
PUBLIC UTILITIES - IOWA

Xenia Rural Water District v. City of Johnston

Supreme Court of Iowa - May 7, 2021 - N.W.2d - 2021 WL 1822780

Rural water district, which sought to service areas within two miles of city, brought action against city asserting § 1983 claim based on alleged violation of provision of Consolidated Farm and Rural Development Act prohibiting municipalities from encroaching upon federally-indebted utilities, and seeking, among other forms of relief, an injunction and declaratory judgment.

City counterclaimed, seeking an injunction and declaration as to parties' legal rights to service disputed areas.

The United States District Court granted partial summary judgment to district as to areas beyond two miles of city limits and granted partial summary judgment to city as to areas within two miles of city limits. District filed a motion for reconsideration, and the District Court certified three questions to the Iowa Supreme Court.

The Supreme Court held that:

- Statute setting territorial limits for district's provision of services grants cities primary right to provide service to areas within two miles of city limits;
- District does not obtain right to serve such areas on basis that county board of supervisors' resolution describes or includes areas in district's service territory;
- Act did not preempt two-mile rule;
- District is not excepted from statute's notice-of-intent requirements on basis that county board of supervisors' resolution designates disputed areas as within district's boundaries;
- Areas were not district's "existing service area," and thus district was not excepted from notice-o--intent requirements;
- Nonprofit corporation does not have legal right to provide water service "anywhere" in Iowa; and
- Any broader territorial rights enjoyed by nonprofit are abandoned when corporation dissolves and reincorporates as rural water district.

BONDS - MINNESOTA

Matter of Trusteeship under Indenture of Trust, dated as of September 1, 1996.

Court of Appeals of Minnesota - April 19, 2021 - Not Reported in N.W. Rptr. - 2021 WL 1522479

City Industrial Development Agency (the IDA) is the fee owner of a property (the Facility). The IDA issued industrial development revenue bonds (the Bonds) in the amount of $5.7 million to finance the Gemma Development Company's acquisition and renovation of the Facility. The Bonds were

payable from, and secured by, funds generated by the Facility. The Bonds had a maturity date of March 20, 2018.

The IDA created a trust (the Trust) via an indenture of trust (the Indenture) dated September 1, 1996, for the purpose of receiving funds and paying the Bonds. Wells Fargo Bank, National Association (Trustee), is the successor trustee of the Trust. In a concurrent lease agreement (the Lease) dated September 1, 1996, the IDA leased the Facility to Gemma. The Lease required Gemma to "pay or cause to be paid basic rent for the Facility on or before each monthly Bond Payment Date directly to the Trustee, in an amount equal to the Debt Service Payment becoming due and payable on the Bond on such Bond Payment Date." Gemma then sublet the Facility to the County via a sublease agreement (the Sublease). Pursuant to an assignment of rents, rent under the Sublease was payable "directly from Sublessee [Orange County] to the Trustee."

In 2006, Gemma received a loan from respondent M&T Bank Corporation in exchange for a mortgage on the Facility and an assignment of rents and leases. Gemma defaulted on loan payments, and in 2008, M&T initiated foreclosure proceedings. In 2010, Gemma abandoned the Facility, but Orange County continued making monthly rent payments directly to the Trustee.

The Bonds matured and the Lease terminated by its terms on March 20, 2018. The Trustee paid the Bondholders. On April 30, 2019, the Trustee filed a petition in district court pursuant to what is now Minn. Stat. § 501C.0202(24) (2020) seeking an order directing the Trustee's distribution of $351,507.37 in remaining funds.

On September 30, 2019, the Trustee filed an amended petition regarding the disposition of the reduced net remaining balance of $325,935.19. The IDA and M&T filed separate objections and claimed the right to disbursement of the net remaining balance. M&T claimed it was entitled to the funds based on its mortgage and assignment of rents with Gemma. The IDA meanwhile argued that, because the net remaining balance was generated by Orange County's rent payments, the IDA was entitled to the funds.

On April 24, 2020, the district court issued its order for the distribution of the net remaining balance. The district court concluded that the Trustee was entitled to its fees and expenses and that neither M&T nor the IDA were entitled to the net remaining balance.

The IDA argued that it was Gemma's successor because Gemma abandoned the property without consummating the purchase of the Facility, thereby surrendering its rights under the Lease and any interest in the net remaining balance to the IDA.

The district court denied the IDA's motion. It explained that "[t]he terms successors and assigns are commonly used in the context of corporate mergers and acquisitions transactions or transactions involving the sale of the assets of an entity." It reasoned that, in the context of the Bond Documents, the phrase referred "to the circumstances of a transaction involving the sale of Gemma or the sale of Gemma's assets …. [T]he parties agree Gemma is a corporation that has not been dissolved and Gemma's assets have not been sold. Thus, the IDA is not Gemma's successor or assign." The district court likewise concluded that the IDA was not Gemma's successor in interest. It explained that the term meant "[s]omeone who follows another in ownership or control of property. A successor in interest retains the same rights as the original owner, with no change in substance." The district court concluded that, because Gemma's right to the net remaining balance was not premised on its ownership of the Facility, the IDA's fee-theory asserted a different right.

An appeal followed.

The Court of Appeals began its analysis by stating that, "The district court concluded that Gemma was entitled to the net remaining balance pursuant to the clear language of the Indenture and Lease and because the IDA was not Gemma's successor. The IDA acknowledges that the Indenture and Lease identify 'Gemma … and its successors and assigns' as the 'Company' entitled to the net remaining balance. But the IDA argues that it became Gemma's successor upon either Gemma's abandonment of the Facility in 2010 or upon the expiration of the Lease in 2018."

"Additionally, neither the Indenture nor the Lease conditioned Gemma's entitlement to the net remaining balance on either: (1) the nonexistence of any event of default, or (2) Gemma's ongoing occupancy of the Facility. Instead, the only preconditions to the disbursement of the net remaining balance were the payments of the Bonds, fees, charges, and expenses."

"Because we conclude that the district court properly read the relevant provisions of the documents, and because the district court's decision was consistent with its reading of those documents, we discern no abuse of discretion by the district court and affirm the order instructing the Trustee regarding the distribution of the net remaining balance."

EMINENT DOMAIN - OHIO

Harrison v. Montgomery County, Ohio

United States Court of Appeals, Sixth Circuit - May 11, 2021 - F.3d - 2021 WL 1881382

Owner of property foreclosed for failure to pay taxes brought putative § 1983 class action against county, asserting takings claims under the Fifth and Fourteenth Amendments, alleging that county transferred properties to a land reutilization corporation without providing compensation for value that exceeded tax liabilities.

The United States District Court granted county's motion to dismiss for failure to state a claim. Owner appealed.

The Court of Appeals held that:

- Ohio claim preclusion law did not bar claims;
- Tax Injunction Act did not bar claims;
- Comity principles did not compel abstention; and
- Remand from appellate court was warranted for district court to consider claims in the first instance.

Ohio claim preclusion law did not bar property owner's § 1983 federal takings claims challenging county's seizure of surplus equity, an amount in excess of taxes owed, through Ohio's land bank foreclosure statute whereby county transferred clear title to owner's property to a land bank; federal takings claim was not ripe until county Board of Revision's final decision adjudicating foreclosure of owner's property and transfer of property to land bank.

Tax Injunction Act did not bar property owner's § 1983 takings claims challenging county's seizure of surplus equity, an amount in excess of taxes owed, through Ohio's land bank foreclosure statute whereby county transferred clear title to owner's property to a land bank; property owner did not challenge Ohio's collection of delinquent taxes and did not seek to halt foreclosures of tax-delinquent property or seek to get home back.

Comity principles did not compel federal court abstention from property owner's § 1983 takings

claims challenging county's seizure of surplus equity, an amount in excess of taxes owed, through Ohio's land bank foreclosure statute whereby county transferred clear title to owner's property to a land bank, since property owner challenged only Ohio's extinguishment of surplus equity, not its foreclosure of tax-delinquent property.

Remand from appellate court was warranted for district court to consider property owner's § 1983 takings claim in the first instance, challenging county's seizure of surplus equity, an amount in excess of taxes owed, through Ohio's land bank foreclosure statute whereby county transferred clear title to owner's property to a land bank; neither Tax Injunction Act nor comity principles barred challenge.

SCHOOL FINANCE - OHIO

State ex rel. Horizon Science Academy of Lorain, Inc. v. Ohio Department of Education

Supreme Court of Ohio - May 19, 2021 - N.E.3d - 2021 WL 1992212 - 2021-Ohio-1681

Community schools that were operated by a foreign corporation filed petition for writ of mandamus directing Ohio Department of Education (ODE), the governor, and other state officials to approve schools' applications for Quality Community School Support (QCSS) program grants and accordingly award each school $1,750 for each economically disadvantaged student and $1,000 for other students enrolled for the fiscal year.

The Supreme Court held that:

- As a matter of first impression, the definition of "good standing," as criteria for QCSS grant, related to solely to the operator's standing as a qualified and effective operator of community schools, and
- Schools were entitled to writ of mandamus directing the ODE to approve their grant applications and award them QCSS-grant funding.

Definition of "good standing" for community-school operators under Quality Community School Support (QCSS) program, which provided grant funding of $1,750 or $1,000 per student to a school designated as a "Community School of Quality" depending on whether the student was economically disadvantaged, related solely to the operator's standing as a qualified and effective operator of community schools, not corporate registration with the Secretary of State.

Community schools established that they had clear legal right to Quality Community School Support (QCSS) program funding grants and a clear legal duty on the part of the Ohio Department of Education (ODE) to provide them, and therefore, schools were entitled to writ of mandamus ordering ODE to approve their grant applications and award them QCSS-grant funding, where schools' operator satisfied each of the good-standing criteria pertaining to operators.

ZONING & PLANNING - CALIFORNIA

Kracke v. City of Santa Barbara

Court of Appeal, Second District, Division 6, California - May 4, 2021 - Cal.Rptr.3d - 2021 WL 1746301 - 21 Cal. Daily Op. Serv. 4342 - 2021 Daily Journal D.A.R. 4377

Manager of short-term vacation rentals filed petition for writ of mandate commanding city to allow short-term vacation rentals in its coastal zone as it had done before instituting new policy that banned such rentals in the coastal zone.

The Superior Court, Ventura County granted the petition. City appealed.

The Court of Appeal held that city's ban on short-term vacation rentals in the coastal zone constituted a "development" under the Coastal Act that required a coastal development permit (CDP) or an amendment to its certified local coastal program (LCP).

City's enforcement of a ban on short-term vacation rentals in its coastal zone constituted a "development" under the Coastal Act and, as such, city was required to obtain a coastal development permit (CDP) or an amendment to its certified local coastal program (LCP) prior to instituting the ban, where city had previously allowed such rentals in the coastal zone, and by changing that policy, it necessarily changed the intensity and use of and access to land and water in the coastal zone, which was inconsistent with the Coastal Act's goals of providing low-income families with access to visit the coast.

DUMBASSERY - MASSACHUSETTS

Commonwealth v. Tinsley

Supreme Judicial Court of Massachusetts, Berkshire - May 6, 2021 - N.E.3d - 487 Mass. 380 - 2021 WL 1803606

Defendant was convicted in the Superior Court Department of armed home invasion and other offenses.

After his convictions were affirmed, his motion for new trial was granted and his armed home invasion conviction was vacated. State appealed.

The Supreme Judicial Court held that:

- Defendant's entry into attached garage of victims' house constituted entry into "dwelling place of another," for purposes of armed home invasion offense; but
- Defendant, who had taken screwdriver he used as weapon from toolbox in garage, was not armed at time of entry; and
- Double Jeopardy principles did not prevent resentencing defendant on his remaining convictions after his conviction for armed home invasion was vacated.

ANNEXATION - MISSISSIPPI

Matter of Enlarging, Extending and Defining Corporate Limits and Boundaries of City of Canton v. City of Canton

Supreme Court of Mississippi - May 6, 2021 - So.3d - 2021 WL 1807424

Residents of unincorporated community neighboring city petitioned for incorporation. Subsequently, city petitioned to annex five areas of unincorporated territory in same county.

After consolidating the incorporation and annexation proceedings, the Chancery Court granted

incorporation petition in part and annexation petition in part. Objectors appealed, and city cross-appealed.

The Supreme Court held that:

- Signatures from original incorporation petition counted in determining whether amended petition met statutory signature requirement;
- Chancellor did not manifestly err in determining that incorporation petition contained requisite signatures;
- City had need to expand with respect to two areas with significant spillover residential development;
- City's path of growth weighed in favor of annexation of those two areas;
- City had reasonable financial ability to annex two areas; and
- Proposed annexation was reasonable in terms of fairness and equity for two areas.

Signatures from original petition to incorporate new municipality counted in determining whether amended petition met statutory requirement of signatures of two-thirds of qualified electors residing in proposed incorporation area, even though petitioners did not attach signatures to amended petition, where grant of petitioners' motion to amend petition was for limited purpose of correcting a legal description to match city's map, and amended petition referred back multiple times to original petition, which included numerous lists of signatures.

A certified copy of voter roll is starting point for determining registered voters as part of a determination of whether a petition to incorporate new municipality contains requisite signatures of two-thirds of qualified electors residing in proposed incorporation area, and a voter's address on roll is the most viable record of whether a voter resided in proposed incorporation area on date of filing.

Chancellor did not manifestly err in determining that petition to incorporate new municipality contained requisite signatures of two-thirds of qualified electors residing in proposed incorporation area, even though voter roll provided by county on date of initial filing was incomplete because it did not contain inactive voters, where chancellor, in his own analysis based on all testimony, accepted petitioners' methodology of accounting for known voters by canvassing area and unknown voters by a process known as reverse engineering voter roll, chancellor calculated margin or cushion of qualified electors, and chancellor used methodology based on a rationale used by county election commission, as well as that used throughout state, when attempting to purge voters.

While voter rolls are the most viable evidence for determining registered voters as part of a determination of whether a petition to incorporate new municipality contains requisite signatures of two-thirds of qualified electors residing in proposed incorporation area, citizens seeking incorporation may offer evidence that voters appearing on voter rolls have died, have moved, or otherwise have become ineligible to vote.

To determine reasonableness of annexation, a court considers: (1) need for expansion; (2) path of growth; (3) potential health hazards; (4) city's financial ability to make improvements and furnish municipal services; (5) need for zoning and overall planning; (6) need for municipal services; (7) natural barriers; (8) past performance and time element involved in city's provision of services to present residents; (9) economic or other impact of annexation upon those who live in or own property in annexation area; (10) impact of annexation upon voting strength of protected minority groups; (11) whether property owners and other inhabitants have enjoyed economic and social benefits of city without paying fair share of taxes; and (12) any other factors that may suggest reasonableness.

Factors for determining whether a city has a need for expansion, as a factor for determining reasonableness of annexation, include: (1) spillover development into proposed annexation area; (2) city's internal growth; (3) city's population growth; (4) city's need for development land; (5) need for planning in annexation area; (6) increased traffic counts; (7) need to maintain and expand city's tax base; (8) limitations due to geography and surrounding cities; (9) remaining vacant land within city; (10) environmental influences; (11) city's need to exercise control over proposed annexation area; and (12) increased new building permit activity.

City had need to expand with respect to two of five areas of unincorporated territory that it sought to annex, so as to support finding that city's proposed annexation was reasonable with respect to those areas, even though city had vacant land within its boundaries and a declining population, where two areas had significant residential development that spilled over from city at a very dense level, unlike the other three areas, and citizens in two areas received benefit of water, sewer services, electricity, natural gas, police response, fire response, and emergency response without having to pay ad valorem taxes to help city fund the large expenses incurred to provide services.

Factors for determining a city's path of growth, as a factor for determining reasonableness of annexation, include: (1) spillover development in annexation area; (2) annexation area immediately adjacent to city; (3) limited area available for expansion; (4) interconnection by transportation corridors; (5) increased urban development in annexation area; (6) geography; and (7) subdivision development.

The "path of growth" factor for determining reasonableness of city's proposed annexation of five areas of unincorporated territory weighed in favor of annexation for first and second areas, was neutral for third and fourth areas, and weighed against annexation of fifth area, where first and second areas had significant spillover residential development, third and fourth areas contained a mix of commercial and residential development with no spillover, fifth area contained commercial development with no spillover, city provided services to first four areas, and third through fourth areas lay, at best, in potential growth paths for city unlike first and second areas which were an active path of growth.

Potential health hazards from sewage and waste disposal existed in proposed annexation areas, as a factor for determining reasonableness of city's proposed annexation of five areas of unincorporated territory, and those potential hazards were worthy of remedy, annexation or otherwise.

Factors for evaluating a city financial ability to make the improvements and furnish municipal services promised, as a factor for determining reasonableness of annexation, include (1) city's present financial condition; (2) sales tax revenue history; (3) recent equipment purchases; (4) financial plan and department reports proposed for implementing and fiscally carrying out annexation; (5) fund balances; (6) city's bonding capacity; and (7) expected amount of revenue to be received from taxes in annexed area.

City had reasonable financial ability for proposed annexation with respect to two of five areas of unincorporated territory that city sought to annex, so as to support finding that annexation was reasonable with respect to those two areas, which had significant spillover residential development; although city had recent budget cuts and violations of state audit and budget laws, city also a history of stable sales tax revenues, city's bond capacity was healthy, and an expert projected that annexation would generate net general-fund revenues which would be added to city's debt-servic--fund balance.

City's proposed annexation was reasonable in terms of fairness and equity as to the two proposed areas that had significant spillover residential development unlike the three other proposed areas,

even though city had highest millage rate in county, where financial impact resulting from city taxes would be offset by savings on both homeowners-insurance premiums and on certain county-tax levies that could potentially be eliminated, residents in annexed areas would begin receiving their water and sewer services at in-city rates which would result in savings on utility bills, and annexation would result in a de minimis tax increase to owners of vacant or agricultural land.

ZONING & PLANNING - MONTANA

Hartshorne v. City of Whitefish

Supreme Court of Montana - May 11, 2021 - P.3d - 2021 WL 1884148 - 2021 MT 116

Residents brought action for declaratory relief, challenging city ordinance permitting commercial development of certain area through a conditional use permit, instead of a planned unit development, as illegal spot zoning and as violating uniformity requirements.

The District Court granted summary judgment to residents on uniformity claim and struck certain conditional commercial uses, but denied summary judgment on spot zoning claim. Developer appealed, and residents cross-appealed.

The Supreme Court held that:

- Ordinance was not improper spot zoning, and
- Ordinance did not violate uniformity requirements.

Ordinance allowing for commercial use, through conditional use permit, in on certain parcel where the prevailing use was residential was not improper spot zoning, where neighborhood plan, which was adopted before the zoning ordinance, specifically contemplated “commercial uses intended to be complimentary to the proposed development of the neighborhood,” while ordinance changed the discretionary review process from a planned unit development to a conditional use permit, both processes were similar and required review for neighborhood compatibility, and parcel affected by the ordinance, although small and owned by single developer, was same size as it was when the neighborhood plan designated it for mixed-use.

Ordinance which rezoned parcel in largely residential area to preserve developer’s opportunity to seek commercial development through a conditional use permit after the planned unit development process became unavailable did not violate uniformity requirements; district to which statute applied were not the “use districts” in the city code but rather were the “districts” on the city’s zoning map to which the use districts ware applied, and parcel was in its own zoning district such that the zoning ordinance was uniformly applied within that district.

MUNICIPAL CORPORATIONS - TEXAS

In re City of Galveston

Supreme Court of Texas - May 7, 2021 - S.W.3d - 2021 WL 1822939

Municipality petitioned for writ of mandamus to compel state officials to refer claim for reimbursement of settlement with contractor that performed disaster relief work to State Office of Administrative Hearings (SOAH) for administrative law judge to hear it.

The Supreme Court held that:

- Referring agency did not have any authority to interpret provisions of statute establishing mediation process for certain disputes between state agencies and their contractors;
- Municipality's petition was related proceeding within meaning of municipality's agreement to not sue Commissioner of General Land Office in "any related proceeding," and therefore Supreme Court would not issue mandamus relief; and
- Denial of municipality's petition did not prevent municipality from seeking reimbursement through legislative appropriation.

EMINENT DOMAIN - WYOMING

EME Wyoming, LLC v. BRW East, LLC

Supreme Court of Wyoming - May 10, 2021 - P.3d - 2021 WL 1850890 - 2021 WY 64

Oil and gas company brought action under Eminent Domain Act seeking access to landowners' property for stated purpose of gathering data to evaluate its suitability for condemnation.

The District Court entered orders allowing company access to survey and gather data but barring company from using the collected information to file application for permit to drill. Company appealed and landowners cross-appealed.

The Supreme Court held that:

- Company did not show a landlocked mineral ownership needed under Act to enter property to gather data about its suitability for condemnation, and
- Data that company gathered in violation of Act could not be used for any purpose including in support of a condemnation action.

Eminent Domain Act provision allowing entry onto real property to gather data to determine property's suitability for condemnation is not intended to be a device by which an entity may obtain access to determine if it wants to acquire mineral ownership in the area; a party seeking access under Act must show that it owns development rights to landlocked minerals and that the data it seeks to collect relates to that interest and will be used for its development.

Oil and gas company failed to show that it owned right to develop landlocked minerals that it could not access without condemning property, and therefore company did not qualify as a "condemnor" under Eminent Domain Act provision allowing entry onto real property to gather data to determine property's suitability for condemnation, despite claim that company had 22,000 acres of holdings which were a combination of leases and options to lease, where record did not identify the percentage of either or their precise locations.

Data gathered from landowners' properties by oil and gas company that had non-condemnor status, in violation of Eminent Domain Act provision allowing entry onto real property to gather data to determine property's suitability for condemnation, could not be used for any purpose including in support of a condemnation action; data was not lawfully in company's possession.

LIABILITY - CONNECTICUT

Pollard v. City of Bridgeport

Appellate Court of Connecticut - April 27, 2021 - A.3d - 204 Conn.App. 187 - 2021 WL 1603610

Pedestrian who tripped and fell on city sidewalk sued city and owner of land abutting sidewalk, bringing negligence claims against both defendants and a nuisance claim against landowner. Abutting landowner moved for summary judgment.

The Superior Court granted motion. Pedestrian appealed.

The Appellate Court held that:

- Landowner did not owe any duty of care to pedestrian and was therefore not liable in negligence, and
- Pedestrian could not establish nuisance claim.

Owner of land abutting city sidewalk owed no duty of care to pedestrian who tripped and fell on sidewalk and, therefore, was not liable in negligence for pedestrian's injuries, even though growth of tree roots on owner's land caused sidewalk to be uneven; growth of tree roots was not an affirmative act, there was no evidence as to how the tree came to grow on owner's land, and there was no evidence that reasonable care would have revealed that the tree root was the cause of the uneven sidewalk.

Pedestrian who tripped and fell on uneven city sidewalk could not establish nuisance claim against owner of land abutting the sidewalk, even if growth of tree roots on owner's land caused the sidewalk to be uneven; allowing tree to grow was not an affirmative act and was not an unreasonable or unlawful use of the land, and regardless of whether landowner knew about the uneven sidewalk, it was not under landowner's ownership or control, but under city's, so that city had duty to maintain and repair it.

BALLOT INITIATIVE - ILLINOIS

McHenry Township v. County of McHenry

Appellate Court of Illinois, Second District - April 15, 2021 - N.E.3d - 2021 IL App (2d) 200478 - 2021 WL 1422748

Township sued county and county clerk for writ of mandamus or mandatory injunctive relief, seeking to have clerk place on township's general election ballot a referendum proposition, initiated by township's board of trustees, to dissolve township. County filed motion to dismiss township's complaint, with prejudice.

The Circuit Court granted county's motion. Township appealed.

The Appellate Court held that:

- Question at issue on appeal involved substantial public interest, and
- Clerk impermissibly looked beyond four corners of township's filings in rejecting township's referendum proposition to dissolve township.

Question at issue in township's appeal—whether county clerk had authority to reject township's dissolution ballot proposal on basis that township filed proposal within 23 months of prior, identical

proposition—involved substantial public interest, thus warranting appellate review that was otherwise rendered moot by passing of election in which township sought to have proposal placed on ballot; question on appeal was election-law issue that was inherently a matter of public concern, a ruling by the reviewing court would aid local election officials and lower courts in deciding nature of county clerk's duties under relatively new election-law statute, and question was likely to recur, given there had been two attempts to dissolve township within one year.

County clerk impermissibly looked beyond four corners of township's filings when clerk rejected township's referendum proposition to dissolve township, on grounds that identical proposition had been presented to voters within 23-month statutory period, and therefore trial court erred in dismissing township's complaint in which it sued county and clerk for writ of mandamus or mandatory injunctive relief; from face of township's filings, clerk could not have known that proposition with identical wording, except for dissolution date, had been presented to voters months earlier, and determining whether proposition had previously appeared on township ballot within statutorily prescribed timeframe was not ministerial task, as it constituted assessment of content of filings.

EMPLOYMENT - MARYLAND

Brown v. Washington Suburban Sanitary Commission

Court of Special Appeals of Maryland - May 3, 2021 - A.3d - 2021 WL 1731690

Employee, whose termination from Washington Suburban Sanitary Commission was upheld by the Office of Administrative Hearings (OAH), filed petition for judicial review.

The Circuit Court dismissed petition and denied employee's motions to alter or amend and to revise the court's judgment, and employee appealed.

The Court of Special Appeals held that:

- Sanitary Commission was the agency that mattered, and not OAH, for purposes of rule providing that agency shall transmit to clerk of the circuit court the original or a certified copy of record of its proceedings within 60 days after agency receives petition for judicial review, and
- Employee's petition for judicial review should not have been dismissed for employee's failure to transmit the record to circuit court.

Washington Suburban Sanitary Commission was the agency that mattered, and not Office of Administrative Hearings (OAH), for purposes of rule providing that agency shall transmit to the clerk of the circuit court the original or a certified copy of the record of its proceedings within 60 days after agency receives petition for judicial review; Commission employed employee, paid her checks, suspended her, and made the decision to terminate her, and although that decision was upheld on appeal after a hearing conducted by OAH, the agency action that employee petitioned the circuit court to review was Commission's decision.

Employee's petition for judicial review of decision of the Office of Administrative Hearings (OAH) upholding Washington Suburban Sanitary Commission's termination of employee should not have been dismissed for employee's failure to transmit the record to circuit court; Commission could have required employee to order and pay for the transcript, but the record did not reveal how or where or any other basis on which to shift Commission's responsibility to employee to transmit the record to the circuit court.

PUBLIC UTILITIES - MINNESOTA

Matter of Minnesota Power's Petition for Approval of EnergyForward Resource Package

Supreme Court of Minnesota - April 21, 2021 - N.W.2d - 2021 WL 1556816

Objectors sought review of Public Utilities Commission's (PUC) order, 2019 WL 356543, approving electric utility's affiliated-interest agreements governing construction and operation of natural gas power plant in neighboring state without environmental review, environmental assessment worksheet (EAW), or environmental impact statement (EIS) under Minnesota Environmental Policy Act (MEPA).

The Court of Appeals reversed and remanded. Utility petitioned for review, which was granted.

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

- Statute addressing affiliated-interest agreements does not require environmental review, EAW, or EIS before PUC approval;
- PUC's approval of agreements was not a project causing environmental effects under MEPA; and
- A reasonably close causal relationship between environmental effect and alleged cause is required under MEPA.

Statute requiring Public Utilities Commission's (PUC) approval of affiliated-interest agreements between a public utility and an affiliated interest does not require environmental review, an environmental assessment worksheet (EAW), or an environmental impact statement (EIS) before PUC approval.

Public Utilities Commission's (PUC) approval of electric utility's affiliated-interest agreements governing construction and operation of natural gas power plant in neighboring state was not a project causing environmental effects, and thus Minnesota Environmental Policy Act (MEPA) did not apply and no MEPA review, environmental assessment worksheet (EAW), or environmental impact statement (EIS) was needed for PUC approval; PUC's approval of the agreements did not grant a permit, did not approve construction or operation of plant, and did not authorize utility to proceed forward in other state.

A "but for" causal relationship is insufficient to make agency responsible for particular environmental effect under Minnesota Environmental Policy Act (MEPA); the line that must be drawn requires a reasonably close causal relationship between environmental effect and the alleged cause.

IMMUNITY - PENNSYLVANIA

Wise v. Huntingdon County Housing Development Corporation

Supreme Court of Pennsylvania - April 28, 2021 - A.3d - 2021 WL 1661243

Pedestrian brought personal injury action against public housing entities, after she fell and was injured walking on sidewalk in front of public housing development around midnight, alleging that insufficient outdoor lighting in the sidewalk area created a dangerous condition.

The Court of Common Pleas granted summary judgment in favor of housing entities. Pedestrian

appealed. The Commonwealth Court affirmed. Petition for discretionary review was granted.

The Supreme Court held that real estate exception to sovereign immunity applied to pedestrian's claim, as a matter of law.

Alleged insufficient outdoor lighting adjacent to sidewalk in front of public housing development, stemming from existence and location of light pole, tree, and sidewalk, created allegedly dangerous condition of Commonwealth realty, so that real estate exception to sovereign immunity applied to permit personal injury claim against public housing entities brought by pedestrian who was injured when she fell while walking on sidewalk in front of public housing development around midnight.

TAX - CONNECTICUT

Town of Ledyard v. WMS Gaming, Inc.

Supreme Court of Connecticut - April 21, 2021 - A.3d - 2021 WL 1567671

Town brought action to collect unpaid personal property taxes for gaming equipment that was owned by company and that was leased to tribal nation for use in its gaming operations. Action was stayed pending the outcome of action in federal court in which tribal nation challenged state's and town's authority to tax the equipment.

After federal proceedings concluded, parties executed a stipulation that company would pay all outstanding taxes, accrued interest, and penalties, and that town was entitled to attorney's fees and costs incurred in state action.

Town and company filed motions for summary judgment as to company's liability for attorney's fees with respect to the federal action. The Superior Court denied company's motion and granted town's motion. Company appealed before a ruling on town's motion for attorney's fees. The Appellate Court granted town's motion to dismiss appeal on the grounds that there was no appealable final judgment. The Supreme Court reversed and remanded. On remand, the Appellate Court reversed and remanded. Town petitioned for certification, which was granted.

The Supreme Court held that federal action was "as a result of and directly related to" state collection proceeding, allowing award to town of attorney's fees incurred in federal action.

Federal action in which tribal nation, as lessee of gaming equipment, challenged town's authority to tax the equipment was "as a result of and directly related to" town's state court action against equipment owner to collect delinquent personal property taxes for the equipment, allowing award to town of attorney's fees incurred in federal action, even though equipment owner was not formally a party to federal action, where federal action was commenced after town initiated state collection proceeding, and federal action was commenced for purpose of challenging town's authority to pursue state collection action.

ELECTIONS - ILLINOIS

Corbin v. Schroeder

Supreme Court of Illinois - April 27, 2021 - N.E.3d - 2021 IL 127052 - 2021 WL 1619490

Objector petitioned for judicial review of Electoral Board's denial of objector's challenge to

nominating petitions filed by candidates for village president that did not contain statutory minimum number of signatures from persons who voted in most recent election, based on determination that candidates reasonably relied on representations by village president that, presumably due to COVID-19 pandemic, candidates needed to obtain signatures from only one percent of voters.

The Circuit Court affirmed, and objector appealed. The Appellate Court affirmed. Objector filed petitions for leave to appeal. Petitions were granted and consolidated.

The Supreme Court held that statute governing signature requirements for nominating petitions for candidate for village president was mandatory and required strict compliance, regardless of whether candidates may have relied on representations of village clerk to contrary, overruling Merz v. Volberding, 94 Ill. App. 3d 1111, 50 Ill.Dec. 520, 419 N.E.2d 628, and Atkinson v. Schelling, 370 Ill.Dec. 502, 988 N.E.2d 700.

LIABILITY - MINNESOTA

Reetz v. City of Saint Paul

Supreme Court of Minnesota - March 17, 2021 - 956 N.W.2d 238

Police officer petitioned for writ of certiorari, to challenge city's determination that officer was not entitled to defense and indemnification in connection with a personal-injury lawsuit alleging that his conduct while providing security for a homeless shelter caused or contributed to injuries from a stabbing incident.

The Court of Appeals reversed. City petitioned for review.

The Supreme Court held that:

- City's decision not to defend and indemnify its employee was a quasi-judicial decision that could only be appealed by writ of certiorari; and
- City had no duty to defend and indemnify police officer in connection with a personal-injury lawsuit.

City's decision not to defend and indemnify its employee in connection with a personal-injury lawsuit alleging that his conduct while providing security for a homeless shelter caused or contributed to injuries from a stabbing incident was a quasi-judicial decision that could only be reviewed by writ of certiorari; there was a genuine dispute over whether the officer was entitled to defense and indemnification, the city gathered and weighed evidence to reach a decision on the issue, the process used by the city resembled a judicial proceeding, and the statute governing indemnification of city employees did not provide for a right of review.

City had no duty to defend and indemnify police officer in connection with a personal-injury lawsuit alleging that his conduct while providing security for a homeless shelter caused or contributed to injuries from a stabbing incident; the police officer, who, while acting as a security officer, was searching persons and their belongings for weapons and alcohol, would have had no authority as a police officer to confiscate a knife from shelter's client, and was instead, acting in a purely private capacity.

MUNICIPAL ORDINANCE - NORTH DAKOTA

City of Jamestown v. Casarez

Supreme Court of North Dakota - April 20, 2021 - N.W.2d - 2021 WL 1540414 - 2021 ND 71

Following denial of his motion to suppress, defendant entered conditional guilty plea in the District Court to refusing to take a chemical breath test. Defendant appealed.

The Supreme Court held that:

- City's chemical test refusal ordinance did not impermissibly conflict with state statute;
- Defendant was not seized at law enforcement center, where he was attempting to post bail for his girlfriend, until officer informed defendant he was under investigation for driving under the influence and requested that he complete a Horizontal Gaze Nystagmus (HGN) test; and
- Officer had reasonable suspicion of criminal drunk driving activity to seize defendant.

BALLOT INITIATIVE - OHIO

State ex rel. Gil-Llamas v. Hardin

Supreme Court of Ohio - April 29, 2021 - N.E.3d - 2021 WL 1686419 - 2021-Ohio-1508

Petitioners sought a writ of mandamus to compel members of city council to submit to electors a proposed municipal ordinance initiative on primary election ballot.

The Supreme Court held that:

- City council was entitled to strike supplemental evidence filed by petitioners;
- Amended evidence filed by petitioners did not relate back to the earlier filed evidence;
- City council's failure to file an answer to the complaint did not result in the facts alleged in the complaint to be deemed admitted; and
- City council abused its discretion when it determined initiative petition for proposed municipal ordinance failed to comply with city charter's title requirement for proposed ordinances.

City council abused its discretion when it determined initiative petition for proposed municipal ordinance failed to comply with city charter's title requirement for proposed ordinances; proposed ordinance's title, which was more than 150 words long, sufficiently described substance of proposed ordinance as it stated ordinance would require city auditor to transfer from general fund $10 million to "Energy Conservation and Energy Efficiency Fund," $10 million to "Clean Energy Education and Training Fund," $10 million for the purpose of funding a minority-business-development program, and $57 million for the purpose of funding electricity-subsidy program, and the omission in the title of the name of minority-business-development fund sought to be created did not make title's description inaccurate.

PUBLIC UTILITIES - PENNSYLVANIA

Philadelphia Gas Works v. Pennsylvania Public Utility Commission

Supreme Court of Pennsylvania - April 29, 2021 - A.3d - 2021 WL 1681311

Real property owners filed complaints against city-owned natural gas utility, arising from several billing disputes over accrual of late fees on unpaid gas bills that were the subject of docketed municipal liens.

The Public Utility Commission ordered refunds of years of late fees on charges that were subject to docketed liens, imposed financial penalties on utility for charging those late fees, and ordered utility to reorganize its billing system. Utility petitioned for review. The Commonwealth Court reversed. Petition for allowance of appeal was granted.

The Supreme Court held that municipal lien arising out of delinquent bills for city-owned natural gas utility service was "judgment," so that after it was docketed, the utility could only charge 6% statutory interest rate.

A municipal lien arising out of delinquent bills for city-owned natural gas utility service was a "judgment," so that after such a lien was docketed, the utility could only charge the customer the 6% statutory interest rate applicable to judgments, rather than the 18% tariff rate on late payments that had not been reduced to judgment.

EMINENT DOMAIN - SOUTH CAROLINA

United States v. 269 Acres, More or Less, Located in Beaufort County South Carolina

United States Court of Appeals, Fourth Circuit - April 16, 2021 - F.3d - 2021 WL 1432960

Government filed eminent domain action to impose permanent easement on undeveloped land near military base for military jets' flight paths.

The United States District Court for the District of South Carolina accepted in part and rejected in part recommendation by three-member land commission issued following bench trial and awarded landowners approximately $4.4 million as just compensation, and, subsequently denied landowner's request for attorney's fees and costs and ordered parties to split costs of commission, but granted in part landowners' motion for relief from judgment, apportioning attorney's fees and litigation costs. Government appealed, and landowners cross-appealed.

The Court of Appeals held that:

- District court did not clearly err in crediting comparable land sales relied on by landowners' expert appraiser for purposes of determining just compensation;
- District court did not clearly err in finding that landowners' established non-speculative basis for valuing property at highest and best use as industrial and residential development;
- Government, not landowners, was prevailing party under Equal Access to Justice Act based on asserting value closest to amount awarded, and thus landowners were not entitled to attorney's fees; and
- District court acted within its discretion in equally dividing costs for land commission between landowners and government.

PUBLIC UTILITIES - VERMONT

In re Chelsea Solar LLC

Supreme Court of Vermont - April 16, 2021 - A.3d - 2021 WL 1439754 - 2021 VT 27

Developer appealed Public Utility Commission decision denying developer's petition for a certificate of public good (CPG) to construct and operate a solar electric generation facility, and intervenors

cross-appealed.

The Supreme Court held that:

- Facility and sister facility together were a single 4.0 megawatt plant which exceeded generation cap, and
- Intervenors articulated potential aesthetic injuries sufficient to allow intervention.

Solar energy developer, which sought to construct solar energy facilities to take advantage of standard-offer program's set price for energy, failed to show that it preserved argument that program's statutory definition of "plant," including its reference to "newly constructed facilities," was unconstitutionally vague and standardless, and Supreme Court therefore would decline to address that argument when reviewing the Public Utilities Commission's denial of developer's petition seeking a certificate of public good.

Developer's proposed 2.0-megawatt solar electricity generation facility and nearby sister facility constituted a single 4.0 megawatt plant which exceeded generation cap imposed on Vermont's Sustainably Priced Energy Enterprise Development (SPEED) Program participants seeking guaranteed set price for renewable energy, where proposed facilities were commonly owned, physically contiguous, and designed to "fit together," facilities were pursued and developed as part of a common scheme, and their interconnection to the grid required developer to construct a mile-long line extension at its own expense, the use of which would be shared by the facilities.

Supreme Court, which affirmed Public Utilities Commission's decision that two proposed solar electricity generator facilities constituted a single plant for purposes of generation cap imposed on Vermont's Sustainably Priced Energy Enterprise Development (SPEED) Program participants seeking guaranteed set price for renewable energy, would decline intervenors' request that Court nonetheless address their arguments regarding the certificate of public good factors for one of the proposed facilities, as certificate of public good application was essentially invalid because it related to a theoretical smaller facility that was not in fact the "plant" found to exist by the Commission.

Homeowners association and country club intervenors, who sought to intervene in Public Utilities Commission proceeding regarding developer's application for certificate of public good to construct and operate a 2.0-megawatt solar electric generation facility, articulated potential aesthetic injuries that fell within the scope of the interests protected by statute and that were uniquely felt by them, and thus Commission appropriately exercised its discretion in allowing them to intervene; homeowners association's issues included the aesthetic impact of the project resulting from increased noise and wind and the effect on its views, while country club expressed concern about the effect of the project on the views from the public golf course and expressed interest.

ANNEXATION - FLORIDA

Ranucci v. City of Palmetto

District Court of Appeal of Florida, Second District - April 14, 2021 - So.3d - 2021 WL 1395231

City brought action for declaratory relief and specific performance, seeking declaration that subdivision lot was contiguous to city's property, that its annexation agreement with prior owner was valid and enforceable, that owners of lot were required to petition for annexation under annexation agreement, and that owners and subdivision's homeowners association (HOA) were

equitably estopped from refusing to perform under annexation agreement.

Following a bench trial, the Circuit Court entered final judgment in favor of city. Owners and HOA appealed.

The District Court of Appeal held that:

- City's claim for declaratory relief accrued, and five-year limitations period began to run, when lot became contiguous to city's property and owners failed to petition for annexation;
- City's claim for specific performance accrued, and one-year limitations period began to run, when owners failed to petition for annexation when lot became contiguous to city's property; and
- Failure of owners and HOA to petition for annexation were not continuing breaches of annexation agreement, and thus city's claims accrued when owners and HOA initially failed to petition for annexation.

City's claim for declaratory relief concerning validity and enforceability of its annexation agreement with prior owner of subdivision lot accrued, and five-year limitations period began to run, when lot became contiguous to city's property and owners of lot failed to petition for annexation as contemplated in annexation agreement.

City's claim for specific performance of its annexation agreement with prior owner of subdivision lot accrued, and one-year limitations period began to run, when owners of lot failed to petition for annexation when lot became contiguous to city's property.

City's request, as part of its claim for declaratory relief arising out of agreement providing that landowners would petition for annexation of property when landowners' lot became contiguous to city's property, that trial court declare that landowners were required to petition city for annexation was effectively a request for specific performance and thus was subject to one-year statute of limitations.

Failure of owners of subdivision lot and homeowners association (HOA) to petition for annexation into city under city's annexation agreement with prior owner were not continuing breaches of agreement, and thus city's claims for declaratory judgment and specific performance of annexation agreement accrued, and limitations periods began to run, when owners and HOA initially failed to petition for annexation; obligation to seek annexation occurred only when lot or property became contiguous to city's property.

OPEN MEETINGS - MINNESOTA

City of Bloomington v. Raoul

Appellate Court of Illinois, Fourth District - April 26, 2021 - N.E.3d - 2021 IL App (4th) 190539 - 2021 WL 1608790

City, city council, and mayor of city sought administrative review of Attorney General's binding opinion that city council violated Open Meetings Act when it held a closed session to discuss termination of agreement with town.

The Circuit Court reversed the Attorney General's binding opinion. Attorney General appealed.

The Appellate Court held that:

- Attorney General's opinion would be reviewed de novo;
- City council improperly invoked litigation exception to the Act to justify council's closed session; and
- Even if city council had lawfully invoked litigation exception, the council violated the Act by failing to limit its discussion to probable or imminent litigation.

Appellate Court would review de novo the determination by the Attorney General that city council violated the Open Meetings Act when it held closed session, purportedly pursuant to Act's litigation exception, regarding termination of agreement with town; terms "probable" and "imminent" in litigation exception were not ambiguous and, therefore, did not warrant deference to Attorney General's opinion, and historical facts were established.

City council improperly invoked litigation exception to Open Meetings Act to justify council's closed session regarding termination of agreement with town, where there was no litigation pending for city to invoke exception at time of session, and council members did not reasonably believe that litigation was probable or imminent.

