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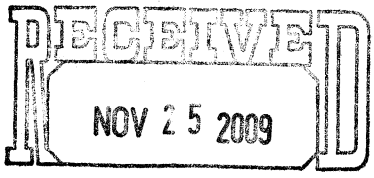
| SUPREME COURT, STATE OF COLORADO<br>2 East 14th Avenue, 4th Floor<br>Denver, Colorado 80203 | |
| COURT OF APPEALS, STATE OF COLORADO<br>Opinion of: Judge Jones, Judge Dailey and Judge Bernard, Concurring<br>Case Number: 07CA1343<br><br>DISTRICT COURT, ADAMS COUNTY, STATE OF COLORADO<br>Judge Thomas R. Ensor<br>Case Number: 06CV502 | ▲ **COURT USE ONLY** ▲ |
| DEBORA M. PALIZZI; GLORIA A. BENNETT; PALIZZI & SON, INC., a Colorado corporation;<br><br>v.<br><br>CITY OF BRIGHTON, a municipal corporation of the State of Colorado. | |
| Attorney for *Amicus Curiae* :<br><br>Erin E. Goff, #31072<br>COLORADO MUNICIPAL LEAGUE<br>1144 Sherman Street<br>Denver, Colorado 80203<br>Phone: (303) 831-6411<br>Fax: (303) 860-8175<br>Email: egoff@cml.org | Case Number: 08 SC 1026<br><br>  <br><br>CLERK<br>COLORADO SUPREME COURT |

**BRIEF OF THE COLORADO MUNICIPAL LEAGUE AS *AMICUS CURIAE* IN SUPPORT OF THE CITY OF BRIGHTON**

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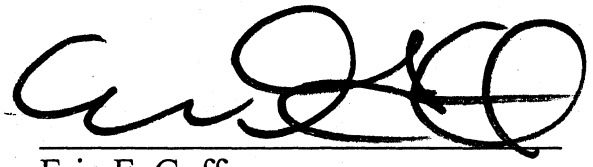
## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that the brief complies with C.A.R. 28(g) because it does not exceed 30 pages.



Erin E. Goff

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**OTHER AUTHORITIES**

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 the City of Brighton (the "City").

## INTERESTS OF THE LEAGUE

The League is a non-profit, voluntary association of 262 of the 271 municipalities located throughout the state of Colorado (comprising nearly 97 percent of the total incorporated state population), including all 100 home rule municipalities, 162 of the 171 statutory municipalities and the lone territorial charter city; 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, 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 League's member municipalities is represented.

Municipalities have a particular interest in the outcome of this case, as they are responsible for approving and guiding development within their individual jurisdictions that is best suited for serving the health, safety and welfare of the

citizens living therein. Municipalities often condition land use entitlements upon the dedication of land for roads, parks, water and sewer lines, and other necessary public uses. This is a common practice, well accepted throughout the state as a way to pay for impacts of new development without burdening the taxpayers. A decision in this case that would allow property owners to value property at an unattainable highest and best use rather than a realistic value, and require condemning authorities such as the City to compensate property owners at that inflated value at the expense of the taxpayers, would turn the current system on its head and be costly to the financial, and potentially the physical well-being of citizens throughout the state.

## ISSUE PRESENTED FOR REVIEW

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

## STATEMENT OF THE CASE

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

## SUMMARY OF ARGUMENT

Municipalities take very seriously their responsibility to serve the health, safety and welfare of their citizens, and do so in part through extensive land use

planning and zoning regulation. If the Court of Appeals decision in this case is overturned, the City will be required to pay hundreds of thousands of dollars, at taxpayers' expense, for a parcel of property that could *never* be used for the highest and best use claimed by the property owner – a parcel that would have to be dedicated to the City upon annexation in order for the property to be rezoned to the claimed highest and best use. The only way for the City to avoid paying such an inflated price for the parcel would be to hold off on making essential public improvements until the property is annexed and the parcel dedicated. A decision by this Court to overturn the Court of Appeals decision in this case would have the undesirable effect of making municipalities choose between providing essential public improvements in a timely manner to protect the health, safety and welfare of their citizens, or leaving them inadequately served in order to avoid such an astronomical cost to taxpayers.

It is common and accepted practice for Colorado municipalities, in their land use planning role, to require dedication by developers of land (or a fee in lieu of land) for roads, water and sewer lines, parks, or other necessary public uses, as a part of the development approval process.[1] It is important for municipalities

[1] State law requires, of course, that there be an essential nexus between any such dedication and a legitimate local government interest, and that the dedication is

statewide to be able to require such development exactions in order to insure that necessary public improvements, such as street-widening, will occur to serve new development, and existing development affected by new growth, without burdening taxpayers with the expense.

The constitutional requirement for the payment of just compensation is not only for the benefit of the landowner, but also for the benefit of the public. If, as in this case, property is subject to rezoning at a future date, which rezoning would trigger a dedication, and the municipality determines that such property is needed to serve the public sooner and condemns such property, the just compensation paid should take into consideration any burden or encumbrance on the property (such as a required dedication) that would decrease the value of property owner's projected highest and best use of the property. To not recognize such a decrease in value would be unfair and very costly to the taxpayers, who ultimately bear the expense.

## ARGUMENT

**A. Municipalities, charged with the responsibility of serving the health, safety and welfare of their inhabitants, appropriately address this obligation in part through extensive land use planning and zoning regulation. To**

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roughly proportional to the impact of the proposed development. Colo. Rev. Stat. § 29-20-203(1). In the Palizzi case, it was not disputed that the City's dedication requirement met this nexus/rough proportionality standard and that the dedication requirement was lawfully imposed.

**overturn the Court of Appeals decision in this case would be enormously detrimental to essential municipal planning.**

Pursuant to state statute, municipalities have the power to adopt ordinances as necessary to provide for the safety, preserve the health, promote the prosperity, and improve the morals, order, comfort, and convenience of such municipality and its inhabitants. Colo. Rev. Stat. § 31-15-103. Further, and also for the purpose of promoting health, safety, morals, or the general welfare of the community, the governing body of each municipality is expressly empowered by statute to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, the height and location of trees and other vegetation, and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes. Colo. Rev. Stat. § 31-23-301(1). Article 23 also states that such regulations shall be designed to *lessen congestion in the streets*, to secure safety from fire, panic, floodwaters, and other dangers; to promote health and general welfare, to provide adequate light and air; to prevent the overcrowding of land, to avoid undue concentration of population, to promote energy conservation; *and to facilitate the adequate provision of transportation*,

water, sewerage, schools, parks and other public requirements. Colo. Rev. Stat. § 31-23-303(1) (emphasis added).

Municipalities take very seriously this responsibility to serve the health, safety and welfare of their citizens, and do so in part through extensive land use planning and regulation. Such planning and regulation may include, for example, annexation, zoning and rezoning, nuisance regulation, floodplain regulation, open space preservation, subdivision regulation, imposition of impact fees or development exactions, and condemnation. A municipality may also enter into intergovernmental agreements with surrounding jurisdictions to address future growth in the region.

In this case, the City entered into an intergovernmental agreement (the "IGA") with Adams County (the "County") to address future land use planning to best suit the needs of its citizens. The IGA provides that properties in the area of the Palizzi property would develop under the sole authority and jurisdiction of the City and that the County would not process any development applications for property in the area. The City also developed a land use policy that anticipated the need to make public improvements to accommodate growth in the area. For example (and of particular interest in this case) the City required landowners along Bromley Road (the road adjacent to the property covered in the IGA), as a

condition of annexation and rezoning, to dedicate a portion of property for the widening of Bromley Lane.

Based on the IGA and the City's land use policy requiring dedication upon annexation and rezoning, it is clear that the City planned well in advance for the eventual development of the Palizzi property and other growth in the area. Knowing that such growth would require widening of an adjacent road, the City planned for that need. The City began to widen Bromley Lane to "lessen congestion in the streets" to better serve developing adjacent properties. When the City made the determination to begin the street-widening project, Palizzi had not sought to annex into the City. However, in order to make these necessary public improvements, the City had to acquire seventy feet of additional right-of-way from all of the properties along Bromley Lane, including the Palizzi property.

Rather than wait an indeterminate amount of time for the property to be annexed, rezoned and a portion dedicated for the road improvements, the City condemned that portion of the Palizzi property that would be subject to the dedication requirement if the property were ever to be developed to its proposed highest and best use. To wait for the annexation to occur and leave the road in a condition that under-served the community until the property was dedicated potentially could have been detrimental to the health, safety and welfare of the

inhabitants of the City. If the Court of Appeals decision in this case is overturned, the City will be required to pay hundreds of thousands of dollars at the expense of the taxpayers to acquire property that would otherwise have to be dedicated at no monetary cost to the City if annexation and rezoning were ever to occur. Such a decision could have disastrous results to public safety and would simply fashion bad public policy. It would have the undesirable effect of making municipalities choose between providing essential public improvements in a timely manner to protect the health, safety and welfare of their citizens, or leaving them inadequately served in order to avoid such an astronomical cost to taxpayers.

**B. Development exactions, such as the City's dedication requirement, are a vital component of the municipal financing system for providing infrastructure and services to new development without burdening existing taxpayers with the cost of acquisition.**

In pursuit of their goal of serving the public health, safety and welfare through land use planning and regulation, it is quite common for municipalities to require various forms of lawful development exactions (including, for example, dedication of land, money in lieu of such dedication, and impact fees) in order to apportion some of the capital expenses faced as a result of development to those responsible for the new impacts created by the development. Colorado courts generally have had no trouble finding sufficient authority for municipalities to

require that developers provide those capital facilities that are clearly necessary to serve their developments, such as streets, sidewalks, easements and rights-of-way. For example, in Bethlehem Evangelical Lutheran Church v. City of Lakewood, 626 P.2d 668 (Colo. 1981), this Court reviewed a challenge to the City of Lakewood's attempt to impose a requirement upon a church that it construct and pay for curb, gutter, sidewalk and street improvements and dedicate the necessary right-of-way. On the question of whether the requirements were sufficiently authorized by state statute, this Court found that "the city has broad statutory authority to widen, pave and otherwise improve the streets; to provide for the construction and maintenance of sidewalks, curbs and gutters; and to assess the costs of street servicing and improvements, and the sidewalks, curbs and gutters upon adjacent abutting property. Section 31-15-702, C.R.S. 1973," Bethlehem, 686 P.2d at 672. There, this Court concluded that the imposition of the condition of dedication is a proper exercise of the police power. Id. at 673. Accordingly, Colorado courts generally have inferred that local governments have the ability to require developers to provide for infrastructure necessitated by new development, based on the general police, and on statutory land-use authority for zoning. *See, e.g.*, Colo. Rev. Stat. § 31-23-101, *et seq.* and Colo. Rev. Stat. § 31-23-206.

The imposition of certain types of dedication requirements by Colorado counties and municipalities is also expressly recognized and regulated elsewhere in state statute.[2] However, for home rule municipalities, which derive their authority from Colorado Constitution Art. XX, § 6, specified statutory authority for land dedication is not necessary. Under Article XX, home rule municipalities can make their own rules when it comes to matters of purely local concern. Both zoning and the financing of local capital improvements have been held by this Court to be matters of purely local concern. Roosevelt v. City of Englewood, 176 Colo. 576, 492 P.2d 64 (Colo. 1971); Davis v. Pueblo, 158 Colo. 319, 406 P.2d 671 (Colo. 1965). Therefore, through their own legislative enactments, home rule municipalities such as the City have long had the authority, independent of the general assembly, to condition development approval upon dedication of real property or payment of a fee designed to offset the costs of infrastructure associated with new development.

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[2] Colo. Rev. Stat. § 29-20-104.5 provides that any schedule of impact fees adopted by a local government shall include provisions to ensure that no individual landowner is required to provide a site specific dedication or improvement to meet the same need for capital facilities for which the impact fee is imposed; Colo. Rev. Stat. § 29-20-201 *et seq.*, the Regulatory Impairment of Property Rights Act, requires that no local government require a landowner to dedicate real property to the public unless there is an essential nexus between the dedication or payment and a legitimate local government interest, and the dedication or payment is roughly proportional to the impact of the proposed use or development of such property.

Requiring development to "pay its own way" is a familiar concept in land use planning and regulation. See Board of County Comm'rs v. Bainbridge, Inc., 929 P.2d 691, 698 (Colo. 1996). The general assembly expressed its support for this concept in its legislative declarations for the Local Government land Use Control Enabling Act, Colo. Rev. Stat. § 29-20-101 *et seq.*, declaring that "local governments will be better able to properly plan for growth and serve new residents if they are authorized to impose impact fees as a condition of approval of development permits." Colo. Rev. Stat. § 29-20-102(2).

According to a survey conducted in the fall of 2004 by the Office of Smart Growth in the Colorado Department of Local Affairs, in cooperation with the League, 73% of Colorado municipalities had, at the time of the survey, adopted an impact fee or a land dedication/fee in lieu of a dedication. Land dedications, or fees in lieu of land dedications, were most commonly used for parks & recreation (44%) and schools (21%), but many municipalities reported requiring land dedications for affordable housing, sewers, transportation (roads) and water as well. Colorado Municipal Land Use Survey (2004).[3]

[3] A summary report and the full results of this survey can be found at: http://www.dola.colorado.gov/dlg/osg/docs/municipal%20survey%20summary.pdf (last visited, November 20, 2009).

Such dedications may be required as in this case, where the City required that certain property, upon annexation into the City, be rezoned and a portion of that property dedicated to the City. A similar dedication may also be required absent an annexation pursuant to a City's municipal code and master plan. For example, a City's planning and development code may require dedication of land for street-widening for any future development or redevelopment within the city. If the City determines that it must acquire land for such street-widening and condemns property to do so, the property should be valued at its current use, rather than the proposed highest and best use that *cannot* occur without the dedication. Consequently, this Court's decision in this case will affect *any* municipality that acquires property in advance of an event that triggers dedication of such property by the owner. A decision adverse to the City in this case is a decision adverse to the interests of all municipalities throughout the state.

**C. The public policy sought to be served by the "just compensation" clause of the United States and Colorado Constitutions would be violated by overturning the Court of Appeals decision in this case.**

Both the United States and Colorado Constitutions provide for a right to just compensation when private property is taken for public use. U.S. Const. amend. V., Colo. Const. art. II, § 15. Accordingly, a landowner whose property is taken for a public purpose is entitled to "just compensation" for that property. However,

the constitutional requirement for the payment of "just compensation" is not only for the benefit of the landowner, but also for the benefit of the public. Bauman v. Ross, 167 U.S. 548, 570; 17 S.Ct. 966, 975 (1897) (finding that "[j]ust compensation means a compensation that would be just in regard to the public, as well as in regard to the individual."). Condemnation awards must balance fairness to the landowner and to the public. E-470 Public Highway Authority v. Revenig, 91 P.3d 1038, 1042 (Colo. 2004). The award must be just to both the property owner and the public; the landowner is not entitled to a windfall at the taxpayers' expense. Fowler Irrevocable Trust 1992-1 v. City of Boulder, 17 P.3d 797, 804 (Colo. 2001).

Following this general policy of fairness to the public is the notion that the public should not be required to pay a premium in order to effect a legitimate public purpose. United States v. 320.0 Acres of Land, 605 F.2d 762, 782 (5th Cir. 1979)("to permit recovery of value that is not created by fair, open market conditions would be to award a few private property holders windfall gains solely because of public needs and exigencies"). A landowner is not entitled to be placed in a better position financially than he was before the condemnation; neither is the state required to pay more than land is worth merely because of some theoretical, intangible concept. City of Fresno v. Cloud, 102 Cal.App.3d 113, 123 (Cal. Ct.

App. 1972). Rules of evaluation which harmonize with the constitutional requirement of "just compensation" and which prevent landowners from receiving windfalls at public expense should not be ignored. Id. at 123. Nor should valuation evidence be allowed that has no basis in reality. E-470 Public Highway Authority v. Jagow, 30 P.3d 798, 802 (Colo. Ct. App. 2001).

In this case, Palizzi sought to establish compensation for a highest and best use based upon a reasonable likelihood that the property would be annexed into the City, rezoned and developed. However, it was undisputed that, as a condition of annexation and development, the landowner would have been required to dedicate the seventy feet of right-of-way to the City at no monetary cost to the City. A landowner's valuation evidence in a condemnation action cannot possibly be based upon a potential future use of the subject property if that potential future use would necessarily require the dedication of the same property being acquired in the condemnation action. A landowner cannot claim the benefits of a reasonably probable future use of the property and at the same time ignore the costs and requirements associated with that use. In order to ensure that a landowner receives just compensation, but not a windfall at the taxpayers' expense, a landowner's valuation evidence cannot be based upon uses of the property that would necessarily trigger the dedication of the same property being condemned. Rather,

compensation must be limited to the value of the highest and best use that would not trigger dedication. *That* is just compensation.

## CONCLUSION

WHEREFORE, for all of the reasons set forth above, the League respectfully requests that the decision of the Court of Appeals be affirmed.

Respectfully submitted this 25th day of November, 2009.

COLORADO MUNICIPAL LEAGUE

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## CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of November, 2009, a true and correct copy of the foregoing **BRIEF OF THE COLORADO MUNICIPAL LEAGUE AS *AMICUS CURIAE* IN SUPPORT OF THE CITY OF BRIGHTON**, was placed in the United States mail, first class postage prepaid and addressed to the following:

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