
IMMUNITY - TEXAS

Fraley v. Texas A&M University System

Supreme Court of Texas - March 24, 2023 - S.W.3d - 2023 WL 2618532 - 66 Tex. Sup. Ct. J. 515

Motorist brought premises-defect action against public university which was charged with maintaining road on which motorist was injured in an accident, alleging that a lack of lighting, barricades, and warning signs around the intersection caused his injuries.

The 361st District Court denied university's plea to the jurisdiction. University appealed. The Amarillo Court of Appeals reversed. Review was granted.

The Supreme Court held that:

- Ditch encountered by motorist when he left roadway by proceeding straight through a T-shaped intersection was not a "special defect" and thus did not support application of Tort Claims Act exception to governmental immunity for discretionary decisions about design and signage;
- University's decision to redesign four-way intersection to a three-way, T-shaped intersection and place a yield sign, rather than a stop sign or some other signal, was discretionary and thus subject to governmental immunity under Tort Claims Act; and
- Court of Appeals properly ordered action dismissed rather than remanded for re-pleading.

IMMUNITY - WASHINGTON

Hanson v. Carmona

Supreme Court of Washington, En Banc - March 23, 2023 - P.3d - 2023 WL 2604579

Motorist brought claims for negligence and vicarious liability against local governmental entity that administered for multiple counties grants for programs under Senior Citizens Services Act, and entity's employee, relating to collision when employee was driving vehicle owned by entity.

Defendants filed motion for summary judgment, alleging motorist's failure to comply with statutory presuit notice requirement, and motorist filed amended complaint that removed all references to entity and to allegations that employee was acting in scope of employment.

The Superior Court granted partial summary judgment to entity, allowed case to proceed against employee in her individual capacity, and certified its order for discretionary review. The Court of Appeals reversed. Review was granted.

The Supreme Court held that:

- Statutory presuit notice requirement applies to a tort action alleging that a local governmental

employee was acting within scope of employment, even if employee is sued in their individual capacity, and
- Statutory presuit notice requirement does not violate constitutional separation of powers.

Statutory presuit notice requirement applies to a tort action alleging that a local governmental employee was acting within scope of employment, even if employee is sued in their individual capacity and governmental entity technically is not sued; statute encompasses acts within scope of employment, and governmental entity rather than employee would be bound by any judgment.

In light of legislature's constitutional power to decide conditions precedent to suing state and local governments, statutory presuit notice requirement for tort actions did not violate constitutional separation of powers, as applied to motorist's tort action alleging that employee of local government entity that administered for multiple counties grants for programs under Senior Citizens Services Act was acting within scope of employment at time of collision between motorist's vehicle and entity-owned vehicle driven by employee, despite conflict with a civil rule for courts, i.e., presuit notice requirement changed court rule's procedure for commencing a lawsuit, by adding a precondition not found in court rule.

IMMUNITY - ALABAMA

Fernando v. City of Chickasaw

Supreme Court of Alabama - March 17, 2023 - So.3d - 2023 WL 2543794

Administrator of estate of arrestee who died in city jail after being arrested on suspicion of driving under the influence (DUI) brought action in which he asserted wrongful-death claims under state law and various claims under federal law against city, city's public-safety director, first jailer, and numerous fictitiously named defendants.

Following removal, the United States District Court for the Southern District of Alabama entered summary judgment for defendants on the federal claims and dismissed the wrongful-death claim. Estate administrator then commenced a second action in which he asserted wrongful-death claims and named a police officer and a second jailer as additional defendants, whom he later sought to substitute for the fictitiously named defendants.

After granting administrator's motion to reinstate the first action and consolidate the two actions, the Circuit Court entered a summary judgment in both actions in favor of all defendants. Estate administrator filed a notice of appeal in each action, and the appeals were consolidated.

The Supreme Court held that:

- After federal court's judgment, trial court lacked jurisdiction to consider motion to reinstate the initial action as well as to consider any other subsequent pleadings or motions purportedly filed in that action;
- Federal removal statute's tolling provision did not apply to the state-law-based wrongful-death claims that administrator asserted against the additional defendants;
- Administrator's naming of the additional defendants in the second action did not substitute those individuals for the fictitiously named defendants in the initial action;
- Consolidation of the actions did not mean that the additional defendants were substituted for the fictitiously named defendants in the initial action;
- Administrator did not present the required substantial evidence to show that failure of city's

public-safety director to provide any medical training to police officers and jailers was conduct that was beyond his authority so as to deprive him of State-agent immunity;
- Administrator failed to present the required substantial evidence to show that first jailer acted beyond her authority when she failed to contact emergency medical services;
- Administrator failed to show that first jailer acted beyond her authority when she failed to check on arrestee every 30 minutes; and
- Administrator failed to show that first jailer acted beyond her authority when she allegedly violated the jail's operations policy for booking, housing, and releasing inmates.

BALLOT INITIATIVE - CALIFORNIA

No on E, San Franciscans Opposing the Affordable Housing Production Act v. Chiu

United States Court of Appeals, Ninth Circuit - March 8, 2023 - F.4th - 2023 WL 2397500 - 2023 Daily Journal D.A.R. 1843

Political committee, its treasurer, and contributor brought action alleging that municipality's ordinance requiring it to disclose identities of major donors to its top contributors violated First Amendment.

The United States District Court for the Northern District of California denied plaintiffs' motion for preliminary injunction, and they appealed.

The Court of Appeals held that:

- Appeal fell within scope of mootness exception for controversies capable of repetition, yet evading review;
- District court did not abuse its discretion by concluding that disclosure requirement was substantially related to municipality's strong governmental interest in informing voters about who funded political advertisements;
- Plaintiffs were not likely to succeed on merits of their argument that ordinance was impermissible burden on speech as applied to longer advertisements;
- District court did not abuse its discretion by concluding that disclosure requirement did not impose impermissible burden on speech as applied to shorter advertisements;
- District court did not abuse its discretion in concluding that plaintiffs failed to demonstrate that disclosure requirement actually and meaningfully deterred contributors;
- District court did not abuse its discretion by concluding that disclosure requirement was narrowly tailored to municipality's strong interest in informing voters about who funded political advertisements; and
- Public interest and balance of hardships weighed in favor of denying preliminary injunction.

BONDS - ILLINOIS

Dale v. NFP Corp.

United States District Court, N.D. Illinois, Eastern Division - March 1, 2023 - Slip Copy - 2023 WL 2306825

Board of Trustees of a pension plan (Plaintiff) brought an action under ERISA on behalf of the Plan and its participants. Plaintiffs alleged that Defendants, the Plan's administrators and investment

advisors, breached their fiduciary duties by structuring investments to generate excessive direct and indirect compensation for themselves; failing to disclose to Plaintiffs all compensation received from investment of Plan assets; providing false or inadequate reports on investment performance; providing inadequate or misleading investment advice; and investing Plan assets in imprudent and illiquid investments.

Defendants moved to dismiss.

With regard to Plaintiffs' claims regarding Defendants' treatment of bonds in the portfolio, the District Court held that:

- Plaintiffs' stated a claim that Defendants' had engaged in churning of the bonds based on an excessive volume of trades, not the value of the commission on each trade; and
- The churning claim did not require that the Plaintiffs' supply every trading metric necessary for proving the churning claim at the motion to dismiss stage.

"Defendants contend that Plaintiffs' claim should be dismissed because there is 'no meaningful data establishing a purported reasonable commission on bond trades….' If Plaintiff's claim was premised solely on the value of the mark-ups—in other words, whether a 1.0-2.5% mark-up on bond trades was excessive, Defendants would have a viable argument. But Plaintiffs' 'churning' claim is based on an excessive volume of trades, not the value of the commission on each trade. To the extent Defendants traded bonds excessively to generate commissions for themselves, not to maximize the Plan's financial performance, Defendants failed to 'discharged their duties with respect to a plan solely in the interest of the participants.'"

"Defendants also argue that Plaintiffs fail to provide 'a metric for bond laddering.' Bond laddering is an investment strategy that involves buying bonds with different maturity dates to protect against 'interest rate risk, the risk that interest rates will change over the life of a bond.' In other words, laddering helps diversify a bond portfolio. Defendants say bond laddering explains the selling of bonds before maturity. That may be so. But at the motion to dismiss stage, Plaintiff is not required to supply every trading metric necessary for proving the churning claim. Metrics relevant to churning, such as the 'applicable turnover ratio or percentage of the account value paid in commissions,' will be calculated after discovery. Accordingly, Plaintiffs have pleaded sufficient facts to establish a churning claim. Defendants motion to dismiss Count III is denied."

PUBLIC UTILITIES - MISSISSIPPI

City of Canton v. Slaughter

Supreme Court of Mississippi. - March 16, 2023 - So.3d - 2023 WL 2533264

Two municipal utilities commissioners sought judicial review of decision by city board of aldermen to remove them from their appointed positions. The Circuit Court reversed the board's decision. Board appealed.

The Supreme Court held that:

- Commissioners' notice of appeal naming board rather than city complied with statutory requirements;
- Commissioners' notice of appeal satisfied requirement that such notices contain a description or designation of the record;
- Commissioners' notice of appeal was timely filed;

- Commissioners were “public officers” entitled to notice and opportunity to be heard; and
- Commissioners were improperly removed from their positions because board failed to override mayor’s veto of their resolution to issue notice and opportunity to be heard.

Municipal utilities commissioners fell within definition of “public officer,” and thus, decision by city board of aldermen to remove them from their appointed positions for without providing them notice and opportunity to be heard prior to removal violated commissioners’ procedural due process rights, notwithstanding statute providing for removal of commissioners for inefficiency or incompetency or any other cause, since commissioners were appointed to discharge a designated duty concerning the public.

City board of aldermen’s four-to-one vote to override mayor’s veto of their resolution to issue notice and opportunity to be heard to two municipal utilities commissioners failed to pass since it lacked the requisite two-thirds majority of board members, thus resulting in improper removal of the commissioners from their appointed positions, where vote cast by alderman acting his capacity as mayor pro tempore did not count because he was serving in place of the mayor and by statute could only vote as the mayor would, that is, in case of a tie.

EMINENT DOMAIN - NORTH CAROLINA

Epcon Homestead, LLC v. Town of Chapel Hill

United States Court of Appeals, Fourth Circuit - March 21, 2023 - F.4th - 2023 WL 2564355

Housing developer filed § 1983 action in state court alleging that town’s special use permit condition requiring that it set aside portion of its development for low-income residents or pay fee in lieu of that condition effected unconstitutional taking and violated state law and due process.

After removal, the United States District Court dismissed complaint, and developer appealed.

The Court of Appeals held that:

- Developer’s claims accrued when it began purchasing land subject to special use permit, rather than when it was compelled to pay challenged fees, and
- Continuing wrong doctrine did not toll statutory period for developer to commence § 1983 action.

Housing developer’s claim that town’s special use permit condition requiring that it set aside portion of its development for low-income residents or pay fee in lieu of that condition effected unconstitutional taking and violated its substantive due process rights accrued, and limitations period for filing § 1983 action commenced, when developer began purchasing land subject to special use permit, rather than when it was compelled to pay challenged fees as condition of town issuing certificates of occupancy for its development project, where developer learned of permit condition when it purchased land.

Under North Carolina law, continuing wrong doctrine did not toll statutory period for housing developer to commence § 1983 action alleging that town’s special use permit condition requiring that it set aside portion of its development for low-income residents or pay fee in lieu of that condition effected unconstitutional taking; while essence of developer’s state return-of-fees claim was arguably unlawful fee payments exacted, its § 1983 injury was inflicted by special use permit condition requiring it to set aside part of its property or pay fee-in-lieu.

BANKRUPTCY - PUERTO RICO

In re Financial Oversight and Management Board for Puerto Rico

United States District Court, D. Puerto Rico - March 22, 2023 - B.R. - 2023 WL 2589708

Financial Oversight and Management Board for Puerto Rico brought adversary proceeding to disallow bondholders' proofs of claim for amounts due pursuant to trust agreement with Puerto Rico Electric Power Authority (PREPA). Bondholders counterclaimed for declaratory judgment. Numerous entities were allowed to intervene. Parties moved for summary judgment.

The District Court held that:

- Adversary proceeding was ripe for adjudication;
- Resolutions for bonds issued by PREPA gave bondholders security interests under trust agreement only in moneys actually received and deposited into fund created by trust agreement and subjected to lien and charge for payment on bonds (sinking fund) and funds explicitly made subject to liens by terms of trust agreement, subject to perfection of those liens, limiting bondholders' recovery under proofs of claim for amounts due;
- PREPA did not use authority to grant security interest in future revenues when it issued bonds, and therefore bondholders did not have security interest in future revenues not yet received for energy not yet generated;
- PREPA bondholders had perfected liens in sinking fund to extent that deposit accounts comprising funds were in control of trustee for bondholders;
- Factual issue as to whether bondholders had perfected liens on construction fund or capital improvement fund precluded summary judgment on issue of whether Oversight Board could avoid for benefit of PREPA any unperfected security interests of PREPA's bondholders;
- PREPA bond claim had to be disallowed to extent it asserted security interest, perfected or otherwise, in moneys beyond those actually deposited into sinking fund as of time of discharge, if and when PREPA plan of adjustment was confirmed; and
- PREPA bondholders had unsecured net revenue claim arising from covenants of trust agreement to pay bond principal and interest from pledged net revenues of system, which was partially secured by moneys in sinking fund, and otherwise was unsecured, and remedies provisions of trust agreement provided bondholders with ability to obtain relief against PREPA.

PUBLIC PENSIONS - WISCONSIN

Milwaukee Police Supervisors Organization v. City of Milwaukee

Supreme Court of Wisconsin - March 21, 2023 - N.W.2d - 2023 WL 2577560 - 2023 WI 20

Labor unions representing police supervisors and firefighters brought action challenging city employee retirement system's decision to start excluding a "pension offset payment," i.e., a payment that was made pursuant to the collective bargaining agreements (CBAs) and that was conditioned on an employee-paid pension contribution, from the calculation of "current annual salary" for the purpose of calculating duty disability retirement (DDR) benefits.

The Circuit Court entered summary judgment for unions. City appealed. The Court of Appeals affirmed the judgment as to the police union but reversed the judgment as to the firefighters union. Firefighters union petitioned for review.

The Supreme Court held that under the city charter and CBA with firefighters union, the "pension

offset payment" was part of the "current annual salary" for the purpose of calculating DDR benefits.

Pursuant to city charter and city's collective bargaining agreement (CBA) with labor union representing firefighters, "pension offset payment," i.e., payment that was made pursuant to CBA and that was conditioned on employee-paid pension contribution, was part of "current annual salary" for purpose of calculating duty disability retirement (DDR) benefits; despite argument that DDR beneficiaries did not make the requisite contribution, charter provided that DDR beneficiaries were to be paid percentage of "current annual salary" for position held at time of injury, "current annual salary" meant base salary, and salary grids listed in CBA included "pension offset payment" in base salaries listed.

ZONING & PLANNING - CALIFORNIA

Pacific Palisades Residents Association, Inc. v. City of Los Angeles

Court of Appeal, Second District, Division 8, California - March 8, 2023 - Cal.Rptr.3d - 2023 WL 2401079

Neighbors association brought writ proceeding against city and California Coastal Commission, challenging approval of eldercare facility in city.

The Superior Court denied the petition, and neighbors appealed.

The Court of Appeal held that:

- Proposed eldercare facility was not subject to city zoning code's yard requirements;
- Evidence was sufficient to support city's determination that facility was compatible with the neighborhood, and thus that Class 32 categorical California Environmental Quality Act (CEQA) exemption for in-fill development projects applied;
- Evidence was sufficient to support city's determination that facility did not violate community plan's policy of preserving and protecting views from hillsides, public lands, and roadways; and
- Evidence was sufficient to support California Coastal Commission's determination that proposed eldercare facility presented no substantial issue under the Coastal Act.

Proposed eldercare facility was not subject to city zoning code's yard requirements pursuant to ordinance stating that no such requirements apply to the residential portions of buildings located on lots "[1] used for combined commercial and residential uses, if [2] such portions are used exclusively for residential uses, [3] abut a street, private street or alley, and [4] the first floor of such buildings at ground level is used for commercial uses or for access to the residential portions of such buildings," where facility was to have ground floor bistro open to the public, facility contained private individual rooms where resident elders would sleep, and residential portions of the facility would abut streets.

IMMUNITY - GEORGIA

Georgia Department of Transportation v. White

Court of Appeals of Georgia - March 6, 2023 - S.E.2d - 2023 WL 2362728

Landowner filed claims against Department of Transportation (DOT) for inverse condemnation and for judicial review of DOT's decision denying landowner's request for permits to build two full-access

commercial driveways on his property.

The trial court granted landowner's motion for partial summary judgment on judicial-review claim. DOT's petition for discretionary review was granted.

The Court of Appeals held that DOT's denial of landowner's driveway permits was not a "contested case" under the Administrative Procedure Act (APA), and thus DOT did not waive sovereign immunity as to landowner's claim for judicial review under APA.

Landowner was not entitled to a hearing to contest Department of Transportation's (DOT's) decision denying his request for permits to build two full-access commercial driveways on his property, so that DOT's denial did not amount to a "contested case" under the Administrative Procedure Act (APA), and thus DOT never waived its sovereign immunity as to landowner's claim for judicial review of DOT's permit denials under the APA; statutes governing permitting process for commercial driveways did not provide for a hearing, other statutes governing DOT decisions did provide for hearing, and finding otherwise would have vitiated other APA provisions regarding administrative hearings and transmission of record to trial court.

EMINENT DOMAIN - INDIANA

Town of Linden v. Birge

Supreme Court of Indiana - March 7, 2023 - N.E.3d - 2023 WL 2383795

Property owners brought action against county and town after modifications to a town drainage system caused flooding on their property, asserting claims for nuisance, civil conspiracy, and inverse condemnation.

The Circuit Court granted town's motion to dismiss, and property owners appealed. The Court of Appeals reversed. On remand, the Circuit Court concluded that a taking had occurred and set the matter for a determination of damages. County and town filed interlocutory appeal, and the Court of Appeals reversed. The Supreme Court granted petition to transfer.

The Supreme Court held that

- Floodings were to be analyzed as a per se taking;
- Whether flooding resulted in substantial damage, and thus amounted to a permanent physical invasion, required remand; and
- Statute exempting county for liability for entry on private property for drain "reconstruction or maintenance" did not insulate it from liability.

Floodings of farmland property following county's and town's drainage improvement plan were repetitive and of indefinite duration and thus were to be analyzed as a per se taking; drain reconstruction project resulted in repeated flooding events on the property due to increased pressurization at water pipe transfer point during every heavy rainfall, and while flooding was intermittent, overflows inevitably recurred if the property sustained heavy rainfall.

Whether intermittent but inevitable flooding of farm owners' property following county's and town's drainage reconstruction project resulted in substantial damage, and thus amounted to a permanent physical invasion, required remand for additional fact-finding; while farm owners presented evidence of the flooding's interference with their use of the property, including testimony by tenant farmer that property was "almost always" wet, creating "root issues" for the crops and preventing

him in some years from farming it “at all without getting equipment stuck,” and by delaying the annual planting season by up to a month, preventing tenant from ever attaining the “maximum yield,” trial court only found that the flooding made farming “more difficult” than before.

Statute giving county a “right of entry over and upon land” lying within 75 feet of a regulated drain and exempting it from liability for any necessary drain “reconstruction or maintenance” that results in damage to crops grown within that right of way did not exempt county from liability for a taking of farm owners’ property following drainage reconstruction project which resulted in intermittent but inevitable flooding of farm property; property intrusions contemplated by the statute were merely incidental, minimal, and infrequent, and would permit a farmer to continue to use the land, while the complete destruction of crops from intermittent yet inevitably recurring flooding did not.

ZONING & PLANNING - KANSAS

American Warrior, Inc. v. Board of County Commissioners of Finney County

Court of Appeals of Kansas - February 10, 2023 - P.3d - 2023 WL 1876581

Plaintiffs brought suit against board of county commissioners and operator of sand and gravel quarry, challenging the validity of conditional-use permit issued by the county board of zoning appeals (BZA) to operate the quarry.

The District Court granted defendants’ motion for summary judgment and denied plaintiffs’ motion for summary judgment. Plaintiffs appealed.

The Court of Appeals held that conditional-use permit issued by BZA and not approved by board was void and unenforceable.

Conditional-use permit issued by county board of zoning appeals (BZA) to operator of sand and gravel quarry was void and unenforceable, where zoning laws required that conditional-use permits be first reviewed by a governing body’s planning commission and then voted upon by the governing body itself, and board of county commissioners instead allowed its BZA to independently review and issue the conditional-use permit.

MUNICIPAL GOVERNANCE - MISSISSIPPI

Lumumba v. City Council of Jackson

Supreme Court of Mississippi - March 9, 2023 - So.3d - 2023 WL 2420981

City council brought action against mayor, seeking declaratory and injunctive relief arising from mayor’s attempt to veto a negative vote of council, and mayor counterclaimed for declaration that he had authority to veto such a vote.

The Chancery Court entered summary judgment in favor of council. Mayor appealed.

The Supreme Court held that:

- Exhibits of public records sought to be introduced by city council were “on file” and thus admissible at summary judgment stage;
- Statute providing a mayor in a mayor-council municipality with authority to veto an ordinance that

has been adopted by city council does not provide mayor with authority to veto a negative vote or non-action of a city council; and
- City code also did not provide mayor with such authority.

ZONING & PLANNING - NEW JERSEY

Malanga v. Township of West Orange

Supreme Court of New Jersey - March 13, 2023 - A.3d - 2023 WL 2467376

Taxpayer brought action to challenge township's designation of library as an area in need of redevelopment.

The Superior Court, Law Division, summarily dismissed the complaint. Taxpayer appealed, and the Superior Court, Appellate Division, affirmed. Taxpayer petitioned for certification to appeal, which was granted, and townships subsequently authorized the sale of the library to a private developer.

The Supreme Court held that:

- Township's sale of library to private developer did not render appeal moot;
- Evidence was insufficient to support finding that library suffered from "obsolescence," as a ground for township's designation of library as an area in need of redevelopment; and
- Evidence was insufficient to support determination that, as a result of any faulty arrangement or obsolete layout, library site was detrimental to the welfare of the community.

Township's sale of library to private developer did not render moot taxpayer's appeal challenging township's designation of library as an area in need of redevelopment under the Local Redevelopment and Housing Law (LRHL), where resolution designating the library site as an area in need of redevelopment was still in force, and, if the sale fell through, township would want the designation to remain in place.

Proper interpretation of Local Redevelopment and Housing Law (LRHL) standard for designating property for redevelopment was an issue of substantial public importance such that Supreme Court would address merits of taxpayer's allegedly moot appeal in action challenging township's designation of library as an area in need of development; library had been sold to a private developer after taxpayer appealed.

Proof that a property is not used in an optimal manner or that it could function better is not an independent basis for redevelopment under Local Redevelopment and Housing Law (LRHL) subdivision providing for a determination that a property is in need of redevelopment if it contained buildings which, by reason of "dilapidation, obsolescence, overcrowding, faulty arrangement or design, lack of ventilation, light and sanitary facilities, excessive land coverage, deleterious land use or obsolete layout, or any combination of these or other factors, are detrimental to the safety, health, morals, or welfare of the community."

Evidence was insufficient to support finding that library suffered from "obsolescence," as a ground for township's designation of library as an area in need of redevelopment; both consultant and the mayor recognized the Library was a functioning building, members of the community actively used it more than 150,000 times a year, and needed improvements and upgrades were not uncommon for older buildings and did not present code violations.

Evidence was insufficient to support determination that, as a result of any faulty arrangement or

obsolete layout, library site was detrimental to the welfare of the community, and thus did not support township's determination that library was an area in need of redevelopment; while consultant stated that, because of its physical obsolescence and layout, the library could not add more computers or programming, and was not "up to the benchmark standard of modern libraries," benchmarks used did not clearly show how library compared to its peers or how its programming and the number of computers it had compared to other libraries, and needed repair work and mere references to asbestos did not establish actual detriment to the welfare of the community.

IMMUNITY - TEXAS

Rattray v. City of Brownsville

Supreme Court of Texas - March 10, 2023 - S.W.3d - 2023 WL 2438952

Homeowners brought negligence action against city alleging that city's negligent use of motor-driven equipment to open and close sluice gates in resaca and to pump water resulted in stormwater accumulation that flooded their homes.

The 107th District Court denied city's plea to the jurisdiction. City filed interlocutory appeal, and the Corpus Christi – Edinburg Court of Appeals reversed and remanded with instructions. Homeowners filed petition for review, which was granted.

The Supreme Court held that:

- Sluice gate was put to "operation or use" within meaning of Texas Tort Claims Act, and
- Homeowners met their burden at motion to dismiss stage to create a fact issue on whether their property damage arose from city's closure of sluice gate.

Under Tort Claims Act sections providing an exception to immunity for property damage, injury, and death "proximately caused" by the negligence of an employee if such damage, injury, or death "arises from" the operation of a motor-driven vehicle or equipment, the "proximately cause" and "arises from" requirements are separate and independent, so that satisfying the "arises from" requirement does not excuse a plaintiff from demonstrating proximate cause.

Motor-driven sluice gate in resaca was put to "operation or use" within meaning of Texas Tort Claims Act provision waiving immunity for the damage which "arises from the operation or use of a motor-driven vehicle or motor-driven equipment," where city employees closed the gate during a rainstorm, gate blocked the water in the resaca as intended, and the flooding of properties happened within about an hour of the closure; while city claimed that the owners of the flooded properties were actually complaining about the city's failure to open the gate, such nonuse was only a factor due to the city's initial use and operation of the gate by closing it.

Homeowners met their burden to create a fact issue on whether their property damage arose from city's closure of motor-driven sluice gate in resaca during rainstorm which flooded homeowners' properties, as required to survive city's plea to the jurisdiction; rainstorm, the gate's closure, and the flooding all happened within the same episode of events, one closely following the occurrence of the other, there was no significant geographical attenuation between the gate and the homeowners' properties, and homeowners potentially could show that rainstorm itself did not make property damage inevitable absent the closure of the gate.

EMINENT DOMAIN - WASHINNGTON

City of Sammamish v. Titcomb

Court of Appeals of Washington, Division 1 - March 13, 2023 - P.3d - 2023 WL 2473120

City filed a petition in eminent domain after enacting an ordinance condemning property rights in water flowing through homeowners' property.

The Superior Court denied city's motion for an order adjudicating public use and necessity, denied city's motion for reconsideration, and granted homeowners' motion for attorney fees and costs. City appealed.

The Court of Appeals held that:

- City had statutory authority to condemn homeowners' property to divert stream for stormwater facilities improvement project;
- Homeowners' argument that city's receipt of funding pursuant to the Salmon Recovery Act precluded condemnation was not properly before the Court of Appeals;
- Homeowners were not entitled to remand for an evidentiary hearing regarding public use and necessity;
- City's condemnation of homeowners' property for a stormwater facilities improvement project constituted a public use;
- City's condemnation of homeowners' property was necessary to accomplish the public use of a stormwater facilities improvement project; and
- Homeowners were not entitled to an award of attorney fees and costs.

City had statutory authority to condemn homeowners' property to divert stream for stormwater facilities improvement project, although the project additionally provided fish passage benefits; the condemnation ordinance stated that the current infrastructure was not adequate to convey the two-year storm event and that the purpose of the project was to reduce or eliminate storm drainage conveyance system capacity issues, improve traffic safety of adjacent roadways by reducing hazardous flooding conditions, and provide greater flood protection, and the project was required by state law to provide for fish passage.

City's condemnation of homeowners' property was necessary to accomplish the public use of a stormwater facilities improvement project; the city considered the merits of four project alternatives and concluded that acquisition of homeowners' property was the only alternative that met critical project requirements, including state fish passage rules, the capacity to convey a 100-year flow event, and the requisite federal permitting, and there was no evidence of actual fraud or arbitrary and capricious conduct.

BONDS - WISCONSIN

In re Atrium of Racine, Inc.

Supreme Court of Wisconsin - March 16, 2023 - N.W.2d - 2023 WL 2530355 - 2023 WI 19

Residents of senior-living facility that had gone into receivership after defaulting on debt-service payments objected to receiver's motion to authorize sale of facility and also sought an order that would reiterate and state finality for purposes of appeal a prior order that declared that bondholders' mortgage lien was superior to residents' claim under their residency agreements that

they were entitled to reimbursement of their entrance fees.

The Circuit Court entered order authorizing the sale while also granting residents' motion for a reiteration of the prior order. Residents appealed both the sale order and the order reiterating the prior order, and the appeals were consolidated. The Court of Appeals reversed and remanded. Bondholders and receiver petitioned for review.

The Supreme Court held that:

- Bond underwriter's "official statement" could not be a basis for finding that bondholders subordinated mortgage to residents' claims for entrance fees, and
- Finance documents concerning issuance of bonds and corresponding mortgage lien did not provide that bondholders subordinated mortgage to residents' claims for entrance fees.

Bond underwriter's "official statement" concerning issuance of bonds and corresponding mortgage lien on senior-living facility could not be basis for finding that bondholders subordinated mortgage to residents' claims to have entrance fees reimbursed pursuant to their residency agreements; although residents' claims to entrance fees were among liens permitted under "official statement," which stated that mortgage lien was subject to permitted liens, "official statement" was not agreement at all but rather government-required notice to investors about investment risks.

Financing documents concerning issuance of bonds and corresponding mortgage lien on senior-living facility did not provide that bondholders subordinated mortgage to residents' claims to have entrance fees reimbursed pursuant to their residency agreements; documents merely contemplated that mortgage could be subordinated to other liens, and entrance fees were nothing more than unsecured, contingent liabilities and were not liens.

Senior-living facility residents did not properly develop argument challenging court of appeals' decision holding that receiver, who had been appointed when facility defaulted on debt-service payments, did not violate his fiduciary duties to residents when he moved circuit court to issue order on priority concerning bondholders' mortgage lien and residents' claim to reimbursement of entrance fees, and thus supreme court would not address argument; residents did not engage in any detailed analysis to support argument and did not request any remedy.

"Under Wis. Stat. § 128.17, the bondholders' Mortgage lien has priority over the residents' entrance fee claims. No provision of the Financing Documents subordinates the bondholders' lien, and Episcopal Homes does not extend to the proceeds from the sale of real property with a properly perfected mortgage lien. The bondholders are therefore entitled to first payment from the proceeds of the sale of the Atrium's assets."

ZONING & PLANNING - CALIFORNIA

Spencer v. City of Palos Verdes Estates

Court of Appeal, Second District, Division 5, California - February 27, 2023 - Cal.Rptr.3d - 2023 WL 2237502

Non-local surfers, who encountered alleged harassment from local surf group when trying to access

premier surf spot at city beach, and non-profit organization dedicated to preserving coastal access brought action against surf group, some of group's individual members, and city alleging conspiracy to deny access under California Coastal Act.

The Superior Court granted city's motion for judgment on the pleadings. Plaintiffs appealed.

The Court of Appeal held that:

- Masonry and wood fort built on city beach qualified as "development" requiring permit under Act;
- City, as landowner, could be held strictly liable under Act for unpermitted fort; and
- Plaintiffs stated conspiracy claim against city under Act based on alleged harassment.

Masonry and wood fort built on city beach qualified as "development" requiring permit under California Coastal Act, since fort was indisputably a structure, which term was included in statutory definition of "development."

City, as landowner, could be held strictly liable under California Coastal Act for unpermitted masonry and wood fort built on city beach, although city did not construct fort and did not possess a private landowner's right to exclude others from public beach, since any property owner who maintained a development undertook activity within meaning of Act, even if built by prior owner or trespasser, Act was not concerned with potential exclusion of local surf group that allegedly built fort, but with construction of unpermitted fort which city allowed to remain in its location for over 30 years, and city possessed ability to remove fort.

Non-local surfers sufficiently alleged city's participation in purported conspiracy with local surf group to deny access to city beach, as required to state claim against city under California Coastal Act based on conspiracy liability, where non-local surfers alleged many city residents and city council did not want "outsiders" in city, local surf group had decades-long practice of blocking access to city beach, by words and acts, city was aware of such conduct by local surf group and complicit in it, and city did not enforce its laws against local surf group, but acted to exclude "outsiders" by targeting them with traffic citations, parking tickets, and towing.

EMINENT DOMAIN - CALIFORNIA

Robinson v. Superior Court of Kern County

Court of Appeal, Fifth District, California - March 2, 2023 - Cal.Rptr.3d - 2023 WL 2338102

Investor-owned electric utility filed complaint in eminent domain seeking to condemn easement across landowner's property for purpose of accessing and maintaining existing power transmission lines.

The Superior Court granted utility's motion for order of prejudgment possession. Landowner petitioned for writ of mandate.

The Court of Appeal held that:

- Utility was a "public utility" to which right of eminent domain could extend;
- Utility was not a "public entity" which would be required, pursuant to Eminent Domain Law, to adopt a resolution of necessity before initiating suit to condemn property;
- Utility was not required to obtain approval of its regulator before instituting eminent domain action;

- A “public agency,” as would be required to comply with the California Environmental Quality Act (CEQA) before commencing an eminent domain action, does not include investor-owned public utilities;
- As a matter of first impression, a nonpublic entity is “entitled to take the property by eminent domain,” as could support order for prejudgment possession of property pursuant to “quick take” procedure, when the plaintiff establishes it is statutorily authorized to exercise power of eminent domain and proves by preponderance of evidence that all the requirements of statute setting out general limitations on exercise of eminent domain are met; and
- As a matter of first impression, trial court was required to make explicit findings as to whether all requirements of statute setting out general limitations on exercise of eminent domain were met when granting motion for order of prejudgment possession.

Investor-owned electric utility was a “public utility” to which right of eminent domain could extend so as to allow utility to condemn easement across landowner’s property for purpose of accessing and maintaining existing power transmission lines, where transmission lines were part of an electrical plant, and utility was an electrical corporation.

Investor-owned electric utility was not a “public entity” which would be required, pursuant to Eminent Domain Law, to adopt a resolution of necessity before initiating suit to condemn easement on landowner’s property for purpose of accessing and maintaining existing power transmission lines, even though utility was a “public utility” to which right of eminent domain could extend; utility was not a political subdivision.

Investor-owned public electric utility was not required to obtain approval of its regulator, the California Public Utilities Commission (CPUC), before instituting action to condemn easement on landowner’s property for purpose of accessing and maintaining existing power transmission lines, where easement was not sought for competitive purposes.

