No. 26844

IN THE

SUPREME COURT

OF THE

STATE OF COLORADO

The City of Louisville, a municipal corporation, and Anthony Delpizzo, Vivian Dhieux, Frank Domenico, Eugene Di Carlo, Howard Berry, Lawrence Caranci, and John Waschek, in their official capacities as members of the Louisville City Council and constituting the Louisville City Council, Petitioners, v. The District Court in and for the County of Boulder, State of Colorado, and the Honorable William D. Neighbors, Judge, Respondents.	ORIGINAL PROCEEDING

BRIEF OF THE COLORADO MUNICIPAL LEAGUE AS AMICUS CURIAE

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INTEREST OF THE COLORADO MUNICIPAL LEAGUE

One of the most controversial political issues before the Colorado General Assembly in recent years has been the relationship among state and local governments in land use planning and regulation. The land use controversy emerged full scale with the introduction and defeat of Senate Bill 377 during the 1973 session of the General Assembly. It culminated during the 1974 session with the adoption of House Bill 1041 [C.R.S. 1963, 106-7-101 et seq. (1974 Session Laws), hereinafter H.B. 1041], and has since continued to a lesser extent through the introduction and defeat of several land use measures during the 1975 session of the General Assembly. The central issue presented in this case is whether the General Assembly, through adoption of H.B. 1041, authorized county, state or judicial control over the exercise of municipal annexation or zoning powers. Thus this case represents a shifting of the land use controversy from the political arena to the judicial system.

The Colorado Municipal League, an association of 228 cities and towns located throughout the state, appears as amicus curiae because the central issue presented in this case is of significant interest to and may have a substantial impact upon Colorado's municipalities statewide. Specifically, a ruling by this Court that use of the word "development" in H.B. 1041 includes the exercise of municipal annexation and zoning powers could -- and likely would -- lead to an assertion that, under various circumstances, a municipality must obtain a county permit prior to the exercise of its annexation powers. See C.R.S. 1963, 106-7-501 (1974 S.L.). Additionally, such a ruling may lead to assertions that H.B. 1041 authorizes county or state control over other types of "boundary adjustments" such as municipal incorporations and consolidations and the creation of special districts.

The existence of such control, in the form of H.B. 1041, is at issue in this case. Having actively sought a legislative resolution to the land use controversy in Colorado and having observed the legislative progress toward such a resolution, the League submits that neither the language nor the legislative history of H.B. 1041 supports assertions of such control.

STATEMENT OF THE ISSUES

The League adopts the statement of the issues appearing in the brief of the City of Louisville.

STATEMENT OF THE CASE

The League adopts the statement of the case appearing in the brief of the City of Louisville.

SUMMARY OF THE ARGUMENT

THE BOULDER DISTRICT COURT LACKED JURISDICTION UNDER HOUSE BILL 1041 OR ANY OTHER APPLICABLE LAW TO RESTRAIN OR ENJOIN THE CITY OF LOUISVILLE FROM ENACTING THE PROPOSED ANNEXATION AND ZONING ORDINANCES:

I. The Legislative History and Activity Surrounding Enactment of H.B. 1041 Shows that the General Assembly Did Not Intend H.B. 1041 to Authorize State, County or Judicial Control Over the Exercise of Municipal Annexation or Zoning Powers.

II. The Language of H.B. 1041 Provides No Jurisdictional Basis for a Court to Restrain or Enjoin the Exercise of Municipal Annexation or Zoning Powers.

III. No Circumstances Exist to Exempt this Proceeding from the Established Doctrine that a Court May Not Restrain or Enjoin the Exercise of Municipal Legislative Powers.

ARGUMENT

THE BOULDER DISTRICT COURT LACKED JURISDICTION UNDER HOUSE BILL 1041 OR ANY OTHER APPLICABLE LAW TO RESTRAIN OR ENJOIN THE CITY OF LOUISVILLE FROM ENACTING THE PROPOSED ANNEXATION AND ZONING ORDINANCES:

I. The Legislative History and Activity Surrounding Enactment of H.B. 1041 Shows that the General Assembly Did Not Intend H.B. 1041 to Authorize State, County or Judicial Control Over the Exercise of Municipal Annexation or Zoning Powers.

