COURT OF APPEALS, STATE OF COLORADO
Case No. 96 CA 11

OPENING BRIEF OF THE COLORADO MUNICIPAL LEAGUE AS AMICUS CURIAE

THE TOWN OF PARKER,

Petitioner and Appellant

v.

JOHN T. NORTON,

Respondent and Appellee.

On appeal from the District Court, County of Douglas, Case No. 95-CV-301, Division 2, Honorable Thomas J. Curry, District Court Judge

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COLORADO MUNICIPAL LEAGUE
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Comes now the Colorado Municipal League (the "League") as an amicus curiae and submits this brief in support of the position of the petitioner-appellant, the Town of Parker.

I. Interests of the League

The League is a voluntary non-profit association of 258 municipalities located throughout the state of Colorado, including all Colorado municipalities above 2,000 population and the vast majority of those having a population of 2,000 or less. The League's membership represents 99.9% of the municipal population of Colorado. The League has for many years appeared before the courts as an amicus curiae to present the perspective of Colorado municipalities.

The League's membership includes every home rule municipality in Colorado, currently 75 in all. Over two-thirds of the state's entire population and over 90% of the municipal population currently resides within the boundaries of a home rule municipality. Thus, the preservation of home rule authority under Article XX of the Colorado Constitution is of particular concern to the League.

The decision of the trial court in this case, if affirmed on appeal, would impair the authority of all Colorado municipalities, including all home rule municipalities to exercise eminent domain

in order to acquire property for recreational trails. This prospect is especially alarming at a time when many municipalities are expending greater effort and resources to develop trails for both recreational and transportation purposes, often in conjunction with larger efforts to develop or conserve park lands, open space, green belts, and floodplains.

More generally, however, the decision of the trial court contradicts some of the more basic and time honored principles upon which eminent domain authority is vested in Colorado home rule municipalities. If affirmed on appeal in contravention of a long line of prior decisions to the contrary, this case may stand for the anomalous proposition that the constitutional right of home rule municipalities to exercise eminent domain may be constrained by statute.

II. Issues Presented for Review

The League hereby adopts by reference the issues presented for review as contained in the opening brief of the Town of Parker. The League will, however, confine its arguments largely to the one issue the League believes to be thoroughly dispositive of this case, to wit:

> *Did the trial court err in applying the restriction contained in § 33-11-104 (4), C.R.S., to the Town of Parker, a home rule municipality, thus abridging the Town's constitutional power of eminent domain under Article XX of the Colorado Constitution?*

III. Statement of the Case

The League hereby adopts by reference the statement of the case and the statement of facts as contained in the Town of Parker's opening brief.

IV. Summary of Argument

The oblique "restriction" on local government eminent domain authority as contained in statutes related to the state recreational trails system, § 33-11-101, et seq., cannot and should not be deemed to apply to the Town of Parker or any other Colorado home rule municipality. It is well settled in this state that eminent domain authority in home rule municipalities derives directly from Article XX of the Colorado constitution and individual home rule charters; is not dependant on some delegation of authority from the state legislature; overrides any statutory restrictions on such authority to the contrary; includes the authority to condemn for parks and recreational purposes; includes the authority to condemn extraterritorial property without limitation; and is quite broad in scope in the sense that it can be used for purposes not specifically enumerated in the constitution.

In light of the foregoing principles, Parker, as a home rule municipality, need not rely on the authority granted by § 31-25-201, C.R.S., which allows statutory cities to acquire land through

eminent domain for parks and recreational purposes. Accordingly this court need not reconcile that statute with the state recreational trails statute for purposes of deciding this case. However, if this court deems it necessary and appropriate to seek supplemental statutory enabling authority for the exercise of eminent domain by this home rule municipality, the court should deem § 31-25-201 to empower Parker to the same extent it empowers statutory cities.

