric Power Authority (PREPA) filed motion for preliminary injunction, seeking to enjoin implementation of operation and management agreement between PREPA and power company, whereby company was scheduled to take over operation of PREPA's transmission and distribution system.

The District Court held that:

- Plaintiffs had standing to assert claims based on union's loss of membership or employees' alleged loss of vested rights;
- Plaintiffs lacked standing to assert claim that agreement was null and void based on policy disagreements and broad allegations of societal harm;
- Plaintiffs failed to demonstrate that they were likely to succeed on the merits of their claims for ERISA violations;
- Plaintiffs failed to demonstrate that they were likely to succeed on the merits of their claims for PROMESA violations;
- Plaintiffs failed to demonstrate that they were likely to succeed on the merits of their claims based on Contracts Clause of federal constitution;
- Plaintiffs failed to demonstrate that they were likely to succeed on the merits of their claims for tortious interference with contractual relations; and
- Plaintiffs failed to demonstrate that they were likely to succeed on the merits of their claims for contract in prejudice of third parties.

In matter arising within Commonwealth of Puerto Rico's debt adjustment proceeding under Title III of the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), union and individuals who were employees of Puerto Rico Electric Power Authority (PREPA) had Article III standing to assert claims seeking to enjoin implementation of operation and management agreement between PREPA and power company, whereby company was scheduled to take over operation of PREPA's transmission and distribution system, including violations of ERISA, PROMESA, Contracts Clause of federal constitution, tortious interference with contract, and contract in prejudice of third party, to the extent claims were based on union's loss of membership or employees' alleged loss of vested rights that were required to be protected, as those alleged injuries were concrete and

particularized.

PUBLIC UTILITIES - RHODE ISLAND

Laprocina v. Lourie

Supreme Court of Rhode Island - May 26, 2021 - A.3d - 2021 WL 2131725

Pedestrian, who had incurred permanent brain damage after he was hit by car while crossing intersection, for whom administratrix of estate was substituted following death, brought negligence action against electric company, alleging that area where collision occurred was not properly illuminated because electric company allowed rolling blackout to occur or failed to repair, replace, and maintain streetlights in area.

Following denial of electric company's first summary judgment motion, the Superior Court entered summary judgment in favor of electric company. Administratrix appealed.

The Supreme Court held that:

- Law of the case doctrine did not preclude trial court judge from considering summary judgment motion;
- Streetlight tariff and city ordinances did not establish duty of company to individual members of public to repair and maintain streetlights;
- Company owed no common law duty to pedestrian; and
- As issue of first impression, public utility generally owes no common-law duty to individual third parties who are allegedly injured, at least in part, as result of inoperable streetlights.

ZONING & PLANNING - TEXAS

Powell v. City of Houston

Supreme Court of Texas - June 4, 2021 - S.W.3d - 2021 WL 2273976 - 64 Tex. Sup. Ct. J. 1209

Homeowners brought action against City of Houston, a home rule city, seeking a declaratory judgment that City's historic preservation ordinance (HPO) violated zoning statute and city charter's general prohibition against zoning.

Following bench trial, the County Civil Court at Law entered take-nothing judgment for city. Homeowners appealed. The Houston Court of Appeals affirmed. Homeowners petitioned for review, which was granted.

The Supreme Court held that:

- HPO did not zone property in violation of city charter's general prohibition against zoning;
- City complied with zoning statute's requirement that HPO be enacted in accordance with a comprehensive plan; and
- City complied with zoning statute's requirement that home-rule municipality appoint zoning commission to implement regulations authorized by statute.

Historic preservation ordinance (HPO) enacted by home rule city did not zone property in violation of city charter's general prohibition against zoning; ordinance did not regulate purposes for which

land could be used and, in fact, provided that it could not be construed to authorize city to regulate use of any structure or property, ordinance focused on protecting and preserving the exterior architectural characteristics of buildings based on historical significance, distinctiveness and connection to a neighborhood, instead of restricting the purposes for which land could be used, ordinance was targeted to fewer than one percent of city's total lots, thereby lacking geographical comprehensiveness associated with zoning regulations, and Local Government Code provided different remedies for violations of zoning ordinances and for damage to designated historic structures.