An understanding of the legislative history and activity surrounding the adoption of H.B. 1041 is essential to a determination of the specific issues presented in this case. Respondents do not argue that the explicit language of H.B. 1041 grants jurisdiction to the District Court to restrain the exercise of municipal annexation or zoning powers. They argue, instead, that such jurisdiction results in part from a proper interpretation of the language and purpose of the bill. Statutory interpretation, however, must be governed by legislative intent. Frohlick Crane Service, Inc. v. Mack, 182 Colo. 34, 510 P.2d 891 (1973). The lack of any legislative intent to grant such jurisdiction to the Court through H.B. 1041 is apparent upon viewing H.B. 1041 within its historical perspective.

The political controversy surrounding the proper relationship among state and local governments in land use planning and regulation emerged full scale in 1973 with the introduction of Senate Bill 377 (First Regular

Session of the Forty-ninth General Assembly). Attempting to define a comprehensive state role in the land use decision-making process, S.B. 377 would have established a "state commission" and granted the commission broad authority in land use matters. In part, the bill set forth certain "areas or activities of state concern" (similar to several of the "areas or activities of state interest" to be set forth a year later in H.B. 1041). Additionally, S.B. 377 would have granted the state commission: (1) specific authority to review and approve or disapprove certain municipal or county zoning proposals in the Front Range area; and, (2) specific authority to review and approve or disapprove every proposed "boundary adjustment" in the state. ("Boundary adjustments" were specifically defined in the bill to include annexations, detachments, incorporations and consolidations involving a municipality or special district.) The bill also specifically amended the "Municipal Annexation Act of 1965", C.R.S. 1973, 31-8-101 et seq., to provide that no annexation would be effected until approved by the state commission. After lengthy and often heated debate, the General Assembly rejected S.B. 377.

The land use controversy and debate, however, did not fade with the rejection of S.B. 377. House Bill 1041 was introduced during the next (1974) session of the legislature (Second Regular Session of the Forty-ninth General Assembly) in another attempt to resolve the controversy. As introduced, the bill in part created a "state land appeals board" and granted the state board authority to: (1) designate certain areas or activities of state interest; and (2) review appeals from local government orders granting or denying permits for development in the designated areas of state interest or for the conduct of designated activities of state interest. Following extensive review and debate by the General Assembly, H.B. 1041 was substantially rewritten and finally adopted.

As enacted, H.B. 1041 provided in general for the identification and designation by local governments (counties and municipalities) of certain areas or activities of state interest, and for the issuance by local governments of permits to develop in designated areas of state interest or to conduct designated activities of state interest. The Colorado Land Use Commission was granted certain initiating and review authority under the bill as enacted, but substantially less authority than was proposed to be granted to the "state land appeals board" under H.B. 1041 as introduced, and certainly less than was proposed to be granted to the "state commission" in S.B. 377.

Most importantly, the scope of land use matters regulated by H.B. 1041 was substantially restricted from the scope of matters contained in S.B. 377. H.B. 1041 contains no mention of "boundary adjustments" and specifically contains no mention of municipal annexations. It contains no amendments to the "Municipal Annexation Act of 1965". Additionally, it contains no mention of state review or review by any other governmental entity over municipal zoning proposals, whether located along the Front Range or elsewhere in the state. The League submits that the omission of any mention in H.B. 1041 of control over annexations or zoning proposals was intentional on the part of the legislature, resulting from a process of debate and compromise over a highly controversial political issue.

A brief review of legislation rejected or approved by the General Assembly contemporaneously with or subsequent to the adoption of H.B. 1041 lends additional support to the conclusion that the legislature did not intend H.B. 1041 to provide a method of control over the exercise of municipal annexation powers. Contemporaneously with the adoption of H.B. 1041 in 1974, the General Assembly:

* Rejected House Bill 1156 which in part would have restricted municipal annexations and incorporations and the formation and expansion of special districts ("boundary adjustments") through a comprehensive planning process.

