No. 75-791

IN THE

COURT OF APPEALS

OF THE

STATE OF COLORADO

CITY OF AURORA, COLORADO, a municipal corporation, Plaintiff-Appellee, vs. JACK ZWERDLINGER, MORRIS DICKHART and JO COATES, individually and as representatives of a class of persons signing that certain referendum petition protesting the going into effect of Ordinance No. 74-146, enacted by the City Council of the City of Aurora, Colorado, and entitled "Utility Rates," and establishing rates for water services in the City of Aurora, Colorado, Defendants-Appellants, and J. D. MacFARLANE, Attorney General of the State of Colorado, Defendant.	Appeal from the District Court of the County of Arapahoe State of Colorado Honorable M. O. Shivers, Jr., Judge

BRIEF OF THE COLORADO MUNICIPAL LEAGUE

IN SUPPORT OF THE

PETITION FOR REHEARING OF THE CITY OF AURORA

Susan K. Griffiths - No. 2328
General Counsel for the
Colorado Municipal League
4800 Wadsworth Boulevard, Suite 204
Wheat Ridge, Colorado 80033
Telephone: 421-8630

September 13, 1976

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTION AND STATUTES

INTEREST OF THE COLORADO MUNICIPAL LEAGUE AS AMICUS CURIAE

The Colorado Municipal League (League) is an association of two hundred twenty-eight cities and towns located throughout the State of Colorado. The primary objective of the League is to aid in the improvement of municipal government to the benefit of Colorado's cities and towns and their citizens.

Obtaining credit at a reasonable cost is essential to a municipality's ability to provide for the immediate and long range needs of its citizens and to meet ever-expanding obligations imposed on municipalities by the state and federal governments. Where those needs involve major expenditures (such as for resources and facilities to provide adequate supplies of safe drinking water to the public, improving facilities for wastewater treatment, construction of necessary public buildings, recreational facilities, parking facilities, and other public facilities), a principal method of obtaining sufficient funds is the issuance of general obligation* or revenue* bonds. As an example of the reliance placed upon such bonds by Colorado's municipalities, the 1974 Local Government Financial Compendium prepared by the State of Colorado, Division of Local Government, reports that in 1974, the total general obligation debt for 90 municipalities in Colorado having a population of 1,000 or more was approximately $484 million, and the total

---

* In very broad terms, general obligation bonds are bonds payable from an unlimited general ad valorem tax on all taxable property within a municipality. 15 McQuillin, Municipal Corporations §43.05, p. 479. Revenue bonds, on the other hand, are normally defined as bonds payable solely from the revenues or earnings obtained from a revenue producing facility or operation which is constructed, expanded or acquired with the proceeds of the bonds. Chermak, The Law of Revenue Bonds (1954), p. 62.

revenue bond debt of these municipalities was $260 million---for a total of $744 million in bonded indebtedness.

Because of their significant degree of reliance on both general obligation and revenue bonds to finance major expenditures, municipalities throughout Colorado are vitally interested in and concerned with any action or decision which may adversely affect their bonding capability or increase the cost to their citizens of any bonds.

To the extent that the Court's decision in this case recognizes a limitation on the revenue sources which are specifically pledged to service general obligation bonds, the quality of those bonds may be lessened and thus the market for the bonds may be reduced and the cost of the bonds to the municipality and its citizens may be increased. Further, if the Court's decision is interpreted to mean that a referendum is applicable even to ordinances increasing water or sewer rates pursuant to a revenue bond pledge, the very market for those bonds may disappear since it is unlikely that investors will risk money on bonds where the sole security pledged (i.e., revenues from the facility derived from rates and charges necessary to operate and maintain the system and service bonds) may be defeated by the citizens in a referendum.

Because of the potentially substantial adverse impact of the Court's decision on the capability of municipalities to obtain credit at a reasonable cost and thereby meet the needs of their citizens, the League appears as Amicus Curiae to seek a reversal or substantial modification of the Court's opinion.

