SUPREME COURT STATE OF COLORADO 2 East 14th Avenue Denver, Colorado 80203	DATE FILED: September 26, 2019 11:33 AM FILING ID: C047D625576D7 CASE NUMBER: 2018SC793
On Certiorari to the Colorado Court of Appeals Court of Appeals Case No. 2017CA1663 El Paso County District Court, 2017CV30105	
Petitioners: Raymond Decker and Forest View Company, v. **Respondent:** Town of Monument, A Statutory Municipality of the State of Colorado.	▲ **COURT USE ONLY** ▲
Attorneys for *Amicus Curiae* the COLORADO MUNICIPAL LEAGUE: Laurel A. Witt, Staff Attorney, #51188 David W. Broadwell, General Counsel, #12177 Colorado Municipal League 1144 Sherman Street Denver, Colorado 80203 Phone: (303) 831-6411 Fax: (303) 860-8175 Email: lwitt@cml.org; dbroadwell@cml.org	Supreme Court Case No: 2018SC793

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

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with 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 3,243 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.

COLORADO MUNICIPAL LEAGUE

/s/ Laurel A. Witt
Laurel A. Witt, #51188
1144 Sherman Street
Denver, CO 80203-2207
Phone: 303-831-6411
Fax: 303-860-8175
E-mail: lwitt@cml.org
Staff Attorney, Colorado Municipal League

Attorney for Amicus Curiae

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ISSUES ON APPEAL

Whether the Court of Appeals was in error interpreting the Colorado Supreme Court's decision in *Smith v. Clifton Sanitation District*, 300 P.2d 548 (1956), that a restrictive covenant proscribing certain uses of property is not a compensable property interest in the context of an eminent domain case, and in the process created a significant exception to the takings clause of the Colorado Constitution, Article II, Section 15.

IDENTITY AND STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Colorado Municipal League (the "League" or "CML") is a non-profit, voluntary association of 270 of the 272 municipalities located throughout the state of Colorado (comprising 99 percent of the total incorporated state population), including all 102 home rule municipalities organized under Article XX of the Colorado Constitution, 168 of the 170 statutory municipalities, all municipalities with populations greater than 2,000, and the vast majority of those having a population of 2,000 or less. The League has been appearing as an *amicus curiae* 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 decision the Court renders in this case will affect all of the League's member municipalities. Like the Town of Monument, all municipalities in Colorado can exercise the power of eminent domain in accordance with the procedures set forth in Article 1 of Title 38, C.R.S. Every home rule municipality in Colorado independently derives eminent domain authority from Section 1 of Article XX, Colo. Const. *Town of Telluride v. San Miguel Valley Corp.,* 185 P.3d 161 (Colo. 2008). The power of eminent domain permits municipalities to conduct basic municipal functions—such as widening a road or constructing municipal buildings—to provide services concerning the health, safety, and welfare for municipal residents.

In the present case, the Town of Monument strives to erect a water storage tank for the benefit of the town residents, including, of course, the residents of the subdivision in which the water tank will be located. In the ordinary course of conducting basic municipal functions, any municipality may need to condemn all or a portion of a parcel of property, the use of which is constrained by a private restrictive covenant for a purpose such as a municipal water tank. The League, as *amicus curiae*, will provide the Court with a statewide municipal perspective on how upholding or overturning this Court's decision in *Smith v. Clifton Sanitation*

District, 300 P.2d 548 (1956), affects municipalities in Colorado and the everyday business of such municipalities.

STATEMENT OF THE CASE

The League adopts and incorporates by reference the statement of the case as stated in the Answer Brief of the Respondent Town of Monument.