City of Houston, a home rule city, complied with zoning statute's requirement that historic preservation ordinance (HPO) be enacted in accordance with a comprehensive plan; ordinance was comprehensive with respect to changes to structures in historic areas, as it laid out in detail which changes were prohibited, which were allowed, and procedures for carrying out allowed changes, it required owners not to allow their landmarks and contributing structures to fall into state of disrepair resulting in deterioration of exterior features, and exemptions were similarly thorough.

City of Houston complied with zoning statute's requirement, when enacting historic preservation ordinance (HPO), that home-rule municipality appoint zoning commission to implement regulations authorized by statute; Houston Archaeological and Historical Commission served as requisite commission, which made recommendations to City Council by identifying areas with potential for historic-district designations and initiating designation process, reviewed applications for designation of landmarks and historic districts and made recommendations before Council decided whether to make designation.

ZONING & PLANNING - VIRGINIA

Norton v. Board of Supervisors of Fairfax County

Supreme Court of Virginia - May 27, 2021 - S.E.2d - 2021 WL 2149384

Short-term lodging providers brought action against county board challenging amendments to the county zoning ordinance and imposition of transient occupancy tax.

The Fairfax Circuit Court ruled in favor of the board and dismissed. Providers appealed.

The Supreme Court held that:

- County board correctly interpreted the zoning ordinance's original definition of a dwelling as permitting only non-transient residential occupancy;
- County zoning ordinance amendment to definition of dwelling was not internally contradictory; and
- Short-term lodging providers used their properties in the same manner as commercial facilities offering short-term guest rooms.

County board correctly interpreted the zoning ordinance's original definition of a dwelling as permitting only non-transient residential occupancy, and thus short-term lodging providers failed to meet burden of establishing that the board's actions in amending the ordinance to impose requirements on short-term lodging providers were unreasonable, arbitrary, or capricious; even though first sentence of original definition broadly defined a dwelling, the second sentence modified the residential occupancy requirement, such that only non-transient residential occupancy was permitted in a dwelling, and a necessary corollary to modification was that transient residential occupancy was prohibited in a dwelling.

County zoning ordinance amendment to definition of dwelling was not internally contradictory, and thus amendment was not unconstitutionally vague in violation of due process; original definition of a dwelling did not permit by-right short-term lodging, and amendment did not permit anything more than short-term lodging subject to permitting and other restrictions.

Short-term lodging providers used their properties in the same manner as commercial facilities offering short-term guest rooms, and thus distinction between providers' properties and commercial facilities were irrelevant in determining whether county code allowed a locality to levy a transient occupancy tax on those properties, where, while the level of ancillary services provided, such as maid service, food service, and other amenities varied greatly for commercial facilities, they all provided a place for people to stay where they could live and sleep, and providers' residences were likewise offered as an accommodation to people requiring a place to conduct those same activities of daily living.

BONDS - CALIFORNIA

Denny v. Arntz

Court of Appeal, First District, Division 2, California - May 12, 2021 - Not Reported in Cal.Rptr. - 2021 WL 1903766

On July 30, 2019, the San Francisco Board of Supervisors (Board) passed an ordinance providing for a special election on November 5, 2019, for the purpose of submitting to the city's voters "a proposition to incur bonded indebtedness not to exceed $600 million to finance the construction, development, acquisition, improvement, rehabilitation, preservation, and repair of affordable housing improvements, and related costs necessary or convenient for the foregoing purposes" and related matters."

The ordinance specified the official language to be included on the ballots as follows: " 'SAN FRANCISCO AFFORDABLE HOUSING BONDS. To finance the construction, development, acquisition, and preservation of housing affordable to extremely-low, low- and middle-income households through programs that will prioritize vulnerable populations such as San Francisco's working families, veterans, seniors, and persons with disabilities; to assist in the acquisition, rehabilitation, and preservation of existing affordable housing to prevent the displacement of residents; to repair and reconstruct distressed and dilapidated public housing developments and their underlying infrastructure; to assist the City's middle-income residents or workers in obtaining affordable rental or home ownership opportunities including down payment assistance and support for new construction of affordable housing for San Francisco Unified School District and City College of San Francisco employees; and to pay related costs; shall the City and County of San Francisco issue $600,000,000 in general obligation bonds with a duration of up to 30 years from the time of issuance, an estimated average tax rate of $0.019/$100 of assessed property value, and projected average annual revenues of $50,000,000, subject to independent citizen oversight and regular audits?'"