Even if city council had lawfully invoked litigation exception to Open Meetings Act in order to justify holding a closed session regarding termination of agreement with town, the council violated the Act by failing to limit its discussion to probable or imminent litigation, where the council discussed topics related to potential financial and public-relations implications of council's various options for terminating agreement, and absent from the closed session was any discussion of legal theories, defenses, claims, or possible approaches to litigation.

EMINENT DOMAIN - MASSACHUSETTS

Cobble Hill Center LLC v. Somerville Redevelopment Authority

Supreme Judicial Court of Massachusetts, Suffolk - April 22, 2021 - N.E.3d - 2021 WL 1568753

Property owner filed action against urban redevelopment authority, alleging that authority's taking by eminent domain of owner's land for demonstration project was not valid taking under eminent domain statute and was unconstitutional.

The Superior Court Department granted judgment on the pleadings in favor of authority. Property owner appealed. Action was transferred from the Appeals Court.

The Supreme Judicial Court, in a matter of first impression, held that:

- Eminent domain statute furnished urban redevelopment authorities with the power to take property in furtherance of a demonstration projects;
- "Demonstration," for purpose of eminent domain statute authorizing taking in furtherance of demonstration projects, meant the testing or development of a different, new, or improved means or method of elimination of urban blight;
- Authority's taking of parcel was valid as demonstration project under eminent domain statute; and
- Exercise of eminent domain power for demonstration projects under Massachusetts eminent domain statute comported with Takings Clause.

The eminent domain statute furnishes urban redevelopment authorities with the power to take property by eminent domain in furtherance of a demonstration projects in order to prevent and eliminate slums and urban blight, independent of an urban renewal plan or urban renewal project.

“Demonstration,” for purpose of eminent domain statute giving urban redevelopment authorities the power to take property by eminent domain in furtherance of demonstration projects, means the testing or development of a different, new, or improved means or method of accomplishing the statutory purpose of elimination of urban blight.

Urban redevelopment authority’s plan for property owner’s parcel qualified as “demonstration project,” so that authority’s taking of parcel was valid under eminent domain statute; plan was designed to serve as model innovative approach to community development that integrated a public safety complex with private development on a single site with nearby public transit in order to eliminate urban blight.

Urban redevelopment authority’s exercise of eminent domain power for demonstration projects under Massachusetts eminent domain statute comports with Takings Clause requirements that taking must be for public purpose and the landowner must receive just compensation.

Fact that an urban redevelopment authority plans to use some of the property taken pursuant to eminent domain statute as a municipal building and plans to sell some of the property for development does not negate the public purpose of taking, for purpose of compliance with Fifth Amendment Takings Clause.

PUBLIC UTILITIES - MINNESOTA

Matter of Minnesota Power's Petition for Approval of EnergyForward Resource Package

Supreme Court of Minnesota - April 21, 2021 - N.W.2d - 2021 WL 1556816

Objectors sought review of Public Utilities Commission’s (PUC) order approving electric utility’s affiliated-interest agreements governing construction and operation of natural gas power plant in neighboring state without environmental review, environmental assessment worksheet (EAW), or environmental impact statement (EIS) under Minnesota Environmental Policy Act (MEPA).

The Court of Appeals reversed and remanded. Utility petitioned for review, which was granted.

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

- Statute addressing affiliated-interest agreements does not require environmental review, EAW, or EIS before PUC approval;
- PUC’s approval of agreements was not a project causing environmental effects under MEPA; and
- A reasonably close causal relationship between environmental effect and alleged cause is required under MEPA.

Statute requiring Public Utilities Commission’s (PUC) approval of affiliated-interest agreements between a public utility and an affiliated interest does not require environmental review, an environmental assessment worksheet (EAW), or an environmental impact statement (EIS) before PUC approval.

Public Utilities Commission’s (PUC) approval of electric utility’s affiliated-interest agreements governing construction and operation of natural gas power plant in neighboring state was not a project causing environmental effects, and thus Minnesota Environmental Policy Act (MEPA) did not apply and no MEPA review, environmental assessment worksheet (EAW), or environmental impact statement (EIS) was needed for PUC approval; PUC’s approval of the agreements did not grant a

permit, did not approve construction or operation of plant, and did not authorize utility to proceed forward in other state.

A "but for" causal relationship is insufficient to make agency responsible for particular environmental effect under Minnesota Environmental Policy Act (MEPA); the line that must be drawn requires a reasonably close causal relationship between environmental effect and the alleged cause.

CONTRACTS - NORTH DAKOTA

City of Glen Ullin v. Schirado

Supreme Court of North Dakota - April 20, 2021 - N.W.2d - 2021 WL 1540423 - 2021 ND 72

Park district and city brought action against owners of land near park district's undeveloped lots, with streets and alleys under city's authority running adjacent to and between lots, seeking to enjoin property owners from placing fencing and allowing their horses to graze on lots.

After granting preliminary injunction, the District Court entered summary judgment in favor of park district and city, found property owners in contempt of court based on violation of default judgment in prior lawsuit, and awarded attorney fees and costs in the amount of $11,106.85. Property owners appealed, and the Supreme Court reversed and remanded. On remand, the District Court denied landowners' motion for trial and granted city's motion for summary judgment, granted permanent injunctive relief, and awarded attorney's fees. Landowners appealed.

The Supreme Court held that:

- City council's meeting minutes did not constitute a sufficient memorandum of the alleged grazing agreement to satisfy the statute of frauds;
- Doctrine of part performance did not apply; and
- Court adequately explained award of $5,460 in attorney's fees to park district.

City council's meeting minutes did not constitute a sufficient memorandum of alleged grazing agreement to satisfy the statute of frauds and allow landowners to use city property for grazing their horses in exchange for cleaning up streets and alleys; meeting minutes merely noted that landowners had asked if they could graze horses on "the Schultz land" on the city's extreme north side and that such grazing was permissible, and did not provide the terms of any agreement to allow landowners to use platted streets and alleys as pasture land if garbage was removed.

Doctrine of part performance did not apply to remove alleged agreement between landowners and city from the statute of frauds absent any evidence that such an agreement existed and that landowners' part performance was consistent only with that agreement; while landowners alleged that city had agreed to allow them to graze horses on city land in exchange for cleaning up city streets and alleys, they were unable to provide evidence of any such agreement other than their own allegations.

District court adequately explained award of $5,460 in attorney's fees to park district which obtained permanent injunction to prevent landowners from grazing horses on park land; court was presented with an invoice listing the time and amounts billed by counsel to the city and the park district since the commencement of the litigation, court explained that the park district was awarded recovery of attorney's fees from landowners for their contempt of the injunction, and the fee amount was half the invoice total because the city was not protected under the injunction.

EMINENT DOMAIN - TEXAS

San Jacinto River Authority v. Medina

Supreme Court of Texas - April 16, 2021 - S.W.3d - 2021 WL 1432227

Downstream property owners' brought separate suits for declaratory judgment under eminent domain statutes that river authority, by precipitously releasing water from dam at excessive rate in response to hurricane, had caused or added to the flooding of their land and thereby caused a "taking."

The District Court denied river authority's motions to dismiss, and river authority appealed. The Court of Appeals affirmed, and river authority petitioned for review.

The Supreme Court held that:

- Statutory takings claims under the eminent domain statutes are not limited solely to claims for regulatory takings, and
- Allegations in downstream property owners' complaints did not conclusively establish that river authority's actions met either the "reasonable good faith belief" test of one exception to eminent domain statutes or the "measured and appropriate response" test of another.

Statutory takings claims under the eminent domain statutes are not limited solely to claims for regulatory takings; such claims may also be brought for physical takings, such as a flooding.

Allegations in downstream property owners' complaints for declaratory judgment that river authority, by precipitously releasing water from dam at excessive rate in response to hurricane, had caused or added to the flooding of their land and thereby caused a "taking," when its knowledge and experience from prior hurricane that had caused even more precipitation should have informed it that it could have released water more slowly in manner that would not have caused such damage, did not conclusively establish that river authority's actions met either the "reasonable good faith belief" test of one exception to eminent domain statutes or the "measured and appropriate response" test of another, as required for court to dismiss property owners' suits as having no basis in law or fact.

ZONING & PLANNING - ALASKA

Griswold v. Homer Advisory Planning Commission

Supreme Court of Alaska - April 9, 2021 - P.3d - 2021 WL 1325541

Owners of bicycle shop applied for conditional use permit to expand existing entryway by six feet and construct covered porch, thereby extending covered area up to eight feet into 20-foot setback at front of business.

City's advisory planning commission approved permit over resident's objection, and, on appeal to the Office of Administrative Hearings, administrative law judge affirmed. Resident appealed. The Superior Court affirmed the permit approval and subsequently denied resident's motion for reconsideration and request for disqualification. Resident, proceeding pro se, appealed.

The Supreme Court held that:

- City properly exercised its legislative discretion in permitting setback reductions via conditional use permitting rather than through variances;
- Commission properly applied city code by approving setback reduction as a conditional use permit;
- Resident's claims of constitutional rights violations were not adequately briefed and so were waived;
- Substantial evidence supported commission's findings;
- Commission did not err by omitting screening and fire marshal conditions from conditional use permit;
- It was appropriate for city planner to submit brief and participate in appeal proceedings; and
- The Superior Court judge did not have a disqualifying bias.

BALLOT INITIATIVE - ARIZONA

Leach v. Hobbs

Supreme Court of Arizona - March 31, 2021 - P.3d - 41 Arizona Cases Digest 13 - 2021 WL 1217116

Objectors brought action challenging the validity of certain signature petitions filed by political action committee with the Secretary of State to qualify health care ballot initiative for inclusion on general election ballot, based on various objections to petition circulators and signatures.

Following trial during which 94 subpoenaed circulators failed to appear, the Superior Court disqualified certain signatures, and held that the committee had failed to gather sufficient valid signatures to place the initiative on the ballot. Committee and objectors appealed.

The Supreme Court held that:

- A registered petition circulator may not, by "de-registering," evade the statutory requirement that registered circulators subpoenaed in a petition challenge appear for trial;
- Registered circulators of petition were properly and timely served with subpoenas for appearance at trial held virtually due to COVID-19 pandemic; and
- Objectors did not abuse subpoena provision of statute disqualifying signatures collected from registered circulators of statewide initiatives who fail appear at trial.

BONDS - CALIFORNIA

San Diegans for Open Government v. Public Facilities Financing Authority of City of San Diego

Court of Appeal, Fourth District, Division 1, California - April 19, 2021 - Cal.Rptr.3d - 2021 WL 1525877

In order to fund construction of an underground parking garage and other improvements in Balboa Park, the City of San Diego entered into a "lease revenue bond" transaction. For a nominal fee, the City would lease the land underlying the improvements to the Public Facilities Financing Authority of the City of San Diego (Financing Authority). The Financing Authority, in turn, would lease the land and improvements back to the City in exchange for annual payments. The Financing Authority would issue bonds to fund construction of the improvements, secured by the City's annual lease payments to the Financing Authority. In the event of default by the Financing Authority, any recourse by the bondholders would be limited to collection of the City's lease payments. This type of

transaction was approved by the California Supreme Court in *Rider v. City of San Diego* (1998) 18 Cal.4th 1035, 77 Cal.Rptr.2d 189, 959 P.2d 347 (Rider) and by California Court of Appeal in *San Diegans for Open Government v. City of San Diego* (2015) 242 Cal.App.4th 416, 195 Cal.Rptr.3d 133 (SanDOG).

In *Rider*, the California Supreme Court explained that a joint powers agency, like the Financing Authority, has the power under state law to issue bonds in its own name. It therefore need not comply with the limitations that would apply to City-issued bonds, such as voter approval: "[W]hen the Financing Authority issues bonds, it does so independently of any common powers delegated in the joint powers agreement, and therefore it is not subject to the limitations that would apply to the City, including the two-thirds vote requirements in the [California] Constitution and the City's charter."

In *SanDOG*, the Court of Appeal followed *Rider* even where, as here, the Financing Authority is under the control of the City. The Court explained, "Rider made clear that for purposes of the debt limitation provisions, when a financing authority created to issue bonds 'has a genuine separate existence from the City,' 'it does not matter whether or not the City 'essentially controls' the financing authority."

After *Rider* and *SanDOG*, San Diego voters approved several amendments to the San Diego City Charter regarding bond issuance. Plaintiff San Diegans for Open Government (SanDOG) challenged the Balboa Park lease revenue bond transaction based on these amendments. In SanDOG's view, one newly-amended provision restricts the ability of the City to use the Financing Authority to issue bonds without voter approval.

The parties disputed whether the newly-amended section 90.1 applied to lease revenue bonds issued by the Financing Authority. SanDOG contended that section 90.1 applies to revenue bonds, including those issued by the Financing Authority, and lease revenue bonds are a type of revenue bond. SanDOG argued that the Financing Authority's lease revenue bonds are impermissible because they violate section 90.1's two conditions, that the bonds not be "payable from the general fund" and that they be used "for the construction, reconstruction or replacement of water facilities, wastewater facilities, or stormwater facilities." The City and the Financing Authority, by contrast, contended that section 90.1's limitations do not apply to the Financing Authority. Even if they did, they argue that the "revenue bonds" described in the section do not encompass the "lease revenue bonds" at issue here.

The trial court disagreed with SanDOG's position and the Court of Appeal affirmed the court's judgment on this issue.

The Court of Appeal found that the provision in question reflects a limitation on City-issued bonds; it does not cover bonds issued by the Financing Authority. Moreover, even if the provision were not limited to City-issued bonds, it would not cover the lease revenue bonds contemplated here. "In sum, we conclude section 90.1 does not apply to lease revenue bonds issued by the Financing Authority. The plain language does not unambiguously encompass such bonds, and the ballot materials make clear that the voters intended section 90.1 to have a limited scope. The type of financial transaction at issue here, approved in Rider and SanDOG, is not prohibited by the 2016 amendments to the San Diego City Charter."

IMMUNITY - ILLINOIS

Robinson v. Village of Sauk Village

Appellate Court of Illinois, First District, FIFTH DIVISION - April 9, 2021 - N.E.3d - 2021 IL App (1st) 200223 - 2021 WL 1399812

Pedestrian brought action against two villages and police officers, seeking damages for injuries he sustained when he was struck by vehicle driven by car theft suspect who was fleeing from the police. Both villages and officers filed a motion for summary judgment asserting immunity under Local Government and Governmental Employees Tort Immunity Act.

The Circuit Court granted summary judgment in favor of all of the defendants. Pedestrian appealed.

The Appellate Court held that:

- Genuine issue of material fact existed as to whether car theft suspect had escaped or was escaping when he struck pedestrian during police chase, precluding summary judgment;
- Genuine issue of material fact existed as to whether police officers engaged in willful and wanton conduct when they pursued car theft suspect, precluding summary judgment; and
- Genuine issue of material fact existed as to whether police officers chasing vehicles driven by car theft suspect was a material element and a substantial factor in bringing about the collision with pedestrian, precluding summary judgment on issue of proximate cause.

CONTRACTS - KANSAS

Jayhawk Racing Properties, LLC v. City of Topeka

Supreme Court of Kansas - April 9, 2021 - P.3d - 2021 WL 1323817

Private owners of a reversionary interest in a multi-purpose motorsports facility brought action against city, seeking declaration of its rights under a memorandum of understanding and alleging breach of agreement for city's purchase of the reversionary interest.

The District Court converted city's motion to dismiss for failure to state a claim into a motion for summary judgment, and granted the motion. Owners appealed, and the Court of Appeals reversed. City filed petition for review, which was granted.

The Supreme Court held that city's agreement served a governmental or legislative function, and thus facility owners could not sue for breach of contract when new city council decided not to proceed.

City's agreement to expand existing sales tax and revenue bond district and issue additional bonds to purchase full ownership interest in multi-purpose motorsports facility served a governmental or legislative function, and thus facility owners could not sue for breach of contract when new city council decided not to proceed; city's decision to invest in race track, expand the surrounding area and encourage commercial development, and improve the facilities, all with a purpose of making the city more attractive to visitors and increasing tax revenues and the economic viability of businesses, represented the epitome of governmental policy making, and while memorandum of understanding called for some routine maintenance, it emphasized major reconstruction and new development.

OPEN MEETINGS - OKLAHOMA

Fraternal Order of Police, Bratcher/Miner Memorial Lodge, Lodge No. 122 v. City of Norman

Supreme Court of Oklahoma - April 13, 2021 - P.3d - 2021 WL 1379396 - 2021 OK 20

Police organization filed petition for declaratory judgment and injunctive relief, claiming that city violated city ordinance and the Open Meeting Act, by enacting amendments to city budget at a special meeting of the city council that were not included in the posted agenda.

The District Court granted summary judgment in favor of organization. City appealed.

The Supreme Court held that:

- A city must follow mandates of the Open Meeting Act when taking action pursuant to the Municipal Budget Act, whether the city is adopting or amending budget, and
- Agenda for special meeting was deceptively vague and likely to mislead, and thus, it was a willful violation of the Open Meeting Act, and actions taken at such meeting were invalid.

Agenda for special meeting of the city council at which city enacted amendments to city budget was deceptively vague and likely to mislead, and thus, it was a willful violation of the Open Meeting Act, and actions taken at such meeting were invalid; city knew that the council would continue discussions at special meeting about potentially reallocating funds within the city budget from prior meeting, but disregarded the Open Meeting Act and failed to include anything on the agenda to give the public notice of the matters under consideration, but rather, the agenda specifically limited council's potential actions to adopting or rejecting the city budget, thereby concealing the actions taken by council.

ZONING & PLANNING - RHODE ISLAND

New Castle Realty Company v. Dreczko

Supreme Court of Rhode Island - April 13, 2021 - A.3d - 2021 WL 1377277

Applicant sought judicial review of zoning board's denial of its request for a special-use permit and dimensional variance from zoning ordinance requiring minimum lot sizes of three acres to build a house and install a septic system on a preexisting nonconforming one-acre lot that contained wetlands.

The Superior Court affirmed the board's decision. Applicant filed petition for writ of certiorari, which was granted.

The Supreme Court held that:

- Substantial evidence did not exist in the record to support zoning board's decision to deny the special-use permit, and
- Substantial evidence did exist to support board's denial of the dimensional variance.

Substantial evidence did not exist in the record to support zoning board's decision to deny special-use permit to install a septic system within 100 feet of wetlands on preexisting nonconforming lot, where applicant had already obtained permits from Department of Environmental Management

(DEM) to alter freshwater wetlands and to construct an onsite water treatment system, which showed that applicant had satisfied all applicable DEM regulations with respect thereto absent competent contrary evidence in the record, and reasons espoused by board members for denying the special-use permit, including possible negative impact on wetlands, were all within realm of DEM's expertise, while board members lacked specialized knowledge necessary to refute DEM's decisions.

Substantial evidence supported zoning board's denial of dimensional variance from zoning ordinance requiring minimum lot size of three acres, in order for applicant to construct a house on preexisting nonconforming one-acre lot, which had been conforming under a previous ordinance, where applicant did not satisfy its burden of showing that requested relief was least relief necessary and that there was no other reasonable alternative way to enjoy a legally permitted beneficial use of the property, as applicant was unwilling to consider board members' suggestions of trying to move the house further back, making it smaller, or making just a two-bedroom house, because applicant determined those options to not be marketable or of value to potential buyers.

BALLOT INITIATIVE - UTAH

Smith v. Zook

Supreme Court of Utah - April 15, 2021 - P.3d - 2021 WL 1419579 - 2021 UT 10

Citizens, who had collected signatures in support of referendum petition after city enacted ordinance that approved development project on land owned by land developer, filed petition for extraordinary writ after city recorder rejected petition on ground that signatures collected in response to mailer were not valid and legal, seeking order compelling recorder to accept referendum petition and qualify it for ballot.

The First District Court granted summary judgment in favor of citizens. Land developer appealed.

The Supreme Court held that online referendum packet failed to fulfill requirements of Election Code.

Online referendum packet regarding challenge to city ordinance, to which sponsors directed voters via document sent through mail, failed to fulfill requirements of Election Code, and thus signatures collected in response to such document were not valid and legal, even after taking into consideration executive order issued by governor during COVID-19, which suspended enforcement of provisions that required sponsor to physically attach copy of law at issue and that required packet to be bound physically and signature sheet to be attached physically; order did not alter requirement that sponsors create packet that bound together copy of components of packet into single unit to be opened for signing by voters and include copy of referendum petition and ordinance, and it was not enough for sponsors to merely make packet available to voters online.

MUNICIPAL ORDINANCE - WASHINGTON

Hassan v. GCA Production Services, Inc.

Court of Appeals of Washington, Division 1 - April 5, 2021 - P.3d - 2021 WL 1247949

Employees brought action against employer, a contractor that shuttled rental car company's vehicles to and from company's airport location, alleging that employer was a transportation employer subject to city ordinance that required transportation employers to pay their employees $15-pe-

-hour minimum wage.

The Superior Court entered summary judgment for employer. Employees appealed.

The Court of Appeals held that defendant was not a "transportation employer" and therefore was not subject to ordinance's $15-per-hour minimum wage requirement.

Contractor that shuttled rental car company's vehicles to and from its airport location was not a "transportation employer" within meaning of city ordinance that required transportation employers, including those that provided or operated rental car services, to pay workers a $15 per hour minimum wage, and thus, it was not subject to the ordinance's minimum wage requirements, because contractor did not supply individuals with possession and enjoyment of cars in exchange for payments.

SCHOOL CONSTRUCTION BONDS - ALASKA

North Slope Borough v. State

Supreme Court of Alaska - April 2, 2021 - P.3d - 2021 WL 1236786

Municipality sought judicial review of Department of Education and Early Development decision to deny reimbursement for school construction bonds which did not meet statutory requirement of equal repayments for a minimum ten year period, despite prior reimbursement of similar bonds.

The Superior Court denied request for trial de novo and affirmed. Municipality appealed.

The Supreme Court held that:

- Municipality was not entitled to trial de novo;
- Deferential standard of review was appropriate standard for hearing officer's review;
- Court would apply reasonable basis review;
- Determination that municipality's bonds did not comply with statute was reasonable;
- Determination was not a new regulation to which the Administrative Procedure Act applied;
- Doctrine of substantial compliance did not apply; and
- Department was not equitably estopped from denying municipality's request for reimbursement.

Municipality was not entitled to trial de novo on challenge to Department of Education and Early Development decision denying reimbursement for municipal school construction bonds on grounds that bonds did not meet equal repayment payments requirement for reimbursement; municipality had stipulated to summary adjudication at agency level, record at the administrative hearing provided an adequate basis for the hearing officer's decision, and there were no factual disputes.

Deferential standard of review, rather than standard akin to summary judgment, was appropriate standard for hearing officer's review of Department of Education and Early Development decision to deny reimbursement for school construction bond payments which were not repaid in equal payments.

Supreme Court would apply reasonable basis review to Department of Education and Early Development determination that municipal school construction bonds did not qualify for reimbursement because they were not to be repaid in approximately equal payments; whether the bond structure furthered the purpose of the reimbursement program was a question within the Department's expertise, and whether the bonds provided budget certainty for the Department or the

State was a policy question about managing the public fisc that could only be determined by looking to unique internal government policy considerations.

Department of Education and Early Development determination that word "bond," in statute allowing municipalities to be reimbursed for bond payments related to school construction and renovation which were to be repaid in approximately equal payments over a period of at least 10 years, referred to each bond as a whole, rather than only the school debt portion of the bond, was reasonable, and thus determination that municipality's bonds did not comply with statute was also reasonable; plain language of the statute indicated that term "bond" did not refer to any subcomponent, and treating bonds as a whole was crucial to the Department's process of verifying a municipality's payment information.

Department of Education and Early Development determination that municipality's bonds did not meet requirements for state repayment of bonds for school construction was not a new regulation to which the Administrative Procedure Act applied, although Department employee had reimbursed prior, similar bonds; employee's prior failure to apply the controlling law was not a formal interpretation of the statute that would bind future review, Department's new interpretation corrected a previous oversight, and it was neither expansive or unforeseeable that once it learned of its previous failure to apply the law, the Department would correct that failure.

Doctrine of substantial compliance did not apply to allow Department of Education and Early Development reimbursement of municipality's bonds which did not comply with statutory requirements for reimbursement of bonds for school construction funding, although Department had reimbursed similar, earlier bond repayments; Legislative concern regarding predictability of future appropriations led to requirement of a ten-year minimum term of approximately equal bond payments, while bonds at issue contained large balloon payments near the end of their terms.

Department of Education and Early Development was not equitably estopped from denying municipality's request for reimbursement of school construction bonds on grounds that reimbursement requests for prior, similar bonds had been approved, as reimbursement would require Department to violate statutory requirement that bonds be subject to relatively equal payments for a minimum ten year period.

PUBLIC RECORDS - OHIO

State ex rel. Armatas v. Plain Township Board of Trustees

Supreme Court of Ohio - April 8, 2021 - N.E.3d - 2021 WL 1301186 - 2021-Ohio-1176

Requester, proceeding pro se, sought writ of mandamus to compel township to produce invoice for legal services performed on township's behalf. Requester moved for damages under the Public Records Act, attorney fees, and costs.

The Fifth District Court of Appeals denied the writ and related claims for damages, attorney fees, and costs. Requester appealed.

The Supreme Court held that:

- Invoice constituted a "public record" under the Public Records Act pursuant to the quasi-agency theory;
- Township had clear legal duty to make invoice available; and
- Requester was entitled to recover maximum amount of statutory damages.

Invoice for legal services performed on township's behalf which was in possession of claims administrator for a private entity, a government risk-management pool that had hired and supervised the attorneys, constituted a "public record" under the Public Records Act pursuant to the quasi-agency theory, since invoice related to a delegated public duty; township had public duty to obtain legal representation to protect the public interest, it delegated that duty by becoming a member of the risk-management pool, and its attorney-client relationship persisted even though attorneys were hired and controlled by risk-management pool.

Township had clear legal duty to make available to requestor an invoice for legal services performed on township's behalf, which was in possession of private entity, a government risk-management pool that hired and supervised the attorneys, as required for mandamus relief for his Records Act claim; invoice came under township's jurisdiction and documents procedures and operations that it had delegated to the risk-management pool.

Relator in mandamus action related to Public Records Act request was entitled to recover maximum amount of statutory damages after township denied his request for an invoice for legal services performed on township's behalf, where township lacked reasonable legal basis for failing to provide requester with a written explanation for denying access to the requested records before he filed his mandamus complaint.

PUBLIC UTILITIES - TEXAS

Public Utility Commission of Texas v. Texas Industrial Energy Consumers

Supreme Court of Texas - March 26, 2021 - S.W.3d - 2021 WL 1148227 - 64 Tex. Sup. Ct. J. 576

Electricity consumer advocacy group and others petitioned for judicial review of decision of Public Utilities Commission that electric utility met its burden of proving that it was prudent to complete construction of coal-fired power plant, and therefore, that utility's construction costs could be included in utility rate base passed onto consumers.

The District Court affirmed, and petitioners appealed. The Austin Court of Appeals reversed and remanded. Review was granted.

The Supreme Court held that:

- Electric utility was not required to present expert testimony to show that its decision to continue construction of coal-fired power plant was prudent at time, and
- Substantial evidence supported conclusion of Public Utilities Commission that electric utility's decision to complete construction of plant.

Electric utility was not required to present expert testimony in its independent, retrospective analysis in order to show that its decision to continue construction of coal-fired power plant fell within the select range of options that reasonable utility manager would exercise or choose, based on information available at time, and thus was prudent, given its lack of contemporaneous records at time decision was made, as required for Public Utilities Commission to allow utility to include construction costs in utility rates passed onto consumers; nothing prevented Commission from

assessing prudence based on historical facts and employee testimony adduced at hearing.

Substantial evidence supported conclusion of Public Utilities Commission that electric utility's decision to complete construction of coal-fired power plant fell within range of reasonably prudent options available to utility at time, and thus, utility was entitled to include costs of construction in utility rates passed onto consumers; utility presented evidence regarding volatility of natural gas prices, whereas price of coal, in contrast, remained stable within same period, engineering work for plant was 93% complete at time it made decision to complete construction and overall plant construction was 39% complete, utility had $655 million in outstanding commitments dependent on completion of construction, and plant's capacity met utility's power demands and had anticipated useful life that extended beyond economic conditions at time of decision.

ZONING & PLANNING - VERMONT

In re JSCL, LLC CU Permit

Supreme Court of Vermont - April 2, 2021 - A.3d - 2021 WL 1250969 - 2021 VT 22

Applicant and neighbors sought review of town zoning board of adjustment's grant of conditional use permit to construct trucking facility for fuel-hauling business in industrial zone.

The Superior Court approved application. Neighbors appealed.

The Supreme Court held that:

- Evidence supported determination that project was not a fire, explosive, or safety hazard under zoning bylaws;
- Noise limitation in bylaws applied to noises at property line emanating from proposed use itself and not to sounds created by vehicles passing into and out of property;
- Trial court conducted appropriate analysis of daytime noise impacts;
- Trial court's analysis of nighttime impacts was inadequate to support conclusion of no adverse effect at night; and
- Permit condition requiring applicant to minimize nighttime arrivals and prohibiting Sunday and holiday operations except for emergency was impermissibly vague.

TAX - VIRGINIA

Galloway v. County of Northampton

Supreme Court of Virginia - April 1, 2021 - S.E.2d - 2021 WL 1220722

In action brought by taxpayers against county and town, alleging that real property had been overvalued in tax assessments, county and town moved in limine and to dismiss, seeking exclusion of taxpayers' expert witnesses for failure to comply with uniform pretrial scheduling order and dismissal of case for failure to provide timely detailed report on substance of witness' intended testimony.

The Northampton Circuit Court excluded expert witnesses and dismissed case with prejudice. Taxpayers appealed.

The Supreme Court held that:

- Taxpayers failed to comply with pretrial scheduling order, and thus exclusion of expert witness' testimony was warranted;
- Taxpayers' identification of another intended expert witness was valid; and
- Taxpayers did not waive right to have witness testify as expert.

Taxpayers failed to comply with provision of pretrial scheduling order that required them to disclose substance of facts and opinions to which expert witnesses were expected to testify and to provide grounds for each opinion 90 days before trial, and thus exclusion of witness from testifying was warranted in action brought by taxpayers against county and town, alleging that real property had been overvalued in tax assessment, even though taxpayers identified witnesses several days before deadline and had provided opportunity to depose witness; taxpayers did not disclose substance of facts and opinions and grounds for opinions until two months after disclosure of witnesses' identities, and while order was not entered by court until date on which taxpayers were required to make witness disclosures, taxpayers' counsel had signed order before such date.

Taxpayers' identification of intended expert witness was valid in action brought against county and town, alleging that real property had been overvalued in tax assessments, even though taxpayers' counsel failed to sign signature blank on response to interrogatories regarding expert witnesses, as required by court rule governing signing of discovery requests, responses, and objections; counsel's signatures at end of discovery responses, together with taxpayer's notarized and sworn signature, satisfied rule's requirements, and even if they had not, counsel promptly signed response after he realized, without prompting from opposing counsel or court, that he had initially failed to do so.

Taxpayers, in response to interrogatory regarding expert witnesses, did not waive right to have intended witness testify as expert in action brought against county and town, alleging that real property had been overvalued in tax assessments, even though response did not list expert; taxpayers had already informed county and town that they intended to call expert in response to previous interrogatory, and if county and town had conferred with taxpayers on issue, they would have known that taxpayers intended to supplement, rather than supplant, identification of experts.

PUBLIC EMPLOYMENT - WASHINGTON

Seattle Police Department v. Seattle Police Officers' Guild

Court of Appeals of Washington, Division 1 - April 5, 2021 - P.3d - 2021 WL 1247946

City applied for a writ directing arbitration panel to transmit records and files to the Superior Court to determine whether to vacate panel's decision to reinstate former city officer who was terminated by city for violating police department's use-of-force policies.

The Superior Court granted city's motion to vacate. Police guild appealed.

The Court of Appeals held that:

- Public policy against use of excessive force in policing was explicit;
- Policy was dominant;
- Policy was well defined;
- Panel considered mitigating factors that were not properly considered as mitigating in light of policy;
- Award was so lenient as to violate policy; and
- Policy barred reinstatement.

Public policy against use of excessive force in policing was explicit, as required to vacate, as violative of public policy, arbitration panel's decision to reinstate former city officer who was terminated by city for violating police department's use-of-force policies; right to be free from excessive force had source in Bill of Rights and was enforceable against states via Fourteenth Amendment, Fourth Amendment provided explicit textual source of constitutional protection against physically intrusive governmental conduct, and Fourth Amendment, not more generalized notion of substantive due process, was guide for analyzing excessive force claims.

Public policy against use of excessive force in policing was dominant, as required to vacate, as violative of public policy, arbitration panel's decision to reinstate former city officer who was terminated by city for violating police department's use-of-force policies; right to be free from excessive force was enshrined in the U.S. Constitution, which Washington's constitution recognized as the supreme law of the land, § 1983 was enacted to create a broad remedy for violations of federally protected civil rights, and congress, through enactment of statute prohibiting pattern or practice of right deprivations, provided remedy for violations of federal civil rights, specifically for violations that were systematically perpetrated by local police departments.

Public policy against use of excessive force in policing was well defined, as required to vacate, as violative of public policy, arbitration panel's decision to reinstate former city officer who was terminated by city for violating police department's use-of-force policies; statute imposed affirmative duty on municipal employers to sufficiently discipline officers who violated use-of-force policies, and consent decree between city and United States confirmed that effective accountability mechanisms, including ones that sufficiently disciplined officers who violated the very policies designed to ensure constitutional policing, were a cornerstone of municipal employers' duty to not engage in patterns or practices of use of excessive force.

In determining to reinstate former city officer who was terminated by city for violating police department's use-of-force policies, arbitration panel considered mitigating factors that were not properly considered as mitigating in light of public policy against use of excessive force; panel considered as mitigating factors that officer acted "perhaps reflexively" after being kicked, that officer's patience was being tried, and that he sincerely believed that he did nothing wrong, even though officer punched suspect while she was handcuffed, intoxicated, and officers and police dog were at scene, officer responded to circumstance not unique for officers, and consideration of subjective belief telegraphed that policy violations were condoned if officer was passionate.

Arbitration panel's award reinstating former city officer who was terminated by city for violating police department's use-of-force policies was so lenient as to violate public policy against use of excessive force; despite officer's adequate training and clarity and specificity of policies, he punched woman who, although angry and resistant, was not large and was handcuffed and intoxicated, although officer described suspect as amazingly strong, officer himself was relatively large and physically strong, woman was only person arrested, and there were two additional officers and police dog at scene.

Public policy against use of excessive force in policing barred reinstatement of former city officer who was terminated by city for violating police department's use-of-force policies, as required to vacate arbitration panel's award reinstating officer; reinstatement would have sent message that it was not that serious when an officer, who had time to execute other options, violated clear and specific policy on which he was adequately trained by using excessive force on handcuffed subject "perhaps reflexively" because "patience was being tried," causing serious injury, and insisting he did nothing wrong, and remanding to panel to reinstate officer subject to some other penalty would have thwarted city's ability to ensure that no pattern or practice of using excessive force existed.

MUNICIPAL GOVERNANCE - WASHINGTON

Matter of Recall of Sawant

Supreme Court of Washington - April 1, 2021 - P.3d - 2021 WL 1217195

Voters filed petition to recall city council member, alleging that member delegated city employment decisions to political organization outside city government, that member used city resources to promote ballot initiative and failed to comply with public-disclosure requirements, that member disregarded state orders related to COVID-19 and endangered safety of city workers and other individuals by admitting hundreds of people into city hall while it was closed to public, and that member led protest march to mayor's private residence, the location of which member knew was protected under state confidentiality laws.

The Superior Court found charges factually and legally sufficient for recall. Member appealed

The Supreme Court held that:

- Allegation that member delegated city employment decisions to political organization, on its face, was factually sufficient to support recall petition;
- Allegation that member delegated city employment decisions to political organization was legally insufficient to support recall petition;
- Allegations that member used city resources to promote ballot initiative and failed to comply with public-disclosure requirements were factually sufficient to support recall petition;
- Allegations that member used city resources to promote ballot initiative and failed to comply with public-disclosure requirements were legally sufficient to support recall petition;
- Allegations that member disregarded state orders related to COVID-19 and endangered safety of city workers and other individuals by admitting hundreds of protestors into city hall while it was closed to public were legally sufficient to support recall petition;
- Allegations that city council member led protest march to mayor's private residence, the location of which member knew was protected under state confidentiality laws, were factually sufficient to support recall petition; and
- Allegations that city council member violated her oath of office and city charter by leading protest march to mayor's private residence were legally sufficient to support recall petition.

PUBLIC WORKS - CALIFORNIA

Kaanaana v. Barrett Business Services, Inc.

Supreme Court of California - March 29, 2021 - P.3d - 2021 WL 1166963 - 21 Cal. Daily Op. Serv. 2696

Belt sorters at a county recycling facility brought action against staffing company, alleging failure to pay minimum wages, overtime, and all wages owing at termination, failure to provide meal periods, and unfair competition, and the employees sought civil penalties under Private Attorneys General Act (PAGA).

Following bench trial, the Superior Court entered judgment in favor of employees but reduced amount of civil penalties for noncompliant meal periods. Employees appealed. The Court of Appeal reversed and remanded.

On further review, the Supreme Court held that:

- Term “public works,” as used in California’s prevailing wage law in guaranteeing a certain minimum wage to those employed on public works, had to be interpreted broadly as not limited only to workers employed in construction activities, and
- Belt sorters at county recycling facility qualified as workers employed on “public works,” who were entitled to be paid a minimum wage under California’s prevailing wage law.

Overarching purpose of California’s prevailing wage law is to protect and benefit employees on public works projects, and this general objective subsumes within it numerous specific goals: to protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas; to permit union contractors to compete with nonunion contractors; to benefit the public through superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees.

Term “public works,” as used in California’s prevailing wage law in guaranteeing a certain minimum wage to those employed on public works, had to be interpreted broadly as not limited by previous definition only to workers employed in construction- and infrastructure-related work activities.

Belt sorters at a county recycling facility, whose job in sorting refuse deposited on conveyor belt was to remove nonrecyclable materials, clear obstructions, and put recyclables into containers, qualified as workers employed on “public works,” who were entitled to be paid a minimum wage under California’s prevailing wage law.

BOND VALIDATION - GEORGIA

Franzen v. City of Atlanta

Court of Appeals of Georgia - March 29, 2021 - S.E.2d - 2021 WL 1168893

Citizen intervenors in bond validation proceedings involving tax allocation district (TAD) established for the purpose of redeveloping a blighted area of the city, filed an objection to bond validations, asserting that the Atlanta Board of Education and the Fulton County Board of Commissioners did not have the authority to commit educational tax dollars derived from the TAD to the redevelopment.

The Superior Court issued orders both denying intervenors’ objections and validating the bonds. Intervenors appealed.

The Court of Appeals held that:

- School board had authority to consent to participation in TAD;
- County did not need to adopt a project-specific resolution to approve of proposed TAD financing of redevelopment project;
- School board resolution was relevant to trial court’s ultimate conclusion regarding the propriety of TAD bonds;
- City was not required to enact a new or amended local law before exercising its authority to use school tax funds in TAD to fund redevelopment costs of blighted area;
- City’s redevelopment plan did not violate the Redevelopment Powers Law; and
- Trial court orders validating municipal bonds and ruling on objections by citizen intervenors in bond validation proceeding contained adequate findings of fact and conclusions of law.

City school board had authority to consent to participation in city’s tax allocation district (TAD), although school board adopted interim resolution stating that no further use of ad valorem tax

increments would be permitted without its prior written consent, where subsequent resolution expressly reinstated school board's consent to the inclusion of any ad valorem property tax dollars as a basis for computing the tax allocation increment for the TAD.

County's resolution extending its consent to inclusion of its ad valorem taxes on real property in the computation of tax allocation increments for tax allocation district (TAD) applied to all projects approved on or before a specific date, included approved redevelopment project, and thus county did not need to adopt a project-specific resolution to consent to proposed financing of redevelopment project; county's resolution required additional approval only for projects proposed after specific date.

School board resolution was relevant to trial court's ultimate conclusion regarding the propriety of tax allocation district (TAD) bonds and whether the school board properly consented to the inclusion of its property tax increment in the TAD bonds, and thus was admissible in bond validation proceeding, where resolution clarified that it superseded any conflicting provision in an earlier school board resolution related to city tax allocation districts.

City was not required to enact a new or amended local law before exercising its authority to use school tax funds in a tax allocation district (TAD) to fund redevelopment costs of blighted area, where city had already passed a local law authorizing the city's redevelopment power prior to enactment of statute stating that redevelopment powers could be exercised only if authorized by a local law.

City's redevelopment plan did not violate the Redevelopment Powers Law, although it did not contain a school system impact analysis, where redevelopment plan was adopted and amended prior to statutory amendment requiring such a plan, and Redevelopment Powers Law provided that a school board's pre-amendment consent was ratified and confirmed.

Trial court orders validating municipal bonds and ruling on objections by citizen intervenors in bond validation proceeding contained adequate findings of fact and conclusions of law; trial court's lengthy orders discussed extensive evidence presented during three days of hearings regarding the mechanics of the bond financing structure and included a clear statement of trial court's reasoning.

PUBLIC UTILITIES - ILLINOIS

Souza v. City of West Chicago

Appellate Court of Illinois, Second District - March 9, 2021 - N.E.3d - 2021 IL App (2d) 200047 - 2021 WL 871193

Water-service customers filed a class action complaint against municipality, seeking declaratory and injunctive relief in addition to economic damages based on municipality's attempt to bill more than 12 months, for residential customers, and 24 months, for nonresidential customers, after alleged usage of water and sewer services, and against contractor for breach of contract with municipality, which required installation of infrastructure to deliver "real time" meter reads, premised on customers' alleged status as third-party beneficiaries of the contract.

Following municipality's amendment of its local ordinance concerning billing practices, the Circuit Court granted contractor's motion to dismiss, granted municipality's motion for judgment on the pleadings, and ordered municipality's separate motion to dismiss stricken as moot. After entering an order granting customers leave to withdraw their motion to reconsider, the Circuit Court granted

municipality's motion to strike customers' motion to limit the scope of the judgment, but also denied customers' motion to limit the scope of the judgment on the merits. Customers appealed.

The Appellate Court held that:

- Customers' motion to limit the Circuit Court's judgment tolled the time period for filing a notice of appeal;
- The Appellate Court would overlook on appeal customers' forfeiture of certain arguments;
- Ordinance setting forth water billing practices of municipality pertained to local government affairs, as required for constitutional exercise of home rule power;
- Legislature did not expressly restrict home rule authority of municipality to adopt ordinance;
- Validating municipality's home rule power to adopt ordinance did not lead to absurd consequences;
- Legislature's enactment of water-utility billing statute in Municipal Code did not create private vested right in customers such that retroactive application of ordinance would violate due process clause of state constitution; and
- Contract between municipality and contractor did not confer direct benefit on customers, as required for customers to sue on contract as third-party beneficiaries.