* Adopted for submission to the state's electors Senate Concurrent Resolution No. 7, an amendment to the state Constitution placing certain restrictions on the annexation authority of the City and County of Denver, and more limited annexation restrictions on the cities of Lakewood and Aurora. [This amendment was approved by the state's electors in the 1974 general election, along with an initiated amendment (so-called "Poundstone" amendment) to the state Constitution placing additional restrictions on the annexation powers of the City and County of Denver.]

In its 1975 session, subsequent to the adoption of H.B. 1041, the General Assembly:

* Rejected Senate Bill 429 which would have granted counties specific authority to review and approve or disapprove all municipal annexations, except the annexation of land owned by a municipality.

* Rejected House Bill 1092 which in part would have placed restrictions on "boundary adjustments" -- municipal annexations and incorporations and the formation and expansion of special districts.

From the above review of legislative activity, an argument that H.B. 1041 was intended to or should be "interpreted" as providing a basis for control over the exercise of municipal annexation or zoning powers is unsupportable, particularly in light of the highly controversial nature of the subject when it was before the General Assembly and the lack of any explicit mention in H.B. 1041 of control over the exercise of such powers. Had the General Assembly intended to establish such control, it would have been a simple matter for it to have so stated.

In light of the legislative history, an interpretation of H.B. 1041 as providing such control would constitute "judicial legislation". Industrial Commission v. Carpenter, 102 Colo. 22, 76 P.2d 418 (1938), and Littleton v. Wagenblast, 139 Colo. 346, 338 P.2d 1025 (1959). Moreover, such an interpretation would violate the established doctrine that the judiciary cannot read into an act something which is clearly not present or which the legislature has not seen fit to express. Gallegos v. Tinsley, 139 Colo. 157, 337 P.2d 386 (1959); and Hart-Bartlett-Sturtevant Grain Company v. Burton, 133 Colo. 482, 297 P.2d 267 (1956).

II. The Language of H.B. 1041 Provides No Jurisdictional Basis for a Court to Restrain or Enjoin the Exercise of Municipal Annexation or Zoning Powers.

Respondents' primary argument for jurisdiction in the District Court is based upon an interpretation of the word "development", as it is used in H.B. 1041. The Colorado Land Use Commission argues that the word "development" includes the exercise of municipal zoning power. Boulder County (but not the Land Use Commission) argues that the word "development" includes the exercise of municipal annexation power. In its order temporarily restraining the City of Louisville from adopting its proposed annexation and zoning ordinances, the Boulder District Court agreed with both and ruled that "development" included the exercise of annexation and zoning powers (pages 2-3 of Boulder District Court order).

Specifically, respondents' argument and the District Court's order are based upon an interpretation of the word "development" as it is used in paragraph (b) of 106-7-407(1). Paragraph (a) of 106-7-407(1) authorizes the Land Use Commission to submit a formal request to a local government

(defined in 106-7-102(2) as a municipality or county) to take action with regard to a specific matter which the Commission believes to be of state interest. (A "matter of state interest" is defined in 106-7-102(4) to mean "an area of state interest or an activity of state interest or both".) After receipt by the local government of the Commission's request, paragraph (b) of 106-7-407(1) provides that:

> "...no person shall engage in development in the area or conduct the activity specifically described in said request until the local government has held its hearing and issued its order relating thereto."

The Commission did submit requests pursuant to 106-7-407(1)(a) to both Boulder County and the City of Louisville to take action with respect to certain areas or activities considered by the Commission to be of state interest. Since such request was submitted, respondents argue that the word "development" in the above-quoted portion of paragraph (b) includes the exercise of annexation and zoning powers by the City and thus, they argue, the City is prohibited from adopting the annexation and zoning ordinances until a hearing has been held and an order issued. They further argue that jurisdiction rests in the Court to prohibit the City from adopting the ordinances either: (1) as a necessary incident to implementation of 106-7-407(1)(b); or (2) because 106-7-407(1)(b) removes the legislative discretion or power of the City to adopt the ordinances absent compliance with the requirements of the paragraph, and injunctive relief is therefore proper under City and County of Denver v. Board of County Commissioners of Arapahoe County, 141 Colo. 102, 347 P.2d 132 (1959).

