COLORADO COURT OF APPEALS

Case No. 89 CA 1633

BRIEF OF AMICUS CURIAE, COLORADO MUNICIPAL LEAGUE

CITIZENS FOR QUALITY GROWTH PETITIONERS' COMMITTEE, MARY ELLEN RUBLEY, JO ANN BAKER, LYNNE VAN WESTRENEN, CHARLA ANN THORSTAD, as individuals and members of the Citizens for Quality Growth Petitioners' Committee,

Plaintiffs-Appellees,

v.

CITY OF STEAMBOAT SPRINGS, CITY COUNCIL OF THE CITY OF STEAMBOAT SPRINGS, LES LIMAN, JULIE SCHWALL, PAT GLEASON, MARY BROWN, RITA VALENTINE, PAULA BLACK and PETE WITHER, as members of the City Council, and SARA AXELSON, City Clerk of the City of Steamboat Springs,

Defendants-Appellants.

APPEAL FROM THE DISTRICT COURT
ROUTT COUNTY, COLORADO

Case No. 89-CV-02

Honorable Robert P. Fullerton
(Order Issued April 13, 1989
Certified as a Final Judgment by
Honorable R. L. Kourlis on
June 23, 1989)

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ATTORNEYS FOR AMICUS CURIAE
COLORADO MUNICIPAL LEAGUE

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DEVELOPMENT PERMIT APPROVALS ARE ADMINISTRATIVE OR EXECUTIVE ACTS NOT SUBJECT TO REFERENDUM.

1. Colorado has adopted the distinction between legislative and administrative acts, for purposes of referendum and initiative.

In its Order dated April 13, 1989 (hereinafter "Order," copy attached as Appendix 1), the district court proposes to expand the constitutional right of referendum over municipal actions to include matters which are purely administrative or executive in nature.

The district court erred in failing to recognize the limitations placed upon the scope of referendum by decisions of the Colorado Supreme Court, in particular City of Aurora v. Zwerdlinger, 194 Colo. 192, 571 P.2d 1074 (1977); Margolis v. District Court, 638 P.2d 297 (Colo. 1981); Witcher v. Canon City, 716 P.2d 445 (Colo. 1986); and City of Idaho Springs v. Blackwell, 731 P.2d 1250 (Colo. 1987).

In City of Aurora v. Zwerdlinger, supra, the Court held that a city ordinance raising water rates was not subject to referendum. After stressing the importance of the initiative and referendum powers as the means by which the people exercise their reserved legislative power, the Supreme Court stated:

> It is also not unimportant that these [legislative] powers are reserved in the article of our Constitution which deals expressly and singularly with the legislative branch of government. We, therefore, construe the constitutional provisions to apply only to acts which are legislative in character, which is consistent with the majority view. [citing cases] (emphasis supplied)

571 P.2d at 1076. In the instant case, the district court has erred in failing to distinguish between the legislative acts of the Steamboat Springs City Council in adopting the Community Development Code and zoning the subject property as "Commercial Resort," and the administrative or executive acts of the Council in enforcing the regulations applicable to that zone district as individual development proposals are submitted. In Zwerdlinger, supra, 571 P.2d at 1076, the Colorado Supreme Court made that distinction by quoting with approval from Carson v. Oxenhandler, 334 S.W.2d 394 (Mo. App. 1960).

The distinction between the administrative and legislative roles of municipal governing bodies noted in Zwerdlinger, supra, was expressly approved and continued by the Colorado Supreme Court in Margolis v. District Court, supra, 638 P.2d at 303. (Each of the three fact situations present in Margolis involved a challenge to an admitted zoning or rezoning decision, not an administrative application of the zoning regulation to a specific development proposal, as here.) In Margolis, the zoning ordinances and maps of the cities of Greenwood Village, Lakewood and Arvada had been or were proposed to be amended. In each case, the acts contemplated were determined to be legislative in character. In the instant case, the City of Steamboat Springs has not amended its Community Development Code. Neither has it amended the Commercial Resort district or the zoning map entries denoting the location of that district. Under none of the tests

announced in Margolis is the challenged action of the City Council of Steamboat Springs a legislative activity.

The district court places great reliance upon Witcher v. Canon City, 716 P.2d 445 (Colo. 1986), and the three tests therein announced to determine whether an underlying municipal action is legislative in character. Order, p. 8. Before refuting the district court's reliance on Witcher, it is worth noting that the challenged action in that case (approval of a lease amendment), was held to be an administrative act carrying out a previously established policy, and thus not subject to referendum.

