



CITY OF COLORADO SPRINGS

We Create Community

COUNCIL MEETING DATE: January 12, 2010

DATE: December 30, 2009

TO: Honorable Mayor and Members of City Council

FROM: Patricia K. Kelly, City Attorney/Chief Legal Officer

PKK

SUBJECT TITLE: Codification of Issue 300

Strategic Goal this item supports:



BACKGROUND:

General: The proposed Article 10 of Chapter 14 implements Issue 300. Prior to and after the election, the drafter and the sponsors of Issue 300, some members of the public, and media reports provided information relating to the intent of Issue 300. This information was divergent and it was clear that not everyone read the language of Issue 300 to have one meaning and effect. Staff used this information, the direction of City Council, and the language of Issue 300 to draft the proposed ordinance.

Issue 300 has two principal components, one found in each of its two sentences. The first sentence provides in part that, after a phase-out period, "payments" from an enterprise to the City shall cease. The second sentence prohibits "loans, gifts, and subsidies" between an enterprise and the City or another enterprise.

There would be no difficulty in complying with these requirements in the case of private business entities. Each entity would be permitted to buy and sell the goods and services of the other and to enter into agreements, to share services, and take advantages of economies of scale.

Compliance is, however, difficult for the City and its enterprises because there is only one legal entity recognized by the City Charter and state law: the City. Because the City and its enterprises are recognized as one legal entity, it is impossible simultaneously to prevent payments from an enterprise to the City and to prevent the City as well as an enterprise from providing loans, gifts or subsidies in the absence of a

construction of Issue 300 to harmonize its two principle components. Otherwise, Issue 300 would, in effect, eliminate all enterprises in their entirety. This construction would attribute or serve a purpose unrelated to the central theme of the initiative: restructuring the relationship between the City and its enterprises so that the enterprises operate into the future more like private businesses.

How the Conflict Arises: The City of Colorado Springs, as a home rule city and Colorado municipal corporation, is authorized to create enterprise operations. An enterprise is a City-owned business and is not a separate legal, business, or governmental entity. Because the City and its enterprises are recognized as one legal entity by law, actions undertaken by an enterprise are considered to be undertaken by the City. By way of example, enterprise contracts are deemed to have been executed by the City on behalf of the enterprise. Revenue received from the business activities of the enterprise fund the contract, but the City is a party to the contract and City resources may be called upon to administer or enforce the contract, to assure the contract complies with the law and to be satisfied that the contract does not expose the City or its enterprise to unintended liability. If the enterprise does not transfer funds to pay for the administrative services provided by the City, the City municipal government subsidizes the enterprise.

In addition to contracts, all real property interests and enterprise business assets are held in the name of the City. All enterprises benefit from their use and occupancy of City-owned real property, easements, buildings, infrastructure, equipment, personal property and other assets. It would, for example, be impossible for the golf enterprise to function without using the real property that was bequeathed to or purchased by the City.

Likewise, all enterprise employees are City employees because, again, there is only one legal entity. See, e.g., Charter § 6-10. Although these employees are funded by the business operations of the enterprise, the City must assure that applicable employment laws are followed by the enterprise so that the City is not found to be in violation. Compliance monitoring requires use of City resources. When, for example, an enterprise employee injures a member of the public in an accident related to the enterprise operations, the enterprise may be protected by the City's "governmental immunity," a benefit that is not available to private business entities generally. Certain services are also provided by the City or its enterprises to one another in order to benefit from economies of scale. Shared services reduce the business expenses of the enterprise and the cost of running the City's municipal government. These are but a few examples of the City's efforts to assure the efficient functioning of its municipal government and enterprises.