V. Argument

A. The constitutional eminent domain powers of a home rule municipality cannot be restricted by statute.

The League concurs with arguments made by the Town of Parker in the Town's opening brief to the effect that the language of § 33-11-104 (4)[1] neither expressly nor impliedly prohibits any local government from exercising eminent domain to acquire recreational trails. Instead, the plain language of this statute clearly indicates that Article 11 of Title 33 should not be deemed to grant any eminent domain authority. This is certainly a far cry from stating that it prohibits or somehow repeals by implication the

[1] The statute provides in pertinent part: "Nothing in this article shall permit the acquisition of recreational trails by proceedings in eminent domain by any state agency or any unit of local government or any agency thereof. . . ."

exercise of any eminent domain powers that may otherwise be authorized by law.

However, the League would strenuously assert that, no matter how Article 11 of Title 33 is construed, the threshold question in this case is whether these statutes or any other express or implied statutory limitation can constrain the eminent domain authority of a Colorado home rule municipality such as Parker. For many years, on a variety of occasions, and in a variety of contexts, the courts in this state have held that the eminent domain powers of home rule municipalities are derived directly from the constitution and are therefore immune from whatever strictures or prohibitions the General Assembly may try to impose through statute.

Section 1 of Article XX of the Colorado Constitution (which is incorporated by reference in section 6 of that article, and thus made applicable to all home rule municipalities) afforded the prototype home rule municipality, Denver, a broad grant of eminent domain authority:

> *". . .the power, within or without its territorial limits, to . . . condemn . . . water works, light plants, power plants, transportation systems, heating plants, and any other public utilities or works or ways, local in use and extent, in whole or in part, and everything required therefore . . . (and) . . . may enforce such purchase by proceedings at law as in taking land for public use by right of eminent domain . . ."*

By judicial construction, the breadth of this constitutional grant of authority has been expanded even further than its express

terms might indicate. "(W)e have no doubt that the people of Colorado intended to and, in effect did, thereby delegate to Denver full power to exercise the right of eminent domain in the effectuation of any lawful, public, local and municipal purpose." Fishel v. City and County of Denver, 108 P.2d 236, 106 Colo. 576, 583 (1940); Toll v. City and County of Denver, 340 P.2d 862, 139 Colo. 462 (1959). Moreover, in reference to Colo. Const. art. XX, § 1, it has been held that "the powers enumerated therein are by way of illustration and not of limitation." Town of Glendale v. City and County of Denver, 322 P.2d 1053, 137 Colo. 188, 194 (1958).

The courts have repeatedly rejected arguments that a particular exercise of eminent domain by a home rule municipality was invalid due to the fact that it was for a purpose other than one of those specifically enumerated in Colo. Const. art. XX, § 1, whether it be an Air Corps Technical School as in Fishel; "flowage easements" as in Toll; a sewer line as in Town of Glendale; an airport as in City and County of Denver v. Board of County Commissioners of Arapahoe County, 156 P.2d 101, 113 Colo. 150 (1945); or water and water rights as in City of Thornton v. Farmers Reservoir and Irrigation Co., 575 P.2d 382 (Colo. 1978).

Most germane to the instant case, the courts have specifically held that art. XX, § 1 vests home rule municipalities with full and complete authority to condemn lands for "parks and parkways" in

Londoner v. City and County of Denver, 119 P. 156, 52 Colo. 15 (1911) and to freely exercise eminent domain authority on an extraterritorial basis without regard to any statutory limitation on the distance the city may go in taking property for a municipal purpose, City and County of Denver v. Board of County Commissioners of Arapahoe County, supra.

Unlike statutory cities and towns which derive virtually[2] any eminent domain powers they may have from enabling statutes adopted by the General Assembly, home rule municipalities need only look to art. XX and their own charters. The supreme court clearly recognized this distinction in Beth Medrosh Hagodol v. City of Aurora, 248 P.2d 732, 126 Colo. 267 (1952). In this and similar[3] cases, the courts have articulated the principle that condemnation "can be had only under powers specifically granted by the legislature," but then have applied this principle exclusively to statutory cities and towns.[4]

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[2] Note, however, that even statutory municipalities are deemed to enjoy independent constitutional authority to exercise eminent domain for waterworks under Colo. Const. art. XVI, sec. 7, a power that cannot be impaired by any statute, Town of Lyons v. City of Longmont, 129 P. 198, 54 Colo. 112 (1913).

