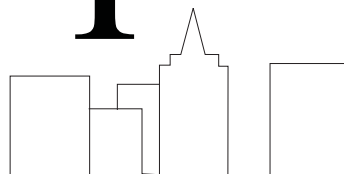


# Municipal

## LITIGATION

## REPORTER

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## In The Supreme Court

### Employment

#### Discrimination

#### Firefighters

##### Firefighter applicants' disparate impact claims against city fail

**Torgerson v. City of Rochester, Minn.**, No. 643  
F.3d 1031 (8th Cir. 2011), *cert. denied*, No. 11-273  
(U.S. Oct. 31, 2011)

The Supreme Court declined to review a decision of the Eighth U.S. Circuit Court of Appeals affirming a district court's grant of summary judgment in favor of a city in a suit brought by Native American and female firefighter applicants alleging discrimination under Title VII of the 1964 Civil Rights Act after they were not hired by the city.

After the EEOC dismissed their charges, the Native American applicant and female applicant filed suit in district court alleging national origin and gender discrimination, respectively. The district court granted summary judgment, and the applicants appealed.

The Eighth Circuit affirmed the district court's judgment dismissing the applicants' disparate impact claims. The Eighth Circuit held that the applicants—both of whom scored low on the application test and received low ratings on their interviews—failed to show that the ultimate decisionmaker, the city council, made its decision in response to a statement by the civil service commissioner that the city should not have taken a federal grant that stipulated the hiring of women and minority candidates.

## In The Courts

### Adult Entertainment

#### Zoning

#### Permits

##### City properly denied "compensated dance" permit to adult entertainment establishment

**600 Marshall Entm't Concepts L.L.C. v. City of Memphis**, No. 05-2865 (W.D. Tenn. Sept. 21, 2011)

The U.S. District Court for the Western District of Tennessee held that a city could not be compelled to issue an adult entertainment establishment a compensated dance permit (CDP) that would allow adult entertainment performed by compensated dancers.

600 Marshall Entertainment Concepts L.L.C., an adult entertainment business located at 598, 600 and 616 Marshall and 631 Madison in Memphis, Tenn., sought a permit from the city of Memphis to provide compensated dancing at that location after acquiring the property in 2005. The city initially issued the permit, but quickly revoked it on the ground that 600 Marshall was located in a zoning area in which adult entertainment had not been permissible since 1993.

600 Marshall sought an injunction and declaratory relief asserting it was entitled to a CDP allowing nudity despite the zoning restrictions because there had been a continuous, lawful, non-conforming adult entertainment use at the location since before a 1993 ordinance went into effect. The district court found 600 Marshall had not carried its burden of proving it was entitled to "grandfathering" and, therefore, denied the requested injunction. 600 Marshall appealed.

The Sixth Circuit remanded the case for additional factual findings and legal conclusions. Specifically, the Sixth Circuit directed the district court to address: (1) the history of adult entertainment at 600 Marshall; (2) whether such entertainment was abandoned or discontinued; (3) the possible expansion of any prior nonconforming use; and (4) the availability of damages for alleged constitutional violations.

The district court found that adult entertainment, which did not require a CDP, was presented at 600 Marshall prior to the 1993 ordinance. This finding was sufficient to substantiate grandfathering. Moreover, sporadic incidents of adult enter-



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tainment continued until the time Charles Westlund, 600 Marshall's owner, purchased the property, precluding a finding that the nonconforming use was abandoned or discontinued.

However, the district court found that permitting 600 Marshall to regularly feature adult entertainment by compensated dancers would impermissibly expand this prior nonconforming use in violation of Memphis, Tenn., Code § 16-116-2(C). The city therefore could not be compelled to issue 600 Marshall a CDP that would allow adult entertainment performed by compensated dancers. Finally, 600 Marshall failed to prove a right to recover damages against the city under 42 U.S.C. § 1983.

## Annexation

Ordinances	Standing
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### Challenge to city's annexation of land is moot

**Petition in Opposition to Annexation Ordinance F-2008-15 v. City of Evansville**, No. 82A05-1102-PL-84 (Ind. Ct. App. Oct. 6, 2011)

The Indiana Court of Appeals determined that a trial court did not err in dismissing remonstrators' challenge to the annexation of land by a city. The issue was moot because the annexation had already been completed.

Several landowners challenged an adopted amended annexation ordinance enacted by the city of Evansville that reduced the amount of territory contained in the original proposed annexation. Approximately two months after the amended annexation ordinance was published, the landowners filed a combined remonstrance petition and complaint for declaratory relief. The trial court dismissed the declaratory judgment action for lack of jurisdiction and entered final judgment against the landowners and for the city. The landowners appealed.

The appeals court affirmed the trial court's judgment. In so ruling, the appeals court agreed with the city that it could not grant the landowners any effective relief because they

failed to request a stay or file a notice of appeal before the annexation became effective on Feb. 11, 2011 and, as a result, the appeals court could not order disannexation.

The appeals court inferred, based on previous cases, that the Indiana Supreme Court recognized that challenges to a proposed annexation will become moot if the annexation becomes effective before a review of the matter can be completed, absent an injunction or stay on proceeding with the annexation pending appeal. The appeals court explained that in order to preserve their challenge to the trial court's order, the landowners should have requested a stay of the annexation following the trial court's adverse ruling. By not doing so, the issues they presented on appeal were moot.

