

2021

ANNUAL SEMINAR
ON MUNICIPAL LAW



2020-21 Survey of Local Government Law

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Colorado Municipal League

October 22, 2021

Campaigns and Elections

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ON MUNICIPAL LAW



Campaigns and Elections

2021
ANNUAL SEMINAR
ON MUNICIPAL LAW

- Voter suppression vs. voter fraud and election integrity
 - *Brnovich v. Democratic National Committee*, 141 S.Ct. 2321 (2021)
 - *People v. Curtis*, 2021 WL 3412620 (Colo. App., August 5, 2021)
- Congressional and state redistricting
 - *In re: Interrogatories on Senate Bill 21-247*, 488 P.3d 1008 (Colo. 2021)
- Advent of more sophisticated municipal campaign finance ordinances
 - *Rio Grande Foundation v. City of Santa Fe*, 7 F.4th 956 (10th Cir. 2021)
 - *Mike Coffman v. City of Aurora*
- Recalls, recalls, and more recalls
 - *Westminster Citizens for Responsible Government v. Parker*, 2021 CV 30004, Adams County District Court
 - *Town of Avon v. Avon Recall Committee*, 2020 CV 30264, Eagle County District Court

Employment

2021
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ON MUNICIPAL LAW

Discrimination

The prejudicial treatment or consideration of a person, racial group, minority, etc. based on category rather than individuality, excluding or restricting members of on the grounds of race, sex, or age.

Employment

2021
ANNUAL SEMINAR
ON MUNICIPAL LAW

- Claims for compensatory damages under CADA
 - *Denver Health and Hospital Authority v. Houchin*, 477 P.3d 149 (Colo. 2020)
 - *Elder v. Williams*, 477 P.3d 694 (Colo. 2020)
- ADA claims without “adverse employment actions”
 - *Exby-Stolley v. Board of County Commissioners*, 979 F.3d 784 (10th Cir. 2020); *cert. denied* (2021)
- Rights of employees to testify in court without retribution
 - *Butler v. Board of County Commissioners for San Miguel County*, 491 P.3d 506 (Colo. App. 2021)

First Amendment

2021
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ON MUNICIPAL LAW



First Amendment

2021
ANNUAL SEMINAR
ON MUNICIPAL LAW

- Video recording as an exercise of First Amendment Rights
 - Qualified immunity questions
 - *Frasier v. Evans*, 992 F.3d 1003 (10th Cir. 2021)
 - *Irizarry v. Yehia*, 2021 WL 2333019 (D. Colo. 2021)
 - Public forum questions
 - *Fenn v. City of Truth or Consequences*, 983 F.3d 1143 (10th Cir. 2020)
 - *Kerr v. City of Boulder*, 2021 WL 2514567 (D. Colo. 2021)
- Other speech retaliation cases
 - Mayor can criticize "hate speech"
 - *VDARE Foundation v. City of Colorado Springs*, 11 F.4th 1151 (10th Cir. 2021)
 - Sheriff cannot inconsistently enforce political speech restrictions in workplace
 - *Duda v Elder*, 7 F.4th 899 (10th Cir. 2021)

First Amendment

2021
ANNUAL SEMINAR
ON MUNICIPAL LAW

- Social Media Cases
 - Vulgar speech on Instagram
 - *Mahoney Area School District v. B.L.*, 141 S.Ct. 2038 (2021)
 - “True threats” on Facebook
 - *People v. Counterman*, 2021 WL 3085519 (Colo. App., July 22, 2021)
- Facial challenges to ordinances regulating speech
 - Upholding disturbing the peace ordinance (“loud and unusual noises”)
 - *Harmon v. City of Norman*, 981 F.3d 1141 (10th Cir. 2020)
 - Invalidating a law designed to protect agricultural operations from animal rights activists
 - *Animal Legal Defense Fund v. Kelly*, 9 F.4th 1219 (10th Cir. 2021)

First Amendment

2021
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ON MUNICIPAL LAW

- Free Exercise and Establishment Clause Cases
 - Termination of contract with faith-based service provider disapproved
 - *Fulton v. City of Philadelphia*, 141 S.Ct. 1868 (2021)
 - Government cannot force anyone to receive services from faith-based organizations
 - *Janny v. Gamez*, 8 F.4th 883 (10th Cir. 2021)
 - Churches successfully challenge COVID-19 public health orders
 - *Denver Bible Church v. Azar*, 494 F.Supp.3d 816 (D.Colo. 2020);
 - *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63 (2020)

