COLORADO SUPREME COURT Colorado State Judicial Building Two East 14th Avenue Denver, CO 80203	
COURT OF APPEALS, STATE OF COLORADO Hon. Judge Miller; Sternberg and Rothenberg, JJ., concur Appeals Court Case No. 14CA1869 Pitkin County District Court No. 12CV224 Honorable John F. Neiley, Judge	**▲COURT USE ONLY ▲**
Petitioners: Colorado Union of Taxpayers Foundation, v. **Respondent:** City of Aspen; Steve Skadron; Adam Frisch; Art Daily; Ann Mullins; and Bert Myrin, all in their official capacities as members of the Aspen City Council.	Case No: 2016SC377
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BRIEF OF *AMICUS CURIAE* COLORADO MUNICIPAL LEAGUE IN SUPPORT OF RESPONDENTS

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 29 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The amicus brief complies with the applicable word limit set forth in C.A.R. 29(d).

☒ It contains 3,167 words (does not exceed 4,750 words).

The amicus brief complies with the content and form requirements set forth in C.A.R. 29(c).

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 29 and C.A.R. 32.

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TABLE OF CONTENTS

CERTIFICATE OF COMPLIANCE i
TABLE OF AUTHORITIES iii
INTEREST OF AMICUS CURIAE 1
ARGUMENT 2
A. Innumerable State and Local Fees Exist Under Current Tax and Fee Jurisprudence. 2
1. Overview of Tax and Fee Jurisprudence. 2
2. Waste Reduction Fee. 5
3. A Stricter Fee Standard Unreasonably Restricts Municipal Power. 7
4. Municipal Fees May Influence Behavior. 10
B. The Beyond a Reasonable Doubt Standard Preserves the Separation of Powers and Municipal Police Power. 12
CONCLUSION 14
CERTIFICATE OF SERVICE 15

TABLE OF AUTHORITIES

Cases

Barber v. Ritter, 196 P.3d 238 (Colo. 2008)..... 2, 8, 13
Bloom v. City of Fort Collins, 784 P.2d 304 (Colo. 1989)..... 2, 3, 4, 5
Bruce v. City of Colorado Springs, 131 P.3d 1187 (Colo. App. 2005)..... 3, 4, 8
In re Submission of Interrogatories on House Bill 99-1325, 979 P.2d 549 (Colo. 1999) 13
Rathke v. MacFarlane, 648 P.2d 648 (Colo. 1982).....12
Tabor Found. v. Colorado Bridge Enter., 353 P.3d 896 (Colo. App. 2014).....3, 4
Tabor Found. v. Regional Transp. Dist., No. 15CA0582, 2016 WL 3600286 (Colo. App. June 30, 2016).....12
Western Heights Land Corp. v. City of Fort Collins, 362 P.2d 155 (Colo. 1961) 3
Woldt v.People, 64 P.3d 256 (Colo. 2003) 12
Zelinger v. City and Cnty. of Denver, 724 P.2d 1356 (Colo. 1986) 3, 8

The Colorado Municipal League ("CML"), by undersigned counsel and pursuant to C.A.R. 29, submits this brief as amicus curiae in support of Respondents, the City of Aspen, Steve Skadron, Adam Frish, Art Daily, Ann Mullins and Bert Myrin, in their official capacities as members of the Aspen City Council (collectively, the "City").

INTEREST OF AMICUS CURIAE

CML was formed in 1923. The League is a non-profit, voluntary association of 269 of the 272 municipalities located throughout the State of Colorado (comprising nearly 99 percent of the total incorporated state population), including all 101 home rule municipalities, 168 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. Participation by CML is intended to provide the Court with a statewide municipal perspective because the outcome of this case will impact all cities and towns in Colorado.

