SC Municipal Attorneys Association CLE
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LEGAL SHORT TAKES ON MUNICIPAL CASE LAW (AND OTHER THINGS)

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Breach of Contract/Right to Jury Trial/Sovereign Immunity

Pearson v. Richland Cnty., 445 S.C. 246, 912 S.E.2d 286 (Ct. App. 2025).

A county employee brought causes of action for breach of contract, promissory estoppel, and whistleblower retaliation. The employee alleged she was unfairly criticized in retaliation for the filing of a grievance regarding a racially insensitive comment made by a director. The employee requested a jury trial. The county moved to transfer the matter to the non-jury docket on the ground that there was no constitutional right to a jury trial for a breach of contract claim against the sovereign at the time the state constitution was adopted. The circuit court ordered a jury trial on the breach of contract claim, but denied the employee's request for a jury trial on the remaining claims. The circuit court based its decision on the supreme court's abolishment of the State's total sovereign immunity.

Holding: The employee was not entitled to a jury trial on her breach of contract claim. The state constitution "secures the right to a jury trial only in cases in which that right existed at the time of the adoption of the constitution in 1868." Unisys Corp. v. S.C. Budget & Control Bd. Div. of Gen. Servs. Info. Tech. Mgmt. Office, 346 S.C. 158, 172, 551 S.E.2d 263, 271 (2001). "The right to a jury trial does not apply to actions against the sovereign that were not recognized in 1868." Id. "At the time our constitution was adopted in 1868, the State was immune from suit on a contract." Id. The court of appeals was constrained by the supreme court's ruling in Unisys to conclude that the employee did not have a right to a jury trial.

Illegal gaming machines/ Games of skill

1 Dragon's Ascent Video Gaming Mach. v. South Carolina Law Enforcement Division, 445 S.C. 252, 912 S.E.2d 407 (Ct. App. 2025) (filed Feb. 5, 2025) (Hewitt), reh'g denied (March 12, 2025), cert. denied (Sept. 9, 2025)

SLED confiscated a gaming machine that the parties stipulated was predominately a game of skill, not chance. The Court of Appeals reversed the circuit courts finding that the machine was lawful because it was a game of skill.

Holding: (1) The prohibition in S.C. Code Ann. § 12-21-2710 of gaming machines used for gambling extends to games of skill, and is not limited to games of chance.

Board of Zoning Appeals/ Jurisdiction/ Variances

John's Marine Serv. v. Oconee Cnty. Bd. of Zoning Appeals, 445 S.C. 423, 914 S.E.2d 481 (Ct. App. 2025), cert. denied (Aug. 13, 2025).

Prior to the development of a peninsula ("Arrowhead Point") on Lake Keowee, the developer sought a variance from the county's 50-foot right-of-way requirement. The variance was necessary because at its narrowest point Arrowhead Point is only 31.9 feet wide. The developer proposed to move the roadbed entirely onto its property and to provide access to John's Marine. John's Marine argued the County had no prescriptive easement over the road, claimed the variance would landlock its property, and warned of traffic and safety impacts. The property line separating the John's Marine property from the Arrowhead Point property is the centerline of the existing roadbed. Following multiple hearings, the board of zoning appeals unanimously approved the requested variance. John's Marine appealed, arguing the board lacked jurisdiction to decide a dispute related to the existence of a prescriptive easement. John's Marine also argued the board erred in expanding the purported easement, and that the granting of the variance was arbitrary and capricious because the location of the proposed road was left undetermined.

Holdings: (1) the board did not exceed its authority or jurisdiction because it made no determination regarding the existence of a prescriptive easement. The board's decision addressed only the variance from the County's right-of-way width requirement, and noted that the developers might need to satisfy other requirements prior to development, such as access rights; (2) the board properly considered each of the statutory factors for the granting of a variance, S.C. Code Ann. § 6-29-800(A)(2).

Inverse condemnation/ Causation of stormwater flooding/Stormwater and Sediment Reduction Act Immunity

Marlowe v. South Carolina Department of Transportation, 446 S.C. 309, 919 S.E.2d 553 (S.C. 2025) (filed March 26, 2025) (James), reh'g denied (Sept. 10, 2025)

A project involving realignment of Highway 378 in Florence County involved raising the elevation of the road in front of Marlowe's home. During construction, after the roadbed was elevated, stormwater flooded the interior of the home in October 2015 (the 1,000-year flood) and October 2016 (Hurricane Matthew). The project involved replacing a nearby culvert with a larger culvert, but at the time of the flooding the new, larger culvert had not yet been installed. The Court upheld the trial court's grant of summary judgment on Marlowe's inverse condemnation claim, affirming that a "most probably" standard applies to expert testimony on causation in physical takings cases.

