Nathan Woodliff-Stanley, Executive Director
Mark Silverstein, Legal Director

July 5, 2017

SENT VIA U.S. MAIL AND EMAIL: dirk.nelson@durangogov.org

Dirk Nelson
Durango City Attorney
949 E. 2nd Ave.
Durango, CO 81301

Re: Durango ordinance unlawfully denying right to jury trial

Dear Mr. Nelson:

The City of Durango is enforcing an unlawful ordinance that denies criminal defendants the right to a jury trial, in violation of controlling Colorado law. We write to ask that Durango immediately stop enforcing this ordinance and initiate the steps necessary to repeal it.

I. Legal Background

Section 15-54(f) of the Durango Code of Ordinances (DCO) provides that "no defendant shall be entitled to a jury trial in municipal court when the defendant is not subject to jail as a potential penalty if convicted . . . ." This ordinance directly conflicts with, and is pre-empted by, state law.

Under Colorado law, the right to jury trial is guaranteed for all criminal prosecutions, whether for a felony, a misdemeanor or a petty offense. The Colorado Constitution provides for the right to a jury trial in "criminal prosecutions." Colo. Const., art II §§ 16, 23. While it is clear that this constitutional right extends to all cases in which a defendant is charged with a felony or misdemeanor,[1] in 1969, the Colorado Supreme Court interpreted this right to exclude "petty offenses." *Austin v. City and Cnty. of Denver*, 462 P.2d 600, 604 (Colo. 1969). The *Austin* court defined "petty offenses" as offenses punishable by no more than six months in jail and/or a fine of no more than $500. *Id.* Within months of the *Austin* decision, the Colorado General Assembly filled the gap by adopting legislation that guarantees a right to jury trial in all prosecutions (including those in municipal courts) for the petty offenses not covered by the

[1] *See, e.g.*, *People v. Martinez*, 128 P.3d 291 (Colo. Ct. App. 2005) ("[Persons charged with misdemeanors, like persons charged with felonies, are entitled to a trial by jury . . . .").

Austin ruling.[2] C.R.S. § 16-10-109; *see also Roalstad v. City of Lafayette*, 363 P.3d 790, 794 (Colo. Ct. App. 2015) (explaining the history of the legislation). Thus, between Colorado statutory and constitutional law, criminal defendants have a right to jury trial in all criminal prosecutions, whether for a felony, misdemeanor or petty offense.

II. Illegal denial of right to jury trial in Durango Municipal Court

Despite the binding authority discussed above, the Durango Municipal Court is enforcing DCO Section 15-54(f) to illegally deny the right to a jury trial in some criminal cases. One recent example underscores the need for prompt action by the City to end its illegal application of this ordinance. In the City's early 2017 prosecution of a local professor, Anthony Nocella, for allegedly participating in a protest march without a permit,[3] the Durango Municipal Court relied on Section 15-54(f) to refuse Mr. Nocella's request for a jury trial. This denial of Mr. Nocella's jury trial right violated Colorado law.[4]

Mr. Nocella was charged with two municipal ordinance violations. Both were punishable, pursuant to the City's general penalty ordinance, by up to 90 days imprisonment and/or a $1,000 fine. DCO Sec. 1-16(1). Given these potential penalties, it is clear that Mr. Nocella was charged with criminal offenses. As detailed above, Mr. Nocella therefore had a right to a jury trial under Colorado law. Nevertheless, the municipal court denied Mr. Nocella's right to a jury trial after the prosecutor stated that the City was not seeking a jail sentence. Based on this assertion, and the court's promise that jail would not be imposed, the court applied DCO Sec. 15-54(f) to deny Mr. Nocella's request for a jury trial.[5] In doing so, the city court acted unlawfully.

That the prosecution was not seeking jail time, and that the court promised not impose a jail sentence in the event of a conviction, had no legal import on Mr. Nocella's right to a jury trial. Section 16-10-109 does not contain an exception to the right to a jury trial should the prosecutor decide not to seek jail and the court decide not to impose jail. When courts consider whether the right to jury trial applies, the relevant consideration is the penalty allowed by law for conviction of the charged offense. *See, e.g.*, *Byrd v. Stavely*, 113 P.3d 1273, 1278 (Colo. Ct. App. 2005) (in determining whether defendant had a right to a jury trial pursuant to C.R.S. § 16-10-109, looking to statutorily authorized penalties for charged offense); *Roalstad*, 363 P.3d at 795 (same).

