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

August 3, 2016

Re: Draft position statement of IEC concerning Colo. Const. Art. XXIX, § 7

Dear Members of the Independent Ethics Commission:

Please note: These comments supplement those previously made to the Commission by CML on the record in connection with the inquiry regarding Aurora Councilmember Lawson, wherein CML generally endorsed the position expressed by the Aurora City Attorney in his letter to the Commission of January 22, 2016 (attached).

Introduction

CML has been following the Commission’s proceedings regarding Councilwoman Lawson, as well as the Commission’s related decision to issue, *sua sponte*, this draft Position Statement. We are pleased to emphasize to the Commission that these proceedings are not driven by any actual, real-world examples of gift-driven bad acts by *anybody* associated with *any* of Colorado’s 100 home rule municipalities. Nor are bad guys in home rule municipalities escaping justice as a consequence of being beyond the Commission’s jurisdiction due to Article XXIX, § 7 (hereafter referred to as “section 7” or the “opt out” provision). As with any constitutional question, the ultimate decision of what the constitution requires is the province of the courts. Assuming that the present paucity of real world cases or controversies involving home rule jurisdictions continues (and we see no reason why it should not...), we sincerely hope that it will be many years before a court is presented with a ripe case.

Comments

Read as a whole, it is plain that in section 7 voters intended to make clear the prerogative of home rule municipalities and counties to adopt gift bans *less stringent* than the requirements contained in Article XXIX. Unlike statutory jurisdictions, whose only choice under the first sentence of section 7 is to treat the constitutional standards as a minimum and adopt more stringent local standards, home rule jurisdictions with local charter or ordinance provisions that “address” the matters covered by Article XXIX are not subject to its requirements. Thus, they may enact less stringent requirements. In this Position Statement, a majority of the current members of the Commission offer their opinion as to how extensively a home rule jurisdiction must address such matters in order to have the requirements of Article XXIX not apply.

CML agrees with the introductory citation by the Commission of various rules of statutory and constitutional construction concerning the plain meaning of words and intent of voters. Yet, the Commission has chosen to read into the “opt out” provision conditions that essentially exclude it from Article XXIX in a manner that defeats the obvious intent of Colorado’s voters to permit less stringent regulation in this area by home rule

municipalities. The Commission's unfortunate choice is neither compelled by the language of Article XXIX, nor by Colorado case law.

The Commission essentially wants home rule jurisdictions to adopt local requirements parroting those in Article XXIX in order to not be subject to Article XXIX's requirements (see the numbered items on pages 3 and 4 of the Position Statement). What sort of "opt-out" is this? This is like telling somebody that they are free to ignore a requirement that all cars be painted black, so long as they first paint their car black. Courts regularly refuse to impute to voters the intent to adopt such absurd requirements. If Article XXIX is meant to serve as a minimum requirement for *all* home rule jurisdictions, why was the "opt out" provision included in section 7 in the first place? After all, the first sentence of section 7 makes it plain that *any* jurisdiction is free to adopt more stringent local provisions. In addition to eschewing absurd constructions, courts tend to reject arguments that effectively render constitutional language surplusage.

The Commission bases its decision entirely on the Court of Appeals decision in *In re Complaint Filed by City of Colorado Springs*, 277 P.3d 937 (Colo. App. 2012). In *Colorado Springs*, the court decided whether the City had "opted out" of constitutional and statutory campaign finance reporting requirements under a State law provision that permitted this option to home rule jurisdictions which locally "addressed" matters covered by the State requirements. In the facts of that case, the City had adopted the State statute by reference and supplemented it with local provisions. Not surprisingly, the court found that the City qualified for the "opt out."

Significantly, the court nowhere said, nor implied, that an enactment of the sort adopted by the City was *required* by the law. In other words, the court applied a statutory test; it did not set a standard for meeting that test (much less a test set forth in a separate constitutional provision). Respectfully, the Commission makes too much of the decision in *Colorado Springs*, by finding that it requires a home rule jurisdiction to adopt every one of the detailed requirements set forth in the Position Statement to exercise its constitutional prerogative under section 7.

To require that a matter be "addressed," does not require that a matter be dealt with in any particular fashion. A matter may be addressed in detail or it may be addressed more generally. A matter can be addressed through specific guidelines, or alternatively, through a performance standard. Webster's Collegiate Dictionary defines the verb "address" as "to direct the efforts or attention of (oneself)"; there is nothing here about the quality or extent of such "efforts or attention." Accordingly, CML urges that a jurisdiction could reasonably be found to have "addressed" the matters covered by Article XXIX without meeting the detailed list of requirements proposed by the Commission.

Indeed, many of the requirements listed by the Commission describe *how* a given item must be addressed by a home rule jurisdiction (no gifts over \$59, etc.), rather than whether the item in question has been addressed *at all*. These matters might be far more generally stated, in a way that would facilitate, rather than frustrate, the evident purpose of section 7. For example, items (1), (2), and (3) on the Commission's list detail various types of gift restrictions, while items (5), (6), and (7) all detail a complaint process relating to the gift ban.¹

Rather than requiring home rule jurisdictions to parrot Article XXIX, a far more reasonable assumption is that voters did not intend Article XXIX to apply to home rule jurisdictions that adopted local provisions addressing some sort of local gift ban with a complaint process, even if these provisions are less stringent than the requirements in Article XXIX. Such an interpretation is entirely reasonable, given Colorado's long history of deference to local control in a wide variety of areas. Indeed, voters may well have supported Amendment 41

¹ Some of the requirements are themselves absurd: required political party representation on a commission for a non-partisan jurisdiction; requiring a local restriction on representation when leaving office, when the counterpart provision of Article XXIX expressly applies this requirement only to statewide officeholders and members of the General Assembly. Pursuant to this last remarkable aspect of the Commission's proposed interpretation, a home rule jurisdiction could opt out of Article XXIX only if it first enacted local provisions that are actually *more restrictive* than those to which the City was already subject under Article XXIX.

precisely because of the deference provided in section 7 to home rule municipalities. In the infrequent case where an issue like this arises in a home rule jurisdiction, local processes may be viewed by voters as less political, more responsive, and more accountable than an obscure commission buried somewhere in the State government bureaucracy.

Conclusion

CML recommends that the Position Statement not be finalized and that the Commission abandon its foray into this issue. The Commission has operated without difficulty for many years without presuming to direct home rule municipalities in this fashion. No one has asked the Commission for direction, or otherwise to opine, and we are frankly at a loss to understand why this Commission is now choosing to go where none have gone before.

Should the Commission choose to proceed, CML urges that the Position Statement be revised to facilitate, rather than frustrate, the exercise of the "opt out." In deciding whether to take jurisdiction of a complaint involving a home rule jurisdiction, CML respectfully recommends that this Commission confine its examination to whether the jurisdiction has "addressed" matters such as gift restrictions *at all*, rather than conducting the sort of detailed, substantive review implicit in the draft Position Statement.

Thank you very much for your attention to our concern and for your service to our state.

Sincerely,

A handwritten signature in black ink, appearing to read "Geoff Wilson", with a large, sweeping flourish extending to the left.

Geoff Wilson
General Counsel

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