

2021 legislative wrap-up and A look-ahead to the November ballot

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July 15, 2021



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Odd-year election basics

- Regular election date for 60 municipalities (11 statutory cities and 49 home rules)
 - Potential coordinated election date for all municipalities, including TABOR matters
 - State questions qualify for the odd-year ballot only if they concern state matters arising under “TABOR”
 - August 2 deadline for submission of state petitions
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Potential state ballot questions

- *"Learning Enrichment and Academic Progress Program"*
 - *"Requirements for Spending Custodial Money"*
 - *"Property Tax Assessment Rate Reduction and Voter-Approved Revenue Change"*
 - Waiting in the wings for 2022
 - Another initiated state income tax reduction
 - A state sales tax rate reduction
 - Key players in the spate of tax reduction initiatives
 - Colorado Rising State Action (Michael Fields)
 - The Independence Institute (Jon Caldera)
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“Learning Enrichment and Academic Progress Program”

- 5% sales tax increase on recreational marijuana to raise \$137 million/year
- Earmarked for after-school and summer enrichment programs for kids ages 5-17
- In the past decade
 - Three education tax increases were DEFEATED
 - Four “sin taxes” were APPROVED!



“Requirements for Spending Custodial Money”

- Shifts power from the Governor to the General Assembly to decide how to spend “custodial funds” received by Colorado
- Would apply to things like federal relief dollars, lawsuit settlements, or donations to the state for a particular purpose
- Includes both constitutional and statutory amendments, thus triggering 55% voter approval requirement
- Includes de-Brucing language for all custodial funds received in the future.



“Property Tax Assessment Rate Reduction and Voter-Approved Revenue Change”

- Property in Colorado is taxed at only a fraction of its actual value: 7.15% for residential, 29% for non-residential
- Repeal of the Gallagher Amendment last year prevented the residential ratio from continuing to plummet automatically every two years
- But the repeal also opened the door for manipulation of the ratio by the legislature or initiative petitioners
- The General Assembly declared a “moratorium” last year on changes to the ratios



“Property Tax Assessment Rate Reduction and Voter-Approved Revenue Change”

“Shall there be a change to the Colorado Revised Statutes concerning property tax reductions, and, in connection therewith, reducing property tax revenue by an estimated \$1.03 billion in 2023 and by comparable amounts thereafter by reducing the residential property tax assessment rate from 7.15% to 6.5% and reducing the property tax assessment rate for all other property, excluding producing mines and lands or leaseholds producing oil or gas, from 29% to 26.4% and allowing the state to annually retain and spend up to \$25 million of excess state revenue, if any, for state fiscal years 2022-23 through 2026-27 as a voter-approved revenue change to offset lost revenue resulting from the property tax rate reductions and to reimburse local governments for revenue lost due to the homestead exemptions for qualifying seniors and disabled veterans?”



“Property Tax Assessment Rate Reduction and Voter-Approved Revenue Change”

- Token “de-Brucing” language was added to the measure to qualify it for 2021 odd-year ballot
- Per TABOR, once the ratios go down, they can never go up again without voter approval
- More motivation for local governments to adopt floating mill levies (“de-Gallagher questions”) to offset revenue loss due to declining assessment ratios



SB 21-293: Blunting the impact of the initiative to reduce assessment ratios

- Introduced and adopted in the final six days of the session
- Two-year *temporary* reduction on assessment ratios for some classes of property
- \$200 million/year reduction in property tax revenue
- Restructures property tax code in a way that undercuts the pending initiative, such that the a reductions in the initiative would only apply to multi-family and lodging property
- Key precedent: *Colorado Community Health Network v. Colorado General Assembly*, 166 P.3d 280 (Colo. App. 2007) (General Assembly undermines key provision of pending 2004 tobacco tax initiative)



HB 21-1321: Dictating the ballot wording for all future tax decrease initiatives

- Introduced and adopted in the last two weeks of the session
- Unprecedented move to dictate the inclusion of certain wording in initiated ballot questions
- Requires future tax decrease questions to identify the services likely to be reduced if taxes are cut
- Runs against the grain of traditional title drafting principles:
 - Requirement for ballot titles to be brief
 - Prohibition against ballot title language that goes beyond the content of the measure and creates an argument for or against the measure



TABOR lessons from the '21 Session

*“The Year That Democrats Left TABOR Behind: Billions in New Spending Can Cut Through Colorado’s Fiscal Firewall”**

Colorado Public Radio headline, 5-31-21

*Not entirely true . . .