Because "the application and the approval contemplate documents being recorded in the public land records," the district court opines that the first Witcher test, for "permanency," has been met. Order, p. 8. This fact is not legally significant. Anyone, armed with the requisite recording fee, may record anything in the public land records. Of much more relevance is the discussion of permanency in City of Idaho Springs v. Blackwell, 731 P.2d 1250 (Colo. 1987), in which the city had selected a site and structure for a new city hall. Initiative petitions were brought to enjoin expenditure of funds for the project. The Colorado Supreme Court held the matter to be administrative, not subject to initiative or referendum. The Court brushed aside the "property" aspects of the decision:

> The structure is, of course, permanent in the sense that it will serve as the city hall for an indefinite period of time. However, the duration of legislation or the anticipated useful life of a municipal improvement does not completely determine the meaning of permanence when determining when an ordinance is legislative or administrative . . . the term 'permanent' is used to signify a declaration of public policy or general applicability because a permanent enactment is more likely to involve policy consideration.

731 P.2d at 1254.

The district court concluded the second Witcher test (declaration of public policy) was satisfied because the city council had not yet considered "whether a major retail facility should be approved for the site of the application . . . or what precise guidelines or regulations would have to be met in order to develop the property, . . ." Order, p. 8. This ignores the action which declared the public policy on this subject: the adoption by the city council of a zoning ordinance designating the subject property as a Commercial Resort District. Any later decisions (other than rezoning decisions) which apply that policy and subject potential developments to design criteria such as setbacks, access and open space requirements, are administrative. They are no different from the issuance of a site grading permit or building permit, neither of which are subject to referendum review.

The district court determined that the third Witcher test (amendment to a legislative act) was met because ". . . the

approvals noted above, which in effect, amend the open-ended provisions in the CR district to make them specific constituted amendments to the original CR zoning classification." Order, p. 9. The record reveals no amendment of the CR zone regulations. Perhaps the district court was not comfortable with the "open-ended" aspects of the CR zone. Local governments in Colorado, and especially home rule municipalities, have broad power to regulate land use, and may choose various techniques for doing so. See, Section 24-65.1-101, et seq., 29-20-101, et seq., and 31-23-101, et seq., C.R.S., and the Colorado Constitution, Article XX, section 6. The CR zone in Steamboat Springs is one such method. The administration of the CR zone and its application to individual development proposals is not legislative in nature. The district court cannot and does not point to any reference in the record indicating that the zoning map or the zoning regulations applicable to the CR zone were amended to accommodate the challenged development proposal, or as a consequence of the approval of that proposal. The three tests in Witcher, as applied to the facts in this case, compel the conclusion that the subject development approval is administrative, not legislative.

The importance of the legislative/administrative distinction has been recognized by the commentators. See Glenn, Peter G., State Law Limitations on the Use of Initiatives and Referendum in Connection with Zoning Amendments,

51 S. Cal. L. Rev. 265 at 294-298 (1978); Tymkovich, Colorado Survey: Recent Legislation and Colorado Supreme Court Decisions, 53 U. Colo. L. Rev. 745 at 759 (1982); Kahn, Jeffery J., Judicial Review, Referral and Initiation of Zoning Decisions, 13 Colo. Law. 387 at 388 (March 1984).

2. **The legislative-administrative distinction has been applied to land development permits or approvals granted subsequent to zoning in other states.**

The Colorado Supreme Court in Margolis v. District Court, supra, specifically noted that California and Ohio both recognize that zoning and rezoning decisions are subject to initiative and referendum. 638 P.2d at 305. A series of California cases on the legislative-administrative distinction have been decided upon the basis of a broad reservation of the power of initiative and referendum in the state constitution. The Margolis court specifically cited and relied upon Arnel Development Co. v. City of Costa Mesa, 169 Cal. Rptr. 904, 620 P.2d 565 (1980), for its holding that zoning and rezoning decisions are legislative in character. Margolis, supra, 638 P.2d at 304-305. In Arnel, the California Supreme Court held that the distinction between legislative acts such as zoning, and administrative actions carrying out those zoning decisions, was appropriate and of long standing. Justice Trobriner listed a number of circumstances under which a land use decision was administrative:

> Prior California decisions had distinguished from zoning legislation a variety of administrative land use decisions, including the granting of a variance [citation omitted], the granting of a use permit [citation omitted], and the approval of a subdivision map [citation omitted].

