Colorado Court of Appeals 2 East 14th Avenue Denver, CO 80203	
Appeal from the Larimer County District Court Hon. Juan G. Villaseńor, Judge Case No. 2014CV30822	
Defendants/Appellants: BOARD OF COUNTY COMMISSIONERS OF LARIMER COUNTY, COLORADO, and COULSON EXCAVATING COMPANY, INC v. **Plaintiffs/Appellees:** THOMPSON AREA AGAINST STROH QUARRY, INC., a Colorado nonprofit corporation, and individuals Dani Korkegi, Gregory Marino, Monique Griffin, Cristi Baldino, Victoria Good, and Arlene Libby	**▲COURT USE ONLY▲**
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BRIEF OF *AMICUS CURIAE*, COLORADO MUNICIPAL LEAGUE, IN SUPPORT OF APPELLANTS

CERTIFICATION

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 3981 words (does not exceed 4,750 words).

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

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.

*s/ David W. Broadwell*_____
David W. Broadwell, #12177

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Amicus Curiae Colorado Municipal League ("CML") respectfully submits the following *Amicus* Brief in Support of the position of Appellants, Board of County Commissioners of Larimer County, Colorado and Coulson Excavating Company, Inc.

INTRODUCTION

CML, formed in 1923, is a non-profit, voluntary association of 270 of the 272 municipalities located throughout the state of Colorado, comprising nearly 99 percent of the total incorporated state population. Its members include all 102 home rule municipalities, 167 of the 169 statutory municipalities and the lone territorial charter city. This membership includes all municipalities greater than 2,000 in population, and the vast majority of those having a population of 2,000 or less.

The governing body of every municipality in the state is composed of elected officials. Many of these elected officials accept political contributions when running for office. All elected municipal officials are subject to the campaign finance reporting provisions of the Colorado Fair Campaign Practices Act, except for those home rule municipalities that have chosen to adopt their own local campaign finance ordinances. § 1-45-116, C.R.S. Likewise all elected municipal officials are subject to state ethics laws such as Article XXVIII of the

Colorado Constitution and the code of ethics set forth in §§ 24-18-101, et seq., C.R.S., as well as an assortment of ethics laws and policies adopted in individual municipalities throughout the state.

Elected officials serving on a municipal governing board perform a wide variety of functions: legislative and other policy making actions; administrative and supervisory functions; and individual decision-making that is sometimes quasi-judicial in nature. Most commonly, quasi-judicial decisions involve land use and development approvals as in the instant case, but many other examples exist such as liquor licensing, action on various types of administrative appeals, and some personnel decisions.

Never before in the history of Colorado has a court ruled that campaign contributions to a local elected official may force a recusal of that official from participation in a quasi-judicial decision on Due Process grounds. Apparently, the ruling of the trial court in this case may also be unprecedented nationwide. If the trial court ruling is affirmed by this Court, it will likely engender mass confusion for local elected officials throughout the state and the attorneys who advise them. It may even cripple the ability of local governing bodies to muster a quorum to make quasi-judicial decisions due to the political connections members of the body may have to those who would be affected by the decision. And most ominously, it

may have the effect of chilling the exercise of First Amendment rights by those running for municipal office in the future as well as those citizens who would contribute to candidate campaigns.

ISSUES PRESENTED FOR REVIEW

From the perspective of CML, the central issue in this case is whether political campaign contributions should ever force the recusal of an elected official serving on the governing body of a local government (such as a county or municipality) from participation in a quasi-judicial decision, absent some other indicia of prejudgment of the matter by the official.

STATEMENT OF THE CASE

CML hereby incorporates by reference any statement of the case, nature of the case, or statement of facts contained in the Opening Brief of the Appellants.

SUMMARY OF ARGUMENT

Anything a candidate for election to a local governing board may have said or done during the course of running for election, including the acceptance of campaign contributions, should not disqualify the candidate from participation in quasi-judicial decision-making if the candidate is elected to office, short of outright prejudgment of a specific quasi-judicial decision to come before the local governing body. It is inappropriate, unrealistic, and contrary to Colorado

precedent to hold a local elected official to the same standard of purity and objectivity as applies to judges under the Judicial Code of Ethics. Colorado law expressly recognizes that campaign contributions reside outside the normal purview of ethics laws prohibiting inappropriate "gifts" and conflicts of interest in decision-making by local elected officials. If the trial court's Order in this case is affirmed on appeal, the decision may have a serious chilling effect on the exercise of First Amendment rights by candidates for local office and their contributors.