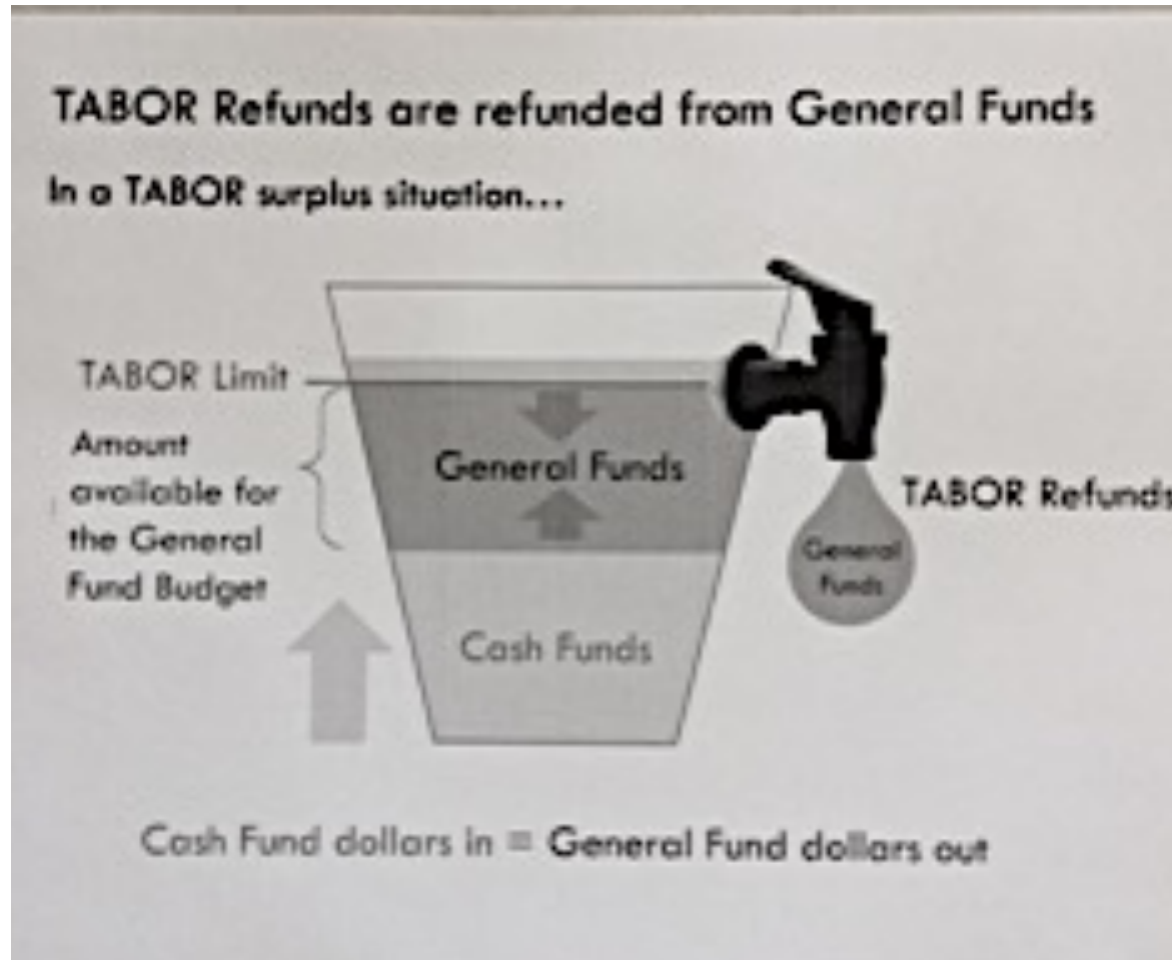
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“The heartbreak of excess revenue . . .”

