WATER LAW - CALIFORNIA

California-American Water Company v. Marina Coast Water District

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

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

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

The Court of Appeal held that:

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

EMINENT DOMAIN - FLORIDA

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

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

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

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

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

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

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

IMMUNITY - GEORGIA

Johnson v. 3M Company

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

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

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

The Court of Appeals held that:

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

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

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

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

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

unmodifiable by the courts.

ZONING & PLANNING - GEORGIA

Carson v. Brown

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

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

Landowner then filed separate action for mandamus relief against planning director and a planner technician for the county, in their individual and official capacities, to have county's moratorium on land-disturbance permits for development at certain densities declared void and to have director and technician ordered to process land-disturbance-permit application under the iteration of the zoning code that allowed for lots of landowner's desired size.

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

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

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

EMINENT DOMAIN - INDIANA

Guzzo v. Town of St. John, Lake County

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

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

Property owners appealed, and transfer was granted.

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

The Court of Appeals held that:

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

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

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

DECLARATORY JUDGMENT - MARYLAND

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

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

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

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

The Supreme Court held that:

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

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

Preamble of county ethics code did not demonstrate any unique legislative intent on the part of the county commissioners to create an implied right of action that would permit a taxpayer to obtain a

remedy in the form of a judicial declaration invalidating a legislative enactment in circumstances in which a commissioner's vote on a legislative action violated the conflicts of interest provisions contained in the county ethics code; county ethics code was substantially the same as the model local ethics laws created by the State Ethics Commission, while preamble was the same as the language in the General Assembly's legislative findings in the Maryland Public Ethics Law, the preamble of the another county's ethics code, and the model ethics laws established by the State Ethics Commission.

POLITICAL SUBDIVISIONS - MICHIGAN

Taxpayers for Michigan Constitutional Government v. Department of Technology

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

Taxpayer organization brought action against state and state authorities to enforce the Headlee Amendment that requires certain percentage of state spending to be apportioned to local government.

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

On remand, the Court of Appeals held that:

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

EMINENT DOMAIN - NEW YORK

74 Pinehurst LLC v. New York

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

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

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

The Court of Appeals held that:

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

EMINENT DOMAIN - NEW YORK

Bowers Development, LLC v. Oneida County Industrial Development Agency

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

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

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

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

PUBLIC UTILITIES - OHIO

Corder v. Ohio Edison Company

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

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

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

The Court of Appeals held that:

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

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

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

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

PUBLIC UTILITIES - OREGON

Portland General Electric Company v. Alfalfa Solar I, LLC

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

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

The Court of Appeals held that:

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

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

Provision in purchase power agreements (PPAs) providing for a 15-year period during which a

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

WATER LAW - TEXAS

Fort Bend County v. United States Army Corps of Engineers

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

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

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

The Court of Appeals held that:

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

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

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

court could order such relief in action brought pursuant to Administrative Procedure Act (APA).

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

Issue of whether United States Army Corps of Engineers complied with Engineer Regulation (ER) when it prepared water control manual (WCM) documenting reservoir regulation plans involved fact questions that could not be resolved on motion to dismiss political subdivisions' action under Administrative Procedure Act (APA) alleging that Corps acted arbitrarily and capriciously in adopting WCM.

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

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

BONDS - ARIZONA

UMB Bank, NA v. Parkview School, Inc

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

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

The Superior Court appointed receiver. Nonprofit organization appealed.

The Court of Appeals held that:

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

did not bar appointment of receiver.

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

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

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

POLITICAL REFORM ACT - CALIFORNIA

Travis v. Brand

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

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

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

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

PUBLIC UTILITIES - FEDERAL

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

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

Protesting entities separately petitioned for review of the Federal Energy Regulatory Commission's

(FERC) orders that approved regional transmission organization's cost allocations for upgrades to transmission owner's facilities.

After consolidation, the Court of Appeals held that:

- The FERC failed to reasonably explain why a "flow-based" method called the "solution-based distribution-factor analysis" (DFAX), which assigned costs based on how much each utility used a facility over time, was permissible to be used to allocate the costs of the upgrades;
- The "de minimis" threshold used in the DFAX violated the Federal Power Act's cost-causation principle and caused undue discrimination;
- The FERC reasonably explained its decision that netting the flows to each delivery point in a zone to calculate total flow in a zone did not violate the Federal Power Act's cost-causation principle and did not cause undue discrimination;
- It was reasonable to use a model of the flow of electricity that assumed that each zone was at peak demand;
- The FERC reasonably read the tariff as requiring an appropriate substitute proxy for the DFAX method;
- Responsibility of public utility outside of transmission organization's region to pay costs associated with the upgrades ended upon termination of its power exchange transmission service, or "wheeling," agreement with transmission owner; and
- The FERC reasonably came to and adequately explained conclusion that the overall cost allocation for entities outside the transmission organization's region was not unjust or unreasonable.

MANDAMUS - GEORGIA

BCG Operations, LLC v. Town of Homer

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

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

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

The Court of Appeals held that:

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

Statute requiring plaintiff to show pecuniary loss for which compensation in damages was unavailable to enforce a private right by mandamus supported determination that grant of writ of

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

Even if trial court was mistaken in relying on statute requiring plaintiff to show pecuniary loss for which compensation in damages was unavailable to enforce a private right by mandamus to support determination that grant of writ of mandamus in favor of operator of golf course, seeking order requiring town to process and grant operator's application for distilled spirits consumption license, precluded award of monetary damages due to town's delay in issuing license, denial of monetary damages award was not erroneous, since denial was also based on alternative, independent reasoning; trial court denied award of monetary damages on basis that awarding damages in addition to mandamus would amount to an impermissible stacking of remedies.

EMPLOYMENT - ILLINOIS

Yates v. City of Chicago, Illinois

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

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

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

The Court of Appeals held that:

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

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

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

MANDAMUS - LOUISIANA

Pineville City Court v. City of Pineville

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

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

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

The Supreme Court held that:

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

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

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

CHARTER AMENDMENT - MAINE

Fair Elections Portland, Inc. v. City of Portland

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

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

The Superior Court denied petition. Voters appealed.

The Supreme Judicial Court held that:

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

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

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

PUBLIC UTILITIES - MAINE

Maine Coalition to Stop Smart Meters v. Public Utilities Commission

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

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

The Supreme Judicial Court held that:

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

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

Conclusion of Public Utilities Commission that electric utility's plan to provide solid-state meters, instead of analog meters, as alternative to smart meters for consumers concerned about potential

health effects of RF radiation emitted by smart meters would result in safe, reasonable, and adequate facilities and service was not arbitrary, unreasonable, unjust, or unlawful; there was evidence that solid-state meters emitted RF radiation at levels similar to those emitted by analog meters, and manufacturers were no longer producing analog meters.

BONDS - PENNSYLVANIA

Wilmington Trust, N.A. as Trustee of $29, 615, 000 Philadelphia Authority for Industrial Development Senior Housing Revenue Bonds v. Pavilion Apartments PENN LLC

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

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

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

COUNTIES - WYOMING

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

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

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

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

The Supreme Court held that:

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

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

Pari-Mutuel Act only granted county authority to approve, or, impliedly, to deny a corporation's request for approval for proposed pari-mutuel and simulcast operations as a condition precedent to Wyoming Gaming Commission issuing a pari-mutuel permit or authorizing the corporation to

conduct simulcasting off the permitted premises, and therefore, after Gaming Commission had issued permits and authorized simulcasting, county board of commissioners lacked express or implied authority under the Act to adopt resolution that revoked its prior approvals of simulcasting off of permitted live horse racetrack premises within county.

BALLOT INITIATIVES - CALIFORNIA

City of Oxnard v. Starr

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

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

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

The Court of Appeal held that:

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

ZONING & PLANNING - CALIFORNIA

Socal Recovery, LLC v. City of Costa Mesa

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

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

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

The Court of Appeals held that:

- Operators had standing to bring actions;
- Operators were not required to present individualized evidence of actual disability of their residents;

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

Sober living home operators had standing to bring actions alleging that city's denial of their applications for special use permits and reasonable accommodation requests violated Fair Housing Act (FHA), ADA, and California Fair Employment and Housing Act (FEHA), even though they were not disabled or "handicapped," and some residents may not have been disabled; city ordinances' requirement that sober living homes be located at least 650 feet away from any other sober living home or any state-licensed drug and alcohol treatment center prevented operators from conducting their normal business operations.

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

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

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

PREEMPTION - FLORIDA

Fried v. State

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

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

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

The Supreme Court held that:

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

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

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

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

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

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

LIABILITY - GEORGIA

City of Alpharetta v. Francis

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

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

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

The Court of Appeals held that:

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

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

to identify insurance policies under which residents sought to recover.

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

MUNICIPAL ORDINANCE - ILLINOIS

Lintzeris v. City of Chicago

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

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

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

The Supreme Court held that:

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

MUNICIPAL GOVERNANCE - MICHIGAN

Warren City Council v. Fouts

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

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

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

The Court of Appeals held that:

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

City charter permitted city council to unilaterally amend mayor's recommended budget when

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

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

IMMUNITY - NORTH CAROLINA

Devore for Horton v. Samuel

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

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

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

The Court of Appeals held that:

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

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

Limited waiver of governmental immunity for school bus negligence claims against local school boards applies only to claims brought in Industrial Commission and does not apply broadly to third-party claims asserted in court; although State may be joined in court proceedings as third-party defendant for contribution or indemnification, and Tort Claims Act provides that liability of local school boards in school bus negligence cases shall be same as tort claims against State Board of Education, statute merely explains that local school board's liability, together with other aspects of

case, shall be same as provided with respect to tort claims against State Board of Education and does not unambiguously provide that boards are considered state agency or include express statutory authorization to pursue claim outside Industrial Commission.

Local school board's excess liability insurance coverage did not waive board's governmental immunity for school bus negligence claims, under statute allowing local boards of education to waive governmental immunity from tort actions in superior courts by purchasing liability insurance; policy stated that it was not "intended by the Insured to waive its governmental immunity" and that policy provided coverage "only for occurrences or wrongful acts for which the defense of governmental immunity is clearly not applicable or for which, after the defenses are asserted, a court of competent jurisdiction determines the defense of governmental immunity not to be applicable."

PUBLIC RECORDS - PENNSYLVANIA

Auslander v. Tredyffrin/Easttown School District

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

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

Parties cross-moved for summary judgment.

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

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

DEVELOPMENT FEES - ARIZONA

Southern Arizona Home Builders Association v. Town of Marana

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

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

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

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

Town violated statute governing apportionment of "development fees to offset costs to the

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

FALSE CLAIMS ACT - CALIFORNIA

Cordoba Corporation v. City of Industry

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

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

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

The Court of Appeal held that:

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

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

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

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

and solar energy developer arising from city's discovery of allegedly fraudulent billings for solar energy project.

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

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

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

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

EMINENT DOMAIN - FLORIDA

Jamieson v. Town of Fort Myers Beach, Florida

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

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

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

The District Court of Appeal held that:

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

Act claim was time-barred.

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

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

EMINENT DOMAIN - LOUISIANA

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

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

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

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

The Court of Appeal held that:

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

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

Genuine issues of material fact as to whether design-build contractor hired by Department of Transportation and Development (DOTD) to deliver project design and construction for highway

reconfiguration acted negligently in staging project and caused unreasonable delay in construction process, as well as whether DOTD was liable for any such negligent delay, precluded summary judgment on adjacent property owner and business's general negligence action against DOTD.

ZONING & PLANNING - NEW HAMPSHIRE

Appeal of Town of Amherst

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

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

The Supreme Court held that:

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

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

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

BOND VALIDATION - OKLAHOMA

Oklahoma Turnpike Authority v. Olsen

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

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

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

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

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

> "For over 70 years, this Court construed the Legislature's grant of jurisdiction as giving the Court ***sole*** authority to determine ***all*** questions of sufficiency of the law to authorize bonds and construct turnpikes. The Court must consider the validity of the bonds, the constitutionality of the bonds, and the OTA's authority to construct and operate turnpikes. The Real Parties in Interest's claims directly impact these determinations that are within the exclusive jurisdiction of this Court as the relief sought in the district court is to prevent the OTA from using the bonds to construct the turnpike extensions."
>
> "The OTA invoked the Court's exclusive jurisdiction under § 1718 when it filed its application with this Court to validate the bonds for the turnpike expansion. And that exclusive jurisdiction makes any determination by this Court binding upon the lower court. To hold otherwise might present a conflict of jurisdictions, where this Court approves the bonds and the OTA's ability to proceed with its proposed turnpikes and the judgment by the district court bars the OTA from exercising the authority this Court authorized. Even a potential conflict of jurisdiction between the two courts should be avoided. This Court should have assumed original jurisdiction to prevent such a conflict."
>
> "This Court gained exclusive jurisdiction to consider the questions raised by the Real Parties in Interest in the Cleveland County District Court when the OTA filed its application to validate the proposed bonds. The Real Parties in Interest's claims concern the sufficiency of the law to authorize the OTA to construct the turnpike expansion even though the claim arises under the Open Meetings Act. I would have therefore granted the writ of prohibition and ordered the Cleveland County District Court to transfer the Real Parties in Interest's petition to this Court to be treated as a protest in the pending bond validation case."

SERVICE DISTRICTS - TEXAS

Walker County ESD No. 3 v. City of Huntsville

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

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

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

The Court of Appeals held that:

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

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

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

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

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

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

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

EMINENT DOMAIN - UTAH

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

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

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

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

The Court of Appeals held that:

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

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

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

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

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

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

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

EMINENT DOMAIN - VERMONT

Nesti v. Vermont Agency of Transportation

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

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

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

The Supreme Court held that:

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

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

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

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

LIABILITY - WASHINGTON

Norg v. City of Seattle

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

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

aggravated caller and husband's injuries.

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

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

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

PUBLIC UTILITIES - CALIFORNIA

Southern California Gas Company v. Public Utilities Commission

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

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

The Court of Appeal held that:

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

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

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

shareholder expenditures, they exceeded the PAO's mandate to obtain the lowest possible costs for ratepayers and its authority to compel disclosure of information necessary for that task.

ANTI-SLAPP STATUTE - CALIFORNIA

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

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

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

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

The Court of Appeal held that:

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

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

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

General rule of non-consideration of evidence newly submitted with reply papers did not preclude theme park operator from submitting new evidence, namely that reasonable attorneys could

disagree on whether theme parks could be deemed artistic works, in reply to city's response to operator's anti-SLAPP motion, in which city requested sanctions for frivolous motion practice, and thus trial court was not required to admit new evidence when operator filed it in opposition to city's subsequent noticed motion for attorney fees; city raised issue of frivolity of artistic-work argument under anti-SLAPP statute for first time in its response to anti-SLAPP motion, and trial court was to determine frivolity issue upon submission of operator's reply, tentative ruling, and oral argument.

Theme park was not "artistic work" within meaning of artistic work exception to commercial speech exemption in anti-SLAPP statute; theme park was not involved in activities similar to news or information gathering or dissemination and did not involve constitutionally protected artistic works, such that theme park was not like examples of "artistic works" provided by statute and did not fall within scope of activities discussed in statute's legislative history, and defining "artistic work" to include anything with artistic qualities would make artistic work exception so broad as to encompass almost all commercial speech.

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

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

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

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

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

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

EMINENT DOMAIN - GEORGIA

Schroeder Holdings, LLC v. Gwinnett County

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

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

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

The Court of Appeals held that:

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

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

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

MUNICIPAL ORDINANCE - KANSAS

City of Wichita v. Peterjohn

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

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

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

After the residents filed their petition and proposed ordinance, the City sued, seeking a declaration

that the ordinance concerned administrative matters that could not be raised via the initiative process.

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

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

BONDS - LOUISIANA

U. S. Securities & Exchange Commission v. Breland

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

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

Defendant asserted a series of affirmative defenses.

The District Court held that:

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

personal use constitutes an affirmative defense.
- Defendant's assertion that his criminal indictment in this matter merits a stay would be struck, as a request to stay or dismiss a matter is not an affirmative defense. Defendant could bring a separate motion for a stay.

BONDS - NORTH DAKOTA

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

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

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

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

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

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

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

IMMUNITY - VERMONT

Civetti v. Turner

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

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

The Superior Court granted motion to dismiss for failure to state cause of action, and driver appealed. The Supreme Court reversed and remanded. On remand, the Superior Court entered

summary judgment for town and commissioner on basis of qualified immunity. Driver appealed.

The Supreme Court held that:

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

Town road commissioner's decision whether to widen road surface for street on which propane truck driver got into an accident after he lost control of his vehicle, causing it to roll over and come to rest on its roof, was discretionary, rather than type of ministerial act commanded by town's road and bridge standards, as required for town and commissioner to have qualified immunity from driver's negligence claims under discretionary-function exception to waiver of sovereign immunity in the Vermont Tort Claims Act (VTCA); widening roadways was an exercise of alteration and reconstruction of preexisting infrastructure, involving weighing of considerations such as cost, safety, environmental, and aesthetic factors.

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

WATER DISTRICTS - CALIFORNIA

California-American Water Company v. Marina Coast Water District

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

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

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

The Court of Appeal held that:

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

Genuine issue of material fact as to whether public water district waived investor-owned water utility's compliance with Government Claims Act's claims presentation requirement precluded

summary judgment on that basis in utility's negligence action against water district.

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

Trial court's grant of public water district's motion for summary adjudication in investor-owned water utility's negligence action on ground that dispute resolution provision in parties' water purchase agreement did not relieve utility of its obligation to comply with Government Claims Act's claims presentation requirement on ground that agreement "was declared void" in prior action failed to comply with trial court's obligation to state its reasons for any determination made in summary judgment order; trial court had recognized in subsequent ruling that its earlier decision was wrong, and failed to address utility's argument that agreement's ab initio status did not retroactively render dispute resolution procedure in that agreement inapplicable.

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

TERM LIMITS - COLORADO

Kulmann v. Salazar

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

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

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

The Supreme Court held that:

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

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

Under plain and unambiguous terms of city charter and code, the offices of mayor and of ward councilmember were separate and distinct offices for purposes of term limitations under state constitutional provision stating that no nonjudicial elected official of any city shall serve more than two consecutive terms in office; charter and code made clear that the mayor could exercise various

powers unilaterally without involvement or consent of ward councilmembers, no such powers or responsibilities were delegated to any individual councilmember, and charter and code provisions addressed mayor and councilmembers separately with the disjunctive "or" in provisions outlining limits and requirements that applied to both offices.

BANKRUPTCY - FLORIDA

In re BVM The Bridges LLC

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

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

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

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

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

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

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

The Bankruptcy Court held that:

- The Tax Collector and Clerk of Court strictly complied with Chapter 197's notice provisions;
- The Clerk of Court properly mailed the Tax Deed Warning Notice to the Debtor;
- The Clerk of Court properly mailed the Tax Deed Warning Notice to U.S. Bank;
- The notice given by the Clerk of Court satisfied constitutional due process requirements;
- The Clerk of Court took additional reasonable steps to ensure notice;
- The Debtor had actual notice of the tax deed sale;
- U.S. Bank had actual notice of the tax deed sale;
- The Bankruptcy Court did not have the equitable power to invalidate the Tax Deed. "In essence, what CPIF asks is for this Court to create a new equitable ground for challenging a tax deed: the usage of Parcel 10 as an assisted living facility. But although the bankruptcy court is a court of

equity with broad remedial powers, its powers are not "unlimited." And CPIF has not cited any legal authority for the proposition that a bankruptcy court—or any court for that matter—may use its equitable powers to invalidate a tax deed; and
- Even if the Bankruptcy Court had authority to invalidate the Tax Deed based on the use of Parcel 10, the equities did not warrant invalidating the Tax Deed.

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

EMINENT DOMAIN - KENTUCKY

City of Cold Spring v. Campbell County Board of Education

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

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

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

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

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

PUBLIC RECORDS - NORTH CAROLINA

Matter of Custodial Law Enforcement Recording Sought by City of Greensboro

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

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

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

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

By denying city's motion to modify restrictions on city council's use and discussion of police-worn body camera videos of incident involving alleged misconduct by the police without evidence in the

record supporting finding restrictions were not a substantial impediment to city council members in discharging their duties, trial court abused its discretion, thus warranting remand for new hearing on the motion; even though nearly every party sought transparency through release of the videos, the trial court denied the city's motion without providing any analysis, explanation, or conclusions of law.

IMMUNITY - OHIO

Doe v. Greenville City Schools

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

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

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

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

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

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

IMMUNITY - TEXAS

Gulf Coast Center v. Curry

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

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

Following jury trial, the District Court entered judgment on jury's finding that agency was negligent and awarded $216,000 in damages. After the denial of its motion to reform the judgment, agency

appealed. The Houston Court of Appeals affirmed. Agency petitioned for review

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

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

MUNICIPAL CORPORATIONS - COLORADO

Brown v. Walker Commercial, Inc.

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

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

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

The Supreme Court held that:

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

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

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

IMMUNITY - GEORGIA

Johnson v. 3M Company

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

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

toxic chemicals used by local carpet manufacturers.

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

The Court of Appeals held that:

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

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

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

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

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

EMINENT DOMAIN - LOUISIANA

Saloom v. Department of Transportation and Development

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

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

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

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

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

MONUMENTS - NORTH CAROLINA

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

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

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

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

The Supreme Court held that:

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

ZONING & PLANNING - MISSOURI

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

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

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

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

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

Circuit court improperly overrode city's discretion when it entered judgment for landowners and issued writ of mandamus requiring city to issue permit, in proceeding on landowners' petition for judicial review of city's decision to deny conditional use permit to proposed purchaser for construction of convenience store and service station, despite circuit court's finding that there was evidence presented supporting finding that requirements under one subsection of city zoning code governing issuance of such permit had been met; there was no limitation that conditional use permit must issue as matter of law when evidence supported only single subsection of code, and code reserved full authority to city to deny any request for conditional use.

POLITICAL SUBDIVISIONS - MISSOURI

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

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

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

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

The Supreme Court held that:

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

Board of trustees of petroleum storage tank insurance fund was a state agency entitled to sovereign immunity from city's fraud claim arising from fund's failure to reimburse cost of installing petroleum-resistant pipe and fittings in an easement as remediation for leaking underground storage tanks from adjacent gas station, where board was designated as a "type III agency" by statute, implemented as a constitutional amendment reorganizing executive department of state

government, and was vested thereunder with authority to appoint an executive director and other employees as needed, "who shall be state employees," and board participated in state's annual budget process and was given rulemaking authority that was subject to same rulemaking procedures as other state entities.

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

Circuit court's finding on city's motion in limine that petroleum storage tank insurance fund was not an agent of the state, in city's action arising from fund's failure to reimburse costs of remediation of petroleum leaking into city easement, did not decide issue of fund's board of trustees' sovereign immunity to final judgment, and thus, law of the case doctrine did not apply to bar board from asserting sovereign immunity as defense after it was substituted for the fund on remand, because board was not a party at time of the ruling.

IMMUNITY - NORTH CAROLINA

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

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

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

The Court of Appeals affirmed. Department appealed.

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

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

Sovereign immunity barred adult care home from asserting claims under State Tort Claims Act (STCA) that Department of Health and Human Services employees were negligent in inspecting and exercising regulatory authority over home; claims rested entirely upon discretionary actions that were taken in pursuit of Department's statutory authority to regulate adult care homes, plain language of STCA precluded a finding that a state agency like Department was liable to a private party for what amounted to negligent regulation, and Administrative Procedure Act provided process

by which regulated entitles could challenge the lawfulness of and seek redress from allegedly unlawful regulatory actions; overruling *Nanny's Corner Day Care Center, Inc. v. North Carolina Department of Health and Human Services*, 264 N.C. App. 71, 825 S.E.2d 34.

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

While the public duty doctrine protects a state agency from liability based upon a failure to carry out a statutorily-created duty that is designed to protect the public at large rather than a specific individual, and operates to prevent a plaintiff from establishing duty as an element of a negligence claim, the mere fact that the doctrine does not apply with respect to a particular set of facts does not, without more, determine whether the duty of care necessary to support the assertion of a negligence claim against the state agency under the State Tort Claims Act (STCA) exists in the first place.

PUBLIC UTILITIES - OHIO

Matter of Establishing the Solar Generation Fund Rider

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

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

The Supreme Court held that:

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

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

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

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

Manufacturers' advocacy group failed to satisfy its burden of demonstrating reversible error with respect to Public Utilities Commission's extension of $242 monthly rate cap on solar-generation-fund rider to all nonresidential customers that were eligible to become self-assessing purchasers for excise tax purposes, rather than merely industrial customers eligible to become such purchasers, where group did not challenge, or even mention, Commission's reliance on a particular sentence concerning the $242 cap in statute governing collection of funds for solar-generation fund, and group made no attempt to show how its members suffered harm or prejudice.

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

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

REAL PROPERTY CONVEYANCE - OHIO

Ohio Public Works Commission v. Barnesville

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

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

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

The Supreme Court held that:

- Public policy did not preclude alienation deed restrictions;
- OPWC could pursue equitable relief as means to enforce restrictions; and

- Village violated use and development restrictions.

Public policy generally favoring alienability of real property did not preclude alienation deed restrictions imposed in connection with grants from environmental conservation fund for village's purchase of two properties as "open space" reservoir and wetlands projects; no rule, statute, or other authority supported a complete ban on transfer restrictions, disputed restrictions were sufficiently supported by public-policy purpose regarding environment and related conservation authorized by the Ohio Constitution, and restrictions were contracted for by the parties for that specific public purpose.

Ohio Public Works Commission (OPWC) could pursue equitable relief as means to enforce alienation deed restrictions imposed in connection with grants from environmental conservation fund for village's purchase of two properties as "open space" reservoir and wetlands projects; nothing in statute requiring director of OPWC to establish policies related to real property subject to an application for grant limited OPWC's remedies exclusively to liquidated damages.

Village violated use and development deed restrictions imposed in connection with grants from environmental conservation fund for village's purchase of two properties as "open space" reservoir and wetlands projects by leasing oil and gas rights without obtaining consent of the Ohio Public Works Commission (OPWC); by obtaining oil and gas rights, lessee's assignee also obtained right to use the surface of the property to gain access to oil and gas below, which was in direct contradiction to use and development restrictions that plainly prohibited any use of property that did not involve "open space with trails" and "passive recreational appurtenances," and it was of no consequence that assignee had yet to disturb property in any way.

EMPLOYMENT - ILLINOIS

Barwin v. Village of Oak Park

United States Court of Appeals, Seventh Circuit - November 22, 2022 - F.4th - 2022 WL 17100477

Former village manager brought diversity action against village, alleging village breached employment contract's duty of good faith and fair dealing through conduct that led to former manager's resignation.

The United States District Court for the Northern District of Illinois dismissed in part and subsequently granted summary judgment to village. Former manager appealed.

The Court of Appeals held that:

- Under Illinois law, even if village sought to procure former manager's resignation in order to prevent his pension from vesting, this was not a breach of employment contract's implied duty of good faith and fair dealing, and
- Genuine issue of material fact as to whether village had practice of allowing senior village employees to purchase out-of-state pension credits precluded summary judgment on former manager's claim under Illinois law that village's effective refusal of former manager's request to purchase such credits, when he resigned prior to reaching vesting threshold for pension rights, breached duty of good faith and fair dealing implied into employment contract.

Under Illinois law, even if village sought to procure at-will village manager's resignation in order to prevent manager's pension from vesting, this was not a breach of manager's employment contract's

implied duty of good faith and fair dealing, in case involving contract which provided for manager's pension rights to vest after eight years; if contract were interpreted to provide for a minimum employment term of eight years, manager would not have been an at-will employee, manager's resignation occurred two and a half years prior to pension vesting, and manager's pension contributions during employment were not rendered worthless by failure of pension rights to vest, since manager had right to request refund of contributions.

Genuine issue of material fact as to whether village had a practice of allowing senior village employees to purchase out-of-state pension credits precluded summary judgment on former village manager's claim under Illinois law that village's effective refusal of former manager's request to purchase such credits, when he resigned prior to reaching vesting threshold for pension rights, breached duty of good faith and fair dealing implied into employment contract which granted manager benefits that "are enjoyed" by other senior employees "by practice."

PUBLIC UTILITIES - MAINE

Black v. Bureau of Parks and Lands

Supreme Judicial Court of Maine - November 29, 2022 - A.3d - 2022 WL 17257088 - 2022 ME 58

State legislators, citizens, and environmental advocacy organization brought action against Bureau of Parks and Lands, and power companies challenging Bureau's lease of public reserved land to companies for construction of a high-capacity transmission line.

The Superior Court granted plaintiffs' request for declaratory judgment and reversed Bureau's decision to lease the public reserved land. Bureau and power companies appealed, and plaintiffs cross appealed. Plaintiffs moved to dismiss pending appeals as moot in light of voter initiative.

The Supreme Judicial Court held that:

- Citizens had standing to bring suit;
- Environmental advocacy organization had associational standing;
- Voter initiative retroactively imposing two-thirds majority legislative approval for lease of public lands violated Contracts Clause as to Bureau's lease to power companies;
- Under law in effect at time, Bureau was not required to conduct any public administrative process prior to granting lease; and
- Bureau's lease did not substantially alter use of public reserved lands at issue, and thus Bureau acted within its constitutional and statutory authority in granting lease.

ZONING & PLANNING - MARYLAND

Matter of Homick

Court of Special Appeals of Maryland - December 1, 2022 - A.3d - 2022 WL 17347897

Protesters petitioned for review of decision of city board of appeals approving developer's application for special exception to build new and retrofit existing buildings to create restaurant, four dwelling-unit apartments, and commercial office space, but which denied developer's request for parking variances.

The Circuit Court affirmed decision granting approval of special exception and denying request for parking variances, and remanded for board to clarify incongruity between decisions. On remand, board approved application based on amended site development plan (SDP) to comply with parking restrictions in light of denial of parking variances. Protesters again sought review, and Circuit Court affirmed. Protesters appealed.

The Court of Special Appeals held that:

- Court of Special Appeals had jurisdiction over appeal;
- Board's consideration on remand of developer's amended SDP did not impermissibly exceed scope of circuit court's remand order;
- Approval of application based on amended SDP was not inconsistent with remand order;
- Substantial evidence supported board's approval on remand of application for special exception; and
- Board's approval of application on remand was not arbitrary and capricious.

Court of Special Appeals had jurisdiction over appeal from circuit court's final judgment on judicial review of city board of appeals' grant of developer's request for special exception to build new and to retrofit existing buildings to create restaurant, four dwelling-unit apartments, and commercial office space, under statute authorizing appeal from judgment of circuit court to Court of Special Appeals when litigation involved zoning dispute.

City board of appeals' consideration on remand of developer's amended site development plan, which reduced seating capacity of proposed new restaurant in order to comply with zoning requirements for parking, did not impermissibly exceed scope of circuit court's remand "for further clarification" as to how board could grant developer's original request for special exception to construct restaurant and to retrofit existing buildings to create dwelling apartments and commercial office space, despite having denied request for variances from parking requirements; circuit court found that substantial evidence supported board's findings in support of its decisions granting zoning district boundary adjustment and denying parking variances, such that those issues could not be relitigated on remand, and order did not prohibit board from considering new facts not considered when application was first evaluated, in order to remain consistent with circuit court's order.

City board of appeals' approval of application for special exception to build and retrofit existing buildings to create restaurant, four dwelling-unit apartments, and commercial office space, based on amended site development plan (SDP) that reduced restaurant seating capacity in order to comply with parking restrictions in light of board's denial of request for parking variances, was not inconsistent with circuit court's order in which it found that board had not adequately explained how it could grant application while denying request for parking variances and remanding to board "for further clarification consistent with this ruling," despite protesters' assertion that remand order was law of case; board did not reject law of case, as it was able to point to modifications to SDP, including zoning district boundary adjustment that was previously affirmed, reduced seating capacity for restaurant, and conditions and restrictions imposed on approved special exception, all of which addressed circuit court's original concern about incongruity between approval of application despite denial of request for parking variances.

Substantial evidence supported city board of appeals' approval on remand of developer's amended application for special exception to build new and retrofit existing buildings to create restaurant, four dwelling-unit apartments, and commercial office space, which reduced proposed seating capacity of restaurant to comply with parking restrictions, following denial of request for parking variances; restaurants in zoning district had to provide parking spaces for 30% of its patronage

capacity, additional ten spaces had to be on site for apartments and commercial office space plans, developer's amended site development plan (SDP) enhanced bufferyards and reduced onsite parking spaces needed and established parking management plan, and number of parking spaces provided, used in accordance with parking management plan, provided sufficient parking for all proposed users, in compliance with city code parking restrictions, without need for parking variances.

City board of appeals' approval on remand of developer's application for special exception to build new and retrofit existing buildings to create restaurant, four dwelling-unit apartments, and commercial office space, based on amended site development plan (SDP) that reduced seating capacity of restaurant and parking management plan in order to comply with code parking restrictions in light of denial of request for parking variances, was not arbitrary and capricious, despite protesters' assertion that board did not comply with requirement of one-year wait period for resubmission of application after initial denial, where board approved original application, subject to conditions, circuit court affirmed approval and denial of parking variances but remanded for board to clarify incongruity between grant of application and denial of parking variances, and amended application addressed circuit court's concerns and complied with parking restrictions.

BONDS - MICHIGAN

Jackson v. Mayor of Detroit

Court of Appeals of Michigan - September 29, 2022 - Not Reported in N.W. Rptr. - 2022 WL 4586567

Citizen plaintiff led a group of concerned Detroit residents in sounding the alarm about the city's issuance of bonds without proper notification and authorization. Specifically, the plaintiffs contended that Detroit issued bonds beyond the city's borrowing limit and kept residents uninformed about the city's bonding efforts.

The trial court, on summary disposition, carefully considered the plaintiffs' arguments and concluded that all of the defendants (the Mayor of Detroit, the Detroit City Council Members, and Detroit Chief Financial Officer John Naglick (collectively Detroit)) were entitled to prevail because the bonds were issued before plaintiffs filed suit.

Plaintiffs appealed.

The Court of Appeals hold that:

- Under the preclusive doctrine discussed in *Bigger v Pontiac*, 390 Mich 1; 210 NW2d 1 (1973), and *Sessa v Macomb Co*, 220 Mich App 279; 559 NW2d 70 (1996), the issuance of bonds stops challenges in their tracks because no meaningful remedy can be provided without harming bond-holders. Thus, the court was bound to apply that preclusive doctrine to end the lawsuit; and
- Detroit did not issue bonds in excess of the debt limit imposed by MCL 117.4a(2).

EMINENT DOMAIN - OHIO

State Ex Rel. Ohio History Connection v. Moundbuilders Country Club Company

Supreme Court of Ohio - December 7, 2022 - N.E.3d - 2022 WL 17479895 - 2022-Ohio-4345

State-funded lessor of land containing prehistoric earthworks petitioned to appropriate a leasehold estate for creation of public park, and lessee counterclaimed for breach of lease/contract.

The Court of Common Pleas entered a decision and order granting lessor's petition to appropriate, and dismissing lessee's counterclaims. Lessee appealed. The Court of Appeals affirmed. Lessee sought discretionary review.

The Supreme Court held that:

- Objective standard governed question whether lessor provided written good-faith offer to purchase lessee's interest;
- Lessor complied with requirement that it provide written good-faith offer; and
- Lessee failed to rebut presumption that creation of public park constituted public use and that taking was necessary for such use.

Whether state-funded lessor of land containing prehistoric earthworks complied with requirement that it provide lessee a written good-faith offer to purchase lessee's interest before commencing appropriation action was governed by objective standard, inquiring whether lessor acted reasonably under the circumstances in addition to considering whether it acted honestly, which was consistent with dictionary definitions of "good faith" and "bad faith."

State-funded lessor of land containing prehistoric earthworks complied with requirement that it provide a written good-faith offer before commencing appropriation action by hiring two real-estate appraisal companies and submitting to lessee a written offer to purchase lessee's interest for amount not less than the highest quoted value, even though offer was based on misunderstanding on part of lessor's executive director with regard to what quoted value actually represented; it was not objectively unreasonable to obtain two appraisals, lessee made no claim that either appraiser was unqualified or untruthful, and no complex legal issue would have been reasonably apparent to director, since attorney ordered appraisals, and appraisers were told to provide value of leasehold interest.

