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No. 27462

IN THE

SUPREME COURT

OF THE

STATE OF COLORADO

CITY OF THORNTON, COLORADO, A Municipal Corporation of the State of Colorado, acting by and through its Utilities Board,

Petitioner-Appellant,

vs.

THE FARMERS RESERVOIR AND IRRIGATION COMPANY, a Mutual Ditch Company organized pursuant to the Corporation Laws of the State of Colorado, et al,

Respondent-Appellees.

From the
District Court
of the
County of Jefferson
State of Colorado

Honorable
Roscoe Pile
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 non-profit association of two hundred twenty-nine cities and towns located throughout the State of Colorado. Providing citizens a safe and adequate supply of water is a basic municipal function necessary to the health and prosperity, and essential to the continued existence of our cities and towns:

> "...[I]t would seem that without question the procurement of a pure and abundant supply of water is as much an incident to city government, and equally as essential to the health, life, and success of its inhabitants, as is the maintenance of a police force. The difference lies not in the ultimate effect, but in the class of dangers sought to be obviated." City of McMinnville v. Howenstine, 56 Ore. 451, 109 P. 81, 83 (1910).

Procuring an adequate supply of water to meet both the existing needs of its citizens and future needs resulting from expected increases in population over a reasonable period of time is an act of highest prudence on the part of municipalities. Denver v. Sheriff, 105 Colo. 193, 96 P. 2d 836 (1939).

Historically, Colorado's municipalities have met the water needs of their citizens through appropriation, purchase, gift, dedications, etc. These methods, however, either are or may become inadequate. Acquisition of water by appropriation is not a reasonable alternative in most areas of the State, and the ability of a municipality to acquire water by purchase is limited by a number of factors outside its control -- the prices that may be demanded; the financial resources of the municipality (particularly

of smaller municipalities) to pay those prices; and the willingness, or lack of willingness, of the owner to sell. Although the power of eminent domain has been rarely used in the acquisition of water supplies by Colorado municipalities, the existence of an effective power to condemn is essential to ensure that adequate supplies of domestic water are available for both present and future citizens.

The problems which are being or will be faced by municipalities in acquiring adequate supplies of water for their citizens are not imaginary, nor are they limited to any particular area of the State. Some municipalities which supply water through wells may be required to replace all or parts of those supplies just to meet the needs of their current residents, as a result of State action curtailing the use of or shutting down the municipal wells. Some municipalities face the prospect of insufficient water to supply even existing needs in the event of prolonged drought conditions. Other Colorado municipalities may be expected to experience rapid population growth over which they have little control, and which will result in increased water demands. And some municipalities may be compelled to acquire alternate supplies of domestic water because of an inability to comply with federal and state requirements regulating the quality of drinking water which may be supplied to the public.

If the above-described needs and others cannot be met by appropriation or other means, if prices demanded for the sale of water rights are excessive or if there is no willingness to sell, the final resort must be an effective right to exercise the power of eminent domain through payment of just compensation.

The Colorado General Assembly adopted C.R.S. 1973, 38-6-201 et seq. (referred to herein as H.B. 1555) in 1975. Although clothed as a procedural mechanism for municipal exercise of the right of eminent domain in acquiring water supplies, the actual effect of the bill is to place major substantive limitations on the exercise of that right. For that reason, the constitutionality of the bill, and the Court's determination of the issue, are of concern to Colorado's municipalities statewide. While numerous issues appear to be presented to the Court in this case, the sole purpose for which the League seeks to appear as Amicus Curiae is to protect the effective exercise of municipal eminent domain powers and to present to the Court its arguments regarding the unconstitutionality of H.B. 1555.

## STATEMENT OF THE ISSUES

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

## STATEMENT OF THE CASE

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

## SUMMARY OF THE ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT H.B. 1555 APPLIES TO THE CITY OF THORNTON, A HOME RULE MUNICIPALITY.

A. The City of Thornton, Pursuant to the Colorado Constitution and Its Home Rule Charter, May Determine the Most Appropriate Procedure to Follow in Exercising Its Power of Eminent Domain.

