SUPREME COURT, STATE OF COLORADO

Case No. 94SC250

RULE 50 CERTIORARI TO THE COLORADO COURT OF APPEALS, 94CA0577
DISTRICT COURT, ARAPAHOE COUNTY, 93CV2467

BRIEF OF THE COLORADO MUNICIPAL LEAGUE AS AMICUS CURIAE

CITY OF AURORA, Petitioner

v.

MAX ACOSTA, JOSEPHINE PULLANO, JAMES ROPER AND LARRY HOFFENBERG, Respondents

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The Colorado Municipal League, amicus curiae, by and through its attorney David W. Broadwell, hereby submits this brief in support of the Petitioner City of Aurora.

I. Issues Presented for Review

The Municipal League hereby adopts and incorporates by reference the issues presented for review contained in Aurora's answer brief.

II. Statement of the Case

The Municipal League hereby adopts and incorporates by reference the statement of the case contained in Aurora's answer brief.

III. Summary of Argument

The Municipal League hereby adopts and incorporates by reference Aurora's arguments as contained in their answer brief, and makes the following additional arguments.

Having now been duly adopted by the voters of Aurora as an exercise of their reserved legislative power, Ballot Questions A and G are vested with a presumption of validity and constitutionality, and must stand absent a showing by the Respondents that these measures are unconstitutional beyond a reasonable doubt. This the Respondents have not and cannot do.

Questions A and G fall within the mainstream of how local governments throughout

Colorado have worded tax and debt questions since the adoption of TABOR. In keeping with prior precedent, and especially in light of the pervasive ambiguity of TABOR, the Court should grant deference to the contemporaneous, legislative interpretations of TABOR's arcane election requirements which were made by the Aurora city council and are continuing to be made by other elected officials throughout the state even as this case is pending.

The court should summarily reject the Respondents' penchant for offering what is, at most, an anti-government polemic masquerading as a legal argument; for offering conclusory statements about the "meaning" and "intent" of TABOR which are unsupported either by its legislative history or the record in this case; and for ignoring this Court's traditional disfavor for repeal by implication. Respondents should be called to task for the inherent inconsistency, not to mention hypocrisy, of invoking the "will of the voters" who adopted TABOR and the "fundamental right to vote" while simultaneously attempting to disenfranchise the voters of Aurora by nullifying or modifying two popularly approved measures in that city.

Nothing in TABOR prevents local governments from continuing to issue general obligation bonds as they have in the past. On the contrary, language in TABOR supports and even exalts the concept of general obligation bonding.

As applied to the wording of Ballot Questions A and G, it is virtually irrelevant whether the Court adopts a "substantial compliance" theory or a "strict compliance" theory. These questions literally complied with the requirements of TABOR, and therefore they pass muster under any test.

IV. Argument

A. The formulation of Ballot Questions A and G by the Aurora City Council and the ultimate adoption of these questions by the voters are legislative acts which are entitled to a presumption of validity and constitutionality.

The parties in this case, along with the court below, have spent a great deal of time focusing on the standard of review which will apply to election challenges under TABOR. However, perhaps getting lost in the shuffle is the most important standard which should guide the Court at this point: The approval of the bonds under question A and the increased tax rate under question G are presumed valid and constitutional and any proof to the contrary must be made beyond a reasonable doubt.

This case stands in marked contrast to the first time this court ruled on the constitutionality of a legislative enactment under TABOR in Submission of Interrogatories on Senate Bill 93-74, 852 P.2d 1 (Colo. 1993), n.4. In that case, the court declined to grant the legislature's actions a presumption of constitutionality because the legislative enactment was essentially inchoate. It was merely a bill pending in the General Assembly. Furthermore, the instant case is distinguishable from other decisions where the court has declined to pass judgement on the ultimate constitutionality of measures submitted for voter approval until after the election, McKee v. Louisville, 616 P.2d 969 (Colo. 1980); Rocky Ford v. Brown, 133 Colo. 262, 293 P.2d 974 (1956).

