2023-2024 Survey of Local Government Law

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This outline contains a review of selected published appellate decisions of interest to municipal attorneys from the Colorado Supreme Court and Court of Appeals, the Tenth Circuit Court of Appeals, and the United States Supreme Court, reported from October 3, 2023, through September 16, 2024.

1. Contracts
2. Criminal Justice
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1. Contracts

Statute of limitations for breach of intergovernmental agreements
City and Cnty. of Denver v. Bd. of Cnty Comm'rs of Adams Cnty., 543 P.3d 371 (Colo. 2024)

As part of an agreement to locate Denver International Airport in what was then Adams County, Denver agreed to install a noise monitoring and pay a penalty for aircraft noise that violated set limits. Although the county was aware early on that Denver had installed a different system, the Colorado Court of Appeals held that claims of violations of the agreement's noise standards in the mid-2010's were not time barred because the county lacked knowledge of any damages flowing from the breach. The Colorado Supreme Court rejected the damages-based accrual rule and held that the claim accrued in 1995 when the county was aware of the breach and was barred by the three-year statute of limitations.

Non-appropriations clause prevents accelerated payments
Ctr. for Wound Healing v. Kit Carson Cnty. Health Serv. Dist., 549 P.3d 1018 (Colo. App. 2024)

A health service district, in a 7-year contract with a vendor, agreed to a provision that would accelerate future payments due under the contract for the district's breach. The Colorado Court of Appeals held that the 7-year contract did not violate the Taxpayer Bill of Rights because it included a non-appropriation clause giving the district discretion with respect to future year financial obligations. The court then held that the non-appropriations clause prevented the enforcement of the accelerated payment provision.

Penalty for including unliquidated amount in verified claim
Ralph L. Wadsworth Constr. Co. LLC v. Reg'l Rail Partners, --- P.3d ---, 2024 WL 3611078 (Colo. App. Aug. 1, 2024)

A subcontractor working on the North Metro Rail Line from Denver to Thornton filed a verified statement of claim with the Regional Transportation District under the Public Works Act. The Colorado Court of Appeals held that the subcontractor knowingly included an unliquidated, disputed claim for a contract adjustment. Because the amount was unliquidated it was not an "amount due" under the law and the claim was excessive. Pursuant to C.R.S. § 38-26-100, the subcontractor forfeited the entirety of its claim for including the excessive amount.

2. Criminal Justice

Eighth Amendment does not prohibit urban camping bans
City of Grants Pass v. Johnson, 144 S.Ct. 2202 (2024)

The U.S. Supreme Court upheld a generally applicable ordinance that imposed limited or reasonable penalties for sleeping on sidewalks, streets, or alleys and camping on public property. The city's enforcement progressed from supportive outreach followed by a civil fine; repeat offenses would result in a temporary ban, with violations punishable by jail time. The Court rejected the Ninth Circuit's view, first expressed in *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019), that the Eight Amendment prohibited camping bans as a form

of cruel and unusual punishment as applied to an involuntarily homeless person in the absence of available secular shelter space.

Expectation of privacy for Google search history

Seymour v. People, 536 P.3d 1260 (Colo. 2023)

Officers obtained a warrant requiring Google to perform a reverse keyword search that would provide an anonymous list of searches for the address of an arson, identified only by IP address. Using a separate warrant, officers identified the names of persons associated with those IP addresses, including the person ultimately charged with the crime. The Colorado Supreme Court held that the defendant had both reasonable expectation of privacy under the Colorado Constitution in his search history, even though it did not reveal his name, and a protected possessory interest under the state and federal constitutions.

Man in bloody shirt during welfare check wasn't in custody

Bohler v. People, 545 P.3d 509 (Colo. 2024)

During a welfare check, officers encountered a man covered in blood and walking in the middle of a snowy road. The man was asked to sit on the side of the road and checked for injury, but was ultimately arrested when identified as a suspect for a nearby homicide. The trial court improperly suppressed the statements made before the arrest. The Colorado Supreme Court viewed the pre-arrest questions from the officer, who encountered the man during a welfare check, as biographical or related to the man's potential injuries. The officers spoke in a neutral tone and was cordial, did not show force or unholster their weapons, no threats or promises, made no reference to criminal liability. As a result, the man was not in custody and no *Miranda* warning was required.

Restrictions during gunshot residue test created custodial situation

Niemeyer v. People, --- P.3d ---, 2024 WL 4115688 (Colo. Sep. 9, 2024)

After a man was shot in a motel room, his wife was taken to a police station to meet with victim advocate and detectives and for a gunshot residue test. Officers placed plastic bags over her hands without consent or explanation and did not permit her to remove the bags. She was not arrested or placed in handcuffs but was transported in the back of a police car and was not permitted to leave the station to see her husband. The Colorado Supreme Court held that incriminating statements she made during this period should have been suppressed because a reasonable person would not feel free to leave and she was deprived of freedom of action to a degree associated with a formal arrest.

