SUPREME COURT, STATE OF COLORADO

Case No. 82-SA165

BRIEF OF COLORADO MUNICIPAL LEAGUE AS AMICUS CURIAE

CHERRY HILLS FARMS, INC., a Colorado Corporation, CARRIAGE HOMES CONSTRUCTION, INC., on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

v.

CITY OF CHERRY HILLS VILLAGE, COLORADO,

Defendant-Appellant.

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TABLE OF CONTENTS

Page:

Table of Authorities....................................i,ii,iii

Statement of the Issues....................................1

Statement of the Case....................................1

Summary of the Argument....................................1

Arguments:

A. Interest of the Colorado Municipal League.........2

B. Cherry Hills Village, A Home Rule City, is Constitutionally Authorized to Adopt the Service Expansion Fee........................5

1. The service expansion fee is a tax...........7

2. Cherry Hills Village is authorized by the Colorado Constitution, art. XX, section 6, to adopt the tax..............8

3. The district court erred in relying on case law applicable to statutory (non-home rule) municipalities..............10

C. The Tax Does Not Violate the Uniformity Clause of the Colorado Constitution or the Equal Protection or Due Process Clauses of the United States Constitution........12

1. The tax does not violate the uniformity clause of the Colorado Constitution................................14

2. The uniformity clause is not applicable since the Cherry Hills Village tax is not an ad valorem property tax................................16

3. The tax does not violate the equal protection or due process clauses of the United States Constitution..............18

Conclusion 20

TABLE OF AUTHORITIES

Cases: Page:

American Mobilehome Association, Inc. v. Dolan, 191 Colo. 433, 553 P.2d 758 (1976)..............13,14,15

Ard v. People, 66 Colo. 480, 182 P.892 (1919)..............7

Berman v. City and County of Denver, 156 Colo. 538, 400 P.2d 434 (1965)....................................8

Bethlehem Evangelical Lutheran Church v. City of Lakewood, _____ Colo. _____, 626 P.2d 668 (1981).......3

California Co. v. State of Colorado, 141 Colo. 288, 348 P.2d 382 (1959), appeal dismissed, 364 U.S. 285 (1960).................................13

Callaway v. City of Overland Park, 211 Kan. 646, 508 P.2d 902 (1973)...............................17,18

Cimarron Corp. v. Board of County Commissioners, 193 Colo. 164, 563 P.2d 946 (1977).....................2

City and County of Denver v. Duffy Storage and Moving Co., 168 Colo. 91, 450 P.2d 339 (1969).......8,19

City and County of Denver v. Sweet, 138 Colo. 41, 329 P.2d 441 (1958)....................................9

City of Aurora v. Bogue, 176 Colo. 198, 489 P.2d 1295 (1971)...6

City of Colorado Springs v. State of Colorado, _____ Colo. _____, 626 P.2d 1122 (1980)...............9

City of Englewood v. Wright, 147 Colo. 537, 364 P.2d 569 (1961)...................................18

City of Sheridan v. City of Englewood, _____ Colo. _____, 609 P.2d 108 (1980).................6

Deluxe Theatres, Inc. v. City of Englewood, 198 Colo. 85, 596 P.2d 771 (1979).................6,8,17

Denver Urban Renewal Authority v. Byrne, _____ Colo. _____, 618 P.2d 1374 (1980)................9

Page:

District 50 Metropolitan Recreation District v. Burnside, 167 Colo. 425, 448 P.2d 788 (1968)....13,14,19

McArthur v. Zabka, 177 Colo. 337, 494 P.2d 89 (1972)..10

Minturn v. Foster Lumber Co., 190 Colo. 479, 548 P.2d 1276 (1976)....................................9

Mountain States Telephone and Telegraph Co. v. City of Colorado Springs, 194 Colo. 404, 572 P.2d 834 (1977)....................................9

Ochs v. Town of Hot Sulphur Springs, 158 Colo. 456, 407 P.2d 677 (1965)................................5,10,11

People ex rel. Tate v. Prevost, 55 Colo. 199, 134 P.129 (1913)..9

Pines v. City of Santa Monica, 29 Cal.3d 656, 630 P.2d 521 (1981)......................................15

