COURT OF APPEALS, STATE OF COLORADO Colorado State Judicial Building 2 East 14th Avenue, 4th Floor Denver, CO 80203	FILED DEC 2 9 2004 Clerk, Court of Appeals ▲ COURT USE ONLY ▲
District Court, Boulder County, Colorado The Honorable Carol Glowinsky, District Court Judge Case No. 02CV458	
Appellant: CITY OF LONGMONT, an incorporated home-rule municipality v. **Appellee:** JAM RESTAURANT, INC., a Colorado corporation, d/b/a/ BELLA'S CABARET	Case Number 04-CA-1705
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BRIEF OF THE COLORADO MUNICIPAL LEAGUE AS *AMICUS CURIAE*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

CASES (con't) **PAGE(S)**

STATUTES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

COMES NOW the Colorado Municipal League (the "League") by its undersigned counsel, pursuant to Rule 29, Colo. App. R., and files this brief as *amicus curiae* in support of Appellant, the City of Longmont ("Appellant" or "the City").

STATEMENT OF ISSUES ON APPEAL

The League hereby adopts and fully incorporates by reference the statement of the issues on appeal in the opening brief of the City. The League's brief is limited to the following issue:

> **Did the district court err in holding that C.R.S. 38-1-101(3)(a) is not an unconstitutional infringement upon the home rule powers of the City of Longmont?**

More specifically, are laws that terminate or eliminate nonconforming uses by amortization a matter of statewide concern such that section 38-1-101(3), C.R.S. preempts section 6.65.140 of the Longmont City Code (the "Longmont Ordinance")?

STATEMENT OF THE CASE

The League hereby adopts and fully incorporates by reference the statement of the case in the opening brief of the City.

SUMMARY OF ARGUMENT

Section 38-1-101(3), C.R.S. does not preempt section 6.65.140 of the Longmont City Code. Under the Colorado Constitution, power is divided between home rule municipalities and the state into the following three relevant categories: 1) areas of local and municipal concern - areas in which the interest of the home rule municipality predominates and the local enactment supersedes any conflicting state statute; 2) areas of statewide concern – areas in which a home rule municipality may legislate, if at all, only by express delegation from the General Assembly; and 3) areas of mixed state and local concern – areas in which both the state and the home rule

municipality may legislate, but in which the state interest predominates so that a state enactment overrides any conflicting municipal enactment. A systematic analysis of the issue, involving the considerations announced by the Supreme Court for determining whether a matter is of local, statewide or mixed state and local concern, reveals that the Longmont Ordinance is a matter of local concern. Freeing home rule cities from meddling by the General Assembly in the minutia of local affairs was the principal reason the home rule provisions were added to the Colorado Constitution. Throughout Colorado's history, zoning regulation has been held by the Supreme Court to be predominately local in extent and effect. Therefore, Longmont's ordinance amortizing nonconforming sexual oriented business uses supersedes the conflicting state statute and the decision of the District Court should be reversed.

ARGUMENT

The League hereby adopts and incorporates by reference the argument of the City in its opening brief, and submits the following additional argument.

A. The District Court erred in finding that the regulation of laws that terminate or eliminate nonconforming uses by amortization is a matter of statewide concern.

Article XX, Section 6 of the Colorado Constitution, adopted by Colorado voters in 1912, granted "home rule" to municipalities opting to adopt home rule charters. Colo. Const. art. XX, § 6. "The effect of the amendment was to grant to home rule municipalities *every power* theretofore possessed by the legislature to authorize municipalities to function in local and municipal affairs." City and County of Denver v. State of Colorado, 788 P.2d 764, 767 (Colo. 1990) (emphasis in original)[hereinafter "Denver v. State"], quoting Four County Metro. Capital Improvement Dist. v. Board of County Comm'rs, 149 Colo. 284, 294, 369 P.2d 67, 72 (1962).

Longmont is a home rule city, having adopted a charter pursuant to Article XX of the State Constitution, and therefore has every power previously possessed by the state to function with respect to local and municipal affairs.

The Supreme Court consistently has "recognized that regulated matters fall into one of three broad categories: (1) matters of local concern; (2) matters of statewide concern; and (3) matters of mixed state and local concern." City of Northglenn v. Ibarra, 62 P.3d 151, 155 (Colo. 2003), quoting City of Commerce City v. State, 40 P.3d 1273, 1279 (Colo. 2002). See also, Fraternal Order of Police v. City and County of Denver, 926 P.2d 582, 587 (Colo. 1996); City and County of Denver v. Board of County Comm'rs, 782 P.2d 753, 762 (Colo. 1989); National Advertising Co. v. Dep't of Highways, 751 P.2d 632, 635 (Colo. 1988). The authority to regulate is different as to each of these three types of matters.

