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SUPREME COURT, STATE OF COLORADO Colorado State Judicial Building 2 East 14th Avenue, 4th Floor Denver, Colorado 80203	
Appeal from the District Court, County of San Miguel, Colorado Honorable Charles R. Greenacre, Case No. 04-CV-22	
Petitioner/Appellee: TOWN OF TELLURIDE v. **Respondents/Appellants:** SAN MIGUEL VALLEY CORPORATION, a Colorado corporation; BOOMERANG HOLDINGS, LLC, a Colorado limited liability company; ALLEY OOP HOLDINGS, LLC, a Colorado limited liability company; and CORDILLERA CORPORATION, a Utah corporation	▲ **COURT USE ONLY** ▲
Attorney for *Amicus Curiae* the COLORADO MUNICIPAL LEAGUE: ERIN E. GOFF, #31072 1144 Sherman Street Denver, Colorado 80203 Phone: (303) 831-6411 Fax: (303) 860-8175 Email: egoff@cml.org	Case Number: 07-SA-101 RECEIVED OCT - 1 2007 CLERK COLORADO SUPREME COURT

BRIEF OF AMICUS CURIAE THE COLORADO MUNICIPAL LEAGUE

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COMES NOW the Colorado Municipal League (the "League") by its undersigned counsel and, pursuant to Rule 29, C.A.R., submits this brief as *amicus curiae* in support of the position of Appellee, Town of Telluride ("Telluride").

INTERESTS OF THE LEAGUE

The League is a non-profit, voluntary association of 264 of the 270 municipalities located throughout the state of Colorado (comprising nearly 98 percent of the total incorporated state population), including all 96 home rule municipalities, 167 of the 173 statutory municipalities, all municipalities greater than 2,000 in population, and the vast majority of those having a population of 2,000 or less. The League 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.

The League has a heightened interest in the outcome of this particular case, and a long history of involvement in the extraterritorial use of eminent domain, including as an *amicus* in one of the seminal cases in Colorado dealing with this issue, City of Thornton v. Farmers Reservoir and Irrigation Co., 575 P.2d 382 (Colo. 1978). In fact, this Court cited the League's *amicus* brief in its opinion in City of Thornton, declaring:

> We quote with approval this statement from the brief of the amicus curiae, Colorado Municipal League: "The power of eminent domain is an inherent attribute of sovereignty limited only by applicable portions of the state and federal constitutions, and the exercise of the right of eminent domain is the exercise of the sovereign power. People of Colorado v. District Court, 207 F.2d 50 (10th Cir. 1953). A portion of that sovereign power is granted directly by the people of the state of Colorado to the citizens of home rule municipalities through the adoption of Sections 1 and 6 of Article XX of the Colorado Constitution."

City of Thornton, 575 P.2d at 388.

The League as an *amicus* in this case, will once again provide the Court with a statewide municipal perspective on the issues presented, and assure that the general interest of the great majority of those other member municipalities is represented. League members, particularly home rule municipalities, have a great deal at stake in the proper resolution of this matter.

Section 38-1-101(4), C.R.S. ("Subsection 4") prohibits Colorado home rule municipalities from exercising their constitutionally granted extraterritorial power of eminent domain, not just in order to acquire property for open space, park and recreation uses, which is at issue in the instant case, but in order to acquire property for "conservation, preservation of views of scenic vistas, or for similar purposes . . . " as well. See C.R.S. § 38-1-101(4). Moreover, Subsection 4 prohibits home rule municipalities from providing any funding to any other public

or private party for such condemnations. These statutory prohibitions are particularly threatening at a time when many municipalities are expending greater effort and resources to acquire and preserve open space for public uses such as parks, trails and other recreational uses; preserving scenic views and wildlife habitats; and protecting the environment.[1]

The preservation of open space is a basic municipal function necessary to preserving the American west. Keeping some land as open space is good for Colorado's health, beauty, economic vitality and overall quality of life. Open space lands provide places to recreate and enjoy the outdoors, preserve critical habitat for wildlife, attract tourists to hike, raft, fish and watch wildlife (and contribute millions of dollars to the Colorado economy) and provide these same opportunities for Colorado citizens, creating a higher quality of life for the people of Colorado. Open space is important to the people of the state of Colorado.