Respondents' arguments are not only contrary to the intent of the legislature in adopting H.B. 1041, as discussed previously, but are also contrary to any reasonable interpretation of the language of the bill itself. The word "development" is defined in 106-7-102(1) to mean:

> "(A)ny construction or activity which changes the basic character or the use of the land on which the construction or activity occurs."

Neither annexation nor zoning can be considered "construction", and respondents have not so alleged. Nor can either be considered an "activity which changes the basic character or use of the land on which the...activity occurs". Annexation is simply a legal mechanism which results in a transfer of jurisdiction over land from one governmental entity (county) to another governmental entity (municipality) for certain purposes. Zoning is simply a legal mechanism to regulate or restrict the uses to which certain land may be put. Neither annexation nor zoning falls within the usual meaning of the word "activity"; neither is generally referred to as occurring "on" land; and neither, separately or together, changes the basic character or use of land.

The context in which the word "development" is used throughout H.B. 1041 likewise indicates that it was not intended to be applicable to legal proceedings such as annexation or zoning. See, e.g., 106-7-107(1)(a) ("The development...is covered by a current building permit..."); 106-7-107 (1)(c)(II) ("The development...is to be on land...which has been zoned by the appropriate local government for the use contemplated by such development..."); 106-7-202(2)(a)(II) ("Firebreaks and other means of reducing conditions conducive to fire shall be required for wildfire hazard areas in which development is authorized."); and 106-7-202(2)(a)(III) ("In geologic hazard areas all developments shall be engineered and administered in a manner that will minimize significant hazards to public health and safety or to property...").

Respondents' argument that the word "development" includes the exercise of annexation and zoning powers is unwarranted for an additional reason. Complete procedures, including procedures for judicial review, to

be followed in accomplishing an annexation are contained in the "Municipal Annexation Act of 1965", C.R.S. 1973, 31-8-101 et seq. Within the Act, municipalities are authorized to adopt an ordinance zoning land at the same time the ordinance annexing the land is adopted. C.R.S. 1973, 31-8-115; and Cline v. City of Boulder, 168 Colo. 112, 450 P.2d 335 (1969). Broad zoning powers are granted to municipalities by C.R.S. 1973, 31-23-201 et seq. Yet none of these statutes were specifically amended by H.B. 1041.

To reach the conclusion that the Court has jurisdiction under 106-7-407(1)(b) to enjoin adoption of the proposed annexation and zoning ordinances, respondents argue in part that 106-7-407(1)(b) places additional requirements on a municipality which must be met prior to exercising its annexation and zoning powers. They argue, in essence, that 106-7-407(1)(b) impliedly amends the "Municipal Annexation Act of 1965", C.R.S. 1973, 31-8-115, and the zoning laws set forth in C.R.S. 1973, 31-23-201 et seq. Amendments by implication, however, are not favored in Colorado. Nelson v. Nelson, 72 Colo. 20, 209 P. 810 (1922). Nor may a conflict between two statutes be raised by implication. Hodgkins v. Ashby, 56 Colo. 553, 139 P. 538 (1914). As stated in 1A Sutherland, Statutory Construction (1972), Sec. 22.13:

> "Amendments by implication, like repeals by implication, are not favored and will not be upheld in doubtful cases. The legislature will not be held to have changed a law it did not have under consideration while enacting a later law, unless the terms of the subsequent act are so inconsistent with the provisions of the prior law that they cannot stand together. 1A Sutherland, pp. 139-140. (Footnotes omitted.)

