No. 27697

IN THE

SUPREME COURT

OF THE

STATE OF COLORADO

ADAMS COUNTY ASSOCIATION FOR RETARDED CITIZENS, INCORPORATED, et al, Plaintiffs-Appellees and Cross Appellants, v. THE CITY OF WESTMINSTER, a Colorado Municipal Corporation, et al, Defendants-Appellants and Cross Appellees, v. PEOPLE OF THE STATE OF COLORADO, Intervenors-Appellees and Cross Appellants.	Appeal from the District Court of the County of Adams State of Colorado Honorable Abraham Bowling Judge

BRIEF OF THE COLORADO MUNICIPAL LEAGUE

AS AMICUS CURIAE

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INTEREST OF THE COLORADO MUNICIPAL LEAGUE

The Colorado Municipal League is a nonprofit association of two hundred twenty-four cities and towns located throughout the State of Colorado. At least three issues raised in the instant case may significantly affect these municipalities. The first issue of interest is the proper interpretation of C.R.S. 1973, 31-23-301(4) and 31-23-303(2), as amended. These statutes, adopted by the General Assembly in 1975, seek to place certain limitations upon the zoning authority of municipalities with respect to the location of group homes for the developmentally disabled. The Court's interpretation of the scope of the limitations and responsibilities sought to be imposed on municipalities by these statutes is of substantial interest not only to Colorado's statutory cities and towns, but also to those home rule municipalities -- such as the City of Westminster and others -- which have sought to comply voluntarily with the intent of the statutes.

Second, the remedy awarded by the District Court is of significant concern and interest to all Colorado municipalities which seek to implement local zoning and similar regulations. In this case, the District Court concluded that the Westminster City Council applied inappropriate criteria in denying the requested special use permit. And the Court simply ordered issuance of the permit rather than notifying the Council of its error, explaining the appropriate criteria to be applied and remanding the matter back to the Council for further proceedings. If the governing body of a municipality errs in questions of law during a good faith effort to follow its own ordinances and applicable statutes, that governing body should have the opportunity to conduct further proceedings after being notified of its error. If such an opportunity is not granted, the lawful powers and responsibilities of the local governing body may be usurped by the judiciary.

Third, the determination by the District Court that the matter at issue is "statewide" rather than "local" in nature is of substantial concern to the League and its member municipalities. The League strongly believes that this issue need not be decided herein since no conflict exists between the Westminster ordinance and the applicable state statutes with which Westminster voluntarily sought to comply. If, however, the issue is to be decided, its resolution could significantly affect Colorado's home rule municipalities. Historically, the Colorado Supreme Court has recognized that decisions regarding the use of land within home rule municipalities is a matter of primarily local concern. Continued recognition of local decision-making authority in land use matters is of vital importance to these home rule municipalities.

Thus, this Court's review of and decision in the instant case can be expected to directly affect all statutory cities and towns in Colorado, and may affect home rule municipalities as well.

STATEMENT OF THE ISSUES

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

STATEMENT OF THE CASE

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

SUMMARY OF THE ARGUMENT

I. NO CONFLICT EXISTS BETWEEN SECTION 11-4-19 OF THE WESTMINSTER CITY CODE AND SECTIONS 31-23-301(4) AND 31-23-303(2), COLORADO REVISED STATUTES 1973, AS AMENDED.

A. No Conflict Exists Between the Westminster Ordinance and the State Statutes at Issue.

B. Since No Conflict Exists Between the Westminster Ordinance and the State Statutes at Issue, the Court Need Not Decide Whether the Subject Matter of the Ordinance and Statutes is of Statewide or Local Concern.

II. THE WESTMINSTER CITY COUNCIL APPLIED APPROPRIATE AND LAWFUL CRITERIA IN DETERMINING THAT PLAINTIFF'S APPLICATION FOR A SPECIAL USE PERMIT SHOULD BE DENIED.

