9-10-1979

Bethlehem Evangelical Lutheran Church v. City of Lakewood

NO. 28521

IN THE

SUPREME COURT

OF THE

STATE OF COLORADO

CITY OF LAKEWOOD, a Colorado Municipal corporation, THE CITY COUNCIL OF THE CITY OF LAKEWOOD; CAROLYN BACHER, SHARON CARR, DON DeDECKER, CARL NEU, GAYLOR SMITH, PAUL THOMPSON, LESTER WILLSON, BILL WILSON and ROBERT WRIGHT as members thereof; CITY OF LAKEWOOD PLANNING COMMISSION; KENNETH CAMERON, SARAH MASTERSON, HOWARD REVIE, ANTHONY SABATINI and JOHN KELLY as members thereof; and CHARLES L. GILLETT, SUPERINTENDENT OF CODE ENFORCEMENT and CHIEF BUILDING OFFICIAL OF THE CITY OF LAKEWOOD, COUNTY OF JEFFERSON, STATE OF COLORADO, Defendants-Appellants, v. BETHLEHEM EVANGELICAL LUTHERAN CHURCH, a Colorado non-profit corporation, and TAMMINGA CONSTRUCTION COMPANY, INC., a Colorado corporation, Plaintiffs-Appellees.	APPEAL FROM THE DISTRICT COURT OF JEFFERSON COUNTY No. 49336 HONORABLE GEORGE G. PRIEST JUDGE

BRIEF OF PLAINTIFFS-APPELLEES

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BRIEF OF PLAINTIFFS-APPELLEES

I.

STATEMENT OF THE ISSUE

1. Does City of Lakewood Municipal Ordinance 14.13.010 violate Sections 15 and 25 of Article II of the Constitution of the State of Colorado and the Fifth and Fourteenth Amendments of the Constitution of the United States?

2. Do the "public improvement requirements" attached to the building permit in question violate the rights of Bethlehem Evangelical Lutheran Church and Tamminga Construction Company, Inc. under Sections 15 and 25 of Article II of the Constitution of the State of Colorado and the Fifth and Fourteenth Amendments of the Constitution of the United States?

3. Do the "public improvement requirements" exceed the

boundaries of the statutory authority and police power of the City of Lakewood?

4. Does the resolution of the City of Lakewood Planning Commission violate Sections 15 and 25 of Article II of the Constitution of the State of Colorado and the Fifth and Fourteenth Amendments of the Constitution of the United States?

5. Does City of Lakewood Municipal Ordinance 14.13.010 and the appeal of any decision to the City of Lakewood Planning Commission provide for an unlawful delegation of authority to the Department of Community Services and the Planning Commission of the City of Lakewood?

6. Do churches and schools enjoy a constitutionally protected status different from mere commercial enterprises and do different considerations apply in considering expansion or modification of existing structures?

II.

STATEMENT OF THE FACTS

Tamminga Construction Company, Inc., as the contractor for Bethlehem Evangelical Lutheran Church, applied for a building permit to construct a gymnasium unit for Bethlehem Lutheran School at 2190 Wadsworth Boulevard, Lakewood, Colorado. On February 11, 1976, Building Permit No. 11093, attached hereto as Exhibit "A", and incorporated by this reference, was issued.

On appeal of the "public improvement requirements" attached to Exhibit A to the City of Lakewood Planning Commission, the Lakewood Planning Commission adopted on March 31, 1976, the resolution attached hereto as Exhibit "B", and incorporated by this reference.

III.

SUMMARY OF ARGUMENT

Bethlehem Evangelical Lutheran Church sought to enlarge an existing facility in order to relieve the crowded conditions already in existence. The old church building was being used

as a gymnasium but was inadequate for Bethlehem Lutheran School.

The building permit that was issued, Exhibit A, contains unconstitutional conditions requiring the building of public improvements and then the dedication of those improvements to the City of Lakewood and the State of Colorado. Nowhere does the City of Lakewood have the authority or police power to force the dedication of property to another governmental entity. The building permit, Exhibit A, also demands the dedication of the existing 15 feet of West 22nd Avenue and the existing walk, both of which were built by the church years ago. Nowhere does the ordinance in question state that existing improvements may be demanded to be dedicated. The building permit, Exhibit A, also demands that the new right of way line along West 22nd Avenue is to be " '6' in back of the existing walk." It is a fact that the existing walk touches the church building along the north wall (testimony of Pastor Robert V. Zehnder, folio 578-579, Plaintiffs' Exhibits C and D, folio 577-579, admitted folio 585). The City of Lakewood does not have the authority to demand the dedication of a part of an existing church building as a public improvement under the ordinance in question.

The resolution of the City of Lakewood Planning Commission, Exhibit B, contains no findings and only states that "needs which may be expected." Furthermore, the Planning Commission accelerated the dedication demands of the building permit, specifically required improvements by calendar date, and added the additional requirement of a contract and sureties. The Planning Commission as the quasi-judicial body hearing an appeal cannot punish the appealing party.

