No. 20615

IN THE

SUPREME COURT

OF THE

STATE OF COLORADO

THE CITY OF COLORADO SPRINGS, a municipal corporation, Plaintiff in Error, vs. KITTY HAWK DEVELOPMENT CO., a corporation, Defendant in Error,	Error to the District Court of El Paso County, Colorado HONORABLE WILLIAM M. CALVERT, JUDGE

BRIEF OF AMICUS CURIAE

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I

STATEMENT OF THE CASE

The statement of the case contained in the brief of plaintiff in error is hereby incorporated by reference as a portion of this brief, the facts as stated therein being the basis for this brief. The brief of defendant in error was not available at the time of submitting this brief.

II

SUMMARY OF ARGUMENT

A. ANNEXATION IS PERMISSIVE UNDER THE CONSTITUTION AND THE STATUTES OF THE STATE

OF COLORADO, AND THEREFORE THE IMPOSITION OF REASONABLE CONDITIONS PRECEDENT BY A MUNICIPALITY FOR ACCEPTANCE OF A PETITION FOR ANNEXATION IS NOT PROHIBITED.

B. ONE WHO AGREES TO CONDITIONS OF ANNEXATION AND ACCEPTS FOR A PERIOD OF SIX YEARS THE BENEFITS IMPARTED BY SUCH ANNEXATION IS ESTOPPED TO DENY THE VALIDITY OF SUCH CONDITIONS.

C. THE DISTINCTION BETWEEN COMPULSORY DEDICATION OF LAND BY A SUBDIVIDER AND COMPULSORY DEDICATION OF MONEY BY A SUBDIVIDER IS WITHOUT A LEGAL DIFFERENCE.

III

ARGUMENT

A. ANNEXATION IS PERMISSIVE UNDER THE CONSTITUTION AND THE STATUTES OF THE STATE OF COLORADO, AND THEREFORE THE IMPOSITION OF REASONABLE CONDITIONS PRECEDENT BY A MUNICIPALITY FOR ACCEPTANCE OF A PETITION FOR ANNEXATION IS NOT PROHIBITED.

C.R.S. 1953, 139-11-3 provides, in part, as follows:

> "If such legislative body shall find that the petition and documents attached thereto meet the requirements of this section, the annexation of such territory to such city, city and county, or incorporated town shall be accomplished, when no qualified counterpetition has been filed as provided in Section 139-11-4, by the following procedure: The legislative body *shall be resolution accept or reject* the petition . . . ." (emphasis supplied)

The rest of the section deals with procedures if the petition is accepted. Thus, annexation is strictly permissive on the part of the city council or corresponding municipal legislative body. No guide posts for rejection or acceptance are delineated in the statute. No legal norms have been postulated by the legislature in regard thereto. If the municipality wants to accept a petition for annexation, it may; if it wants to reject such a petition, irrespective of the arbitrariness

of the decision so to reject, it may. The manifestation of public policy in the legislature's refusal to set forth norms is apparent. It is part of the democratic process that the spokesmen for many decide whether or not to let one or two into the unit.

The implication of this permissiveness is bargaining. Must the municipality remain silent when rejecting a proposed annexation? May it not say that if you will do such and such your petition will be accepted? Surely it has the right by reason of this permissiveness to impose reasonable conditions precedent to annexation as a result of the bargaining process. One of the most jealously guarded rights by the law is the right to expect enforcement of an agreement reached through arm's-length bargaining.

Cases decided in other jurisdictions have recognized this right. In *Ayres V. City Council of Los Angeles,* 34 Cal. 2d 31, 207 P. 2d 1 (1949), in answer to petitioners contention that by compulsory dedication of rights of way his property had been taken for public use without compensation, the court reasoned that the dedication was voluntary. The dedication had been made a condition precedent to plat recordation. In *Fortson Investment Co. V. Oklahoma City,* 179 Okla. 473, 66 P.2d 96 (1937), the contention that a required dedication of 5% of a subdivision for public open spaces was a non-compensated taking for public use was rejected on the basis that the dedication was voluntary.