Unless the language of Issue 300 is construed to harmonize¹ its two sentences, it is impossible to implement the initiative without either violating the first sentence or the second sentence: (i) if no payments from an enterprise are made to the City, in compliance with the first sentence, the City would provide subsidies and gifts to the

¹ If the two sentences cannot be harmonized and the conflict resolved, a court would likely conclude that Issue 300 is unenforceable and would set it aside. This is a step that courts will take only as a last resort.

enterprise due to the enterprise's governmental status and its relationship to the City; and (ii) if the City receives payment from the enterprise for the City's services and benefits, in compliance with the second sentence, the City avoids providing a subsidy or gift to the enterprise, but violates the first sentence of Issue 300 by permitting the enterprise to make a "payment" to the City.

Notwithstanding this internal conflict in the language of Issue 300, the two sentences of Issue 300 can be harmonized so that the intent of the voters in adopting Issue 300 can be implemented to the extent possible. Staff has reviewed the same materials that were presented to City Council relating to the intent of the drafter and sponsors of Issue 300 and the intent of the voters in adopting Issue 300. Based upon this review, it appears the voters intended: (i) that an enterprise operate as a business entity that stands or falls based upon the economic viability of the service it provides; (ii) that enterprise customer fees, rates, or charges be set in an amount that covers the costs of doing business; and (iii) that the enterprise not be used as a source of uncompensated cash, funds, or other benefits to the City's general fund. Staff believes that the proposed ordinance to implement Issue 300 carries out the intent of the voters in adopting the initiated measure.

The proposed ordinance is drafted to permit the enterprises to engage in their business activities without providing uncompensated financial support to the City or without receiving uncompensated financial benefit or support from the City. At the same time, the proposed ordinance recognizes the City and its enterprises are one legal entity. The proposed ordinance recognizes that exchange of "value for value" does not result in a "payment" and is not a "subsidy" or a "gift." This follows the apparent intent of the voters that an enterprise operate as a business by paying for the services and assets it receives from the City and at the same time by not serving as a source of uncompensated revenue or benefits for the City.

Under the proposed ordinance, for example, if the City had a piece of heavy equipment with a fair market value of \$25,000, the City could "sell" the equipment to an enterprise for \$25,000 cash. Likewise, Colorado Springs Utilities provides utility services to the City in exchange for cash. In those cases, neither the City nor the enterprise is benefited or harmed. Each transferred something of value for another asset of value. The proposed ordinance reaches the same result with respect to all other services, benefits, and assets that result from the City's and enterprise's status as one governmental entity. So long as value is exchanged for value between an enterprise and the City, there is no violation of Issue 300. In other words, enterprises would operate in the same way that private business entities do.

Definitions in the Proposed Ordinance: To implement Issue 300 and to adhere to the intent of the voters in adopting Issue 300, staff has determined that it is necessary to define various terms that are used in the proposed ordinance. The following discussion explains how and why these terms are used.

ALL YEARLY SAVINGS PASSED ON AS REDUCTIONS TO EACH CUSTOMER BILL IN DOLLAR AMOUNTS AS EQUAL AS POSSIBLE, as used in the proposed ordinance,

means enterprise fees, rates, and charges as established in the regular course of business after consideration of relevant financial factors, including any savings resulting from the phase-out of enterprise payments to the City.

This phrase in Issue 300 is defined to make it clear that once a fee, rate, or a charge is established, after considering all relevant financial factors, the enterprise will experience the savings and the savings are deemed to have been passed on to the customers of the enterprise. It is impossible for the savings resulting from the phase-out of enterprise payments to the City to result in an absolute reduction in the fees, rates, or charges that the enterprise imposes on customers if other financial factors may necessitate an increase that is greater than the savings resulting from the phase-out.

For example, green fees established for the golf enterprise may be increased in a particular year because labor costs or the costs of capital improvements may be greater than the reduction in fees resulting from the fact that savings to the enterprise resulting from the phase-out of payments to the City as required by Issue 300.

ASSET is defined broadly in the proposed ordinance to make it clear that any "thing" of value is an asset. This definition is necessary to prevent a subsidy or gift from the City to an enterprise or vice versa that would result from a narrow definition. If there is a benefit, whether direct or indirect, tangible or intangible, there is an asset. The value of certain assets cannot be directly measured. The definition makes it clear that the inability to measure the value of an asset does not negate the fact that there is an asset. City Council establishes the value of these assets that cannot be directly measured through the budget process.