No *Miranda* warning required during brief interview at neutral location

Eugene v. People, --- P.3d ---, 2024 WL 4115374 (Colo. Sep. 9, 2024)

Officers questioned a road rage suspect outside his apartment during a conversation but did not let him use the bathroom in his apartment. The trial court declined to suppress statements made during this period, but the Colorado Court of Appeals held that the suspect was in custody for *Miranda* purposes. The Colorado Supreme Court held that the suspect was not in custody during the 30-minute conversational, daytime encounter at the

suspect's home. The officers "barely restrained" him by denying his request to use the bathroom, monitoring him, and briefly frisking him.

Driver can revoke statutory expressed consent for blood test
Tarr v. People, 549 P.3d 966 (Colo. 2024)

Over his repeated objection, an inebriated driver who struck and killed a pedestrian was subjected to a blood draw pursuant to Colorado's expressed consent statute (C.R.S. § 42-4-1301.1). A breath test was not available, and the driver said, "You're not taking my blood" but didn't physically resist. The Colorado Supreme Court held that a conscious driver could revoke statutory consent under the law and a warrant would be required to conduct the test.

Extraordinary circumstances under the expressed consent statute
Spencer v. People, --- P.3d ---, 2024 WL 3448522 (Colo. App. Jul. 18, 2024)

Colorado's expressed consent statute (C.R.S. § 42-4-1301.1) requires a driver to submit to a blood or breath alcohol test when probable cause exists to believe they are intoxicated. Normally, a person can choose which test to take, but statute authorizes an officer to direct the person to take the other test if extraordinary circumstances exist that prevent the chosen test from being completed within 2 hours. Here, the Colorado Court of Appeals held that the trial court erred by suppressing a breath test ordered by law enforcement when medical personnel couldn't locate a vein to perform the blood test chosen by the driver.

Mom can't lie to your parole officer for you
Hupke v. People, --- P.3d ---, 2024 WL 3364904 (Colo. App. Jul. 11, 2024), reh'g denied

To obtain release from a parole hold, a parolee had his mother tell the parole officer that he was planning to change residences when he had already moved. The Colorado Court of Appeals held that the use of a third party to lie to a public servant supported a conviction for attempting to influence a public servant "by means of deceit" (C.R.S. § 18-8-306).

Prosecutors can enjoin law enforcement to meet discovery obligations
Solano v. Newman, --- P.3d ---, 2024 WL 3818698 (Colo. App. Aug. 15, 2024)

A district attorney successfully obtained a declaratory judgment and injunction against a county sheriff related to the sheriff's failings in the disclosure of investigatory materials to the prosecutor. Rule of Criminal Procedure 16 rule includes materials in the prosecutor's actual or constructive possession (including a law enforcement agency's investigative materials) and requires a prosecutor to take affirmative steps to ensure that such materials are provided. Even though Rule 16 doesn't apply directly to law enforcement, the Colorado Court of Appeals endorsed imposing remedial actions on the sheriff's office to benefit the prosecutor and affirmed orders relating to time production of discovery, tracking systems for compliance, training, use of a state-provided system, and proper chain of custody practices. The court rejected the notion that a prosecutor should subpoena records for Rule 16 material.

Officer could look at, but not take, deceased animal
Gillespie v. People, --- P.3d ---, 2024 WL 4113776 (Colo. App. Aug. 29, 2024)

When attempting to post a notice on a back door, an animal control officer found that a dog had been strangled by its tether in the home's backyard. The officer later returned to the site to collect the dog and take pictures. The owner was charged the animal cruelty, and the trial court declined to suppress the evidence because the search and seizure in the backyard was justified by the plain view doctrine. The Colorado Court of Appeals reversed, holding that the officer's incidental discovery of the animal during a "knock and talk" was not unconstitutional but that his return, without a warrant, violated the Fourth Amendment. Once the officer determined the animal was deceased, no exigent circumstances existed to justify another entry.

3. Eminent Domain

Contract to buy land admissible as evidence of value in condemnation
City of Westminster v. R. Dean Hawn Int., --- P.3d ---, 2024 WL 3611146 (Colo. App. Aug. 1, 2024), petition for cert. filed

Seeking to build a water treatment facility, the City of Westminster filed a condemnation action to condemn about 37 acres, roughly one-third of a vacant property zoned for mixed-use. The city valued the taken property at $9.4 million compared to the owner's valuation of $32 million, which was based partially on a contract to purchase the remainder that was signed on the final day of discovery. The commissioners awarded the owner $25 million for the taken property. In a case of first impression, the Colorado Court of Appeals held that a binding contract for the purchase of the remainder of taken property was admissible to determine value. Although offers to purchase land are inadmissible, a binding executory contract "entered into in good faith by sophisticated parties" was probative of value and admissible under the more lenient standards of condemnation cases. The court failed to mention the late disclosure of the agreement or the many opportunities it offered the buyer to back out.

4. Employment

Title VII doesn't require "significant" injury because of job transfer
Muldrow v. City of St. Louis, 601 U.S. 346 (2024)

A female police officer was transferred from a specialized plainclothes position to a uniformed position supervising patrol officers. Her rank and pay remained the same, but her responsibilities, perks, and schedule changed. Reversing summary judgment for the city on her gender discrimination claim, the U.S. Supreme Court held that Title VII plaintiffs must show only that some harm to an identifiable term or condition of employment occurred. The Court rejected a judicially created standard that previously required a job transfer cause a "significant" injury to the terms or conditions of employment to state a viable claim.

