

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.

10  
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**

18  
19 FOR THE PLAINTIFF: ROBERT HOBAN

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21 FOR THE DEFENDANT: CHARLES RICHARDSON & THERESA KINNEY  
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THE COURT:           Alright, let me call the matter, this is Zero Nine C V Two Seven Four One, Mission Viejo Homeowners' Association versus the City of Aurora. (inaudible) appearance please.

MR. HOBAN:           Good morning, Your Honor, Robert T. Hoban, Hoban and Viola LLC on behalf of the plaintiff, Mission Viejo Homeowners' Association and with me is the president of the Homeowners' Association, Mr. Todd McMahon (phonetic).

THE COURT:           I'm sorry the last name?

MR. MCMAHON:        Todd McMahon.

MR. HOBAN:           Thank you, Your Honor.

THE COURT:           (inaudible)

MR. RICHARDSON:     Good morning, Your Honor, Charles Richardson with the Aurora City Attorney's Office Colorado Registration Number Seven Nine Three Four. Theresa?

MS. KINNEY:          Oh, and Your Honor, Theresa Kinney, that's co-counsel for the City of Aurora.

THE COURT:           Alright and good morning to everyone. I've received several submissions in this case in regards to the declaratory judgment action that's been filed. Before we get going on this, I, I do have some preliminaries, but notice of hearing that was set in this case was to set by plaintiff

1 for a half day hearing for on injunctive and declaratory  
2 relief. Thereafter I received opposition to application for  
3 temporary restraining order and I don't think we're here on  
4 the temporary restraining order so I need a little  
5 clarification there. Thereafter, plaintiff's counsel files  
6 and submissions including an e-mail quasi agreement if you  
7 will between the parties on this hearing on preliminary  
8 injunction and declaratory relief. That was coupled with  
9 (inaudible) filed by plaintiff saying no, no we don't need  
10 preliminary injunctive relief so please.

11 MR. HOBAN: I'll do my best to enlighten the  
12 Court, Your Honor. Um, when Ms. Kinney and I had come down to  
13 the Court, uh, approximately a week, ten days ago, at that  
14 point in time we thought there was a potential need for a TRO  
15 given that this library is set to be shut down on the Thirty  
16 First of December. However, because we were able to get a  
17 Court date and, and thank the Court for that, prior to the  
18 Thirty First we feel, we felt as if we could address, uh, the  
19 declaratory and injunctive portions now. And, and the e-mail  
20 you have is, is basically our agreement and that represents  
21 our discussion as does the notice of hearing. The idea would  
22 be, we have all the facts available. We have the documents as  
23 from the plaintiff's perspective and until yesterday from the  
24 defendant's, defendant's perspective declaratory relief can be  
25 entered based on what we present today. So then that sort of

1 flip flops the injunctive and the declaratory relief. In  
2 other words, we would seek declaratory for relief from the  
3 Court and injunctive relief as a remedy, if you will, to, uh,  
4 to enforce any such declaratory relief that comes out. For  
5 example, if the Court were to deem that the contract's valid  
6 finding and that the library should stay open, declaratory  
7 relief being permanent relief, the Court could issue some form  
8 of equitable relief and or an injunction pursuant to rule  
9 sixty five that was mandatory which would carry out the intent  
10 and effect of the rule fifty seven declaratory relief  
11 judgment. That was what we prepared for, that's what our  
12 agreement stated, uh, and that's what we're hoping to have  
13 addressed here today because frankly, Your Honor, I, I don't  
14 see any other evidence or information outside of what would be  
15 presented to you today that's relevant to this case but more  
16 importantly under rule fifty seven, the plaintiff is entitled  
17 to a speedy remedy on rule fifty seven which would be the  
18 permanent relief. Uh, there's no reason, frankly, to drag  
19 this thing on, uh, from a permanent relief perspective beyond  
20 today. With that said, I do understand there's a breach of  
21 contract action that we've raised which will not be considered  
22 today so technically that is the only thing that would not be  
23 decided today although if the declaratory relief came down in  
24 favor of the plaintiff that would have, uh, significant  
25 bearing on the ultimate adjudication of the breach of contract

1 claim. With, with that said if you have any questions or if I  
2 spoke too quickly and you don't understand where I'm coming  
3 from, I'm happy to clear that up for you.

4 THE COURT: I'll tell you, frankly, my concern,  
5 today's the Twenty Second of December, this is the only day I  
6 have to hear this, that the issues are much more complex than,  
7 than you believe them to be, that you are asking this Court to  
8 really decide on the merits on a half day hearing major issue  
9 and I think pre-, a preliminary injunction is really the more  
10 appropriate hearing today so that a full hearing on the merits  
11 where everyone's not racing around and filing things at five  
12 o'clock the night before and expecting the Court to digest it  
13 and be ready is really more appropriate. You are entitled to  
14 have a hearing, the parties agreed to it, you came in, you  
15 were here for that, but, but this is not to me as the newcomer  
16 to the case as straightforward as you would like to believe  
17 that the presentation would be. I would love to be surprised,  
18 I'd love to see that it's all a straightforward, but in the  
19 filings that I've received there's a clash of issues, there's  
20 a clash of many issues in this case. There's almost virtually  
21 no agreement on any of the issues so I, I, I think it's a  
22 little bit more complex to decide today. I'll hear from the  
23 defense, Mr. Richardson or Ms. Kinney?

24 MR. RICHARDSON: Well, I agree with the Court's  
25 comments one hundred percent. This is not a Christmas present

1 that we're trying to get under the tree here this morning and  
2 my staff tells me that I haven't looked at a law book in ten  
3 years so last night I decided to open a law book and I want to  
4 read to the Court something I found that was pretty useful.  
5 And this is under the annotations to rule sixty five. A Court  
6 errors and is precipitous in its action by making an  
7 injunction permanent where issues remain to be tried upon  
8 which parties are entitled to be heard before any orders could  
9 be made final, *Graham v Hoyle* Four Oh Two P Second Six Oh  
10 Four. Uh, Your Honor, uh, there will be depositions in this  
11 case, uh, we are contemplating having an expert witness to  
12 talk about the, uh, Colorado, uh, State Library Law, um, and  
13 so I agree with the Court, uh, we have um, conceited the  
14 temporary restraining order in a spirit of cooperation, we  
15 understand this is an HOA, they don't have unlimited funds.  
16 So we've really worked hard to get a half day hearing, uh, to  
17 address the important issue of a preliminary injunction this  
18 morning, Your Honor.

19 THE COURT: Alright, Mr. Hoban as I in-, just  
20 indicated in my questioning of you, I think that's, that's  
21 really the proper posture of the case before me. And I know  
22 you alluded to that in your bench brief and thank you for that  
23 bench brief and you had laid out as others have and of course  
24 Radkey (phonetic) gives the Court the factors to look at in a  
25 preliminary injunction hearing, um, and that's the way we'll



1 proceed today. Now one of the issues that defense raised was  
2 the issue of standing as, as a preliminary matter and, can you  
3 address that briefly I don't know if the parties wanted to  
4 reach that or how you wanted to proceed on the standing issue  
5 since that sort of was a gate keeping function (inaudible)-

6 MR. HOBAN: Absolutely, Your Honor, um, let, let  
7 me simply just make one, one comment on your, your prior  
8 decision, um, regarding rule fifty seven, if I may. Um, un-,  
9 understanding that today will be strictly for a preliminary  
10 injunction hearing, I understand the Court's rationale and I  
11 understand the defendant's position, fair enough. Um, what  
12 we'd like to do with the Court's cooperation not of course  
13 right now is, is to set an actual declaratory relief hearing  
14 before we leave the Court today because we are entitled under  
15 rule fifty seven m to have that come up as speedily, uh, in  
16 advance on the Court's docket as possible. So I would simply  
17 request on the record and request to you that before we leave  
18 this Court today regardless of what happens that we could  
19 schedule a perhaps a full day hearing on the merits of the  
20 declaratory judgment action because, uh, that would give the  
21 other side an opportunity to conduct discovery and comply with  
22 the plaintiff's rights under rule fifty seven. Um, I would  
23 simply ask the Court for that, uh, indulgence in scheduling it  
24 before we leave today so we have some certainty leaving this

25

1 Courtroom regardless of the outcome of the preliminary  
2 injunction.

3 THE COURT: Well, I don't have a problem with  
4 that, I'm trying to get our calendars together and come up  
5 with a date, we'll, let's see where we get to. Mr.  
6 Richardson, objection to that procedure?

7 MR. RICHARDSON: Yeah, one cautionary note, Your  
8 Honor, we're apparel going to hear from Mr. Smith for the  
9 first time, um, this morning. I guess he, he may be driving  
10 around in an RV somewhere but, um, having a non-deceased, uh,  
11 participant in this transaction from the early Seventies is  
12 certainly a, uh, an important uh, component of this case and,  
13 uh, you're going to hear me ask him if he's available for  
14 deposition. Everybody on our side of the case is deceased and  
15 so to set a hearing, uh, I, I just want to be sure, there's  
16 going to have to be extraordinary cooperation to do all of our  
17 discovery that we're going to be doing. Um, I am going to  
18 take the deposition of Mr., of the HOA president at some  
19 point. Um, just don't wanna in this rush, uh, uh, interfere  
20 with our rights. This is a case that's been filed in the  
21 highest trial Court in the State of Colorado and we are, we  
22 are not trying to be obstreperous or, or block anything but we  
23 are entitled to certain rights, uh, to conduct, uh, uh, our  
24 discovery in a way that, that is useful to, to the Court and  
25 to the parties.

1 THE COURT: Well, and I didn't hear Mr. Hoban say  
2 anything contrary to that.

3 MR. RICHARDSON: Okay.

4 THE COURT: He did talk about after an  
5 opportunity for full discovery-

6 MR. RICHARDSON: Okay.

7 THE COURT: Certainly, I expect the parties who  
8 are coming in front of me to be using that air of cooperation  
9 in getting those calendars out, it's in the plaintiff's best  
10 interest to move this along speedily and in order to do so  
11 need to make witnesses available to defense so those  
12 depositions can be conducted so that you are fully ready to  
13 come back in-

14 MR. RICHARDSON: Right.

15 THE COURT: For the appropriate hearing in front  
16 of the Court to set it and then have everyone come back in and  
17 say well we're not ready because everything wasn't done,  
18 (inaudible) just jams up the system and that's not efficient  
19 so.

20 MR. RICHARDSON: Right.

21 THE COURT: But I'm hearing that the playing  
22 field is wide open right now and that the parties are, are  
23 willing to cooperate on the issues that they can. So-

24 MR. HOBAN: Yes, Your Honor, thank you.

25 THE COURT: Alright.

1 MR. HOBAN: With that said, your question about  
2 standing, would you like me to address that right now?

3 THE COURT: You know I'm going to interrupt you  
4 because I had one matter set at eight thirty and I see the  
5 defendant has just come in-

6 MR. HOBAN: Okay.

7 THE COURT: So I'm going to take that up quickly  
8 and then we'll come right back here, if you'd just stay right  
9 where you are.

10

11

**APPROXIMATELY ONE MINUTE LATER**

12

13 THE COURT: We're back on the record going on  
14 Zero Nine C V Two Seven Four One, Mission Viejo Homeowners'  
15 Association versus the City of Aurora with counsel present and  
16 Mr. Hoban was going to address the issue of standings, please.

17 MR. HOBAN: Yes, yes Your Honor, and if I may  
18 approach, I'm going to hand you what's also been provided to  
19 opposing counsel, these are our exhibits for today's hearing.

20 THE COURT: Thank you.

21 MR. HOBAN: Uh, importantly with regard to the  
22 issue of standing our documents that are in there and, and  
23 it's my understanding, uh, and correct me if I'm wrong, Ms.  
24 Kinney, that the documents in this binder are stipulated to?

25 MS. KINNEY: All of your exhibits?

1 MR. HOBAN: Yes.

2 MS. KINNEY: No, we don't have a stipulation on  
3 all of them.

4 MR. HOBAN: Okay, well, well with that said, Your  
5 Honor, we'll, we'll certainly lay a foundation, introduce  
6 these through evidence and that may be the more appropriate  
7 way to do it. However, as an offer of proof, I would address  
8 the issue of standing very simply. The Mission Viejo company,  
9 or pardon me, the Mission Viejo Homeowners' Association formed  
10 in Nineteen Seventy Five, is charged with very specific things  
11 in its articles of incorporation and you'll hear that this  
12 morning about stewarding the neighborhood and taking up  
13 interests that are related to the Mission Viejo Community and  
14 adjacent communities. With that said, under rule fifty seven,  
15 clearly any interested party has a right to bring a  
16 declaratory relief action. So under rule fifty seven there is  
17 no dispute that they have standing, in fact, there's no  
18 dispute that there's a controversy considering the meaning of  
19 this Nineteen Seventy Three agreement which is the subject of  
20 the dispute between the City and the plaintiffs here. So  
21 that's on the declaratory relief. Perhaps the, the other  
22 issue would be on the breach of contract claim, what give the  
23 HOA the standing to stand in the shoes of the Mission Viejo  
24 Company on the breach of contract claim? And what we've got  
25 is some documents from Shea Homes a successor by merger to the

1 Mission Viejo Company and these are not stipulated apparently  
2 but we won't be able to work through that on the stand. But  
3 if you'd look at Exhibit Two understanding it's not into  
4 evidence but for your, for my offer of proof, Exhibit Three in  
5 your binder is a certificate of merger which you can take  
6 judicial notice of. It is a document issued by the Secretary  
7 of State for the State of California. This document shows  
8 that the Mission Viejo Company merged with Shea Homes, that's  
9 piece number one. Let's link that together with the next two  
10 documents, Exhibits Four and Five in the binder. Exhibit Four  
11 is an assignment of a contract. An assignment of this  
12 specific Nineteen Seventy Three agreement which is the subject  
13 of the entire proceedings here today, the rights and  
14 obligations from the Mission Viejo Company which were signed  
15 by merger to Shea Homes, had been assigned to the Mission  
16 Viejo HOA so therefore we have a valid, legitimate, finding  
17 assignment of any and all rights under that contract to the  
18 Mission Viejo HOA and that's codified in the second to last  
19 paragraph, or the last multi-line paragraph on Exhibit Four.  
20 And to take that to the next level, Shea Homes again merger,  
21 successor and interest to Mission Viejo Company has in fact  
22 quick claimed any potential interest in this specific  
23 property, this Track F of the Mission Viejo filing to the  
24 Mission Viejo HOA. For all intensive purposes, Your Honor,  
25 for the breach of contract claim and for any other claims of

1 interest or damage as we sit here today, the Mission Viejo HOA  
2 is the Mission Viejo Company, it stands in their shoes both  
3 legally, by way of contract, by way of assignment and Colorado  
4 Case Law upholds their right by this assignment to stand in  
5 the shoes of Mission Viejo Company. That should solve the  
6 standing problem. You'll hear testimony on the stand and an  
7 offer of proof has been made in the, in the complaint and in  
8 the affidavits that in fact the Mission Viejo Company, pardon  
9 me, the Mission Viejo HOA has suffered damages due to the loss  
10 or the impending loss of this community asset. That's going  
11 to be the bulk of the testimony today. So with regard to  
12 damage, damage financially, damage to a legally contracted  
13 (inaudible), all of those issues will be discussed on the  
14 stand and presented to this Court before appropriate  
15 testimony. But for your purposes and by way of this offer of  
16 proof, those three documents, um, tie up and clear up any  
17 standing issues or standing concerns that this Court may have.  
18 With that said, of course, I'm open to any questions the Court  
19 may have, but that's the plaintiff's position, Your Honor.

20 THE COURT: Let me ask you, Mr. Hoban, Mr.  
21 Richardson's argument has objection to the TRO, even though  
22 it's under TRO, it still stands here today as, as a little  
23 more nuances twofold and one it, it's under the case law that  
24 there has to be an injury in fact and then that it's a legally  
25 protected interest that you're allowed to go forward on so

1 assuming you've met the second hurdle that you've established  
2 by these documents that the homeowners' association stands in  
3 the shoes of Mission Viejo Company, the issue really is the  
4 injury (inaudible). And interestingly that, that, that tails  
5 with one of the factors under the preliminary injunction, that  
6 is the danger of real, immediate and irreparable injury which  
7 might be prevented by injunctive relief so it sort of goes  
8 together but that appears to be Mr. Richardson's argument is  
9 that you can't establish injury.

10 MR. HOBAN: Your, Your Honor, as both the HOA for  
11 the community and as a successor to the Mission Viejo Company,  
12 the reason and the only reason that this property was ever  
13 deeded to the City was for one thing, operate a library on  
14 this property for fifty years. So the injury in fact is that  
15 the Mission Viejo Company is losing any and all rights and  
16 obligations under the contract. This is a community asset  
17 that was specifically bargained for and created in conjunction  
18 with the City predecessors to everyone in this Courtroom from  
19 the City to say that this community, the Mission Viejo  
20 Community, will benefit from this library. It is the  
21 cornerstone of this neighborhood. The loss of it, in and of  
22 itself, is the damage. That can be codified equitably, that  
23 can be codified or quantified rather, um, through financial or  
24 economic damages, which we're not here to address today, but  
25 the damages, they lose their benefit of the bargain. And for



1 all, and, and, and the, and the community loses an asset which  
2 was specifically provided to it by the City through, through a  
3 deed, a free conveyance of land to the Mission Viejo, or to,  
4 to the City from the Mission Viejo Company, so I would argue,  
5 Your Honor, that, that and the testimony will back this up,  
6 there is unequivocally damage to these protected interests,  
7 contractual interests, interests under rule fifty seven, and  
8 those the, those damages can be co-, quantified in a number of  
9 different ways, um, and that's what we intend to present  
10 today. Uh, so with that said, I don't know how much clearer I  
11 could make it to, to the Court that the damage is the loss of  
12 the benefit of the bargain. The loss of this, this community  
13 asset which was specifically agreed by the city to be provided  
14 for fifty years, five zero, the documents say that so unless  
15 it's carried out for fifty years, they're being deprived of  
16 the benefit of the bargain. They're being deprived of a  
17 community asset, that's the damage.

18 THE COURT: Thank you. Mr. Richardson?

19 MR. RICHARDSON: I agree with the Court's  
20 comments, um, our argument had to do with the overall generic  
21 issue of injury in fact, um, but I will note we are going to  
22 vigorously object to Exhibits Four and Five on, on numerous  
23 grounds, um, also uh, Shea Homes will be, uh, now, uh,  
24 involved in the discovery process to try to learn what the  
25 circumstances of those recently executed documents. But there

1 is no injury in fact. Now it is uncomfortable arguing against  
2 a very important part of our community's well understood  
3 desire to maintain a branch library in the vicinity of their  
4 neighborhood. I understand the emotion but the law requires  
5 there be an injury in fact and you're going to hear on my  
6 cross examination of the HOA president we believe this comes  
7 down to convenience, nothing more, nothing less. It's great  
8 to have a convenient branch library but we are maintaining to  
9 the best of our budget abilities our library system, the City  
10 of Aurora's been under incredible budgetary, uh, pressure as a  
11 sales tax based, uh, governmental entity in Colorado and so  
12 while I understand the HOA's admirable efforts to maintain a  
13 branch library in their community, there is no injury in fact  
14 to a legally recognizable cognizable, um, right un, under the  
15 law. Convenience is not, uh, a, a legitimate reason, uh, for  
16 using the strong arm and that's in, that's the term used in  
17 the annotations, the very strong arm of the Court in terms of  
18 injunctive relief one branch of the government the judicial  
19 versus the legislative that's struggling with these incredible  
20 budgetary problems.

21 THE COURT: What's sort of interesting, Mr.  
22 Richardson, is as plaintiff pointed out, the City has the  
23 power to contract but the City doesn't have the power to the  
24 just say never mind, you enter into a contract to honor  
25 something for fifty years and then the economics get tough and

1 you say never mind you, you can't be bound one way to bind the  
2 other party and not bound the other way to walk away from  
3 contractual obligations. So it's more than convenience,  
4 they're sitting on contractual rights if all of these  
5 documents play out and I'm not, I'm not giving an opinion  
6 whether they do or don't, but I'm just putting it into play  
7 that the injury in fact is a breach of contract at its heart.

8 MR. RICHARDSON: A-, actually, Your Honor, and  
9 this is a hard argument to make because it's counterintuitive,  
10 the law of municipal corporations and we allude to it in our  
11 trial brief is that one city council cannot, uh, bind any  
12 future council in terms of their legislative activity and so  
13 what, what the, and that goes against the Ninety Nine percent  
14 of normal contract law, but it is a well recognized, uh,  
15 principle of municipal corporation law and we allude to that  
16 in our trial brief and yes we're going to be arguing that this  
17 contract entered in the early Nineteen Seventies cannot bind  
18 the legislative ability of this city council to make the  
19 critical, unfortunately very tough decisions regarding the  
20 library. Now, you didn't ask this directly but we're going to  
21 be getting into a lot of what is a public library. You're  
22 going to hear me cross examine Mr. Smith and say the Mission  
23 Viejo Company, did they want to specify what hours it's open;  
24 what the book stock was going to be; how it would be staffed;  
25 the level of, of the, the staffing in terms of the hierarchy

1 of the library; and so, um, that, that's a whole nuther area  
2 of what was intended by the parties back in the early  
3 Seventies before the internet, um, what, what, what, what is a  
4 public library and that gets to the issue of whether ju-, the  
5 judicial branch, and I'm trying to be, you know, I don't want  
6 to be up here criticizing the judicial branch, but I have to  
7 really, I feel compelled to point out what the limitations of  
8 the judicial branch are in terms of the legislative branch in  
9 terms of what is actually the operation of a library. And so,  
10 yes Your Honor, uh, I, I know it seems weird but there is a  
11 well known principle of municipal corporation law that says,  
12 uh, one council cannot, uh, bind a, a future council. And in  
13 Nineteen Seventy Two they said shall be operated as a public  
14 library and again we're going to get into what is a public  
15 branch library.

16 THE COURT: Alright, counsel. Alright, let's  
17 return back to the standing issue which we started with at the  
18 outset. And really the first hurdle is whether there's a  
19 legally protected interest that the homeowners' association  
20 holds a cognizable interest and although there's objection to  
21 the various exhibits, just on their face they seem to  
22 establish and certainly I'll allow the parties to go into it  
23 further, but seem to establish that Viss-, Mission Viejo  
24 Company contracted with the City of Aurora and then got merged  
25 with Shea Homes and then Shea Homes assigned the contract to

1 the homeowners' association and quick claimed, through a quick  
2 claim deed the property rights to the homeowners' association  
3 as well and so as, as far as the documents appear to establish  
4 the Mission Viejo Homeowners' Association is the entity to, to  
5 bring suit under the breach of contract claim and for  
6 declaratory judgment. So that hurdle has been established.  
7 The second issue is the injury in fact that I've been  
8 questioning both sides upon and because that really fits into  
9 the factors the Court must consider in the preliminary  
10 injunction, I know that I'll hear more questioning and  
11 evidence on that so I will lay that to the side for now. And,  
12 and I've asked questions and we've, we've sort of opened the  
13 field a bit and I'm going to ask the field to be narrowed back  
14 to the prelimin-, preliminary injunction factors, I know that  
15 both sides are well familiar with Rackey versus McFarland  
16 that's at Six Forty Eight Pacific Second Six Forty Eight from  
17 Colorado Supreme Court in Nineteen Eighty Two setting forth  
18 the factors that the moving party must satisfy to obtain the  
19 preliminary injunction. And again speaking to the Court of  
20 Appeals let me just lay out for the record and those factors  
21 and I'll ask the parties to address themselves to those  
22 factors through their evidentiary presentation. And although  
23 the parties said they, they can be done in half a day, luckily  
24 for you all I have the whole day available so we will use the  
25 time expeditiously and I'll ask the parties to leave the Court

1 enough time to be able to rule as well so we don't have  
2 (inaudible) again the Rackey factors are a reasonable  
3 probability of success on the merits; a danger of real,  
4 immediate and irreparable injury which may be prevented by  
5 injunctive relief; lack of a (inaudible), speedy and adequate  
6 remedy at law; no disservice to the public interest; balance  
7 of equities in favor of the injunction; and the injunction  
8 will preserve and protect legal rights pending the final trial  
9 on the merits. So with that we'll turn our attention then to  
10 evidence and (inaudible)?

11 MR. HOBAN: Your Honor, would you, uh, entertain  
12 a brief opening statement or would you like us to jump right  
13 into the evidentiary presentation? It's entirely up to you.  
14 I can limit it to five or ten minutes if that helps.

15 THE COURT: Well, no I'll, I think I'll just  
16 start with witnesses and I'll certainly allow you a closing.

17 MR. HOBAN: Fair enough, thank you.

18 THE COURT: Okay?

19 MR. HOBAN: Thank you. Um-

20 THE COURT: And I, I have our phone up here when  
21 you need to call whichever witness you wish to call in  
22 whatever order.

23 MR. HOBAN: So for purpose of efficiency I'm  
24 going to call Mr. McMahon right now and at nine thirty we'd  
25 like to, uh, interrupt and then put Mr. Smith on the phone who

1 would, said he would make himself available at nine thirty, if  
2 that's okay with the Court.

3 THE COURT: Any objection from the defense on  
4 that?

5 MR. RICHARDSON: No, Your Honor.

6 THE COURT: Alright, that's what we'll do then,  
7 just make sure you give me the signal if I miss the nine  
8 thirty time.

9 MR. HOBAN: I'll do my best.

10 THE COURT: Mr. McMahon, if you'll step forward  
11 to the witness stand I'll swear you in. Raise you right hand  
12 for me. Do you solemnly swear or affirm under penalty of law  
13 that the testimony you'll give before this Court shall be the  
14 truth, the whole truth, and nothing but the truth?

15 MR. MCMAHON: I do, Your Honor.

16 THE COURT: Please have a seat. Your witness,  
17 counsel.

18 MR. HOBAN: Thank you, Your Honor.

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**DIRECT EXAMINATION OF TODD MCMAHON**

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by MR. HOBAN:

Q Um, Mr. McMahon can you please tell us where you reside?

A Yes, I reside at One Six Zero Eight One East Viola Place in Aurora, Colorado.

Q Okay, and is that in the Mission Viejo subdivision?

A Yes, Mr. Hoban.

Q Um, how are you currently employed?

A I am currently employed with the, uh, History Colorado, formerly known as the Colorado Historical Society at Thirteen Hundred Broadway.

Q And what is your title or position?

A I am a staff archeologist.

Q And did you graduate, uh, with a degree in archeology?

A Yes, I did.

Q From, from where?

A University of Colorado Denver.

Q Um, you had a, you have a position with the Homeowners' Association?

A Correct, sir.

Q What is that position?



1           A       I am the president of the Mission Viejo Homeowners'  
2 Association.

3           Q       Okay, and in your role as the president do you have  
4 any rights, obligations or responsibilities?

5           A       Yes, indeed. Um, as the, as our bylaws indicate,  
6 um, we, my position as president is the, is to represent the  
7 entire Mission Viejo Homeowners' Association as well as being  
8 a signatory on all of our (inaudible) documents and, uh, to  
9 share our meetings and, um, to represent (inaudible).

10          Q       Uh, and Mr. McMahon I just put a binder in front of  
11 you and I'll represent to the Court and to opposing counsel  
12 it's the very same binder that each of you have. Could you  
13 please turn to Exhibit Two of that binder, uh, separated by  
14 blue pages out of the Exhibits?

15          A       Yes, Your Honor, or I'm sorry, Mr. Hoban.

16          Q       Uh, Mr. McMahon, what is this document in front of  
17 you, Exhibit Two?

18          A       The is the Articles of Incorporation for the Mission  
19 Viejo, uh, Homeowners' Association.

20          Q       And have you seen this document before today?

21          A       Yes, yes I have.

22          Q       Um, have there been any new articles or  
23 reorganization documents filed on behalf of the HOA?

24          A       No there have not.

25

1 Q If you look at article three, does that accurately  
2 state your view of the HOA's role and responsibilities?

3 A Yes, it does.

4 Q And, um, does well let me, let me lay this  
5 foundation is this a document that was prepared for and kept  
6 in the ordinary course of the business for the Homeowners'  
7 Association?

8 A Yes, indeed, we keep all of our documents, um, in a  
9 file and of course, uh, many of them are available on our, on  
10 our internet for our members to, to, to view.

11 Q When was this, uh, HOA incorporated or created?

12 A It's my understanding it was incorporated on I think  
13 January Twenty Ninth Nineteen Seventy Five. Uh, (inaudible)

14 Q And do you know if the Mission Viejo Company had any  
15 involvement with the creation of the HOA?

16 A It's, it's my understanding that, um, the Mission  
17 Viejo Company fostered the development of the, the Mission  
18 Viejo Homeowners' Association, um, as a testament toward cre-,  
19 ensuring the value of the community, um, after the developer  
20 and the builder left the development.