Rancho Colorado, Inc. v. City of Broomfield, 196 Colo. 444, 586 P.2d 659 (1978)..........5,7,11,12,16

Security Life and Accident Co. v. Temple, 177 Colo. 14, 492 P.2d 63 (1972)........................8

Springston v. City of Fort Collins, 184 Colo. 126, 518 P.2d 939 (1974)..............................9,18,19

State Farm Mutual Automobile Insurance Co. v. Temple, 176 Colo. 537, 491 P.2d 1371 (1971)...................8

Tom's Tavern, Inc. v. City of Boulder, 186 Colo. 321, 526 P.2d 1328 (1974)............................8,9,19

Walker v. Bedford, 93 Colo. 400, 26 P.2d 1051 (1933)...7,17

Wood Brothers Homes, Inc. v. City of Colorado Springs, 193 Colo. 543, 568 P.2d 487 (1977)............3

Colorado Constitution:

Art. X, §3................................5, 11, 13, 14, 18
Art. X, §17...9
Art. XX,§6..............................1, 6, 7, 8, 10, 19

Page

Statutes:

§29-2-101 et seq., C.R.S. 1973..............................11
§31-2-201 et seq., C.R.S. 1973 (1977 Repl.Vol.)............10
§31-20-101 et seq., C.R.S. 1973............................12
Title 39, C.R.S. 1973, as amended..........................12
§39-1-105, C.R.S. 1973......................................4

§39-1-111(1), C.R.S. 1973...................................4
§39-5-128(1), C.R.S. 1973...................................4
§39-10-102, C.R.S. 1973.....................................4
§39-10-103, C.R.S. 1973.....................................4

§138-10-1 et seq., C.R.S. 1963 (1967 Perm.Supp.)...........11
§139-37-1, C.R.S. 1963.....................................11
§139-75-1(3), C.R.S. 1963..................................11
§139-78-3(2), C.R.S. 1963..................................11

Other:

Heyman and Gilhool, The Constitutionality of Imposing Community Costs on New Suburban Residents Through Subdivision Exactions, 73 Yale L.J. 1119 (1964)............5

STATEMENT OF THE ISSUES

The Colorado Municipal League ("League") adopts the statement of the issues appearing in the brief of the City of Cherry Hills Village ("City" or "Cherry Hills Village").

STATEMENT OF THE CASE

The League adopts the statement of the case appearing in the brief of the City of Cherry Hills Village.

SUMMARY OF ARGUMENT

Cherry Hills Village, a home rule municipality, is authorized by Colo.Const., art. XX, §6, to adopt a "service expansion fee." The fee is a tax and does not violate any constitutional limit on the City's taxing power. The tax does not violate the uniformity clause of the Colorado Constitution. In fact, although the Court need not reach the issue since no violation exists, the uniformity clause is not even applicable because the tax is an excise tax, not an ad valorem property tax. The tax does not violate equal protection or due process requirements. Consequently, the tax is valid and the decision of the district court should be reversed.

ARGUMENT

A. INTEREST OF THE COLORADO MUNICIPAL LEAGUE.

The League is a non-profit voluntary association of two hundred thirty-four cities and towns located throughout the State of Colorado. Each of Colorado's sixty-two home rule cities and towns, including the City of Cherry Hills Village, is a member of the League.

The issues presented in this case are of concern to Colorado's home rule cities and towns for at least two reasons. First, the district court's analysis and conclusions reflect a misapprehension of the distinction between Colorado's statutory and home rule municipalities. If allowed to stand, the misapprehension could result in an unwarranted limitation on the taxing powers of home rule municipalities.

Second, the tax adopted by Cherry Hills Village is of particular interest to those home rule municipalities which, like Cherry Hills Village, face substantial development pressure. One purpose of the tax is to ensure to the extent possible that new development pays its share of the cost of municipal services.