However, the appeals court said, even assuming that the issues presented on appeal by the landowners were not moot, their claims would fail because they did not have the required minimum of landowners' signatures on the remonstrance petition. Moreover, they did not explain how their substantial rights were violated by alleged procedural defects by the city.

## Billboards & Signs

Zoning	Ordinances
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### Adjustment board's citation of restaurant for violations of sign ordinance upheld

**Bojangles' Rests. Inc. v. Town of Pineville**, No. COA11-202 (N.C. Ct. App. Oct. 4, 2011) *unpublished*

The North Carolina Court of Appeals affirmed a trial court's judgment upholding a town adjustment board's citation of a restaurant for violations of the town's zoning ordinance due to the restaurant's nonconforming sign. The board's decision was supported by competent, material and substantial evidence.

Bojangles Restaurants Inc. leased approximately .86 acres of property located at 8720 Pineville-Matthews Road in

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Pineville, N.C. The property contained a single building from which Bojangles operated a fast food restaurant with a drive-through window.

A dispute arose as to the size of a wall sign that was attached to the building. It was undisputed by the parties that the wall sign did not comply with the sign regulations in the Pineville Zoning Ordinance. However, the ordinance allowed a sign which existed before the ordinance's effective date to remain as a legally permitted nonconforming sign, so long as the sign complied with Section 2.8 of the ordinance, which was entitled "Nonconformities." Both Pineville and Bojangles considered the attached wall sign to be a legal nonconforming sign under the ordinance.

The wall sign was initially installed on the restaurant in 1993 and was attached to the building by two metal poles that extended through a fabric awning and connected to the sign. In October 2009, Bojangles decided to replace the fabric awning. To do so, Bojangles removed the wall sign from the two poles, removed the fabric awning, and installed a metal awning. Once the metal awning was in place, Bojangles re-attached the wall sign in November 2009.

Thereafter, the town of Pineville Board of Adjustment cited Bojangles for violations of the ordinance, finding Bojangles had replaced the wall sign within the meaning of § 2.8.8(A) of the ordinance. According to § 2.8.8(A), "[w]henver any nonconforming sign or part thereof (including the copy) is altered, replaced[ ], converted or changed, the entire sign must immediately comply with the provisions of this Chapter." The trial court affirmed, and Bojangles appealed.

The appeals court affirmed the trial court's judgment. Based on the appeals court's analysis of the language, spirit and goal of the ordinance, it held the Board's intent supported Pineville's definition of "replaced" to mean "to restore to a former place or position." Thus, Bojangles did replace the wall sign and was therefore in violation of the ordinance.

Moreover, upon review of the whole record in this case, the appeals court found substantial evidence to support the Board's findings of fact. The Board's February 2010 minutes established that in October 2009 Bojangles removed the wall sign and placed it in storage while the underlying awning was changed from fabric to metal. Thereafter, Bojangles put the wall sign back in its place once the metal awning was installed. Thus, competent, material and substantial evidence supported the trial court's decision to affirm the Board's decision.

## Constitutional Law

### Permits

### Ordinances

#### City's taxicab ordinance does not violate Equal Protection Clause

**Greater Houston Small Taxicab Co. Owners Ass'n v. City of Houston**, No. 10-20381 (5th Cir. Oct. 10, 2011)

The Fifth U.S. Circuit Court of Appeals held that a city ordinance authorizing distribution of new taxicab permits based

on the size of the taxicab company did not violate the Equal Protection Clause of the Fourteenth Amendment.

On Dec. 12, 2007, the Houston City Council (the city) passed an ordinance authorizing 211 additional taxicab permits to be allocated over the subsequent four-year period. New taxicab permits had not been issued in Houston since 2001, and the city wanted to expand its cab fleets. The ordinance planned to distribute new permits based on the size of the taxi company.

Under the distribution scheme, the 211 permits would be issued over the course of four years. Small companies would enter a lottery for 16 new permits in the first year and would have no opportunities for additional permits in years two to four.

The city viewed the four large companies as "full-service taxicab companies" in that they offered, among other things, full 24-hour radio dispatch services and complete on-site repair facilities for their vehicles. The mid-large companies offered only "limited radio dispatch services." Mid-small and small companies, by contrast, generally did not offer 24-hour service; they communicated by cell phone and tended to operate primarily at the airports. The city concluded further that larger taxi companies were better able to provide disabled access vehicles and more efficient, environmentally friendly taxicabs.

The Greater Houston Small Taxicab Company Owners Association, representing small taxicab companies, brought an action under 42 U.S.C. §1983 against the city arguing the distribution proposal in the ordinance violated the Fourteenth Amendment's Equal Protection Clause. The city moved to dismiss. Converting the motion to one for summary judgment, the district court granted the motion, and the Association appealed.

The Fifth Circuit upheld the constitutionality of the ordinance, noting the city had offered a reasonable explanation for the disparate distribution of permits: the larger the taxi company, the more likely it was to offer a broader range of services that better served consumer needs. Moreover, even if the city was motivated in part by economic protectionism, there was no real dispute that promoting full-service taxi operations was a legitimate government purpose under the rational basis test.