III. ASSUMING, ARGUENDO, THAT THE WESTMINSTER CITY COUNCIL APPLIED SOME INAPPROPRIATE CRITERIA IN DENYING PLAINTIFF'S SPECIAL USE PERMIT APPLICATION, THE DISTRICT COURT ERRED IN ORDERING ISSUANCE OF THE PERMIT.

IV. ASSUMING, ARGUENDO, THAT A CONFLICT EXISTS BETWEEN SECTION 11-4-19 OF THE WESTMINSTER CODE AND C.R.S. 1973, 31-23-301 AND 31-23-303, AS AMENDED, THE WESTMINSTER ORDINANCE PREVAILS OVER THE CONFLICTING PORTIONS OF THE STATUTES, PURSUANT TO ARTICLE XX OF THE COLORADO CONSTITUTION.

ARGUMENT

I. NO CONFLICT EXISTS BETWEEN SECTION 11-4-19 OF THE WESTMINSTER CITY CODE AND SECTIONS 31-23-301(4) AND 31-23-303(2), COLORADO REVISED STATUTES 1973, AS AMENDED.

The District Court in this case found that the special use permit ordinance of the Westminster Code (Section 11-4-19) applied to group homes for the developmentally disabled, but that the ordinance conflicted with C.R.S. 1973, 27-10.5-113 and 31-23-303(2), as amended, in that the ordinance specified criteria different from those listed by the legislature for use in determining whether to grant or deny a permit for the group home. The Court did not identify the specific criteria set forth in the Westminster ordinance which differed from those listed by the state legislature. Having concluded that some conflict existed between the ordinance and statute, the Court went on to state that the establishment of group homes for the developmentally disabled is a matter of statewide concern. The Court then ordered that the matter be remanded to the Westminster City Council with direction that it issue a special use permit for the operation of the group home.

The League agrees with the City of Westminster that an analysis of the statute and ordinance at issue must result in a determination that no conflict exists between the two. Since no conflict exists, the Court need not determine whether the subject matter of the statute and ordinance is one of statewide or local concern.

A. No Conflict Exists Between the Westminster Ordinance and the State Statutes at Issue.

In 1975, the Colorado General Assembly adopted S.B. 135 which added a new subsection (4) to 31-23-301 and a new subsection (2) to

31-23-303 of the municipal zoning statutes. Subsection (4) forbids any statutory or home rule municipality from enacting an ordinance which prohibits the use of a state-licensed group home for the developmentally disabled serving not more than 8 developmentally disabled persons and staff, as a residential use of property for zoning purposes. Paragraph (2)(a) of 31-23-303 states that the establishment of state-licensed group homes for the exclusive use of developmentally disabled persons is a matter of statewide concern and that a state-licensed group home for 8 developmentally disabled persons is a residential use of property for zoning purposes. Paragraph (b) of subsection (2) seeks to explain the meaning of subsection (2) by stating that the subsection shall not be construed to supersede the authority of municipalities to regulate group homes for the developmentally disabled appropriately through local zoning ordinances, unless the local regulations would be tantamount to prohibition to such group homes from <u>any</u> residential district. In further explanation, paragraph (b) goes on to state what is not permitted of any group home, and further clarifies the authority of municipalities to include in their local zoning or other development regulations, specific location requirements to the approval of the group home.

By adopting S.B. 135, the General Assembly stated a basic intention that group homes for the developmentally disabled should not be excluded automatically from all residential areas within municipalities. At the same time, the General Assembly sought to ensure that local governments retained the right to decide the specific location of the group homes so long as the decision did not have, as its effect, the total

exclusion of group homes for the developmentally disabled from all residential areas:

> "(T)he legislature has sought to ensure that the limitation on local zoning authority be construed quite narrowly to include only efforts by...municipalities to totally exclude group homes from residential neighborhoods." Zimmerman and Kurtz-Phelan, "The Developmentally Disabled in Colorado", 4 Colorado Lawyer, 2315 at 2321. (Emphasis added.)

