the WatchHouse
KEEPING AN EYE ON SEX OFFENDERS

MEMO: The Watch House Project Can Survive Home Rule Challenge

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C. Adam Foster and David Miller wish to present the following regarding the relationship between municipal ordinances, home rule and statewide concern. The conclusion is that legislation for the creation of SOCR should be successful from the perspective of challenges based on home rule concerns because sex offenders and their management are clearly statewide concerns that trump home rule and municipalities' interest in implementing local zoning regulations.

The following excerpt provides some additional background on recent Colorado Supreme Court cases defining the extent of home rule sovereignty under the Colorado State Constitution. The discussion of the holding in Northglenn v. Ibarra is particularly instructive, because in that case the Colorado Supreme Court held that state statutes governing the placement and treatment of juvenile sex offenders raised statewide concerns that controlled over contrary provisions in a City of Northglenn zoning ordinance.

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Specialty Law Columns
Government and Administrative Law News
Home Rule in Colorado: Evolution or Devolution
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The adoption of the home-rule provision of the Colorado Constitution altered the basic relationship between home-rule municipalities and the state by granting home-rule municipalities the same power over local affairs as that possessed by the legislature as to statewide matters.4 With the advent of municipal home rule, three broad categories of regulatory matters developed. These include matters of: (1) local concern; (2) statewide concern; and (3) mixed state and local concern.

In determining whether a municipal ordinance or charter supersedes state legislation, a court first must determine into which category the object of the regulation fits. For matters of statewide concern, the state legislature has supreme authority; home-rule municipalities have no power to act unless authorized by state statute or the constitution.

Regarding matters of local concern, both home-rule municipalities and the state may legislate. However, if a home-rule ordinance or charter conflicts with a state statute regulating a local matter, the home-rule provision supersedes the conflicting state provision.5 In matters of mixed state and local concern, both home-rule municipalities and the state legislature may adopt legislation that can coexist, as long as there is no conflict. In the event of a conflict,6 the state statute supersedes a conflicting provision of the home-rule charter or ordinance.7

According to the Colorado Supreme Court, "There is no litmus-like indicator for resolving whether a matter is of local, statewide, or mixed concern."8 Classifying a particular regulation as a matter of state, local, or mixed concern is a legal issue that requires a court to consider both facts and policy in making its determination.9

In addition, the three categories are not mutually exclusive. The Colorado Supreme Court has recognized that interests that are of local, state, or mixed concern often merge.10 For that reason, the courts have not developed a specific test to determine into which category a matter belongs. By its own admission, the Supreme Court classifies regulations on an ad hoc basis.11 Likewise, courts in Colorado must consider the relative interests of the state and home-rule municipalities in regulating the issue in a particular case.12

In assessing whether a regulatory matter is one of local, state, or mixed concern, the Colorado Supreme Court has stated that the General Assembly's declaration that an issue is a matter of statewide concern is relevant, but not determinative.13 Past legislative declarations are not binding on a court's decision.14 According to the Court, changing conditions may influence the analysis.15 Specifically, the court has stated that what constitutes a local versus state concern depends on the time, circumstances, technology, and economics.16

Four-Factor Analysis

Several general factors bear on whether an issue is of local, state, or mixed concern. Courts generally will weigh: (1) the need for statewide uniformity; (2) the impact of municipal regulations on persons living outside the municipal limits (extraterritorial impact); (3) historical considerations; and (4) whether the Colorado Constitution specifically commits the matter to state or local regulations.17 In addition, the court may consider whether there is cooperation between the state and municipality.18 The Colorado Supreme Court has stated that the factors are intended to assist the court in measuring the importance of the state interests against the importance of the local interests in order to make the ad hoc decision as to which law should prevail.19

Regarding the first issue, analyzing the need for uniformity, courts assess whether the state has a pervading interest in uniform regulations statewide.20 Although "uniformity in the operation of the law may be a sufficient basis for legislative preemption, . . . uniformity in itself is no virtue."21 As early as 1941, the court warned that "[t]echnological and economic forces play their part" in determining what constitutes local, state, or mixed interest.22

In recent cases, the Court has increased its emphasis on the consideration of the need for uniformity in the face of technological advances. As evidence of this phenomenon, in City and County of Denver v. Qwest Corp.,23 the Court noted that “advances in technology and the phenomenon of globalization have greatly increased the need for uniformity of regulation.”24
The second factor, extraterritorial impact, necessitates that courts analyze the effect of a local ordinance on those outside the municipality.25 Extraterritorial impacts are “those involving the expectations of state residents.”26

The third factor inquires as to the history and tradition of the subject matter.27 Specifically, courts consider whether a particular matter is one traditionally governed by the state or a local government.28

Finally, the fourth factor focuses on whether the Colorado Constitution commits the matter to either state or local regulations.29 When the text of the Constitution commits a particular matter to state or local regulation, that fact alone is significant but not dispositive. For example, when the subject matter of a local regulation implicates local and state concerns, the Constitution cannot be read to dictate the matter at issue as one of exclusively local concern. In addition, when the Colorado Constitution assigns a power to a home-rule municipality in a general way, the matter assigned is not a strictly local issue.30
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Northglenn v. Ibarra
In 2003, the Court decided City of Northglenn v. Ibarra.53 Northglenn had adopted an ordinance as part of its zoning code defining "family" in such a manner as to limit to one the number of unrelated registered sex offenders who could live in a single family residential structure within the city. Juliana Ibarra was a state-certified foster care parent who housed three unrelated children, each of whom had been both the victim and perpetrator of sexual abuse. Northglenn prosecuted Ibarra in its municipal court for violating the local ordinance.

The Supreme Court affirmed the overturning of Ibarra's conviction in municipal court for violating the ordinance in question. The Court based its decision on a finding that "considering the totality of the circumstances," the state's interest in placement of juvenile offenders under a uniform statewide system prevailed over the city's home-rule authority in the area of land use regulation, thereby negating the ordinance's effect as to the state-placed juvenile offenders. After such offenders were placed, the Court found that the state had exclusive authority and jurisdiction over their placement, and a local zoning enactment would not be allowed to interfere with that authority.54
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Here's a link to the complete article:
http://66.161.141.176/cgi-bin/texis/web/colawyer/+IenSRPea-h5wBme+qLGeoxfwww/bvindex.html