### Religion

### Police

#### City's restriction of Christian group's efforts to conduct outreach activities is constitutional

**Marcavage v. City of Chicago**, Nos. 09-3335, 09-4079 (7th Cir. Oct. 4, 2011)

The Seventh U.S. Circuit Court of Appeals found that a city did not violate Christian group members' constitutional rights by restricting their efforts to conduct outreach activities during a homosexual athletic and cultural event and arresting them when they refused to comply.

Volunteers with the religious organization Repent America demonstrated during the 2006 Gay Games, a series of athletic and cultural gatherings with the stated mission “to foster and augment the self-respect of gay men and women throughout the world and to engender respect and understanding from the non-gay world.” At three different locations during the games—Soldier Field, Navy Pier and Wrigley Field—Chicago police officers ordered the organization’s volunteers to change the location of their activities. Failure to comply resulted in the arrests of James Deferio and Michael Marcavage.

Deferio and Marcavage brought an action against the city of Chicago and individual officers of the Chicago Police Department. The complaint alleged the denial of their First Amendment rights to free speech and exercise of religion; denial of their Fourteenth Amendment right to equal protection; denial of their rights under the Illinois Religious Freedom Restoration Act; and denial of their Fourth Amendment rights. On cross-motions for summary judgment, the district court granted the city’s motion and denied the plaintiffs’ motion [see 29 **Mun.Lit.Rep.** 146, Aug. 15, 2009]. The plaintiffs appealed.

The Seventh Circuit affirmed, except with respect to the First Amendment claim dealing with a policy requiring a permit for even small-group demonstrations outside Navy Pier. The constitutionality of that policy must be evaluated in light of the unique features of the location.

The city’s legitimate concerns justified its actions with respect to the other locations. The Seventh Circuit held that the orders issued by the police during the events were content-neutral regulations narrowly tailored to serve the legitimate purpose of maintaining an orderly and effective flow of traffic and therefore did not violate the First Amendment. Furthermore, the plaintiffs’ Equal Protection claim failed because they could not identify any similarly situated individuals at the Games who received more favorable treatment from the officers. Finally, the plaintiffs’ Fourth Amendment claims failed because their arrests were supported by probable cause.

## Employment

### Discrimination

### Parks

#### Black employee’s race discrimination claim against city fails

**Nunley v. Waco, Tex.**, No. 11-50119 (5th Cir. Sept. 1, 2011) *unpublished*

The Fifth U.S. Circuit Court of Appeals determined that a black city employee failed to show his race was the reason the city denied him a promotion.

The city of Waco, Tex., posted a job opening for an operations coordinator (OC) position in the Parks and Recreation Department. The posting stated a high school diploma was required and an associate’s degree desired; that two years of previous supervisory experience in a related field was re-

quired and athletic field maintenance experience desired; and that pest applicator’s and irrigator’s licenses were desired. Kenneth Nunley and four other applicants were selected to be interviewed by a panel of four persons.

After interviews, the panel chose Ken Griffin, a white male, over Nunley, a black male, citing Griffin’s possession of an associate’s degree in turf management and an irrigator’s license, his experience maintaining irrigation systems and ballfields at Baylor University, and his favorable impression during the interview. The panel concluded Nunley, who had considerable experience working for the city and a pest applicator’s license, was qualified for the job, but not as qualified as Griffin.

Nunley brought an action alleging race discrimination under Title VII. The district court granted the city’s motion for summary judgment, and Nunley appealed.

The Fifth Circuit affirmed the district court’s judgment. The city conceded Nunley had established a prima facie case of discrimination and Nunley conceded the city had articulated legitimate, non-discriminatory reasons for its decision not to hire him. Nunley was required, and failed, to offer sufficient evidence that the city’s reasons for not hiring him were not true, but were instead a pretext for discrimination.

### Police

### Settlements

#### Police officer’s waiver of state statutory rights protections is valid

**Lanigan v. City of Los Angeles**, No. B228686 (Cal. Ct. App. Oct. 4, 2011)

The California Court of Appeal held that a police officer’s waiver of his protections under the Public Safety Officers Procedural Bill of Rights Act (POBRA) was permissible in the context of a settlement of a pending disciplinary action.

A trial court granted a preemptory writ of mandate in favor of Robert Lanigan, a former Los Angeles police officer. The court reinstated Lanigan to his employment, finding a settlement of pending disciplinary charges by the city against Lanigan, pursuant to which he agreed to resign if similar misconduct charges were upheld in the future and gave up his right to pursue an administrative appeal, constituted an impermissible waiver of his rights under POBRA. The city appealed.

The court of appeal reversed the writ of mandate. Peace officers protected by POBRA may waive those protections when faced with disciplinary proceedings, provided that any settlement is a voluntary and knowing act done with sufficient awareness of the relevant circumstances and likely consequences. The court concluded the settlement in this case met these requirements. Moreover, the settlement was not the product of fraud, mistake, undue influence or duress, and was not unconscionable.