620 P.2d at 569, footnote 8. Justice Trobriner then applied the legislative-administrative distinction in the land use context to confirm that administrative decisions are not subject to referendum. Arnel, supra, 620 P.2d at 572.

An earlier California case, Lincoln Property Co. No. 41, Inc. v. Law, et al., 45 Cal. App. 3d 230, 119 Cal. Rptr. 292, (1975) very closely matches the facts in the case before this Court. In Lincoln, a developer sought to enjoin the city from conducting a referendum election. The California Court of Appeal held that where the city council had adopted a development plan for a tract of land in January, 1972 and imposed various conditions, a subsequent December, 1972 resolution approving a precise plan, a tentative subdivision map and a grading plan was a purely administrative act which was not subject to referendum:

> Tested by the foregoing standard, the instant record conclusively establishes that the zoning change which undoubtedly constituted a legislative act [citations omitted] took place not in December 1972, but by the adoption of the new plan of development on January 24, 1972. The December Resolution, which is the subject matter of the present litigation, was no more than an approval of the precise plan which, in turn, simply carried out and implemented the purposes and conditions that had been prescribed by the January resolution. (emphasis supplied)

119 Cal. Rptr. at 294-295. The court noted: "In reaching our conclusion we are greatly aided by Andrews v. City of San Bernardino (1959) 175 Cal. App. 2d 459, 346 P.2d 457 (cert. denied, 364 U.S. 288, 81 S. Ct. 48, 5 L. Ed. 2d 38), and Valentine v. Town of Ross [39 Cal. App. 3d 954, 114 Cal. Rptr. 678 (1974)] . . ." In Andrews, a city ordinance approving final redevelopment plans under an earlier adopted community redevelopment law was held administrative or executive. In Valentine, the town approved schematic plans for a flood control project. Approval of the detailed plans two years later was held an administrative act. In the instant case, the approval of a development permit in the Commercial Resort zone is no different than the approval of the precise plan, subdivision map and grading plan held to be administrative and not subject to referendum in Lincoln v. Law, supra.

The California Court of Appeal cited Lincoln v. Law, supra, with approval in the recent case of W.W. Dean and Associates v. City of South San Francisco, 190 Cal. App. 3d 1368, 236 Cal. Rptr. 11 (1987). The Court of Appeal upheld the lower court entry of a writ of mandate enjoining the City from holding a referendum election with respect to an amendment to a development plan. The Court of Appeal held that the development plan amendment was an administrative act:

> Zoning and rezoning ordinances, and the adoption of and amendments to general plans, are legislative actions [citing Arnel

> Development Co. v. City of Costa Mesa, supra.] The approval of variances, conditional use permits, and tentative subdivision maps, which involve the application of preestablished standards and conditions to particular land uses, is administrative or "adjudicatory." [Citing Horn v. County of Ventura; Arnel Development Co. v. City of Costa Mesa, supra.]

236 Cal. Rptr. at 15-16.

The Colorado Supreme Court in Margolis v. District Court, supra, 638 P.2d at 305, cited a number of cases from Ohio, which has also adopted the legislative-administrative distinction. State ex rel. Barberis v. City of Bay Village, 281 N.E.2d 209 (Ohio 1971). The Margolis court cited Forest Cities Enterprises, Inc. v. City of Eastlake, 41 Ohio St. 2d 187, 324 N.E.2d 740 (1975), overruled on other grounds 426 U.S. 668, 49 Law. Ed. 2d 132 (1976). In that case, the Supreme Court of Ohio held that the power to zone or rezone "via the passage or amendment of a comprehensive zoning ordinance, is clearly a legislative function," subject to the referendum process. 324 N.E.2d at 743. However, the Ohio court distinguished administrative land use actions from this rule. 324 N.E.2d at 743.

In Meyers v. Schiering, 27 Ohio St. 2d 11, 271 N.E.2d 864 (1971), the Ohio Supreme Court held that a city council resolution granting a permit for the operation of a sanitary landfill, as required by an existing zoning regulation, constituted an administrative action not subject to referendum. In State ex rel. Srovnal v. Linton, 46 Ohio St. 2d 207, 346

N.E.2d 764 (1976), the Ohio Supreme Court held that a city council resolution confirming the planning and zoning commission's grant of a use exception as to height regulations was administrative rather than legislative:

> The action taken was within the administrative discretion of the municipal government of the city of Solon and does not constitute legislative alteration or amendment of that municipality's property, planning and zoning code.

