



# CITY AND COUNTY OF DENVER

DEPARTMENT OF LAW  
CITY ATTORNEY

1437 Bannock Street  
Room 353  
Denver, Colorado 80202  
Phone: 720-865-8600  
FAX: 720-865-8796

## **2015-16 Survey of Local Government Law**

David W. Broadwell, Assistant City Attorney  
October 7, 2016

This program contains a review of selected Colorado, Tenth Circuit, and U.S. Supreme Court appellate decisions of interest to local government attorneys in Colorado, reported from October, 2015 through September, 2016.

**Home Rule and Preemption**  
**Elections and Petitions**  
**Employment**  
**First Amendment**  
**Governmental Immunity/Torts**  
**Marijuana**  
**Open Meetings/Open Records**  
**Police Civil Liability**  
**Public Works and Utilities**  
**Special Districts**  
**Taxation and Finance**  
**Zoning, Land Use, and Eminent Domain**  
**Miscellany**

## HOME RULE AND PREEMPTION

### *Fracking cases clarify the paradigm for preemption analysis in Colorado*

In 2012 Longmont voters approved an initiated ordinance banning hydraulic fracturing in that city. In 2013 Ft. Collins voters approved an initiated ordinance imposing a five-year moratorium on fracking in that city. “Applying well-established preemption principles,” a unanimous Supreme Court struck down both ordinances due to their “operational conflict” with state law. The major takeaways for municipal attorneys:

- These two decisions reset the analytical framework for home rule preemption cases in Colorado by “clarifying” prior case law, and will probably be cited for years to come as the starting point for the analysis,
- Plaintiffs claiming home rule ordinances are preempted by state law need not prove their case “beyond a reasonable doubt.”
- In these and future cases, the courts must clearly break the pre-emption analysis into two distinct steps: First, identifying whether the subject of the ordinance is a matter of local, mixed or statewide concern (applying the *Denver v. State* criteria); then and only then analyzing whether there is a conflict between the ordinance and state law.
- In almost all cases, this two-part analysis will merely involve a “facial evaluation” of the local and state laws, without the need for elaborate fact-finding, and with the determination made as a matter of law.
- Even in matters of “statewide concern” or areas where there is a “dominant state interest,” municipal ordinances on the same subject are not necessarily preempted unless they are in conflict with the state law. In other words, a finding of “statewide concern” does not necessarily equal field preemption!
- Once again in these cases, industry arguments for “implied preemption” (*i.e.* a form of field preemption) in the field of oil and gas regulation are rejected. In fact, the decisions reflect a strong disfavor for implied preemption. If the state legislature intends to entirely preclude municipalities from regulating in a particular field, they should say it explicitly.
- Having rejected the argument that state law impliedly preempts any municipal regulation of oil and gas drilling, cities and towns are still free to adopt some forms of regulation affecting the industry, particularly land use regulations. According to the court, it may even be possible for municipalities to regulate the “technical aspects of oil and gas operations” as long as the local regulations do not conflict with state law.

- In close preemption cases, the test for conflict will tend to be whether the local law would “materially impede or destroy a state interest,” i.e. “operational conflict.” The more simplistic rule—does the local law permit what the state prohibits or vice versa—is too narrow to cover all situations where a local law might be trumped by state interests.
- A five-year moratorium on fracking is just as much in operational conflict with state law as a total ban. (But there are hints in the *Ft. Collins* decision that a shorter moratorium might have been defensible.)

*City of Longmont v. Colorado Oil and Gas Association*, 369 P.3d 573 (Colo. 2016); *City of Fort Collins v. Colorado Oil and Gas Association*, 369 P.3d 586 (Colo. 2016).

***Englewood can ban sex offenders from registering in 99% of their community (and perhaps so can every other city?)***

A few months before the fracking decisions, the Supreme Court refused to engage in an “operational conflict” analysis in a case involving regulation of registered sex offenders, *Ryals v. City of Englewood*, 364 P.3d 900 (Colo. 2016). Englewood and at least five other municipalities impose strict locational restrictions on where set offenders may register their residence, tantamount to a *de facto* ban on any practical ability to register anywhere in the municipality. The 5-2 decision upholding Englewood’s ordinance turned largely on a 2012 amendment to the registration statutes allowing local police departments to refuse to accept a registration for a residence address that would violate any local law. §16-22-108(1)(a)(I), C.R.S. (The 2012 amendment was adopted as a component of legislation designed to clarify how *homeless* sex offenders can and must register some sort of residential address.)

The holding included these pearls of wisdom, likely helpful to cities in future preemption cases:

- The majority rejected plaintiff’s argument that the state, by its silence on residential location restrictions, *authorized* registered sex offenders to live anywhere. “If legislative silence amounted to authorization, then it would be virtually impossible for local governments to restrict anything.”
- In order to prove a conflict with state law, the conflict cannot merely be hypothetical or “potential.” The majority opinion stated: “our test for conflict does not suggest that any *potential* conflict must be deemed a conflict. State law and home-rule ordinances conflict where they ‘cannot coexist’ and are ‘irreconcilable.’”

In his dissenting opinion, Justice Hood focused extensively on the extraterritorial impact (i.e. the domino effect) of Englewood’s ordinance, and the likelihood that the

state's interest in reintegrating sex offenders into communities would be frustrated if enough cities copy Englewood's approach.

Coincidentally, an important decision regarding sex offender registration laws was also rendered in the Tenth Circuit, *Shaw v Patton*, 823 F.3d 556 (10th Cir., 2016). The plaintiff claimed the requirement that he register as a sex offender when he moved to Oklahoma was an unconstitutional *ex post facto* law. The court disagreed, primarily based on a finding that the registration requirement is not a form of "punishment." Notably, the court also addressed the argument that Oklahoma's locational restrictions on where sex offenders can reside amounted to a form of "banishment," (i.e. a form of "punishment" with ancient origins). Unlike Colorado, Oklahoma enforces setbacks from schools, parks, etc. through a uniform *state* law. But the court held that the restrictions did not amount to "banishment" because they did not prohibit the presence of the sex offender in entire "communities."

---

## ELECTIONS AND PETITIONS

### ***Redistricting in proportion to eligible, voting age population not required***

Local governments, like states, are required to draw their electoral districts following one-person-one-vote principles, with a roughly proportional amount of population in each district. *Avery v. Midland County*, 390 U.S. 474 (1968). This year, a unanimous U.S. Supreme Court rejected a novel argument that state and local governments should be required to draw their electoral districts based on the number of lawfully eligible electors of voting age in each district, not the total number of people in each district. Such a rule would radically change the size and shape of electoral districts, particularly in areas with a large population of immigrants who are not eligible to vote, and people under the age of eighteen. *Evenwell v. Abbott*, 136 S.Ct. 1120 (2016).

