SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	COURT USE ONLY
Court Below: Colorado Court of Appeals Case No.: 02-CA-1586 Trail Court: Pitkin County District Court Case No.: 00-CV-218	Case Number: 03-SC-616
DEPARTMENT OF TRANSPORTATION, STATE OF COLORADO; BOARD OF COUNTY COMMISSIONERS OF PITKIN COUNTY; COLORADO, Petitioners, v. CRAIG R. STAPELTON, Respondent.	
Attorney for *Amicus Curiae* the CITY OF ASPEN, COLORADO John P. Worcester, #20610 City Attorney City of Aspen 130 S. Galena St. Aspen, Colorado 81611 Phone Number: (970) 920-5055 and Attorney for *Amicus Curiae* the COLORADO MUNICIPAL LEAGUE Carolynne C. White, #23437 1144 Sherman Street Denver, Colorado 80203 Phone Number: (303) 831-6411	

BRIEF OF *AMICUS CURIAE* THE COLORADO MUNICIPAL LEAGUE AND THE CITY OF ASPEN, COLORADO

Come now the City of Aspen and the Colorado Municipal League and for the reasons that follow, urge this honorable Court to reverse the decision of the Court of Appeals.

I. Interests of the Parties.

A. The Colorado Municipal League.

The Colorado Municipal League ("CML") is a non-profit, voluntary association of 264 of the 270 municipalities located throughout the state of Colorado (comprising 99.99 percent of the total incorporated state population), including all 88 home rule municipalities, 175 of the 181 statutory municipalities, all municipalities greater than 2,000 in population, and the vast majority of those having a population of 2,000 or less. CML has been appearing as an *amicus* before the Colorado Court of Appeals and the Colorado Supreme Court for decades in appeals where a significant decision affecting Colorado municipalities is possible.

CML as an *amicus* would provide the Court with a statewide municipal perspective on the issues presented in this case, and would assure that the general interest of those other members municipalities is represented. CML members have a great deal at stake in the proper resolution of the matter before the Court.

B. The City of Aspen, Colorado.

The City of Aspen is a Colorado home rule municipal corporation with a particular interest in the outcome of the case at bar and a general interest in the legal issues presented for review.

As noted in the Petition for a Writ, the City of Aspen has collaborated with Petitioners, Colorado Department of Transportation and Pitkin County, in developing transportation solutions for State Highway 82 at the entrance to Aspen. CDOT's and Pitkin County's efforts to condemn a portion of the Stapleton property is but one step in a long list of steps necessary to improve State

Highway 82 as it heads into the city limits of the City of Aspen. The City of Aspen not only supports the condemnation of the Stapleton property for highway improvements, but to improve the recreational opportunities that are afforded by the installation of parking facilities at that location. Accordingly, the City of Aspen supports Petitioners' arguments that the Court of Appeals' decision be reversed.

The citizens of the City of Aspen have been engaged in a civic debate for the last 25 to 30 years concerning potential solutions to ever increasing traffic problems within the City limits and along Colorado State Highway 82 (commonly referred to as "Killer 82") which is the main transportation artery through the Roaring Fork River Valley between the City of Glenwood Springs and the City of Aspen. The debate has centered on the alignment of any new or reconstructed highway into Aspen (whether to continue to use the existing alignment or construct a new, more direct, alignment across City owned property), the width of the highway itself (two lanes or four lanes), and what type of mass transportation system, if any, should be implemented to alleviate traffic congestion and improve commuter ridership.

Over these many years, the electors of the City of Aspen and Pitkin County have been asked to vote in a number of elections on these issues without seemingly coming to any final resolution. The Colorado Department of Transportation has been engaged in reconstructing State Highway 82 from Glenwood Springs to the entrance to Aspen by improving the highway and widening it to four lanes for almost as many years as the citizens of Aspen have been debating how the last four miles should be handled. Highway 82 is still under construction, but is almost complete with the exception of certain portions through an area known as Snowmass Canyon between the Town of Basalt and the Buttermilk Ski Area on the outskirts of the City.