CITY is defined to exclude enterprises. Issue 300 relates to the relationship between "the City" and "enterprises" and does not address the status of both as one legal and governmental entity. The City Charter recognizes the legal status of the City and its enterprises, and City Code § 1.1.106 defines "City", for purposes of the City Code, to include its enterprises "unless the meaning is excluded by express provision." The definition of City in the proposed ordinance expressly excludes the enterprises for the purpose of Issue 300 only.

CONSIDERATION means "anything of value," and includes any direct or indirect service, benefit, cash, or other tangible or intangible asset. "Consideration" and "asset" are, for all practical purposes, identical. However, both words are defined to make the ordinance easier to understand.

ENTERPRISE is defined by looking to the Taxpayer Bill of Rights found in the Colorado Constitution and the City Charter. The definition makes it clear that all municipal enterprises as well as Colorado Springs Utilities and the Memorial Health System are "enterprises." Under the Constitution and the Charter, certain conditions must be met before a City's business activities qualifies as an "enterprise," conditions that may or may not be within the control of the City. The definition proposed in the ordinance makes it clear that the City retains the authority to take action to disqualify a business activity from qualifying as an enterprise. For example, under the State Constitution, a

City-owned business is not an enterprise if the business is not authorized to issue its own revenue bonds. If the City were to withhold this authority from its business activities, the business would not be an enterprise.

GIFT means a gratuitous benefit or transfer of an asset without consideration. Because a transfer of funds as a "payment in lieu of taxes," or "PILT", is made without consideration, that payment is a gift and is precluded under Issue 300.²

"Gift" does not include funds held in a fiduciary capacity. For example, the City holds the Evergreen and Fairview Cemetery Endowment funds for the benefit of the cemeteries. With this clarification, a transfer of endowment funds to the Cemetery enterprise is not a gift.

"Gift" does not include the transfer of the remaining surplus of the net earnings of Colorado Springs Utilities to the general revenues of the City if the transfer is authorized in the annual budget and appropriation ordinance adopted by City Council, as provided in Charter § 6-40(b). An initiated ordinance cannot supersede the charter of a city. This definition makes it clear that Issue 300 will not be construed to conflict with the Charter.

"Gift" does not include a transfer of funds to satisfy an obligation existing as of the date Issue 300 became effective, or a transfer of funds required by law. This provision draws a distinct line between obligations prior to the adoption of Issue 300 and those incurred after its adoption. A commitment made prior to adoption should be fulfilled even though the same type of commitment would be impermissible after the adoption of Issue 300. A transfer required by law would include the payment of a judgment against an enterprise which the City is required to pay, or vice versa.

"Gift" does not include a transfer of funds for the purpose of making an investment, or a transfer of funds that represents a return on an investment. This provision places enterprises on parity with private business entities, and thus permits the City to invest funds in an enterprise and receive a return on that investment.

"Gift," "payment," and "subsidy" have substantially the same meanings.

LOAN is defined by turning to the language of the State and City TABOR provisions prohibiting debt. This provides consistency and reflects that there is no loan unless there is a debt.

PAYMENT means the transfer of cash, funds, or other benefits without consideration, and is included within the definition of "gift."

SUBSIDY means providing a benefit without consideration or transferring an asset without consideration, and is included within the definition of "gift."

² A PILT is a payment that is made solely because taxes are not paid and is a transfer of funds made without consideration. This is not the same as a transfer of funds in exchange for consideration where the value of the consideration is not clear but is calculated based upon taxes that the enterprise would have paid if it were a private business entity.

STAKEHOLDER PROCESS: The proposed draft ordinance was distributed for review and comment to the City Manager, Assistant City Managers, finance staff, and municipal enterprises; Utilities CEO and finance staff; Memorial Health System CEO and finance staff; City Auditor; City Clerk; and City Attorney staff assigned to the enterprises. In addition, this Office has met with all the enterprises to discuss the proposed draft ordinance.

