

ARTICLE XXIX OF THE COLORADO CONSTITUTION
AND THE COLORADO INDEPENDENT ETHICS
COMMISSION

"LATELY IT OCCURS TO ME WHAT A LONG, STRANGE TRIP IT'S BEEN"
- ROBERT HUNTER



Article XXIX of the Colorado Constitution

- Approved at the November 7, 2006, election with 62% of the vote
- Exempts home rule counties and municipalities
- "... The requirements of this article shall not apply to home rule counties or home rule municipalities **that have adopted charters, ordinances, or resolutions that address the matters covered by this article.**" Colo. Const. Art. XXIX, § 7. (emphasis added)
- Home rule exemption is specifically addressed by the Title Board



Independent Ethics Commission

- Created by Article XXIX to:
 - Hear complaints
 - Issue findings
 - Assess penalties
 - Issue advisory opinions
- Extent of authority:
 - Ethics issues arising under Article XXIX
 - Any other standards of conduct and reporting requirements as provided by law



Case Law – Expansion of IEC’s Authority

- *Developmental Pathways v. Ritter*, 178 P.3d 524 (Colo. 2008)
 - The nature of Article XXIX is that it is self-executing
 - General Assembly can only pass legislation “to facilitate,” and not “limit or restrict,” the article and the powers it grants
- *In re Colo. Ethics Watch v. Indep. Ethics Comm’n*, 369 P.3d 270 (Colo. 2016)
 - Citing *Ritter*, notwithstanding the provisions of §24-18.5-101(9), C.R.S., only enforcement actions are subject to judicial review
 - Dismissals of frivolous complaints are not subject to judicial review



Case Law – Expansion of IEC’s Authority

- *Gessler v. Grossman*, 2015 Colo. App. LEXIS 687 (Colo. App. 2015)
 - Court of Appeals rejects assertion that Article XXIX, Section 5 applies only to standards of conduct and reporting requirements that expressly delegate enforcement to the IEC
 - Finds instead that the phrase, “as provided by law,” invokes laws already in existence
 - Unprecedented expansion of jurisdiction – Court of Appeals has given the IEC free reign to enforce any state law
 - The Colorado Supreme Court has granted Gessler’s petition for certiorari review



IEC Draft Position Statement on Home Rule Counties and Municipalities

- Matters that must be addressed to opt out of Article XXIX:
 - Gift ban
 - Applies to local officials and employees; their spouses and dependent children
 - No gifts over \$59 may be accepted
 - Prohibition against receiving any money, forbearance, or forgiveness of indebtedness without equal consideration
 - Complete ban on receiving any gift from a lobbyist
 - Restrictions on representation after leaving office



IEC Draft Position Statement on Home Rule

- Matters a home rule municipality must address to opt out of Article XXIX:
 - Creation of an independent ethics commission
 - Comprised of members of different political parties
 - Rules governing appointment and succession
 - Complaint, investigative and enforcement process
 - Penalties imposed for violations
 - Process to seek ethical guidance
 - Jurisdiction over ethical issues arising under any standard of conduct or reporting requirement as provided by law



IEC Draft Position Statement on Home Rule

- A home rule municipality must meet each of the seven requirements to opt out of Article XXIX
- If a home rule municipality does not meet each of these requirements, the covered individuals are subject to Article XXIX and the IEC's jurisdiction
- By requiring home rule municipalities to adopt Article XXIX verbatim, the exception in Section 7 is rendered meaningless



Everybody agrees -- The IEC got it wrong

- City of Aurora
 - Article XXIX addresses three matters that concern local governments:
 - Gift ban
 - Enforcement mechanism; and
 - Penalties for violations
 - How these matters are addressed is up to the individual municipality
 - Aurora adopted the state Standards of Conduct (§ 24-18-101 *et seq.*, C.R.S.) as they existed on October 30, 2006



Everybody agrees -- The IEC got it wrong

- Colorado Municipal League
 - The IEC misinterprets the Court of Appeals' decision in *In Re City of Colorado Springs*, 277 P.3d 937 (Colo. App. 2012)
 - Requiring that a matter "be addressed" does not mean that it has to be dealt with in any particular fashion – it may be addressed in detail or it may be addressed more generally



Everybody agrees -- The IEC got it wrong

- Common Cause/Colorado Ethics Watch
 - A home rule municipality need not adopt an ethics code that mirrors the provisions of Article XXIX
 - In order to opt out of Article XXIX, a home rule municipality adopt an ethics policy that includes:
 - A gift ban, and
 - An entity to civilly enforce the gift ban
 - The substantive rules may be less stringent than the corresponding provisions of Article XXIX



Everybody agrees -- The IEC got it wrong

- Facts
 - Of the 98 home rule municipalities reviewed by Ethics Watch, 62 have either adopted their own ethics code or the 2006 Standards of Conduct
 - 50 home rule municipalities have created some type of civil enforcement of local ethic rules
 - When the Draft Position Statement is applied, however, none of the 62 home rule municipalities passes muster



What now?

- The IEC will be conducting a special meeting to address the comments on their Draft Position Statement
- Date , Time and Place: October 13th, at 8:30 a.m. in Room 2B of the Ralph Carr Judicial Center, 1300 Broadway in Denver
- You are all cordially invited to attend



Questions?





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Independent Ethics Commission
1300 Broadway, Suite 240
Denver, CO 80203

August 3, 2016

Re: Draft position statement of IEC concerning Colo. Const. Art. XXIX, § 7

Dear Members of the Independent Ethics Commission:

Please note: These comments supplement those previously made to the Commission by CML on the record in connection with the inquiry regarding Aurora Councilmember Lawson, wherein CML generally endorsed the position expressed by the Aurora City Attorney in his letter to the Commission of January 22, 2016 (attached).

Introduction

CML has been following the Commission’s proceedings regarding Councilwoman Lawson, as well as the Commission’s related decision to issue, *sua sponte*, this draft Position Statement. We are pleased to emphasize to the Commission that these proceedings are not driven by any actual, real-world examples of gift-driven bad acts by *anybody* associated with *any* of Colorado’s 100 home rule municipalities. Nor are bad guys in home rule municipalities escaping justice as a consequence of being beyond the Commission’s jurisdiction due to Article XXIX, § 7 (hereafter referred to as “section 7” or the “opt out” provision). As with any constitutional question, the ultimate decision of what the constitution requires is the province of the courts. Assuming that the present paucity of real world cases or controversies involving home rule jurisdictions continues (and we see no reason why it should not...), we sincerely hope that it will be many years before a court is presented with a ripe case.

Comments

Read as a whole, it is plain that in section 7 voters intended to make clear the prerogative of home rule municipalities and counties to adopt gift bans *less stringent* than the requirements contained in Article XXIX. Unlike statutory jurisdictions, whose only choice under the first sentence of section 7 is to treat the constitutional standards as a minimum and adopt more stringent local standards, home rule jurisdictions with local charter or ordinance provisions that “address” the matters covered by Article XXIX are not subject to its requirements. Thus, they may enact less stringent requirements. In this Position Statement, a majority of the current members of the Commission offer their opinion as to how extensively a home rule jurisdiction must address such matters in order to have the requirements of Article XXIX not apply.

CML agrees with the introductory citation by the Commission of various rules of statutory and constitutional construction concerning the plain meaning of words and intent of voters. Yet, the Commission has chosen to read into the “opt out” provision conditions that essentially exclude it from Article XXIX in a manner that defeats the obvious intent of Colorado’s voters to permit less stringent regulation in this area by home rule

municipalities. The Commission's unfortunate choice is neither compelled by the language of Article XXIX, nor by Colorado case law.

The Commission essentially wants home rule jurisdictions to adopt local requirements parroting those in Article XXIX in order to not be subject to Article XXIX's requirements (see the numbered items on pages 3 and 4 of the Position Statement). What sort of "opt-out" is this? This is like telling somebody that they are free to ignore a requirement that all cars be painted black, so long as they first paint their car black. Courts regularly refuse to impute to voters the intent to adopt such absurd requirements. If Article XXIX is meant to serve as a minimum requirement for *all* home rule jurisdictions, why was the "opt out" provision included in section 7 in the first place? After all, the first sentence of section 7 makes it plain that *any* jurisdiction is free to adopt more stringent local provisions. In addition to eschewing absurd constructions, courts tend to reject arguments that effectively render constitutional language surplusage.

The Commission bases its decision entirely on the Court of Appeals decision in *In re Complaint Filed by City of Colorado Springs*, 277 P.3d 937 (Colo. App. 2012). In *Colorado Springs*, the court decided whether the City had "opted out" of constitutional and statutory campaign finance reporting requirements under a State law provision that permitted this option to home rule jurisdictions which locally "addressed" matters covered by the State requirements. In the facts of that case, the City had adopted the State statute by reference and supplemented it with local provisions. Not surprisingly, the court found that the City qualified for the "opt out."

Significantly, the court nowhere said, nor implied, that an enactment of the sort adopted by the City was *required* by the law. In other words, the court applied a statutory test; it did not set a standard for meeting that test (much less a test set forth in a separate constitutional provision). Respectfully, the Commission makes too much of the decision in *Colorado Springs*, by finding that it requires a home rule jurisdiction to adopt every one of the detailed requirements set forth in the Position Statement to exercise its constitutional prerogative under section 7.

To require that a matter be "addressed," does not require that a matter be dealt with in any particular fashion. A matter may be addressed in detail or it may be addressed more generally. A matter can be addressed through specific guidelines, or alternatively, through a performance standard. Webster's Collegiate Dictionary defines the verb "address" as "to direct the efforts or attention of (oneself)"; there is nothing here about the quality or extent of such "efforts or attention." Accordingly, CML urges that a jurisdiction could reasonably be found to have "addressed" the matters covered by Article XXIX without meeting the detailed list of requirements proposed by the Commission.

Indeed, many of the requirements listed by the Commission describe *how* a given item must be addressed by a home rule jurisdiction (no gifts over \$59, etc.), rather than whether the item in question has been addressed *at all*. These matters might be far more generally stated, in a way that would facilitate, rather than frustrate, the evident purpose of section 7. For example, items (1), (2), and (3) on the Commission's list detail various types of gift restrictions, while items (5), (6), and (7) all detail a complaint process relating to the gift ban.¹

Rather than requiring home rule jurisdictions to parrot Article XXIX, a far more reasonable assumption is that voters did not intend Article XXIX to apply to home rule jurisdictions that adopted local provisions addressing some sort of local gift ban with a complaint process, even if these provisions are less stringent than the requirements in Article XXIX. Such an interpretation is entirely reasonable, given Colorado's long history of deference to local control in a wide variety of areas. Indeed, voters may well have supported Amendment 41

¹ Some of the requirements are themselves absurd: required political party representation on a commission for a non-partisan jurisdiction; requiring a local restriction on representation when leaving office, when the counterpart provision of Article XXIX expressly applies this requirement only to statewide officeholders and members of the General Assembly. Pursuant to this last remarkable aspect of the Commission's proposed interpretation, a home rule jurisdiction could opt out of Article XXIX only if it first enacted local provisions that are actually *more restrictive* than those to which the City was already subject under Article XXIX.

precisely because of the deference provided in section 7 to home rule municipalities. In the infrequent case where an issue like this arises in a home rule jurisdiction, local processes may be viewed by voters as less political, more responsive, and more accountable than an obscure commission buried somewhere in the State government bureaucracy.

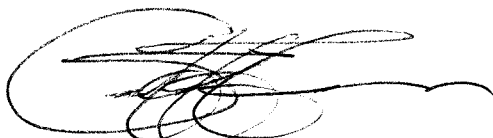
Conclusion

CML recommends that the Position Statement not be finalized and that the Commission abandon its foray into this issue. The Commission has operated without difficulty for many years without presuming to direct home rule municipalities in this fashion. No one has asked the Commission for direction, or otherwise to opine, and we are frankly at a loss to understand why this Commission is now choosing to go where none have gone before.