In 1992, the governments of the City of Aspen, the Town of Snowmass Village and Pitkin

County, through their respective elected officials, recognizing the need to develop a transportation strategy for State Highway 82, entered into a Joint Resolution confirming a framework for an upper valley transportation strategy for State Highway 82. Pursuant to that original joint resolution, the governments adopted a subsequent joint resolution approving a Comprehensive Valley Transportation Plan and endorsed a one-half (1/2) cent county-wide sales tax and a one-half (1/2) cent county-wide use tax to fund elements of the transportation plan. The sales and use taxes were approved by the electors of Pitkin County. To date, local governmental entities, including Pitkin County and the City of Aspen, have spent in excess of $10.0 million dollars to improve or enhance State Highway 82 in ways that state or federal funding was not eligible to fund. These improvements have included pedestrian trails, pedestrian underpasses, planning and design fees, and inter-modal transit centers. These local governments have spent those funds because they understand that a modern transit corridor including a highway needs to incorporate mass transit solutions and other amenities that integrate recreational opportunities in the overall design of the transportation project. The Court of Appeals' decision in the matter under review deals a serious blow to the cooperative efforts between local governing bodies and CDOT to design and construct an overall solution to the problems of the existing state highway at the entrance to Aspen.

In August, 1998, the Colorado Department of Transportation and the Federal Highway Administration issued a Record of Decision for proposed improvements on State Highway 82 – Entrance to Aspen. A prior Environmental Impact Statement dealt with the section of Highway 82 between the Town of Basalt to the Buttermilk Ski Area. Both Record of Decisions were prepared in compliance with the Department of Transportation Act of 1966, as amended, and the National Environmental Protection Act, following publication of a Final Environmental Impact

Statement. The Record of Decision concluded that the preferred alternative for the Entrance to Aspen Project be as follows:

> The Preferred Alternative is a combination of highway and intersection improvements, a transit system, and an incremental transportation management (TM) program. The highway component will consist of a two-lane parkway that generally follows the existing alignment, except at the Maroon Creek crossing and across the Marolt-Thomas Property. ... The transit component includes an LRT [light rail transit] system that, if local support and/or funding are not available, will be developed initially as exclusive bus lanes. ...

R. Vol. X, Ex. E, pg. 1.

Of critical importance to the case at bar, was the decision to reduce the number of highway lanes from four to two at or near the Stapleton property and the Buttermilk Ski Area and providing a multimodal facility to accommodate a transit station and parking facilities. A similar multimodal facility was determined to be necessary at the Pitkin County Airport less than a mile away from the Buttermilk Ski Area facility. The facility at the Pitkin County Airport was intended to be used primarily by commuters with a City of Aspen destination. The multimodal facility at the Stapleton property was intended primarily to be used by day skiers and other recreational enthusiasts. R. Vol. X, Ex. E, pg 24. The multimodal facilities, therefore, were intended to capture privately owned vehicles traveling to the City of Aspen or the various skiing and recreational areas in the immediate vicinity. Thus, the intent was to encourage travelers to transfer from privately owned vehicles to mass transit at one or the other multimodal transit facility and reduce the congestion on Highway 82 as it approached and entered the City of Aspen. The parking facility at the Stapleton property is an integral part of a much more complex improvement to a state highway.

Also significant to understanding the importance of the totality of the solutions for State Highway 82 as proposed in the Record of Decision is the fact that the City of Aspen is a PM_{10} air

quality non-attainment area requiring that all solutions for improving the highway conform with the requirements of the 1990 federal Clean Air Act Amendments. *See* 42 U.S.C. §7502. Because of this "non-attainment" classification, the State of Colorado is required to prepare an implementation plan reflecting how the state plans to bring air quality into conformance with federal anti-pollution standards, including PM_{10}. *Id.* The construction of multimodal facilities, including parking facilities is an integral part of the overall solution for improving Highway 82 as proposed in the Record of Decision and conforming with federal clean air regulations for the Aspen area. 40 CFR 52.332, 59 FR 47091 (Sept. 14, 1994.)

The City of Aspen has a significant interest in how the Record of Decision and all of the joint planning the City of Aspen, Pitkin County, and CDOT have engaged in are implemented; and, particularly that parking facilities be provided at the intended inter-modal transfer stations.

II. The Colorado Department of Transportation has the authority to condemn private lands for parking facilities associated with the construction of a state highway.