21 MR. HOBAN: Okay, um, Your Honor, I'd move for  
22 admission of Exhibit Two.

23 MR. RICHARDSON: No objection.

24 THE COURT: Two will be received.

25

1 Q Do you recall the development of the Mission Viejo  
2 Subdivision, Mr. McMahon?

3 A Yes, indeed. Um, not only have, uh, my, my wife and  
4 my, our family lived in Mission Viejo for over fifteen and a  
5 half years, but um, our family, uh, visited Mission Viejo, uh,  
6 when it was first developed and at that time, um, I went with  
7 my family, it was quite the, the buzz of the entire town  
8 because here was a, uh, new development from California, they  
9 were building homes like no, nobody else had ever built  
10 before. There were long lines of people who came to see the  
11 homes, the new concept, the whole, even as I was a child could  
12 clearly understand the whole concept of trying to build a  
13 community and all the assets that were being built when  
14 Mission Viejo, our family definitely considered it as an, as  
15 an option, um, but ultimately chose not to because of my,  
16 where my father worked.

17 Q When you purchased your home in the subdivision, was  
18 anything important to you about that community or that  
19 neighborhood?

20 A Well, absolutely, um, when my wife and I decided on,  
21 um, where we would like to live and raise our family, um, I  
22 had remembered the Mission Viejo development and all of its  
23 assets that were there and, um, certainly, you know, all of  
24 the things and the amenities that were, were placed upon it,  
25 um, especially, um, I among them would have been the library

1 because we knew that the library as we both grew up, libraries  
2 were always important to us and that asset was very important  
3 in telling us to, uh, buy in Mission Viejo.

4 Q Um, and the Mission Viejo Company or pardon me, the  
5 Mission Viejo HOA sits here today in Court, have there been  
6 any documents or exchanges between the HOA and the Mission  
7 Viejo Company or any successors of the Mission Viejo Company,  
8 um, that you'd like to tell the Court about that give you, uh,  
9 some of the standing issues we talked about with the Judge  
10 this morning?

11 A Yes, um, when this, um, I've, I've had some  
12 discussions with, with sev-, several former, um, Mission Viejo  
13 Employees, um, over the course of the years but, um, mostly  
14 just to help with some, uh, an exhibit that we put together  
15 about our community (inaudible)-

16 MR. RICHARDSON: Your Honor, before we get on  
17 too, uh, far, Your Honor, I'm going to have to object on  
18 hearsay basis until, it, unle-, it looks like we're starting  
19 to go toward comments made by people who apparently are not  
20 going to be here today.

21 THE COURT: Well, I'll grant some leeway here in  
22 terms of, of introducing some hearsay for the purposes of this  
23 preliminary injunction, but, um, to the extent we can stay  
24 away from that and get hard evidence, I'd appreciate that, Mr.  
25 Hoban?

1 MR. HOBAN: Absolutely, Your Honor.

2 Q Uh, Mr. McMahon, I would direct your attention to  
3 Exhibit Three in the notebook before you. Have you seen this  
4 document before?

5 A Yes, I have.

6 Q What's your understanding of what this document is?

7 A This, um, is a document that, that shows the  
8 successor and merger of Shea Homes, um, assuming the Mission  
9 Viejo Company's, uh, assets and its, uh, all of its, uh,  
10 (inaudible)

11 Q And Mission Viejo Company, of course, was the  
12 developer of the Mission Viejo Community?

13 A Correct.

14 Q And turn your attention, please, to Exhibit Four,  
15 uh, tell me what that document is?

16 A This document is an assignment of contract, um, that  
17 was negotiated, um, between Shea Homes and the Mission Viejo  
18 company.

19 Q And what does, what does it do?

20 A It assigns our Homeowners' Association's rights to,  
21 uh, enforce the contract that was signed by the Mission Viejo  
22 Company to the Mission Viejo Homeowners' Association.

23 Q And if you'd look at that second to last paragraph,  
24 um, is, is that not more or less what it says in that, in that  
25 paragraph?

1 A Yes, indeed.

2 Q Um, and Mr. McMahon, turn to Exhibit Five please,  
3 and explain to me what Exhibit Five is?

4 A Yes, this is a quick claim deed that, uh, again was  
5 negotiated with Shea Homes, uh, giving us the Homeowners'  
6 Association, uh, um, the enforcement of the, the deed itself  
7 for the library.

8 Q Okay. Um, did the HOA have Exhibits Four and Five  
9 prepared in its discussions with the Shea Homes group?

10 A Yes, they did.

11 Q And are these the types of documents that the HOA  
12 would create and maintain in the ordinary course of their  
13 business?

14 A Absolutely.

15 Q Um, and you currently have Exhibits Three, Four and  
16 Five in your possession as the HOA in your, in your business  
17 files?

18 A Yes, yes we do.

19 MR. HOBAN: Your Honor, we'd move to admit  
20 Exhibit Three, Four and Five, uh, and just to hedge the  
21 potential objections I would note Exhibit Three is something  
22 the Court can take judicial notice of, Exhibit Four and Five  
23 fall under the, the exception under eight oh three fifteen, in  
24 other words they are documents effecting a conveyance of real  
25 estate, therefore there is a blatant exception. Um, Exhibit

1 Four also, uh, and Five also are business records as we just  
2 suggested because they were created and maintained by the HOA.

3 THE COURT: (inaudible)

4 MR. RICHARDSON: No objection to Three, uh,  
5 vigorous objection to Four and Five and would like to voir  
6 dire the witness.

7 THE COURT: Alright.

8 MR. RICHARDSON: Thank you.

9

10 **VOIR DIRE OF TODD MCMAHON**

11 by MR. RICHARDSON:

12

13 Q Mr. McMahon, um, let's look at the assignment of  
14 contract document that's, uh, listed in your book as, I  
15 believe as Exhibit Four. This was prepared in anticipation of  
16 this litigation, correct?

17 A Yes, Your Honor, yes.

18 Q Don't give me a promotion there.

19 A Sorry.

20 Q Um, you, there's no date on it, um, could you give  
21 us a date?

22 A Um, I think it was about the same time we did the,  
23 uh, the quick claim deed which was the Twenty Fifth of  
24 November.

25

1 Q So late November, right? A couple of weeks ago?  
2 Um, and so did your, did your, did you draft these, or did  
3 your lawyer draft these, I'm just trying to get an  
4 understanding here, how these documents came into being.

5 A It's my understanding that Shea Homes drafted these,  
6 their attorney.

7 Q Did you request Shea Homes to draft these?

8 A No, Your Honor, no, um, we, uh, realized that Shea  
9 Homes was the successor to, uh, to the, uh, Mission Viejo  
10 Company and, um, we had approached them to see if they would,  
11 uh, uh, uh, defend the agreements. Um, but then it really  
12 (inaudible) on us that we really since we also have interest  
13 in this that it probably made more sense that we, the  
14 Homeowners' Association, um, were the ones that would probably  
15 should take the, the lead on defending it since we had already  
16 done a number of things attune with the City as far as other  
17 issues that we tried to address. And since that really is our  
18 obligation, um, as the Mission Viejo Homeowners' Association  
19 to (inaudible) interests of the community.

20 Q Okay, Mr. McMahon, these were drafted and executed  
21 apparently after the library (inaudible) in early November,  
22 that's correct?

23 A After, I'm sorry?

24 Q After the vote?

25 A Yes.



1 Q They were prepared after the Two Thousand and Ten  
2 City Budget was put together and approved, correct?

3 A Yes.

4 Q Alright. Now it says for value received, what, what  
5 value are we talking about here, if you know, I'm not trying  
6 to ask you tricky questions here, it says for the first three  
7 words of this for value received, do you know what that means?

8 MR. HOBAN: Your Honor, that does call for a  
9 legal conclusion (inaudible)?

10 THE COURT: Well, he asked if you know, so he can  
11 answer.

12 A I, I can't say what the, the real value is, I mean I  
13 don't know what quantify-, quantifiably what that value is.

14 Q That's fine. Let's, let's look down now and I,  
15 follow along with me, um, the, the paragraph, the one sentence  
16 paragraph, and I'll read it to you. Assignor assigns the  
17 contract without representation or warranty regarding the  
18 validity, effectiveness, or enforceability thereof and  
19 assignor disclaims the forgoing. If you know, what, what does  
20 this mean, disclaims the forgoing?

21 A Um, I'm not sure what the legal-

22 Q That's fine, and you see that disclaims the forgoing  
23 again in the next to last paragraph is that correct?

24 A I see that.

25

1 Q Okay, now there are some rather exotic signatures on  
2 this document, we don't have the benefit of printed, uh,  
3 names, um, were you there when these were signed?

4 A No.

5 Q So you don't know who these people are?

6 A I assume they are (inaudible)-

7 Q Well, we're-

8 A Yeah-

9 Q We're not in the assumption business so, do you know  
10 who these, who, who these signatures where they came from?

11 A Um, again I don't know who those folks are exactly.

12 Q Okay, um-

13 A I know-

14 Q You don't know if they're the general partner or-

15 A I know that, um, if I may, on the quick claim deed,  
16 um, Jeffery, Jeffery Cappers (phonetic), um, is in fact a Shea  
17 Homes, um, Vice President, I believe of the Shea Homes  
18 Company. I had dis-, discussions with him. (inaudible)

19 Q Do you know if he's a general partner?

20 A Uh, I don't know that for sure.

21 Q Do you know if he's a limited partner?

22 A I don't know.

23 Q Do you have a certificate of authorization, uh, for  
24 the execution by the board of directors of Shea Homes to  
25 execute these documents?

1           A       Um, it's my understanding that when I first  
2 approached Shea Homes, uh, Corporate Office in California, um,  
3 at the same time I approached the Shea Homes, um, Office here  
4 in Denver and, um, Mr. Cappers, uh, was my contact through  
5 that, through them and, um, I was, um, told that Shea Homes,  
6 uh, wanted, uh, that, that all of their, uh, legal expertise  
7 and, and their operations were, um, concentrated at the, uh,  
8 Highlands Ranch Facility here in Denver and that, that I  
9 should be contacting that office. Um, and so that's where  
10 the, these, uh, this, this, uh, whole issue was, was raised  
11 and where it, the assignment to the contract and the quick  
12 claim deed originated.

13           Q       Okay. Let's move on now to the quick claim deed.  
14 Uh, as you testified these, uh, uh, this document was, uh,  
15 dated, so it's dated November Twenty Fifth Two Thousand and  
16 Nine, is that correct?

17           A       That's correct.

18           Q       Has it been recorded?

19           A       It's my understanding it was recorded.

20           Q       Do you have a copy of that?

21           A       I do not here.

22           Q       Pardon?

23           A       I do not here, no.

24           Q       Okay. It talks about quick claiming, uh, again  
25 you're not a lawyer but in the second paragraph it talks about

1 quick claiming any reverter and reversionary interests in the  
2 F track, um, to the HOA I take it, is that how you see it?

3 A Yes, if you could refresh me on that, where that  
4 paragraph is?

5 Q Oh, yeah, it's witnessed-

6 A Okay, yes.

7 Q Take a look at that for a second.

8 A Yes.

9 Q In fact, isn't it true that all the reversionary  
10 interests, excuse me, in this matter have all terminated?

11 MR. HOBAN: That calls for, clearly calls for a,  
12 a, a legal conclusion, Your Honor.

13 THE COURT: Sustained.

14 Q Mr. McMahon, um, you filed a, a certificate in, in  
15 context of the filing of the complaint that you knew, uh, that  
16 true-, you were asserting that, that all the documents were  
17 truthful and accurate and everything, um, did you remember in  
18 the context of those documents attached to your complaint, uh,  
19 uh, a cancellation of all covenants after thirty five years?

20 A Can you explain?

21 MR. HOBAN: Objection, form of the question.

22 MR. RICHARDSON: Let me rephrase it.

23 THE COURT: Yes, please.

24 Q Do you believe that today there is still a  
25 reversionary or reverter interest relating to the track f?

1           MR. HOBAN:       Legal conclusion, Your Honor, I'm not  
2 sure if the witness understands the, the nature and scope of  
3 what those different rights are while a document may  
4 specifically pro-, provide for a reverter interest to, to  
5 terminate at a certain date there are other reversionary and  
6 reverter interests that are equitable and that exist here and  
7 that we intend to pursue and I don't want to, the client to  
8 prejudice himself by answering this with a legal conclusionary  
9 basis.

10           THE COURT:       Sustained.

11           MR. RICHARDSON:       No further questions, Your  
12 Honor. We object to Four and Five.

13           THE COURT:       On what basis?

14           MR. RICHARDSON:       On several basis such as the no,  
15 uh, indication that these individuals who are purported to, to  
16 be acting on behalf of Shea Homes are in fact authorized, uh,  
17 to be acting, uh, in this regard. Uh, now we would like to  
18 see the testimony of these individuals, there's no date on the  
19 assignment of, of contract. Um, I'm not able to cross examine  
20 these people, uh, as to what their intent was on disclaiming  
21 the forgoing. Some rather bizarre language, uh, I the  
22 exhibit. Um, and number, uh, the, the quick claim deed is  
23 absolutely irrelevant. There, it's our position that there's  
24 no current reverter or reversionary interest. There's no

25

1 indication it's, this has been recorded. Um, so that's it on  
2 those.

3 THE COURT: Mr. Hoban?

4 MR. HOBAN: Your, Your Honor, again I mean Mr.  
5 Richardson acknowledges that these are documents that affect a  
6 piece of property in his line of questioning as a specific  
7 exception it's subsection fifteen, I believe it's eight oh  
8 three fifteen which allows to get that through the hearsay,  
9 uh, level, I'd be happy to lay an (inaudible) an additional  
10 foundation on these documents through Mr. McMahon about who he  
11 talked to and what that person represented his position was,  
12 etcetera. And who, who actually signed these documents if the  
13 Court has concerns about whether these people have the  
14 authority or the right to do so, our purposes for doing this  
15 today and I hate to, to belabor this point because we've got  
16 so many other things to, to, to get to, is the standing issue.  
17 Ultimately, these documents evidence at least in the mind of  
18 the HOA and they relied on that that the Mission Viejo Company  
19 by and through Shea Homes have assigned it all of its rights  
20 under the contract.

21 THE COURT: Alright, in terms of these documents,  
22 Exhibit number Five purports to be a quick claim deed which  
23 has been duly notarized and in the notary, the notary public  
24 indicates that the signatories are authorized agents of Shea  
25 Home Limited Partnership, and the notary is here in the State

1 of Colorado. It appears, just as a lay person looking between  
2 Exhibits Four and Five is the same authorized agents who  
3 signed the quick claim deed are the same who signed the  
4 assignment of contract. (inaudible) it's not the strongest,  
5 but that the authenticity of the documents has been  
6 established. And I'll let these documents in alternatively  
7 under eight oh three fifteen as they are documents effecting  
8 real property. That does not ascribe the weight to be given  
9 to the evidence but merely that the evidence can be commented  
10 and used for argument so Exhibits Four and Five are received,  
11 Three is received without objection.

12 MR. HOBAN: Okay, thank you, Your Honor. It is  
13 in fact nine twenty eight and maybe this is a logical time to  
14 cut off Mr., uh, McMahon and then go to our telephone  
15 testimony with Mr. Smith which he assured me he'd be ready to  
16 do.

17 THE COURT: Alright-

18 MR. HOBAN: (inaudible)

19 THE COURT: Mr. McMahon, you can step down and be  
20 seated back at table and we'll go ahead and call, it's Mr.  
21 Smith?

22 MR. HOBAN: William Smith, yes, Your Honor.

23 THE COURT: (inaudible) What's the number?

24 MR. HOBAN: Seven One Four, Seven (inaudible)  
25 Zero Seventy Four Six Eight.

1 MR. SMITH: Hello?

2 THE COURT: Mr. Smith?

3 MR. SMITH: Yes, uh-huh.

4 THE COURT: This is Judge Spencer, I'm sitting on  
5 the bench in Arapahoe County District Court, we are on the  
6 record in Zero Nine C V Two Seven Four One, I want to say.  
7 That is the Mission Viejo versus City of Aurora case. And  
8 you're, let's see Mr. Hoban, he's not your attorney, Mr. Hoban  
9 has asked that we place you under oath and have you testify  
10 telephonically. Are you prepared to do that at this time?

11 MR. SMITH: Yes, I am.

12 THE COURT: Alright, can you hear me alright?

13 MR. SMITH: I can, yes.

14 THE COURT: Alright, I'm going to ask you to keep  
15 your voice up because we are digitally recording this. At  
16 this time, Mr. Smith, I'm going to swear you in. Do you  
17 solemnly swear or affirm under penalty of law that the  
18 testimony you'll give before this Court or give telephonically  
19 shall be the truth, the whole truth, and nothing but the  
20 truth?

21 MR. SMITH: I do.

22 THE COURT: Alright, I'll turn it over to Mr.  
23 Hoban to ask you questions and I'll, I'm just having counsel  
24 move closer so that everyone can hear.

25 MR. HOBAN: Thank you, Your Honor.



1 MR. SMITH: Alright.

2

3 **DIRECT EXAMINATION OF WILLIAM SMITH**

4 by MR. HOBAN:

5

6 Q Good morning, Mr. Smith, it's Bob Hoban, how are you  
7 this morning?

8 A Good morning, Mr. Hoban, fine thank you.

9 Q Please just let me know if you don't understand my  
10 question or, um, if you can't hear me because of the  
11 technology here.

12 A Okay, I think I can hear you fine so far.

13 Q Terrific. Um, Mr. Smith, just for purposes of the  
14 record, why can't, couldn't you be available to testify in  
15 Court today?

16 A I, we, we are in the middle of Texas on our way to  
17 San Antonio for Christmas with our family.

18 Q Fair enough, fair enough, thank you, thank you for  
19 that. Um, did you have occasion, uh, years ago to work for  
20 the Mission Viejo Company?

21 A I did.

22 Q And what were your positions?

23 A Well, I had a number of sort of positions over the  
24 years, but basically I was an in house counsel.

25

1 Q Were, were you at any point a Vice President or a  
2 Secretary of the Mission Viejo Company?

3 A Uh, yes.

4 Q And how many years did you work in that capacity  
5 with the Mission Viejo Company?

6 A Well, it's a long time ago, I can't tell you exactly  
7 when I became Secretary, let me tell you, tell you I joined  
8 the company full time in Nineteen Sixty Nine, I believe it was  
9 and I retired in Nineteen Ninety Seven.

10 Q Okay. Uh, do you recall the Mission Viejo  
11 Development in Aurora, Colorado?

12 A Uh, yes sir.

13 Q And were you a part of any of the documents or  
14 negotiations with regard to that development in your position  
15 with the Mission Viejo Company?

16 A Yes.

17 Q Do you recall an agreement signed between the  
18 Mission Viejo Company and the City of Aurora in Nineteen  
19 Seventy Three concerning that particular development?

20 A Um, yes, now that you have provided me with a copy,  
21 which refreshed my recollection.

22 Q So do you, do you happen to have that copy of the  
23 Nineteen Seventy Three agreement and the two attachments with  
24 you today?

25

1           A     I have, um, I have (inaudible) were pretty much on  
2 my computer, uh, which, I believe are the documents in  
3 question, yes.

4           Q     Um, in looking at and for the Court's purposes this  
5 is Exhibit One and this is in fact a stipulated document,  
6 Exhibit One, by the plaintiff. Um, looking at the first page  
7 of this Nineteen Seventy Three agreement and then looking at  
8 the couple pages behind, do you recall this document, uh, if  
9 not originally by way of refreshing your recollection having  
10 viewed it recently?

11          A     Uh, yes.

12          Q     And is that your signature on, I'll tell you what  
13 page number, I believe it's page three of the Nineteen Seventy  
14 Three agreement?

15          A     Yes, it is.

16          Q     Okay, and I'll direct your attention if you have  
17 this open in front of you but to paragraph seven, do you see  
18 that sir?

19          A     Paragraph seven did you say?

20          Q     Yes, sir.

21          A     Uh, yes I see paragraph seven.

22          Q     And what was the intent of paragraph seven when you  
23 signed this document?

24

25

1           A       Well, it's my recollection that the intent was that  
2 the City would operate the library for, for at least fifty  
3 years.

4           Q       (inaudible)

5           A       Just as the language states.

6           Q       On, on that specific location?

7           A       Yes, sir.

8           Q       And do you recall what Mission Viejo had given to  
9 the City for that fifty year agreement?

10          A       I, I'm sorry I missed part of that question, one  
11 more time please?

12          Q       Do you recall what Mission Viejo had, had given, if  
13 anything, to the City, uh, in relation to that agreement to  
14 operate the library in that spot for fifty years?

15          A       Well, yes, I, I believe Mission Viejo Company gave  
16 the City the property upon which the library was to be  
17 constructed.

18          Q       And if you could turn to the last two pages of that  
19 document in front of you, Mr. Smith. It's a warranty deed,  
20 pardon me, the last three pages, do you see that?

21          A       Um, hang on just a moment, um, I'm combing through  
22 this document here, I think it's a separate attachment as it  
23 came to me, yes I see the warranty deed now.

24          Q       And is that your signature on the third page of this  
25 warranty deed?

1 A Uh, yes, sir.

2 Q And does this evidence that the Mission Viejo  
3 Company had given property to the City in exchange for that  
4 fifty year agreement?

5 A That's my understanding, yes.

6 Q Okay. Was there a reason that Mission Viejo Company  
7 wanted a library in this community?

8 A Uh, well, yes, in a general sense we were in the  
9 business of creating communities and we strove to get in each  
10 community all of the services that a community generally  
11 requires and a library certainly, uh, would normally be one of  
12 those.

13 Q Also attached to this Nineteen Seventy Three  
14 agreement are conditions regarding how the library should be  
15 built and landscaped, do you see those as well?

16 A Um, uh, just a moment, I, I think I'm in the  
17 warranty deed at the moment, it's (inaudible)

18 Q This would be Exhibit-

19 A I beg your pardon?

20 Q Exhibit A to the agreement.

21 A Uh, I'm gonna go back to the agreement, just a  
22 moment. Um, now as, as it came across here, I have something  
23 called restrictions that are attached to the agreement.

24

25

1 Q Do you recall those, that document entitled  
2 restrictions being attached to the Nineteen Seventy Three  
3 agreement as well?

4 A Um, I, I, I, I don't have separate recollection but  
5 it certainly looks correct. What, what I'm, what I'm saying  
6 is that on my computer, the page titled restrictions does not  
7 say Exhibit A on it as it came across.

8 Q Okay, are you aware that the restrictions attached  
9 to that document were to expire thirty five years after the  
10 date of their issuance?

11 A Uh, yes sir.

12 Q And are you aware that there's a provision in the  
13 warranty deed, that we just discussed, that says the right of  
14 reverter expires after twenty one years, were you aware of  
15 that, sir?

16 A Uh, yes I can, I can, I see that, I'm reminded of  
17 that in reviewing this, yes.

18 Q And as you look at those documents is, is, do you  
19 recall any intention that that fifty year library provision be  
20 limited, restricted, or terminated under either one of those  
21 thirty five or twenty one year standards?

22 A Uh, no I, I have no recollection of that, that's, no  
23 I think we would have stated it differently if that had been  
24 our intent.

25

1 Q Do you know, or do you have any general idea as to  
2 why there are different dates of expiration in those  
3 attachments, in other words, the thirty five and the twenty  
4 one year, um, which appears to be inconsistent with the fifty  
5 year. Are you aware of any reason why?

6 A Yes, I am.

7 Q And what is that?

8 A (inaudible) Yeah, I, I can, I can tell you that, um,  
9 that one of the things that we were concerned about from time  
10 to time over those years was that there, there was a risk if  
11 you don't put a certain period on certain types of controls  
12 that the control might go away from day one. Um, so there was  
13 concern that the applicable law, for example, might require  
14 that if you state a term such as for the restrictions longer  
15 than thirty five years then they might not be enforceable at  
16 all. And a similar concern about, uh, a right of reverter  
17 that if it stated to be longer than a certain period of, in  
18 this case I believe, twenty one years then it might not be  
19 enforceable at all.

20 Q Those-

21 A It is my recollection that that's the reason that  
22 these are stated for a term different than the underlying  
23 covenant that the City undertook in the agreement itself.

24 Q When you signed these documents was there any  
25 intention that these limit restrict or cut short the fifty

1 year obligation set forth in the Nineteen Seventy Three  
2 agreement?

3 A There certainly was no intent on my part, no.

4 Q And isn't it true that the, the City was deeded this  
5 property at no charge in exchange for those representations?

6 A That's my recollection and my understanding, yes.

7 Q Would the Mission Viejo Company take lightly the  
8 deeding of a property for free?

9 A Well, we, we, we never did to, to my recollection of  
10 many years with the company, no.

11 Q And did you rely when you signed these documents on  
12 the City's representation that it would operate a library on  
13 that site for fifty years?

14 A Uh, certainly, that's why the agreements so states,  
15 yes.

16 Q Um, Mr. Smith, I'm going to pass the witness now to  
17 opposing counsel, Mr., Mr. Richardson. So please bear with  
18 us.

19 A Alright, thank you.

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**CROSS EXAMINATION OF WILLIAM SMITH**

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by MR. RICHARDSON:

Q Hello, Mr. Smith, my name is Charles Richardson, can you hear me?

A Hello, Mr. Richardson, I certainly can, thank you.

Q Okay, nobody's ever complained about not being able to hear me, but, uh, I can speak up.

A That's alright.

Q Um, I owe you an apology, um, I, I told some city officials that Paul Beck is deceased, Lee Colter's deceased, Gail Johnson's deceased, and so I think you know where I'm going here. Um, are you available for a deposition if it's convenient to you at a later date and do you know what a deposition is?

A Oh, I certainly do.

Q Uh, would you be available, uh, to go over all of the agreements at some point?

A I, I, I, I think so, I, I don't know when, when our schedule calls us, for us to be back in Colorado, but, uh, certainly, yes.

Q Uh, are you going to be somewhere warm?

A Well, relatively speaking, yes. We're going to be in San Antonio, we have a grandchild due in the relatively near future so we have some responsibilities there.

1 Q How did the City of Aurora treat the Mission Viejo  
2 Company when you were working with them?

3 A I, I'm not sure how to, how to answer that question.  
4 How did, how did they treat the Mission Viejo Company.

5 Q Was it a good relationship?

6 A Uh, it's my, my recollection is that it was a good  
7 relationship, yes.

8 Q I think one of the earlier agreements, you may not  
9 have it in front of you, said the City'll build a fire station  
10 and a library. In fact, the City has done or, or a library,  
11 the City, in fact, did both didn't they?

12 A I, I don't, I don't have personal knowledge of what  
13 actually happened, I just don't recall.

14 Q Okay, um, let's look at, there, there's something  
15 missing from the warranty deed apparently you were provided,  
16 uh, did you, did you note that or do you want me to help you  
17 with that?

18 A I, I'm not sure what you mean just, I, I only have  
19 what I have, so-

20 Q All of our, all of our documents show that that  
21 document entitled restrictions was also appended to the  
22 warranty deed, would that surprise you?

23 A No, it does appear attached to the warranty deed in  
24 my, in my electronic version also.

25

1           Q     The reason I'm asking you that is that Exhibit, the  
2 Exhibit One here today doesn't, isn't formatted that way. So  
3 that's why I had to clear that up with you. So you have a  
4 copy with restriction document on both the deed and the  
5 agreement is that correct?

6           A     That appears to be correct, yes.

7           Q     Did the City build the library, the branch library  
8 to the satisfaction of Mission Viejo Company?

9           A     I don't have any information or recollection to the  
10 contrary.

11          Q     When is the last time you were physically in the  
12 City of Aurora?

13          A     That's an interesting, interesting question. Uh, it  
14 was, um, just a coup-, just a few days ago. We were there for  
15 a brief time to see a friend in the hospital and then we  
16 turned around and left the next morning.

17          Q     Okay, so you didn't visit the Mission Viejo Library  
18 site, I take it?

19          A     No, we did not.

20          Q     Now you had tested the documents as the corporate  
21 Secretary and I believe you eluded you have some legal  
22 training, is that correct?

23          A     That's correct.

24

25

1 Q Um, what, I can't make out the signature, who, it  
2 says Vice President, I think, is that person still with us?  
3 Or who is that person?

4 A That, that person is, it's the signature is JG  
5 Gilleran (phonetic), uh, James G Gilleran and he at the time  
6 it appears here was Vice President of the company and Jim is  
7 still alive, yes.

8 Q Okay, and do you know where he's residing?

9 A I do.

10 Q And, uh, what, where would that be?

11 A He lives in Las Vegas.

12 Q Oh, um, do you know, if, were these documents, both  
13 the agreement and the deed, drafted by the Mission Viejo  
14 Company or the City of Aurora?

15 A I, you know, I, I really don't know for sure but it  
16 is my belief that they were drafted by outside counsel.

17 Q On behalf of Mission Viejo?

18 A Most likely, yes.

19 Q Okay, do you realize as a corporate secretary one of  
20 your important jobs is to attest, um, the signatures of the  
21 officers of the corporation, is that correct?

22 A Well, my, my (inaudible) in this case was, yes, was  
23 to, to, to be one of those, it happens to bear the name, the  
24 word attest, yes.

25

1 Q Did you play an active role in the negotiations with  
2 any city officials relating to the, the library agreement?

3 A I, I, I believe that I did not, I was based in  
4 California and there were other folks in Colorado who were  
5 involved in the face to face negotiations as I recall.

6 Q Okay, can I, can I direct your attention to  
7 paragraph seven that really is the nut of, of this case that's  
8 going on now. Do you have that on your computer?