B. Certain Provisions of H.B. 1555 Impose Substantive Limitations on the Exercise of the Eminent Domain Power and Therefore Cannot Constitutionally be Applied to the City of Thornton Under Article XX and the City's Charter.

II. THAT PORTION OF H.B. 1555 GRANTING AUTHORITY TO A COMMISSION TO DETERMINE THE NEED AND NECESSITY FOR THE EXERCISE OF MUNICIPAL CONDEMNATION POWERS IS UNCONSTITUTIONAL.

A. The Grant to a Commission of the Authority to Determine the Need and Necessity for the Exercise of Municipal Condemnation Powers Violates Article V, Section 35 of the Colorado Constitution.

B. The Grant to a Court-Appointed Commission of the Authority to Determine the Need and Necessity for the Exercise of Municipal Condemnation Powers Violates Article III of the Colorado Constitution.

C. The Statutory Grant to a Commission of the Authority to Determine the Need and Necessity for the Exercise of Municipal Condemnation Powers Lacks Adequate Standards to Guide the Commission's Decision and is Thus Unconstitutional.

## ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT H.B. 1555 APPLIES TO THE CITY OF THORNTON, A HOME RULE MUNICIPALITY.

A. The City of Thornton, Pursuant to the Colorado Constitution and Its Home Rule Charter, May Determine the Most Appropriate Procedure to Follow in Exercising Its Power of Eminent Domain.

The power of eminent domain is an inherent attribute of sovereignty limited only by applicable provisions of the state and federal constitutions, and the exercise of the right of eminent domain is the exercise of the sovereign power. People of Colorado v. District Court, 207 F.2d 50 (10th Cir. 1953). A portion of that sovereign power was granted directly by the people of the state of Colorado to the citizens of home rule municipalities through the adoption of Sections 1 and 6* of Article XX of the Colorado Constitution. Section 1 of Article XX provides, in part, that a home rule municipality:

> "...shall have the power, within or without its territorial limits, to construct, condemn and purchase, purchase, acquire, lease, add to, maintain, conduct, and operate water works, light plants, power plants, transportation systems, heating plants, and any other public utilities or works or ways local in use and extent, in whole or in part, and everything required therefore...and...the same or any part thereof may be purchased by said city and county which may enforce such purchase by proceedings at law as in taking land for public use by right of eminent domain...." (Emphasis added.)

In a number of cases decided over the years, the Colorado courts have interpreted the scope of power granted to home rule munici-

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* Section 1 of Article XX grants numerous specific powers to the city and county of Denver, and Section 6 of Article XX provides that all home rule municipalities shall have the powers set forth in Section 1.

palities by Article XX. The general rule adopted by the courts is that Article XX confers upon home rule municipalities every power possessed by the General Assembly in granting charters generally. See, e.g., Denver v. Hallett, 34 Colo. 393, 83 P. 1066 (1905); Londoner v. City and County of Denver, 52 Colo. 15, 119 P. 156 (1911); Fishel v. City and County of Denver, 106 Colo. 576, 108 P.2d 236 (1940); and Denver v. Board of Commissioners of Arapahoe County, 113 Colo. 150, 156 P.2d 101 (1945). If the General Assembly constitutionally could have conferred any particular power on a municipality, then a home rule municipality has that power pursuant to its grant of authority in Article XX, without any legislative action. Londoner v. City and County of Denver, supra; Fishel v. City and County of Denver, supra; and Denver v. Board of Commissioners of Arapahoe County, supra.

The specific rule setting forth the scope of the eminent domain power granted to home rule municipalities by Article XX is equally well-settled: by adopting Article XX, the people of Colorado intended to, and in effect did, delegate to home rule municipalities full power to exercise the right of eminent domain in the effectuation of any lawful, public and municipal purpose. Fishel v. City and County of Denver, supra; Glendale v. Denver, 137 Colo. 188, 322 P.2d 1053 (1958); and, Toll v. Denver, 139 Colo. 462, 340 P.2d 862 (1959).

The citizens of the City of Thornton, through adoption of its home rule charter, reserved to the City the full power of eminent domain delegated to it by Article XX. Section 2.1 of the Thornton Charter provides specifically that:

> "The City shall have all the power of self-government and home rule and all power possible for a city to have, under the Constitution of the State of Colorado. The City shall also have all powers that now or hereafter may be granted to municipalities by the laws of the State of Colorado...."