The Court of Appeals' decision states that CDOT does not have any independent authority to condemn private lands for a purpose not specifically granted to it by the state Legislature, but that the authority can be found "by necessary implication." Opinion at 3-4. After quoting the definition of a "state highway[1]" and "highway" the Court concludes that "[n]othing in these statutes suggests that "state highway" or "highway" refers by implication to structures not related directly to highway construction, such as parking and transit facilities." *Id* at 6. In so doing, the Court of Appeals reversed the opinion of the trial court which held that "the

[1] It should be noted that the definition of "state highway" in § 43-1-203 C.R.S. is preceded by the admonition that the definition given is only valid "unless the context otherwise requires." As noted herein, the context of the definition requires, by necessary implication, more than the definition quoted and relied upon by the Court of

Department of Transportation has the power to condemn for highway purposes. Where the parking is a required element of highway construction, the right to condemn for parking must therefore be necessarily implied." The trial court was correct. The logic of finding implied authority in the case at bar to include parking facilities within the power to condemn for "highway purposes" is unassailable. The Court of Appeals' decision completely emasculates the doctrine of implied authority. If left undisturbed, the decision will make meaningless the entire concept of implied authority.

It should be noted that the Colorado Department of Transportation was created by the state Legislature in 1991 to replace the Colorado Department of Highways. *See* C.R.S. §43-1-108 and §24-1-128.7(4). The change was more than a mere name change. Its current duties include more than the construction and maintenance of the state highways; it includes "strategic planning for statewide transportation systems," the promotion and "coordination between different modes of transportation," and respond to "federal mandates for multi-modal transportation planning." §43-1-101 C.R.S. In other words, the old Highway Department was converted into a state department with an ability to, *inter alia*, "plan, develop, construct, coordinate, and promote an integrated transportation system in cooperation with federal, regional, local and other state agencies and with private individuals and organizations concerned with transportation planning and operation in the state." (emphasis added) §43-1-105(a) C.R.S.

When the state Legislature amended § 43-1-208 transferring from the Department of Highways to the Department of Transportation the power to condemn for "state highway purposes", it only makes common sense to acknowledge that the state Legislature intended for the new Department of Transportation to have all the powers of eminent domain necessary to

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carry out its new duties to develop an integrated transportation system for the state in cooperation with regional and local governmental entities. It is true that § 43-1-208 was not amended so as to include these new purposes, but retained the terminology of the previous legislation: "for state highway purposes." However, if the concept of "necessary implication" means anything, it must surely mean that the state Legislature intended for the new Department of Transportation to plan and develop modern state highways incorporating the very elements set forth in the new department's duties; to wit: not only highways, but modern transportation[2] systems. From all of the current construction taking place on the Front Range for transportation purposes, this Court can take judicial notice of the fact that modern state highways include more than just "bridges, culverts, sluices, drains, ditches, waterways, embankments, retaining walls, trees, shrubs and fences along or upon the same and within the right-of-way." § 42-1-203 C.R.S. They include all sorts of structure and facilities to accommodate mass transit systems, including, but not limited to parking lots, parking structures, and buildings to facilitate inter-modal transfers from motor vehicles to mass transit systems.

As noted above, the improvements to Highway 82 were never intended to simply widen the pavement from two lanes to four. The improvements attempt to incorporate an integrated transportation system capable of accommodating a mass transit system of either busses or light rail. The mass transit system necessarily requires the construction of inter-modal transit facilities and parking lots. Without these elements of the integrated transportation system, the reduction of lanes from two to four in the vicinity of the Stapleton property will ensure that vehicles will not be captured at that point and continue to drive into the City of Aspen adding to the already

[2] "Transportation" is defined at § 43-1-102(6) as the "transport of persons or property by motor vehicle, bus, truck, railroad, light rail, mass transit, airplane, bicycle, or any other form of transport." The definition also includes "pedestrian transportation."

congested highway and adding to the air pollution that currently exists in Aspen.

III. Pitkin County has the power of eminent domain to condemn private lands for recreational purposes.

The Court does not need to employ the "necessary implication" doctrine to find that the state Legislature has authorized counties to condemn private lands for a parking lot when the parking lot is a necessary component of a larger recreational project. § 29-7-104 C.R.S. specifically grants counties authority to condemn private lands for "recreational systems." § 29-7-107 C.R.S defines a "recreational system" as "such land or interest in land as may be necessary, suitable, or proper for park or recreational purposes ..." (Emphasis added.) Parks and recreational facilities all over America have designated parking areas that are not part of any existing right-of-way. They are constructed and maintained as parking facilities to accommodate visitors to the park or recreational facility. The Court of Appeals' decision finds no specific authority to condemn for parking lots or transit facilities as these uses are not specifically listed in the statute. The decision, however, completely ignores that the definition includes all land deemed "necessary" for park or recreational purposes. Creating areas for parking cars has been a necessary component of most parks and recreational facilities since the first Ford Model T was used to visit a public park. Even if one concludes that parking lots were not intended to be included as part of the "necessary" definition of the statute, it is only logical that the doctrine of "implied authority" should apply to conclude the power of eminent domain for recreational systems must necessarily include the power to condemn private lands for parking lots associated with parks or recreational facilities.

