



WYOMING LEGISLATIVE SERVICE OFFICE

Memorandum

DATE September 12, 2023

TO Regulatory Reduction Task Force

FROM Matt Obrecht, LSO

SUBJECT Scope of Permissible Legislative Regulation of Local Land Use Issues

The Housing Subcommittee of the Regulatory Reduction Task Force asked the Legislative Service Office to provide a memorandum with background information concerning the ability of the Wyoming Legislature to establish statewide housing development land use standards that may conflict with previously enacted city and municipal ordinances.

History and Principles of Municipal Authority in Wyoming

In providing a brief answer to this question, it is important to note first, that the Wyoming Legislature may regulate any activity within the state so long as that regulation does not violate the United States Constitution, the Wyoming Constitution or is preempted by federal law.¹ By and large, local government land use planning is an issue under the control of the state and local governments, not the federal government.² Counties and municipalities are both created under the Wyoming Constitution.³ Counties are wholly creations of the state, embodied with only that authority provided or necessarily implied by the Wyoming Constitution and Wyoming statutes and subject to all constitutional regulations of the state.⁴ Municipalities, however, are granted broader self-governance authority under Article 13, Section 1 of the Wyoming Constitution. This section was adopted by amendment in 1972 and is known as the “Home Rule” provision.⁵

¹ It should be emphasized that the Wyoming Constitution is a restriction on the Legislature’s authority, not a grant of authority. See Dir. of the Office of State Lands & Invs. v. Merbanco, Inc., 2003 WY 73, 70 P.3d 241, 256, 260.

² An example of when a local or state land use planning regulation would violate federal law is if it had a discriminatory intent or impact in violation of the Fair Housing Act of 1968 (42 USCS §§ 3601 et seq.).

³ Wyo. Const. art. 12 (Counties); art. 13 (Municipalities).

⁴ Dunnegan v. Laramie Cty. Comm'rs, 852 P.2d 1138, 1142 (Wyo. 1993) (citing Hyde v. Board of Commissioners of Converse County, 47 Wyo. 101, 31 P.2d 75 (1934)).

⁵ Wyo. Const. art. 13, § 1 is attached to this memorandum as Amendment A.

Prior to the adoption of the Home Rule Provision, municipalities in Wyoming were treated as “creatures of the state” indistinguishable from counties. A judicial doctrine was adopted by many states named after an Iowa Supreme Court justice from the late 19th century called “Dillon’s Rule.” This rule prohibited municipalities from adopting many local regulations without explicit legislative authorization:

It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others: first, those granted in express words: second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation-not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.⁶

The implementation of Dillon’s Rule by courts across the country often led to harsh results which limited the ability of cities and towns to adopt ordinances to meet their unique needs.⁷ Home Rule provisions were adopted in 48 states to alleviate the lack of municipal control and inflexibility imposed under Dillon’s Rule.⁸ Some of those home rule provisions are constitutional (like Wyoming) and others are statutory.⁹

Professor Rudolph, in his seminal work on local governments in Wyoming, made this observation about the full breadth of the various home rule provisions as they were interpreted by the courts, “While the law varies considerably among the states on questions of this sort, it is doubtful that the law is clear in any state.”¹⁰ His statement certainly still holds true in Wyoming almost 40 years after it was written. There is little guidance on how to interpret or implement the Home Rule Provision in Wyoming. Since its adoption, Article 13, Section 1 has been the subject of very few court cases, and none of them have been particularly insightful or helpful.

⁶ See Thomas A. Smith and Shane T. Johnson, Survey of Wyoming Law: No Home on the Range for Home Rule, 31 Land & Water L. Rev. 791 (1996), n.3, quoting 1 Commentaries on the Law of Municipal Corporations, 448–50 (5th ed. Boston: Little, Brown and Company 1991). See also Home Rule in Wyoming: A Municipal Official’s Guide, produced for the Wyoming Association of Municipalities (2010), p.2.

⁷ See e.g., Whipps v. Town of Greybull, 56 Wyo. 355 (Wyo 1941). A state statute granted authority for general obligations bonds, city had no authority to fund power plant through revenue bonds. The court also refused to recognize implied authority for the Town of Greybull to issue revenue bonds from an earlier statute authorizing construction of power plants which did not provide a method of funding. See E. George Rudolph, Wyoming Local Government Law (1985), p. 76 (hereinafter referred to as “Rudolph”).

⁸ Survey of Wyoming Law: No Home on the Range for Home Rule at p.4 (citing U.S. Advisory Commission on Intergovernmental Affairs, State Laws Governing Local Government Structure and Administration 5 (Mar. 1993).

⁹ Id. at pp. 3 and 4.

¹⁰ Rudolph, p. 77.

