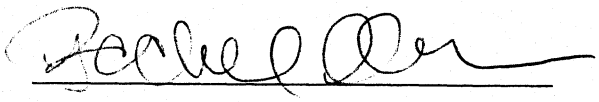
SUPREME COURT, STATE OF COLORADO 101 West Colfax Ave., Suite 800 Denver, Colorado 80202	
Colorado Court of Appeals, Case No. 09CA1824 Opinion by: Judge Dailey Participating Judges: Judge Hawthorne & Judge Marquez	▲COURT USE ONLY▲
Defendants-Appellees-Petitioners: TOWN OF MINTURN, COLORADO; and GINN BATTLE NORTH, LLC; and GINN BATTLE SOUTH, LLC; and GINN-LA BATTLE ONE LTD., LLLP **v.** **Plaintiff-Appellant-Respondent:** SENSIBLE HOUSING CO., INC.	Case Number: 10-SC-670
Attorney for *Amicus Curiae* : Rachel L. Allen, #37819 COLORADO MUNICIPAL LEAGUE 1144 Sherman Street Denver, Colorado 80203 Phone: (303) 831-6411 Fax: (303) 860-8175 Email: rallen@cml.org	

BRIEF OF THE COLORADO MUNICIPAL LEAGUE AS *AMICUS CURIAE* IN SUPPORT OF THE TOWN OF MINTURN

CERTIFICATE OF COMPLIANCE

I hereby certify that this *Amicus Curiae* Brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in the Rules. Specifically, the undersigned certifies that the following Brief complies with C.A.R. 28(g) in that it contains 3,182 words and incorporates by reference portions of the Opening Brief of the Town of Minturn.



Rachel L. Allen

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND CONSTITUTIONAL PROVISIONS

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 Defendants-Appellees-Petitioners, the Town of Minturn (the "Town") and Ginn Battle North, LLC, Ginn Battle South, LLC, and Ginn-La Battle One Ltd., LLLP (the "Ginn Parties").

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The League hereby adopts and incorporates by reference the statement of the issues presented for review in the Opening Brief of Petitioners.

STATEMENT OF THE CASE

The League adopts and incorporates by reference the statement of the case in the Petitioners' Opening Brief, as well as the statement regarding the standard of review, which appears on page 1 of the Opening Brief.

SUMMARY OF ARGUMENT

At the center of this appeal is the manner chosen by the Court of Appeals to address two contemporaneous actions; one judicial: a title dispute and another legislative: an annexation. The ownership of the parcels of land and the legislative authority of the Town to annex is not at issue in this dispute.

The Town exercised its delegated authority to annex nine parcels of land at the request of the owners of the Ginn Parcels pursuant to the requirements in C.R.S. §§ 31-12-104 and 105 of the Municipal Annexation Act. After twenty three public hearings on the annexation petitions over the course of two years, the Town Board of Trustees acted on the evidence presented to them and unanimously approved the proposed ordinances on February 27, 2008, to annex the property. There was no evidence in the record and no credible evidence before the Board that the Ginn Parties didn't own the annexed property. A subsequent referendum challenging the approval of these ordinances was rejected when the voters overwhelmingly ratified Minturn's approval of the annexation. Respondent, Sensible Housing Co., Inc. (hereafter "Sensible Housing") then filed a motion for reconsideration, and Minturn denied the motion. Sensible Housing then commenced the present action challenging the Ginn Annexation. The Court of

Appeals *sua sponte* applied the priority rule to void the Town's annexation ordinances and stay any further annexation proceedings pending the quiet title action in which Sensible Housing disputed ownership of some of the annexed property.

The League respectfully urges that the Board of the Town of Minturn had valid reasons and a *prima facia* case to annex the Ginn Properties and that there is nothing unlawful about the action that they took. The Court of Appeals decision voiding the annexation ordinances was improper, and the decision of the Court of Appeals should be reversed.

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS PERMITS THE JUDICIAL BRANCH TO INVENT A JURISDICTIONAL LIMITATION TO PAST AND PENDING LEGISLATIVE ACTS, A RESULT AT ODDS WITH THE DOCTRINE OF SEPARATION OF POWERS AND THE LANGUAGE OF THE ANNEXATION ACT.