A “public agency,” as would be required to comply with the California Environmental Quality Act (CEQA) before commencing an eminent domain action, does not include investor-owned public utilities.

A nonpublic entity is “entitled to take the property by eminent domain,” as could support order for prejudgment possession of property pursuant to “quick take” procedure, when the plaintiff establishes it is statutorily authorized to exercise power of eminent domain and proves by preponderance of evidence that all the requirements of statute setting out general limitations on exercise of eminent domain are met.

Trial court was required to make explicit findings as to whether all requirements of statute setting out general limitations on exercise of eminent domain were met, when granting investor-owned electric utility’s motion for order of prejudgment possession pursuant to “quick take” procedure in utility’s action to condemn easement across landowner’s property for purpose of accessing and maintaining existing power transmission lines; property rights being taken from landowner were significant, potential adverse effects, including widening of existing roadway to 16 feet, were substantial and not quickly remediated, and utility’s original moving papers did not acknowledge necessity of findings that statutory requirements were satisfied.

Evidence was insufficient to support any implied finding that easement sought to be condemned by investor-owned electric utility to access and maintain existing power transmission lines, in form of roadway 16 feet in width, satisfied condemnation requirement of necessity, as would be required to support utility’s motion for order of prejudgment possession pursuant to “quick take” procedure; declaration of utility’s employee implied that existing roadways would provide adequate access to

transmission lines since those roadways had been used in past, and declaration of utility's real estate advisor stated that a 16-foot wide access easement was the most feasible method of access but did not provide any facts to support that opinion.

TELECOM - GEORGIA

Gwinnett County v. Netflix, Inc.

Court of Appeals of Georgia - March 8, 2023 - S.E.2d - 2023 WL 2398217

County, city, and unified government consisting of former county and city brought putative class action against video-streaming service providers alleging providers violated Consumer Choice for Television Act and local ordinances by providing streaming services without obtaining franchises and paying franchise fees to local governments, asserting unjust enrichment claims, and seeking declaratory relief, accounting of all monies owed, and injunctive relief.

Following removal and remand, one provider asserted counterclaim under § 1983 alleging imposition of franchise fees would violate its civil and constitutional rights. The Superior Court granted defendants' motions to dismiss for failure to state a claim and conditionally dismissed counterclaim. Plaintiffs appealed.

The Court of Appeals held that:

- Plaintiffs did not have express right of action under the Act;
- Plaintiffs did not have implied right of action under the Act;
- Amendments to the Act rendered declaratory judgment claim moot;
- Lack of any private right of action under the Act precluded declaratory judgment claim; and
- Providers were not unjustly enriched by their failure to pay franchise fees.

Express right of action under Consumer Choice for Television Act provided to an affected local governing authority seeking to recover additional amount of franchise fee alleged to be due after performing an audit of business records or by a franchise holder seeking refund of alleged overpayment did not apply to allow county, city, and unified government consisting of former county and city to bring action against video-streaming service providers alleging they provided streaming services without obtaining franchises and paying franchise fees to local governments, where plaintiffs did not allege that providers were franchise holders or that plaintiffs conducted any audits of providers' business records.

Express right of action under Consumer Choice for Television Act provided to local governing authorities if mediation failed to resolve complaint by residential subscribers who believed they were being denied access based on low-income status did not apply to allow county, city, and unified government consisting of former county and city to bring action against video-streaming service providers alleging they provided streaming services without obtaining franchises and paying franchise fees to local governments, since enforcement powers granted to local governing authorities under such provision did not extend to a service provider's failure to obtain or apply for a franchise.

County, city, and unified government consisting of former county and city did not have implied right of action under Consumer Choice for Television Act to bring action against video-streaming service providers alleging they provided streaming services without obtaining franchises and paying franchise fees to local governments; by terms of Act's definition of franchise, obligation to obtain

franchise was triggered only where a cable or video service provider constructed or operated a network in public rights of way, which providers of video-streaming services did not do, and Act's franchise fee obligation arose only in connection with issuance of a state franchise, over which municipalities and counties had no authority.

Amendments to Consumer Choice for Television Act rendered moot claim by county, city, and unified government consisting of former county and city seeking declaratory judgment that video-streaming service providers offered "video service" within meaning of the Act, failed to comply with the Act, and owed franchise fees; change to Act's definition of "video service" expressly excluded streaming video, and any debt for past-due fees did not arise under any contract or unclear judgment that was subject to prior definition.

Lack of any private right of action by county, city, and unified government consisting of former county and city to bring action under Consumer Choice for Television Act against video-streaming service providers for failure to pay franchise fees precluded claim by county, city, and unified government for declaratory judgment that providers owed franchise fees; Declaratory Judgment Act merely created procedural device for declaration of rights between parties, and Consumer Choice for Television Act was sole basis for any obligation on part of providers to pay franchise fees, as county, city, and unified government failed to produce for the record local ordinances that purportedly required payment of franchise fees.

Video-streaming service providers were not unjustly enriched by their failure to pay franchise fees to county, city, or unified government consisting of former county and city, since providers were not obligated under Consumer Choice for Television Act to pay such fees, as they were not franchise holders.

IMMUNITY - GEORGIA

Griffith v. Robinson

Court of Appeals of Georgia - February 22, 2023 - S.E.2d - 2023 WL 2153157

Principal of public high school sued school's assistant principal, alleging that he made defamatory statements about principal in a complaint filed with the Professional Standards Commission, and asserting claims including libel and slander.

The Superior Court granted assistant principal's motion for summary judgment based on sovereign immunity and official immunity. Principal appealed.

The Court of Appeals held that:

- Georgia Tort Claims Act did not waive assistant principal's sovereign immunity from claims against him in his official capacity, and
- There was no evidence that assistant principal negligently performed a ministerial task or performed a discretionary act with malice.

Georgia Tort Claims Act did not waive assistant high school principal's sovereign immunity from libel and slander claims brought against him in his official capacity by school's principal, alleging that assistant principal made defamatory statements about principal in a complaint that he filed with the Professional Standards Commission; although the Act provided a limited waiver of the State's sovereign immunity for torts of state officers and employees, the term "state," as defined in the Act, specifically excluded school districts.

There was no evidence that assistant principal of public high school negligently performed a ministerial task or performed a discretionary act with malice, and thus school's principal could not overcome assistant principal's official immunity from principal's claims against assistant principal in his individual capacity for libel and slander, based on his allegedly defamatory statements in complaint filed with the Professional Standards Commission.

EMINENT DOMAIN - ILLINOIS

130 E. Devon, LLC v. Village of Elk Grove, Illinois

United States District Court, N.D. Illinois, Eastern Division - February 7, 2023 - F.Supp.3d - 2023 WL 1800278

Owner of vacant lot brought action against village, alleging that village violated Fifth Amendment by engaging in regulatory taking when it forcibly annexed lot, zoned it as residential district, and refused to grant owner special use permit that would have enabled owner to sell lot to developer for use as truck and trailer parking facility.

Village moved to dismiss.

The District Court held that lot owner failed to state claim for regulatory taking.

Owner of vacant lot, which owner purportedly sought to sell to developer who planned to operate it as truck and trailer parking facility, failed to state claim for regulatory taking as result of village's acts of forcibly annexing lot, zoning it as residential district, and refusing to grant special use permit to operate parking lot; lot owner failed to quantify value of lot in light of village's annexation and zoning and provided only conclusory allegations that zoning-compliant uses were not economically viable, owner did not claim to have incurred significant costs or invested substantial resources to develop or market property for particular use, and village's exercise of authority to annex lot and imposition of zoning regulations were garden-variety measures to promote common good.

ZONING & PLANNING - MISSISSIPPI

State by and through Watson v. RW Development, LLC

Supreme Court of Mississippi - March 2, 2023 - So.3d - 2023 WL 2323012

State brought action against city and developer, seeking declaratory judgment that State was the sole and exclusive authority to lease particular property which was intended to be developed as pier.

The Chancery Court entered judgment in favor of city and developer. State appealed.

The Supreme Court, en banc, held that:

- Statutes granting Secretary of State charge of public lands and empowering Secretary, with approval of Governor, to rent or lease all lands belonging to state "except as otherwise provided by law" did not preclude city from exercising its statutory authority, as municipality with port or

harbor that met specified prerequisites, to construct piers;
- Developer which contracted with city for pier rebuilding project changed position as result of its belief and reliance on State's representation that no tidelands lease would be required for rebuilding of pier, as could support finding that State was equitably estopped from requiring such a lease; and
- Such change in position was detrimental to developer.

Statutes granting Secretary of State charge of public lands and empowering Secretary, with approval of Governor, to rent or lease all lands belonging to state "except as otherwise provided by law" did not preclude city from exercising its statutory authority, as municipality with port or harbor that met specified prerequisites, to construct piers; statutes setting out Secretary's authority were general statutes, and phrase "except as otherwise provided by law" made room for other, more specific statutes.

Developer which contracted with city for pier rebuilding project changed position as result of its belief and reliance on State's representation that no tidelands lease would be required for rebuilding of pier, as could support finding that State was equitably estopped from requiring such a lease, where, based on State's representation, developer had undertaken expense and effort of planning and agreeing to rebuild.

State's change in position, in which it determined that, contrary to its prior representation, a tidelands lease was required for city's development of pier, caused detriment to developer with which city had contracted for pier rebuilding project, as could support finding that State was equitably estopped from requiring such a lease, where developer asserted that State's change in position had added expense and delay to project and that, because developer was not being allowed to proceed, citizens were being denied use of pier.

IMMUNITY - OHIO

Emanuel's LLC v. Restore Marietta, Inc.

Court of Appeals of Ohio, Fourth District, Washington County - January 17, 2023 - N.E.3d - 2023 WL 311525 - 2023-Ohio-147

Corporate liquor licensee brought action against city, nonprofit organization that partnered with city to establish designated outdoor refreshment area (DORA) in city's downtown, and organization's executive director, seeking preliminary injunction and damages for alleged tortious interference with business relations and monopoly in violation of state antitrust statute, relating to requirement of purchasing designated cups that could be carried by customers in DORA.

The Court of Common Pleas granted defendants' motion for judgment on the pleadings. Licensee appealed.

The Court of Appeals held that:

- Exception to city's general statutory immunity in cases involving negligent performance of proprietary functions did not apply to tortious interference and Valentine Act claims, and
- Licensee failed to sufficiently allege particular business relationships with which organization and director interfered.

Even if city's alleged conduct, in requiring liquor licensees to purchase designated cups that could be carried by customers in designated outdoor refreshment area (DORA) in city's downtown, and

relating to plaintiff licensee not be allowed to purchase cups, involved proprietary functions, alleged conduct was intentional or purposeful rather than negligent, and thus, exception to general statutory immunity from tort liability, in cases involving negligent performance of proprietary functions, did not apply to licensee's claims for tortious interference with business relations, and monopoly in violation of Valentine Act.

Vague assertion in liquor licensee's complaint, that nonprofit organization that partnered with city to establish designated outdoor refreshment area (DORA) in city's downtown, and organization's executive director, interfered with certain unspecified business relationships, was insufficient to allow inference that defendants interfered with licensee's business relationships with members of public by preventing it from being able to purchase designated cups that could be carried by customers in DORA, and thus, licensee failed to sufficiently allege a prospective business relationship with which defendants interfered, as would be required to state a claim for tortious interference with business relations.

BALLOT INITIATIVE - CALIFORNIA

City of Oxnard v. Starr

Court of Appeal, Second District, Division 6, California - January 19, 2023 - 87 Cal.App.5th 731 - 303 Cal.Rptr.3d 819 - 2023 Daily Journal D.A.R. 481

City brought action against proponent of city initiatives, seeking to have two initiatives passed by voters declared void.

Proponent brought anti-SLAPP motion seeking dismissal of the suit and attorney fees. The Superior Court denied the anti-SLAPP motion. Proponent appealed.

The Court of Appeal held that:

- City's post-election lawsuit against proponent implicated protected activity for anti-SLAPP purposes;
- City had power to seek to invalidate initiatives and did not have duty to defend initiatives, for purposes of proponent's anti-SLAPP motion;
- Proponent was proper defendant in city's lawsuit, for purposes of proponent's anti-SLAPP motion;
- Initiative modifying rules governing city's legislative bodies was not invalid under exclusive delegation rule, for purposes of proponent's anti-SLAPP motion;
- Initiative modifying rules governing city's legislative bodies was legislative in nature and thus was not invalid, for purposes of proponent's anti-SLAPP motion; and
- Initiative amending sunset date of local sales and use tax increase was administrative in nature and thus was invalid, for purposes of proponent's anti-SLAPP motion.

City's post-election lawsuit against proponent of city initiatives implicated protected activity for anti-SLAPP purposes, in proceeding in which proponent brought anti-SLAPP motion seeking dismissal of city's suit against proponent which sought to have two initiatives passed by voters declared void; proponent was sued because he was the proponent of the initiatives, and being a proponent of an initiative was an activity that clearly constituted protected speech and petitioning.

City had power to seek to invalidate initiatives and did not have duty to defend initiatives, for purposes of initiative proponent's anti-SLAPP motion seeking dismissal of city's suit against proponent which sought to have two initiatives passed by voters declared void; statute governing

action for declaration of rights or duties with respect to another unequivocally gave city standing to challenge validity of initiatives.

Initiative proponent was proper defendant in city's post-election lawsuit which sought to have two initiatives passed by voters declared void, for purposes of proponent's anti-SLAPP motion seeking dismissal of city's suit against proponent; city was not forcing proponent to bear any legal or financial burden, city was seeking only declaratory relief and was not seeking damages against proponent, proponent's vigorous defense of initiatives showed he was acting voluntarily, proponent proposed both measures to citizens of city, measurers expressly gave proponent standing to defend them, and there was no reason proponent could not be named as defendant's in action challenging initiative, particularly where there was no other logical defendant.

Initiative modifying rules governing city's legislative bodies was not invalid under exclusive delegation rule, for purposes of initiative proponent's anti-SLAPP motion seeking dismissal of city's suit against proponent which sought to have initiative passed by voters declared void, though city argued initiative intruded into subject exclusively delegated to city council by statute governing procedural rules for conduct of city council proceedings; statute established no specific rules for conduct of city council proceedings, statute left to each municipality to establish its own rules and thus establishment of rules was purely municipal affair, and section of Brown Act defining legislative body strongly supported conclusion that legislature did not intend to preclude action by electorate.

Statute governing procedural rules for conduct of city council proceedings establishes no specific rules for the conduct of city council proceedings; instead, it leaves it to each municipality to establish its own rules and thus the establishment of such rules is purely a municipal affair.

Initiative modifying rules governing city's legislative bodies was legislative in nature and thus was not invalid, for purposes of initiative proponent's anti-SLAPP motion seeking dismissal of city's suit against proponent which sought to have initiative passed by voters declared void; initiative did not simply carry out a plan already adopted, initiative created new rules for conduct of city council meetings that were reasonable, and rules stated in initiative were intended to increase public's ability to have information about and to participate in the decisions made by its public agencies.

Initiative amending sunset date of local sales and use tax increase was administrative in nature and thus was invalid, for purposes of initiative proponent's anti-SLAPP motion seeking dismissal of city's suit against proponent which sought to have initiative passed by voters declared void; initiative required city to expend general fund monies on road maintenance and failure of city to comply would result in loss of tax increases, manifest purpose of initiative was to ensure that tax revenue was expended for road repair and initiative even set precise dates for completion of work, and determination of how funds from tax increases should be spent was administrative in nature.

ZONING & PLANNING - FLORIDA

Citizens for Responsible Development, Inc. v. City of Dania Beach

District Court of Appeal of Florida, Fourth District - February 15, 2023 - So.3d - 2023 WL 1999800

Public interest nonprofit corporation and city resident filed complaint for declaratory judgment and injunctive relief against city, county, and entertainment company, challenging procedures that city used to approve development agreements that allowed company to expand entertainment facility, and disputing county's comportment with its required review process for facility expansion.

The Circuit Court granted summary judgment for defendants on basis that plaintiffs lacked standing. Plaintiffs appealed.

On rehearing, the District Court of Appeal held that:

- Resident lacked standing to challenge city's procedures;
- Corporation lacked standing to challenge city's procedures; and
- Corporation and resident lacked standing to bring claims against county.

City resident failed to establish injury-in-fact or special injury, and thus lacked standing to challenge procedures that city used to approve development agreements allowing entertainment company to expand its entertainment facility, despite resident's assertion that, because he was legally blind, increased traffic resulting from expansion led to increased risk of being hit by car; alleged injury was purely conjectural, and increase in traffic congestion would be suffered alike by all property owners similarly situated and was condition incident to urban living.

Public interest nonprofit corporation lacked standing to challenge procedures that city used to approve development agreements allowing entertainment company to expand its entertainment facility; corporation relied on alleged injury of one of its members, who was city resident, but such alleged injury was insufficient to constitute injury-in-fact or special injury because it was purely conjectural.

Public interest nonprofit corporation and city resident lacked standing to bring claims against county in action challenging procedures that city used to approve development agreements allowing entertainment company to expand its entertainment facility; corporation's and resident's alleged injury related solely to city's alleged defective approval of agreements, county was not party to agreements, and county played no role in agreements.

LABOR & EMPLOYMENT - IOWA

City of Ames v. Iowa Public Employment Relations Board

Supreme Court of Iowa - February 24, 2023 - N.W.2d - 2023 WL 2192913

City filed petition for judicial review challenging Public Employee Relations Board's (PERB) ruling that broader bargaining rights must be extended to the city's nontransit employees in a bargaining unit consisting of at least 30 percent transit employees.

The District Court denied the petition. City appealed.

The Supreme Court held that city was not required to provide broader bargaining rights to nontransit employees in bargaining unit with 30 percent transit employees.

City employer was not required to provide broader bargaining rights to nontransit employees in a bargaining unit, regardless of whether the bargaining unit had 30 percent transit employees, pursuant to provision of the Iowa Public Employee Relations Act (PERA) that extended the rights of public safety workers to transit employees as necessary to avoid the loss of federal transit funding under the Urban Mass Transportation Act (UMTA), which was conditioned upon labor protections for transit workers; scope of the PERA provision was limited to determining the substantive bargaining rights of transit employees, and extending broader bargaining rights to nontransit employees had nothing to do with provision's purpose of protecting federal funding.

ZONING & PLANNING - NEBRASKA

Preserve the Sandhills, LLC v. Cherry County

Supreme Court of Nebraska - February 24, 2023 - N.W.2d - 313 Neb. 590 - 2023 WL 2193414

Organization dedicated to preservation of sand dune region, along with landowner, brought action under Nebraska Political Accountability and Disclosure Act (NPADA) to enjoin county board of commissioners from voting on a conditional use permit (CUP) application for wind turbine project on basis of alleged conflicts of interest.

The District Court dismissed for lack of standing. Organization and landowner appealed.

The Supreme Court held that:

- Landowner lacked requisite injury in fact for standing due to 40-mile distance of her property from project;
- Landowner did not have injury in fact based on her neighbor's lease/easement agreement with CUP applicant's affiliate;
- County zoning regulations did not confer standing on organization and landowner;
- Statute conferring standing on affected real estate owners to challenge an alleged zoning violation did not apply; and
- Standing was not created via organization and landowner's appearance in CUP application process without objection.

LABOR & EMPLOYMENT - OHIO

State ex rel. Ohio Bureau of Workers' Compensation v. O'Donnell

Supreme Court of Ohio - February 16, 2023 - N.E.3d - 2023 WL 2025360 - 2023-Ohio-428

Relator, the Ohio Bureau of Workers' Compensation, filed petition for writ of prohibition ordering Court of Common Pleas to stop exercising jurisdiction over underlying case, a class action brought by city, alleging that Bureau illegally overcharged the public employers group-rated workers' compensation premiums and seeking refund of excessive premiums paid, and also filed petition for writ of mandamus ordering the dismissal of the underlying case.

The Supreme Court denied Judge's motion to dismiss, denied city's motion to intervene, and granted an alternative writ, and subsequently granted city's second motion to intervene.

The Supreme Court held that city's claims for injunctive and declaratory relief were subject to exclusive jurisdiction of the Court of Claims.

City's claim against Bureau of Workers' Compensation seeking injunction prohibiting Bureau from refusing to furnish refunds of excessive workers' compensation premiums sounded in law, and therefore, Court of Claims had exclusive jurisdiction over case, notwithstanding city's additional claim for declaratory relief, because objective of city's request for injunctive and declaratory relief was to obtain money damages, for loss resulting from Bureau's alleged breach of legal duty, by compelling Bureau to issue refunds.

PUBLIC UTILITIES - RHODE ISLAND

In re Block Island Power Company

Supreme Court of Rhode Island - February 10, 2023 - A.3d - 2023 WL 1872317

Electric utility provider for town located on island filed petition for writ of certiorari, seeking review of order of the Public Utilities Commission (PUC) denying provider's petition for judgment declaring that statute, which authorized construction of five-turbine wind farm off the coast of island, required the costs for provider's interconnection facilities and backup transformer to be socialized across all electric ratepayers in the State, not just those in the town.

The Supreme Court held that phrase "related facilities" in statute excluded costs of provider's interconnection facilities and backup transformer, such that costs were not required to be socialized across all ratepayers in the State.

Phrase "related facilities" in section of statute, governing cost allocation associated with transmission cable that transferred wind-generated power, unused by customers of electric utility provider for town located on island, from island to the mainland, excluded costs of provider's interconnection facilities and backup transformer, such that costs were not required to be socialized across all electric ratepayers in the State; legislature coupled the phrase with conjunctive connector "and" along with "the transmission cable," indicating that "related facilities" referred only to those facilities directly involved with transmission cable project, and statute section covered transmission cable project only and was not required to advance general policy goals for wind farm project.

ANNEXATION - SOUTH CAROLINA

City of Charleston v. City of North Charleston

Court of Appeals of South Carolina - February 1, 2023 - S.E.2d - 2023 WL 1424899

City brought action challenging two annexations by neighboring municipality.

The Court of Common Pleas granted neighboring municipality's motion to dismiss. City appealed.

The Court of Appeals held that:

- Municipality sufficiently complied with statutory annexation requirements, and
- City's argument that it possessed standing to challenge municipality's annexation was moot.

Municipality sufficiently complied with statutory annexation requirements by including a description of the property to be annexed and attaching a plat of the area in annexation ordinance, although ordinance inadvertently incorporated a parcel already annexed by neighboring city; municipality's inadvertent inclusion of already-annexed parcel based on existing county information was a technical deficiency capable of correction by municipality's subsequent ordinance.

City's argument that it possessed standing to challenge neighboring municipality's annexation based on municipality's infringement of city's statutory and proprietary rights by including parcel already annexed by city was moot; municipality's initial ordinance relied on existing county information and inadvertently included parcel already annexed by city, and subsequent ordinance corrected the description of the property to be annexed to omit parcel annexed by city

UTILITY FEES - UTAH

Utah Sage, Inc. v. Pleasant Grove City

Supreme Court of Utah - February 23, 2023 - P.3d - 2023 WL 2172352 - 2023 UT 2

Property owners brought action against city, seeking to block implementation of a three-tiered transportation utility fee, dedicated to roadway repair and maintenance, under which property owners would be charged a monthly fee corresponding to the intensity with which they used city roads.

Property owners and city filed cross-motions for summary judgment. The Fourth District Court entered judgment that city had authority to enact fee but that fee was a tax. Property owners and city both appealed.

The Supreme Court held that:

- City had authority under general welfare statute to enact transportation utility fee, and
- Purpose of the transportation utility fee was characteristic of a service fee.

City had authority under general welfare statute to enact transportation utility fee dedicated to roadway repair and maintenance, under which property owners would be charged a monthly fee corresponding to the intensity with which they used city roads; although transportation utility was not listed in statute giving cities right to construct utility and telecommunications services, or in other statute defining "utility," those statutory lists were not exhaustive, and it was undisputed that city had right to repair and maintain roads.

Purpose of transportation utility fee, which city charged property owners corresponding to the intensity with which they used city roads, was characteristic of a service fee, for purposes of whether fee was a service fee or a tax, even if service provided also benefited the general public; purpose of the fee to generate funds for the repair and maintenance of city roads by charging a three-tiered fee that correlated with the fee payer's "intensity of use" of those roads, fee related to specific service of the use of city roadways, and funds generated by the fee could only be used to compensate the city for the repair and maintenance of its roadways.

REFERENDA - ARIZONA

Workers for Responsible Development v. City of Tempe

Court of Appeals of Arizona, Division 1 - January 26, 2023 - P.3d - 2023 WL 406245

Challengers brought action against city seeking writ of mandamus to compel city clerk to file and process their petition to challenge by referendum city ordinance, which authorized mayor to enter into development agreement to execute sale of city-owned land to real estate developer, and permanent and preliminary injunctions to prohibit the ordinance from taking effect.

The Superior Court held that the ordinance constituted a legislative act subject to referendum but concluded that challengers' petition form was invalid. Challengers appealed.

The Court of Appeals held that:

- Challengers' referendum petition strictly complied with statute governing form of referendum

petitions;
- In matter of apparent first impression, word "form" in statute governing form of referendum petitions does not mandate that the "Referendum Description" section must always precede the "Petition for Referendum" section;
- Ordinance was permanent in nature;
- Ordinance was general legislative act; and
- Ordinance was matter of policy creation rather than implementation of previously declared policy.

Challengers' referendum petition strictly complied with statute governing form of referendum petitions, although petition had statutorily required "Referendum description" and "Petition for Referendum" sections in reverse order as it appeared in statute, where petition form and both "Petition for Referendum" and "Referendum description" sections appeared on same page as signature lines, as required by statute, and petition provided signers with all required information on one page.

EMINENT DOMAIN - CALIFORNIA

Ventura29 LLC v. City of San Buenaventura

Court of Appeal, Second District, Division 6, California - January 4, 2023 - 87 Cal.App.5th 1028 - 304 Cal.Rptr.3d 122 - 2023 Daily Journal D.A.R. 774

Developer brought action against city, asserting causes of action for inverse condemnation, private nuisance, trespass, and negligence, arising from city engineer's modification of approved grading plan to require developer to remove uncertified fill, which city had dumped on the property 38 years before developer acquired it.

The Superior Court sustained city's demurrer to the complaint without leave to amend. Developer appealed.

The Court of Appeal held that:

- Developer's contention that time-sensitive construction would come to a grinding halt with no forward progress did not excuse its failure to exhaust administrative remedies;
- City engineer's alleged oral modification of the grading plan did not excuse developer from having to exhaust administrative remedies;
- Developer's lack of knowledge of its right to appeal did not excuse its failure to exhaust administrative remedies;
- City was not equitably estopped from asserting that developer forfeited its inverse condemnation claim by failing to exhaust administrative remedies; and
- Developer's concession that prior owners may have known of the uncertified fill on the property precluded application of the discovery rule.

EMINENT DOMAIN - FLORIDA

TR Investor, LLC v. Manatee County

District Court of Appeal of Florida, Second District - February 3, 2023 - So.3d - 2023 WL 1483829 - 48 Fla. L. Weekly D249

Landowners who obtained a permit to develop a subdivision in county brought a regulatory takings

action against county, claiming that requiring 30-foot wetland buffers was tantamount to an unconstitutional taking without just compensation.

The Circuit Court granted county's motion to dismiss, concluding that landowners could not state a cause of action for an unlawful exaction or a permanent physical occupation upon their land. Landowners appealed.

The District Court of Appeal held that:

- County's wetland buffers did not amount to an illegal exaction, and
- County's wetland buffer regulations did not operate as a per se taking in the form of a permanent physical occupation.

County's wetland buffers, which it required from landowners who obtained a permit to develop a subdivision in county, did not amount to an illegal exaction, in landowners' regulatory takings action against county; county did not require any property rights, easement, dedication of land, or monetary payment as a condition of approval of landowners' permit, but instead, landowners retained complete ownership of wetland buffer area, and landowners did not submit applications or wetland impact studies to county in conjunction with development approval proposal in order to request a reduction of buffer areas, pursuant to procedures county had in place, but instead claimed they submitted a request to and received approval from a separate agency with no authority to approve such reductions.

County's wetland buffer regulations did not operate as a per se taking in the form of a permanent physical occupation by government, its agents, or the public at large, in regulatory takings action against county by landowners who obtained a permit to develop a subdivision in county; regulations did not require that strangers be allowed to pass over property, there was no required acquiescence as necessary for landowners to state a facially sufficient per se takings claim, regulations did not leave landowners without any practical use or value in land, and landowners retained complete ownership of wetland buffers and all property rights, including right to exclude others.

BONDS - INDIANA

Indiana Municipal Power Agency v. United States

United States Court of Appeals, Federal Circuit - February 17, 2023 - F.4th - 2023 WL 2052785

Issuers of Direct Payment Build America Bonds under authority of American Recovery and Reinvestment Act (ARRA) brought action against the United States, claiming violation of statutory duty under ARRA and breach of contract based on IRS failing to refund 35% of interest payable under bonds.

The Court of Federal Claims granted government's motion to dismiss for failure to state a claim and denied issuers' motion for reconsideration. Issuers appealed.

The Court of Appeals held that:

- Sequestration applied to tax refunds, and
- ARRA section authorizing bonds did not create contract requiring government to pay tax refund equal to 35% of interest paid by issuers.

Sequestration pursuant to Budget Control Act and American Taxpayer Relief Act applied to tax refunds of 35% of interest payable on Direct Payment Build America Bonds issued under authority of American Recovery and Reinvestment Act (ARRA), since refunds were issued from permanent, indefinite appropriation of necessary amounts for refunding internal revenue collections provided by statute, which constituted direct spending.

Section of American Recovery and Reinvestment Act (ARRA) authorizing Direct Payment Build America Bonds did not create contract requiring government to pay tax refund equal to 35% of interest paid by bond issuers; ARRA did not provide for execution of written contract on behalf of United States or reflect any language establishing a contract, but instead, it merely set forth payment program for bond issuers.

MANDAMUS - LOUISIANA

Crooks v. State Through Department of Natural Resources

Supreme Court of Louisiana - January 27, 2023 - So.3d - 2023 WL 526075 - 2022-00625 (La. 1/1/23)

Property owners, who had been recognized as owners of riverbanks and awarded damages for mineral royalties received from riverbank leases in class action suit brought against Louisiana Department of Natural Resources (LDNR) petitioned for writ of mandamus to enforce payment of royalties judgment.

The District Court denied writ and the Third Circuit Court of AppeaL reversed. Department applied for writ of certiorari, which was granted.

The Supreme Court held that mandamus did not lie to compel payment of judgment.

Satisfaction of judgment awarded to landowners in underlying proceeding, in which landowners were recognized as owners of riverbanks and granted damages for mineral royalties received from riverbank leases, required legislative appropriation, and thus payment of judgment was discretionary, rather than ministerial duty, and mandamus did not lie to compel payment, even though landowners argued funds sought were not public funds; landowners cited no controlling constitutional or statutory provisions that allocated funds for purpose of executing judgment such as one at issue, and funds received from mineral leases were deposited into state's general fund.

MUNICIPAL ORDINANCE - OHIO

Kinzel v. Ebner

Court of Appeals of Ohio, Sixth District, Erie County - January 20, 2023 - N.E.3d - 2023 WL 334768 - 2023-Ohio-164

Neighbor filed complaint against owner of two residential properties seeking injunctive relief and damages based on allegations that owner's use of properties for short-term rentals violated deed restrictions and city ordinances. Owner filed counterclaim against neighbor, neighbor's husband, and city challenging constitutionality of ordinances, and claiming that city's criminal enforcement action against him under city code prohibiting transient rentals of property violated equal protection.

The Court of Common Pleas granted partial summary judgment to neighbor, granted summary judgment to city on owner's counterclaims other than equal protection claim. Neighbor and owner appealed. The Sixth District Court of Appeals affirmed in part, reversed in part, and dismissed certain assignments of error. On remand, the Court of Common Pleas awarded summary judgment to city on owner's equal protection counterclaim, and parties settled remaining claims, leaving in tact trial court's previous holding that ordinances were valid and constitutional. Owner appealed.

The Court of Appeals held that:

- City was not required to comply with public notice and hearing requirements before passing ordinance as an emergency measure;
- City failed to substantially comply with requirement that planning commission's recommendation and report be available for public examination for at least 30 days before hearing, and thus city's ordinance amending prior ordinance was invalid;
- Ordinance prohibiting short-term rentals was not unconstitutionally vague;
- Ordinance was rationally related to legitimate governmental interest, and thus was not facially unconstitutional on due process grounds;
- Ordinance was not unconstitutional as applied to property owner; and
- City's enforcement of zoning ordinances against property owner did not violate equal protection clauses of federal and state constitutions.

LIABILITY - OHIO

State ex rel. Hunt v. East Cleveland

Supreme Court of Ohio - February 15, 2023 - N.E.3d - 2023 WL 1998874 - 2023-Ohio-407

After driver and passenger had obtained a civil judgment of nearly $8 million dollars against city and former city police officer, they sought a writ of mandamus ordering city to satisfy the monetary judgment, plus pre- and postjudgment interest.

The Supreme Court held that:

- Driver and passenger were entitled to writ of mandamus compelling city to pay principal amount of judgment, prejudgment interest, and postjudgment interest;
- Civil judgment was not ambiguous; and
- City's argument that it could not be held liable for the entire amount of the jury's verdict against city and former police officer because there was no apportionment of damages constituted an impermissible collateral attack on the trial court's judgment.

Driver and passenger, who had obtained a monetary judgment against city and former police officer after they were injured when officer, while driving his police vehicle at a high rate of speed, collided with driver's vehicle injuring driver and passenger, were entitled to writ of mandamus compelling city to pay principal amount of judgment, prejudgment interest, and postjudgment interest; driver and passenger had a clear legal right to enforcement of their judgment, city had a clear legal duty to satisfy the judgment, and driver and passenger lacked an adequate remedy in the ordinary course of the law as city was immune from execution.

Trial court civil judgment awarding driver and passenger nearly $8 million in damages, after jury found injuries sustained by driver and passenger in collision with police officer were caused by negligence of officer and city, was not ambiguous, as would preclude driver and passenger from establishing clear legal entitlement to have city satisfy judgment, as needed for mandamus relief;

trial court issued judgment entry on form indicating case was disposed pursuant to jury trial, journal entry recited jury's award, form noted it was a disposition of case, and fact that judgment did not specifically state city was liable did not invalidate judgment, as jury found officer was liable, and political subdivisions were liable for injuries caused by negligent operation of motor vehicles by employees.