Section 16.7 of the Charter further provides that the City shall have the power to acquire:

> "...within or without its corporate limits...water, water rights and water storage rights...and may take the same upon paying just compensation to the owner as provided by law."

Finally, section 5.7(d) of the City's Charter grants to the City Utilities Board, the following powers:

> "Subject to the limitations contained in this Charter, the Board shall have and exercise all powers of the City of Thornton granted by the Constitution and laws of the State of Colorado any by this Charter including, but not limited by the following powers; powers to ...condemn...water and sewer utilities...any everything necessary, pertaining, or incidental thereto...."

The full power of eminent domain over water rights has thus been delegated by the citizens to the Utilities Board, and the Board has the power to take such rights limited only by the constitutional requirement of payment of just compensation to the owner of the right taken.

Under the laws of Colorado, there now exist three separate procedures through which a municipality may exercise its power of eminent domain: C.R.S. 1973, 38-1-101 et seq.; C.R.S. 1973, 38-6-101 et seq.; and, with respect to water rights only, C.R.S. 1973, 38-6-201 et seq. (1975, often referred to herein as H.B. 1555). Each set of statutes contains procedural requirements and certain powers different from the others. The District Court concluded in this case that a home rule municipality could be required by the General Assembly to exercise its power of eminent domain over water supplies only through the procedures set forth in H.B. 1555, even though it had elected to proceed under the provisions of C.R.S. 1973, 38-1-101 et seq. It is submitted, however, that having been granted through Article XX of the Constitution, and having assumed through its charter, the full power of eminent domain subject only to the payment of just compensation, the City of Thornton and its Utilities

Board may elect to exercise its power under whichever one of the three sets of statutes it deems most appropriate for its purposes.

This conclusion is consistent with prior Colorado decisions. In two separate cases, the Colorado Supreme Court has rejected the argument that a home rule municipality can be forced to follow a particular statutory proceeding in exercising its power of eminent domain. In Toll v. Denver, supra, the Court concluded that Denver could elect to exercise its eminent domain powers under the procedural statutes best suited to its circumstances. And, in Englewood v. Weist, 184 Colo. 328, 520 P.2d 120 (1974), the Court stated that once Englewood (a home rule city) elected to proceed under C.R.S. 1973, 38-1-101 et seq., it could not be forced to follow, comply with, or be bound by the provisions contained in C.R.S. 1973, 38-6-101 et seq. Each decision is consistent with the proposition that a constitutional grant of full eminent domain powers includes the power to select, absent other constitutional or charter restrictions, the most appropriate procedure for exercising the power.

B. Certain Provisions of H.B. 1555 Impose Substantive Limitations on the Exercise of the Eminent Domain Power and Therefore Cannot Constitutionally be Applied to the City of Thornton Under Article XX and the City's Charter.

If a home rule municipality can be required by the General Assembly to exercise its constitutional power of eminent domain over water rights only through the procedural requirements of H.B. 1555, the bill's substantive limitations on the exercise of that power still cannot be applied to a home rule municipality. In Glendale v. Denver, supra, it was argued that Denver could not condemn certain property located within Glendale without the latter's consent pursuant to C.R.S. 1953, 139-52-2(2)

which provided that:

> "No sewerage facilities shall be operated in whole or in part in any other municipality unless the approval of such other municipality in the territory in which the facilities will be located is obtained."

The Court rejected Glendale's argument, indicating that Denver's authority to condemn was by constitutional grant, and if the consent statute relied on by Glendale was construed as limiting such power, the statute would be of doubtful validity.

The Court's decision in Glendale is consistent with Town of Lyons v. City of Longmont, 54 Colo. 112, 129 P. 198 (1913). In that case, the City of Longmont sought to condemn a right of way through the Town of Lyons pursuant to powers granted by Article XVI, Section 7 of the Colorado Constitution. Lyons argued that various statutes prohibited Longmont from condemning the right of way, including a statute which then prohibited the laying of a pipeline within a municipality without the municipality's consent. In rejecting the argument of the Town of Lyons, the Court pointed out that Longmont was condemning the right of way pursuant to a constitutional grant of power - Article XVI, Section 7 - and, thus, a statutory limitation on the exercise of that power must fail.