9 A Paragraph seven of the agreement itself?

10 Q Right.

11 A Uh, just a moment, let me bring that up again here.  
12 Alright, I'm there.

13 Q Okay, let's, let's break it down if you don't mind,  
14 it's pretty important. Um, let me read portions of it to you  
15 and see if you agree with this. The City for itself, its  
16 successors and assigns hereby agrees to furnish library  
17 services to the citizens of Aurora, can we stop there for a  
18 second?

19 A Alright.

20 Q Um, how, what would interpret that to mean?

21 A I, I, I'm, I'm really not sure exactly how to answer  
22 that question but it would seem to me, it means to operate a  
23 library. I'm not sure, I, I suppose we could go lots of  
24 places as to what library services mean but I suspect there is

25

1 now a thirty some year history as to what was operated on this  
2 property.

3 Q Well, the fact, it, this doesn't reference the  
4 Mission Viejo Branch Library does it? It, it, it's more  
5 global and in it, it's nature and it talks about providing  
6 library services to the citizens of Aurora, there's no  
7 reference to Mission Viejo Branch Library, is that correct?

8 A Perhaps not at that portion of the sentence, I, I  
9 don't, I don't have a real opinion on that.

10 Q Okay and then it goes on, for so long as the  
11 property, which is the Mission Viejo Branch Library, is used  
12 as a library, correct?

13 A Correct.

14 Q Do you agree or disagree with my characterization,  
15 it, it's some awkward language. It seems to say that as long  
16 as the Mission Viejo Branch Library is operating, the City has  
17 to provide a library system to now three, over three hundred  
18 thousand people, is that one way to look at, do you, are you  
19 following me?

20 A I, I'm following you, it may be, I at this point,  
21 I'm really being asked to kind of speculate and I don't, I  
22 don't think that, uh, I'm comfortable doing that.

23 Q Well, let me ask you, I don't want you to speculate  
24 or be uncomfortable, why doesn't par-, paragraph seven just

25

1 say the City shall operate the Mission Viejo Branch Library  
2 for fifty years?

3 MR. HOBAN: Speculation, Your Honor.

4 THE COURT: Sustained, you don't have to answer  
5 Mr. Smith.

6 Q Um, Mr. Smith, uh, do you have any information that  
7 for thirty six years the library's been operating as a branch  
8 library?

9 A I don't have any personal knowledge of that, I have  
10 been so advised.

11 Q Now at the time in, in, when this document was  
12 executed, did Mission Viejo want to specify the staffing of  
13 the library?

14 A I don't know.

15 Q Did Mission Viejo want to specify the, the volume of  
16 book stock that was at the facility?

17 A I don't know.

18 Q Did Mission Viejo want to specify the hours of  
19 operation?

20 A I don't know.

21 Q Did Mission Viejo want to specify the days of  
22 operation?

23 A I don't know.

24 Q Did Mission Viejo want to specify the qualifications  
25 of the staff there?

1 MR. HOBAN: Your Honor, I'm going to object it's,  
2 uh, it's practically cumulative-

3 A I don't know.

4 MR. HOBAN: It's speculative and the witness-

5 THE COURT: Hang on, Mr. Smith.

6 MR. HOBAN: Doesn't know, and the witness has no  
7 knowledge so I, I would just object on this ongoing basis of  
8 any specific piece note questions, clearly the witness  
9 (inaudible).

10 THE COURT: I think you've made your record, Mr.  
11 Richardson on the issue.

12 MR. RICHARDSON: Thank you, Your Honor.

13 THE COURT: Alright.

14 MR. RICHARDSON: Um, no further questions, Your  
15 Honor.

16 THE COURT: Alright, Mr. Smith hang on, we'll see  
17 if there's any redirect questions, Mr. Hoban?

18

19 **REDIRECT EXAMINATION OF WILLIAM SMITH**

20 by MR. HOBAN:

21

22 Q Yeah, Mr. Smith, thanks for bearing, bearing with us  
23 and hanging in there, we're just about through, um, if you  
24 look at that paragraph seven, not the part, part that Mr.  
25 Richardson focused on but the, the last part after the comma,



1 doesn't that indicate that that property shall be used as a  
2 library for a minimum of fifty years?

3 A Well, that's, that's the way I read it and I believe  
4 that was the intention of-

5 Q And the Nineteen Seventy Three agreement and those  
6 two attachments, to the best of your recollection, were they  
7 executed contemporaneously?

8 A That is my belief, yes.

9 Q Thank you, Mr. Smith. I have no further questions.

10 MR. RICHARDSON: Just one redirect, Your Honor.

11 THE COURT: Alright, recross.

12

13 **RECROSS EXAMINATION OF WILLIAM SMITH**

14 by MR. RICHARDSON:

15

16 Q So did I hear you correctly, Mr. Smith, that, is it  
17 your testimony that the possibility of reverter has expired  
18 now on this property?

19 A Well, I, I, I believe that's what the language says,  
20 yes.

21 Q Thank you.

22 THE COURT: Alright, Mr. Smith, we're going to  
23 disconnect with you, thank you for your time today.

24 MR. SMITH: Thank you all, have a good day.

25 THE COURT: You too.

1 MR. SMITH: Bye.

2 THE COURT: Alright, Mr. McMahon, if you want to  
3 resume the stand I will remind you you're still under oath and  
4 subject to direct examination, Mr. Hoban?

5 MR. HOBAN: Thank you, Your Honor.

6

7

**DIRECT EXAMINATION OF TODD MCMAHON**

8 by MR. HOBAN:

9

10 Q Um, Mr. McMahon, are you aware of this Nineteen  
11 Seventy Three agreement that we were just talking about with  
12 Mr. Smith on the phone?

13 A Yes, I am.

14 Q And I'm going to hand the witness again that, that  
15 witness notebook. Can you look at Exhibit One and tell me if  
16 that's the, the document that we've been referring to and I  
17 guess for the purposes of this hearing we'll continue to refer  
18 to as the Nineteen Seventy Three agreement, is that it?

19 THE COURT: And, and let me interrupt you-

20 MR. HOBAN: Yes.

21 THE COURT: Because, I, when you were questioning  
22 Mr. Smith, you said something about a stipulated document and  
23 Mr. Richardson had a reaction so I, I think we need clear up  
24 whether this is actually an entered Exhibit at this stage.

25

1                   MR. RICHARDSON:        Yeah, I, I don't think there's a  
2 problem but I think there's the wrong constitution in the  
3 proposed exhibit notebook. You heard me talking to Mr. Smith,  
4 essentially, the restriction, restrictions pages should be  
5 appended to both the warranty deed and the library agreement  
6 and so that, that's where I think the confusion is coming  
7 from. It, it didn't turn out that way in the exhibit book.

8                   MR. HOBAN:            Your Honor, I, I would agree with Mr.  
9 Richardson to an extent. I don't know specifically what was  
10 recorded, so if Mr. Richardson's saying that the, these  
11 restrictions were also recorded and attached to the warranty  
12 deed at the time of the recording, that's fine but that's sort  
13 of a different thing than what I'm saying. My, my, what I'm  
14 saying is, my Exhibit One represents the entirety of the  
15 agreement. It's the agreement and Exhibits A and B to, um, to  
16 the Nineteen Seventy Three agreement and not what was  
17 specifically recorded. And, and I would stipulate that, yes,  
18 those restrictions were attached to it and recorded but I  
19 don't, I don't think we're arguing about much of anything  
20 here.

21                   MR. RICHARDSON:        Well, the document itself, the  
22 warranty deed makes reference to an Exhibit A, uh, Exhibit A  
23 is the restriction document. I have, uh, stamped on the  
24 restrictions in consecutive order book two two two three page  
25 two two three. That follows the last page of the warranty

1 deed which is two two two three page two two two. So I'm  
2 relatively confident that the, uh, restrictions were, uh, part  
3 and parcel and, in fact, are referenced in the warranty deed  
4 itself. I just want to get the right exhibit before the  
5 Court.

6 MR. HOBAN: Uh, I would stipulate, Your Honor,  
7 that the restrictions are, in fact, attached for purposes of  
8 recording and for purposes of (inaudible) disagreement, to the  
9 warranty deed as well. My document doesn't have them in there  
10 twice but for purposes of the record, or to facilitate,  
11 streamline this, I agree that it was in fact attached to the  
12 warranty deed when it was, when it was recorded.

13 THE COURT: Alright, I'll receive Exhibit One,  
14 I'll note that in the documents that were tendered through e-  
15 filing that the restrictions as stamped as recorded as part of  
16 the warranty deed (inaudible) what was submitted. What's in  
17 Exhibit One has been tendered today of the restrictions are  
18 not those recorded and stamped. They appear to be  
19 restrictions attached to the Nineteen Seventy Three agreement  
20 and so for completeness the warranty deed should also have  
21 similar restrictions attached to it and (inaudible) so just so  
22 our record's complete.

23 MR. HOBAN: No problem with that, Your Honor.  
24  
25

1 THE COURT: Okay, and I'll receive Exhibit One,  
2 then and we'll turn back to the questions and I'll have to ask  
3 you to ask again because I've lost track.

4 MR. HOBAN: I, I'm sure Mr. McMahon has as well.

5 Q Um, Mr. McMahon, looking at Exhibit One, um, is this  
6 what you understand, uh, that we have generally referred to as  
7 the Nineteen Seventy Three agreement?

8 A Yes.

9 Q When did you first become aware of this agreement?

10 A Actually, probably about two years ago, um, that was  
11 because I was making sure that we had all of our agreements  
12 prior to an issue we, an, an un-, unrelated issue about some  
13 of our right of way movements. And I was combing through both  
14 the clerk and recorder's, um, office as well as the city  
15 archives looking for documents related to that I had made a  
16 mental note at that time that there was an agreement that I  
17 had seen, um, and it had restrictions associated with it as  
18 well as some years. So I had made a mental note of it. Um,  
19 if I may, um, when, um, it was announced, uh, in the summer, I  
20 think it was either July or August, um, we had our council  
21 member Rob Broom (phonetic) from our neighborhood, come to one  
22 of our HOA meetings, regular HOA meetings and had announced,  
23 um, that the council was going to be closing the, uh, our  
24 branch library. I immediately afterward called him because I  
25 remember mentally that there was this agreement and, um, I

1 asked him at that time to please research that for me. He got  
2 back to me, um, middle of August, um, in an e-mail which I  
3 think I have, um, stating that there was a reverter clause to  
4 it which I, I didn't really, I again, I didn't have a document  
5 in my hands but he had said that it expired in thirty five  
6 years. Um, I took that (inaudible) faith, I understood that  
7 that was what it said, um, and as a board we decided that as  
8 far as the, the GID issue was concerned we weren't going to  
9 take any real stand on it but we were actually as part of our  
10 newsletter, for instance, we decided to have residents  
11 themselves write the editorials either pro or con related to  
12 that. We did inform the people that, that the potential might  
13 be that the library might be closed. It was after the  
14 election that one of the proponents contacted me for the GID  
15 and said could you please find all the documents related to  
16 the library and I said well I think there was one, um, it was  
17 my understanding through conversations with, um, Councilman  
18 Broom that those had expired after thirty five years, but I  
19 will go and retrieve it and take a look at it. So I did, this  
20 was, I think on the Friday after the election, I went to the  
21 city archives and retrieved this document and it was at that  
22 point, in fact, that I had it in my hands and read it  
23 thoroughly and really came to, came clear to me that this was  
24 an obligation that the city had to have this property be open  
25 for fifty years.

1 Q And Mr. McMahon, um, if you'd look at the third  
2 paragraph from the bottom of the first page of Exhibit One.  
3 Does that paragraph appear to you to, to say that this  
4 document, the Nineteen Seventy Three document, is being  
5 executed, um, due to covenants that were made between the City  
6 and the Mission Viejo Company in, in a previous annexation  
7 agreement?

8 A Yes, indeed.

9 Q And I'll direct your attention to Exhibit Six, it's  
10 also in your binder, sir. Take a quick look at that and tell  
11 me what that is, if you know.

12 A Yes, this is the annexation agreement, um, that was  
13 executed, um, prior to the development starting in Mission  
14 Viejo, uh, with the City.

15 Q Do you know if there's anything in the annexation  
16 agreement, um, that specifically provides for this ultimate  
17 Nineteen Seventy Three agreement?

18 A Yes, let me find it. Um, it, it seems to be in  
19 paragraph five here.

20 Q What page would that be, sir, looking at the top?

21 A Uh, page five oh four.

22 Q And where, what does it say in paragraph five that  
23 leads you to believe that?

24 A It states here, Mission Viejo agrees to dedicate to  
25 the City in addition to the thirty ac-, acres dedicated to

1 public park and recreation facilities, at least five acres  
2 upon which the city shall construct at least one fire station  
3 or police sub-station or at least one branch public library.

4 Q And was this annexation agreement, based on your  
5 review of it, uh, s-, executed by the Mission Viejo Company  
6 and The City?

7 A Absolutely, is my understanding.

8 MR. HOBAN: Uh, move for admission of Exhibit  
9 Six, Your Honor?

10 THE COURT: Mr. Richardson?

11 MR. RICHARDSON: Just a quick voir dire, Your  
12 Honor.

13 THE COURT: Alright.

14

15 **VOIR DIRE EXAMINATION OF TODD MCMAHON**

16 by MR. RICHARDSON:

17

18 Q Mr. McMahon, um, you I think even rec-, recognize we  
19 had an option to build either a fire station, a police station  
20 or a library is that correct?

21 A I believe (inaudible)-

22 MR. HOBAN: (inaudible) based on the agreement.

23 THE COURT: Well, I'll, I'll allow that.

24 Q Do you remember reading or in there?

25



1           A       Well, I, I, the way I read this it says, um, five,  
2 five acres upon which the City shall construct at least one,  
3 and I think that means one, one fire station or police sub-  
4 station and then the second comma part is or at least one  
5 public library.

6           Q       Okay.

7           A       So.

8           Q       So.

9           A       Police station, fire station and one library.

10          Q       And one library is how you read it?

11          A       Well, at least one means one.

12          Q       Okay, um, do you agree the City did build a fire  
13 station and a library?

14                THE COURT:        I'm going to interrupt you, Mr.  
15 Richardson, this isn't voir dire, this is-

16                MR. RICHARDSON:        Okay.

17                THE COURT:        Questioning on the document.

18                MR. RICHARDSON:        Thank you, Your Honor.

19                THE COURT:        Any objection to Exhibit Six?

20                MR. RICHARDSON:        No, Your Honor.

21                THE COURT:        Alright, six, Exhibit Six will be  
22 received.

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**DIRECT EXAMINATION OF TODD MCMAHON**

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by MR. HOBAN:

Q Um, so going back to Exhibit One, is it your understanding that Exhibit One was executed pursuant to that obligation from Nineteen Seventy One in the annexation agreement?

A That's, that's my understanding is (inaudible) in this agreement, yes.

Q And what leads you to believe that this library, the Mission Viejo la-, Library, or later called the Mission Viejo Library is supposed to be operated on this property for fifty years?

A Because of this agreement, it, it's obligated to keep it open for fifty years.

Q Tell me where it says that or something to the effect to that?

A It's in paragraph seven, the City for itself, it's successors, and (inaudible) hereby agree to furnish library services to the citizens of Aurora for so long as the property is used as a library the minimum of which use shall be for fifty, and it's, uh, then typed out numerically fifty years.

Q So you read that comma clause, uh, to modify the word property is used the, the, the phrase property is used as a library?

1 A Yes.

2 Q Okay, there were two attachments referenced in this  
3 agreement, do you know what those two attachments are and if  
4 you do, tell me if they're attached to this document?

5 A Yes, they, they are and they are attached to this  
6 document.

7 Q What's the first, uh, attachment or Exhibit A as  
8 referenced in Nineteen Seventy Three document?

9 A Uh, the title is restrictions.

10 Q And as you read through this what's your  
11 understanding of what this does?

12 A Well, as I've read through this, um, it seems to be  
13 basically something like covenants. It's, it talks about how  
14 the development plan is executed what the landscape plan  
15 should be like, that the architectural style of the building  
16 should fit in with the neighborhood. It talks about antennas  
17 and maintenance, these are all issues related to the  
18 aesthetics basically of, of the building.

19 Q Is it your understanding that this document entitled  
20 restrictions is actually in fact just construction and  
21 landscaping conditions for the building of the new library?

22 A Yes, that's that's my understanding.

23 Q Okay, and look at the last, uh, couple of pages, the  
24 last three pages, Exhibit B to Exhibit One the warranty deed,  
25 do you see that?

1 A Yes.

2 Q And is it your understanding that this was, in fact,  
3 um, the mechanism to transfer the property to the City?

4 A Yes, that's (inaudible)

5 Q And the City was supposed to do what in exchange for  
6 that?

7 A Build a library, um, that, that was the, that's what  
8 this agreement talks about.

9 Q And operate a library?

10 A Um-hum.

11 Q For how long?

12 A Fifty years.

13 Q Okay, when did you first learn that the library was  
14 going to close, this specific Mission Viejo Library?

15 A I believe it was, it was first talked about my  
16 Council Member Rob Broom I think at, in our July Board  
17 Meeting. And then was, uh, then reiterated by, I think,  
18 Council Member, uh, Fitzgerald, um, who attended our meeting  
19 in August.

20 Q Okay, and at that point in time did you know that  
21 this Nineteen Seventy Three agreement existed?

22 A I knew it existed but I didn't have it in hand.

23 Q Did you raise the existence of this agreement to Mr.  
24 Broom or anyone else from the City at that time?

25

1           A     I did, um, I, I initially talked to Mr. Broom about  
2 this and I knew that it existed, I asked him to research it.

3           Q     Was he aware of it?

4           A     My impression was he wasn't at first, no.

5           Q     Um, did he ask you for a copy of it?

6           A     No, he did not.

7           Q     Did you ultimately provide him or the City a copy of  
8 this agreement?

9           A     No, I did not.

10          Q     When did the City for the first time acknowledge to  
11 you that they knew this, this document existed?

12          A     I think it was Aug-, August Fifteenth that I got a  
13 reply back from Mr. Broom via e-mail that said there was an  
14 agreement that they acknowledged existed.

15          Q     Okay, so it was, they decided to close the libraries  
16 and then later they became aware of this existence of this  
17 contract to your knowledge?

18          A     To my knowledge.

19          Q     Tell me about this library, what does this library  
20 mean to you, well, strike that question, let me ask you this.  
21 You, you're sitting here today as a property owner, as a  
22 father, as the president of the HOA and as the successor to  
23 the Mission Viejo Company, is that not correct?

24          A     Yes.

25

1 Q So you, you're wearing a bunch of different hats up  
2 there. And is it fair to say for each of those hats, there's  
3 a different reason that this library's important to you?

4 A Yes.

5 Q Could you start with the owner slash father aspect  
6 of this and tell us what this specific library means to you?

7 A Yes, um, the library is, is incredibly important to  
8 our family. Um, we grew up with libraries always in existence  
9 as (inaudible) throughout my childhood and I know that's the  
10 same with my wife's and we've always made it a point to bring  
11 our kids to the library to instill the value of learning and  
12 knowledge and, you know, we would always bring our kids to  
13 their story time, to do crafts, uh, you know to check out  
14 books, to find things on the internet, we were always going to  
15 this library. And having that being taken away, is personally  
16 just very hard.

17 Q How about as the president of the HOA?

18 A As president of the HOA representing the interests  
19 of the community, I can tell you that the same sort of  
20 sentiment exists that I have for this library that it's a main  
21 asset to the community. It provides so much service in terms  
22 of not only its books and learning but also as a community  
23 center. We regularly have our Homeowners' Association  
24 meetings there monthly. We regularly have neighborhood watch  
25 meetings there. We regularly have, uh, you know, literary

1 groups that meet there, story times, all of those take place  
2 there. Having that not in the community certainly that asset  
3 would be detrimental completely to us. Um, those things are  
4 immeasurable in my opinion as to that value.

5 Q What about with respect to your position here as  
6 the, uh, assignee, or assignee of the Mission Viejo Company,  
7 um, and successor to that contract? How does that affect or  
8 damage you in that respect?

9 A Well, as, as successor to this contract, we feel  
10 like that, there was an obligation here, that the City had to  
11 have this library open for fifty years and it's an asset that  
12 was always built in, always, um, promoted as part of this  
13 community. It, taking that away is detrimental, I think, to  
14 the higher whole concept of the Mission Viejo Neighborhood.  
15 It is, uh, negates all of those, um, ideals that the Mission  
16 Viejo Company expounded upon when they were building our  
17 community.

18 Q The library, would you characterize it as a  
19 cornerstone or a backbone of your community?

20 A Um-

21 MR. RICHARDSON: No, objection, leading question.

22 THE COURT: I'll allow it.

23 A Absolutely, it's, it's a major, major asset.

24 Q What will happen if the library's shut down in terms  
25 of the effect on the community? Forget about the use of the

1 library itself, but the library's gone, what effects is that  
2 going to have on the community?

3 A The effects are maybe a little bit hard to, you  
4 know, at this point speculate, but I can assure you that in  
5 having an empty building there is potentially going to cause  
6 irreparable damage as far as property values are concerned, as  
7 far as being a haven, perhaps, for, uh, you know, youth that  
8 are, are running around and perhaps graffiting things. We  
9 already have a situation in which we have a recreation center  
10 that's been under foreclosure for over a year and a half, I  
11 believe, and it already is, is hit constantly. Having another  
12 facility in the neighborhood empty is, is just, it's going to  
13 cause a lot of problems and I, and it's detrimental.

14 Q What, what years were, was this community built,  
15 roughly (inaudible)?

16 A Well, I think it was in Nineteen Seventy Two that it  
17 actually, or Seven-, yeah, Seventy Two when it actually  
18 started and it took several years for it to complete. I  
19 believe the last date may have been Nineteen Eighty Four or  
20 something like that, it was one of those (inaudible)

21 Q Have you, have you seen a changing of that community  
22 over time, first hand?

23 A Um, what, what do you mean, demographically or-

24 Q Just in terms of the makeup and the nature of the  
25 neighborhood?



1           A       I would have to say it has to a certain degree, that  
2 certainly the first homeowners that were there have, you know,  
3 their kids have grown and, and gone. But it continues to  
4 still be used, I, I still see a lot of young people coming  
5 into the neighborhood and because I think it has so many great  
6 assets to it. And we try to promote that as an association as  
7 well that it has these great things such as a wonderful  
8 school, school system, um, great school, great library, um,  
9 great parks and, and recreation amenities and I think that and  
10 of course the proximity to everything else in the Metro area  
11 really attracts, young people and, and young families, um, to  
12 our neighborhood continually. So it's a good mix, I still  
13 think.

14           Q       The removal of a library, would that have a, an  
15 adverse or a benef-, beneficial effect in your opinion?

16           A       I would have to say a definitely a, a, a  
17 detrimental, um, effect because, um, I, I think you know, I  
18 would think twice about perhaps moving into Mission Viejo if I  
19 was just starting out with my family and saying you know what  
20 we can go somewhere else where there is libraries and things  
21 to, amenities such as that. (inaudible)

22           Q       Well, that begs the million dollar question then,  
23 why is, why is this library so important, why can't the  
24 central library just five miles away but as the crow flies,  
25 why can't that library fill the void?

1           A       Well, first of all, I think it, it's the, the  
2 distance is definitely one thing, um, and, and the older, uh,  
3 elderly folks in our neighborhood, I think, would have a hard  
4 time getting to those areas. Um, when you look at it  
5 geographically as you said, the closest one five miles, the  
6 other one ten miles, um, other two, those are great distances  
7 to go and travel. But again, I think the detriment is, is not  
8 so much the distance it's the detriment of all of those  
9 things, all the programming, all of the, um, services that are  
10 provided locally in the community, we have a wholes system of  
11 a network of, of trails, uh, greenbelts in our neighborhood  
12 where children can easily walk or ride their bike to our  
13 library. Um, and it's, to me, detrimental for the youth as  
14 well, because they can't then easily go and research something  
15 that they need to for a school project for instance. And  
16 being able to get to these other libraries is incredibly hard,  
17 um, with, you know, bus services on weekends hardly available  
18 and, um, it seems that that would be a real detriment to our  
19 community.

20           Q       What if, what detrimental effects would it have if  
21 the library were simply temporarily closed, say from January  
22 First Two Thousand Ten through a date where we might prevail  
23 on a permanent ruling on this case?

24           A       My opinion it would be still highly detrimental.  
25 Um, having it closed any per-, period of time, um, for a long

1 period of time, I think, would be really hard for this  
2 community to then get access to all of these needs, uh, which  
3 the community uses regularly. It's the second most used  
4 library in the City statistically, um, by usage.

5 Q Where'd you get that stat, Mr. uh, McMahon?

6 A That, that, those figures, uh, were provided to me,  
7 I believe, from one of the library staff and that, those  
8 figures are then reported to the, uh, Colorado State Library.

9 Q Okay. This isn't about convenience is it?

10 A It's more than convenience, I mean, it's more about  
11 (inaudible)-

12 Q I, I, I think the Court needs to understand that, so  
13 if there's anything you haven't said, please, please testify  
14 to that.

15 A It's definitely more than, than just convenience, it  
16 as I said. It provides so much, I know that, that, um,  
17 economically looking at some economic, um, impacts what, what  
18 a library provides to a community. I was recently looking at  
19 a study done by the, uh, Urban Institute and the Urban, um,  
20 Library Council, looking at the economic benefits of what a  
21 library provide and it's really the, uh, return on investment  
22 is astronomical. What the library provides. Not only to the,  
23 uh, to the neighborhood itself, but also the surrounding areas  
24 as far as businesses are concerned. It provides traffic and,  
25 uh, and we are already, may, may I just sort of say that, you

1 know, we're trying to get new development hopefully going on  
2 in a shopping center. Um, I'm not sure, I think they were  
3 under the impression that there was always going to be a  
4 library there, so having that gone, certainly would be  
5 detrimental, um, to those efforts. Um, and we know that it  
6 provides a lot of, of, of traffic that way. Um, we also know  
7 that the library provides a service to the community in fact  
8 our zip code eight zero zero one three one was one of the  
9 hardest hits as far as foreclosures is concerned and having  
10 that library there provides a service for those people who are  
11 job hunting, job seeking, um, and hopefully gets those people  
12 back on their feet as quickly as possible and having those  
13 things there available to us is im-, I, you know, it's just,  
14 it's more than convenience, it's more all of the services  
15 that, that the library provides all of the youth, all of the  
16 people who use it.

17 Q What sort of businesses are in the, immediately  
18 adjacent retail center that you just referenced, right next to  
19 the library?

20 A Yes, there's, um, near it there, there of course,  
21 uh, is uh, some strip centers there, there's, uh, a Mexican  
22 restaurant across the street as well as a, a natural food  
23 store, um, some other retail outlets there, um, right near  
24 the, the shopping center, across the street from the library,  
25 um, there's of course a, a soccer store there as well as, uh,

1 I think, uh, a, a pizza place, a Papa Murphy's type of place.  
2 Um, it seems to me like there's also another restaurant or a,  
3 a liquor store there, um, as well as, uh, uh, sort of a  
4 consignment, a pawn type shop there as well. Um, and it's  
5 there is an empty space there that we're hoping that will get  
6 filled right next to it, on the pad closest to the street, um,  
7 I know that we've talked to Walgreens, they're planning to  
8 build a new Walgreens there. Um, they, uh, approached us many  
9 times and said we like the location and we like the fact that  
10 there's a library here.

11 Q As the, as you sit here as the Mission Viejo  
12 Company, um, can you talk briefly about why the, the City's  
13 decision to breach this contract will deprive you of the  
14 benefit of the bargain?

15 MR. RICHARDSON: Well, Your Honor, I'm going to  
16 object to that, uh, portion of his question that called for an  
17 ultimate legal conclusion.

18 THE COURT: Sustained, I'll ask you to rephrase.

19 MR. HOBAN: I will, Your Honor.

20 Q Um, as the Mission Viejo Company, as you sit here,  
21 um, the City's actions, how have they deprived the Mission  
22 Viejo Company of rights and obligations under this Nineteen  
23 Seventy Three agreement?

24 A Um, can you, can I ask you this (inaudible)?

25

1 Q What did the Mission Viejo Company give to the City  
2 in exchange for the fifty year library?

3 MR. RICHARDSON: Well, objection Your Honor, this  
4 is cumulative, I believe the documents, um, speak for  
5 themselves, we've heard from the representative of Mission  
6 Viejo.

7 THE COURT: Well, I think I understand where  
8 you're going Mr. Hoban, the, the benefit of the bargain is  
9 they've given up the land.

