

1 DISTRICT COURT, COUNTY OF ARAPAHOE, STATE OF COLORADO
2 CASE NO. 09CV2741

3 **TRANSCRIPT OF DIGITALLY RECORDED PROCEEDINGS**

4
5 MISSION VIEJO HOMEOWNERS' ASSOCIATION,
6 Plaintiff,
7 and
8 CITY OF AURORA,
9 Defendant.
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11 THIS MATTER came on for a hearing that was held on
12 December 22, 2009, before THE HONORABLE JUDGE VALERIA SPENCER.
13 The following is a complete record of the proceedings from
14 that date.

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17 **A P P E A R A N C E S**

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19 FOR THE PLAINTIFF: ROBERT HOBAN

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21 FOR THE DEFENDANT: CHARLES RICHARDSON & THERESA KINNEY
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1 the budget therefore a one dollar or one hundred dollar bond
2 would be appropriate for this case.

3 THE COURT: Alright, the Court has heard the
4 arguments of the parties and taken evidence today and received
5 several exhibits in regards to argument, actually if I could
6 ask one of you to come up and give me Defense A, I never
7 actually got a chance to look at it wasn't referred
8 (inaudible) purposes but I just wanted to take a look at it.
9 Exhibit Six is the exhibit which sets for the agreement
10 between the City of Aurora and Mission Viejo Company back in
11 Nineteen Seventy One, May Twenty Fourth Nineteen Seventy One
12 in setting forth the various agreements that he parties would
13 have in regards to the Mission Viejo complex or community and,
14 and how Mission Viejo were to dedicate various parcels of land
15 and things that needed to be done including the, then the City
16 living up to its obligations for a fire station, police
17 station, library and that sort of thing. That exhibit then
18 takes us forward to Exhibit number One which is what has been
19 called the Nineteen Seventy Three agreement. On November
20 Twenty Sixty Nineteen Seventy Three, Mission Viejo Company
21 entered into an agreement with the City of Aurora of, of and
22 that was about Mission Viejo having certain land, the City
23 wishing to and agreeing to develop and build and maintain a
24 public library services within the Mission Viejo Development
25 and that set for the various agreements of what they were

1 going to do. Specifically, paragraph seven bound the City for
2 itself and I'm quoting now the City for itself, its successors
3 and assigns hereby agree to furnish library services to the
4 citizens of Aurora for so long as the property is used as a
5 library, the minimum of which such use will be for fifty
6 years. And puts that in numerically as well as spelled out so
7 it's very clear it's going to be fifty years. The paragraph
8 before that, paragraph six, says the City for itself, its
9 successors and assigns hereby accepts and agrees to be bound
10 by each and every covenant condition and restriction contained
11 in the attached Exhibit A and the determinable fee in the form
12 and manner of the deed set forth on the attached Exhibit B.

13 And Exhibit A to the agreement is the restrictions and Exhibit
14 B is the warranty deed. The warranty deed then attaches
15 Exhibit A to itself and gets filed appropriately with the
16 clerk and recorder so that that warranty deed of the land
17 passing was clear and so those who wanted to research the
18 title would have that and it, within the warranty deed it sets
19 forth the possibility of reverter at twenty one years and the
20 restrictions talks about within that document the restrictions
21 of thirty five years. And I, I really I've started on this
22 just to lay out in terms of standing because the contract was
23 with Mission Viejo Company and the City of Aurora. Now the
24 other documentation I have shows that in Nineteen Ninety
25 Seven, Mission Viejo Company merged with Shea Homes Limited