ARGUMENT

A. Standard of review.

CML hereby incorporates any discussion of the standard of review as set forth in the Opening Brief of the Appellants.

B. An illustration of the dilemma this case presents for municipalities.

Before proceeding to legal arguments, a concrete example of the challenges facing municipalities if the trial court Order is affirmed on appeal may prove illuminating for the court.

Consider this typical scenario. A resident of a municipality is energized to run for an open spot on her local city council by her concerns over the pace of growth and change in her community. The current council and the entire

community are bitterly divided over growth, but a bare majority on the council is perceived to be "in the pocket of developers" and too amenable to approving any and all new land development proposals. Our hypothetical candidate knows that, if elected, she may actually swing the balance of powers and lead the city in the direction of slow-growth policies. She promises to lend a much more skeptical eye to future development proposals coming before council. Her campaign for office rallies behind her a large cadre of like-minded citizens as well as neighborhood and environmental groups. Some of these may offer campaign contributions, albeit none of the contributions are very large. But cumulatively, this support represents the entirety of the candidate's campaign war chest, and of course represents support for the policies and positions upon which she is running.

Our hypothetical candidate is elected, and indeed becomes the decisive vote in shifting the council's attitude in regard to new development. Shortly after assuming office, she sits in a quasi-judicial capacity to decide whether to grant a site-specific rezoning to pave the way for a new commercial development. She is advised by the city attorney and acknowledges that she must appropriately apply the legal criteria for rezoning and base her decision upon evidence presented at the public hearing. Nevertheless, the applicant for rezoning demands that the new councilmember must recuse herself due to her prejudice against new development,

as reflected in her entire campaign for office.

If the decision by the trial court is affirmed in this case, how will local elected officials and the municipal attorneys who represent them ever be able to determine whether the level and type of support a candidate receives in a political campaign requires the candidate to recuse herself from decisions once she is elected?

C. Prior precedent analyzing judicial standards of conduct have no relevance to this case.

As this Court analyzes and renders a decision in this case, CML urges the Court to focus on prior Colorado precedent that relates to standards of fairness and due process in cases specifically involving local elected officials. Not hearing officers; not administrative officials; not unelected boards and commissions; and certainly not administrative law judges and judicial officers. The body of case law analyzing the fairness of quasi-judicial decisions by elected officials evinces a great deal of sympathy by the courts for the reality that elected officials wear many different hats, both in the policy and political realm, and in the world of case-by-case quasi-judicial decision making.

The Colorado Supreme Court decision in *Manassa v. Ruff*, 235 P.3d 1051 (Colo. 2010), decisively stands for the proposition that the same standards of

ethics, objectivity, and due process that apply to judges do not apply to quasi-judicial decision-makers. It is true that the Supreme Court discussed a case involving judicial recusal in its *Manassa* decision, *Caperton v. A.T. Massey Coal Co., Inc*., 556 U.S. 868 (2009). But the *Manassa* case dealt solely with the objectivity of an unelected "independent medical examiner" in the context of deciding a worker's compensation claim. No appellate court in Colorado has ever applied the reasoning of *Caperton* to the decisions made by an elected member of a city council or board of county commissioners, nor has a Colorado court ever invalidated a quasi-judicial decision by a local governing body on the theory that a political contribution of whatever size or scale tainted the decision.

Indeed, in preparing for this brief, CML reviewed all of the prior briefing of the parties to this case at the trial court level. To date, the Plaintiffs have not yet produced any appellate court decision anywhere in the United States applying the reasoning in *Caperton* to evaluate, let alone invalidate, any decision of any type made by a local elected body such as a city council or board of county commissioners. Remarkably, plaintiffs have not yet cited any precedent in which a campaign contribution of any size required the recusal of a local elected official. Certainly, the trial court likewise cited no such precedent in its order granting the

Plaintiffs' motion for summary judgment on their Due Process theory.

D. Colorado local governing bodies have always enjoyed a strong judicial presumption of integrity in their quasi-judicial decision making.

