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COLORADO SUPREME COURT Court Address: 2 E. 14th Ave., 3rd Floor Denver, CO 80203 Phone Number: (303) 861-1111	
Certiorari from the Court of Appeals, 07CA1054 Trial Court: District Court, City and County of Denver, Colorado: Honorable Gloria A. Rivera, Judge Case No. 06CV1557	
Petitioner-Appellant: THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF RIO BLANCO, STATE OF COLORADO v. **Respondent-Appellee:** EXXONMOBIL OIL CORPORATION	**▲COURT USE ONLY▲**
Attorneys for Amici Curiae	
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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF THE APPELLANT THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF RIO BLANCO, COLORADO FROM COLORADO COUNTIES, INC. AND THE COLORADO MUNICIPAL LEAGUE

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STATUTES

Colorado Counties, Inc. ("CCI") and Colorado Municipal League ("CML") hereby submit their amicus Brief in support of Appellant, Rio Blanco County.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Are materials and equipment that are used in the extraction and processing of natural gas "construction and building materials" subject to the use tax that local governments may impose pursuant to § 29-2-109(1), C.R.S.?

The term "construction and building materials" is not defined in the statute. This is a case of first impression.

INTEREST OF *AMICI CURIAE*

CCI is a Colorado non-profit corporation formed by the State's county commissioners in 1907 to further county government cooperation and efficiency. All sixty-four Colorado counties are CCI members, including Rio Blanco County. Through collaboration and cooperative action, CCI works to solve the many financial, legal, administrative and legislative problems confronting county governments throughout Colorado. CCI regularly appears before this Court when issues are raised on appeal that concern Colorado counties.

CML is a non-profit, voluntary association of 262 of the 271 municipalities located throughout the State of Colorado, including all 98 home rule municipalities, 163 of the 172 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 this Court for decades in appeals where a significant decision affecting Colorado municipalities is possible.

CCI and CML are interested in this appeal because counties and statutory municipalities are authorized by § 29-2-109(1), C.R.S., to levy a use tax on "any construction and building material" purchased at retail. Home rule municipalities may levy a use tax pursuant to their plenary home rule authority. The Court of Appeals decision in this case, *Board of County Commissioners of Rio Blanco County v. ExxonMobil Oil Corporation,* 192 P.3d 582 (Colo. App. 2008), impacts the authority of 62 counties and 172 statutory municipalities to impose a construction and building materials use tax, as authorized by § 29-2-109(1), C.R.S.. The Court's decision may also affect the taxation of materials and equipment in other circumstances. To any extent that the Court of Appeals' approach can be said to limit the scope of the use tax to residential construction and narrowly define construction and building materials, the Court of Appeals approach has called into question use taxes as currently imposed by counties and statutory municipalities into question. CCI and CML ask this Court to reverse the

Court of Appeals and provide a functional definition of construction and building materials consistent with the statute.

STATEMENT OF THE CASE

CCI and CML hereby adopt and incorporate by reference the Statement of the Case as presented in the Opening Brief of Rio Blanco County.

SUMMARY OF ARGUMENT

The Court of Appeals' decision may be read to limit the scope of the use tax and define construction and building materials in a manner that is inconsistent with the statute. The Court of Appeals also defined construction and building materials in a way that creates significant practical problems for government entities that collect, administer and enforce the use tax.

According to the Court of Appeals, materials subject to the use tax must lose their individual identity when incorporated into an improvement to real property, in order to be subject to the use tax. This is a concept not found in the plain language of the statute, its legislative history or the case law. The Court of Appeals decision also reads into the statute an exemption based on the landlord-tenant law concept of "trade fixtures," which is nowhere expressed in the statute. Both of these aspects of the Court of Appeals decision could, unless reversed, create serious problems for government entities charged with collecting,

administering and enforcing use taxes. This is because those government entities would have to determine which construction and building materials fall within the Court's new exemptions.

Finally, the Court of Appeals states that the General Assembly did not intend to impose the use tax on industrial facilities, as only *residential* construction was discussed in the legislative deliberations. This logic proceeds to the absurd conclusion that commercial and retail construction, which were also not mentioned in the legislative hearings, are thus not subject to the use tax. Yet, none of these exemptions is found in the statute.

ARGUMENT

CCI and CML agree with the Court of Appeals that construction and building materials may be properly defined as those items that become improvements to real property. An improvement to real property includes those items that are permanently annexed or attached to the real property, are integral and essential for the property to function as it is intended, and that enhance the value, utility or appearance of the property. *See Barron v. Kerr-Mcgee Rocky Mt. Corp.*, 181 P.3d 348, 350 (Colo. App. 2007). This practical approach is consistent with the existing practice of those local governments that impose a use tax. The concept is also enforceable from an administrative standpoint. The three criteria

are readily discernable by the taxpayer and the taxing authority alike. These criteria are also objectively definable. The criteria advanced by the Court of Appeals, on the other hand, are confusing, contradictory and uncertain, inviting an unacceptable degree of subjective judgment and *ad hoc* decision-making in tax administration.

A. The Local Government's Interpretation of its Use Tax Code is Entitled to Deference.

The Court of Appeals asserts that the Department of Revenue is the administrative agency charged with the enforcement of the use tax. 193 P.3d at 586. This is simply untrue. The legislature granted local governments in Colorado the authority to impose the use tax under § 29-2-109(1), C.R.S. and to collect, administer and enforce it. Section 29-2-106(3)(a), C.R.S. The Department of Revenue does not issue regulations or guidelines regarding the local government use tax and does not supervise collection of the use tax. The Department of Revenue does no more than hear appeals brought to it after a taxpayer exhausts local remedies by appealing to the local government and receiving a decision. *See* § 29-2-106.1, C.R.S.. The Department of Revenue plays no administrative role respecting county or municipal use taxes.

Where a statute is reasonably susceptible of more than one interpretation, deference should be given to the interpretation employed by the agency charged

with the statute's administration and enforcement. *Colorado State Personnel Board v. Department of Corrections,* 988 P.2d 1147 (Colo. 1999). Administrative interpretations that are of long standing application are entitled to even greater deference. *Centennial Turf Club v. Colorado Racing Com'n*, 271 P.2d 1046, 1048 (Colo. 1954). Because local governments are charged with the administration and enforcement of the use tax, their interpretation should be entitled to deference. Many have collected the use tax for more than 35 years, when the statute first went into effect.

Here, the Court of Appeals, rather than deferring to the local government's interpretation, instead established nonstatutory criteria that make the administration and enforcement of the use tax particularly difficult. On review, this Court should acknowledge the role of Colorado local governments in locally administering and enforcing the use tax and the problems that will result for government entities charged with the administration and enforcement of the use tax under the new standard set by the Court of Appeals.

B. The "Loss of Individual Identity" Test is Administratively Unworkable.

The Court of Appeals states:

> Construction and building materials are assembled into and become part of a structure *so that they lose their individual identities* and take on a new composite form—

> that of a building or structure that is generally associated with the realty upon which it is built.

192 P.3d at 587. (Emphasis added.) The Court of Appeals thus requires an item to lose its individual identity, by being incorporated into a structure, in order to become subject to the use tax. This approach burdens Colorado's counties and municipalities because there is no ready means of determining what it means for such items to "lose their identity." Administration of such a standard can be expected to be endlessly complicated.

The Court of Appeals cites two cases in support of this "loss of identity" concept, *Updegraff v. Lesem*, 62 P. 342 (Colo. App. 1900) and *Andrews v. Williams*, 173 P.2d 882 (Colo. 1946). Both cases deal with determining what is a "trade fixture" and whether a trade fixture may be removed at the end of a lease. Nowhere in either decision do the Courts discuss whether construction or building materials must lose their individual identity. In fact, the court in *Updegraff* notes that it does not matter how firmly items are attached or whether they are made of bricks and wood. *Updegraff,* 62 P. at 345. As long as such items are placed there by the tenant, the items are trade fixtures, which may be removed at the end of the term. *Id.* These cases provide no support for the determination of the Court of Appeals in this case.

Besides leaving government and taxpayers perplexed as to its application, the Court of Appeals "loss of identity" test could well lead to absurd results.

For example, all kinds of doors are manufactured so that the door itself, the hardware, and the frame form a single unit. Such a door assembly is then installed in a house or a commercial building. The door never loses its identity as a door. It can be removed and replaced. It can be reinstalled in another building. The item's identity as a door remains intact throughout any such changes.

Common sense would identify a door as an improvement to property. It is annexed or attached to a building. It is integral and essential to the functioning of a building. It enhances the value and utility of the property, and in some cases, its appearance. No obvious utility attaches to the door except as part of a structure. Doors are commonly considered construction and building materials, and subject to use tax. Similarly, windows, locks, light fixtures, electrical wiring and switches, and many more items commonly found in improvements to real property, retain their individual identities even though they are annexed to an improvement and integral and essential to its functioning.

Yet, despite all of these common sense reasons, which would lead an ordinary person to conclude that such items are subject to use tax, the Court of Appeals' decision in this case may indicate that such items are, in fact, *not* subject

to taxation as construction and building materials, because they do not lose their "individual identity." No language in the statute compels this awkward approach, one that leads to such counter-intuitive outcomes as illustrated above. Plainly, this was not the intent of the General Assembly, and it is well-established that a statutory interpretation cannot defeat the legislative intent or lead to an absurd result. *AviComm, Inc. v. Colorado PUC*, 955 P.2d 1023, 1031 (Colo. 1998).

The Court of Appeals also notes that if an item can be disassembled and moved to a new location, it is not an improvement to real property. 193 P.3d at 587. Doors, windows, locks, light fixtures, electrical wiring and switches and the like are removable and may be, and often are, reinstalled in a new location. Such realities establish that no local government will possess a ready means of distinguishing between those items that lose their individual identity and those that retain such identity or determining which items can be disassembled and moved and which cannot. The loss of individual identity standard created by the Court of Appeals loses any practical utility for such reasons.

C. The Trade Fixture Criteria Results in Serious Administrative Problems as well as Allowing an Unauthorized Exemption For Tenants.

The Court of Appeals found that trade fixtures are not "improvements to real property," and therefore that the materials used in their construction are not subject

to use tax. 193 P.3d at 587. This holding contradicts the Court of Appeals' position that construction and building materials are items used to construct improvements to real property. Trade fixtures are fixtures, but since they are built by a tenant, they belong to the tenant who may remove them at the end of the term. *Updegraff*, 62 P. at 345. This rule is an exception to the law of fixtures and only applies between landlord and tenant.

Grafting this trade fixture concept into a sales and use tax context creates an anomalous situation in which an improvement constructed for a *tenant* would not be subject to use tax, while an identical improvement installed or constructed for the *owner* of property would be taxable. Section 29-2-109(1), C.R.S., contains no exemption for construction or building materials purchased for tenants, and no exemption to taxation may be inferred. *Colorado Department of Revenue v. Cray Computer Corporation*, 18 P.3d 1277, 1283 (Colo. 2001).

The trade fixture concept also creates significant administrative problems. Under such a standard, anyone filing a use tax return must separate the cost of those items used to construct improvements for the landlord from the cost of "trade fixtures" constructed for the tenant. In addition, if the local government audits the use tax return, the government will be required to examine the property and all of the improvements to distinguish those built for the tenant and those built for the

landlord. This approach may lead to subjective and arbitrary distinctions that only complicate tax administration.

In addition, the Court of Appeals finds the distinction between real and personal property in the *ad valorem* tax statute, § 39-1-1-1 *et seq.*, C.R.S. helpful when determining the meaning of construction and building materials. 192 P.3d at 588. However, any reference to the *ad valorem* tax statute leads to contradiction. As noted by the Court of Appeals, personal property as defined by the *ad valorem* statute includes articles that are affixed to the real property for proper utilization. *Id.* Personal property as defined by the *ad valorem* statute therefore includes items that are improvements to real property, and according to the Court of Appeals, materials used in improvements to real property are subject to the use tax. Following such reasoning, the Court of Appeals acknowledges that the use tax may apply to personal property, while at the same time saying that it does not. Reference to the *ad valorem* definition of personal property is not helpful in this regard.

Resort to the *ad valorem* statute is also misplaced because the use tax and the *ad valorem* tax are grounded on very different rationales. The Court of Appeals correctly recognizes that the use taxes are enacted to equalize the burden between those who purchase items within or outside the taxing jurisdiction. 192

P.3d at 586, *citing Mathews v. State,* 562 P.2d 415, 417 (1977). Use taxes are analogous to the sales tax and are intended to tax a transaction based on its purchase price.

On the other hand, an *ad valorem* tax is levied on the value of property, not on a transaction. One reason for making the definition of personal property in the *ad valorem* statute expansive enough to encompass commercial and industrial property, that could otherwise be considered fixtures or improvements to realty, is to allow the items to be valued through depreciation from their original cost. For many items, using the depreciated cost to establish the value the item results in a reasonable and simple approximation of value when items lack a readily established market value. Homes and commercial buildings, on the other hand, do have a cash market that can be investigated by assessors so that a market value can be placed on this type of property. The use tax system and the *ad valorem* tax scheme have different roots and different purposes. It is misleading and inappropriate to exempt materials from the use tax because such items could be classified as personal property for *ad valorem* purposes.

D. The Use Tax Should Not Be Limited to Residential Construction.

Finally, the Court of Appeals concludes that the General Assembly did not intend to apply the use tax to industrial facilities, because all of the discussion in

legislative committee hearings focused on residential construction. 192 P.3d at 590. By such logic, one could also conclude that there was no intention to impose the use tax on commercial or agricultural buildings or facilities. Neither the language of the use tax statute nor its legislative history require this dramatic evisceration of the use tax.

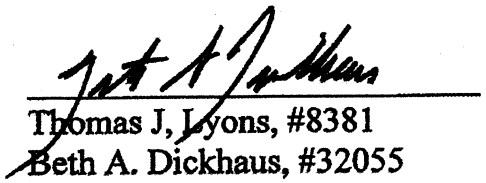
Limiting the construction and building use tax to residential construction would unreasonably limit the capacity of many local governments to raise money by the use tax. While some Front Range counties and municipalities may experience extensive residential construction, most counties and municipalities around the state can expect more in the way of agricultural, commercial and industrial construction. This is particularly the case in communities where resource extraction is a major component of the economy. If the purpose of the use tax is to complement the sales tax, *Mathews,* 562 P.2d at 417, there is no underlying legislative purpose to limiting the tax to residential improvements. The Court of Appeals' determination to limit the use tax to residential construction frustrates to public policy underlying the use tax and dramatically limits the utility of the use tax as a source of local government revenue.

CONCLUSION

Imposing the use tax on materials used in the construction of improvements to real property is grounded in law and allows for ease in administration. It is a relatively simple matter for both the taxpayer and the local government to determine what items are annexed or attached to real property, which items are integral and essential to the functioning of the property, and which items enhance the value or utility of the property. The criteria advanced by the Court of Appeals regarding loss of identity and trade fixtures are unsupported by the statute or accepted rules of statutory construction. Such criteria also introduce confusion and may result in artificial classifications. Finally, limiting the use tax to residential property is unsupported by the legislative history and unduly limits the role of the use tax as a source of revenue to local governments.

For all of the foregoing reasons, CCI and CML respectfully request that this Court reverse and remand this case with directions to the district court to determine what facilities meet the definition of improvement to real property and to impose a use tax on those items used to construct the facilities that meet the definition, and for all other and further relief this Court deems just and appropriate.

Respectfully submitted this ____ day of May, 2009.



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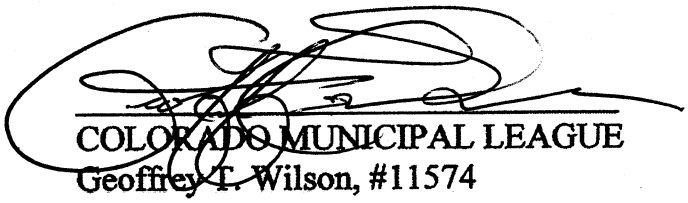

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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing **MOTION TO PARTICIPATE AS *AMICUS CURIAE* IN SUPPORT OF THE APPELLANT THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF RIO BLANCO, COLORADO** was placed in the U.S. Postal System by first class mail, postage prepared, on the 20 day of May, 2009, addressed to:

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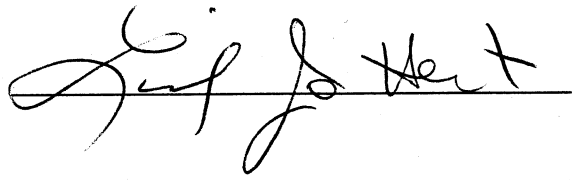

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