City's argument that it could not be held liable for the entire amount of the jury's verdict against city and former police officer because there was no apportionment of damages constituted an impermissible collateral attack on the trial court's judgment, which awarded driver and passenger nearly $8 million in damages after jury found the injuries driver and passenger sustained in collision with police officer were caused by the negligence of officer and city; city had the burden to establish at trial whether an apportionment of damages was appropriate, and the absence of an apportionment of damages did not call into question city's liability to pay the entire judgment, rather, the absence of apportionment was consistent with joint and several liability among tortfeasors.

BONDS - PENNSYLVANIA

Ursinus College v. Prevailing Wage Appeals Board

Supreme Court of Pennsylvania - February 22, 2023 - Slip Copy - 2023 WL 2153745

AND NOW, this 22nd day of February, 2023, the Petition for Allowance of Appeal is **GRANTED**. The issue, as stated by petitioner, is:

(1) Whether the Commonwealth Court's [o]rder concluding that a construction project that was funded by the issuance and sale of tax-exempt municipal bonds by a public authority did not constitute "public works" severely undermines the purposes of the Pennsylvania Prevailing Wage Act, and will allow employers to circumvent the requirements of the Act, thus undermining Pennsylvania public policy?

ANNEXATION - SOUTH CAROLINA

National Trust for Historic Preservation in United States v. City of North Charleston

Court of Appeals of South Carolina - February 1, 2023 - S.E.2d - 2023 WL 1425317

City and property owner brought action against neighboring city, alleging its annexation of one-acre tract was void because tract was not contiguous or adjacent to neighboring city and portion of tract belonged to owner and had already been annexed into city.

Neighboring city counterclaimed. The Circuit Court dismissed city and owner's complaint for lack of standing, determined in the alternative that neighboring city failed to properly annex tract, and denied all parties' motions to reconsider. Parties cross-appealed.

The Court of Appeals held that:

- City and owner lacked standing under annexation statute, and
- City and owner lacked standing under public-interest doctrine.

City and property owner lacked standing under annexation statute to challenge neighboring city's annexation of one-acre tract, even if tract included four inches of property that belonged to owner and already had been annexed by city; neighboring city annexed tract pursuant to statute that provided for annexation only of property wholly owned by municipalities, neighboring city only intended and claimed to annex property within its proprietary rights, and any deviations in legal description or plat, or belief by neighboring city that it did own contested four inches, did not affect city's or owner's ownership rights.

City and property owner lacked standing under public-interest doctrine to challenge neighboring city's annexation of one-acre tract based on allegations that tract included four inches of property that belonged to owner and already had been annexed by city; annexation incited nothing more than boundary dispute between two municipalities, absence of challenge to annexation by state illustrated its position that matter did not rise to level of public concern, and neighboring city did not engage in any deceitful conduct that would necessitate finding standing under public-interest doctrine.

BALLOT INITIATIVES - SOUTH DAKOTA

SD Voice v. Noem

United States Court of Appeals, Eighth Circuit - February 17, 2023 - F.4th - 2023 WL 2055397

Ballot question committee brought action against South Dakota officials seeking permanent injunction against enforcement of South Dakota statutes regulating ballot initiative campaigns.

The United States District Court for the District of South Dakota entered judgment for committee in part. Parties cross-appealed. The Court of Appeals dismissed appeal and remanded. After a bench trial, the District Court permanently enjoined enforcement of one-year filing deadline for ballot initiative petitions and denied motion for a stay of ruling pending appeal. Officials appealed and committee cross-appealed.

The Court of Appeals held that:

- One-year filing deadline to submit petitions to initiate state statutes violated First Amendment right to free speech;
- Filing deadline to submit initiative petitions to amend the State Constitution violated First Amendment; and
- District court lacked authority to impose a new filing deadline.

South Dakota statute providing that petitions to initiate state statutes be filed at least one year before the next general election implicated First Amendment right to free speech, where the one-year filing deadline limited the number of voices who would convey the proposed message during the year before the election and burdened the ability to express a position on a political matter by signing an initiative petition.

South Dakota statute providing that petitions to initiate state statutes be filed at least one year before the next general election imposed a burden on political speech that South Dakota failed to justify with the interest of election integrity, and thus, statute violated First Amendment free speech guarantee; although South Dakota's interest in protecting the integrity of the initiative process was a paramount interest, there was nothing to suggest that the one-year filing deadline lent anything of

value to South Dakota, and South Dakota had validated prior referenda petitions in as little as two days using a random sample of collected signatures, and spent at most five months reviewing all petitions in prior years.

South Dakota statute providing that petitions to initiate state statutes be filed at least one year before the next general election imposed a burden on political speech that South Dakota failed to justify with an interest of administrative efficiency, and thus, statute violated First Amendment free speech guarantee; although administrative efficiency was a legitimate interest that was noteworthy because of South Dakota's small staff of 14 people, South Dakota had no trouble complying with various deadlines in past years including the 12-week deadline to certify ballot questions before the general election.

South Dakota statute providing that petitions to initiate state statutes be filed at least one year before the next general election imposed a burden on political speech that South Dakota failed to justify with an interest of the legislature's ability to respond to petitions, and thus, statute violated First Amendment free speech guarantee; assuming that such an interest existed, the one-year filing deadline did virtually nothing to advance it, and South Dakota already had an intervening legislative session between a general election and the date an initiated law became effective.

South Dakota statute providing that initiative petitions to amend the State Constitution be filed at least one year before the next general election violated the First Amendment right to free speech; statute imposed a burden on political speech that South Dakota failed to justify with asserted interests of election integrity, administrative efficiency, or the legislature's ability to respond to petitions.

District court lacked authority to impose a new filing deadline upon its determination that South Dakota statute setting forth a one-year filing deadline for petitions to initiate state statutes was facially violative of First Amendment right to free speech; court could only grant request for permanent injunction against enforcement of filing deadline and allow the legislature to decide how to respond.

LIABILITY - TENNESSEE

Lawson v. Hawkins County

Supreme Court of Tennessee - February 16, 2023 - S.W.3d - 2023 WL 2033336

Deceased motorist's widow brought wrongful death action against county, county emergency communications district, county emergency management agency, and others following fatal accident in which motorist hit rock embankment on road blocked by trees and mudslide and flipped down mountain.

The Circuit Court granted county defendants' motions for judgment on the pleadings on immunity grounds. Widow appealed, and the Court of Appeals reversed. The Supreme Court granted county defendants' application for permission to appeal.

The Supreme Court held that term "negligence" in Government Tort Liability Act statute lifting immunity for "injury proximately caused by a negligent act or omission of any employee within the scope of his employment" does not include recklessness or gross negligence.

ZONING & PLANNING - VIRGINIA

Morgan v. Board of Supervisors of Hanover County

Supreme Court of Virginia - February 2, 2023 - S.E.2d - 2023 WL 1456752

Neighbors brought an action seeking declaratory judgment and injunctive relief and claiming that the county board of supervisors violated Virginia law when it approved rezoning and special-exception requests that authorized the construction of a large distribution and warehousing facility nearby.

The Hanover Circuit Court sustained board's demurrer, and dismissed the complaint. Neighbors appealed.

The Supreme Court held that:

- Neighbors sufficiently alleged a likelihood of harm to have standing;
- Action was not an untimely effort to challenge county's original decision to rezone the property;
- Neighbors alleged a non-speculative, direct cause-and-effect relationship between the county's decision and specific, detailed harm; and
- Neighbors asserted a sufficiently "ripe" controversy.

Neighbors' complaint sufficiently alleged a likelihood of harm as required for standing to challenge rezoning and approval of warehouse expansion project; neighbors did not generalize about industrial sites in the abstract or speculate about potential harms, but rather alleged specific harms, including tractor-trailer traffic on specific feeder roads surrounding the facility, the increased level of noise caused by back-up alarms from these trucks, anticipated flooding caused by the topography of the project, and the night-sky light pollution from taller lighting poles in the parking area.

Neighbors' challenge to county's approval of warehouse expansion project was not an untimely effort to challenge county's original decision to rezone the property, but rather their injury was fairly traceable to county's approval of the specific development plan such that neighbors had standing to assert the challenge; original rezoning authorized over 100 specific uses, and while property owner argued it could have developed the property pursuant to that original rezoning ordinance without ever asking the county to supersede its prior zoning ordinance with a revised set of proffers and a special exception, property owner did in fact ask for and receive a favorable decision from the county.

Neighbors alleged a non-speculative, direct cause-and-effect relationship between the county's decision to approve rezoning and special-exception requests for distribution and warehousing facility and specific, detailed harm, as required to maintain declaratory judgment action to challenge the decision; neighbors alleged that property owner's conceptual development plan, as approved, would encroach into resource protection areas, that the facility would violate the county's noise ordinance during construction and operation based upon a county sound study, and that the project would constitute an unlawful nuisance because of the deleterious effects of the site development, including the tractor-trailer traffic, the night-sky light pollution, the unlawful levels of noise, the impact on wetlands and wildlife, and the reduction of property values.

Neighbors asserted a sufficiently "ripe" controversy arising from county's decision to approve rezoning and special-exception requests for distribution and warehousing facility as required to maintain claim for declaratory judgment; neighbors alleged that conceptual development plan, as approved, would encroach into resource protection areas, that the facility would violate the county's

noise ordinance during construction and operation based upon a county sound study, and that the project would constitute an unlawful nuisance because of the deleterious effects of the site development, including the tractor-trailer traffic, the night-sky light pollution, the unlawful levels of noise, the impact on wetlands and wildlife, and the reduction of property values.

POLITICAL SUBDIVISIONS - CALIFORNIA

Stone v. Alameda Health System

Court of Appeal, First District, Division 5, California - February 3, 2023 - Cal.Rptr.3d - 2023 WL 1508276

Health system employees brought class action against health system employer alleging failure to provide off-duty meal periods, failure to provide off-duty rest breaks, failure to keep accurate payroll records, failure to provide accurate itemized wage statements, unlawful failure to pay wages, failure to timely pay wages, and a Private Attorneys General Act (PAGA) claim.

Employer demurred, and the Superior Court sustained the demurrer as to all seven class action claims. Employees appealed.

The Court of Appeal held that:

- Death knell doctrine applied to trial court's order sustaining demurrer and thus order was appealable;
- Hospital authority enabling statute did not contain positive indicia of a contrary legislative intent to exempt health system from general words of statute under the sovereign powers principle;
- Industrial Welfare Commission (IWC) wage order did not contain positive indicia of a contrary legislative intent to exempt health system from general words of relevant labor code statutes under the sovereign powers principle;
- Subjecting health system to IWC wage order or relevant Labor Code provisions would not result in infringement of sovereign governmental powers in context of sovereign powers principle;
- Health system was not a statutorily exempt municipal corporation for purposes of statute requiring employers to timely pay wages semimonthly;
- Health system was an "other governmental entity" within meaning of section of itemized statements statute that exempted state, city, county, district, or other governmental entity; and
- Section of Labor Code defining "person" provided no ground for sustaining demurrer as to PAGA claim.

Health system was an "other governmental entity" within meaning of section of itemized statements statute that exempted state, city, county, district, or other governmental entity, in health system employees' class action against health system alleging failure to provide accurate itemized wage statements; system was established by county government, system's establishment required special authorization from state legislature, and system bore all the rights and duties set forth in state law with respect to hospitals owned or operated by a county.

RAILS-TO-TRAILS - FEDERAL

Bradley v. United States

United States Court of Federal Claims - February 1, 2023 - Fed.Cl. - 2023 WL 1432639

In rails-to-trails case, owners of real property adjacent to railroad line sued United States, claiming just compensation for alleged taking of their property by authorizing conversion of right-of-way for railroad line into recreational trail pursuant to National Trail Systems Act.

After entering settlement agreement, in which owners obtained award of just compensation and interest from government, eight owners moved for award of attorneys' fees and costs, under Uniform Relocation Assistance and Real Property Acquisition Policies Act (URA).

The Court of Federal Claims held that:

- Owners' recovery of attorneys' fees was not limited by contingency fee agreement;
- Owners were entitled to fees and costs for prelitigation work by prior counsel;
- Owners moving for award of fees and costs were entitled to $183,999.96 for work performed by one law firm; and
- Owners moving for award of fees and costs were entitled to $21,101.92 for prelitigation work by prior counsel.

EMINENT DOMAIN - FLORIDA

Lake Lincoln, LLC v. Manatee County

District Court of Appeal of Florida, Second District - January 13, 2023 - So.3d - 2023 WL 175208 - 48 Fla. L. Weekly D144

Developer brought inverse condemnation action against county, alleging categorical regulatory taking based on county's denial of its application to amend development order and zoning ordinance for developer's 10.32-acre parcel within a 1,124-acre development of regional impact (DRI).

The Circuit Court granted county's motion for summary judgment. Developer appealed.

The District Court of Appeal held that "relevant parcel" for purposes of takings analysis included only developer's 10.32-acre parcel within DRI, and not entire 1,124-acre DRI.

For purposes of Fifth Amendment takings analysis stemming from county's denial of developer's application to amend development order and zoning ordinance for 1,124-acre development of regional impact (DRI), "relevant parcel" included only a 10.32-acre parcel located within the DRI, rather than the entire DRI itself; developer's request to develop its 10.32-acre parcel was physically and temporally remote from other existing developments within DRI, and undisputed facts demonstrated that landowner could achieve no economic use on its 10.32-acre parcel as a result of county's restriction to uses for only open spaces and wetlands during a nearly nine-year period.

EMINENT DOMAIN - GEORGIA

Schroeder Holdings, LLC v. Gwinnett County

Court of Appeals of Georgia - January 5, 2023 - S.E.2d - 2023 WL 109401

Landowner and others filed complaint and petition for writ of certiorari against county to recover damages and equitable relief after county denied rezoning application resulting in inverse condemnation and violation of substantive due process.

The Superior Court granted county's motion for summary judgment. Plaintiffs appealed.

The Court of Appeals held that:

- Denial of rezoning application was not quasi-judicial decision that could only be challenged by writ of certiorari;
- Just Compensation Provision of state constitution was waiver of sovereign immunity with respect to inverse condemnation claim; and
- Landowner failed to establish that county waived sovereign immunity barring substantive due process claim.

Just Compensation Provision of state constitution was waiver of sovereign immunity with respect to landowner's inverse condemnation claim seeking damages and equitable relief after county denied rezoning application; nothing indicated that county had invoked the power of eminent domain.

Landowner failed to establish that county waived sovereign immunity barring substantive due process claim arising out of denial of rezoning application, where landowner did not cite any constitutional or statutory authority that expressly or impliedly waived sovereign immunity for all zoning cases.

EDUCATION FUNDING - GEORGIA

Jackson County Board of Education v. City of Commerce Board of Education

Court of Appeals of Georgia - February 13, 2023 - S.E.2d - 2023 WL 1957290

County board of education filed declaratory judgment action seeking declaration that written agreement it entered into with city board of education was in effect and enforceable.

The trial court granted city board's motion to dismiss and/or for judgment on the pleadings, finding agreement unenforceable pursuant to the Intergovernmental Contracts Clause of the Georgia Constitution. County board's application for interlocutory review was granted, and appeal was transferred from Supreme Court.

The Court of Appeals held that county board sufficiently alleged that agreement was for the provision of services, precluding judgment on the pleadings as to county board's declaratory-judgment claim.

County board of education sufficiently alleged that agreement between city and county boards, which provided that boards would share tax revenue for education of students residing within one district that attended schools in other district, known as "crossover students," was a contract for the provision of services, so as to preclude judgment on the pleadings on county board's declaratory-judgment claim asserting that agreement complied with Intergovernmental Contracts Clause of State Constitution; agreement tied revenue-sharing, which was based on per pupil tax base, to service being provided, which was to educate crossover students, taxes being divided could only be used to support public schools, and both boards educated crossover students while agreement was suspended.

ZONING & PLANNING - MISSISSIPPI

Heritage Hunter Knoll, LLC v. Lamar County

Supreme Court of Mississippi - February 9, 2023 - So.3d - 2023 WL 1854308

Following federal court settlement and denial of its proposed variances from county ordinance denying waste collection and disposal services for multi-family properties, property owner brought action to appeal county board of supervisors decisions to amend ordinance to deny waste collection and disposal services and to deny proposed variances.

The Circuit Court dismissed the appeal for lack of jurisdiction, and property owner appealed.

The Supreme Court held that:

- Appeal of board's amendment of ordinance was untimely;
- Appeal of the variance denials was timely; and
- Property owner did not engage in improper claim splitting when it filed a notice of appeal as well as federal action.

Denial of two of property owner's requested variances from ordinance denying waste collection and disposal services for multi-family properties finally disposed of the controversy such that property owner had ten days from that date to appeal board's amendment of ordinance to deny waste collection and disposal services; letter from board advised property owner that anyone "affected or aggrieved by" the amendment could apply for a variance, property owner thereafter submitted three variance requests, and the board denied two of the variance requests, but property owner did not appeal the amendment for another four months.

Property owner filed appeal of county's denial of its two resubmitted requests for variances from county ordinance denying waste collection and disposal services for multi-family properties within ten days of the decision of the county board of adjustment, and thus appeal of the variance denials was timely; as part of federal court settlement, property owner resubmitted variance requests, which county board of supervisors had previously denied, and, on resubmission, the board denied the variance requests a second time.

Property owner did not engage in improper claim splitting when it filed a notice of appeal regarding county board of supervisors amendment to ordinance denying waste collection and disposal services for multi-family properties and the denial of property owner's variance requests, and in separate federal action asserted causes of action for violations of due process and equal protection, although some of property owner's claims asserted in its federal case were incorporated in the issues presented in its appeal; notice of appeal asserted that the board's amendment to the waste ordinance was arbitrary and capricious, beyond the board's scope and power, and in violation of statutory and constitutional rights, and property owner further asserted that the denial of its variance requests was arbitrary and capricious.

IMMUNITY - MISSOURI

Zang v. City of St. Charles

Supreme Court of Missouri, en banc - January 31, 2023 - S.W.3d - 2023 WL 1384032

Bicyclist injured after falling on open-grated bridge filed suit against defendants including city, alleging claims including premises liability.

The Circuit Court granted city's motion to dismiss premises liability claim for failure to provide required notice of suit. Bicyclist appealed.

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

- Statute imposing notice requirement for municipalities larger than city did not preempt notice requirement;
- Statute waiving sovereign immunity for injuries caused by the condition of a public entity's property did not preempt notice requirement;
- There was no field preemption of notice requirement;
- Statute of limitations did not preempt notice requirement; and
- Statute declining to impose notice requirement for premises liability claims on all negligence claims did not preempt notice requirement.

Statute imposing a notice requirement for personal injury actions against cities of at least a certain population did not prohibit city, which had a population below such threshold, from enacting its own statutory notice requirement, and thus statute did not preempt notice requirement in city's charter that barred premises liability claim brought against city by bicyclist injured when he fell on open-grated metal bridge, even though statute limited statutory waiver of sovereign immunity for injuries caused by condition of a public entity's property; statute's language and population requirement were clear, unambiguous, and entirely inapplicable to city, and nothing in the statute indicated that legislature intended it to apply to cities that did not meet the population requirement.

Provision of city charter requiring notice to city in order to maintain personal injury action against city did not prohibit anything permitted by statute waiving sovereign immunity for injuries caused by the condition of a public entity's property, and thus statute did not preempt charter's notice requirement, which barred premises liability claim brought without notice against city by bicyclist injured when he fell while crossing open-grated metal bridge.

Legislature evinced no intent to occupy the legislative field by preventing constitutional charter cities with populations below a certain threshold from creating notice requirements for actions against such cities, and thus there was no field preemption of notice requirement in city's charter that barred premises liability claim brought against city by injured bicyclist, even though legislature enacted statutes waiving sovereign immunity for injuries caused by the condition of a public entity's property and imposing a notice requirement for cities above the population threshold; although statutes imposing notice requirements covered the majority of cities in the state, legislature did not express an intention to limit notice requirements to those cities, as it could have done.

Provision of city charter requiring 90 days' notice to city in order to maintain personal injury action against city did not irreconcilably conflict with applicable five-year statute of limitations, and thus statute of limitations did not preempt notice requirement that barred premises liability claim brought against city by bicyclist injured in fall on open-grated metal bridge, despite bicyclist's argument that both provision and statute created time restrictions for action; although notice requirement might have restricted who was eligible to bring suit against city, it did not change what type of suits could be brought against city or how long a claimant had under the statute of limitations, which functioned independently of the notice requirement and served a different purpose.

Provision of city charter requiring notice to city in order to maintain personal injury action growing out of any negligence of the city did not irreconcilably conflict with statute that declined to impose on certain negligence claims the notice requirement that state law imposed on premises liability claims, and thus statute did not preempt notice requirement in city's charter that barred premises liability claim brought against city by bicyclist injured while crossing open-grated metal bridge; statute did not permit what the charter provision prohibited and did not contain any indication of an intent by the legislature to occupy the legislative field.

INSURANCE - NEW JERSEY

Statewide Insurance Fund v. Star Insurance Company

Supreme Court of New Jersey - February 16, 2023 - A.3d - 2023 WL 2026832

Public entity joint insurance fund (JIF) brought action against commercial general liability (CGL) insurer, seeking declaratory judgment for excess coverage in connection with underlying negligence action brought against one of JIF's member cities.

After parties settled action, the Superior Court entered summary judgment for JIF, meaning insurer was solely responsible for payment of settlement. Insurer appealed. The Superior Court, Appellate Division, affirmed. Insurer petitioned for certification, which was granted.

The Supreme Court held that CGL insurer provided primary, rather than excess, coverage to city in connection with settlement of underlying action.

City obtained "self-insurance" liability protection, rather than insurance, by joining public entity joint insurance fund (JIF) and, thus, JIF did not trigger commercial general liability (CGL) insurer's "other insurance" clause, such that CGL insurer provided primary, rather than excess, coverage to city in connection with settlement of underlying negligence action brought against city; JIFs did not provide insurance through authorized carrier in exchange for premiums but, instead, JIF members reduced insurance costs by pooling financial resources, distributing and retaining risk, and paying claims through member assessments.

ZONING & PLANNING - NEW YORK

Town of Southampton v. New York State Department of Environmental Conservation

Court of Appeals of New York - February 9, 2023 - N.E.3d - 2023 WL 1824432 - 2023 N.Y. Slip Op. 00689

Town, civic organizations, environmental organizations, and neighboring landowners commenced article 78 proceeding seeking to annul settlement agreement between owner and operator of sand and gravel mine and Department of Environmental Conservation (DEC), DEC's amended negative declaration with respect to application for modification permit seeking expansion of mining operations, and DEC's issuance of renewal permit for mining operations, and seeking to enjoin DEC from processing modification application.

After DEC granted modified permit, petitioners filed supplemental petition seeking to annul modified permit. The Supreme Court, Albany County, denied petitions. Petitioners appealed. The Supreme Court, Appellate Division, modified. Operator was granted leave to appeal.

The Court of Appeals held that:

- The phrase "permit to mine," as used in the statute barring agencies from considering an application for a permit to mine as complete or processing such an application if local zoning laws or ordinances prohibit mining uses within the area proposed to be mined, encompasses all applications to mine, including applications for renewal and modification, and
- Statute does not eliminate or alter non-conforming use.

The statute barring agencies from considering an application for a permit to mine as complete or processing such an application if local zoning laws or ordinances prohibit mining uses within the area proposed to be mined does not eliminate or alter non-conforming use; rather, the statute acts only as a protection against further expansion of those mining activities beyond the permissible non-conforming use.

EMINENT DOMAIN - NEW YORK

HBC Victor LLC v. Town of Victor

Supreme Court, Appellate Division, Fourth Department, New York - December 23, 2022 - N.Y.S.3d - 212 A.D.3d 121 - 2022 WL 17882656 - 2022 N.Y. Slip Op. 07313

Owner of vacant commercial real property that was formerly occupied by a department store brought action against town under Eminent Domain Procedure Law (EDPL) to annul town's determination authorizing the condemnation of the property.

The Supreme Court, Appellate Division, held that:

- Absent any specification by town of a public purpose for the condemnation, the condemnation was not a valid taking under the EDPL, and
- Remediation of blight, based on property's vacancy alone, did not support town's condemnation of property, since property was not in a blighted condition.

Absent any specification by town of the public purpose for which town had condemned owner's real property, which was connected to a mall and was formerly occupied by a department store, the condemnation was not a valid taking under the Eminent Domain Procedure Law (EDPL), even though the property was allegedly vacant and underutilized, where neither town's condemnation notice nor its determination and findings identified or described a legitimate public project, and the town stated in its determination and findings that "no specific future uses or actions have been formulated and/or specifically identified.

Remediation of substandard conditions, i.e., urban blight, did not support town's determination to condemn owner's real property, which was connected to a mall and was formerly occupied by a department store, even though the property was vacant, where the property was not in a blighted condition, the vacancy had occurred unexpectedly in the midst of the global COVID-19 pandemic, owner had cleaned and maintained the premises since they had become vacant, and owner continued to pay property taxes at the assessed value of more than $4 million.

BONDS - NORTH DAKOTA

UMB Bank, N.A. v. Eagle Crest Apartments, LLC

Supreme Court of North Dakota - January 5, 2023 - 984 N.W.2d 360 - 2023 ND 4

Successor trustee for owners of bonds issued by city to finance construction of apartment complex brought action against construction limited liability company (LLC) and member for breach of contract and foreclosure, and, after apartment complex was sold at a sheriff's sale, successor trustee amended its complaint multiple times to add claims for fraudulent transfers, deceit, and exemplary damages against individual with ownership interest in company which was the LLC's sole member, and numerous entities associated with him.

Following a jury trial, the District Court entered judgment on jury verdict against defendants, jointly and severally, piercing the corporate veil. Defendants appealed.

The Supreme Court held that trial court appropriately pierced the corporate veil.

Trial court appropriately pierced the corporate veil to find individual's numerous separate entities liable for deficiency judgment against construction limited liability company (LLC) following foreclosure on apartment complex financed by municipal bonds; testimony and evidence indicated that individual disregarded the entities' corporate form and used them for personal purposes, jury found each defendant was the alter ego of both individual and the other defendants, and also found they fraudulently transferred roughly $2.9 million to the detriment of investors and engaged in a conspiracy to commit deceit.

IMMUNITY - TEXAS

Christ v. Texas Department of Transportation

Supreme Court of Texas - February 10, 2023 - S.W.3d - 2023 WL 1871560

Motorists injured as result of head-on collision in construction zone brought action against Texas Department of Transportation and others, alleging premises liability based on condition of construction zone.

The District Court denied Department's plea to the jurisdiction and no-evidence motion for summary judgment. Department filed interlocutory appeal. The Corpus Christi reversed and dismissed for want of jurisdiction. Motorists' petition for review was granted.

The Supreme Court held that use of painted stripes and buttons to separate opposing lanes of traffic when engineer-sealed traffic control plan called for concrete barriers did not create unreasonably dangerous condition that would allow motorists to invoke waiver of sovereign immunity under Tort Claims Act.

Use of painted yellow stripes and buttons to separate opposing lanes of traffic in construction zone did not create "unreasonably dangerous condition," and thus, did not waive Texas Department of Transportation's sovereign immunity under Tort Claims Act from premises defect claim by motorists injured as result of head-on collision in construction zone, although engineer-sealed traffic control plan called for concrete barriers; stripes and buttons themselves were not defective, there was absence of any other accident or injury occurring at collision site, and use of stripes and buttons to separate travel lanes on roadways was ordinary, commonplace, and standard engineering practice, absent any inference that some aspect of construction site rendered use more dangerous than usual.

MUNICIPAL UTILITY DISTRICTS - TEXAS

The Hanover Insurance Company v. Binnacle Development, L.L.C.

United States Court of Appeals, Fifth Circuit - January 12, 2023 - 57 F.4th 510

Construction contractor's payment-bond surety, as contractor's assignee, brought action under Texas law against land developers to recover amounts allegedly due on contracts that developers had with contractor to complete paving and infrastructure projects in county municipal utility district.

The United States District Court for the Southern District of Texas granted surety's motion for summary judgment. Developers appealed.

The Court of Appeals held that:

- Texas Water Code section authorizing economic disincentive clauses for construction delay in district contracts did not apply, and
- Damages clause was an unenforceable liquidated damages clause seeking penalties.

Texas Water Code section authorizing economic disincentive clauses for late completion of construction work on a district contract "made by the board" did not apply to contracts between land developers and contractor to complete paving and infrastructure projects in county municipal utility district, even though county managed the public bidding process, which contractor won, and county planned to purchase the infrastructure after completion, where county was not a party to any of the contracts.

Texas Water Code section authorizing economic disincentive clauses for late completion of construction work on a district contract "made by the board" required county municipal utility district to be a contracting party to contracts that land developers had with contractor to complete paving and infrastructure projects in the district, in order for section to apply; section limited its applicability to contracts "made by the board," and boards governed districts.

Texas Water Code section authorizing economic disincentive clauses for late completion of construction work on a district contract "made by the board" required county municipal utility district to be a contracting party to contracts that land developers had with contractor to complete paving and infrastructure projects in the district, in order for section to apply; section limited its applicability to contracts "made by the board," and boards governed districts.

Chapter of Texas Water Code governing "Provisions Applicable to All Districts," including a section authorizing economic disincentives for late completion of construction work on a district contract "made by the board," applies only to districts unless a section narrows its application to certain types of districts.

Incorporation of Texas Government Code chapter governing performance and payment bonds on public works projects into Water Code did not convert private contracts between land developers and contractor to complete paving and infrastructure projects in county municipal utility district into district contracts that would be subject to Water Code section authorizing economic disincentive clauses for late completion of construction work on a district contract "made by the board"; whether Government Code chapter even applied was unclear due to absence of any public entity in contracts, and even if chapter did apply, it was not inconsistent to conclude that the Water Code section in issue applied only to contracts "made by the board" of a district.

Definition of "district facility" under Texas Water Code, as any plant or equipment supplied for the business or operations of a district, did not alter the requirement that a contract be made by a district board in order to trigger applicability of Water Code section authorizing economic disincentive clauses for late completion of construction work on a district contract, in action concerning private contracts that land developers had with contractor to complete paving and infrastructure projects in county municipal utility district.

Texas Water Code section authorizing economic disincentive clauses for late completion of construction work on a district contract "made by the board" could not be incorporated into land developers' private contracts with contractor for paving and infrastructure projects in county

municipal utility district; there was no statutory text suggesting that private parties could rely on, or were protected by, section when there was no contract executed by a district board, and developers were trying to make Water Code apply to contracts between private parties that one day might have been assumed by a district.

Texas Water Code section authorizing economic disincentive clauses for late completion of construction work on a district contract "made by the board" allows economic disincentive clauses only in contracts where a district is a contracting party.

Under Texas law, damages clause in private contracts between land developers and contractor to complete paving and infrastructure projects in county municipal utility district was not a limitation of liability clause but rather was an unenforceable liquidated damages clause seeking a penalty, where clause was entitled "liquidated damages for delay/economic disincentive," clause expressly provided for liquidated damages of $2,500 for each calendar day of delay, and clause did not set a ceiling on liability.

PUBLIC PENSIONS - CALIFORNIA

Casson v. Orange County Employees Retirement System

Court of Appeal, Fourth District, Division 3, California - January 30, 2023 - Cal.Rptr.3d - 2023 WL 1097958 - 2023 Daily Journal D.A.R. 888

Retired firefighter, who suffered on-the-job injury and received a disability pension from county retirement system, filed petition for writ of mandate after county retirement system imposed a "disability offset" due to firefighter's receipt of pension from California Public Employees Retirement System (CalPERS) from his prior job.

The Superior Court denied the petition, and retired firefighter appealed.

The Court of Appeal held that disability pension was not subject to offset, as firefighter did not elect reciprocity.

Retired firefighter's disability pension from county retirement system was not subject to a "disability offset" based on firefighter's receipt of pension from California Public Employees Retirement System (CalPERS) from his prior job, where firefighter did not elect reciprocity, but chose to treat the two pensions as separate.

When a pensioner receives a service retirement under a pension governed by the County Employees Retirement Law of 1937 and becomes a member of a second pension governed by that law, but does not elect reciprocity, his or her first service pension cannot be considered part of a "disability allowance" under statute prohibiting a pensioner from receiving a disability allowance from two pensions greater than the amount that would have been received if all the pensioner's service had been with only one entity.

WATER LAW - CALIFORNIA

California-American Water Company v. Marina Coast Water District

Court of Appeal, First District, Division 2, California - December 28, 2022 - 86 Cal.App.5th 1272 - 303 Cal.Rptr.3d 227 - 2022 Daily Journal D.A.R. 13,018

County water resources agency and investor-owned water utility brought action against public water district alleging that parties' regional desalination project failed as result of negligence of water district's employees and independent contractors in retaining and supervising member of county water resources agency's board, despite his illegal conflict of interest.

The Superior Court granted water district's motion for summary adjudication, and plaintiffs appealed.

The Court of Appeal held that:

- Fact issues remained as to whether water district waived utility's compliance with Government Claims Act's claims presentation requirement;
- Fact issues remained as to whether water district's attorney had apparent authority to waive its right to statutory notice of claim;
- Trial court's grant of water district's motion for summary adjudication did not comply with its obligation to state its reasons for any determination made in summary judgment order; and
- Summary judgment on limitations grounds was not warranted on county agency's negligence claim against water district.

EMINENT DOMAIN - FLORIDA

Sabal Trail Transmission, LLC v. 18.27 Acres of Land in Levy County

United States Court of Appeals, Eleventh Circuit - February 3, 2023 - F.4th - 2023 WL 1493219

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

The United States District Court for the Northern District of Florida determined that Florida law requiring attorney fees and costs provided measure of compensation. Company appealed.

The Court of Appeals held that state law provided measure of compensation, and, thus, landowners were entitled to attorney fees and costs.

State law provided measure of compensation in proceedings by natural gas company under the Natural Gas Act to condemn property for pipeline easement, and, thus, landowners were entitled to attorney fees and costs as part of compensation under Florida law.

Rule governing eminent domain actions did not preclude application of Florida law requiring award of attorney fees and costs as measure of compensation in proceedings by natural gas company under the Natural Gas Act to condemn property for pipeline easement; rule did not bear on question of measure of compensation to apply under the Natural Gas Act, but governed only practice and procedure, not substantive law.