SUMMARY OF THE ARGUMENT

I. AN ORDINANCE ESTABLISHING WATER RATES PURSUANT TO A RATE COVENANT CONTAINED IN A PREVIOUSLY ADOPTED BOND ORDINANCE IS AN ADMINISTRATIVE

ACTION AND, AS SUCH, IS NOT SUBJECT TO REFERENDUM UNDER THE COLORADO CONSTITUTION OR THE CHARTER OF THE CITY OF AURORA.

II. SUBMISSION TO REFERENDUM OF AN ORDINANCE ESTABLISHING WATER RATES PURSUANT TO A RATE COVENANT CONTAINED IN A PREVIOUSLY ADOPTED BOND ORDINANCE WOULD BE AN UNCONSTITUTIONAL IMPAIRMENT OF THE OBLIGATION OF CONTRACTS.

ARGUMENT

I. AN ORDINANCE ESTABLISHING WATER RATES PURSUANT TO A RATE COVENANT CONTAINED IN A PREVIOUSLY ADOPTED BOND ORDINANCE IS AN ADMINISTRATIVE ACTION AND, AS SUCH, IS NOT SUBJECT TO REFERENDUM UNDER THE COLORADO CONSTITUTION OR THE CHARTER OF THE CITY OF AURORA.

A. Introduction

In general, there is little or no specific division of legislative and executive responsibilities at the municipal level of government, as there is at the state and federal levels. As a result, a municipal governing body normally makes both legislative and administrative decisions for its citizens. This lack of distinct separation of legislative and administrative powers at the municipal level has led the great majority of courts considering the question to conclude---as both a policy and legal matter---that initiative and referendum powers apply only to those actions of a municipal governing body which can be considered "legislative"---not "administrative"---in nature. See, e.g., Scroggins v. Kerr, 217 Ark. 953, 228 S.W.2d 995 (1950); Hopping v. Richmond, 170 Cal. 605, 150 P. 977 (1915); State v. City of St. Petersburg, 61 So.2d 416 (Fla. 1952); People v. Kapp, 355 Ill. 596, 189 N.E. 920 (1934); Murphy v. Gilman, 204 Iowa 58, 214 N.W. 679 (1927);

State v. Salome, 167 Kan. 766, 208 P.2d 198 (1949); Seaton v. Lackey, 298 Ky. 188, 182 S.W.2d 336 (1944); Dooling v. Fitchburg, 242 Mass. 599, 136 N.E. 616 (1922); West v. Portage, 392 Mich. 458, 221 N.W.2d 303 (1974); Carson v. Oxenhandler, 334 S.W.2d 394 (Mo.App. 1960); City of Billings v. Nore, 148 Mont. 96, 417 P.2d 458 (1966); Read v. City of Scottsbluff, 139 Neb. 418, 297 N.W. 669 (1941); Cuprowski v. City of Jersey City, 101 N.J. Super. 15, 242 A.2d 873 (1968); Myers v. Schiering, 27 Ohio St.2d 11, 271 N.E.2d 864 (1971); In Re Referendum Petition No. 1968-1 of City of Norman, 475 P.2d 381 (Okla. 1970); Monahan v. Funk, 137 Ore. 580, 3 P.2d 778 (1931); Keigley v. Bench, 97 Utah 69, 89 P.2d 480 (1939); Whitehead v. H & C Development Corp., 204 Va. 144, 129 S.E.2d 691 (Ct.App. 1963); and Ruano v. Spellman, 81 Wash.2d 820, 505 P.2d 447 (1973).

The distinction adopted by these courts and others reflects sound public policy. While the citizens of a state or a municipality should be able to express their opinion on and establish matters of general policy, at some point in time administrative discretion must be permitted in order to carry out the policies previously established.