[3] See also: Healy v. City of Delta, 147 P. 662, 59 Colo. 124 (1915); Mack v. Town of Craig, 191 P. 101, 68 Colo. 337 (1920); Public Service Co. v. Loveland, 245 P. 493, 79 Colo. 216 (1923).

[4] In one anomalous case, the court of appeals did apply this principle to a home rule municipality. City of Aurora v. Commerce Group Corp., 694 P.2d 382 (Colo. App. 1984). Aurora had adopted a home rule charter in 1961. However, for whatever mysterious reason, it appears from the decision in that case that Aurora simply did not make the argument that it was exempt from statutory strictures on its eminent domain authority as a home rule

If the scope of eminent domain authority in a home rule municipality is deemed to be limited at all, that limitation must be found in the city's own charter or in the constitution, Fishel v. Denver, supra, 106 Colo. at 585. Colorado home rule charters typically contain a broad reservation of any and all eminent domain powers that a municipality may possibly exercise, as demonstrated in Fishel; City of Thornton v. Farmer's Reservoir, supra, 575 P.2d at 389; and in the instant case, in Section 15.5 of the Parker home rule charter.[5]

While a determination of the exact scope of home rule authority is sometimes a delicate task, generally turning on the question of what is truly a matter of local versus statewide concern, the courts have had little difficulty determining that eminent domain authority in home rule municipalities is a local matter that cannot be impaired by enactments of the General Assembly. First and foremost, this conclusion is based squarely on the fact that eminent domain authority is so clearly reserved to home rule municipalities in the constitution itself. As the supreme court forcefully said in the City of Thornton case, "Here, however, there is involved a specific constitutional power granted to home rule municipalities and, even though the matter may be of statewide concern, the General Assembly has no power to enact any

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municipality, and therefore the court did not reach that issue.

[5] The Town of Parker home rule charter gives the town "the right of eminent domain for all municipal purposes whatever within or without the limits of the town."

law that denies a right specifically granted by the Colorado Constitution." 575 P.2d at 389.

In a different context, the supreme court more recently observed of Colo. Const. art. XX, § 6:

> *"Although we agree with the state that the enumeration in Section 6 of matters subject to regulation by home rule municipalities is not dispositive, we also agree with the cities that it is significant. If the state is unable to demonstrate a sufficiently weighty state interest in superseding local regulation of such areas, then pursuant to the command of Section 6, statutes in conflict with such local ordinances or charter provisions are superseded."* City and County of Denver v. State, *788 P.2d 764, at 771.*

Therefore, even if we assume, arguendo, that C.R.S. 33-11-104 (4) is supposed to impose some sort of limitation on local government eminent domain authority, it is significant that the statute is completely bereft of any indication of how or whether it is supposed to apply to home rule municipalities. The statute does not contain any declaration of statewide concern nor does it identify any "weighty state interest" that would provide any evidence or indication that it should be deemed to supersede home rule authority.

The general principle that state statutes are superseded by home rule eminent domain authority has been demonstrated in several different contexts.

For example, in City of Thornton v. Farmers Reservoir, supra, the court held that a statutory limitation on the purposes for which eminent domain may be utilized could not constitutionally be applied to a home rule municipality.

In City and County of Denver v. Board of County Commissioners of Arapahoe County, supra, the court held that a statutory limitation on the distance that a city could condemn outside its boundaries did not apply to a home rule municipality.

In Town of Glendale v. City and County of Denver, the court noted that a statute requiring a city to obtain the permission of another jurisdiction when condemning property extrateritorially was of "doubtful validity" as applied to a home rule municipality.

And in a series of case including City of Thornton as well as Toll v. City and County of Denver, supra, and City of Englewood v. Weist, 520 P.2d 120 (Colo. 1974), the courts have held that home rule municipalities are not bound to follow any particular statutory procedure when exercising their eminent domain authority, (even statutes that are designed expressly for "cities and towns" as provided in § 38-6-101, et seq.) but instead are free to select any procedure that may be available by law.

