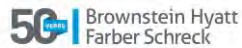


"You Break It, You Buy It"

Colorado Local Campaign Finance, Elections, and Ethics Rules: Matters of Local Concern

Presented By: Sarah Mercer
CML Annual Conference
June 22, 2018



Roadmap – Matters of Local Concern

- I. Municipal elections are, without question, a matter of local concern
- II. Local campaign finance rules have been tested and are also, without question, a matter of local concern
- III. Local ethics rules are currently being tested, and there is a strong argument that they too are a matter of local concern

bhf.com

©Brownstein Hyatt Farber Schreck, LLP

Municipal elections are, without question, a matter of local concern

- *Mauff v. People*, 123 P. 101 (1912): Holding that municipal elections were matters of state concern
- Colo. Const., art. XX § 6: Declaring municipal elections to be a matter of local concern
- *May v. Town of Mountain Village*, 969 P.2d 790 (Colo. App. 1998): Holding that voter qualifications in municipal elections are a matter of local concern

bhf.com

©Brownstein Hyatt Farber Schreck, LLP

The POWER of Article XX

- Home rule municipalities have the “power to legislate upon, provide, regulate, conduct, and control: . . . All matters pertaining to municipal elections in such city or town, and to electoral votes there in on measures submitted under the charter or ordinances thereof, including the calling or notice and the date of such election or vote, the registration of voters, nominations, nomination and election systems, judges and clerks of election, the form of ballots, balloting, challenging, canvassing, certifying the result, securing the purity of elections, guarding against abuses of the elective franchise, and tending to make such elections . . . non-partisan.” (Colo. Const., art. XX § 6)

bhf.com

©Brownstein Hyatt Farber Schreck, LLP

Local campaign finance rules have been tested and are also, without question, a matter of local concern

- Statutory Language
- Case Law Authority
- Constitutional Construction

bhf.com

©Brownstein Hyatt Farber Schreck, LLP

Statutory Language

- Colorado Fair Campaign Practices Act, C.R.S. § 1-45-116:
- “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

bhf.com

©Brownstein Hyatt Farber Schreck, LLP

Case Law Authority

- In re City of Colorado Springs, 277 P.3d 937 (Colo. App. 2012)
- Explaining that because municipal elections are a matter of local concern – and not a matter of mixed state and local concern – a municipality’s local ordinance cannot coexist with the FCPA, and thus supersede the FCPA in its entirety
- Holding that neither the FCPA, Article XXVIII, nor their enforcement schemes apply to a local municipal elections where the municipality has adopted laws addressing the matters covered by the FCPA and Article XXVIII

dhrs.com

©Brownstein Hyatt Farber Schreck, LLP

7

Constitutional Construction

- Attorney General Opinion, No. 03-01 (Jan. 13, 2003)
- Observing that Article XXVIII does NOT:
 - State that it governs home rule municipalities
 - Declare inapplicable any conflicting local rules
 - Repeal C.R.S. § 1-45-116, which preexisted Article XXVIII
- Reasoning that Articles XX and XXVIII can be harmonized by construing the provisions of Article XXVIII as applying only to cities that do NOT exercise their home rule authority by adopting local rules

dhrs.com

©Brownstein Hyatt Farber Schreck, LLP

8

The provisions of the FCPA and Article XXVIII apply only if local rules do NOT exist

- Attorney General Opinion, No. 03-01 (Jan. 13, 2003)
- “Home rule cities and towns remain responsible for compliance with state law where they have not otherwise provided a rule by charter or ordinance.”
- The local elections provisions contained in Article XXVIII and the FCPA “do not supplant the home rule powers of cities, towns and counties to regulate [their own] elections.”

dhrs.com

©Brownstein Hyatt Farber Schreck, LLP

9

Local rules control so long as they “address the matters covered by” state law

- Local campaign finance rules run the gamut from scant to comprehensive
- Arguably, just one local rule is sufficient to supersede state law (e.g., contribution limits)
- Arguably, even incorporating the FCPA in its entirety is enactment of a local rule that supersedes state law
 - In re Colorado Springs: “By adopting the FCPA by reference, the City effectively incorporated the provisions of the FCPA into its campaign finance ordinance. . . . An adopting government enforces its own law adopted by reference the same as any of its other laws.”

dhrs.com

©Brownstein Hyatt Farber Schreck, LLP

10

Local rules may be more (or less) stringent

- C.R.S. § 1-45-116: “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 [the FCPA].”
- Thus, state law does not fill in where local rules are silent (e.g., corporate contributions)

dhrs.com

©Brownstein Hyatt Farber Schreck, LLP

11

Adopting local rules – even one – triggers the obligation of enforcement

- In re Colorado Springs: “The City cites no authority, and we are aware of none, for its view that it may force a state agency to enforce the City’s own ordinance adopted pursuant to its home rule authority.”
- An important caution about enforcement . . .