CHARTER AMENDMENT - OHIO

State ex rel. Cincinnati Action for Housing Now v. Hamilton County Board of Elections

Supreme Court of Ohio - March 30, 2021 - N.E.3d - 2021 WL 1186411 - 2021-Ohio-1038

Organization and individual electors sought writ of mandamus to compel county board of elections, Secretary of State, and city council to change ballot language regarding proposed city charter amendment on primary-election ballot.

The Supreme Court held that:

- Language regarding city's priorities for appropriation of funds was not misleading or inappropriately argumentative;
- Language regarding funding dedicated to essential city services and infrastructure was not misleading or inappropriately argumentative;
- Language relating to selection process for members of board did not mischaracterize process and was not inappropriately misleading;
- Ballot language was not misleading as to list of funding sources;
- Ballot language that potential funding sources were "prohibited by state law" was inappropriately argumentative; and
- Language regarding purposes of proposed amendment was not misleading or incomplete.

County board of elections, alone, had legal duty to prepare ballot language relating to proposed city-charter amendment, under statute providing for use of ballot language "as prepared and certified…by the board," and its role was not to merely choose between petition signed by electors or ballot language proffered by city council, though electors and council were free to suggest ballot language.

Ballot language regarding proposed amendment to city charter requiring appropriation of at least $50 million for affordable housing trust fund, which stated that the appropriation would take priority over other funding needs of the city and "could require" city to reduce city services and

infrastructure projects by as much as $50 million annually, was not misleading or inappropriately argumentative; statement that appropriations would have priority over infrastructure and city services funding was accurate, language did not state it would "mandate" reduction in funding, only that it "could require" such reduction, and it was fair for ballot language to explain consequences of proposed measure on future city budgets.

Ballot language for proposed amendment to city charter requiring appropriation of at least $50 million for affordable housing trust fund, which stated that amendment would require city to appropriate funding using sources otherwise dedicated to providing for essential city services and public infrastructure needs, was not misleading or inappropriately argumentative; text fairly and accurately described reality, as much of the $50 million funding would have to come from city's general-operating and capital funds, appropriations for essential services and infrastructure projects currently came from general-operating and capital funds, and objectors to ballot language did not dispute that trust fund would dip into bucket of funds that provided for essential city services and public infrastructure.

Ballot language for proposed amendment to city charter requiring appropriation of at least $50 million for affordable housing trust fund, which stated that the trust-fund board would be "administered by an unelected volunteer board," and that the board members would be selected by community organizations and city council president pro tem, did not mischaracterize selection process and was not impermissibly argumentative, though objectors to ballot language asserted that language omitted critical role played by city council in selecting members; council would not have significant role in deciding membership, as, even if it had authority to reject nominees, it did not have right to select individuals for service, and ballot language that members were "unelected" was factually accurate.

Ballot language regarding source of funds for proposed amendment to city charter requiring appropriation of at least $50 million for affordable housing trust fund, which provided that city would appropriate funds from its operating or capital funds, revenue related to railway, proposed fee on developers, "or" personal income tax, was not misleading as to funding sources, though objectors to ballot language asserted that language misleadingly suggested that funding would be drawn from all, and not merely from among, the potential sources, as provided in proposal; use of disjunctive "or" plainly indicated that funding need not be drawn from each of the listed sources.

Ballot language regarding source of funds for proposed amendment to city charter requiring appropriation of at least $50 million for affordable housing trust fund, which provided that city would appropriate funds from its operating or capital funds, revenue related to railway, proposed fee on developers, or personal income tax, was not misleading as to funding sources on the ground that it omitted fifth potential source, namely an increase in municipal-income-tax rate if approved by city voters, as provided in proposal; proposal language related to municipal-income-tax rate, if approved by voters, did not establish a funding source, but it instead prohibited funding source absent future voter approval.

Ballot language stating that two proposed funding sources for proposed amendment to city charter requiring appropriation of at least $50 million for affordable housing trust fund, namely revenue related to railway and personal income tax on stock-option income, were "prohibited by state law," was inappropriately argumentative; statements were legal opinions on questions that the proposed amendment did not address.

Ballot language regarding purposes of proposed amendment to city charter requiring appropriation of at least $50 million for affordable housing trust fund, which stated fund would be established for affordable housing for persons with low incomes "and for related purposes," but did not list specific

related purposes of neighborhood stabilization, housing investment to prevent displacement, and leveraging additional outside resources, was not misleading or incomplete; there was no indication that stating specific purposes was essential to voters understanding proposal, nature of summary necessarily required omission of some important but nonessential information, and later part of summary stated that funds could be allocated to items including new construction, renovation, and direct services.

Secretary of State had no clear legal duty to eliminate inappropriately argumentative ballot language stating that two proposed funding sources for proposed amendment to city charter requiring appropriation of at least $50 million for affordable housing trust fund, namely revenue related to railway and personal income tax on stock-option income, were "prohibited by state law," under statutes governing preparation of ballot title and final approval of ballot language, and thus objectors to ballot language were not entitled to writ of mandamus compelling secretary to change language; statute governing ballot title was inapplicable to issue with ballot language, and relators were not trying to compel Secretary to substantively review language, which duty belonged to County Board of elections.

Objectors to ballot language relating to proposed amendment to city charter requiring appropriation of at least $50 million for affordable housing trust fund were not entitled to award of attorney fees or costs against county board of elections, Secretary of State, or city council, in mandamus proceeding in which objectors successfully challenged some of the language as being inappropriately argumentative, in absence of evidence that board, Secretary, or council acted in bad faith.

IMMUNITY - TEXAS

White v. City of Houston

Court of Appeals of Texas, Houston (1st Dist.) - March 25, 2021 - S.W.3d - 2021 WL 1133152

Driver sued city to recover damages for personal injuries that were allegedly sustained when unsecured firehose from one of city's firetrucks became entangled in car's rear axle while driver was in car and caused car to be dragged for 30 feet.

The District Court granted city's plea to the jurisdiction. Driver appealed.

The Court of Appeals held that:

- Driver alleged claim that was legally sufficient to invoke Tort Claims Act's waiver of governmental immunity for injuries caused by condition or use of tangible personal property, but
- Emergency exception to waiver of governmental immunity applied.

Driver, who purportedly was injured when unsecured firehose from city's firetruck became entangled in his car's rear axle and caused car to be dragged for 30 feet, alleged a claim that was legally sufficient to invoke Tort Claims Act's waiver of governmental immunity for injuries caused by condition or use of tangible personal property, where driver alleged that hose, or compartment in which it was stowed, lacked integral safety component to secure hose in place while in transit, such safety components existed, and fire captain thought that those safety components were used in other firetrucks operated by city's fire department.

Emergency exception to Tort Claims Act's waiver of governmental immunity applied to suit brought by driver for personal injuries allegedly sustained when unsecured firehose from city's firetruck

dislodged while truck was en route to house fire and caused car accident, although act of stowing hose in truck occurred before emergency response; driver did not allege he was injured when firefighters stowed hose, claim necessarily arose from firefighters' transport of allegedly negligently stowed hose while responding to emergency call, and firefighters were responding to emergency when accident happened.

ZONING & PLANNING - VIRGINIA

Stafford County v. D.R. Horton, Inc.

Supreme Court of Virginia - April 1, 2021 - S.E.2d - 2021 WL 1220736

Real estate developers filed petitions against county challenging county planning department's determination that developers proposed development plans would need to undergo a comprehensive plan compliance review, and seeking writs of mandamus requiring county to approve their development plans, writs of prohibition preventing county from ordering a comprehensive plan review, declaration that county must approve their plans.

After developers' petitions were consolidated, the Circuit Court rendered judgment in favor of developers. County appealed.

The Supreme Court held that:

- Cluster development statute did not apply to developers' proposed cluster development plans, thus, developers were required to submit plans for approval, and
- Approval of developers' subdivision plans did not foreclose requirement for approval of their cluster development plans.

Cluster development statute, which required municipalities to extend water or sewer services to cluster developments located within an area designated for such services, did not apply to real estate developers' plans to construct a cluster development on their respective properties, and, thus, developers were required to submit their plans to county planning commission for approval, under planning commission review statute requiring commission's approval for plans intending to construct a "feature" not shown on county's comprehensive plan, where most of the land covered by the plans was outside of the area that the comprehensive plan designated for water and sewer services.

County planning commission's approval of real estate developers' plans to construct a subdivision on their respective properties did not exempt their amended plans for cluster developments from review, under statute mandating that the comprehensive plan adopted by county would control the location, character, and extent of "features" shown on the comprehensive plan; even though there were similarities between developers' respective initial and amended plans, both of their amended plans involved more lots and more parcels not included in their initial plans, county had updated its comprehensive plan after developers' initial plans were approved, and approval of developers' initial plans did not cause any change to the comprehensive plan.

ZONING & PLANNING - WISCONSIN

Village of Slinger v. Polk Properties, LLC

Supreme Court of Wisconsin - April 1, 2021 - N.W.2d - 2021 WL 1216687 - 2021 WI 29

Village brought action for an injunction ordering landowner to stop agricultural use of property and later amended its complaint to state claim for lost tax revenue and claim for daily forfeitures for zoning law violations.

The Circuit Court enjoined agricultural use, entered summary-judgment order requiring landowner to pay forfeitures for zoning violations and damages for village's lost property tax revenue, and, on village's motion to have landowner held in contempt, awarded attorney fees to village. Landowner appealed. The Court of Appeals affirmed. Landowner petitioned for review.

The Supreme Court held that landowner did not cease the legal, nonconforming use of property for agriculture, despite building homes on property.

Landowner did not cease the legal, nonconforming use of property for agriculture, and thus landowner did not "abandon" legal, nonconforming use of land for agriculture, despite landowner's actions of seeking and obtaining rezoning of land from agricultural to residential use, entering into development agreement restricting property to residential use, recording declaration explicitly stating that landowner intended to develop subdivision for residences, building couple of homes on property, and installing residential infrastructure; changes on property did not alter or expand legal, nonconforming use of farming and instead initiated development of property into residential conforming use.

IMMUNITY - WYOMING

Wyoming State Hospital v. Romine

Supreme Court of Wyoming - March 25, 2021 - P.3d - 2021 WL 1135510 - 2021 WY 47

Parents of patient who was sexually assaulted by certified nursing assistant brought action against state hospital asserting various claims of negligence under Wyoming Governmental Claims Act.

The District Court denied hospital's motion for summary judgment. Hospital filed a notice of appeal or, in the alternative, a petition for writ of review.

The Supreme Court held that:

- Appeal did not involve purely legal issue of whether the hospital was immune from suit under Act, and
- Act's waiver of liability for negligence of health care providers is not limited to medical malpractice claims.

State hospital's interlocutory appeal of district court's determination, which was that there were genuine disputes of material fact as to whether claims brought by parents of patient who was sexually assaulted by certified nursing assistant constituted a single transaction or occurrence under Wyoming Governmental Claims Act, did not involve purely legal issue of whether the hospital was immune from suit under the Act, as required for Supreme Court's jurisdiction over appeal, where section related to the State's liability, not its immunity from suit, as section capped the hospital's liability only if it was found to have waived its immunity from suit.

Wyoming Governmental Claims Act's waiver of liability for negligence of health care providers is not limited to medical malpractice claims.

ZONING & PLANNING - CALIFORNIA

Travis v. Brand

Court of Appeal, Second District, Division 8, California - March 19, 2021 - Cal.Rptr.3d - 2021 WL 1049863 - 21 Cal. Daily Op. Serv. 2591

City residents brought action alleging that political candidates controlled political action committee created to oppose redevelopment of municipal waterfront, in violation of Political Reform Act.

The Superior Court entered judgment in defendants' favor and awarded attorney fees. Plaintiffs appealed and appeals were consolidated.

The Court of Appeal held that:

- Nonparties that funded action had standing to appeal fee award;
- Substantial evidence supported trial court's finding that committee was general purpose committee;
- Substantial evidence supported trial court's finding that committee was not controlled committee;
- Trial court acted beyond its authority by issuing judgment holding nonparties liable for defendants' attorney fees; and
- Trial court had authority under Political Reform Act to award attorney fees to defendants.

Nonparties that funded action alleging that political candidates improperly controlled political action committee that had opposed their municipal beachfront redevelopment project had standing to appeal trial court's order awarding candidates and committee attorney fees and costs incurred in action, where court found nonparties "were the true entity and persons behind the lawsuit," and ordered its judgment to be entered against them.

Substantial evidence supported trial court's that finding political action committee that opposed municipal waterfront redevelopment project was general purpose committee, and thus did not need to reclassify itself as primarily formed committee, in light of evidence that committee's founders created it to support and oppose more than one candidate or ballot measure, that it was not involved in running principal campaign against project, that it was involved in many different activities, and that its political expenditures did not meet threshold for primarily formed committees.

Substantial evidence supported trial court's finding that political action committee that opposed municipal waterfront redevelopment project was not controlled committee, even though political candidates supported committee's efforts to stop project, and committee had fundraiser with candidates, in light of evidence that candidates did not direct or control committee, work on committee's efforts to pass ballot measure opposing project, strategize with committee, have significant influence over committee, share office space with committee, or act jointly with committee.

Trial court acted beyond its authority by issuing judgment holding nonparties who funded action against political candidates and political action committee that opposed municipal waterfront redevelopment project liable for defendants' attorney fees, even though nonparties had notice that case was ongoing, where they had no notice that judgment could include them.

Trial court had authority under Political Reform Act to award attorney fees to political candidates and political action committee that prevailed in action alleging that candidates violated Act by controlling committee, regardless of whether action was frivolous, unreasonable, or without foundation.

OPEN MEETINGS - CONNECTICUT

City of Meriden v. Freedom of Information Commission

Supreme Court of Connecticut - March 12, 2021 - A.3d - 2021 WL 952887

City sought review of determination by Freedom of Information Commission that gathering of four members of its 12-member city council, the city's mayor, and the retiring city manager to discuss the search for a new city manager violated open meeting requirements of state's Freedom of Information Act.

The Superior Court dismissed appeal. City appealed. The Appellate Court reversed and remanded with directions. Commission's petition for certification to appeal was granted, as limited to specified issue.

The Supreme Court held that:

- The Supreme Court was not required to afford deference to Commission's interpretation of "proceeding," as that term was used in subdivision of Act defining "meeting" as any hearing or other proceeding of a public agency, and
- Gathering of city council's four-member leadership group with the mayor and the retiring city manager was not a "hearing or other proceeding" of a public agency and, thus, was not a "meeting" subject to the open meeting requirements of the Act.

IMMUNITY - FLORIDA

Carollo v. Platinum Advisors, LLC

District Court of Appeal of Florida, Third District - March 24, 2021 - So.3d - 2021 WL 1112554

Limited liability company (LLC) brought action against city commissioner for breach of fiduciary duty, breach of agreement, and misappropriation of trade secrets, after commissioner, who had contracted with LLC to help secure government approval of a ferris wheel prior to his election, participated in a public discussion conducted by the city commission regarding the ferris wheel's economic benefits.

The Circuit Court denied commissioner's motion to dismiss on grounds of sovereign immunity. Commissioner appealed.

On clarification, the District Court of Appeal held that commissioner enjoyed absolute legislative immunity from civil suit.

City commissioner who, prior to his election, had contracted with limited liability company (LLC) to help LLC secure government approval of a proposed ferris wheel, enjoyed absolute legislative immunity from suit arising from comments he made at a public discussion conducted by the city commission regarding ferris wheel's economic benefits; even if unethical, commissioner's participation in the discussion was precisely the type of legislative conduct in which elected city commissioners were expected to engage.

ZONING & PLANNING - INDIANA

Department of Business and Neighborhood Services of Consolidated City of Indianapolis v. H-Indy, LLC

Court of Appeals of Indiana - March 19, 2021 - N.E.3d - 2021 WL 1047361

Two affiliated entities seeking to open retail store in city petitioned for judicial review of Board of Zoning Appeals' (BZA) decision finding proposed use of site was "adult entertainment business," which was not a permitted use in the zoning district and required variance, and declaratory judgment action against city department of business and neighborhood services (Department) alleging it violated entity's constitutional rights by imposing unauthorized litigation hold on permit applications related to site until judicial review was completed.

Actions were consolidated, and all parties filed motions for summary judgment. The Superior Court issued order reversing BZA decision, ordering Department to issue requested permits, and declaring entity's constitutional rights had been violated by imposition of litigation hold. City filed interlocutory appeal.

The Court of Appeals held that:

- Finding that proposed use was an adult bookstore was arbitrary, capricious, and unsupported by evidence;
- Finding that proposed use was an adult services establishment was arbitrary, capricious, and unsupported by evidence; and
- Due process rights of entity seeking to open retail store were violated by unauthorized litigation hold placed until completion of judicial review.

Board of Zoning Appeals' (BZA) finding that proposed use of site for retail store was an adult bookstore requiring variance was arbitrary, capricious, and unsupported by substantial evidence; city department of business and neighborhood services' (Department) license administrator made determination that proposed use was an adult bookstore without considering projected revenue data specific to proposed store, adult products were projected to make up a maximum of 18.1% of site's weekly expected revenue and take up 12.% of retail floor space, and city could not prove entity seeking to operate store intentionally mischaracterized merchandise in order to fall below 25% floor space and weekly revenue limits.

Board of Zoning Appeals' (BZA) finding that proposed use of site for retail store was an adult services establishment providing services in two or more specified categories requiring variance for operation was arbitrary, capricious, and unsupported by substantial evidence; city presented no evidence specific to proposed store that its proposed use was to provide services involving specified sexual activity or display of specified anatomical areas in any category other than the sale of books, magazines, periodicals, photos, films, cassettes, slides, tapes, or records.

Due process rights of entity seeking to open retail store in city were violated by unauthorized litigation hold placed by city department of business and neighborhood services (Department) until completion of judicial review of Board of Zoning Appeals (BZA) decision finding affiliated entity's proposed use of site required variance, where entity had property interest in site, harm to entity occurred when department indicated it would not process any permit application, and any attempt by entity to submit applications would have been futile.

EMINENT DOMAIN - MASSACHUSETTS

Abuzahra v. City of Cambridge

Supreme Judicial Court of Massachusetts - February 17, 2021 - 486 Mass. 818 - 162 N.E.3d 653

After securing judgment in the Superior Court establishing his ownership over property at issue in action against the city, property owner filed motion to compel full tender of pro tanto payment with accrued interest.

The Superior Court Department issued interlocutory order denying the motion. Owner petitioned for interlocutory review. A single justice of the Appeals Court reversed the order. City appealed.

On transfer, the Supreme Judicial Court held that:

- As matter of first impression, "quick take" eminent domain statute permits property owners to both accept a pro tanto payment for a taking and simultaneously challenge the lawfulness of that taking, and
- City's appeal was not frivolous one as would warrant double costs as sanction.

"Quick take" eminent domain statute, which immediately transfers ownership of property from property owner to the taking authority independent of judicial processes, permits the property owner to both accept a pro tanto payment for a taking and simultaneously challenge the lawfulness of that taking.

City's appeal of determination by single justice of the Appeals Court, that "quick take" eminent domain statute allowed property owner to accept city's pro tanto offer for the taking of his property while simultaneously challenging that underlying taking was not frivolous, and thus property owner was not entitled to recover attorney fees and double costs as sanction, even though Supreme Judicial Court affirmed the single justice's order, since the case involved a novel question of law that the Court previously did not have occasion to address.

IMMUNITY - OHIO

Fulps v. City of Urbandale

Supreme Court of Iowa - March 19, 2021 - N.W.2d - 2021 WL 1044414

Pedestrian brought negligence action against city, seeking to recover damages for injuries she incurred from a fall on an allegedly uneven, damaged, and improperly maintained sidewalk.

The District Court dismissed the action. Pedestrian appealed.

The Supreme Court held that public-duty doctrine did not apply to bar negligence claim.

Public-duty doctrine did not apply to bar pedestrian's negligence claim against city, seeking damages for injuries incurred by her fall on allegedly uneven, damaged, and improperly maintained sidewalk, where pedestrian's petition alleged that, at all times material to the matter, the relevant

section of uneven sidewalk was maintained by city.

IMMUNITY - CALIFORNIA

City of Los Angeles v. Superior Court of Los Angeles County

Court of Appeal, Second District, Division 4, California - March 18, 2021 - Cal.Rptr.3d - 2021 WL 1034389 - 21 Cal. Daily Op. Serv. 2438

City filed petition for writ of mandate to challenge decision of the Superior Court overruling its demurrer to police officer's wife's complaint alleging negligence and dangerous condition of public property.

The Court of Appeal held that:

- City had no duty to protect wife from unsanitary conditions at police station, and
- Wife's claims fell within scope of statute immunizing city's decisions regarding prevention or control of disease.

City had no duty to protect police officer's wife from unsanitary conditions at police station, and thus was not subject to liability under Government Claims Act after she contracted typhus from her husband after he was exposed to disease at station; wife had no contact with station and did not allege exposure to any condition of subject property.

Police officer's wife's claims against city arising from its alleged failure to remedy unsanitary conditions at police station, which caused her to contract typhus after her husband was exposed to disease at station, fell within scope of statute immunizing city's "decision to perform or not to perform any act to promote the public health of the community by preventing disease or controlling the communication of disease," absent allegation that city violated any mandatory duties with respect to its decisions relating to spread of typhus on city property.

EMINENT DOMAIN - CALIFORNIA

Felkay v. City of Santa Barbara

Court of Appeal, Second District, Division 6, California - March 18, 2021 - Cal.Rptr.3d - 2021 WL 1034275 - 21 Cal. Daily Op. Serv. 2454

Owner of oceanfront lot filed a consolidated petition for writ of administrative mandamus and complaint for inverse condemnation after city denied coastal development permit to construct residence on lot.

The Superior Court denied mandamus relief but entered judgment on jury award for lot owner and awarded attorney and expert fees. City appealed.

The Court of Appeal held that:

- Inverse condemnation claim was ripe;
- Any additional development proposals would have been futile and thus were not required;
- Lot owner sufficiently exhausted administrative remedies; and
- City was estopped from arguing that lot owner's failure to challenge on mandamus the city's

decision declining to waive the requirements of coastal development policy precluded him from seeking damages for inverse condemnation.

Oceanfront landowner's inverse condemnation action against city was ripe, as city had rejected a coastal construction permit variance or waiver and "made plain" that no development would be permitted below the 127-foot elevation.

Owner of oceanfront lot was not required to submit a second development proposal prior to bringing regulatory takings claim against city following denial of coastal development permit, as any additional proposals would have been futile; city's expert noted there would be no point in going back to seek mitigation, as city mad plain that it would not permit any development below the 127-foot elevation, and the limited area above that elevation was unbuildable.

Owner of oceanfront lot sufficiently exhausted administrative remedies as required prior to bringing regulatory takings claim based on city's denial of coastal development permit, where city planning commission and the city council were presented with the option to waive the full impact of their development policy by invoking California Coastal Act's waiver provision, but they declined to do so, and after the court found a taking occurred, it gave the city option to grant permit, and city again declined to issue a permit, with or without conditions, and chose to proceed to trial on damages.

City was estopped from arguing that oceanfront lot owner's failure to challenge on mandamus the city's decision declining to waive the requirements of coastal development policy pursuant to the California Coastal Act precluded him from seeking damages for inverse condemnation following denial of coastal development permit, where stipulation limited issues to be heard on mandamus and reserved inverse condemnation issues for trial, mandamus petition proceeded to a ruling, and the city proceeded to trial without objecting that a trial was barred by a deficiency in the mandamus proceedings; following the ruling on mandamus, and by virtue of the parties' stipulation, landowner had the right to proceed to trial to determine if the city was liable for a taking, and, if so, a jury trial on the amount of compensation.

REFERENDA - ILLINOIS

Jones v. Municipal Officers Electoral Board for City of Calumet City

Supreme Court of Illinois - March 11, 2021 - N.E.3d - 2021 IL 126974 - 2021 WL 925921

Mayoral candidate, who was also a member of the General Assembly, sought judicial review of decision of city's electoral board that his name be removed from the primary election ballot due to recently passed city referendum providing that candidates could not seek the office of mayor while simultaneously holding an elected, paid state office.

The Circuit Court affirmed the board's decision, and candidate appealed. The Appellate Court summarily reversed, and review was granted.

The Supreme Court holds that:

- Referendum became legally effective on date the results of the referendum were certified and declared, rather than on election day, and
- Individuals who brought objection before city's electoral board forfeited their contention that even if candidate was qualified at time he filed nomination papers, the subsequently passed referendum barred his candidacy.

City referendum providing that candidates could not seek the office of mayor while simultaneously holding an elected, paid state office became legally effective on date the results of the referendum were certified and declared, rather than on election day when referendum was approved by a majority of voters, and thus, mayoral candidate, who was also a member of the General Assembly, was legally qualified to run for mayor when he filed his nomination papers after election day but before certification; counting and certification of ballots was not a purely ministerial task, and it would cause instability and confusion for election to be effective on election day, as it would create period of time where the results of the election were legally effective yet unknown to the public.

Individuals who brought objection before city's electoral board seeking to have mayoral candidate, who was also a member of the General Assembly, removed from primary election ballot due to recently passed city referendum providing that candidates could not seek the office of mayor while simultaneously holding an elected, paid state office forfeited before Supreme Court their contention that even if candidate was qualified to run for mayor at the time he filed his nomination papers, the subsequently passed referendum operated to bar him from running for mayor, where the individual objectors did not raise this contention before the board.

IMMUNITY - MISSISSIPPI

Williams v. City of Batesville

Supreme Court of Mississippi - March 18, 2021 - So.3d - 2021 WL 1035076

Homeowner brought action against city for negligence and inverse condemnation arising out of sewer backup and flooding of homeowner's property, which was resolved after a year by installation of a lift-station pump for homeowner's property.

The Circuit Court granted city's motion for summary judgment, and homeowner appealed.

The Supreme Court held that:

- Genuine issue of material fact as to whether city exercised ordinary care in exploring alternatives before spending money necessary to install lift station pump precluded summary judgment on governmental immunity, and
- Genuine issue of material fact as to whether city's alleged conduct resulted in a taking or damaging of her property for the public benefit precluded summary judgment on inverse condemnation claim.

POLITICAL SUBDIVISIONS - NORTH CAROLINA

Benitez v. Charlotte-Mecklenburg Hospital Authority

United States Court of Appeals, Fourth Circuit - March 23, 2021 - F.3d - 2021 WL 1100661

Patient brought action against hospital authority, alleging violations of Sherman Act.

The United States District Court granted judgment on the pleadings. Patient appealed.

The Court of Appeals held that:

- Hospital authority was "special function governmental unit" under Local Government Antitrust Act, and

- Mere growth of hospital authority did not prevent it from continuing to be considered "special function governmental unit."

Hospital authority with authority to acquire real property by eminent domain and power to issue revenue bonds under North Carolina's Local Government Revenue Bond Act for purpose of acquiring, constructing, or operating hospital facilities was "special function governmental unit" under Local Government Antitrust Act; although private corporations had some of same powers as hospital authority, some of authority's powers were uniquely governmental powers.

Although ultimate answer of whether hospital authority qualified as a "special function governmental unit" under Local Government Antitrust Act was function of federal law, Congress' pairing of term "special function governmental unit" with phrase "established by State law in one or more States" required court to consider state law.

Quasi-municipal corporations are commonly used in North Carolina to perform ancillary functions in government more easily and perfectly by devoting to them, because of their character, special personnel, skill and care; in such instances, for purposes of government and for the benefit and service of the public, the State delegates portions of its sovereignty, to be exercised within particular portions of its territory, or for certain well-defined public purposes.

Mere growth of hospital authority did not prevent it from continuing to be considered "special function governmental unit" under the Local Government Antitrust Act, since Act only asked only whether organization qualified as a "local government," as defined by Act, and that determination required examining state law applicable to entity's creation, which did not contain any such limitation.

REFERENDA - OHIO

State ex rel. Walker v. LaRose

Supreme Court of Ohio - March 17, 2021 - N.E.3d - 2021 WL 1022451 - 2021-Ohio-825

Electors sought writ of mandamus seeking to compel Secretary of State, county board of elections, and city to change language on primary-election ballot relating to proposed ordinance to relocate city municipal court or to strike issue from ballot entirely.

The Supreme Court held that:

- Electors were not entitled to mandamus relief against Secretary;
- Electors were not entitled to mandamus relief against city;
- As a matter of first impression, proposed ordinance was required to be passed by majority affirmative vote, not majority of all qualified electors;
- Board's language did not violate statute prohibiting persuasive argument; and
- Ballot title complied with statutory requirements.

Electors were not entitled to mandamus relief compelling Secretary of State to change ballot language of local issue related to proposed ordinance governing relocation of municipal court on primary-election ballot or to strike issue from ballot entirely; Secretary complied with statutory duty to give final approval to form of ballot language, electors did not assert that final-approval statute imposed any further duties on Secretary to review of proposed ordinance for content, and while electors cited statutes relating to form of official ballots and duties of board of elections, they did not explain how those statutes supported duty on part of Secretary to amend ballot language in manner

they sought.

Electors were not entitled to mandamus relief compelling city to change ballot language of local issue related to proposed ordinance governing relocation of municipal court on primary-election ballot or to strike issue from ballot entirely, where electors cited no statute stating that city had power, much less duty, to amend ballot language approved by board of elections or to remove an issue from the ballot.

Initiative passed by city electors prohibiting city from using funds to undertake demolition and construction relating to relocation of city municipal court without "a majority vote of the qualified electors" who were residents of city required proposed ordinance regarding relocation of court to be passed by majority affirmative vote, and not affirmative vote of all qualified electors of the city, including electors who did not vote on the issue; language of initiative was not enough to depart from general rule that simple majority of votes cast was all that was required for passage of ballot issue.

County board of elections' ballot language for proposed ordinance relating to relocation of city municipal court to county courthouse, which contained full text of ordinance, did not violate statute allowing the board to place a summary of an issue on the ballot in lieu of the issue's full text, without any persuasive argument in favor of or against the issue, though objecting electors asserted that use of phrase "so as to preserve the 1969 courthouse as a court building" was misleading and improperly designed to appeal to preservationist voters; board did not draft summary of ordinance for ballot in lieu of full text, and there was no apparent basis for requiring board to amend allegedly persuasive and misleading language when full text was placed on ballot.

Ballot language approved by county board of elections indicating title of "Proposed Ordinance of City of Medina Ordinance No. 222-20" for proposed ordinance regarding relocation of city municipal court complied with statute requiring a "brief title descriptive of the question or issue below it," which provided examples that would suffice, including "Proposed Constitutional Amendment," "Proposed Annexation of Territory," and "Proposed Increase in Tax Rate."

ANNEXATION - CALIFORNIA

San Luis Obispo Local Agency Formation Commission v. City of Pismo Beach

Court of Appeal, Second District, Division 6, California - March 3, 2021 - Cal.Rptr.3d - 2021 WL 803740 - 21 Cal. Daily Op. Serv. 2067 - 2021 Daily Journal D.A.R. 2094

County's local agency formation commission and non-profit organization that reimbursed commission brought action against city and developer, seeking $400,000 for attorney fees and costs incurred in defending an appeal brought by city and developer after the commission denied their application for annexation of real property, which contained an indemnity agreement.

The Superior Court granted city and developer judgment on the pleadings, and denied commission's request for leave to amend. Commission and non-profit organization appealed.

The Court of Appeal held that:

- Agreement was not supported by consideration, as required for a contract;
- Section of Cortese-Knox-Hertzberg Act authorizing local agency formation commission to charge fees does not apply to post-administrative matters; and
- Commission had no authority under Act to require agreement.

Provision contained in application for annexation of real property, stating that applicants agreed to indemnify county's local agency formation commission for attorney fees and costs incurred in connection with the application, was not supported by consideration, as required for a contract; commission's insertion of indemnity provision into application in exchange for not requiring applicants to pay anticipated attorney fees in advance was neither a benefit nor a detriment, because commission had no authority under the Cortese-Knox-Hertzberg Act to charge fees for post-administrative matters.

County's local agency formation commission, which was established under the Cortese-Kno--Hertzberg Act, had no authority under the Act to require applicants for annexation of real property to agree to indemnify commission for attorney fees and costs incurred after the conclusion of administrative proceedings; even if construed as broadly as possible, Act limited commission's authority to charge fees to the administrative process, not post-decision court proceedings.

MUNICIPAL CORPORATIONS - GEORGIA

Harris v. City of South Fulton

Court of Appeals of Georgia - March 8, 2021 - S.E.2d - 2021 WL 854888

Petitioners brought action for declaratory and injunctive relief, alleging their neighborhood was not included in the incorporation of city.

The trial court denied the petition, and petitioners appealed.

The Court of Appeals held that:

- Trial court did not retroactively redraw newly incorporated city's boundaries by including petitioner's neighborhood, and
- Trial court did not abuse its discretion by denying resident petitioners' voting rights and equal protection claims.

Trial court did not retroactively redraw newly incorporated city's boundaries by including petitioner's neighborhood, even though neighborhood had allegedly been annexed by another city, where the neighborhood was incorporated into the newly incorporated city before referendum, was included in the referendum vote, and could only have left the city if the referendum had failed.

District court did not abuse its discretion by denying resident petitioners' voting rights and equal protection claims, even assuming their rights were violated because they could not vote on referendum to incorporate city; the result of the election could only be contested when the challenge involved votes of a sufficient number to make a difference or cast doubt on the outcome, and even assuming that all of the 404 registered voters who were unable to cast ballots had voted against the referendum, the referendum would have still passed where it was carried by over 7,000 votes.

PUBLIC UTILITIES - GEORGIA

City of Sandy Springs v. City of Atlanta

Court of Appeals of Georgia - February 26, 2021 - S.E.2d - 2021 WL 750431

First city brought action against second city, which was the county's retail water service provider

pursuant to a previously-executed service delivery agreement, alleging violations of the Open Records Act and Service Delivery Strategy (SDS) Act and seeking injunctive relief, stemming from second city's refusal to review and revise purportedly arbitrary and unreasonable water rate differentials.

The Superior Court dismissed the claims alleging violations of the SDS Act, and denied first city's motion to transfer venue. First city appealed.

The Court of Appeals held that:

- First city was not an "affected municipality" under SDS Act entitled to mandatory mediation of its claim that second city's refusal to review rate violated Act, and
- First city was required to submit challenge to reasonableness of rate to alternative dispute resolution before bringing challenge in court.

First city was not an "affected municipality" within meaning of Service Delivery Strategy Act entitled to mandatory mediation, conducted in a separate jurisdiction, of its claim that refusal of second city, the county's retail water service provider pursuant to terms of previously-executed service delivery agreement, to review and revise water rates charged to first city's customers violated the Act, where first city was not an express party to agreement, was unincorporated when agreement was originally executed, and never passed a resolution adopting agreement.

First city was required to submit its challenge to the reasonableness of the water rate differential imposed by second city, the county's retail water service provider pursuant to the terms of a previously-executed service delivery agreement, to some form of alternative dispute resolution before bringing challenge in court, under section of the Service Delivery Strategy Act providing the process for a governing authority to challenge water and sewer rate differential imposed by another governing authority located in same jurisdiction.

PUBLIC EMPLOYMENT - NEW JERSEY

Delanoy v. Township of Ocean

Supreme Court of New Jersey - March 9, 2021 - A.3d - 2021 WL 865354

Police officer brought action against township, her employer, asserting claims for pregnancy discrimination in violation of the New Jersey Law Against Discrimination (LAD), as modified by the New Jersey Pregnant Workers Fairness Act (PWFA).

The Superior Court granted township's motion for summary judgment and denied officer's cross-motion for summary judgment. Officer appealed. The Superior Court, Appellate Division, reversed in part, vacated in part, and remanded. Township's petition for certification was granted.

Addressing issues of first impression, the Supreme Court held that:

- The PWFA provides three distinct statutory causes of action for pregnant and breastfeeding employees: unequal or unfavorable treatment, failure to accommodate, and unlawful penalization;
- Township violated the PWFA by enacting a facially unfavorable policy, that is, a Light Duty Standard Operating Procedure (SOP) applicable to non-pregnant injured officers that provided for waiver of accumulated-leave condition and a Maternity SOP that did not;
- To establish a reasonable-accommodation claim under the PWFA, a plaintiff must follow the statutory direction set forth in subsection (s), governing pregnancy discrimination in the workplace

and principles of reasonable accommodation, and not case law governing claims for failure to accommodate a disability under the LAD;
- The PWFA may require, in specific circumstances, that an employer provide a reasonable accommodation that entails temporarily permitting a pregnant employee to transfer to work that omits an essential function of her job;
- Officer stated a prima facie failure-to-accommodate claim under the PWFA; and
- A cause of action for unlawful penalization under the PWFA prohibits employer-imposed conditions on accommodations that are especially harsh.

EMINENT DOMAIN - PENNSYLVANIA

PBS Coals, Inc. v. Department of Transportation

Supreme Court of Pennsylvania - January 20, 2021 - 244 A.3d 386

Coal companies brought action against Pennsylvania Department of Transportation (DOT), alleging that condemnation of property deprived companies of access to coal estate.

After a hearing, the Court of Common Pleas ruled that a de facto taking had not occurred and sustained Department's preliminary objections to companies' petition for appointment of a board of viewers. Companies appealed. The Commonwealth Court reversed and remanded. DOT petitioned for review.

The Supreme Court held that:

- Insufficient evidence existed to demonstrate that coal companies possessed any beneficial use and enjoyment of their unmined coal estate, as required to prove a de facto taking;
- Trial court's determination that a permit to mine coal estate was not likely to issue went directly to whether coal companies could establish that DOT's highway construction substantially deprived coal companies of the beneficial use and enjoyment of their coal estate, while the suggestion that until a permit was secured there was no estate, and thus no value in the estate, went to damages;
- Sufficient evidence existed to support the trial court's conclusion that coal companies' ability to obtain approval for a surface mining permit was too speculative and uncertain, and thus, that coal companies could not meet their burden to establish that a de facto taking had occurred.

EMINENT DOMAIN - UTAH

Cardiff Wales LLC v. Washington County School District

Court of Appeals of Utah - March 4, 2021 - P.3d - 2021 WL 822216 - 2021 UT App 21

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

The Fifth District Court dismissed. Former landowner appealed.

The Court of Appeals held that school district's purported pre-sale statements about ability to use eminent domain, without any vote approving use of power, were not a "threat of condemnation" triggering right of first refusal.

School district's purported statements to landowner, before parties entered into sales agreement, that school district would use its eminent domain powers to acquire landowner's property if necessary did not involve a specific authorization of use of eminent domain, and thus statements did not qualify as a "threat of condemnation" under statute providing for right of first refusal to a grantor upon a declaration, by the state or one of its subdivisions, that property obtained by threat of condemnation was surplus real property, where there was no vote and approval of use of eminent domain power by school district, which originally wanted to build high school on property.

STORMWATER UTILITY FEES - FLORIDA

School Board of Miami-Dade County, Florida v. City of Miami Beach, Florida

District Court of Appeal of Florida, Third District - February 24, 2021 - So.3d - 2021 WL 709763

City sued county school board to demand that school board pay municipal stormwater utility fees.

The Circuit Court denied school board's motion to dismiss which was based on sovereign immunity. School board appealed the non-final order.

The District Court of Appeal held that school board was protected by sovereign immunity from paying municipal stormwater utility fees.

County school board, which owned ten developed properties that operated as public schools in the city, was protected by sovereign immunity from paying municipal stormwater utility fees; there was no written contract between school board and city to collect stormwater utility fees, and repealed statute stating that city could charge reasonable assessments to those who benefited from city's drains and sewers was not a clear and unequivocal legislative expression of intent needed to waive sovereign immunity, despite additional statute saying that the repeal did not prevent municipalities from exercising all powers previously conferred.

PUBLIC UTILITIES - ILLINOIS

Brotze v. City of Carlinville

Appellate Court of Illinois, Fourth District - March 2, 2021 - N.E.3d - 2021 IL App (4th) 200369 - 2021 WL 791651

City residents brought action against city, village, nonprofit corporation, and new water company formed by the three entities, seeking declaratory judgment that city and village could not participate in the formation or continued funding and operation of new water company, which was formed for purpose of creating a potable water supply.

The Circuit Court dismissed residents' claims for lack of standing, and allowed residents to file an amended complaint against city. After residents filed an amended complaint seeking mandamus, the Circuit Court entered summary judgment against city, and declared new water company was an illegal company. City and new water company appealed, and appeals were consolidated.

The Appellate Court held that city acted within its authority when it joined with village and nonprofit corporation to create new water company to build and maintain a water supply for its members.

City acted within its authority, under state constitutional provision governing intergovernmental cooperation, to join together with village and nonprofit corporation to create new water company for purpose of building and maintaining a water supply for its members; constitutional provision authorized units of local government to contract or associate among themselves and with corporations in any manner not prohibited by law or by ordinance, there was no statute or ordinance that prohibited city, village, and nonprofit corporation from joining together to form water company, and each municipality and nonprofit had the authority to do individually what they wished to do collectively.

City was not required to contract "and" associate with nonprofit corporation when it joined with other municipality and nonprofit corporation to create new water company to build and maintain a water supply for its members, and thus new water company was valid nonprofit corporation even though city did not enter into any contracts; state constitutional provision governing intergovernmental cooperation stated units of local government could contract "and" otherwise associate with individuals, associations, and corporations in any manner not prohibited by law or ordinance, and this provision authorized units of local government to contract, associate, or contract and associate with private entities.

IMMUNITY - NEW JERSEY

Maison v. New Jersey Transit Corporation

Supreme Court of New Jersey - February 17, 2021 - A.3d - 2021 WL 608269

Bus passenger brought negligence action against state transit system and bus driver arising from incident in which co-passenger threw glass bottle at her causing facial injuries following her harassment by group of male teenage co-passengers at back of bus.

The Superior Court entered judgment upon jury verdict for passenger. Defendants appealed. The Superior Court, Appellate Division, affirmed in part, vacated in part, and remanded. Cross-petitions for certification were granted.

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

- Heightened standard governing private common carriers applies equally, under Tort Claims Act (TCA), to public common carriers;
- TCA immunity for failure to provide police protection did not apply;
- TCA immunity for failure to enforce a law did not apply;
- TCA immunity for good-faith enforcement of a law did not apply; and
- TCA required allocation of fault between defendants as negligent tortfeasors and unidentified bottle-thrower as intentional tortfeasor.

IMMUNITY - NORTH CAROLINA

Hicks v. KMD Investment Solutions, LLC

Court of Appeals of North Carolina - March 2, 2021 - S.E.2d - 2021 -NCCOA- 39 - 2021 WL 786599

Motorist and passenger brought negligence action against North Carolina Department of Transportation (NCDOT), seeking damages for injuries sustained in automobile accident that

occurred when water flowed from debris-filled ditch onto highway and froze.

The Superior Court denied NCDOT's motion for directed verdict during jury trial and later denied NCDOT's motion for judgment notwithstanding the verdict (JNOV) and entered judgment in favor of motorist and passenger. NCDOT appealed.

The Court of Appeals held that sufficient evidence supported jury's finding that NCDOT had constructive notice of deficient condition of ditch and thus breached its duty to maintain highway.