This Court has recognized in recent years that new development can be required to finance the cost of capital improvements necessitated by the development. For example, in Cimarron Corp. v. Board of County Commissioners, 193 Colo. 164, 563 P.2d 946 (1977), the Court upheld dedication

requirements in county subdivision regulations. Conditioning the issuance of a building permit on the construction (at the cost of the property owner) of streets, sidewalks, curbs, and gutters which are necessitated by an enlarged use of property, was upheld in Bethlehem Evangelical Lutheran Church v. City of Lakewood, ______ Colo. ______, 626 P.2d 668 (1981). Moreover, a home rule city's authority to impose on a subdeveloper, fees and construction requirements necessary to remedy drainage problems caused by a development was recognized in Wood Brothers Homes, Inc. v. City of Colorado Springs, 193 Colo. 543, 568 P.2d 487 (1977).

But capital improvement construction and financing do not address all of the costs associated with developing vacant land to residential, commercial or industrial uses, or otherwise enlarging the use of land. Other costs are incurred, costs resulting from an expanded need for police and fire protection, snow removal and other steet maintenance services, maintenance of recreational facilities, street lighting costs, and additional general administrative costs and services provided by the city administration, the municipal court, and other parts of the municipal government.

Eventually, a developing area will bear its share of these increased costs, in part through property taxes which increase because of the greater value of the improved

land. Under Colorado property tax procedures, however, this increase will not be realized until one to two years after the improvement is completed and after the increased demand is placed on municipal services. For example, assume a building permit is issued on January 15, 1981, to construct a business or home on a vacant lot. By statute, the improvements will not be appraised, or valued for assessment, until the following January 1, 1982. §39-1-105, C.R.S. 1973. Property taxes on the improvements will be levied in late 1982, will be due and payable on January 1, 1983, and will be considered delinquent on August 1, 1983. §§39-5-128(1), 39-1-111(1), 39-10-103, and 39-10-102.

Thus, increased revenue from the improvement will be received by the municipality as late as two and one-half years[1] after construction of the improvements and the need for increased service began. While property taxes on the lot itself will be paid during this period of time, the cost of services demanded from the municipality will increase beyond that necessary for a vacant lot. For the initial one to two year period after construction of the improvements, this increased cost of services must be paid for by other taxpayers in the municipality or through taxes other than property taxes.

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[1] This time frame will vary, of course, depending on when the building permit is obtained.

The one-time service expansion fee adopted by Cherry Hills Village helps pay that initial increased cost and helps ensure that the City's tax burden is more equitably spread among those who receive the City's services. See generally Heyman and Gilhool, The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions, 73 Yale L.J. 1119 (1964) at 1152-1154 (re use of excise taxes).

B. CHERRY HILLS VILLAGE, A HOME RULE CITY, IS CONSTITUTIONALLY AUTHORIZED TO ADOPT THE SERVICE EXPANSION FEE.

The district court did not specifically rule that Cherry Hills Village lacked authority to adopt the service expansion fee, and the plaintiff's complaint does not question the City's authority. The district court did, however, erroneously base its analysis of the issues, and its conclusions, on case law applicable to the taxing authority of statutory municipalities: Ochs v. Town of Hot Sulphur Springs, 158 Colo. 456, 407 P.2d 677 (1965); and Rancho Colorado, Inc. v. City of Broomfield, 196 Colo. 444, 586 P.2d 659 (1978). Finding these cases "dispositive," the district court concluded that the Cherry Hills Village tax was an invalid special assessment or an ad valorem property tax violative of the uniformity clause of Colo.Const., art. X, §3, or both. But the two cases are not applicable to taxes adopted by a home rule municipality.

The powers of home rule and statutory municipalities are vastly different. A statutory municipality has only those powers which are expressly conferred by statutory grant or exist by necessary implication. City of Sheridan v. City of Englewood, ______ Colo. ______, 609 P.2d 108 (1980); and City of Aurora v. Bogue, 176 Colo. 198, 489 P.2d 1295 (1971). The powers of a statutory municipality are strictly construed and any doubt as to its power to act is resolved against it. Id. Home rule municipalities, on the other hand, may rely upon their constitutional grant of authority to act in matters of local and municipal concern (such as taxation) without the need for any statutory grant.