IMMUNITY - GEORGIA

Johnson v. 3M Company

United States Court of Appeals, Eleventh Circuit - December 21, 2022 - 55 F.4th 1304

Water subscriber brought putative class action against operator of municipal wastewater treatment system and other defendants, asserting claims including nuisance abatement arising from operator

allegedly allowing city's domestic water supply to be contaminated with dangerously high levels of toxic chemicals used by local carpet manufacturers.

After removal, the United States District Court for the Northern District of Georgia denied operator's motion to dismiss based on municipal immunity. Operator appealed, and subscriber moved to dismiss appeal.

The Court of Appeals held that:

- As a matter of apparent first impression, under Georgia law, municipal immunity is immunity from suit rather than just a defense to liability;
- Issue of operator's asserted Georgia municipal immunity was separate from merits of subscriber's nuisance abatement claim, supporting finding that denial of motion to dismiss was immediately appealable pursuant to collateral-order doctrine; and
- Under Georgia law, scope of municipal liability for nuisance claims includes personal injuries beyond those tied to the plaintiff's property.

Issue of wastewater-treatment system operator's asserted Georgia municipal immunity was separate from merits of local water subscriber's nuisance abatement claim, supporting finding that denial of operator's motion to dismiss based on such immunity was immediately appealable pursuant to collateral-order doctrine, even if court was required to consider subscriber's factual allegations in resolving the immunity issue, in action arising from alleged contamination of city's domestic water supply with dangerously high levels of toxic chemicals by local carpet manufacturers.

Water subscriber's filing of fourth amended complaint did not divest Court of Appeals of jurisdiction over wastewater-treatment system operator's appeal from district court's denial of operator's motion to dismiss third amended complaint on grounds of Georgia municipal immunity, in subscriber's claim for nuisance abatement arising from alleged contamination of city's water supply, where fourth amended complaint did not change the nuisance abatement allegations on which operator's municipal immunity defense was based.

Under Georgia law, scope of municipal liability for nuisance claims includes personal injuries beyond those tied to the plaintiff's property.

Under Georgia law, voter-approved amendment of state constitution to constitutionalize common-law doctrine of sovereign immunity, which authorized General Assembly to establish a state court of claims with jurisdiction to try and dispose of cases involving claims for injury or damage against state, preserved the scope of sovereign immunity as it existed at common law and rendered it unmodifiable by the courts.

ZONING & PLANNING - GEORGIA

Carson v. Brown

Court of Appeals of Georgia - February 7, 2023 - S.E.2d - 2023 WL 1792668

Landowner filed petition for a writ of certiorari against the county and its planning director over county zoning board of appeals' decision affirming determination that landowner lacked vested right to develop property at a certain lot size.

Landowner then filed separate action for mandamus relief against planning director and a planner technician for the county, in their individual and official capacities, to have county's moratorium on

land-disturbance permits for development at certain densities declared void and to have director and technician ordered to process land-disturbance-permit application under the iteration of the zoning code that allowed for lots of landowner's desired size.

In the mandamus action, the Superior Court partially granted director and technician judgment on the pleadings. Both sides appealed. The Court of Appeals affirmed in part and reversed in part. After the case returned to the trial court, landowner amended his complaint to add claims for declaratory and injunctive relief against director and technician in their individual capacities, and the Superior Court granted in part and denied in part the parties' motions for summary judgment. Landowner appealed, and planner and technician cross-appealed. In the certiorari action, the Superior Court, Forsyth County, David L. Dickinson, J., affirmed decision of the local zoning board of appeals. Landowner applied for discretionary appellate review. Upon consideration of the appeals in both actions, the Court of Appeals reversed the judgment in the certiorari action and dismissed the appeal and cross-appeals in the action for mandamus, injunctive, and declaratory relief. On certiorari review, the Supreme Court reversed and remanded with direction.

On remand, the Court of Appeals vacated its opinion, adopted the Supreme Court's opinion, and held that:

- Landowner's initiation of process to obtain sewer easements under zoning code's provisions allowing lots of desired size did not grant landowner a vested right to a land-disturbance permit to develop lots of that size;
- Alleged lack of ascertainable standards or objective criteria in county ordinance setting out the administrative procedure for determining vested rights was not a basis to find that landowner had vested rights to a land-disturbance permit for lots of desired size;
- The Court's prior ruling that landowner's purported failure to pursue an administrative appeal did not bar the action for mandamus, injunctive, and declaratory relief was the law of the case; and
- Resolution adopted by county's board of commissioners before landowner applied for land-disturbance permit created a valid moratorium on lots of landowner's desired size.

EMINENT DOMAIN - INDIANA

Guzzo v. Town of St. John, Lake County

Court of Appeals of Indiana - January 19, 2023 - N.E.3d - 2023 WL 309619

In eminent domain action, the Superior Court granted town's motion for summary judgment.

Property owners appealed, and transfer was granted.

The Supreme Court remanded. On remand, the Superior Court denied property owners' motion for partial summary judgment and entered final judgment as to fair market value of property. Property owners appealed.

The Court of Appeals held that:

- Eminent-domain statute defining "residential property," as would trigger particular rate of required compensation, as, inter alia, a single-family "dwelling" does not imply a requirement of habitability, and
- Property at issue was residential property.

Eminent-domain statute defining "residential property," as would trigger particular rate of required

compensation, as, inter alia, a single-family “dwelling” does not imply a requirement of habitability.

Condemned property was “residential property” that would require compensation of property owners at statutory rate of 150 percent of fair market value, even though dwelling on property was not subject of personal use, where dwelling was a single-family dwelling, and it was not owned for purposes of resale, rental, or leasing.

DECLARATORY JUDGMENT - MARYLAND

Dzurec v. Board of County Commissioners of Calvert County, Maryland

Supreme Court of Maryland - January 25, 2023 - A.3d - 2023 WL 383006

County resident brought action seeking a declaratory judgment that county comprehensive plan was “illegally passed” and was “therefore void” because one of the county commissioners had a conflict of interest in the legislation and did not recuse himself.

The Circuit Court granted summary judgment for county. Resident appealed, and the Appellate Court affirmed. Resident petitioned for certiorari review, which was granted.

The Supreme Court held that:

- Maryland common law did not permit resident’s sought declaration that county comprehensive plan was illegally passed because its deciding voter should have recused himself due to a conflict of interest, and was therefore void, and
- Preamble of county ethics code did not demonstrate any unique legislative intent on the part of the county commissioners to create an implied right of action.

Even assuming that county resident had standing, Maryland common law did not permit judicial declaration that county comprehensive plan was illegally passed because its deciding voter should have recused himself due to a conflict of interest, and was therefore void; there was no assertion that the adoption of the plan was inconsistent with the requirements of the Land Use Article or a procedural requirement under the county charter or code for the adoption of a legislative act of the county commissioners, and, under separation of powers principles, court would not void plan based on improper legislative motivation.

Preamble of county ethics code did not demonstrate any unique legislative intent on the part of the county commissioners to create an implied right of action that would permit a taxpayer to obtain a remedy in the form of a judicial declaration invalidating a legislative enactment in circumstances in which a commissioner’s vote on a legislative action violated the conflicts of interest provisions contained in the county ethics code; county ethics code was substantially the same as the model local ethics laws created by the State Ethics Commission, while preamble was the same as the language in the General Assembly’s legislative findings in the Maryland Public Ethics Law, the preamble of the another county’s ethics code, and the model ethics laws established by the State Ethics Commission.

POLITICAL SUBDIVISIONS - MICHIGAN

Taxpayers for Michigan Constitutional Government v. Department of

Technology

Court of Appeals of Michigan - December 22, 2022 - N.W.2d - 2022 WL 17865554

Taxpayer organization brought action against state and state authorities to enforce the Headlee Amendment that requires 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 affirmed in part, vacated in part, and remanded.

On remand, the Court of Appeals held that:

- As an issue of first impression, an intermediate school district (ISD) qualifies as a "political subdivision of the state" and "unit of local government" within meaning of Headlee Amendment;
- Community college district controlled of a federally-recognized Indian tribe was not a "political subdivision of the state" within meaning of Headlee Amendment;
- As an issue of first impression, state funding to a public school academy (PSA) by their authorizing body qualified as state spending to a "unit of local government" within meaning of Headlee Amendment; and
- Taxpayer organization was not entitled to mandamus relief.

EMINENT DOMAIN - NEW YORK

74 Pinehurst LLC v. New York

United States Court of Appeals, Second Circuit - February 6, 2023 - F.4th - 2023 WL 1769678

Landlords, through trade associations, brought § 1983 action against the State of New York, the New York Division of Housing and Community Renewal and its commissioner, the City of New York, and the city's rent guidelines board and board members, alleging that the city's amended Rent Stabilization Law, both facially and as applied, effected physical and regulatory takings in violation of the Fifth Amendment's Takings Clause and violated the Fourteenth Amendment's Due Process Clause.

The United States District Court for the Eastern District of New York granted defendants' motion to dismiss for failure to state a claim. Landlords appealed.

The Court of Appeals held that:

- Landlords' facial challenge to the Rent Stabilization Law as allegedly effecting a physical taking failed;
- The Rent Stabilization Law, as applied, did not effect a physical taking of landlords' properties;
- Landlords' facial challenge to the Rent Stabilization Law as allegedly effecting a regulatory taking failed;
- Landlords' as-applied regulatory-takings claim challenging the Rent Stabilization Law was unripe;
- Assuming landlords' as-applied regulatory-takings claim was ripe, the claim failed;
- Assuming that landlords could bring a due-process challenge, the Rent Stabilization Law survived rational-basis review; and
- Sovereign immunity barred landlord's claims against the State of New York and its Division of

Housing and Community
- Renewal, and claims against the division's commissioner to the extent they sought monetary relief.

EMINENT DOMAIN - NEW YORK

Bowers Development, LLC v. Oneida County Industrial Development Agency

Supreme Court, Appellate Division, Fourth Department, New York - December 23, 2022 - N.Y.S.3d - 211 A.D.3d 1495 - 2022 WL 17882632 - 2022 N.Y. Slip Op. 07327

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

The Supreme Court, Appellate Division, held that agency lacked authority to condemn property because the primary purpose was not a commercial purpose.

County industrial-development agency's determination to condemn certain real property by eminent domain for purposes of using property as a surface parking lot associated with a hospital and healthcare-facility project exceeded its authority and would thus be annulled, where the primary purpose of the condemnation was not a commercial purpose, and agency's authority did not include the power to condemn property for projects related to hospital or healthcare-related facilities.

PUBLIC UTILITIES - OHIO

Corder v. Ohio Edison Company

Court of Appeals of Ohio, Seventh District, Harrison County - December 30, 2022 - N.E.3d - 2022 WL 18140100 - 2022-Ohio-4818

Landowners brought action seeking declaratory and injunctive relief regarding scope electrical transmission line easement, specifically whether electric utility could use herbicides to control vegetation within easement.

The Court of Common Pleas entered a judgment after sua sponte finding that Public Utilities Commission of Ohio (PUCO) had exclusive jurisdiction. Landowners appealed and the Court of Appeals reversed. Utility sought discretionary review and the Supreme Court reversed in part. On remand, the Court of Common Pleas granted summary judgment in the declaratory judgment action favor of landowners. Utility appealed.

The Court of Appeals held that:

- Easements did not authorize use of herbicide to control vegetation;
- Evidence did not support conclusion that purpose of easements was for utility to act preemptively to control vegetation; and
- Use of herbicides was not absolutely necessary for utility to fully clear brush and trees from easements.

Electrical transmission line easements giving electric utility "the right to trim, cut and remove" limbs, trees, and underbrush did not authorize utility to use herbicide to control vegetation within easements; language in easements was ambiguous, and ambiguity was required to be resolved in

landowners' favor.

Evidence did not support conclusion that purpose of electric utility's electrical transition line easements was for utility to act preemptively to control vegetation, including by use of herbicides, where there was no history of herbicide use on easements, there was no evidence that herbicide use was contemplated as one of the rights granted in the easements, and utility first contemplated use of herbicides on easements more than 50 years after easements were executed.

Use of herbicides was not absolutely necessary for electric utility to fully clear brush and trees from its electrical transition line easements, as part of the purpose of the easements, and thus herbicide use was not within the scope of the easements, where utility did not contemplate the use of herbicides on the easements for at least the first 50 years of the life of the easements.

PUBLIC UTILITIES - OREGON

Portland General Electric Company v. Alfalfa Solar I, LLC

Court of Appeals of Oregon - January 5, 2023 - P.3d - 323 Or.App. 531 - 2023 WL 107425

Group of renewable-energy-generating facilities sought review of a final order from the Public Utilities Commission (PUC), which resolved a dispute about meaning of provision contained in power purchase agreements (PPAs) in favor of public utility.

The Court of Appeals held that:

- PUC had authority to review public utility's complaint regarding dispute about meaning of provision contained in PPAs, and
- Provision in PPAs providing for a 15-year term during which a "qualifying facility" was entitled to fixed-price term started on date of contract execution, rather than date qualifying facility first delivered power.

Public Utilities Commission (PUC) had jurisdiction to resolve public utility's complaint regarding its dispute with group of renewable-energy-generating facilities about meaning of provision contained within power purchase agreements (PPAs) under statute providing that any person may file complaint with PUC against any person whose business or activities were regulated or enforced by PUC; renewable-energy-generating facilities fell within statutory definition of "persons," their actives as "qualifying facilities" for purposes of the Public Utility Regulatory Policies Act (PURPA) were regulated by the PUC, and nothing in statute limited its application to complaints against public utilities or entities subject only to ongoing regulation by the PUC.

Provision in purchase power agreements (PPAs) providing for a 15-year period during which a "qualifying facility" for purposes of the Public Utility Regulatory Policies Act (PURPA) was entitled to a fixed-price term started on date of contract execution, rather than on date qualifying facility first delivered power; PPAs unambiguously provide that a PPA between public utility and qualifying facility could have a term extending from one to 20 years, but that such term started on date of contract execution, provided that a fixed price option was available only for first 15 years of that term, and that for a contract with a term that is longer than 15 years, fixed price was available only for first 15 years.

WATER LAW - TEXAS

Fort Bend County v. United States Army Corps of Engineers

United States Court of Appeals, Fifth Circuit - February 2, 2023 - F.4th - 2023 WL 1465325

Local political subdivisions brought action under Administrative Procedure Act (APA) challenging United States Army Corps of Engineers' adoption of water control manual (WCM) documenting reservoir regulation plans without including procedures to prevent flooding of their property, Corps' failure to revise WCM after floods, and Corps' failure to acquire their lands when it adopted WCM and after floods.

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

The Court of Appeals held that:

- Subdivisions' claim was not claim for money damages subject to Court of Federal Claims' exclusive jurisdiction;
- Tucker Act did not provide adequate remedy for harms that subdivisions allegedly faced;
- Fact issues remained as to whether Corps' adoption of revisions to WCM rendered subdivisions' claim moot;
- Fact issues remained as to whether Corps complied with Engineer Regulation (ER) when it prepared WCM;
- Corps' failure to amend WCM after recent flooding events and to acquire additional land when it adopted WCM was discrete agency action;
- ER requiring WCMs to be revised "as necessary" did not impose mandatory duty on Corps;
- Fact issues remained as to whether Corps' non-public documents imposed mandatory duty to acquire additional lands; and
- Reassignment of case to another judge on remand was not warranted.

Political subdivisions' claim for injunctive, declaratory, and mandamus relief under Administrative Procedure Act (APA) requiring United States Army Corps of Engineers to acquire additional land upstream from reservoirs was not claim for money damages subject to Court of Federal Claims' exclusive jurisdiction under Tucker Act, even though relief would require Corps to pay money; subdivisions claimed that Corps' failure to comply with its internal regulations resulted in flooding of their property during floods, claim was not premised on Takings Clause, and they sought only prospective relief.

Tucker Act did not provide adequate remedy for harms that political subdivisions allegedly faced as result of United States Army Corps of Engineers' purported failure to implement procedures to prevent flooding of their property, even though private landowners had sought compensation for takings resulting from floodings, and takings claims could compensate subdivisions for past harms; Court of Federal Claims lacked general equitable powers to grant prospective relief, but district court could order such relief in action brought pursuant to Administrative Procedure Act (APA).

Issue of whether United States Army Corps of Engineers' adoption of revisions to water control manual (WCM) documenting reservoir regulation plans rendered moot political subdivisions' claim that Corps' failure to include procedures to prevent flooding of their property or to acquire their lands violated Administrative Procedure Act (APA) involved fact questions that could not be resolved on motion to dismiss subdivisions' action against Corps.

Issue of whether United States Army Corps of Engineers complied with Engineer Regulation (ER)

when it prepared water control manual (WCM) documenting reservoir regulation plans involved fact questions that could not be resolved on motion to dismiss political subdivisions' action under Administrative Procedure Act (APA) alleging that Corps acted arbitrarily and capriciously in adopting WCM.

Engineer Regulation (ER) requiring water control manuals (WCM) to be revised "as necessary" did not impose mandatory duty on United States Army Corps of Engineers to revise WCM for reservoir system after flooding events, and thus federal court lacked jurisdiction under Administrative Procedure Act (APA) to order Corps to revise WCM; regulation did not specify when such conditions required Corps to update WCM, but left that decision to Corps' discretion.

Reassignment of case to another judge on remand was not warranted in political subdivisions' action under Administrative Procedure Act (APA) challenging United States Army Corps of Engineers' adoption of water control manual (WCM) documenting reservoir regulation plans without including procedures to prevent flooding of their property, Corps' failure to revise WCM after floods, and Corps' failure to acquire their lands when it adopted WCM and after floods, even though some of judge's rulings were unconventional; judge's actions would not reasonably cause objective observer to question his impartiality, and reassigning case to another judge would likely entail waste and duplication out of proportion to any gain in appearance of fairness.

BONDS - ARIZONA

UMB Bank, NA v. Parkview School, Inc

Court of Appeals of Arizona, Division 1 - January 5, 2023 - P.3d - 87 Arizona Cases Digest 4 - 2023 WL 106472

Trustee for loan made to nonprofit organization operating charter schools commenced action for a receiver after being authorized to do so by Minnesota probate court.

The Superior Court appointed receiver. Nonprofit organization appealed.

The Court of Appeals held that:

- Notice of claim statute did not apply to trustee's request for appointment of receiver;
- Even assuming one-year statute of limitations applied, receivership action was timely; and
- Arizona court properly deferred to Minnesota court's ruling in finding that forbearance agreement did not bar appointment of receiver.

Request for appointment of receiver made by trustee for loan made to nonprofit organization operating charter schools was not mere predicate to damages claim, and thus notice of claim statute did not apply; trustee requested receivership for prospective protection of bondholders, and to extent trustee requested past-due debt be collected within the receivership, severance of those requests did not redefine the nature of the action.

Receivership action initiated by trustee for loan made to nonprofit organization operating charter

schools was timely, even assuming applicability of one-year statute of limitations for actions against public entities; trustee premised receivership action on nonprofit organization's failure to satisfy its obligation to make regular debt payments in full for several years, including defaults that occurred within one year of complaint, and any purported debt acceleration arising from trustee's complaint alleging "total aggregate due and owing" had no bearing on timeliness of receivership action.

In proceedings initiated by trustee for loan made to nonprofit organization operating charter schools, Minnesota court exercised jurisdiction over action by ruling on trustee's petition, which sought declaration that bondholder directive for trustee to enter forbearance agreement was ineffective and instruction not to enter forbearance agreement, before Arizona court exercised jurisdiction by ruling on trustee's motion for appointment of receiver, and thus, under prior exclusive jurisdiction doctrine, Arizona court properly deferred to Minnesota court's ruling in finding that forbearance agreement did not bar appointment of receiver.

POLITICAL REFORM ACT - CALIFORNIA

Travis v. Brand

Supreme Court of California - January 30, 2023 - P.3d - 2023 WL 1094709

City residents brought action alleging that political action committee created to oppose redevelopment of municipal waterfront failed to disclose identity of entities that supported ballot measure and that it was controlled by political candidates, in violation of Political Reform Act.

Following bench trial, the Superior Court entered judgment in defendants' favor and awarded attorney fees. Plaintiffs appealed and appeals were consolidated. The Second District Court of Appeal affirmed in part and reversed in part. Plaintiffs' petition for review was granted.

The Supreme Court held that as matter of first impression, prevailing defendant under Political Reform Act should not be awarded attorney fees and costs unless court finds that action was objectively without foundation when brought, or that plaintiff continued to litigate after it clearly became so.

PUBLIC UTILITIES - FEDERAL

Consolidated Edison Company of New York, Inc. v. Federal Energy Regulatory Commission

United States Court of Appeals, District of Columbia Circuit - August 9, 2022 - 45 F.4th 265 - Util. L. Rep. P 15,234

Protesting entities separately petitioned for review of the Federal Energy Regulatory Commission's (FERC) orders that approved regional transmission organization's cost allocations for upgrades to transmission owner's facilities.

After consolidation, the Court of Appeals held that:

- The FERC failed to reasonably explain why a "flow-based" method called the "solution-based distribution-factor analysis" (DFAX), which assigned costs based on how much each utility used a facility over time, was permissible to be used to allocate the costs of the upgrades;
- The "de minimis" threshold used in the DFAX violated the Federal Power Act's cost-causation

principle and caused undue discrimination;
- The FERC reasonably explained its decision that netting the flows to each delivery point in a zone to calculate total flow in a zone did not violate the Federal Power Act's cost-causation principle and did not cause undue discrimination;
- It was reasonable to use a model of the flow of electricity that assumed that each zone was at peak demand;
- The FERC reasonably read the tariff as requiring an appropriate substitute proxy for the DFAX method;
- Responsibility of public utility outside of transmission organization's region to pay costs associated with the upgrades ended upon termination of its power exchange transmission service, or "wheeling," agreement with transmission owner; and
- The FERC reasonably came to and adequately explained conclusion that the overall cost allocation for entities outside the transmission organization's region was not unjust or unreasonable.

MANDAMUS - GEORGIA

BCG Operations, LLC v. Town of Homer

Court of Appeals of Georgia - January 26, 2023 - S.E.2d - 2023 WL 412460

Operator of golf course that purchased property with intent to build clubhouse that would serve liquor filed petition for writ of mandate and complaint for inverse condemnation and damages against town, town council, and town's mayor, stemming from town's refusal to accept operator's application for a distilled spirits consumption license.

The Superior Court granted operator's writ of mandamus, ordered town to process and grant operator's application for liquor license, and subsequently denied operator's motion for partial summary judgment seeking damages related to town's refusal to accept operator's application. Operator appealed and town, town council, and town's mayor cross-appealed.

The Court of Appeals held that:

- Cross-appeal from grant of writ of mandamus and order requiring town to process and grant application was moot;
- Grant of writ of mandamus precluded award of monetary damages;
- Statute requiring showing of pecuniary loss for which compensation in damages was unavailable to enforce private right of action by mandamus supported determination that grant of mandamus precluded award of damages; and
- Even if reliance on statute in denying award of monetary damages was error, denying award of damages was not erroneous.

Statute requiring plaintiff to show pecuniary loss for which compensation in damages was unavailable to enforce a private right by mandamus supported determination that grant of writ of mandamus in favor of operator of golf course, seeking order requiring town to process and grant operator's application for distilled spirits consumption license, precluded award of monetary damages based on delay in issuing license; the right associated with a license to sell liquor by the drink was in the nature of a private right to the individual, rather than a public right of the citizens as a whole.

Even if trial court was mistaken in relying on statute requiring plaintiff to show pecuniary loss for which compensation in damages was unavailable to enforce a private right by mandamus to support determination that grant of writ of mandamus in favor of operator of golf course, seeking order

requiring town to process and grant operator's application for distilled spirits consumption license, precluded award of monetary damages due to town's delay in issuing license, denial of monetary damages award was not erroneous, since denial was also based on alternative, independent reasoning; trial court denied award of monetary damages on basis that awarding damages in addition to mandamus would amount to an impermissible stacking of remedies.

EMPLOYMENT - ILLINOIS

Yates v. City of Chicago, Illinois

United States Court of Appeals, Seventh Circuit - January 25, 2023 - F.4th - 2023 WL 382348

Aviation security officers brought action against city and state officials alleging that city's decision to end their classification as law enforcement personnel violated Due Process Clause.

The United States District Court dismissed claims against officials and entered summary judgment in city's favor. Officers appealed.

The Court of Appeals held that:

- City's decision to end officers' classification as law enforcement personnel did not violate Due Process Clause, and
- City was not promissorily estopped from ending officers' classification as law enforcement personnel.

City's decision to end aviation security officers' classification as law enforcement personnel did not violate Due Process Clause, even if city ordinance granting them law enforcement status gave them cognizable property interest in their classification; state denied ordinance's validity under state law, through their union, all aviation security officers received hearing on question whether they were law enforcement officers, and Illinois Labor Relations Board ruled against them, and officers did not claim that union had breached its duty of fair representation.

Under Illinois law, city was not promissorily estopped from ending aviation security officers' classification as law enforcement personnel; officers' collective bargaining agreement (CBA) with city did not promise that aviation security officers would remain law enforcement officials, CBA contained zipper clause saying that parties could not rely on anything that was not written into agreement, and city's field manual that set out aviation security officers' rights and duties expressly reserved city's right to make changes.

MANDAMUS - LOUISIANA

Pineville City Court v. City of Pineville

Supreme Court of Louisiana - January 27, 2023 - So.3d - 2023 WL 534255 - 2022-00336 (La. 1/27/23)

City court and city court judge petitioned for writ of mandamus against city and its mayor, seeking order requiring city to fully fund court clerks' salaries and benefits associated with their employment.

The District Court granted defendants' peremptory exception of no cause of action and dismissed petition. Plaintiffs appealed. The Court of Appeal reversed and remanded. Defendants sought writ of certiorari, which was granted.

The Supreme Court held that:

- Payment by city of amounts exceeding statutory minimum was not purely ministerial act that could be compelled by mandamus, and
- Amendment of mandamus petition was not warranted.

Payment by city of amounts exceeding minimum in statute governing salary of city court clerks and deputy clerks was not purely ministerial in nature, but discretionary, and thus, mandamus action was inappropriate vehicle for city court and city court judge to seek order requiring city to fully fund clerks' salaries and benefits associated with their employment; statute did not expressly provide any compulsory language for payments exceeding statutory minimums, nor did it clearly define any amounts exceeding minimums for which governing authorities were mandated responsibility, and issue of whether statutory minimums set in 1960 were no longer reasonable was policy concern involving discretion exercised by legislative branch of government.

Amendment of mandamus petition by city court and city court judge seeking order requiring city to fully fund clerks' salaries and benefits associated with their employment was not warranted under statute governing amendment after a peremptory exception of no cause of action was sustained, although city and judge could properly seek mandamus to fund minimum set forth in statute governing salary of city court clerks and deputy clerks, where city was currently funding above statutory minimum, and statutory language concerning amounts above statutory minimum, and nature of demand by city court, clearly had elements left to governing authorities' discretion.

CHARTER AMENDMENT - MAINE

Fair Elections Portland, Inc. v. City of Portland

Supreme Judicial Court of Maine - January 26, 2023 - A.3d - 2023 WL 407801 - 2023 ME 9

Voters petitioned for review of city's decision to classify their proposed modification to city charter establishing public financing mechanism for city elections as revision of charter requiring recommendation of charter commission for submission to voters, instead of amendment to charter requiring direct submission to voters.

The Superior Court denied petition. Voters appealed.

The Supreme Judicial Court held that:

- Issue of whether proposed modification was revision or amendment was moot, and
- Exception to mootness for questions of great public concern did not apply.

Issue on appeal of whether voters' proposed modification to city charter establishing public financing mechanism for city elections was revision of charter requiring recommendation of charter commission for submission to voters or amendment to charter requiring direct submission to voters was rendered moot by voters' approval of ballot question establishing mechanism for public campaign financing that was proposed by charter commission; commission's ballot question was substantially similar to voters' proposed modification, despite broadening scope of funding mechanism, and difference between fully funding program, as required by commission's ballot

question, and sufficiently funding program, as required by voters' proposed modification, was inconsequential because outcome was same.

Exception to mootness for questions of great public concern did not apply, on appeal by voters from denial of their petition for review of city's decision to classify their proposed modification to city charter establishing public financing mechanism for city elections as revision of charter requiring recommendation of charter commission for submission to voters, instead of amendment to charter requiring direct submission to voters; framework for determining whether a proposed charter modification was amendment or revision that was mixed question of fact and law was more than adequate guidance for municipalities.

PUBLIC UTILITIES - MAINE

Maine Coalition to Stop Smart Meters v. Public Utilities Commission

Supreme Judicial Court of Maine - January 24, 2023 - A.3d - 2023 WL 364533 - 2023 ME 8

Objector sought review of order of Public Utilities Commission denying reconsideration of order approving revised terms and conditions for electric utility's smart-meter opt-out program.

The Supreme Judicial Court held that:

- Evidence was sufficient to support Commission's finding that solid-state electric meters were safe with regard to radiofrequency (RF) radiation exposure, as could support conclusion that allowing electric utility to offer solid-state meters, instead of analog meters, as an alternative to smart meters for consumers concerned about potential health effects of radiation emitted by smart meters, and
- Commission's conclusion that provision of solid-state meters as alternative would result in safe, reasonable, and adequate facilities and service was not arbitrary, unreasonable, unjust, or unlawful.

Evidence was sufficient to support finding of Public Utilities Commission that solid-state electric meters were safe with regard to radiofrequency (RF) radiation exposure, as could support conclusion that allowing electric utility to offer solid-state meters, instead of analog meters, as an alternative to smart meters for consumers concerned about potential health effects of radiation emitted by smart meters would result in safe, reasonable, and adequate facilities and service, as required by statute; testing performed by another utility indicated that solid-state meters emitted RF radiation at levels similar to those emitted by analog meters.

Conclusion of Public Utilities Commission that electric utility's plan to provide solid-state meters, instead of analog meters, as alternative to smart meters for consumers concerned about potential health effects of RF radiation emitted by smart meters would result in safe, reasonable, and adequate facilities and service was not arbitrary, unreasonable, unjust, or unlawful; there was evidence that solid-state meters emitted RF radiation at levels similar to those emitted by analog meters, and manufacturers were no longer producing analog meters.

BONDS - PENNSYLVANIA

Wilmington Trust, N.A. as Trustee of $29, 615, 000 Philadelphia Authority for

Industrial Development Senior Housing Revenue Bonds v. Pavilion Apartments PENN LLC

United States District Court, E.D. Pennsylvania - January 13, 2023 - Slip Copy - 2023 WL 187568

Wilmington Trust, N.A., as Trustee of the $29,615,000 Philadelphia Authority for Industrial Development Senior Housing Bonds, filed a mortgage foreclosure action against Pavilion Apartments PENN LLC ("Pavilion"). Wilmington Trust subsequently moved to appoint a receiver to manage the mortgaged property, a low-income senior housing project.

The Court held an evidentiary hearing on the Motion and on January 3, 2023, entered an order granting it.

COUNTIES - WYOMING

Campbell County Board of Commissioners v. Wyoming Horse Racing, LLC

Supreme Court of Wyoming - January 31, 2023 - P.3d - 2023 WL 1182776 - 2023 WY 10

Operators of live horse racing, historic horse racing, and simulcast events sought judicial review under the Wyoming Administrative Procedure Act (WAPA) of county board of commissioners' resolution revoking and superseding permits to conduct simulcast operations, asserting the resolution exceeded county's statutory authority under the Wyoming Pari-Mutuel Act.

The District Court ordered the resolution to be set aside. County appealed.

The Supreme Court held that:

- The resolution was subject to judicial review under WAPA, and
- County lacked express or implied authority under the Pari-Mutuel Act to adopt resolution revoking its prior approvals.

County board of commissioners' resolution, which revoked and superseded prior approvals of pari-mutuel and simulcast permits authorizing operators to conduct simulcast operations in county, was not legislative action, but instead was an administrative decision subject to judicial review under Wyoming Administrative Procedure Act (WAPA), even though resolution generally imposed conditions on all future approvals for simulcasting; resolution specifically revoked county's prior approvals for particular operators and thereby aggrieved or adversely affected them.

Pari-Mutuel Act only granted county authority to approve, or, impliedly, to deny a corporation's request for approval for proposed pari-mutuel and simulcast operations as a condition precedent to Wyoming Gaming Commission issuing a pari-mutuel permit or authorizing the corporation to conduct simulcasting off the permitted premises, and therefore, after Gaming Commission had issued permits and authorized simulcasting, county board of commissioners lacked express or implied authority under the Act to adopt resolution that revoked its prior approvals of simulcasting off of permitted live horse racetrack premises within county.

BALLOT INITIATIVES - CALIFORNIA

City of Oxnard v. Starr

Court of Appeal, Second District, Division 6, California - January 19, 2023 - Cal.Rptr.3d - 2023 WL 312378

City brought action against proponent of city initiatives, seeking to have two initiatives passed by voters declared void. Proponent brought anti-SLAPP motion seeking dismissal of the suit and attorney fees.

The Superior Court denied the anti-SLAPP motion. Proponent appealed.

The Court of Appeal held that:

- City's post-election lawsuit against proponent implicated protected activity for anti-SLAPP purposes;
- City had power to seek to invalidate initiatives and did not have duty to defend initiatives, for purposes of proponent's anti-SLAPP motion;
- Proponent was proper defendant in city's lawsuit, for purposes of proponent's anti-SLAPP motion;
- Initiative modifying rules governing city's legislative bodies was not invalid under exclusive delegation rule, for purposes of proponent's anti-SLAPP motion;
- Initiative modifying rules governing city's legislative bodies was legislative in nature and thus was not invalid, for purposes of proponent's anti-SLAPP motion; and
- Initiative amending sunset date of local sales and use tax increase was administrative in nature and thus was invalid, for purposes of proponent's anti-SLAPP motion.

ZONING & PLANNING - CALIFORNIA

Socal Recovery, LLC v. City of Costa Mesa

United States Court of Appeals, Ninth Circuit January 3, 2023 - 56 F.4th 802 - 2023 Daily Journal D.A.R. 54

Sober living home operators brought actions alleging that city's denial of their applications for special use permits and reasonable accommodation requests violated Fair Housing Act (FHA), Americans with Disabilities Act (ADA), and California Fair Employment and Housing Act (FEHA).

The United States District Court for the Central District of California entered summary judgment in city's favor, and operators appealed. Appeals were consolidated.

The Court of Appeals held that:

- Operators had standing to bring actions;
- Operators were not required to present individualized evidence of actual disability of their residents;
- As matter of first impression, operators can satisfy "actual disability" prong of disability discrimination claim on collective basis; and
- Operators were not required to show that city subjectively believed that their residents were disabled.