A 1986 report by the Colorado Land Use Commission, perhaps even more relevant today, concluded that:

> Open space is an asset whose value is intangible but whose worth cannot be overestimated. . . . It is crucial that we make open space a priority and that future development be guided by a strong

[1] A number of home rule municipalities manage extensive open space programs. Many have an open space master plan and an entire department or division within the municipality devoted to open space acquisition and preservation. See Appendix A for illustrative examples.

> commitment to open space preservation. Coloradans have long valued open space in its own right and have overwhelmingly supported its protection for such varied uses as passive and active recreational activities, preserving indigenous ecosystems and wildlife habitats, preserving agricultural lands, protecting watersheds and wild rivers, and establishing visual corridors, trails, and green belts. Open spaces in and around our communities are one of Colorado's most valuable natural and economic resources. The citizens and political leaders of the state must recognize that well-conceived open space policies and programs are inseparable from enduring civic and economic vitality. A decision not to preserve open space today is a decision to forego its benefits tomorrow. The price of a better and healthier Colorado tomorrow is simply the foresight of today.

COLORADO LAND USE COMM'N, COLORADO'S OPEN SPACE: A STUDY IN ACHIEVEMENT, NEGLECT AND OPPORTUNITY (OCT. 1986).

To that end, several programs exist throughout the state that are geared, in whole or in part, toward the preservation of open space. Some of these programs were created by the state or federal government and/or are publicly funded, such as the United States Fish and Wildlife Service, the United States Forest Service, Great Outdoors Colorado, and the Colorado Open Space Alliance. Others are run by non-profit organizations, including Colorado Open Lands, The Nature Conservancy, Land Trust Alliance, and the Colorado Coalition of Land Trusts, to name a few. Some of these groups' work to preserve open space is limited to Colorado and others are national organizations working to preserve open space, both in Colorado and nationwide.

In recognition of the importance of open space to our state, the state legislature, over the years, has enacted a number of statutory provisions that confer upon statutory municipalities and other local governments the authority to acquire land by eminent domain (including extraterritorially) for the preservation of open space, and parks and recreation uses. See C.R.S. § 31-25-201(1), C.R.S. § 38-6-110, C.R.S. § 29-7-104 and 107, C.R.S. § 32-1-1005 (1)(c). Of course, Telluride and all other home rule municipalities in the state already have the authority to do that which is authorized by these statutes, pursuant to Article XX of the state Constitution, but statutory municipalities rely on these enactments.

Notably, C.R.S. § 31-25-201(1) authorizes "[a]ny city . . . to establish, maintain, and acquire by gift, devise, purchase, or right of eminent domain such lands or interest in land, within or without the municipal limits of such city, as in the judgment of the governing body of such city may be necessary, suitable, or proper for . . . park or recreational purposes for the preservation or conservation of sites, scenes, open space, and vistas of scientific, historic, aesthetic or other public interest." C.R.S. § 31-25-201(1). This section also provides that "[a]ny city may unite with any other similarly authorized political subdivision of this state in acquiring, establishing, and maintaining any property which a city is authorized to acquire, establish, or maintain pursuant to subsection (1) of this section." C.R.S. §

31-25-201(3). Subsection 4 contradicts this statute twice: first, with the prohibition on the extraterritorial use of eminent domain for open space or park uses; and second, with the prohibition on helping fund such acquisitions by another governmental entity.

Colorado home rule municipalities use their constitutional power to condemn extraterritorially in order to acquire property for a multitude of lawful, public, local or municipal purposes, including open space, parks and recreation purposes. For example, municipalities such as the Town of Gypsum, the City of Thornton, The City of Longmont, the City of Cortez and the City of Gunnison have used this power for uses such as airports, water facilities and rights of way. The City of Englewood used this power to acquire property to build a baseball field. The Town of Parker (which earlier condemned property for recreational trails outside its corporate limits pursuant to Town of Parker v. Norton, 939 P.2d 535 (Colo. App. 1997)) recently filed another condemnation petition to acquire property outside the town limits for open space purposes.