In this case, Ballot Questions A and G have been signed, sealed and delivered by the voters of Aurora as full blown legislative enactments.

The approval of municipal bonds with the consent of the voters is a legislative act, McNichols v. Denver, 101 Colo. 316, 74 P.2d 99 (1937). The power of taxation is fundamentally a legislative prerogative, Gates Rubber Company v. South Suburban Metropolitan Recreation and Park District, 183 Colo. 222, 516 P.2d 436 (1973), and the adoption of municipal sales taxes in particular has traditionally been effected through the adoption of a legislative ordinance and then ratified by the voters. See, Sec. 29-2-102, C.R.S. When duly adopted by the voters and then subjected to a constitutional challenge, these measures should be judged according to the same standard of review as would any enactment of a standing legislative body.

In McNichols v. Denver, supra, the court upheld a voter-approved bond issue in the face of a constitutional challenge, and noted the essential duality in the process where a ballot question is first approved by the governing body then ratified by the voters. The court said:

> In the case at bar it is pointed out by the defendants in error that the determination of the local and municipal character of the proposed outlay was made both by the ordinance enacted by the city council and by the vote of the taxpaying electors in favor of the issuance of the bonds, and they assert that a determination by the legislative authorities of the municipality is ordinarily conclusive thereof, and, except in the most extreme cases, will not be interfered with by the courts. On this subject it is sufficient to say that so much of these proceedings as can properly be considered legislative come within the general rule that where the constitutionality of legislative acts is questioned all presumptions are indulged in their favor, and their invalidity must be established beyond a reasonable doubt. Id at 323-24.

As recently as Evans v. Romer, 854 P.2d 1270 (Colo. 1993), the court appeared to reaffirm this principle while noting that legislation adopted by the voters is presumed to be valid in the same fashion as laws adopted by a legislative body.

At this stage of the proceedings, Respondents are not merely seeking a declaration as to the proper way to implement the minutiae of TABOR election procedures. Instead, they are seeking to obliterate one law passed by the citizens of Aurora and vitiate another. This court must be able to satisfy itself that the interpretations of TABOR now being advance by the Respondents are correct beyond a reasonable doubt before granting the drastic relief sought by the Respondents. As argued by Aurora and as discussed further below, there is in fact abundant doubt about the correctness of the Respondents' idiosyncratic explanations of what TABOR is supposed to mean.

B. The Contemporaneous Construction of TABOR by Aurora and Other Municipalities Around the State Should Be Afforded Deference by the Court.

The utterly inept wording of TABOR continues to bedevil municipalities and other public entities throughout Colorado. Two examples are germane to this case.

Article X, Section 20 3 (a) provides in part, "Except for petitions, bonded debt, or charter or constitutional provisions, districts may consolidate ballot questions. . . ." This language forms the keystone for Respondents' argument that debt questions cannot be "consolidated" with tax questions. Yet where does the text say that? It would be equally plausible to read this language in any one of three ways. It could mean that each item in the litany may not be combined with like items, i.e. bonded debt questions may not be combined with other bonded debt questions. Or it could mean that each item in the litany may not be combined with other items in the litany, i.e. a bonded debt question may not be combined with a petition. Or it could mean that the items in the litany may not be combined with some

undefined netherworld of questions which are just "out there" somewhere. Aurora correctly argues that the claim that Question G is a "consolidated" question is thoroughly specious since the question clearly related to a single subject. However, even assuming, arguendo, that both a debt proposition and a tax proposition are implicated in Question G, there is simply nothing in subsection 3 (a) or anywhere else in TABOR which would, beyond a reasonable doubt, prevent Aurora voters from approving such a question.

Turning to another ambiguity, TABOR apparently requires voter approval for at least 14 different types of propositions.[1] However, TABOR mandates specific wording for only two types of questions in subsection 3 (c), "tax increase" and "bonded debt," and even then it only spells out the first few words of each question. In contrast, there is no mandatory wording for "voter approved revenue changes" which "do not require a tax rate change" as mentioned in subsection 7 (d) nor, apropos of Aurora Question A, voter approved revenue changes after the first full fiscal year of a tax increase. Under these circumstances, it would be fair to assume that governing bodies and local voters are left with some discretion about how to word and approve ballot questions.