Moreover, even if Durango's commitment to forego a jail sentence carried some legal import, the Colorado statute and Colorado caselaw make clear that even fine-only criminal offenses carry with them a jury-trial right. In 2012, the City of Boulder attempted to abolish the right to jury trial for a number of municipal ordinance violations by eliminating jail as a possible

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[2] As amended in later years, the legislation that filled the gap created by the *Austin* ruling, establishes only two exceptions to the right to a jury trial: (1) non-criminal municipal traffic infractions, and (2) non-criminal municipal ordinances which do not have a counterpart state statute punishable by imprisonment. *See* C.R.S. § 16-10-109(1).

[3] Durango Municipal Court Case No. 2017-249.

[4] The ACLU of Colorado represented Mr. Nocella in his criminal case but never had the opportunity to fully litigate the jury trial issue, because the City dismissed all charges against him.

[5] *2017-03-08 Order re: Request for Trial by Jury*. During a hearing on Mr. Nocella's motion to reconsider the court's denial of a jury trial, the municipal court explained that it was comfortable denying Mr. Nocella a jury trial given its belief that "the City of Durango did their research" before enacting DCO 15-54(f). *Tr., 2017-03-29 Readiness Hearing, 4:23-25.*

penalty and setting the maximum fine at $500.[6] Although Boulder adopted the proposed ordinance changes, the elimination of jail as a possible penalty did not succeed in eliminating the right to jury trial. The Boulder Municipal Court issued a detailed ruling that explains why Section 16-10-109 continues to guarantee a right to jury trial even when jail is not a possible sentence upon conviction.[7] Similarly, in 2015, the Colorado Court of Appeals held that a defendant charged with violating a Lafayette municipal ordinance regarding vicious animals was entitled to a jury trial under Section16-10-109 even though a fine between was the only possible sentence. *Roalstad,* 363 P.3d at 799. Thus, even if the charged offenses in Mr. Nocella's case had been non-jailable pursuant to DCO ordinance, because Mr. Nocella was charged with a criminal offense carrying a possible punishment of a fine, he had a right to a jury trial under state law.

III. State law controls

The status of Durango as a home-rule city does not exempt it from state law guaranteeing the right to jury trial. When a municipal ordinance operates to deny criminal defendants a jury trial in violation of state law, state law controls. First, in the section of the Colorado statutes governing municipal courts, Section 13-10-114(1) mandates: "In any action before municipal court in which the defendant is entitled to a jury trial by the constitution or the general laws of the state, such party shall have a jury upon request." Second, as the Colorado Supreme Court has explained, when adopting Section 16-10-109, the legislature explicitly found that provision of a jury trial for petty offenses was an issue of "state-wide concern" over which "the general assembly shall retain sole legislative jurisdiction." *Hardamon v. Municipal Court*, 497 P.2d 1000, 1002 (Colo. 1972). The *Hardamon* court agreed with this legislative declaration, finding that the right to a jury trial is a matter of state-wide, rather than local, concern:

> We would consider it to be destructive of the concept of equality of justice to grant or deny jury trials in petty offense cases merely on the basis of where the offense occurred or in what court the guilt or innocence is to be determined. It is illogical and without reason to say that a defendant charged in a state or non-home rule municipal court should be permitted a jury trial, whereas if he is similarly charged in a home rule court he should be denied a jury trial.

Id. Accordingly, Section 15-54(f) of the Durango Municipal Code must yield to the controlling state law. Durango's home-rule status does not allow the city to deny jury trials that are protected and guaranteed by Colorado law.

IV. Conclusion

Based on the authority cited in this letter, the City of Durango must stop relying on DCO Sec. 15-54(f) and must agree to begin immediate steps to repeal the provision. To that end, we ask the City of Durango to take the following immediate steps to ensure no further violations of state law:

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[6] *See* Heath Urie, "Boulder proposes eliminating jury trials for most tickets," Boulder Daily Camera, Jan. 14, 2014, available at http://www.dailycamera.com/ci_19739509.