- Legislative Council quarterly economic forecast (6/18/21) projects \$1 Billion TABOR refunds starting next year
- On 7/8/21 Gov. Polis vetoes one motor vehicle registration fee bill (H 21-1254) on the theory that it would exacerbate TABOR refunds and squeeze out general fund spending
- TABOR surplus driven by:
 - Robust economic recovery
 - New fee revenue (unsheltered by a TABOR enterprise)
 - New tax revenue caused by changes in “tax policy”



How fees drive TABOR refunds



SB 21-260: Transportation funding and greenhouse gas reduction

- \$5.4 billion* in new revenue without a TABOR vote (*Ten-year estimate)
- What's in it for municipalities?
 - \$43 million/year in new HUTF revenue for local governments (FY23/24, increasing annually)
 - Enhanced authority to form regional transportation authorities
 - Numerous spending opportunities re electric vehicle conversion (e.g. EV charging stations; fleet conversion to EV, etc.)



SB 21-260: Transportation funding and greenhouse gas reduction

- Six new state fees (no sunset; indexed to increase in perpetuity)
 - Road Usage Fee on gasoline*
 - Bridge and Tunnel Impact Fee on diesel
 - EV Registration Fee
 - Retail Delivery Fee* (really seven distinct fees)
 - Passenger Ride Services Fee
 - Vehicle Rental and Car Sharing Fee

*These two generate the largest revenue streams by far



SB 21-260: Transportation funding and greenhouse gas reduction

- Approximately half of new revenue sheltered in a TABOR enterprise; the other half treated as “cash funds” subject to TABOR/Ref C cap
- Four new TABOR enterprises created:
 - Community Access Enterprise (EV charging infrastructure)
 - Clean Fleet Enterprise (conversion of fleets to EV)
 - Clean Transit Enterprise (conversion of transit to EV)
 - Non Attainment Area Air Pollution Mitigation Enterprise (reduce driving)
- Largest recipient of fee revenue will be existing Colorado Bridge (and Tunnel) Enterprise created in 2009



SB 21-260: TABOR Issues

- Distinguishing fees from taxes
 - Extensive legislative declaration language; heavy reliance on *Colorado Union of Taxpayers v. City of Aspen* (Colo. 2018)
 - Mix of “user fee” and “regulatory fee” theories
 - **User fees** “imposed at rates that are reasonably calculated to defray the costs of providing the service . . . Proportional to the benefits received.” *TABOR Foundation v. Colorado Bridge Enterprise* (Colo. App. 2014)
 - **Regulatory fees** connected to “comprehensive regulatory scheme” and to defray the costs of providing “remediation services.” *Aspen* case.



SB 21-260: TABOR Issues

- “Government-owned business”
 - Definition of “business services” to be provided by each enterprise
 - “the enterprise engages in an activity conducted in the pursuit of a benefit, gain or livelihood” Nicholl v. E-470 Public Highway Authority (Colo. 1995)
- Revenue bonding authority
 - Query: what’s the plan for bonding against the new enterprise revenue?



SB 21-260: Prop 117 Issues

Proposition 117 of 2020 requires voter approval for the creation of new TABOR-exempt enterprises

“(1) After January 1, 2021, any state enterprise qualified or created, as defined under Colo. Const. Art. X, section 20(2)(d) with projected or actual revenue from fees and surcharges of over \$100,000,000 total in its first five fiscal years must be approved at a statewide general election

“(2) Revenue collected for enterprises created simultaneously or within the five preceding years serving primarily the same purpose shall be aggregated in calculating the applicability of this section.”



