SUPREME COURT, STATE OF COLORADO
Case No. 95SC354 and 95SC479

OPENING BRIEF OF COLORADO MUNICIPAL LEAGUE AS AMICUS CURIAE

CASE NO. 95SC354
RULE 50, CERTIORARI TO THE COLORADO COURT OF APPEALS, 94CA1416, 94CA1787, 94CA2031 & 94CA2157
DISTRICT COURT, DOUGLAS COUNTY, 92CV455

THE BOARD OF COUNTY COMMISSIONERS OF DOUGLAS COUNTY COLORADO; DOUGLAS COUNTY, COLORADO SCHOOL DISTRICT Re. 1; and ROBERT A. CHRISTENSEN, JAMES R. SULLIVAN AND SUZY MCDANAL, in their capacities as members of the Douglas County Board of County Commissioners,

Petitioners,

v.

BAINBRIDGE, INC., a Colorado corporation; VILLAGE HOMES OF COLORADO, INC. a Colorado corporation; FALCON DEVELOPMENT GROUP, INC., d/b/a FALCON HOMES, a Colorado corporation; LHLI, LTD., a Colorado corporation, VIRDEN HOMES, INC., a Colorado corporation; THE GENESSEE COMPANY, a Colorado corporation; SATTLER HOMES, INC., a Colorado corporation; and SUGARBUSH HOMES, INC., a Colorado corporation,

Respondents.

CASE NO. 95SC479
RULE 50 CERTIORARI TO THE COLORADO COURT OF APPEALS, 95CA0399
DISTRICT COURT, BOULDER COUNTY, 93CV670

THE BOARD OF COUNTY COMMISSIONERS OF BOULDER COUNTY COLORADO; ST. VRAIN VALLEY, COLORADO SCHOOL DISTRICT; AND RON STEWART, HOMER PAGE, SANDY HUME, in their capacities as members of the Boulder County Board of County Commissioners,

Petitioners,

v.

HOMEBUILDERS ASSOCIATION OF METROPOLITAN DENVER, PUMA PROPERTY PARTNERS; BAINBRIDGE, INC.; MCSTAIN ENTERPRISES, INC.; AND I.T.S. CORPORATION,

Respondents.

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CONSTITUTION AND STATUTES

COMES NOW the Colorado Municipal League (hereinafter referred to as "the League"), having been granted leave of the court on December 6 1995 to appear in this case as an amicus curiae, and submits this opening brief pursuant to Rule 29, C.A.R.

ISSUES PRESENTED FOR REVIEW

A. Whether a county, as a condition for issuing a building permit for a new home, may impose an impact fee to pay part of the school buildings needed to serve that home.

B. Whether state statutes regulating school financing and state equalization funds preempt a county from imposing a school impact fee.

C. Whether a county school impact fee constitutes a valid regulatory fee.

STATEMENT OF THE CASE

The League hereby adopts by reference the statement of the case and statement of facts as contained in the opening brief of the Petitioners (hereinafter referred to as "the Counties") and would offer the following additional salient factors to explain the League's interest in this case.

The rulings by the district courts below, if affirmed on appeal, may have implications which go far beyond the authority of counties to charge school impact fees. The sheer breadth of some of the language in the opinions below may be read to touch upon a wide range of land use regulatory practices exercised by local governments statewide and may seriously alter our understanding of general questions related to implied authority and intergovernmental contracting, as well as the specific issue of funding capital construction in response to growth.

For example, in his order of July 11, 1994, Judge Curry held at page 24:

> "(T)he state has indicated its intention to occupy the field of school finance. . . .(T)his court concludes that the state intended to fully cover the subject of school finance, at least to the extent that the state or its *political subdivisions* were to be included in that process." (Emphasis supplied.)

This broad reference to "political subdivisions" apparently indicates the court's opinion that all local governments, including both statutory and home rule municipalities, would similarly be prohibited from providing financial assistance to schools. Like the Counties, all municipalities are considered "political subdivisions" of the state. City of Boulder v. Regents of the University of Colorado, 199 Colo. 420, 501 P.2d 123 (Colo. 1972).

In the same order, Judge Curry also said at p.23:

> "None of the broad delegations of authority set forth in zoning, land use, or P.U.D. statutes specifically permitted a county to implement a school impact fee. Likewise, these statutes covering, in a very broad sense, location and use of property are not broad enough to imply authority to impose a school impact fee."

As more fully discussed in the following pages of this brief, this holding diverges from a substantial line of cases permitting local governments to impose exactions and other forms of regulation on land uses based upon general enabling authority. Once again, if this ruling stands on appeal, it may operate as a new restraint on local regulatory authority equally applicable to municipalities as well as counties.