The League submits that respondents' argument falls readily within the category of a "doubtful case". Moreover, any inconsistency among the annexation act, zoning laws and H.B. 1041 exists only if the word "development" is interpreted as urged by respondents. If such interpretation is

rejected, no inconsistency or conflict exists. Where two acts of the legislature may be so construed that an inconsistency will be avoided, it is the duty of the court to so construe them. Marshall v. Golden, 147 Colo. 521, 363 P.2d 650 (1961).*

III. No Circumstances Exist to Exempt this Proceeding from the Established Doctrine that a Court May Not Restrain or Enjoin the Exercise of Municipal Legislative Powers.

The Colorado Supreme Court has adopted and historically supported the doctrine that a court may not enjoin or restrain the exercise of municipal legislative power except in extreme cases or under extraordinary circumstances. Lewis v. Denver City Waterworks Co., 19 Colo. 236, 34 P. 993 (1893).

> "...[A] city council or board of trustees of an incorporated town, when acting, or proposing to act, in a legislative capacity upon a subject within the scope of its powers as conferred by its charter or by the general laws of the state, is entitled to immunity from judicial interference. It is true, the municipal legislative body may adopt an illegal ordinance; so the state legislature may enact an unconstitutional statute; the remedy is the same in either case. By proper and timely application to the courts the enforcement of the unconstitutional statute, as well as the enforcement of the illegal ordinance, may be restrained or corrected.

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* Boulder County apparently urges on page 9 of its brief that C.R.S. 1963, 106-7-501(6) (1974 S.L.) grants jurisdiction to the Court to enjoin Louisville from adopting the proposed ordinances. This argument is founded on an unwarranted interpretation (see above discussion) of the word "development" as including the exercise of municipal annexation or zoning powers. Additionally 106-7-501(6) applies only where areas or activities of state interest have been "designated". [See 106-7-401 and 106-7-404 for designation procedures.] No one has alleged that any designations were made prior to this proceeding.

* * * *

> It is an exceedingly delicate matter for the courts to interfere by injunction with the action, or contemplated action, of a legislative body in any case; and such interference cannot be justified, except in extreme cases and under extraordinary circumstances." Lewis v. Denver Waterworks Co., 19 Colo. at 239, 242.

See Mues v. City and County of Denver, 145 Colo. 553, 359 P.2d 1032 (1961); and City and County of Denver v. Widom, 90 Colo. 147, 7 P.2d 406 (1932).

In City and County of Denver v. Board of County Commissioners of Arapahoe County, supra, the Colorado Supreme Court denied the authority of a trial court to enjoin the adoption of an annexation ordinance stating: "Proceedings to annex territory may only be enjoined where they are in excess of the city's power." 347 P.2d at 134. The Court indicated that statutes granted Denver the power to annex, and that the annexation statutes provided an adequate remedy for allegedly agrieved parties. Thus, while exceptions to the rule of non-interference may exist, reported Colorado cases indicate that the exceptions have been rarely applied and the adoption of few municipal ordinances enjoined - perhaps in respect for the "extreme case" and "extraordinary circumstances" admonition contained in Lewis v. Denver Waterworks Co., supra.

Both annexation [see, e.g., Littleton v. Wagenblast, supra] and zoning [see, e.g., Nopro v. Town of Cherry Hills Village, 180 Colo. 217, 504 P.2d 344 (1972); and Baum v. Denver, 147 Colo. 104, 363 P.2d 688 (1961)] are legislative functions, as recognized on page 3 of the Boulder District Court order and the briefs of respondents. Thus, so long as an "extreme case" or extraordinary circumstance" does not exist, adoption of the proposed annexation and zoning ordinances by the City of Louisville is entitled to judicial protection rather than interference. Lewis v. Denver Waterworks Co., supra.

No such "case" or "circumstance" exists. The brief of the Land Use Commission argues that jurisdiction in the District Court to restrain adoption of the proposed ordinances is necessary to implement public policy and avoid a frustration of the purposes of the bill. However, the effect of the proposed annexation ordinance would be simply to bring the subject property under the land use jurisdiction of the City of Louisville rather than Boulder County. The land, and development on the land, would still be subject to regulation under H.B. 1041: municipalities have no less powers than counties to regulate under H.B. 1041; the bill mentions no preference for county regulation over municipal regulation; and the Land Use Commission loses no authority under H.B. 1041 by reason of the annexation since the authority of the Commission is granted in terms of "local governments" [defined to mean municipalities or counties in 106-7-102(2)]. See 106-7-407.