These are just two of many types of interpretive questions which are challenging local governments throughout the state. While much of the early litigation, including the instant case, has centered on election issues, the courts have barely begun to scratch the surface on the myriad of technical, financial accounting issues surrounding the calculation and limitation of

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[1] (1) New taxes; (2) tax rate increases; (3) mill levy above that for the prior year; (4) valuation for assessment ratio increases; (5) extension of expiring taxes; (6) tax policy changes; (7) correction to tax increases; (8) ratification of emergency taxes; (9) debt; (10) other multiple fiscal year obligations; (11) voter approved revenue changes; (12) four year delay in voting; (13) additions to election notices; (14) weakening of other limits.

fiscal year spending.

With TABOR perhaps more than any other amendment to the Colorado Constitution, the Court should defer to the reasonable contemporaneous interpretations being made in the other branches of government in the early years of TABOR implementation. To do otherwise would require an inordinately activist judicial approach in a futile effort to provide definitive meaning where no plain meaning exists, and to scrape for legislative history where none was provided prior to the election.

While acknowledging that legislative and administrative interpretations of the constitution are not dispositive, the court has historically been willing to say, "To determine what is constitutional is not committed exclusively to the judicial branch of government. The views of officials of co-ordinate branches of the government are also entitled to consideration." Hudson v. Annear, 101 Colo. 551, 75 P.2d 587 (1938); see also, Bradford v. White, 106 Colo. 439, 106 P.2d 469 (1940); Dempsey v. Romer, 825 P.2d 44 (Colo. 1992). In light of the pervasive ambiguity in TABOR, the Court is urged to extend this tradition of deference.

Aurora Questions A and G are squarely in the mainstream of how public entities and their voters are construing TABOR throughout the state. As indicated by the Municipal League and others in our Amicus brief in the pending case of Bickel v. Boulder, 94SA130, ballot questions for general obligation bonds, worded in much the same style as Aurora's Question A, were approved by local voters in many jurisdictions in November 1993. A few such as Aurora were challenged in court. Most were not.

The Respondent's principal complaint against Aurora's sales tax Question A appears to be the manner in which the voters are willing to allow revenue flowing from the increased tax

rate to increase after the first fiscal year dollar amount. However, tax questions similar in form to Aurora's Question A were approved in at least five other municipalities in 1993-94 alone (see Appendix), and the Colorado General Assembly itself formulated a question for renewal of the state tourism tax which contained the same defect complained of by the Respondents in this case. See: Section 39-26.1-113, C.R.S.; HB 93-1330, Section 2. TABOR proponents have sued (so far unsuccessfully) in three of these cases besides Aurora.

In Colorado Springs, Judge Matt. M. Raley said, "the Court cannot find any reasonable reading" and "the Court cannot find the implicit dictate" preventing voter-approved taxes from increasing in future years. Douglas Bruce v. City of Colorado Springs, El Paso County District Court, 93CV550, Division 3. (The decision was not appealed by Bruce.) In litigation over the tourism tax, Judge John N. McMullen held that ballot language allowing tax revenue to increase in future years "to be that type of surplusage which is not forbidden or precluded by TABOR. Another way of putting this is, I'm not convinced beyond a reasonable doubt that subsection 3 of TABOR precludes insertion of the challenged provision." Campbell v. Meyer, Denver District Court, 93CV4343, Courtroom 2. (An appeal of this decision is pending in the Court of Appeals, Case Number 93CA1565.) Then in this case, the trial court held, "the Court finds that TABOR paragraph 4(a) specifically allows the City to submit a proposed tax rate increase, including the revenue change authorization necessary to spend the resulting revenues, to the voters as a formula." A decision on this same issue has yet to be issued in a fourth case, Campbell v. Arvada, Jefferson County District Court, 93CV2190, Division 4.

