policy, prohibiting all employee contact with the media without the prior approval of the Executive Director, was "functionally indistinguishable" from regulations previously invalidated on First Amendment grounds: the policy acted as a prior restraint that was overbroad in its scope, "potentially acting to chill comment by Commission employees, rendered in a private capacity, about non-confidential matters of public concern." The matters upon which Gonzalez spoke were matters of public concern; thus, his speech was that of a citizen, rather than that of an employee. The agency's interests in employee security and the confidentiality of its investigations did not outweigh any interest Gonzalez may have had in expressing his concerns, because his "conduct did nothing to jeopardize" the employer's interests. *In re Disciplinary Action Against Gonzalez*, 964 A.2d 811 (N.J. Super. A.D. 2009).

Finance
Appropriations

In 2008, the Arizona Legislature passed a general appropriations bill, H.B. 2209, for the coming 2008-2009 fiscal year. Section 47 of the bill required Arizona counties, incorporated cities, and towns to pay approximately $30 million into the state general fund (the cities' and towns' share was roughly $18.3 million). The amount for each local entity would be determined by legislative budget committee staff. The League of Arizona Cities and Towns contacted the Governor's Office to express its view that forcing localities to pay into a general fund was unconstitutional under the Arizona Constitution. Meetings between the two parties failed to result in a compromise, and the League sued. The Arizona Constitution stated that, "[t]he general appropriation bill shall embrace nothing but appropriations for the different departments of the State, for State institutions, for public schools, and for interest on the public debt. . . . Any legislation in a general appropriations bill that is neither an appropriation of money for a specific purpose nor a provision necessary for the proper expenditure of that money is improper."

The primary question for the Arizona Supreme Court was whether the legislation was an "appropriation." The court referred to a prior case, *Hunt v. Callaghan*, 32 Ariz. 235 (Ariz. 1927), in which it held that an appropriation was "the setting aside from the public revenue of a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money." The "essential parts of this definition" were the "certain sum," the "specified object," and the "authority to spend." Applying this approach to the case before it, the court found the legislature "did not expressly attach the assessed amount to any public revenue that it had previously set aside for the cities and towns. Because Section 47 fails to identify any prior appropriation, it fails to meet the definition of an appropriation." Addressing the State's argument that the cities and towns had received monies from the State far exceeding the $18 million at issue and the court should "infer that these were the prior appropriations intended to be reduced by Section 47," the court declined to agree. Section 47 did not identify either the urban revenue-sharing funding, or the various discretionary grants made for the benefit of the cities and towns, as appropriations that the legislature designated for reduction. In any event, the various discretionary grants were often subject to restrictions (e.g., use or reimbursement limitations imposed by the federal government) and were not always appropriated to the cities and towns themselves, but to various executive agencies for use by the cities and towns. Because Section 47 did not reduce any identified prior appropriation, it violated the State constitution's limit on the contents of general appropriations bills and was, therefore, unconstitutional. *League of Arizona Cities and Towns v. Martin*, 219 Ariz. 556, 201 P.3d 517 (Ariz. 2009).

Land Use
Vested Rights in Zoning

In 1998, the plaintiff property owners, Alzamora, Dunn, and Creative Homes, Inc., applied for a special use permit to construct a multi-unit seniors' residential building in the Village of Chester, New York. In 2004, while the application was pending, the Village adopted amendments to its zoning law that prohibited the plaintiffs' planned construction under the permit. The plaintiffs alleged that the Village did so knowing that the plaintiffs' construction project was the only pending project in the Village to be affected by the change in law, yet it failed to provide them with actual notice of the meeting at which the proposed amendments were discussed. In 2005, the Village extended the amendment to all multiple dwelling projects, not just those for senior citizens, which meant that the plaintiffs could not use the property to operate a regular adult community to avoid the new requirements. They received no notice of the meeting at which this amendment was passed, although public notice of each hearing was given once by means of publication in the local newspaper. The plaintiffs brought suit pursuant to 42 U.S.C. § 1983, claiming that the special use permit was deemed approved by reason of the Planning Board's failure to approve or disapprove the application within 62 days of its 2002 hearing on their application; second, that the failure to notify them of the meeting was a violation of their procedural due process rights, guaranteed by the Fourteenth Amendment. The Village and its Planning Board moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6), which motion was granted. Under New York law, a property owner had no right to the existing zoning status of his land unless his right had become vested; for it to vest, the owner had to have undertaken substantial construction and must have made substantial expenditures prior to the enactment of the more restrictive zoning ordinance. The lower court held that, because the plaintiffs had not begun any construction at all, they had no vested right that allowed them to construct and operate the project despite the prohibitory changes in the zoning law; thus, they had no protected property interest as required for the due process claim to succeed.

On appeal, the U.S. Circuit Court of Appeals for the Second Circuit affirmed. It declined to address whether the plaintiffs had, in fact, obtained the special use permit by operation of the default provision in the law, as the failure to complete substantial construction meant that they had "no

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constitutionally protected property right in the zoning status of their land or a constitutional right to receive actual notice of the proposed change in the zoning status." The court expressly rejected the plaintiffs' additional argument – that the un-exercised right to develop land conferred a due-process right in its existing zoning status – stating "[i]f that were so, our court would effectively be transformed into a zoning board of appeals – a role we have expressly declined to assume." *Alzamora v. Village of Chester*, No. 07-2944-cv, 2009 WL 578630 (2d Cir. Mar. 06, 2009).