Finally, in Denver v. Board of Commissioners of Arapahoe County, supra, it was argued that Denver, pursuant to a statute, lacked authority to condemn land for airport purposes where the land was located more than five miles beyond the city's limits. The Court held that the statutory limitation was inapplicable to Denver in the exercise of the condemnation powers granted it by Article XX of the Colorado Constitution.

Pursuant to the above-cited cases, statutory limitations on the exercise of eminent domain powers cannot be applied where the power of eminent domain is derived directly from the people of Colorado through constitutional enactment. Specifically, the following-described limitations

contained in H.B. 1555 cannot constitutionally be applied to the City of Thornton or to other home rule municipalities.

1. C.R.S. 1973, 38-6-202(2)(1975 Supp.) attempts to prohibit municipalities from condemning water rights for anticipated or future needs in excess of fifteen years. The effect of the language is to place an absolute limit on the amount of water which can be condemned to meet future needs of a municipality. As discussed previously, however, the Constitution grants to home rule municipalities the full power to exercise the right of eminent domain for any lawful, public and municipal purpose, and places no absolute limit on the amount of property which can be taken.

Historically, the determination of how much property can be condemned to meet future needs has been considered a part of the determination of necessity and, therefore, a legislative determination subject only to review by the courts where the action is found to be clearly fraudulent or clearly unreasonable. Denver v. Board of Commissioners of Arapahoe County, supra. In that case, Denver sought to condemn certain lands located outside its boundary for an airport. The Supreme Court overruled the trial court's determination that Denver required only 320 acres for the airport, ruling that the City had authority to obtain an amount of land sufficient to accomodate reasonably immediate future needs. See Lavelle v. Town of Julesburg, 49 Colo. 290, 112 P. 774 (1911).

2. C.R.S. 1973, 38-6-202 and 207 (1975 Supp.) provide that three "disinterested commissioners" shall be appointed to determine the necessity of exercising the power of eminent domain for the proposed purposes and provide a recommendation to the Court that: there is no need or necessity for condemnation as proposed by the municipality; there is a need and necessity for condemnation as proposed; or, there is a need and necessity for condemnation, but it is premature. Following

receipt of the commissioners' report, the court is granted the authority, "for good cause shown", to modify, alter, change, annul, or confirm the report of the commissioners, or any part of the report. C.R.S. 1973, 38-6-210 (1975 Supp.).

The determination of necessity is an essential part of the power of eminent domain:

> "'[A] legislative act declaring the necessity, being the customary mode in which that fact is determined, must be held for this purpose, 'the law of the land,' and no further finding or adjudication can be essential, unless the Constitution of the state has expressly required it.' Cooley's Const. Lim. pp. 759, 760." Londoner v. City and County of Denver, supra, 119 P. at 159.

By the overwhelming weight of authority in Colorado and elsewhere, that determination is considered a legislative act, vested in the discretion of the public body granted the power of eminent domain, and not reviewable by the judiciary, absent a showing of fraud or bad faith. Colorado State Board of Land Commissioners v. District Court, 163 Colo. 338, 430 P.2d 617 (1967); Dallasta v. Department of Highways, 153 Colo. 519, 387 P.2d 25 (1963); Mack v. Highway Commission, 152 Colo. 300, 381 P.2d 987 (1963); Denver v. Board of Commissioners of Arapahoe County, supra; Lavelle v. Town of Julesburg, supra; and, 1 Sackman, Nichols on Eminent Domain §4.11 (Rev. 3rd Ed.). Historically included within the scope of "necessity" to be determined by the public body are the following considerations: the location of the project (Dallasta v. Department of Highways, supra; Lavelle v. Town of Julesburg, supra; and, Colorado State Board of Land Commissioners v. District Court, supra); the feasibility and practicability of the project (Dallasta v. Department of Highways, supra); the amount of property to be taken (Lavelle v. Town of Julesburg, supra; and, Denver v. Board of Commissioners of Arapahoe County, supra); whether there is any need for resorting to eminent domain in effecting the acquisition (1 Sackman, Nichols on Eminent Domain, supra);

whether the time is a fitting one; (1 Sackman, Nichols on Eminent Domain, supra); and whether another tract would not better serve the purposes of the condemnor (1 Sackman, Nichols on Eminent Domain, supra; and Lavelle v. Town of Julesburg, supra).

