

# DRAFT

## 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 municipalities.

## 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 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 covered individuals 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 question of under what circumstances 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 opt out of the requirements of Article XXIX. “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 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 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 for a home rule entity to opt out of Article XXIX, it must have adopted a charter, ordinance or resolution that addresses the matters covered by Article XXIX including:

1. A gift ban prohibiting local officials and local government employees from accepting gifts over \$59 (subject to adjustment every 4 years) including money, forbearance, forgiveness of indebtedness, loans, rewards, promises or negotiations of future employment, favors or services, honoraria, travel, entertainment, or special discounts, to any official or employee or spouses or dependent children of officials or employees;
2. A prohibition on covered individuals receiving any money, forbearance, or forgiveness of indebtedness without providing consideration equal to the value of whatever amount was received;
3. A complete ban on receiving any gift from a lobbyist;
4. Restrictions on representation after leaving office;

5. An independent commission comprised of members of different political parties, with provisions governing manner of appointment and manner of succession with a complaint, investigative and enforcement process that allows penalties be imposed ;
6. A process for covered individuals to seek ethical guidance; and
7. Provisions granting the independent commission with jurisdiction over ethical issues arising under any other applicable standard of conduct or reporting requirement as provided by law.

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 does not meet the requirements set forth above, it may not opt out of Article XXIX and 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**