



August 3, 2016

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

VIA EMAIL ONLY TO IECINFO@STATE.CO.US

RE: Draft Position Statement addressing Colorado's Home Rule Cities and Counties and Article XXIX of the Colorado Constitution

Dear Commissioners,

The City of Colorado Springs ("City"), a home rule municipality pursuant to Article XX of the Colorado Constitution, submits these comments in response to the Colorado Independent Ethics Commission's ("Commission") Draft Position Statement addressing Colorado's home rule cities and counties and Article XXIX of the Colorado Constitution ("Draft Position Statement").

I. Background

Amendment 41, "Standards of Conduct in Government," now codified as Article XXIX of the Colorado Constitution, was passed by the voters in November 2006 and contains the following exemption for home rule cities and counties:

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.

Colo. Const. art. XXIX, § 7 (emphasis added).

Article XXIX does not apply to the City because on April 10, 2007, the City passed Ordinance No. 07-59 approving the City's Code of Ethics.

The Draft Position Statement is contrary to the plain language of Article XXIX, undermines the intent of the electorate, and impermissibly infringes on the authority granted to home rule municipalities under Article XX, § 6(a) to regulate the duties and terms of their officers and employees.

II. Analysis

A. The Draft Position Statement is contrary to the plain language of Article XXIX and undermines the intent of the electorate.

Colorado courts interpret constitutional amendments by ascertaining and giving “effect to the intent of the electorate adopting the amendment.” *Zaner v. City of Brighton*, 917 P.2d 280, 283 (Colo. 1996) (internal citations omitted). In determining intent, “courts first examine the language of the amendment and give words their plain and commonly understood meaning.” *Id.* (internal citations omitted). “Courts should not engage in a narrow or technical reading of language contained in an initiated constitutional amendment if to do such would defeat the intent of the people.” *Id.* (internal citation omitted). If an “amendment is clear and unambiguous, the amendment must be enforced as written.” *Colorado Cmty. Health Network v. Colorado Gen. Assembly*, 166 P.3d 280, 283 (Colo. App. 2007) (internal citation omitted).

In *In re City of Colorado Springs*, 277 P.3d 937, 941 (Colo. App. 2012), the Colorado Court of Appeals construed language identical to Article XXIX, § 7, which was included in the Fair Campaign Practices Act (“FCPA”):

Any home rule county or municipality may adopt ordinances or charter provisions with respect to its local elections that are more stringent than any of the provisions contained in this act The requirements of article XXVIII of the state constitution and 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 article XXVIII and this article.

Id. at 940 (citing C.R.S. § 1-45-116).

The Court concluded the “clear intent of the General Assembly [was] to exclude home rule municipality elections from state disclosure requirements when the home rule municipality has adopted its own ordinance regulating campaign practices.” *Id.* at 940. Thus, the Court held that the Secretary of State did not have subject matter jurisdiction over a complaint alleging violations of the City’s campaign finance disclosure ordinances. *Id.* at 941.

The Court applied the plain and ordinary meaning of the language in holding the City fell within the exclusion contained in C.R.S. § 1-45-116 because “its Charter and campaign practices ordinance *address those matters.*” *Id.* (emphasis added). The Court noted that the City had adopted ordinances addressing disclosure requirements and enforcement provisions. *Id.* at 940.

In addition to the plain language of the FCPA, the Court relied on the Secretary of State’s rule which states, “[A]rticle XXVIII and the FCPA do not apply to ‘home rule municipalities that have adopted charters, ordinances, or resolutions that address *any* of the matters covered by Article XXVIII or [the FCPA].” *Id.* at 940-41 (quoting Campaign & Political Finance Rule 7.1, 8 Code Colo. Regs. 1505–6:7.1) (emphasis in original).

The Court also relied on the Attorney General's conclusion that Article XXVIII did "not apply to home rule municipalities that have enacted provisions addressing the same subject matter." *Id.* at 941 (*citing* Op. Atty. Gen. No. 03-1 (Jan. 13, 2003)). Finally, the Court cited Supreme Court precedent recognizing that "municipal elections are matters of local concern." *Id.*

The Draft Position Statement acknowledges that the plain language of Article XXIX, § 7 allows home rule municipalities and counties to opt out of the requirements of Article XXIX. However, the Commission then adopts "a narrow or technical reading of [the] language" of Article XXIX which undermines the intent of the electorate. *See Zaner*, 917 P.2d at 283. The Commission concludes that, in order to be exempt from Article XXIX, the ethics codes of home rule entities must: (1) adopt the same dollar limit on gifts (\$50.00 adjusted every four years for inflation); (2) include the identical definition of "gift" found in Article XXIX; (3) include a complete ban on gifts from lobbyists; (4) have restrictions on representation after leaving office; (5) create an independent commission with members of different political parties and with exclusive jurisdiction over ethical issues; (6) include specific complaint, investigative, enforcement, and penalty provisions; and (7) set forth a process for advisory guidance.

