

<p>SUPREME COURT, STATE OF COLORADO  101 West Colfax Ave., Suite 800  Denver, Colorado 80202</p>	
<p>District Court, Gilpin County, No. 11CV17,  Hon. Jack W. Berryhill</p> <p>Municipal Court, City of Black Hawk,  No. 10-3179, Hon. Ronald W. Carlson</p>	<p>▲ COURT USE ONLY ▲</p>
<p><b>Appellants-Petitioners-Defendants:</b> JAMIE WEBB,  JEFFREY HERMANSON, and MICHALEEN  JERONIMUS</p> <p style="text-align: center;">v.</p> <p><b>Appellee-Respondent-Plaintiff:</b> CITY OF BLACK  HAWK, a Home Rule City and Colorado municipal  corporation</p>	
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<p><b>BRIEF OF THE COLORADO MUNICIPAL LEAGUE AS <i>AMICUS</i>  <i>CURIAE</i> IN SUPPORT OF THE CITY OF BLACK HAWK</b></p>	

## 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 Answer Brief of the City of Black Hawk.

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Loyal E. Leavenworth, Esq.

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COMES NOW the Colorado Municipal League (the "League") by its undersigned special counsel and, pursuant to Rule 29, C.A.R., submits this brief as *amicus curiae* in support of Appellee-Plaintiff, the City of Black Hawk (the "City").

### **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 City's Response Brief.

### **STATEMENT OF THE CASE**

The League adopts and incorporates by reference the Statement of the Case in the City's Response Brief, as well as the statement regarding the standard of review, which appears on page 1 of the Response Brief.

### **SUMMARY OF ARGUMENT**

At the center of this appeal is the interpretation of Colorado Revised Statutes Title 42, Article 4 and its grant of regulatory power to local authorities over local roadways and the legitimate exercise of local police power, including the limited judicial review of such exercise pursuant to the rational basis analysis. C.R.S. §



42-4-110, and other provisions of Title 42, Article 4, are clear in its grant of authority to local governments to regulate local roadways under their jurisdiction. Where such authority is not given to local governments, the general assembly has specifically so stated. In the exercise of police power, courts are not to substitute their analysis of expert reports, prepared by professionals, for that of the local government body, where the local government body's interpretation thereof and reliance thereon is not arbitrary and provides a rational basis for legislation.

The City had a rational basis to exercise its police power and prohibit bicycles on the main streets through the City, and such prohibition was within its power even when there is no nearby alternative bicycling route. To not allow this regulation of local streets will eviscerate municipalities' power as recognized and provided in Title 42, Article 4, Colorado Revised Statutes. The District Court's decision upholding the City's Ordinance 2010-3 and the convictions of the Plaintiffs must be affirmed.

## **ARGUMENT**

- I. MUNICIPALITIES HAVE THE AUTHORITY AND POWER PROHIBIT BICYCLING ON LOCAL STREETS EVEN ABSENT A SUITABLE NEARBY ALTERNATIVE CYCLING ROUTE.

The Model Traffic Code (“MTC”) (also sometimes referred to as the “Uniform Vehicle Code” or “Uniform Traffic Code”), as published by the Colorado Department of Transportation<sup>1</sup> is codified in the Colorado Revised Statutes as Article 4, Title 42. *See* C.R.S. §§ 42-4-102 and -103. The MTC may be adopted by municipalities, in whole or in part, with or without deletions and additions, by ordinance pursuant to C.R.S. § 31-16-201 *et seq.* *See* C.R.S. § 42-4-110(1)(b). There is no requirement that the MTC be adopted in its entirety or without changes or amendments; in fact, local governments are empowered to *not* adopt the MTC (local authorities “may ...adopt”), adopt all or part of the MTC, and supplement the MTC with additional regulations. *See* C.R.S. § 42-4-110(1)(b) – “All local authorities, may, . . . adopt by reference *all or any part* of a model traffic code which embodies the rules of the road and vehicle requirements set forth in this article *and such additional regulations* as are provided for in section 42-4-111.” Pursuant to this authority, the City deleted that portion of § 109(11) of the MTC that it had adopted that refers to the need for an alternative route if bicycles are prohibited.

