SUPREME COURT, STATE OF COLORADO

Case No. 91 SC _____

AMICUS CURIAE BRIEF OF THE COLORADO MUNICIPAL LEAGUE AND THE CITY AND COUNTY OF DENVER ACTING BY AND THROUGH ITS BOARD OF WATER COMMISSIONERS ON BEHALF OF PETITIONER, CITY OF NORTHGLENN

CITY OF NORTHGLENN, COLORADO,

Petitioner,

vs.

JACK J. GRYNBERG,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE COLORADO COURT OF APPEALS
Case No. 90 CA 0721, Division 1
Opinion by Judge Pierce,
Sternberg, C.J. and Marquez, J., concur

Kathleen E. Haddock #16011
Staff Attorney
Colorado Municipal League
1660 Lincoln, Suite 21000
Denver, CO 80264
(303) 831-6411

ATTORNEYS FOR AMICUS CURIAE
COLORADO MUNICIPAL LEAGUE
ON BEHALF OF PETITIONER
CITY OF NORTHGLENN

Patricia L. Wells #10120
Henry C. Teigen #5936
City and County of Denver
Acting by and through its
Board of Water Commissioners
1600 W. 12th Avenue
Denver CO 80254
(303) 628-6460
ATTORNEYS FOR AMICUS CURIAE
CITY AND COUNTY OF DENVER
ACTING BY AND THROUGH ITS
BOARD OF WATER COMMISSIONERS
ON BEHALF OF PETITIONER
CITY OF NORTHGLENN

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

COLORADO REVISED STATUTES

COLORADO CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

COMES NOW the Colorado Municipal League (the League) and the City and County of Denver acting by and through its Board of Water Commissioners (Water Board), by their undersigned attorneys, and pursuant to Rule 29, C.A.R., respectfully submit the following brief as amici curiae in support of the Petitioner, the City of Northglenn.

I. INTRODUCTION

This case concerns whether the state, Colorado municipalities, and other public entities with the power of eminent domain shall be required to pay just compensation to existing or former property owners for any effect on the commercial value of property caused by the public discussion of plans for public projects or by the filing of statutorily required reports, and whether current or former property owners can circumvent the requirements and limitations of the Colorado Governmental Immunity Act by bringing a tort claim as an inverse condemnation claim.

The case at bar arises out of an action by an owner of a mineral estate commenced on several tort claims in 1980. This Honorable Court first recognized the tort of geophysical trespass in Grynberg v. City of Northglenn, 739 P.2d 230 (Colo. 1987). At that time this Court refused to grant the property owners' request for summary judgment in his favor on his tort claims because Northglenn had not had the opportunity to present affirmative defenses such as governmental immunity. 739 P.2d at 239. After that decision, the property owner amended his complaint to include

a claim for inverse condemnation and venue was changed from Denver to where the property was located in Weld County. The trial court proceeded to hearing on the just compensation of the property without finding a taking had occurred by Northglenn. At the hearing, the court did not limit the evidence to evidence of the fair market value of the property, but allowed testimony regarding the tort damages alleged to be caused by Northglenn and independent contractors of Northglenn. The court then gave an incorrect respondeat superior instruction that Northglenn was responsible for the acts of its independent contractors. The Court of Appeals sanctioned the actions of the trial court without addressing the arguments of Northglenn and amici curiae that by allowing evidence of tort damages during a hearing on the fair market value of property allegedly taken, the Court circumvented the monetary and liability limitations of the Governmental Immunity Act, C.R.S. 24-10-101 et seq. The Court of Appeals determined that the acts of Northglenn that cause a taking include

> "the City's unauthorized entry and exploratory drilling on the mineral estate, [the tort recognized by this Court in Grynberg v. City of Northglenn, supra] and the publications of the Chen Report containing geophysical information about the mineral estate that belonged exclusively to plaintiff, which publication damaged the commercial value of his coal lease."

The Chen Report was required to be made and filed to comply with Colorado law to preserve commercial mineral deposits in populace counties. Sections 34-1-301 et seq., C.R.S. The decision of the Court of Appeals is the first case in Colorado which interprets the Colorado Constitution as requiring just compensation

for pre-construction activity of a governmental entity when there is no physical ouster.

II. STATEMENT OF THE CASE

The amici adopt and incorporate herein the statement of the case from the brief of the Petitioner, City of Northglenn.