> Whether a matter is of local, state or mixed concern determines who may legislate in that area. First, in matters of local concern, both home-rule cities and the state may legislate. However, when a home rule ordinance or charter provision and a state statute conflict with respect to a local matter, the home rule provision supersedes the conflicting state statute. Second, in matters of statewide concern, the General Assembly may adopt legislation and home rule municipalities are without power to act unless authorized by the constitution or by state statute. Third, . . . in . . . matters of "mixed" [local and state] concern, local enactments and state statutes may coexist if they do not conflict.

Ibarra, 62 P.3d at 155, quoting Commerce City, 40 P.3d at 1279 (citations omitted).

While the Supreme Court has found the terms "local," "state," and "mixed" useful to resolve potential conflicts between state and local governments, these terms "are not mutually exclusive or factually perfect descriptions of the relevant interests of the state and local governments." Ibarra, 62 P.3d at 155, quoting Denver v. State, 788 P.2d at 767. The Supreme

Court has not developed a specific test that dictates the process of analyzing whether a matter is of local, state or mixed concern. Ibarra, 62 P.3d at 155. Instead the determination is made on an *ad hoc* basis, considering the totality of the circumstances. Id. The Supreme Court emphasized that determinations of how to characterize a given matter are made on such an *ad hoc* basis, taking into account "the relative interests of the state and the home rule municipality in regulating the matter at issue in a particular case." Denver v. State, 788 P.2d at 768. The Supreme Court also pointed out that issues often do not fit neatly into one category or another:

> Those affairs which are municipal, mixed or statewide concern often imperceptibly merge. [citation omitted.] To state that a matter is of local concern is to draw a legal conclusion based on all facts and circumstances presented by a case. In fact, there may exist a relatively minor state interest in the matter at issue but we characterize the matter as local to express our conclusion that, in the context of our constitutional scheme, the local regulation must prevail. Thus, even though the state may be able to suggest a plausible interest in regulating the matter to the exclusion of a home rule municipality, such an interest may be insufficient to characterize the matter as being even of "mixed" state and local concern.

Id. at 767.

In its Denver v. State opinion, the Supreme Court originally identified four considerations in determining whether a matter is of statewide, local or mixed concern. These four factors have been applied since Denver v. State in several major cases involving conflicts between state statutes and home rule municipal ordinances (see Fraternal Order of Police, 926 P.2d at 588; Winslow Const. Co. v. City and County of Denver, 960 P.2d, 685, 693 (Colo. 1998); Town of Telluride v. Lot Thirty-Four Venture, L.L.C., 3 P.3d 30, 37 (Colo. 2000); City and County of Denver v. Qwest, 18 P.3d 748, 754-755 (Colo. 2001); Commerce City, 40 P.3d at 1279; Ibarra, 62 P.3d at 156) and have been summarized as follows: "[1]Whether there is a need for statewide

uniformity of regulation; [2] whether the municipal regulation has an extraterritorial impact; [3] whether the subject matter is one traditionally governed by state or local government; and [4] whether the Colorado Constitution specifically commits the particular matter to state or local regulation." Voss v. Lundvall Bros. Inc., 830 P.2d 1061, 1067 (Colo. 1992).

The Supreme Court has at times weighed other factors in its consideration of whether a subject matter is of local, state or mixed state and local concern, including (1) the need for cooperation between state and local government in order to effectuate the local government scheme and (2) any legislative declaration as to whether a matter is of statewide concern. Ibarra, 62 P.3d at 156. See also, Commerce City, 40 P.3d at 1280; Telluride, 3 P.3d at 37.

The following analysis of the four factors identified in Denver v. State and the two additional factors considered by the Court in Telluride, Commerce City and Ibarra, as applied to the issue at bar, confirms that whether a home rule municipality chooses to terminate or eliminate nonconforming uses through use of amortization is a matter of "local and municipal" concern under Article XX of the Colorado Constitution.

(1) Uniformity

In determining whether the state's interest is sufficient to justify a statute overriding an inconsistent home rule municipal ordinance, the first consideration announced by the Supreme Court in Denver v. State is "the need for statewide uniformity of regulation." Denver v. State, 788 P.2d at 768. The need for statewide uniformity requires substantially more than the desirability of a statewide prohibition on local amortization of nonconforming uses to those individuals involved in passing the state amortization statute. As the Court declared in its Fraternal Order of Police decision, "[u]niformity in itself is no virtue, and a municipality is

entitled to shape its law as it sees fit if there is no *discernable pervading state interest* involved." Fraternal Order of Police, 926 P.2d at 589-90 (emphasis in original).