In personal-injury action arising from automobile accident that occurred when water flowed from ditch onto highway and froze, sufficient evidence supported jury's finding that North Carolina Department of Transportation (NCDOT) had constructive notice of deficient condition of ditch and thus breached its duty to maintain highway; evidence indicated that NCDOT violated its own guidelines in maintenance of ditch, which was completely filled in at time of accident, ditch had been at least 50% filled in for at least six months before accident, and deficient condition of ditch was clearly visible.

IMMUNITY - OHIO

Eikenberry v. Municipality of New Lebanon

Court of Appeals of Ohio, Second District, Montgomery County - February 19, 2021 - N.E.3d - 2021 WL 650485 - 2021 -Ohio- 453

Apartment building owner brought negligence action against city alleging that city's negligent failure to reinstate lateral sewer service connection from building to main sewer pipe during city's rehabilitation of sewer main caused sewage to backup into basement.

The Court of Common Pleas granted summary judgment for city. Owner appealed.

The Court of Appeals held that:

- City engaged in a governmental function for which it had immunity under Political Subdivision Tort Liability Act, and
- Statements in civil engineer's summary judgment affidavit about nature of project were legal conclusions that were subject to being stricken.

Negligence claim against city arising from city's alleged negligent failure to reinstate lateral sewer service connection from apartment building to sewer main in connection with city's efforts to rehabilitate its deteriorating sewer main involved a governmental function that was more than routine maintenance, and therefore city had immunity under Political Subdivision Tort Liability Act from claim arising from sewage backup into building's basement, where rehabilitation involved installation of cured-in-place pipe (CIPP) using special materials and specialized equipment, rehabilitation was essentially an upgrade to sewer system, rehabilitation involved considerable discretion by city, and project was funded through a state grant for capital improvement projects.

Statements in civil engineer's summary judgment affidavit that, in his professional opinion, city's efforts to rehabilitate the sewer main amounted to maintenance and upkeep of a sewer system, which would fall under category of proprietary function for which city would not have immunity under Political Subdivision Tort Liability Act, were legal conclusions that were subject to being stricken in negligence action against city arising from sewage backup in apartment building's basement due to city's alleged negligent failure to reinstate the lateral sewer service connection

from building to sewer main; engineer's statements were in effect a notarized legal argument.

EMINENT DOMAIN - PENNSYLVANIA

Pileggi v. Newton Township

Commonwealth Court of Pennsylvania - January 5, 2021 - A.3d - 2021 WL 29266

Landowners brought inverse condemnation against township alleging de facto taking arising from township's denial of landowners' submissions for alternative sewage treatment facility that was not permitted under township's official sewage facilities plan which was approved by Department of Environmental Protection (DEP) or under sewage disposal ordinance.

The Court of Common Pleas granted township's preliminary objections and dismissed. Landowners appealed.

The Commonwealth Court held that:

- Township acted pursuant to its police power and not power of eminent domain;
- Township did not engage in a regulatory taking; and
- Landowners' claims of unreasonable and discriminatory actions by township and DEP were impermissible collateral attacks.

Township acted pursuant to its police power and not power of eminent domain in denying landowners' submissions for alternative sewage treatment facility that was not permitted under plain terms of township's official sewage facilities plan and sewage disposal ordinance, and therefore no de facto taking occurred, even if a member of township's planning commission stated that the undesired result of all of landowners' lots becoming buildable would occur if landowners put in sewage system, where there was no evidence that impetus for regulations was a concern for visual appearance of township's sewer infrastructure, and township's plan and ordinance detailed steps to obtain a permit to construct on-lot sewage system and explained which sewage facilities were acceptable.

Township did not engage in a regulatory taking in denying landowners' submissions seeking alternative sewage treatment facility that was not permitted under plain terms of township's official sewage facilities plan and sewage disposal ordinance; landowners' interest in obtaining sewer service was nothing but an inchoate interest in the conferral of a benefit to enhance market value and, assuming that landowners would not obtain approval of desired alternative treatment plan, it was possible that landowners could still use a community on-lot or an individual on-lot sewage system if they decided to pursue such a course of action.

Landowners' assertions, in inverse condemnation action, that township and Department of Environmental Protection (DEP) engaged in unreasonable, arbitrary, and discriminatory actions in handling or disposing of landowners' submissions seeking approval of proposed alternative sewage treatment facility were impermissible collateral attacks on validity of administrative decisions; any error in that regard should have been pursued through the administrative appeal process.

BANKRUPTCY - PUERTO RICO

In re Financial Oversight And Management Board for Puerto Rico

United States Court of Appeals, First Circuit - March 2, 2021 - F.3d - 2021 WL 791605

Order was entered the by United States District Court confirming debt adjustment plan in debt restructuring proceedings under the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA).

Creditors, after failing to seek a stay of order and unsuccessfully moving for reconsideration, belatedly filed notice of appeal two years after the plan was fully implemented, and debtor moved to dismiss on equitable mootness grounds.

The Court of Appeals held that appeal that creditors belatedly sought to pursue from unstayed order of district court confirming debt adjustment plan was equitably moot.

Appeal that creditors belatedly sought to pursue from unstayed order of district court confirming debt adjustment plan, in debt restructuring proceedings under the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), was equitably moot more than two years after the plan had been fully implemented, and after tens of thousands of transactions worth billions of dollars had been implemented by third parties relying in good faith on finality of plan confirmation order; upsetting those transactions more than two years later to afford relief to creditors that had slept on their rights by not attempting to obtain stay would throw those transactions into doubt and unfairly harm innocent third parties.

Dismissal, as equitably moot, of appeal that creditors belatedly sought to pursue from unstayed order of district court confirming debt adjustment plan in debt restructuring proceedings under the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), without addressing the merits of creditors' challenge to plan, would not violate their due process rights; creditors had opportunity to brief their case and to present oral argument on the various issues raised by their appeal.

Plan proponents were not barred, by "unclean hands" doctrine, from raising equitable mootness doctrine in order to bar creditors from belatedly appealing from unstayed order of district court confirming debt adjustment plan in debt restructuring proceedings under the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), two years after the plan was fully implemented; while creditors vaguely asserted that the plan proponents had engaged in misconduct by "steamroll[ing]" the confirmation of plan, creditors received notice of the plan, objected to it in writing, participated in the confirmation hearing, and had their objection heard and addressed by the court, and were "steamrolled" only in sense that they lost quickly.

CONTRACTS - TENNESSEE

Elvis Presley Enterprises, Inc. v. City of Memphis

Supreme Court of Tennessee - February 24, 2021 - S.W.3d - 2021 WL 714651

Prospective concert facility developer brought action against city and professional basketball team, seeking declaratory judgment concerning rights and obligations of parties under contract that restricted city from providing tax incentives or other benefits for facilities that would compete with arena where team played.

The Chancery Court dismissed the complaint based on lack of standing. Developer appealed. The

Court of Appeals, Armstrong affirmed on ground that res judicata barred the action.

On appeal by permission, the Supreme Court held that dismissal for failure to exhaust administrative remedies did not constitute an "adjudication on the merits" for purposes of res judicata.

BALLOT INITIATIVE - TEXAS

In re Durnin

Supreme Court of Texas - March 2, 2021 - S.W.3d - 2021 WL 791079

Proponents of voter-initiated city ordinance regarding camping, sitting or lying down on public sidewalks, sleeping outdoors, and aggressively soliciting money petitioned for writ of mandamus to amend ballot language.

The Supreme Court held that word "anyone" was misleading and needed to be stricken from ballot proposition as ordinance contained several exceptions.

Word "anyone" was misleading and needed to be stricken from ballot proposition stating that proposed ordinance would create criminal offense for "anyone sitting or lying down on a public sidewalk or sleeping outdoors" in certain areas and "anyone camping in a public area not designated by the Parks and Recreation Department"; the proposed ordinance did not criminalize all instances of sitting or lying down on a sidewalk, proposition did not mention several exceptions, and proposed ordinance retained significant exception that prohibited police officer from citing a person for illegal camping before making a reasonable effort to advise camper of alternatives and contact someone with authority to provide transportation and services.

IMMUNITY - TEXAS

Tercero v. Texas Southmost College District

United States Court of Appeals, Fifth Circuit - February 24, 2021 - F.3d - 2021 WL 709569 - 2021 IER Cases 65,916

Former employee of state junior college district brought action against district, asserting a procedural due process claim under § 1983 and a breach of contract claim under state law, arising out of her termination.

Following jury verdict for employee, the United States District Court vacated jury's verdict on employee's breach of contract claim and reduced damages award on her procedural due process claim to $1. Employee appealed.

The Court of Appeals held that:

- Texas Legislature's abrogation of governmental immunity owed to local governmental entities for purpose of breach of contract claims applied to former employee's breach of contract claim; abrogating *Olford v. City of Hous.*, 2018 WL 3208196; *Smith v. Hous. Indep. Sch. Dist.*, 229 F. Supp. 3d 571; *Scherff v. S. Tex. Coll.*, 2017 WL 3783042; *Nationwide Pub. Ins. Adjusters, Inc. v. Edcouch-Elsa Indep. Sch. Dist.*, 913 F. Supp. 2d 305;
- Employee was only entitled to recover nominal damages for district's violations of her due process rights; and

- District court abused its discretion in vacating former employee's attorney fees award on her breach of contract claim.

Texas Legislature's abrogation of governmental immunity owed to local governmental entities for purpose of breach of contract claims applied to former employee's breach of contract claim against state junior college district, brought in federal court under its supplemental jurisdiction, notwithstanding provision in immunity-waiver statute that purportedly excluded suits brought in federal court from the waiver; state did not have power to limit federal jurisdiction; abrogating *Olford v. City of Hous.,* 2018 WL 3208196; *Smith v. Hous. Indep. Sch. Dist.,* 229 F. Supp. 3d 571; *Scherff v. S. Tex. Coll.,* 2017 WL 3783042; *Nationwide Pub. Ins. Adjusters, Inc. v. Edcouch-Elsa Indep. Sch. Dist.,* 913 F. Supp. 2d 305.

MUNICIPAL ORDINANCE - WASHINGTON

City of Edmonds v. Bass

Court of Appeals of Washington, Division 1 - February 22, 2021 - P.3d - 2021 WL 672333

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

The Superior Court granted gun owners' motion for summary judgment in part, and permanently enjoined city from enforcing ordinance provision that made it a civil infraction if a minor, at-risk person, or prohibited person obtained a firearm from an owner's premises that was not secured by a locking device. City appealed.

The Court of Appeals held that:

- Gun owners had standing to challenge city ordinance, and
- City ordinance was preempted by state statute that preempted the entire field of firearms regulation within the boundaries of the state.

Individual gun owners had standing to challenge city ordinance that made it a civil infraction to allow a minor, at-risk person, or prohibited person access to a firearm that was not secured by a locking device, or to store unlocked any firearm, even if gun owners had no intention of violating the ordinance; whether the provision was preempted by state law was an issue of public importance, and the gun owners testified that they had an interest in keeping their firearms unsecured in the presence of unauthorized users, and they would have to deviate from their storage practices to avoid violating the ordinance.

City ordinance that made it a civil infraction to allow a minor, at-risk person, or prohibited person access to a firearm that was not secured by a locking device, or to store unlocked any firearm, was preempted by state statute that preempted the entire field of firearms regulation within the boundaries of the state; the legislature expressed its intent to fully occupy and preempt the entire field of firearms regulation.

MUNICIPAL CORPORATIONS - ILLINOIS

145 Fisk, LLC v. Nicklas

United States Court of Appeals, Seventh Circuit - January 26, 2021 - 986 F.3d 759

Developer brought § 1983 action against city manager, alleging manager sought to retaliate against developer in violation of its First and Fourteenth Amendment rights by terminating city's preliminary agreement with developer to allocate development incentive funds for hotel development project.

The United States District Court dismissed action. Developer appealed.

The Court of Appeals held that:

- Actions of attorney member of developer in prior lawsuit did not implicate attorney's First Amendment right to petition the government, and thus could not satisfy first prong of First Amendment retaliation claim;
- Preliminary development agreement did not confer a constitutionally protected property interest on developer; and
- There was a rational basis for city manager to recommend termination of preliminary development agreement, thus defeating developer's equal protection claim against manager under a class-of-one theory.

Actions of attorney, who later became member of limited liability company (LLC) developer, on behalf of a client in prior lawsuit in which city manager was called as a witness, did not implicate attorney's First Amendment right to petition the government, and thus could not serve as the required protected conduct to satisfy first prong of developer's First Amendment retaliation claim against city manager alleging manager retaliated against developer by terminating city's preliminary agreement to allocate development incentive funds to developer; attorney's actions on behalf of his client, who was not involved with developer or incentive fund agreement with city, only constituted client's exercise of his First Amendment petition rights, not an exercise of attorney's or developer's rights.

Preliminary development incentive agreement between city and developer, under which city was to provide $2.5 million to developer to finance redevelopment of dilapidated property, and city's resolution approving the agreement, did not confer a constitutionally protected property interest on developer, and thus city's termination of agreement did not deprive developer of its property in violation of Due Process Clause; under Illinois law, city's resolution approving the agreement only constituted an expression of city's opinion, resolution did not mandate a particular result based on stated criteria, agreement itself provided that developer acknowledged that city was not required to provide the incentive, and contract for building was conditioned on execution of final development agreement.

There was a rational basis for city manager to recommend termination of preliminary development incentive agreement with developer, under which city was to provide $2.5 million to developer to finance redevelopment of dilapidating property, thus defeating developer's equal protection claim against manager under a class-of-one theory premised on developer's allegation that manager blocked the project out of animus for developer's member embarrassing him in prior lawsuit; manager relied on developer's own submissions about the corporate entity and its principals' finances to conclude that project was not financially viable, which developer failed to refute, other concerns were raised at city council meeting, including developer's failure to submit required development plans, and manager expressed concern about developer's lack of experience in hotel development.

ZONING & PLANNING - INDIANA

City of Bloomington Board of Zoning Appeals v. UJ-Eighty Corporation

Supreme Court of Indiana - February 23, 2021 - N.E.3d - 2021 WL 717972

Property owner sought judicial review of decision by city's zoning board of appeals, which upheld notices of violation (NOVs) issued to owner regarding property leased to a fraternity that subsequently lost state university's sanction.

The Circuit Court entered judgment in favor of property owner, finding the ordinance unconstitutional. Board appealed. The Court of Appeals affirmed. Petition to transfer was filed.

Transfer was granted. The Supreme Court held that:

- City did not violate the Indiana Constitution by improperly delegating the authority to define "fraternity" and "sorority," terms used in ordinance, to university, and
- City did not violate property owner's due process rights by delegating authority to university to define "fraternities" and "sororities," terms used in zoning ordinance that covered owner's property, without any standards.

MUNICIPAL CORPORATIONS - MARYLAND

Mayor and City Council of Baltimore v. ProVen Management, Inc.

Court of Appeals of Maryland - March 1, 2021 - A.3d - 2021 WL 772309

City contractor petitioned for review of decision by director of public works denying an additional $1.6 million in compensation under contract to clean sewers.

The Circuit Court affirmed. Contractor appealed. The Court of Special Appeals denied city's motion to dismiss appeal and remanded with instructions to remand case to agency. City's petition for writ of certiorari was granted.

The Court of Appeals held that contractor's petition was in form and substance a petition for judicial review of agency decision arising under city charter, rather than common law action for writ of mandamus, and, thus, affirmance was not reviewable by Court of Special Appeals.

City contractor's petition for review of decision by public works director to deny additional compensation in recorded proceeding with a transcript was in form and substance a petition for judicial review of agency decision arising under city charter, rather than common law action for writ of mandamus, and, thus, circuit court affirmance was not reviewable by Court of Special Appeals under city charter; although petition alleged violation of due process and director's failure to review entire record and provide sufficient factual basis or adequate opportunity to address claims, most contentions related to substantive compensable claims, and contractor sought to overturn decision on monetary claims with limited remand for determination of damages, rather than order to perform

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EMINENT DOMAIN - NEW MEXICO

City of Albuquerque v. SMP Properties, LLC

Supreme Court of New Mexico - February 25, 2021 - P.3d - 2021 WL 732243

City filed complaint for condemnation to acquire commercial property on which city wanted to build a road, and after city was granted possession and right to work on the property, the commercial property owners argued in their answer that $143,850 city had deposited with court was not just compensation and that city's actions caused owners' tenant not to renew its lease.

The District Court granted city's motion for partial summary judgment, and entered a stipulated final judgment for condemnation. Property owners appealed, and the Court of Appeals reversed. The Supreme Court granted certiorari review.

The Supreme Court held that:

- Genuine issues of material fact as to substantial interference by city before condemnation precluded summary judgment, and
- Value of lease with tenant was potentially a compensable element of damages for city's partial taking.

Genuine issue of material fact as to substantial interference by city before condemnation of part of commercial landowner's property, including nature and extent of communications with commercial tenant, which failed to renew lease with landowner, and whether such communications were reasonable and diligent efforts at negotiation, precluded summary judgment for city on landowner's inverse condemnation claim seeking consequential damages for loss of tenant leases.

Value of commercial landowner's lease with tenant was potentially a compensable element of damages for city's partial taking of commercial landowner's property.

EMINENT DOMAIN - NEW YORK

Village of Haverstraw v. Ray River Co., Inc.

Supreme Court, Appellate Division, Second Department, New York - February 24, 2021 - N.Y.S.3d - 2021 WL 710499 - 2021 N.Y. Slip Op. 08191

Condemnees brought action against village as condemnor seeking compensation arising from the taking of condemnees' real property.

Following nonjury trial, the Supreme Court, Rockland County, issued order awarding condemnees $8,950,000 as just compensation. The Supreme Court subsequently entered judgment upon the order in favor of condemnees in the principal sum of $6,810,000. Village appealed, and condemnees cross-appealed.

The Supreme Court, Appellate Division, held that:

- Record established that highest and best use of condemnees' real property was 80–unit townhouse configuration;
- Contract of sale for the subject property was not a reliable indicator of the subject real property's value; and
- Sufficient evidence supported village's adjustments for market conditions and topography in determining fair market value of subject real property.

Record established that highest and best use of condemnees' real property on title vesting date was 80–unit townhouse configuration, for purposes of calculating damages for village's taking of the property; condemnees' proposed mix of 131 units in five-story high rise dwelling, representing the

maximum number of units permitted under zoning code, did not consider construction costs, and lacked data to substantiate their expert's assertion that proposal would be profitable due to high absorption rates for residential properties in area, whereas village's appraiser opined that 80–unit townhouse configuration avoided additional costs associated with condemnees' proposal and his appraisal included exhibits detailing construction and development costs underlying his analysis.

In action by condemnees for compensation for taking of their real property, contract of sale for the subject property was not a reliable indicator of the subject property's value, and thus trial court providently declined to afford any weight to it, where contract was dated over 14 years earlier, and the purchaser admitted at trial that he conducted almost no due diligence before or after consummating it.

Sufficient evidence supported village's market conditions adjustment and topography adjustment for purposes of determining fair market value of subject real property, in condemnees' action to determine just compensation of real property condemned by village, where village's appraiser provided sufficient facts, figures, and calculations to support both adjustments, including charts depicting change in housing prices around the time of the vesting date.

BOND INSURANCE - PUERTO RICO

In re Financial Oversight and Management Board for Puerto Rico

United States Court of Appeals, First Circuit - March 3, 2021 - F.3d - 2021 WL 805936

Insurers of bonds issued by the Puerto Rico Highways and Transportation Authority (HTA) moved for relief from automatic stay so that they could seek to apply certain revenues collected by Puerto Rico and the HTA to the payment of claims stemming from HTA bonds.

The United States District Court denied motion, and insurers appealed.

The Court of Appeals held that district court did not abuse its discretion in denying stay relief motion and in not allowing companies that had insured bonds to bring suit in another forum challenging the Commonwealth's decision to suspend payment on the bonds.

On motion for relief from automatic stay that was triggered by commencement of Title III case under the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), district court did not abuse its discretion in denying motion and in not allowing companies that had insured bonds issued by certain Commonwealth entities to bring suit in another forum challenging the Commonwealth's decision to suspend payment on the bonds; grant of stay relief to allow companies to commence litigation in another forum, when the issues that they sought to raise would ultimately be addressed in Title III case, would not promote judicial economy and would interfere with bankruptcy case.

NEGLIGENCE - UTAH

Feldman v. Salt Lake City Corporation

Supreme Court of Utah - January 28, 2021 - P.3d - 2021 WL 279709 - 2021 UT 4

Husband and children of victim who drowned in city park brought action against the city, alleging claims for negligence, premises liability, negligent infliction of emotional distress, vicarious liability,

and wrongful death.

Third District Court granted city's motion to dismiss. Plaintiffs appealed.

The Supreme Court held that:

- Statute that barred claims for personal injury against landowners where the injured party was participating in an activity with a recreational purpose on the land applied to wrongful death action;
- Application of statute to plaintiffs' wrongful death action did not violate the Wrongful Death Clause of the Utah Constitution;
- Victim was participating in an activity with a recreational purpose on the land for purposes of the Limitation of Landowner Liability Act;
- In a matter of first impression, for purposes of the Limitation of Landowner Liability Act, a risk is an "integral and natural part" of a given activity if that risk would be expected in the given setting; and
- Plaintiffs sufficiently alleged that her drowning was not caused by a risk inherent in her recreational activity, and thus, that their wrongful death action was not barred by the Limitations on Landowner Liability Act.

IMMUNITY - VIRGINIA

AlBritton v. Commonwealth

Supreme Court of Virginia - February 4, 2021 - 853 S.E.2d 512

Inmate in a state penitentiary sued the Commonwealth of Virginia, alleging that he was injured when he fell down stairs which were allegedly negligently maintained by the Department of Corrections (DOC).

The Sussex Circuit Court granted the Commonwealth's plea in bar and entered summary judgment dismissing inmate's complaint, and he appealed.

The Supreme Court held that:

- On remand, circuit court was to determine whether inmate mailed grievance within the five-day deadline, and if so, was to deny the Commonwealth's plea in bar because inmate did all that he could have done to exhaust his administrative remedies pursuant to Tort Claims Act;
- Issues of fact as to whether prison rules prohibited inmate from using stairs and whether prison officials had actual or constructive knowledge of defective condition on stairs precluded grant of summary judgment to the Commonwealth; and
- Issues of fact as to whether inmate was in an unauthorized area taking shower and whether he was carrying his shower bag loosely near his legs when he was descending stairs precluded grant of summary judgment to Commonwealth on issue of inmate's contributory negligence.

EMINENT DOMAIN - ARKANSAS

Convent Corporation v. City of North Little Rock

Supreme Court of Arkansas - January 28, 2021 - S.W.3d - 2021 Ark. 72021 WL 297242

Landowner brought putative class action against city seeking injunctive relief, declaratory judgment,

and damages for violation of civil rights and trespass following city's resolution condemning structure as public nuisance.

Following removal to federal court and return, the Circuit Court denied landowner's motion for class certification, dismissed several claims, and denied landowner's motion for a judgment on the pleadings. Landowner appealed, and the Supreme Court reversed and remanded. Upon remand, the Circuit Court entered an order finding that substantial evidence supported the city council's determination that the property was a nuisance. Landowner appealed, and the Supreme Court dismissed the appeal as from a nonfinal order. Landowner thereafter filed an amended and reinstated petition for declaratory judgment, seeking a declaration that the city's ordinance related to condemnation proceedings was unconstitutional. The Circuit Court granted city's motion for summary judgment, and landowner appealed.

The Supreme Court held that:

- Landowner had standing to bring action;
- Challenge that city's condemnation decision was not supported by substantial evidence and was arbitrary and capricious was moot;
- Exhaustion of administrative remedies doctrine did not preclude landowner from bringing constitutional, civil-rights, and trespass claims in conjunction with appeal from condemnation decision;
- Condemnation ordinance and procedures were not facially unconstitutional in violation of due process;
- Condemnation ordinance and resolution condemning landowner's property as a nuisance was not an improper bill of attainder; and
- Court appropriately exercised its discretion when declining to grant landowner's motion to strike city's answer.

Commercial landowner had standing to bring appeal challenging city's condemnation of its property, although it failed to pay taxes for certain years and did not redeem the property until after the condemnation proceedings were commenced, where landowner was named and recognized as the property owner by the city in its condemnation proceeding and resolution, and landowner also retained the right to redeem the property during the relevant time period by paying the delinquent taxes.

Commercial landowner's challenge that city's condemnation decision was not supported by substantial evidence and was arbitrary and capricious was moot, where landowner only requested that city resolution ordering its property condemned as a nuisance be overturned, structure had already been razed by the city, and landowner had not requested a stay of the circuit court's final order or attempted to post a bond to prevent destruction of the property.

Issue of whether circuit court erred in action challenging condemnation by dismissing landowner's constitutional claims, civil-rights claims, and common-law claim of trespass, on the basis that it had failed to exhaust its administrative remedies, was not moot on grounds that, after court rejected landowner's appeal of the condemnation decision, it then considered landowner's amended and reinstated petition for declaratory judgment, which raised only a facial challenge to the condemnation ordinance and procedures; court had declined to reinstate claims in order deciding the administrative appeal, despite the fact that landowner filed a motion requesting it to do so, court did not rule on the merits of the claim, and landowner did not voluntarily dismiss or otherwise abandon them.

Exhaustion of administrative remedies doctrine did not preclude landowner from bringing

constitutional, civil-rights, and trespass claims in conjunction with appeal from city's condemnation decision; while it may have been appropriate for the circuit court to first rule on the administrative appeal before proceeding to the additional claims, the court denied without explanation landowner's motion to reinstate the claims once the administrative appeal had been decided.

City's condemnation ordinance and procedures were not facially unconstitutional in violation of due process; ordinance provided for adequate notice prior to condemnation, as well as a public hearing, and included information on how to appeal a condemnation decision, and while ordinance did not include procedures by which an owner could rehabilitate a structure prior to a condemnation resolution, it did not expressly prohibit a precondemnation rehabilitation plan either.

Issue of whether city's condemnation ordinance contained important and material terms that were undefined and vague and provided city too much discretion was raised for first time in landowner's motion for summary judgment, and thus Court appropriately granted summary judgment against landowner on that claim; landowner did not include the claim in its original complaint or in its amended and reinstated petition for declaratory judgment, even within the context of its due-process argument.

City's condemnation ordinance and resolution condemning landowner's property as a nuisance was not an improper bill of attainder; condemnation ordinance did not legislatively punish a named individual or an easily ascertainable group, and resolution condemning the property was not a legislative act but an administrative one.

Even assuming city was required to file an answer within 30 days of notice of remand from federal court, circuit court appropriately exercised its discretion when declining to grant landowner's motion to strike the answer in action challenging city's decision to condemn landowner's property as a nuisance, given that city filed an answer in federal court and then filed an amended answer, albeit outside the 30 day time period, to the specific claims raised in state court.

PUBLIC RECORDS - FLORIDA

Scott v. Lee County School Board

District Court of Appeal of Florida, Second District - January 22, 2021 - So.3d - 2021 WL 220811 - 46 Fla. L. Weekly D219

Records requester petitioned for writ of mandamus, alleging that county school board failed to provide documents responsive to records request.

The Circuit Court summarily denied the petition. Requester appealed.

The District Court of Appeal held that requester, whose mandamus petition was facially insufficient, could file a new petition with a copy of his records request attached.

Upon the appellate court's determination that records requester's mandamus petition, to compel county school board to produce records, was facially insufficient absent a copy of his records request, the trial court's order summarily denying the petition would be affirmed without prejudice, thereby allowing the requester to file a new petition, with his records request attached.

EMINENT DOMAIN - MASSACHUSETTS

Abuzahra v. City of Cambridge

Supreme Judicial Court of Massachusetts - February 17, 2021 - N.E.3d - 486 Mass. 818 - 2021 WL 609038

After securing judgment in the Superior Court establishing his ownership over property at issue in action against the city, property owner filed motion to compel full tender of pro tanto payment with accrued interest.

The Superior Court Department issued interlocutory order denying the motion. Owner petitioned for interlocutory review. A single justice of the Appeals Court, Rubin, J., reversed the order. City appealed.

On transfer, the Supreme Judicial Court held that:

- As matter of first impression, "quick take" eminent domain statute permits property owners to both accept a pro tanto payment for a taking and simultaneously challenge the lawfulness of that taking, and
- City's appeal was not frivolous one as would warrant double costs as sanction.

"Quick take" eminent domain statute, which immediately transfers ownership of property from property owner to the taking authority independent of judicial processes, permits the property owner to both accept a pro tanto payment for a taking and simultaneously challenge the lawfulness of that taking.

City's appeal of determination by single justice of the Appeals Court, that "quick take" eminent domain statute allowed property owner to accept city's pro tanto offer for the taking of his property while simultaneously challenging that underlying taking was not frivolous, and thus property owner was not entitled to recover attorney fees and double costs as sanction, even though Supreme Judicial Court affirmed the single justice's order, since the case involved a novel question of law that the Court previously did not have occasion to address.

ANNEXATION - MISSISSIPPI

Pendorff Community Association, LLC v. City of Laurel

Supreme Court of Mississippi - September 24, 2020 - 302 So.3d 1208

After city enacted ordinance annexing four parcels of real property, neighboring city contested the annexation of one part of one parcel and community association entered an appearance to contest the annexation of that entire parcel.

After annexing city stipulated to exclude the part contested by neighboring city, the Chancery Court entered judgment after a bench trial approving the annexation. Community association appealed.

The Supreme Court held that:

- Sufficient evidence supported chancellor's finding that city's internal growth favored annexation;
- Sufficient evidence supported chancellor's finding that city's population increase favored annexation;
- Sufficient evidence supported chancellor's finding that city's need for developable land favored annexation;
- Sufficient evidence supported chancellor's finding that increased traffic counts favored annexation;

- Sufficient evidence supported chancellor's finding that city's sales tax revenue history favored annexation;
- Sufficient evidence supported chancellor's finding that city's plans for implementing and fiscally carrying out the proposed annexation favored annexation; and
- Sufficient evidence supported chancellor's finding that city's bonding capacity favored annexation.

EMINENT DOMAIN - SOUTH DAKOTA

Hamen v. Hamlin County

Supreme Court of South Dakota - February 10, 2021 - N.W.2d - 2021 WL 501207 - 2021 S.D. 7

Property owners brought action against county, sheriff, and other deputies, seeking compensation for inverse condemnation and asserting a separate claim for violations of rights under the Fourth and Fourteenth Amendments pursuant to § 1983 in connection with damages to mobile home during arrest of property owners' son, an alleged fleeing felon.

Parties cross-moved for summary judgment. The Circuit Court denied property owners' motion, granted county's motion, and denied sheriff's motion. County and sheriff appealed.

The Supreme Court held that:

- As a matter of first impression, damage caused to mobile home was not a compensable taking under South Dakota Constitution's damages clause;
- As a matter of first impression, a taking or damaging claim under the South Dakota Constitution arises from a public use function, rather than a police power function;
- Question whether warrantless entry was supported by an objectively reasonable belief that alleged fleeing felon was living in and present in mobile home at the time of entry was a question of law for the court to decide, overruling *Thornton v. City of Rapid City*, 692 N.W.2d 525;
- Sheriff's warrantless entry into mobile home required an objectively reasonable belief that alleged fleeing felon was living in and present in home at the time of entry;
- Whether sheriff had an objectively reasonable belief that alleged felon was present inside mobile home at time of warrantless entry was a material fact issue precluding summary judgment;
- Whether, at the time sheriff decided to enter mobile home, exigent circumstances existed so that law enforcement needed immediate access to mobile home was material fact issue precluding summary judgment in favor of sheriff on unlawful entry claim;
- Sheriff failed to establish that he was entitled to summary judgment on qualified immunity grounds on warrantless entry claim under the clearly established prong; and
- Sheriff was entitled to qualified immunity on excessive force claim.

EMINENT DOMAIN - TEXAS

DM Arbor Court, Limited v. City of Houston

United States Court of Appeals, Fifth Circuit - February 12, 2021 - F.3d - 2021 WL 523030

Operator of low-income housing complex brought action against city, challenging city's refusal to grant permits to operator to repair units damaged in hurricane, and alleging claims of regulatory taking, and violation of the due process, equal protection and contracts clauses of the United States constitution.

The United States District Court for the Southern District of Texas dismissed operator's suit for lack of subject matter jurisdiction, concluding it was not ripe because operator had not yet obtained a decision from city council, which was final arbiter of city permit requests. Operator appealed.

The Court of Appeals held that:

- Claims by operator were not ripe at the time they were dismissed by district court, but
- Given city's final decision after entry of district court judgment, operator's claims had become ripe, and thus vacatur of district court's judgment was warranted.

Claims by operator of low-income housing complex, including regulatory taking, due process, equal protection and contracts clause violations, arising out of city's refusal to grant permits for operator to conduct repairs at property based on hurricane damage, were not ripe when considered by the district court; city council had final say about operator's permit applications, and city council had not yet taken a final, definitive position on those applications at the time of hearing before district court that resulted in judgment dismissing claims without prejudice.

Claims by operator of low-income housing complex against city, including regulatory taking, and due process, equal protection and contracts clause violations, arising out of city's denial of permits to operator to repair hurricane damage at property, became ripe after district court entered judgment dismissing such claims against city, and thus vacatur of district court's judgment was warranted; while city council was final decisionmaker as to operator's permit applications, and had not yet made a final decision at the time operator's action was filed, city council made such a decision prior to consideration of operator's appeal from district court's judgment, and district court's ripeness concern was prudential, rather than jurisdictional.

TAX - CALIFORNIA

Schmid v. City and County of San Francisco

Court of Appeal, First District, Division 4, California - February 1, 2021 - Cal.Rptr.3d - 2021 WL 321405 - 21 Cal. Daily Op. Serv. 1232 - 2021 Daily Journal D.A.R. 1164

Two taxpayers brought action against city and county and affiliated defendants, seeking to overturn an order authorizing removal of a bronze sculpture.

The Superior Court sustained a demurrer without leave to amend. Taxpayers appealed.

The Court of Appeal held that:

- Taxpayers failed to allege any threats, intimidation, or coercion, as required to support their claim that city and county and affiliated defendants violated the Tom Bane Civil Rights Act by removing sculpture;
- Taxpayer failed to allege facts supporting his claim that board of appeals' affirmance of commission's grant of a certificate of appropriateness to take down sculpture was motivated by discriminatory animus;
- Taxpayer failed to allege a viable basis for a claim that city and county, acting through its board of appeals, violated federal law pertaining to national historic district and grant money;
- Taxpayer failed to state a viable public nuisance claim;
- Taxpayer failed to exhaust administrative remedies under the California Environmental Quality Act (CEQA);
- Taxpayer did not have standing to enforce the terms of charitable trust; and

- Taxpayer's challenge to removal of sculpture prior to installation of plaque explaining the removal did not provide a basis for issuance of a traditional writ of mandate.

LIABILITY - FLORIDA

Elalouf v. School Board of Broward County

District Court of Appeal of Florida, Fourth District - January 6, 2021 - So.3d - 2021 WL 49915 - 46 Fla. L. Weekly D114

High school student athlete brought claim of negligence against school board for injury sustained while playing a soccer game.

The Circuit Court granted summary judgment for the school board. Student appealed.

The District Court of Appeal held that pre-game release signed by student released school board from liability for negligence.

School board was clearly and unambiguously released from liability for negligence claims by language in pre-game release signed by student athlete which released school board from liability for "any injury or claim resulting from athletic participation," although release did not contain word "negligence"; language unequivocally demonstrated a clear and understandable intention for school board to be relieved from liability.

EMINENT DOMAIN - INDIANA

Haggard v. State

Court of Appeals of Indiana - January 21, 2021 - N.E.3d - 2021 WL 209208

As part of State's improvement of interstate freeway, State filed complaint for appropriation of real estate.

The Circuit Court granted State's motion for appropriation and appointment of appraisers. Named defendants filed objections and moved trial court to vacate order of appropriation. The trial court overruled the objections and motion to vacate order of appropriation. Defendants appealed.

The Court of Appeals held that defendants were not landowners with title to property sought to be condemned.

Named defendants in State's complaint for appropriation of property as part of its improvement of interstate freeway were not landowners with title to property sought to be condemned, and therefore they were not entitled to pre-complaint offer to purchase their easement; named defendants were not listed on tax assessment rolls and were not persons in whose name title in property was shown in recorder's records, their name appeared on deed as easement holders, an easement for ingress/egress and to erect /maintain billboard.

ZONING & PLANNING - MINNESOTA

State by Smart Growth Minneapolis v. City of Minneapolis

Supreme Court of Minnesota - February 10, 2021 - N.W.2d - 2021 WL 485400

Advocacy groups filed complaint alleging city's scheduled approval of comprehensive plan violated Minnesota Environmental Rights Act (MERA), and seeking declaratory and injunctive relief.

The District Court granted city's motion to dismiss the complaint. Advocacy groups appealed. The Court of Appeals affirmed. Advocacy groups appealed.

The Supreme Court held that on issue of first impression, advocacy groups stated city's scheduled approval of comprehensive plan under Metropolitan Land Planning Act likely would cause materially adverse environmental effects in violation of MERA.

Advocacy groups stated city's scheduled approval of comprehensive plan under Metropolitan Land Planning Act (MLPA) likely would cause materially adverse environmental effects in violation of Minnesota Environmental Rights Act (MERA), on allegations that presumed full build-out of plan likely would increase rate and volume of storm-water runoff, threaten sanitary sewer systems and water supply, reduce wildlife habitat, and diminish air quality; although plan was planning document for city that could be amended, it would control city's land use because any zoning ordinances in conflict with plan would have to be brought into compliance with it.

IMMUNITY - NEBRASKA

Edwards v. Douglas County

Supreme Court of Nebraska - January 29, 2021 - N.W.2d - 308 Neb. 259 - 2021 WL 297637

Victim, who was held hostage and sexually assaulted by her former boyfriend, brought action against county under Political Subdivisions Tort Claims Act (PSTCA), alleging county negligently handled emergency telephone calls and, as a result, emergency personnel did not arrive in time to prevent or stop the assault.

The District Court entered summary judgment for county. Victim appealed.

The Supreme Court held that victim's claim fell within PSTCA's intentional torts exception and, thus, city did not waive its sovereign immunity.

Negligence claim brought against county by victim arose when she was held hostage and sexually assaulted by her former boyfriend and, thus, claim fell within intentional torts exception to Political Subdivisions Tort Claims Act (PSTCA), and county did not waive its sovereign immunity; although victim alleged county negligently mishandled emergency telephone calls and, as a result, emergency personnel did not arrive in time to prevent or stop the assault, all of her claimed damages stemmed from former boyfriend's assault.

BANKRUPTCY - PUERTO RICO

In re Financial Oversight and Management Board for Puerto Rico

United States Court of Appeals, First Circuit - February 8, 2021 - F.3d - 2021 WL 438891

In Title III debt restructuring proceedings brought pursuant to the Puerto Rico Oversight,

Management, and Economic Stability Act (PROMESA), plan objections to the proposed adjustment plan of the Puerto Rico Sales Tax Financing Corporation (COFINA) were overruled, and plan was confirmed, by the United States District Court for the District of Puerto Rico,

Objectors appealed.

The Court of Appeals held that:

- Equitable mootness doctrine applies in Title III debt restructuring proceedings brought pursuant to PROMESA, and
- Appeals from unstayed order confirming the Puerto Rico Sales Tax Financing Corporation's (COFINA's) plan of adjustment were equitably moot.

Equitable mootness doctrine applies in municipal bankruptcy proceedings to appeals from orders confirming Chapter 9 adjustment plans; if interests of finality and reliance are paramount to the application of equitable mootness for Chapter 11 plans, then these same interests apply with greater force to a Chapter 9 plan, which can implicate substantial reliance interests, and in which there is a particular need for finality.

In Title III debt restructuring proceedings brought pursuant to the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), appeals from unstayed order confirming the Puerto Rico Sales Tax Financing Corporation's (COFINA's) plan of adjustment were equitably moot, where appellants had not sought a stay at any time over the nearly two years that the plan was being implemented, and where transactions involving billions of dollars, and likely tens of thousands of individuals, had been completed in reliance on plan confirmation order; there was no relevant stand-alone component of plan that could be modified to satisfy the various plan objectors without upsetting reliance interests of innocent third parties.

PUBLIC EMPLOYMENT - RHODE ISLAND

Starnino v. Employees' Retirement System of the City of Providence

Supreme Court of Rhode Island - February 5, 2021 - A.3d - 2021 WL 405870

City employee petitioned for a writ of certiorari to review city retirement board's decision to deny his application for an accidental disability retirement from his position as a firefighter due to shoulder injury.

The Supreme Court held that physician's independent medical evaluation that employee could return to full duty supported denial of accidental disability retirement.

Physician's independent medical evaluation of city employee, which concluded that employee could return to full duty as a firefighter after he had sustained shoulder injuries on the job, was legally competent evidence that supported city retirement board's decision to deny employee's application for accidental disability retirement, notwithstanding functional capacity evaluation that concluded employee could not return to working full duty and opinion of other medical examiners that employee was unable to return to work as a firefighter; board was within its discretion in discounting functional evaluation, in view of length of time that had passed since it had been performed, and to give more credence to physician's opinion as to subjective nature of employee's complaints.

ZONING & PLANNING - SOUTH DAKOTA

Holborn v. Deuel County Board of Adjustment

Supreme Court of South Dakota - February 10, 2021 - N.W.2d - 2021 WL 501343 - 2021 S.D. 6

Residents of Deuel County and neighboring counties filed petition for writ of certiorari challenging special exception permits (SEPs) to develop two wind energy systems (WES) in Deuel County, including claim that several members of Deuel County Board of Adjustment had interests or biases that disqualified them from considering SEPs.

The Circuit Court determined that two Board members had disqualifying interests and invalidated their votes, and reversed decision of Board granting SEPs. Applicants appealed.

The Supreme Court held that:

- Due process standard of serious objective risk of actual bias was not violated by Deuel County Board;
- Disqualification of members of Board was not warranted under statute that limited grounds for disqualification to "direct pecuniary interest" by public official;
- Disqualification of member was not warranted under statute allowing municipal, county, or township officers to communicate with and receive information from public "about any matter of public interest";
- Prior advocacy by member of Board for wind energy in Deuel County, and his prior opposition to more stringent ordinance requirements for WESs, were not sufficient to rebut presumption of objectivity;
- Members' support of wind energy development in Deuel County and financial benefit they derived from such development were not sufficient to rebut presumption of objectivity;
- Board members' family and employment relationships were not sufficient to rebut presumption of objectivity; and
- Decision by Board to exclude unimproved land from definition of "business" under zoning ordinance was consistent with provisions of ordinance and purposes of setback requirements.

STATES - COLORADO

Raven v. Polis

Supreme Court of Colorado - February 1, 2021 - P.3d - 2021 WL 320607 - 2021 CO 8

Transgender women who were confined in correctional facilities of Colorado Department of Corrections (CDOC) brought action against defendants including CDOC and state Governor, alleging discrimination and seeking declaratory, injunctive, and monetary relief.

After the District Court, City and County of Denver denied Governor's motion to dismiss, Governor brought petition for exercise of original jurisdiction.

Following issuance of order to show cause, the Supreme Court held that:

- Relief in nature of an original proceeding was appropriate, but
- Governor was proper defendant to action.