III. ARGUMENT

A. THE COURT OF APPEALS HAS DECIDED A QUESTION OF SUBSTANCE IN A WAY NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT, OTHER DECISIONS OF THE COURT OF APPEALS, AND HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

1. The Court of Appeals finding of a taking for pre-construction activity not involving a physical ouster is contrary to previous Court of Appeal and Supreme Court decisions.

In order for there to be a taking, there must be a legal interference with the use of the property or a physical ouster of the owner by the condemnor. Lipson v. Colorado Department of Highways, 41 Colo. App. 568, 588 P.2d 390 (1978); Kratzenstein v. Board of County Commissioners, 674 P.2d 1009 (Colo. App. 1983). The Court of Appeals cites these cases, but ignores the holding of both.

The Court of Appeals relies on Lipson, supra, to support its conclusion that publication of the Chen Report constituted an interference with his power of disposition over his property. However, in Lipson, this Court specifically found that announcement of a pending project which caused damage does not constitute a taking. Therefore, under Lipson, reduction in value is not

sufficient interference with the power of disposition of property to constitute a taking, and in fact Grynberg had the power to dispose of his interest in the mineral estate without any interference by Northglenn. Grynberg exercised that power and did in fact dispose of his interest in the mineral estate prior to the alleged taking.

The Court of Appeals then relied on Kratzenstein, supra, to find that damage includes the result of public improvements for which condemnation proceedings were not initiated. However, on the facts of Kratzenstein, the court found that private property was not taken even though the property owner was damaged and that the property owner had to comply with the Governmental Immunity Act, §24-10-101, et seq. in order to pursue claims against the governmental entity; the exact opposite of the holding by the Court of Appeals in this case.

The Court of Appeals then relies on this Court's decision in Board of County Commissioners v. Flickinger, 687 P.2d 975 (Colo. 1984), another case which states the opposite of the decision of the Court of Appeals. In Flickinger, this Court analyzed whether a statute which allowed the public to obtain title to a private roadway by adverse use constituted a taking. This Court recognized that determining exactly when a taking occurs can be difficult, but resolved that difficulty by finding that property interests find their source in state law. Conditions on the owner's interest in its property was conditioned on the statutory provisions being interpreted and this Court found no taking. The present case

presents the same circumstances. The Court of Appeals found a taking for three reasons: (1) acquisition of the surface estate; (2) an authorized entry on the mineral estate; and (3) publication of the Chen Report. Each of these three are controlled by Colorado law which place conditions on Grynberg's property interests. First, the mineral estate is subservient to the surface estate, William E. Russell Coal Co. v. Board of County Commissioners, 129 Colo. 330, 270 P.2d 772 (1954), and there has been no question in this case that Northglenn lawfully acquired the interests in the surface estate. Second, this Court recognized the unauthorized entry as the tort of geophysical trespass in Grynberg v. Northglenn, 739 P.2d 230 (Colo. 1987), which tort is subject to the Governmental Immunity Act, §24-10-105, C.R.S. Third, publication of the Chen report was required by §34-1-301 et seq., C.R.S., the regulations promulgated thereunder, and Colorado open records requirements to be made public. These conditions are a lawful exercise of the state lawmaking authority and do not result in a taking under the Colorado Constitution.

The Court of Appeals affirmed the trial court decision proceeding to a valuation hearing without making the preliminary finding that a taking had occurred contrary to its decisions in Morrison v. City of Aurora, 745 P.2d 1042 (Colo. App. 1987) and contrary to the general principle of law stated in 11 McQuillin, Municipal Corporations §32.132a (3rd Ed.).

2. The Court of Appeals affirming the trial court's allowance of evidence of tort damages at the hearing on fair market

value is contrary to prior holdings of this Court.

In the event a claimant has both tort and an inverse condemnation claim, he must elect between the remedies and any inverse condemnation claim must be conducted in strict compliance with §38-1-101 et seq. Ossman v. Mountain States Telephone and Telegraph, 184 Colo. 360, 520 P.2d 738 (1974). If the claimant elects to proceed in inverse condemnation, an in limine hearing must be held to determine whether a taking has occurred. Radinsky v. Denver, 159 Colo. 134, 410 P.2d 644 (1966); Troiana v. State Highway Department, 170 Colo. 360, 511 P.2d 517 (1974). It is error for the trial court to proceed on the question of damages until the preliminary question of whether a taking has occurred has been determined by the trial court in accordance with C.R.S. §38-1-101. Colorado State Board of Land Commissioners v. District Court, 164 Colo. 338, 430 P.2d 617 (1967).