Sober living home operators had standing to bring actions alleging that city's denial of their applications for special use permits and reasonable accommodation requests violated Fair Housing Act (FHA), ADA, and California Fair Employment and Housing Act (FEHA), even though they were not disabled or "handicapped," and some residents may not have been disabled; city ordinances'

requirement that sober living homes be located at least 650 feet away from any other sober living home or any state-licensed drug and alcohol treatment center prevented operators from conducting their normal business operations.

Sober living homes and other dwellings intended for occupancy by persons recovering from alcoholism and drug addiction were protected by Fair Housing Act (FHA), ADA, and California Fair Employment and Housing Act (FEHA) from illegal discrimination against disabled without need for home operators to present individualized evidence of actual disability of their residents; operators only had to establish—through house rules, admissions requirements, or testimony of house employees and residents—that they had policies and procedures to ensure that they served or would serve those with actual disabilities and that they adhered or would adhere to such policies and procedures.

Sober living home operators can satisfy "actual disability" prong of disability discrimination claim under Fair Housing Act (FHA), ADA, and California Fair Employment and Housing Act (FEHA) on collective basis by demonstrating that they serve or intend to serve individuals with actual disabilities.

In determining whether city regarded sober living home residents as disabled, for purposes of ADA, home operators were not required to show that city subjectively believed that all of their residents—or some specific residents—were disabled.

PREEMPTION - FLORIDA

Fried v. State

Supreme Court of Florida - January 19, 2023 - So.3d - 2023 WL 309000

Municipalities, counties, elected officials, and one private citizen brought actions, which were consolidated, for declaration invalidating statutes that imposed civil penalties against governmental entities and individual officers for violating a statute that expressly preempted the whole field of firearm and ammunition regulation.

The Circuit Court granted summary judgment in part for plaintiffs. State appealed. The First District Court of Appeal reversed. Plaintiffs applied for review.

The Supreme Court held that:

- The statutes that imposed civil penalties against local officials for violating the firearm preemption statute abrogated common law legislative immunity for local officials as to the preemption statute, and
- Governmental-function immunity did not preclude enforcement of statute that allowed lawsuits against local governments for violating the firearm preemption statute.

Statute that imposed civil penalties against local officials for violating a statute that expressly preempted the whole field of firearm and ammunition regulation abrogated common law legislative immunity for local officials as to that preemption statute.

Statutes that imposed civil penalties against local officials for violating a statute that expressly preempted the whole field of firearm and ammunition regulation did not violate legislative immunity arising from the separation of powers in the Florida Constitution, despite argument that the preemption statute at issue authorized the judiciary's interference with legislative acts of local

officials.

Florida Constitution's article on local government was not a basis on which legislative immunity could preclude enforcement of statutes that imposed civil penalties against local officials for violating a statute that expressly preempted the whole field of firearm and ammunition regulation; the article at issue expressly granted the legislature plenary authority over local governments, and those governments, which included counties and municipalities, were creatures of the State without any independent sovereignty.

While state legislators are immune from civil suits for their acts done within sphere of legislative activity, legislative immunity does not shield individuals who knowingly and willfully act contrary to or beyond limits of state law that provides for statutory penalties against government officials.

Governmental-function immunity did not preclude enforcement of statute that allowed lawsuits against local governments for violating a statute that expressly preempted the whole field of firearm and ammunition regulation.

LIABILITY - GEORGIA

City of Alpharetta v. Francis

Court of Appeals of Georgia - January 19, 2023 - S.E.2d - 2023 WL 311338

Residents of home brought action against city, asserting that negligent maintenance of storm water drainage systems caused flooding in home and alleging claims for inverse condemnation, personal injuries, trespass, nuisance, punitive damages, and attorney fees.

The trial court denied city's motion to dismiss. City applied for interlocutory review, which was granted.

The Court of Appeals held that:

- Notice failed to satisfy requirement of ante litem notice requirement that notices include specific amount of monetary damages sought from municipal corporation, and
- Court would decline to consider residents' claim that requirements of ante litem notice statute did not apply to inverse condemnation claim.

Notice that residents of home submitted to city, indicating intent to sue, failed to satisfy requirement of ante litem notice statute that notices, in describing extent of injury, include specific amount of monetary damages being sought from municipal corporation; while notice indicated residents would seek damages for complete and total taking of property in amount to be proven at trial, believed to be between $350,000 and $500,000, as well as medical damages between $75,000 and limitations of applicable insurance policies, and promised to supplement notice with formal demand, no such demand was ever filed, and notice merely provided estimated range of potential damages and failed to identify insurance policies under which residents sought to recover.

Court of Appeals would decline to rule on home residents' claim that requirements of ante litem notice statute did not apply to inverse condemnation claim brought against city; residents did not raise such argument before trial court, and trial court did not rule on issue.

MUNICIPAL ORDINANCE - ILLINOIS

Lintzeris v. City of Chicago

Supreme Court of Illinois - January 20, 2023 - N.E.3d - 2023 IL 127547 - 2023 WL 329492

Vehicle owners brought putative class action against home rule city, seeking declaratory and injunctive relief and damages arising from city's ordinance imposing administrative penalties for recovery of impounded vehicles when there was probable cause to believe vehicle was used in certain enumerated offenses.

The Circuit Court dismissed action on pleadings. Owners appealed, and the Appellate Court, 2021 WL 2952783, affirmed. Owners petitioned for leave to appeal, which was allowed.

The Supreme Court held that:

- Provision of Vehicle Code authorizing municipalities to impose "a reasonable administrative fee" for costs associated with properly impounded vehicles did not preempt ordinance;
- Ordinance pertained to city's local government and affairs, supporting finding that ordinance was not preempted by Vehicle Code, regulating vehicles generally;
- Penalty imposed by ordinance was intended as civil rather than criminal, supporting finding that imposition of penalty did not violate double jeopardy; and
- Penalty was not so punitive as to render it criminal in nature, supporting finding that imposition of penalty did not violate double jeopardy.

MUNICIPAL GOVERNANCE - MICHIGAN

Warren City Council v. Fouts

Court of Appeals of Michigan - December 29, 2022 - N.W.2d - 2022 WL 17997585

City council brought action against mayor seeking a writ of mandamus, declaratory judgment, and injunctive relief, alleging that mayor violated city charter, Uniform Budgeting and Accounting Act (UBAA), and recodified tax increment financing act (RTIFA) by spending unappropriated money from city budget.

The Circuit Court granted preliminary injunctive and declaratory relief in city council's favor. Mayor appealed.

The Court of Appeals held that:

- Court properly granted declaratory judgment in city council's favor stating that mayor was not entitled to proceed with his own budget as if it had been passed by city council, and
- City council showed that it was likely to prevail on merits of its mandamus claim against mayor.

City charter permitted city council to unilaterally amend mayor's recommended budget when passing general appropriations resolution, and thus court properly granted declaratory judgment in city council's favor stating that mayor was not entitled to proceed with his own budget as if it had been passed by city council; charter required mayor to prepare and submit a proposed budget to city council, but also stated that city council was required to pass "a" budget and not "the" budget, charter described budget submitted by mayor to city council as "a recommended budget" and as a "budget proposal," and city council had power to "adopt a budget" for next fiscal year.

City council had clear legal right to have mayor act in accordance with city charter and Uniform Budgeting and Accounting Act (UBAA) and recodified tax increment financing act (RTIFA) and mayor had clear legal duty to comply with law authorizing only those expenditures that were approved by city council, and thus city council showed that it was likely to prevail on merits of its mandamus claim against mayor, as required for issuance of preliminary injunction to enjoin mayor's further expenditure of unappropriated money; city charter gave city council sole power within city to appropriate money, mayor's legal duties to follow expenditure rules in charter were ministerial in nature, and mayor had no discretion to determine whether money had been appropriated for particular program or project.

IMMUNITY - NORTH CAROLINA

Devore for Horton v. Samuel

Court of Appeals of North Carolina - December 20, 2022 - S.E.2d - 2022 WL 17814512 - 2022-NCCOA-834

Guardian ad litem for elementary school student struck by car after exiting school bus brought negligence action on behalf of child against multiple defendants, including operator of afterschool childcare center to which student was heading when he was struck by car.

Operator then filed third-party complaint against bus driver and local school board that employed bus driver, alleging claims for contribution and indemnity. Board filed motion to dismiss on ground that third-party claims were barred by governmental immunity. After a hearing, the Superior Court denied the motion. Board appealed.

The Court of Appeals held that:

- As matter of first impression, limited waiver of governmental immunity for school bus negligence claims against local school boards applies only to claims brought in Industrial Commission and does not apply to third-party claims asserted in court, and
- Board's excess liability insurance coverage did not waive board's governmental immunity for school bus negligence claims.

Governmental immunity that applies to counties and other municipalities applies to a local school board because it is a governmental agency, and is therefore not liable in a tort or negligence action except to the extent that it has waived its governmental immunity pursuant to statutory authority.

Limited waiver of governmental immunity for school bus negligence claims against local school boards applies only to claims brought in Industrial Commission and does not apply broadly to third-party claims asserted in court; although State may be joined in court proceedings as third-party defendant for contribution or indemnification, and Tort Claims Act provides that liability of local school boards in school bus negligence cases shall be same as tort claims against State Board of Education, statute merely explains that local school board's liability, together with other aspects of case, shall be same as provided with respect to tort claims against State Board of Education and does not unambiguously provide that boards are considered state agency or include express statutory authorization to pursue claim outside Industrial Commission.

Local school board's excess liability insurance coverage did not waive board's governmental immunity for school bus negligence claims, under statute allowing local boards of education to waive governmental immunity from tort actions in superior courts by purchasing liability insurance; policy

stated that it was not “intended by the Insured to waive its governmental immunity” and that policy provided coverage “only for occurrences or wrongful acts for which the defense of governmental immunity is clearly not applicable or for which, after the defenses are asserted, a court of competent jurisdiction determines the defense of governmental immunity not to be applicable.”

PUBLIC RECORDS - PENNSYLVANIA

Auslander v. Tredyffrin/Easttown School District

United States District Court, E.D. Pennsylvania - December 5, 2022 - F.Supp.3d - 2022 WL 17418625

Taxpayer brought § 1983 action against school district, alleging First Amendment violation arising from district’s refusal to allow taxpayer to make verbatim verbal recordings of copyrighted educational materials used by school which were provided by private contractor.

Parties cross-moved for summary judgment.

The District Court held that district’s refusal to allow taxpayer to record the materials did not violate taxpayer’s First Amendment free speech right.

School district’s refusal to allow taxpayer to make verbatim voice recording of copyrighted educational classroom materials used by district, during taxpayer’s visual inspection of those materials, did not violate taxpayer’s First Amendment free speech right; pursuant to Copyright Act, author had exclusive right to reproduce the copyrighted work, and district had contractual obligation to protect author’s copyright.

DEVELOPMENT FEES - ARIZONA

Southern Arizona Home Builders Association v. Town of Marana

Supreme Court of Arizona - January 17, 2023 - P.3d - 2023 WL 193607

Home builders association brought action for declaratory judgment against town, alleging that town violated statute governing municipal-development fees by assigning entire cost of upgraded and expanded wastewater treatment facilities to future homeowners through development impact fees.

On cross-motions by parties, the Superior Court granted summary judgment for town. Association appealed. The Court of Appeals affirmed. The Supreme Court granted review.

The Supreme Court held that town violated development-fee statute by assigning entire cost of upgraded and expanded wastewater treatment facilities to future homeowners.

Town violated statute governing apportionment of “development fees to offset costs to the municipality associated with providing necessary public services” by making future development bear 100% of cost of town’s acquisition of wastewater reclamation facility (WRF) from county, by making future development bear nearly all cost of upgrading, modernizing, and improving facility, and by failing to determine what could or could not be included in development fees or to make any proportionate allocation of costs between existing and future development, where acquisition and improvement of water facilities benefited both new and existing developments, and thus statute required proportional allocation of costs between existing and future residents.

FALSE CLAIMS ACT - CALIFORNIA

Cordoba Corporation v. City of Industry

Court of Appeal, Second District, Division 8, California - January 3, 2023 - Cal.Rptr.3d - 2023 WL 21762 - 2023 Daily Journal D.A.R. 98

City brought action against civil engineering consultant and solar energy developer alleging fraud under False Claims Act, along with other claims, after uncovering allegedly fraudulent billings, and consultant filed cross-complaint for breach of contract, breach of implied covenant of good faith and fair dealing, and declaratory relief.

The Superior Court granted city's motion to strike cross-complaint under anti-SLAPP statute. Consultant appealed.

The Court of Appeal held that:

- Consultant's cross-claims arose from city's protected petitioning activity;
- 30-day notice provision about fee disputes in consulting contract did not preclude city from asserting fraud claims;
- Consultant failed to state a claim for breach of implied covenant of good faith and fair dealing; and
- An actual present controversy did not exist for declaratory relief about requirements of previously-terminated contracts.

Civil engineering consultant's cross-claim against city for breach of contract, alleging that city's years-delayed allegations of fraudulent billings relating to solar development project violated consulting contract, arose from city's protected petitioning activity of lawsuit suit against consultant and developer, for purposes of city's anti-SLAPP motion; consultant's breach of contract claim plainly arose from city's lawsuit.

City's investigations of suspicious claims on public funds, as a precursor to filing fraud and contract-based suit against solar energy developer and civil engineering consultant, were protected by anti-SLAPP statute as communications in preparation of litigation, for purposes of city's anti-SLAPP motion concerning consultant's cross-claim against city for breach of implied covenant of good faith and fair dealing, in which consultant alleged that city created an unsustainable contractual relationship forcing consultant to resign and thereby be deprived of the benefits of its consulting contracts with city.

City council's considering firing its city manager, which allegedly contributed to volatile situation with city's civil engineering consultant, was protected by anti-SLAPP statute as communications undertaken in connection with a legislative proceeding, for purposes of city's anti-SLAPP motion that it filed in response to consultant's cross-claim against city for breach of implied covenant of good faith and fair dealing, in city's action asserting fraud and contract-based claims against consultant and solar energy developer arising from city's discovery of allegedly fraudulent billings for solar energy project.

Civil engineering consultant's cross-claim against city for declaratory relief, asking court to declare that consultant was not responsible for approving developer's allegedly fraudulent invoices for solar energy development on city land, arose from city's protected petitioning activity of its lawsuit against consultant and developer for fraud and contract-based claims, for purposes of city's anti-SLAPP motion, where consultant had no present or future duties under its consulting contracts, which it chose to terminate, and the only use of a declaration would have been to undermine city's

legal claims.

The 30-day notice provision in civil engineering consultant's contract with city, providing that city was to give written notice to consultant of dispute with fees within 30 days of receipt of invoice, did not preclude city from asserting fraud claims under False Claims Act more than 30 days after receipt of invoices, after uncovering allegedly fraudulent billing; on its face, the provision addressed payment of invoices, not legal action, interpreting provision to require city to discover and to file a lawsuit for fraud under Act within 30 days would have been unreasonable, and the intentional fraud that city alleged under Act was not an error contemplated by the notice provision and likely to have been discovered by routine perusal of invoices.

Civil engineering consultant failed to state a claim against city for breach of implied covenant of good faith and fair dealing arising from consultant's terminating its consulting contracts with city in midst of city's disputes with solar energy developer and city's investigations of suspicious billings relating to solar energy project, where consultant complained that city deprived it of the benefits of its contracts with city, but consultant did not say what benefit it unfairly lost.

No actual controversy existed concerning present rights and duties under civil engineering consulting contracts with city, and therefore consultant could not obtain a declaratory relief that the contracts did not require it to approve solar energy developer's invoices to city, which asserted fraud and contract-based claims against consultant and developer arising from city's uncovering allegedly fraudulent billing for the solar energy project; the only immediate controversy in city's action concerned past acts or duties under contracts that consultant previously terminated, and consultant merely sought a declaration that it was innocent of the alleged fraud.

EMINENT DOMAIN - FLORIDA

Jamieson v. Town of Fort Myers Beach, Florida

District Court of Appeal of Florida, Second District - December 29, 2022 - So.3d - 2022 WL 17982952

Landowner brought action against town alleging inverse condemnation, partial inverse condemnation, and violation of the Bert J. Harris, Jr., Private Property Rights Protection Act.

The Circuit Court granted the town's motion for summary judgment. Landowner appealed. The District Court of Appeal reversed and remanded. On remand, the Circuit Court granted town summary judgment. Landowner appealed.

The District Court of Appeal held that:

- Landowner's claim for inverse condemnation against town was ripe for review, and
- Remand was required to allow the trial court to address town's claim that landowner's Bert Harris Act claim was time-barred.

Landowner's claim for inverse condemnation against town was ripe for review; landowner argued that the town's categorization of his property as wetlands precluded him from using his property in any economic manner, and thus he was entitled to compensation for the loss, landowner had previously challenged the wetlands designation, sought a comprehensive plan amendment, and sought a variance, and letter from town attorney offered to settle landowner's Bert Harris Private Property Rights Protection Act claims, by removing the wetlands designation to three lots, if landowner gave up his development rights to the remaining 37 lots.

Remand was required to allow the trial court to address town's claim that landowner's Bert Harris Act claim was time-barred, in action for inverse condemnation and a violation of the Bert Harris Private Property Rights Protection Act, where town raised the issue in its motion for summary judgment, and the trial court failed to address the issue in its order granting the town's motion.

EMINENT DOMAIN - LOUISIANA

Southland Engine Company, Inc. v. State through Department of Transportation and Development

Court of Appeal of Louisiana, Third Circuit - December 21, 2022 - So.3d - 2022 WL 17825562 - 2022-205 (La.App. 3 Cir. 12/21/22)

Property owners and business operating on property brought action against Department of Transportation and Development (DOTD), asserting claims of negligence and inverse condemnation arising from decrease in business allegedly caused by construction project.

The District Court granted summary judgment in favor of DOTD. Landowners and business appealed.

The Court of Appeal held that:

- Any damage suffered by property owners and business was not peculiar to them and thus could not support inverse condemnation claim, but
- Genuine issues of material fact as to whether design-build contractor hired by DOTD to deliver project design and construction for highway reconfiguration acted negligently in staging project and caused unreasonable delay in construction process, as well as whether DOTD was liable for any such negligent delay, precluded summary judgment on general negligence claim.

Any damage suffered by property owner and by power-equipment business operating on property was not peculiar to them, and thus such damage could not support inverse condemnation claim arising out of construction project which resulted in altered access to property from adjacent highway, allegedly causing difficulty and confusion for customers of business attempting to access property, even though owner and business alleged that their customers in particular had difficulty accessing premises because they were frequently driving large trucks or pulling trailers; same complaints regarding access difficulty were made by principals of the four other businesses affected by project, and one of those businesses also alleged damage based on customers driving large trucks or pulling trailers.

Genuine issues of material fact as to whether design-build contractor hired by Department of Transportation and Development (DOTD) to deliver project design and construction for highway reconfiguration acted negligently in staging project and caused unreasonable delay in construction process, as well as whether DOTD was liable for any such negligent delay, precluded summary judgment on adjacent property owner and business's general negligence action against DOTD.

ZONING & PLANNING - NEW HAMPSHIRE

Appeal of Town of Amherst

Supreme Court of New Hampshire - January 18, 2023 - A.3d - 2023 WL 224671

Town appealed from orders of the housing appeals board (HAB) vacating the denial by town's planning board of applicants' subdivision and site plan approval plan for condominium project containing both age-restricted and unrestricted units.

The Supreme Court held that:

- HAB reasonably determined that town planning board's articulated ground of "age" as basis for denial of subdivision/site plan application was itself unreasonable, and
- HAB reasonably determined that board's articulated ground of "rural aesthetic" as basis for denial of subdivision/site plan application was itself unreasonable.

Housing appeals board (HAB) reasonably determined that town planning board's articulated ground of "age" as basis for denial of subdivision/site plan application for condominium project containing both age-restricted and unrestricted units was itself unreasonable; applicants had previously been granted conditional use permit (CUP) for project that included "elderly" component, compliance with applicable federal and state statutes could be addressed by condominium documents, town counsel's review and approval of proposed condominium documents was customary practice and ordinarily condition of site/subdivision approval, and board's failure to follow this customary practice and, instead, to deny application based on its own concerns about legal compliance was unreasonable.

Housing appeals board (HAB) reasonably determined that town planning board's articulated ground of "rural aesthetic" as basis for denial of subdivision/site plan application for condominium project containing both age-restricted and unrestricted units was itself unreasonable; applicants had previously been granted conditional use permit (CUP) for project, and it was unreasonable to deny project based on non-compliance with "rural aesthetic" because the applicable factors related to rural character or aesthetic were already considered in granting the CUP, and in denying the application, board did not focus on the elements of rural character, but, rather, focused on density.

BOND VALIDATION - OKLAHOMA

Oklahoma Turnpike Authority v. Olsen

Supreme Court of Oklahoma - December 6, 2022 - 521 P.3d 806 (Mem) - 2022 OK 98

The Supreme Court of Oklahoma authorized the Oklahoma Turnpike Authority (OTA) to issue bonds for turnpike repair and expansion.

Real Parties in Interest filed an action in the Cleveland County District Court claiming that the OTA violated the Oklahoma Open Meeting Act in seeking approval of the bonds.

OTA's Application to Assume Original Jurisdiction for Writ of Prohibition was denied as moot by the Supreme Court.

Two Justices dissented, arguing that the legal issue brought in this original proceeding was whether the Cleveland County District Court had the authority to determine the Real Parties in Interest's claims or whether the claims were within the exclusive jurisdiction of the Oklahoma Supreme Court.

> "For over 70 years, this Court construed the Legislature's grant of jurisdiction as giving the Court ***sole*** authority to determine ***all*** questions of sufficiency of the law to authorize bonds and construct turnpikes. The Court must consider the validity of the bonds, the

constitutionality of the bonds, and the OTA's authority to construct and operate turnpikes. The Real Parties in Interest's claims directly impact these determinations that are within the exclusive jurisdiction of this Court as the relief sought in the district court is to prevent the OTA from using the bonds to construct the turnpike extensions."

"The OTA invoked the Court's exclusive jurisdiction under § 1718 when it filed its application with this Court to validate the bonds for the turnpike expansion. And that exclusive jurisdiction makes any determination by this Court binding upon the lower court. To hold otherwise might present a conflict of jurisdictions, where this Court approves the bonds and the OTA's ability to proceed with its proposed turnpikes and the judgment by the district court bars the OTA from exercising the authority this Court authorized. Even a potential conflict of jurisdiction between the two courts should be avoided. This Court should have assumed original jurisdiction to prevent such a conflict."

"This Court gained exclusive jurisdiction to consider the questions raised by the Real Parties in Interest in the Cleveland County District Court when the OTA filed its application to validate the proposed bonds. The Real Parties in Interest's claims concern the sufficiency of the law to authorize the OTA to construct the turnpike expansion even though the claim arises under the Open Meetings Act. I would have therefore granted the writ of prohibition and ordered the Cleveland County District Court to transfer the Real Parties in Interest's petition to this Court to be treated as a protest in the pending bond validation case."

SERVICE DISTRICTS - TEXAS

Walker County ESD No. 3 v. City of Huntsville

Court of Appeals of Texas, Waco - December 7, 2022 - S.W.3d - 2022 WL 17488327

City brought action against county emergency services district (ESD), along with its officers and commissioners, for committing ultra vires acts, alleging that new territory approved to be annexed by ESD included territory within the City's extraterritorial jurisdiction (ETJ), however, city never consented to its ETJ being annexed.

The District Court denied ESD's plea to the jurisdiction. ESD filed interlocutory appeal.

The Court of Appeals held that:

- City's claim was not an election contest;
- Statute stating that an ESD may sue and be sued was not waiver of governmental immunity;
- Differing procedures under statute governing expansion of ESD territory and statute governing the creation of an ESD would not lead to absurd result; and
- City did not allege ultra vires actions.

City's claim seeking a declaration that election in which voter's approved annexation of new territory by county emergency services district (ESD) was void because ESD did not have the authority to order the election without obtaining the city's consent was not an "election contest," in city's action against ESD, along with its officers and commissioners, for committing alleged ultra vires acts, where city's claim was premised on allegation that the election was void on the ground

that the city did not consent to the annexation of municipal territory.

Statute stating that an emergency services district (ESD) may sue and be sued was unclear and ambiguous, and thus did not amount to waiver of governmental immunity as to county ESD, in city's action against ESD, along with its officers and commissioners, for committing alleged ultra vires acts, alleging that new territory approved to be annexed by ESD included territory within the City's extraterritorial jurisdiction (ETJ), but district was required to obtain the city's consent before territory in the city's ETJ could be annexed, which it did not.

Statute governing expansion of emergency service district's (ESD) territory does not require an ESD to make a request to, or to obtain consent from, a municipality before annexing territory in a municipality's limits or extraterritorial jurisdiction (ETJ)

Statute governing the creation of an emergency services district (ESD) is the only provision that requires an ESD to make a request to a municipality and consent by a municipality but not the only provision that gives an ESD the authority to include within its territory a municipality's limits or extraterritorial jurisdiction (ETJ).

Differing procedures under statute governing expansion of emergency service district's (ESD) territory, which did not require municipal consent to annex territory in a municipality's limits or extraterritorial jurisdiction (ETJ), and statute governing the creation of an emergency services district (ESD), which did require municipal consent to annex territory in a municipality's limits or ETJ, would not lead to absurd result; it was presumed that municipal consent requirement was excluded for a reason, regardless of if that made the most policy sense.

City's allegations that individuals behind creation of county emergency services district (ESD) always intended to include within ESD's boundaries territory in city's extraterritorial jurisdiction (ETJ), but sought to evade statutory requirement of obtaining city's consent by waiting until ESD was created to annex territory, did not allege ultra vires actions, in action against ESD and its officers and commissioners; action could be nothing other than an expansion of ESD's territory, which did not require city's consent, there were no facts alleging that a specific officer or commissioner drafted language in petition for expansion, and it was not a violation of chapter of Health and Safety Code governing ESDs for officer or commissioner to participate in drafting or preparing a petition.

EMINENT DOMAIN - UTAH

R.O.A. General Inc. v. Salt Lake City Corporation

Court of Appeals of Utah - December 15, 2022 - P.3d - 2022 WL 17684993 - 2022 UT App 141

Following denial of relocation request for demolished billboard billboard owner brought action for inverse condemnation, arguing that denial of relocation request required just compensation.

The Third District Court denied city's motion for summary judgment, and, following stipulation to value of billboard, entered judgment for billboard owner as to compensation. City appealed.

The Court of Appeals held that:

- Doctrine of issue preclusion did not apply;
- Doctrine of stare decisis did not apply;
- Billboard owner did not establish equitable estoppel as a matter of law; and
- Billboard owner did not establish judicial estoppel as a matter of law.

Prior litigation regarding city's denial of billboard owner's relocation request did not resolve whether that denial required compensation, and thus doctrine of issue preclusion did not apply in billboard owner's subsequent inverse condemnation action against city; while court stated in prior litigation that statute "expressly permits the City to deny such requests, so long as it pays just compensation," the court did not address whether the billboard at issue in fact qualified for compensation under the statute nor did it address factual scenarios at issue in the inverse condemnation action, including whether a denied relocation request required compensation where two applicants sought to locate billboards in essentially the same location or where the billboard owner destroyed its billboard before filing its permit request.

Prior litigation regarding city's denial of billboard owner's relocation request did not, under doctrine of stare decisis, resolve issue in subsequent inverse condemnation proceeding of whether that denial required compensation; court in prior litigation did not decide whether a relocation applicant is entitled to compensation where two applicants sought to place billboards in essentially the same location, or is entitled to compensation where the billboard owner destroyed its billboard before filing its permit request.

Billboard owner failed to establish as a matter of law that city was equitably estopped from arguing new reasons that demolished billboard did not qualify for statutory compensation absent showing by billboard owner that it took reasonable action or inaction based on city's prior assertion that demolished billboard qualified for compensation under statute; billboard owner claimed it would have taken the opportunity to bank its billboard credits or would have changed litigation strategies, but did not provide record citations to affidavits or other evidence that might establish those claims.

Billboard owner failed to establish as a matter of law that it relied to its detriment on any assertion city took in prior action that demolished billboard qualified for statutory compensation, and thus city was not judicially estopped from arguing new reasons in billboard owner's inverse condemnation action as to why demolished billboard did not qualify for compensation.

Court of Appeals would decline to affirm trial court's conclusion on summary judgment, that city was estopped from relying on new reasons to reject billboard owner's relocation application in an effort to avoid paying just compensation. on alternative ground of claim preclusion, where billboard owner did not cite or engage with the transactional test applied by Utah courts to the question of claim preclusion, nor did billboard owner support its assertion that city should have raised defenses to a claim for compensation where billboard did not seek compensation in previous tribunals.

Court of Appeals would decline to reach the merits of city's arguments that billboard owner was not entitled to statutory compensation for demolished billboard because two companies requested relocation permits for the same location and owner did not have an existing billboard to relocate when it submitted its relocation request, but rather, following reversal of summary judgment for billboard owner, would remand for district court to consider the merits of the arguments.

EMINENT DOMAIN - VERMONT

Nesti v. Vermont Agency of Transportation

Supreme Court of Vermont - January 6, 2023 - A.3d - 2023 WL 125249 - 2023 VT 1

Landowner brought action against Vermont Agency of Transportation, seeking damages and injunctive relief and alleging claims for takings, trespass, private nuisance, ejectment, and removal of lateral support arising out of reconstruction of road which allegedly caused stormwater runoff to form a ravine on landowner's property.

The Superior Court dismissed ejectment and lateral support claims for failure to state a claim, and the Court granted summary judgment for Agency. Landowner appealed.

The Supreme Court held that:

- Takings claim was subject to six-year statute of limitations for civil actions;
- Six-year statute of limitations for civil actions applied to landowner's trespass claim;
- Six-year statute of limitations for civil actions applied to landowner's private nuisance claim; and
- Even assuming continuing tort doctrine applied to trespass and nuisance claims, Agency did not commit any tort within six-year limitations period after reconstruction of road.

Six-year statute of limitations for civil actions, rather than 15-year statute of limitations for bringing actions to recover lands, applied to landowner's trespass claim against Vermont Agency of Transportation arising out of road reconstruction which allegedly caused stormwater runoff to form a ravine on landowner's property.

Six-year statute of limitations for civil actions, rather than 15-year statute of limitations for bringing actions to recover lands, applied to landowner's private nuisance claim against Vermont Agency of Transportation arising out of road reconstruction which allegedly caused stormwater runoff to form a ravine on landowner's property.

Vermont Agency of Transportation did not commit any tort within six-year limitations period after reconstruction of road, and thus, even assuming continuing tort doctrine, it would not apply to save landowner's trespass and nuisance claims against Agency arising out of road reconstruction which allegedly caused stormwater runoff to form a ravine on landowner's property.

LIABILITY - WASHINGTON

Norg v. City of Seattle

Supreme Court of Washington, En Banc - January 12, 2023 - P.3d - 2023 WL 164077

Caller who had placed 911 call seeking emergency medical assistance for her husband, as well as husband, brought action against city, alleging that delayed response by city's fire department aggravated caller and husband's injuries.

The Superior Court granted partial summary judgment in favor of caller and husband and struck city's affirmative defense of public duty doctrine. On interlocutory review, the Court of Appeals affirmed. Review was granted.

The Supreme Court held that caller and husband's action was one based on alleged breach of city's common law duty to use reasonable care, rather than on breach of a statute or ordinance, and thus the public duty doctrine did not preclude imposition of liability on city.

Action against city by caller who placed 911 call and by caller's husband, for whom caller had sought medical assistance, was one based on alleged breach of city's common law duty to use reasonable care, rather than on breach of a statute or ordinance, and thus the public duty doctrine did not preclude imposition of liability on city, even though there was statutory basis for city to provide 911 services, where caller and husband did not claim that city failed to operate a 911 service or violated any implicit promise under 911 statute to promptly dispatch medical aid but rather that city undertook to render emergency assistance but then did so negligently by going to the wrong address even though caller had provided correct address.

PUBLIC UTILITIES - CALIFORNIA

Southern California Gas Company v. Public Utilities Commission

Court of Appeal, Second District, Division 1, California - January 6, 2023 - Cal.Rptr.3d - 2023 WL 118496

Investor-owned natural gas utility petitioned for writ of mandate to directing Public Utilities Commission (PUC) to rescind its data requests, initiated by its Public Advocate's Office (PAO) division, seeking to discover whether utility's political activities were funded by utility's shareholders or ratepayers, on the ground that the requests infringed on utility's First Amendment associational rights.

The Court of Appeal held that:

- Utility was afforded procedural due process, but
- Data requests violated utility's First Amendment associational rights.

Investor-owned natural gas utility was afforded procedural due process with respect to data requests initiated by Public Advocate's Office (PAO), as a division of Public Utilities Commission (PUC), seeking to discover whether utility's political activities were funded by utility's shareholders or ratepayers, even though the dispute did not involve a formal proceeding in which PUC rules of practice and procedure and filing requirements would apply, where, at each step of process in utility's case, the PAO defended discrete discovery requests focused on the information needed to perform its statutory duties, and utility had an opportunity to challenge the PAO's motions, submit motions itself, and move for the full PUC to act on the requests.

Public Utilities Commission's (PUC) data requests, initiated by its Public Advocate's Office (PAO) division, seeking to discover whether political activities of investor-owned natural gas utility were funded by utility's shareholders or ratepayers were not narrowly tailored to serve a compelling governmental interest, and therefore the requests violated utility's First Amendment associational rights, where the requests, which were about all sources of funding for utility's lobbying activities, went beyond ratepayer expenditures, and insofar as the requests sought information about shareholder expenditures, they exceeded the PAO's mandate to obtain the lowest possible costs for ratepayers and its authority to compel disclosure of information necessary for that task.

ANTI-SLAPP STATUTE - CALIFORNIA

City of Rocklin v. Legacy Family Adventures-Rocklin, LLC

Court of Appeal, Third District, California - December 21, 2022 - Cal.Rptr.3d - 2022 WL 17827565 - 2022 Daily Journal D.A.R. 12,782

City brought action against theme park operator and its chief executive officer (CEO) for claims arising from joint undertaking to construct and operate theme park, including claims for fraud, negligent misrepresentation, and violation of Unfair Competition Law (UCL).