Governmental Immunity Act

2021
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ON MUNICIPAL LAW



Governmental Immunity

2021
ANNUAL SEMINAR
ON MUNICIPAL LAW

- Dangerous conditions in municipal sidewalks; “unreasonable risk”
 - *Maphis v. City of Boulder*
- State regulatory sanctions do not “lie in tort”
 - *Board of County Commissioners of the County of La Plata v. Colorado Department of Public Health and Environment*, 488 P.3d 1065 (Colo. 2021)
- Expansion of tort liability for motor vehicle claims
 - *Teran v. Regional Transportation District*, 477 P.3d 799 (Colo. App. 2020)
- Strict two-year statute of limitations for bringing tort claims against public entities
 - *Morin v. ISS Facility Services, Inc.*, 487 P.3d 1289 (Colo. App. 2021)

Marijuana

2021
ANNUAL SEMINAR
ON MUNICIPAL LAW



Marijuana

2021
ANNUAL SEMINAR
ON MUNICIPAL LAW

- Facially neutral marijuana laws do not violate religious freedom
 - *People v. Torline*, 487 P.3d 1284 (Colo. App. 2020); *cert. denied* (2021)
 - *Aguilera v. City of Colorado Springs*, 834 Fed.Appx. 665 (10th Cir. 2020)
- Minimal criminal sanctions for exceeding plant counts in residences
 - *People v. Garcia-Gonzalez*, 478 P.3d 1288 (Colo. App. 2020)
- State and local laws cannot expand criminal sanctions on medical marijuana patients and care-givers
 - *People v. Cox*, 493 P.3d 914 (Colo. App. 2021)

Open Meetings/Open Records

2021
ANNUAL SEMINAR
ON MUNICIPAL LAW



Open Meetings/Open Records

2021
ANNUAL SEMINAR
ON MUNICIPAL LAW

- Authority to publicly name only one “finalist” when public body hires “chief executive officer”
 - *Prairie Mountain Publishing CO. L.L.P. v. Regents of the University of Colorado*, 491 P.3d 472 (Colo. App. 2021); *cert. denied* (2021)
- Expanded access to records concerning completed police internal investigations
 - *People v. Sprinkle*, 489 P.3d 1242 (Colo. 2021)
- Colorado Independent Ethics Commission is not subject to either CORA or the OML
 - *Dunafon v. Krupa*, 477 P.3d 785 (Colo. App. 2020)

Police Civil Liability/Fourth Amendment

2021
ANNUAL SEMINAR
ON MUNICIPAL LAW



Police Civil Liability/Fourth Amendment

2021
ANNUAL SEMINAR
ON MUNICIPAL LAW

- Key civil liability exposures for police
 - Use of excessive force on arrestee who no longer poses a threat
 - *Vette v. K-9 Deputy Sanders*, 989 F.3d 1154 (10th Cir. 2021)
 - Use of a “prone restraint” resulting in death of arrestee
 - *Lombardo v. City of St. Louis*, 141 S.Ct. 2239 (2021)
 - Prisoner in medical distress
 - *Lance v. Morris*, 985 F.3d 787 (10th Cir. 2021)
 - Arrestee in medical distress or under some physical or mental disability
 - *Schmitz v. Colorado State Patrol*, 841 Fed.Appx. 45 (10th Cir. 2020)

Police Civil Liability/Fourth Amendment

2021
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ON MUNICIPAL LAW

- Qualified Immunity doctrine remains an important defense in federal courts
 - SCOTUS overturns Tenth Circuit in case implicating duty to de-escalate (or avoid further escalation) when police approach obviously unstable person
 - *Bond v. City of Tahlequah*, 981 F.3d 808 (10th Cir. 2020); reversed on October 18 by *City of Tahlequah v. Bond*, 595 U.S. ____ (2021)
 - Botched investigation and arrest where officer did not proffer “deliberate falsehoods” or engage in a “knowing and reckless disregard of the truth”
 - *Metzler v. City of Colorado Springs*, 841 Fed.Appx. 94 (10th Cir. 2021)

