

LEGAL MEMORANDUM
By Earl Staelin, Attorney at Law
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The City of Boulder, Colorado May Own and Operate Its Own Bank
under Home Rule Authority and Other Provisions of Colorado Law

We have not found any Colorado statutes or legislation expressly authorizing the establishment of a city-owned bank. However, Article XX of the Colorado Constitution grants home-rule powers to municipalities operating under its provisions. CO. CONST. Art. 20 § 6. As home-rule municipalities, each city has:

the powers set out in sections 1, 4 and 5 of this article, and all powers necessary, requisite, or proper for the government and administration of its local and municipal matters, including power to legislate upon, provide, regulate, conduct and control:

...

(e) The issuance, refunding and liquidation of all kinds of municipal obligations, including bonds and other obligations of park, water and local improvement districts;

...

It is the intention of this article to grant and confirm to the people of all municipalities coming within its provisions the full right of self-government in both local and municipal matters and the enumeration herein of certain powers shall not be construed to deny such cities and towns, and to the people thereof, any right or power essential or proper to the full exercise of such right.

The statutes of the state of Colorado, so far as applicable, shall continue to apply to such cities and towns, except insofar as superseded by the charters of such cities and towns or by ordinance passed pursuant to such charters.

CO. CONST. Art. 20 § 6 section 1 further provides the city “shall own, possess, and hold all property, real and personal,” and

may purchase, receive, hold, and enjoy or sell and dispose of, real and personal property; may receive bequests, gifts, and donations of all kinds of property, in fee simple, or in trust for public, charitable, or other purposes; and do all things and acts necessary to carry out the purposes of such gifts, bequests, and donations, with power to manage, sell, lease, or otherwise dispose of the same in accordance with the terms of the gift, bequest, or trust; shall have the power, within or without its territorial limits, to construct, condemn and purchase, purchase, acquire, lease, add to, maintain, conduct, and operate water works, light plants, power plants,

transportation systems, heating plants, and any other public utilities or works or ways local in use and extent, in whole or in part, and everything required therefore, for the use of said city and county and the inhabitants thereof, and any such systems, plants, or works or ways, or any contracts in relation or connection with either, that may exist and which said city and county may desire to purchase, in whole or in part, the same or any part thereof may be purchased by said city and county which may enforce such purchase by proceedings at law as in taking land for public use by right of eminent domain, and shall have the power to issue bonds upon the vote of the taxpaying electors, at any special or general election, in any amount necessary to carry out any of said powers or purposes, as may by the charter be provided.”

Thus, under Article XX, municipalities have broad authority to create or amend charters to govern local and municipal matters, including managing money and assets.

Article XX, § 6 further provides:

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The statutes of the state of Colorado, so far as applicable, shall continue to apply to such cities and towns, except insofar as superseded by the charters of such cities and towns or by ordinance passed pursuant to such charters.

The Charter of the City of Boulder in Section 2 - “Corporate powers-rights-liabilities” provides broad powers for the City that would appear to include the power to establish a public bank, as follows:

The City of Boulder, as its name and limits now are, or may hereafter be,

(a)

Shall have perpetual succession, and shall own, possess, and hold all property, real and personal, now owned, possessed, or held by the said City of Boulder, and shall assume, manage, and dispose of all trusts in any way connected therewith;

...

(d)

Shall have the power, within or without its territorial limits, to construct, condemn and purchase, purchase, acquire, lease, add to, maintain, conduct, and operate waterworks, light plants, power plants, transportation systems, heating plants, and any other public utilities or works or ways local in use and extent, in whole or in part, and everything required therefore, for the use of said city and

the inhabitants thereof; and any such systems, plants, or works or ways, or any contracts in relation or connection with either, that may exist, and which said city may desire to purchase, in whole or in part, the same or any part thereof may be purchased by said city, which may enforce such purchase by proceedings at law, as in taking land for public use by right of eminent domain, and shall have the power to issue bonds upon the vote of the tax-paying electors, at any special or general election, in any amount, within the limit fixed by this charter, necessary to carry out any of said powers or purposes. ²□

(e)

Shall have the power to conduct and engage in, lease, or contract in connection with such business, enterprises, pursuits, and activities as may be determined to be for the common welfare and benefit of the inhabitants of the city, including the acquirement, establishment, and operation within or without the city limits of telephone systems, gas works, ice plants, municipal coal yards and mines, municipal stores and markets, park grounds and systems, and places of recreation, amusement, and instruction, and the ornamentation and improvement of any or all such grounds, systems, and places;

...

(g)

Shall have all powers not denied to said city by the constitution of the State of Colorado, including all powers, privileges, and functions, expressed or implied, which, by or pursuant to the constitution or laws of said state, have been, or could be, granted to or exercised by any city of the first or second class; it being the intention of this article to grant and confirm to the people of the City of Boulder the full right of self-government, in both local and municipal matters, and the enumeration herein of certain powers shall not be construed to deny to said city, and to the people thereof, any right or power essential or proper to the full exercise of such right.