In Lavelle v. Town of Julesburg, supra, it was argued that a board of commissioners should have been appointed to determine the necessity for the town's taking of a particular lot. The Supreme Court rejected that argument, pointing out that the applicable statute authorized the town to condemn so much private property as was necessary for the construction of a waterworks:

> "It is the province of the town authorities to determine what property shall be taken and condemned upon which to construct a plant to operate a waterworks system belonging to the town. As applied to the facts of this case, the exercise of discretionary power and judgment of municipal officers, when acting within the scope of their authority, is conclusive, unless it clearly appears their action was fraudulent or unreasonable....
>
> Could the action of the town authorities in such matters be submitted to either a court or commission, it might be that the judgment of the former would be regarded as not sound; but to permit this question to be gone into could result in substituting the judgment of others for those to whom the statute has specifically delegated the power to determine what property shall be taken for the public use under consideration, how much, and its location." Lavelle v. Town of Julesburg, supra, 112 P. at 776.

Just as the scope of condemnation power granted to the Town of Julesburg precluded a commission or court determination of necessity, the scope of condemnation power granted the City of Thornton by Article XX of the Constitution and its Charter precludes a commission or court determination of necessity. To hold otherwise would convert the City's constitutional grant of full eminent domain powers into a simple request to exercise the power, and thereby deny the City the authority and discretion vested in it. See Lavelle v. Town of Julesburg, supra.

II. THAT PORTION OF H.B. 1555 GRANTING AUTHORITY TO A COMMISSION TO DETERMINE THE NEED AND NECESSITY FOR THE EXERCISE OF MUNICIPAL CONDEMNATION POWERS IS UNCONSTITUTIONAL.

A. The Grant to a Commission of the Authority to Determine the Need and Necessity for the Exercise of Municipal Condemnation Powers Violates Article V, Section 35 of the Colorado Constitution.

As previously discussed, C.R.S. 1973, 38-6-202 and 207 (1975 Supp.) require a court-appointed commission to determine the need and necessity for the exercise of municipal condemnation powers. The League submits that this legislative grant directly violates the language and intent of Article V, Section 35 of the Colorado Constitution:

> "The general assembly shall not delegate to any special commission, private corporation or association, any power to make, supervise or interfere with any municipal improvement, money, property or effects, whether held in trust or otherwise, or to levy taxes or perform any municipal function whatever."

The term "special commission" as used in Article V, Section 35, refers to a body or association of individuals which are separate and distinct from the municipal government, created for some limited object, and not connected with the general administration of municipal affairs. In re Senate Bill, 12 Colo. 188, 21 P. 481 (1888); Milheim v. Moffat Tunnel Improvement District, 72 Colo. 268, 211 P. 649 (1922); and, Town of Holyoke v. Smith, 75 Colo. 286, 226 P. 158 (1924). The purpose of this constitutional limitation on the powers of the General Assembly is to prevent such a special commission from being authorized by law to control or interfere with municipal matters:

> "The framers of the Constitution had in mind the possibility that the legislature might attempt to create some special body to interfere with the management of municipal affairs, and wisely made provision to prevent such action." Town of

Holyoke v. Smith, supra, 226 P. at 161. See Public Utilities Commission v. Loveland, 76 Colo. 188, 230 P. 399 (1924); Thornton v. Public Utilities Commission, 157 Colo. 188, 402 P.2d 194 (1965); and, Englewood v. Denver, 123 Colo. 290, 229 P.2d 667 (1951).

Certainly the commissioners authorized to determine "need and necessity" by H.B. 1555 comprise a "special commission" within the meaning of Article V, Section 35. The three commissioners are appointed to sit for one eminent domain proceeding. They are required to be separate and distinct from the municipal government and are not connected with the general administration of municipal affairs: each commissioner is appointed by the court and must be "disinterested"; one must be a resident of the area affected by the proposed condemnation; one must be a resident of the municipality bringing the action; and one must be a party who has no interest in the controversy. C.R.S. 1973, 38-6-202(1) (1975 Supp.).

