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July 10, 2024

Gov. Jared Polis
Colorado State Capitol
200 E. Colfax Ave., Rm. 136
Denver, CO 80203
HAND DELIVERED

Dear Gov. Polis:

On behalf of the Colorado Municipal League's 271 member cities and towns, I am writing to request confirmation that departments of the State of Colorado are complying with the provisions of 24-4-103 (2.7), C.R.S., that prohibit the creation of state rules creating an unfunded mandate on local governments unless accompanied by state funding, as well as require procedures in each state agency to include local governments in the promulgation of rules that may affect them.

Unfunded mandates are state laws or regulations that misappropriate local government revenues to pay for new or increased levels of service to further state policies. They reduce funding available to achieve priorities of local voters and taxpayers. In recognition of the harm this causes, the General Assembly enacted 29-1-304.5, C.R.S., in 1991 to prohibit unfunded mandates in state legislation, recognizing that local revenue should not be redirected to pay for state policies. As such, it is crucial that the state follow its own law giving local governments the ability to see the level of transparency and consistency in the analysis of the impact any proposed rules may have on local governments, as well the posting and sharing of all that analysis.

When Gov. John Hickenlooper was sworn in back in 2011, one of his first official actions was to sign Executive Order D 2011-005, "Establishing a Policy to Enhance the Relationship between State and Local Government." (EO5) The order applied the principles of the statutory prohibition of unfunded mandates on local governments found at 29-1-304.5, C.R.S., to state agency rulemaking. EO5 said:

Local governments should have more flexibility to design solutions to problems without excessive interference or oversight, or unnecessary regulation, from state government. In addition, local governments should not be expected to implement laws and regulations without the funding necessary to do so. In order to assist local governments in effectively complying with such requirements, this Executive Order gives direction to state agencies on consulting and working with local governments before imposing new regulations or other obligations.

In 2012, the General Assembly adopted EO5 by enacting SB12-026, which passed with a single “no” vote and was signed into law on May 24, 2012. It remains unamended in the Administrative Procedures Act at 24-4-103 (2.7), C.R.S., and requires the following:

1. No state agency shall promulgate a rule creating an unfunded mandate on a local government without complying with the requirements of 29-1-304.5, C.R.S., to fund the mandate.
2. When a potential rule creating a state mandate is contemplated, the agency shall provide the agency director with a description of:
 - a. The proposed rule
 - b. Descriptions of the consultation the agency had with impacted local governments
 - c. Descriptions of the concerns of elected officials or representative of impacted local governments
 - d. Any written communication from impacted local governments to the agency
 - e. The agency’s reason supporting the need for the mandate
3. The agency director shall review all information to determine compliance with the prohibition on unfunded mandates and no rule-making may proceed unless the agency has received a notice of compliance from the agency director.
4. Agencies shall develop and implement a process to solicit the “meaningful and timely input of elected officials and other representatives of local governments” into each process for developing proposed rules.

Without reflecting on the merits of any policies, some examples of recent and anticipated rulemakings that implicate 24-4-103 (2.7), C.R.S., include the following. Given the inconsistency among agencies, it is challenging to determine overall compliance with the Administrative Procedures Act or to find consistent information regarding the analysis of unfunded mandates.

- The Air Quality Control Commission of the Department of Public Health and Environment imposed unfunded mandates on local governments pursuant to Regulation 29 (5 CCR 1001-33).¹ Under that rule, certain local governments are restricted from using gasoline-powered and hand-held lawn and garden equipment during summer months, requiring the expenditure of local funds to obtain battery-powered equipment. The rules also impose record-keeping and reporting requirements without providing funding. The rulemaking did not appear to document the analysis required by 24-4-103 (2.7), C.R.S., or a statement of compliance from the agency director. Recent regulations implementing HB21-1110 (Colorado Laws for Persons with Disabilities) and HB23-244 (Technology Accessibility Cleanup) require local governments to adopt accessibility plans and modify records in a manner that exceed the requirements of federal law. The proposed rulemaking that resulted in the adoption of 8 CCR 1501-11 included some analysis