Should the Commission choose to proceed, CML urges that the Position Statement be revised to facilitate, rather than frustrate, the exercise of the "opt out." In deciding whether to take jurisdiction of a complaint involving a home rule jurisdiction, CML respectfully recommends that this Commission confine its examination to whether the jurisdiction has "addressed" matters such as gift restrictions *at all*, rather than conducting the sort of detailed, substantive review implicit in the draft Position Statement.

Thank you very much for your attention to our concern and for your service to our state.

Sincerely,

A handwritten signature in black ink, appearing to read "Geoff Wilson", with a large, sweeping flourish extending to the right.

Geoff Wilson
General Counsel

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August 3, 2016

Via Email Only

Bill Leone
Chair, Independent Ethics Commission
1300 Broadway, Suite 240
Denver, CO 80203
iecinfo@state.co.us

Re: Draft Position Statement Regarding Ethics Codes for Home Rule Cities or Counties

Dear Commissioner Leone:

Colorado Common Cause ("CCC") submits these comments to the Independent Ethics Commission (the "Commission") concerning the Commission's draft position statement regarding Article XXIX of the Colorado Constitution and the Commission's jurisdiction over home rule municipalities. CCC is uniquely positioned to comment on this issue as the primary drafter of Amendment 41 and as a member of Coloradans for Clean Government, the coalition that sponsored Amendment 41.

As noted in our comments to the Commission dated April 4, 2016, CCC believes that the intent of Amendment 41 was to ensure that standards of ethical government were in place at all levels of government, including standards governing local government officials and employees. Colo. Const. art. XXIX, § 1 (stating that "local government officials," among others, "must hold the respect and confidence of the people").

While Article XXIX permits home rule municipalities to adopt their own "charters, ordinances, or resolutions that address the matters covered by [Article XXIX]," it does not thereby permit home rule municipalities to simply brush aside the fundamental ethics standards and enforcement policies set forth in Article XXIX. Colo. Const. art. XXIX, § 7. If that was what the voters intended, Amendment 41 would have included a provision that simply permitted home rule jurisdictions to opt out of Article XXIX altogether.

However, CCC disagrees with the Commission's analysis that the only way a home rule municipality may exempt itself from Article XXIX is by adopting an ethics code that precisely mirrors the provisions of Article XXIX. If that were the intent, Amendment 41 would have omitted the home rule exemption altogether or created an exemption that was narrowly focused on the creation of a local enforcement entity. Instead, Amendment 41 required municipalities to "address the matters covered in [Article XXIX]."

Rather than the seven provisions outlined in the Commission's draft position statement, CCC believes that, for a home rule municipality to exempt itself from Article XXIX, that municipality must adopt an ethics policy that includes: (1) a gift ban and (2) an entity to enforce the gift ban. If either prong is omitted, it is impossible for the municipality to have addressed the matters covered by Article XXIX because the gift ban would be nonexistent or illusory in the absence of an enforcement entity.

CCC does not believe that the gift ban must be identical to the gift ban in Article XXIX, or that a local ethics policy must include a provision regarding representation after leaving office. Likewise, there is no requirement that the composition of the entity charged with enforcing the gift ban mirror the composition requirements of the Commission. Indeed, the comments submitted by the Town of Windsor dated July 28, 2016 note that partisan representation requirements in place at the state level are in conflict with the nonpartisan nature of elected office in many municipal governments.

Colorado Common Cause appreciates the Commission's interest in providing clarity regarding the interpretation of the home rule exemption of Article XXIX. We do not believe that the draft position statement affords home rule municipalities the ability to adopt ethics codes that reflect local concerns while honoring the voters' intent in adopting Article XXIX and would encourage the Commission to continue to solicit feedback on how best to address this important matter.

Thank you for the opportunity to comment.

A handwritten signature in black ink, appearing to read 'E Nunez', with a long horizontal stroke extending to the right.

Elena Nunez
Executive Director
Colorado Common Cause
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DRAFT

I. Introduction

The Colorado Constitution authorizes the Independent Ethics Commission (“Commission”) to give advice and guidance on ethics issues arising under Article XXIX of the Colorado Constitution and any other standards of conduct and reporting requirements as provided by law. In its discretion, the Commission may issue position statements, which are generally applicable written statements providing guidance to public officers, members of the General Assembly, local government employees and members of the public.

The Commission issues this Position Statement to address Section 7 and the applicability of Article XXIX to home rule counties and municipalities.

II. Discussion

Background

Amendment 41 of the Colorado Constitution, now codified as Article XXIX of the Colorado Constitution, was a citizen-initiated amendment to the Colorado Constitution passed by Colorado voters in November 2006. Over 62% of the votes cast were in favor of the amendment.

Article XXIX contains a gift ban, which by its plain language, prohibits public officers, members of the general assembly, local government officials, and state and local government employees (“covered individuals”) from accepting gifts over \$50, which amount is adjusted for inflation over time. Currently, that amount is set at \$59. Article XXIX also prohibits covered individuals from receiving any money, forbearance, or forgiveness of indebtedness without providing consideration equal to the value of whatever amount was received. In addition, Article XXIX contains a ban on gifts from lobbyists and restrictions on representation after leaving office (“revolving door” restrictions).

Article XXIX also creates an independent commission comprised of members of different political parties, with provisions governing manner of appointment and manner of succession. Additionally, Article XXIX contains a complaint, investigative, enforcement and penalty imposition process. It also provides a process for covered individuals to request and obtain advisory opinions on whether any conduct by that person would constitute a violation of Article XXIX, or any other standards of conduct or reporting requirements as provided by law.

Although Article XXIX applies the same ethical requirements to local officials and employees as it does to state public officials and employees, as well as members of the General Assembly, section 7 of Article XXIX contains a discrete section that applies solely to counties and municipalities:

Any county or municipality may adopt ordinances or charter provisions with respect to ethics matters that are more stringent than any of the provisions contained in this article. The requirements of this article shall not apply to home rule counties or home rule municipalities that have adopted charters, ordinances, or resolutions that address the matters covered by this article.

This position statement addresses the question of under what circumstances the requirements of Article XXIX do not apply to home rule counties and municipalities.

Analysis

When interpreting a constitutional amendment adopted by a citizens' initiative like Amendment 41, now codified in Article XXIX, the Commission must give effect to the electorate's intent in enacting the amendment. *See Colo. Ethics Watch v. Senate Majority Fund, LLC*, 269 P.3d 1248, 1253 (Colo. 2012). To determine voter intent, words should be given their ordinary and popular meaning. *Id.* at 1253-1254. If the language of the amendment is clear and unambiguous, it must be enforced as written. *Id.* at 1254; *Colo. Community Health Network v. Colo. General Assembly*, 166 P.3d 280, 283 (Colo.App. 2007).

By its plain language, the first sentence of section 7 applies to all counties and municipalities. "Any county or municipality may adopt ordinances or charter provisions with respect to ethics matters that are more stringent than any of the provisions contained in this article." *Emphasis added.* Thus, whether home rule or otherwise, any local jurisdiction may adopt ordinances or charter provisions that are more stringent than the requirements of Article XXIX.

While the first sentence of section 7 affords local jurisdictions the opportunity to adopt ethical standards more stringent than those set forth in Article XXIX, the plain language of the second sentence of section 7 contemplates that only home rule counties or municipalities may opt out of the requirements of Article XXIX. "The requirements of this article *shall not apply to home rule counties or home rule municipalities* that have adopted charters, ordinances, or resolutions that address the matters covered by this article." *Emphasis added.*

The question, then, is under what circumstances has a home rule jurisdiction adopted local charters, ordinances, or resolutions that “address the matters” covered by Article XXIX?

In *In re Complaint Filed by City of Colo. Springs*, 277 P.3d 937 (Colo. App. 2012), the Colorado Court of Appeals grappled with an analogous issue—whether a home rule jurisdiction, the City of Colorado Springs, had “adopted charters, ordinances, or resolutions that address the matters covered by article XXVIII and [the Fair Campaign Practices Act (“FCPA”).” Under the FCPA, home rule jurisdictions which adopt such laws are exempt from the requirements of article XXVIII of the Colorado Constitution and the FCPA.

In performing its analysis, the Court of Appeals first reviewed the matters at issue addressed by article XXVIII and the FCPA: 1) disclosure requirements; 2) various penalties for violations of those requirements; and 3) a complaint resolution process with matters being referred to an ALJ. The Court of Appeals then analyzed the City’s Charter and ordinances and determined that the City’s laws “address the matters covered” by: 1) having disclosure requirements for campaign expenditures and contributions and adopting by reference provisions of the FCPA; 2) specific local jurisdiction sanctions as well as incorporating sanctions provided in the FCPA; and 3) having enforcement provisions where anyone may file a complaint which would then be investigated and prosecuted in municipal court in the same manner as other municipal ordinance violations.

The Commission believes this same type of analysis applies here. In order for a home rule entity to opt out of Article XXIX, it must have adopted a charter, ordinance or resolution that addresses the matters covered by Article XXIX including:

1. A gift ban prohibiting local officials and local government employees from accepting gifts over \$59 (subject to adjustment every 4 years) including money, forbearance, forgiveness of indebtedness, loans, rewards, promises or negotiations of future employment, favors or services, honoraria, travel, entertainment, or special discounts, to any official or employee or spouses or dependent children of officials or employees;
2. A prohibition on covered individuals receiving any money, forbearance, or forgiveness of indebtedness without providing consideration equal to the value of whatever amount was received;
3. A complete ban on receiving any gift from a lobbyist;
4. Restrictions on representation after leaving office;

5. An independent commission comprised of members of different political parties, with provisions governing manner of appointment and manner of succession with a complaint, investigative and enforcement process that allows penalties be imposed ;
6. A process for covered individuals to seek ethical guidance; and
7. Provisions granting the independent commission with jurisdiction over ethical issues arising under any other applicable standard of conduct or reporting requirement as provided by law.

If a home rule entity has all of the above listed provisions, then the requirements of the constitution are met and Article XXIX does not apply. Conversely, if a home rule city or county does not meet the requirements set forth above, it may not opt out of Article XXIX and the covered individuals remain subject to Article XXIX and under the Commission's jurisdiction.

The Commission is mindful of Article XX, which allows home rule entities some independence from state-wide standards or statutes. Article XX, section 6 of the Colorado Constitution, grants and confirms, "to the people of all municipalities coming within its provisions the full right of self- government in both local and municipal matters and the enumeration herein of certain powers shall not be construed to deny such cities and towns, and to the people thereof, any right or power essential or proper to the full exercise of such right.." Colo. Const. art XX, § 6.

However Article XX is not without its limitations. Article XX also recognizes the inherent conflict between the state and home rule entities and imposes the boundaries between the two. "The statutes of the state of Colorado, so far as applicable, shall continue to apply to such cities and towns, except insofar as superseded by the charters of such cities and towns or by ordinance passed pursuant to such charters." Colo. Const. art XX, § 6.

In this instance the Commission finds that there is a state interest in setting and maintaining ethical standards within the state of Colorado. Amendment 41, was a citizen-initiated amendment to the Colorado Constitution passed by over 62 % of Colorado voters. Ethics are a matter of statewide concern and, therefore, Article XXIX, is not superseded by local charters or ordinances. The only authority for a home rule entity to act independently of Article XXIX is from the exception stated in section 7.

This, as all Position Statements, is intended to give broad advice to government officials and employees and the public. The Commission encourages individuals with particular questions to request more fact-specific advice through requests for advisory opinion and letter ruling.