The question in this appeal is whether there is such a discernable, pervasive state interest in uniform prohibition of amortization of nonconforming uses as to justify preemption of the Longmont Ordinance. The League believes there is not and respectfully disagrees with the District Court's finding of such an interest rooted in the state's obligation to protect the right of persons to possess property and not to have their property taken or damaged without just compensation. See Colo. Const. Art. II §§ 3, 15.

In Euclid v. Ambler Realty, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926), the United States Supreme Court acknowledged that zoning, because it restricts an owner's right to use his property, inevitably constitutes a partial taking. However, zoning is constitutionally permissible so long as it is reasonable. Service Oil v. Rhodus, 179 Colo. 335, 347, 500 P.2d 807, 812-13 (1972). This is the context in which nonconforming uses arise. As the Colorado Supreme Court stated in 7250 Corp. v. Board of County Comm'rs, "[a] nonconforming use may be lost for a variety of reasons, including the expiration of a period of amortization. The amortization period, however, must be reasonable." 799 P.2d 917, 928 (Colo. 1990). Whether a particular period of amortization is reasonable necessarily depends upon a balancing of the burden placed on the property owner against the benefits gained by the termination. Id. The fact that an amortization ordinance may deprive a property owner of what might be its *most* profitable use of the property in question does not result in a due process violation where the governmental interest in the regulatory scheme is substantial and the property owner is given a reasonable period of time to relocate a business. Id. Longmont's substantial governmental interest in regulating the location

of sexually oriented businesses within the City limits in order to minimize the secondary effects of such businesses is not in question. Additionally, the Supreme Court has upheld an ordinance which terminated a nonconforming use with a six-month amortization period. Id. Therefore, any "taking" realized by the amortization of a nonconforming use is reasonable and does not give rise to a discernable, pervasive state interest in the issue.

Under the uniformity analysis, the Supreme Court also has found public expectation of consistency to be an important factor to consider in determining whether a matter is of statewide concern. Telluride, 3 P.3d at 38. In Telluride, the Supreme Court found that landlord-tenant relations is an area in which state residents have an expectation of consistency throughout the state. Telluride 3 P.3d at 38. There is no such expectation of consistency in the case at bar.

This is a local ordinance, designed to meet local conditions. Whether and to what extent it is effective at accomplishing its objectives will be felt locally. The ordinance is intended to result in limiting the secondary effects of sexual oriented businesses on the citizens of and visitors to the City. There is no overriding, pervasive state interest in a uniform prohibition on home rule municipalities such as Longmont trying to minimize the secondary effects of sexually oriented businesses through ordinances such as the one at issue in this case.

> To state that a matter is of local concern is to draw a legal conclusion based on all the facts and circumstances presented by a case. *In fact, there may exist a relatively minor state interest in the matter at issue but we characterize the matter as local to express our conclusion that, in the context of our constitutional scheme, the local regulation must prevail.*

Denver v. State, 788 P.2d at 767 (emphasis added).

Whatever the state interest in uniformity of prohibition of amortization of nonconforming uses may be, it does not rise to the level of the discernable, pervading state interest required by the Supreme Court and it is thus not sufficient to preempt the Longmont Ordinance.

(2) Extraterritorial Impact

As articulated by the Supreme Court in Denver v. State, the second consideration concerning whether a matter should be classified as of local, statewide or mixed state and local concern is "the impact of the municipal regulation on persons living outside the municipal limits." Denver v. State, 788 P.2d at 768. The Supreme Court has defined "extraterritorial impact" as a ripple effect that impacts state residents outside the municipality. Telluride, 3 P.3d at 38-39. To find a ripple effect the extraterritorial impact must have serious consequences to residents outside the municipality, and be more than incidental or *de minimus*. Ibarra, 62 P.3d at 161; Denver v. State, 788 P.2d at 769.

The Longmont Ordinance does not cause any such ripple effect to residents outside of Longmont, let alone "serious" consequences. The Longmont Ordinance requires amortization of nonconforming sexually oriented businesses *within* Longmont. The businesses may relocate to another zone in Longmont where they are allowed. This has no effect on any other municipality in Colorado. Respectfully, the League urges that it is impossible to specify what, if any, "serious" extraterritorial impact there may be from the Longmont Ordinance.

(3) Traditionally regulated by State or Local Government.