> "(I)f there is a law already enacted which authorizes the very action provided for by a later resolution or ordinance, then there is no right to have a referendum on the new measure. It is not a new law, but only a procedural device for administering an old law. The right of referendum should have been exercised when the original measure, the enactment that put the law on the books, was newly adopted." Scroggins v. Kerr, supra, 228 S.W.2d at 999.

If government is to be able to operate effectively and thereby achieve the policy objectives determined by the governing body or the citizens, the public battles should be waged with respect to the establishment of the policies, and not their execution. While the Colorado courts have stated that the right of referendum reserved to the people must be liberally construed, the courts have also recognized that the referendum does not or would not apply to all actions of a municipal governing body, as

discussed in Part B following. This position is consistent with the view that there is a need to balance the public interest in the availability of the referendum, with the public interest in permitting effective implementation of policy decisions. See, e.g., Geiger v. Board of Supervisors, 48 Cal. 832, 313 P.2d 545 (1957); and Dooling v. Fitchburg, supra. Application of such considerations to this case should lead to the conclusion that the Aurora rate ordinance, adopted pursuant to a rate covenant in a previously existing bond ordinance, is not subject to referendum.

B. The Referendum Power Reserved to the People by Article V, Section 1 of the Colorado Constitution is Not Applicable to Municipal Ordinances which are Solely Administrative in Nature.

In its opinion, this Court concludes that the referendum power reserved to the people by Article V, Section 1, applies to all municipal ordinances (and presumably to all other actions of a municipal governing body), including those of an administrative nature. This conclusion is not consistent, however, with the history, intent or language of Article V, Section 1.

On September 2, 1910, the General Assembly of Colorado approved H.B. 6, which submitted to the electors the amendment to Article V, Section 1 of the Constitution reserving initiative and referendum powers to the people. Session Laws of Colorado - 1910, pp. 11-14. The amendment was subsequently approved by the state's voters in the November, 1910 general election. A portion of that amendment, quoted on page 3 of this Court's opinion, reads as follows:

> "The initiative and referendum powers reserved to the people by this section are hereby further reserved to the legal voters of every city, town and municipality as to all local, special and municipal legislation of every character in or for their respective municipalities."

The Court's opinion placed emphasis on the words "of every character"

in the above quote and went on to state, in part, that the constitution makes no exception for ordinances pertaining to proprietary* functions of a municipality. The history of the above-quoted language, however, indicates that it must be interpreted to exclude administrative actions of a municipal governing body.

It is well-settled in Colorado that the 1910 initiative and referendum amendment to Article V, Section 1 was borrowed almost literally from the Oregon Constitution. Shields v. Loveland, 74 Colo. 27, 218 P. 913 (1923); and Van Kleeck v. Ramer, 62 Colo. 4, 156 P. 1108 (1916), specially concurring opinions of Mr. Justice Hill and Mr. Justice White. Article 4, Section 1a of the Oregon Constitution, adopted June 4, 1906, provided in part that:

> "The initiative and referendum powers reserved to the people by this constitution, are hereby further reserved to the legal voters of every municipality and district, as to all local, special, and municipal legislation, of every character, in or for their respective municipalities and districts." See Monahan v. Funk, supra, 3 P.2d at 779; and Tillamook Peoples' Utility District v. Coates, 174 Ore. 476, 149 P.2d 558, 561 (1944).

A comparison of the above-quoted language from the Oregon Constitution and the previously-quoted language from Article V, Section 1 of the Colorado Constitution, indicates that the two provisions are identical in substance, except that the Oregon language reserves the referendum and initiative powers to the legal voters of "districts" as well as municipalities.

