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# 2019-20 Survey of Local Government Law

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This outline contains a review of selected Colorado, Tenth Circuit, and U.S. Supreme Court appellate decisions of interest to municipal attorneys in Colorado, reported between October 1, 2019 and September 30, 2020.

**Campaigns and Elections**
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# CAMPAIGNS AND ELECTIONS

## *Strict compliance required for signatures on election petitions*

- *Griswold v. Ferrigno Warren,* 462 P.3d 1081 (Colo. 2020).

- State and local election officials have benefited for years from the "substantial compliance" standard when challenged over technical irregularities in how an election is conducted. Strict compliance with the procedural aspects of election laws is generally not required; an alleged violation of an election law may simply be evaluated through a no-harm-no-foul lens. But in a series of rulings in May beginning with the case of *Griswold v. Ferrigno Warren*, the Colorado Supreme Court held that some aspects of elections laws do indeed require absolute compliance, for example the number of signatures required on nominating petitions.

- Burdens on signature gatherers caused by the COVID-19 public health emergency are no excuse. Only the General Assembly, not a judge, can change the signature requirements. This decision may foreshadow how the high court will evaluate pending challenges to the Governor's decision to suspend a host of state laws requiring initiative petitions to be signed and witnessed in person.

## *Governor can't suspend constitutional requirements for circulating initiative petitions*

- *Ritchie v. Polis,* 467 P.3d 339 (Colo. 2020)

- A unanimous Colorado Supreme Court held that Governor Polis exceeded his emergency powers when he issued Executive Order D 2020 065 in May and purported to allow state initiative petitions to be circulated and signed via e-mail. The Supreme Court interpreted the Colorado Constitution to absolutely require in-person circulation and signing of state initiative petitions.

- Of greatest significance to municipalities, the court declared that the Colorado Disaster Emergency Act "does not authorize the Governor to suspend a constitutional requirement."

- Ironically, municipalities enjoy broader authority than the state to authorize remote signatures on initiative petitions if they choose to do so, per Art. V, Sec. 1(9), Colo. Const. and C.R.S. 31-11-102.

## *Changing legal landscape for adjudicating FCPA complaints against municipal officials*

- Two years ago federal Judge Raymond Moore declared the complaint procedures of the FCPA to be unconstitional in violation of the First Amendment. *Holland v. Williams*, 2018 WL 2938320 (D.Colo. 2018) This led to to a complete overhaul of the complaint system by the SOS and the Colorado General Assembly, including an off-loading by the SOS of any responsibiliy for handling any FCPA complaints against municipalities.

- One complaint that was in the pipeline when the rules changed involved the Town of Palisade. *Day v. Chase for Colorado,* 2020 WL 2759679 (Colo. App., May 28, 2020). A town newsletter published in June 2018 contained information about a town trustee who intended to run for a seat in the General Assembly, including information about how to sign the nominating petition for the trustee. The trustee's political opponents cried foul under C.R.S. 1-45-117, but the SOS screened out the complaint as being untimely under the new rules the SOS had adopted immediately after Judge Moore's ruling.

- The complainant tried to appeal directly to the court of appeals, but the court held that it no longer takes direct appeals as it formerly did under the original FCPA complaint procedure that Judge Moore found to be unconstitutional.

## *Supreme Court refuses to rule on equitable estoppel claim in Boulder petition case*

- *Bedrooms Are for People v. City of Boulder,* Boulder County District Court, 2020CV30632; direct appeal dismissed by the Colorado Supreme Court, August 28, 2020.

- Boulder rejected a petition for an initiated charter amendment on the basis that the petitioners took too much time to circulate their petition and failed to garner enough signatures, per the requirements of C.R.S. 31-2-210. Peitioners sued under an equitable estoppel theory, arguing that city officials had previously represented that the city charter, not state law, governed charter amendment petitions in Boulder.

- The district court granted Boulder's motion to dismiss while holding that the doctrine of equitable estoppel, as applied to municipalities, allows for claims based solely on mistaken facts, not mistaken law. Boulder's own petitioning guidelines warned petitioners that they should consult with their own attorney when deciding how and when to circulate and submit their petitions.

- The Supreme Court initially agreed to take a direct appeal, ordered expedited breifing, but then eight days later dismissed the appeal saying, "a number of unresolved factual disputes preclude the Court from properly deciding the questions presented in this appeal."

# EMPLOYMENT

## *SCOTUS rules that Title VII prevents discrimination on the basis of sexual orientation*

- *Bostock v. Clayton County,* 140 S.Ct. 1731 (2020)

- In a historic 6-3 ruling penned by Justice Gorsuch, the U.S. Supreme Court interpreted the plain language ("on the basis of sex") in Title VII of the Civil Rights Act of 1964 to prohibit employment discrimination on the basis of sexual orientation or gender identity.

- One immediate implication for municipal employers in Colorado: When suing under Title VII an aggrieved employee may seek a broader range of damages and attorney's fees than would be true under the Colorado Anti-Discrimination Act (CADA).

- Two cases testing the limited scope of remedies under CADA are currently pending in the Colorado Supreme Court, *Houchin v. Denver Health and Hospital Authority* and *Williams v. Elder* (see below).

## *New exposure to compensatory damages for employment discrimination claims brought under CADA?*

- *Williams v. Elder,* 2019 WL 5996606 (Colo. App., November 14, 2019); *cert. granted* (2020).

- In late 2019 a division of the Colorado Court of Appeals again addressed the relationship between the Colorado Anti-Discrimination Act (CADA) and the Colorado Governmental Immunity Act (CGIA). Earlier in *Houchin v. Denver Health and Hospital Authority* a different division held that 2013 amendments to CADA created a new compensatory damage remedy in employment discrimination cases and waived tort immunity under the CGIA, but only when such claims are brought against the state as an employer (not political subdivisions of the state).

- The newer case involved age discrimination and retaliation claims filed against the El Paso County Sheriff's Office. This time the court held that the new compensatory damage remedy in the 2013 amendments to CADA applies equally to local government employers for two reasons.

    - The court determined that the CADA damage remedy did not really sound in tort, and thus was not barred by the CGIA.
    - The court interpreted the word "state" in the 2013 amendments to include "Colorado's numerous political subdivisions."

## *Serial litigation of a §1983 claim may be barred by "claim preclusion" doctrine in Denver sheriff case*

- *Gale v. City and County of Denver,* 2020 WL 989623 (Colo. 2020); 962 F.3d 1189 (10th Cir. 2020).

- After a Denver deputy sheriff was fired, he appealed his termination under Rule 106. A month after filing his state court action he also filed a separate §1983 lawsuit in federal court alleging that his firing was in retaliation for his exercise of First Amendment rights (union activity) and seeking damages.

- In the state court action, the termination was upheld. Denver then sought dismissal of the federal action under the doctrines of *res judicata* and claim preclusion, arguing the deputy should have bundled his claims in the original action and should not be allowed a second bite at the apple.

- Responding to a certified question from the Tenth Circuit, the Colorado Supreme Court ruled (narrowly) that the Colorado courts have never exactly crafted a categorical exception to the doctrine of *res judicata* when the first action was brought under Rule 106. Thus, it is at least possible for Denver to seek dismissal of the federal case on a claims preclusion theory. The Tenth Circuit then ruled that the plaintiff was indeed barred by claims preclusion from pursuing his §1983 claims in federal court.

## *ADA and reasonable accommodations: Weld County failed to engage in "collaborative interactive process"*

- *Aubrey v. Koppes*, 2020 WL 5583649 (10th Cir., Sept. 18, 2020)

- This case involved a termination by the Weld County Clerk and Recorder of an otherwise "exemplary" employee who contracted a rare, debilitating disease that required months of unpaid leave while the employee was recovering and rehabilitating. The county eventually took the position that it could not hold the position open indefinitely and scheduled a "pre-termination hearing."