The trial court never found a taking and allowed evidence of a trespass claim to be heard in the inverse condemnation hearing. By approving the trial court rulings, the Court of Appeals here committed the same error corrected by this Court in Ossman, supra:

> " . . . the trial court combined elements of the measure of damages of a trespass action and an inverse condemnation action in its instructions. As a result, the verdict which was submitted to the jury was not applicable either to trespass or inverse condemnation. This, of course, was error and requires a reversal of the judgment of the trial court." Ossman v. Mountain States Telephone & Telegraph, 184 Colo. 360, 520 P.2d 738, 741 (1974).

The Supreme Court must correct the same mistake of the Court of Appeals by ordering a new trial in this proceeding.

3. The Court of Appeals circumvented the GIA by interpreting Article II §15 of the Colorado Constitution to require compensation for the tort of geophysical trespass.

The Governmental Immunity Act was adopted to avoid disruption of the provision of essential governmental services and functions, and to avoid excessive fiscal burdens to taxpayers for those services. §24-10-102, C.R.S. Individual tort claims are subject to the $150,000 limit of the GIA. §§24-10-105 and 24-10-114, C.R.S. An inverse condemnation claim is not a tort claim subject to the GIA. The Mill v. State Department of Health, 787 P.2d, 176 (Colo. App. 1989) rev'd on other grounds, 809 P.2d 434 (Colo. 1991); Hayden v. Board of County Commissioners, 41 Colo. App. 102, 580 P.2d 830 (1978). However, in the event a claimant has both tort claims and a condemnation claim, he must elect between the remedies and any condemnation claim must be conducted in strict compliance with §38-1-101, et seq., C.R.S. Ossman v. Mountain States Telephone and Telegraph, 184 Colo. 360, 520 P.2d 738 (1974). The same principle is true for condemnation and inverse condemnation actions; both must be conducted or strict compliance with §§ 38-1-101, et seq, C.R.S. This requirement is to ensure that the jury determines the fair market value based upon evidence thereof, not based on speculation, conjecture or claims for other damages. Department of Highways v. Schulhoff, 167 Colo. 72, 445 P.2d 402 (1968); Ruth v. Department of Highways, 145 Colo. 546, 359 P.2d 1033 (1961); Board of County Commissioners v. Vail Associates, 171 Colo. 381 468 P.2d 842 (1970); 11 McQuillin, Municipal Corporations

§§32.92e, 32.92g, 32.95 (3rd Ed.). By allowing evidence of alleged tort claims in the valuation hearing, the trial court ignored the requirement to elect between tort remedies and a condemnation claim, resulting in an increase of the award and nullification of the legislative purposes and limitations of the GIA.

4. The Court of Appeals makes Governments Liable for Tort Damages for Acts of Third Parties Contrary to Previous Decisions. Inverse condemnation claims can only be brought against a governmental or public entity having the power of eminent domain. The Mill v. State Department of Health, 809 P.2d 434 (Colo. 1991). The Governmental Immunity Act governs all tort actions against Northglenn. §24-10-105, C.R.S. Northglenn is only liable for the acts of its agents, public employees, as specified in the GIA. §24-10-102, C.R.S. The definition of public employee in the GIA specifically excludes independent contractors such as Sheaffer & Roland, Inc., Chen & Associates, Inc. Cameron Engineers, and Arrow Drilling Company. §24-10-103(4)(a), C.R.S. Grynberg introduced substantial evidence of tort claims at the valuation hearing against independent contractors of Northglenn not party to the suit. Sheaffer & Roland Inc., Chen & Associates, Inc, Cameron Engineers & Arrow Drilling Company are private entities with no power of eminent domain. In addition, the court gave an improper instruction to the jury in the valuation hearing under a tort respondeat superior theory that Northglenn was responsible for the acts of its independent contractors. The instruction is improper in an inverse condemnation claim, Ossman v. Mountain States

Telephone and Telegraph, 184 Colo. 360, 520 P.2d 738 (1974), or a tort claim, §§24-10-103(4)(a) and 24-10-105, C.R.S., and led to an award based on considerations prohibited by this Court's ruling in Ossman.

B. THE COURT OF APPEALS HAS INTERPRETED ARTICLE II, §15 OF THE COLORADO CONSTITUTION IN WAY NEVER PREVIOUSLY DETERMINED BY THIS COURT WITH DEVASTATING CONSEQUENCES TO ALL PUBLIC ENTITIES WITH THE POWER OF EMINENT DOMAIN WHICH DECISION CALLS FOR THE EXERCISE OF THIS COURT'S POWER TO REVIEW THE DECISION.