The Independent Ethics Commission



August 3, 2016

Bill Leone
Chair, Independent Ethics Commission
1300 Broadway, Suite 240
Denver, CO 80203

VIA EMAIL TO IECINFO@STATE.CO.US

Re: Draft Position Statement Regarding Home Rule Municipalities Ethics Codes

Dear Commissioners Leone, Bacon, Jones and Smith:

Ethics Watch submits this public comment regarding the Draft Position Statement released for comment at the IEC's June 30 meeting. We will not restate our comments submitted on March 1 and April 1 regarding the general question of the legal interpretation of Colo. Const. art. XXIX § 7, but reincorporate the legal analysis set forth in those earlier comments and apply our legal analysis to the specific provisions in the Draft Position Statement.

As a general comment, we urge the Commission not to adopt a final Position Statement on this matter until the Fifth Commissioner (representing local governments) joins the IEC and can participate in the crafting, discussion and voting. This is a new step the Commission is taking with regard to its authority over Home Rule municipalities and a question that has not been definitely answered since Article XXIX was adopted by popular vote 10 years ago this November. A month or two further delay at this point will not cause as much harm as the risk in enacting something that does not properly reflect the perspective and views of the local government representative on the IEC. As discussed in more detail below, a number of provisions in the Draft Position Statement appear to be inapplicable or unworkable at the local level and it would benefit the Commission to have that Fifth Commissioner's perspective and answers to questions on those issues before adopting binding policy for the whole state.

In a similar vein, while the Commission has been generally discussing this topic for

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months, it was not until the Draft Position Statement was released in writing that many government entities had something concrete to react to. Given the summer timing of this release, the IEC might not have the full range of comments by the August 10 meeting. For example, the Denver Board of Ethics did not have a meeting on the schedule to be able to consider this Draft between when it was released on June 30 and when comments were due on August 3 (their next meeting is August 17). While in general we support the Commission taking action without undue delay, we believe this matter is important and a prospective policy move should not be taken without full comment in the record and consideration by a complete five-member Commission.

I. Legal Analysis of Draft Position Statement

As we have stated in prior submissions, our legal analysis is that the two sentences in Article XXIX § 7 should be interpreted together to allow home rule entities more leeway than other municipalities when adopting local ethics codes. The first sentence (“any county or municipality”) is a permissive statement allowing any home rule – or non-home rule – local government to enact rules stricter than the provisions within Article XXIX, while the Article XXIX provisions and IEC enforcement jurisdiction still continue to apply. The second provision only applies to home rule localities and provides they may “opt-out” of the entire Article XXIX scheme – including the provision stating that municipalities may enact rules stricter than those found in the Article – by enacting local provisions that “address the matters” covered in Article XXIX. This opt-out provision does not require that such local rules be stricter in order to meet the home rule exemption. Because the first provision is merely permissive, a home rule entity could enact a comprehensive ethics code and enforcement scheme that satisfies the home rule exemption, even if some of the substantive rules within that code (such as the gift rule) are less stringent than the corresponding provisions of Article XXIX that the local code supplants.

The Commission’s Draft Position Statement reads these two sentences as compounding requirements such that home rule entities seeking the exemption must both enact a comprehensive code that addresses the matters in Article XXIX and that local code must be identical to or stricter than the corresponding Article XXIX provisions. This reading erases the additional latitude accorded to home rule entities (as discussed in the legislative history submitted by other requestors) to determine the types of ethical standards for their local officials and the best way to enforce those standards locally by opting out of Article XXIX substantive

provisions and IEC enforcement jurisdiction. Section 7 requires home rule entities to “address” the matters in Article XXIX not “incorporate” exact provisions set forth in the Article.

The Draft Position Statement allows home rule municipalities to “opt out” of IEC enforcement, but only if they locally enforce the same substantive provisions, meaning they can never “opt out” of the other provisions of Article XXIX. Yet, Section 7 doesn’t state that home rule entities merely opt out of enforcement under Section 5 (creating the IEC), it states that “the requirements of this article” – all provisions – “shall not apply” if local provisions are adopted. The Draft Position Statement is too strict when it effectively rewrites Section 7 to state that the requirements of Article XXIX shall not apply to home rule municipalities that locally adopt the identical requirements of Article XXIX.

Applying the Draft Position Statement interpretation to the analogous situation of the Colorado Springs campaign finance scheme relied upon in the draft would mean that Colorado Springs would only be removed from Article XXVIII and state jurisdiction if the disclosure requirements and contribution limits adopted for local city officials mirrored the state requirements *in toto*. Yet they do not, and the court did not require that they do so in every instance. For example, while the court held that Colorado Springs local enforcement mechanism for city campaign finance violations was sufficient to opt out of Article XXVIII by operation of home rule law, the city did not adopt an identical system to the state where private parties file and prosecute cases in front of an administrative law judge. Instead, some civil enforcement was needed, but the court deferred to the city’s determination how to proceed. This is not the approach of the Draft Position Statement.

It is important how specific and strict each requirement is articulated in the Draft Position Statement because the Commission states that failure of one of these seven requirements is enough to fail Section 7 exemption. Ethics Watch believes each of the seven requirements listed in the Draft Position Statement is too strict or inappropriate for home rule ethics codes to meet Article XXIX, § 7.

A. Gift Bans

The first two prongs of the seven-part test in the Draft Position Statement attempt to replicate the Article XXIX, § 3 gift ban and require home rule entities to adopt this exact (or stricter) language. There is no reason articulated by the Commission why home rule entities must (1) base their gift bans on a dollar limit and (2) adopt the exact same dollar limit as Article

XXIX. How can the Commission even determine if a substantive gift rule that is based on factors other than a dollar limit is stricter or more forgiving than Article XXIX? Plus, the Draft Position Statement's test is an incomplete and misleading formulation of the Article XXIX, § 3 gift rule because it omits entirely the numerous exceptions to the \$59 gift rule articulated in Section 3 (not to mention the Commission-created exception in Position Statement 12-01). Some home rule entities have different exceptions – or fewer exceptions – than Article XXIX, does the Draft Position Statement mean to require adoption of the same exceptions? Why does the Commission believe the definitional statement regarding items received without adequate consideration must be included while the specific definition of gift and various exceptions in Article XXIX are not mandated? For example, Denver has a very detailed gift rule with substantive provisions that do not rely upon a dollar figure but other factors (such as a 4 ticket limit per donor per year) and includes a number of different exceptions than Article XXIX, § 3. This code would fail because the Draft Position Statement is at the same time requiring identical adoption of the Section 3 gift rule while cherry-picking which parts of that rule must be enacted by home rule entities.

B. Lobbyist Gifts and Revolving Door Provisions

The next two parts of the Draft Position Statement's seven-prong test do not make sense to be mandated at the local level as a condition of home rule Section 7 exemption. In #3, the Commission requires home rule entities to adopt an ordinance that includes “a complete ban on receiving any gift from a lobbyist.” It is unclear what “lobbyist” this test is referring to – state registered lobbyists or locally registered lobbyists?

If the Draft Position Statement intends to require a local ban on gifts from state registered lobbyists, this mandate misunderstands the provision in Article XXIX, § 3(4) upon which it is based. Section 3(4) is itself phrased as restrictions on “professional lobbyist” behavior – individuals who are licensed and regulated by the Secretary of State – and prohibits the giving of gifts, not the receipt of gifts by officials. Thus, Article XXIX itself does not include “a complete ban on receiving any gift from a lobbyist” even for state officials and non-home rule entities under its restrictions. Section 3(4) also covers the giving of gifts by state lobbyists to any “local government official” under the state regulatory authority. Because this provision merely regulates the behavior of state lobbyists, not local government employees or officials, it is a provision that would continue to exist as enforced by the Secretary of State and bind state lobbyists regardless of whether any particular home rule entity passed a local provision

prohibiting its own officials from accepting gifts from state lobbyists. Moreover, such a local prohibition should not be required under Section 7 for exemption since “the matters addressed” in § 3(4) is lobbyist behavior, not officials.

However, it does not follow that Article XXIX and the Commission must instead interpret this prong of the Draft Position Statement test to require home rule entities to ban local registered lobbyists from giving gifts to local officials. Apart from Denver, no home rule municipality even requires registration or reporting of lobbyists at the local level. By adopting this prong in the Draft Position Statement test, the Commission would be requiring home rule entities to pass ordinances to create a lobbyist regulation system and registry simply in order to pass another ordinance banning gifts from any individual on such registry. Because most home rule entities do not have “lobbyists,” the spirit of this prong might be met by other provisions in those home rule gift rules regarding donors subject to official action or other formulations that do not involve “lobbyists.” (However, such provisions might be disqualified through the first two prongs of the test discussed above). For these reasons, it is not logical to impose a lobbyist gift prohibition on home rule municipalities as a requirement for Section 7 exemption.

Similarly, the fourth prong requiring a revolving door provision misinterprets Article XXIX, §4 which creates a two-year waiting period for any “statewide elected officeholder or member of the general assembly.” These restrictions do not apply to local government officials, in stark contrast to the wording of other provisions in Article XXIX. By requiring such restrictions be adopted by home rule entities, the Draft Position Statement takes the position that a home rule entity must create a provision on restrictions for local government officials in order to opt-out of an Article XXIX provision (Section 4) that doesn’t reach local government officials. This interpretation contradicts the explicit language of the last sentence of Section 4 stating “similar restrictions on other public officers, *local government officials* or government employees *may* be established by law.” This statement both underscores that local officials are not subject to Section 4 revolving door restrictions and makes it merely *permissive*, not mandatory, that such restrictions be adopted at the local level. The Draft Position Statement test improperly converts Article XXIX’s “may” into a “shall” as a condition of Section 7 exemption.

C. Civil Enforcement Authority

As stated in prior comments, Ethics Watch believes that Article XXIX, § 7 exemption does require a home rule entity to adopt a civil enforcement entity – the “matters addressed” in

Section 5. However, Section 7 does not require the exact replication of the IEC at the local level. The Draft Position Statement test parts 5 through 7 require an identical mini-IEC to be created at the local level. This strict requirement eliminates flexibility at the local level for enforcement and advice. For example, the fifth part of the test requires an independent commission comprised of “different political parties” in many home rule jurisdictions where elections are nonpartisan and political affiliation is not a relevant test. This is another part of the test where the Commission appears to pick and choose what language from Article XXIX must be adopted. Is the requirement that no more than two are affiliated with the same party, or that a majority cannot be from the same party, or that at least one person from each major (or minor) party must be on the local commission? Local enforcement entities also need flexibility as to whether it is a board, commission or single ethics officer. All these models are used throughout the state, and throughout the country, in ways that show independence and accountability for advising and enforcement. The Draft Position Statement chooses the exact model of Article XXIX as best for all home rule localities regardless of other considerations as a condition of Section 7 exemption.

Finally, the last prong of the Draft Position Statement test requires home rule entities to adopt the same formulation of a jurisdictional statement for the local mini-IECs as contained in Article XXIX. Again, this might not make sense in the context of the local ordinances or charters and a home rule entity might choose a different more specific grant of jurisdiction for the local civil enforcement entity. Yet, the Draft Position Statement does not allow such flexibility and would fail the entity on this point therefore forfeiting Section 7 exemption.

II. Practical Effects of Draft Policy Statement

In prior submissions, Ethics Watch provided the Commission with the diversity of approaches in home rule municipalities regarding (1) whether to adopt a local ethics code; and (2) what type of local enforcement (if any) to establish for that ethics code while claiming an exemption under Article XXIX, § 7. Our prior submissions gave examples of certain home rule municipalities that we believed had adopted ethics codes and enforcement systems that met the requirements of Article XXIX, § 7. However, when the Draft Position Statement is applied to these same home rule codes, it appears **no** home rule municipality will be able to meet the stringent test set forth in the Draft and maintain its current ethics code. Although certain of the seven requirements in the Draft Position Statement present a problem for numerous home rule

jurisdictions, a simple fix to one criterion would not make a difference because of the difficulties caused by the combination of all seven strictly worded requirements. As discussed above, the Draft Position Statement states that if a home rule municipality fails even one out of seven parts of the test then the opt-out provision of Article XXIX § 7 is not met.