A clear example of these differences is presented in City of Sheridan v. City of Englewood, ______ Colo. ______, 609 P.2d 108 (1980). In that case, the Court concluded that Sheridan, a statutory city, lacked the authority to adopt an admissions tax since there was no state statute granting it that authority. The Court distinguished its earlier opinion in Deluxe Theatres, Inc. v. City of Englewood, 198 Colo. 85, 596 P.2d 771 (1979) (upholding the validity of a city admissions tax) on the ground that Englewood was a home rule municipality, deriving its tax authority from Colo.Const., art. XX, §6, rather than from any statute.

Because of these very different powers, different analyses must be applied to determine the validity of actions

taken by a home rule or statutory municipality. When analyzing the validity of taxes adopted by a statutory municipality, the statutes are examined to find some express grant of authority to tax. When analyzing the validity of taxes adopted by a home rule municipality, however, the authority to tax (other than incomes) exists by virtue of Colo.Const., art. XX, §6, and the only relevant questions are whether the exercise of the authority offends any applicable constitutional limitation or whether the exercise of the authority offends the municipality's own home rule charter.

1. The service expansion fee is a tax.

The City admits that the service expansion fee is a tax. The sole purpose of the fee is to raise revenue to fund the expanding cost of City services, as stated in the purpose clause of the tax ordinance. The ordinance adopting the fee is not a regulatory measure and it expresses no regulatory purpose. Under these circumstances, the fee must be considered a tax, regardless of its label. See Rancho Colorado, Inc. v. City of Broomfield, 196 Colo. 444, 586 P.2d 659 (1978); Walker v. Bedford, 93 Colo. 400, 26 P.2d 1051 (1933); and Ard v. People, 66 Colo. 480, 182 P.892 (1919).

2. Cherry Hills Village is authorized by the Colorado Constitution, article XX, section 6, to adopt the tax.

The Colorado Supreme Court has long supported the taxing powers of Colorado's home rule municipalities, recognizing that local taxation is a power "essential" to the existence of home rule municipalities and to the full exercise of the right of self-government granted by article XX of the Colorado Constitution. Security Life and Accident Co. v. Temple, 177 Colo. 14, 492 P.2d 63 (1972); and, Deluxe Theatres, Inc. v. City of Englewood, 198 Colo. 85, 596 P.2d 771 (1979). The levy and collection of taxes is considered a matter of purely local and municipal concern, thus within the constitutional powers granted home rule municipalities by art. XX, §6. See, e.g., Security Life and Accident Co. v. Temple, supra (sales and use tax); Berman v. City and County of Denver, 156 Colo. 538, 400 P.2d 434 (1965)(sales tax); Deluxe Theatres, Inc. v. City of Englewood, supra (admissions tax); State Farm Mutual Automobile Insurance Co. v. Temple, 176 Colo. 537, 491 P.2d 1371 (1971) (occupational privilege tax); City and County of Denver v. Duffy Storage and Moving Co., 168 Colo. 91, 450 P.2d 339 (1969), appeal dismissed, 396 U.S.2 (1969) (occupational privilege tax); Tom's Tavern, Inc. v. City of Boulder, 186 Colo.

321, 526 P.2d 1328 (1974) (occupation tax on liquor licensed facility); Springston v. City of Fort Collins, 184 Colo. 126, 518 P.2d 939 (1974) (occupation tax on liquor licensed facility); People ex rel. Tate v. Prevost, 55 Colo. 199, 134 P.129 (1913) (ad valorem property tax); Denver Urban Renewal Authority v. Byrne, _____ Colo. _____, 618 P.2d 1374 (1980) (ad valorem property tax); and City of Colorado Springs v. State of Colorado, _____ Colo., _____ 626 P.2d 1122 (1980) (ad valorem property tax).

An income tax is the only tax, to this counsel's knowledge, which has been ruled not to be within the constitutional authority of a home rule municipality. In City and County of Denver v. Sweet, 138 Colo. 41, 329 P.2d 441 (1958), the Court ruled that Colo.Const., art. X, §17 preempted the field of income taxation and granted to the General Assembly the exclusive non-delegable power to levy income taxes. See also City and County of Denver v. Duffy Storage and Moving Co., supra; Minturn v. Foster Lumber Co., 190 Colo. 479, 548 P.2d 1276 (1976); and Mountain States Telephone and Telegraph Co. v. City of Colorado Springs, 194 Colo. 404, 572 P.2d 834 (1977). Since the Cherry Hills Village tax is not and is not alleged to be an income tax,

adoption of the tax is within the City's home rule powers,[2] granted by Colo.Const., art. XX, §6.