SUMMARY OF THE ARGUMENT

The League supports the Town of Monument in its principal argument that *Smith v. Clifton Sanitation District*, 300 P.2d 548 (1956) (holding that private restrictive covenants cannot restrict the power of eminent domain), should be upheld and applied to the facts of the instant case. Additionally, the League supports the assertion of the Town that *Smith v. Clifton* does not violate the takings clause of the Colorado Constitution, Article II, Section 15. However, if the Court decides to overturn[1] *Smith v. Clifton*, the League argues that the Court should narrow the applicability of the requirement that private restrictive covenants are compensable property.

[1] The League acknowledges that, in their Opening Brief, the Petitioners do not appear to expressly call for the "overturning" of the *Smith v. Clifton* decision. Instead, they primarily appear to argue that the holding in *Smith v. Clifton* should not be "extended" to the facts of the instant case. However, because the League agrees with the Town of Monument that the practical result of the Petitioners' argument may lead to a determination that restrictive use covenants constitute a compensable property interest in any eminent domain action, the League characterizes this as a plea for this Court to "overturn" the fundamental holding in *Smith v. Clifton*.

If the Court overturns *Smith v. Clifton*, municipalities will be required to undertake the eminent domain proceedings set forth in Title 38 of the Colorado Revised Statutes for *every* home in the private residential covenant, rather than the ones directly affected by the taking of the property. With the continued development of subdivisions around the state and the popularity of private restrictive covenants, this requirement could impose the significant Title 38 burden for hundreds or thousands of homes for something as simple as widening a road to allow for better traffic flow.

Therefore, if the Court does overturn *Smith v. Clifton*, this Court should *limit* the applicability of such a rule so as to allow municipalities to use constitutionally derived eminent domain powers, without the overwhelming burden imposed by private restrictive covenants. Many states around the country that do require compensation for private restrictive covenants also provide various narrowing principles, such as limiting damages, placing the burden of proof on the landowner to show the diminution of value, and disallowing compensation for restrictive covenants created in bad faith, such as the facts at issue in *Smith v. Clifton*. Providing clarity and narrowing the requirements of compensation will greatly assist municipalities in their efforts to conduct basic functions for residents in their respective jurisdictions.

ARGUMENT

I. The League supports the primary argument of the Respondent to uphold *Smith v. Clifton*.

The League supports the Town of Monument in its principal argument that *Smith v. Clifton Sanitation District*, 300 P.2d 548 (1956), should be upheld and applied to the facts of the existing case, recognizing that private restrictive covenants are not compensable property interests in the eminent domain context. The Petitioner urges this Court to overturn a decades' old precedent to align with other states around the country.[2] However, the states who deny compensation for private restrictive covenants put forth reasoning for refusing compensation to which the Court can look when deciding whether to uphold *Smith v. Clifton*. One common reason is the practical difficulties of effectuating such a rule.

Municipal governments use eminent domain powers to condemn property for the purpose of, for example, building or widening a road, either condemning entire lots in a subdivision or a portion of certain lots in a "partial take" scenario. The latter poses the greater concern to municipalities, if this Court were to abrogate *Smith v. Clifton*. For example, consider the common circumstance in which a municipality may need to widen an arterial street on the boundary of a covenant-

[2] Approximately half of the states have not yet ruled on whether compensation must be given for private restrictive covenants. The states that have ruled on the topic fall under either a "majority" or "minority" rule, a misnomer. *See* 4 A.L.R.3d 1137; 2 Nichols on Eminent Domain (3d ed. 1970) § 5.73.

controlled subdivision. The project may require the taking of a ten-foot strip from the yards of some of the lot owners within the subdivision, which obviously requires payment of compensation to the affected lot owners. Should every other lot owner in the subdivision also be entitled to just compensation on the theory that the expanded street is not a permitted use of any platted lot within the subdivision?

