Why Home Rule Matters (Or Doesn’t)

Cory Rutz and Brian Connolly

APA Colorado – Snowmass Village 2019
AGENDA

• Overview of Local Government Land Use Authority
• Limitations on Home Rule Powers
• Specific Examples of Different Powers (e.g., annexation, subdivision)
• Quiz!
LOCAL GOVERNMENT LAND USE AUTHORITY

Home Rule Cities and Towns: 96
Statutory Cities: 12
Statutory Towns: 160
Home Rule Counties: 2
Statutory Counties: 60

(plus two, plus one)
STATUTORY CITIES, TOWNS AND COUNTIES

In General

- Have only those powers granted by state statute
- Powers are narrowly construed...
  - But, can be granted expressly or by implication

If the statute doesn’t say (or imply) you can... you can’t.

Colorado Supreme Court found that a statutory county could not require additional school fees where the state statute specified the maximum fee due and when it was payable (at subdivision plat).


Note: this is more of a preemption case, but we’ll get to that later...
Statutory Cities and Towns

- C.R.S. Title 31: Government – Municipal
- “The enumeration of the powers set forth in this title shall not be construed to limit the exercise of any other power granted to municipalities by the provisions of any other law of this state.”
  C.R.S. § 31-15-104

Statutory Counties

- C.R.S. Title 30: Government – Counties
- “No county shall adopt an ordinance that is in conflict with any state statute.”
  C.R.S. § 30-15-411

Powers are strictly construed, with doubts as to a municipality’s power resolved against the municipality.

City of Aurora v. Bogue, 176 Colo. 198 (Colo. 1971)
Colo. Const. art. XX, § 6
The people of each city or town of this state, having a population of two thousand inhabitants as determined by the last preceding census taken under the authority of the United States, the state of Colorado or said city or town, are hereby vested with, and they shall always have, power to make, amend, add to or replace the charter of said city or town, which shall be its organic law and extend to all its local and municipal matters.

You can (almost) do whatever you want.
HOME RULE AUTHORITY – COUNTIES

Colo. Const. art. XIV, § 16

... the registered electors of each county of the state are hereby vested with the power to adopt a home rule charter establishing the organization and structure of county government consistent with this article and statutes enacted pursuant hereto.

BUT... exercise such permissive powers as may be authorized by statute applicable to all home rule counties, except as may be otherwise prohibited or limited by charter or this constitution.

You can do more, but not less.
HOME RULE AUTHORITY -- LIMITATIONS

1. Home Rule Charter
   • Subject to applicable statute until charter is duly adopted
     • Needs to specifically address statutory provision
   • “...it is the intent of the general assembly that the provisions of this title shall apply to home rule municipalities except insofar as superseded by charter or ordinance passed pursuant to such charter and to all statutory cities and towns...” C.R.S. § 31-1-102

If your charter doesn’t say you can... you’re bound by the applicable state statute.
2. Preemption (a.k.a., the Big One)

- Applies to statutory cities, towns and municipalities, too.
- Court-derived mechanism for deciding conflicts between state and local regulations (or federal and state regulations, or federal and local regulations)

Q1. Is the matter of purely local concern?

OR

Is the matter of purely state concern?

OR

Is the matter of “mixed” state and local concern?
As with many court-derived mechanisms, it’s a case-by-case balancing test...

Q2. What is the need for statewide uniformity?
   AND
What are the extra-territorial impacts of the regulation?
   AND
Is there precedent for treating this as a state, local or mixed concern?
   AND
Does the Constitution address the matter?

Who wins though?

State Concern → State Regulation
Local Concern → Local Regulation
Mixed Concern → State Regulation
But we’re not done!

“In matters of mixed local and state concern where there is a conflict between home rule provision and state statute, the state statute will prevail.”

_Fraternal Order of Police, Colorado Lodge No. 27 v. City & Cty. of Denver, 926 P.2d 582 (Colo. 1996)_

Q3. Is there express preemption?
   OR
Is there implied (or “field”) preemption?
   OR
Is there an operational conflict?

If you’re regulating in a matter of mixed state and local concern and the state statute doesn’t agree with your regulation... you can’t.
“Statute permitting storage of collectors' vehicles, provided they are screened from ordinary public view, preempted county zoning policy permitting outdoor storage of only one collectors' vehicle and requiring remaining vehicles to be stored in garage.”

_Bd. of Cty. Comm'rs of Cty. of Boulder v. Martin, 856 P.2d 62 (Colo. App. 1993)_

See any oil and gas preemption case law for more examples of operational conflicts...
WHO GETS TO DO WHAT?

Initiative and Referenda
Annexation
Zoning Procedure
Subdivision
Comprehensive Planning
# Initiative and Referenda

## Home Rule Counties
- **Must** provide for initiative and referenda in home rule charter
  
  *C.R.S. § 30-11-508*
- **What does my charter say?**

## Statutory Counties
- **No power of initiative and referendum** (except maybe where vested rights are in play)

## Home Rule Cities and Towns
- **May** provide for initiative and referenda in home rule charter
  
  *(but cannot eliminate it)*
- **What does my charter say?**
  
  *If nothing, what does the statute say?*

## Statutory Cities and Towns
- **Must** follow statutory procedure
  
  *C.R.S. § 31-11-101, et seq.*
- **What does the statute say?**
<table>
<thead>
<tr>
<th><strong>Home Rule Counties</strong></th>
<th><strong>Statutory Counties</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>• Don’t even try.</td>
<td>• Don’t even try.</td>
</tr>
<tr>
<td>• Except...City and County of Denver is subject to</td>
<td></td>
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<tr>
<td>the jurisdiction of a boundary control commission.</td>
<td></td>
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<td></td>
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<tr>
<td></td>
<td><strong>Home Rule Cities and Towns</strong></td>
</tr>
<tr>
<td>• Maybe have to follow statute, to the extent the</td>
<td>• Must follow statutory procedure</td>
</tr>
<tr>
<td>provisions apply to municipalities, but not to the</td>
<td><em>C.R.S. § 31-12-101</em>, et seq.</td>
</tr>
<tr>
<td>extent they apply to cities... okay.</td>
<td>• What does the statute say?</td>
</tr>
<tr>
<td><em>C.R.S. § 31-1-101</em></td>
<td></td>
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<tr>
<td>• What does my charter say?</td>
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<td>What does the statute say?</td>
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## ZONING PROCEDURE