Article III of the Colorado Constitution prohibits any branch of government from assuming the powers of another branch. Colo. Const. art. III. Courts cannot,

under the pretense of an actual case, assume powers vested in either the executive or the legislative branches of government. Wimberly v. Ettenberg, 570 P.2d 535 (Colo. 1977). This Court has recognized that "it is a general principle in the governmental system of this country that the judicial department has no direct control over the legislative department. Each department of the state government is independent within its appropriate sphere. Legislative action by the general assembly cannot be coerced or restrained by judicial process." Lewis v. Denver City Waterworks Co., 34 P. 993, 994 (Colo. 1893). *See also* Greenwood Cemetery Land Co. v. Routt, 28 P. 1125 (Colo. 1892); Colorado Cent. R.R. Co. v. Lea, 5 Colo. 192 (1879); Phillips v. City of Denver, 34 P. 902 (Colo. 1893).

Legislative bodies have broad authority to enact laws, and judicial bodies have narrow authority to review those laws. As this Court has stated:

> This power of judicial determination is delicate in character, one to be exercised with caution and care, for it may result in disapproval of acts of the legislative department or of actions of the executive department, both co-ordinate branches of government. This care, this caution has been proverbially observed by the courts, lest in their zeal to prevent what they deem unjust, they exceed their judicial authority, assert an unwarranted superiority over their co-ordinate governmental branches and invade the fields of policy preserved to the legislative arm or the realm of administrative discretion lodged in the executive branch. Wimberly v. Ettenberg, 194 Colo. 163, 570 P.2d 535 (Colo. 1977); Ass'n of Data Processing Serv. Org's Inc. v. Camp, 397 U.S. 150 (1970).

Therefore, courts should apply proper deference to legislative actions.

The priority rule was relied upon by the Court of Appeals to reach their decision in this case. This Court held that "with respect to dual actions involving the same subject matter and substantially the same parties" are pending, the first action filed has priority, and the second action must be stayed until the first is decided. Wiltgen v. Berg, 435 P.2d 378, 381 (Colo. 1968); Martin v. District Court, 150 Colo. 577, 375 P.2d 105 (Colo. 1963). The application of the priority rule does not intend to deprive the second court of jurisdiction, but to permit the first action to proceed to final judgment before the court may proceed in the second matter. Id.

The Court of Appeals applied the priority rule to void annexation ordinances approved by the Town because the quiet title action was pending. No court has used the priority rule to stay or void legislative proceedings when a parallel judicial case was pending that involved the same or similar parties and issues. Article 3 of the Colorado Constitution and several cases from this Court provide that courts cannot deprive municipalities of powers vested in them when municipalities are acting in their legislative capacity. Annexation is plainly legislative in nature as shown in City and Cnty. of Denver v. Dist. Court, In and For Jefferson Cnty., 509 P.2d 1246 (Colo. 1973); Berry Prop's v. City of Commerce City, 667 P.2d 247,

248 (Colo. App. 1983). The procedure for annexation has been set forth in considerable detail in Article 12 of Title 31, C.R.S. The Annexation Act delegates broad annexation jurisdiction to municipalities. The manner of challenging was defined by the General Assembly in § 31-12-116, C.R.S. That statute provides that the role of the court is limited to reviewing whether the municipality has exceeded its jurisdiction or abused its discretion. C.R.S. § 31-12-116(3). The General Assembly evidences its intent that this statute defines the exclusive means of challenging an annexation by its provision in subsection (4) of the statute that "any annexation...shall not be directly or collaterally questioned in any suit, action, or proceeding, except as expressly authorized in this section." C.R.S. § 31-12-116(4). The Court of Appeals overreached by applying a common law doctrine to a legislative annexation action and allowing the priority rule to void Minturn's annexation ordinances.

The Court of Appeals erred in applying the priority rule to void the Town's annexation ordinances. This Court has explained:

> A municipal ordinance passed in pursuance of valid authority emanating from the state legislature has the same force and effect, within proper limits, as if passed by the legislature itself. It follows, as a logical sequence, that a city council or board of trustees of an incorporated town, when acting, or proposing to act, in a legislative capacity upon a subject within the scope of its powers as conferred by its charter or by the general laws of the state, is entitled to immunity from judicial interference. Lewis v. Denver City Waterworks Co., 34 P. 993 (Colo. 1893). See Greenwood Cemetery Land

Co. v. Routt, 28 P. 1125 (Colo. 1892); Colorado Cent. R.R. Co. v. Lea, 5 Colo. 192 (1879); Phillips v. City of Denver, 34 P. 902 (Colo. 1893).

