SUPREME COURT, STATE OF COLORADO

CASE NO. 87SC169

AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

THE TOWN OF WINTER PARK, a Home Rule Town; THE TOWN COUNCIL OF THE TOWN OF WINTER PARK; and THE WINTER PARK DEVELOPMENT AUTHORITY,

Petitioners,

v.

THE EAST GRAND COUNTY SCHOOL DISTRICT NO. 2; THE BOARD OF EDUCATION OF THE EAST GRAND COUNTY SCHOOL DISTRICT NO. 2; THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF GRAND; JACK RANDALL; MEDILL McC. BARNES; ROBERT L. BUSSE; STEVEN M. SHARP; R. FRANK NORTON; RICHARD R. MULLIGAN; and JANE O. SMITH,

Respondents.

Case No. 86CA0479
Division I
Opinion by the Honorable Charles D. Pierce
The Honorable Dale P. Tursi and John A. Criswell concur.

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I. INTRODUCTION

The Colorado Municipal League (CML) supports the petition for writ of certiorari filed in this case. Issuance of a writ is proper under C.A.R. 49(a)(2) because the Court of Appeals has granted standing not in accord with previous decisions of this Court. The decision of the Court of Appeals here at issue is in conflict with a decision of Division II of the Court of Appeals on the same subject (interpretation of similar home rule charter provisions). Certiorari review under C.A.R. 49(a)(3) is appropriate to resolve the difference between divisions of the Court of Appeals. Finally, this Court should exercise its supervisory power under C.A.R. 49(a)(4) because the Court of Appeals has interferred with the right of citizens of home rule municipalities to adopt and exercise certain charter provisions.

A simple statutory requirement to make findings prior to adoption of an urban renewal plan has become a complex appelate issue because of its effect on the right of self government granted Colorado cities and towns. The League urges this Court to protect the right to self government guaranteed in the Colorado Constitution by granting the petition for certiorari review.

II. ARGUMENT

A. THE COURT OF APPEALS HAS GRANTED STANDING NOT IN ACCORD WITH PREVIOUS DECISIONS OF THIS COURT.

The Court of Appeals has determined that a county and a school district are entitled, as a matter of law, to challenge the adoption of a tax increment-financed urban renewal plan in a home rule municipality. Standing is a question of substance within the meaning of C.A.R. 49(a)(2). In making this determination, the Court of Appeals has substantially departed from the decisions of this Court in Denver Urban Renewal Authority v Byrne, 618 P.2d 1374 (Colo. 1980) and Wimberly v. Ettenberg, 570 P.2d 535 (Colo. 1977). Certiorari review to determine whether the Court of Appeals was correct in ignoring the Supreme Court's decisions is appropriate under C.A.R. 49(a)(2).

In Byrne, supra, defendant-appellants Byrne, Auditor for the City and County of Denver, and the School District No. 1 appealed a district court order mandating that Byrne countersign and register a cooperative agreement between the Denver Urban Renewal Authority (DURA) and the Denver City Council. The agreement included the use of tax increment financing for the development of an urban renewal project. The auditor and the school district disagreed with the merits of the project. However, because the agreement appeared to comply with C.R.S. § 31-25-

107(9), the auditor and the school district attacked the constitutionality of the statute itself.

On appeal, this Court found that plaintiff school district had no standing to challenge the tax increment financing scheme, stating:

> A long-standing rule of law is that "political subdivisions of the state, and the officers thereof, lack standing to challenge the constitutionality of a state statute directing the performance of their duties." 618 P.2d at 1379 (citing Board of County Commr's v. Fifty-First Gen. Assembly, 559 P.2d 887 (Colo. 1979))

The important feature of the Byrne decision, with the present petition for certiorari in mind, is that it specifically denied standing to challenge a tax increment financing scheme as to potential school district parties. The City and County of Denver, considered as a single entity, was granted standing. However, in doing so, this Court recognized that the requirement of a statutorily or constitutionally created interest has been applied to deny county standing: "This rule has been applied to counties, county officers, and county agencies e.g., Florida County Commissioners v. Fifty First Gen. Assembly, supra." 618 P.2d 1380.A similar set of facts exists in the case at bar, but the Court of Appeals has granted, not denied standing.

