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2016-17 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 local government attorneys in Colorado, reported from October 2016 to September 2017.

Elections and Campaigns
Employment
First Amendment
Governmental Immunity/Torts
Marijuana
Municipal Courts and Prosecution
Public Works
Special Districts
Taxation and Finance
Zoning, Land Use, and Development
Miscellany

ELECTIONS AND CAMPAIGNS

No violation of FCPA when school district distributes puff piece supporting reelection of incumbents

Several weeks before the November 2013 school board election, the Douglas County School District distributed to 85,000 county residents an email linked to a privately commissioned white paper (for which $15,000 in district funds were paid), extolling the work of incumbent board members who supported the conservative "reform agenda" of the school board and who were running for reelection. A losing candidate in the election sued under § 1-45-117, C.R.S. claiming that the email and white paper constituted a "contribution" to the campaigns of the incumbent council members paid for with public funds in violation of the FCPA. The Colorado Supreme Court agreed with the court of appeals that nothing in this scenario constituted a direct or indirect "contribution" to the campaigns of candidates within the meaning of the statute, primarily because the candidates did not actually "receive the thing of value" from the district.

Note, however, that given differences in the way the statute is worded for ballot issue campaigns, as contrasted with candidate campaigns, a different result might have occurred if the behavior of the board had been associated with supporting or opposing a ballot question. *Keim v. Douglas County School District,* 397 P.3d 377 (Colo. 2017).

Sec. 1983 claims cannot be combined with pre-election claims brought under the UEC

A 5-2 majority of the Colorado Supreme Court held for the first time this year that civil rights claims based on 42 U.S.C. § 1983 cannot be combined with a state court action brought under § 1-1-115 of the Uniform Election Code. This statute provides a summary and expedited process for adjudicating claims against election officials arising *prior* to the election, for example a claim that the election official improperly rejected a nominating petition for a candidate. (Compare § 31-10-114 in the Municipal Election Code, which is similar but not identical.) The high court noted this kind of litigation proceeds at a "breakneck pace" in both the trial court and the supreme court itself, given the tight deadlines for conducting elections. It is utterly impractical and unrealistic to expect to adjudicate § 1983 claims in the time frame provided for claims arising under § 1-1-115. The court reiterated that state courts always remain open generally to § 1983 claims in separate lawsuits, as they must under the Supremacy Clause. But henceforth such a claim cannot be adjudicated in the context of a state court special proceeding conducted under § 1-1-115. *Frazier v. Williams*, 2017 WL 3974285 (Colo, September 11, 1017); *Williams v. Libertarian Party*, 2017 WL 3974462 (Colo., September 11, 2017).

Again, no violation of secret ballot requirements in Town of Center recall election

In 2014 the Colorado supreme court ruled that the clerk in Center did not violate the "secret ballot" guarantees in the Colorado Constitution when ballot counters in a recall election inadvertently failed to remove the numbered stubs on some of the mail-in ballots, as long as there was no evidence that anyone ever learned how a particular elector voted. *Jones v. Samora,* 318 P.3d 462 (Colo. 2014). Late last year, lingering § 1983 claims arising out of the same election and alleging that the ballot stub snafu violated voters' federal constitutional rights were again heard in the court of appeals. Under the principle of "issue preclusion," the court again ruled for the town on the "secret ballot" issue by concluding that "the factual issue in the state proceeding was identical to the factual issue pertinent to the § 1983 claim." The court also disposed of various due process and equal protection claims. *Jones v. Samora,* 395 P.3d 1165 (Colo. App., 2016).

"Continuing violations" of FCPA lead to indefinite statute of limitations for penalizing violators

Similar to TABOR, the authors of the voter initiated Fair Campaign Practices Act (Amendment 27) included a *private* cause of action allowing an individual plaintiff to sue in order to enforce penalties against a violator, even if the secretary of state chose not to do so. After a violation has been determined by and ALJ or by the courts, a citizen can sue to impose penalties on the violator, as long as the suit is brought within one year of the date the violation occurred. The FCPA does not mention "continuing violations" or clarify how the one-year is calculated in the event of a continuing violation. However, on this question of first impression, a divided panel of the Colorado Court of Appeals ruled that it is possible for some types of violations to be "continuing" in nature, for example the failure to register as a campaign committee, thus potentially extending the statute of limitations indefinitely. The case centered on an election for the Woodman Hills Metropolitan District Board in El Paso County, and and a community group that sent postcards "directed at undermining (a candidate's) character and political platform," but failed to register as a political committee. *Campaign Integrity Watchdog, LLC v. Alliance for a Safe and Independent Woodman Hills,* 2017 WL 710493 (Colo. App., February 23, 2017).

EMPLOYMENT

Executive assistant in police chief's office could be fired for siding with officer suing the department

This year the Tenth Circuit again ruled in favor of the municipal defendants in a speech retaliation case based upon the *Garcetti/Pickering* standards, especially this particular determinative factor: "whether the government's interest, as employer, in promoting the efficiency of the public service are sufficient to outweigh the plaintiff's free speech interests." In this case, an administrative secretary in the central office of the police department sided with an individual officer who had been fired from the department and was suing the secretary's supervisors. In so doing, she voluntarily signed an affidavit supporting the officer's position that he had been fired for pre-textual reasons (and was really the victim of retaliation himself for his union activities). Crucial to the outcome, the affidavit revealed confidential information, causing the chief to lose any faith or trust in her ability to continue to perform her duties in the "nerve center" of the police department. Conversely, it could not be said that the affidavit disclosed "with any certainty" that the department had in fact engaged in misconduct, thus undermining the secretary's "free speech interests" as a whistleblower on a matter of public concern. Thus the department could fire her for signing the affidavit without being culpable for a First Amendment violation. *Helget v. City of Hays Kansas*, 844 F.3d 1216 (10th Cir., 2017).