In Long v. City of Portland, 53 Ore. 92, 98 P. 149 (1908), on petition for rehearing, 98 P. 1111 (1909), the Oregon Supreme Court concluded that its constitutional provision on referendum did not make

---

* The League does not argue here that all "proprietary" functions of a municipality are exempt from the referendum, but argues rather that "administrative" actions are not subject to referendum. Action by a municipal governing body with respect to a proprietary function could be either "legislative" or "administrative" in nature. It is assumed that, by the Court's reference to "proprietary" functions, it also intended to hold that "administrative" actions of a municipality were subject to the referendum.

the right of referendum applicable to every ordinance or resolution of a city council. According to that Court, the only acts of the council which are made subject to a referendum by the Oregon Constitution are those acts which come within the term "municipal legislation". The Court went on to note that the "legislation" contemplated by the Oregon constitutional provision was in the nature of general laws, rules of civil conduct prescribed by the lawmaking power and of general application, relating to subjects of permanent or general character. In essence, the Court adopted the rule that the Oregon constitutional reference to "municipal legislation" limited the power of referendum to legislative matters. That rule has since been consistently followed by the Oregon courts. See Monahan v. Funk, supra; Tillamook Peoples' Utility District v. Coates, supra; and Campbell v. Eugene, 116 Ore. 264, 240 P. 418 (1925).

It is well-settled in Colorado that, when this state adopts the constitutional or legislative provisions of another state, it also adopts the prior construction given to such provisions by the courts of the state from which they are taken. Lace v. People, 43 Colo. 199, 95 P. 302 (1908); Van Kleeck v. Ramer, supra, specially concurring opinion of Mr. Justice Hill and Mr. Justice White; Crystal Park Co. v. Morton, 27 Colo. App. 74, 146 P. 566 (1915); and Shields v. Loveland, supra. See also, Vandermee v. District Court, 164 Colo. 117, 433 P.2d 335 (1967); Hoen v. District Court, 159 Colo. 451, 412 P.2d 428 (1966); Twilley v. Durkee, 72 Colo. 444, 211 P. 668 (1922); and Warner v. People, 71 Colo. 559, 208 P. 459 (1922). That rule is based on the reasonable presumption that the Colorado law or constitutional provision was enacted in the light of the construction given it by the courts of the state from which the statute or constitutional provision was taken and thus, by using language similar to the other state, it was intended that the same construction would be adopted in Colorado.

See Russell v. Jordan, 58 Colo. 445, 147 P. 693 (1915); Hallett v. Alexander, 50 Colo. 37, 114 P. 490 (1911); and Vider v. Zavislan, 146 Colo. 519, 362 P.2d 163 (1961).

Adoption of the Oregon interpretation in Colorado simply means that the legislative acts of a municipality would be subject to referendum, regardless of their form - i.e., whether they are embodied in ordinances, resolutions or other types of local action. This interpretation is consistent with the language of the Colorado Constitution. The clause of Article V, Section 1 of the Colorado Constitution pertaining to the right of the initiative and referendum, refers consistently to "legislation".

Moreover, the language of the municipal referendum clause of Article V, Section 1, begins: "The initiative and referendum powers reserved to the people by this section are hereby further reserved to the legal voters of every city, town and municipality...." This language must be interpreted in accordance with the previous clauses of Article V, Section 1. Shields v. Loveland, supra. See Hopping v. Richmond, supra. The first clause of Section 1 vests the legislative power of the state in the General Assembly, but reserves to the people the power to propose laws and amendments to the constitution, enact or reject such laws or amendments at the polls, and to approve or reject at the polls any act, item, section, or part of any act of the General Assembly. The executive power, or administrative power, of the state is of course vested in the executive branch through Article IV of the Colorado Constitution.

In interpreting the language of Article V, Section 1 relating to the exercise of initiative and referendum powers statewide, the Colorado Supreme Court concluded that the referendum power does not extend to a concurrent resolution of the General Assembly and limited the referendum power to "lawmaking legislation" for the state. Prior v. Noland,

68 Colo. 263, 188 P. 729 (1920). Thus it seems clear that the initiative and referendum powers reserved to the people by Section 1, and thus "further reserved" to the citizens of municipalities by the next to last clause of Section 1 are limited to matters which are "legislative" in nature. This conclusion is merely a logical extension to the municipal level of government of the same limitation existing at the state level.