The decision of this Court in Byrne to deny standing to the school district is in accord with the Court's earlier decision in Wimberly v. Ettenberg, supra. In that case, this Court adopted a two-prong test for determining whether standing

was appropriate. First, plaintiff must suffer an injury in fact. Second, plaintiff must show by statutory or constitutional provisions a legally protected interest as contemplated. The county and school district plaintiffs in this case have failed to meet the standards of either test. This Court has clearly established rules which, when fairly applied to the facts in this case, would result in a holding that no standing to sue is available to East Grand County School District or to Grand County. However, the Court of Appeals has ignored these decisions. As to the school district, the Court of Appeals appears to rely upon C.R.S. § 31-25-107(9)(d), which provides school districts with an advisory role in the use of tax increment financing. However, an advisory role does not and cannot rise to the level of the legally protected interest required as a basis for standing under the decisions of this Court. This Court recognized in Byrne, supra, that legislative permission to participate in an advisory capacity was insufficient to confer a legally protected interest for purposes of standing. In Footnote 4 of the Byrne decision the Court stated that "The school district was permitted to participate in an advisory capacity with respect to the tax-allocation provisions of the plan to the extent required by section 31-25-107(9)." Note, however, that this Court still denied the school district standing as a matter of law, since no statute conferred a protected interest to it.

As to the county, the Court of Appeals relies upon the authority of counties to levy property taxes and to sue to protect the levy. However, urban renewal law confers no statutory interest on counties sufficient to satisfy the requirements of Byrne and Wimberly, supra. The urban renewal law, as a specific enactment, controls over the general county and taxation statutes. C.R.S. § 2-4-205 The Court of Appeals was in error in ignoring this Court's decisions in Byrne, and Wimberly, supra, and extending judicial challenge rights to the school district, the county, and individual plaintiffs by mere association.

Standing to sue, particularly when used as the basis to challenge a legislative decision made by the people in the exercise of their constitutional right to self-government, is a powerful legal tool. The decisions of this Court have established reasonable thresholds which must be reached before parties who would disagree with the merits of such decisions have the legal right to challenge them in court. The Court of Appeals has departed from those standards and extended standing in a manner inconsistent with this Court's past decisions. Certiorari review under C.A.R. (a)(2) is appropriate as the means by which the Supreme Court's past decisions should be reviewed and implemented.

B. SEPARATE DIVISIONS OF THE COURT OF APPEALS HAVE CONSTRUED SIMILAR MUNICIPAL HOME RULE CHARTER PROVISIONS DIFFERENTLY.

At the heart of the instant case is whether the electorate in the Town of Winter Park should be allowed to act as their own "governing body" for purposes of the requirements of C.R.S. § 31-25-107(4), where the home rule charter they adopted allows them to do so. Division I of the Court of Appeals narrowly construed Winter Park's home rule charter provisions §§ 3.5 and 5.7 to mean that the citizens retained no such rights.

Contrary to the decision of Division I at issue here, Division II of the Court of Appeals has come to a different conclusion in construing home rule charter provisions allowing citizen referendum and initiative. In Witkin Homes, Inc. v. City & County of Denver, 504 P.2d 1121 (Colo. 1972), Division II held that the Denver City Council could submit to the citizens for referendum a zoning ordinance which had already become effective. The Court of Appeals held that the language in Denver's charter was determinative of the scope of referendum and initiative. In Witkin, the Court of Appeals broadly construed the home rule charter provision which allowed the City Council to submit for a referendum "any ordinance passed by it in the same manner and with the same force and effect as hereinabove provided." 504 P.2d at 1123. Division II stated that the language of the charter was not limited to those types of ordinances allowed to be the subject of referendum initiated by petition:

> In construing a home rule charter, broad effect is given to the power granted a city council to submit a matter to a vote of the people, and any limitations on that power will be narrowly construed. (citing Brooks v. Zabka, 450 P.2d 653 (Colo. 1969) and Burks v. City of Lafayette 349 P.2d 692 (Colo. 1960)). Id at 1123

Contrary to the rule espoused by Division II, the Court of Appeals in the present case chose not to give broad effect to the charter provisions at issue. Division I limited the definition of "governing body" to the Winter Park Town Council, rather than including the electorate. Clearly, a conflict between divisions exists as to the proper rules to apply when construing home rule charter provisions which allow or require the submission of ordinances to a vote of the electors. Resolution of this present conflict between divisions of the Court of Appeals is appropriate through certirori review by this Court under C.A.R. 49(a)(3).

C. THIS COURT SHOULD INVOKE ITS POWER OF SUPERVISION OVER THE COURT OF APPLEAS TO PROTECT THE RIGHT OF SELF GOVERNMENT GUARANTEED BY THE COLORADO CONSTITUTION.

Article XX § 6 of the Colorado Constitution grants the citizens in home rule municipalities the power of self government. As a home rule municipality, Winter Park provides in its charter that the Town Council is the governing body except when the Council refers an ordinance or other questions to the electors. Despite these charter provisions the Court of Appeals determined that for purposes of the Urban Renewal Law, at C.R.S. § 31-25-107, the Town Council is required to serve as the

governing body. In so holding, the Court of Appeals has so far departed from the accepted course of judicial proceedings that this Court should exercise its supervisory power.

