

HOME-RULE MUNICIPALITIES AND PUBLIC LANDS: DISPOSAL OF PUBLIC LANDS AS A MATTER OF LOCAL CONCERN

INTRODUCTION

The safety, preservation, and management of public lands, including parks, has become a matter of increasing concern since President Donald Trump decreased the size of multiple national monuments.¹ Within Colorado, the Conservation in the West Poll revealed that 75% of voters in 2018 consider themselves to be conservationists, up from 65% in 2016.² In the same poll, 53% of Colorado voters also indicated that they opposed privatizing the management of services provided at national public lands.³ Colorado state law protects public parks owned by Colorado municipalities with C.R.S. § 31-15-713, which requires an election to approve the sale of any such public park.⁴ However, a recent case before the Colorado Court of Appeals has raised the question of whether home-rule municipalities in Colorado may avoid the election requirement and dispose of park lands in accordance with their own ordinances.⁵ This Article will argue that the local ordinances addressing the disposition of land owned by home rule municipalities should supersede C.R.S. § 31-15-713.

I. STRAWBERRY FIELDS: IS AN ELECTION REQUIRED BEFORE COLORADO SPRINGS MAY TRADE A PUBLIC PARK TO A PRIVATE ENTITY?

A. Background

In 2016, the Colorado Springs City Council voted to trade the Strawberry Fields open space and a parking lot to the private entity The Broadmoor in exchange for about 400 acres of other “wilderness” property, easements for trails, and other property.⁶ The Broadmoor agreed to use nine acres of the 189-acre Strawberry Fields property for a picnic pavilion and

1. Michelle Baran, *After Bear Ears Reduction, Tour Operators Worry that National Parks Are Vulnerable*, TRAVEL WKLY. (Dec. 8, 2017), <http://www.travelweekly.com/Travel-News/Tour-Operators/After-Bears-Ears-reduction-tour-operators-worried-that-national-parks-vulnerable>.

2. COLORADO COLLEGE, 2018 WESTERN STATES SURVEY 19 (2018), https://www.coloradocollege.edu/other/stateoftherockies/conservationinthewest/2018/reports/2018WesternStates_InterviewSchedule_Colorado.pdf.

3. *Id.* at 10.

4. COLO. REV. STAT. § 31-15-713(1)(a) (2017).

5. Pam Zubeck, *Update: Strawberry Fields Case Argued Before the Colorado Court of Appeals*, COLO. SPRINGS INDEP.: THE WIRE (Jan. 9, 2018, 3:03 PM), <https://www.csindy.com/TheWire/archives/2018/01/09/strawberry-fields-case-argued-before-the-colorado-court-of-appeals> [hereinafter *Update*].

6. Pam Zubeck, *Land Swap Approved by 6-3 Vote*, COLO. SPRINGS INDEP.: THE WIRE (May 24, 2016, 7:55 PM), <https://www.csindy.com/IndyBlog/archives/2016/05/24/land-swap-approved-by-6-3-vote> [hereinafter *Land Swap Approved*].

a stable but to leave the rest open for public use.⁷ The City of Colorado Springs (hereinafter the City) states in its Charter that it has the power to acquire and dispose of real property.⁸ In its ordinances and Procedure Manual for the Acquisition and Disposition of Real Property Interests, the City describes the procedure for disposing of real property and does not require an election.⁹

Opponents of the Strawberry Fields trade formed nonprofit Save Cheyenne, which sued the City in state court arguing, inter alia, that C.R.S. § 31-15-713 forbade the City from disposing of the Strawberry Fields open space without an election.¹⁰ However, the district court ruled in the City's favor in December 2016.¹¹ On appeal to the Colorado Court of Appeals, Save Cheyenne argues that the district court erred in concluding that the land trade was a matter of local concern and that C.R.S. § 31-15-317 thus does not apply to the trade.¹²

B. Home-rule ordinances supersede conflicting state statutes in matters of local concern

To prevail on their claim, Save Cheyenne must show that the state statute applies to the City. Article XX, Section 6 of the Colorado constitution states that Colorado statutes only apply to home-rule municipalities as long as the charter or ordinance of the home-rule municipalities does not supersede state law.¹³ The Colorado Supreme Court has stated that when a Colorado statute and a home-rule ordinance conflict over a matter of “local concern,” the home-rule ordinance supersedes the Colorado statute.¹⁴ However, when the Colorado statute and home-rule ordinance conflict over a matter of “statewide concern” or of “mixed state and local concern,” the state law supersedes the ordinance.¹⁵ Thus, the question of which law supersedes the other depends on the determination of whether the matter at issue is of local concern, mixed state and local concern, or statewide concern.¹⁶

7. *Id.*

8. COLO. SPRINGS, COLO., THE CHARTER OF THE CITY OF COLO. SPRINGS, § 1-20(b) (2017).

9. *See* COLO. SPRINGS, COLO., CITY CODE, § 7.7.1804 (2017); CITY OF COLO. SPRINGS, PROCEDURE MANUAL FOR THE ACQUISITION AND DISPOSITION OF REAL PROPERTY INTERESTS 18–22 (2016), https://coloradosprings.gov/sites/default/files/res-web_version_real_estate_manual_4-26-16.pdf.