No inquiry into "cause" of mental illness allowed in unemployment compensation cases

Under Colorado's unemployment compensation system, a claimant is entitled to full benefits only when she is discharged through no fault of her own. Moreover, the law expressly contemplates that a claimant is entitled to benefits when she is "mentally unable to perform the job." This year the supreme court affirmed that the statute does not allow any inquiry into <u>why</u> an employee might be mentally unable to perform, even if the record clearly discloses that the mental illness was brought on by the employee's poor job performance. By a 5-1 majority, the court affirmed a divided panel of the court of appeals in a case involving the discharge of a longtime Mesa County Public Library District employee. The employee suffered job stress as a result of demands placed upon her by her new boss, causing her to fall into a state of diagnosed anxiety and depression, in turn causing her job performance to suffer even more, until she was fired for failing to perform her job duties. The supreme court held that a discharged employee loses her right to unemployment benefits only when she is "unwilling to perform" her job duties or has committed some volitional act, not when this is "unable to perform" due to a mental impairment. *Mesa County Public Library District v. Industrial Claims Office,* 396 P.3d 1114 (Colo. 2017).

Police officer bears burden of proof when seeking to overturn discipline in Denver

Denver's home rule charter contains far more detail than does the charter of other home rule cities in regards to the employment rights of its employees, particularly police officers and firefighters. Disciplinary actions are recommended by the chief of the department, determined by the manager of safety, appealable to a hearing officer, then to the civil service commission, and then to court. Departing from longstanding tradition, in 2013 the commission promulgated a rule clarifying that, instead of a *de novo* hearing where the manager bears the burden of justifying his or her disciplinary decision to the civil service commission and its hearing officers, now the police officer bears the burden of proving that the manager's decision was "clearly erroneous." When the new rule was challenged by the police union in a case involving a ten-day suspension for use of excessive force, both the district court and the court of appeals upheld the rule as being consistent with the Denver charter. The court based its reasoning in part on the principle that, in an administrative proceeding such as an employment appeal, the burden is typically on the person challenging the propriety of the agency's original action. *Marshall v. Civil Service Commission of the City and County of Denver,* 2016 WL 6122814 (Colo. App., October 20, 2016); *cert. denied* (2017).

County employee enjoys workers comp coverage when injured while attending union meetings

On a question of first impression in Colorado, the court of appeals held that a public employee can assert a worker's comp claim when injured while attending a meeting with fellow union members, even if she is injured while off-duty. The claimant, a Pueblo County employee, attended a meeting to discuss the union's position in collective bargaining negotiations. The meeting was held after work hours in a county building with no management representatives present. The claimant was injured when she slipped and fell on ice in the county parking lot after the meeting. Applying the "mutual benefit doctrine," the court of appeals determined that the injury occurred in the course and scope of the claimant's employment. The union meeting "served to facilitate ongoing negotiations between the union and the employer concerning a new collective bargaining agreement. This process contributed to the employer's efficient operations. Thus, we hold that the union activity in this case was of mutual benefit to the employer and the employee." The court also observed that it would have reached this same conclusion even if the meeting and the injury had not occurred on county property. Since this court of appeals decision goes against the grain of common law on the subject throughout the U.S., it is a likely candidate for supreme court review. *Pueblo County v. Industrial Claim Appeals Office of the State of Colorado,* 2017 WL 2189458 (Colo. App., May 18, 2017).

FIRST AMENDMENT

Churches cannot be automatically excluded from government grant programs

A church-based preschool in Missouri was denied the right to compete for state grants that assisted in installing playground surfaces manufactured from recycled tires. The grant program contained a *per se* disqualification for projects on church property, primarily based on a provision in the state constitution that expressly prohibited the use of public funds in support of churches. (The Colorado Constitution contains a similar provision—the so-called "Blaine Amendment—codified at Art IX, Sec. 7.) A 7-2 majority of the U.S. Supreme Court held that the automatic disqualification of churches, purely on the basis of their status as churches, from applying for the grants violated the Free Exercise of the First Amendment. The decision appears to leave intact the line of cases that allow (or even require) public entities to restrict the use of public money for "religious exercise" in order to avoid an Establishment Clause violation. Nevertheless the two dissenting justices (Sotomayor and Ginsburg) described this year's ruling as a "profound change" from prior law, a "startling departure from our precedents," and "a radical mistake." *Trinity Lutheran Church of Columbia, Inc. v. Comer,*137 S.Ct. 2012 (2017).

More litigation over religious monuments on government property

Once again this year, the Tenth Circuit ruled against a religious display on municipal property, finding a violation of the Establishment Clause of the First Amendment. This year's case addressed a Ten Commandments monument installed in 2011 directly in front of the municipal building in Bloomfield, New Mexico. The monument was challenged by two "polytheistic Wiccans." The case provides a good illustration of the familiar situation where the original installation of the display was infused with obvious religious motivation and intent on the part of town officials, but then the town *later* tried in vain to immunize the monument from an Establishment Clause claim by adding disclaimers to the display, opening the forum to other monuments, etc. The court held that, while it is not impossible for the government to "cure" an unconstitutional endorsement of religion after the fact, the cure needs to be "at least as persuasive as the initial endorsement." *Felix v. City of Bloomfield,* 841 F.3d 848 (10th Cir., 2016).

Grounds of courthouses and other public buildings are not "traditional public forum" spaces

On remand from last year's decision in *Verlo v. Martinez*, 820 F.3d 1113 (10th Cir., 2016), the federal district court concluded that the plaza space adjacent to Denver's

courthouse cannot be considered "traditional public forum" space for purpose of analyzing a First Amendment challenge to speech restrictions in that space. In 2015 the the chief judge for the Second Judicial District had ordered that protestors and demonstrators must remain outside of the areas immediately adjacent to the public entrances to the court house, on the principle that their activities could be disruptive to the administration of justice within the building. The plaintiffs, a couple of individuals insistent on handing pamphlets advocating for "jury nullification" to persons entering the courthouse, based their case entirely on the theory that the approaches to the court house were a traditional public forum, and any restriction on their speech could not survive strict scrutiny. In a remarkable and wide ranging opinion, the district court concluded that the category of "traditional public forum" ***only*** applies to streets, sidewalks and parks, and ***not*** to other types of government-owned property. At most, other forms of government owned property might fall into the category of "designated public forum" space for the exercise of First Amendment rights, with the concomitant authority of the government to remove the designation at any time. An earlier injunction against the state court's order restricting speech in the plaza area was dissolved. *Verlo v. Martinez,* 2017 WL 3193812 (D. Colo., July 27, 2017).