The City of Lakewood ordinances state that any appeal of "public improvement requirements" go to the Planning Commmission, which is an exhaustion of administrative remedies, which has been admitted (Paragraph 22 of the Complaint, folio 16, admitted in Paragraph 1, Third Defense, Answer to Parties and Factual Allegations, folio 114). C.R.S. 1973 31-35-303 and 304, attached

hereto as Exhibit "C" and incorporated by this reference, require that whenever a "public improvement" is necessary the City of Lakewood must "declare by ordinance the necessity for such improvement," and "said ordinance shall declare such necessity," respectively. There has never been an ordinance declaring the necessity of the "public improvements" attached to the building permit, Exhibit A, or approved by the resolution of the Planning Commission, Exhibit B. By the City of Lakewood ordinances, an aggrieved party cannot appeal to the City Council, and the City of Lakewood can never declare by ordinance the necessity of any public improvements. There are no Colorado Statutes authorizing such procedures, and thus, such procedures are an unlawful delegation of authority.

The uncontroverted testimony before the Planning Commission (Affidavits of Dean H. Boedeker and Donald E. Mielke, pages 16-19 of the Record and at pages 12-14 of the Transcript of the Public Hearing of the Planning Commission) and the uncontroverted testimony before the Court of Pastor Robert V. Zehnder (folio 571-576) and Principal Martin W. Barlau (folio 599-600) showed that the "public improvements" imposed a financial hardship upon Bethlehem Evangelical Lutheran Church that it could not afford at that time, could not foresee any income to pay for in the near future, and if forced to build the "public improvements" the proposed gymnasium would be drastically modified, and, finally, at the present time, if forced to build the "public improvements" the church would decrease some religious activity and the school would cut its services, enrollment, or teachers. There is no showing of a direct or immediate adverse effect by the building of the new gymnasium. There is only a showing in the record by the City of Lakewood's witnesses of existing problems prior to the building of the gymnasium. The Planning Commission by their resolution, Exhibit B, stated that there may be increased problems.

The "public improvement requirements" and the resolution of the Planning Commission abridge the religious freedom of Bethlehem Evangelical Lutheran Church in derogation of the First Amendment of the Constitution of the United States and Section 4 of Article II of the Constitution of the State of Colorado.

IV.

ARGUMENT

This Court has had fears that absolute, arbitrary, and capricious power, with no bounds or guidelines, absolutely, arbitrarily and capriciously corrupts. Those fears have come true in this case. Everything that the City of Lakewood has done has been an attempt to coerce and blackmail a church into the building of "public improvements" and the theft of the land under those improvements for itself and another governmental body, and finally, the theft of existing streets, sidewalks, and a portion of the church building for itself. All of this the City of Lakewood has attempted to do under the guise of its police power. When the church appealed those "public improvements", the administrative board, the City of Lakewood Planning Commission, without making adequate findings and ignoring evidence of financial hardship, imposed accelerated and additional conditions, in effect punishing the church for appealing.

In Town of Sheridan vs. Valley Sanitation District, 137 Colo. 315, 324, P.2d 1038 (1958), this Court, in considering whether the Town of Sheridan had an absolute right to withhold its consent and deny construction of certain sewer lines, for any reason or no reason at all, and whether such withholding was arbitrary and capricious, said at page 322:

> A municipality cannot use its police power for bargaining purposes. Sheridan attempted to do just that, namely acquire a sewer system for its own inhabitants by full use of the facilities being created by the District. To permit the city to base its action upon considerations of financial benefit to itself would be allowing it to put its powers up for sale to the highest bidder. We say without hesitation that the city has no right to barter with the police powers, or exact for itself financial benefits as a

> condition for its exercise. Such power must be exercised for the public good and public welfare, and not for public gain. State ex rel. Wisconsin Tel. Co. vs. Sheboygan, 111 Wis. 23, 86 N.W. 657. See also: Wisconsin Tel. Co. vs. City of Milwaukee, 223 Wis. 251, 270 N.W. 336. (Emphasis supplied)

Under the guise of its police power, Lakewood is attempting to coerce Bethlehem Evangelical Lutheran Church into making said "public improvements" by prohibiting a lawful use of its property until compliance with the demands is effected. Lakewood seeks to gain the benefit of the improvements and property of the Church while shifting all of the burden, risk and expense of the project to the Church. Such actions by Lakewood are not necessary for the public welfare, are for its own financial gain, and is an attempt to coerce and manipulate the Church by an unlawful use of its police power. Thus, these actions are in derogation of the responsibilities imposed upon Lakewood by statute and opposed to the views of this Court, as precisely set forth above.

The case of General Outdoor Advertising Co. vs. Goodman, 128 Colo. 344, 262 P.2d 261 (1973), was an action for a declaratory judgment to test the constitutional validity of a resolution adopted by the Arapahoe County zoning board in relation to signs. To erect any structure without obtaining a building permit from the building inspector was unlawful and the building inspector was prohibited from issuing a building permit unless the permit was in conformity with all of the regulations in effect. A resolution provided that signs were permitted "...when approved by the combined action of [the board of adjustment and board of county commissioners]." Despite the fact that the sign would meet all rules and regulations and was not to be constructed in a prohibited area, the combined boards refused the application. Plaintiff sought a declaratory judgment and alleged, among other things, that the resolution governing signs was unconstitutional and invalid; vested arbitrary discretion and absolute and unlimited power with respect to the lawful business and a right to discriminate unreasonably between business and advertising signs;

restricted the conduct of business and the use of private property; that the section failed to provide uniform standards by which such applications may be determined; and that the section was beyond the powers of the board. This Court reversed the trial court, and stated at page 347 and 348 that:

> On the face of the amended resolution it instantly appears that the county commissioners and the board of adjustment, without any set of standards or limitations, are permitted to act according to their particular liking for any reason or no reason at all. It would be difficult to find a more direct grant of arbitrary discretion and unlimited power than is here vested, and, of course, the freedom to use such power as it might relate to lawful enterprises and the uses of property, permits uncontrolled regulation and dictatorial powers of commercial and industrial enterprises in the area involved and therefore is repugnant to the Constitution of the United States and that of the State of Colorado. The unlimited power therefore apparent is double-barreled in that it provides the power to grant and equal power to take away or destroy. (Emphasis supplied)

Citing Ames vs. People, 26 Colo. 83, 56 P.656 (1899) and People ex rel. vs. Johnson, 34 Colo. 143, 36 P.233 (1905) the Court went on to say at page 348 that:

> The test of the constitutionality of a statute is not what has been done, but what, by its authority, may be done under it. (Emphasis supplied)

The Court found that even though "...it might be said that the resolution intended that a discretion be exercised according to the circumstances, nevertheless, the plain arbitrary power to grant or withhold was present, therefore any discretion that might apparently be given was subject to the will of the constituents of the boards involved."

The general rule was set forth by this Court in the People vs. Stanley, 90 Colo. 315, 9 P.2d 288 (1932), that a statute which attempts to vest in public officials arbitrary discretion and unlimited power with respect to a lawful business, without prescribing uniform rules and regulations, so that officials as well as those affected thereby may govern themselves accordingly, is unconstitutional. Stanley was applied in City

and County of Denver et al vs. Thrailkill et al, 125 Colo. 488, 244 P.2d 1074 (1952) in which this Court held that a municipal ordinance which "arbitrarily prohibits transfers and renewals, and seems to be based upon the fact that the amended ordinance leaves to the manager, without any standards for his guidance, the power to grant or deny a license, and thus grants him arbitrary control thereover," is properly condemned as unconstitutional.

The aforementioned Colorado cases have predicted the worst that may be done under an unconstitutional ordinance, which has come true in this case, with the City of Lakewood arbitrarily coercing the dedication of a part of an existing church building and with a quasi-judicial body imposing additional requirements upon appeal.

The Lakewood Municipal Ordinances 14.13.010 state that "applications for building permits shall be reviewed by the Department of Community Service to determine whether the proposed construction will require the installation of public improvements, such as street paving, curbs, gutters, sidewalks, drainage facilities, or other public improvements." The ordinance further provides that if any "public improvements" are deemed necessary, a condition will be submitted in the permit requiring such construction; "at the sole cost, risk, and expense of the permitee." Clearly there are no standards or guidelines provided for the determination of such a finding. The Department of Community Services has the power to arbitrarily act for no reason at all, in any way they see fit according to their whim or caprice. Even if this has not been the case in the past, the power to act in such a manner exists under the authority of the ordinances. Certainly such ordinances are in violation of the Constitution of the United States and the Constitution of the State of Colorado.

The Fifth Amendment of the Constitution of the United States provides that:

> No person shall be....deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

The applicable part of the Fourteenth Amendment to the United States Constitution states that:

> ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws.

Section 15 of Article II of the Constitution of the State of Colorado provides that:

> Private property shall not be taken or damaged, for public or private use, without just compensation. Such compensation shall be ascertained...in such manner as prescribed by law, and until the same shall be paid to the owner, or into the court for the owner, the property shall not be needlessly disturbed...

Article II, Section 25 of the Constitution of the State of Colorado provides that:

> No person shall be deprived of life, liberty, or property, without due process of law.

C.R.S. 1973 38-6-101, attached hereto as Exhibit C and incorporated by this reference, provides that the City of Lakewood has the "right of eminent domain" to acquire private property, which it has failed and refused to use and has never passed "a resolution or ordinance" as required by the statute to take the property of the Church in this matter.

The Colorado Courts have often stated that the unrestricted use and enjoyment of property for a lawful purpose is the very basic element of property ownership. The right to use property is a fully protected right under the Constitutions of the United States and the State of Colorado. Willison vs. Cooke, 54 Colo. 320, 130 P.820 (1913); City and County of Denver vs. Denver Buick, 141 Colo. 121, 347 P.2d 919 (1959); Jones vs. Board of Adjustment, 119 Colo. 420, 204 P.2d 560 (1949); Wright vs. The City of Littleton, 174 Colo. 318, 483 P.2d 953 (1971); Western Income Property vs.

City and County of Denver, 174 Colo. 533, 485 P.2d 120 (1971); City of Englewood vs. Apostolic Christian Church, 146 Colo. 374, 362 P.2d 172 (1961). An actual, physical taking of private property, as well as the destruction or impairment of some right or interest pertaining to the property, will give rise to a cause of action for compensation. Harrison vs. Denver City Tramway Company, 54 Colo. 593, 131 P.409. An ordinance will be held to be invalid if, as it is applied to the aggrieved person's property, the ordinance is confiscatory and deprives him of the use of his land without due process of law. Baum vs. City and County of Denver, 147 Colo. 104, 363 P.2d 688 (1961); and City and County of Denver vs. Chuck Ruwart Chevrolet, Inc., 32 Colo. App. 19, 508 P.2d 789 (1973). The Supreme Court of the United States, in Buchanan vs. Warley, 243 U.S. 60, 38 Supreme Court Reporter 16, has stated that:

> Property is more than the mere thing which a person owns. It is elemental that it includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property.