Moreover, the interpretation that the referendum powers reserved to the citizens of municipalities by Article V, Section 1 of the Colorado Constitution can be exercised only with respect to legislative actions, in whatever form they may appear, is not inconsistent with existing Colorado case law. In fact, the legislative/administrative distinction adopted by the Oregon courts was specifically recognized by the Colorado Supreme Court in People v. Graham, 70 Colo. 509, 203 P. 277 (1922), the only case in which such distinction appears to have been raised.

The Colorado Supreme Court has also recognized in other cases that the right of referendum may not be applicable to all actions of a municipality. For example, in Burks v. City of Lafayette, 142, Colo. 61, 349 P.2d 692 (1960), the Court stated that if a particular ordinance were shown to relate exclusively to a segment of a municipality and that only the persons within that district were affected by the ordinance, then the referendum might not be applicable to such ordinance. And, in a most recent case, the Colorado Supreme Court noted that the right of referendum would not apply to a town resolution which gave notice of an intent to create an improvement district for the undergrounding of utilities and set a date for the hearing. Lyman v. Town of Bow Mar, ____ Colo. ____, 533 P.2d 1129 (1975). The Court stated that the ordinance actually creating the district was enacted as an emergency ordinance and thus was not subject to referendum:

> "The plaintiffs cannot subvert the constitutional and legislative declaration that the referendum power does not lie to an emergency act by attempting to require a vote of the people on the desirability of the act by the device of a petition attacking the legislative body's notice that it will hold a hearing on the act and describing its provisions." Lyman v. Town of Bow Mar, supra, 533 P.2d at 1137.

The Court's statement in Lyman is consistent with the position of the League and the City of Aurora---that only legislative or policy-making actions of a municipality are subject to referendum. An interpretation of the Court of Appeals' opinion in the present case, however, would seem to require that even a resolution of a municipal governing body, calling an election or giving notice of a hearing, would be subject to referendum.

C. The Referendum Power Reserved to the Citizens of Aurora by Article VI, Sec. 6-4 of the Aurora City Charter is not Applicable to the City's Ordinances Which are Solely Administrative in Nature.

The Aurora City Charter provides in Article VI, Sec. 6-4, that the referendum shall apply to "all ordinances passed by the council" with certain exceptions. This Court concluded that because a water rate ordinance is not included within any of the exceptions set forth in the Aurora Charter, it is therefore subject to referendum. This conclusion is, however, contrary to the apparent intent of the charter, the ordinary meaning of the word "ordinance", and the general rule on the applicability of referendum provisions to ordinances.

The provisions of Sec. 6-4, that the referendum shall apply to "all ordinances" with certain exceptions, must be read in light of Article V, Sec. 5-1 of the Aurora Charter. That section requires that the City Council act only by ordinance, resolution or motion and, further, that:

> "All legislative enactments must be in the form of ordinances; all other actions, except as herein provided, may be in the form of resolutions or motions." (Emphasis added.)

From the above language, it is apparent that the word "ordinance", as used

in the Aurora Charter, was intended to apply to legislative acts of the council.

The above interpretation of the use of the word "ordinance" in the Aurora Charter is also consistent with the almost universally adopted rule that the words "any ordinance" in a provision reserving the right of referendum is construed to mean only ordinances which are legislative in character. See, e.g., State v. City of St. Petersburg, supra; Carson v. Oxenhandler, supra; Keigley v. Bench, supra; Tillamook Peoples' Utility District v. Coates, supra; State v. Salome, supra; Seaton v. Lackey, supra; Housing Authority of City of Eureka v. Superior Court, 85 Cal.2d 550, 219 P.2d 457 (1950); 5 McQuillin, Municipal Corporations §16.55 (3rd Ed. 1972) at p. 215; and 122 A.L.R. 769.