In the first few cases after the adoption of the Home Rule Provision, the Wyoming Supreme Court ruled as if the provision had not been adopted.¹¹ The few cases that have been decided on the issue since that time have seemed to read the Home Rule Provision quite restrictively, seemingly in contradiction to Article 13, Section 1(d).¹²

In 2016, the Wyoming Supreme Court struck down as violative of state statute a City of Laramie ordinance that provided an enhanced penalty for driving under the influence than what was stipulated by state statute.¹³ The City argued that a local government could impose stricter regulations than required by state statute if the local ordinance was not in conflict with the statute and if the Legislature had not “preempted the regulation of the field.”¹⁴ The Supreme Court did not agree, holding that the statutory scheme for driving under the influence was intended to be uniform throughout the state and Laramie’s enhanced penalties disrupted the uniformity of that scheme.¹⁵ In coming to this conclusion, the Court held that the Legislature’s desire for uniform application of the traffic code was clear when statute [W.S.31-5-108] stated the traffic code was “applicable and uniform throughout this state” even though the Legislature “authorized local governments to enact local ordinances consistent with the Act’s provisions.”¹⁶

One of the more articulate defenses of the Home Rule Provision came in a dissent from Justice Kite. The case involved what is known as the “Dram Shop Rule” and the immunity from liability for anyone who legally provides alcohol to a person and that person subsequently injures another as a result of the alcohol that was provided.¹⁷ The statute in question was W.S. 12-8-301(a).¹⁸ Justice Kite, joined in dissent by Justice Hill, argued that the statute did not preempt the field of alcohol liability in the state and that a violation of a municipal ordinance while providing alcohol could lead to liability. The dissent argued there was nothing in W.S. 12-8-301 that indicated that the

¹¹ Nation v. State, 518 P.2d 931, 932 (Wyo. 1974) and City of Buffalo v. Joslyn, 527 P.2d 1106 (1974).

¹² See generally Laramie Citizens for Good Government v. City of Laramie, 617 P.2d 474 (Wyo. 1980) – City could not issue revenue bonds for construction of a water system where the statute only provided for general obligation bonds; Coulter v. City of Rawlins, 662 P.2d 888 (Wyo. 1983) – City would not have the authority to impose water and sewer tap fees absent statutory authorization because the Home Rule Provision (Article 13, Section 1(a)(iii)) reserved to the Legislature the authority to impose all charges; *but compare to* Hadden v. City of Laramie, 648 P.2d 551 (Wyo. 1982) – Under Article 13, Section 1(b), city could limit smaller fireworks than those authorized to be regulated by state statute because the statute was not uniformly applicable to all municipalities. Article 13, Section 1(d) states, “The powers and authority granted to cities and towns, pursuant to this section, shall be liberally construed for the purpose of giving the largest measure of self-government to cities and towns.”

¹³ Wofford v. City of Laramie, 2016 WY 59, 375 P.3d 740 (Wyo. 2016).

¹⁴ Id. at 743.

¹⁵ Id. at 746.

¹⁶ Wofford 375 P.3d at 744.

¹⁷ Baessler v. Freier, 2011 WY 125, 258 P.3d 720 (Wyo. 2011).

¹⁸ W.S.12-8-301 provides, “No person who has legally provided alcoholic liquor or malt beverage to any other person is liable for damages caused by the intoxication of the other person.”

Legislature intended to preempt the field of alcohol regulation and in turn the imposition of liability for damages arising from providing alcohol.¹⁹

Based on these cases, the plain language of the Home Rule Provision and of scholarly works discussing the provision, a few guiding principles emerge that are helpful to determine the scope of Home Rule in Wyoming:

1. Municipalities have the authority, within constitutional limits, to adopt regulations on a subject without an express grant of authority from the Legislature, if the Legislature has not uniformly preempted the field of regulation on that subject for all cities and towns;²⁰
2. A municipality may choose, through adoption of a charter ordinance, to adopt a regulation in conflict with most state statutes²¹ if that state statute is not uniformly applicable to all cities and towns in the state.²²

Application of Home Rule Provisions to Municipal Land Use

The Legislature currently provides for many aspects of municipal land use planning and regulations through the implementation of statutes.²³ These statutory sections appear to apply to all municipalities uniformly.²⁴ However, at least as to zoning regulations, the Tenth Circuit Court of Appeals has held that the state did not intend to “preempt the field” as to those regulations.²⁵

¹⁹ Baessler, 258 P.3d at 729.

²⁰ While W.S. 15-1-103 contains a laundry list of at least 50 different areas in which a municipal governing body may act, this statute and others controlling municipal duties are not an exhaustive recital of all the areas in which a city or town may act.

²¹ It appears that a charter ordinance may not be adopted if it conflicts with state statutes concerning: methods of incorporation; alterations of boundaries; merger, consolidation and dissolution; limitations on debt; levying taxes, excises, fees, or any other charges. Municipalities also may not supersede statutes relating to “civil service, retirement, collective bargaining, the levying of taxes, excises, fees, or any other charges, whether or not applicable to all cities and towns” even if those statutes are not applicable to all cities and towns if those statutes were adopted prior to the effective date of the Home Rule Provision in November of 1972. Wyo. Const. art. 13, § 1(a) and (b).

²² See Rudolph at p. 76.