Thus an ordinance which precludes the use of property for any reasonable use to which it is adaptable or prevents a use which is lawful and harmless in itself and useful to the community is confiscatory and violates fundamental constitutional concepts of freedom and liberty. Baum vs. City and County of Denver, supra.; Bird vs. City of Colorado Springs, 176 Colo. 32, 489 P.2d 324 (1971); City and County of Denver vs. Thrailkill, 125 Colo. 488, 244 P.2d 1074 (1952); Ford Leasing Development Co. vs. County Commissioners of the County of Jefferson, 186 Colo. 418, 528 P.2d 237 (1974); Denver vs. Denver Buick, supra.; and Trans-Robles Corp. vs. City of Cherry Hills Village, 30 Colo. App. 511, 497 P.2d 335 (1972). In the Trans-Robles case, supra., developers had installed sewer lines, water, underground utilities, and a considerable amount of curbs, gutters and streets, all of which were made to serve 1/2 acre lots as permitted under the zoning ordinance

then in effect. The City of Cherry Hills Village then changed the zoning ordinance to require 2-1/2 acre minimum lots. The Court found that the effect of the ordinance was to foreclose any reasonable use of the land with respect to the existing improvements. The Court, in distinguishing Garrett vs. City of Littleton, 177 Colo. 167, 493 P.2d 370, found it significant that here the developers were not seeking a zoning change but attempting to maintain the original zone.

The requirements imposed by the "public improvements" as set forth on Building Permit, Exhibit A, and approved by the Lakewood City Planning Commission resolution, Exhibit B, that the Church dedicate certain property to the City of Lakewood and the State of Colorado is a direct taking of Church's property. No compensation has been offered for this taking, either under the city's power of eminent domain or otherwise, but instead the full burden of the expense and risk of making the improvements has been imposed upon Bethlehem. Bethlehem Evangelical Lutheran Church is not seeking a new use of their property, but merely to replace a structure that was lawfully built and used under previous laws. Bethlehem's property, as such, is not adaptable to any other use, and the effect of the conditions is to prohibit the reasonable use of the property. Such requirements and restrictions are clearly in derogation of Bethlehem's rights as guaranteed by the federal and state constitutions.

In Battaglia vs. Wayne Township Planning Board, 236 A.2d 608 (1967), the Supreme Court of New Jersey found that the requiring of a landowner to grant a 50 foot easement to the Township, post a bond to cover costs of improving it as a road, and to ultimately dedicate the road to the Township as a condition precedent to approving his application to build a single building in an industrial zone was beyond the authority of the planning board and a taking of property without just compensation. The Court reasoned that these types of requirments are those generally

imposed upon subdividers for the reasons that such improvements have a direct bearing on the cost to the municipality of street maintenance and provision of services in future years and works indirectly to discourage irresponsible land division. Importance was placed on the fact that the conditions were set forth with particularity in the ordinances and that the municipality could not require improvements not specified. The Lakewood Municipal Ordinance 14.13.010 contains no standards or criteria specifying when "public improvements" will be necessitated or required. As a result a person is not on notice as to such "requirements" and cannot effectively plan and budget the cost of his undertaking to construct. The builder's cost will vary with the arbitrary decisions of the City of Lakewood Department of Community Services and the Planning Commission. As shown aforesaid, Bethlehem Evangelical Lutheran Church was

operating on a reduced, minimized budget which could not withstand the costs of the "public improvements" demanded by the City of Lakewood. Bethlehem was already at the maximum amount of financing available for the new gymnasium and could not obtain new, permanent financing that would be required to make the "public improvements." As noted in Battaglia, supra., the municipality has the power to acquire what it needs for the public welfare through the use of its eminent domain powers. If the City of Lakewood needs the property, which was required to be improved and dedicated to the City of Lakewood and the State of Colorado, they should acquire it through the process of eminent domain as set forth in the C.R.S. 1973 38-6-101. To do otherwise is to be unreasonable and to violate Bethlehem Evangelical Lutheran Church's rights under the federal and state constitutions.

All of the problems that the City of Lakewood's witnesses advanced at the time of the Planning Commmssion hearing and at trial before Judge Priest existed prior to the building of the new gymnasium. There was no evidence of problems created by the new gymnasium even after one year of use. Opposing counsel in his brief cites lengthy testimony regarding Bethlehem Lutheran School buses, which was a problem prior to the new gymnasium and continued after the new gymnasium, but was not caused by the new gymnasium. Opposing counsel makes assumptions regarding increased vehicle traffic, but there was no evidence of increased traffic flow after even one year. In fact, Principal Martin Barlau of Bethlehem Lutheran School testified before Judge Priest that he keeps through his secretary the calendar of every activity that was scheduled in the new gymnasium (folio 858), and that the new gymnasium serves the same constituencies and the traffic is the same as before the new gymnasium. (folio 862-865).

All of the problems raised by the City of Lakewood could be corrected by the police enforcing the parking regulations, as Judge Priest pointed out (folio 1006), by the power of eminent

domain, or by special improvement districts. Opposing counsel admitted in his opening brief that the City of Lakewood could establish a special improvement district (p. 13) and the City's witness, Doug Pilcher, also stated the City could form a special improvement district (folio 674-675).