Colorado municipalities and other local governments have relied on the Court's fee setting precedents to impose various types of fees, including voluntary fees for use of utility and recreation services and facilities, and involuntary fees for storm drainage, street lighting, and transportation purposes. The Colorado Union of Taxpayers Foundation ("CUT") proposes criteria that will significantly alter the

framework under which local governments in Colorado set fees pursuant to their police powers. These new standards will invite chaos by requiring unattainable fee structures for municipal governments. CUT also recommends that the Court abandon its long-established "beyond a reasonable doubt" standard of review for constitutional matters, which will invite an indeterminable increase in municipal litigation on fee jurisprudence. CML and its members fear the adoption of CUT's proposed criteria and abandonment of the beyond a reasonable doubt standard will unduly restrict the ability of municipalities to perform essential duties in regulating for the welfare and safety of communities.

ARGUMENT

A. Innumerable State and Local Fees Exist Under Current Tax and Fee Jurisprudence.

1. Overview of Tax and Fee Jurisprudence.

The Court has long held that a tax raises revenues to defray the general expenses of government, while a fee charged to persons or property defrays the cost of a particular government service. *See, e.g., Barber v. Ritter*, 196 P.3d 238, 249 (Colo. 2008); *Bloom v. City of Fort Collins*, 784 P.2d 304, 308 (Colo. 1989). In distinguishing taxes from fees, "the dispositive criteria is the primary or dominant purpose of such imposition at the time the enactment calling for its collection is passed." *See, e.g., Barber*, 196 P.3d at 249 (citing *Zelinger v. City*

and Cnty. of Denver, 724 P.2d 1356, 1358 (Colo. 1986)). If the language set forth in the ordinance imposing a charge states that the primary purpose for the imposition is to finance or defray the cost of a service, the charge is a fee. *See id.* (citing *Western Heights Land Corp. v. City of Fort Collins*, 362 P.2d 155, 158 (Colo. 1961)).

Fees may convey benefits on individuals who pay the charge, as well as those who do not. For example, in *Bloom*, the Court upheld a transportation utility fee imposed on owners of developed properties to raise revenues for road maintenance. Owners of undeveloped land did not pay the fee, but nevertheless still used the roads. The Court determined the transportation utility fee was a fee, not a tax. *See Bloom*, 784 P.2d at 308. As the trial court noted, "[h]ad the [*Bloom*] Court believed that the services generated by the fee had to be limited only to those properties that paid the fee, it certainly would have said so." *See* R. CF. pp. 408-409.

An individual who pays a fee need not use the services funded by the fee. *See Tabor Found. v. Colorado Bridge Enter.*, 353 P.3d 896, 904 (Colo. App. 2014), cert. denied, *Tabor Found. v. Aden*, No. 14SC766, 2015 WL 3956128, at *1 (Colo. June 29, 2015); *see also Bloom*, 784 P.2d at 308; *Bruce v. City of Colorado Springs*, 131 P.3d 1187, 1190 (Colo. App. 2005). In *Bridge Enterprise*, the court

considered whether a fee imposed by the Colorado Bridge Enterprise ("CBE") for bridge maintenance constituted a tax or a fee. The TABOR Foundation argued that because CBE only maintained 168 of the 3,500 bridges in the State, some fee payers may never use any of the CBE bridges. *Id.* at 902. The TABOR Foundation further argued that some "direct nexus or physical connection" must exist between an individual's use of the service funded by the fee and the fee paid. The court rejected this argument, holding instead that the fee was "properly imposed on those who are reasonably likely to benefit from or use the service." *Id.* at 904.[1]

To implement a fee, the amount must reasonably relate to the overall cost of the service provided. *See Bruce*, 131 P.3d at 1190 (citing *Bloom*, 784 P.2d at 308). Mathematical exactitude is not required and legislative discretion generally governs the mode of municipal adoption. *See, e.g.*, *Bloom*, 784 P.2d at 308 (upholding a transportation utility fee); *Bruce*, 131 P.3d at 1190 (upholding a street light service charge). The Court generally upholds an ordinance that creates a

[1] Should the Court adopt CUT's proposed criteria of requiring a nexus between the fee payer and the services received, it will effectively overrule the decision of the court of appeals in *Bridge Enterprise*, even after the Court declined to review the *Bridge Enterprise* case. *See Aden*, 2015 WL 3956128, at *1. If the Court adopts CUT's proposed criteria, CML respectfully requests that the Court distinguish the *Bridge Enterprise* holding from the facts at issue in this case.

special service fee and reasonably defrays the cost of a particular service provided by the municipality. *Bloom*, 784 P.2d at 308.