### ***Small-dollar "issue committees" still cannot be compelled to report to the SOS***

For at least the fourth time, the state or federal courts in Colorado have confirmed that the overwhelming complexity and expense of reporting campaign contributions cannot be applied to small-dollar "issue committees" without violating the First Amendment. Each time the courts have ruled in this manner, however, they have only done so on an as-applied basis, and have refused to facially invalidate the \$200 trigger originally imposed in Amendment 27 of 2002, or to specify exactly how many dollars in contributions and/or expenditures can constitutionally trigger a reporting requirement. This year's case simply held that \$3500 in expenditures by a group opposing the various "personhood amendments" to the Colorado Constitution should not trigger reporting

requirements. *Coalition for Secular Government v. Williams*, 815 F.3d 1267 (10th Cir., 2016).

***Opponents have only five days to file a pre-election challenge to a candidate's residency***

For the third time in three years, the Colorado Supreme Court returned to a situation where a candidate's residency qualification is challenged right before the election (i.e. when ballots have been printed and circulated, but the election has not been completed yet). The court confirmed that, under the UEC, anyone wishing to challenge a candidate on the basis of residency has only five days to do so after the clerk certifies the candidate for the ballot, per §1-45-501 (3), C.R.S. *Carson v. Reiner*, 370 P.3d 1137 (Colo. 2016).

***"Clear title requirement" means ballot questions should communicate "significance" of proposed changes to the law***

As is true in any state general election year, many challenges to state ballot titles were heard in the Colorado Supreme Court in 2016 under both the single-subject rule or the "clear title requirement" or both. Perhaps the decision of greatest interest to municipalities would be *In the Matter of the Title, Ballot Title and Submission Clause for 2015-2016 #73*, 369 P.3d 565 (Colo. 2016), rejecting the title for a proposed constitutional amendment that would have radically changed the way state and local recall elections are conducted in Colorado. Generally a ballot title cannot and should not try to "interpret" how the proposal will be construed and applied if adopted. But a "clear title" can and should communicate to the voters the general import of the change. In this case, the proposed title was too generic and simply too matter-of-fact, such that it did not communicate how radically it would alter the current law governing recalls.

***Are pro bono legal services provided to campaign committees a type of "contribution" under Colorado campaign finance laws?***

Interpreting Amendment 27 to the Colorado Constitution in combination with the Fair Campaign Practices Act, the court of appeals held that *pro bono* legal services provided to a campaign committee are a type of in-kind contribution that must be valued, reported, and otherwise subject to the limitations of state campaign finance laws. And this is true even if the legal services are not directly related to promoting the election of the candidate. The Colorado Supreme Court has agreed to review this important ruling. *Campaign Integrity Watchdog v. Coloradans for a Better Future*, 2016 WL 1385668 (Colo. App., April 7, 2016).

## EMPLOYMENT

### ***More guidance on vested employment rights for public employees***

In 2014 the Colorado Supreme Court rendered an important decision on the question of whether or not a law creates an immutable “contract” right enjoyed by public employees in the case of *Justus v. State of Colorado*, 336 P.3d 1041 (Colo. 2014). This year, the court of appeals returned to the same subject, and held that a 2010 change to state law affecting the employment rights of public school teachers potentially created both a Contract Clause and a Due Process claim on behalf of non-probationary teachers. The 2010 law was designed to make it easier for school districts to place low-performing teachers on indefinite unpaid leave, rather than reassigning them from school to school as had been the case under prior law. The case was remanded for further consideration under the standards set forth in *Justus*, but local government attorneys can anticipate that this dispute will eventually result in additional reported decisional law in the future on the question of how and when a law creates a “contract” or “property interest” in public employment. *Masters v. School District No. 1*, 2015 WL 6746229 (Colo. App., November 5, 2015); *cert. granted* (2016).

### ***High court clarifies standards for showing firefighters’ cancers are not likely to be job-related in WC cases***

In 2006 state workers compensation statutes were amended to create a rebuttable presumption that certain types of cancer contracted by firefighters are job related, and thus subject to payment of WC benefits. Sec. 8-41-209, C.R.S. In three separate unanimous decisions this year, the Colorado Supreme Court corrected inconsistent interpretations of the law made at the administrative or lower court level since 2006, each time supporting the ability of municipalities to rebut the claim. *City of Littleton v. Industrial Claim Appeals Office*, 370 P.3d 157 (Colo. 2016), *Industrial Claim Appeals Office v. Town of Castle Rock*, 370 P.3d 151 (Colo. 2016); *City of Englewood v. Harrell*, 370 P.3d 139 (Colo. 2016). The most crucial ruling came in the *Littleton* case: the employer can meet its burden of persuasion by establishing the “absence of either general or specific causation.” (Emphasis supplied.) In other words, the employer can overcome the presumption by showing in general that the type of cancer suffered by the firefighter is probably not associated with any exposure with carcinogens the firefighter actually or potentially experienced on the job. The Castle Rock decision also demonstrated how the employer can overcome the presumption by showing that the type of cancer in question (e.g. skin cancer) is probably attributable to factors occurring outside the workplace.

## ***Standards of behavior for public safety officers can and should be higher than for other public employees***

Two employment disciplinary cases arising out of the Denver Sheriff Department in 2016 make a similar point about strict enforcement of conduct rules against law enforcement officers.

The Colorado Court of Appeals agreed with Denver and its Career Service Board that a sheriff deputy can be punished for “conduct unbecoming” of a public safety officer under the departmental rules of the DSD, regardless of whether or not the conduct caused “actual harm” to the city. (In this case, the male deputy had engaged in inappropriate sexual interactions with a female subordinate and threatened retaliation if she filed a sexual harassment complaint.) Employees in any “paramilitary” organization are simply held to a higher standard, and any regulation of police behavior designed to cultivate the highest ethical standards is entitled to deference by the courts as a matter of public policy. *Khelik v. City and County of Denver*, 2016 WL 1385323 (Colo. App., April 7, 2016)

Another decision in the court of appeals addressed the so-called “locker room culture” or “culture of sexual banter” between some members of the DSD. Sheriff department rules prohibit DSD employees from engaging in “immoral, indecent or disorderly conduct.” The courts agreed with the city that the “culture” of the department is no excuse for inappropriate sexual banter in the workplace, and the intent of the employee making sexually suggestive comments is irrelevant. The inappropriateness of the comments should be evaluated under an “objective standard.” *City and County of Denver v. Gutierrez*, 2016 WL 2962030 (Colo. App., May 19, 2016).