The citizens of dozens more Colorado home rule municipalities have seen fit to acquire property for open space, often outside the territorial boundaries of

the municipality.[2] Prohibiting municipalities from exercising their constitutional power to condemn for open space would not only prevent Telluride from achieving

this goal, but would prevent a number of additional municipalities throughout the state from acquiring open space as they deem necessary to serve the citizens in their respective municipalities. Even those municipalities that do not currently have plans to acquire property for open space or parks and recreation uses would be prohibited from such acquisition should they wish to exercise that power in the future.

Public policy in general supports the preservation of home rule authority to condemn property for open space, parks and recreation uses in the manner at issue in this case and for any other lawful, public, local and municipal purpose. In addition to the fact that the preservation of open space is clearly a valid, important, lawful, public use, the preservation of this particular open space in Telluride is, without a doubt, good public policy.

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[2] By way of illustration, following are a few home rule municipalities that have acquired open space outside their municipal boundaries: Arvada, Aurora, Boulder, Broomfield, Canon City, Castle Rock, Commerce City, Durango, Englewood, Evans, Glenwood Springs, Gunnison, Longmont, Loveland, Parker, Pueblo, Steamboat Springs and Windsor.

The National Trust for Historic Preservation (the "National Trust") placed the Telluride Valley Floor on its 11 most endangered places list in 2001, due to sprawl and proposed development that was threatening the region's historic context and altering one of the Rocky Mountains' last intact mining towns. http://www.nationaltrust.org/11most/list.asp?i=47 (last visited, Sept. 27, 2007).[3]

Also noteworthy, is the fact that the registered voters of the Town of Telluride overwhelmingly passed an initiated ordinance to authorize the acquisition of the Valley Floor property in 2002, and Telluride continues to receive an outpouring of support from the public for its attempt to preserve the property in question for open space, parks and recreation uses.

Consequently, to uphold Subsection 4 as constitutional would contradict some of the most basic and time honored principles upon which eminent domain authority is vested in Colorado home rule municipalities. The constitutional right of home rule municipalities may *not* be constrained by statute. For this Court to support such an anomalous proposition would cut deep into the heart of Article

[3] The National Trust was created by the 81st Congress of the United States in October, 1949, "in order to further the policy enunciated in the Act of August 21, 1935 (49 Stat. 666), entitled 'An Act to provide for the preservation of historic American sites, buildings, objects, and antiquities of national significance. . . ." and to "receive donations of sites, buildings, and objects significant in American history and culture, [and] to preserve and administer them for public benefit . . . ." 16 US § 468 (1949).

XX, preventing home rule municipalities statewide from pursuing the very local interest of preserving open space, parks and recreation uses for the health, safety and welfare of their citizens.

ISSUES PRESENTED FOR REVIEW

The League hereby adopts and fully incorporates by reference the statement of the issues presented for review in Telluride's Answer Brief.

STATEMENT OF THE CASE

The League adopts and incorporates by reference the statement of the case as stated in the Telluride's Answer Brief.

SUMMARY OF ARGUMENT

The League adopts and incorporates by reference the Summary of Argument as stated in Telluride's Answer Brief, and adds the following:

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 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 open space; includes the authority to condemn extraterritorially for any lawful, public, local and municipal

purpose; and is quite broad in scope in the sense that it can be used for purposes not specifically enumerated in the constitution.

Telluride has the authority to condemn Appellants' property under Article XX of the Colorado constitution, and its own home rule charter. Home rule municipalities statewide have equivalent authority to condemn extraterritorially for any lawful, public, local and municipal purpose. Subsection 4, which prohibits a municipality from acquiring by condemnation (or providing funding for the acquisition by condemnation) property located outside of its territorial boundaries for the purpose of parks, recreation, open space, conservation, preservation of views of scenic vistas, or for similar purposes, is unconstitutional as applied to Telluride and all home rule municipalities.