2. Waste Reduction Fee.

In this case, City Ordinance No. 24 (the "Ordinance") added a chapter entitled "Waste Reduction" to the City's Municipal Code. The City enacted the Ordinance to "conserve resources, reduce greenhouse gas emissions, waste and litter, and to protect the public health and welfare, including wildlife, all of which increases the quality of life for the City's residents and visitors." R. CF. p. 88. The legislative declaration section of the Ordinance noted that both single use plastic bags and single use paper bags cause negative impacts to the environment, and City residents bear the cost of disposing these bags. Due to this need to regulate the use of disposable bags, the Ordinance prohibits grocers from providing single use plastic bags and imposes a fee on customers who choose to use single use paper bags (the "Waste Reduction Fee").

The proceeds of the Waste Reduction Fee fund multiple services related to the fee, including: providing reusable bags to residents and visitors; educating residents, businesses, and visitors about the impact of waste on the environment; funding programs and infrastructure to reduce waste and encourage recycling; purchasing and installing equipment designed to minimize pollution; funding

community cleanup events; maintaining a website that educates residents on the progress of waste reduction efforts; and paying for the administration of the waste reduction program. C. RF. p. 92. Some fee payers receive direct or tangible benefits such as a reusable bag, the use of trash receptacles, or waste reduction education. The Waste Reduction Fee also enables the City to sustain the environmental quality of the City by providing regulatory and service activities which more broadly benefit all residents, visitors, and businesses within the City, whether they pay the Waste Reduction Fee or not. *See* Section A.1, *supra*.

The City carefully considered the programmatic costs when setting the Waste Reduction Fee. In its analysis, the City reviewed a San Francisco study that found that the cost of subsidizing the recycling, collection, and disposal of disposable bags was seventeen cents per bag. R. CF. 409. Considering factors unique to the City, such as its distance from recycling markets, the smaller size of its waste stream as compared to that of the City of San Francisco, and input from the community, the City set its Waste Reduction Fee at twenty cents per bag. R. CF. 409.

The City provided for the deposit of Waste Reduction Fee receipts to a dedicated account designated the "Waste Reduction and Recycling Account," separate from the City's General Fund. While an isolated fund is not required for a

fee, the separation of the receipts from the general fund indicates that the City limits the use of the fee revenues for specific purposes such as waste reduction and recycling. This exemplifies the relationship between the Waste Reduction Fee and the administration of the services funded with the fee. *See Marcus v. Kansas*, 170 F.3d 1305, 1311 (10th Cir. 1999) (rejecting the characterization of charge as "tax," explaining that "the governing statute expressly ties these monies to the administration of the motor vehicle registration laws.").

3. A Stricter Fee Standard Unreasonably Restricts Municipal Power.

In accordance with the Court's existing tax and fee jurisprudence, the Waste Reduction Fee constitutes a fee because it provides specific waste reduction, management, and education services in the City. The proceeds of the fee fund services both to those who pay and do not pay the Waste Reduction Fee. Because the amount of the Waste Reduction Fee reasonably relates to the services provided, and the use of proceeds is related to the charge, the Waste Reduction Fee constitutes a fee.

CUT seeks to invalidate the Waste Reduction Fee, seven other municipal fees that are imposed on disposable bags[2], and innumerable other state and local

[2] The following jurisdictions impose fees on disposable bags: the Towns of Aspen, Breckenridge, Carbondale, Crested Butte, Telluride and Vail, and the City of Boulder.

fees by creating additional criteria that Colorado's courts have never applied. For instance, CUT argues that the services funded by fee proceeds must exclusively benefit those who pay the fee. R. CF. Petitioner's Opening Brief pp. 15-16. However, the Court declined to impose such a rigid standard in *Barber*, noting that fees "subsidize the cost of governmental services provided to those charged, or to otherwise defray the social costs of their activities." 196 P.3d at 242; *see also* Section A.1., *supra*. In fact, Colorado courts upheld charges as fees despite proceeds conferring benefits on fee payers and non-fee payers alike. *See Zelinger*, 724 P.2d at 1357 (storm drainage facilities fee was a fee even though it was imposed on owners of developed land but may have also benefited owners of undeveloped land); *Bruce*, 131 P.3d at 1190 (street lighting fee paid by property owners also conveyed a benefit on non-property owners).