346 N.E.2d at 768.

Appellate courts nationwide have respected the legislative-administrative distinction for the purpose of determining whether referendum rights apply. Mitchell v. City of Aurora, 44 Ill. App. 2d 361, 194 N.E. 2d 560 (1963) (ordinance fixing water rates); City of Shelby v. Soundholm, 208 Mont. 77, 676 P.2d 178 (1989) (creation of a special improvement district encompassing less than the entire city); Dieruf v. City of Bozeman, 173 Mont. 447, 568 P.2d 127 (1977) (ordinance assessing property to construct an off-street parking facility); Rauh v. City of Hutchinson, 223 Kan. 514, 575 P.2d 517 (1978) (municipal ordinances issuing industrial revenue bonds); In re Supreme Court Adjudication, 534 P.2d 3 (Okla. 1975) (fixing of municipal utility rates).

The challenged permit approval in this case was administrative, not legislative. The applicable law precludes referendum. The decision of the district court should be reversed.

Respectfully submitted this 27th day of April, 1990.

GORSUCH, KIRGIS, CAMPBELL,
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ATTORNEYS FOR AMICUS CURIAE
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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the above and foregoing BRIEF OF AMICUS CURIAE, COLORADO MUNICIPAL LEAGUE were deposited in the United States mail, postage prepaid, this 27th day of April, 1990, addressed as follows:

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DISTRICT COURT, ROUTT COUNTY, COLORADO

Case No. 87 CV 2

ORDER GRANTING MOTION FOR PARTIAL SUMMARY JUDGMENT

ORDER DENYING MOTION TO DISMISS

CITIZENS FOR QUALITY GROWTH PETITIONERS' COMMITTEE, MARY ELLEN RUBLEY, JO ANN BAKER, LYNN VAN WESTRENEN, CHARLA ANN THORSTAD, as individuals and members of the citizens for Quality Growth Petitioners' Committee,

Plaintiffs,

v.

CITY OF STEAMBOAT SPRINGS; CITY COUNCIL OF THE CITY OF STEAMBOAT SPRINGS, LES TIMAN, JULIE SCHWALL, PAT GLEASON, MARY BROWN, RITA VALENTINE, PAULA BLACK, and PETE WITHER, as members of the City Council, and SARA AXELSON, City Clerk of the City of Steamboat Springs,

Defendants.

THIS MATTER comes before the Court upon the Plaintiffs' Motion for Partial Summary Judgment and the Defendants' Motion to Dismiss. The Court has read the motions, the briefs filed by counsel, and reviewed the applicable law and matters attached as exhibits to the motions. The following is a summary of the case:

SUMMARY OF THE CASE

This case involves the approval on October 11, 1988 of Resolution No. 88-26 by the City of Steamboat Springs of a major development permit for construction of a 55,000 square foot retail store and adjacent 8,300 square foot retail wing, located on Block 3, Steamboat Village Commercial Center Replat A ("Block 3").

On November 11, 1988, a petitioners' committee, consisting of five residents of the City of Steamboat Springs, submitted petitions requesting the City Council to refer Resolution No.

88-26 to the electors of the City of Steamboat Springs, Colorado.

On November 21, 1988 the Steamboat Springs City Clerk certified the petitions insufficient based on her finding that Resolution No. 88-26 was a quasi-judicial, executive, or administrative matter not subject to a referendum under Colorado law. The members of the petitioners' committee filed a request that the City Clerk's decision be reviewed by the City Council and on December 6, 1988 the Council approved the Clerk's decision by a three to two vote.

On January 5, 1989, four of the five members of the petitioners' committee, individually and as members of the committee, filed suit against the City of Steamboat Springs, the City Council, its members, and the City Clerk. In Counts I and II of the Complaint, the Plaintiffs request that the determination of insufficiency of the Clerk and Council be reversed by the Court and that the Council be ordered to refer the matter to the "voters" of the City. In Counts III and IV, Plaintiffs request the Court to order the City to reconsider its decision on Resolution No. 88-26, to declare the City Council PUD approval void, and to enjoin the City for issuing permits in connection therewith. Finally, in Count V of the Complaint, Plaintiffs seek a declaration of this Court that the CR Zone District is unconstitutionally vague.