The Court of Appeals' decision in this case opens the door for any current or past owner of property to bring, and possibly succeed on, a takings claim against the state or any local government with the power of eminent domain when the governmental entity has initiated public discussion of a proposed public project, filed a statutorily required report, or hired independent consultant's to advise the governmental entity on public projects. This Court has never before interpreted Article II, §15 of the Colorado Constitution to be so broad as to require just compensation in such circumstances. In fact this Court has held the opposite. The practical application of such a ruling is described in the Motion of Amici applying the ruling to a fact situation such as the Two Forks Dam project which was first announced in 1903, and for which numerous studies and assessments have been prepared. If this decision stands without review by this Court, there will be a chilling effect on public discussion of projects, an increase in potential costs to governments in any public improvements, and an increase in litigation against the

state and local governments.

Conclusion

In providing essential government services, municipalities are responsible for the expenditure of taxpayer funds for the health, safety and welfare of their citizens. They also have a duty to their citizens to spend such funds only for public purposes and not for the benefit of private individuals. Individuals harmed by the acts of municipalities, either in tort or by a taking of property are entitled to recovery for legitimate damages. However, neither the power of the municipality or the rights of the individual are unbridled.

In balancing the interests of the individual taxpayer to benefit from government services and be protected from individual harms, the legislature and the people have adopted several limitations on municipalities and individuals: Municipalities cannot take property without paying just compensation (Article II, § 15, Colorado Constitution); just compensation is the fair market value of property which must be determined by a trier of fact whereas all other related issues are determined by the court (§38-1-101, C.R.S.); individuals must follow certain procedures to proceed with claims for recovery against a municipality (§24-10-101, et seq, C.R.S.); and the total amount of tort recovery by an individual against a municipality is limited to $150,000 (§24-10-114, C.R.S.). The courts have adopted additional policies to implement these constitutional and legislative provisions: A

taking does not occur unless there is a physical invasion of the interests of the property owner; announcement or plans for property by the government does not constitute a taking; fair market value of property is what a buyer would pay and what a seller would accept for a parcel of property in cash under normal circumstances if both were willing and neither under an obligation to do so; the fair market value does not include claims for other injuries or values based on speculation or conjecture; if a municipality takes property without paying just compensation, the owner may initiate an inverse condemnation action to receive just compensation; if the owner has additional claims against the municipality, it cannot present evidence of tort claims in a valuation hearing, but must elect between tort claims and inverse condemnation claims because a property owner is not entitled to multiple recovery from the government.

In this case, the court has ignored all these procedures and requirements. If this case stands, individuals will be able to obtain excess public funds from a municipality by: circumventing the requirements and limitations of the Governmental Immunity Act by filing inverse condemnation claims for tort actions; receiving just compensation from a municipality whether or not it has taken property of the individual; recovering more than just compensation from a municipality by introducing evidence of tort claims at a valuation hearing; all resulting in an artificial inflation of the cost of property planned for public improvement. The net result would be a complete imbalance of the interests of the government

and individual taxpayers to the ultimate harm of both.

Wherefore, the Colorado Municipal League and Denver Water respectfully request that this Court uphold the existing balance established by the people, the legislature, and the judicial system by reversing the Court of Appeals and the district court and dismissing Grynberg's claims.

Respectfully submitted this 23rd day of December, 1991.

CITY AND COUNTY OF DENVER
ACTING BY AND THROUGH ITS
BOARD OF WATER COMMISSIONERS

Patricia L. Wells # 10120
Henry C. Teigen #5936
City and County of Denver
Acting by and through its
Board of Water Commissioners
1600 W 12th Ave
Denver, Colorado 80254
(303) 628-6460

COLORADO MUNICIPAL LEAGUE

Kathleen E. Haddock, #16011
Attorney for Petitioner
Colorado Municipal League
1660 Lincoln Street Ste 2100
Denver, Colorado 80264
(303) 831-6411

CERTIFICATE OF MAILING

I hereby certify that on this 23rd day of December, 1991, I placed a true and correct copy of the foregoing in the United States mail, first class postage prepaid at Denver, Colorado, and addressed as follows:

Herbert C. Phillips
James C. Maloney
Hayes Phillips & Maloney
1350 Seventeenth Street
Suite 450
Denver, Colorado 80202-1517

Phillip D. Barber
Keith D. Tooley
Welborn, Dufford, Brown
& Tooley
1700 Broadway
Suite 1700
Denver, Colorado 80290-1701

Thomas W. Gibb
Attorney General's Office
Natural Resources Section
110 16th Street, 10th Floor
Denver, Colorado 80202

Cathy Pounder