One DEI training isn't discriminatory under Title VII (but are two?)
Young v. Colo. Dep't of Corr., 94 F.4th 1242 (10th Cir. 2024)

A white Colorado corrections officer claimed that the state's mandatory online diversity, equity, and inclusion (DEI) training created a hostile work environment that violated Title VII of the Civil Rights Act of 1964. The Tenth Circuit Court of Appeals affirmed the district court's dismissal for failure to state a claim because he failed to plausibly allege that the alleged harassment was objectively "severe and pervasive" as required under Title VII. The plaintiff's subjective perception was not sufficient and he failed to allege attending more than one training or that any specific acts of ridicule or insult occurred. Two members of the panel, however, believed that the DEI training was a form of unwelcome harassment that "could promote racial discrimination and stereotypes in the workplace" or "encourage racial preferences in hiring, firing, and promotion decisions."

Firearm alternative can be a reasonable accommodation
Hampton v. Utah Dep't of Corr., 87 F.4th 1183 (10th Cir. 2023)

A Utah corrections officer challenged his department's failure to accommodate his request to use an alternative firearm on duty. The department's policy only approved Glock handguns that the plaintiff couldn't easily hold because of his physical disability. The Tenth Circuit Court of Appeals reversed summary judgment for the department on a claim under the Rehabilitation Act of 1973. The requested accommodation – to use another brand of handgun – could not automatically be viewed as unreasonable or changing an essential function of the job solely because of the department's policy.

5. First Amendment

State action is foundation for public official's liability for social media use
Lindke v. Freed, 601 U.S. 187 (2024)
O'Connor-Ratcliff v. Garnier, 601 U.S. 205 (2024)

The U.S. Supreme Court issued unanimous opinions endorsing a two-part test (with numerous subparts) for whether a public official engages in "state action" when engaging on social media for purposes of a Section 1983 claim. Under the test announced in *Freed*, an act of blocking someone from social media or deleting a comment could violate the First Amendment only if the public official: 1) possessed actual authority, based in law or longstanding custom, to speak on the government's behalf on that matter; 2) and purported to exercise that authority in the relevant posts, determined from the context. The status of the public official or the mere fact that the subject matter is within their authority does not dictate the outcome.

A gratuitous discussion of incitement under the First Amendment
Anderson v. Griswold, 543 P.3d 283 (Colo. 2023), reversed on other grounds by *Trump v. Anderson*, 601 U.S. 100 (2024)

When the Colorado Supreme Court determined that former President Trump could not appear on the primary ballot, the Court held that the First Amendment did not prevent his speech on Jan. 6, 2022, from supporting a finding that he engaged in insurrection that

would bar his eligibility for the presidency. The Court held that the speech constituted incitement, an unprotected category of communication. Analogizing to the "true threat" doctrine, the court held that the analysis properly considered the broader context of the speech. The court upheld the district court's findings that the speeches encouraged the use of violence or lawless action, were intended to produce such actions, and were likely to do so. The U.S. Supreme Court reversed the Colorado Supreme Court's essential holding – that the state could determine eligibility under the Fourteenth Amendment – by ruling that only Congress could enforce Section 3 of the Fourteenth Amendment.

Termination for refusing to publicly support candidate violated First Amendment
Vogt v. McIntosh Cnty., 98 F.4th 1013 (10th Cir. 2024)

A county court clerk fired her deputy after the deputy refused to publicly support her in a re-election campaign. The Tenth Circuit Court of Appeals resolved the clerk's claim of qualified immunity by applying the "*Elrod/Branti*" test (derived from *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980)) that protects public employees from discrimination based on political beliefs or affiliation or non-affiliation, unless political allegiance is required for the work. Because the defendant did not argue that political allegiance was required for the deputy's work, the court held that the plaintiff was able to allege that her First Amendment right to political affiliation was violated. The right was clearly established even though there was no direct precedent addressing an official's request for "public support."

Ambiguous context and purpose of employee comments support qualified immunity
Avant v. Doke, 104 F.4th 203 (10th Cir. 2024)

A county employee, a truck driver, was believed to be complaining to citizen's about the county's road plan and the assignment of a sex offender to work near a school. The employee was warned to stop, but on information he hadn't, a county commissioner terminated him. The employee denied making the statements and argued his termination was based on "perceived speech" about potential illegal conduct. The Tenth Circuit held that there was not a clearly established public concern underlying the speech under the *Garcetti/Pickering* analysis. A reasonable but mistaken belief that speech involved personal, not public matters, was not unconstitutional. The court also held that an investigation into the speech was not required before the termination.

Hospital's vaccine exemption rules violated First Amendment
Jane Does 1-11 v. Bd. of Regents, 100 F.4th 1251 (10th Cir. 2024)

The Anschutz Campus of the University of Colorado permitted religious exemptions from its COVID vaccination requirement only the employee provided an explanation and cited the official doctrine of an organized religion of not allowing any vaccines. The policy was revised to permit religious exemptions unless they presented an undue burden on the safety of others. The 10th Circuit Court of Appeals characterized the policies as being motivated by religious animus and held that they should have been enjoined. The first policy categorically violated the Establishment and Free Exercise clauses of the First Amendment by applying exemptions inconsistently to different religious that lacked formal teachings or

were not organized, required intrusive inquiry, and was based on the employer's perception of the validity of the beliefs. The later policy granted exemptions more favorably to secular purposes.