1 Partnership and that certificate of merger, as I said, was
2 received as Exhibit Three showing that now Shea Homes was
3 standing in the shoes of Mission Viejo Company. Subsequently,
4 Mission Viejo or I'm sorry, Shea Homes then entered into an
5 agreement to assign its rights under both the Nineteen Seventy
6 Three agreement and its rights under the land, whatever they
7 might have been at this stage to the Mission Viejo Homeowners'
8 Association. The assignment of contract is Exhibit number
9 Four and although undated, Mr. McMahon testified that it was
10 done contemporaneously with the quick claim deed that was
11 November Twenty Fifth Two Thousand Nine. The assignment came
12 about when Mission Viejo Homeowners' Association realized what
13 was afoot with its library and that it might be in the best
14 position to take action versus Shea Homes, an out of state
15 corporation, even though having some major business here in
16 Colorado that they would not have the same interest that the
17 Homeowners' Association would have so that assignment was
18 affected. And although the assignment of contract says for
19 value received it's not clear what that was. That does not
20 invalidate that assignment. And I make this record all by way
21 of finding that the Mission Viejo Homeowners' Association is
22 the party in interest, they do have a protected legal interest
23 to bring an action and so they do have the appropriate
24 standing under the action that's been brought as well as
25 having an interest under the declaratory relief of rule fifty

1 seven which is very broad as any party having an interest and
2 certainly the Homeowners' Association has an interest in its
3 community and in its development in the things that are
4 happening within that. So in terms of that documentation I
5 find that that satisfies the issue of standing. And I do find
6 the plaintiff does have standing to pursue its claims. One of
7 the other issues that's brought forward is this issue of
8 merger and since I was talking about the documentation, I do
9 want to talk about that. The doctrine of merger talks about
10 the documents that are prepared, covenants and agreements
11 prepared in advance of the final documentation, the final
12 transfer of real property and those sorts of things. Once
13 that final piece is put into place the antecedent documents of
14 then are merged into that final document, into the final deed.
15 This is not the situation here and I do not find that these
16 documents merged. It is clear from the testimony and from the
17 documentation in front of the Court that the Nineteen Seventy
18 Three agreement was executed tem-, contemporaneously with the
19 warranty deed, therefore the Nineteen Seventy Three agreement
20 was never anticipated to merge into the warranty deed and I do
21 not find that the language in the warranty deed about the
22 possibility of reverter in the twenty one years trumping
23 paragraph seven of the Nineteen Seventy Three agreement which
24 specifically states and clearly and unambiguously states that
25 that property is to be used as a library for fifty years.

1 Similarly the restrictions that are attached to both the
2 Nineteen Seventy Three agreement and to the warranty deed, I
3 do not find that those, the restrictions there, the
4 conditions, excuse me, the covenants, conditions and
5 restrictions contained herein shall be effective for a period
6 of thirty five years after the date of reprobation hereof.
7 That is roman five of the restrictions. That is thirty five
8 years of the covenants, conditions, and restrictions in the
9 restrictions themselves. Again, not modifying paragraph seven
10 which specifically sets forth as fifty years. So I, I think
11 under the doctrines that I'm required to follow as a trial
12 court in the careful reading of the face of these documents
13 they are not ambiguous such that I need to marry the documents
14 together in order to have them make sense. The intent of the
15 parties clearly by the agreement was to provide library and
16 library services for the Mission Viejo Development. Mission
17 Viejo gave considerable consideration for that, that is giving
18 the property to the city in order to have the City then put
19 out a bond and get the money together to build the library and
20 then to run it at, that was to be for a minimum of fifty
21 years. And we haven't passed outside of that fifty years yet,
22 we are still within that time period. So merger does not
23 apply in this instance either. And I'm, I'm making sort of a
24 number of findings and eventually getting my way to the Rathke
25 factors and everyone's referred to that today, I talked about

1 it at the very beginning, the Rathke factors are the factors
2 that the moving party needs to establish in order for a Court
3 to impose any preliminary injunction that is requested and as
4 has been cited, injunctive relief should not be
5 indiscriminately granted and should be exercised sparingly and
6 cautiously and with full conviction on the part of the trial
7 Court of the urgent necessity of that injunctive relief that
8 is citing to, to Rathke case and to the Court there cautioning
9 the trial court before it issues a preliminary injunction to
10 enjoin whatever is being asked to be enjoined that a
11 determination must be made that the moving party has
12 established the prerequisites in the six factors that are laid
13 forth. And this is not discretionary, it says, the trial
14 court must find that the moving party has demonstrated those.
15 And so factor number one is reasonable probability of success
16 on the merits and that's where my findings of fact about the
17 Nineteen Seventy Three agreement, the warranty deed and its
18 restrictions come into play because I do find that there is
19 substantial likelihood and I will get to my reasonable
20 probability of success on the merits on the breach of
21 contract. **There is a valid contract** in place between the
22 parties and **the City is in breach** of that notwithstanding
23 their own legal analysis and their reporting of that legal
24 analysis to the City Manager in making his decisions this,
25 this was an inappropriate move **that they validly bound**