Moreover, as shown on page 11 of this brief, the determination of necessity is a legislative act, essential to the exercise of a municipality's eminent domain power. By granting the special commission authority to decide there is no need or necessity for condemnation as proposed by the municipality or that the need and necessity is premature, as provided in C.R.S. 1973, 38-6-207 (1975 Supp.), the General Assembly has granted the commission the authority to deny the condemnation itself. The effect of the denial certainly results in a supervision and interference with municipal affairs since it may prohibit the municipality from adequately providing water supplies to its present and future citizens or, at the least, may require the municipality to spend increased funds of its citizens to acquire such supplies.

In Thornton v. Public Utilities Commission, supra, the PUC sought to prevent the City's acquisition of certain water and sewer

facilities. The Supreme Court found that the PUC was a "special commission" as contemplated by Article V, Section 35, and that:

> "By force of this article (Article V, Section 35) the legislature could not, by any law, vest in the Public Utilities Commission or any agency with like powers and duties jurisdiction to interfere with municipal improvements such as the water and sewer facilities acquired by Thornton." Thornton v. Public Utilities Commission, supra, 157 Colo. at 194.

Delegation to a commission of the power to determine the necessity for municipal condemnation of water supplies likewise is prohibited by Article V, Section 35 of the Colorado Constitution.

B. The Grant to a Court-Appointed Commission of the Authority to Determine the Need and Necessity for the Exercise of Municipal Condemnation Powers Violates Article III of the Colorado Constitution.

C.R.S. 1973, 38-6-202(1) (1975 Supp.) specifically provides that three court-appointed commissioners shall determine the need and necessity for the exercise of municipal condemnation power to acquire water rights. After considering certain information, the commissioners must report and make one of three recommendations to the court: there is no need and necessity for condemnation as proposed; there is such need and necessity; or, there is a need and necessity for condemnation, but it is premature. C.R.S. 1973, 38-6-207(1) (1975 Supp.). Additionally, in making its recommendation to the court, the commissioners are authorized to recommend an alternate source of water supply. C.R.S. 1973, 38-6-207(2) (1975 Supp.). Finally, the court itself, "for good cause shown", is authorized to modify, alter, change, annul or confirm all or part of the report of the commissioners. C.R.S. 1973, 38-6-210 (1975 Supp.).

In at least two cases, the Colorado Supreme Court has considered whether vesting court-appointed individuals with certain power is unconstitutional. In Fladung v. Boulder, 165 Colo. 244, 438 P.2d 688 (1968), a portion of the Boulder ordinance which provided for a court-appointed receiver to collect assessments and pay bondholders in the event of a default on certain bonds was challenged on the basis that it constituted an illegal delegation of power to a non-governmental entity and an interference with the governmental functions of the city. The Court rejected the argument, stating that:

> "A receiver appointed in the eventuality anticipated in the ordinance would not be dealing with public moneys as that term is normally construed. Likewise the receiver would not be vested with power to levy taxes or otherwise interfere with the governmental functions of the city officials but would be limited to the function of collecting, receiving and applying the assessments levied by law. These ministerial functions are therefore strictly limited."

Fladung v. Boulder, supra, 165 Colo. at 250. (Emphasis added.) In In re Interrogatories Propounded by the Senate Concerning House Bill 1078, ____ Colo. ____, 536 P.2d 308 (1975), it was argued in part that a constitutional amendment providing for the inclusion of certain court-appointed persons in a commission assigned to draw up a reapportionment plan violated the separation of powers doctrine. The Court rejected the argument on the grounds that the amendment providing for the appointment was an amendment to the Colorado Constitution itself, and that no federally protected right was involved.

The court appointments at issue in this case, however, do not result from any constitutional provision, but rather from a statute adopted by the General Assembly. Moreover, the powers to be exercised by the court-appointed commissioners are not purely ministerial, since a determination of necessity in an eminent proceeding is a legislative determination. (See page 11 of this brief and the cases cited therein.)