The claims in all of these case have an uncanny similarity. The plaintiffs invent "mandatory" ballot language where none exists in the text of TABOR, and defend it by saying

in effect, "Well, that's what Douglas Bruce meant to say and that's what the voters meant when they approved TABOR in 1992." As indicated by the cavalcade of litigation over this one issue alone, TABOR proponents are unwilling to take a judicial "no" for an answer and are unwilling to accept that the electorate, with whom they invested so much credibility in the 1992 vote, could reasonably construe and implement the amendment in local elections since 1992.

Thankfully, this Court can resolve the issue once and for all, and at the same time send a message that it will defer to local elected officials and local voters when TABOR interpretive questions are mired in a semantic and analytical fog, as they so often are.

C. Respondents' Various Unsubstantiated "Explanations" of TABOR should be rejected.

Respondents' opening brief is littered with unsupported and unsupportable explanations of what the people "meant" or "intended" when they adopted TABOR in 1992. These flights of fancy are almost too numerous to mention. The court should not dignify any of this speculative rambling with the least bit of consideration, and should stick to the text of TABOR as it can and should be read in the context of existing law and conventional rules of construction.

In Submission of Interrogatories on Senate Bill 93-74, supra, the court probably said about as much as anybody can say definitively to explain the rationale for TABOR: "As presented to the electorate, it was designed to protect citizens from unwarranted tax increases." Moreover, the decision in that case should have squelched any more post hoc rationalization about how TABOR was supposed to work. At footnote 7, the Court said the opinions of TABOR proponents "on the issues presently before the court must stand on their own intrinsic merits and must be justified by the text of the amendments as approved by the voters of

Colorado."

Much of Respondent's brief is just a thinly veiled diatribe against government, a hangover from the 1992 campaign when it was "us" (i.e., we the people) against "them" (sinister government bureaucrats.) This rhetoric sinks to a new low when Respondents assert that Aurora was acting for "its own pecuniary benefit," that the city was acting as an "advocate" to obtain passage of the ballot questions (this argument ignores statutory prohibitions against the city doing any such thing, Sec.1-45-116, C.R.S.) and then suggest that the taxes involved in this case are tantamount to a taking of private property by eminent domain. Apparently, the irony of these arguments is totally lost on the Respondents -- these dastardly deeds were committed by the voters of Aurora, yet they must be struck down in the name of the fundamental right to vote!

This all makes for interesting political theater, but adds nothing in the way of merit to Respondent's legal claims.

D. The Court Should Reaffirm Its Disfavor for Repeal by Implication.

One of the Respondents' main arguments against Aurora Question G is that previous constitutional provisions for general obligation bonds, (Colo. Const. Art. XI, Sec. 6) have been superseded or repealed by TABOR. This is just the first in what will likely be a long line of similar disputed issues, the inevitable consequence of the lazy man's style of drafting evidenced in TABOR subsection 1. Rather than explicitly indicating other provisions of the constitution which have been amended or repealed by TABOR, the amendment simply purports to supersede every law with which it is in "conflict."

(This same ploy is being attempted in Amendment 12 of 1994, a proposed initiative which is even longer and more complex than TABOR. See: In the Matter of the Title, Ballot Title and Submission Clause, and Summary Adopted February 3, 1993 Pertaining to the Proposed Election Reform Amendment, 852 P.2d 28 (Colo. 1993).)

Now is as good a time as any to strongly reaffirm that repeal by implication is disfavored in this state, People v. Field, 56 Colo. 367, 181 P. 526 (1919), and that the court will go to the mat to defend and preserve other constitutional provisions to the extent they can be reasonably harmonized with TABOR.

E. TABOR should be read to actually favor general obligation bonding.

Respondents' arguments against Aurora Question G in this case seem to assume that general obligation bonding is now dead in Colorado, due to the fact that, in their view, an unlimited tax pledge under which a bond redemption mill levy may float upward on a year-to-year basis is no longer possible under TABOR subsection 4 (a). As with many of their arguments, this one appears to be little more than wishful thinking based upon their imagined "intent" of TABOR. Actually, at least two provisions in the text of TABOR suggest just the opposite result.