The chart submitted with these comments includes our listing of the 98 home rule municipalities reviewed in our research and a Yes/No statement as to whether that home rule ethics code meets each of the seven requirements in the Draft Position Statement. As a threshold matter, 10 home rule municipalities have explicitly adopted resolutions or ordinances that state the municipality is not claiming exemption under Article XXIX, § 7 and local employees and officials remain subject to the restrictions of Article XXIX and IEC jurisdiction (noted as “Colorado Constitution Article XXIX in chart). An additional 16 home rule municipalities have not appeared to have adopted any ordinance or resolutions regarding ethics at all, which can be interpreted as submitting to Article XXIX restrictions and IEC jurisdiction (noted as “No Ethics Provisions”). The remaining municipalities have affirmatively adopted some resolution or ordinance enacting a local ethics code or adopting the 2006 state Title 24 Code of Ethics (similar to Aurora) as a means to claim Article XXIX, § 7 exemption. As the chart shows, none of these home rule municipal ethics codes meet all seven parts of the Draft Position Statement test.

Beginning with the first part of the seven-part test regarding the gift ban, our research has found 62 home rule municipalities which have adopted substantive provisions for addressing the issue of improper gifts to officials (Column B). Ethics Watch believes most of these provisions would qualify under Article XXIX, § 7 to “address the matter” covered by the general gift rule in Article XXIX § 3. However, the Draft Position Statement’s approach of requiring the same specific dollar amount for gifts in a home rule ethics code would reject the gift rules of almost all of these 62 municipalities (Column C). First, the majority of home rule ethics codes, such as those in Arvada and Denver, contain substantive gift provisions but do not use a specified dollar amount as the legal trigger for the gift ban.¹ As discussed above, all of those gift bans would fail the first part of the Draft Position Statement test regardless of the strictness of the gift rule or narrowness of exceptions. Next, most municipalities which do include a dollar limit trigger for

¹ See Arvada Code of Ordinances, Chap. 2, Article VIII, *available at* https://www.municode.com/library/co/arvada/codes/code_of_ordinances?nodeId=PTIICOOR_CH2AD_ARTVIIIICOET and Denver Revised Municipal Code, Art. IV, §2-60 *available at* <https://www.denvergov.org/Portals/5/documents/Code-2012Changes-FINAL.pdf>.

the gift ban, such as Golden or Frisco, would not meet the strict test of the Draft Position Statement because the dollar amount in the local ethics code is higher than \$59 (\$100 and \$400, respectively).² Only 3 municipalities – Durango, Rifle and Silt – meet this first prong of the Draft Position Statement test after enacting a \$50 gift rule. Thus, before moving on to the last six parts of the test, only three home rule ethics codes could possibly comply with the Draft Position Statement based on the narrow formulation of the gift rule prong.³

However, the dollar amount of the gift ban is only one part of the criteria that the IEC has laid out regarding gifts. The Draft Position Statement also has two other prongs of the test requiring language regarding equal consideration and a complete ban on gifts from professional lobbyists (Columns D and E). Using Durango as an example, the city contains provisions for almost everything set out by the IEC; Durango has a \$50 gift rule, restrictions on representation after leaving office, even an independent ethics enforcement body.⁴ But, Durango does not include a complete ban on professional gifts from lobbyists.⁵ Conversely, the city of Lone Tree contains a complete ban on lobbyist gifts but fails to include language about which types of gifts must receive equal consideration from the public officials.⁶ These specific criteria, argued above as inappropriate to impose on home rule entities in any event, could eliminate the vast majority of home rule municipalities which may have qualified to opt out under other parts of the Draft Position Statement test.

Another example lies in the parts of the Draft Position Statement test governing enforcement entities. While there are 50 home rule municipalities which have created some type of civil enforcement of local ethics rules, the necessity of having an independent ethics commission reduces that number to 9 (Column G). Other forms of civil enforcement used by home rule municipalities include *ad hoc* City Council committees, committees created from

² See Golden Municipal Code, Chapter 2.32, available at https://www.municode.com/library/co/golden/codes/municipal_code and Frisco Town Code Chapter 15 available at <http://www.frisco.gov/wp-content/uploads/2011/03/15-Code-Of-Ethics.pdf>.

³ These three municipalities each fail other prongs of the test and therefore result in no municipalities satisfying the Draft Position Statement.

⁴ See Durango City Code, Chap. 2, Article VII, available at https://www.municode.com/library/co/durango/codes/code_of_ordinances?nodeId=PTIICOOR_CH2AD_ARTVIIICOCOCOET.

⁵ See *id.* at Sec. 2-205.

⁶ See Lone Tree Resolution 06-28 available at http://www.cityoflonetree.com/UserFiles/Servers/Server_745898/File/Government/Elected%20Officials/City%20Council/Res%2006-28.pdf.

other city officials, City Manager office jurisdiction or independent civil prosecution in municipal court by city attorneys.

Of these 9 municipalities with an independent commission (or board), Denver is the only one that comes close (but not quite) to meeting the substantive Code of Ethics requirements for gift rule and revolving door provisions.⁷ However, the Draft Position Statement specifies that an independent ethics commission must also match Article XXIX with requirements regarding political affiliations. Here, even Denver fails because the Code does not refer to political affiliation as a qualification for Board Members.⁸ In addition, the Draft Position Statement requires home rule commissions to have the power to impose penalties after enforcement process. It is unclear whether the Denver Board of Ethics, which may issue letters of reprimand and recommendations for punitive action but cannot impose monetary penalties, would meet this part of the test. Thus, the specificity of the criteria in the Draft Position Statement completely eliminates even the most stringent ethics code and most robust of independent civil enforcement entities among home rule municipalities.

These examples illustrate how the Commission's Draft Position Statement creates a set of criteria which no home rule municipalities can fulfill other than by explicitly duplicating the language of Article XXIX or by simply revoking their local ethics code and forgoing their ability to opt out under Section 7 altogether. Though many home rule municipalities have ethics codes which we believe substantively cover the matters in Article XXIX, and should have the power to maintain their own ethics code, the Draft Position Statement would deem these codes insufficient under Section 7.

If the Commission believes the practical effect of the Draft Position Statement would be to invalidate any home rule codes that do not meet the seven-part test, the IEC should more explicitly state so in the document. The Draft ends with the standard language that specific individuals should bring "fact-specific" and "particular questions" to the Commission through a request for advisory opinion as to how this Draft Position Statement would apply in their case. However, discussions in Commission open meetings showed an intent that the 60+ home rule municipalities with ethics codes should all submit their codes to the IEC for general approval – divorced from any particular advisory opinion from a local official regarding a specific gift.

⁷ See Denver Rev. Muni. Code, Art. IV, Sections 2-59 to 2-64, *available at* <https://www.denvergov.org/content/dam/denvergov/Portals/5/documents/Code-2012ChangesFINAL.pdf>.

⁸ See *id.* at Sec. 2-53.

First, it is unclear the Commission has the staff and resources to review and pass judgment on all home rule ethics codes in the state. Second, it is unclear what the IEC's jurisdictional basis would be to enforce such a "rejection" of a local ethics code. In open meeting discussions, the Commission seemed to underestimate how difficult it can be for a local city council to pass changes to their code of ethics based on the IEC's pronouncements. Indeed, some ethical provisions may be in the City Charter, and not ordinances, which may require voter approval to change. Local city councils may need to engage various stakeholders and look at local needs when revising ethics codes – a process that is not speedy or guaranteed to pass in the end.⁹ In the meantime, local officials will be operating under their home rule code of ethics and believe they are complying with the law while possibly opening themselves up to complaints at the Commission. Citizens with evidence of wrongdoing by their local elected officials will not know which authority or standards to submit that information to. Such uncertainty is not appropriate. The Commission should provide clear guidance as to how the Draft Position Statement will be applied to home rule entities and how any finding against such a home rule entity will be enforced.

Thank you again for this opportunity to comment regarding this inquiry by the Commission. I will be happy to answer any questions regarding our submissions at the August 10, 2016 monthly IEC meeting.

Respectfully Submitted,



Peg Perl

Senior Counsel

⁹ For some examples, see the ongoing saga of a working group looking at changes to Denver's Code of Ethics over the last two years: <http://blogs.denverpost.com/thespot/2015/10/21/new-working-group-will-take-a-stab-at-denver-ethics-code-changes/123404/> and <http://www.denverpost.com/2016/05/29/councilman-says-he-will-start-drafting-changes-to-denver-code-of-ethics/>.

City of Aurora

City Attorney's Office
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January 22, 2016

Independent Ethics Commission
1300 Broadway, 8th Floor
Denver, Colorado 80203

Re: Request for an Advisory Opinion regarding the acceptance of gifts by a state employee elected to Aurora City Council

Members of the Commission,

At the January 4, 2016 meeting of the Colorado Independent Ethics Commission, Deputy Secretary of State Suzanne Staiert requested an advisory opinion from the Commission regarding the acceptance of gifts by her employee, Angela Lawson, while serving in her capacity as a member of the Aurora City Council. As City Attorney for the City of Aurora, I was invited by Ms. Staiert and Ms. Lawson to attend the meeting.

As an employee of the State of Colorado, Ms. Lawson is bound by the ethical standards found in Article XXIX of the Colorado Constitution ("Article XXIX"). Article XXIX, Section 3 prohibits Ms. Lawson from soliciting, accepting, or receiving any gift or other thing of value having either a fair market value or aggregate actual cost greater than fifty dollars in any calendar year unless the gift-giver receives lawful consideration of equal or greater value in return from Ms. Lawson.

As an elected official of the City of Aurora, Ms. Lawson is bound by a different set of standards – the standards of conduct found in Title 24, Article 18 of the Colorado Revised Statutes as they existed on October 30, 2006 (the "2006 Standards of Conduct"). *See* attached Appendix A. Unlike the numeric standard set forth in Article XXIX, Section 3, the 2006 Standards of Conduct employ a qualitative standard to determine the propriety of gifts. Accordingly, a City official or employee shall not accept a gift of substantial value or a substantial economic benefit tantamount to a gift of substantial value:

- (i) Which would tend improperly to influence a reasonable person in his position to depart from the faithful and impartial discharge of his public duties; or

- (ii) Which he knows or which a reasonable person in his position should know under the circumstances is primarily for the purpose of rewarding him for official action he has taken.

See § 24-18-104(1)(b), C.R.S. (2006).

The gift ban described in each of these standards is relevantly different. Hence, Ms. Staiert has asked this Commission to determine whether Ms. Lawson's status as a state employee would prohibit her from accepting gifts that she would otherwise be permitted to accept as a city official.

During the course of the meeting, Commissioner Leone asked me to provide the Commission with a written explanation as to why the City of Aurora, as a home rule municipality organized pursuant to Article XX of the Colorado Constitution, is exempt from the provisions of Article XXIX. Please accept the following as a statement of the City's position on this question of law.

I. THE PLAIN AND ORDINARY MEANING OF THE LANGUAGE USED IN ARTICLE XXIX OF THE COLORADO CONSTITUTION MAKES IT CLEAR THAT IT IS NOT INTENDED TO APPLY TO HOME RULE MUNICIPALITIES THAT HAVE ADOPTED THEIR OWN STANDARDS OF CONDUCT.

At the November 7, 2006, general election, Colorado voters enacted the Colorado Standards of Conduct in Government Initiative (the "Initiative"), which is now codified as Article XXIX of the Colorado Constitution. Article XXIX is intended to provide public officers, members of the general assembly, local government officials, and government employees specific standards to guide their conduct, and of a penalty mechanism to enforce those standards. Colo. Const. Art. XXIX, Section 1(e).