In Burks v. City of Lafayette, supra, the Court stated that a home rule municipality could grant a broader right of referendum than that provided in Article V, Section 1 of the Colorado Constitution. As shown previously, the reservation of the right of referendum contained in Article V, Section 1 must properly be interpreted as applicable only to legislative enactments. Pursuant to the Court's statement in Burks, it appears that the citizens of a home rule municipality could make the referendum power applicable to a city's administrative enactments as well as its legislative enactments. Because of the historical and widespread interpretation of the referendum power as being applicable only to legislative enactments, and the interpretation of the phrase "any ordinance" as applying only to legislative enactments, such an unusual expansion of the referendum power could be accomplished only by a specific statement or clear declaration to that effect in the city's charter. See Hopping v. Richmond, supra. No such statement or declaration

appears in the Aurora charter.*

D. An Ordinance Establishing Water Rates Pursuant to a Covenant Contained in a Previously Adopted Bond Ordinance is an Administrative Action and, as such, is Not Subject to Referendum.

The question presented by this case is not whether any ordinance increasing water or sewer rates is subject to referendum. Rather, the question presented is whether an ordinance establishing such rates pursuant to a rate covenant contained in a previously adopted bond ordinance is subject to referendum. Other states considering this question have concluded that a rate ordinance which is adopted pursuant to a prior ordinance authorizing the issuance of bonds and providing for their payment through user rates and charges, is not subject to the initiative or referendum. See, e.g., City of Billings v. Nore, supra; and State v. City of St. Petersburg, supra. The reason for the rule adopted by these courts is clear - the ordinance authorizing the bond issue, and providing for payment of the bonds through user rates and charges, established the policy of the municipality. It was legislative in nature. The subsequent ordinance imposing the necessary rates and charges was administrative in nature, implementing the earlier policy decision. See City of Billings v. Nore, supra; and State v. City of St. Petersburg, supra. By so holding, the courts ensure that the implementation or achievement of legislative policy,

---

* Article XII, Section 12-3 of the Aurora City Charter does require the city council to establish rates for city-owned utilities by ordinance. This requirement does not necessarily express an intent that all rate ordinances be subject to referendum. It may instead be interpreted as providing various protections to the citizens set forth in other portions of the charter. For example, Article V, Section 5-2 requires that all ordinances be approved by majorityvote of the entire membership of the council, whereas resolutions and motions may be approved only by a majority of the members present; Article V, Section 5-5 requires two readings and a public hearing on any ordinance, as well as publication by reference or in full; and Article V, Section 5-8 requires all ordinances to be codified.

validly established and in effect, cannot be frustrated or delayed by use of the referendum process. Thus, the right of referendum would be exercised only with respect to the original measure - the measure setting forth the legislative policy - and not with respect to measures simply implementing that policy. In so holding, the purpose of the referendum is still achieved. Citizens continue to be ensured the right of majority rule on policy issues affecting their municipality.

As applied to this case, it is clear that Ordinance No. 73-221 adopted the legislative policy of the City of Aurora. It authorized the issuance of $9,900,000 in bonds for the purpose of acquiring certain water rights and constructing and installing transmission lines, other extensions, and improvements to the water system. The ordinance also provided, in part, that:

> "(T)he City Council of the City hereby covenants and agrees that it will maintain, collect and enforce rates and charges for connection to, use of and services furnished by the municipal water system of the City as shall create an annual income and revenue in each fiscal year, which, together with any municipal sales tax proceeds that are lawfully available and the proceeds of general ad valorem taxes, shall be sufficient to pay all reasonable costs and expenses of the operation and maintenance of the municipal water system, and to pay the interest on and principal of the general obligation bonds authorized by this ordinance, promptly as they become due and payable, respectively."

Thus it is clear that Ordinance No. 74-146 establishing rates, fees and charges for water supplied to the residents was simply administrative in nature, executing the policy set forth in the earlier bond ordinance. Moreover, this Court did recognize in its opinion, that the establishment of the water rate by the Aurora City Council was an executive and administrative function. As such, it should not be subject to referendum.