Lessee of land containing prehistoric earthworks failed to rebut presumption that state-funded lessor's planned creation of public park constituted a public use and that taking of lessee's interest was necessary for such use; lessee's contention that government would not adequately preserve the site and that government merely wanted site to acquire international recognition called for speculation and artificially narrowed lessor's purpose, and decision to create public park on land at issue did not arbitrarily single out a parcel for different, less favorable treatment than neighboring ones, but instead park would help preserve and ensure perpetual public access to one of the most significant landmarks in Ohio.

PUBLIC UTILITIES - VERMONT

Otter Creek Solar LLC v. Vermont Agency of Natural Resources

Supreme Court of Vermont - December 2, 2022 - A.3d - 2022 WL 17366190 - 2022 VT 60

Developer of solar electric generation facility and the owner of the project site filed complaint for

declaratory and injunctive relief against the Vermont Agency of Natural Resources (ANR), seeking ruling that two guidance documents and a plant-classification system created by ANR were unlawful and therefore could not be relied upon by ANR or the Public Utilities Commission (PUC) in determining whether to issue a certificate of public good for a proposed electric generation facility.

The Superior Court granted ANR's motion to dismiss for failure to state a claim. Developer and owner appealed.

The Supreme Court held that:

- One-year statute of limitations under Vermont Administrative Procedure Act (VAPA) applied to the action, even if plaintiffs were also challenging ANR's entire "rare" plant regulatory scheme outside of endangered-species law, and
- Specific and limited procedure provided in VAPA for challenging agency rules through declaratory-judgment action applied notwithstanding plaintiffs' assertion of a general common-law right to enjoin unlawful state action that adversely impacted them.

One-year statute of limitations under Vermont Administrative Procedure Act (VAPA) for declaratory-judgment actions challenging agency rules applied to declaratory-judgment action brought by developer of solar electric generation facility and owner of project site against Agency of Natural Resources (ANR), challenging validity of ANR's alleged de facto rules consisting of two guidance documents and a plant-classification system that were used in determining whether to issue certificate of public good for proposed facility, even if developer and owner were also challenging ANR's entire "rare" plant regulatory scheme outside of endangered-species law; VAPA provision allowing court to "fashion appropriate relief" did not allow a challenge to agency policy more than a year after it was issued.

Specific and limited procedure provided in Vermont Administrative Procedure Act (VAPA) for challenging agency rules through declaratory-judgment action, including VAPA's one-year limitation period for such actions, governed declaratory-judgment action brought by developer of solar electric generation facility and owner of project site against Agency of Natural Resources (ANR) challenging validity of alleged de facto rules created by ANR, notwithstanding developer and owner's contention that they had general common-law right to enjoin unlawful state action that adversely impacted them; declaratory-judgment vehicle could not be used to frustrate specific procedure provided by legislative for challenging administrative rule.

ZONING & PLANNING - CALIFORNIA

Save Lafayette v. City of Lafayette

Court of Appeal, First District, Division 3, California - November 30, 2022 - Cal.Rptr.3d - 2022 WL 17336106

City residents petitioned for writ of mandate alleging that apartment development project approved by city conflicted with city's general plan and zoning requirements, environmental impact report (EIR) was inadequate, and supplemental EIR was required.

The Superior Court denied petition. Residents appealed.

As matter of apparent first impression, the Court of Appeal held that under Housing Accountability Act, city's general plan and zoning standards in effect when original application was deemed complete applied.

Under Housing Accountability Act, city's general plan and zoning standards in effect when original apartment development application was deemed complete applied to variant of original application, as opposed to standards in effect when applicant terminated process agreement that had suspended original application for consideration of alternative project and asked city to resume processing variant of its original application, although there was lengthy delay between certification of environmental impact report and project approval that was outside time limits of Permit Streamlining Act; consequence under Permit Streamlining Act of any failure by city to act was project being deemed approved, not disapproved, and applicant's request to resume processing did not serve as resubmittal.

EMINENT DOMAIN - CALIFORNIA

Gearing v. City of Half Moon Bay

United States Court of Appeals, Ninth Circuit - December 8, 2022 - F.4th - 2022 WL 17492266

Landowners brought § 1983 action against city, alleging a regulatory taking and related claims.

City moved for federal court to abstain pending resolution of state-court eminent domain action, which the United States District Court for the Northern District of California granted. Landowners appealed.

The Court of Appeals held that:

- Even if Pullman abstention was prohibited when it would create effective exhaustion requirement for a takings plaintiff, abstention from instant action would not subject landowners to such a requirement;
- Landowners' action touched on sensitive area of social policy, supporting determination that Pullman abstention was appropriate;
- Constitutional question in federal action could be mooted or narrowed by a definitive ruling on state law issues, supporting determination that Pullman abstention was appropriate; and
- Federal action involved unclear question of state law, supporting determination that Pullman abstention was appropriate.

Even if *Pullman* abstention was prohibited when it would create effective exhaustion requirement for a takings plaintiff, abstention from landowners' § 1983 action against city, alleging a regulatory taking and related claims, would not subject landowners to effective exhaustion requirement, supporting district court's determination that *Pullman* abstention was appropriate pending resolution of city's state-court eminent domain action against landowners; state court could adjudicate the eminent domain action without reaching the regulatory taking issue because eminent domain and regulatory takings suits compensated a property owner for different injuries, and landowners had made express reservation in state court to prevent ruling on federal issues.

Landowners' § 1983 action against city, alleging a regulatory taking and related claims, touched on sensitive area of social policy, supporting district court's determination that Pullman abstention was appropriate pending resolution of city's state-court eminent domain action against landowners, where landowners' federal claim arose from city's denial of building proposal pursuant to city land use plan.

Constitutional question in landowners' federal action, a § 1983 claim alleging a regulatory taking

arising from city's denial of building proposal pursuant to city land use plan, could be mooted or narrowed by a definitive ruling on state law issues, supporting district court's determination that Pullman abstention was appropriate pending resolution of city's state-court eminent domain action against landowners; state action would require court to interpret sections of land use plan which were relevant to federal action, because such interpretation would be required for determination of properties' fair market values.

Landowners' § 1983 claim alleging a regulatory taking arising from city's denial of building proposal pursuant to city land use plan involved an unclear question of state law, supporting district court's determination that Pullman abstention was appropriate pending resolution of city's state-court eminent domain action against landowners; case involved interaction between land use plan and state senate bill prohibiting the rejection of certain affordable-housing proposals, and senate bill had not yet been interpreted by any state courts.

EMINENT DOMAIN - MICHIGAN

Mount Clemens Recreational Bowl, Inc. v. Director of Department of Health and Human Services

Court of Appeals of Michigan - November 17, 2022 - N.W.2d - 2022 WL 17070755

Owners of restaurants, bars and banquet halls brought purported class action against the Governor, Director of Health and Human Services, and Chairperson of the Liquor Control Commission, seeking just compensation for their alleged regulatory taking by promulgating executive orders and regulations in response to the COVID-19 pandemic.

The Court of Claims denied owners' motion to transfer venue and granted defendants' motion for summary disposition. Owners appealed.

The Court of Appeals held that:

- Owners could not pursue their action in a circuit court by a jury under Court of Claims Act;
- Owners failed to state a claim for regulatory taking under Penn Central; and
- Governor did not engage in ultra vires conduct, as required for owners' claims to avoid governmental immunity.

Action brought by owners of restaurants, bars, and banquet halls against the Governor, Director of Health and Human Services, and Chairperson of the Liquor Control Commission, seeking just compensation for an alleged regulatory taking through executive orders promulgated during the COVID-19 pandemic, was against the State, and thus, owners had no right to jury under Court of Claims Act, where owners sued the Governor, Director, and Chairperson in their official capacities.

In their action seeking just compensation for an alleged regulatory taking through executive orders promulgated during the COVID-19 pandemic, owners of restaurants, bars and banquet halls could not pursue their action against the State by a jury in the circuit court under the Court of Claims Act; owners' complaint made clear that they were seeking money damages under state constitution, and their claims were not brought under Uniform Condemnation Procedures Act (UCPA), as would allow them to demand a jury trial, because they did not allege that the State acquired their property.

Owners of restaurants, bars and banquet halls failed to state a claim that governor's executive orders that closed and imposed restrictions on their businesses during the COVID-19 pandemic

constituted a regulatory taking under Penn Central, as required for owners to be entitled to just compensation under state constitution; even though owners alleged that regulations and executive orders at-issue were not actually warranted, they emphatically argued government's purpose in making restrictive regulations was not pertinent to a regulatory-takings analysis under Penn Central, stating that whether orders were "arbitrary, invalid exercises of police power" was ultimately irrelevant to regulatory taking analysis, and they did not argue that the executive orders at-issuer were imprudent.

Governor did not engage in ultra vires conduct by promulgating executive orders that closed and imposed restrictions on owners' restaurants, bars and banquet halls during the COVID-19 pandemic, as required for owners' tort claims for interference with business and contractual relationships to avoid governmental immunity; Governor was clearly acting, at the very least, under implied authority under the Emergency Powers of the Governor Act of 1945, even if the Supreme Court had ruled against that authority.

LIABILITY - MISSISSIPPI

Simmons as Estate of Simmons v. Jackson County

Court of Appeals of Mississippi - November 22, 2022 - So.3d - 2022 WL 17099959

Wife of deceased motorist, as administratrix of motorist's estate, brought action pursuant to the Mississippi Tort Claims Act (MTCA) against county, county's road manager, and construction company hired to repave the road just prior to motorist's death.

Following a bench trial, the Circuit Court held that the county bore no liability for motorist's death. Wife appealed.

The Court of Appeals held that sufficient evidence supported trial court's finding that deceased motorist's own negligence constituted the sole proximate cause of his accident.

Sufficient evidence supported trial court's finding that deceased motorist's own negligence, in failing to exercise vigilant caution or to reduce his speed as he drove down road under construction, constituted sole proximate cause of accident, in which motorist ran off road due to alleged defect in roadway, in negligence action brought by deceased motorist's wife, as administratrix of motorist's estate, pursuant to Mississippi Tort Claims Act (MTCA) against county, county's road manager, and construction company hired to repave road just prior to motorist's death; witness testified that motorist seemed to be driving fast, edges of pavement were visible with vehicle headlights, and witnesses' knowledge of the road conditions existing at time of accident attested to need for vigilant caution.

EMPLOYMENT - NEW JERSEY

Matter of DiGuglielmo

Supreme Court of New Jersey - November 28, 2022 - A.3d - 2022 WL 17246816

Employer, a state university, sought review of Public Employment Relations Commission's (PERC) determination that former employee, a campus police officer, was eligible to challenge his termination for alleged non-criminal misconduct through special disciplinary arbitration.

The Superior Court, Appellate Division affirmed in part and reversed in part. Employee petitioned for certification, which was granted.

The Supreme Court held that:

- Special disciplinary arbitration is not limited to non-civil service municipal police officers, and
- An officer suspended with pay prior to termination is eligible to engage in special disciplinary arbitration.

Special disciplinary arbitration is not limited to non-civil service municipal police officers but rather includes non-municipal officers like campus police officers at a public university.

A municipal or public university police officer who is suspended with pay prior to termination is eligible to engage in special disciplinary arbitration.

ZONING & PLANNING - OHIO

Willow Grove, Ltd. v. Olmsted Township Board of Zoning Appeals

Supreme Court of Ohio - December 9, 2022 - N.E.3d - 2022 WL 17542590 - 2022-Ohio-4364

Developer sought judicial review of decision by township's board of zoning appeals denying its application for a zoning certificate allowing it to construct single-family townhomes on a single parcel of land, due in part to developer's failure to comply with zoning resolution's off-street parking requirements.

The Court of Common Pleas affirmed in part, reversed in part, and remanded with instructions to issue zoning certificate. Both sides appealed. The Eighth District Court of Appeals affirmed in part, reversed in part, and remanded to the trial court. Developer's petition for discretionary review was accepted.

The Supreme Court held that column headings in schedule for zoning resolution regulating number of off-street parking spaces had to be read substantively and could not be read as mere guidepost.

Column heading entitled "Principal Building or Use" in schedule for township zoning resolution regulating number of off-street parking spaces "for each facility or use," which consisted of a column setting forth number of spaces of off-street parking for each principal building or use identified in a second column, served as more than a guidepost, but rather, provided details of a law, and thus, it had to read substantively to limit schedule's application to principal buildings or uses, because the heading used specific terminology, namely, "principal use," that was defined within the resolution, which gave the term legal significance.

ZONING & PLANNING - OREGON

Urban Renewal Commission v. Williams

Court of Appeals of Oregon - November 16, 2022 - P.3d - 322 Or.App. 615 - 2022 WL 16960508

Urban renewal agency, which operated under urban renewal plan approved by city, brought action against city and an individual proponent of amendment to city's charter that restricted urban

renewal activities within the city, seeking declaratory judgment that amendment was unconstitutional under Oregon Constitution and that amendment was preempted by state law.

On cross-motions for summary judgment, the Circuit Court granted proponent's motion on agency's claim that amendment was unconstitutional, and granted agency's motion on its claim that amendment was preempted. Proponent appealed, and agency and city, which aligned with agency, cross-appealed.

The Court of Appeals held that:

- Agency was independent from city, and, thus, was not subject to direct regulation by city;
- Amendment to city's charter was preempted by chapter of state statutes governing urban renewal;
- Section governing prospective urban renewal plans in amendment was not severable from amendment;
- City's home rule authority did not prevent preemption of amendment; and
- Chapter of state statutes governing urban renewal was a general law addressed primarily to substantive social, economic, and regulatory objectives of the state, and, thus, city's home rule authority did not prevent preemption of amendment.

Urban renewal agency was independent from city, and, thus, was not subject to direct regulation by city, except through powers reserved to city under state's urban renewal statutes; relevant statutes emphasized separateness of agency from city, agency had power to sue and be sued, to contract, to make rules and regulations, to acquire and dispose of real property, and to acquire funds and incur indebtedness, agency was created for city, not by city, actions of agency were independent of city, agency could amend its plans without approval from city, and agency had power to operate outside of territorial boundaries of city.

Amendment to city's charter restricting urban renewal within city was preempted by chapter of state statutes governing urban renewal; amendment purported to direct actions of urban renewal agency created for city, agency was separate entity from city under statutes, agency was statutorily required to carry out approved urban renewal plan and was authorized by statute to acquire funds to carry out urban renewal plans, amendment was passed long after city declared need for urban renewal agency and approved urban renewal plan for agency to carry out, and amendment placed direct prohibitions on city and agency regarding financing and property acquisition for that renewal plan, such that amendment and statutes could not operate concurrently.

Section governing prospective urban renewal plans, in amendment to city's charter restricting urban renewal plans, was not severable from section of amendment that was expressly preempted by chapter of state statutes governing urban renewal; nothing in amendment suggested that it was an effort to shape future approval of urban renewal plans not yet in effect, and section at issue explicitly sought to direct current actions of city and urban renewal agency.

City's home rule authority did not prevent preemption of amendment to city's charter restricting urban renewal in city by state statutes governing urban renewal; urban renewal agency, which was created for city, was not an agency of the city, but, rather, was a public corporation created by statute that was independent of the city.

Chapter of state statutes governing urban renewal was a general law addressed primarily to substantive social, economic, and regulatory objectives of the state, and, thus, city's home rule authority did not prevent preemption of amendment to city's charter restricting urban renewal in city by those statutes; statutes were primarily concerned with combatting perceived detrimental social and economic effects of allowing blighted urban areas to persist, statutes were directed at

statewide concerns, accomplished through creation of independent urban renewal agencies without changes to political form of local government, and statutes were not irreconcilable with local community's freedom to choose its own political form

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INDEMNIFICATION - PENNSYLVANIA

McGuire on behalf of Neidig v. City of Pittsburgh

Supreme Court of Pennsylvania - November 23, 2022 - A.3d - 2022 WL 17170459

Judgment creditor, as assignee of judgment debtor's right, if any, to indemnification from city as a police officer, filed an action against city for declaratory judgment, alleging that city failed to comply with its alleged obligation to indemnify judgment debtor following a federal district court judgment that was entered against judgment debtor, in his individual capacity as a police officer, in favor of judgment creditor, who was an arrestee.

Following a jury trial, the Court of Common Pleas denied the parties' post-trial motions and entered judgment on the jury verdict in favor of city. Judgment creditor appealed. The Commonwealth Court affirmed. Judgment creditor petitioned for allowance of appeal, which was granted.

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

- Restatement (Second) of Agency section setting forth "scope of employment" test would be adopted to determine if public employee's conduct fell within "scope of office or duties" under indemnity provision of Political Subdivision Tort Claims Act (PSTCA), and
- Determination that officer acted "under color of state law," for purposes of § 1983, did not establish that he acted "within the scope of his office or employment," for purposes of the PSTCA.

Restatement (Second) of Agency section, providing that employee's conduct falls within the "scope of his employment," for purpose of common law vicarious liability, if it is of the kind he is employed to perform, it occurs substantially within the authorized time and space limits, it is actuated, at least in part, by a purpose to serve the employer, and if force is intentionally used by employee against another, the use of force is not unexpected by the employer, would be adopted in determining whether public employee's conduct fell within his "scope of office or duties" under indemnity provision of the Political Subdivision Tort Claims Act (PSTCA).

Determination that a police officer acted "under color of state law," for purposes of § 1983 liability, did not establish that officer acted "within the scope of his office or employment," for purposes of indemnity provision of the Political Subdivision Tort Claims Act (PSTCA); the two phrases involved different inquiries and were not synonymous, as officer could act under color of state law without necessarily acting with the scope of his employment.

PUBLIC ROADWAYS - RHODE ISLAND

Davis v. Town of Exeter

Supreme Court of Rhode Island - December 1, 2022 - A.3d - 2022 WL 17347388

Property owner brought action against town, seeking declaratory and injunctive relief in dispute over whether unimproved land between cul-de-sac at terminus of a road leading to a subdivision and his property was a public road which he had right to use to access his land.

The Superior Court entered summary judgment for town. Owner appealed.

The Supreme Court held that:

- Unimproved property was not intended to be a public roadway;
- Town did not accept the unimproved property for public use;
- Unimproved property was not accepted as a roadway by a public user; and
- Futility exception to administrative exhaustion requirement did not apply.

Record demonstrated that subdivision developer intended unimproved property between end of cul-de-sac at termination of an improved, paved road to subdivision and owner's property line to be designated a paper street, not dedicated as a public roadway, at time the improved road was developed, for purposes of owner's action seeking injunctive relief to prevent town from denying his use of the improved road for development applications and from blocking road so it could not be used to access his property; paved road and cul-de-sac were designated on official map with double lines while the unimproved area after the cul-de-sac was designed with only a single solid line, and minutes of planning board meeting indicated that town and developer intended the public roadway to extend to the cul-de-sac and no further.

There was no clear and convincing evidence that town accepted undeveloped land between end of cul-de-sac at termination of improved, paved road leading to a subdivision and owner's property line for public use, as would support owner's claim for injunctive relief to prevent town from denying his use of the improved road for development applications and from blocking the road so it could not be used to access his property, where subdivision developer never performed any construction or clearing of the land beyond the cul-de-sac, and town had never opened, certified, or accepted the land for public use, nor did it ever maintain the land.

Undeveloped land between end of cul-de-sac at termination of improved, paved road leading to a subdivision and owner's property line was not accepted as a roadway by a public user, as would support owner's argument that the land was a public roadway that he had right to use for development applications and to access his property, where property in dispute had been inaccessible to vehicular access since inception of the subdivision and had been covered by vegetation and trees until owner's unauthorized excavation.

Property owner failed to show that town planning board's refusal of road opening permit would be near certainty, and thus, futility exception to exhaustion of administrative remedies requirement did not apply in action alleging that paper street, an undeveloped land between cul-de-sac at terminus of a paved road leading to a subdivision and his property was a public roadway which he could use for development applications and as access to his land, where owner failed to follow procedures for a paper street to be certified as a public road and accepted by the town.

IMMUNITY - TEXAS

City of Houston v. Gilbert

Court of Appeals of Texas, Houston (14th Dist.) - November 10, 2022 - S.W.3d - 2022 WL 16842193

Relatives of two minors who suffered electrocution injuries at city-owned park when one minor made physical contact with electrical box brought action against city, sports organization minors were involved in, and other defendants, alleging negligent activity, premises liability, negligence,

negligence per se, and gross negligence.

The District Court denied city's plea to the jurisdiction. City appealed.

The Court of Appeals held that:

- Claims by relatives were premises liability claims as a matter of law;
- Fact issue existed as to whether city-owned park was reserved for sports organization on particular day of incident;
- Relative of minor who made physical contact with electrical box was licensee as a matter of law;
- City did not have actual knowledge that metal cover of electrical box had become energized prior to injuries;
- City did not have actual, subjective awareness that electrical box had become energized and chose to do nothing; and
- Fact issue existed as to trial court's jurisdiction over minor child's premises defect claim against city.

City did not have actual, subjective awareness that electrical box with metal cover had become energized and chose to do nothing and, thus, city was entitled to immunity-based plea to the jurisdiction in premises liability action brought by step-grandfather of minor child who was injured when she made physical contact with electrical box at city-owned softball field; city was not aware that metal cover had, against all probability, become energized, city was not working with electrical box at or near time of incident, city had no records of working on box in years leading up to incident, and nothing indicated that a person had ever been electrocuted by any one of hundreds of electrical box covers at city parks at any time prior to incident.

LABOR - WASHINGTON

Washington State Council of County and City Employees v. City of Spokane

Supreme Court of Washington, En Banc - December 8, 2022 - P.3d - 2022 WL 17491849

Union brought action seeking declaratory judgment that city ordinance requiring all collective bargaining between city and union representatives be conducted in manner that was open to the public was preempted by state law and therefore unconstitutional.

The Superior Court granted summary judgment in favor of union. City appealed and case was transferred to the Supreme Court which granted direct review.

The Supreme Court held that:

- Union's challenge presented justiciable controversy under Uniform Declaratory Judgments Act (UDJA);
- Ordinance was conflict preempted; and
- Ordinance was field preempted.

Union's challenge to city ordinance requiring all collective bargaining between city and union representatives be conducted in manner that was open to the public as preempted by state law and therefore unconstitutional presented justiciable controversy under Uniform Declaratory Judgments Act (UDJA); city's ultimate acquiescence to union's demands to conduct negotiations in private did not render challenge speculative, given mandatory language in ordinance and city's repeated assertions during preliminary negotiations that it needed to follow ordinance, which significantly

slowed down negotiations, ordinance applied to all unions that negotiated with city, and judicial determination would resolve dispute.

City ordinance requiring all collective bargaining between city and union representatives be conducted in manner that was open to the public was conflict preempted by Public Employees' Collective Bargaining Act (PECBA); setting mandatory ground rules before negotiations occurred directly conflicted with negotiation process prescribed in PECBA, and possible harmful effects from opening bargaining to public observation, including inhibiting open exchange in negotiations, setting discordant tone, encouraging posturing for the record, and politicizing bargaining process, would conflict with purpose of PECBA to improve relationships between public employers and employees.

City ordinance requiring all collective bargaining between city and union representatives be conducted in manner that was open to the public was field preempted by Public Employees' Collective Bargaining Act (PECBA); uniformity in rules for collective bargaining was central to purpose of PECBA, and a patchwork system of rules by local governments was inconsistent with that intention.

IMMUNITY - CALIFORNIA

Holt v. Brock

Court of Appeal, Third District, California - November 21, 2022 - Cal.Rptr.3d - 2022 WL 17087787

Part owner of real property that was subject to partition action brought action against real estate broker that was appointed by court in partition action to determine listing price and sell property, alleging that broker violated fiduciary duties and committed other torts in the performance of his court-appointed role.

The Superior Court granted summary judgment in favor of broker, concluding that he was protected under quasi-judicial immunity. Part owner appealed.

The Court of Appeal held that:

- Trial court acted within its discretion in granting summary judgment despite broker's procedural violations of rule governing summary judgment motions, and
- As matter of first impression, broker was entitled to quasi-judicial immunity.

Trial court acted within its discretion in granting summary judgment despite real estate broker's procedural violations of rule governing summary judgment motions by failing to identify quasi-judicial immunity as affirmative defense in notice of motion and separate statement of undisputed material facts, in action by part owner of real property that was subject to partition action in which broker had been appointed to determine listing price and sell property alleging broker violated fiduciary duties and committed other torts in his court-appointed role; owner did not raise procedural issue before the trial court, owner argued against affirmative defense on its merits, trial court ruled on the defense, and owner did not show how procedural defect impaired his ability to oppose the defense.

Real estate broker, who was appointed by court in partition action to determine listing price and sell real property, was entitled to quasi-judicial immunity in subsequent action by part owner of property alleging broker violated fiduciary duties and committed other torts in court-appointed role; broker was appointed to exercise discretionary judgment in serving function integral to partition action and

as arm of the court, as the court set broker's commission rate, broker was authorized to adjust listing terms upon court order and without parties' stipulation, broker was required to report marketing activities to court and parties on monthly basis, and final approval of any sale negotiated by broker rested with the court, and public policy reasons also justified extending immunity to broker.

EDUCATION - CALIFORNIA

Let Them Choose v. San Diego Unified School District

Court of Appeal, Fourth District, Division 1, California - November 22, 2022 - Cal.Rptr.3d - 2022 WL 17101508

Nonprofit public benefit corporation representing students' parents and student's parents filed actions and petitions for writ of mandate challenging school district's requirement that students ages 16 or older be vaccinated for COVID-19 in order to attend in-person classes and participate in sports and other extracurricular activities.

After cases were consolidated for trial, the Superior Court entered judgment in plaintiffs' favor, and district appealed.

The Court of Appeal held that:

- District's vaccine mandate conflicted with, and thus was preempted by, state statute;
- Legislature fully occupied field of compulsory student vaccination; and
- Education Code provision requiring school districts to cooperate with local health officers in preventing communicable diseases did not authorize vaccination mandate.

School district's requirement that students ages 16 or older be vaccinated for COVID-19 in order to attend in-person classes and participate in sports and other extracurricular activities conflicted with, and thus was preempted by, state statute prohibiting school districts from unconditionally admitting students unless they were fully immunized against enumerated diseases.

Legislature fully occupied field of compulsory student vaccination, thus preempting school district's requirement that students ages 16 or older be vaccinated for COVID-19 in order to attend in-person classes and participate in sports and other extracurricular activities; legislature historically regulated student vaccination, legislature had covered matter fully and completely, defining the who, what, when, and where of compulsory student vaccination, legislature contemplated new vaccine mandates in future without further legislative action—but assigned that responsibility not to school authorities, but rather to Department of Public Health (DPH), and local authorities had no decision-making authority regarding who could administer vaccines.

Education Code provision requiring school districts to cooperate with local health officers in preventing communicable diseases and to use its funds and personnel "to administer an immunizing agent to a pupil" whose parent had consented did not authorize local school district to mandate that students ages 16 or older be vaccinated for COVID-19 in order to attend in-person classes and participate in sports and other extracurricular activities.

FALSE CLAIMS ACT - CALIFORNIA

JPMorgan Chase Bank, N.A. v. Superior Court of City and County of San Francisco

Court of Appeal, First District, Division 4, California - November 18, 2022 - Cal.Rptr.3d - 2022 WL 17076589

Plaintiff filed qui tam action alleging that two banks violated the California False Claims Act (FCA) by failing to report and deliver millions of dollars owed on unclaimed cashier's checks to the State of California as escheated property.

The Superior Court denied banks' demurrers to the complaint. Banks filed separate petitions for writs of mandate, which were consolidated.

The Court of Appeal held that:

- In a matter of apparent first impression, prior notice from State Controller to banks was not prerequisite to filing of qui tam action under FCA predicated on violation of California Unclaimed Property Law (UPL);
- Plaintiff stated plausible claims against banks under the California FCA predicated on violations of California's UCL; and
- Banks would not be deprived of due process by judgments against them in the FCA action.

Prior notice from the California State Controller to banks, as alleged holders of funds subject to escheat, was not prerequisite to filing of qui tam California False Claims Act (FCA) action against banks predicated on the failure to report and deliver escheated property in the form of unclaimed cashier's checks in violation of the California Unclaimed Property Law (UPL).

Plaintiff plausibly asserted that two banks were obligated to report and deliver to California money owed on uncashed cashier's checks, as required to state qui tam claims against banks for violation of the California False Claims Act (FCA) predicated on violations of California's Unclaimed Property Law (UCL), based on allegations that cashier's checks were "written instruments" similar to money orders, that the checks were purchased in California, that the checks were uncashed, and that they were made payable to payees with last known addresses in California, so that they escheated to California.

Banks would not be deprived of due process by escheat judgment against them in qui tam action alleging that two banks violated the California False Claims Act (FCA) by failing to report and deliver millions of dollars owed on unclaimed cashier's checks to the State of California as escheated property, even if banks were not protected from competing escheat claims by other states to the same funds, absent showing that any other states had asserted claims or obtained judgments for the money owed on the uncashed cashier's checks.

INVERSE CONDEMNATION - GEORGIA

City of Lawrenceville v. Alford

Court of Appeals of Georgia - November 22, 2022 - S.E.2d - 2022 WL 17099947

Property owner brought negligence action against city relating to storm-water runoff on her property.

After a jury trial, the Superior Court awarded owner $425,000 in damages plus $8,742.86 in

litigation expenses. City appealed.

The Court of Appeals held that:

- Issue of whether special damages occurred during six-month period prior to owner giving ante litem notice to city as required under municipal corporation statute governing demand prerequisite was for jury;
- Issue of whether city engaged in bad faith conduct with respect to creek project as would support award of statutory litigation expenses was for jury;
- Trial court did not abuse its discretion in determining that evidence regarding conditions on property owner's property leading up to city's creek project, and the cause of those conditions, was relevant, more probative than prejudicial, and admissible at trial; and
- Trial court's error, if any, in admitting evidence that city trespassed on property owner's property during prior project was harmless.

EMINENT DOMAIN - INDIANA

Lake Ridge School Corporation v. Holcomb

Court of Appeals of Indiana - November 9, 2022 - N.E.3d - 2022 WL 16827671

School corporations sued the Governor, Attorney General, State Board of Education, and Department of Education, alleging that statutes requiring school corporations to sell or lease unused properties to charter schools or state educational institutions for $1 violated taking clauses of Fifth Amendment and state constitution and seeking declaratory and injunctive relief.

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

The Court of Appeals held that school corporations could not assert takings claims against State.

School corporations could not sue Governor, Attorney General, State Board of Education, and Department of Education under takings clauses of Fifth Amendment and state constitution regarding statutes requiring school corporations to sell or lease unused properties to charter schools or state educational institutions for $1, since school corporations were political subdivisions of the State.

PREVAILING WAGE ACT - MISSOURI

Brockington v. New Horizons Enterprises, LLC

Supreme Court of Missouri, en banc - November 22, 2022 - S.W.3d - 2022 WL 17128824

Labor union brought putative class action against employer, a construction contractor, for violations of Missouri Prevailing Wage Act, alleging employer failed to pay employees prevailing wage for properties performed in construction of public works.

Individual employee was substituted for union as class representative. Employee and employer filed cross-motions for summary judgment. The Circuit Court sustained employer's motion and overruled employee's. Employee appealed, and the Court of Appeals affirmed. The Supreme Court granted employee's application for transfer. Employee moved for attorney fees.

The Supreme Court held that triable issues existed as to whether employee was employed on behalf

of public body engaged in construction as part of blight remediation project.

Genuine issues of material fact as to whether employees of employer, an asbestos abatement and window work contractor, were employed on behalf of public body, namely city or its industrial expansion authority, engaged in construction as part of area blight remediation and redevelopment project precluded summary judgment on employees' putative class claims against employer for failure to pay prevailing wage as required by Missouri Prevailing Wage Act.

NEGLIGENCE - NEW YORK

Annitto v. Smithtown Central School District

Supreme Court, Appellate Division, Second Department, New York - November 2, 2022 - N.Y.S.3d ----2022 WL 16626086 - 2022 N.Y. Slip Op. 06098

Mother, on behalf of high school football player, brought personal injury action against school district, alleging that district was negligent in supervising football player during off-season weight-training test, during which he lost control of bar weighing 295 pounds, causing one of his fingers to be crushed.

The Supreme Court, Suffolk County, granted district's motion for summary judgment. Mother appealed.

The Supreme Court, Appellate Division, held that:

- Doctrine of primary assumption of risk did not negate district's duty to safeguard football player from risks that led to incident, and
- Genuine issues of material fact precluded summary judgment.

Doctrine of primary assumption of risk did not negate school district's duty to safeguard high school football player from risks that led to incident during off-season weight-training test, in which football player lost control of bar weighing 295 pounds, causing one of his fingers to be crushed, although weight test was related to the football player's conditioning and was occasioned by his membership on football team; the only risks football player assumed were those that were inherent in the sport of football, and the risk that football coach would fail to provide adequate supervision during the weight test, causing the football player's finger to be crushed, was not a risk assumed when football player chose to join the football team.

Genuine issues of material fact existed as to whether student assistant inadequately spotted high school football player during weight-training test, whether assistant had sufficient time to render assistance but negligently failed to perceive the difficulty encountered by the football player or react appropriately, or whether football coach negligently entrusted that task to assistant, precluding summary judgment in personal injury action against school district, alleging that during test, football player lost control of bar weighing 295 pounds, causing one of his fingers to be crushed between the bar and the support rack.

TELECOM - OHIO

Maple Heights v. Netflix, Inc.

Supreme Court of Ohio - November 30, 2022 - N.E.3d - 2022 WL 17331374 - 2022-Ohi-

-4174

City filed class action in federal court against video-streaming services, seeking judgment declaring that services were in violation of the Fair Competition in Cable Operations Act by providing video services without authorization from the director of commerce and without paying the requisite fees to city.

The United States District Court certified questions to the Supreme Court.

The Supreme Court held that:

- Services were not "video-service providers" within meaning of the Fair Competition in Cable Operations Act; and
- City did not have implied right of action under the Act to sue services.

Video-streaming services were not "video-service providers" within meaning of the Fair Competition in Cable Operations Act, and therefore, they were not required to obtain a video-service authorization from Director of the Department of Commerce, because services used the public internet to provide content and as such, they did not place their own wires or equipment in public rights-of-way to provide their subscribers with their programing, and equipment used to access their services belonged to their customers, not them.

City did not have implied private right of action under the Fair Competition in Cable Operations to sue video-streaming services to enforce Act's video-service authorization requirement and pay video-service provider fee to city; city was not within class meant to benefit from Act, and Act granted Director of the Department of Commerce with sole authority to issue authorizations and investigate allegations that a video-service provider was violating or failing to comply with Act's authorization and service fee requirements, so as to centralize authority and eliminate local governments' authority.

BANKRUPTCY - PUERTO RICO

In re Financial Oversight and Management Board for Puerto Rico

United States Court of Appeals, First Circuit - November 23, 2022 - F.4th - 2022 WL 17175263

State-chartered credit unions that were part of a financial cooperative system that provided banking and financial services to communities in the Commonwealth of Puerto Rico filed second amended adversary complaint against the Commonwealth, the Financial Oversight and Management Board for Puerto Rico (FOMB) and its individual members, and other governmental entities, asserting claims under, inter alia, Puerto Rico contract and tort law, Puerto Rico's Act Against Organized Crime and Money Laundering (PR-RICO), and provisions of the Commonwealth and United States constitutions, alleging that defendants engaged in a fraudulent scheme to coerce plaintiffs into buying government bonds knowing that the bonds were unsustainable and would diminish in value.

Plaintiffs also sought an order excepting their claims from discharge in certain defendants' debt adjustment proceedings under Title III of the Puerto Rico Oversight, Management, and Economic

Stability Act (PROMESA) as well as additional declaratory relief, injunctive relief, and compensatory damages.

Defendants moved to dismiss for lack of subject matter jurisdiction and failure to state a claim. The United States District Court granted the motions and dismissed the claims. Credit unions appealed.

The Court of Appeals held that:

- Credit unions failed to allege fraud with the requisite particularity;
- Under Puerto Rico law, the statute of limitations for credit unions' negligence-based claims was not equitably tolled; and
- Credit unions failed to plausibly plead coercion as the manner in which the government and related entities deprived them of any property interest in the bonds, as required to establish their takings claims under the Commonwealth's and United States' Constitutions.

State-chartered credit unions failed to meet heightened pleading standard for claims of fraud against Commonwealth of Puerto Rico, Corporación Pública para la Supervisión y Seguro de Cooperativas de Puerto Rico (COSSEC), and Government Development Bank (GDB), arising from defendants' alleged participation in fraudulent scheme to coerce credit unions into buying government bonds while knowing that bonds were unsustainable and would diminish in value; while providing some factual allegations beyond "based-on-information-and-belief" assertions, credit unions did not plausibly plead even the first element of fraud, false representations by defendants, with complaint failing to provide requisite level of particularity and instead outlining a broad and vague scheme involving COSSEC's issuance of circular letters, purported threats, and unspecified meetings between individuals over four-year period, and mere speculation about defendants' knowledge of falsity of any allegedly false statements.