ALTERNATIVES: (1) approve the proposed ordinance as presented, (2) approve the proposed ordinance as modified, or (3) take no formal action to define, clarify, or implement Issue 300.

RECOMMENDATION: Pass the proposed ordinance as presented or as modified.

c: City Manager
Colorado Springs Utilities CEO
Memorial Health System CEO
Municipal Enterprise Managers
Assistant City Manager
Public Communications

Attachment: Ordinance
Legal Opinion

ORDINANCE NO. 10-_____

AN ORDINANCE ADDING A NEW ARTICLE 10 (INITIATED ORDINANCE PERTAINING TO ENTERPRISES) OF CHAPTER 14 (MUNICIPAL ENTERPRISES) OF THE CODE OF THE CITY OF COLORADO SPRINGS 2001, AS AMENDED, PERTAINING TO ENTERPRISES

WHEREAS, at the November 3, 2009 Coordinated Election the electorate of the City of Colorado Springs approved an initiated ordinance, "Issue 300"; and

WHEREAS, Issue 300 pertains to enterprises that operate as municipal-owned businesses; and

WHEREAS, Issue 300 requires the phase out of payments from an enterprise to the City over a period not to exceed eight (8) years, and effectively prohibits payments from an enterprise to the City after the phase out period; and

WHEREAS, Issue 300 requires that the savings realized from the phase out of payments from an enterprise to the City be passed on to customers as reductions on each customer bill; and

WHEREAS, Issue 300 expressly prohibits enterprises and the City from providing loans, gifts, and subsidies to each other, but does not prohibit the exchange of assets, in-kind services, or a transfer of funds as consideration for providing tangible or intangible assets or sole-source or shared services that provide benefits or otherwise add value; and

WHEREAS, City Council has received information concerning Issue 300 from its author and sponsors and from members of the public through presentations at City Council meetings, telephone calls, e-mails, letters, and media coverage; and

WHEREAS, this information gave insight into these individuals' beliefs concerning the meaning and effect of Issue 300; and

WHEREAS, there was no unanimous public agreement on the meaning and effect of Issue 300; and

WHEREAS, City Council concludes that the voters intended for enterprises to function in the same manner as for-profit businesses and did not intend for the City to subsidize the enterprises in any manner; and

WHEREAS, the City of Colorado Springs, a home rule city and Colorado municipal corporation, exists as one legal entity that consists of the municipal government and its enterprises; and

WHEREAS, as City-owned businesses, enterprises are subject to certain laws and standards that provide benefits beyond those available to private business entities; and

WHEREAS, for-profit business entities pay for City services through fees, rates, and charges and by remitting municipal taxes; and

WHEREAS, the City provides subsidies to qualifying not-for-profit entities by way of exemption from municipal taxes; and

WHEREAS, as City-owned businesses, enterprises are not subject to municipal taxes, and this exemption results in the City subsidizing enterprises by providing or making available City police and fire services and other City services and assets to enterprises without the payment of municipal taxes; and

WHEREAS, to avoid a violation of Issue 300 by the City subsidizing an enterprise, an enterprise must provide consideration to the City for the City services and assets made available to or received by the enterprise; and

WHEREAS, the exchange consideration to avoid a subsidy could be construed as a payment; and

WHEREAS, savings from the phase out of enterprise payments to the City may not necessarily result in a reduction in customer bills because other financial factors may require fees, rates, and charges to be increased more than the savings realized from the phase out of payments to the City; and

WHEREAS, without the benefit of defined terms in the text of Issue 300, the prohibition of payments mandated in the first sentence of Issue 300 conflicts with the prohibition against the provision of gifts and subsidies between an enterprise and the City mandated in the second sentence of Issue 300; and

WHEREAS this conflict between the two sentences of Issue 300 can be resolved by defining the terms used in the text of Issue 300; and