Holdings: (1) The Stormwater and Sediment Reduction Act does not impose liability on governmental entities, but also does not immunize governmental entities from liability for otherwise actionable claims (see S.C. Code Ann. § 48-14-160); and (2) Causation of stormwater

flooding is not established by expert testimony that the project was a "substantial contributor" to flooding and that it is "possible" that the home would not have flooded but for the project, where there is no expert testimony that the project "most probably" caused the flooding of the home.

Additional notes: (1) The Court appears to affirm that "some degree of permanence" is an element of a physical taking (*cf*, discussion of regulatory takings in Byrd v. City of Hartsville, 365 S.C. 650, 620 S.E.2d 76 (2005)); (2) The Court of Appeals, in an unchallenged holding, found the Tort Claims Act protected SCDOT from liability for negligence under maintenance and design immunity (§ 15-78-60(15)) and discretionary immunity (§ 15-78-60(5)).

Disorderly conduct/ Ordinances/ First Amendment

Whitehurst v. Town of Sullivan's Island, 446 S.C. 137, 919 S.E.2d 402 (2025).

The town cited Whitehurst with a violation of its disorderly conduct ordinance after she loudly berated an Uber driver with profanity and racial and xenophobic epithets at 2:00 a.m. A jury found Whitehurst guilty. The circuit court affirmed the conviction and a direct appeal was taken to the supreme court based on Whitehurst's arguments that the ordinance violated the First Amendment's protection of private speech and her words were not "fighting words." Whitehurst also argued the ordinance was unconstitutionally vague.

After asking Whitehurst and her friend to be quiet, Whitehurst began loudly mocking the driver. The driver stopped the car before reaching their destination and asked the women to exit the car. Upon exiting the vehicle, Whitehurst hurled numerous epithets at the driver in a very loud voice, causing a man nearby to stop upon hearing her.

The court charged the jury that a person could be guilty of disorderly conduct if a person, "with the purpose of causing public danger, alarm, disorder or nuisance makes "loud, boisterous and unreasonable noise or disturbance to the annoyance of any other persons nearby," or near any public road, "whereby the public peace is broken or disturbed or the public annoyed;" or if a person makes any "loud, boisterous or unreasonable noise or disturbance to annoy other persons nearby," or near any public road, "whereby the public peace is broken or disturbed or the traveling public is annoyed."

Holdings: (1) the ordinance was a content-neutral time, place, and manner restriction which was narrowly tailored to serve a significant governmental interest in maintaining peace and quiet in a residential area. The ordinance regulated speech solely upon the noise generated rather than the message conveyed; (2) the terms "loud," "boisterous," and "unreasonable had common meanings and provided sufficient notice to satisfy due process, together with the ordinance's scienter requirement that a person willfully do any of the prohibited acts.

Dissent (Kittredge, C.J.): "In my view, the Town of Sullivan's Island disorderly conduct ordinance affords too much discretion to law enforcement to pick and choose whether someone's behavior in any given instance constitutes a crime. I therefore do not believe the ordinance provides adequate notice of the scope of prohibited conduct. I am likewise concerned that, while the ordinance itself is facially content-neutral, its open-ended language will invariably result in the exercise of law enforcement discretion without guardrails. That, in turn, will result in the criminalization of speech based purely on its content, which unquestionably occurred here."

Partisan redistricting/ Non-justiciable political question

League of Women Voters of South Carolina v. Alexander, S.C. Supreme Court Opinion No. 28301, 2025 LX 489530, 2025 WL 2656407 (filed Sept. 17, 2025) (James)

After the 2020 Census revealed South Carolina's 1st Congressional District to be overpopulated by 87,689 residents and the 6th Congressional District to be underpopulated by 84,741 residents, the General Assembly approved a redistricting plan signed into law in January 2022. The redistricting plan was developed with an intentional emphasis on increasing the Republican majority in District 1. The Court rejected the League's challenge that the partisan redistricting violated the South Carolina Constitution, holding that the dispute presented a non-justiciable political question.

Holdings: (1) the Free and Open Elections Clause, S.C. Const. art. I, § 5, protects individual voting rights but does not prohibit partisan considerations in redistricting; (2) The redistricting plan did not violate the Equal Protection Clause, S.C. Const. art. I, § 3, where each person was still entitled to one vote and there was no showing of disparate treatment; (3) a partisan redistricting plan does not restrict speech in violation of the Free Speech Clause, S.C. Const. art. I, § 2; and (4) the so called "whole-county directive," S.C. Const. art. VII, §§ 9 & 13, does not prohibit splitting counties as part of a partisan redistricting plan.