Police Civil Liability/Fourth Amendment

2021
ANNUAL SEMINAR
ON MUNICIPAL LAW

- SCOTUS clarifies the “mere touch” rule; a person is considered “seized” under the Fourth Amendment even if a use of force is not immediately successful in restraining the person and taking the person into custody.
 - *Torres v. Madrid*, 141 S.Ct. 989 (2021)

Police Civil Liability/Fourth Amendment

2021
ANNUAL SEMINAR
ON MUNICIPAL LAW

- Warrantless entry into residences
 - Continuous video surveillance into fenced back yard of residence disapproved
 - *People v. Tafoya*, 494 P.3d 613 (Colo. 2021)
 - Hot pursuit of fleeing misdemeanor into residence
 - *Lange v. California*, 141 S.Ct. 644 (2021)
 - Community Caretaking Doctrine applies only to warrantless motor vehicle impoundment and inventory searches, not entry into a residence
 - *Caniglia v. Strom*, 141 S.Ct. 1596 (2021)

Police Civil Liability/Fourth Amendment

2021
ANNUAL SEMINAR
ON MUNICIPAL LAW

- Warrantless impoundment and search of motor vehicles after a traffic stop
 - Not OK: Impoundment of vehicle parked on city street without exhausting other viable options for removal or securing of vehicle
 - *People v. Thomas*, 488 P.3d 1191(Colo. App. 2021).
 - Not OK: Same in private parking lot of a motel
 - *U.S. v. Venezia*, 995 F.3d 1170 (10th Cir. 2021)
 - Not OK: When the impoundment and search appears to be pretextual
 - *U.S. v. Woodard*, 5 F.4th 1148 (10th Cir. 2021)
 - OK: Impoundment of vehicle parked on city street when there are no other lawful options for moving the vehicle
 - *U.S. v. Kendall*, 2021 WL 4434206 (10th Cir., September 28, 2021)

Public Works and Utilities

2021
ANNUAL SEMINAR
ON MUNICIPAL LAW



Public Works and Utilities

2021
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ON MUNICIPAL LAW

- Tenth Circuit rejects various constitutional claims alleging injury due to “radio frequency emissions” from cell towers
 - *Santa Fe Alliance for Public Health and Safety v. City of Santa Fe*, 993 F.3d 802 (10th Cir. 2021)
- Ubiquitous pending legal controversies over municipal water supply projects
 - Gross Reservoir expansion by Denver Water in Boulder County
 - Thornton Pipeline in Larimer and Weld County
 - Northern Integrated Supply Project (Glade Reservoir, etc.) in Larimer County
 - Whitney Reservoir proposed by Aurora and Colorado Springs in Eagle County

Taxation and Finance

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ANNUAL SEMINAR
ON MUNICIPAL LAW



Taxation and Finance

2021
ANNUAL SEMINAR
ON MUNICIPAL LAW

- All TABOR all the time
 - Entire Tenth Circuit set to decide whether TABOR is constitutional
 - *Kerr v. Polis*, 977 F.3d 1010 (10th Cir. 2020)
 - Restoration of school district mill levies to historic levels without a vote
 - *In re: Interrogatory on House Bill 21-1164*, 487 P.3d 936 (Colo. 2020)
 - Denial of standing to mount TABOR challenges to state and local fiscal policies
 - Challenge to state “Hospital Provider Fee” legislation
 - *TABOR Foundation v. Colorado Department of Health Care Policy and Financing*, 487 P.3d 1277 (Colo. App. 2020); *cert. denied* (2021)
 - Challenge to multi-year funding contract for road in Estes Park
 - *Jirsa v. Town of Estes Park*, 2020CV3082, Larimer County District Court