## ***Work-related mental health problems don't necessarily preclude unemployment comp benefits***

A longtime employee of the Mesa County Public Libraries ran into problems with her new boss. Shortly after arriving the new boss demanded reports from the employee, and then criticized the quality of the reports. This sent the employee into an emotional tailspin, and she was diagnosed by her doctor with depression and anxiety disorders. Her condition led to more performance problem, soon leading to her termination. Terminated employees in Colorado have a right to claim unemployment benefits as long as the termination was through no fault of their own. An ALJ denied benefits on these facts because the chain of events was set in motion by the employees own poor performance. But, a split panel of the court of appeals reversed, with the majority finding that the employee was not at fault for the mental health problems that ultimately led to her dismissal. The dissenting judge said, “I fear the majority’s application of the law will encourage underperforming employees to claim that they ultimately cannot be held responsible for their poor job performance merely because that poor performance caused them stress.” *Mesa County Public Library District v. Industrial Claim Appeals Office*, 2016 WL 3365012 (Colo. App., June 16, 2016).

## FIRST AMENDMENT

### ***Speech retaliation claim actionable, even when the retaliation is based on a mistake of fact***

A 6-2 majority of the U.S. Supreme Court agreed that a public employee can bring a First Amendment speech retaliation claim, even when the adverse employment action suffered by the employee was based on a mistake. In this case, a police officer was demoted, allegedly because he was observed picking up a yard sign for the incumbent mayor's opponent prior to an upcoming election. (The police chief was politically aligned with the incumbent mayor.) The officer was actually picking up the sign for his mother, and thus was not engaged in speech or expressive activity on behalf of himself. Nevertheless, he stated an actionable claim for a First Amendment violation. Retaliation should be discouraged, regardless of whether the speech against which the retaliation is directed was real or perceived. *Heffernan v. City of Paterson*, 136 S.Ct. 1412 (2016).

### ***Whistleblowing by internal auditor not protected speech***

An important speech retaliation case in the Tenth Circuit this year reviewed the recent holding by the U.S. Supreme Court in *Lane v. Franks*, 134 S.Ct. 2369 (2015) and determined that *Lane* did not appreciably change the rule previously enunciated in *Garcetti v. Ceballos*, 126 S.Ct. 1861 (2006). In order to evaluate whether speech by a public employee occurring in the course and scope of employment is protected against a retaliatory employment action, "both *Lane* and *Garcetti* direct us to focus on whether the employee's speech was within the scope of the employee's usual duties, not whether the speech was frequent, usual, or customary."

In this case, an internal auditor for the Adams 12 Five Star School District pulled rank and went directly to school board members with complaints about alleged budgetary irregularities (even though the allegations had been fully and fairly vetted and dismissed by the superintendent and the CFO for the district). The auditor was essentially alleging that the district's reserves were being underreported in the budget, thus hiding money from the teachers' union and others. Her "inability to move past her discredited budget concerns meant that she could no longer be an unbiased and productive employee," leading to her termination. The Tenth Circuit affirmed the district court's dismissal of the auditor's First Amendment speech retaliation claim, even though her decision to take her concerns directly to school board members was outside her customary chain of command, because reporting on irregular budgetary practices is precisely what an internal auditor is hired to do. *Holub v. Gdowski*, 802 F.3d 1149 (10<sup>th</sup> Cir. 2015).

## ***Can speech be restricted on the sidewalks and plazas adjacent to public buildings?***

In a very important ongoing case, the Tenth Circuit upheld a preliminary injunction entered against the chief judge of the Second Judicial District (i.e. the judicial district that encompasses Denver County), preventing the judicial district from banning certain “jury nullification” protestors from handing out leaflets on the sidewalks leading to the courthouse. The appellate court went above and beyond, however, and included an exhaustive review of case law from throughout the country on the nature of the “forum” space in and around court houses, strongly implying that the walkways directly leading into the courthouse need not be considered “public forum” space, and that speech and protest activities can be regulated in these areas on a content-neutral basis. The appellate panel appeared to be perplexed that neither the city nor the state had developed this argument at the preliminary injunction stage of the proceedings. (Indeed, Denver stipulated that the plaza and walkways adjacent to the courthouse were in fact public forum space.) *Verlo v. Martinez*, 820 F.3d 1113 (10th Cir. 2016).

## ***Aurora/Gaylord litigation ends on a First Amendment note***

Several years ago Aurora received state approval under the Regional Tourism Act for an \$81 million tax subsidy to assist with the financing of the Gaylord hotel and convention facility project near DIA. In 2013 a group of hotel owners sued asking the state to withdraw the subsidy, but their case was dismissed last year due to their inability to prove “competitor standing.” *1405 Hotel, LLC v. Colorado Economic Development Commission*, 370 P.3d 309 (Colo. App., 2015).

In the meantime, Aurora attempted to turn the tables and sue the hotels for filing the original suit, claiming the suit amounted to tortious interference with contracts, a civil conspiracy, etc. The hotels successfully moved to dismiss Aurora’s complaint on the theory that Aurora was punishing them for exercising their First Amendment right to petition the government for redress of grievances in the first suit, citing the precedent laid out in *Protect Our Mountain Environment, Inc. v. District Court*, 677 P.2d 1361 (Colo. 1984). Generally, plaintiffs have a right to sue the government on a matter of public concern without fear of retaliation by a third party, as long as the suit is not “devoid of objectively reasonable factual support or, if so supported, was lacking a cognizable basis in law.” Even though the hotels’ original case was tossed for lack of standing, the court of appeals in the second case held that none of the claims in the original suit could be considered a “sham” or devoid of merit, or filed simply to harass Aurora or the State of Colorado. Thus it was appropriate for the trial court to dismiss Aurora’s countersuit on the basis of the First Amendment principles enunciated in the *POME* case. *City of Aurora v. 1405 Hotel, LLC*, 371 P.3d 764 (Colo. App., 2016).