Relief in the nature of an original proceeding was appropriate for Governor's claim that trial court should have dismissed him from action because he was not a proper defendant, in discrimination action brought by transgender inmates against Governor and Colorado Department of Corrections (CDOC); direct appeal would be inadequate remedy because it would come only after Governor's participation in discovery and trial.

Because the Governor is the state's supreme executive, with ultimate authority over the executive agencies under his control, the Governor is an appropriate defendant in an action that seeks to enjoin or mandate enforcement of a statute, regulation, ordinance, or policy.

IMMUNITY - MASSACHUSETTS

Slavin v. American Medical Response of Massachusetts, Inc.

Appeals Court of Massachusetts, Bristol - January 11, 2021 - N.E.3d - 99 Mass.App.Ct. 55 - 2021 WL 80668

911 Caller, individually and as personal representative of the estate of her deceased mother, brought action against city for wrongful death and emotional distress, alleging that city employees negligently delayed in responding to 911 call reporting that caller and her mother had been stabbed by an intruder.

The Superior Court Department denied city's motion to dismiss. City appealed.

The Appeals Court held that:

- Absent negligent medical treatment, caller's claims were barred by provision of the Massachusetts Tort Claim barring claims against public employers based on tortious conduct of third parties not originally caused by the public employer, and
- Negligent medical treatment exception to provision barring liability did not apply.

Absent negligent medical treatment, claims by 911 caller against city, alleging that city employees negligently delayed in responding to 911 call reporting that caller and her mother had been stabbed by an intruder, were barred by provision of the Massachusetts Tort Claims Act barring claims against public employers based on tortious conduct of third parties not originally caused by the public employer; even though a more prompt response by city personnel might have diminished the harmful consequences of the stabbings, the lack of a prompt response was not the original cause of the harm, as the harm was originally caused by the violent and tortious conduct of a third person, the perpetrator of the stabbings, and not by the public employer or anyone acting on its behalf.

Negligent medical treatment exception to Tort Claims Act provision barring claims against public employers based on tortious conduct of third parties not originally caused by the public employer did not apply to claim brought by 911 caller, alleging city employees negligently delayed in responding to 911 call reporting that caller and her mother had been stabbed; caller did not allege that once the public employees responded to the scene, medical treatment that was furnished was provided in a negligent manner, nor did she allege that they were negligent in not providing additional or different treatment, and "negligent medical treatment" could not be stretched to encompass nonmedical acts or omissions by public employees before arriving at location where they could provide treatment.

INDUSTRIAL REVENUE BONDS - NEW MEXICO

Midway Leasing, Inc. v. Wagner Equipment Co.

United States Court of Appeals, Tenth Circuit - January 8, 2021 - Fed.Appx. - 2021 WL 71254

"This case involves an effort to obtain tax relief through a county's issuance of industrial revenue bonds. The taxpayer, Wagner Equipment Company, hired Midway Leasing, Inc. to lobby the county for legislative approval of the bonds. Midway Leasing prepared the bond application and met with county officials to support passage. The effort succeeded, and Wagner Equipment obtained the bonds, which resulted in considerable savings in taxes. In light of these savings, Midway Leasing sought payment for its lobbying work. But the parties disputed the amount, and Midway Leasing sued for breach of contract, quantum meruit, and unjust enrichment. For these claims, Midway Leasing alleged a contract for a contingency fee, to be computed as a percentage of Wagner Equipment's tax savings."

The Court of Appeals held that:

- New Mexico law prohibits enforcement of an agreement to pay contingency fees for legislative lobbying, and thus the district court properly awarded summary judgment to Wagner Equipment on the claim for breach of contract.
- On the quantum meruit and unjust enrichment claims, the court upheld the award to Midway Leasing of $175,000 based on what it had charged another taxpayer for similar lobbying efforts.

TRAFFIC IMPACT FEES - WASHINGTON

Douglass Properties II, LLC v. City of Olympia

Court of Appeals of Washington, Division 2 - February 2, 2021 - P.3d - 2021 WL 345458

Building permit applicant appealed city's hearing examiner's decision regarding transportation impact fees city imposed as a condition of issuance of building permit.

The Superior Court affirmed, and applicant appealed.

The Court of Appeals held that:

- City's traffic impact fee, imposed as a condition of issuance of building permit, was not subject to Fifth Amendment scrutiny;
- Applicant had the burden of establishing any exception to city ordinance governing calculation of traffic impact fees;
- Hearing examiner's decision to uphold city's traffic impact fee calculation was not clearly erroneous; and
- City, as prevailing party, was entitled to an award of reasonable attorney fees and costs.

ZONING & PLANNING - CONNECTICUT

One Elmcroft Stamford, LLC v. Zoning Board of Appeals of City of Stamford

Supreme Court of Connecticut - January 25, 2021 - A.3d - 2021 WL 262666

Adjacent landowner sought review of approval by city zoning board of appeals of application of property owner to locate used car business on property.

The Superior Court affirmed and adjacent property owner appealed. The Appellate Court reversed and remanded. Property owner appealed.

The Supreme Court held that:

- Statute governing procedures for consideration of used car dealerships by towns, cities, or boroughs had been repealed at time zoning board considered application for use of property as used car dealership, and thus, city zoning board was not required to review application for zoning approval of property as used car lot under standard set forth therein, and
- Conflict between public act that repealed statute that governed procedures for consideration of used car dealerships by towns, cities, or boroughs, and public act that purported to amend the statute, could not be resolved by application of statute governing application of multiple amendments.

CONTRACTS - MARYLAND

K. Hovnanian Homes of Maryland, LLC v. Mayor of Havre de Grace

Court of Appeals of Maryland - January 29, 2021 - A.3d - 2021 WL 302874

Developer which had performed infrastructure improvements involving water, sewer lines, and roads to one of three adjacent parcels, and who had allegedly entered into agreement with city to recoup costs for doing so from owners of other two parcels, brought declaratory judgment action against city to compel execution and recordation of the agreement.

The Circuit Court granted summary judgment to city. Developer appealed. The Court of Special Appeals reversed and remanded. On remand, the Circuit Court granted summary judgment to developer. City appealed. The Court of Special Appeals reversed. Developer petitioned for writ of certiorari, and petition was granted.

The Court of Appeals held that:

- Municipal action that developer sought to enforce as would be subject to Home Rule Amendment, local government statutes, and city charter provisions requiring fees to be established by municipal legislative body;
- Pursuant to city charter, legislative acts, including imposition of water and sewage fees and charges, were to be undertaken by ordinance adopted by mayor and city council, rather than solely by mayor or by verbal resolution of city council; and
- Where a party is seeking to enforce a contract against a municipality in which the substance of the contract was required to be adopted by an ordinance, and no such ordinance was enacted, the contract is ultra vires and unenforceable.

PUBLIC EMPLOYMENT - NORTH DAKOTA

Potts v. City of Devils Lake

Supreme Court of North Dakota - January 12, 2021 - N.W.2d - 2021 WL 99712 - 2021 IER Cases 95422021 ND 2

Dismissed municipal police officer involved in fatal shooting brought wrongful termination action against municipality.

The District Court granted municipality's motion for summary judgment, and officer appealed.

The Supreme Court held that at-will municipal police officer who fatally discharged his firearm during the course of his duties could be discharged by the municipality at any time and for any reason, notwithstanding that he had allegedly fired in self-defense; there was no "self defense of police officers" exception to at-will employment doctrine.

REFERENDA - OKLAHOMA

In re Petition to Recall Ward Three City Commissioner Ezzell

Supreme Court of Oklahoma - January 26, 2021 - P.3d - 2021 WL 252162 - 2021 OK 5

City commissioner brought action challenging sufficiency of recall petition.

Petition's proponents intervened. The District Court denied protest, and commissioner appealed.

The Supreme Court held that recall petition was invalid on its face.

Petition to recall city commissioner that did not contain statutorily required warning of penal sanctions for placing duplicate, false, or fraudulent signatures or for signing of petition by person who was not legal voter was invalid on its face.

IMMUNITY - WASHINGTON

Mancini v. City of Tacoma

Supreme Court of Washington, EN BANC - January 28, 2021 - P.3d - 2021 WL 279715

Apartment resident, detained by police officers exercising search warrant, filed action against city, city police department and police chief, alleging, inter alia, negligence, assault and battery, false imprisonment, and invasion of privacy.

The Superior Court denied defendants' motion for directed verdict, and entered judgment on jury verdict in favor of apartment resident on negligence claim. Defendants appealed. The Court of Appeals reversed. Resident appealed.

The Supreme Court held that:

- As a matter of first impression, police executing a search warrant owe the same duty of reasonable care that they owe when discharging other duties, abrogating *Estes v. Brewster Cigar Co.*, 156 Wash. 465, 287 P. 36, *Reese v. City of Seattle*, 81 Wash.2d 374, 503 P.2d 64, and *Coldeen v. Reid*, 107 Wash. 508, 182 P. 599;
- Police owed duty of reasonable care to apartment resident, enforceable in tort; and
- Issue of whether police officers breached duty of reasonable care in entering, searching, and detaining resident at resident's apartment in the execution of search warrant was for jury.

IMMUNITY - NEBRASKA

Mercer v. North Central Service, Inc.

Supreme Court of Nebraska - January 22, 2021 - N.W.2d - 308 Neb. 224 - 2021 WL 219240

Landowners and their insurers, who were affected by a natural gas explosion and fire after a natural gas line was struck while contractor was drilling an underground path for fiber optic cable, brought action against the Metropolitan Utilities District (MUD), asserting claims for negligence.

The District Court denied MUD's motion for summary judgment. MUD appealed.

The Supreme Court held that:

- Discretionary function exception to the Political Subdivisions Tort Claims Act (PSTCA) did not immunize MUD with respect to its actions in locating and marking the relevant gas lines;
- Discretionary function exception to the PSTCA did not immunize MUD with respect to its failure to timely shut off gas line; and
- Discretionary function exception to the PSTCA did not immunize MUD with respect to workers' failure to properly tell a supervisor that gas line had not been properly abandoned.

To extent that Metropolitan Utilities District (MUD) had any discretion in locating and marking relevant natural gas lines, so as to avoid natural gas pipe strikes when statewide one-call notification center performed horizontal directional drilling (HDD) to bore an underground path for fiber optic cable, that discretion was not protected by the discretionary function exception to the Political Subdivisions Tort Claims Act (PSTCA), as would provide MUD immunity from suit by landowners and their insurers who were affected by natural gas explosion when a buried gas line was struck during HDD process; buried utility lines were under MUD's sole control, and because lines were not readily apparent, MUD had statutory duty to advise excavators of location of the lines with stakes, flags, paint, or other clearly identifiable markings.

Failure by Metropolitan Utilities District (MUD) to timely shut off natural gas lines and properly abandon out-of-service gas line outside of building prior to natural gas explosion was not protected by the discretionary function exception to the Political Subdivisions Tort Claims Act (PSTCA), in suit brought by landowners and insurers who were affected by the explosion, since MUD, because of its own gas emergency procedures, had no choice as to whether it needed to turn off the gas in a timely manner.

Actions by Metropolitan Utilities District (MUD) workers following natural gas explosion, in not properly telling supervisor that line that caused the explosion had not been properly abandoned, were not protected by the discretionary function exception to the Political Subdivisions Tort Claims Act (PSTCA), in suit brought by landowners and insurers who were affected by the explosion; MUD's locating manual provided that a locator "shall" call into dispatch or fill out forms reporting the error, and a separate MUD procedure manual provided a guide in event that it needed to abandon a gas line.

EMINENT DOMAIN - PENNSYLVANIA

PBS Coals, Inc. v. Department of Transportation

Supreme Court of Pennsylvania - January 20, 2021 - A.3d - 2021 WL 190970

Coal companies brought action against Pennsylvania Department of Transportation (DOT), alleging that condemnation of property deprived companies of access to coal estate.

After a hearing, the Court of Common Pleas ruled that a de facto taking had not occurred and sustained Department's preliminary objections to companies' petition for appointment of a board of viewers. Companies appealed. The Commonwealth Court reversed and remanded. DOT petitioned for review.

The Supreme Court held that:

- Insufficient evidence existed to demonstrate that coal companies possessed any beneficial use and enjoyment of their unmined coal estate, as required to prove a de facto taking;
- Trial court's determination that a permit to mine coal estate was not likely to issue went directly to whether coal companies could establish that DOT's highway construction substantially deprived coal companies of the beneficial use and enjoyment of their coal estate, while the suggestion that until a permit was secured there was no estate, and thus no value in the estate, went to damages;
- Sufficient evidence existed to support the trial court's conclusion that coal companies' ability to obtain approval for a surface mining permit was too speculative and uncertain, and thus, that coal companies could not meet their burden to establish that a de facto taking had occurred.

ZONING & PLANNING - PENNSYLVANIA

Lamar Advantage GP Company, LLC v. City of Pittsburgh Zoning Board of Adjustment

Supreme Court of Pennsylvania - January 20, 2021 - A.3d - 2021 WL 189276

Billboard owner, which had ratcheted a static vinyl sign over electronic advertising on billboard, appealed decision of city's zoning board of adjustment which upheld city's citation for adding to or enlarging a nonconforming sign.

The Court of Common Pleas reversed. City appealed, and the Commonwealth Court affirmed. City petitioned for review, which was granted.

The Supreme Court, held that Commonwealth Court's decision was not inconsistent with *Lamar Advertising Co. v. Zoning Hearing Bd. of Monroeville*, 939 A.2d 994.

Commonwealth Court's decision that billboard owner's decision to drape vinyl static sign over existing electronic sign and sign structure did not violate city code provision barring a nonconforming sign from enlarging, adding to, or replacing another nonconforming sign was not inconsistent with *Lamar Advertising Co. v. Zoning Hearing Bd. of Monroeville*, 939 A.2d 994, which held that structural alterations required to replace 17 static vinyl signs with electronic signs "altered" those signs within the meaning of a municipal ordinance; conclusion in that case was premised upon language of that city's zoning ordinance, the failure to establish the billboards as legal nonconforming uses, and the significant structural alterations that the change would entail, none of which were present in the case at hand.

ANTITRUST AND TRADE REGULATION - VIRGINIA

Western Star Hospital Authority Inc. v. City of Richmond, Virginia

United States Court of Appeals, Fourth Circuit - January 19, 2021 - F.3d - 2021 WL 162023

Bidder selected to provide nonemergency medical transportation services to Veteran's Administration Medical Center, conditioned on obtaining permit from city to operate emergency medical services (EMS) vehicles, brought action against city and city ambulance authority for violations of the Sherman Antitrust Act and the Supremacy Clause of the United States Constitution.

The United States District Court dismissed the case with prejudice, and bidder appealed.

The Court of Appeals held that:

- City and city ambulance authority enjoyed Parker doctrine immunity from federal antitrust liability for anticompetitive conduct;
- City and city ambulance authority were not subject to the active state supervision requirement for nonsovereign actors; and
- The Supremacy Clause was not implicated by city's conduct in denying application for permit to operate emergency medical services (EMS) vehicles.

City and city ambulance authority enjoyed Parker doctrine immunity from federal antitrust liability for anticompetitive conduct, and thus, federal law did not preempt their actions in denying applicant a permit to operate emergency medical services (EMS) vehicles; the Virginia legislature expressly conferred broad authority on local governing bodies to engage in anticompetitive conduct in the EMS vehicle services market.

City and city ambulance authority asserting state action immunity from federal antitrust claims were not subject to the active state supervision requirement for nonsovereign actors; municipalities, and substate governmental entities like the ambulance authority, had less of an incentive to pursue their own self-interest under the guise of implementing state policies, and, unlike private parties, were exposed to public scrutiny and checked by the electoral process.

Supremacy Clause was not implicated by city's conduct in denying applicant a permit to operate emergency medical services (EMS) vehicles; applicant alleged that city's conduct conflicted with the Competition in Contracting Act (CICA), because without the permit, applicant's bid to provide nonemergency medical transportation services would not be accepted by the Veteran's Administration (VA) Medical Center, but the VA repeatedly made clear, both when it initially requested quotes and when it conditionally selected applicant's bid that there would be no contract unless it first obtained a permit from the City.

LIABILITY - WASHINGTON

State v. Birge

Court of Appeals of Washington, Division 2 - January 5, 2021 - P.3d - 2021 WL 37509

Defendant police officers were charged with third-degree assault of child under theory of accomplice liability and official misconduct.

The Superior Court granted defendants' motion to dismiss, and State appealed.

The Court of Appeals held that:

- State made prima facie showing that created disputed issues of material fact, as required to survive dismissal of charge for third-degree assault of child;
- State made prima facie showing that created disputed issues of material fact, as required to survive dismissal of charge for official misconduct;
- Official misconduct statute did not require State to prove both that defendants "intended to obtain benefit" and to "deprive another person of lawful right or privilege" in committing unauthorized act;
- Official misconduct statute was not unconstitutionally vague on its face for failure to define "unauthorized act";
- Official misconduct statute was not unconstitutionally vague as applied to defendants;
- Official misconduct statute was not facially overbroad; and
- Official misconduct statute was not unconstitutionally overbroad as applied to defendants.

TRANSPORTATION - CALIFORNIA

Menges v. Department of Transportation

Court of Appeal, Fourth District, Division 3, California - December 24, 2020 - Cal.Rptr.3d - 59 Cal.App.5th 13 - 2020 WL 7653957 - 20 Cal. Daily Op. Serv. 13,080

Passenger of car involved in motor vehicle accident sued Department of Transportation, alleging negligent construction of an interstate off-ramp, stemming from incident in which tractor-trailer truck exiting from off-ramp broadsided vehicle in which passenger was riding.

The Superior Court granted Department summary judgment on the basis of design immunity. Passenger appealed. Subsequently, the Superior Court awarded Department costs. Passenger appealed, and appeals were consolidated.

The Court of Appeal held that:

- Evidence supported determination that design of off-ramp was reasonable, as required for Department to prevail on design immunity defense;
- Alleged lack of conformance between plans for off-ramp and actual construction did not preclude the application of design immunity;
- Evidence demonstrated that construction of off-ramp substantially complied with design plans, as required to support design immunity defense;
- Trial court did not abuse its discretion in denying passenger's motion to continue motion for summary judgment;
- Department's offer to compromise was statutorily compliant and reasonable, as required to support award of expert witness fees; and
- Trial court did not abuse its discretion in awarding Department expert witness fees in amount of $24,516.05 for work performed related to passenger's medical records and life care plan.

MUNICIPAL CORPORATIONS - CALIFORNIA

Department of Finance v. Commission on State Mandates

Court of Appeal, Second District, Division 1, California - January 4, 2021 - Cal.Rptr.3d - 2021 WL 22066 - 21 Cal. Daily Op. Serv. 234

Department of Finance, State Water Resources Control Board, and regional water quality control

board filed petition for writ of administrative mandamus seeking to overturn decision of Commission on State Mandates that regional board's condition on permit authorizing local governments to operate storm drain systems, requiring local governments to install and maintain trash receptacles at transit stops, constituted a reimbursable state mandate, and local governments filed cross-petition, challenging the Commission's determination that requirement that they periodically inspect commercial facilities, industrial facilities, and construction sites to ensure compliance with various environmental regulatory requirements, was not a reimbursable state mandate.

The Superior Court granted petition, and denied cross-petition as moot. Local governments appealed. The Second District Court of Appeal affirmed. Local governments petitioned for review. The Supreme Court reversed. The Superior Court again granted petition. Local governments appealed.

The Court of Appeal held that:

- Conditions constituted new programs or higher levels of service, for purposes of state constitutional provision requiring the state to pay for such programs that it imposes upon local governments;
- Local governments had authority to levy a fee on businesses to cover their costs of inspecting various facilities to ensure compliance with environmental regulatory requirements; and
- Local governments did not have authority to charge a fee to transit agencies or adjacent property owners to install and maintain trash receptacles at transit stops.

Supreme Court's statement that state agencies and local governments did not dispute that each challenged condition on permit authorizing local governments to operate storm drain systems was a new program or higher level of service, did not constitute a rule of law necessary to the decision of the case, and thus, was not law of the case, for purposes of action brought by state agencies seeking to overturn decision of Commission on State Mandates that regional board's condition on permit authorizing local governments to operate storm drain systems, requiring local governments to install and maintain trash receptacles at transit stops, constituted a reimbursable state mandate.

"Programs," for purposes of state constitutional provision requiring the state to pay for new governmental programs, or for higher levels of service under existing programs, that it imposes upon local government agencies, are programs that carry out the governmental function of providing services to the public, or laws which, to implement a state policy, impose unique requirements on local governments and do not apply generally to all residents and entities in the state; the two parts of the definition are alternatives, and either will trigger the subvention obligation unless an exception applies.

Conditions on permit authorizing local governments to operate storm drain systems, requiring local governments to install and maintain trash receptacles at transit stops and to periodically inspect various facilities to ensure compliance with environmental regulatory requirements, constituted new programs or higher levels of service, for purposes of state constitutional provision requiring the state to pay for such programs that it imposes upon local governments; both requirements increased the level of service provided by the existing stormwater drainage system, but also imposed new requirements on local governments, and alternatively, both were requirements unique to local governments to implement state policy.

Based upon the local governments' constitutional police power and their ability to impose a regulatory fee that does not exceed the reasonable cost of the inspections, is not levied for unrelated revenue purposes, and is fairly allocated among fee payers, local governments had authority to levy a fee on businesses to cover their costs of inspecting various facilities to ensure compliance with

environmental regulatory requirements, as required by permit authorizing local governments to operate storm drain systems; permit's inspection requirements and statute requiring regional water quality control boards to use a portion of fees they received from certain waste dischargers for stormwater inspection and regulatory compliance issues could be applied without duplication or conflict.

A regulatory fee local governments could impose on businesses to cover their costs of inspecting various facilities to ensure compliance with environmental regulatory requirements, as required by permit authorizing local governments to operate storm drain systems, would not be preempted by statute obligating waste dischargers to pay annual fees to the state, and requiring some of those fees be used for stormwater inspection and regulatory compliance issues; there was no evidence that a local government's inspection fee would necessarily duplicate the annual fees imposed under statute, nor was there any indication that the Legislation intended to occupy the field of stormwater program inspections or inspection fees.

Local governments did not have authority to charge a fee to transit agencies to install and maintain trash receptacles at transit stops, under statute allowing one public agency to impose a fee for a public utility service provided to another public agency, as would provide an exception to subvention under state constitutional provision requiring the state to pay for new governmental programs, or for higher levels of service under existing programs, that it imposes upon local government agencies; transit authority was not a public utility customer that solicited installation and ongoing maintenance of trash receptacles.

EMINENT DOMAIN - FLORIDA

Galleon Bay Corporation v. Board of County Commissioners of Monroe County

District Court of Appeal of Florida, Third District - December 2, 2020 - So.3d - 2020 WL 7050188

Corporate landowner initiated inverse condemnation proceedings against State and county.

Following jury trial, the Circuit Court entered judgment awarding landowner $480,000 in damages. Landowner appealed, and State and county cross-appealed. The Third District Court of Appeal affirmed. After unsuccessfully motioning the Third District Court of Appeal for rehearing, rehearing en banc, and for a written opinion, landowner filed motion seeking to void judgment on ground that State and county did not timely deposit judgment amount. The Circuit Court denied motion. Landowner appealed.

The District Court of Appeal held that statute requiring petitioner in eminent domain proceedings to deposit judgment amount within 20 days after rendition of judgment did not apply to void judgment in inverse condemnation proceedings.

Statute requiring petitioner in eminent domain proceedings to deposit judgment amount within 20 days after rendition of judgment did not apply to void judgment in inverse condemnation proceedings in which jury awarded corporate landowner $480,000 in damages that the State and county did not deposit within 20 days; statutory scheme demonstrated that term "petitioner" referred to a condemning authority initiating an eminent domain lawsuit by filing a petition, and statute made sense only in eminent domain context, in which it allowed a condemning authority to walk away from an unaffordable valuation.

EASEMENTS - NEW HAMPSHIRE

Shearer v. Raymond

Supreme Court of New Hampshire - January 13, 2021 - A.3d - 2021 WL 117758

Landowner brought action against neighbors seeking to establish easement over neighbors' property to access his landlocked property that abutted a discontinued public highway.

After a bench trial, the Superior Court found that landowner had an easement. Landowner appealed and neighbors cross-appealed.

The Supreme Court held that:

- As matter of first impression, an easement exists over a discontinued highway if abutting landowner demonstrates that easement is reasonably necessary for ingress and egress;
- Width of any private easement for landowner was not controlled by handwritten notes of selectboard's decision 250 years earlier to lay out highway;
- Trial court was not bound by contemporary design standards for rural subdivision streets in determining width of any easement;
- Court's limitation of easement to residential and agricultural purposes was reasonable; and
- Highway was not subject to gates and bars via town vote after highway was discontinued.

PUBLIC UTILITIES - VERMONT

In re Acorn Energy Solar 2, LLC

Supreme Court of Vermont - January 15, 2021 - A.3d - 2021 WL 139140 - 2021 VT 3

Applicant sought certificate of public good (CPG) to build and operate a ground-mounted 150-kW solar net-metering system on leased pasture land.

The Public Utility Commission (PUC) denied motion to dismiss filed by intervening adjoining landowners, granted application, and subsequently denied reconsideration. Adjoining landowners appealed.

Holdings: The Supreme Court held that:

- The PUC did not err in concluding that application was administratively complete under PUC rule setting forth standards and procedures applicable to CPG applications for net-metering systems, even though it did not include a drainage plan;
- The PUC's determination that proposed relocation of two maple trees was a "minor" amendment to application was neither unreasonable nor did it demonstrate compelling indications of error;
- The scope of adjoining landowners' intervention was not limited to the aesthetics criteria;
- Adjoining landowners lacked standing to challenge the PUC's preferred-site determination;
- As a matter of first impression, in determining whether a proposed project has an undue adverse aesthetic effect, alternative siting is a mitigating measure under Quechee in the CPG context;
- The PUC did not clearly err in finding that any project-related sound impacts would not be undue; and
- In concluding that project would not unduly interfere with orderly development of region, the PUC properly considered letter of support from town selectboard and town planning commission, even though both entities acknowledged that they violated Vermont's Open Meeting Law at meetings

where they discussed whether to support project.

ENVIRONMENTAL LAW - ALABAMA

Breland v. City of Fairhope

Supreme Court of Alabama - December 31, 2020 - So.3d - 2020 WL 7778223

Property owner and property owner's corporation brought action against city, seeking a declaration that they were entitled to fill wetlands on the property, which lay outside city's corporate limits but within its police jurisdiction, without further approval from city, asserting a claim that city had acted negligently regarding property owner's application for a land-disturbance permit, and seeking expungement of property owner's criminal citation for beginning work without a permit.

The Circuit Court entered summary judgment in favor of city. Property owner and his corporation appealed. The Supreme Court reversed and remanded. On remand, the Circuit Court entered judgment holding that property owner and his corporation had not obtained a vested right to fill the wetlands, that state law did not preempt city's ordinances at issue, that city's ordinances at issue were not improper zoning ordinances, and that the negligence and expungement claims of property owner and his corporation were moot. Property owner and his corporation appealed.

The Supreme Court held that:

- Property owner and his corporation lacked a vested right to fill wetlands on property when they first obtained a land-disturbance permit from county;
- Alabama Environmental Management Act (AEMA) did not preempt the field of wetlands regulation;
- Alabama Water Pollution Control Act (AWPCA) did not preempt the field of wetlands regulation;
- Water-quality certification that the Alabama Department of Environmental Management (ADEM), in accordance with the
- Alabama Water Pollution Control Act (AWPCA), issued to the Army Corps of Engineers as part of process of determining whether property owner was to be issued federal permit to fill wetlands on property was not a basis to find that State law preempted, on conflict-preemption grounds, city ordinances at issue; and
- City ordinances at issue were not de facto zoning regulations.

COMMUNITY REDEVELOPMENT AGENCIES - CALIFORNIA

Legal Aid Society of San Mateo County v. Department of Finance

Court of Appeal, Third District, California - December 29, 2020 - Cal.Rptr.3d - 2020 WL 7706827 - 21 Cal. Daily Op. Serv. 115

City, as successor to its dissolved redevelopment agency (RDA), and county legal aid society filed petitions for writ of mandate and complaints for declaratory and injunctive relief against Department of Finance (DOF), relating to legal aid society's agreement with city and RDA, pursuant to which RDA had deposited tax increment funds into RDA's low and moderate income (LMI) housing fund maintained under Community Redevelopment Law (CRL), and alleging the applicability of exception, under Dissolution Law for community RDAs, to remittance of funds from tax increment financing to county auditor-controller, for distribution to local taxing agencies faced with fiscal emergency.

The Superior Court denied the petition and dismissed the complaint. City and legal aid society

appealed.

The Court of Appeal held that Dissolution Law's exception for an encumbered housing asset was applicable.

Exception, under Dissolution Law for community redevelopment agencies (RDA), to remittance of tax increment financing funds to county auditor-controller for distribution to local taxing agencies faced with fiscal emergency, which exception was for an encumbered housing asset, applied to tax increment financing funds which city's RDA, under agreement between city, RDA, and county legal aid society, had deposited into RDA's low and moderate income (LMI) housing fund maintained under Community Redevelopment Law (CRL), in pursuit of public policy of providing affordable housing to legal aid society's clients; agreement was enforceable obligation of RDA and was also a housing asset under new, legislatively-created LMI housing asset fund, and city, as successor to dissolved RDA, was required, under due diligence review (DDR) for audit of a successor agency, to separately account for amounts in LMI housing fund that were legally restricted as to purpose, even if funds in LMI housing fund were not committed to a specific project.

EMINENT DOMAIN - FEDERAL

Ideker Farms, Inc. v. United States

United States Court of Federal Claims - December 14, 2020 - Fed.Cl. - 2020 WL 7334407

Over 400 farmers, landowners, and business owners from six states sued United States, claiming Fifth Amendment taking of their land for which just compensation was required based on Army Corps of Engineers' implementation of Missouri River Recovery Program (MRRP) in order to comply with Endangered Species Act (ESA), thereby allegedly causing intermittent flooding of their properties.

Phase II bench trial was held on three representative properties on which Phase I trial determined that MRRP caused additional or more severe flooding in certain years.

The Court of Federal Claims held that:

- MRRP caused changed pattern of increased flooding on properties;
- Severity factor was satisfied for taking of flowage easement;
- Duration factor was satisfied for taking of flowage easement;
- Foreseeability factor was satisfied for taking of flowage easement;
- Character of land factor was satisfied for taking of flowage easement;
- Reasonable investment-backed expectations factor was satisfied for taking;
- Claims for taking of flowage easement were not time barred;
- Just compensation was awarded for diminution in property value;
- Just compensation was awarded for levee repair; and
- Award of interest was warranted.

Missouri River Recovery Program (MRRP), implemented by Army Corps of Engineers, caused new and ongoing pattern of increased flooding on three representative properties that would continue into future, in support of representative owners' claims for just compensation for taking of permanent flowage easement across properties due to additional flooding; owners' descriptions of flooding and change in flooding patterns on their properties post-MRRP were credible and reliable, and their descriptions were not undermined by government's evidence of crop insurance that could

not be used to account for flooding on those bellwether properties.

Increased and repeated flooding on owners' three representative properties caused by Missouri River Recovery Program (MRRP) that was implemented by Army Corps of Engineers satisfied severity factor for Fifth Amendment taking of flowage easement, where return periods associated with flooding of bellwether properties post-MRRP were likely to occur every two years, flooding was far more frequent and damaging than owners had experienced pre-MRRP and was outside range that they could have reasonably expected to experience, and post-MRRP flooding had considerable effects on owners' crop yields.

Permanent yearly increased flooding on owners' three representative properties caused by Missouri River Recovery Program (MRRP) that was implemented by Army Corps of Engineers satisfied duration factor for Fifth Amendment taking of flowage easement, where flooding attributable to MRRP lasted of sufficient duration each year to impact owners' farming operations by causing them to lose crops, and significant invasions of increased flooding were not temporary or isolated events, but rather, would often recur for foreseeable future.

Continued increased flooding on owners' three representative tracts was foreseeable consequence of Missouri River Recovery Program (MRRP) that was implemented by Army Corps of Engineers, thus satisfying foreseeability factor for Fifth Amendment taking of flowage easement, where Corps took combined actions to make river shallower and slower, so rising water surface elevations (WSEs) were natural, direct, and probable consequence of Corps' actions, and Corps was continuing to implement MRRP and would do so into future.

Army Corps of Engineers' actions in implementing Missouri River Recovery Program (MRRP) were sufficient to change character of owners' three representative properties, as required for Fifth Amendment taking of flowage easement, where changes implemented by Corps under MRRP caused more severe, frequent, and long-lasting flooding than owners had historically experienced.

Army Corps of Engineers' actions in implementing Missouri River Recovery Program (MRRP) interfered with reasonable investment-backed expectations of owners that flooding pattern on their three representative properties prior to implementation of MRRP would continue, and thus, Corps' actions effected Fifth Amendment taking of permanent flowage easement, where owners made substantial investments in farming their properties in reliance on government's flood protection system prior to implementation of MRRP, owners' expectation that properties would not be subject to increased flooding was reasonable, and Corps' MRRP actions interfered with owners' expectations in that increased flooding led to lower crop yields and drop in productivity and value of properties.

Under stabilization doctrine, permanent flowage easement takings claim by owners of three representative properties, arising from Army Corps of Engineers' implementation of Missouri River Recovery Program (MRRP) that caused pattern of increased flooding on properties, accrued, under six-year statute of limitations, on date that effects of MRRP were sufficiently stabilized on last day of year that MRRP construction activities relied on by owners were completed when all of the events fixing government's liability occurred at time that intermittent flooding on properties became sufficiently permanent in nature and owners knew or should have been aware of nature and extent of MRRP-caused flooding.

Owners of three representative properties were entitled to award of just compensation for taking of permanent flowage easement by Army Corps of Engineers' implementation of Missouri River Recovery Program (MRRP) that caused pattern of increased flooding on properties, in amount of $1,530,268 for one owner, $3,698,887 for second owner, and $1,868,928 for third owner, as reasonable approximation of diminution in fair market value of their properties.

Owners of three representative properties alleged damages above and beyond value of flowage easement that was taken by Army Corps of Engineers' implementation of Missouri River Recovery Program (MRRP), that caused pattern of increased flooding on properties, for which just compensation was not available, including damages for crop losses and lost profits based on reduced yields, damage to structures and equipment, flood prevention expenses, and flood reclamation expenses, since such expenses were consequential damages that were indirect result of taking, and it was improper to both claim compensation for diminution in value and compensation for consequential damages.

Owners of one representative property were entitled to award of $1,032,338 severance damages for repair of levee, in addition to award of just compensation for diminution in value of property for taking of permanent flowage easement by Army Corps of Engineers' implementation of Missouri River Recovery Program (MRRP) that caused pattern of increased flooding on properties, since destruction of levee was entirely attributable to government's actions, repair of levee was severance damage assumed to protect remainder of property, and compensation for such damage could be measured by mitigation cost of rebuilding levee.

Under prudent investor rule, Moody's rate was appropriate measure of interest compounded annually, for just compensation award to owners of three representative properties for taking of permanent flowage easement by Army Corps of Engineers' implementation of Missouri River Recovery Program (MRRP) that caused pattern of increased flooding on properties.

EMINENT DOMAIN - GEORGIA

HBC2018 LLC v. Paulding County School District

Court of Appeals of Georgia - December 21, 2020 - S.E.2d - 2020 WL 7488624

Lender filed a claim for inverse condemnation against school district, seeking to collect loan for construction of field house building.

Parties filed cross motions for summary judgment.

The Superior Court granted summary judgment in favor of school district, and lender appealed.

The Court of Appeals held that lender had no property interest in repayment of loan.

Lender had no property interest in repayment of loan used to construct field house building, as required for takings claim against school district seeking to collect loan obtained by booster club president to construct field house; although school district made gratuitous payments toward balance of loan, lender issued loan to booster club, which assumed responsibility for repayment of loan, lender did not provide materials or expend labor for construction of field house, there was no evidence that school's use of field house frustrated lender's right to seek repayment of debt, lender secured a default judgment against obligor on loan and released guarantors, and school district was not a party to loan agreement and was under no legal obligation to repay lender.

EMINENT DOMAIN - HAWAII

DW Aina Le'a Development, LLC v. State Land Use Commission

Supreme Court of Hawai'i - December 17, 2020 - P.3d - 2020 WL 7394265

Landowner brought inverse condemnation action in state court against the State of Hawai‘i, challenging reclassification of its property from urban used to agricultural use.

Following removal, the United States District Court granted State’s motion to dismiss on limitations grounds, and landowners appealed. The Court of Appeals certified question to the Hawai‘i Supreme Court.

The Supreme Court held that six year statute of limitations applies to regulatory taking claim under the under the Hawai‘i Constitution.

BALLOT INITIATIVES - MICHIGAN

League of Women Voters of Michigan v. Secretary of State

Supreme Court of Michigan - December 29, 2020 - N.W.2d - 2020 WL 7765755

Voters, ballot-question committee, and nonpartisan voting rights group brought action against Secretary of State, seeking declaration that statutory changes to procedures governing petition drives were unconstitutional.

Legislature brought separate action against Secretary of State seeking a declaration that the statutes were constitutional. After the cases were consolidated, the Court of Claims determined some, but not all, of the statutes were unconstitutional. Voters, committee, and group appealed, and the Court of Appeals affirmed in part, but concluded all the challenged statutes were unconstitutional. Legislature sought leave to appeal and moved to intervene in the other case.

The Supreme Court held that:

- Legislature was an aggrieved party, as required to intervene and appeal;
- As a matter of first impression, case was moot on appeal as to ballot-question committee;
- Voters and voting rights group lacked standing to seek declaration as to statutes’ constitutionality;
- The Supreme Court would vacate the lower courts’ decisions regarding statutes’ constitutionality; and
- Attorney General opinion concluding that statutes were unconstitutional did not confer standing on Legislature to bring separate action.

Legislature’s claim or defense and main action, brought by voters, ballot-question committee, and voting rights group to challenge constitutionality of statutes governing petition drives, had question of law or fact in common, as required for Legislature’s permissive intervention on appeal; main action and Legislature both sought declaratory judgment as to constitutionality of certain statutes.

Legislature was an aggrieved party, as required to intervene and appeal action that had resulted in declaration that certain statutes governing petition drives were unconstitutional; even though neither Attorney General nor any other party appealed, lower courts had concluded that Legislature had no standing to pursue its case and considered and rejected Legislature’s arguments that statutes were constitutional, and failing to allow Legislature’s intervention would have enabled executive branch to nullify Legislature’s work by declining to contest lower-court rulings.

Supreme Court would deem Legislature’s motion to intervene for purposes of appeal as timely in declaratory judgment action, even though Legislature did not file motion before deadline for application for leave to appeal case involving challenge to statutes governing petition drives, where Legislature participated in case below, Legislature had filed motion to intervene earlier when

plaintiffs sought to bypass Court of Appeals, and Supreme Court explicitly permitted Legislature to file another motion to intervene after the expedited deadline for appealing had expired.

Case that sought declaration that certain statutes governing petition drives were unconstitutional was moot on appeal as to ballot-question committee, where committee voluntarily stopped circulating its petition with intent to put it on ballot due to COVID-19 pandemic, a Supreme Court decision on matter would only have served to instruct committee as to the law should committee choose to pursue a petition in the future, and committee did not have anything at stake in dispute.

Issue in case, in which ballot-question committee sought declaration that certain statutes governing petition drives were unconstitutional, was not likely to recur or to evade review, and thus Supreme Court would not hear appeal of case, as to committee, pursuant to mootness exception; committee, which voluntarily stopped circulating its petition with intent to put it on ballot due to COVID-19 pandemic, did not assert that it intended to resume petition drive later, and Supreme Court heard and could easily have decided case before relevant election.

Voters and voting rights group lacked standing to seek declaration as to constitutionality of statutes governing petition drives, despite contention that voters and group's members wished to exercise their rights to support placement of proposals on general election ballot by signing petitions; ballot-question committee voluntarily stopped circulating its particular petition due to COVID-19 pandemic, and voters and members did not allege that they had any concrete plans to sign any other petition, much less shown that their signatures would not be counted due to statutes.

Supreme Court would vacate lower courts' decisions declaring that certain statutes governing petition drives were unconstitutional, after determining that case was moot as to one plaintiff and remaining plaintiffs lacked standing, where case had been a procedural mess from beginning, with Attorney General declining to defend constitutionality of statutes, Legislature bringing its own action rather than intervening, Court of Claims adjudicating a dispute with no actual controversy as required by declaratory judgments rule, and Court of Appeals issuing a published opinion when no appealing party was aggrieved by lower-court judgment.

Attorney General opinion concluding that statutes governing petition drives were unconstitutional did not confer standing on Legislature to bring action seeking declaration that statutes were constitutional; allowing standing based on any formal opinion concluding that an act was unconstitutional would go far beyond view that a legislative body could defend the constitutionality of an act that has already been struck down by a court when the executive refuses to do so.

ZONING & PLANNING - MINNESOTA

State v. Sanschagrin

Supreme Court of Minnesota - December 30, 2020 - N.W.2d - 2020 WL 7759466

Defendants, who owned undeveloped lot on lake, were charged with misdemeanor violations of city code arising from their installation of dock.

The District Court dismissed. State appealed. The Court of Appeals affirmed. State appealed.

The Supreme Court held that defendants' letter to city in response to notice of zoning violation was not a written request allowing automatic approval upon city's non-response.

Landowners' letter to city planning commission contesting a notice of zoning violation relating to

dock installation on undeveloped lot on lake and asserting their interpretation of city zoning code as allowing the dock was not a written "request" under statute providing for automatic approval of a written request relating to zoning for a permit, license, or other governmental approval of an action upon an agency's failure to deny request within 60 days; letter was not made on an application form provided by city, and letter did not clearly identify a specific license, permit or "other governmental approval" sought.

EMINENT DOMAIN - MISSISSIPPI

Mississippi Sand Solutions, LLC v. Otis

Supreme Court of Mississippi - December 17, 2020 - So.3d - 2020 WL 7417014

Sand mining company brought petition seeking to condemn private right-of-way across neighboring landowners' property.

After bench trial portion of proceeding, the Special Court of Eminent Domain granted directed verdict in favor of landowners. Mining company appealed.

The Supreme Court held that:

- Issue of whether mining company had access to its property was raised and ruled on in prior litigation between parties, and thus collateral estoppel doctrine barred relitigation of such issue, and
- Even if collateral estoppel bar did not apply, condemnation was not necessary for ingress and egress to mining company's property.

Issue of whether sand mining company had access to its property was raised and ruled on in prior declaratory judgment action by neighboring landowners, and thus collateral estoppel doctrine barred relitigation of such issue in mining company's action under private condemnation statute, seeking to condemn portion of landowners' property for access to mining company's property, where landowners argued in declaratory judgment action that there was no entitlement by mining company to an easement by necessity because alternative access was available, and trial court's order in declaratory judgment action specifically held that no easement by necessity was established because there were other ways to access mining company's property.