10. *Update, supra* note 5.

11. Pam Zubeck, *Strawberry Fields Argument Filed with Appellate Court*, COLO. SPRINGS INDEP.: THE WIRE (Jun. 6, 2017, 5:47 PM), <https://www.csindy.com/TheWire/archives/2017/06/06/strawberry-fields-argument-filed-with-appellate-court>.

12. *See* Opening Brief at 34–35, *Save Cheyenne v. City of Colo. Springs*, No. 17CA0043 (Colo. App. May 27, 2017).

13. COLO. CONST. art XX, § 6.

14. *City of Longmont v. Colo. Oil & Gas Ass'n*, 369 P.3d 573, 579 (Colo. 2016).

15. *Id.*

16. *Id.*

To determine whether a matter is of local, mixed state and local, or statewide concern, the supreme court applies a totality of the circumstances test that considers four factors: (1) the necessity of uniformity in regulation across the state, (2) the impact the local regulation will have on other areas of Colorado, (3) whether the matter has traditionally been regulated by local or state governments, and (4) whether the Colorado constitution specifies the matter as an issue of state or local regulation.¹⁷

II. THE COURT OF APPEALS SHOULD HOLD THAT COLORADO SPRINGS' LOCAL ORDINANCE ALLOWING THE DISPOSITION OF THE OPEN SPACE SUPERSEDES THE STATE STATUTE REQUIRING AN ELECTION.

The court of appeals should hold in favor of the City on this issue. An application of the four-factor totality of the circumstances test shows that the disposition is a matter of local concern and thus that the local ordinance supersedes the state statute, thereby allowing the trade without an election. Because there is some question as to whether consideration of the fourth factor may render consideration of the other three factors unnecessary, the analysis begins out of order with the fourth factor.

A. *The fourth factor weighs in favor of the City, because the Colorado constitution specifically provides home rule cities with the power to acquire and dispose of real property.*

The fourth factor considers whether the Colorado constitution commits a matter to the state or locality.¹⁸ Article XX, Section 1 of the Colorado constitution specifically enumerates the power to acquire and “dispose of” real property as a power of home-rule municipalities.¹⁹ Amicus curiae Colorado Municipal League argues that the analysis of whether a matter is of local concern is unnecessary when the Colorado constitution grants a municipality a specific power.²⁰ As the Colorado Municipal League contends, the Colorado Supreme Court has stated that no state statute can deny any rights the Colorado constitution grants, and an analysis of statewide and local interests is unnecessary when a state statute purports to deny such a right.²¹ In this case, the Colorado constitution has clearly and specifically granted home-rule municipalities the power to dispose of real property,²² and thus no analysis of interests should be necessary. For this reason alone the court of appeals should end its analysis here and hold in favor of the City on this issue.

17. *Id.* at 580.

18. *Id.*

19. COLO. CONST. art. XX, § 1.

20. Brief of Amicus Curiae Colorado Municipal League in Support of Defendants/Appellees at 13–15, *Save Cheyenne v. City of Colo. Springs*, No. 17CA0043 (Colo. App. Jul. 31, 2017) [hereinafter Brief of Amicus Curiae].

21. *Id.* (citing *Town of Telluride v. San Miguel Valley Corp.*, 185 P.3d 161, 169–70 (Colo. 2008)).

22. COLO. CONST. art. XX, § 1.

However, the Colorado Supreme Court in an earlier decision also stated that whether the Colorado constitution commits a matter to the state or a locality is “not dispositive.”²³ The court stated that when the Colorado constitution commits a power to home-rule cities “in a general way,” then the matter is not necessarily “strictly local.”²⁴ However, an argument that the Colorado constitution only commits the power to dispose of property to local governments in a “general way” should not persuade the court of appeals. The Colorado constitution is very specific when it states that home-rule municipalities “may purchase, receive, hold, and enjoy or sell and dispose of, real and personal property.”²⁵

Save Cheyenne also attempts to dodge the constitutional question entirely by arguing that requiring elections does not interfere with the City’s constitutional power to dispose of real property but rather “simply inserts a procedural requirement.”²⁶ The court of appeals should not find this argument persuasive, as a restriction on an ability to dispose of property without fulfilling a statutory requirement necessarily interferes with a power to dispose of property.

