SUPREME COURT, STATE OF COLORADO
CASE NO. 96SC440
CERTIORARI TO THE COLORADO COURT OF APPEALS, 94CA1834

BRIEF OF THE COLORADO MUNICIPAL LEAGUE AS *AMICUS CURIAE*

CITY OF WESTMINSTER, COLORADO, a Colorado home-rule City,

Petitioner,

v.

BRANNAN SAND & GRAVEL CO., INC.,

Respondent.

Colorado Municipal League
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February 3, 1997

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COMES NOW the Colorado Municipal League (the "League") as an *amicus curiae* and submits this brief in support of the position of the Petitioner, City of Westminster.

I. INTERESTS OF THE LEAGUE

The League is a voluntary non-profit association representing 261 of the 269 incorporated municipalities in Colorado, including all municipalities in excess of a population of 500. The League has for many years appeared before this court to represent the interests of Colorado municipalities.

The maintenance of a system of public streets and roads is one of the most pervasive and conventional functions of municipalities, §§ 31-15-702, 43-2-123, *et seq.*, C.R.S., and municipalities routinely require the dedication of land and the construction of public improvements upon that land as a condition of subdivision or development approval pursuant to statutory enabling authority, §§ 31-23-101, *et seq.*, 29-20-104, C.R.S., as well as their plenary home rule authority. See, e.g., Bethlehem Lutheran Church v. City of Lakewood, 626 P.2d 668 (Colo. 1981).

The facts presented in this case are quite common to municipalities throughout Colorado; i.e. situations where a developer is required to dedicate public right-of-way and construct, via private contract, new public streets as a condition of regulatory approval of a subdivision, planned unit development, or some other land use. Therefore, the holding of the Court of Appeals in this case indicating, for the first time ever in

Colorado, that one of the developer's contractors or subcontractors may file a lien upon the public right-of-way and thereafter presumably force a foreclosure and sale of the public right-of-way to satisfy the lien is of grave concern to all municipalities.

II. ISSUE PRESENTED FOR REVIEW

Did the Court of Appeals err in interpreting the Colorado General Mechanic's Lien Law in a way that permits a mechanic's lien to be filed against previously dedicated public streets on the theory that such liens "relate back" to a time before the streets were dedicated for public use and ownership?

III. STATEMENT OF THE CASE

The League hereby adopts by reference the statement of the case and statement of facts contained in the City's Opening Brief.

IV. SUMMARY OF ARGUMENT

The decision by the Court of Appeals in this case is unprecedented and is contrary to the manner in which the General Mechanic's Lien law has been understood and applied for nearly a century. In fact, the statute contains language which directly circumscribes the degree to which private contractors may obtain liens based upon improvements constructed in the public right-of-way, and then only allows such liens to attach to the adjacent private property that may be benefitted by the improvements. The broader implications of the Court of Appeals' decision lead to one

of two possible conclusions, both of which are contrary to law and public policy in Colorado. The holding of the court would lead to either the forced sale of the public right-of-way through foreclosure (which would contradict other statutes that provide the exclusive methods for disposition of public property) or it would require municipalities and their contractors to assume private debts (which would contradict the Colorado Constitution itself).

V. ARGUMENT

A. The Mechanic's Lien Law has never been interpreted or understood by the courts to apply to public property.

Consider the following sequence of events:

1. A city adopts subdivision regulations, including various technical specifications and engineering standards for any and all plats to be approved by the city, along with provisions for the dedication of property for public infrastructure where necessary.

2. A landowner, desiring to subdivide his or her land, contracts with surveyors, engineers, and other design professionals to create a subdivision plat and plan meeting the city's specifications.

3. The city approves the plat, accepts property which may be dedicated thereon to the public, and at the same time requires the owner to construct public

infrastructure as a condition of the subdivision approval.

4. The owner then retains a contractor (who may or may not be affiliated with the aforementioned design professionals) to construct the public infrastructure upon the land dedicated to the city.

This is the garden variety chronology that has played itself out, perhaps tens of thousands of times, in Colorado municipalities and counties in the century[1] that the Colorado General Mechanic's Lien Law has been in effect. Alas, on occasion the owner in this scenario may suffer financial difficulties before sufficient lots are sold to recover the owner's investment and pay all contractors associated with the project for services rendered. Faced with a project that has gone "belly up," the contractors may seek to protect themselves to some extent by filing mechanic's liens against the subdivision lots. Never, however, have they been permitted to file liens against the public property within the subdivision.