On January 25, 1989, the Defendants submitted a Motion to Dismiss pursuant to C.R.C.P. 12(b) and on January 26, 1989 the Plaintiffs submitted a Motion for Partial Summary Judgment pursuant to C.R.C.P. 56.

The primary thrust of the Plaintiffs' action is that they are entitled to a referendum, for the general electorate of the City to determine whether the decision of City Council (Resolution 88-26) should stand. Their position is that the City acted in a quasi-judicial manner which was equivalent to a rezoning (and therefore of a "legislative character" under the holding of Margolis v. District Court, 638 P.2d 297 (Colo. 1981)), or that the City approved a site specific development plan which is subject to referendum, under C.R.S. 24-68-103.

The Plaintiffs' claim here is against their government, the City Council and the City Clerk who determined that, in spite of a referendum petition with over 900 signatures, they were not entitled to a referendum. Plaintiffs' action seeks, in effect, a reconsideration of the zoning decisions embodied in Resolution 88-26 by the electorate pursuant to basic right established by the Colorado Constitution.

FINDINGS OF FACT

The City of Steamboat Springs has adopted a detailed development code. The CD Code represents "the official public policy guidelines and legal requirements concerning the management of growth by and within the City of Steamboat Springs," and shall apply to developers, property owners, and ". . . all other private and public interests and persons engaged in and concerned about the growth and development of the community." (CD Code 166.100.020). Development of any type in the City of Steamboat Springs is to proceed only in compliance with the provisions of the CD Code.

The process to secure development approval involves several steps under the provisions of the CD Code. A basic requirement is that, "All requirements of the specific zone district relating to the subject property must be met." (CD Code 16.140.030). In the case before this Court, this means that all of the requirement of the CR zone district must be met. The CR zone district allows only two uses to a property owner as a matter of right -- underground utility lines and parks. However, the CR zone district also provides for a number of conditional uses which may be approved by the council according to the requirements and procedures established in the code.

A "development permit" is required for virtually all development proposed within the City limits. The development permit application provides the City Council with detailed information on the proposed development of a site and, where a conditional use is requested will detail the proposed/requested use of the property. The procedure for review and approval of development permits require the giving of public notice and holding public hearings before the Planning Commission and the City Council.

Finally, no building or structure may be erected until a building permit has been issued by the building official. The provisions of the CD Code are to be enforced by the council, the city manager, the city attorney, and the director, by enumerated methods which include, ". . . (A) Requirement of development permit; (B) Requirement of building permit. . . ."

In summary then, the process established in the CD Code requires that a property owner comply with the requirements of the zone district, obtain approval by the City Council for any proposed conditional use, obtain approval by the City Council of a development permit, and then obtain a building permit from the city building official. Then construction can begin.

The Court finds and concludes that this process is akin to rezoning as it affects the use of property according to a master plan.

CONCLUSIONS OF LAW

Two technical issues are raised by the Defendants in their Motion to Dismiss.

First, whether the Plaintiffs filed this Rule 106 proceeding timely. The Court finds there is no dispute that on December 6, 1988, City Council made its decision on the referendum issue adverse to the Plaintiffs. On January 5, 1989, the Plaintiffs filed this action which is within the 30-day time limit to file a Rule 106 proceeding.

Secondly, Defendants claim the Plaintiffs failed to join an indispensable party, the Steamboat Ski Corporation, the property owner. Plaintiffs argue that the corporation is not an indispensable party.

The position of the Plaintiffs is supported by the decision of the Colorado Supreme Court in the case, Margolis v. District Court, 638 P.2d 297 (Colo. 1981). The City of Greenwood Village argued that Margolis' failure to join indispensable parties was a jurisdictional defect where a referendum was sought on a zoning decision. The Colorado Supreme Court disagreed, stating that the individual landowners were not necessary.

> We hold that the individual landowners are not indispensable parties to this action under C.R.C.P. 19(b), nor are they necessary parties whom the district court should have joined under C.R.C.P. 19(a). The relief sought can be granted in the absence of the landowners, and the relief neither impairs nor impedes the landowners' ability to protect their interests, and does not lead to the risk of multiple inconsistent obligations.

