SUPREME COURT, STATE OF COLORADO
Case No. _____

BRIEF OF COLORADO MUNICIPAL LEAGUE AS AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

City of Aspen and Aspen Planning and Zoning Commission,

Petitioners,

v.

Ronnie Marshall,

Respondent

Court of Appeals, Division II, Case No. 93CA1001

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Dated: October 31, 1994

TABLE OF CONTENTS

TABLE OF AUTHORITIES

COMES NOW the Colorado Municipal League ("League"), amicus curiae, and submits this brief in support of the Petition for Certiorari heretofore filed by the City of Aspen and the Aspen Planning and Zoning Commission.

INTRODUCTION

The unprecedented decision by the Court of Appeals in this case has important implications for every Colorado municipality which has adopted zoning and building codes. While both this Court and the Court of Appeals have previously decided numerous cases concerning the interrelationship of zoning and building codes and the respective rights and obligations of property owners and local governments, the case at bar presents unique facts. In attempting to apply established legal principles to these new facts and circumstances, the Court of Appeals has simultaneously ignored express provisions of the Aspen municipal code which makes this case distinguishable from all prior cases and has potentially rewarded a landowner (Respondent) for her unlawful conduct of constructing improvements in the first instance without the necessary permits.

The League hereby adopts and incorporates herein by reference the Statement of the Case contained in the Petition for Certiorari, and highlights the two most salient factors recited therein. First, unlike all prior cases where the courts have ruled that an application for a building permit must be reviewed in accordance with the laws then in effect, this case contains a material dispute about whether the application, when it was purportedly tendered to the city,

was actually ripe for consideration at all. Second, unlike all prior cases evaluating the owners "right" to construct improvements pursuant to a permit, this case involves a situation where the improvements were constructed before the permit was even sought, thus creating the possibility that a requirement to issue the building permit will be tantamount to the creation of a vested right to keep and maintain unlawfully constructed improvements.

In overruling the trial court and ordering the Petitioners to consider the "application for the permit under the laws in affect at the time of her application," the judgment of the Court of Appeals places the Petitioners (as well as any other similarly situated municipality) in an untenable Catch-22 situation when, paradoxically, a permit is sought to construct improvements which have already unlawfully been constructed.

ARGUMENT

In this case the Court of Appeals has decided two questions of substance in ways which are probably not in accord with applicable decisions of the Supreme Court, and are not consistent with earlier decisions of the Court of Appeals.

A. When did the application for the Building permit occur?

The League acknowledges prior case law which appears to hold that an application for a building permit must be reviewed in accordance with the law in effect at the time of

application. City and County of Denver v. Denver Buick, 141 Colo. 121, 347 P.2d 919 (1959); Gramiger v. County of Pitkin, 794 P.2d 1045 (Colo. App. 1989), cert. denied July 30, 1990. However, in neither of these cases was there any question or controversy about any conditions precedent which may have prevented the processing of the building permit application. On the contrary, in an earlier stage of the dispute in Gramiger, the courts made an express finding that "at the time plaintiff applied for the permit, there was no 'legal impediment' to its issuance." 794 P. 2d at 1047; Gramiger v. Crowley, (Colo. App. No. 78-882, March 1, 1984) (not selected for official publication.)

In contrast, in the instant case the Aspen municipal code contained express conditions precedent to the application for a building permit, i.e. the obtaining of a "development order" which in turn may only be had after the potential applicant has obtained any necessary variances and Historical Preservation Committee approvals, as more fully detailed in Aspen's Petition for Certiorari. As Sec. 24-6-206 (2) (a) of the Aspen code clearly provides, the "applicant may proceed to apply for a building permit" only "upon receipt of a development order."

The Court of Appeals apparently ignored this provision of the code in finding that the action taken by the respondent on June 14, 1994, prior to obtaining a "development order," sufficiently constituted an "application for a building permit" within the meaning of prior case law. In so doing, the Court ignored the existence of a fairly major "legal impediment" which existed at the time of the purported "application," and which rendered the "application" unripe for consideration by the city.

Properly applying the express provisions of the Aspen municipal code, the earliest the Respondent could have been considered to have satisfied the conditions for a "development order" thus setting the stage for a building permit application was June 6, 1991, the date upon which she obtained her variance from the Board of Adjustment. Thus the Hallam Lake ESA ordinance, which had been adopted in 1990, should apply to the building permit application under the rules laid down in Denver Buick and Gramiger.