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<sup>1</sup> *See* <http://www.coloradodotinfo/library/traffic/traffic-manuals-guidelines/fed-state-co-traffic-manuals/model-traffic-code/view> for full text

Many municipalities have adopted the MTC only in part, with amendments, or with deletions. *See, e.g.*, City of Longmont Municipal Code § 11.04.010, Cherry Hills Village Municipal Code § 8-1-10 to – 60, City of Evans Municipal Code § 10.04.010 to – 060, Fort Lupton Municipal Code § 8-1 to – 72, Town of Hayden Municipal Code § 10.04.020 and 10.04.030, and City of Leadville Municipal Code § 10.04.010. (copies attached). The local governments cited above are both home rule and statutory municipalities. Other cities, including Denver and Boulder, have not adopted the MTC at all.<sup>2</sup> If the legislature intended that every provision of the MTC must apply to local roadways, it would have specified such in Title 42. It did not. In fact, C.R.S. § 42-4-110(1)(a) states that local authorities may adopt traffic regulations that “cover the same subject matter as the various sections of this article and such additional regulations as are included in section 42-4-111...” C.R.S. § 42-4-110(1)(b) specifically states that local authorities “may” adopt “all or any part of a model traffic code.” *See also* C.R.S. § 31-16-201 *et seq.* This use of “may” is permissive, not mandatory. *See Duprey v. Anderson*, 518 P.2d 807 (Colo. 1974).

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<sup>2</sup> The municipal codes of Boulder and Denver concerning traffic and vehicles are not attached hereto due to their length. They are available at <http://library.municode.com/> - search Denver; <http://www.colocode.com/boulder/2/index.htm>

The legislature also specifically stated that “in no event” can local authorities promulgate their own regulations regarding DUIs, driving under the influence of drugs, vehicle registration and driver’s licenses, duties and obligations regarding traffic accidents and “vehicle equipment requirements in conflict with the provisions of this article...,” C.R.S. § 42-4-110(1)(d).

The legislature also mandates that local authorities cannot enact ordinances affecting *state* highways (not local streets) that change the “rules of the road” or are “otherwise in conflict with the provisions of this article.” C.R.S. § 42-4-110(1)(c). However, except for these specific areas outlined in § 110(1)(d), and with regard to state highways in § 110(1)(c), *the legislature did not expressly or impliedly prohibit local authorities from enacting ordinances that may be in conflict with this article.* Whether the issue of bicycle prohibition is a matter of local concern, or mixed local and state concern, is irrelevant based upon the clear language of Title 42, which direct the areas in which local governments *cannot* regulate. The fact that municipalities throughout Colorado have chosen to either (1) not adopt the MTC at all or (2) adopt it with many deletions, amendments and additions to tailor it to the local circumstances and desires of the municipality is evidence of the undisputed belief of local governments that they have this authority. (*See attached municipal codes*).

Even if the Court conducts an analysis of the City's legislation prohibiting bicycles as a matter of a home rule municipality legislating regarding a matter of mixed state and local concern, the League agrees with the district court's conclusion that the City's bicycle prohibition is still authorized. *See Mobell v. City and County of Denver*, 671 P.2d 433 (Colo.App. 1983). The Court of Appeals in *Mobell* analyzed § 110(1), as it was earlier codified (though it included the same language as discussed herein) and concluded that, with the exception of the certain areas enumerated in the statute as being specifically under the State's power only, local governments were authorized to enact and enforce "local traffic ordinances which cover the same subject matter as state traffic statutes and *which are in conflict therewith*, so long as the local ordinance is not enforced on any street which is a state highway." *Id.* at 434 (emphasis added). This is the plain reading of § 110(1), which gives meaning to every word therein in accordance with the rules of statutory interpretation found at C.R.S. § 2-4-101 to -402.