1 **themselves and once the City does bind itself it cannot just**
2 **ad hoc decide that it doesn't want to follow those.** The

3 analysis doesn't just end there and okay well we're finished,
4 and that's why I was asking very carefully about the issues of
5 intruding into the legislative and executive branches. And
6 the case law is right in telling the trial courts to be very
7 careful, the separation of powers is a very important concept
8 that we hold dear in this country where just because someone
9 doesn't like what the legislature did, they cannot just run to
10 the Courts and say just change that. There are standards that
11 must be met and, and that's why I asked many, many questions
12 about the Cornerstone case and read it carefully because I
13 think that the Cornerstone case does stand for the proposition
14 and does specifically state that, say that, that specific
15 performance does not lie in a suit against the government,
16 that a breach of contract claim, which is what Cornerstone was
17 sent back on to be heard on the breach of contract claim was
18 not on ordering specific performance. The Trial Court found
19 it could not specifically order in that case and there were
20 very specific issues about eminent domain there but it found
21 it couldn't and the Colorado Supreme Court took it up and took
22 it up more generally. In the Ace case, Ace Line Services that
23 the plaintiff relies upon what Justice Coats in the
24 Cornerstone Case says whatever the merits of the rationale of
25 Ace, neither Ace or any subsequent reliance on it by this

1 Court involved a claim of specific performance for breach of
2 contract and the question of that (inaudible) remedy has never
3 been addressed by this Court and so then they, then the Court
4 goes ahead and talks about it. And then I questioned counsel
5 carefully on it because I was curious as to why Judge Jackson
6 felt he could issue a preliminary injunction on the one hand,
7 but find that he had no authority to order specific
8 performance on the other and the way I read it and I certainly
9 don't know the facts as well as Mr. Hoban, but the way I read
10 it is that Judge Jackson ordered the preliminary injunction
11 and ordered preservation of assets and didn't order a specific
12 performance. And that may be cutting a fine line but that's
13 my read of it and, and that is. So that's a slightly
14 different nuance here and as I said the way I read Cornerstone
15 for our Appellate purposes that's One Seventy Six Pacific
16 Third Seven Fifty Seven in the Colorado Supreme Court opinion
17 in Two Thousand and Seven says that that does not lie in the
18 trial court, that there are other remedies but specific
19 performance is not a one of them. I do want to address the
20 other Rathke factors, then I'll come back to this issue of
21 Cornerstone finally. One of the major issues the Court heard
22 testimony today was the injury piece and it must be
23 established that there's a danger of real, immediate, and
24 irreparable injury which may be prevented by injunctive
25 relief. And the injunctive relief is to maintain the status

1 quo and order that the Mission Viejo Library be maintained and
2 I heard from Mr. McMahon and Ms. Marie Spencer and Ms.
3 Appleton today about the injuries that would be suffered not
4 only by the local community but by others within the Aurora
5 community who visit and use the Mission Viejo Library. Of the
6 branches it is the second most used library in the Aurora
7 Public Library System. The injury was talked about at a very
8 specific level that's an injury to the children in the
9 community not having the easy and local access to the branch
10 library, to the elderly who might not have the ability to go
11 to another branch, and that again the easy access to
12 neighborhood would be lost to them. Defendant (inaudible)
13 that as a matter of convenience but that's something that was
14 raised very clearly. The injury was also specifically talked
15 about from the teacher perspective that children who don't
16 have the resources at home need to be able to turn to the
17 library for internet access, for research projects, and for
18 those purposes and that that is not replaceable for them in a
19 home environment and because of the situation in the home
20 environment they may not have access and in Ms. Marie
21 Spencer's opinion do not have access to those branch libraries
22 to be able to use the access elsewhere. Finally, Ms. Appleton
23 talked about from a real estate perspective as well as living
24 in the neighborhood that there is a, a real danger of loss
25 economically to home values and to the willingness of people