FCPA ballot issue committee disclosure requirements narrowed

No on EE v. Beall, --- P.3d ---, 2024 WL 3611383 (Aug. 1, 2024)

Colorado's Fair Campaign Practices Act, at C.R.S. § 1-45-108.3, required the disclosure of the registered agent in election communications by ballot issue committees. The "No on EE" issue committee challenging the statewide tobacco tax measure in 2020 was fined for failing to comply with this requirement. The Colorado Supreme Court held that the disclosure requirement violated the First Amendment on its face. The disclosure requirement could only be justified by an interest in providing information to voters, and that interest wasn't served by disclosing the registered agent's name.

6. Governmental Immunity

Probable cause doesn't defeat retaliatory arrest claim by council member

Gonzalez v. Trevino, 602 U.S. ---, 144 S.Ct. 1663 (2024)

A city council member sued city officials for her arrest for tampering with a government record – a petition calling for the removal of the city manager. The council member alleged the arrest was retaliation for her organizing the petition. Although probable cause for the arrest normally would preempt the retaliatory arrest claim under *Nieves v. Bartlett*, 587 U.S. 391 (2019), the U.S. Supreme Court held that the case fell within the narrow exception to that rule where the plaintiff demonstrates that similarly situated individuals who engaged in the same sort of protect speech were not arrested. The plaintiff's proof that no one had ever been arrested for that conduct satisfied this burden, even though there was no specific comparator evidence.

No immunity for county when "final policymaker" commits sexual assault

Whitson v. Hannah, 106 F.4th 1063 (10th Cir. 2024)

A county sheriff sexually assaulted an inmate during a detour while transporting her to jail. The district court dismissed the municipal liability claims because the sheriff's assault was purely personal and unrelated to his grant of authority relating to prisoner transport. The Tenth Circuit Court of Appeals reversed and held the sheriff acted as the final policymaker because the victim was in his custody, and he was statutorily charged with the victim's care. As a result, the assault, even though unlawful and in violation of local policy, was sufficiently within both his authority and responsibility to set policy and be treated as the county for liability purposes.

Antitrust immunity not lost by possible ethics violation

Van Sant & Co. v. Town of Calhan, 83 F.4th 1254 (10th Cir. 2023), cert. denied

A mobile home park owner had been exploring the conversion of the property to an RV park when the Town of Calhan passed a new ordinance regulating RV parks. The ordinance exempted existing RV parks that the park owner alleged had some speculative

connection to family members of two town board members. The Tenth Circuit Court of Appeals determined first that, even if true, voting on an ordinance in violation of the Colorado Ethics Code would not make an action "unofficial" and exempt from the immunity from antitrust claims under the Local Government Anti-Trust Act of 1984. The court also rejected the due process and equal protection claims that rested on, at best, nonfundamental rights to operate the property as an RV park subject to the town's regulations.

A narrow view of the "design" exception for immunity in public buildings
Cnty. of Jefferson v. Stickle, 542 P.3d 688 (Colo. 2024)

Jefferson County's Courts and Administration Building is served by a two-story, detached parking structure. A woman broke her arm after stumbling on a step down from a walkway to the parking lot surface that were the same shade of gray (and delineated by a yellow curb marking). Although the step down itself was part of the original design and construction, the new color and condition of a "curb illusion" was established during a maintenance project in 2017 in which the county installed a new surface material to preserve the structure and prevent damage from water and deicing material. The Colorado Supreme Court held that the parking structure was a "public building" under the Colorado Governmental Immunity Act (CGIA) and was subject to the immunity waiver under C.R.S. § 24-10-106(1)(c). The condition was not excluded from the definition of "dangerous condition" because it was not attributable solely to the design and was, at least in part, maintenance.

Economic loss rule has no bearing on governmental immunity
City of Aspen v. Burlingame Ranch II Condo. Owners Ass'n, 551 P.3d 655 (Colo. 2024)

A condo owners association sought arbitration against the City of Aspen, the builder, over alleged construction defects, the city sought a declaratory judgment that the CGIA barred claims of breach of contract, express warranty against deficient conditions, and related implied warranties. The Colorado Supreme Court reversed the Court of Appeals' view that the "economic loss rule" could remove the claims from the realm of tort and the protections of the CGIA. Reaffirming that the CGIA barred claims that could sound in tort despite an overlap with contract claims, the court held that the economic loss rule "has no bearing on whether an action brought against a public entity is barred by the CGIA."

Immunity not strictly waived for failure to use emergency signals
Hice v. Giron, 543 P.3d 385 (Colo. 2024)

During a 36-second pursuit, an officer used no sirens and turned on emergency lights only for the final 5-10 seconds. The officer struck a van that was turning across the roadway, killing the occupants. The Colorado Supreme Court rejected the Court of Appeals' interpretation of the CGIA's immunity waiver at Section 24-10-106(1), that would have required the use of emergency lights and sirens for the entirety of a pursuit. The Court focused on A causal requirement that a plaintiff's injuries "could have resulted from the emergency driver's failure to use alerts." The lower courts will consider whether the failure to use alerts until the last 5-10 seconds could have contributed to the accident and whether

immunity was waived by a failure of the requirement of C.R.S. 42-4-108(2)(c), to "refrain from endangering life and property while speeding."