Under Puerto Rico law, the statute of limitations for credit unions' negligence-based claims against the Commonwealth of Puerto Rico, the Financial Oversight and Management Board for Puerto Rico (FOMB) and its individual members, and other governmental entities arising from credit unions' purchase of government bonds was not equitably tolled; even taking as true credit unions' allegations of actual loss on the bonds at specified time and of their efforts to work with the government at that time to mitigate that loss, the one-year statute of limitations for their negligence-based claims expired prior to Hurricane Maria's passage through Puerto Rico.

State-chartered credit unions that were part of financial cooperative system failed to allege facts showing that regulatory actions of Commonwealth of Puerto Rico and related governmental entities coerced them to purchase allegedly unsustainable government bonds, as required to support their takings claims under the Commonwealth's and United States' Constitutions; although government-issued "circular letters" authorized and enticed credit unions to purchase bonds in an amount representing up to 30% of their liquid assets, letters' use of permissive language belied claim that credit unions had no choice but to purchase the bonds offered, and allegations about so-called mandatory nature of circular letters in general and the general authority of the Corporación Pública para la Supervisión y Seguro de Cooperativas de Puerto Rico (COSSEC) to force compliance with regulations did not lead to the inference that defendants actually forced or compelled credit unions to purchase the bonds.

TELECOM - TENNESSEE

City of Knoxville v. Netflix, Inc.

Supreme Court of Tennessee - November 22, 2022 - S.W.3d - 2022 WL 17099921

City brought action in federal court against video streaming services seeking judgment declaring that services were "video service providers" within meaning of Competitive Cable Video Services Act and accordingly were required to apply for a franchise and pay franchise fees to city and other localities.

The United States District Court for the Eastern District of Tennessee certified question to the Supreme Court.

The Supreme Court held that video streaming services did not provide a "video service" within meaning of the Competitive Cable Video Services Act and thus they were not required to apply for a franchise and pay franchise fees to city and other localities.

Video streaming services did not provide a "video service" within meaning of the Competitive Cable Video Services Act, and thus, they were not subject to Act's requirement that video service providers obtain a franchise and pay franchise fees to localities, because services did not physically occupy public rights-of-way and used another entity's wireline facilities to deliver video programming.

COURTS - CALIFORNIA

Dedication and Everlasting Love to Animals, Inc. v. City of El Monte

Court of Appeal, Second District, Division 8, California - November 8, 2022 - Cal.Rptr.3d - 2022 WL 16757286 - 2022 Daily Journal D.A.R. 11,509

Property owner brought action, designated as a limited civil case, challenging administrative hearing officer's decision upholding citations for property owner's violations of municipal code based on accumulated trash on property owner's vacant lot.

The Superior Court summarily affirmed, and property owner filed a notice of appeal to the Appellate Division of the Superior Court. The Appellate Division rejected the filing, and property owner appealed to the Court of Appeal.

The Court of Appeal held that:

- Property owner's appeal was a limited civil case;
- The Appellate Division of the Superior Court, not the Court of Appeal, had jurisdiction over property owner's appeal; and
- The Court of Appeal had authority to transfer property owner's appeal to the Appellate Division of the Superior Court.

Property owner's action challenging the decision in an administrative hearing in which the amount in controversy was less than $25,000, an action that had been designated a limited civil matter from the outset, was a limited civil case.

Appellate Division of the Superior Court, not the Court of Appeal, had jurisdiction over property owner's appeal from the Superior Court's affirmance, in an action that had been designated a limited civil matter from the outset, of an administrative decision in which the amount in controversy was less than $25,000, because the appeal was in a limited civil case.

The inherent authority of the Court of Appeal, together with the statute governing appeals taken to the incorrect court, empowered the Court of Appeal to transfer to the Appellate Division of the Superior Court property owner's appeal from the Superior Court's affirmance, in a limited civil case, of an administrative decision upholding citations for property owner's violations of municipal code.

SCHOOLS - COLORADO

Education ReEnvisioned BOCES v. Colorado Literacy and Learning Center

Colorado Court of Appeals, Division VII - November 3, 2022 - P.3d - 2022 WL 16641819 - 2022 COA 128

School district cooperative brought declaratory-judgment action against nonmember school district, seeking to continue to operate a school within school district's boundaries without school district's permission.

School district filed counterclaim and third-party claim against contractor that operated school for cooperative, seeking an opposite declaratory judgment. The District Court denied school district's motion for partial summary judgment and granted cooperative and contractor's motion for summary judgment. School district appealed.

The Court of Appeals held that for purposes of statute allowing school district cooperative to lease sites and buildings to provide facilities necessary for operation of cooperative service program at any appropriate location, "any appropriate location" means any location in the geographic bounds of a participating member school district.

MUNICIPAL ORDINANCE - GEORGIA

City of Atlanta v. Girls Galore, Inc.

Court of Appeals of Georgia - November 14, 2022 - S.E.2d - 2022 WL 16935999

Nightclub operator petitioned for certiorari review in the superior court of mayor's sanction of operator for violating provisions of city's alcoholic beverages ordinance.

The Superior Court reversed the mayor's decision. City applied for discretionary appeal, and the Court of Appeals granted the application.

The Court of Appeals held that evidence was insufficient to support mayor's decision to sanction nightclub operator for violating provisions of city's alcoholic beverages ordinance.

Evidence was insufficient to support mayor's decision to sanction nightclub operator for violating provisions of city's alcoholic beverages ordinance, in proceeding following operator's petition for certiorari review of mayor's sanction, though city argued evidence supported mayor's decision because operator violated provisions listed in due cause letter; it was mayor's written decision to sanction operator and the reasons stated in that written decision that were under review rather than the recommendation of the license review board or the allegations in the due cause letter, and city did not argue that record supported mayor's finding of violations of provisions cited in her letter.

SCHOOL FINANCE - IOWA

Save Our Stadiums v. Des Moines Independent Community School District

Supreme Court of Iowa - November 18, 2022 - N.W.2d - 2022 WL 17072350

Citizens filed action for declaratory judgment, seeking an adjudication that their referendum petition included enough signatures to trigger a public referendum on the financing of a school district's proposed athletic stadium.

The District Court granted summary judgment for school district, and citizens appealed.

The Supreme Court held that:

- Total number of voters at the election, rather than total number of votes cast in at-large school board election race, was number to be counted when determining the statutory threshold to trigger public referendum;
- Citizens were not prejudiced by school district's failure to return referendum petition;
- District's failure to return referendum petition did not constitute a de facto acceptance; and
- Denial of referendum petition did not amount to a denial of citizens' due process rights.

Total number of voters at the election, rather than total number of votes cast in at-large school board election race, was number to be counted when multiplying by 30% to determine the statutory threshold to trigger public referendum on school district's proposed athletic stadium and financing plan; statute required count of "voters at" the election, which included multiple races for city council seats and school board positions, and did not refer to the number of "votes in" the last election of school officials.

School district's statutory duty to return referendum petition, on athletic facility financing, which lacked requisite number of voter signatures was directory, rather than mandatory, although the statute stated that the petition "shall" be returned, as statute directed whom to do what and when: the school board was to return the petition after it determined that the petition lacked sufficient signatures.

Citizens were not prejudiced by school district's failure to return referendum petition on athletic facilities financing after school board determined that the petition lacked the requisite number of voter signatures; even if the district had returned the petition immediately, citizens only had 30 minutes to collect another 381 signatures, and citizens knew the district would require more signatures based on the superintendent's email setting forth the number of signatures required.

School district's failure to return referendum petition on athletic facilities financing, after school board determined that the petition lacked the requisite number of voter signatures, did not constitute a de facto acceptance of the petition for filing; district never accepted the petition for filing by its action or inaction, but instead examined the petition and found the number of signatures insufficient, and, because the filing deadline expired the same day citizens submitted the petition with inadequate time to cure the deficiency, any obligation to return the petition was moot.

Denial of citizens' referendum petition on financing for school district athletic facilities did not amount to a denial of citizens' due process rights; citizens failed to submit a valid petition to trigger a statutory right to a public referendum.

School district's denial of citizens' referendum petition on financing for school district athletic facilities did not shock the conscience, and thus did not amount to a violation of citizens' substantive

due process rights; referendum petition was facially invalid due to failure to obtain required number of signatures.

ZONING & PLANNING - MONTANA

Tai Tam, LLC v. Missoula County by and Through Board of County Commissioners

Supreme Court of Montana - November 15, 2022 - P.3d - 2022 WL 16946486 - 2022 MT 229

Landowner brought claim for statutory damages against county board of county commissioners, as well as § 1983 claims, after board denied landowner's subdivision proposal.

The District Court granted board's motion to dismiss, and landowner appealed.

The Supreme Court held that:

- 30 day statute of limitations did not apply;
- Landowner's status as owner of property was sufficient to state a protected property interest for § 1983 claims;
- Complaint sufficiently set forth a § 1983 claim against the board;
- Allegations were sufficient to state a § 1983 due process claim;
- Allegations were sufficient to state a § 1983 claim based on an unconstitutional taking; and
- Allegations were sufficient to state a "class of one" equal protection claim.

Thirty day statute of limitations for persons aggrieved by a decision to approve, conditionally approve, or deny an application and preliminary plat for a proposed subdivision or a final subdivision plat did not apply to landowner's action under other subsection allowing a person who has filed a subdivision application to bring an action for damages.

Landowner's status as owner of property was sufficient to state a protected property interest and allow landowner to bring § 1983 claims against board of county commissioners following their denial of landowner's subdivision proposal, even if it lacked a protected property interest in its subdivision application.

Landowner's complaint, in which it alleged the board of county commissioners violated its rights to due process and equal protection, and constituted a taking of property without just compensation, when the board "implemented policies to protect viewsheds, protect generic ecologic values, and protect adjacent property owners, despite having no such adopted regulations," and "[h]aving adopted plans acknowledging much of the prime agricultural soils in the Target Range area have been developed, the Board now requires the few remaining landowners to unfairly shoulder the burden of preserving what remains via policies and actions carried out under color of state law," sufficiently set forth a § 1983 claim against the board, although it did not set forth in detail the relevant four-part test for imposing liability on a local governmental entity under § 1983.

Landowner's assertion that board of county commissioners had implemented policies to protect viewsheds, generic ecologic values, and adjacent property owners "despite having no such adopted regulations," and that the board was both failing to implement regulations it had adopted and implementing policies which were not based on any adopted regulations at all, were sufficient to state a § 1983 due process claim that landowner, regardless of the hearings held on its actual subdivision application, had not been given an opportunity to be heard at a meaningful time and in a

meaningful manner regarding the board's adoption and implementation of policies and regulations which could deprive landowner of its property interest as a landowner, and thus to survive motion to dismiss for failure to state a claim.

Landowner's allegations that board of county commissioners, which rejected landowner's subdivision application, was applying rules and regulations to the proposed development which had not been adopted with proper notice and opportunity to be heard, and that the board was unfairly requiring landowner to shoulder the burden of preserving agricultural lands and viewsheds which was not imposed on other landowners, were sufficient to state a § 1983 claim based on an unconstitutional taking.

Allegations in landowner's § 1983 complaint against board of county commissioners which denied landowner's subdivision application, including that surrounding property had been allowed to be developed in the same pattern as that desired by landowner, that landowner had been subjected to policies which county had not formally adopted and which were applied on an ad hoc basis, that landowner was being forced to preserve its property for agriculture when other landowners in the area were allowed to develop their properties, and that the board was not following the area land use element regarding the property, were sufficient to state a "class of one" equal protection claim.

LIABILITY - NEW YORK

Maldovan v. County of Erie

Court of Appeals of New York - November 22, 2022 - N.E.3d - 2022 WL 17095561 - 2022 N.Y. Slip Op. 06632

Public administrator of estate of woman with developmental disabilities, who was sexually assaulted, abused, and murdered by her brother and mother, with whom she had lived, brought actions against county and sheriff, alleging that caseworkers for county's child and adult protective services agencies, who had investigated reports the woman was being abused, as well as sheriff's deputies, were negligent in the performance of their duties, leading to the woman's death.

The Supreme Court, Erie County, denied the parties' motions for summary judgment, and they appealed. The Supreme Court, Appellate Division, reversed the order denying defendants' motion and granted summary judgment to defendants. Leave to appeal was granted.

The Court of Appeals held that:

- County did not voluntarily assume a duty beyond what was owed to the public generally;
- Sheriff's deputies took no action that could have induced reliance by the woman's other family members; and
- Special duty rule for municipal negligence is not satisfied whenever a municipality's child or adult protective services agency receives a report of abuse, opens an investigation, and has contact with the injured party; abrogating *Boland v. State*, 218 A.D.2d 235, 638 N.Y.S.2d 500.

ANNEXATION - OHIO

State ex rel. Tangeman v. Miami County Board of County Commissioners

Court of Appeals of Ohio, Second District, Miami County - October 21, 2022 - N.E.3d - 2022 WL 15948703 - 2022-Ohio-3851

After board of county commissioners denied petition for expedited type-2 annexation of township property to city on ground that city did not resolve to provide water and sewer services to territory proposed to be annexed, agent for group of township landowners who sought annexation petitioned for writ of mandamus compelling board of county commissioners to approve annexation petition.

The Court of Appeals held that annexation petition satisfied statutory requirements.

Petition for expedited type-2 annexation of township property to city complied with statutory provision requiring that municipal corporation to which annexation was proposed agree to provide services specified in its statutorily-required services resolution to territory proposed for annexation, even though city did not resolve to provide water and sewer services to proposed territory; statute plainly permitted municipality to pick and choose services it would offer annexed territory, and board of county commissioners could not exercise veto power over substance of municipal corporation's services resolution.

PUBLIC UTILITIES - PENNSYLVANIA

Adorers of the Blood of Christ United States Province v. Transcontinental Gas Pipe Line Co LLC

United States Court of Appeals, Third Circuit - November 8, 2022 - F.4th - 2022 WL 16754137

Religious organization opposed to the extraction, transportation, and use of fossil fuels brought action for money damages, challenging the construction and operation of gas pipeline on property owned by organization as violative of its rights under the Religious Freedom Restoration Act (RFRA).

The United States District Court for the Eastern District of Pennsylvania dismissed the action. Organization appealed.

The Court of Appeals held that action was impermissible collateral attack on Federal Energy Regulatory Commission (FERC) order concerning certification of interstate gas pipeline.

Cause of action asserted by religious organization opposed to the extraction, transportation, and use of fossil fuels seeking money damages under the RFRA for the construction and operation of gas pipeline on property owned by organization was impermissible collateral attack on Federal Energy Regulatory Commission (FERC) order concerning the certification of interstate gas pipeline; organization could have and should have raised its RFRA claim before FERC, it was inescapably intertwined with pipeline's route, construction, and operation, which was authorized after extensive, public proceedings before FERC as required by the Natural Gas Act (NGA).

SCHOOLS - PENNSYLVANIA

Save Our Saltsburg Schools v. River Valley School District

Commonwealth Court of Pennsylvania - November 7, 2022 - A.3d - 2022 WL 16727334

Advocacy group representing area students, parents, community members, and business owners filed a complaint against school district and school board members, alleging that the board members improperly decided to close a high school in violation of procedural due process and in breach of their fiduciary duty to the group's members.

The Court of Common Pleas sustained defendants' preliminary objections. Advocacy group appealed.

The Commonwealth Court held that:

- Advocacy group failed to assert an established constitutional right that would support its procedural due process challenge, and
- School district's mission statement and the relationship between the community and elected members of school board did not create a fiduciary duty related to school closures.

Advocacy group failed to assert an established constitutional right that would support its procedural due process challenge to decision by school district and members of school board to close a public high school; section of the Pennsylvania School Code providing procedural rules to govern school officials in the closing of a school did not create any constitutionally-recognized procedural due process rights to participate in the school district's decision.

School district's mission statement and the relationship between the community and elected members of school board did not create a fiduciary duty related to school closures, in action by advocacy group representing area students, parents, community members, and business owners who were opposed to the closing of a high school; the Public School Code limited local school board members' fiduciary status to their capacity to expend taxpayer funds to operate the schools, and gave local school boards significant discretion to close a school after a properly-noticed public hearing regardless of community opposition.

Local school boards must hold a properly noticed public hearing at which the community may voice opposition to a proposed school closure, but regardless of that opposition, boards have significant discretion thereafter to vote for and order a closure so long as the decision is not arbitrary, capricious, or fraudulent.

IMMUNITY - WEST VIRGINIA

Jones v. Logan County Board of Education

Supreme Court of Appeals of West Virginia - November 17, 2022 - S.E.2d - 2022 WL 17038200

Former middle school student brought action against county board of education, alleging that board's employees were aware that he was severely bullied by his classmates, but took no action to stop it, and asserting various claims including negligence.

The Circuit Court granted board's motion to dismiss for failure to state a claim. Student appealed as to negligence claim.

The Supreme Court of Appeals held that:

- Board was not entitled to immunity from negligence claim under the Tort Claims Act;
- Student sufficiently alleged duty, as an element of negligence claim; and
- Student sufficiently alleged proximate cause, as an element of negligence claim.

County board of education failed to assert before circuit court that any statutory exception applied to limit its liability for injury caused by negligence of board's employees, and thus board was not entitled to immunity under the Tort Claims Act from former middle school student's negligence claim alleging that board's employees did not respond when he was severely bullied by classmates,

where student's allegations were not based on employees' intentional acts and related to negligence occurring on school grounds.

Assertion of former middle school student that he had reported to principal that he had been choked with a rope by another pupil sufficiently alleged that it was foreseeable to principal that his affirmative inaction would expose student to a high risk of harm from bullies' misconduct, and thus that principal had a duty of protection or supervision, as required for student to state a negligence claim against county board of education, based on board's employees' failure to respond when student was severely bullied by his classmates, even though harm to student was a result of intentional misconduct by a third party; choking incident was a far more serious act than student's prior alleged instances of bullying.

Former middle school student sufficiently alleged that principal's failure to respond when he was bullied was the proximate cause of his injuries, as required for student to state a negligence claim against county board of education, by alleging that principal, as board's employee, had known for almost three years that student was being bullied and had told student's mother that it would be addressed, that student told principal that another pupil had choked him with a rope with enough force to leave red welts on his neck, that principal did not notify mother of choking incident, and that student was attacked days later, at which time he was punched in the face and knocked unconscious, notwithstanding board's contention that bullies' actions were a superseding cause of student's injuries.

USER FEES - CALIFORNIA

Raja Development Co., Inc. v. Napa Sanitary District

Court of Appeal, First District, Division 4, California - November 8, 2022 - Cal.Rptr.3d - 2022 WL 16757563 - 2022 Daily Journal D.A.R. 11,512

Condominium owners brought action for declaratory and injunctive relief against sanitary district alleging that the use-fee portion of sewer service charge, which also included a capacity-fee portion, was an unlawful tax.

The Superior Court sustained sanitary district's demurrer. Owners appealed.

In a case of first impression, the Court of Appeal held that putative inseverability of ordinances authorizing sewer charge did not make a challenge to use-fee portion of charge subject to shorter limitations period for challenging capacity fees.

Putative inseverability of county ordinances authorizing sewer service charge did not make condominium owners' challenge to the use-fee component of service charge, as an illegal tax, subject to the 120-day limitations period for challenging capacity fees, which were captured in the capacity-fee component of charge; regardless of whether ordinances were severable, owners did not allege any wrongful conduct by sanitary district with respect to capacity fee, the invasion of any right or interest that owners possessed related to capacity fee, or any legal injury from capacity fee.

CONSTITUTIONAL LAW - CALIFORNIA

Lunn v. City of Los Angeles

United States District Court, C.D. California - September 20, 2022 - F.Supp.3d - 2022 WL

4357436

Property owners brought § 1983 action against city, alleging that it had violated their constitutional rights by permitting persons experiencing homelessness to camp their tents and vehicles on street across from their property, which caused owners' views of golf course to become obstructed, and by removing one owners' freight container that displayed political speech that she had placed on a public walkway in same area where persons experiencing homelessness were camping in protest of perceived selective enforcement of city code pertaining to storage of personal property in public spaces.

City moved to dismiss for lack of subject-matter jurisdiction and for failure to state a claim.

The District Court held that:

- Property owners failed to establish that purported injury of having their view of a golf course obstructed was substantially motivated by city's actions;
- Single incident in which city allegedly removed property owners' freight container was not tantamount to city policy or custom;
- Property owner failed to state a procedural due process claim;
- Property owner failed to state substantive due process claim; and
- City's removal of property owner's freight container did not violate owner's rights under equal protection clause.

LIENS - CONNECTICUT

Metropolitan District Commission v. Marriott International, Inc.

Appellate Court of Connecticut - October 25, 2022 - A.3d - 216 Conn.App. 154 - 2022 WL 13683532

Municipal water-control authority brought civil action for breach of contract and unjust enrichment against hotel and state, seeking to recoup authority's costs related to sewer improvements. Meanwhile, authority brought separate administrative proceeding in which a sewer-benefit assessment was imposed on hotel's property.

In civil action, the Superior Court granted state's motion to dismiss and granted summary judgment to hotel and, in postjudgment proceedings, denied hotel's motion to hold authority in contempt but granted hotel's application to discharge lien that authority had filed to enforce an unpaid and unchallenged sewer-benefit assessment made in the administrative proceeding. Authority appealed the order discharging the lien.

The Appellate Court, held that:

- Trial court lacked subject-matter jurisdiction over hotel's motion to discharge lien, and
- Statute allowing a party to seek discharge of a lien on real property did not provide trial court authority to discharge lien.

Trial court lacked subject-matter jurisdiction in breach-of-contract action between municipal water-control authority and hotel over hotel's motion to discharge sewer-benefit-assessment lien that authority had obtained to enforce assessment that had been imposed on hotel's property in separate administrative proceeding; hotel's exclusive remedy to challenge lien was to appeal the assessment in the administrative proceeding within the appeal period, something hotel had not done.

Statute allowing a party to seek discharge of a lien on real property did not provide trial court authority, in breach-of-contract action between municipal water-control authority and hotel, to discharge sewer-benefit-assessment lien that authority had obtained to enforce assessment that had been imposed on hotel's property in separate administrative proceeding, where court made no finding that hotel had complied with all necessary statutory notice requirements, nor did court make any finding that authority's lien was legally invalid.

MONUMENTS - GEORGIA

Sons of Confederate Veterans v. Henry County Board of Commissioners

Supreme Court of Georgia - October 25, 2022 - S.E.2d - 2022 WL 14147669

Organizations brought action for injunctive relief against first county board of commissioners, alleging that board voted to remove a Confederate monument from courthouse square in violation of statute concerning such monuments.

Board moved to dismiss. The Superior Court granted motion. Organizations appealed. Individual and organizations also brought separate actions against second county board of commissioners based on similar allegations. The Superior Court consolidated and then dismissed actions for lack of standing. Organizations and individual appealed. Appeals were consolidated and the Court of Appeals affirmed. Organizations and individual petitioned for certiorari, which was granted.

The Supreme Court held that:

- Requirement that plaintiffs have a cognizable injury is a standing requirement arising from the Georgia Constitution;
- Individual alleged cognizable injury, as required to establish standing to bring claim for injunctive relief; and
- Organizations failed to allege that they suffered cognizable injuries, and thus failed to establish independent, direct standing to bring claim for injunctive relief.

The constitutional limitations on judicial power, which require that an actual controversy must exist in order to sue, prevent the Georgia Supreme Court from rendering advisory opinions on Georgia law, but the Court does have the power to issue advisory opinions regarding the Georgia Rules of Professional Conduct, which govern lawyers, and the Georgia Code of Judicial Conduct, which governs judges; the Georgia Constitution vests in the Court as an incident of the judicial power the exclusive power to regulate the practice of law and to promulgate the Code of Judicial Conduct.

Because the Georgia Constitution vests the "judicial power" in state courts, and the nature of judicial power has long been understood as limited to resolving those controversies in which there is a cognizable injury, the requirement that plaintiffs have a cognizable injury in order to invoke the power of the courts is a standing requirement arising from the Georgia Constitution.

By alleging that she was citizen of county, individual alleged cognizable injury as result of county board of commissioners' vote to move public Confederate monument from display, as required to establish standing to bring claim for injunctive relief under statute governing preservation and protection of certain public monuments and memorials.

Organizations failed to allege that they suffered cognizable injuries as result of county boards of commissioners' decisions to move public Confederate monuments from display, and thus failed to establish independent, direct standing to bring claim for injunctive relief under statute governing

preservation and protection of certain public monuments and memorials, where organizations failed to allege that they were citizens, residents, or taxpayers of counties that they sued or that they were community stakeholders, such that duty created by statute was one owed to them.

POLITICAL SUBDIVISIONS - KANSAS

Hennessey v. University of Kansas Hospital Authority

United States Court of Appeals, Tenth Circuit - November 9, 2022 - F.4th - 2022 WL 16828836

Alleging that she was sexually assaulted by hospital radiology technician, patient brought action against state university hospital authority, asserting claim for negligent supervision.

Hospital authority moved to dismiss for lack of subject matter jurisdiction and based on Eleventh Amendment sovereign immunity. Finding that authority was an arm of the state, the United States District Court for the District of Kansas granted motion to dismiss. Patient appealed.

The Court of Appeals held that:

- As matter of first impression, authority bore the burden to establish its status as an arm of the state for purposes of sovereign immunity defense;
- Authority bore the burden to establish its status as an arm of the state for purposes of diversity jurisdiction;
- Limited role of governor and legislature with respect to board governing authority supported determination that it was not an arm of the state;
- Factor of ownership and control over property favored a finding that authority was an arm of the state;
- Ability of authority to form its own contracts favored supported determination that it was not an arm of the state;
- Ability of authority to set policies supported determination that it was not an arm of the state; and
- Vacatur of dismissal and remand to receive additional evidence was warranted.

State university hospital authority bore the burden to establish its status as an arm of the state for purposes of its Eleventh Amendment sovereign immunity defense, in patient's action against authority, asserting claim for negligent supervision based on alleged sexual assault by hospital radiology technician; authority possessed the evidence relating to its status, putting the burden on authority potentially obviated the need for discovery so that authority could benefit from immunity sooner, and assigning the burden to authority was consistent with precedent under the Foreign Sovereign Immunities Act (FSIA) placing burden on foreign sovereign to make a prima facie showing of immunity, and also consistent with general rule requiring defendants to bear the burden when asserting a defense.

State university hospital authority's possession of evidence as to its status as an arm of the state for purposes of Eleventh Amendment sovereign immunity supported placing the burden on authority to establish such status, in patient's action against authority, asserting claim for negligent supervision of hospital radiology technician who sexually assaulted patient, despite authority's contention that patient could obtain evidence about authority's status through an open records request; although the text of the act creating the authority was readily available to patient, the authority was in possession of key evidence regarding its finances, day-to-day operations, and operating procedures.

State university hospital authority bore the burden to establish its status as an arm of the state for purposes of an attack on patient's prima facie showing of district court's diversity jurisdiction over patient's action against authority, asserting claim for negligent supervision based on alleged sexual assault by hospital radiology technician; authority possessed the evidence relating to its status, courts had already shifted the burden to defendant on arm-of-the-state inquiry in sovereign immunity context such that it was natural to do so for purposes of diversity of citizenship, and placing the burden on authority was analogous to placement of burdens under the Foreign Sovereign Immunities Act (FSIA).

Under Kansas act establishing state university hospital authority, factor of authority's finances favored determination that authority was not an arm of the state entitled to Eleventh Amendment sovereign immunity from patient's suit asserting claim for negligent supervision based on sexual assault by hospital radiology technician; act provided for the authority to have its own funds, managed outside of the state treasury, allowing authority to open and maintain bank accounts, fix its rates, hire collection services, borrow money, make loans, and set the salaries of employees and provide supplemental benefits, and although authority could not levy taxes, act allowed it to issue bonds that were solely its responsibility and not backed by the state.

Under Kansas law, limited role of governor and legislature with respect to board governing state university hospital authority favored a finding that authority was autonomous from the State, thus supporting determination that it was not an arm of the state entitled to Eleventh Amendment sovereign immunity from patient's suit asserting claim for negligent supervision based on sexual assault by hospital radiology technician; although 13 of 19 board members had been appointed by governor and confirmed by legislature at authority's inception, governor now had to select from candidates chosen by the board when appointing a new member, governor did not choose who led the board or who was in charge of overseeing authority's daily operations, and governor could not remove a member of the board.

Under Kansas law, classification of employees favored a finding that state university hospital authority was autonomous from the State, thus supporting determination that it was not an arm of the state entitled to Eleventh Amendment immunity from patient's suit asserting claim for negligent supervision based on sexual assault by hospital radiology technician; the act which created authority largely treated the authority like a private hospital for purposes of hiring, firing, and providing benefits for employees, in that it explicitly declared that employees of hospital and authority were not state employees, stated that it did not place any officer or employee of the authority under the civil service act, and gave authority discretion to create benefit programs and set terms of employment.

Under Kansas law, factor of ownership and control over property favored a finding that state university hospital authority was an arm of the state, and thus entitled to Eleventh Amendment sovereign immunity from patient's suit asserting claim for negligent supervision based on sexual assault by hospital radiology technician; although the act establishing authority allowed it to acquire and regulate the use of certain property and equipment, act did not transfer buildings and facilities to authority and did not allow authority to own buildings or facilities, including those constructed with funds from its revenues, and the act provided that disputes over transfer of property from university to authority would be resolved by governor.

SCHOOL FINANCE - NORTH DAKOTA

Hoke County Board of Education v. State

Supreme Court of North Carolina - November 4, 2022 - S.E.2d - 2022 WL 16703972 - 2022-NCSC-108

Proceeding was brought to review State's compliance with comprehensive remedial plan (CRP) that was developed pursuant to a consent order to achieve its obligation under the State Constitution to provide all children the opportunity to obtain a sound basic education in a public school.

The Superior Court entered order requiring transfer of state funds to fully fund the CRP. After an appeal and a grant of discretionary review, the case was remanded. The Superior Court entered order removing transfer directives, and case returned to the Supreme Court.

The Supreme Court held that:

- Trial court acted within its inherent power in issuing order directing transfer of state funds to implement CRP;
- Budget Act did not satisfy State's constitutional obligations;
- Order for transfer of funds did not raise non-justiciable political questions; and
- Transfer order was not an impermissible constitutional determination in a friendly suit.

Trial court acted within its inherent power in issuing order directing state officials to transfer available funds to implement portions of comprehensive remedial plan that was developed pursuant to a consent order to achieve State's obligation under State Constitution to provide all children in state an opportunity to obtain a sound basic education in a public school, where court provided the executive and legislative branches time and space to fix the violation on their own terms for over 17 years, executive and legislative branches repeatedly failed to remedy an established statewide violation, court exhausted all established alternative methods before directing transfer of funds, and court sought the least intrusive remedy that would still adequately address the violation.

Budget Act did not satisfy State's constitutional obligations, as set forth in a Supreme Court opinion, to provide all children the opportunity to obtain a sound basic education in a public school, where a comprehensive remedial plan that was developed pursuant to consent order was the only remedial plan that State presented to Court, and the Act, as measured against the 18-year remedial phase of case, did not substantially comply with the constitutional mandate as measured by applicable educational standards.

Trial court's order directing state officials to transfer available funds to implement portions of comprehensive remedial plan that was developed pursuant to a consent order to achieve State's obligation under State Constitution to provide all children in state an opportunity to obtain a sound basic education in a public school did not involve non-justiciable political questions, where the court assessed the State's compliance with the State's own determination of constitutional educational adequacy, not the court's.

Trial court's order directing state officials to transfer available funds to implement portions of comprehensive remedial plan that was developed pursuant to a consent order to achieve State's obligation under State Constitution to provide all children in state an opportunity to obtain a sound basic education in a public school was not an impermissible constitutional determination in a friendly suit prior to intervention of legislative defendants, where case was hotly contested for decades, and State repeatedly asserted either that it had achieved constitutional compliance or that trial court no longer had jurisdiction over case, even if State made efforts to achieve constitutional compliance over 17 years after Supreme Court's decision finding a constitutional violation.

PREEMPTION - WASHINGTON

Rental Housing Association of Washington v. City of Federal Way

Court of Appeals of Washington, Division 1 - November 14, 2022 - P.3d - 2022 WL 16918272

Advocacy group for rental housing providers brought action against city, challenging citizens' initiative that required landlords to have good cause to terminate tenancy or refuse lease renewal and prohibited discrimination against certain community members.

The Superior Court granted partial summary judgment in favor of city. Advocacy group appealed.

The Court of Appeals held that:

- City ordinance irreconcilably conflicted with state law;
- Initiative did not violate single subject rule;
- Initiative did not exceed scope of city's initiative power; and
- Issue of admissibility of declaration of city's expert was moot.

PUBLIC UTILITIES - WEST VIRGINIA

Mason County Public Service District v. Public Service Commission of West Virginia

Supreme Court of Appeals of West Virginia - November 10, 2022 - S.E.2d - 2022 WL 16848080

County public service district appealed Public Service Commission's decision to invalidate $50 residential water disconnection fee.

The Supreme Court of Appeals held that:

- Commission had statutory authority to investigate and ultimately invalidate disconnect fee even if resident who complained about residential water service disconnection to the Commission did not mention the fee, and
- Commission's order that disconnect fee was an unreasonable practice was consistent with the Commission's precedent and rules.

Public Service Commission had statutory authority to investigate and ultimately invalidate county public service district's practice of charging a $50 residential water service disconnect fee even if resident who complained about residential water service disconnection to the Commission did not mention the fee.

Public Service Commission's order that county public service district's $50 residential water service disconnect fee was an unreasonable practice was consistent with the Commission's precedent and rules, even if district, as a locally rate regulated utility, had plenary authority to set rates, fees, and charges; Commission's rules allowed only for a reconnect fee, and Commission historically found that disconnect fees amounted to a double-recovery because the expenses involved should be part of a utility's operation and maintenance expenses recoverable in base rates.

TELECOM - ARKANSAS

City of Ashdown, Arkansas v. Netflix, Inc.

United States Court of Appeals, Eighth Circuit - November 8, 2022 - F.4th - 2022 WL 16754392

City filed putative class action lawsuit seeking declaratory judgment that online video streaming service providers had to comply with Arkansas Video Service Act (VSA) and damages for their failure to pay required fee.

The United States District Court for the Western District of Arkansas dismissed complaint, and city appealed.

The Court of Appeals held that VSA did not create implied right of action for city to bring suit against providers.

Under Arkansas law, Arkansas Video Service Act (VSA) did not create implied right of action for city to bring suit against online video streaming service providers for alleged failure to pay applicable franchise fees, even though city was owed fees and had other rights under VSA; VSA expressly conferred right of action onto Public Service Commission, but limited Commission to mandamus and injunction proceedings, which did not allow relief in form of compelling payment of past-due fees, and municipalities were not special class that legislature intended to protect through VSA.

IMMUNITY - CALIFORNIA

State Department of State Hospitals v. Superior Court of Napa County

Court of Appeal, First District, Division 5, California - November 2, 2022 - Cal.Rptr.3d - 2022 WL 16631117

Former ward of state brought action against State Department of Hospitals alleging she was sexually assaulted by a Department counselor when she was a minor and confined at hospital, and asserted claims of negligence, negligent supervision/training/hiring/retention, sexual battery, assault, and statutory civil rights violations.

The Superior Court sustained Department's demurrer in part, with leave to amend, and overruled it in part. Department filed petition for writ of mandate, and an order to show cause was issued.

The Court of Appeal held that:

- Complaint was barred by Department's immunity under statute providing immunity to public entities for injury to inpatient of mental institution;
- Former ward could not overcome immunity accorded to Department for injury to inpatient of mental institution by alleging Department violated generally worded regulations, overruling *Baber v. Napa State Hospital,* 257 Cal.Rptr. 55; and
- Leave to amend complaint was not warranted.

Statute providing for public entity's liability for act or omission of employee within scope of employment did not establish minimum personnel standards as would have triggered liability under statute providing for liability for failure to provide adequate or sufficient equipment, personnel or facilities, and thus complaint brought by former ward of state against State Department of Hospitals,

alleging that Department employee sexually abused her when she was minor and ward of state, was barred by Department's immunity under statute providing immunity to public entities for injury to inpatient of mental institution; statute did not set any minimum standards for personnel, and immunity for injury to inpatient of mental institution was subject only to exceptions set out in statute itself.

Former ward could not overcome immunity accorded to State Department of Hospitals for injuries to inpatient of mental institution by alleging that Department violated generally worded regulations; rather, for claims to fall within statutory exception for failure to provide adequate or sufficient equipment, personnel or facilities, as an exception to immunity, ward was required to allege Department violated specific minimum standard sufficient to put the Department on notice as to the minimum requirements with which it must comply, overruling Baber v. Napa State Hospital, 257 Cal.Rptr. 55.

EMINENT DOMAIN - FEDERAL

Hippely v. United States

United States Court of Federal Claims - October 18, 2022 - Fed.Cl. - 2022 WL 10329550

In a rails-to-trails case, owners of property subject to railroad easement filed suit seeking just compensation for alleged temporary taking by Surface Transportation Board's (STB) issuance of notice of interim trail use (NITU) subject to a National Historic Preservation Act (NHPA) historic preservation condition, authorizing the county and railroad to negotiation potential conversion of easement into public recreational trail under National Trails Systems Act Amendments, prior to eventual expiration of the NITU and abandonment of easement.

Property owners moved for summary judgment on liability; government brought cross-motion for summary judgment.

The Court of Federal Claims held that:

- Railroad intended to complete abandonment during the period in which the NITU was in effect, thus requiring compensation for a taking, and
- The NITU was a factual cause of railroad's delayed abandonment of easement, despite concurrent presence of NHPA historic preservation condition.

In rail-to-trail takings case, evidence was sufficient to support an inference that, had there been no notice of interim trail use (NITU), railroad intended to complete abandonment during the period in which the NITU was in effect, thus satisfying causation element and requiring compensation for a taking; the railroad filed an application to abandon, which indicated an affirmative intent to abandon at the time the NITU was issued, railroad never sought further extension of time to negotiate trail use, railroad consummated abandonment six months after the NITU expired, NITU authorized removal of track during its pendency, and railroad met the standard of abandonment under Ohio law.

In rails-to-trails case, the notice of interim trail use (NITU) was a factual cause of railroad's delayed abandonment of easement and the delay of property owners' reversionary interests, despite the existence of a National Historic Preservation Act (NHPA) historic preservation condition; the NITU alone would have caused the delay in abandonment.

PUBLIC UTILITIES - FEDERAL

United Power, Inc. v. Federal Energy Regulatory Commission

United States Court of Appeals, District of Columbia Circuit - September 16, 2022 - 49 F.4th 554 - Util. L. Rep. P 15,235

Utility member of generation and transmission cooperative petitioned for review of declaratory order of the Federal Energy Regulatory Commission (FERC), which determined that upon admission of natural gas supplier to electrical cooperative, cooperative was subject to jurisdiction of FERC, and that FERC had exclusive jurisdiction over exit charges, which cooperative charged to exiting utility members of cooperative. Second utility member and Colorado Public Utilities Commission (PUC) intervened in support of utility member. Cooperative, and a third and fourth utility member intervened in support of FERC.

The Court of Appeals held that:

- Utility member failed to exhaust argument that FERC acted ultra vires or beyond agency's statutory authority, as required for Court of Appeals to exercise jurisdiction over argument;
- Utility member exhausted issue before FERC as to whether FERC's actions were arbitrary and capricious;
- FERC's issuance of declaratory order was within its broad discretion to determine when and how to hear and decide matters; and
- Cooperative's exit charge was a rate charged in connection with provision of wholesale electricity, and thus FERC had exclusive jurisdiction to determine reasonableness of exit charge.

Utility member failed to raise with specificity in application for rehearing its argument that Federal Energy Regulatory Commission (FERC) acted ultra vires or beyond statutory authority in finding generation and transmission cooperative was subject to FERC jurisdiction, such that utility member failed to exhaust argument before FERC as required for Court of Appeals to exercise jurisdiction over issue, and thus Court of Appeals was without jurisdiction to consider utility member's argument; utility member argued in footnote to introduction of its request for rehearing that FERC's action was premature and inefficient, but did not describe FERC's action as ultra vires or beyond agency's statutory authority.

Utility member's discussion in footnote of its application for rehearing before Federal Energy Regulatory Commission (FERC), which described FERC's action in asserting jurisdiction over generation and transmission cooperative as premature and inefficient and specified what FERC ought to have done, was sufficiently specific to permit finding that utility member raised argument before FERC that FERC's actions were arbitrary and capricious, and thus utility member exhausted issue before FERC as required for appellate jurisdiction under Federal Power Act (FPA); utility member's description of what FERC did and what FERC ought to have done, which was wait for state tribunal's resolution of related issue, were specific enough to make out an "arbitrary and capricious" argument without squinting.

Federal Energy Regulatory Commission's (FERC's) decision to issue declaratory order as to FERC's jurisdiction over generation and transmission cooperative to determine utility member's exit charge was within FERC's broad discretion to determine when and how to hear and decide matters, despite fact that proceeding before state agency was still pending as to whether natural gas supplier's admission to cooperative, from which FERC's jurisdiction was rendered, was proper; FERC explained it had statutory obligation to act on rate filings submitted by electrical cooperative, it did not matter that FERC might have had to revisit its determination and some later time, and providing

temporary clarity to parties was useful and reasonable.

Generation and transmission cooperative's exit charge, levied against a withdrawing member, was a rate charged in connection with the provision of wholesale electricity, and thus Federal Energy Regulatory Commission (FERC) had exclusive jurisdiction to determine reasonableness of cooperative's exit charge, although exit charge was not a rate or charge for a jurisdictional service; exit charge protected cooperative's members against rate increases caused by exit of a member while also increasing membership commitment and stability, exit charge was important part of bargain to which a firm agreed when it became part of cooperative, and if there were no obligation to pay an equitable exit charge, cost of electricity under requirements contract would have been higher

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IMMUNITY - NORTH CAROLINA

Estate of Ladd by Ladd v. Funderburk

Court of Appeals of North Carolina - October 18, 2022 - S.E.2d - 2022 WL 10219785 - 2022-NCCOA-676

Deceased motorist's wife and estate filed suit against property owners for wrongful death, negligence, and negligent infliction of emotional distress, alleging that owners' negligence caused tree that stood in owners' front yard to fall on motorist's car during a storm, fatally injuring motorist and injuring motorist's wife, and owners cross-sued town for contribution under the Uniform Contribution Among Tortfeasors Act.

The Superior Court denied town's motion for summary judgment. Town appealed.

The Court of Appeals held that:

- Town's statutory affirmative duty to keep public streets free from unnecessary obstructions did not require preventative measures for tree that was not already obstruction;
- Town's activity in failing to exercise its authority pursuant to tree ordinance to remove tree from owners' yard was necessarily governmental in nature; and
- Town did not waive its governmental immunity by purchasing liability insurance.

A municipality's statutory affirmative duty to keep public streets open for travel and free from unnecessary obstructions does not require preventative measures for trees on private property which are not already an obstruction.

Town's activity in failing to exercise its authority pursuant to tree ordinance to remove tree from property owners' front yard was necessarily governmental in nature, and thus town was entitled to defense of governmental immunity, in action by deceased motorist's wife and estate to recover for injuries sustained when tree fell on motorist's car during storm; ordinance preserved authority to eliminate threats to public health, safety, or welfare from trees solely for town, and private party could not have, under color of ordinance, walked onto owners' property and unilaterally cut down tree.

Town did not waive its governmental immunity by purchasing liability insurance, where policy contained clause stating that it applied to tort liabilities of any insured only to extent that such liability was not subject to any defense of governmental immunity.

MUNICIPAL ORDINANCE - FLORIDA

Florida Association of Realtors v. Orange County, Florida

District Court of Appeal of Florida, Fifth District - October 27, 2022 - So.3d - 2022 WL 15234476

Real estate agents' association filed suit against county, seeking declarations that proposed rent control ordinance was unconstitutional and that ballot summary of ordinance was invalid, and seeking injunctive relief to prevent county from enforcing ordinance and to prevent county supervisor of elections from conducting or certifying referendum election on ordinance.

The Circuit Court denied association's motion for temporary injunction, but concluded that association had a substantial likelihood of succeeding in its challenges against the ordinance and summary. Association filed interlocutory appeal and county cross-appealed.

The District Court of Appeal held that:

- Association was likely to succeed on merits of its claim that ordinance was invalid;
- Association was likely to succeed on the merits of its claim that ballot summary for ordinance would mislead voters;
- Direct conflict between ordinance and statutory requirements for rent control ordinances constituted irreparable harm;
- Association had no adequate legal remedy on its claims; and
- Public interest supported issuance of temporary injunction.

Real estate agents' association was likely to succeed on merits, as element for temporary injunction, on its claim that county rent control ordinance was invalid under state constitution because it violated statute prohibiting local governments from adopting rent control ordinances without determining that controls were necessary to eliminate existing housing emergencies that constituted serious menace to general public; ordinance's legislative findings primarily referred to historical structural issues, rather than sudden or unexpected occurrence, and findings addressing more recent circumstances cited only spiraling inflation, housing prices, and rental rates.

Real estate agents' association was likely to succeed on merits, as element for temporary injunction, on its claim that proposed county rent control ordinance was invalid under state constitution because it violated statute prohibiting local governments from adopting rent control ordinances without determining that controls were necessary to eliminate existing housing emergencies that constituted serious menace to general public, even if county could prove existence of housing emergency, where county's legislative findings were virtually devoid of findings that allegedly existing housing emergency was so grave as to constitute serious menace to general public, at most citing to low rental vacancy rate and low availability of affordable housing.

Real estate agents' association was likely to succeed on merits, as element for temporary injunction, on its claim that proposed county rent control ordinance was invalid under state constitution because it violated statute prohibiting local governments from adopting rent control ordinances without determining that controls were necessary to eliminate existing housing emergencies that constituted serious menace to general public, even if county could prove existence of housing emergency that constituted serious menace to general public, where county's legislative findings did not even suggest that ordinance would eliminate housing emergency, and consultant team that evaluated ordinance's effectiveness for county concluded that ordinance might actually hurt rental conditions in county.

Real estate agents' association was likely to succeed on the merits, as element for temporary injunction, on its claim that the ballot summary for proposed county rent control ordinance was invalid because it would mislead the voters as to the ordinance's chief purpose, where the summary only advised voters about the amount of the proposed rent control, and did not advise voters as to the frequency of allowable rent increases under the ordinance.

Direct conflict between proposed county rent control ordinance and statute setting conditions under which local governments could adopt such ordinances, which conflict rendered ordinance unconstitutional pursuant to state constitutional prohibition against ordinances inconsistent with general law, constituted irreparable harm, in and of itself, for purposes of determining whether real estate agents' association was entitled to temporary injunction, in association's action challenging validity of ordinance and its associated ballot measure.

Real estate agents' association had no adequate legal remedy, as element for temporary injunction, on its claims that proposed county rent control ordinance was invalid under state constitution because it violated statute setting conditions under which local governments could adopt such ordinances and that ballot summary for proposed county rent control ordinance was invalid because it would mislead the voters as to the ordinance's chief purpose, even if damages suffered by association and its members were quantifiable, where county was protected by sovereign immunity, and neither association nor its members could recover damages from county for harm they had and would incur.

Public interest supported issuance of temporary injunction to prevent county from enforcing proposed rent control ordinance that did not meet facial requirements of statute setting conditions under which local governments could adopt such ordinances, and did not meet facial requirements of state constitutional prohibition against ordinances inconsistent with general law.

Public interest supported issuance of temporary injunction to prevent county supervisor of elections from conducting or certifying referendum election on ordinance using ballot summary that omitted material information regarding ordinance's purpose; there was no defensible reason to determine ballot initiative was misleading, yet still have electorate vote on it, only then informing them that measure was unenforceable opinion poll all along.

EMINENT DOMAIN - GEORGIA

Edgewater Hall Enterprises, LLC v. City of Canton

Court of Appeals of Georgia - November 1, 2022 - S.E.2d - 2022 WL 16569409

After order and judgment stating that permanent easement was condemned for city's use to construct and maintain a gravity sewer main and pedestrian trail, servient tenement owner filed petition to set aside declaration of taking, and following subsequent order and judgment stating that temporary construction easement was condemned for city's use for access across property to construct sewer main and trail, servient tenement owner filed second petition to set aside taking.

Following hearing, the Superior Court denied petitions. Servient tenement owner filed applications for interlocutory appeal challenging denial of both petitions, which were granted.

The Court of Appeals held that:

- Evidence support determination that city's actions during negotiations regarding taking for temporary construction easement did not rise to level of bad faith;

- Plat city attached to declaration of taking for temporary construction easement was sufficient under taking statute; but
- Servient tenement owner was property owner and therefore had standing to petition to set aside declaration of taking related to permanent easement.

Evidence supported trial court's determination that actions of city during negotiations regarding taking for temporary construction easement for access across property to build sewer main and pedestrian trail did not rise to the level of bad faith to justify setting aside declaration of taking, even though city failed to recognize servient tenement owner as property owner despite conducting negotiations with it and offered lower amount than appraisal valuation; evidence showed that city stopped negotiating with servient tenement owner after city's title search led to erroneous conclusion that servient tenement owner was not the owner of property underlying easement and that amount city offered was based on comparable settlement city had reached with owner of different property.

Plat city attached to declaration of taking for temporary construction easement for access across property to build sewer main and pedestrian trail was sufficient under taking statute; even though plat did not provide any specific metes and bounds, plat set out sufficient information from which boundaries of claimed easement could be calculated exactly.

Servient tenement owner was owner of property and therefore was entitled to be named in and served with condemnation petition and had standing to petition to set aside city's declaration of taking related to permanent easement to construct and maintain a gravity sewer main and pedestrian trail; servient tenement owner paid taxes assessed by city and county and held title to the property by virtue of its deed.

MUNICIPAL ORDINANCE - NEBRASKA

REO Enterprises, LLC v. Village of Dorchester

Supreme Court of Nebraska - November 4, 2022 - N.W.2d - 312 Neb. 792 - 2022 WL 16703325

Landlord brought declaratory judgment action against village alleging that ordinance requiring landlords to guarantee payment of tenants' unpaid utility charges for services provided by village was unconstitutional special legislation and violated equal protection, the Equal Credit Opportunity Act (ECOA), and public policy.

The District Court granted landlord's motion for summary judgment on equal protection claim. Village appealed. The Supreme Court reversed and remanded. The District Court granted summary judgment for village on other claims. Landlord appealed.

The Supreme Court held that:

- Ordinance did not violate state constitutional prohibition against special legislation;
- Landlord was not an applicant for credit under ECOA;
- Ordinance was not void as against public policy; and
- Trial court did not plainly err in not entering summary judgment on issue not raised on motion for summary judgment.

Ordinance requiring landlords to guarantee payment of tenants' unpaid utility charges in order for tenants to receive utility services from village did not violate state constitutional prohibition on

special legislation, even though ordinance did not require third-party guarantee for property owners applying for utility services from village; there was a substantial difference in circumstances between tenants and property owners as to time and expense that was likely necessary for village to collect unpaid utility bills.

Landlord that was required by ordinance to serve as guarantor of unpaid utility bills of its tenants in order for tenants to receive utility services from village was not an "applicant" for credit under Equal Credit Opportunity Act (ECOA), and therefore landlord could not seek equitable or declaratory relief under ECOA as to alleged invalidity of ordinance. Consumer Credit Protection Act.

Landlord that was required by ordinance to serve as guarantor of unpaid utility bills of its tenants in order for tenants to receive utility services from village, but that did not qualify as an "applicant" for credit under Equal Credit Opportunity Act (ECOA), could not obtain declaratory relief under ECOA as to validity of ordinance by naming one of its tenants as a third-party defendant, where tenant did not make an application to district court for relief.

Ordinance requiring landlords to guarantee payment of tenants' unpaid utility charges for services provided by village was not void as against public policy, even though state law capped the amount landlords could demand as a security deposit.

ZONING & PLANNING - PENNSYLVANIA

PSIP JVI Krumsville Road, LLC v. Board of Supervisors of Greenwich Township

Commonwealth Court of Pennsylvania - October 26, 2022 - A.3d - 2022 WL 14659062

Developer appealed decision of township board of supervisors, which rejected developer's preliminary land development plan for reason that developer had conveyed land to Pennsylvania Department of Transportation (PennDOT) for a highway right-of-way without first obtaining township's subdivision approval.

The Court of Common Pleas reversed supervisors' decision and granted developer's land use appeal. Supervisors appealed.

The Commonwealth Court held that:

- Developer was not required to obtain subdivision approval from township before, or after, conveyance of land to PennDOT for public purpose, and
- Township acted in bad faith with respect to its disapproval of the plan.

Developer was not required to obtain subdivision approval from township before, or after, conveyance of land to Pennsylvania Department of Transportation (PennDOT) for required right-o--way, as this public purpose rendered township's subdivision and land development ordinance (SALVO) inapplicable; deed from developer to PennDOT recited that real estate transfer was for required highway right-of-way and limited use of the real estate to that single public purpose.

Township acted in bad faith with respect to its disapproval of developer's land development plan, and this bad faith constituted, in itself, a basis for trial court to reverse township supervisors' disapproval of the plan; faced with a final plan that fully complied with every substantive requirement in township subdivision and land development ordinance (SALDO), township devised self-serving technical violations as means to reject the plan.

EMINENT DOMAIN - TEXAS

In re Upstream Addicks and Barker (Texas) Flood-Control Reservoirs

United States Court of Federal Claims - October 28, 2022 - Fed.Cl. - 2022 WL 15805669

Property owners sued federal government, claiming Fifth Amendment taking of flowage easement from two dams designed, constructed, maintained, and operated by Army Corps of Engineers, after properties within flood-pool reservoirs were inundated with impounded flood waters during Hurricane Harvey.

Following consolidation of actions within master docket and then splitting of actions into two sub-master dockets based on whether property was upstream or downstream from dams and bifurcation of upstream cases to consider liability and damages separately, the Court of Federal Claims determined that partial taking of non-categorical, permanent flowage easement was effected on all 13 upstream bellwether test case properties. After cases moved to discovery on damages, six upstream properties were chosen for just compensation phase, and bench trial was held.

The Court of Federal Claims held that:

- Just compensation was warranted for real property taken by flowage easement;
- Just compensation was warranted for personal property taken by easement;
- Awards for certain personal property required reductions for lack of documentation;
- Just compensation was warranted for displacement costs;
- Just compensation awards would be offset by government's direct payments; and
- Interest rate of 3.62% was warranted on owners' just compensation awards.

Government's flowage easement that effected permanent physical partial taking of owners' real property upstream from dams operated by Army Corps of Engineers required just compensation in amount of difference between property's market value with and without easement plus depreciation resulting to remainder of property after Corps flooded properties with impounded water during hurricane; easement left owners fee simple interest in properties, allowing them to continue lawful use subject to risk of occasional flooding caused by dams, market was aware of flood risk even if not aware of easement, and award reflected properties' value in their damaged state subject to easement and included only repair costs incurred to restore property to pre-taking state and only for remainder of any lease.

Government's flowage easement that effected permanent physical partial taking of owners' real and personal property upstream from dams operated by Army Corps of Engineers required just compensation for personal property, fixtures, and improvements damaged or destroyed by Corps' flooding of properties with impounded water during hurricane, since owners' personal property was not merely damaged by government's taking of their real property, but rather, owners' personal property itself was taken by government, and their personal property losses were compensable even if Corps did not intend to cause such damage and did not acquire personal property for public use.

Property owners' displacement costs would be awarded as just compensation for government's flowage easement that effected permanent physical partial taking of owners' real and personal property upstream from dams operated by Army Corps of Engineers, including owners' costs of securing substitute housing actually and necessarily incurred due to Corps' flooding of properties with impounded water during hurricane, since owners' displacements extended from time their homes were rendered uninhabitable until their homes were repaired and safe to occupy once again, but dislocation awards would be reduced by half to reflect each owner's co-tenancy and would not

be based on monthly rental value of properties as that would duplicate their real property awards.

Property owner's costs for displacement of tenants from his rental units would be awarded as just compensation for government's flowage easement that effected permanent physical partial taking of owners' real and personal property upstream from dams operated by Army Corps of Engineers, including owner's costs in lost income and utility payments for one unit and lost rent for another unit due to Corps' flooding of properties with impounded water during hurricane, since owner's units were vacant because of government's taking, but award was reduced by half to reflect owner's proportional ownership of property, and costs incurred in traveling from his home in California to Texas to oversee repair of his properties and testify during liability trial were incidental and thus noncompensable.

Federal Emergency Management Agency's (FEMA) direct payments to property owners were required to be offset from owners' just compensation awards for government's flowage easement that effected permanent physical partial taking of their real and personal property upstream from dams operated by Army Corps of Engineers, due to Corps' flooding of properties with impounded water during hurricane, even though FEMA made funds available to others whose homes were flooded during hurricane but not because of government taking, since owners would receive double recovery if FEMA payments were not deducted, and government reimbursed for some losses of property once by issuing FEMA relief and should not be compelled to pay again for damage to property by same flood pursuant to just compensation award.

EMINENT DOMAIN - WYOMING

Colton v. Town of Dubois

Supreme Court of Wyoming - November 3, 2022 - P.3d - 2022 WL 16645722 - 2022 WY 138

Landowner brought declaratory judgment action against town concerning his rights under Eminent Domain Act to reclaim, for non-use by town, the portion of his property that town previously sought to condemn for airport project but ultimately acquired through a settlement agreement with landowner.

After a bench trial, the District Court granted summary judgment for town. Landowner appealed.

The Supreme Court held that:

- Settlement agreement satisfied elements for landowner's waiver of rights under Act, and
- Settlement agreement did not contravene public policy behind Act.

Landowner's settlement agreement with town waived any right he had under Eminent Domain Act to reclaim, for non-use by town, the portion of his property that town previously sought to condemn for airport project but ultimately acquired through settlement agreement, where Act's provisions were primary basis for parties' claims throughout their dispute leading to settlement agreement, waiver provisions in settlement agreement were not ambiguous, the stated purpose of settlement agreement was to resolve "any and all" future claims "related in any way" to the condemnation action, and landowner agreed to release town from "any and all" claims in multiple sections of settlement agreement.

Landowner's waiver of his right under Eminent Domain Act to reclaim, for non-use by town, the portion of his property that town previously sought to condemn for airport project but ultimately acquired through settlement agreement with landowner did not contravene public policy behind Act;

landowner's waiver of statutory opportunity to reclaim property did not affect the public interest in the acquisition, possession, occupation, and enjoyment of private land by a public entity when the public interest and necessity so required, and public policy or interest was also served by recognizing an individual's right to freely contract.

ENVIRONMENTAL LAW - CALIFORNIA

G.I. Industries v. City of Thousand Oaks

Court of Appeal, Second District, Division 6, California - October 26, 2022 - Cal.Rptr.3d - 2022 WL 14750209

Competitor petitioned the trial court for a writ of mandate directing the city to vacate both its approval of solid waste hauling franchise agreement and its finding that the project was exempt from the California Environmental Quality Act (CEQA).

The Superior Court sustained city's and solid waste hauling company's demurrer without leave to amend.

The Court of Appeal held that:

- City violated the Ralph M. Brown Act by adopting CEQA exemption without having listed it as an item on its agenda for at least 72 hours, and
- Competitor's letter to city was sufficient to satisfy the Brown Act's requirements for a "cure and correct" letter.

City violated the Ralph M. Brown Act by adopting California Environmental Quality Act (CEQA) exemption for solid waste hauling franchise agreement without having listed it as an item on its agenda for at least 72 hours; CEQA exemption was not a component of the agenda item awarding the franchise agreement to waste hauling company, but rather involved a separate action or determination by the city and concerned discrete significant issues of CEQA compliance.

Competitor's letter informing city that it violated the Ralph M. Brown Act by "voting to adopt a Notice of Exemption (NOE)" prior to adopting solid waste hauling franchise agreement "and without adequate notice to the public" was sufficient to satisfy the Act's requirements for a "cure and correct" letter; regardless of whether city technically voted to "adopt" a notice of exemption or when that notice was filed, letter informed city that it violated the Act by considering California Environmental Quality Act (CEQA) exemption for the franchise agreement without describing the action in the agenda for at least 72-hours prior to the meeting.

IMMUNITY - GEORGIA

City of Roswell v. Hernandez-Flores

Court of Appeals of Georgia - October 28, 2022 - S.E.2d - 2022 WL 15654230

Pedestrian filed negligence suit against city, seeking to recover for multiple permanent injuries sustained when she was struck on the sidewalk by a fleeing suspect's vehicle after it swerved to avoid tire-deflating spikes deployed by a city police officer.

Asserting sovereign immunity, city moved for summary judgment. The trial court denied city's

motion. City appealed.

The Court of Appeals held that:

- Officer was not actively using his patrol car at the time pedestrian was injured, so as to waive city's immunity;
- Officer's storage of spikes in the trunk of his patrol car was not a use of a motor vehicle that would waive city's immunity; and
- Officer was not using patrol car as a vehicle when he was positioned behind it and deploying spikes, so as to waive city's immunity.

City police officer was not actively using his patrol car at the time pedestrian was injured by fleeing suspect's vehicle after it swerved to avoid tire-deflating spikes deployed by officer, and thus officer's conduct involving a motor vehicle was insufficient to waive city's sovereign immunity from pedestrian's negligence suit, even though officer's patrol car had been involved in his monitoring of the pursuit of the suspect on his radio and his travel to intersection at which he deployed spikes; patrol car had already been parked on the side of the road when pedestrian was injured.

City police officer's storage of tire-deflating spikes in the trunk of his patrol car was not a use of a motor vehicle within the meaning of statute waiving city's sovereign immunity for losses arising out of claims for the negligent use of a vehicle, and thus did not waive city's immunity from pedestrian's negligence suit seeking to recover for injuries sustained when she was struck by a fleeing suspect's vehicle after it swerved to avoid such spikes; it was officer's actual use of spikes that allegedly led suspect's vehicle to injure pedestrian, not the location in which spikes were stored, and thus officer's allegedly tortious conduct did not originate in or flow from the storage of spikes in the patrol car, and such storage was not the direct cause of pedestrian's injuries.

City police officer was not using his parked patrol car as a vehicle when he was positioned behind it and deploying tire-deflating spikes, within the meaning of statute waiving city's sovereign immunity for losses arising out of claims for the negligent use of a vehicle, and thus statute did not apply to waive city's immunity from pedestrian's negligence suit seeking to recover for injuries sustained when she was struck by a fleeing suspect's vehicle after it swerved to avoid such spikes; patrol car was parked and analogous to a static prop, and its presence at the scene did not directly contribute to accident, in that suspect allegedly swerved to avoid spikes, not the patrol car.

Statutes that provide for a waiver of sovereign immunity, such as the provision waiving immunity of local government entities for a loss arising out of claims for the negligent use of a motor vehicle, are in derogation of the common law and thus are to be strictly construed against a finding of waiver.

POLITICAL SUBDIVISIONS - GEORGIA

City of Winder v. Barrow County

Court of Appeals of Georgia - October 28, 2022 - S.E.2d - 2022 WL 15645176

County brought action against city, challenging manner of funding road maintenance and rates assessed for water utility services.

The Superior Court denied city's motion to dismiss and for summary judgment, and granted county's motion for partial summary judgment. City appealed.

The Court of Appeals held that:

- County could charge city residents for countywide maintenance of unincorporated roads outside the city limits;
- Statute regarding viable sources of funding for countywide services did not restrict funding sources; and
- Superior Court had authority to resolve county's claim that water usage rates assessed by city amounted to illegal tax.

Statute governing funding strategies for county services, providing that when the county and municipality jointly fund a countywide service, the costs should be shared by property owners and residents that received the service, did not preclude county from charging city residents for countywide maintenance of unincorporated roads outside the city limits; county roads, regardless of their specific geographic location, and their proper maintenance, benefited all residents of county.

Statute regarding viable sources of funding for countywide services, which listed property taxes, insurance premium taxes, assessments, and user fees, did not limit funding for countywide services to the four listed sources; sources listed were general categories that could be used for funding.

Superior Court had authority to resolve county's claim that water usage rates assessed by city amounted to an illegal tax on its unincorporated residents.

LIABILITY - KENTUCKY

City of Barbourville v. Hoskins

Supreme Court of Kentucky - October 20, 2022 - S.W.3d - 2022 WL 12196572

Visitor to water park owned by city brought action against the city under theories of premises liability, strict liability, and breach of contract to recover for burns she sustained on the bottom of her feet after visiting the park.

The Circuit Court granted summary judgment to city, and visitor appealed. The Court of Appeals affirmed in part and reversed in part. Discretionary review was granted.

The Supreme Court held that:

- Visitor was an invitee at the park, and thus, city owed her a duty to discover unreasonably dangerous conditions and either eliminate or warn of them;
- The sun-heated walkways at the water park were not an unreasonably dangerous condition, and thus, city had no duty to warn of or ameliorate the condition; and
- The burns visitor sustained from the sun-heated walkways were not foreseeable to the city, and thus it had no duty to eliminate the allegedly dangerous condition.

Visitor who sustained burns on the bottom of her feet after visiting city-owned water park was an "invitee" at the park, and thus, city owed her a duty to discover unreasonably dangerous conditions on the land and either eliminate or warn of them, for purposes of her premises liability claim, where visitor was an individual present on the premises at the explicit or implicit invitation of the city, as property owner, to do business or otherwise benefit the city.

The sun-heated walkways at city-owned water park were not an unreasonably dangerous condition, and thus, city had no duty to warn of or ameliorate the condition, precluding city's liability for burns invitee sustained on the bottom of her feet after visiting the park; there was no evidence that the walkways at the water park were negligently maintained or defectively designed, that other water

parks took steps to minimize the sun-generated heat of their concrete walkways, or that the park failed to comply with industry standards or practices.

The burns invitee, who had diabetic neuropathy that caused a loss of protective sensation in her feet, sustained from walking on sun-heated walkways at city-owned water park were not foreseeable to the city, and thus the city had no duty to eliminate the allegedly dangerous condition; there was no evidence of any feasible means the city could have undertaken to lessen the alleged risk created by heat radiating from sidewalks warmed by the summer sun, no evidence that the city acted outside of industry standard practices, and no evidence why the city would have anticipated injuries like invitee's to take place.

SHORT TERM RENTALS - LOUISIANA

Hignell-Stark v. City of New Orleans

United States Court of Appeals, Fifth Circuit - August 22, 2022 - 46 F.4th 317

Homeowners who sought to operate short term rentals and company providing services for short term rental owners brought § 1983 action against city, alleging violations of the dormant Commerce Clause, the Takings Clause of the Fifth Amendment, and the First Amendment right to free speech, based on the city's ordinance requiring licenses to operate short term rentals.

The United States District Court for the Eastern District of Louisiana granted summary judgment in favor of city, in part, and denied city's motion, in part. Parties cross-appealed.

The Court of Appeals held that:

- Homeowners had no protected property interest in the renewal of their short term rental licenses, as required to support Takings Clause claim for nonrenewals;
- Ordinance's residency requirement violated dormant Commerce Clause; and
- Court of Appeals lacked jurisdiction to review District Court's decision on the homeowners' First Amendment claim.

Homeowners who sought to operate short term rentals had no protected property interest in the renewal of their short term rental licenses, as required to support Takings Clause claim against city for nonrenewals; the original licensing ordinance stated expressly that a short term rental license was a privilege, not a right, and that the license could be revoked or not renewed for non-compliance with the ordinance, and homeowners only held prior licenses for a couple of years, so that they were not firmly established in custom and practice.

Residency requirement of city ordinance governing licenses for short term rentals, providing that no homeowner could obtain license to operate short term rental unless property was also homeowner's primary residence and owner had homestead exemption for that property, violated dormant Commerce Clause; requirement discriminated on its face against interstate commerce, as it completely prohibited out-of-state residents who owned property in city from obtaining short term rental licenses, and legitimate local purposes of requirement, including preventing nuisances and promoting affordable housing, could adequately be served by reasonable nondiscriminatory alternatives, such as enforcement efforts to address nuisances, and reducing housing regulations.

The Court of Appeals lacked jurisdiction to review District Court's determination that homeowners' First Amendment claim, alleging that city ordinance requiring homeowners to obtain licenses to operate short term rentals was a prior restraint on free speech, was viable; finding that claim was

viable was not “final, appealable judgment,” as determination did not resolve all of homeowners’ claims for relief.

FINANCIAL REPORTING - MISSOURI

City of Foley v. Director, Missouri Department of Revenue

Missouri Court of Appeals, Western District - October 18, 2022 - S.W.3d - 2022 WL 10199680

After state Department of Revenue fined city for filing a late financial report, city filed a declaratory judgment action against state Department of Revenue and State Auditor alleging that regulation governing annual financial reports of political subdivisions was unreasonable, arbitrary, capricious, and violative of due process provisions of constitutions of state and the United States.

The Circuit Court granted defendants’ motions for judgment on the pleadings. City appealed.

The Court of Appeals held that:

- City failed to prove its claim that defendants’ motions for judgment on the pleadings were essentially motions to dismiss for failure to state a claim;
- Trial court properly decided merits of well-pleaded declaratory relief action by judgment of dismissal;
- There was no declaration that trial court could make with regard to regulation that would change fact that filing requirement and penalty procedures were all statutory;
- Regulation did not exceed its statutory authority; and
- Trial court necessarily could not proclaim that regulation’s six-month post fiscal year deadline imposed a mandatory fine on city without due process.

ZONING & PLANNING - OHIO

State ex rel. Halstead v. Jackson

Supreme Court of Ohio - September 13, 2022 - N.E.3d - 2022 WL 4137610 - 2022-Ohi--3205

Relators sought writ of mandamus to have referendum on zoning ordinance passed as emergency legislation placed on upcoming general-election ballot.

The Supreme Court held that:

- Relators caused unreasonable delay in waiting to file action, as relevant to whether action was barred by laches;
- City and prospective purchaser of land were not prejudiced by delay, and thus action was not barred by laches;
- Relators lacked adequate remedy in ordinary course of law;
- Ordinance validly passed as emergency legislation was not subject to referendum under city charter; and
- Ordinance sufficiently stated reasons for passage as emergency legislation.

Zoning ordinance validly passed as emergency legislation was not subject to referendum under city’s

charter, which stated that zoning ordinances "shall be subject to the provisions of [the charter] pertaining to their enactment and matters of initiative or referendum"; natural reading of charter was that "subject to" had one object, i.e., "the provisions of [the charter]," meaning that zoning ordinances could be enacted in same way as other ordinances and that charter's referendum provisions applied to such ordinances, and charter incorporated state law concerning referendum petitions, which law exempted from referendum power ordinances passed as emergency legislation.

Stated reasons in zoning ordinance for its passage as emergency legislation, specifically, to preserve and increase municipal income tax revenues, to protect value of previously made utility infrastructure investments in zoned area, and to protect city's influence over and ability to fund infrastructure improvements in zoned area, were sufficient to satisfy requirement that ordinance set forth reasons for passage as emergency legislation under statute providing that such ordinances go into immediate effect, and thus zoning ordinance was not subject to referendum.

PUBLC RECORDS - NEW HAMPSHIRE

Colquhoun v. City of Nashua

Supreme Court of New Hampshire - October 26, 2022 - A.3d - 2022 WL 14664688

Records requester brought action against city after city denied request for certain e-mail communications between city employees pursuant to Right-to-Know Law.

The Superior COURT entered judgment in favor of requester but denied requester's motion for attorney's fees. Requester appealed.

The Supreme Court held that:

- City should have known that denial of request on basis that records were not reasonably described violated Right-to-Know Law, as would require award of fees, and
- City also should have known that denial of request on basis that it was unduly burdensome violated Right-to-Know Law, as would require award of fees.

City should have known that denial of records request, which sought all email communications between two city employees during specified two-month period, on basis that records were not reasonably described violated Right-to-Know Law, as would require award of attorney's fees to requester after trial court found in her favor in her action against city for violation of Right-to-Know Law; although city asserted that caselaw indicated use of "all" rendered request deficient, such caselaw was distinguishable, and city's own actions in quickly finding the responsive documents after requester filed suit demonstrated that requester's description was sufficient to permit city to find documents.