GOVERNMENTAL IMMUNITY ACT

Injury incurred on non-defective facility in a park or recreation area is not actionable under the CGIA

In 2008 a ten-year old girl broke her arm when she fell from a zip-line apparatus on a school playground, and her parents have been suing ever since in an attempt to force the school district to pay for the injury. This year a unanimous Colorado Supreme Court laid the case to rest by ruling that the zip line could not be considered a "dangerous condition" under the CGIA. The plaintiffs never alleged that the zip line was in any way physically defective in either its original installation or due to the way it been maintained through the years. Instead, they argued that the zip line was "inherently dangerous" and simply never should have been allowed to exist on the playground in the first place. The Supreme Court rejected this theory and reversed the most recent ruling by the court of appeals in this case for two reasons. First, the definition of "dangerous condition" in the CGIA requires some sort of "physical defect" of a "facility" to be shown. Second, plaintiffs' theory was tantamount to a claim of negligent "design" of the school playground, and the CGIA definition of "dangerous condition" explicitly excludes claims based upon negligent design. *St. Vrain School District v. Loveland,* 395 P.3d 751 (Colo. 2017).

Metro district can assert tort claims against the developer who created the district

The court of appeals held for the first time in 2017 that the CGIA does not protect public officers and employees when they are sued in tort by the public entity for whom they are employed for acts committed in the course and scope of their employment. It is remarkable that this issue has never been addressed by the appellate courts in Colorado in the 46-year history of the CGIA. The court stated, "In our view, it would frustrate the purpose of the CGIA to permit the employee to shield himself or herself with the sovereign immunity meant to protect a public entity, and a public employee only when acting as an extension of the entity." The case involved self-dealing by developer with the alter-ego district he formed in Douglas County in 2007 to finance infrastructure for a failed housing subdivision, culminating in foreclosure on the developer's construction loan in 2011. This collapse subsequently led the metro district (presumably after the district had passed into the control of others who were left holding the bag) to sue the developer asserting various claims of fraud, misrepresentation, and breach of fiduciary duty. *Tillman Gulch Metropolitan District v. Natureview Development, LLC,* 2017 WL 2190744 (Colo. App., May 18, 2017).

MARIJUANA

Proposal to create "marijuana bank" in Colorado still languishes in federal court

The effort by the Hickenlooper administration to create a state-chartered credit union to provide banking services to "marijuana-related businesses" ran into a stone wall several years ago when the Federal Reserve Bank of Kansas City refused to grant a "master account" that would allow the entity to operate like and interact with all of the other banks in the U.S. The Feds reasoned that they could not recognize an entity that, by its own admission, will be complicit in the violation of the nation's drug laws. When the credit union challenged the Fed's position, the district court granted the Fed's motion to dismiss and agreed that, under the Supremacy Clause, the Controlled Substances Act eclipsed the so-called "legalization" of marijuana in Colorado. This year, a panel of the Tenth Circuit split three ways in reviewing the matter. One judge would have affirmed that dismissal with prejudice, one would have affirmed on the theory that the credit union had a statutory entitlement to a master account (albeit, once the account was issued the credit union would be compelled to provide services in accordance with federal law), and the third judge reasoned that the matter was not yet ripe. The net effect of the dueling opinions is that the original complaint by the credit union was dismissed without prejudice, with the potential for the credit union to try again with the Feds to obtain a master account and then sue again in the likely event that the Feds will again say no. *The Fourth Corner Credit Union v. Federal Reserve Bank of Kansas City,* 861 F.3d 1052 (10th Cir., 2017).

Amendment 64 given limited retroactive effect by state supreme court

Even after the "legalization" of marijuana in Colorado by virtue of the adoption of Amendments 20 and 64, those how purvey, possess or use marijuana have most often been unsuccessful when litigating marijuana-related disputes in the appellate courts. One narrow exception to this trend occurred in 2017. A 4-3 majority of the supreme court ruled that the state lost the ability to continue to prosecute anyone for possession of an ounce of less of marijuana just as soon as Amendment 64 became effective by its own terms on December 10, 2012, even for acts committed prior to that date. This ruling applies regardless of whether the prosecution was pending trial, or even in circumstances where the defendant had already been convicted and had a pending appeal right as of December 10, 2012. The opinion relied entirely on a U.S. Supreme Court decision that reached the same conclusion when alcohol prohibition was repealed at the federal level in 1933. *U.S. v. Chambers*, 291 U.S. 217 (1934). Watch for some marijuana advocates in Colorado to continue to make policy and legal arguments that all convictions for small-scale marijuana possession prior to the adoption of Amendment 64 should now be

considered null and void. *People v. Boyd,* 387 P.3d 755 (Colo. 2017); *People v. Wolf,* 387 P.3d 753 (Colo. 2017).

"Return provision" of Amendment 20 preempted by federal law

When trade in "medical" marijuana began to explode in Colorado *circa* 2010, law enforcement agencies were chilled in their willingness to continue to enforce marijuana laws due to a variety of factors, not the least of which was the so-called "return provision" of Amendment 20. The state constitution requires law enforcement to preserve any seized marijuana while a prosecution is pending, and then return the marijuana if a defendant is acquitted. Art. XVIII, sec. 14(2)(e), Colo. Const. Ever since an acquittal that occurred in 2011, the Colorado Springs police department has been arguing that it should not and cannot be compelled to return seized marijuana, because in order to do so they would be violating federal laws that broadly prohibit the "distribution" of marijuana. This year, a 4-3 majority of the Colorado Supreme Court reversed an earlier opinion by the Court of Appeals and agreed with the city that the "return provision" of Amendment 20 is in operational conflict with the federal Controlled Substances Act (CSA).

The main legal issue that split both the Court of Appeals and the Supreme Court was the interpretation of safe harbor language in the CSA that immunizes police from prosecution under the CSA if they are distributing marijuana in conjunction with the lawful "enforcement" of any state or municipal law, *e.g.* if they are conducting a sting operation. The dissent was based primarily on the theory that return of marijuana pursuant to a court order and the requirements of Amendment 20 itself constituted the "lawful" enforcement of state law. However, relying on their landmark decision in *Coats v. Dish Network,* the majority again ruled that an act cannot be deemed "lawful" unless it is legal under both state and federal law. *People v. Crouse,* 388 P.3d 39 (Colo. 2017).