Improper water line marking doesn't waive immunity

Jacobs Inv, LLC v. Fort Collins-Loveland Water Dist., --- P.3d ---, 2024 WL 3611779 (Colo. App. Aug. 1, 2024)

A boring company struck a water line that the owner, a water district, had mismarked when attempting to comply with the utility marking requirements of the Excavation Requirements Statute. The Colorado Court of Appeals held that the water district's marking of lines as required by statute was not an act of "maintenance or operation" of the public water facility, as needed to waive immunity under CGIA. Marking of utility lines was ancillary to the primary purposes of collecting, treating, and distributing water. Moreover, the statutory duty to mark lines didn't waive the district's immunity.

CGIA bars pension class action founded in negligent misrepresentation allegations

Grand Junction Peace Officer's Ass'n v. City of Grand Junction,--- P.3d ---, 2024 WL 3611779 (Colo. App. Aug. 1, 2024)

An employee group filed a class action lawsuit against the City of Grand Junction and several officials alleging mismanagement of retiree health program. The suit alleged claims of breach of contract, unjust enrichment, breach of fiduciary, each of which was couched in terms of negligent or misrepresentation. the Colorado Court of Appeals affirmed a determination that the CGIA barred the claims because the claims could lie in tort. As pled, the alleged injuries were all attributable to the defendant's alleged misrepresentations. The court also held that the public trust statute, C.R.S. § 24-18-203, did not provide for a private claim.

Self-trained service animal may lead to ADA liability

Stalder v. Colo. Mesa Univ., 551 P.3d 679 (Colo. App. 2024)

A college student suffering from PTSD, anxiety, and depression claimed to have trained his dog as a "service animal" by watching online videos and "registering" him through a website. His university prevented him from bringing the dog into campus buildings because the student had described the animal as a "therapy dog" and the dog wore a vest saying "therapy." The owner later identified specific services it would provide and obtained a letter from a social worker. The Tenth Circuit Court of Appeals reversed summary judgment for the university on the students ADA claims because there was a genuine dispute as to whether the dog was a "service animal" at the time it was rejected by the university. The court noted the low bar for demonstrating an issue of fact as to the animal's status, reducing the effect of the dog's lack of complete training and the owner's description of it as a "therapy dog." The court also rejected the "legitimate suspicion" theory that some courts have used to allow inquiries beyond the limited questions allowed by ADA regulations.

7. Open Meetings

Court of Appeals revisits "rubber stamping" under the Open Meetings Law
Anzalone v. Bd. of Trustees, 549 P.3d 255 (Colo. App. 2024), cert. denied

A town board held a special meeting to hold an executive session to receive legal advice concerning the potential removal of a board member. After a 90-minute executive session, the board immediately moved to censure the board member, relying on a lengthy written motion, and voted to approve a censure resolution. The district court rejected the board member's challenge to the action based on an alleged Open Meetings Law (OML) violation, determining that the censure was not a "formal action" because it was simply the opinion of the board. Reversing, the Colorado Court of Appeals held that the censure was a formal action subject to the OML. The court went on to hold that the evidence showed that the formal action was taken during the executive session and the prompt action to adopt the resolution without substantive discussion was merely a "rubber stamp" of policymaking done improperly in executive session.

Court of Appeals muddles executive sessions with attorneys
The Sentinel Colo. v. Rodriguez, 544 P.3d 1278 (Colo. App. 2024), cert. granted

A city held an executive session to confer with its attorneys to discuss an investigation of a councilmember and her threatened legal challenge against the city. During the session, the council directed its attorneys to conclude the investigation and enter a stipulation dismissing the underlying charges. At a future meeting, the council formally approved the stipulation reached by its attorneys. The Colorado Court of Appeals held, in that the council's direction to its attorneys violated the OM because it was the adoption of a position or formal action, notwithstanding the council's future public approval. The court also held that the city had waived the attorney-client privilege because a letter attached to a future meeting agenda packet described the session and that, because there had been no challenge to the city's decision, the city could not cure any technical violation of the OML. The court held, however, that the newspaper was not entitled to attorney's fees because it was not a "citizen," as the term is used in the OML.

Standing for all under the Open Meetings Law
Roane v. Elizabeth Sch. Dist., 526 P.3d 220 (Colo. App. 2024)

A school district board held an executive session for legal advice without describing the subject matter, as required by the OML and *Guy v. Whitsitt*, 469 P.3d 546 (Colo. App. 2020). An attorney in another county noticed the apparent error and sued the district. The Colorado Court of Appeals rejected the school district's argument that the attorney lacked standing because he had no connection to the district. The court viewed C.R.S. § 24-6-402(9)(a) as unambiguously creating "a legally protected interest in favor of at least every natural person in Colorado . . . in having public bodies conduct public business in compliance with the OML."