[7] Order Re: Defendant's Request for Jury Trial, Case No. CR-2012-4861, Boulder Municipal Court, May 9, 2012. A copy of that ruling is attached.

1. **Immediately stop enforcing DCO Sec. 15-54(f). This means that the City must instruct city judges and city prosecutors that the ordinance is no longer to be enforced.**

2. **Formally counsel city judges and prosecutors regarding preservation of criminal defendant's right to a jury trial under Colorado state law.**

3. **Examine currently pending prosecutions in the city court to determine if any defendant was illegally denied the right to a jury trial and restore the right to a jury trial in any such case.**

4. **Promptly initiate the steps necessary to repeal Section DCO Sec. 15-54(f).**

Please provide a written response to this letter by **July 19, 2017**.

Sincerely,

Mark Silverstein
Legal Director,
ACLU of Colorado

Rebecca Wallace
Staff Attorney and Policy Counsel
ACLU of Colorado

Attachment: Order Re: Defendant's Request for Jury Trial, Case No. CR-2012-4861, Boulder Municipal Court, May 9, 2012.

MUNICIPAL COURT CITY OF BOULDER, COUNTY OF BOULDER STATE OF COLORADO Court address: 1777 6TH Street, Boulder, Colorado 80302	Case Number CR-2012-4861
People of the City of Boulder, Vs. IRVIN ROBERT BENNETT	
ORDER RE: DEFENDANT'S REQUEST FOR JURY TRIAL	

In response to the Defendant's Request for a Jury Trial Pursuant to C.R.S. 16-10-109, the Court enters the following Findings and Order:

I. Introduction

Defendant Irvin Bennett was charged on March 6, 2012, with a violation of Section 5-6-10, Camping or Lodging on Property Without Permission, of the Boulder Revised Code. Subsection (f) of Section 5-6-10 states that the maximum penalty for a first or second conviction within two years is a $500 fine. The parties agree that this is Mr. Bennett's first charge of a camping violation in the City of Boulder in the last two years. Therefore, the maximum allowable penalty is a $500 fine. The Defendant has filed a request for a jury trial in this matter pursuant to C.R.S. 16-10-109. This statute states:

> (1) For purposes of this section, "petty offense" means any crime or offense classified as a petty offense or, if not so classified, which is punishable by imprisonment other than in a correctional facility for not more than six months, or by a fine of not more than five hundred dollars, or by both such imprisonment and fine and includes any violation of a municipal ordinance or offense which is not considered a crime at common law; except that violation of a municipal traffic ordinance which does not constitute a criminal offense or any municipal charter, municipal ordinance, or county ordinance offense which is neither criminal or punishable by imprisonment under any counterpart state statute shall not constitute a petty offense. . . . .

Subsection (2) of this statute states that a person charged with a "petty offense" is entitled to a jury trial.

The Court must determine if this statutory section is applicable to a defendant charged with a violation of the Boulder Revised Code and if so, has Mr. Bennett has been charged with a petty offense as defined by the statute which would entitle to him a jury trial.

II. HOME RULE CHARTER

The City of Boulder is a Home Rule City, adopting a Home Rule Charter on October 30, 1917. As such, the City of Boulder is subject to the restrictions and directives of Article XX, Section 6, of the Colorado Constitution which states:

> "Any act in violation of the provisions of such charter or of any ordinance thereunder shall be criminal and punishable as such when so provided by any statute now or hereafter in force."

State statutes are applicable to Home Rule cities in matters of statewide concern. *Conrad vs. City of Thornton*, 553 P.2d 822 (1976). For an issue that is exclusively of statewide concern, state statutes control. *DeLong vs. City and County of Denver*, 576 P.2d 537 (1978). The state legislature in Colorado has declared the right to a jury trial to be matter of statewide concern. C.R.S. 13-10-101 and 13-10-114. See *People vs. District Court of Colorado 17th Judicial District*, 843 P.2d 6 (1992).