City should have known that denial of records request, which sought all email communications between two city employees during specified two-month period, on basis that request was unduly burdensome violated Right-to-Know Law, as would require award of attorney's fees to requester after trial court found in her favor in her action against city for violation of Right-to-Know Law; caselaw clearly demonstrated that, even if request was unduly burdensome, city could not simply categorically deny the request in its entirety but rather was required to undertake reasonable search.

PUBLIC UTILITIES - PENNSYLVANIA

City of Lancaster v. Pennsylvania Public Utility Commission

Commonwealth Court of Pennsylvania - October 11, 2022 - A.3d - 2022 WL 6572195

Municipalities filed petition for review against Public Utility Commission (PUC) challenging constitutionality of regulation that mandated outdoor gas meter locations but permitted natural gas distribution companies (NGDC's) to consider indoor gas meter locations when meter was within building in a locally designated historical district.

The Commonwealth Court sustained PUC's preliminary objection to petition's count alleging regulation violated state constitutional provision governing natural resources, but overruled PUC's preliminary objection to count challenging regulation as unconstitutional as an improper delegation of PUC's authority to private parties. Municipalities filed application seeking summary relief as to remaining count.

The Commonwealth Court held that regulation improperly vested absolute discretion in NGDCs, and thus was an unconstitutional delegation of legislative authority.

Regulation, that generally required gas meters to be placed outside building but allowed inside meter location to be considered when building was located in historic district, improperly vested absolute discretion in natural gas distribution companies (NGDCs) as to whether to require that a gas meter be located inside or outside of historic building, such that regulation was without adequate standards to guide and restrain exercise of authority delegated from Public Utility Commission (PUC) to NGDCs, and thus regulation was unconstitutional delegation of legislative authority; regulation lacked formal procedure to challenge NGDC's decision, NGDCs were not required to give reasons for decision, and regulation contained no presumption of maintaining gas meter's current location.

BANKRUPTCY - PUERTO RICO

In re Financial Oversight and Management Board for Puerto Rico

United States District Court, D. Puerto Rico - October 12, 2022 - B.R. - 2022 WL 6949441

In Title III debt restructuring proceedings brought pursuant to the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), debtor, the Puerto Rico Highways and Transportation Authority (HTA), by and through the Financial Oversight and Management Board for Puerto Rico, sought confirmation of its modified fifth amended Title III plan of adjustment.

The District Court held that confirmation of the plan was warranted.

Good and sufficient cause supported confirmation, under Title III of the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), of the modified fifth amended Title III plan of adjustment of the Puerto Rico Highways and Transportation Authority (HTA); all objections to confirmation had been resolved, overruled, or withdrawn, the plan was consistent with the applicable HTA fiscal plan and satisfied applicable sections of PROMESA, the provisions of the plan constituted a good faith, reasonable, fair, and equitable compromise and settlement of all claims and controversies resolved pursuant to the plan, including specified bond claims, and the Financial Oversight and Management Board for Puerto Rico consented to confirmation.

BANKRUPTCY - PUERTO RICO

In re Financial Oversight and Management Board for Puerto Rico

United States Court of Appeals, First Circuit - October 27, 2022 - F.4th - 2022 WL 15254099

In Title III debt restructuring proceedings brought pursuant to the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), Financial Oversight and Management Board for Puerto Rico filed motion for confirmation of modified eighth amended proposed joint plan of adjustment for Commonwealth of Puerto Rico, Employees Retirement System of the Government of the Commonwealth of Puerto Rico and the Puerto Rico Public Buildings Authority.

Creditors objected.

The United States District Court for the District of Puerto Rico overruled objections, and confirmed plan.

Teachers' associations appealed and filed motions for stay pending appeal. The District Court denied stay motions.

Retirees then appealed confirmation order.

The Court of Appeals held that:

- Confirmation order did not incorporate by reference the stipulation and final judgment's invalidation of Acts and, thus, Court did not possess jurisdiction over retirees' action, and
- Retirees' failure to timely appeal stipulation and final judgment meant that Court lacked jurisdiction over retirees' action.

A passing reference in findings of fact, conclusions of law and confirmation order for plan of adjustment for Commonwealth of Puerto Rico, Employees Retirement System of the Government of the Commonwealth of Puerto Rico and the Puerto Rico Public Buildings Authority to a stipulation and final judgment approved by Title III court, which entered settlement in adversary proceeding between Financial Oversight and Management Board for Puerto Rico, the Commonwealth government, and Office of Management and Budget (OMB) agreeing that Acts permitting certain government employees to retire early and providing enhanced retirement benefits were invalidated pursuant to Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA) did not amount to confirmation order's incorporation by reference of stipulation and final judgment's invalidation of Acts and, thus, Court of Appeals did not possess jurisdiction over retirees' action seeking to challenge confirmation order.

Under merger doctrine, adversary proceeding's stipulation and final judgment approved by Title III court, which entered settlement between Financial Oversight and Management Board for Puerto Rico, the Commonwealth government, and Office of Management and Budget (OMB) agreeing that Acts permitting certain government employees to retire early and providing enhanced retirement benefits were invalidated pursuant to Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), could not be construed as part of main bankruptcy case's findings of fact, conclusions of law and confirmation order for plan of adjustment for Commonwealth of Puerto Rico, Employees Retirement System of the Government of the Commonwealth of Puerto Rico and the Puerto Rico Public Buildings Authority and, thus, retirees' failure to timely appeal stipulation and final judgment meant that Court of Appeals lacked jurisdiction over retirees' action, seeking to challenge confirmation order; adversary proceeding was separate from bankruptcy case and, upon

entry of approval order, became final and immediately appealable.

WATER LAW - SOUTH DAKOTA

Little v. Hanson County Drainage Board, Hanson County

Supreme Court of South Dakota - October 26, 2022 - N.W.2d - 2022 WL 15115230 - 2022 S.D. 63

Objectors brought action against county drainage board, alleging that the board failed to follow approval procedures outlined in its ordinances and state statutes when granting drainage permit application to clean out pre-existing ditch located in township road's right-of-way.

The Circuit Court affirmed board's decision. Objectors appealed.

The Supreme Court held that:

- Objectors were required to directly appeal township's approval of application in order to challenge township's consent to permit;
- Board complied with procedures outlined in its ordinances for examining drainage permit application to determine whether township provided necessary written approval;
- Board complied with public notice requirements;
- Board did not violate its ordinance requiring applicant to post notice on the property at county's direction by failing to require applicant to post notice on his property;
- Board did not abuse its discretion in approving application without considering applicant's alleged prior improper removal of driveway and culvert; and
- Proffered evidence that objectors alleged would establish that township's consent to permit was invalid was not relevant in determining whether board complied with its ordinances in granting application.

BALLOT INITIATIVES - SOUTH DAKOTA

Dakotans for Health v. Noem

United States Court of Appeals, Eighth Circuit - November 1, 2022 - F.4th - 2022 WL 16559224

Ballot question committee brought action against Governor of the State of South Dakota, South Dakota Attorney General, and South Dakota Secretary of State, alleging that legislative bill amending state law regarding petition circulation process violated First Amendment.

The United States District Court for the District of South Dakota granted committee's motion for preliminary injunction, and state appealed.

The Court of Appeals holds that:

- Committee had standing to seek prospective First Amendment relief;
- Committee was likely to succeed on merits of its First Amendment claim;
- Committee faced irreparable harm in absence of preliminary injunction; and
- Balance of harms and public interest favored issuance of preliminary injunction.

Ballot question committee faced concrete, particularized, and actual injury from South Dakota law

imposing new obligations on persons compensated to circulate initiative petitions, as required to establish standing to seek prospective First Amendment relief, even though challenged provisions were directed primarily at petition circulators; requirement that paid petition circulators publicly disclose sensitive personal information would likely make it more difficult for committees to recruit paid circulators, thereby restricting committee's ability to reach its audience, and South Dakota regulated petition circulators and ballot question committees in such way that their interests were highly intertwined, if not inseparable.

Ballot question committee was likely to succeed on merits of its claim that South Dakota law requiring paid petition circulators to make sensitive personal information publicly available violated First Amendment, for purposes of evaluating committee's entitlement to preliminary injunction; state failed to show that paid petition circulators created greater risk of fraud than volunteers, public disclosure requirement was likely to chill right to circulate petitions, and requirement was not narrowly tailored to serve state's important interests.

Ballot question committee faced irreparable harm in absence of preliminary injunction barring enforcement of South Dakota law imposing restrictions on paid petition circulators that likely violated First Amendment; committee could not sue for money damages, and law affected core political speech by impacting number of persons willing to circulate petitions for committee and number of persons eligible to circulate for it, and thus its ability to reach its audience and successfully gather enough signatures to place question on ballot.

Balance of harms and public interest favored issuance of preliminary injunction barring enforcement of South Dakota law imposing restrictions on paid petition circulators that likely violated First Amendment; while South Dakota had important interests in protecting integrity of ballot initiative process, it had no interest in enforcing overbroad restrictions.

SURETY BONDS - UTAH

In re Western Insurance Company

Supreme Court of Utah - October 27, 2022 - P.3d - 2022 WL 15048431 - 2022 UT 38

County sought hearing after insurer's liquidator denied county's claims to recover on surety bonds purchased from insurer by developer which defaulted and ceased work on municipal projects.

The Third District Court entered judgment for liquidator, and county appealed.

The Supreme Court held that:

- Release and waiver was ambiguous such that extrinsic evidence was admissible to interpret the document;
- Any error by district court in admitting or excluding evidence was not harmful; and
- County failed to show that court's determination that liquidator could amend determination of insurer's liability was faulty.

Release and waiver which insurer's liquidator sent to county, which sought to recover on surety bonds purchased from insurer by developer which defaulted and ceased work on municipal projects, which provided that county's claim would be "fully compromised and settled and [ ] not in dispute" was ambiguous such that extrinsic evidence was admissible to interpret the document; while county argued that they had entered into a binding settlement agreement which required liquidator to recommend county's claims to the court, liquidator argued that the document simply affirmed the

statutory rights and obligations placed on each party and that the "compromised and settled" language warned county that, if it objected, it would lose its statutory right to object to the liquidator's determination.

County failed to establish that Insurer Receivership Act did not allow insurer's liquidator to amend determination of insurer's liability to county on surety bonds purchased by developer which defaulted and ceased work on municipal projects; while county contended that insurer's liability became fixed on the date court issued liquidation order, county provided no analysis or authority to back up its claims, and did not show why the district court's determination that the Act allowed the liquidator to amend the notice of determination, after obtaining additional information, was faulty.

Record on appeal in action regarding notice of determination for liquidated insurer did not support county's contention that the district court found that bonded projects had been substantially completed, and that such finding was error; district court concluded that the county had failed to demonstrate that it would need to expend any money to finish the projects and therefore dismissed the county's objection to the amended notice of determination because the county failed to provide sufficient evidence to demonstrate that the liquidator got it wrong when he concluded that the county had not suffered a loss.

TELECOM - ARIZONA

Vertical Bridge Development LLC v. County of Maricopa

United States District Court, D. Arizona - October 5, 2022 - F.Supp.3d - 2022 WL 5434217

Developer brought a claim against county board of supervisors, alleging that board's decision denying developer's special use permit (SUP) application to build a cellular network tower violated the Telecommunications Act (TCA).

Board moved for partial judgment on the pleadings.

The District Court held that:

- Board's denial of developer's SUP was a decision subject to the TCA, and
- Developer's allegations stated a claim for violation of TCA requirements that the basis of a denial be in writing and supported by substantial evidence.

County board of supervisors' denial of developer's special use permit (SUP) application to build a cellular network tower was a "decision" to deny a request to place personal wireless service facilities subject to the Telecommunication Act's (TCA) requirements that the basis of the denial be stated in writing and supported by substantial evidence, regardless of whether the denial was characterized as a legislative or adjudicative act; the board considered the SUP application, considered the proposed cellular tower site along with specific technical facts, design specifications, and community member opinions, and denied the application.

Developer's allegation that the county board of supervisors denied its special use permit (SUP) application to construct a cellular tower without providing a basis for the denial stated a claim for violation of the Telecommunications Act (TCA) requirement that the basis of a denial of a request to build a wireless service facility be stated in writing.

Developer's allegation that the county board of supervisors denied developer's special use permit (SUP) application to construct a cellular tower based on certain objectors' aesthetic concerns or the

rural nature of the area stated a claim for violation of the Telecommunications Act (TCA) requirement that a denial of a request to build a wireless service facility be supported by substantial evidence in a written record.

ANNEXATION - CALIFORNIA

Tracy Rural County Fire Protection District v. Local Agency Formation Commission of San Joaquin County

Court of Appeal, Third District, California - October 13, 2022 - Cal.Rptr.3d - 2022 WL 7265008

Rural county fire protection district, joined by city, filed petition for writs of ordinary and administrative mandate and complaint for declaratory relief challenging decision by county local agency formation commission (LAFCO) adopting governance model for fire services requiring that future annexations to city would detach from district.

The Superior Court denied petition. District appealed.

The Court of Appeal held that:

- LAFCO did not have authority to issue resolution under statute granting it authority to approve proposals for change of organization;
- Resolution was not authorized under statute granting LAFCO authority to make and enforce regulations for orderly and fair conduct of hearings;
- Resolution was not authorized under statutes providing LAFCO with power to review and approve proposals for changes of organization consistent with procedures;
- Resolution was not authorized under statutes providing LAFCO with power to review and approve changes of organizations consistent with policies and guidelines;
- Resolution was contrary to statute setting forth legislative findings and declarations;
- Resolution was not authorized under statutes governing standards for LAFCO to assess proposals; and
- Resolution was not authorized by statutes granting LAFCO power to review spheres of influence.

County local agency formation commission (LAFCO) was not authorized to issue resolution ordering detachment of fire protection services from rural county fire protection district in future annexations of territory by the city, but rather it was required to act on specific proposals for annexation and/or detachment, under statute granting it power to review and approve with or without amendment proposals for organization or reorganization; although resolution was issued against backdrop of two annexation proposals, LAFCO was not reviewing either of those proposals when it issued challenged resolutions, and LAFCO instead established policy requiring city to include detachment in all future annexation proposals.

Statute granting county local agency formation commission (LAFCO) authority to make and enforce regulations for the orderly and fair conduct of hearings by LAFCO did not authorize it to issue resolution ordering detachment of fire protection services from rural county fire protection district in future annexations of territory by the city; resolution had nothing to do with orderly and fair conduct of hearings by LAFCO.

Resolution adopted by county local agency formation commission (LAFCO) ordering detachment of fire protection services from rural county fire protection district in future annexations of territory by

the city was not “procedure,” within meaning of statutes providing LAFCO with power to review and approve proposals for changes of organization or reorganization consistent with procedures adopted by LAFCO, and to adopt written procedures for evaluation of proposals, and thus statutes were not basis of authority to issue resolution; resolution did not set forth any rules of procedure for bringing or presenting an annexation proposal to the LAFCO, but it instead dictated the substance of that proposal.

Resolution adopted by county local agency formation commission (LAFCO) ordering detachment of fire protection services from rural county fire protection district in future annexations of territory by city was not “policy” or “guideline,” within meaning of statute providing LAFCO with power to review and approve proposals for changes of organization or reorganization consistent with policies and guidelines adopted by the LAFCO, and thus statute was not basis for authority to issue resolution; resolution was not statement of general principles, as it went beyond statement of general goals or outline of policy or conduct and specifically precluded consideration of annexation proposals that did not include detachment, and while policies could include directives, change in organization could not be one of them.

Resolution adopted by county local agency formation commission (LAFCO) ordering detachment of fire protection services from rural county fire protection district in future annexations of territory by city was contrary to statute setting forth legislative findings and declarations of Cortese-Kno--Hertzberg Local Government Reorganization Act of 2000, which made clear that dispositive issue to be decided was which agency or agencies could best provide the relevant services; preventing city from proposing what it considered to be best model for fire protection services, i.e., nondetachment from district, improperly limited LAFCO’s consideration of that dispositive issue in context of specific annexation being proposed.

Resolution adopted by county local agency formation commission (LAFCO) ordering detachment of fire protection services from rural county fire protection district in future annexations of territory by city was not “standard,” under statutes governing standards for assessing factors in reviewing a proposal for change of organization or for assessing evaluation of plan for providing services within affected territory, and thus statutes were not basis for LAFCO’s authority to issue resolution; resolution did not set up detachment model as standard against which annexation proposal should be compared in assessing proposal or factors, but it instead required detachment in the proposal itself.

Resolution adopted by county local agency formation commission (LAFCO) ordering detachment of fire protection services from rural county fire protection district in future annexations of territory by city was not authorized by statutes granting LAFCO power to review services and spheres of influence of cities and special districts, and to enact policies to promote development of areas within the sphere; LAFCO did something entirely different from sphere of influence determination when it ordered detachment for all future annexation proposals, and resolution went beyond authorizing logical and orderly development of areas within the sphere by effectively initiating future changes of organization by requiring detachment as condition of submitting any future annexation proposal.

EMINENT DOMAIN - CALIFORNIA

Sheetz v. County of El Dorado

Court of Appeal, Third District, California - October 19, 2022 - Cal.Rptr.3d - 2022 WL 10993726

Landowner filed petition for writ of mandate and complaint for declaratory and injunctive relief to challenge $23,420 traffic impact mitigation fee imposed by county as a condition of issuing him a building permit for the construction of a single-family residence on his property.

The Superior Court sustained county's demurrer in part and denied the petition for writ of mandate, and landowner appealed.

The Court of Appeal held that:

- Fee was not subject to the heightened scrutiny of the Nollan/Dolan test;
- County was not required by the Mitigation Fee Act to evaluate the specific traffic impacts attributable to landowner's development before imposing fee; and
- Fee was reasonably related to the burden imposed by the development.

The requirements of *Nollan v. California Coastal Comm'n*, 483 U.S. 825, and Dolan v. City of Tigard, 512 U.S. 374, do not extend to development fees that are generally applicable to a broad class of property owners through legislative action; legislatively prescribed monetary fees, as distinguished from a monetary condition imposed on an individual permit application on an ad hoc basis that are imposed as a condition of development are not subject to the Nollan/Dolan test for an unconstitutional monetary exaction.

Traffic impact mitigation fee $23,420 which county imposed on landowner as a condition of issuing a building permit for the construction of a single-family residence on his property was not subject to the heightened scrutiny of the *Nollan/Dolan* test for assessing takings claims in the context of land-use exactions; fee was not an "ad hoc exaction" imposed on a property owner on an individual and discretionary basis, but was a development impact fee imposed pursuant to a legislatively authorized fee program that generally applied to all new development projects within the county, and fee was calculated using a formula that considered various factors.

Landowner could not maintain claim for declaratory relief that county's policy of requiring new development to pay the full cost of constructing new roads and widening of existing roads without regard to the cost specifically attributable to the particular project on which the fee is imposed resulted in an unlawful exaction of $23,420, which was required as condition for landowner to obtain permit to construct single-family residence, as landowner's sole remedy was administrative mandamus, not declaratory relief.

Traffic impact mitigation fee of $23,420, which county imposed as a condition for issuing a building permit for the construction of a single-family residence, was reasonably related to the burden imposed by the development, and thus was valid under the Mitigation Fee Act, where county considered the information contained in a technical report prepared by the Department of Transportation (DOT) and studies analyzing the impacts of contemplated future development on existing public roadways and the need for new and improved roads as a result of new development, and amended fee rates were adopted after DOT prepared a detailed memorandum explaining the purpose of the fee, the use to which the fee was to be put, and the methodology used to calculate the fee rate for each type of new development.

EMINENT DOMAIN - FLORIDA

Gulf Coast Transportation, Inc. v. Hillsborough County

District Court of Appeal of Florida, Second District - October 7, 2022 - So.3d - 2022 WL

5265431

Taxicab companies, which operated in county pursuant to medallions issued by commission created by special legislation, brought inverse condemnation against the State and county, alleging the two entities had taken their taxi medallions without compensation when the legislature dissolved the commission and repealed the special legislation, and the county did not compensate the companies for or offer to purchase their old medallions, but instead required them to purchase new ones.

The Circuit Court denied the State's motion to dismiss, but granted summary judgment to the county. The State and the companies appealed, and the appeals were consolidated.

The District Court of Appeal held that:

- District Court of Appeal had jurisdiction to review Circuit Court's order denying the State's motion to dismiss, and
- The companies did not have a property interest in the medallions that was cognizable under the Takings Clause.

District Court of Appeal had jurisdiction to review Circuit Court's order denying the State's motion to dismiss, for failure to state a claim, taxicab companies' claim the State had taken their private property without compensation by negating their taxicab medallions when the legislature dissolved the commission that had issued the medallions and repealed the special legislation governing the commission, since the Circuit Court's ruling on that motion was directly related to an aspect of its appealable final summary judgment in favor of county in the same inverse condemnation proceeding, namely, whether a taking occurred within the meaning of the Florida Constitution.

Taxicab companies that held medallions issued by commission created by special legislation did not have a property interest in the medallions that was cognizable under the Takings Clause of the Florida Constitution, and thus, the State did not take compensable property from the companies when the legislature dissolved the commission and repealed the special legislation governing it, even though the legislature had declared that the medallions were the private property of medallion holders and had granted them the ability to transfer their medallions; the legislature always retained the power to change or abolish the regulatory framework that created the medallions, and any interest the companies had in their medallions was a unilateral expectation in the persistence of that framework.

TELECOM - ILLINOIS

City of East St. Louis v. Netflix, Inc.

United States District Court, S.D. Illinois - September 23, 2022 - F.Supp.3d - 2022 WL 4448868

City brought putative class action in diversity against video streaming platforms, alleging ongoing violations of the Illinois Cable and Video Competition Law (CVCL), and also asserting claims for trespass and violation of city ordinance requiring city's and operating franchise company's prior written consent and approval to resell cable communication signals or service within the city.

Platforms moved to dismiss.

The District Court held that:

- As a matter of first impression, CVCL did not provide an express private right of action;
- City did not have right of action based on home rule authority;
- CVCL did not imply a private right of action;
- City failed to state a claim for trespass;
- City ordinance did not provide an express right of action;
- City did not plausibly allege that platforms were violating the ordinance at issue; and
- Implying a private right of action was not warranted since ordinance provided an adequate remedy.

Illinois' Cable and Video Competition Law (CVCL), which required video service providers to obtain authorization from the state to provide services and pay service provider fees to local units of government, did not provide an express private right of action to city to bring lawsuit and collect service fees from video streaming platforms; CVCL clearly provided an express right of action to the state's Attorney General to institute a lawsuit for violations of CVCL and did not state that local units of government could do the same, nor did it affirmatively delegate any sort of power to local units of government when it came to enforcing its provisions.

City failed to establish that it had right of action based on home rule authority to bring lawsuit against video streaming platforms under the Illinois Cable and Video Competition Law (CVCL) to collect requisite provider fees, where CVCL only authorized the state's Attorney General to bring suit and city did not show that home rule authority operated to allow it to step into the Attorney General's shoes and file the lawsuit, and further, CVCL limited ability of local governments to act because it explicitly stated that its provisions were a limitation of home rule powers under the state constitution.

Illinois' Cable and Video Competition Law (CVCL), which required video service providers to obtain authorization from the state to provide services and pay service provider fees to local units of government, did not imply a private right of action for city to bring lawsuit and collect service fees from video streaming platforms, where CVCL provided an adequate remedy through enforcement framework which granted authority to the state's Attorney General to investigate, penalize, and remedy violations of the statute, and implying a private right of action for local governments was not consistent with statute's underlying purpose, which was to implement a state authorization process and uniform standards and procedures for cable franchising.

Content provided through the internet by video streaming platforms did not cause a physical intrusion or interfere with city's possessory rights in its property, and thus, the alleged unlawful entry of platforms' content on city's property, delivered to subscribers via wireline facilities located at least partially in public rights-of-way without compensating city for use of the public rights-o--way, did not give rise to an actionable trespass claim under Illinois law; video content transmitted through the internet did not take up physical space that could conceivably interfere with city's exclusive possession of public rights-of-way or subtract from city's use of the rights-of-way, and any actual physical intrusion was by the internet wirelines, which platforms did not install, operator, or maintain.

Section of municipal code requiring city's and operating franchise company's prior written consent and approval to resell cable communication signals or service within the city, did not provide an express private right of action under Illinois law to remedy a violation, in city's lawsuit against video streaming platforms alleging that platforms owed it a service fee for using its public rights-of-way to transmit content to subscribers; instead, the municipal code provided for administrative enforcement and punishment for violations as a misdemeanor with a fine and imprisonment.

Implying a private right of action under section of municipal code requiring city's and operating

franchise company's prior written consent and approval to resell cable communication signals or service within the city was not warranted under Illinois law, in city's lawsuit against video streaming platforms alleging that platforms owed it a service fee for using its public rights-of-way to transmit content to subscribers, where city's allegations regarding platforms' peering agreements with internet service provides did not lead to plausible conclusion that platforms were even reselling cable in violation of the ordinance.

Municipal code provided adequate remedy for section requiring city's and operating franchise company's prior written consent and approval to resell cable communication signals or service within the city, and thus, implying a private right of action was not warranted under Illinois law, in city's lawsuit against video streaming platforms alleging that platforms owed it a service fee for using its public rights-of-way to transmit content to subscribers; municipal code established a framework for administrative enforcement and remediation of ordinance violations, which city did not argue was inadequate to deter violations.

MUNICIPAL CORPORATIONS - MISSISSIPPI

Longo v. City of Waveland

Supreme Court of Mississippi - October 20, 2022 - So.3d - 2022 WL 11581158

Individual objector filed a notice of appeal of decision of city's board of aldermen to approve application for conditional use and preliminary plat approval. After the ten-day period for taking an appeal had run, objector then amended the notice of appeal to name applicant as appellee.

In a different action, an objector, which was a neighboring property owner, filed a notice of appeal of city's decision to grant preliminary plat approval for the development of a subdivision, and that notice of appeal did not name the applicant as a party.

The Circuit Court entered separate judgments dismissing the appeals in both actions. Both objectors appealed, and the two actions were consolidated.

As a matter of first impression, the Supreme Court held that under the statute governing appeals of decisions of local governing authorities, which requires that a petitioner before a local governing authority be made a party to the appeal, a notice of appeal that is filed on time but that erroneously omits a petitioner's name does not defeat the circuit court's jurisdiction.

Under the statute governing appeals of decisions of local governing authorities, which requires that a petitioner before a local governing authority be made a party to the appeal, a notice of appeal that is filed on time but that erroneously omits a petitioner's name does not defeat the circuit court's jurisdiction, and the omission may be corrected; naming all petitioners as appellees in a notice of appeal is a procedural requirement and is not jurisdictional.

TELECOM - NEVADA

City of Reno v. Netflix, Inc.

United States Court of Appeals, Ninth Circuit - October 28, 2022 - F.4th - 2022 WL 15579803

City brought action against digital content service providers, alleging providers failed to pay

franchise fees under Nevada's Video Service Law (VSL) and seeking declaration pursuant to federal Declaratory Judgment Act.

The United States District Court for the District of Nevada dismissed action. City appealed.

The Court of Appeals held that:

- Under Nevada law as predicated by the Court of Appeals, the Video Service Law (VSL), permitting local governments to impose franchise fees that do not exceed five percent of a video service provider's gross annual revenue from subscribers within the local government's jurisdiction, does not impliedly create a private right of action for cities to sue for unpaid franchise fees;
- The Declaratory Judgment Act does not provide a cause of action when a party lacks a cause of action under a separate statute and seeks to use the Act to obtain affirmative relief; and
- City's action was offensive, not defensive, and thus city could not obtain relief pursuant to Declaratory Judgment Act in absence of an independent cause of action against providers.

Court of Appeals would exercise its discretion to forgive city's forfeiture of issue of whether Declaratory Judgment Act provided an independent right of action, on city's appeal of dismissal, for failure to state claim, of its action against digital content service providers alleging providers failed to pay franchise fees under Nevada's Video Service Law (VSL) and seeking declaration pursuant to federal Declaratory Judgment Act; issue was pure question of law, and because Court of Appeals would ultimately affirm district court's dismissal, there was no risk that providers would suffer prejudice.

Under Nevada law as predicated by the Court of Appeals, the Video Service Law (VSL), permitting local governments to impose franchise fees that do not exceed five percent of a video service provider's gross annual revenue from subscribers within the local government's jurisdiction, does not impliedly create a private right of action for cities to sue for unpaid franchise fees.

City's action against digital content service providers, alleging providers failed to pay franchise fees under Nevada's Video Service Law (VSL), was offensive, not defensive, and thus city could not obtain relief pursuant to Declaratory Judgment Act in absence of an independent cause of action against providers.

NEGLIGENCE - NEW YORK

Schneider v. Hanasab

Supreme Court, Appellate Division, Second Department, New York - October 5, 2022 - N.Y.S.3d - 2022 WL 5065968 - 2022 N.Y. Slip Op. 05552

Executrix of motorized-scooter rider's estate brought personal injury and wrongful death action against driver and town, alleging that as a result of defendants' negligence, rider was struck by driver's vehicle at an intersection in town.

After jury found that both driver and the town were negligent, apportioned liability 70% to the town and 30% to driver, and awarded plaintiff damages in the principal sums of $2,000,000 for the decedent's conscious pain and suffering and $125,000 for loss of services, the Supreme Court, Nassau County, denied driver's motion to set aside the jury verdict and for new trial and denied town's motion to set aside the jury verdict and for judgment as a matter of law or a new trial. Defendants separately appealed.

The Supreme Court, Appellate Division, held that:

- Jury finding that town was 70% at fault was not contrary to the weight of the evidence;
- Jury's award of principal sum of $2,000,000 for rider's conscious pain and suffering was not contrary to the weight of the evidence; but
- Jury's award of damages for loss of services in the sum of $125,000 was contrary to the weight of the evidence.

Jury verdict finding town 70% at fault was not contrary to the weight of the evidence in personal injury and wrongful death action brought by executrix of motorized-scooter rider's estate against driver and town, alleging that as result of defendants' negligence, rider was struck by driver's vehicle at an intersection in town, where there was valid line of reasoning and permissible inferences that could lead rational persons to jury's conclusion that town was negligent with respect to placement of stop line at intersection where rider was struck and that such negligence was proximate cause of accident, and jury's apportionment of fault was supported by fair interpretation of the evidence.

Jury verdict awarding executrix of motorized-scooter rider's estate principal sum of $2,000,000 for rider's conscious pain and suffering was not contrary to the weight of the evidence in personal injury and wrongful death action brought by executrix against driver and town, alleging that as result of defendants' negligence, rider was struck by driver's vehicle at an intersection in town, where opinion of executrix's medical expert regarding pain rider experienced between time of accident and his death four days later, together with executrix's testimony regarding her observations of rider during his hospitalization, sufficiently demonstrated degree of rider's consciousness and severity of pain he suffered, and award did not deviate materially from what would be reasonable compensation.

Jury's award of damages for loss of services in the sum of $125,000 was contrary to the weight of the evidence in personal injury and wrongful death action brought by executrix of motorized-scooter rider's estate against driver and town, alleging that as result of defendants' negligence, rider was struck by driver's vehicle at an intersection in town, where loss of services for four days was not supported by showing of cost of replacing the rider's household services.

DEEDED PROPERTY - OHIO

Cleveland Botanical Garden v. Worthington Drewien

Supreme Court of Ohio - October 20, 2022 - N.E.3d - 2022 WL 11391874 - 2022-Ohio-3706

Sublessee of city park filed declaratory judgment action against heirs of grantor who conveyed land to city for creation and operation of park, seeking judicial determination that sublessee's use, operation, and maintenance of deeded property was consistent with deed restrictions.

Heirs sought injunction to prevent sublessee from charging for admission and parking. Parties brought cross-motions for partial summary judgment, and the Court of Common Pleas entered declaratory judgment in favor of sublessee. Heirs appealed. The Court of Appeals affirmed in part, reversed in part, and remanded. Heirs appealed and sublessee cross-appealed.

The Supreme Court held that:

- Sublessee's operation of facilities, building, gardens, and parking garage in park, along with charging of fees to maintain those operations, was consistent with terms of deed granting property

to city;
- Deed of gift conveying property to city for purpose of maintaining a park therein "for the benefit of all the people" did not create a trust; and
- Reversionary interest held by heirs was original to root of title and thus could not be extinguished under Marketable Title Act (MTA).

City park sublessee's operation of facilities, buildings, gardens, and a parking garage, and its charging of fees to maintain those operations, on property granted to city for purpose of "improving and maintaining a beautiful and attractive Public Park therein" was consistent with terms of deed granting property to city, which required city to maintain property "in such repair and condition as to make it an attractive and desirable place of resort" and required park "to be open at all times to the public"; to interpret deed as requiring city to permit any person to freely access all parts of park at all times would nearly suspend the practical realities of operating park.

Deed of gift conveying property to city for purpose of maintaining a park therein "for the benefit of all the people" did not create a trust, even though grantor might have intended for city to act symbolically as trustee for park, where deed used language of transfer, including that grantor did "freely give, grant, and convey" property, and deed contained reversionary clause.

Reversionary interest held by grantor's heirs in property donated to city for use as park was original to root of title and thus could not be extinguished under the Marketable Title Act (MTA), in case in which grantor's deed provided that, if property or any part thereof was diverted from specified use, property would revert to grantor or heirs.

PUBLIC RECORDS - VIRGINIA

Hawkins v. Town of South Hill

Supreme Court of Virginia - October 20, 2022 - S.E.2d - 2022 WL 11420016

Requester petitioned for writ of mandamus to compel town to produce documents requested under Virginia Freedom of Information Act (VFOIA) relating to employment disputes involving town manager.

The Mecklenburg Circuit Court granted petition in part. Requester appealed.

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

- "Personnel information" under VFOIA exemption means private data, facts, or statements within a public record relating to a specific government employee, and
- Data, facts, and statements are "private" if disclosure would be an unwarranted invasion of personal privacy to a reasonable person.

The terms of the personnel information exemption of Virginia Freedom of Information Act (VFOIA) are to be narrowly construed to provide open access to public records.

Term "personnel," under the personnel information exemption of Virginia Freedom of Information Act (VFOIA), means a body of persons employed in some service or government employees; the definition is narrowly limited to those employed by the government and does not encompass any individual whose information merely happens to appear in a public record.

For purposes of the personnel information exemption of Virginia Freedom of Information Act

(VFOIA), the term “content,” as included in VFOIA’s definition of “information” as “the content within a public record that references a specifically identified subject matter,” means data, facts, or statements.

Term “personnel information,” for purposes of the personnel information exemption of Virginia Freedom of Information Act (VFOIA), means data, facts, or statements within a public record relating to a specific government employee, which are in the possession of the entity solely because of the individual’s employment relationship with the entity, and are private, but for the individual’s employment with the entity.

GOVERNMENTAL FUNCTIONS - ALABAMA

Barnes v. Town Council of Perdido Beach

Supreme Court of Alabama - October 21, 2022 - So.3d - 2022 WL 12240411

Objectors sought an injunction to prevent town council from constructing a public boat launch and pier at the end of a public street and establishing a public park in the surrounding area.

After the case was removed to federal court and then remanded, the Circuit Court held a bench trial and then entered a judgment for town council. Objectors appealed.

The Supreme Court held that:

- Construction of the boat launch and pier did not violate the street’s public dedication;
- As a matter of apparent first impression, the construction of the boat launch and pier was a governmental function, not a proprietary one, and thus the wetland-setback provisions of city zoning ordinances and subdivision regulations did not preclude the construction project even though it would take place near a creek; and
- That certain amendments to zoning ordinances made it easier for town council to go through with the project did not make the amendments arbitrary.

Town council’s construction of a public boat launch and pier at the end of a public street did not violate the street’s public dedication; boat launch and pier would be placed where the street ended at the edge of a creek and would not destroy or inhibit the use of the street as a public road.

Town council’s construction of a public boat launch and pier near a creek was a “governmental function,” not a “proprietary one,” and thus the wetland-setback provisions of city zoning ordinances and subdivision regulations did not preclude the construction project; municipalities had delegated authority to provide recreational facilities for the well-being of their citizens, and the town’s master plan contained several references to providing public water access and boat launches to the community.

That certain amendments to zoning ordinances made it easier for town council to construct a public boat launch and pier did not make the amendments “arbitrary”; the adoption of the amendments raised questions upon which reasonable differences could exist in view of all the circumstances, and the wisdom of the amendments was fairly debatable.

OPEN MEETINGS - ILLINOIS

Scatchell v. Board of Fire and Police Commisioners for Village of Melrose Park

Appellate Court of Illinois - September 30, 2022 - N.E.3d - 2022 IL App (1st) 201361 - 2022 WL 4590759

Former police officer appealed decision of village board of fire and police commissioners, which terminated officer after finding that he had violated departmental policies.