(h)

All powers of the city shall, except as otherwise provided in this charter, be vested in its elective officers, subject to distribution and delegation of such powers as provided in this charter or by ordinance. (emphasis added)

The above provisions of the Boulder City Charter provide broad powers that would appear to allow the establishment of a public bank, especially considering that a public bank would facilitate the achievement of the city's other responsibilities.

In examining Boulder city ordinances relating to finance, we do not find any ordinances that would deny to the city its right as a home rule city to have its own public bank.

In examining the scope of home rule authority, Colorado courts have generally acknowledged that home rule municipalities have the authority to govern local matters. *Town of Telluride v. San Miguel Valley Corp.*, 185 P.3d 161, 165 (Colo. 2008). Specific actions listed in Sections 1 through 6 of Art. XX of the Colorado Constitution were not intended to be an “enumeration of powers conferred, but simply the expression of a few of the more prominent

powers municipal corporations are frequently granted.” *Id.* Consequently, courts have concluded that the Section 6 language establishes that home rule cities have plenary power over local and municipal matters. *Id.* at 166.

While our review of municipal ordinance cases has not yielded any Colorado court decision on the establishment of a city-owned bank, Colorado courts have generally validated a wide variety of ordinances based on the Section 6 language. Similar to *Telluride*, while the establishment of a bank is not explicitly listed as a home rule power, Section 6’s “all powers” language will likely be broad enough to cover such an ordinance. In addition, we have not found any Colorado statutes expressly forbidding the creation of such bank. Accordingly, we conclude home rule cities in Colorado will arguably have the authority to establish a city-owned bank. We have not researched the issue as to whether non-Home Rule cities and counties could lawfully have their own banks, and we are not saying they could not do so at this time. Boulder County is not a home rule county, and so this issue is relevant to the county.

In conclusion, based upon its home rule powers, we believe that the City of Boulder, acting through its City Council and/or through its citizens by referendum or ballot initiative, could enact a City Charter amendment or municipal legislation to establish a public bank and then apply for a charter from the Colorado State Banking Board. Our tentative opinion is that a city-owned bank would be regulated by the State Division of Banking and Banking Board under applicable laws and regulations. The Colorado legislature has made extensive efforts to regulate Colorado banks uniformly. Thus, it appears probable that if a city-owned bank attempted substantial variations of its operation from the provisions of state legislation they would likely be preempted by the state statutes governing banking in Colorado.

Additional Issues

We will also comment briefly here on several other legal issues that will probably arise in in connection with the effort to establish a public bank for the City of Boulder. The state of Colorado and City of Boulder do impose some requirements for state chartered banks that would need to be addressed,

Requirement of 102% Collateral for Public Deposits. The Colorado Public Deposit Protection Act, C.R.S. § 11-1.5-101 et seq. and a Boulder City Ordinance 2-2-4 requires state-chartered banks to maintain 102% collateral for public deposits, such as deposits from a city. While it might be argued that this requirement does not apply to a public bank because the purpose of this requirement was to protect government funds deposited in private banks, whereas a city-owned bank would be holding its own money, given that the public bank would be a dba of the city. In the event the rule is held to apply to a public bank, such collateral could probably be provided at relatively low cost by the Federal Home Loan Bank in Topeka, Kansas, which serves Colorado. The FHLB can issue letters of credit for such purpose at reasonable cost. This issue will be taken up in more detail in a separate memorandum.

FDIC Membership. Another question that will need to be addressed is whether the public bank would need to be a member of the Federal Deposit Insurance Corporation. If the bank had only one depositor, the city of Boulder, this requirement would not make much sense because the

maximum coverage for each ownership category of a depositor under the FDIC is \$250,000. Under our model for a public bank for the City of Boulder, the bank would start with \$240 million in deposits. This means that if there was only one ownership category, \$250,000 would only cover 0.14% of the banks' deposits, but even with multiple ownership categories the coverage would be relatively worthless. The publicly owned Bank of North Dakota (BND) is not covered by the FDIC and doesn't need that coverage. The fact the BND is not required to obtain FDIC coverage resulted from the fact that BND was established in 1919, and therefore preceded the formation of the FDIC.

The TABOR Amendment. We see that under § 96 of your Municipal Code the City of Boulder "de-Bruced" in 1996 by making revenue and expenditures of the City exempt from the limits of the TABOR Amendment. Therefore, there would be probably be no need to establish a Boulder public bank as a "TABOR Enterprise." For cities that have not de-Bruced, or at least not completely, and for the state of Colorado, which has not de-Bruced, we have recommended that a public bank, as a self-sustaining "enterprise", be qualified as a "TABOR enterprise", which is not difficult. Under the TABOR Amendment, such banks would be expressly exempt from TABOR income and expenditure limits.

CONCLUSION

Under the principles of home rule as applied by the Colorado Constitution, case law, and the City of Boulder Charter and Municipal Code, it appears that Boulder could establish a public bank. It also appears that other provisions of Colorado and Boulder law applicable to state-chartered banks would not prohibit Boulder from having its own public bank, but might require some accommodation in order to best serve the purposes of and meet the requirements of such laws.

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