The City of Aspen and member municipalities of the Colorado Municipal League routinely cooperatively maintain recreational facilities with counties, public recreational districts, and even private entities. In the case at bar, notwithstanding the Court of Appeals' conclusion that "there is

no evidence, for example, that trail heads converge at the parking areas," (Opinion at 10) the City of Aspen, Pitkin County, and the Town of Snowmass Village do, in fact, maintain nordic skiing and summer pedestrian trails throughout the immediate area of the proposed parking lot on the Stapleton property. Without a parking lot serving this area, vehicles would park in the current narrow rights-of-way that exist in the immediate area of the Stapleton property thereby creating a significant hazard to motorists and recreational enthusiasts.

IV. The condemnation of the Stapleton property for parking, transit, and recreational uses would further a public use.

Respondent, Stapleton, has argued that the condemnation of his property would not serve a public use as the primary beneficiary of the parking facilities would be the Buttermilk Ski Area, a privately owned business operating under the name of Aspen Skiing Company. Will a private entity benefit from the construction of a parking lot? Certainly, but that doesn't detract from the significant benefit the parking lot will provide to the general public.

As noted above, the construction of the parking lot will serve a number of public benefits. It can not be emphasized enough that the main reason that CDOT included the parking facilities in the plan for improving Highway 82 was to design an overall integrated transportation system to meet the needs and scope of the Environmental Impact Statement for the Entrance to Aspen project. The plan contemplates reducing the number of lanes from four to two at the Stapleton property and encourages motorists to use the inter-modal facility to embark on a mass transit system of either busses or light rail to continue their trip into Aspen. Without a parking facility to store vehicles, motorists will not transfer to mass transit and the very congestion and air pollution on Highway 82 that the City of Aspen has attempted to avoid will continue into the future. Simply stated: no parking lots, no inter-modal facility, and no improvement to Highway 82.

It is no coincidence that the reduction of lanes is planned for the vicinity of the Buttermilk Ski Area and the Stapleton property. The Buttermilk Ski Area, unlike Aspen Mountain, Highlands Ski Area, or Snowmass Village is immediately adjacent to the highway. It is the easiest for motorists to access from the highway. Accordingly, day skiers and other recreational enthusiasts from all over the valley drive to Buttermilk, park their cars in the existing parking lot, and either ski at Buttermilk, access nordic ski trials in the immediate vicinity, or transfer to shuttles that take them to the other skiing areas. The proposed parking lot at the Stapleton property will further encourage motorists to leave their cars at that location and enjoy the recreational opportunities provided by the area without driving their cars into Aspen, Snowmass Village or the Highlands Base Area. Capturing all of those vehicles at the Stapleton property will have immeasurable benefits to the public. The privately owned Aspen Ski Company will most assuredly benefit from the operation of the proposed parking lot, but the public benefit can not be seriously disputed.

WHEREFORE, for the reasons stated herein, the Colorado Municipal League and the City of Aspen Municipal Defendants respectfully urge this honorable Court to reverse the decision of the Court of Appeals in this case.

DATED this 4th day of March, 2004

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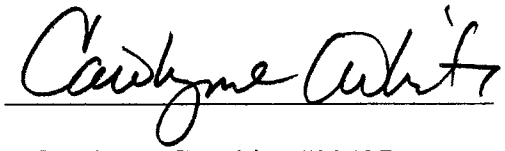

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CERTIFICATE OF SERVICE

This is to certify that I have mailed a true and accurate copy of the foregoing **MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* BY THE COLORADO MUNICIPAL LEAGUE AND THE CITY OF ASPEN, COLORADO, AND *AMICUS CURIAE* BRIEF** by placing the same, properly addressed, with sufficient postage attached thereto in the United States mail this 4th day of March, 2004, addressed as follows:

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