The Circuit Court upheld the board's decision. Officer appealed.

The Appellate Court held that:

- Seven of eight factual findings that officer violated departmental policies were not against the manifest weight of the evidence;
- Decision to terminate officer was neither unreasonable nor arbitrary, and was appropriate considering nature and scope of his misconduct;
- Police department not violate its own policies, collective bargaining agreement with officer's union, or any other procedural challenges while investigating officer;
- Officer failed to establish that board violated the Open Meetings Act; and
- Trial court did not abuse its discretion in denying officer leave to amend his complaint.

MUNICIPAL CORPORATIONS - GEORGIA

City of College Park v. Martin

Court of Appeals of Georgia - October 18, 2022 - S.E.2d - 2022 WL 10225601

Former city firefighter brought action against city and city officials challenging city's termination of her employment, alleging, among other things, that city violated Open Meetings Act (OMA) in appointing interim city manager without a public vote and that city manager thus was not authorized to uphold firefighter's termination.

The Superior Court initially granted summary judgment to defendants. On firefighter's appeal, the Court of Appeals, affirmed in part and reversed in part, but the Supreme Court granted certiorari to defendants, affirmed in part and reversed in part, and remanded for further consideration of key issue for firefighter's OMA claim, namely whether city charter required a public vote on appointment of an interim city manager. On remand, the Superior Court granted summary judgment to firefighter, holding that interim city manager's appointment without a public vote was improper. Defendants appealed.

The Court of Appeals held that:

- Provision in city charter providing for appointment of an interim city manager did not require that a public vote be taken on the appointment, and
- Interim city manager was not improperly appointed and was authorized to uphold city's termination of firefighter's employment.

Provision in city charter providing that the mayor and the city council "shall have full powers to make a temporary appointment" to the office of city manager in the event of a vacancy does not require that a vote be taken on appointment of an interim city manager.

City did not violate the Open Meetings Act by failing to vote on the appointment of an interim city

manager in an open meeting, and interim city manager was thus not improperly appointed and was authorized to uphold city's termination of firefighter's employment; city charter permitted mayor and council to appoint an interim city manager without a public vote.

SCHOOL FINANCE - MISSISSIPPI

Jones County School District v. Covington County School District

Supreme Court of Mississippi - October 13, 2022 - So.3d - 2022 WL 7278319

Noncustodial school district brought action against custodial school district for accounting, declaratory judgment, money had and received, breach of fiduciary duties, and preliminary injunction, alleging that custodial district failed to share sixteenth-section income as required by statute for period of 18 years or more.

Custodial district asserted counterclaim seeking declaratory judgment regarding application of statute controlling sixteenth-section fund allocation. Noncustodial district moved for accounting and for partial summary judgment. Custodial district filed cross-motion for partial summary judgment. The Chancery Court granted motion for accounting in part. Noncustodial district filed interlocutory appeal.

The Supreme Court held that:

- Statutes establishing one-year limitations period for noncustodial school district to make a claim with custodial school district for pro rata share of sixteenth-section income were not statutes of limitation and were not in conflict with section of Mississippi Constitution providing that statutes of limitation did not run against political subdivisions, and
- Term "available," as used in statutes governing investment and pro rata distribution of sixteenth-section revenue, means only those funds which are capable of being utilized.

Statute establishing one-year limitations period for noncustodial school district to make a claim with custodial school district for pro rata share of sixteenth-section income and statute providing that "[a]ny school district failing to timely provide the list [of enrolled children] to the…custodial school district shall forfeit its right to such funds" were not statutes of limitation and were not in conflict with section of Mississippi Constitution providing that statutes of limitation did not run against political subdivisions; one-year period did not place time limit on litigation, but rather placed time limit on when noncustodial district could make claim with a custodial district, and thus was not statute of limitations.

Term "available," as used in the statute requiring custodial school district to invest revenues from sixteenth-section lands in principal fund and the statute describing payment of pro rata shares of available funds to noncustodial school districts, cannot mean all funds derived from sixteenth-section lands, and thus must mean only those funds which are capable of being utilized, i.e., expendable funds.

EMINENT DOMAIN - NEW YORK

Savo v. City of New York

Supreme Court, Appellate Division, Second Department, New York - September 28, 2022 - N.Y.S.3d - 2022 WL 4489340 - 2022 N.Y. Slip Op. 05343

Owners of three nonadjacent lots located in park preserve brought action against city seeking to recover damages for inverse condemnation.

The Supreme Court, Richmond County, denied city's motion for summary judgment. City appealed.

The Supreme Court, Appellate Division, held that:

- Owners' inverse condemnation cause of action accrued when city's parks department acquired their properties;
- Doctrine of equitable estoppel did not apply bar city's affirmative defense claiming that the statute of limitations on landowners' claim had expired;
- City's motion for summary judgment was not premature; and
- Owners' request for leave to amend their complaint was improperly raised for the first time on appeal.

LIABILITY - NEW YORK

McDaniel v. City of New York

Supreme Court, Appellate Division, First Department, New York - October 4, 2022 - N.Y.S.3d - 2022 WL 4830527 - 2022 N.Y. Slip Op. 05501

Pedestrian who allegedly tripped and fell while walking in an uneven and cracked portion of crosswalk at intersection brought personal injury action against city, road-milling contractor that had performed work in the area a little over a year before pedestrian's alleged accident, and contractor that had installed electrical conduits in the area five years before the alleged accident.

The Supreme Court, Bronx County, denied city's and road-milling contractor's motions for summary judgment and denied the electrical-conduit contractor's motion for summary judgment. City and contractors appealed.

The Supreme Court, Appellate Division, held that:

- Genuine issue of material fact as to whether map of purported defects in city's sidewalks and streets satisfied prior written notice requirement under city's administrative code precluded summary judgment in favor of city;
- Road-milling contractor was not liable for pedestrian's injuries; and
- Electrical-conduit contractor was not liable for pedestrian's injuries.

Genuine issue of material fact existed as to whether defect identified on map of purported defects in city's sidewalks and streets, which city acknowledged receiving, was the uneven and cracked portion of crosswalk that pedestrian claimed caused her to trip and fall, so as to satisfy prior written notice requirement under city's administrative code, precluding summary judgment in favor of city in pedestrian's personal injury action.

COUNTIES - OHIO

Estate of Fleenor v. Ottawa County

Supreme Court of Ohio - October 11, 2022 - N.E.3d - 2022 WL 6572090 - 2022-Ohio-3581

Estate of deceased nursing home resident filed action for negligence and other causes of action

against county, which owned and ran nursing home.

The Court of Common Pleas granted summary judgment in favor of county. Estate appealed. The Sixth District Court of Appeals reversed. County appealed, and the Supreme Court accepted jurisdiction.

The Supreme Court held that unchartered county was not sui juris, and therefore county was required to be sued in name of board of commissioners.

Unchartered county was not sui juris, and therefore it was required to be sued in the name of its board of commissioners; although county that adopted charter or alternative form of government was transformed into body politic and corporate, so as to be capable of suing and being sued, different rule applied to unchartered counties, and it was board of commissioners that could sue and be sued.

CHARTER SCHOOLS - PENNSYLVANIA

Bell v. Wilkinsburg School District

Supreme Court of Pennsylvania - September 29, 2022 - A.3d - 2022 WL 4541536

Operator of public charter schools, and grandmother of two charter school students, jointly filed lawsuit against school district seeking declarative and injunctive relief challenging district's decision changing mode of transportation for charter school students from school buses to public transportation through issuance of free passes.

The Court of Common Pleas dismissed complaint following nonjury trial. The Commonwealth Court reversed and remanded for entry in favor of charter school operator. Allowance of appeal was granted.

The Supreme Court held that:

- Regulation governing Department of Education's approval of school district's transportation plan was ambiguous, and
- Regulation did not obligate school district to obtain Department of Education's approval of transportation plan prior to implementing plan.

Department of Education regulation, which provided that a school district's means of student transportation to and from school "shall be subject to approval by the Department," was ambiguous since regulation did not unambiguously resolve question of when Department was required to approve a change in a school district's transportation plan in suit by charter school operator and grandparent of charter school students challenging district's decision to change charter school student's mode of transportation from bussing to public transportation; charter school operator contended plan must be approved before implementation, district contended Department approved plans after implementation Department decision on whether to reimburse district, and both constructions were reasonable.

Regulation governing approval of school district student transportation plans by Department of Education does not impose a requirement of prior approval, rather, the Department's remedy, if it concludes a transportation plan does not comport with the requirements of the School Code or applicable regulations, is limited to withholding financial reimbursement from the school district for the costs it incurred in implementing the transportation plan.

Regulation did not obligate school district to first obtain approval from Department of Education as to its transportation plan prior to implementing the plan, which changed mode of transportation for charter school students from school buses to public transportation through issuance of free passes; evidence showed that Department, historically, had not required school districts to seek approval prior to implementing a transportation plan, Department repealed previous regulation requiring prior approval, no other sections in same title required prior Department approval of transportation plans, and matters regarding the perceived safety advantages of transporting students by school bus over common carrier involved policy judgments reserved for General Assembly.

IMMUNITY - TEXAS

Varner v. City of Andrews

Court of Appeals of Texas, El Paso - September 28, 2022 - S.W.3d - 2022 WL 4538877

Pedestrian brought personal injury action against city, alleging that city was liable for injuries incurred when she was attacked by a pack of dogs while walking in city. The District Court granted city's plea to the jurisdiction. Pedestrian appealed.

The Court of Appeals held that pedestrian's complaints about city's animal control policies and procedures to mayor and police chief were insufficient to put city on notice, for purposes of Texas Tort Claims Act's notice requirement, of her claim.

Pedestrian's complaints about city's animal control policies and procedures to mayor and police chief were insufficient to put city on notice, for purposes of Texas Tort Claims Act's notice requirement, of claim in her personal injury action against city, that city was liable for injuries incurred when she was attacked by pack of dogs; there was no evidence that either mayor or police chief came away from meeting having subjective awareness of possible claim that city's conduct caused pedestrian's injuries, dogs had escaped from owner's private property moments before attack and owner was present at the scene shortly after the attack, and in statement to city, pedestrian described the event, but made no reference to city's animal control procedures being a causal factor.

EMINENT DOMAIN - CALIFORNIA

Today's IV, Inc. v. Los Angeles County Metropolitan Transportation Authority

Court of Appeal, Second District, Division 8, California - October 5, 2022 - Cal.Rptr.3d - 2022 WL 5107251

Hotel owner brought action for nuisance and inverse condemnation against county transportation authority and general contractor, alleging that defendants' construction of underground subway line interfered with operation of hotel.

General contractor moved to strike portions of complaint. The Superior Court granted motion. Authority filed demurrer concerning claim for inverse condemnation. The Superior Court granted motion. Defendants then filed motion for judgment on the pleadings as to nuisance claim. The Superior Court granted motion. General contractor thereafter moved for summary adjudication as to nuisance claim. The Superior Court granted motion. Owner appealed.

The Court of Appeal held that:

- Owner failed to allege that traffic detours set up by authority caused its property to suffer from intangible intrusion burdening property in way that was direct, substantial, and peculiar to property itself, and thus failed to state claim for inverse condemnation under intangible-intrusion theory;
- Owner failed to allege that intrusion of noise and dust was unique, special or peculiar in comparison with other stakeholders in area, and thus failed to state claim against authority for inverse condemnation under intangible-intrusion theory;
- Owner alleged that invasion of, or interference with, use and enjoyment of its property caused by construction project was substantial, as required to state claim for private nuisance;
- Owner failed to allege that gravity of harm to owner's use and enjoyment of its property outweighed social utility of construction project, and thus failed to state claim for private nuisance;
- Statute providing that "[n]othing which is done or maintained under the express authority of a statute can be deemed a nuisance" provided defendants with immunity from liability for owner's nuisance claim;
- Whether or not general contractor's method of construction was reasonable did not hinge on whether general contractor possibly breached term of its contract with authority, in connection with its subcontractor's classification of noise limits, and thus did not create triable issue of material fact precluding summary adjudication on nuisance claim; and
- Testimony of hotel's former managing director that defendants conspired to harm hotel was speculative and did not create triable issue of material fact precluding summary adjudication on nuisance claim.

MUNICIPAL ORDINANCE - CALIFORNIA

Kirk v. City of Morgan Hill

Court of Appeal, Sixth District, California - September 30, 2022 - Cal.Rptr.3d - 2022 WL 4592168

City residents and firearms interest group brought action for declaratory relief to challenge city ordinance requiring that the theft or loss of a gun be reported within 48 hours, alleging ordinance was preempted by a state law requiring that missing guns be reported within five days.

The Superior Court granted summary judgment for the city, and residents and interest group appealed.

The Court of Appeal held that:

- Ordinance was not duplicative of state statute;
- Ordinance did not contradict state statute;
- Statute did not expressly occupy the field; and
- Statute did not preempt ordinance by implication.

City ordinance requiring that the theft or loss of a gun be reported within 48 hours was not duplicative of state statute requiring that missing guns be reported within five days, and thus was not preempted on that ground; ordinance imposed a more stringent requirement, and thus was not coextensive with state law.

City ordinance requiring that the theft or loss of a gun be reported within 48 hours did not obstruct application of state statute requiring that missing guns be reported within five days, and thus ordinance was not preempted on grounds it contradicted state law; statute set a minimum standard and merely established the outer limit for when a report must be made, it was also permissible

under the statute to notify law enforcement before the five days had elapsed, and purpose of the statute to ensure prompt reporting of missing firearms was furthered by and was consistent with the ordinance.

State statute requiring that missing guns be reported within five days did not contain language precluding municipalities from issuing their own requirements for reporting missing guns, and thus did not expressly occupy the field or preempt, on that ground, city ordinance requiring that the theft or loss of a gun be reported within 48 hours.

State statute requiring that missing guns be reported within five days did not preempt by implication city ordinance requiring that the theft or loss of a gun be reported within 48 hours; state concern reflected by the statute was that local law enforcement authorities be promptly notified of a lost or stolen gun, statute was entirely tolerant of local regulation furthering its purpose by requiring even earlier notification, and local interest at stake justified any burden on transient citizens.

SECURITIES REGS - FEDERAL

U.S. Securities & Exchange Commission v. Murphy

United States Court of Appeals, Ninth Circuit - October 4, 2022 - F.4th - 2022 WL 4866712

Securities and Exchange Commission (SEC) brought enforcement action against three investors, alleging violations of the Securities Exchange Act of 1934 section prohibiting unregistered brokers from effecting transactions in securities, § 10(b), and Rule 10b-5.

The United States District Court for the Southern District of California granted summary judgment in favor of SEC, and imposed civil penalties and injunctive relief. Investors appealed.

The Court of Appeals held that:

- Investors traded securities "for the account of others" and thus violated provision barring unregistered "broker" from trading securities;
- Provision barring any unregistered "broker" from trading securities was not unconstitutionally vague;
- Investor's knowing provision of false zip codes to municipal bond underwriters were "material misrepresentations" in violation of § 10(b) and Rule 10b-5;
- District court acted within its discretion in using number of months investor traded as unregistered broker to calculate total violations for purposes of determining amount of civil penalty;
- Civil monetary penalties did not violate Excessive Fines Clause;
- Injunction was warranted under the circumstances; and
- Injunction ordering defendant to comply with the Act was not insufficiently specific.

Investors who purchased municipal bonds at direction of owner of prime brokerage, with his capital, and shared portion of trading risk with him, traded securities "for the account of others," and thus were "brokers," within meaning of Securities Exchange Act of 1934, such that they violated the Act by failing to register with the Securities and Exchange Commission (SEC); investors put owner's capital at risk on every trade they made, contrary to investors' arguments, fact that they bore risk did not remove then from ambit of statute, and investors acted as owner's agents.

Provision of the Securities Exchange Act of 1934 barring any "broker" from trading securities without registering with the Securities and Exchange Commission (SEC) was not unconstitutionally vague, though unregistered broker asserted that neither statute nor SEC regulation provided fair

notice that his trading arrangement, in which he bought municipal bonds as agent of owner of prime brokerage, with owner's capital, and shared a portion of the trading risk, required him to register as a broker; broker's conduct fell within text of the statute, and if he had concerns about the legality of his business arrangement, he could have requested clarification from the SEC in the form of a "No-Action Letter."

Investor's knowing provision of false zip codes to municipal bond underwriters to obtain highest retail priority for purchase of municipal bonds were "material misrepresentations" in violation of § 10(b) and Rule 10b-5, though investor asserted that underwriters had actual knowledge of her real zip code provided on her account registration forms and that there was no evidence underwriters submitted false zip codes to issuers; issuers mainly relied on zip codes to determined retail priority order, any underwriters that examined forms would be left with two zip codes and no basis to discern truth from fraud, and misrepresentations were material even if not communicated to issuers.

Record supported district court's finding at remedies stage that investor committed 21 § 10(b) violations, based on the number of times she provided false zip codes to municipal bond underwriters to obtain highest retail priority for purchase of municipal bonds, in Securities and Exchange Commission (SEC) enforcement proceeding, though her liability turned on only three fraudulent transactions; at remedies stage, district court could consider more evidence to assess full extent of investor's misconduct so long as new evidence did not conflict with its liability findings, SEC submitted evidence of 21 conversations in which investor provided underwriters with false zip codes, and investor admitted to communicating 21 false zip codes.

District court acted within its discretion in using number of months investor traded as unregistered broker to calculate his total violations of provision of the Securities Exchange Act of 1934 barring any "broker" from trading securities without registering with the Securities and Exchange Commission (SEC) to determine amount of civil penalty in civil enforcement action brought by SEC; decision was especially reasonable, and favorable to investor, as district court could have found thousands of violations if it had relied on number of transactions he made as unregistered broker.

Record supported district court's finding that investor traded as unregistered broker for 46 months, in calculating his total violations of provision of the Securities Exchange Act of 1934 barring any "broker" from trading securities without registering with the Securities and Exchange Commission (SEC), to determine amount of civil penalty in civil enforcement action brought by SEC, though investor asserted that record contained just 12 months of trading data, where investor's trading logs, which were submitted to district court, confirmed 46 months of trading activity.

District court acted within its discretion in declining to consider civil penalties imposed on other defendants when imposing penalties on investors for violations of Securities Exchange Act of 1934 section prohibiting unregistered brokers from effecting transactions in securities, § 10(b), and Rule 10b-5, in enforcement action brought by Securities and Exchange Commission (SEC); comparison to settling defendants in same action who entered into consent decrees with SEC would be inapt because penalties resulted from bargained-for exchange, particularly since those defendants admitted wrongdoing, and comparison to defendants in separate actions would be inappropriate because circumstances varied so widely, and district could needed to perform individualized inquiry.

Civil monetary penalties of $414,090.40, $308,512.80, and $1,761,920, imposed against three investors, did not violate Excessive Fines Clause, in Securities and Exchange Commission (SEC) enforcement action in which investors were found to have violated Securities Exchange Act of 1934 section prohibiting unregistered brokers from effecting transactions in securities and one investor was found to have violated § 10(b) and Rule 10b-5; penalties were well within statutory maximum, investors made thousands of trades, which could have led to multimillion-dollar penalties, district

court exercised its discretion in manner that led to substantially lower penalties, and, although there was no direct harm to individuals, violations caused systemic harm and were serious enough to warrant penalties imposed.

Injunction was warranted requiring defendants to disclose for five years a copy of complaint and final judgment in Securities and Exchange Commission (SEC) enforcement proceeding to any brokerage firm that they opened or maintained an account with, and permanently enjoining one defendant from future violations of Securities Exchange Act of 1934 section prohibiting unregistered brokers from effecting transactions in securities and the other from violating that section as well as § 10(b) and Rule 10b-5; defendants' current compliance with law did not render injunctive relief unavailable, defendants remained engaged in securities industry, and district court found they had failed to fully appreciate wrongfulness of their conduct.

Injunction, which ordered defendant to comply with Securities Exchange Act of 1934 section prohibiting unregistered brokers from effecting transactions in securities, was not insufficiently specific on the ground that it merely directed defendant to comply with the law, in Securities and Exchange Commission (SEC) enforcement proceeding; the statutory terms were not impermissibly vague, and the injunction also referenced the district court's summary judgment decision finding liability, which provided defendant, a sophisticated actor, with additional guidance for his future conduct.

PUBLIC MEETINGS - FLORIDA

Gundy v. City of Jacksonville Florida

United States Court of Appeals, Eleventh Circuit - September 30, 2022 - F.4th - 2022 WL 4591231

Pastor brought § 1983 action against city and city council president, alleging that his rights of free speech and free exercise of religion were violated when city council president turned off pastor's microphone during prayer invocation at city council meeting, subsequently posted a critical social media message about pastor, and proposed new guidance on future invocations.

The United States District Court for the Middle District of Florida granted summary judgment in favor of defendants. Pastor appealed.

As a matter of first impression, the Court of Appeals held that pastor's invocation was government speech, which was not protected by Free Speech or Free Exercise Clauses.

Pastor's prayer invocation at city council meeting was "government speech," rather than "private speech," and thus invocation's contents, which included political criticism of council and incumbent mayor, were not protected by Free Speech or Free Exercise Clauses, in § 1983 claim challenging city council president's conduct of turning off pastor's microphone during invocation; legislative invocations were part of history and tradition of United States, council memorandum stated that invocations were part of council's tradition and were for benefit and blessing of council's proceedings, and placed restraints on invocations, such as prohibiting speakers from disparaging other faiths or beliefs, and invocation speaker was chosen and invited by active council member.

ZONING & PLANNING - ILLINOIS

Station Place Townhouse Condominium Association v. Village of Glenview

Appellate Court of Illinois, First District, Third Division - September 28, 2022 - N.E.3d - 2022 IL App (1st) 211131 - 2022 WL 4492999

Condominium associations and individual unit owners filed a complaint for declaratory judgment against village, challenging village's approval of application to develop a mixed-use building on nearby property and village's purchase and sale agreement with developer.

The Circuit Court dismissed the complaint in its entirety for failure to state a claim and for lack of standing. Plaintiffs appealed.

The Appellate Court held that:

- Purchase and sale agreement was not invalid, as village acted within its home rule powers;
- Plaintiffs were not deprived of their procedural due process rights during rezoning process;
- Plaintiffs' claim of violation of their substantive due process rights failed to state a cause of action; and
- Relief requested by plaintiffs alleging violations of the Open Meetings Act was unavailable, as meetings at issue were not "closed" meetings.

Village's purchase and sale agreement with developer was not invalid, though village did not comply with section of Illinois Municipal Code governing sale of surplus real estate, as village acted within its home rule powers in entering into the agreement, so was not required to comply with Illinois Municipal Code; entirety of property at issue was located within boundaries of village, and sale of municipal real property was considered a function pertaining to village's government and affairs, as village had a longstanding interest in revitalizing its downtown area and sale of village-owned parcel of property located in downtown area to developer seeking to build a mixed-use development implicated local concerns.

EMINENT DOMAIN - MONTANA

Hamlin Construction and Development Company Inc. v. Montana Department of Transportation

Supreme Court of Montana - October 4, 2022 - P.3d - 2022 WL 4917982 - 2022 MT 190

Developer brought action against the Montana Department of Transportation (MDT), raising claims for inverse condemnation, unjust enrichment, negligence, and nuisance, arising from MDT's alleged role in causing developer to be required to accommodate floodplain development permit requirements in order to construct a subdivision on its property. Developer brought separate action against the county, raising similar claims.

The District Court dismissed the unjust enrichment claim, entered summary judgment for MDT on inverse condemnation and nuisance claims, and denied developer's motion to consolidate case with the parallel case against the county. Developer appealed.

The Supreme Court held that:

- Developer failed to satisfy the causation element of inverse condemnation claim;
- Developer failed to show it conferred a benefit on MDT as required for unjust enrichment;
- Statute immunizing government agencies from liability for damages caused by an obstruction for

which a flood plain permit had been granted survived rational basis review for constitutionality; and
- District court was not precluded from considering lack of causal connection as justification to grant summary judgment on the nuisance claim.

Developer failed to show that but for Montana Department of Transportation's (MDT) public project in reconstructing a road adjacent to site of its proposed subdivision it would not have suffered the damage for which it sought compensation, the inability to obtain a county development permit to construct a subdivision without construction of a large floodwater detention pond, and thus, developer failed to satisfy the causation element of claim for inverse condemnation under the Fifth Amendment and the Montana Constitution; developer did not assert that MDT's project created or worsened flood concerns on its property, as the property had preexisting flooding concerns and MDT's project, if anything, reduced those preexisting concerns.

Developer failed to plausibly allege that it had conferred a benefit on the Montana Department of Transportation (MDT) in form of county permit requirement that developer construct a large floodwater detention pond where it had planned to put houses in its planned subdivision project, which it alleged was to accommodate for defects and deficiencies in new culverts which were part of MDT's reconstruction project on an adjacent public road, for which MDT had alleged duty to repair, and thus, developer failed to satisfy an essential element for an actionable unjust enrichment claim; developer did not plausibly allege there were any problems associated with MDT's new culverts beyond those associated with developer's plans to its subdivision construction project or that MDT would have had to replace the culverts absent the detention pond.

To extent that statute immunizing government agencies from liability for damages caused by an obstruction for which a flood plain permit had been granted barred developer's claims for a damages remedy for permitted obstructions but did not bar just compensation for a constitutional taking or damaging under the Montana Constitution or Fifth Amendment, the challenged statutory section did not impinge upon developer's rights of acquiring, possessing, and protecting property to degree sufficient to warrant constitutional review under the strict scrutiny, and thus, the rational basis review standard applied, in developer's action alleging negligence by the Montana Department of Transportation (MDT) in replacing culverts on a public road, which caused flooding issues on developer's adjacent property.

Statute immunizing government agencies from liability for damages caused by an obstruction for which a flood plain permit had been granted was rationally related to legitimate government interest in shielding such entities from threat of costly damages litigation associated with water-flow obstructions resulting from development or maintenance of public works, so long as that government entity went through valid permit process intended to mitigate significant risks of flood damage to the travelling public and private property, and thus, developer failed to show statute violated substantive due process rights under the Fifth and Fourteenth Amendments and Montana Constitution, in action alleging negligence by the Montana Department of Transportation (MDT) in replacing culverts on public road that caused flooding to its adjacent property.

Issue of lack of causal connection between Montana Department of Transportation's (MDT) actions in replacing culverts on public road in reconstruction project and flooding issues on developer's adjacent property was before the court, and thus, district court was not precluded from using the lack of causal connection as justification to dismiss, on summary judgment, developer's nuisance claims due to MDT's failure to raise the argument until its reply brief on its motion for summary judgment, where developer had addressed the issue during the summary judgment hearing, and it was not clear that the district court even relied on arguments made in MDT's reply brief in reaching its determination.

MUNICIPAL ORDINANCE - NEW YORK

West 49th Street, LLC v. O'Neill

Civil Court, City of New York, New York County - September 23, 2022 - N.Y.S.3d - 2022 WL 4392993 - 2022 N.Y. Slip Op. 22296

After tenant's death and expiration of his lease to rent-stabilized premises, landlord brought holdover licensee proceeding against respondent, tenant's purported successor, who had shared apartment with deceased tenant and who had not vacated premises after having received a notice to quit.

Respondent asserted, among other defenses, that he had a right as a nontraditional family member to a renewal lease in his own name. The parties cross-moved for summary judgment, respondent moved for discovery, and landlord moved for use and occupancy pendente lite.

The Civil Court of the City of New York held that:

- Genuine issues of material fact about nature of deceased tenant's relationship with respondent and with third party, who had not lived with tenant but had been a purported life partner of tenant, precluded summary judgment;
- As a matter of first impression, fact that a deceased tenant may have had a nontraditional family relationship not just with a purported successor but also with another person does not automatically preclude the purported successor from establishing a succession claim as a nontraditional family member under city's rent-stabilization ordinance;
- Respondent was not entitled to discovery into bank records of joint bank account between deceased tenant and purported life partner who had not lived with tenant; and
- Landlord was entitled to use and occupancy pendente lite from date of court's order.

PUBLIC NUISANCE - ALABAMA

State v. Epic Tech, LLC

Supreme Court of Alabama - September 30, 2022 - So.3d - 2022 WL 4588777

State brought actions for declaratory and injunctive relief against companies that allegedly had created a public nuisance due to their operation of illegal slot machines and gambling devices.

In addition, State named a town council as a defendant in one of the actions.

The Circuit Court dismissed actions. State appealed, and the appeals were consolidated. The Supreme Court reversed and remanded in both actions. On remand, the Circuit Court denied State's request for injunctive relief and dismissed counterclaims asserted by a company and the town council, and the Circuit Court denied State's request for injunctive relief. State appealed, the company and the town council cross-appealed the dismissal of their counterclaims, and the appeals were consolidated.

The Supreme Court held that:

- State established that the machines at issue did not constitute the otherwise legal game of bingo;
- The potential existence of another remedy, namely criminal prosecution, did not prevent the issuance of preliminary or permanent injunctive relief;

- Even if the potential existence of another remedy could preclude injunctive relief, State demonstrated the lack of an alternate remedy;
- State demonstrated that it would be irreparably harmed in the absence of injunctive relief; and
- Company and town council waived on appeal any argument concerning the dismissal of their counterclaims.

BONDS - CALIFORNIA

Bates v. Poway Unified School District

Court of Appeal, Fourth District, Division 3, California - September 29, 2022 - Cal.Rptr.3d - 2022 WL 4545805

Property owners who had paid special tax bonds for construction of new elementary school in school district filed a petition for a writ of mandate and a complaint for declaratory and injunctive relief challenging school district's failure to allocate state funds to retire local bonds or toward uses permitted by local bonds.

The Superior Court denied petition. Property owners appealed.

The Court of Appeal held that:

- Clear and unambiguous language of regulation limited a school district's use of state reimbursement funds by imposing a savings requirement to reward school districts by allowing them to retain any savings achieved during school construction for any future high priority capital outlay expenditures;
- Informal correspondence in e-mails between school district and employees of Office of Public School Construction (OPSC) was not relevant to interpretation of regulation;
- Opinions offered by OPSC program analyst were entitled to full weight;
- Informal correspondence between school district and OPSC employees regarding interpretation of regulation was not entitled to presumptive deference;
- Executive order (EO) report was relevant;
- EO report did not clarify whether SAB imposed a savings requirement in regulation; and
- Extrinsic evidence of voter-approved bond initiative was not relevant to interpretation of regulation.

Clear and unambiguous language of regulation promulgated under the Leroy F. Greene School Facilities Act limited a school district's use of post-construction state reimbursement funds by imposing a savings requirement to reward school districts by allowing them to retain any savings achieved during school construction for any future high priority capital outlay expenditures, such that only school districts that reported a savings after completing the approved project could retain state funds for other construction projects, and therefore if a school district failed to realize any savings during construction, it was required to use all of state's money toward uses permitted by the local bond or completely retire the local bonds funding the project.

Informal correspondence in e-mails between school district and employees of Office of Public School Construction (OPSC), an arm of the California Department of General Services, was not relevant to consideration of State Allocation Board's (SAB) intent in drafting regulation supporting Leroy F. Greene School Facilities Act, or purpose of regulation, with respect to question whether savings on construction was required for school district's use of post-construction state reimbursement funds; communications did not directly answer question, but rather were focused on theoretical possible uses of funds.

Opinions offered by program analyst for Office of Public School Construction (OPSC), an arm of the California Department of General Services, that when there were no project savings with respect to construction of a school, the school district was limited to using post-construction state reimbursement funds for local bond uses or paying off debt on project, were entitled to full weight when determining State Allocation Board's (SAB) intent in drafting regulation supporting Leroy F. Greene School Facilities Act, or purpose of regulation, even though program analyst had told school district she would refer matter to audit team member because she was not as familiar with expenditure reporting; lack of expertise on how to report expenditures to SAB did not mean program analyst lacked understanding of regulation's requirements and restrictions.

Informal correspondence between school district and employees of Office of Public School Construction (OPSC), an arm of the California Department of General Services, regarding interpretation of regulation supporting Leroy F. Greene School Facilities Act was not entitled to presumptive deference that would ordinarily be due to an administrative agency on a statutory construction issue, when deciding legislative intent with respect to school district's use of post-construction state reimbursement funds; employees did not claim to have any expertise with respect to legal or regulatory issues, and did not suggest State Allocation Board (SAB) previously interpreted the regulation in any particular way.

Executive order (EO) report prepared for a State Allocation Board (SAB) meeting at which SAB agreed to enact regulation supporting Leroy F. Greene School Facilities Act clarified appropriate uses of state bond funds used to reimburse local funding, clearly reflected SAB's intention that school districts use the grant money to reimburse original source of funding, and contradicted school district's claim that funding was unencumbered, and thus report was directly relevant so as to be admissible for court's evaluation of regulation's purpose, when deciding whether school district's use of post-construction state reimbursement funds was limited to local bond uses or paying off debt on school construction project; report stated that goal was to make sure school districts could not misuse state bond funds used to reimburse local funding, and agency understood it needed regulation to address how to best safeguard intent of local and state bond funds.

Executive order (EO) report prepared for a State Allocation Board (SAB) meeting at which SAB agreed to enact regulation supporting Leroy F. Greene School Facilities Act did not clarify whether SAB imposed a savings requirement in regulation to reward school districts by allowing them to retain any savings achieved during school construction for any future high priority capital outlay expenditures; report did not mention any specific part of proposed regulation or suggest any preference for new capital outlay expenditures, and the only suggested preferences stated in report was to make sure the money was used to reimburse local funding, avoid violating intent of local and state bond funds, and ensure bonds maintained a certain tax-exemption status.

Extrinsic evidence of voter-approved bond initiative was not relevant to supply insight into statutory purpose of Leroy F. Greene School Facilities Act enacted 17 years prior, or supporting regulation enacted 12 years prior, with respect to question whether school was required to use all post-construction state reimbursement funds toward uses permitted by the local bond or completely retire local bonds funding project, absent savings during construction; initiative did nothing to alter Act's express restrictions on expenditures beyond approved construction of new school, voters were aware limited exception to rule applied only in cases where school district achieved a savings, and if creators of initiative wished to make sure specific bond funds were available for new capital expenditures, beyond those mandated by Act, they needed to have explicitly stated so in the proposed legislation.

ZONING & PLANNING - DELAWARE

Ocean Bay Mart, Inc. v. City of Rehoboth Beach Delaware

Supreme Court of Delaware - September 30, 2022 - A.3d - 2022 WL 4587490

Owner of city real estate brought action against city, alleging that it had a vested right to approval of site plan proposing to develop property into 63 residential condominium units as a single, undivided parcel, substantially in the form submitted without going through major subdivision approval, since owner had begun the approval process before zoning code amendments were enacted, seeking a declaratory judgment, and alleging that city was equitably estopped from enforcing against owner zoning code amendments that were adopted after site plan had been submitted.

The Court of Chancery found in favor of city. Owner appealed.

The Supreme Court held that:

- Substantial question existed as to whether plan complied with city's existing zoning law;
- Court of Chancery did not abuse its discretion in concluding that property owner could not reasonably have relied on vague and indirect interaction between owner's real estate agent and building inspector;
- Court of Chancery did not abuse its discretion in finding that owner did not reasonably rely on conversation in which owner's attorney confirmed with city solicitor that a condominium was not a subdivision;
- Court of Chancery did not abuse its discretion in determining that approval of other condominium projects did not support claim of reliance to establish vested right in development plan;
- Owner could not have reasonably relied on decision of Board of Adjustment overruling building inspector's decision that condominium development could not be approved as a single, undivided parcel;
- There was no evidence that owner relied upon rule of statutory construction that ambiguity in a statute will be resolved in favor of owner;
- Amended zoning ordinances unambiguously applied to owner's pending site plan application; and
- Court of Chancery did not abuse its discretion in finding that city was not equitably estopped from applying amended zoning ordinances to pending site plan application.

CONTRACTS - INDIANA

Performance Services, Inc. v. Randolph Eastern School Corporation

Court of Appeals of Indiana - September 19, 2022 - N.E.3d - 2022 WL 4295425

School corporation brought action seeking declaratory judgment that contact with wind turbine company for construction and operation of wind turbine facility was void, and company asserted counterclaims for breach of contract, suit on account, and equitable entitlement to the reasonable value of services provided, after school failed to pay access fees.

Parties filed cross-motions for summary judgment, and the Circuit Court granted the school's motion. Company appealed.