The Draft Position Statement goes well beyond the plain meaning of the phrase "address the matters covered by this article." The word "address" is defined as "to deal with." *Merriam Webster Dictionary*, <http://www.Merriamwebster.com/dictionary/address>. The word "matter" is defined as "the situation or subject that is being discussed or dealt with." *Merriam Webster Dictionary*, <http://www.Merriamwebster.com/dictionary/matter>. Applying these definitions, Article XXIX does not apply to home rule entities with regulations that deal with ethics matters. Home rule entities have the authority to address ethics matters more generally and less stringently than Article XXIX. Requiring, among other things, identical definitions, the same gift limit amount, and a partisan ethics commission with exclusive jurisdiction over ethics matters far exceeds the plain meaning of the language in Article XXIX, § 7.

In addition to improperly interpreting the language of Article XXIX, § 7, the Commission wrongly applied Article XXIX, § 4 to local governments. The Draft Position Statement claims that the ethics regulations of home rule entities must include, "[r]estrictions on representation after leaving office." Article XXIX, § 4 states:

No statewide elected officeholder or member of the general assembly shall personally represent another person or entity for compensation before any other statewide elected officeholder or member of the general assembly, for a period of two years following vacation of office. Further restrictions on public officers or members of the general assembly and similar restrictions on other public officers, local government officials or government employees may be established by law.

Colo. Const. art. XXIX, § 4 (emphasis added). By its terms, the prohibition in Article XXIX, § 4 does not apply to local government officials and employees. Rather, all cities and counties are permitted, but not required to, adopt similar restrictions.

The Draft Position Statement also incorrectly concludes that home rule entities without an independent ethics commission “comprised of members of different political parties” are not exempt from Article XXIX. Like most home rule municipalities, the City’s Charter, § 11-30, prohibits partisan municipal elections. Under the Commission’s position, the City’s nonpartisan elected officials would be required to appoint members of different political parties to one of its forty-eight boards, committees, and commissions. Surely the electorate did not intend such a technical, illogical outcome when it passed Amendment 41.

The Draft Position Statement overreaches the authority of the Commission over the officials and employees of home rule entities. It fails to give effect to the plain meaning of Article XXIX, § 7 and fails to effect the clear intent of the electorate to exempt home rule entities with ethics provisions regulating gifts to local officials and local employees from the article.

B. The Draft Position Statement impermissibly infringes on the authority granted to home rule municipalities under Article XX, § 6(a) to regulate the duties and terms of their officers and employees.

The Commission concludes that “[e]thics are a matter of statewide concern and, therefore, Article XXIX, is not superseded by local charters or ordinances.” Notably, Article XXIX does not state that ethics are a matter of statewide concern. However, Article XX, § 6 specifically grants home rule municipalities the “power to legislate upon, provide, regulate, conduct and control: [t]he creation and terms of municipal officers, agencies and employments; 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, § 6(a). The ethics provisions of Article XXIX impose restrictions on and regulate the duties and terms of municipal officers and employees, which are clearly matters of local concern.

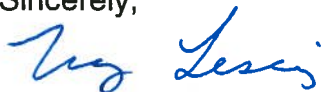
The authority of home rule entities to legislate on matters of local concern was recognized by the drafters of Amendment 41. As noted by the City of Aurora in its January 22, 2016 letter to the Commission (p. 4 and Appendix C, p. 6), at the Title Board hearing for Amendment 41, Martha Tierney, the chief author of the Amendment, acknowledged that its provisions would not apply to home rule jurisdictions with weaker ethics laws. The City of Aurora further pointed out that the ballot title of Amendment 41 states “the measure shall not apply to home rule jurisdictions that have adopted laws concerning matters covered by the measure.” The intent of the electorate was to exclude home rule entities with local laws addressing ethics for local officials and local employees from Amendment 41. The Draft Position Statement improperly regulates the home rule authority granted to home rule entities under Article XX, § 6.

III. Conclusion

In order to opt out of Article XXIX, home rule entities are only required to have regulations that address ethics matters. The Draft Position Statement contains a narrow and technical interpretation of Article XXIX, § 7. It is inconsistent with the plain language of Article XXIX and the intent of the electorate. The Commission's conclusions also intrude on the home rule power of municipalities to regulate the duties and terms of their officers and employees.

The City respectfully requests the Commission reverse its decision to issue a position statement addressing Article XXIX and home rule cities and counties and allow the plain language of Article XXIX to govern. Thank you for the opportunity to provide input on the Draft Position Statement.

Sincerely,



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