## GOVERNMENTAL IMMUNITY ACT

### ***Immunity determinations regarding individual public officers and employees are subject to interlocutory appeal***

In *Martinez v. Estate of Bleck*, 2016 WL 4819318 (Colo., September 12, 2016), a unanimous Colorado Supreme Court corrected a couple of egregious rulings by the lower courts that had misinterpreted the CGIA on the subject of interlocutory appeals. The case involved tort claims against an Alamosa police officer who was trying to subdue a suicidal man and accidentally shot the man in the leg. Incredibly, the trial court ruled that the plaintiff's claim that the shooting was "willful and wanton" must be allowed to proceed to trial, and the court of appeals took the position that this ruling was not subject to interlocutory appeal. The Supreme Court restored order by clarifying that tort claims against individual public employees (including willful and wanton claims) are as much subject to a *Trinity* hearing (where the trial court is supposed to determine all jurisdictional immunity questions as a matter of law) and an interlocutory appeal, as are claims against the public entity itself. Furthermore, the high court corrected the trial court's erroneous application of a "negligence standard" to the officer's behavior. Conduct must "exhibit a willful disregard for danger" in order to be considered "willful and wanton" under the CGIA.

### ***CGIA does not apply to claims to prevent future injury***

A novel CGIA argument was asserted by a *private* litigant in the case of *Open Door Ministries v. Lipschuetz*, 373 P.3d 575 (Colo. 2016). The city had issued a zoning permit to Open Door for a congregate living facility for "people in need," characterizing the use as a rooming house. A neighbor sued, claiming the use was misclassified under Denver's zoning code, and that the city should have treated the use as a group home/residential care facility. During the course of the litigation, Open Door cross-claimed against the city to prevent revocation of the permit under an estoppel theory. Denver took the position that it could not and would not revoke the permit. But the neighbor attempted to overcome the cross-claim on the theory that the estoppel claim "could lie in tort," and Open Door had never filed a notice of claim under the CGIA. A unanimous Colorado Supreme Court disagreed, noting that a claim for declaratory or injunctive relief to prevent *future* injury is simply not subject to the statute. The CGIA only governs claims for damages associated with injuries that have already occurred.

### ***Mere presence of zip line on school playground may constitute a "dangerous condition"***

Generally, in order to prove a "dangerous condition" of a "facility" in a park or recreation area, leading to potential tort liability under the CGIA, a plaintiff must establish that a "physical condition" of the facility led to the injury. However, the court of appeals for the first time this year interpreted this requirement very broadly to include

situations where a particular device, like a child’s zip line on an elementary school playground, even if perfectly installed and maintained, can nevertheless create tort liability on the theory that it is “inherently dangerous.” In the court’s view, the “facility” is the playground as a whole, and the “physical condition” of the playground that leads to tort liability is the mere existence of the zip line as one apparatus installed in the playground. The decision also turned on the fact that manufacturer warning labels for the zip line recommended adult supervision; and the case was remanded for further fact finding regarding whether the school district’s decision to allow the zip line in the first place constituted an act of negligence. *Loveland v. St. Vrain School District*, 2015 WL 5607645 (Colo. App., September 24, 2015); *cert. granted* (2016).

### **When does a “deteriorated roadway” present an “unreasonable risk” under the CGIA?**

This is a “novel question” according to a just-released opinion from the Colorado Court of Appeals. Under the CGIA, the state and municipalities are potentially liable in tort for damage or injury caused by the dangerous physical condition of the surface of a roadway, but only when the condition represents an “unreasonable risk” according to the language in the statute. The case involved a motorcycle accident on a Denver street, upon which the city official in charge of pavement management characterized the surface condition as being “dangerous but not dangerous enough to fix.” The court of appeals reversed the dismissal of the case by the trial court and held that the plaintiff had adduced enough evidence at the *Trinity* hearing to go forward with her claim that the surface conditions created an “unreasonable risk” to traffic. Most ominously, the court conflated the maintenance language of the CGIA with the concept of “reasonableness” and apparently held that public entities have a duty to continuously maintain and restore street surfaces up to the standard they were in when they were originally built, in order to avoid the conclusion that the surface creates an “unreasonable risk.” *Sean Dennis v. City and County of Denver*, 2016 WL 5219967 (Colo. App., September 22, 2016).

---

## **MARIJUANA**

### ***MMJ “home grow” for self-use versus criminal intent to distribute?***

Fraud in the world of medical marijuana lay at the heart of another court of appeals decision this year. Law enforcement agencies have struggled for years in Colorado with situations where clever entrepreneurs use their medical marijuana registrations as a subterfuge to hide a criminal MJ distribution operation. This year, the court of appeals affirmed the conviction of a defendant who, along with her partner, operated sizeable growing operation in her mobile home in Federal Heights. The two residents claimed MMJ registrations allowing them to possess 24 plants. But police

found 28 plants in the home supported by a “sophisticated and elaborate” growing operation, along with two and a half pounds of plant material, three guns, and \$1000 in cash. The appellate court agreed that these facts supported a reasonable inference by the jury that the defendant possessed the marijuana with the “intent to distribute” within the meaning of the Colorado Criminal Code.

The decision included an interesting sidelight issue with the appellate court agreeing that the trial court did not commit reversible error when the lower court refused, under CRE 702, to certify a witness who claimed to be a “self-taught” expert in medical marijuana grows. The would-be “expert” testified that “in 2006 he suddenly began constructing marijuana grows” and he had acquired “superior skill through on the job training” since then. This sort of experiential learning, with nothing more, fell short of qualifying the witness as an expert under CRE 702. *People v. Douglas*, 2015 WL 6306529 (Colo. App., October 22, 2015).

### ***The odor of marijuana may still signal criminal activity***

A 6-1 majority of the Colorado Supreme Court agreed that, since many aspects of marijuana remain illegal notwithstanding the adoption of Amendment 64, the smell of marijuana can still be a factor in establishing probable cause to search a vehicle. The court upheld the search of a vehicle with Iowa license plates heading east on I-76 in Weld County, resulting in the discovery of a pound of raw marijuana three-quarter of a pound of marijuana concentrate, far in excess of the legal limit. The decision begs the question of whether the odor standing alone would be sufficient, because in this case the odor was just one factor considered as part of the “totality of the circumstances,” including other suspicious behavior by the occupants of the vehicle. *People v. Zuniga*, 372 P.3d 1052 (Colo. 2016)

---

## **OPEN MEETINGS/OPEN RECORDS**

### ***Action taken by a public body without any meeting at all violates the OML***

Typically, litigation under the Colorado Open Meetings Law involves a situation where a state or local public body has gathered in violation of the law, taken some official action, and then is sued by a plaintiff seeking to invalidate the action. But what happens when a public body purports to take an action without meeting at all? On this remarkable question of first impression, the court of appeals ruled this year that plaintiffs can use the OML to challenge actions taken by or in the name of a public body that did not convene an official meeting before taking the action. The case centered on these facts: Within the Colorado Department of Corrections, the Approved Treatment Provider Review Board is charged with the responsibility of approving or denying certificates to entities applying to provide sex offender treatment services. However, the board had a custom and practice of delegating to two individual board members the responsibility to

review and act upon individual applications. In this case, plaintiff’s application was rejected by two board members, acting without a meeting. Both the trial court and the court of appeals agreed that the rejection violated the OML due to the board’s failure to meet and take action in a public setting, and moreover the plaintiff was entitled to attorney fees for proving the violation. *Wisdom Works Counseling Services, P.C. v. Colorado Department of Corrections*, 360 P.3d 262 (Colo. App. 2015).