The third prong of the Denver v. State analysis involves "historical considerations, i.e., whether a particular matter is one traditionally governed by state or by local government." Denver v. State, 788 P.2d at 768. "[Colorado] case law has recognized that the exercise of

zoning authority for the purpose of controlling land use within a home rule city's municipal borders is a matter of local concern." Voss, 830 P.2d at 1064.

It has been well settled law in Colorado for decades that zoning ordinances, such as Longmont's nonconforming use ordinance address matters of local concern and therefore supersede conflicting state statutes. See, e.g., City of Colorado Springs v. Securecare Self Storage, Inc., 10 P.3d 1244, 1247 (Colo. 2000); Voss, 830 P.2d at 1064; National Advertising Co., 751 P.2d at 635; City of Greeley v. Ells, 186 Colo. 352, 357-58, 527 P.2d 538, 541 (1974); Service Oil, 179 Colo. at 344, 500 P.2d at 811; Roosevelt v. City of Englewood, 176 Colo. 576, 586, 492 P.2d 65, 70 (1971).

The Supreme Court stated early last century that "zoning ordinances have a much wider scope that mere suppression of offensive uses of property, and act not only negatively, but affirmatively for the promotion of the public welfare." Colby v. Board of Adjustment, 81 Colo. 344, 351, 255 P. 443, 446 (1927). This broad scope of municipal zoning authority has carried forward to the present day.

> It is well settled that "[m]unicipalities may zone land to pursue any number of legitimate objectives related to the health, safety, morals, or general welfare of the community" [citations omitted]. The police power of a municipality is very broad and the objectives of zoning ordinances can be many and varied.

Colorado Manufactured Hous. Ass'n v. Board of County Comm'rs, 946 F. Supp. 1539, 1554 (D. Colo. 1996).

Comprehensive zoning contemplates the existence of nonconforming uses and, to effectively accomplish the end sought to be accomplished it is inherent that reasonable means must be afforded to terminate nonconforming uses. Service Oil, 179 Colo. at 340, 500 P.2d at

809. "The power to zone cannot be effective without the power to ultimately, under reasonable conditions, terminate that which does not conform. Id., 179 Colo. at 343, 500 P.2d at 811.

The District Court contends that the Longmont Ordinance implicates the state's obligations to sexually oriented business owners who have an interest in land, because the sweep of the ordinance's impact implicates constitutionally-protected rights in property. As discussed above, all zoning constitutes a taking on some level, but zoning is constitutionally permissible, so long as it is reasonable. Longmont's regulation amortizing nonconforming sexually oriented businesses is reasonable. Therefore, this is not an area in which the state has traditionally had any significant role (see Argument supra p. 6-7). It is clear that zoning and land use issues traditionally have been regulated at the local level, a fact reflected in the numerous decisions of Colorado courts concluding that these issues are of local and municipal concern. See Voss, 830 P.2d at 1064; City of Colorado Springs v. Smartt, 620 P.2d 1060, 1062 (Colo. 1981); Service Oil, 179 Colo. at 344, 500 P.2d at 811.

(4) Constitutional Allocation of Authority

The last of the Denver v. State factors is whether "the Colorado Constitution specifically commits a particular matter to state or local regulation." Denver v. State, 788 P.2d at 768. Article XX of the Colorado Constitution does not expressly mention "amortization of nonconforming uses." That acknowledged, it is nonetheless worth noting here what the Supreme Court said in Four County Metro. Capital Improvement Dist. v. Board of County Comm'rs: "In numerous opinions handed down by this Court extending over a period of fifty years, it has been made perfectly clear that when the people adopted Article XX they conferred *every power*

theretofore possessed by the legislature to authorized municipalities to function in local and municipal affairs." 149 Colo. at 295, 369 P.2d at 72 (emphasis in original).

The Denver v. State criteria evidence considerable deference to this plenary authority of home rule municipalities. Preemption of home rule authority is not favored. There must be more than simply a state interest in uniformity of regulation to overcome a home rule ordinance; there must be a "discernable pervading state interest" in uniformity (see Argument supra p. 6). For a state interest to justify overriding a home rule ordinance, the regulation must have more than a contingent speculative or *de minimus* extraterritorial impact; the extraterritorial impact must have "serious" consequences (see Argument supra p. 9).

This deference is especially appropriate where, as here, the challenged local regulation involves an exercise of home rule land use and zoning authority, an area long recognized as of local and municipal concern, and the local regulation affects a local issue traditionally within the regulatory domain of local government, i.e., amortization of nonconforming uses.