In addition, language in the decision in *Retallack v. Police Court of City of Colorado Springs*, 351 P.2d 884 (Colo. 1960), which was decided prior to the enactment of Title 42, is compelling. There, this Court stated that "[r]eckless or careless driving is a relative thing and is wholly dependent upon so many variable and local circumstances that conviction thereof could not have uniform application

throughout the state.” 351 P2d at 886. Thus, regulation of reckless driving could not, and was not, preempted by the State. Since the Court found that the ordinance in *Retallack* was one of purely local concern, it certainly follows that whether and how bicycles are allowed to travel over local roadways is variable and dependent upon local circumstances and, therefore, is not subject to “uniform application throughout the state.”

Municipalities in Colorado vary greatly in size, topography, traffic density, and street conditions. To preclude local authorities from deleting the provisions of § 109(11) such that bicycles can only be prohibited on roadways that have an alternate route within 450 feet fails to recognize the importance of these local circumstances, and renders superfluous the language of § 110(1)(a) and 110(1)(b) that refers to the adoption of local regulations concerning “same subject matter” as Article for and the direction that local governments *may adopt* “all or any part of a model traffic code.” Regulation of bicycles and other traffic in municipalities, especially in mountain municipalities like the City, is often dictated by the local topography. Narrow canyons and steep topography often prevent roads, which might be very narrow in width, from being in close proximity to each other, or there might not be any other roads in existence that could provide an alternate route, as in the case of the City. If municipalities in such locations and situations

are not able to prohibit bicycles where their use is incompatible with traffic, the street conditions, and local circumstances, then local governments' power over local roads is eviscerated.

In their Opening Brief, Defendants state that to allow the City's ordinance to be upheld, and thus determine that local governments have the authority to delete the provision of § 109(11) that requires an alternate route within 450 feet, will allow local authorities to adopt ordinances that would contravene other provisions of Title 42, Article 4, such as C.R.S. § 42-4-239(2) and (3) (persons under 18 cannot use a cell phone while driving; no driver can text while driving). *See* Opening Brief at 25. However, this section is entitled "Misuse of a wireless telephone – definitions – penalty – *preemption*" (emphasis added) and specifically states that "the general assembly finds and declares that use of wireless telephones in motor vehicles is a matter of statewide concern." C.R.S. 42-4-239(9). This language emphasizes that the district court's analysis, and the City's analysis, that § 110(1) is the controlling statute that authorizes the City's changes, is correct.

The legislature, throughout C.R.S. Title 42, Article 4, specifies which areas are not open to changes by local authorities for application to local roadways. Defendants cite C.R.S. § 42-4-1412(1) as a determination that the state has

preempted bicycle regulation or created a policy favoring cycling. *See* Opening Brief at 15. Thus, they analogize bicycles to agricultural equipment, and rely on the decision in *Board of County Commissioners v. Vandemoer*, 205 P.3d 423 (Colo.App. 2008) that bicycles, like agricultural equipment, cannot be prohibited on local roadways (absent the alternate route). However, in *Vandemoer*, the Court of Appeals relied upon the legislative declaration in C.R.S. § 31-3.5-101 that it is a *state policy* to protect agricultural operations, C.R.S. § 42-4-111's failure to list implements of husbandry as an additional area of regulation by local governments, and C.R.S. §§ 42-1-102(44) and (112)'s definition of "implements of husbandry," specifically excluding them from the definition of vehicles. *Id.* at 427-428.

There is no such state policy statement in C.R.S. § 42-4-1412(1), bicycles are enumerated in § 111 as an additional area of local regulation, and unlike C.R.S. § 42-4-239(9) which specifies a finding of statewide concern, § 1412 does not contain any preemption language. In fact, C.R.S. § 42-4-1412 is entitled "Operation of bicycles and other human-powered vehicles," and then sets out the rules of the road, lighting requirements, passenger requirements, etc. for bicycles and bicyclists. It expressly recognizes there may be "special regulations" that apply to bicycles. *Id.* A declaration that persons riding bicycles "have all of the rights and duties applicable to the driver of any other vehicles under this article"



(very different from the exclusion of implements of husbandry from the definition of vehicles) does not create preemption of local authority to regulate or a state policy favoring bicycles – if so, it would also be a state policy favoring drivers of cars. As such, the analysis in *Vandemoer* is inapplicable here.