### ***“Personnel file” exception in CORA protects very little***

This year, the Colorado Court of Appeals echoed its earlier holding in the watershed case of *Daniels v. Commerce City*, 988 P.2d 648 (Colo. App., 1998), and ruled that the “personnel file” exception in the Colorado Open Records Act protects little more than “demographic” information about public employees. The case centered on a request by some Jefferson County residents to see sick leave records of teachers who conducted a “sick-out” in protest of certain school board policies. Besides the fact that sick leave records do not fall within the narrow exception for “personnel files,” the court held that such records must also be disclosed under the affirmative language in CORA that requires records associated with “compensation” to be made public on demand. In this case, the school district did not deny that it had an obligation to release the records; instead it was the teachers’ union that attempted unsuccessfully to resist the release of the records. *Jefferson County Education Association v. Jefferson County School District R-1*, 2016 WL 241605 (Colo. App., January 14, 2016); *cert. denied* (2016).

IMPORTANT FOOTNOTE: the court hinted that, even when an attempt to withhold employee records under the personnel file exception may prove unavailing, it is possible that certain employment-related records may be shielded under other sections of CORA, for example the general authority to withhold records on the basis that disclosure would be contrary to the public interest, or under the deliberative process privilege, etc.

---

## **POLICE CIVIL LIABILITY**

### ***Government defendant can’t recover attorney fees under Sec. 1988 absent a finding that the claims were frivolous***

In a police civil liability case, or any other case brought under 42 U.S.C. §1983, the “prevailing party” may claim attorney fees under §1988. This language in the federal statute itself is neutral, implying that either plaintiffs or defendants may seek attorney fees. But the statute has long been interpreted to say an award to a prevailing defendant is justified only if the “the plaintiffs action was frivolous, unreasonable, or without

foundation.” Thus, attorney fee awards to defendants are extremely rare under the statute. This year, the U.S. Supreme Court reaffirmed that state courts are bound by this interpretation when handling §1983 claims at the state level, and cannot award attorney fees to a prevailing defendant absent a proper finding. *James v. City of Boise*, 136 S.Ct. 685 (2016). On remand, the Idaho Supreme Court did indeed make such a finding, and awarded the city a portion of its attorney fees on the basis that the plaintiff’s claims and appeals were frivolous. *James v. City of Boise*, 160 Idaho 466 (2016).

### ***Phony arrests do not support claim of malicious prosecution***

A “civilian fleet manager” who was also a “volunteer reserve police officer” for the City of Albuquerque took it upon himself to arrest several women for prostitution offenses, even though he lacked any arrest authority. The city subsequently vacated the convictions, but the women sued for Due Process violations anyway, claiming malicious prosecution. The Tenth Circuit affirmed dismissal of their civil case, because one element of a malicious prosecution claim in federal court is a showing that “the original proceeding terminated in favor of the plaintiff.” In this case, though the plaintiffs’ convictions were vacated, the vacation did not admit or concede that the plaintiffs were actually innocent in their original criminal cases. *M.G. v. Young*, 826 F.3d 1259 (10th Cir. 2016)

### ***911 operator not liable for “incompetent” and “foolish” decisions that placed victim at risk***

The Tenth Circuit reversed a district court ruling and granted qualified immunity to a Denver 911 dispatcher who gave tragically bad advice to a caller, leading to the caller’s death. The caller had reported that the car in which he was driving had been attacked by unknown assailants, before the assailants and the victims both fled the scene. The operator inexplicably directed the caller to return to Denver in order to receive a police response, and to make their vehicle obvious. At which point the assailants returned, spotted the vehicle again and murdered the caller. Despite these terrible facts, the appellate court ruled that the dispatcher enjoys qualified immunity, because civil rights liability under these facts is not “clearly established.” Substantive due process claims under a “danger creation” theory are only possible when a public officer or employee restrains a person’s freedom of movement in some way, thus increasing the person’s risk of harm by a third party. The courts was simply unable to find any reported decision anywhere in the U.S. that involved claims against a police dispatcher and resembled the facts of this case. *Estate of Jimma Pal Reat v. Rodriguez*, 824 F.3d 960 (10th Cir. 2016).

***No Fourth Amendment “seizure” when a “find-and-bite” police dog attacks someone accidentally***

A 4-2 majority of the Colorado Supreme Court affirmed a decision of the court of appeals (albeit on slightly different reasoning) and held that a police dog effects a Fourth Amendment seizure only when it bites the person who the dog’s handler intended it to bite, i.e. the seizure occurred “by means intentionally applied.” More broadly, the decision may stand for the proposition that people who are accidentally injured due to a police action are not construed to suffer an actionable Fourth Amendment seizure. *Sebastian v. Douglas County*, 266 P.3d 601 (Colo. 2016).

---

**PUBLIC WORKS AND UTILITIES**

***Acceptance of dedicated roadways does not create a “contract” to perpetually maintain the roadway***

In a truly unique cause of action, a large group of homeowners in unincorporated Boulder County sued the County Commissioners claiming that the county had a contractual obligation to repair the internal roadways in their subdivisions. They claimed this “contract” arose when the county accepted the dedication of the roads from the original developers of the subdivisions, thus incorporating the roads into the overall county road system. The condition of the roads had deteriorated in recent years due to county budget cut-backs for road maintenance. The court of appeals agreed with the county that no such “contract” existed. Simply put, the residents had no standing to bring a claim of this nature because they could identify no “legally protected interest” in state law that would afford them such standing. *Wibby v. Boulder County Board of County Commissioners*, 2016 WL 3600291 (Colo. App., June 30, 2016).

