CML LEGAL CORNER

Grant funding and "non-compliance" with state laws

By Robert Sheesley, CML general counsel

The Colorado Revised Statutes overflow with restrictions, prohibitions, and requirements that could apply to municipalities. Inevitably, errors in compliance occur, often through inadvertence, a lack of awareness, or even the impossibility of implementing statutes in the real world. Sometimes, unclear language and other legal concerns lead municipalities to interpret statutes as not applying to them.

On May 16, Gov. Jared Polis unexpectedly issued Executive Order D 2025 05 shortly after the legislative session ended. The order, which isn't supported by any act of the General Assembly, threatens to withhold appropriated state funding if his agencies determine a municipality is not complying with recent land use laws. Almost immediately, several Front Range cities filed suit to challenge the executive action.

LIMITS OF AGENCY AUTHORITY

Government entities, especially administrative departments, possess only the authority granted to them by law. Agency action must be based on and within the scope of statutory authorization. That action can't be arbitrary, should follow a process, and be subject to review by the courts.

When the law provides a specific remedy for a violation, the consequences of non-compliance are clear. Agencies may have explicit authority to take steps to ensure compliance, such as notifying a county treasurer to withhold property tax revenue when the municipality fails to file budgets or audits. Permitting or oversight agencies, as with environmental regulations and employment laws, can investigate and order remedies.

Often, however, state law does not provide a specific consequence for an alleged violation by a municipality or authorize a state agency to force municipalities to comply with the law. In those cases, a municipality may not qualify for a particular grant or status, but the state likely has no direct recourse. Withholding grant funding or deprioritizing applicants for grants when that remedy is not authorized by legislation, as proposed in D2025 05, frustrates the General Assembly's intent in appropriating funds and setting eligibility criteria to achieve important goals.

Agencies may contend that the administration of state grant programs carries an implied authority to remedy problems. Every state contract, including grant agreements, includes a provision required by the state comptroller, that requires the recipient or vendor to "comply with all applicable federal and state laws, rules, and regulations in effect or hereafter established … ." But that is a contractual provision, not a grant of authority for any state agency to unilaterally determine compliance with laws and then select a preferred remedy of withholding funding under the grant agreement.

A FEDERAL COMPARISON

In 2020, Colorado successfully challenged a grant condition relating to immigration enforcement that the Department of Justice created in reliance on a statutory provision requiring that grantees "comply with" all other applicable federal laws. The state is now challenging federal agency actions that threaten funding to coerce state conformity with various presidential orders including elections, gender ideology, and diversity, equity, and inclusion.

These federal actions follow processes established by laws that are generally not mirrored in Colorado. For example, a federal agency, vested with specific authority, notifies a grantee of perceived noncompliance, sometimes with a suspension of funding. The grantee has an opportunity to correct the problem or challenge the determination, including seeking judicial review.

RESOLVING "COMPLIANCE" ISSUES

Of course, municipalities first should make every effort to know and comply with applicable laws. State agencies, like the Department of Local Affairs, often provide helpful reminders and assistance when clear errors occur.

But reasonable people can disagree as to the scope and application of the law, including whether state laws apply to home rule municipalities or whether unfunded mandates apply to any local government. Reasonable people can disagree as to whether a municipality is not complying with state law and to the materiality of noncompliance. Most Colorado agencies lack authority or processes to make such determinations in a consistent manner.

Agency actions should be evaluated for express statutory authority, the applicability of the law, and the relationship between a condition and the purpose of the grant. Unless a law clearly establishes state authority, municipalities should scrutinize any claim of non-compliance made by a state agency. This is particularly important in the context of grants on which municipalities rely to provide essential services. As it would with any contract obligation, municipalities also can justifiably question whether a condition was clear and established at the time of acceptance of a grant.

Going forward, municipalities should look closely at any funding application or agreement conditions to ensure consistency with applicable law and be ready to challenge any arbitrary decision-making that could undermine their eligibility for grants.

This column is not intended and should not be taken as legal advice. Municipal officials are always encouraged to consult with their own attorneys.