"*Canine alert" can still be used as one factor to establish probable cause for marijuana search*

Last year in the case of *People v. Zuniga,* 372 P.3d 1052 (Colo. 2016), the supreme court confirmed that the odor of marijuana can still be used under a "totality of the circumstances" standard to establish probable cause for search of a vehicle, even though possession of small amounts of marijuana is now legal under Colorado law. The court noted the obvious reality that "a substantial number of other marijuana-related activities remain unlawful under Colorado law." A 5-2 majority of the court applied the same reasoning again this year in a case involving the same highway (I-76 eastbound to Nebraska), the same state trooper, and the same drug sniffing dog. In particular the court was not concerned that the dog was trained to give the same signal regardless of what sorts of illegal drugs or the quantity of marijuana is detected. Other suspicious behavior

by the defendant, combined with the dog's signal, supplied sufficient probable cause for the search. *People v. Cox,* 2017 WL 481620 (Colo., February 6, 2017).

There is probably no drug-detecting dog that can distinguish one ounce of marijuana from ten pounds of marijuana. Either will cause the dog to give an alert. This is why in the post-Amendment 64 world the dog's alert, *standing alone*, will no longer provide probable cause to conduct a warrantless search of vehicle in Colorado. A few months after the the Supreme Court's ruling in *Cox,* this point was illustrated again in the court of appeals in *People v. McNight,* 2017 WL 2981808 (Colo. App., July 13, 2017).

Cities may consider the "number, type and availability" of existing MMJ licenses when deciding whether to grant another license

When the Medical Marijuana Code was adopted in 2010, the Colorado General Assembly did not include a formal requirement for a "needs and desires" hearing identical to the one that has been in the Liquor Code for many years. However, the code still authorized local licensing authorities to generally consider the "number, type and availability" of other MMJ outlets when making new licensing decisions. Northglenn and other municipalities have incorporated this precise criterion in their own local codes. This year, a unanimous Colorado Supreme Court agreed that this criterion is not void for vagueness and upheld Northglenn's denial of a license passed upon a finding that there were already enough outlets in that city. Among other things, the court reiterated the principle that in the highly discretionary licensing context, language in the governing law can be more general and subjective than might be true in other laws, such as criminal laws. *Rocky Mountain Retail Management v. City of Northglenn,* 393 P.3d 533 (Colo. 2017).

No constitutional right to extract hash oil in your laundry room

As with several other unfortunate souls in recent years, Austin Lente blew up his own home while attempting butane extraction of hash oil from marijuana plants in his laundry room. He was charged with illegal "manufacturing" of marijuana concentrate, still a felony under the Colorado Criminal Code. However, the district court dismissed the charge under the theory that Amendment 64 decriminalized the "processing" of no more than six marijuana plants by any adult in the state. A 5-2 majority of the Supreme Court reversed the dismissal, concluding that unlicensed hash oil extraction is not protected at all under Amendment 64. At the time Amendment 64 was adopted, the word "manufacturing" was defined in state laws to include "extraction or chemical synthesis" and had a meaning distinct from the word "processing" in the view of the majority. The two dissenting justices would have ruled that the words "manufacturing" and "processing" are interchangeable, and that adults in Colorado thus have a constitutional right to extract hash oil (at least from a small number of marijuana plants) without fear of prosecution under state and local laws. *People v. Lente,* 2017 WL 2633534 (Colo., June 19, 2017).

MUNICIPAL COURTS

Supreme court again upholds basic ground rules for prosecuting and winning speeding cases

Municipal attorneys who prosecute thousands of speeding tickets every year in municipal courts were pleased to receive confirmation by a unanimous Colorado Supreme Court about how the burden of proof works in such cases. The court again held that, when the prosecution makes out a *prima facie* case that the driver exceeded the posted speed limit, the burden of "persuasion" then shifts to the defendant to show that his speed may have nevertheless been safe and prudent under the circumstances. An attorney in Grand Junction was detected by CSP driving 78 mph in a 55 zone. He argued that proof of his speed by the prosecution should create only a "permissible inference" that the speed was not safe, instead of a rebuttable presumption. Any other conclusion, he argued, would violate his right to due process. He prevailed in the district court on this theory. The supreme court reversed, and held that, because most speeding cases are civil infractions, the burden shifting provisions of the law do not violate due process as they might in a criminal case. *People v. Hoskin,* 380 P.3d 130 (Colo. 2016).

No forfeiture of right to possess firearms when convicted of domestic violence offense in a municipal court

One of the more controversial aspects of the Violence Against Women Act (VAWA) originally adopted in the 1990's has been the provision that causes a person to lose his or her right to possess a firearm after having been convicted of a crime involving domestic violence. See: 18 U.S.C. 922(g)(9). The prohibition encompasses misdemeanor convictions under any "federal, state or tribal law." In a case of first impression, the Tenth Circuit construed the plain language of the statute to mean that the prohibition does *not* extend to convictions obtained under a municipal ordinance. This decision will obviously lead to anomalous outcomes—two persons who may have committed precisely the same act of violence may suffer different collateral consequences in terms of their right to bear arms in the future, depending on whether they are cited under a state misdemeanor statute or a counterpart municipal ordinance. *U.S. v. Pauler,* 857 F.3d 1073 (10th Cir., 2017).

PUBLIC WORKS

Sidewalk maintenance ordinances can impose civil liability on adjacent owners

The Colorado Court of Appeals has repeatedly been called upon to resolve premises liability cases in which an accident or injury occurred on a public sidewalk adjacent to private property. While the Colorado premises liability statute, §13-21-115, C.R.S., typically does not support such claims, civil liability can be imposed via a municipal sidewalk maintenance ordinance. In this case, the plaintiff was injured when she allegedly tripped on an "uneven sidewalk" in the public right-of-way in Colorado Springs. She sued the adjacent owner (rather than suing the city, which may have been possible under the CGIA). She cited a city ordinance that imposes a duty on all property owners to report promptly to the city engineer any defects in adjacent public sidewalks, and imposes civil liability if a failure to report proximately causes someone to be injured. The appellate court agreed with the plaintiff that the ordinance created a cause of action, and remanded the case for a trial on the merits. *Andrade v. Johnson*, 2016 WL 6087899 (Colo. App., October 6, 2016).

CDOT has been improperly authorizing eminent domain actions since 1994?

Although this decision involved a state agency, local government attorneys should heed the cautionary tale told in the case of *Department of Transportation v. Amerco Real Estate Company,* 380 P.3d 117 (Colo. 2016). The supreme court ruled that the Colorado Transportation Commission, under a policy adopted over twenty years ago, did not effectively approve the acquisition of property for a state highway project by eminent domain when the commission unlawfully delegated to the executive director and his staff the authority to designate and define the property to be taken. Under the applicable statutes, the resolution authorizing the taking should have contained a parcel-by-parcel designation of the properties to be acquired. The case thus provides a stark example of how the unlawful delegation and devolution of legislative authority to administrative subordinates can defeat an action by a public body at any level of government.