Courts should apply proper deference to municipal legislative actions, and the Court of Appeals misapplied the priority rule because it violates the separation of powers doctrine and the plain language of the Municipal Annexation Act.

The decision by the Court of Appeals in the instant case creates conflicts with this Court's decision in Wiltgen case, as well as several Court of Appeals decisions, all of which provide that the appropriate remedy was to stay the municipal annexation proceeding rather than to void the annexation ordinances. (In an incorporation proceeding filed subsequent to another city incorporation proceeding involving same subject matter and basically same parties, this Court held that the district court order voiding the election held in connection with the second filed incorporation petition was erroneous, since impact of application of priority of jurisdiction rule was not to deprive court of jurisdiction *ab initio* in second filed matter, but was simply to permit first filed incorporation action to proceed to final judgment before court could proceed in second matter) Wiltgen v. Berg, 435 P.2d 378 (Colo. 1968); (District Court for County of Adams prohibited respondents from proceeding further in a civil action, so Martin filed this appeal. The Supreme Court held that valid service of process was accomplished in another action between same parties. Respondents were ordered to suspend further action

in proceedings pending in Adams County until such time as action between same parties pending in District Court of Denver was finally determined) Martin v. Dist. Court, In and For Adams Ctny., 375 P.2d 105 (Colo. 1962); (Nationwide Mutual Insurance filed a declaratory judgment action regarding its liabilities to insured, and the District Court dismissed the complaint on the basis that Mayer had filed a prior action in New Mexico regarding same subject matter and same parties. Nationwide appealed, and the Court of Appeals held that the trial court should have stayed, rather than dismissed the suit, on the ground that the prior suit was pending in another state involving same subject matter and same parties) Nationwide Mut. Ins. Co. v. Mayer, 833 P.2d 60 (Colo. App. 1992). These decisions clearly show that application of the Rule results in the second action being stayed and permitted to proceed once the first case is resolved. Moreover, the Court of Appeals not only applied a common law rule for establishing judicial priority between concurrent judicial actions to a legislative action, the court sanctioned the Town by voiding prior legislative actions, a result not part of the "priority rule" even when properly applied. The League respectfully urges that this Court got it right in Wiltgen as have the various parties of the Court of Appeals rulings that have followed this Court's rulings over the past nearly fifty years. In

accord with those decisions, we urge this Court to reverse the decision of the Court of Appeals.

II. IF THOSE CHALLENGING AN ANNEXATION PROCESS ARE PERMITTED TO STALL THE PROCESS BY FILING A QUIET TITLE ACTION, THIS PRACTICE COULD DELAY ANNEXATIONS FOR YEARS AS THE RECORD IN THE CASE AT BAR ILLUSTRATES.

The quiet title claim in this case was initiated in 1998, nine years before the annexation proceeding commenced and interest in parts of annexation proceeding initially claimed.[1] Battle Mountain Limited Liability Corporation ("BMLLC"), Battle Mountain Corporation ("BMF"), and Sensible Housing Company, Inc. ("Sensible Housing") have been to the Court of Appeals twice on in this particular title dispute, and other pieces of litigation arising from the same property have also been involved in litigation. The Colorado Court of Appeals and Colorado Supreme Court, however, have repeatedly determined that BMLLC and BMF have no

[1] These have been litigated for more than ten years in the ongoing litigation in Case No. 98CV374, as appealed.

interest in the Battle Mountain property. [2] See cases Mortgage Inv. Corp. v. Battle Mountain Corp., 70 P.3d 1176 (Colo. 2003); Mortgage Inv. Corp. v. Battle Mountain Corp., 93 P.3d 557 (Colo. App. 2003). Further, the Eagle County District Court has twice held that Sensible Housing has no interest in the Battle Mountain property and struck or dismissed Sensible Housing's claims for lack of standing. Under the doctrine of issue preclusion, BMLLC and BMF are each estopped from reasserting their claims of ownership to the Battle Mountain property because such claims have been conclusively rejected by the Colorado Courts. Sensible Housing's claims on appeal are limited to small tracts of land.[3]

