



DENVER
THE MILE HIGH CITY

Protecting Home Rule Through Litigation

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HB 22-1024

- ▶ Signed into law on April 18, 2022
- ▶ Prohibits home rule cities from collecting sales taxes on construction and building materials used by contractors and subcontractors for “use in the building, erection, alteration, or repair of a public school”
- ▶ Materials declared exempt from taxation under Part 1 of Article 26 of the Colorado Revised Statutes

Legislature Justifications

- ▶ Contractors should not pay taxes to governmental entities who benefit from their activities
- ▶ Taxing construction materials impairs the state's obligation to provide a thorough and uniform education as required by Article IX, Section 2 of Colorado Constitution
- ▶ Extraterritorial impacts to taxpayers who reside in school districts that serve both taxing and non-taxing municipalities

The Issues



Home Rule Powers Protected by Colorado Constitution Article XX, Section 6

[Home rule municipalities] shall have the powers . . . necessary, requisite or proper for the government and administration of its local and municipal matters, including power to legislate upon, provide, regulate, conduct and control:

(g) The assessment of property in such city or town for municipal taxation and the levy and collection of taxes thereon for municipal purposes and special assessments for local improvements; such assessment, levy and collection of taxes and special assessment to be made by municipal officials or by the county or state officials as may be provided by the charter;

There are Problems Here

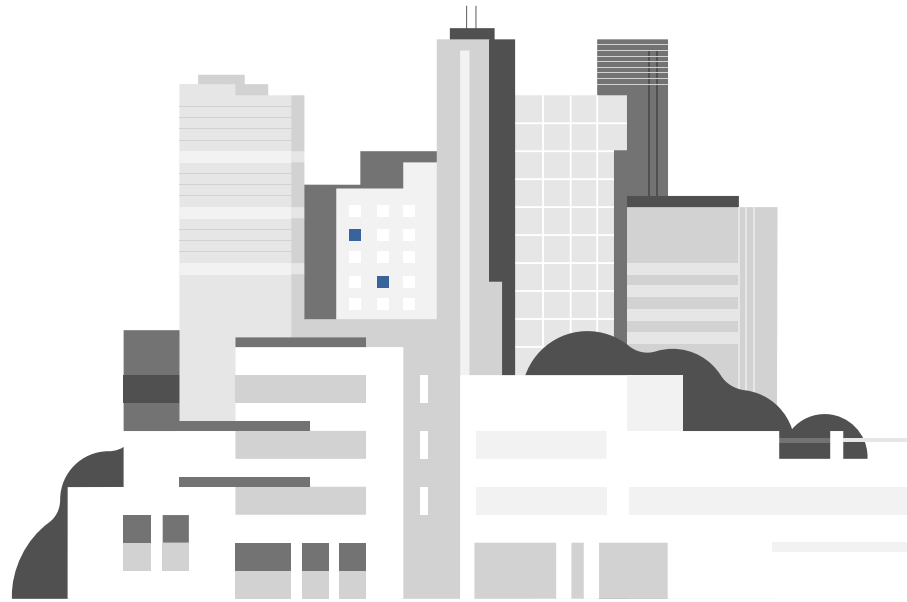


- ▶ Article XX, Section 3 gives home rule municipalities right to tax
- ▶ Home rule municipalities do not tax pursuant to Part 1 of Article 26

Jurisdictions Impacted

- ▶ City and County of Denver
- ▶ City of Boulder
- ▶ Commerce City
- ▶ Pueblo
- ▶ Westminster

- ▶ Woodland Park



Prior Decisions Regarding Authority to Tax

- ▶ *Berman v. City and County of Denver*, 400 P.2d 434 (Colo. 1965) (recognizing Denver's authority to levy sales and use taxes)
- ▶ *Deluxe Theaters v. City of Englewood*, 569 P.2d 771 (Colo. 1979) (Taxing power essential to full exercise of the right to self-government by home-rule municipalities)

Doctrine of Preemption

- ▶ Purely state concern – only Colorado can legislate
- ▶ Mixed state and local concern – local jurisdictions can legislate as long as it does not conflict with state law
- ▶ Purely local concern – local home-rule jurisdictions given exclusive authority to regulate

Can Colorado Limit the Right to Collect Sales Taxes?

Berman v. City and County of Denver, 400 P.2d 434 (Colo. 1965) (sales tax is a purely local and municipal concern) – use tax on vehicle purchased in another jurisdiction

Security Life v. Temple, 492 P.2d 63 (Colo. 1972) (look to act of imposing sales tax not activities of entity being taxed) – purchases made by insurance companies

Winslow Construction v. City and County of Denver, 960 P.2d 685 (Colo. 1998) (state's interest in free flow of commerce does not justify limit on home rule tax authority) – excise tax on self-propelled construction equipment used at an airport



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Yay Denver!!