Weld County properly valued land when acquiring parcel for CR 49

Weld County scored an important win in an eminent domain action to acquire 19 acres of agricultural land for the county's massive County Road 49 project. The court of appeals affirmed that projected lost income from future use of the property for gravel mining and water storage was too speculative to serve as the basis for valuation of the property using an "income approach" to valuation, even though "future" highest and best use (and future income derived therefrom) can be considered as a factor in establishing present fair market value in an eminent domain case. *Board of County Commissioners of the County of Weld v. DPG Farms, LLC,* 2017 WL 2589519 (Colo. App., June 15, 2017).

SPECIAL DISTRICTS

Unusual "geographic shift" of metro district deemed illegal by appellate court

Yet another example of "bad facts" involving a developer district led to the repudiation of another Title 32 metro district's taxing authority in Weld County. The bizarre sequence of events:

- The Altamira Metro District was formed entirely within the boundaries of the Town of Lochbuie in 2004 to finance infrastructure for a large mixed use development that was never built.
- In 2009 the metro district annexed 13,000 acres of land 30 miles outside of Lochbuie.
- In 2011 the district detached the original territory that existed within the boundaries of the town, effectively shifting the entire district to a location far away in unincorporated Weld County, and assumed a new name.
- In 2013 the district revised its service plan to change the focus of the district to regional water development.

All of the foregoing occurred without the involvement or consent of Weld County, leading the courts to conclude that both the letter and the spirit of the special district Control Act had been violated. The plaintiffs in this case were oil companies that had paid millions of dollars in property taxes to the district. The court of appeals held that all district taxes since 2009 were illegal and must be refunded. *Bill Barrett Corporation v. Sand Hills Metropolitan District,* 2016 WL 6087897 (Colo. App., October 6, 2016); *cert. denied* (2017).

Flurry of activity on other legal disputes involving special districts acting as alter-egos for private developers

See elsewhere in this outline other examples of ongoing legal disputes in which the roles and relationships of private developers and the special districts they form to finance and construct public infrastructure are currently being litigated:

- *Tillman Gulch Metropolitan District v. Natureview Development, LLC,* 2017 WL 2190744 (Colo. App., May 18, 2017).

- *Landmark Towers Assn. v. UMB Bank, N.A.,* 2016 WL 1594047 (Colo. App., April 21, 2016); *cert. granted* (2016).

- *Forest City v. Rogers,* 393 P.3d 487 (Colo. 2017).

TAXATION AND FINANCE

Quartet of important TABOR cases pending in the Colorado Supreme Court

Colorado Union of Taxpayers Foundation v. City of Aspen, 2015 WL 6746311 (Colo. App., November 5, 2015); *cert. granted* (2016). Whether Aspen's grocery bag "fee" is actually a "tax" which should have been voted under TABOR. Oral argument in this case occurred on June 7, 2017.

TABOR Foundation v. Regional Transportation District, 2016 WL 3600286 (Colo. App., June 30, 2016); *cert. granted* (2017). Whether the statutory expansion of RTD's sales tax base in 2013 to conform to the state's sales tax base should have been voted as a tax policy change under TABOR.

Landmark Towers Assn. v. UMB Bank, N.A., 2016 WL 1594047 (Colo. App., April 21, 2016); *cert. granted* (2016). Whether a tax vote conducted in a developer district occurred constituted a "sham election" and/or excluded electors who should have been allowed to vote under TABOR and the Special District Act. Oral argument in this case occurred on September 20, 2017.

National Federation of Independent Business v. Williams, 2017 WL 819719 (Colo. App., March 2, 2017). Whether the Secretary of State's office is violating TABOR by using fees collected from business licensing fees to fund state election expenses. A petition for *certiorari* is pending in this case. In the unpublished opinion issued by the Colorado Court of Appeals in March, the court remanded the case to the trial court to determine whether or to what extent the business licensing fees had actually been increased since TABOR was adopted in 1992. This case may ultimately be decided on the question of whether or not the longstanding practice of co-mingling revenues from various sources in the Secretary of State's office to pay for all SOS function, a practice that long preceded TABOR, somehow saves the practice from a TABOR challenge now.

Municipal lodger's taxes must be collected by on-line travel companies

In a case with enormous statewide and even national implications, a 4-3 majority of the Colorado Supreme Court reversed the court of appeals and held that on-line travel companies (or "OTCs" such as Orbitz and Travelocity) must collect and remit taxes under Denver's lodger's tax ordinance. The case involved a painstaking and fairly arcane parsing of the language in Denver's tax code, but the interpretation of Denver's ordinance would likely apply equally to lodger's tax ordinances in other cities and towns. The court made two key rulings in situations where the OTC operates under a so-called "merchant model" and collects payment directly from the customer when booking a room at a

particular hotel: (1) in the merchant model, the OTC is actually "furnishing" the lodging to the customer; and (2) the payment for lodging includes the OTC's markup for performing the booking, not just the net amount to be remitted by the OTC to the hotel. Thus the city's lodger's tax rate should be applied to the markup.

Of perhaps even greater significance for future tax litigation in Colorado, the plurality opinion in this case clarified the longstanding common law rule that ambiguities in tax ordinances should be construed against the taxing entity and in favor of the taxpayer. Justice Coates characterized this as a "rule of last resort." In other words, the courts should utilize all other conventional rules of statutory construction first to come up with a reasonable interpretation of a tax law if possible, before defaulting to the conclusion that any conceivable ambiguity must be construed in favor of the taxpayer. *City and County of Denver v. Expedia, Inc.,* 2017 WL 1449530 (Colo., April 24, 2017).

Counties lack authority to impose special marijuana sales taxes within the boundaries of municipalities

In 2014 the Adams County board of county commissioners referred to the voters a county-wide special retail sales tax on marijuana, most of which would be collected at marijuana stores that existed within the corporate boundaries of cities where the voters had likewise approved the imposition of a municipal tax. Northglenn, Commerce City and Aurora sued, challenging the basic statutory authority of Adams County to impose or collect such a tax. The court of appeals agreed with the cities, and reiterated the very limited statutory authority counties enjoy to impose sales and excise taxes in general. While counties have some authority to impose sales taxes of general applicability, they lack the statutory authority to single out a specific product for taxation.

