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Re: Draft Position Statement 23-___ of the IEC concerning its jurisdiction over the officials and employees of home rule cities and counties

Dear Members of the Independent Ethics Commission:

The Colorado Municipal League (“CML”) appreciates the opportunity to comment on the Draft Position Statement regarding the Commission’s view of its jurisdiction over officials and employees of home rule municipalities (“Draft Position Statement”). CML is encouraged by the Commission’s repeal of Position Statement 16-01 and supports the Commission’s recognition that home rule municipalities may have ethics standards that are less stringent than Article XXIX of the Colorado Constitution. The Draft Position Statement, however, should be modified to avoid conflicts with home rule ethics standards and remove unnecessary, inaccurate language regarding the application of C.R.S. § 24-18-101, *et seq.*, to home rule municipalities.

1. Applicability of Article XXIX to home rule municipalities

CML generally supports the Commission’s confirmation that home rule entities that establish local ethics provisions addressing the matters covered in Article XXIX are not subject to Article XXIX or the Commission’s jurisdiction. Furthermore, CML applauds the Commission’s statement that a home rule municipality’s ethics provisions “may be more or less stringent” than Article XXIX’s components and that the Commission will consider neither the adequacy of the provisions nor their implementation. Unfortunately, as addressed in Section 2, below, the Draft Position Statement does not fully implement this concept and is internally inconsistent.

Colorado voters plainly intended to give home rule municipalities the prerogative to adopt standards that are less stringent than the requirements of Article XXIX. Under the first sentence of Section 7, statutory municipalities must use the constitutional standards as a minimum and may adopt more stringent standards. Section 7 then explicitly permits home rule municipalities to avoid Article XXIX entirely if they “address the matters covered by the article.” If home rule municipalities must adopt Article XXIX’s standards as the minimum, the express exemption from Article XXIX is rendered meaningless.

For the exemption of Article XXIX, Section 7 to apply, the charter, ordinances, or resolutions of a home rule municipality must “address the matters covered by this article.” Looking to the plain and commonly understood meaning of the words in this provision, to require that a “matter” be “addressed” does not require that a specific standard be dealt with in any particular fashion or degree. A matter may be addressed in detail or generally and may even be addressed by intentional omission. “Address,” as a verb, means “to deal with” or “to direct the efforts or attention of (oneself).” *Merriam Webster Dictionary*, <http://www.Merriamwebster.com/dictionary/address>. “Covered” (or “cover”) is defined similarly to “address,” as “to deal with.” *Merriam Webster Dictionary*, <https://www.merriam-webster.com/dictionary/covered>. A “matter” is a “subject under consideration.” *Merriam Webster Dictionary*, <http://www.Merriamwebster.com/dictionary/matters>. Nothing in the language of Article XXIX, Section 7 establishes a floor with respect to the quality, scope, or extent of how a home rule municipality “deals with” or directs its “efforts or attention” to the matters.

Home rule municipalities qualify for the Section 7 exemption by passing legislation concerning standards of conduct for local officials and employees. Home rule municipalities, by establishing local ethics standards in the scope and extent they deem appropriate, can ensure the propriety of the conduct of their officials and employees and the confidence of the public. That result fully implements the intent of the voters in creating a state ethics standard that expressly authorizes the exemption of home rule municipalities.

2. Clarification of prohibition on “implied or assumed” provisions

CML recommends deletion or clarification of the ambiguous statement that “[t]he main components cannot be implied or assumed; they must . . . be promulgated in the home rule entity’s charter, ordinances, or resolutions” and footnote number one. The statement about components being “implied or assumed” will only cause confusion and, to the extent requiring a categorical or unequivocal comparison to Article XXIX, is inappropriate.

First, this statement is not necessary because Article XXIX already provides that its exemption requires the adoption of “charters, ordinances, or resolutions” If it is necessary to require that a local provision be premised in a local law, the statement should simply provide that home rule ethics provisions be “addressed in charters, ordinances, or resolutions,” as provided in Article XXIX.

Second, CML is concerned that, using this draft statement, the Commission would improperly assess the adequacy of home rule ethics provisions or their implementation. For example, the “main components” of Article XXIX, in the Commission’s view, contain at least one subjective element – the requirement of “an independent decisionmaker.” A home rule jurisdiction may expressly appoint the governing body as the decisionmaker or a hearing officer appointed by the governing body, thus implicitly addressing the component by adopting a less stringent provision.