***Xcel Energy and Boulder continue to battle over municipalization of electric system***

In 2011 Boulder voters approved the acquisition of the local electric infrastructure currently owned by Public Service Company of Colorado (Xcel Energy), but only if certain conditions precedent are met regarding price and services. The parties are engaged in a running debate over whether the pre-conditions have been or can be satisfied. This year, the court of appeals ruled that the trial court lacks jurisdiction under Rule 106 to hear Xcel’s challenge to the process because a “final agency decision” has not yet been made by Boulder. *Public Service Company of Colorado v. City of Boulder*, 2016 WL 5219966 (Colo. App., September 22, 2016).

## **SPECIAL DISTRICTS**

### ***Landmark Towers decision rocks the world of “developer districts”***

Title 32, C.R.S. has always required an election to form a special district, and TABOR requires the taxes and debt of any newly formed district to be voter-approved as well. In so-called “dirt districts” where there are not yet any electors residing in the district, developers have long used the technique of subdividing a very small parcel of the property and entering into contracts to purchase portions of the property with a handful of persons who thus become the “electors” to participate in the organizational elections for the district. In the case of *Landmark Towers Assn. v. UMB Bank, N.A.*, 2016 WL 1594047 (Colo. App., April 21, 2016) the court of appeals determined such an election arrangement to be a “sham,” resulting in the conclusion that taxes collected pursuant to such an election are subject to refund under TABOR.

The case presented particularly bad facts due to the circumstances in which the metropolitan districts were originally formed in Greenwood Village in 2005 to fund infrastructure for the Landmark and an adjacent development. Persons under contract to purchase condominiums in the Landmark Towers were not informed of the election which would impose upon them a tax burden to pay for infrastructure on the adjacent property. This, too, constituted a TABOR violation according to the court of appeals.

The issuance of the Landmark Towers decision on April 21, just a couple of weeks before the General Assembly was scheduled to adjourn, caused lobbyists and legislators to scramble to do damage control. SB 16-211 was introduced and adopted to provide partial protection for existing and proposed metropolitan districts that used election procedures virtually identical to those that were called a “sham” by the court of appeals.

### ***More angst over “developer district” as alter ego of private developer***

Several recent reported decisions in Colorado have explored the relationship between private developers and the metropolitan districts created and controlled by those developers under Title 32 to finance and build public infrastructure. Forest City Stapleton, Inc. is the master developer for the old Stapleton Airport site in Denver, and formed the Park Creek Metropolitan District to build infrastructure associated with the project. A much-ballyhooed aspect of the project has been the use of recycled runway concrete to serve as the base course for streets constructed in the development. However, a plaintiff claimed that the recycled concrete leached calcite into the soil and caused subterranean drainage problems that damaged the basement in his home. He sued Forest City under a nuisance theory and for breach of implied warranty. A split panel of the court of appeals held that a jury verdict against Forest City on the nuisance claims should

be tossed out, because it was the metro district, not the developer, who actually caused the recycled concrete to be installed beneath the streets in Stapleton. The dissenting judge observed that Forest City essentially acted as an alter ego of the district board and thus the jury was justified in holding Forest City accountable.

On the second claim, a different 2-1 majority of the panel held for the first time in Colorado that a master developer can be held liable under an implied warranty of habitability theory simply for selling an unimproved lot to a homebuilder, who in turn sells a constructed home to a homebuyer. This ruling will be heard in the Colorado Supreme Court, given its unique and pervasive impact on land development throughout the state. *Rogers v. Forest City Stapleton, Inc.*, 2015 WL 7293730 (Colo. App., November 19, 2015); *cert. granted* (2016).

### ***Aggrieved taxpayer in a special district can seek recourse with BAA***

Special district service plans approved under Title 32 commonly include an overall cap on the maximum property tax rate that may be imposed upon property owners in the district. This year the court of appeals held that such a cap obviously says what it means and means what it says. More remarkable, however, was a ruling by the court on a question of first impression about how and where an alleged violation of the cap can be adjudicated. The court held that a property owner who believes the cap has been unlawfully exceeded can take his case to the county board of assessment appeals, under the provision of the statute which give the BAA jurisdiction over a refund claim based upon any “irregularity in levying” property taxes. While this case dealt with the specific wording of a particular service plan of a Title 32 special district located in Mt. Crested Butte, it could open a whole new horizon of county BAA jurisdiction in any case where an aggrieved taxpayer claims that any type of taxing entity has exceeded its lawful taxing authority. *Prospect 34, LLC v. Gunnison County Board of Commissioners*, 363 P.3d 819 (Colo. App., 2015).

### ***“Authority” to provide a metro district service does not necessarily equate to a responsibility to do so***

When the approved service plan for a metropolitan district “authorizes” the district to engage in various services, and then the district fails to provide one of the authorized services, this failure does not constitute a “material modification” of the service plan. Depending on the language of the service plan and other circumstances in the case, the courts may not compel a district to provide the service. *Indian Mountain Corporation v. Indian Mountain Metropolitan District*, 2016 WL 1745824 (Colo. App., August 11, 2016).

## TAXATION AND FINANCE

### ***Individual state legislators can't sue to overturn TABOR***

Last year the U.S. Supreme Court definitively clarified the circumstances under which a state legislature enjoys “institutional standing” to challenge a voter-initiated state constitutional amendment on the theory that the amendment violates the U.S. Constitution. *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S.Ct. 2652 (2015). While the “institution” enjoys such standing, individual legislators certainly do not. Thus the Tenth Circuit was required to revisit an earlier ruling to the contrary, and hold that five individual Colorado state legislators who have been suing over the last several years in an attempt to overturn TABOR (on the theory that TABOR violates federal guarantee that every state must have a “republican form of government) lack standing to continue the suit. *Kerr v. Hickenlooper*, 824 F.3d 1207 (10th Cir., 2016)

### ***Education funding advocates fail again in effort to enforce constitutional spending mandates***

For the second time in two years, plaintiffs seeking more state spending for K-12 education failed to win their case in the Colorado Supreme Court. In 2013, a 4-2 majority of the high court ruled that current state practices for funding schools complies with the constitutional mandate for a “through and uniform” public school system in Colorado. *State v. Lobato*, 304 P.3d 1132 (Colo. 2013). This year the same four-justice majority (Rice, Coates, Eid, and Boatright) upheld 2010 statutory amendments to the School Finance Act that have actually had the effect of reducing state spending for schools, even though a 2000 state constitutional amendment (Amendment 23) was widely understood to have required annual increases in per-pupil funding by the state. The majority opinion contains a fascinating and fairly lucid explanation of the statutory formulas used by the state to calculate per-pupil spending, both before and after 2010.