Defendants filed special motion to strike fraud, negligent misrepresentation, and UCL claims under anti-SLAPP (strategic lawsuit against public participation) statute. The Superior Court, sitting by assignment, denied anti-SLAPP motion and found motion was frivolous. Subsequently, the Superior Court, sitting by assignment, granted city's motion for statutory attorney fees and costs. Defendants appealed.

The Court of Appeal held that:

- Trial court was not bound to accept expert's legal conclusion that theme parks could constitute "artistic works" under anti-SLAPP statute;
- Portions of expert's report describing theme park contained case-specific hearsay;
- Operator and CEO failed to timely present evidence that reasonable attorneys could disagree on whether theme parks could constitute "artistic works";
- As a matter of apparent first impression, theme park was not "artistic work";
- Argument that theme park was "artistic work" was frivolous;
- Absence of published decision conclusively establishing frivolity of such argument did not preclude award of attorney fees as a matter of due process; and
- Adjudication of matter by three trial judges did not violate due process.

On theme park operator's anti-SLAPP motion to strike claims that city asserted against it, including for fraud, arising from construction and operation of theme park, trial court, in determining whether challenged claims arose from activity protected by anti-SLAPP statute, was not bound to accept opinion of operator's expert that theme parks could qualify as "artistic works" for purposes of artistic work exception to commercial speech exemption from protection of anti-SLAPP statute; expert's opinion amounted to pure conclusion of law as to interpretation of anti-SLAPP statute, which was matter for judge, not expert, to decide.

Portions of design expert's opinion describing theme park, which theme park operator submitted in support of its anti-SLAPP motion to strike claims that city asserted arising out of joint undertaking to construct and operate theme park, relayed case-specific hearsay, and thus trial court was not required to consider such portions in determining whether artistic work exception to commercial speech exemption from protections of anti-SLAPP statute applied to claims; portions of opinion described case-specific characteristics of park as envisioned by operator's principal and related to expert via renderings.

General rule of non-consideration of evidence newly submitted with reply papers did not preclude theme park operator from submitting new evidence, namely that reasonable attorneys could disagree on whether theme parks could be deemed artistic works, in reply to city's response to operator's anti-SLAPP motion, in which city requested sanctions for frivolous motion practice, and thus trial court was not required to admit new evidence when operator filed it in opposition to city's subsequent noticed motion for attorney fees; city raised issue of frivolity of artistic-work argument under anti-SLAPP statute for first time in its response to anti-SLAPP motion, and trial court was to determine frivolity issue upon submission of operator's reply, tentative ruling, and oral argument.

Theme park was not "artistic work" within meaning of artistic work exception to commercial speech exemption in anti-SLAPP statute; theme park was not involved in activities similar to news or information gathering or dissemination and did not involve constitutionally protected artistic works, such that theme park was not like examples of "artistic works" provided by statute and did not fall

within scope of activities discussed in statute's legislative history, and defining "artistic work" to include anything with artistic qualities would make artistic work exception so broad as to encompass almost all commercial speech.

Any reasonable attorney would agree that theme park was not "artistic work" within meaning of artistic work exception to commercial speech exemption in anti-SLAPP statute, and thus theme park operator's assertion of exception as basis for anti-SLAPP motion to strike city's fraud claims was frivolous, warranting award of statutory attorney fees to city, even though term "artistic work" was ambiguous; reasonable attorney, finding ambiguity, would have consulted legislative history and case law to find, consistent with statute's non-exhaustive list of excepted activities, that exception applied to conduct similar to news or information gathering or dissemination or conduct involving constitutionally protected artistic works, and theme park was not similar to such conduct.

Theme park operator forfeited its argument, on appeal from trial court's order awarding attorney fees to city as sanction for operator's frivolous anti-SLAPP motion to strike fraud claims, that trial court failed to follow procedural requirements of statute generally governing sanctions for frivolous litigation conduct and that strict compliance with such procedures was required, where operator failed to raise argument before trial court.

Issue of whether strict compliance with procedures set forth in statute governing sanctions for frivolous litigation conduct was necessary before trial court could award attorney fees to city as sanction for theme park operator's frivolous anti-SLAPP motion did not present matter of vital public policy, and, thus, Court of Appeal would not exercise its discretion to review argument after operator forfeited it by failing to present it to trial court.

Absence of published decision indicating, without a doubt, that theme park operator's argument that theme park qualified for artistic work exception to commercial speech exemption in anti-SLAPP statute was frivolous did not preclude trial court, under Due Process Clause, from awarding attorney fees to city as sanction for frivolous anti-SLAPP motion; published authority confirming that argument was devoid of merit was not necessary to support determination that argument was frivolous.

Issuance of tentative ruling on theme park operator's anti-SLAPP motion to strike city's fraud claims by first judge, followed by second judge's signing of order denying anti-SLAPP motion and finding it frivolous, and then by third judge's order granting city's motion for attorney fees based on frivolous anti-SLAPP motion, did not violate theme park operator's due process right to be heard; operator did not file motion to reconsider second judge's order finding frivolity, but, rather, sought to re-litigate issue of frivolity in opposing city's motion for specific fees, possibility that second judge might have reconsidered frivolity finding on his own motion did not deprive operator of due process, and involvement of multiple judges did not make third judge less capable of evaluating fees.

City was entitled to award of attorney fees incurred on theme park operator's appeal from trial court's order, which had awarded attorney fees to city based on operator's frivolous anti-SLAPP motion to strike city's fraud claims, where Court of Appeal affirmed trial court's finding that anti-SLAPP motion was frivolous, and provision of anti-SLAPP statute authorizing attorney fees as sanction for frivolous anti-SLAPP motions did not explicitly preclude recovery of appellate attorney fees.

EMINENT DOMAIN - GEORGIA

Schroeder Holdings, LLC v. Gwinnett County

Court of Appeals of Georgia - January 5, 2023 - S.E.2d - 2023 WL 109401

Landowner and others filed complaint and petition for writ of certiorari against county to recover damages and equitable relief after county denied rezoning application resulting in inverse condemnation and violation of substantive due process.

The Superior Court granted county's motion for summary judgment. Plaintiffs appealed.

The Court of Appeals held that:

- Denial of rezoning application was not quasi-judicial decision that could only be challenged by writ of certiorari;
- Just Compensation Provision of state constitution was waiver of sovereign immunity with respect to inverse condemnation claim; and
- Landowner failed to establish that county waived sovereign immunity barring substantive due process claim.

Just Compensation Provision of state constitution was waiver of sovereign immunity with respect to landowner's inverse condemnation claim seeking damages and equitable relief after county denied rezoning application; nothing indicated that county had invoked the power of eminent domain.

Landowner failed to establish that county waived sovereign immunity barring substantive due process claim arising out of denial of rezoning application, where landowner did not cite any constitutional or statutory authority that expressly or impliedly waived sovereign immunity for all zoning cases.

MUNICIPAL ORDINANCE - KANSAS

City of Wichita v. Peterjohn

Court of Appeals of Kansas - December 30, 2022 - P.3d - 2022 WL 18034659

Ordinance was proposed by a group of Wichita residents through the initiative process to prevent the sale, demolition, or redevelopment of performing arts center and former Wichita public library.

The proposed ordinance would require the City of Wichita to hold an election whenever it sought to destroy, replace, or adversely affect prominent buildings owned by the City that are historically important or architecturally significant.

After the residents filed their petition and proposed ordinance, the City sued, seeking a declaration that the ordinance concerned administrative matters that could not be raised via the initiative process.

The district court agreed and entered judgment in the City's favor. Residents appealed.

The Court of Appeals affirmed, holding that Kansas law had long recognized that residents may not use the initiative process to advance ordinances that are predominantly administrative in nature, and the ordinance proposed here fell into this category.

BONDS - LOUISIANA

U. S. Securities & Exchange Commission v. Breland

United States District Court, W.D. Louisiana, Monroe Division.December 6, 2022Slip Copy2022 WL 17840413

SEC brought an action against former city mayor alleging that he had submitted false projections to the Louisiana State Bond Commission which resulted in the approval of a series of revenue bonds.

Defendant asserted a series of affirmative defenses.

The District Court held that:

- Defendant's affirmative defense that the SEC had failed to state a claim or cause of action because the Louisiana State Bond Commissioner was neither a purchaser or seller of a security as required under the federal securities law was immaterial because the SEC alleged that the investors who purchased the bonds were advised that the Bond Commission had approved the bonds – approval that was obtained via alleged fraudulent misrepresentations.
- Defendant's affirmative defense that the SEC had failed to state a claim or cause of action because to the extent that any alleged misrepresentation or omission in fact exists, the holder of the security has not suffered any damages was inapplicable because damages are not an element of an SEC. claim.
- Defendant's affirmative defense that he "is a person with no experience or expertise in bond issuances or securities law. Plaintiff relied solely upon the advice and expertise of legal counsel and the advisor retained by the City of Sterlington in preparing the projections, offering the bonds, and the legality of using the bond proceeds for the purposes the proceeds were used for. This Offering was a private placement. There is no[ ] requirement that an offering memorandum be prepared or that the information which is the subject of the claim of Plaintiff be included in an offering Memorandum. The purchasers of the securities were sophisticated parties and accredited investors." would not be struck, as the SEC had not established that the defense was insufficient as a matter of law.
- Defendant's affirmative defense that, "Plaintiff has failed to state a claim or cause of action because the disclosure of the actual expenditure of funds from the prior bond offerings by the City of Sterlington was not a material fact that would have in any way impacted purchasers' decision to purchase the bonds. Purchaser was given the audits of each of these years disclosing these issues prior to the time the bonds were purchased by the Purchaser" would be struck as redundant.
- Defendant's affirmative defense that "Plaintiff has failed to state a claim or cause of action because to the extent any misrepresentation exists as to the use of the funds, the proceeds from the bond issuance were always used for a[n] expenditure to operate the City of Sterlington, and no proceeds were misappropriated for any personal use by the Defendant" would not be struck, as neither side submitted case law to show whether the fact that Breland failed to misappropriate proceeds for personal use constitutes an affirmative defense.
- Defendant's assertion that his criminal indictment in this matter merits a stay would be struck, as a request to stay or dismiss a matter is not an affirmative defense. Defendant could bring a separate motion for a stay.

BONDS - NORTH DAKOTA

UMB Bank, N.A. v. Eagle Crest Apartments, LLC

Supreme Court of North Dakota - January 5, 2023 - N.W.2d - 2023 WL 105209 - 2023 ND 4

Successor trustee for owners of bonds issued by city to finance construction of apartment complex brought action against construction limited liability company (LLC) and member for breach of contract and foreclosure, and, after apartment complex was sold at a sheriff's sale, successor trustee amended its complaint multiple times to add claims for fraudulent transfers, deceit, and exemplary damages against individual with ownership interest in company which was the LLC's sole member, and numerous entities associated with him.

Following a jury trial, the District Court entered judgment on jury verdict against defendants, jointly and severally, piercing the corporate veil. Defendants appealed.

The Supreme Court held that trial court appropriately pierced the corporate veil.

Trial court appropriately pierced the corporate veil to find individual's numerous separate entities liable for deficiency judgment against construction limited liability company (LLC) following foreclosure on apartment complex financed by municipal bonds; testimony and evidence indicated that individual disregarded the entities' corporate form and used them for personal purposes, jury found each defendant was the alter ego of both individual and the other defendants, and also found they fraudulently transferred roughly $2.9 million to the detriment of investors and engaged in a conspiracy to commit deceit.

Defendants, including individual and his various companies, were on notice of successor trustee's claim for a deficiency judgment following foreclosure on apartment complex built by construction limited liability company (LLC) with ties to individual and companies and were able to fully defend themselves, and thus were not unfairly surprised by deficiency judgment finding them jointly and severally liable as alter egos of the LLC, where complaint plainly stated it "seeks the entire amount of the deficiency judgment from all Defendants" under its alter ego veil piercing counts, and the issues concerning veil piercing were fully litigated at trial.

IMMUNITY - VERMONT

Civetti v. Turner

Supreme Court of Vermont - December 30, 2022 - A.3d - 2022 WL 17998536 - 2022 VT 64

Propane truck driver brought action against town and town road commissioner, seeking to recover damages for injuries allegedly sustained in rollover accident allegedly caused by noncompliant town street.

The Superior Court granted motion to dismiss for failure to state cause of action, and driver appealed. The Supreme Court reversed and remanded. On remand, the Superior Court entered summary judgment for town and commissioner on basis of qualified immunity. Driver appealed.

The Supreme Court held that:

- Commissioner's decision whether to widen the road surface of the street was discretionary, and
- Commissioner's decision was kind of town planning decision contemplated by discretionary-function exception to waiver of sovereign immunity under the Vermont Tort Claims Act (VTCA).

Town road commissioner's decision whether to widen road surface for street on which propane truck driver got into an accident after he lost control of his vehicle, causing it to roll over and come to rest on its roof, was discretionary, rather than type of ministerial act commanded by town's road and bridge standards, as required for town and commissioner to have qualified immunity from driver's

negligence claims under discretionary-function exception to waiver of sovereign immunity in the Vermont Tort Claims Act (VTCA); widening roadways was an exercise of alteration and reconstruction of preexisting infrastructure, involving weighing of considerations such as cost, safety, environmental, and aesthetic factors.

Town commissioner's decision whether to alter street to increase its width was kind of town planning decision contemplated by discretionary-function exception to waiver of sovereign immunity under the Vermont Tort Claims Act (VTCA), as required for town and commissioner to have qualified immunity from driver's negligence claims, because decision necessarily implicated considerations steeped in public policy, such as safety, cost, necessity, traffic conditions, aesthetics, and environmental impact.

WATER DISTRICTS - CALIFORNIA

California-American Water Company v. Marina Coast Water District

Court of Appeal, First District, Division 2, California - December 28, 2022 - Cal.Rptr.3d - 2022 WL 17973690

County water resources agency and investor-owned water utility brought action against public water district alleging that parties' regional desalination project failed as result of negligence of water district's employees and independent contractors in retaining and supervising member of county water resources agency's board, despite his illegal conflict of interest.

The Superior Court granted water district's motion for summary adjudication, and plaintiffs appealed.

The Court of Appeal held that:

- Fact issues remained as to whether water district waived utility's compliance with Government Claims Act's claims presentation requirement;
- Fact issues remained as to whether water district's attorney had apparent authority to waive its right to statutory notice of claim;
- Trial court's grant of water district's motion for summary adjudication did not comply with its obligation to state its reasons for any determination made in summary judgment order; and
- Summary judgment on limitations grounds was not warranted on county agency's negligence claim against water district.

Genuine issue of material fact as to whether public water district waived investor-owned water utility's compliance with Government Claims Act's claims presentation requirement precluded summary judgment on that basis in utility's negligence action against water district.

Genuine issue of material fact as to whether public water district's attorney had apparent authority to waive district's right to statutory notice of claim precluded summary judgment in investor-owned water utility's negligence action against water district on ground that utility for failure to comply with Government Claims Act's claims presentation requirement.

Trial court's grant of public water district's motion for summary adjudication in investor-owned water utility's negligence action on ground that dispute resolution provision in parties' water purchase agreement did not relieve utility of its obligation to comply with Government Claims Act's claims presentation requirement on ground that agreement "was declared void" in prior action failed to comply with trial court's obligation to state its reasons for any determination made in summary

judgment order; trial court had recognized in subsequent ruling that its earlier decision was wrong, and failed to address utility's argument that agreement's ab initio status did not retroactively render dispute resolution procedure in that agreement inapplicable.

Genuine issue of material fact as to when public water district became aware that its general manager's negligent supervision of county water resources agency's board member that district had hired to facilitate approval of regional desalinization project caused agency harm precluded summary judgment on limitations grounds in agency's negligence action against district predicated on subsequent voiding of parties' water purchase agreement as result of board member's illegal conflict of interest.

TERM LIMITS - COLORADO

Kulmann v. Salazar

Supreme Court of Colorado - December 19, 2022 - P.3d - 2022 WL 17748017 - 2022 CO 58

City resident brought action against city and mayor seeking a declaration as to whether the offices of mayor and of ward councilmember were separate and distinct offices for purposes of constitutional term limits for elected government officials.

The District Court granted summary judgment for resident in part. Resident, city, and mayor appealed, and appeals were consolidated. Thereafter, city and mayor petitioned for writ of certiorari, which was granted.

The Supreme Court held that:

- Phrase "in office" in constitutional term limit provision referred to a specific office and not to an institution or governing body, and
- Offices of mayor and of ward councilmember were separate and distinct offices for purposes of constitutional term limits.

Phrase "in office," in state constitutional provision stating that no nonjudicial elected official of any city shall serve more than two consecutive terms in office, referred to a specific office held by a nonjudicial elected official, and not to an institution or governing body.

Under plain and unambiguous terms of city charter and code, the offices of mayor and of ward councilmember were separate and distinct offices for purposes of term limitations under state constitutional provision stating that no nonjudicial elected official of any city shall serve more than two consecutive terms in office; charter and code made clear that the mayor could exercise various powers unilaterally without involvement or consent of ward councilmembers, no such powers or responsibilities were delegated to any individual councilmember, and charter and code provisions addressed mayor and councilmembers separately with the disjunctive "or" in provisions outlining limits and requirements that applied to both offices.

BANKRUPTCY - FLORIDA

In re BVM The Bridges LLC

United States Bankruptcy Court, M.D. Florida - December 16, 2022 - Slip Copy - 2022 WL 17730743

Plaintiff, Pallardy LLC ("Pallardy"), was the successful bidder at a prepetition tax deed sale of a parcel of property located in Hillsborough County, Florida ("Parcel 10"). BVM The Bridges LLC ("Debtor") is the former owner of Parcel 10; the Debtor operates an assisted living facility constructed on Parcel 10 and two adjacent parcels of property. CPIF Lending LLC ("CPIF") holds a mortgage on Parcel 10 and the two adjacent parcels.

The Debtor's acquisition of Parcels 10, 30, and 70 was funded through industrial revenue bonds. CPIF holds 100% of the bonds, and U.S. Bank is the bond trustee. As bond trustee, U.S. Bank is the named mortgagee on the mortgage encumbering Parcels 10, 30, and 70 (the "Mortgage").

U.S. Bank escrowed money to pay the insurance and property taxes for Parcels 10, 30, and 70. In 2017, the Debtor paid the property taxes with funds that were held in escrow by U.S. Bank. But, for reasons that are unclear, neither the Debtor nor U.S. Bank paid the 2018 real estate taxes for Parcels 10, 30, and 70 before they became delinquent on April 1, 2019.

On September 23, 2021, the Clerk of Court conducted a public tax deed auction. Pallardy was the successful bidder. And on September 24, 2021, the Clerk of Court issued a tax deed to Pallardy (the "Tax Deed").

Pallardy subsequently filed a state court lawsuit against the Debtor and CPIF to quiet title to Parcel 10, and CPIF counterclaimed for a declaration that Pallardy's tax deed was invalid. After the Debtor filed for Chapter 11 bankruptcy, Pallardy removed its quiet title action to the Bankruptcy Court.

In its summary judgment motion, Pallardy asked the Court to confirm the validity of its tax deed and to quiet title to Parcel 10 in Pallardy as a matter of law. CPIF and the Debtor opposed Pallardy's summary judgment motion, and in their own summary judgment motions, asked the Court to invalidate Pallardy's tax deed as a matter of law.

The Bankruptcy Court held that:

- The Tax Collector and Clerk of Court strictly complied with Chapter 197's notice provisions;
- The Clerk of Court properly mailed the Tax Deed Warning Notice to the Debtor;
- The Clerk of Court properly mailed the Tax Deed Warning Notice to U.S. Bank;
- The notice given by the Clerk of Court satisfied constitutional due process requirements;
- The Clerk of Court took additional reasonable steps to ensure notice;
- The Debtor had actual notice of the tax deed sale;
- U.S. Bank had actual notice of the tax deed sale;
- The Bankruptcy Court did not have the equitable power to invalidate the Tax Deed. "In essence, what CPIF asks is for this Court to create a new equitable ground for challenging a tax deed: the usage of Parcel 10 as an assisted living facility. But although the bankruptcy court is a court of equity with broad remedial powers, its powers are not "unlimited." And CPIF has not cited any legal authority for the proposition that a bankruptcy court—or any court for that matter—may use its equitable powers to invalidate a tax deed; and
- Even if the Bankruptcy Court had authority to invalidate the Tax Deed based on the use of Parcel 10, the equities did not warrant invalidating the Tax Deed.

The Court concluded that Pallardy met his burden on summary judgment to show that there was no genuine issue as to any material fact and that it was entitled to judgment as a matter of law, and that the Debtor and CPIF failed to meet their burdens.

EMINENT DOMAIN - KENTUCKY

City of Cold Spring v. Campbell County Board of Education

Court of Appeals of Kentucky - December 16, 2022 - Not Reported in S.W. Rptr. - 2022 WL 17724455

“This case involves the proper exercise of the power of eminent domain. At issue is whether a school board possesses the right to invoke that power in order to acquire real property owned by a city.”

Appellant, the City of Cold Spring (the City), appealed the interlocutory order of the Circuit Court that concluded that the Campbell County Board of Education (the Board of Education or the Board) was entitled to exercise the power of eminent domain to acquire real property.

The Court of Appeals revered, finding no express — or necessarily implied — statutory authority permitting a Board of Education to condemn property owned by the City.

The Court ruled that the right of eminent domain granted to a school board under the relevant state statutes applied only to the acquisition of private property.

PUBLIC RECORDS - NORTH CAROLINA

Matter of Custodial Law Enforcement Recording Sought by City of Greensboro

Supreme Court of North Carolina - December 16, 2022 - 881 S.E.2d 96 - 2022-NCSC-125

City petitioned for release of police body camera videos depicting incident in which police misconduct was alleged.

The Superior Court issued order placing restrictions on city council members’ use and discussion of the videos, and denied city’s subsequent motion to modify the restrictions. City appealed. the Court of Appeals affirmed. City’s petition for discretionary review was accepted.

The Supreme Court held that trial court abused its discretion by denying city’s motion without explanation.

By denying city’s motion to modify restrictions on city council’s use and discussion of police-worn body camera videos of incident involving alleged misconduct by the police without evidence in the record supporting finding restrictions were not a substantial impediment to city council members in discharging their duties, trial court abused its discretion, thus warranting remand for new hearing on the motion; even though nearly every party sought transparency through release of the videos, the trial court denied the city’s motion without providing any analysis, explanation, or conclusions of law.

IMMUNITY - OHIO

Doe v. Greenville City Schools

Supreme Court of Ohio - December 28, 2022 - N.E.3d - 2022 WL 17970377 - 2022-Ohi--4618

High-school students and their parents brought negligence action against school and school officials, alleging that injuries the students sustained when alcohol caught fire in a science classroom were caused by negligent supervision and by the failure to provide a fire extinguisher or other safety equipment in the classroom.

The Court of Common Pleas denied defendants' motion to dismiss based on their alleged immunity under the Political Subdivision Tort Liability Act, and the Second District Court of Appeals, noting a split between appellate districts over application of the statutory exception to immunity for claims based on a "physical defect" in a building. Defendants appealed, and the Supreme Court accepted jurisdiction of the question whether absence of a device or piece of safety equipment that was not a fixture could constitute a "physical defect" supporting an exception to immunity.

The Supreme Court held that absence of a fire extinguisher or other safety equipment in science classroom could be a "physical defect" supporting an exception to statutory immunity under the Political Subdivision Tort Liability Act.

Students' allegations of the absence of a fire extinguisher or other safety equipment in high-school science classroom were sufficient to allege a "physical defect" within or on the grounds of the school building that could support an exception to statutory immunity in students' action against school district and officials alleging that injuries they sustained when alcohol caught fire in a classroom were caused by negligent supervision of the science teacher and the lack of a fire extinguisher or other safety equipment.

The absence of safety equipment within or on the grounds of a building used in the performance of a governmental function can be a "physical defect" such that an exception to immunity could exist under the Political Subdivision Tort Liability Act.

IMMUNITY - TEXAS

Gulf Coast Center v. Curry

Supreme Court of Texas - December 30, 2022 - S.W.3d - 2022 WL 17998210

Pedestrian, who while crossing a street was hit by a bus driven by employee of local government agency that provided public transportation to its facilities, brought action against the agency.

Following jury trial, the District Court entered judgment on jury's finding that agency was negligent and awarded $216,000 in damages. After the denial of its motion to reform the judgment, agency appealed. The Houston Court of Appeals affirmed. Agency petitioned for review

The Supreme Court held that agency was a community center and, therefore, a unit of local government subject to $100,000 cap on damages under the Tort Claims Act.

Agency that provided mental health services was a community center under Health and Safety Code and, therefore, it was a unit of local government subject to $100,000 cap on damages under the Tort Claims Act, for purposes of claim brought against the agency by pedestrian who, while crossing a street, was hit by a bus driven by an agency employee, which was used to provide public transportation to assist agency's patients in getting to its facilities.

MUNICIPAL CORPORATIONS - COLORADO

Brown v. Walker Commercial, Inc.

Supreme Court of Colorado - December 19, 2022 - P.3d - 2022 WL 17748065 - 2022 CO 57

Developer filed complaint for judicial review of final decision of city's water director to levy a storm drain development fee against developer's property.

The District Court dismissed complaint as untimely, and issued orders denying developer's motion for extension of time. Developer appealed. The Court of Appeals reversed and remanded. Director's petition for certiorari review was granted.

The Supreme Court held that:

- As a matter of first impression, 28-day filing deadline for complaints seeking judicial review of final action of a government body or official is a strict jurisdictional limitation on actions, and is not subject to equitable tolling or broader equitable considerations like excusable neglect, and
- Because developer's complaint was untimely filed, developer could not amend its complaint to join additional claims seeking declaratory relief.

Twenty-eight-day filing deadline for complaints seeking judicial review of final action of government body or official is a strict jurisdictional limitation on actions, and so it is not subject to equitable tolling, let alone broader equitable considerations like excusable neglect.

Because developer's claim seeking judicial review of city water director's decision to levy fee against developer's property was untimely filed, in that it was filed 30 days after director's decision, developer could not amend its complaint to join additional claims seeking declaratory relief; rule required that developer file his complaint not later than 28 days after director's final decision.

IMMUNITY - GEORGIA

Johnson v. 3M Company

United States Court of Appeals, Eleventh Circuit - December 21, 2022 - F.4th - 2022 WL 17828942

Water subscriber brought putative class action against operator of municipal wastewater treatment system and other defendants, asserting claims including nuisance abatement arising from operator allegedly allowing city's domestic water supply to be contaminated with dangerously high levels of toxic chemicals used by local carpet manufacturers.

After removal, the United States District Court for the Northern District of Georgia denied operator's motion to dismiss based on municipal immunity. Operator appealed, and subscriber moved to dismiss appeal.

The Court of Appeals held that:

- As a matter of apparent first impression, under Georgia law, municipal immunity is immunity from suit rather than just a defense to liability;
- Issue of operator's asserted Georgia municipal immunity was separate from merits of subscriber's nuisance abatement claim, supporting finding that denial of motion to dismiss was immediately appealable pursuant to collateral-order doctrine; and
- Under Georgia law, scope of municipal liability for nuisance claims includes personal injuries beyond those tied to the plaintiff's property.

Issue of wastewater-treatment system operator's asserted Georgia municipal immunity was separate from merits of local water subscriber's nuisance abatement claim, supporting finding that denial of operator's motion to dismiss based on such immunity was immediately appealable pursuant to collateral-order doctrine, even if court was required to consider subscriber's factual allegations in resolving the immunity issue, in action arising from alleged contamination of city's domestic water supply with dangerously high levels of toxic chemicals by local carpet manufacturers.

Water subscriber's filing of fourth amended complaint did not divest Court of Appeals of jurisdiction over wastewater-treatment system operator's appeal from district court's denial of operator's motion to dismiss third amended complaint on grounds of Georgia municipal immunity, in subscriber's claim for nuisance abatement arising from alleged contamination of city's water supply, where fourth amended complaint did not change the nuisance abatement allegations on which operator's municipal immunity defense was based.

Under Georgia law, voter-approved amendment of state constitution to constitutionalize common-law doctrine of sovereign immunity, which authorized General Assembly to establish a state court of claims with jurisdiction to try and dispose of cases involving claims for injury or damage against state, preserved the scope of sovereign immunity as it existed at common law and rendered it unmodifiable by the courts.

Under Georgia law, the purported "nuisance exception" to sovereign immunity is not an exception at all but instead a doctrine that is used to evaluate whether municipal liability may be imposed in a given case.

EMINENT DOMAIN - LOUISIANA

Saloom v. Department of Transportation and Development

Supreme Court of Louisiana - December 9, 2022 - So.3d - 2022 WL 17546623 - 2022-00596 (La. 12/1/22)

Landowners who inherited property from father brought inverse condemnation action against State pertaining to portion of property that father conveyed to State for highway project at a time when father owned an undivided one-half interest in property and landowners owned other one-half interest via inheritance from mother.

The District Court granted partial summary judgment for landowners. State appealed. The Court of Appeal reversed. Landowners applied for writ of certiorari, which was granted.

The Supreme Court held that doctrine of estoppel by deed did not bar inverse condemnation claims.

Doctrine of estoppel by deed did not apply to bar inverse condemnation claims against State by landowners who inherited an undivided one-half interest in property from their mother before their father, who owned the other one-half interest, conveyed a portion of property to State with "all lawful warranties" for highway project, after which landowners inherited father's one-half interest, where dispute involved central issues of State's obligation to pay just compensation, landowners' right to assert ownership, and available remedies for breach of warranty against eviction, those matters were addressed by State Constitution and numerous statutes, and State was fully aware of landowners' ownership interests for many years and chose not to pursue its legal remedies against its seller.

MONUMENTS - NORTH CAROLINA

United Daughters of the Confederacy v. City of Winston-Salem by and through Joines

Supreme Court of North Carolina - December 16, 2022 - S.E.2d - 2022 WL 17725422 - 2022-NCSC-143

Local chapter of women's heritage association brought declaratory judgment action against city and county to determine rights with respect to Confederate statue that association's predecessor organization had assertedly helped fund a century earlier, which was located on private property which was former site of county courthouse and which city planned to remove.

The Superior Court dismissed for lack of subject matter jurisdiction and failure to state a claim. Local chapter appealed. The Court of Appeals affirmed with one judge dissenting. Local chapter appealed.

The Supreme Court held that:

- Plan to remove and relocate statue was not a legal or factual injury that could support local chapter's standing;
- Local chapter lacked taxpayer standing;
- Even if statute setting out limitations on removal of certain monuments on public property created implied private right of action, local chapter was not within class of plaintiffs who could bring such an action;
- Erection of statue on county courthouse property did not render statue a fixture that would be part of county's real property;
- County's conveyance of courthouse property to third party while reserving easements for purpose of maintaining monuments and plaques on the property did not result in the real property beneath statue being excluded from the conveyance;
- Statue was not unclaimed "property" that could escheat to state; and
- Federal statute precluding destruction of veterans' memorials does not provide a private cause of action for enforcement of statute.

ZONING & PLANNING - MISSOURI

BG Olive & Graeser, LLC v. City of Creve Coeur

Supreme Court of Missouri, en banc - December 20, 2022 - S.W.3d - 2022 WL 17823591

Landowners filed petition for judicial review of city's decision to deny conditional use permit to proposed purchaser for construction of convenience store and service station on subject property.

Following trial, the Circuit Court entered judgment for landowners and issued writ of mandamus requiring city to issue permit. City appealed.

On transfer from the Court of Appeals, the Supreme Court held that circuit court improperly overrode city's discretion.

Circuit court improperly overrode city's discretion when it entered judgment for landowners and issued writ of mandamus requiring city to issue permit, in proceeding on landowners' petition for judicial review of city's decision to deny conditional use permit to proposed purchaser for

construction of convenience store and service station, despite circuit court's finding that there was evidence presented supporting finding that requirements under one subsection of city zoning code governing issuance of such permit had been met; there was no limitation that conditional use permit must issue as matter of law when evidence supported only single subsection of code, and code reserved full authority to city to deny any request for conditional use.

POLITICAL SUBDIVISIONS - MISSOURI

City of Harrisonville v. Board of Trustees of Mo Petroleum Storage Tank Insurance Fund

Supreme Court of Missouri, en banc - December 20, 2022 - S.W.3d - 2022 WL 17823590

City brought action in Circuit Court against petroleum storage tank insurance fund. On remand of appeal of judgment against fund, city substituted fund's board of trustees as defendant and asserted cause of action for fraud arising from fund's failure to reimburse costs of remediation of petroleum leak in a city easement, and thereafter, the case was transferred.

The Circuit Court entered judgment against board and awarded $8 million in punitive damages to city, and denied board's motion to vacate, correct, alter, or amend the judgment. Board and city cross-appealed.

The Supreme Court held that:

- Board was a state agency entitled to sovereign immunity;
- Board did not waive or abandon sovereign immunity by failing to raise it prior to circuit court's entry of final judgment against fund; and
- Law of the case doctrine did not apply to bar board from asserting sovereign immunity.

Board of trustees of petroleum storage tank insurance fund was a state agency entitled to sovereign immunity from city's fraud claim arising from fund's failure to reimburse cost of installing petroleum-resistant pipe and fittings in an easement as remediation for leaking underground storage tanks from adjacent gas station, where board was designated as a "type III agency" by statute, implemented as a constitutional amendment reorganizing executive department of state government, and was vested thereunder with authority to appoint an executive director and other employees as needed, "who shall be state employees," and board participated in state's annual budget process and was given rulemaking authority that was subject to same rulemaking procedures as other state entities.

Substitution of board of trustees of petroleum storage tank insurance fund as defendant, in place of the fund in city's fraud action arising from fund's failure to reimburse costs of installing petroleum-resistant pipe and fittings in an easement as remediation for leaking underground storage tanks from adjacent gas station was not simply a misnomer, and thus, board did not waive or abandon its sovereign immunity by failing to assert it prior to circuit court's entry of final judgment against fund, because it was not clear that board was the correct party before the substitution, given that board and fund were separate and distinct entities, and as such, board was not party to the litigation until it was substituted on remand.

Circuit court's finding on city's motion in limine that petroleum storage tank insurance fund was not an agent of the state, in city's action arising from fund's failure to reimburse costs of remediation of petroleum leaking into city easement, did not decide issue of fund's board of trustees' sovereign

immunity to final judgment, and thus, law of the case doctrine did not apply to bar board from asserting sovereign immunity as defense after it was substituted for the fund on remand, because board was not a party at time of the ruling.