- When the employee asserted ADA and other discrimination claims based on her termination, the trial court granted the county's motion for summary judgement. But the Tenth Circuit reversed, fundamentally because there were unresolved disputed facts in this case about the potential accomodations that the county might make.

- The record showed that the county sechduled the "pre-termination meeting" with one day's notice, and then treated it more like a "Due Process hearing" than an "interactive process" as required by the ADA and CADA. The county HR director opened the meeting by saying this was the employee's "opportunity to tell why we shouldn't dismiss you." Conversely, "County officials made no effort to discover exactly what Aubey's limitations were at that time, nor in exploring with Aubrey whether there were any accomodations that would have enabled her to retrun to work at that time, or in the near future, even with her limitations."

# FIREARMS

## *New clarity on standards for regulating firearms in Colorado*

- *Rocky Mountain Gun Owners v. Polis,* 467 P.3d 314 (Colo. 2020)

- On June 29 the Colorado Supreme Court unanimously upheld a 2013 state law prohibiting high-capacity magazines associated with semi-automatic firearms, affirming the constitutionality of the law under Art. II, Sec. 13, Colo. Const.

- Of greatest import to municipalities, the court reaffirmed and clarified the standards that apply to any challenge to a state or local firearms regulation arising under the state constitution. A firearms law is not tested under either a "rational basis" or a "strict scrutiny" standard. Instead, it is tested under an intermediate standard called the "reasonable exercise test." Does the law have a legitimate government purpose within the police power? Is there a reasonable fit between the purpose and the means? Does the law serve an actual purpose, not just a conceivable purpose? And, most importantly, does the law stop short of rendering the state constitutional right to bear arms for personal self-protection a nullity?

## *Tenth Circuit abstains from hearing Boulder firearms case*

- *Caldara v. City of Boulder,* 955 F.3d 1175 (10th Cir. 2020)

- A recent Boulder ordinance prohibiting assault weapons and high-capacity magazines is being tested in both federal and state courts.
- The federal courts made short work of the case on abstention grounds. Among other things, the plaintiffs are claiming that the city's assault weapon and high-capacity magazine restrictions are preempted by state law. The federal courts noted that this is a significant home rule question, and Colorado law is essentially unsettled. So the statutory preemption issues must play out in Colorado courts before the federal courts will entertain a Second Amendment challenge.

## *Tenth Circuit mulling ATF rule banning "bump stocks"*

- *Aposhian v. Barr,* 958 F.3d 969 (10th Cir., 2020); *en banc* review granted and decision vacated, 2020 WL 5268055 (10th Cir., Sept. 4, 2020)

- Federal law has long banned unlicensed fully automatic "machine guns" or any device that would convert a conventional firearm into a "machine gun." In 2017 a mass shooter in Las Vegas used a "bump stock" attached to a semi-automatic rifle to achieve an automatic rate of fire and thereby kill 58 people and wound approximately 500 others. Under direction from President Trump and the DOJ, the Bureau of Alcohol, Tobacco and Firearms proceeded to

adopted a rule clarifying that the existing law prohbiiting machine guns includes a ban on bump stocks.

- In May, a divided panel of the Tenth Circuit appplied *Chevron* deference and denied a premlinary injunction against the rule on the basis that the plaintiff was unlikely to succeed on the merits of his argument that the rule conflicted with the statute. In September, the judgment was vacated and *en banc* review was granted.

- Colorado angles: In January, 2018 Denver adopted an ordinance banning bump stocks, however a state bill that would have imposed a similar ban statewide was defeated

# FIRST AMENDMENT

## *SCOTUS strikes down "Blaine Amendments" in state constitutions*

- *Espinoza v. Montana Dept. of Revenue,* 140 S.Ct. 2246 (2020)

- The U.S. Supreme Court essentially struck down the Blaine Amendment in Montana in the context of a state tax credit program that expressly excluded religious schools. The 5-4 majority of the court held that these laws evince hostility to religion and violate the Free Exercise Clause of the First Amendment.

- This holding is important to municipalities in Colorado because the Blaine Amendment in our state (Art. IX, Sec. 7, Colo. Const.) restricts disbursements by local governments as well as the state, and purports to completely prohibit any disbursement to a church or sectarian society for any purpose, not just schools.

- Any disbursement of public funds to a religious entity must still serve a non-sectarian purpose and stay within the bounds of the Establishment Clause.

## *More Guidance from the Tenth Circuit on Regulating Solicitation from Medians*

- *Evans v. City of Sandy,* 944 F.3d 847 (10th Cir. 2019)

- In July of 2019 a divided panel of the Tenth Circuit upheld a municipal ordinance regulating panhandling and solicitation from medians in *Evans v. Sandy City.* In December the entire Tenth Circuit denied a petition for *en banc* review. Meanwhile, the original panel modified its decision in a way that provides additional guidance to municipalities in regards to the standards of the "narrow tailoring" of such ordinances. Of greatest importance, the court reiterated the principle that this or any other type of speech regulation "need not be the least restrictive or least intrusive means of serving the government's interests"

## *How much evidence is needed to support a restriction on commercial speech?*

- *Aptive Environmental v. Town of Castle Rock,* 959 F.3d 961 (10th Cir. 2020)

- The Tenth Circuit struck down a 7 p.m. curfew on door-to-door commercial solicitation that was originally adopted by the town in 2008. The holding echoed an earlier ruling in the circuit applying the so-called *Central Hudson* test and affirming an injunction against other types of municipal restrictions on commercial solicitors, i.e. fingerprint and bonding requirements. *Pacific Frontier v. Pleasant Grove City*, 414 F.3d 1221 (10th Cir. 2005).

- In exhaustive detail in the Castle Rock case, the court faulted the town for failing to adduce concrete and non-speculative evidence that the ordinance actually advances "in a direct and material way" the town's substantial interest in public safety and residents' privacy. The opinion is sobering because it leaves many questions unanswered about the quantum of evidence necessary to support a restriction on commercial speech, either at the time an ordinance is adopted or even many years later. As the concurring judge pithily observed, "City attorneys may find it difficult to provide advice based on the majority opinion."

# GOVERNMENTAL IMMUNITY

## *Analyzing the applicability of the CGIA to public-private partnerships in Denver Housing Authority case*

- *Martinez v. CSG Redevelopment. Partners, LLP,* 469 P.3d 491 (Colo. App. 2019); *cert. granted* (March 30, 2020).
- The Colorado Governmental Immunity Act (CGIA) covers local governments as well as any "instrumentality" of a local government. What happens when a political subdivision of the state, in this case the Denver Housing Authority, forms a public-private partnership to build and operate the Casa Loma Residences in the Sunnyside neighborhood, and a plaintiff sues due to a slip-and-fall injury sustained in the common areas surrounding the residences? The court of appeals illustrated in this case that, under the right facts and circumstances, even when the private party has a 99.989 percent ownership interest in the project, the partnership can still be considered an "instrumentality" of the public entity, and thus the partnership can enjoy immunity from tort liability under the CGIA.

## *Conscious disregard of a health danger can constitute "willful and wanton" conduct, negligent operation of a jail under the CGIA*

- *Duke v Gunnison County Sheriff's Office,* 456 P.3d 38 (Colo. App. 2019).

- A known drug user and prior offender was taken into custody at the Gunnison County Jail and placed on a sixteen-hour drug hold. Unbeknownst to his jailers, the individual had ingested a baggie containing multiple opiates and a fentanyl patch that proved to be lethal. When the decedent's parents sued the county and individual deputies for wrongful death, the trial court initially ruled that sheriff deputies could not have engaged in "willful and wanton" conduct within the meaning of the CGIA because there was no evidence the deputies knew or should have known that the decedent had ingested the fentanyl patch.