Colorado governments have imposed several fees that provide a benefit to both fee payers and non-fee payers. *See Barber*, 196 P.3d at 242 (citing C.R.S. §§ 19-3.5-101 et seq.) (fees for dissolution of marriage, legal separation, annulment, and child support used to fund statewide prevention programs for child abuse and neglect); DENVER REV. MUN. CODE § 48-113 (2016) (radioactive waste disposal fee used to regulate, manage, control and dispose of radioactive waste); BRECKENRIDGE TOWN CODE §§ 5-12-1 et seq. (2016) (disposable bag fee used to

defray costs of bag disposal and to provide reusable bags to residents and visitors). Proceeds from these fees generate revenues for specific services. Requiring a fee to exclusively benefit those charged overturns the Court's precedent and invalidates countless State and local fees.

Furthermore, to require a municipality to limit the services funded with fee to those who pay the fee will substantially limit the types of regulatory fees that municipalities impose. For instance, the City of Aurora ("Aurora") enacted an ordinance to establish a master plan for the planting and maintenance of trees on public streets. The ordinance includes the imposition of a tree planting fee paid by developers of single-family homes constructed in residential zones. *See* AURORA MUN. CODE § 142-31. The number of feet fronting the property determines the fee. Funds from the tree planting fee pay for the planting of a tree every 45 feet in single family zoned premises. Proceeds of the fee may also fund the planting of trees in other areas of Aurora. Thus, some owners of non-residential property may benefit from the tree planting fee even though they do not pay the fee, and there is no guarantee that a property on which a fee is imposed receives a benefit equal to the value of the fee paid. If the Court determines that the proceeds of a fee must exclusively benefit payers, Aurora will be forced to substantially alter its comprehensive master plan for planting and maintenance of trees. The

consequences of requiring fee proceeds to directly benefit a fee payer or property encroaches upon municipal authority to impose regulatory fees pursuant to their police powers. Accordingly, CML urges the Court to uphold the current criteria for determining an imposition for the fee.

4. Municipal Fees May Influence Behavior.

CUT and the TABOR Foundation, as Amicus Curiae, argue that the Waste Reduction Fee constitutes a "sin tax" because it seeks to impact behavior. R. CF. Petitioner's Opening Brief pp. 23-25; R. Brief of Amicus Curiae Filed on Behalf of CUT. This comparison misses the important distinctions between taxes and fees, namely, that sin taxes are not set in relation to societal costs and that the primary purpose of a tax is to raise revenue. Sin taxes also do not reflect the requirement that there be a reasonable relationship between a fee and the use of the revenue generated by that fee. For example, Colorado's consumer cigarette tax distributes fifteen percent of the money collected to the general fund, and eighty-five percent to the old age pension fund. C.R.S. § 39-28-110. These amounts do not relate to offsetting the health or education costs of society's cigarette use. To the contrary, sin taxes typically generate revenue for general government purposes. *See* C.R.S. 39-28.8-501(2)(b)(1) (allowing the general assembly to appropriate money in the Marijuana Tax Cash Fund for any purpose).