In November 2019, San Francisco voters passed Proposition A, San Francisco Affordable Housing Bonds. Citizen/Appellant brought an action to set aside the measure. His lawsuit alleged various deficiencies in the ballot materials as grounds for contesting the election pursuant to Elections Code section 16100, as well as a claim that the measure violated the California Constitution.

The Court of Appeal held that:

- Appellant had provided no reason to believe the ballot materials for Proposition A "were so inaccurate or misleading as to prevent the voters from making informed choices."
- The overriding purpose of the proposed bonds was to finance the development of affordable housing through new construction and rehabilitation of existing housing. This purpose involves acquisition and improvement of real property within the parameters of article XIIIA, section 1, subdivision (b), of our state Constitution, negating Appellant's argument that Proposition A authorized bonds for purposes other than "acquisition or improvement of real property."

The court also addressed procedural issues, including: res judicata, the inclusion of paid arguments in the voter information guide; maximum word count in the ballot description; whether housing projects should be funded by revenue, as opposed to general obligation, bonds due to the payment of rents; judicial compensation; and jurisdiction.

MUNICIPAL ORDINANCE - ILLINOIS

Word Seed Church v. Village of Hazel Crest

United States District Court, N.D. Illinois, Eastern Division - April 12, 2021 - F.Supp.3d - 2021 WL 1379497

Church and church association brought action against village alleging zoning ordinance that restricted religious land use unreasonably limited First Amendment free exercise rights under the Religious Land Use and Institutionalized Persons Act (RLUIPA) and Fourteenth Amendment and was causing serious, irreparable harm.

Church and association brought motion for preliminary injunction and a declaratory judgment.

The District Court held that:

- Church and association were not likely to succeed on claim that ordinance violated equal terms provision of RLUIPA;
- Church and association were not likely to succeed on claim that village did not treat similarly situated assembly uses equally in violation of equal protection;
- Church and association were not likely to succeed on claim that designation of churches as a special use in residential districts violated unreasonable limits provision of RLUIPA; and
- Church and association were not likely to succeed on claim that restriction of religious land use to three residential districts violated unreasonable limits provision of RLUIPA.

ANNEXATION - NEBRASKA

Darling Ingredients Inc. v. City of Bellevue

Supreme Court of Nebraska - May 28, 2021 - N.W.2d - 309 Neb. 338 - 2021 WL 2172079

Landowners brought actions to challenge annexation, asking the court to declare the annexation ordinance invalid and to permanently enjoin the city from taking actions to enforce it.

The District Court entered judgment for landowners, and city appealed.

The Supreme Court held that:

- Annexation of largely agricultural area was not invalid based on the character of the use, and

- Due to neighboring baseball complex, largely agricultural area was adjacent and contiguous to the city.

Annexation of largely agricultural area was not invalid based on the character of the use, although some of the land within the area had greenbelt tax valuation status; area was not isolated but was near major road and several residential subdivisions, as well as an Air Force base which employed 10,000 people, area contained an industrial plant, city's comprehensive plan anticipated the area would be used for industrial and other nonagricultural purposes in the future, "for sale" listing for certain land in the area had divided it into several "small industrial lots," and city had initiated procedures to annex subdivision immediately south of the area.

Due to neighboring baseball complex, largely agricultural area was adjacent and contiguous to the city for purposes of annexation requirements; although prior annexation of baseball complex appeared to be isolated from the rest of the city and created distinct masses within the city, that unchallenged annexation could be used to establish adjacency.

ZONING & PLANNING - VIRGINIA

Historic Alexandria Foundation v. City of Alexandria

Supreme Court of Virginia - May 27, 2021 - S.E.2d - 2021 WL 2149459

Historic preservation group brought action challenging city's approval of landowner's applications for permits for the renovation of a historic property in city's old and historic district.

The Alexandria Circuit Court sustained city's demurrers and dismissed the challenge, and preservation group appealed.

The Supreme Court held that group did not suffer particularized harm and thus lacked standing.

Historic preservation group lacked standing to challenge city's approval of landowner's permits to renovate historic property in city's old and historic district, as, even assuming that renovation would compromise the integrity of the historic residence located on the property and would diminish the protected open space on the property, the resulting harm would be shared by the public generally, and the group did not suffer any particularized harm; group's interest in the preservation of historic buildings did not give it standing to challenge the city's decision.