II. SUBMISSION TO REFERENDUM OF AN ORDINANCE ESTABLISHING WATER RATES PURSUANT TO A RATE COVENANT CONTAINED IN A PREVIOUSLY ADOPTED BOND ORDINANCE WOULD BE AN UNCONSTITUTIONAL IMPAIRMENT OF THE OBLIGATION OF CONTRACTS.

In 1973, the Aurora City Council adopted Ordinance No. 73-221 authorizing issuance of general obligation bonds* in the amount of $9,900,000 for the purpose of acquiring certain water rights and constructing and installing transmission lines and other extensions and improvements to the water system. Section 5 of that ordinance stated in part that the City Council covenanted and agreed to establish and enforce rates and charges for services furnished by the water system in such amount as to create an annual revenue which, together with available sales tax proceeds and proceeds of general ad valorem taxes, would be sufficient to pay for the operation and maintenance of the water system and the principal and interest of the bonds authorized by the ordinance. Section 8 of the ordinance stated that, after issuance of the bonds, the ordinance would be irrepealable until the bonds and interest thereon are fully paid and discharged.

Subsequent to the adoption of the bond ordinance, the Aurora City Council adopted Ordinance No. 74-146 raising the rates and charges for water supplied to the residents of the City. Thereafter, a referendum petition was filed, seeking repeal of the rate ordinance. In ruling on the City of Aurora's argument that allowing a referendum on the rate ordinance would impair the bonds issued pursuant to the prior bond ordinance, the Court of Appeals concluded:

---

* Although the bonds issued by the city are termed general obligation bonds, they appear to be "mixed" general obligation and revenue bonds. They pledge not only proceeds from a general ad valorem tax, but also proceeds from rates and charges to water users for service of the bonds.

> "The only effect on these prior obligations which would result from a defeat of this ordinance would be a greater reliance on other income sources such as sales and general ad valorem taxes in order to provide the necessary funds. The obligations are in no way impaired."

In so stating, the Court appears to misconstrue the applicable constitutional provisions prohibiting the impairment of contracts. Persons who enter into a contract with either the state or a local government are protected from subsequent laws impairing the obligation of the contract by Article I, Section 10 of the United States Constitution and Article II, Section 11 of the Colorado Constitution. See People v. Hall, 8 Colo. 485, 9 P. 34 (1885); Johnson v. McDonald, 97 Colo. 324, 49 P. 2d 1017 (1935); and Golden v. Schaul, 105 Colo. 158, 95 P. 2d 806 (1939). The provisions of law, as they existed at the time the contract was entered into, become a part of the contract. See Golden v. Schaul, supra. Finally, the obligation of a contract is not simply the requirement for payment, but includes the means provided by law for its enforcement, and any law which materially changes the contract or changes the substantive rights of the parties constitutes an impairment. Golden v. Schaul, supra.

Application of these rules to the present case indicates that the rate covenant set forth in the ordinance authorizing issuance of the bonds (Ordinance No. 73-221) became a part of the contract between the City and the bond purchasers. A referendum and negative vote on the subsequent rate ordinance would, in essence, repeal that rate covenant and thus would materially change the contract entered into by the parties, constituting a prohibited impairment of the contract.

The Washington Supreme Court considered a closely analogous situation in Ruano v. Spellman, supra. Following appropriate procedures, King County, Washington adopted a resolution authorizing issuance of $40 million of

general obligation bonds to construct a stadium. Although the bonds were termed general obligation bonds, King County also covenanted that the proceeds of a special exise tax were irrevocably pledged to the payment of the bonds, and otherwise unpledged revenues from the stadium might be allocated to service the bonds in addition to the proceeds of an ad valorem tax. After a portion of the bonds were issued, an initiative petition was filed with the County to repeal the resolution authorizing issuance of the bonds and to prohibit spending funds for further develop- of the stadium.