The decision also contained a strong reaffirmation of the breadth of the standing home rule municipalities enjoy to defend their economic interests in court. In this case, the cities successfully argued that the extra layer of county taxation would place their marijuana stores at a competitive disadvantage in comparison to Denver and other nearby jurisdictions. *City of Northglenn v. Board of County Commissioners, Adams County*, 2016 WL 7241424 (Colo. App., December 15, 2016); *cert. denied* (2017).

*(*Note: while this case was pending, counties and statutory municipalities obtained enabling legislation in 2015 to impose special marijuana sales taxes. However, the legislation expressly precluded counties from collecting such a tax within the boundaries of any municipality that has its own marijuana tax without the consent of the municpality.)

Municipal sales tax does not apply to concessionaire for food plan on college campus

For the second time, the City of Golden was forced this year to litigate the applicability of its sales tax to meals served at the Colorado School of Mines under the college's meal plan structure. Four years ago, a panel of the court of appeals ruled that the sales tax *does* apply to meals served under the plan. *City of Golden v. Aramark Educational Services, LLC*, 310 P3d 262 (Colo. App., 2013). This year a new concessionaire asserted exactly the same claim, and a different panel of the court of appeals reached exactly the opposite conclusion, holding that the sale of food by the concessionaire was made to the college, not to the end consumers (the students), and thus qualifies as a "wholesale" sale exempted from taxation under the language of the ordinance. *Sodexo America, LLC v. City of Golden,* 2017 WL 3927880 (Colo. App., September 7, 2017).

ZONING, LAND USE, and EMINENT DOMAIN

Lost zoning ordinance and map does not support due process claims

In 1983 Elbert County adopted its first comprehensive zoning regulations, but by 1997 county officials discovered to their chagrin that the county had lost all but six pages of their zoning regulations, and could not put their hands on the zoning map at all. The BOCC directed their planning director to do the archival research necessary to reconstruct the regulations and map, but did not formally readopt these documents in accordance with state statutory procedures. A group of landowners asserted years later in federal courts that this action (or non-action) violated their due process rights when they were denied the right to subdivide their property for failing to satisfy the prerequisites of the zoning regulations. Not surprisingly, however, the federal courts concluded that the adoption of a comprehensive zoning regulations and map constitutes a legislative action, and thus the plaintiffs had no cognizable due process claim under § 1983. Whether or not the BOCC violated state law in readopting the reconstructed zoning code was beyond the purview of the federal courts. The court also rebuffed a substantive due process claim, quoting this observation from the Fifth Circuit, "the due process clause may not ordinarily be used to involve federal courts in the rights and wrongs of local planning disputes, and has limited relief to 'truly horrendous situations.'" *Onyx Properties, L.L.C. v. Board of County Commissioners of Elbert County,* 838 F.3d 1039 (10th Cir., 2016).

Blight determination and approval of an urban renewal plan are legislative acts

The federal district court relied heavily on the *Onyx Properties* case, above, in concluding that the City of Glendale's approval of an urban plan, the determination of blight contained therein, and any subsequent decision to acquire property through eminent domain under the plan are legislative acts or determinations, and therefore do not provide any basis for procedural due process claims against the city. The plaintiff, a landowner in the urban renewal area, claimed to have been misled by an assistant city manager into believing that he did not need to attend the public hearing on the adoption of the urban renewal plan, and he did not understand that the plan would cause a "cloud" of potential condemnation of their property. The landowner also mounted a novel claim that the city violated his right to due process by failing to advise him about the short 30-day time frame for challenging the blight determination in state courts. Similar to the *Onyx Properties* case, the district court held that the adoption of an urban renewal plan encompassing "forty-three parcels privately owned by twenty-six landowners" that would also affect numerous lessees and adjacent owners was a legislative action, and due process rights typically do not attach to legislative acts. *M.A.K. Investment Group, L.L.C. v. City of Glendale,* 2016 WL 7324158 (D. Colo., November 21, 2016).

Springing TIF effective date not possible in urban renewal plans

Colorado urban renewal statutes generally allow a tax increment financing provision of an urban renewal plan to run for a maximum of twenty-five years. However, is it possible for an urban renewal plan to be approved in a way that delays the start of the clock until some point in time after they plan is approved? This year the court of appeals answered this question of first impression in the negative. The court reasoned that the plain language of the statute required the twenty-five year limit to run from the date of adoption of the TIF provision by the governing body, which could occur only upon the original adoption of the plan or a subsequent formal amendment thereto by the governing body.

The City of Aurora had attempted in one of its urban renewal plans involving a phased redevelopment project to delay the commencement of the twenty-five year clock for future phases until the city actually approved a site plan for that particular phase. When the county assessor refused to delay the calculation of the "base" and the TIF allocations, Aurora sued in an attempt to compel him to do so. In siding with the assessor, the courts also rebuffed various arguments made by Aurora that the the assessor had waived his right to challenge the springing TIF effective date for the future development phases by having failed to protest this arrangement when the urban renewal plan was originally adopted.

Finally, as in the *M.A.K. v. Glendale c*ase, above, the court addressed the question of whether the approval of an urban renewal plan is "legislative" (as Aurora had argued) or was quasi-judicial, and reached the opposite conclusion from that of the federal court. However, under either standard, the court held that Aurora did not have the authority to delay the start of the twenty-five year clock in a manner that conflicted with the statute. *City of Aurora v. Scott,* 2017 WL 710507 (Colo. App., February 23, 2017).

Strict deadlines for challenging municipal annexations upheld again

The Town of Erie entered into a pre-annexation agreement for a 320-acre tract of land that was proposed to be the site of a massive mixed use development, and then proceeded to annex the land by ordinance. The pre-annexation agreement included a caveat in the event the parties were unable to reach a final annexation and development agreement by a certain date, allowing the owner to "retroactively withdraw the annexation petition." When the parties failed to reach a final agreement, the owner sued under the original annexation agreement seeking both disconnection of the property and over $700,000 in damages *after the statutory 60-day deadline for challenging the annexation under § 31-12-116, C.R.S. had passed*. The court of appeals held: (1) that the provision of the pre-annexation agreement allowing the petition to be withdrawn could

only be effective prior to the adoption of the annexation ordinance; and (2) any challenge to the annexation after the fact must be brought within 60 days per the statute, and the pre-annexation agreement could not alter the deadline. Thus, the district court in this case had no jurisdiction to hear the case or award damages. *Gold Run Estates, LLC v. Town of Erie,* 2016 WL 6087885 (Colo. App., October 6, 2016); *cert. denied* (2017).