Margolis v. District Court, 638 P.2d 297, 301 (Colo. 1981).

THE CITY COUNCIL'S DECISION THAT A REFERENDUM IS NOT APPROPRIATE WAS AN ABUSE OF DISCRETION OR WAS BEYOND ITS JURISDICTION (C.R.C.P. RULE 106) (COMPLAINT, COUNT I)

The Constitution of the State of Colorado (Article V) clearly reserves a broad right to initiative and referendum to the citizens of the State. The Colorado Supreme Court has consistently given a broad interpretation to the rights of the people to initiative and referendum, and has strictly construed legislation or actions which would tend to limit these powers. As the Court has noted,

> One of the unquestioned purposes of the referendum and initiative powers is to expeditiously permit the total and free exercise of legislative power by the people, except in rare circumstances . . . indeed, a heightened community sensitivity to the quality of the living environment and an increased skepticism of the judgment of elected officials provide much of the impetus for the voters' exercise of the powers of referenda and initiative in the zoning context.

Margolis v. District Court, etc., 638 P.2d 297, 303 (1981). See also Burks v. City of Lafayette, 349 P.2d 692 (1960).

Because of the nature of the people's right to a referendum, the Colorado Supreme Court has laid out clear rules for interpretation of the constitutional provisions.

> Being a reservation to the people, it should not be narrowly construed. On the other hand, there should be strict construction of the grant of authority which would nullify the referendum, and no good reason is apparent for extending it by implication or by reference. This viewpoint has support in the cases.

Burks v. City of Lafayette, 349 P.2d at 695.

The Court is asked to rule for the Plaintiffs and uphold their right to a referendum under the C.R.C.P. 106 review by utilizing either of two theories: (1) that the provisions of the Colorado Constitution are controlling in substance and that Plaintiffs have a constitutional right to the referendum requested, or (2) that the plans and agreements approved by the City Council (in spite of an agreement to the contrary between the City council and the Ski Corporation) constitute a site specific development plan, and therefore Plaintiffs are entitled to a referendum under the provisions of Section 24-68-103 C.R.S., which indicates that "such approval shall be subject to all rights of referendum and judicial review."

A. The Plaintiffs are entitled to a referendum under the Colorado Constitution.

The Colorado Supreme Court has consistently indicated that the people's right to referendum under Article V of the

Colorado Constitution cannot be reduced or limited by the General Assembly or by a locality. Burks v. City of Lafayette, 349 P.2d at 694.

The Court cites with approval a California decision which indicates clearly that the constitutional reservation of power to the electorate cannot be limited by local act or charter, but can be expanded upon. As stated in the California case,

> * * * the declaration of the Constitution that its provisions do not affect or limit the referendum power reserved to the people of any city by its charter does not limit the constitutional reservation, nor enlarge those reserved by such charter. The two reservations are thereby made independent of each other. The constitutional reservation goes to the full extent expressed by its language. If the charter differs from the Constitution in any respect, it does not thereby diminish the power reserved by the Constitution.

Burks v. City of Lafayette, 349 P.2d at 695, citing Hopping v. Council of City of Richmond, 170 Cal. 605, 150 P. 977, 979.

This language suggests that this Court may, without interpreting whether the provisions of the Steamboat Springs city charter conflict with the Colorado Constitution, simply interpret the provisions of the Colorado Constitution to permit a referendum here.

The fact that zoning ordinances and zoning issues are appropriate for referendum has been well established in Colorado for a number of years. City of Fort Collins v. Dooney, 496 P.2d 316 (1972).

It is abundantly clear, and is not disputed by the Defendants, that the decision made by the City Council (Resolution 88-26), was "quasi-judicial" for purposes of judicial review. This can be ascertained by a review of the City's Community Development Code (City Code, Title 16) as well as by a review of decisions from the Colorado Supreme Court, Snyder v. City of Lakewood, 542 P.2d 371 (1975).