In analyzing the above statutes, it is apparent that the General Assembly sought to place the following restrictions on municipalities:

1. Municipalities were not to enact an ordinance prohibiting the use of state-licensed group homes for the developmentally disabled as a residential use of property for zoning purposes.
2. Municipalities were not to regulate such homes in a manner tantamount to prohibiting group homes for the developmentally disabled from all residential districts.

The legislature, however, also recognized continued municipal authority over group homes for the developmentally disabled:

1. Municipalities could continue to regulate the group homes through local zoning ordinances.
2. Group homes specifically would be subject to height, setback area, lot coverage, and external signage provisions of zoning ordinances.
3. Group homes for the developmentally disabled would not be permitted to utilize architectural designs substantially inconsistent with the character of the surrounding neighborhood.

4. The conducting of ministerial activities of any private or public organization or agency or the types of treatment activities or the rendering of services in a manner substantially inconsistent with the activities otherwise permitted in the particular zoning districts would not be permitted.

5. Local zoning or other development regulations could also attach specific location requirements to the approval of a group home, including the availability of various services, if reasonably related to the requirements of the particular home.

After S.B. 135 took effect, Westminster adopted ordinances establishing a zoning category of "residential care facility". The City asserts, and the District Court agreed, that group homes for the developmentally disabled fall within the definition of "residential care facility" as it appears in the Westminster ordinance. The Westminster ordinance provides that a residential care facility is considered a special use which may be granted by the City Council in any zoning district after application and review by the special permit and licenses board. By permitting a group home for the developmentally disabled as a special use within every zone district of the City, the ordinance necessarily permits a group home for the developmentally disabled to be established within any of the City's residential districts, upon compliance with the requirements of the ordinance.

Section 11-4-19 of the Westminster Code also establishes the criteria to be applied in granting or denying any special use permit, such as a special use permit for a group home:

> "Review criteria for granting or denying the license or Special Use Permit shall be governed by applicable statutes, ordinances, and written policies of the City."

Thus, by ordinance, Westminster specifically allows group homes for the developmentally disabled in all zone districts, including residential districts, through the special use permit; and, the City further voluntarily adopted as the criteria for granting or denying the permit all "applicable statutes".

A comparison of the Westminster ordinance with the requirements of the state statutes regarding group homes for the developmentally disabled makes it clear that the ordinance in no way conflicts with the statutes. In fact, it is apparent that the City of Westminster sought voluntarily to comply with the statutes. The City's ordinance does not prohibit group homes for the developmentally disabled in any residential district. It has no provisions which are tantamount to prohibiting group homes from any residential district. The ordinance does retain local control over the specific location of the group home, but this local control is clearly permitted by the provisions of the applicable statutes. And the ordinance adopts as the review criteria for granting or denying a special permit, all applicable statutes. There is simply no conflict between the ordinance of the City of Westminster and the state statutes in question.

The District Court itself did not identify the specific provisions of the Westminster ordinance which it deemed to conflict with the state statute, other than stating that the criteria in the ordinance conflicted with the statute. However, when the only criteria set forth in the ordinance adopts the criteria of "applicable statutes", the criteria cannot be said to conflict with those very statutes.

B. Since No Conflict Exists Between the Westminster Ordinance and the State Statutes at Issue, the Court Need Not Decide Whether the Subject Matter of the Ordinance and Statutes is of Statewide or Local Concern.

In the years since adoption of Article XX, this Court has established certain general principals of law to guide its decisions in resolving alleged jurisdictional conflicts between state and local regulation. Among these principals are the following:

1. There is nothing basically invalid about legislation on the same subject by both a home rule municipality and the state. Vela v. People, 174 Colo. 465, 484 P.2d 1204 (1971). Thus, where the state and local legislation are not in conflict, both pieces of legislation may validly coexist. See Vela v. People, supra, and Woolverton v. Denver, 146 Colo. 247, 361 P.2d 982 (1961), wherein the doctrine of "mutual exclusion" set forth in Canon City v. Merris, 137 Colo. 169, 323 P.2d 614 (1958) was overruled.