**Discrimination****Firefighters****Court orders monitor to oversee fire department's hiring practices****United States v. N.Y. City**, No. 07-2067 (E.D.N.Y. Oct. 5, 2011)

The U.S. District Court for the Eastern District of New York ruled that the Fire Department of the city of New York's (FDNY) hiring practices are discriminatory on the basis of race and ordered the hiring of a court monitor to oversee FDNY's hiring practices.

In May 2007, the U.S. Department of Justice brought an action alleging the city of New York's pass/fail and rank-order uses of written examinations to hire entry-level firefighters in the FDNY had an unlawful disparate impact on black and Hispanic applicants. The Vulcan Society, a fraternal organization of black firefighters, and three individual applicants joined the action as intervenors and asserted additional intentional discrimination claims in September 2007.

In July 2009 and January 2010, the district court issued two rulings finding the city's hiring practices were discriminatory and unlawful, including a finding of intentional discrimination. However, the scope and nature of the court's prospective remedy for these violations remained in dispute.

In the present case, the district court explained the scope and nature of the prospective relief it intended to impose on the city that included a fairness hearing and the hiring of a court monitor to oversee hiring practices for the FDNY. The court said the parties will jointly or separately suggest three or more names of individuals who they believe would be suitable in carrying out the role of court monitor.

**Retirement Benefits****Contracts****Retirement board lawfully recouped benefits received by some city retirees****Arken v. City of Portland**, No. S058882 (Or. Oct. 6, 2011)

The Oregon Supreme Court held that the Public Employees Retirement Board (PERB or the Board) acted lawfully in correcting the retirement benefits received by certain retirees who benefitted from the prior Board's unlawful distribution of 1999 Public Employees Retirement System (PERS) Fund earnings.

Two cases were consolidated before the supreme court on certified appeals from the appeals court. Both cases involved the PERB's revision or reduction of benefits with respect to so-called "Window Retirees." These cases involved the Board's efforts to recoup overpayments of benefits to retirees that were predicated on a 20% earnings credit for calendar year 1999 that the Board approved by order in 2000. PERB sought to recoup these overpayments to the Window Retirees through an overpayment recovery mechanism set out in Or. Rev. Stat. § 238.715.2.

PERB did so in two steps. First, in an order issued by the Board on Jan. 27, 2006, the Board established a general

method for the recovery of overpayments made to PERS members based on the 20% crediting order. Subsequently, the Board made individualized recovery determinations based on the individual circumstances of each affected PERS member.

A number of members (the Arken plaintiffs and the Robinson petitioners) challenged the statutory mechanism for returning the payments, and the methodology the Board used in making its individualized determinations. The trial court granted summary judgment in favor of the Arken defendants and the Robinson petitioners, and denied PERB's cross-motion for summary judgment. The Arken plaintiffs and PERB appealed.

The supreme court determined the trial court correctly granted summary judgment to the "Arken defendants" on the Arken plaintiffs' claims based on breach of contract, promissory estoppel, wage claim, and declaratory and injunctive relief under the Administrative Procedures Act. Furthermore, the court determined the trial court erred in granting summary judgment to the "Robinson petitioners" on their claims that the Board violated Oregon Laws 2003, chapter 67, § 14b(1).

Because the supreme court found PERB correctly applied Or. Rev. Stat. § 238.715 to recoup overpayments that were made to the Window Retirees based on the 20% earnings credit for 1999, the court also determined that the trial court erred in denying PERB's cross-motion for summary judgment on that claim. On appeal, the court determined PERB properly could recoup the overpayments made to the Window Retirees under § 238.715, and it remanded this case to the trial court for entry of judgment in favor of PERB on its cross motion for summary judgment.

**Finance & Revenue****Forfeiture****Drugs****City, not tenant, is entitled to money seized during drug raid****City of Walla Walla v. Ibarra-Raya**, No. 28887-1-III (Wash. Ct. App. Oct. 6, 2011)

The Washington Court of Appeals ruled that a city, not the tenant of a house where money was seized during a drug raid, is entitled to retain the money. The tenant is not entitled to its return since substantial evidence supported the finding that he was not the rightful owner of the money.

A narcotics officer with the Walla Walla Police Department obtained a search warrant and seized \$401,333 from a residence at 1035 St. John St., following the arrest of Adrian Ibarra-Raya at the home earlier in the morning. Ibarra-Raya had been arrested by officers responding to a noise complaint, who entered the home, saw the cash and provided information relied upon for the search warrant.

Later in the day, the city of Walla Walla initiated forfeiture proceedings against the money by issuing a notice of seizure and forfeiture. The notice was addressed to Ibarra-Raya at the St. John St. address and was personally served on him at the county jail. At about the same time, Ibarra-Raya was charged

with possession of a controlled substance with intent to deliver and possession of a controlled substance.

Ibarra-Raya requested a hearing in the forfeiture proceeding and removed it to a trial court. He was convicted of the two drug charges but his conviction was reversed because officers entered his home without a warrant or circumstances supporting an emergency exception to the warrant requirement. Therefore, the evidence supporting his conviction should have been suppressed.