Additional notes: (1) throughout the opinion the Court emphasized that the underlying dispute presented a non-justiciable political question, because the law "does not furnish judicially discernible and manageable standards for reviewing claims of partisan gerrymandering"; (2) Chief Justice Kittredge, in a concurring opinion joined by Justice Hill, stated that, "I do not . . . read the Court's decision as creating a categorical rule that all future claims of excessive partisan gerrymandering are beyond judicial review. . . . It remains conceivable that a future challenge may present more fully developed constitutional violations with a discernable nexus to manageable judicial standards, thereby warranting judicial intervention"; and (3) the analysis in this case would seemingly also apply to municipal election ward redistricting pursuant to S.C. Code Ann. § 5-15-50.

Planned Developments/ Takings/ Inverse Condemnation/ Due Process/ Ethical Consideration

Gulfstream Café, Inc. v. Georgetown Cnty., Op. No. 28303 (S.C. Sup. Ct. filed Oct. 29, 2025) (Howard Adv.Sh. No. 38 at 12).

The county council created a Planned Development (PD) in 1982 which originally included two buildings – the Gulfstream Café and a marina. The marina housed a restaurant and store that served a sixty-slip marina. The marina owned 62 parking spaces in the PD's parking lot, and Gulfstream owned 17 spaces of its own. Gulfstream has an easement allowing ingress and egress to and from the parking lot and the non-exclusive use of the marina's 62 parking spaces.

The marina changed ownership in 2016 and the new owners demolished the existing marina building and began making plans for a new restaurant. The new owners submitted multiple proposals to the county council. The third proposal moved forward after approval from the county and resulted in parking scarcity for Gulfstream's patrons because of the increased intensity of use. Gulfstream sued the county, the county council, and one of the councilmembers individually and in his official capacity, for: violations of procedural and substantive due process rights; a taking and inverse condemnation; and invalidation of the approval based on the councilmember's unethical conduct involving an earlier proposal.

Holdings: (1) Gulfstream has not been deprived of its nonexclusive use of the parking lot, and the county had a rational basis to use only the heated square footage of the new marina to calculate the number of parking spaces needed; (2) a per se taking did not occur because Gulfstream retains its easement rights, and it has not been deprived of all economically beneficial or productive use of its easement; (3) a regulatory taking did not take place based on the Penn Central factors; (4) there was no inverse condemnation (the analysis would collapse into the Penn Central analysis); and, (5) no procedural due process violation because Gulfstream had notice and an opportunity to be heard at all stages of the approval process.

Notes: Chief Justice Kittredge concurred and wrote separately to chastise the councilmember for "self-dealing and inappropriate conduct from the outset that tainted the entire process." The councilmember was a principal in the architecture firm that designed and presented the proposals to the council. The councilmember did not recuse himself from voting on the first proposal, and was subsequently fined by the ethics commission. He did not participate in voting on later proposals presented to council. Kittredge would have held the county's actions to be arbitrary and capricious, however, Gulfstream did not pursue injunctive relief, and it did not prove its entitlement to damages.

Road maintenance fees/ Class actions against political subdivisions/ Sovereign immunity for equitable claims

Thompson v. Killian, S.C. Supreme Court Opinion No. 28305, 2025 LX 481406, 2025 WL 3085990 (filed Nov. 5, 2025) (Verdin)

Thompson filed this action, individually and as a class representative, challenging Aiken County and City of Aiken road maintenance fees and seeking a refund and other forms of compensation.[1] The Supreme Court held that certain claims for compensation were barred, but remanded for further proceedings on the individual and class claims against Aiken County for declaratory judgment and refunds.

Holdings: (1) A local road maintenance fee, even if it is an unauthorized "tax" under Burns v. Greenville Cty. Council, 433 S.C. 583, 585, 861 S.E.2d 31, 31 (2021), is not a "tax" within the meaning of the S.C. Revenues Procedures Act ("RPA") and the circuit court therefore is not deprived of subject matter jurisdiction;[2] (2) The RPA class action "catch all" provision, § 12-60-80(C), bars class actions against political subdivisions based on values based property taxes but does not bar other class actions against political subdivisions (including this road maintenance fee litigation); (3) Section 8-21-30, providing for recovery of 10 times the amount of an improperly charged fee, does not apply to road maintenance fees; and (4) the Tort Claims Act's restoration of sovereign immunity shields the government from liability for equitable claims, and the exception for contractual liability does not remove liability for implied contract or quasi-contractual equitable claims such as unjust enrichment.