It is interesting to note that at the time of hearing on the Motions for Declaratory Judgment and Summary Judgment, on January 3, 1978, before Judge Priest, opposing counsel stated:

> Now, I didn't really remember that this 15 feet along 22nd Avenue was supposedly already constructed. And if that is so, I think I would agree with Mr. Mielke that if it's already in existence, then we can't ask them to buy it, and we would have to condemn that. I will have to check that, because I was unaware of it until this time. (folio 502) (Emphasis supplied).

Furthermore, Judge Priest found that:

8. There are not set standards or requirements under the ordinance in question, Lakewood Ordinance 14.13.010, Public Improvements (folio 354).

13. Private property shall not be taken without compensation (folio 356).

14. Various jurisdictions have the right of eminent domain and when they enlarge, develop or use property and exercise the right of eminent domain, the owner is compensated (folio 356).

15. The law also provides for cities to set up Special Improvement Districts which provide for public improvements with all adjoining landowners paying their proportionate share (folio 356).

17. The Court is of the opinion that the Statutes do not allow this kind of taking under the police power (folio 357).

The existence or lack of standards under the ordinance in question was a question of fact.

It is elemental black-letter law that the findings of the trial court, if based upon evidence to support it, will stand. Allen v. Elrich, 29 Colo. 118, 66 P.891 (1901); Heatherridge Management Co. v. Benson, ___Colo.___, 558 P.2d 435 (1976).

Moreover, at the trial before Judge Priest, Plaintiffs' Exhibits Q, R, S, T, U and V (folio 722 admitted folio 726;

folio 726 admitted 732; folio 733 admitted 738; folio 747 admitted 752; folio 753 admitted 757; folio 758 admitted 762; respectively) show the haphazard, arbitrary, and capricious handling of other building permits and "public improvement" by the City of Lakewood. Exhibit Q was a building permit for a day care center for the church at 430 South Kipling Street and did not require "public improvements" because Kipling was at that time under design as a federally-funded project and the City of Lakewood had someone else's money to buy that right-of-way, as stated by Doug Pilcher, the City's engineer:

> ...we cannot have them dedicate or convey any of that right-of-way to us when we are buying it from all of the adjoining property owners. (folio 794-795).

Exhibit R was a building permit for a commercial building at Colfax and Wadsworth with no "public improvement requirements" for which Doug Pilcher said:

> I would like to point out that I got chewed when that one didn't get done. (folio 731)

Exhibit S was a building permit for the City of Lakewood's shops for which no independent investigation for public improvements takes place, about which Doug Pilcher testified:

> Q So, you made no independent investigations for public improvements for sidewalks in review of the City's property?
>
> A That is true (folio 737)

Exhibit T was a building permit for a public high school, Green Mountain High School, and Douglas Pilcher wrote a memorandum stating they reviewed the permit and only required a drainage plan. It is very interesting to further note that Exhibit T, the building permit for a $2,600,000 new public school did not require any permit fees but Bethlehem, for a private religious school gymnasium, had a permit fee of $590. This further illustrates the arbitrary and capricious actions of the City of Lakewood. Exhibit U was a building permit for a house directly across from Bethlehem Evangelical Lutheran Church at the corner of Vance Street

and 22nd Street for which no public improvements were required (folio 755). Exhibit V was a building permit for a garage just down the street from the Church on Vance Street for which no public improvements were required because the engineering department did not even review this building permit because it was a "minor" addition (folio 759).

The applicable part of the First Amendment of the Constitution of the United States provides that:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof;...

Section 4 of Article II of the Constitution of the State of Colorado provides:

> The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever hereafter be guaranteed; and no person shall be denied any civil or political right, privilege, or capacity, on account of his opinions concerning religion; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness or justify practices inconsistent with the good order, peace or safety of the state. No person shall be required to attend or support any ministry or place of worship, religious sect or denomination against his consent. Nor shall any preference be given by law to any religious denomination or mode of worship.

In Westchester Reform Temple vs. Brown, 22 N.Y. d2 488 (1968), the Westchester Reform Temple sought to expand their existing facilities to meet the increased demands of their congregation. The Planning Commission imposed setback and side-yard restrictions which would increase the cost of the project by $100,000. Being unable to meet such requirements the Temple brought suit on the grounds that the restrictions were arbitrary, capricious, bore no substantial relationship to the health, safety, or welfare of the community, imposed an onerous financial burden, and abridged their right of freedom of religion under the federal and state constitutions. The Court of Appeals of New York stated that churches and schools enjoy a constitutionally protected status different from mere commercial enterprises and