The Court of Appeals held that:

- Court of Appeals owed no deference to written opinions of State Board of Accounts on legality of contract;
- Contract did not reflect illegal investment by political subdivision;
- Contract was not subject to leasing procedures set forth in Public Leasing Act;
- Public Works Act did not apply to contract; and
- Contract was not void for indefiniteness.

On appeal from grant of summary judgment in favor of school corporation on its action seeking declaratory judgment that school's contract with wind turbine company was void, Court of Appeals owed no deference to written opinions of State Board of Accounts, stating that contract between school and company reflected an illegal investment; Board was in no better position than Court of Appeals to read contract at issue and discern its meaning, and Board's opinions did not state binding legal conclusions on meaning of contract, which spoke for itself.

School corporation's contract with wind turbine company for construction and operation of wind turbine facility never amounted to more than school owing payments for services rendered by company, and thus did not reflect an illegal investment by a political subdivision in a wind turbine, in violation of limited statutory authority of schools to invest money, where school agreed to make semiannual payments to company in exchange for certain access to facility and data, and school had option after five years of such payments to purchase facility by paying off company's construction debt and any capital improvements, which school did not do.

School corporation's contract with wind turbine company for construction and operation of wind turbine facility was not a lease, and thus leasing procedures set forth in Public Leasing Act were not applicable to contract, even though school had unvested option to purchase facility; contract did not create property right of school in facility, which was in all respects owned, managed, and controlled by company, but rather contract right, whereby school was granted access to facility and data in exchange for payments, that company could have revoked based on school's nonperformance.

Public Works Act did not apply to school corporation's contract with wind turbine company for construction and operation of wind turbine facility, where contract was neither a lease nor paid for out of a public fund or special assessment, but was rather funded by bond agreement between company and bank.

School corporation's contract with wind turbine company for construction and operation of wind turbine facility was not void for indefiniteness because it called for an indefinite number of semiannual payments from school to company; parties were presumed to have had a reasonable time for payments in mind, and at no point did the school seek to terminate contract, which was a contract at will.

Contract containing no specific termination date is terminable at will, and where the parties fix no time for the performance or discharge of obligations created by the contract they are assumed to have had in mind a reasonable time.

PUBLIC CONTRACTS - MISSISSIPPI

Broadband Voice, LLC v. Jefferson County

Supreme Court of Mississippi - September 29, 2022 - So.3d - 2022 WL 4543841

Telephone and internet services company, which had entered into three-year contracts with prior

county board of supervisors, brought breach of contract action against county and moved for judgment on the pleadings after county terminated contracts before end of terms.

The Circuit Court denied motion and dismissed complaint with prejudice. Company appealed.

The Supreme Court held that:

- Law on successor boards prevented company from enforcing early-termination clauses, and
- Supreme Court would decline to review unjust enrichment and quantum meruit claims.

Law on successor boards, which generally prohibited predecessor boards of supervisors from binding successor boards by contract, prevented telephone and internet services company from enforcing early-termination clauses of three-year contracts into which it had entered with county board of supervisors, after successor board terminated contracts before end of terms, even though company argued that early-termination fee was due before contract was voided, given that termination notice sent by county, 13 days before termination date, made fee due immediately; plain language of contract indicated that, if customer terminated prior to expiration of term, company would charge remaining service fees due immediately, and termination fee would not be effective until termination.

Supreme Court would decline to review unjust enrichment and quantum meruit claims raised by telephone and internet services company, in breach of contract action brought against county, arising from county's failure to pay early-termination fees for contracts into which it had entered with company; company did not raise unjust enrichment and quantum meruit issues at any time prior to appeal, and reversing trial court's judgment based on claims that were not part of pleadings would have chilling effect of depriving trial court of opportunity to first rule on issue, and then depriving Supreme Court of opportunity to perform appellate review by utilizing appropriate standard of review of trial court's ruling.

BONDS - PUERTO RICO

Ponsa-Rabell v. Santander Securities LLC

United States Court of Appeals, First Circuit - May 20, 2022 - 35 F.4th 26 - Fed. Sec. L. Rep. P 101,405

Customers who had purchased municipal bonds from broker brought securities fraud class action against brokerage firm asserting it made material omissions when making the sales, in violation of Securities Exchange Act and Puerto Rico law.

The United States District Court for the District of Puerto Rico adopted report and recommendation of United States Magistrate Judge and dismissed. Customers appealed.

The Court of Appeals held that:

- Brokerage firm was under no duty to repeat information already known or readily accessible to investors, and
- There was no evidence of a special relationship between broker and its customers, as would impose duty on firm to disclose omitted information.

Brokerage firm selling municipal bonds to its customers was under no duty to repeat information already known or readily accessible to the investors to avoid later claim for securities fraud based on

the omission; although customers asserted that firm should have disclosed to them in fund prospectus information regarding the deteriorating market conditions for Puerto Rico bonds, it was commonly known to public at the time of the purchase that Puerto Rico was experiencing an economic recession and that its debts might become unpayable.

There was no evidence of a special relationship between brokerage firm and customers who purchased municipal bonds from the firm, as would impose duty on the firm, under securities law, to disclose to customers that, at time of sale, it was actively trying to rid itself of its inventory of municipal bonds because of its concern of risk exposure, given the direction of the market; there was no indication that firm made any special promises to its customers to outline the risks of their investment, or to inform them that any projected risks were materializing.

MUNICIPAL ORDINANCE - TEXAS

City of Port Arthur v. Thomas

Court of Appeals of Texas, Beaumont - August 31, 2022 - S.W.3d - 2022 WL 3868106

After city and city's public works director attempted to enforce ordinances regulating use of heavy vehicles on city street adjacent to owner's property where he operated landfarm for disposing used drilling mud from oil and gas operations, owner filed suit against city and director for tortious interference, violations of Equal Protection Clause and alternatively, inverse condemnation and regulatory taking, declaratory relief against both defendants, ultra vires actions against director, and sought to enjoin city's enforcement of ordinances.

Defendants filed plea to the jurisdiction. The District Court denied defendants' plea to the jurisdiction. Defendants appealed.

The Court of Appeals held that:

- Owner pled ultra vires claim sufficient to invoke trial court's jurisdiction;
- Owner failed to allege that director acted ultra vires in enforcing city roadway ordinances;
- Fact issues existed as to whether owner was "reasonably prudent operator" and whether director enforced road use ordinances in "commercially reasonable manner";
- City did not waive its sovereign immunity under Uniform Declaratory Judgments Act (UDJA);
- Fact issues as to whether director acted ultra vires in enforcing ordinance warranted denial of director's plea to the jurisdiction on owner's UDJA claim;
- Owner failed to demonstrate that defendants' actions in enforcing ordinance were not rationally related to legitimate government objectives; and
- Owner failed to allege viable inverse condemnation or regulatory takings claim to establish waiver of city's immunity.

Property owner who operated landfarm for disposing used drilling mud from oil and gas operations pled ultra vires claim sufficient to invoke trial court's jurisdiction, in his action against city's public works director asserting that director enforced road use ordinances in manner that was pre-empted by state law and/or violated owner's right to Equal Protection under Texas Constitution; owner complained that director's enforcement of statute by requiring him and his customers to obtain permit or agreement when director had not made others do so constituted ultra vires act, specifically pleading that director acted without reference to or in conflict with constraints placed on his discretion by local law authorizing him to act.

Property owner who operated landfarm for disposing used drilling mud from oil and gas operations failed to allege that city's public works director acted ultra vires in enforcing city roadway ordinances requiring applications to operate excess loads on roadways, for purposes of whether governmental immunity barred suit against director for enforcing ordinances in manner that was pre-empted by state law and/or violated owner's right to Equal Protection under Texas Constitution; ordinances vested director with authority to determine heavy truck routes and empowered him to take applications and to determine, based on information provided, whether to designate roadways capable of sustaining excess load and duration, and fact that owner was first person city required to complete application did not mean that director acted outside his authority.

Fact issues existed as to whether property owner who operated landfarm for disposing used drilling mud from oil and gas operations was "reasonably prudent operator" and whether city's public works director enforced road use ordinances in "commercially reasonable manner," warranting denial of city and director's plea to the jurisdiction in owner's claim that city and director enforced road use ordinances in manner that was pre-empted by state law.

City did not waive its sovereign immunity under Uniform Declaratory Judgments Act (UDJA) in declaratory judgment action brought by property owner, who operated landfarm for disposing used drilling mud from oil and gas operations, seeking to prevent city from enforcing its road use ordinances requiring him to apply and obtain permit to operate excess loads on roadways; although city's sovereign immunity could be waived if owner challenged validity of ordinances, owner did not challenge validity of ordinances but, rather, challenged enforcement of ordinances, and such a challenge did not fall within scope of UDJA's express waivers of sovereign immunity.

Fact issues existed as to whether city's public works director's enforcement of road use ordinances constituted ultra vires action, warranting denial of director's plea to the jurisdiction as to property owner's Uniform Declaratory Judgments Act (UDJA) claim against director seeking to prevent him from enforcing road use ordinances requiring owner to apply and obtain permit to operate excess loads on roadways with respect to his operation of landfarm for disposing used drilling mud from oil and gas operations.

Property owner who operated landfarm for disposing used drilling mud from oil and gas operations failed to demonstrate that city and its public works director's actions in enforcing ordinance requiring owner to file permit application to operate excess loads on roadways were not rationally related to legitimate government objective of responding to specific citizen complaints regarding owner's operation and damage to city streets, and therefore owner failed to allege facially valid claim that city and director's enforcement of ordinance violated Equal Protection Clause; city provided evidence that owner's operation created more wear and tear on streets compared to purportedly similar trucks, and, although owner was first person city required to apply for permit under ordinance, city offered evidence it intended to use such permit applications going forward.

Property owner who operated landfarm for disposing used drilling mud from oil and gas operations, but was required to file permit application to operate excess loads on roadways pursuant to city ordinance, failed to allege viable inverse condemnation or regulatory takings claim to establish waiver of city's immunity; ordinances dealt with regulating road use and specifically, heavy traffic on roads, which was not a regulation of owner's property, and true nature of owner's claim was based on city's alleged wrongful enforcement of its ordinance, rather than an intentional taking or damage of his property for public use.

Whether state law preempted city ordinances requiring filing of permit application to operate excess loads on certain roadways necessarily depended upon whether city's actions in enforcing it were "commercially reasonable" and whether property owner acted as "reasonably prudent operator"

under civil statute expressly preempting municipal regulation of oil and gas operations with exception for municipality's ability to enact or enforce ordinance regulating traffic or noise, and therefore, because essence of owner's case against city and public works director was substantively more civil than criminal, trial court did not lack jurisdiction to enjoin enforcement of ordinance for violation of constitution and certain statutory provisions.

ZONING & PLANNING - WASHINGTON

Homeward Bound v. Central Puget Sound Growth Management Hearings Board

Court of Appeals of Washington, Division 2 - September 27, 2022 - P.3d - 2022 WL 4477915

Operator of drop-in center filed petitions for review of two orders of growth management hearings board, which found that city's regulations restricting the siting of day use centers and overnight shelters serving people experiencing homelessness complied with city's comprehensive growth management plan, and the Growth Management Act (GMA).

The Superior Court consolidated the two petitions and affirmed both the initial order and compliance order. Operator appealed.

The Court of Appeals held that:

- Determination of whether centers and shelters serving people experiencing homelessness were essential public facilities was a matter of local discretion;
- Prior to requesting that board declare center and shelters as essential public facilities under GMA, operator was required to request that city designate centers and shelters as essential public facilities under its local discretion;
- City's regulation violate GMA provision prohibiting the preclusion of siting of essential public facilities;
- Substantial evidence supported board's decision that city's regulation complied with its comprehensive plan, as required under GMA;
- Substantial evidence supported board's decision that regulation complied with policy in comprehensive plan that encouraged range of housing types and densities to meet needs of all economic sectors;
- City's regulation complied with city's policies addressing access to transit and pedestrian safety; and
- Centers and shelters were not "commercial uses," and thus policy in city's comprehensive plan regarding commercial uses in industrial areas did not apply to centers and shelters.

LIABILITY - ILLINOIS

Quiroz v. Chicago Transit Authority

Supreme Court of Illinois - September 22, 2022 - N.E.3d - 2022 IL 127603 - 2022 WL 4372898

Estate of pedestrian who died from being struck by a rapid transit train brought wrongful death action against city transit authority, alleging that transit authority's negligence caused pedestrian's death.

The Circuit Court dismissed the action. Estate appealed. The Appellate Court reversed and remanded. Transit authority's petition for leave to appeal was granted.

The Supreme Court held that:

- Exception to rule regarding open and obvious conditions that imposed duty to warn trespassers about artificial conditions highly dangerous to known trespassers did not apply;
- Transit authority did not owe duty to rescue; and
- Estate did not allege any conduct that would impose liability under willful and wanton conduct theory.

Exception to rule regarding open and obvious conditions that imposed duty to warn trespassers about artificial conditions highly dangerous to known trespassers did not apply so as to impose duty upon city transit authority to warn pedestrian of moving rapid transit train, in action brought by pedestrian's estate arising from pedestrian's death from being struck by train after he allegedly trespassed inside underground subway tunnel, fell from a recessed catwalk authorized for transit authority personnel onto ground near the tracks, and injured himself so that he could not get away, since transit authority had no reason to believe a trespasser would not appreciate the danger posed by a moving rapid transit train, and moreover, estate did not allege a failure to warn.

City transit authority did not owe pedestrian a duty to rescue him from rapid transit train, after he allegedly trespassed inside an underground subway tunnel, fell from a recessed catwalk authorized for transit authority personnel onto the ground near the tracks, and injured himself so that he could not avoid being struck by oncoming train, despite transit authority's awareness of pedestrian's presence, where there was no special relationship between transit authority and pedestrian, transit authority did not put him in a position of peril, as his injury from falling in an unauthorized area not open to the public into open and obvious path of the train was personal to him through no fault of transit authority, and transit authority was not an insurer of a trespasser's safety.

Pedestrian's estate did not allege any conduct by city transit authority that would impose liability for pedestrian's death from being struck by a rapid transit train, after he trespassed into area of subway tunnel authorized for transit authority personnel and fell and injured himself so that he could not avoid the oncoming train, under theory of willful or wanton conduct; while estate alleged that train operators failed to keep a lookout for objects and persons who might be in a subway tunnel and failed to monitor the security cameras in the tunnel in real time to determine if people in those areas were endangered, transit authority did not owe legal duty to trespassers to either keep a lookout or to monitor its security cameras to keep a lookout for trespassers in real time.

IMMUNITY - MASSACHUSETTS

Harrison v. Massachusetts Bay Transportation Authority

Appeals Court of Massachusetts, Suffolk - September 13, 2022 - N.E.3d - 101 Mass.App.Ct. 659 - 2022 WL 4137192

Workers, who had been hired by staffing agencies to perform information technology (IT) services for transportation authority, brought action against authority, with both alleging violation of independent contractor statute and one alleging retaliation.

The Superior Court Department dismissed claims on sovereign immunity grounds. Workers appealed.

The Appeals Court held that:

- Provision of authority's enabling statute that concerned authority's liability did not waive authority's sovereign immunity;
- Provision that granted authority power to sue or be sued did not waive authority's sovereign immunity;
- Statutes that prohibited employers from penalizing employees as result of action to seek rights and that governed classifying individuals as employees did not waive authority's sovereign immunity; and
- Public policy did not support waiving authority's sovereign immunity.

EMINENT DOMAIN - MICHIGAN

Miner v. Ogemaw County Road Commission

United States District Court, E.D. Michigan, Northern Division - September 2, 2022 - F.Supp.3d - 2022 WL 4017281

Landowner brought state court action against county road commission and commission's managing director, alleging violation of the federal Takings Clause, violation of the Michigan takings clause, violation of due process, conspiracy to interfere with civil rights under § 1983, and state law claims of trespass, malicious prosecution, abuse of process, and unlawful arrest.

Commission and director removed. Owner moved for summary judgment and commission and director cross-moved for summary judgment.

The District Court held that:

- Commission failed to establish prescriptive easement for culvert that could defeat landowner's takings claims;
- Natural-flow doctrine under Michigan law did not impair landowner's takings claims;
- Landowner established commission's inverse condemnation of his land under Michigan law;
- Genuine issue of material fact existed as to whether purpose of drainage culvert was for private use or public use, precluding summary judgment on claim for substantive due process violation;
- Genuine issue of material fact as to whether county had policy or custom that would render it liable under *Monell* for conduct of commission employees, precluding summary judgment on claim for substantive due process violation;
- Neither commission nor director was entitled to immunity, under Michigan Governmental Tort Liability Act, from landowner's trespass claim under Michigan law; and
- Director was subject to money damages on landowner's trespass claim under Michigan law.

County road commission failed to establish prescriptive easement for water culvert under Michigan law, which diverted water from neighboring property onto landowner's property, that could defeat landowner's takings claims under federal and Michigan constitutions, where neighboring property owner had only owned his parcel for four years, such that he could not have prescriptive drainage easement unless by succession from parcel's former owner, county failed to establish that there was previous owner of parcel that owned it for 15 continuous years, and nothing indicated that county had prescriptive easement.

Natural-flow doctrine under Michigan law did not impair landowner's takings claims under federal and Michigan constitutions, arising from culvert that diverted water from neighboring property onto landowner's property, which caused flooding, and thus landowner was entitled to compensation from

county road commission and its managing director for culvert's diversion of water onto his land, where landowner's takings claims involved flow of water caused by county highway and man-made culvert, and nothing indicated that water from neighboring property naturally "washed" over county highway onto landowner's property while culvert was blocked by concrete, but instead that water traveled down side of ditch further west while culvert was blocked.

Landowner's takings claims under federal and Michigan constitutions did not begin to run, and six-year limitations period did not accrue, until eight months after landowner filed action in state court under "continuing violation" doctrine, where county road commission's wrongful conduct was physical trespass of culvert onto land after they unblocked it—not its initial installation or intermittent flooding that culvert allegedly caused, such trespass newly accrued each day that culvert trespassed onto landowner's land, and culvert continued to trespass onto land following initiation of suit even though culvert was trimmed so that it only trespassed onto land by .33 feet rather than six feet.

Landowner's entitlement to damages for any harm to property that trespassing culvert proximately caused would not be limited by six-year statute of limitations for inverse-condemnation cases under Michigan law and would date back to landowner's purchase of property through date that takings claims, under federal and Michigan constitutions, in state court; damages seemingly began to run when county road commission admittedly removed blockage from culvert for first time, which was approximately five months prior to landowner's purchase of property, and then persisted under "continuing violation" doctrine.

Landowner established county road commission's inverse condemnation of his land without actual physical occupation, acquisition, or appropriation, through presence of culvert on his land, which diverted water onto his land from neighboring property, and thus landowner was entitled to just compensation for commission's unconstitutional taking of land under Michigan law, where commission abused its legitimate power by entering land without warrant under guise of easement, commission affirmatively acted and caused damage to property by cutting and unblocking culvert, which flooded property, and trespassing culvert caused diminution in value of property since flood waters froze nearly all land surrounding landowner's house, rendering use and enjoyment of property practically scant.

County road commission committed unconstitutional taking of landowner's real property under Fifth Amendment through physically trespassing drain culvert on his land, which diverted water onto his land from neighboring property and cause flood damage, and thus landowner was entitled to just compensation for such taking, where physical trespass and flooding of property occurred from time that landowner purchased parcel until he filed action in state court.

Genuine issue of material fact existed as to whether purpose of drainage culvert, which diverted water onto landowner's property from neighboring property causing flooding, was for private use or public use, precluding summary judgment on landowner's claim for violation of his substantive due process rights to his property.

Genuine issue of material fact as to whether county had policy or custom with regard to upkeep and maintenance of drainage culvert, which diverted water onto landowner's property from neighboring property and caused flooding, that would render it liable under *Monell* for conduct of county road commission employees who entered onto landowner's land without permission to cut and unblocked culvert, precluding summary judgment on landowner's claim for violation of his substantive due process rights to his property.

County road commission's managing director was not entitled to qualified immunity from

landowner's claim for violation of his substantive due process rights to his property, where commission and director violated landowner's constitutional right to be free from unconstitutional governmental takings by its physically trespassing culvert that diverted water onto landowner's property from neighboring property and caused flooding, it was clearly established that permanent occupations of land by installations constituted takings even if such installation occupied only relatively insubstantial amounts of space and did not seriously interfere with landowner's use of rest of his land, and drain culvert constituted such installation.

County road commission's managing director was subject to money damages on landowner's trespass claim under Michigan law for damages caused by drain culvert, which divert water onto landowner's property from neighboring property and caused flooding, even though commission could not be held liable for money damages under Act, where Act removed qualified immunity for agency employees for intentional torts, which included trespass.

TELECOM - OHIO

Tarpon Towers II, LLC v. City of Sylvania

United States District Court, N.D. Ohio, Western Division - September 1, 2022 - F.Supp.3d - 2022 WL 3998799

Communications companies sought judicial review of decision by city council which denied companies' application for special-use permit to construct cell-phone tower.

Both parties moved for summary judgment.

The District Court held that:

- City council failed to set forth contemporaneous written reasons which were stated clearly enough to enable judicial review, as required by the Telecommunications Act (TCA);
- Substantial evidence did not support denial based on local height restrictions;
- Substantial evidence did not support denial based on alleged negative impact on property values;
- Companies demonstrated that denial of application would result in significant gap in personal wireless service coverage;
- Companies demonstrated that they inquired into feasibility of alternative site locations; and
- Order requiring city council to approve application was warranted.

REFERENDA - OHIO

State ex rel. Sanduskians for Sandusky v. Sandusky

Supreme Court of Ohio - September 23, 2022 - N.E.3d - 2022 WL 4395899 - 2022-Ohi--3362

Taxpayer and others sought a writ of mandamus ordering city, city law director, and city commission members to certify a charter-amendment petition for a vote by city electors at general election, and requested attorney fees.

The Supreme Court held that:

- Estoppel did not apply to preclude taxpayer and others from arguing that statute, which listed

what had to be included in any initiative or referendum petition, did not apply to their charter-amendment petition;
- Statute requiring an initiative petition to contain a full and correct copy of the title and text of the proposed ordinance, and a full and correct copy of the ordinance to be referred, did not apply to taxpayer and others' petition to amend city charter; abrogating *State ex rel. Hackworth v. Hughes,* 97 Ohio St.3d 110, 776 N.E.2d 1050; *Morris v. City Council of the City of Macedonia*, 71 Ohio St.3d 52, 641 N.E.2d 1075; *State ex rel. Becker v. Eastlake*, 93 Ohio St.3d 502, 756 N.E.2d 1228; and
- Taxpayer was not entitled to mandamus relief on claim seeking to have city and board of elections take the necessary steps to place proposed charter amendment on the next general election ballot.

Estoppel did not apply to preclude taxpayer and others from arguing that statute, which listed what had to be included in any initiative or referendum petition, did not apply to their charter-amendment petition; even if taxpayer and others took the position in their communications with city that the general municipal initiative and referendum statutes applied to their petition, they did not raise the argument in a court proceeding, and thus estoppel did not apply.

Statute requiring an initiative petition to contain a full and correct copy of the title and text of the proposed ordinance, and a full and correct copy of the ordinance to be referred, did not apply to taxpayer and others' petition to amend city charter; statute applied only to initiative and referendum petitions, and thus was inapplicable to a municipal charter-amendment petition, unless something in the municipal charter incorporated the statute into the charter-amendment process, as a charter amendment was not an "initiative"; abrogating *State ex rel. Hackworth v. Hughes*, 97 Ohio St.3d 110, 776 N.E.2d 1050; *Morris v. City Council of the City of Macedonia*, 71 Ohio St.3d 52, 641 N.E.2d 1075; *State ex rel. Becker v. Eastlake*, 93 Ohio St.3d 502, 756 N.E.2d 1228.

Taxpayer was not entitled to mandamus relief on claim seeking to have city and board of elections take the necessary steps to place proposed charter amendment on the next general election ballot; city charter called for a proposed amendment to be submitted to the electors "at the next regular municipal election" occurring between 60 and 120 days from the city commission's passage of an ordinance providing for the submission, and "regular municipal election" was defined as an election occurring in November of an odd numbered year.

Taxpayer was not entitled to an award of attorney fees in mandamus action seeking to compel city, city law director, and city commission members to certify a charter-amendment petition for a vote by city electors at general election, pursuant to statute that allowed a court to award attorney fees to a successful taxpayer instituted a lawsuit after a city law director failed, upon request of a taxpayer, to apply for a writ of mandamus to enforce any duty enjoined by law or ordinance; an award of fees was generally warranted only when a respondent's actions were not reasonably supported by law, and city respondents position that charter-amendment petition was deficient as it failed to contain a full and correct copy of the title and text of the proposed ordinance was supported by caselaw.

EMINENT DOMAIN - TEXAS

Baker v. City of McKinney, Texas

United States District Court, E.D. Texas, Sherman Division - August 26, 2022 - F.Supp.3d - 2022 WL 3704302

Homeowner brought action against city seeking compensation for damages to her home caused by standoff with armed fugitive, alleging violation of the Takings Clauses of the federal and state constitutions.

Following jury trial, the District Court entered judgment in favor of homeowner and awarded $44,555.76 in just compensation for the cost of repairs to her real property, and $15,100.83 in just compensation for the loss in market value to her personal property. City moved for new trial.

The District Court held that:

- City was liable for unconstitutional taking based on destruction of property during standoff;
- Homeowner's daughter did not consent to taking;
- Governmental immunity did not shield city from liability under Takings Clause of Texas Constitution;
- Jury instruction on relevance of police officers' actions did not constitute plain error; and
- Damages award of $15,100 for loss of personal property was not against the weight of the evidence.

City was liable on homeowner's claim for unconstitutional taking in violation of the Fifth Amendment based on destruction of property during standoff and after officers forcefully entered home by breaking down both front and garage door and running over backyard fence, even though law enforcement could lawfully enter homeowner's property pursuant to the public interest in order to draw armed fugitive out of home, where law enforcement could not lawfully destroy homeowner's property.

Homeowner's daughter did not consent to taking, as would preclude city's liability for unconstitutional taking under the Texas Constitution, although daughter consented to law enforcement's entry onto the property in order to draw out armed fugitive in home, where daughter did not consent to destruction of property.

Governmental immunity did not shield city from liability under Takings Clause of Texas Constitution for damage to homeowner's property caused by police officers' apprehension of dangerous fugitive in home; claim under state constitution for taking, damaging, or destruction of property for public use constituted waiver of governmental liability, and officers destroyed homeowner's property for public use.

Exclusion of evidence of donations of items, money, and insurance proceeds that reduced out-o--pocket expenses homeowner incurred in repairing home after it was damaged by police officers pursuing armed fugitive did not prejudice city by forcing it to compensate homeowner twice for same injury, as would warrant new trial in action alleging unconstitutional taking in violation of the Fifth Amendment, where benefits were entirely voluntary and from private third-party payments or services, benefits were in no way funded or paid for by city, nor had homeowner ever been compensated by city for her losses, and allowing city to completely forego paying just compensation by taking private property then waiting for third party to cover owner's losses would have resulted in injustice to homeowner.

Jury instruction, in homeowner's § 1983 action against city alleging unconstitutional taking based on damages caused to her home by police officers' standoff with armed fugitive, stating that any actions taken by police department were not relevant to consideration of whether city violated homeowner's rights by taking her property without just compensation did not constitute plain error, as would warrant new trial, where homeowner's § 1983 claim was not premised on officers' actions in destroying her property, but on city's refusal to provide her with just compensation.

Verdict awarding homeowner $15,100 for loss of personal property was not against the weight of the evidence, and thus did not warrant new trial in homeowner's action against city alleging unconstitutional taking under the Fifth Amendment and Texas Constitution arising from police

officers' standoff with armed fugitive, where homeowner testified that tear gas had permeated the walls and floors of her home, and that, by the time she was permitted to enter her home after tear gas had been remediated, city had removed everything that was in it and no pictures of her damaged personal property had been taken, and homeowner's testimony detailed personal property that had been destroyed, including pre-destruction photographs of each item she discussed.

ZONING & PLANNING - WASHINGTON

Futurewise v. Spokane County

Court of Appeals of Washington, Division 3 - September 22, 2022 - P.3d - 2022 WL 4373952

Petitioners filed petition for judicial review of a final decision of the Growth management Hearings board which upheld county's comprehensive plan.

By agreement of the parties, the Superior Court certified the case for direct review, and appeal was transferred.

The Court of Appeals held that:

- A "capital facility," as contemplated by comprehensive plan requirements of the Growth Management Act (GMA), is a fixed, physical facility that has been built, constructed, or installed to perform a service relevant to the considerations at issue in the GMA, such as public services;
- Transportation facilities need be addressed only in the transportation element of a comprehensive plan, not both the transportation and capital facilities elements;
- GMA requirement that the capital facilities plan element of a comprehensive plan include the proposed locations and capacities of expanded or new capital facilities applies only to facilities owned and operated by the city or county preparing the plan; and
- Capital facilities element of county's comprehensive plan did not have to include a detailed itemization of the amounts of money to be derived from identified public sources.

IMMUNITY - WYOMING

Casey v. Teton County Hospital District

Supreme Court of Wyoming - September 16, 2022 - P.3d - 2022 WL 4284714 - 2022 WY 112

Surgical patient brought action against county hospital and others, alleging that she received negligent medical treatment during her hospital stay.

The District Court granted summary judgment in favor of hospital. Patient appealed.

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

- Patient's untimely presentment to county hospital of her notice of claim required dismissal of suit against hospital, and
- Party could not satisfy two-year requirement for presenting notice of claim against governmental entity by substantial compliance.

Surgical patient's untimely presentment to county hospital of her notice of claim more than two years after the accrual of her claim for negligent medical treatment during her hospital stay failed to strictly comply with the Wyoming Governmental Claims Act (WGCA), requiring the dismissal of the

negligence suit against the hospital.

IMMUNITY - CALIFORNIA

Flores v. City of San Diego

Court of Appeal, Fourth District, Division 1, California - September 15, 2022 - Cal.Rptr.3d - 2022 WL 4244284 - 2022 Daily Journal D.A.R. 9981

Mother and girlfriend of motorcyclist, who died during police vehicle pursuit when his motorcycle crashed, brought actions against city for wrongful death and negligence. Actions were consolidated.

The Superior Court granted city's motion for summary judgment based on statutory immunity. Mother and girlfriend appealed.

The Court of Appeal held that:

- Commission on Peace Officer Standards and Training (POST) regulation specifying minimum standards for legislatively-mandated training courses applied to annual trainings;
- Vehicular pursuit training requirements specified in immunity statute were "legislatively mandated" within meaning of POST regulation;
- Term "guidelines" in immunity statute referred to "standards" in vehicle pursuit training statute;
- POST regulation setting forth standard of one year of annual vehicular pursuit training did not exceed statutory authority; and
- Triable issue existed as to whether city provided at least one hour in annual vehicular pursuit training.

PUBLIC UTILITIES - COLORADO

United Power, Inc. v. Federal Energy Regulatory Commission

United States Court of Appeals, District of Columbia Circuit - September 16, 2022 - F.4th - 2022 WL 4281979

Utility member of generation and transmission cooperative petitioned for review of declaratory order of the Federal Energy Regulatory Commission (FERC), which determined that upon admission of natural gas supplier to electrical cooperative, cooperative was subject to jurisdiction of FERC, and that FERC had exclusive jurisdiction over exit charges, which cooperative charged to exiting utility members of cooperative.

Second utility member and Colorado Public Utilities Commission (PUC) intervened in support of utility member. Cooperative, and a third and fourth utility member intervened in support of FERC.

The Court of Appeals held that:

- Utility member failed to exhaust argument that FERC acted ultra vires or beyond agency's statutory authority, as required for Court of Appeals to exercise jurisdiction over argument;
- Utility member exhausted issue before FERC as to whether FERC's actions were arbitrary and capricious;
- FERC's issuance of declaratory order was within its broad discretion to determine when and how to hear and decide matters; and

- Cooperative's exit charge was a rate charged in connection with provision of wholesale electricity, and thus FERC had exclusive jurisdiction to determine reasonableness of exit charge.

Utility member failed to raise with specificity in application for rehearing its argument that Federal Energy Regulatory Commission (FERC) acted ultra vires or beyond statutory authority in finding generation and transmission cooperative was subject to FERC jurisdiction, such that utility member failed to exhaust argument before FERC as required for Court of Appeals to exercise jurisdiction over issue, and thus Court of Appeals was without jurisdiction to consider utility member's argument; utility member argued in footnote to introduction of its request for rehearing that FERC's action was premature and inefficient, but did not describe FERC's action as ultra vires or beyond agency's statutory authority.

Utility member's discussion in footnote of its application for rehearing before Federal Energy Regulatory Commission (FERC), which described FERC's action in asserting jurisdiction over generation and transmission cooperative as premature and inefficient and specified what FERC ought to have done, was sufficiently specific to permit finding that utility member raised argument before FERC that FERC's actions were arbitrary and capricious, and thus utility member exhausted issue before FERC as required for appellate jurisdiction under Federal Power Act (FPA); utility member's description of what FERC did and what FERC ought to have done, which was wait for state tribunal's resolution of related issue, were specific enough to make out an "arbitrary and capricious" argument without squinting.

Federal Energy Regulatory Commission's (FERC's) decision to issue declaratory order as to FERC's jurisdiction over generation and transmission cooperative to determine utility member's exit charge was within FERC's broad discretion to determine when and how to hear and decide matters, despite fact that proceeding before state agency was still pending as to whether natural gas supplier's admission to cooperative, from which FERC's jurisdiction was rendered, was proper; FERC explained it had statutory obligation to act on rate filings submitted by electrical cooperative, it did not matter that FERC might have had to revisit its determination and some later time, and providing temporary clarity to parties was useful and reasonable.

Generation and transmission cooperative's exit charge, levied against a withdrawing member, was a rate charged in connection with the provision of wholesale electricity, and thus Federal Energy Regulatory Commission (FERC) had exclusive jurisdiction to determine reasonableness of cooperative's exit charge, although exit charge was not a rate or charge for a jurisdictional service; exit charge protected cooperative's members against rate increases caused by exit of a member while also increasing membership commitment and stability, exit charge was important part of bargain to which a firm agreed when it became part of cooperative, and if there were no obligation to pay an equitable exit charge, cost of electricity under requirements contract would have been higher.

PUBLIC MEETINGS - CONNECTICUT

Priore v. Haig

Supreme Court of Connecticut - September 7, 2022 - A.3d - 344 Conn. 636 - 2022 WL 4099434

Special permit applicant filed suit against neighbor for libel per se, libel per quod, slander per quod, and defamation, alleging neighbor's comments at planning and zoning commission meeting caused reputational damage to his standing in community and profession and falsely accused him of

criminal misconduct and being untrustworthy.

The Superior Court granted neighbor's motion to dismiss on grounds that court lacked subject matter jurisdiction and denied applicant's motion to reargue. Applicant appealed, and the Appellate Court affirmed. Applicant petitioned for certification to appeal, which was granted.

The Supreme Court held that public hearing on special permit application was not "quasi-judicial," and thus statements neighbor made during hearing about permit applicant were not protected by an absolute privilege from applicant's defamation claim.

A proceeding may be "quasi-judicial," for purposes of absolute defamation privilege, when the body or entity conducting the proceeding has the discretion to apply the law to the facts, while additional factors that could assist in determining whether a proceeding is quasi-judicial in nature include whether the body has the power to exercise judgment and discretion, hear and determine or to ascertain facts and decide, make binding orders and judgments, affect the personal or property rights of private persons, examine witnesses and hear the litigation of the issues on a hearing, and enforce decisions or impose penalties; these factors are not exclusive, nor must all factors militate in favor of a determination that a proceeding is quasi-judicial in nature for a court to conclude that the proceeding is quasi-judicial.

Public hearing on special permit application before town planning and zoning commission was not "quasi-judicial," and thus statements neighbor made during hearing about permit applicant were not protected by an absolute privilege from applicant's defamation claim; while commission had discretion to apply the law to the facts of the application before it, and was empowered to make binding orders or judgments affecting the rights of private persons, the hearing lacked procedural safeguards, the commission had limited authority to reject evidence or otherwise limit what information was brought before it to ensure the reliability of the proceeding, and there was a lack of a public policy rationale for extending absolute immunity.