Even if the court of appeals does not end its analysis at this factor, it should find that this factor weighs in favor of the City. The Colorado constitution specifically commits the matter of disposal of property to home-rule municipalities, making it matter of local concern.²⁷

B. The first factor weighs slightly in favor of Save Cheyenne, because uniformity in regulation helps achieve the state goal of protecting land.

The first factor considers a need for uniformity of regulation statewide.²⁸ The Colorado Supreme Court has said that uniformity is not desirable for its own sake but rather is necessary “when it achieves and maintains specific state goals.”²⁹ The Colorado General Assembly has stated that one of its goals is the protection of public land: “The protection of the utility, value, and future of all lands within the state, including the public domain . . . is a matter of public interest.”³⁰ Because an election gives voters the opportunity to preserve public lands that might otherwise be disposed of, it is clear how C.R.S. § 31-15-317 could further this goal. Thus, this factor weighs in favor of Save Cheyenne and indicates that the

23. City of Commerce City v. State, 40 P.3d 1273, 1284 (Colo. 2002).

24. *Id.*

25. COLO. CONST. art. XX, § 1.

26. Oral argument at 1:04:38, Save Cheyenne v. City of Colo. Springs, No. 17CA0043 (Colo. App. argued Jan. 9, 2018), <https://cojudicial.ompnetwork.org/shows/16ca1383-17ca0043>.

27. COLO. CONST. art. XX, § 1.

28. City of Longmont v. Colo. Oil & Gas Ass’n, 369 P.3d 573, 580 (Colo. 2016).

29. *Id.* (quoting City of Northglenn v. Ibarra, 62 P.3d 151, 160 (Colo. 2003)).

30. COLO. REV. STAT. § 24-65.1-101 (2017).

matter of property disposal is at least a matter of mixed state and local concern.

However, while it is clear how C.R.S. § 31-15-317 could further the stated goal, it is not clear why C.R.S. § 31-15-317 is necessary to achieve and maintain that goal. Indeed, in this case, without an election, the City is gaining much more public space than it loses.³¹ Thus, this factor only weighs slightly in favor of Save Cheyenne.

C. The second factor weighs in favor of the City, because the City's local ordinances about land disposal have no ripple effect.

The second factor considers the impact of the local regulation outside the municipality. To satisfy this factor, the Court looks for a “ripple effect” with “serious consequences” on people outside the municipality.³² In *City of Longmont v. Colo. Oil & Gas Ass'n*, the court found that the enactment of a fracking ban in Longmont could create a “ripple effect,” because the ban could encourage other municipalities to enact similar bans and ultimately create a statewide ban.³³

No ripple effect is likely here. The fact that the City has not required an election before disposing of property is not likely to encourage other cities to adopt similar procedures. A survey of thirty-one home-rule municipalities in Colorado shows that twenty-six do not require an election before the disposal of property, but five do require such an election.³⁴ The existence of the City's ordinance is unlikely to encourage the five who do require an election to drop that requirement. Therefore, this factor weighs in favor of the City and this matter being one of local concern.

D. The third factor weighs in favor of the City, because local governments have traditionally regulated land use issues.

The third factor considers whether the matter has traditionally been in the domain of state or local government.³⁵ The Colorado Supreme Court recognizes that the use of zoning authority to control land use within a home-rule city is a matter of local concern.³⁶ The Local Government Land Use Control Enabling Act of 1974 gave local governments, including those that were not home rule, a great amount of authority to plan for and regulate their land.³⁷ Since land-use control has typically been in the domain of local government, this factor weighs in favor of the City and this matter being one of local concern.

31. *Land Swap Approved*, *supra* note 6.

32. *City of Longmont*, 369 P.3d at 581 (quoting Ibarra, 62 P.3d at 161).

33. *Id.* at 581.

34. Brief of Amicus Curiae, *supra* note 20, at 18–19.

35. *City of Longmont*, 369 P.3d at 580.

36. *Id.* at 581; *Voss v. Lundvall Bros.*, 830 P.2d 1061, 1064 (Colo. 1992).

37. *Voss*, 830 P.2d at 1065 (citing COLO. REV. STAT. § 29-20-101 to -107 (2017)).

CONCLUSION

The Colorado Court of Appeals should find on the basis of the four-factor test that the disposal of municipal lands is a matter of local concern. A local ordinance of a home-rule municipality addressing the disposal of municipality-owned real property should thus supersede C.R.S. § 31-15-317. Colorado Springs' ordinance that allows for the trade of the Strawberry Fields property to a private entity should not be superseded by C.R.S. § 31-15-317, and thus no vote should be required before the property can be traded.

*Angela Hygh**

* Angela Hygh is a Staff Editor for the *Denver Law Review* and a 2019 J.D. Candidate at the University of Denver Sturm College of Law.