(5) Need for Cooperation between State and Local Governments

A fifth factor in evaluating the interest of the state is the degree of cooperation between the state and the local governments necessary to make the system work. Ibarra, 62 P.3d at 162. See also, Commerce City, 40 P.3d at 1281; Telluride, 3 P.3d at 37. In Denver v. State, the Supreme Court found that a state concern is more likely where there is a high degree of cooperation necessary between state and local governments. Denver v. State, 788 P.2d at 768.

In the case at bar, there is no need for cooperation between the state and the counties necessary with respect to the "system" of regulating the location of sexually oriented businesses within the City of Longmont. It is purely a matter of local concern.

(6) Legislative Declarations

The final factor considered by the Supreme Court in evaluating state and local interests is any legislative declaration as to whether a matter is of statewide concern. Ibarra, 62 P.3d at 162. See also, Commerce City, 40 P.3d at 1281; Telluride, 3 P.3d at 37. Senate Bill 03-251, the bill that added subsection (3) to section 38-1-101, C.R.S., contains a declaration that the elimination of nonconforming uses by amortization is a matter of statewide concern. See Colo. Sess. Laws 2003, Ch. 420 at 2666. The Supreme Court has said that such declarations are not dispositive, but are entitled to "some deference." Telluride, 3 P.3d at 37.

The Supreme Court has recognized that the constitutional authority of home rule municipalities would not be protected from General Assembly usurpation if the legislature could "end-run" Article XX of the Colorado Constitution by the simple expedient of inserting declarations of "statewide concern" into its acts. For this reason, the Supreme Court has stated repeatedly that it is not bound by such declarations. See, e.g., Denver v. State, 788 P.2d at 768 n.6; Winslow Construction, 960 P.2d at 694.

As the Supreme Court has observed, "the overall effect of the [home rule] amendment [Colo. Const. Art. XX] was to grant to home rule municipalities the power the legislature previously had and to limit the authority of the legislature with a respect to local and municipal affairs in home rule cities." Fraternal Order of Police, 926 P.2d at 587. Furthermore, the General Assembly may not "reinvest itself with any portion of the authority it lost to home rule cities upon adoption of Article XX by the people." Four County Metro, 149 Colo. at 295, 369 P.2d at 72.

This appeal raises significant issues concerning the appropriate division of authority under the Colorado Constitution between home rule municipalities and the General Assembly in the areas of land use and zoning. If critical constitutional prerogatives of home rule municipalities can be extinguished based upon statements by legislators and lobbyists whose clients, for whatever reason, are unwilling or unable to accomplish their objectives by working directly with local elected officials, there will shortly be little left of home rule in Colorado. It is common practice for all manner of special interests to dispatch their lobbyists to the Capitol in an attempt to resolve a particular local "problem" by statewide act. Indeed the amortization statute at issue in this case was not proposed in response to widespread amortization across Colorado; the bill was introduced to deal with local objection to the City of Aurora's use of amortization in the Fitzsimons redevelopment area. The City of Aurora rescinded its amortization ordinance after the public objected.

CONCLUSION

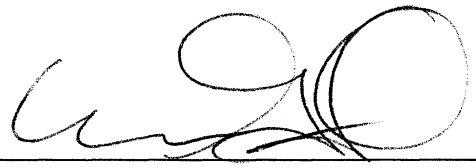
The League respectfully urges that a Denver v. State analysis (including the additional factors considered by the Supreme Court in Ibarra) leads to the conclusion that the Longmont Ordinance that terminates or eliminates nonconforming sexual oriented business uses by amortization involves a matter of local concern and that the ordinance thus supersedes section 38-1-101(3), C.R.S.

There is no discernable, pervading state interest in a uniform prohibition of ordinances such as Longmont's. The extraterritorial impacts of the ordinance are contingent and speculative, at best; they certainly are not significant. Amortization of nonconforming uses, particularly sexually oriented businesses, has traditionally been regulated at the local level,

where local interests are strong; as a zoning regulation this ordinance operates in an area long held to be of local concern. There is no specific constitutional authority for regulating amortization of nonconforming uses, either on the state or local level; however, the state constitution confers plenary authority to home rule municipalities There is no need for cooperation between state and local governments with respect to amortization of nonconforming uses and this Court is certainly not bound by the General Assembly's naked assertion that this is a matter of statewide concern.

WHEREFORE, for the reasons stated herein and in the opening brief of the City, the League urges that the decision of the District Court be reversed.

Dated this 29th day of December 2004.



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CERTIFICATE OF MAILING

I hereby certify that on this 29th day of December 2004, I deposited a true and complete copy of the foregoing **Brief of the Colorado Municipal League as an *Amicus Curiae*** in the U.S. Mail, postage prepaid, addressed as follows:

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