2. Only if the legislation adopted by the state and by the home rule municipality conflict must the Court determine which applies (or prevails) in any particular situation by deciding whether the subject matter of the legislation is of "statewide", "mixed" state and local, or primarily "local" concern. Pursuant to Article XX of the Constitution, only if the matter is found to be of primarily "local" concern, will the ordinance prevail over the conflicting statute. Vela v. People, supra; Bennion v. Denver, 180 Colo. 213, 504 P.2d 350 (1972); and, Huff v. Mayor of Colorado Springs, 182 Colo. 108, 512 P.2d 632 (1973).

Of particular importance in the instant case is the first rule set forth above, namely, that non-conflicting state and local legislation may validly coexist. This rule requires that the initial question to be resolved in any alleged jurisdictional conflict between state statutes and local ordinances is whether the two conflict. If they do not conflict, then they may coexist and there is no necessity for determining the statewide or local nature of the subject matter of the legislation.

For example, in Vela v. People, supra, petitioners were convicted under the state disturbance statute and sought review of their convictions on the basis that the state statute was superseded by Greeley's local disturbance ordinance. The first issue addressed by the Court in its opinion was whether the state statute and local ordinance were in conflict. The Court determined that no conflict existed between the two and that, therefore, the further question of whether disturbance is a matter of local concern need not be decided since non-conflicting state and local legislation may validly coexist. Vela v. People, supra, 174 Colo. at 469.

Only where a conflict is first found to exist must the Court inquire into the nature of the subject matter at issue. In Bennion v. Denver, supra, for example, the Court again analyzed first whether Denver's ordinance involving resistance of arrest conflicted with the state resistance statute. After analysis of the respective legislation, the Court concluded that a conflict in fact existed and only then proceeded to determine whether the subject matter at issue was of statewide or local concern:

> "The conflict having been established, it now becomes necessary to determine whether the ordinance deals with matters local and municipal, or whether the subject matter is of statewide concern." Bennion v. Denver, supra, 180 Colo. at 215. (Emphasis added.)

In Huff v. Mayor of Colorado Springs, supra, the Court again recognized that the initial determination required of it was whether a conflict existed between the local ordinance and the state statute. Only upon finding the conflict was it necessary to determine whether the subject was one of statewide or local concern:

> "Since the existence of a conflict between the Firemen's Pension Act and certain provisions of this Colorado Springs ordinance is apparent and has been conceded by both parties, the only question for this Court to resolve is whether the subject of firemen's pensions is exclusively local in nature, or whether it has state-wide interest as well." Huff v. Mayor of Colorado Springs, supra, 182 Colo. at 112.

The League submits that a comparison of the Westminster ordinance and the applicable state statutes must lead the Court to a conclusion that no conflict exists between the two. Having once determined that no conflict between the two exists, the Court need not inquire further into the nature of the subject matter at issue and the ordinance and statutes may validly coexist.

II. THE WESTMINSTER CITY COUNCIL APPLIED APPROPRIATE AND LAWFUL CRITERIA IN DETERMINING THAT PLAINTIFF'S APPLICATION FOR A SPECIAL USE PERMIT SHOULD BE DENIED.

The brief of the City of Westminster thoroughly discusses the issue of the appropriateness of the criteria applied by the City Council of Westminster in denying the petitioner's special use permit application The League adds only the following additional comments on this issue.

The state statutes relating to group homes for the developmentally disabled are contained in the general zoning grants of authority to municipalities in C.R.S. 1973, 31-23-301, et seq., as amended. The specific provisions relating to group homes, contained in 31-23-301(4) and 31-23-303(2),

cannot and should not be read separate and apart from the other provisions of the zoning laws. In fact, as discussed previously, paragraph (2)(b) of 31-23-303 specifically states an intent that the group home provisions shall not be construed to supersede the authority of municipalities to regulate such homes appropriately through local zoning ordinances. Thus, in determining the criteria in the "applicable statutes" to be applied by the City, as required by the City's own ordinance, it was certainly reasonable of the City to apply the criteria which were contained not only in the specific group home provisions of the zoning laws, but also those criteria otherwise applicable to zoning regulations in general, such as the criteria set forth in 31-23-301 and 31-23-303(1).