8. Open Records

Draft comprehensive financial report was not "work product" of council
Simpson v. Harmer, 551 P.3d 669 (Colo. App. 2024)

A city denied a public records request seeking inspection of a draft of the city's annual comprehensive financial report for 2021. The city asserted that the draft was not subject to disclosure as "work product" under the Colorado Open Records Act (CORA). The Court of Appeals held that, on the facts presented, the draft met several of the "work product" criteria, including that the material was inter- or intra-agency in nature, was advisory or deliberative, and was assembled for the benefit of elected officials. The draft, however, was not "for the purpose of assisting . . . elected officials in reaching a decision within their scope of authority" because the act of sending the final report to the State Auditor pursuant to state law was not established to be "a 'decision' within the scope of the City Council's authority."

A narrow view of confidentiality of child abuse reports
Colo. Sun v. Brubaker, 542 P.3d 1190 (Colo. App. 2023), cert. granted

The Children's Code, C.R.S. § 19-1-307(1)(a), provides that child abuse reports and "the name and address of any child, family, or informant or any other identifying information . . . shall be confidential and shall not be public information." Asserting that disclosure of records of child abuse reports would identify the address of child or informant in violation of that law, the Department of Human Services denied public records requests under the exception in C.R.S. § 24-72-204(1)(a). The Colorado Court of Appeals held that the phrase "or any other identifying information" in C.R.S. § 19-1-307(1)(a) was ambiguous and interpreted it as a "catch all" only on the enumerated terms "name and address." The court determined that the legislature only intended to limit the disclosure of information that would identify a particular child, family, or informant.

9. Police Civil Liability

Qualified immunity for use of force based on threat of harm to others
Estate of Allen George v. City of Rifle, 85 F.4th 1300 (10th Cir. 2023)

After learning that he carried a firearm and had vowed not to go to jail, officers stopped a man wanted for possession and distribution of child pornography on a bridge near the City of Rifle. After a lengthy encounter in which the armed man refused to comply with officer orders and stood close to the edge of the bridge, the man started to jog toward the downtown and an officer shot him twice in the back, killing him. The Tenth Circuit Court of Appeals held that qualified immunity was appropriate because the use of force was objectively reasonable under the *Graham v. Connor* factors. Under a de novo review of the facts, the court held that the use of force against an armed felony suspect while fleeing arrest was proper largely because the officer had probable cause to believe that he was a threat to others, given the fact that he had ignored commands, was not at close range, and had apparently abandoned any suicidal intent.

No qualified immunity in 2020 protest case
Packard v. Budaj, 86 F.4th 859 (10th Cir. 2023)

During the 2020 protests in Denver following the murder of George Floyd, police officers are alleged to have fired less-lethal munitions that struck certain protestors who later sued. Based on the lack of threat from the plaintiff's actions, the district court denied qualified immunity to officers, even with uncertainty as to whether the defendant officers fired the rounds that struck the plaintiffs. The Tenth Circuit Court of Appeals affirmed the trial court's determination that the use of force was not objectively reasonable under clearly established precedent, given that the record reflected that plaintiffs committed no offense, and a jury could find that neither posed a threat to the safety of the officers.

No qualified immunity for arrest for failure to produce identification while filming
Bustillos v. City of Artesia, 98 F.4th 1022 (10th Cir. 2024)

Officers arrested an "independent journalist" for failing to provide identification at their request as he filmed an oil refinery from a public road outside of the refinery's fence. The Tenth Circuit Court of Appeals held that the plaintiff overcame both elements of the qualified immunity defense. First, a reasonable jury could find that the warrantless arrest violated the First and Fourth Amendments, given the lack of a reasonable suspicion of an underlying crime to justify the identification request and lack of probable cause to arrest him for any crime (e.g., trespassing, loitering, disorderly conduct, engaging in potential terrorist activity). Second, the officer had fair warning that the lack of reasonable suspicion would not justify an arrest for failure to produce identification.

Qualified immunity for traffic stop, dog sniff, searches, and arrest
Hoskins v. Withers, 92 F.4th 1279 (10th Cir. 2024)

The Tenth Circuit Court of Appeals affirmed a finding of qualified immunity for an officer in a traffic stop that ended in the arrest of the driver, a search of his car, and the confiscation of a cell phone. The initial stop was justified by the officer's reasonable suspicion that the driver's license plate was obstructed. A dog sniff didn't prolong the stop because the officer had already asked dispatch to check for warrants and it concluded before dispatch responded or the driver found his insurance information. The vehicle search was justified by probable cause based on the dog's alert and the search yielded probable cause for the arrest. Other acts incident to the search and arrest (e.g., a pat down search, placing the driver in the patrol car, pointing a gun at the driver before the arrest, and applying handcuffs) were all justified under the circumstances and violated no clearly established rights.

Officers' completion of search ending in shooting was not reckless
Flores v. Henderson, 101 F.4th 1185 (10th Cir. 2024)

Responding to a 911 call from a person who claimed to be holding hostages who had only a few minutes left, officers entered the man's apartment after meeting his sister outside. Although the sister was not distressed when they saw her, the officers later received a radio call reporting that the sister believed the man was alone, unarmed, and had mental health issues. Bodycam footage showed that an officer shot and killed the man when he

rushed out of a bedroom toward them with a machete. The Tenth Circuit Court of Appeals affirmed the grant of qualified immunity to the officers. The officers were responding to a serious reported crime and threat of injury and a reasonable officer would want to complete the search under exigent circumstances, despite the radio call with inconsistent information.