For local government attorneys, the case also provides a brilliant example of how a ballot issue which promises voters additional spending for a particular purpose can later be reinterpreted to provide no additional resources for that purpose at all, *e.g.* when the promise of increased spending from one source is not accompanied by a “maintenance of effort” requirement that spending not be decreased from other sources for the same purpose. *Dwyer v. State*, 357 P.3d 185 (Colo. 2015).

### ***State severance tax revenue takes a big hit***

Municipalities that depend heavily on state-shared severance tax revenue were stunned by an April decision by the Colorado Supreme Court, *BP America v. Colorado Department of Revenue*, 369 P.3d 281 (Colo. 2016), that significantly undermines the way the DOR has been calculating deductions until now. The court ruled that oil and gas companies must be allowed to deduct their “cost of capital” as a type of transmission

expense. In this case, BP was entitled to a refund of \$1.3 million based on just two tax years. In the wake of the decision, the state estimated that as much as \$100 million in additional refunds may be at stake now, and hastily adopted SB 16-218 to embargo \$48 million in local distributions until the state exposure to refund claims can be sorted out.

### ***Aspen grocery bag “fee” is not a “tax” under TABOR***

In 2011 the City of Aspen adopted an ordinance banning plastic grocery bags and imposing a twenty cent “waste reduction fee” on use of paper bags. The city was sued on the theory that the “fee” was actually a “tax” that should have been submitted for voter approval under TABOR. The court of appeals upheld the fee, thus continuing the strong trend in Colorado case law upholding the authority of state and local governments to structure new fee-based programs without a vote. In particular, the decision once again evinced a very liberal view toward the nexus between a fee and the benefits received by the fee payer:

“The payor of the waste reduction fee obtains a number of services, including reusable carryout bags, availability of recycling containers and waste receptacles, trash cleanup events, and various waste reduction and recycling educational services . . . the fact that the payor of the waste reduction fee may choose not to take advantage of the reusable carryout bags or the education, community outreach, or other trash and waste reduction efforts that the charge funds does not bar its consideration as a fee.”

The Colorado Supreme Court recently granted a petition for writ of certiorari in this case, and promises to revisit the entire paradigm for distinguishing taxes and fees, including this intriguing question: “Whether Aspen’s levying of a \$0.20 charge on every disposable paper bag provided by a grocer, which was imposed for the primary purpose of affecting customers’ behavior and to fund services available to all Aspen residents, is a tax subject to TABOR.” *Colorado Union of Taxpayers Foundation v. City of Aspen*, 2015 WL 6746311 (Colo. App., November 5, 2015); *cert. granted* (2016).

### ***Elimination of tax exemptions does not create a “new tax” or a “tax policy change” under TABOR***

TABOR subsection (4)(a) requires voter approval in advance for any “new tax” or any “tax policy change” that results in a net revenue gain to the government. The state and local governments have been challenged for years to determine what this language actually means in regard to changes in tax laws that merely redefine the scope of applicability of an existing tax.

The Regional Transportation District (RTD) and the Scientific and Cultural Facilities District (SCFD) subsist on a regional sales tax which, when originally adopted, applied to the same tax base as the state sales tax. But through the years as certain types

of sales transaction were added or deleted from the state sales tax law, conforming amendment were not made to the RTD/SCFD statutes. Thus in 2013 the legislature adopted a law to bring the RTD/SCFD sales tax bases back into synch with the state law, meaning that some transactions that were formerly exempt from the RTD/SCFD sales taxes were now subject to the taxes. Plaintiffs sued, claiming that these changes require voter approval under TABOR.

The courts rejected the plaintiffs' theories, applying a "beyond a reasonable doubt" standard. ("To hold a statute unconstitutional beyond a reasonable doubt, the constitutional flaw must be so clear that the court can act without reservation.") The elements of the 2013 statute that added items to the RTD/SCFD tax bases was neither a "new tax" or a "tax policy change" to which TABOR applied for several reasons. First, the measure was not motivated by a desire to raise new revenue but instead to promote "efficiency" in the state tax system. Second, when voters approved the creation of both the RTD and the SCFD prior to the adoption of TABOR in 1992, they authorized the districts to collect taxes on "every taxable transaction, now and in the future." Third, the 2013 legislation was not a "tax policy change" because the word "policy" means a "high level overall plan" and the legislation did not change the basic structure of the districts' original statutory tax framework. *TABOR Foundation v. Regional Transportation District*, 2016 WL 3600286 (Colo. App., June 30, 2016).

### ***County treasurers' duty of "diligent inquiry" before issuing tax deeds***

Two reported decisions in 2016 discuss and clarify the statutory duty of county treasurers to notify the last known owner of real property before issuing a tax deed. *Klingsheim v. Cordell*, 2016 WL 1321050 (Colo., April 4, 2016); *Sandstrom v. Solon*, 370 P.3d 669 (Colo. App., 2016). In the *Sandstrom* case, the court held for the first time that when a county treasurer fails to fulfill her duty of diligent inquiry and wrongfully issues a tax deed, the deed is not void *ab initio*, but instead is merely voidable if an action is brought to challenge the deed within the applicable statute of limitations, as was true in this case.

### ***YMCA prevails again in property tax battle with counties***

The YMCA has battled with Grand County and Larimer County for years over the question of whether or not the Y should enjoy a religious tax exemption for its retreat properties located in those two counties. State law in Colorado is very favorable to entities that claim a religious exemption from property taxes under the Colorado Constitution by asserting that the use of particular property is in "furtherance" of the entity's stated religious objectives, or even simply incidental thereto. Conversely, the government cannot impose its own "test of religiosity" to second-guess whether a use of the entity's property is religious enough. Such a test would unduly entangle the government in making judgements that could violate the First Amendment in either of two ways--either by favoring one self-proclaimed religious entity over another and thus violating the Establishment Clause, or discriminating against a religious entity in

violation of the Free Exercise Clause. This year, the court again agreed that the YMCA property should enjoy a religious exemption from property taxes. *Grand County Board of Commissioners and Larimer County Board of Commissioners v. Colorado Property Tax Administrator*, 2016 WL 241466 (Colo. App., January 14, 2016).