Land Use, Zoning and Eminent Domain

2021
ANNUAL SEMINAR
ON MUNICIPAL LAW



Zoning, Land Use and Eminent Domain

2021
ANNUAL SEMINAR
ON MUNICIPAL LAW

- Fifth Amendment “Takings” cases
 - “Physical invasion” when a state law allows one person to enter another person’s property without permission of the owner
 - *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063 (2021)
 - When is a regulatory decision ripe for adjudication in federal court?
 - Ripe: A challenge to a San Francisco restriction on condo conversions
 - *Pakdel v. City and County of San Francisco*, 141S.Ct. 2226 (2021)
 - Not ripe: A challenge to an Aspen land use restriction preventing a landowner from building “free market residential” units on a downtown property
 - *North Mill Street, LLC v. City of Aspen*, 6 F.4th 1216 (10th Cir. 2021)

Zoning, Land Use and Eminent Domain

2021
ANNUAL SEMINAR
ON MUNICIPAL LAW

- Oil and gas cases:
 - The adoption of SB 19-181 did not revive Longmont's fracking ban
 - *Our Health, Our Future, Our Longmont v. State of Colorado*, 20 CV 30033, Boulder County District Court
 - Boulder County tries in vain to convince courts that oil and gas leases on county open space property long ago lapsed due to lack of production
 - *Board of County Commissioners of Boulder County v. Crestone Peak Resources Operating LLC*, 493 P.3d 917 (Colo. App. 2021)

Zoning, Land Use and Eminent Domain

2021
ANNUAL SEMINAR
ON MUNICIPAL LAW

- Spotlight on special use permits (and quarries):
 - Boulder County neighbors convince court of appeals that a county special use permit for gravel quarry long ago lapsed due to lack of production
 - *Save Our Saint Vrain Valley, Inc. v. Boulder County Board of Adjustment*, 491 P.3d 562 (Colo. App. 2021)
 - District court upholds authority of county to enforce conditions of a special use permit originally issued in 1982 at limestone quarry site above Glenwood Springs
 - *Rocky Mountain Industrials, Inc. v. BOCC of Garfield County*, 2019CV30087, Garfield County District Court

Zoning, Land Use and Eminent Domain

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ANNUAL SEMINAR
ON MUNICIPAL LAW

- Other important cases affecting municipal land use powers and decisions in the past year:
 - Rule 106 appeals from quasi-judicial decisions; strict 28 day deadline is not necessarily binding; excusable neglect may allow longer appeal period
 - *Walker Commercial, Inc. v. Brown*, 492 P.3d 1045 (Colo. App. 2021)
 - Discrimination against condominium form of ownership in municipal land use regulations is prohibited by Colorado Common Interest Ownership Act
 - *Town of Vail v. Village Inn Plaza-Phase V Condominium Association*, 2021 WL 3556087 (Colo. App., August 12, 2021)

Miscellany

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ANNUAL SEMINAR
ON MUNICIPAL LAW



MISCELLANY

2021
ANNUAL SEMINAR
ON MUNICIPAL LAW

- Update on municipal regulation of unauthorized encampments
 - On May 10 the Colorado Supreme Court denied a petition for cert in *Burton v. City and County of Denver*, a case challenging Denver's camping ordinance. The prosecution of the case continues in Denver County Court
 - On February 4, a district court overturned a conviction of a man for violating the Ft. Collins camping ordinance, using a cruel and unusual punishment rationale. *People v. Wiemold*, 19 CV 30889, Larimer County District Court
- Remote judicial hearings do not violate Due Process or Equal Protection
 - *People in the Interest of R.J.B.*, 482 P.3d 519 (Colo. App. 2021); *cert. denied* (2021)
 - *People v. Hernandez*, 488 P.3d 1055 (Colo. 2021)

Miscellany

2021
ANNUAL SEMINAR
ON MUNICIPAL LAW

- Sex offender registration system may violate Eighth Amendment
 - *People in the Interest of T.B.*, 489 P.3d 752 (Colo. 2021)
- Boulder nuisance suit against oil companies might remain in federal court
 - *BP P.L.C. v. Mayor and City Council of Baltimore*, 141 S.Ct. 1532 (2021)
- Glendale sues again to challenge the jurisdiction of the Colorado Independent Ethics Commission over home rule officers and employees
- District court strikes down Boulder firearms laws; but General Assembly revives them
 - *Chambers v. City of Boulder*, 2018CV30581, Boulder County District Court

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Questions? Comments? Corrections?

**Wonderful to see everybody in-person in beautiful and historic
Pueblo, Colorado!**