- But the court of appeals held that the trial court applied the wrong standard for assessing willful and wanton behavior within the meaning of the CGIA, and that the burden of proof should be more lenient: "knowledge and conscious disregard of a health danger to another is sufficient." A critical factor in the case—one of the deputies, after being warned that the decedent might be in distress, and after observing the decedent slumped over in an unusual posture, allegedly said, "That's what you get for doing drugs." The case was remanded for a *Trinity* hearing on the question of whether this deputy's behavior was willful and wanton, thus exposing the deputy to a wrongful death claim.

- In a similar case Tenth Circuit decision with even more aggrevated facts, *Sawyers v. Norton*, 962 F.3d 1270 (10th Cir. 2020), the court held that Rio Grande County could be liable for negligent operation of a jail under the CGIA when jailers failed to adequately monitor a pretrial detainee

suffering from schizophrenia and the detaineee inflicted serious injury upon himself. In this case, three individual deputies were also denied qualified immunity on federal claims of deliberate indifference in violation of the Fourteenth Amendment.

## *CGIA does not bar enforcement of CDPHE environmental regulations against a county landfill*

- *Board of County Commissioners of the County of La Plata v. Colorado Department of Public Health and Environment,* 2020 WL 1471863 (Colo. App. March 26, 2020); *cert. granted* (2020)

- La Plata County owns a landfill site in Bayfield that has been closed since 1994. CDPHE has been attempting to force the county to remediate groundwater contamination associated with the landfill site. The county asserted the creative defense that the Colorado Governmental Immunity Act should shield the county from state enforcement actions, analogizing the enforcement to a nuisance abatement action that could lie in tort.

- The court of appeals disagreed, saying a "public enforcement action" is clearly distinguishable from a private tort action. "Non-tortious statutory duties are distinct from general duties of care because the former seeks to implement broad policy while the latter primarily seek to compensate individuals for personal injuries."

- La Plata also defended on the basis that counties (for some mysterious reason) have never been listed in the statutory definition of "persons" who are supposed to comply with state solid waste laws. Municipalities and special districts are listed in the definition, but not counties. After reviewing forty years of legislative history, as well as the entire statutory scheme, the court concluded that it would be absurd to hold other local governments accountable, but not counties.

## *More fine distinctions in the "emergency vehicle exception" to the CGIA explored in Denver case*

- *Bilderback v. McNabb,* 2020 WL 5241272 (Colo. App. 2020)

- The CGIA has always waived immunity for negligent operation of a motor vehicle but also has always included an emergency vehicle exception when the emergency vehicle is operated in accordance with the Colorado Traffic Code.

- The exception allows emergency vehicles to proceed through stop lights under some circumstances, but "only after slowing down as may be necessary for safe operation." In this case the officer was at a complete stop at the red light before proceeding, and the trial court

erred by assuming that no further factual analysis was necessary to determine whether the officer proceeded safely and an accident ensued. The case was remanded for a *Trinity* hearing.

## *CGIA bars replevin action against law enforcement agencies*

- *Woo v. El Paso County Sheriff's Office*, 2020 WL 5415824 (Colo. App., Sept. 10, 2020)

- Echoing rullings by the supreme court in *City of Denver v. Desert Truck Sales, Inc*., 837 P.2d 759 (Colo. 1992), the court of appeals again held that a replevin actions seeking to recover property held by a local government sounds in tort, and since the CGIA does not waive immunity for replevin actions the claim must be dismissed. In this case, the plaintiff had been tried and convicted for murder. He was seeking to reclaim a hard drive and other personal property that had been seized when he was originally arrested, but was not used in the criminal case.

- Secondarily, the plaintiff argued if the CGIA bars his replevin action, he would be deprived of property without Due Process in vioaltion of his constituitonal rights. But the court of appeals noted that any criminal defendant has recourse to reclaim property by filing a motion in the criminal proceedings.

# MARIJUANA

## *Colorado marijuana businesses experience the burdens (but not the benefits) of federal Law*

- *Kenney v. Helix TCS, Inc.,* 939 F.3d 1106 (10th Cir. 2019).

- Colorado marijuana businesses continue to have a hard time achieving parity with "normal" commercial businesses under federal law. Because large-scale trafficking in marijuana remains a felony under the Controlled Substances Act, it is common knowledge that federally chartered and insured banks refuse to accept accounts from marijuana businesses. Likewise, although obligated to pay federal income taxes, marijuana businesses cannot deduct their business expenses from their taxes. Nor can they invoke federal law to provide patent and trademark protection for their products. Nor can they assert a "takings" claim under federal law for marijuana seized or destroyed by the government. (See: *Young v. Larimer County Sheriff's Office*, 356 P.3d 939 (Colo. App. 2014.)

- However, in general, marijuana businesses are expected to comply with federal regulatory laws of general applicability, including the FLSA and other labor and employment laws. The Tenth Circuit in this case held that an overtime claim could proceed against a business that specializes in providing security services to the Colorado marijuana industry.

## *Presumptive statutory right to use medical marijuana while on probation*

- *Walton v. People,* 451 P.3d 1212 (Colo. 2019).

- In 2015, the state amended the Colorado Criminal Code to say defendants who are registered medical marijuana patients are presumptively allowed to continue their use of MMJ while on probation, absent a particularized finding that such drug use would defeat the goals of sentencing. The county court in El Paso County, unwilling to accept defendants' MMJ registrations on face value, had adopted a standing policy that a defendant's doctor must appear and provide evidence that the defendant actually needed to continue using MMJ while on probation.

- A unanimous Supreme Court held that the county court's policy violated the plain language of the 2015 statute presumptively allowing MMJ use by probationers. Although the 2015 legislation did not expressly apply to municipal courts, some municipalities may have adopted parallel laws or policies regarding MMJ use as a condition of municipal court sentences.

## *Tenth Circuit upholds IRS access to Colorado Marijuana Enforcement Division records*

- *Standing Akimbo LLC v. U.S.,* 955 F.3d 1146 (10th Cir. 2020)

- Colorado marijuana businesses have always tended to fare poorly in federal courts, mainly attributable to fact that commerce in marijuana remains entirely illegal under federal law. The latest addition to the pantheon is the case of *Standing Akimbo, LLC v. U.S.*

- An IRS auditor was investigating the income tax returns of three owners of a medical marijuana shop in Denver, primarily to determine whether the owners reported unlawful business deductions on their personal returns (Marijuana business deductions of any sort are not legal under federal laws). In the course of the investigation, the IRS issued a summons for documents and information held by the state Marijuana Enforcement Division: plant reports, gross-sales reports, and license information. Among many other things, the owners claimed a right to privacy in the information, and asserted that MED would be violating Colorado law if MED complied with the IRS summons.

- The Tenth Circuit upheld the validity of the IRS summons and reiterated for the umpteenth time that the federal Controlled Substances Act preempts Colorado marijuana laws.

# MUNICIPAL COURT PROSECUTION

## *New burden of proof for municipal prosecutors seeking restitution*

- *Williams v. People*, 454 P.3d 219 (Colo. 2019)

- The Colorado General Assembly has enacted multiple changes to state laws in recent years designed to make it more difficult for state and municipal courts to impose or enforce payment conditions on indigent defendants. One example was HB 14-1061, which added new protections for defendants before a court may revoke a probation or a deferred judgment and impose jail when the defendant asserts that he or she is unable to pay a fine or restitution due to economic hardship. The 2014 law was drafted to explicitly apply to municipal courts via a provision now codified at C.R.S. 18-1.3-702 (6).

- The legislation was silent on who bears the burden of proof when a defendant asserts an inability to pay, but now the Colorado Supreme Court has unanimously interpreted the statute to impose the burden on the prosecution. In a footnote, the court acknowledged this: "We recognize the concern that placing the burden to prove ability to pay on the prosecution might require the prosecution to investigate the defendant's financial situation, which could demand significant time and resources."