The trial court found the city had established its right to retain the \$401,333 on both bases urged by the city: that the cash was subject to statutory forfeiture under Wash. Rev. Code § 69.50.505 and alternatively could be retained under CrR 2.3 because Ibarra-Raya was not its rightful owner. Ibarra-Raya appealed.

The appeals court affirmed the trial court’s judgment. In so ruling, the appeals court rejected Ibarra-Raya’s arguments that the city should be judicially estopped to assert probable cause for commencing the forfeiture proceeding. The findings and conclusions were insufficient for appellate review on the element of probable cause. The court said it did not need to remand for further findings on probable cause, however, because substantial untainted evidence supported the trial court’s finding that Ibarra-Raya was not the rightful owner of the cash because the home was a drug “drop house,” which in turn supported its conclusion that he was not entitled to its return.

## First Amendment

Religion	Ordinance
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**Ordinance restricting protests at funerals violates First Amendment**

**Phelps-Roper v. Manchester, Mo.**, No. 10-3197 (8th Cir. Oct. 5, 2011)

The Eighth U.S. Circuit Court of Appeals found that a city’s funeral protest ordinance that regulated protests near funerals violated the First Amendment to the U.S. Constitution.

Shirley and Megan Phelps-Roper were members of the Westboro Baptist Church (WBC), which believed God is punishing America for tolerating homosexuality. WBC expressed its views by protesting at funerals, including those of American soldiers. Its members held signs with messages such as “Thank God for Dead Soldiers” and “God Hates You” at protests staged near funerals.

In 2007, the city of Manchester, Mo., adopted an ordinance regulating protests at funerals in response to the WBC’s activities. The ordinance was amended twice, and its final form prohibited “picketing or other protest activities ... within three hundred (300) feet of any residence, cemetery, funeral home, church, synagogue or other establishment during or within one (1) hour before or one (1) hour after the conducting of any actual funeral or burial service at that place.”

The Phelps-Ropers brought a First Amendment challenge to the ordinance. The district court concluded they had standing

to bring their claims. The court also decided that the second and third versions of the ordinance were content based, but that even if they were content neutral, they would have still violated the First Amendment. The district court concluded that each version violated the First Amendment, permanently enjoined enforcement of the ordinance, and awarded nominal damages to the Phelps-Ropers. Manchester appealed.

The Eighth Circuit affirmed the district court’s judgment. In so ruling, the Eighth Circuit agreed that the Phelps-Ropers had standing to challenge the ordinance. Manchester’s ordinance specifically targeted the Phelps-Ropers’ conduct, and Manchester did not disavow intentions to enforce it. Thus, the Phelps-Ropers had some reason in fearing prosecution under the ordinance.

The Eighth Circuit found the district court erred in concluding that the ordinance was a content based regulation. The ordinance did not favor some topics or viewpoints over others and it applied equally to all demonstrators, regardless of viewpoint. It was not a “regulation of speech” but rather “a regulation of the places where some speech may occur.”

However, the Eighth Circuit, relying on its precedent in *Phelps-Roper v. Nixon*, 545 F.3d 685 (8th Cir. 2008), found the ordinance could not survive because it was not narrowly tailored to serve a significant government interest where Manchester had no significant interest “in protecting funeral attendees from unwanted communication.” The Eighth Circuit agreed that the district court was required to follow its precedent in *Nixon*.

Ordinances	Municipal Authority
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**County’s seal ordinance is unconstitutional and must be enjoined**

**Rothamel v. Fluvanna County**, No. 11-0002 (W.D. Va. Sept. 2, 2011)

The U.S. District Court for the Western District of Virginia held that an ordinance prohibiting the unauthorized display of a county seal violated a blogger’s free-speech rights; thus, the blogger is entitled to a permanent injunction that prohibits the county from enforcing the ordinance against him.

Fluvanna County, Va., had an ordinance which provided that “The seal of Fluvanna County shall be deemed the property of the County; and no persons shall exhibit, display, or in any manner utilize the seal or any facsimile or representation of the seal of Fluvanna County for non-governmental purposes unless such use is specifically authorized by law.” Violators faced a fine of up to \$100 and up to 30 days in jail.

Bryan Rothamel operated a blog on the Internet entitled “FLUCO,” found at <http://flucoblog.com>, for which he wrote about news and events in Fluvanna County. On numerous occasions, Rothamel placed the official seal of the county next to or preceding news articles and commentary that concerned the county. Rothamel’s inclusion of the seal near the articles was intended to indicate that the written material was about county government.

Rothamel brought an action against the county requesting a declaration that the ordinance violated the First Amendment of the U.S. Constitution. Rothamel also sought injunctive relief. Both the county and Rothamel moved for summary judgment.

The district court granted Rothamel's motion and denied the county's motion. In so ruling, the court rejected the county's argument that the ordinance was constitutional under the theory that any display of the seal was government speech that the county could constitutionally control. The use by a private individual of a government emblem like a seal is private speech or expression, not government speech.

The district court found Rothamel was entitled to a permanent injunction that prohibited the county from enforcing the ordinance against him for the ways in which Rothamel had been displaying and wished to continue displaying the county seal. Under well-established principles of equity, a plaintiff seeking a permanent injunction must demonstrate: (1) that he had suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be diserved by a permanent injunction. Each of the factors for issuing a permanent injunction was satisfied in this case.