By its terms, however, Article XXIX exempts home rule counties and municipalities from its application. This exemption is found in Section 7 of Article XXIX, which reads as follows:

Any county or municipality may adopt ordinances or charter provisions with respect to ethics matters that are more stringent than any of the provisions contained in this article. *The requirements of this article shall not apply to home rule counties or home rule municipalities that have adopted charters, ordinances, or resolutions that address the matters covered by this article.* (Emphasis added.)

II. AS A HOME RULE MUNICIPALITY THAT HAS ADOPTED A RESOLUTION ADDRESSING THE VERY MATTERS COVERED IN ARTICLE XXIX, THE CITY OF AURORA FALLS SQUARELY WITHIN THIS EXEMPTION.

The City of Aurora is a home rule municipality, having adopted its home rule charter at a special election held on June 27, 1961. Aurora City Charter, *Prefatory Synopsis*. As such, the City possesses all powers which are necessary, requisite or proper for the government and

administration of its local and municipal matters, and all powers which are granted to home rule municipalities by Article XX of the Colorado Constitution. Aurora City Charter § 1-3. This includes the power to legislate upon, provide, regulate, conduct and control “the definition, regulation and alteration of the powers, duties, qualifications and terms or tenure of all municipal officers, agents and employees.” Colo. Const. Art. XX, Section 6(a).

On October 30, 2006, in the exercise of this power, the Aurora City Council adopted Resolution No. R2006-94. *See* attached Appendix B. The operative language of this Resolution reads as follows:

The Aurora City Council does hereby formally adopt each and every provision found in Article 18 of Title 24 of the Colorado Revised Statutes entitled “Standards of Conduct” as they existed on October 30, 2006, and does hereby declare that all such provisions shall apply with full force and effect to all of the City’s elected officials, City officers, City employees, and all independent contractors under contract with the City.

At the time Resolution No. R2006-94 was adopted, the Aurora City Council would have been fully aware of the text of Article XXIX, including the exemption provided for home rule municipalities in Section 7. The Council chose to chart a familiar course by adopting the statutory standards of conduct as they existed prior to the impending general election. Since that date, the City, its officials, and employees have strictly adhered to these ethical standards.

A cursory review of the 2006 Standards of Conduct reveals that they address the very same matters covered by Article XXIX, albeit in a different fashion. As heretofore addressed, both Article XXIX (Section 3) and the 2006 Standards of Conduct (§ 24-18-104(1)(b), C.R.S. (2006)) include a gift ban. Likewise, both provide an enforcement mechanism – the Independent Ethics Commission in the case of Article XXIX (Section 5) and the attorney of the district in which the violation occurs in the case of the 2006 Standards of Conduct (§ 24-18-103(2), C.R.S. (2006)). Lastly, Article XXIX imposes a penalty equal to double the amount of the financial equivalent of any benefits obtained by the offending action (Section 6), while the 2006 Standards of Conduct impose the same liabilities upon the offender as a private fiduciary would suffer for abuse of his trust (§ 24-18-103(2), C.R.S. (2006)).

Therefore, as a home rule municipality that has adopted a resolution addressing the matters covered by Article XXIX, the City meets the prerequisites of the exemption set forth in Section 7 and, as such, is not subject to the application of the Article.

III. AT THE TIME OF THE NOVEMBER 7, 2006, GENERAL ELECTION, THE VOTERS OF THE STATE OF COLORADO FULLY UNDERSTOOD THAT ARTICLE XXIX WOULD NOT APPLY TO HOME RULE MUNICIPALITIES AND COUNTIES THAT HAVE ADOPTED THEIR OWN STANDARDS OF CONDUCT.

In construing a constitutional amendment, a reviewing court must ascertain and give effect to the intent of the electorate adopting the amendment. *Zaner v. City of Brighton*, 917 P.2d 280, 283 (Colo. 1996). To determine that intent, one must first look at the plain and ordinary meaning of the words in the amendment without engaging in narrow or overly technical constructions. *Rocky Mt. Animal Def. v. Colo. Div. of Wildlife*, 100 P.3d 508, 514 (Colo. App. 2004). The electorate's intent may also be discerned by considering the ballot title, the submission clause, the Bluebook, and other materials. *Id.*

From its inception as a citizen-initiated constitutional amendment, Article XXIX was never intended to supplant the authority of home rule municipalities to legislate upon the ethical standards that govern the conduct of their officers and employees. On the contrary, from the initial hearing before the Colorado Title Board to the ballot title that appeared on the general election ballot, there was never any question that home rule municipalities would, in fact, be exempt from the application of Article XXIX.

At the May 17, 2006, Title Board hearing for the Initiative, in the following exchange with the petitioners' attorney, Maura Tierney, concerning the ballot title, Deputy Secretary of State Bill Hobbs addressed this very issue:

Hobbs: ... Line 16 says specific measures shall not apply to home rule jurisdictions that have adopted laws covering, concerning matters covered by that measure. The way I understood the measure, I think, is that home rule jurisdictions could have weaker ethics laws and that could prevail over this measure?

Tierney: ... You are correct that, if a home rule city has adopted by charter, ordinance, or resolution measures that address the matters covered in the article, then home rule will prevail. ...

See attached Appendix C, page 6.

At the conclusion of the hearing, the Title Board approved the following ballot title for the Initiative:

An amendment to the Colorado Constitution concerning standards of conduct by persons who are professionally involved with governmental activities, and, in connection therewith, prohibiting a public officer, member of the general assembly, local government official, or government employee from soliciting or accepting certain monetary or in-kind gifts; prohibiting a professional lobbyist from giving anything of value to a public officer, member of the general assembly, local government official, government employee, or such person's immediate family member; prohibiting a statewide elected officeholder or member of the general assembly from personally representing another person or entity for compensation before any other such officeholder or member for a period of two years following departure from office; establishing penalties for a breach of public trust or

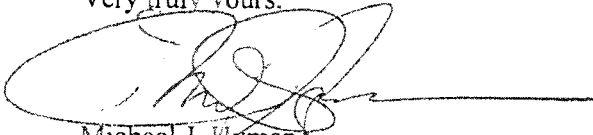
inducement of such a breach; creating a five-member independent ethics commission to hear ethics complaints, to assess penalties, and to issue advisory opinions on ethics issues; and *specifying that the measure shall not apply to home rule jurisdictions that have adopted laws concerning matters covered by the measure.* (Emphasis added.)

See attached Appendix D. Quite clearly, the final clause of the ballot title puts the voters of this State on notice that Article XXIX would not apply to home rule jurisdictions such as the City of Aurora.

IV. CONCLUSION

Article XXIX, Section 7 of the Colorado Constitution provides a means for the home rule municipalities and counties of this State to exempt themselves from the application of this Article. Without question, the City of Aurora took all of the necessary steps to avail itself of this exemption. As such, the Commission does not have jurisdiction with respect to ethics issues involving the City, its officials and employees.

Very truly yours,

A handwritten signature in black ink, appearing to read "Michael J. Hyman", with a long horizontal line extending to the right.

Michael J. Hyman
City Attorney

APPENDIX A

2006 STANDARDS OF CONDUCT

TITLE 24. GOVERNMENT-STATE ARTICLE 18. STANDARDS OF CONDUCT PART 1. CODE OF ETHICS

24-18-101. Legislative declaration.

The general assembly recognizes the importance of the participation of the citizens of this state in all levels of government in the state. The general assembly further recognizes that, when citizens of this state obtain public office, conflicts may arise between the public duty of such a citizen and his or her private interest. The general assembly hereby declares that the prescription of some standards of conduct common to those citizens involved with government is beneficial to all residents of the state. The provisions of this part 1 recognize that some actions are conflicts per se between public duty and private interest while other actions may or may not pose such conflicts depending upon the surrounding circumstances.

24-18-102. Definitions. As used in this part 1, unless the context otherwise requires:

- (1) "Business" means any corporation, limited liability company, partnership, sole proprietorship, trust or foundation, or other individual or organization carrying on a business, whether or not operated for profit.
- (2) "Compensation" means any money, thing of value, or economic benefit conferred on or received by any person in return for services rendered or to be rendered by himself or another.
- (3) "Employee" means any temporary or permanent employee of a state agency or any local government, except a member of the general assembly and an employee under contract to the state.
- (4) "Financial interest" means a substantial interest held by an individual which is:
 - (a) An ownership interest in a business;
 - (b) A creditor interest in an insolvent business;
 - (c) An employment or a prospective employment for which negotiations have begun;
 - (d) An ownership interest in real or personal property;
 - (e) A loan or any other debtor interest; or
 - (f) A directorship or officership in a business.
- (5) "Local government" means the government of any county, city and county, city, town, special district, or school district.

(6) "Local government official" means an elected or appointed official of a local government but does not include an employee of a local government.

(7) "Official act" or "official action" means any vote, decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority.

(8) "Public officer" means any elected officer, the head of a principal department of the executive branch, and any other state officer "Public officer" does not include a member of the general assembly, a member of the judiciary, any local government official, or any member of a board, commission, council, or committee who receives no compensation other than a per diem allowance or necessary and reasonable expenses.

(9) "State agency" means the state; the general assembly and its committees; every executive department, board, commission, committee, bureau, and office; every state institution of higher education, whether established by the state constitution or by law, and every governing board thereof; and every independent commission and other political subdivision of the state government except the courts.

24-18-103. Public trust - breach of fiduciary duty.

(1) The holding of public office or employment is a public trust, created by the confidence which the electorate reposes in the integrity of public officers, members of the general assembly, local government officials, and employees. A public officer, member of the general assembly, local government official, or employee shall carry out his duties for the benefit of the people of the state.

(2) A public officer, member of the general assembly, local government official, or employee whose conduct departs from his fiduciary duty is liable to the people of the state as a trustee of property and shall suffer such other liabilities as a private fiduciary would suffer for abuse of his trust. The district attorney of the district where the trust is violated may bring appropriate judicial proceedings on behalf of the people. Any moneys collected in such actions shall be paid to the general fund of the state or local government. Judicial proceedings pursuant to this section shall be in addition to any criminal action which may be brought against such public officer, member of the general assembly, local government official, or employee.

24-18-104, Rules of conduct for all public officers, members of the general assembly, local government officials, and employees.

(1) Proof beyond a reasonable doubt of commission of any act enumerated in this section is proof that the actor has breached his fiduciary duty and the public trust. A public officer, a member of the general assembly, a local government official, or an employee shall not:

- (a) Disclose or use confidential information acquired in the course of his official duties in order to further substantially his personal financial interests; or
- (b) Accept a gift of substantial value or a substantial economic benefit tantamount to a gift of substantial value:

- (I) Which would tend improperly to influence a reasonable person in his position to depart from the faithful and impartial discharge of his public duties; or
 - (II) Which he knows or which a reasonable person in his position should know under the circumstances is primarily for the purpose of rewarding him for official action he has taken.
- (2) An economic benefit tantamount to a gift of substantial value includes without limitation a loan at a rate of interest substantially lower than the commercial rate then currently prevalent for similar loans and compensation received for private services rendered at a rate substantially exceeding the fair market value of such services.
- (3) The following shall not be considered gifts of substantial value or gifts of substantial economic benefit tantamount to gifts of substantial value for purposes of this section:
- (a) Campaign contributions and contributions in kind reported as required by section 1-45-108, CRS;
 - (b) An occasional nonpecuniary gift, insignificant in value;
 - (c) A nonpecuniary award publicly presented by a nonprofit organization in recognition of public service;
 - (d) Payment of or reimbursement for actual and necessary expenditures for travel and subsistence for attendance at a convention or other meeting at which such public officer, member of the general assembly, local government official, or employee is scheduled to participate;
 - (e) Reimbursement for or acceptance of an opportunity to participate in a social function or meeting which is offered to such public officer, member of the general assembly, local government official, or employee which is not extraordinary when viewed in light of the position held by such public officer, member of the general assembly, local government official, or employee;
 - (f) Items of perishable or nonpermanent value, including, but not limited to, meals, lodging, travel expenses, or tickets to sporting, recreational, educational, or cultural events;
 - (g) Payment for speeches, appearances, or publications reported pursuant to section 24-6-203;
 - (h) Payment of salary from employment, including other government employment, in addition to that earned from being a member of the general assembly or by reason of service in other public office.
- (4) The provisions of this section are distinct from and in addition to the reporting requirements of section 1-45-108, CRS, and section 24-6-203, and do not relieve an incumbent in or elected candidate to public office from reporting an item described in subsection (3) of this section, if such reporting provisions apply.