As the Defendants succinctly state, statutes are not to be interpreted to render any statutory language superfluous. Opening Brief at 17; *see Colo. Water Cons. Board v. Upper Gunnison River Water Cons. District*, 109 P.3d 585, 597 (Colo. 2005). In making such statement, they emphasize the use of the words “regulate” and “prohibit” throughout § 111. Opening Brief at 18. What they fail to recognize is that, although C.R.S. § 42-4-111(h) says “regulating the operation of bicycles,” § 111(u) also says “regulating persons upon skates, coasters, sleds, or similar devices.” No one can argue that municipalities do not have the right to prohibit sleds, skates or coasters on local streets. The same is true of § 111(t) (“regulating persons propelling push carts”); municipalities certainly have the right to prohibit this use on local streets. The district court was correct in concluding that “regulate” includes “prohibit” in this statutory scheme found at Title 42, Article 4.

It is important to note that the City's ordinance, and current effect, is not a total ban of bicycles within the City but only on certain streets. The City is not alone in such an enactment, including the deletion or failure to follow the requirement applicable to state highways contained in C.R.S. § 42-4-109(11) (also known as Sec. 109(11) of the MTC) that such prohibitions are limited to those situations where an alternative route exists within 450 feet. The League requests that this Court take judicial notice of the following portions of various municipal codes, copies of which are attached hereto:

Denver Municipal Code § 54-577: Prohibited on roadways where posted. The city traffic engineer is authorized to erect signs on any roadway prohibiting the riding of bicycles or electrical assisted bicycle thereon by any person, and when such signs are in place, no person shall disobey the same, except a uniformed city or state or federal employee riding a bicycle...while engaged in the discharge of his or her duties...

Lakewood Municipal Code § 10.51.130: Bicycle prohibited. Whenever official signs are erected giving notice that bicycles are prohibited, as authorize in this title, no bicyclist shall violate any of the instructions contained thereon.

Longmont Municipal Code § 11.04.123(18): Wherever official signs prohibit bicycles, no bicycle or electrical assisted bicycle rider shall disobey the signs.

City of Cherry Hills Village Code § 8-1-30. The 2010 edition of the Model Traffic Code is adopted as if set out at length, save and except (i) the sections or subsections which are hereby declared to be inapplicable to the City and are therefore expressly deleted below; and (ii) the sections or subsection that shall be subject to the following amendment and additions: (2) Section 106, Article I, of the Model Traffic Code is hereby amended to read in its entirety as follows: "**106.**

**Who may restrict right to use highways.** “The use of certain streets, roadways and highways by motor-driven cycles, trucks or other commercial vehicles, bicycles, motorized bicycles, motorcycles, mobile machinery, and horse-drawn vehicles or otherwise nonmotorized traffic shall be restricted or prohibited when official signs giving notice thereof are erected thereon.”

Town of Hayden Municipal Code Chapter 10.04. MODEL TRAFFIC CODE Schedule IV-Sec. 805(5) Non-Motorized Traffic and Motor-Driven Cycles Excluded. In accordance with the provisions of Sections 805(5) of the Model Traffic Code, and when official signs are erected giving notice thereof, no pedestrian, bicyclist or other non-motorized traffic and no person operating a motorized bicycle or a motor-driven cycle shall use any of the following streets or highways or parts thereof:

<u>Name of Street</u>	<u>Portion Affected (terminal limits)</u>
100 Block West Jackson (Ord. 270 Schedule VI, 1979)	No bicycle traffic allowed downhill (Hospital Hill)

As discussed in depth above, it is lawful for local authorities to delete and amend those sections of the MTC not specifically preempted by the State, then it follows that it is lawful to delete a portion of § 109(11) and prohibit bicycles even when no alternate route exists within 450 feet thereof. In Denver, where the MTC has not been adopted at all, the Municipal Code section provided above gives the power to the city engineer to designate *any* local roadways as closed to bicycles. There is no restriction or reservation about an alternative route. Within the statutory framework of Title 42, Article 4, the City had authority to enact its bicycle prohibition.