3. The district court erred in relying on case law applicable to statutory (non-home rule) municipalities.

On reviewing the challenge to the Cherry Hills' Village tax the district court failed to follow the analysis applicable to home rule taxing powers. Instead, it relied on the two cases involving the powers of statutory municipalities. At issue in Ochs v. Town of Hot Sulphur Springs, supra, was the validity of a "frontage tax" imposed by the statutory town. The Supreme Court decided that the Town's tax was "unsupported by any permissive revenue producing authority" and so violated due process. 158 Colo. at 462. The Court's analysis of the case properly began with a search for the Town's authority to impose the tax:

> If the ordinances under attack are to be given validity they must be justified within one of two types of taxes permitted under statutory or constitutional authority,

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[2] The citizens of a home rule municipality may impose restrictions on the municipality's taxing power in adopting, or by amendment to, the charter of the municipality. Colo. Const., art. XX and §§31-2-201 et seq., C.R.S. 1973 (1977 Repl.Vol.). Any charter limitation is, of course, binding on the municipality. See McArthur v. Zabka, 177 Colo. 337, 494 P.2d 89 (1972) The charters of many home rule municipalities do in fact contain various types of tax limitations.

> namely: (1) a general ad valorem tax as prescribed by article X, section 3 of the Colorado Constitution, which must be imposed uniformly upon both real and personal property according to their assessed valuation...; or (2) an assessment in the nature of a special tax for purposes of municipal improvement conferring a special benefit upon the property being assessed....

158 Colo. at 459. The Court made this statement, not because these two types of "taxes" (a special assessment, of course, is not a "tax") were the only ones which were or could constitutionally be authorized for any municipality,[3] but because they were the only two types of "taxes" specifically authorized at that time[4] for statutory municipalities which might have provided authority for the Town's "frontage tax."

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[3] The district court may have read such a limitation into the case since it stated that the Cherry Hills Village tax is an invalid special assessment and that it is not uniform contrary to Colo.Const., article X, section 3, and that Ochs and Rancho Colorado, Inc. were "dispositive of this matter...."

[4] The only taxes authorized for statutory municipalities were the ad valorem property tax [§139-37-1, C.R.S. 1963], the business or occupation tax [§§139-75-1(3) and 139-78-3(2), C.R.S. 1963], and the sales tax [§138-10-1 et seq. (1967 Perm.Supp.)]. In 1973, the use tax was authorized [§29-2-101 et seq., C.R.S. 1973]. These remain the only taxes authorized by statute for statutory cities and towns.

Similarly, in Rancho Colorado, Inc. v. City of Broomfield, supra, the Court ruled that Broomfield's service expansion fee, adopted when Broomfield was a statutory city, imposed a tax "which was beyond the city's legislative competence." 586 P.2d at 663. The Court explicitly decided, correctly, that no statutory authority existed for Broomfield to adopt the particular tax. At the time of the opinion, statutory municipalities were authorized to impose property taxes in conformance with state law. §31-20-101 et seq. and title 39, C.R.S. 1973, as amended. Broomfield's tax, however, did not conform to state law and so was outside the City's statutory authority.

Because Ochs and Rancho Colorado, Inc., concern only the authority of statutory municipalities to enact taxes, they are inapplicable to issues involving the taxing activities of a home rule municipality such as Cherry Hills Village. The district court's mistaken reliance on the two cases resulted in its erroneous conclusion that the Cherry Hills Village tax was invalid.

C. THE TAX DOES NOT VIOLATE THE UNIFORMITY CLAUSE OF THE COLORADO CONSTITUTION OR THE EQUAL PROTECTION OR DUE PROCESS CLAUSES OF THE UNITED STATES CONSTITUTION.