Practice and Procedure
Trial Questions – Prior Disciplinary Actions

Two District of Columbia Metropolitan Police Department (MPD) officers, Merritt and Hackley, were patrolling in a marked car. They stopped, and a confrontation between the officers and two men occurred, after which the men escaped into Mrs. Hudson's nearby home. The police followed, and in the scuffle, one of the men, Clayton, was struck by the officers, and Hudson (Clayton's grandmother) was knocked to the floor. Clayton and Hudson sued the District of Columbia and the officers, alleging causes of action for excessive force, assault and battery, false arrest, malicious prosecution and negligent or intentional infliction of emotional distress based on the officers' conduct. During Clayton's counsel's cross-examination of Merritt at trial, Merritt was asked about false reports, prior disciplinary actions, the improper use of force, and "conduct unbecoming" incidents. Counsel pointed out to the jury that Merritt had been suspended for a year for lying on a report and using inappropriate force on a woman, and added, "Let me tell you something. You're not a bad cop on Monday and a good cop on Tuesday. It don't work like that. If you were a bad cop on Monday, you're a bad cop on Tuesday ... And you know from Officer Merritt himself that he was a bad cop." Defense counsel had objected and asked for a curative instruction, which the court denied because it had "sustained" the defendants' objection to the "bad cop" argument. After the jury returned verdicts in favor of the plaintiffs, the defendants moved for a new trial, which was denied, and subsequently appealed the jury verdicts finding them liable, arguing that the district court abused its discretion when it denied the motion for a new trial on all of the claims, notwithstanding the plaintiff counsel's improper "prior bad acts" cross-examination and closing argument.

The U.S. Court of Appeals for the District of Columbia Circuit agreed that the trial court committed a reversible error, and remanded the matter for a new trial. It was a violation of Federal Rules of Evidence, Rule 404(b), for the trial judge to permit Clayton's counsel to elicit testimony about Merritt's purported history of anger, the use of "improper use of force," and filing "false reports." "Such testimony is evidence of prior bad acts introduced 'to show action in conformity therewith' and is therefore prohibited under Fed. R.Evid. 404(b)." The court further compounded its error when it permitted Clayton's counsel to exploit the Rule 404(b) questioning during closing to indict Merritt as a "bad cop" and when it declined to provide a curative instruction. "The cumulative effect of the inadmissible evidence and the inflammatory argument based on it is precisely what Rule 404(b) prohibits: exhorting a jury to find against a defendant because he acted 'in conformity' with his bad acts" – here, the purported history of physical violence, the improper use of force, and filing false reports. The jury "may well have been persuaded" by such testimony, and the error was not a harmless one because "the trial was hotly contested and turned largely on credibility." *Hudson v. Dist. of Columbia*, 558 F.3d 526 (D.C. Cir. 2009).

Search and Seizure
Vehicle Search and Non-Verbal Conduct

A police officer, Tran, saw Neely driving without his headlights on and stopped him. His check of Neely's documents revealed no problems and he gave Neely a verbal warning. Before he let him go, he asked if Neely had any "guns, weapons, grenades, bazookas" in the vehicle. Neely answered no, and asked Tran if he would like to check the trunk. Because it took Neely more than 30 seconds to open the trunk – a period Tran thought was excessive– he asked Neely to get out of the vehicle. Neely gave Tran the car keys, and after Tran did a pat-down search, he began to search the car's interior (but not the trunk). He found a firearm in the magazine pouch of the passenger side front seat. Neely was charged with being a felon in possession of a firearm and filed a motion to suppress, alleging that Tran's search of the passenger compartment of his vehicle violated his Fourth Amendment rights. The district court found that when Neely handed over the keys, left the door to his vehicle open, failed to object to the search of the interior of his vehicle, and carried on a "relatively friendly" conversation with another police officer while the search was being carried out, he broadened the scope of his original consent, which had been expressly limited to the trunk, to include his entire vehicle.

On appeal, the U.S. Court of Appeals for the Fourth Circuit reversed and remanded. By asking whether Tran would like to "check" the trunk, Neely consented to a search of his trunk. While non-verbal conduct could be sufficient to establish consent, such conduct was assessed in light of an objective reasonableness standard. Neely did not offer his keys in response to an officer's request to search his car, "an action which might reasonably be viewed as non-verbal consent," or offer his keys while asking Tran whether he would like to search his vehicle. Neely surrendered his keys on being ordered out of the vehicle, and had already placed a verbal limit on the scope of his consent. His decision to give Tran his keys and leave his car door open "were the product of cooperation with a law enforcement officer, not an intentional indication of consent." Neely's actions and his failure to object did not overcome his prior verbal limitation on the scope of his consent. Further, because Tran could not have reasonably believed that Neely was dangerous, the search of the car could not be justified as a protective search *U.S. v. Neely*, No. 08-4257, 2009 WL 1142571 (4th Cir. April 29, 2009). **ML**