In addition to permitting continued application of the zoning regulations, the specific language of 31-23-303(2)(b) clarifies that the legislature did not intend the specific criteria identified in that statute to be the sole criteria applicable to the approval of the group homes:

> "If reasonably related to the requirements of a particular home, a local zoning or other development regulations may, without violating the provisions of this section, <u>also</u> attach specific location requirements to the approval of the group home, <u>including</u> the availability of <u>such</u> services and facilities <u>as</u> convenience stores, commercial services, transportation, and public recreation facilities." (Emphasis added.)

Use of the word "also" in the above-quoted sentence indicates that this clarification of authority is <u>in addition</u> to the prior statement in paragraph (b) that municipalities may continue to regulate group homes appropriately through local zoning ordinances. Further, use of the word "including" clarifies that the specific location requirements identified were only examples of the location requirements which could be attached to the approval of a group home. Use of the word "including" in this sentence cannot be read to limit the location requirements only to those specifically identified. In Colorado, use of the word "include" or

"including" is considered to be a word of extension or enlargement and not one of limitation:

> "...(T)he word 'include' is ordinarily used as a word of extension or enlargement, and we find that it was so used in this definition. To hold otherwise here would transmogrify the word 'include' into the word 'mean'." Lyman v. Town of Bow Mar, 188 Colo. 216, 533 P.2d 1129, 1133 (1975). (Citations omitted.)

Finally, use of the words "such as" in the above-quoted sentence further indicates that the location requirements which may appropriately and lawfully be considered in approval of the group homes are not limited solely to those specifically identified in the statute.

It therefore is apparent that the criteria applied by the City Council of Westminster in denial of the special use permit application at issue were based on "applicable statutes" as required by Westminster's own ordinance.

III. ASSUMING, ARGUENDO, THAT THE WESTMINSTER CITY COUNCIL APPLIED SOME INAPPROPRIATE CRITERIA IN DENYING PETITIONER'S SPECIAL USE PERMIT APPLICATION, THE DISTRICT COURT ERRED IN ORDERING ISSUANCE OF THE SPECIAL USE PERMIT.

In its findings of fact and conclusions of law, the District Court concluded that:

> "...(T)he action of the Westminster City Council in denying the special use permit exceeded its jurisdiction and constituted an abuse of discretion, pursuant to Rule 106, Colo.R. Civ.P., in that it was based on standards other than those enunciated by the legislature...for the establishment of group homes.
>
> "The Court therefore finds that this matter should be remanded to the Westminster City Council with the direction that it issue a special use permit to the...(petitioner) for the operation of a group home facility at the Clemson Lane residence."

In deciding to deny plaintiff's application for a special use permit, the Westminster City Council applied and considered two criteria

specifically identified in C.R.S. 1973, 31-23-303(2)(b), and found that the proposed location of the group home and the structural changes proposed to the exterior of the group home did not meet those criteria. See the fourth and fifth findings of the City Council in its "Findings of Fact, Statement and Order" at Folio 83.

Assuming, arguendo, that all other criteria applied by the Council were inappropriate, the duty of the District Court upon review of the Council decision was to determine whether there was "any competent evidence" in the record to support the Council's findings with respect to the criteria which were appropriately applied by the Council. See Bauer v. City of Wheat Ridge, 182 Colo. 324, 513 P.2d 203 (1973); Dillon Company v. Boulder, 183 Colo. 117, 515 P.2d 627 (1973); and Board of County Commissioners of Jefferson County v. Simmons, 177 Colo. 347, 494 P.2d 85 (1972). Since some of the criteria applied by the Council were clearly appropriate, then its decision based upon those criteria cannot be set aside unless there is "no competent evidence to support the decision." Ford Leasing Development Company v. Board of County Commissioners of Jefferson County, 186 Colo. 418, 528 P.2d 237, 240 (1974)(emphasis by the Court). Corper v. City and County of Denver, Colo., 552 P.2d 13 (1976).