Using the proposed framework, a jurisdictional determination could ask, “How independent is the decisionmaker?” or “Is the implicit rejection of the component of an ‘independent

decisionmaker' sufficient to maintain the exemption?" By asking this or similar questions, the Commission would erroneously attempt to measure how strict a measure is or whether the local provision is adequate. Footnote one, defining the concept of independence, acknowledges the internal inconsistency by establishing an expectation of the adequacy and stringency of a provision.

The Commission must acknowledge that home rule ethics provisions may, by implication or assumption, establish an exemption from the provisions of Article XXIX. The mere adoption of an irreconcilable provisions, whether before or after the adoption of Article XXIX, can exempt home rule municipalities. Colorado's rules of statutory construction recognize these principles. For example, in the context of conflicts between state and local laws, "[p]reemption may be implied when a state statute 'impliedly evinces a legislative intent to completely occupy a given field' but "cannot be inferred . . . merely from the enactment of a state statute addressing certain aspects of those activities. See *City of Longmont v. Colorado Oil and Gas Association*, 369 P.3d 573, 582 (Colo. 2016) (citing *Bd. of Cnty. Comm'rs v. Bowen/Edwards Assocs., Inc.*, 830 P.2d 1045 (Colo. 1992)). Courts may presume that the legislature implicitly approved of prior decisions when legislative amendments do not modify statutes that are the subject of those decisions. See *Diehl v. Weiser*, 444 P.3d 313, 319 (Colo. 2019) (citing *Semendinger v. Brittain*, 770 P.2d 1270 (Colo. 1989)). Courts can presume that terms were intentionally omitted from a law by the inclusion of certain other words or provisions. See *Reale v. Bd. of Real Estate Appraisers*, 880 P.2d 1205, 1213 (Colo. 1994).

CML encourages the Commission to revise this statement to more accurately reflect the broader authority of home rule municipalities to adopt charters, ordinances, or resolutions that address the matters covered by Article XXIX, as outlined in Section 1, above, and to respect on drafting methods recognized by Colorado law. Article XXIX imposes no qualifications as to the Section 7 exemption based on the nature, quality, or scope of local ethics law. The Commission's examination should, at most, be confined to whether a jurisdiction has "addressed" matters covered by Article XXIX *at all*, rather than falling into a detailed, substantive review of components or their sufficiency.

3. Applicability of C.R.S. § 24-18-101, et seq., to home rule municipalities

CML agrees that the Commission lacks jurisdiction to adjudicate complaints arising under C.R.S. § 24-18-101, et seq., when made against the officers and employees of home rule municipalities with local ethics standards. The Draft Position Statement, however, inaccurately cautions local officials and employees that "the statutory standards of conduct set forth in C.R.S. § 24-18-101, et seq., continue to apply to them, regardless of whether the home rule entity is exempt from the provisions of Article XXIX."

Article XX, Section 6 of the Colorado Constitution expressly grants home rule municipalities with the "power to legislate upon, provide, regulate, conduct, and control: (a) [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...." No appellate court has determined that C.R.S. § 24-18-101, et seq.,

overrides the ethics standards of home rule municipalities. Given the constitutional authority of Article XX, Section 6, as well as the express exemption from Article XXIX for home rule municipalities, the establishment of standards of ethics should be considered a matter of local and municipal concern and the statute would have no application where it conflicts with local law.

To the extent this statement is carried forward, CML encourages the Commission to restrict it to an acknowledgement that the statutory provisions “may” apply municipal officials and employees.

About CML

CML, formed in 1923, is a non-profit, voluntary association of 270 of the 273 municipalities located throughout the state of Colorado, comprising nearly 99 percent of the total incorporated state population. Its members include all 105 home rule municipalities, 163 of the 166 statutory municipalities, and the lone territorial charter city. This membership includes all municipalities greater than 2,000 in population, and the vast majority of those having a population of 2,000 or less.

Thank you very much for your attention to our concerns and for your service to the State of Colorado.

Sincerely,



Kevin Bommer
Executive Director



Robert Sheesley
General Counsel