10 MR. HOBAN: Fair enough, Your Honor, I, I've got  
11 one more question.

12 THE COURT: So, I get it.

13 MR. HOBAN: I, I, (inaudible) I don't doubt it.

14 Q Um, Mr. McMahon, one, one further question on direct  
15 examination, why are you here today wearing so many hats?

16 A I am here because, um, first of all with my hat as  
17 a, as a father, as a homeowner, as a resident in Mission Viejo  
18 Company, or Mission Viejo Neighborhood, sorry, um, the library  
19 is important, it's been important for our family ever since  
20 we've, we've first come to this neighborhood. I'm here in a,  
21 (inaudible) I'm here as the President of the Mission Viejo  
22 Homeowners' Association because so many of our residents are  
23 concerned about this library and losing this library. We've  
24 had a number of people who have come today and we've had many  
25 of them who through our process of trying to keep it open have

1 stepped forward and, um, advocated for our library. There is  
2 strong support for our library. And finally, as the successor  
3 to the Mission Viejo Company, we see this as an obligation  
4 that the City had, as you alluded to, that this was free land  
5 that was given to the City as a partnership to this  
6 development to create a library with the stipulation that it  
7 be open and operated for a minimum fifty years.

8 Q I lied, I have one more question.

9 A Okay.

10 Q And that question is, um, if the Court ultimately  
11 enters relief that (inaudible) or disbands this contract from  
12 the very beginning and somehow, some way, uh, the Mission  
13 Viejo HOA obtains title to this property, what will it en-,  
14 endeavor to do with the property?

15 MR. RICHARDSON: Objection, Your Honor, the, the  
16 HOA obtaining title to the property? What is the legal theory  
17 for that, it's not even in the complaint. I, I don't  
18 understand where we're going with this question.

19 THE COURT: (inaudible)

20 MR. HOBAN: Mr. Richardson hasn't read the  
21 complaint, Your Honor.

22 THE COURT: It is listed in the, in the  
23 complaint. I'll allow the question. You may answer the  
24 question.

25

1           A       Yes, Your Honor. Um, we believe that it really  
2 needs to be operated as a library. I have made, um, inquiries  
3 into seeing if the Arapahoe Library District could operate  
4 the, um, facility and have made contacts with, uh, um, County  
5 Commissioner Rod Bockenfeld, feld, sorry, and, uh, Pat Newman,  
6 um, at our last HOA board meeting, we allocated funds so that  
7 we could actually receive, uh, the abstract for the, uh, GID  
8 issue so that we can research the probab-, the possibility of  
9 creating extending out the Arapahoe Library District to our  
10 neighborhood. Um, in conversations with, um, County  
11 Commissioner Rod Bockenfeld, it seems as if when we, when he  
12 was punching the numbers that our community as well as maybe  
13 about a thousand more, um, participants could actually, um, be  
14 inscribed if, if we can make a connection then to, because  
15 we're only about a mile and a half or two miles at the most to  
16 the Arapahoe County Library District. So we're looking into  
17 that possibility with hopefully the, uh, obtaining the  
18 abstract information we can sort of see how, what the support  
19 level is, (inaudible) GID to help them strategize how we could  
20 get the Arapahoe Library District to take it, take it on, um,  
21 which as, as far as I know the only way we can do that is  
22 through, through valid admission (inaudible) I don't know if  
23 there's another avenue that we could do that through, but, um,  
24 that's, that's would be our primary, um, interest if we were  
25 to somehow get title to the property.



1 MR. HOBAN: Pass the witness, Your Honor.

2 THE COURT: Alright, let's take our morning  
3 recess before we begin cross examination. Mr. McMahon, you  
4 can step down, I'll ask the parties to be read to go at twenty  
5 to eleven, we'll start back up.

6 COURT CLERK: Please rise.

7

8 **APPROXIMATELY TWENTY MINUTES LATER**

9

10 COURT CLERK: Please rise.

11 THE COURT: You may be seated. We are on the  
12 record on Zero Nine C V Two Seven Four One Mission Viejo  
13 Homeowners' Association versus the City of Aurora. Counsel is  
14 here. And we'll return back to testimony. Mr. McMahon, I'll  
15 ask you to resume the stand, remind you again you're still  
16 under oath and subject now to cross examination. Counsel?

17 MR. RICHARDSON: Thank you, Your Honor.

18

19 **CROSS EXAMINATION OF TODD MCMAHON**

20 by MR. RICHARDSON:

21

22 Q Mr. McMahon, I think you indicated, uh, you moved  
23 into the Mission Viejo Community about fifteen and a half  
24 years ago, is that correct?

25 A That's correct.

1 Q And it's fair to say that, um, you did not know  
2 about the existence of the agreement at that time, is that  
3 correct?

4 A That's true.

5 Q Um, is it fair to say that the branch library has  
6 been operating in a, a, a suitable, acceptable fashion up  
7 until very, very recently as far as you're concerned?

8 A Yes.

9 Q So the City of Aurora kept its obligation to build  
10 the facility and has run it, uh, for thirty six years, is that  
11 correct?

12 A Yes.

13 Q Are you aware, generally speaking, I know you may  
14 not be an economist, are you generally aware of the economic  
15 environment confronting cities in Colorado?

16 A I am, yes.

17 Q I think you attended a couple of council meetings,  
18 correct?

19 A Correct.

20 Q And, um, you heard some discussions about the budget  
21 situation, is that correct?

22 A Yes.

23 Q Okay, um, you referenced in your testimony about the  
24 absence of, uh, the ability to conduct neighborhood watch,  
25

1 community meetings, etcetera, the use of the facility, do you  
2 remember that?

3 A Yes.

4 Q And, and is it fair to say that, um, well let me ask  
5 you this, have you asked any City Officials if you'd be able  
6 to conduct these activities in that building even if it wasn't  
7 being operated as a library?

8 A I, I did have a discussion with, uh, Council Member  
9 Broom right after the election, um, and I asked him, I said so  
10 what will happen with the library and he responded to me he  
11 didn't know. That they were going to have to figure that out  
12 and, um, one possibility he proposed was maybe talking to, we  
13 had, were trying to solicit the YMCA to buy the old rec center  
14 and he said maybe we could rent it out and have the  
15 (inaudible). Um, that's the bulk of the discussion that we  
16 went through, um, so-

17 Q Okay.

18 A Yeah.

19 Q You haven't had a conversation with Mr. Miller, is  
20 that correct? Who's our City Manager?

21 A No.

22 Q So you don't know today whether or not you'd be able  
23 to have all those ancillary community type functions there, is  
24 that correct?

25 A That's correct.

1 Q Okay, um, how far away is the Smokey Hill Library  
2 from you?

3 A I would, when I looked at it, I think on Google Maps  
4 there's at least, the Smokey Hill Library?

5 Q That's correct.

6 A Um, at least five miles away.

7 Q My records indicate and you can disagree with me  
8 records, um, we'll have testimony later on this three point  
9 nine miles.

10 MR. HOBAN: Your Honor, that's, that's not a  
11 question. That's Mr. Richardson testifying, I'd object to  
12 form.

13 THE COURT: I'll allow it.

14 Q Do you know how close, uh, Denver's Hampden Library  
15 is to the Mission Viejo Library? If you don't, that's fine.

16 A I don't know but it seems a, a distance.

17 Q Do you know how close the Aurora Central Main  
18 Library is to the Mission Viejo Library?

19 A I think it's at least five miles straight on.

20 Q Okay, now would you agree that, uh, do you have your  
21 library card on you?

22 A I believe so, yeah.

23 Q Okay, why don't you pull it out, I have some  
24 questions.

25 A Okay.

1 Q Now with, with that card is it, is it true you can  
2 access any of the libraries that are run by the Arapahoe  
3 Library District? Have you ever tried to do so, or if you  
4 don't know I'm not trying to trick you here.

5 A (inaudible) says that on the card, it does-, it  
6 doesn't say that, it doesn't give me that-

7 Q Okay.

8 A (inaudible) I believe you could use it for the  
9 Arapahoe Library District.

10 Q Okay, you've never tried to is that correct?

11 A Um, I, I probably have, uh, once or twice, yes.

12 Q Okay. Um, have you ever used our Central Library?

13 A Uh, yes.

14 Q And, and while we're on the library card it does not  
15 say Mission Viejo Branch Library Card, does it?

16 A No, no, that's true.

17 Q Okay, are you aware of the Aurora Library's  
18 internet, uh, service that you can access, uh, by computer?

19 A I'm not sure if I know about that.

20 Q Okay.

21 A (inaudible) you mean the catalogue or-

22 Q Well, no if you're not, if you're-

23 A (inaudible)

24 Q I, I don't want you to speculate so if you're not  
25 familiar with it, we'll, we'll get into that, uh, later. Um,

1 you've been in discussions with, apparently with, uh, Arapahoe  
2 Library District, is that correct?

3 A Only through the, uh, County Commissioners, uh, yes,  
4 and some of the elected officials of at the state level who've  
5 indirectly were making inquiries on my, our behalf.

6 Q Okay, so you have a plan, is that correct that you  
7 would put into place if this library, uh, were to be closed?

8 A I would have to say (inaudible) a completely  
9 fallback position, I mean that's not our primary thing, but  
10 indeed, that's certainly an option that we've been looking at.

11 Q Okay, now because you assert that you're standing  
12 now in the shoes of the Mission Viejo, it's one of those hats  
13 that I can see, um, I'm going to ask you some questions about  
14 the original agreement, then. Did you hear my cross  
15 examination of Mr. Smith where I talked about the parameters  
16 of operating a library?

17 A Yes.

18 Q Um, now, you would object, would you not, if that  
19 facility were used, for example, as a water treatment  
20 facility, is that correct?

21 A Yes.

22 Q Or if it was used as a, um, storage area by the City  
23 is that correct?

24 MR. HOBAN: We would object on the relevance of  
25 this line of questioning, Your Honor.

1 THE COURT: Mr. Richardson?

2 MR. RICHARDSON: Pardon?

3 THE COURT: What's the relevance?

4 MR. RICHARDSON: Oh, I'm getting into what, what  
5 the Mission Viejo Company now understands their representative  
6 is here as to how, what are the parameters of this library  
7 going to be or what the expectation was.

8 THE COURT: I'm not sure how your questions were  
9 getting there.

10 MR. RICHARDSON: Okay, let me, let me maybe help-

11 THE COURT: Alright.

12 MR. RICHARDSON: From the look on the Court's  
13 face, um, I'm going to approach this a little bit differently.

14 Q Um, would you agree in the agreement there is no  
15 definition of what a, a branch library is?

16 A In the, uh, original agreement?

17 Q Right.

18 MR. HOBAN: I'm going to object as, Mr.  
19 Richardson keeps using the term branch agreement, I presume it  
20 has some sort of legal significance therefore it is calling  
21 for a legal conclusion of some sort.

22 THE COURT: Well the, the document speaks for  
23 itself and I know there has been at least on the paper some  
24 issues of public library versus branch and what all that means  
25 so, I, I guess, I, I'm not exactly sure where both sides are

1 going with the questioning. I'm the finder of fact here, and  
2 so I need to get it and, and there's a lot of documentation  
3 and I get that, so to the extent that you need to argue the  
4 paper, you can argue the paper to me, you don't need to have  
5 the witness do that. And to the extent you're asking this  
6 witness to interpret an agreement from Nineteen Seventy Three,  
7 I don't know that that's helpful.

8 MR. RICHARDSON: Well, I'm, not I'm, I'm, I uh, I  
9 apologize, Your Honor, I'm not trying to do that, and also  
10 what I'm not trying to do is ask any questions about the, the  
11 argument on the relevance or non-relevance of the State of  
12 Colorado Library Law, so I, I don't intend to get into that,  
13 so that was not where I was going. They, they, they're  
14 seeking a preliminary injunction to enforce the agreement to  
15 have a library and so I'm just trying to discern what they're  
16 seeking in terms of having the Court (inaudible) the City to  
17 continue an operation with, that's all I'm trying to do.

18 MR. HOBAN: Those are all specifically identified  
19 in the complaint, Your Honor, is all I would say.

20 THE COURT: Well, I'll allow questioning to that  
21 extent. Get right to the point.

22 Q How many days, uh, do you want the library to be  
23 open?

24

25



1           A       Well, I, I would defer that there's a State Library,  
2 uh, Division that has set standards. I believe that the  
3 recommendation for that standard is twenty hours a week.

4           Q       Okay.

5           A       With the understanding that there be hours allocated  
6 toward the daytime, the afternoon, and either evenings or  
7 weekends.

8           Q       Do you have that document here by any chance today?

9           A       I do, yes.

10          Q       Okay, can you make it available to me later? Okay,  
11 um, any, do you have any opinions about the staffing level?

12          A       No.

13          Q       Uh, any, any opinions about the stock, about the  
14 turnover in the stock, the replenishment of the stock, what,  
15 what would constitute a library?

16               MR. HOBAN:       I, I have a foundation objection and  
17 a relevance objection, I'm not sure what Mr. McMahan-, Mc-,  
18 McMahan's background is with regard to the operation of a  
19 library and this line of questioning.

20               THE COURT:       Mr. Richardson, you asked Mr. Smith  
21 these same types of questions.

22               MR. RICHARDSON:       Well, that's because I'm trying  
23 to ascertain what, what the plaintiff's are asking the Court  
24 to do in terms of the injunction because I'm going to get into  
25 the area of what the cost for purposes of the security bond

1 are going to be to operate this library at the level that it's  
2 operating and it, because it's not in the Two Thousand and Ten  
3 City Budget right now. So I'm trying to get a feel for what  
4 the plaintiff's envision, um, would be, uh, uh, in, in, in  
5 enjoined library operation. That's all I'm trying to do.

6 THE COURT: Alright, (inaudible) you can answer  
7 that Mr. McMahon?

8 A Could you rephrase that, I, I (inaudible)-

9 Q Do you have any opinions that you want to share with  
10 the Court in terms of the, the, the stock in the library, a  
11 number, uh, and if you don't that's fine.

12 A A stock as in books?

13 Q Books.

14 A Well, I, I think that the books that are, that have  
15 been collected for the library need to remain in the library-

16 Q Okay.

17 A If that's what you're referring to, then yes.

18 Q Those books, those particular books correct? Okay,  
19 um, hours of operation, I think you briefly talked on that,  
20 you think it should be operated twenty hours per week?

21 A Well, with all due respect, it, it seems to me that  
22 this is the second most used library in the City and so I  
23 think it seems logical, then to, to look at the state's  
24 standards and say that it should be open at least the minimum  
25 which is twenty hours a week.

1 Q Okay, now the HOA is not, um, sharing in the  
2 financial burden of operating this library is that correct?

3 A No, we're not.

4 Q Okay, how, do you know how many other libraries are  
5 unfortunately because, uh, closed uh, at the end of this year  
6 in the City of Aurora?

7 A Um, I know that, that, that four of them are being  
8 closed. I think though the relevancy of this questioning is  
9 that there's a contract on this particular property that  
10 obligates it to open for fifty years.

11 Q But that, that's your position, I understand that.  
12 Um, now you, I think you answered my question and gave me some  
13 legal advice at the same time about the other libraries  
14 closing is that correct?

15 A I'm sorry, that I gave you legal advice (inaudible)

16 Q On the relevancy of the other libraries closing but  
17 did you agree that the City of Aurora because of its budgetary  
18 situation is being forced to close several libraries?

19 MR. HOBAN: Foundation, Your Honor?

20 THE COURT: Sustained.

21 Q Um, do you, do you admit that you and your family  
22 could drive to the Smokey Hill Library and use those  
23 facilities?

24 A We could but again-

25 Q That's a yes or no, Mr. McMahan, please.

1 A Yes, we could but-

2 Q Yes.

3 A Honestly, it's not convenient.

4 Q It's, it's not convenient-

5 A (inaudible)

6 MR. RICHARDSON: Thank you, Your Honor, no  
7 further questions.

8 THE COURT: Redirect?  
9

10 **REDIRECT EXAMINATION OF TODD MCMAHON**

11 by MR. HOBAN:  
12

13 Q Mr. McMahon, you talked about this fallback Arapahoe  
14 County Library District plan, um, what do you mean fallback,  
15 fallback to what?

16 A Well, obviously our intent here today is to try to  
17 keep our library open and, and that the City adhere to its  
18 obligation of keeping it open for fifty a minimum of fifty  
19 years.

20 Q Are there other communities besides Mission Viejo  
21 that this library serves?

22 A Absolutely, um, in addition to our Homeowners'  
23 Association which represent the nineteen hundred and seventy  
24 three homes, there are in addition to that, um, three condo  
25 associations in our community. Um one of which is Seville

1 Town Homes, I can't tell you exact numbers of that residency  
2 but it's quite a few. Um, there's the Cherry Glen Homeowners'  
3 Association, as well as, uh, French Creek and I, and one other  
4 actually, uh, Southlight HOA (phonetic) directly in our  
5 neighborhood and surrounding it are a number of other, um,  
6 neighborhood association, associations such as Meadow Wood  
7 directly across from us, um, which is also a voluntary  
8 association like ourselves with limited funds. Um, there is,  
9 um, a couple of other, uh, uh, townhome condominium  
10 associations across the street from us, the Timbers, um, there  
11 is other, uh, Meadow, uh, Meadow Hills which is a residential  
12 subdivision as well. They also have an HOA. All of those  
13 neighborhoods utilize this facility. Um, many of them have  
14 regular meetings held there, um, annual meetings, regular  
15 meetings, um, they all use this facility and all their  
16 residents use all of those services that the library provides.

17 Q The other three libraries that Mr. Richardson  
18 mentioned and that you discussed that are being closed in  
19 addition to the Mission Viejo library, are you aware of any  
20 contract that the City has entered into to keep those  
21 libraries open for a specified period of time?

22 A Not that I'm aware of, no.

23 Q There is one, however, with this contract, with this  
24 library?

25 A Absolutely.

1 Q Were you ever asked to vote to close this specific  
2 library?

3 A No we were not asked to vote, vote to specifically  
4 close this library.

5 Q Were you ever asked to sign a petition to put on the  
6 ballot a vote to close certain libraries?

7 A No, we were not.

8 Q I know the Smokey Hill Library's convenient but does  
9 it solve all of the problems concerning community that you  
10 addressed earlier?

11 A Not at all, it's so important to have those things,  
12 those assets right there within the community and, and being  
13 there. Um, those services at Smokey Hill and the Arapahoe  
14 Library District are way far removed from us. And don't have  
15 an impact on the community.

16 Q Thank you. Thank you, Mr. McMahan.

17 THE COURT: Mr. McMahan you may step down. I'm  
18 going to ask the parties to give me a, a little bit of a  
19 forecast of witnesses and where we're headed. The parties  
20 very optimistically said this would take have a day and it's  
21 eleven am.

22 MR. HOBAN: Your Honor, uh, my, my representation  
23 to the Court is that my next two perhaps three witnesses are  
24 extremely short, just to hone in on the irreparable harm  
25

1 issue, uh, and I suspect we can get all three of those done  
2 before we break for lunch.

3 MR. RICHARDSON: Maybe I, maybe an offer of proof  
4 can be made, Your Honor, that I could agree with counsel, uh,  
5 if these were all residents of the Mission Viejo Neighborhood.

6 THE COURT: Mr. Hoban?

7 MR. HOBAN: Uh, Your Honor, our first witness is  
8 a Miss Appleton and she is a realtor in the community and a,  
9 and a resident, a long time resident. She will expand upon  
10 and explain the effects from a market based perspective and  
11 from her own personal ba-, perspective as the deleterious  
12 effects that the closing of this library will have on this  
13 neighborhood. In addition, I've got two education pro-, uh,  
14 professionals who live in adjacent neighborhoods who will talk  
15 about how this library serves a vital function for students,  
16 youth, etcetera for access, for education, for programs that  
17 other libraries cannot serve because of the fact that these  
18 children actually walk and get off the bus and go to this  
19 particular library. So given that offer of proof, um, I would  
20 limit my, my elicited testimony to those specific areas, um,  
21 and I don't believe it's cumulative because it's a little bit  
22 of a different take on what Mr. McMahon has already said. But  
23 if the Court understands those, those issues, um, I'm happy to  
24 forgo their, the presentation of those witnesses, I think that  
25 those are important points, but that's your call, Your Honor.

1 THE COURT: Mr. Richardson?

2 MR. RICHARDSON: Well, I'm going to object if any  
3 real estate testimony is going to be brought in today because  
4 that's not our understanding of, uh, as of last Friday what  
5 type of witnesses we were going to have here today. Um, on  
6 this real estate issue, I, I know where we're going with this,  
7 uh, there's going to be a long cross examination, we're going  
8 to have to get our own experts at some point, um, had no  
9 expectation we were going to get into property valuation in  
10 this hearing today. Now, what I was talking about is some,  
11 uh, uh, testimony from residents, uh, saying, uh, uh, how  
12 important the Mission Viejo Library is to this neighborhood  
13 and I think I started off this morning by alluding to the fact  
14 that I'm not surprised that the HOA president is here and I'm  
15 not surprised these great citizens of Aurora are here trying  
16 to preserve this library, so that's what I'm talking about if  
17 we wanted to have an offer of proof that, that several  
18 residents want to talk about how important the library is. I  
19 don't think it's legally relevant, but I'm just trying to  
20 facilitate the Court's schedule here.

21 THE COURT: And what witnesses are you calling  
22 Mr. Richardson?

23 MR. RICHARDSON: Um, we're calling the City  
24 Manager, I believe, um, the, uh, Mr. Hoban is going to, uh,  
25 call on his case in chief, uh, the Deputy City Manager, and



1 then the, besides Mr. Miller we were going to call the head  
2 librarian to talk about what it's going to cost to keep this  
3 library, uh, open, uh, into next year and to talk about some  
4 of the services that the internet aspect of, uh, the Aurora  
5 Public Libraries is all about. We're going to have her  
6 testify to some of these distances, uh, and what the, uh,  
7 interaction is, uh, I guess the shared access between the, the  
8 various library systems.

9 THE COURT: Alright, Mr. Hoban, I, I, I think I  
10 do understand these issues but you're the moving party, if you  
11 think you need to put these witnesses on, then you should. I  
12 hear you saying two educational professionals and that is  
13 cumulative, I don't know that they're offering a different  
14 perspective.

15 MR. HOBAN: I can limit that to one. I will do  
16 that.

17 THE COURT: (inaudible) put one of each on.

18 MR. HOBAN: I will do that. I call Ms. Appleton  
19 to the stand right now.

20 THE COURT: Alright. (inaudible) want to step  
21 forward I'll swear you in. Do you solemnly swear or affirm  
22 under penalty of law that the testimony you'll give before  
23 this Court shall be the truth, the whole truth, and nothing  
24 but the truth?

25 MS. APPLETON: I do.

1 THE COURT: Please have a seat.

2

3 **DIRECT EXAMINATION OF DEENA APPLETON**

4 by MR. HOBAN:

5

6 Q Good morning, Ms. Appleton, I represent the Mission  
7 Viejo HOA, thank you for coming this morning. I'm going to  
8 ask you questions in rapid fire fashion if you don't  
9 understand just have me rephrase or stop or speak more slowly.  
10 I want to try to get this moving along.

11 THE COURT: Well, it's one thing to be efficient  
12 and another thing to make your record, why don't we start with  
13 your name so the record's then complete.

14 A Deena Appleton.

15 Q Ms. Appleton, what's your occupation?

16 A I'm a realtor.

17 Q And are you a resident of the Mission Viejo  
18 Community?

19 A Yes, I am.

20 Q For how long?

21 A For over fifteen years.

22 Q Can you describe you and your family's use of this  
23 library?

24 A Um, yes, it's multifaceted. Um, I have a seven year  
25 old who we, um, frequently use the library, we were part of

1 the summer reading program, um, at the library. I'm part of a  
2 book club, so I access the library frequently. Um, we attend  
3 the HOA meetings, we vote there, it's a, it's a cornerstone of  
4 our community.

5 Q What will happen if this library is taken away from  
6 your community?

7 A Well, I think it's just another asset to our  
8 community that is going to be a detriment. Um, I have spoke  
9 with many members of the community who, um, this could be  
10 final straw that, um, that we speak with our feet and leave.  
11 It's that important to us, it's bricks and mortar that when we  
12 signed contracts to buy our home that we were under the  
13 impression that the library was part of the community  
14 forevermore, fifty years or whatever, but-

15 Q When you say act with your feet, what do you mean?

16 A We'll leave the neighborhood.

17 Q And is this a sentiment that you've, that have  
18 become aware of?

19 A Absolutely, I had a conversation with a neighbor  
20 last night.

21 Q Um, beyond the two of you, are you aware of this as  
22 a more of a (inaudible)-

23 A Yes, I've heard it from many others in the  
24 community, absolutely.

25 Q And why, why leave?

1           A       It just seems as though, um, there have been many  
2 closings around the neighborhood, um, you know, we have and  
3 we're attracting pawn shops now on, um, the perimeter of the  
4 community, um, it just is, uh, we keep talking about community  
5 and that's what we signed up for. Um, and when you turn the  
6 lights off to these cornerstones of our community, you might  
7 as well turn the lights off to our homes. It's part of it.

8           Q       Are you a residential or commercial realtor?

9           A       (inaudible)

10           MR. RICHARDSON:       I'm going to object, Your Honor,  
11 this is getting into expert testimony, this is a complete  
12 ambush from what we were told on Friday would be the type of  
13 witnesses we were going to have today in this proceeding. I  
14 have no expert report, I have no ability to cross examine?

15           A       Can I speak to that?

16           THE COURT:       No, Mr. Hoban?

17           MR. HOBAN:       Your Honor, I, I would simply suggest  
18 there's nothing inconsistent about the testimony to be  
19 elicited from this witness from what was described a, and b,  
20 on its face, the question is not expert testimony.

21           THE COURT:       Counsel I'll ask you to speak with me  
22 and not to each other.

23           MR. HOBAN:       Yes, Your Honor, and, and c, I would  
24 suggest to you that under no circumstance are we asking  
25 professional rule seven oh two opinions and I don't intend to

1 go down there. I'm simply trying to give context to her  
2 background as to what she knows, why she knows it.

3 THE COURT: I'll, I'll allow it in a limited  
4 fashion, I, I don't, I'm not receiving this as expert  
5 testimony, this is an injunction hearing so there hasn't been  
6 the opportunity for expert reports and the like. So I'll  
7 allow it, and ma'am I interrupted you because you only answer  
8 questions that are asked of you.

9 A Yes, Your Honor.

10 THE COURT: Thank you.

11 MR. HOBAN: Thank you, Your Honor.

12 Q I, I would reassert the question, are you a realt-,  
13 uh, a residential or commercial realtor?

14 A Residential.

15 Q Uh, and will, in your opinion, this closing of this  
16 library have an impact on your home and, and the neighborhood  
17 that whi-, which your home sits?

18 A Yes.

19 MR. RICHARDSON: Can I have a continuing  
20 objection, uh, noted, Your Honor?

21 THE COURT: Yes.

22 Q You talked about the library as a cornerstone of  
23 your community, can you explain that?

24 A Well, it's just a, it's a positive, um,  
25 establishment, um, in the community, it's a synergy, we have a

1 school in the neighborhood, um, it's, it's again when I, I  
2 hear testimony from previous, it's what was intended of the  
3 community, that we have a community. Um, it's a safe haven  
4 for children in the neighborhood. Um, there are elderly that  
5 utilize the resources, there are many users of our library  
6 that don't have internet and so they come to use the internet,  
7 um, it's a community gathering place, it's just, it's more  
8 than a library, in addition to all of the books and all of the  
9 resources, the DVDs and all those kinds of things that are a  
10 part of it.

11 Q Can the Central Library or the Smokey Hill Library  
12 fill that void?

13 A Yes, I suppose so, I mean in terms of when you're  
14 asking me technically can I get books from those places, can I  
15 get those kinds of things from those places, I can. Can I  
16 get, um, an addition to my community where I purchased my  
17 home, no. Those, those establishments will not check that box  
18 for me.

19 Q So your comments are based on more of the, the, the  
20 cornerstone idea that you'd suggested or the fact that this is  
21 a, an asset to the community, not the specific services  
22 offered?

23 A Correct.

24 Q Did you say you purchased your home ba-, because  
25 there was a library there?

1           A       Well, there were many rea-, reasons that we  
2 purchased, um, we owned three homes in the neighborhood so  
3 there were many reasons that we have, um, put down roots in  
4 Mission Viejo. Um, when we first purchased we didn't have a  
5 child and we wanted to be in Cherry Creek School District, um,  
6 just in the event that we would and eventually we did and so  
7 it was just, again, one of those positives that we felt like,  
8 um, it was welcoming to us, uh, to have a library, to have a  
9 fire station, the park, I mean, it's, it's multifaceted.

10           Q       If the library's closed do you see that the, the  
11 neighborhood changing as a result of that?

12           A       Yes, I do.

13           Q       How so?

14           A       Well, I think it's going to have a negative impact,  
15 um, as Todd had indicated the Heartwood Community Center has  
16 closed and, um, you know, there's, um, it's just a, a magnet  
17 for crime, um, and just you know, after hours activates that  
18 are unsavory and things that we don't want to have happen in  
19 our neighborhood.

20           Q       And the presence of a vacant building how would  
21 that, uh, uh, effect you in the same way you just discussed?

22           A       Well, again, it's, I mean, not even getting into the  
23 property value aspect of it, it's just, it's something that we  
24 purchased as part, we didn't obviously purchase the library,  
25 but it was one of the things that was in the pyramid of why we

1 made the decision that we, we selected Mission Viejo and it's  
2 just going to be a gaping hole in our community if it goes  
3 away.