Since an elected official is, by definition, someone who comes into office representing a defined point of view and political philosophy, the courts consistently apply a deferential standard when evaluating the fairness of individual quasi-judicial decisions. This attitude is reflected in the decisions recounted below, each of which dealt with either a city council or a board of county commissioners.

But first, it is important to illustrate an example of what local elected bodies must not do, *i.e.* take concrete actions demonstrating prejudice on a specific pending quasi-judicial action before the body. This principle was illustrated in the case of *Booth v. Town of Silver Plume*, 474 P.2d 227 (Colo. App. 1970), where: (l) every member of the town board signed a petition expressing opposition to a pending liquor license application, and (2) a subcommittee of the council submitted an investigatory report recommending denial of the application, the Court of Appeals concluded the "applicant was working against a 'stacked deck' and was denied the fair and impartial hearing to which she was entitled."

Other scenarios in which the objectivity of elected officials who are called upon to perform quasi-judicial tasks has reflected a strong tradition of deference by

the courts in Colorado. Each of these reflect actions taken by local elected officials that would never be permitted in the judicial context.

For example, in *Johnson v. City of G1enda1e*, 595 P.2d 701 (Colo. App. 1979), the Court of Appeals analyzed these facts: prior to facing a termination hearing before the whole city council, plaintiff requested an informal hearing, at which two individual council members allegedly expressed their wish that plaintiff be terminated. When plaintiff was later terminated by the council as a whole, the court rejected his procedural Due Process claim, holding: "The mere fact that a Councilmember has learned facts or expressed an opinion is not sufficient in itself to demonstrate that a hearing is unfair."

A decision that Colorado municipalities have relied upon for guidance for many years is *Soon Yee Scott v. City of Eng1ewood*, 672 P.2d 225 (Colo. App. 1983). This case stands for the proposition that a mere "appearance of impropriety" does not invalidate a quasi-judicial decision made by a local elected body. "An adjudicatory hearing will be held to have been conducted impartially in the absence of a personal, financial, or official stake in the hearing evidencing a conflict of interest on the part of a decision-maker. The taking of a public stance on a policy issue related to an upcoming hearing does not, in the absence of a showing of bias, disqualify the decision-maker." (As more fully explained in Part E of this

brief, a campaign contribution should not be deemed to be a "financial stake" in a decision within the meaning of this precedent.)

In *Best v. La Plata County Planning Commission*, 701 P.2d 91 (Colo. App. 1984), the court refused to disqualify a county commissioner on the basis of her prior business relationship with a law firm representing a developer, finding, "plaintiffs failed to overcome the presumption of integrity, honesty, and impartiality in favor of those serving in quasi-judicial capacities."

In *Burns v. City and County of Denver*, 759 P.2d 748 (Colo. App. 1988), the court held that the inclusion of city-owned property in a rezoning protest area (*i.e.* the inclusion of city-owned streets in the 200-foot protest radius around the parcel to be rezoned) does not render the city a "party" to the action and thereby disqualify the city council from acting on the rezoning, when the plaintiff can "point to nothing in the record that overcomes the presumption of integrity, honesty, and impartiality that is accorded those serving in a quasi-judicial capacity."

The case of *Applebaugh v. Board of County Commissioners*, 837 P.2d 304 (Colo. App. 1992), vividly illustrates the way a local elected governing body, in wearing multiple hats, is allowed to do things a judicial officer could never do, in this case acting as both the initiator of an action and the final quasi-judicial

decision maker on the same action. "Here, although the Board [of County Commissioners] was the applicant as well as the decision-maker on the rezoning decision, there is nothing in the record to show it was incapable of judging the issue fairly."

Most recently the claims of Due Process violations in *Whitelaw v. Denver City Council,* 405 P.3d 433 (Colo App. 2017), *cert. denied* (2017), were resolved in a manner consistent with all of the prior precedents in Colorado that tend to grant elected governing bodies the benefit of the doubt. The case involved a highly contested site-specific rezoning: the city council representative for the district in which the rezoning was proposed received, on her private email account, numerous messages from both proponents and opponents of the project, messages that were neither revealed nor placed on the record at the public hearing on the rezoning. Neighbors who opposed the rezoning sued, claiming, *inter alia,* that the very existence of the *ex parte* emails tainted the process and deprived them of due process. The Court of Appeals refused to adopt a *per se* rule on *ex parte* contacts (as would apply in a case involving actual judicial officers), and instead reaffirmed the principle that the burden of proof resides with the plaintiffs to prove that *ex parte* contacts in any way prejudiced the proceedings, and did so in manner sufficient to overcome the presumption of integrity, honesty and impartiality

enjoyed by the council member and the council as a whole.[1]

As more fully addressed in the Opening Brief of the Defendant/Appellants in the instant case, the record in this case is bereft of any specific evidence on the record of prejudice by the county commissioner that would overcome the well-settled presumption of integrity. The trial court simply made the leap to its conclusion that a campaign contribution of a certain scale automatically requires recusal and abstention.