1 to stay in the community who have lost an important resource.
2 And, although I said finally, Mr. McMahon also talked about
3 the community retail landscape that is where the Mission Viejo
4 Library is located some of the retailers who are located there
5 are located in part because of the presence of the traffic,
6 the positive traffic that is associated with a library that
7 they are able to get that business and from losing the library
8 they automatically lose that traffic. People are no longer
9 swinging by as long as they're there, stopping by to pick up a
10 pizza or to have Mexican food or to take advantage of the
11 other retail establishments that are there. **So we're talking**
12 **about an economic loss at a commercial level almost**
13 **immediately with the loss of the library.** So we talked about
14 some short term injuries, also talked about long term injury
15 with the loss of that library over time. An empty building
16 attracts maybe an unsavory element that, that it just has the
17 look of an economic downturn to have empty storefronts and
18 the, and the Mission Viejo Library, I imagine there's a rather
19 large footprint in that area and so that emptiness contributes
20 to a more of a long term loss economically and certainly the
21 look of that. **So it appears to the Court that it has been**
22 **established that there is injury to the parties.** And I've
23 struggled in, in this about whether it's irreparable injury
24 because what's before the Court today, everyone needs to be
25 very clear is the issue of injunctive relief. This is not the

1 trial on the merits. This is a stop in the road to what did
2 Mr. Hoban call it, d-day, to address the issues before
3 December Thirty First. If the Court orders injunctive relief
4 and says to the City you must keep the library open, that's
5 only until there's a trial on the merits. If the Court finds
6 an injunctive relief is not appropriate, that's only until the
7 time that there's a trial on the merits. So the question is
8 whether the injury is irreparable. And that is if on a trial
9 on the merits it, it is results in a different outcome whether
10 that library building can be reopened, the stock reallocated,
11 the people be hired and that sort of thing can happen. And,
12 and so I'm reluctant to say there's irreparable injury.
13 There, there are some remedies immediately to at least some of
14 the citizens in Aurora and that is the use of the libraries in
15 the other, the other branches and the Central Library. Is it
16 a complete ameliorative effect? No, it's not a hundred
17 percent recovery and I think everyone would recognize that Ms.
18 Bateman in testifying today as the Director of Library
19 Services, a woman, who is a woman who was in tears over the
20 thought of the closing of these libraries and how very
21 incredibly difficult the decision was to make and the loss of
22 those libraries is truly a loss to the community and it's not
23 just to Mission Viejo, it is to the entire community in Aurora
24 that, that, that is happening to but is it irreparable and I
25 don't know that it is irreparable, I will acknowledge that it

1 has been established that it's real injury and there is,
2 certainly, immediate injury. But I won't go so far as to say
3 it's irrepar-, irreparable which could be prevented by
4 injunctive relief. The next factor is whether there's plain,
5 speedy and adequate remedy at law. And Mr. Hoban stated and
6 then, then the testimony bears out that the Homeowners'
7 Association tried its various remedies in asking for opinions,
8 asking for the Council to review, asking the Council to pass a
9 budget neutral proposition and this was through Councilman
10 Broom taking up their cause, asking for a review of the
11 various documents, Mr. McMahon went in and researched the
12 archives and, and various other places to try and find all the
13 documents. The (inaudible) and the understanding apparently
14 leading into these final decisions was that the Nineteen
15 Seventy Three agreement had expired concomitant with the
16 warranty deed and so there was a feeling of oh well it's done
17 and then when the Nineteen Seventy Three agreement was
18 recovered that is (inaudible) very late date of realization
19 that it was a fifty year time period that was at play here.
20 So there have been an exhausting of remedies of other remedies
21 to try and get a resolution to this case. So I do find that
22 that has been established. The next factor is written in the
23 negative which is the preliminary injunction will not disserve
24 the public interest and read another way that it will serve
25 the public interest to do so and until the, the final