4 Q If the library closes are there dollars and cents  
5 that can cure this problem, these effects you just discussed?

6 A Absolutely not. I, I no.

7 MR. HOBAN: Pass the witness, Your Honor.

8 THE COURT: Cross examination?

9 MR. RICHARDSON: None, Your Honor.

10 THE COURT: Okay, you may step down, ma'am, thank  
11 you.

12 MS. APPLETON: Thank you.

13 MR. HOBAN: Thank you, Your Honor, um, our next  
14 witness is Ms. Mary Spencer.

15 THE COURT: Okay and if you want to step forward  
16 to the witness table, I'll swear you in as well. Do you  
17 solemnly swear or affirm under penalty of law that the  
18 testimony you'll give before this Court shall be the truth,  
19 the whole truth, and nothing but the truth?

20 MS. SPENCER: I do.

21 THE COURT: Please have a seat, your witness.  
22  
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**DIRECT EXAMINATION OF JOANNE SPENCER**

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by MR. HOBAN:

Q Good morning.

A Good morning.

Q Can you please state your name for the record?

A Joanne Mary Spencer.

Q And do you reside in the City of Aurora?

A I do.

Q And what's your occupation?

A Teacher.

Q Uh, what grade do you teach?

A First grade.

Q How many years have you done that?

A Oh, nine, uh, nine years.

Q Okay.

A In first grade.

Q How many years have-

A Twenty seven years teaching.

Q (inaudible) Don't guess my questions if you wouldn't  
mind please, just let me, let me get them out, thank you. Uh,  
so you've, you've been a teacher for twenty seven years?

A Correct.

Q Okay, um, in the Aurora area?

A Uh, about fifteen in the Aurora area.

1 Q Okay, now just for purposes of the record and to put  
2 your mind at ease, you're not here to speak on behalf of the  
3 school district or your employer in any form or fashion,  
4 correct?

5 A That's correct.

6 Q You are here as an individual, as a member of the  
7 community?

8 A Um-hum, yes.

9 Q Okay. Um, you're familiar with the Mission Viejo  
10 Library?

11 A Yes.

12 Q Are you familiar with the, um, the youth and the  
13 students that use that library?

14 A I am, indeed.

15 Q And what do they use it for?

16 A Well, my students use it for research, they use it  
17 for, uh, checking out books when we have, uh, book reports or  
18 they need to, uh, analyze a, a information about a country or  
19 a concept or jobs we're discussing in the classroom. So, uh,  
20 they use it for, uh, summer reading programs, um, and, um,  
21 sometimes they will have a weeklong camps where they can learn  
22 about our, a particular type of a genre style of, uh,  
23 literature, they can learn about there.

24 Q Do you have any particular reason to know why the  
25 students that you're familiar with use this specific library?

1           A       I do, they're students that I work with and we ask  
2 them to do a book report and the books aren't available in our  
3 school, our Mission Viejo School, they go over there or they  
4 get supplementary materials and, uh, to add to their reports.

5           Q       Why the Mission Viejo Library?

6           A       Well, um, our community, I say our, but I, I mean,  
7 I'm speaking in terms of my teaching community, uh, has been  
8 changing in that they're, uh, I've noticed more students who  
9 don't have access to driving other places. I've noticed that  
10 some families have once car, some don't have any cars, and  
11 it's essential that they're able to walk to a facility and  
12 that's what they do in Mission Viejo.

13          Q       If the library were to close, uh, do you believe  
14 that would have an impact on these students, these children  
15 that you described today?

16          A       Oh, absolutely.

17          Q       How so?

18          A       (inaudible) parents who are working in the evening  
19 and if they have the one car, they don't have access to go to  
20 the other, uh, libraries to get information. Some of them  
21 don't have the money for the internet services, they don't  
22 have computers in their home, we take inventory all the time  
23 and they just don't have resources, so when they need to do  
24 research or learn things they just go to that community and  
25 they walk there.

1 Q Based on what you know about these students in your  
2 experience, does the Central or the Smokey Hill Library fill  
3 that void, um, for these particular students or can it fill  
4 that void?

5 A It could if they have the ab-, ability to get there,  
6 if they have the rides and I know there are some boys and  
7 girls whose parents work at nighttime and they don't have  
8 rides, I mean sometimes they'll uh, we'll offer cultural  
9 opportunities and tell them about various events in the  
10 community and I'll say well did you go last night, no I didn't  
11 have a ride. And it's just essential to keep this  
12 intellectual stimulation alive and well in a community you  
13 have to have this as, like someone else already stated, a  
14 cornerstone, this is part of a, uh, learning and loving, uh,  
15 in a, a community.

16 MR. HOBAN: One second, Your Honor, please? Your  
17 Honor, uh, I will pass the witness, thank you.

18 THE COURT: Cross examination?

19 MR. RICHARDSON: None, Your Honor.

20 THE COURT: Alright, thank you ma'am you may step  
21 down.

22 MS. SPENCER: You're welcome.

23 THE COURT: Further testimony (inaudible)?

24 MR. HOBAN: Yes, Your Honor, uh, our final  
25 witness, um, I believe we were going to call another teacher

1 but I think you've gotten the gist of it and it's certainly,  
2 uh, cumulative. Uh, our next witness is Tom Nicholas  
3 Assistant City Manager and, uh, perhaps our final witness here  
4 this morning.

5 THE COURT: Alright. Sir if you want to step  
6 forward, I'll swear you in. Do you solemnly swear or affirm  
7 under penalty of law that the testimony you'll give before  
8 this Court will be the truth, the whole truth, and nothing but  
9 the truth?

10 MR. NICHOLAS: (inaudible)

11 THE COURT: Please have a seat, your witness.

12

13 **DIRECT EXAMINATION OF THOMAS NICHOLAS**

14 by MR. HOBAN:

15

16 Q Mr. Nicholas, good morning.

17 THE COURT: (Inaudible) you have to loosen the  
18 top to get it out.

19 A Go ahead.

20 Q Thank you, uh, please state your name for the  
21 record.

22 A It's Thomas Nicholas.

23 Q And I apologize for inadvertently demoting you, can  
24 you please state your title for the record.

25

1           A     Oh, gee, I, I (inaudible) Deputy City Manager of the  
2 City of Aurora.

3           Q     Um, how long have you been the Deputy City Manager,  
4 sir?

5           A     About a year and a half.

6           Q     Okay, prior to that, um, were you not the head of  
7 libraries for the City?

8           A     I was the director of library, recreation and  
9 cultural services.

10          Q     For how many years?

11                THE COURT:        I'm going to ask you to keep your  
12 voice up Mr. Nicholas, do you need some water, I can ask my  
13 clerk to go get, fill that up if it's empty.

14                MR. NICHOLAS:    (inaudible) empty but-

15                THE COURT:        Either nothing comes out or it's  
16 pouring out so.

17                MR. NICHOLAS:    I got it.

18                THE COURT:        We're, we're electronically recording  
19 so I'm just concerned your voice is soft and I want to make  
20 sure our record is good. And I missed the last question, I  
21 was busy with the water and sounds, (inaudible)

22                MR. HOBAN:        Fair enough, Your Honor, I will  
23 circle back.

24

25

1 Q Uh, Mr. Nicholas, prior to being a Deputy City  
2 Manager, you were the head of libraries, and the library and  
3 recreation district for how many years?

4 A Oh, uh, Nineteen Ninety Five as Director of Library,  
5 Recreation and Cultural Services, about Nineteen Eighty Four  
6 to that period, Director of Library and Television Services.

7 Q All told, how many years have you been involved with  
8 the operation of libraries?

9 A Seventy Five, Nineteen Seventy Five.

10 Q I was going to say, seventy five years, your, your,  
11 you look so young (inaudible)

12 A Nineteen Seventy Five (inaudible)

13 Q Um, let's see here, um, so you're familiar with the  
14 libraries and the operations of libraries?

15 A Correct.

16 Q Do you have a, a, a degree that, uh, sort of  
17 formalizes that, that familiarity or that you've studied about  
18 libraries prior to becoming any of these roles?

19 A Yes.

20 Q What's that degree?

21 A Um, (inaudible) excuse me, Librarianship and  
22 Information Management.

23 Q Okay, and, and, and I won't ask you what year, but  
24 what school was that from?

25 A Um, University of Denver.

1 Q University of Denver. And are you familiar  
2 generally with library policy on a municipal or a local  
3 government level?

4 A Um, yes.

5 Q Wouldn't you agree that a library is a, uh, uh, a  
6 fundamental community asset?

7 A Yes.

8 Q And wouldn't you agree, in fact I think when we  
9 first met we had a discussion that going into an actual  
10 library's a heck of a lot better than pulling up things on-  
11 line.

12 A I don't really recall that conversation but-

13 Q But would you agree with that?

14 A Uh, yes.

15 Q Are you familiar with what libraries are slated to  
16 close by the end of the year in the City?

17 A Yes, I am.

18 Q And what are those libraries, sir?

19 A Mission Viejo, um, Illiff Square, Chambers, and, um,  
20 (inaudible) have to remember the, the name.

21 Q And were you involved in the decision making  
22 concerning the closing of those libraries?

23 A I was involved in the discussions.

24

25



1 Q Okay, do you know when each of those libraries began  
2 operations and or were created starting with the Mission Viejo  
3 library?

4 A Um, Mission Viejo started in Nineteen Seventy Five  
5 or Seventy Six.

6 Q And how about the others sir?

7 A Hoffman Heights would be Nineteen Sixty, Sixty Five.

8 Q And the other two, yes (inaudible).

9 A Uh, Illiff I can't recall, but it's about ten years  
10 and Chambers about five years.

11 Q Okay, so the later two have only been created within  
12 the last five to ten years?

13 A To my recollection.

14 Q Okay, um, the decision to close these libraries, uh,  
15 that was made during the summer of Two Thousand Nine, correct?

16 A The decision to close the libraries was made by City  
17 Council.

18 Q But it was made in the summer of Oh Nine?

19 A No.

20 Q When was it made?

21 A October of, uh, this year.

22 Q (inaudible)

23 A (inaudible) City Council.

24 Q And that's when the budget for Two Thousand Ten was  
25 formally adopted.

1 A Correct.

2 Q Alright, and that was before ballot item Two A  
3 concerning the creation of a new CIG was actually voted on by  
4 the citizens of Aurora?

5 A I don't know when the citizens of Aurora were, uh,  
6 given the ballot question to, to answer. I mean I don't know  
7 when that's, when they could turn them in.

8 Q Well, wasn't election day the first week in November  
9 of Oh Nine?

10 A Correct, but you could turn in your ballots much  
11 earlier than that.

12 Q But they weren't counted until then?

13 A Right.

14 Q So the decision had been made to close these four  
15 libraries before any vote had been taken or counted-

16 A Counted yes.

17 Q By the (inaudible) okay. Do you recall a petition  
18 being circulated amongst the citizens in any part of the City  
19 to close any of these libraries in Two Thousand Nine or  
20 immediately prior?

21 A No.

22 Q Are you generally familiar with the City budget as  
23 the, in your role as a Deputy City Manager?

24 A Yes.

25

1 Q Um, I'm gonna hand you a binder here, and ask you to  
2 turn to Exhibit Eight which is the very last exhibit in the  
3 book. And just, just keep your thumb there for a second if  
4 you would, sir. Um, is it fair to say that the decision to  
5 close these library was, was made, uh, based upon financial  
6 con-, considerations?

7 A I beg your pardon.

8 Q Is it fair to say that the decision to close these  
9 specific four libraries was made on financial considerations?

10 A Yes, it is.

11 MS. KINNEY: Objection, Your Honor, foundation.  
12 He just testified that the decision was made by City Council.

13 THE COURT: Well, to the extent that he knows as  
14 the Deputy City Manager, what the basis was for these  
15 decisions you can answer if you don't know please let us know.

16 A (inaudible) budget constraints.

17 Q So is the answer to my question, yes, sir? That the  
18 decision to close these libraries was based on financial  
19 considerations?

20 A Yes.

21 Q Okay, if you look at Exhibit Eight, uh, this is  
22 taken directly from the Two Thousand Ten budget, can you turn  
23 to the second page which is number E dash Forty One, do you  
24 see that sir?

25 A Correct.

1 Q Do you see where it says policy reserved funds  
2 summary at the top? At the very top of the page?

3 A I do.

4 Q Is this a, a general fund of, of money reserved by  
5 the City for Two Thousand Ten?

6 A Uh, I'm not sure I would be the best one to answer  
7 that question but it would appear to be.

8 Q Okay, and if you look at the bottom right box of  
9 this chart all the way to the right, doesn't it appear, at  
10 least based on this chart, that there are, is over twenty one  
11 million dollars in this policy reserve fund for Two Thousand  
12 Ten?

13 MS. KINNEY: Objection, foundation, Your Honor.

14 THE COURT: Sustained. I think this witness has  
15 said he doesn't really know, (inaudible)

16 Q Were, were you involved in the preparation of the  
17 budget concerning reserves and policy reserves?

18 A I was involved in my area of the budgets which is  
19 police, fire, (inaudible) services. (inaudible)

20 Q Okay so not with-

21 A General overview of the budget is typically out of  
22 the budget office.

23 Q So you weren't involved in the policy reserve fund?

24 A No.

25 Q You weren't involved with the so-called green fund?

1 A No.

2 Q And you weren't involved with the so-called Tabor  
3 reserve fund?

4 A No.

5 Q The City Manager would be the best person to ask  
6 those questions to, wouldn't it?

7 A Or the budget office.

8 Q Okay, the Mission Viejo Library was open in Nineteen  
9 Seventy Five do you recall that?

10 A I do recall.

11 Q Okay and was it not subject to a bond vote to pay  
12 for the building of that library sometime immediately prior to  
13 it opening?

14 A That was my understanding but I don't have the  
15 direct knowledge of that.

16 Q The, are you familiar with Exhibit One here, the  
17 Nineteen Seventy Three agreement we keep talking about? And  
18 you're cert-, you're welcome to look at it, it's Exhibit One.

19 A Okay.

20 Q Doesn't that document suggest that a bond election  
21 will be held to fund the building of the Mission Viejo, uh,  
22 Library? And you're welcome to look at is as detailed as you  
23 want, I'm not trying to trick you or put words in your mouth.

24 A Well, to expedite could you just tell me what  
25 section?

1 Q Subsection Four, sir, on the second page.

2 A Okay.

3 Q Um, does, is that fair to say that that provision  
4 talks about a bond election to fund the building of the  
5 Mission Viejo Library?

6 A It does.

7 Q And it's your recollection that that was ultimately  
8 approved by the voters?

9 A I have no idea, I wasn't there at the time.

10 Q Okay.

11 A But I have to assume since, since it's, it's built  
12 but-

13 Q Okay, you're not aware of any other funding sources?

14 A Not that I'm aware of.

15 Q Okay. Um, and if you'd look at, uh, the fourth page  
16 of that Exhibit One, top of the page, restrictions. Um, have  
17 you seen those before?

18 A I've seen them but I haven't necessarily read  
19 through them.

20 Q Would you agree with me that those restrictions  
21 provide for the, to the extent you, you, you know that they  
22 provide for the standards of construction and landscaping for  
23 the actual library to be built?

24 MS. KINNEY: Objection, foundation and calls for  
25 legal conclusion.

1           THE COURT:       I'm not sure how it's relevant for  
2 the Deputy Manager of the City to be looking through  
3 restrictions, this is not a document he's familiar with.

4           MR. HOBAN:       My understanding he worked for the  
5 library system for a number of years and I just, he said he  
6 looked at it, I said to the extent he knows, that's all Your  
7 Honor, and if he doesn't know that's fine.

8           A       I don't know.

9           Q       Okay, I, I will move on (inaudible). Are you aware  
10 that the Mission Viejo Company deeded land under which this  
11 library sits to the City for free in exchange for the  
12 operation of a library?

13          A       I do know that.

14          Q       And we've heard some testimony are, are you aware of  
15 a statistic that the Mission Viejo Library is the second most  
16 used library in the City?

17          A       Correct.

18          Q       And do you know how many years that goes back?

19          A       No, I don't.

20          Q       Um, it would that statistic we just referred to, is  
21 that Two Thousand Nine, Two Thousand, uh, Two Thousand Eight,  
22 do you (inaudible)-

23          A       I'm going to guess Two Thousand Eight.

24          Q       Okay.

25

1 MR. HOBAN: Your Honor, if I may just have one  
2 minute to fumble through a quick paper here.

3 THE COURT: Alright.

4 Q Um, Mr. Nicholas, were you involved in the  
5 preparation of a document called History of the Aurora Public  
6 Library Nineteen Twenty Nine through Two Thousand Four?

7 A I actually had a stand person who constructed that  
8 document.

9 Q Um, and did you review that before it was published  
10 to the public?

11 A Uh, yes, but I can't even remember when.

12 Q That's fine, that's fine. Any reason to doubt any  
13 infor-, uh, that the information contained in there is  
14 correct?

15 A Well, uh, without having the document in front of me  
16 I'm not sure because, um, it a lot of it was just what people  
17 could remember.

18 Q Isn't the Mission Viejo Library formerly known as  
19 the South Library?

20 A Correct.

21 Q Okay, for purp-, would it help to refresh your  
22 recollection if you would look at that document I've just  
23 referred prepared by the City to talk about whether or not  
24 this library was in fact paid for by a bond? Or do you agree  
25



1 that a bond was approved in, in this, and this library built  
2 was built by a bond approved?

3 MS. KINNEY: Excuse me, Your Honor, what Exhibit  
4 are we referring to?

5 MR. HOBAN: It's not an exhibit it's for his, re-  
6 , purposes of refreshing his recollection if it would help  
7 him.

8 A I wasn't employed with the City at the time of the  
9 bond was, uh, voted on.

10 Q But do, do you have any reason to believe the bond  
11 didn't pass?

12 A Oh, I believe it passed-

13 Q (inaudible)

14 A I mean it built the building.

15 MR. HOBAN: Okay, pass the witness, Your Honor.  
16 Thanks Mr. Nicholas.

17 THE COURT: Cross examination.

18 MS. KINNEY: Thank you, Your Honor.

19

20 **CROSS EXAMINATION OF THOMAS NICHOLAS**

21 by MS. KINNEY:

22

23 Q Uh, Mr. Nicholas as the Deputy City Manager are you  
24 familiar with the City Manager's proposed Twenty Ten budget?

25 A Yes.

1 Q Um, and that budget was approved by the Aurora City  
2 Council in October of Two Thousand Nine?

3 A Yes.

4 Q Would you describe the financial situation the City  
5 was facing in Two Thousand Nine?

6 A Uh, it had to deal with a lot of budget reductions  
7 throughout, um, the City.

8 Q And was this financial crisis the City facing every  
9 publicly discussed?

10 A Oh, yes.

11 Q In what type of formats?

12 A Um, it's been discussed, uh, council workshops, it's  
13 been discussed in the newspapers, it's been pretty widely  
14 discussed.

15 Q Are the council workshops in which the Aurora City  
16 Council discusses the proposed budget open to the public?

17 A Yes, they are.

18 Q Were there any public meetings that the City  
19 sponsored to educate the public?

20 A There are a number of public, uh, hearings on the  
21 budget that people can talk, talk and come speak to, there are  
22 (inaudible) meetings that I know that council members hold  
23 that they, uh, discuss the budget.

24 Q And do you have any personal knowledge as to whether  
25 or not members of the public came to these public hearings to

1 listen to information on the budget and make their own  
2 comments?

3 A Um, in the public hearings at city council, yes  
4 there would be.

5 Q Okay.

6 A With ward meetings, I did not attend the ward  
7 meetings, but the budget officer did.

8 Q In Two Thousand Nine how much money did the Aurora  
9 Libraries drop in the City's general fund?

10 A Uh, in Two Thousand Nine?

11 Q Yes.

12 A A little over six million dollars per library.

13 Q Are you familiar with ballot issue four, four a in  
14 the Two Thousand Nine mail in election?

15 A Yes.

16 Q What was ballot issue four a?

17 A It was a library, uh, issue that, uh, asked for a  
18 mill levy, uh, to support and be dedicated to libraries, uh,  
19 to (inaudible).

20 Q And did ballot issue four a pass in November of Two  
21 Thousand Nine?

22 A No.

23 Q If it had been passed, how much of the tax increase  
24 would it have brought?

25

1           A       (inaudible) given to the, uh, library operations  
2 about twelve million dollars a year.

3           Q       And that twelve million dollars would have been  
4 directed, dedicated to library services?

5           A       Correct, it would not by example (inaudible) library  
6 and cultural services department, those funds could only go to  
7 the library.

8           Q       Okay, even if the City closes the four branch  
9 libraries you previously mentioned at the end of this year, is  
10 the City of Aurora still providing library services free of  
11 charge to the public?

12          A       Yes.

13          Q       In what way?

14          A       Uh, we have the Central Library, um, Martin Luther  
15 King, and Talon's Reach Library.

16          Q       And how much does it cost the City annually to  
17 provide those library services?

18          A       It's gonna be about point nine million I believe,  
19 uh, for Martin Luther King and, um, the Central Library and  
20 then the funding for Talon's Reach is from a mill levy  
21 (inaudible).

22          Q       Do you know how much it costs the City to operate  
23 the branch library at Mission Viejo on a daily basis?

24          A       Roughly twenty five hundred dollars.

25

1 Q And what does that twenty five hundred dollars a day  
2 cover?

3 A Um, it includes all the staffing and the, uh, uh,  
4 general heat, air conditioning, uh, supplies, etcetera.

5 Q And by staffing you're referring to paid staff  
6 salaries?

7 A Correct. At the facility.

8 Q At, at the facility okay, if the City is required to  
9 keep the Mission Viejo Branch Library open, what impact would  
10 that have on the City's budget in Twenty Ten?

11 A Well, it's not budgeted so we're going to have to  
12 find some reduction somewhere within the budget.

13 Q Aurora is a home rule city is that correct?

14 A Yes.

15 Q Are you familiar with how Aurora's library system  
16 was created?

17 A Uh, if I recall, this goes to my memory, uh,  
18 Nineteen Twenty Nine the library was established.

19 Q And how was it established?

20 A Uh, by the city council.

21 MS. KINNEY: Thank you, I don't have anything  
22 further.

23 THE COURT: Redirect?

24 MR. HOBAN: Yes, Your Honor.

25

1                                   **REDIRECT EXAMINATION OF THOMAS NICHOLAS**

2 by MR. HOBAN:

3

4           Q     Um, Mr. Nicholas, do you recall, when's the earliest  
5 you recall being involved in the discussion where the closure  
6 of the Mission Viejo Library was on the table?

7           A     Probably the early part of, um, Two Oh Nine and  
8 form-, formally in June, July.

9           Q     And you didn't become aware of this Nineteen Seventy  
10 Three agreement, Exhibit One, until sometime in the summer of  
11 Oh Nine, (inaudible) correct?

12          A     That's correct.

13          Q     Um, Ms. Kinney asked you about ballot question four  
14 a, that ballot question didn't say do you vote to close a  
15 library or specific libraries did it?

16          A     No.

17          Q     And again, there's no petition that you're aware of  
18 that was circulated to get that on the ballot by the citizens?

19          A     No.

20          Q     Are you aware of a priority list of, of city  
21 services that was, um, distributed to, to members of the  
22 community and reported back to the City for purposes of  
23 assessing it's budget?

24          A     Not specifically. I'd have to see the document that  
25 you reference otherwise I'm not sure.

1 Q Do you recall at all whether libraries were ranked  
2 fifth under priorities, um, by the City?

3 MS. KINNEY: Objection it's been asked and  
4 answered.

5 THE COURT: Well, to the extent that you know,  
6 (inaudible)

7 Q Not the document, sir, but do you are you aware of  
8 that?

9 A Well, without a document that you're referencing,  
10 (inaudible) library fifth and I would have to see the  
11 document.

12 Q Mr. Nicholson I'm going to show you a document, if  
13 you recognize it tell me, if you don't that's fine as well.

14 A Um, I don't particularly recognize it.

15 Q Okay, fair enough. Um, and Ms. Kinney asked you  
16 about the creation of the library system, let me just ask you  
17 a few questions about the library system itself. Um, the  
18 library system in the City of Aurora, Aurora is known as what?

19 A The Aurora Public Libraries.

20 Q And it's has agreements with, um, local  
21 universities, correct? For sharing of books in, in and the  
22 like?

23 A It has a, uh, uh, statewide agreement that  
24 (inaudible) all the libraries producing free acc-, access to  
25 (inaudible).

1 Q So the Aurora Public Libraries has a, an agreement  
2 that is statewide-

3 A In terms of sharing, uh, it participates-

4 Q Okay.

5 A In a program.

6 Q Is it, uh, participating in a program with any  
7 Universities outside of this state program as a depository or  
8 to share resources or the like?

9 A No, not that I'm aware of.

10 Q Um, is, does the Aurora Public Library have any  
11 other intergovernmental a-, agreements or affiliations with  
12 any other library districts or library services outside of the  
13 City of Aurora for sharing of resources and the like?

14 A It does with Arapahoe Library District,  
15 specifically.

16 Q Okay. So there are, in fact, other ripple effects  
17 of the closing of these libraries outside of the City due to  
18 this (inaudible) correct?

19 MS. KINNEY: Objection, foundation.

20 THE COURT: I'll allow it, you may answer it if  
21 you know.

22 A I'm, I'm not sure I would ans-, I would be able to  
23 answer that question the way it's structured.

24 Q Okay, and then finally, I, I'm going to ask you  
25 hypothetically, I want you to assume for me that I give you a



1 piece of property and I want to assume for me that in return  
2 for me giving you that piece of property, you're supposed to  
3 perform services, you're supposed to cut my lawn fifty times.  
4 And after thirty five times you say you're not going to cut my  
5 lawn anymore, did I receive the benefit of the bargain?

6 MS. KINNEY: Objection, Your Honor, speculation,  
7 legal conclusion, and lack of foundation.

8 THE COURT: Sustained.

9 MR. HOBAN: No further questions Your Honor.

10 THE COURT: You may step down sir.

11 MS. KINNEY: Your Honor, may I just it's for the  
12 Court's benefit, um, we were sort of taking Mr. Nicholas out  
13 of turn so that, to facilitate claimants presentation and  
14 given that I just, would just like to ask two follow up  
15 questions and then we won't need to recall him.

16 MR. HOBAN: No objection.

17 THE COURT: I'll allow, I'll allow it.

18 MS. KINNEY: Thank you.

19

20 **REXCROSS EXAMINATION OF THOMAS NICHOLAS**

21 by MS. KINNEY:

22

23 Q Mr. Nicholas, having spent your entire career in the  
24 field of libraries was it difficult to be part of the process  
25 in which closing libraries was discussed and decided?

1 A Yes.

2 Q Based on your many years with the City of Aurora, in  
3 you, your personal knowledge has the City ever been through  
4 such difficult financial times as we're facing now?

5 A Not to this extent, no.

6 MS. KINNEY: Thank you, I don't have anything  
7 further.

8 THE COURT: Alright, Mr. Nicholas you may step  
9 down, thank you, sir. (inaudible) Mr. Hoban?

10 MR. HOBAN: With that said, Your Honor, I believe  
11 the plaintiffs rest on that testimony for purpose of the PI  
12 hearing.

13 THE COURT: Alright. Defense intends to call  
14 witnesses?

15 MS. KINNEY: Your Honor, the City has two  
16 witnesses we would like to call.

17 THE COURT: Alright, then let's get started.  
18 First witness?

19 MS. KINNEY: The City will call Ron Miller.

20 THE COURT: (inaudible) step forward I'll swear  
21 you in, do you solemnly swear or affirm under penalty of law  
22 that the testimony you'll give before this Court shall be the  
23 truth, the whole truth, and nothing but the truth?

24 MR. MILLER: I do.

25 THE COURT: Please have a seat. Your witness.

**DIRECT EXAMINATION OF RONALD MILLER**1  
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by MS. KINNEY:

Q Mr. Miller would you please state your name for the record?

A Ronald Miller.

Q And what is your occupation?

A I'm the City Manager.

Q For the City of Aurora?

A City of Aurora.

Q Colorado?

A Yes.

Q How long have you been so employed?

A Twelve years.

Q Would you briefly describe your job responsibilities as the City Manager for Aurora Colorado?

A I'm the Chief Executive Officer of the City, uh, and excuse me, I oversee the day to day operations of the City under the policy direction of the mayor and city council.

Q Are you familiar with the City's fiscal situation?

A Yes, I am.

Q How would you describe Aurora's fiscal situation in Two Thousand Nine?

A I think (inaudible) very serious.

1 Q Um, how long would you characterize Aurora's, uh,  
2 financial situation as very serious?

3 A For the last four and a half to five years.

4 Q And when was the last time the City of Aurora had a  
5 tax increase for operations?

6 A Nineteen Ninety Three.

7 Q Would you explain just in general terms how the City  
8 Budget functions?

9 A We're required by charter to have a balance budget  
10 and we're primarily funded by the, uh, retail sales tax which  
11 represent fifty four percent or more of the general fund  
12 budget for the City.