---

## **ZONING, LAND USE, and EMINENT DOMAIN**

### ***Comp plan and small area plan are merely “advisory” in informing decision to issue special use permit***

For the first time in a while, the Colorado Court of Appeals revisited the question of how adopted land use plans inform site-specific decision making. As a general rule, plans are considered merely advisory. But on several occasions the courts in Colorado have held that if plan requirements are incorporated into the local government’s regulatory structure with sufficient “specificity,” the plan itself can play an actual regulatory role. In this year’s case, a neighborhood group in the Black Forest area of El Paso County challenged the issuance of special use permit for a massive greenhouse project that they claimed violated the express terms of the “small area plan” for the neighborhood. However, both the trial court and the court of appeals held that the language in the plan, read in conjunction with the county’s overall comprehensive plan and land development code, must be considered advisory only, and did not bind the county commissioners to deny the permit. *Friends of Black Forest Preservation Plan, Inc. v. Board of County Commissioners of El Paso County*, 2016 WL 1386899 (Colo. App., April 7, 2016).

### ***Aurora City Council did not err in approving rezoning to “Sustainable Infill Redevelopment Zoning District”***

Similar to the foregoing case, the court of appeals was highly deferential to a decision by the city council in Aurora to treat some of the language in its zoning code and development regulations as being non-mandatory, when approving a rezoning and site plan for an in-fill redevelopment project. Again, the court analyzed various codes, policies and handbooks in concert, to reach the conclusion that certain approval criteria were merely discretionary and not mandatory as the complaining neighbors had asserted. On the threshold issue of standing, however, a 2-1 majority of the panel again reflected the very liberal standard in Colorado for neighbors to file a Rule 106 appeal from the approval of a site-specific rezoning, even while pleading little if any real “damage” in their complaint. *Rangeview, LLC v. City of Aurora*, 2016 WL 3885212 (Colo. App., July 14, 2016).

***GOCO money dedicated to river trail project does not nullify town’s ability to acquire a trail segment through eminent domain***

The laws governing GOCO grants to local governments generally prevent the money from being used to acquire property through condemnation. But what happens when GOCO dollars are used to finance some aspects of a trail project, but money from other sources are used to acquire one particular segment of the trail through eminent domain? On this question of first impression, the court of appeals rejected landowners’ argument that use of GOCO money on one part of a project prevents eminent domain from being used on any other part of the same project. *Town of Silverthorne v. Lutz*, 370 P.3d 368 (Colo. App., 2016).

---

**MISCELLANY**

***No right to appeal summary rejection of ethics complaints filed with the Independent Ethics Commission***

When Amendment 41 embedded the Independent Ethics Commission in the Colorado Constitution, the amendment: (A) empowered the IEC to summarily screen out frivolous complaints, while keeping them confidential; and (B) prevented the General Assembly from adopting any statutes that would limit the powers of the IEC. This year, a 4-3 majority of the Colorado Supreme Court held that these two provisions in combination prevent the legislature and the courts from providing any right of appeal to a person whose complaint against a public official is screened out by the commission. In this case, Ethics Watch had filed a complaint against an Elbert County commissioner who received a monetary penalty for violating the prohibition against using public money in political campaigns, §1-45-117, C.R.S., then directed the county attorney to appeal the penalty imposed against him. *Colorado Ethics Watch v. Independent Ethics Commission*, 369 P.3d 270 (Colo. 2016).

***Jury trial right for municipal offenses that have a “counterpart” in state law***

The court of appeals reaffirmed this year the exceedingly broad jury trial rights enjoyed by defendants in Colorado who are charged with a petty offense, whether in a state court or a municipal court. The court revisited the relevant statute, § 16-10-109, C.R.S., and held that any municipal ordinance for which there is a “counterpart” state criminal statute carries with it a right to a jury trial, even when the municipality has purported to “decriminalize” the offense when prosecuted in its own court. The case centered on a vicious animal ordinance in Lafayette punishable only by fines, and turned

on the similarities between the city ordinance titled “vicious animals prohibited” and the similar state criminal law titled “unlawful ownership of dangerous dog” and held that the two were indeed counterparts of one another. *Roalstad v. City of Lafayette*, 363 P.3d 790 (Colo. App., 2015).

### ***More on state and local authority to regulate firearms***

Second Amendment advocates continue their quest to convince the courts that any regulation of firearms should be subject to strict scrutiny when tested in court. Courts at all levels continue to reject this standard or review. This year the Colorado Court of Appeals noted again that, even if the right to bear arms is “fundamental,” the standard for reviewing firearms regulations is at most “intermediate,” and any “reasonable” police power regulations will continue to be upheld.

Under this standard, the courts have upheld most of the new state firearms regulations adopted in 2013. However, the court of appeals remanded for further proceedings a challenge to the fifteen-round limit on magazines adopted in HB 13-1224, asking “was the fifteen-round limit based upon any reasonable safety concern, or was it an arbitrary number.” The court also indicated that it was concerned about the fact that, immediately after HB 1224 was adopted, the Governor and the Attorney General felt the need to issue several “nonbinding advisory letters” to clarify their intent in enforcing the new law, thus implying that the law was ambiguous about its scope and intent on its face. *Rocky Mountain Gun Owners v. Hickenlooper*, 371 P.3d 768 (Colo. App., 2016).

In the meantime, a parallel challenge to the 2013 gun bills was tossed out by the Tenth Circuit for lack of Article III standing. Of particular note in the federal decision was a ruling that county sheriffs lack standing to challenge the new state firearms laws. Fifty-five of Colorado’s sixty-four sheriffs had signed on to the case individually to challenge the new laws. They claimed, among other things, that the new laws could be construed to “criminalize” some of their own behavior, such as “transferring a firearm to a crime lab for investigation.” The court gave short shrift to such “speculative” arguments. *Colorado Outfitters Association v. Hickenlooper*, 823 F.3d 537 (10th Cir., 2016).

### ***Hospitals may charge municipalities for cost of health care provided to persons “in custody” of police***

The Colorado Court of Appeals confirmed again this year that a state statute obligating municipalities to provide medical care to detainees in their custody, § 16-3-401(2), C.R.S., incidentally creates a cause of action for hospitals to sue the municipality for the costs of such care. This year the court construed the term “custody” quite broadly in accordance with the definition in Title 16, to include any situation where the police are restraining a person’s freedom of movement. Thus the statutory mandate is not void for vagueness. The court also held that the hospital’s claims are essentially contractual in

nature and thus not barred by the CGIA. In a concurring opinion, Judge Vogt noted that the issues raised in this case “cry out for a legislative solution” due to the competing equities between the city’s position and the hospital’s position. In the meantime, however, the Colorado Supreme Court agreed to review the dispute. *Denver Health and Hospital Authority v. City of Arvada*, 2016 WL 335171 (Colo. App., January 28, 2016); *cert. granted* (2016).