II. THE CITY'S ORDINANCE IS RATIONALLY RELATED TO A GOVERNMENTAL INTEREST, AND WAS A REASONABLE EXERCISE OF POLICE POWER

All parties agree that the City's exercise of its police power in adopting the bicycle prohibition ordinance is to be analyzed under the rational basis test. Ordinances enacted pursuant to a local government's police power will be upheld if they are "reasonably related to a legitimate governmental interest such as the public health, safety, or welfare." *Robertson v. City and County of Denver*, 874 P.2d 325, 331 (Colo. 1994). No one disputes that protecting the safety of bicyclists and motorists falls in this category. However, Defendants insist that the "Stolfus Study" issued on October 13, 2009, and upon which the City based its Ordinance 2010-3 does not provide any findings regarding bicycle safety. Opening Brief at 32-33. This is beyond belief. The Stolfus Study specifically states that it is a "Bicycle Compatibility Analysis." It logically follows that if a street is not compatible with bicycles, then it is unsafe for bicycles. Furthermore, the photographs in the Stolfus Study are specifically labeled as "poor roadway condition," "hazards within roadway," and "roadside hazards." "Hazard" means unsafe. Finally, in its Findings, the Stolfus Study states that there is very low bicycle compatibility. The City's Ordinance 2009-20 that amended the MTC

specifically used the word “incompatible” as a basis for amending Section 8-111 of the Municipal Code to delete the requirement of an alternative bicycle route in § 109(11) of the MTC, as adopted by the City. The City’s action in reviewing and relying upon the Stolfus Study in passing Ordinance 2010-3 was in no way arbitrary or capricious, or without a rational basis in fact, and must be upheld. *See People v. Rosberg*, 805 P.2d 432, 438 (Colo. 1991).

To further assuage any concerns that the City’s prohibition of bicycles on Gregory Street, the street that connects Central City to Black Hawk, is not irrational, it is important to note that the affected portion is under 1600 feet long. The Town of Hayden, as set forth above, has banned downhill bicycle traffic on a portion of one street. There is no alternate route within 450 feet, and when asked what a bicyclist could do, the Town responded that it is about one-quarter of a mile long and people often walk it, with their bicycles, which is allowed. Bicyclists can do the same for 1600 feet through the City on Gregory Street. In their Petition for Certiorari, Defendants cite to many bicycling groups and tours that state they changed their routes so that they avoided Black Hawk. However, the League asks the Court to take judicial notice of Article X, Section 6-331 to -338 of the Black Hawk Municipal Code regarding “Special Event Permits.” These tours could apply for such permits to utilize Gregory Street for such an event. Many cities and

towns have closed local roads to vehicular traffic for special events, including bicycle races, which were held in the streets.<sup>3</sup>

In sum, the City's prohibition of bicycles on certain streets passes the rational basis test, and the district court's decision should be upheld. Courts should not begin the practice of re-writing professional and expert reports based upon the use of words like "compatibility" in lieu of "safety," or substitute their judgment for that of a local government who is familiar with the conditions of its local roadways and has engaged expert professionals to analyze them. To do so would call into question nearly every local ordinance for health, safety and welfare.

### CONCLUSION

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

Respectfully submitted this 22<sup>nd</sup> day of February, 2012.

COLORADO MUNICIPAL LEAGUE

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<sup>3</sup> See, e.g. <http://rfta.us/going-green/pro-cycling-tour-in-aspen> - Monarch Street closed from Durant St. to Hyman Ave. on 8/23, on 8/24 Main St., Hopkins Ave., Hyman Ave., and Cooper St. from Original through Monarch St.....)

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## CERTIFICATE OF SERVICE

The undersigned herein certifies that on this 22nd day of February, 2012, 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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