Thus, assumption by the court-appointed commissioners and by the courts of the power to determine necessity as provided in H.B. 1555, would violate the separation of powers guaranteed by Article III of the Colorado Constitution:

> "The powers of the government of this state are divided into three distinct departments - the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted."

C. The Statutory Grant to a Commission of the Legislative Authority to Determine the Need and Necessity for the Exercise of Municipal Condemnation Powers Lacks Adequate Standards to Guide the Commission's Decision and is Thus Unconstitutional.

If this Court determines that the statutory grant of authority to the commissioners and to the courts to determine the need and necessity for the exercise of municipal condemnation powers does not violate Article V, Section 35 or the separation of powers doctrine set forth in Article III of the Colorado Constitution, the delegation of such authority to the commission must still be held invalid because of the failure of the legislature to set forth any standards to guide the decision of the commissioners.

It has long been the law in Colorado that the distinction between a lawful and unlawful delegation of legislative power is the distinction:

> "...between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made." Sapero v. State Board of Medical Examiners, 90 Colo. 568, 11 P.2d 555, 557 (1932). To be valid, a delegation of

legislative power must include sufficient standards to guide and limit the body exercising the power. Lloyd A. Fry Roofing Co. v. State Department of Health, 179 Colo. 223, 499 P.2d 1176 (1972); People v. Giordano, 173 Colo. 567, 481 P.2d 415 (1971); State Board of Cosmetology v. Maddux, 162 Colo. 550, 428 P.2d 936 (1967); Swisher v. Brown, 157 Colo. 378, 402 P.2d 621 (1965); Apple v. Denver, 154 Colo. 166, 390 P.2d 91 (1964); Bettcher v. State, 140 Colo. 428, 344 P.2d 969 (1959); Prouty v. Heron, 127 Colo. 168, 255 P.2d 755 (1953); Hazlet v. Gaunt, 126 Colo. 385, 250 P.2d 188 (1952); and Sapero v. State Board of Medical Examiners, supra. While it may not be practical or possible to formulate absolutely precise standards, it is apparent that some standards must exist to ensure that the legislative power is not totally abdicated. See Lloyd A. Fry Roofing Company v. State Department of Health, supra.

That a decision regarding the necessity of exercising the power of eminent domain is legislative in nature has previously been established (see page 11 of this brief). A search through the provisions of H.B. 1555, however, indicates a total lack of standards to guide the commission's decision. In reaching its decision, the commission is required to examine the information provided by the municipality in its growth development plan and statement. C.R.S. 1973, 38-6-207(1)(a). The information therein provided may well assist the commission in factually determining the nature of the impact of the proposed action on the municipality, the condemnee and the general area affected. But no standards and no criteria are provided to guide the commission in balancing or assessing those impacts and in finally reaching a decision on need and necessity.

Assume, for example, that a municipality does have an alternate supply of water available to it by purchase, but purchase of the water and transporting it for use would cost several hundreds of thousands, or

even millions of dollars more than the water rights proposed to be condemned. What standards or criteria exist in the law to guide the commission's decision of need and necessity under those circumstances? What standard does it use to balance that interest against the economic and environmental impacts incurred by condemnation of the proposed water rights? Clearly no guidance is provided in the statute. Instead, the standards must be provided by the commission itself, a body which exists for only one condemnation proceeding, with no unique expertise in such matters nor any continuing ability to establish and apply its own guidelines. Thus each member of the commission will be forced to apply his own social, economic and environmental theories to the facts in arriving at a decision on the need and necessity for the condemnation.

A close examination of H.B. 1555 reveals that the commissioners appointed to determine the need and necessity for condemnation would have to create the "law" before performing the functions vested in them. Given the importance of the decisions to be made by such commissioners, the lack of continuity in commission membership, the complexity of the facts and issues involved, and the lack of standards in the statute, it is clear that the commission's statutory grant of authority to determine need and necessity constitutes an unlawful delegation of legislative power.

## CONCLUSION

For the reasons stated and the authorities cited, the Colorado Municipal League prays that the Court reverse that portion of the District Court decision holding that the City of Thornton is required to comply with the provisions of C.R.S. 1973, 38-6-201 et seq.