The use of eminent domain by municipalities is a local, municipal issue. The location and purpose of a municipal condemnation is a matter of purely local concern. Consequently, there is no need for this Court to make a determination of whether the use of condemnation for open space, parks and recreation is a matter of local or statewide concern, because the power in question is directly granted by the constitution. Moreover, the state has chosen not to be involved in this case in order to voice its purported "concern" and interest in extraterritorial condemnation by municipalities. Nevertheless, such a discussion with respect to the instant case

illustrates that extraterritorial condemnation of open space, parks and recreation uses is clearly a matter of purely local concern.

ARGUMENT

A. Subsection 4 is unconstitutional as applied to Telluride and all Colorado home rule municipalities. All home rule municipalities in the state have the authority pursuant to Article XX of the Colorado constitution, to condemn property outside of their boundaries for open space, parks and recreation uses or any lawful, public, local and municipal purpose.

In general, municipal home rule is based upon the theory that the citizens of a municipality should have the right to decide how their government is to be organized and how their problems should be solved. The citizens of Colorado expressly recognized this in 1902 when they adopted Article XX of the Colorado constitution.[4] Home rule municipalities are granted plenary authority by the Colorado constitution to regulate all local and municipal matters. See COLO.

[4] Voters overwhelmingly approved Article XX as an amendment to the state constitution in 1902. Article XX consolidated the city and the county of Denver into one entity, granted the new entity the right to adopt a home rule charter, and provided in Section 6 for the adoption of home rule charters by certain other Colorado cities. In the decade following 1902, the Colorado courts took a restrictive view of the home rule powers granted in Article XX. In 1912, Section 6 of Article XX was substantially amended to provide a broader statement of home rule powers and to extend the right of home rule to any Colorado city or town having a population of in excess of 2,000. In 1970, as part of an overall effort to modernize local government, Article XX was again amended by the addition of a new Section 9. In general, Section 9 permits any municipality, regardless of size, to adopt a home rule charter; permits the adoption of a home rule charter at the time of incorporation; and requires the legislature to establish procedures for adopting, amending, and repealing charters for existing and prospective home rule municipalities. Source: Colorado Municipal League, Home Rule Handbook: An Introduction to the Establishment and Exercise of Home Rule (1999).

CONST., Art. XX, Sec. 6. This includes the power of eminent domain, which is also expressly granted in Article XX, Section 1. Said this Court: "[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, 106 Colo. 576, 583, 108 P.2d 236 (1940); Toll v. City and County of Denver, 139 Colo. 462, 340 P.2d 862 (1959).

Moreover, in reference to Article XX, Section 1, this Court has held that "the powers enumerated therein are by way of illustration and not of limitation." Town of Glendale v. City and County of Denver, 137 Colo. 188, 194, 322 P.2d 1053 (1958). In fact, this Court has 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 Article XX, Section 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, 113 Colo. 150, 156 P.2d 101 (1945); or water and water rights as in City of Thornton.

Significant to the instant case, this Court also specifically held that Article XX, Section 1, vests home rule municipalities with full and complete authority to condemn lands for parks and parkways. Londoner v. City and County of Denver, 52 Colo. 15, 119 P. 156, 158-159 (1911). In Londoner, the Court determined with certainty that Article XX, Section 1, neither enumerates nor withholds the power to exercise the right of eminent domain in acquiring property for parks and parkways: "There being no constitutional limitation on the exercise of these powers by the municipality, it necessarily follows that the people of the city and county of Denver, on whom was 'conferred every power possessed by the Legislature in the making of a charter for Denver,' could therein grant or withhold such powers." Londoner 119 P. at 159.

Unlike statutory municipalities which derive most of their eminent domain powers from enabling statutes adopted by the legislature, home rule municipalities need only look to Article XX and their own charters.[5] This Court clearly recognized this distinction in Beth Medrosh Hagodol v. City of Aurora, 126 Colo. 267, 248 P.2d 732 (1952). See also: Healy v. City of Delta, 59 Colo. 124, 47 P. 662 (1915); Mack v. Town of Craig, 68 Colo. 337, 191 P. 101 (1920); Public

[5] Even statutory municipalities have 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, 54 Colo. 112, 129 P. 198 (1913).