EMINENT DOMAIN - WISCONSIN

Southport Commons, LLC v. Wisconsin Department of Transportation

Supreme Court of Wisconsin - June 8, 2021 - N.W.2d - 2021 WL 2325008 - 2021 WI 52

Property owner filed an inverse-condemnation claim against the state Department of Transportation (DOT).

The Circuit Court entered judgment on the pleadings for the DOT. Property owner appealed. The Court of Appeals affirmed. Property owner petitioned for review.

The Supreme Court held that the three-year period in which a property owner must file a notice of claim of damages from violation of statute enacted to protect property owners from damage to lands

caused by unreasonable diversion or retention of surface waters due to construction of highways or railroad beds begins to run when the damage happens or take place and not when it is discovered.

BANKRUPTCY - CALIFORNIA

In re Venoco LLC

United States Court of Appeals, Third Circuit - May 24, 2021 - F.3d - 2021 WL 2067331

Liquidating trustee appointed under confirmed Chapter 11 plan of debtors, entities that had operated leased offshore oil and gas drilling rig and owned onshore refining facility, filed adversary complaint seeking to recover, on inverse condemnation theory, compensation from the State of California and its Lands Commission for the alleged taking of debtors' refinery.

State defendants moved to dismiss based on, inter alia, sovereign immunity. The United States Bankruptcy Court for the District of Delaware denied motions, and defendants were granted leave for partial interlocutory appeal. The District Court affirmed. Defendants appealed.

The Court of Appeals held that:

- Liquidating trustee's claims were brought to effectuate the bankruptcy court's in rem jurisdiction and were thus claims as to which the state had waived its immunity from suit by ratifying the Bankruptcy Clause of the United States Constitution;
- State defendants forfeited the argument they had immunity from liability when they failed to raise it in the Bankruptcy Court; and
- Even if they had not forfeited argument, state defendants were not actually immune from liability under California law.

Although states can generally assert sovereign immunity to shield themselves from lawsuits, bankruptcy proceedings are one of the exceptions; by ratifying the Bankruptcy Clause of the United States Constitution, states waived their sovereign immunity defense in proceedings that further a bankruptcy court's exercise of its jurisdiction over property of the debtor and its estate, also known as "in rem jurisdiction."

Adversary proceeding in which liquidating trustee appointed under debtors' confirmed Chapter 11 plan sought to recover, on inverse condemnation theory, compensation from State of California and its Lands Commission for alleged taking of debtors' oil refinery was brought to effectuate the bankruptcy court's in rem jurisdiction and was thus claim as to which state had waived its Eleventh Amendment immunity from suit by ratifying Bankruptcy Clause of United States Constitution; though form of action resembled claim for money damages, its function was to decide property rights and so it furthered court's exercise of jurisdiction over property of debtors and their estates, under the circumstances court's in rem jurisdiction extended to estate property transferred to trust for purpose of liquidation and distribution to debtors' creditors, and over which court retained substantial control under the plan, and proceeding also furthered equitable distribution of estate's assets.

In adversary proceeding in which liquidating trustee appointed under debtors' confirmed Chapter 11 plan sought to recover, on inverse condemnation theory, compensation from State of California and its Lands Commission for alleged taking of debtors' oil refinery, both State and Commission could be sued in California courts for their alleged violation of the Takings Clause under the United States or California Constitutions, and so they were not actually immune from liability under California law.

EMINENT DOMAIN - GEORGIA

D. Rose, Inc. v. City of Atlanta

Court of Appeals of Georgia - May 20, 2021 - S.E.2d - 2021 WL 2010139

Property owner filed inverse condemnation action alleging that city's setback requirements in its zoning code effectively deprived it of all economic use of property.

The trial court entered summary judgment in city's favor, and owner appealed.

The Court of Appeals held that it was not city's 60-foot setback restriction, by itself, that deprived owner of all economic use of property.

It was not city's 60-foot setback restriction, by itself, that deprived owner of all economic use of property, and thus city's denial of its request for variance was not taking, even though owner was unable to build residence on property without variance due to restriction in conjunction with 100-year floodplain and several sewer easements and sewer lines on rear 2/3 of property.

ZONING & PLANNING - ILLINOIS

Word Seed Church v. Village of Hazel Crest

United States District Court, N.D. Illinois, Eastern Division - April 12, 2021 - F.Supp.3d - 2021 WL 1379497

Church and church association brought action against village alleging zoning ordinance that restricted religious land use unreasonably limited First Amendment free exercise rights under the Religious Land Use and Institutionalized Persons Act (RLUIPA) and Fourteenth Amendment and was causing serious, irreparable harm.