Neither does the mere zoning of the subject property by the City of Louisville restrict regulation under H.B. 1041. Section 106-7-107 of the bill provides, in part, that H.B. 1041 shall not apply to any development which, as of the effective date of the article (May 17, 1974), is to be on land which was zoned for the use contemplated by the development. Thus, a development is not exempt from regulation under H.B. 1041 if the land is zoned for the use contemplated by the development after May 17, 1974.

The Land Use Commission also offers the theory that if H.B. 1041 regulations are applied to a development after the zoning is accomplished, and if such regulations conflict with the zoning, a multiplicity of suits might result and the principle of estoppel might be successfully applied against the City---particularly if a building permit is issued under the zoning and some development of the property is initiated. The essential question should be whether any such conflict would likely result in a multiplicity of suits having a reasonable probability of success. In

light of the exemption clause in H.B. 1041, it appears that the probability of success would be quite minimal. Moreover, the estoppel claim appears to have little probability of success since estoppel is applied against a municipality only when necessary to prevent injustice. Denver v. Stackhouse, 135 Colo. 289, 310 P.2d 296 (1957); Cline v. City of Boulder, supra; Crawford v. McLaughlin, 172 Colo. 366, 473 P.2d 725 (1970); and Miller v. Board of Trustees, ____ Colo. App. ____, 534 P.2d 1232 (1975). It is for the protection of innocent persons who lack knowledge of the truth of the facts, and only the innocent may invoke it. Jacobs v. Perry, 135 Colo. 550, 313 P.2d 1008 (1957).

Under the facts of this case, one may reasonably question whether the developer of the property proposed to be annexed to Louisville could possibly fall within the categories of persons entitled to invoke the estoppel principle. Additionally, if the developer obtains a building permit under the zoning, Cline v. City of Boulder, supra, --- where the Court refused to apply the estoppel principle partly on the basis that a building permit had been obtained "merely as a tactic" --- might be particularly appropriate. Finally, 106-7-407(1)(b) prohibits persons from engaging in development in the described area of state interest, or from conducting the described activity of state interest until the local government has held its hearing and issued its order. That stay may be continued through court review proceedings pursuant to 106-7-407(1)(c). Enforcement of these provisions against a developer may prevent the creation of any "material reliance" on the developer's part necessary to sustain an estoppel argument.

Other arguments seeking to bring the District Court's jurisdiction within an exemption to the "non-interference" doctrine established in Lewis v. Denver Waterworks Co., supra, are made in respondents' briefs.

The Land Use Commission, for example, argues that jurisdiction in the Court is necessary to restrain the City of Louisville from engaging in "contract zoning". While the concept of "contract zoning" is not applicable to the facts of this case [cf. Tanner v. City of Boulder, 158 Colo. 173, 405 P.2d 939 (1965); and see cases cited on pages 21-22 of the Land Use Commission's brief], more importantly perhaps is a recognition that absent some authority in H.B. 1041, neither the Land Use Commission nor Boulder County is a proper party to seek injunctive relief against adoption of the proposed annexation or zoning ordinances. See C.R.S. 1973, 31-8-116; Westminster v. Northglenn, 178 Colo. 334, 498 P.2d 343 (1972); and Westwood Meat Market v. McLucas, 146 Colo. 435, 361 P.2d 776 (1961). A proper party plaintiff is essential to confer jurisdiction on the court. City and County of Denver v. Miller, 151 Colo. 444, 379 P.2d 169 (1963).

CONCLUSION

Based upon the above discussion and authorities, the Colorado Municipal League submits that the Boulder District Court lacked jurisdiction to enter its order restraining the City of Louisville from enacting the proposed annexation and zoning ordinances, and prays that the Court quash the order and make its rule absolute.

Respectfully submitted,

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