different considerations apply in consdering applicable zoning ordinances. Although the Court found that the ordinance was not unconstitutional per se, they did find that the Planning Commission, under the guise of reasonable regulation, had unconstitutionally abridged religious freedom. They held that when educational or religious needs have grown so that existing structures are inadequate the same reasoning applied to zoning in the initial construction must pertain to the proposed expansion or modification of existing structures. To preclude an expansion, it must convincingly be shown that the proposed expansion would have a direct and immediate adverse effect upon health, safety, or welfare of the community. The court found that when an irreconcilable conflict exists between a right to erect a religious structure and potential hazards of traffic or diminution of value, the latter must yield to the former, and that the imposition of an unnecessary $100,000 hardship abridged the Temple's right of religious freedom. In their opinion the Court relied upon their previous holding in Diocese of Rochester vs. Planning Board of Brighton, 1 N.Y.2d 508, 136 N.E.2d 827. Diocese was used in the specially concurring opinion of Mr. Justice McWilliams in City of Englewood vs. Apostolic Church, supra, who stated, at page 384, that the application of a church "to build in a residential area can be denied if and only if there is a strong showing that to permit such would endanger the public safety because of the greatly increased flow of traffic and resulting congestion, fumes, noise and the like." (Emphasis Mr. Justice McWilliams). Bethlehem is a religious and educational institution. The Planning Commission in their Resolution only allege that there may be increased problems. This is certainly not a strong showing of an endangerment of the public welfare. The financial hardship testimony, above set forth, clearly shows the adverse effect that the imposition the "public improvements" will have on the Bethlehem Evangelical Lutheran Church. The actions of the City of Lakewood

thus abridge the religious freedom of Bethlehem Evangelical Lutheran Church in derogation of the First Amendment of the Constitution of the United States and Section 4 of Article II of the Constitution of the State of Colorado.

V.

CONCLUSION

The decision of the Honorable George G. Priest should be affirmed. Lakewood Municipal Ordinance 14.13.010 violates Sections 15 and 25 of Article II of the Constitution of the State of Colorado and the Fifth and Fourteenth Amendments of the Constitution of the United States. The "public improvement requirements" attached to the building permit violate the rights of Bethlehem Evangelical Lutheran Church and Tamminga Construction Company, Inc. under the same constitutional provision. The "public improvement requirements" exceed the statutory authority and police power of the City of Lakewood. The resolution of the City of Lakewood Planning Commission violates the same constitutional provisions. There has been an unlawful delegation of authority. Finally, there has been a violation of the First Amendment of the Constitution of the United States and Section 4 of Article II of the Constitution of the State of Colorado.

The worst fears of this Court regarding absolute, arbitrary and capricious power, with no bounds or guidelines, have come true in this case. The City of Lakewood has attempted to coerce and blackmail a church into building "public improvements" and then take the land for itself and the State of Colorado. The City has attempted to coerce and blackmail the taking of existing streets, sidewalks, and a portion of the church itself. All of this has been attempted under the guise of the City of Lakewood's police power. Only this Court can prevent this injustice.

Respectfully submitted,

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DEFENDANT'S EXHIBIT 27 #49336

EXHIBIT A

C E R T I F I C A T I O N

STATE OF COLORADO)
COUNTY OF JEFFERSON) ss.
CITY OF LAKEWOOD)

I, Charles L. Gillett, Superintendent of Code Administration, City of Lakewood, Colorado, do hereby certify that the attached is a true and correct copy of Building Permit No. 11093, also Comm. Services requirements

as the same remains on file and record in the office of Code Administration.

Charles L. Gillett, Superintendent
Division of Code Administration
Department of Community Development
City of Lakewood, Colorado

STATE OF COLORADO)
) ss.
COUNTY OF JEFFERSON)

The foregoing instrument was acknowledged before me this 6th day of March, 1978, by Charles L. Gillett, Superintendent of Code Administration.

WITNESS my hand and official seal.

Mary Ann Fritz
Notary Public

My Commission expires:

My Commission expires Nov. 13, 1979

IT IS NOT TRANSFERABLE

CITY OF LAKEWOOD

NEW ___ ALTERATION X RESIDENTIAL ___ COMM. X

IN ACCORDANCE WITH THE PROVISIONS SET FORTH IN YOUR APPLICATION, PERMISSION IS HEREBY GRANTED TO:

JOB ADDRESS: 2190 Wadsworth Blvd.

PLUMBING

INSTALL PLUMBINGSYSTEM AS PER APPLICATION

CONTRACTOR			LICENSE NO.
Elfline Plbg & Htg, Inc.			74E
DATE	PERMIT VALUATION	PAID	FEE
4/19/76	~~$35,000.00~~	X	~~$142.00~~

MECHANICAL

INSTALL HEATING SYSTEM AS PER APPLICATON

CONTRACTOR			LICENSE NO.
Airway, Inc.			86E
DATE	PERMIT VALUATION	PAID	FEE
4[illegible]/8/ 76	~~$35,000.00~~	X	$142.00

ELECTRICAL

INSTALL ELECTRICAL SYSTEM AS PER APPLICATION

CONTRACTOR			LICENSE NO.
Belmont Elec. Serv, Inc.			593
DATE	PERMIT VALUATION	PAID	FEE
[illegible] 4/7/76	$28,500.00	X	$124.00

ELECTRICAL

INSTALL ELECTRICAL SYSTEM AS PER APPLICATION

CONTRACTOR			LICENSE NO.
Littleton Elec., Inc.			853
DATE	PERMIT VALUATION	PAID	FEE
6/14/76	$600.00	X	$6.00

CONTRACTOR SHALL NOTIFY THE BUILDING INSPECTOR TWENTY-FOUR (24) HOURS IN ADVANCE FOR ALL INSPECTIONS. REFER TO THIS PERMIT NUMBER WHEN YOU CALL.
CONTRACTOR OR OWNER ACCEPTS FULL RESPONSIBILITY FOR COMPLIANCE WITH APPLICABLE LAWS OF THE STATE OF COLORADO AND TO THE ZONING REGULATIONS AND BUILDING CODE OF THE CITY OF LAKEWOOD.