Once it is determined that the tax is within the constitutional authority of Cherry Hills Village (i.e., that it

is not an income tax), the only[5] remaining question is whether it violates any constitutional limitation on the City's taxing power. No such violation exists.

1. The tax does not violate the uniformity clause of the Colorado Constitution.

Assuming arguendo that the Cherry Hills Village tax is an ad valorem property tax,[6] the tax does not violate the uniformity requirement of Colo.Const., art. X, §3. The brief of the City of Cherry Hills Village addresses this issue in detail. The League will not repeat that argument, but will add only the following few comments.

Particularly applicable to this issue are the Court's opinions in American Mobilehome Association, Inc. v. Dolan, 191 Colo. 433, 553 P.2d 758 (1976) and District 50 Metropolitan Recreation District v. Burnside, 167 Colo. 425, 448 P.2d 788 (1968). In Mobilehome, the Court upheld the constitutionality of state legislation imposing an ad valorem tax on movable structures. The movable structures were assessed and taxed differently from other types of residen-

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[5] There appears to be no argument that the City's home rule charter limits its authority to impose the tax.

[6] Colo.Const., art. X, §3, applies only to ad valorem property taxes. California Co. v. State of Colorado, 141 Colo. 288, 348 P.2d 382 (1959), appeal dismissed, 364 U.S. 285 (1960) and cases cited therein, 348 P.2d at 389.

tial property. Yet the Court found no violation of the uniformity requirement of art. X, §3:

> Because two types or classes of property are both subjected to an ad valorem taxing scheme does not preclude the legislature from applying different rates and different means for determining value.
>
> * * *
>
> Because the legislature treated movable structures as a distinct class for purposes of assessment and collection, the ensuing happenstance of higher taxable rates on such structures is not critical, so long as these rates are imposed uniformly on the class or type of property involved.

553 P.2d at 761. The Court stated that, under the uniformity and equal protection clauses, classifications for tax purposes may be made so long as they rest upon some reasonable considerations of difference or policy:

> The burden is therefore on the one attacking the classification to negative every conceivable basis which might support it, at least where no fundamental right is imperiled.

553 P.2d at 762. _See also_ _District 50 Metropolitan Recreation District v. Burnside_, _supra_.

The district court in this case did not indicate how the City's tax violated the uniformity clause. If the court had applied the proper test, described in _Mobilehome_, it could not have found a violation. The Cherry Hills Village tax

ordinance creates a separate, one-time[7] tax classification for improvements to be constructed, different from the tax classification for existing improvements. The rates imposed by the City are uniform within each class. The plaintiff did not "negative every conceivable basis" which might support the separate tax classification. In fact, the City proposed a reasonable basis for the classification: an increased demand for City services caused by the new development, a property tax revenue lag of one to two years from the new development, and a desire to ensure that the City's costs are shared by all who use the City's services. A somewhat similar justification was upheld in Mobilehome, where the Court found a reasonable basis for the different treatment afforded movable structures in part because of their greater need for governmental services. 553 P.2d at 762.

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[7] The one-time nature of the Cherry Hills Village tax does not affect its validity. See, e.g., Pines v. City of Santa Monica, 29 Cal.3d 656, 630 P.2d 521 (1981) in which the California Supreme Court upheld the validity of a home rule city's condominium tax ordinance, imposing a one-time charge per salable unit to be paid prior to the issuance of various development permits.

2. The uniformity clause is not applicable since the Cherry Hills Village tax is not an ad valorem property tax.

If the Court finds that the Cherry Hills Village tax does not violate the uniformity clause, it need not determine the exact nature of the tax. Otherwise, to find a violation of the uniformity clause, the Court first must find that the Cherry Hills Village tax is an ad valorem property tax.[8] That finding is unwarranted.

The district court impliedly found the tax to be a property tax, relying on Rancho Colorado, Inc. v. City of Broomfield, supra. But the Cherry Hills Village tax differs substantially from the Broomfield tax. The Broomfield tax was measured by the value of the property as indicated on the approved building permit application. The valuation estimate was to be made by the building inspector similar to the manner real property is assessed. 586 P.2d at 663. Consequently, the Court concluded, the tax was a property tax, invalid because it did not comport with Broomfield's statutory authority.