1 testimony that there was a budget neutral proposition, I was
2 very concerned that a preliminary injunction would disserve
3 the public interest because the public being the Aurora
4 Community would be disserved because I would be forcing the
5 City Council to reallocate its budgetary resources in keeping
6 the Mission Viejo Library open a win for the Mission Viejo
7 Community and those who serve that library, a loss for
8 whatever other entity the City might have to dip into and
9 effect, and although Ms. Bateman was willing to go so far as
10 to say that there were budget neutral propositions and
11 allocation of resources that would not affect the bottom line,
12 I, I view that with a bit of grain of salt to keep an entire
13 building open I think it would affect negatively some other
14 services whether that's just within the library milieu or
15 others, I don't know and the evidence is not clear before me.
16 But I, I, I, I think it's not an easy answer that a
17 preliminary injunction would serve the public interest.
18 While, when we're talking about the narrow public interest of
19 the Mission Viejo, yes, as I've said; but when we're talking
20 about the larger public interest of Aurora, we may not be, and
21 that (inaudible) the backdrop of a ballot being presented.
22 The City Council took the unusual measure of putting the vote
23 to the public and I don't have the ballot in front of me, that
24 wasn't presented so I wasn't exactly clear what the language
25 was on the ballot, if the question was hey do you want more

1 taxes and it got voted down or the question was do you, if you
2 don't give us some money we're going to close the libraries or
3 something in between which I guess it probably was, the voting
4 public, the community said no, we don't want to allocate our
5 resources that way. Notwithstanding a survey that laid out
6 what they felt the priority of services was when it came down
7 to it, it came down to their pocketbooks the public spoke and
8 said no we're not going to give more money to be specifically
9 allocated to the libraries. And so the City Council, as I
10 said, took the unusual measure not just of exercising its
11 authority but putting it out the public to see if there was
12 one final chance to avoid this loss of libraries, not just the
13 Mission Viejo Libraries but one half of the Aurora Public
14 Library services and those other three branches. So it's not
15 just Mission Viejo as noted by Mr. Hoban it is many other
16 libraries and many other citizens who are being affected. The
17 balance of equities is the fifth factor that the balance of
18 equities favors the injunction. And Mr. Hoban argues that the
19 balance of equities that it should be that the government is
20 held to its contract regardless of its financial problems that
21 it has the monies in its reserve and it has an ability to
22 allocate those monies and it should and **I agree very strongly**
23 **that a government should be held to its contract, that any**
24 **contracting entity should be held to its contract. You decide**
25 **to enter into this contract and then when things don't go the**

1 way you hoped you say never mind and get to walk away from it
2 scot-free is not the, the, the balance that we strike in this
3 country in contract law and just because one of those contract
4 (inaudible) happens to be the government it doesn't mean they
5 get to walk away from it and thumb their nose at the contract.
6 They said in Nineteen Seventy Three we want to enter into this
7 for a minimum of fifty years and sort of that said well never
8 mind times are tough we want to do something else. I, I would
9 hope that had the City Council had the actual Nineteen Seventy
10 Three agreement in front of it, they would have recognized
11 they needed to honor that contract and made the tough decision
12 about a different branch to close but that's just speculation.
13 There's no way to know what they would have decided. So the
14 balance of equities in holding the government to its contract
15 certainly would have favored an injunction. But I don't think
16 that's the only balancing that needs to be done and again it
17 goes back to that public interest. The balance of equities is
18 also the balance on a larger scale and that is saying to the
19 City this is what you should do with your money and your money
20 should be given to the libraries and not to public safety or
21 not to public health or to cut services or to lay off people
22 in parks and rec or to, to take other steps. And, and so in
23 that sense the balance of equities doesn't favor injunction.
24 The balance is, again, (inaudible) to separation of powers is
25 to have the City Council continue to make the tough decisions

1 that it has been elected to make in how to allocate its
2 limited resources. The final factor is that the preliminary
3 injunction will preserve the status quo and I was interested
4 to hear from Ms. Bateman at the end about the different
5 library hours because in, in contemplating this I was trying
6 to craft in my mind what the preliminary injunction would look
7 like. Who am I as a Judge to tell a library how it shall be
8 run, what hours, how many staff, what sort of books should be
9 there, what other items, should that include DVDs, should
10 those be removed, and although the Court has broad powers
11 under injunctive relief, it, it, it is difficult to define
12 what would the status quo look like and how would I order
13 that. The easy answer is the status quo is the way the
14 library was presented on the day that the complaint was filed
15 for example and that would preserve the status quo in the
16 sense that it would keep the library open, it would not
17 preserve the status quo in that if the City Council and going
18 back to its budgetary table decided on a budget intro
19 proposition, it would very much effect the other branches that
20 they would have to remove resources from the Central Library
21 or the other two remaining branches to try and keep the
22 Mission Viejo Library open. Well, they wouldn't even try,
23 they'd have to under Court Order and I'm not sure that they
24 could reach into the Talon's Reach resources because that's
25 supported by the Arapahoe Library District so it would be