E. The trial court's reasoning is inconsistent with Colorado campaign and ethics laws

Colorado laws draw an analytical distinction between money that is contributed to a campaign committee on behalf of a person who is candidate for election to a public office, and money that is gifted directly to a public official in his or her personal and individual capacity. The trial court Order conflates these two concepts and does not pay due respect to the fact that state law cabins off campaign contributions from "gifts" which would tend to corrupt or unduly influence an elected official in the performance of his or her duties.

The Fair Campaign Practices Act, as reflected in both §§ 1-45-101, *et seq*.,

[1] The *Whitelaw* case also included an allegation that campaign contributions to individual city council members tainted the process, citing *Caperton*, but the plaintiffs failed to adequately preserve this argument.

C.R.S. and Art. XXVIII of the Colorado Constitution, contains extensive, detailed regulations of contributions made to support the candidacy of persons running for office. Fundamentally, the law does not permit such contributions to go directly to the individual, instead they must flow to a "candidate committee account" maintained by a "candidate committee" as defined in Art. XXVIII, Secs. 3(9) and 2(3), Colo. Const. The entire purpose of the FCPA is then to subject these committees to strict levels of accountability so the public can tell who is supporting whom in the election. And, most crucially, campaign funds cannot be siphoned off for personal use by the candidate. The FCPA strictly limits the way unexpended campaign contributions may be spent, and explicitly states: "Except as authorized by §1-45-103.7(6.5), C.R.S.[2] in no event shall contributions to a candidate committee be used for personal purposes not reasonably related to supporting the election of a candidate." §1-45-106, C.R.S.

Now turning to state and local ethics laws, CML would urge the Court to consider the way laws banning or regulating "gifts" to elected officials make a

[2] Sec. 1-45-107(6.5) states: "Notwithstanding any other provision of law, a candidate committee established in the name of a candidate may expend contributions received and accepted by the committee during any particular election cycle to reimburse the candidate for reasonable and necessary expenses for the care of children or other dependents the candidate incurs directly in connection with the candidate's campaign activities during the election cycle. The candidate committee shall disclose the expenditures in the same manner as any other expenditures the committee is required to disclose under section 1-45-108(1)(a)(I)."

distinction for campaign contributions.

For example, the strict gift law adopted by Colorado voters in 2006 as Amendment 41 to the Colorado Constitution says this at Art. XXIX, §3 (emphasis supplied):

> (1) No public officer, member of the general assembly, local government official, or government employee shall accept or receive any money, forbearance, or forgiveness of indebtedness from any person, without such person receiving lawful consideration of equal or greater value in return from the public officer, member of the general assembly, local government official, or government employee who accepted or received the money, forbearance or forgiveness of indebtedness.
>
> (3) The prohibitions in subsections (1) and (2) of this section do not apply if the gift or thing of value is:
>
> (a) A campaign contribution as defined by law;

Likewise, state ethics statutes that predated the adoption of Amendment 41 in 2006 made the same distinction:

> **§ 24-18-104. Rules of conduct for all public officers, members of the general assembly, local government officials, and employees**
>
> (1) Proof beyond a reasonable doubt of commission of any act enumerated in this section is proof that the actor has breached his fiduciary duty and the public trust. A public officer, a member of the general assembly, a local government official, or an employee shall not:
>
> (b) Accept a gift of substantial value or a substantial economic benefit tantamount to a gift of substantial value:

(I) Which would tend improperly to influence a reasonable person in his position to depart from the faithful and impartial discharge of his public duties; or

. . . .