The foregoing common scenario is, of course, identical to the facts presented by the parties in the instant case. And herein lies the aspect of this case that the League would emphasize to the Court--while the decision below was itself remarkable, there is

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[1] See: Laws 1899, SB 428.

nothing whatsoever remarkable about the facts upon which it was based.

Inevitably, some preparatory work is done upon a subdivision plan before the plat is submitted for approval. Commonly, title to real property dedicated on the plat will vest in the municipality at or about the time the plat is approved.[2] Only then will the actual commencement of construction of public improvements within the subdivision occur.

For the sake of brevity, the League will not reiterate the legal authority cited by the City for the principle that mechanic's liens have not and can not be applied to public property in Colorado under any theory. However, we would call the Court's attention to two additional cases which illustrate the degree to which litigants and the courts have taken this principle for granted for years, especially in the area of street rights-of-way.

In Brannan Sand and Gravel Company v. Santa Fe Land and Improvement Company, 138 Colo. 314, 332 P.2d 892 (1958), the plaintiff had constructed a roadway across right-of-way owned by the City of Denver and two separate private properties. The plaintiff then asserted a mechanic's lien for the entire amount of the contract against one of the private properties, the one owned

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[2] So called "statutory dedication" of public property via a plat is specifically provided for in § 31-23-107 and § 31-2-106 (3), C.R.S. If the municipality manifests its acceptance of the property on the plat, the dedication is deemed complete upon the recording of the plat. Board of County Commissioners of the County of Delta v. Sherrill, 757 P.2d 1085 (Colo. App. 1988). For purposes of its opinion in the instant case, the Court of Appeals did indeed assume that the City owned the street right-of-way at the time Brannan filed its lien.

by the company that had contracted with the plaintiff in the first instance. In resolving the legal issues[3] in the case, this Court noted, "Liens were not filed on . . . the City and County of Denver property . . . as under the statute *none could be*." 138 Colo. at 316 (emphasis supplied).

More recently, in Schmidt Construction Company v. Fast, 776 P.2d 1175 (Colo. App. 1989), the dispute again centered on the ability to assert a lien for improvements made to a public street right-of-way, this time in Colorado Springs. The Court of Appeals observed:

> "Fast failed to pay plaintiffs for their work on the extension, so they filed liens against the subdivision property, *since, by then, the City owned the property on which the extension was constructed*." 776 P.2d at 1176 (emphasis supplied).

The court then went on to explore the circumstances under which a contractor working on a new subdivision may be able to establish a nexus between improvements made in the public right-of-way and the private lots benefitted by those improvements for purposes of asserting a mechanic's lien. Particularly germane to the instant case, the Court of Appeals noted that the General Mechanics Lien Law was amended in 1965 to specifically permit the cost of certain

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[3] The 1958 Brannan case ultimately was decided on the principle that a mechanics lien on a particular piece of property cannot exceed the value of the work actually performed on that property.

public improvements (i.e. "adjacent curb, gutter and sidewalk") to be imputed to the private lots in a subdivision.[4]

The League would submit that this express reference to "adjacent curb, gutter and sidewalk" in the Mechanic's Lien Law is evidence that the General Assembly has considered the ability of contractors to assert a lien for public improvements, has provided for it to a limited degree, but has done so only to the extent of allowing the lien to be asserted against "adjacent" private property. In the face of this express reference, it would defy logic (not to mention principles of statutory construction) for the courts to expand the claimant's lien remedy to include the public right-of-way itself, or to include any type of public improvement not specifically provided for in the statute.

While no appellate decision in Colorado has ever condoned the assertion of a mechanic's lien against public property, the decision by the Court of Appeals in the instant case appears to be based upon the new theory that somehow, as a matter of law, a contractor's claim may be deemed to date back to a time before the subdivision was approved and the property was dedicated to the public under § 38-22-106, C.R.S. This theory appears to be based on the assumption that somebody (it is not entirely clear who this is supposed to be) may have performed some sort of work related to

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[4] The amendment was adopted pursuant to Laws 1965, HB 1354, § 1, and is now codified at § 38-22-101 (1). Significantly, in the instant case, at least a portion of the claim that Brannan is asserting against the City is for "curb and gutter." Brannan Sand & Gravel Co., Inc. v. Federal Deposit Insurance Corp., 94 CA 1834, slip op. p.1.

the property to be dedicated prior to the time title passed to the City. Again, the League would urge the Court to recognize that this theory would apply equally to virtually every subdivision dedication in the state and radically change the rules of the game as municipalities understand them.