¹ <https://drive.google.com/file/d/1W54F5q6W3wclHbU8myffWs3ZqrrOOBsi/view>

required by 24-4-103 (2.7), C.R.S., but ignored the requirement to comply with 29-1-304.5, C.R.S., to fund the mandate.² The Office of State Planning and Budgeting, however, indicated that it “has no concerns with OIT proceeding with their rule-making process.”³

- The Department of Labor and Employment, Division of Family and Medical Leave Insurance, in its Regulations Concerning Local Government Participation with the Paid Family Medical Leave Program (7 CCR 1107-2) imposed reporting and programmatic requirements on local governments, including a requirement to remain in the program for three years.
- SB23-111 (Public Employees’ Workplace Protection) authorized the Division of Labor Standards and Statistics in the Department of Labor and Employment to promulgate rules to implement the new law. Those rules, 7 CCR 1103-17, impose procedural mandates regarding personnel and the operation of local governments. The rulemaking did not appear to document the analysis required by 24-4-103 (2.7), C.R.S., or a statement of compliance from the agency director.
- Pursuant to HB21-1286 (Energy Performance for Buildings), the Air Quality Control Commission enacted the Building Performance Standards Rule (5 CCR 1001-32) that includes public buildings of a certain size. The mandates in that rule require reporting of benchmarking data and performance requirements. The rulemaking did not appear to document the analysis required by 24-4-103 (2.7), C.R.S., or a statement of compliance from the agency director.
- Various 2024 legislation requires rulemaking to implement legislation that will impose unfunded reporting requirements on local governments, including HB24-1152 (Accessory Dwelling Units), HB24-1304 (Minimum Parking Requirements), HB24-1173 (EV Charging System Permits), and HB24-1313 (Transit Oriented Communities).

Through 2018, state agencies posted the processes by which they implemented the requirement to seek the input of local officials, and local governments were consulted regularly, often with the assistance of CML and other local government associations. At last check, that information cannot be found on any agency website, and we are unaware that any agencies are explicitly consulting with local governments prior to developing rules with impact on local governments. Further, we are unaware that the state is complying or planning to comply with the requirement to fund any mandate created by agency rulemaking for the rule to be legally binding.

On behalf of CML’s members, I am happy to commit the League to an effort to reestablish and promote the procedures required by law to ensure the greatest level of state-local partnership in the development and implementation of state agencies rules. Finally, I urge you to confirm all state agencies are adhering to the requirements of the law and ensure funding is requested annually and included in the budget to reimburse local governments for the cost of compliance with any state

² https://docs.google.com/document/d/1QJnJCFdkzZJ_5DXO3g_78KOBPs0ykInb4lqDmsIJ3Bg/edit

³ <https://drive.google.com/file/d/1Ntb9e2kpn36yPgaC9zTOX0dIH4H4Uk9f/view>

agency rule that creates an unfunded mandate, if such rules are to be effective and legally enforceable.

Thank you for your attention to this important and timely issue.

Best regards,



Kevin Bommer
Executive Director

cc: Alec Garnett, Chief of Staff
Wynetta Massey, CML Executive Board President & Colorado Springs City Attorney
Kelly Flenniken, Executive Director, Colorado Counties, Inc.
Ann Terry, Executive Director, Special District Association
Sen. Steve Fenberg, President of the Senate
Rep. Julie McCluskie, Speaker of the House
Rep. Shannon Bird, Joint Budget Committee Chair
Sen. Rachel Zenzinger, Joint Budget Committee Vice Chair
Sen. Jeff Bridges, Joint Budget Committee
Sen. Barbara Kirkmeyer, Joint Budget Committee
Rep. Emily Sirota, Joint Budget Committee
Rep. Rick Taggart, Joint Budget Committee
Phil Weiser, Attorney General