Taking at face value the rule of law laid down in Denver Buick and Gramiger, it is obviously important for all municipalities to clearly understand exactly what point in time marks the "application" for a building permit, because that point in time will determine the law to be applied to the application (whether it be ordinances already in existence or those which are in the process of being adopted, see: Crittenden v. Hauser, 41 Colo. App. 235, 585 P.2d 928 (1978)). This rule of law will be subverted, however, if any submittal, even a submittal which is deficient under local law, is allowed to pass muster as an "application" thus precluding the local government from making changes to the law as applied to that submittal.

B. Has the Respondent obtained a "vested right" to keep the unlawfully constructed improvements to her property?

Echoing Gramiger again, the Court of Appeals in this case ruled that there is a distinction between "whether a permit must be issued" and "whether the applicant's rights have vested under that permit" and did not really reach the second issue. In so do, the Court left open a very disturbing possibility, one which could turn the law of "vested rights" in this state on its head.

Municipalities throughout Colorado have long since become accustomed to the doctrine of "vested rights" as it relates to building permitting. In essence, the right to put property to a particular use becomes vested only after a person actually obtains a building permit and expends resources in reliance on the permit, and the municipality which initially issued the permit can be estopped from revoking it or changing zoning laws to the detriment of the permittee once this has occurred. Denver v. Stackhouse, 135 Colo. 289, 310 P.2d 296 (1959); Cline v. Boulder, 450 P.2d 335 (Colo. 1969); Crawford v. McLaughlin, 172 Colo. 366, 473 P.2d 725 (1970); Bear Valley Drive-In Theater Corp. v. Board of County Commissioners, 173 Colo. 57, 476 P.2d 48 (1970); Witkin Homes v. City and County of Denver, 31 Colo. App. 410, 504 P.2d 1121 (1972); Miller v. Board of Trustees of the Town of Palmer Lake, 36 Colo. App. 85, 534 P.2d 1232 (1975); P.W. Investments Inc. v. City of Westminster, 655 P.2d 1365 (Colo. 1982); Gramiger v. County of Pitkin, supra, see also, Schwartz, Alan E., "Asserting Vested Rights in Colorado," 12 Colo. Law. 1199. When the Colorado General Assembly created a "vested property rights" statute in 1987, they apparently carried forward the common law doctrine of vested rights based upon building permitting, see Sec. 24-68-106 (3), C.R.S.

All of these cases, especially Miller v. Board of Trustees, suggest that the landowners rights will vest only if there is detrimental reliance based squarely on a building permit and occurring after the permit has been issued.

However, none of the decisions in this great body of precedent dealt with the anomalous fact pattern which is present in the instant case, i.e. a situation where the construction is a fait

accompli and the owner is merely seeking a permit to retroactively legitimize her previously unlawful act.

What are municipalities to make of the Court's order in this case? Upon issuance of the building permit, will Aspen be allowed to immediately turn around and revoke it or, applying current law to the owner's new construction, declare the deck and hot tub illegal and subject it to immediate abatement? Would not this result be justified under all the prior case law, in that the owner had no vested right to keep and maintain the new structures since installation had not occurred in reliance on a building permit?

Or, more ominously, will the owner be able to justifiably claim that the Court of Appeals could not have intended such a bizarre result, a situation where the permit must be issued (because the ESA ordinance may not be applied to the "application") but is totally ineffectual (because, upon issuance, the city has a right to change the zoning laws absent detrimental reliance)? Will the owner be permitted to somehow argue that her unlawful construction of the deck and hot tub in the first instance somehow constitutes some sort of advance detrimental reliance on the hypothetical possibility of receiving a building permit in the future, thus causing her right to keep the improvements without interference from the city to "vest" immediately upon receipt of the building permit?

The League would respectfully submit that the issue of whether or not the Respondent has a right to keep her new structures under a vested rights theory must be resolved in this case,

and must be resolved adverse to the Respondent in the name of harmony with all prior case law on building permitting and vested rights. To do otherwise would, ironically, favor the unlawful actor over another who may have dutifully applied for a building permit first, only to see the zoning laws change to his detriment before he has commenced construction.

WHEREFORE, the Colorado Municipal League as amicus curiae respectfully urges this Court to grant the petition for certiorari.

Respectfully submitted this 31st day of October, 1994.

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CERTIFICATE OF MAILING

The undersigned hereby certifies on this 31st day of October, 1994, copies of the foregoing Brief of Amicus Curiae were placed in the U.S. Postal Service, postage prepaid, addressed to:

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