13 Q If the revenues go down, what does the City do in  
14 response to that?

15 A Uh, in order to maintain a balance budget we have to  
16 cut services and in, uh, recent times cut personnel.

17 Q As the City Manager was it your responsibility to  
18 propose the Twenty Ten budget to the Aurora City Council?

19 A Yes.

20 Q And did you do that?

21 A Yes, I did.

22 Q When did you do that?

23 A Um, I believe late August of Two Thousand Nine,  
24 approximately.

25

1 Q Prior to your making the proposed Twenty Ten budget  
2 to the Aurora City Council was the public give access to the  
3 concerns the city was facing?

4 A Yes, there were a number of budget workshops and  
5 study sessions, uh, public hearings, uh, that all describe  
6 the, uh, uh, the challenges and serious condition of the  
7 City's finances.

8 Q What were you faced with when you were making the  
9 proposed Twenty Ten budget?

10 A Uh, for Twenty Ten, uh, we fo-, foresee, foresaw  
11 rather the need to cut fifteen million dollars from  
12 appropriations from the general fund to maintain a balanced  
13 budget in Twenty Ten, uh, so we, uh, needed to, uh, cut a  
14 hundred and thirty positions, sixty of which were by, by  
15 layoffs.

16 Q If I could interrupt you for just a moment?

17 A Sure.

18 Q Um, when you say we were required to reduce the  
19 budget by fifteen million dollars are you referring to the  
20 Twenty Ten budget being fifteen million dollars less than the  
21 Twenty Nine, or the Two Thousand Nine budget?

22 A The Twenty Ten budget for general fund, uh,  
23 appropriations is fifteen million dollars less than was  
24 authorized for year Two Thousand Nine, yes.

25

1 Q Okay. In order to reach that fifteen million dollar  
2 reduction, what steps did you take?

3 A Um, we eliminated a hundred and thirty positions,  
4 uh, sixty by layoffs or positions that were currently filled,  
5 uh, we enacted a hiring freeze, uh, we had to cut services in  
6 the public works department, uh, parks and recreation, uh,  
7 library, (inaudible) services, uh, a number of other city  
8 departments, uh, had to, uh, experience cuts in operations and  
9 services.

10 Q Other, I, just so I understood your testimony  
11 correctly, other than the library and public works departments  
12 what other departments cut funds or cut services?

13 A Parks and recreation.

14 Q Parks and rec. Have, has the City implemented any  
15 furloughs?

16 A Um, we will be enacting, uh, furloughs as part of  
17 the budget reduction in Twenty Ten, uh, for all employees.

18 Q And what exactly is a furlough?

19 A A furlough is, a um, a day off without pay.

20 Q Um, with respect to the city's fleet or computer  
21 replacements, has there been any change in plans for the year  
22 Twenty Ten?

23 A Uh, for the last couple of years, um, we have not  
24 had funds to replace city vehicles that were, uh, old and in  
25

1 states of disrepair nor had we had money to replace computers,  
2 uh, that were outdated.

3 Q In your attempt to present a balanced budget for the  
4 year Twenty Ten were any senior level positions in Aurora  
5 eliminated?

6 A Uh, yes there were. Um, in order to cut cost, uh, I  
7 conducted in conjunction with the staff a reorganization study  
8 that consolidated, uh, a number of departments and, uh, as a  
9 result of that process we were able to save taxpayers one  
10 point five million dollars and eliminate about eleven, uh,  
11 senior uh, manager and supervisory level positions.

12 Q And if I understood your testimony previously you  
13 indicated that the City has laid off sixty, uh, employees is  
14 that correct?

15 A That, uh, there were sixty, uh, slated for layoff in  
16 Twenty Ten.

17 Q At the, uh, it, uh, do, are-

18 A As of January First.

19 Q Is the City facing additional layoffs by the end of  
20 this year?

21 A Um, we don't have, um, there were some layoffs  
22 earlier this year in the development review fund, um, but the  
23 layoffs are scheduled to be effective January One.

24 Q Of Twenty Ten?

25 A Yes, that's correct.

1 Q Okay. As the City Manager, what are your priorities  
2 when it comes to budgeting various municipal services?

3 A Um, the City's highest priorities are the  
4 resident's, uh, public health and safety and, uh, so those  
5 would be primarily police services, fire services, emergency  
6 management, uh, emergency dispatch for nine one one, uh,  
7 responses, so those, um, are considered the highest priority  
8 to the City.

9 Q And when you were in the process of making decisions  
10 regarding the Twenty Ten budget, did you consult with others?

11 A Uh, yes, I consulted with all the department  
12 directors, Deputy City Managers, uh, finance director, uh, uh,  
13 budget, uh, budget office staff.

14 Q In the process of making these budget cuts, were you  
15 operating with any particular philosophy?

16 A Uh, I would say our philosophy was, uh, um, a  
17 programmatic approach, um, programmatic approach um, basically  
18 means that, excuse me, whatever services are decided to be the  
19 highest priority, uh, and to be provided to the citizens are  
20 provided at a high quality level, uh, rather than doing, uh,  
21 across the board budget cuts that just basically weaken all  
22 services. So that, I guess, if you call that a philosophy is,  
23 is kind of the approach we used.

24 Q How did that philosophy relate to the City's library  
25 services?



1           A       Well, as mentioned, uh, public health and safety  
2 were seen as the high priorities, uh, libraries, in my view,  
3 are very important to the community and something that, uh,  
4 uh, we wanted to, uh, provide in the highest quality and  
5 manner possible so, um, we, uh, we used an approach in terms  
6 of the libraries, of uh, the ones that would remain open would  
7 be based on ge-, geographical basis. Um, and again provided a  
8 full service, high quality, uh, nature uh, one (inaudible)  
9 North MLK library, Central Library and the Talon's Reach  
10 Library, uh, on the far south part of the City. So, uh,  
11 geographical location, I think was important to those  
12 considerations, um, also, um, the, uh, first library and the  
13 third one I mentioned are multipurpose libraries so other  
14 services are provided, excuse me, out of those facilities.  
15 Uh, another consideration was the age of the, uh, facilities  
16 and which ones were most cost effective to maintain and I  
17 would say a fourth consideration was the fact, uh, as Mr.  
18 Nicholas indicated that the Talon's Reach Library is funded  
19 through an agreement with the Arapahoe Library District and we  
20 share revenues with that district and they, uh, provide us  
21 with about five hundred thousand dollars a year which  
22 maintains that library. So those were the considerations in  
23 terms of, um, which libraries would remain open.

24           Q       When you were deciding which libraries were going to  
25 be closed and which ones would remain open, did you consider

1 at any time reducing the hours at the various libraries so we  
2 could keep them all open?

3 A Yes.

4 Q And did you decide against that?

5 A Yes.

6 Q Why, why did you decide that wasn't a good approach?

7 A Well, basically, um, we thought they would, uh,  
8 weaken in caliber and the quality of the services at each of  
9 the libraries, and uh, uh, again, uh, with our programmatic  
10 approach, we thought the best thing would be the libraries  
11 that would remain open would be full service, uh, would have,  
12 uh, state of the art computers, uh, have current materials,  
13 um, and um, so that was a part of the decision.

14 Q Okay, did you consider it cost effective to keep  
15 some of the libraries open just a few days a week?

16 A No, I don't think that would be, uh, cost effective  
17 or efficient or-

18 Q Why, why not?

19 A Well, because we would have to, uh, still provide  
20 uh, staffing and all of the resources required to maintain the  
21 libraries, uh, even with, uh, partially use, so we thought we  
22 would, uh, the ones that we would keep open would be provided,  
23 uh, full service and, uh, with high quality materials and, uh,  
24 would be open, uh, virtually all week.

25

1 Q I believe you testified that the Martin Luther King  
2 Junior Branch Library and the Talon's Reach Libraries are, are  
3 multipurpose buildings, is that correct?

4 A I, uh, that's right.

5 Q What, what does that mean?

6 A Well, in terms of the, uh, MLK Library in the north  
7 part of the, uh, community, uh, they have neighborhood  
8 services, um, uh, services for, uh, youth, uh, there are  
9 programs for, uh, low and moderate income residents, uh, in  
10 terms of assisting them financially to rehabilitate their  
11 homes, uh, there are loans and grant for small businesses in  
12 original Aurora, all those are, uh, are officed and housed,  
13 uh, in the MLK Library along with of course the, the library  
14 itself. Uh, and, and there's also a Police sub-station that  
15 is, uh, housed in that library. (inaudible)

16 Q In the Martin Luther King Library?

17 A Yes, ma'am.

18 Q Okay.

19 A Uh, in the uh, uh, Talon's Reach Library in the  
20 south, uh, there is a, uh, station, a fire station, number  
21 thirteen, uh, there's a, uh, uh, police department, um,  
22 district three headquarters, uh, there are our emergency  
23 dispatch, uh, personnel, uh, nine one one personnel, um, all  
24 in addition to the, uh, library itself.

25 Q And that's at Talon's Reach?

1 A Yes, ma'am.

2 Q Talon's Reach is the library branch that's funded by  
3 the Ar-, Arapahoe Library District?

4 A Yes, ma'am.

5 Q So with the proposed Twenty Ten Budget, the City is  
6 left with three libraries, the Central Library and two  
7 branches is that correct?

8 A That's correct.

9 Q Geographically where are those libraries located  
10 within the city limits?

11 A Uh, the uh, MLK (inaudible) Library is on Colfax in  
12 the northern, um, part of the city. Uh, Central Library is,  
13 uh, on Alameda kind of in the center of the City and the  
14 Talon's Reach Library is in the southernmost sector of the  
15 City.

16 Q How would you describe the decision make-, making  
17 process that led you to close the four branches that are  
18 proposed to close at the end of the year?

19 MR. HOBAN: Asked and answered, Your Honor.

20 THE COURT: I'll allow it, you may answer Mr.  
21 Miller.

22 A Uh, those were, uh, uh, based on, um, the fact that,  
23 um, they were not efficient to maintain, uh, because they were  
24 not as new as the, the MLK Library which is fairly newer, the  
25 Talon's Reach Library which is also new. Um, so um, it would

1 have been uh, extraordinary expense to keep them open on a day  
2 to day basis. Um, (inaudible)

3 Q As (inaudible)

4 A I'm sorry.

5 Q I'm sorry.

6 A (inaudible)

7 Q As a City Manager, was this a difficult decision for  
8 you to make?

9 A Yes.

10 Q Why?

11 A Because I think libraries are very important for the  
12 community and, um, that led to our recommendation in  
13 conjunction with the City Council is to put a library GID  
14 ballot, excuse me, on uh, for voter, uh, consideration that  
15 would provide enough money to maintaining all of the  
16 libraries, all seven, uh, if it were to pass. And, and, uh,  
17 create an infusion of twelve and a half million dollars into  
18 the library system and it would be dedicated solely for  
19 library, no other city functions. And so we thought that, uh,  
20 that was an important, uh, consideration for the public to  
21 help us fund the libraries and, uh, avoid the uh, or preclude  
22 the necessity of closing any libraries.

23 Q You're referring in your testimony the ballot issue  
24 four a, is that correct?

25 A Yes, ma'am.

1 Q Okay, um, why did the City decide to put that  
2 ballot, that issue on the ballot?

3 A Uh, to maintain all the library services that we're  
4 currently providing.

5 Q That was your hope.

6 A That was our hope.

7 Q And, but the ballot issue did not pass?

8 A That's correct.

9 Q After the voters rejected the tax hike to fund the  
10 libraries were there any other efforts made to try and keep  
11 these branches open?

12 A Um, Council Member Broom proposed a resolution, uh,  
13 to maintain the Mission Viejo Library.

14 Q And what was, what happened with that?

15 A Uh, the City Council rejected that proposal.

16 Q Does the City of Aurora have a library board?

17 A Uh, yes it does.

18 Q Who comprises that?

19 A Uh, they're citizen volunteers from the community.

20 Q And what is the role of the library board?

21 A Uh, they're basically, uh, uh, advisory to the mayor  
22 and city council on the terms of, uh, library services and  
23 operations and other aspects of the library system.

24 Q Did the Aurora Library Board take a position with  
25 respect to closing the four branches?

1 MR. HOBAN: Your Honor, I'll object (inaudible)  
2 hearsay is called for.

3 THE COURT: I'll allow it, you may answer it.

4 A Could you please restate that?

5 Q Did the Aurora Library Board take a position with  
6 respect to closing the four branches you've testified to?

7 A Yes.

8 Q And what was their position?

9 A Uh, they supported the, uh, City Council's rejection  
10 of the resolution offered by Council Member Broom to maintain  
11 the, uh, Mission Viejo library, um, being open. And, uh, they  
12 said they had studied the issue and um, thought that the plan,  
13 uh, as inducted by the City Council to maintain the three, um,  
14 major libraries and to close the four others, um, met with  
15 their support.

16 MR. HOBAN: Move to strike, hearsay, Your Honor.

17 THE COURT: Overruled.

18 Q When, when you testified that we decided to put the  
19 library GID on the ballot is that something the City does on a  
20 regular basis?

21 A It's really pretty unusual.

22 Q Okay, and why did we take that step in this  
23 particular case?

24 A Well, because we wanted to, uh, um, try every  
25 opportunity or option we had to provide, provide needed

1 funding for the library system and to keep all the branches  
2 open.

3 Q When the City keeps a library open, what type of  
4 ongoing maintenance services have to be done?

5 A Well, all the utilities have to be maintained, uh,  
6 uh, there has to be security, uh, there has to, uh, um, the  
7 property maintenance, uh, both to the structure and to the  
8 grounds, uh, so there're a number of requirements and, in  
9 maintaining any city facility.

10 Q Now you testified that making this decision to  
11 propose the closing of four branch libraries was a very  
12 difficult decision for you with respect to the Twenty Ten  
13 Budget. Were there more difficult decisions you had to face  
14 with respect to the Twenty Ten Budget?

15 A Well, probably the most difficult decisions had to,  
16 um, do with laying off, uh, long term employees. Uh, both in  
17 the library system and in other city departments.

18 MS. KINNEY: Thank you, I don't have anything  
19 further.

20 A Thank you.

21 THE COURT: Cross Examination?

22 MR. HOBAN: Yes, Your Honor.

23

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**CROSS EXAMINATION OF RONALD MILLER**

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by MR. HOBAN:

Q Good day.

A Good day.

Q Um, as the City Manager of Aurora you've got some pretty difficult decisions to make?

A At times, yes sir.

Q And you have certain duties and obligations prescribed by the charter and the ordinances in the city, correct?

A Yes, sir.

Q In fact, doesn't the City Charter require you to enforce all terms and conditions of agreements either in favor of the City or not and report the same to the City Council for such actions if, uh, if something acts inconsistent with those obligations?

A Yes.

Q What did you do here to report to the City Council that this contract existed and there's lik-, there's a potential violation?

A We didn't see a violation, the City Attorney's Office provided legal advice to the City Council, um, regarding the contract and, um, the advice as I understood it (inaudible)

1 MS. KINNEY: Your Honor, I'm going to object to  
2 any attorney, client privileged communication.

3 THE COURT: Sustained.

4 Q Mr. Miller, you can continue on with your answer but  
5 do not talk about what your counsel had advised you or the  
6 City Council is, is the gist of it, is that fair, Your Honor?

7 THE COURT: Yes.

8 A Okay.

9 Q So don't, don't tell the specific advice.

10 A Okay, um, it was my understanding that there were no  
11 legal impediments to closing any of the four libraries that we  
12 determined, uh, were most appropriate to close.

13 Q Okay, so you ultimately made the decision to cut  
14 these four libraries?

15 A Ultimately it was the City Council's decision in  
16 terms of adopting the Twenty Ten Budget, um, staff and I make  
17 recommendations. Those were part of the recommendations.

18 Q So your recommendation was to close these four  
19 libraries?

20 A Yes, sir.

21 Q Okay, as the City Manager, on behalf of the City,  
22 um, the City's authorized to, to enter into contractual  
23 obligations on a regular basis, correct?

24 A Uh, that's correct.

25 Q And, and you do that?

1           A     Yes, sir.

2           Q     And when you enter into a contract isn't it fair to  
3 say that you expect the other party to live up to the  
4 obligation of that contract?

5           A     Yes.

6           Q     Isn't it true that the City considered as recently  
7 as last night contributing sixty million dollars to a  
8 development called the Horizon Uptown, uh, for a company  
9 called Len (inaudible)?

10           MS. KINNEY:     Objection, relevance?

11           THE COURT:     Mr. Hoban?

12           MR. HOBAN:     Your Honor, the, the budget, my point  
13 in the next couple of questions are going to do with the fact  
14 that the city has plenty of money, they've made a decision to  
15 close the libraries based on some certain fiscal realities,  
16 however, there is money and there's substantial money as  
17 you're about to find out, to spend and allocate as they, as  
18 they see fit. So it's not about not having the money as was  
19 portrayed on direct.

20           THE COURT:     Alright, I'll allow it.

21           Q     Um, I'll repeat the question. Isn't it true that  
22 the City considered as recently as last night contributing  
23 upwards of sixty million dollars in TIF Funds to a  
24 development, the Horizon Uptown Development?

25

1           A       There was a presentation, uh, by uh, the Len Lease  
2 (phonetic) company to the City Council, uh, that had a tax  
3 increment financing component. There was no decision by the  
4 City Council and I can't speculate as to what reaction or  
5 response the City Council would have to that concept or  
6 proposal.

7           Q       When did, uh, Len Lease first come to the City for  
8 this potential financing assistance?

9           A       Um, we've been, uh, in discussions with them about  
10 the project, uh, itself for probably a little over a year, I  
11 would say um, more recently, uh, there were, um, uh,  
12 proposals, uh, put forward, uh, by that company for, um, uh,  
13 tax (inaudible) project.

14          Q       So you were approached approximately a year ago and  
15 as recently as last night the still, the City's still  
16 considering, they haven't made a decision but it's still  
17 considering whether it will contribute upwards of sixty  
18 million dollars towards a redevelopment project, isn't that  
19 fair to say?

20                   MS. KINNEY:       Objection, foundation, it's City  
21 Council's decision.

22                   THE COURT:        Alright, I'll allow you to answer to  
23 the extent you know, sir.

24           A       Um, the Council, um, hasn't finalized any kind of  
25 parameter on what kind of financial support if any would be

1 authorized, so um, I really couldn't speculate on whether  
2 they'll approve any, uh, uh, tax increment financing support  
3 or not. Um, there are various scenarios under consideration  
4 with different dollar, uh, amounts that would be generated by  
5 the project and so, uh, I can't say exactly what number is  
6 operative at this point.

7 Q It, and that's fair, I, I guess what I'm getting at  
8 is it's still under consideration that the City will give  
9 substantial funds to a deve-, assist a developer with  
10 substantial funds to facilitate a redevelopment, that's still  
11 under consideration as of today's date?

12 A Uh-

13 Q As far as you know?

14 A I'm not sure I would characterize it as substantial,  
15 it depends on what final agreement there is, if any, um, and  
16 uh, I guess it's relative, uh, based on the magnitude of the  
17 project as to what would be substantial or not, so it really  
18 be premature for me to speculate on that.

19 Q And that's not in the Two Thousand Ten Budget?

20 A Correct.

21 Q And libraries are part of that proposal by this Len  
22 Lease Corporation, are they not?

23 A Uh, they uh, are proposing to construct a library,  
24 uh, for, uh, the Aurora Public School District, uh, as part of  
25 the, the concept for the plan.

1 Q And the idea being that a library does in fact  
2 facilitate community, as you've testified earlier?

3 A I'm sorry.

4 Q The idea is that the li-, a library does in fact  
5 facilitate community similar to what you've testified here  
6 today.

7 A Um, I can't represent what the intent was, uh, by  
8 the developer I can just say that that was one of the features  
9 of the, uh, proposed (inaudible) plan.

10 Q Okay, um, I'll have you take a look, sir, at Exhibit  
11 Eight in that book, um,-

12 A Exhibit?

13 Q Uh, Eight, inside this book sir, (inaudible) assist  
14 you if you'd like, uh, it's just the very last exhibit.

15 A Did you say A or Eight?

16 Q Eight as in, uh, Ocho. And just page through those  
17 documents, uh-

18 A (inaudible) okay.

19 Q Yes, sir, do you recognize these graphs on those  
20 four pages after, uh, the cover page? And I'm not asking you  
21 specific questions about them but have you seen these before?

22 A Well, it's uh, appears to be, uh, one page of, uh,  
23 um, of document, has numerous pages regarding, uh, detail from  
24 the Twenty Ten proposed budget.

25

1 Q Okay, and the City has various funds in which  
2 there's substantial amount of money in plan for Two Thousand  
3 Ten, correct?

4 A There are a number of funds that have appropriate,  
5 um, uh, funds for uses approved by the City Council.

6 Q Isn't it true that the City has nearly, or perhaps  
7 more than thirty million dollars in reserves in the Two  
8 Thousand Ten Budget, and that's, that's a yes or no question,  
9 sir.

10 A I, uh, would have to, um, probably refer to, refer  
11 to the budget officer for the exact amount, I can give you  
12 percentages of.

13 Q Well, it, it, do you believe it to be in the  
14 neighborhood to be thirty million dollars?

15 A It could be.

16 Q Okay, um, and looking at that second page which is  
17 number E dash Forty One, the bottom right corner where it says  
18 Twenty One One Seventeen Four Five Eight, do you see that?

19 A Um, yes, sir.

20 Q Does that number suggest that there is over twenty  
21 one million dollars reserved under the policy reserve fund for  
22 Two Thousand Ten?

23 A Yes, we, uh, (inaudible)

24 Q Yes, is fine, sir, yes is fine. Um, and if you turn  
25 the page, the, the very last paragraph on E dash Forty Two,

1 isn't it fair to say that you expect that fund to increase  
2 several million dollars by Two Thousand Fourteen?

3 A It's based on a percentage of-

4 Q Yes or no, sir.

5 A The budget, so, if the budget increases, uh, these  
6 are estimates because there's no budget bet-, behind, beyond  
7 excuse me, Twenty Ten so those are projected budgets so if  
8 budgets increase then the percentage required for emergency  
9 reserves would increase.

10 Q And I appreciate your tech, super technical answers,  
11 I, I just need a yes or no and if you don't like the answer,  
12 your counsel will have an opportunity to clean it up, okay?

13 A Okay, okay.

14 Q Is that fair?

15 A Sure.

16 Q Alright, and if you could look at E dash Fifty One,  
17 the Tabor Reserve Fund, uh, bottom right corner once again, is  
18 it fair to say that the undesignated funds available on this  
19 chart are nearly nine million dollars?

20 A Yes.

21 Q And again, the last paragraph on the next page isn't  
22 it true that that paragraph says that, that you expect that to  
23 grow?

24 A Yes.

25



1 Q So it's fair to say that the City exercised its  
2 discretion and closed the libraries but it also exercised its  
3 discretion as to keep certain amounts in reserves as we've  
4 just talked about?

5 A Yes.

6 MS. KINNEY: Object-, objection to the form of the  
7 question, Your Honor.

8 THE COURT: Overruled.

9 Q Um, are you aware of the green fund?

10 A Yes. (inaudible)

11 Q Is it, is it in the Two Thousand Ten Budget?

12 A Uh, part of it remains in the Twenty Ten Budget.

13 Q Is there approximately a million dollars in the Two  
14 Thousand Ten Budget for the green fund?

15 A Um, council authorized using half of it, uh, to  
16 shore up the budget shortfalls.

17 Q Okay, so there's approximately a half a million  
18 dollars in there, approximately?

19 A Yes.

20 Q And it's unallocated for all of Two Thousand Ten as  
21 we sit here today?

22 A No, there's specific uses for it.

23 Q But it's not allocated for those uses as we sit here  
24 today or in the budget?

25 A Uh, not itemized yet.

1 Q Okay. You made a decision to cut the libraries  
2 early based on a multitude of factors you, you described that.

3 A Yes, sir.

4 Q Um, later you became aware of this Nineteen Seventy  
5 Three agreement, Exhibit One, isn't that correct?

6 A Yes, sir.

7 Q And was the fact that there was a contract  
8 concerning the Mission Viejo Library one of the factors you  
9 considered in deciding to close these libraries?

10 A No.

11 Q Do you know if the Citizen Advisory Library Board  
12 was aware of Exhibit One? Exhibit One being the Nineteen  
13 Seventy Three agreement?

14 A I'm sorry would you please restate the question?

15 Q Are you, are you aware if the Citizen's Library  
16 Advisory Board became, was aware of Exhibit One which is that  
17 Nineteen Seventy Three agreement?

18 A No, I don't know.

19 MR. HOBAN: Okay, thank you, Your Honor, thank  
20 you sir. I pass the witness.

21 THE COURT: Redirect?

22 MS. KINNEY: Very briefly, Your Honor.

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**REDIRECT EXAMINATION OF RONALD MILLER**

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by MS. KINNEY:

Q Uh, Mr. Miller the reserve requirements are imposed on the City by law, is that correct?

A Uh, City Council, um, imposes, uh, by policy, um, one kind of reserve and the State Tabor Law, uh, requires another kind of reserve.

Q And these reserve funds are also governed by financing requirements to pass audits, is that correct?

A Yes, there are standard, uh, reserve requirements, uh, that are looked at, um, both by auditors and by credit rating agencies.

Q With respect to these tabor reserve funds that you testified to, aren't there explicit restrictions with what you can do with that fund?

A Yes.

MS. KINNEY: Okay, uh, nothing further, thank you.

THE COURT: Alright, you may step down, thank you sir. In terms of witnesses, Ms. Kinney and Mr., Mr. Richardson?

MS. KINNEY: Your Honor, we have one more, one more witness.

THE COURT: Alright, we're going to take our lunch recess since we're all (inaudible) need a little bit of

1 a break, and we'll hear from that witness and then see if  
2 there's any rebuttal (inaudible) and argument. So it is  
3 twelve fifteen right now, I'll ask everyone to be back and  
4 ready to go at one thirty. So be back here at one thirty and  
5 we'll-

6 COURT CLERK: Please rise.

7 MR. HOBAN: Your Honor, can we leave our material  
8 here (inaudible).

9 THE COURT: (inaudible)

10 MR. HOBAN: Okay.

11 THE COURT: (inaudible)

12

13 **APPROXIMATELY ONE HOUR AND FIFTEEN MINUTES LATER**

14

15 COURT CLERK: Please rise.

16 THE COURT: You may be seated. We are on the  
17 record on Zero Nine C V Two Seven Four One, Mission, Mission  
18 Viejo Homeowners' Association versus the City of Aurora. The  
19 attorneys are present and we were in the defense case before  
20 we broke for lunch, my apologies for starting late, never  
21 answer the phone at twenty eight after when you have to be out  
22 two minutes later. Mr. Richardson your next witness?

23 MS. KINNEY: Your Honor, the City calls Patty  
24 Bateman.

25

1 THE COURT: Please step forward, ma'am, I'll  
2 swear you in. Do you solemnly swear or affirm under penalty  
3 of law that the testimony you'll give before this Court shall  
4 be the truth, the whole truth and nothing but the truth?

5 MS. BATEMAN: I do.

6 THE COURT: Please have a seat. Your witness.  
7

8 **DIRECT EXAMINATION OF PATTY BATEMAN**

9 by MS. KINNEY:  
10

11 Q Ms. Bateman would you please state your name and  
12 spell your last name for the record?

13 A Patty Bateman, my last name is spelled B-A-T-E-M-A-  
14 N.

15 Q How are you employed?

16 A I'm the Director of the Library and Cultural  
17 Services Department.

18 Q For whom?

19 A The City of Aurora.

20 Q Okay, how long have you been so employed?

21 A As the director since the middle of September, um,  
22 as an employee of the City of Aurora, since, uh, Nineteen  
23 Seventy Seven.

24 Q And has your employment with Aurora always been in  
25 the library services?

1           A     Yes.

2           Q     Would you briefly describe your job duties as  
3 director of the library?

4           A     I work with the city management and my staff to  
5 direct the operations of the library and all of the cultural  
6 services operations. How many municipal libraries are  
7 currently operating in Aurora?

8           A     Currently seven.

9           Q     Would you limit your testimony for the time being to  
10 the main library, the Central Library and explain, uh, what  
11 size is that library?

12          A     The building itself is about fifty four thousand  
13 square feet, um, twenty eight thousand, nearly twenty nine  
14 thousand is completely public service for the library. Um, it  
15 has a number of offices, cultural services, art (inaudible)  
16 dance, it has five thousand square feet of, uh, meeting  
17 surfaces, um, genealogy is based out of there, we have over  
18 two hundred thousand items on the shelves, uh, large  
19 children's area, extensive, uh, fiction, we have a separate  
20 teen area, and we have a very large non-fiction area. We have  
21 (inaudible) fifty seven pc's dedicated only for the use of the  
22 public. We have free internet, we have thirteen MLS degreed  
23 reference librarians to help with children's and, and adult  
24 reference. We have, um, a lot.

25          Q     Does the city employ paid staff there?

1 A Oh, yes.

2 Q Okay, um, what types of services are provided  
3 through that library?

4 A Um, we have, uh, children's programming, we have,  
5 uh, adult family lectures we work closely with the museum it's  
6 just across the parking lot and also community college that's  
7 literally across the street to provide educational programs.  
8 We do, uh, help with your resume, we help people with, um,  
9 applying for jobs, for looking for jobs, uh, applying for  
10 unemployment, um, homework, reference, um, just about anything  
11 you can think that a large public library would do.