Finding that mining company had access to its property was essential to prior judgment entered in favor of neighboring landowners in their declaratory judgment action against mining company, asserting that mining company did not hold easement by necessity across landowners' property, supporting finding that collateral estoppel barred relitigation of issue of access to property in mining company's petition for condemnation of portion of landowners' property to provide access to mining company's property, where, in declaratory judgment action, landowners based their argument for lack of existence of easement solely on ground that mining company had alternative access to its property.

Condemnation of portion of neighboring landowners' property was not necessary for ingress and egress to mining company's property, defeating mining company's petition under private condemnation statute, where mining company principal testified that mining company had always been able to cross to its property and that landowners had never barred it or its employees from crossing to its property.

POLITICAL SUBDIVISIONS - KENTUCKY

Northern Kentucky Area Development District v. Wilson

Supreme Court of Kentucky - December 17, 2020 - S.W.3d - 2020 WL 7396295 - 2020 IER Cases 496,244

Employee brought action against her former employer, the Northern Kentucky Area Development District (NKADD), under the Kentucky Whistleblower Act (KWA), alleging that it retaliated against her by forcing her resignation for having reported a co-worker's fraudulent billing practice.

The Circuit Court granted former employer's motion for summary judgment, and employee appealed. The Court of Appeals reversed, and discretionary review was granted.

The Supreme Court held that as a matter of first impression, as to those claims filed before January 1, 2018, including employee's, NKADD was not one of the Commonwealth's "political subdivisions" subject to the KWA.

Northern Kentucky Area Development District (NKADD) was not then a Commonwealth "political subdivision" and so was not potentially liable on Kentucky Whistleblower Act (KWA) claim filed before January 1, 2018, by former employee for NKADD's alleged retaliation in purportedly forcing her to resign for having reported a co-worker's fraudulent billing practice; although statutorily NKADD was a "public agency" for purposes of the Interlocal Cooperation Act, that did not turn it into a political subdivision for KWA purposes, and, under the Comair analysis, 295 S.W.3d 91, while NKADD was created by statute by the General Assembly, an immune "parent," it did not serve an integral state function, as when its multitude of elder care, economic development, transportation planning, and other services was examined holistically, its operation concerned more regional than statewide needs, it carried out proprietary, non-governmental functions, and it was not necessary to government services.

MUNICIPAL CORPORATIONS - NORTH DAKOTA

DiCesare v. Charlotte-Mecklenburg Hospital Autuhority

Supreme Court of North Carolina - December 18, 2020 - S.E.2d - 2020 WL 7415943

Insureds filed putative class action against healthcare services provider, as quasi-municipal corporation organized under Hospital Authorities Act, seeking reimbursement for healthcare costs based upon claims for restraint of trade and monopolization pursuant to North Carolina General Statutes and Anti-Monopoly Clause in North Carolina's Constitution.

The Superior Court granted provider judgment on pleadings in part. Insureds noted appeal, and provider petitioned for writ of certiorari.

The Supreme Court held that:

- Provider was immune from suit under unfair trade practices and antitrust statutes, and
- Claim under Anti-Monopoly Clause was not sufficiently alleged.

Healthcare services provider, as quasi-municipal corporation organized under Hospital Authorities Act, not for-profit corporation, was not "person, firm, or corporation," within meaning of unfair trade practice and antitrust statutes, and thus, provider was immune from liability for insureds' class

action statutory claims for restraint of trade and monopolization by allegedly encouraging insurers to steer insureds toward provider by offering insurers modest concessions on provider's market-power driven, premium prices while forbidding insurers from allowing provider's competitors to do same; provider was registered non-profit organization jointly operated by city and county and acting in its delegated legislative function of providing public rather than private healthcare facilities.

Insureds failed to sufficiently allege that healthcare services provider had monopoly in relevant market, as required to state class action claim against provider under Anti-Monopoly Clause of State Constitution; insureds did not adequately plead that provider controlled so large portion of market that it not only stifled competition and restricted freedom of commerce, but also controlled prices, as insureds alleged that provider only possessed approximately 50% share of acute inpatient hospital services in relevant market and that it faced sizeable competitors within that market, but did not allege that provider had ability to actually control prices in that market.

MUNICIPAL ORDINANCE - OHIO

City of Cincinnati v. Fourth National Realty, L.L.C.

Supreme Court of Ohio - December 22, 2020 - N.E.3d - 2020 WL 7501943 - 2020 -Ohio-6802

City brought action against the owner of a billboard sign, claiming that the sign was installed without obtaining the necessary permit and variance. Owner counterclaimed for a declaration that the city's outdoor advertising prohibitions violated its free speech and due process rights.

City moved for summary judgment, arguing that the trial court lacked subject-matter jurisdiction because the owner had not served the attorney general with notice of its constitutional claims at the inception of owner's case. While concluding that it had subject-matter jurisdiction, the Court of Common Pleas granted the motion. The parties appealed. The Court of Appeals affirmed in part, reversed in part, and remanded. City sought discretionary review.

The Supreme Court held that:

- Service on attorney general for claims seeking declaration that a statute or ordinance was unconstitutional was not required at inception of a case, and
- Owner satisfied the service requirements for its constitutional claims.

Statute requiring service on the attorney general of a pleading seeking a declaratory judgment that a statute or municipal ordinance was unconstitutional did not deprive a trial court of subject-matter jurisdiction if such service did not occur at the inception of the action; the statute contained no language dictating the timing of service on the attorney general, and there was no language divesting the trial court of its subject-matter jurisdiction if parties did not complete service on the attorney general within a certain time.

Owner of a billboard sign satisfied the requirements of a statute requiring service on the attorney general of a pleading seeking a declaratory judgment that a statute or municipal ordinance was unconstitutional, in an action brought by a city, claiming that the sign was installed without obtaining the necessary permit and variance, in which the owner counterclaimed for a declaration that the city's outdoor advertising prohibitions violated its free speech and due process rights, where the owner asserted its challenge in a counterclaim and ultimately served the counterclaim on the attorney general, although such service did not occur until nearly two and a half years after the

constitutional violations were first alleged.

OPEN RECORDS - PENNSYLVANIA

Uniontown Newspapers, Inc. v. Pennsylvania Department of Corrections

Supreme Court of Pennsylvania - December 22, 2020 - A.3d - 2020 WL 7502321

Newspaper petitioned to enforce a decision of Office of Open Records (OOR) that required Department of Corrections (DOC) to disclose records, pursuant to the Right to Know Law (RTKL) regarding illnesses of inmates and staff members at certain correctional facility.

The Commonwealth Court denied newspaper's motion for summary relief and then the Court, in single-judge opinions, concluded that DOC acted in bad faith, ordered disclosure of certain records, and ordered sanctions and awarded attorney fees to newspaper. DOC's petition for allowance of appeal was granted.

The Supreme Court held that:

- DOC's open records officer failed to act with diligence, which supported conclusion that DOC acted in bad faith, and
- RTKL permits recovery of attorney fees when the receiving agency determination is reversed and it deprived a requester of access to records in bad faith.

Department of Corrections' (DOC) open records officer failed to act with diligence in response to newspaper's request for records regarding illnesses of inmates and staff members at certain correctional facility, which supported conclusion that DOC acted in bad faith under Right to Know Law (RTKL); even though officer forwarded request to DOC's Health Care Bureau, officer did not seek an explanation or question Bureau's narrow interpretation that request exclusively sought records related to specific internal investigation, and officer did not take any steps to confirm whether only records that existed other than those generated in ongoing investigation were medical records.

The attorney fees provision of the Right to Know Law (RTKL) permits recovery of attorney fees when the receiving agency determination is reversed, and it deprived a requester of access to records in bad faith; recovery is not limited to when a court reverses the determination of the appeals officer or the agency deems the request denied.

MUNICIPAL ORDINANCE - WASHINGTON

City of Seattle v. Rodriguez

Court of Appeals of Washington, Division 1 - December 14, 2020 - P.3d - 2020 WL 7332611

Defendant was convicted in the Superior Court under city's sexual exploitation ordinance, stemming from incident in which he handed undercover police detective $80 in exchange for sexual conduct.

Defendant appealed, challenging ordinance as unconstitutionally vague and overbroad.

The Court of Appeals held that:

- Ordinance was not subject to strict-scrutiny analysis for constitutionality;
- Ordinance proscribed conduct which was not protected by First Amendment, and thus was not overbroad;
- Ordinance was not unconstitutionally vague based on its inclusion of term "agreement" and phrase "pursuant to an understanding"; and
- Ordinance was not unconstitutionally vague based on discretion it vested in police officers to enforce ordinance.

City's sexual exploitation ordinance, which proscribed agreements to compensate another person in exchange for engaging in sexual conduct, was not subject to strict-scrutiny analysis for constitutionality, where prostitution, which was clearly the conduct proscribed by the ordinance, was not a free speech activity protected by the First Amendment.

City's sexual exploitation ordinance, which proscribed agreements to compensate another person in exchange for engaging in sexual conduct and required no intent element, was not unconstitutionally overbroad in violation of the First Amendment, where the proscribed conduct, which was clearly the solicitation of prostitution, was not a free speech activity protected by the First Amendment.

City's sexual exploitation ordinance, which proscribed agreements to compensate another person pursuant to an understanding that the person would engage in sexual conduct, was not rendered unconstitutionally vague in violation of the Due Process Clause based on its inclusion of term "agreement" or phrase "pursuant to an understanding," the meaning of which was readily ascertainable to persons of ordinary intelligence.

City's sexual exploitation ordinance, which proscribed agreements to compensate another person in exchange for engaging in sexual conduct, was not rendered unconstitutionally vague in violation of the Due Process Clause based on the discretion vested in police officers to enforce the ordinance, since the ordinance did not invite an inordinate amount of police discretion outside of the normal level of police officer discretion typically associated with the enforcement of statutes.

OPEN MEETINGS - WASHINGTON

Tateuchi v. City of Bellevue

Court of Appeals of Washington, Division 1 - December 28, 2020 - P.3d - 2020 WL 7692154

Non-profit corporation and one of its members filed petition under the Land Use Petition Act (LUPA), seeking to revoke property owner's conditional use permit authorizing use of a rooftop in city as helistop, and filed claim against city council, alleging violation of the Open Public Meetings Act (OPMA) in connection with appeal of city's decision denying LUPA petition.

The Superior Court affirmed the city's decision, and dismissed the action. Plaintiffs sought direct review before the Supreme Court, which transferred review.

The Court of Appeals held that:

- Term "abandoned" in city zoning ordinance governing conditional use permits required overt act plus intent to abandon the conditional use of the property;

- Property owner's failure to use rooftop for helicopter takeoffs or landings during 12-month period did not amount to "abandonment" of conditional use permit;
- City council meeting on appeal of city's decision denying LUPA petition was exempt from the OPMA; and
- Defendants were entitled to award of attorney fees, as prevailing parties on appeal in land use decision.

MUNICIPAL ORDINANCE - CALIFORNIA

Hotop v. City of San Jose

United States Court of Appeals, Ninth Circuit - December 7, 2020 - 982 F.3d 710 - 20 Cal. Daily Op. Serv. 12,665 - 2020 Daily Journal D.A.R. 12,969

Owners of rent-stabilized rental housing in city brought civil rights action challenge, on constitutional grounds, the disclosure obligations imposed on them by municipal ordinance.

The United States District Court granted motion to dismiss for failure to state cause of action, and lessors appealed.

The Court of Appeals held that:

- Lessors did not adequately allege that they had reasonable expectation of privacy in information that they were required by ordinance to disclose, and did not state plausible claim to recover for municipality's alleged violation of their Fourth Amendment rights;
- Lessors did not state plausible claim for regulatory taking;
- Complaint contained only vague allegations that the ordinance affected lessors' contracts with tenants and did not state a Contracts Clause claim that was plausible on its face;
- City had rational basis for the distinctions drawn in ordinance based, inter alia, on the significant resources that it would have to expend if ordinance were expanded to include duplexes; and
- Lessors did not state a plausible substantive or procedural due process claim against municipality.

IMMUNITY - KENTUCKY

A.H. v. Louisville Metro Government

Supreme Court of Kentucky - December 17, 2020 - S.W.3d - 2020 WL 7395585

Inmate's estate brought action against city and county's consolidated local government body and director of local department of corrections, among others, alleging multiple torts and constitutional violations seeking compensatory and punitive damages for allegedly withholding inmate's medication.

After removal and remand, the Circuit Court entered four orders granting summary judgment and dismissing all claims. Estate appealed.

The Court of Appeals affirmed. Both sides' requests for discretionary review were granted.

The Supreme Court held that:

- Stipulation drafted by estate and filed in federal court prior to remand did not dismiss government body from case;

- Government body qualified for immunity to claimed statutory violation;
- Claims brought against director in his official capacity were treated as suit against local government body, to which immunity applied;
- Director was entitled to qualified immunity on claims against him in his individual capacity;
- Record failed to indicate that Attorney General was notified of constitutional challenge to statutes, precluding appellate review;
- Statute that creates a private right of action for a violation of a statute does not create a private right of action for violations of the state constitution; and
- The Supreme Court would not create new cause of action.

MUNICIPAL ORDINANCE - OHIO

Ohioans for Concealed Carry, Inc. v. Columbus

Supreme Court of Ohio - December 18, 2020 - N.E.3d ----2020 WL 7409665 - 2020 -Ohio-6724

Gun rights organizations, allegedly composed of gun owners from across the state, filed complaint against city, seeking an injunction and declaratory relief against city ordinances.

The Court of Common Pleas granted activists' request for a permanent injunction enjoining enforcement of ordinance prohibiting the possession of certain firearm accessories, and denying injunctive relief regarding enforcement of ordinance prohibiting individuals convicted of domestic violence from possessing firearms.

The Tenth District Court of Appeals reversed and remanded. Plaintiffs' petition for discretionary review was granted.

The Supreme Court held that:

- Firearms statute did not provide basis for standing;
- Organizations did not have associational standing by virtue of one member's individual-taxpayer standing; and
- Organizations lacked standing to pursue relief under the Declaratory Judgment Act.

Firearms statute, which pertained to ensuring that laws throughout the state regarding right to bear arms were uniform, did not provide basis for gun rights activists to have standing, in declaratory judgment action, to challenge two firearms-related city ordinances that restricted the rights of individuals convicted of misdemeanor domestic-violence offenses from possessing firearms and prohibited "bump stocks" firearms accessories; even if statute implied a private right of action, that did not abrogate the need to establish standing, and plaintiffs' arguments that whether any of them owned or planned to own any of the several firearm components banned by the city did not show they had a personal stake in the outcome of the case.

Gun rights organizations, allegedly composed of firearm owners across the state, did not have associational standing, by virtue of one member's individual-taxpayer standing, to pursue taxpayer action for injunctive relief for allegedly unconstitutional city ordinances that restricted some individuals from possessing firearms and "bump-stocks" firearms accessories, where complaint did not allege that corporations were bringing the action on behalf of that member, but rather, made clear that corporations and their members were suing on behalf of themselves.

Gun rights organizations lacked standing to pursue relief under the Declaratory Judgment Act for

allegedly unconstitutional city ordinances that restricted some individuals from possessing firearms and "bump stocks" firearms accessories, where complaint was devoid of any allegation signaling a significant possibility of future injury, as complaint did not contain allegations that organizations' members owned firearms with bump stocks or some other accessory that could be considered within purview of the bump-stocks ordinance, or that any members offered bump stocks for sale, nor did it contain any allegations specific to the weapons-under-disability ordinance.

Gun rights organizations lacked standing to pursue relief under the Declaratory Judgment Act for allegedly unconstitutional city ordinances that restricted some individuals from possessing firearms and "bump stocks" firearms accessories, where complaint was devoid of any allegation signaling a significant possibility of future injury.

PUBLIC UTILITIES - OHIO

In re Determination of Existence of Significantly Excessive Earnings for 2017 Under Electric Security Plan of Ohio Edison Company

Supreme Court of Ohio - December 1, 2020 - N.E.3d - 2020 WL 7033864 - 2020 -Ohio- 5450

Office of Ohio Consumers' Counsel (OCC) sought judicial review of orders of the Public Utilities Commission finding that an electric-distribution utility's earnings for a particular year were not excessive, challenging the Commission's decision to remove the utility's revenue collected under its distribution modernization rider (DMR) from the excessive-earnings test.

The Supreme Court held that:

- Commission violated statute governing electric security plans (ESP) by removing DMR revenue;
- Court lacked jurisdiction over issue of whether Commission violated statute requiring it to file written opinions;
  OCC established harm resulting from Commission's decision; and
- Court had jurisdiction to remand for new excessive-earnings proceeding.

Public Utilities Commission violated the statute governing electric security plans (ESP) by removing an electric-distribution utility's revenue collected under its distribution modernization rider (DMR) from the test to determine whether the utility's ESP resulted in significantly excessive earnings compared to companies facing comparable risk; the Commission offered no explanation as to how the statute permitted exclusion of the revenue as introducing an unnecessary element of risk that undermined the DMR's purpose of providing credit support, and the DMR was an adjustment under the statute of the sort the Commission was required to include when determining whether an ESP resulted in excessive earnings.

Supreme Court lacked jurisdiction over issue of whether the Public Utilities Commission violated the statute requiring the Commission to file written opinions in all contested cases by failing to explain the statutory and evidentiary bases for excluding an electric-distribution utility's revenue collected under its distribution modernization rider (DMR) from the test to determine whether the utility's electric security plan (ESP) resulted in significantly excessive earnings compared to companies facing comparable risk, where the Office of Ohio Consumers' Counsel did not allege a violation of the statute in its application for rehearing before the Commission challenging the DMR decision.

Public Utilities Commission's claim that it sought to improve electric-distribution utility's capital structure was not a basis for affirming its decision to remove the utility's revenue collected under its

distribution modernization rider (DMR) from the test to determine whether the utility's electric security plan (ESP) resulted in significantly excessive earnings compared to companies facing comparable risk, where the Commission, in rendering its decision, never said it was making an adjustment for capital structure when it removed DMR revenue, and the utility did not argue that removal of the revenue was justified on such ground.

Need for a valid comparison based on comparable risk was not a basis for affirming the Public Utilities Commission's decision to remove an electric-distribution utility's revenue collected under its distribution modernization rider (DMR) from the test to determine whether the utility's electric security plan (ESP) resulted in significantly excessive earnings compared to companies facing comparable risk, where the Commission never mentioned the comparable-risk clause in the ESP statute's provision requiring the excessive-earnings test as its reason for excluding the DMR revenue.

Purported status of revenue earned by an electric-distribution utility under its distribution modernization rider (DMR) as an extraordinary item or an additional liability or write-off of a regulatory asset, so as not to be part of the utility's earned return on common equity, was not a basis for affirming the Public Utilities Commission's decision to remove DMR revenue from the test to determine whether the utility's electric security plan (ESP) resulted in significantly excessive earnings compared to companies facing comparable risk, where the Commission did not rely on the utility's argument regarding such a status or make express or implied findings to support it, and the application seeking the Commission's analysis did not mention an exclusion of DMR revenue as an extraordinary item.

Office of Ohio Consumers' Counsel (OCC) established harm resulting from the Public Utilities Commission's decision to remove an electric-distribution utility's revenue collected under its distribution modernization rider (DMR) from the test to determine whether the utility's electric security plan (ESP) resulted in significantly excessive earnings compared to companies facing comparable risk, as required to seek reversal of an order of the Commission; the OCC was not required to show that ratepayers were entitled to a refund to establish harm, but instead the OCC's harm was that the utility was not required to include its DMR revenue in its earnings for the excessive-earnings test.

Supreme Court had jurisdiction to remand to the Public Utilities Commission for a new proceeding to determine whether an electric-distribution utility's electric security plan (ESP) resulted in significantly excessive earnings compared to companies facing comparable risk, in an appeal brought by Office of Ohio Consumers' Counsel challenging the Commission's decision to exclude the utility's revenue collected under its distribution modernization rider (DMR) from the excessive-earnings test, where the Commission did not decide a return-on-equity threshold for the test, so that it was unclear whether inclusion of the DMR revenue would have resulted in a return-on-equity calculation that exceeded the applicable threshold.

Office of Ohio Consumers' Counsel (OCC) did not waive its challenge to a stipulation approved by the Public Utilities Commission, which recommended that the Commission find that utility's electric security plan (ESP) did not result in significantly excessive earnings compared to companies facing comparable risk; the OCC was not required to argue on appeal that the stipulation did not meet the three criteria necessary for approval of a stipulation, but instead it was enough for the OCC to argue that the Commission's orders were unlawful and unreasonable because it removed the utility's revenue collected under the utility's distribution modernization rider (DMR) in making an excessive-earnings determination, which directly implicated the Commission's approval of the stipulation.

PUBLIC UTILITIES - OHIO

Corder v. Ohio Edison Company

Supreme Court of Ohio - November 12, 2020 - N.E.3d - 2020 WL 6600368 - 2020 -Ohio-5220

Landowners who were organic farmers 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. The Court of Appeals reversed. Utility sought discretionary review.

The Supreme Court held that landowners' action was within subject-matter jurisdiction of common pleas court and was not within PUCO's exclusive jurisdiction.

Landowners' action seeking declaratory and injunctive relief regarding scope of electrical transmission line easement, specifically whether electric utility could use herbicides to control vegetation within easement, was within subject-matter jurisdiction of common pleas court, and was not a matter within the exclusive jurisdiction of Public Utilities Commission of Ohio (PUCO); determination of scope of easement did not depend on PUCO's exercise of its administrative expertise or its review of a public utility's vegetation-management program, but rather required a court to interpret and apply the language of the instrument creating the easement.

When a declaratory judgment action seeks an adjudication of the terms of an electrical transmission line easement to determine respective property rights of a landowner and a public utility, that particular class of case is not within the exclusive jurisdiction of Public Utilities Commission of Ohio (PUCO), but rather may be heard and decided by a court of common pleas.

BONDS - PUERTO RICO

Altair Global Credit Opportunities Fund (a), LLC v. United States

United States Court of Federal Claims - November 23, 2020 - Fed.Cl. - 2020 WL 6865053

Bondholders filed suit against United States, seeking just compensation for alleged taking of their pledged property serving as collateral for their bonds issued by Puerto Rico's employers retirement system (ERS), including their right to receive timely principal and interest payments, as well as their purported liens on and contractual right to future employer contributions to ERS, after Oversight Board established by Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), incorporating Bankruptcy Code, to pursue judicially supervised debt restructuring for Puerto Rico drafted ERS bond legislation and mandated its enactment to transfer bondholders' collateral to Puerto Rico without compensation.

Government moved to dismiss for lack of subject matter jurisdiction and for failure to state claim.

The Court of Federal Claims holds that:

- Board was not federal entity within Tucker Act jurisdiction;
- Board's actions were not attributable to United States;

- PROMESA did not bar Tucker Act jurisdiction;
- Bondholders lacked property interest required for takings claim based on liens; and
- Impairment of bondholders' contractual right was insufficient for taking.

Puerto Rico's Financial Oversight and Management Board that allegedly effected taking of bondholders' liens on their pledged property and their contractual right to timely payment of principal and interest by Puerto Rico's Employers Retirement System (ERS), as issuer of bonds, was not "federal entity" subject to Tucker Act jurisdiction, but rather, was "local entity," under Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), providing that Board "shall be created as an entity within the territorial government" and "shall not be considered to be a department, agency, establishment, or instrumentality" of federal government, and Congress gave Board structure, duties, and powers consistent with entity in territorial government.

Puerto Rico Financial Oversight and Management Board's actions, that allegedly effected taking of bondholders' liens on their pledged property and their contractual right to timely payment of principal and interest by Puerto Rico's Employers Retirement System (ERS), as issuer of bonds, could not be attributed to United States, under sole-sovereign doctrine, thus barring exercise of Tucker Act jurisdiction over claims under Fifth Amendment Takings Clause that applied to Puerto Rico through Fourteenth Amendment, since Board was instrumentality of Puerto Rico, and Board's acts were attributable to Puerto Rico as expressly directed in Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA).

Court of Federal Claims' prior determination that Congress did not withdraw Tucker Act jurisdiction in Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA) or direct all suits under PROMESA to federal district court was law of the case that barred United States from asserting that same argument in subsequent motion to dismiss for lack of jurisdiction over bondholders' takings claims arising from their alleged liens on and contractual right to future contributions to Puerto Rico's employers retirement system (ERS), as issuer of bonds.

Bondholders' takings claims arising from their alleged liens on and contractual right to future contributions to Puerto Rico's employers retirement system (ERS), as issuer of bonds, was ripe, even though bondholders were still litigating value of their bonds in other courts, since claims were based on retroactive application of Bankruptcy Code provision incorporated in Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), and bondholders' separate ongoing litigation only affected extent of damages.

Prior determination by district court and First Circuit, that under Puerto Rico law bondholders did not have property interest in alleged liens on future employer contributions to Puerto Rico's employers retirement system (ERS), as issuer of bonds, collaterally estopped bondholders from relitigating issue of whether they had property interest required for their claims seeking just compensation for alleged taking of their purported liens; issue of property interest in liens was identical to issue in prior proceeding, was litigated and resolved, and was necessary to resulting judgment, and bondholders had full and fair opportunity to litigate that issue.

Under Puerto Rico law, bondholders lacked property interest in their purported liens on future employer contributions to Puerto Rico's employers retirement system (ERS), as issuer of bonds, thus barring their claims seeking just compensation for alleged taking of their liens, since ERS did not have property interest in future employer contributions as they were merely expectancy rather than fixed and calculable at time of ERS's petition under Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA) provision incorporating Bankruptcy Code providing that property acquired by debtor after petition was not subject to any lien resulting from any security agreement entered into by debtor before petition.

Bondholders lacked property interest in their contractual right to future employer contributions to Puerto Rico's employers retirement system (ERS), as issuer of bonds, thus barring bondholders' claims seeking just compensation for alleged taking of their contracts by ERS's petition under Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA) provision incorporating Bankruptcy Code, since bonds were not taken by petition or underlying statutory authority, but rather, their value was impaired, which was insufficient for taking, as at most, Bankruptcy Code took some subject matter of contract, namely, future employer contributions, but not contract itself.

Government's enactment of Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), incorporating Bankruptcy Code, that enabled Puerto Rico's debt restructuring, did not result in regulatory taking of bondholders' contractual right to future employer contributions to Puerto Rico's employers retirement system (ERS), as issuer of bonds, by cutting off bondholders' ability to receive benefit of future employer contributions to ERS; Penn Central factors weighed against taking, as contributions were merely expectancy and bonds still existed, United States did not interfere with investment-backed expectations of bondholders who were warned that bankruptcy was possibility, and government had legitimate interest in mitigating Puerto Rico's fiscal emergency.

EMINENT DOMAIN - VIRGINIA

Palmyra Associates, LLC v. Commissioner of Highways

Supreme Court of Virginia - December 17, 2020 - S.E.2d - 2020 WL 7393500

Department of Transportation (DOT) filed petition in condemnation after recording certificate of take.

The Circuit Court entered order confirming commissioners' award of $107,131 for the take and setting aside the award for damages to the residue. Landowner appealed.

The Supreme Court held that:

- Landowner's ten-year-old site plans were not admissible to establish damages to the residue;
- Landowner's testimony concerning lost "development potential" was speculative and inadmissible to establish damages to the residue; and
- Invited error doctrine precluded consideration of claim that the trial court erred in putting the parties on terms of either the court confirming the value of the taken property or ordering a new trial.

Landowner's ten-year-old site plans were not admissible in eminent domain action to establish damages to the residue of the property not taken, where site plans had not been approved, landowner had not met conditions which county had imposed on approval, it was unclear whether site plans would require retaining wall, widened road, or bridge, and plans required entrance to proposed development for which landowner would have to gain approval.

Landowner's testimony concerning lost "development potential," which was necessarily rooted in a lost "pad site," was speculative and inadmissible in eminent domain action to show damages to the residue; pad site depended on contingent and speculative site plans, property's development potential was uncertain because the county had imposed certain conditions, which had not been satisfied, the property was situated in a flood plain, which would necessitate adjustments, and the property would need additional infrastructure changes to be developed as a commercial site.

Invited error doctrine precluded consideration of landowner's claim on appeal in eminent domain action that the trial court erred in putting the parties on terms of either the court confirming the value of the taken property or ordering a new trial, where landowner did not object at that time that the trial court was "putting it on terms," but instead agreed that the circuit court should confirm the award rather than grant a new trial.

PUBLIC EMPLOYMENT - ALABAMA

Caton v. City of Pelham

Supreme Court of Alabama - December 11, 2020 - So.3d - 2020 WL 7326399

Terminated city employee, who had worked as a police officer and later as a firefighter and who allegedly had suffered injuries at work, brought action against city based on claim of retaliatory discharge in violation of workers' compensation statutes.

The Circuit Court entered summary judgment for city after setting aside an initial summary judgment for city. Terminated city employee appealed.

The Supreme Court held that:

- Trial court did not abuse its discretion when it granted terminated city employee's motion, made pursuant to rule on relief from judgment due to mistakes, inadvertence, excusable neglect, newly discovered evidence, fraud, or any other reason justifying relief, to set aside first summary judgment for city;
- Determination in unemployment-compensation proceedings that city employee had been terminated for misconduct collaterally estopped him from maintaining retaliatory-termination claim; and
- As matter of apparent first impression, use of determination in unemployment-compensation proceedings that city employee had been terminated for misconduct to find that he was collaterally estopped from maintaining retaliatory-termination claim did not violate his right to trial by jury on his retaliatory-termination claim.

BALLOT INITIATIVE - ARKANSAS

Kimbrell v. Thurston

Supreme Court of Arkansas - December 3, 2020 - S.W.3d - 2020 Ark. 392 - 2020 WL 7136101

Voter brought action for writ of mandamus and declaratory and injunctive relief, challenging sufficiency of ballot titles of constitutional amendments that General Assembly proposed concerning term limits and process for submitting, challenging, and approving proposed initiated acts, constitutional amendments, and referenda.

The Circuit Court dismissed. Voter appealed.

The Supreme Court held that:

- Voter's appeal was moot, and
- No mootness exceptions applied.

Voter's appeal of dismissal of complaint seeking mandamus, declaratory, and injunctive relief as to allegedly insufficient ballot titles on constitutional amendments proposed by General Assembly was moot, where deadlines for both the election and certification of election results had occurred, voter did not request in his motion to expedite that his appeal be addressed before certification deadline, voter did not lodge appeal with Supreme Court until six days after election, and voter failed to seek a stay of certification from either the circuit court or Supreme Court.

Exception to mootness doctrine for issues that were capable of repetition yet evading review did not apply to allow Supreme Court to review moot appeal of dismissal of voter's action seeking mandamus, declaratory, and injunctive relief as to allegedly insufficient ballot titles on constitutional amendments proposed by General Assembly, where Court addressed the nearly identical issue presented in case in another case, and Court's opinion in other case was handed down before election.

Exception to mootness doctrine for issues raising considerations of substantial public interest which, if addressed, would prevent future litigation did not apply to allow Supreme Court to review moot appeal of dismissal of voter's action seeking mandamus, declaratory, and injunctive relief as to allegedly insufficient ballot titles on constitutional amendments proposed by General Assembly, where Court addressed and rejected the nearly identical issues presented in case in another case that Court handed down before election.

ANNEXATION - INDIANA

Holcomb v. City of Bloomington

Supreme Court of Indiana - December 15, 2020 - N.E.3d - 2020 WL 7349155

City brought declaratory judgment action against Governor, challenging statute that stopped city's proposed annexation of several areas of land and prohibiting city from trying to annex the areas for five years.

The Circuit Court entered summary judgment in favor of city. Governor appealed.

The Supreme Court held that:

- Statute stopping city's annexation vested enforcement authority in Governor, and thus Governor was proper defendant;
- Prudential concerns did not render case nonjusticiable; and
- Statute was a special law when a general law could have been made, rendering it unconstitutional.

Statute stopping city's proposed annexation of several areas of land and prohibiting city from trying to annex the areas for five years vested enforcement authority in Governor, and thus Governor was proper defendant in city's declaratory judgment action challenging statute; annexation statutes primarily impacted public, rather than private relations, statute at issue did not require challengers to use remonstrance process to challenge annexation, as was generally required to enforce annexation laws, and was incompatible with remonstrance procedure, annexation statutes impacted citizens' relationship to municipal bodies that were subdivisions of the state, and Governor was the constitutional officer vested with executive power of the state, giving him an interest in the relationships between public and state's subdivisions.

Prudential concerns with regard to Governor being named defendant in city's challenge to statute stopping city's proposed annexation of several areas of land and prohibiting city from trying to annex the areas for five years did not render case nonjusticiable, but rather, compelled court to reach the merits; requiring city to sue different defendant would have resulted in substantial delay and cost to taxpayers, but court would ultimately have reached same result on underlying question, there was no other defendant for city to sue unless city first expressly violated statute, and separation of powers principles compelled court to check an unconstitutional action of other branches of government.

Speed of city's attempted annexation of areas of land, opposition to the annexation, and city's drawing of annexation boundaries to cover areas with existing remonstration waivers in order to minimize opposition to annexation were not unique circumstances of city's proposed annexation that warranted special treatment that precluded legislature from making a general law applicable to city, and thus statute stopping city's proposed annexation and prohibiting city from trying to annex the areas for five years was unconstitutional special legislation; 133 days for city to complete annexation process was within the statutory time frame for annexations, which allowed them to take place in 120 days, landowners commonly opposed annexations and did not shy away from using statutory remonstrance process to challenge them, and remonstrance waivers were commonly discussed and incorporated into determining which areas were suitable for annexation.

ANNEXATION - MISSISSIPPI

Pendorff Community Association, LLC v. City of Laurel

Supreme Court of Mississippi - September 24, 2020 - 302 So.3d 1208

After city enacted ordinance annexing four parcels of real property, neighboring city contested the annexation of one part of one parcel and community association entered an appearance to contest the annexation of that entire parcel.

After annexing city stipulated to exclude the part contested by neighboring city, the Chancery Court entered judgment after a bench trial approving the annexation. Community association appealed.

The Supreme Court held that:

- Sufficient evidence supported chancellor's finding that city's internal growth favored annexation;
- Sufficient evidence supported chancellor's finding that city's population increase favored annexation;
- Sufficient evidence supported chancellor's finding that city's need for developable land favored annexation;
- Sufficient evidence supported chancellor's finding that increased traffic counts favored annexation;
- Sufficient evidence supported chancellor's finding that city's sales tax revenue history favored annexation;
- Sufficient evidence supported chancellor's finding that city's plans for implementing and fiscally carrying out the proposed annexation favored annexation; and
- Sufficient evidence supported chancellor's finding that city's bonding capacity favored annexation.

Sufficient evidence supported chancellor's finding that city's internal growth, as subfactor of the "need to expand" factor relevant to determining the reasonableness of a municipal annexation, favored approval of city's proposed annexation of certain real property; over a 13-year period preceding the annexation, city issued 295 new single-family residential-unit permits, 170 new

multifamily residential-unit permits, 152 new commercial permits, and almost 10,500 other permits for a combined total value of $359 million, and expert witness for community association that opposed the annexation agreed that those numbers reflected a component of internal growth.

Sufficient evidence supported chancellor's finding that city's population increase, as subfactor of the "need to expand" factor relevant to determining the reasonableness of a municipal annexation, favored approval of city's proposed annexation of certain real property; though city's population had previously experienced a period of decline, in more recent years it had increased again, and city's expert witness testified that city had a dense population, with 1,142 people per square mile.

Sufficient evidence supported chancellor's finding that city's need for developable land, as subfactor of the "need to expand" factor relevant to determining the reasonableness of a municipal annexation, favored approval of city's proposed annexation of certain real property; only 7.7% of city's land was vacant and unconstrained, proposed annexation would increase city's vacant and unconstrained land by almost 30 percent, and expert witness for community association that opposed the annexation testified that he could not identify a city in the state with less vacant and developable land.

Sufficient evidence supported chancellor's finding that increased traffic counts within the area that city proposed to annex, as subfactor of the "need to expand" factor relevant to determining the reasonableness of a municipal annexation, favored approval of the proposed annexation; though city's expert witness provided no reason for the increased traffic counts within the proposed annexation area, it was undisputed that traffic counts were increasing.

Sufficient evidence supported chancellor's finding that city's sales tax revenue history indicated that city had a reasonable financial ability to provide municipal services to real property it proposed to annex, as factor relevant to determining whether the proposed annexation was reasonable; though city's sales tax receipts had fluctuated, its receipts were trending upward, and expert witness testified that city's receipts for most recent year would exceed the amount budgeted by the city.

Sufficient evidence supported chancellor's finding that city's plans for implementing and fiscally carrying out its proposed annexation of real property indicated that city had a reasonable financial ability to provide municipal services to the property it proposed to annex, as factor relevant to determining whether the proposed annexation was reasonable; city undertook extensive planning, including with respect to water and sewer improvements, which was the only area about which community association that opposed the annexation complained.

Sufficient evidence supported chancellor's finding that city's bonding capacity indicated that city had a reasonable financial ability to provide municipal services to real property it proposed to annex, as factor relevant to determining whether the proposed annexation was reasonable; expert witness testified that city had more than $5.6 million in bonding capacity, more than 18 years of clean audits, and an A-plus rating from rating agency.

PUBLIC UTILITIES - OHIO

In re Complaint of Wingo v. Nationwide Energy Partners, L.L.C.

Supreme Court of Ohio - December 9, 2020 - N.E.3d - 2020 WL 7233638 - 2020 -Ohio- 5583

Customer who purchased water, sewer, and electric services from a submetering company sought judicial review of a decision of the Public Utilities Commission concluding that the Commission

lacked jurisdiction.

The Supreme Court held that test used by Commission improperly deviated from the relevant statutory language, abrogating *In re the Commission's Investigation of Submetering in the State of Ohio*, 2016 WL 11541704, and *In re the Commission's Investigation of Submetering in the State of Ohio*, 2017 WL 4484334.

Modified version of a test applied by the Public Utilities Commission to determine whether it had jurisdiction over claims asserted by a customer against a company that provided submetering services, from which the customer purchased water, sewer, and electric services, improperly deviated from the statute describing the companies subject to the Commission's jurisdiction; the test went beyond considerations of whether the utility-resale activities of the company were ancillary to another business, focusing on how much profit the reseller made and whether a consumer was charged more than she would have been under default-service-tariff rates, which was an inquiry that had nothing to do with the statutory language; abrogating *In re the Commission's Investigation of Submetering in the State of Ohio*, 2016 WL 11541704, and *In re the Commission's Investigation of Submetering in the State of Ohio*, 2017 WL 4484334.

MUNICIPAL CORPORATIONS - OHIO

City of Centerville v. Knab

Supreme Court of Ohio - November 12, 2020 - N.E.3d - 2020 WL 6605846 - 2020 -Ohio-5219

Defendant was convicted in the Municipal Court of making a false report to law enforcement, arising out of incident in which defendant falsely reported active shooter situation to city police department.

Defendant appealed convictions and sentence, which included restitution order.

The Court of Appeals affirmed convictions but vacated restitution order. City appealed.

The Supreme Court held that a municipal corporation cannot be a "person" against whom a criminal offense or delinquent act is committed and thus does not qualify as a "victim" which could receive an award of restitution, under constitutional amendment expanding rights of crime victims, or Marsy's Law.

EMINENT DOMAIN - VIRGINIA

Johnson v. City of Suffolk

Supreme Court of Virginia - December 10, 2020 - S.E.2d - 2020 WL 7251969

Lessees of oyster grounds brought inverse condemnation action against city and sanitation district, seeking declaratory judgment and alleging that discharges from a sewer system operated by city and district polluted the waters in which lessees raised their oysters.

The Circuit Court granted defendants' demurrers. Lessees appealed.

The Supreme Court held that alleged discharge of pollutants by city and sanitation district did not affect a property interest of lessees and thus could not support an inverse condemnation claim.

Alleged discharge of pollutants by city and sanitation district did not affect a property interest of lessees of oyster grounds and thus could not support an inverse condemnation claim by lessees, who asserted that pollution of water had prevented lessees from properly harvesting oysters; discharge did not interfere with lessees' rights to be on the leased lands, city and district did not remove or physically destroy the oysters, and nothing in leases conferred or presupposed a right to grow oysters in conditions free of pollution or guaranteed a lessee a commercially-viable oyster lease.

BONDS - CALIFORNIA

Davis v. Fresno Unified School District

Court of Appeal, Fifth District, California - November 24, 2020 - Cal.Rptr.3d - 2020 WL 6882737 - 20 Cal. Daily Op. Serv. 12,214 - 2020 Daily Journal D.A.R. 12,675

Taxpayer brought action against school district and contractor, alleging that contract for construction of a middle school violated competitive bidding requirements, rules governing conflicts of interest, and education statutes, among other claims.

The Superior Court sustained district's and contractor's demurrer and the Court of Appeal reversed in part. On remand, the Superior Court granted district's and contractor's motion for judgment on the pleadings. Taxpayer appealed.

The Court of Appeal held that:

- Taxpayer's action was a reverse validation action combined with an action to restrain or prevent an illegal expenditure of public money;
- Taxpayer did not abandon or forfeit portion of lawsuit that was an action to restrain or prevent an illegal expenditure of public money;
- Taxpayer's reverse validation action was rendered moot after contracts were fully performed; and
- It was appropriate for taxpayer to challenge legality of contracts in action to restrain or prevent an illegal expenditure of public money.

Taxpayer's action against school district and contractor, which challenged contracts for construction of a middle school, was a reverse validation action to determine validity of district's decision combined with a taxpayer's action to restrain or prevent an illegal expenditure of public money; even though complaint stated that action was brought as special in rem proceeding for judicial invalidation of contracts, complaint did not state it was "exclusively" or "only" brought as such a proceeding, and complaint's prayer for relief requesting that contractor be ordered to pay back monies sought relief that was not available in validation action but was available in a taxpayer's action.

Taxpayer did not abandon or forfeit portion of lawsuit that was brought as a taxpayer's action to restrain or prevent an illegal expenditure of public money in school district's construction of middle school, which was combined in lawsuit that also was reverse validation action to determine validity of district's decision; taxpayer's opposition to motion for judgment on pleadings asserted his taxpayer's complaint was not moot, taxpayer used fact that complaint sought remedy not available in reverse validation action to distinguish cases, and taxpayer's appellate brief requested remand to proceed with trial on in personam taxpayer claims.

Taxpayer's reverse validation action, which sought declaration that district's contracts with contractor in constructing middle school were invalid, was rendered moot after contracts were fully

performed and no longer in effect; declaratory judgment as to the validity of completed contracts was not effectual relief.

Contracts for construction of middle school were not "contracts" to which validation statutes applied, and thus it was appropriate for taxpayer to challenge legality of contracts in a taxpayer's action to restrain or prevent an illegal expenditure of public money; school district paid for construction as it was completed, making alternative lease-leaseback approach not a method of financing the construction, but rather a construction contract with no element of financing included, and terms of lease stated that district's obligations could not be construed as debt or creating indebtedness.

The reference to "contracts" is construed narrowly in the statute that declares that the validation statutes apply to an action to determine the validity of a local agency's contracts; only contracts involving financing and financial obligations fall within the statute.

In the context of a taxpayer's action, the fact that the plaintiff could have enjoined the illegal expenditure does not prevent him seeking to recover on behalf of the local agency monies illegally expended.