## *Court of Appeals issues four new interpretations of traffic laws*

- *People v. Sims,* 2020 WL 2204547 (Colo. App. May 7, 2020); *May v. Peterson,* 465 P.3d 589 (Colo. App. 2020); *People v. McBride*, 2020 WL 4211563 (Colo. App., July

- ***Vehicular eluding***. In *Sims*, a case arising out of Estes Park, the court held that simply failing to stop while being followed by police officers for five miles with lights and sirens blaring could be considered a type of "eluding" in violation of state traffic laws. The defendant tried to argue that, since he did not exceed the lawful speed limit or use any other "tricks" to evade the officers, it could not be considered "eluding." (He also claimed he didn't notice the officers because he had one earbud in, and his music was turned up loud.) A violation can occur in any situation where the driver "willfully attempts in any . . . manner to elude the police officer" including trying to just outlast the officer by never stopping.

- ***Vehicle/Wheelchair collision; failure to yield to pedestrian in crosswalk***. In *May,* a civil case arising out of Colorado Springs, the court clarified the meaning of two other traffic laws. Mr. May, while using a wheelchair, collided with the side of a car driven by Ms. Petersen, that was already half-way through a crosswalk. State traffic laws require a vehicle to stop and take certain precautions when "it approaches an individual who has an obviously apparent disability." But the court held that this law does not create strict liability in the driver. The driver does not "approach" the disabled person when the disabled person runs into the vehicle.

More broadly, the court also analyzed the traffic code provision requiring vehicles to yield to a pedestrian (including a person in a wheelchair) who is already in a crosswalk, and held for the first time that curb ramps adjacent to a street are not part of the crosswalk.

- ***Traffic Circles.*** Analyzing a traffic stop set in Mesa County that led to a drug arrest, the court ruled in *McBride* that state laws requiring use of a turn signal do not apply to vehicles entering a roundabout. The roundabout is treated, not as a right turn, but merely as a curve in the road. The state Traffic Code and the Model Traffic Code pay scant attention to roundabouts, so the court borrowed the reasoning from other states that have ruled on the same question.

- ***Broken tail light.*** Nevertheless, the conviction in *McBride* was affirmed due to a defective tail light. The court held that if a vehicle is stopped for a broken tail light, the stop is justified if the tail light is emitting anything other than red light. For example, if the red casing for the light is cracked and patched with duct tape, but the patch job is still allowing some white light to leak through, it violates the statutory requirement that taillights must emit pure red light.

## *Sealing of municipal court domestic violence convictions still possible*

- *Huffman v. City and County of Denver,* 465 P.3d 108 (Colo. App. 2020)

- In the wave of criminal justice reform bills that have impacted municipal courts in recent years, one of the most common themes is sealing of records. Every recent bill is designed to favor the defendant and make sealing or expungement of convictions easier. However, in a municipal assault case involving domestic violence, Denver argued that a change to the statutes in 2017 meant that records of convictions in a DV case can never be sealed.

- The trial court agreed with Denver's interpretation of the 2017 legislation, but the court of appeal reversed. The appellate court interpreted the 2017 legislation to mean only that a subsequent DV conviction may disqualify a defendant from sealing of records in a prior case. But the legislation did not adopt a *per se* rule that a single conviction of a DV offense can never be sealed.

# OPEN RECORDS/OPEN MEETINGS

## *Supreme Court rebuffs "absurd" interpretation of the Colorado Open Meetings Law proffered by MMJ doctors*

- *Doe v. Colorado Department of Public Health and Environment*, 451 P.3d 851 (Colo. 2019).
- In 2014, staff at the CPDHE adopted an internal policy and procedure for referring to the Colorado Medical Board the names of doctors who demonstrate suspicious patterns of behavior in regard to medical recommendations made on behalf of qualifying "patients." The Medical Board could then exercise its own statutory authority to determine whether to investigate these doctors for compliance with the professional standards that apply to anyone engaged in the practice of medicine in Colorado.
- A small group of doctors specializing in a large volume of MMJ recommendations sued in three separate actions to stop the CDPHE from making such referrals to the Medical Board. Among others things, the doctors argued that the adoption of the internal policy violated the Colorado Open Meetings Law because the entire CDPHE was a "state public body" to which the OML applied.
- A unanimous Colorado Supreme Court made short work of this novel argument. The doctors' proposal to radically expand the meaning of "public body" beyond the plain language in the OML would mean "an untold number of routine conversations among agency employees would be subject to the OML and would require notice of the meetings, as well as compliance with all of the OMLs remaining requirements. The legislature could not have intended so absurd a result."

## *Need for specificity when announcing the purpose of an executive session*

- *Guy v. Whitsett,* 469 P.3d 546 (Colo. App. 2020)

- In order to comply with the requirement of the Colorado Open Meetings Law that the purpose of an executive session be announced in "as much detail as possible without compromising the purpose for which the executive session is authorized," it's not enough to say that the purpose of the executive session is a "personnel matter" or a "matter of attorney-client privilege." Something more must be added.

- In this case the Town of Basalt attempted to argue that announcing the fact that an executive session would be to talk about the town manager might compromise a confidentiality agreement with the manager. But the court held that a town cannot contract away its obligation to comply with the OML.

- On remand, Basalt paid the plaintiff (who happened to be a lawyer) $115,000 in attorney fees to settle the case.

# POLICE CIVIL LIABILITY

## *Search and seizure of impounded vehicle must be guided by adopted policy*

- *People v. Allen*, 450 P.3d 724 (Colo. 2019)

- One long-recognized exception to the Fourth Amendment warrant requirement allows police to impound and conduct an inventory search of a motor vehicle under the "community caretaking doctrine," particularly when the vehicle is "impeding traffic or threatening public safety and convenience." In ordering a warrantless inventory search of an impounded vehicle, a police officer must be acting under a duly adopted policy. In 2018 the Colorado Supreme Court ruled that an Aurora ordinance went too far when it granted police the discretion to impound a vehicle *whenever* the driver has been cited for driving without a valid license, regardless of whether the driver had been arrested or merely issued a summons, and regardless of whether the vehicle was capable of being safely parked and locked where it was. *People v. Brown,* 415 P.3d 815 (Colo. 2018).

- In a similar case in 2019, the court held that an impoundment and inventory search of a vehicle by Greeley police officers (after citing the driver for failure to have proof of registration or insurance) could not be justified under the community caretaking doctrine, because the D.A. failed to show that the city had any policy or procedure constraining the discretion of the officers to conduct such searches.

## *Targeted Video Surveillance Violates Fourth Amendment in Colorado Springs Case*

- *People v. Tafoya,* 2019 WL 6333762 (Colo. App., November 27, 2019); (*cert. granted*, June 26, 2020)

- Cutting edge advancements in video and digital wireless technologies now collide with the Fourth Amendment in a first-of-its-kind decision from the Colorado Court of Appeals. Colorado Springs police discreetly installed a video camera atop a utility pole across the street from the residence of a suspected drug trafficker. The camera was equipped with "zoom, pan, and tilt" features, and was used to live-stream video back to the police station for a period of three months. The camera was capable of viewing the curtilage of the residence, including areas of the lot behind a "privacy fence." After the video evidence of exterior activities at the house provided probable cause for a search warrant, the house was searched and the owner was arrested and convicted on felony drug charges.

- State and federal courts around the U.S. are deeply divided over whether this kind of targeted video surveillance of residential property violates the Fourth Amendment, but the Colorado Court of Appeals concluded that it does under the facts and circumstances of this case. Watch for this crucial issue to end up in the Colorado Supreme Court

## *A sampling of qualified immunity cases reported in the Tenth Circuit*

- Even before SB 20-217 was adopted by the Colorado General Assembly in June allowing plaintiffs to sue police officers under the Colorado Constitution for unlimited damages while abrogating the doctrine of qualified immunity, the ACLU, the Cato Institute, legal scholars, and other groups were on a mission to convince the courts to completely abandon the doctrine of qualified in immunity in the context of §1983 claims. These groups argue that the judge-made doctrine is constitutionally unsound, particularly when it shields police officers from liability in excessive force cases.