IF SO BASED.

In Guildner Way, Inc. v. Board of Adjustment of Adams County, 35 Colo.App. 70, 529 P.2d 332 (1974), the county Board of Adjustment denied a special use permit. Upon review, the trial court reversed the Board's action, in part because the Board had found that Guildner Way had failed to establish a "hardship" as a prerequisite to granting the special exception. The Court of Appeals noted that the requirement of a "hardship" did not apply to special uses. However, the Court of Appeals also found that at least one appropriate criteria was applied by the Board, and it further found that the record was sufficient to support the Board's conclusion that the permit should be denied for failure to meet that approp-

riate criteria. Thus, the Court of Appeals recognized that failure to meet any appropriate criteria, if supported by any evidence in the record, is sufficient to uphold a special use permit denial, even if some inappropriate criteria was also considered as part of the denial.

In the instant case, then, the District Court should have reviewed the record to determine whether there was any competent evidence in the record to support the Council's findings regarding the clearly appropriate criteria. And if such evidence existed, the Court should have upheld the Council's decision. Certainly the Court should not have ordered issuance of the special permit merely because it believed some of the criteria applied by the Council were inappropriate.

Finally, even if the Court somehow determined that all of the criteria applied by the Council were inappropriate, the proper remedy would not have been to order issuance of the special permit. Rather, the Court should have identified the appropriate criteria for the Council and remanded the matter for further proceedings in light of those criteria. By determining that the City Council applied improper criteria and ordering that the permit be issued, the Court usurped the function and duty of the Council to rule upon the issuance of the special permit.

The scope of review granted to a District Court in a C.R.C.P. 106(a)(4) proceeding is strictly limited:

> "Review shall not be extended further than to determine whether the inferior tribunal has exceeded its jurisdiction or abused its discretion...." C.R.C.P. 106(a)(4), and

see Colorado Springs v. District Court, 184 Colo. 177, 519 P.2d 325 (1974). In State Board of Medical Examiners v. Brown, 70 Colo. 116, 198 P. 274 (1921), the Court stated:

> "It appears from the record that the district court assumed to determine the right of the petitioner to a license, despite the fact that the matter was under consideration on a writ of certiorari.
>
> * * *

> "In no event could the district court, in a proceeding of this kind, direct the granting of the license. If it found that the board had exceeded its jurisdiction, or failed regularly to pursue its authority, the duty of the court is to remand the cause to the board for a rehearing." State Board of Medical Examiners v. Brown, supra, 198 P. at 275, 276.

The circumstances in the present case are not at all similar to those in Bauer v. City of Wheat Ridge, supra, where the Court did order issuance of a special use permit. In Bauer, the Court reviewed the appropriate criteria, and determined from the record that the applicant had complied with all of those appropriate criteria and that the evidence of compliance was undisputed. In the instant case, however, the Court failed to review the record for any evidence of compliance with appropriate criteria and even failed to identify the appropriate criteria. Under these circumstances, to order issuance of a special use permit extends the Court's authority far beyond that contemplated by C.R.C.P. 106 (a)(4) and substitutes the Court's judgment for that of the duly authorized body--the Westminster City Council.

Even if this Court were to affirm the findings and conclusions of the District Court, it should provide the duly elected officials of the Westminster City Council the opportunity to apply the appropriate criteria to the evidence before them. Consequently, the Court should at least remand this case to the Council for the application of those criteria, consistent with the Court's opinion, to the evidence presented.

IV. ASSUMING, ARGUENDO, THAT A CONFLICT EXISTS BETWEEN SECTION 11-4-19 OF THE WESTMINSTER CODE AND C.R.S. 1973, 31-23-301 AND 31-23-303, AS AMENDED, THE WESTMINSTER ORDINANCE PREVAILS OVER THE CONFLICTING PORTIONS OF THE STATUTES, PURSUANT TO ARTICLE XX OF THE COLORADO CONSTITUTION.