Church and association brought motion for preliminary injunction and a declaratory judgment.

The District Court held that:

- Church and association were not likely to succeed on claim that ordinance violated equal terms provision of RLUIPA;
- Church and association were not likely to succeed on claim that village did not treat similarly situated assembly uses equally in violation of equal protection;
- Church and association were not likely to succeed on claim that designation of churches as a special use in residential districts violated unreasonable limits provision of RLUIPA; and
- Church and association were not likely to succeed on claim that restriction of religious land use to three residential districts violated unreasonable limits provision of RLUIPA.

ZONING & PLANNING - ILLINOIS

Medponics Illinois, LLC v. Department of Agriculture

Supreme Court of Illinois - May 20, 2021 - N.E.3d - 2021 IL 125443 - 2021 WL 2005476

After the Illinois Department of Agriculture (DOA) denied its application for permit to operate medical cannabis cultivation center in particular Illinois State Police (ISP) district and instead

awarded permit to competitor, applicant petitioned for administrative review of DOA's decision, asserting that competitor's application contained disqualifying flaw, namely, that its proposed cultivation center was within 2,500 feet of area zoned "exclusively" for residential use, in violation of the Compassionate Use of Medical Cannabis Pilot Program Act.

The Circuit Court reversed. Competitor and DOA appealed. The Appellate Court reversed judgment of circuit court and ordered permit reinstated to competitor. Applicant's petition for leave to appeal was allowed.

The Supreme Court held that:

- Although competitor's proposed cultivation center was within 2,500 feet of city's R-1 and R-5 districts, such districts were not zoned "exclusively" for residential use within meaning of the Act, and so cultivation center did not violate the Act;
- Ample evidence in the administrative record supported the Supreme Court's decision, independent of letter from city to DOA advising that location of proposed cultivation center was not within 2,500 feet of any area zoned exclusively for residential use and "Frequently Asked Questions" (FAQ) document located on DOA website, neither of which was included in the administrative record;
- Even if applicant had not forfeited its argument, the location requirement as interpreted by DOA did not impermissibly limit the scope of the Act; and
- DOA's interpretation of location requirement was reasonable and harmonized with purpose of the Act, and so would be given due deference.

ZONING & PLANNING - NEW YORK

West 58th Street Coalition, Inc. v. City of New York

Court of Appeals of New York - May 27, 2021 - N.E.3d - 2021 WL 2144169 - 2021 N.Y. Slip Op. 03346

Objectors commenced article 78 proceeding, challenging determination by the Department of Buildings (DOB) that classified nine-story building proposed for employment shelter for homeless men as a "class A" multiple dwelling with an "R-2" occupancy group, grandfathered from compliance with current building code.

The Supreme Court, New York County, denied petition and dismissed proceeding. Objectors appealed. The Supreme Court, Appellate Division, affirmed as modified by remitting to Supreme Court with the direction to conduct a hearing on whether the building's use was consistent with general safety and welfare standards. Objectors appealed.

The Court of Appeals held that:

- DOB's classification was rational, but
- In reviewing DOB decision in article 78 proceeding, Court of Appeals was precluded from remitting action for plenary judicial proceedings.

Department of Buildings' (DOB) classification of nine-story building proposed for employment shelter for homeless men as a "class A" multiple dwelling with an "R-2" occupancy group, which includes buildings occupied for permanent residence purposes, and grandfathering building from compliance with current building code, was rational; the building's "R–2" classification was based on evidence that residents would occupy their dwelling units, on average, for at least 30 days given the

nature of the services and programs that would be offered there.

In reviewing decision by Department of Buildings (DOB) that classified nine-story building proposed for employment shelter for homeless men as a "class A" multiple dwelling with an "R-2" occupancy group, grandfathered from compliance with current building code, Court of Appeals was precluded from remitting action to Supreme Court for plenary judicial proceedings on whether building's use as a homeless shelter was consistent with general safety and welfare standards after Court of Appeals had found that classification determination had a rational basis in article 78 proceeding pursuant to which the scope of review did not extend past question of whether challenged determinations were irrational, which was a question of law.