- ***Perceived active shooter in a crowded area***. The ACLU and the Cato Institute participated as *amici curiae* in the case of *The Estate of Marquez Smart v. City of Wichita*, 951 F.3d 1161 (10th Cir. 2020) to urge a reevaluation of the doctrine of qualified immunity. Police officers shot and killed a man fleeing when shots rang out among a "chaotic crowd of potential victims" as a concert was letting out in the Old Town section of downtown Wichita, Kan. Numerous facts were disputed in light of the hysteria and chaos that ensued. The courts concluded that there were sufficient facts to potentially prove to a jury that the officers use of deadly force was not objectively reasonable, but the officers were nevertheless shielded from Fourth Amendment liability by qualified immunity. At the appellate level, a divided panel determined there was no clearly established law in the Tenth Circuit finding a police shooting violated Fourth Amendment rights "in the uniquely fraught context of a perceived active shooter situation on a crowded street." On the other hand, the panel unanimously denied qualified immunity to one of the officers who continued to fire his weapon even after the suspect was lying prone on the ground and had been "effectively subdued."

- ***Sexual assault by prison official against an inmate***. In another 2020 case, *Ullery v. Bradley*, 949 F.3d 1282 (10th Cir., 2020), the Plaintiffs likewise attempted to convince the Tenth Circuit to completely abrogate the doctrine of qualified immunity. The court demurred, saying, "while Plaintiff asks us to reject the current qualified-immunity framework as unconstitutional, her competent counsel is well-aware it is not the appellate court's place to issue such edicts." Nevertheless, the court held that the Defendant did not deserve the shelter of qualified immunity in this particular case. Plaintiff, an inmate at the Denver Women's Correctional Center, alleged that a male corrections officer and supervisor of inmates violated the Eighth Amendment when he "sexually harassed, abused, and assaulted" her for a period of more than two years. The Defendant did not deny his behavior, but asserted he should be entitled to qualified immunity anyway, because (amazingly enough) it was not "clearly established" in the Tenth Circuit that these behaviors violated the Eighth Amendment. The opinion in this case provides a vivid example of how the court will rely upon "a consensus of cases of persuasive authority" from other circuits to conclude that a constitutional right is clearly established, even when there is a paucity of specific, on-point case law in the Tenth Circuit. This is particularly true when conduct is "repugnant to the conscious of mankind" and "incompatible with evolving standards of decency." Later in the year, a similar denial of qualified immunity was upheld in a

case where a jailer engaged in non-consensual sex with a pre-trial detainee. *Brown v. Flowers,* 2020 WL 5509683 (10th Cir., Sept. 14, 2020)

- ***"Rough ride" in the backseat of a police car***. In *McCowan v City of Las Cruces*, 945 F.3d 1276 (10th Cir. 2019), the Tenth Circuit demonstrated again that a police officer does not enjoy qualified immunity against a Fourth Amendment claim just because there is no "identical" precedent on point with his case. As a general principle, it is clearly established law in the Tenth Circuit that "an officer's gratuitous use of excessive force against a fully compliant, restrained, and non-threatening misdemeanant is unreasonable—and, therefore violates the Fourth Amendment." Thus, even though there was no precedent exactly on point, the officers was not shielded by the doctrine of qualified immunity when the officer arrested a drunk driving suspect who was already complaining of shoulder pain, "placed in the backseat of a patrol car, handcuffed behind his back and unrestrained by a seat belt, and then drove recklessly to the police station, knowing his driving was violently tossing (the suspect) back and forth across the backseat." The court also denied qualified immunity in relation to a Fourteenth Amendment "deliberate indifference" claim when the officer delayed transport of the suspect for medical care for over two hours after the suspect complained of severe pain.

- ***Shooting driver of vehicle stopped in I-70 traffic jam.*** In the case of *Cox v. Wilson* 971 F.3d 1159 (10th Cir. 2020) a circuit panel determined that a Clear Creek County sheriff deputy was shielded by qualified immunity in a case where the deputy shot into a vehicle after a lengthy and dangerous car chase on I-70 concluded with the driver being stuck in traffic. The shooting left the driver a quadriplegic. On Aug. 19, *en banc* review of the case was denied on a 10-2 vote, but two judges (Lucero and Hartz) wrote a blistering dissent. Judge Lucero joined a chorus of other critics around the U.S. in saying, "the relentless transformation of qualified immunity into an absolute shield must stop."

- ***"Contempt of Cop" scenario.*** In *Mglej v. Gardner*, 2020 WL 5384938 (10th Cir., Sept. 9, 2020), qualified immunity was denied when a small-town sheriff in Utah arrested a man on phony charges ("failure to show I.D.") and subjected the man to excessive force by applying handcuffs that resulted in "actual injury."

## *SCOTUS denies cert in Greenwood Village police "takings" case*

On June 29 the U.S. Supreme Court denied the petition for certiorari in *Lech v. Jackson*, 791 Fed. Appx. 711 (10th Cir., 2019), an important case testing the question of whether damage to private property caused by a police action can ever be actionable as a compensable "taking" under the Fifth Amendment. In a decision rendered on October 29, 2019 a panel of the Tenth Circuit treated this as a question of first impression in the circuit. The court ruled in a case arising out of Greenwood Village that actions taken by law enforcement officers under the "police power" cannot form the basis of a takings claim regardless of the extent of property damage alleged in the case. Strangely enough given the local and national import of this decision, the circuit court elected not to publish its opinion.

# PUBLIC WORKS AND UTILTIES

## *Magistrate rules that municipal sidewalks are a "program or service" under ADA*

- *Hamer v. City of Trinidad*, 924 F.3d 1093 (10th Cir. 2019); *cert. denied* (2019). *Hamer v. City of Trinidad*, 441 F.Supp. 3d 1155 (D.Colo. 2020).

- In early 2019 the Tenth Circuit ruled in a case challenging the condition of the sidewalks in Trinidad that each day a municipal "program, service or activity" remains out of compliance with Title II of the ADA constitutes a "repeated violation," essentially preventing the statute of limitation from running as long as the violation continues to exist. Apparently, this ruling is the first of its kind in the United States, at least insofar as ADA sidewalk claims are involved. However, the ruling reserved judgment on the much more fundamental question of whether a municipal sidewalk system a type of "program, service or activity" that is covered by Title II.
- On remand, U.S. Magistrate Judge Nina Wang ruled on February 21, 2020 that a municipal sidewalk network is among the "public services, programs, or activities" covered by Title II. Shortly thereafter, Trinidad announced a settlement of the case. The practical effect of the magistrate's holding (if it is ever reflected in an appellate decision in the Tenth Circuit) could be that any time a person with a qualifying disability encounters a sidewalk deficiency that impedes mobility, the person may have grounds for a discrimination complaint under Title II.

## *Metro districts can include and tax owners of severed mineral estates against the will of those owners*

- *Bill Barrett Corp. v. Lembke,* 2020 WL 5507858 (Colo., Sept. 14, 2020)
- For the last several years there have been ongoing legal challenges from oil and gas extraction companies that resent being included in new metro districts against their will. When a metro district is formed by a developer to finance infrastructure on the surface of the land, the owners of the subsurface estate get taxed, too, even if (according to them) they will derive no benefit from the metro district. And the metro district taxes can result in millions of dollars being paid by the oil and gas companies.
- In this case, a bare 4-3 majority of the Colorado Supreme Court interpreted the plain language of Title 32 to require only the assent of surface owners when a new metro district is formed. Writing for the majority, Justice Hart hinted at a degree of sympathy for the plaintiffs' plight, but suggested that their relief must come from the General Assembly, not the courts.

- This dissent suggested that even if the plaintiffs cannot avoid being included in the district, they may still have a valid Due Process argument that the metro district taxes cannot be applied to them because they derive no benefit from the district. See: *Landmark Towers Association v. UMB Bank,* 436 P.3d 1139 (Colo. App. 2018)

# TAXATION AND FINANCE

## SOS Business Licensing and Registration Fees Survive TABOR Challenge

- *Griswold v. National Federation of Independent Businesses,* 449 P.3d 373 (Colo. 2019)
- Since the advent of TABOR in 1992, Colorado municipalities have understood that the adoption of any new "fee" may be susceptible to a legal challenge on the theory that the "fee" is really a "tax" in disguise, and thus requires voter approval. In 2018 the City of Aspen showed how to overcome such a challenge when the city successfully defended their grocery bag fee in the Colorado Supreme Court. *Colorado Union of Taxpayers Foundation v. City of Aspe*n, 418 P.3d 506 (Colo. 2018).
- But what about fee regimes that predate the adoption of TABOR? For example, since 1983 state statutes have required the Colorado Secretary of State to adjust fees annually as necessary to cover all of the "direct and indirect" costs of the Department of State. The Colorado chapter of the National Federation of Independent Businesses complained that this regime unduly burdens its members, because almost all of the functions of the department (including election costs) rely on revenue derived from business registration and licensing fees.
- The Colorado Supreme Court held, since the requirements of TABOR apply *prospectively* only, the basic fee regime in the SOS office must be upheld because it is "part of a statutory mechanism that predates TABOR." This case ultimately turned on a failure of proof by the plaintiffs. They simply failed to show that there had been any new charge or increase in the rate of any existing charge imposed by the SOS since 1992 that would qualify as a "new tax," "tax rate increase," or "change in tax policy."
- The Supreme Court hinted, however, that the old fee regime does not give the SOS *carte blanche* to adopt entirely new fees on businesses on discretionary basis, saying such entirely new fees could be "potentially problematical."

## *Municipal sales and use tax audits: When does victory in one case dictate the outcome of the next case?*

- *IBM Corp. v. City of Golden*, 461 P.3d 659 (Colo. App. 2020).
- Culminating in 2012, the City of Golden successfully litigated a sales and use tax claim against IBM based upon tax liability arising out of an "Information Technology Services Agreement" for the delivery of certain goods and services by IBM to Xcel Energy in Golden. The 2012 case was originally litigated in Jefferson County District Court, and arose from an audit for tax years 2003-2005. Meanwhile, Golden audited the same contract for tax years 2006-2012 and asserted a claim of $6 million for unpaid taxes.

- This time, the case was adjudicated in Denver District Court, and the court analyzed the contract, along with IBM's response to the audit, much more favorably toward IBM, ultimately finding only $33,000 in taxes due. The city argued unsuccessfully that the doctrine of "issue preclusion" should have dictated a consistent result between the first and the second case. The court disagreed for two reasons. First, on several points, the court simply disagreed that a particular issue had indeed been addressed or decided in the first case. Second, the court noted that changed circumstances between the first and second audit could logically result in a different outcome.

## *Digital Motion Pictures Subject to Municipal Use Taxes in Aurora Case*

- *American Multi-Cinema Inc. v. City of Aurora,* 2020 WL 34677 (Colo. App., January 2, 2020); *cert. denied* (Sept. 8, 2020).

- On two prior occasions the Colorado Court of Appeals has affirmed that motion picture film reels obtained by commercial movie theatres are subject to municipal use taxes. Now that the technology has changed and most theaters have switched to digital projection, the result is the same. The data file on the hard drive leased to the movie theater remains tangible personal property subject to use taxes. So said the court of appeals in a case arising out of City of Aurora. As in the earlier cases, the court went on to hold that the rental of the digital files by the theatres cannot be regarded as a purchase for resale, nor are the digital files regarded as part of a manufacturing process. Finally, there is no "double-taxation" problem when patrons are charged a sales or admission tax to view the movie. The use tax on the value of the data files is paid by the business. The admissions tax on the privilege of viewing the movie is paid by the customers.

## *A flurry of decisions on residential property valuation*

- *Mook v. Board of County Commissioners of Summit County, Board of County Commissioners of Summit County v. Hogan*, *Board of Assessment Appeals of Summit County v. Kelly,* 457 P.3d 568 (Colo. 2020); *Ziegler v. Park County*, 457 P.3d 584 (Colo. 2020).

- Under the Gallagher Amendment, residential property is taxed at less than one-quarter the rate of vacant land and other non-residential property. Moreover, Colorado statutes generously confer residential classification under Gallagher, not just to upon a lot containing a residence, but to all other contiguous vacant lots held under common ownership and "used as a unit" by the homeowner.

- The Colorado Supreme Court rendered decisions in four separate cases in February, each a variation on scenarios where a homeowner is seeking residential classification for a whole cluster or series of lots. On the one hand, the court agreed with the county taxing authorities and strictly interpreted the relevant statute to require literal contiguity (i.e. "touching") and literal common ownership (all lots must be owned in exactly the same name). On the other

hand, the court agreed with the homeowners and set a very low bar on the more subjective question of whether all the lots were indeed "used as a unit" by the homeowner.

- Each of the four cases involved valuable mountain home properties in Summit and Grand Counties. Attorneys for numerous other counties appeared as *amici* fighting to preserve the tax base in their respective jurisdictions.

## *Factoring in "condo net income" at luxury resort properties may increase tax base in some mountain communities*

- *Lodge Properties v. Eagle County Board of Equalization,* 2020 WL 5553332 (Colo. App., Sept. 17, 2020)

- The Lodge at Vail is a luxury resort property consisting of 160 units, split approximately 50/50 between traditional hotel rooms and private residential condo units, all of which are physically and functionally integrated on the same site. Under Colorado property tax laws, the resort is valued under the income approach to valuation like other commercial properties that largely derive their property from rentals.

- In this case, the court of appeals sided with the county and reversed the state Board of Assessment Appeals when it found that "condo net income" and resort fees flowing to the Lodge at Vail from rental of the condos should be included in the property valuation. The BAA simply erred when it treated the income stream as intangible personal property rather than as a fundamental indicia of the value of the real property. The BAA had set the value of the Lodge at $26 million. Factoring in the condo net income increased the value to $44 million.

# ZONING, LAND USE AND EMINENT DOMAIN

## *Town can construct water facility in covenant-controlled subdivision with no obligation to pay just compensation*

- *Forest View Company v. Town of Monument,* 464 P.3d 774 (Colo. 2020)

- The Town of Monument acquired a lot in a covenant-controlled subdivision with the intent of installing a water storage tank on the lot. Restrictive covenants in the neighborhood limited all lots to residential use. The neighboring lot owners claimed that the town should be required to pay just compensation for using the lot in a manner that was inconsistent with the covenants.

- The Colorado Supreme Court reaffirmed its holding in a 1956 case on the same issue, and held that restrictive use covenants are not a compensable property interest under the taking clause of the Colorado Constitution, Art. II, Sec. 15.

- The decision did, however, leave to a later day the question of whether municipal use of a lot contrary to a private covenant could form the basis of a "damaging" claim under the same section of the state constitution.

## *Abandoning an eminent domain action after the money is already gone*

- *Aurora Public School District v. Stapleton Gateway, LLC*, 465 P.3d 142 (Colo. App. 2020)

- A question of first impression, albeit a very narrow one, was addressed by the Colorado Court of Appeals in this case. Aurora Public Schools set out to condemn a commercial property for expansion of a school site. The parties entered into a stipulation for limited possession, and APS deposited $2.7 million into the court registry. Immediately thereafter, the property owner withdrew the money with APS consent, and the owner used the money to purchase a couple of other properties. But within a month, APS abandoned the condemnation action and demanded that the owner immediately return the $2.7 million to the registry.

- The court of appeals disagreed with APS that there was any obligation under Colorado law for the owner to do so, as long as there was going to be a separately filed case in which the parties would litigate whether APS should pay "abandonment damages."

## *Consequences of failure to make necessary statutory findings in a quasi-judicial proceeding*

- *Hajek v. County Commissioners for Boulder County*, 461 P.3d 665 (Colo. App. 2020).

- In 2008, state statutes were amended to require local governments, including both statutory and home rule municipalities, to make an adequate water supply finding whenever an application for a development permit proposes a "new water use." The requirement applies only for developments that are projected to use the amount of water equal to "fifty single-family equivalents." §§29-20-301, et seq., C.R.S. Until now, the meaning of this mandate has never been tested in court.

- A permit was approved in Boulder County for a new organic farm operation, including "laying hens in mobile houses" with no indication that the farm would consume any more water than prior agricultural uses on the property. When the BOCC approved the permit, they deferred any finding about the adequacy of the water supply for the new development. A neighbor who was upset at the prospect of a chicken farm next to her property appealed the permit approval under Rule 106(a)(4) and convinced the court of appeals the BOCC's failure to make a water finding constituted an abuse of discretion.

- Somewhat counter-intuitively, the court interpreted the term "new water use" to include both "the use of additional quantities of water as well as the use of a similar quantity of water for a different purpose." Of course, this ruling by the Court of Appeals did not kill the project; it merely resulted in a remand to the BOCC to make further findings consistent with the statute.

## *Colorado Supreme Court upholds land use approvals for a gravity coaster in Estes Valley*

- *Yakutat Land Corp. v. Langer,* 462 P.3d 65 (Colo. 2020); *Langer v. Board of County Commissioners of Larimer County*, 462 P.3d 59 (Colo. 2020).

- The Colorado Supreme Court demonstrated once again how difficult it is for neighbors to convince the courts to overturn quasi-judicial approvals of a land use to which the neighbors object. Two companion cases focused on the approval of a "gravity-based mountain roller coaster" to be installed near a low density residential neighborhood in the uplands near Estes Park. In both cases, county officials reasonably interpreted their own land use regulations and the court deferred to their interpretations as usual.

- The only unique wrinkle: in one case, a pure Rule 106(a)(4) appeal, the trial court erred by ruling on the constitutionality of the local laws that guided the decision, even though the plaintiffs did not plead a facial challenge and combine it with their Rule 106 appeal.

- The Supreme Court easily held that Rule 106(a)(4) appeals, standing alone, are about one thing and one thing only--whether the lower tribunal abused its discretion or exceeded its jurisdiction according to the laws on the books.

- The companion case offered a textbook illustration of a "use classification," a sometimes challenging task faced by every zoning administrator when a proposed land use arguably fits into more than one category of uses allowed by the zoning code. In this case, county officials decided the coaster was a "parks and recreation" facility even though it was commercial in nature.

## *Neighbors opposed to Cordillera addiction treatment facility were exercising their First Amendment rights to do so*

- *CSMN Investments, LLC v. Cordillera Metropolitan District*, 956 F.3d 1276 (10th Cir. 2020)

- Residents of the exclusive Cordillera community in Eagle County were largely unsuccessful in challenging the interpretation by county zoning officials of PUD regulations governing the community. The residents were upset to learn in 2016 that new ownership was converting the Lodge at Cordillera and associated facilities formerly open to the residents into a private addiction treatment facility. They appealed the interpretation up through the BOCC, the district court, and the court of appeals.

- Meanwhile, the new owners struck back. They filed a lawsuit of their own in federal court, claiming, among other things, that the bringing of the legal challenge by the residents and the Cordillera Metro District constituted an act of discrimination under the Americans with Disabilities Act and the Fair Housing Act. The federal courts dismissed these claims.

- The Tenth Circuit held: The residents, in utilizing legal action to challenge the zoning interpretations, were exercising their First Amendment right to petition for redress of grievances and cannot be punished for doing so if their lawsuit was objectively reasonable. Whatever their subjective motives, the neighbors resort to the courts was "objectively reasonable" because, even though they were ultimately unsuccessful, their legal arguments were based upon a legitimate disagreement about the interpretation of the PUD use restrictions governing the Lodge.

- Most pointedly, the Tenth Circuit refused to adopt a "categorical unlawful-objective exception to the First Amendment right to petition the government for redress of grievances" as urged by the new owners of the Lodge.

# MISCELLANY

## *Sex offender registration as a potential Eighth Amendment violation?*

- *People in the Interest of T.B.,* 2019 WL 2528764 (Colo. App. June 20, 2019); *cert. granted* (February 3, 2020)

- In a remarkable turn of events, a division of the Colorado Court of Appeals ruled for the first time in 2019 that the obligation to register under longstanding state sex offender registration statutes may be considered a form of "punishment" and thus could be the basis of an Eighth Amendment claim of cruel and unusual punishment depending on the circumstances of the case. (This case involved a provision of the statute that requires lifetime registration for anyone convicted twice for sexual offenses, even those offenses committed as a juvenile.) Over the last twenty years, other divisions of the court of appeals had reached exactly the opposite conclusion on ten prior occasions. Not surprisingly, the panel in the new case split 2-1, and after years of eschewing the issue, the Colorado Supreme Court finally agreed to take it up in 2020.
- Municipalities care about Colorado's sex offender registration system for two distinct reasons: (1) all municipal police departments play a hands-on role in administering the registration system at the local level; and (2) a handful of municipalities have chosen to adopt restrictions on where sex offenders may reside and register within their communities.

## *Tenth Circuit upholds Colorado's sex offender registration system*

- *Millard v. Camper,* 971 1F.3d 174 (10th Cir. 2020)

- The Tenth Circuit on Aug. 20 reversed a 2017 district court decision invalidating Colorado's registration system. Consistent with abundant precedent from all around the country, including the U.S. Supreme Court, the appellate panel concluded that registration is not a form of "punishment" at all, let alone cruel and unusual punishment that would implicate the Eighth Amendment.

- Not surprisingly, the Attorneys General from all the other states in the Tenth Circuit filed an *amicus curiae* brief in support of Colorado in this case.

## *Local governments score procedural victory in case against oil companies*

- *Board of County Commissioners of Boulder County v. Suncor Corp.,* 965 F.3d 792 (10th Cir. 2020)

- In 2018, the City of Boulder joined Boulder County and San Miguel County in a state court lawsuit against Suncor Energy and Exxon Mobile for "global warming-related damages" to their communities. The suit seeks monetary compensation under nuisance and other state law theories. The oil companies sought to remove the case to federal court, but the district court remanded the state law claim to state courts and on July 7, a Tenth Circuit panel concluded that it had no jurisdictional authority to overrule the remand.

- This ongoing litigation is part of a larger trend in Colorado and throughout the U.S. of local governments suing private companies for monetary damages based on harms allegedly caused by certain industry players to their communities. State law nuisance claims lay at the heart of many of these cases.

## *Exploring the contours of "official misconduct"*

- *People v. Berry*, 457 P.3d 597 (Colo. 2020).

- The Lake County Sheriff Department held in their evidence locker several seized firearms that the department was planning to destroy per department policy. A deputy hatched a scheme to obtain the firearms, one of which was a rare Colt handgun worth several thousand dollars, with the intent to sell the Colt and pocket the money.

- Notably, on a question of first impression, a 5-2 majority of the Colorado Supreme Court ruled that these facts do not support a conviction for embezzlement under Colorado law, because the statute applies only to the misappropriation of property "owned" by the government, not merely "possessed" as in this case.