IMMUNITY - NORTH CAROLINA

Cedarbrook Residential Center, Inc. v. North Carolina Department of Health and Human Services

Supreme Court of North Carolina - December 16, 2022 - S.E.2d - 2022 WL 17726478 - 2022-NCSC-120

Department of Health and Human Services appealed decision of Industrial Commission denying its motion to dismiss adult care home's claims under State Tort Claims Act (STCA) alleging that Department employees were negligent in inspecting and exercising regulatory authority over home.

The Court of Appeals affirmed. Department appealed.

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

- Sovereign immunity barred home's claims of negligent regulation; overruling *Nanny's Corner Day Care Center, Inc. v. North Carolina Department of Health and Human Services*, 264 N.C. App. 71, 825 S.E.2d 34;
- Department did not owe home a legal duty of care sufficient to support a claim of negligent regulation; and
- Duty of care component of a negligence claim is distinct from affirmative defense of the public duty doctrine.

Sovereign immunity barred adult care home from asserting claims under State Tort Claims Act (STCA) that Department of Health and Human Services employees were negligent in inspecting and exercising regulatory authority over home; claims rested entirely upon discretionary actions that were taken in pursuit of Department's statutory authority to regulate adult care homes, plain language of STCA precluded a finding that a state agency like Department was liable to a private party for what amounted to negligent regulation, and Administrative Procedure Act provided process by which regulated entitles could challenge the lawfulness of and seek redress from allegedly unlawful regulatory actions; overruling *Nanny's Corner Day Care Center, Inc. v. North Carolina Department of Health and Human Services*, 264 N.C. App. 71, 825 S.E.2d 34.

Department of Health and Human Services did not owe adult care home a legal duty of care necessary to support claim that Department was negligent in inspecting and exercising regulatory authority over home; relevant duty of care ran to persons whom Department's regulatory actions were intended to protect rather than to home as the entity being regulated, tort law principles were ill-suited to identification of proper scope of regulatory activity, the exercise of regulatory authority by state agencies like Department generally required a level of expertise and exercise of some amount of discretion that was difficult to evaluate using a reasonable person standard, and General Assembly created a system for specific purpose of resolving disputes over validity of regulatory actions by state agencies.

While the public duty doctrine protects a state agency from liability based upon a failure to carry out a statutorily-created duty that is designed to protect the public at large rather than a specific individual, and operates to prevent a plaintiff from establishing duty as an element of a negligence

claim, the mere fact that the doctrine does not apply with respect to a particular set of facts does not, without more, determine whether the duty of care necessary to support the assertion of a negligence claim against the state agency under the State Tort Claims Act (STCA) exists in the first place.

PUBLIC UTILITIES - OHIO

Matter of Establishing the Solar Generation Fund Rider

Supreme Court of Ohio - December 7, 2022 - N.E.3d - 2022 WL 17478659 - 2022-Ohio-4348

Manufacturers' advocacy group sought judicial review of an order of the Public Utilities Commission authorizing a solar-generation-fund rider with a fixed annual revenue requirement of $20 million.

The Supreme Court held that:

- Statute governing collection of amounts for solar-generation fund established a fixed annual revenue requirement of $20 million;
- Commission did not violate statute governing its written opinions in contested cases;
- Group failed to show reversible error with respect to Commission's establishment of rider on per-account basis;
- Group failed to show reversible error with respect to Commission's extension of $242 monthly rate cap to all nonresidential customers eligible to become self-assessing purchasers for excise tax purposes;
- Remand was required for clarification as to order's treatment of commercial activity tax; and
- Group's contention that Commission erred in failing to require refund language in tariffs to rider was moot.

Statute requiring electric-distribution utilities to charge customers an aggregate amount for solar-generation fund established a fixed annual revenue requirement of $20 million, rather than an amount up to $20 million conditioned on generation output of solar resources, and thus Public Utilities Commission properly established an annual revenue requirement of $20 million for solar-generation-fund rider; statute did not use language such as "up to" to qualify the revenue requirement.

Public Utilities Commission did not violate statute governing its written opinions in contested cases by failing to provide citations to the record in support of its order establishing a fixed annual revenue requirement of $20 million for solar-generation-fund rider, since statute requiring electric-distribution utilities to charge customers an aggregate amount for solar-generation fund established the revenue requirement.

Manufacturers' advocacy group failed to satisfy its burden of demonstrating reversible error with respect to Public Utilities Commission's establishment of solar-generation-fund rider on a per-account basis, rather than per-customer, where group did not offer argument against definition of "customer" used in electric-service regulations and upon which Commission based its determination.

Manufacturers' advocacy group failed to satisfy its burden of demonstrating reversible error with respect to Public Utilities Commission's extension of $242 monthly rate cap on solar-generation-fund rider to all nonresidential customers that were eligible to become self-assessing purchasers for excise tax purposes, rather than merely industrial customers eligible to become such purchasers, where group did not challenge, or even mention, Commission's reliance on a particular sentence

concerning the $242 cap in statute governing collection of funds for solar-generation fund, and group made no attempt to show how its members suffered harm or prejudice.

Remand was required for clarification with respect to treatment of commercial activity tax (CAT) in Public Utilities Commission's order establishing a solar-generation-fund rider, where order could be read to mean that no CAT amounts were to be included in the rider, but order could also be read as holding that CAT could be included in rider.

Manufacturers' advocacy group's contention that Public Utilities Commission erred in failing to require refund language in tariffs to solar-generation-fund rider was moot, since all Ohio electric-distribution utilities included language in their rider tariffs to effectuate the required refund and reconciliation process.

REAL PROPERTY CONVEYANCE - OHIO

Ohio Public Works Commission v. Barnesville

Supreme Court of Ohio - December 22, 2022 - N.E.3d - 2022 WL 17835696 - 2022-Ohi--4603

Ohio Public Works Commission (OPWC) brought action against village, lessee of oil and gas rights, and lessee's assignee, seeking injunction, declaratory judgment, and damages, and alleging that village violated use and development and alienation deed restrictions imposed in connection with grants from environmental conservation fund for village's purchase of two properties as "open space" reservoir and wetlands projects by leasing oil and gas rights without obtaining OPWC's consent.

The Court of Common Pleas denied OPWC's motion for judgment on the pleadings, granted assignee's motion for judgment on the pleadings, and granted village and lessee's motions for summary judgment. OPWC appealed. The Court of Appeals, 2020 WL 4596891, affirmed in part, reversed in part, and remanded. Assignee, lessee, and village sought further review.

The Supreme Court held that:

- Public policy did not preclude alienation deed restrictions;
- OPWC could pursue equitable relief as means to enforce restrictions; and
- Village violated use and development restrictions.

Public policy generally favoring alienability of real property did not preclude alienation deed restrictions imposed in connection with grants from environmental conservation fund for village's purchase of two properties as "open space" reservoir and wetlands projects; no rule, statute, or other authority supported a complete ban on transfer restrictions, disputed restrictions were sufficiently supported by public-policy purpose regarding environment and related conservation authorized by the Ohio Constitution, and restrictions were contracted for by the parties for that specific public purpose.

Ohio Public Works Commission (OPWC) could pursue equitable relief as means to enforce alienation deed restrictions imposed in connection with grants from environmental conservation fund for village's purchase of two properties as "open space" reservoir and wetlands projects; nothing in statute requiring director of OPWC to establish policies related to real property subject to an application for grant limited OPWC's remedies exclusively to liquidated damages.

Village violated use and development deed restrictions imposed in connection with grants from environmental conservation fund for village's purchase of two properties as "open space" reservoir and wetlands projects by leasing oil and gas rights without obtaining consent of the Ohio Public Works Commission (OPWC); by obtaining oil and gas rights, lessee's assignee also obtained right to use the surface of the property to gain access to oil and gas below, which was in direct contradiction to use and development restrictions that plainly prohibited any use of property that did not involve "open space with trails" and "passive recreational appurtenances," and it was of no consequence that assignee had yet to disturb property in any way.

EMPLOYMENT - ILLINOIS

Barwin v. Village of Oak Park

United States Court of Appeals, Seventh Circuit - November 22, 2022 - F.4th - 2022 WL 17100477

Former village manager brought diversity action against village, alleging village breached employment contract's duty of good faith and fair dealing through conduct that led to former manager's resignation.

The United States District Court for the Northern District of Illinois dismissed in part and subsequently granted summary judgment to village. Former manager appealed.

The Court of Appeals held that:

- Under Illinois law, even if village sought to procure former manager's resignation in order to prevent his pension from vesting, this was not a breach of employment contract's implied duty of good faith and fair dealing, and
- Genuine issue of material fact as to whether village had practice of allowing senior village employees to purchase out-of-state pension credits precluded summary judgment on former manager's claim under Illinois law that village's effective refusal of former manager's request to purchase such credits, when he resigned prior to reaching vesting threshold for pension rights, breached duty of good faith and fair dealing implied into employment contract.

Under Illinois law, even if village sought to procure at-will village manager's resignation in order to prevent manager's pension from vesting, this was not a breach of manager's employment contract's implied duty of good faith and fair dealing, in case involving contract which provided for manager's pension rights to vest after eight years; if contract were interpreted to provide for a minimum employment term of eight years, manager would not have been an at-will employee, manager's resignation occurred two and a half years prior to pension vesting, and manager's pension contributions during employment were not rendered worthless by failure of pension rights to vest, since manager had right to request refund of contributions.

Genuine issue of material fact as to whether village had a practice of allowing senior village employees to purchase out-of-state pension credits precluded summary judgment on former village manager's claim under Illinois law that village's effective refusal of former manager's request to purchase such credits, when he resigned prior to reaching vesting threshold for pension rights, breached duty of good faith and fair dealing implied into employment contract which granted manager benefits that "are enjoyed" by other senior employees "by practice."

PUBLIC UTILITIES - MAINE

Black v. Bureau of Parks and Lands

Supreme Judicial Court of Maine - November 29, 2022 - A.3d - 2022 WL 17257088 - 2022 ME 58

State legislators, citizens, and environmental advocacy organization brought action against Bureau of Parks and Lands, and power companies challenging Bureau's lease of public reserved land to companies for construction of a high-capacity transmission line.

The Superior Court granted plaintiffs' request for declaratory judgment and reversed Bureau's decision to lease the public reserved land. Bureau and power companies appealed, and plaintiffs cross appealed. Plaintiffs moved to dismiss pending appeals as moot in light of voter initiative.

The Supreme Judicial Court held that:

- Citizens had standing to bring suit;
- Environmental advocacy organization had associational standing;
- Voter initiative retroactively imposing two-thirds majority legislative approval for lease of public lands violated Contracts Clause as to Bureau's lease to power companies;
- Under law in effect at time, Bureau was not required to conduct any public administrative process prior to granting lease; and
- Bureau's lease did not substantially alter use of public reserved lands at issue, and thus Bureau acted within its constitutional and statutory authority in granting lease.

ZONING & PLANNING - MARYLAND

Matter of Homick

Court of Special Appeals of Maryland - December 1, 2022 - A.3d - 2022 WL 17347897

Protesters petitioned for review of decision of city board of appeals approving developer's application for special exception to build new and retrofit existing buildings to create restaurant, four dwelling-unit apartments, and commercial office space, but which denied developer's request for parking variances.

The Circuit Court affirmed decision granting approval of special exception and denying request for parking variances, and remanded for board to clarify incongruity between decisions. On remand, board approved application based on amended site development plan (SDP) to comply with parking restrictions in light of denial of parking variances. Protesters again sought review, and Circuit Court affirmed. Protesters appealed.

The Court of Special Appeals held that:

- Court of Special Appeals had jurisdiction over appeal;
- Board's consideration on remand of developer's amended SDP did not impermissibly exceed scope of circuit court's remand order;
- Approval of application based on amended SDP was not inconsistent with remand order;
- Substantial evidence supported board's approval on remand of application for special exception; and
- Board's approval of application on remand was not arbitrary and capricious.

Court of Special Appeals had jurisdiction over appeal from circuit court's final judgment on judicial review of city board of appeals' grant of developer's request for special exception to build new and to retrofit existing buildings to create restaurant, four dwelling-unit apartments, and commercial office space, under statute authorizing appeal from judgment of circuit court to Court of Special Appeals when litigation involved zoning dispute.

City board of appeals' consideration on remand of developer's amended site development plan, which reduced seating capacity of proposed new restaurant in order to comply with zoning requirements for parking, did not impermissibly exceed scope of circuit court's remand "for further clarification" as to how board could grant developer's original request for special exception to construct restaurant and to retrofit existing buildings to create dwelling apartments and commercial office space, despite having denied request for variances from parking requirements; circuit court found that substantial evidence supported board's findings in support of its decisions granting zoning district boundary adjustment and denying parking variances, such that those issues could not be relitigated on remand, and order did not prohibit board from considering new facts not considered when application was first evaluated, in order to remain consistent with circuit court's order.

City board of appeals' approval of application for special exception to build and retrofit existing buildings to create restaurant, four dwelling-unit apartments, and commercial office space, based on amended site development plan (SDP) that reduced restaurant seating capacity in order to comply with parking restrictions in light of board's denial of request for parking variances, was not inconsistent with circuit court's order in which it found that board had not adequately explained how it could grant application while denying request for parking variances and remanding to board "for further clarification consistent with this ruling," despite protesters' assertion that remand order was law of case; board did not reject law of case, as it was able to point to modifications to SDP, including zoning district boundary adjustment that was previously affirmed, reduced seating capacity for restaurant, and conditions and restrictions imposed on approved special exception, all of which addressed circuit court's original concern about incongruity between approval of application despite denial of request for parking variances.

Substantial evidence supported city board of appeals' approval on remand of developer's amended application for special exception to build new and retrofit existing buildings to create restaurant, four dwelling-unit apartments, and commercial office space, which reduced proposed seating capacity of restaurant to comply with parking restrictions, following denial of request for parking variances; restaurants in zoning district had to provide parking spaces for 30% of its patronage capacity, additional ten spaces had to be on site for apartments and commercial office space plans, developer's amended site development plan (SDP) enhanced bufferyards and reduced onsite parking spaces needed and established parking management plan, and number of parking spaces provided, used in accordance with parking management plan, provided sufficient parking for all proposed users, in compliance with city code parking restrictions, without need for parking variances.

City board of appeals' approval on remand of developer's application for special exception to build new and retrofit existing buildings to create restaurant, four dwelling-unit apartments, and commercial office space, based on amended site development plan (SDP) that reduced seating capacity of restaurant and parking management plan in order to comply with code parking restrictions in light of denial of request for parking variances, was not arbitrary and capricious, despite protesters' assertion that board did not comply with requirement of one-year wait period for resubmission of application after initial denial, where board approved original application, subject to conditions, circuit court affirmed approval and denial of parking variances but remanded for board to clarify incongruity between grant of application and denial of parking variances, and amended

application addressed circuit court's concerns and complied with parking restrictions.

BONDS - MICHIGAN

Jackson v. Mayor of Detroit

Court of Appeals of Michigan - September 29, 2022 - Not Reported in N.W. Rptr. - 2022 WL 4586567

Citizen plaintiff led a group of concerned Detroit residents in sounding the alarm about the city's issuance of bonds without proper notification and authorization. Specifically, the plaintiffs contended that Detroit issued bonds beyond the city's borrowing limit and kept residents uninformed about the city's bonding efforts.

The trial court, on summary disposition, carefully considered the plaintiffs' arguments and concluded that all of the defendants (the Mayor of Detroit, the Detroit City Council Members, and Detroit Chief Financial Officer John Naglick (collectively Detroit)) were entitled to prevail because the bonds were issued before plaintiffs filed suit.

Plaintiffs appealed.

The Court of Appeals hold that:

- Under the preclusive doctrine discussed in *Bigger v Pontiac*, 390 Mich 1; 210 NW2d 1 (1973), and *Sessa v Macomb Co*, 220 Mich App 279; 559 NW2d 70 (1996), the issuance of bonds stops challenges in their tracks because no meaningful remedy can be provided without harming bond-holders. Thus, the court was bound to apply that preclusive doctrine to end the lawsuit; and
- Detroit did not issue bonds in excess of the debt limit imposed by MCL 117.4a(2).

EMINENT DOMAIN - OHIO

State Ex Rel. Ohio History Connection v. Moundbuilders Country Club Company

Supreme Court of Ohio - December 7, 2022 - N.E.3d - 2022 WL 17479895 - 2022-Ohio-4345

State-funded lessor of land containing prehistoric earthworks petitioned to appropriate a leasehold estate for creation of public park, and lessee counterclaimed for breach of lease/contract.

The Court of Common Pleas entered a decision and order granting lessor's petition to appropriate, and dismissing lessee's counterclaims. Lessee appealed. The Court of Appeals affirmed. Lessee sought discretionary review.

The Supreme Court held that:

- Objective standard governed question whether lessor provided written good-faith offer to purchase lessee's interest;

- Lessor complied with requirement that it provide written good-faith offer; and
- Lessee failed to rebut presumption that creation of public park constituted public use and that taking was necessary for such use.

Whether state-funded lessor of land containing prehistoric earthworks complied with requirement that it provide lessee a written good-faith offer to purchase lessee's interest before commencing appropriation action was governed by objective standard, inquiring whether lessor acted reasonably under the circumstances in addition to considering whether it acted honestly, which was consistent with dictionary definitions of "good faith" and "bad faith."

State-funded lessor of land containing prehistoric earthworks complied with requirement that it provide a written good-faith offer before commencing appropriation action by hiring two real-estate appraisal companies and submitting to lessee a written offer to purchase lessee's interest for amount not less than the highest quoted value, even though offer was based on misunderstanding on part of lessor's executive director with regard to what quoted value actually represented; it was not objectively unreasonable to obtain two appraisals, lessee made no claim that either appraiser was unqualified or untruthful, and no complex legal issue would have been reasonably apparent to director, since attorney ordered appraisals, and appraisers were told to provide value of leasehold interest.

Lessee of land containing prehistoric earthworks failed to rebut presumption that state-funded lessor's planned creation of public park constituted a public use and that taking of lessee's interest was necessary for such use; lessee's contention that government would not adequately preserve the site and that government merely wanted site to acquire international recognition called for speculation and artificially narrowed lessor's purpose, and decision to create public park on land at issue did not arbitrarily single out a parcel for different, less favorable treatment than neighboring ones, but instead park would help preserve and ensure perpetual public access to one of the most significant landmarks in Ohio.

PUBLIC UTILITIES - VERMONT

Otter Creek Solar LLC v. Vermont Agency of Natural Resources

Supreme Court of Vermont - December 2, 2022 - A.3d - 2022 WL 17366190 - 2022 VT 60

Developer of solar electric generation facility and the owner of the project site filed complaint for declaratory and injunctive relief against the Vermont Agency of Natural Resources (ANR), seeking ruling that two guidance documents and a plant-classification system created by ANR were unlawful and therefore could not be relied upon by ANR or the Public Utilities Commission (PUC) in determining whether to issue a certificate of public good for a proposed electric generation facility.

The Superior Court granted ANR's motion to dismiss for failure to state a claim. Developer and owner appealed.

The Supreme Court held that:

- One-year statute of limitations under Vermont Administrative Procedure Act (VAPA) applied to the action, even if plaintiffs were also challenging ANR's entire "rare" plant regulatory scheme outside of endangered-species law, and
- Specific and limited procedure provided in VAPA for challenging agency rules through declaratory-judgment action applied notwithstanding plaintiffs' assertion of a general common-law right to

enjoin unlawful state action that adversely impacted them.

One-year statute of limitations under Vermont Administrative Procedure Act (VAPA) for declaratory-judgment actions challenging agency rules applied to declaratory-judgment action brought by developer of solar electric generation facility and owner of project site against Agency of Natural Resources (ANR), challenging validity of ANR's alleged de facto rules consisting of two guidance documents and a plant-classification system that were used in determining whether to issue certificate of public good for proposed facility, even if developer and owner were also challenging ANR's entire "rare" plant regulatory scheme outside of endangered-species law; VAPA provision allowing court to "fashion appropriate relief" did not allow a challenge to agency policy more than a year after it was issued.

Specific and limited procedure provided in Vermont Administrative Procedure Act (VAPA) for challenging agency rules through declaratory-judgment action, including VAPA's one-year limitation period for such actions, governed declaratory-judgment action brought by developer of solar electric generation facility and owner of project site against Agency of Natural Resources (ANR) challenging validity of alleged de facto rules created by ANR, notwithstanding developer and owner's contention that they had general common-law right to enjoin unlawful state action that adversely impacted them; declaratory-judgment vehicle could not be used to frustrate specific procedure provided by legislative for challenging administrative rule.

ZONING & PLANNING - CALIFORNIA

Save Lafayette v. City of Lafayette

Court of Appeal, First District, Division 3, California - November 30, 2022 - Cal.Rptr.3d - 2022 WL 17336106

City residents petitioned for writ of mandate alleging that apartment development project approved by city conflicted with city's general plan and zoning requirements, environmental impact report (EIR) was inadequate, and supplemental EIR was required.

The Superior Court denied petition. Residents appealed.

As matter of apparent first impression, the Court of Appeal held that under Housing Accountability Act, city's general plan and zoning standards in effect when original application was deemed complete applied.

Under Housing Accountability Act, city's general plan and zoning standards in effect when original apartment development application was deemed complete applied to variant of original application, as opposed to standards in effect when applicant terminated process agreement that had suspended original application for consideration of alternative project and asked city to resume processing variant of its original application, although there was lengthy delay between certification of environmental impact report and project approval that was outside time limits of Permit Streamlining Act; consequence under Permit Streamlining Act of any failure by city to act was project being deemed approved, not disapproved, and applicant's request to resume processing did not serve as resubmittal.

EMINENT DOMAIN - CALIFORNIA

Gearing v. City of Half Moon Bay

United States Court of Appeals, Ninth Circuit - December 8, 2022 - F.4th - 2022 WL 17492266

Landowners brought § 1983 action against city, alleging a regulatory taking and related claims.

City moved for federal court to abstain pending resolution of state-court eminent domain action, which the United States District Court for the Northern District of California granted. Landowners appealed.

The Court of Appeals held that:

- Even if Pullman abstention was prohibited when it would create effective exhaustion requirement for a takings plaintiff, abstention from instant action would not subject landowners to such a requirement;
- Landowners' action touched on sensitive area of social policy, supporting determination that Pullman abstention was appropriate;
- Constitutional question in federal action could be mooted or narrowed by a definitive ruling on state law issues, supporting determination that Pullman abstention was appropriate; and
- Federal action involved unclear question of state law, supporting determination that Pullman abstention was appropriate.

Even if *Pullman* abstention was prohibited when it would create effective exhaustion requirement for a takings plaintiff, abstention from landowners' § 1983 action against city, alleging a regulatory taking and related claims, would not subject landowners to effective exhaustion requirement, supporting district court's determination that *Pullman* abstention was appropriate pending resolution of city's state-court eminent domain action against landowners; state court could adjudicate the eminent domain action without reaching the regulatory taking issue because eminent domain and regulatory takings suits compensated a property owner for different injuries, and landowners had made express reservation in state court to prevent ruling on federal issues.

Landowners' § 1983 action against city, alleging a regulatory taking and related claims, touched on sensitive area of social policy, supporting district court's determination that Pullman abstention was appropriate pending resolution of city's state-court eminent domain action against landowners, where landowners' federal claim arose from city's denial of building proposal pursuant to city land use plan.

Constitutional question in landowners' federal action, a § 1983 claim alleging a regulatory taking arising from city's denial of building proposal pursuant to city land use plan, could be mooted or narrowed by a definitive ruling on state law issues, supporting district court's determination that Pullman abstention was appropriate pending resolution of city's state-court eminent domain action against landowners; state action would require court to interpret sections of land use plan which were relevant to federal action, because such interpretation would be required for determination of properties' fair market values.

Landowners' § 1983 claim alleging a regulatory taking arising from city's denial of building proposal pursuant to city land use plan involved an unclear question of state law, supporting district court's determination that Pullman abstention was appropriate pending resolution of city's state-court eminent domain action against landowners; case involved interaction between land use plan and state senate bill prohibiting the rejection of certain affordable-housing proposals, and senate bill had not yet been interpreted by any state courts.

EMINENT DOMAIN - MICHIGAN

Mount Clemens Recreational Bowl, Inc. v. Director of Department of Health and Human Services

Court of Appeals of Michigan - November 17, 2022 - N.W.2d - 2022 WL 17070755

Owners of restaurants, bars and banquet halls brought purported class action against the Governor, Director of Health and Human Services, and Chairperson of the Liquor Control Commission, seeking just compensation for their alleged regulatory taking by promulgating executive orders and regulations in response to the COVID-19 pandemic.

The Court of Claims denied owners' motion to transfer venue and granted defendants' motion for summary disposition. Owners appealed.

The Court of Appeals held that:

- Owners could not pursue their action in a circuit court by a jury under Court of Claims Act;
- Owners failed to state a claim for regulatory taking under Penn Central; and
- Governor did not engage in ultra vires conduct, as required for owners' claims to avoid governmental immunity.

Action brought by owners of restaurants, bars, and banquet halls against the Governor, Director of Health and Human Services, and Chairperson of the Liquor Control Commission, seeking just compensation for an alleged regulatory taking through executive orders promulgated during the COVID-19 pandemic, was against the State, and thus, owners had no right to jury under Court of Claims Act, where owners sued the Governor, Director, and Chairperson in their official capacities.

In their action seeking just compensation for an alleged regulatory taking through executive orders promulgated during the COVID-19 pandemic, owners of restaurants, bars and banquet halls could not pursue their action against the State by a jury in the circuit court under the Court of Claims Act; owners' complaint made clear that they were seeking money damages under state constitution, and their claims were not brought under Uniform Condemnation Procedures Act (UCPA), as would allow them to demand a jury trial, because they did not allege that the State acquired their property.

Owners of restaurants, bars and banquet halls failed to state a claim that governor's executive orders that closed and imposed restrictions on their businesses during the COVID-19 pandemic constituted a regulatory taking under Penn Central, as required for owners to be entitled to just compensation under state constitution; even though owners alleged that regulations and executive orders at-issue were not actually warranted, they emphatically argued government's purpose in making restrictive regulations was not pertinent to a regulatory-takings analysis under Penn Central, stating that whether orders were "arbitrary, invalid exercises of police power" was ultimately irrelevant to regulatory taking analysis, and they did not argue that the executive orders at-issuer were imprudent.

Governor did not engage in ultra vires conduct by promulgating executive orders that closed and imposed restrictions on owners' restaurants, bars and banquet halls during the COVID-19 pandemic, as required for owners' tort claims for interference with business and contractual relationships to avoid governmental immunity; Governor was clearly acting, at the very least, under implied authority under the Emergency Powers of the Governor Act of 1945, even if the Supreme Court had ruled against that authority.

LIABILITY - MISSISSIPPI

Simmons as Estate of Simmons v. Jackson County

Court of Appeals of Mississippi - November 22, 2022 - So.3d - 2022 WL 17099959

Wife of deceased motorist, as administratrix of motorist's estate, brought action pursuant to the Mississippi Tort Claims Act (MTCA) against county, county's road manager, and construction company hired to repave the road just prior to motorist's death.

Following a bench trial, the Circuit Court held that the county bore no liability for motorist's death. Wife appealed.

The Court of Appeals held that sufficient evidence supported trial court's finding that deceased motorist's own negligence constituted the sole proximate cause of his accident.

Sufficient evidence supported trial court's finding that deceased motorist's own negligence, in failing to exercise vigilant caution or to reduce his speed as he drove down road under construction, constituted sole proximate cause of accident, in which motorist ran off road due to alleged defect in roadway, in negligence action brought by deceased motorist's wife, as administratrix of motorist's estate, pursuant to Mississippi Tort Claims Act (MTCA) against county, county's road manager, and construction company hired to repave road just prior to motorist's death; witness testified that motorist seemed to be driving fast, edges of pavement were visible with vehicle headlights, and witnesses' knowledge of the road conditions existing at time of accident attested to need for vigilant caution.

EMPLOYMENT - NEW JERSEY

Matter of DiGuglielmo

Supreme Court of New Jersey - November 28, 2022 - A.3d - 2022 WL 17246816

Employer, a state university, sought review of Public Employment Relations Commission's (PERC) determination that former employee, a campus police officer, was eligible to challenge his termination for alleged non-criminal misconduct through special disciplinary arbitration.

The Superior Court, Appellate Division affirmed in part and reversed in part. Employee petitioned for certification, which was granted.

The Supreme Court held that:

- Special disciplinary arbitration is not limited to non-civil service municipal police officers, and
- An officer suspended with pay prior to termination is eligible to engage in special disciplinary arbitration.

Special disciplinary arbitration is not limited to non-civil service municipal police officers but rather includes non-municipal officers like campus police officers at a public university.

A municipal or public university police officer who is suspended with pay prior to termination is eligible to engage in special disciplinary arbitration.

ZONING & PLANNING - OHIO

Willow Grove, Ltd. v. Olmsted Township Board of Zoning Appeals

Supreme Court of Ohio - December 9, 2022 - N.E.3d - 2022 WL 17542590 - 2022-Ohio-4364

Developer sought judicial review of decision by township's board of zoning appeals denying its application for a zoning certificate allowing it to construct single-family townhomes on a single parcel of land, due in part to developer's failure to comply with zoning resolution's off-street parking requirements.

The Court of Common Pleas affirmed in part, reversed in part, and remanded with instructions to issue zoning certificate. Both sides appealed. The Eighth District Court of Appeals affirmed in part, reversed in part, and remanded to the trial court. Developer's petition for discretionary review was accepted.

The Supreme Court held that column headings in schedule for zoning resolution regulating number of off-street parking spaces had to be read substantively and could not be read as mere guidepost.

Column heading entitled "Principal Building or Use" in schedule for township zoning resolution regulating number of off-street parking spaces "for each facility or use," which consisted of a column setting forth number of spaces of off-street parking for each principal building or use identified in a second column, served as more than a guidepost, but rather, provided details of a law, and thus, it had to read substantively to limit schedule's application to principal buildings or uses, because the heading used specific terminology, namely, "principal use," that was defined within the resolution, which gave the term legal significance.

ZONING & PLANNING - OREGON

Urban Renewal Commission v. Williams

Court of Appeals of Oregon - November 16, 2022 - P.3d - 322 Or.App. 615 - 2022 WL 16960508

Urban renewal agency, which operated under urban renewal plan approved by city, brought action against city and an individual proponent of amendment to city's charter that restricted urban renewal activities within the city, seeking declaratory judgment that amendment was unconstitutional under Oregon Constitution and that amendment was preempted by state law.

On cross-motions for summary judgment, the Circuit Court granted proponent's motion on agency's claim that amendment was unconstitutional, and granted agency's motion on its claim that amendment was preempted. Proponent appealed, and agency and city, which aligned with agency, cross-appealed.

The Court of Appeals held that:

- Agency was independent from city, and, thus, was not subject to direct regulation by city;
- Amendment to city's charter was preempted by chapter of state statutes governing urban renewal;
- Section governing prospective urban renewal plans in amendment was not severable from amendment;
- City's home rule authority did not prevent preemption of amendment; and
- Chapter of state statutes governing urban renewal was a general law addressed primarily to

substantive social, economic, and regulatory objectives of the state, and, thus, city's home rule authority did not prevent preemption of amendment.

Urban renewal agency was independent from city, and, thus, was not subject to direct regulation by city, except through powers reserved to city under state's urban renewal statutes; relevant statutes emphasized separateness of agency from city, agency had power to sue and be sued, to contract, to make rules and regulations, to acquire and dispose of real property, and to acquire funds and incur indebtedness, agency was created for city, not by city, actions of agency were independent of city, agency could amend its plans without approval from city, and agency had power to operate outside of territorial boundaries of city.

Amendment to city's charter restricting urban renewal within city was preempted by chapter of state statutes governing urban renewal; amendment purported to direct actions of urban renewal agency created for city, agency was separate entity from city under statutes, agency was statutorily required to carry out approved urban renewal plan and was authorized by statute to acquire funds to carry out urban renewal plans, amendment was passed long after city declared need for urban renewal agency and approved urban renewal plan for agency to carry out, and amendment placed direct prohibitions on city and agency regarding financing and property acquisition for that renewal plan, such that amendment and statutes could not operate concurrently.

Section governing prospective urban renewal plans, in amendment to city's charter restricting urban renewal plans, was not severable from section of amendment that was expressly preempted by chapter of state statutes governing urban renewal; nothing in amendment suggested that it was an effort to shape future approval of urban renewal plans not yet in effect, and section at issue explicitly sought to direct current actions of city and urban renewal agency.

City's home rule authority did not prevent preemption of amendment to city's charter restricting urban renewal in city by state statutes governing urban renewal; urban renewal agency, which was created for city, was not an agency of the city, but, rather, was a public corporation created by statute that was independent of the city.

Chapter of state statutes governing urban renewal was a general law addressed primarily to substantive social, economic, and regulatory objectives of the state, and, thus, city's home rule authority did not prevent preemption of amendment to city's charter restricting urban renewal in city by those statutes; statutes were primarily concerned with combatting perceived detrimental social and economic effects of allowing blighted urban areas to persist, statutes were directed at statewide concerns, accomplished through creation of independent urban renewal agencies without changes to political form of local government, and statutes were not irreconcilable with local community's freedom to choose its own political form

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INDEMNIFICATION - PENNSYLVANIA

McGuire on behalf of Neidig v. City of Pittsburgh

Supreme Court of Pennsylvania - November 23, 2022 - A.3d - 2022 WL 17170459

Judgment creditor, as assignee of judgment debtor's right, if any, to indemnification from city as a police officer, filed an action against city for declaratory judgment, alleging that city failed to comply with its alleged obligation to indemnify judgment debtor following a federal district court judgment that was entered against judgment debtor, in his individual capacity as a police officer, in favor of judgment creditor, who was an arrestee.

Following a jury trial, the Court of Common Pleas denied the parties' post-trial motions and entered judgment on the jury verdict in favor of city. Judgment creditor appealed. The Commonwealth Court affirmed. Judgment creditor petitioned for allowance of appeal, which was granted.

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

- Restatement (Second) of Agency section setting forth "scope of employment" test would be adopted to determine if public employee's conduct fell within "scope of office or duties" under indemnity provision of Political Subdivision Tort Claims Act (PSTCA), and
- Determination that officer acted "under color of state law," for purposes of § 1983, did not establish that he acted "within the scope of his office or employment," for purposes of the PSTCA.