Additionally, the Court has never held that a fee constitutes a tax simply because it may impact behavior. For this reason, several municipalities currently impose regulatory fees for the health, safety, and welfare of their citizens that arguably impact behavior. For instance, the City and County of Denver imposes a licensing fee on owners of dogs and cats that are not spayed or neutered. *See* DENVER REV. MUN. CODE § 8-65. The purpose of that fee promotes the welfare of Denver residents by reducing the number of stray dogs and cats, which may carry and spread disease. *Id.* at § 8-70. Furthermore, many municipal utilities encourage conservation among water or electric users by implementing an inverted pricing structure. The Town of Georgetown's Water and Sewer Fee Schedule charges users of less than 17,000 gallons per water $8.32 per 1,000 gallons. The price per 1,000 gallons of water for users of 17,000 to 27,000 gallons of water increases to $8.73. Several municipal fees will be invalidated if the Court strikes fees that may influence behavior.

Changing the criteria for determining what is a fee will require local governments to hold TABOR elections each time a new regulation is proposed with a commensurate fee for its proper administration. Emerging issues, such as the need to implement regulatory schemes for medical or retail marijuana, will be hampered by additional red tape. Municipalities need the flexibility to implement

regulatory schemes that address the complex and rapidly evolving challenges confronting modern cities.

A change in criteria for determining what constitutes a fee negatively impacts municipal regulation of the health, safety, and welfare of their citizens. For these reasons, CML encourages the Court to decline to hold that a municipal fee constitutes a tax simply because it impacts consumer behavior.

B. The Beyond a Reasonable Doubt Standard Preserves the Separation of Powers and Municipal Police Power.

Any enacted municipal law is presumed to be constitutional unless proven otherwise beyond a reasonable doubt. *See, e.g.*, *Rathke v. MacFarlane*, 648 P.2d 648, 655 (Colo. 1982). The heavy burden imposed by the beyond a reasonable doubt standard highlights the respect of "the roles of the legislative and executive branches." *See Woldt v. People*, 64 P.3d 256, 266 (Colo. 2003). Notwithstanding CUT's suggestion that the beyond a reasonable doubt standard is outdated, Colorado courts have declined to abandon the beyond a reasonable doubt standard. *See, e.g., Tabor Found. v. Regional Transp. Dist.*, No. 15CA0582, 2016 WL 3600286, at *4 (Colo. App. June 30, 2016).

An even greater presumption of constitutionality applies to an ordinance enacted pursuant to a municipality's police power. *Rathke*, 648 P.2d at 655. Pursuant to the City's police power to impose regulatory fees, the City

implemented the Waste Reduction Fee. The heavy burden of the beyond a reasonable doubt standard reflects an appropriate level of scrutiny for any municipal ordinance.

Moreover, the Court has "consistently rejected readings of TABOR that would hinder basic functions or cripple the government's ability to provide services." *Barber*, 196 P.3d at 248; *see also In re Submission of Interrogatories on House Bill 99-1325*, 979 P.2d 549, 557 (Colo. 1999) (rejecting an interpretation of Amendment 1 that would "cripple the everyday workings of government"). Should this Court abandon the beyond a reasonable doubt standard, the Court will effectively overturn its previous holdings in *Barber* and *House Bill 99-1325*, inviting litigation, increasing costs, and causing fiscal uncertainty. In so doing, the Court will limit the ability of municipal governments to budget and plan for new fee driven programs that effectively respond to the needs of their respective communities.

Finally, Colorado courts reviewing challenges to regulatory fees will be required to impose the vague standard of "restraining the growth of government" while balancing a municipality's ability to impose regulatory fees. These competing standards will create inconsistencies as to the permissible exercise of municipal police power across the State. Most importantly, it will cause judicial

preference to supplant legislative determination. CML respectfully requests in the interest of its member municipalities and the citizens thereof, that the Court decline to abandon the beyond a reasonable doubt standard.

CONCLUSION

For the foregoing reasons, CML respectfully requests that the Court uphold the City's Waste Reduction Fee and decline to add criteria requiring a direct and limited connection between proceeds of fees and individuals who pay those fees. Furthermore, CML requests that the Court uphold the beyond a reasonable doubt standard to promote fiscal certainty and municipal regulatory authority.

Respectfully submitted this 23rd day of December, 2016.

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CERTIFICATE OF SERVICE

I certify that on the 23rd day of December, 2016, the foregoing document was filed with the court via ICCES. True and accurate copies of the same were served on the following via ICCES:

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