In *Anderson v. Lynch*, 3.S.E.2d 85 (Ga. 1939), a Georgia county purchased a lot for use of a public road. Residents of the surrounding properties brought an inverse condemnation action before the courts, asking for an injunction or damages due to the private restrictive covenant limiting the lot to residential use. *Id*. The Supreme Court of Georgia looked at the practical problems resulting from a holding that a private restrictive covenant creates a property interest, warranting compensation:

> Appellees' contention, if carried to its extreme, is that, if there was an addition to the city in which there were 10,000 lots, the city would be required to serve the owner or owners of each lot in a suit to condemn any one of such lots for public purposes. Such contention, if established as the law governing such matters, would be *practically to prohibit* the city from condemning property so situated for public use; it would at least greatly restrict the rights of the city to condemn property for public purposes. It is apparent that, if it could not do so in cases where the owners of lots are 10,000 or more in number, it could not do so when they are 1,000 or 1,500 in number.

Id. at 88 (quoting *City of Houston v. Wynne*, 279 S.W. 916, 919 (Tex. Civ. App. 1925)(emphasis added)). The Court continued, "we cannot escape the conclusion that the plaintiffs have no property interest in the lot… the most that can be said is

that the restrictive covenants on which they rely are enforceable as between the parties thereto…" *Id*. at 89. With recognition that caselaw leaned in favor of the majority rule, Georgia held the private restrictive covenants did not convey interest in land which warranted compensation. *Id*. at 90.

Similarly, the Alabama Supreme Court held that private restrictive covenants are not compensable property interests for purposes of eminent domain. *Burma Hills Dev. Co. v. Marr*, 229 So.2d 776 (Ala. 1969). In this case, a development company condemned a portion of a lot to build a road in a subdivision for one dollar. A nearby landowner within the private restrictive covenant sued the development company, claiming the partial take violated the covenant. *Id*. The Court held that private restrictive covenants are not property rights, and that these covenants do not vest in owners of other land rights for which compensation must be made if the lands are "devoted to public use." *Id*. at 781. The Court reasoned, "[w]ere we to recognize a right of compensation in such instances, it would place upon the public an *intolerable burden wholly out of proportion to any conceivable benefits* to those who might be entitled to compensation" *Id*. at 782 (emphasis added). Before concluding, the Court noted that it "should consider practical matters and problems as well as theories." *Id.*

In addition to practical problems, other state courts have held that use restrictions were not intended to bind public improvements; that these restrictions are void as against public policy because they infringe on the rights of governments to exercise eminent domain powers; and that the private restrictive covenants are merely contractual rights to which the condemning authorities are not a party to. *See, e.g.*, *Wells, State ex rel. v. City of Dunbar*, 95 S.E.2d 457 (W. Va. 1956) (reasoning that allowing compensation would greatly inconvenience or even defeat the ability of government to property exercise its right to eminent domain); *Bd. of Public Instruction v. Bay Harbor Islands*, 81 So.2d 637 (Fla. 1955) (enforcing private restrictive covenants against the government would be against public policy and therefore void). *See also* 4 A.L.R.3d 1137; 2 Nichols on Eminent Domain (3d ed. 1970) § 5.73.

II. Alternatively, if this Court decides to overturn its prior holding in *Smith v. Clifton*, the rule should be applied narrowly.

If this Court overrules the holding in *Smith v. Clifton*, the League respectfully urges the Court to narrow its holding. A narrower holding would, for example, help municipalities with the practical difficulties of implementing eminent domain proceedings on hundreds or thousands of landowners contractually within private restrictive covenants. Otherwise, if this Court does not permit a narrower rule, the

high cost will deter local governments from effectuating essential municipal functions, such as widening a road or building a water tower.

a. If this Court does not narrow the majority rule, municipalities will be burdened with a high cost and little alternatives for basic municipal services.