SCHOOLS - FLORIDA

Chabad Chayil, Inc. v. School Board of Miami-Dade County, Florida

United States Court of Appeals, Eleventh Circuit - September 8, 2022 - F.4th - 2022 WL 4100687

Operator of Jewish oriented afterschool program brought § 1983 action against school district and county's Office of Inspector General (OIG), alleging violations of its First Amendment right to freely exercise religion, violation of equal protection rights, and violation of due process under the Fourteenth Amendment.

United States District Court for the Southern District of Florida dismissed the claims with prejudice and without leave to amend. Operator appealed.

The Court of Appeals sitting by designation, held that:

- School district did not have *Monell* liability;
- OIG did not have § 1983 liability for alleged violations of operator's First Amendment right to freely exercise its religion;
- Operator failed to establish a "class of one" equal protection claim;
- Operator's alleged agreement with school district did not support its due process claim;
- Operator did not have a due process protected right to have school district consider its application

for use of school facilities; and
- OIG did not have § 1983 liability for the alleged due process violation.

School superintendent's alleged actions in making decision to prevent operator of Jewish oriented afterschool program from using school district's facilities for the program were subject to meaningful administrative review and therefore lacked the final policymaking authority required for school district to have *Monell* liability for alleged violations of operator's religious freedom rights under the First Amendment, and equal protection and procedural due process rights under the Fourteenth Amendment, where state statutory scheme as a whole made clear that the school district retained ultimate authority to review and reverse any of the superintendent's decisions that it disapproved.

Allegations by operator of Jewish oriented afterschool program, that county's Office of Inspector General (OIG), in investigating operator for failing to reveal it collected monies in application for free access to school district facilities, exhibited bias against operator based on its teaching of religion and that OIG investigators pressured interviewees to say that teaching religious topics violated some policy, despite having no basis to believe that religious orientation of the program violated any school district policy, were insufficient to plausibly allege an official policy or custom of OIG that would render it liable for violating operator's right to freely exercise its religion; allegations did not demonstrate a custom so longstanding and widespread that it was deemed authorized by policymaking officials.

Operator of Jewish oriented afterschool program failed to demonstrate that its comparators were similarly situated in all relevant respects and thus failed to establish a "class of one" equal protection claim against county's Office of Inspector General (OIG) arising from allegations that OIG singled it out for investigation for failing to disclose it collected monies in order to get facility use fee waivers from the school district when numerous other organizations received fee waivers while charging fees, where OIG's investigation into operator was instigated by an anonymous complaint alleging that operator was improperly receiving fee waivers, and operator did not allege that any of the proposed comparators were also the subject of such a complaint.

Purported informal agreement between operator of Jewish oriented afterschool program and school district, allowing operator to use school facilities for program until conclusion of county Office of Inspector General (OIG) investigation into operator's alleged misrepresentations in order to gain free use of school facilities and circumvention of process for having an afterschool program at a school district facility, was not a stigma plus legal entitlement, and thus, operator failed to establish a valid § 1983 due process claim for deprivation of a liberty interest based on reputational harm against OIG for making allegedly false and defamatory statements in its investigation report, where operator did not have a signed, written agreement to use school district facilities for the school year.

Right to have applications for use of school facilities be considered by school district was not a property right recognized under state law, and thus, operator of Jewish oriented afterschool program did not have a stigma plus legal entitlement supporting a valid § 1983 due process claim for deprivation of a liberty interest based on reputational harm against county Office of Inspector General (OIG), arising from OIG's investigation into operator's alleged misrepresentations in order to gain free use of school facilities and circumvention of process for having an afterschool program at a school district facility; operator did not point to any legal authority providing that it had a right to have a local school district consider its applications.

Even if county's Office of Inspector General (OIG) acted in accordance with some official policy or custom, that policy or custom did not cause harm suffered by operator of Jewish oriented afterschool program from school district's action in barring operator from continuing to use school facilities

following OIG's investigation into operator's alleged misrepresentations in effort to obtain free use of school facilities, and thus, OIG did not have § 1983 liability for operator's due process claim for deprivation of a liberty interest based on reputational harm arising from OIG's alleged defamatory statements in its investigation report; OIG's role was to conduct investigations and issue reports, and it did not have authority to refuse any group permission to use school district property.

MARKETABLE TITLE ACT - MINNESOTA

Lundstrom v. Township of Florence

Court of Appeals of Minnesota - September 6, 2022 - N.W.2d - 2022 WL 4074769

Landowners brought declaratory-judgment action against township, claiming that township's interest in unopened streets abutting their property was extinguished by Marketable Title Act (MTA).

The District Court denied landowners' summary judgment motion and granted township's summary judgment motion in which they sought a declaration that the disputed streets were platted, public, unopened roads. Landowners appealed.

The Court of Appeals held that:

- Landowners established a "source of title" for purposes of their claim under MTA, and
- Township neither timely recorded notice of its easement interest nor identified evidence that satisfied possession exception notice requirement of MTA.

Landowners established a "source of title" for purposes of their claim under Marketable Title Act (MTA) in declaratory-judgment action against township regarding their respective interests in portions of two platted, unopened streets that abutted landowners' lots; fee simple title to real estate was "source of title" for MTA purposes, landowners owned fee simple interests in their lots, lots abutted streets dedicated by plat, neither street had been vacated, and landowners had fee simple interest to center of street.

Township neither timely recorded notice of its easement interest in unopened streets abutting landowners' property nor identified evidence that satisfied possession exception notice requirement of Marketable Title Act (MTA), and thus township was conclusively presumed to have abandoned its interest in unopened streets to which landowners had asserted interest, although township had purported interest through execution and recording of land by plat dedication in 1857 and claimed that public used street to access river abutting landowners' property; recording of plat did not satisfy township's duty to file notice of claim under MTA, township did not show that public used streets to access riverfront, and abandonment of platted public street did not require affirmative act.

REFERENDA - NEW JERSEY

Kumar v. Piscataway Township Council

Superior Court of New Jersey, Appellate Division - August 23, 2022 - A.3d - 2022 WL 3589079

Voters sought review of a decision from township council, which approved resolutions to place non-binding public opinion questions on general election ballot regarding proposed ordinances to

establish emergency medical services department and to required township to record, broadcast, or stream township's public meetings.

The Superior Court found township's resolutions were void and enjoined township from placing non-binding public opinion questions on the ballot, but denied voters' motion for attorney's fees. Appeals were taken.

The Superior Court, Appellate Division, held that:

- Township council was not authorized to place non-binding public opinion questions on general election ballot under the Faulkner Act, but
- Voters were entitled to award of attorney's fees under Civil Rights Act.

Township council was not authorized to place non-binding public opinion questions concerning identical binding questions proposed by voters on the same general election ballot under the Faulkner Act; voters had already asked township council to consider and place binding questions regarding creation of an emergency medical services department and recording or broadcasting of township meetings under statutory procedure governing initiatives for proposed ordinances, and inclusion of both binding and non-binding questions would have caused voter confusion and could have resulted in contradictory results.

Voters' right to petition initiatives for proposed township ordinances constituted a "substantive right" protected by the Civil Rights Act (CRA), such that a deprivation of the right entitled voters to an award of attorney fees as the prevailing party under the CRA; township, through its council, violated the Act and prevented voters from having their petitions fully and fairly considered, and court's order enjoining township from placing non-binding questions on the ballot altered legal relationship between the parties in favor of voters.

EMINENT DOMAIN - NEW YORK

20 Rewe Street, Ltd. v. State

Supreme Court, Appellate Division, Second Department, New York - September 14, 2022 - N.Y.S.3d - 2022 WL 4230493 - 2022 N.Y. Slip Op. 05145

Landowner brought action against State for damages from partial taking of real property. Following nonjury trial, the Court of Claims rendered judgment in favor of landowner, and awarded landowner $3,310,500 in damages. Landowner appealed.

The Supreme Court, Appellate Division, held that record supported trial court's pre-taking value of real property based on State's appraisal.

Record supported trial court's $4,389,000 pre-taking value of landowner's real property based on State's appraisal, in action to recover damages arising from a partial taking of real property; comparable sales proffered by State's expert were sufficiently similar to serve as a guide to the market value of the property, notwithstanding differences between the comparables and the property, and State's appraiser sufficiently and credibly explained the basis for his selection of comparable properties and relevant adjustments made to the valuation of the properties, and evidence supported trial court's rejection of certain adjustments made by landowner's appraiser.

BONDS - OHIO

Vandercar, LLC v. Port of Greater Cincinnati Development Authority

Court of Appeals of Ohio, First District, Hamilton County - September 9, 2022 - N.E.3d - 2022 WL 4112705 - 2022-Ohio-3148

In 2019, Developer entered into a $36 million purchase contract for the purchase of the Millennium Hotel in downtown Cincinnati in order to facilitate the redevelopment of the hotel. Developer later assigned its interest in the contract to the Port of Greater Cincinnati Development Authority under an Agreement Regarding Assignment ("the Agreement") in exchange for two potential fees totaling $7.5 million.

Under the purchase and sale agreement, the Port was obligated to pay Developer a $2.5 million "Developer Fee" upon the closing of the transaction. In the event that the Port issued the "Redevelopment Bonds" within one year of the closing of the sale, it was obligated to pay Developer an additional $5 million.

On February 13, 2020, the Port issued revenue bonds in the amount of $52 million. On February 14, 2020, the Port closed on its acquisition of the real property and paid Developer its $2.5 million Development Fee.

Developer subsequently submitted an invoice for the remaining $5 million, Developer asserted that the revenue bonds were issued for purposes other than simply property acquisition and were thus Redevelopment Bonds issued within one year of closing, which triggered the Port's obligation to pay the Redevelopment Fee. Developer claimed that the $52 million of revenue bonds consisted of both Property Acquisition Bonds and Redevelopment Bonds.

The Port argued that the revenue bonds consisted only of Property Acquisition Bonds, and that it was not obligated to pay the Redevelopment Fee because it did not issue Redevelopment Bonds to construct a new hotel.

The Agreement did not define "acquisition" or "redevelopment," and defined "Property Acquisition Bonds" only as bonds issued to acquire the Real Property and "Redevelopment Bonds" as those issued for redevelopment of the Real Property.

The Court of Appeals held that:

- The $52 million issuance of revenue bonds constituted both Property Acquisition Bonds and Redevelopment Bonds, triggering the Port's obligation to pay Developer's $5 million Redevelopment Fee.
- Remand was necessary to determine if the Port acted in bad faith, as the basis for an award of attorneys' fees as costs.
- Developer was not entitled to the payment of prejudgment interest, as the Port was an arm or instrumentality of the state.

ZONING & PLANNING - OHIO

State ex rel. Halstead v. Jackson

Supreme Court of Ohio - September 13, 2022 - N.E.3d - 2022 WL 4137610 - 2022-Ohi--3205

Relators sought writ of mandamus to have referendum on zoning ordinance passed as emergency legislation placed on upcoming general-election ballot.

The Supreme Court held that:

- Relators caused unreasonable delay in waiting to file action, as relevant to whether action was barred by laches;
- City and prospective purchaser of land were not prejudiced by delay, and thus action was not barred by laches;
- Relators lacked adequate remedy in ordinary course of law;
- Ordinance validly passed as emergency legislation was not subject to referendum under city charter; and
- Ordinance sufficiently stated reasons for passage as emergency legislation.

Zoning ordinance validly passed as emergency legislation was not subject to referendum under city's charter, which stated that zoning ordinances "shall be subject to the provisions of [the charter] pertaining to their enactment and matters of initiative or referendum"; natural reading of charter was that "subject to" had one object, i.e., "the provisions of [the charter]," meaning that zoning ordinances could be enacted in same way as other ordinances and that charter's referendum provisions applied to such ordinances, and charter incorporated state law concerning referendum petitions, which law exempted from referendum power ordinances passed as emergency legislation.

Stated reasons in zoning ordinance for its passage as emergency legislation, specifically, to preserve and increase municipal income tax revenues, to protect value of previously made utility infrastructure investments in zoned area, and to protect city's influence over and ability to fund infrastructure improvements in zoned area, were sufficient to satisfy requirement that ordinance set forth reasons for passage as emergency legislation under statute providing that such ordinances go into immediate effect, and thus zoning ordinance was not subject to referendum.

MUNICIPAL CORPORATIONS - OHIO

State ex rel. Village of Moscow v. Clermont County Board of Elections

Supreme Court of Ohio - September 8, 2022 - N.E.3d - 2022 WL 4100752 - 2022-Ohio-3138

Protestors, a village and its mayor, sought writ of prohibition to reverse Board of Elections' denial of protest to keep petition to surrender the corporate powers of village off the ballot as it had not been submitted to village's legislative authority prior to its submission to the Board of Elections and had not been filed with township Board of Trustees, and to reverse Board of Elections' certification of petition to the ballot, and sought a writ of mandamus compelling Board of Elections to remove the measure from the ballot.

The Supreme Court held that:

- Board of Elections failed to follow applicable legal provisions by placing surrender petition on ballot despite fact that petition had not been submitted to village's legislative authority prior to its submission to Board of Elections, as would support writ of prohibition to reverse certification of

surrender petition to ballot, abrogating *Pringle v. Clermont Cy. Bd. of Elections*, 12th Dist. Clermont No. CA2019-10-078, 2019-Ohio-4528, 2019 WL 5692285; and
- Grant of writ of prohibition mooted request for a writ of mandamus.

SCHOOLS - OKLAHOMA

Ritter v. State

Supreme Court of Oklahoma - September 20, 2022 - P.3d - 2022 WL 4359959 - 2022 OK 73

Parents of public school students brought a declaratory judgment action challenging the constitutional validity of statutes prohibiting a public school district from requiring a vaccination or proof of a vaccination against COVID-19 for a student to attend in-person school and from mandating masks for unvaccinated students unless the Governor declared a state of emergency in the jurisdiction in which the school board was located.

The District Court granted a temporary injunction. State appealed and parents filed a counter-appeal.

The Supreme Court held that:

- Statutes were an unconstitutional delegation of legislative authority to the extent they required Governor to declare an emergency, and
- Unconstitutional provision could be severed from the remainder of statutes.

Principles of sovereign immunity did not preclude plaintiffs from pursuing a declaratory judgment action against the State challenging the validity of statutes relating to vaccination restrictions and COVID-19 mask mandates in public schools as violative of various constitutional provisions including provision on delegation of legislative authority; a declaratory judgment could be sought to determine the validity of any statute, and a suit for declaratory judgment was neither strictly legal nor equitable, but assumed the nature of the controversy at issue.

Statutes prohibiting school boards for public school districts from requiring a vaccination or proof of a vaccination against COVID-19 for a student to attend in-person school and from mandating masks for unvaccinated students unless the Governor declared a state of emergency in the jurisdiction in which the school board was located were an unconstitutional delegation of legislative authority, to the extent the statutes required the Governor to declare an emergency before school boards could make decisions regarding local health matters; statutes removed the school boards' authority to act independently and exercise the authority granted to school boards and statutes granted that authority to Governor, who had neither constitutional nor statutory authority over operation of schools.

Unconstitutional provision in statutes relating to vaccination restrictions and COVID-19 mask mandates in public schools, which impermissibly delegated legislative authority to the Governor to declare an emergency before local school districts could make decisions regarding local health matters, could be severed from the valid provisions, which remained enforceable; valid provisions were separable, or were capable of being executed in accordance with the legislative intent of the statutes as enacted.

IMMUNITY - CONNECTICUT

Daley v. Kashmanian

Supreme Court of Connecticut - August 30, 2022280 A.3d - 344 Conn. 464 - 2022 WL 3692856

Motorcyclist brought action against police officer and city, alleging that officer had negligently and recklessly caused motorcyclist to be ejected from his motorcycle.

Following close of evidence at jury trial, the Superior Court granted officer's motion for directed verdict as to recklessness charge, and subsequently, following jury verdict in motorcyclist's favor on negligence charge, granted officer's and city's motions to set aside the jury verdict. Motorcyclist appealed. The Appellate Court affirmed in part, reversed in part, and remanded. Motorcyclist filed petition for certification.

The Supreme Court held that:

- Operation of a motor vehicle is a "ministerial act" for which a municipal employee lacks qualified immunity;
- Officer's operation of unmarked police car was not itself a discretionary activity, but officer's decision to use unmarked police car to surveil motorcyclist was discretionary for purposes of governmental immunity; and
- Officer and city were not entitled to discretionary act immunity for officer's negligent operation of the police car.

Operation of a motor vehicle is a "ministerial act" for which a municipal employee lacks qualified immunity; terms of the relevant motor vehicle laws establish a ministerial duty, insofar as they contain mandatory statutory language that itself limits discretion in the performance of the mandatory act.

City police officer's operation of unmarked police car was not itself a discretionary activity during the surveillance operation that led to the collision that injured motorcyclist since operation of a motor vehicle was a highly regulated activity that constituted a ministerial function, but officer's decision to use unmarked police car to surveil motorcyclist was discretionary one for purposes of governmental immunity.

City police officer's operation of unmarked police car, including following the statutory rules of the road, was a ministerial function, and thus, officer and city were not entitled to discretionary act immunity for officer's negligent operation of the police car, while surveilling motorcyclist, which resulted in motorcyclist's being ejected from his motorcycle; motor vehicle statutes providing the rules of the road imposed numerous ministerial duties that officer violated in his operation of unmarked police car.

IMMUNITY - DISTRICT OF COLUMBIA

Thurman v. District of Columbia

District of Columbia Court of Appeals - September 15, 2022 - A.3d - 2022 WL 4241684

Juvenile brought action against District of Columbia and police officers alleging negligence and excessive force arising from his being bitten by police dog that officers released into house without a canine warning to search for potentially armed juvenile suspects during a burglary call.

The Superior Court granted summary judgment for District of Columbia and officers. Juvenile

appealed.

The Court of Appeals held that:

- Juvenile could use defense expert's affidavit on standard of care about deploying police dogs on juvenile suspects at summary judgment stage;
- Factual issues on any deviation from standard of care and causation precluded summary judgment on negligence claims against officers;
- Sovereign immunity barred claims of negligent hiring, training, and supervision against District of Columbia;
- Officers had qualified immunity from excessive force claims; and
- District of Columbia did not have *Monell* liability on excessive force claims.

ZONING & PLANNING - KANSAS

Pretty Prairie Wind LLC v. Reno County

Court of Appeals of Kansas - August 26, 2022 - P.3d - 2022 WL 3693052

Company that was denied conditional-use permit from county to build wind farm brought action against county challenging denial, alleging that protest petitions submitted by county residents were invalid, and that decision to deny permit was unreasonable.

The District Court denied company's motion for partial summary judgment, denied company's subsequent request to file interlocutory appeal, and, at company's request, dismissed outstanding claim and entered final judgment. Company appealed.

The Court of Appeals held that statutes governing requirements for election petitions did not apply to zoning protest petitions for conditional-use permit to build wind farm.

Statute requiring three-fourths majority of board of county commissioners to overrule planning commission's recommendation when the owners of at least 20% of the land within 1,000 feet of the property at issue sign and file protest petitions within 14 days after the end of the public hearings, rather than statutes governing requirements for election petitions, applied to zoning protest petitions for conditional-use permit for company that sought to build wind farm; language of statutes concerned elections and signature requirements for electors, zoning protest petitions did not trigger public involvement, unlike election petitions, signing requirement for zoning petitions required land ownership, not ability to vote as in election petitions, and zoning petitions were filed with city or county clerk, not election officer.

EMINENT DOMAIN - LOUISIANA

City Bar, Inc. v. Edwards

Court of Appeal of Louisiana, First Circuit - August 30, 2022 - So.3d - 2022 WL 3754747 - 2021-1437 (La.App. 1 Cir. 8/30/22)

Bar owners filed class action lawsuit against Governor in his official capacity, alleging that they were uniquely singled out by series of executive orders that closed and restricted the operation of bars statewide for the purpose of slowing the spread of COVID-19, and seeking just compensation for the alleged taking of their property, permits, business operations, and income.

The District Court granted the Governor's peremptory exception of no cause of action. Owners appealed.

The Court of Appeal held that owners plausibly alleged that executive orders closing and restricting operation of bars statewide for purpose of slowing spread of COVID-19 was regulatory taking under State Constitution.

Bar owners plausibly alleged that Governor's conduct, in issuing series of executive orders closing and restricting operation of bars statewide for purpose of slowing spread of COVID-19, constituted taking of their property under Louisiana Constitution, where owners alleged that they had constitutionally protected property rights in lawfully issued alcohol permits and income derived from their business enterprises, owners alleged that their rights were taken and damaged by Governor for express purpose of removing or reducing risk to public health or safety, and owners alleged that orders constituted regulatory takings that damaged their property rights.

PUBLIC RECORDS - OHIO

State ex rel. Stevenson v. King

Supreme Court of Ohio - September 7, 2022 - N.E.3d - 2022 WL 4086758 - 2022-Ohio-3093

City council president filed a mandamus action seeking to compel city mayor and finance director to produce records related to certain public expenditures.

The Eighth District Court of Appeals granted the writ in part and denied the writ in part. Mayor and finance director appealed.

The Supreme Court held that:

- President of city council was entitled to mandamus relief on her claim seeking the production of public records from mayor and finance director, and
- Evidence was insufficient to establish an attorney-client relationship between city council or city council president and law firm.

President of city council was entitled to mandamus relief on her claim seeking the production of public records from city mayor and finance director related to funds received and spent by the city under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), where mayor and finance director failed to respond to the request, they failed to present sufficient evidence to support their claim that no written records existed pertaining to the application for and award of CARES Act grant money, and they failed to authenticate evidence submitted in support of their claim that records pertaining to the appropriation and expenditure of CARES Act money had already been shared with the city council through regular financial reports.

Evidence was insufficient to establish an attorney-client relationship between city council or city council president and law firm, and thus city council president was entitled to an award of attorney fees based on city mayor and finance director's failure to comply with public records request; city council passed resolution to hire law firm, mayor vetoed the resolution, council president did not allege that city council overrode the veto, and there was no evidence that president retained law firm in her personal capacity.

BOND ELECTION - TEXAS

Rawls v. Woodville ISD

Court of Appeals of Texas, Beaumont - August 31, 2022 - Not Reported in S.W. Rptr. - 2022 WL 3908530

Charles Rawls filed Plaintiff's/Contestant's Original Election Contest against Woodville ISD (WISD), Lisa Meysembourg, in her official capacity as Superintendent of WISD, and Donece Gregory, in her official capacity as County Clerk of Tyler, County (collectively, the Appellees) concerning WISD's $47.85 million school bonds for 2022 on the May 7, 2022 election ballot.

Rawls alleged a variety of election irregularities in the bond election process. Rawls sought a declaration from the trial court stating that the administration, conduct, and manner of the early voting and election day voting for the Proposition was illegal and invalid as a matter of law.

The trial court granted Appellees' Pleas to the Jurisdiction and Rawls appealed.

The Court of Appeals affirmed, holding that:

- WISD's Board of Trustees ordered the bond election and WISD's Board of Trustees was the canvassing authority for the bond election.
- Because Rawls's suit named WISD, Meysembourg, and Gregory as contestees instead of the presiding officer of the authority that ordered the contested election or the presiding officer of the final canvassing authority for the contested election (namely, the President of WISD's Board of Trustees), Rawls failed to comply with the statutory prerequisite to filing an election contest suit.

POLITICAL SUBDIVISIONS - VIRGINIA

Fines v. Rappahannock Area Community Services Board

Supreme Court of Virginia - September 8, 2022 - 876 S.E.2d - 2022 WL 4099848

Patient brought action against community services board for negligent retention, negligent supervision, negligence, and vicarious liability, alleging that patient received psychological therapy through board at its facilities when he was between six and eight years old, that therapist employed by board molested him multiple times during individual counseling sessions, and that patient suffered significant mental and emotional injuries as result of the repeated sexual assaults.

Board demurred and filed plea in bar asserting sovereign immunity. The King George Circuit Court granted plea in bar. Patient appealed.

The Supreme Court held that:

- Board was not "arm" of Commonwealth entitled to sovereign immunity;
- Board was not specifically created as body corporate and politic and as political subdivision of Commonwealth, for purposes of determining whether board was municipal corporation immune from tort liability;
- Board was created to fulfill public purpose, for purposes of determining whether board was municipal corporation;
- Board only partially satisfied third factor pertinent to determination of whether board was municipal corporation, i.e., whether board had power to have common seal, to sue and be sued, to

enter into contracts, to acquire, hold and dispose of its revenues, personal and real property;
- Board only partially satisfied fifth factor pertinent to determination of whether board was municipal corporation, i.e., whether board had power to borrow money and issue tax-exempt bonds;
- Question whether board was immune from tort liability involved matter of substantive law, for purposes of determining whether board was municipal corporation; and
- Board was not municipal corporation immune from tort liability.

PRISONS - VIRGINIA

Clayton v. Commonwealth

Court of Appeals of Virginia, Lexington - September 13, 2022 - S.E.2d - 2022 WL 4135504

After bench trial, prisoner was convicted in the Danville Circuit Court of possession of an unlawful chemical compound by a prisoner, and he appealed.

The Court of Appeals held that:

- Statute providing that it is unlawful for prisoner to procure, sell, secrete or have in his possession any chemical compound which he has not lawfully received is a strict liability offense, and
- Commonwealth was not required to prove that prisoner had knowing possession of the chemical compound.

PUBLIC PENSIONS - CALIFORNIA

Hale v. California Public Employees' Retirement System

Court of Appeal, First District, Division 3, California - August 29, 2022 - Cal.Rptr.3d - 2022 WL 3713449

Retired firefighters with California's Department of Forestry and Fire Protection who had served as executive officers for union sought judicial review of ALJ's proposed decision that was adopted by California Public Employees' Retirement System board (CalPERS), concluding that cash-outs or buy-downs of holiday leave credits were not compensation earnable and therefore should not be included in final compensation for purposes of calculating monthly retirement allowances.

Union officers petitioned for writ of administrative mandamus. The Superior Court denied petition. Union officers appealed.

The Court of Appeal held that:

- Rule defining special compensation items for members employed by contracting agency and school employers that must be reported to CalPERS did not control whether holiday cash-outs were special compensation that were required to be included in calculating pensions;
- Cash-outs met the statutory definition of special compensation, and thus were required to be included in income when calculating pension benefits;
- Characterization of group or class was the union bargaining unit, rather than class-of-two consisting of union officers alone;
- Cash-outs were not required to be available to all members of bargaining unit, regardless whether they were similarly situated, to be considered special compensation; and

- Court would take judicial notice of decision indicating that CalPERS had taken inconsistent positions on whether state members were subject to rule.

EMINENT DOMAIN - INDIANA

624 Broadway, LLC v. Gary Housing Authority

Supreme Court of Indiana - August 29, 2022 - N.E.3d - 2022 WL 3714283

Condemnee brought action against municipal housing authority, seeking injunctive relief and damages based on allegations that authority unlawfully exercised eminent domain over condemnee's commercial real property and violated condemnee's constitutional and statutory procedural rights.

The Superior Court granted authority's motion for summary judgment and denied condemnee's motion for summary judgment. Condemnee appealed. The Court of Appeals affirmed in part, reversed in part, and remanded with instructions. Petition to transfer was granted.

The Supreme Court held that:

- Notice of condemnation proceedings by publication violated due process;
- Inadequate notice in violation of due process was not harmless; and
- Proper remedy for due process violation was new hearing on just compensation.

Municipal housing authority's use of notice by publication to provide condemnee with notice of hearing regarding authority's exercise of eminent domain on condemnee's property and the valuation of the property, rather than providing actual notice to condemnee's registered agent, violated due process; housing authority knew identity and name of registered agent from condemnee's articles of organization filed with Secretary of State.

Municipal housing authority's due process violation in providing condemnee notice by publication of hearing regarding authority's exercise of eminent domain on condemnee's property and the valuation of the property, rather than providing actual notice to condemnee's registered agent, was not harmless; if condemnee had been given sufficient notice, it could have timely presented its appraisal of the property before the final valuation hearing, and condemnee's appraisal in the amount of $325,000 was significantly higher than the authority's $24,000 appraisal and significantly higher that the final award of $75,000.

Proper remedy for municipal housing authority's due process violation in providing condemnee inadequate notice by publication of hearing regarding authority's exercise of eminent domain on condemnee's property and valuation of the property was new hearing on damages to determine just compensation for taking; authority strictly followed statutory procedures for administrative taking of the property, the taking was not subterfuge to convey private property to another individual for private use, there was no showing that authority acted arbitrarily and capriciously, and adequate legal remedy could be provided through just compensation.

PUBLIC UTILITIES - MAINE

NECEC Transmission LLC v. Bureau of Parks and Lands

Supreme Judicial Court of Maine - August 30, 2022 - A.3d - 2022 WL 3723172 - 2022 ME 48

Owner of renewable energy project, which involved construction of high-voltage direct current (HVDC) transmission line from Canada to New England, brought declaratory judgment action seeking to permanently block retroactive application of ballot initiative that imposed a geographic ban on construction of high-impact electric transmission lines in the state and that required a two-thirds approval from legislature for any similar project on public lands.

The Business and Consumer Court denied owner's motion for preliminary injunction and reported the interlocutory ruling for review.

The Supreme Judicial Court held that retroactive application of ballot initiative could violate due process thus warranting a preliminary injunction.

Retroactive application of ballot initiative that imposed a geographic ban on construction of high-impact electric transmission lines in the state, and that required a two-thirds approval from legislature for any similar project on public lands, would violate due process clause of the State Constitution if owner of renewable energy project undertook substantial construction consistent with and in good-faith reliance on its previously-issued public convenience and necessity (CPCN) for the project, which involved the construction of high-voltage direct current (HVDC) transmission line from Canada into New England, and thus owner was entitled to a preliminary injunction in its declaratory judgment action seeking to permanently block retroactive application of ballot initiative.

REFERENDA - NEBRASKA

Eggers v. Evnen

United States Court of Appeals, Eighth Circuit - August 31, 2022 - F.4th - 2022 WL 3905817

Ballot campaign committee and ballot sponsor brought action alleging that provision of Nebraska constitution establishing signature distribution requirement for ballot initiatives violated Equal Protection Clause.

The United States District Court for the District of Nebraska granted plaintiffs' motion for preliminary injunction, and state appealed.

The Court of Appeals held that:

- Claim that requirement violated Equal Protection Clause was subject to rational basis review;
- Plaintiffs failed to establish likelihood of success on merits; and
- Balance of equities and public interest did not favor issuance of preliminary injunction.

Provision of Nebraska constitution establishing signature distribution requirement for ballot initiatives did not restrict fundamental right, and thus claim that requirement violated Equal Protection Clause was subject to rational basis review.

Ballot campaign committee and ballot sponsor failed to establish likelihood of success on merits of their claim that provision of Nebraska constitution establishing signature distribution requirement for ballot initiatives violated Equal Protection Clause by devaluing signatures of voters in populous counties relative to signatures of citizens in less populous counties, and thus were not entitled to preliminary injunction; state had legitimate interest in limiting ballot initiatives to those with reasonable chance of success in order to avoid overcrowded ballot, and lawmaker could rationally conclude that signature distribution requirement furthered that interest by weeding out initiatives

with small but concentrated support base.

Balance of equities and public interest did not favor issuance of preliminary injunction barring application of Nebraska constitution's signature distribution requirement for ballot initiatives in evaluating petition to place proposals to legalize marijuana for medical and recreational purposes on ballot, in light of state's interest in lawfully managing its elections, and fact that signature distribution requirement appeared not to violate ballot campaign committee's equal protection rights.

SHORT TERM RENTALS - NEW JERSEY

Nekrilov v. City of Jersey City

United States Court of Appeals, Third Circuit - August 16, 2022 - 45 F.4th - 2022 WL 3366430

Individuals who invested in and operated short-term rentals filed § 1983 action alleging that city ordinance limiting short-term rentals violated their rights under Takings, Contracts, and Due Process Clauses.

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

The Court of Appeals held that:

- Plaintiffs' forward-looking right to pursue their short-term rental businesses was not property right cognizable under Takings Clause;
- Ordinance did not result in total taking or taking per se;
- Ordinance did not effect partial taking;
- Ordinance did not violate Contracts Clause; and
- Ordinance did not violate plaintiffs' substantive due process rights.

City ordinance limiting short-term rentals did not deprive properties formerly used as short-term rentals of all economically viable use, and thus did not result in total taking or taking per se, even though individuals who invested in and operated short-term rentals could not expect same profits from long-term leases as from short-term rentals; ordinance did not entirely ban short-term rentals, and investors could still make economically viable use of properties by occupying properties or sub-leasing them on long-term basis.

City's enactment of ordinance limiting short-term rentals did not effect partial taking, even though owners and lessees of properties previously used as short-term rentals may have lost between 50% and 66% of their potential revenue, and city officials had encouraged them to invest in short-term rentals; ordinance was general zoning regulation restricting permissible uses of residential housing with goals of protecting residential housing market and promoting public safety, values of underlying properties or leases had not decreased, lost-profit claims failed to account for other potential uses of properties, prior ordinance placed qualifications on operation of short-term rentals, and amended ordinance permitted lessees to use properties for short term rentals for majority of lease term.

City had substantial public purpose in passing ordinance limiting short-term rentals, and thus ordinance did not violate Contracts Clause, even if it substantially impaired long-term leases that investors had entered into for purpose of offering short-term rentals, and mayor was subjectively motivated by his dissatisfaction with online short-term rental platform over campaign donations; city

was not party to long-term leases, and ordinance articulated multiple public purposes, including desire to protect residential character of neighborhoods and reduce nuisance activity associated with short-term rentals.

City ordinance limiting short-term rentals did not violate substantive due process rights of individuals who invested in and operated short-term rentals, even if mayor was subjectively motivated by his dissatisfaction with online short-term rental platform over campaign donations; ordinance articulated several legitimate state interests furthered by change in regulation, including protecting long-term housing supply, reducing deleterious effects on neighborhoods caused by short-term rentals, and protecting residential character and density of neighborhoods.

POLITICAL SUBDIVISIONS - OHIO

State ex rel. Ohio-Kentucky-Indiana Regional Council of Governments v. Bureau of Workers' Compensation

Supreme Court of Ohio - September 6, 2022 - N.E.3d - 2022 WL 4074772 - 2022-Ohio-3058

Council of regional governments, which provided coordinated planning services to federal, state and local governments, their political subdivisions, agencies, departments, instrumentalities, special districts and private agencies or entities relating to regional transportation and development plan within region, sought writ of mandamus ordering state Bureau of Workers' Compensation (BWC) to change council's Ohio State Workmen's Compensation Insurance Fund Manual classification as a "special public authority," a type of public-employer taxing district, which resulted in a much higher premium, and to reassign classifications previously in effect which were applicable to private employers.

Magistrate issued decision recommending issuance of writ. The Tenth District Court of Appeals denied writ. Council appealed.

The Supreme Court held that:

- Council was not a public employer;
- Manual classification that applies to public employers that are taxing districts did not apply to council; and
- BWC's failure to explain why reclassification to "special public authorities" most closely described council's degree of hazard warranted grant of limited writ of mandamus.

Council of regional governments, which provided coordinated planning services to federal, state and local governments, their political subdivisions, agencies, departments, instrumentalities, special districts and private agencies or entities relating to regional transportation and development plan within region, was not a "public employer" for classification of council with respect to risk of hazard for purposes of determining workers' compensation premium rates, even though council received some of its funding from public sources and designated itself a public body in its articles of agreement, apparently for purposes of receiving federal transportation funds; council did not fit into any of the categories of public employers, which were delineated with great specificity.

Council of regional governments, which provided coordinated planning services to federal, state and local governments, their political subdivisions, agencies, departments, instrumentalities, special districts and private agencies or entities relating to regional transportation and development plan within region, was not a "taxing district," and thus classification in Ohio State Workmen's

Compensation Insurance Fund Manual that applies to public employers that are taxing districts, for purposes of determining rate of an employer's workers' compensation premiums, did not apply to council, which was not a territorial division of government throughout which a tax may be levied, and council had no taxing authority.

Bureau of Workers' Compensation's (BWC) failure to explain why reclassification under Ohio State Workmen's Compensation Insurance Fund Manual from classifications for private employers to "special public authorities" most closely described degree of hazard for Council of regional governments, which provided coordinated planning services to federal, state and local governments, their political subdivisions, agencies, departments, instrumentalities, special districts and private agencies or entities relating to regional transportation and development plan within region, warranted grant of limited writ of mandamus ordering BWC to evaluate degree of hazard in council's business and to explain any conclusion as to why classification best described council's business with respect to the degree of hazard; council did not meet the definition of a classification.

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