(3) The following are not gifts of substantial value or gifts of substantial economic benefit tantamount
to gifts of substantial value for purposes of this section:

(a) Campaign contributions and contributions in kind reported as required by section 1-45-108, C.R.S. (emphasis supplied)

Finally, many municipal ethics codes make the same distinction in their local gift laws. For example, the following is an excerpt from the Denver Revised Municipal Code:

Sec. 2-60. Gifts to officers, officials, and employees.

The purpose of this section is to avoid special influence by donors who give gifts to city officers, employees or officials.

(a) Except when acceptance is permitted by paragraph (b) below, it shall be a violation of this code of ethics for any officers, officials, or employees, any member of their immediate families to solicit or to accept any of the following items if (1) the officer, official, or employee is in a position to take direct official action with regard to the donor; and (2) the city has an existing, ongoing, or pending contract, business, or regulatory relationship with the donor:

(1) Any money, property, service, or thing of value that is given to a person without adequate and lawful compensation

(b) Officers, officials, and employees and the members of their immediate family may accept the following even if the officer, official, or employee is in a position to take direct official action

> with regard to the donor, or, if the donor is a lobbyist or representative, the donor's client:
>
> (2) Campaign contributions as permitted by law; (emphasis supplied.)

The exception for campaign contributions in each of the foregoing ethics laws reflects a common sense recognition that, given the way such contributions are so highly regulated under campaign finance laws, and given the fact that it would be a clear violation of the First Amendment for an ethics law to attempt to unduly restrict campaign contributions, there must be a distinction and carve-out for campaign contributions in any "gift" law. A campaign contribution does not accrue to the personal benefit and use of a public official in the same way a personal "gift" does and should therefore not be presumed to create prejudice or a conflict of interest when a local elected official makes a decision in a quasi-judicial capacity.

F. If the trial court order is affirmed on appeal, the effect will be to chill the exercise of First Amendment rights.

CML will conclude with another hypothetical. Imagine if Colorado citizens initiated a state constitutional amendment to codify the District Court holding in this case. Perhaps the ballot question would say: "Shall the Colorado Constitution be amended to prohibit any local elected official from taking any official action affecting any person or group of persons who ever

made a substantial or disproportionate campaign contribution to support the official's election to office?" Can there be any doubt that the courts would declare such a measure overbroad, void for vagueness, and a violation of the First Amendment? Even if the ballot question were limited to quasi-judicial actions, would not the result be the same?

The Colorado Supreme Court faced a similar set of facts in the case of *Dallman v. Ritter*, 225 P.3d 610 (Colo. 2010), striking down Amendment 54 of 2008. Amendment 54 would have broadly prohibited sole-source government contractors form making campaign contributions and political candidates from receiving such contributions, all in the name of rooting out corruption and undue influence. In repudiating the entire amendment on First Amendment and other constitutional grounds, the Supreme Court observed: "A contribution limit must 'not undermine to any material degree the potential for robust and effective discussion of candidates and campaign issues by individual citizens, associations, the institutional press, candidates, and political parties.' Subsequent cases have clarified that courts should examine the effect that the restriction will have on the party ultimately using the money for political speech." *Citing Buckley v. Valeo*, 424 U.S. 1, 29 (1976).

If the trial court decision is affirmed in the instant case, it will have

the practical effect of imposing some sort of nebulous, unspecified, *de facto* "contribution limit" on any contributor or candidate who wishes to avoid contributions that will have the effect of forcing the candidate, once elected, to recuse himself or herself from important quasi-judicial decisions. In other words, the trial court decision creates an intractable dilemma. The message to candidates and contributors: Forego your First Amendment rights and eschew contributions that may make it impossible for the elected official to perform one of the most important elements of his or her job, the ability to vote on quasi-judicial decisions that are critical to the health, safety and general welfare of the community the official was elected to represent.

CONCLUSION

For the reasons set forth in this Brief, CML urges this Court to reverse the decision of the trial court and hold that campaign contributions never require the recusal of a local elected official in a quasi-judicial matter, in the absence of any concrete evidence of pre-judgment by the official in the record that would overcome the normal presumption of integrity.

DATED this 25th day of March, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of March, 2020, a true and correct copy of the foregoing **BRIEF OF AMICUS CURIAE, COLORADO MUNICIPAL LEAGUE, IN SUPPORT OF THE DEFENDANTS/APPELLANTS** was served via Colorado Courts E-Filing to the following:

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