PUBLIC UTILITIES - CALIFORNIA

Humphreville v. City of Los Angeles

Court of Appeal, Second District, Division 2, California - December 3, 2020 - Cal.Rptr.3d - 2020 WL 7065315 - 20 Cal. Daily Op. Serv. 12,480

City resident brought action against city, city's Department of Water and Power, and city Board of Water and Power Commissioners, alleging that defendants' annual practice of transferring surplus from city-owned utilities to city's general fund constituted a "tax" that required voter approval.

The Superior Court sustained defendants' demurrer without leave to amend. Resident appealed.

The Court of Appeal held that city's practice of transferring surplus from city-owned utilities to city's general fund did not constitute a "tax" requiring voter approval.

City's alleged ongoing practice of transferring a surplus from city-owned utilities to city's general fund, when rates charged to customers nevertheless did not exceed costs of providing electricity to them, did not constitute a "tax" that required voter approval; practice did not satisfy definition of a "tax" under plain language of the California Constitution, conclusion was one that best aligned with purpose behind Constitution's restrictions on local taxation to stop local governments from extracting more revenue from taxpayers, and Supreme Court precedent strongly suggested that yearly transfers of surplus funds did not constitute a "tax" when they did not cause the utility rates to exceed costs of providing electricity.

LOAN GUARANTY - KANSAS

Farmers Bank & Trust v. Homestead Community Development

Court of Appeals of Kansas - October 2, 2020 - 476 P.3d 1

Bank brought action against city for breach of guaranty, fraud, and negligent misrepresentation, based on city's failure to render payment to bank pursuant to their guaranty agreement after community development group defaulted on its loan.

The District Court granted summary judgment in favor of city. Bank appealed.

The Court of Appeals held that:

- Issue of whether city had undesignated funds in excess of the guaranty was irrelevant in determining whether the Cash-Basis Law and the Budget Law rendered the guaranty void;
- City finance director's deposition testimony did not warrant disregarding of her affidavit;
- City's payments to community development group did not ratify the guaranty;
- Fact that the guaranty was contingent on group's default was irrelevant in determining whether the guaranty was void;
- The guaranty was void on its face;
- Notice of bank's tort claims to city attorney did not constitute substantial compliance with statutory notice requirements; and
- Mayor, city clerk, and city attorney acted within scope of employment in executing guaranty.

Issue of whether city had undesignated funds on hand in excess of the amount of guaranty which bank executed with city was irrelevant in determining whether the Cash-Basis Law and the Budget Law precluded city from paying the guaranty, for purposes of bank's action for breach of guaranty, fraud, and negligent misrepresentation; the Cash-Basis Law precluded payment by city unless it had enough funds available in its treasury to do so and such funds had been designated to pay the guaranty, and the Budget Law, which had to be construed together with cash-basis statute, required city to appropriate funds for its expenditures.

City finance director's deposition testimony that she did not reach out to prior city employees regarding guaranty which city executed with bank and was not involved in investigations regarding bank's suit against city for payment did not warrant disregarding of director's summary judgment affidavit averring that city never budgeted or appropriated any funds to pay guaranty, as to preclude city from paying the guaranty under the Cash-Basis Law and the Budget Law.

City's payments to community development group did not ratify city's guaranty with bank, which was void due to city's failure to establish and maintain separate funds for payment of guaranty as required by the Cash-Basis Law and the Budget Law, and thus city was not obligated to pay the guaranty after group defaulted on its loan.

Bank, which contracted with city for a loan guaranty on behalf of community development group, was bound at its peril to check city's budget and accounts to verify that city had appropriated necessary funds to pay the guaranty, and thus city's failure to allocate such funds precluded city from having to pay the guaranty pursuant to the Cash-Basis Law and the Budget Law; financial institutions transacting business with municipalities in the state typically asked for annual budgets and audits to verify that municipalities had appropriated necessary funds to pay debt obligations but bank never asked for such verifications.

Fact that guaranty which city executed with bank for loan to community development group was contingent on group's default was irrelevant in determining whether the guaranty was void pursuant to the Cash-Basis Law and the Budget Law, which together prohibited city from creating

indebtedness without having funds on hand for that purpose.

City could not have amended its budget to appropriate funds each time it had to make a payment on guaranty executed with bank for a loan to community development group, and thus the guaranty was void on its face pursuant to the Cash-Basis Law and the Budget Law, which together prohibited city from creating an indebtedness without having funds on hand for that purpose; amendment would only have been allowed if guaranty had contained a stipulation that it was conditioned on future appropriations but guaranty had no such conditions.

Bank's notice to city attorney of its fraud and negligent misrepresentation claims against city for failure to pay a loan guaranty did not constitute substantial compliance with statutory notice requirements for tort claims against municipalities, and thus the statute precluded bank's claims; city did not designate city attorney to receive notice of tort claims, and, even if city had done so, it could not have waived statutory requirement of notice to the city clerk or city's governing body.

Issue of whether city clerk or city's governing body received all of the correspondence regarding city's loan guaranty with bank was irrelevant in determining whether bank substantially complied with statutory notice requirements for its fraud and negligent misrepresentation claims against city; statute required that notice of claims be served on city clerk or city's governing body but bank only served notice to city attorney.

No evidence supported bank's claim that mayor, city clerk, or city attorney were motivated by a personal purpose in executing guaranty between city and bank for a loan to community development group, and thus these officials acted foreseeably within scope of employment even though they lacked express authority to execute guaranty, thereby obligating bank to comply with statutory notice requirements for its fraud and negligent misrepresentation claims against city under the Tort Claims Act.

The Court of Appeals was not obligated to consider bank's argument that city employees could have been sued in their individual capacities under the Tort Claims Act for city's alleged breach of loan guaranty agreement, even if said employees were acting within the scope of employment, where bank abandoned its argument by failing to cite any supporting authority, on appeal from grant of summary judgment in favor of city.

INSURANCE - GEORGIA

Atlantic Specialty Insurance Company v. City of College Park

Court of Appeals of Georgia - November 2, 2020 - S.E.2d - 2020 WL 6390041

Relatives of deceased persons brought action against municipality, alleging wrongful death after deceased persons' vehicle was struck by unknown driver who was being pursued by police.

Insurer intervened for limited purpose of litigating limits of its insurance policy with municipality, and trial court held on insurer's motion for partial summary judgment that insurance policy limits available were $5 million under business auto and excess liability coverage. Insurer appealed.

The Court of Appeals held that policy's endorsements did not exempt insurer from statutory language that increased sovereign immunity waiver to amount of coverage.

Public policy prevented sovereign immunity endorsement in municipality's insurance policy that included business auto and excess liability coverage from limiting $1 million for automobile liability

coverage and $4 million for excess coverage to $700,000 for claimants who sustained injuries arising out of negligent use of government motor vehicle; insurer was required to pay damages under policy if defense of sovereign immunity was not applicable, and waiver of sovereign immunity, which occurred by operation of law, was limited to amount of coverage purchased by municipality as prescribed by statute.

ZONING & PLANNING - ILLINOIS

Sullivan v. Village of Glenview

Appellate Court of Illinois - November 4, 2020 - N.E.3d - 2020 IL App (1st) 200142 - 2020 WL 6483137

After commercial developer applied for permits to rezone and construct commercial buildings on property adjacent to homeowners' properties, homeowners brought action against city, seeking declaratory judgment invalidating the municipal ordinance purportedly allowing the property to be rezoned.

The Circuit Court dismissed action as untimely. Homeowners appealed.

The Appellate Court held that:

- To constitute a "decision" triggering the limitations period for challenges to municipal zoning actions, an ordinance must make change to subject property, and
- Ordinance had no effect on zoning classification of property, and thus was not a "decision" that triggered limitations period.

To constitute a "decision" triggering the running of the limitations period for challenges to municipal zoning actions, a municipal ordinance must actually make some sort of change with respect to the zoning classification of the subject property.

Municipal ordinance did not effect zoning classification of landowner's property, and, thus, was not a "decision" within meaning of municipal code, as was required to trigger running of 90-day limitations period applicable to challenges to municipal zoning actions; even though ordinance contemplated rezoning of property, ordinance conditionally required landowner to begin entirely new application process before property could actually be rezoned, thereby placing landowner in precisely same position as before ordinance was passed.

COMMUNITY IMPROVEMENT DISTRICT ASSESSMENTS - MISSOURI

Real Estate Recovery, LLC v. Branson Hills Facility Infrastructure Community Improvement District

Missouri Court of Appeals, Southern District, Division One - October 14, 2020 - S.W.3d - 2020 WL 6054606

Purchaser of land parcels at post-third-offering sale filed petition against community improvement district (CID) and others to quiet title to parcels. After purchaser failed to pay additional assessments levied by CID upon parcels, purchaser and CID filed cross-motions for summary judgment.

The Circuit Court initially denied motions, but upon parties' joint request for reconsideration, granted summary judgment in favor of CID. Purchaser appealed.

The Court of Appeals held that:

- Amendment to Community Improvement District Act (CID Act) governing special assessments was change in procedural law that could apply retrospectively, and
- As a matter of first impression, purchase of parcels did not remove parcels from CID's authority to levy assessments.

Amendment to section of Community Improvement District Act (CID Act) governing special assessments was change in procedural rather than substantive law, and, thus, retrospective application of amendment did not violate constitutional prohibition on retrospective laws, where amendment merely dealt with mechanism and machinery by which delinquent CID assessments could be collected.

Provision of Jones-Munger Act stating that purchasers of property at post-third offering tax sales would receive collector's deeds with "priority over all liens and encumbrances on the property sold except for real property taxes" did not mean that parcels bought by purchaser were no longer subject to community improvement district (CID) assessments; language of Community Improvement District Act (CID Act), which provided authority for sale at issue, indicated legislature did not intend to remove property from CID's power and authority to levy and impose assessments when sold via Jones-Munger Act, and interpreting term "real property taxes" to exclude CID assessments would upend entire statutory framework for CID assessments, CID initiative financing, and removal of property from CIDs.

PUBLIC UTILITIES - NEW HAMPSHIRE

Northern New England Telephone Operations, LLC v. Town of Acworth

Supreme Court of New Hampshire - November 6, 2020 - A.3d - 2020 WL 6534452

Telecommunications company brought actions against several towns and cities, alleging claims of ultra vires taxation and disproportionate taxation arising out of company's use of municipal rights-o--way for poles, conduits, and other equipment.

After consolidation of cases into a "test case" structure, the Superior Court granted summary judgment for company on most of its claims of ultra vires taxation, and, following trial, entered judgment for company on its tax abatement claims. Towns appealed.

The Supreme Court held that:

- Licenses must include requirement to pay personal and real estate taxes;
- Nature of use did not constitute a perpetual lease which gave rise to an independently taxable property interest;
- Court's decisions to credit various expert opinions were reasonable; and
- Guy wires and anchors were not taxable as "structures."

Licenses to place telecommunications equipment in public rights-of-way arising pursuant to statute providing that certain poles, structures, conduits, and related property in a location which becomes a public highway shall "be deemed legally licensed" must, as a matter of law, include requirement to pay personal and real estate taxes, as, without such tax payment requirements, licenses would not

be legal.

Purpose of statute providing that telecommunications poles, cables, and other equipment approved by a local land use board shall be deemed legally permitted or licensed if the location of the equipment becomes a public highway is to place the utility in the same position it would have been had it applied for a license, without the need for further proceedings.

Nature of telecommunications company's use or occupation of municipal rights-of-way as an owner of telephone poles, conduits, and related property did not constitute a perpetual lease as a matter of law which gave rise to an independently taxable property interest, but rather was pursuant to a license or permit.

Trial court's decisions to credit various opinions of telecommunications company's expert as to value of company's poles and conduits, and on company's use or occupation of municipal rights-of-way, and to reject those of towns' expert were reasonable based upon the evidence presented at trial on company's tax abatement claim; court did not accept company's expert's valuations carte blanche, but engaged in a mindful evaluation of her opinions, even rejecting some.

Telecommunications company's guy wires and anchors were not taxable as "structures" under statute providing for real estate taxes for "structures, poles, towers, and conduits employed in the transmission of telecommunication" services; as licensing statute for erecting or installing structures in public highways authorized a licensee "to place upon such poles and structures the necessary and proper guys, cross-arms, fixtures, transformers and other attachments and appurtenances," the guy wires and anchors could not be considered "structures," but rather were items placed upon the structures.

EMINENT DOMAIN - OHIO

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

Supreme Court of Ohio - December 2, 2020 - N.E.3d - 2020 WL 7213816 - 2020 -Ohio- 5482

Saltwater injection well operator filed petition for writ of mandamus to compel state to commence property-appropriation proceedings, alleging that state's suspension order with respect to one of its two wells effected a governmental total or partial taking of property requiring state to pay it just compensation.

State moved for summary judgment. The Eleventh District Court of Appeals granted the motion. Operator appealed.

On reconsideration, the Supreme Court held that:

- Operator's failure to submit third restart plan did not render its takings claim unripe;
- Fact issues precluded summary judgment on determination that state effected a total regulatory taking;
- State waived its nuisance defense to total takings claim;
- Fact issues precluded summary judgment on economic-impact factor of test for partial takings;
- Fact issues precluded summary judgment on reasonable-backed expectations factor of test for partial takings;
- Character of state's regulation weighed against finding a partial taking.

Saltwater injection well operator's failure to submit third restart plan did not render its takings

claim, arising from state's suspension of operation of one of its wells due to potential seismicity problem, unripe for judicial resolution; state suggested that if operator submitted plan that met its standards, then operator would be able to restart operations, but operator had twice tried, and failed, to persuade state to allow it to restart operations at the well, and there was no indication state's standards, if met, would be binding on state, as it could change the standards at any time and create another opportunity to say all that operator had to do was submit another plan.

State's suspension of saltwater injection well for potential seismicity problem could not be characterized as temporary, for purposes of determining analysis of total or partial taking applied in assessing well operator's takings claim arising from state's suspension of operation of one of its wells, where suspension would remain in effect unless and until Department of Natural Resources' Division of Oil and Gas Resources Management decided that operations at the well could be restarted.

Genuine issue of material fact as to whether state's suspension of operations of second of two saltwater injection wells due to potential seismicity problems deprived operator of all economically beneficial use of its leasehold precluded summary judgment determination that state effected a total regulatory taking of operator's property.

State waived its nuisance defense to saltwater injection well operator's total takings claim, arising from state's suspensions of operations at one of two wells due to potential seismicity problems, for purposes of summary judgment and appeal of that judgment, where, even though its amended answer to the complaint clearly set forth the defense, state supplied no argument regarding whether relevant case law, applied to the facts of the case, justified decision in its favor.

Genuine issue of material fact as to value of operator's investment in the leasehold after state suspended operation on one of operator's two saltwater injection wells due to potential seismicity problem precluded summary judgment determination on economic-impact factor of test for determining whether state's regulation effected a partial taking.

Genuine issues of material fact existed as to whether operator was aware of the potential seismicity problem with its saltwater injection wells and whether operator could have anticipated that state would waver between case-by-case approach and statewide approach to addressing induced seismicity while rebuffing operator's attempt to meet state's regulatory expectations precluded summary judgment on reasonable investment-backed expectations factor for determining whether state's suspension of one of operator's two wells effected a partial taking.

Character of state's suspension of operations at one of two saltwater injection wells was to protect the public's health and safety, weighing against finding that the regulation was a temporary, partial taking of well operator's property, where state did not single out the well for unfair treatment, as well's injection volumes contributed to seismicity in the surrounding area and differed geologically, and was closer in proximity to densely populated areas, than the other well, well's operations posed imminent threat to public safety, and there was no showing that there was extraordinary delay in decisionmaking process with respect to operator's restart plan for the well.

PUBLIC UTILITIES - TEXAS

AEP Texas Central Company v. Arredondo

Supreme Court of Texas - November 20, 2020 - S.W.3d - 2020 WL 6811465 - 64 Tex. Sup. Ct. J. 165

Landowner brought negligence action against electric utility, utility's independent contractor, and utility's inspector arising from landowner's fall in hole that allegedly was created by contractor's removal of utility stub pole from municipal right-of-way on edge of landowner's property.

The District Court granted summary judgment for defendants. The San Antonio Court of Appeals affirmed in part, reversed in part, and remanded. Utility and contractor filed petitions for review, which were granted.

The Supreme Court held that:

- Factual issues as to whether contractor properly fill hole precluded summary judgment on negligence claim against contractor;
- Utility did not have a contractual right of control of contractor's work on which to base a duty to landowner;
- Contractor's removal of stub pole was not an inherently dangerous activity giving rise to a nondelegable duty of utility; and
- There was no statute on which to premise negligence per se claim against utility.

COUNTIES - WASHINGTON

Perillo Trustees of the Diane Perillo Living Trust, dated September 28, 2011 v. Island County

Court of Appeals of Washington, Division 1 - November 30, 2020 - P.3d - 2020 WL 7021689

Purchasers, who learned that house they bought had history as a "drug house" and had to be demolished due to methamphetamine contamination, brought negligence action against county for failure to inspect the property for hazardous chemical contamination. The Superior Court granted summary judgment for county under the public duty doctrine, and purchasers appealed.

The Court of Appeals held that:

- Law enforcement has a duty to report to local health officers when it has information that causes it to realize or perceive that hazardous chemicals are polluting a property, even if law enforcement does not have actual knowledge of contamination;
- Genuine issue of material fact as to whether county sheriff's office had sufficient information to cause it to realize or perceive that hazardous chemicals were polluting property, and thus trigger its duty to report to local health officers, precluded summary judgment; and
- County owed statutory duty to property purchasers, not just the public at large, to notify local health officials of information that hazardous chemicals were polluting property.

BALLOT INITIATIVE - ARIZONA

Molera v. Hobbs

Supreme Court of Arizona - October 26, 2020 - 250 Ariz. 1330 Arizona Cases Digest 6 - 474 P.3d 667

Opponents of initiative to increase educational funding brought action against Secretary of State and sponsor of initiative to enjoin Secretary from placing initiative on ballot for general election, alleging that 100-word description on petition sheets violated statute governing petition sheets and

that petition circulators were paid in violation of statute governing signature collection.

Following a bench trial, the Superior Court rejected signature-based objection, found that description on petition sheets violated applicable statute, and enjoined Secretary from certifying and placing initiative on ballot. Secretary and sponsor appealed, and opponents cross-appealed.

The Supreme Court held that:

- Percentage distribution of new income tax revenues under initiative was not principal provision of initiative and thus did not need to be included in description of principal provisions in petition signature sheets;
- Description stating that initiative would impose 3.5% surcharge on individuals' taxable incomes over specified amounts sufficiently communicated principal provision of raising the marginal tax rate on wealthier taxpayers;
- That increased marginal rate on individual taxable income would encompass business income taxable to individuals was not principal provision of initiative;
- Initiative's proposed statute stating that monies received by schools under initiative did not replace other funding sources was not principal provision of initiative;
- Graduated hourly wage scales did not violate statute prohibiting compensation based on number of signatures collected by a circulator;
- Spin-the-wheel program, which provided for prizes for circulators, did not violate statute prohibiting compensation based on number of signatures collected by a circulator; and
- Opponents were not entitled to preliminary injunction prohibiting initiative from being placed on ballot so that opponents could conduct discovery.

PUBLIC UTILITIES - CALIFORNIA

Communities for a Better Environment v. Energy Resources Conservation and Development Commission

Court of Appeal, First District, Division 4, California - November 20, 2020 - Cal.Rptr.3d - 2020 WL 6817480 - 20 Cal. Daily Op. Serv. 12,071 - 2020 Daily Journal D.A.R. 12,486

Nonprofit environmental groups brought action against Energy Resources Conservation and Development Commission for declaratory and injunctive relief, challenging the constitutionality of a statute that limited judicial review of Commission's decisions on the siting of thermal powerplants.

The Superior Court sustained Commission's demurrer, but that judgment was reversed on appeal. Later, the Superior Court granted groups' motion for summary judgment. Commission appealed.

The Court of Appeal held that:

- Statute that bars certain courts from reviewing Commission decisions conflicts with constitutional provision granting these courts original jurisdiction;
- No other constitutional provision authorizes the statute; and
- Statute that bars judicial review of Commission's findings on questions of fact is an unconstitutional seizure of judicial power.

Statute that bars superior courts and courts of appeal from reviewing Energy Resources Conservation and Development Commission decisions on siting of thermal powerplants is in direct conflict with the state constitutional provision granting these courts original jurisdiction.

State constitutional provision that gives the Legislature the power to establish the manner and scope of review of Public Utilities Commission (PUC) action in a court of record does not authorize the statute that bars superior courts and courts of appeal from reviewing Energy Resources Conservation and Development Commission decisions on the siting of thermal powerplants, and thus the statute is unconstitutional in light of the state constitutional provision granting these courts original jurisdiction.

Statute that mandates that Energy Resources Conservation and Development Commission findings and conclusions on questions of fact regarding siting of thermal powerplants are final and are not subject to judicial review is an unconstitutional seizure of judicial power.

PUBLIC EMPLOYMENT - LOUISIANA

State v. Alexander

Court of Appeal of Louisiana, Second Circuit - November 18, 2020 - So.3d - 2020 WL 6750116 - 53,449 (La.App. 2 Cir. 11/18/20)

Following a bench trial, defendant was convicted in the District Court of two counts of abuse of office, and sentenced to four years at hard labor, with all but one year suspended, on each count, to be served concurrently. Defendant appealed.

The Court of Appeal held that:

- Insufficient evidence supported first count, and
- Sufficient evidence supported second count.

There was no evidence that dismissal of defendant's possession of marijuana charge was obtained, directly or indirectly, by a knowing and intentional use by defendant of his authority as mayor of neighboring small town, and thus insufficient evidence supported abuse of office conviction; police chief was adamant in her testimony that the decision to dismiss the charge was made in the exercise of her discretion as an officer, not because of anything defendant said or did.

Sufficient evidence supported conviction for abuse of office; town clerk testified that defendant, the town's mayor, told him to write defendant a $500 check for a trip to visit his sister out of state, which clerk stated he did to avoid verbal abuse from defendant, and although defendant disputed that the $500 check written to him from town was for personal travel, his explanation for the purpose of the check was inconsistent.

IMMUNITY - NEW YORK

Castillo v. New York City Transit Authority

Supreme Court, Appellate Division, First Department, New York - November 12, 2020 - N.Y.S.3d - 188 A.D.3d 484 - 2020 WL 6600656 - 2020 N.Y. Slip Op. 06447

Passenger on city bus brought personal injury action against city transit authority claiming that due to bus driver's negligence the bus stopped short causing passenger to fall into fare box.

The Supreme Court granted city's motion for summary judgment and dismissed passenger's complaint. Passenger appealed.

The Supreme Court, Appellate Division held that emergency doctrine excused transit authority from liability for alleged negligence of bus driver resulting in passenger's tripping and falling.

No evidence indicated that emergency created by car moving into bus's lane of travel was created by bus driver, or responded to by bus driver in unreasonable manner, and thus, emergency doctrine excused city transportation authority from liability for alleged negligence of bus driver resulting in passenger's tripping and allegedly sustaining injury; transit authority submitted bus driver's sworn testimony, written immediately after the incident, that he was obliged to brake because of actions of car suddenly entering into his lane, and passenger offered no evidence, other than speculation, challenging bus driver's account, and passenger conceded he did not see what happened outside the bus because he was looking to find a seat.

PUBLIC UTILITIES - OHIO

In re Complaint of Suburban Natural Gas Company v. Columbia Gas of Ohio, Inc.

Supreme Court of Ohio - November 12, 2020 - N.E.3d - 2020 WL 6600063 - 2020 -Ohio-5221

Natural-gas company sought judicial review of a decision of the Public Utilities Commission, finding that the company failed to prove allegations arising from a competitor's use of energy-efficiency incentives for home builders in areas served by company and from the competitor's expansion of its gas-distribution service.

The Supreme Court held that:

- Commission adequately explained its rejection of claim that competitor violated stipulated agreement;
- Company failed to show error in determination that competitor's tariff schedules authorized energy-efficiency incentives;
- Commission adequately explained its decision not to rely on precedent offered by company;
- Record supported Commission's rejection of company's challenge to competitor's expansion of its service based on purported duplication of facilities;
- Commission did not ignore evidence in rejecting claim that competitor implemented incentives in unfair and anticompetitive manner;
- Company failed to show error in Commission's determination that it should have intervened in prior case brought by competitor; and
- Company failed to show error in Commission's summary dismissal of allegations of various statutory violations.

Supreme Court lacked jurisdiction over natural-gas company's claim that the Public Utilities Commission failed to apply the express terms of a stipulated agreement with a competitor by ignoring the competitor's release and covenant not to sue, which purportedly prohibited competitor from instituting energy-efficiency incentives for home builders in areas served by company, where company did not argue on rehearing that the Commission should have applied the language of competitor's release instead of distributor's, but instead company alleged that the Commission erred when it applied the language of company's release to claims company did not make.

Public Utilities Commission sufficiently explained its order rejecting natural-gas company's claim that a competitor violated a stipulated agreement between them by offering energy-efficiency

incentives to home builders to compete in areas served by company; the Commission reviewed the pertinent language of the agreement, and, because the agreement was unambiguous, the Commission was not required to consider other evidence to refute company's interpretation of the agreement.

Natural-gas company failed to show error in Public Utilities Commission's determination that a competitor's tariff schedules were sufficiently detailed to authorize payment of incentives to builders for construction of homes that exceeded certain energy-efficiency standards, where company did not cite the applicable tariff or point to language, or lack thereof, in the tariff that would support its claim.

Public Utilities Commission did not erroneously conclude that it lacked authority to preclude the duplication of utility facilities, in a proceeding brought by a natural-gas company, challenging a competitor's extension of its gas-distribution service based on a purported duplication of facilities in an area served by company; the Commission merely held that company failed to cite caselaw for the proposition that the Commission had to preclude a natural-gas company from serving new customers if that service would result in duplication of facilities.

Public Utilities Commission adequately explained its decision not to rely on precedent offered by natural-gas company in challenging a competitor's extension of its gas-distribution service based on a purported duplication of facilities in an area served by company; Commission explained that the cases cited by company were inapplicable because they did not involve a natural-gas company being precluded from serving a new customer if such service would result in duplication of facilities, Commission cited longstanding precedent establishing that natural-gas companies were not bound by certified service territories and could serve any customer in any part of the state, and Commission reiterated in its second rehearing entry that the cases cited by company were factually and legally dissimilar, if not wholly irrelevant.

Record supported Public Utilities Commission's decision rejecting a claim by a natural-gas company, challenging a competitor's extension of its gas-distribution service based on a purported duplication of facilities in an area served by company; county's chief deputy engineer testified that he knew of no unnecessary duplication of natural-gas facilities in the county, even with the recent extension of competitor's distribution main, engineer's testimony that he did not specifically consider whether competitor's distribution main duplicated company's main was not affirmative evidence that competitor duplicated company's facilities on a particular road, and company's vice president of system development admitted that a particular home builder was under no legal obligation to select company to serve a home development.

Natural-gas company failed to show error in Public Utilities Commission's decision rejecting company's challenge to a competitor's extension of its gas-distribution service based on a purported duplication of facilities in an area served by company; contrary to company's claims regarding waste of resources, testimony established that some duplication might be inherent and even necessary, evidence showed that a subdivision to be served by competitor was still under development and that no gas company was providing distribution service to the subdivision when competitor extended its gas main, and a county chief deputy engineer's testimony about potential for increased costs to customers concerned the concept of unnecessary duplicate facilities in general, not the merits of company's complaint.

Supreme Court lacked jurisdiction over natural-gas company's contention that a competitor improperly extended energy-efficiency incentives to home builders outside its service territory; company did not seek rehearing of Commission's determination that a particular subdivision to be served by competitor was outside of competitor's service territory, company did not argue on

rehearing that competitor's builder incentives were limited to customers already served by competitor, and company's rehearing application did not mention a statute setting forth a policy of promoting alignment of natural-gas-company and consumer interests in energy efficiency and conservation.

Public Utilities Commission did not ignore evidence that natural-gas company's competitor told a subdivision's developer about energy-efficiency incentives and that the incentives gave competitor an advantage over company, in rejecting company's claim that competitor implemented the incentives in an unfair and anticompetitive manner; Commission found that competitor was authorized to offer incentives to encourage developers to choose competitor and that competitor had an advantage over company as a result of the incentives, but instead the Commission rejected company's claim that the advantage violated a statute forbidding a public utility from subjecting a corporation to undue or unreasonable prejudice or disadvantage, as company could have requested its own energy-efficiency program.

Supreme Court lacked jurisdiction over natural-gas company's contention that the Public Utilities Commission failed to explain its purported departure from its precedent in finding that a competitor did not use energy-efficiency incentives as a competitive-response tool at home development, where the company failed to raise the argument on rehearing before the Commission.

Natural-gas company failed to show reversible error in Public Utilities Commission's determination that company should have intervened in a prior case brought by a competitor to raise concerns about competitor's purported unfair and anticompetitive use of energy-efficiency incentives, in company's subsequent proceeding challenging competitor's use of the incentives; Commission did not find that company forfeited any arguments by failing to intervene, but instead the Commission's order addressed and found no merit to company's claims that competitor used the incentives in an abusive or anticompetitive manner.

Supreme Court lacked jurisdiction to consider natural-gas company's claim challenging the Public Utilities Commission's determination that company raised for the first time on rehearing its issue regarding a competitor's purportedly unfair and anticompetitive use of energy-efficiency incentives, where the company never filed a subsequent application for rehearing and, thus, never alleged error in the Commission's finding.

Natural-gas company failed to show error in Public Utilities Commission's summary dismissal of company's allegations of various statutory violations on the part of a competitor based on the competitor's implementation of energy-efficiency incentives; the Commission's order noted the company's argument that the same proofs purportedly supporting company's other counts, including that the incentives violated a stipulated agreement and that they were used in an unfair and anticompetitive manner, would support the statutory violations, but the Commission rejected the other counts, and company failed to identify an independent legal theory or evidence to support its claim that the statutory violations stood on their own.

PUBLIC PENSIONS - OKLAHOMA

Harrison v. Oklahoma Police Pension and Retirement System

Supreme Court of Oklahoma - November 24, 2020 - P.3d - 2020 WL 6886498 - 2020 OK 91

Retired police officer sought judicial review of order of Oklahoma Police Pension and Retirement System (OPPRS) stating that officer forfeited retirement benefits because officer was convicted of

felony committed while in line of duty.

The District Court affirmed. Officer appealed. The Court of Civil Appeals affirmed. Officer petitioned for writ of certiorari.

The Supreme Court held that officer had retirement benefit that was a vested benefit within meaning of statute requiring forfeiture of retirement benefits as result of felony conviction, and thus retirement benefit was not subject to forfeiture.

City police officer had retirement benefit that was a "vested benefit" within meaning of statute requiring forfeiture of retirement benefits from a public retirement system when municipal employee was convicted of felony for crime related to duties of employment when statute became effective, and thus retirement benefit was not subject to forfeiture under statute when officer was convicted, following retirement, of felony committed while in line of duty; officer had 16 years of credited service when statute was enacted and therefore had enough years of service to elect vested benefit.

PUBLIC UTILITIES - CALIFORNIA

State Lands Commission v. Plains Pipeline, L.P.

Court of Appeal, Second District, Division 6, California - November 19, 2020 - Cal.Rptr.3d - 2020 WL 6791510 - 20 Cal. Daily Op. Serv. 11,871 - 2020 Daily Journal D.A.R. 12,329

California State Lands Commission and insurer brought action against owner of ruptured pipeline, claiming that when owner's negligent maintenance of pipeline resulted in disrupting the flow of oil, it also disrupted the payment of royalty income to the Commission, and caused damage to improvements on the Commission's land.

The Superior Court sustained pipeline owner's demurrer without leave to amend, and Commission and insurer appealed.

The Court of Appeal held that:

- Even assuming it was a public utility, oil pipeline owner was not entitled to immunity from liability for its negligence which resulted in pipeline rupture;
- Commission sufficiently alleged damage to property to preclude application of economic loss rule; and
- Special relationship existed which allowed Commission to recover purely economic damages.

Even assuming it was a public utility, oil pipeline owner was not entitled to immunity from liability for its negligence which resulted in pipeline rupture; pipeline owner did not deliver essential municipal services to members of the general public, but rather its task was to transport oil to a private entity for commercial purposes, and its rates were set by Federal Energy Regulatory Commission (FERC) and did not include compensation for liability.

California State Lands Commission sufficiently alleged damage to property to preclude application of economic loss rule to negligence claim against owner of oil pipeline which ruptured and leaked oil, where Commission alleged that it had succeeded to oil and gas well owner's property such that the damage from the inability to transport oil continued, and it was required to spend substantial amounts for repairs and maintenance to keep the oil and gas well property in a safe condition.

Special relationship existed between California State Lands Commission and owner of ruptured oil pipeline which allowed Commission to recover purely economic damages stemming from owner's negligent maintenance of the pipeline; purpose of the pipeline was to transport oil taken from the Commission's land so that the Commission, among others, could make a profit, it was entirely foreseeable that Commission would lose royalties if the pipeline failed, there was a high degree of certainty that Commission was injured, there was an immediate and direct connection between owner's conduct and the Commission's injury, owner's conduct was both negligent and criminal, and damages would encourage pipeline operators to avoid future harm, including immense environmental damage caused by oil spills.

PUBLIC UTILITIES - CALIFORNIA

Mahon v. City of San Diego

Court of Appeal, Fourth District, Division 1, California - November 20, 2020 - Cal.Rptr.3d - 2020 WL 6817061 - 20 Cal. Daily Op. Serv. 12,107

Electric utility customers brought class action against city challenging undergrounding surcharge, collected by utility from customers pursuant to franchise agreement with city, as an illegal tax obtained without voter approval under Right to Vote on Taxes Act.

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

The Court of Appeal held that surcharge was valid franchise fee rather than a tax subject to voter approval.

Undergrounding surcharge that electric utility collected pursuant to franchise agreement with city from its customers with electric utility service within city's boundaries was valid franchise fee rather than a tax subject to voter approval under Right to Vote on Taxes Act; surcharge was compensation validly given in exchange for franchise rights.

City's failure to deposit revenues from undergrounding surcharge collected by electric utility from its customers pursuant to franchise agreement with city into city's environmental growth fund did not demonstrate that surcharge was a tax subject to voter approval under Right to Vote on Taxes Act rather than a valid franchise fee; city charter provision establishing environmental growth fund did not serve same object as did test for franchise compensation, and any error in not depositing surcharge revenue into fund might well have resulted from inadvertence, negligence, or even malfeasance that was entirely distinct and unrelated to city's determination of whether surcharge constituted a charge for franchise rights.

City was not required to present a valuation analysis of franchise rights in order establish that the amount of undergrounding surcharge that electric utility collected from its customers pursuant to franchise agreement with city bore a reasonable relationship to value of franchise rights, to show that surcharge was a valid franchise fee rather than a tax subject to voter approval under Right to Vote on Taxes Act; city could establish value of franchise through bona fide negotiations surrounding the franchise.

EMINENT DOMAIN - ILLINOIS

Tzakis v. Maine Township

Supreme Court of Illinois - November 19, 2020 - N.E.3d - 2020 IL 125017 - 2020 WL 6788163

Landowners whose property flooded brought action against township, city, and water-reclamation district for negligence, negligent nuisance, negligent trespass, statutory duty to maintain property, duty to remedy dangerous plan, and taking of real and personal property.

The Circuit Court granted township's, city's, and district's motions to dismiss based on the public duty rule, and reinstated the dismissal after reconsideration based on the Supreme Court's subsequent abolition of the public duty rule. Landowners appealed. The Appellate Court affirmed in part and reversed in part. Township, city, and district's petition for leave to appeal was allowed.

The Supreme Court held that:

- The Supreme Court case that abolished the public duty rule did not apply retroactively;
- The public duty rule barred landowners' negligence-based and duty-based claims; and
- Landowners failed to allege that water flowing onto their property was the intended or foreseeable result, as required for takings claims.

Supreme Court case that abolished common-law public duty rule, Coleman v. East Joliet Fire Protection District, 46 N.E.3d 741, did not apply retroactively, and thus public duty rule applied to landowners' complaint against local public entities regarding property flooding; case established new principle of law by overturning decades of existing precedent, judgment would have been final and appealable well prior to Supreme Court's case if public entities had obtained dismissal when they first raised issue, and public entities relied upon public duty rule throughout 11-year course of litigation that related to actions going back 60 years, during which time public duty rule existed.

Public duty rule, despite being abolished prospectively, applied to bar landowners' negligence-based and duty-based claims against township, city, and water-reclamation district arising out of flooding allegedly caused by municipal stormwater system; to the extent that landowners alleged that township, city, and district failed to provide adequate public services in design, maintenance, improvement, or operation of the stormwater system, that duty ran to public at large and not to individual members of public such as landowners.

Landowners failed to allege that water flowing onto their property causing flood damage was the intended or foreseeable result of authorized government actions by township, city, or water-reclamation district, as required for a viable takings claim; landowners merely alleged that township, city, and district had caused properties to become partially or totally uninhabitable by their actions or inactions.

IMMUNITY - KENTUCKY

Upper Pond Creek Volunteer Fire Department, Inc. v. Kinser

Supreme Court of Kentucky - November 12, 2020 - S.W.3d - 2020 WL 6735854

Motorist who had been rescued by members of volunteer fire department from beneath the vehicle under which he was pinned, but who allegedly sustained significant injuries as result of firefighters' actions, brought cause of action to recover from fire department for its alleged failure to properly train or supervise and negligent hiring.

Fire department filed motion to dismiss on government immunity grounds, and the Circuit Court denied motion, and appeal was taken. The Court of Appeals dismissed appeal, and discretionary review was granted.

The Supreme Court held that circuit court order denying volunteer fire department's motion to dismiss, on governmental immunity grounds, the negligent failure to train or supervise and negligent hiring claims against it was not immediately appealable.

Circuit court order denying volunteer fire department's motion to dismiss, on governmental immunity grounds, the negligent failure to train or supervise and negligent hiring claims against it by individual who had sustained significant injuries due to volunteer firefighters' alleged lack of care in extricating him from beneath vehicle under which he was pinned, but without resolving question of whether fire department's training, supervising, and hiring were governmental functions, for which it was entitled to immunity, pending further discovery on issue, was in nature of interlocutory order that was not immediately appealable.

EMINENT DOMAIN - NEW HAMPSHIRE

State v. Beattie

Supreme Court of New Hampshire - November 19, 2020 - A.3d - 2020 WL 6788764

Landowners appealed from decision of the Superior Court, dismissing, with prejudice, their preliminary objection challenging the State's taking of 0.93 acres of their land in fee simple, as well as permanent and temporary easements.

The Supreme Court held that:

- Standard of review in eminent domain case involving condemnation of land for alteration for state highway is governed by Eminent Domain Procedure Act, and not by the enabling statute;
- De novo is the appropriate standard of review under Eminent Domain Procedure Act for trial court's review of preliminary objections that challenge necessity, public uses, or net-public benefit; and
- Application of de novo standard of review for trial court's review of preliminary objections that challenge necessity, public uses, or net-public benefit under Eminent Domain Procedure Act does not impermissibly enlarge condemnee's substantive rights.

EMINENT DOMAIN - NORTH DAKOTA

Montana-Dakota Utilities Co. v. Behm

Supreme Court of North Dakota - November 19, 2020 - N.W.2d - 2020 WL 6791506 - 2020 ND 234

Condemnor, a utility company, brought an eminent domain action against landowner to acquire an easement across landowner's property for a 3,000-foot natural gas pipeline to service a railroad switch which was required to be heated to keep it operable during winter months.

District Court dismissed action. Parties cross-appealed, and the Supreme Court reversed and remanded for a trial on eminent domain damages. Landowner petitioned the United States Supreme Court for writ of certiorari, which was denied. On remand, the parties stipulated to the valuation of

the easement, and the district court adopted the stipulation and awarded landowner attorney's fees and costs. Landowner appealed.

The Supreme Court held that:

- Law of the case doctrine and the mandate rule precluded consideration of landowner's various arguments about the constitutionality of eminent domain proceedings;
- Attorney's fees which landowner incurred in unsuccessful petition for writ of certiorari to the United States Supreme Court were unreasonable; and
- Appeal was frivolous and warranted award of attorney's fees to condemnor.

Law of the case doctrine and the mandate rule precluded consideration of landowner's various arguments about the constitutionality of eminent domain proceedings, where the issue of the necessity of the taking and whether the taking was for a public use were previously tried and appealed, case was remanded by Supreme Court for a trial on damages, and arguments about the constitutionality of the eminent domain proceedings and whether a jury should have determined certain issues could have been raised in the district court before the prior appeal and to the Supreme Court in the first appeal.

MUNICIPAL ORDINANCE - OHIO

State ex rel. Ohio Patrolmen's Benevolent Association v. Warren

Supreme Court of Ohio - November 25, 2020 - N.E.3d - 2020 WL 6930025 - 2020 -Ohio-5372

City police officers filed petition for writ of mandamus seeking to compel city to promote officers, or allow them to sit for competitive promotional examination, pursuant to state civil-service law to positions city asserted were abolished by attrition under ordinance.

The Eleventh District Court of Appeals denied officers' motion for partial summary judgment, granted city's motion for judgment on the pleadings, and dismissed the petition. Officers appealed, and city filed motion for oral argument.

The Supreme Court held that:

- City was not entitled to oral argument, and
- City was authorized to enact ordinance to reduce police force by prospectively canceling legal authorizations for positions upon retirement of incumbents.

City was not entitled to oral argument, in police officers' appeal of determination in mandamus action that abolishment of senior positions in police department to which officers sought promotion did not violate state civil-service law, though city asserted that oral argument might be helpful to Supreme Court in making its decision and would allow the Court to ask questions of counsel on any aspect of the case, where city failed to indicate that case involved matter of great public importance, complex issues of law or fact, substantial constitutional issue, or conflict among the Courts of Appeals.

A city council, without violating the civil-service statutes governing promotion of police officers and removals, reappointments, and demotions in police departments, is authorized to enact an ordinance to reduce a police force by prospectively canceling the legal authorization for certain positions upon the retirement of the incumbents.

PUBLIC PENSIONS - OHIO

Sherman v. Ohio Public Employees Retirement System

Supreme Court of Ohio - October 22, 2020 - N.E.3d - 2020 WL 6163923 - 2020 Employee Benefits Cas. 408,701 - 2020 -Ohio- 4960

Public employment retiree who returned to public employment brought action against Ohio Public Employees Retirement System (OPERS), alleging a violation of Ohio's Equal Protection Clause based on OPERS's practice of reducing health insurance subsidies for retirees reemployed in OPERS-covered positions, while not reducing the subsidy for retirees reemployed in non-OPERS-covered positions.

The Court of Common Pleas granted OPERS's motion to dismiss for failure to state a claim upon which relief could be granted. Retiree appealed. The Court of Appeals reversed and remanded. OPERS appealed.

The Supreme Court held that:

- Retiree's allegations were sufficient to negate OPERS's justification based on cost of identifying all retirees in non-OPERS-covered positions, and
- Additional costs purportedly incurred only with respect to retirees reemployed in OPERS-covered positions did not constitute rational basis requiring dismissal of retiree's claim.