On consideration of the case, the Washington Supreme Court concluded that submission of the initiative would constitute an impairment of contracts "due to the encroachment upon the pledged proceeds of the special excise tax and the consequent diminution of value of the stadium bonds...." Ruano v. Spellman, supra, 505 P. 2d at 452.

A major consideration in the Court's decision was the substantial doubt which would be cast by the repeal of the prior resolution on the special excise tax which had been committed to pay the bonds. The situation, the Court stated, was analogous to an effort to repeal the authority to levy the tax -- which clearly would have been in violation of the constitution.

The appellant in that case argued that the entire tax base of King County was security for the bonds, and thus the excise tax wasn't necessary to meet the County's obligation. In response, the Court stated:

> "That may well be true, but it is not the contract entered into with the bond buyers. The contract included an irrevocable pledge of the special excise tax as well as any otherwise unpledged revenues from the

> stadium which might be allocated to payment of the bonds.
>
> The effect of the initiative upon the bonds was the subject of testimony by a municipal bond expert.... He testified that the double source of revenue made the bonds more attractive to an investor....
>
> This bond expert testified that...[the initiative] would make the bonds worth less in the market and that he would not recommend them to an investor because of the uncertainties created by the initiative." Ruano v. Spellman, supra, 505 P. 2d at 451.

If the Aurora rate ordinance is required to be submitted to a vote of the citizens and is rejected, the rejection would in fact constitute an indirect repeal of the rate covenant contained in Section 5 of Ordinance 73-221, an obligation of the bond contract. The repeal might well lessen the value of the bonds and would certainly constitute a material change in the bond agreement and in the substantive rights of the parties to the bond, in contravention of both the Colorado and United States Constitution. See Golden v. Schaul, supra.

CONCLUSION

For the reasons previously stated, the Colorado Municipal League urges the Court to reverse its opinion and hold either that the referendum is not applicable to Ordinance No. 74-146 because that ordinance is administrative in nature, or because submission of the ordinance to referendum would be an unconstitutional impairment of the bond contract entered into by the City and the bond purchasers. A decision by the Court which is favorable to the City on one of the arguments presented would make it unnecessary for the Court to rule on the other.

In the alternative, the League respectfully requests the Court to modify the first part of its decision (relating to the application of the referendum to administrative actions) by eliminating references to the Colorado Constitution and clearly confining its opinion to an interpre-

tation of the several specific provisions of the Aurora City Charter. Existing references to the Colorado Constitution are unnecessary and may substantially broaden the scope of the decision. Additionally, the League respectfully urges the Court to modify the second part of its decision, relating to the impairment of contracts, by clarifying that a rate ordinance adopted pursuant to a covenant in a revenue bond issue (where the sole source of payment is revenue from user rates and charges) would clearly constitute an impairment by contracts and thus would not be subject to referendum. Such a modification of the opinion would assist in alleviating the concern of present and future revenue bond purchasers in Colorado that the revenues pledged to service those bonds are secure.

Respectfully submitted,

SUSAN K. GRIFFITHS (#2328)
General Counsel for the
Colorado Municipal League
4800 Wadsworth Blvd., Suite 204
Wheat Ridge, Colorado 80033
Telephone: 421-8630

Attorney for Amicus Curiae
Colorado Municipal League

CERTIFICATE OF SERVICE

I certify that copies of the foregoing brief have been served upon the following listed parties of record by first class mail, postage prepaid, this 13th day of September, 1976.

Leland M. Coulter
Richard Kaufman
1470 South Havana - 8th Floor
Aurora, Colorado 80012

Robert A. Dufty
Attorney at Law
600 Boston Building
828 - 17th Street
Denver, Colorado 80202

and

Dawson, Nagel, Sherman & Howard
Clyde C. Dawson
Duncan A. Campbell
2900 First of Denver Plaza
633 Seventeenth Street
Denver, Colorado 80202

J.D. MacFarlane
Office of the Attorney General
104 State Capitol
Denver, Colorado 80203

Maribeth Ray