

Under what circumstances has a home rule county or municipality adopted charters, ordinances or resolutions that address the matters covered by Article XXIX such that the Article does not apply?

The second sentence of Article XXIX section 7 specifically states "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". As stated by the IEC majority, to determine voter intent, words should be given their ordinary and popular meaning.

The majority enumerates select provisions from Article XXIX as firm and final measurements of home rule opt out compliance. The majority analysis and conclusion is based solely on its interpretation of the Court of Appeals decision in *In re City of Colorado Springs*, 277 P.3d 937 (Colo. App. 2012), however, the majority interprets the actions of the Court of Appeals too narrowly and correspondingly reaches conclusions inconsistent with Article XXIX.

The Court of Appeals found that "First, as previously noted, section 1-45-116 expressly provides that neither article XXVIII nor the FCPA applies to home rule municipalities that have adopted laws *addressing the matters covered by those state law provisions*. Therefore, the attempted referral of CEW's complaint to the Secretary of State conflicts with the clear intent of the General Assembly to exclude home rule municipality elections from state disclosure requirements *when the home rule municipality has adopted its own ordinance regulating campaign practices*." *Id.* at 940 (emphasis added). The Court of Appeals further found persuasive the Attorney General's reasoning that article XXVIII *does not declare inapplicable* any conflicting home rule municipality's ordinance.

In order to determine whether or not the City of Colorado Springs had addressed the matters covered by article XXXVIII and the FCPA *that were otherwise covered by state law*, the Appellate Court and the ALJ in the underlying action necessarily had to review the provisions of the City's Charter and campaign practice ordinance in applicable detail. The act of reviewing itself does not justify a conclusion that the court was seeking specific enumerated criteria that would serve to opt the City in or out of the home rule exception rather it was a function of necessity.

If the City was required to incorporate exact terms of the FCPA, the Court could have foregone the analysis of the applicable provisions and concluded succinctly that the very fact that the City had incorporated the exact terms of the FCPA rendered the Article inapplicable. However, the court referenced the City's incorporation by reference of the FCPA only after analyzing the City's various provision and then largely to support its conclusion that "[t]he 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. By adopting the FCPA by reference, the City effectively incorporated the provisions of the FCPA into its campaign practices ordinance. *Id.* at 941. The Court was intending to shut the door on the City's argument that it could delegate its power to the State when the city had in fact incorporated the terms of the FCPA. The Court's conclusion is more a statement of who cannot *opt back in* the Article rather than a compulsory conclusion as to the sole path to compliance with the Article.

The Court of Appeals recognized that “The ALJ issued a well-reasoned written order *sua sponte* addressing subject matter jurisdiction. After observing that the City is a home rule municipality that may legislate as to matters of local concern, the ALJ concluded that the City's campaign practices ordinance regulates campaign registration and disclosure practices and provides a process for local investigation and prosecution of alleged violations, and that these provisions superseded state law provisions providing for a different hearing process. Accordingly, because the superseded law was the source of the ALJ's authority, the ALJ dismissed the complaint for lack of subject matter jurisdiction.” *Id.* at 940.

The IEC should seek to analyze the home rule opt out provisions of a city or municipality on a case by case basis using the rationale of the ALJ in City of Colorado Springs cited above. In doing so, the IEC review should include in its analysis a determination of whether there exists a good faith, sufficient and reasonable nexus between the intent of Article XXIX and the home rule city or municipality's rules and enforcement provisions being reviewed.

Reviewing city compliance on a case by case basis will require more individualized analysis and review. However a cookie cutter approach that puts the IEC in opposition to nearly ever proposed home rule municipality in the state will strain the resources of the IEC by its own doing. In any event, more finesse and thoughtfulness is warranted than is evidenced in the position statement as written.