24-18-105. Ethical principles for public officers, local government officials, and employees.

(1) The principles in this section are intended as guides to conduct and do not constitute violations as such of the public trust of office or employment in state or local government.

(2) A public officer, a local government official, or an employee should not acquire or hold an interest in any business or undertaking which he has reason to believe may be directly and substantially affected to its economic benefit by official action to be taken by an agency over which he has substantive authority.

(3) A public officer, a local government official, or an employee should not, within six months following the termination of his office or employment, obtain employment in which he will take direct advantage, unavailable to others, of matters with which he was directly involved during his term of employment. These matters include rules, other than rules of general application, which he actively helped to formulate and applications, claims, or contested cases in the consideration of which he was an active participant.

(4) A public officer, a local government official, or an employee should not perform an official act directly and substantially affecting a business or other undertaking to its economic detriment when he has a substantial financial interest in a competing firm or undertaking.

24-18-106. Rules of conduct for members of the general assembly.

(1) Proof beyond a reasonable doubt of commission of any act enumerated in this section is proof that the member of the general assembly committing the act has breached his fiduciary duty and the public trust. A member of the general assembly shall not accept a fee, a contingent fee, or any other compensation, except his official compensation provided by statute, for promoting or opposing the passage of legislation.

(2) It shall not be a breach of fiduciary duty and the public trust for a member of the general assembly to:

(a) Use state facilities or equipment to communicate or correspond with a member's constituents, family members, or business associates; or

(b) Accept or receive a benefit as an indirect consequence of transacting state business.

(3) Notwithstanding any other provision of law, no member of the general assembly shall lobby, solicit lobbying business or contracts, or otherwise establish a lobbying business or practice respecting issues before the general assembly prior to the expiration of his or her term. Where the member tenders his or her resignation prior to the expiration of his or her term, the requirements of this subsection (3) shall apply up through the date of the member's resignation from office.

24-18-107. Ethical principles for members of the general assembly.

(1) The principles in this section are intended only as guides to a member of the general assembly in determining whether or not his conduct is ethical.

(2) A member of the general assembly who has a personal or private interest in any measure or bill proposed or pending before the general assembly shall disclose the fact to the house of which he is a

member and shall not vote thereon. In deciding whether or not he has such an interest, a member shall consider, among other things, the following:

- (a) Whether the interest impedes his independence of judgment;
 - (b) The effect of his participation on public confidence in the integrity of the general assembly; and
 - (c) Whether his participation is likely to have any significant effect on the disposition of the matter.
- (3) An interest situation does not arise from legislation affecting the entire membership of a class.
- (4) If a member of the general assembly elects to disclose the interest, he shall do as provided in the rules of the house of representatives or the senate, but in no case shall failure to disclose constitute a breach of the public trust of legislative office.

24-18-108. Rules of conduct for public officers and state employees.

- (1) Proof beyond a reasonable doubt of commission of any act enumerated in this section is proof that the actor has breached his fiduciary duty.
- (2) A public officer or a state employee shall not:
- (a) Engage in a substantial financial transaction for his private business purposes with a person whom he inspects, regulates, or supervises in the course of his official duties;
 - (b) Assist any person for a fee or other compensation in obtaining any contract, claim, license, or other economic benefit from his agency;
 - (c) Assist any person for a contingent fee in obtaining any contract, claim, license, or other economic benefit from any state agency; or
 - (d) Perform an official act directly and substantially affecting to its economic benefit a business or other undertaking in which he either has a substantial financial interest or is engaged as counsel, consultant, representative, or agent.
- (3) A head of a principal department or a member of a quasi-judicial or rule-making agency may perform an official act notwithstanding paragraph (d) of subsection (2) of this section if his participation is necessary to the administration of a statute and if he complies with the voluntary disclosure procedures under section 24-18-110.
- (4) Repealed.

24-18-108.5. Rules of conduct for members of boards and commissions.

- (1) Proof beyond a reasonable doubt of commission of any act enumerated in this section is proof that actor has breached his fiduciary duty.

(2) A member of a board, commission, council, or committee who receives no compensation other than a per diem allowance or necessary and reasonable expenses shall not perform an official act which may have a direct economic benefit on a business or other undertaking in which such member has a direct or substantial financial interest.

24-18-109. Rules of conduct for local government officials and employees.

(1) Proof beyond a reasonable doubt of commission of any act enumerated in this section is proof that the actor has breached his fiduciary duty and the public trust.

(2) A local government official or local government employee shall not:

(a) Engage in a substantial financial transaction for his private business purposes with a person whom he inspects or supervises in the course of his official duties; or

(b) Perform an official act directly and substantially affecting to its economic benefit a business or other undertaking in which he either has a substantial financial interest or is engaged as counsel, consultant, representative, or agent.

(3) (a) A member of the governing body of a local government who has a personal or private interest in any matter proposed or pending before the governing body shall disclose such interest to the governing body and shall not vote thereon and shall refrain from attempting to influence the decisions of the other members of the governing body in voting on the matter.

(b) A member of the governing body of a local government may vote notwithstanding paragraph (a) of this subsection (3) if his participation is necessary to obtain a quorum or otherwise enable the body to act and if he complies with the voluntary disclosure procedures under section 24-18-110.

(4) It shall not be a breach of fiduciary duty and the public trust for a local government official or local government employee to:

(a) Use local government facilities or equipment to communicate or correspond with a member's constituents, family members, or business associates; or

(b) Accept or receive a benefit as an indirect consequence of transacting local government business.

24-18-110. Voluntary disclosure.

A member of a board, commission, council, or committee who receives no compensation other than a per diem allowance or necessary and reasonable expenses, a member of the general assembly, a public officer, a local government official, or an employee may, prior to acting in a manner which may impinge on his fiduciary duty and the public trust, disclose the nature of his private interest. Members of the general assembly shall make disclosure as provided in the rules of the house of representatives and the senate, and all others shall make the disclosure in writing to the secretary of state, listing the amount of his financial interest, if any, the purpose and duration of his services rendered, if any, and the compensation received for the services or such other information as is necessary to describe his interest. If he then performs the official act involved, he shall state for the record the fact and summary nature of

the interest disclosed at the time of performing the act. Such disclosure shall constitute an affirmative defense to any civil or criminal action or any other sanction.

24-18-111. Powers of the secretary of state.

- (1) The secretary of state may:
 - (a) Issue advisory opinions to persons subject to the provisions of this article concerning issues relating to the requesting person's conduct and the provisions of this article with such deletions as are necessary to protect the identity of the requesting party or the party about whom the opinion is written;
 - (b) Keep and permit reasonable public access to voluntary disclosure statements;
 - (c) Make rules for the conduct of his affairs under this part 1.
- (2) Any advisory opinion issued by the secretary of state shall take priority over any comment issued by the board of ethics for the executive branch pursuant to section 24-18-112 or any opinion issued by the board of ethics for the general assembly pursuant to section 24-18-113 if the comment or the opinion covers the same circumstances and the same issues as covered by the opinion of the secretary of state and if the comment or the opinion reached a separate conclusion from that reached by the opinion of the secretary of state.

24-18-112. Board of ethics for the executive branch- created- duties.

- (1) There is hereby created a board of ethics for the executive branch of state government in the office of the governor. The board shall consist of five members to be appointed by and serve at the pleasure of the governor.
- (2) The board of ethics for the executive branch shall:
 - (a) Comment, when requested by the governor, on each proposed gubernatorial appointment, including the heads of the principal departments and the senior members of the governor's office based upon the provisions of this article;
 - (b) Upon written request of the governor, review complaints of any violation of the provisions of this article by a member of the executive branch of state government;
 - (c) Make written recommendations to the governor concerning his requests; and
 - (d) Review appeals brought before the board of ethics pursuant to section 24-30-1003(4).

24-18-113. Board of ethics for the general assembly- created- duties.

- (1) There is hereby created a board of ethics for the general assembly. The board shall consist of four legislative members. One member shall be appointed by and serve at the pleasure of the majority leader of the house of representatives; one member shall be appointed by and serve at the pleasure of the majority leader of the senate; one member shall be appointed by and serve at the pleasure of the minority

leader of the house of representatives; and one member shall be appointed by and serve at the pleasure of the minority leader of the senate.

(2) The board of ethics for the general assembly shall, upon written request of a member of the general assembly, issue advisory opinions concerning issues relating to the requesting member's conduct and the provisions of this article.

APPENDIX B

CITY COUNCIL RESOLUTION NO. R2006-94

EFFECTIVE DATE: 10.30.06

RESOLUTION NO. R2006-94

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF AURORA, COLORADO, ADOPTING A COMPREHENSIVE SET OF STANDARDS FOR CONDUCT AND ETHICS FOR ALL CITY ELECTED OFFICIALS, OFFICERS, EMPLOYEES AND INDEPENDENT CONTRACTORS

WHEREAS, the City Council of the City of Aurora considers it extremely important to maintain a strong sense of confidence in the operations of the Aurora Municipal Corporation by the residents of the City of Aurora; and

WHEREAS, the City Council upon advice of the City Attorney has chosen to adopt all of the existing state laws regarding standards of conduct and ethics; and

WHEREAS, the City Council has determined that the previous resolution, R88-63, be readopted with those amendments that have occurred since 1988.

NOW THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF AURORA, COLORADO:

The Aurora City Council does hereby formally adopt each and every provision found in Article 18 of Title 24 of the Colorado Revised Statutes entitled "Standards of Conduct" as they existed on October 30, 2006, and does hereby declare that all such provisions shall apply with full force and effect to all of the City's elected officials, City officers, City employees, and all independent contractors under contract with the City.

RESOLVED AND PASSED this 30th day of October, 2006.


EDWARD J. TAUER, Mayor

ATTEST:


DEBRA JOHNSON, City Clerk

APPROVED AS TO FORM:



APPENDIX C

**TRANSCRIPT OF MAY 17, 2006 TITLE BOARD HEARING ON PROPOSED INITIATIVES 118
& 120 – ETHICS IN GOVERNMENT**

Title Board hearing 05-17-06 3:14 p.m.

C= Chairman Bill Hobbs, Deputy Secretary of State

T = Martha Tierney

U = Deputy Director of the Office of Legislative Legal Services Sharon L. Eubanks

D = Solicitor General Dan Domenico

Chairman Bill Hobbs, Deputy Secretary of State – 118 and 120 have both ethics in government have the same proponents and similar measures. Let's first hear from the proponents and

One of the things perhaps you could address are the similarities and difference. If you would please introduce yourself for the record.

Martha Tierney – My name is Martha Tierney. I am with the law firm Kelly, Haglund, Garsey and Kahn. (inaudible). The only difference between the two measures is that 120 does not contain the provision regarding subsection 4 of 118 which is title 24. Other than that subsection the measures are identical.

C- Questions

Deputy Director of the Office of Legislative Legal Services Sharon L. Eubanks, - I need to make a disclosure first. Ms. Tierney and her law firm is in litigation with the state and the general assembly. That matter has no relevance in terms of the measures before the board today. I just want to make that disclosure for the record

C – Ms. Tierney has in the past been involved in litigation with the secretary of state as well, but it is unrelated to this. Questions for Ms. Tierney?