If this Court overturns *Smith v. Clifton*, municipalities statewide would be hard-pressed not only to compensate numerous homeowners in covenant-controlled subdivisions, but also to follow eminent domain proceedings outlined in Title 38 of the Colorado Revised Statutes. To conform with Title 38, a municipality would need to (a) provide adequate notice to each of the record landowners and, if the estimated value of the property interest is $5,000 or more, notify the right to appraise the property paid for by the condemning authority; (b) show that the condemning authority has negotiated in good faith with the landowners and show a failure to agree on the amount of compensation to be paid or that the negotiation is futile; (c) make a final written offer to the landlord; (d) serve each party with a summons and copies of the court pleadings; etc. *See* C.R.S. §§ 38-1-121; 38-1-102. The municipality, without a narrow ruling from this Court, would need to go through this process with all landowners in a covenant-controlled subdivision and for every type of eminent domain, including condemnation proceedings for a piece of a property for a road widening. Many municipalities do not have alternative

locations for these basic municipal functions, either due to the size of the municipality or access to the community the municipality is trying to serve. This presents an impossibility: a municipality would need to abandon essential municipal services, such as purchasing a lot for a water tank, because the cost and burden is too high in neighborhoods with a *private* restrictive covenant.

The California Supreme Court, in deciding to compel compensation for private restrictive covenants, opined on the practical difficulties of such a requirement without providing a workable solution. *S. Cal. Edison Co. v. Bourgerie*, 507 P.2d 964, 968 (Cal. 1973). "As a practical matter some takings would result in negligible damage to the owners…As the procedural difficulties, while they are not here involved and we need not decide on the issue…" *Id*. Rather than address the practical difficulties, the Court hypothetically states that the condemning authority *could* selectively join landowners whose "property is more likely to be damaged by the violation" and that "other remedies" exist for excluded property owners, without describing what those remedies are. *Id*.

The California Supreme Court leaves many questions unanswered, causing confusion for condemning authorities such as municipalities. Which landowners need to be included in eminent domain proceedings? Does the condemning authority include the numerous landowners, despite the likelihood that many would

have nominal damage awards? How can these authorities follow a broad sweeping rule without any guardrails? Unanswered questions beg for future litigation and ongoing uncertainty for municipalities, who will avoid projects essential for municipal governance, rather than engage in potentially costly eminent domain proceedings and litigation.

The New Mexico Court of Appeals provided more guidance for condemning authorities, but the guidance leaves a heavy burden on municipal taxpayers. *Leigh v. Los Lunas*, 108 P.3d 525 (N.M. 2004). In this case, landowners brought an inverse condemnation claim against the Village of Los Lunas for constructing a drainage pond that violated the private restrictive covenants of the subdivision. *Id*. at 528. The Court, after thorough discussion of New Mexico and other state law, held that private restrictive covenants are deemed property interests in New Mexico that require compensation. *Id.*

The New Mexico Court of Appeals then turned to the question of damages. The Court opined that "the proper calculation of damages for the taking of a restrictive covenant is the difference between the fair market value of the property benefitted by the covenants immediately before and immediately after the taking." *Id*. at 532. Courts award property owners damages for the diminution in value to their property. This type of process— evaluating the change in fair market value—

is time consuming for appraisers, who are paid for by the condemning authority at the expense of taxpayers.[3] Additionally, under New Mexico law (as in Colorado), the burden of paying for an appraiser would fall on a municipality, whether or not the landowner is awarded compensation for diminution in value to their property. Further, a jury awards damages in New Mexico meaning the municipality, at its own expense, has to pay for any lawsuit brought by a landowner, whether or not the landowner receives any compensation reward.

b. The Court should consider minimizing the cost of litigation for municipalities to minimize the overwhelming burden brought on by the majority rule.

This Court should consider abating some of the costs of litigation and the ultimate damage award. Damages should not be the same for landowners across the subdivision, who are both next to the widened road and across the subdivision from it. The costs of appraisal and litigation is high and particularly problematic with landowners receiving little to no compensation or landowners entering private restrictive covenants in bad faith (i.e., for the purpose of receiving compensation).

Many states that recognize private restrictive covenants as property rights also apply narrowing principles to allow for these complications. For example, the

[3] A traditional inverse condemnation proceeding can use the diminution in fair market value of the property to assess damages. However, private restrictive covenants cover many more properties and each property may have a different diminution number, creating a large amount of work for appraisers at the expense of the municipality, and therefore the expense of taxpayers.