SUPERINTENDENT OF BUILDING INSPECTION

DATE Feb. 18, 1976

CITY OF LAKEWOOD
COLORADO

BUILDING PERMIT

FOR INSPECTIONS PHONE 234-8666

REFER TO PERMIT 11093

ISSUED TO	LICENSE NO.	OWNER	JOB ADDRESS
Tammiwga Const. Co.	Pend		2190 Wadsworth Blvd.

TOTAL VALUATION	PERMIT VALUATION	FEE	SQUARE FEET	CONSTRUCTION	TYPE	OCCUPANCY	ZONING DIST.
$420,000.00	$301,500.00	$590.00	12962		V-1HR	B2	R1

LEGAL DESCRIPTION:
ct A (N) a tract of land in the SW1/4 NE1/4 of sec 35, T3S, R69W of the 6th PM more particularly cribed as follows: Beg. at the SW corner of the N 30 acres of the W1/2 W1/2 NE1/4 of said sec 3 running thence E along the S line of the N 30 acres of the W1/2 W1/2 NE1/4 of said sec 35, a di ce of 635'; thence N a distance of 145'; thence W at right angles a distance of 635' to the W e of the N 30 acres of the W1/2 W1/2 NE1/4 of said sec 35; thence S along said W line a distance 145' to the point of beginning, subject to a highway over the W 40' thereof. Tract B (S) The 2 SW1/4 SW1/4 NE1/4 of sec 35, T3S, R69W of the 6th PM, Jeff. Cty, Colo. exceptthe W 40' thereof

CONDITIONS:

- This permit was issued in accordance with the provisions set forth in your application and is subject to the laws of the State of Colorado and to the zoning regulations and building code of the City of Lakewood.
- This permit shall expire if (a) the work authorized is not commenced within sixty (60) days from the date of (b) the building authorized is suspended or abandoned for a period of one hundred and twenty (120) days.
- If this permit expires a new permit may be acquired for a fee of one half the amount originally required provided no changes have been or will be made in the original plans and specifications and any suspension or abandonment has not exceeded one (1) year. If changes are made or if suspension or abandonment exceeds one (1) year, full fees shall be paid for a new permit.
- No work of any manner shall be done that will obstruct the natural flow of water causing a drainage problem.
- Contractor shall notify the building inspector twenty four (24) hours in advance for all inspections and shall receive written approval on inspection card before proceeding with successive phases of the job.

NOT VALID UNLESS RECEIPTED

PERMISSION IS HEREBY GRANTED TO CONSTRUCT:

New GYMNASIUM UNIT, BETHLEHEM LUTHERN SCHOOL, as per applicat

DEPARTMENT OF COMMUNITY SERVICES

February 11 19 76

TAMMINGA CONSTRUCTION CO.
Permit Applicant

1869 S. Pearl St.
Address

Re: Building Permit For

Denver
City ZIP CODE

2190 WADSWORTH BOULEVARD

This building permit is approved subject to the completion of the Department of Commun Services' requirements listed below. Construction of any public improvements within th right of way requires a permit obtainable from the Development Coordination Section loc at 7811 West 16th Avenue, telephone number 234-8734. Inspections are required during c struction and these services are provided by the Quality Control Section which is locat at 850 Parfet Street, telephone number 234-8765. After preliminary acceptance by Quali Control, the Development Coordination Section will be notified. This section will for ward a recommendation of approval for a Certificate of Occupancy to the Building Depart ment; provided, however, all the requirements listed below are satisfied. Your coopera tion and close adherence to this procedure will expedite the issuance of the Certificat of Occupancy. Questions concerning these requirements should be directed to the Develo ment Coordination Section, telephone number 234-8734.

ALL PUBLIC IMPROVEMENTS MUST BE INSPECTED DURING CONSTRUCTION

REQUIREMENTS: pf

(1) Yes (No) Plans, as related to Public Improvements, approved as submitted.

(2) (Yes) No Curb, gutter and sidewalk as per City of Lakewood Design Standard S-223, with five (5) foot attached sidewalk.

(3) Yes (No) Curb and gutter as per City of Lakewood Design Standard S-222 and S-2

(4) (Yes) No Standard driveway cut as per City of Lakewood Design Standard S-230 through S-232.

(5) (Yes) No Paving for 1/2 the street plus 5 feet with a thickness based on a soi analysis relating to an R-value, Group Index or the California Bear ing Ratio test results.

(6) (Yes) No Six (6) inch, full depth asphalt must be installed between existing asphalt and proposed gutter lip. Where #5 above does not apply.

(7) (Yes) No Plans, profiles and designs must be submitted to the Development Coor nation Section for approval covering all public improvements. Thes plans must be done by a Registered Professional Engineer. If it is determined during the review process of these plans that additional right of way is needed, it must be conveyed to the City of Lakewood prior to issuance of a Certificate of Occupancy.

(8) Yes (No) Curb stops must be placed adjacent to public right of ways.

(9) (Yes) No. Curb ramp must be constructed at curb radii.