Rational-basis test applied to determination of whether a public employment retiree, who was reemployed by a public employer within the Ohio Public Employees Retirement System (OPERS) network, stated a claim against OPERS for violation of Ohio's Equal Protection Clause based on its practice of reducing health insurance subsidies for retirees reemployed in OPERS-covered positions, while not reducing the subsidy for retirees reemployed in non-OPERS-covered positions.

Allegations of former state employee, who received a health insurance subsidy from the Ohio Public Employees Retirement System (OPERS) in connection with his OPERS pension, and whose subsidy was reduced after he was reemployed by a public employer within the OPERS network, that it was administratively feasible to require OPERS retirees reemployed in non-OPERS-covered positions to send a form notifying OPERS of a retiree's reemployment, as was required for retirees reemployed in OPERS-covered positions, and that OPERS regularly requested information from OPERS retirees, were sufficient to negate OPERS's proffered justification for not reducing health insurance subsidies of retirees reemployed in non-OPERS-covered positions, namely, the cost of identifying all reemployed retirees, and thus retiree stated a claim for violation of Ohio's Equal Protection Clause.

Additional costs incurred by the Ohio Public Employees Retirement System (OPERS) when its retirees were reemployed in OPERS-covered positions that allegedly were not incurred when its retirees were reemployed in non-OPERS-covered positions did not provide a sufficient rational basis to require dismissal of state retiree's claim for violation of Ohio's Equal Protection Clause based on OPERS's practice of reducing health insurance subsidies for retirees reemployed in OPERS-covered positions, while not reducing the subsidy for retirees reemployed in non-OPERS-covered positions; if an employer in the OPERS network did not hire an OPERS retiree, the position would still need to be filled, but it was unclear whether the costs OPERS incurred administering an employee's pension equaled or exceeded the costs OPERS incurred administering a retiree's contributions.

LABOR - WASHINGTON

Lincoln County v. Public Employment Relations Commission

Court of Appeals of Washington, Division 3 - November 3, 2020 - 475 P.3d 252

County and workers' union both appealed from Public Employment Relations Commission (PERC) decision which found both parties to have committed unfair labor practices (ULP).

The Superior Court affirmed the PERC, and both parties appealed.

The Court of Appeals held that:

- Hearing examiner did not abuse its discretion by excluding evidence that purported to show a connection between county's resolution, that required all collective bargaining to be conducted in public, and anti-union group;
- The legislature, by exempting collective bargaining from the Open Public Meetings Act (OPMA), did not impliedly preempt resolutions such as county's; but
- Neither county nor workers' union had the authority to impose its preferred procedure on the other;
- County and workers' union both committed ULPs; and
- Status quo doctrine did not apply when parties were unable to agree on a permissive subject of bargaining.

SCHOOL IMPACT FEES - CALIFORNIA

AMCAL Chico LLC v. Chico Unified School District

Court of Appeal, Third District, California - November 5, 2020 - Cal.Rptr.3d - 2020 WL 6498638 - 20 Cal. Daily Op. Serv. 11,591 - 2020 Daily Journal D.A.R. 12,009

Developer of private dormitory for students at state university within school district boundaries brought action for refund of school impact fees imposed by school district.

The Superior Court granted school district's motion for summary judgment, and developer appealed.

The Court of Appeal held that district was not required to determine whether dormitory would generate new students for school district in order to justify fee.

School district was not required to determine whether private residential dormitory for state university students would generate new students for school district in order to justify imposition of school impact fee based on study analyzing all new residential construction.

A school district need not make an individualized determination for each particular development project before imposing school impact fee; instead, the school district must make findings based on the general type of construction, such as residential construction.

School impact fee imposed on new private residential dormitory for state university students, which was based on general study of new residential development and impact on school facilities, was reasonable and complied with the Mitigation Fee Act, and thus was not an invalid special tax.

School impact fee imposed on new private residential dormitory for state university students was not a taking without payment of just compensation, as fee complied with the Mitigation Fee Act.

Developer fees generally do not constitute a taking if the fee is reasonably related to the impacts of the type of new residential development on the school district's school facilities and meet the requirements of the Mitigation Fee Act.

PREEMPTION - GEORGIA

Faulkner v. Crumbley

Court of Appeals of Georgia - November 2, 2020 - S.E.2d - 2020 WL 6389973

Driver and her passenger, who were injured when their vehicle struck a cow standing in the roadway, brought negligence action against cow's owners. The Superior Court denied cow owners' motion for summary judgment, and they appealed.

The Court of Appeals held that:

- Summary judgment evidence that there were three stray cows on roadway, rather than just one, without more, did not create genuine issue of fact that cow's owners breached their duty to keep their livestock off the road, and
- State statute, providing that no owner shall permit livestock to run at large on or to stray upon the public roads of the state or any property not belonging to owner of the livestock, except by permission of owner of such property, preempted county ordinance.

EMINENT DOMAIN - NEBRASKA

Douglas County School District No. 10 v. Tribedo, LLC

Supreme Court of Nebraska - November 6, 2020 - N.W.2d - 307 Neb. 716 - 2020 WL 6533474

Landowner sought review of board of appraisers' award of $2.6 million for school district's condemnation of approximately 43 acres of landowner's 74-acre tract, which landowner planned to develop into a mixed-use development, for a new high school site.

The District Court entered judgment upon jury verdict awarding landowner $4.6 million in just compensation. School district appealed.

The Supreme Court held that:

- Trial court acted within its discretion in admitting expert testimony regarding diminution of market value to remaining property;
- Any error in trial court's refusal to give proposed jury instruction relating to remaining property did not prejudice school district;
- Sufficient evidence supported jury's $4.6 million award; and
- Trial court acted within its discretion in awarding landowner $591,000 in attorney fees.

Trial court acted within its discretion in admitting expert testimony of developer's real estate appraisers regarding diminution of market value to developer's remaining property following the taking of portion of its 74-acre tract for new high school site, where experts detailed numerous elements that influenced their valuations, including dirt fill and leveling costs, and both appraisers testified that their references to damages related to a reduction in fair market value.

Any error in trial court's refusal to give condemnor's proposed jury instruction relating to remaining property following the taking, which stated that the "costs to cure" could be considered only if they had an impact on fair market of remaining property, did not prejudice condemnor, even though instruction was a correct statement of law, where substance of proposed instruction was consistent with instructions the court gave on measure of damages to remaining property.

Sufficient evidence supported jury's total award of $4,625,967 as compensation for both the taken property and diminution to fair market value of the remainder, for the condemnation of approximately 43 acres of a 74-acre tract that condemnee planned to develop into a mixed-use development instead of new high school site that was the reason for the taking, where condemnee's first real estate appraiser valued total compensation at $5,890,000, condemnee's second appraiser valued total damages at $7,022,000, and condemnor's real estate appraiser valued total damages at $2,601,600.

Trial court acted within its discretion in awarding condemnee $590,924.89 in attorney fees in condemnation proceeding resulting in judgment of $4,625,967 for condemnee, where condemnee offered affidavits of three members of State Bar who testified that they reviewed fees charged by condemnee's attorneys, that they received a detailed summary of work provided by counsel, and that they found requested fees to be reasonable, and court provided detailed explanation for fee award, including an acknowledgment that judgment exceeded condemnation award by more than 75%, that judgment was believed to be one of largest jury awards in a condemnation matter in a reported decision in state, that litigation was fairly complex, and that litigation persisted for over two and one-half years.

INCORPORATION - SOUTH DAKOTA

State through Attorney General v. Buffalo Chip

Supreme Court of South Dakota - November 10, 2020 - N.W.2d - 2020 WL 6601926 - 2020 S.D. 63

State filed a petition for, or in the nature of, a writ of quo warranto seeking a judgment declaring that campground did not lawfully incorporate as a municipality, after the Supreme Court concluded that county residents and neighboring city lacked standing to challenge the incorporation.

The Circuit Court granted State's motion for summary judgment. Campground appealed.

The Supreme Court held that:

- As a matter of first impression, statute that barred suits seeking to annul the existence of an actually incorporated municipality did not apply;
- State was not barred by doctrines of laches, estoppel, and waiver from bringing petition; and
- A municipality is prohibited from incorporating if it contains less than 100 residents or if it contains less than 30 voters.

Statute that barred suits seeking to annul the existence of a municipality that had actually incorporated did not apply to State's petition for writ of quo warranto that sought judgment declaring that campground did not lawfully incorporate as a municipality; State did not allege that campground abused its powers or surrendered its charter as legally existing corporation, but rather State sought to prevent campground from further acting as municipal corporation because it did not lawfully incorporate in the first instance.

State was not barred by doctrines of laches, estoppel, and waiver from bringing petition for writ of quo warranto that sought judgment declaring that campground did not lawfully incorporate as a municipality, despite contention that State would have known from census that campground did not have requisite 100 residents when it sought to incorporate and State should have challenged its existence then; no statute required State to institute action prior to a municipality's purported incorporation, and Secretary of State's filing of certified copy of canvas of votes in favor of incorporation was ministerial act that could not operate as waiver.

A municipality is prohibited from incorporating if it contains less than 100 residents or if it contains less than 30 voters; under either scenario, a municipality is not allowed to incorporate.

EMINENT DOMAIN - UTAH

Salt Lake City Corporation v. Kunz

Court of Appeals of Utah - October 16, 2020 - P.3d - 2020 WL 6106942 - 2020 UT App 139

City initiated action against owners of land south of airport acquired by city to obtain aviation easement by condemnation over airspace south of airport runway.

The Third District Court dismissed condemnation action. City appealed and owners cross-appealed.

The Court of Appeals held that:

- Owners' admissions at hearing on motion for partial summary judgment were limited in applicability to then-pending motions before trial court;
- Ruling on partial summary judgment motion did not rule on issue of whether city complied with notice and disclosure requirements;
- Notice to owners of eminent domain proceedings was inadequate to initiate condemnation for aviation easement;
- Actual notice and previous opportunities to be heard did not amount to compliance with notice and disclosure requirements;
- Owners were not required to show prejudice with respect to violation of notice statute; and
- Trial court did not err by not allowing city to amend complaint.

Land owners' admissions in May 2009 hearing on motion for partial summary judgment, on issue of city's authority to condemn air rights over owners' land, that certain facts were "undisputed for the purposes of the current motions" were limited in their applicability to the then-pending motions before the district court, and thus trial court did not err in failing to consider ruling when dismissing city's condemnation complaint for failing to follow notice and disclosure requirements, where admissions came in response only to issue of extraterritorial eminent domain power, owners never withdrew immediate occupancy deposit including defense that city had not followed notice procedures, and city propounded discovery request for documents related to that defense.

Language in prior ruling for partial summary judgment on issue of city's extraterritorial eminent domain power in action to obtain avigation easement over airspace south of airport, that one of undisputed issues was that owners "were provided with timely and proper notice regarding condemnation efforts" did not amount to ruling on issue of whether city gave land owners proper notice and disclosure required by statute, and thus reconsideration of issue was unnecessary on appeal; partial summary judgment ruling merely identified that notice issue was not in dispute as it related to city's extraterritorial eminent domain power.

Notice to land owners of eminent domain proceedings regarding airspace over land they owned south of airport did not adhere to statute's directive regarding timing of that notice, and thus was inadequate to initiate condemnation for avigation easement, although notice for first meeting complied with statutory requirements, where owners were allowed to speak at second meeting but were not sent written notice of meeting at least ten business days in advance, and notice for third meeting arrived only three business days before meeting and owners were not allowed opportunity to be heard.

Statute governing notice requirements for condemnation proceedings required strict compliance, and thus actual notice to land owners of eminent domain proceedings regarding air rights over land they owned south of city's airport, and previous opportunities to be heard on issue did not fulfill purposes of statute to provide abundant procedural fairness to property owners.

Trial court did not err by not allowing city to amend complaint to obtain avigation easement over airspace south of airport through condemnation; city failed to adequately explain why amendment should be granted, failed to provide proposed amended complaint for consideration, and amendment would be futile since city could not retroactively follow statutory preconditions for condemning private property rights.

HIGHWAYS - VERMONT

In re Diverging Diamond Interchange Act 250

Supreme Court of Vermont - November 6, 2020 - A.3d - 2020 WL 6534557 - 2020 VT 98

Objector sought review of Environmental Commission's decision granting Agency of Transportation's application for an Act 250 land use or development permit for highway project involving reconfiguration of interstate exit, citing concerns of phosphorus and chloride discharges into impaired lake.

The Superior Court, Environmental Division, granted permit and entered a postjudgment motion clarifying its decision. Objector appealed.

The Supreme Court held that:

- Environmental Division did not apply an improper de minimis standard in determining whether project would cause undue water pollution;
- Mere possibility of additional mitigation measures, without more, did not require a finding that phosphorus discharge was undue pollution;
- Environmental Division did not improperly afford Agency a presumption of compliance with criterion of no undue pollution;
- Environmental Division did not improperly shift burden of proof to objector with respect to issue of chloride pollution;
- Finding that project would not cause undue chloride pollution was not clearly erroneous; and
- Environmental Division acted within its discretion in not joining town as a necessary co-applicant.

Environmental Division did not apply an improper de minimis standard in determining whether proposed project would cause undue water pollution precluding grant of an Act 250 land use or development permit sought by Agency of Transportation for highway project involving reconfiguration of interstate exit, even if Division characterized amount of phosphorus discharged by project into impaired lake as exceedingly small, where Division considered testimony from both

parties' experts regarding amount of phosphorus discharges, Division agreed with objector that there was no automatic allowance for de minimis water pollution, and Division also weighed project's compliance with applicable regulations, ability of floodplains to retain phosphorus, and available mitigation measures.

Mere possibility of additional mitigation measures, without more, did not require a finding that water pollution from phosphorus discharges into impaired lake was undue water pollution that would preclude grant of an Act 250 land use or development permit sought by Agency of Transportation for highway project involving reconfiguration of interstate exit, where Agency provided evidence of a carefully designed stormwater treatment system that used grass channels to remove phosphorus, and objector's expert testified that additional mitigation measures were available but could not quantify the expected reduction in phosphorus load or offer an opinion as to effect of reductions.

Environmental Division did not improperly afford Agency of Transportation a presumption of compliance with criterion of no undue water pollution for granting an Act 250 land use or development permit based on existence of stormwater permit for highway project involving reconfiguration of interstate exit; stormwater permit vested in regulations that did not include specific standards for phosphorus or chloride discharges, Division was concerned about strength of a presumption arising out of project's circumstance because phosphorus or chloride discharges were at issue, and Division expressly evaluated each pollutant on the merits rather than relying upon a presumption.

Environmental Division did not improperly shift burden of proof to objector with respect to issue of undue chloride pollution from proposed highway project involving reconfiguration of interstate exit, in determining whether grant Agency of Transportation's application for an Act 250 land use or development permit, where Division considered all evidence presented by Agency, including statewide snow and ice control plan, project's chloride management plan, and extensive expert testimony, Division concluded that Agency satisfied its burden based on that evidence, and Division then considered objector's evidence and concluded that it was insufficient to disturb that conclusion.

Environmental Division did not clearly err in finding that proposed project would not cause undue chloride pollution that would preclude grant of an Act 250 land use or development permit sought by Agency of Transportation for highway project involving reconfiguration of interstate exit, even though Division did not have evidence before it about chloride use by town that was responsible for maintaining portion of project, where Agency witness testified that town's plan was reasonable and accorded with Agency's statewide snow and ice control plan, Agency had agreement with town detailing town's responsibility for winter road maintenance, and order granting permit provided that project was required to abide by conditions imposed by District Commission including chloride management plan.

Environmental Division acted within its discretion in not joining town as necessary co-applicant on appeal of Environmental Commission's grant of Agency of Transportation's application for an Act 250 land use or development permit for highway project involving reconfiguration of interstate exit, where Agency effectively controlled land such that appropriate permit conditions could be imposed on project, project's chloride management plan accorded with Agency's snow and ice control plan and also incorporated town's snow and ice plan by reference, Agency's expert testified that town's plan was reasonable, permit required Agency to perform winter road management in accordance with chloride management plan, and Agency's agreement with town required town to abide by chloride management plan.

PUBLIC PENSIONS - WASHINGTON

Wilson v. Washington State Department of Retirment Systems

Court of Appeals of Washington, Division 1 - November 2, 2020 - P.3d - 2020 WL 6389986

Retired city police officer sought judicial review of Department of Retirement Systems decision to deny him retirement benefits because, after leaving the police force, he took a new job as chief of staff for the city mayor.

The Superior Court reversed, and Department appealed.

The Court of Appeals held that:

- Retired officer could assert equitable estoppel as a defense;
- Department was equitably estopped from denying retired city police officer his pension benefits; and
- Officer was entitled to attorney's fees under the Equal Access to Justice Act (EAJA).

Retired city police officer could assert equitable estoppel as a defense to Department of Retirement System's defense of not paying him his pension because of his alleged breach in taking job as chief of staff for mayor; retired officer was due his pension and had, in essence, a contractual right to his pension benefits, and to contest the Department's denial of his pension, his only remedy was to appeal the decision.

Department of Retirement Systems was equitably estopped from denying retired city police officer his pension benefits on grounds he accepted job as city mayor's chief of staff; Department publications uniformly explained that an employee could return to work in the public sector and maintain their benefits by opting out of any other retirement program, city called and confirmed that information before hiring officer, officer relied on that information by resigning his law enforcement commission, terminating his employment as chief of police, and filling out the Department's form for returning to work, and retroactive application of Department's new requirement that a retiree have no reasonable expectation of continuing employment with the employer at the time of separation would be manifestly unjust to retired officer.

Department of Retirement System's application of is new interpretation of "separated from service," which provided that, to obtain pension benefits, a retiree have no reasonable expectation of continuing employment with the employer at the time of separation, to retired city police officer who took job as city mayor's chief of staff was not substantially justified, and thus officer was entitled to attorney's fees under the Equal Access to Justice Act (EAJA); Department's website, publications, training, and oral representations confirmed the department's historical interpretation of "separation of service" before officer retired, and there was no notice of any change of interpretation before it was applied to officer.

VOTING - GEORGIA

Wright v. Sumter County Board of Elections and Registration

United States Court of Appeals, Eleventh Circuit - October 27, 2020 - F.3d - 2020 WL 6277718

Voter brought action challenging county's re-drawn school board district map, alleging that the

electoral mechanism created by the new map would violate section 2 of the Voting Rights Act by diluting the strength of Black voters in county.

The United States District Court granted summary judgment in favor of county board of elections and registration. Voter appealed. The United States Court of Appeals reversed and remanded. Following bench trial on remand, the District Court found a section 2 violation, enjoined upcoming school board elections, and drew a new district map for county's school board. Board appealed.

The Court of Appeals held that:

- Court of Appeals would review the entire record, both what voter's expert on redistricting demographic analysis and the analysis of racial voting patterns presented at trial and the findings, report, and maps presented by special master in subsequent remedial proceedings, and
- District court did not clearly err in finding that county's re-drawn school board district map violated section 2 of the Voting Rights Act.

ZONING & PLANNING - GEORGIA

Dawson County Board of Commissioners v. Dawson Forest Holdings, LLC

Court of Appeals of Georgia - October 29, 2020 - S.E.2d - 2020 WL 6336058

Landowner brought two actions against county board of commissioners and board's commissioners in both their official and individual capacities, after board denied landowner's zoning requests, asserting that the current zoning classification was unconstitutional and seeking prospective relief to prevent its enforcement.

The Superior Court granted defendants' motion to dismiss actions against the board and its commissioners in their official capacities, but declined to dismiss the actions against the commissioners in their individual capacities. The parties cross-appealed.

The Court of Appeals held that:

- Sovereign immunity barred landowner's claims against county board of commissioners and its commissioners in their official capacities;
- Legislative immunity did not bar landowner's claims against commissioners, in their individual capacities; and
- Landowner plausibly stated claims against commissioners in their individual capacities.

Sovereign immunity barred landowner's claims for declaratory and injunctive relief against county board of commissioners and its commissioners in their official capacities; the claims sought injunctive and declaratory relief from the enforcement of an allegedly unconstitutional ordinance, i.e., zoning classification as applied to the properties, against the board and its commissioners in their official capacities, Supreme Court decision laying out sovereign immunity rule did not exempt zoning cases, and landowner identified no constitutional or statutory authority waiving sovereign immunity on the ground that an action was a zoning case.

Legislative immunity did not bar landowner's claims against commissioners on county board of commissioners, in their individual capacities, in which landowner challenged current zoning classification and sought prospective relief to prevent its enforcement; even assuming commissioners' votes against rezoning the properties were legislative acts, landowners claims did not arise from commissioners' past votes on the properties' zoning classifications, but instead, their

claims for declaratory and injunctive relief arose from commissioners' anticipated future enforcement of allegedly unconstitutional zoning classifications.

Landowner plausibly stated claims against commissioners on county board of commissioners, in their individual capacities, in which landowner challenged current zoning classification and sought prospective relief to prevent its enforcement; complaints claimed that commissioners were empowered to enforce the current, allegedly unconstitutional zoning classifications on the properties, and the allegations of the complaints did not disclose with certainty that landowner would not be entitled to relief under any state of provable facts asserted in support.

LIABILITY - KENTUCKY

Troutman v. Louisville Metro Department of Corrections

United States Court of Appeals, Sixth Circuit - October 29, 2020 - F.3d - 2020 WL 6336315

Estate and daughter of pretrial detainee who committed suicide while in solitary confinement at correctional facility brought civil rights action against classification officer, facility director and municipality, alleging deliberate indifference.

The United States District Court entered summary judgment in favor of defendants. Daughter appealed.

The Court of Appeals held that:

- Fact question as to whether classification officer acted with deliberate indifference to pretrial detainee's likelihood of suicide precluded summary judgment in favor of officer;
- Daughter failed to establish claim that director of correctional facility acted with deliberate indifference; and
- Daughter failed to establish claim that municipality acted with deliberate indifference.

Genuine issue of material fact as to whether classification officer acted with deliberate indifference to pretrial detainee's likelihood of suicide precluded summary judgment in favor of officer in detainee's daughter's § 1983 action alleging violation of due process following detainee's suicide; although officer claimed reliance on a medical judgment that detainee no longer presented a suicide risk, the situation did not remain stable between detainee's initial clearance from medical and his suicide days later, as detainee was involved in altercations that merited his removal to isolation, and medical clearance to general population was not the same as clearance to solitary confinement with access to bedsheets and barred windows.

ZONING & PLANNING - MAINE

Portland Pipe Line Corporation v. City of South Portland

Supreme Judicial Court of Maine - October 29, 2020 - A.3d - 2020 WL 6325858 - 2020 ME 125

Pipeline operator and trade association brought action against city and city's code enforcement officer, challenging validity of city zoning ordinance that prohibited bulk loading of crude oil onto tankers in city harbor and building new structures for that purpose.

The United States District Court granted in part and denied in part defendants' motion for summary judgment and denied plaintiffs' cross-motion for summary judgment, and, after bench trial, dismissed plaintiffs' sole remaining claim. Plaintiffs appealed. The United States Court of Appeals certified question.

The Supreme Judicial Court held that:

- City ordinance was not in direct conflict with the Maine Department of Environmental Protection's (MDEP) exercise of the State's police power pursuant to the Coastal Conveyance Act;
- In a matter of first impression, license issued by the MDEP to pipeline operator, that authorized operator to reverse the flow of oil in one of its pipelines, was not an "order" within meaning of the Coastal Conveyance Act; and
- The Coastal Conveyance Act did not preempt city ordinance by implication.

City ordinance intended to limit air pollution by prohibiting the bulk loading of crude oil onto any marine vessel in city's harbor was not in direct conflict with the Maine Department of Environmental Protection's (MDEP) exercise of the State's police power pursuant to the Coastal Conveyance Act; the Ordinance did not purport to require the MDEP to do anything that the Act said it could not do, nor did it bar the MDEP from doing what the Act says that it could do, and it was not impossible to comply with both the ordinance and the license issued to pipeline operator by the MDEP, where the license permitted, and the ordinance did not forbid, transporting oil from city's harbor via pipeline to Canada, as operator had always done.

License issued by the Maine Department of Environmental Protection's (MDEP) to pipeline operator, that authorized operator to reverse the flow of oil in one of its pipelines, was not an "order" within meaning of the Coastal Conveyance Act; while the words "Department Order" appeared on the first page of the renewal license, the license did not command, direct, or instruct the operator to do anything other than fill rodent burrows and remove soil from the base of storage tanks before it conducted permitted activities.

The Coastal Conveyance Act did not preempt city ordinance intended to limit air pollution by prohibiting the bulk loading of crude oil onto any marine vessel in city's harbor by implication; the Act unambiguously declared that municipal ordinances concerning oil terminal facilities were valid unless they directly conflicted with the Act or rules or orders made pursuant to it, and the city's home rule authority to enact the ordinance was expressly recognized and affirmed by the Act.

TELECOM - MASSACHUSETTS

Cellco Partnership v. City of Peabody

Appeals Court of Massachusetts - September 24, 2020 - N.E.3d - 98 Mass.App.Ct. 496 - 2020 WL 5667189

Personal wireless services carrier sought review of city's denial of special permit application to construct a wireless services facility to remedy wireless coverage gap in city, alleging violation of Telecommunications Act (TCA).

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

The Appeals Court held that:

- Municipal-wide distributed antenna system was not a feasible alternative to proposed facility;

- Statements in summary judgment affidavit concerning cost comparisons for alternative to facility were conclusory and unsupported; and
- No feasible alternative existed.

Municipal utility's proposed municipal-wide distributed antenna system to remedy personal wireless services coverage gap in city was not a feasible alternative to carrier's proposed personal wireless service facility, and thus city's denial of carrier's special permit application to construct facility effectively prohibited provision of personal wireless services in violation of Telecommunications Act (TCA), where carrier requested a price proposal seven times over a two-month period, utility failed to offer any price proposal, and parties could not reach an agreement as to provision of communication services to the new antennae, pole rental fees, and safety concerns.

Statements from municipal utility's affidavit about estimated cost comparisons for a proposed alternative option to remedy carrier's coverage gap for personal wireless services were conclusory and unsupported, and thus, insufficient to defeat motion for summary judgment in carrier's zoning appeal alleging that city's denial of special permit application to construct a wireless services facility violated Telecommunications Act (TCA) as an effective prohibition on service, where proposed option failed to materialize and cost estimates were developed based on wireless services from a different town.

No feasible alternative existed to carrier's proposed personal wireless service facility, and thus city's denial of carrier's special permit application to construct facility effectively prohibited provision of personal wireless services in violation of Telecommunications Act (TCA), where carrier made diligent attempts, over course of four and one-half years, to find another feasible option, carrier considered multiple locations including utility pole, a church steeple, and site itself, carrier explored other options, such as small cell antennae and a municipal-wide distributed antenna system, and carrier considered some options multiple times.

EMINENT DOMAIN - MISSISSIPPI

Bay Point Properties, Inc. v. Mississippi Transportation Commission

Supreme Court of Mississippi - October 29, 2020 - So.3d - 2020 WL 6334788

Landowner filed inverse condemnation proceedings against the Mississippi Transportation Commission (MTC), claiming the easement MTC had across landowner's property had terminated and that MTC was required to pay landowner the unencumbered value of the property.

The Circuit Court entered judgment on jury verdict finding that the easement, for which MTC had paid $50,000, continued to encumber the property, but that the use by MTC was not a highway purpose and awarding landowner the encumbered value of $500.00 and no attorney fees. Landowner appealed. The Supreme Court affirmed in part, reversed in part, and remanded for award of attorney fees. On remand, the Circuit Court awarded fees, but not in amount requested, and landowner appealed.

The Supreme Court held that trial court's decision, in making award of prevailing party attorney fees to landowner in inverse condemnation action, to place greater weight on the results obtained and to award landowner only $67,277.35 of the $880,171.81 sought was not manifest abuse of discretion.

Trial court's decision, in making award of prevailing party attorney fees to landowner in inverse condemnation action, to place greater weight on the results obtained and to award landowner only

$67,277.35 in attorney fees, costs and expenses, not the $880,171.81 that it sought for obtaining an inverse condemnation award in nominal amount of $500.00, was not unmistakable or indisputable error and could not be disturbed under a "manifest abuse of discretion" standard of review.

MUNICIIPAL GOVERNANCE - WASHINGTON

Matter of Recall of White

Supreme Court of Washington - October 29, 2020 - P.3d - 2020 WL 6332723

Petition was filed for recall of city councilmember based on actions that he took which allegedly undermined public response to corona virus pandemic.

The Superior Court dismissed the petition, and appeal was taken.

The Supreme Court held that:

- Charge in recall petition, that member of city council had used his position as elected official to wrongfully encourage citizens to disobey stay-at-home orders issued during corona virus pandemic, was factually and legally insufficient;
- Charge in recall petition, that councilmember had encouraging the public to disobey emergency orders issued during corona virus pandemic, such as by not wearing face mask, was both factually and legally insufficient; and
- Charge in recall petition, that member of city council had refused to attend council meetings in protest of stay-at-home orders and mask mandates issued during corona virus pandemic, was both factually and legally insufficient.

TELECOM - FEDERAL

COMPTEL v. Federal Communications Commission

United States Court of Appeals, District of Columbia Circuit - November 3, 2020 - F.3d - 2020 WL 6437312

Competitive local exchange carrier and California's telecommunications regulator filed petitions for review of order of the Federal Communications Commission (FCC), which determined that incumbent local exchange carriers no longer dominated telecommunications market, and exercised its authority under the Telecommunications Act to forbear from enforcing wholesale pricing requirement and analog loops network element of unbundling requirement it had previously imposed to foster competition in providing voice services for resale to customers.

Following consolidation of proceedings, incumbent carrier intervened in support of FCC.

The Court of Appeals holds that:

- FCC's decision to forbear from enforcing wholesale pricing requirement was not arbitrary and capricious, and
- Findings and modes of analysis that were allegedly inconsistent with FCC's past orders did not render its forbearance order arbitrary and capricious.

Federal Communication Commission's (FCC) decision to forbear, under the Telecommunications Act, from enforcing wholesale pricing requirement it had previously imposed to foster competition in

providing voice services for resale to customers was not arbitrary and capricious under the Administrative Procedure Act (APA), where it reasonably focused on national market for voice telecommunication services, rather than local markets separately, it found that copper wire advantage was of rapidly declining importance due to competing modes of voice transmission, and it found that incumbents' possession of copper loops no longer gave them meaningful market power in national voice market, even though there were isolated geographic locations, especially rural areas, where competing modes were less robust.

Federal Communication Commission's (FCC) decision to forbear, under the Telecommunications Act, from enforcing analog loops network element of unbundling requirement it had previously imposed to foster competition in providing voice services for resale to customers was not arbitrary and capricious under the Administrative Procedure Act (APA), although there were times when only copper loops, being self-powered, could conduct 9-1-1 calls when power went out, and FCC did not engage in detailed discussion about negative impact on public safety, where forbearance from unbundling requirement would not reduce availability of line-powered copper networks.

Findings and modes of analysis that were allegedly inconsistent with Federal Communication Commission's (FCC) past orders did not render arbitrary and capricious its order, pursuant to its authority under the Telecommunications Act, to forbear from enforcing wholesale pricing requirement and analog loops network element of unbundling requirement it had previously imposed to foster competition in providing voice services for resale to customers, where FCC took different positions over last few decades because market for voice services and relevant technology had changed dramatically, it explained how market had evolved, and it reasonably concluded that intermodal competition was now sufficient to discipline prices.

EMINENT DOMAIN - GEORGIA

Clay v. Douglasville-Douglas County Water and Sewer Authority

Court of Appeals of Georgia - October 16, 2020 - S.E.2d - 2020 WL 6111205

Property owner brought action against county water and sewer authority (WSA), seeking damages for inverse condemnation, various costs, attorney fees, penalties, and other items.

The Superior Court granted defendant's motion to dismiss, and property owner appealed.

The Court of Appeals held that:

- WSA's denial of property owner's request for a variance from its stormwater regulations constituted an administrative determination;
- WSA was a local administrative agency; and
- Property owner was required to file an application for discretionary appeal from superior court's dismissal of his action against the WSA, disapproving *Brownlow v. City of Calhoun*, 198 Ga. App. 710, 402 S.E.2d 788.

County water and sewer authority's (WSA) denial of property owner's request for a variance from its stormwater regulations constituted an "administrative determination" for purposes of the Appellate Practice Act provision governing appeals from state and local administrative agencies; the WSA simply determined that based on the size of property owner's property and the specifics of his proposed construction plans that the applicable stormwater regulations barred him from proceeding without taking corrective measures and that the WSA was not authorized to grant a variance, and as

such, the WSA's denial was based on the particulars of property owner's proposal and the decision pertained to his property alone.

County water and sewer authority (WSA) was a "local administrative agency" for purposes of the Appellate Practice Act provision governing appeals from state and local administrative agencies; the legislature established the WSA as a "public body corporate," and its powers included the power to contract with the city with respect to a water and sewage system, to include apportioning or designating the responsibility for any functions normally maintained by a water and sewerage system.

Property owner was required to file an application for discretionary appeal from superior court's dismissal of his action against county water and sewer authority (WSA), even though the action was couched as a claim for inverse condemnation; property owner challenged the WSA's decision by arguing its regulations should not have applied to his property because they had been superseded by federal and state statutory law, and property owner had been heard in two tribunals on the relevant issues, once by an administrative agency, and once by the superior court; disapproving Brownlow v. City of Calhoun, 198 Ga. App. 710, 402 S.E.2d 788.

EMPLOYMENT - LOUISIANA

Meiners v. St. Tammany Parish Fire Protection District No. 4

Supreme Court of Louisiana - October 20, 2020 - So.3d - 2020 WL 6146106 - 2020-0491 (La. 10/1/20)

Former assistant fire chief for parish fire protection district filed petition for judicial review of decision of the district's civil service board which affirmed his termination.

The District Court reversed and remanded. District sought supervisory review. The Court of Appeal denied writ. District filed application for supervisory writ, and certiorari was granted.

The Supreme Court held that district court exceeded its statutory authority in reversing civil service board's decision.

District court exceeded its authority, under statute governing court's review of decision of civil service board, in reversing decision of parish fire protection district's civil service board, which had upheld termination of assistant fire chief based on findings that assistant chief had made untruthful statements under oath, had improperly used his position to intimidate another officer, and had conducted factory reset of his district-issued cellphone, thereby destroying evidence; district court found sufficient evidence supported board's good faith in making two of the findings, but still remanded for further proceedings, and although district court did not impose different sanction in place of board's sanction, clear implication of court's judgment was that termination was excessive.

INVERSE CONDEMNATION - MISSISSIPPI

Bay Point Properties, Inc. v. Mississippi Transportation Commission

Supreme Court of Mississippi - October 29, 2020 - So.3d - 2020 WL 6334788

Landowner filed inverse condemnation proceedings against the Mississippi Transportation Commission (MTC), claiming the easement MTC had across landowner's property had terminated

and that MTC was required to pay landowner the unencumbered value of the property.

The Circuit Court entered judgment on jury verdict finding that the easement, for which MTC had paid $50,000, continued to encumber the property, but that the use by MTC was not a highway purpose and awarding landowner the encumbered value of $500.00 and no attorney fees. Landowner appealed. The Supreme Court, en banc, affirmed in part, reversed in part, and remanded for award of attorney fees. On remand, the Circuit Court awarded fees, but not in amount requested, and landowner appealed.

Trial court's decision, in making award of prevailing party attorney fees to landowner in inverse condemnation action, to place greater weight on the results obtained and to award landowner only $67,277.35 in attorney fees, costs and expenses, not the $880,171.81 that it sought for obtaining an inverse condemnation award in nominal amount of $500.00, was not unmistakable or indisputable error and could not be disturbed under a "manifest abuse of discretion" standard of review.

BALLOT INITIATIVE - TEXAS

Pool v. City of Houston

United States Court of Appeals, Fifth Circuit - October 23, 2020 - F.3d - 2020 WL 6253444

Professional petition circulators brought action challenging city charter provision, which permitted only registered voters who were city residents to circulate petitions for ballot initiatives and referenda.

The United States District Court for the Southern District of Texas sua sponte dismissed the action. Circulators appealed.

The Court of Appeals held that:

- Petition circulators alleged injury-in-fact sufficient to establish standing to challenge city charter provision, and
- Action was not rendered moot.

Professional petition circulators alleged injury-in-fact sufficient to support standing to bring action challenging city charter provision, which permitted only registered voters who were city residents to circulate petitions for ballot initiatives and referenda, as violative of their First Amendment free speech rights; circulators allegedly participated in circulation of numerous petitions in the past and intended to participate in such activity in the future, and there was reasonable threat of city's future enforcement of charter provision, in light of city's prior attempted enforcement and language on the city's petition forms.

Professional petition circulators' action challenging city charter provision, which permitted only registered voters who were city residents to circulate petitions for ballot initiatives and referenda, as violative of their First Amendment free speech rights was not rendered moot by city's placement of "editor's note" on its website indicating that city would accept petitions circulated by individuals who were not city residents and registered voters with a link to a revised petition form for nonresidents, where city council did not formally change the challenged provision or approve the nonresident petition form.

TAXPAYER STANDING - VIRGINIA

McClary v. Jenkins

Supreme Court of Virginia - October 22, 2020 - S.E.2d - 2020 WL 6192724

Taxpayers brought action for declaratory and injunctive relief against sheriff and county concerning sheriff's cooperation agreement with the federal government concerning the enforcement of federal immigration laws.

The Circuit Court dismissed the suit, and taxpayers appealed.

The Supreme Court held that taxpayers lacked standing to challenge local governmental actions concerning enforcement of federal immigration laws.

Taxpayers seeking declaratory and injunctive relief against sheriff and county concerning the enforcement of federal immigration laws failed to allege specific local costs or expenditure as required to establish standing to challenge a governmental action; taxpayers' did not make any allegations regarding a certain dollar amount or specifics concerning the appropriation of local tax revenues.

POLITICAL SUBDIVISIONS - VIRGINIA

Dumfries-Triangle Rescue Squad, Incorporated v. Board of County Supervisors of Prince William County

Supreme Court of Virginia - October 22, 2020 - S.E.2d - 2020 WL 6192378

County board brought declaratory judgment action against provider of emergency medical services, seeking determination that board had authority to dissolve provider's corporate status.

The Circuit Court entered judgment in favor of board. Provider appealed.

The Supreme Court held that:

- Provider was not "established pursuant to" statute governing emergency medical services agency, and thus county board lacked authority under such statute to dissolve provider, and
- Such statute did not grant board power by implication to dissolve provider.

Entity which provided emergency medical services to county pursuant to contract was not "established pursuant to" statute governing emergency medical services agency, and thus county board lacked authority under such statute to dissolve entity, where entity existed well prior to enactment of statute, and after board severed its contractual relationship with entity, entity continued as private, nonstock corporation.

Statute allowing a county board to dissolve an emergency medical services agency "established pursuant to" such statute did not grant board, by implication, the power to dissolve an entity which was not established pursuant to statute but which provided emergency medical services pursuant to contract with county; plain language of statute was so strong as to preclude authority by necessary implication.

UTILITY FEES - CALIFORNIA

Malott v. Summerland Sanitary District

Court of Appeal, Second District, Division 6, California - October 19, 2020 - Cal.Rptr.3d - 2020 WL 6128117 - 20 Cal. Daily Op. Serv. 10,825 - 2020 Daily Journal D.A.R. 11,217

Owner of 30-unit apartment building filed an administrative mandamus petition against sanitary district alleging it imposed an excessive wastewater disposal charge for the property without regard to the proportional cost of providing wastewater service for her property, in violation of the California Constitution.

The Superior Court dismissed the petition on the ground that owner did not exhaust her administrative remedies. Owner appealed.

The Court of Appeal held that:

- Owner was not required to exhaust administrative remedies by appearing at sanitary district's public hearing, and
- Declaration of owner's expert on utility and wastewater service rates should have been admitted.

Owner of 30-unit apartment building was not required to exhaust administrative remedies by appearing at sanitary district's public hearing before bringing action against the district for allegedly violating California Constitution by imposing excessive wastewater disposal charge for the property without regard to proportional cost of providing wastewater service, despite the fact owner elected to file an administrative mandamus petition instead of a declaratory relief action; owner's petition asked for ruling that the district's method of calculating residential rates was invalid, an appropriate type of relief in a declaratory relief action, and owner claimed she had no adequate forum at the public hearing to resolve evidentiary issues involved in a challenge to the rate structure.

Declaration of expert on utility and wastewater service rates should have been admitted by the court in proceedings on the challenge brought by owner of 30-unit apartment building to sanitary district's allegedly excessive wastewater disposal charge for the property, which district allegedly imposed without regard to proportional cost of providing wastewater service, in violation of California Constitution; expert said the district used a flawed system of determining and allocating costs for residential users, the result of which was that it was overcharging apartment buildings and undercharging single-family residences, and a trier of fact accepting expert's claims could reasonably find rate payers in apartment units were being substantially overcharged by the district.

LIABILITY - CONNECTICUT

Costanzo v. Town of Plainfield

Appellate Court of Connecticut - October 13, 2020 - A.3d - 200 Conn.App. 755 - 2020 WL 5988227

Estate of young child who drowned in swimming pool brought action to recover damages against town and town's employees, alleging, among other claims, municipal defendants failed to conduct proper inspection of pool.

Municipal defendants filed an apportionment complaint against owners of property where pool was

located and their former tenants who had pool constructed. The Superior Court sustained estate's objections to apportionment complaint and dismissed municipal defendants' complaint. Municipal defendants appealed.

The Appellate Court held that complaint alleged negligence, and not recklessness, and thus municipal defendants could seek apportionment as to negligence of other defendants.

After young child drowned in swimming pool, child's estate alleged in complaint that town's employees, and thus town, had actual notice that pool was constructed in violation of applicable laws and/or that pool constituted hazard to health or safety and failed to conduct an inspection, accordingly, the complaint's allegations were made pursuant to statutory exception to municipal immunity which required proof of actual notice, but not recklessness, and thus, complaint alleged negligence, and not recklessness, on the part of the municipal actors, and town and town's employees could therefore seek apportionment as to negligence of owners of property where pool was located and their former tenants who had pool constructed.

MUNICIPAL ORDINANCE - KANSAS

City of Wichita v. Trotter

Court of Appeals of Kansas - September 25, 2020 - P.3d - 2020 WL 5740895

Defendant was convicted in the District Court of operating a club without an entertainment-establishment license. Defendant appealed.

The Court of Appeals held that:

- License ordinance constituted a permissible prior restraint on the time, place, and manner of expression, and thus ordinance did not infringe upon defendant's free expression under the First Amendment;
- License ordinance was not unconstitutionally vague, either on its face or as applied;
- License ordinance was not an unconstitutionally overbroad infringement on First Amendment protected expression;
- Defendant lacked standing to contest ordinance's inspection requirement;
- Sufficient evidence supported finding that night club was open to the public;
- Sufficient evidence supported finding that person operating sound equipment at night club was a disc jockey (DJ);
- Prosecutor's comments in closing argument were within permissible scope of argument, thus, did not constitute prosecutorial-error;
- Prosecutor's comments in rebuttal argument were within permissible scope of argument, thus, did not constitute prosecutorial-error; and
- Trial court's response to jury's mid-deliberation question was not an abuse of discretion.