SB 21-260: Prop 117 Issues

No voter approval required under Prop 117 because:

- A great deal of the fee revenue is funneled to an existing enterprise, not a new enterprise
- Each of the four new enterprises is crafted to stay under the \$100 million/five year cap
- Each new enterprise serves a distinctive “primary business purpose”
- Distinct and separate fees serve each of the four new enterprises



State Tax Reform Package

- **HB 21-1311** and **21-1312** described as most significant tax reform package in a decade
- Two key municipal takeaways:
 - “Tax policy changes” that demonstrably increase revenue, but do not trigger a TABOR vote. See: *Bd. of Cty. Comm’rs v. Ritter*, 203 P.3d 519 (Colo. 2009); *TABOR Found. v. RTD*, 416 P.3d 101 (Colo. 2017)
 - Dramatically increased business personal property tax exemption, but with local backfill funded by the state



HB 21-1164: Restoration of School District Mill Levies

- TABOR requires voter approval for any “mill levy about that for the prior year” but . . .
 - HB 21-1164 allows school districts to gradually restore mill levies to their 1990’s levels without a vote
 - The legislation was blessed by the Colorado Supreme Court in: *In Re Interrogatory on House Bill 21-1164 Submitted by the Colorado General Assembly*, 487 P.3d 636 (Colo. 2021)
 - Municipal takeaway: A de-Brucing question effectively ratifies tax rates that existed on the date of the de-Brucing and allows a district to return to those rates
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Ongoing Changes in Sales Tax

- Update on statewide sales tax collection
 - Sales Tax Task Force
 - Remote sellers and the development of SUTS
- Continuation of small business exception to economic nexus rules **SB 21-282**
- Creation of another state body looking at statewide tax policy
 - Legislative Oversight Committee Concerning Tax Policy, **HB 21-1077**



Regulating marijuana concentrates... and more

- Regulating marijuana concentrates, **HB 21-1317**
 - Tracking and anti-looping for both retail marijuana stores and medical marijuana stores
 - Youth diversion with medical marijuana
 - Lawsuit questioning constitutionality of this bill.See:
https://www.coloradopolitics.com/legislature/advocate-sues-gov-jared-polis-to-stop-implementation-of-marijuana-concentrates-bill/article_7dfb68d6-e0b0-11eb-ab1e-b330de77232f.html



Other marijuana legislation

- Ability to change license designations
HB21-1216
 - Starting July 1, 2022, the act allows licensees to change the designation of marijuana from medical to retail, and vice versa.
 - ... but, before businesses begin to change, MED must conduct and present a feasibility study to the general assembly
- Outdoor cultivation adverse weather plans
HB 21-1301



Liquor and Beer

- **HB 21-1027**
 - Extending takeout and delivery to 2025
 - Modification of premises: Communal dining and a change in landscape post-COVID
- Wine festivals extended to other types of alcohol **SB 21-082**
 - Different than special events permitting under C.R.S. 44-5-103



Ranked Choice Voting

- Allowance for ranked choice voting (or instant runoff voting) **HB 21-1071**
 - Historical background rooted in City of Boulder charter amendment
 - Allows RCV for municipalities in one county after 1/1/23, for multiple counties 7/1/26
 - Secretary of State to certify machines and create rules around the topic



Election Clean Up

- Municipal recall statutes amended in large election clean up bill, **SB 21-250**
 - Towards the end of the bill
- Later this year, CML will be putting out a new edition of the Elections Book in anticipation of the next round of elections



Open Meetings and Open Records

- Chief executive officer applications, **HB 21-1051**
 - How many candidate names and information for the chief executive officer must a municipality provide under CORA?
 - CU Board of Regents lawsuit
 - Proponents of the bill say the bill will encourage more applicants to fill positions because their identity will be protected in the application process
 - Opponents express concern for the lack of transparency and the effect that could have on diverse candidates



Workers Compensation

- Pandemic put workers compensation process in Colorado into a pressure cooker
- Workers' compensation act cleanup, **HB 21-1050**
 - Overpayment of workers' compensation, **HB 21-1207**
- Discussion of Choice of Doctor Bill **SB 21-197** (Note: did not pass)



Removing Lawful Presence

- Move towards more immigration friendly legislation
- Following bills require the removal of lawful presence requirements
 - From any state or local benefit, **SB 21-199**
 - From any public or assisted housing benefits (unless otherwise required by federal law), **HB 21-1054**
 - From any state or local regulated professional licenses, certificates, or registrations, **SB 21-077**



Immigration reform, ctd.

