

State of Colorado



William Leone, *Chair*
Bob Bacon, *Vice-Chair*
April Jones, *Commissioner*
Matt Smith, *Commissioner*
Jo Ann Sorensen, *Commissioner*

Independent Ethics Commission
1300 Broadway, Suite 240
Denver CO 80203
Phone: (720) 625-5697
www.colorado.gov/iec

Dino Ioannides, *Executive Director*

Position Statement 16-01 (Home Rule Counties and Municipalities)

Important Notice:
The Independent Ethics Commission
unanimously rescinded Position
Statement 16-01 on September 19,
2023.

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 municipalities¹.

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

¹ Home rule municipalities derive their authority from Colo. Const. Article XX. Home rule counties derive their authority from Article 35 of Title 30, C.R.S.

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 a covered individual 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 circumstances under which 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 be exempt from the requirements of Article XXIX.² “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

² Home rule entities may request a letter ruling from the Commission providing guidance about whether home rule charters, ordinances, or resolutions would qualify under the standards set forth in this position statement.

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 about 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 to be considered as having addressed the matters set forth in Article XXIX, a home rule entity must have adopted a charter, ordinance or resolution that addresses the matters covered by Article XXIX including:^{3 4 5}

1. A gift ban indicating that no covered individual shall accept or receive any money, forbearance, or forgiveness of indebtedness from any person, without such person receiving lawful consideration of equal or greater value in return from the covered individual who accepted or received the money, forbearance or forgiveness of indebtedness.⁶
2. A gift ban indicating that no covered individual, either directly or indirectly as the beneficiary of a gift or thing of value given to such person's spouse or dependent child,

³ For purposes of the criteria enumerated below, the term “covered individual” includes, at a minimum, a home rule entity’s elected or appointed officials; and a home rule entity’s employees, including independent contractors. A home rule entity may include additional covered individuals in the home rule entity’s discretion.

⁴ The Commission makes no determination at this time about the extent to which the restrictions pertaining to lobbyists in Colo. Const. Art. XXIX, § 3(4) apply to home rule counties and municipalities seeking exemption under § 7.

⁵ Restrictions on representation after leaving office are not included in the list below. By its terms, section 4 of Article XXIX does not impose post-office representation restrictions on local governments. Rather, section 4 specifies that restrictions for local government officials or employees may be established by law. In this position statement, the Commission is not deciding whether Article 18 of Title 24, C.R.S., establishes such restrictions on local government officials or employees that would be applicable to home rule entities; rather, the Commission reserves judgment, in an appropriate case, about whether the provisions in Article 18 of Title 24, C.R.S., constitute such restrictions.

⁶ Article XXIX provides an absolute prohibition upon any covered individual receiving money, forbearance, or forgiveness of indebtedness of any kind without receiving consideration of equal or greater value. This prohibition is not limited in amount.

shall solicit, accept or receive any gift or other thing of value having either a fair market value or aggregate actual cost greater than fifty dollars (\$50) in any calendar year, including but not limited to, gifts, loans, rewards, promises or negotiations of future employment, favors or services, honoraria, travel, entertainment, or special discounts, from a person, without the person receiving lawful consideration of equal or greater value in return from the covered individual who solicited, accepted or received the gift or other thing of value.⁷

3. The home rule entity's gift ban may include the exceptions contained in Article XXIX, § 3(3), together with exceptions recognized by the Independent Ethics Commission. If a home rule entity were to adopt exceptions in addition to those listed above, the home rule entity will bear the burden of demonstrating how such additional exceptions are consistent with the purposes and findings set forth in § 1 of Article XXIX.
4. An adjustment of the fifty dollar (\$50) gift ban limit that generally is equivalent to and coincides with the adjustment made by the Commission every four years. There is a presumption that the constitutional limit is acceptable. If a home rule entity were to adopt a gift ban amount above the constitutional limit, the home rule entity will bear the burden of demonstrating how such gift ban amount is consistent with the purposes and findings set forth in § 1 of Article XXIX.
5. An independent commission,⁸ with provisions governing manner of appointment and manner of succession.
6. A complaint, investigative, and enforcement process.
7. A penalty provision indicating that any covered individual who breaches the public trust for private gain and any person or entity inducing such breach shall be liable to the local jurisdiction for double the amount of the financial equivalent of any benefits obtained by such actions. The manner of recovery and additional penalties may be provided by law.⁹
8. A process for covered individuals to seek ethical guidance is encouraged.¹⁰

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

⁷ The 'gift ban' specified in the Amendment, which is currently \$59 (subject to adjustment every 4 years), provides a bright line test when a gift has been made. It avoids the subjective analysis of whether a gift influenced or was intended to influence a covered individual. It is easily understood by covered individuals and the public. The gift prohibition is in addition to conflict of interest, bribery, and corruption standards found elsewhere in the law.

⁸ Among other issues, section 5 of Article XXIX details how and by whom the members of the Commission are appointed, applicable terms of office, and political party affiliation. The specificity of these provisions is not generally applicable in a county or municipal context. However, throughout Article XXIX, independence of the Commission is a central, key concept that must also be made applicable to home rule entities seeking exemption under section 7 of Article XXIX. Independence is a functional concept and does not necessarily depend on vesting ethics authority in a body that is distinct from, for example, a city council or board of county commissioners. As a functional concept, rather, independence exists when the body with ethics authority is able to judge cases fairly, objectively, and free of undue influence from persons interested in the outcome of a case. Due to the highly variable characteristics among local governments, use of different models is expected and encouraged, provided that independence is not compromised.

⁹ This provision establishes a floor for the penalty amount; home rule entities are not limited to this amount, as provided in section 7 of Article XXIX.

¹⁰ Section 5(5) of Article XXIX allows requests for advisory opinions. The Commission provides ethical guidance to covered individuals in the form of advisory opinions under a philosophy that covered individuals will follow an ethical course of conduct, if provided an opportunity to do so. The Commission would encourage all local governments to provide ethical guidance in advance of unethical actions, if they can do so.

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.

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

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Dated: December 19, 2016