The Solution



▶ COMMON INTEREST AGREEMENT

- ▶
1. *Parties.* The parties to this Common Interest Agreement (“Agreement”) are the City and County of Denver (“Denver”) OTHER PARTIES
 - ▶
 1. *Statement of Common Interest.* The Parties are aware of potential litigation related to the recent law passed by the State of Colorado, House Bill 22-1024 (“HB 22-1024”), which the Parties believe violates the grant of taxing authority given to home rule municipalities by the Colorado Constitution, Article XX, Section 6. The Parties share an interest in challenging the constitutionality of HB 22-1024.
 - ▶
 1. *Information Sharing.* Each of the Parties shares a common interest in the potential litigation claims, which may ripen to a lawsuit, and believes that it will mutually benefit from a full and free exchange of information related to the potential lawsuit, as well as from a coordinated investigation, preparation, and prosecution of the lawsuit. The Parties agree that it is in their mutual best interests to cooperate with each other to the extent permitted by law and to share information protected by the attorney-client privilege and the work-product doctrine. To further their common interests, the Parties may need to exchange privileged and work-product information including, but not limited to, factual analyses, mental impressions, legal memoranda, outlines, notes, correspondence, witness interviews, draft briefs, and draft pleadings, hereinafter referred to as “Common Interest Information.” The Parties intend to exchange Common Interest Information orally, electronically and in document form. The parties will not disclose Common Interest Information except for their mutual and common interests in the defense of any lawsuit related to subject matter outlined in the Statement of Common Interest, *supra*.
 - ▶

Common Interest Agreements

<p>DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO 1437 Bannock Street Denver, Colorado 80202</p>	<p>▲ COURT USE ONLY ▲</p> <hr/> <p>Case Number: 2022CV31841</p>
<p>Plaintiffs: CITY AND COUNTY OF DENVER, a home rule city and municipal corporation; CITY OF BOULDER, a home rule city and municipal corporation; CITY OF COMMERCE CITY, a home rule city and municipal corporation; CITY OF PUEBLO, a home rule city and municipal corporation; and CITY OF WESTMINSTER, a home rule city and municipal corporation;</p> <p>v.</p> <p>Defendants: THE STATE OF COLORADO and JARED POLIS, in his official capacity as the Governor of the State of Colorado.</p>	<p>Courtroom: 275</p>
<p>COMPLAINT FOR EXPEDITED DECLARATORY RELIEF UNDER C.R.C.P. 57</p>	

Rule 57

- ▶ Declaratory judgment rule
- ▶ Permits court to declare rights of parties
- ▶ Subsection (m) provides for expedited hearing



Colorado Response

- ▶ Article III gives us authority to tax what we want to
- ▶ Matter is local
- ▶ Subject of the tax does not matter
- ▶ Article IX requires us to provide thorough and uniform system of public schools
- ▶ Matter is mixed
- ▶ Cannot tax access to education

Home Rule Position

State Position

City of Boulder v. Regents of Univ. of Colorado, 501 P.2d 123 (Colo. 1972)

- ▶ State argues *Boulder v. Regents* stands for the proposition that duty to provide education trumps right to sales tax
- ▶ Home rule municipalities assert that the case only says that cannot tax state entities (which they don't do anyway) and cannot require state entities to collect local taxes

Colorado Filings

▶ Motion to Dismiss

- Conflicting constitutional obligations
- Education trumps sales tax
- Mixed concern

Counterclaims

- Declaration that HB 22-1024 not unconstitutional
- Home rule sales tax ordinances unconstitutional



Bumps in the Road



- ▶ Rule 57(m)
- ▶ Placement of law in Article 26
- ▶ Don't focus on subject matter of taxation
- ▶ Response to counterclaims
- ▶ Partial Motion for Judgment on the Pleadings

The Result



Court Grants Motion for Partial Judgment on the Pleadings

- ▶ November 23, 2022
- ▶ *City of Boulder* not dispositive
- ▶ Sales and use taxes can be a matter of mixed concern
- ▶ Colorado's interests in providing education not sufficiently or directly implicated
- ▶ Taxing of construction materials used in public schools of local concern
- ▶ Declared HB 22-1024 unconstitutional

Judgment becomes final In
January 2023 when Colorado
chooses not to appeal