12 Q Now the services that you've referenced are those  
13 available free to the public?

14 A Oh, yes.

15 Q What hours is the main Central Library open?

16 A Monday through Thursday nine am to nine pm, we're  
17 closed on Fridays, uh, Saturdays ten am to six pm, and Sundays  
18 twelve thirty to six pm.

19 Q What is the annual budget for the main library?

20 A It's approximately one and a half million plus  
21 whatever costs are for maintenance, grounds, custodian,  
22 etcetera.

23 Q I'm sorry tell me again?

24 A Uh, it's about a million and a half plus  
25 maintenance, uh, custodial, etcetera.

1 Q Are you familiar with the branch library located at  
2 Mission Viejo?

3 A Oh, yes.

4 Q Is that branch scheduled to close at the end of this  
5 year?

6 A Yes.

7 Q Are there any other branch libraries also scheduled  
8 to close on December Thirty First of this year?

9 A Yes.

10 Q Which ones are those?

11 A Um, Chambers Plaza, the Hoffman Heights Library, and  
12 the Illiff Square Library.

13 Q DO you know where those libraries are located?

14 A Yes, Chambers Plaza is on the corner of Colfax and  
15 Chambers. Uh, Hoffman Heights is at Twelve Ninety Eight  
16 Peoria and just a couple of blocks south of Colfax. Illiff  
17 Square is on the corner of Illiff and Peoria. And, um,  
18 Mission Viejo is on the corner of Chambers and Hampden Circle.

19 Q I'm going to ask you to look at the document that's  
20 up by your witness stand there and has been marked as, uh,  
21 Defense Exhibit A, can you identify that document?

22 A Yes, that's a map of, uh, Aurora and it shows maps  
23 of, it shows where the libraries are in Aurora and close to  
24 Aurora.

25



1 Q Would you mark on that map the libraries that are  
2 scheduled to close at the close of this year, mark those with  
3 an X?

4 A Okay.

5 Q Okay, now there are libraries that will remain open  
6 at the end of the year, correct?

7 A Yes.

8 Q And which libraries are those?

9 A Uh, Central Library, the Martin Luther King Library  
10 and the Talon's Reach Library.

11 Q Would you circle those libraries on that map?

12 A Yes. Okay.

13 Q Um, are those libraries the Central, the Martin  
14 Luther King and Talon's Reach are those all operated by the  
15 City of Aurora?

16 A Yes.

17 Q Are there other libraries within that district?

18 A Within the, the map?

19 Q On the map.

20 A Yes.

21 Q What libraries are those?

22 A Uh, do you want specific names or, or-

23 Q Yes.

24 A Okay, uh, the Arapahoe Library District's Smokey  
25 Hill Library, uh, Arapahoe Library District's Castlewood

1 Library, uh, Arapahoe Library District's Eloise May Library,  
2 the Denver Public Library's Hampden Branch, Denver Public  
3 Library's Schlesman (phonetic) Family Branch Library.

4 Q And those libraries are operated by either Denver or  
5 Arapahoe?

6 A Correct.

7 Q Okay. Taking each one of those libraries that  
8 you've referenced, one by one, could you explain to the Court  
9 how far those libraries are located from the current library  
10 at Mission Viejo?

11 A (inaudible) we're talking about the ones that are  
12 staying open or (inaudible)-

13 Q The, the I'm sorry, yes, the ones that will remain  
14 open in Twenty Ten.

15 A Okay, so just the Aurora Libraries?

16 Q No, any of the libraries-

17 A Any of the libraries?

18 Q That will remain open in Twenty Ten, would you  
19 explain to the Court what their distance is from the current  
20 location of the Mission Viejo Branch?

21 MR. HOBAN: Foundation, Your Honor.

22 THE COURT: I'll allow it. You may answer.

23 A Um, the closest is the Arapahoe Library District's  
24 Smokey Hill Library that's approximately three point nine  
25 miles, it's on the corner of Smokey Hill and Bisque Circle.

1           Q     It's three point nine miles from the current branch  
2 library at Mission Viejo?

3           A     Correct.

4           Q     Okay.

5           A     From parking lot to parking lot. Uh, the next  
6 closest would be the Denver Public Library's Hampden Branch,  
7 that's four and a quarter, more or less, uh, that's on the  
8 corner of Girard and Dayton is the cross street. The next  
9 closest is the Central Library run by the A-, City of Aurora,  
10 that's uh, One Four Nine Four Nine East Alameda Parkway, it's  
11 between Chambers Plaza and Sable and it's, uh, four point six  
12 miles from Mission Viejo to Central. The next closest is, um,  
13 the Eloise May Library run by the Arapahoe Library District,  
14 uh, that's on the corner of Parker and Florida and that's  
15 about five and a half miles. The next, I believe would be the  
16 Schlesman Family Branch Library run by Denver, that's on the  
17 corner of Quebec and First and that's about seven, just under  
18 eight miles. The next one would be, the next closest would be  
19 the Talon's Reach Library which is a City of Aurora Library,  
20 it's on the corner of Arapahoe Road and Aurora Parkway.  
21 That's eight, eight point three, thereabouts miles. Uh, next  
22 one would be the Arapahoe Library District's Castlewood  
23 Library on the corner of Arapahoe and Uinta, Uinta, Uinta,  
24 that's nine and a quarter miles. And then the last, within  
25 this range would be the Martin Luther King, um, Junior Library

1 and Community Center, on the corner of, well it's on Colfax  
2 between Emporia and Florence and that's about nine point nine  
3 miles, about.

4 Q Is that eight libraries within a ten mile radius of  
5 the library located at Mission Viejo?

6 A I didn't count but I think that's correct.

7 Q Can someone with an Aurora Library Card use  
8 libraries that aren't operated by the City of Aurora?

9 A Oh, yes.

10 Q How does that work?

11 A Um, the State of Colorado is very unique in that  
12 many years ago we hammered out an agreement across the state,  
13 uh, whereby if I, if you get a library card at your local  
14 library, um, you can take it to any other, uh, participating  
15 library and most of them are participating particularly the  
16 public libraries and they will put you in their, in their  
17 system and put, uh, their, we call it a zebra but it's the  
18 barcode on the back and you can check out books there.

19 Q Of the eight libraries you just referenced within a  
20 ten mile radius of the Mission Viejo Branch, are all of those  
21 accessible with an Aurora Public Library Card?

22 A Oh, yes.

23 Q I would like you to explain to the Court the  
24 difference between the branch library at the Mission Viejo  
25

1 location versus the services that we offer at our Central  
2 Library.

3 A Okay, um, the, the, the size of, of the building at  
4 Mission Viejo is much smaller, it's about seventeen and, and a  
5 half thousand square feet. Um, the collection is about  
6 seventy five thousand items, it has one MLS degreed librarian  
7 who is also the supervisor for the three south region  
8 libraries. Um, basically much smaller collections, uh, fewer,  
9 fewer programs.

10 Q What are the hours that Mission Viejo Library  
11 operates versus the Central Library?

12 A Uh, it's open on Tuesdays from ten am to nine, ten  
13 to, ten am to nine pm; um, Wednesday, Thursday and Friday it's  
14 open, oh and Saturday, it's open ten to six it's about forty  
15 three hours per week.

16 Q Compared to the Central Library with I believe you  
17 said fifty seven personal computers, how many does Mission  
18 Viejo have?

19 A Fifteen.

20 Q And they have one degreed librarian as opposed to  
21 the thirteen at Cen-, the Central Library?

22 A Correct.

23 Q How many reference questions does the Central  
24 Library handle on a, an annual basis?

25 A Um, about six hundred thousand.

1 Q And how does that compare to the reference questions  
2 handled at the library at Mission Viejo?

3 A Uh, (inaudible) you know what, I'm not one hundred  
4 percent sure, uh, let me think just a second, seventy five  
5 thousand thereabouts.

6 Q Do the City's Talon's Reach and Martin Luther King  
7 Junior Branch Libraries offer the same type of services and  
8 resources that are offered at our Central Library?

9 A Yes, um, their branch libraries, they're it's, it's  
10 all relative. Branches are smaller and give a little bit less  
11 in the way of services.

12 Q How many library cards are currently active for  
13 Aurora Residents?

14 A A hundred and sixty six thousand.

15 Q If these four library branches are closed at the end  
16 of Two Thousand Nine, what library services will the City of  
17 Aurora still offer free of charge to its citizens?

18 A Everything we did except at the three remaining  
19 facilities.

20 Q Do you know what year the lib-, the Aurora Library  
21 System was started?

22 A Oh, yes, Nineteen Twenty Nine.

23 Q And how did that come about?

24 A Um, there's a wonderful ladies organization in  
25 Aurora, it's the Aurora's Women's Club and it was started in

1 Nineteen Twenty Five, um, it, its mission, one of its missions  
2 is, uh, cultural, mental culture and collaborative community  
3 work and they have a great history of doing exactly that. Uh,  
4 one of their goals was to open a public library for the  
5 growing community of Aurora and, uh, towards that end they  
6 spent four years giving card parties and tea parties and bake  
7 sales and, and putting on plays and making and selling  
8 stationary, um, somewhere towards the end of Nineteen Twenty  
9 Eight, they talked one of their members, uh, Sarah Wood,  
10 there's a picture of Sarah Wood in administration, as our very  
11 first librarian into, uh, opening up her parlor on Dallas  
12 Street, right about Colfax and Dallas, and she agreed to be  
13 the first librarian and have the, actually host that library  
14 in her house. Um, I believe it opened in January or February  
15 with approximately three thousand books, um, many of which had  
16 been donated, some had been bought, uh, one library table and  
17 some (inaudible) chairs and a, an oak rocker to do story times  
18 in, it cost them twenty five dollars a month and that included  
19 her salary and the electricity and the heat and the light.

20 Q Did there come a time when the Aurora City Council  
21 took over that library?

22 A Yes.

23 Q And when was that?

24

25

1           A       Uh, October of Nineteen Twenty Nine, uh, they, they  
2 accepted the library from the ladies and, um, took over  
3 providing library services.

4           Q       That was the Aurora City Council?

5           A       Yes.

6           Q       Would you explain to the Court what is all involved  
7 in running a library?

8           A       Uh-

9           Q       What's it, what are their day to day  
10 responsibilities?

11          A       Well, it's much more complicated than you really  
12 want to hear but-

13               MR. HOBAN:       Your Honor, I, I, I would just  
14 object, this is all interesting from an int-, intellectual and  
15 historical perspective, I'm not sure any of this has anything  
16 to do with why we're here today, more importantly the  
17 question's framed very, very vaguely and broadly.

18               THE COURT:       Ms. Kinney?

19               MS. KINNEY:       Your Honor, it goes into, um, what  
20 all is involved, the costs that are involved, the problems  
21 that the City will face if we are forced to keep this library  
22 branch open, that's where I'm headed.

23               THE COURT:       Alright, I'll ask you to drill down  
24 to those questions, although I really enjoyed the historical  
25 (inaudible) So let's (inaudible) to it.



1 Q Let's talk about the branch library at Mission  
2 Viejo, explain to the Court if you would what it really costs,  
3 what it takes to run that library.

4 A What it takes, the different elements?

5 Q Yes.

6 A Um, staff, um, money for collection, um, collection,  
7 people think the books stay on the shelves and they're viable  
8 forever, but within six months to a year many books are no  
9 longer of interest or they're, they're obsolete, so you need  
10 money for, to replenish and update your collection. Um, we  
11 have guards, it's a sad fact in today's society but we do have  
12 to have a guard. We have a custodian. We have courier  
13 delivery because your (inaudible) will come from other  
14 facilities perhaps other Aurora Libraries, perhaps other  
15 libraries in the state, somebody has to deliver that, uh, we  
16 have, um, grounds, uh, maintenance, we have water, sewer,  
17 electrical, um, is that enough?

18 Q That's, that's plenty.

19 A (inaudible)

20 Q Okay, um, if we, if the City is required to keep the  
21 library branch at Mission Viejo open what will, how will that  
22 impact you with respect to the other libraries?

23 A Well there are different decisions the city might be  
24 able to make, uh, but primarily I expect that we will have to

25

1 cut services at the Central Library and shift resources to the  
2 Mission Viejo library in order to open the library.

3 Q How much did the City spend on inventor for  
4 libraries in the year Two Thousand Nine, the current year?

5 A The approved budget for Two Thousand Nine was about  
6 one point two million for the collection.

7 Q And what is your budget for that collection in the  
8 year Twenty Ten?

9 A Um, um, three hundred thousand. Sorry, three  
10 hundred thousand.

11 MS. KINNEY: If I could have just a minute, Your  
12 Honor? Um, Your Honor, at this time the City would request  
13 the Court take judicial notice that the library law was  
14 enacted in Nineteen Forty Seven.

15 THE COURT: Any objection to that Mr. Hoban?

16 MR. HOBAN: Um, I don't know if that's accurate,  
17 I, I think you can, we can look at the, uh, the book that, uh,  
18 that, uh, to find that out.

19 THE COURT: (inaudible) Twenty Four Ninety One Oh  
20 One?

21 MS. KINNEY: Yes, Your Honor.

22 THE COURT: Since I don't have that right in  
23 front of me.

24 MS. KINNEY: I do, in fact I have the sessions law  
25 book here, if you would like to see it.

1 THE COURT: I will take your submission as an  
2 Officer of the Court, and I'll take judicial notice. Nineteen  
3 Forty Seven?

4 MS. KINNEY: Correct.

5 THE COURT: Alright.

6 MS. KINNEY: Thank you.

7 MR. HOBAN: I would just, uh, note that there's  
8 probably applicable, um, amendments etcetera over the year  
9 that, uh, that would make that, that number vary but, uh,  
10 that's all I have to say, Your Honor, thank for the time for  
11 the record.

12 MS. KINNEY: And Your Honor, at this time the City  
13 would offer Defense Exhibit A for illustrative purposes only.

14 MR. HOBAN: We would ob-, object that it, it's  
15 used as, as evidence, I mean for illustrative purposes for  
16 closing argument is fine, but that there's no foundation laid  
17 for how this has, uh, been created or the, the distances  
18 etcetera.

19 THE COURT: Ms. Kinney?

20 MS. KINNEY: It's only for illustrative purposes.

21 THE COURT: Okay, I'll receive it for that  
22 purpose then.

23 MS. KINNEY: Thank you.

24 THE COURT: Cross examination?

25 MR. HOBAN: Yes, Your Honor, thank you.

**CROSS EXAMINATION OF PATTY BATEMAN**

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by MR. HOBAN:

Q Good day.

A Hi.

Q How are you doing? The Central Library that's the first most used library in the City is that correct?

A Yes.

Q And the Mission Viejo is the second?

A Yes.

Q How far behind, numbers wise?

A How far behind, um, we used, customers used approximately one and a half million items out of the Central Library, they used approximately three hundred and twenty five thousand out of the Mission Viejo Library.

Q Okay, you'd agree that a library is a vital community resource?

A Oh, yes.

Q Do you recall on December Seventh, and maybe you don't that a, a proposal was made by and to the City Council, uh, to keep Mission Viejo Library open?

A At council yes.

Q Were you there that night?

A Yes.

1 Q And wasn't that proposal to keep the Mission Viejo  
2 Library open, the one made on December Seventh, wasn't that  
3 budget neutral?

4 A Yes.

5 Q That proposal? Okay, so it's possible, and you  
6 talked about this a minute ago, it's possible to keep this  
7 library open in a way that doesn't impact the budget?

8 A Yes.

9 MS. KINNEY: Objection, foundation.

10 THE COURT: I'll allow it.

11 A Yes.

12 Q Okay, um, it would just cause some shifting of  
13 services from other places?

14 A Yes.

15 Q Okay. In other words there, there would be  
16 decisions for the City to make if the Court were to order the  
17 Mission Viejo Library to at least stay temporarily open as to  
18 how it was going to allocate existing budget funds?

19 A Yes.

20 Q The library, the Central Library, it contains many  
21 other services as, the library services for your description  
22 is that correct?

23 A I'm sorry, to, ask you question again?  
24  
25

1 Q Yeah, you talked about the, the Central Library as  
2 providing a number of other services and, and housing other,  
3 um, services.

4 A It has other offices.

5 Q Other offices and those are services that fall  
6 outside of specific library services?

7 A Some of them.

8 Q Okay. Have you excluded any of those services from  
9 your one point five million dollar budget for the-

10 A (inaudible)

11 Q For the Central Library?

12 A The one point five is only staff (inaudible) the  
13 library.

14 Q Okay, there's thirteen full time, uh, degreed  
15 librarians?

16 A Yes.

17 Q At the Central Library?

18 A Yes.

19 Q What does each of those get paid annually, what's  
20 the range?

21 A Probably thirty thousand plus some benefits.

22 Q Okay, and that's-

23 A I, I don't know exactly because it all depends on  
24 (inaudible)

25

1 Q Approximately thirty thousand and some benefits  
2 times thirteen is that fair to say?

3 A Correct.

4 Q For the Central Library?

5 A For the Central Library.

6 Q And that's factored into its budget?

7 A Yes.

8 Q Okay, uh, is there ever a time where there's  
9 multiple librarians of these that you just specified these  
10 degreed librarians on at the same time?

11 A I hope so.

12 Q And, there's only one degree certified librarian at  
13 the Mission Viejo Library, correct?

14 A Yes.

15 Q In that same price range?

16 A I don't recall, she's a supervisor so she's probably  
17 getting paid more than that.

18 Q Okay, any of the other libraries that you i-, that  
19 you've identified as the ones that are being closed as of the  
20 Thirty First of this year, are you aware of a contract in any  
21 way similar to Exhibit One that, that's, that has to do with  
22 the Mission Viejo Library, on any of those other libraries?

23 A No.

24

25

1 Q Were you involved in, in any decision making or  
2 discussions about budgets in closing these particular  
3 libraries?

4 A Oh, yes.

5 Q And when did you first become aware of this contract  
6 concerning the Mission Viejo Library?

7 A Not until sometime towards the end of August.

8 Q So, so many months after the decision had been made,  
9 uh, to recommend closing four libraries?

10 A Well, many months after the recommendation had been  
11 sent to council, because we don't actually make that decision.

12 Q Right, but it was the recommendation?

13 A Correct.

14 Q Did you change your recommendation when you learned  
15 of the contract?

16 A No.

17 Q Did you hear Mr. Miller testify that the contract  
18 wasn't even a consideration when they decided to, uh,  
19 ultimately adopt the Two Thousand Ten budget?

20 A Yes.

21 Q And would you agree with that based on any  
22 participation that you had in the process?

23 A Would I agree that he said that or would I-

24 Q No would you agree with that, that, that you didn't  
25 consider that in your involvement in that process?



1           A       I would agree with that.

2           Q       Okay, contract didn't mean, make a difference for  
3 your decision?

4           A       We were advised it was not, that it had expired.

5           Q       Talked about mileage of certain libraries on this  
6 particular map, um, as the crow flies, or on roads, what,  
7 what's the basis for your mile-, mileage?

8           A       Uh, that's, that's as you drive the road.

9           Q       Okay, um, and did you make any determinations of how  
10 long it takes to get from library to, one library to another  
11 based on traffic and lights etcetera, have you done any time,  
12 uh, analysis?

13          A       I've driven them all, but I, I can only guess at  
14 this point. I, I drive a lot between them.

15               MR. HOBAN:       Okay. Thank you, no further  
16 questions.

17               THE COURT:       Redirect Ms. Kinney?

18               MS. KINNEY:       No redirect Your Honor and the City  
19 rests.

20               THE COURT:       I have some questions I wanted to ask  
21 Ms. Bateman. There was a question about (inaudible) to keep  
22 Mission Viejo opened presented to the City Council and it was  
23 a budget neutral proposition.

24               MS. BATEMAN:     Right.

25

1 THE COURT: Can you tell me a little bit more  
2 about that?

3 MS. BATEMAN: Sure. We were going to close  
4 essential library, um, additional hours, intake, staff, and  
5 reallocate them to the Mission Viejo Library to open it a few  
6 hours a week.

7 THE COURT: So you gave the hours for the Central  
8 Library's already closed on Fridays so this was on top of the  
9 already closed hours, there would be additional-

10 MS. BATEMAN: Correct.

11 THE COURT: Closed hours?

12 MS. BATEMAN: Correct.

13 THE COURT: I have to say I was a little  
14 surprised to hear the Central Library's closed one day a week,  
15 is that a recent event or have they always been closed on  
16 Fridays?

17 MS. BATEMAN: No, it's, it's been in the last  
18 couple of years due to budget restrictions and cuts.

19 THE COURT: There was another question I had, oh  
20 in terms of your involvement in deciding which branches would  
21 need to be closed, what, what's your level of input or, or  
22 where are you at the table? Do you get a vote or do you just  
23 make recommendations?

24 MS. BATEMAN: I just make recommendations.

25 THE COURT: And what were your recommendations?

1 MS. BATEMAN: That I was told that the budget would  
2 be cut in half and to ascertain which facilities I could  
3 maintain at the current level for with the money I had left.  
4 Uh, Talon's Reach was basically a given because we had, get  
5 funded through the, the Arapahoe Library District Agreement.  
6 Um, and the money that we had left would only fund two more  
7 libraries and I needed one in the North Region so, um, in  
8 addition to the other reasons such as multiuse buildings and  
9 age and efficiency and whether or not they would, uh,  
10 accommodate new technology, um, I, we looked at geographic so  
11 the Martin Luther King was in the northwest, um, Talon's Reach  
12 was in the southeast and Central was central.

13 THE COURT: So in terms of the budget cut with  
14 the closing of the branches as it's proposed will you have the  
15 ability to behoove some of the services so the Central Library  
16 can absorb the loss of the branches, for instance through more  
17 hours, more staff, more-

18 MS. BATEMAN: No. No we are, um, going to move  
19 the, we have a, a couple of gates grant (inaudible) in, in  
20 this north region library and we're going to move those gates  
21 grant funded pc's over to the, the Central Library because we  
22 have lines all the time waiting for use of the pc's even  
23 though we have fifty seven, we never have enough so we're  
24 going to add another thirty from some of the libraries that  
25 are being closed and, um, but they don't have any staff to add

1 to Central or to Martin Luther King. They will remain the  
2 same hours, uh, same level of staff, same everything.

3 THE COURT: And what about the stock from the  
4 branches that are closing?

5 MS. BATEMAN: We will, we are actually looking at  
6 that now in one of the reports and, um, books that are newer  
7 and are still in demand where we have space we will put them  
8 on the shelves. Um, we're pretty maxed out as to putting  
9 additional shelving on the floor, uh, we could use some more  
10 space for people to come and sit and (inaudible) either. So  
11 we're going to put as much as we can on the shelves and, um,  
12 we'll keep the newer ones in storage for six months or  
13 thereabouts, maybe more, (inaudible) assess that (inaudible)  
14 next six months and see if we can put more, it depends on how  
15 many check out. If our shelves are jammed you can't put more,  
16 more books on the shelf. If people are checking them out a  
17 lot then, uh, you could have thirty, forty percent of your  
18 collection checked out if you're lucky and then you can add  
19 more materials to the shelves.

20 THE COURT: I've also heard testimony about a  
21 Library Board, made of the citizens in the community.

22 MS. BATEMAN: Right.

23 THE COURT: Is that something that you sit on or  
24 they report to you, how, how does that function (inaudible)?

25

1 MS. BATEMAN: I'm, I'm the library liaison, they,  
2 they are their own entity, they are appointed by council, they  
3 apply, go through an interview process, um, and council  
4 approves them and then I am the liaison to the, to that board  
5 when they meet.

6 THE COURT: And how is their function different  
7 or similar to yours in making these decisions about closures  
8 or how to handle the new budget?

9 MS. BATEMAN: They are advisory only, they are not  
10 governing and so, um, we bring different issues to them and  
11 explain them from, you know, the City's perspective and, um,  
12 they ask questions and we see if we've answered them or maybe  
13 they as a citizen, uh, have a different perspective.

14 THE COURT: And how big is that board?

15 MS. BATEMAN: Seven members.

16 THE COURT: Alright, thank you ma'am, I'll open  
17 it up to the attorneys based on my questions, Ms. Kinney any  
18 follow up?

19 MS. KINNEY: No, Your Honor.

20 THE COURT: And Mr. Hoban?

21 MR. HOBAN: Just one, uh, if the li-, this  
22 Mission Viejo Library were to have, to have to stay open by  
23 Court Order or otherwise, there are ways to shift resources  
24 around so it doesn't impact the budget, correct?

25

1 MS. KINNEY: I'm going to object on grounds of  
2 foundation, she's not the budgetor person or the City Manager  
3 who recommends the budget.

4 THE COURT: Well, I think it, that does hold from  
5 my questions even though she might not (inaudible) that would  
6 be my fault so if you can answer that, go ahead and answer the  
7 question.

8 MS. BATEMAN: Yes.

9 MR. HOBAN: Yes, there are ways to shift the  
10 resources?

11 MS. BATEMAN: Well, we just discussed it, yeah.

12 MR. HOBAN: Okay, no further questions. Thank  
13 you, Your Honor.

14 THE COURT: Alright.

15 MR. HOBAN: Thank you, Ms. Bateman.

16 THE COURT: Thank you, Ms. Bateman, you may step  
17 down and, and Ms. Kinney I had interrupted you, I think you  
18 said that the defense rests after this witness?

19 MS. KINNEY: That, that is correct, Your Honor.

20 THE COURT: Any rebuttal evidence?

21 MR. HOBAN: No rebuttal evidence from the  
22 plaintiff.

23 THE COURT: Alright, are the parties prepared to  
24 make argument, do you want a little bit of a break or-

25 MR. RICHARDSON: I'm ready.

1 THE COURT: Well, we'll start with plaintiff  
2 (inaudible)-

3 MR. RICHARDSON: Alright.

4 THE COURT: Mr. Hoban, you ready?

5 MR. HOBAN: Yes, Your Honor, sure.

6 THE COURT: Alright.

7 MR. HOBAN: Um, at the outset, let me just say  
8 you've got a bench briefing from me which, which I think lays  
9 out the law and, and I'll get to the six Rathke factors in a  
10 minute. Um, I'm not going to spend much, if any, time on the  
11 law and why I think we're likely to prevail because I think  
12 we've laid that out adequately in the bench brief. If you  
13 have any questions or would you like any clarifications on  
14 that particular issue, please let me know. But with, with  
15 that said, it's important to look at this case from a  
16 perspective that that you've really got a community at a  
17 crossroads here. I understand that there's budget decisions,  
18 tough decisions have to be made, but it's a community at a  
19 crossroads and it's not just the Mission Viejo Community, it's  
20 a number of the other surrounding communities that Mr. McMahon  
21 talked about here today. The backbone of that community, the  
22 cornerstone of that community is being taken away. It's more  
23 than just library books and some specific library related  
24 services. This is in fact a community asset. You can't solve  
25 the problem that, that, the Mission Viejo Library closure

1 problem with dollars and cents. You can't. Some form of  
2 equitable relief ultimately if the plaintiff's were to, are to  
3 prevail needs to be the remedy. And some of the cases in my  
4 bench brief identify why the equitable remedies are  
5 appropriate when monetary damages just can't be quantified.  
6 This community, because of its age and because of the  
7 resources being diverted elsewhere, this community will falter  
8 if this backbone, if this cornerstone is taken away.  
9 Ultimately we have a contract, we have a contract that no  
10 testimony today would indicate that it's not a binding  
11 contract. Free land in exchange for operation of a library on  
12 that land for fifty years. Fairly straightforward view.  
13 You've heard from Mr. Smith talk about the intent and that was  
14 the intent. You've got my arguments concerning the merger in  
15 your bench brief and that, I'll direct your attention  
16 specifically to the Westminster case in there. Clearly when  
17 you have documents ex-, executed contemporaneously involving  
18 different forms of consideration that no merger can in fact  
19 bar the operation or enforcer of this fifty year agreement.  
20 You heard the testimony regarding the intent to clear up any  
21 ambiguity between the twenty one, the thirty five and the  
22 fifty year commitments in those various documents all executed  
23 at the same time. Then second we've got testimony (inaudible)  
24 that on its face, the closure of these libraries violates  
25 Colorado Library Law because there was no petition circulated



1 as a prerequisite to the vote on an abolishment of libraries.  
2 Not a vote to preserve or, or provide additional funding to  
3 libraries but rather a vote on abolishment. Mr. Nicholas and,  
4 uh, Mr. Miller testified to the fact that there was no  
5 petition. The law regarding Colorado Library Laws say that  
6 every library that exists before nineteen seventy nine is in  
7 fact a quote unquote "public library" and is subject to that  
8 act. It's in the law, it's in the bench brief. With regard  
9 to the ultimate likelihood of prevailing on the merits, we  
10 think that those are the, the ultimate issues and they're  
11 briefed very thoroughly in the bench brief. You've heard  
12 testimony today from Mr. McMahon, from Ms. Appleton, and from  
13 a Ms. Spencer talking about the deleterious effects of the  
14 fact if this library closes down here's what's going to happen  
15 to this community from a real estate perspective, from a youth  
16 perspective, from a community perspective and it's not just  
17 about library books. You heard that this library serves a  
18 specific need and that the other libraries will not fill that  
19 need. Five miles to the central library is not going to make  
20 it for a number of the kids and a number of the folks that  
21 were referenced today when it comes down to talking about  
22 keeping this library open. You heard Mr. Nicholas and Mr.  
23 Miller talk about how libraries benefit communities, that's  
24 not sort of a isolated statement. A community is a  
25 neighborhood, the books don't benefit the community, the

1 tables don't benefit the community, the total aggregate of  
2 everything a library offers is what benefits a community.  
3 Here that community is the Mission Viejo Community and its  
4 immediately adjacent neighborhoods. You heard Ms. Bateman and  
5 Mr. Miller both talk about there's no consideration whatsoever  
6 given to the fact that there was a contract on this library  
7 when the decision was made to close it. That's problematic.  
8 That causes some people to question the decisions made by our  
9 elected officials. You heard Mr. Miller talk about, and he  
10 expects people to live up to their end of a contract when they  
11 enter into a contract, that's all that the Mission Viejo HOA  
12 wants, just live up to the end of the contract here. Don't  
13 look for ways to get out of the contract. So what can this  
14 Court do? I would refer back the Chief Judge Brooke Jackson  
15 in Two Thousand Four, December Thirtieth Two Thousand Four in  
16 a case called Cornerstone versus Wheat Ridge. The Supreme  
17 Court Citation's in my brief, however there is a Court of  
18 Appeals Citation as well. In that order, Judge Jackson was  
19 irate that the City would just come in sit on the stand and  
20 say we can breach this because we want to breach this, this  
21 particular agreement. He upheld the agreement and ultimately  
22 he entered an injunction and it's a bit of a, a peculiar  
23 injunction, this injunction actually said City preserve funds,  
24 you must open up a bank account and report to me every thirty  
25 days, put the money into the bank and I'm going to tell you

1 how it's going to be used so we can preserve this asset for  
2 this library. Pardon me, in that case it wasn't a library it  
3 was an eminent domain action. Um, but ultimately what we're  
4 asking for here is much, much, much less severe and intrusive  
5 than that relief and that relief was ultimately hold up, hel-,  
6 by the Court of Appeals of this State of Colorado. Briefly on  
7 the factors. Um-

8 THE COURT: Well, let, let me stop you there  
9 (inaudible)

10 MR. HOBAN: Yes, Your Honor.

11 THE COURT: I have been reviewing the Cornerstone  
12 case carefully because you know the Supreme Court had some  
13 very specific language about what the trial court can do and  
14 found that specific performance did not lie and sent the case  
15 back to the trial for the breach of contract claims, finding a  
16 valid contract but went through very carefully its analysis  
17 and relying on the United States Supreme Court in a Larson  
18 case finding that the sovereign immunity still holds, once the  
19 entity contracts there's the ability to sue on the contract  
20 but not to sue for specific performance and so, and I know you  
21 disagree because you say that and I, I think that Justice  
22 Coat's parsing out of ace leaves you a bit at a loss. It is  
23 very clear in here that specific performance does not lie  
24 leaving me with due question of how can I order a preliminary  
25 injunction which is a mini specific performance to keep this

1 library open when at the end of the day I can't order specific  
2 performance if I were to find there was a breach of contract?