Thus, given the massive weight of decisional law affirming the broad authority of home rule municipalities to exercise eminent

domain under the constitution and their own charters, this court should reverse the trial court and determine that the Town of Parker has the power to condemn property for recreational trails both within and without its territorial limits, that this power is derived directly from Colo. Const. Art. XX, Secs. 1 and 6, and that this power cannot be impaired by any statute.

B. C.R.S. 31-25-201 provides supplemental authority for the Town of Parker to condemn lands for parks and recreational purposes.

On occasion, the courts have observed that enabling authority for an eminent domain action by a home rule municipality can be gleaned from more than one source. For example, in acquiring property for a municipal water system, a home rule city "is vested with ample authority under both the constitution and the statutes to condemn for the purposes indicated." Toll v. City and County of Denver, supra, 139 Colo. at 469-470. In this spirit, the Town of Parker has invoked § 31-25-201, C.R.S., as further evidence of its authority to condemn land for parks and recreational purposes, including lands lying outside its municipal boundaries.

The League would note that this statute, which both grants and to some degree limits eminent domain authority in relation to park

land, purports to apply only to statutory "cities,"[6] not home rule municipalities. In contrast, statutes found at secs. 31-25-301, et seq., C.R.S., provide for the acquisition of park land by statutory "towns" but conspicuously absent from these sections is any reference to eminent domain authority whatsoever. The League would submit that implicit in these statutes is a recognition by the General Assembly that there was no need to authorize home rule municipalities to acquire park lands by eminent domain or otherwise because such authority already existed under Article XX of the Constitution, and was affirmed as long ago as 1911 in Londoner v. City and County of Denver, supra.

However, this does not necessarily mean that C.R.S. 31-25-201 is totally irrelevant in determining whether Parker and other home rule municipalities should be deemed to have the authority to condemn lands for parks and recreational purposes. Colo. Const. art. XX, § 6 provides that, "The statutes of the state of Colorado, so far as applicable, shall continue to apply to such cities and towns, except insofar as superseded by the charters of such cities and towns or by ordinance passed pursuant to such charters." As with many home rule charters, section 1.2 of the Parker home rule charter provides, "The Town shall have all the power of local self-

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[6] As used throughout Title 31, the term "city" does not include any municipality that has adopted a home rule charter. See: § 31-1-101 (2), C.R.S. Compare the more inclusive term "municipality" as defined at § 31-1-101 (6), which includes both statutory and home rule entities.

government and home rule and all power possible for a municipality to have under the Constitution and laws of the State of Colorado."

Home rule municipalities are constitutionally granted every power possessed by the General Assembly unless restricted by their respective charters, Veterans of Foreign Wars v. City of Steamboat Springs, 575 P.2d 835 (Colo. 1978), and the courts can and do look to specific enabling legislation to supplement the general reservation of municipal powers that is often expressed in home rule charters. Leek v. City of Golden, 870 P.2d 580 (Colo. App. 1993).

Section 31-25-201 is an express acknowledgement by the Colorado General Assembly that park lands and recreational facilities, even those located in extraterritorial areas, are legitimate public purposes for which municipal eminent domain authority may be exercised. To the extent this is a legitimate power for any statutory municipality in the state, it is incorporated by reference in the home rule charter as a power that may likewise be exercised by the Town of Parker.

VI. Conclusion

For the reasons stated herein, the League respectfully urges this court to enter judgment for the Town of Parker, to reverse the judgment of the trial court wherein the court held that the Town

did not have the authority to condemn property for recreational trails due to a perceived limitation in C.R.S. 33-11-104 (4), to rule that the Town has full authority as a home rule municipality to condemn property for recreational trails under the auspices of Colo. Const. art. XX and its own charter, to strike the award of attorney's fees entered against the Town, and to remand this case for determination of valuation of the property to be taken.

Respectfully submitted this 21st day of May, 1996.

COLORADO MUNICIPAL LEAGUE

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Certificate of Mailing

The undersigned hereby certifies that on the 21st day of May, 1996, a true and correct copy of the foregoing BRIEF OF THE COLORADO MUNICIPAL LEAGUE AS AMICUS CURIAE was placed in the United States Mail, postage prepaid, addressed to:

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