Service Co. v. Loveland, 79 Colo. 216, 245 P. 493 (1926). The League notes that many of the legal principles upon which the Appellants rely in their Opening Brief are based on statutory eminent domain powers. These principles simply have no application to the interpretation of Article XX home rule eminent domain powers which are derived from the constitution, not state statutes.

Many Colorado home rule charters 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, 575 P.2d at 389; and in the instant case, in Section 14.1 of Article XIV of the Telluride home rule charter, which provides that "[t]he Town shall have the right of eminent domain to acquire property both within and without the boundaries of the Town for any purpose deemed by the Town Council to be in the Town's best interest."

This type of charter provision is not at all unusual. Of the 96 home rule municipalities in Colorado, 53 have charter provisions that expressly authorize the use of extraterritorial condemnation. Of these, 31 contain language that clarifies that the constitutional authorization contained in Article XX, Section 1 is illustrative and not limiting, either by expressly stating that the authorization includes "but is not limited to" certain purposes, or by using language like Telluride: for any purpose deemed to be in the municipality's best interest. The

other 22 authorize the use of condemnation within or outside municipal boundaries, as provided by state constitution and/or statute. See Appendix B. These 22 and the 43 remaining home rule municipalities that do not expressly address the use of extraterritorial condemnation in their charters, rely even more heavily on this Court to declare Subsection 4 unconstitutional. These municipalities clearly interpret Article XX, Section 1, as providing all the authority they need to decide on a case by case basis when it is appropriate to use their constitutionally granted power of eminent domain outside the boundaries of the municipality, for a public use deemed by that municipality to be in its best interest. These municipalities view Article XX, Section 1, as providing *such clear authority* to condemn property outside their municipal boundaries, that there is no reason to include additional authorization in a home rule charter. The League urges this Court to do the same.

This Court has had little difficulty determining that eminent domain authority in home rule municipalities is a local matter that cannot be impaired by legislative enactments. Above all, 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 this Court unequivocally said in City of Thornton: "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 legislature has no power to enact any law that denies a right specifically granted by the Colorado constitution." City of Thornton, 575 P.2d at 389.

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, the League urges this Court to uphold the trial court's decision and determine that the Town of Telluride, along with all Colorado home rule municipalities, has the power to condemn property for open space, parks and recreation uses, both within and without its territorial limits, that this power is derived directly from Article XX, Sections 1 and 6, and that this power cannot be denied by any statute.

B. Because the Colorado constitution authorizes the use of extraterritorial condemnation by home rule municipalities, there is no need for this Court to determine whether the use of extraterritorial condemnation for open space, parks and recreation uses is a matter of local or statewide concern. However, such an analysis further illustrates the fact that the issue is a matter of purely local concern.

Under the Colorado constitution, power is divided between home rule municipalities and the state into the areas of local and municipal concern, areas of statewide concern, and areas of mixed state and local concern. Freeing home rule municipalities from meddling by the legislature in the minutia of local affairs was

the principal reason the home rule provisions were added to the Colorado constitution.

While this 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." City of Northglenn v. Ibarra, 62 P.3d 151, 155 (Colo. 2003), quoting Denver v. State, 788 P.2d 764, 767 (Colo. 1990). The 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, and taking into account "the relative interests of the state and the home rule municipality in regulating the matter at issue in a particular case." Id., Denver, 62 P.3d at 768. This 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 Denver v. State, this Court originally identified four considerations in determining whether a matter is of statewide, local or mixed concern. These four factors have since been applied in several major cases involving conflicts between state statutes and home rule municipal ordinances, but never in any cases involving eminent domain.[6] See Fraternal Order of Police v. City and County of Denver, 926 P.2d 582, 588 (Colo. 1996); 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 v. State of Colorado, 40 P.3d 1273, 1279 (Colo. 2002); and Ibarra, 62 P.3d at 156. The four considerations 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

[6] The fact that this Court has never felt it necessary to engage in such an analysis, notwithstanding the numerous decisions it has issued dealing with the extraterritorial power of eminent domain, supports the argument here that the power is so deeply embedded in the constitution that such an analysis is both inapplicable and unnecessary.