1 either Martin Luther King Branch or the Central Library would
2 have to be affected in order to preserve the status quo in
3 this limited fashion to the Mission Viejo Library itself. Now
4 plaintiff is arguing that part of this injunctive relief would
5 be to keep all the branches open, you know, finding that the
6 plaintiff or the defendant has violated the Colorado Library
7 Law and that all the branches should be kept open under
8 injunctive relief and, as the parties will know, I reacted
9 with some surprise because I'm certainly not in the position
10 to say to the City Council guess what you're keeping all the
11 libraries open and good luck finding a budget neutral
12 proposition to do that. And, and so I'm not going that far.
13 I do not find that the injunctive relief request is to cover
14 all the branches notwithstanding that plaintiff might have
15 standing to argue all the branches, that is not what's in
16 front of me today. The testimony and argument has been
17 limited to the Mission Viejo Library only and not to those
18 other branches so I'm certainly not going to reach to those.
19 I have to tell you this is a very difficult case, this has all
20 the equities on the plaintiff's side and when I use the word
21 equities in as Mr. Richardson acknowledged there isn't anyone
22 who doesn't like libraries, there isn't anyone who thinks that
23 we should just get them all closed and be done with it and
24 save all that money. So this is a very difficult situation to
25 say to a community well sorry, it looks like they're breached

1 their contract but you're stuck without a library. That being
2 said the appellate courts have set out very clear factors that
3 the trial court must follow so that emotion doesn't come into
4 it so that personal opinion doesn't come into it. It is
5 factors that must be met by the moving party and law that must
6 be applied and so although that doesn't take the (inaudible)
7 out of a result, it does ensure that people are not carried
8 away by the passions of the moment and are looking at the law
9 as objectively as possible. So although I have found on some
10 of the factors that plaintiff has prevailed, I, it is with
11 great regret that I have to find that an injunction does not
12 lie in this case. And I say that because of factor number
13 one, the reasonable probability of success on the merits, the
14 merits being specific performance. I, I do find that it is
15 contrary for me to say a preliminary injunction should stand
16 and Mission Viejo Library should remain open until a trial on
17 the merits when there is no possibility that a specific
18 performance can lie as a result of success on the merits. And
19 please take me up, (inaudible) Colorado Supreme Court say that
20 I misread the Cornerstone case and it is not as broad as I
21 read it to be, but I read Justice Coat's opinion to tell the
22 trial courts that specific performance does not lie and I am
23 extending that to say that that means preliminary injunction
24 should not enter when that cannot be the result in this case.
25 And that's clearly the remedy that Mission Viejo is seeking

1 and appropriately so. Money is not going to cure this but
2 that's the way the law appears to this Court and that's what
3 I'm left with applying. So notwithstanding the elements that
4 I have found that have been met in this case I will not find
5 that an injunction should lie in this case. It's a drastic
6 remedy, so. That request is denied. We do need to set this,
7 Mr. Hoban you had asked at the outset if we could clear some
8 dates today but I'll need the parties to, to really think
9 about discovery and where they want to go with this and I can
10 give you some dates but I don't know how far out you're really
11 talking.

12 MR. HOBAN: Your Honor, do you think you could
13 throw out a handful of dates from early, early March?

14 THE COURT: I can.

15 MR. HOBAN: Just to get it set (inaudible).

16 THE COURT: And, and tell me is this a, a jury
17 trial, a Court Trial, what are we setting for?

18 MR. HOBAN: Uh, we would elect for, well.

19 THE COURT: I don't know, did you ask for a jury
20 trial in your complaint?

21 MR. HOBAN: We did not and we want a Court Trial,
22 Your Honor.

23 THE COURT: And length?
24
25