U- There where some changes made between the review and comment version and the version filed with the title board. Would you say in general those changes were made in response to the review and comment.

T- I would. I did make some changes and they were all in response to suggestions proposed (inaudible)

U- I looked through the review and comment memo, and I worked through it that way. There were a couple of changes that I couldn't quit track and I was wondering if you would help me. One, and I am looking at number 18 page 4. At the bottom of sub section 1 section 5. About the fact that the members of the commission receives no compensation. I saw a ques6tions regarding the staffing of the commission. And I think some of the language in the preceding language may have been in response to that questions, but I didn't see anything about a q raised about compensation for members of the commission

T – we took that, added that as a result of those same comments because we didn't want any questions about the general assembly appropriating funds to pay the commission members because the question raised was will there be any need for appropriation for the commission. And we discussed this at length and we agreed that there may be some admin costs or costs of operations that may go along with this ethics commission but we did not want there to be a suggestion that there would be a suggestion of payment of the commissioners.

U- And I can refer you to the specific question if you like? It arises out of question 27 a-d. And the other page I had a question on was on page 5 subsection 3c. There was some language added about the commission conducting an investigation. Where the review and comment version just said the commission shall hold a public hearing and issue finding I didn't see a specific question asking about the commission conducting an investigation

T – We discussed the mechanics of what the commission would need to do to hear complaint there was some suggestion that maybe it was ambiguous on what they were to do when it comes to a complaint. So we added that language though it is not in direct response to a question that I can recall. We did talk about what the jurisdiction commission would be.

U- In terms of another addition in section 3b and this I think may be a misspelling

T- That was one thing that I wanted to mention. Determined. I would like to ask for a technical correction there. If I may and it exists in both 118 and 120. Its section 5 subsection 3 and in it determines needs an E before the last S. I apologize for that error.

D – Subsection B?

T- Sub E. That last word there, determines. Second line subsection E

O- Is there another instance of that?

T- It's the same change in 120

Chair- Ok, were there any other technical corrections

T- There were not

C- Let's go ahead and dispose of that. We can make technical correction that is clearly a misspelling. I'll go ahead and move that we make a tech correction on 3E on page 5. To correction spelling of determined

Carried 3-0

c- Further for Ms. Tierney?

C- Lets turn to single subject compliance questions now. I don't have anyone else signed up to testify. Is there anyone else that wishes to address the board on this measure? On single or otherwise. OK then let's talk about single S

U- In terms of section 4 restriction on rep after leaving office. Can you explain to me the connection between government ethics? It seems more easy to understand gift ban or the commission

t- We see the restriction on rep after leaving office as falling under ethics umbrella. Avoiding as the purposes and findings sections it creates a violation of the public trust or the trust can be violated. The concern is that persons who appear in front of their peers. There may be an appearance that they are getting an advantage that they are now exploiting. So we cover that under the general conflict of ethics in government.

U- Is there any possibility of that going the other way as whether or not the rationale behind that prohibition that when the person is in office that they are doing some preferential treatment for who their perspective employer maybe when they are coming out of office. To get a job. Is that also part of the perceived perception?

T- It can be perceived that way as well.

U- Ok

C- Let's jump ahead slightly to title. We are required to clearly express the single subject. The staff draft expresses the single subject as standards of ethical conduct by certain people. But the heart of it is the establishment of ethical conduct. Is that a fair statement of what you think the single subject should be?

T- It is a fair statement.

C- I am weighing everything in the measure against that expression of single subject. And it seems to me that it does. I am Ok with section 4 based on what I can understand about the measure so far. I think it can be understood as that relating to the standards of ethical conduct. I don't right off see a problem with single subject. Mr. Domenico

Solicitor General Dan Domenico – As the new guy, I may not be quite as familiar with the standards we are dealing with here. It seems to me part of the goal of single subjects is to allow voters to deal with issues one at a time. Rather than omnibus measures that address all sorts of things at once. Obviously you can raise or lower the levels of generality and sort of include anything into some single subject if you define it broadly enough. Can you help me understand where we should draw the line on how general the subject can be or can it be as general as the proponent want it to be.

T- Well I think the single subject requirement is to protect voters from fraud and surprise of combining several unrelated subjects together for the purpose of enlisting the support of all the different advocates of those subjects to support a measure where the single subject is connected where the subjects are connected as the topics are here as ethics in government. As Mr. Hobbs stated standards of ethical conduct in government there is not a risk of misleading the voters in this initiative.

D – Is the only q whether it is misleading to voters? Isn't part of it also that voters shouldn't be required to vote yes no on too many subjects at once all in one yes or no questions? That if there are that if someone should be able to, say they are in favor of generally approving of ethics in government but they don't want to set up put these additional provisions in s4 but they think that the gift ban is a terrific idea. Isn't part of the single subject just to prevent fraud and misleading to express their real will on individual issue? So my question is that if we allow the single subject to be defined too broadly don't we run the risk of um of undermining the purpose of the initiative process. Which is to allow voters to express their will on issues. Say for example this included in addition a pay increase or decrease whatever way you think would improve ethics for government employees, a revision in the taxes are

collected to pay for that. That could all be brought under the rubric of improving ethics in gov. But it may not be a single subject. I think that there is case law somewhere, where somewhere you cross a line if you define it too generally. I wonder if this crosses that line.

t- Well, Again I think that you are right there is a line and you talk about where that line is. Pay increases for various person may bring us to that line, but I think that where the topics are connected and here we are establishing standards for ethics in government for person in gov. then that you don't cross that line. You are still within the standards of establishing ethical standards for people in gov. Not raising salaries, lowering salaries doing things that are off the map. In this case I don't see that we have crossed that line.

D – Ok I appreciate that. I think, I think we are close to it just not beyond it. Thanks for your help though

C- Well thinking about that there are several things that I think we can refer to as a guide. I think we can refer to the statutory provisions with the single subject amendment that was proposed to the gen assembly when the provision was put to the voters and the statutory provisions that I have in mind provide a little bit of help in trying to find where that line is. And am looking in s1-40-106.5 that deals with single subject requirement. The general assembly said that there were a couple of purposes in enacting the single subject requirement. One of them and I think each of these purposes provides, in my mind, a bit of a test. One of them was to was to forbid the treatment of incongruous subjects in the same measure. So that is part a of one test. Do you have incongruous subjects? Whatever that is. It goes on to say especially the practice of putting together in one measure subjects having no necessary or proper connection for the purpose of enlisting in support of the measure the advocates of each measure and thus carrying the advocates of each measure that cannot be carried on their own merits. I think that is log rolling. I think that's the phrase. In any event that's the idea of combining unrelated things in order to secure passage of somethings that couldn't pass on their own. To me that is one of the tests here. At least in this particular case I haven't yet looked at this proposal as being an example of incongruous subjects in order to enlist support. But in thinking that through then just going on to the next thing that the statute says that the purpose of the single subject amendment is also to prevent surreptitious measures and appraise the people of the subject of each measure by the title. That is to prevent surprise and fraud being practiced upon voters. That to me in my mind is another test. If we establish the single subject in such a way would voters be surprised if they find something else in there that seems unrelated. And again if the single subject is standards of ethical conduct than s4 doesn't strike me as being, seems to me that it is related. It as at least in the ball park. It seems to me that is it not fraud. Especially where we make sure in the titles that we do identify the major feature in the of the proposal so again I am just thinking through in my own mind and I think with respect to this proposal I am still Ok with it complying with the single subject requirement.

c- Any other discussion by the board?

U – Putting my 2 cents. I find myself in the same place as mister Domenico as trying to find out where that line is. I went back to the sup court decision in petitions in the 1995 decision and that particular initiative was found to contain a single subject although general subject and it had number types of provision that deal with time limits, types of provisions, procedures for challenging ballot titles, regarding printing distribution, rules providing a limitation on peaceful petitions and a variety of things relating to petitions. And the sup court upheld that even though it was very broad subject in contrast to another initiative petition dealing with water that it struck down because it was dealing with sort of

election and boundary rules as well as dealing with water. Although you can have a very broad subject you can have matters that are so unrelated that they are not a single subject. I think with this matter I feel comfortable going forward with ethical standards.

C. Any other discussion?

Motion contains single subject carries 2 to 1 U and C for D against

C – Ms. Tierney have you had a chance to look at the staff draft and have you had time to come up with any comments?

T- I have Mr. Hobbs, I have a couple. The staff draft does capture quite well what we are trying to do. With initiative 118 the first comment I have on line 3 with relation to the word processes. As an alternate suggestion I have come up with the word activities. The concern is that they word processes may not be as well understood or as well utilized in the sentences. By voters reading the title. It may be governmental activities better captures what it is, or better explains to the reader what we are trying to cover here. You want me to continue with all my comments or do you want me to pause.

C – Let's talk about that 1 just briefly. The phrase that you are referring to I was trying to puzzle out in my mind why it was worded the way it was. Staff drafts in my mind are done very carefully and very thoughtfully. I am sure the drafter had crafted that very carefully. And I am sure that is why it is worded the way it is. But it seems like it is kind of obtuse with referring to person who are professionally involved with government something. I might have missed something in the text, subtlety in the text that could explain why it is worded the way it is. I think it applies to government officials and employees at state and local levels. And so 1 possibly is just to say standards of ethical conduct by government employees and officials. Now if that is accurate. I suspect one reason the drafter wanted to do that is because that is an expression of the single subject. When we put a conjunction in it looks like 2 different things. Its standards for this group and standards for this group. And so that could be the explanation, but I am wondering if there could be something more to it. Mr. Domenico?

D – I think the reason it is written so obtusely is because the subject is so very broad. I think too broad to be a single subject. And in fact I think the reason specifically is section 4 which relates not to government officials but former government officials. And so that why it was probably written that way. Which highlights the problems I had with it earlier. That's what I thought of when I read that.

c- Ms. Eubanks?

U – I think in addition to the point just raised with Mr. Domenico is also in section 3 subsection 4 is a prohibition against professional lobbyist. I think that is some of the difficulty in trying to come up with a term or describe the group of individuals that are involved by the scope or covered by the scope of this measure because it lobbyist both in government officials once they are out of office who are lobbying but also lobbyist who are lobbying regardless of whether they previously held public office so that is part of the difficulty.

C – Good point. Ok I think that I am back on track.

T- I think that those may be what the staff was concerned with Ms. Eubanks comments. It is not a one word person who is covered so they are looking to efficiently describe who is covered. I do think that we run into some problems if we start reciting that litany everywhere. Some of my other comments will go

to that. I think if we recite the same thing over and over in the title in terms of brevity I hope that we can avoid that. I would be satisfied with the phrase "governmental activities" does grasp what it does.

C- The other comments that you have?

T- In line 5 it states "accepting or receiving" certain in kind gifts. Accepting or receiving is the language in the act. There is another term in that is not listed here. That is soliciting. We thought maybe if we change the language to say soliciting or accepting certain monetary or in kind gifts it keeps the measure the same way without a number of word needed. But accepting and receiving are more similar than soliciting. Soliciting can be used to capture that different activity that tis covered.

c- I am sorry was the proposal to add the word soliciting or replace the word soliciting?

T- Why don't I read you the proposal? I will read starting on line 4 government employee from new words would be "soliciting for" leave as accepting, but delete "or receiving".

t- Third comment I have is for brevity. 12 and 13 instead of reciting the whole litany of persons again instead we put a comma on line 12 and then delete "filed against government officials, government employees" So the next word would be "to access" .

C – OK

3:44 pm T- next comments in on the very next lines. After opinions add a semicolon delete "on ethics issues" add an "and" before "establishing. Then a period a period after public trust. Then our proposal is to delete the remainder of this preproposal because the remainder of the title is more ministerial functions, implementation functions that we don't generally see in a title.