- On another question of first impression; however, the court unanimously held that these facts do support a conviction for "official misconduct" under § 18-8-404, C.R.S. The court construed the statutory language— "an act relating to his office but constituting an unauthorized exercise of his official function"—to mean "when a public official commits an act of malfeasance that is made possible because of his office or the opportunities afforded to him by his office." (Emphasis supplied.)

## *Still no clarity on IEC jurisdiction over home rule municipal officials*

- *Dunafon v. Jones*, 19CA0321. March 26, 2020.

- Amendment 41 of 2006 constitutionalized state ethics laws and created the Colorado Independent Ethics Commission (IEC). The amendment applies to both state and local officials, but contains an exception for home rule municipalities that have adopted an ethics ordinance that "addresses the matters" contained in Amendment 41.

- In 2016, the IEC, for the first time, anointed itself with the authority to determine whether a municipal ethics ordinance is sufficient enough to shield an officer or employee of a home rule municipality from the jurisdiction of the IEC.

- A complaint at the IEC against the Mayor of Glendale set up a battle over how and when the IEC's jurisdictional rulings can be tested in court, and CML assisted Glendale as an *amicus curiae* in the case in order to argue for the quickest possible judicial determination of whether a municipal ethics ordinance sufficiently "addresses the matters" contained in Amendment 41.

- In an unpublished decision, the Colorado Court of Appeals interpreted both the IEC statutes and Rule 106 to mean that an interlocutory appeal from the IEC on the jurisdictional question is not possible. The case was remanded to the IEC for action on the original complaint. Bottom line: If a home rule municipal official is named in an IEC complaint, the complaint may need to be fully investigated and adjudicated on the merits before the official and the municipality can make the argument that the matter was never within the jurisdiction of the IEC in the first place.

## *Supreme Court allows the General Assembly to split their 2020 regular session*

- *In re Interrogatory on House Joint Resolution 20-1006,* 2020 WL 1855215 (Colo. April 1, 2020).

- Since 1988, the Colorado Constitution has provided that the regular session of the General Assembly is limited to 120 calendar days per year. In 2009, the Colorado General Assembly adopted a rule allowing the body to adjourn during a declared public health emergency and then resume their regular session later. In other words, the 120 days do not need to be consecutive. On April 1, in response to an interrogatory propounded by the General Assembly, a 4-3 majority of the Colorado Supreme Court upheld the constitutionality of this rule.

- Municipal attorneys may enjoy reading the opinion in this case because it contains a detailed discussion of an interpretive question that often comes up in our world: the difference between calendar days, consecutive days, and business days.

# APPENDIX: CML *AMICUS* PARTICIPATION IN 2019-20

## Decided Cases

### *AMC Theaters v. Aurora*

- Issue: Applicability of municipal use tax to digital movies displayed in theaters as a type of tangible personal property
- Status: Court of Appeals ruled for Aurora and upheld the tax; Colorado Supreme Court denied cert.
- CML *Amicus* Author: Michael Axelrad, City of Greeley; filed jointly with five municipalities

### *Aptive Environ., LLC v. Town of Castle Rock*

- Issue: First Amendment challenge to door-to-door solicitation curfew
- Status: Tenth Circuit determined that the curfew did not survive First Amendment scrutiny
- CML *Amicus* Author: Todd Messenger, Fairfield and Woods, P.C.

### *Decker v. Town of Monument*

- Issue: Whether municipalities and other condemning authorities must pay just compensation to eliminate private restrictive covenants on property aquired by the municipality
- Status: Colorado Supreme Court ruled for Monument and reaffirmed that restrictive covenants do not create a compensable property interst in an eminent domain action
- CML *Amicus* Author: Laurel Witt, CML

### *Hamer v. City of Trinidad*

- Issue: Whether "continuing violation doctrine" applies to ADA Title II claims (sidewalks); whether municipal sidewalks are a "program or service" within the meaning of Title II?

- Status: After the U.S. Supreme Court denied cert in late 2019 on the "continuing violation" issue, on remand to the district court a magistrate judge ruled that sidewalk deficiencies can form the basis of a Title II claim, and then Trinidad settled the case.
- CML *Amicus* Author: Lindsay Rose, City of Colorado Springs

### *John Does 1-9 v. Colo. Dept. of Public Health and Environ.*

- Issue: Definition of "public body" under the Colorado Open Meetings Law; whether an entire agency of government can be considered a "public body"
- Status: The Colorado Supreme Court held that the OML had no applicablity to the agency decisions in this case
- *Amicus* Author: Emmy Langley, Assistant Solicitor General. Attorney General's Office; filed jointly with seventeen state departments

### *National Association for Gun Rights, Inc. v. Polis*

- Issue: CML focused on the singular issue of the standard of review that applies to any legal challenge to any state or local firearms regulation; the Supreme Court will ultimately determine whether the high-capacity magazine restriction in HB 13-1224 violates the right to keep and bear arms secured by the Colorado Constitution.
- Status: Colorado Supreme Court upheld the magazine restriction and reaffirmed the "resonableness" stardard of review.
- CML *Amicus* Author: David Broadwell, CML

### *Williams v. National Federation of Independent Business (NFIB)*

- Issue: Whether SOS business licensing "fees" are actually "taxes" under TABOR
- Status: Colorado Supreme Court upheld the SOS fee structure, primarily because the structure was in place prior to the adoption of TABOR.
- CML *Amicus* Author: David Broadwell, CML

### *Lech v. Jackson*

- Issue: Viability of a Fifth Amendment takings claim for property damaged or destroyed in police standoff with cirminal suspect.
- Status: After the Tenth Circuit ruled for Greenwood Village, the U.S. Supreme Court denied a petition for certorari by the homeowner.
- CML *Amicus* Author: former CML Legislative Counsel Dianne Criswell

### *City of Westminster v. Park Forest Care Center, Inc.*

- Issue: Whether food sales to a nursing home operator should be subject to Westminster use taxes when the food was included in services provided by the operator to nursing home residents.
- Status: CML supported Westminster's petition for certiorari in this case after an adverse decision in the court of appeals, but on September 21, 2020 cert was denied.
- CML Amicus Author: Laurel Witt, CML

## Pending Cases

### *Dunafon v. Independent Ethics Commission*

- Issue: Jurisdiction of the IEC over home rule municipalities who have their own ethics codes
- Status: The Colorado Court of Appeals held that it did not have jurisdiction to rule on the merits of the case because the complaint against Dunafon had not been fully adjudicated at the IEC level; petition for cert to the Colorado Supreme Court is pending
- CML *Amicus* Author: Tracy Lessig, City of Colorado Springs

### *Aurora Urban Renewal Authority v. Kaiser*

- Issue: Whether the methodolgy used by the Arapahoe County Assessor for calculating incremental property tax revenue for urban renwal projects in Aurora complies with state

statutes and prior case law governing tax increment financing (TIF); whether AURA has standing to make this argument.

- Status: Pending in the Colorado Court of Appeals
- CML *Amicu*s Author: David Broadwell, CML

### *Walker Commercial v. Brown*

- Issue: Whether a provision of the Aurora Code saying a certain quasi-judicial decision is not effective until 30 days after the decision is made overrides the 28-day deadline for bringing an appeal under Rule 106, C.R.C.P. thus giving the plaintiff two additional days to appeal to district court.
- Status: Pending in the Colorado Court of Appeals
- CML *Amicus* Author: Laurel Witt, CML

### *Board of County Commissioners of Larimer County v. Thompson Area Against Stroh Quarry*

- Issue: Whether campaign contributions to a local elected official should ever disqualify the official from voting on a quasi-judicial matter involving the contributor
- Status: Pending in the Colorado Court of Appeals
- CML *Amicus* Author: David Broadwell, CML