- Removing the Term “Illegal Alien” from Contracts, **HB 21-1075**
 - Replace with “worker without authorization.”
This term means someone who is unable to provide evidence that they are authorized by the federal government to work in the U.S.
- U Visa certification reform, **HB 21-1060**



Trends in Municipal Preemption

- Current General Assembly continues to (partially) roll back old preemption statutes
 - Oil and gas regulation (**SB 19-181**)
 - Minimum Wages (**HB 19-1210**)
 - Rent Control (**HB 21-1117**)
 - Plastics (**HB 21-1162**)
 - Firearms (**SB 21-256**)
- Common features:
 - Each bill comes with a “catch”
 - Legislation always allows local regulations to be more restrictive, never less restrictive, than state law



Trends in Municipal Preemption

Rent Control and Inclusionary Zoning (HB 21-1117)

- Clarifies that “housing impact” and “inclusionary zoning” ordinances are not a form of prohibited “rent control”
- The catch:
 - Such ordinances must give developers a menu of options in lieu of delivering affordable units on site
 - In order to adopt such an ordinance, the municipality must have one or more policies in place to increase the supply and density of housing within the community



Trends in Municipal Preemption

HB 21-1162 Regulation of Plastics

- Repeals a 1989 law that prohibited municipalities from regulating “the use or sale of specific types of plastic materials.” Adopts new statewide restrictions on single-use bags and polystyrene food containers
- The catch:
 - The preemption is not lifted for another three years (7-1-24)
 - All enforcement responsibility for new statewide laws devolved to local governments
 - Sixteen Colorado municipalities that already have bag bans or bag fees/taxes will now need to decide what to do next



Trends in Municipal Preemption

SB 21-256 Regulation of Firearms

- Partially repeals preemption statutes adopted in 2003 which generally prohibited local laws that regulate firearms more strictly than the state and standardized laws related to concealed handgun permits. Allows stricter (but not less strict) local regulation under some circumstances.
- The catch:
 - Local governments still cannot adopt forms of regulation that are prohibited by state law (e.g. C.R.S. 18-12-105.6 prohibiting local restrictions on firearms in vehicles)
 - A local ordinance cannot be enforced against a person who neither knew or should have known about the existence of the ordinance.



Trends in Municipal Preemption

HB 21-1222: Authority to restrict or prohibit family child care homes in residential zoning districts

- Generally requires that state-licensed family child care homes be regulated no more strictly than residential land uses
- Similar (but more expansive) than laws adopted years ago requiring local governments to allow “group homes” in residential zone districts
- May be part of a larger trend of state involvement in local land use policies under the banner of “statewide interests”



Trends in Municipal Liability

- In general there is a rising tide of legislation creating new ways to sue municipalities for monetary damages
- CML often lobbies alongside business and other private sector interests in response to this sort of legislation, particularly legislation that creates new employer liabilities



Trends in Municipal Liability

- **SB 21-073 and SB 21-088:** New employer exposure for claims related to childhood sexual abuse by employees and volunteers; waiver of governmental immunity for such claims; allows retrospective claims for events that may have occurred in the past
- **HB 21-1108:** Adds gender expression and gender identity as a basis for discrimination claims under CADA
- **HB 21-1051:** Adopts ADA Title II counterpart in CADA re discrimination in public services and programs; special provisions for access to government websites
- **NOT ADOPTED: SB 21-176.** Would have substantially broadened the definition of “hostile work environment” for purposes of discrimination claims under CADA



Policing and Criminal Justice

HB 21-1250: Further refinements to the historic 2020 legislation, SB 20-217, adopted in the immediate wake of George Floyd's murder. Key features of this year's legislation:

- Accelerated body-worn camera mandates
- Clarification of requirements for recording police "contacts"
- "Exoneration" as a defense to officer sanctions
- Clarification of "failure to intervene" sanctions
- Whistle-blower protection for officers reporting bad behavior by others
- Further expansion of civil liability
- Expanded "multi-agency review" of police killings
- Expansion of A.G. "pattern and practices" powers
- POST database; mandatory background checks for police hiring
- Limitation on encryption of police radio
- Expanded public access to internal investigation files
- Study of "no-knock warrants" launched