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## Transit Authority

## Billboards & Signs

### Cancellation of group's contract to run ads on buses is constitutional

**Seattle Mideast Awareness Campaign v. King County**, No. 11-0094 (W.D. Wash. Oct. 7, 2011)

The U.S. District Court for the Western District of Washington determined that a county's cancellation of a group's contract to run advertisements on the exterior of the county's buses did not violate the group's First Amendment rights.

Seattle Mideast Awareness Campaign (SeaMAC) was a Washington state nonprofit corporation whose primary purpose was to educate the public about the Israeli-Palestinian conflict and its relationship to United States' foreign policy. SeaMAC proposed an advertisement that would run on King County's Metro bus exteriors in December 2010 and January 2011, commemorating the two-year anniversary of the Israeli military campaign in Gaza. The proposed ad read "Israeli War Crimes: Your Tax Dollars at Work" and featured a picture of children next to a bomb-damaged building.

Metro determined the advertisement complied with its advertising policy; thus, the advertisement was approved and scheduled to run on 12 buses for four weeks, starting on Dec. 27, 2010. However, when the local news media reported that the advertisement was scheduled to run, King County received numerous telephone calls and emails from members of the public, the vast majority of which was negative. Then on December 20, a security guard found photographs of severely injured people and buses destroyed by explosives, with "No to bus ads for Muslim terrorists" written across the top, shoved under the door at the Metro customer service center.

Subsequently, two other groups submitted counter-advertisements in response to the SeaMAC advertisement. One advertisement read "Palestinian War Crimes—Your Tax Dollars at Work," featuring images of either a burning bus or injured passengers in a damaged bus. The other counter-advertisement read "In Any War Between the Civilized Man and the Savage, Support the Civilized Man," with seven accompanying graphics, including images of Adolf Hitler with a Palestinian youth and Muslim people with Nazi Swastika flags.

On December 22, King County Sheriff Sue Rahr contacted King County Executive Dow Constantine to recommend that the SeaMAC advertisement should not be run, in the interest of public safety. Constantine decided that because service disruptions, civil disobedience, and lawless and violent actions had become reasonably foreseeable, neither the SeaMAC ad nor the counter-advertisements would be displayed on Metro buses. King County simultaneously modified its advertising policy to limit advertising content to commercial and government speech. SeaMAC brought an action, asserting a First Amendment claim. King County moved for summary judgment.

The district court granted King County's motion. The advertising space on the exterior of Metro buses was a limited public forum. Speech restrictions in a limited public forum must be both viewpoint neutral and reasonable. In light of the totality of the circumstances in this case, the court concluded that King County's decision to reject SeaMAC advertisement was a viewpoint-neutral and reasonable restriction in a limited public forum.

## Preemption

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### Medical Marijuana

### Ordinances

#### Federal Controlled Substances Act preempts city's medical marijuana permit ordinance

**Pack v. Los Angeles County Super. Court**, No. B228781 (Cal. Ct. App. Oct. 4, 2011)

The California Court of Appeal found that the federal Controlled Substances Act (CSA), which prohibits the possession and distribution of marijuana, preempted a city's ordinance permitting and regulating medical marijuana collectives.

A Long Beach ordinance limited the number of medical marijuana collectives allowed in the city and required all collectives which sought to operate in the city to submit applications and a non-refundable application fee. The qualified applicant would then participate in a lottery for a limited number of permits. Those who received permits were required to pay an annual fee of \$10,000.

In order to obtain a permit, a collective must demonstrate its compliance, and assure its continued compliance, with certain requirements, including the installation of sound insulation, odor absorbing ventilation, closed-circuit television monitoring, and centrally-monitored fire and burglar alarm systems. Collectives must also agree that representative samples of the medical marijuana they distribute will have been

analyzed by an independent laboratory to ensure it is free of pesticides and contaminants.

The ordinance also makes it illegal for a person to belong to more than one collective, and for anyone to possess marijuana for any purpose other than as provided by the ordinance. Violations of the ordinance are misdemeanors, as well as enjoined nuisances per se.

Ryan Pack and Anthony Gayle, members of medical marijuana collectives who were directed to cease operations for noncompliance with the ordinance, brought an action seeking declaratory relief that the ordinance was invalid as it was preempted by federal law. After the trial court denied their request for a preliminary injunction, the plaintiffs petitioned for writ of mandate.

The court of appeal granted the petition. The permit provisions in the ordinance, including the application fees, renewal fees and lottery system for the permits, were preempted by the federal CSA that bans using, growing or selling marijuana. To Congress, all use of marijuana is recreational drug use, the combating of which is the core purpose of the CSA. An ordinance which establishes a permit scheme for medical marijuana collectives stands as an obstacle to the accomplishment of this purpose.

Having concluded that the permit provisions of the ordinance were federally preempted, the court of appeal remanded the case to the trial court to determine whether the other provisions of the ordinance could be interpreted to stand alone in the absence of the city’s permit system and, therefore, not be in conflict with the CSA. It is also for the trial court to consider whether any provisions of the ordinance that are not federally preempted impermissibly conflict with state law to the extent the plaintiffs have appropriately pleaded (or can so plead) the issue.