WHEREAS, Issue 300 contains words and phrases that conflict with the City Charter, including but not limited to §§ 3-10(d), 6-40(b), 7-30(c), 7-90, 13-80, and 13-90; and

WHEREAS, the Colorado Court of Appeals in *Vail Associates v. Bd. of Assessment Appeals*, 765 P.2d 593 (Colo. App. 1988) and the Colorado Supreme Court in *Flanders v. City of Pueblo*, 114 Colo. 1, 160 P.2d 980 (1945) upheld a city council's obligation to ensure that ordinances conform to its city charter and upheld a city's authority to harmonize conflicting provisions; and

WHEREAS, because Issue 300 is subject to multiple interpretations and conflicts with the City Charter, it is necessary to define terms to implement the intent of the voters, to give meaning to Issue 300 as a whole, and to construe Issue 300 to harmonize its provisions with the City Charter.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF COLORADO SPRINGS:

Section 1. That a new Article 10 (Initiated Ordinance Pertaining to Enterprises) of Chapter 14 (Municipal Enterprises) of the Code of the City of Colorado Springs 2001, as amended, is hereby created to read as follows:

SECTION:

- 14.10.101: Legislative Declaration
- 14.10.102: Initiated Ordinance
- 14.10.103: Definitions
- 14.10.104: General

14.10.101: LEGISLATIVE DECLARATION:

At the November 3, 2009, Coordinated Election, the voters of Colorado Springs approved an initiated ordinance, "Issue 300."¹ The initiated ordinance presented to the voters did not define terms or give guidance for its implementation. The wording of Issue 300 is susceptible to more than one meaning. City Council has considered evidence pertaining to the effect and meaning of Issue 300 from its author, its proponents, and members of the public. However, in accord with Colo. Const. Art. XX, § 6, Charter §§ 1-30(a) and 3-130, City Code § 1.1.104 and well-settled case law², it falls to the City Council to enact legislation to implement and further the purposes of Issue 300 absent defined words and phrases in the initiated ordinance presented to the voters. To that end, the City Council hereby implements the intent of the voters by giving meaning to Issue 300 as a whole and construing Issue 300 to harmonize its provisions with the City Charter.

14.10.102: ISSUE 300³:

"Excluding sales and use taxes forwarded from enterprise customers, all enterprise payments to the city shall phase out in eight or fewer equal yearly steps starting in January, 2010, with all yearly savings passed on as reductions to each customer bill in dollar amounts as equal as possible. Hereafter, all loans, gifts, and subsidies between an enterprise and the city or another enterprise are prohibited."

14.10.103: DEFINITIONS:

The following definitions apply to this Article:

¹ The Coordinated Election results were certified by the El Paso County Clerk and Recorder to the Colorado Secretary of State on November 16, 2009. There were 53,290 votes for the initiated ordinance, 44,402 votes against the initiated ordinance.

² *City of Colorado Springs v. Securcare Self Storage, Inc.*, 10 P.3d 1244 (Colo. 2000); *People v. Pickens*, 91 Colo. 109, 12 P.2d 349 (1932); *Flanders v. City of Pueblo*, 114 Colo. 1, 160 P.2d 980 (1945).

³ Notice of Initiated Ordinance Election Results Ordinance No. 09-137, dated December 2, 2009.

“ALL YEARLY SAVINGS PASSED ON AS REDUCTIONS TO EACH CUSTOMER BILL IN DOLLAR AMOUNTS AS EQUAL AS POSSIBLE” means enterprise fees, rates, and charges as established in the regular course of business after consideration of relevant financial factors, including any savings resulting from the phase out of enterprise payments to the City.

ASSET means a tangible or intangible asset regardless of whether the asset provides direct or measurable benefits to the City or the enterprise. “Asset” includes, but is not limited to: (i) cash and other funds; (ii) services, including studies and reports, provided by consultants, (iii) police and fire services consumed or made available, (iv) street and traffic services consumed or made available, (v) all other City services used, consumed or made available, (vi) memberships in organizations that provide technical advice and services, and (vii) any other asset that confers value or is intended to confer value. “Asset,” as the term relates to a specific enterprise, includes only the proportional share of the total cost of an asset that is allocated to the enterprise by way of the budget adopted by City Council.