Then after reiterating these broad rulings, Judge Bailin in her order of December 23, 1994 said at page 12:

> "The school impact fee is an invalid regulatory fee because the county does not provide a service, the cost of which is defrayed by the monies collected."

Depending on how this conclusion of law by the trial court is treated by the Supreme Court, it could eviscerate a lot of conventional wisdom about how intergovernmental contracting may be used to further cooperative land use planning and service delivery, and again will have implications for both municipalities and counties.

The concern about whether Colorado municipalities can lawfully provide financial assistance to schools is far more than

hypothetical. Under the auspices of longstanding state constitutional provisions and statutes that are very favorable to intergovernmental cooperation, municipal assistance to schools already takes several different forms.

Any number of municipalities have actually codified in their municipal ordinances various forms of land use exactions in support of schools.[1] Some of these are quite similar to the impact fees on building permits that are at issue in this case in the sense that they are intended to aid in school capital construction, while others are more in the nature of fees in lieu of land dedication. All share this in common however--they may all be at risk if this court affirms the preemption theory articulated by the courts below.

Voters in some municipalities--notably Montrose, Steamboat Springs, Boulder, and Broomfield--have approved increases in municipal sales and use taxes earmarked specifically to assist local school districts with their capital needs through intergovernmental cooperation. Again, these financial arrangements would be suspect based on the preemption reasoning of the trial courts in this case.

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[1]Attached hereto as Appendix A are excerpts of ordinances from the municipalities of Colorado Springs (code sec. 15-3-1207 (c)); Durango (code sec. 10-5-13); Florence (code sec. 16-01.010); Fountain (ord. 653); Louisville (ord. 1118); Basalt (code sec. 17-16); and Carbondale (code sec. 17-24-020); to illustrate examples of municipal land use regulations in support of schools.

In many other municipalities, financial assistance for schools may be obtained not through an exercise of the police power but via contracts with certain landowners, i.e. those desiring to annex to a particular municipality. Because annexation in this state is essentially contractual, City of Colorado Springs v. Kitty Hawk Development Co., 154 Colo. 535, 392 P.2d 467 (1964), municipalities can and do negotiate on a case-by-case basis various concessions on behalf of local schools when new land comes into the community. Again, irrespective of the legality of this practice on the part of the municipalities who may choose to exercise it, the lower court rulings in this case would appear to prevent school districts from accepting any financial assistance via this route.

Finally, fiscal constraints and concerns over more efficient use of resources are motivating more and more municipalities and school districts to consider joint construction, operation, and use of facilities such as ball fields, auditoriums, etc. Again, to the extent school districts would benefit financially from these sorts of cooperative efforts, this largess may be forbidden according to the sort of broad form preemption that the courts below inferred from the school finance acts.

SUMMARY OF ARGUMENT

The League supports arguments made by the Counties in their opening brief and, for the sake of brevity, will generally not

reiterate any of the authorities cited therein. Instead, the League will attempt to place the issue in this case in a larger context as we assume that the ultimate disposition of the issues in this case may have some of the wider implications recited above.

The League urges the court to reaffirm, consistent with prior case law applicable to both counties and municipalities, that broadly worded enabling statutes suffice to grant local governments the authority to charge impact fees; that the law in this state is to be liberally construed in favor of intergovernmental cooperation; and that local governments, in their role as regulators of land use, can validly require the payment of monies directly or indirectly to assist other local governments who are called upon to deliver services to new development.

ARGUMENT

I. Contrary to the analysis and the rulings below, this court has often allowed local government authority for land use exactions to be inferred from broadly worded enabling legislation.

While there are several references to schools in the various land use enabling statutes cited by the Counties, it is obvious that none of these statutes <u>expressly</u> authorize "impact fees" for schools. For that matter, none of the statutes expressly use that term in relation to parks, transportation facilities, environmental degradation, or anything else that may be of local concern in the

course of "regulating the use of land on the basis of the impact thereof on the community and surrounding area," § 29-20-104 (1) (g), C.R.S. The generality of the Local Government Land Use Enabling Act, however has not stopped Colorado courts from approving some truly creative and highly detailed forms of growth management at the local level. See, e.g., Wilkinson v. Board of County Commissioners of Pitkin County, 872 P.2d 1269 (Colo. App. 1993), certiorari denied.

In addition to the Land Use Act, other general pieces of land use legislation cited by the Counties are equally applicable to municipalities, e.g. the Planned Unit Development Act of 1972, § 24-67-101, et seq., and the Land Development Charges statutes, § 29-1-801, et seq.