It is, again, the League's position that no conflict exists

between the Westminster ordinance and the state statutes at issue, and thus the question of which prevails in case of a conflict need not be decided by this Court. Nevertheless, if this Court should determine that some conflict exists, then it should also find that the subject matter of the conflict is of primarily local concern.

Any analysis of the statewide or local nature of the subject matter at issue must begin with an identification of the "subject matter" itself -- i.e., what is the subject matter of those portions of the ordinance and statutes which conflict? The answer to this question is somewhat difficult in the instant case since any conflict between the two is not apparent.

Nevertheless, it is apparent that the subject at issue is not the prohibition of group homes for the developmentally disabled from residential areas. The District Court did not find that the Westminster ordinance either prohibited group homes for the developmentally disabled in any residential district, or regulated such group homes in a manner tantamount to exclusion of such group homes from all residential districts. The District Court found only that the criteria (without further specification) set forth in the Westminster ordinance for granting or denying special use permits for the group homes conflicted in some manner with the state statutes.

However, even the legislature itself did not declare the criteria to be used in determining specific locations of the group homes to be of statewide concern. And in fact, the legislature recognized broad authority in municipalities to adopt and apply specific locational requirements. (See Argument I of this brief.) The legislature's declaration of "statewide concern" must be read narrowly -- to include only a concern that group homes for the developmentally disabled are not totally excluded from all residential areas. (See Argument I of this brief.) And the question of

total exclusion is not at issue in this case.

Assuming, then, that the subject matter at issue is the criteria for review established by the Westminster ordinance, the League submits that the establishment and application of those criteria is a matter of local concern. The establishment of criteria for determining the granting or denial of a special use permit is part of the zoning process. The end result of the special use procedure is to determine the use to which specific property within the municipality may be put -- clearly a function of the local zoning, land use decision-making process.

As early as 1925, the Colorado Supreme Court implicitly recognized that the power to determine the location of buildings through locally-established standards was granted to home rule municipalities by Article XX of the Colorado Constitution. Averch v. City and County of Denver, 78 Colo. 246, 242 P. 47 (1925). In 1927, the Court again implicitly recognized that the authority of a home rule municipality to enact ordinances relating to zoning and regulating the use of land within its boundaries arises from Article XX. See Colby v. Board of Adjustment, 81 Colo. 344, 255 P. 443 (1927). In later cases, the decision that the zoning process and power is a "local and municipal" matter under Article XX, Section 6 of the Colorado Constitution has been consistently upheld: Roosevelt v. Englewood, 176 Colo. 576, 492 P.2d 65 (1971); Service Oil Company v. Rhodus, 179 Colo. 335, 500 P.2d 807 (1972); City of Greeley v. Ells, 186 Colo. 352, 527 P.2d 538 (1974); and, Moore v. Boulder, 29 Colo.App. 248, 484 P.2d 134 (1971). See, McArthur v. Zabka, 177 Colo. 337, 494 P.2d 89 (1972); and, Fort Collins v. Dooney, 178 Colo. 25, 496 P.2d 316 (1972). In Service Oil Company v. Rhodus, supra, the Court stated:

> "The General Assembly has power to legislate zoning regulations applicable to statutory cities. Where, however, the Charter of a home rule city exercises the power delegated to it by Article XX, Section 6, as to matters of purely local concern, the legislature has no power." Service Oil Company v. Rhodus, supra, 179 Colo. at 346. (Emphasis by the Court.)

If required to decide the issue, this Court should reaffirm the judicial recognition of over 50 years that the regulation and process of determining the use of land within home rule municipalities is a "local and municipal matter" under Article XX of the Colorado Constitution. Such a decision is particularly warranted in this case, where the only conflict suggested between the state and local regulations is the criteria for decision-making established at the local level.

CONCLUSION

Based upon the foregoing arguments and authorities, the Colorado Municipal League prays that the Court affirm the decision of the Westminster City Council denying plaintiff's special use permit application or, in the alternative, remand this case to that Council for further proceedings and application of the proper criteria to the evidence before it.

Respectfully submitted,

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