Stapleton homeowner cannot sue master developer under an implied warranty of suitability theory

This year a unanimous Colorado Supreme Court reversed the court of appeals and held that a purchaser of a home in the Stapleton neighborhood of Denver cannot sue the master developer, Forest City, for design and construction defects under implied warranty theories. The homebuyer had paid extra for a basement that was allegedly rendered uninhabitable due to a higher-than-expected water table. At Stapleton, Forest City subdivides the land and then sells lots to various homebuilders, who in turn improve the lots, build the houses and then sell the houses to individual home buyers. Because the home buyer has no privity of contract with Forest City, the master developer is insulated from liability for implied warranty claims, which are essentially contractual in nature. (At an earlier stage of this litigation, the plaintiff had tried unsuccessfully to sue Forest City under a negligence theory, alleging that the master developer had built the surrounding public infrastructure that contributed to the basement flooding. However, that claim was tossed because the metro district formed by the developer, not the developer itself, was the entity that actually built the infrastructure.) *Forest City v. Rogers,* 393 P.3d 487 (Colo. 2017).

Housing growth limitation initiative survives single-subject challenge

In January of this year the state title setting board approved a title for a proposed constitutional amendment that would limit housing growth to 1% per annum in Colorado's ten most populous counties. Among other things, the measure would also create a new right for county citizens to initiate growth control measures in the other fifty-three counties as well. In May, a unanimous supreme court ruled that the measure encompassed a single subject—"housing growth"—even though it affected the home rule powers of Denver and Broomfield counties, even though it created a new right of initiative in other counties that does not currently exist in the constitution, and even though it changed the ground rules for initiative and referendum petitions associated with growth control. On a question of first impression, the court also considered the new fiscal "abstract" requirement for initiated measures adopted in 2016, 1-40-105.5, C.R.S. and agreed that the adequacy of the new abstracts will be subject to appeal to the supreme court under the same highly deferential standard of review that applies to the title itself. *In the Matter of the Title, Ballot Title and Submission Clause for 2017-2018 #4,* 395 P.3d 318 (Colo. 2017).

(Note: The 1% limit in the proposed statewide constitutional amendment resembles a similar measure being proposed in Lakewood for the November ballot and currently under litigation.)

Mandatory arbitration requirements obviate the need for municipal condominium construction defect ordinances?

In the long-running debate over why there are so few new condominium projects being constructed in Colorado, homebuilders and their allies have pointed to construction defect litigation risks and insurance costs as being the prime culprits. Moreover they have pursued alternative dispute resolution (binding arbitration) as the primary way to fix the problem and re-catalyze condominium construction. To this end they have advocated for changes to state law and even the adoption of local laws that favor or require the use of binding arbitration for construction defect claims. Now, the Colorado Supreme Court has confirmed that condominium developers can require the use of arbitration under current state statutes without requiring further action by the Colorado General Assembly. Specifically, a 5-2 majority of the court held that when the covenants are originally recorded for a condominium community, the declarant can include a requirement for binding arbitration that cannot later be repealed by the HOA or the unit owners without the consent of the declarant. *Vallagio at Inverness Residential Condominium Association v. Metropolitan Homes, Inc.,* 395 P.3d 788 (Colo. 2017).

War on fracking moves to COGCC rule-making battleground

The record for the most *amicus* participation in a single state appellate case in 2017 was set in the latest anti-fracking case, where twenty-nine agencies and individuals signed on as *amicus curiae*, mostly in support of a group of Boulder high school students who want to force a dramatic rule change at the Colorado Oil and Gas Conservation Commission. Having failed to establish the existence in the Colorado Constitution of an express or implied "public trust doctrine" in relation to the development of the state's natural resources last year in the case of *City of Longmont v. Colorado Oil and Gas Association,* 369 P.3d 573 (Colo. 2017), so-called "fractivists" are now pursuing the next best thing: A rule that every applicant for a new oil or gas well permit prove that the well will not cause any degradation of human or environmental health or contribute to global warning. The COGCC, acting not the advice of the Attorney General, took the position that such a rule would be *ultra vires* its statutory authority, and that Colorado law requires the commission to "balance" its obligation to foster the industry's development of oil and gas with its obligation to do so to the extent possible in a manner that protects human and environmental health. A divided panel of the court of appeals ruled that the wording of the governing statute (at least since 2007) does not impose a balancing test at all, but instead exalts environmental protection as "a condition that must be fulfilled"

every time the commission acts. Thus, the rule proposed by the plaintiffs is entirely consistent with the existing statute. The state is currently seeking supreme court review of this watershed decision by the court of appeals. *Martinez v. Colorado Oil and Gas Conservation Commission,* 2017 WL 1089556 (Colo. App., March 23, 2017).

Ex parte contacts with Denver council member through private email account did not taint rezoning process

Denver is currently engaged in several 106(a)(4) appeals pending in the appellate courts, in each of which the neighbors are challenging a site-specific rezoning approval. One of these involved a published decision in 2017. The most highly-publicized aspect of the case was the fact that the councilwoman who represented in neighborhood in which the rezoning occurred had received numerous *ex parte* messages from constituents and lobbyists on her private email account both supporting and opposing the rezoning, emails that were not made a part of the hearing when the rezoning was decided. Both the trial court and the court of appeals determined that the emails did not prejudice the outcome or violate the due process rights of the opponents. In particular the proponents failed to produce any tangible evidence that the emails overcame the "presumption of integrity, honesty, and impartiality" that attaches to any quasi-judicial tribunal.

One fact may have helped the city's case tremendously. The councilwoman said explicitly in one of her own emails that she herself would maintain her neutrality as a quasi-judicial decision maker and would not be goaded into prejudging the merits of the rezoning, regardless of tidal wave of constituent correspondence she was receiving.