CITY means the municipal government of the City of Colorado Springs, Colorado. For purposes of this article only, “City” does not include enterprises of the City.

CONSIDERATION means anything of value, and includes any direct or indirect service, benefit, cash, or other tangible or intangible asset, regardless of whether or how the service, benefit, or other tangible or intangible asset can be measured. Consideration may be measured, in whole or in part, by the amount of taxes that would have been paid by the enterprise if the enterprise were a taxable entity.

ENTERPRISE means a business function that (i) qualifies as an “enterprise” under Colo. Const. art. X, § 20(2)(d), (ii) qualifies under Charter § 7-90(b)(5), and (iii) is classified as an enterprise by the City. Enterprise includes the municipal enterprises, Colorado Springs Utilities, and the Memorial Health System.

GIFT means a benefit or a transfer of an asset without consideration. “Gift” includes the transfer of funds made solely because an enterprise is exempt from the obligation to pay taxes. “Gift” does not include a transfer of funds if the funds are held in a fiduciary capacity. “Gift” does not include the transfer of funds to the general revenues of the City of the remaining surplus of the net earnings of Colorado Springs Utilities if the transfer is authorized in the annual budget and appropriation ordinance adopted by City Council, as provided in Charter § 6-40(b). “Gift” does not include a transfer of funds to satisfy an obligation existing as of the date Issue 300 became effective, or a transfer of funds required by law. “Gift” does not include a transfer of funds for the purpose of making an investment, or a transfer of funds that represents a return on an investment. “Gift” does include payments and subsidies.

LOAN means the undertaking of a financial obligation of the City by an enterprise, or the undertaking of a financial obligation of an enterprise by the City, where the undertaking extends past the fiscal year. “Loan” does not include the undertaking of an obligation that extends past the fiscal year if the obligation is secured with adequate present cash reserves irrevocably pledged and held for all future payments.

PAYMENT means the transfer of assets or other benefits without consideration.

SUBSIDY means providing a benefit or transferring an asset without consideration.

14.10.104: GENERAL:

A. This Article 10 applies to the City, all municipal enterprises, Colorado Springs Utilities, and Memorial Health System.

B. Any relevant factors may be considered when valuing consideration. Relevant factors may include taxes, fees, rates, and charges that an enterprise would be required to pay the City if the enterprise were a for-profit business.

C. Issue 300 shall not be read to conflict with Charter § 3-10(d) or to prohibit the payment of compensation to the City Attorney, City Clerk, City Treasurer, and City Auditor from being apportioned among the enterprises.

D. Issue 300 shall not be read to conflict with Charter § 6-40(b) or to prohibit the appropriation of any remaining surplus of the net earnings of Colorado Springs Utilities to the general revenues of the City by City Council in its annual budget and appropriation ordinance.

E. Issue 300 shall not be read to conflict with Charter § 7-30(c) or to prohibit City Council from apportioning its budget among the City's general fund, Colorado Springs Utilities, and Memorial Health System based upon a reasonable allocation method as City Council may determine.

F. Issue 300 shall not be read to conflict with Charter § 7-90 or to prohibit the City from creating or maintaining enterprise operations.

G. Issue 300 shall not be read to conflict with Charter §§ 13-80 and 13-90 or to prohibit the City Attorney and the City Attorney's Assistants from serving as the legal advisor to the City and the enterprises.

Section 2. This ordinance shall be in full force and effect from and after its passage and publication as provided by Charter.

Section 3. Council deems it appropriate that this ordinance be published by title and summary prepared by the City Clerk and that this ordinance shall be available for

inspection and acquisition in the office of the City Clerk.

Introduced, read, passed on first reading and ordered published this ____ day of _____, 2010.

MAYOR

ATTEST:

CITY CLERK