Policing and Criminal Justice

- **HB 21-1250:** Acceleration of body-worn camera(BWC) mandates
 - Under SB 20-217, all of the BWC mandates were not going to take effect until 7/1/23
 - Now, for police departments that already use BWC
 - Requirements for release of BWC video and sanctions for tampering with BWC in effect NOW
 - All other operational mandates imposed by the statute will be in effect on 7/1/22
 - For departments that have not yet deployed BWC, the deadline for doing so remains 7/1/23



Policing and Criminal Justice

- **HB 21-1250:** Reporting of all police “contacts” for inclusion in a new statewide database
 - SB 20-217 contained many ambiguities about the definition of “contact” and the entire reporting process
 - This years legislation:
 - Carves out a number of exceptions from the definition of “contact”
 - Refines the kind of data that must be collected and from whom
 - Requires the Colorado Department of Criminal Justice to promulgate uniform “data-collection methods” for contact reporting
 - Accelerates from 1/1/23 to 4/1/22 the date upon which first contacts report from local law enforcement to the DCJ will be due
 - More clearly defines the “legal basis” for making a “contact”



Policing and Criminal Justice

- **HB 21-1250:** New civil liability provisions
 - SB 20-217 was heavily oriented toward requiring municipalities to fully indemnify officers for damage claims arising from constitutional violations committed by the officer, with two narrow exceptions: (1) criminal acts by the officer; and (2) bad faith acts by the officer (leading to a maximum of \$25,000 personal exposure for the officer)
 - This years legislation
 - expands indemnification to include even criminal acts by the officer if the municipality was a “causal factor”
 - Prohibits municipalities from adopting blanket policies exonerating officers from personal responsibility for acts of bad faith



Policing and Criminal Justice

- **HB 21-1250:** Release of completed internal investigation files
 - HB 19-1119 adopted two years ago was intended to make it easier for anyone to access such files of completed investigations as relates to a “specific, identifiable incident.”
 - This year, HB 1250 struck the words “specific, identifiable” from the 2019 law to make it easier for requestors to make blanket requests for IA files
 - Meanwhile, on June 28 the Colorado Supreme Court ruled in *People v. Sprinkle* that requestors already had the right to make blanket requests for IA files under the 2019 law without needing to tie the request to a specific incident



Policing and Criminal Justice

- Other police reform measures adopted this session

HB 21-1251: Limitations on use of ketamine as a form of “chemical restraint”

- Criminal sanctions against police who “unduly influence” EMTs to administer ketamine
- Restrictions on administration of ketamine by EMTs

HB 21-1142: Requirements for “show-up” identification of criminal suspects

HB 21-1122: Mandatory training re first responder interaction with persons with disabilities

SB 21-174: Standardization of “officer credibility” disclosures from law enforcement to district attorneys for “Brady disclosure” purposes in criminal cases



Policing and Criminal Justice

- Other criminal justice measures adopted this session:
 - SB 21-271:** Reclassifying and reducing the penalties for hundreds of state misdemeanors and petty offenses
 - For theft, vandalism, and other property crimes, establishes \$2000 in theft or damage as the consistent line of demarcation between misdemeanors and felonies
 - Maximum fine for a state misdemeanor will now be \$1000; maximum fine for a municipal ordinance violation remains \$2,650+ per C.R.S. 31-16-101
 - HB 21-1314:** Elimination of the O/JW system for reporting unpaid municipal traffic tickets to DMV and suspending driving privileges until driver pays ticket or appears in court



Policing and Criminal Justice

- Looking ahead, a list of topics likely to return in 2022:
 - Limitations on authority of police to make arrests for “lower level” offenses
 - Limitations on authority of courts to impose cash bail
 - Limitations on police actions against juveniles in school settings
 - Limitations on police actions in response to protests
 - Limitations on use of no-knock warrants
 - Limitations on police collection of biometric data (e.g. facial recognition technology)
 - Further refinement of use of force standards as adopted in SB 20-217 (e.g. duty to use “de-escalation tactics and techniques”)



**Questions?
Clarifications?
Corrections?**

Thank you for attending today!



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CLE Code for Today's Presentation

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2021 Annual Business Meeting CML Municipal Attorneys Section

Section Chair Carrie Daggett,
Ft. Collins City Attorney, presiding



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