The plaintiffs included numerous other claims in their complaint in an attempt to show that the council abused its discretion and/or violated the neighbors' right to due process, all of which failed:

- *Planning board recommendation*. The plaintiff's alleged that a planning board member allegedly acted unethically at an earlier step in the process. But the courts held that the planning board recommendation was merely advisory, was not a final decision, and therefore was not reviewable in a 106(a)(4) action.

- *Irrelevant political factors/"flawed quasi-judicial decision making."* The fact that the council debate on the rezoning may have strayed into extraneous matters did not overcome the fact that there was sufficient evidence on the record to support the rezoning, and the proper rezoning criteria were ultimately applied.

- *Calculation of protest area*. Denver, like many local governments, requires a super-majority vote to approve a rezoning if a protest petition is filed by nearby landowners representing a certain percentage of the adjacent land area. In this case, the court

reaffirmed the longstanding principle that property owned by the city itself is included in the calculation of the adjacent area. See: *Burns v. City Council,* 759 P.2d 748 (Colo. App. 1988).

- *Campaign contributions.* The plaintiff alleged on appeal that the entire council was tainted due to campaign contributions received from the developer. But the court of appeals refused to review this claim in the context of a 106(a)(4) appeal because no evidence was placed on the record to this effect when the rezoning was approved.

- *Compliance with the zoning code.* In keeping with other similar cases, the court of appeals agreed that there was abundant evidence in the record supporting the criteria set forth in the code, particularly criteria related to conformance with adopted city plans.

- *Authority to consider traffic and parking.* Plaintiffs alleged that some council members voted for the rezoning under the misapprehension that they could not consider traffic and parking impacts to the neighborhood that would flow from the rezoning. The court held that the city can and did consider such impact before voting to approve.

- "*Changed or* changing circumstances." The court held that this rezoning criterion can be met <u>*either*</u> based upon changed circumstances in the neighborhood in general, <u>*or*</u> on the subject property that is proposed for rezoning.

- "*Unlawful spot zoning.*" Finally, the plaintiffs attempted to resurrect this old chestnut, even though the appellate courts in Colorado have not invalidated a site-specific zoning on a "spot zoning" theory for over half a century. The court of appeals ruled that the rezoning approval in this case was not "spot zoning" because the new zone district would allow the property to be used consistently with nearby properties, and more importantly was consistent with the city's adopted plans for the area.

Whitelaw v. Denver City Council, 2017 WL 1279771 (Colo. App., April 6, 2017).

MISCELLANY

Should there be a "scope of authority" exception to qualified immunity in Sec. 1983 cases?

When a public official is acting totally outside his or her job description under state or local law, should he or she still be able to invoke a qualified immunity defense when sued under 42 U.S.C. §1983? Seven federal circuits have answered this question in the negative, but so far the Tenth Circuit has not yet done so. This year a deeply divided panel debated the issue, with the lead opinion suggesting that the "scope of authority exception" should be adopted in this circuit, but only in cases where the deviation from an official's normal job description violated clearly establish state law. A second member of the panel bitterly disagreed and opined that such an "additional antecedent condition" probing whether the official exceeded his authority under *state* law should not be interjected into the normal qualified immunity analysis—Did the defendant violate clearly established *federal* law?

The case involved a New Mexico district attorney who "took matters into his own hands" by personally cutting a lock and removing barbed wire and other obstructions placed in a roadway by the plaintiff. The trial court applied the "scope of authority exception" and denied the D.A.'s motion for summary judgment based on qualified immunity. However the lead opinion at the appellate level concluded that, since prosecutors sometimes perform "policing functions" under state law, this behavior did not clearly exceed the scope of the D.A.'s authority under New Mexico law. Ergo, the D.A. should be allowed to assert the defense of qualified immunity if he can show that his actions did not violate any clearly established federal law. *Stanley v. Olona,* 852 F.3d 1210 (10th Cir., 2017).

Colorado sex offender registration law deemed unconstitutional in as-applied challenge

After being on the books for over twenty-five years, the Colorado Sex Offender Registration Act succumbed to an as-applied challenge mounted in federal court by three offenders who suffered all sorts of travails and personal retaliation as a consequence of being required to register. The court held that the effect, if not the intent, of the statute was punitive based upon the facts presented by the three plaintiffs as well as other witnesses. The court equated the punitive effects of the statute to the medieval sanctions of "shaming" and "banishment" made worse in the modern age of social media. The court also cited last year's decision by the Colorado Supreme Court in *Ryals v. City of*

Englewood, 364 P.3d 900 (Colo. 2016) as proof of the punitive effect of the registration requirements, when cities can effectively preclude sex offenders from living virtually anywhere within their boundaries. The court also took issue with the fundamental fact that the registration system works as a proverbial "blunt instrument" that makes no individualized determination of whether a particularly offender is likely to re-offend and/or poses an ongoing threat to the community. In sum, the registration requirement constitutes disproportionally cruel and unusual punishment in violation of the Eighth Amendment, and also violates the due process rights of the plaintiffs in light of the arbitrariness of the requirement.

This decision has drawn national attention because it is so far ahead of the curve in threatening the entire viability of registration statutes that are common throughout the U.S., and is arguably at odds with the leading Supreme Court case on the subject, *Smith v. Doe,* 538 U.S. 84 (2003). Colorado Attorney General Cynthia Coffman has pledged to appeal the decision. *Millard v. Rankin,* 2017 WL 3767796 (D. Colo., August 31, 2017).

Counties are not required to indemnify district attorneys for defense costs associated with disciplinary charges

After the district attorney for the Third Judicial District litigated disciplinary charges against him filed by the Office of Attorney regulation, the D.A. sued to force Las Animas County and Huerfano County to cover his costs of defense. His case was primarily based on the language in Sec. 20-1-303, C.R.S., which provides that a district attorney "shall be allowed to collect and receive from each of the counties in his district the expenses necessarily incurred in the discharge of his official duties for the benefit of the county." The court of appeals held in *Ruybalid v. Board of County Commissioners of the County of Las Animas County,* 2017 WL 3667333 (Colo. App., August 24, 2017), that this statute is not specific enough to overcome the "American Rule," i.e. the basic presumption that litigants bear the cost of their own attorneys. This year's ruling is somewhat inconsistent with an earlier ruling by the court of appeals which implied that counties are indeed responsible for covering the litigation costs incurred by district attorneys when they are sued for any reason. See: *Colorado Counties Casualty & Property Pool v. Board of County Commissioners,* 51 P.3d 1100 (Colo. App. 2002).