## Taxation

Municipal Authority	Ordinances
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**Municipalities cannot require electronic intermediaries to collect taxes on resold tickets**

**City of Chicago v. StubHub Inc.**, No. 111127 (Ill. Oct. 6, 2011)

On certified question, the Illinois Supreme Court ruled that Illinois municipalities may not require electronic intermediaries to collect and remit amusement taxes on resold tickets.

StubHub Inc. registered as an Internet auction listing service in compliance with the Ticket Sale and Resale Act. StubHub described itself as “the world’s largest online ticket marketplace” and operated a website or “platform” where users could buy and sell tickets to various events around the country. A prospective buyer and a prospective seller communicated with each other only via the website. Once they agreed upon a price, StubHub processed the sale, charging the buyer a service fee of 10% of that price, and the seller a 15% fee. Pursuant to the Act, StubHub informed its sellers of their tax obligations.

In 2006, the city of Chicago amended its amusement tax ordinance to require not only “resellers,” but also “reseller’s

agents” to collect and remit the amusement tax. The amendment further provided that ticket resellers and reseller’s agents had a joint and several duty to collect and remit the tax to the city.

In 2007, the city sent a letter to StubHub stating it might be deemed a reseller’s agent under the ordinance, and could be required to collect and remit the amusement tax on behalf of its users. The letter requested information and documents with respect to StubHub’s “facilitation” of ticket resales to entertainment events located in Chicago since Jan. 1, 2000.

StubHub declined to provide any of the information, and the city brought an action against StubHub seeking a judgment that StubHub was responsible for collecting the city amusement tax on ticket sales. The district court held that the city lacked the authority to require StubHub to collect and remit the amusement tax. The Seventh U.S. Circuit Court of Appeals certified the question to the Illinois Supreme Court.

The supreme court accepted certification and answered no to the certified question. First the court agreed with the city that StubHub was a “reseller’s agent” as that term was defined in the amusement tax ordinance because StubHub provided services that helped users sell their tickets, and it was compensated for those services.

Nevertheless, the supreme court found the city exceeded its home rule authority in enacting the ordinance. According to the court, the nature and extent of the problem in this case was the opening of a new market (Internet resales) and protecting consumers—not local revenue sources. The court concluded the state had a greater interest than any municipality in regulating this emerging business model and protecting consumers. This was a matter of statewide concern that was best left to the general assembly to regulate.

Jurisdiction	Nuisance
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**Court has jurisdiction over some of property owners’ claims in tax assessment challenge**

**Barnes v. Cowley County Bd. of Comm’rs**, No. 99,609 (Kan. Sept. 2, 2011)

The Kansas Supreme Court held that a trial court had subject matter jurisdiction over some of property owners’ claims in their action challenging a special tax assessment the county levied against their property.

The Cowley County Board of Commissioners levied a special tax assessment against real property for cleanup costs the county claimed it incurred while removing dangerous structures and unsightly conditions on that property. Property owners Victor and Nancy Barnes sued the county pursuant to Cowley County Resolution 2005-01, which the Board adopted to identify and clean up unsafe structures and unsightly conditions on county properties. The petition sought an injunction pursuant to Kan. Stat. Ann. § 60-907 to prevent the Board from enforcing the tax lien or attempting to collect the amount billed.

The property owners claimed: (1) the county acted without statutory authority when it completed the work and levied the

claimed costs against the property; (2) Resolution 2005-01 was void and unenforceable because it contradicted Kansas nuisance abatement statutes; and (3) the county violated the property owners' due process and equal protection rights.

The county moved to dismiss the action, arguing the trial court lacked subject matter jurisdiction. It claimed the property owners were required to appeal the county's actions under Kan. Stat. Ann. § 19-223 within 30 days of the Board's cleanup order. The county argued this statute was the exclusive method by which a trial court could review judicial or quasi-judicial board actions, and the failure to comply with the statute deprived the trial court of jurisdiction.

The trial court held that it lacked subject matter jurisdiction over the property owners' claims because there was no appeal within 30 days of the Board's cleanup order, which the court found was required by § 19-223. But, despite finding it lacked jurisdiction, the court went on to reach the merits of the claims by granting the county's motion for summary judgment motion and denying the property owners' motion for summary judgment. The appeals court affirmed the trial court's finding that it lacked jurisdiction, and the supreme court granted the property owners' petition for review solely to determine whether the appeals court erred in finding no subject matter jurisdiction.

The supreme court affirmed in part, reversed in part and remanded with directions. It held that the property owners satisfied the jurisdictional burdens under § 60-907(a) on the following issues: (1) the county exceeded its statutory authority in violation of the County Home Rule Act when the Board enacted the Resolution's self-help and abatement remedy provisions; and (2) Resolution 2005-01 was unconstitutional as applied, and the county engaged in arbitrary and capricious conduct.

Normally, the supreme court explained, its holding would require remand to the trial court to determine the merits of the surviving claims, but the trial court went beyond the jurisdiction question and found for the county on the merits. The appeals court stopped short of considering the merits of any claims when it found § 19-23 jurisdictionally barred the entire case. Since the supreme court found the appeals court erred in part in its jurisdictional ruling, it remanded to the appeals court to determine whether the trial court properly granted summary judgment on those claims that were not jurisdictionally barred.