The Charter of the City of Boulder in Section 87, states "There shall be no trial by jury, and there shall be no change of venue from said court." This prohibition of a jury trial was found to be invalid in *Hardamon vs. Municipal Court In and For City of Boulder*, 497 P.2d 1000 (1972). The Supreme Court ruled that the granting of jury trial in petty offenses was a matter of statewide concern, citing the language of the predecessor of C.R.S. 13-10-101, and ruled that the City of Boulder could not limit or remove the right to a jury trial by its Charter language.

The right to a jury trial is a matter of statewide concern and the fact that the City of Boulder is a Home Rule city does not restrict or limit the applicability of the C.R.S. 16-10-109 to this case. See also Rule 223 of the Colorado Municipal Rules of Procedure.

III. ANALYSIS OF C.R.S. 16-10-109

C.R.S. 16-10-109 defines a "petty offense" as a crime punishable by either imprisonment in other than a correctional facility for not more than sixty day, or by a fine of not more than five hundred dollars, or by both imprisonment and fine. If a particular charge is a crime and is subject to any one of the three listed possible penalties, the charge is a "petty offense" and a defendant charged with such a violation is entitled to a jury trial.

Does the charge against the Defendant, Camping or Lodging on Property Without Permission, Section 5-6-10 of the Boulder Revised Code fit the definition in 16-10-109 of a petty offense?

Section 5-6-10(f) states that the maximum allowable fine for a first or second violation within two years is a fine of $500. Therefore, the camping ordinance meets the penalty criteria of a "petty offense".

Is the camping charge a crime? The City Prosecutor argues that violations of municipal ordinances are civil in nature, citing a number of historic decisions. The City argues that since a jail sentence is not a possible penalty, then a first violation of the Camping ordinance is not "criminal". Historic findings and decisions do not meet the current legal standards for review and consideration to determine if a violation is considered to be a crime.

In *City of Greenwood Village vs. Fleming*, 643 P.2d 511 (1982), the Supreme Court set forth a number of factors to be considered to determine if particular violations should be characterized as criminal or noncriminal. The Court referenced C.R.S. 18-4-104(1) which states "The terms offense and crime are synonymous and mean a violation of, or conduct defined by, any state statute for which a fine or imprisonment may be imposed." [1] The specific factors to consider in making the determination are:

> "The establishment of a penalty scheme of fines only affects the seriousness of the offense but does not necessarily determine the character of the violation of criminal or non-criminal. In determining whether conduct has been effectively decriminalized, other factors should also be considered such as, for example, the presence or absence of a legislative declaration of intent to establish a system of administrative as distinguished from criminal adjudication, the right of law enforcement officers to arrest and detain an individual for a proscribed conduct, whether a judgment of conviction carries stigmatizing or condemnatory significance, and the collateral consequences attaching to a conviction."

Section 5-6-16(f) regarding camping in the City of Boulder was amended by Ordinance 7831, adopted on February 7, 2012. That amendment limited the maximum penalty for a first time violation of the camping ordinance to a fine of up to $500. There is no language in Ordinance 7831 or the amendment to Section 5-6-16 that changed or modified the procedures for this Court in dealing with a charged violation of the camping ordinance to some type of administrative hearing rather than a criminal adjudication.[2] The amended camping ordinance does not require this Court to procedurally handle a camping case involving the sixth charged camping violation in the last two years differently from the way this Court deals with a first time camping violation. There is no language, procedure or classification which distinguishes the first or second camping violation from most of the other violations in the Code. [3]

A person charged with a camping violation maybe arrested by the Boulder Police Department when charged for the first or second camping violation. See BRC, 2-6-18.

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[1] It is noted that this language is very similar to Section 5-2-5 of the Boulder Revised Code.

[2] See the Colorado Rules For Traffic Infractions as an example.

[3] The Boulder Revised Code does distinguish most traffic violations as traffic infractions as an example.

A defendant convicted of a first or second camping violation has the conviction recorded and reported to various criminal record entities in the same fashion as convictions for any and all other ordinance violations.