dhrs.com

©Brownstein Hyatt Farber Schreck, LLP

12

... An Important Caution About Enforcement

- Last week, a federal district court declared the enforcement provisions of Article XXVIII (§9(2)(a)) and of the FCPA (§ 1-45-111.5(1.5)(a)) to be unconstitutional (*Holland v. Williams*, Case No. 16CV00138 (D. Colo. Jun. 12, 2018))
- Under these provisions, “[a]ny person who believes a violation . . . has occurred may file a written complaint with the secretary of state” to be referred to an administrative law judge for a hearing

33

dhrs.com

©Brownstein Hyatt Farber Schreck, LLP

... An Important Caution About Enforcement

- The district court’s order holds that the enforcement provisions are unconstitutional because:
 - They allow ANY person (i.e., the complainant) to act as the enforcer of political speech (i.e., the subject conduct of the complaint); and
 - There is no compelling or reasonable interest justifying why ANY person – rather than the state – should be authorized to exercise an enforcement action that results in the diminution of the First Amendment speech of another

34

dhrs.com

©Brownstein Hyatt Farber Schreck, LLP

... An Important Caution About Enforcement

- From the district court’s order:
- “[H]ow is it reasonable to encroach upon First Amendment speech by allowing a person to enforce campaign finance regulations when that person may have no experience of campaign finance regulation? Because that is precisely what the enforcement provisions facially allow – any person to enforcement, which obviously includes those people with no experience of campaign finance regulation.”

35

dhrs.com

©Brownstein Hyatt Farber Schreck, LLP

... An Important Caution About Enforcement

- In response, the Secretary of State’s Office has adopted temporary rules that create an internal review process to:
 - Determine whether the complainant has alleged a sufficient legal and factual basis for the complaint, and
 - Then, must either:
 - Dismiss the complaint,
 - Provide an opportunity to cure, or
 - Conduct further investigation to determine whether to file the complaint with a hearing officer
- Office of Secretary of State, Notice of Temporary Adoption of Rules, 8 CCR 1505-6 (Jun. 19, 2018)

36

dhrs.com

©Brownstein Hyatt Farber Schreck, LLP

... An Important Caution About Enforcement

- What does this mean for home rule municipalities?
- Presumably, local rules that likewise allow ANY person to enforce local campaign finance rules may be unconstitutional if complaints are forwarded to a hearing officer without some sort of internal review for merit

37

dhrs.com

©Brownstein Hyatt Farber Schreck, LLP

Local ethics rules are currently being tested, and there is a strong argument that they too are a matter of local concern

- Amendment 41 (codified at Colo. Const., art. XXIX):
- Prohibits public officers, members of the general assembly, local government officials, and state and local government employees from accepting gifts of over \$50, adjusted for inflation – currently \$59
- Also bans gifts from lobbyists and imposing revolving door restrictions

38

dhrs.com

©Brownstein Hyatt Farber Schreck, LLP

Examining the Jurisdiction of the Colorado Independent Ethics Commission

- The Colorado Independent Ethics Commission has asserted jurisdiction over elected officials from home rule counties and municipalities if the home rule county or municipality
 - Does not have a gift ban, or
- Has a gift ban less stringent than the constitutional one

bhfs.com

©Brownstein Hyatt Farber Schreck, LLP

19

Examining the Jurisdiction of the Colorado Independent Ethics Commission

- IEC Position Statement 16-01:
- “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 the home rule city or county does not meet the requirements set forth above, the home rule city or county will not be considered as having addressed the matters set forth in Article XXIX; the covered individuals remain subject to Article XXIX and under the Commission’s jurisdiction.”

bhfs.com

©Brownstein Hyatt Farber Schreck, LLP

20

Identical Statutory Language

- Colo. Const., art. XXIX § 7 mirrors the language of C.R.S. § 1-45-116 of the FCPA:
- “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.”

bhfs.com

©Brownstein Hyatt Farber Schreck, LLP

21

Similar Constitutional Construction

- Colo. Const., art. XX § 6 confers broad authority to home rule municipalities over local “officers, agencies, and employment”:
- Declaring that home rule municipalities have the “power to legislate upon, provide, regulate, conduct, and control: . . . The creation and terms of municipal officers, agencies and employment; the definition, regulation and alteration of the powers duties, qualifications and terms or tenure of all municipal officers, agents and employees.”

bhfs.com

©Brownstein Hyatt Farber Schreck, LLP

22

The POWER of Article XX

- There is a strong argument – grounded in Article XX – that local ethics rules are no different than local election rules and local campaign finance rules
- And that if a home rule municipality touches the subject (i.e. ethics rules), it becomes theirs – the whole kit and caboodle

bhfs.com

©Brownstein Hyatt Farber Schreck, LLP

23

Thank you!

Questions? More info?

Sarah Mercer
smerc@bhfs.com
303-223-1139

bhfs.com

©Brownstein Hyatt Farber Schreck, LLP

24