Chairman Bill Hobbs, Deputy Secretary of State - let me ask you a question about then one part of that that would be deleted. Line 16 says specific measures shall not apply to home rule jurisdictions that have adopted laws covering, concerning matters covered by that measure. The way I understood the measure, I think, is that home rule jurisdictions could have weaker ethics laws and that could prevail over this measure?

Martha Tierney- If a home rule city has adopted ethical provisions that are more stringent than any of the provisions contained in the article ... I am sorry, I am combining those two sentences. You are correct that, if a home rule city has adopted by charter, ordinance, or resolution measures that address the matters covered in the article, then home rule will prevail. And I was listening earlier to the hearings this morning so I know this issue didn't come up. I can rethink whether or not we need to rethink leaving home rule in here. I am certainly up to discussing that with you.

Chairman Bill Hobbs, Deputy Secretary of State - I would have some hesitation removing that being that it might be a key feature. If it deferred to home rule measures. Home rule provisions that were more stringent then I would feel differently I think. But the fact that home rule jurisdictions can have weaker measures may be something we need to mention. We can think about that. Those are your suggestions?

Martha Tierney- Those are our suggestions.

c- Any question for Ms. Tierney? Discussion by the board

U- In terms of the statement of single subject in addition to the issues that have already been raised by the board. I am a little concerned about the current statement not being quite accurate. That's in regards to the establishment of standards of ethical conduct. While I agree it is establishing standards in terms of the gift ban and the ability to lobby those sorts of things. I am not sure that the ethics commission is the establishment of standards. That is how I understand it and let me ask Ms. T, the ethics commission can be involved with enforcing ethical standards created by other constitutional standards or those created by state law. It is not just the standards created in this measure?

T- That is correct.

U- I am not sure the entire measure deals with the establishment of standards. Maybe it deals with standards of ethical conduct or maybe it deals with just ethical conduct. I am just not sure that establishment is accurate.

c- That would be remedied by just removing "the establishment of"

U- I think so.

c- Motions.

U – I move

c- Ms. Tierney you accept that?

T- The proponents accept that.

C- Mr. Domenico you have a comment?

D- I suppose I should have said earlier, I am not entirely comfortable with the commission being part of this single subject. But I also think that standards isn't quite the right word even with that change. What's being done here is not establishing standards or something concerning them but regulating conduct and overseeing it. I mean The standards that I guess that are being put in place here are the gift ban and the ban on lobbying after you leave and the prohibitions on lobbyists I just question whether what we are trying to do here is regulate conduct. Rather than just discuss standards for ethical conduct. Because it really is more about establishing a structure for regulating conduct than laying out standards it seems to me. But again it is difficult for me to state what this does because it seems like this is more than one thing.

c- Let me ask Mr. Domenico This will not go to your concerns but 1 of the things I at least want to bring up is removing the word "ethical" in line 2. And the reason I bring that up, well there is a couple probably. But my recollection is the existing government ethics does say which title 24 a18 is. I think the title to that is standards of conduct. In fact I don't think it refers to ethical conduct. And in my mind that may be sufficient that standards of conduct implies ethical type conditions without using that word which would be. This is my 2nd reason for bringing it up because it might be a catch phrase or an unnecessary word that might be unfairly gathering support for the measures. If we don't have to use it then we shouldn't use it. Again it doesn't go very far to meeting Mr. Domenico's issues but there could be some question about whether everything in the measure relates to ethical conduct. Although my recollection is the state ethics code, the standards of conduct, include a board, provision for advisory positions and both advisory opinions by the Secretary Of State that provides a board for both the executive branch and the

general assembly as I recall. And as I recall there is some sort of a time out period, that I think is 6 months that they are prohibited from accepting employment, and it is a little different than what this measure does, but for matters that they were involved in as government employees. I am not sure if that ethical conduct. I am not sure if those are necessary ethical conduct. I am kind of rambling, but I think taking the word ethical out would be OK. Do you have any reaction to that Ms. Tierney?

T- I am not in favor of that change. I think it does loose, but I agree with you that CRS is titled standards of conduct and later parts of the measure reference that sections by using those words to show that complaints could be brought under other standards of conduct that are in other legislation.

C- Personally I would prefer to take the word out.

D- Just on quick glance I think ethics the word ethics or ethical appears in the title and not again until the creation of the ethics commission so just if that helps suggest how prominent the words should be but you are right id does not solve my other problems.

U- I think that your point is well taken especially in regards to a catch phrase. I think that the standards of conduct establishes the purposes without running the risk of having something in there that 1 doesn't appear much other then what Mr. Domenico has already brought to our attention. Whether we just say standards of conduct or go the regulation of conduct. I am fine either way.

D- What would get closer to getting rid of my issue is to say standards and regulation but I know that raises other problems but that is where I am.

c- I don't think that we have a motion, but I think that we can take the expression of a single subject separately. I guess we will just go ahead and move that lines 1 and 2 be changed to read "concerning standards of conduct by person who are professionally involved with etc..."

Motion passed 3-0

C – Other suggested changes?

U – I am fine with Ms. Tierney's suggestion at the end of the single subject statement to change "processes" to "activates"

Motion passed 3-0

C- I'll move another suggested change that Ms. Tierney made. I what is not line 5 after from insert "soliciting or" and then striking "or receiving". That my motion

U- Can I ask a question first?

C- You may

U – Ms. Tierney, in terms of the measure you used all 3 terms is that correct?

T- Yes, our thinking was that accepting and receiving were more similar concepts and soliciting is a more different concept and we should add soliciting as an issue of brevity and take out "or receiving".

C- Any further discussion?

Motion carried 3-0

U – at the end of the phrase where we were talking about soliciting or accepting gifts, where it is talking about without lawful consideration for such gifts. It would add words but it seems a little awkward to me it seems like lawful consideration is given for something I don't know whether it reads a little strangely without lawful consideration being given in return for such gifts or being given for such gifts, or just being given for such gift, but I don't know just saying lawful consideration for such gifts

D- You could take the receiving that we just took out and put it before lawful. Well that's wrong.

U- Because it is the person soliciting or accepting such gifts has given something in exchange for the gifts. But maybe you could saying "without giving lawful consideration for such gifts" rather than "being given". But "prohibits the person from soliciting or accepting such gifts." Or maybe it's not an issue if you don't think it's an issue. It just seems a little awkward to me.

c- Can we drop the phrase "without lawful consideration for such gifts" the idea being that a gift is something that does not have consideration? I am assuming the word lawful is there because a bribe would be considered consideration but if you are going to have the phrase at all the word lawful has to be included, but I am concerned whether the concept of consideration is necessary to the reader here.

U – Although it seemed essential in the text of the measure to specify that.

T- We would be very careful to include that in the measure to be clear that you can accept things if you paid for them. So that it wasn't a ban on accepting things. Whether or not that it necessary to have that in the title I don't feel super strongly about.

U- When you pay for something it is not a gift, you bought it. We could just drop the language on line 6 "without lawful consideration for such gifts"

c- Lets do that drop that phrase "without lawful consideration for such gifts"

T- Proponents would accept that change

Motion carries 3-0

U- I will start us on the issue of a whole laundry list of people. I am not sure what to do about it. I think it is somewhat important specifically down in the language that starts at the end of line 14 that starts at the phrase "establishing the penalties for a breach of public trust or inducement". One of the problems I have in that as it appears in the staff draft is that it does nothing to recognize that there is also penalties imposed for people who are not included in this laundry list who induced the breach so where it is a lobbyist or someone else. When they induced the public officer to breach the public trust there is also penalties so that causes me a problem in terms of just leaving it as "establishing penalties for breach of public trust" because it does more than that but I do think that there is a distinction because of the provision apply to lobbyist and the others don't. The way I understand it is that the ethics commission does not apply to the actions of lobbyist. Is that correct?

T- Well the ethics commission can hear complaints the way its drafted brought under reporting requirement so arguably there some broad requirements in the lobbying part

U- So lobbying would fall under this scope?

T- It would fall under a piece of that puzzle.

U- But a lobbyist couldn't submit a written request for an advisory opinion? Maybe that, although subsection 3a any person can file a written complaint with the ethics commission when a public officer, member of the general assembly, local government official, or government employee has failed to comply with this article. It does not include lobbyist there.

T- I stand corrected, you are right.

U- Ok. Like I said I will get us started on this but I am not sure how to resolve. It. Maybe in the scope of that context. If the ethics commission is dealing with public officers and employee maybe you could group it very broadly under a shortened terminology. You don't have to use lobbyist, but I am concerned with that phrase I pointed out in term of breach of public trust because there is also penalties for breach of public trust by any other person. Now maybe you can drop that whole laundry list of individuals as long as we add something about inducing such a breach or something.

D- That does not relate to the ethics commission. Maybe it would help to move it somewhere else. The way it reads even though the staff was careful to use a semicolon there. When I first read it I thought that was discussing something the commission could do and it took me a while to realize that as a separate one on our list of things if not subjects. You could just say "establishing penalties for breach of public trust or inducement", but I think it maybe should be moved before discussion the commission just to clarify that that's a separate provision independent of the ethics commissions

T- I wrestled with that as well. That providing penalties is provided for in that measure where the commission measure separately establishes the measure. I agree that maybe if we move that beforehand.

D- There may not be a better place to put it but that might make it a little clearer. Of course the ethics commission provision may be an important provision that we just leave it, and this long list, because there is probably not a better place to put it given all the other important subjects this discusses.

C- Is there a specific suggestion to moving it?

D- Well I think if you moved "establishing penalties for breach of public trust" to after the "to" after the semicolon on line 11 after creating. That doesn't solve Ms. Eubanks problem about inducement I think the idea is that we would delete the remainder of that clause. The list of individuals. Line 11 before creating, right, that's right.

C- At line 15 continuing to strike the remainder of that clause.

D- To employee for now. And then Ms. Eubank, would it satisfy your concern about inducement to just say "establishing penalties for a breach or inducement of a breach of public trust"?

U- I don't know whether it's better to have "breach" or "inducement of a breach" up front. To where you talk about a breach of public trust and then refer to an inducement that is sort of a B concept. And then refer to or inducement of such a breach. Something like that. I am open to either way whatever works best. But I am fine with that.

T- Proponents would prefer the latter. And say "for a breach of public trust or inducement of such a breach"

D- That's fine

U- Do you want to include that in your motion?

D- Yes I will move that

D- Semicolon and,

Motion carries 3-0

C- What about in line 13 dropping the subjects of the ethics complaints and just refer to hear ethics complaints and drop the rest of that.

T- And just pick up again to access penalties.

C- Where is that?

T- It is at the end of 14

C- To me it would be sufficient to just say "creating a commission to hear ethics complaints;". Any opposition to that?

D- So you would also delete the part about accessing penalties and issuing advisory opinions?

C- No I would delete everything after the word complaint is in line 13 up to the end of line 14 that says to access. I would leave to "access penalties".

D- I don't object to that

C- I'm going to go ahead and make that motion. It should read "to assess penalties, and to issue advisory opinions on ethics issues".

Motion carries 3-0

4:13 pm U – in terms of Ms. Tierney's last suggestion about removing the remainder of the language there that starts on line 20. While I am fine with eliminating the language about conflicting state statutes and authorizing the enactment of legislation I think the home rule issue may be important. Though I would be agreeable to remove the 2 latter phrases but not that one.

C- I agree.

U – if we keep the home rule phrase at least if we keep the home rule phrase then we need to remove the "and" on line 12 because creating a 5 member ethics commission wouldn't be (inaudible)

T- Proponents don't object to that change.

c- Lets start on line 13 and remove the "and" before "creating and" in line 17 before the specifying insert the word "and", and then line 19 after "measure" delete everything up to the period.

Motion carries 3-0

C- Further suggested changes to staff draft?

T- None from the proponents.