²³ See W.S. 15-1-401 through 15-1-423 (Annexation); W.S. 15-1-501 through 15-1-512 (Planning); W.S. 15-1-601 through 15-1-611 (Zoning).

²⁴ E.g., W.S. 15-1-402(a)(intro) “(a) Before any territory is eligible for annexation, *the governing body of any city or town* at a hearing as provided in W.S. 15-1-405 shall find that”; W.S. 15-1-502 “*Each city and town* may have a planning commission”; W.S. 15-1-602(a)(intro) “*The governing body of any city or town*, by ordinance, may...” (emphasis added).

²⁵ Schanzenbach v. Town of La Barge, 706 F.3d 1277, 1285 (10th Cir. 2013) “The Wyoming constitution establishes a baseline rule that municipalities should be allowed to govern their own affairs unless affirmatively contradicted by state law.” The federal appeals court went on to hold that state law controls when local and state law conflict. However, the town of LaBarge’s restriction on siting any manufactured home over 10 years old did not conflict with state law.

Accordingly, municipalities under the Home Rule Provision are free to adopt zoning regulations which are not in conflict with W.S. 15-1-601 et seq.²⁶

If the Legislature wished to adopt a comprehensive suite of land use regulations for residential and commercial development, it could do so by employing statutory language that “every city and town” are covered by the regulations and the regulations shall be applicable and uniform throughout this state.

²⁶ Please note that other land use planning statutes likely “preempt the field” and municipalities cannot adopt provisions to the contrary, such as the requirements prior to annexation at W.S. 15-1-402.

Appendix A

Article 13, Section 1 of the Wyoming Constitution: The Home Rule Provision

Article 13, Section 1 Incorporation; alteration of boundaries; merger; consolidation; dissolution; determination of local affairs; classification; referendum; liberal construction.

(a) The legislature shall provide by general law, applicable to all cities and towns,

(i) For the incorporation of cities,

(ii) For the methods by which city and town boundaries may be altered, and

(iii) For the procedures by which cities and towns may be merged, consolidated or dissolved; provided that existing laws on such subjects and laws pertaining to civil service, retirement, collective bargaining, the levying of taxes, excises, fees, or any other charges, whether or not applicable to all cities and towns on the effective date of this amendment, shall remain in effect until superseded by general law and such existing laws shall not be subject to charter ordinance.

(b) All cities and towns are hereby empowered to determine their local affairs and government as established by ordinance passed by the governing body, subject to referendum when prescribed by the legislature, and further subject only to statutes uniformly applicable to all cities and towns, and to statutes prescribing limits of indebtedness. The levying of taxes, excises, fees, or any other charges shall be prescribed by the legislature. The legislature may not establish more than four (4) classes of cities and towns. Each city and town shall be governed by all other statutes, except as it may exempt itself by charter ordinance as hereinafter provided.

(c) Each city or town may elect that the whole or any part of any statute, other than statutes uniformly applicable to all cities and towns and statutes prescribing limits of indebtedness, may not apply to such city or town. This exemption shall be by charter ordinance passed by a two-thirds (2/3) vote of all members elected to the governing body of the city or town. Each such charter ordinance shall be titled and may provide that the whole or any part of any statute, which would

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otherwise apply to such city or town as specifically designated in the ordinance shall not apply to such city or town. Such ordinance may provide other provisions on the same subject. Every charter ordinance shall be published once each week for two consecutive weeks in the official city or town newspaper, if any, otherwise in a newspaper of general circulation in the city or town. No charter ordinance shall take effect until the sixtieth (60th) day after its final publication. If prior thereto, a petition, signed by a number of qualified electors of the city or town, equaling at least ten per cent (10%) of the number of votes cast at the last general municipal election, shall be filed in the office of the clerk of such city or town, demanding that such ordinance be submitted to referendum, then the ordinance shall not take effect unless approved by a majority of the electors voting thereon. Such referendum election shall be called within thirty (30) days and held within ninety (90) days after the petition is filed. An ordinance establishing procedures, and fixing the date of such election shall be passed by the governing body and published once each week for three (3) consecutive weeks in the official city or town newspaper, if any, otherwise in a newspaper of general circulation in the city or town. The question on the ballot shall be: "Shall Charter Ordinance No. Entitled (stating the title of the ordinance) take effect?". The governing body may submit, without a petition, any charter ordinance to referendum election under the procedures as previously set out. The charter ordinance shall take effect if approved by a majority of the electors voting thereon. An approved charter ordinance, after becoming effective, shall be recorded by the clerk in a book maintained for that purpose with a certificate of the procedures of adoption. A certified copy of the ordinance shall be filed with the secretary of state, who shall keep an index of such ordinances. Each charter ordinance enacted shall prevail over any prior act of the governing body of the city or town, and may be repealed or amended only by subsequent charter ordinance, or by enactments of the legislature applicable to all cities and towns.

(d) The powers and authority granted to cities and towns, pursuant to this section, shall be liberally construed for the purpose of giving the largest measure of self-government to cities and towns.