3 MR. HOBAN: Well, first of all let me tell you  
4 that was my case, I tried that case at the trial Court, the  
5 Cornerstone case, I briefed the appeal and prevailed, uh, the,  
6 the, the Court of-, the Colorado Supreme Court case was  
7 changed to a different law firm. I can tell you from  
8 firsthand experience and if you look at that case very  
9 carefully and I've cited it, the Colorado Supreme Court does  
10 not preclude specific performance on government contracts. It  
11 is, in fact it says we need not address anything outside the  
12 scope of specific performance involving eminent domain. It's  
13 in, it's cited in the brief and it's in the case and I would  
14 urge you to look at it. My point is that a typical standard  
15 government contract can in fact be specifically per-, uh,  
16 performed. Order from this Court can in fact require that.  
17 That case is specifically and expressly by its own language  
18 limited to ordering the use of eminent domain for obvious  
19 reasons. It's, it's an oppressive power. But I would also  
20 note that in that case the Court considered other equitable  
21 remedies such as promissory estoppel and, and estoppel in  
22 pais, p-a-i-s. Another remedy, which in fact is equitable  
23 which is tantamount to specific performance which the Court  
24 clearly has ordered in the past in the Piz, p-i-z, case versus  
25 Dora which is also in that brief so, so my point to you is

1 specific performance in Cornerstone has not been precluded in  
2 any, uh, subject government contract but for eminent domain  
3 and b alternative estoppel based arguments as remedies would  
4 entitle this Court to enter both an injunction and ultimate  
5 permanent equitable relief if, and, and I hope that answers  
6 your question. And I did hope to sort of hone in and quote  
7 that specific language because the Court does say we need not  
8 consider whether this applies outside the context of eminent  
9 domain, I'm paraphrasing, but that's the gist of it.

10 THE COURT: You are because I have it in front of  
11 me and I, and I think you misquote it. In talking about  
12 congressional action this is the United States Supreme Court  
13 talking about the Federal Court says a absence of such  
14 congressional action that nevertheless holds that Courts are  
15 without the authority to order specific relief against the  
16 government for breach of contract. Whether this jurisdiction,  
17 Colorado, will similarly lead to the general assembly, the  
18 power to determine the availability of equitable relief for  
19 governmental breach of other kinds of contractual obligations  
20 is a question that need not be resolved in this case. And  
21 then they go on but what they're saying, I think, is the  
22 opposite which is it's up to the general assembly the state  
23 legislature to decide what immunity it will give away in its  
24 contracts and allow that equitable relief. So I think it's in  
25 the negative Justice Coats is not saying absent that being

1 said, all remedies are available, he's saying absent that,  
2 it's not available.

3 MR. HOBAN: I, I would simply respond to that and  
4 you have the language in front of you so I'm not going to  
5 argue language with you but the Supreme Court Case and the  
6 Court of Appeals Case did concern different issues. The Court  
7 of Appeals Case, the Court of Appeals did in fact affirm and  
8 enforce the injunction in that case-

9 THE COURT: To preserve assets.

10 MR. HOBAN: To preserve assets so it was an  
11 equitable issue. What this Court does is ultimately clear up  
12 the permanent, long lasting and equitable relief. I, and, and  
13 I see your reading of it but what, what I, I guess what I'm  
14 getting at is for purposes of the entry of an injunction, this  
15 Court is not powerless, in fact the Court of Appeals would  
16 sug-, case in Cornerstone would suggest otherwise. Perhaps-

17 THE COURT: Well, that's, that's where I, I'm  
18 sort of asking-

19 MR. HOBAN: (inaudible) yeah.

20 THE COURT: You know for your input because-

21 MR. HOBAN: Yeah.

22 THE COURT: What, what you're asking for in, in a  
23 preliminary injunction is as I called it a mini specific  
24 performance, your asking-

25 MR. HOBAN: Right.

1           THE COURT:        To remain status quo which is to  
2 force the City to perform under the terms of the contract,  
3 which you are arguing about. But at the end of the day I  
4 can't order specific performance of the contract is it  
5 equitable to order it in the short term pending the, the  
6 actual meritorious hearing? The actual trial in the case and,  
7 and that's where I was reading carefully because-

8           MR. HOBAN:        Yeah.

9           THE COURT:        I thought it was interesting Judge  
10 Jackson did order the preliminary injunction that was upheld  
11 repeatedly that's not the issue before the Supreme Court then  
12 they talk about the specific performance for purposes of  
13 sending it back and, and so I looked at it and his specific  
14 performance, or his preliminary injunction is preserve the  
15 assets, not a preliminary injunction forcing the, the eminent  
16 domain and that's where the issue then factually in the  
17 Cornerstone is eminent domain and-

18          MR. HOBAN:        It is and-

19          THE COURT:        And ordering it in that-

20          MR. HOBAN:        Much different palate.

21          THE COURT:        And that's, you know, and that's,  
22 that's different and that being said on the next page or  
23 perhaps it's the page before or no on the same page as a  
24 matter of fact, apart from any implied waiver of sovereign  
25 immunity or consent to be sued in Court the question of

1 equitable relief for breach of contract or specific  
2 performance implicates an additional concern for the  
3 separation of government powers. Um, it talks about these  
4 reasons of public policy to keep the Judicial Branch out of  
5 the Executive and Legislative Branches. So it's sort of a two  
6 pronged argument that Justice Coats is putting forth to give  
7 the trial Court some guidance so. Sor-, sort of throwing it  
8 all out there.

9 MR. HOBAN: I understand and, and I would, I  
10 would urge you to read that Cornerstone case from top to  
11 bottom. I did my best to, to convey what I think the, the,  
12 the case stands for. Uh, there is not one case in the State  
13 of Colorado however that prohibits any form of injunction to  
14 enter against a governmental entity. In fact, there are  
15 numerous cases where injunctions, preliminary injunctions have  
16 been entered so for our purposes here, that is the case. Now  
17 ultimately-

18 THE COURT: And, and so and, and let me interrupt  
19 you-

20 MR. HOBAN: Yes.

21 THE COURT: Again, so you're, you're suggesting  
22 well I do have the power to enter in this equitable relief of  
23 the injunction, and we disagree on the issue of whether I can  
24 order specific performance so you're saying even if, even if I

25



1 can't I can still and should, I would guess, you're going to  
2 argue, should still enjoin the city with this injunction.

3 MR. HOBAN: Well, I mean, it, it's equitable, I  
4 mean ultimately and if you have to, you have to look at this  
5 case there's no way to quantify it with dollars and cents, in  
6 the Cornerstone case there was and that's ultimately how it  
7 was resolved. There's no way to quantify in dollars and cents  
8 any relief for any party here. I mean, ultimately, if we  
9 have, if we have to get there we will come up with our best  
10 good faith theory towards that but-

11 THE COURT: Well, and the other theory you put  
12 forth among several is rescission.

13 MR. HOBAN: And, and ultimately if, if the Court  
14 were to order, uh, in lieu of specific performance, uh, to  
15 rescind the contract and put the parties back in the positions  
16 they were, uh, that's not the primary preferred way to do it  
17 but you heard the testimony that we're going to try to keep  
18 this library open, uh, through private or other means for as  
19 long as we can. Um, and there are a number of other cases in  
20 there, Your Honor, the Ace case in particular which was not  
21 overruled or cut back by either one of the Cornerstone cases,  
22 which talked that, about the fact that governments must and  
23 should be held to their contracts. So while I did cite the  
24 Cornerstone case, because I was involved in it, I believe, I  
25 read the case slightly different than you do and, and that's

1 certainly something we can agree to disagree on, however, what  
2 I would say is that, um, there are numerous cases where Courts  
3 have ordered outside of the unique situation of eminent domain  
4 that specific performance and or some sort of estoppel  
5 equitable type argument, uh, be put into play so that the city  
6 cannot get away with breaching its own contract. Those cases  
7 are in there as well, Your Honor. Um, talk about the  
8 irreparable injury, we've heard a slew of testimony from the  
9 folks about that fact if the, did, if this library closes down  
10 it will, in fact, have a detrimental effect to the community  
11 and the local neighborhood. You've also heard that the other  
12 services in other libraries are not going to be increased to  
13 absorb this, uh, this overflow from other libraries. Central  
14 Library will not necessarily be able to take on the overflow  
15 from the Mission Viejo Library. Planties (phonetic) plain and  
16 speedy and adequate remedy law December Thirty First is D-day,  
17 Your Honor. There's nothing besides this injunction that can  
18 get this taken care of and addressed before D-day. Um, we've  
19 asked for declaratory relief here, we understand the Court's  
20 concerns we thought that's what we're going to do here, um,  
21 that was our speedy and adequate remedy at law and that's what  
22 we were hoping to get addressed today. And then fin-, finally  
23 we used the political process from front to back to try to  
24 avoid coming to Court and it failed us, so we have no other  
25 adequate remedy at law but to get this injunction to preserve

1 the status quo and to a declaratory relief here. Public  
2 interest and the equities intertwined issues as I see them.  
3 The public interest and the equities dictate that the  
4 government should be held to a contract. The government can't  
5 run around making agreements to do things and accepting  
6 valuable consideration for that and then turn around and  
7 dishonor. There's a case in my brief, by the way, that says  
8 financial problems do not constitute any reason to abandon or,  
9 uh, do not constitute, constitute any possibility for a  
10 contract. The money is here, it's just not decided to be used  
11 for libraries. More importantly this library can stay open in  
12 such a way where it's budget neutral. The proposal had already  
13 been made by the City Council or to the City Council and it is  
14 appropriate. Then you heard Ms. Bateman testify on the stand  
15 that resources can be shipped around to accommodate that goal  
16 in a budget neutral way. Again, we don't see an easy way to  
17 fashion a monetary remedy at the end of the day. And that's  
18 not what the client, my client is interested in. My client  
19 does not want one dollar from the City unless there's no  
20 equitable relief available. And ultimately that's what we'll  
21 have to get to if we can't serve, uh, something under  
22 equitable relief. And then finally, um, I think it goes  
23 without saying that an injunction here will, in fact, preserve  
24 the status quo and preserve this library ability to continue  
25 operation and it'll preserve and protect all of these local

1 community assets which you heard about, um, at length through  
2 testimony today. Um, those are the brief arguments, Your  
3 Honor, on the six Rafferty factors, you've got the law in  
4 front of you, I did my best, um, to present this in an orderly  
5 and concise fashion and to address your legal questions and  
6 concerns. Um, ultimately should you decide to enter an  
7 injunction which is what we would request to keep, not only  
8 this library, but all four libraries open because they don't  
9 comply, they did not get shut down properly in compliance with  
10 Colorado Library Law, um, we can discuss a bond if that's  
11 appropriate.

12 THE COURT: (inaudible) let me ask what standing  
13 you have to argue the other three branches, I didn't know you  
14 were arguing on behalf of the other branches, I thought you  
15 were just doing the Mission Viejo one.

16 MR. HOBAN: Well, that's our specific concern,  
17 Your Honor, but if, in fact, the City has violated the  
18 Colorado Library Law as a member of the community, uh, the  
19 Mission Viejo HOA does in fact have standing, have a quote  
20 unquote interest under rule fifty seven a, or fifty seven b  
21 rather, to as a community (inaudible) citizen to ensure that  
22 its laws are properly complied with when libraries are shut  
23 down.

24 THE COURT: Thank you.

25 MR. HOBAN: Thank you.

1 THE COURT: Counsel?

2 MR. RICHARDSON: Good afternoon, Your Honor. I,  
3 I have to make a comment about the trial briefs. The Court  
4 asked the parties to file the trial briefs on Friday and so we  
5 hired an outside law firm to comply with the Court's Order to  
6 accelerate the trial brief. I get here this morning and I  
7 find out that their trial brief was filed after five o'clock  
8 last night, I'm in a City Council meeting until nine o'clock  
9 and your right I'm blowing off some steam here because I can't  
10 discuss the Cornerstar case with plaintiff's counsel. I  
11 appreciate the fact the Court is entering into a dialogue with  
12 plaintiff's counsel on his brief that I haven't even had time  
13 to research and so I just wanted to discuss what are the  
14 consequences of following Court Orders and what are the  
15 benefits of following Court Orders. Now I'm not delusional,  
16 um, I'm a lot of things. When I left my house this morning,  
17 my wife told me I hope you lose the case and we know what  
18 that's all about. Everybody in this Courtroom loves  
19 libraries, the only thing worse I could think of and be  
20 standing up here and talking about is kittens and puppies and  
21 thank goodness we're not talking about that. But I hope as a  
22 result of this proceeding the Court is convinced that the City  
23 for thirty six years did the best it could to comply with its  
24 requirements to run a branch library. That the City's actions  
25 have not been capricious or arbitrary. These are incredible,

1 incredible economic times and I want to talk about the  
2 standing a little bit. There is no injury in fact in this  
3 case and I'm talking about the generic kind. And I will  
4 comment on the, the, the um, activities three and a half weeks  
5 ago with Shea Homes. That obviously took place way after, uh,  
6 our budget process, our analysis of the contract that was  
7 alluded to by Mr. Miller in the context of seeking legal  
8 advice from our office in terms of the validity or non-  
9 validity of the contract so I would hope the Court would take  
10 into account the recency of those purported efforts to provide  
11 standing. There is no injury in fact here. It's a matter of  
12 convenience. I extracted that from the plaintiff during cross  
13 examination. Everybody would like to have a neighborhood, uh,  
14 library. Um, but our other libraries that Arapahoe Libraries  
15 are available. Let me talk about the Keeling Doctrine  
16 (phonetic) which is in our trial brief. The Keeling Doctrine  
17 is evil, cruel, misleading, uh, and, uh, probably has acted to  
18 the detriment of a lot of people but it is good municipal  
19 corporation law in this state especially where the City has  
20 not received products or services that have been consumed or  
21 delivered to the City. The Keeling Doctrine stands for fact  
22 that no City Council can ever bind a future City Council from  
23 exercising its full legislative uh, uh, uh, abilities. It's a  
24 cruel doctrine but it's Colorado Law. Now there was some  
25 reference to, um, well I'll wait until the separation of, uh,

1 powers argument. Now on the Merger Doctrine, I would direct  
2 the Court's attention to the warranty deed, Exhibit number  
3 One, the paragraph and I'll read it quickly, provided however  
4 that this possibility of reverter reserved to the grantor  
5 shall exist only for a period of twenty one years from the  
6 date of this deed and from and after the said twenty one years  
7 the lands herein conveyed shall be subject only to those  
8 covenants referred to in Exhibit A. Now Exhibit A clearly  
9 says all of those expire within thirty five years. And so  
10 this case invokes the Merger Doctrine, a well known doctrine  
11 of, of uh, contract law, uh, uh, the, uh, agreement is merged  
12 into the specific language of the warranty deed and I hope we  
13 cleared up some initial confusion over their reversionary  
14 interest, um, I, I don't want to make additional argument here  
15 but I believe the testimony is, the uncontradicted testimony,  
16 is there's no longer a reversionary interest on this, um, on  
17 this property. Let me talk about separation of powers. I had  
18 a difficult time making that argument to the Court this  
19 morning because what I was trying not to do was challenge the  
20 Court's authority because nobody wants to be challenged on  
21 their authority but what I was trying to do is say as is  
22 discussed in Rathke there is the Legislative Branch of  
23 Government, there's the Executive Branch and there's the  
24 Judicial Branch. I do not believe separation of powers is  
25 necessary implic-, is necessarily implicated in every contract

1 situation. But here it is a core Legislative function of  
2 budgeting and appropriation. Budgeting and appropriation.  
3 You can't get anymore core Legislative than that principle.  
4 This is not an injunction talking about don't sell the used  
5 fire truck, don't certify the captain's test results, and  
6 apparently in the Cornerstar case it was open a bank account  
7 or don't open a bank account. But to staff and to operate a  
8 branch library is a function that implicates a core  
9 legislative activity of budgeting and appropriation. Now  
10 plaintiff's counsel says well it's just a mere, you can merely  
11 shift services around. Unfortunately, um, you have to be an  
12 elected official, uh, of a legislative body to make those  
13 critical difficult decisions about shifting services around  
14 and I'm suggesting the Court should not substitute its  
15 judgment until, uh, the City of Aurora, well close down the  
16 Central Library for additional hours, uh, so that the Mission  
17 Viejo Library can be operated, uh, the way they want it to be  
18 operated. And I'd like to talk a little bit about Rathke and  
19 the quote of course is preliminary injunctive relief is an  
20 extraordinary remedy because equitable relief in the nature  
21 and injunction constitutes a form of judicial interference  
22 with continuing activities. The Court's have generally been  
23 reluctant to grant such relief where, quote, "the actions  
24 complained of are those of departments of the executive and  
25 legislative branches of government under the separation of



1 powers." Lastly, let me talk about security. I grant to this  
2 Court that, that the appellate case law that has interpreted  
3 the civil rule dealing with injunctions does not mandate  
4 granting of, of a, of a security, uh, a cost bond. But I'm  
5 urging the Court that it impose, if it is, if it is, which we  
6 hope it's not based on all the legal arguments but it if is,  
7 if it's leaning toward granting an injunction, we are urging  
8 the Court to secure this extraordinary interference with the  
9 legislative process with a bond that will protect the City and  
10 its taxpayers to the extent of two thousand five hundred  
11 dollars a month to operate this library when we wouldn't have  
12 to expend those costs but for this lawsuit seeking to mandate  
13 the operation of a library. Thank you, Your Honor. Twenty,  
14 she's whispering, twenty five hundred dollars a day, I  
15 apologize.

16 THE COURT: (inaudible) for twenty five hundred  
17 dollars a month, I would have given my salary over-

18 MR. RICHARDSON: I'm sorry.

19 THE COURT: For that. Unfortunately it's not  
20 twenty five hundred dollars-

21 MR. RICHARDSON: Whatever Mr. Nicholas testified  
22 to, I'm adopting that.

23 THE COURT: Alright, just preliminarily I'll the  
24 Mr. Hoban have the last word as the moving party. When this  
25 hearing was set up the City was ordered to file its response

1 by Friday so the Court could be fully apprised of the  
2 position. There was no statements about trial briefs and so  
3 that was really at, at the election of the parties, if, if  
4 either side filed it. And plaintiff did and I found it be  
5 helpful. But Mr. Richardson you cite the Cornerstone case in  
6 your own objection to the application for a TRO which we  
7 already talked about this morning, there wasn't an application  
8 for a TRO but you, you cited the Cornerstone Case and then  
9 counsel picked up on that and cited it in his trial brief and  
10 I took the opportunity to read it carefully so I could ask the  
11 parties about it.

12 MR. RICHARDSON: Well, I'm glad the Court is so  
13 astute in picking up on that. I, uh, I did not get a chance  
14 to dig into their trial brief, that's the point I was making.  
15 To file a brief at five twelve last night, um, that's a,  
16 that's a tough one, Your Honor.

17 THE COURT: It is but it wa-, it wasn't you filed  
18 your trial brief and then you responded (inaudible) that was  
19 fine so I, I'm just, I'm just nitpicking, I know you were  
20 venting but I, I'm not finding that anyone was in derogation  
21 of deadline set by the Court. The dead-, the only deadline  
22 that was set, you met, which was filing your response by close  
23 of business Friday so that I would have an opportunity to  
24 digest the complaint and the answer and any other responses  
25 thereto. It, it was just by chance I had checked the Lexus

1 system at the end of the day and there it was and so I got it  
2 late as well but was able to, to use that. So I just wanted  
3 to make the record clear that it, it wasn't a late filing per  
4 se and, and that it might have been your citing the  
5 Cornerstone and the fact that Mr. Hoban coincidentally  
6 actually tried it that he actually referred to it in his own  
7 trial brief. With that being said, I'll turn my attention  
8 back to plaintiff's counsel if you have any rebuttal argument.

9 MR. HOBAN: I just would note this, that Ms.  
10 Kinney and I, the day we got this scheduled we sat down side  
11 by side in a chair over here and we said if you think you'd  
12 like to do a trial brief lets file those by Monday and it was  
13 agreed to right, Ms. Kinney? Side by side? You said I don't  
14 think we're going file (inaudible)

15 THE COURT: Well, we're not (inaudible)

16 MR. HOBAN: (inaudible) Your Honor, my point is  
17 I, I wasn't try to (inaudible) anybody but I think you've ex-,  
18 explained it well. I've made my legal argument, I've made my  
19 arguments and unless the Court has further questions I would  
20 simply note that what we seek here is equity. This Court sits  
21 here in equity. Equity demands that the City cannot get away  
22 with simply tossing aside agreements as it sees fit. We ask  
23 for an injunction to preserve the status quo and we would  
24 submit to you that an injunction ordering that this library  
25 stay open can be done in such a manner that it will not affect

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

1 MR. HOBAN: Um, I suspect you'll hear a lot of  
2 what you heard today, uh, plus perhaps a half a day more.  
3 With closing argument-, two full days tops?

4 MR. RICHARDSON: I, I, in my career Your Honor,  
5 I've never guessed appropriately on how long a, a, a hearing  
6 or a trial's going to last, um, three days, just to be on the  
7 safe side? I've got to bring the Shea people in, I'm just  
8 thinking here uh, uh,

9 THE COURT: Well, I'm looking at March Tenth,  
10 Eleventh and Twelfth. I'm just going to see what the Twelfth  
11 looks like for me. That's a Wednesday, Thursday, Friday. I  
12 have a eight day Court trial that's the eighth day would be  
13 the Tenth and I'm hoping it doesn't really go eight days so  
14 I'm offering the Tenth to start that would be the three days.  
15 I'm really, really hoping that you can accept that because  
16 that's really all I have in March to give you is the Tenth,  
17 Eleventh and Twelfth. If necessary we can break it up over  
18 time, I much prefer to do everything in a piece because  
19 everyone's recollection's fresh, but if necessary we can do it  
20 piecemeal. What does that look like for the parties?

21 MR. HOBAN: I-

22 MR. RICHARDSON: That's fine, we'll make it work.

23 MR. HOBAN: It certainly works for the  
24 plaintiffs, and-

25 MR. RICHARDSON: Alright.

1           THE COURT:        Make it work, alright.  That puts you  
2 on an expedited discovery schedule in terms of getting your  
3 depositions scheduled and that sort of thing.  I'll remind the  
4 parties how we started out the day which was my saying that  
5 you would agree to be cooperative in, in getting witnesses  
6 available.  I know it might be difficult to find some of them,  
7 you had to ask Mr. Smith about, about whether some people were  
8 even alive any longer so I'll leave the parties to, to sort  
9 that out.  If, if it ends up that a party's asking to continue  
10 then out of March, I'm just kind of warning that it might be  
11 difficult to, to reschedule quickly and so that's always the,  
12 the worry.  The sooner you know that March Tenth, Eleventh and  
13 Twelfth won't work, let us know so that we can get it  
14 scheduled as quickly as possible.  By way of example you come  
15 in March Tenth and say we're not ready to go, I don't have  
16 anything left in April or May by then, you let me know next  
17 month that you can't go in March, (inaudible) available.  Just  
18 throwing that out there scheduling wise so best efforts for  
19 everyone to get everything ready and I'll hear it Court Trial  
20 March Tenth, Eleventh, Twelfth.

21           MR. HOBAN:        And, and we'll endeavor to coordinate  
22 a discovery schedule amongst ourselves.

23           THE COURT:        What else can I do to facilitate the  
24 process, Mr. Hoban?

25



1           MR. HOBAN:        If we have any difficulty doing that  
2 we'll certainly contact the Court but I, I think we can, we  
3 can work on that piece, that's, that's easy.

4           THE COURT:        I just meant any other issues. Other  
5 deadlines or anything you want me to set out? I guess I do  
6 need a deadline, I'll set a status for you all to come in and,  
7 let's see, we can either do it February Nineteenth or March  
8 Fifth. I can't do the Friday the Twenty Sixth to have you  
9 come in and tell me if you're really ready to go to trial,  
10 what things look like, the timing, witnesses and that sort of  
11 thing. That's (inaudible).

12           MR. RICHARDSON:    Yeah, I was just going to say  
13 how about this time we have simultaneously filing of, uh,  
14 trial briefs so I don't get worked up into a tizzy.

15           THE COURT:        And, and I, I still do leave it up to  
16 the parties, if you think it will facilitate matters, file  
17 one, I don't order that you file one but I use it, I do  
18 appreciate it but what I'm, I'm saying is I do want a status  
19 to have the parties come in, I'd prefer to do it February  
20 Nineteenth, and that day then I'll set a deadline probably  
21 around March Fifth for the trial briefs.

22           MR. HOBAN:        Okay.

23           THE COURT:        So the deadline is not (inaudible)  
24 status-

25           MR. HOBAN:        Right.

1 THE COURT: I just want to see you at status,  
2 hear where we are, if you're ready to go, and sort things out.

3 MR. HOBAN: Do you want a pretrial order in this  
4 case, uh, a standard pretrial order or just an exchange of,  
5 uh, witnesses, um-

6 THE COURT: I want the standard so that gets  
7 filed and-

8 MR. HOBAN: Alright.

9 THE COURT: I know what issues remain and that  
10 sort of thing. So February Nineteenth, I threw that out there  
11 and I, (inaudible) agreement?

12 MR. RICHARDSON: That works (inaudible).

13 THE COURT: Alright, February Nineteenth that's a  
14 Friday, that's at eight thirty in here. I do have some  
15 standard orders and that sort of thing and so you know check  
16 on Lexus, we'll just send those out so everybody knows what  
17 page we're on (inaudible). Mr. Richardson, anything else?

18 MR. RICHARDSON: No, thank you, Your Honor.

19 THE COURT: (inaudible) City?

20 MR. HOBAN: That's all for the plaintiff, thank  
21 you-

22 THE COURT: Alright.

23 MR. HOBAN: For your attentiveness today, Your  
24 Honor.

25

1                   THE COURT:        Alright, I do want to thank all the  
2 people who have come today, I know it may not have been the  
3 decision that you all were hoping for but I do appreciate  
4 everyone's (inaudible) and dignity in the Courtroom today.  
5 Not an easy decision and I know not easy to hear so I do  
6 appreciate that. With that, we'll go off the record, I'm just  
7 cleaning up, up here but you all are free to leave so you  
8 won't hear the all rise because I'm (inaudible).

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