It is submitted that these cases are no different in principle than the case at hand. The City of Colorado Springs merely required compliance with its subdivision ordinances at such time as the defendant in error decided to subdivide as a condition of annexation. The power to accept or reject is the power to accept on condition. Defendant in error made the choice. The choice was voluntary.

B. ONE WHO AGREES TO CONDITIONS OF ANNEXATION AND ACCEPTS FOR A PERIOD OF SIX YEARS THE BENEFITS IMPARTED BY SUCH ANNEXATIN IS ESTOPPED TO DENY THE VALIDITY OF SUCH CONDITIONS.

This court stated in *Mabray V. Williams,* 132 Colo. 523, 291 P.2d 677 (1955), as follows:

"The vital priniciple of equitable estoppel is that a person who by his language and conduct leads another to do what he would not otherwise have done may not subject such person to loss or injury by disappointing the expectations on which he acted. This principle in equity stands on the foundation of fair dealing."

Referring to pages 8, 9 and 10 of the Brief for Plaintiff in Error, Mr. Morrison of Kitty Hawk Development Company talked with City officials as early as September, 1954 regarding the necessity of compliance with all city ordinances as a condition of annexation. On January 10, 1955, a petition for annexation was filed together with an annexation map reciting that the subdivision was subject to the appropriate ordinances. On March 8, 1955, the annexation was consummated by ordinance with a proviso of compliance with the various ordinances. On March 22, 1955 (only 16 days later) the plat of the subdivision was approved subject to the same conditions. These facts showing a repetition of the conditions (compliance with the city's ordinances) at every level of negotiation show, if nothing else, that the defendant in error at least acquiesced in the imposition of those conditions. Now, after more than six years from annexation, the defendant in error seeks the abolition of one of those conditions. Is this the fair dealing spoken of in the *Mabray* case? Can it be said with any certainty that it was not this very condition which moved the city council to approve the annexation?

We submit to this Honorable Court that where one party has voluntarily agreed to the imposition of a condition to annexation, has reaped the benefits of that annexation for over six years and has acquiesced therein without protest for over six years, he is estopped from denying the validity of the condition so imposed through the bargaining process.

C. THE DISTINCTION BETWEEN COMPULSORY DEDICATION OF LAND BY A SUBDIVIDER AND COMPULSORY DEDICATION OF MONEY BY A SUBDIVIDER IS WITHOUT A LEGAL DIFFERENCE.

Mr. Dennis O'Harrow, Executive Director of the American Society of Planning Officials, believes that compulsory dedication will be upheld by the courts in this decade.

Municipal Law Service Letter, American Bar Association, Jan. 1960, p.7. Problems have arisen in the past in various jurisdictions with this kind of ordinance for failure to have enabling legislation. Brief of Plaintiff in Error, p. 27 *et. seq.* Since such is not the case in Colorado, Colorado Springs being a charter city, this Honorablo Court has the opportunity to take the lead in this field.

Land use planners and developers agree that the dedication of a sum of money reasonably calculated to defray the cost of the subdivision's proportionate share of public sites required to serve the subdivision is more satisfactory than requiring the dedication of land in each subdivision. This is not hard to understand from a developers standpoint in light of the facts of this case that over $4,400.00 per acre was paid for the land, and the dedication was based on a valuation of about $3,100.00 per acre. On the other hand, the municipality is able to acquire with the funds accumulated a consolidated holding. The dedication of land tends to leave the municipality with holdings of land, many of which alone are not only insufficient in size to accomplish the end sought, but also inappropriately located and scattered. But this latter result need not be so. Dedicating five acres worth $10,000.00 and dedicating $10,000.00 can be distinguished, but there is no legal difference. The argument that one is different from the other in that it violates due process of law is bald sophistry. The gossamer shield of alleged unconstitutionality by reason of taking for public use without compensation is the theme of an unconvincing narrative. The compensation is ever present in annexation in the form of the municipal services to be received. Does the establishment of these services cost nothing? Indeed not, hence the request to annex.

CONCLUSION

In the light of the facts of this case, the bargained for, compulsory dedication of funds for public open spaces was a reasonable exercise of the police power incidental to the owner's request for authority to dedicate future public streets, accept municipal services and protection, and thereby open his land for sale.