However, it is equally clear from a review of the Colorado case law on zoning that the "quasi-judicial" characterization of the local legislature's action has been established by the courts only for purposes of judicial review of rezoning (site

specific) decisions. The fact that initial zoning of an area is legislative has also been clearly established in the cases. See e.g., City of Greeley v. Ellis, 527 P.2d 538, 541 (1974). Furthermore, the Court has recognized the fact that subsequent amendment to the initial legislation is technically a legislative act:

> We do not believe that, for the purposes of determining whether it is subject to referendum and initiative, rezoning may be characterized as other than a legislative decision subject to referendum and initiative. It seems entirely inconsistent to hold that an original act of general zoning is legislative, whereas an amendment to that act is not legislative. It appears only logical that since the original act of zoning is legislative, the amendatory act of rezoning is likewise legislative even though the procedures may entail notice and hearing which characterize a quasi-judicial proceeding. Essentially, the City Council ultimately amends the zoning ordinance or denies the amendment, a legislative function.

Margolis v. District Court, etc., 638 P.2d at 304.

After considering the issue, whether citizens petitioning for a referendum on a site specific zoning decision are entitled to a referendum, the Colorado Supreme Court has responded clearly in the affirmative.

> In view of the purposes for which the referendum and initiative powers were reserved, and the nature of the acts themselves, we find that zoning and rezoning decisions -- no matter what the size of the parcel of land involved -- are legislative in character and subject to the referendum and initiative provisions of the Colorado Constitution.

Margolis v. District Court, etc, 638 P.2d at 304.

In Margolis the Court has clarified that there are two standards of review to apply in two different situations. In the case of a direct (Rule 106) challenge to a limited zoning decision, the Court has determined that the decision will be reviewed as quasi-judicial. In the case of review of the same decision on the issue of whether voters are entitled to a

referendum, the Court has acknowledged the true legislative character of the action and sent the zoning issue to referendum.

In more recent cases where the Supreme Court of Colorado has considered the issue of whether a referendum is appropriate, the Court has developed a series of tests to determine whether the underlying municipal action was "legislative in character." The three tests set out are:

> First, actions that relate to subjects of a permanent or general character are legislative, while those that are temporary in operation and effect are not. . . .
>
> [Second] . . . acts that are necessary to carry out existing legislative policies and purposes or which are properly characterized as executive are deemed to be administrative, while acts constituting a declaration of public policy are deemed to be legislative. . . .
>
> [Third] . . . if an original act was legislative, then an amendment to the original act must also be legislative.

Witcher v. Canon City, 716 P.2d 445, 449, 450 (1986). See also City of Idaho Springs v. Blackwell, 731 P.2d 1250, 1254 (1987).

Even though the Margolis decision establishes clearly that zoning and rezoning actions, for purposes of determining whether a referendum is appropriate, are legislative in character, the tests of the Witcher case apply satisfactorily to the undisputed facts here. Clearly, the Application and the Resolution adopted by the City Council contemplate development of property according to very specific terms and conditions. The Application and the approval contemplate documents being recorded in the public land records and therefore are clearly subjects of a permanent character, satisfying the first test.

The City Council had not previously considered whether a major retail facility should be approved for the site of the Application. Furthermore, the City Council had not determined what precise guidelines or regulations would have to be met in order to develop the property, including issues such as setback, design, access, and open space requirements. Therefore, the decisions of the City Council, as reflected in its Resolution 88-26 and actions constitute declarations of public policy and satisfy the second test.

The original designation of the property in the CR zone was, without question, legislative. Therefore, the approvals noted above which, in effect, amend the open-ended provisions in the CR district to make them specific constituted amendments to the original CR zoning classification. Thus, the third test is also satisfied.

So long as any one of the tests is satisfied, the Court may find the action to be of a legislative character and appropriate for consideration by referendum. In the case before this Court, where all three tests are satisfied, the right of the Plaintiffs to a referendum is clear.

B. Plaintiffs are entitled to a referendum under Section 24-68-102 C.R.S. because the City Council approved a site specific development plan.

In the alternative, this Court finds the approvals of the City Council in its Resolution 88-26 as constituting a "site specific development plan" as envisioned in the Colorado statutes Section 24-68-102 C.R.S. Under this legislation a site specific development plan "means a plan which has been submitted to a local government by a landowner . . . describing with reasonable certainty the type and intensity of use for a specific parcel or parcels of property." The statute goes on to discuss the types of plans or approvals that may constitute a site specific development plan. Included are a planned unit development, a subdivision plan, a specially planned area, a planned building group, a general submission plan, a development agreement, or any other land use approval designation as may be utilized by a local government. The undisputed facts in this case indicate that the City Council approved a conditional development, a planned unit development, a development agreement, and a subdivision. Although this definition section goes on to give the local government the right to determine exactly which of these approvals will constitute the site specific development plan, the statute does not authorize the local government to deny the existence or contract away the existence of a site specific development plan where one has been approved.