Plausible Fourth Amendment claims arising from snow machine search
Cuervo v. Sorenson, --- F.4th ---, 2024 WL 3997268 (10th Cir. Aug. 30, 2024)

Officers obtained a search warrant for a woman's garage when looking for a snow machine believed to have been stolen by her son. The woman alleged that, when executing the warrant, officers from several agencies fired chemical munitions into the residence without warning, searched the home, and failed to close windows or secure doors, resulting further damage from looters. The Tenth Circuit Court of Appeals held that the trial court, in granting a Rule 12(b)(6) motion to dismiss the Fourth Amendment claims, erred by considering a police report that wasn't attached to or relied on in the complaint. The plaintiff pled plausible (though identical) claims against each defendant by alleging specific acts (though identical). Qualified immunity was not proper based on the allegations of the complaint because the search warrant didn't authorize a search of the entire home and there was no justification for failing to announce their presence.

Crime victim's deprivation of rights claim rejected
Puerta v. Newman, 542 P.3d 693 (Colo. App. 2023)

An attempted murder victim claimed that his alleged assailant was not prosecuted because of law enforcement's failure to timely process evidence. As a result, he brought a deprivation of rights claim under C.R.S. § 13-21-131(1), asserting that he was deprived of constitutional rights under the Colorado Constitution to see the assailant prosecuted and to speak at his sentencing. The Colorado Court of Appeals determined that the plaintiff could not identify a property interest, as needed to support a due process claim, under the Victim's Rights Act or rules of criminal procedure. Further, the plaintiff lacked a constitutional right to be heard at sentencing for a specific offense of his choosing.

Good and bad news for litigating state excessive force claims
Woodall v. Godfrey, 553 P.3d 249 (Colo. App. 2024)

A plaintiff alleged that an officer seized him in violation of the Colorado Constitution by firing a beanbag shotgun without alerting another officer that he was about to use less than lethal force, and those actions predictably resulted in the other officer firing his own (lethal) weapon, striking the plaintiff, under a mistaken belief that the plaintiff had also fired a lethal weapon. The Colorado Court of Appeals held that excessive force claims brought under C.R.S. § 13-21-131 should be evaluated under the test of "objective reasonableness" derived through Federal caselaw regarding excessive force claims under the Fourth Amendment, particularly *Graham v. Connor*, 490 U.S. 386 (1989). The court, however, held that the plaintiff plausibly stated a claim based on "indirect participation" that required no recklessness or willful intent regarding the deprivation of rights. The court recited the elements of such a claim: 1) the force used against the plaintiff was excessive (i.e.,

objectively unreasonable under the circumstances); 2) the defendant's actions set in motion a series of events causing the use of excessive force (by another person); 3) the defendant knew or reasonably should have known that actions would result in use of excessive force (by another person); and 4) the application of excessive force (by another person) caused the injuries.

10. Taxation and Finance

Property tax administrator's has broad power to implement TIF adjustments
Kaiser v. Aurora Urban Renewal Auth., 541 P.3d 1130 (Colo. 2024)

In 2018, the Aurora Urban Renewal Authority (AURA) challenged aspects of the methodology defined by the state (PTA, including its treatment during reassessment of "indirect benefits" of inclusion of property in an urban renewal area that ultimately led to certain tax revenue being diverted from the tax increment. The Colorado Supreme Court held that the URL's language requiring proportional adjustment was unambiguous and that the legislature delegated "broad authority" to the PTA by directing that the PTA's manuals contain "the manner and methods" by which the adjustment requirements would be implemented. The Court deferred to the PTA's decision to require a distinction between direct and indirect benefits, even to the extent that value increases attributable to an urban renewal plan were directed away from the urban renewal projects.

TABOR demands voter approval for mill levy fluctuation despite statutory range
Aranci v. Lower South Platte Water Conservancy Dist., 550 P.3d 1146 (Colo. App. 2024)

In 1996, a water conservancy district fixed a mill levy of 0.5 mill and voters approved a ballot question authorizing the retention and expenditure of additional property tax revenues with the limitation that "no local tax rate or property mill levy shall be increased at any time without the prior approval of the voters" of the district. The district increased its levy to 1 mill from 2019 to 2022, without voter approval. The district court held that, because a pre-TABOR statute required that such districts' levies follow a non-discretionary formula, the levy was intended to fluctuate and voters expected a mill levy range between zero and 1.0 mill. The Colorado Court of Appeals reversed and held that, because the increase resulted in a net tax revenue gain, TABOR's voter approval requirement applied.

11. Zoning & Land Use

Legislatively adopted impact fees face new scrutiny
Sheetz v. El Dorado Cnty., 601 U.S. 267 (2024)

The U.S. Supreme Court unanimously determined that legislatively adopted impact fees must comply with traditional takings standards, including the *Nollan/Dolan* framework for reviewing land use permit conditions. Such fees must have an essential nexus to a government land-use interest and rough proportionality to the development's impact on that interest.