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<tr>
<td>• Not required to zone</td>
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</tr>
<tr>
<td>• <strong>May</strong> zone and rezone by resolution, or by ordinance if the charter provides</td>
<td>• <strong>Must</strong> zone and rezone by resolution</td>
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<tr>
<td><em>C.R.S. § 30-28-112</em></td>
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<td>• What does the statute say? Do I want to add anything else?</td>
<td>• What does the statute say?</td>
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<tr>
<td>• <strong>May</strong> (and probably will) zone by ordinance (if you zone)</td>
<td>• <strong>Must</strong> zone and rezone by ordinance (if you zone)</td>
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<td>• What does my charter say? If nothing, what does the statute say?</td>
<td><em>C.R.S. § 31-23-304</em></td>
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<tr>
<td></td>
<td>• What does the statute say?</td>
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### Home Rule Counties
- **Must** adopt subdivision regulations consistent with state statute but can do more, *C.R.S. § 30-11-103.5*
- What do my regulations (that are probably consistent with statute) say?

### Statutory Counties
- **Must** adopt subdivision regulations consistent with state statute, *i.e.*, the definition of a subdivision (35-acre rule) *C.R.S. § 30-11-103.5*
- What do my regulations (that are consistent with statute) say?

### Home Rule Cities and Towns
- **Must** adopt subdivision regulations, in most instances consistent with state statute but not always *C.R.S. § 31-23-226*
- What do my regulations (that are probably consistent with statute) say?

### Statutory Cities and Towns
- **Must** adopt subdivision regulations consistent with state statute (no 35-acre rule) *C.R.S. § 31-23-214 et seq.*
- What do my regulations (that are consistent with statute) say?
### PLANNING DOCUMENTS

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<td>• May adopt an advisory master plan in accordance with (and at the frequency of) state statute <em>C.R.S. § 30-28-106</em></td>
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LAND USE LAW OF STATEWIDE CONCERN

- Taxpayers Bill of Rights, Colo. Const. Art. XX, Sec. 20
  - *Limits on taxation and spending power*
- Open Meetings Law, C.R.S. § 24-6-401 et seq.
  - *Requires certain notifications and conduct of public meetings*
- Vested Property Rights Act, C.R.S. § 24-68-101 et seq.
  - *Authorizes local governments to established vested property rights for site specific development plans*
  - *However, local governments have authority to decide whether or not to grant vested property rights*
- Open Records Law, C.R.S. § 24-72-201 et seq.
  - *Requires maintenance of open records*
- Impact Fee statute, C.R.S. § 29-20-104.5
  - *Limits government authority to collect impact fees*
- Regulatory Impairment of Property Rights Act, C.R.S. § 29-20-201 et seq.
  - *Prohibits exactions that fail to meet Nollan and Dolan*
- “Group Homes” statutes, C.R.S. § § 30-28-115; 31-23-301
- Prohibition on amortization of nonconforming uses, C.R.S. § 38-1-101(3)(a)
- Prohibition on rent control, C.R.S. § 38-12-301
MURKY AREAS

- Areas and Activities of State Interest, C.R.S. § 24-65.1-101 et seq. (*HB 1041*)
- Mineral interest owner notification, C.R.S. § 24-65.5-101 et seq.
- Planned Unit Development Act of 1972, C.R.S. 24-67-101 et seq.
- Oil and gas regulation
QUIZ:
CAN I DO THAT?
You are: Pitkin County (Home Rule)
You want to: Amortize Old (Nonconforming) Billboards

Can I do that...?

Hint: Notwithstanding any other provision of law to the contrary, a local government shall not enact or enforce an ordinance, resolution, or regulation that requires a nonconforming property use that was lawful at the time of its inception to be terminated or eliminated by amortization. C.R.S. § 38-1-101(3)(a)
You are: Eagle County (Statutory)
You want to: Exempt 35+ acre parcels from subdivision process

Can I do that...?

Hint: The terms “subdivision” and “subdivided land”, as defined in [this section], shall not apply to any division of land which creates parcels of land each of which comprises thirty-five or more acres of land and none of which is intended for use by multiple owners. C.R.S. § 30-28-101
You are: Town of Basalt (Statutory)
You want to: Restrict permitted uses by agreement

Can I do that…?

 Hint: “...the governing body may divide the municipality into districts of such number, shape, and area as may be deemed best suited to carry out the purposes of this [section], and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings, structures, or land. All such regulations shall be uniform for each class or kind of buildings throughout each district, but the regulations in one district may differ from those in other districts.” C.R.S. § 31-23-302
You are: City of Longmont (Home Rule)
You want to: Establish Oil and Gas Setbacks

Can I do that...?

Hint: Except as expressly provided in section 29-20-104.5, the power and authority granted by this section does not limit any power or authority presently exercised or previously granted. Each local government within its respective jurisdiction has the authority to plan for and regulate the use of land by... regulating... the location and siting of oil and gas facilities and oil and gas locations. C.R.S. § 29-20-104