As with the Counties, municipalities will find some references to schools in the land use statutes that relate directly to cities and towns. For example, the enabling legislation for municipal zoning provides in pertinent part:

> "Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; . . . to promote health and general welfare; . . .to prevent the overcrowding of land; to avoid undue concentration of population; . . . and to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements." (Emphasis supplied,) § 31-23-303 (1).

The urban renewal statutes make explicit reference to municipal

assistance for the construction and repair of schools, §§ 31-25-105 (1) (c) and 31-25-112 (1) (e); and whenever municipalities engage in a major annexation they are supposed to prepare a report quantifying the impacts on local school districts, § 31-12-108.5 (1)(f).

These statutes should be read as providing further support for the Counties' argument that it is incongruous to infer some sort of field preemption[2] in the area of school construction and financing while Titles 30 and 31 of the statutes are peppered with references to city and county authority in this area.

Instead, consistent with prior decisions, this court should infer just the opposite--that both counties and municipalities can enforce specific forms of land use exactions based upon fairly

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[2]The League would also note that complete preemption of financial assistance to schools through regulatory impact fees would be especially harsh and unprecedented if applied to home rule municipalities. This court has evinced a strong tradition of recognizing zoning and land use regulation to be a matter of local concern in home rule municipalities, Roosevelt v. City of Englewood, 492 P.2d 65 (Colo. 1971); Zavala v. City and County of Denver, 759 P.2d 664 (Colo. 1988); and many others. On those rare occasions where there has also been a statewide interest in a land use regulatory matter, the court has gone no further than to declare it a matter of "mixed" statewide and local concern, thus allowing some degree of regulation to occur at both levels of government. See, e.g.: National Advertising Company v. Department of Highways, (billboards on state highways) 751 P.2d 632 (Colo. 1988), and Voss v. Lundvall, (oil wells) 830 P.2d 1061 (Colo. 1992). Thus, the instant case would be most unusual if it came to stand for the proposition that, in the words of the Douglas County District Court, all "political subdivisions" of the state, including home rule municipalities, were totally preempted from imposing school impact fees.

general enabling authority. In their opening brief, the Counties have already referred to several outstanding examples of where this court has condoned some specific types of land use exactions by a county, even in the absence of explicit statutory authority for the regulation in question.

Applying the same reasoning, here are a few others from the municipal side of the fence.

In City of Arvada v. City and County of Denver, 663 P.2d 611, 614 (Colo. 1983), against claims that an impact fee for water facilities was ultra vires this court said, "(W)hile the imposition of a development fee as such is not authorized by this section. . .such a charge is within the general contemplation of this broadly worded statute." Accord: Loup Miller Construction Co. v. City and County of Denver, 676 P.2d 1170, n. 9 (Colo. 1984). In Bethlehem Evangelical Lutheran Church v. City of Lakewood, 626 P.2d 628, 672 (Colo. 1981) this court allowed the city to require street widening and payment for certain street improvements as a condition of receiving a building permit under the auspices of the cities "broad statutory authority" (which said nothing about attaching conditions to building permits).

And this court espoused a most expansive and pragmatic take on the issue of implied zoning authority in the case of Service Oil Co. v. Rhodus, 179 Colo. 335, 500 P.2d 807 (1972); overruling City

and County of Denver v. Denver Buick, 141 Colo. 121, 347 P.2d 919 (1957) to the extent the earlier case had said that the city was powerless to adopt law requiring the termination of non-conforming land uses absent a specific grant of authority.[3] Service Oil is often cited for the proposition that municipalities enjoy implied powers that are essential to give effect to powers expressly granted. McQuillin Mun Corp, § 10.12 (3rd ed.).[4]

Despite the general references to regulating the "impacts" of growth as codified in the Land Use Act, and the specific references to schools in some of the enabling statutes, the trial courts in the instant case appear to have balked at the fact that the statutes contained no express reference to school impact fees. Given the precedents in the area of implied authority, the courts' reticence was unwarranted.

II. The court should construe constitutional and statutory provisions related to intergovernmental contracting liberally.

The authority of local governments in Colorado to engage in

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[3]A portion of Service Oil was subsequently overruled on other grounds, but the court did not disturb its expansive ruling on the scope of implied land use authority. Hartley v. City of Colorado Springs, 764 P.2d 1216 (Colo. 1988).