The Court of Appeals decision left undisturbed creates an avenue to manipulate the annexation process by initiating an ownership dispute because a quiet title claim, no matter how tenuous, will void a lawful annexation proceeding. This case has been stuck in the courts for years. During this period, the trial court in dismissing Respondent's quiet title action described "evidence" supporting that action as "a charade-an empty, inherently deceptive pretense-to assert acclaim of title by offering incomplete, unsigned documents and unrecorded documents which

[2] The "Battle Mountain property" is approximately 5400 acres of land purchased by the Ginn Parties in December of 2004, which includes the approximately 4300 acres of property annexed by the Town of Minturn in 2008.

[3] The property Sensible Housing claimed to own within the Battle Mountain property is on appeal before this Court from the District Court's order in Case No. 98CV374.

create a disturbing absence of credibility." (Order Granting Pl.'s Cross-Mot. for Partial Summ. J. as to the Quiet Title Countercl. of Pine Martin Mining Company and Piney Lumber Company).

The Court of Appeals decision creates a disproportionate result wiping away an extensive annexation process and requiring the municipality to start the whole process over again after completion of quiet title proceedings. This result unfairly punishes an expanding municipality where the objector ends up having no title claim. If an objector can overturn an annexation by simply filing a quiet title action before a § 116 action, many developers would shy away from the time, expense, and effort of an annexation. Developers would then likely try to develop in unincorporated areas of a county, resulting in suburban sprawl in areas that may not have as suitable services and infrastructure. Municipalities cannot grow if they cannot entertain another annexation in the future. In this case, and others, voiding an annexation and requiring the municipality to recreate the process after resolution of the pending litigation is an onerous burden to place on a Town Council.

Assuming *arguendo* that the priority rule applies, a seemingly appropriate remedy would be to stay the judicial action filed under Section 116 of the Annexation Act, which will have the corresponding effect of staying the

annexation proceeding to preserve the actions of the annexing municipality until the pending litigation comes to a resolution. If the quiet title action is adjudicated first and the judicial action involving the annexation under Section 116 is stayed from further action, it eliminates the harsh result of voiding the annexation ordinances. Further, it allows for the annexation to remain effective and to comply with the zoning and taxation requirements of the Annexation Act, while the judicial review of the annexation is stayed and the annexation itself is suspended pending the title determination. Staying the annexation proceeding would create a better balance between the developer's, municipality's and the objector's interests. It will promote efficiency and economy for the municipality in the event that the quiet title action is resolved in favor of the annexing party; the annexation does not have to be begun anew. If not, the judicial review of the annexation under Section 116 can proceed accordingly and the interests of the successful party of the quiet title action are not compromised.

This case illustrates how a party opposed to an annexation can delay or derail the annexation proceeding by filing a thin or specious quiet title action. The Court of Appeals decision permits opponents to accomplish voiding of a prior annexation even if the property claim turns out to be completely groundless. Voiding the annexation ordinances *ab initio* because of a pending title dispute is an

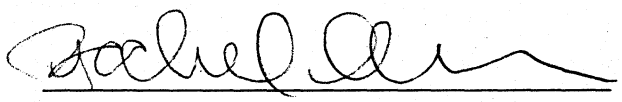
unreasonable restraint on the annexation process, one that the General Assembly did not permit and indeed sought expressly to preclude.

CONCLUSION

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

Respectfully submitted this 10th day of June, 2011.

COLORADO MUNICIPAL LEAGUE



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CERTIFICATE OF SERVICE

The undersigned herein certifies that on this 10th day of June, 2011, a true and correct copy of the foregoing **BRIEF OF THE COLORADO MUNICIPAL LEAGUE** was served via LexisNexis File & Serve and/or by depositing same in the U.S. Mail, postage prepaid, addressed to the following:

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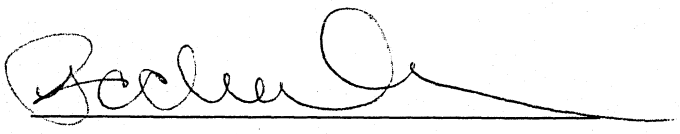

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