(10) (Yes) No Additional Requirements: (A) The following property is to be dedicate as public right of way:
(1) To the City of Lakewood, the east 25 feet for Vance Street and
(2) To the City of Lakewood, approximately the north 15 feet for Wes 22nd Avenue. The new right of way line is to be 6" in back o the existing walk and
(3) To the State of Colorado, approximately the west 8 feet of the south 280 feet for Wadsworth Blvd. The new right of way line is to be 6 inches behind the new 5 foot attached concrete sid
(B) Plans and profiles for street and curb gutter to be submitted for review and approval and
(C) The 6 inch clay drain pipe that drains the roof must daylight west of the curb and gutter to allow the dis charge to drain to the curb and gutter as overland flow. (See plot plan for details).

EXHIBIT "B"

CERTIFICATION OF RESOLUTION
CITY OF LAKEWOOD PLANNING COMMISSION

I, Carla Givens, Secretary to the City of Lakewood Planning Commission, do hereby and herewith certify that the following resolution was duly adopted by MAJORITY vote of the members present at their regular public meeting, held in the Lakewood City Hall, 1580 Yarrow Street, Lakewood, Colorado, on the 31st day of March, 1976, and the roll having been called, the vote of the Commission was as follows:

Kenneth Cameron	:	aye
Sarah Masterson	:	aye
Howard Revie	:	aye
Anthony Sabatini	:	aye
John Kelly	:	nay

SUBJECT: BUILDING PERMIT PUBLIC IMPROVEMENTS APPEAL
CASE A-76-1 - BETHLEHEM EVANGELICAL LUTHERAN CHURCH

WHEREAS, there will be increased activity as a result of the proposed construction of the gymnasium based on 1) the increased availability of the facility for church usage, and 2) increased availability of the facility for the use of the community at large; and

WHEREAS, in addition, this increased activity may well aggravate an already substandard situation with regard to vehicular, pedestrian and bicycle facilities.

THEREFORE, the Planning Commission finds:

THAT, the construction of public improvements and the dedication of land for rights-of-way required by the Department of Community Services is directly related to vehicular and pedestrian problems and needs which may be expected to result from the proposed usage of the gymnasium; and

THAT the construction of public improvements and dedication of land for rights-of-way will neutralize and mitigate the vehicular and pedestrian problems and needs which may be expected to result from the proposed usage of the gymnasium.

HOWEVER, BE IT RESOLVED, that the following schedule of improvements will apply in lieu of the normal requirement to be accomplished prior to issuance of the Certificate of Occupancy.

a) The dedication of all rights-of-way, including Vance Street, shall be made immediately; and

b) The sidewalk improvement on Wadsworth Boulevard shall be constructed on or before July 1, 1977; and

c) The improvements on 22nd Avenue for approximately 150' are to be constructed on or before July 1, 1977; and

d) The curb, gutter and asphalt patchback from 22nd Avenue to 21st Avenue shall be deferred until such time as Vance Street is extended from 21st Avenue to 20th Avenue. At that time, public improvements on Vance between 22nd and 21st shall be done at the full expense of the church; and

BE IT FURTHER RESOLVED that a construction agreement will be entered into by both the Bethlehem Evangelical Lutheran Church and the City of Lakewood, and further, that proper sureties will be posted except for improvements on Vance Street, in accordance with the fifth paragraph of Section 14.13.010 of the Lakewood Municipal Code, 1972.

DATED this _____ day of _____, _____.

_____
Carla Givens, Secretary to the
City of Lakewood Planning Commission

EXHIBIT C

1973 C.R.S. 31-35-303 states that:

> When, in the opinion of the governing body, it is necessary to make any public improvement, including the establishment, extending, widening, grading, or improving of any street or alley, or the establishment, construction, extending, enlarging, or completing of any sewer, sidewalk, bridge, or viaduct, or removing any irrigating ditch, it is lawful for said body to declare by ordinance the necessity for such improvement.

1973 C.R.S. 31-35-304 states:

> In case such proposed improvements consist of the establishment, opening, extending, or widening of any street or alley in such city or town and it is necessary to take private property to make such improvement, said ordinance shall declare such necessity, specifying and describing the property to be taken. Thereupon such city or town, by its governing body and its duly authorized officers, may exercise the right of eminent domain and may condemn, take, or damage any private property that may be necessarily condemned, taken, or damaged in the making of such improvement. The manner of proceeding in such cases shall be as prescribed by the laws of this state for the condemnation of lands in other cases.

1973 C.R.S. 38-6-101 states:

> Whenever, in a town, city, or city and county, the council thereof or other municipal board having authority by charter or statute passes a resolution or ordinance to establish, construct, extend, open, widen, or alter any street, lane, avenue, boulevard, park, playground, parkway, pleasure way, public square, market, viaduct, bridge, sewer, tunnel, or subway or to build, acquire, construct, or establish any public building or any other public work or public improvement, said town, city, or city and county shall have the right to take, damage, condemn, or appropriate by right of eminent domain such private property as may be required in the manner provided for in this article; but, except as specifically authorized by law, no incorporated town shall exercise the power of eminent domain over property outside the town boundaries. In any case where such special benefits are not to be assessed by commissioners as provided in section 38-6-107 against the real estate specially benefited, the said town, city, or city and county may follow the procedure set forth in this article or the procedure set forth in article 1 of this title.