Nevada Supreme Court held that after notice of an eminent domain proceeding, the burden is on the plaintiff to appear and establish loss, and to show the difference in market value before and after the taking. *See Meredith v. Washoe Cty. Sch. Dist.*, 435 P.2d 750 (Nev. 1968).[4] Additionally, South Carolina, New York, and California have suggested limitations on damages to limit the amount of liability a condemning authority has. *See Sch. Dist. No. 3 of Charleston Cnty. V. Ctry. Club of Charleston*, 127 S.E.2d 625 (S.C. 1962) (the claimants, a country club that had no interest in the land other than as a mortgagee, were entitled to nominal damages only); *Rittenhouse v. Haines*, 185 N.Y.S.2d 714 (N.Y. 1959) (holding that a private restrictive covenant limiting the use of property to residential use only entitled the landowners to nominal damages for the taking and consequential damages less benefits derived from the construction of an elementary school); *S. Cal. Edison Co. v. Bourgerie*, 507 P.2d at 968 (notating that if landowners enter into private restrictive covenants in bad faith solely for collecting compensation, a court could refuse compensation).

Requiring "just compensation" for harm to private use covenants without guardrails would allow every landowner in a covenant-controlled subdivision to

[4] In Colorado, this burden arguably exists already from previous precedent in condemnation actions.. *See, e.g.*, *Troiano v. Colo. Dept. of Highways*, 463 P.2d 448 (Colo. 1969) (holding the property owner has burden of proof in condemnation case with regard to establishing existence of damages and amount of compensation); *Bd. of Cty. Comm'rs of Weld Cty. v. Highland Mobile Home Park, Inc.*, 543 P.2d 103 (Colo. App. 1975) (holding that the condemning authority must negotiate a purchase before proceeding with a condemnation action, but the burden of proof on condemning authority is only to establish that a good-faith attempt was made to agree upon compensation).

claim damages at the expense of all municipal taxpayers. This approach would unduly limit municipalities in the exercise of their constitutionally-guaranteed eminent domain powers.

CONCLUSION

For the reasons set forth above, the League respectfully urges the Court to uphold *Smith v. Clifton*, reiterating that private restrictive covenants are not compensable property interests, but rather private contractual agreements that do not bear on the right to condemn land for public purposes. Alternatively, if the Court decides to overturn *Smith v. Clifton*, the League urges that the Court narrow the holding through limitation on damages, burden of proof, or other means, thereby addressing the practical problems that municipalities would face.

Respectfully submitted this 26th day of September, 2019.

COLORADO MUNICIPAL LEAGUE

/s/ Laurel A. Witt

Laurel A. Witt, #51188
Staff Attorney
Colorado Municipal League
1144 Sherman Street
Denver, Colorado 80203
Phone: (303) 831-6411
Fax: (303) 860-8175
Email: lwitt@cml.org

/s/ David W. Broadwell

David W. Broadwell, #012177
General Counsel
Colorado Municipal League
1144 Sherman Street
Denver, Colorado 80203
Phone: (303) 831-6411
Fax: (303) 860-8175
Email: dbroadwell@cml.org

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of September, 2019, the foregoing document was filed with the court via Colorado Courts E-Filing. True and accurate copies of the same were served on the following via Colorado Courts E-Filing:

Richard W. Hanes, Esq.
Brenda L. Bartels, Esq.
Hanes & Bartels LLC
102 South Tejon Street, Suite 800
Colorado Springs, CO 80903

BY: /s/ Laurel A. Witt

Laurel A. Witt, #51188
Staff Attorney
Colorado Municipal League
1144 Sherman Street
Denver, Colorado 80203
Phone: (303) 831-6411
Fax: (303) 860-8175
Email: lwitt@cml.org