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).

(1) Uniformity

As this Court declared in Fraternal Order of Police, "[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). Under the uniformity analysis, this 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, this 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. In contrast, residents have no expectation of consistency throughout the state with regard to individual home rule municipalities' use of eminent domain outside their boundaries for open space, parks and recreation uses, or any other purpose enumerated or not enumerated in the state constitution or Subsection 4. As an example, residents in the City of Sterling surely have no expectation regarding what purpose property will be condemned in the Town of

Telluride, any more than the Town of Telluride has such expectation regarding the City of Sterling.

There is no discernable pervading state interest involved in maintaining uniformity in the selection of property condemned by municipalities. Condemnation, by its very nature, will be different every time. So many variables in what, where, when and why a municipality determines to condemn property, make it completely implausible to require uniformity. It is purely a local decision.

(2) Extraterritorial Impact

As articulated by the 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.

Telluride's condemnation of Appellants' property outside the municipal boundaries for open space, parks and recreation uses, has no consequences to

residents outside the municipality, serious, incidental or otherwise. Condemnation merely changes the ownership of the property from the private property owner to the public entity. This change simply does not impact residents outside the municipality in any way which is different than other changes of ownership, over which the state would have no control. Annexation, development, rezoning or other similar acts could conceivably cause an impact, but condemnation in and of itself, does not. San Miguel county supports the condemnation and future use of the property and the state, once again, has declined to object to the condemnation. There is no extraterritorial impact unique to condemnation or to open space, parks and recreation uses that makes it a matter of state, rather than local concern.

(3) Traditionally governed 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." The state constitution reserves the power of condemnation to both the state and municipalities. Historically, therefore, municipal condemnation has been governed by municipalities and state condemnations by the state. It would make no sense for the state to have the power to decide when, where and for what public purpose a municipality should condemn property, either inside or outside its municipal boundaries, just as it

would make no sense for the Town of Telluride, or the City of La Junta to tell the Colorado Department of Transportation, for example, where and when to condemn property to build a highway. The two governmental entities simply act independently of each other in these matters.

(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. As stated above, the state constitution allocates condemnation authority to both the state and local governments. That acknowledged, it is nonetheless worth noting here what the Supreme Court said in Four County Metro. Capital Improvement Dist. v. Board of County Commissioners: "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." Four County Metro, 149 Colo. 284, 295, 369 P.2d 67, 72 (Colo. 1962) (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 pp. 19-20). 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 pp. 20-21).

(5) Legislative Declarations

In addition to the four factors set fourth above, the Court has at times considered other factors in evaluating state and local interests, including legislative declarations. Ibarra, 62 P.3d at 156. See also, Commerce City 40 P.3d at 1280; Telluride, 3 P.3d at 37.

Subsection 4 contains various declarations of statewide concern with respect to the extraterritorial condemnation of property. This Court has said that such declarations are not dispositive, but are entitled to "some deference." Telluride, 3 P.3d at 37. This Court has also recognized that the constitutional authority of home rule municipalities would not be protected from legislative 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, this 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.

The legislative declarations in Subsection 4 state:

> (4)(a) The general assembly hereby finds and declares that:
> (I) The acquisition by condemnation by a home rule or statutory municipality of property outside of its territorial boundaries involves matters of both statewide and local concern because such acquisition by condemnation may interfere with the plans and operations of other local governments and of the state.
> (II) In order that each local government and the state enjoy the greatest flexibility with respect to the planning and development of land within its territorial boundaries, it is necessary that the powers of a home rule or statutory municipality to acquire by condemnation property outside of its territorial boundaries be limited to the narrowest extent permitted by Aticle XX of the state constitution.

C.R.S. § 38-1-101(4)(a).