Restatement (Second) of Agency section, providing that employee's conduct falls within the "scope of his employment," for purpose of common law vicarious liability, if it is of the kind he is employed to perform, it occurs substantially within the authorized time and space limits, it is actuated, at least in part, by a purpose to serve the employer, and if force is intentionally used by employee against another, the use of force is not unexpected by the employer, would be adopted in determining whether public employee's conduct fell within his "scope of office or duties" under indemnity provision of the Political Subdivision Tort Claims Act (PSTCA).

Determination that a police officer acted "under color of state law," for purposes of § 1983 liability, did not establish that officer acted "within the scope of his office or employment," for purposes of indemnity provision of the Political Subdivision Tort Claims Act (PSTCA); the two phrases involved different inquiries and were not synonymous, as officer could act under color of state law without necessarily acting with the scope of his employment.

PUBLIC ROADWAYS - RHODE ISLAND

Davis v. Town of Exeter

Supreme Court of Rhode Island - December 1, 2022 - A.3d - 2022 WL 17347388

Property owner brought action against town, seeking declaratory and injunctive relief in dispute over whether unimproved land between cul-de-sac at terminus of a road leading to a subdivision and his property was a public road which he had right to use to access his land.

The Superior Court entered summary judgment for town. Owner appealed.

The Supreme Court held that:

- Unimproved property was not intended to be a public roadway;
- Town did not accept the unimproved property for public use;
- Unimproved property was not accepted as a roadway by a public user; and
- Futility exception to administrative exhaustion requirement did not apply.

Record demonstrated that subdivision developer intended unimproved property between end of cul-de-sac at termination of an improved, paved road to subdivision and owner's property line to be designated a paper street, not dedicated as a public roadway, at time the improved road was developed, for purposes of owner's action seeking injunctive relief to prevent town from denying his use of the improved road for development applications and from blocking road so it could not be used to access his property; paved road and cul-de-sac were designated on official map with double lines while the unimproved area after the cul-de-sac was designed with only a single solid line, and

minutes of planning board meeting indicated that town and developer intended the public roadway to extend to the cul-de-sac and no further.

There was no clear and convincing evidence that town accepted undeveloped land between end of cul-de-sac at termination of improved, paved road leading to a subdivision and owner's property line for public use, as would support owner's claim for injunctive relief to prevent town from denying his use of the improved road for development applications and from blocking the road so it could not be used to access his property, where subdivision developer never performed any construction or clearing of the land beyond the cul-de-sac, and town had never opened, certified, or accepted the land for public use, nor did it ever maintain the land.

Undeveloped land between end of cul-de-sac at termination of improved, paved road leading to a subdivision and owner's property line was not accepted as a roadway by a public user, as would support owner's argument that the land was a public roadway that he had right to use for development applications and to access his property, where property in dispute had been inaccessible to vehicular access since inception of the subdivision and had been covered by vegetation and trees until owner's unauthorized excavation.

Property owner failed to show that town planning board's refusal of road opening permit would be near certainty, and thus, futility exception to exhaustion of administrative remedies requirement did not apply in action alleging that paper street, an undeveloped land between cul-de-sac at terminus of a paved road leading to a subdivision and his property was a public roadway which he could use for development applications and as access to his land, where owner failed to follow procedures for a paper street to be certified as a public road and accepted by the town.

IMMUNITY - TEXAS

City of Houston v. Gilbert

Court of Appeals of Texas, Houston (14th Dist.) - November 10, 2022 - S.W.3d - 2022 WL 16842193

Relatives of two minors who suffered electrocution injuries at city-owned park when one minor made physical contact with electrical box brought action against city, sports organization minors were involved in, and other defendants, alleging negligent activity, premises liability, negligence, negligence per se, and gross negligence.

The District Court denied city's plea to the jurisdiction. City appealed.

The Court of Appeals held that:

- Claims by relatives were premises liability claims as a matter of law;
- Fact issue existed as to whether city-owned park was reserved for sports organization on particular day of incident;
- Relative of minor who made physical contact with electrical box was licensee as a matter of law;
- City did not have actual knowledge that metal cover of electrical box had become energized prior to injuries;
- City did not have actual, subjective awareness that electrical box had become energized and chose to do nothing; and
- Fact issue existed as to trial court's jurisdiction over minor child's premises defect claim against city.

City did not have actual, subjective awareness that electrical box with metal cover had become energized and chose to do nothing and, thus, city was entitled to immunity-based plea to the jurisdiction in premises liability action brought by step-grandfather of minor child who was injured when she made physical contact with electrical box at city-owned softball field; city was not aware that metal cover had, against all probability, become energized, city was not working with electrical box at or near time of incident, city had no records of working on box in years leading up to incident, and nothing indicated that a person had ever been electrocuted by any one of hundreds of electrical box covers at city parks at any time prior to incident.

LABOR - WASHINGTON

Washington State Council of County and City Employees v. City of Spokane

Supreme Court of Washington, En Banc - December 8, 2022 - P.3d - 2022 WL 17491849

Union brought action seeking declaratory judgment that city ordinance requiring all collective bargaining between city and union representatives be conducted in manner that was open to the public was preempted by state law and therefore unconstitutional.

The Superior Court granted summary judgment in favor of union. City appealed and case was transferred to the Supreme Court which granted direct review.

The Supreme Court held that:

- Union's challenge presented justiciable controversy under Uniform Declaratory Judgments Act (UDJA);
- Ordinance was conflict preempted; and
- Ordinance was field preempted.

Union's challenge to city ordinance requiring all collective bargaining between city and union representatives be conducted in manner that was open to the public as preempted by state law and therefore unconstitutional presented justiciable controversy under Uniform Declaratory Judgments Act (UDJA); city's ultimate acquiescence to union's demands to conduct negotiations in private did not render challenge speculative, given mandatory language in ordinance and city's repeated assertions during preliminary negotiations that it needed to follow ordinance, which significantly slowed down negotiations, ordinance applied to all unions that negotiated with city, and judicial determination would resolve dispute.

City ordinance requiring all collective bargaining between city and union representatives be conducted in manner that was open to the public was conflict preempted by Public Employees' Collective Bargaining Act (PECBA); setting mandatory ground rules before negotiations occurred directly conflicted with negotiation process prescribed in PECBA, and possible harmful effects from opening bargaining to public observation, including inhibiting open exchange in negotiations, setting discordant tone, encouraging posturing for the record, and politicizing bargaining process, would conflict with purpose of PECBA to improve relationships between public employers and employees.

City ordinance requiring all collective bargaining between city and union representatives be conducted in manner that was open to the public was field preempted by Public Employees' Collective Bargaining Act (PECBA); uniformity in rules for collective bargaining was central to purpose of PECBA, and a patchwork system of rules by local governments was inconsistent with that intention.

IMMUNITY - CALIFORNIA

Holt v. Brock

Court of Appeal, Third District, California - November 21, 2022 - Cal.Rptr.3d - 2022 WL 17087787

Part owner of real property that was subject to partition action brought action against real estate broker that was appointed by court in partition action to determine listing price and sell property, alleging that broker violated fiduciary duties and committed other torts in the performance of his court-appointed role.

The Superior Court granted summary judgment in favor of broker, concluding that he was protected under quasi-judicial immunity. Part owner appealed.

The Court of Appeal held that:

- Trial court acted within its discretion in granting summary judgment despite broker's procedural violations of rule governing summary judgment motions, and
- As matter of first impression, broker was entitled to quasi-judicial immunity.

Trial court acted within its discretion in granting summary judgment despite real estate broker's procedural violations of rule governing summary judgment motions by failing to identify quasi-judicial immunity as affirmative defense in notice of motion and separate statement of undisputed material facts, in action by part owner of real property that was subject to partition action in which broker had been appointed to determine listing price and sell property alleging broker violated fiduciary duties and committed other torts in his court-appointed role; owner did not raise procedural issue before the trial court, owner argued against affirmative defense on its merits, trial court ruled on the defense, and owner did not show how procedural defect impaired his ability to oppose the defense.

Real estate broker, who was appointed by court in partition action to determine listing price and sell real property, was entitled to quasi-judicial immunity in subsequent action by part owner of property alleging broker violated fiduciary duties and committed other torts in court-appointed role; broker was appointed to exercise discretionary judgment in serving function integral to partition action and as arm of the court, as the court set broker's commission rate, broker was authorized to adjust listing terms upon court order and without parties' stipulation, broker was required to report marketing activities to court and parties on monthly basis, and final approval of any sale negotiated by broker rested with the court, and public policy reasons also justified extending immunity to broker.

EDUCATION - CALIFORNIA

Let Them Choose v. San Diego Unified School District

Court of Appeal, Fourth District, Division 1, California - November 22, 2022 - Cal.Rptr.3d - 2022 WL 17101508

Nonprofit public benefit corporation representing students' parents and student's parents filed actions and petitions for writ of mandate challenging school district's requirement that students ages 16 or older be vaccinated for COVID-19 in order to attend in-person classes and participate in sports and other extracurricular activities.

After cases were consolidated for trial, the Superior Court entered judgment in plaintiffs' favor, and district appealed.

The Court of Appeal held that:

- District's vaccine mandate conflicted with, and thus was preempted by, state statute;
- Legislature fully occupied field of compulsory student vaccination; and
- Education Code provision requiring school districts to cooperate with local health officers in preventing communicable diseases did not authorize vaccination mandate.

School district's requirement that students ages 16 or older be vaccinated for COVID-19 in order to attend in-person classes and participate in sports and other extracurricular activities conflicted with, and thus was preempted by, state statute prohibiting school districts from unconditionally admitting students unless they were fully immunized against enumerated diseases.

Legislature fully occupied field of compulsory student vaccination, thus preempting school district's requirement that students ages 16 or older be vaccinated for COVID-19 in order to attend in-person classes and participate in sports and other extracurricular activities; legislature historically regulated student vaccination, legislature had covered matter fully and completely, defining the who, what, when, and where of compulsory student vaccination, legislature contemplated new vaccine mandates in future without further legislative action—but assigned that responsibility not to school authorities, but rather to Department of Public Health (DPH), and local authorities had no decision-making authority regarding who could administer vaccines.

Education Code provision requiring school districts to cooperate with local health officers in preventing communicable diseases and to use its funds and personnel "to administer an immunizing agent to a pupil" whose parent had consented did not authorize local school district to mandate that students ages 16 or older be vaccinated for COVID-19 in order to attend in-person classes and participate in sports and other extracurricular activities.

FALSE CLAIMS ACT - CALIFORNIA

JPMorgan Chase Bank, N.A. v. Superior Court of City and County of San Francisco

Court of Appeal, First District, Division 4, California - November 18, 2022 - Cal.Rptr.3d - 2022 WL 17076589

Plaintiff filed qui tam action alleging that two banks violated the California False Claims Act (FCA) by failing to report and deliver millions of dollars owed on unclaimed cashier's checks to the State of California as escheated property.

The Superior Court denied banks' demurrers to the complaint. Banks filed separate petitions for writs of mandate, which were consolidated.

The Court of Appeal held that:

- In a matter of apparent first impression, prior notice from State Controller to banks was not prerequisite to filing of qui tam action under FCA predicated on violation of California Unclaimed Property Law (UPL);
- Plaintiff stated plausible claims against banks under the California FCA predicated on violations of California's UCL; and

- Banks would not be deprived of due process by judgments against them in the FCA action.

Prior notice from the California State Controller to banks, as alleged holders of funds subject to escheat, was not prerequisite to filing of qui tam California False Claims Act (FCA) action against banks predicated on the failure to report and deliver escheated property in the form of unclaimed cashier's checks in violation of the California Unclaimed Property Law (UPL).

Plaintiff plausibly asserted that two banks were obligated to report and deliver to California money owed on uncashed cashier's checks, as required to state qui tam claims against banks for violation of the California False Claims Act (FCA) predicated on violations of California's Unclaimed Property Law (UCL), based on allegations that cashier's checks were "written instruments" similar to money orders, that the checks were purchased in California, that the checks were uncashed, and that they were made payable to payees with last known addresses in California, so that they escheated to California.

Banks would not be deprived of due process by escheat judgment against them in qui tam action alleging that two banks violated the California False Claims Act (FCA) by failing to report and deliver millions of dollars owed on unclaimed cashier's checks to the State of California as escheated property, even if banks were not protected from competing escheat claims by other states to the same funds, absent showing that any other states had asserted claims or obtained judgments for the money owed on the uncashed cashier's checks.

INVERSE CONDEMNATION - GEORGIA

City of Lawrenceville v. Alford

Court of Appeals of Georgia - November 22, 2022 - S.E.2d - 2022 WL 17099947

Property owner brought negligence action against city relating to storm-water runoff on her property.

After a jury trial, the Superior Court awarded owner $425,000 in damages plus $8,742.86 in litigation expenses. City appealed.

The Court of Appeals held that:

- Issue of whether special damages occurred during six-month period prior to owner giving ante litem notice to city as required under municipal corporation statute governing demand prerequisite was for jury;
- Issue of whether city engaged in bad faith conduct with respect to creek project as would support award of statutory litigation expenses was for jury;
- Trial court did not abuse its discretion in determining that evidence regarding conditions on property owner's property leading up to city's creek project, and the cause of those conditions, was relevant, more probative than prejudicial, and admissible at trial; and
- Trial court's error, if any, in admitting evidence that city trespassed on property owner's property during prior project was harmless.

EMINENT DOMAIN - INDIANA

Lake Ridge School Corporation v. Holcomb

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

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

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

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

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

PREVAILING WAGE ACT - MISSOURI

Brockington v. New Horizons Enterprises, LLC

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

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

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

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

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

NEGLIGENCE - NEW YORK

Annitto v. Smithtown Central School District

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

Mother, on behalf of high school football player, brought personal injury action against school district, alleging that district was negligent in supervising football player during off-season weight-

training test, during which he lost control of bar weighing 295 pounds, causing one of his fingers to be crushed.

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

The Supreme Court, Appellate Division, held that:

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

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

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

TELECOM - OHIO

Maple Heights v. Netflix, Inc.

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

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

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

The Supreme Court held that:

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

Video-streaming services were not "video-service providers" within meaning of the Fair Competition in Cable Operations Act, and therefore, they were not required to obtain a video-service authorization from Director of the Department of Commerce, because services used the public

internet to provide content and as such, they did not place their own wires or equipment in public rights-of-way to provide their subscribers with their programing, and equipment used to access their services belonged to their customers, not them.

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

BANKRUPTCY - PUERTO RICO

In re Financial Oversight and Management Board for Puerto Rico

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

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

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

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

The Court of Appeals held that:

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

State-chartered credit unions failed to meet heightened pleading standard for claims of fraud against Commonwealth of Puerto Rico, Corporación Pública para la Supervisión y Seguro de Cooperativas de Puerto Rico (COSSEC), and Government Development Bank (GDB), arising from

defendants' alleged participation in fraudulent scheme to coerce credit unions into buying government bonds while knowing that bonds were unsustainable and would diminish in value; while providing some factual allegations beyond "based-on-information-and-belief" assertions, credit unions did not plausibly plead even the first element of fraud, false representations by defendants, with complaint failing to provide requisite level of particularity and instead outlining a broad and vague scheme involving COSSEC's issuance of circular letters, purported threats, and unspecified meetings between individuals over four-year period, and mere speculation about defendants' knowledge of falsity of any allegedly false statements.

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

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

TELECOM - TENNESSEE

City of Knoxville v. Netflix, Inc.

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

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

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

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

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

COURTS - CALIFORNIA

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

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

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

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

The Court of Appeal held that:

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

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

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

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

SCHOOLS - COLORADO

Education ReEnvisioned BOCES v. Colorado Literacy and Learning Center

Colorado Court of Appeals, Division VII - November 3, 2022 - P.3d - 2022 WL 16641819 - 2022 COA 128

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

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

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

MUNICIPAL ORDINANCE - GEORGIA

City of Atlanta v. Girls Galore, Inc.

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

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

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

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

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

SCHOOL FINANCE - IOWA

Save Our Stadiums v. Des Moines Independent Community School District

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

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

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

The Supreme Court held that:

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

Total number of voters at the election, rather than total number of votes cast in at-large school board election race, was number to be counted when multiplying by 30% to determine the statutory

threshold to trigger public referendum on school district's proposed athletic stadium and financing plan; statute required count of "voters at" the election, which included multiple races for city council seats and school board positions, and did not refer to the number of "votes in" the last election of school officials.

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

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

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

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

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

ZONING & PLANNING - MONTANA

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

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

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

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

The Supreme Court held that:

- 30 day statute of limitations did not apply;
- Landowner's status as owner of property was sufficient to state a protected property interest for § 1983 claims;
- Complaint sufficiently set forth a § 1983 claim against the board;
- Allegations were sufficient to state a § 1983 due process claim;

- Allegations were sufficient to state a § 1983 claim based on an unconstitutional taking; and
- Allegations were sufficient to state a "class of one" equal protection claim.

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

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

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

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

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

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

LIABILITY - NEW YORK

Maldovan v. County of Erie

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

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

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

The Court of Appeals held that:

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

ANNEXATION - OHIO

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

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

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

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

Petition for expedited type-2 annexation of township property to city complied with statutory provision requiring that municipal corporation to which annexation was proposed agree to provide services specified in its statutorily-required services resolution to territory proposed for annexation, even though city did not resolve to provide water and sewer services to proposed territory; statute plainly permitted municipality to pick and choose services it would offer annexed territory, and board of county commissioners could not exercise veto power over substance of municipal corporation's services resolution.

PUBLIC UTILITIES - PENNSYLVANIA

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

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

16754137

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

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

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

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

SCHOOLS - PENNSYLVANIA

Save Our Saltsburg Schools v. River Valley School District

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

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

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

The Commonwealth Court held that:

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

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

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

hearing regardless of community opposition.

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

IMMUNITY - WEST VIRGINIA

Jones v. Logan County Board of Education

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

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

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

The Supreme Court of Appeals held that:

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

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

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

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

USER FEES - CALIFORNIA

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

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

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

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

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

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

CONSTITUTIONAL LAW - CALIFORNIA

Lunn v. City of Los Angeles

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

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

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

The District Court held that:

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

LIENS - CONNECTICUT

Metropolitan District Commission v. Marriott International, Inc.

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

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

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

The Appellate Court, held that:

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

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

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

MONUMENTS - GEORGIA

Sons of Confederate Veterans v. Henry County Board of Commissioners

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

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

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

The Supreme Court held that:

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

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

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

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

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

POLITICAL SUBDIVISIONS - KANSAS

Hennessey v. University of Kansas Hospital Authority

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

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

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

The Court of Appeals held that:

- As matter of first impression, authority bore the burden to establish its status as an arm of the state for purposes of sovereign immunity defense;
- Authority bore the burden to establish its status as an arm of the state for purposes of diversity

jurisdiction;
- Limited role of governor and legislature with respect to board governing authority supported determination that it was not an arm of the state;
- Factor of ownership and control over property favored a finding that authority was an arm of the state;
- Ability of authority to form its own contracts favored supported determination that it was not an arm of the state;
- Ability of authority to set policies supported determination that it was not an arm of the state; and
- Vacatur of dismissal and remand to receive additional evidence was warranted.

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

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

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

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

Under Kansas law, limited role of governor and legislature with respect to board governing state university hospital authority favored a finding that authority was autonomous from the State, thus supporting determination that it was not an arm of the state entitled to Eleventh Amendment sovereign immunity from patient's suit asserting claim for negligent supervision based on sexual assault by hospital radiology technician; although 13 of 19 board members had been appointed by governor and confirmed by legislature at authority's inception, governor now had to select from

candidates chosen by the board when appointing a new member, governor did not choose who led the board or who was in charge of overseeing authority's daily operations, and governor could not remove a member of the board.

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

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

SCHOOL FINANCE - NORTH DAKOTA

Hoke County Board of Education v. State

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

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

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

The Supreme Court held that:

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

Trial court acted within its inherent power in issuing order directing state officials to transfer available funds to implement portions of comprehensive remedial plan that was developed pursuant to a consent order to achieve State's obligation under State Constitution to provide all children in state an opportunity to obtain a sound basic education in a public school, where court provided the executive and legislative branches time and space to fix the violation on their own terms for over 17

years, executive and legislative branches repeatedly failed to remedy an established statewide violation, court exhausted all established alternative methods before directing transfer of funds, and court sought the least intrusive remedy that would still adequately address the violation.

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

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

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

PREEMPTION - WASHINGTON

Rental Housing Association of Washington v. City of Federal Way

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

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

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

The Court of Appeals held that:

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

PUBLIC UTILITIES - WEST VIRGINIA

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

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

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

The Supreme Court of Appeals held that:

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

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

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

TELECOM - ARKANSAS

City of Ashdown, Arkansas v. Netflix, Inc.

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

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

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

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

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

IMMUNITY - CALIFORNIA

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

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

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

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

The Court of Appeal held that:

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

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

Former ward could not overcome immunity accorded to State Department of Hospitals for injuries to inpatient of mental institution by alleging that Department violated generally worded regulations; rather, for claims to fall within statutory exception for failure to provide adequate or sufficient equipment, personnel or facilities, as an exception to immunity, ward was required to allege Department violated specific minimum standard sufficient to put the Department on notice as to the minimum requirements with which it must comply, overruling Baber v. Napa State Hospital, 257 Cal.Rptr. 55.

EMINENT DOMAIN - FEDERAL

Hippely v. United States

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

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

easement into public recreational trail under National Trails Systems Act Amendments, prior to eventual expiration of the NITU and abandonment of easement.

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

The Court of Federal Claims held that:

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

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

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

PUBLIC UTILITIES - FEDERAL

United Power, Inc. v. Federal Energy Regulatory Commission

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

Utility member of generation and transmission cooperative petitioned for review of declaratory order of the Federal Energy Regulatory Commission (FERC), which determined that upon admission of natural gas supplier to electrical cooperative, cooperative was subject to jurisdiction of FERC, and that FERC had exclusive jurisdiction over exit charges, which cooperative charged to exiting utility members of cooperative. Second utility member and Colorado Public Utilities Commission (PUC) intervened in support of utility member. Cooperative, and a third and fourth utility member intervened in support of FERC.

The Court of Appeals held that:

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

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

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

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

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

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IMMUNITY - NORTH CAROLINA

Estate of Ladd by Ladd v. Funderburk

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

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

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

The Court of Appeals held that:

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

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

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

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

MUNICIPAL ORDINANCE - FLORIDA

Florida Association of Realtors v. Orange County, Florida

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

Real estate agents' association filed suit against county, seeking declarations that proposed rent control ordinance was unconstitutional and that ballot summary of ordinance was invalid, and seeking injunctive relief to prevent county from enforcing ordinance and to prevent county supervisor of elections from conducting or certifying referendum election on ordinance.

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

The District Court of Appeal held that:

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

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

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

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

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

Direct conflict between proposed county rent control ordinance and statute setting conditions under which local governments could adopt such ordinances, which conflict rendered ordinance unconstitutional pursuant to state constitutional prohibition against ordinances inconsistent with general law, constituted irreparable harm, in and of itself, for purposes of determining whether real estate agents' association was entitled to temporary injunction, in association's action challenging validity of ordinance and its associated ballot measure.

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

Public interest supported issuance of temporary injunction to prevent county from enforcing proposed rent control ordinance that did not meet facial requirements of statute setting conditions under which local governments could adopt such ordinances, and did not meet facial requirements

of state constitutional prohibition against ordinances inconsistent with general law.

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

EMINENT DOMAIN - GEORGIA

Edgewater Hall Enterprises, LLC v. City of Canton

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

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

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

The Court of Appeals held that:

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

Evidence supported trial court's determination that actions of city during negotiations regarding taking for temporary construction easement for access across property to build sewer main and pedestrian trail did not rise to the level of bad faith to justify setting aside declaration of taking, even though city failed to recognize servient tenement owner as property owner despite conducting negotiations with it and offered lower amount than appraisal valuation; evidence showed that city stopped negotiating with servient tenement owner after city's title search led to erroneous conclusion that servient tenement owner was not the owner of property underlying easement and that amount city offered was based on comparable settlement city had reached with owner of different property.

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

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

MUNICIPAL ORDINANCE - NEBRASKA

REO Enterprises, LLC v. Village of Dorchester

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

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

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

The Supreme Court held that:

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

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

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

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

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

ZONING & PLANNING - PENNSYLVANIA

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

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

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

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

The Commonwealth Court held that:

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

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

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

EMINENT DOMAIN - TEXAS

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

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

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

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

The Court of Federal Claims held that:

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

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

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

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

Property owner's costs for displacement of tenants from his rental units would be awarded as just compensation for government's flowage easement that effected permanent physical partial taking of owners' real and personal property upstream from dams operated by Army Corps of Engineers, including owner's costs in lost income and utility payments for one unit and lost rent for another unit due to Corps' flooding of properties with impounded water during hurricane, since owner's units were vacant because of government's taking, but award was reduced by half to reflect owner's proportional ownership of property, and costs incurred in traveling from his home in California to Texas to oversee repair of his properties and testify during liability trial were incidental and thus noncompensable.

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

EMINENT DOMAIN - WYOMING

Colton v. Town of Dubois

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

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

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

The Supreme Court held that:

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

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

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

ENVIRONMENTAL LAW - CALIFORNIA

G.I. Industries v. City of Thousand Oaks

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

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

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

The Court of Appeal held that:

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

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

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

IMMUNITY - GEORGIA

City of Roswell v. Hernandez-Flores

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

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

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

The Court of Appeals held that:

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

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

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

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

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

POLITICAL SUBDIVISIONS - GEORGIA

City of Winder v. Barrow County

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

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

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

The Court of Appeals held that:

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

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

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

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

LIABILITY - KENTUCKY

City of Barbourville v. Hoskins

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

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

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

The Supreme Court held that:

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

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

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

The burns invitee, who had diabetic neuropathy that caused a loss of protective sensation in her feet, sustained from walking on sun-heated walkways at city-owned water park were not foreseeable to the city, and thus the city had no duty to eliminate the allegedly dangerous condition; there was no evidence of any feasible means the city could have undertaken to lessen the alleged risk created by heat radiating from sidewalks warmed by the summer sun, no evidence that the city acted outside of industry standard practices, and no evidence why the city would have anticipated injuries like invitee's to take place.

SHORT TERM RENTALS - LOUISIANA

Hignell-Stark v. City of New Orleans

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

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

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

The Court of Appeals held that:

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

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

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

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

FINANCIAL REPORTING - MISSOURI

City of Foley v. Director, Missouri Department of Revenue

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

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

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

The Court of Appeals held that:

- City failed to prove its claim that defendants' motions for judgment on the pleadings were essentially motions to dismiss for failure to state a claim;
- Trial court properly decided merits of well-pleaded declaratory relief action by judgment of dismissal;
- There was no declaration that trial court could make with regard to regulation that would change fact that filing requirement and penalty procedures were all statutory;
- Regulation did not exceed its statutory authority; and

- Trial court necessarily could not proclaim that regulation's six-month post fiscal year deadline imposed a mandatory fine on city without due process.

ZONING & PLANNING - OHIO

State ex rel. Halstead v. Jackson

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

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

The Supreme Court held that:

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

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

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

PUBLC RECORDS - NEW HAMPSHIRE

Colquhoun v. City of Nashua

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

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

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

The Supreme Court held that:

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

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

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

PUBLIC UTILITIES - PENNSYLVANIA

City of Lancaster v. Pennsylvania Public Utility Commission

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

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

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

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

Regulation, that generally required gas meters to be placed outside building but allowed inside meter location to be considered when building was located in historic district, improperly vested absolute discretion in natural gas distribution companies (NGDCs) as to whether to require that a gas meter be located inside or outside of historic building, such that regulation was without adequate standards to guide and restrain exercise of authority delegated from Public Utility Commission (PUC) to NGDCs, and thus regulation was unconstitutional delegation of legislative authority; regulation lacked formal procedure to challenge NGDC's decision, NGDCs were not

required to give reasons for decision, and regulation contained no presumption of maintaining gas meter's current location.

BANKRUPTCY - PUERTO RICO

In re Financial Oversight and Management Board for Puerto Rico

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

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

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

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

BANKRUPTCY - PUERTO RICO

In re Financial Oversight and Management Board for Puerto Rico

United States Court of Appeals, First Circuit - October 27, 2022 - F.4th - 2022 WL 15254099

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

Creditors objected.

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

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

Retirees then appealed confirmation order.

The Court of Appeals held that:

- Confirmation order did not incorporate by reference the stipulation and final judgment's

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

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

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

WATER LAW - SOUTH DAKOTA

Little v. Hanson County Drainage Board, Hanson County

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

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

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

The Supreme Court held that:

- Objectors were required to directly appeal township's approval of application in order to challenge township's consent to permit;
- Board complied with procedures outlined in its ordinances for examining drainage permit application to determine whether township provided necessary written approval;
- Board complied with public notice requirements;
- Board did not violate its ordinance requiring applicant to post notice on the property at county's direction by failing to require applicant to post notice on his property;

- Board did not abuse its discretion in approving application without considering applicant's alleged prior improper removal of driveway and culvert; and
- Proffered evidence that objectors alleged would establish that township's consent to permit was invalid was not relevant in determining whether board complied with its ordinances in granting application.

BALLOT INITIATIVES - SOUTH DAKOTA

Dakotans for Health v. Noem

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

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

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

The Court of Appeals holds that:

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

Ballot question committee faced concrete, particularized, and actual injury from South Dakota law imposing new obligations on persons compensated to circulate initiative petitions, as required to establish standing to seek prospective First Amendment relief, even though challenged provisions were directed primarily at petition circulators; requirement that paid petition circulators publicly disclose sensitive personal information would likely make it more difficult for committees to recruit paid circulators, thereby restricting committee's ability to reach its audience, and South Dakota regulated petition circulators and ballot question committees in such way that their interests were highly intertwined, if not inseparable.

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

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

Balance of harms and public interest favored issuance of preliminary injunction barring enforcement of South Dakota law imposing restrictions on paid petition circulators that likely violated First

Amendment; while South Dakota had important interests in protecting integrity of ballot initiative process, it had no interest in enforcing overbroad restrictions.

SURETY BONDS - UTAH

In re Western Insurance Company

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

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

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

The Supreme Court held that:

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

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

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

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

TELECOM - ARIZONA

Vertical Bridge Development LLC v. County of Maricopa

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

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

Board moved for partial judgment on the pleadings.

The District Court held that:

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

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

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

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

ANNEXATION - CALIFORNIA

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

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

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

The Superior Court denied petition. District appealed.

The Court of Appeal held that:

- LAFCO did not have authority to issue resolution under statute granting it authority to approve

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

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

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

Resolution adopted by county local agency formation commission (LAFCO) ordering detachment of fire protection services from rural county fire protection district in future annexations of territory by the city was not "procedure," within meaning of statutes providing LAFCO with power to review and approve proposals for changes of organization or reorganization consistent with procedures adopted by LAFCO, and to adopt written procedures for evaluation of proposals, and thus statutes were not basis of authority to issue resolution; resolution did not set forth any rules of procedure for bringing or presenting an annexation proposal to the LAFCO, but it instead dictated the substance of that proposal.

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

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

from district, improperly limited LAFCO's consideration of that dispositive issue in context of specific annexation being proposed.

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

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

EMINENT DOMAIN - CALIFORNIA

Sheetz v. County of El Dorado

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

Landowner filed petition for writ of mandate and complaint for declaratory and injunctive relief to challenge $23,420 traffic impact mitigation fee imposed by county as a condition of issuing him a building permit for the construction of a single-family residence on his property.

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

The Court of Appeal held that:

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

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

Traffic impact mitigation fee $23,420 which county imposed on landowner as a condition of issuing a building permit for the construction of a single-family residence on his property was not subject to the heightened scrutiny of the *Nollan/Dolan* test for assessing takings claims in the context of land-

use exactions; fee was not an “ad hoc exaction” imposed on a property owner on an individual and discretionary basis, but was a development impact fee imposed pursuant to a legislatively authorized fee program that generally applied to all new development projects within the county, and fee was calculated using a formula that considered various factors.

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

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

EMINENT DOMAIN - FLORIDA

Gulf Coast Transportation, Inc. v. Hillsborough County

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

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

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

The District Court of Appeal held that:

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

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

proceeding, namely, whether a taking occurred within the meaning of the Florida Constitution.

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

TELECOM - ILLINOIS

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

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

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

Platforms moved to dismiss.

The District Court held that:

- As a matter of first impression, CVCL did not provide an express private right of action;
- City did not have right of action based on home rule authority;
- CVCL did not imply a private right of action;
- City failed to state a claim for trespass;
- City ordinance did not provide an express right of action;
- City did not plausibly allege that platforms were violating the ordinance at issue; and
- Implying a private right of action was not warranted since ordinance provided an adequate remedy.

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

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

constitution.

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

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

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

Implying a private right of action under section of municipal code requiring city's and operating franchise company's prior written consent and approval to resell cable communication signals or service within the city was not warranted under Illinois law, in city's lawsuit against video streaming platforms alleging that platforms owed it a service fee for using its public rights-of-way to transmit content to subscribers, where city's allegations regarding platforms' peering agreements with internet service provides did not lead to plausible conclusion that platforms were even reselling cable in violation of the ordinance.

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

MUNICIPAL CORPORATIONS - MISSISSIPPI

Longo v. City of Waveland

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

Individual objector filed a notice of appeal of decision of city's board of aldermen to approve

application for conditional use and preliminary plat approval. After the ten-day period for taking an appeal had run, objector then amended the notice of appeal to name applicant as appellee.

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

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

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

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

TELECOM - NEVADA

City of Reno v. Netflix, Inc.

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

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

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

The Court of Appeals held that:

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

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

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

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

NEGLIGENCE - NEW YORK

Schneider v. Hanasab

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

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

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

The Supreme Court, Appellate Division, held that:

- Jury finding that town was 70% at fault was not contrary to the weight of the evidence;
- Jury's award of principal sum of $2,000,000 for rider's conscious pain and suffering was not contrary to the weight of the evidence; but
- Jury's award of damages for loss of services in the sum of $125,000 was contrary to the weight of the evidence.

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

Jury verdict awarding executrix of motorized-scooter rider's estate principal sum of $2,000,000 for rider's conscious pain and suffering was not contrary to the weight of the evidence in personal injury and wrongful death action brought by executrix against driver and town, alleging that as result of defendants' negligence, rider was struck by driver's vehicle at an intersection in town, where opinion of executrix's medical expert regarding pain rider experienced between time of accident and his death four days later, together with executrix's testimony regarding her observations of rider

during his hospitalization, sufficiently demonstrated degree of rider's consciousness and severity of pain he suffered, and award did not deviate materially from what would be reasonable compensation.

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

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