The effect of a home rule charter is to render a municipality free to manage its own affairs in all municipal and local matters in harmony with the constitution and general laws throughout the state. Winter Park's charter provisions defining governing body are in accord with Article XX § 6 of the Colorado Constitution and the Colorado Revised Statutes.

Article XX § 6 of the Colorado Constitution provides in pertinent part:

> The people of each city or town of this state . . . are hereby vested with, and they shall always have, power to make, amend, or replace the charter of said city or town, which shall be its organic law and extend to all its local and municipal matters . . . . (emphasis supplied)

Designation of the electorate as the governing body for the purpose of adopting an urban renewal plan is a local matter. Winter Park's designation is consistent with the powers delegated home rule municipalities by the Colorado Constitution.

C.R.S. section 31-1-101(4), defines "governing body" to include ". . . the city council . . . the board of trustees of a town, or any other body, by whatever name known, given lawful authority to adopt ordinances for a specific municipality." Therefore, designation in the Winter Park charter of the

electorate as the governing body for a specific purpose is also consistent with the Colorado Revised Statutes.

Because Winter Park's charter defines governing body in harmony with both the Colorado Constitution and the Colorado Revised Statutes, the charter should control as the organic law for Winter Park. See City and County of Denver v. Tihen, 235 P.777 (Colo. 1925) and Denver v. Sweet, 392 P.2d 441 (Colo. 1958).

The Winter Park charter itself reserves the right to the citizens of the Town to act as their own governing body in specified circumstances. At section 3.5 it provides, in pertinent part:

> The council shall be the . . . governing body of the town and shall exercise, except as otherwise provided in this charter, all powers conferred upon or possessed by the town . . . . (emphasis supplied)

Section 5.7 of the Winter Park charter provides, in pertinent part:

> The Town Council, on its own motion, shall have the power to submit . . . any proposed ordinance or any question to a vote of the electors.

These charter provisions are not unique to the Town of Winter Park. Such reservations of rights to the citizens to act as their own governing bodies are common in home rule charters throughout Colorado. Of the 66 Colorado home rule municipalities, 21 have charter provisions identical to or substantially

the same as the Winter Park charter provisions quoted above. In addition, 61 home rule municipalities have charter provisions incorporating the constitutional and statutory rights of citizen initiative and referendum. It is the rule, rather than the exception, for home rule municipalities to make provision in their charters for the citizens to act as the governing body of the municipality in place of the elected board or council. The decision of the Court of Appeals in this case would set aside these charter provisions. The impact of such a decision, if not reversed or modified by this Court, would be statewide, both directly upon the 21 municipalities with similar charter provisions, and indirectly upon the citizens of all other municipalities in the state, which have the continuing right to adopt home rule charters.

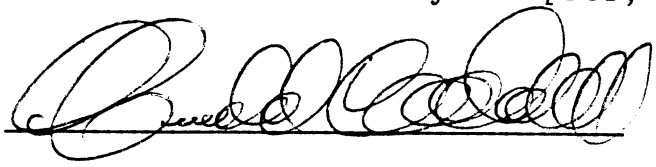
Even without the definition of governing body provided by Winter Park in its charter, home rule towns and cities are delegated power over matters of mixed local and statewide concern. DeLong v. City and County of Denver, 195 P.2d 537 (1978) and Aurora v. Martin, 507 P.2d 868 (Colo. 1973). Winter Park is a home rule municipality. In Byrne, this Court stated that, "Urban blight is a matter of both statewide and local concern." 618 P.2d at 1385. Therefore, Winter Park has authority to define the governing body and vary the procedure for adopting an urban renewal plan.

Despite this authority granted home rule municipalities, the Court of Appeals held that the power of the Winter Park Town

Council to refer an ordinance to the electorate did not excuse the Town Council from complying with the requirements of C.R.S. § 31-25-107(4). C.R.S. § 31-25-107(4) requires the governing body to make specific findings prior to approving an urban renewal plan. In approving Ordinance No. 117 the people of Winter Park, acting by charter as the governing body, made the findings required by C.R.S. § 31-25-107(4).

WHEREFORE, the Colorado Municipal League respectfully urges this Court to grant the Writ of Certiorari sought by petitioners.

Respectfully submitted this 28th day of April, 1987.



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CERTIFICATE OF HAND DELIVERY

I certify that a true copy of the foregoing was hand delivered this 28th day of April, 1987, to the following:

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