Right of initiative extends to rezoning a PUD ordinance
Telluride Locals Coal. Petitioners' Comm. v. Kavannaugh, --- P.3d ---, 2024 WL 3297951 (Colo. App. Jul. 3, 2024)

In 1995, a developer established a PUD zoning ordinance in the Town of Telluride that resulted in 13 residential lots and 3 common open space parcels. After the town rejected a rezoning, the developer sought to rezone an open space parcel using the power of initiative. The town rejected the initiative as being administrative in nature and because the developer failed to obtain the consent of the other landowners in the PUD. The Colorado Court of Appeals held that a PUD rezoning was a legislative matter, following *Margolis v. District Court*, and subject to the power of initiative.

Court of Appeals divided over local noise permits
Hobbs v. City of Salida, 550 P.3d 193 (Colo. App. 2024), petition for cert. pending
Freed v. Bonfire Entm't, --- P.3d ---, 2024 WL 3058386 (Colo. App. June 20, 2024) petition for cert. pending

Colorado's Noise Abatement Act, C.R.S. § 25-12-101 et seq., limits sound level to 50 db(A) between 7 p.m. and 7 a.m., but exempts "the use of property by . . . any political subdivision . . . or any of their permittees . . . ." The statutory City of Salida authorizes noise permits by local ordinance that limits noise to 85 db(A) and sets an end time of 10 p.m. without prior approval. A resident challenged a permit granted to a venue that exceeded the noise limits. A division of the Colorado Court of Appeals held that the statute was unambiguously authorized the city to issue permits that would conflict with state law, even on land not owned by the city.

But then another division of the Court of Appeals invalidated a Chaffee County permit for the reasons stated in the dissent in Salida's case. The division found some ambiguity in the statute and looked at legislative history to hold that less restrictive standards were allowed only when the municipality was the user or owner of the property where the event is being held. The City of Colorado Springs avoided the disagreement in a recent appeal that centered on a procedural issue.

12. Miscellaneous

No more Federal administrative deference
Loper Bright Enters. v. Raimondo, 144 S.Ct. 2244 (2024)

The U.S. Supreme Court overruled the *Chevron* doctrine that required courts to defer to reasonable agency interpretations of ambiguous statutes.

Domestic violence restraining orders can prohibit firearm possession
U.S. v. Rahimi, 602 U.S. ---, 144 S.Ct. 1889 (2024)

The U.S. Supreme Court held that the Second Amendment permits temporarily disarming when a person poses a credible threat to another person's physical safety (here, a federal law prohibiting persons under a domestic violence restraining order from

possessing a firearm). The Court required only a relevantly similar comparison to a law preexisting the Second Amendment, roundly rejected Justice Thomas' view that his *Bruen* opinion required a specific "historical twin" to justify an infringement on the Second Amendment.

Federal law doesn't prohibit gratuities for past acts by local officials

Snyder v. U.S., 144 S.Ct. 1947 (2024)

The U.S. Supreme Court held that state and local officials could accept gratuities for past actions without violating a federal anti-corruption statute, 18 U.S.C. § 666. Bribes (acceptance of a payment or agreement to a future payment before acting) remain unlawful.

Political subdivision standing doctrine abandoned

Colo. State Bd. of Educ. v. Adams Cnty. Sch. Dist. 14, 537 P.3d 1 (Colo. 2023)
Weld Cnty. Bd. of Cnty. Cmm'rs v. Ryan, 536 P.3d 1254 (Colo. 2023)

The Colorado Supreme Court abandoned the political subdivision standing doctrine of *Martin v. District Court*. Instead of a special standing rule that led to "the unfair denial of judicial relief to public entities," political subdivision standing will be determined under the general standing test of *Wimberly v. Ettenberg*, 570 P.2d 535 (Colo. 1977). In one case, a school district challenged a state action to remove its accreditation and order a reorganization. In the other, a county challenged state air quality rules. In both cases, the Court held that even if the political subdivisions had legally protected interests, they could not demonstrate any injury to the interest.

Probability of actual bias is the basis for recusal

Sanders v. People, 539 P.3d 148 (Colo. 2024)

In a road rage criminal trial, the court disclosed personal involvement in a similar case, as the victim of a road rage incident three years before. The court declined to recuse itself over defense counsel's objection that the defendant's rights to due process and a fair trial would be violated. The Colorado Supreme Court, relying on *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, (2009), held that recusal was not required but that an "actual bias" standard was too strict a standard. Instead, recusal is warranted "when the probability of actual bias is sufficiently high so as to undermine the right to a fair trial." In addition, recusal is needed "only in circumstances involving a direct, personal, substantial, or pecuniary interest."

13. CML Amicus Participation October 2023 to September 2024

https://www.cml.org/home/advocacy-legal/Amicus-curiae

Woodall v. Godfrey, 553 P.3d 249 (Colo. App. 2024)

The Sentinel Colorado v. Rodriguez, 2024SC51, 2024 WL 3526414 (Jul. 22, 2024) (granting cert.)

Fort Collins - Loveland Water Dist. v. Jacobs Inv. LLC, --- P.3d ---, 2024 WL 3611779 (Colo. App. Aug. 1, 2024)