Additional notes: (1) Justice Hill, joined by Justice James, dissented in part on the issue of sovereign immunity, taking the position that the State's sovereign immunity never applied to equitable claims and the Tort Claims Act did not restore or otherwise create equitable immunity.

[1] The City fee was revoked before this litigation was filed, and at a circuit court hearing Thompson stipulated that his declaratory judgment action against the City was moot.

[2] The Revenue Procedures Act, S.C. Code Ann. §§ 12-60-10, et seq., limits trial court jurisdiction over claims involving taxes within the meaning of the Act. See § 12-60-80.

S.C. Attorney General Opinions

S.C.A.G. Op. Dec. 16, 2024 (Chief Lawrence Wiggins, Allendale Police Department)

- Effect of **trespass notice** on charge of burglary in the third degree

S.C.A.G. Op. Dec. 16, 2024 (Chief Christopher Mooney, Town of Harleyville)

- Operation of **golf carts** on "state primary highways"

S.C.A.G. Op. Jan. 3, 2025 (Chief Tyrone Smith, Varneville Police Department)

- County assessment of municipality for **911 services**.
- County billing of municipality to house inmates

S.C.A.G. Op. Jan. 14, 2025 (Peter M. Balthazor, Esq., Town of Blythewood)

- **Strong-mayor authority** to appoint necessary employees
- Council authority to amend budget in strong-mayor municipality

S.C.A.G. Op. Jan. 21, 2025 (Mark Brandenburg, Esq., The Citadel)

- Prohibition on political subdivision entering into **indemnification agreements**.

S.C.A.G. Op. Feb. 10, 2025 (The Honorable Thomas E. Pope, Speaker pro Tempore, S.C. House of Representatives)

- Explanation of different **annexation** methods
- Limited basis for challenging annexation and lack of requirement for County consent

S.C.A.G. Op. Feb. 26, 2025 (Virginia "Ginny" L. Merck-Dupont, Esq., Lancaster County)

- Timing of County **transportation tax referendum** in even or odd-numbered years

S.C.A.G. Op. Mar. 17, 2025 (The Honorable George E. "Chip" Campsen III, Chairman, S.C. Senate Fish, Game and Forestry Committee)

- Engagement of private law firm, part-time municipal attorney
- **Dual-office holding (municipal attorneys)**

S.C.A.G. Op. Mar. 31, 2025 (The Honorable Robert Krouse, Mayor, Town of Surfside Beach)

- Effect of **subdivision** on legal nonconforming status

S.C.A.G. Op. May 7, 2025 (Mary McCorman, Esq., Town of Six Mile)

- Various considerations regarding the effect of **resignation** of a Planning Commission member:
  - Meetings following resignation
  - *De jure* or *de facto* status of resigned member
  - Quorum/public meeting considerations

S.C.A.G. Op. May 27, 2025 (The Honorable Tom Davis, S.C. Senate)

- Validity of **rules of order and time limits** for public comments

S.C.A.G. Op. July 2, 2025 (Queenie L. Crawford, Ed.D., Chairperson, Colleton County Board of Voter Registration and Elections)

- **Prohibition on political campaign activity** by election board member (elected or appointed position with political party)

S.C.A.G. Op. July 22, 2025 (The Honorable Larry K. Grooms, S.C. Senate)

- Authority of **municipal code enforcement** officers to prosecute cases in municipal court.
- *Note, there are other opinions that, contrary to this opinion, state code enforcement officers are not considered law enforcement officers

S.C.A.G. Op. July 28, 2025 (Mollie DuPriest Taylor, Chair, S.C. Board of Paroles and Pardons)

- **"Public meeting" -** rebuttable presumption that gathering of quorum is for the purpose of a meeting
- Effect of gathering of a quorum discussing any matter under their control or supervision

S.C.A.G. Op. September 3, 2025 (P.J. McCann, III, Special Agent, Defense Counterintelligence and Security Agency)

- Requirement that local law enforcement agency comply with **federal agency request** for criminal history information.

S.C.A.G. Op. September 11, 2025 (Paul B. Wickensimer, House of Representatives)

- Concerns **expungement** of convictions pursuant to S.C. Code Ann. § 22-5-910

S.C.A.G. Op. September 29, 2025 (Sharon H. West, Spartanburg County Auditor)

- Authority of a County Council to **withhold salary of a constitutional officer** in response to an unauthorize leave of absence.