In comparison, the Cherry Hills Village tax is measured on a square footage basis. No valuation of the property or assessment by an assessor is necessary or even applicable in

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[8] The uniformity clause applies only to ad valorem property taxes. See footnote 6, supra.

determining the amount of the tax. Consequently, the tax is not a property tax, but in the nature of an excise tax (to which the uniformity clause does not apply). See Walker v. Bedford, 93 Colo. 400, 26 P.2d 1051 (1933); and Deluxe Theatres, Inc. v. City of Englewood, supra.

In fact, the Kansas Supreme Court found that a similar tax, measured on a square footage basis, was not an ad valorem tax. At issue in Callaway v. City of Overland Park, 211 Kan. 646, 508 P.2d 902 (1973) was a home rule city's tax imposed on the leasing of certain residential rental properties at $.0035 per square foot of living space leased. It was argued that the tax was an invalid ad valorem tax, but the Court disagreed, finding instead that the tax was an excise tax:

> The term "excise tax" has come to mean and include practically any tax which is not an ad valorem tax. An ad valorem tax is a tax imposed on the basis of the value of the article or thing taxed. An excise tax is a tax imposed on the performance of an act, the engaging in an occupation or the enjoyment of a privilege.

508 P.2d at 907. In rejecting the argument that a tax imposed on a square footage basis becomes an impermissible tax on property, the Court stated:

> The use of square footage of living area rented is merely a means of measuring the amount of the occupational tax to be collected annually. Ordinarily if imposition of a tax is authorized and legally permissible the method by which this

> amount of tax is measured is left to the discretion of the taxing authority.

508 P.2d at 909. Similarly, in Springston v. City of Fort Collins, supra, 518 P.2d at 941, the Colorado Supreme Court ruled that the amount of an excise tax is a matter for legislative determination, as is the subject of the excise.

The fact that the incidence of a tax relates to realty does not change the nature of the tax from an excise tax to a property tax. See City of Englewood v. Wright, 147 Colo. 537, 364 P.2d 569 (1961); and Callaway v. City of Overland Park, supra. Nor is the nature of the tax determined by the concerns of the Cherry Hills Village City Council over the revenue lag between the time a building permit is issued and the receipt of property taxes. The only effect of the time lag is to increase the City's need for additional revenue, a need which could be filled by any authorized tax. A tax which is adopted in-lieu-of a property tax, does not necessarily become a property tax.

3. The tax does not violate the equal protection or due process clauses of the United States Constitution.

Due process and equal protection impose requirements on municipal taxation similar to the uniformity requirement in Colo.Const., art. X, §3: that "all persons who are members of any class, or all property logically belonging in a given classification, shall receive equal treatment to that ac-

corded all other persons or property in the same class"; and that any classification must have some basis in reason and logic. District 50 Metropolitan Recreation District v. Burnside, supra, 448 P.2d at 790. See also City and County of Denver v. Duffy Storage and Moving Co., supra; and Tom's Tavern, Inc. v. City of Boulder, supra. Consequently, the argument made in this and the City's brief, that the tax does not violate the uniformity clause of Colo.Const., art. XX, §6, applies to the equal protection and due process issues.

The fact that the tax applies to only one class does not violate due process or equal protection. Neither requires equality of taxation. Tom's Tavern, Inc. v. City of Boulder, supra. Instead, home rule municipalities may exercise a wide discretion in selecting the subjects of taxation so long as those who are similarly situated are treated according to uniform rules. Id. The Cherry Hills Village tax conforms to that requirement.

Finally, the amount of a home rule municipality's tax is a matter for legislative determination, and due process does not require that the tax be levied and assessed according to municipal cost so long as it is not confiscatory or prohibitory. Springston v. City of Fort Collins, supra; and Tom's Tavern, Inc. v. City of Boulder, supra. Judged by these standards, the Cherry Hills Village tax cannot be considered violative of due process or equal protection.

CONCLUSION

Based on the foregoing points and authorities, the Cherry Hills Village tax is within the constitutional powers of the City to enact, and does not violate any applicable constitutional limitation. The decision of the district court should be reversed.

Respectfully submitted,

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