## Zoning

### Environment

### Streets & Roads

#### County's development order permitting mining in Everglades struck down

**1000 Friends of Fla. Inc. v. Palm Beach County,**  
No. 4D10-60 (Fla. Dist. Ct. App. Oct. 5, 2011)

The Florida District Court of Appeal held that a trial court erred in upholding a development order issued by a county commission permitting mining in the Everglades.

The Palm Beach County Commission issued a development order to Bergeron Sand and Rock Mine Aggregates Inc. granting the corporation the right to mine within the "Everglades Agricultural Area" in western Palm Beach County. Bergeron sought to expand its mining operations on property designated as "agricultural production" in the comprehensive plan. After a public hearing, the Palm Beach County Commission unanimously granted conditional approval for the development order and subsequently adopted Bergeron's application, finding the mining proposal to be consistent with the comprehensive plan.

After the order issued, 1000 Friends of Florida Inc. and Sierra Club Inc. challenged the development order claiming the order was inconsistent with a future land use element (FLUE) policy of the comprehensive plan. The specific FLUE policy, 2.3-e.3, stated that "[m]ining and excavation activities, as applicable, shall be restricted" as follows:

Within the Agricultural Production Future Land Use designation, mining may be permitted only to support public roadway projects or agricultural activities or water management projects associated with ecosystem restoration, regional water supply or flood protection, on sites identified by the South Florida Water Management District or the U.S. Army Corps of engineers where such uses provide viable alternate technologies for water management.

Both at the public hearing and later at trial, the parties admitted that aggregate mined from the property designated as agricultural production within the Everglades Agricultural Area could be used for purposes other than to "support public roadway projects." The county submitted to the trial court a staff analysis which stated that "limestone aggregate from the subject property will be marketed to FDOT for road building and construction."

The trial court entered summary judgment on behalf of the county and Bergeron, finding the proposed mining was proper since "some portion of the material produced by the proposed mine will be FDOT certified material that will be used in road projects." The court determined the use of some material by FDOT was sufficient to "support" public road construction. Sierra Club and 1000 Friends appealed.

The district court of appeal reversed the trial court's judgment. The sole issue on appeal was whether the development order, authorizing Bergeron's mining of the "agricultural production" area in the Everglades Agricultural Area, was consistent with FLUE policy 2.3-e.3, which states that mining may be permitted "only to support" public roadways, agricultural activities, or water management projects. The trial court erred by failing to define "only" as restrictive and thereby failing to limit mining to the purposes enumerated in the FLUE policy.

## In The Law Journals

### Should local governments be subject to antitrust liability?

Scott Weese, *Eminent Need: Proposing a Market Participant Exception For Municipal Parker Immunity*, 9 Cardozo Pub. L. Pol'y & Ethics J. 529 (2011)

Local governments often use eminent domain and zoning to redevelop areas that have become blighted. However, what constitutes blight can be controversial, and some have argued that the local governments have become monopolistic in their use of eminent domain and zoning. According to Scott Weese, a market participant exception must be put in place so that local governments can be subject to the prohibitions of the federal antitrust laws.

Pricing for eminent domain procedures can lead to antitrust concerns. Because of the role the local government may play in the market and the prices that other property owners who are not involved in the eminent domain process may accept, the local government may be the controlling influence on the market. These actions may violate the federal Sherman Act, which prohibits actions that result in restraint of trade. In addition, the Sherman Act prohibits the creation of monopolies.

The use of eminent domain by local governments can also create a monopsony, which is the situation where a market is dominated by one buyer, whereas a monopoly is a situation where a market is dominated by one seller. Monopsonies are prohibited by the Sherman Act, too. As such, the eminent domain takings that are authorized by the Fifth Amendment of

the U.S. Constitution conflict with the Sherman Act. Also, most state constitutions allow for eminent domain takings, and these state constitutions therefore conflict with the Sherman Act as well. However, where a piece of federal legislation conflicts with the constitution, whether federal or state, the constitution will take precedence.

The legal approach to the antitrust concerns for monopsonies are different from the approach used to consider monopolies. The focus for courts shifts to the excluded buyers in a monopsony, as opposed to the excluded sellers in a monopoly. The damages associated with a monopsony would be calculated using the antitrust model, where the damages are calculated by subtracting the appraised value of the property in question from the price offered by the monopsonist.

However, the federal Local Government Antitrust Act of 1984 limits damages recoverable from local governments in certain antitrust lawsuits to injunctive relief. The Act's injunctive relief limitation only applies to lawsuits brought under the Clayton Act, though, so it is possible that monetary damages would be recoverable if the lawsuit were to be brought under the Sherman Act.

In bringing a lawsuit under the Sherman Act using the antitrust model, the parties would have to establish the relevant markets and market prices, as well as the alleged monopsonist's market power. With regard to a local government's use of eminent domain, arguments could be made in favor of bringing lawsuits under either §1 or §2 of the Sherman Act. However, because of the State Action Immunity Doctrine, local governments will likely be shielded from antitrust liability unless a market participation exception is created.

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