S.C.A.G. Op. October 10, 2025 (James Graham Padgett, III, Esq., City of Greenwood)

- Constitutionality of municipal **hate crime ordinances** ("setting aside")

S.C.A.G. Op. October 27, 2025 (The Honorable Gil Gatch, S.C. House of Representatives)

- Voiding **tax sale** after subsequent receipt of tax payment.

S.C.A.G. Op. Oct. 28, 2025 (The Honorable Leon D. Gilliam, S.C. House of Representatives)

- Constitutionality of DSS firearm-storage regulation for foster homes (Second Amendment)
- Discussion of **Second Amendment exception for "sensitive places"** (such as governmental buildings)

S.C.A.G Op. Nov. 19, 2025 (Jordan S. Thayer, Esq., Anderson County)

- Authorization for **administrative search warrants** for code violations

Assorted Federal Cases

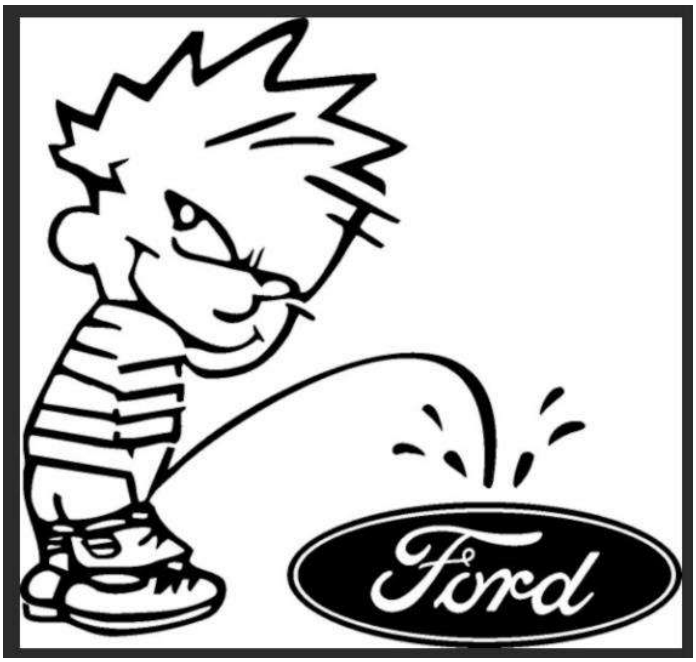
Noise Ordinance/ First Amendment/ Obscene/ Vulgar

Moshoures v. City of North Myrtle Beach, 131 F.4th 158 (4th Cir. 2025).

A city ordinance made it a crime "to broadcast obscene, profane or vulgar language from any commercial property" above certain volumes at certain times. A bar owner sued, arguing these restrictions violate the First Amendment. The district court concluded the obscene-language and vulgar-language provisions were constitutional because they both only restrict speech that is obscene. The district court concluded the profane-language provision was unconstitutional. The bar owner appealed and challenged only the district court's interpretation of the vulgar-language provision as applying only to speech that is obscene as a constitutional matter. The city did not appeal. "Vulgar" was defined in the ordinance as "making explicit and offensive reference to sex, male genitalia, female genitalia or bodily functions."

Holdings: (1) the vulgar-language provision is content-based, and is not a generally applicable noise ordinance; it imposes strict limits on the use of sound equipment based solely on the type of language being broadcast; (2) the vulgar-language provision reaches at least some "constitutionally protected speech; and (3) the vulgar-language provision fails strict scrutiny.

Notes: the court provided examples of works that would not be obscene in the constitutional sense but would meet the definition of "vulgar." First, the court pointed out *2 Live Crew*'s 1989 album that made "explicit and offensive reference to sex, male genitalia, female genitalia or bodily functions." This album was not obscene in a constitutional sense because it had not been shown to lack "serious artistic value." The second example was Calvin, of the comic strip Calvin & Hobbes, engaging in a bodily function on logos and other items.



Police Power/ Takings/ Due Process/ Equal Protection

Brady v. City of Myrtle Beach, 137 F.4th 233 (4th Cir. 2025).

Around 2016, the city stepped up police presence in an area containing a small cluster of bars. The city shut down two of the bars for repeated legal violations, and a third bar closed for lack of business. Years later, the bars sued the city, bringing claims for a taking and due process and equal protection violations. The bars claimed the city targeted the bars because their owners and clientele were predominantly racial minorities. The district court granted a directed verdict to the city.

Holdings: (1) there was no regulatory taking because the bars do not have a constitutionally protected property interest; the activity of doing business, or the activity of making a profit is not property; (2) no violations of due process or equal protection because the city acted reasonably in responding to a documented pattern of legal violations and public safety threats in the area; it was sensible for the police to focus on a concentrated hub of criminal activity.