Upon concluding that an authorized agency has reviewed a matter applying the proper legal standard and that its determination has a rational basis, a court cannot second guess that determination by granting a hearing to find additional facts or consider evidence not before the agency when it made its determination.

PUBLIC MEETINGS - OHIO

State ex rel. Fritz v. Trumbull County Board of Elections

Supreme Court of Ohio - May 27, 2021 - N.E.3d - 2021 WL 2154706 - 2021-Ohio-1828

Relators filed petition for writ of prohibition to prevent county board of elections and its members from holding special recall election to remove a member from city council, and a petition for writ of mandamus ordering the board to remove the recall election from the ballot.

The Supreme Court held that:

- Board did not exercise the quasi-judicial power needed for writ of prohibition, and
- As a matter of first impression, term "majority vote," when applied to city council action taken by motion, means at least a majority vote of council members present at the meeting; and
- Relators were entitled to writ of mandamus ordering the board to remove issue of city member's recall from special election ballot.

EMINENT DOMAIN - GEORGIA

City of Atlanta v. Carlisle

Court of Appeals of Georgia - May 17, 2021 - S.E.2d - 2021 WL 1960198

Homeowners brought action against the city for trespass, nuisance, a "per se" taking, and inverse condemnation, after discovering underground sanitary sewer and storm lines traversing their property.

Homeowners and city moved for summary judgment. The trial court granted partial summary judgment to the homeowners on the issue of liability and denied the city's motion. City appealed, arguing that the claims were time barred.

The Court of Appeals held that sewer and storm lines constituted a permanent and nonabatable nuisance, and thus trespass occurred and nuisance was created, triggering accrual of statute of limitations, when sewer and storm lines were installed on property.

Sewer and storm lines constituted a permanent and nonabatable nuisance, and thus trespass occurred and nuisance was created, beginning four-year statute of limitations period for homeowners' claims for trespass, nuisance, "per se" taking, and inverse condemnation, when sewer and storm lines were installed on property, even though homeowners were not aware of lines for decades; damage or destruction alleged to have been caused by installation of lines was completed at installation, installation was both a substantial and relatively enduring feature of plan of construction, lines were already in place when homeowners purchased their property nearly twenty years before, and homeowners were aware of lines for more than four years before filing suit.

BONDS - ILLINOIS

Tillman v. Pritzker

Supreme Court of Illinois - May 20, 2021 - N.E.3d - 2021 IL 126387 - 2021 WL 2005481

Taxpayer filed a petition for leave to file a taxpayers' suit to restrain and enjoin state officials, including the governor, from disbursing public funds for two general obligation bonds that taxpayer alleged were unconstitutional.

After a hearing on the petition, the Circuit Court entered a written order denying the petition. Taxpayer appealed. The Appellate Court reversed and remanded. State officers' petition for leave to appeal was granted.

The Supreme Court held that there was no "reasonable ground" for filing the taxpayer petition to restrain and enjoin disbursement of public funds for the bonds.

The necessary elements for laches were satisfied, and therefore, there was no "reasonable ground" for filing taxpayer petition to restrain and enjoin state officials, including the governor, from disbursing public funds for two general obligation bonds that he alleged were unconstitutional; taxpayer had constructive notice of the dates statutes were enacted to authorize the bonds and of the dates the bonds were issued, but he offered no excuse for why he waited until 16 years after first bond authorization to file his action, such that his delay was unreasonable, and further, officials suffered prejudice as a result of the delay, as the state had already expended billions of dollars and made irrevocable transactions rendering it impossible to return to the status quo.

LIABILITY - INDIANA

Flores v. City of South Bend

United States Court of Appeals, Seventh Circuit - May 12, 2021 - F.3d - 2021 WL 1903225

Personal representative of motorist who died when struck by patrol car driven by police officer filed action against officer and city under § 1983 and associated state laws, asserting that officer violated motorist's substantive due process rights and that the city was liable under Monell.

The United States District Court granted defendants' motion to dismiss for failure to state a claim and denied personal representative leave to amend. Personal representative appealed.

The Court of Appeals held that:

- Police officer’s alleged conduct reflected deliberate indifference, as required to state claim for violation of substantive due process;
- Allegations did not support Monell claim based on de facto policy of city encouraging reckless speeding by officers; but
- Complaint plausibly alleged that city acted with deliberate indifference to known recklessness of officers, as required for Monell liability.