Clearly, the last sentence in TABOR subsection 1 suggests that general obligation bonding will continue to occur in Colorado because the text mentions such bonding by name, and even goes on to provide that, under some circumstances, tax increases may occur to support such bonds without voter approval. What a paradox it would be if a constitutional amendment

which included such a provision were construed elsewhere to implicitly prohibit the kind of bonds which the first provision expressly contemplates. TABOR should be read as a whole and internally harmonized. De'Sha v. Reed, 194 Colo. 367, 572 P.2d 821 (1977).

Furthermore, general obligation bonding is widely acknowledged as the cheapest way to do municipal financing. The promise of the full faith and credit of the city, as evidenced by an unlimited tax pledge, is the best way to obtain the lowest possible interest rate for public borrowers. TABOR subsection 1 indicates that its "preferred interpretation shall reasonably restrain most the growth of government," a rule of construction which this court expressly acknowledged in Submission of Interrogatories on Senate Bill 93-74 supra. If general obligation bonding were eradicated, as urged by the Respondents, would this not exacerbate "the growth of government" in the sense of adding substantially to the cost of municipal financing?

In addition to the many cogent arguments made by the city of Aurora on the continued viability of general obligation bonding under Article XI, Section 6, the court need look no further than the text of TABOR itself to see that general obligation bonding is still permissible (with voter approval, of course).

F. The Wording of Ballot Question A is Abundantly Supported by the Text of TABOR.

Respondents would lead the court to believe that there is something in TABOR, or perhaps in the unwritten "intent" of TABOR, which prohibits the style of wording employed for the sales tax rate increase in Aurora Question A. On the contrary, Aurora complied with all of the literal requirements of TABOR and the ballot question is fully supported by the text of the

constitution.

TABOR subsections 3(c) and 3(b)(iii) require only that the "dollar increase" of a tax increase be expressed for the "first full fiscal year." This Aurora did. The ellipsis included in the text after the mandatory ballot wording implies that those drafting the question are free, after the first seven words, to complete the question any way they choose. To the extent TABOR contains revenue and spending limitations as set forth in subsection 7, these limitations are expressly applicable only to the "base" of fiscal year spending and property tax revenue which began to be calculated in 1992. Significantly, subsection 7(d) expressly provides that tax increases and other "voter approved revenue changes" are never a part of the base and thus, presumably, are not subject to annual limitations related to inflation and local growth which apply only to the base itself.

In the face of the substantial amount of textual support for the Aurora position (a position which has now been ratified by three separate district courts as described above) the Respondents can offer nothing more than a wing and a prayer that this court will recognize some sort of implicit intent of TABOR and join them in imagining a proscription on tax ballot wording which simply does not exist in the Constitution.

Conclusion

Wherefore, for the reasons stated in the Aurora brief and by Amicus Curiae in this brief, the Municipal League respectfully urges this Court to affirm the judgement of the trial court dismissing all of the Respondents claims with prejudice.

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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Brief of Colorado Municipal League as Amicus Curiae was placed in the U.S. Postal System on the 29th day of August, 1994, addressed to the following:

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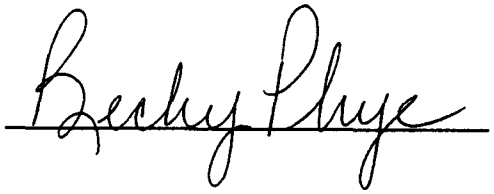

APPENDIX

Selected Sales Tax Questions Considered by Municipal Voters
1993-1994

Approved by Arvada voters, November 2, 1993:

Referendum A -- "Police Services": SHALL THE CITY OF ARVADA INCREASE SALES AND USE TAX BY AN AMOUNT NOT TO EXCEED $1,500,000.00 ANNUALLY IN THE FIRST FULL FISCAL YEAR AND THEREAFTER AS ADJUSTED FOR INFLATION PLUS ANNUAL LOCAL GROWTH TO THE EXTENT PERMITTED BY ARTICLE X, SECTION 20 OF THE COLORADO CONSTITUTION THROUGH THE IMPOSITION OF AN ADDITIONAL CITY-WIDE SALES AND USE TAX OF $.0021 (OR TWENTY-ONE ONE HUNDREDTHS OF A CENT OR $.21 ON A $100.00 PURCHASE); SUCH VOTER APPROVED REVENUE CHANGE TO BE AN EXCEPTION TO THE LIMITS WHICH WOULD OTHERWISE APPLY. TO EXPAND POLICE SERVICES IN THE FOLLOWING PROGRAM AREAS; POLICE NEIGHBORHOOD PATROLS, EMERGENCY RESPONSE, NON-EMERGENCY CITIZEN SERVICE, GANG CRIME, SENIOR CITIZEN VICTIMIZATION, JUVENILE CRIME, SEXUAL EXPLOITATION OF CHILDREN, ANIMAL CONTROL SUPPORT FUNCTIONS INCLUDING NECESSARY PROGRAM TRAINING AND EQUIPMENT FOR WHICH THIS VOTER APPROVED REVENUE CHANGE SHALL BE COLLECTED AND SPENT WITHOUT LIMITATION OR CONDITION AND WITHOUT LIMITING THE COLLECTION OR SPENDING OF ANY OTHER REVENUES OR FUNDS BY THE CITY UNDER ARTICLE X, SECTION 20 OF THE COLORADO CONSTITUTION OR ANY OTHER LAW?

Disapproved by Colorado Springs voters, April 6, 1993 (although form of question was approved by El Paso County District Court in **Bruce v. Colorado Springs**):

SHALL CITY TAXES BE INCREASED $15 MILLION ANNUALLY IN 1994 AND BY WHATEVER ANNUAL AMOUNT FUTURE COLLECTIONS TOTAL FROM A REINSTATED 0.5% SALES AND USE TAX, SOLELY FOR CAPITAL IMPROVEMENTS?

Approved by Elizabeth voters, November 2, 1993:

Shall Town of Elizabeth taxes be increased $80,345.00 annually in 1994 and by whatever annual amount future collections total from an additional one percent sales tax?

Approved by Parachute voters, April 5, 1994:

"Shall the Town of Parachute taxes and municipal spending be increased by approximately $30,000.00 annually in 1994 and by whatever initial amount future collections total from an increase of three-quarters of one percent on the existing sales and use tax.

Approved by Silt voters, April 5, 1994:

SHALL SILT'S TAXES BE INCREASED BY $25,000.00 ANNUALLY IN THE FIRST FULL FISCAL YEAR AND THEREAFTER BY WHATEVER ANNUAL AMOUNT FUTURE COLLECTIONS TOTAL FROM AN INCREASE OF ONE PERCENT IN THE TOWN'S USE TAX RATE, AS OUTLINED BELOW, SUCH REVENUES TO BE COLLECTED AND SPENT WITHOUT LIMITATION OR CONDITION UNDER ARTICLE X SECTION 20 OF THE COLORADO CONSTITUTION?

Approved by Westminster voters, November 2, 1993:

SHALL CITY OF WESTMINSTER TAXES BE INCREASED $300,000 (THREE HUNDRED THOUSAND DOLLARS) ANNUALLY BY EXTENDING THE CITY'S 3.0 PERCENT ADMISSIONS TAX TO CHARGES MADE FOR ADMISSION TO ANY DISPLAY OF LIVE ANIMALS OR PLANTS, SUCH AS THE PROPOSED WESTMINSTER AQUARIUM AND BUTTERFLY HOUSE PROJECTS, AND IN CONNECTION THEREWITH, SHALL A REVENUE CHANGE BE APPROVED TO ALLOW THE CITY TO COLLECT, RETAIN AND EXPEND THE FULL REVENUES DERIVED FROM THE CITY'S 3.0 PERCENT ADMISSIONS TAX, NOTWITHSTANDING ANY STATE REVENUE OR EXPENDITURE LIMITATION?