[4]Municipalities in Colorado also enjoy a generous statutory description of their implied authority at § 31-15-101 (2), C.R.S.: "such implied and incidental powers, authority, and privileges as may be reasonably necessary, proper, convenient or useful" to carry out the power and authority granted them. Durango Transportation Inc. v. City of Durango, 824 P.2d 48 (Colo. 1991).

intergovernmental contracting is preserved in the state constitution itself, Colo. Const. Art. XIV, § 18 (2)(a), and, as more fully detailed in the Counties' opening brief, is broadly embodied in state statutes. Significantly, the General Assembly has "encouraged" local governments to make use of intergovernmental agreements and the general enabling statutes on intergovernmental relationships provide that those statutes are to be liberally construed. § 29-1-201, C.R.S.

Equally as significant, these statutes make explicit reference to the "sharing of costs," § 29-1-203 (1) C.R.S., while the Land Use Enabling Act itself was amended in 1989 to make specific reference to the fact that, "Local governments may, pursuant to an intergovernmental agreement, provide for revenue sharing." § 29-20-105 (2) (h).

Against this backdrop, if in doubt, the court should err on the side of allowing local governments to meet their respective needs and fulfill their respective purposes through intergovernmental cooperation.

A good example of how the body of constitutional and statutory law can and should be liberally construed was provided by the court of appeals in Durango Transportation Inc. v. City of Durango, 824 P.2d 48 (Colo. App. 1991), certiorari denied. In that case, the court said:

> "In our view, this law demonstrates that cooperation between governmental entities through intergovernmental agreements should be encouraged and that the contracting entities should be deemed to possess the powers necessary to effectuate such agreements."

In particular, the court in the Durango case eschewed a harsh interpretation of the concept that functions to be performed pursuant to an intergovernmental contract must be those that are "lawfully authorized to each" of the parties. The court noted that it would be ridiculous to read this requirement to mean that each of the parties was independently authorized to perform the task for which the agreement was entered into, because to impose such a requirement would vitiate the purpose of having an agreement at all.

Similarly, in the instant case, we know that school districts are authorized to build schools. We know that counties are authorized to regulate the impacts of growth on communities. An intergovernmental contract between the two to help them achieve their respective goals would seem to be exactly what the laws of this state contemplate.

III. A land development charge assessed by a county or municipality should be deemed a valid regulatory fee.

For municipalities, perhaps the most troubling aspect of the lower court decisions in this case was the judgment by the Boulder County District Court that the impact fee in question was not a "valid regulatory fee." This ruling was apparently based on a

misreading of Bloom v. City of Fort Collins, 784 P.2d 304 (Colo. 1989). While Bloom provides a good paradigm for analyzing and understanding the difference between taxes and fees in the context of a particular local government's own revenue stream, it says nothing about the authority of one local government to collect or compel the payment of a fee or charge on behalf of another. If anything, this is a question of first impression.

Once again, a proper application of the law related to the local government's express and implied land use authority, as well as a liberal construction of the law on intergovernmental contracting should lead naturally to a reversal of the district court on this point.

But to underscore the serious implications of the Judge Bailin's holding, this court need only consider the practical realities of land use decision making and local government service delivery in Colorado. What would happen if a county (or a municipality) could not enforce a fee or land development charge unless the county (or municipality) were itself providing the service for which the charge was being imposed?

By its very nature, planning, zoning, subdivisions, planned unit developments, and virtually every other kind of land use regulation is administered by only two types of local governments--counties and municipalities--as provided in Titles 29, 30, and 31

of the statutes. Yet a host of essential public services are provided by special districts, currently 871[5] in all, organized under Title 32 of the statutes. The regulating entity, whether it be a county or a municipality, is merely a gatekeeper. The heavy lifting that will come with serving new development with fire stations, parks and recreation services, and basic utilities is often performed by an entirely independent quasi-municipal corporation which, in and of itself and very much like school districts, has no authority of its own to manage the rate of growth in its jurisdiction through zoning and land use regulation.

If the regulating entities are prevented from collecting or compelling the payment of land development charges under their general police power in order to ensure that the service-providing entities will meet their needs, then the entire system falls apart. Colorado's extremely fractured and decentralized system of service delivery at the local level requires a much more lenient interpretation of what may constitute a "valid regulatory fee" than the Boulder County District Court had to offer.

CONCLUSION

WHEREFORE, the League respectfully urges this court to reverse the decisions of the Douglas County District Court and the Boulder County District Court, to rule that state laws do not pre-empt

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[5]Source: Colorado Department of Local Affairs

counties from assessing school impact fees, to rule that counties do have the authority to assess school impact fees, and that such fees are not invalid regulatory fees, and to grant the Counties such other relief as the court deems appropriate.

Respectfully submitted this 4th day of March, 1996.

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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 4th day of March, 1996, addressed to the following:

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