B. Any remedy available to a claimant under the Mechanic's Lien Law cannot be applied to public property without violating other statutes or the constitution.

The Court of Appeals in this case engaged in a purely hypothetical consideration of the "relate back" language in § 38-22-106, and held that it could be read to allow the filing of a mechanic's lien against a public right-of way. The League would now urge the Supreme Court to contemplate the broader implications of this holding.

In particular, in carrying the holding to its logical conclusion, we must assume that Brannan would be entitled to a judgment against the City and the foreclosure and sale of the public street right-of-way if necessary to satisfy its claims. § 38-22-114, C.R.S. Aside from the obvious practical difficulties inherent in selling a public street, the League would assert that such an outcome would flatly contradict the law and policy of the state as expressed in several other statutes.

For example, § 43-2-303 (2)(c) provides:

> "If any roadway has been established as a municipal street at any time, such street shall not be vacated by any method other than an ordinance approved by the governing body of the municipality."

This statute goes on to afford special protection for private property owners adjacent to the right-of-way, essentially providing that no such right-of-way shall be vacated or abandoned in such a manner as to leave any property owner without access to the city street system. See: § 43-2-303 (2)(a). The notion that a public street may be lost through foreclosure of a mechanic's lien is utterly irreconcilable with this statute.

Other statutes similarly underscore the inviolability of public property and add credence to the argument that such property is indeed treated differently in the eyes of the law. For example, § 31-15-713 (1)(a) prohibits the sale of any municipal property that has been "used or held for any governmental purpose" unless the question is submitted to a vote of the people. Moreover, the statutes specifically prohibit the loss of public property to anyone asserting a claim of adverse possession, § 38-41-101 (2), and this statute has been applied specifically to a claim against a dedicated street right-of-way, City of Canon City v. Cingoranelli, 740 P.2d 546 (Colo. App. 1987).

Considering the great weight of law and policy in this state, the courts should not lightly construe any statute that may lead to the forfeiture of any public property, particularly a public right-of-way.

Brannan may argue that all it is seeking from the City is payment of its claim, which would not necessarily involve a loss of the right-of-way by the public. The obvious problem with this alternative, however, is that it would essentially place the City

and all municipalities (i.e. their taxpayers) in the role of being the guarantor on debts that may be incurred by virtually every land developer who comes down the pike and purports to dedicate land and improvements to the public.

Land development is a business venture wherein private parties assume certain risks and contract together for that most respectable private objective of all--making a profit. The Colorado Constitution flatly prohibits municipalities from lending their credit in aid of private ventures or from becoming responsible for any private debts. Colo. Const. Art. XI, § 1.[5] "The thrust of this constitutional provision is that cities and towns should not allow their tax-derived general funds to secure assistance to private corporations," Lyman v. Town of Bow Mar, 533 P.2d 1129, 1134 (Colo. 1975), and "to prohibit the mingling of public funds with private funds." In Re Interrogatories by the Colorado State Senate, 566 P.2d 350, 356 (Colo. 1977); Lord v. City and County of Denver, 58 Colo. 1, 143 P. 284 (1914).

In sum, either a forced sale of municipal property to satisfy a mechanic's lien or an attempt to compel a municipality to assume the private debt owed by a developer to one of his contractors would violate the constitution and statutes of this state.

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[5] Section 1 of Article XI provides in its entirety: "Neither the state, nor any county, city, town, township or school district shall lend or pledge the credit or faith thereof, directly or indirectly, in any manner to, or in aid of, any person, company or corporation, public or private, for any amount whatsoever; or become responsible for any debt, contract or liability of any person, company or corporation, public or private, in or out of the state."

VI. CONCLUSION

For the reasons stated herein and in the City's Opening Brief the League urges this Court to reverse the decision of the Court of Appeals and remand this case with directions to reinstate the summary judgment entered by the trial court in favor of the City.

Respectfully submitted this 3rd day of February, 1997.

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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Brief of the Colorado Municipal League as *Amicus Curiae* was placed in the U.S. Postal System on the 3rd day of February, 1997, addressed to the following:

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