The statute goes on, in the following section, 24-68-103 to declare that "a vested property right shall be deemed established with respect to any property upon the approval, or conditional approval, of a site specific development plan. . . ." This section clearly states that where a site specific development plan has been approved, the approval is subject to all rights of referendum and judicial review.

The following section, 24-68-104 permits the locality to enter into "development agreements" with land owners and to

include a provision for vested rights. In this case also, the legislation states that the agreements are subject to referendum, "such development agreements shall be adopted as legislative acts subject to referendum."

These statutes, contained in Title 4, Article 68, "Vested Property Rights" are designed to "foster cooperation between the public and private sectors in the area of land use planning" (Section 24-68-101) and establish the rule which is to apply in fact patterns similar to that before this Court. Here the applicant/developer has requested approval for all of the component parts of a site specific development plan, and the City has approved them. This approval is subject to a referendum by the voters pursuant to the applicable statute cited above. To refuse a referendum is an abuse of discretion by City Council.

Wherefore, under either of the above alternatives, the Court finds and concludes that the Defendants abused their discretion and misapplied the law respecting whether their acts were legislative or not, and further they denied the Plaintiffs their constitutional right to a referendum vote on the rezoning issue. The Court finds the Motion for Summary Judgment should be granted and it is so ordered.

The Court deems it unnecessary to make findings or rulings as to Plaintiffs' other claims in view of the Court's findings and rulings as to the Rule 106 issues.

As to the Defendants' Motion to Dismiss, the Court finds and concludes that the grounds raised therein lack merit and therefore the motion should be denied and it is so ordered.

IT IS ORDERED, ADJUDGED, AND DECREED that the City Council refer the issues raised by Plaintiffs' petitions to a referendum vote by the qualified electors of the City.

DATED this 13th day of April, 1989.

BY THE COURT:

Robert P. Fullerton
District Court Judge

cc: Richard Tremaine
Anthony B. Lettunich

AFFIDAVIT OF CHARLES E. BERRY

I, Charles E. Berry, being first sworn under oath, depose and say:

1. I am a member of the Colorado House of Representatives and was a member of the Colorado House of Representatives in 1987.

2. I was the House sponsor in 1987 of Senate Bill 60 and of Senate Bill 219. With minor changes, the House-passed version of Senate Bill 60 (which was vetoed by the Governor) became Senate Bill 219 as introduced and as finally adopted.

3. My purposes in sponsoring Senate Bill 60 and Senate Bill 219 were to provide certainty and stability in the land use planning process in order to secure the reasonable investment-backed expectations of developers of land.

4. Senate Bill 60 was amended in the House to include, and Senate Bill 219 as introduced and as finally adopted contained, the following language (now codified at C.R.S. §24-68-103):

> Such approval [of a site-specific development plan for land] shall be subject to all rights of referendum and judicial review . . . .

5. I understood the purpose of the above-quoted language of C.R.S. §24-68-103 to be only the preservation of any right of referendum that might otherwise exist pursuant to applicable laws.

6. I did not intend, in acquiescing to the inclusion of the above-quoted language of C.R.S. §24-68-103 in Senate Bill 60 and Senate Bill 219, that rights of referendum existing pursuant to applicable laws would be broadened, or that any new rights of referendum would be created or granted.

7. Interpreting the above-quoted language of C.R.S. §24-68-103 to broaden rights of referendum existing pursuant to applicable laws, or to create or grant any new rights of referendum, would be inconsistent with the purposes for which I sponsored Senate Bill 60 and Senate Bill 219.

8. As House sponsor, I participated in all House hearings and debates on Senate Bill 60 and Senate Bill 219. To the best of my recollection, at no time during those proceedings was the above-quoted language of C.R.S. §24-68-103 interpreted as broadening any rights of referendum existing pursuant to applicable laws, or creating or granting any new rights of referendum.

Charles E. Berry

STATE OF COLORADO)
) ss.
COUNTY OF DENVER)

The foregoing Affidavit was subscribed and sworn before me this 23rd day of January, 1989 by Charles E. Berry.

Witness my hand and official seal.

My commission expires: July 22, 1992.

Notary Public

January 23, 1989
Date

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