A review of other provisions of the Boulder Revised Code is relevant to this analysis. There is no language in Title 5 of the Code which states that any of the specific sections of Title 5 are intended to decriminalized. A defendant charged with a camping violation who fails to appear in court for his or her arraignment will have a warrant for his or her arrest as in all criminal matters rather than a default order being entered as would be standard for a decriminalized violation. A camping charge by the language of the Code is a "strict liability" offense, meaning the prosecution is not required to prove any specific intent by the defendant. The elements for a strict liability violation are set forth in Section 5-2-7(a) which states that the "minimum requirement for criminal liability" includes an act or omission to perform an act. There is no distinction in this definitional section as applied to a camping violation between "criminal liability" and a decriminalized violation in the case of a first or second violation.

Section 5-2-5(a) states:

> "The terms "crime," "offense", misdemeanor", and "violation" as used in this code or any uncodified ordinance are synonymous. Any act or omission declared to be a violation or to be unlawful or required or prohibited by the phrase "no person shall," or similar mandatory language in or by this code or any ordinance of the city or any rule promulgated thereunder constitutes a violation."

Section 5-6-10 (both subsection a and b) has the language "No person shall camp" in defining the violation of the camping ordinance. By the definition in Section 5-2-5(a), camping is a violation and a violation is defined by the Code as synonymous to a crime.

When considering all of the various cited sections of the Code in totality, it is clear that a violation of Section 5-6-10 is defined as a crime. While the Ordinance 7831 amended the maximum allowable penalty for a first or second violation within two years, it did not decriminalize a violation of the camping section at issue. A camping violation is a crime punishable by a fine of not more than five hundred dollars and as such is a "petty offense" as defined by C.R.S. 16-10-109. Therefore, the Defendant in this matter is entitled to a jury trial.

IV. COUNTERPART STATE STATUTE

The Defendant argued that he is entitled to a jury trial since there is a counterpart state statute for camping which is punishable by imprisonment. Given the findings of the Court above, it is not necessary for the Court to enter a finding on this argument. But the parties have briefed this issue and presented arguments and the Court will enter findings on this issue to avoid additional litigation.

The Defendant has argued that C.R.S. 18-9-117 is a counterpart state statute to the Boulder ordinance relative to camping and since this statute has a maximum penalty of a six months in

jail, the Defendant is entitled to a jury trial in this Court. The prosecution argues that C.R.S. 18-9-117 is not a counterpart statute as defined by C.R.S. 16-10-109 because the cited state statute authorizes the state to establish rules and regulations for camping, which may include the disallowance of camping in certain places, but is not a prohibition of camping as is the Boulder ordinance. The prosecutor has further argued that since the elements of the two sections are not the same, the state statute is not a counterpart statute to the City of Boulder ordinance.

A counterpart state statute must be a substantial duplication of the municipal ordinance in question. *City of Greenwood Village, Supra; Bradford vs. Longmont Municipal Court of the City of Longmont*, 830 P.2d 1135 (Colo. App. 1992). C.R.S. 18-9-117 gives authority for the enforcement of established rules and regulations for a number various activities including camping. It does not specifically control or restrict camping as does the Boulder ordinance. Therefore, it is not a counterpart statute which entitles the Defendant to a jury trial.

V. ORDER

The request of the Defendant for a jury trial in this matter is hereby granted. The Court will enter a plea of Not Guilty for Mr. Bennett and this case shall be set for a Jury Readiness Conference and Jury Trial upon the payment by Mr. Bennett of his jury deposit fee or the waiver of such fee by the Court.

Dated this 9th day of May, 2012.

BY THE COURT:

MUNICIPAL COURT JUDGE
P.O. Box 8015
Boulder, Colorado 80306
(303) 441-1842

CERTIFICATE OF MAILING/HAND DELIVERY

I hereby certify that on May 14, 2012, a true and correct copy of the foregoing was served by hand delivery to the City Attorney's Office, Prosecution Division, 1777 - 6th Street, Boulder, CO 80302 and by placing a copy in the United States mail, postage prepaid to the following:

DAVID HARRISON
2305 BROADWAY
BOULDER, CO 80304

BY: