SUPREME COURT, STATE OF COLORADO Colorado State Judicial Building 2 East 14th Avenue, 4th Floor Denver, Colorado 80203	
COURT OF APPEALS, STATE OF COLORADO Opinion of: Judge Connelly, Judge Taubman and Judge Carparelli, Concurring Case Number: 2007CA002184 DISTRICT COURT, EL PASO COUNTY, STATE OF COLORADO Judge David S. Prince Case Number: 06CV4394	▲ **COURT USE ONLY** ▲
WOLF RANCH, LLC, a Colorado limited liability company, v. THE CITY OF COLORADO SPRINGS, a Colorado home-rule city	
Attorney for *Amicus Curiae* : Erin E. Goff, #31072 COLORADO MUNICIPAL LEAGUE 1144 Sherman Street Denver, Colorado 80203 Phone: (303) 831-6411 Fax: (303) 860-8175 Email: egoff@cml.org	Case Number: 08 SC 1073
BRIEF OF THE COLORADO MUNICIPAL LEAGUE AS *AMICUS CURIAE* IN SUPPORT OF THE CITY OF COLORADO SPRINGS	

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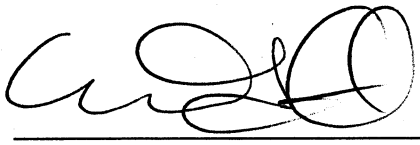
CERTIFICATE OF COMPLIANCE

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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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, the City of Colorado Springs (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 throughout the state have, for many years, imposed fees designed to defray the cost of providing various municipal infrastructure and

services such as water, sewer, storm drainage, street maintenance, parks and recreation and libraries. Relying on decisions of this Court and express statutory language, municipalities understand that such fees are legal so long as they are reasonably calculated to defray the cost of providing the service, and that such reasonably calculated fees will not be brought into question so long as they are legislatively formulated and imposed on a broad class of property owners. Krupp v. Breckenridge Sanitation District, 19 P.3d 687, 693-94 (Colo. 2001); § 29-20-203, C.R.S. It is crucial that the legislative bodies of municipalities statewide be able to apply their legislatively formulated, reasonable fees to development applications of a broad class of property owners, without apprehension that such fee assessment will be challenged under § 29-20-201, *et seq.*, C.R.S., the Regulatory Impairment of Property Rights Act ("RIPRA"). Municipalities certainly ought to be able to rest assured that their legislatively formulated development impact fees will remain in their possession so that they may ensure adequate infrastructure and services for all of their citizens.

If a City's denial of a property owner's request for an exemption from a legislatively formulated and otherwise broadly imposed fee can trigger the application of RIPRA, what will stop any property owner from requesting an exemption to any legislatively formulated fee, just to be able to later claim the fee

was imposed on an individualized and discretionary basis? Such a decision would frustrate, rather than advance, good public policy surrounding land use and property rights. The League respectfully requests that this Court consider the improper precedent such a decision would set, and uphold the decision of the Court of Appeals. League members have a great deal at stake in the proper resolution of this matter.

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

Petitioner, Wolf Ranch, LLC ("Wolf Ranch") urges this Court to apply the test codified in RIPRA to determine the legality of the drainage fee charged to Wolf Ranch by the City because the City denied Wolf Ranch's request to exempt its property from the fee. In this case, the Court of Appeals correctly held that RIPRA does not apply because the City's drainage fees are legislatively formulated and imposed on a broad class of property owners, not determined on an

individual and discretionary basis. The City's denial of Wolf Ranch's request to be exempted from this fee does not constitute an individualized and discretionary imposition of the fee. Special fees such as the City's drainage fee are vital to a municipality's ability to finance the provision and maintenance of public infrastructure and services for its citizens. The public policy sought to be served by the adoption of RIPRA most certainly would not be advanced by embracing Wolf Ranch's argument in this case, rather it would be severely stymied.

ARGUMENT

A. Analysis of the City's drainage fee under RIPRA is not appropriate in this case because the City's drainage fees are not determined on an individual and discretionary basis; rather, they are legislatively formulated and imposed on a broad class of property owners.

RIPRA provides:

> In imposing conditions upon the granting of land-use approvals, no local government shall require an owner of private property to dedicate real property to the public, or pay money or provide services to a public entity *in an amount that is determined on an individual and discretionary basis*, 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 both in nature and extent to the impact of the proposed use or development of such property. *This section shall not apply to any legislatively formulated assessment, fee or charge that is imposed on a broad class of property owners by a local government.*

§ 29-20-203(1), C.R.S. (emphasis added).

The City promulgated ordinances, dating back to the 1960's, that apportion drainage infrastructure costs among all developers within a particular basin. Wolf Ranch v. City of Colorado Springs, 207 P.3d 875, 877 (Colo. App. 2008). These ordinances require the City Council, by resolution, to set a per-acre drainage fee for each basin, which fee is determined by dividing the total number of developable acres into the estimated total costs of the drainage facilities and studies for that basin. Id. at 877. It is undisputed that the City's drainage fees are legislatively formulated.

Wolf Ranch owns 1982 acres of land located within the Cottonwood Creek Basin. E-Record@LNFS#13681749, pp.2-4. This land is part of approximately 10,000 acres annexed into the City pursuant to a 1982 annexation agreement known as the Briargate Annexation Agreement (the "Annexation Agreement"). E-Record@LNFS#13377836, pp.12-14; June 15 Drainage Board Meeting, E-Record@LNFS#13378145, p.1, 11.20-24 (Transcript, p.1, 11.20-24). Since at least 1982, every developer in the Cottonwood Creek Basin has been subject to the drainage fee. E-Record@LNFS#13377904, pp.12-15.

The drainage fee, therefore, was imposed on a large class of property owners, to wit, every developer in the Cottonwood Creek Basin. This fact, coupled with the undisputed certainty that the City's drainage fees are legislatively

formulated, confirms that RIPRA does not apply to the facts of this case, or to any legislatively formulated, broadly imposed municipal impact fee.

B. The City's denial of Wolf Ranch's request that its property be exempt from the drainage fee does not constitute an individualized and discretionary application of the fee, thereby subjecting it to analysis under RIPRA.

Notwithstanding the discussion set forth above, Wolf Ranch claims that RIPRA should be applied to analyze the action of the City in denying the request by Wolf Ranch to exempt the Wolf Ranch property from the City's drainage fee. In the fall of 2006, Wolf Ranch requested that the City (originally through its Drainage Board, then through the City Council) exempt its property from the drainage fee by determining under the language of the Annexation Agreement that the Wolf Ranch property could be developed as a "closed basin." E-Record@LNSF#13377836, pp.22-23; E-Record@LNSF#13377836, pp.16-19; E-Record@LNSF#13378145, pp.1-25; E-Record@LNSF#13378276, pp.1-23. Pursuant to the Annexation Agreement, owners of property authorized to be included in a closed basin would not be subject to the City's drainage fees. Specifically, the pertinent section of the Annexation Agreement states:

> 5.6 Drainage. Promptly after annexation, Briargate will prepare and submit to the City an overall drainage concept for the Property. This will be a conceptual plan to determine whether drainage on the Property can be handled as an integrated basin

> without materially increasing historic off-site flows. If such an integrated basin approach is practicable, and the City approves the overall drainage concept, then Owners, at their sole cost and expense and without any reimbursement, will provide drainage facilities in accordance with the City-approved drainage fees. If such an integrated basin approach is not practicable for all or some of the Property, the property that an integrated basin approach cannot be applied to will be subject to the City's drainage ordinances and policies.
>
> E-Record@LNSF#13377904, pp.7-9.

Accordingly, the decision that led Wolf Ranch to the district court, the Court of Appeals, and now this Court, was a decision by the City Council that the Wolf Ranch property could not be operated as a closed basin pursuant to the language in the Annexation Agreement. It was neither a decision "imposing a condition upon the granting of land-use approvals," nor was it a decision to "require an owner of private property to dedicate real property to the public, or pay money or provide services to a public entity in an amount that is determined on an individual and discretionary basis." § 29-20-203(1), C.R.S. Therefore, there is no reason for this Court, or was there any reason for the lower courts, to consider whether there is "an essential nexus between the dedication or payment and a legitimate local government interest, and the dedication or payment is roughly proportional both in nature and extent to the impact of the proposed use or development of such property," under RIPRA. § 29-20-203(1), C.R.S.

Wolf Ranch, disappointed at the City's interpretation of, and resulting determination under the Annexation Agreement, failed to pursue the appropriate appellate procedure, which was to file a C.R.P.C. 106(a)(4) petition to review the City's decision. Instead, Wolf Ranch brought action under RIPRA, which clearly does not apply to the facts of this case. If a City's denial of a property owner's request for an exemption from a legislatively formulated and otherwise broadly imposed fee can trigger the application of RIPRA, what will stop every property owner from requesting an exemption to every legislatively formulated fee, just to be able to later claim the fee was imposed on an individualized and discretionary basis? To validate this behavior would promote pernicious public policy, indeed.

C. Special fees, such as the City's drainage fee, are a crucial component of the municipal financing system for providing infrastructure and services to new development.

It is quite common for local governments to require various forms of 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 expense burden they face as a result of development on the developers and new residents. The imposition of certain types of impact fees by Colorado counties and municipalities is expressly authorized by state statute. § 29-20-104.5, C.R.S. However, for home rule municipalities, which derive their authority from

Colorado Constitution Art. XX, § 6, specified statutory authority for impact fees has not been 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, 492 P.2d 64 (Colo. 1971); Davis v. Pueblo, 406 P.2d 671 (Colo. 1965). Therefore, through their own legislative enactments, home rule municipalities have long had the authority, independent of the general assembly, to condition development approval upon payment of a fee designed to offset the costs of infrastructure associated with new development. In addition, Colorado courts generally have inferred that local governments (including both counties and municipalities) 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.*, § 31-23-101, *et seq.* and § 31-23-206, C.R.S.[1]

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.,

[1] For more on the history of the law of impact fees in Colorado, *see* Colorado Municipal League, Paying for Growth: Impact Fees under Senate Bill 15 (April 2002).

929 P2d 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, § 29-20-101 *et seq.*, C.R.S., 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." § 29-20-102(2), C.R.S.

Indeed, Colorado municipalities may have the longest history of using development fees. As early as the 1920s, cities in Colorado charged developers for the water rights needed to serve their developments. Jane H. Lillydahl, Impact Fees in Colorado: Economic, Political, and Legal Overview, presented at Conference of the American Planning Association: A Symposium on Impact Fees, April 26-30, 1987. Today, use of impact fees in the state has expanded to finance not only water and sewer facilities, but also roads, drainage facilities, police and fire protection, library services, museums, and parks and recreation. 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, approximately half (49%) of Colorado's municipalities have adopted an impact fee, while 73% have adopted an impact fee or a land dedication/fee in lieu of a dedication. The most commonly utilized impact fees were for water (40%), sewer

(27%), parks & recreation (24%), storm drainage (20%) and transportation (19%). Land dedications, or fees in lieu of land dedications, were more commonly used for parks & recreation (44%) and schools (21%). Colorado Municipal Land Use Survey (2004).[2]

In this case, in accordance with the authority of local governments to set appropriate fees to offset the impact of development on local government services, the City promulgated ordinances in the 1960s, regulating drainage and control of flood and surface waters. The City's ordinances require, among other things, that drainage basins be established and studies be done to estimate the costs of constructing drainage facilities within each basin. Colorado Springs, CO., Code § 7.7.901, *et. seq*. The ordinances apportion drainage infrastructure costs among all developers within a given basin and require the City Council, by resolution, to set a per-acre drainage fee for each basin (which fee is determined by dividing the total number of developable acres into the estimated total cost of the drainage facilities for that basin). This comprehensive system for drainage fees is assessed on virtually every new development in the City. In promulgating its schedule for

[2] 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, July 28, 2009).

assessing this drainage fee, the City acted in a legislative capacity. Krupp, 19 P.3d at 693 (holding that a district acts legislatively when it sets rates and charges for its services). A service fee is "a charge imposed on persons or property for the purpose of defraying the cost of a particular government service." Id. at 693. The City's drainage fee meets this definition. It is a one time charge assessed on all new development within a drainage basin for the purpose of defraying the cost of expanding and maintaining the City's drainage infrastructure. The drainage fee was established by legislative authority, is reasonably related to the specific government service of providing drainage, and is imposed on a broad class of property owners.

Impact fees, such as the City's drainage fee, are critical to a municipality's ability to finance and maintain public infrastructure and services for its citizens. Every municipality should be able to rely on the fact that its legislatively formulated, reasonable fees, imposed on a broad class of property owners cannot be challenged under RIPRA and that the money from such fees will remain available to the municipality so that it may ensure adequate infrastructure and services for all of its citizens.

D. The public policies the General Assembly sought to serve in RIPRA (and the U.S. Supreme Court sought to serve in Nollan and Dolan) would not be violated by upholding the Court of Appeals decision in this case.

The United States Supreme court determined in its well-known Nollan v. California Coastal Commission, 483 U.S. 826 (1987) and Dolan v. City of Tigard, 512 U.S. 374 (1994) decisions that a development exaction (when a government requires a landowner to forfeit part of his or her property for public use as a condition of development) will be deemed a taking unless it satisfies a two part test: (1) there must be an essential nexus between the legitimate government interest and the exaction demanded , Dolan, 512 S.C. at 386; Nollan, 483 U.S. at 837; and (2) there must be "rough proportionality" between the governmental interest and the required dedication. Dolan, 512 S.C. at 391. Application of this test, which was essentially codified in Colorado statute by the adoption of RIPRA, has been limited to the narrow set of cases where a permitting authority, through a specific, discretionary adjudicative determination, conditions continued development on the exaction of private property for public use. Krupp, 19 P.3d at 695.

As set forth in the legislative declaration section of RIPRA, "[t]he general assembly intends, through the adoption of section 29-20-203, to codify certain constitutionally-based standards that have been established and applied by the

courts." § 29-20-201(a)(3), C.R.S. To that end, RIPRA codified the Nollan/Dolan test, and with it, the distinction between legislative and adjudicative determinations. Krupp, 19 P.3d at 696. In addition, the language in RIPRA on monetary exactions is taken essentially verbatim from one of the leading cases on the subject, Ehrlich v. City of Culver City, 12 Cal. 4th 854, 911 P.2d 429, 50 Cal. Rptr.2d 242 (1996). This case is considered to be of particular importance because it was remanded by the United States Supreme Court to the California Supreme Court shortly after Dolan was decided. Even though Ehrlich dealt exclusively with monetary exactions rather than land dedication, the United States Supreme Court directed the state court to reexamine its judgment in light of Dolan. In Ehrlich, the California court drew a clear distinction between quasi-judicially determined monetary exactions (to which the Nollan/Dolan analysis is deemed to apply) and legislatively established fees (to which Nollan and Dolan do not apply). RIPRA carries forward this distinction in Colorado law. Accordingly, RIPRA cannot be used to challenge standard and uniformly imposed application fees, impact fees, tap fees, or other similar legislatively formulated fees imposed on a broad class of property owners. RIPRA was never intended to apply to such fees.

Moreover, by its very language, RIPRA limits the Nollan/Dolan test to charges that are "determined on an individual and discretionary basis." § 29-20-

203(1), C.R.S. RIPRA explicitly declines to apply the test to "any legislatively formulated assessment, fee, or charge that is imposed on a broad class of property owners by a local government." §29-20-203(1), C.R.S. A critical difference between a legislatively based fee and a specific, discretionary adjudicative determination is that the risk of leveraging or extortion on the part of the government is virtually nonexistent in a fee system. Krupp, 19 P.3d at 696. When a governmental entity assesses a generally applicable, legislatively based development fee, all similarly situated landowners are subject to the same fee schedule, and a specific landowner cannot be singled out for extraordinary concessions as a condition of development. Krupp, 19 P.3d at 693 (cites omitted).

In this case, the City created a generally applicable fee assessed on all development within the Cottonwood Creek Basin, under the terms of a legislatively formulated fee schedule. Neither the promulgation of the fee schedule, nor the calculation of the fee constituted a discretionary adjudicative decision or an exaction of property. The City's drainage fee is a payment for drainage infrastructure necessary to serve the development.

Wolf Ranch wanted the City to exempt it from a fee that was assessed on all new development within the Cottonwood Creek drainage basin. The public policy behind RIPRA and the case law that prompted it's adoption is to prevent the

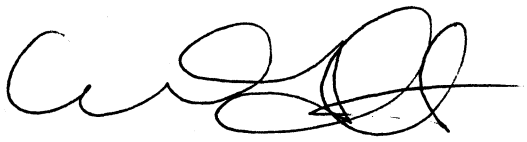
government from imposing on one property owner, burdens that should be borne by the public at large. To exempt Wolf Ranch from the drainage fee would do the exact opposite and exempt one property owner from the burdens that should be borne by all. This clearly would fly in the face of the public policy sought to be served by Nollan/Dolan and RIPRA.

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 31st day of July, 2009.

COLORADO MUNICIPAL LEAGUE



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CERTIFICATE OF SERVICE

I hereby certify that on this 31 day of July, 2009, a true and correct copy of the foregoing **BRIEF OF THE COLORADO MUNICIPAL LEAGUE AS *AMICUS CURIAE* IN SUPPORT OF THE CITY OF COLORADO SPRINGS**, was placed in the United States mail, first class postage prepaid and addressed to the following:

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