It is clear from the facts of this case that Telluride's condemnation of Appellants' property does not interfere with the plans and operations of other local governments or the state. San Miguel county is totally supportive of the acquisition and the state has voiced no opposition. Condemnation by a home rule municipality, of property outside the municipal boundaries, does not need to be "limited to the narrowest extent permitted," as asserted in the legislative declarations of Subsection 4, because its use is already limited to the "effectuation

of any lawful, public, local and municipal purpose." Fishel, 106 Colo. 576, 108 P.2d 236.

As this Court has observed, "the overall effect of the [home rule] amendment [Article XX] was to grant to home rule municipalities the power the legislature previously had and to limit the authority of the legislature with respect to local and municipal affairs in home rule cities." Fraternal Order of Police, 926 P.2d at 587. Furthermore, the legislature 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.

If critical constitutional prerogatives of home rule municipalities can be extinguished based solely upon statements by legislators and others who testify in favor of such preemptive legislation, there will shortly be little left of home rule in Colorado.

CONCLUSION

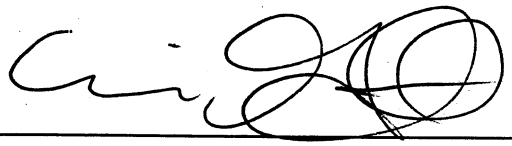
The preservation of open space is a basic municipal function necessary to preserving Colorado's health, beauty, economic vitality and overall quality of life. All home rule municipalities in the state have the authority pursuant to Article XX of the Colorado constitution, to condemn property outside of their boundaries for open space, parks and recreation uses or any other lawful, public local and

municipal purpose. The use of eminent domain by home rule municipalities is a matter of purely local concern.

WHEREFORE, for all of the reasons set forth above, the League respectfully requests that the decision of the trial court be affirmed and that Section 38-1-101(4), C.R.S., be declared unconstitutional as applied to home rule municipalities.

Respectfully submitted this 1st day of October, 2007.

COLORADO MUNICIPAL LEAGUE



Erin E. Goff, #31072
Colorado Municipal League
1144 Sherman Street
Denver, Colorado 80203
303.831.6411

Appendix A

Illustrative Examples of Home Rule Municipalities
With Extensive Open Space Programs

Municipality	Website
Arvada	http://arvada.org/docs/Arvada_Parks_Masterplan_Secure.pdf
Aspen	http://www.aspenrecreation.com/pages.cfm?category1id=6&contentid=8
Aurora	http://www.auroragov.org/AuroraGov/Departments/Parks___Open_Space/Open_Space__Natural_Areas/007444?ssSourceNodeId=826&ssSourceSiteId=621
Boulder	http://www.ci.boulder.co.us/index.php?option=com_content&task=view&id=1166&Itemid=1084
Breckenridge	http://www.townofbreckenridge.com/documents/page/TOB_OpenSpace_FINAL1.pdf
Castle Rock	http://www.crgov.com/Page.asp?NavID=961
Colorado Springs	http://www.springsgov.com/Page.asp?NavID=6589
Denver	http://www.denvergov.org/Default.aspx?alias=www.denvergov.org/Natural_Areas
Englewood	http://www.englewoodgov.org/Index.aspx?page=784
Frisco	http://www.townoffrisco.com/uploadedFiles/frisco-open-space-plan.PDF
Lafayette	http://www.cityoflafayette.com/page.asp?navid=121
Lakewood	http://www.lakewood.org/CP/2003CompPlan/PDF/parks.pdf
Littleton	http://www.littletongov.org/parks/default.asp
Louisville	http://www.ci.louisville.co.us/landmanagement/mgmtplan.htm
Northglenn	http://www.northglenn.org/p285.html
Steamboat Springs	http://www.ci.steamboat.co.us/index.php?id=250

Thornton	http://www.cityofthornton.net/park/MP.asp
Westminster	http://www.ci.wheatridge.co.us/GovSite/default.asp?serviceID1=469

Appendix B

Home Rule Charter Provisions that Expressly Authorize Extraterritorial Condemnation:

Municipality	Charter Provision
Aspen◊	Art. XIII, §13.1
Avon◊	Art. XVIII, §18.1
Basalt*	Art. 1, §1.3(A)
Blackhawk*	Art. VIII, §4
Boulder†	Art. 1, §2(d)
Brighton◊	Art. XVII, §17.9
Broomfield◊	Chapter XVIII, §18.1
Burlington◊	Article XIII, §13.4
Carbondale	Art. 1, §1-4
Cherry Hills Village◊	Art. XIII, §13.5
Colorado Springs†	Art. 1, §1-20(d)
Commerce City	Chapter IV, §4.15
Craig	Art. IX §1
Crested Butte*	Art. 14 §14.1
Edgewater◊	Art. XIX, §19.5
Evans	Art. §15.4
Federal Heights◊	Art. 1, §1.5
Fort Collins	Art. IV, §14
Fountain◊	Art. XII, §12.1
Grand Junction†	Art. 1, §2(d)
Greenwood Village◊	Art. XIV, §14.05
Holyoke◊	Art. XIV, §14.9
Johnstown◊	Art. 1, §1.5
Kiowa*	Art. XIV, §14.02
Lafayette†	Chapter XVI, §16.8
Lamar◊	Art. X, §10.9
Lakewood	Art. XIV, §14.04
Larkspur	Art. XII, §12.03
Lone Tree	Art. XVI, §2
Longmont◊	Art. XIII, §13.5

Minturn*	Art. XII, §12.1
Montrose	Art. 1, §4
Morrison	Art. 13, §13.2
Mountain View◊	Art. XIII, §13.5
Mountain Village	Art. XI, §11.1
New Castle*	Art. XIV, §14.1
Northglenn◊	Art. XIV, §14.1
Pagosa Springs◊	Art. 12, §12.1
Parachute◊	Art. I, §1.2(a)
Parker*	Art. XV, §15.5
Rifle◊	Art. XIII, §13.4
Sheridan◊	Art. 1, §1.5
Silt	Art. 1, §1.2(a)
Silverthorne*	Art. XIV, §14.3
Steamboat	Art. 13, §13.1
Sterling	Art. 8, §8.6
Snowmass*	Art. 1, §1.4
Telluride	Art. XIV, §14.1
Thornton	Art. XVI, §16.5
Trinidad	Chapter II, §2.3
Westminster	Chapter XVII, §17.8
Wheat Ridge◊	Chapter XVI, §16.4
Winter Park◊	Art. XIII, §13.12

◊ Authorizes the use of condemnation within or outside municipal boundaries, as provided by state constitution and/or statute.

* Contains language the same or nearly the same as Telluride's charter provision.

† Contains language the same or nearly the same as the Article XX, Section 1 extraterritorial condemnation provisions.

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of October, 2007, a true and correct copy of the foregoing **BRIEF OF AMICUS CURIAE OF THE COLORADO MUNICIPAL LEAGUE**, was placed in the United States mail, first class postage prepaid and addressed to the following:

VIA HAND-DELIVERY
Thomas J. Ragonetti
Darrell G. Waas
Patricia C. Campbell
Otten, Johnson, Robinson,
Neff & Ragonetti
950 Seventeenth Street, Suite 1600
Denver, Colorado 80202

Steve Zwick
San Miguel County Attorney's Office
P.O. Box 791
Telluride, Colorado 81435

Kevin Geiger, Esq.
Town Attorney
Town of Telluride
P.O. Box 397
Telluride, Colorado 81435

Gerald E. Dahl
Murray Dahl Kuechenmeister &
Renaud LLP
2401 15th Street, Suite 200
Denver, Colorado 80202

Clerk of the District Court
San Miguel County
305 S. Colorado Avenue
Telluride, Colorado 81435

VIA HAND-DELIVERY
Leslie A. Fields
John R. Sperber
Faegre & Benson LLP
1700 Lincoln Street, Suite 3200
Denver, Colorado 80203

Alan D. Sweetbaum
Fisher, Sweetbaum & Levin, P.C.
1125 Seventeenth Street
Suite 2100
Denver, Colorado 80202

Kenneth Larson